No. 12-6382

In The Supreme Court of the United States

MICHAEL ANTHONY PEAK,

Petitioner,

v.

PATTI WEBB, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

SAMUEL SPITAL
Counsel of Record
ALAN D. REITZFELD
KATHERINE A. SKEELE
PAULINE HA
HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, NY 10019
(212) 513-3200
samuel.spital@hklaw.com

Attorneys for Amicus Curiae
The Constitution Project

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. The Project's essential mission is to promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. The Constitution Project regularly files *amicus* briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues.

The Constitution Project has a keen interest in the Court's review of this case. To preserve our citizenry's fundamental constitutional rights, state and federal courts must follow this Court's precedents

[1] The parties were timely notified of *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. During his previous employment at Squire Sanders (US) LLP, the undersigned counsel of record worked on Petitioner's appeal to the Sixth Circuit.

defining those rights. In this case, Petitioner's Sixth Amendment right to be confronted with the witnesses against him was flagrantly violated at trial. On appeal, the Kentucky Supreme Court cited the leading Confrontation Clause case from this Court, but the state court did not cite – much less apply – the legal rule set forth in that opinion. A majority of the Sixth Circuit denied habeas relief, concluding that the Kentucky Supreme Court's decision was reasonable within the meaning of the Antiterrorism and Effective Death Penalty Act (AEDPA). That conclusion finds no support in this Court's precedent and threatens to undermine the rule of law in criminal cases, including capital cases, in Kentucky, Ohio, Tennessee, and Michigan. Under AEDPA, state courts have significant leeway in how to apply the legal rules set forth by this Court, but nothing in AEDPA grants state courts leeway about whether to apply those rules in the first place.

SUMMARY OF THE ARGUMENT

When a state court correctly identifies the governing rule of law set forth by this Court's precedent, AEDPA instructs federal habeas courts to give significant leeway with respect to the application of that rule. Habeas relief will not lie if the state court incorrectly applies the controlling rule of law, unless its application is objectively unreasonable. These principles, which flow from AEDPA's plain text, are well-established, and they are not disputed in this case.

This case involves something very different. The problem here is not that the state court made a mistake in applying the governing rule of law; the problem is that the state court did not apply that rule at all. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court expressly held that the Confrontation Clause prohibits testimonial evidence by a non-testifying witness unless the witness was both unavailable and the defendant had a prior opportunity to cross-examine her. In adjudicating Petitioner's Confrontation Clause claim, the state court cited *Crawford*, but it did not acknowledge *Crawford*'s rule governing testimonial hearsay. Had the state court applied that rule, it would have been compelled to grant relief. There is no question that the out-of-court statements introduced at Petitioner's trial were testimonial, and that neither of the necessary conditions for admitting testimonial evidence under *Crawford* was present: the declarant was available, and Petitioner did not have a prior opportunity for cross-examination.

The majority of the Sixth Circuit panel nonetheless denied relief. The Sixth Circuit did not (and could not) conclude that the state court had reasonably applied *Crawford*'s rule prohibiting testimonial hearsay absent unavailability and a prior opportunity for cross-examination. Instead, the court below concluded that, because the declarant was available to be called in the defense's case-in-chief, the state court's failure to apply *Crawford*'s rule governing out-of-court testimonial statements did not warrant habeas relief. The majority stated that its analysis was compelled by

recent decisions of this Court which, in its view, have constricted habeas review beyond AEDPA's text.

The decision below fails on its own terms. It cannot be reconciled with the text of the Sixth Amendment or this Court's Confrontation Clause precedents. Moreover, the decision below represents a fundamental misunderstanding of AEDPA and this Court's opinions interpreting AEDPA. This Court has been faithful to AEDPA's text. That text grants state courts leeway in *how* to apply clearly established federal law, but it does not grant state courts leeway on the threshold question of *whether* to apply clearly established federal law.

The decision below constitutes a dangerous precedent on an important legal issue, such that this Court's intervention is warranted. A state court's failure to acknowledge this Court's constitutional rules compromises the federal rights protected by the writ of habeas corpus and erodes the rule of law.

ARGUMENT

I. THE LINCHPIN OF THE PROSECUTION'S CASE AGAINST PETITIONER WAS TESTIMONIAL HEARSAY WHICH VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM.

At the capital trial of Petitioner Michael Peak, the prosecution's case "was notable for its lack of

physical evidence or witnesses." Appendix to the Petition for Certiorari (App.) 2a (decision below). The prosecution's linchpin evidence was an audio tape, which the prosecution played over Peak's objection, of statements made by Peak's co-defendant, Patrick Meeks, during a custodial interrogation that Meeks alleged was coercive. *See id*. at 5a; App. 4c (plurality opinion of the Kentucky Supreme Court); Petition for Certiorari (Pet.) at 6. The interrogation took place in the middle of the night, from 10:55 p.m. until 2:03 a.m., and then again from 5:00 a.m. until 6:42 a.m. *See* App. 4c-5c. "As is often the case, Meeks's statement minimized his own role in the murder and robbery while pointing the finger at Peak as both the planner and the triggerman." *Id*. at 21c (Cooper, J., dissenting in relevant part). Meeks's unsworn taped statements were "[t]he only direct evidence establishing Peak as the shooter in this murder." App. 5a.[2]

The prosecution played the recording of Meeks's out-of-court statements a second time during its closing argument. *See* App. 16a (Clay, J., dissenting). The prosecution argued that Petitioner's failure to

[2] Unlike Meeks, the prosecution's other principal witness, Leann Bearden, did not claim to have witnessed the shooting. *See* App. 4a-5a; *id*. at 17a (Clay, J., dissenting). And, in the understated words of the Sixth Circuit: "Bearden was demonstrated to be a witness with somewhat less than sterling credibility." App. 4a; *see id*. (noting that Bearden was an admitted drug dealer, who had made contradictory statements, and failed a polygraph exam); *id*. at 6a n.6 (noting that Bearden's version of events "differs dramatically" from Meeks's).

call Meeks during the defense's case-in-chief indicated that Petitioner accepted Meeks's statements. *See* Pet. 6; App. 17a. During its deliberations, the jury asked to review one, and only one, piece of evidence: the tape of Meeks's out-of-court statements. App. 16a-17a. Thus, the jury heard the recording of Meeks's out-of-court statements three times.

The introduction of Meeks's out-of-court statements violated Petitioner's Sixth Amendment right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court established the following straightforward rule governing the admissibility of out-of-court statements: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id*. at 68. In other words, the Court established two conditions precedent that must both be satisfied before the prosecution may introduce out-of-court testimonial statements. *First*, the witness must be unavailable. *Second*, the defendant must have had a prior opportunity for cross-examination.

Meeks's statements, made during a custodial police interrogation after Meeks was given the *Miranda* warnings, were unquestionably testimonial. *See* Pet. at 11; *Crawford*, 541 U.S. at 52-53 & n.4, 68; *Davis v. Washington*, 547 U.S. 813, 822 (2006) (statements "made and recorded while [an individual is] in police custody, after having been given *Miranda* warnings as a possible suspect," are indisputably

testimonial); *id*. at 837-38 (Thomas, J., concurring in the judgment in part and dissenting in part) (statements made during custodial interrogation after the *Miranda* warnings are testimonial because they are formal, solemn interactions which resemble *ex parte* examinations under the Marian statutes). Yet, neither of the two conditions precedent established by *Crawford* for the admission of testimonial hearsay was satisfied. Meeks was available, and Peak had no prior opportunity to cross-examine him.

This should have been an easy case. As the three dissenting Justices of the Kentucky Supreme Court recognized: "In *Crawford*, the United States Supreme Court held that 'where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: *unavailability and a prior opportunity for cross-examination*.'" App. 22c (Cooper, J., joined by Lambert, C.J., and Scott, J.) (quoting *Crawford*, 541 U.S. at 68) (alterations omitted) (emphasis Justice Cooper's). Justice Cooper pointed out that Meeks's out-of-court statements were testimonial, and the Commonwealth did not assert otherwise. *Id*. The introduction of this testimonial evidence "violated both aspects of the holding in *Crawford*. Peak did not have a prior opportunity to cross-examine Meeks, and Meeks was not unavailable." *Id*. Similarly, as Judge Clay explained in dissenting from the Sixth Circuit's decision: "Meeks never took the stand, and the exception in *Crawford* did not apply because Meeks was available and Petitioner had not had a prior opportunity to cross-examine him. This constitutional

violation is clear under the simplest, most straightforward application of the Confrontation Clause and Supreme Court jurisprudence[.]" App. 25a-26a.

II. THE SIXTH CIRCUIT'S DENIAL OF HABEAS RELIEF RESTS ON FUNDAMENTAL MISAPPREHENSIONS OF THIS COURT'S PRECEDENT.

Notwithstanding the clarity of the Sixth Amendment violation, the Kentucky Supreme Court denied relief. The majority of the Sixth Circuit suggested that the Kentucky Supreme Court's decision was likely incorrect, but held that 28 U.S.C. § 2254(d), as interpreted by this Court, barred habeas relief. *See* App. 2a (acknowledging the "trial court may well have violated Peak's constitutional rights"); *see also id*. at 12a; *id*. at 13a (Merritt, J., concurring). On the contrary, this Court's precedent makes clear that § 2254(d) authorizes relief in this case. The Sixth Circuit's decision, if not corrected by this Court, risks eviscerating the writ of habeas corpus and undermining the rule of law.

It is, of course, well-settled that 28 U.S.C. § 2254(d), as amended by AEDPA, provides significant leeway to state courts in how to apply the federal constitutional rules established by this Court. The statute prohibits habeas relief when the state court identified the correct rule of law from this Court's precedent, and reasonably applied that rule to the facts of the petitioner's case. There can be a range of

applications which, even if incorrect, are not unreasonable. *See*, *e.g.*, *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) ("For purposes of § 2254(d)(1), 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'") (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). This is especially true if the rule of law is a general one. *See id*. at 786. ("'[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.'") (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

But this case does not involve a dispute about whether the application of a properly stated rule of law was reasonable. Here, the Kentucky Supreme Court failed to acknowledge, much less apply, *Crawford*'s controlling rule. Nothing in AEDPA authorizes federal courts to look away when faced with a state court's failure to acknowledge the governing constitutional rule established by this Court. This Court has emphasized that "[j]udges must be vigilant and independent in reviewing petitions for the writ." *Harrington*, 131 S. Ct. at 780. This case is a paradigmatic example of why habeas corpus remains necessary "as a safeguard against imprisonment of those held in violation of the law." *Id*.

A. The Kentucky Supreme Court's Failure to Apply *Crawford*'s Controlling Rule

The three-Justice plurality of the Kentucky Supreme Court concluded that the introduction of Meeks's statements did not violate the Confrontation Clause because Meeks *was* available, and Peak could have called him in Peak's case. *See* App. 9c.[3] This turns *Crawford*'s rule on its head. As discussed, *Crawford* conditions the introduction of testimonial hearsay on, *inter alia*, the declarant's *unavailability*. *See* 541 U.S. at 68. But the plurality never cited *Crawford*'s controlling legal test, and therefore made no effort to explain how Meeks's availability could be a justification for introducing his testimony under *Crawford*.

Instead, the plurality cited *Crawford* to support propositions that are, in fact, foreclosed by *Crawford*. The plurality began its discussion of *Crawford* by stating, correctly: "[w]e require live testimony in court subject to adversarial testing." App. 8c (citing *Crawford*). Yet, in the very next sentence, the plurality reversed course, writing: "Although cross-examination is a method typically used by counsel to tease out the truth of a matter, it is not the only method available." *Id*. at 8c-9c. The plurality's citation, to page 67 of *Crawford*, supports the *opposite* proposition. On page 67, this Court discussed the reliability regime that

[3] Justice Roach concurred in the result only, without assigning reasons. *See* App. 19c; *see also* App. 6a & n.7.

had been in place under *Ohio v. Roberts*, 448 U.S. 56 (1980), and concluded that *Roberts* had to be overruled because it was inconsistent with the plain text of the Sixth Amendment and placed "too much discretion in judicial hands." *Crawford*, 541 U.S. at 67. This Court explained: "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." *Id*.

Next, the Kentucky Supreme Court plurality stated: "Confrontation and not any particular formalized method of confrontation is how the determination of the reliability of testimonial statements is achieved." App. 9c. The state court cited page 69 of *Crawford*, but that page says no such thing. Instead, this Court wrote: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69. Earlier in *Crawford*, this Court made clear that confrontation means cross-examination: "[The Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a **particular manner**: by testing in the crucible of cross-examination." *Id*. at 61 (emphasis added).

The Kentucky Supreme Court plurality's final reference to *Crawford* was to quote the following language from footnote 9 of that opinion: " 'The

Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.'" App. 9c. As Justice Cooper explained in dissent, the plurality disregarded the context of this language, which demonstrates that this Court was referring to the use of out-of-court statements during the questioning of *testifying* witnesses. In footnote 9, the *Crawford* majority "was responding to concerns expressed in Chief Justice Rehnquist's dissenting opinion that the reliability of some out-of-court statements 'cannot be replicated even if the declarant *testifies to the same matters in court*.'" *Id*. at 23c (quoting *Crawford*, 541 U.S. at 59 n.9) (in turn quoting Chief Justice Rehnquist's dissenting opinion) (emphasis Justice Cooper's). "Obviously, both Justice Scalia [writing for the majority] and Chief Justice Rehnquist were assuming that the declarant would testify, but the Chief Justice believed that the prior statement might be more reliable than the in-court testimony." App. 23c (Cooper, J., dissenting). As this Court stated in *California v. Green*, 399 U.S. 149 (1970), cited by *Crawford* in the relevant paragraph of footnote 9: "Viewed historically . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, **as long as the declarant is testifying as a witness and subject to full and effective cross-examination**." *Id*. at 158 (emphasis added); *see also* App. 23c (Cooper, J., dissenting) (discussing *Crawford*'s reference in footnote 9 to *Green*); App. 29a (Clay, J., dissenting) (explaining that *Crawford*'s footnote 9 was "part of a discussion of

scenarios where . . . a witness was actually put on the stand by the prosecution to testify").

In sum, the Kentucky Supreme Court did not acknowledge *Crawford*'s controlling legal test, and it completely misinterpreted the parts of the opinion it did cite. The plurality's conclusion that the prosecution may introduce testimonial statements of an *available, but non-testifying* witness cannot be reconciled with any reasonable interpretation of *Crawford*.

B. The Sixth Circuit's Misapplication of This Court's Precedents Interpreting the Sixth Amendment and AEDPA

The Sixth Circuit majority made clear it thought Petitioner's Confrontation Clause rights were likely violated. *See* Pet. at 3 (citing App. 2a); *see also* App. 12a; *id*. at 13a (Merritt, J., concurring). Nonetheless, the majority held that AEDPA precluded relief. In the majority's view, there was room for fair-minded disagreement as to whether Meeks's availability to be called by Peak meant Peak was "confronted" by Meeks, thus satisfying the Confrontation Clause. *See* App. 12a; *see also id*. at 10a ("Clearly, if Peak was not 'confronted' with Meeks, then playing Meeks's statement violated *Crawford*."); *id*. ("The crux of the issue is whether making a witness available to be called is confrontation[.]"). The majority's analysis cannot be reconciled with either the Confrontation Clause or AEDPA.

1. The Sixth Circuit's Analysis Is Foreclosed by the Confrontation Clause.

The Confrontation Clause states that criminal defendants have the right "to be confronted with the witnesses against" them. U.S. Const. amend. VI. No reasonable interpretation of the plain text of the Amendment can reduce the right from one of confrontation to one of availability. As a matter of plain English, confrontation is not the same as availability. If Jane says: "I was confronted by John about what happened last night," she does not mean "John did not speak, but he was present and available to speak about what happened last night." *See also Coy v. Iowa*, 487 U.S. 1012, 1016 (1987) ("Shakespeare was . . . describing the root meaning of confrontation when he had Richard the Second say: 'Then call them to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accuser freely speak.' ") (citation and alterations omitted).

Equating confrontation with availability is likewise foreclosed by this Court's precedent. *Crawford* holds that out-of-court testimonial statements can only be introduced as evidence if, *inter alia*, the declarant is unavailable. *See* 541 U.S. at 68. But the Kentucky Supreme Court wrongly upheld the admission of Meeks's out-of-court statements because Meeks was available. The Sixth Circuit attempted to justify the state court's upside-down conclusion by quoting two statements from earlier in the *Crawford* opinion. *See* App. 11a. Those statements, made during this Court's discussion of history and its prior

precedent, refer to testimonial statements of witnesses absent from trial, but they do not in any way equate confrontation with availability. *See Crawford*, 541 U.S. at 53-54, 59. Much less does either statement suggest a "super availability" exception that would transform *Crawford*'s rule prohibiting out-of-court testimonial statements to read: "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination [**unless the non-testifying witness is in the courtroom, and thus super available, in which case unavailability and a prior opportunity for cross-examination are not necessary**]." 541 U.S. at 68.

Indeed, as Judge Clay pointed out, well-before *Crawford*, this Court had made clear that the Confrontation Clause places a burden on the prosecution, not the defense, to call the witnesses adverse to the defendant. *See* App. 20a-21a. In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court recognized that, in contrast to the Sixth Amendment's Compulsory Process Clause, the Confrontation Clause is among those parts of the Sixth Amendment "'designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused.'" *Id*. at 410 n.14 (quoting commentator's analysis).[4] This conclusion is

[4] *Kirby v. United States*, 174 U.S. 47 (1899), confirms this proposition. In *Kirby*, the Court favorably cited the 1832 English decision in *Rex v. Turner* and quoted it at length. At Turner's trial for receiving stolen coins, a testimonial confession of Sarah

(Continued on following page)

compelled by the text of the Confrontation Clause. *See* App. 20a (Clay, J., dissenting) ("The language drafted by our founding fathers and unchanged since 1791 could not be clearer. The right is conferred in the passive voice: a defendant has a right 'to be confronted' with his accusers, not merely the privilege 'to confront' his accusers.").

This conclusion is also compelled by the purpose of the Confrontation Clause. The Clause advances the accuracy of the truth-determining process by making witnesses testify under oath and assuring that the trier of fact has a satisfactory basis for evaluating the truth of the testimony presented.

> "[T]he right guaranteed by the Confrontation Clause[, *inter alia*,] (1) insures that the witness will give his statements under oath – thus impressing with him the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; and (3) permits the jury that is to decide the

---

Rich was admitted, in part, over Turner's objection. *See Kirby*, 174 U.S. at 56-57. Earlier, the same Judge presided over a trial in which Rich was convicted of theft, but the judge delayed sentencing, and Rich was available to testify at Turner's trial. Even though " 'either party might have called her as a witness,' " the appellate court concluded that " 'Rich's confession was no evidence against [Turner],' " and Turner's " 'conviction was held wrong.' " *Id*. at 57 (quoting *Turner*).

> defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."

Maryland v. Craig, 497 U.S. 836, 845-46 (1990) (quoting *Green*, 399 U.S. at 158) (alterations omitted).[5] None of these components of the Confrontation Clause right is satisfied if a witness is available, but his out-of-court statements are read to the jury in lieu of live testimony. The out-of-court statements are not necessarily made under oath (they were not here); the witness is not compelled to submit to cross-examination; and the jury cannot judge the witness's demeanor. This is why the Confrontation Clause requires witnesses to be "subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Craig*, 497 U.S. at 846.

2. The Sixth Circuit's Analysis Cannot Withstand Scrutiny Under AEDPA.

At bottom, the Sixth Circuit's decision reflects its misunderstanding of 28 U.S.C. § 2254(d), as amended by AEDPA. The court below thought this Court's recent precedents modified the § 2254(d) standard, such that habeas review is "even more constrained than

---

[5] *See also Coy*, 487 U.S. at 1019 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly."); App. 19a (Clay, J., dissenting); App. 24c (Cooper, J., dissenting); Pet. at 13-14 (discussing, *inter alia*, *Barber v. Page*, 390 U.S. 719 (1968)).

AEDPA's plain language already suggests." App. 9a; *see also id*. at 13a (Merritt, J., concurring) (stating that this Court's recent precedent interpreting AEDPA "appears to grant much more deference to state decisions . . . than the earlier interpretation in *Williams v. Taylor*"). In light of what it perceived as this Court's "increasingly strident" standard for applying § 2254(d), the Sixth Circuit thought it was compelled to deny relief. App. 12a.

Contrary to the Sixth Circuit's conclusion, this Court has not modified the habeas standard, much less departed from AEDPA's plain text. As amended by AEDPA, 28 U.S.C. § 2254(d)(1) permits habeas relief if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In *Williams v. Taylor*, this Court carefully analyzed the text of § 2254(d)(1). *See* 529 U.S. at 402-05 (majority opinion of O'Connor, J.). Based on its textual analysis, the Court held that § 2254(d)(1) authorizes habeas relief if the state court's decision either: (1) was "contrary to" the governing legal rule set forth by this Court – meaning the state court applied the wrong rule, or reached a different result than a decision of this Court in a case with materially indistinguishable facts; or (2) constituted an "unreasonable application of" the governing legal rule set forth by this Court, meaning the state court decision was *objectively* unreasonable. *See* 529 U.S. at 405-06, 409. As discussed in the Petition, and in Judge Clay's dissenting opinion, *Williams* has not

been modified, and it remains the touchstone for applying § 2254(d)(1). *See* Pet. at 17-20; App. 30a-32a.

The governing legal rule at issue here is *Crawford*'s prohibition on the use of testimonial hearsay absent unavailability and a prior opportunity for cross-examination. *See Crawford*, 541 U.S. at 68. This rule is clear and specific. As discussed, it admits of only one reasonable outcome in this case.

Yet the Kentucky Supreme Court denied relief without citing, much less attempting to apply, *Crawford*'s rule. Instead, the plurality came up with its own rule: *viz*., since Meeks *was* available and could have been called by Peak in his case-in-chief, there was no Confrontation Clause violation. Because the Kentucky Supreme Court applied a different rule than the rule set forth by this Court's governing precedent, its decision was "contrary to . . . clearly established Federal law," and 28 U.S.C. § 2254(d) authorizes relief. *See Williams*, 529 U.S. at 405-06. A state court's failure to acknowledge this Court's controlling legal rule is precisely the type of "'extreme malfunction[ ] in the state criminal justice system[ ]'" that the writ of habeas corpus is designed to remedy. *Harrington*, 131 S. Ct. at 786 (citation omitted).

The Sixth Circuit's contrary decision is not only incorrect, it represents a serious departure from established constitutional principles. State courts, just like lower federal courts, must apply this Court's precedent governing federal constitutional claims. As interpreted by this Court, AEDPA respects this

axiomatic principle by requiring that state courts adhere to "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1). *See Williams*, 529 U.S. at 391 (majority opinion of Stevens, J.). Moreover, as interpreted by this Court, AEDPA also makes clear that this Court's constitutional holdings must be applied fully and fairly. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'") (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in the judgment)). By contrast, as interpreted by the Sixth Circuit, AEDPA gives state courts room to disregard this Court's holdings. This Court should grant certiorari to make clear that AEDPA gives state courts leeway respecting how to apply this Court's constitutional rules, but it does not give state courts leeway about whether to apply them.

CONCLUSION

This Court has devoted considerable resources to ensuring that federal courts of appeal properly apply AEDPA. Often, the Court has done so to ensure that the circuit courts, including the Sixth Circuit, do not overturn state court decisions that faithfully and reasonably applied this Court's precedent. *Amicus curiae* respectfully submits that similar vigilance is warranted here, where the federal habeas court badly

misapplied AEDPA in upholding a state court decision that was contrary to clearly established federal law. Under the decision below, AEDPA bars relief even where the state court failed to apply this Court's controlling constitutional rule. The Sixth Circuit's interpretation of AEDPA lacks foundation in this Court's precedent and requires this Court's intervention.

Dated: New York, New York
October 24, 2012

Respectfully submitted,

SAMUEL SPITAL
Counsel of Record
ALAN D. REITZFELD
KATHERINE A. SKEELE
PAULINE HA
HOLLAND & KNIGHT LLP
31 West 52nd Street
New York, NY 10019
(212) 513-3200

Attorneys for Amicus Curiae
The Constitution Project