No. 15-___

In the Supreme Court of the United States

BRIAN COOK, WARDEN,

Petitioner,

v.

THOMAS BARTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
PETER T. REED
Deputy Solicitors
M. SCOTT CRISS
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
Brian Cook, Warden

QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act establishes deferential standards of review in federal habeas proceedings if a state prisoner's claim has been "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). This case considers the meaning of that phrase. The Sixth Circuit held that a state trial court's rationales for substantively rejecting a prisoner's constitutional claim did not qualify as an adjudication "on the merits" for two reasons: (1) because the trial court's substantive analysis of the claim was mere "dicta" given its initial finding that the prisoner had procedurally defaulted that claim, and (2) because the intermediate appellate court rejected the prisoner's claim only on those procedural-default grounds without addressing the claim's substance at all.

This case presents two questions:

1. If a state court's decision on a prisoner's constitutional claim contains both reasoning substantively rejecting the claim and reasoning procedurally rejecting the claim, when do § 2254(d)'s standards apply to the claim?

2. If a lower court in the state proceedings rejects a state prisoner's claim "on the merits," do § 2254(d)'s standards nevertheless fall away whenever a higher court in the state proceedings rejects the claim on procedural grounds without addressing the claim substantively?

LIST OF PARTIES

The Petitioner is Brian Cook, the Warden of Ohio's Southeastern Correctional Institution. Cook is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

The Respondent is Thomas Barton, an inmate imprisoned at the Southeastern Correctional Institution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

OPINIONS BELOW

The Sixth Circuit's en banc denial, Pet. App. 1a, is unpublished. Its decision, Pet. App. 2a-37a, is published at 786 F.3d 450. The district court's unpublished decision, Pet. App. 38a-46a, is at 2012 WL 3150940. The magistrate judge's report, Pet. App. 62a-123a, and supplemental report, Pet. App. 47a-61a, are unpublished.

JURISDICTIONAL STATEMENT

On May 15, 2015, the Sixth Circuit issued its decision. On August 5, 2015, it denied rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

INTRODUCTION

This case addresses two important questions that have split the circuit courts over what types of state-court decisions qualify as adjudications "on the merits" entitled to § 2254(d)'s deferential standards of review.

First, the state trial court in this case found a constitutional claim *procedurally* defaulted, but also explained why the claim *substantively* failed. Pet. App. 135a-36a. Circuit courts have adopted competing clear-statement rules to decide if a state court's substantive analysis qualifies as a decision "on the merits" where, as here, the court also invokes a procedural bar. Some hold that § 2254(d) applies "unless the state court clearly states that its decision was based solely on a state procedural rule." *Childress v. Floyd*, 642 F.3d 953, 968-69 (11th Cir. 2011) (en banc), *judgment vacated* 133 S. Ct. 1452 (2013), *reaffirmed* 736 F.3d 1331 (11th Cir. 2013). Others, like the Sixth Circuit, require a state court to "make[] clear" that it "definitively" resolved the claim's substance whenever it also asserts procedural grounds. Pet. App. 17a-18a. This disagreement warrants review, especially because the Sixth Circuit's approach conflicts with this Court's teaching to "presume that state courts adjudicate federal claims on their merits in ambiguous situations." *Frazier v. Jenkins*, 770 F.3d 485, 506 (6th Cir. 2014) (Sutton, J., concurring in part and concurring in the judgment).

Second, the state *intermediate* court in this case adopted the procedural-default holding, but, unlike the *trial* court, said nothing about the claim's substance. Pet. App. 132a. Circuit courts disagree over whether § 2254(d)'s standards apply to a lower court's rationale where, as here, a higher court rests on different grounds. Some hold that "[w]here a lower state court ruled on an element that a higher state court did not, the lower state court's decision is entitled to AEDPA deference." *Loden v. McCarty*, 778 F.3d 484, 495 (5th Cir. 2015). Others, like the Sixth Circuit, require federal courts to ignore those lower-court opinions. Pet. App. 19a-24a. This conflict, too, "belongs on the Supreme Court's plate." *Thomas v. Clements*, 797 F.3d 445, 446 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing en banc). The Sixth Circuit's approach is again mistaken. "Respect for the state judiciary"—AEDPA's guiding light—"requires considering both" state opinions, not just one. *Id.*

STATEMENT OF THE CASE

Respondent Thomas "Jim" Barton discovered his wife, Vickie Barton, dead on their bed in the late afternoon on April 11, 1995. He had just returned to their home on a horse farm from his job as a City of Springboro police officer. Pet. App. 63a. After years of investigations, the evidence eventually pointed to Barton for setting the events in motion that led to Vickie's death. A jury convicted him of involuntary manslaughter and aggravated burglary. The murderer has, tragically, never been found.

A. The Police Investigations

1. *The 1995 Investigation*. Barton called 911 at 4:34 p.m. Doc.18-1, Tr., PageID#936. He can be heard walking around the house. Doc.11-1, Ex.9, PageID#150-51. After Barton noted that the culprits "broke in through my garage," and "[t]hat's how they got in," *id.* PageID#155, the original transcript suggested that Barton then said: "I've got to call Phillip, man." Doc. 18-1, Tr., PageID#1195.

In the ensuing days, detectives investigated the scene. Vickie had been shot three times in the head and sexually assaulted. Pet. App. 63a. Investigators obtained DNA evidence on a bite mark on her breast. *Id*. The burglary looked staged. The den "appeared to have been made to look like it had been ransacked, it was too orderly." Doc. 18-1, Tr., PageID#875, 992. Little else was disturbed. *Id.* PageID#888, 988-995. Pieces of broken Plexiglas from the garage's side-door window had been neatly stacked, but the door did not appear to be the entry point. *Id.* PageID#866-68, 996. Investigators expected to recover more fingerprints. *Id.* PageID#1065, 1075. Detectives thought these were all "indicators that this was made to look like something that it probably wasn't." *Id.* PageID#1024.

Detectives also retraced the day's events. Vickie, a nurse, called from the hospital to Barton at the station at 12:09 p.m. *Id*. PageID#906, 1271-72. When arriving at the station around 1:00 p.m., Vickie was "running late" after stopping at home. *Id.* PageID#1611, 1617. A records supervisor and the chief overheard her tell Barton about a young man with a beat-up gas can who "had come up off the Interstate"

while she was at home; he "apparently had run out of gasoline and he was looking for some." *Id.* PageID#1588; *id.* 1593-95, 1612-13. Nobody had done so before; the chief found it "odd" that "somebody [would come] by to get gas" in "an isolated location." *Id.* PageID#1611-12. Vickie and Barton went to lunch in a park. Around the time that Vickie purchased lunch for two from a sandwich shop at 1:27 p.m., *id.* PageID#1138-39, Barton invited his friend to join them, something he had not done before while on duty, *id.* PageID#1092-93. After lunch, Barton remained at the station. *Id.* PageID#1590.

The case eventually went cold.

2. *The 1998 Discovery*. A lead developed in November 1998. Detective Frank Hensley was interrogating a career criminal named Gary Henson for unrelated burglaries. *Id.* PageID#1653-54, 1667. After Detective Hensley asked if there was "anything else" Henson wanted to discuss, Henson emotionally responded that William Phelps, his half-brother, committed suicide in August 1995 because of guilt about Vickie's death. *Id.* PageID#1667-68. Hensley found Henson "credible" because he conveyed non-public information about Vickie's murder, so Hensley called the detective on the case to interview Henson. *Id.* PageID#1661-62, 1670. According to Hensley, Henson initially suggested that Phelps had been having an affair with Vickie, but later stated that the two had not been involved. *Id.* PageID#1656-57, 1671-72. Hensley recalled Henson discussing how Phelps and an accomplice burglarized Barton's home. *Id.* PageID#1657, 1674. Henson had taught Phelps that if homeowners return "while you're committing a bur-

glary, . . . fire [a weapon] over their head" "as a distraction." *Id.* According to Hensley, Henson said Phelps accidentally shot Vickie when doing so. *Id.* Henson, jailed from March to May 1995, learned this during phone conversations with Phelps from jail. *Id.* PageID#1672-73. Henson did not implicate Barton to Hensley. *Id.* PageID#1394, 1450-51, 1681.

The police exhumed Phelps's body, *id.* PageID#1395, but his DNA did not match the DNA from the scene, *id.* PageID#1041. The exhumation surprised Henson and "tore [their] mom to pieces." *Id.* PageID#1395. When the detective spoke with Henson afterward, Henson told him that "he didn't have to exhume my brother" because Phelps's accomplice had assaulted Vickie. *Id.* PageID#1396. He refused to cooperate further. *Id.*

The case again went cold.

3. *The 2003 Cold-Case Investigation*. Around April 2003, a new Springboro chief helped develop a cold-case unit led by Captain John Newsom. *Id.* PageID#1177-78, 1190. Newsom told local police chiefs that since Barton had always been "a veiled suspect," they should view it as an accomplishment if the unit could authoritatively clear him. *Id.* PageID#1191. The unit immersed itself in the case file, and interviewed over 200 people. *Id.* PageID#1192, 1203.

The unit started focusing on Barton when members re-listened to his 911 call. *Id.* PageID#1193-98. After Barton said the culprits broke in through his garage, the unit heard him say, "Oh man. I got to call Phelp, man." Doc.11-1, Ex.9, PageID#155; Doc.

18-1, Tr., PageID#1195. This had gone unnoticed previously, the unit believed, because the original transcript had transcribed it as I've got to call "Phillip," man. *Id.* PageID#1195. The unit connected Barton's 911 statement to the later discovered evidence from Henson about his half-brother, Phelps. *Id.* PageID#1196.

The unit interviewed Barton in July 2003. *Id.* PageID#1186. Barton later agreed to take a polygraph exam. The examiner concluded that Barton intentionally used deep-breathing "counter measures" to impede the test. *Id.* PageID#1496. In January 2004, the unit searched Barton's home. *Id.* PageID#1210. Among newspaper clippings about police, they found a whole newspaper from August 15, 1995. *Id.* PageID#1211-13. That paper, which contained an article referencing Barton and a robbery, included Phelps's obituary. *Id.* PageID#1213, 1224.

The unit interviewed Henson many times. *Id.* PageID#1278. For months, Henson did not implicate Barton, and continued to suggest that the burglary had been real. *Id.* PageID#1451. In early 2004, after requesting and receiving immunity, Henson began implicating Barton. *Id.* PageID#1444, 1459. Henson indicated that he and Phelps had committed real burglaries and staged burglaries for insurance. *Id.* PageID#1368-69. Around January 1995, Phelps asked Henson to help stage a burglary for Barton to scare Vickie (Barton had not explained why). *Id.* PageID#1370-75. The plan was to shoot over Vickie's head when she came home. *Id.* PageID1376-77. In March 1995, however, Henson was arrested on unrelated crimes. *Id.* PageID#1380. Henson later read in

a newspaper that Vickie had been murdered; he called Phelps from jail. *Id.* PageID#1385-86. Phelps told Henson that a new accomplice, whom Henson did not know, accidentally shot Vickie and that the "sick f**k" then "bit her on the chest." *Id.* Phelps also said that Barton afterwards called complaining about a gas can the burglars had left behind. *Id.* PageID#1388. Phelps and Henson had previously used a gas can to facilitate burglaries; they would knock on the door and feign needing gas if anyone answered. *Id.* PageID#1390.

A couple months after incriminating Barton, a court granted Henson's *pro se* motion for judicial release. *Id.* PageID#1400-02. Within weeks, police re-arrested Henson. *Id.* While drunk, he wrecked a car, traversed through the woods around Barton's former home, and stole a van from a nearby church. *Id.* PageID#1402-03.

B. The State Proceedings

1. A grand jury indicted Barton in April 2004, and a trial occurred over February 2005. About 45 witnesses testified. Doc. 18-1, Tr., PageID#831-2069.

The prosecution argued that Barton hired Phelps to stage a burglary to scare his wife, but the burglary "went bad." *Id.* PageID#2093. Newsom highlighted where Barton stated "I gotta call Phelp" on the 911 tape. *Id.* PageID#1195. The prosecution also introduced circumstantial evidence, including that detectives thought the burglary had been staged, *id.* PageID#1024, that Barton had unusually asked a friend to join him and Vickie for lunch upon learning of the man with the gas can, *id.* PageID#1092-93, 1098,

that Barton had a newspaper with Phelps's obituary, *id.* PageID#1211-12, and that a gas can was recovered at the scene that Henson said looked like Phelps's, *id.* PageID#1391. Henson testified about how Barton hired Phelps to stage a burglary and about his conversations with Phelps. *Id.* PageID#1370-91. The prosecution also introduced evidence why Barton may have wanted to scare his wife. *Id.* PageID#1161-62. The city manager testified that while the city had no formal residency rule, an unwritten rule required the police chief to live in the city. *Id.* Only one chief in the manager's experience negotiated to live outside it. *Id.* And Barton's second (now ex-) wife indicated that he searched for a new home only in Springboro because "he eventually wanted to become chief." *Id.* PageID#1143-44.

The defense sought to discredit this case. With respect to the 911 tape, it called two experts who slowed down the tape. One stated that Barton used two words, not Phelp, *id.* PageID#1802; the other stated that Barton said "for help" in a truncated fashion, *id.* PageID#1898. With respect to the newspaper containing Phelps's obituary, the defense highlighted the article referencing Barton. *Id.* PageID#1224. With respect to the gas can, Vickie's mother testified that it might have been her husband's. *Id.* PageID#1573. With respect to Barton's motive, no ordinance required the chief to live in the city, and the chief hired in 1997 lived outside it. *Id.* PageID#1166. The defense also highlighted Barton's cooperation with various investigators. *Id.* PageID#846, 897, 1016.

With respect to Henson, defense counsel sought to impeach him. Counsel catalogued his many crimes, including falsification, receiving stolen property, burglary, robbery, and theft. *Id.* PageID#1446-48. Counsel also detailed the events surrounding Henson's 2004 arrest, *id.* PageID#1448-49, and got Henson to admit that he had lied to Hensley about other matters, *id.* PageID#1424, 1445, 1654. Counsel, moreover, went through Henson's conflicting accounts about Vickie's murder. Detective Hensley said that Henson initially told him in 1998 that Phelps, not the accomplice, had shot Vickie and that they had been romantically involved. *Id.* PageID#1656-57, 1671-72. Henson also never incriminated Barton to Hensley in 1998 or to the cold-case unit for months in 2003. *Id.* PageID#1450-51. The defense also suggested that Henson had received an informal deal, highlighting his 2004 judicial release and allegedly reduced charges from his 2004 arrest. *Id.* PageID#829-30. At closing, counsel argued that Henson told at least "ten lies" to the jury, PageID#2131, and had "a greater record than Charles Manson and Al Capone combined," *id.* PageID#2128.

To rebut the defense, a second prosecution expert testified that the word on the tape was Phelp. *Id.* PageID#1989, 1993-94. The polygraph examiner testified that Barton intentionally impeded the test in response to Barton's cooperation defense. *Id.* PageID#1252-53, 1496. Henson also sought to explain his prior statements. He indicated that Hensley misunderstood him in 1998 when Hensley heard him say that Phelps *himself* had shot Vickie. *Id.* PageID#1431, 1459-60. And while Henson conceded that

he had not implicated Barton for years, he testified that he had been trying to catch the murderer, not "trying to get Jim Barton." *Id.* PageID#1459-60. Many witnesses also testified that Henson received no deal for testifying. *Id.* PageID#1216-19, 1406, 1536.

The jury found Barton guilty of involuntary manslaughter and aggravated burglary. *Id.* PageID#2189-90. After denying a new-trial motion based on Henson's statements to fellow prisoners, Doc.11-1, Ex.24, PageID#260, the court sentenced Barton to 15 to 50 years' imprisonment, *id.*, Ex.25, PageID#268. The intermediate court affirmed, noting that Henson's testimony "was corroborated by other evidence that strongly pointed to [Barton's] guilt." *Ohio v. Barton*, 2007 WL 731409, *4 (Ohio Ct. App. 2007). The Ohio Supreme Court denied review. *Ohio v. Barton*, 870 N.E.2d 733 (Ohio 2007).

2. Barton's state post-conviction petition asserted a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Doc.11-2, Ex.39, Page#569-71. He based this claim on the burglary of a home owned by James and Ann Kelly. *Id.* PageID#561. At trial, Henson stated that Phelps got the idea to shoot over Vickie Barton from a prior incident. Doc.18-1, Tr., PageID#1379. A "[l]ady came home" when they were "in the process of laying out [a] house and she seen us and she turned and we fired over her head, we ran out and fired over her head. She ran and got in her car and we got away with it." *Id.* Henson told the cold-case unit about this incident and showed them the house. *Id.* PageID#1379-80. Henson did not testify whether

this burglary had been staged or real, but did indicate it "wasn't an insurance job." *Id.* PageID#1379.

Barton's petition conceded that the prosecution disclosed a "police report regarding a burglary at" "a residence owned by James and Ann Kelly." Doc.11-2, Ex.39, PageID#561. In the report, Becky Kelly, the Kellys' daughter, stated that a burglar had "shot 3 or 4 times at [her] car" as she fled. *Id.* Ex.46, PageID#681. The petition also noted that the prosecution turned over summaries of Henson's statements about conversations with Phelps, one of which noted that the "plan was to shoot over [Vickie's] head as they had done in prior burglaries." *Id.* Ex.39, PageID#575. But the petition argued the prosecution should have disclosed that, while Henson had stated to detectives that the Kelly burglary had been staged, James Kelly denied the allegation. *Id.* PageID#570-71. In an affidavit, Becky Kelly stated that, in 2004, detectives told her that a "key witness in another case claimed my father paid him to burglarize our home to scare us into moving because he was tired of farming." *Id.* PageID#580. Becky also stated that the detectives questioned James Kelly in 2004, who had died by the time of the post-conviction petition. Her dad had told her that the detectives accused him of hiring someone to burglarize his home and that they could charge him with obstruction if he did not testify. *Id.* PageID#581. Kelly told his daughter that he had told the police "that this was a lie." *Id.* Ann Kelly's affidavit was largely identical. *Id.* PageID#578-79.

The state trial court rejected this claim. It held that Barton could have discovered this information

before trial: "As the State points out a post-conviction relief petition is not a substitute for a direct appeal. By not raising any *Brady* issues on direct appeal, the defendant is barred from raising this issue here." Pet. App. 135a.

The court then suggested that the Kelly information was not material for two reasons. To begin with, it was extrinsic evidence on a collateral matter:

> Henson admitted during his testimony that he had participated with his brother, William Phelp [sic], in committing other staged burglaries, which the crime here appeared to be. The Kelley [sic] burglary being a collateral matter the Court has strong reservations as to what limited relevant evidence would have been admitted had the defense attempted to raise the matter at trial.

Id. Indeed, the same judge, during trial, had sustained objections to cross-examination of Henson about other staged burglaries. Doc.18-1, Tr., PageID#1451-52. In addition, the court found no likelihood this information would change the outcome:

> Again, the defense invites the Court to speculate that a different result might have occurred had this information been presented. Both burglaries are similar in the respect that Henson claimed he and his half-brother were hired to scare the owner's wife and daughter into moving from the home. Just because Mr. Kelly denies any part in such a plot, does not mean that the jury here would have believed him or that the jury would not have found a

> ring of truth in the similarity between the two stories. Again, trial counsel was faced with myriad of options as to how to proceed in impeaching Gary Henson's testimony. To the extent that some strategies were pursued while others were ignored or rejected, the Court has no way of knowing and will not speculate on.

Pet. App. 136a.

The intermediate court affirmed. Pet. App. 132a. It noted that res judicata requires a defendant to assert on direct appeal any claim that "'could have been raised by the defendant at the trial.'" *Id.* (citation omitted). The Ohio Supreme Court denied review. Pet. App. 124a.

C. The Federal Proceedings

1. A magistrate judge's report rejected the *Brady* claim. *Brady* requires a petitioner to prove that the evidenced favored the accused, that the prosecution suppressed it, and that prejudice resulted. Pet. App. 91a. Yet the magistrate judge noted that no unlawful suppression occurs if "the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information." *Id.* Here, "Barton had in his possession the original sheriff's office report of" the Kelly burglary, Pet. App. 93a, so he could have obtained information from the Kellys. Pet. App. 93a-94a.

The magistrate judge's supplemental report found that § 2254(d) applied. Relying on *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the judge looked through the state *appellate court's* procedural ruling to the *trial court's* merits rationales. Pet. App. 53a-54a. It

found that the trial court reasonably rejected the *Brady* claim for two reasons. The magistrate judge "share[d] the trial judge's doubt about the admissibility of James Kelly's testimony." Pet. App. 54a. Defense counsel would have used Kelly's statements as "proof of prior falsehood." Pet. App. 50a. But "how would [Kelly's testimony] have been admitted"? *Id.* "Ohio R. Evid. 608(B) would appear to exclude such testimony as extrinsic evidence of prior misconduct of Henson for purposes of attacking his credibility." *Id.* The magistrate judge also agreed that this evidence would "have been at best further gilding the lilly." Pet. App. 54a. Defense counsel thoroughly impeached Henson with his other crimes and his "lie[s] to investigators about this very crime." Pet. App. 55a.

The district court adopted these reports. Pet. App. 46a.

2. Reversing, the Sixth Circuit granted a conditional writ. Pet. App. 4a. It made three findings.

First, it held that the state courts had not decided the *Brady* claim "on the merits." Pet. App. 15a-19a. While conceding that this Court presumes that state courts have decided claims on their merits, Pet. App. 15a, this presumption can be overcome with evidence that the courts resolved a claim on other grounds, Pet. App. 16a-17a. Here, the Sixth Circuit relied on the trial court's procedural-default analysis. *Id.* While the "trial court did, in dicta, appear to consider some of the substantive aspects behind Barton's claim," its "offhand remark[s] cannot be taken as an adjudication on the merits." Pet. App. 18a. Alternatively, the Sixth Circuit found the trial court's analy-

sis irrelevant. Pet. App. 19a-24a. Interpreting *Ylst* differently from the magistrate judge, it held that *Ylst*'s last-reasoned-decision rule "requires us to examine the reasoning behind" only the state appellate court. Pet. App. 20a.

Second, the Sixth Circuit noted that the cause and prejudice to overcome a procedural default "'parallel[s] two of the three components of the alleged *Brady* violation.'" Pet. App. 26a (quoting *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). So it proceeded directly to a *de novo* review of Barton's claim. *Id.*

Third, on the merits, the Sixth Circuit found that the Kelly statements favored Barton. Pet. App. 28a-29a. "Although the Kellys' unrecorded statements might have been inadmissible hearsay," Barton might have called James Kelly "to impeach Henson." Pet. App. 28a. As the reason why his testimony would be admissible, the court noted that Ohio Rule of Evidence 616(A) allows a party to introduce extrinsic evidence to show a witness's bias. *Id.*

The court next held that the prosecution suppressed this evidence. Pet. App. 30a-33a. The prosecution failed to tell Barton that the cold-case unit investigated the Kelly burglary and that Kelly maintained that the burglary had been real. Pet. App. 31a-32a. Disclosure of the older police report did not suffice to uncover this information because it did not reference Henson. Pet. App. 32a.

The court, lastly, rejected the magistrate judge's view that this evidence was immaterial. Pet. App. 33a-36a. If Kelly testified, the jury would have had to believe, despite vehement denials, that two farm

owners hired the same burglars to scare their families. Pet. App. 33-34a.

The Sixth Circuit stayed its mandate.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURTS DISAGREE OVER WHEN A STATE COURT'S ANALYSIS SUBSTANTIVELY REJECTING A CLAIM TRIGGERS § 2254(D) IF THAT COURT ALSO REJECTS THE CLAIM ON PROCEDURAL GROUNDS

The Court should review the Sixth Circuit's holding that § 2254(d)'s standards did not apply because the trial court's "dicta" about Barton's *Brady* claim did not "make[] clear" that it resolved the claim substantively. Pet. App. 17a-18a. Circuit courts agree that "an alternative merits determination to a procedural bar ruling is entitled to AEDPA deference." *Stephens v. Branker*, 570 F.3d 198, 208 (4th Cir. 2009); *Robinson v. Louisiana*, 606 F. App'x 199, 213 n.1 (5th Cir. 2015) (Elrod, J., dissenting) (collecting cases). But they disagree over how a federal court should decide whether a state court has made alternative rulings. Some circuits hold that a state court's substantive analysis qualifies as a merits decision unless the state court clearly indicates that it rested on procedural grounds *alone*. Others hold that a state court's substantive analysis does not qualify as a merits decision unless it clearly indicates that it resolved the claim *both* substantively and procedurally. This conflict warrants the Court's attention.

A. Some circuits interpret "on the merits" to reach all state-court decisions that do not *clearly* rest

solely on procedural grounds. The Eleventh Circuit holds that § 2254(d)'s standards apply "unless the state court clearly states that its decision was based solely on a state procedural rule." *Childress v. Floyd*, 642 F.3d 953, 968-69 (11th Cir. 2011) (en banc), *judgment vacated* 133 S. Ct. 1452 (2013), *reaffirmed* 736 F.3d 1331 (11th Cir. 2013). To reach that result, the circuit cited the presumption from *Harrington v. Richter*, 562 U.S. 86 (2011), that a state court has resolved a claim on its merits. *Childress*, 642 F.3d at 968. It also expressed concern with creating mandatory opinion-writing rules for state courts; "to do so would be anomalous under the guise of a statute meant to give greater deference to state court decisions." *Id.* This Court remanded *Childress* for reconsideration after *Johnson v. Williams*, 133 S. Ct. 1088 (2013), which extended *Richter*'s merits presumption to state-court decisions that discuss several claims but say nothing on the claim at issue. *Id.* at 1096. On remand, the Eleventh Circuit found that *Johnson* supported its result. *Childress*, 736 F.3d at 1334-35.

Loggins v. Thomas, 654 F.3d 1204 (11th Cir. 2011), provides a good example of the Eleventh Circuit's approach. There, a state trial court rejected a set of claims considering whether *Roper v. Simmons*, 543 U.S. 551 (2005), invalidated a juvenile's life-without-parole sentence. 654 F.3d at 1213. The state appellate court initially noted that the claims were not properly presented on appeal. *Id.* at 1214. It added: "Moreover, the sole holding in *Roper* was that a juvenile defendant could not be sentenced to death." *Id.* The Eleventh Circuit held that this quali-

fied as an alternative merits ruling to the procedural bar. *Id.* at 1219-20. The state court did not need "to expressly state it was adjudicating" the claims. *Id.* at 1219. Section 2254(d)'s standards applied because, "[a]t the least, and the least is all that is required in this area," the court did not "'clearly state'" it was ruling "'solely on a state procedural rule.'" *Id.* at 1220 (quoting *Childress*, 642 F.3d at 969).

The Tenth Circuit adopted a similar approach when deciding whether § 2254(d)'s standards apply to a state court's plain-error review of a defaulted claim. When finding that a petitioner has failed to prove plain error, state courts often give reasons why the claim substantively fails as well. If they do so, the Tenth Circuit holds, § 2254(d) applies. *See Matthews v. Workman*, 577 F.3d 1175, 1186 n.4 (10th Cir. 2009); *Douglas v. Workman*, 560 F.3d 1156, 1177-78 (10th Cir. 2009); *Cargle v. Mullin*, 317 F.3d 1196, 1205-06 (10th Cir. 2003); *cf. Lee v. Comm'r, Ala. Dep't of Corrs.*, 726 F.3d 1172, 1210 (11th Cir. 2013). The Tenth Circuit has extended this rule to *ambiguous* plain-error rulings that do not say whether they rest on a substantive review or on the absence of a miscarriage of justice. *See Douglas*, 560 F.3d at 1178; *cf. Cooper v. Bergeron*, 778 F.3d 294, 302 (1st Cir. 2015) (applying AEDPA to ambiguous state ruling after "read[ing] the state court's decision pragmatically").

B. Other circuits interpret "on the merits" to reach only decisions *clearly* stating that they have definitively resolved a claim *both* substantively and procedurally. The Second Circuit, for example, refuses to apply § 2254(d)'s standards whenever a state

court resolves the claim on procedural grounds and then states that the court *would* find the claim meritless *if* it reached the merits. *Fulton v. Graham*, __ F.3d __, 2015 WL 5294878, at *5 (2d Cir. 2015); *Clark v. Perez*, 510 F.3d 382, 394 (2d Cir. 2008); *Bell v. Miller*, 500 F.3d 149, 155 (2d Cir. 2007). In the Second Circuit, "[w]hen a state court's 'discussion of the merits was preceded by a contrary-to-fact construction,' then 'the wording of the opinion reflects that the disposition was not premised on the court's view of the merits.'" *Fulton*, 2015 WL 5294878, at *5 (quoting *Bell*, 500 F.3d at 155). This approach dates to a three-part balancing test that the circuit applied before AEDPA to determine whether a state court's ambiguous ruling invoked a procedural bar. *See Jimenez v. Walker*, 458 F.3d 130, 145 (2d Cir. 2006).

Clark provides a good example. There, the Second Circuit refused to apply § 2254(d) even though the state court considered the claim's substance "in detail." 510 F.3d at 394. The court had rejected an inadequate-waiver-of-counsel claim on the procedural ground that the petitioner failed to take a direct appeal. *Id.* at 389. It then explained why, if it considered the claim, "'it would find the claim completely meritless.'" *Id.* Yet because the state court couched its detailed analysis in conditional language, the Second Circuit reviewed the claim *de novo*. *Id.* at 394.

The Fifth Circuit, applying a similar three-part test, reached a similar result in *Robinson v. Louisiana*, 606 F. App'x 199 (5th Cir. 2015). There, the state court denied the petitioner's inadequate-waiver-of-counsel claim in a note: "DENIED—

Although defendant conducted his own defense[,] appointed counsel was present during the proceedings. The issue of representation was not raised on appeal by appointed defense counsel." *Id.* at 203. The Fifth Circuit held that this decision was *only* a procedural ruling "because Louisiana courts routinely dismiss similar claims . . . as waived" and the state court was "aware of a procedural ground for not adjudicating the merits." *Id.* at 205. It refused to apply *Richter*'s presumption because the state court's opinion had been "unclear and ambiguous" rather than "without explanation" like the opinion in *Richter*. *Id.* at 204 n.3.

This reasoning invoked a vigorous dissent. The dissent would have applied *Richter*'s presumption, rejecting the majority's ambiguous-versus-silent distinction as "mak[ing] no difference." *Id.* at 213. Seven judges, *on their own motion*, would have granted rehearing en banc. *Robinson v. Louisiana*, 791 F.3d 614, 615 (5th Cir. 2015). The written en banc dissent believed that the panel should have treated the state court's two-sentence denial as *both* a merits ruling *and* a procedural holding. *Id.* at 615-16 (Smith, J., dissenting from denial of rehearing en banc).

The Sixth Circuit adopted a similar approach here. The decision below refused to find a ruling on the merits because the state trial court did not "definitively" rule on Barton's claim. Pet. App. 18a. It reasoned that "instead of issuing a merits decision" the state court "made clear that [it was] applying a procedural bar and thus not considering the merits." Pet. App. 17a. The Sixth Circuit thus placed the onus on a state court, whenever it resolves a claim on

procedural grounds, to "*make[] clear* that it is deciding a claim" substantively. Pet App. 17a (emphasis added). Because the state court's substantive statements rejecting Barton's *Brady* claim were "offhand," "unclear," "cursory," and not "definitive[]," they did not suffice. Pet. App. 18a-19a.

At least one Sixth Circuit judge has questioned this approach. *Frazier v. Jenkins*, 770 F.3d 485, 506 (6th Cir. 2014) (Sutton, J., concurring in part and concurring in the judgment). In *Frazier*, the court held that a state court's holding that no error had occurred did not trigger § 2254(d) because the court had done so on plain-error review. *Id.* at 496. Judge Sutton disagreed, noting that *Richter* and *Johnson* teach courts "to presume that state courts adjudicate federal claims on their merits in ambiguous situations." *Id.* at 506. He would have held that such an ambiguous opinion qualifies as *both* a procedural-default finding *and* a substantive ruling. *Id.*

II. THE CIRCUIT COURTS DISAGREE OVER WHETHER A LOWER COURT'S ANALYSIS TRIGGERS § 2254(D) IF A HIGHER COURT RESOLVES THE CLAIM ON DIFFERENT GROUNDS

The Court should also review the Sixth Circuit's alternative conclusion that the state trial court's rejection of the *Brady* claim did not trigger § 2254(d)'s standards because the state appellate court rejected the claim solely on procedural grounds. "Whether the first in a sequence of state-court decisions should be ignored has divided the courts of appeals." *Thomas v. Clements*, 797 F.3d 445, 446 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing en

banc) (citing cases). Accordingly, this subject "belongs on the Supreme Court's plate." *Id.*

A. On one side of the split, the Eleventh and Fifth Circuits have considered a lower court's substantive analysis through § 2254(d)'s deferential lens even when a higher court did not resolve the claim on the same ground. The Eleventh Circuit started this approach in *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009), a case involving an ineffective-assistance claim under *Strickland v. Washington*, 466 U.S. 668 (1984). In *Hammond*, the state trial court rejected the claim on performance grounds while the supreme court rejected it on prejudice grounds. 586 F.3d at 1330. The petitioner "argue[d] that a state appellate court decision on one element of the ineffective assistance issue automatically erases the trial court's decision on the other element." *Id.* at 1330-31. Disagreeing, the Eleventh Circuit applied § 2254(d)'s standards to both decisions. It cited *Wiggins v. Smith*, 539 U.S. 510 (2003), which had applied *de novo* review to the prejudice prong only because "'*neither* of the state courts below reached this prong.'" *Id.* at 1331 (quoting *Wiggins*, 539 U.S. at 534). It added that "all we can infer from the [state supreme court's] decision to resolve this ineffective assistance claim on the prejudice element is that it believed that was the easier route"; it could not "conclude that [the supreme court] disagreed with or meant to discredit" the trial court's different route. *Id.*

The Eleventh Circuit applied this approach to alternative substantive/procedural rulings in *Loggins*. There, as noted, the court considered whether *Roper* invalidated a juvenile's life-without-parole sentence.

654 F.3d at 1207. The state trial court rejected the *Roper* claims on substantive grounds. *Id.* at 1217-18. The state appellate court rejected the claims on procedural grounds, and was ambiguous about whether it had reached their substance. *Id.* Before determining that such ambiguous opinions qualify as merits decisions, the Eleventh Circuit held that § 2254(d) applied regardless of how the appellate court resolved these claims. *Id.* at 1218. The state trial court "did adjudicate these [*Roper*] claims." *Id.* And because "that rejection of the claims on the merits was not disturbed on appeal," § 2254(d) applied. *Id.*

The Fifth Circuit adopted a similar approach in *Loden v. McCarty*, 778 F.3d 484 (5th Cir. 2015). There, a Mississippi trial court rejected an ineffective-assistance claim with little reasoning, and the Mississippi Supreme Court rejected the claim on performance grounds. *Id.* at 494-95. The Fifth Circuit noted that the trial court, unlike the supreme court, had "not expressly cabin[ed] its decision to" one of the ineffective-assistance elements. *Id.* at 495. It then held that "[w]here a lower state court ruled on an element that a higher state court did not, the lower state court's decision is entitled to AEDPA deference." *Id.* And while the trial court did not articulate reasons, the Fifth Circuit relied on *Richter*'s presumption that unreasoned decisions receive deference on all elements. *Id.*

B. On the split's other side, some courts ignore a lower court's ground for rejecting a claim if a higher court's reasoned decision does not incorporate that ground. The Seventh Circuit followed this course in *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015).

There, the state trial court rejected an ineffective-assistance claim under both performance and prejudice prongs, but the appellate court rejected the claim on prejudice grounds alone. *Id.* at 765. The Seventh Circuit held that § 2254(d)'s standards applied only to the *appellate* court's reasoning on prejudice, not to the state *trial* court's analysis on performance. *Id.* at 766-67. It gave two reasons in support. It initially invoked this Court's pre-AEDPA *Ylst* decision. *Id.* at 767. *Ylst* had held that federal courts should look through unreasoned higher-court decisions to the "last reasoned" lower-court decision when deciding whether state courts had rested on procedural bars. 501 U.S. at 804. The Seventh Circuit thought that this rule required courts to stop at the last-reasoned decision and *ignore* reasons in additional opinions. *Thomas*, 789 F.3d at 765. The court also believed that § 2254(d)'s text required it to examine only the last-reasoned decision because it referred to an "adjudication" and a "decision" in the singular. *Id.* at 767; *see Woolley v. Rednour*, 702 F.3d 411, 421-22 (7th Cir. 2012).

Judge Easterbrook questioned this reasoning. *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc). He noted that, "[w]hen two state courts give different reasons, and the second (a court of appeals or state supreme court) does not disagree with the first (a trial court or intermediate appellate court), there is little reason to treat the first as having been obliterated." *Id.*

Like the Seventh Circuit, the Ninth Circuit has refused to consider a lower court's grounds that are not adopted by a higher court. *Barker v. Fleming*,

423 F.3d 1085, 1091-93 (9th Cir. 2005). In *Barker*, the court considered a *Brady* claim that had been denied in reasoned decisions by the state supreme court and state court of appeals. *Id.* at 1091. When determining which decision to consider, it rejected the State's request "to review the decisions of the [state] Court of Appeals and Supreme Court together as a collective whole." *Id.* at 1092. The court stated that *Ylst*'s last-reasoned-decision rule supported that result. *Id.* at 1091-92. And while § 2254(d)'s text may be "ambiguous as to whether we may review multiple state court judgments" because it did refer to state-court *proceedings*, the text's "reference to a single decision underscores that Congress meant federal courts to review only one final state court decision." *Id.* at 1092-93; *see also Towery v. Ryan*, 673 F.3d 933, 944 n.3 (9th Cir. 2012).

The Sixth Circuit's decision below agreed. Pet. App. 19a-24a. Like the Seventh and Ninth Circuits, it relied on *Ylst*. *Id.* It added a pragmatic point to the mix: "[T]he core purpose of [*Ylst*'s] rule is to improve 'administrability' and 'accuracy' amongst the lower federal courts," the Sixth Circuit said, but "[t]hese objectives are contravened when a court attempts to combine various state-court decisions together for purposes of reviewing a single claim." Pet. App. 22a-23a (citation omitted).

C. Two Third Circuit cases adopt an unexplained middle course. On the one hand, the Third Circuit *has* applied § 2254(d) to a lower court's merits analysis even when a higher court did not resolve the claim on the same ground. *Collins v. Sec'y of Pa. Dep't of Corrs.*, 742 F.3d 528, 545-46 (3d Cir. 2014).

In *Collins*, a Pennsylvania trial court rejected an ineffective-assistance claim on *both* performance and prejudice grounds. *Id.* at 545. The Pennsylvania Supreme Court rejected the claim *only* on performance grounds. *Id.* at 545. The Third Circuit held that § 2254(d) applied to the *trial* court's prejudice ruling. *Id.* at 545-46. It reasoned that "[t]he lack of an express ruling from the Pennsylvania Supreme Court on the question of prejudice does not negate the [trial] court's decision that Collins was not prejudiced," and that this prejudice issue "was adjudicated on the merits in state court, even if only at the [trial] court level." *Id.* at 546. The Third Circuit recognized that its view "may seem at odds with the approach approved by the Seventh Circuit," but stated that it was "the better course" "in light of the [this] Court's repeated admonitions that AEDPA mandates broad deference to the decisions of the state courts." *Id.* at 546 n.12.

On the other hand, *Collins* did not distinguish the Third Circuit's decision in *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009). In *Horn*, the trial court rejected two of three of the petitioner's claims on their merits, but the state supreme court "dismissed all three claims as waived." *Id.* at 114. The State argued that § 2254(d) should apply to the claims the trial court rejected on the merits. *Id.* The Third Circuit disagreed. It noted that "a claim has been 'adjudicated on the merits in State court proceedings' when a state court has made a decision that 1) finally resolves the claim, and 2) resolves the claim on the basis of its substance, rather than on a procedural, or other, ground." *Id.* at 115. The trial court's merits

decisions did not satisfy these standards, the Third Circuit held, because the supreme court's procedural ruling "stripped [that] substantive determination . . . of preclusive effect." *Id.* The court cited common-law authorities for the rule that if a lower court rejects a claim on two issues and an appellate court affirms on one, issue preclusion applies only to that issue. *Id.*

III. THESE TWO AEDPA QUESTIONS ARE IMPORTANT AND RECURRING

The Court should grant review because these questions are important, the Sixth Circuit's answers to them conflict with this Court's cases, and the questions arise frequently.

A. These questions ask what triggers § 2254(d), and so implicate AEDPA's central purpose. "'Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Richter*, 562 U.S. at 103 (citation omitted). AEDPA addresses this problem by "recogniz[ing] a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). Indeed, one of Justice Jackson's most famous sayings came in the habeas context: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result). Simply because a federal court can disagree with a state court's resolution of a habeas claim "is not proof that justice is thereby better done." *Id.* AEDPA enshrines his logic into law with § 2254(d), which limits federal intervention to cases where no "fairminded

jurists" could agree with a state court's resolution. *Richter*, 562 U.S. at 102. In so doing, it "'further[s] the principles of comity, finality, and federalism.'" *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (citation omitted).

Yet AEDPA does not serve this overarching purpose whenever federal courts conclude, rightly or wrongly, that § 2254(d) does not apply. Accordingly, preliminary questions that divide § 2254(d)'s deferential standards from *de novo* review cut to the core of what Congress tried to accomplish with AEDPA. It is critical that federal courts correctly answer these preliminary questions—as evidenced by the Court's review of several of them already. *See, e.g.*, *Johnson*, 133 S. Ct. at 1091; *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); *Richter*, 562 U.S. at 92.

B. The Sixth Circuit's answers to these questions conflict with the Court's cases. As for the first question, the Sixth Circuit told state courts that, whenever they analyze a claim both substantively and procedurally, they must "*make[] clear*" that they definitively decided the claim substantively. Pet. App. 17a (emphasis added). But "federal courts have no authority to impose [such] mandatory opinion-writing standards on state courts." *Johnson*, 133 S. Ct. at 1095. Indeed, telling state courts that their analysis is too "offhand[ed]" or "unclear" to warrant federal respect is a good way to promote acrimony, not comity. Pet App. 18a. Unsurprisingly, then, this holding flips *Richter* on its head. 562 U.S. at 99. Its presumption of a merits ruling turns into a presumption of dicta whenever a procedural finding accompanies the substantive rationale.

As for the second question, the Sixth Circuit told state appellate courts that whenever they affirm a lower court on one of several grounds, § 2254(d)'s standards evaporate for the rest—no matter how well-reasoned the lower court's opinion. Pet. App. 19a-24a. But "[t]he caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind." *Johnson*, 133 S. Ct. at 1095-96. Federal courts should not readily interpret a state appellate court's silence on one ground as if "it disagreed with or meant to discredit" the ground. *Hammond*, 586 F.3d at 1331. *Ylst* comports with this result. While the Sixth Circuit described *Ylst*'s primary purpose as improving federal administrability, Pet. App. 22a, its "look-past-silence approach" also sprang from a desire "to provide proper respect to the state's effective adjudications." *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc). *Ylst* and AEDPA thus both seek to show "[r]espect for the state judiciary," and that purpose requires federal courts to "consider[] both" state-court decisions. *Id.*

C. These questions also routinely arise. It is not uncommon for a lower court to reject a claim on multiple grounds, and for a higher court to choose one of the lower court's grounds as the "easier route" to affirmance. *Hammond*, 586 F.3d at 1331. This Court routinely approves that approach. In the qualified-immunity context, it has told circuit courts that they may affirm a decision on immunity grounds, without delving into whether the plaintiff has made out a constitutional violation. *Pearson v. Callahan*, 555

U.S. 223, 236 (2009); *see, e.g.*, *Alday v. Groover*, 601 F. App'x 775, 776 (11th Cir. 2015). In the ineffective-assistance context, it has told circuit courts that they may affirm a decision rejecting the claim on one or the other of the two prongs. *Strickland*, 466 U.S. at 697; *see, e.g.*, *United States v. Fazio*, 795 F.3d 421, 427 (3d Cir. 2015).

Cases implicating § 2254(d)'s standards also make up a substantial part of federal dockets. The Court need look no further than its own. *See, e.g.*, *Davis v. Ayala*, 135 S. Ct. 2187 (2015); *Woods v. Donald*, 135 S. Ct. 1372 (2015); *Glebe v. Frost*, 135 S. Ct. 429 (2014); *Lopez v. Smith*, 135 S. Ct. 1 (2014); *White v. Woodall*, 134 S. Ct. 1697 (2014); *Burt*, 134 S. Ct. 10; *Nevada v. Jackson*, 133 S. Ct. 1990 (2013); *Metrish v. Lancaster*, 133 S. Ct. 1781 (2013); *Johnson*, 133 S. Ct. 1088. Thus, the Court will conserve substantial resources by providing nationwide answers to common and preliminary questions about what triggers § 2254(d).

What is more, the sheer number of AEDPA cases shows that those preliminary rules should themselves be clear. "[A]dministrative simplicity" is just as much a "virtue" in this standard-of-review statute as it is "in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). A fact-intensive, three-part balancing test for deciding whether § 2254(d) should apply disserves that goal. *See Robinson*, 606 F. App'x at 203-04. Far better to adopt a clear rule, one "presum[ing] that state courts adjudicate federal claims on their merits in ambiguous situations." *Frazier*, 770 F.3d at 506 (Sutton, J., concurring in part and concurring in the judgment).

IV. THIS CASE PRESENTS A GOOD VEHICLE TO RESOLVE THE AEDPA QUESTIONS

A. This case provides a good vehicle to resolve these questions. As for the first, changing the rule for deciding when unclear merits rulings trigger § 2254(d) changes the result in this case. If instead of requiring a clear statement that the state trial court had decided the merits, the Sixth Circuit adopted the Eleventh Circuit's competing clear-statement rule, § 2254(d) would apply. The Sixth Circuit *itself* conceded that the trial court's decision was at least ambiguous on the merits. That court noted that the trial court had "consider[ed] some of the substantive aspects behind Barton's claim," but was in the end "unclear" about whether it had resolved the claim. Pet. App. 18a. The magistrate judge's supplemental report was less equivocal; it thought that the state court had "analyzed the merits and concluded that the James Kelly information was collateral and therefore of doubtful admissibility and its hypothetical admission did not change the likely outcome of the trial." Pet. App. 53a. Thus, the proper rule for whether an opinion qualifies as a merits decision makes a difference.

As for the second, changing the rule for deciding whether federal courts may review a lower court's merits decision when a higher court resolves the claim on other grounds likewise changes the result. All agree that the state appellate court relied on the ground that res judicata barred Barton's post-conviction claim because he could have found the alleged *Brady* material before trial. Pet. App. 12a, 51a. If this Court agrees that the state trial court resolved

the merits, therefore, it could decide whether federal courts may consider a trial court's substantive reasons when an appellate court resolves the claim on procedural grounds. Further, this case presents a substantive-procedural divide in the state system. It thus allows the Court to consider the middle course chosen by the Third Circuit, which permits federal courts to look to the lower court's reasoning if the higher court resolves the claim on alternative substantive grounds, but apparently not if the higher court resolves it on alternative procedural grounds. *Compare Collins*, 742 F.3d at 545-46, *with Horn*, 570 F.3d at 115.

B. If the Court agrees with the Warden on these questions, it can remand for the Sixth Circuit to review the magistrate judge's application of § 2254(d)'s standards in the first instance. Yet it should be noted that the ultimate merit of Barton's request for federal relief also hinges on whether § 2254(d) applies. Indeed, the magistrate judge would have rejected Barton's claim under *de novo* review, necessarily showing that the claim would fail under § 2254(d)'s deferential standards. Pet. App. 54a. As the magistrate judge held, the state trial court's reasons for rejecting the *Brady* claim were at least reasonable. *Id.*

To begin with, the state trial court suggested that the Kelly information was immaterial because it addressed a "collateral matter" and the court had "strong reservations" as to what evidence would have been admitted. Pet. App. 135a. At trial, the court prohibited Barton from *cross-examining* Henson about staged burglaries other than the crime at is-

sue. Doc.18-1, Tr., PageID#1451-52. It is thus unlikely the state court would have permitted Barton to introduce *extrinsic evidence* about prior burglaries. Both treatise law, 3A John H. Wigmore, *Evidence* § 1003 (J. Chadbourn rev. 1970), and Ohio law, *State v. Boggs*, 588 N.E.2d 813, 817 (Ohio 1992), prohibit a party from impeaching a witness with extrinsic evidence on collateral matters. *Cf. United States v. Morales*, 746 F.3d 310, 314 (7th Cir. 2014) (noting "difference of opinion among the circuits" on when, if ever, inadmissible evidence is material).

In addition, the state trial court stated that Barton "invite[d] the Court to speculate that a different result might have occurred had this information been presented." Pet. App. 135a. In that respect, Barton introduced far stronger impeachment evidence. Defense counsel ticked through Henson's crimes. Doc.18-1, Tr., PageID#1446-48. Counsel's closing argument asserted that Henson had "a greater record than Charles Manson and Al Capone combined." *Id.* PageID#2128. And Captain Newsom agreed that Henson was "where he belongs" when asked whether he should be in prison. *Id.* PageID#1301. Defense counsel also brought out Henson's inconsistent statements about *this* crime. Detective Hensley noted that during the 1998 interview Henson did not mention Barton's involvement, and seemed to suggest that Phelps, not the unknown accomplice, had shot Vickie. *Id.* PageID#1656-57, 1673, 1681. Likewise, Henson admitted that he had not implicated Barton in earlier interviews with the cold-case unit. *Id.* PageID#1444. Defense counsel's closing argu-

ment claimed that Henson had told at least "ten lies" to the jury. *Id.* PageID#2131.

To reach a contrary result, the Sixth Circuit's *de novo* review suggested that the state court might have allowed James Kelly to testify to show "Henson's bias." Pet. App. 28a. It failed to explain why the *Kelly* burglary would show Henson's bias against *Barton*. Instead, as the magistrate judge noted, the state court at least could reasonably conclude that "Ohio R. Evid. 608(B) would appear to exclude such testimony as extrinsic evidence of prior misconduct of Henson for purposes of attacking his credibility." Pet. App. 50a; *see also* Ohio R. Evid. 616(C). Defense counsel, moreover, did introduce potential motives for Henson to lie, including that Henson said he had "very serious issues" with some county police, Doc.18-1, Tr., PageID#1664, 1666, and that he had been released after inculpating Barton, *id.* PageID#829-30. "And still the jury believed him." Pet. App. 55a.

The Sixth Circuit also found that any potential testimony from James Kelly was not cumulative because his testimony that he had not hired Phelps and Henson would bolster Barton's argument that he had not done so either. Pet. App. 33a-34a. But any reference to the Kelly burglary made up all of one page of a 1394-page trial transcript, and Henson did not even testify whether that burglary had been staged. Doc.18-1, Tr., PageID#1379. That burglary was mentioned to show one fact—that Henson and Phelps learned to escape detection by shooting over homeowners' heads during prior burglaries—and Kelly's testimony would have corroborated that fact. *Id.*

The Sixth Circuit also placed far more weight on Henson's testimony than did the state trial court. Pet. App. 36a. When resolving a different claim, that court noted that it was "not at all convinced that Henson's testimony was the lynchpin for the jury's verdict anyway." Pet. App. 134a; *cf. Barton*, 2007 WL 731409, at *4 (noting that Henson's testimony "was corroborated by other evidence that strongly pointed to [Barton's] guilt").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
PETER T. REED
Deputy Solicitors
M. SCOTT CRISS
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
Brian Cook, Warden

NOVEMBER 2015