No. _____

In the Supreme Court of the United States

JEFFREY WOODS, PETITIONER

v.

TIMOTHY ETHERTON

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals failed to apply either layer of the double deference due on federal habeas review when a state court's *Strickland* analysis is reviewed through AEDPA's lens.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Jeffrey Woods, warden of a Michigan correctional facility. The respondent is Timothy Etherton, an inmate. In the proceedings below, the habeas respondent was Steven Rivard. Woods is the current warden having custody over Etherton.

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The opinion of the Sixth Circuit, App. 1a–38a, is reported sub nom. *Etherton* v. *Rivard*, at 800 F.3d 737 (6th Cir. 2015). The opinion and order of the district court denying habeas relief, App. 39a–81a, is not reported, but is available at 2014 WL 764843. The order of the Michigan Supreme Court denying leave to appeal, App. 82a–83a, is reported at 760 N.W.2d 472 (Mich. 2009). The opinion of the Michigan Court of Appeals denying Etherton's application for leave to appeal, App. 84a, is not reported. The Michigan trial court's decision denying Etherton's motion for relief from judgment, App. 85a–89a, is not reported.

JURISDICTION

The Sixth Circuit entered its opinion on September 2, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in part:

(d) 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; . . . .

INTRODUCTION

As Judge KETHLEDGE explained in his dissent in this case, "[t]he problem with the majority opinion is not that it misapplies the habeas standard, but that it fails to apply that standard at all." App. 36a. And that is not its only problem. Even on direct review, a defendant seeking to show that counsel was constitutionally ineffective must overcome the presumption of effective assistance established in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Thus, when a habeas court reviews a *Strickland* claim through AEDPA's lens, review is "doubly deferential." *Cullen* v. *Pinholster*, 563 U.S. 170, 190 (2011). The Sixth Circuit afforded neither tier of deference here.

This case involves Timothy Etherton's conviction for possessing cocaine with intent to deliver. Etherton drove a car that police followed because it matched information provided by an anonymous tipster. When police stopped the car for speeding and received Etherton's consent to search, they found a brick of cocaine right next to him, in the driver's side door. At trial, officers testified about the content of the tip to explain why they investigated Etherton.

On habeas review, the majority below held that describing the tip violated Etherton's right to confrontation. While holding this claim to be procedurally defaulted, the majority also held that appellate counsel was constitutionally ineffective for failing to raise (1) the confrontation claim and (2) an associated claim of ineffective assistance of trial counsel. The Sixth Circuit granted habeas relief, ordering the State to grant Etherton a new appeal.

At the outset, the majority disregarded AEDPA's plain language that requires comparing state-court decisions with the decisions of "the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Instead, the majority relied on circuit precedent for the proposition that an anonymous tip is testimonial. The majority's inability to identify any decision of this Court holding an anonymous tip to be testimonial should have been the end of its efforts to find a basis for habeas relief.

The majority also rejected numerous reasonable arguments supporting the state court's decision. It failed to acknowledge that the tip was not admitted to prove the truth of the matter asserted. That detail also should have ended the matter. After all, *Crawford* v. *Washington* states that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. 36, 59 n.9 (2004). And the majority rejected reasonable arguments that admitting the tip was harmless, was not plain error, and did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. And it rejected sensible explanations for why it was good strategy for trial counsel not to object and for appellate counsel not to raise the claims.

Even if the State's position on *all* of these points is wrong, if its position on *any* of them is *reasonable*, then Etherton's claim for habeas relief must fail. But the majority did not engage any of these arguments.

This Court should grant certiorari and summarily reverse to reinforce AEDPA's and *Strickland*'s deferential standards of review.

STATEMENT OF THE CASE

A. The discovery of the drugs

The day before Thanksgiving 2006, Michigan State Trooper Trevin Antcliff was working with a team of uniformed and undercover officers, doing drug interdiction on I-96 in Ionia County. App. 40a. The team had received an anonymous tip, and they were on the lookout for a white Audi with two white males, traveling between Detroit and Grand Rapids, possibly carrying cocaine. App. 40a, 8a–11a.

Meanwhile, Timothy Etherton (the driver) and Ryan Pollie (the passenger) were traveling back from Detroit to Grand Rapids in a white Audi, carrying, as it turns out, cocaine. App. 40a–42a. According to passenger Pollie's testimony at trial, the plan that day was to take a trip to Detroit "and then obviously it came out a little bit different." *Id.* Etherton dropped Pollie off at a restaurant in the Detroit suburb of Farmington Hills, and told Pollie that he had to take some family members to the airport. App. 5a; 2/15/07 Trial Tr. at 150–51. Pollie drank some beers while he waited, and 30 to 45 minutes later, Etherton returned and the two left. App. 4a–5a.

As Etherton drove back toward Grand Rapids, he showed Pollie a bag of cocaine. App. 5a. Pollie held the bag a moment and thought, "Wow you know that's quit[e] a bit." *Id.* He then handed the bag back to Etherton. *Id.* Etherton told Pollie that he bought the cocaine on credit, and had to come up with $2,500 to pay for it by Sunday. *Id.*; 2/15/07 Trial Tr. at 153.

Etherton said he could sell some of the cocaine to holiday-weekend bargoers to make up the money. 2/15/07 Trial Tr. at 153–54.

Trooper Antcliff's drug-interdiction operation converged with Etherton's and Pollie's road trip on I-96 approaching Grand Rapids when another member of Antcliff's team recognized Etherton's car as meeting the description from the tip. In response, Antcliff positioned his marked vehicle so that he was driving directly behind it. 2/15/07 Trial Tr. at 77–78. Antcliff followed the car for about two miles, and matched its speed at about 80 miles per hour. *Id.* at 78–79. Antcliff then pulled the car over for speeding. *Id.* at 79.

When they were being pulled over, Etherton handed Pollie the cocaine and told him to put it in the glove compartment. App. 42a. Pollie refused and gave it back to Etherton. *Id.* Pollie testified that Etherton either put it in his lap or in the door. *Id.*

When Trooper Antcliff arrived at the stopped car, he asked Etherton, the driver, whether he had anything illegal in the car. App. 40a. Etherton said no, and consented to a search. App. 40a, 4a. The search turned up 124.3 grams (almost four and a half ounces) of cocaine, in the compartment in the bottom of the driver-side door, under an empty potato-chip bag. App. 4a. Antcliff arrested Etherton and his passenger, Ryan Pollie. App. 41a.

B. The state-court proceedings

Testifying for the prosecution, passenger Pollie described their trip to Detroit, including how Etherton showed him the bag of cocaine. Pollie also admitted to

the jury that he was testifying as part of a plea deal under which he received a nine-month jail sentence for possession of less than 25 grams of cocaine. App. 5a, 42a. When the officers mentioned the tip to explain why they focused on Etherton's white Audi, the court instructed the jury that the tip was not evidence, but rather mentioned only to show why the police did what they did. App. 88a.

The jury convicted Etherton of one count of possession with intent to deliver more than 50 grams and less than 450 grams of cocaine. He was sentenced as a fourth-offense habitual offender to 20 to 40 years' imprisonment.

Etherton appealed, raising five challenges to his conviction and one to his sentence. The Michigan Court of Appeals affirmed. *People* v. *Etherton*, No. 277459, 2008 WL 4604075 (Mich. Ct. App. Oct. 16, 2008). Etherton then sought leave to appeal in the Michigan Supreme Court, which that Court denied. *People* v. *Etherton*, 760 N.W.2d 472 (Mich. 2009).

Nine months later, Etherton returned to the trial court and filed a collateral attack on his conviction in the form of a motion for relief from judgment under subchapter 6.500 of the Michigan Court Rules. The motion raised six new challenges to Etherton's conviction, of which three are relevant here: first, that the admission of the content of the anonymous tip violated his right of confrontation; second, that trial counsel was constitutionally ineffective for failing to adequately object; and third, that appellate counsel was constitutionally ineffective for failing to raise either of the first two claims on direct appeal.

The state trial court rejected the claim of ineffective assistance of appellate counsel on the merits, holding in part that Etherton had "failed to rebut the presumption that 'appellate counsel's decision regarding which claims to pursue was sound appellate strategy.' " App. 89a. The trial court rejected the other two claims because Etherton had failed to raise them on direct appeal and failed to show good cause and actual prejudice to excuse that failure, as required by Michigan Court Rule 6.508(D)(3). *Id.*

Etherton sought leave to appeal in the Michigan Court of Appeals, which was denied under Rule 6.508(D). App. 84a. He then sought leave to appeal in the Michigan Supreme Court, which was denied for the same reason. App. 82a–83a.

C. The district court's habeas denial

Etherton then filed a petition for habeas corpus in the Eastern District of Michigan, raising the same issues he raised in his motion for relief from judgment. The district court (TARNOW, J.) denied relief on the merits of the claims. Although the State argued that the Confrontation Clause claim and ineffective-assistance-of-trial-counsel claim were procedurally defaulted, the district court found it simpler to deny relief on the merits. App. 47a.

The district court observed at the outset that Etherton's "defense was that the prosecution failed to prove that he knew the cocaine was in his car." App. 43a. In a section of the opinion titled, "Clearly Established Federal Law," the district court cited a Sixth Circuit decision holding that statements of a confidential informant are testimonial for Confrontation

Clause purposes. App. 51a–52a. Based on this court-of-appeals precedent, the district court held that the anonymous tip in this case was testimonial. App. 52a.

The district court then examined whether the tip was offered to prove the truth of the matter asserted—information "about the vehicle, the gender and race of the occupants, the time frame for the individual's departure and return, and the route of travel." App. 53a. Though the district court did not conclude that the tip provided any information about the issue disputed at trial (whether Etherton knew there was cocaine in the car), the court "assume[d] the hearsay was offered at least in part to prove the truth of the matter asserted[.]" App. 52a–53a.

The district court held, however, that "the alleged error could not have had a substantial and injurious effect or influence on the jury's verdict and was harmless." App. 55a. It held that it was harmless because "[t]he tipster's statement to the police . . . was not essential to the prosecution's case." App. 54a. "The police officers' testimony at trial established that [Etherton] owned the car he was driving and was seated next to a brick of cocaine when the officers stopped him." App. 54a. "Pollie, moreover, testified that [Etherton] had showed him the cocaine . . . and told him how he acquired it." App. 54a–55a. Further, "the trial court specifically instructed the jurors that the testimony regarding the tip given to law enforcement officials was not evidence and that the testimony was admitted to demonstrate why the police did what they did." App. 55a. The district court accordingly denied relief on the Confrontation Clause claim. App. 55a.

As to the claim that *trial* counsel was ineffective, the district court held that, because the testimony was harmless, Etherton could not make the required prejudice showing. App. 71a.

Finally, the district court addressed the claim that *appellate* counsel was ineffective. The court found "that [Etherton's] appellate attorney did a commendable job on appeal. . . . The issues [raised by counsel] were significant enough to require an eight-and-a-half-page, single-spaced court opinion to resolve them." App. 79a. The district court further held that the omitted claims lacked merit, and that it was not unreasonable for appellate counsel to decide not to present them. App. 79a. The district court did, however, grant a certificate of appealability as to all three issues.

D. The Sixth Circuit's habeas grant

Etherton then appealed to the Sixth Circuit. The panel majority (DONALD, J., and MCCALLA, D.J.) rejected the confrontation and ineffective-assistance-of-trial-counsel claims as procedurally defaulted. App. 14a–15a. Like the district court, the majority relied on precedent from the courts of appeals, for the proposition that it is clearly established law that an anonymous tip is testimonial. App. 22a n.2. After confirming that the case turned on "Etherton's knowledge of the presence of the cocaine," App. 26a, the majority listed the limited content of the tip as saying nothing about Etherton's knowledge that cocaine was in the car: "The content of the tip that was introduced described[] (1) two white men; (2) in a [w]hite Audi; (3) driving from Grand Rapids to Detroit and back to Grand Rap-

ids on I-96; and (4) possibly with cocaine in the vehicle." App. 28a. After acknowledging that "each element of the tip was ultimately corroborated by largely undisputed evidence," the majority opined that "the tip tends to suggest improper inferences precisely because it is consistent with the admitted evidence." App. 28a. The majority ultimately granted relief on the ineffective-assistance-of-appellate-counsel claim, holding that counsel was ineffective both for omitting the confrontation claim and the ineffective-assistance-of-trial claim. App. 31a, 32a.

Judge KETHLEDGE dissented. In his view, the problem with the majority opinion

> is not that it misapplies the habeas standard, but that it fails to apply that standard at all. The opinion nowhere gives deference to the state courts, nowhere explains why their application of *Strickland* was unreasonable rather than merely (in the majority's view) incorrect, and nowhere explains why fairminded jurists could view Etherton's claim only the same way the majority does. The opinion, in other words, does exactly what the Supreme Court has repeatedly told us not to do. [App. 36a.]

The dissent took issue with the majority's prejudice analysis, noting that it was "creative—in the sense that making do with the ingredients on hand is often creative—but it is hardly constitutionally required." App. 37a. He observed that "the tip was agnostic as to whom the cocaine belonged," so he had "a hard time seeing the putative prejudice upon which the majority rests its decision." App. 37a.

The dissent concluded by pointing out that "[w]hat it takes" to apply AEDPA's standard correctly is "a willingness to take seriously the arguments that supported or 'could have supported' the state-court decision, and then to ask not merely whether we agree with those arguments, but whether they are coherent and grounded enough in the facts and applicable law that an unbiased jurist could agree with them." App. 38a.

The Sixth Circuit granted the State's motion to stay the mandate pending this petition.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit failed to apply AEDPA's deferential standards.

Etherton ought to have faced a steep uphill climb in seeking habeas relief. AEDPA's exacting standard requires that "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement. *Harrington* v. *Richter*, 562 U.S. 86, 102 (2011). While AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," it allows relief only "where there is no possibility that fairminded jurists could disagree that the state court's decision conflicts with this Court's precedent." *Id.* Its standard is "meant to be" "difficult to meet." *Id.*

Unfortunately, as this Court has observed, AEDPA is "a provision of law that some federal judges find too confining[.]" *White* v. *Woodall*, 134 S. Ct. 1697,

1701 (2014); see also *Rapelje* v. *Blackston*, No. 15-161, slip op. at 3 (U.S. Nov. 30, 2015) (SCALIA, J., dissenting from denial of certiorari). The majority below ruled as if it were not confined by AEDPA, and the erroneous opinion that resulted merits summary reversal.

A. The majority below failed to give any deference to the Michigan court's merits adjudication of Etherton's claim.

Although the majority below correctly recited the governing standard of review found in § 2254(d) of AEDPA, its analysis betrayed no signs of actually applying that standard. Accord App. 36a (KETHLEDGE, J., dissenting) ("The [majority] opinion fails to apply [the habeas] standard at all.").

In granting habeas relief on Etherton's claim that appellate counsel was constitutionally ineffective for failing to raise a Confrontation Clause claim, the majority's entire AEDPA analysis is as follows:

> Moreover, having considered the arguments raised by [habeas respondent] Rivard and relied on by the Michigan courts, we hold that it was an unreasonable application of clearly established Federal law for the Michigan court to hold otherwise. Fairminded jurists could not disagree. [App. 31a–32a.]

In granting habeas relief on Etherton's claim that appellate counsel was constitutionally ineffective for failing to raise a claim that trial counsel was ineffective (for failing to object to the supposed Confrontation

Clause violation), the majority's entire AEDPA analysis was equally sparse:

> For the reasons stated above, we find that it was an unreasonable application of Federal law to hold otherwise. [App. 32a–33a.]

But none of "the reasons stated above" included an explanation of why the majority's view was the only reasonable one. Instead, the majority's opinion "granting the writ[] read just like [it] would in a direct appeal." App. 38a (KETHLEDGE, J., dissenting).

The majority had numerous distinct opportunities, detailed in subparts I.B through I.E of this brief, to take seriously the arguments that could have supported a denial of relief. Instead, at every step the majority proceeded as if on de novo review.

B. This Court has never held that an anonymous tip—especially one that does not accuse any individual of a crime—is "testimonial" for Confrontation Clause purposes.

The first question that the Sixth Circuit should have asked is a straightforward one: has the U.S. Supreme Court ever held that an anonymous tip is "testimonial" for Confrontation Clause purposes? On this, reasonable minds cannot differ—this Court has never so held. The majority below cited *Davis* v. *Washington*, 547 U.S. 813, 824 (2006), for the proposition that "[a]n accuser *who makes a formal statement* to government officers bears testimony . . . ." App. 22a–23a (quoting *Crawford*, 541 U.S. at 51) (emphasis added). But the anonymous tipster in this case did not

"make[ ] a formal statement[.]" It is hard to understand (and the majority does not explain) how the tip was "formal" in any sense, or even how it was an "accusation," in light of the fact that it did not accuse Etherton (or any specific person) of a crime.

Indeed, *Davis* could not be clearly established law that an anonymous tip *is* testimonial because *Davis* held that the statement at issue (a victim's statement to a 911 operator) was "*not* testimonial." 547 U.S. at 829 (emphasis added). *Davis* does not suggest, let alone prove, that the state court's decision was unreasonable.

The majority then examined *its own precedent* and that of other circuits which establish that statements of a *confidential informant* are testimonial. But that examination was doubly flawed. First, circuit precedent is not, as AEDPA's plain language requires, "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This point is by itself sufficient to demonstrate that the Sixth Circuit has again disregarded Congress's commands in AEDPA. *Parker* v. *Matthews*, 132 S. Ct. 2148, 2155–56 (2012); *Renico* v. *Lett*, 559 U.S. 766, 778–79 (2010).

Second, even if those circuit precedents could be sufficient, but see 28 U.S.C. § 2254(d)(1), a confidential informant is not an anonymous tipster. A CI is a person who is known to and working with police. The CI's identity is a secret to the defendant, for the CI's safety, but not a secret to the police. And of course, if the CI's statement is admitted at trial, the Confrontation Clause requires that the CI testify, at which point, his or her identity is revealed. An anonymous

tipster, on the other hand, is anonymous to all, including to the police, and is not acting as the police's agent.

A reasonable jurist (who mistakenly thought circuit precedent could constitute clearly established law) might think an anonymous tipster is different from a confidential informant because a tip like the one in this case is not the functional equivalent of trial testimony. Rather, it has quite a different function—to spur investigation. To paraphrase *Davis*'s reasoning for holding a statement was not testimonial, the tip's "primary purpose was to enable police assistance to meet an ongoing [crime]." 547 U.S. at 828.

Further, this Court has described the class of statements deemed "testimonial" and therefore covered by the Confrontation Clause, and an anonymous tip does not resemble any of this Court's examples:

- *"ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";

- "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and

- "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later

> trial." *Crawford*, 541 U.S. at 51–52 (citations, quotation marks, and alterations omitted).

It is not at all clear that an anonymous tip to police—especially a tip that did not accuse any individual of any crime—would "lead an objective witness reasonably to believe that the [tip] would be available for use at a later trial." *Id.*

In short, the majority should have recognized the absence of any relevant clearly established federal law, and denied habeas relief on that basis alone, or, at the very least, recognized that a reasonable jurist could think that statements by confidential informants differ in a meaningful way from anonymous tips.

C. The majority failed to defer to the state court's reasonable determination that the tip was not admitted for its truth or to recognize that its admission therefore did not violate the Confrontation Clause.

In addition to showing that the tip was testimonial, Etherton was also required to show that it was admitted to prove the truth of the matter asserted. *Crawford* itself states, after all, that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59 n.9. In other words, Etherton must show that the prosecution admitted the anonymous tip (that there was a white Audi with two white men driving between Detroit and Grand Rapids, possibly carrying cocaine) to *prove* those facts (that there was a white Audi with two white men driving between Detroit and Grand Rapids,

possibly carrying cocaine). But the prosecution did not need to prove those facts because, as the majority acknowledged, those facts were established by "largely undisputed evidence." App. 28a, 4a.

All three times testimony regarding the tip was admitted, it was to provide context to the police investigation—to explain why the police chose to follow this particular car, to pull it over, and to seek consent to search. App. 8a–10a (quoting the three references). Again, the majority below provided almost no explanation as to why it felt the statement was admitted to prove its truth. The majority referred to the fact that "[i]t was elicited by the prosecution from three different witnesses during its case-in-chief," App. 23a, but that does not show that no fairminded jurist could think it was being mentioned for a reason other than its truth. Quite the opposite: given that the only facts in the tip were undisputed facts, a reasonable jurist could conclude, as the state court did, that "the tip was not evidence" but was mentioned "only to show why the police did what they did." App. 88a. And the reason the prosecution elicited it three times from three different witnesses was to explain why each of these three different witnesses investigated as they did, not to prove the tip's truth.

The majority also says that "the prosecution emphasized the tip during closing argument[.]" App. 23a. But again, this does not mean that the prosecutor argued that the tip proved that the matter asserted in the tip was true. The prosecutor mentioned the tip in *rebuttal* to respond to defense counsel's insinuations that Etherton did not fit the profile of a drug dealer.

App. 88a (explaining references during closing argument were "in response to defense theories of the case") (citing 2/15/07 Trial Tr. at 216–17). The prosecutor mentioned the tip in response to explain again why the police investigated Etherton.

In short, reasonable jurists could agree with the state trial court that the tip was mentioned not to prove undisputed facts but to explain why the police pulled the car over in the first place.

The majority also declined to grapple with the fact that the trial court instructed the jury not to consider the tip for its truth, but only to explain why the police pulled over the car. App. 88a. By omitting this instruction, the majority was spared from having to consider whether Etherton had overcome the "almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). And while the majority did consider the instruction when discussing whether the error was harmless, a fairminded jurist might think that the instruction meant there was no Confrontation Clause violation in the first place. *Id.* at 211 (holding that "the Confrontation Clause is *not violated* by the admission of a nontestifying codefendant's confession with a proper limiting instruction") (emphasis added); see also *United States* v. *Applewhite*, 72 F.3d 140, 145 (D.C. Cir. 1995) (concluding that a limiting instruction was "sufficient to cure any Confrontation Clause problem"). Yet the majority did not consider the instruction for that purpose.

In sum, a fairminded jurist could conclude that no Confrontation Clause violation occurred *both* because

the tip was not admitted for its truth *and* because the instruction cured the violation.

D. The majority failed to consider seriously arguments about harmless error or plain error.

The majority also failed to give any deference to the state court in two categories of analysis that relate to whether admitting the tip even affected the outcome of the trial.

As to harmlessness, the majority did not take seriously any argument that the admission of the tip was harmless. It characterized the trial court's instruction not to consider the tip as evidence of Etherton's guilt as an "attempt to issue a curative instruction," declared without explanation that the instruction was vague, and surmised that the jury "could have" interpreted it "to mean that the tip by itself was not sufficient to find Etherton guilty, but that it could otherwise be considered for its truth." App. 26a. AEDPA cannot function as intended if a federal court can overcome its near-total bar to habeas relief by speculating that a jury *might* think an instruction means the opposite of what it says.

The majority's harmlessness analysis was dubious throughout. Its crux was that, because Pollie's testimony agreed with the tip, it was the tip that established Pollie as credible, which bolstered his testimony that Etherton was the possessor of the cocaine. But this would be a stretch even on de novo review. A jury might have thought Pollie was credible not because his information agreed with the tip, but because his information agreed with the facts that "were not

contested at trial"—that cocaine was found in Etherton's car while Etherton was driving it in the driver's side door just inches away from Etherton. App. 3a–4a. There is no reason that the jury would view Pollie as any more credible as to fact *at issue* in the case (i.e., whether Etherton knew about the cocaine) merely because his testimony matched the uncontested facts. Indeed, the majority's theory fails to explain why any inferences about Etherton's knowledge of the cocaine must have come from the tip, and not from the undisputed facts.

But again, the State does not need to establish that the majority's reasoning is erroneous. For the habeas grant to be justified, the majority's reasoning must not only be correct; it must be the only reasonable view of the case. It is not. It is reasonable to think as the dissent did, App. 36a, as the district court did, App. 55a, and as the state court did, App. 89a, that the admission of the tip had no impact on the outcome of the case.

As to plain error, the majority did not seriously consider any argument that the supposed error was not plain. The majority felt that it was plain that the anonymous tip was testimonial. App. 22a. But there was no plain-error analysis as to whether the tip was admitted for its truth.

As to another aspect of plain-error review, the majority did not seriously consider any argument that the supposed error did not "seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings independent of [Etherton's] innocence." App. 25a. The majority cited one decision of the Michigan Supreme Court in which that Court held, with almost no

discussion, that an error met that standard. App. 30a–31a (quoting *People* v. *Shafier*, 768 N.W.2d 305, 316 (Mich. 2009)). The majority found that Etherton's case "bears striking similarities to *Shafier*," even though the error in *Shafier* was the admission of the defendant's post-*Miranda* silence, contrary to *Doyle* v. *Ohio*, 426 U.S. 610 (1976), not the admission of an anonymous tip that contained only uncontested facts.

The majority could have looked to any number of Michigan cases to inform its analysis of the "fourth prong" of Michigan plain-error analysis. E.g., *People* v. *Cain*, 869 N.W.2d 829, 840 (Mich. 2015) (fourth prong not met where jury was not properly sworn); *People* v. *Vaughn*, 821 N.W.2d 288, 305 (Mich. 2012) (fourth prong not met where courtroom was closed during jury selection); *People* v. *Pipes*, 715 N.W.2d 290, 300 (Mich. 2006) (fourth prong not met where non-testifying codefendant's confession was admitted (*Bruton* error)); *People* v. *Carines*, 597 N.W.2d 130, 143 (Mich. 1999) (fourth prong not met where jury instructions did not correctly instruct as to elements of the offense); *People* v. *Johnson*, 866 N.W.2d 883, 890 (Mich. Ct. App.), vacated in part on other grounds, 864 N.W.2d 147 (Mich. 2015) (fourth prong not met where other-acts evidence was improperly admitted); *People* v. *Fyda*, 793 N.W.2d 712, 722 (Mich. Ct. App. 2010) (fourth prong not met where prosecutor arguably denigrated defense counsel); *People* v. *Scott*, 739 N.W.2d 702 (Mich. Ct. App. 2007) (fourth prong not met by double-jeopardy violation in charging, where conviction did not constitute double jeopardy); *People* v. *Dobek*, 732 N.W.2d 546, 567 (Mich. Ct. App. 2007) (fourth prong not met even if other-acts evidence had been improperly admitted); *People* v. *Ackerman*, 669

N.W.2d 818, 827–28 (Mich. Ct. App. 2003) (fourth prong not met where prosecutor arguably asked defendant to comment on witnesses' credibility); *People* v. *Callon*, 662 N.W.2d 501, 514 (Mich. Ct. App. 2003) (fourth prong not met where prosecutor argued facts not in evidence); *People* v. *Barber*, 659 N.W.2d 674, 680 (Mich. Ct. App. 2003) (fourth prong not met where prosecutor referred to witness's guilty plea in closing argument); *People* v. *Rodriguez*, 650 N.W.2d 96, 107 (Mich. Ct. App. 2002) (fourth prong not met where court allowed witness to invoke right against self-incrimination without adequate questioning).

Properly applying AEDPA's standard after examining any of these cases, a fairminded jurist could agree that the trial court's decision did not undermine the fairness, integrity, or public reputation of judicial proceedings, and therefore that plain-error review precluded relief.

E. The majority failed to consider reasons trial counsel might have decided not to object to statements about the tip.

As to whether appellate counsel was ineffective for not asserting ineffective assistance based on trial counsel's decision to not object to the tip, the majority also failed to consider whether that decision might have been sound trial strategy. Trial counsel may well have reasonably decided that to object to the tip would distract from her defense theory and harm her credibility with the jury. By objecting, trial counsel would have signaled to the jury that the defense had something to hide or something to fear regarding the tip. App. 88a (state court explaining that "trial counsel's

strategy" included "show[ing] [Etherton's] non-involvement and possible responsibility of the passenger (who was also charged)").

Further, the defense had no reason to contest the accuracy of the tip. The defense's theory, remember, "was that the prosecution failed to prove that [Etherton] knew the cocaine was in his car." App. 43a. Counsel did not argue, for example, that Etherton was not in the car, or that the cocaine was not in the car. Rather, counsel chose the more reasonable defense theory that both Etherton and the cocaine were in the car, but that the prosecution had not proven the cocaine belonged to Etherton. In light of this choice, it was reasonable for counsel to decide not to enter distracting objections to the admission of uncontested facts.

The majority below did not consider any of this, but simply held, that "[b]ecause there was a Confrontation Clause violation that resulted in substantial prejudice, there is a reasonable probability that Michigan appellate courts would have found trial counsel constitutionally ineffective." App. 32a. But because there was a reasonable argument that trial counsel's decision not to object was trial strategy, the majority erred in granting relief.

And finally, the majority below did not seriously consider whether the decision by appellate counsel to omit this claim was a reasonable decision by a competent attorney. This is discussed in fuller detail in Section II below.

* * *

In sum, at every step of the analysis, there was a reasonable argument that defeated Etherton's claim for habeas relief, and at every step, the majority below failed to take these arguments seriously. Other than a brief nod to AEDPA's standard of review, there is no indication that the majority did anything other than a de novo review of the claims. For any of these reasons, or for all of them, this Court should summarily reverse the Sixth Circuit's decision.

II. The majority below failed to apply the correct standard for ineffective assistance of appellate counsel.

In addition to the layer of deference afforded by AEDPA, the standard of review for ineffective assistance of counsel is also highly deferential to counsel's performance. Under *Strickland*'s standard, courts are to presume that counsel's decisions are reasonable trial strategy, finding deficient performance only where no competent counsel could have made the decisions counsel made. *Strickland*, 466 U.S. at 689–90.

In the appellate context, this standard means that a petitioner must do more than simply show that appellate counsel omitted a non-frivolous or even a potentially meritorious claim. Rather, "only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith* v. *Robbins*, 528 U.S. 259, 288 (2000) (quoting *Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

If a petitioner could show ineffective assistance of appellate counsel merely by showing that appellate

counsel had omitted a meritorious issue (itself a difficult showing and not one Etherton has made), that would collapse the deficiency prong into the prejudice prong. That erroneous approach would evaluate counsel's performance with the benefit of hindsight and the knowledge that the claims chosen did not succeed, and that at least one omitted claim (in the reviewing court's opinion) did. The correct standard, in contrast, places the reviewing court in the shoes of appellate counsel at the time of the appeal, without the foreknowledge of what a reviewing court will find meritorious. The majority below made no such effort; in looking at the claims appellate counsel chose to present, the majority simply said, "Many less meritorious issues were raised on direct appeal in this case, which suggests that the failure to raise the issue was an oversight and not deliberate strategy." App. 19a–20a.

If the panel majority had applied the correct standard, it might have considered, as the district court and the state court did, the several serious claims appellate counsel did present on appeal, each of which required several paragraphs to adjudicate, resulting in, as the district court pointed out, "an eight-and-a-half-page, single-spaced court opinion." App. 79a; see *Etherton*, 2008 WL 4604075 (opinion of the Michigan Court of Appeals on Etherton's direct appeal). (In particular, it is hard to argue that appellate counsel's claim that Michigan's sentencing guidelines violate *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), was *clearly* weak, in light of the fact that the Michigan Supreme Court has since accepted the same argument as *correct*. *People* v. *Lockridge*, 498 Mich. 358 (2015).)

Appellate counsel could have considered the omitted claims to be meritless for any or all of the reasons stated in Section I above, and for any or all of the reasons why 12 of the 14 judges who have ruled upon them so far have found them meritless. Or she could have even considered them potentially meritorious but still reasonably chosen to omit them in favor of other claims she felt were stronger. Such a decision is not a sign of incompetence. This Court has recognized "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possibly, or at most on a few key issues." *Jones* v. *Barnes*, 463 U.S. 745, 751–52 (1983). Even accepting the holding of the majority below that the omitted issues had merit, it was reasonable for counsel to think they had less of a chance of success than the issues she chose to raise.

Thus, even if this Court were to agree that the omitted claims have merit, the majority below still erred in finding that no fairminded jurist could hold that no competent appellate attorney could decide to omit these claims. This Court should summarily reverse.

CONCLUSION

The petition for writ of certiorari should be granted, and this Court should summarily reverse.

Respectfully submitted,

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