No. 20-1246

IN THE

Supreme Court of the United States

ANNA VALENTINE, WARDEN,
Petitioner,

v.

JOHNNY R. PHILLIPS,
Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Kentucky's petition should be denied for two reasons.

First, this case is moot. Johnny Phillips petitioned for habeas corpus after Kentucky unconstitutionally suppressed material favorable evidence during his 2009 trial in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Mr. Phillips had been accused of intentionally or wantonly shooting another man, but Kentucky suppressed evidence—an x-ray of the decedent's head—that supported Mr. Phillips's contention that the shot was indirect when the gun went off accidentally during a struggle. The district court denied habeas relief after an evidentiary hearing on the x-ray's significance; the Sixth Circuit reversed, "convinced that, had Phillips had the X-ray to rely on, the course of his trial would likely have been quite different" and so, under this Court's decision in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), it lacked "confidence in the outcome of the trial." Pet. App. 27a. Rather than release or retry Mr. Phillips, Kentucky offered him a plea bargain—a conviction of manslaughter with a sentence of time served. Mr. Phillips accepted, pleaded guilty on March 25, 2021, was sentenced to time served on April 26, 2021, and was unconditionally released. There is therefore no live dispute about Mr. Phillips's 2009 conviction. This case is moot or, at a minimum, it is a poor vehicle to address Kentucky's questions presented.

Second, those questions presented do not merit this Court's review anyway. None even arguably presents a circuit split or a departure from this Court's precedent. Instead, Kentucky contends that the Sixth Circuit panel either created a new standard of review of a district court's expert-witness credibility determina-

tions or misapplied de novo review instead of clear-error review. The Sixth Circuit did no such thing. It applied the clear-error standard that everyone agrees it should have applied. Kentucky merely disagrees with the result the court reached when applying this well-established law to the particular facts of this case. There is nothing cert-worthy about that disagreement. Certiorari should be denied.

STATEMENT

As the Sixth Circuit detailed (Pet. App. 2a-5a), Johnny Phillips and Phillip Glodo began the day of October 18, 2007, as friends. After traveling together to get a boat license, they returned to Mr. Phillips's home, where Mr. Phillips napped while Mr. Glodo drank beer on the patio. Pet. App. 2a. When Mr. Phillips woke up, he said something that Mr. Glodo understood to accuse him of stealing $50. *Id.* From this, "Glodo flew into a rage and stayed in one for the rest of the day." *Id.* The men parted, but Mr. Glodo called Mr. Phillips repeatedly that afternoon, threatening to "kick his ass" and leaving him profanity-laced voicemails, before finally tracking Mr. Phillips down that evening at a mutual friend's house. Pet. App. 3a.

At around 10 p.m., Mr. Phillips left the house in his truck, heading home, but Mr. Glodo pursued him in his own vehicle, gunning his engine and yelling, "I'll ram your ass." Pet. App. 3a. The men drove down a narrow country road and both pulled into a church parking lot to let two horseback riders pass. Pet. App. 4a-5a. According to Mr. Phillips, Mr. Glodo jumped out of his vehicle with a knife and started toward him, so Mr. Phillips got out of his vehicle with his shotgun. *Id.* Mr. Glodo rushed at him, the men struggled, and the gun went off, the shot hitting Mr. Glodo in the back of

the head. *Id.* Mr. Phillips called 9-1-1, thinking he'd shot Mr. Glodo in the chest. *Id.*

Mr. Phillips was charged with intentional murder and, because he allegedly "point[ed] a loaded gun at somebody's head," with wanton murder (as well as second-degree manslaughter and reckless homicide). Pet. App. 7a. He was tried in Laurel Circuit Court in June 2009. Pet. App. 5a. Before trial, he moved for discovery of *Brady* evidence including results or reports of physical examinations of the decedent. *Id.* Kentucky produced an autopsy report and photographs, but no x-ray. *Id.* In its opening statement, the prosecution told the jury that Mr. Phillips "'intentionally took a 12-gauge shotgun, pointed it at the back of the victim's head, and pulled the trigger.'" Pet. App. 7a. Kentucky's medical examiner, Dr. Jennifer Schott, then testified that Mr. Glodo had been shot "in the back of the head," that is "in the middle" not on the "right-hand side [or] the left-hand side" of the head, and that "[t]he pellets entered the back of his head" and "[i]n general, the direction [of the pellets] was back to front." Pet. App. 5a-6a. Without the x-ray, Mr. Phillips lacked the physical evidence to challenge this theory or to impeach testimony supporting it. From this testimony, Kentucky argued to the jury in closing:

> Ladies and gentlemen, don't—I keep saying he was shot in the back of the head. That's obvious. But don't forget what Dr. Schott told us, that the bullets were traveling from back to front, okay? That doesn't give credence to his story that he was shot from the side and grazed and took a chunk of his head off. He was shot from the back, and the bullets were from back to forward—the pellets did, not bullets. But

> the pellets went from back to forward, which means that shotgun was fired directly from his back into his head.

Pet. App. 7a. The jury was instructed on intentional murder, wanton murder, second-degree manslaughter, and reckless homicide, and it convicted Mr. Phillips of wanton murder. Pet. App. 9a. That conviction carried a twenty-year statutory minimum sentence, but the jury sentenced Mr. Phillips to thirty years. *Id.* The conviction and sentence were upheld on direct appeal. *Id.*

On state collateral appeal, Mr. Phillips raised the possibility that an x-ray had been taken of Mr. Glodo's skull but not produced. Pet. App. 9a-10a. Kentucky continuously denied that any x-ray existed, insisting that no x-rays were taken during the autopsy. Pet. App. 10a. In April 2014, however, nearly five years after Mr. Phillips's trial, Kentucky finally turned over the x-ray in response to a state open-records request. Mr. Phillips brought a *Brady* claim in state court—which the court rejected on the ground that the claim should have been raised on direct appeal, at a time when Kentucky was still denying the x-ray even existed. *Id.*

Mr. Phillips then filed a § 2254 habeas petition in the Eastern District of Kentucky. Dist. Dkts. 1, 68. A magistrate judge recommended his petition be denied, but the district court (Thapar, J.) disagreed and ordered an evidentiary hearing on the significance of the x-ray. Dist. Dkt. 89 at 18. At the hearing, Larry Dehus, a forensic scientist, testified for Mr. Phillips. Among other things, he testified that there would be around 170 to 220 pellets of birdshot in the kind of shotgun shell at issue. And he agreed that "[i]f an individual was shot from the back with a shotgun … in the

back of the head" then "all those pellets [would] go into the skull normally." Pet. App. 98a. But, he explained, the x-ray showed "the relative quantity of the shot," Pet. App. 101a, and, although "[i]t's not possible from the x-ray to individually count each pellet," it "certainly doesn't appear to be that number" or even "anywhere near that number." Pet. App. 97a. Instead, the "x-ray shows a very small amount of projectiles or birdshot in the skull." Pet. App. 98a.

For its part, Kentucky produced Dr. Schott, its trial witness. She testified that "[a]n x-ray is taken … so that I can see if there are any projectiles in the head" and that such an x-ray "gives me a general idea of distribution of pellets or of the bullets," but she agreed that she could not "tell from the x-ray how many pellets are … in the head." Pet. App. 112a-114a. She also testified that, contrary to Mr. Dehus's statement, the x-ray had been taken front-to-back not back-to-front. Pet. App. 114a-115a. She did not testify one way or another whether all the pellets one would expect from a direct shot were in Mr. Glodo's skull or about the relative quantity of the shot that *was* in his skull.

After the hearing, the district court (Caldwell, J.) denied Mr. Phillips's petition. Pet. App. 43a. The court acknowledged Mr. Dehus's testimony that the x-ray showed the relative quantity of the shot. Pet. App. 41a. But it concluded that Mr. Dehus's "testimony about the significance of the x-ray is not reliable" because he disagreed with Dr. Schott, a medical doctor, about the direction the x-ray was taken. *Id.* So the court held that the x-ray was not favorable or material and therefore Kentucky's admitted suppression of this evidence did not violate *Brady*.

On appeal, the Sixth Circuit reversed. Judge Boggs, joined by Chief Judge Cole, explained that in "a habeas proceeding following an evidentiary hearing" like this one, it "review[s] the district court's conclusions of law and of mixed questions of law and fact *de novo*, while reviewing its factual findings for clear error." Pet. App. 14a. Applying that standard, the court concluded (Pet. App. 24a) that the district court had erred by rejecting Mr. Phillips's *Brady* claim on the ground that the x-ray was merely "'not inconsistent with the jury's verdict'" because under *Kyles*, *Brady* is not a sufficiency-of-the-evidence test and a "defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-435. The court explained that, since the x-ray showed far fewer pellets than expected from a straight-on shot from behind, it met the low bar for favorability, which asks only which party the evidence favors. Pet. App. 17a. It acknowledged (Pet. App. 16a-17a) that the district court found Mr. Dehus's opinion about the x-ray's significance unreliable, but held that even "stripped … of matters on which Dr. Schott rebutted" Mr. Dehus, the evidence demonstrated that there were 170 to 220 pellets in the fired shot, that these pellets should all have ended up in the wound in a direct straight-on shot, and that the x-ray did not show anywhere near that number—and that this evidence together favored Mr. Phillips because it supported his theory that the shot was indirect, not direct. The court emphasized that the key point—whether the x-ray showed what one would expect from a direct shot—was never rebutted by Dr. Schott. Pet. App. 17a.

The court then concluded that, correcting the district court's misapplication of *Kyles*, there was at least a reasonable probability of a different result with the x-ray, such that Kentucky's suppression undermined confidence in the outcome of the trial. Pet. App. 22a-23a. The court explained that "[r]elying on the X-ray, Phillips could have produced an expert to testify that the physical evidence was consistent with his account of a glancing shot, fired in the course of a struggle," and "could also have used the X-ray for impeachment purposes," especially of Dr. Schott, on whose testimony the prosecution relied so heavily in opening and closing statements. Pet. App. 21a. Finally, the court noted that the x-ray's support for Mr. Phillips's contention that the shot was fired by accident during self-defense could have led to a conviction for a lesser offense or at least led to a lower sentence for the charge of conviction. Pet. App. 22a.

Judge Sutton dissented. In his view, the x-ray did not undermine confidence in the result of the trial and so was not material. To support his view, in the words of the majority, Judge Sutton "ably present[ed] the case for how a good prosecutor could still have obtained a conviction for wanton murder and a 30-year sentence." Pet. App. 24a. But, the majority responded, the test for materiality of *Brady* evidence is not "that the outcome would necessarily have been different, or even that it is 50.1% likely that there would have been a different outcome." *Id.* Instead, the majority explained that the x-ray was favorable and material because it was "obvious" that "as a defense attorney, you would rather go to the jury" with "access to the X-ray" than without it, along with "the best accompanying testimony, cross-examination, and argument that could be

based on the X-ray"—including, specifically, "Where are all the pellets?" Pet. App. 24a-25a.

Kentucky then petitioned for rehearing, *see* C.A. Dkt. 41-1, which the court of appeals denied with "[n]o judge" even "request[ing] a vote on the suggestion for rehearing en banc," Pet. App. 35a. Kentucky then moved to stay the mandate, *see* C.A. Dkt. 46, which the court of appeals also denied, *see* Pet. App. 36a. The mandate issued, *see* Pet. App. 37a, and the district court ordered Kentucky to either retry Mr. Phillips or release him. Dist. Dkt. 169. Kentucky applied to this Court to recall and stay the mandate, and, after calling for a response to the application, Justice Sotomayor denied Kentucky's application. *See* No. 20A92. After Kentucky requested and obtained various further extensions, the district court ultimately ordered it to retry or release Mr. Phillips by May 1, 2021. Dist. Dkts. 174, 183.

Rather than retry or release him, Kentucky offered Mr. Phillips a plea bargain: manslaughter in the first degree with a sentence of time served—that is, twelve years. Mr. Phillips accepted. On Kentucky's motion, the murder count in Mr. Phillips's indictment was amended to first-degree manslaughter, to which Mr. Phillips pleaded guilty in Laurel County Circuit Court on March 25, 2021, and was sentenced to time served on April 26, 2021. He was unconditionally released the next day.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS MOOTED BY MR. PHILLIPS'S PLEA—OR, AT MINIMUM, IT IS A POOR VEHICLE TO REVIEW THE QUESTIONS PRESENTED

1. When Kentucky filed its petition for certiorari on March 5, 2021, a live dispute existed between the parties over the constitutionality of Mr. Phillips's 2009 conviction for wanton murder. But since then, Kentucky has obtained another, undisputed conviction for the conduct at issue: a conviction of manslaughter by way of a guilty plea. This case concerning Mr. Phillips's 2009 conviction is now moot.

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). This basic rule "require[s] that a case embody a genuine, live dispute between adverse parties." *Carney* v. *Adams*, 141 S. Ct. 493, 498 (2020). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis*, 494 U.S. at 477. For this Court "[t]o sustain [its] jurisdiction," "it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Id.* at 477-478. "The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Id.* at 478 (quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983)). As the party invoking this Court's jurisdiction, Kentucky has the burden to prove that an ongoing controversy exists. *See, e.g.*, *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 231 (1990).

Kentucky cannot satisfy that burden because there is no live controversy. Although the parties still disagree about the constitutionality of Mr. Phillips's 2009

conviction for wanton murder, they have now reached an agreement that resolves that dispute, in the form of a plea bargain for manslaughter and time served. That agreement—and the conviction and completed sentence that results—moots the dispute over Mr. Phillips's previous conviction for this incident. It is well established that an agreement to settle the underlying controversy moots the case, including at the certiorari stage. *Cf. U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 20 (1994); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 122 (1994) (per curiam) (dismissing petition for certiorari as improvidently granted after parties reached settlement agreement). Given the plea agreement and resulting plea, conviction, and completed sentence, any question regarding the constitutionality of Mr. Phillips's 2009 conviction has become purely theoretical.

This Court has recognized that such circumstances render a case moot. For example, in *Garrison* v. *Hudson*, 468 U.S. 1301 (1984), the district court denied a state prisoner's habeas petition, the court of appeals reversed, and the district court ordered the state to retry or release the prisoner. The state petitioned this Court for certiorari and asked to stay any retrial. The Court (Berger, C.J.) explained that, in those circumstances, "[r]etrial of respondent … would effectively deprive this Court of jurisdiction to consider the petition for writ of certiorari." *Id.* at 1302. Just so here. In contrast, in *Calderon* v. *Moore*, this Court found that a petition for certiorari from a grant of a habeas petition was *not* moot because the scheduled retrial had "not yet even begun, let alone reached a point where the court could no longer award any relief in the State's favor." 518 U.S. 149, 150 (1996) (per curiam). In other words, that case was not moot because "a decision in

the State's favor would release it from the burden of the new trial itself." *Id.* Not so here, where the prospect of release or retrial has been eliminated by Mr. Phillips's plea, conviction, and completed sentence. Contrast also the circumstances of *Kernan* v. *Cuero*, where this Court concluded that the case was not moot after the state court resentenced a successful habeas petitioner because the state and the petitioner "continue[d] to disagree about the proper length of [his] sentence, a portion of which he has not yet served." 138 S. Ct. 4, 7 (2017) (per curiam). Here, on the other hand, there is no disagreement about the proper length of Mr. Phillips's sentence, which was the result of a plea agreement and which has been fully served. In these circumstances, no live controversy between the parties remains, and the case is moot.[1]

2. The cases that Kentucky cites its supplemental brief are not to the contrary.

Kentucky v. *King*, 563 U.S. 452 (2011), is nothing like this case. *King* was a *direct* appeal, not a habeas action, in which the defendant was convicted and sentenced, the intermediate appellate court affirmed but the Kentucky Supreme Court reversed, and then the intermediate appellate court dismissed the charges. *Id.* at 458 n.2. This Court said that the case was not mooted by the lack of an indictment because the indictment

[1] The courts of appeals and district courts have recognized this principle as well. *See, e.g.*, *Johnson* v. *Smith*, 764 F.2d 114, 116 (2d Cir. 1985) ("Once retrial occurred, the appeal became moot, as did the cross-appeal, since they both raised hypothetical issues, the earlier trial no longer being the cause of Johnson's incarceration."); *Bauberger* v. *Haynes*, 702 F. Supp. 2d 588, 595-596 (M.D.N.C. 2010) (acknowledging that a new trial could moot the state's appeal).

had merged into the conviction and sentence, which were still on appeal and under dispute. *Id.* In those circumstances, a reversal of the Kentucky Supreme Court's decision by this Court "would reinstate the judgment of conviction and the sentence entered." *Id.* Not so here, where there is now a separate, undisputed conviction and sentence in place for this conduct.

Carafas v. *LaVallee*, 391 U.S. 234 (1968), held that the habeas statute's "in custody" requirement was satisfied if the prisoner was in custody when his petition was filed, even if he was later released. That holding has no bearing here, where the jurisdictional issue is not statutory jurisdiction under the habeas statute, but constitutional jurisdiction under Article III's case-or-controversy requirement—that is, "mootness in the technical or constitutional sense." *Id.* So Kentucky's argument that the Court retains jurisdiction under *Carafas* is aimed at the wrong target.[2]

Last, *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), is totally irrelevant: It concerns the effects of *Teague* retroactivity on state courts' criminal procedure rules and has nothing to do with mootness. Kentucky cites it for the general proposition that "[t]he federal habeas statute is broad with respect to the relief that may be granted," Supp. Br. 2—which may be true, but gives no reason why the current petition is not moot after

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[2] *Carafas* also references the longstanding principle that the completion of a prisoner's sentence does not moot his habeas petition in the constitutional sense if he continues to suffer collateral consequences from his conviction. *See* 391 U.S. at 237-238 (citing *Fiswick* v. *United States*, 329 U.S. 211 (1946); *Ginsberg* v. *New York*, 390 U.S. 629, 633-634 & n.2 (1968)). No analogous doctrine establishes that a *state's* appeal of a *successful* habeas petition is not moot after it re-convicts the prisoner.

Mr. Phillips successfully obtained habeas relief and, as a result, was re-convicted pursuant to a plea bargain, sentenced, and unconditionally released.

3. Even if there were some doubt about this appeal's mootness—and there is not—at minimum Mr. Phillips's plea makes this case a poor vehicle for certiorari. Now that Kentucky has obtained a valid, undisputed conviction by Mr. Phillips's plea, the dispute over the constitutionality of his earlier conviction is "hypothetical, and to no effect, at this stage of the proceedings." *Padilla* v. *Hanft*, 547 U.S. 1062, 1062 (2006) (Kennedy, J., concurring in denial of certiorari). "Whatever the ultimate merits of the parties' mootness arguments," they give rise to "strong prudential considerations disfavoring the exercise of the Court's certiorari power." *Id.* However the Court might decide the mootness issue if it took up the merits, the prospect of mootness is reason enough by itself to deny the petition for certiorari. *See, e.g.*, *In re T.W.P.*, 388 U.S. 912 (1967) (mem.) (petition for writ of certiorari denied on mootness grounds); *Hayes* v. *Hornbuckle*, 341 U.S. 941 (1951) (same); *Spurlock* v. *Steer*, 324 U.S. 868 (1945) (mem.) (same); *cf. Aikens* v. *California*, 406 U.S. 813, 814 (1972) (per curiam) (dismissing writ of certiorari where the question presented had become moot).

II. THE SIXTH CIRCUIT'S APPLICATION OF WELL-ESTABLISHED STANDARDS OF REVIEW DOES NOT MERIT CERTIORARI REVIEW

Even setting the mootness issue aside, there are no "compelling reasons" that warrant this Court's discretionary review of the decision below. Sup. Ct. R. 10. On the contrary, this is precisely the kind of case that this Court typically declines to consider: an application of a well-established and undisputed legal standard to a

unique set of facts. The Sixth Circuit decision creates no circuit split, neither establishes nor contravenes precedent within the Sixth Circuit, and does not "so far depart[] from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." *Id.* 10(a). Indeed, there is no disagreement—among Kentucky, Mr. Phillips, the Sixth Circuit majority, or the Sixth Circuit dissent—that this case is governed by this Court's decision in *Brady* v. *Maryland*, 373 U.S. 83 (1963), as interpreted and applied by *Kyles* v. *Whitley*, 514 U.S. 419 (1995). The parties, and the majority and dissent, disagree only on the result of applying this "well-established law to the particular facts of this case." *Barnes* v. *Ahlman*, 140 S. Ct. 2620, 2622 (2020) (mem.) (Sotomayor, J., dissenting from the grant of stay). In these circumstances, certiorari is unwarranted.

Kentucky tries to avoid this conclusion by drumming up a different issue: not the application of *Brady* and *Kyles* to the suppressed x-ray at the center of this case, but the standard of review that the Sixth Circuit applied to the district court's decision. Kentucky contends that the district court made factual findings entitled to deference under Federal Rule of Civil Procedure 52(a)(6) and this Court's decisions like *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985), and *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948), and that—rather than apply that standard—the Sixth Circuit "adopted an entirely new standard" or, apparently in the alternative, "conducted improper de novo review." Pet. i, 8-10. The Sixth Circuit did neither.

1. It would be surprising news to the Sixth Circuit majority that its unpublished and nonprecedential opinion actually created an entirely new standard of

review of district court's expert-witness credibility determinations. It stated exactly the opposite: that in "a habeas proceeding following an evidentiary hearing" like this case, it "review[s] the district court's conclusions of law and of mixed questions of law and fact *de novo*, while reviewing its factual findings for clear error." Pet. App. 14a. Indeed, Kentucky admits, as it must, that "[i]n its opinion reversing the district court's judgment, the panel majority recited the appropriate standard of review." Pet. 9. Thus, while Kentucky characterizes the Sixth Circuit as creating a new rule—a transparent effort to give this case the veneer of certworthiness—the court's decision itself reveals that the supposed error that Kentucky points to actually consists not of a new rule, but of the mere alleged "misapplication of a properly stated rule of law"—for which a "petition for writ of certiorari is rarely granted." Sup. Ct. R. 10.

The notion that the majority created a whole new standard of review for expert credibility determinations is equally unsupported by Judge Sutton's dissent. Although he disagreed with the majority's conclusion as to the favorability and the materiality of the x-ray, he agreed with the majority on the standard of review—i.e., that the court of appeals "may disturb [a] finding of fact only if it sinks to clear error." Pet. App. 31a. And he never once objected that the majority opinion somehow created an entirely new standard of review. He simply disagreed with the outcome of the majority's application of the properly stated rule.

That the majority opinion created no new rule is also supported by the Sixth Circuit's denial of rehearing en banc. Although Kentucky raised this same argument before the full court, including that the panel's nonprecedential opinion conflicted with established

Sixth Circuit precedent, the court of appeals denied rehearing en banc with "[n]o judge" even "request[ing] a vote on the suggestion for rehearing en banc." Pet. App. 35a. That includes Judge Sutton, who would have "grant[ed] rehearing for the reasons stated in his dissent" (*id.*)—reasons that do not include the majority's creation of any new rule or standard of review, as explained above. The absence of any request even for an en banc vote is particularly notable since the judges of the Sixth Circuit have not hesitated to take habeas cases en banc when warranted. *See, e.g.*, *Hill* v. *Anderson*, 964 F.3d 590 (6th Cir. 2020) (mem.) (granting rehearing en banc); *Davenport* v. *MacLaren*, 975 F.3d 537 (6th Cir. 2020) (denying rehearing en banc by an 8-7 vote); *see also Hill* v. *Curtin*, 792 F.3d 670 (6th Cir. 2015) (en banc); *Guilmette* v. *Howes*, 624 F.3d 286 (6th Cir. 2010) (en banc); *Awkal* v. *Mitchell*, 613 F.3d 629 (6th Cir. 2010) (en banc); *Garner* v. *Mitchell*, 557 F.3d 257 (6th Cir. 2009) (en banc); *Simmons* v. *Kapture*, 516 F.3d 450 (6th Cir. 2008) (en banc). The denial of rehearing en banc with no requests for a vote suggests that the judges of the Sixth Circuit found Kentucky's contention that the panel opinion manifested a new standard of review out of thin air that would wreak havoc in habeas proceedings to be unworthy of their full-court consideration. That contention, belied by the plain text of the opinion, is equally unworthy of this Court's review.

2. Apparently in the alternative to its argument that the Sixth Circuit "created a new rule," Pet. 12, Kentucky also argues that the court wrongly applied an old rule, applying *de novo* review rather than clear-error review. *See* Pet. 9-10. Kentucky claims that the district court found Mr. Phillips's expert unreliable, yet the Sixth Circuit nonetheless credited his unreliable testimony *de novo*. But the Sixth Circuit did no such

thing, and its decision was entirely consistent with clear-error review of the district court's credibility determinations.

The Sixth Circuit rightly focused on Mr. Phillips's central argument: that the x-ray showed too few shotgun pellets for a straight-on shot. This x-ray showed far fewer shotgun pellets than the 170 to 220 pellets that would have entered a direct wound—suggesting that the shot was angled, not direct, and supporting Mr. Phillips's contention that it occurred accidentally during a self-defensive struggle. In considering that argument, the Sixth Circuit acknowledged that "an X-ray … does not 'speak for itself,' particularly to those not trained to read one." Pet. App. 16a (quotation marks omitted). It recapped that the district court had credited the views about the x-ray's significance of Kentucky's expert Dr. Schott over the contradictory opinions of Mr. Phillips's expert Mr. Dehus.

The Sixth Circuit then concluded, however, that the district court committed a legal error because the x-ray was favorable even crediting Dr. Schott's opinion over Mr. Dehus's. Consistent with the district court's credibility finding—and with clear-error review—the Sixth Circuit did not credit Mr. Dehus's discredited opinions; rather, it "stripped" away "matters on which Dr. Schott rebutted [Dehus]." Pet. App. 16a-17a. Doing so left only four unrebutted points. Pet. App. 17a.

The first point was that "[t]here were 170 to 220 pieces of shot in the shell that was fired." Pet. App. 17a. The court explained that "Dr. Schott admitted that she was not qualified to address [this] first point, but at trial, the state's firearms witness gave testimony suggesting this general type of shell might have '2 or 300 shot' shot in it," so the court could "take De-

hus's testimony on this point as relatively uncontested." Pet. App. 17a n.12.

The second point was that "[h]ad the shell been fired straight-on at the distance indicated, these [pellets] should all have wound up in Glodo's skull." Pet. App. 17a. The court explained, "The state produced no evidence—nor argued—to suggest the second point is wrong, at least as to the vast majority of the shot." Pet. App. 17a n.12.

The third point was that "[t]he X-ray does not show anywhere near that number [of pellets] in Glodo's skull." Pet. App. 17a. The court explained, "It is upon the third of these points—whether or not the X-ray shows what one would expect to see—that the question of favorability turns." *Id.* The court emphasized the "noteworthy" fact that "Dr. Schott did *not* rebut this point directly." *Id.* Instead, she only "testified that she could not tell 'from the x-ray how many pellets are … in the head,'" even though "elsewhere, she stated that X-rays of this type 'give me a general idea of the distribution of the pellets or of the bullets.'" *Id.* The court explained that, "[g]iven how X-rays work, there would be a significant and visible difference between an X-ray of a skull with a full load of 170-220 metal pellets in it (or nearly that many) or one with far fewer than that." *Id.* Thus, the court could not "discount this conclusion in view of Kentucky's and Dr. Schott's inability to rebut it directly." Pet. App. 17a-18a. That unrebutted conclusion about what the x-ray showed—fewer pellets than would be expected from a direct shot—led to the fourth point: that, "[t]herefore, the shot must have been fired at an angle." Pet. App. 17a.

Thus, even and only *after* expressly "stripp[ing]" away any matters on which the more credible expert

rebutted the less credible one, the court of appeals concluded that "the X-ray provides some support for Phillips's theory" and was favorable for *Brady* purposes. Pet. App. 16a-17a.[3]

In a section of the opinion that draws most of Kentucky's ire, the court confronted the question: "what is the role of the court in evaluating the credibility of the experts who will help it evaluate the meaning (rather than the credibility) of the *Brady* material?" Pet. App. 18a. In exploring this question, the court emphasized the importance of the district court's gatekeeping function in this regard: Unlike with *Brady* testimony, whose favorability should be judged without assessing its credibility, here "[t]he *Brady* material is the X-ray itself, and as an inanimate object, it does not present a 'credibility' question in the usual sense—but on the other hand, most judges cannot evaluate it without an expert intermediary" and "courts perform a screening role constantly as to expert credibility," including "in evidentiary hearings." *Id.* "Such a role, to some extent, seems necessary here," the court went on, because—echoing Kentucky's concerns—"obviously, it would be a recipe for chaos (and injustice) if courts

[3] The court of appeals also agreed with Mr. Phillips's second argument, that the distribution of the pellets in the x-ray to one side, rather than in the middle, further suggested that the shot was angled. *See* Pet. App. 18a. The court explained that although "Dr. Schott demonstrated at the evidentiary hearing why the 2-D image could not be used to trace the directionality of any given pellet," "if the mass of the pellets is to one side, that would suggest they were fired at an angle"—and Mr. Dehus's "mistake over whether the X-ray was taken back-to-front or front-to-back would not matter for this inquiry, because either way, off-centeredness would remain." *Id.* This conclusion too comports with the district court's credibility analysis, crediting only conclusions that the supposedly more reliable witness did not rebut.

were obligated to accept as true any testimony, no matter how blatantly incorrect and self-serving, regarding the value of a supposed piece of *Brady* evidence." Pet. App. 18a-19a.

That said, the court explained, it is still improper to "equate[] the *value* of the X-ray with the *credibility* of the expert witnesses," as the district court did here. Pet. App. 16a. Instead, the criminal trial is "'the chosen forum for ascertaining the truth about criminal accusations,'" and "[i]f the evidence suffices to create a battle of the experts, such a battle should be waged at trial," especially given that "[t]here are good reasons to think that the threshold for the favorability inquiry should be fairly low." Pet. App. 19a.

In this case, the court rightly concluded that the physical evidence itself, alongside the unrebutted portions of the expert testimony, cleared that low threshold—a conclusion with no semblance of a split from other circuits, state high courts, or in-circuit precedent. In fact, the majority's aside on the role of courts in evaluating expert credibility was not even necessary to its conclusion. Regardless of the testimony or credibility of Mr. Phillips's expert, the court concluded that the x-ray itself "provides some support for Phillips's theory" because it does not reveal "nearly enough shot in the skull to support Kentucky's theory." Pet. App. 17a. And as the court observed, the error by Mr. Phillips's expert as to whether the x-ray had been taken from the front or the back "does not seem to affect the basic ability to argue such points as the density of shot shown." *Id.* In other words, the court's decision rests on grounds independent of the dicta that commands nearly all of Kentucky's attention.

3. However dressed up, Kentucky's claim, at its core, is that the panel majority misapplied the well-established standard of review of district court fact-finding that it expressly invoked. Even if the panel had committed an error—and it did not—mere "error correction … is outside the mainstream of the Court's functions and … not among the 'compelling reasons' … that govern the grant of certiorari." Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at p. 5-45 (11th ed. 2019).

Kentucky disagrees, arguing that "[i]mproper *de novo* review … is the type of error this Court has historically addressed." Pet. 10. But its cases do not support this contention. Both *Teva Pharmaceuticals* and *CWCapital Asset Management* confronted standard-of-review questions of first impression, not the mere alleged misapplication of a long-established standard. *See Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U.S. 318, 321-322 (2015) (explaining the case "requires us to determine what standard the Court of Appeals should use when it reviews a trial judge's resolution of an underlying factual dispute"); *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018) ("In this case, we address how an appellate court should review that kind of determination: de novo or for clear error?"). *Shinn* v. *Kayer*, 141 S. Ct. 517, 520 (2020) (per curiam), on the other hand, concerned a federal court's review of claims on habeas that were "adjudicated on the merits" by a state court, under 28 U.S.C. § 2254(d). In that unique area—federal court review of state-court merits decisions—this Court has sometimes intervened when federal-court decisions were "not just wrong" but "also committed fundamental errors that this Court has repeatedly admonished courts to avoid."

Sexton v. *Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam). But this case does not involve federal-court review of a state-court merits determination under § 2254(d) because (as Kentucky does not dispute) the state courts never considered the merits of Mr. Phillips's *Brady* claim and the allegedly misapplied standard of review comes not between a federal court and state court—raising federalism concerns—but between a federal court of appeals and a federal district court. So Kentucky's assertion that this Court regularly engages in freewheeling error correction of the courts of appeals' review of district court decisions under well-worn standards has no support and provides no reason for granting certiorari in this case.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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