No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MAURICE BURKS

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case is about the respect and deference that an appellate court owes a district court. Here, the district court listened to and observed the government's only inculpatory witnesses on the charges at issue - three informants whose testimony was inconsistent with each other, inconsistent with the crime scene evidence, and patently absurd - and made the unusual, but painstakingly detailed, decision that the jury's verdict of guilt was against the weight of the evidence and the interests of justice required Petitioner be granted a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The result-driven opinion by the Sixth Circuit panel majority - over a lengthy, detailed, and logically persuasive dissenting opinion - gave neither deference nor respect to the district court's decision, and ignored the fact that the district court's decision was informed by having actually seen and listened to the witnesses. Instead, the panel majority imposed a more stringent standard of review for when a district court grants a motion for new trial than when it denies such a motion and substituted its own, uninformed, view of the witnesses credibility for that of the district court. The panel majority's opinion conflicts with the decisions of other courts of appeal, as well as prior decisions of the Sixth Circuit, and highlights the split of authority on these important issues which this Court must resolve.

This case presents a significant, and unanswered, question of the appropriate scope of appellate review of a district court order granting a new trial order based on the trial judge's own observation of the evidence and witnesses. The Courts of Appeals are split, and deeply conflicted, in their answer to the question. Some Circuits, including the Sixth Circuit here, conduct an expansive review that defers to the jury's verdict, and applies a greater degree of scrutiny than that which is applied to an order that denies the new trial request. Other Circuits apply an appellate review that is circumscribed, defers to the discretion of the trial judge, and does not change based on the outcome of the trial court's new trial decision.

In this case, an experienced trial court judge partially granted Petitioner a new trial because he concluded -- based on "the weight of evidence" that he personally observed -- that the jury's verdict was "against the manifest weight of the evidence." The Sixth Circuit held that the trial judge abused his discretion in granting the new trial after applying a scope of appellate review that gave no deference to the trial judge's determination. Instead, the Sixth Circuit concluded that the trial judge overreached by weighing the evidence based on its own review of the record, and not deferring to the jury's decision.

I. Whether Using a Different, More Stringent, Standard of Review When a Trial Court Grants a Motion for New Trial than Utilized When a Trial Court Denies a Motion for New Trial Violates Due Process?

II. Whether an Appellate Court is Free to Substitute its own Witness Credibility Determinations for that of the Trial Court Without Regard to the Trial Court Having Seen and Listened to the Witnesses Testimony?

III. Whether a United States Court of Appeals May Effectively Abolish Rule 33 of the Federal Rules of Criminal Procedure by Enacting a Different, More Stringent, Level of Review When a Trial Court Grants a Motion for New Trial that is Functionally Impossible to Meet?

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Petitioner, Maurice Burks, respectfully prays that a writ of *certiorari* issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered on September 4, 2020.

OPINION BELOW

The Order of the United States Court of Appeals for the Sixth Circuit, is reported at *United States v. Burks*, 974 F.3d 622 (6th Cir. 2020). That Order is attached as Appendix "A".

The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's motion for rehearing is not reported. That Order is attached as Appendix "B".

JURISDICTION

On September 4, 2020, the Sixth Circuit entered an Order reversing the district court's partial grant of a motion for new trial for Petitioner. On October 16, 2020, the Sixth Circuit denied rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime ... without due process of law ....

STATEMENT OF THE CASE

Petitioner, along with four (4) co-defendants, proceeded to trial on March 1, 2019, based upon allegations in a Third Superseding Indictment. Petitioner was charged with six (6) counts in the Third Superseding Indictment: a RICO conspiracy, a drug conspiracy, and four (4) counts related to the murder of Malcolm Wright on November 3, 2012.[1] Petitioner was convicted on all six (6) counts.[2]

After trial, Petitioner filed a Motion for New Trial and/or Motion for Judgment of

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[1]The government waited eleven and a half years after the first of the criminal acts alleged in the conspiracy, almost nine (9) years after Petitioner's alleged first involvement, and over four and a half years after Malcolm Wright's killing, to indict Petitioner and his co-defendants for the crimes alleged.

[2]It is instructive to note that while the jury found Petitioner guilty of Wright's murder in Counts 10, 11, 13, and 14. In a separate verdict form, the jury checked boxes indicating that they found Petitioner "used and carried a firearm" and 'brandished a firearm," but did not check the box indicating that they found Petitioner "discharged a firearm." The verdict form thus indicates that the jury did not unanimously find that Petitioner discharged a gun. Wright died of gunshot wounds. If Petitioner did not "discharge a firearm," he could not have killed Wright.

Acquittal. The District Court partially granted Petitioner's motion for new trial, vacating Petitioner's convictions on counts 10, 11, 13, and 14 - the counts relating to Wright's murder.

The murder charges at issue were solely supported by the testimony of three government informants - Danyon "Dangerous Dan" Dowlen, Dezorick "Slick" Ford, and Ronnie Daniels - all of whom testified in some fashion or another that Burks confessed to killing Wright. In a detailed ruling, the District Court found the informants' testimony to be self-contradictory, inconsistent with the physical evidence, and nonsensical. The District Court also, having listened to and observed the testimony of the three informants found their testimony to lack credibility.[3] Finding that the government's case hinged on the testimony of the three (3) informants, and relying on its observations of the informants' testimony and their demeanor on the stand, the District Court conscientiously analyzed their inconsistent, incredible, and patently unreliable testimony, the District Court concluded that Petitioner's "conviction on (the murder) counts represents a miscarriage of justice."[4] The government appealed the District Court's ruling.

After briefing and oral argument, in a divided opinion, the United States Court of Appeals for the Sixth Circuit reversed the District Court's partial grant of Petitioner's motion for new trial. *United States v. Burks*, 974 F.3d 622 (6th Cir. 2020). The panel majority reached its

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[3]"The Court did not believe either Ronnie Daniels' or Ford's testimony about Burks' alleged confessions." R. 1638 - SEALED; Page ID# 14765. In assessing the conflicting trial testimony of Kristine Gaskin, the victim's girlfriend and an eyewitness to the shooting, whose testimony effectively eliminated Petitioner as the shooter, and Danyon Dowlen, an informant, the District Court ruled, "(i)n a war of credibility between Gaskin and Dowlen, Gaskin wins hands down." R. 1460; Page ID# 11820.

[4]Appellate courts typically do, as they should, rely on the type of detailed factual and legal reasoning present in the district court's order in Petitioner's case. *See e.g.*, *State v. Gutierrez*, 2020 Nev. Unpub. LEXIS 1153, *4 (Nev. 2020)("Because the district court's exhaustive factual findings are supported by the record and its legal conclusions are sound, we affirm.").

opinion by utilizing a more stringent standard of review for when a district court grants a Rule 33 motion than when a district court denies a Rule 33 motion, and substituting its own credibility determination regarding the government's three informant witnesses for that of the District Court, in violation of well settled circuit precedent. In her well reasoned dissent, Judge White exactingly detailed how the panel majority "employs an inappropriate standard of review, incompletely considers the record, and rejects the district court's credibility and factual determinations in favor of its own." *United States v. Burks*, 974 F.3d at 628 (White, J., dissenting).[5] Petitioner filed a motion for rehearing *en banc*, which the court denied.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this petition concern fundamental constitutional rights under the Fifth Amendment to the United States Constitution. All of these issues were presented to the trial court and the United States Court of Appeals for the Sixth Circuit in motions and briefs challenging the government's appeal of the District Court's Order partially granting Petitioner's motion for new trial. The United States Court of Appeals for the Sixth Circuit, by way of a written Order, in a divided opinion, rejected Petitioner's federal constitutional claims.

REASONS FOR GRANTING THE WRIT

The authority to grant a new trial is confided almost entirely to the discretion of the trial

[5]Worse, the panel majority's distortion of the law and evidence in this case continues the disturbing pattern of federal circuit courts reversing the opinions of black district court judges significantly more often than their white counterparts. *See* Maya Sen, *Is Justice Really Blind? Race and Reversal in U.S. Courts*, 44 The Journal of Legal Studies 5187 (Jan. 2015)("black federal district judges are consistently overturned on appeal more often than white district judges, with a gap in reversal rates up to 10 percentage points.")

court. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). In ruling on a motion for a new trial, unlike a Rule 29 motion for judgment of acquittal, the judge may consider the credibility of the witnesses, the weight of the evidence, and anything else which justice requires. *Garrison v. United States*, 62 F.2d 41, 42 (4th Cir. 1932); 9 C. A. Wright & A. R. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2531, PP. 575-78 (1971). The trial judge, who heard the testimony and conducted all pretrial and trial proceedings, is uniquely situated to rule on this new trial motion. Thus, the grant or denial of a motion for a new trial "will not be disturbed on appeal unless the district court clearly abused its discretion." *United States v. Turns*, 198 F.3d 584, 586 (6th Cir. 2000). An appellate court will only reverse a district court's ruling on a Rule 33 motion if there "is a clear and manifest abuse of discretion." *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988).

In its decision in Petitioner's case, the Sixth Circuit reversed an order in which an experienced trial court judge exercised his discretion and partially granted Petitioner a new trial pursuant to Rule 33 because he concluded -- based on the evidence and witness credibility he personally observed -- that the jury's verdict was "against the manifest weight of the evidence." R. 1460, Page ID# 11824, *quoting*, *United States v. Lyimo*, 574 F.App'x 667, 671 (6th Cir. 2014). The panel majority in Petitioner's case does not point to any exceptional circumstance or manifest abuse of discretion, but rather reverses the District Court by applying a stricter standard of review when Rule 33 motions are granted than when they are denied, substituting its own witness credibility determinations for that of the trial court which observed the witnesses testify, and disparaging Rule 33 generally. The Sixth Circuit failed to give any consideration to the trial judge's discretion in making that ruling. Instead, it engaged in its own misguided factual

analysis, and substituted its own view of the evidence, including witness credibility, for that of the trial court's.

By applying a different standard of review for when trial courts grant a motion for new trial, substituting its own determination of witnesses credibility, and effectively removing Rule 33 from the federal rules of criminal procedure, the Sixth Circuit's decision: (1) conflicts with this Court's decisions, which stand for the proposition that an appellate court is to defer to the trial court's discretion to grant a new trial based on the weight of the evidence; (2) deepens an already divided circuit split concerning the scope of appellate review of trial court decisions granting new trials; and (3) further differentiates the Sixth Circuit's standard of appellate review on new trial motions from most of its sister circuits.

I. IT VIOLATES DUE PROCESS FOR AN APPELLATE COURT TO UTILIZE A DIFFERENT, MORE STRINGENT STANDARD OF REVIEW WHEN A TRIAL COURT GRANTS A MOTION FOR NEW TRIAL THAN WHEN A TRIAL COURT DENIES A MOTION FOR NEW TRIAL .

There is no basis in this Court's jurisprudence for utilizing different standards of review when a trial court grants a motion for new trial versus when it denies it. In *Tibbs v. Florida*, 457 U.S. 31, 38, n. 11 (1982), this Court quoted approvingly from *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)("When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different . . . . The district court need not view the evidence in the light most favorable to the verdict; ***it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses***. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set

aside the verdict, grant a new trial, and submit the issues for determination by another jury.")(emphasis added).[6]

The scope of appellate review of a trial judge's decision to grant or deny a new trial should not be dependent on the outcome of that motion. This Court's ruling in *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996), counsels that an appellate court is to apply an abuse of discretion standard that demonstrates "restraint," and "give[s] the benefit of every doubt to the judgment of the trial judge." 518 U.S. at 438-39.[7] There is no legal support in that decision, or this Court's jurisprudence, for the view that this limited scope of review applies only to denials of new trial applications.[8] Moreover, there is no reason to believe that the motion's outcome is a determining factor in whether the trial court abused its discretion, such that a grant of a new trial should automatically be subject to a heightened review.

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[6] *See also United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985):

> Rule 33 allows a district court to grant a new trial in the interest of justice. When the motion attacks the weight of the evidence, the court's authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence. In deciding a motion for a new trial, the district court is not constrained by the requirement that it view the evidence in the light most favorable to the government. Thus, it may evaluate the credibility of the witnesses. When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial. *See Tibbs v. Florida*, 457 U.S. 31, 38 n. 11 and 44 n. 20, 72 L. Ed. 2d 652, 102 S. Ct. 2211 (1982); *United States v. Shipp*, 409 F.2d 33, 36-37 (4th Cir. 1969); 3 Wright, *Federal Practice and Procedure* § 553 (1982).

[7] "We review a district court's grant of a motion for a new trial under the same standard in civil and criminal cases." *United States v. Cox*, 995 F.2d 1041, 1043 (11th Cir. 1993).

[8] In *Gasperini*, "(t)he Supreme Court did not suggest that appellate court scrutiny should vary depending on whether the trial court granted or denied a new trial; instead, the Court appeared to allow the circuit courts to review both decisions for abuse of discretion." Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. at 194.

If the Sixth Circuit had adhered to the proper abuse of discretion standard as set forth in *Gasperini*, and followed the example of its sister circuits, and its own precedents, which give significant discretion to the trial court's new trial determination, the district court's order would have been affirmed. As a result, this case presents important questions that flow from this Court's decision in *Gasperini*: whether a decision to grant a new trial should on appeal be subject to greater scrutiny than the denial of a request for a new trial, and what the scope of appellate review should be in connection with the same. This Court granted *certiorari* to resolve these issues in *Dist. of Columbia v. Tri County Indus., Inc.*, 530 U.S. 1305 (2000), but later dismissed the grant, *Dist. of Columbia v. Tri County Indus., Inc.*, 531 U.S. 287 (2001). The Court should now resolve these questions, and the deep inter-circuit conflict -- which the Sixth Circuit's decision only exacerbates -- that has developed concerning them.

Indeed, in the past, the Sixth Circuit has also made it clear that this Court's opinion in *Tibbs* requires an appellate court to apply the same standard in reviewing whether a trial court grants or denies a motion for new trial. Citing *Tibbs*, in *United States v. Crumb*, 187 F. Appx. 532, 536 (6th Cir. 2006), the court held, "When a defendant makes (a motion for new trial), the district court may assess witness credibility and we review for abuse of discretion the district court's decision ***to grant or not grant a new trial***. *See United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998)." (emphasis added). *See also United States v. Seago*, 930 F. 2d 482, 488 (6th Cir. 1991)("The decision to grant or deny a motion for new trial rests within the district court's sound discretion."); and *United States v. Lewis*, 521 F. App'x 530, 531 (6th Cir. 2013)("[T]he district court is entitled to a great deal of deference in [regards to] Rule 33 motions, given that the trial judge . . . can best weigh the errors against the record as a whole to determine whether those

errors in the conduct of the trial justify a new trial.")(citations and internal quotations marks omitted).

In fact, even the panel majority admits that the Sixth Circuit has utilized a different standard than the one it used in the instant case, noting that in *Lewis*, 521 F. App'x 530, the court upheld the grant of a new trial in a criminal case.[9] However, in the instant case, the panel majority very clearly ***does*** utilize a different standard when a district court grants a motion for new trial. The panel majority opinion states that, "(Petitioner) does not ... cite a single case in which our court has upheld the grant of a new trial in a criminal case." *United States v. Burks*, 974 F.3d at 627.[10] The panel majority then string cites twenty six (26) cases in which the Sixth Circuit has affirmed the ***denial*** of a motion for new trial in criminal cases. *Id*. The majority opinion is not subtle. The message to district courts is clear: deny a motion for new trial and we will affirm your ruling; grant a motion for new trial and we will reverse.

Other federal courts have utilized a different standard than the panel majority, reviewing grants or denials of motions for new trial with the same eye. The Eighth Circuit Court of Appeals, in *United States v. Dodd*, 391 F.3d 930, 935 (8th Cir. 2004), affirmed the district court's grant of a new trial, pursuant to Rule 33, holding:

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[9]The panel majority downplayed the significance of that decision by stating that it "did not turn on unexplained credibility assessments." *United States v. Burks*, 974 F.3d at 627. In fact, the panel majority was wrong on both of its assertions in that phrase. As Judge White pointed out: 1) the decision in *Lewis* ***did*** rest on credibility determinations; and 2) the District Court's credibility determinations in the instant case were well explained. *United States v. Burks*, 974 F.3d at 636-637 (White, J., dissenting).

[10]The panel majority ignored the fact that Petitioner cited numerous cases from other jurisdictions in which appellate courts ***did*** uphold the grant of a new trial in criminal cases. R. 33, pp. 16-17.

> it was within the District Court's province to weigh the evidence, disbelieve witnesses, and grant a new trial-even in dutifully rehashed the evidence that Dodd possessed and distributed drugs, but the District Court assumed these two facts in reaching its conclusion regarding Dodd's conviction on the conspiracy charge. The District Court granted a new trial because it was "left with a perpetual 'bad taste' in its mouth over the nature, quantity, and character of evidence" of Dodd's involvement in the conspiracy. In these circumstances, we cannot say the District Court abused its discretion in granting Dodd's motion for a new trial.

In *United States v. Simms*, 508 F. Supp. 1188, 1204-08 (W.D. La. 1980), the court granted a new trial, explaining there was no direct proof of the defendant's guilt and that "the government's case depends upon inferences upon inferences drawn from uncorroborated testimony that . . . is subject to questions of credibility." In *United States v. Hurley*, 281 F. Supp. 443, 449 (D.Conn.1968), the court granted the new trial stating, "(t)he direct testimony of Rutt and MacFarlane [the government's key witnesses] was subject to serious impeachment by prior inconsistent statements and by independent evidence."[11]

Utilizing a different standard of review when a trial court grants a new trial motion diminishes, if not destroys, the trial courts' ability to set aside an unjust verdict. As one commentator has noted:

> (O)ne of the primary goals of appellate review is to ensure that the court's judgment provides justice for the parties by correcting erroneous lower-court rulings. At least in the circuits that review the grant of a new trial more strictly than the denial, however, it seems that current appellate practice is not meeting the goal of error correction. Instead, within those circuits, appellate review may be creating a systemic bias in favor of denying new trials. Trial courts know that granting a new trial will subject their ruling to close scrutiny, but denying a new trial will subject their ruling to little, if any, review. Consequently, the trial courts have an incentive to err on the side of denying a new trial, even when the trial judge believes the jury's verdict to be against the great weight of the evidence.
>
> The incentive to deny a new trial reduces the probability that an unjust verdict will be remedied. As one commentator has pointed out, there is little risk

[11]The same is true of the government's informant witnesses in the instant case.

> if the appellate court errs in reversing the denial of a new trial: "When a denial is reversed the possibility of injustice is minimal since each party is given the benefit of a new trial." But if the court of appeals "errs in reversing the grant of a new trial, the injustice upon which the trial court predicated its order is preserved." As a result, the current practice of reviewing the grant of a new trial more strictly than a denial may be exactly backwards, and may not serve the appellate goal of error correction.

Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. 157, 213 (2008).

To be sure, other circuits have expressly held that a different standard of review is appropriate when the district court grants a motion for new trial. There is a split among the circuit courts of appeal on whether a different standard should be utilized to review the granting of a motion for new trial.[12] Some circuits currently apply an abuse of discretion analysis that gives significant deference to the trial court's determination that a new trial is warranted.[13] Other circuits -- including the Sixth Circuit here - apply an abuse of discretion analysis that closely scrutinizes the determination, and gives significant deference to the jury's verdict.[14]

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[12]Petitioner does not claim that these are absolute categories - there is a spectrum between the positions and more nuanced differences exist between the circuits in each - but it is fair to look at each circuit as falling into one of the two camps.

[13]*See e.g., Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 178 (1st Cir. 1988)(noting that "in the numerous cases where [the court has] considered a trial court's grant or denial of a motion for a new trial," it has applied the same standard of review).

[14]*See e.g.*, *Butcher v. United States*, 368 F.3d 1290, 1297 (11th Cir. 2004)("The grant of a motion for new trial generally is more closely scrutinized than a denial, and the grant of new trial based on the weight of the evidence is more closely scrutinized than the grant of new trial on other grounds", *citing, United States v. Martinez*, 763 F.2d 1297, 1312-13 (11th Cir. 1985). *See also United States v. Hernandez*, 433 F.3d 1328, 1336 (11th Cir. 2005); *Dailey v. Societe Generale*, 108 F.3d 451, 458 (2d Cir. 1997); *United States v. Tobias*, 899 F.2d 1375, 1380 (4th Cir. 1990); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646-47 (D.C. Cir. 1988); *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1372 (9th Cir. 1987); *Conway v. Chem. Leaman Tank Lines, Inc.*, 610 F.2d 360, 362-63 (5th Cir. 1980); and *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960).

"Specifically, the Second, Third, Fourth, Fifth, Ninth, Eleventh, and D.C. Circuits review decisions granting new trials more strictly than decisions denying them." Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. at 194. The two analyses are irreconcilable and outcome-determinative.

The two theories of appellate review of a trial court's determination granting a motion for new trial versus denying a motion for new trial, exemplified by the groups of cases in the above paragraphs, are obviously irreconcilable. Moreover, this is an issue that is certain to reoccur. Because of this conflict amongst the federal circuits and because the Sixth Circuit's holding on this issue in Petitioner's case violates this Court's precedents as well as Due Process, this Court should grant review and decide the issue.

II. AN APPELLATE COURT MAY NOT, CONSISTENT WITH DUE PROCESS, SUBSTITUTE ITS OWN JUDGMENT REGARDING WITNESS CREDIBILITY FOR THAT OF A TRIAL COURT WHICH OBSERVED AND LISTENED TO THE WITNESSES TESTIMONY.

Four federal judges have reviewed the trial testimony of the three "snitch" witnesses who testified that Petitioner shot Malcolm Wright. Only one of those judges observed and listened to the testimony. Yet, two of those judges, who did not see or hear the testimony, substituted their credibility determination of the witnesses' testimony for the one judge who did observe the testimony. It is the credibility determinations regarding those witnesses testimony of the two judges who did ***not*** see or hear the testimony that currently carries the day. That result ignores precedents of this Court, the Sixth Circuit, and the majority of the other circuits.[15]

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[15]As noted above, in *Tibbs*, 457 U.S. at 38, n. 11 (1982), this Court quoted approvingly from *United States v. Lincoln*, 630 F.2d at 1319 ("When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different . . . . The

A reviewing court may not set aside factual findings "simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Credibility determinations are entitled to "even greater deference" because "only the trial judge can be aware of the variations in demeanor and tone of voice." *Anderson*, 470 U.S. at 575; *see also Webster v. Watson*, 975 F.3d 667, 682 (7th Cir. 2020)(same); and *United States v. Austin*, 806 F.3d 425, 431 (7th Cir. 2015)(noting that credibility findings "can virtually never be clear error" (*quoting United States v. Longstreet*, 669 F.3d 834, 837 (7th Cir. 2012)). *See also Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)(observing that the judge will have "a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses").

Indeed, not that long ago, the Sixth Circuit recognized the fact that trial judges are not only in the better position, but the only informed position, to judge the credibility of trial witnesses testimony. *See United States v. Mallory*, 902 F.3d 584 (6th Cir. 2018). In *Mallory*, after remanding the case to the district court because that court utilized the improper standard in

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district court need not view the evidence in the light most favorable to the verdict; ***it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses***.)(emphasis added). *See also United States v. Arrington*, 757 F.2d at 1485:

> Rule 33 allows a district court to grant a new trial in the interest of justice. When the motion attacks the weight of the evidence, the court's authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence. In deciding a motion for a new trial, the district court is not constrained by the requirement that it view the evidence in the light most favorable to the government. Thus, it may evaluate the credibility of the witnesses. When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial. *See Tibbs v. Florida*, 457 U.S. 31, 38 n. 11 and 44 n. 20, 72 L. Ed. 2d 652, 102 S. Ct. 2211 (1982); *United States v. Shipp*, 409 F.2d 33, 36-37 (4th Cir. 1969); 3 Wright, *Federal Practice and Procedure* § 553 (1982).

denying the defendant's motion for a new trial, the court held, "In the end, the manifest weight of the evidence may support the verdict. ***But as an appellate court, this is not for us to say. The judge that saw the witnesses and sat with the evidence at trial must make that call."*** *Mallory*, 902 F.3d at 597 (emphasis added).[16] As Judge White points out in her dissent, *Mallory* is far from the only decision by the Sixth Circuit upholding this long accepted principle of appellate review. *United States v. Burks*, 974 F.3d at 628-629 (White, J., dissenting).[17]

Other courts have reached the same conclusion. *See Meija v. Cook County*, 650 F.3d 631, 635 (7th Cir. 2011)("In the end, the district court is in the best position to evaluate the evidence and determine whether the verdict was against the manifest weight; it heard the witnesses testify, saw the evidence presented, and gained a better appreciation of the nuances of the case than could be gleaned from a cold, written record."); *United States v. Browning*, 252 F.3d 1153, 1157 (10th Cir. 2001)("(t)he credibility of witnesses, the weight to be given evidence, and the reasonable inferences drawn from the evidence fall within the province of the district court"); *Dunlap-McCuller v. Riese Organization*, 980 F.2d 153, 158 (2nd Cir. 1992)("[o]n the basis of the cold record on appeal we would not have granted a new trial, because the grant of a new trial on

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[16]*See United States v. Dodd*, 391 F.3d at 935 (affirming grant of a new trial). *See also United States v. Autuori*, 212 F.3d 105, 121 (2d Cir. 2000)(verdict against weight of evidence because of "dubious testimony" of 2 of government's principal witnesses) In *Autori*, the court held, "the district court may evaluate witness credibility and draw some inferences against the government in deciding whether a new trial is warranted. ... The district court has set forth meticulously the testimony and circumstances that support its exercise of discretion. Having traversed the same ground, guided by the district court's observations and analysis, we agree that the credibility of the principal witnesses was weak and that the soundness of the verdict is highly doubtful. We therefore conclude that it was no abuse of the district court's discretion to order a new trial." *Id*.

[17]*See United States v. Dimora*, 750 F.3d 619, 627-628 (6th Cir. 2014)(appellate courts are not to enter "the forbidden territory of re-weighing evidence"); *See also United States v. Crumb*, 187 F. Appx. at 536; and *United States v. Lutz*, 154 F.3d at 589.

weight of the evidence grounds should be reserved for those occasions where the jury's verdict was egregious. However, such a conclusion is a significant step removed from a holding that the district court abused its discretion. Unlike the district court, we cannot make determinations concerning a witness's credibility."); and *Hall v. United States*, 418 F.2d 1230, 1231 (10th Cir. 1969)("It should be unnecessary to state that the trial judge ... was the judge of the weight and credibility of the evidence. He had the witnesses before him, where he could observe the demeanor, speech and outward appearance of each witness as he testified, and weigh this in connection with the other evidentiary facts present in the situation before him").[18]

There is good reason for the widespread acknowledgment of this principle. "A judge who orders a retrial has a first-hand familiarity with the case and witnesses." Pollis, *The Death of Inference*, 55 B.C. L. Rev. 435, 487-88 (2014). Appellate judges reviewing a cold record do not.

In this regard, this Court's emphasis on the primacy of the trial judge in making new trial decisions is well-settled in its own jurisprudence, and at common law. *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. at 575 ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); *Cone v. W. Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947) (recognizing the discretion to direct a verdict or order a new trial that resides in the district court, the Court stated that the district court "can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses," because the judge "saw and heard the witnesses and has the feel of the case which no

[18]*See also United States v. Todd*, 515 F.3d 1128, 1138 (10th Cir. 2008)("district courts are owed great deference when it comes to determining the credibility of witnesses appearing before them").

appellate printed transcript can impart," and thus has "a perspective peculiarly available to him alone."); and *Patton v. Texas & P. Ry. Co.*, 179 U.S. 658, 660 (1901)("[T]he judge is primarily responsible for the just outcome of the trial. He is not the mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses [and] for noting all those matters in a trial not capable of record.").

The panel majority never addresses this fundamental precept of appellate review. Instead, the panel majority does what the Sixth Circuit prohibited in *Mallory* and other circuits have prohibited in numerous cases: substituting its credibility determination for that of the district court.

But, despite the fact that, "(t)he vast majority of courts that have considered the issue agree that the trial judge should be permitted to make an independent assessment of witness credibility in determining whether the jury's verdict is against the great weight of the evidence," Robertson, 83 Tul.L.Rev. at 180-81, there is a circuit split on this issue. "The United States Courts of Appeals for the Third, Fourth, and Eighth Circuits, however, have been more restrictive and have given the trial judge less latitude to assess the witnesses' credibility." *Id*.

The Third Circuit has held that the district court should be reluctant to make its own credibility determination in ruling on a motion for new trial. *Plastipak Packaging, Inc. v. DePasquale*, 75 F. App'x 86, 90 n.2 (3d Cir. 2003). The court held that when the weight of the evidence depends on credibility, such reluctance is necessary ""to ensure that a district court does not substitute its judgment of the facts and the credibility of the witnesses for that of the jury.'"

Id. (citations omitted). The Third Circuit reversed a trial court's grant of a new trial when it concluded that the trial court failed to defer to the jury's credibility determinations. *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 83, 91 (3d Cir. 1960). In *Lind*, the court concluded that if the jury's credibility determination was accepted, then there was "convincing, [even] overwhelming," evidence to support the verdict. *Id*. at 91. Holding that the trial judge should have deferred to the jury's resolution of that credibility question, the court reversed the trial court's grant of a new trial. *Id*.

In *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 201 (4th Cir. 2000), the Fourth Circuit reversed the trial court's determination of witness credibility, concluding that the trial court usurped the jury's function. *See also Abasiekong v. City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984)(trial judge should not substitute his own judgment of facts and witness credibility, particularly where the subject matter of the trial is easily comprehended by a lay jury).

The Eighth Circuit has been less clear, but in *White v. Pence*, 961 F.2d 776, 781 (8th Cir. 1992), the court held that if two witnesses are both credible, but present diametrically opposed testimony, then the trial judge cannot determine which witness to believe - that choice must be left to the jury.

The two theories of appellate review of a trial court's determination of witness credibility exemplified by the groups of cases in the above paragraphs are obviously irreconcilable. Moreover, this is an issue that is more than likely to reoccur. Because of this conflict amongst the federal circuits and because the Sixth Circuit's holding on this issue in Petitioner's case violates Due Process, this Court should grant review and decide the issue.

III. A FEDERAL CIRCUIT COURT OF APPEALS MAY NOT EFFECTIVELY ABOLISH RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE BY ENACTING A STANDARD FOR GRANTING A MOTION FOR NEW TRIAL THAT IS FUNCTIONALLY IMPOSSIBLE TO MEET.

The tradition of allowing a judge to order a new trial when she independently determines a jury's verdict is contrary to the weight of the evidence originated at common law and dates back to at least seventeenth century England. *United States v. Laub*, 37 U.S. 1, 9 (1838)("For it is a point too well settled, to now be drawn in question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial."); 12 Martin H. Redish, MOORE'S FEDERAL PRACTICE § 59.101, at 15 (3d ed. 2012)("Let us turn to the power of the trial court to grant a new trial. The power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of our Government."). *See also State v. Moats*, 906 S.W.2d 431, 433 (Tenn. 1995); Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. at 165; and Michael Seward, *The Sufficiency-Weight Distinction-A Matter of Life or Death*, 38 U. Miami L. Rev. 147, 159-160 (1983).[19]

That practice is codified in Rule 33 of the Federal Rules of Criminal Procedure which

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[19]The custom of "setting aside the verdict of a jury and granting a new trial * * * is of a date extremely ancient." 3 William Blackstone, *Commentaries on the Laws of England* 387 (1768). By at least the mid-seventeenth century, it was settled law that the court could order another trial to remedy a "verdict without or contrary to the evidence." 3 Blackstone 387; *see also* 2 William Tidd, *The Practice of the Court of King's Bench in Personal Actions* 814-815 (1807) (similar). The procedure for awarding a new trial at common law bears striking resemblance to appellate weight-of-the-evidence review today. Because the en banc court at Westminster could review the trial judge's denial of a new trial motion, federal appellate courts may do likewise "according to the rules of the common law." U.S. Const. amend. VII.

provides, “Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Rule 2 of the Federal Rules of Criminal Procedure states, “These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration ....” In Petitioner’s case, the Sixth Circuit’s opinion “interprets” Rule 33 out of existence.

This Court has long recognized that a district court can grant a motion for a new trial if the verdict was against the weight of the evidence. *Gasperini*, 518 U.S. at 433; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 540 (1958); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). In passing on a motion for a new trial, the district court has the power to get a general sense of the weight of the evidence, assessing the credibility of the witnesses, and the comparative strength of the facts put forth at trial. *See, e.g., Byrd*, 356 U.S. at 540 ("The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses . . . ."). *See also United States v. Washington*, 184 F.3d 653, 658 (7th Cir. 1999)("In considering the weight of the evidence, the court must necessarily consider the credibility of the witnesses."); *United States v. Ruiz*, 105 F.3d 1492, 1501 (1st Cir. 1997); *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992); *United States v. Robertson*, 110 F.3d 1113, 1117 (5th Cir. 1997); *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998); *United States v. Lanier*, 838 F.2d 281, 284-85 (8th Cir. 1988); and *United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994)(all explicitly holding that a court may consider credibility in deciding a motion for new trial). If, after evaluating the evidence, including witness credibility, the district court is of the opinion that the verdict is against the manifest weight of the evidence, a new trial is required "in the interest of justice," under Fed. R. Crim. P. 33.

Courts throughout the country have utilized Rule 33 to correct verdicts that do not meet the "interest of justice" standard. As noted above, the Eighth Circuit Court of Appeals, in *United States v. Dodd*, 391 F.3d at 935, affirmed the district court's grant of a new trial, pursuant to Rule 33. *See also United States v. Simms*, 508 F. Supp. at 1204-08; and *United States v. Hurley*, 281 F. Supp. at 449.

In Petitioner's case, the trial judge was the only objective person with legal training who attended the trial, saw, heard, and evaluated the evidence and testimony, and could evaluate the appropriateness of the jury's verdict. The trial judge did so, and after weighing the evidence, concluded that the jury's verdict was drastically wrong, and would result in a serious injustice if allowed to stand. Notably in this regard, the trial judge minimized any concerns by directing that the case be tried before a new jury, instead of granting Petitioner's Rule 29 application.

The Sixth Circuit, however, gave no deference to the trial court's analysis and reasoning, and instead found that the trial court abused its discretion by conducting its own examination of the trial record that included weighing evidence and determining witnesses credibility without having observed their demeanor. Additionally, as noted above, the panel majority's opinion clearly indicates that a different, and more stringent, standard of review is utilized when a district court grants a motion for new trial than when a district court denies a motion for new trial.

The panel majority's placement of a heavy thumb on the scales of justice violates Due Process. Given the fact that a motion for new trial is filed at the conclusion of virtually every criminal case in which there is a verdict of guilty and, at least sometimes, a district judge may reasonably conclude that a new trial must be ordered in the interest of justice, this issue is certain to reoccur.

It is true that, "federal courts do not often grant new trials on the weight of the evidence." Robertson, *Judging Jury Verdicts*, 83 Tul. L. Rev. at 162.[20] That fact indicates that district court judges invest the proposition of granting a new trial motion with the utmost seriousness and, as such, there is good reason to respect their determination that it is appropriate in an individual case. In this case, the trial judge did not abuse his discretion in granting Petitioner a new trial. Here, the District Court made clear that its decision was entered only after careful and solemn consideration:

> The Court does not know whether Burks killed Wright at C-Rays on November 12, 2012. What the Court does know, however, is that proof beyond a reasonable doubt is a standard not to be trifled with. "When the government has presented enough evidence for a conviction but the judge disagrees with the jury's resolution of conflicting evidence, a reversal is appropriate on the ground that the verdict is against the manifest weight of the evidence." *United States v. Lyimo*, 574 F.App'x 667, 671 (6th Cir. 2014)(citing *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998)). That is the case with respect to Burks' convictions on the counts relating to the murder of Wright and those convictions will be vacated pending a new trial.

R. 1460, Page ID# 11824.

In truth, the Sixth Circuit's opinion is really an attack on Rule 33 motions generally. Though not explicitly stated, the panel majority's position, in reality, is that while Rule 33 motions are very rarely granted in criminal cases, they should ***never*** be granted. That is not the law. The law is that an appellate court may only reverse if it finds the trial judge clearly and manifestly abused his discretion. Nothing in the panel majority's opinion comes close to demonstrating that the District Court did so here. If the panel majority opinion is allowed to stand, district judges' hands will be tied. Rule 33 relief will be unavailable.

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[20]In fact, the author concludes that it is an "underutilized" remedy. *Id*.

In the instant case, applying the strict Rule 33 standard, the District Court made the clear, even-handed determination that Burks was entitled to a new trial on the counts relating to the Wright homicide. The District Court did not clearly and manifestly abuse its discretion. Quite the opposite actually. The District Court made detailed factual findings based upon its observation of the critical witnesses testimony. An appellate court should not be allowed to do away with Rule 33 by substituting its judgment for that of the trial judge who observed the testimony and demeanor of the three (3) informant witnesses, found their testimony incredible, and determined that the jury's verdict was therefore against the manifest weight of the evidence where no other evidence supported Burks' conviction for murder. Rule 33 not only allows a trial judge to make those determinations, it requires it. The panel majority's opinion seeks to unconstitutionally put an end to that practice.

The Sixth Circuit's treatment of Rule 33 eviscerates it. To prevent the demise of Rule 33, this Court must grant this petition for a writ of *certiorari* and reverse the judgment of the Sixth Circuit.

CONCLUSION

This Court should grant *certiorari* in the instant case because there is a split in authority among the lower courts regarding whether a decision to grant a new trial should be subject to greater scrutiny on appeal than the denial of a request for a new trial. Likewise, this Court should grant *certiorari* because there is a split among the lower courts regarding whether the trial judge should be permitted to make an independent assessment of witness credibility in determining whether the jury's verdict is against the great weight of the evidence. This Court should grant *certiorari* to determine whether a circuit court of appeals may effective abolish a rule of criminal

procedure by its opinion.

Additionally, this Court should grant *certiorari* in the instant case because the Court of Appeals' holding in Petitioner's case is in direct conflict with the above listed decisions by this Court, as well as the holding in numerous other cases. *See Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 130 (1959)("We granted the petition for *certiorari* because (the lower court) decision seemed to be out of line with the authorities"). The Court of Appeals has "decided a federal question of substance ... in a way probably not in accord with applicable decisions of this (C)ourt." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). This Court should grant *certiorari* to decided these substantial legal issues. The writ of *certiorari* should, therefore, be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of *Certiorari*, and accompanying appendices, were served upon counsel for Respondent, Cecil W. VanDevender, Assistant United States Attorney, 110 Ninth Ave., South, Suite A-961, Nashville, TN 37203-3870, via U.S. Mail, this 12th day of February, 2021.

/s/ John M. Bailey
John M. Bailey