

Case No. 20-__

**In The
Supreme Court of the United States**

ANNA VALENTINE, Warden

Applicant

v.

JOHNNY PHILLIPS

Respondent

On Appeal from the United States Court
Of Appeals for the Sixth Circuit
Case No. 18-6184

**APPLICATION TO RECALL AND STAY MANDATE OF THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT PENDING PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
PARTIES TO THE PROCEEDINGS BELOW	3
OPINIONS BELOW	3
JURISDICTION	4
CONSTITUTIONS, STATUTES, AND RULES.....	4
STATEMENT OF THE CASE.....	4
I. Factual background.....	4
II. The habeas proceeding.....	5
III. The panel decision.....	7
REASONS TO GRANT THE APPLICATION.....	8
I. There is a reasonable probability that this Court will grant certiorari.	8
II. There is fair prospect that this Court will reverse the Court of Appeals decision.	11
III. Absent a stay, the Commonwealth of Kentucky will suffer irreparable harm.	13
IV. The Balance of Equities Favors a Stay.	14
<u>Conclusion</u>	15
Appendix A: Opinion of the Sixth Circuit (September 1, 2020).....	1a
Appendix B: Sixth Circuit Order Denying Petition for Rehearing <i>En Banc</i>	35a
Appendix C: Sixth Circuit Order Denying Motion to Stay Mandate	36a

Appendix D: Sixth Circuit Mandate	37a
Appendix E: United States District Court Opinion and Order	38a
Appendix F: Magistrate Judge’s Report and Recommendation	44a

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Bessemer City</i> , 470 U.S. 564, 573 (1985).....	passim
<i>Box v. Planned Parenthood of Ind. & Ky., Inc.</i> , 139 S. Ct. 1780, 1782 (2019).....	10
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	passim
<i>Bursztajn v. United States</i> , 367 F.3d 485, 488-89 (5th Cir. 2004).....	10
<i>Calloway v. Caraco Pharm. Labs., Steel, Inc. v. Keeton</i> , 417 F.3d 598, 604 (6th Cir. 2005).....	10
<i>Cooper v. Harris</i> , 137 S.Ct. 1455, 1465 (2017).....	11
<i>Daubert v. Merrell Dow Pharm.</i> , 509 U.S. 579, 589 (1993).....	12
<i>Doe v. Menefee</i> , 391 F.3d 147, 164 (2d. Cir. 2004)	10
<i>In re Feshbach</i> , 974 F.3d 1315, 1321 (11th Cir. 2020).....	10
<i>June Medical Services. L.L.C. v. Russo</i> , 140 S.Ct. 2103, 2121 (2020).....	9,11
<i>Keller v. United States</i> , 38 F.3d 16, 25 (1st Cir. 1994)	10
<i>LAJIM, LLC v. Gen. Elec. Co.</i> , 917 F.3d 933, 946 (7th Cir. 2019).....	10
<i>Lambert v. Wicklund</i> , 520 U.S. 292, 299 (1997).....	9

<i>Phillips v. Commonwealth</i> , 2009-SC-000633-MR, 2010 WL 2471669, at *1 (Ky. June 17, 2010)	5
<i>Phillips v. Commonwealth</i> , No. 2009-SC-000633-MR, 2010 WL 2471669, at *5 (Ky. June 17, 2010)	5, 13
<i>Phillips v. Valentine</i> , —F. App’x.—, 2020 WL 5202070 (6th Cir. Sept. 1, 2020)	3
<i>Rodriquez v. Holder</i> , 683 F.3d 1164, 1170-71 (9th Cir. 2012)	10
<i>Rostker v. Goldberg</i> , 448 U.S. 1306, 1308 (1980)	1, 8
<i>Singleton v. Lockhart</i> , 962 F.2d 1346, 1349 (8th Cir. 1990)	10
<i>Spears v. United States</i> , 555 U.S. 261, 263 (2009)	9
<i>U.S. v. Charboneau</i> , 914 F.3d 906, 912 (4th Cir. 2019)	10
<i>U.S. v. Cortes-Gomez</i> , 926 F.3d 699, 708 (10th Cir. 2019)	10
<i>United States v. United States Gypsum Co.</i> , 333 U.S. 364, 395 (1948)	12
Statutes:	
28 U.S.C. § 1254	4
28 U.S.C. § 1291	4
28 U.S.C. § 2101(f)	1
28 U.S.C. § 2254	1, 4, 5
Fed. R. Civ. P. 52(a)(6)	passim

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF
THE UNITED STATES SUPREME COURT FOR THE SIXTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rules 22 and 23, the Warden, Anna Valentine, by counsel, respectfully requests an order recalling and staying the issuance of the mandate in the United States Court of Appeals for the Sixth Circuit until this Court rules on the Warden's forthcoming petition for writ of certiorari, including any decision on the merits. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.) (describing the "four-part showing" needed to justify the grant of a stay); Sup. Ct. R. 22, 23.

INTRODUCTION

The Warden seeks an order recalling and staying the mandate and the judgment below because without such an order a convicted murderer will be released from custody, which poses a grave risk to members of the Kentucky community at large. A jury convicted Respondent Johnny Phillips of wanton murder after he shot Phillips Glodo in the back of the head with a shotgun. Several years after his conviction, Phillips filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, claiming that the state violated his due-process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to turn over an x-ray of the victim's skull. Following an evidentiary hearing, the United States District Court for the Eastern District of Kentucky concluded that there was no *Brady* violation because the x-ray was not favorable or material to Phillips's case. The district court also made a factual finding that Phillips's expert witness, who he called to testify about the x-ray, was not

credible or reliable. App., *infra*, at 41a. Phillips appealed to the United States Court of Appeals for the Sixth Circuit. In a 2-1 decision, the Sixth Circuit rendered an opinion and judgment reversing the district court's denial of a writ of habeas corpus and granting a conditional writ. App., *infra*, at 27a. In reversing the district court, the panel majority credited the expert testimony that the district court had previously found to be unreliable and lacking in credibility. But the panel majority did not apply well-established law in doing so. That is, it did not apply the well-known standard for reviewing a district court's exercise of its gatekeeping function with regard to expert witnesses. Rather than giving the proper level of deference to the district court's conclusion that Phillips's expert was not reliable or credible, the Sixth Circuit panel majority concluded that the expert's testimony should be credited merely because it did not appear to be "blatantly self-serving or dishonest." App., *infra*, at 19a. On this basis, the Sixth Circuit panel majority reversed the district court and ordered that the case be remanded with instructions to grant a conditional writ of habeas corpus. App. Judge Sutton dissented by separate opinion. App., *infra*, at 27a.

The Warden moved for panel rehearing and rehearing *en banc*. Rehearing was denied, although Judge Sutton would have granted it for the reasons stated in his earlier dissent. App., *infra*, at 35a. On October 20, 2020, the Sixth Circuit denied the Warden's motion to stay the mandate pending a petition for writ of certiorari to the United States Supreme Court and issued its mandate. App., *infra*, at 36a; Fed.

R. App. P. 41(b). The district court thereafter entered the conditional writ and ordered the Commonwealth of Kentucky to either retry or release Mr. Phillips within 90 days.

The decision below effectively changes the district court’s role as gatekeeper of expert testimony and opens the door for using unqualified experts to overturn state-court convictions. This Court has clearly spoken that under Fed. R. Civ. P. 52(a)(6), a district court’s factual findings shall not be set aside unless clearly erroneous and the reviewing court must give even greater deference to the trial court’s credibility determinations. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Without fail, the federal courts of appeal have adopted this appellate standard of review. This appeal presents the Court with the opportunity to reaffirm the proper standard of review that appellate courts should use when reviewing a district court’s findings regarding the credibility and reliability of an expert witness.

PARTIES TO THE PROCEEDINGS BELOW

The Warden, Anna Valentine, was the Respondent in the United States District Court for the Eastern District of Kentucky and the Appellee-Respondent in the United States Court of Appeals for the Sixth Circuit.

Johnny Phillips was the Petitioner in the United States District Court and the Appellant-Petitioner in the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (App. A) reversing the district court’s judgment is reported at *Phillips v. Valentine*, —F. App’x.—, 2020 WL 5202070 (6th Cir. Sept. 1, 2020).

The order of the Sixth Circuit denying the Warden’s petition for rehearing *en banc* (App. B) is unreported. The Sixth Circuit’s order denying the motion to stay the mandate (App. C) is unreported. The Sixth Circuit’s mandate (App. App. D) is unreported.

The district court’s opinion and order (App. E) is unreported. The magistrate judge’s report and recommendation (App. F) is unreported.

JURISDICTION

The district court had jurisdiction of this case under 28 U.S.C. § 2254. The Sixth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The opinion of the Sixth Circuit reversing the district court’s judgment was entered on September 1, 2020. The Sixth Circuit’s order denying the Warden’s petition for rehearing *en banc* was entered on October 9, 2020. This Court has jurisdiction over this case under 28 U.S.C. § 1254.

CONSTITUTIONS, STATUTES, AND RULES

Fed. R. Civ. P. 52(a)(6) provides, “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”

STATEMENT OF THE CASE

I. Factual background.

On October 18, 2007, Johnny Phillips got into an argument with Phillip Glodo. The two men left the residence of a mutual friend in their own vehicles, but later

pulled over in a church parking lot, the victim pulling in behind Phillips. Phillips got out of his truck, pulled out a shotgun, and shot the victim in the back of the head. *Phillips v. Commonwealth*, 2009-SC-000633-MR, 2010 WL 2471669, at *1 (Ky. June 17, 2010). Phillips claimed that the victim came at him with a knife, so he raised his shotgun, pushed the victim back with the gun, and the gun discharged accidentally. *Id.* at *3.

At trial, the medical evidence confirmed that Phillips shot the victim from behind. Dr. Jennifer Schott, the medical examiner who performed the victim's autopsy, testified that the victim's head wound was in the middle of the back of his head – not on the left or right. After her forensic examination, Dr. Schott recovered some of the pellets from inside the victim's brain and determined that the pellets traveled through the victim's head from back to front. App., *infra*, at 6a. The jury convicted Phillips of wanton murder. App., *infra*, at 7a. The Kentucky Supreme Court unanimously affirmed Phillips's conviction, specifically concluding that it was undisputed the victim was shot in the back of the head. *Phillips v. Commonwealth*, No. 2009-SC-000633-MR, 2010 WL 2471669, at *5 (Ky. June 17, 2010).

II. The habeas proceeding.

Several years after his conviction, Phillips obtained— through a request pursuant to the Kentucky Open Records Act— a copy of an x-ray of the victim's skull that had not been disclosed during the trial. He filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, claiming that the state violated his due-process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to turn over the x-ray.

According to Phillips, the x-ray supports his theory of the case because it shows he did not shoot the victim squarely in the back of the head, but instead shot him at an angle consistent with self-defense.

The magistrate judge initially recommended denying the claim on the ground that the x-ray would have been cumulative to the evidence presented at trial. The jury saw autopsy photographs of the victim and heard the testimony of Dr. Schott, all of which would have allowed the jury to understand the angle at which Phillips shot the victim and from what distance. The x-ray, the magistrate reasoned, would not have added to the picture. App., *infra*, at 62a-63a.

Judge Thapar, then at the district court, granted Phillips's motion for an evidentiary hearing to review the x-ray. As he explained, "the Court lacks a medical degree and cannot on its own determine what the [x-ray] shows." Order, R. 89, PageID#2647. So, to resolve this issue, the court ordered an evidentiary hearing for the limited purpose of reviewing the x-ray (with some medical assistance) to determine whether the results were favorable to Phillips. *Id.*

At the evidentiary hearing, Phillips produced one witness: Larry Dehus, a forensic scientist and ballistics expert. Dehus, however, is not a medical doctor and had no training or expertise qualifying him to read or testify as to the meaning of the x-ray. See Evid. Hrg. Tr., R. 137, PageID#2860-61. His inadequacies as a witness were quickly apparent. Dehus could not accurately explain basic details about the image, such as the direction from which the x-ray was taken. *Id.* at PageID#2868, 2899. Despite that, Dehus claimed that the x-ray allowed him to determine the

direction from which Phillips fired the shotgun, as well as the approximate number of pellets lodged in the victim's skull. *Id.* at PageID#2862-64.

The Warden's witness, Dr. Schott (the medical examiner in the case) rebutted much, if not all, of Dehus's testimony. She confirmed that the x-ray did not change her original findings from the autopsy report, primarily because she had the x-ray when she performed the autopsy. *Id.* at PageID#2881. And she explained that, contrary to Dehus's claims, the x-ray could not be used to determine the location or path of the pellets in the skull because the two-dimensional nature of the image made such findings impossible. *Id.* at PageID#2881, 2895-96. The district court weighed the testimony of Dehus and ultimately determined that Dehus's conclusions about the significance of the x-ray were not reliable. App., *infra*, at 41a.

III. The panel decision.

On appeal, a divided panel of the United States Court of Appeals for the Sixth Circuit reversed. The majority reasoned that Dehus's testimony met the "fairly low" threshold under *Brady* to establish that undisclosed evidence would have been favorable to the defendant's case. App., *infra*, at 19a. But, the majority adopted a novel approach to evaluating the district court's credibility findings. Even though the district court determined that Dehus was not a reliable witness, the panel majority credited portions of his testimony that Dr. Schott did not directly refute. App., *infra*, at 17a. Thus, the panel majority found the x-ray was both favorable and material to Phillips's case. The panel majority set aside the district court's conclusion about Dehus's testimony not because it found that the district court committed clear

error regarding its factual findings, or because the district court misapplied the well-established standard for evaluating proffered expert testimony, but merely because Dehus’s testimony did not appear to be “blatantly self-serving or dishonest.” App., *infra*, at 19a. Thus, the panel used an improper standard of review in its decision to ignore the credibility determination by the district court and substituted its own finding that Dehus’s testimony provided some support for Phillips’s claim.

REASONS TO GRANT THE APPLICATION.

A well-established four-part test governs that a Circuit Justice’s consideration of an in-chambers stay application pending a petition for writ of certiorari:

(1) it must be established that there is a “reasonable probability” that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) the applicant must persuade the [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; (3) there must be a demonstration that irreparable harm is likely to result from the denial of a stay; (4) in a close case it may be appropriate to “balance the equities”—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (internal citations omitted). This stay application satisfies all four criteria.

I. There is a reasonable probability that this Court will grant certiorari.

It is reasonably probable that this Court will grant certiorari in this case for two reasons.

First, the Sixth Circuit’s opinion is in direct conflict with the well-established legal guidelines set forth in Fed. R. Civ. P. 52(a)(6) and this Court’s opinion in *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Under Fed. R. Civ. P. 52(a)(6),

a district court’s factual findings shall not be set aside unless clearly erroneous and the reviewing court must defer to the trial court’s opportunity to judge the credibility of the witnesses. *Anderson*, 470 U.S. at 573. The holding in *Anderson* was reaffirmed recently in *June Medical Services, L.L.C. v. Russo*, 140 S.Ct. 2103, 2121 (2020). *See also id.* at 2141 (Roberts, C.J., concurring in the judgment) (clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts).

Here, instead of deferring to the district court’s finding that *any* conclusions from Phillips’s expert about the significance of the x-ray were unreliable, the panel majority explained that, “even with Dehus’s skill somewhat in question ... we cannot dismiss his basic conclusion that there was not nearly enough shot in the skull to support the Commonwealth’s theory.” App., *infra*, at 17a. The panel majority reached this conclusion merely because Dehus’s testimony was not “blatantly self-serving or dishonest.” App., *infra*, at 19a. Thus, the panel majority found that the x-ray was both favorable and material to Phillips’s case, satisfying the elements of his *Brady* claim. In reality, this was improper *de novo* review of the district court’s credibility determination in direct conflict with *Anderson*. A petition for writ of certiorari in cases is proper where the decision below resolves an important question in a way that is in conflict with this Court’s precedent. *See, e.g., Spears v. United States*, 555 U.S. 261, 263 (2009) (per curiam); *Lambert v. Wicklund*, 520 U.S. 292, 299 (1997) (per curiam).

Further, the other Circuits all adhere to the strict standard of review set forth in Fed. R. Civ. P. 52(a)(6) and in *Anderson*. See *Singleton v. Lockhart*, 962 F.2d 1346, 1349 (8th Cir. 1990); *Keller v. United States*, 38 F.3d 16, 25 (1st Cir. 1994); *Doe v. Menefee*, 391 F.3d 147, 164 (2d. Cir. 2004); *Bursztajn v. United States*, 367 F.3d 485, 488-89 (5th Cir. 2004); *Rodriquez v. Holder*, 683 F.3d 1164, 1170-71 (9th Cir. 2012); *U.S. v. Charboneau*, 914 F.3d 906, 912 (4th Cir. 2019); *LAJIM, LLC v. Gen. Elec. Co.*, 917 F.3d 933, 946 (7th Cir. 2019); *U.S. v. Cortes-Gomez*, 926 F.3d 699, 708 (10th Cir. 2019); *In re Feshbach*, 974 F.3d 1315, 1321 (11th Cir. 2020). Thus, the Sixth Circuit's decision is also in conflict with the other circuits, which is a proper reason for granting certiorari. See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam).

Second, the Sixth Circuit's decision is in direct conflict with the law of its own Circuit. In its opinion, the panel majority acknowledged the proper standard of review for factual findings, but ignored the Sixth Circuit's well-established precedent that, "[i]n reviewing factual findings for clear error, 'the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.' " *Calloway v. Caraco Pharm. Labs., Steel, Inc. v. Keeton*, 417 F.3d 598, 604 (6th Cir. 2005) ("Great deference is demanded when the factual findings required the judge to make credibility determinations."). Because the Sixth Circuit decision conflicts with this Court's precedent in *Anderson*, and the legal precedent of all the other Circuits, including its own, there is a reasonable probability that this Court will grant certiorari.

II. There is fair prospect that this Court will reverse the Court of Appeals decision.

In one of its most recent opinions, this Court again reaffirmed the standard of review set forth in *Anderson*, which is that a district court’s findings of fact, “whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” *June Med. Servs. L. L. C.*, 140 S. Ct. at 2121; *see also id.* at 2141 (Roberts, C.J., concurring in the judgment) (clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts); Fed. R. Civ. P. 52(a)(6). Appellate courts must not to decide factual issues *de novo*. *Anderson*, 470 U.S. at 573. Where “the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Anderson*, 470 U.S. at 573-74. “A finding that is ‘plausible’ in light of the full record—even if another is equally or more so—must govern.” *Cooper v. Harris*, 137 S.Ct. 1455, 1465 (2017).

Here, the panel majority did not give proper deference to the district court’s credibility determination. The district court listened to the testimony at the evidentiary hearing and found Dehus, Phillips’s expert, was an unreliable witness and his conclusions about the significance of the x-ray of the victim’s skull were also unreliable. App., *infra*, at 41a. On appeal, the panel majority accepted Dehus’s expert opinion, concluding that, “even with Dehus’s skill somewhat in question, we conclude that we cannot dismiss his basic conclusion that there was not nearly

enough shot in the skull to support the Commonwealth's theory. Or to put it another way, the x-ray provides some support for Phillips's theory." App., *infra*, at 17a. The Sixth Circuit panel may have come to a different conclusion about Dehus's credibility had it been the trier of fact, but as the reviewing court, its function was to defer to the district court's credibility determination unless it was clearly erroneous. "Clearly erroneous" means that the Court was left with a firm conviction that a mistake had been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Yet, the panel majority never concluded that the district court made a mistake in finding Dehus unreliable, instead it credited his testimony merely because it found him to be not "blatantly self-serving or dishonest." App., *infra*, at 19a.

The panel majority's decision improperly ignored the district court's function as the gatekeeper of expert testimony. It is well established that the district court has the duty to evaluate the reliability— and, therefore, admissibility— of expert testimony. See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589 (1993). In this case, Phillips proffered a single expert to interpret the physical evidence at issue, and the district court found that expert to be unreliable and lacking credibility. That decision was entitled to a strong degree of deference from the court. Indeed, it could be disturbed only if clearly erroneous. See *Anderson*, 470 U.S. at 573. Nevertheless, the panel majority apparently accepted the testimony of Phillips's expert at face value. Rather than engaging in a clear-error standard of review, the panel majority concluded that Dehus's testimony should be credited because it was not "blatantly self-serving or dishonest." App., *infra*, at 19a. This decision usurped the district

court's role as the gatekeeper of expert testimony, and— perhaps even more importantly—created a whole new standard for evaluating expert testimony in habeas proceedings involving *Brady* claims. This new standard opens the door to using unqualified experts to overturn state-court convictions, which is not only inconsistent with this Court's precedent, but also involves grave federalism concerns.

III. Absent a stay, the Commonwealth of Kentucky will suffer irreparable harm.

Based upon the Sixth Circuit's decision, Phillips's petition for writ of habeas corpus was conditionally granted and the Commonwealth of Kentucky was given 90 days in which to grant Phillips a new trial or release him from custody.

It is uncontroverted that Phillips shot the victim in the back of the head. The Commonwealth argued to the jury that there was no scuffle (as Phillips alleged), but rather, that the victim saw Phillips with a shotgun, turned back toward his truck to leave, and was shot in the back of the head. A Laurel County, Kentucky jury convicted Phillips of wanton murder and sentenced him to 30 years in the penitentiary. His conviction was affirmed by the Kentucky Supreme Court wherein the court concluded that there was sufficient evidence presented to support Phillips's conviction for wanton murder. *Phillips v. Commonwealth*, No. 2009-SC-000633-MR, 2010 WL 2471669, at *5 (Ky. June 17, 2010) (Phillips was not entitled to a directed verdict because there was sufficient evidence to support a jury verdict of guilt on either of the Commonwealth's theories regarding the murder charge). Based upon the evidence presented at trial, the seriousness of a wanton murder conviction, and the fact that Phillips's conviction was affirmed on direct appeal, the Commonwealth

and the community at large will suffer irreparable harm if Phillips is released from custody.

IV. The Balance of Equities Favors a Stay.

As the Warden argued in section III, it is undisputed that Phillips shot the victim in the back of the head. The heinous nature of the offense trumps any liberty interest that Phillips might have in being released from custody. Therefore, the public interest in a safe community favors a stay in this case.

Moreover, the public interest also favors a stay because the Sixth Circuit's decision erroneously created a new standard for reviewing a district court's credibility determination. By not employing the proper deference, the Sixth Circuit's standard of appellate review seems to require district courts to ignore the unreliability of an expert witness unless his or her testimony is "blatantly self-serving or dishonest." Such a ruling opens the door to using unqualified experts (hired guns) to overturn state-court convictions through habeas proceedings.

Finally, the public interest favors a stay that will allow this Court to address and resolve the important issue presented in this case – whether the Sixth Circuit erred in creating an entirely new appellate standard of review for a district court's credibility determination that is in direct conflict with this Court's precedent and the precedent of all the other Circuits.

CONCLUSION

The legal guidelines for appellate review of a district court's credibility determination are clear. In denying Phillips's petition, the district court— as the court that made a first-hand observation of testimony, qualifications, and demeanor of Phillips's expert— found that expert to be lacking in credibility and reliability. Yet, when the Sixth Circuit panel majority reversed the district court, it carved out an entirely new standard of appellate review without *any* deference to the lower court's determination. Recalling the mandate and staying the case until the Warden can file a petition for writ of certiorari would present this court the opportunity to reaffirm the proper appellate standard of review set forth in *Anderson*.

For the aforementioned reasons, the application for recall of the Sixth Circuit's mandate, pending the filing and disposition of a petition for writ of certiorari in this Court should be granted.

Respectfully Submitted,

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