No. 20A92

IN THE

Supreme Court of the United States

ANNA VALENTINE, WARDEN,

Applicant,

v.

JOHNNY R. PHILLIPS,

Respondent.

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

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INTRODUCTION

During Johnny Phillips's 2009 trial, the Commonwealth of Kentucky unconstitutionally suppressed material favorable evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Mr. Phillips was accused of intentionally or wantonly shooting another man in the head when, Mr. Phillips argued, he had shot him accidentally while acting in self-defense. The Commonwealth sought to prove its case by demonstrating that the decedent was shot directly in the back of the head in a way inconsistent with an accidental shot during a struggle. During the decedent's autopsy, however, the Commonwealth had taken an x-ray showing far fewer shotgun pellets in the decedent's skull than there would have been from a direct shot. That x-ray supported Mr. Phillips's contention that the shot was indirect when the gun went off accidentally during a struggle. But the Commonwealth never disclosed the x-ray before or during trial. Without this key physical evidence, Mr. Phillips was unable to prove his case and to rebut the Commonwealth's evidence and experts, and so was convicted of wanton murder.

For years afterward, Mr. Phillips pursued his claim that the Commonwealth had suppressed *Brady* evidence, in state then federal court. For many of those years, the Commonwealth continued to deny in court that any x-ray existed. Mr. Phillips did not finally obtain the x-ray until 2014, five years after his trial. Once he did, he pursued a writ of habeas corpus based on this *Brady* evidence in federal court. After an evidentiary hearing on the x-ray's significance, the district court held that x-ray was not favorable or material under *Brady* and so denied Mr. Phillips's petition. But the Sixth Circuit reversed, explaining that it was "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), the court could not have "confidence in the outcome of the trial." Op. 27.

The Commonwealth sought rehearing en banc; no judge of the Sixth Circuit called for a vote. It sought a stay of the mandate from the Sixth Circuit, which was denied. And now it seeks a recall and stay of the mandate from this Court pending a petition for certiorari. But this Court is unlikely to grant certiorari on a case that presents no split or conflict with precedent; it is unlikely to reverse a decision that properly applied the correct standards; and the Commonwealth will not suffer irreparable harm—nor would the public be disserved—by Mr. Phillips's retrial. This application should therefore be denied.

BACKGROUND

As the Sixth Circuit detailed (Op. 2-5), 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. Op. 2. 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. Op. 3. 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." *Id.* The men drove down a narrow country road and both

pulled into a church parking lot to let two horseback riders pass. Op. 4-5. 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, 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. Op. 7. He was tried in Laurel Circuit Court in June 2009. Op. 5. Before trial, he moved for discovery of *Brady* evidence including results or reports of physical examinations of the decedent. *Id.* The Commonwealth produced an autopsy report and photographs, but no x-ray. *Id.* In its opening, the Commonwealth 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.'" Op. 7. The Commonwealth'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." Op. 5-6. Without the x-ray, Mr. Phillips lacked the physical evidence to challenge this theory or to impeach testimony supporting it. From this testimony, the Commonwealth 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.

Op. 7. The jury was instructed on intentional murder, wanton murder, second-degree manslaughter, and reckless homicide, and it convicted Mr. Phillips of wanton murder. Op. 9. That conviction carried a twenty-year statutory minimum, 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 and not produced. Op. 9-10. The Commonwealth continuously denied that any x-ray existed, insisting that no x-Rays were taken during the autopsy. Op. 10. In April 2014, however, nearly five years after Mr. Phillips's trial, the Commonwealth finally turned over the x-ray in response to a state open-records request. Mr. Phillips then brought a *Brady* claim in state court—which the court rejected on the ground that it should have been raised on direct appeal, at a time when the Commonwealth 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 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." Dist. Dkt. 137 (Hr'g Tr. 16). But, he

explained, the x-ray showed "the relative quantity of the shot," *id.* (Hr'g Tr. 19), 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." *Id.* (Hr'g Tr. 15). Instead, this "x-ray shows a very small amount of projectiles or birdshot in the skull." *Id.* (Hr'g Tr. 16).

For its part, the Commonwealth 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." Dist. Dkt. 137 (Hr'g Tr. 30-32). She also testified that, contrary to Mr. Dehus's statement, the x-ray was taken front-to-back not back-to-front. *Id.* (Hr'g Tr. 32-33). 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.

After the hearing, the district court (Caldwell, J.) denied Mr. Phillips's petition. Dist. Dkt. 141. The court acknowledged Mr. Dehus's testimony that the x-ray showed the relative quantity of the shot. *Id.* at 4. 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 the Commonwealth'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." Op. 14. Applying that standard, it concluded (Op. 24) 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. Op. 17. It acknowledged (Op. 16-17) 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. Op. 17.

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 the Commonwealth's suppression undermined confidence in the outcome of the trial. Op. 22-23. 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. Op. 21. 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 conviction of a lesser charge or at least a lower sentence for the charge of conviction. Op. 22.

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, he "ably present[ed] the case for how a good prosecutor could still have obtained a conviction for wanton murder and a 30-year sentence." Op. 24. 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?" Op. 24-25.

The Commonwealth then petitioned for rehearing, *see* C.A. Dkt. No. 41, which the court of appeals denied with "[n]o judge" even "request[ing] a vote on the suggestion for rehearing en banc," C.A. Dkt. 44-1. The Commonwealth then moved to stay the mandate, *see* C.A. Dkt. 46, which the court of appeals also denied, *see* C.A. Dkt. 47. The mandate issued on October 19, 2020, *see* C.A. Dkt. 48, and on October 27, 2020, the district court ordered the Commonwealth to either retry Mr. Phillips or release him within 90 days, *i.e.*, by January 25, 2021. Dist. Dkt. 169. Last week, the Commonwealth moved for "an

additional 90 days … in which to commence a new trial in this case," *see* Dist. Dkt. 171 at 3, and the district court granted until March 15, 2021, Dist. Dkt. 174. The Commonwealth now asks this Court to recall and stay the mandate pending its petition for certiorari.

ARGUMENT

The Commonwealth fails to carry its heavy burden to show that a recall and stay of the Sixth Circuit's mandate is warranted. Such a stay "is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Doing so requires "a four-part showing." *Id.* "First, 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." *Id.* "Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Id.* "Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay." *Id.* "And fourth, 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." *Id.*; *see also* *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (an applicant for a stay "must demonstrate (1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay" (internal quotation marks and citation omitted)). The Commonwealth's application fails at every step.

I. THIS COURT IS UNLIKELY TO GRANT CERTIORARI

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 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." Sup. Ct. R. 10(a). Indeed, there is no disagreement—among the Commonwealth, Mr. Phillips, the Sixth Circuit majority, or the 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 and highly unlikely.

The Commonwealth seeks 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. Specifically, the Commonwealth 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 *June Medical Services, LLC* v. *Russo*, 140 S. Ct. 2103 (2020), and that—rather than apply that standard—the Sixth Circuit instead "created a whole new standard for evaluating expert

testimony in habeas proceedings involving *Brady* claims." Application to Recall and Stay Mandate 13 (hereinafter "Appl.").

It would be surprising news to the Sixth Circuit majority that its unpublished and nonprecedential opinion created this brand-new rule of expert review for *Brady* habeas claims. It stated exactly the opposite: 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." Op. 14. Indeed, the Commonwealth admits, as it must, that "[i]n its opinion, the panel majority acknowledged the proper standard of review." Appl. 10. Thus, while the Commonwealth 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 the Commonwealth points to actually consists not of a new rule, but of the 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 *Brady* experts on habeas 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." Op. 31. 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 the Commonwealth 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." C.A. Dkt. 44-1. 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). The denial of rehearing en banc with no requests for a vote suggests that the judges of the Sixth Circuit found the Commonwealth'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.

After trying and failing to convince the en banc Sixth Circuit that the panel majority created a rule contradicting that court's prior precedent, the Commonwealth now tries to convince this Court that the panel's nonprecedential opinion somehow

conflicts with the decisions of other courts of appeals. But there is no circuit split. The Commonwealth admits as much. Although it argues that the Sixth Circuit misapplied the standard of review it invoked in this case, it admits that, "[w]ithout fail, the federal courts of appeal have adopted this appellate standard of review." Appl. 3. That includes "the Sixth Circuit's well-established precedent" and the precedent of "the other Circuits," which "all adhere to" the same standard of review. Appl. 10. There is therefore no need for this Court to take "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," Appl. 3, since by the Commonwealth's own account, every circuit adopts and applies the same standard.

However dressed up, the Commonwealth'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." *Barnes*, 140 S. Ct. 2622 (Sotomayor, J., dissenting from the grant of stay) (quoting Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at p. 5–45 (11th ed. 2019)). It is therefore highly unlikely that four Justices would vote to grant certiorari.

II. THERE IS LITTLE PROSPECT THAT THIS COURT WOULD REVERSE THE DECISION BELOW

Even if this Court granted certiorari, the Court would not conclude that the Sixth Circuit applied an incorrect standard of review. The Commonwealth claims that the district court found Mr. Phillips's expert unreliable, yet the Sixth Circuit nonetheless

credited his unreliable testimony. 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." Op. 16. It recapped that, at the evidentiary hearing, the district court had credited the views about the x-ray's significance of the Commonwealth'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]." Op. 16-17. Doing so left only four unrebutted points. Op. 17.

The first point was that "[t]here were 170 to 220 pieces of shot in the shell that was fired." Op. 17. 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 Dehus's testimony on this point as relatively uncontested." Op. 17 & 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." Op. 17. 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." Op. 17 n.12.

The third point was that "[t]he X-ray does not show anywhere near that number in Glodo's skull." Op. 17. 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.* (emphasis in original). 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 bullet.'" *Id.* The court then 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 the Commonwealth's and Dr. Schott's inability to rebut it directly." Op. 17-18. And 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." Op. 17.

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. Op. 16-17.[1]

In a section that draws most of the Commonwealth'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?" Op. 18. In answering 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 the Commonwealth's concerns—"obviously, it would be a recipe for chaos (and injustice) if courts 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." Op. 18-19.

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[1] 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* Op. 18. 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.

That said, the court explained, it is still improper to "equate[] the *value* of the X-ray with the *credibility* of the expert witness," as the district court did here. Op. 16 (emphasis in original). 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." Op. 19.

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' 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 the Commonwealth's theory." Op. 17. 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 the Commonwealth's attention.

For these reasons, this Court would be unlikely to conclude, as the Commonwealth argues, that the Sixth Circuit conjured up a new standard of review for expert opinions about *Brady* evidence—or even that it misapplied the proper standard. Instead, the Court would likely conclude, as the Sixth Circuit did, that the *Brady* x-ray was favorable

to Mr. Phillips even within the confines of the district court's credibility determinations, and that it was an error for the district court to conclude otherwise.

III. THE COMMONWEALTH OF KENTUCKY WOULD NOT SUFFER IRREPARABLE HARM WITHOUT A STAY

The Commonwealth contends that because Mr. Phillips was convicted, it will be irreparably harmed by his release. Appl. 13-14. This argument fails to carry its burden to show irreparable harm justifying a recall and stay of the mandate. First, although Mr. Phillips was convicted, he was not convicted *constitutionally*, as the decision below held. The "evidence presented at trial" and resulting "wanton murder conviction" on which the Commonwealth relies omitted the *Brady* x-ray and, because the Commonwealth denied the x-ray existed for years later, Mr. Phillips was unable to raise this *Brady* claim "on direct appeal." Appl. 13. In other words, the Commonwealth believes that the very conviction that the Sixth Circuit found to be unconstitutional somehow justifies staying the Sixth Circuit's mandate enforcing that decision. That argument is perverse and illogical and should be rejected.

Second, the Commonwealth argues *only* that it will be irreparably harmed "if Phillips is released from custody." Appl. 13-14. But the Commonwealth does not need a stay from this Court to avoid releasing Mr. Phillips. The Sixth Circuit's mandate orders the Commonwealth either to release Mr. Phillips *or* retry him. Op. 27. Indeed, the Commonwealth has made plain in district court filings that it does intend to retry and not release Mr. Phillips. Yet before this Court, the Commonwealth does not attempt to show or even argue that *retrying* Mr. Phillips would cause irreparable harm, nor could it. So even if Mr. Phillips's release would irreparably harm the Commonwealth—which it has

failed to show in any event—there is no need to stay the mandate to avoid that result. Since no irreparable harm will result, a stay should be denied.

IV. THE EQUITIES WEIGH AGAINST A STAY

The Commonwealth provides two reasons why the balance of equities favors a stay, but neither is persuasive. First, the Commonwealth asserts (Appl. 14) that community safety justifies a stay because Mr. Phillips might endanger the public if released. But, as just explained, the Commonwealth has made clear that it does not intend to release Mr. Phillips, but to retry him. If Mr. Phillips is then convicted at a constitutional trial, he will remain incarcerated; if not, it will be because a jury rightly found that he committed no crime to begin with. So the Commonwealth cannot justify a stay by the supposed danger of Mr. Phillips's release, which no stay is needed to prevent. Nor does the Commonwealth offer good reason to think that Mr. Phillips would endanger the public if released anyway. Mr. Phillips shot Mr. Glodo accidentally while acting in self-defense—even without the suppressed x-ray, a jury concluded that Mr. Phillips did not intend to kill him. So the Commonwealth's public safety argument is meritless.

Second, the Commonwealth suggests that the public interest favors correcting the Sixth Circuit's supposed error. Appl. 14. There was no error. But in any event, the Commonwealth does not explain why this Court needs to provide the extraordinary remedy of a stay to take up the question. The Commonwealth is not entitled to a stay as of right merely because it intends to file a petition for certiorari. Rather, a stay of a court of appeals' mandate is the rare exception, not the rule—even though in *every* case the potential petitioner believes that the court of appeals has erred in its decision below. This argument provides no support for balancing the equities in favor of a stay.

Instead, the equities favor Mr. Phillips, who has now spent over a decade in prison with no constitutional conviction. By its own admission, the Commonwealth suppressed evidence in his case and denied it existed for many years afterward, and the Sixth Circuit Court of Appeals has now held that this evidence was material and favorable to him. Under that decision, he is entitled—finally—to a fair trial or his release. The mandate should not be stayed.

CONCLUSION

The Commonwealth of Kentucky's request to recall and stay the mandate of the Sixth Circuit should be denied.

Respectfully submitted.

/s/ Alan E. Schoenfeld

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December 2020

CERTIFICATE OF SERVICE

I, Alan E. Schoenfeld, a member of the bar of this Court, hereby certify that on this 4th day of December, 2020, I caused all parties requiring service in this matter to be served with the accompanying Opposition to the Application to Recall and Stay the Mandate of the Sixth Circuit Court of Appeals by email to the address below:

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I further certify that paper copies will be submitted to the Court and served on all parties requiring service by overnight courier on December 4, 2020.

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