No. 22-607

IN THE

Supreme Court of the United States

NOAH NAGY, WARDEN,

Petitioner,

v.

JIMMY BAUGH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Given the State's egregious violation of *Brady v. Maryland*, 373 U.S. 83 (1963), did the Sixth Circuit correctly hold that Jimmy Baugh is entitled to federal habeas relief?

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INTRODUCTION

This Court's rules require that a respondent identify any "misstatement of fact" that bears upon the issue before the Court. S. Ct. R. 15.2. Petitioner (hereafter "the State") claims that it "has contended throughout that Baugh was either the criminal principal or an aider and abettor of the murder." Pet. 22. That is untrue. At no point in the trial did the prosecution or any witness contend that respondent Jimmy Baugh was anything other than the criminal principal—that is, the person who planned the robbery and shot the victim. Indeed, the State never argued that Mr. Baugh aided or abetted the actual shooter until this habeas proceeding, more than a decade after Mr. Baugh's conviction.

To be sure, the State's opening argument and the judge's jury instructions contained boilerplate language on "aiding and abetting." But the jury heard evidence of only one theory for Mr. Baugh's guilt: that Mr. Baugh was the shooter. And that theory rested entirely on the testimony of one witness—Robert Kwasniewski.

More than a decade after the trial, Mr. Baugh discovered a statement that the State had concealed. In that statement, Kwasniewski admitted to being the shooter.

Now, faced with the consequences of its violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the State accepts the possibility that Kwasniewski lied at trial when he claimed that Mr. Baugh shot the victim. But the State insists that it can save the original conviction with a new theory: Maybe Kwasniewski was the shooter, and Mr. Baugh is guilty of aiding and

abetting him because he drove the car in which Kwasniewski arrived and left the scene. Yet the State's new theory not only squarely contradicts its earlier one, but it again rests on the testimony of Kwasniewski. And the State provides no basis for concluding that Kwasniewski *ever* told the truth about what happened.

The Sixth Circuit correctly held that, faced with Kwasniewski's contradictory statements, a factfinder would have reasonable doubt as to Mr. Baugh's guilt. Mr. Baugh therefore met the standard under 28 U.S.C. § 2244(b)(2)(B) for pursuing his *Brady* claim on federal habeas. Because Mr. Baugh also satisfied the standard for habeas relief under 28 U.S.C. § 2254(d) with respect to that *Brady* claim, he is entitled to a new trial. If the State really believes its newfound aiding and abetting theory, it can pursue that theory at a new trial. What the State cannot do is defend its original conviction on that basis.

Nothing about this factbound case warrants this Court's review.

STATEMENT OF THE CASE

1. On December 3, 2001, Craig Landyczkowski was shot with a .22 caliber handgun. Pet. App. 2a. The assailant then fled the scene in a Jeep. *Id.* Landyczkowski died a few minutes later. *Id.*

2. The following day, respondent Jimmy Baugh and several other men—Ricky Sailes, Lafayette Dearing, and Robert Kwasniewski—were arrested for an unrelated offense. Pet. App. 3a. Police found a .22 shell casing in Kwasniewski's pocket. *Id.*

Three of the men later gave statements to Detroit Police Detective JoAnn Miller that bore upon the Landyczkowski homicide. Pet. App. 3a, 9a.

First, Mr. Baugh told Detective Miller that he had taken no part in the robbery or the shooting. Pet. App. 23a. Rather, Kwasniewski had accosted the victim and then shot him. *Id.* Mr. Baugh said that he had been in the backseat of the Jeep, which Lafayette Dearing had been driving. *Id.* 4a.

Second, Ricky Sailes told Detective Miller about a conversation at which he claimed Kwasniewski, Baugh, and Dearing had been present. Pet. App. 10a. The bulk of Sailes' statement focused on his account of what Kwasniewski had said. *Id.* 9a-10a. According to Sailes, who used Kwasniewski's nickname "Scottie" throughout his statement, Kwasniewski had bragged about shooting Landyczkowski and had said that Mr. Baugh had been driving the Jeep. *Id.* 9a. Sailes also identified Kwasniewski's gun as a .22, the same type of gun used in Landyczkowski's murder. *Id.* In response to Detective Miller's final question, asking whether Mr. Baugh had said anything, Sailes claimed that "Jimmie said Scottie shot the guy and he drove off." *Id.* 10a. Neither Sailes nor Detective Miller clarified to whom the "he" referred.[1]

Third, Kwasniewski gave a statement to Detective Miller in which he said he drove the Jeep, but claimed that Mr. Baugh had shot and killed Landyczkowski. Pet. App. 3a.

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[1] Kwasniewski has many aliases, including Scottie Trent, Robert Kwanniewski, and Lucky. For consistency, all references to "Kwanniewski" in quotations have been replaced with "Kwasniewski" without indicating as such.

3. Initially, the State charged both Mr. Baugh and Kwasniewski with first-degree felony murder. Pet. App. 4a. The only evidence at their preliminary hearing consisted of their respective statements to Detective Miller. *Id.* 4a-5a. Mr. Baugh's statement placed him in the backseat as a bystander to the robbery and shooting. *Id.* 5a. Because the State could use each statement only against its declarant, the court recognized that the State lacked probable cause to hold Mr. Baugh. *Id.* 4a-5a. It therefore dismissed the charges against him without prejudice. *Id.* 5a.

Kwasniewski, however, had said he was the driver. Pet. App. 3a. The court therefore found probable cause to bind him over for trial. *Id.* 5a.

The State subsequently offered Kwasniewski a plea deal. Pet. App. 5a. If Kwasniewski agreed to testify against Mr. Baugh, he would receive several benefits. First, by pleading guilty to second-degree murder, he would escape a mandatory life sentence for felony murder. *Id.* 6a-7a. Second, he would have three unrelated charges dismissed. ECF No. 10-7, PgID.385-86. Finally, his sentence for the Landyczkowski homicide would run concurrently with a separate carjacking sentence, meaning that he would in effect serve no additional time for his role in killing Landyczkowski. ECF No. 36-1, PgID.1749; ECF No. 38-1, PgID.1784; Pet. App. 47a. The State conditioned the plea deal on Kwasniewski testifying that Mr. Baugh had shot Landyczkowski. Pet. App. 47a. Kwasniewski accepted the plea deal. He was released from prison in May 2022. Pet. App. 6a n.2.[2]

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[2] Citations to the record before the district court refer to the ECF number and pagination.

Armed with this agreement, prosecutors then recharged Mr. Baugh with first-degree felony murder. Pet. App. 6a.

4. At Mr. Baugh's trial, two witnesses testified regarding his role in the crime.

First, Detective Miller told the jury about her conversation with Mr. Baugh in which he had identified Kwasniewski as the shooter and Dearing as the driver. ECF No. 10-8, Pg.ID.697-98. Detective Miller recounted that Mr. Baugh had placed himself in the backseat as an uninvolved passenger. *Id.*

Second, in compliance with his plea agreement, Kwasniewski testified that he drove the car and that Mr. Baugh shot Landyczkowski. Pet. App. 5a-6a; ECF No. 10-8, PgID.752, 758-60. The jury was not informed that in return for this testimony, Kwasniewski would effectively serve no time for his involvement in the murder.

The State emphasized that it was "the People's position, in this particular case, that this crime was committed by two people. Mr. Kwasniewski is the driver and Mr. Baugh [w]as the actual shooter." ECF No. 10-10, PgID.948-49. From opening statement to closing argument, the State insisted that "a major portion" of the case "rest[ed] upon the testimony of Robert Kwasniewski." ECF No. 10-10 , PgID.948; *see also* ECF No. 10-8, PgID.598; ECF No. 10-10, PgID.945, 958, 961. The State presented no other evidence that Mr. Baugh was the shooter. Although the opening statement and jury instructions contained boilerplate language on aiding and abetting, the State presented no evidence whatsoever that Mr. Baugh was the driver. ECF No. 10-8, PgID.599; ECF No. 10-10,

PgID.1014-15. Nor did the State present any evidence of Mr. Baugh aiding and abetting the crime in some other way. The State did not call Dearing as witness. Nor did the State call Sailes as a witness or seek to introduce any part of Sailes' statement as evidence of Mr. Baugh's guilt. It did not turn over Sailes' statement to Mr. Baugh's counsel. Pet. App. 31a.

The jury found Mr. Baugh guilty of first-degree felony murder, felon-in-possession, and use of a firearm in commission of a felony. Pet. App. 8a & n.4. The judge sentenced Mr. Baugh to a life sentence on the murder conviction, two to five years' imprisonment for his felon-in-possession conviction, and a two-year consecutive sentence for his felony firearm conviction. *Id.* At his sentencing, Mr. Baugh reiterated the statement he had given to Detective Miller: "I am not the shooter. The shooter got away. The shooter is the one who said I did the killing." *Id.*

5. Mr. Baugh's conviction and sentence were affirmed on direct appeal, and the Michigan Supreme Court denied review. *People v. Baugh*, No. 247548, 2004 WL 2412692 (Mich. Ct. App. Oct. 28, 2004) (per curiam) (unpublished); *People v. Baugh*, 705 N.W.2d 29 (Mich. 2005); Pet. App. 8a.

Mr. Baugh's initial state court postconviction motion for relief from the judgment was denied. *See* Pet. App. 8a. His first federal habeas petition, which raised several claims about the trial unrelated to the issue before this Court, was also denied, and the district court declined to issue a certificate of appealability. *Id.*

6. In 2015, Sailes mailed Mr. Baugh the statement he had given to Detective Miller in 2002 in which he

had reported that Kwasniewski had confessed to shooting Landyczkowski. Pet. App. 9a. Mr. Baugh immediately contacted his original defense counsel, James O'Donnell, to ask if O'Donnell had been aware of Sailes' statement. *Id.* 58a. Mr. O'Donnell replied that he had no memory of having received it. *Id.* 59a. With Sailes' statement in hand—a statement that Mr. O'Donnell and Mr. Baugh had never seen before—Mr. Baugh filed a second motion for relief from judgment in Michigan state court. *Id.* 12a. He proceeded *pro se*. *Id.* 91a.

The state court denied Mr. Baugh relief under the Michigan analogue to *Brady v. Maryland*. *See* Pet. App. 102a. Without addressing whether the State had wrongly concealed Sailes' statement, the state court concluded that the statement was "not of such a nature as to render a different result on re-trial, as there was other significant testimony proffered against the defendant, as well as other independent indicia and material evidence that was sufficient to prove the guilt of the defendant." *Id.* 103a. According to the court, Mr. Baugh had been "convicted of first-degree felony murder under a theory of aiding and abetting." *Id.* Thus, whether Mr. Baugh was the shooter (as Kwasniewski testified at trial) or the driver (as Kwasniewski told Sailes) would not matter. The judge did not ask whether the new statement impeached Kwasniewski's trial testimony. Instead, the judge assumed that one of Kwasniewski's alternative statements about the robbery and shooting had to be true.

The Michigan Court of Appeals and the Michigan Supreme Court declined review. Pet. App. 12a.

7. In 2018, the Sixth Circuit granted leave for Mr. Baugh to file a "second or successive" habeas petition on the grounds that he had made a prima facie showing under 28 U.S.C. § 2244(b)(2)(B)(i)-(ii)—the standard applicable to such petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA). Pet. App. 91a-95a. The Sixth Circuit found that Mr. Baugh's application presented the "rare case in which additional analysis by the district court is warranted." *Id.* 95a.

8. The district court then conducted that analysis. It found that Mr. Baugh satisfied the first prerequisite for relief under Section 2244(b)(2)(B)(i) because the factual predicate for Mr. Baugh's *Brady* claim could not have been discovered previously. Pet. App. 57a-61a. The court described the failure to turn over the Sailes statement as one of "several" examples of material the State had unfairly withheld from the defense. *Id.* 71a.

The district court then turned to the question whether Mr. Baugh had satisfied the second prerequisite for relief under Section 2244: showing that "but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense" in light of "the evidence as a whole." *Id.* § 2244(b)(2)(B)(ii). The court found that the Sailes statement was favorable to Mr. Baugh within the meaning of *Brady* and its progeny because it contained evidence that "would have impeached" Kwasniewski's testimony at trial. Pet. App. 71a-72a. Indeed, in light of the Sailes statement, the court found that it was "unlikely" that Mr. Baugh "was Craig Land[yczkowski]'s shooter; everything—from his eidetic recall of the shooting to the shell casing

found in his pocket—suggests Kwasniewski was the shooter." *Id.* 70a-71a.

Nevertheless, the district court denied relief because it concluded that "the state decision did not unreasonably apply Michigan's *Brady*-esque standard." Pet. App. 67a. The district court believed that in the Sailes statement, Mr. Baugh "admitted to being the driver," *id.* 69a, and therefore could be found guilty as an aider or abettor "of the same crime [the jury] found him guilty of at trial." *Id.*

Even so, the district court issued a certificate of appealability. Pet. App. 43a. It recognized that Mr. Baugh had made a substantial showing that the State had violated his constitutional rights, *id.* 73a, and that "it is less than clear whether a reasonable juror would have found [Mr. Baugh] guilty as an aider and abettor of Craig Land[yczkowski]'s murder," *id.* 74a. "Surely," the district court concluded, "there is less confidence in jury verdicts arising from courts that excuse prosecutorial finagling." *Id.*

9. The Sixth Circuit reversed. First, with respect to the prerequisite for "second or successive" petitions set out in Section 2244(b)(2)(B)(i), the Sixth Circuit agreed with the district court that Mr. Baugh could not have previously discovered Sailes' statement through due diligence. *See* Pet. App. 18a-22a.

Second, with respect to the prerequisite for "second or successive" petitions set out in Section 2244(b)(2)(B)(ii), the Sixth Circuit held that, in light of the particular *Brady* violation at issue here, a reasonable factfinder could not have found Mr. Baugh guilty beyond a reasonable doubt. Pet. App. 25a. The Court stressed that the "state had a threadbare case

against Baugh with Kwasniewski's testimony being the only evidence that inculpated Baugh." *Id.* Given Kwasniewski's confession to Sailes that he was the shooter, the Sixth Circuit agreed with the district court that the State's theory at trial—that Mr. Baugh shot Landyczkowski—could no longer provide a sufficient basis for upholding Mr. Baugh's conviction beyond a reasonable doubt. *Id.* 23a.

The panel then determined that, "[e]ven if the content of Sailes's statement were admissible" for the truth of the matters asserted, rather than merely as impeachment evidence, Pet. App. 25a, the State's post-hoc theory—that Mr. Baugh, instead of being the shooter, had aided and abetted Kwasniewski by driving the Jeep—could not save the conviction. *See id.* 22a-28a. The court viewed the Sailes statement in light of other evidence undermining Kwasniewski's credibility. *Id.* 34a. It emphasized Kwasniewski's changing stories about the murder, the direct conflict between his admission to Sailes that he was the shooter and his testimony at trial, his plea agreement conditioned on testifying that Mr. Baugh was the shooter, and the fact that a .22 caliber shell casing was found on his person. *Id.* 26a. The court thus concluded, "[w]ith the state's only witness lacking credibility and so much uncertainty about Baugh's role, if any, in the murder of Land[yczkowski], no reasonable juror could find beyond a reasonable doubt that Baugh is guilty of first-degree felony murder." *Id.* 27a-28a.

Having found that Mr. Baugh satisfied the two prongs of Section 2244(b)(2)(B), the court of appeals then turned to the merits of Mr. Baugh's *Brady* claim. It held that the Michigan state court had unreasonably applied clearly established federal law

in analyzing the *Brady* violation. Pet. App. 33a; *see* 28 U.S.C. § 2254(d)(1). Under this Court's precedent, the question in a *Brady* case is whether in the absence of the concealed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Pet. App. 33a (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). The "question is *not* whether the defendant would more likely than not have received a different verdict with the evidence." *Id.* (emphasis added.) But that latter standard was what the Michigan state court had used. It had asked whether there would have been "a different result." Pet. App. 34a. Because the state court had "held Baugh to a higher standard than what is required for relief," its conclusion was an unreasonable application of *Brady*. *Id.* Here, Mr. Baugh did not receive a trial whose verdict was "worthy of confidence" because the State wrongfully deprived him of the ability "to properly impeach the state's star witness." *Id.*

REASONS FOR DENYING THE WRIT

The Sixth Circuit's decision in this case does not warrant this Court's intervention. First, this case involves the application of settled law to a unique set of facts. The court of appeals' analysis does not conflict with the law in any other circuit. Second, the court of appeals' analysis was correct and thus this case is not an appropriate candidate for summary reversal.

I. The Court should not grant plenary review.

The State does not even try to argue that this case satisfies the traditional criteria for certiorari. The answer to the Question Presented turns entirely on whether the statement the State unconstitutionally

concealed "further inculpated Baugh as an active participant in the murder," Pet. i. That question poses no issue of law, let alone an issue of law that meets any of the Court's stated criteria for granting review. To the contrary, it is an entirely factbound question. Because the answer to the question "turns entirely on an interpretation of the record in one particular case," it offers "a quintessential example of the kind that [this Court] almost never review[s]." *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring).

Tellingly, the State does not argue that the Sixth Circuit's interpretation of Section 2244(b)(2)(B)(ii) "conflict[s] with the decision of another United States court of appeals." S. Ct. R. 10(a). The State points to no circuit in which it contends that the court of appeals would have denied Mr. Baugh relief. Thus, this case does not implicate the "principal purpose" for which this Court uses its certiorari jurisdiction: "to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

II. There is no basis for summarily reversing the judgment of the Sixth Circuit.

Unable to make out any serious claim for plenary review, the State asks this Court for summary reversal, suggesting that the Sixth Circuit's decision is so plainly incorrect that it warrants that extraordinary remedy. The State is deeply mistaken.

The State's attack on the Sixth Circuit's decision depends on its assertion that Robert Kwasniewski's contradictory statements provide "strong alternative theor[ies] of guilt." Pet. i. They do no such thing. The

State seems to think that if Kwasniewski lied at trial about Mr. Baugh being the shooter, then he must have been telling the truth to Ricky Sailes when he alleged that Mr. Baugh aided and abetted him in committing the murder by driving the Jeep. But that simply does not follow: If Kwasniewski lied about Mr. Baugh being the shooter, what evidence is there that he told the truth about Mr. Baugh being the driver—as opposed to being an uninvolved backseat passenger? If even the State recognizes that Kwasniewski was an unreliable witness, his irreconcilable accounts cannot support finding Mr. Baugh guilty beyond a reasonable doubt.

Accordingly, the Sixth Circuit correctly held under 28 U.S.C. § 2244(b)(2)(B)(ii) that no reasonable factfinder would have found Mr. Baugh guilty given the combination of the trial record and the *Brady* violation. And when it comes to that *Brady* violation, the State does not challenge the Sixth Circuit's holding that the *Brady* violation entitled Mr. Baugh to habeas relief under 28 U.S.C. § 2254(d). Moreover, regardless of how this Court answers the Section 2244(b)(2)(B)(ii) question, the Court should not summarily reverse the judgment of the Sixth Circuit, given the strong argument that Mr. Baugh should not have been required to satisfy the "second or successive" gatekeeping provision at all. Finally, the Sixth Circuit's decision here does not call for an exercise of this Court's supervisory power.

A. The Sixth Circuit correctly held that Mr. Baugh satisfies the requirements for federal habeas relief.

The Sixth Circuit correctly held that Mr. Baugh satisfies the requirements for federal habeas relief under both 28 U.S.C. § 2244 and 28 U.S.C. § 2254.

1. Mr. Baugh satisfies both prongs of the Section 2244(b)(2)(B) standard that applies to whether an individual can pursue a claim in a "second or successive" habeas petition. The State does not contest the finding of the district court, affirmed by the Sixth Circuit, that Mr. Baugh satisfied the first prong by showing that the predicate for his claim "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i); *see* Pet. App. 57a, 21a-22a. And rightly so: Mr. Baugh's claim rests on the statement by Ricky Sailes that the State concealed from Mr. Baugh and his trial counsel. After receiving the statement, Mr. Baugh timely sought postconviction relief. *Id.* 60a-61a.

The State challenges only the second prong—namely, the Sixth Circuit's holding that, when the trial record is viewed in light of the Sailes statement, "but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). This challenge fails.

2. The State begins by asserting that a showing of "actual innocence" is required to prevail on a "second or successive" habeas petition. Pet. 22, 26. But this suggestion is incorrect. The "actual innocence" showing is required when a petitioner seeks to advance claims that would otherwise be barred by a

state procedural default rule. *See House v. Bell*, 547 U.S. 518, 522 (2006); *Schlup v. Delo*, 513 U.S. 298, 319-22 (1995). By contrast, Section 2244(b)(2)(B)(ii) asks not whether the habeas petitioner is actually innocent, but rather whether "no reasonable factfinder would have found the applicant guilty of the underlying offense." The standard for guilt is, of course, "proof beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364 (1970). Thus, if the combination of the evidence presented at trial and Ricky Sailes' statement would create reasonable doubt in the mind of any reasonable factfinder, then Mr. Baugh has satisfied Section 2244(b)(2)(B)(ii).

3. The district court and the Sixth Circuit correctly found that there is now reasonable doubt whether Mr. Baugh shot Craig Landyczkowski. The State acknowledges that this was the only theory for Mr. Baugh's guilt that it advanced at trial. "The jury heard two competing theories at trial: the prosecution's theory that Baugh was the shooter, and Baugh's own story, that he was an innocent backseat passenger." Pet. 20.

The sole support for the State's theory was the testimony of Robert Kwasniewski. *See* ECF 10-10, PgID.945, 948, 958, 961. The State does not deny that the Sailes statement has powerful impeachment value, since Kwasniewski's confession to Sailes that he was the shooter squarely contradicts his trial testimony about Mr. Baugh. What is more, after the evidentiary hearing, the district court declared that, based on its "review of the record, it is unlikely that Petitioner [Jimmy Baugh] was Craig Land[yczkowski]'s shooter; everything—from his eidetic recall of the shooting to the shell casing found

in his pocket—suggests Lucky [Kwasniewski] was the shooter." Pet. App. 70a-71a.

The State argues that impeachment evidence "will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account of petitioner's actions." Pet. 26 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992)). But this is a case in which it does. First, *Sawyer* turned on whether a habeas petitioner could satisfy the actual innocence standard, not the Section 2244(b)(2)(B)(ii) standard. *See* 505 U.S. at 336. Moreover, in *Sawyer* there was "undisputed evidence" of the defendant's guilt, beyond the evidence at issue in the habeas petition. *See id.* at 350. Here, by contrast, the wrongly withheld statement impeaches the State's only witness. And the statement does more than impeach the star witness—it also exculpates Mr. Baugh with respect to the only theory for his guilt presented to the jury.

The State makes no effort to rehabilitate Kwasniewski's trial testimony that Mr. Baugh was the shooter and Kwasniewski the driver. And the State provides no basis to believe that a reasonable factfinder would buy, beyond a reasonable doubt, a theory that the State no longer fully supports.

4. Instead, the State changes course. It insists the conviction can now be sustained on the theory that, even if Mr. Baugh was only the driver, he was guilty of aiding and abetting the shooter, who now turns out to be Kwasniewski. In embracing this theory, the State implicitly concedes that Kwasniewski lied at trial. This concession leaves the State with no truthful witness to support its prosecution.

Put another way, the Sixth Circuit correctly recognized that the impeachment of Kwasniewski undermines the State's new theory, too. The State cannot support its new theory solely on the testimony of a discredited witness. And that is what Kwasniewski is. "The impeaching value of a prior inconsistent statement comes not from the fact that the prior statement is true and the later statement is false, but from the very fact of the inconsistency." *Jackson v. Stovall*, 467 Fed. Appx. 440, 444 (6th Cir. 2012) (citation omitted). Indeed, "talking one way on the stand and another way previously . . . rais[es] a doubt as to the truthfulness of *both* statements." *Id.* (quoting McCormick on Evidence § 34) (emphasis added).[3]

The core problem with the State's either/or theory is that it rests on two contradictory assertions from the same witness: Kwasniewski's statement that he himself was the driver and Baugh was the shooter; and Kwasniewki's statement that he himself was the shooter and Baugh was the driver. No reasonable factfinder could convict Mr. Baugh on this level of uncertainty. Only Schrödinger could make both these theories true at once.

Ignoring this problem, the State argues that if one theory is not true, then the other must be. Wrong. In this case, *both* theories could be untrue. Mr. Baugh has consistently maintained throughout this case that

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[3] What is worse, if the State's embrace of the Baugh-as-driver theory is *not* newfound, then the State knowingly presented perjured testimony at Mr. Baugh's trial when it elicited Kwasniewski's testimony that Kwasniewski was the driver and Mr. Baugh the shooter. This raises its own constitutional difficulties. *See Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935).

he was *neither* the driver nor the shooter, but was simply an otherwise-uninvolved backseat passenger.[4]

5. So the State pivots again. Now, rather than claiming that anything *Kwasniewski* says about Mr. Baugh's involvement can support the conviction, it argues that Mr. Baugh himself confessed to being involved. Pet. 18 (claiming that "Sailes said both Kwasniewski *and Baugh* told him" that Mr. Baugh was the driver). But as the Sixth Circuit correctly recognized, this pivot cannot eliminate reasonable doubt as to Mr. Baugh's guilt.

This purported confession rests on a single line at the end of the Sailes statement, which reads as follows: When Detective Miller asked Sailes, "Did Jimmie say anything" while Kwasniewski was recounting how he had shot Landyczkowski, Sailes replied, "Jimmie said Scottie shot the guy and he drove off." Pet. App. 83a.

But this single line in Sailes' statement does not claim to be a direct quotation of Mr. Baugh. Moreover, Sailes never identified the person to whom "he" refers, and the pronoun "he" has an ambiguous antecedent—it could refer to either person in the sentence. But it is most naturally read as referring to Kwasniewski. After all, a relative pronoun or demonstrative

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[4] The State's "logic," Pet. 20, might conceivably make sense had this been a case where its star witness was a third party who was able to say nothing more than that he had seen the shooting, had seen only two men at the scene, and could identify those two men as Kwasniewski and Mr. Baugh. Such a witness might have been unsure which of them had been the shooter and which of them had been the driver. But Kwasniewski obviously was not uncertain as to which role he played. The State's "logic" is thus inapposite.

adjective "generally refers to the nearest reasonable antecedent." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012).

And of course, as the Sixth Circuit recognized, Mr. Baugh has consistently denied that he was the driver. Pet. App. 4a. In fact, in his statement to Detective Miller, which was admitted at trial, Mr. Baugh identified *Lafayette Dearing* as the driver. *Id.* It is hard to see how a jury could use this single sentence in the Sailes statement to find Mr. Baugh guilty beyond a reasonable doubt.[5]

The State's own actions reinforce the Sixth Circuit's conclusion. As that court explained, if Sailes' statement "was such strong evidence that Baugh was guilty of felony murder, the State would have called Sailes to testify and further implicate Baugh in the murder. Instead, the prosecutor made no mention of Sailes's statement." Pet. App. 31a. The fact that the State concealed Sailes' statement at trial suggests that, not only did it know that this statement would impeach its sole eyewitness, but the State also knew it did not have enough evidence to convict Mr. Baugh for aiding and abetting.

6. The State's attack on the Sixth Circuit's Section 2244(b)(2)(B)(ii) holding has yet another problem. Even if one were to accept the State's novel theory that

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[5] At the evidentiary hearing in the district court, Mr. Baugh testified that he did not recall Sailes asking him whether he had been the driver. Pet. App. 255a. To be sure, Mr. Baugh acknowledged that he might have told Sailes something along those lines in order to "shut him up," but he testified, consistent with his statement to Detective Miller, "I was in the backseat of that Jeep." *Id.*

Mr. Baugh was the driver, that would not be enough to sustain his conviction for felony murder. To convict Mr. Baugh on the theory that he aided and abetted the shooter—Kwasniewski—by driving the car, the State would have to prove the statutory mens rea for aiding and abetting, which it never attempted to do. Under Michigan law, "knowledge that an offense is about to be committed or is being committed is not enough to make a person an aider or abettor; nor is mere mental approval, passive acquiescence or consent sufficient." *People v. Turner*, 336 N.W.2d 217, 218-19 (Mich. Ct. App. 1983) (citing *People v. Burrel*, 235 N.W. 170, 171 (Mich. 1931)).

All of the evidence that the State presented at trial that went to Mr. Baugh's state of mind was tied to its theory that he was the shooter. To prove Mr. Baugh's state of mind, the State relied on Kwasniewski's testimony that the motive for the crime was Mr. Baugh's need for money to pay his rent. ECF 10-8, PgID.749-50. And the State elicited testimony from Kwasniewski that Mr. Baugh was the only person carrying a firearm, *Id.* at PgID.750.

Once the State abandons that testimony—which it must do to contend that Kwasniewski was the shooter—the remaining evidence would show, at most, nothing more than that Mr. Baugh drove away from the scene after Kwasniewski shot Landyczkowski. To be sure, that evidence could potentially make Mr. Baugh an accessory after the fact. But without evidence that he either encouraged Kwasniewski to rob Landyczkowski or performed some act that enabled Kwasniewski to shoot Landyczkowski, Mr. Baugh cannot be convicted of felony murder simply for being on the scene. The State cannot cherry pick

snippets of Kwasniewski's testimony while walking away from its central claim—that Mr. Baugh was the shooter, not the driver—to cobble together an aiding-and-abetting mens rea.

The bottom line is that there are now three theories of what happened: (1) Mr. Baugh was an unwilling backseat passenger with Kwasniewski as the shooter (supported by Det. Miller's testimony about Mr. Baugh's statement); (2) Mr. Baugh was the shooter with Kwasniewski as the driver (supported at trial by Kwasniewski's testimony); and (3) Mr. Baugh was the driver with Kwasniewski as the shooter (supported only by the Sailes statement, which was wrongly concealed and never presented at trial). The State oscillates between the second and the third. But as the Sixth Circuit explained, "[w]ith the state's only witness lacking credibility and so much uncertainty about Baugh's role, if any, in the murder of Land[yczkowski], no reasonable juror could find beyond a reasonable doubt that Baugh is guilty of first-degree felony murder." Pet. App. 27a-28a. Thus, Mr. Baugh has satisfied the requirement of Section 2244(b)(2)(B)(ii) and was entitled to maintain his habeas action.

7. Beyond its argument about Section 2244(b)(2)(B)(ii), the State offers no additional basis for reversing the Sixth Circuit's judgment. In particular, it does not argue that the Sixth Circuit erred in finding a violation of *Brady v. Maryland* or that the Sixth Circuit erred in its application of 28 U.S.C. § 2254.

a. The Sixth Circuit correctly held that Mr. Baugh satisfied all three elements of a *Brady* claim. *See*

Strickler v. Greene, 527 U.S. 263, 281-82 (1999) (setting out the elements).

First, the State does not dispute that, at the very least, the Sailes statement contained favorable impeachment evidence. Beyond that, the statement could also have been used to exculpate Mr. Baugh with regard to "the People's position, in this particular case": that Mr. Baugh was "the actual shooter." ECF No. 10-10, Pg.ID 948.

Second, the State suppressed the statement. Pet. App. 32a. Indeed, the State no longer contests otherwise.

Third, the State's concealment of the Sailes statement prejudiced Mr. Baugh at trial. As this Court has explained, the inquiry is whether, in the absence of the concealed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler*, 527 U.S. at 289-90. Because a reasonable factfinder would have had reasonable doubts about Mr. Baugh's guilt, *see supra* at 15-21, a reviewing court would necessarily lack confidence in the conviction.

b. The Sixth Circuit also correctly held that the Michigan state court decision rejecting Mr. Baugh's *Brady* claim rested on "an unreasonable application of clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1). *See* Pet. App. 34a. The *Brady* inquiry "is *not* whether the defendant would more likely than not have received a different verdict with the evidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (emphasis added). Rather, it requires only a "reasonable-probability" of a different result; a litigant does *not* need to show that a different result would be

more likely than not. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). Thus, the state court asked exactly the wrong question when it demanded that Mr. Baugh show that the concealed evidence would have "produce[d] a different result on re-trial." Pet. App. 104a. In doing so, the state court "held Baugh to a higher standard than what is required for relief" on a *Brady* claim. *Id.* 34a.

c. In addition, the Sixth Circuit's decision was correct because the state court's adjudication involved an "unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2). The state court believed that, in addition to Kwasniewski's testimony, there was "other significant testimony proffered against the defendant, as well as other independent indicia and material evidence that was sufficient to prove the guilt of the defendant." Pet. App. 103a.

That is flatly untrue. Kwasniewski was the *only* witness who testified about Mr. Baugh's involvement in the Landyczkowski homicide. As the Sixth Circuit articulated, the "state had a threadbare case against Mr. Baugh with Kwasniewski's testimony being the only evidence that inculpated Baugh." Pet. App. 25a. Because there was no other evidence to establish Mr. Baugh's guilt, the state court's conclusion to the contrary failed Section 2254(d)(2).[6]

[6] Moreover, the state court committed the same error as the State in thinking that Mr. Baugh admitted to being the driver of the car. *See supra* at 18-19.

B. Summary reversal is particularly inappropriate here because there is an independent ground for affirming the Sixth Circuit's judgment.

The Sixth Circuit's holding that 28 U.S.C. § 2244(b)(2)(B) poses no bar to relief here could also be affirmed on the ground that in light of the nature of Mr. Baugh's claim, he should not have had to satisfy Section 2244(b)(2)(B)'s gatekeeping standard for "second or successive" habeas petitions in the first place. The panel, bound by circuit precedent, was compelled to assume that that standard applied here. Pet. App. 17a. But if this Court were to conclude that Mr. Baugh had not satisfied Section 2244(b)(2)(B)'s gatekeeping standard, it still could not summarily reverse without holding that that standard actually applies to Mr. Baugh's *Brady* claim. There is a strong argument that it does not.

The restrictions on filing "second or successive" petitions do not apply to every numerically second or successive petition. *See, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 332 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) ("The statutory bar on 'second or successive' applications does not apply" to claims regarding an individual's competency to be executed "brought in an application filed when the claim is first ripe."). A significant number of judges—including two on the panel here—have recently questioned the treatment of *Brady* claims as "second or successive" petitions. Often a petitioner "will have no way of knowing he has a *Brady* claim" when he brings his first habeas petition. *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (Wynn, J., concurring). "Because of the nature of a *Brady* violation, the petitioner often cannot

learn of such a violation at all, even when acting diligently, unless and until the government discloses it." *Scott v. United States*, 890 F.3d 1239, 1250 (11th Cir. 2018); *see also Bernard v. United States*, 141 S. Ct. 504, 506 (2020) (Sotomayor, J., dissenting) (explaining that applying the "second or successive" petition rules to *Brady* claims would "reward[] prosecutors who successfully conceal" their *Brady* violations until after an inmate has filed an initial habeas petition on other grounds).

Treating *Brady* claims as first habeas petitions when filed upon a petitioner's discovery of the concealed evidence would be consistent with Congress' reasons for passing AEDPA. A timely filed *Brady* claim does not involve abuse of the writ because the explanation for the second petition is malfeasance by the state, rather than delinquency by the inmate. Holding an inmate with a valid *Brady* claim to the stringent standard of Section 2244(b)(2)(B) arguably subjects him to "higher standards—through no fault of his own." *Long*, 972 F.3d at 487 (Wynn, J., concurring).

To be clear, the Court need not resolve this question today. At this point, there is no split on whether Section 2244(b)(2)(B) should govern *Brady* claims. Pet. 14 n.6. But summary reversal would be particularly inappropriate here because this Court could not hold that Section 2244(b)(2)(B) bars relief without also addressing the arguments that Section 2244(b)(2)(B) does not apply at all.

C. This case does not warrant this Court's intervention as a matter of its supervisory role.

1. There is no "important and recurring constitutional, statutory, jurisdictional, or procedural problem" that would warrant this Court's intervention as a matter of its supervisory jurisdiction, Stephen M. Shapiro et al., Supreme Court Practice ch. 4.17 (11th ed. 2019). The State here does not point to any pattern of Sixth Circuit decisions that fail to apply Section 2244(b)(2)(B) properly. Nor could it. None of the Sixth Circuit decisions to which the State points (Pet. 29) involved a second or successive habeas petition.

Even when it comes to *Brady* violations, the Sixth Circuit denies second habeas petitions when those violations do not undermine the heart of the prosecution's case. For example, in *LeGrone v. Birkett*, 571 Fed. Appx. 417 (6th Cir. 2014), the Sixth Circuit denied habeas relief because "LeGrone's guilt was also established by two eyewitnesses." *Id.* at 421.

2. At bottom, what the State seeks here is error correction. For the reasons explained above, there is no error to correct. But in any event, this Court does not sit as "a court for correction of errors in factfinding." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)); *see also City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) ("[W]e are not, and for well over a century have not been, a court of error correction."); *Murphy v. Collier,* 139 S. Ct. 1475, 1480 (2019) (Alito, J., dissenting) ("We do not generally grant review of

such factbound questions."). Here, the State asks this Court "to assume not only the function of a court of first view, but also of a jury." *Ciminelli v. United States*, 598 U.S. ___ (2023) (No. 21-1170) (slip op. at 9). But as this Court recently affirmed, "[t]hat is not [its] role." *Id.*

Jimmy Baugh has already served more time than the man the State now acknowledges may both have fired the fatal shots and then lied about it at Mr. Baugh's trial. If the State now thinks that Mr. Baugh should have been convicted for aiding and abetting the actual shooter—a theory in complete contradiction to the evidence it offered at trial—then the State should have to prove that theory to an actual jury.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 15, 2023