No. _____

IN THE

Supreme Court of the United States

JOHN LOWERY,
Petitioner,
v.

MIKE PARRIS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit, after applying a blanket rule of deference, erroneously deferred to the state court's credibility findings when reviewing John Lowery's gateway innocence claim even though the state court's findings rested on clearly incorrect factual premises.

II. Whether John Lowery made a credible showing of actual innocence allowing a federal court to review his constitutional claims given that: (1) the only eyewitnesses against him have recanted, which was also the only proof of his guilt; and (2) a disinterested witness whom the State suppressed has come forward and testified John Lowery was not the culprit.

RELATED PROCEEDINGS

John Lowery v. Mike Parris, No. 3:18-CV-330-HSM-HBG, 2018 WL 11468415 (E.D. Tenn. Nov. 19, 2018).

John Lowery v. Mike Parris, 819 F. App'x 420 (6th Cir. 2020).

John Lowery v. Mike Parris, No. 3:18-CV-330-CLC-HBG, 2021 WL 1700348 (E.D. Tenn. Apr. 29, 2021).

John Lowery v. Mike Parris, No. 21-5577, 2023 WL 5236396 (6th Cir. Aug. 15, 2023).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

John Lowery respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Mr. Lowery petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Tennessee on August 13, 2018. The district court dismissed Lowery's petition on November 19, 2018. App. 45 The United States Court of Appeals for the Sixth Circuit vacated the district court's order and remanded on September 1, 2020. App. 42. On April 29, 2021, the district court again entered an order dismissing Lowery's petition. App. 17. The Sixth Circuit affirmed the district court's order on August 15, 2023. App. 1.

JURISDICTION

The Sixth Circuit denied rehearing en banc on September 14, 2023. App. 54. This petition is timely under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254, in relevant part, provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

INTRODUCTION

This extraordinary case concerns a man who has spent half his life behind bars for a crime he has always maintained he did not commit, and for which the State's evidence against him has now evaporated.

John Lowery was convicted of the 1996 murder of Vincent Hartsell and attempted murder of William Boatwright stemming from an early morning convenience store shooting. The only witnesses who testified to seeing the shooting were teenagers who both were in trouble with the law: Boatwright, who was 18, and Malik Hardin, who was 16. The State presented no physical or forensic evidence connecting Lowery to the crime. And the only other witness, James Bowman, who put Lowery near the scene conceded that he was not even sure Lowery was there. The defense presented *four* witnesses who all testified under oath that Lowery could not have committed the crime. The State's case was weak from the start. Now, it has fallen apart.

Boatwright and Hardin have recanted, *twice*, in affidavits and on the stand. Both have admitted under oath, *twice*, that Lowery was not the shooter. And they have separately explained, *twice*, that they only identified Lowery under threat of prosecution and due to coercive police tactics, tactics the State has not denied. Given this new evidence, "it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Schlup v. Delo*, 513 U.S. 298, 331 (1995).

There's more. The convenience store clerk working at the time of the shooting, Loretta Turner, signed an affidavit and testified under oath that she never

saw Lowery in the store. In fact, Turner told police *the day of the shooting* that Lowery was not the culprit. The State suppressed her statement. Turner's testimony powerfully bolsters the *four* defense witnesses who testified at trial that Lowery was not at the crime scene. Indeed, had Turner's statement not been helpful to Lowery, the State would not have kept it from him. *See United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) (prosecutorial misconduct supports "an inference that the prosecutors resorted to improper tactics because they were justifiably fearful that without such tactics the defendants might be acquitted").

It cannot be coincidence that while the only eyewitnesses recanted independently of one another, not having spoken to each other, they both tell strikingly similar stories of police coercion used to procure their identifications of Lowery. It cannot be ignored that the two eyewitnesses both recanted under oath twice, even when not incarcerated with Lowery, thus minimizing any motive to lie. And it is more remarkable still that their recantations interlock with a third disinterested witness who the State agreed below has no reason to lie (and also suppressed), and with the four defense witnesses who all testified Lowery could not have committed the crime. Lowery has made "a credible showing of actual innocence" such that he should be able "to pursue his constitutional claims." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

The Sixth Circuit reached the opposite conclusion by ignoring this Court's established precedents. This Court should grant the petition and reverse.

First, the Sixth Circuit made up a blanket rule that a court of appeals "*always* owes significant deference to a trial judge's credibility determinations." App. 12 (emphasis added). It then applied its novel rule and

deferred to the state court's findings that Boatwright and Hardin's recantations were not credible. *Id.* But as this Court explained, a "federal court can disagree with a state court's credibility determinations and . . . conclude that the factual premise was incorrect by clear and convincing evidence." *Miller-El v.* Cockrell, 537 U.S. 322, 341 (2003). Here, the reasons the state court gave for finding the recantations not credible were clearly contradicted by the record. Under this Court's established precedents, the Sixth Circuit erred by creating this blanket rule and then applying it to defer to the state court.

Second, the Sixth Circuit failed to conduct the holistic inquiry this Court's precedents require. *House v. Bell*, 547 U.S. 518, 539 (2006) ("[T]he *Schlup* inquiry, we repeat, requires a holistic judgment about all the evidence." (quotation marks omitted)). The Sixth Circuit discounted how the new evidence was mutually reinforcing. It did not consider how the new evidence buttressed Lowery's misidentification defense. Nor did it consider how the circumstances of Boatwright and Hardin's initial identifications undermine the credibility of their trial testimony.

For instance, the Sixth Circuit did not consider the fact that Turner's testimony, which everyone agrees is credible, aligns with Boatwright's and Hardin's recantations. It did not consider the fact that the State's suppression of her statement lends credibility to Boatwright and Hardin's assertions that police engaged in underhanded tactics to strongarm them into inculpating Lowery. The Sixth Circuit ignored how Boatwright and Hardin's recantations corroborate each other, as each testified to similarly coercive tactics police used to procure their identifications of Lowery. And the Sixth Circuit did not engage with the fact

that all the new evidence aligns perfectly with Lowery's defense at trial—he was not there, he did not do it.

This Court could not have been clearer: when reviewing an actual innocence claim, a "habeas court must consider all the evidence, old and new, incriminating and exculpatory." *Id.* at 538 (quotation marks omitted). The Sixth Circuit failed to follow this Court's instructions. To avoid the ultimate miscarriage of justice—an innocent man dying behind bars for crimes he did not commit—this Court should grant Lowery's petition and "exercise [its] summary reversal procedure . . . to correct a clear misapprehension of the [gateway innocence] standard." *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004). This Court should send the message to the lower courts that they must meticulously follow the law when assessing claims of actual innocence. It would be a "fundamental miscarriage of justice" to keep John Lowery in prison for crimes he did not commit, especially given that no court—state *or* federal—has ever reviewed the merits of his underlying constitutional claims. *Murray v. Carrier*, 477 U.S. 478, 495–496 (1986).

STATEMENT OF THE CASE

I. The Trial

A. The State's Case

A little after 6:00 a.m. on October 8, 1996, Vincent Hartsell and William Boatwright went to Kirk's Market convenience store to buy some food. R.6-1, PageID# 104–05. Boatwright went inside while Hartsell waited in the car. R.6-1, PageID# 106. According to Boatwright, while he was inside Kirk's, another man walked in and looked at him, prompting Boatwright to ask him "what he was staring at." *Id.* The man left the store. *Id.*

Boatwright purchased his items and left too. *Id.* Outside, he paused to speak with Jay Harris. *Id.* He then testified to hearing a gunshot, at which point he turned around and saw the man who he had seen in the store running towards him with a gun. R.6.1, PageID# 107. Boatwright went to run back into the store, but was shot as he was heading through the door. R.6-1, PageID# 107, 124. Boatwright testified that he crawled into the store and that the man went to follow him, but ran away when "the lady at the cash register" started screaming. *Id.*

At trial, Boatwright testified that he did not know who the gunman was at the time of the shooting. R.6-1, PageID# 123. He also testified that he did not know Lowery prior to the shooting as he had never had any "dealings" with him. R.6-1, PageID# 126–27. He only identified Lowery after police approached him while he was in the hospital being treated for the gunshot. R.6-1, PageID# 110. In Boatwright's words,

"[t]hey had a picture and they asked was this the guy, and I pointed him out." R.6-1, PageID# 110–11.

Sixteen-year-old Malik Hardin was also at Kirk's that morning to get some food. R.6-1, PageID# 131. While he was in the store, he saw Boatwright arguing with some guy whose name he did not know. *Id.* Hardin left the store and got into his car, at which point he saw someone shoot Hartsell and Boatwright. R.6-1, Page ID# 131–32. Hardin testified that the same person he saw arguing with Boatwright in the store was the gunman. R.6-1, PageID# 135. Hardin identified Lowery as the shooter after being shown a photo lineup at the police station. R.6-1, PageID# 133–34, 141. Before that, Lowery was a stranger to him. R.6-1, PageID# 141.

James Bowman was the only other government witness who was at Kirk's on October 8, although he left before the shooting. Bowman testified that he was in his car "half asleep when somebody walked up to the side of the car" and told him that "somebody had robbed them." R.6-1, PageID# 156. Bowman struggled to recall any details about this conversation, admitting he was on "a lot of medication" that day. R.6-1, PageID# 167. Indeed, Bowman was not even sure it was Lowery he had spoken to that morning, testifying "it could have been; it could not have been. There's another one out here that look just like him, his brother [Fred Lowery]." R.6-1, PageID# 171. Later in the defense case, Fred Lowery testified that he in fact *was* at Kirk's that morning, and that *he* had a run-in with Boatwright. *See infra* p.9.

At trial, the State also presented two incongruous motives for why Lowery would have committed the shooting. First, the State argued that Lowery shot the

men in retaliation. The backstory: at 3:00 a.m. on October 8, Lowery sought aid from police after three masked men robbed and assaulted him. R.6-1, PageID# 98–99. He told officers he could not identify the robbers because they were masked. *Id.* The State suggested that Lowery called the police to report the robbery but lied about his assailants' identities because "he was going to take care of it on his own[.]" R.6-2, PageID# 272. Boatwright undermined this implausible theory when he testified that he did not rob Lowery. R.6-1, PageID# 120.

Then, perhaps recognizing the weakness of this motive, the State offered a second theory. It argued simultaneously that Lowery shot the two men for his uncle as retribution for a bad drug deal months earlier. R.6-1, PageID# 186–88. This theory was supported solely by the testimony of Lowery's uncle's ex-girlfriend, who at the time of her testimony was embroiled in a bitter custody dispute with his uncle. R.6-1, PageID# 189–90. Her credibility was so weak that her own daughter told the judge that her mother had instructed her children to lie about Lowery's uncle in the past. R.6-2, PageID# 220–21.

That was the extent of the State's case against Mr. Lowery. The State presented no physical or forensic evidence connecting him to the crime.

B. The Defense Case

Though the defense has no burden, it presented just as many witnesses who were at Kirk's as did the State: Fred Lowery, Gregory Moore, and Jay Harris. All three testified Lowery was not there. The defense

also presented Tamera McMillan, who testified Lowery was with her at her home at the time of the shooting. R.6-2, PageID# 247–48.

Fred Lowery testified that he was at Kirk's that morning and that his brother, John Lowery, was not. R.6-2, PageID# 225. He was with Jay Harris at Kirk's on October 8 when they ran into Boatwright and Hardin. R.6-2, PageID# 224. They kept asking them, "What [are you] lookin' at?" *Id.* This matches Boatwright's testimony that he had asked someone what they were staring at. *See supra* p.6. Fred Lowery said that after he left the store, he heard gunshots, dropped to the ground, and saw Boatwright and Harris scrambling near the entrance. R.6-2, PageID# 225.

Gregory Moore testified that he was also at Kirk's that morning, and that Lowery was not there. R.6-2, PageID# 232. At Kirk's, Moore ran into Boatwright, who initiated an argument with him inside the store. R.6-2, PageID# 230. Moore recounted, Boatwright "approached me with a gun and asked me . . . why I was goin' around tellin' people he robbed me." *Id.* After the State requested a short bench conference, defense counsel told Moore, "Just tell us what happened. Don't tell us what anybody said." R.6-2, PageID# 232. Moore said that he saw Fred Lowery and Hardin in the store, and heard gunshots as he was leaving. R.6-2, PageID# 233.

Jay Harris was also at Kirk's on October 8, and he also testified that Lowery was not there. R.6-2, PageID# 243. Harris testified that he was with Fred Lowery when he saw a car pull up to Kirk's. R.6-2, PageID# 239–40. He began to suggest he saw the person who robbed him days earlier, when the prosecutor objected. *Id.* After another bench conference, defense counsel told Harris, "Just tell me what you saw and

identify who you are talking about." *Id.* Harris then testified he called out to Boatwright, "Hey, man, come mere [sic] and let me ask you somethin'." *Id.* Harris asked Boatwright, "Why did you rob me? Why you put that gun to my head like that?" R.6-2, PageID# 241. The judge then instructed Harris, "You can't talk about anything other than what happened that morning. That's all you can talk about, what you saw that morning." R.6-2, PageID# 241–42. He told the jury to disregard Harris's statement about Boatwright robbing him. R.6-2, PageID# 242. Harris then testified that he heard gunshots and saw Boatwright run towards Kirk's. *Id.* He and Fred Lowery ran away. *Id.*[1]

Finally, Tamera McMillan, Lowery's neighbor, testified she was with him on the morning of October 8. R.6-2, PageID# 247. McMillan was certain Lowery arrived at her doorstep at 6:30 a.m. because of the television show on air. *Id.* And it was her sister's birthday, so she remembered the date clearly. R.6-2, PageID# 251. Lowery, who "was in tears," sat with her for "[a]bout an hour and a half," telling her about how he had just been robbed. R.6-2, PageID# 254–55. McMillan testified that she would not lie for Lowery, and that she only came forward after learning Lowery had been arrested for the shooting at Kirk's, as she knew for sure he did not commit the crime. R.6-2, PageID# 251, 253.

Despite the weakness of the State's case, the jury convicted Lowery of first-degree murder and attempted first-degree murder. R.6-3, Page ID# 322. The trial court sentenced Lowery to life imprisonment plus 25 years. *State v. Lowery*, No. E1998-00034-CCA-R3-

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[1] On cross-examination, the prosecution suggested Harris shot Hartsell. *See* R.6-2, PageID# 243.

CD, 2000 WL 748103, at *1 (Tenn. Crim. App. June 12, 2000). On direct appeal, Lowery maintained his innocence, claiming that "the state did not prove beyond a reasonable doubt that he was the perpetrator of the crime." *Id.* at *2. The Tennessee Court of Criminal Appeals affirmed his convictions. *Id.* at *9.

II. The State Post-Conviction Proceedings

In September 2011, Lowery petitioned for a writ of error coram nobis in state court to reassert his innocence based on new exculpatory evidence. R.6-11, PageID# 695–98. The new evidence included a September 2010 affidavit executed by Hardin recanting his pretrial and trial identifications of Lowery. R.6-11, PageID# 713–14. And a September 2011 affidavit executed by Loretta Turner declaring that she was working at Kirk's on October 8 and that Lowery was not there. R.6-11, PageID# 715.

Hardin's Affidavit. In his affidavit, Hardin attested that his identification of Lowery "was based upon the . . . coercive tactics of Knoxville Police Department Investigators." R.6-11, PageID# 713–14. "[T]he investigator pointed to the specific photograph of John Bradley Lowery so as to suggest to [Hardin] that [Lowery] was the suspect." *Id.* Hardin, who was only 16, asked for his parents or an attorney, but the police refused his requests, making him "feel that if [he] did not cooperate that [he] would be charged with the offense." *Id.*

Turner's Affidavit. Turner attested that she was working at Kirk's on October 8 and "witnessed the events surrounding the shootings." R.6-11, PageID# 715. She recalled that she "was interviewed by a police officer on the day of the shooting" and the officer "asked if John Bradley Lowery was in the store at the

time of the shootings." *Id.* She "informed the officer that he was not." *Id.* Turner made clear that "Lowery was not in the store during the shooting." *Id.*

In June 2012, the state court issued a two-page order summarily dismissing Lowery's petition. R.6-11, PageID# 753–54. Without holding a hearing or citing any authority, the state court first held that the affidavits did not constitute "newly discovered evidence." *Id.* The state court then concluded that Lowery had failed to show "that the introduction of the contents of the affidavits into evidence would have produced a different result at trial." R.6-11, PageID# 754.

Lowery appealed the dismissal and the Court of Criminal Appeals reversed, holding Lowery "made a sufficient threshold showing of newly discovered evidence to warrant a hearing." *Id.* at *5. *Lowery v. State,* No. E2012-01613-CCA-R3-PC, 2013 WL 4767188, at *5 (Tenn. Crim. App. Sept. 4, 2013).

A. The Evidentiary Hearing

The state court held the evidentiary hearing in October 2014. R.6-16, PageID# 916–95. By then, Boatwright had also sworn out an affidavit recanting his identifications of Lowery.

Boatwright's Affidavit. In his affidavit, Boatwright attested that his trial testimony was "false" and that he was "forced to testify against Lowery at trial by the detectives who investigated the case." R.6-11, PageID# 731.[2] Boatwright made clear that "Lowery was not present at the time the crimes for which he was convicted occurred." *Id.*

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[2] At the time he provided evidence against Lowery, Boatwright was in the "Serious Habitual Offender Comprehensive Apprehension Program," "which targets juveniles accused of

Boatwright, Hardin, and Turner then all voluntarily testified at the hearing.

Boatwright's Testimony. Boatwright recalled that he was hospitalized after being shot when police questioned him twice about the shooting. R.6-16, PageID# 925. First, police showed Boatwright a photo lineup and asked if he "kn[e]w this person [i]n the photo?" *Id.* Boatwright said no and they left. *Id.* Police were more aggressive the second time. R.6-16, PageID# 925–26. They told Boatwright they *knew* he had committed an aggravated robbery, which Boatwright denied. R.6-16, PageID# 926.[3] Officers then told Boatwright that they *knew* he committed the murder, which Boatwright also denied. *Id.* Finally, the police pointed to a photo of Lowery in the lineup and asked, "[I]s this the person that did it?" *Id.* The police "kept pointing at his picture." *Id.* Then, despite not seeing the shooter, Boatwright told the police, "Yeah, he the one who did it." R.6-16, PageID# 925–26.

Boatwright testified that he identified Lowery as the shooter because he was "more afraid that [the police were] going to charge [him] with the murder." R.6-16, PageID# 928. He said the police made it clear: "either he gets charged or you get charged." *Id.* At that point, Boatwright testified that he "really didn't care who they put it on. Once they pointed at [Lowery]," to avoid getting charged, he told police, "Yeah, he did it." R.6-16, PageID# 937. As Boatwright justified: "I'm not fixing to get charged for something I didn't do, so why not say he did it?" R.6-16, PageID# 928.

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serious crimes." *See Man Charged with Murder in Shooting at Market*, KNOXVILLE NEWS-SENTINEL, Oct. 10, 1996, at A4.

[3] In fact, Boatwright was later arrested for a robbery committed just days before the shooting. *Id.*

Boatwright testified that he came forward because it "had been on [his conscience] for many years," and he did not want "a man doing time for something he didn't do." R.6-16, PageID# 928. He also testified that he executed the affidavit recanting when he was *not* incarcerated with Lowery, and that although he and Lowery were incarcerated in the same prison at the time of the evidentiary hearing, he had never spoken with Lowery about the case. R.6-16, PageID# 928. Finally, Boatwright rejected the State's insinuations that he only came forward because he was afraid of being "known as a snitch." R.6-16, PageID# 932.

Hardin's Testimony. Hardin testified that as soon as the police arrived at Kirk's, they handcuffed him and accused him of the shooting. R.6-16, PageID# 959. Hardin denied it, but the police pressed him, "you done it or you know who done it." *Id.* Hardin testified he was out on bond, only 16, and was scared he would be charged with another offense. R.6-16, PageID# 959–60. "[M]an, I'm going to jail," he thought. R.6-16, PageID# 960

The police took Hardin to the police station and began questioning him. *Id.* Hardin testified that during the interrogation, the police presented him with a photo lineup and pointed at a man who somewhat resembled one of the men he had observed at Kirk's. R.6-16, PageID# 960–61. The police told him to initial next to the photo, and Hardin did so. *Id.*

Hardin testified that he was now "100 percent certain it wasn't Lowery." R.6-16, PageID# 962. When asked how he could be so sure, Hardin explained that he had since seen Lowery "up close and stood next to [him]," and the shooter was "shorter than Lowery." R.6-16, PageID# 961. Hardin reiterated that there was someone "who resembled Lowery" at Kirk's the day of

the shooting, "but it wasn't [him]." R.6-16, PageID# 962.[4] Hardin explained that he had studied some law and now realized the police used a suggestive identification procedure. R.6-16, PageID# 964. Hardin apologized to Lowery for falsely identifying him. R.6-16, PageID# 963–64.

On cross-examination the State suggested Hardin only recanted because he was imprisoned with Lowery. *See* R.6-16, PageID# 962–63. But Hardin clarified that he has never been housed at the same prison as Lowery. R.6-11, PageID# 963. Rather, he only saw Lowery once during transit, when they were temporarily held together at the same facility for a single night. *Id.* He made clear that he was not incarcerated at the same prison as Lowery at the time of the coram nobis hearing. *See id.* Nor were they in the same prison when he executed his affidavit. *See* R.6-11, PageID# 714 (affidavit dated September 16, 2010); R.6-16, PageID# 963 (Hardin testifying he was only in Morgan County, where Lowery is incarcerated, September 9 through 10). Finally, when the State pointed out that Lowery had asked someone at the prison library to help prepare an affidavit for Hardin to sign, Hardin clarified that he "rewrote it [him]self to fit. Like, a few things weren't always what was factual, so [he] rewrote it himself." R.6-11, PageID# 965.

Turner's Testimony. Turner testified that she knew Lowery as an acquaintance who had once dated her niece. R.6-16, PageID# 982–83. She made clear that at no point that morning, either inside or outside Kirk's, did she see Lowery. *Id.*

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[4] There is no dispute that Fred Lowery, Mr. Lowery's brother, who could be his twin, was at Kirk's. *See supra* p.9

She testified that she was the store clerk at Kirk's on the morning of October 8. R.6-16, PageID# 980–81. Before the shooting, she observed a large group of young men enter the store. R.6-16, PageID# 981. Turner feared she would be robbed, but the men paid without incident. *Id.* Then, another group of young men entered the store, and an argument broke out. *Id.* Turner asked the men to stop, and as the men left the store, she heard gunshots. *Id.* She momentarily ducked behind the counter. R.6-16, PageID# 981, 987. Turner saw a man who had been shot collapse inside the store. R.6-16, PageID# 982. She went to him, locked the door, and dragged him behind the counter. *Id.*

B. The State Court's Ruling

In February 2016, about 16 months after the evidentiary hearing, the state court issued a three-page double-spaced order denying the petition for writ of error coram nobis. Again, the state court did not cite a single authority, nor did it cite the record. R.6-15, PageID# 908–10. The court refused to issue the writ because it was not "reasonably satisfied" that the trial testimony was false, the new evidence was true, and that the jury may have reached a different result. R.6-15, PageID# 908.

First, the state court concluded Boatwright's hearing testimony was not "truthful" for one reason: "Boatright [sic] struggled to explain how the police were going to make a case against him for shooting Hartsell when he was a victim in the same shooting. He then remembered that it was actually armed robbery against [Lowery] the police were threatening to accuse him of." *Id.* Second, the state court gave one

reason for finding Hardin's testimony not "truthful": "Hardin simply says he was never 100% sure it was [Lowery] he saw running away from the scene of the shooting but over the years he has become 100% sure it was not [him]. He offers no reason for the change in his testimony." R.6-15, PageID# 909–10. Third, the state court found that although Turner "appeared to be telling the truth," her testimony was "cumulative" given that the defense witnesses at trial also testified Lowery was not at Kirk's. *Id.* The state court was therefore not persuaded that Turner's testimony "may have caused the jury to reach a different result." R.6-15, PageID# 910.

The Court of Criminal Appeals affirmed, reasoning that "[a]ppellate courts do not reassess credibility determinations." *State v. Lowery*, No. E2016-00587-CCA-R3-CD, 2017 WL 3078313, at *6 (Tenn. Crim. App. July 19, 2017), *perm. app. denied* (Tenn. Nov. 16, 2017) (quotation marks omitted).

III. The Proceedings Below

In August 2018, Lowery, proceeding pro se, petitioned for a writ of habeas corpus. *See* R.1. In his petition, Lowery raised nine claims: an ineffective assistance of counsel claim; a *Brady* claim; three claims alleging violations of his due process and fair trial rights; an insufficiency of the evidence claim; and three freestanding claims of actual innocence. *See* R.2, PageID# 22–26. In support of his petition, Lowery submitted Boatwright, Hardin, and Turner's affidavits. *See* R.2.[5] He maintained that principles of equity "permitt[ed] his petition to be filed outside the normal one-

[5] The State submitted the coram nobis hearing transcripts and other state court records to the district court. *See* R.6.

year AEDPA statute of limitations" given that it was "based upon newly discovered evidence of actual innocence." R.2, PageID# 18 (citing *McQuiggin*).

The State moved to dismiss Lowery's petition as untimely. *See* R.7. In granting the State's motion, the district court acknowledged that this Court "has held that a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the untimeliness of the habeas petition." App. 49. As the district court explained, allegations of actual innocence must be supported by "new reliable evidence . . . that was not presented at trial." App. 43 (quotation marks omitted). The district court then held that "the affidavits of Boatwright, Hardin, and Turner do not constitute new evidence because the same affidavits were already presented and addressed by the state court." App. 51. Lowery filed a pro se appeal, and the Sixth Circuit vacated the district court's judgment, holding that the district court "erred by concluding that evidence presented to state courts categorically does not qualify" as new. App. 44.

On remand, the district court again dismissed Lowery's petition, although on different grounds. The district court first concluded that Boatwright, Hardin, and Turner's affidavits and testimony constituted "new evidence" because they were not considered by a factfinder at trial. App. 31–32. The district court then turned to the question of reliability, and said it would defer to the credibility findings of the state court. App. 32–33.

As a result, the district court held Boatwright and Hardin's recantations were unreliable, reasoning that "the timing and circumstances surrounding the recantation affidavits undermine their reliability and that a reasonable juror could find their trial testimony

more credible than their recantations." App. 35–36. As for Turner, the district court acknowledged that the state court found her credible. App. 36. And the district court did not adopt the state court's conclusion that her evidence was "cumulative," noting that all the evidence at trial supporting Lowery's contention that "he was not present at Kirk's Market at the time of the shooting . . . came through witnesses with whom [Lowery] had some sort of relationship." App. 37. By contrast, Turner was "a seemingly unbiased witness who was herself partially subjected to the violence at Kirk's market that day." *Id.* Still, the district court concluded that the effect of her testimony was limited because Turner did not see the shooting itself, and according to the district court, "[n]one of the proof of [Lowery's] guilt relied on a finding that [he] was in the store prior to the shooting." App. 38.

The district court thought "it possible that a reasonable juror might view the recantation evidence and the seemingly unbiased evidence provided by Loretta Turner and harbor a reasonable doubt that [Lowery] committed the shootings." *Id.* Even so, the district court held Mr. Lowery had "failed to demonstrate it is more likely than not that *no* reasonable juror would convict him in light of the new evidence." *Id.* (emphasis in original).

The Sixth Circuit affirmed, announcing the rule that "[a]ppellate courts *always* owe significant deference to a trial judge's credibility determinations." App. 12 (emphasis added). Then, applying this blanket rule, the Sixth Circuit deferred to the state court's findings that Boatwright and Hardin's recantations were not credible, although notably, it did *not* adopt the state court's reasons for *why* the recantations were not credible. Instead, the Sixth Circuit made up its own. For

Boatwright, the Sixth Circuit held that the state court's finding that he was not credible was "reasonable" because: (1) Boatwright "was anticipating another 44 years' confinement in the facility that also housed Lowery"; (2) his "evasive answers to questions about the risks snitches face in prison" could be taken as "an ulterior motive to recant truthful testimony"; and (3) his "assertion that police threatened to charge him with Hartsell's murder was implausible." *Id.*

The Sixth Circuit then turned to Hardin and concluded his "testimony contained similar problems." *Id.* It gave two reasons that purportedly supported the state court's finding that Hardin's recantations were not credible. *Id.* First, "[a]lthough the record does not clearly show whether Hardin and Lowery ever stayed in the same prison, Hardin agreed to testify only after another prisoner drafted an affidavit for him—at Lowery's request." App. 12–13. Second, "Hardin confirmed that the shooter had looked a lot like Lowery," both he and Boatwright "denied that Fred Lowery [who was at Kirk's] committed the shooting, and there were no other suspects." App. 13.

Finally, regarding Turner, the Sixth Circuit conceded that "the testimony of an unbiased bystander plainly would have helped Lowery more than that of his friends" who testified in his defense at trial. *Id.* But because Boatwright "testified at trial that Lowery had reached into the store to shoot him without fully entering it," and Turner admitted that she "crouched behind the wooden checkout counter during part of the shooting," her testimony "was not so damaging to the prosecution's case as to prevent any reasonable juror from voting to convict Lowery." *Id.* The Sixth Circuit did not acknowledge the State's suppression of Turner's statement.

REASONS FOR GRANTING THE PETITION

A claim of actual innocence provides a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quotation marks omitted). A petitioner "asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536–37 (2006) (quotation marks omitted).

This Court has advised on how to assess gateway innocence claims. When deciding whether a petitioner has satisfied the actual innocence showing, a "habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial." *Id.* at 538 (quotation marks omitted). This inquiry "requires a holistic judgment about all the evidence." *Id.* at 539 (quotation marks omitted).

This Court has also instructed that while federal courts generally defer to a state court's credibility findings, "in the context of federal habeas, deference does not apply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "A federal court can disagree with a state court's credibility determination and . . . conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.*

The Sixth Circuit failed to heed each of these teachings. First, the Sixth Circuit held that an appellate court "*always* owes significant deference to a trial

judge's credibility findings." App. 12 (emphasis added). This blanket rule cannot be squared with *Miller-El*, especially when considering that the factual premises underlying the state court's credibility findings here were clearly contradicted by the record.

Second, the Sixth Circuit failed to conduct the holistic inquiry this Court's precedents require. Rather than assessing the full evidentiary picture, the Sixth Circuit considered each piece of new evidence in isolation. By not zooming out, the Sixth Circuit failed to grasp the fact that the new evidence is mutually corroborative, working both to bolster Lowery's mistaken identification defense and to cast doubt on the reliability of Boatwright and Hardin's initial identifications—the State's only evidence of guilt.

Applying the correct standards, Lowery's new exculpatory evidence shows that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. This Court should grant his petition and reverse.

I. The Sixth Circuit Erroneously Deferred to the State Court.

A. *The Rule of Blanket Deference Adopted by the Sixth Circuit Contravenes this Court's Precedents.*

The Sixth Circuit abandoned judicial review when it made up the rule that "appellate courts *always* owe significant deference to a trial judge's credibility determinations." App. 12 (emphasis added). As a result, the court of appeals did not meaningfully test the state court's findings that "Boatwright and Hardin's initial testimony was more credible than their belated

recantations." *Id.* This blanket deference was inappropriate. As this Court has explained, "[a] federal court can disagree with a state court's credibility determination and . . . conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 537 U.S. at 340. Here, there is clear and convincing evidence that the state court's factual findings were unsupported by the record. Under this Court's precedents, the Sixth Circuit's deference was undue.

The state court supplied one reason each for mistrusting Boatwright and Hardin's recantations. Neither withstands scrutiny

First, the state court found Boatwright's recantation "not truthful" because he "struggled to explain how the police were going to make a case against him . . . when he was a victim in the same shooting" before later "remembering" on redirect examination that he had been threatened with robbery charges. R.6-15, PageID# 909–09. In fact, Boatwright referenced on direct examination the threats police made to charge him with both murder *and* robbery, and he continued to reference both charges on cross-examination. R.6-16, PageID# 926, 937. Boatwright did not later "remember" anything. The state court's singular reason for finding Boatwright's recantation not credible is thus contradicted by the record.

Second, the state court found Hardin's recantation "not truthful" because he gave no reason for his change in testimony other than becoming certain "over the years" that he identified the wrong man. R.6-15. PageID# 909–10. Wrong again. Hardin testified that it was only after getting to see Lowery up close, while they were temporarily in the same prison, that it became clear to him that he had identified the wrong

person. R.6-16, PageID# 961. He also explained that he had studied law while incarcerated and had come to understand from his studies the suggestiveness of the identification procedures police had used to coerce his identification of Lowery. R.6-16, PageID# 964. The state court's sole reason for finding Hardin's recantation not credible is also contradicted by the record.

As such, clear and convincing evidence reveals that the factual premises underlying the state court's credibility findings were incorrect. *Miller-El*, 537 U.S. at 340. But the Sixth Circuit deferred anyway, refusing to engage with the underlying factual premises of the state court's findings. This is despite Lowery pointing out they were unsupported by the record. *See* Appellant's Br. 48–53. And despite *the State* conceding there were "discrepancies between the state-court's order and the testimony at the error coram nobis hearing." Appellee's Br. 25. Indeed, in deferring to the state court's credibility findings, the Sixth Circuit did not even acknowledge the reasons the state court gave in support of those findings. The Sixth Circuit's deference was inappropriate under this Court's precedents.

B. *The Reasons the Sixth Circuit Supplied in Support of the State Court's Credibility Findings are Either Inconsistent with or Unsupported by the Record.*

Rather than examine the reasons given by the state court for finding Boatwright and Hardin's recantations unreliable, the Sixth Circuit supplied *its own* reasons. But the Sixth Circuit's reasons fare no better, as they, too, were either contradicted by the record or

relied on speculation that lacked adequate basis in the record.

First, the Sixth Circuit said it was reasonable for the state court to discredit Boatwright's recantations because "[a]t the time that Boatwright gave his coram nobis testimony, he was anticipating another 44 years' confinement in the facility that also housed Lowery—an uncomfortable predicament for the star witness in Lowery's murder trial." App. 12. But what the Sixth Circuit left out is that Boatwright first swore out his affidavit recanting his trial testimony *before* the coram nobis hearing, when he was *not* incarcerated with Lowery and would have no way of knowing that he would be in the future. *See* R.6-16, PageID# 928 (explaining he was in South Central Prison; Lowery was in Morgan County Correctional). Thus, even granting the Sixth Circuit's speculation that Boatwright was in "an uncomfortable predicament" at the time of the coram nobis hearing because he and Lowery were in the same prison, he was in no such predicament when he first recanted through his affidavit. This therefore cannot be the basis to find both his written *and* oral recantations not credible. The Sixth Circuit failed to grapple with this distinction.

The second reason the Sixth Circuit gave for disbelieving Boatwright's recantation—that his claim police had threatened to charge him with murder was implausible as he would have been an "unlikely suspect" given that "[f]orensic evidence at trial showed Hartsell and Boatwright had been shot in rapid succession by the same firearm," App. 12—is also unsupported by the record. There is no indication in the record that police had access to any forensic evidence when they first questioned Boatwright just hours after he had been shot. *See* R.6-1, PageID# 122 (Boatwright

testifying that he spoke to detectives the afternoon of the shooting). And even if they had somehow managed to send the evidence to the lab and get it back tout suite, there is no evidence Boatwright knew of the forensic evidence at the time he was questioned by police. Even then, it would not matter, as police officers may deceive suspects about the strength of their evidence during questioning. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969). And critically, despite having multiple opportunities, the State has never tried to rebut Boatwright's testimony that he was pressured by police to identify Lowery.

As for Hardin, the Sixth Circuit observed that "although the record does not clearly show whether Hardin and Lowery ever stayed in the same prison, Hardin agreed to testify only after another prisoner drafted an affidavit for him—at Lowery's request." App. 13. The Sixth Circuit also noted that "Hardin confirmed that the shooter had looked a lot like Lowery," but he "denied that Fred Lowery [who was at Kirk's] committed the shooting, and there were no other suspects." *Id.* These were the only reasons given by the Sixth Circuit in support of the state court's finding that Hardin's recantations were not credible. They also fall flat.

Even if someone else helped draft his affidavit, Hardin testified that he edited the affidavit to ensure its accuracy, R.6-16, PageID# 965, which the Sixth Circuit ignored. And no one was helping Hardin when he testified that Lowery was not the shooter under oath at an evidentiary hearing, a fact the Sixth Circuit similarly overlooked. The Sixth Circuit was also incorrect to presume there were no other suspects. According to the trial testimony, several people confronted Boatwright at Kirk's in the moments leading up to the

shooting, including Fred Lowery (who resembles Lowery), Gregory Moore (whom Boatwright had recently robbed), and Jay Harris (whom Boatwright had recently robbed). R.6-2, PageID# 241. Plenty of people had motive to commit the crime.

In short, the Sixth Circuit's opinion reveals the problem with retrofitting credibility findings. Because the Sixth Circuit could not rely on the factual premises underlying the state court's credibility findings, it searched the record for its own supporting facts. But not only did the Sixth Circuit get the facts wrong, it impermissibly flipped the order of operation. At the point the state court's credibility findings were proven to rest on a faulty premise, rather than search for facts in support of a predetermined answer, it was for the federal courts to reconsider credibility anew. "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El*, 537 U.S. at 340.

II. The Sixth Circuit Failed to Conduct the Holistic Inquiry this Court's Precedents Require.

Furthermore, in holding that a reasonable juror could find Boatwright and Hardin's initial testimony more credible than their recantations, the Sixth Circuit failed to conduct the "holistic" inquiry this Court's precedents require. *House*, 547 U.S. at 539. This Court has made clear that it is *not* enough to look for reasons why a reasonable juror might discredit a new piece of exculpatory evidence, which is what the Sixth Circuit did here. Rather, habeas courts "must assess the probative force of the newly presented evidence in connection with the evidence adduced at trial." *Schlup*, 513

U.S. at 332.[6] The "inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record," which "may include consideration of the credibility of the witnesses presented at trial." *House*, 547 U.S. at 538–39.

The Sixth Circuit failed to follow this Court's "holistic judgment" rule. *Id.* at 539. It did not consider the uncontroverted evidence undermining the credibility of Boatwright and Hardin's trial testimony and supporting their recantations. Nor did the Sixth Circuit consider how Turner's testimony, which everyone agrees is credible, not only exonerated Lowery and bolstered his defense, but also undermined Boatwright and Hardin's initial trial testimony and corroborated their recantations. When the record is viewed in its *entirety*, Mr. Lowery's "evidence of innocence is so strong that" this Court "cannot have confidence in the outcome of [his] trial." *Schlup*, 513 U.S. at 316. He "should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.*

A. The Sixth Circuit Did Not Consider the Full Strength of the Recantation Evidence or the Weaknesses of the Trial Evidence.

When considering the probative force of Boatwright and Hardin's recantations, the Sixth Circuit ignored the facts that bolstered the credibility of their

[6] As the Ninth Circuit explained when applying this Court's precedents, "[t]o measure a recantation's likely effect on a juror, we consider its context, the circumstances and timing of the recantation, the original testimony and evidence, and the credibility and testimony of other witnesses." *Gable v. Williams*, 49 F.4th 1315, 1323 (9th Cir. 2022) (citing *Schlup*, 513 U.S. at 332).

recantations and undermined the credibility of their trial testimony.

To start, the Sixth Circuit did not consider the fact that both Boatwright and Hardin testified that police coerced them into identifying Lowery through similarly suggestive identification procedures.

Boatwright testified that he was at the hospital fresh from being shot when police approached him, pointed to a picture of Lowery, and asked "was this the guy." R.6-1, PageID# 110–11. When Boatwright first told police he could not identify the shooter, they became more aggressive, threatening him with robbery and murder charges. R.6-16, PageID# 926. It was only then that Boatwright identified Lowery. The State could have rebutted Boatwright's charges of coercion but has not done so. And it is not disputed that Boatwright faced legal jeopardy at the time of his testimony, giving him motive to lie or curry favor. *See supra* note 2. All of this new information casts doubt on the credibility of Boatwright's initial identifications of Lowery. None of it features in the Sixth Circuit's opinion.

Hardin told a similar story of police coercion. He recalled that police immediately handcuffed him on the scene, accused him of the shooting, and took him to the station. R.6-16, PageID# 960. Hardin, who was only 16, asked for his parents or an attorney, but the officers refused his request, making him "feel that if [he] did not cooperate that [he] would be charged with the offense." R.6-11, PageID# 713-14. Then, "the investigator pointed to the specific photograph of John Bradley Lowery so as to suggest to [him] that he was the suspect," and told Hardin to initial next to the photograph. *Id.* It was only then that Hardin identified Lowery. Again, the State has not attempted to rebut

Hardin's allegations of coercion. Again, it is not disputed that Hardin faced legal jeopardy at the time of his testimony and thus had motive to lie or curry favor. R.6-16, PageID# 960 (testifying he was out on bond). And again, none of this information features in the Sixth Circuit's opinion.[7]

At its core, the Sixth Circuit's decision reflects the habitual judicial skepticism of recantations. Of course, courts generally mistrust recantations because a recanting witness is, by definition, a witness who has lied—either at trial or when recanting. But where a "witness does not otherwise appear to have been induced or coerced into recanting, that recantation evidence deserves serious consideration." Russell Covey, *Recantations and the Perjury Sword*, 79 ALBANY L. REV. 861, 882 (2015/16). This is particularly true when recantation testimony involves credible allegations of police coercion used to produce false identifications. *See, e.g.*, Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1135 (2013) ("[W]rongful convictions in the mass exoneration cases are tied together by a single dominant causal factor: police misconduct."). Perhaps if just one man told a story of police coercion the Sixth Circuit could dismiss it as implausible. But the fact that two men told similar stories without any coordination is

[7] Boatwright and Hardin's motive to fabricate at trial was thus much stronger and more concrete than the general fear of being labeled a "snitch" that the Sixth Circuit said undermined the credibility of their recantations. *See* App. 12. And taking a step back, the "snitch" motive may actually be a reason *not* to recant. Before recanting, it is possible for people in the prison not to know that a person had testified on behalf of the government—"snitched." But once a person comes forward and recants, then everyone will know that the person was once a government witness, and thus they could be tarred as a "snitch" regardless.

probative of their truthfulness. Under this Court's precedents, the Sixth Circuit *had* to take this into account when reviewing the strength of Lowery's gateway innocence claim.

B. The Sixth Circuit Did Not Consider How the Recantation Evidence Interlocked with a Credible Unbiased Witness Who Exonerated Lowery.

The Sixth Circuit also did not consider how the recantation evidence interlocked with Turner's new and reliable evidence. Turner testified that she was the cashier on duty at Kirk's on October 8, and that she saw the ruckus that precipitated the shooting. R.6-16, PageID # 981. Turner testified that Lowery was not a part of the dispute, and indeed, was not at Kirk's that day. R.6-16, PageID# 982–83. She also testified that she gave this information to police, R.6-11, PageID# 715, but her statement was never turned over to the defense, which the State has not disputed. Turner's new evidence, which the state court found credible, R.6-15, PageID# 909–10, powerfully bolsters Lowery's innocence claim in multiple ways.

First, Turner's evidence undermines Boatwright and Hardin's trial testimony that Lowery was the shooter, as she testified that she did not see him at Kirk's. The Sixth Circuit downplayed the force of Turner's evidence by stating that "Boatwright testified at trial that Lowery had reached into the store to shoot him without fully entering it; and Turner . . . crouched behind the wooden checkout counter during part of the shooting," implying Lowery could have shot Boatwright without Turner seeing him. *Id.* But Boatwright testified at trial that Lowery confronted him

while he was inside the store mere moments before he shot him. R.6-1, PageID# 106. And Hardin confirmed that the person who confronted Boatwright *in the store* was the same person who shot Boatwright. R.6-1, PageID# 135-36. As such, even conceding the shooter was outside the store when they pulled the trigger, the jury was told the shooter was *inside* the store just seconds before. *Id.*[8] Thus, if the jury heard Turner's testimony contradicting Boatwright and Hardin's testimony that Lowery confronted Boatwright in the store, that would have given the jury reason to doubt their identification of Lowery as the shooter, especially given that Lowery was a stranger to them.[9] Indeed, a jury would have found Turner's evidence especially powerful given that she was an unblemished witness who was familiar with Lowery but not familiar enough to have any reason to lie.

Second, Turner's evidence interlocks with Boatwright and Hardin's recantations. It bolsters their recantations in that it corroborates their testimony that Boatwright was in a dispute with the shooter inside Kirk's that morning, but the person involved in that dispute was not Lowery. And it bolsters Boatwright and Hardin's recantation testimony that police used

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[8] Thus, the district court was wrong when it dismissed the import of Turner's evidence under the reasoning that "[n]one of the proof of [Lowery's] guilt relied on a finding that [he] was in the store prior to the shooting." App. 38.

[9] Erroneous eyewitness identifications are a leading cause of wrongful convictions. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 , 60 (2008) (conducting a large scale study of exonerations and noting that the "vast majority of the exonerees (79%) were convicted based on eyewitness testimony").

improper and coercive tactics to pin this crime on Lowery given that the police also improperly suppressed her statement.[10]

Third, Turner's evidence bolsters Lowery's misidentification defense. At trial, Lowery presented *four* witnesses who testified that he was not at Kirk's that morning, but the State neutralized the force of their testimony by pointing out that each witness had a personal relationship with Lowery. R.6-2, PageID# 274–75. If Turner, an "unbiased bystander," App. 13, had also testified that Lowery was not there, then that would have given the jury yet another reason to doubt Lowery's guilt.

Taking a step back, the full evidentiary picture is remarkable. The State's original trial case has completely fallen apart. The new exculpatory evidence, including evidence from an unbiased witness, was all procured independently yet makes coherent sense as a whole. And the new exculpatory evidence fits perfectly with Lowery's defense at trial, when the State's case was weak and made little sense from the start. When considering the *full* evidentiary picture, as this Court's precedents require, "it is more likely than not that no reasonable juror would have convicted" Mr. Lowery of crimes he has always maintained he did not commit. *McQuiggin*, 569 U.S. at 390.

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[10] Again, the State's suppression of Turner's statement does not feature in the Sixth Circuit's opinion.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari and reverse the judgment of the Sixth Circuit.

Respectfully submitted,

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