No. ________

In the Supreme Court of the United States

JOAN YUKINS, PETITIONER

v.

HATTIE TANNER

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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QUESTION PRESENTED

Whether the Michigan Supreme Court's decision upholding a unanimous jury conviction as resting on sufficient evidence was irrational because the prosecution did not rule out every alternate hypothesis suggested by the defense.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The petitioner is Joan Yukins, warden of a Michigan correctional facility. The respondent is Hattie Tanner, convicted of felony murder by a jury but released after the Court of Appeals for the Sixth Circuit granted her habeas relief and denied the State's motion to stay the mandate pending its petition for writ of certiorari in this Court.

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The opinion of the Sixth Circuit, App. 1a–30a, is reported at 867 F.3d 661. The district court's opinion and order denying habeas relief, App. 34a–75a, is not reported, but is available at 2005 WL 2994353. The order of the Michigan Supreme Court, which reversed the Michigan Court of Appeals' grant of a new trial, App. 76a–86a, is reported at 660 N.W.2d 746 (Mich. Ct. App. 2003). The opinion of the Michigan Court of Appeals granting Tanner a new trial, App. 87a–141a, is reported at 671 N.W.2d 728 (Mich. 2003).

JURISDICTION

The Sixth Circuit's opinion was entered on August 15, 2017. The warden invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act, of 1996, Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241, *et seq*.) (AEDPA), provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as deter-mined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. [28 U.S.C. § 2254(d).]

INTRODUCTION

Even on direct review, "a reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos* v. *Smith*, 565 U.S. 1, 2 (2011). Thus, "the only question" in a sufficiency-of-the-evidence challenge is whether the jury's finding of guilt "was so unsupportable as to fall below the threshold of bare rationality." *Coleman* v. *Johnson*, 566 U.S. 650, 656 (2012). That standard is even higher in habeas, where the federal court may overturn a state-court decision regarding sufficiency "only if the state court decision was 'objectively unreasonable.' " *Id*. at 651 (quoting *Cavazos*, 565 U.S. at 2).

The jury's verdict in this case was rational. Tanner admitted that she was at the location of the murder when the murder occurred: she was at a small-town bar between 1:00 and 1:30 a.m., and the murder likely occurred between 12:52 and 2:00 a.m. Tanner also admitted that the murder weapon—a knife—was hers. The murder itself occurred during a struggle that ended after the victim (the bartender) had been stabbed six times. Consistent with Tanner having been in a struggle, blood that matched Tanner's blood type and subtype—and that would *not* match 96% to 98% of the general population—was found near the knife inside the bar. Not only did Tanner have opportunity, she also had motive: over $1,000 was stolen during the murder, and Tanner and her friend Robert Cady, who were smoking crack together earlier, needed more cash to buy more crack. And Tanner even admitted that she was capable of committing this type of murder under the right circumstances—such as if "the bitch" (i.e., the victim) had "treated her bad."

Based on this evidence and reasonable inferences from it (including inferences supported by Tanner's repeated lying on the stand), a rational jury could conclude that Tanner committed the murder. And based on other evidence presented in this case, it could also conclude that she aided and abetted in this felony-murder. But even though the 12-person jury unanimously found her guilty, and even though the trial judge who heard all of the testimony concluded there was sufficient evidence (and so denied Tanner's motion for a directed verdict), and even though the Michigan Court of Appeals held that there was sufficient evidence to convict her as a principal, and even though the Michigan Supreme Court held that there was sufficient evidence to convict her both as a principal and as an aider and abettor, and even though the federal district court concluded there was sufficient evidence, a Sixth Circuit panel held that the evidence was insufficient and granted her habeas relief. The panel substituted its own judgment for that of the jury, *expressly* reweighed conflicting evidence in Tanner's favor, App. 29a ("based on the strength of the potentially exculpatory evidence and the comparative weakness of the incriminating evidence, . . ."), and thus failed to defer either to the jury or to the state courts.

In fact, despite concluding that the Michigan Supreme Court had unreasonably applied *Jackson* v. *Virginia*, 443 U.S. 307 (1979), it was the Sixth Circuit that failed to follow *Jackson*. *Jackson* expressly rejects the "theory that the prosecution is under an affirmative duty to rule out every hypothesis except that of guilt," *id*. at 326, yet the court of appeals here based its conclusion on its belief that the prosecution had not ruled out the theory of an unknown perpetrator.

This case is of great importance to Michigan. A jury convicted Tanner of murder and, unlike most habeas grants, the Sixth Circuit's finding that the evidence was insufficient precludes retrial on the charges. *McDaniel* v. *Brown*, 558 U.S. 120, 131 (2010) ("Because a reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, such a reversal bars retrial."). Given these important state interests, *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011) (habeas review " 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority' "), and the related interest of enforcing AEDPA's limits on habeas review, this Court should grant the petition and summarily reverse.

STATEMENT OF THE CASE

Consistent with the standard of review that governs this sufficiency-of-the-evidence challenge, the following statement of facts presents "the evidence in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319; *id*. at 326 ("[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.").

A. A jury convicts Tanner of murdering Sharon Watson.

Tanner's convictions stemmed from the robbery and murder of Sharon Watson, a bartender at Barney's Bar and Grill, located in Bedford Township, in Calhoun County, Michigan. Watson was murdered

during the early morning hours of March 22, 1995, in the basement of Barney's. Watson was stabbed four times in the chest and twice in the back. 11/16/00 Tr. 109–10. Just over $1,000 was stolen. 11/17/00 Tr. 65–67. The murder weapon—a knife—was found upstairs at Barney's, on the drainboard in the sink area directly behind the bar, with blood nearby. 11/16/00 Tr. 40–43; 11/15/00 Tr. 220, 272.

Law enforcement questioned many individuals about the robbery and murder, including Robert Cady, Dion Paav, and Tanner. In May 2000, the prosecutor charged Tanner with open murder, felony murder, and armed robbery. The prosecution's theory was that Tanner and Cady, after drinking alcohol and smoking crack, went on a mission to get more cash to buy more crack, and they went to Barney's to get that cash. While there, Tanner stabbed Watson, or aided and abetted her friend Cady in killing Watson.

The evidence supported that theory. Tanner admitted on the stand that she had smoked "dope" that evening with Cady, and Cady agreed, testifying that he and Tanner had smoked crack cocaine together that night. 11/21/00 Tr. 26; 11/15/00 Tr. 63–64. Tanner also admitted that she was on the premises of the bar around the time of the murder. Tanner told Detective Walters that she went to Barney's with Cady on March 22 but that she stayed in the car while Cady went in. 11/16/00 Tr. 269–70. She also said that she and Cady went to several other places and admitted to possibly being a "little buzzed." 11/16/00 Tr. 274.

As to the specific time when she was there, she said that she and Cady went to Barney's after 1:00 a.m. and left at approximately 1:30 a.m. 11/16/00 Tr.

273. This timing coincided with when the murder likely occurred: the cash register tape showed that the last drink sale was entered at 12:52 a.m. 11/15/00 Tr. 229–32. Watson's boyfriend testified that he talked to Watson at about midnight or 12:30 a.m. on March 22 and that Watson told him she was closing early, which meant she would be out of the bar around 1:30 a.m. When Watson did not come home, he became concerned and began calling Barney's at about 1:45 or 2:00 a.m. but got no answer. 11/15/00 Tr. 141–43, 162–65.

Tanner also admitted that the knife found at Barney's—which the defense did not dispute was the murder weapon—was hers. 11/16/00 Tr. 263. Tanner identified the knife in a photograph by the unique way its blade had been altered and explained how and why she herself had altered it. 11/16/00 Tr. 263–64. When Detective Walters asked about the knife during a second interview, Tanner again explained how she could identify it and why her fingerprints would be on it. 11/16/00 Tr. 265–66.

A blood sample from the bar sink could not be tested for DNA, but serological testing established that it was blood type B with a phosphoglucomutase (PGM) subtype of two plus one plus. 11/16/00 Tr. 240. The knife was found next to the sink behind the bar, on the drainboard near where this blood sample was found. 11/16/00 Tr. 18, 40, 41, 54. An expert witness testified that this blood type and subtype would occur in only about 4% of the African-American population and in only about 2% of the Caucasian population. 11/16/200 Tr. 160–61, 164–65. Based on data from the U.S. Census Bureau which shows that no other racial

group made up as much as 1% of the population of Bedford Township in 2000, that means that about 96% of African-Americans and about 98% of Caucasians would not match the blood sample. See https://factfinder.census.gov/bkmk/table/1.0/en/DEC/00_PL/PL001/0600000US2602506720 (showing a total population of 9,517 for the township). That blood type and subtype did not match the blood of other suspects (Cady and Paav) or of the victim, Sharon Watson, but it did match Tanner's: she was blood type B two plus one plus. 11/16/00 Tr. 240–41, 236–37.

Tanner also made several comments that could have led the jury to draw inferences against her. While Tanner denied that she killed Watson, when asked under what circumstances she might have killed, Tanner responded that "if that bitch had treated her bad[,] she would do something to that effect." 11/16/00 Tr. 276–77. Also, Tanner pointed out to the detective that the murderer would have had blood on them and then asked, "what would I have done with the bloody clothes." 11/16/00 Tr. 277–78.

The trial court denied Tanner's motion for a directed verdict. 11/21/00 Tr. 55–58. The jury, after considering all the evidence, including testimony from Cady and Tanner herself, unanimously found Tanner guilty of first-degree felony murder, Mich. Comp. Laws § 750.316(1)(b), second-degree murder, Mich. Comp. Laws § 750.317, and armed robbery, Mich. Comp. Laws § 750.529. 11/22/00 Tr. 12.

The trial court originally sentenced Tanner to concurrent prison terms of life without parole for the felony murder conviction and a term of years for the two other convictions, but the trial court later vacated her

sentences for the second-degree murder and armed robbery convictions. See App. 130 n.8 (Michigan Court of Appeals explaining that "principles of double jeopardy prohibit multiple murder convictions for the death of a single victim"). The trial court also denied Tanner's post-conviction motion for new trial, where Tanner in part alleged error in the denial of her motion for a directed verdict. 6/18/01 Mot. Tr. 3–9, 12–16.

B. The Michigan Court of Appeals agrees there is sufficient evidence to convict her as a principal, but not as an aider and abettor.

Tanner then filed a direct state appeal and raised several claims, including that the trial court erred in denying her motions for DNA and serology experts and for a directed verdict and that there was insufficient evidence to convict her. A divided Michigan Court of Appeals reversed Tanner's felony-murder conviction and remanded the case for a new trial, concluding that the trial court erred in denying Tanner's motion for expert assistance. As to her sufficiency claim, the Michigan Court of Appeals found that the trial court properly denied Tanner's motion for a directed verdict on the charges of first-degree premeditated murder and felony murder on the theory that Tanner was the principal in committing the felony murder, but that the trial court erred in denying her motion on the theory that she aided and abetted in the murder. So on retrial, the Michigan Court of Appeals said that the prosecution could not charge Tanner with felony murder under an aiding and abetting theory. And because the jury acquitted Tanner of first-

degree premeditated murder, double jeopardy barred retrial on that charge. App. 141a. The one dissenting judge found no error in denying Tanner expert assistance and would have affirmed Tanner's felony-murder conviction. App. 142a.

C. The Michigan Supreme Court concludes there is sufficient evidence under either criminal-liability theory.

The Michigan Supreme Court reversed the Michigan Court of Appeals' grant of a new trial, finding no error in the trial court's denial of expert assistance. After noting that its ruling "render[ed] moot" the Michigan Court of Appeals' directive that the prosecution on retrial could not charge Tanner with felony murder under an aiding and abetting theory, the court explained that its review of the evidence, when viewed in a light most favorable to the prosecution, confirmed that the case was "properly submitted to the jury on both theories of felony murder because a reasonable jury could find the essential elements of the crime proved beyond a reasonable doubt," and that "circumstantial evidence and reasonable inferences may be sufficient to prove the elements of a crime." App. 83a n.6. The lone dissenting justice found that the trial court erred in denying Tanner expert assistance and would remand the case for a new trial. App. 84a.

D. The district court concludes there is sufficient evidence.

Tanner then filed a habeas petition but the federal district court denied relief on all five of her claims, including those alleging that the trial court erred in

denying expert assistance and alleging insufficient evidence. As to the former claim, the district court found Tanner's asserted right to the appointment of DNA or serological experts was not "clearly established" under AEDPA and that even if she had such a right, she did not establish that the denial of such expert assistance rendered her trial fundamentally unfair. App. 66a–70a. As to the latter claim (the claim at issue here), the district court found that "[w]hile the evidence was not overwhelming, it was sufficient to support [Tanner's] conviction" of felony murder, and that the state-court decisions were neither contrary to nor an unreasonable application of the law or the facts. App. 73a–74a. The district court granted Tanner a certificate of appealability on her denial-of-expert-assistance and insufficient-evidence claims. App. 33a.

E. The federal court of appeals concludes there is insufficient evidence.

Tanner then filed an untimely notice of appeal in the district court. After many years of litigation in the federal courts about her untimely notice of appeal, a two-member panel of the court of appeals, over a dissent, remanded the case to the district court to revive the 30-day period in which to file a notice of appeal. *Tanner* v. *Yukins*, 776 F.3d 434 (6th Cir. 2015). The district court did so, Tanner filed a timely notice of appeal, and the court of appeals considered the two issues previously certified for appeal. (As to her claim relating to expert assistance, Tanner abandoned any claim about the denial of a DNA expert and raised the claim only as to the denial of a serology expert.)

In a published opinion, the court of appeals granted Tanner relief on her insufficient-evidence claim, finding that no rational trier of fact could have convicted her and that the Michigan Supreme Court unreasonably applied *Jackson* v. *Virginia*, 443 U.S. 307 (1979). Despite Tanner's admission that she was at Barney's around the time of the murder, the Sixth Circuit began its analysis by stating that "[t]he inculpatory evidence in this case establishes, at best, 'reasonable speculation' that Tanner was in the Barney's parking lot around the time of the murder." App. 25a. Noting that Tanner had said she had last handled the knife three or four weeks before the murder, the court also concluded that there was "no indication that [the knife] was in her possession close to the time of the murder." App. 27a. Turning to the evidence about blood found near the knife that matched Tanner's blood type and subtype, the court opined, without the support of any evidence in the record, that one of bar employees or friends of Watson that came to the bar the morning after the murder "could have bled near the sink that morning." App. 28a. The court next focused on exculpatory evidence, including the fact that an unidentified woman's blood—blood that did not match Tanner's—was found on the victim's shirt and that a truck with two unidentified people was also at Barney's early that morning. App. 28a.

The court then weighed the exculpatory evidence against the incriminating evidence: "[B]ased on the strength of the potentially exculpatory evidence and the comparative weakness of the incriminating evidence, there is no way to read the record here to support the Michigan Supreme Court's conclusion that a rational trier of fact could have found Tanner guilty of

Watson's murder beyond a reasonable doubt." App. 29a. Based on this conclusion, the court of appeals found it unnecessary to consider Tanner's claim about the denial of expert assistance. App. 2a–3a.

The court of appeals denied the State's motion to stay the mandate pending its petition for writ of certiorari in this Court, resulting in Tanner's release from prison and the vacating of her conviction. The mandate issued on September 7, 2017.

REASONS FOR GRANTING THE PETITION

I. The extraordinary remedy of habeas relief is not warranted on Tanner's sufficiency-of-the-evidence claim.

AEDPA presents a "high bar" that is difficult to meet for prisoners whose claims have been adjudicated on the merits by state courts. *Virginia* v. *LeBlanc*, 137 S. Ct. 1726, 1729 (2017); *Woods* v. *Donald*, 135 S. Ct. 1372, 1376 (2015). As a condition for obtaining habeas relief, the prisoner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Put another way, when reviewing state criminal convictions on collateral review, federal judges must "afford state courts due respect by overturning their decisions only when there could be no reasonable dispute they were wrong." *Woods*, 135 S. Ct. at 1376.

Federal habeas review exists as a guard against "extreme malfunctions" in the state criminal justice system, *Harrington*, 562 U.S. at 102, and a court on habeas review should "not lightly conclude" that a state's criminal justice system experienced an extreme malfunction. *Burt* v. *Titlow*, 134 S. Ct. 10, 16 (2013). "The reasons for this approach are familiar": federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of judicial authority," "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," and "disturbs the State's significant interest in repose for concluded litigation." *Harrington*, 562 U.S. at 103 (citations omitted). No malfunction—let alone an extreme one—occurred here.

A. Sufficiency claims must be afforded double deference on federal habeas review.

Insufficient-evidence claims "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference." *Coleman*, 566 U.S. at 651; *Parker* v. *Matthews*, 567 U.S. 37, 43 (2012) (A court's review of a sufficiency claim under AEDPA is "twice-deferential.").

The first layer of deference is due to the jury's verdict under *Jackson*, which held that the relevant inquiry "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Also, "*all of the evidence* is to be considered in the light most favorable

to the prosecution." *Jackson*, 443 U.S. at 319 (emphasis in original). It is the jury's responsibility—not the reviewing court's—to weigh the evidence and to resolve all conflicts in the testimony, *id.*, and to determine what conclusions should be drawn from the evidence presented at trial, so when "faced with a record of historical facts that supports conflicting inferences [courts] must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Cavazos*, 565 U.S. at 2, 6 (quoting *Jackson*, 443 U.S. at 326).

Further, the prosecution need not "rule out every hypothesis except that of [the defendant's] guilt beyond a reasonable doubt . . . ." *Jackson*, 443 U.S. at 326. Federal habeas courts may not re-determine the credibility of witnesses whose demeanor was observed by the finder of fact. *Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1983). Nor may a reviewing court engage in "fine-grained factual parsing" of the evidence. *Coleman*, 566 U.S. at 655. *Jackson* gives juries "broad discretion" in deciding what inferences to draw from the evidence presented at trial, "requiring only that jurors draw reasonable inferences from basic to ultimate facts." *Id.* at 655 (internal quotation marks omitted). "[T]he only question under *Jackson* is whether [the jury's finding] was so insupportable as to fall below the threshold of bare rationality." *Id.* at 656.

The second layer of deference applies to the state court's decision on the insufficient-evidence claim, here, the Michigan Supreme Court's. A state-court decision that the evidence satisfied the *Jackson* standard is itself "entitled to considerable deference under

AEDPA." *Coleman*, 566 U.S. at 656. "[A] federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." *Cavazos*, 565 U.S. at 2. The state court's ruling must be "objectively unreasonable, not merely wrong; even clear error will not suffice." *Woods*, 135 S. Ct. at 1376. AEDPA also demands that state courts be given the benefit of the doubt. *Renico* v. *Lett*, 559 U.S. 766, 775 (2010) (quotation marks omitted). And because the standard for sufficiency claims is "exceedingly general," *Davis* v. *Lafler*, 658 F.3d 525, 535 (6th Cir. 2011), state courts have more leeway in applying that standard. *Renico*, 559 U.S. at 776 ("Because AEDPA authorizes federal courts to grant relief only when state courts act *unreasonably*, it follows that '[t]he more general the rule' at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—'the more leeway [state] courts have in reaching outcomes in case-by-case determinations.'") (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004)). Also, "even a strong case for relief does not mean that the state court's contrary conclusion was unreasonable." *Harrington*, 562 U.S. at 102. This Court has cautioned that, with this double deference, "judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold." *Cavazos*, 565 U.S. at 3.

B. Sufficient evidence supported the jury's verdict, and the state court reasonably denied relief on the sufficiency claim.

According due respect to the role of the jury and of the state court, the evidence was sufficient to convict

Tanner of felony murder. As noted above, the evidence included Tanner's admission that the murder weapon, which was found at Barney's, was hers. Not only did Tanner tell Detective Walters that the knife was hers, but she specifically identified it in a photograph by its unique blade tip, which she herself had altered. Tanner even explained how she altered it (by using a can opener) and why she did so (to better clean her crack pipes and because it would stick a little better when she used it). 11/16/00 Tr. 262–64. Tanner explained how she could identify the knife during a second conversation with Walters, and added that her fingerprints, and possibly Dion Paav's, would be on it because they both handled it "approximately three or four weeks" before the murder. 11/16/00 Tr. 265–66.

Tanner also admitted that she was on the premises of the bar around the time of the murder, which likely took place on March 22, 1995, between 12:52 a.m. (when the last cash-register entry occurred) and 2 a.m. (when Watson's boyfriend called the bar and was unable to reach Watson). On June 7, 1995, Tanner admitted to Detective Walters that she went to Barney's with Cady on March 22 but said she stayed in the car while Cady went in to cash a check. Tanner said she and Cady got to Barney's after 1:00 a.m. and left at approximately 1:30 a.m. She also said that she and Cady went to a number of other places that night—including Green's Tavern to cash a check, Jim Dandy's convenience store to buy beer, and to Kendall and Manchester, to buy drugs—and that they were possibly a "little buzzed" at the time. 11/16/00 Tr. 269–75. While there was no audio recording of this discussion between Tanner and Detective Walters, App. 6a,

that is because it took place in a police car while detectives were driving Tanner to a polygraph examination.

Serological testing revealed that the blood sample from the bar sink was of the same blood type and PGM subtype as Tanner's. 11/16/00 Tr. 234–37. As to serological testing, one witness explained that there are four common blood types—A, B, AB, and O—and ten different types of the enzyme phosphoglucomutase (PGM) found in human blood, thus permitting subtyping regarding blood type and PGM. 11/16/00 Tr. 157–64. This blood sample was found in close proximity to where Tanner's knife was found. 11/16/00 Tr. 40–43. The odds of this blood type matching a given person were low—4% or lower—and yet the blood type matched Tanner's (and did not match the other suspects). 11/16/00 Tr. 165, 236–37. A rational juror could think that it was not simply a coincidence that the blood found near the murder weapon (Tanner's knife) matched the blood type of someone (Tanner) who admitted being at the scene (Tanner); in short, a rational juror could conclude that this evidence overcame any reasonable doubts that Tanner entered the building, as well as any doubts that Tanner had no part in the struggle that resulted in Watson's death.

True, Tanner denied killing Watson, but a jury did not have to believe her—and as the verdict shows, in fact did *not* believe her. And comments Tanner made undermined her protestations of innocence. For example, when asked under what circumstances she might have killed Watson, Tanner responded by setting a very low bar for that set of circumstances: "if that bitch"—referring to Watson—"had *treated her bad* she

would do something to that effect." 11/16/00 Tr. 276–77 (emphasis added). Further, when interviewed about her involvement, rather than just denying that she committed the murder, she suggested that the police would not be able to prove it, by pointing out that the person responsible "would have had blood on them" and then by asking "what would she have done with the bloody clothes." 11/16/00 Tr. 277.

And the jury had specific reasons to doubt Tanner's credibility. For instance, Tanner initially denied being with Cady on March 22, 11/16/00 Tr. 204–06, but then she changed her story, saying that she was with him but had not gone to Barney's; Tanner claimed it was five to six years since she'd been there. 11/16/00 Tr. 206–11. Tanner changed her story again when she told Detective Walters that she did go to Barney's with Cady on March 22 but stayed in the car. At trial, Tanner went with her second version of events: Cady came to her house (in Battle Creek) after work, they went to get drugs and returned to her house to get high, Cady then left alone to cash a check, returned to her house with more crack and they got high again, and he left at about 2:30 or 3:00 a.m. Tanner denied going to Barney's, denied that the knife was hers and denied telling Walters that the knife was hers. 11/21/00 Tr. 26–29. But this testimony conflicted with what she told Walters.

And Tanner lied about even minor details. On the stand, she claimed that during her first interview she did not know where the bar was and that she had given the wrong street, but she was impeached by the transcript of the interview, which showed that she correctly identified the bar as on Bedford Road. 11/21/00

Tr. 32. She also testified on the stand that she had not prearranged going out with Cady to buy crack, but was again impeached by her earlier admission that she had "lined it up earlier." 11/21/00 Tr. 32. When confronted about inconsistencies between her trial testimony and her prior statements to police, Tanner said the police "must have got it wrong in the tape" or got "whole interview wrong," or were "incorrect" or "lying." 11/21/00 Tr. 29–46.

Cady's version of events at trial, like Tanner's, was not consistent with his earlier statements and conflicted with other evidence. At trial Cady, who lived near Barney's, put himself inside Barney's at around 1:00 a.m. on March 22 but claimed he stayed for only a few minutes because Watson had cashed out and could not cash his check; he said he then went to Green's to cash a check, then bought more crack, then went back to Tanner's to smoke it. According to Cady, Tanner did not go with him after they finished their first round of crack. 11/15/00 Tr. 63–66, 69–72, 79–85. But this conflicted with Tanner's statement to Detective Walters that she went to Barney's on March 22. Cady also did not mention Tanner until weeks after the murder and did not mention buying drugs until weeks after that, after initially telling police he did not know where to get drugs. And during an interview in May 1995, Cady said that "*we* all" left Tanner's after he cashed a check at Green's—which at trial he said was a lie. 11/15/00 Tr. 104–05, 107–11 (emphasis added). Cady also denied going to Barney's on the morning after Watson's murder but the bar owner's son testified that Cady showed up there for a minute or two that morning, asking questions, but did not talk to police. 11/16/00 Tr. 191–93.

In particular, Cady's assertion that he saw an unknown male at Barney's at 1:00 a.m. on March 22—a detail he did not mention when first questioned—conflicted with evidence about Watson's closing procedures. Specifically, the evidence indicated that Watson would not let someone she did not know in after she decided to close early and that she would not complete the bar's closing procedures (such as moving the cash drawer to the basement) in front of a stranger. 11/15/00 Tr. 152. But she would complete the closing procedures in front of regulars, and Cady was a regular. 11/15/00 Tr. 155. (All of the bar's closing procedures were found to be completed when Watson's body was found.)

Given these and other inconsistencies between Cady's trial testimony and the evidence and testimony of others, which the prosecution detailed, it is not surprising that the jury did not believe Cady that Tanner did not go with him to Barney's on March 22. But the jury could reasonably conclude from all of the evidence that Cady's status as a trusted regular at Barney's is how he and Tanner got into Barney's after Watson decided to close early on March 22.

In the end, given all of the problems with Cady's testimony, Tanner's own admissions and statements, her changing stories, the conflicts between her trial testimony and Detective Walters's and her assertion that the police were "lying" or "wrong" about everything, her overall disastrous testimony on cross examination and weak claim of alibi (Tanner's mother could not vouch for Tanner being home during the time Watson was murdered, 11/21/00 Tr. 13–17), and the serology and other evidence presented at trial, it cannot be

said that the verdict of the twelve unanimous jurors who convicted her was "so insupportable so as to fall below the threshold of bare rationality." *Coleman*, 566 U.S. at 656. The Michigan Supreme Court did not think so and, under AEDPA, that determination is entitled to significant deference. But the court of appeals did not defer either to the jury's verdict or to the decision of the state court—let alone both.

C. The court of appeals failed to apply the required two layers of judicial deference to Tanner's sufficiency claim.

Although the court of appeals acknowledged the double deference necessary in analyzing sufficiency claims on habeas review, it failed to correctly apply the standard. Instead, the court of appeals treated the question under *Jackson* and the unreasonableness question under AEDPA as a test of its confidence in the jury's verdict. This substantial error warrants reversal.

The Sixth Circuit failed to defer to the jury at multiple steps in its analysis. At the outset, it asserted that it was, "at best, 'reasonable speculation' that Tanner was in the Barney's parking lot around the time of the murder." App. 25a. But an *admission* is not speculation; it is direct evidence the jury may quite appropriately rely on. And the jury heard evidence that Tanner admitted that specific fact to Detective Walters: she "indicated that she and Rob Cady went to Barney's Bar and Grill . . . after one a.m." and that "[t]hey left at approximately one-thirty a.m." 11/16/00 Tr. 273.

The court of appeals next pointed to "several gaps in the evidence." App. 25a. But the jury could have bridged those gaps. While it is true that Tanner did not say that she *entered* Barney's on March 22, App 25a, the jury reasonably could have inferred that she did, given that she placed herself in Barney's parking lot during the narrow timeframe of the murder, that she admitted the distinctive murder weapon found in Barney's was hers, and that blood found near the murder weapon matched her blood type and PGM subtype and would not match roughly 96% of the population. A reasonable jury could infer from this evidence that the simplest explanation for these facts is that she in fact entered the building, with her knife, bled in the bar area when cleaning off the knife in the bar sink (bleeding either as a result of a struggle with the victim or of injuring herself while cleaning the knife), and then fled the scene.

The court of appeals also set forth the "several problems" it had with Detective Walters's testimony that Tanner told him the murder weapon was hers, including contradictions between Tanner's and Walters's trial testimony, contradictions between Walters's testimony and a partial transcript of a conversation with Tanner, and the court's belief that another witness's testimony "cast[] doubt" on Walters's testimony. App. 26a. But with sufficiency claims, the court must view the evidence *in the light most favorable to the prosecution* and *it is up to the jury* to resolve all conflicts in the testimony. The jury here reasonably found Detective Walters credible and Tanner not credible. And even if the court of appeals "accept[ed]" that Tanner told Walters that the murder weapon was

hers, as it claimed, the court did not think it "advance[d] the prosecution's case very far" because Tanner last handled that knife about "three or four weeks" before Watson's murder. App. 27a. But given all the changes and inconsistencies in Tanner's statements and testimony, the jury reasonably could have found that Tanner was not being truthful with Walters about when she last handled the knife—and so found that she possessed the knife at time of the murder.

The court of appeals also had problems with the serology evidence, noting in part that "[m]illions of people shared Tanner's blood type and PGM subtype" and that "[a]ny one of those people" or one of the individuals gathered at the bar after the murder could have contributed the blood. App. 27a. But there was no evidence that any of the individuals gathered at the bar bled near the sink that morning. And these facts about blood types were presented to the jury. 11/16/00 Tr. 174–75. Further, while "millions" of people out of the entire national population may have the same blood type and PGM subtype, how many of them admitted to being in the small community of Bedford Township (population: 9,517), outside of Barney's bar, on the day of the murder and around the time of the murder? And how many of them were with their close friend, who was a regular at Barney's, buzzed after drinking alcohol and smoking crack cocaine, in search of more cash to buy more crack? And how many of them admitted that the distinctive murder weapon, found inside the bar, was theirs? Add all that to the fact that the murder weapon was found near where the blood sample (matching Tanner's blood type and PGM subtype) was found, and Tanner's reference to the deceased as a "bitch" that she might murder if the

deceased "treated her bad." Given the combination of all of the evidence presented at trial, together with the inferences properly deduced from that evidence, the jury's verdict was not "so insupportable as to fall below the threshold of bare rationality." *Coleman*, 566 U.S. at 656.

Notably, *all* of the state court appellate jurists—three Michigan Court of Appeals judges and seven Michigan Supreme Court justices—found sufficient evidence to charge Tanner with felony murder as principal, and the jury (who was not asked on what theory of felony murder they convicted Tanner) may have convicted her on that theory. 11/22/00 Tr. 12–14. The jury also reasonably could have inferred that Tanner aided and abetted her good friend Cady in a number of ways: by giving her knife to him before he went into Barney's to get cash, by acting as a lookout while he was inside the bar or providing moral encouragement or support to Cady, or by going into Barney's at some point to assist him. Michigan's definition of what constitutes aiding and abetting is a "broad" one. *Sanford* v. *Yukins*, 288 F.3d 855, 862 (6th Cir. 2002).

The court of appeals said there was "no evidence" that Tanner killed Watson or that she helped Cady, and that Tanner denied any involvement to Detective Walters. App. 25a–26a. But a criminal defendant's denial of guilt is hardly surprising. And the jury, who saw Tanner testify firsthand at trial, clearly did not find her credible. That the evidence against Tanner was largely circumstantial is of no moment because circumstantial evidence is entitled to equal weight as direct evidence, and the prosecution may meet its burden entirely through circumstantial evidence. *Desert*

Palace, *Inc*. v. *Costa*, 539 U.S. 90, 100 (2003) ("[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required"); *Holland* v. *United States*, 348 U.S. 121, 140 (1954); see also *United States* v. *Magallanez*, 408 F.3d 672, 681 (10th Cir. 2005) ("Lack of physical evidence does not render the evidence that is presented insufficient."); *United States* v. *Bieghler*, 198 F. App'x 566, 568 (8th Cir. 2006) ("'[F]orensic evidence' is not required for conviction.") The jury's verdict should not be overturned merely because it had to draw inferences to find Tanner guilty.

The court of appeals was also troubled by what it deemed "exculpatory evidence," namely, blood from an unidentified female on Watson's shirt, and, "without an explanation" for this, the court concluded that no rational jury could have convicted Tanner. App. 29a. But the prosecution does not have an affirmative duty to rule out every hypothesis except that of guilt or to explain every piece of evidence at a crime scene. In fact, *Jackson* itself expressly rejected the "theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt . . . ." 443 U.S. at 326. In short, for all of its criticism of the state courts as failing to follow *Jackson*, the Sixth Circuit here made the same mistake as the petitioner in *Jackson*: the prosecution did not have to explain away the defense's alternate theory, because the circumstantial evidence against Tanner was sufficient to defeat any reasonable doubt of guilt.

Further, this unexplained evidence does not necessarily exonerate Tanner. While the jury could have inferred that that evidence did, the jury was not required to draw that inference, and the jury instead could have concluded that it was the blood of another accomplice or that the blood was not related to the murder at all. The bottom line is that more than one plausible inference could have been drawn from this unexplained evidence. The same goes for the testimony about a truck that two witnesses purportedly saw outside of Barney's, at different times, on March 22. 11/21/00 Tr. 47–53 (one witness reporting a truck leaving Barney's parking lot around 1:25 a.m., while another witness said she saw a pickup parked near the bar at 2:47 a.m., with nobody around); but see 11/15/00 Tr. 86–87 (Cady stating he passed Barney's at approximately 2:45 a.m. and did not recall seeing any vehicles there).

And more fundamentally, the court of appeals' focus on the exculpatory evidence revealed that it was engaging in "precisely the sort of reweighing of facts that is precluded by *Jackson* . . . ." *Cavazos*, 565 U.S. at *8 n.*. But despite expressly acknowledging that its role was not to reweigh the evidence—"we do not reweigh the evidence," App. 24a—it went on to expressly reweigh the evidence: "based on the *strength* of the potentially exculpatory evidence and the *comparative weakness* of the incriminating evidence, there is no way to read the record here to support the Michigan Supreme Court's conclusion that a rational trier of fact could have found Tanner guilty of Watson's murder beyond a reasonable doubt." App. 29a (emphasis added).

While there were weaknesses in the prosecution's case and the evidence against Tanner was not overwhelming, as a whole it was sufficient. See *Davis*, 658 F.3d at 533 ("Pieces of evidence are not to be viewed in a vacuum; rather, they are viewed in relation to the other evidence in the case."). In finding otherwise, the court of appeals failed to view all of evidence in the light most favorable to the prosecution. Instead, the court essentially reviewed the sufficiency claim de novo. The court's opinion even reads much like the closing argument *for the defense*, with the court reweighing the evidence, questioning the credibility of witnesses, drawing inferences of its own, and engaging in the "fine-grained factual parsing" of the evidence this Court has prohibited. *Coleman*, 566 U.S. at 655. And because the panel of court of appeals judges lacked confidence in the verdict, the panel found the state-court decision rejecting Tanner's sufficiency claim was necessarily unreasonable. But this is not the standard. This Court has peremptorily reversed courts of appeals for not properly applying the two layers of judicial deference required in analyzing sufficiency claims. See e.g., *Coleman*, 566 U.S. at 651, *Cavazos*, 556 U.S. at 1. That same result is warranted here.

In the end, the question before the court of appeals was not whether the jury's verdict was correct or even whether the Michigan Supreme Court's decision reinstating Tanner's convictions was correct. Rather, the questions were whether, viewing the evidence in a light most favorable to the prosecution, the jury's finding of guilt "was so unsupportable as to fall below the threshold of bare rationality," *Coleman*, 566 U.S. at

656, *and* whether the Michigan Supreme Court's decision finding sufficient evidence to convict her of murder was objectively unreasonable.

While Tanner spun many tales in a desperate attempt to avoid conviction, her own words, particularly those to Detective Walters, sealed her fate. She admitted to being on the premises of the bar around the time of the murder, she admitted that the murder weapon was hers, and she referred to the victim, Sharon Watson, as a "bitch" she might kill if Watson "treated her bad." But this was not all the evidence. A drop of blood, of the same blood type and PGM subtype as Tanner's, was found near the murder weapon, debunking Tanner's claim that she did not go inside the bar at the time of the murder. Moreover, the evidence presented confirmed that Tanner and her companion were seeking cash to buy more crack. What could provide a better motive for Tanner to want to rob and kill Watson as she was closing the bar, a time when Watson would be alone and presumably be handling a lot of cash?

AEDPA and *Jackson* protect the jury's verdict and the state supreme court's decision from just the kind of unwarranted federal interference that occurred here. This Court should grant certiorari and summarily reverse.

CONCLUSION

The petition for writ of certiorari should be granted and summarily reversed.

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