No. 17-729

IN THE
Supreme Court of the United States

JOAN YUKINS,

Petitioner,

v.

HATTIE TANNER,

Respondent.

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

BRIEF IN OPPOSITION

SHAY DVORETZKY
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939

BENJAMIN M. FLOWERS
Counsel of Record
J. TODD KENNARD
NATHAN BONINGER
JONES DAY
325 John H. McConnell
Blvd. Suite 600
Columbus, OH 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
bflowers@jonesday.com

Counsel for Respondent Hattie Tanner

QUESTION PRESENTED

By the time Michigan released Hattie Tanner from prison, she had served seventeen years for a murder she did not commit. There were no eyewitnesses to the murder, and no incriminating physical evidence other than a single drop of diluted blood—of the same *blood type* possessed by Tanner and millions of other people—found in a contaminated portion of the crime scene, one floor above the room where the murder occurred. The other incriminating evidence consisted of alleged out-of-court statements made to a police detective whose central testimony was squarely contradicted by other objective evidence in the case.

All other evidence exculpated Tanner. For example, the victim died of stab wounds in a violent struggle, but blood on the victim's shirt contained DNA matching *neither* the victim nor Tanner; Tanner's DNA was not found anywhere at the murder scene; Tanner's fingerprints were not found at the murder scene; no footprints were ever matched to Tanner; no fibers were linked to Tanner; and no one claims to have seen Tanner in the bar where the murder occurred.

This case presents the factbound question whether the Sixth Circuit erred in awarding habeas relief to a defendant who was effectively exonerated at trial by the State's own DNA evidence. More precisely, it presents the question whether the Sixth Circuit's supposed error is so obvious and egregious that summary reversal is appropriate.

PARTIES TO THE PROCEEDING

The plaintiff in the District Court was Hattie Tanner. The defendant was Joan Yukins, warden of a Michigan correctional facility. Both were parties to the Sixth Circuit appeal below, and both are parties in this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

REASONS FOR DENYING CERTIORARI 22

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT TANNER IS ENTITLED TO HABEAS RELIEF 22

A. The Sixth Circuit would have committed reversible error had it denied Tanner's petition 23

B. The State's contrary arguments are misguided 29

II. THE SIXTH CIRCUIT'S DECISION CONTAINS NO EGREGIOUS ERROR THAT COULD JUSTIFY SUMMARY REVERSAL 32

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Ake v. Oklahoma,
470 U.S. 68 (1985) 21

Brown v. Palmer,
441 F.3d 347 (6th Cir. 2006) 27

Cavazos v. Smith,
565 U.S. 1 (2011) 34

Coleman v. Johnson,
566 U.S. 650 (2012) 34

Dunn v. United States,
442 U.S. 100 (1979) 31

Jackson v. Virginia,
443 U.S. 307 (1979) ....*passim*

Juan H. v. Allen,
408 F.3d 1262 (9th Cir. 2005) 33

Kamienski v. Hendricks,
332 F. App'x 740 (3d Cir. 2009) 33

McDaniel v. Brown,
558 U.S. 120 (2010) 34

O'Brien v. O'Laughlin,
557 U.S. 1301 (2009) 33

O'Laughlin v. O'Brien
568 F.3d 287 (1st Cir. 2009)................................. 33

Parker v. Matthews,
567 U.S. 37 (2012) 34

TABLE OF AUTHORITIES
(continued)

Page(s)

Pavan v. Smith,
137 S. Ct. 2075 (2017) 3, 32

Schweiker v. Hansen,
450 U.S. 785 (1981) 33

United States v. DiDonna,
866 F.3d 40 (1st Cir. 2017) 31

INTRODUCTION

"The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt" of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). Even with the deference required in the context of habeas review, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 317. Such a conviction "cannot constitutionally stand." *Id*. at 318.

Hattie Tanner did not commit the murder for which she spent seventeen years in prison before being released. More relevant here, the State did not introduce evidence sufficient to support a murder conviction. That is true with respect to the State's primary theory that Tanner acted as the principal. And it is true as to its alternative theory that she aided and abetted a man named Rob Cady—a man the State never charged with anything. The State's own forensic expert all but proved Tanner's innocence, testifying that DNA in blood recovered from the victim's body matched neither Tanner nor Cady. When asked at oral argument below how that DNA could be explained as anything other than exonerating evidence, the State's lawyer admitted: "I don't have an explanation for that." *Tanner v. Yukins*, No. 15-1691, Oral Argument at 26:20 (6th Cir., May 4, 2017), *available online at* https://tinyurl.com/TannerOA. Moreover, when the State investigated and tested the clothes Tanner wore the night of the murder, it found *no evidence* that Tanner had been at the scene—this despite the bloody, brutal nature of the

murder in question. And none of the DNA, none of the fingerprints, and none of the footprints at the murder scene were ever matched to Tanner (or Cady).

The State says the jury could nonetheless reasonably have convicted Tanner based on three pieces of evidence: *First*, investigators found one diluted drop of blood on a sink one floor above the murder scene, which contained the same *type* of blood as Tanner's. But that same blood type is shared by millions of other Americans and—if the non-record evidence in the State's brief is to be believed, *see* Pet. 7–8 (citing census figures)—thousands of people in the area where the murder occurred. *Second*, the State points to one detective's testimony that Tanner told him that a knife found at the scene was hers. What the State ignores is that the same detective admitted at trial to misrepresenting what Tanner said: On at least one occasion, she conceded only that the knife *looked like* her own. *Finally*, the State points to testimony from the same detective that Tanner told him she had been in a car outside the bar the night of the murder.

All this led Judge Kethledge to ask, in response to the State's continued insistence that the evidence here permitted a conviction:

> Why? I mean, why? I mean, all you have is it's her knife, this drop of diluted blood, and she's outside of the bar. That's all you have. And then meanwhile, I mean I do think we have to take into account stuff that is pretty clearly exculpatory, right? We do take, it's not like we just

> ignore that, it was part of the trial. I mean, so how does that establish guilt beyond a reasonable doubt?
>
> Oral Arg. 26:42.

The State has never provided a satisfactory answer, nor can it. There was no error in the decision below—certainly no error serious enough to justify "the strong medicine of summary reversal." *Pavan v. Smith*, 137 S. Ct. 2075, 2080 (2017) (Gorsuch, J., dissenting).

Notably, the State failed to move in this Court for a stay of the Sixth Circuit's mandate, which had the effect of setting Tanner free. If the Sixth Circuit had ordered the release of a murderer, and if its decision rested on egregious error, the State of Michigan surely would have taken all possible steps to keep Tanner in prison. But Tanner has now been out of prison for months. That is where she should stay.

STATEMENT

Because this is a sufficiency-of-the-evidence case, the Court must review "*all of the evidence*," and it must do so "in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319. Unless otherwise noted, this brief sets forth the evidence in the light most favorable to the State.

1. Sharon Watson, a bartender at Barney's Bar and Grill in Calhoun County, Michigan, "was stabbed to death in the basement of Barney's sometime after 1:00 a.m. on March 22, 1995." Pet. App. 3a.

Around 5 a.m., one of the bar's owners arrived at the bar, opened the door to the basement office, and

found Watson's body. *Id.* at 4a; 11/15/00 Tr. 219–29. Everyone agrees that Watson struggled with her attacker; authorities found numerous knocked-over boxes and a heavy chair pushed to the side. 11/15/00 Tr. 273–78; 11/16/00 Tr. 63–64. Police "testified that Watson had blood stains smeared across her body, an excessive amount of blood on her neck and chest, and stab wounds to her chest." Pet. App. 4a. In addition to discovering Watson's body, one of the first people to arrive at the scene found fresh mud next to a rug in the basement office, and investigators observed footprints just outside the office door. 11/15/00 Tr. 209–16; 11/16/00 Tr. 59–60. The footprints did not belong to any of the people who had been in the basement since the discovery of Watson's body, and the State never linked the footprints to Tanner despite seizing her shoes—indeed, they never matched the footprints to anybody. 11/16/00 Tr. 84, 232–34, 246–49, 267.

Detective Michael VanStratton, the Battle Creek Police Department's crime lab supervisor, arrived hours after the grisly discovery. But when he got there, he lacked the equipment he needed to process the crime scene. Pet. App. 4a. "VanStratton testified that when he returned to Barney's with the necessary equipment around 8:00 a.m., 'some of the areas which [he] thought might be critical for investigation'—including the area behind the bar—'had already been occupied by people that came in that morning.'" *Id.* at 4a–5a. Barney's employees and other non-law-enforcement people were on the first floor making coffee and milling about behind the bar and around the area where police eventually found a straight-blade knife and a diluted drop of

blood on the sink. *Id.* at 5a, 26a; 11/16/00 Tr. 40. VanStratton testified that it was impossible to determine how long the diluted drop of blood had been there. 11/16/00 Tr. 91–92.

Police later concluded that the straight-blade knife found behind the bar was the murder weapon. 11/21/00 Tr. 44; Pet. App. 26a. And Catherine Huskins, who knew Watson, later testified that Watson found a straight-blade knife she planned to keep in her purse, which police found open behind the bar. 11/15/00 Tr. 205; 11/17/00 Tr. 79–81.

In the basement, technicians collected images and electrostatic lifts of the footprints found outside the office door. 11/16/00 Tr. 59–60. Inside the basement office, they took blood samples from Watson's shirt. Pet. App. 13a; 11/16/00 Tr. 67–72. Outside the bar, police found fresh tire marks in the dirt, made by what appeared to be a truck. 11/16/00 Tr. 13–24.

2. The afternoon after the murder, a Barney's regular named Rob Cady approached Officer Brad Wise. Cady told Wise that he had been one of the last people to leave Barney's the prior evening. Cady stated that, when he left, there was a white male at the bar whom Cady did not recognize. *Id.* at 200–01, 214. Contrary to the State's assertion that Cady did not mention this unknown white male when first questioned, Pet. 21, Cady mentioned this individual during this very first conversation with Wise. 11/15/00 Tr. 106; 11/16/00 Tr. 200–201, 214. Cady helped police create two composite sketches of the white male suspect. 11/15/00 Tr. 124–25.

Two other witnesses saw a truck outside Barney's early that morning around the time that Watson was

killed. Pet. App. 8a. One of them, witness Kevin Sage, testified that a light-colored pickup truck with a wooden cap pulled out of Barney's and almost hit the car he was driving around 1:25 a.m. 11/21/00 Tr. 47–50. "Sage said that the driver appeared to be a white man with a beard, and that there was a passenger who Sage did not get a good look at." Pet. App. 8a. Sage further testified that the truck came from the back side of Barney's, 11/21/00 Tr. 49—the dirt area where police found fresh tire tracks. 11/15/00 Tr. 251–52; 11/16/00 Tr. 13–24. The other witness, Nancy Chantrene, also saw a light-colored truck with a distinctive cap at the bar early that morning. 11/21/00 Tr. 51–53.

Cady would eventually provide further details of his version of what occurred the night of Watson's murder. He stated that he left work around 11 p.m. in his car—a blue "'94 Achieva." 11/15/00 Tr. 65; Pet. App. 7a, 100a. He said that he called Tanner to arrange to purchase some crack cocaine, picked her up around midnight (Tanner did not have a vehicle), and then bought it with her near her house. Pet. App. 7a; 11/15/00 Tr. 63–68; 11/17/00 Tr. 21–22. Cady and Tanner returned to her house and smoked the crack until sometime between 12:30 and 1 a.m. Pet. App. 7a; 11/15/00 Tr. 66–69. Cady then left, *without Tanner*, to cash a check. Pet. App. 7a. After being unable to cash his check at another bar, Cady went to Barney's around 1 a.m., which is when he saw the unidentified white male. 11/15/00 Tr. 69–73. He testified that Watson could not cash the check because she had already "closed out" that night, so he left to cash the check at another bar—Green's Tavern. After doing so, and having a drink, he "went

to buy more crack and then returned to Tanner's house." Pet. App. 7a. When he arrived back at Tanner's, they smoked the rest of the crack until Tanner's mother woke up and asked Cady to leave around 2:30 a.m. 11/15/00 Tr. 85–86.

Wise interviewed Tanner on May 3, 1995. Pet. App. 96a–97a. She told Wise that on the night of the murder, Cady had come over shortly after he got off work at 11 p.m., that they had smoked crack together, that Cady left to cash a check, and that they used the $50 from that check to purchase more crack. *Id.* She also told Wise that Cady left at around 3 a.m., after Tanner's mother complained that they were making too much noise. 11/16/00 Tr. 209–11. When Wise asked Tanner when was the last time she had been to Barney's, she stated that it had been over five years. *Id.*

3. Two months after Watson's murder, Detective David Walters took over the case. Pet. App. 45a–46a. On May 24, 1995, Walters interrogated Tanner at the police department with no counsel present. *Id.* at 46a. Walters conducted the interview in an interrogation room that had recording problems. As a result, only a small portion of what he described as "a lengthy interview" was recorded and transcribed. 11/17/00 Tr. 25–31. The picked-up portions make up thirty-two pages of transcript. Even within those pages, 261 of Tanner's responses (more than 8 responses per page, on average) are listed as "inaudible." *Id.* at 29–31; 11/21/00 Tr. 10–11. Walters did not send the tape to the Michigan State Police Crime Laboratory to enhance the sound quality despite the many inaudible remarks in the transcript. Pet. App. 101a–02a.

Walters testified that, during his interrogation of Tanner, he showed her a picture of the knife found at Barney's and she admitted it was hers. 11/16/00 Tr. 262–63. But he also testified that he had just one conversation about the knife with Tanner during the partially taped interview. And the transcript of that interview shows that Tanner answered in the negative when asked "is that one of your knives?" 11/17/00 Tr. 32–36. According to Tanner, she told Walters during the interview that the knife in the photo *looked like* a knife she used to have but was not her knife. Pet. App. 6a. She testified that the knife could not have been hers, because Walters (truthfully) represented that it did not fold, and because straight-blade knives were "not allowed on [her] job." *Id.* at 58a–59a. Whatever precisely was said in the lengthy interview, the transcript—a transcript that Walters testified would contain just one conversation about the knife—records Tanner denying the knife was hers, and stating only that the knife in the picture "looks like one of [her] knives." 11/17/00 Tr. 32–36; *see also* Pet. App. 26a (Sixth Circuit indicating that "the transcript of Walters's conversation with Tanner flatly contradicts Walters's testimony").

Walters claims to have conducted a second (but unrecorded) interview with Tanner on June 7, 1995. This time, she was in the back of a police vehicle being driven down a highway by his partner, Detective David Adams. 11/16/00 Tr. 265; 11/17/00 Tr. 52–53. According to Walters, Tanner changed her story and told him that she had been in the car with Cady when he went to Barney's to cash a check. Pet. App. 99a. And according to Walters, Tanner told

him that Cady went to Barney's after 1 a.m., that she stayed in the car, and that they left at 1:30 a.m. *Id.*

Though there is no recording of this second interview, Walters testified at Tanner's trial (which occurred five years later) that when he asked Tanner if she had killed Watson, she shook her head in denial. *Id.* According to Walters, when he asked Tanner about the circumstances in which she would hypothetically have killed Watson, she responded that "if that bitch had treated her bad she would do something to that effect." *Id.* Walters also testified that Tanner said that whoever committed the murder would have been covered in blood from carrying Watson's body to the basement. *Id.* at 100a. But the parties agree—and the physical evidence and expert testimony confirm—that the murderer killed Watson in the basement where she was found. 11/16/00 Tr. 64–67.

During the same 1995 interview, Walters claimed that Tanner "again" told him "how she could identify the knife," *id.* at 265–66, suggesting that she reiterated what she said in the prior interview—the one in which Tanner said only that the knife *looked like* one she owned. Walters testified that he told Tanner, untruthfully, that police found her fingerprints on the murder weapon. 11/17/00 Tr. 47. According to Walters, Tanner indicated that her fingerprints or those of Dion Paav—Cady's associate—would be on her knife because "they had both handled the knife" about "three to four weeks prior to the homicide." Pet. App. 99a. Investigators did not find Tanner's fingerprints on the murder weapon—or anywhere else. *Id.* at 95a.

As with the May 24, 1995 interview, Tanner's version of events pertaining to the June 7, 1995 interview is markedly different than Walters'. For one thing, Tanner denied that during the unrecorded interview she answered any of these questions. *Id.* at 109a; 11/21/00 Tr. 45. And it is impossible to corroborate either version, because the State chose not to call Adams—the officer who had been driving the car in which Walters conducted the June 7, 1995 interview. In any event, Tanner did testify at her trial and stated that she did not go to Barney's the night of Watson's murder, that she could not recall ever going there, that she did not kill Watson, that she did not know who did, and that the knife found at the bar was not hers. 11/21/00 Tr. 26–28.

Although not mentioned in the State's petition, in July 1995, Walters sought arrest warrants for both Cady and Tanner (and Dion Paav, a long-time friend of Cady's). Pet. App. 88a; 11/17/00 Tr. 49. "[T]he prosecutor declined to issue the warrants in the fall of 1995 on the ground that there was insufficient evidence to charge these individuals." Pet. App. 88a. Walters then met with the Chief Assistant Prosecutor John Hallacy in another attempt to get a warrant, but the prosecutor's office again refused. 11/17/00 Tr. 49–50.

When a new prosecutor took office in 1997, Walters tried again. *Id.* at 50. Between 1996 and 1997, the State obtained no new evidence. 11/21/00 Tr. 11. Nonetheless, three years after the new prosecutor took office—by this point, five years after Watson's murder—a warrant issued for Tanner only, charging her with murder, felony murder, and armed robbery. Pet. App. 35a. Neither Cady (the supposed

principal in the felony-murder charge) nor Paav was ever charged.

4. The information (equivalent to an indictment) presented during jury selection charged Tanner as the principal without mentioning an aiding and abetting theory. 11/8/00 Tr. 7–8. And the prosecutor's opening statement made clear that the prosecution's theory was that Tanner stabbed Watson. 11/15/00 Tr. 36 ("Because each time that knife was used the Defendant thought about what she was doing before she used it, before that fatal blow was struck."). During trial, however, the prosecution put forth two theories to support felony murder; one in which Tanner committed the murder herself, and one in which she aided and abetted Cady. Pet. App. 89a.

The State's Case. The sole physical evidence on which the State relied to link Tanner to the crime scene was that she happened to have the same blood type as the diluted blood drop found on the upstairs sink in the contaminated area behind the bar—a blood type shared by millions of people in the country. *Id.* at 27a.

Marie Bard-Curtis, a serology expert, testified that Tanner has blood type B, with a phosphoglucomutase (PGM) subtype of two plus one plus, and that this was the same blood type and PGM subtype shared by the diluted blood drop found on the sink. *Id.* at 17a. Another expert, Megan Clement, "testified as an expert in DNA and serology." *Id.* at 14a. Clement's testimony regarding serology was limited to serological testing in general, not the specific results of the case. *Id.* She noted

that approximately 4% of the African American population of the United States have that specific blood type and PGM subtype combination. *Id.* at 14a–15a. (Tanner is an African American. *Id.* at 17a.) Clement did not know the percentages in other racial groups. 11/16/00 Tr. 174–75. And she agreed that other racial groups and mixed-race individuals would add "millions" more to the number of Caucasian and African Americans with blood type B, PGM subtype two plus one plus. Pet. App. 16a. In other words, Clement's testimony—the State's own evidence—established that *millions* of Americans had the same type of blood that was found on the sink.

All other physical evidence exculpated Tanner and tended to confirm her innocence, even when viewed in the light most favorable to the prosecution. For example, none of the DNA found at the crime scene came from either Tanner or Cady. Indeed, DNA found on Watson's shirt appeared to exonerate both of them: One of the State's expert witnesses, Dr. Nibedita Mahanti, tested Watson's shirt for DNA and found that Watson's bloodied shirt had female DNA on it that matched *neither* Watson nor Tanner. *Id.* at 18a. The female DNA obviously did not match Rob Cady either. *Id.* at 13a. Dr. Mahanti also tested DNA found in blood samples taken throughout the bar where the murder occurred, including on and around the knife. *Id.* at 54a–55a. All of the DNA samples that she was able to test excluded both Tanner and Cady. *Id.* Indeed, another prosecution expert conceded that "it could not have been Ms. Tanner" who left blood on the victim's shirt. 11/16/00 Tr. 159; *see also* Pet. App. 104a. That same expert

"testified that the DNA analysis of the six bloodstains exculpated" Tanner. Pet. App. 105a. Moreover, the State found no trace evidence on Tanner or Cady. *Id.* at 48a–49a. This is significant because Watson struggled with her attacker. A forensic scientist testified that the blood stains and contact smears on Watson's body indicated that blood would have transferred to the perpetrator. 11/16/00 Tr. 65–70, 94–96; *see also* Pet. App. 4a (excessive amount of blood on Watson). And a crime-scene technician testified that, in a struggle, trace evidence would likely have transferred from the victim to the attacker. 11/15/00 Tr. 278; 11/16/00 Tr. 6. Transfer would have been especially likely given undisputed evidence, which came in through the testimony of a forensic pathologist, that Watson's body showed evidence of defensive wounds, including scrapes on her forearms and bruises consistent with a struggle. 11/16/00 Tr. 120–24.

Police seized the clothes Tanner wore the night of the murder and her shoes. *Id.* at 267; 11/17/00 Tr. 14–16. They tested the clothing for trace evidence such as blood, hair, and fibers, but came up empty. Pet. App. 48a. They also failed to match Tanner's shoes to the footprints found outside the basement office. 11/16/00 Tr. 232–34. And when police seized Cady's clothing and searched his car, they likewise found no trace evidence linked to the crime scene. Pet. App. 48a–49a.

Because the physical evidence was either exculpatory (the DNA evidence) or exceptionally weak (the blood-type evidence), the State's case relied almost entirely on testimony from Walters—the second lead detective, who had to go to two

different prosecutors a total of three times to secure an indictment five years after the underlying crime. 11/17/00 Tr. 49–50. In particular, its case rested on Walters' recollection of his interviews with Tanner from more than five years earlier, one of which was not recorded.

The State's petition repeatedly states that Tanner "admitted that the murder weapon—a knife—was hers." Pet. 3; *see also id.* at 7, 17, 23; *see also* 11/16/00 Tr. 261–64. What the State omits is Walters' admission, during cross-examination, that this testimony mischaracterized what the transcript demonstrates she actually said during the recorded interview: Rather than admitting that the murder weapon was hers, Walters conceded, Tanner in fact said only that it "look[ed] like" one of her knives. 11/17/00 Tr. 34–36.

The State's petition also omits the fact that Walters admitted to having "[j]ust one" discussion about a knife during the May 24 interview. This matters because the *only* discussion in the transcript records Tanner *denying* that the knife found at the scene was hers. *Id.* at 31–36. Nor does the State acknowledge that the sole reason a more complete recording of Tanner's interview does not exist is that Walters, as he himself testified, interviewed Tanner in a room with broken audio-video equipment, and did so with the knowledge that Tanner can be difficult to understand. *Id.* at 25–31.

The State also fails to mention Huskins' undisputed testimony that Watson had found a straight-blade knife and had told Huskins' husband that she was going to keep it in her purse, which was

found open behind the bar. 11/15/00 Tr. 205; 11/17/00 Tr. 80–81. Again, the State identified as the murder weapon the straight-blade knife that police found behind the bar. 11/16/00 Tr. 40; 11/21/00 Tr. 44; Pet. App. 26a.

The State's incomplete description of Walters' testimony (and the evidence in general) continues throughout its petition:

- It notes Walters' testimony that Tanner admitted to being in Barney's parking lot between 1 a.m. and 1:30 a.m. the night of the murder. 11/16/00 Tr. 273. As an initial matter, the State misconstrues the record by presenting this supposed "admission" in a paragraph that begins with Tanner's own testimony, making it appear as though *she* testified at trial to having been at Barney's. Pet. 6. She did not—Walters testified that Tanner made this statement during an interview. 11/16/00 Tr. 273–75. And the State does not mention Walters' concession that the *only* recorded testimony on the issue consists of Tanner's denying that she went to the bar that night. 11/17/00 Tr. 53.
- The State stresses Walters' testimony that Tanner told him the perpetrator would have been covered in blood from moving Watson to the basement, and that Tanner asked Walters rhetorically what she would have done with those clothes. 11/16/00 Tr. 277–78. But it does not address Walters' further testimony that police in fact seized the clothing Tanner wore the night of the

murder during a consensual search of Tanner's residence—clothing that contained *no trace evidence*. 11/17/00 Tr. 14–16; Pet. App. 48a. Neither does it note that Watson's body was not moved, making this comment entirely irrelevant. 11/16/00 Tr. 64–67.

- It points to Walters' testimony describing Tanner as saying "that her prints or [Paav's] would be on that [knife] because they had both handled that knife I think approximately three to four weeks prior to the homicide." *Id.* at 266. But it leaves out that Walters told Tanner (falsely) that her fingerprints were on the knife. 11/17/00 Tr. 47. It also leaves out Walters' admission that there was no physical evidence placing Tanner in the bar's basement. *Id.* at 44.

The State additionally called Cady—the uncharged supposed principal—to the stand. Indeed, he was the prosecution's first witness. Pet. App. 89a. But his version of events largely mirrored what he told prosecutors earlier: That he went to Barney's *alone* ("Cady denied that defendant accompanied him to Barney's when he attempted to cash a check on the night in question," *id.* at 91a), and that he wound up cashing his check at Green's Tavern. And though it goes unmentioned in the State's petition, an employee at Green's Tavern confirmed that Cady had cashed a check at Green's Tavern the night of Watson's murder, consumed a beer, and made a call from the bar, just as Cady had testified. *Id.* at 8a. That is completely contrary to the State's entire theory of the case. The employee

also corroborated Cady's testimony that Cady had gone to Green's Tavern by himself. 11/21/00 Tr. 19–20.

The State's petition offers as a motive for the robbery that Tanner and Cady needed cash to buy more crack. Pet. 29. But the State fails to note the undisputed evidence that Cady's household earned more than $110,000 per year, that Cady had access to that money, and that he could use his money as he pleased. 11/15/00 Tr. 118–21. Police never recovered the money from the robbery of Barney's.

Finally, the State's petition largely or entirely ignores several other pieces of exculpatory evidence:

- None of the blood analyzed contained DNA matching Tanner's;
- Tanner's clothes from the night of the murder contained no trace evidence linked to the crime scene;
- Tanner's fingerprints were not on the murder weapon or anywhere at the crime scene;
- The State never matched the footprints in the bar's basement to Tanner despite seizing her shoes; and
- No physical evidence linked Cady to the crime: The DNA found at the scene excluded him, none of the blood at the scene matched his bloodtype, his fingerprints were not identified anywhere, and no trace evidence was found that matched his clothes or car.

Pet. App. 13a–14a, 48a–49a, 95a; 11/16/00 Tr. 232–41, 246–49, 267–68.

The Defense. The defense called Kevin Sage, who testified to seeing the light-colored pickup truck driven by a bearded white male, with a passenger, leave the back lot of Barney's around the time of the murder. *See* 11/21/00 Tr. 47–50. Nancy Chantrene corroborated that testimony with her own eyewitness account of the truck. *See id.* at 51–53. (As mentioned above, Cady drove a car at the time, not a truck, and Tanner did not own a vehicle. 11/17/00 Tr. 21–22.)

Tanner also took the stand in her own defense. Her testimony regarding what happened "the night of March 21 mirrored Cady's." Pet. App. 8a. She stated that Cady came to her house, that they smoked crack together, and that Cady left by himself to go cash a check. *Id.* She further "testified that he returned to her house after cashing the check and then left again around 2:30 or 3:00 a.m." *Id.* She denied going anywhere with Cady except to purchase crack around midnight, and "specifically said she did not go to Barney's." *Id.*

The State attempted to impeach Tanner's credibility. And the State established that she did not remember everything she told police during her interviews five years earlier. 11/21/00 Tr. 29–36. "Other witnesses," however, "corroborated aspects of Cady's and Tanner's accounts of that night." Pet. App. 8a.

Summary. In sum, even when the evidence is viewed in the light most favorable to the State,

nearly all of it pointed to somebody other than Tanner. Specifically:

(1) Police found female DNA in the blood on Watson's shirt, which matched neither Tanner nor Watson;

(2) None of the blood analyzed contained DNA matching Tanner's;

(3) The clothes that Tanner wore the night of the murder contained nothing matching anything found at the crime scene—for example, hairs, fiber, or blood;

(4) Tanner's fingerprints were not on the murder weapon or anywhere at the crime scene;

(5) The State never matched the footprints in the bar's basement to Tanner despite seizing her shoes (or to anybody else). Nor did the State ever match the tire tracks found in Barney's parking lot to any vehicle or identify the truck seen leaving Barney's around the time of the murder; and

(6) The State never identified any physical evidence linking Cady to the murder.

Id. at 13a–14a, 48a–49a, 95a; 11/16/00 Tr. 13–14, 84, 232–41, 246–49, 267–68; 11/17/00 41–44.

In contrast, the following evidence implicated Tanner:

(1) A diluted drop of blood found in a contaminated part of the crime scene contained a blood type shared by Tanner and millions of other people;

(2) Testimony from Walters that Tanner admitted in 1995 to driving to the bar with

Cady on the night of the murder and remaining in the car while he went to cash a check; and

(3) Testimony from Walters that Tanner admitted that the knife found was hers—testimony that Walters partially recanted on cross-examination when he admitted that during his recorded interview of her, she said only that the knife *looked like* hers.

Pet. App. 25a–28a.

The jury initially came back deadlocked. 11/22/00 Tr. 8. But after receiving Michigan's deadlocked-jury instruction, it convicted Tanner on all charges. *Id.* at 8–12. The jury did not specify whether it found Tanner committed felony murder as the principal or as an aider and abettor. Pet. App. 141a n.9. The trial court vacated her convictions for second-degree murder and armed robbery. *Id.* at 130a n.8 (noting that the trial court was required to vacate these convictions under the doctrine of double jeopardy).

5. The Michigan Court of Appeals reversed and remanded the case for a new trial, concluding that the trial court erred in depriving Tanner of expert assistance in the areas of DNA and serology. *Id.* at 123a–30a. The court also held that "the trial court erred in denying defendant's motion for a directed verdict with regard to the prosecution's theory that defendant aided and abetted in the felony murder because the prosecution failed to introduce sufficient evidence establishing Cady's guilt beyond a reasonable doubt." *Id.* at 139a.

The Michigan Supreme Court reversed all aspects of the Court of Appeals' decision. *Id.* at 77a. The

Michigan Supreme Court's opinion provided no analysis of its decision regarding the sufficiency of the evidence for felony murder, mentioning the issue only in a single footnote. *Id.* at 83a n.6. Justice Kelly dissented. *Id.* at 84a (Kelly, J., dissenting).

6. After exhausting her state remedies, Tanner sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, arguing (among other things) that the Michigan Supreme Court unreasonably applied federal law in concluding that the State presented evidence sufficient to support her conviction. The District Court denied her *pro se* petition. *Id.* 74a.

On appeal, Tanner retained appellate counsel. And the Sixth Circuit unanimously ruled in her favor. *Id.* at 29a–30a. It concluded that "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." *Id.* at 29a. In light of the exculpatory evidence, the State's extraordinarily weak inculpatory evidence could not support her conviction—even when all of the evidence was viewed in the light most favorable to the prosecution. Accordingly, the court granted the writ of habeas corpus, setting aside Tanner's conviction and freeing her unconditionally from state supervision. *Id.* at 29a–30a. Because the court awarded Tanner relief based on her sufficiency-of-the-evidence argument, it did not reach her additional argument: That the Michigan Supreme Court unreasonably applied *Ake v. Oklahoma*, 470 U.S. 68 (1985), when it affirmed the trial court's

decision to deny "Tanner's trial counsel funding for a serology or DNA expert." Pet. App. 2a, 29a.

The State then asked the Sixth Circuit to stay its mandate. The Sixth Circuit unanimously denied the request. *Tanner v. Yukins*, No. 15-1691 (6th Cir. Sept. 7, 2017) (order denying motion to stay mandate). Rather than ask this Court to stay the mandate, the State released Tanner from prison and then waited to file a petition for certiorari until the day it was due.

REASONS FOR DENYING CERTIORARI

This Court should deny the State's request for summary reversal. The Sixth Circuit's decision is a factbound application of this Court's AEDPA and *Jackson* precedents. It is of no broader legal importance. What is more, the Sixth Circuit correctly awarded Tanner relief. At the very least, the Sixth Circuit's conclusion is not the type of egregious error that could warrant summary reversal.

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT TANNER IS ENTITLED TO HABEAS RELIEF.

In light of the evidence presented at trial, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 308. Because the Michigan Supreme Court unreasonably applied *Jackson* in concluding otherwise, the Sixth Circuit properly awarded habeas relief to Hattie Tanner.

A. The Sixth Circuit would have committed reversible error had it denied Tanner's petition.

The jury heard undisputed DNA evidence that exonerated Tanner—evidence that effectively established that someone other than Tanner or Cady murdered Sharon Watson. When asked at oral argument below how this evidence could possibly be explained as anything other than exonerating, the State's counsel gave a concise answer: "I don't have an explanation for that." Oral Argument 26:20. That is because there is none. Considering "*all of the evidence* … in the light most favorable to the prosecution," *Jackson*, 443 U.S. at 319, Tanner was entitled to habeas relief.

1. The Sixth Circuit found that "[n]one of the evidence that implicates Tanner is sufficient to overcome the reasonable doubt created by the presence of a unknown woman's blood on the victim's shirt." Pet. App. 29a. Rightly so: The State's own DNA evidence proved that an unknown third party—not Tanner and not Cady—murdered Watson. If a conviction is permitted in light of that evidence, then the phrase "reasonable doubt" no longer has meaning: That evidence identifies Watson's killer, and confirms that it was neither Tanner nor Cady.

Again, the DNA in question came from blood found on Watson's shirt. As the Sixth Circuit unanimously concluded, it is "difficult to overestimate the importance of blood on the shirt of a victim who was stabbed in the chest during a struggle." *Id.* For one thing, the State's own witness

testified that Watson was killed during a struggle. *Id.* at 28a. So that much was not disputed. Neither was it disputed that a witness reported having seen a third party driving away from the bar around the time of the murder—and leaving from behind the bar, where police found fresh tire tracks the next day. 11/15/00 Tr. 251–52; 11/16/00 Tr. 13–24; 11/21/00 47–50. As the Sixth Circuit explained, "it is impossible to see how a rational jury could have found the defendant guilty beyond a reasonable doubt without an explanation for the unknown person's blood on the victim's shirt." Pet. App. 29a. More to the point, no reasonable juror could have found Tanner guilty without such an explanation—an explanation that the State conceded it did not have, Oral Argument 26:20—and no reasonable judge could conclude otherwise.

The irrationality of finding Tanner guilty beyond a reasonable doubt, and of affirming her conviction, is bolstered by additional physical evidence. Specifically: (1) Tanner's DNA did not match any of the blood analyzed from the scene; (2) Tanner's clothes from that night did not have anything on them that matched anything found at the scene—no hair, no fibers, and no blood; (3) Tanner's fingerprints were not on the knife or anywhere at the scene; (4) the State never matched Tanner's shoes, which it seized, to the footprints in the basement where the struggle occurred and Watson was found; and (5) Cady's clothing and car contained no trace evidence linked to the crime scene, and no other physical evidence linked Cady to the scene. Pet. App. 13a–14a, 48a–49a, 95a; 11/16/00 Tr. 232–41, 246–49, 267–68.

In light of all this, no rational person could conclude that the State proved Tanner guilty even by a preponderance of the evidence—never mind beyond a reasonable doubt. No court acting rationally could conclude otherwise. The State's paltry inculpatory evidence, to which this brief now turns, does nothing to alter that conclusion.

2. There are only three pieces of inculpatory evidence in this case. As the Sixth Circuit found, these three pieces of evidence would not permit a rational jury to convict Tanner beyond a reasonable doubt, especially in light of the undisputed exculpatory evidence just addressed. Pet. App. 25a.

The first piece of inculpatory evidence is the single drop of diluted blood found near a sink in a contaminated portion of the crime scene, which matched Tanner's blood type and PGM subtype. "Millions of people share Tanner's blood type and PGM subtype." *Id.* at 27a. Any one of those other millions of people could have contributed the blood. That includes the hundreds of Battle Creek residents that (statistically speaking) had that blood type, the thousands more in the area, and the tens of thousands more in Michigan. Thus, there is an easy answer to the State's rhetorical question, Pet. 24–25, about how many of the millions who shared Tanner's blood type could have committed the murder: "Quite a few." (The State notes that it did not obtain inculpatory evidence against any other potential blood matches, Pet. 24–25, but that is only because it barely looked. Instead, it spent five years fixated on Tanner and Cady, and even then was able to indict *only* Tanner, and *only* after presenting its evidence to a second prosecutor willing to overlook

the first prosecutor's repeated determinations that the evidence of guilt was insufficient to permit a lawful conviction.) The fact that Tanner shared this blood type along with millions of other people would not permit any jury to find her guilty beyond a reasonable doubt. Indeed, the only relevance of the blood type is that it fails to affirmatively *rule out* the possibility that Tanner could have been in the bar. It does not come close to establishing beyond a reasonable doubt that she was in the bar.

Blood type does no more to support a conviction than does any other immutable characteristic that millions of people happen to share. Could a murder conviction be supported entirely, or almost entirely, by evidence that the perpetrator and the defendant had the same skin color? What if they were the same height? The same hair color? What if DNA evidence additionally identified someone other than the defendant, as it did here? How about if there is additional physical evidence pointing to another actor? Could the jury still reasonably convict? According to the State, the answer is "yes," at least if there is any other inculpatory evidence. This Court, unlike the State, ought not resolve a *reductio ad absurdum* by accepting the absurdity.

That is especially so here, because the undisputed evidence calls the integrity of the blood-type sample into question. Before the police found and isolated the blood, bar employees and others lacking any connection to law enforcement had already gathered in the area. "One of them could have bled near the sink that morning." Pet. App. 28a; 11/16/00 Tr. 241–46. Far from establishing guilt or even linking

Tanner to the murder, the blood-type evidence does almost nothing even to put her at the scene.

So the blood-type evidence does nothing more than fail to exclude Tanner. Was the remaining evidence strong enough to support a conviction? No.

The second piece of inculpatory evidence came from Walters, who testified that Tanner told him five years earlier that she was in the Barney's parking lot the night of the murder. Even if the jury accepted this uncorroborated evidence, it is extremely weak because Tanner supposedly admitted only to *remaining in the car* while Cady went into Barney's to cash a check. Pet. App. at 25a. This evidence does not even place her in the building, much less at the murder scene in the basement. "Moreover, even if the evidence placed Tanner in Barney's—which it does not—there is no evidence showing that Tanner murdered Watson while in Barney's." *Id.* (Walters claims that he asked Tanner about the "circumstances" in which "she might" kill, and Tanner "said if that the [sic] bitch treated her bad she would do something to that effect." 11/16/00 Tr. 276–77. Tanner's hypothetical answer to Walters' hypothetical question hardly qualifies as evidence that she *in fact* murdered Watson.) Moreover, "even if the prosecution had proved that Cady murdered Watson—although the prosecution did not indict, let alone convict, Cady—there is no evidence showing that Tanner helped him, either from within Barney's or from the parking lot." Pet. App. 25a–26a. And "mere presence, or even knowledge, that a crime is about to be committed is insufficient to prove guilt under an aiding-and-abetting theory" under Michigan law. *Brown v. Palmer*, 441 F.3d 347, 351

(6th Cir. 2006) (citing *People v. Wilson*, 493 N.W.2d 471, 476 (Mich. Ct. App. 1992)).

This leaves only Walters' testimony that Tanner admitted the knife police found at Barney's was hers. There "are several problems with Walters's testimony about the knife." Pet. App. 26a. The most glaring of these is that Walters admitted during cross-examination that his description of his recorded interview with Tanner was (putting it charitably) a mischaracterization: She did not admit that the knife was hers, but rather admitted to owning a knife that *resembled* that one. *Id.* But even assuming "that Tanner told Walters that the murder weapon was her knife," this "still does not advance the prosecution's case very far." *Id.* at 27a. Walters testified that "Tanner told him that she had last handled the knife three or four weeks before Watson's murder." *Id.* Moreover, other people, including Paav, had access to her knife. *Id.* There is also "no indication that [her knife]was in [Tanner's] possession close to the time of the murder," *id*—for example, police found no fingerprints on the murder weapon.

To sum up, in response to DNA evidence for which the State admitted to having no explanation, *see* Oral Argument 26:20, and a complete absence of DNA or other trace evidence putting Tanner or even Cady at the scene, the State points to: (1) a single drop of blood containing a blood type Tanner shared with hundreds of Battle Creek residents, tens of thousands of Michiganders, and millions of Americans; (2) testimony that Tanner, after seeing a picture of a knife found at the scene, claimed that it was hers; and (3) testimony that Tanner admitted to

being in a car in the parking lot of the bar the night of the murder, while Cady went in. That is not enough to support a murder conviction—especially in light of DNA evidence *affirmatively showing* that someone else almost certainly committed the murder.

3. The State admits that its evidence was "largely circumstantial," that "there were weaknesses in the prosecution's case," and that the evidence "was not overwhelming." Pet. 25, 28. But even that significantly understates the problems with the State's case: It was so permeated with reasonable doubt that no juror, acting rationally, could find Tanner guilty with the "near certitude" that the beyond-a-reasonable-doubt standard requires. *Jackson*, 443 U.S. at 315. The Michigan Supreme Court unreasonably applied *Jackson* in concluding otherwise, and the Sixth Circuit properly granted the writ of habeas corpus.

B. The State's contrary arguments are misguided.

The State's petition focuses on a straw-man argument. It says the case presents the question "[w]hether 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." Pet. i. In fact, the case has nothing to do with that question. The Sixth Circuit granted Tanner relief because the State failed to support its *actual* hypotheses with sufficient evidence. In other words, the DNA found on Watson's body is significant because it confirms

that the *State's* theories of what happened—that Tanner or Cady killed Watson—is wrong. That the DNA points to an alternative hypothesis—that someone else killed Watson—is beside the point.

Although the State had no explanation for the exculpatory DNA evidence in oral argument below, the State now seemingly admits its theory of the case at trial was wrong by proposing that the jury "could have concluded that it was the blood of another accomplice." Pet. 27. But the State did not even attempt to make such an argument at trial or in the court below.

Even now, the State provides no indication as to how this third accomplice would fit into its theory of what happened. In any event, to suggest that the jury could have inferred that Tanner somehow aided and abetted an unknown third accomplice, without any supporting evidence, is to suggest that the jury might have impermissibly speculated in reaching its verdict. Indeed, the State's closing argument absolutely disclaimed and excluded the possibility that Tanner aided and abetted a third accomplice:

> [I]t is the theory of the Prosecution that Hattie Tanner either used that knife that caused the death of Sharon Watson … or had a part in providing the knife that was used, *the only other person that was there* with Rob Cady for the purpose of robbing Barney's and taking Sharon Watson's life.
>
> 11/21/00 Tr. 97 (emphasis added).

Affirming Tanner's conviction on the basis that she aided and abetted a third accomplice—a theory

the State never developed at trial or in the Sixth Circuit, and indeed disclaimed at trial—would "offend[] the most basic notions of due process." *Dunn v. United States*, 442 U.S. 100, 106 (1979); *see also United States v. DiDonna*, 866 F.3d 40, 50 (1st Cir. 2017) ("In dealing with criminal defendants, the government must turn square corners. It cannot use bait-and-switch tactics, relying on one theory of the case in the indictment and during the trial and then—after obtaining a favorable verdict—relying on an entirely different theory to uphold the verdict.").

The State additionally claims the jury could have inferred that "the blood was not related to the murder at all." Pet. 27. This suggestion would be funny were it not being advanced to justify re-imprisoning an innocent woman. In any event, the State did not present any evidence at trial to support the notion that the blood on the murder victim was not related to the murder "at all." No witnesses testified, for example, that someone bled on Watson earlier on the day of the murder or that someone saw Watson with a bloodstain on her clothing before she was killed. In short, the State simply presented no evidence for how the blood (which, based on DNA evidence, is indisputably not the blood of the victim, Tanner, or Cady) got on the victim's clothing. And any rational juror or jurist would consider that as giving rise to reasonable doubt.

The State's attempt at supporting the aiding-and-abetting conviction further illustrates the extent to which Tanner's conviction rests on speculation:

> 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.
>
> *Id.* at 25.

What does it cite in support of that? Nothing, confirming the Sixth Circuit's view that the evidence in this case permitted speculation at most.

The State additionally points to evidence appearing nowhere in the record. The State cites U.S. Census Bureau statistics for Bedford Township in 2000 that were not introduced at trial or in the court below. *Id.* at 7–8. In addition, the State—with no support either in or out of the record—claims that Walters and Adams were taking Tanner to a polygraph examination in connection with the unrecorded interview on June 7, 1995. *Id.* at 17–18. The State's attempt to bolster its concededly weak case with evidence from outside the record further demonstrates Tanner's entitlement to relief.

II. THE SIXTH CIRCUIT'S DECISION CONTAINS NO EGREGIOUS ERROR THAT COULD JUSTIFY SUMMARY REVERSAL.

The State seeks "the strong medicine of summary reversal." *Pavan*, 137 S. Ct. at 2080 (Gorsuch, J., dissenting). However, "[a] summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the

facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). This is not such a case. Rather, the Sixth Circuit honestly and fairly applied this Court's jurisprudence and found the evidence insufficient to support Tanner's conviction.

This Court often declines to review AEDPA decisions awarding relief on sufficiency-of-the-evidence grounds. *See, e.g.*, *Kamienski v. Hendricks*, 332 F. App'x 740, 747–52 (3d Cir. 2009), *cert. denied*, 558 U.S. 1147 (2009); *Juan H. v. Allen*, 408 F.3d 1262, 1276–79 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006). This is so even in cases with stronger evidence supporting a conviction than was presented here. For instance, in *O'Laughlin v. O'Brien*, the state presented evidence that the defendant had smoked crack cocaine and run out of drugs and money the night of the assault, had a key to the victim's apartment, was seen by police acting strangely in the area minutes after the assault, gave differing versions of the night in question to police, had cuts and bruises around his face, and owned the weapon believed to have been used in the assault. 568 F.3d 287, 289–94, 297 n.13, 304 (1st Cir. 2009), *cert. denied*, 558 U.S. 1158 (2010). Nonetheless, the Court of Appeals found the evidence was "far from sufficient" to convict the defendant of assault and burglary because no DNA evidence connected the defendant to the bloody crime scene and other evidence pointed to a third party. *Id.* at 308. This Court denied review—indeed, it refused even to stay the First Circuit's mandate. *See O'Brien v. O'Laughlin*, 557 U.S. 1301 (2009).

The Sixth Circuit's opinion below reflects, at bare minimum, a good-faith and arguably correct application of AEDPA. For this reason, this case is not at all comparable to those cases in which this Court summarily reversed lower courts for awarding AEDPA relief on sufficiency-of-the-evidence grounds. Indeed, the State does not cite a single case where this Court has reversed the granting of a habeas petition where there has been exculpatory DNA evidence. *See, e.g.*, *McDaniel v. Brown*, 558 U.S. 120, 132–34 (2010) (holding DNA collected from semen that *matched defendant*, in addition to other circumstantial evidence, was sufficient to convict defendant of rape) (cited at Pet. 5).

Moreover, the cases the State cites involved much stronger inculpatory evidence than is present here. In *Cavazos v. Smith*, 565 U.S. 1 (2011), this Court upheld a conviction based on the defendant's admission that she shook the victim (a baby) and three experts' testimony that the baby died of shaken baby syndrome. *Id*. at 1–7. In *Coleman v. Johnson*, 566 U.S. 650 (2012), the defendant (charged as an accomplice and co-conspirator) witnessed a heated argument between the victim and the killer (the defendant's friend), was present when the killer repeatedly threatened to kill the victim, and was seen by multiple witnesses assisting with the crime. *Id*. at 653–54. Finally, in *Parker v. Matthews*, 567 U.S. 37 (2012), the defendant "did not contest that he killed the two victims," and only disputed whether he had the required culpable mental state, of which the Court noted there was "ample evidence." *Id*. at 38–39, 43. The evidence in those cases was far more robust than it is here, and

none of those cases involved anything like the exculpatory DNA evidence in this case.

CONCLUSION

This Court should deny the State's petition for a writ of certiorari.

February 14, 2018

Respectfully submitted,

BENJAMIN M. FLOWERS
Counsel of Record
J. TODD KENNARD
NATHAN BONINGER
JONES DAY
325 John H. McConnell
Blvd, Suite 600
Columbus, OH 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
bflowers@jonesday.com

SHAY DVORETZKY
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 879-3939

Counsel for Respondent