No. 24A419

IN THE
Supreme Court of the United States

CYNTHIA DAVIS, WARDEN,
Petitioner,

v.

DAVID M. SMITH,
Respondent.

OPPOSITION TO APPLICATION TO STAY OR RECALL THE SIXTH'S CIRCUIT MANDATE PENDING WARDEN CYNTHIA DAVIS'S PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The police officer investigating the beating and robbery of Quorteny Tolliver told her that he "found out who did this to [her]." App. 1, 3. He presented her with a single photograph: a photograph of Respondent David Smith. App. 1 The officer told Tolliver that Smith had committed the crime. *Id.* He told her that Smith wanted her dead, and that Smith previously had been convicted of attempted murder. *Id.* He told her that Smith had disparaged her. App. 3. He told her he had other evidence that Smith had committed the crime. App. 3-4. As the Court of Appeals explained, "[the officer] did not merely *suggest* that Smith was the perpetrator, but rather explicitly *informed* Tolliver several times that Smith committed the crime and tried to kill her." App. 4. The officer himself admitted as much at the suppression hearing. App. 4 n.2. Despite all of this, Tolliver did not identify Smith as her assailant. App. 3-5. It was not until months later, when Tolliver was sentenced to probation on criminal charges, that she positively identified Smith for the first time. App. 5. Smith moved to suppress Tolliver's identification of him based on the corruptive influence of law enforcement's unduly suggestive procedures, but the state trial court denied the motion and the state appellate court affirmed the denial. App. 1. Smith filed a timely petition for habeas relief.

In an unpublished opinion, the Sixth Circuit held that "Ohio courts impermissibly excused this flagrant violation of Smith's right to due process. Not even

AEDPA deference can insulate such an unreasonable application of Supreme Court precedent from proper review and reversal." App. 26. The Court of Appeals remanded the case "with instructions that the district court issue Smith a writ of habeas corpus unless the State proceeds, within 180 days, to prosecute Smith in a new trial not utilizing Tolliver's identification." *Id.* One day before the mandate was set to issue, the State filed a motion in the Court of Appeals to stay the issuance of the mandate. *See* App. 1; No. 23-3604 (6th Cir. Aug. 20, 2024), ECF No. 23; *see also* Fed. R. App. P. 40(a)(1), 41(b). The panel unanimously denied the stay motion on September 4, 2024, in an order of the court without opinion. App. 37. Nearly two months later, on October 24, 2024, the state filed the present motion asking the Supreme Court to take the extraordinary step of recalling and staying the Court of Appeals' mandate pending the disposition of its petition for certiorari in this case.

The state's application should be denied. The state must meet a high burden for recall and stay of the Court of Appeals' mandate. Stay relief is granted only in extraordinary circumstances, and the heavy burden of persuasion is on the applicant. *See, e.g. Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers); *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). The State has the burden of establishing that the Court is likely to "grant certiorari" in the case, that the Court is "likely to reverse the judgment below," and that there is "a likelihood that irreparable harm will result from the denial of a stay."

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). The State's application in this case fails on all counts.

First, the State has failed to meet its heavy burden of showing that this Court is likely to grant certiorari and likely to rule in the State's favor. This case does not meet any of this Court's criteria for certiorari. The Court of Appeals' decision in this case is unpublished. The case does not implicate any circuit split or meet any of the Court's other certiorari criteria. *See* Sup. Ct. R. 10. The case does not ask the Court to resolve an unsettled question of law. The State's petition merely argues that the lower court reached the wrong result on the facts of the case. And in doing so, it seeks review of fact-bound questions that the Court of Appeals carefully considered in its unpublished opinion in this case.

The State has failed to meet its high burden for other reasons, too. This case involves a unique fact pattern, given the extraordinarily suggestive and problematic way that the officer went about securing the eyewitness identification that it used to convict Smith. This is far from a typical eyewitness identification case where an officer is alleged to have made a single misstep in securing an eyewitness identification. This also is far from a typical case because the eyewitness *failed to identify* someone she previously had met – even when confronted with his name, with his picture, and with a barrage of incriminating statements about him. "[M]erely referring to [the officer's] procedures as 'impermissibly suggestive' is a gross understatement, given the manipulative nature of [the officer's] tactics that

'include[ed] repeated attempts to paint Smith in a negative light and describe him as the attacker.'" App. 11 (citation omitted). Indeed, the officer's methods in this case go far beyond the fact patterns in this Court's precedents on witness identifications. And it is telling that the State carefully avoids raising these facts in its Application, instead saying blandly that the case "arises from sub-par policework." Application at 1.

The Court of Appeals did not err in concluding that the state court's decision was contrary to and an unreasonable application of this Court's precedents. Contrary to the allegations in the petition, the Court of Appeals concluded that relief was warranted only after appropriately applying AEDPA deference in this case. The Court of Appeals appropriately deferred to the findings of the state courts. The Court of Appeals then faithfully applied AEDPA deference in concluding that this was the rare case that meets the AEDPA standard, because the state court had unreasonably applied this Court's precedents on eyewitness identifications. As the Court of Appeals explained, "[t]he state court's failure to suppress this identification testimony was an objectively unreasonable application of Supreme Court precedent, thus clearing the highly deferential bar imposed by AEDPA." App. 23. Accordingly, the state's petition merely seeks pure error correction, and error correction is unwarranted here.

Second, far from meeting its burden of establishing irreparable harm necessitating this extraordinary relief, the State's petition belies the need for relief.

As this Court's precedents make clear, the mere fact the State will expend resources preparing for retrial is insufficient. *See, e.g., Renegotiation Bd. v. Bannercroft Clothing Co.*, 415 U.S. 1, 24 (1974). The State concedes that this Court will have acted on its petition for certiorari well in advance of the retrial deadline. *See* Application at 13. And the State's own actions undercut its claim of prejudice. It waited until the day before the mandate was set to issue to seek a stay of the mandate from the Court of Appeals, and then waited nearly two months after the Court of Appeals denied that motion to file this Application. *See* App. 1, 37; No. 23-3604 (6th Cir. Aug. 20, 2024), ECF No. 23; *see also* Fed. R. App. P. 40(a)(1), 41(b). And to the contrary, Smith would be prejudiced by the requested stay, as any delay in his retrial or release prolongs his wrongful incarceration.

STATEMENT

A. Factual Background

Quortney Tolliver was attacked with a hammer in her mobile home on October 16, 2015. App. 2. Following the attack, she was hospitalized and placed in a medically induced coma because of her head injuries. *Id.* Police met with Tolliver for the first time about two weeks after the attack, on November 2, 2015. *Id.* Tolliver communicated through hand signals and writing, as her injuries prevented her from speaking. *Id.* Police showed her a photo array of 24 black men, and she did not signal that she recognized any of the men in the array. *Id.* This array did not include a photo

of Smith. *Id.* When asked by police if she had any memory of the incident, Tolliver replied that she had none. *Id.*

The second meeting took place more than a month later, on December 9, 2015. App. 3. By this time, Smith had become the police's lead suspect. *Id.* Lieutenant Greg Johnson, Chief of Detectives of the Portage County Sherriff's Office, conducted the interview with Tolliver. *Id.* Johnson surreptitiously recorded the conversation with Tolliver. *State v. Smith*, 2018-Ohio-4799, 2018 WL 6313398, ¶ 20 (Ohio Ct. App.). The audio of that conversation was played at the suppression hearing, and a transcript of it was admitted as an exhibit. *Id.* Johnson made the following statements during that meeting:

- Upon entering Tolliver's room, Johnson told Tolliver that he "found out who did this to [her]." App. 3; *Smith*, 2018 WL 6313398, ¶¶ 13, 21.
- Johnson showed Tolliver a single photo: a photo of Smith. He told Tolliver that the person was David Smith and asked if she recognized him. App. 3; *Smith*, 2018 WL 6313398, ¶¶ 13, 21.
- Johnson told Tolliver that he had already interviewed Smith, and that Smith did not "have anything good to say about [Tolliver]." App. 3; *Smith*, 2018 WL 6313398, ¶ 22.
- Johnson told Tolliver that Smith wanted her dead, and that Smith had previously done time in prison for attempted murder. He told Tolliver that

Smith was "very violent" and "cold-hearted." He explained to Tolliver that Smith believed that Tolliver deserved to be attacked, and that Smith had left Tolliver to die. App 4; *Smith*, 2018 WL 6313398, ¶¶ 23-24, 27.

- Johnson told Tolliver that they found Smith's DNA inside of her mobile home. He said to Tolliver, "how the heck did [Smith's] DNA get in there unless the DNA fairy [placed it in there], and there's no such thing as a DNA fairy." App 4; *see also Smith*, 2018 WL 6313398, ¶ 27.

- Johnson told Tolliver that "there's some things I'm going to tell you, [and there's] some things I can't because I don't want this to have a bad effect on the trial." App. 4.

- Johnson told Tolliver that he was going to "get Smith arrested and would let her know right away when he did so." App. 4.

- Johnson subsequently admitted in the suppression hearing that he explicitly told Tolliver that Smith was the person who attempted to murder her with a hammer. App. 4 at n.2; *see also* Transcript of Suppression Hearing at 78-79, 82-83, 120, Case No. 5:20-cv-00438-JPC (N.D. Ohio Aug. 11, 2020), ECF No. 10-1.

Despite all of this, Tolliver did not identify Smith as her attacker at any time during this conversation. App. 4-5. When Johnson initially presented her with the photo, she said that she did not recognize the man in the photo, asking who he was.

App. 3. She eventually told Johnson that she had met Smith at least once before, and that she knew him through a mutual friend. *Id.* Tolliver maintained throughout the interview that "she barely knew Smith, had no problems with Smith, and could not remember the day of the attack at all." App. 4. Toward the end of the conversation – after Johnson had shown her a picture of Smith, told her Smith had a history of attempted murder, and told her that Smith committed the crime against her – Tolliver said she'd "had a dream that a bald black man had maced her and then assaulted her with a hammer." App. 5 (footnote omitted). But again, Tolliver did not identify Smith as her assailant at any time during this conversation. *Id.*

Johnson talked to Tolliver again nearly three months later, on February 29, 2016. App. 5. Tolliver had just been sentenced to probation in her own drug trafficking case. *Id.* During this conversation, Tolliver told Johnson that after replaying her dream in her head, she was now "one hundred percent sure" that it accurately reflected the attack. *Id.* Tolliver said that, on the morning of the attack, Smith had been scheduled to come over to "take her to Cleveland for a drug deal, so Smith had to be her assailant." *Id.* Tolliver also stated for the first time that she knew all along that Smith was her assailant. *Id.*

B. State Court Proceedings

Prior to trial, Smith moved to suppress Tolliver's identification of him as her assailant, based on the unduly suggestive procedures used by law enforcement to obtain it. App. 1, 5. Smith argued that Johnson's actions were so impermissibly

suggestive as to create a substantial risk of misidentification. App. 5. Tolliver testified at the suppression hearing that she had misled Johnson during the December 9, 2015, interview, because she had known who was depicted in the photo. App. 6. Tolliver testified that she had not wanted her mother, who was in the room during that interview, to find out that she was dealing drugs. *Id.* Tolliver stated during the suppression hearing that her conclusions about Smith came from her dreams and independent recollection. *Id.*

The trial court denied Smith's motion to suppress. App 6. The trial court stated that Johnson's identification procedures were not suggestive because Smith was not a stranger to Tolliver. *Id.* "After being presented with Tolliver's eyewitness identification during trial, a jury convicted Smith of attempted murder, felonious assault, aggravated robbery, and aggravated burglary." App. 1.

On appeal, the Ohio appellate court disagreed with the trial court's conclusion about Johnson's procedures, instead concluding that they were "impermissibly suggestive and unnecessary." *Smith*, 2018 WL 6313398, ¶ 37. The Ohio appellate court opinion emphasized that, *before* Tolliver identified Smith as her attacker, Johnson: (1) "made repeated disparaging statements about Smith;" (2) "said that Smith's DNA was found in Tolliver's bathroom sink mixed with her blood"; (3) "for all practical purposes told Tolliver who her attacker was"; (4) "described him as cold-blooded and having a violent criminal history"; and (5) "told Tolliver that Smith wanted her dead and that he thought she deserved her injuries." *Id.* ¶¶ 37, 45.

The Ohio appellate court nevertheless held that the admission of the identification did not violate Smith's due process rights. *Smith*, 2018 WL 6313398, ¶ 48. The majority opinion acknowledged that, in *Neil v. Biggers*, 409 U.S. 188 (1972), this Court set forth factors to be considered in evaluating the likelihood of a misidentification when police have used impermissibly suggestive and unnecessary tactics. *Smith*, 2018 WL 6313398, ¶ 37. Instead of conducing this analysis, however, the majority opinion relied on an Ohio decision for the proposition that "[a] strong showing of reliability can arise from the fact that a victim knew the perpetrator of a crime before the crime was committed." *Id.* ¶ 47 (quotation marks omitted). The majority thus held that the identification was reliable because Tolliver had previously known Smith, had time to view her attacker, and ultimately identified Smith. *Id.* ¶¶ 47-48. Judge Grendell dissented from the majority decision, concluding that the improperly suggestive identification procedure resulted in a completely unreasonable identification applying the factors set forth in *Biggers*. *Id.* ¶¶ 98, 102 (Grendell, J., dissenting).

Smith timely appealed to the Ohio Supreme Court, and the Ohio Supreme Court declined jurisdiction. App 8.

C. Federal Habeas Proceedings

Following a direct appeal and exhaustion of his state court remedies, Smith filed a timely petition for a writ of habeas corpus in federal court pursuant to 28

U.S.C. § 2254. App. 1-2. The district court denied Smith's habeas petition and granted Smith a certificate of appealability. App. 8.

The Sixth Circuit reversed in an unpublished opinion, holding that Smith is entitled to habeas relief on his claim that his due process rights were violated by the admission of the identification. Deferring to the factual findings of the state courts, the panel majority concluded that the "pre-trial identification procedure … vastly exceeds what the Supreme Court has previously viewed as 'unnecessarily suggestive.'" App. 11. The panel majority noted that the state courts had "fail[ed] to engage in the balancing test mandated by clearly established Supreme Court precedent." App. 25. And again deferring to the factual findings of the state courts, the panel majority concluded that a "faithful application of the *Biggers* factors to this case demands a different outcome." App. 14. The panel majority also concluded that the state court's opinion was in direct contravention of this Court's decision in *Foster v. California*, 394 U.S. 440 (1969), because "Johnson's coercive and suggestive tactics 'made it all but inevitable that [the victim] would identify petitioner whether or not he was in fact "the man."'" App. 24 (*quoting Foster*, 394 U.S. at 443) (alteration in original). The panel majority thus held that "[n]ot even AEDPA deference can insulate such an unreasonable application of Supreme Court precedent from proper review and reversal." App. 26. Judge Thapar dissented from the majority opinion.

The Court of Appeals remanded the case with instructions that the district court issue Smith a writ of habeas corpus unless the State proceeds, within 180 days, to prosecute Smith in a new trial not utilizing Tolliver's identification. App. 26. Smith did not seek rehearing or rehearing en banc from the Sixth Circuit. The Sixth Circuit issued its unpublished decision in this case on July 31, 2024. *See* App. 1. On August 20, 2024, the state filed a motion with the Sixth Circuit seeking to stay the issuance of the mandate. *See* No. 23-3604 (6th Cir. Aug. 20, 2024), ECF No. 23. The Sixth Circuit panel unanimously denied that motion on September 4, 2024. *See* App 37. The mandate issued on September 12, 2024. *See* App. 38.

STANDARD OF REVIEW

"A Justice of this Court will grant a stay pending appeal only under extraordinary circumstances." *Ruckelshaus*, 463 U.S. at 1316 (Blackmun, J., in chambers); *see also Williams,* 442 U.S. at 1311-12 (Stevens, J., in chambers). "Denial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers).

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S.

at 190; *see also Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). The applicant faces the "heavy burden" of making each of these showings. *Williams,* 442 U.S. at 1311 (Stevens, J., in chambers).

ARGUMENT

I. The Court is Unlikely to Grant Certiorari and Reverse the Grant of Habeas Relief.

The State has failed to meet its heavy burden of showing that the Court is likely to grant certiorari and likely to rule in the State's favor.

First, this case does not meet any of this Court's criteria for certiorari. The case does not implicate any circuit split or meet any of the Court's other certiorari criteria. *See* Sup. Ct. R. 10. The case does not ask the Court to resolve an unsettled question of law. The State's petition merely argues that the lower court reached the wrong result on the facts of the case. And in doing so, it seeks review of fact-bound questions that the Court of Appeals carefully considered in correctly deciding this case. Indeed, the panel's decision in this case is unpublished, and the State neither sought rehearing nor rehearing en banc in this case.

Second, this case involves a unique fact pattern, given the extraordinarily suggestive and problematic way that the officer went about obtaining the eyewitness identification. Had Johnson merely shown Tolliver the single photo of Smith, the identification procedure would still have been improperly suggestive. *See Simmons v. United States*, 390 U.S. 377, 384 (1968); *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977).

But Johnson's tactics in this case went far beyond those in this Court's precedents regarding eyewitness identifications. As the state appellate court noted, *before* Tolliver identified Smith as her attacker, Johnson also (1) "made repeated disparaging statements about Smith;" (2) "said that Smith's DNA was found in Tolliver's bathroom sink mixed with her blood"; (3) "for all practical purposes told Tolliver who her attacker was"; (4) "described him as cold-blooded and having a violent criminal history"; and (5) "told Tolliver that Smith wanted her dead and that he thought she deserved her injuries." *Smith*, 2018 WL 6313398, ¶¶ 37, 45. Thus, "merely referring to [the officer's] procedures as 'impermissibly suggestive' is a gross understatement, given the manipulative nature of [the officer's] tactics that 'include[ed] repeated attempts to paint Smith in a negative light and describe him as the attacker.'" App 11. The unique and egregiously problematic fact pattern in this case make the case a poor candidate for certiorari review.

Third, the Court of Appeals did not err in concluding that the state court's decision was contrary to and an unreasonable application of Supreme Court precedent. As was the case in *Foster v. California*, 394 U.S. 440 (1969), "the suggestive elements in this identification procedure made it all but inevitable that [the eyewitness] would identify [the police's suspect] whether or not he was in fact 'the man'" – and as a result, "so undermined the reliability of the eyewitness identification as to violate due process." *Id.* at 443 (finding due process violation where eyewitness shown two lineups in which the police's suspect was the only person

with certain identifying characteristics in the first lineup, and the police's suspect was the only person to appear in both lineups). Here, the officer did not just "mak[e] it inevitable" that Tolliver would identify Smith as "the man," although he certainly did that. By his own admission in the suppression hearing, he *told* Tolliver that Smith had attacked her. App. 4 n.2.

An eyewitness identification that is the result of an improperly suggestive police procedure cannot be used in evidence, unless the eyewitness nevertheless is sufficiently reliable. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). The Court in *Biggers* held that "the factors to be considered in evaluating the likelihood of misidentification include [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witnesses' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation." *Id.* at 199-200.

After a court assesses these factors going to reliability, "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself." *Manson*, 432 U.S. at 114. Thus, the reliability inquiry ascertains whether the identification procedure was so suggestive as to be "conducive to" or "created" a substantial likelihood of misidentification. *Stovall v. Denno*, 388 U.S. 293, 302 (1967), *abrogated on other grounds by United States v. Johnson*, 457 U.S. 537 (1982); *Perry v. New Hampshire*, 565 U.S. 228, 239 (2012). "Where the 'indicators of [a witness'] ability to

make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion, the identification should be suppressed." *Perry*, 565 U.S. at 239 (alterations in original) (*quoting Manson*, 432 U.S. at 116).

The Court of Appeals did not err in holding that the State appellate court unreasonably applied this Court's precedents. In this case, "on one side of the balancing scale is a pre-trial identification procedure that vastly exceeds what the Supreme Court has previously viewed as 'unnecessarily suggestive.'" App. 11. The Court of Appeals thus correctly concluded that "[i]n direct contravention of the Supreme Court's holding in *Foster*, Johnson's coercive and suggestive tactics 'made it all but inevitable that [the victim] would identify [the police's suspect,] whether or not he was in fact "the man."'" App. 24 (first bracket in original); *id.* (recognizing that "even worse than the identification procedure [used] in *Foster*, the police disparaged Smith to Tolliver, intentionally painting a picture of a repeat offender who had served time for attempted murder and wanted Tolliver dead."). The Court of Appeals then carefully applied the factual findings of the state courts, and carefully applied this Court's precedents in *Biggers* and its progeny. And only after doing so, it held that "[a]lthough 'deference and latitude' must be afforded to the state court in accordance with AEDPA, fair-minded jurists could not disagree that the scant indicia of reliability in this case simply cannot outweigh the egregious and highly influential identification procedure utilized by Johnson." *Id.*

As the Court of Appeals correctly noted, the State appellate court declined to conduct the balancing test mandated by the *Biggers* and other clearly established precedent of this Court. *See* App. 14. The state court of appeals instead relied on a state court opinion for the proposition that "[a] strong showing of reliability can arise from the fact that a victim knew the perpetrator of a crime before the crime was committed." 2018 WL 6313398, ¶ 47. This Court has not carved out such an exception to its precedents on the appropriate evaluation of eyewitness identification. Moreover, the undisputed facts of this case are that the eyewitness *failed to identify* someone she had met in-person before – even when confronted with his name, with his picture, and with a barrage of incriminating statements about him. This case therefore is a far cry from the circuit cases upon which the State applies in its Application. *See, e.g.*, *United States v. Ross*, 72 F.4th 40, 49-50 (4th Cir. 2023) (applying *Biggers* analysis to assess reliability of in-court identification by witness who had a "months-long intimate relationship" with defendant). And this case would be a poor vehicle for the Court to consider this issue, in any event.

Additionally, while the State's Application discusses *other* evidence against Smith in the case, *see* Application at 4-5, that is irrelevant to the reliability analysis under this Court's precedents. Rather, as this Court's precedents make clear, the weight of the *other* evidence against the defendant in the case does not come into play in the *Biggers* analysis. *See, e.g.*, *Manson*, 432 U.S. at 116 (noting that other evidence against the defendant in the case "plays no part in our analysis"). Accordingly, the

Court of Appeals correctly held that the state court of appeals unreasonably applied this Court's precedents on eyewitness identifications.

Finally, contrary to the allegations in the Application, the Court of Appeals concluded that relief was warranted only after appropriately applying AEDPA deference in this case. As this Court has recognized, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review" and "does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Brumfield v. Cain*, 576 U.S. 305, 314 (2015). The Court of Appeals appropriately respected and deferred to the findings of the state court. And the Court of Appeals then faithfully applied AEDPA deference in concluding that this was the rare case that meets the AEDPA standard. Indeed, the Court of Appeals correctly identified that the due process error in this case was an "extreme malfunction" of the criminal justice system. App. 25 (*quoting Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

After concluding that the identification procedure was unduly suggestive, the Court of Appeals went on to analyze whether the identification was nevertheless reliable under this Court's precedents. *See* App. 12-25. But the Court of Appeals did not stop there. Understanding the heightened bar that AEDPA imposes, the Court of Appeals went on to "examine all theories that could have supported the state court's conclusion." App. 19; *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("Under § 2254(d), a habeas court must determine what arguments or theories supported or,

as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). The Court of Appeals did not "invoke[] AEDPA in name only" as alleged by the State, *see* Application at 11, but recounted the case-specific facts that the state court cited in denying Smith relief and methodically explained why the state court's reasoning unreasonably applied this Court precedent. *See* App 23-25.

The State incorrectly faults the Court of Appeals for criticizing the state court's reasoning instead of its judgment. *See* Application at 12. The Court of Appeals' analysis conforms with this Court's guidance regarding AEDPA review. In federal review of state court decision-making, this Court's "cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). "Deciding whether a state court's decision 'involved' an unreasonable application of federal law…requires the federal habeas court to train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (internal quotation marks omitted). In this case, the state court's failure to balance reliability and suggestibility is not, as the State argues, simply poor opinion writing, but it instead runs counter to what this Court has held that Due Process demands.

Nor is there any merit to the State's argument that this Court's precedents do not speak to the facts of this case, *see* Application at 11. AEDPA does not require an

"identical factual pattern before a legal rule must be applied." *White v. Woodall*, 572 U.S. 415, 427 (2014) (*quoting Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). A reviewing court's charge is to apply Supreme Court precedent that has been "squarely established" to the facts of each case. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *see also Harrington*, 562 U.S. at 102. This Court's precedents make clear that admission of a witness identification violates due process when, as here, it was obtained using extremely coercive means, without sufficient factors of reliability identified by the Court. Under § 2254(d)(1)'s "unreasonable application" clause, it was proper for the Court of Appeals to grant relief because the state court unreasonably applied established Supreme Court precedent to the facts of Smith's case.

II. The State Cannot Prove Irreparable Harm Absent a Stay.

The Sixth Circuit already unanimously denied the State's motion for a stay of the mandate in this case. *See Whalen v. Roe*, 423 U.S. 1313, 1317 (1975) (Marshall, J., in chambers) ("Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." (quotation marks omitted)); *see also Williams*, 442 U.S. at 1312, 1315 (Stevens, J., in chambers).

Far from meeting its burden of establishing irreparable harm necessitating the extraordinary relief from this Court of a recall and stay of the mandate, the State's Application belies the need for relief. The State concedes that this Court will have

acted on its petition well in advance of the retrial deadline. *See* Application at 13. The State also concedes that it seeks a recall and stay of the Sixth Circuit's mandate because the State will be spending time and resources preparing for a retrial in this case. *See id.* As this Court's precedents make clear, however, the mere fact the State will expend resources preparing for litigation is insufficient to meet its high burden of establishing irreparable harm. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough."); *Renegotiation Bd.*, 415 U.S. at 24 ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

The state's own actions also undercut its arguments of prejudice. The State waited until the day before the mandate was set to issue to seek a stay of the mandate from the Sixth Circuit. *See* App. 1; No. 23-3604 (6th Cir. Aug. 20, 2024), ECF No. 23; *see also* Fed. R. App. P. 40(a)(1), 41(b). And when the Sixth Circuit unanimously denied that motion, it waited nearly two more months to file this Application asking this Court for the extraordinary relief of recalling and staying the mandate. *See* App. 37. These delays further belie its assertion of irreparable harm necessity extraordinary relief. *See, e.g.*, *Ruckelshaus*, 463 U.S. at 1318 (Blackmun, J., in chambers) ("While certainly not dispositive, the Administrator's failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay."); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J.,

in chambers) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm"); *see also King*, 567 U.S. at 1303 (Roberts, C.J., in chambers).

The State's reliance on *Brown v. Davenport*, 141 S. Ct. 1288 (2021), *see* Application at 13, similarly is misplaced. In that case, the state had a far more compelling argument on the likelihood of a grant of certiorari. The Sixth Circuit in that case had denied rehearing en banc by a vote of 8-7. *Brown v. Davenport*, 596 U.S. 118, 126 (2022). One of the dissenting opinions from the denial of rehearing en banc observed that the panel's decision conflicted with the decisions of four other circuits. *Id.* Court ultimately granted certiorari in this case "to resolve the conflict in the federal courts of appeals." *Id.* at 126-27. None of these factors are present in this case.

Finally, contrary to the State's assertions, Smith would be prejudiced by the requested stay. Any delay in his retrial or release prolongs his wrongful incarceration. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993) ("Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." (alteration in original) (quotation marks omitted)).

CONCLUSION

For all of these reasons, the State's application to recall and stay the Court of Appeals' mandate should be denied.

Respectfully submitted,

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