No. 24-421

IN THE
Supreme Court of the United States

CYNTHIA DAVIS, WARDEN,
Petitioner,

v.

DAVID M. SMITH,
Respondent.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is undisputed that the police officer in this case presented an eyewitness with a single photo of Respondent, told her Respondent's name, repeatedly told her that Respondent was the person who attacked her, and repeatedly said other incriminating things about Respondent to her. Despite all of this, the eyewitness did not identify Respondent. Months later, right after the eyewitness was sentenced to probation on her own criminal charges, she again met with the same police officer and identified Respondent for the first time.

The Court of Appeals held that Respondent was entitled to a writ of habeas corpus, or in the alternative a retrial, on his claim that the use of this eyewitness identification in his criminal trial violated his due process rights. The Court of Appeals applied AEDPA deference, holding that the state court's decision allowing the eyewitness identification into evidence was an objectively unreasonable application of this Court's precedents.

The question presented is:

Should this Court reject Petitioner's request to overrule the fact-bound decision of the Court of Appeals that the state court's decision was contrary to or an unreasonable application of this Court's precedents?

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BRIEF IN OPPOSITION

The police officer investigating the beating and robbery of Quorteny Tolliver told her that he "found out who did this to [her]." Pet. App. 4a. He presented her with a single photograph: a photograph of Respondent David Smith. *Id.* at 1a. 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. *Id.* at 4a. He told her he had other evidence that Smith had committed the crime. *Id.* at 5a. 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." *Id.* The officer himself admitted as much at the suppression hearing. *Id.* at 5a n.2.

Despite all of this, Tolliver did not identify Smith as her assailant. Pet. App. 5a-6a. It was not until months later, when Tolliver was sentenced to probation on criminal charges, that she positively identified Smith for the first time. *Id.* at 6a. 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. *Id.* at 8a-9a. 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." Pet. App.

31a-32a. Deferring to the factual findings of the state courts, the Court of Appeals concluded that the "pre-trial identification procedure … vastly exceeds what the Supreme Court has previously viewed as 'unnecessarily suggestive.'" Pet. App. 14a. And again deferring to the factual findings of the state courts, the Court of Appeals held that a faithful application of this Court's precedents "demands a different outcome." *Id.* at 17a. 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." *Id.* at 32a.

Nothing in this case warrants certiorari review. This case does not meet any of this Court's criteria for certiorari. The Sixth Circuit's opinion was 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 correctly deciding this case. Indeed, the State neither sought rehearing nor rehearing en banc in this case, and the Court of Appeals panel unanimously denied the State's application to stay the mandate in this case.

Additionally, while the petition seeks fact-bound error correction, 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. The identification techniques used here go far beyond those that this Court has held are "unnecessarily suggestive." Pet. App. 14a. In this Court's leading case on the subject, *Foster v. California*, 394 U.S. 440 (1969), the Court found a due process violation based on officers' unduly suggestive lineup practices alone. *See id.* at 442-43. In this case, in contrast, "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.'" Pet. App. 13a (citation omitted). Accordingly, "[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."'" *Id.* at 30a (second alteration in original) (citation omitted). It is telling that the State in its Petition carefully avoids mentioning *any* of the suggestive or inappropriate statements by Johnson. *See, e.g.,* Petition at 6-7, 10; *see also Perry v. New Hampshire*, 565 U.S. 228, 241 (2012) ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances … is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.").

The Court of Appeals carefully applied the factual findings of the state courts, and carefully applied this Court's precedents about eyewitness identifications. 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" used by the officer in this case. Pet. App. at 30a. And while the State now relies on *other* evidence in the case, *outside* the knowledge of the eyewitness, *see* Petition at 1-2, 5-6, 15, this Court's precedents explain that other evidence against the defendant in the case "plays no part" in the reliability analysis. *See, e.g., Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

And finally, 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." Pet. App. 28a. Not only does the state's petition seek pure error correction, but there is no error here.

STATEMENT OF THE CASE

I. Factual Background

Quortney Tolliver was attacked with a hammer in her mobile home in Portage County, Ohio, on October 16, 2015. Pet. App. 2a. 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. Pet. App. 3a. 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.* Police asked Tolliver if she had any memory of the incident, and she replied that she had none. *Id.* At this time, she also wrote a note to her mother that asked, "who did this to me?" *Id.*

The second meeting took place more than a month later, on December 9, 2015. Pet. App. 3a. By this time, Smith had become the principal suspect. Lieutenant Greg Johnson, Chief of Detectives of the Portage County Sherriff's Office, conducted the interview with Tolliver. *Id.* at 3a-4a. 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 admitted at the suppression hearing in this case that he met with Tolliver "to confirm the identity of a person that [they] had identified as the suspect in the incident." Pet. App. 3a (quoting testimony from the suppression hearing). 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]." Pet. App. 4a; *Smith*, 2018 WL 6313398, ¶¶ 13, 21.
- Johnson showed Tolliver a single photo: a large photo of Smith. He told Tolliver that the person was David Smith and asked if she recognized him. Pet. App. 4a; *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]." Pet. App. 4a; *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. Pet. App. 5a; *Smith*, 2018 WL 6313398, ¶¶ 23-24, 27.
- Johnson told Tolliver that Smith "'left her for dead' at least three times, and that he was 'cold-blooded' twice." *Smith*, 2018 WL 6313398, ¶ 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." Pet. App. 5a; *see also Smith*, 2018 WL 6313398, ¶¶ 27, 37.
- 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." Pet. App. 5a.
- Johnson told Tolliver that he was going to "get Smith arrested and would let her know right away when he did so." Pet. App. 5a.
- 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. Pet. App. 5a 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. Pet. App. 5a-6a. When Johnson initially presented her with the photo, she said that she did not recognize the man in the photo, asking who he was. *Id.* at 4a. 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." *Id.* at 5a-6a. 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." *Id.* at 6a (footnote omitted). But again, Tolliver did not identify Smith as her assailant at any time during this conversation. *Id.*

Tolliver did not provide any more information for nearly three months. Then, on February 29, 2016, Tolliver was sentenced to probation on separate drug charges. Pet. App. 6a. That same day, she also talked to Johnson for the first time since the interview on December 9, 2015. *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.*

II. 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. Pet. App. 1a-2a, 7a. Smith argued that Johnson's actions were so impermissibly suggestive as to create a substantial risk of misidentification. *Id.* at 7a. Tolliver testified at the suppression hearing that she had misled Johnson in the December 9, 2015,

interview, because she had known who was depicted in the photo. *Id.* 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.* at 8a.

The trial court denied Smith's motion to suppress. Pet. App. 8a. 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." *Id.* at 2a.

On appeal, the Ohio appellate court disagreed with the trial court's conclusion about Johnson's procedures. The Ohio appellate court concluded that Johnson's identification procedures 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 agreed with the trial court 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 conducting 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, applying the factors set forth in *Biggers,* the improperly suggestive identification procedure resulted in a completely unreasonable identification. *Id.* ¶¶ 98, 102, 104 (Grendell, J., dissenting). Judge Grendell further concluded that "the fact that [Tolliver] had met Smith once for a short period of time does not impact the foregoing grounds for finding her identification unreliable." *Id.* ¶ 105 (Grendell, J., dissenting).

Smith timely appealed to the Ohio Supreme Court, and the Ohio Supreme Court declined jurisdiction. Pet. App. 10a.

III. 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. Pet. App. 10a. The district court denied Smith's habeas petition and granted Smith a certificate of appealability. *Id.*

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.'" Pet. App. 14a. The panel majority noted that the state courts had "fail[ed] to engage in the balancing test mandated by clearly established Supreme Court precedent." *Id.* at 31a. 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." *Id.* at 17a. 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."'" Pet. App. 30a (alteration in original) (*quoting Foster*, 394 U.S. at 443). 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." *Id.* at 32a. Judge Thapar dissented from the majority opinion, concluding that the state appellate court's decision was sufficiently reasonable for purposes of AEDPA deference. *Id.* at 33a (Thapar, J., dissenting).

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. Pet. App. 32a. The State did not seek rehearing or rehearing en banc from the Sixth Circuit. The Sixth Circuit panel unanimously denied the State's motion to stay the issuance of the mandate. *Id.* at 43a.

REASONS FOR DENYING THE PETITION

I. This case does not meet any of the Court's criteria for certiorari.

This case does not meet any of this Court's criteria for certiorari. The case does not implicate any circuit split. *See* Sup. Ct. R. 10. The Petition in fact concedes that the case does not implicate any circuit split, and even further concedes that a circuit split will "almost certainly never arise." Petition at 22.

Nor does this case 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 panel's decision in this case is unpublished. The State sought neither rehearing nor rehearing en banc in this case – despite its allegations now in the

Petition that the Sixth Circuit's decision in this case was inconsistent with prior Sixth Circuit decisions. *See* Petition at 22.

The State's petition merely argues that the lower court reached the wrong result on the facts of the case. *See* Petition at 14-23. And in doing so, it seeks review of fact-bound questions that the Court of Appeals carefully considered in correctly deciding this case. *See id. "*A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see also NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing writ of certiorari as improvidently granted); *Rudolph v. United States*, 370 U.S. 269, 269-70 (1962) (per curiam) (same); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

II. To obtain an eyewitness identification in this case, the officer used incriminating and coercive tactics that go far beyond those in this Court's precedents regarding eyewitness identifications.

The egregiously problematic fact pattern in this case makes the case an unsuitable candidate for certiorari review. As this Court has acknowledged, "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances … is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place." *Perry*, 565 U.S. at 241. Had Johnson

merely shown Tolliver the single photo of Smith, the identification procedure would still have been improperly suggestive. *See Manson*, 432 U.S. at 111; *Simmons v. United States*, 390 U.S. 377, 384 (1968). But Johnson's tactics in this case went far beyond those in any of 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.'" Pet. App. 11 (citation omitted).

And the unique and egregiously problematic fact pattern in this case makes the case a far cry from the typical case in which an eyewitness identifies someone with whom the eyewitness has a previous relationship. The undisputed facts in 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 thus is a far cry from the circuit cases cited by the State at

the end of its Petition. *See United States v. Ross*, 72 F.4th 40, 49-50 (4th Cir. 2023) (conducting *Biggers* analysis and holding that witness identification of suspect with whom she'd had a "months-long intimate relationship" was sufficiently reliable, "even if the procedure [during in-court testimony] leading to that identification was improperly suggestive"); *United States v. Damsky*, 740 F.2d 134, 140 (2d Cir. 1984) (holding based on *Biggers* factors that witness identification of suspect he had seen "ten or fifteen times" before was sufficiently reliable, even though police had shown witness four photos, two of which were of suspect); *United States v. Osorio*, 757 F. App'x 167, 170-71 (3d Cir. 2018) (holding that defendant "presents no record evidence demonstrating that the identification was unnecessarily suggestive or unreliable," where suspect's former girlfriend confirmed he was the person in surveillance footage).[1]

Accordingly, this case would not be a suitable vehicle for this Court to consider any of the issues

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[1] The remaining circuit cases cited by the State are even farther afield from the present case. *See Johnson v. City of Cheyenne*, 99 F.4th 1206, 1216, 1218, 1224 (10th Cir. 2024) (after conducting *Biggers* analysis, holding that officer was entitled to qualified immunity on plaintiff's claim under 42 U.S.C. § 1983 that officer had fabricated evidence); *United States v. Morsley*, 64 F.3d 907, 916-17 (4th Cir. 1995) (rejecting defendant's arguments that in-court identifications were tainted by inadmissible out-of-court identification in violation of the Fifth and Sixth Amendments).

raised in the State's petition.

III. The Court of Appeals did not err in concluding that the state appellate court's decision was contrary to and an unreasonable application of Supreme Court precedent.

Not only does the State's petition seek pure error correction; 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. In arguing to the contrary, the State in its petition mischaracterizes both this Court's precedents on eyewitness identifications and the Court of Appeals' opinion in this case.

A. Under this Court's well-established precedents, admission of an eyewitness identification obtained through unduly suggestive and unnecessary police procedures violates due process, unless it nevertheless is sufficiently reliable.

In *Foster v. California*, 394 U.S. 440 (1969), this Court held that a police identification procedure that makes "it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man,'" "so undermine[s] the reliability of the eyewitness identification as to violate due process." 394 U.S. at 443. Thus, as this Court more recently reiterated, "[w]here 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 (second alteration in original) (quoting *Manson*, 432 U.S. at 114).

The holding of the Court of Appeals follows *a fortiori* from *Foster*. In that case, a witness had been shown two lineups following a robbery. 394 U.S. at 441-42. In the first lineup, the defendant, who was already the law enforcement officers' principal suspect, was the only person who was tall and the only person who was wearing a clothing item the witness had identified the robber to be wearing. *Id.* at 441. In the second lineup, the defendant was the only person who had also appeared in the first lineup. *Id.* at 441-42. After the second lineup, the witness said he was "convinced" the defendant was the man. *Id.* at 442. This Court held that "[t]he suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify [the defendant] whether or not he was in fact 'the man'" – and thus constituted a due process violation. *Id.* at 443.

Following *Foster*, this Court has repeatedly reaffirmed that 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); *see also Perry*, 565 U.S. at 239; *Manson*, 432 U.S. at 106, 114. This Court in *Neil v. Biggers*, 409 U.S. 188 (1972), 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; *see also Perry*, 565 U.S. at 239, *Manson*, 432 U.S. at 117.

And critically, after a court assesses these factors going to reliability, a court must determine whether the "corrupting effect of law enforcement suggestion" outweighs the "indicators of [a witness'] ability to make an accurate identification." *Perry*, 565 U.S. at 239 (internal quotation marks omitted); *see also Manson*, 432 U.S. at 114. Thus, the reliability inquiry ascertains whether the identification procedure was so suggestive as to be "conducive to" or to have "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*, 565 U.S. at 239.

B. The State's petition relies on critical mischaracterizations of this Court's precedents and the Court of Appeals' opinion.

The State's petition argues that the Court of Appeals misapplied this Court's precedents on eyewitness identifications because it engaged in impermissible "policing of police misconduct" and because it did not sufficiently consider evidence "which tied Smith to the crime." Petition at 15. These arguments misstate both the Court's precedents and the Court of Appeals' opinion in this case.

First, the State's petition carefully avoids mentioning *any* of the suggestive or inappropriate statements by Johnson. *See, e.g.*, Petition at 6-7, 10.

The State instead devotes pages of its Petition to a strawman argument that, in taking into account the suggestive and coercive nature of the police tactics in this case, the Court of Appeals engaged in impermissible "policing [of] police misconduct." *Id.* at 10-16. That is wrong. This Court's precedents *require* lower courts to take into account the suggestive and coercive nature of the police tactics on the eyewitness identification. *See Perry*, 565 U.S. at 239; *Manson*, 432 U.S. at 114. Under this Court's precedents, a court must determine whether the "corrupting effect of law enforcement suggestion" outweighs the "indicators of [a witness'] ability to make an accurate identification." *Perry*, 565 U.S. at 239 (alteration in original) (internal quotation marks omitted); *see also Manson*, 432 U.S. at 114.[2]

Second, the State repeatedly relies on *other* evidence in the case, *outside* the knowledge of the eyewitness, for the proposition that the evidence "is suffused with reliability" because it "tied Smith to the crime." Petition at 15; *see also id. at* 1-2, 5-6. This too, is foreclosed by this Court's precedents. This Court's precedents make clear that the weight of the *other* evidence against the defendant in the case does not come into play in the reliability analysis. *See, e.g., Manson*, 432 U.S. at 116 (stating that "the facts that

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[2] The Petition's reliance on admissibility of evidence in other contexts, *see* Petition at 12-14, similarly is misplaced given this Court's well-established precedents on due process violations and eyewitness identifications. And in any event, this case does not present a suitable vehicle for the Court to examine any of these issues.

respondent was arrested in the very apartment where [the crime] had taken place, and that he acknowledged his frequent visits to that apartment" did not play any part in the *Biggers* reliability analysis); *see also id.* at 118 (Stevens, J., concurring) (commending the majority for "put[ting] other evidence of guilt entirely to one side" in a way that "correctly relies only on appropriate indicia of the reliability of the identification itself").

Accordingly, the State's petition hinges on critical misunderstandings of both this Court's precedents and the Court of Appeals' opinion.

C. The Court of Appeals did not err in holding that the state court's decision was an unreasonable application of this Court's precedents on eyewitness identifications.

The Court of Appeals did not err in holding that the State appellate court unreasonably applied this Court's long-established precedents on due process violations and eyewitness identifications.

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.'" Pet. App. 14a. The Court of Appeals 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."'" *Id.* at 30a (second alteration in original) (citation omitted). Indeed, the suggestive and coercive police tactics in this case go far beyond

those in *Foster*. The Court in *Foster* held that the officer "made it all but inevitable" that the witness would identify their suspect merely by the composition of the two police lineups. 394 U.S. at 443. Here, the officer did not just make it "inevitable" that Tolliver would identify Smith as "the man," although he certainly did that. As the Court of Appeals explained, "[e]ven 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." Pet. App. 30a. And even worse than that, the officer even admitted at the suppression hearing that he *told* Tolliver that Smith had attacked her. *Id.* 5a n.2.

Under this Court's precedents, a court must determine whether the "corrupting effect of law enforcement suggestion" outweighs the "indicators of [a witness'] ability to make an accurate identification." *Perry*, 565 U.S. at 239 (alteration in original) (quotation marks omitted). The Court of Appeals carefully took account of the factual findings of the state courts and 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." Pet. App. 30a.

As the Court of Appeals correctly noted, the state appellate court failed to "engag[e] in any meaningful analysis of the *Biggers* factors" and failed to balance indicia of reliability "against the immensely suggestive law enforcement procedure." Pet. App. 28a, 29a; *see also id.* at 23a. 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 (quotation marks omitted). There is no basis for such an exception to this Court's precedents on the appropriate evaluation of eyewitness identification. And in any event, 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.

And as the Court of Appeals correctly explained, the only other two potential indicia of reliability noted by the state court of appeals – the *Biggers* factors of the witness' opportunity to view the perpetrator and certainty of the witness at the time of the confrontation, *see Smith*, 2018 WL 6313398, ¶¶ 47-48 – could at most provide weak evidence under this Court's precedents. Pet. App. 17a-18a, 19a-21a. The record evidence was that Tolliver had no more than a few seconds to view her assailant – well short of the amount of time this Court has previously held to constitute a genuine opportunity to view the perpetrator of a crime. *See id.* at 17a-18a; *see also Simmons*, 390 U.S. at 385 (up to five minutes); *Manson*, 432 U.S. at 114 (between two and three

minutes); *Biggers*, 409 U.S. at 200 (almost half an hour). And the record evidence was that Tolliver declined to identify Smith at all – much less "certainly" identify Smith – at the time of the confrontation. *See* Pet. App. 19a-21a. Just as in *Foster,* in this case the witness was uncertain of the defendant's identity at the original confrontation, only to identify the defendant later. *Foster*, 394 U.S. at 442-43.

The Court of Appeals thus correctly held that "[a] faithful application of the *Biggers* factors to this case demands a different outcome." Pet. App. 17a; *see also id.* at 29a. This case therefore does not warrant any error correction – much less rise to the level of warranting certiorari review.

IV. Contrary to the allegations in the petition, the Sixth Circuit concluded that relief was warranted only after appropriately applying AEDPA deference in this case.

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. 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). Thus, a federal habeas court appropriately grants relief "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies

that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

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. Pet. App. 31a (*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* Pet. App. 15a-32a. 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." *Id.* at 23a; *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 "conduct[] *de novo* review in substance" as alleged by the State, Petition at 16-17. The Court of Appeals 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* Pet. App. 15a-32a. As the Court of Appeals' analysis makes clear, admitting Tolliver's identification was not ordinary error. *Cf. Sexton v. Beaudreaux*, 585 U.S. 961, 963, 967 (2018) (holding that habeas petitioner failed to establish ineffective assistance of counsel claim based on failure to seek suppression of eyewitness identification, where "[a]t no time did any investigator or prosecutor suggest to [eyewitness] that [petitioner] was the one" who committed the crime). Rather, the Court of Appeals went the extra steps that AEDPA requires and demonstrated that allowing the eyewitness identification was an unreasonable application of this Court's precedents. *See* Pet. App. 30a-31a.

The State incorrectly faults the Court of Appeals for criticizing the state court's reasoning instead of its judgment. *See* Petition at 18-19. 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) (citation 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* Petition at 21. 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.

Again, this case does not warrant the fact-bound error correction that the State seeks.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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