

Case No. 20-__

**In The
Supreme Court of the United States**

ANNA VALENTINE, Warden

Petitioner

v.

JOHNNY PHILLIPS

Respondent

On Petition for Writ of Certiorari to the United
States Court Of Appeals for the Sixth Circuit
Case No. 18-6184

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Respondent Johnny Phillips was convicted of wanton murder for shooting Phillip Glodo in the back of the head. Phillips filed a petition for federal habeas relief in district court claiming the state violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide in discovery an autopsy x-ray of Glodo's skull. The district court conducted an evidentiary hearing to determine whether the x-ray was favorable and material to Phillips's defense and therefore subject to disclosure under *Brady*. Two expert witnesses testified at the hearing about the significance of the x-ray. Phillips's expert was Larry Dehus, a forensic scientist and ballistics expert, and the Warden's expert was Dr. Jennifer Schott, the medical examiner who conducted Glodo's autopsy. The district court did not find Dehus's testimony about the significance of the x-ray reliable, and chose instead to rely on Dr. Schott's testimony. Based upon its findings, the district court rejected Phillips's claim that the autopsy x-ray was favorable and material under *Brady*.

A divided panel of the United States Court of Appeals for the Sixth Circuit reversed the district court, giving no meaningful deference to the district court's expert witness credibility determination. And, it adopted an entirely new standard, holding that the district court should have credited the testimony of Phillips's expert merely because that testimony was not "blatantly self-serving or dishonest." *Phillips v. Valentine*, 826 F. App'x 447, 460 (6th Cir. 2020). Applying that novel standard, the Sixth Circuit found that the autopsy x-ray was in fact favorable and material to Phillips's defense, and therefore should have been disclosed to Phillips in discovery.

The Sixth Circuit reached this conclusion based on nothing more than the expert testimony that the district court rejected as unreliable.

The questions presented are as follows:

- (1) Did the Sixth Circuit violate Fed. Rule Civ. P. 52(a)(6) when it failed to apply the proper, heightened and deferential standard to the district court's expert witness credibility determination?
- (2) Did the Sixth Circuit usurp the district court's expert witness gatekeeping function when it held that the district court should have credited the testimony of Phillips's expert—and granted Phillips's petition—simply because that testimony was not blatantly self-serving or dishonest?

Statement of Related Proceedings

Phillips v. Valentine, No. 18-6184 (United States Court of Appeals for the Sixth Circuit) (order denying rehearing filed on October 19, 2020; opinion reversing the judgment of the district court and granting conditional writ of habeas corpus).

Phillips v. Valentine, No. 6:13-CV-00022-KKC-EBA (United States District Court for the Eastern District of Kentucky at London) (Opinion and Order denying petition for writ of habeas corpus entered on October 15, 2018).

Phillips v. Hart, 6:13-CV-00022-ART-EBA (United States District Court for the Eastern District of Kentucky at London) (Magistrate Judge's Report and Recommendation denying petition for writ of habeas corpus rendered on December 9, 2014).

Phillips v. Commonwealth, 2011-CA-2169-MR (Kentucky Court of Appeals opinion denying post-conviction relief rendered November 9, 2012).

Phillips v. Commonwealth, 2009-SC-633-MR (Kentucky Supreme Court opinion affirming conviction and sentence on direct appeal rendered June 17, 2010).

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Opinions Below

The Sixth Circuit's opinion reversing the district court's judgment is unpublished but reported at *Phillips v. Valentine*, 826 F. App'x. 447 (6th Cir. 2020). App. 1a—34a. The order denying panel rehearing and rehearing *en banc* is unreported. App. 35a. The Sixth Circuit's order denying the motion to stay the mandate is unreported. App. 36a. The district court's opinion and order is unpublished but available at *Phillips v. Valentine*, 6:13-CV-00022-KKC-EBA, 2018 WL 4976801 (E.D. Ky. Oct. 15, 2018). App. 38a—43a. The magistrate judge's report and recommendation is unpublished but available at *Phillips v. Hart*, 6:13-CV-00022-ART-EBA, 2017 WL 10403348 (E.D. Ky. Jan. 1, 2017). App. 44a—68a. The Kentucky Supreme Court's opinion affirming Phillips's conviction is unpublished but available at *Phillips v. Commonwealth*, 2009-SC-633-MR, 2010 WL 2471669, (Ky. June 17, 2010). App. 69a—82a. The Kentucky Court of Appeals opinion denying post-conviction relief is unpublished but available at *Phillips v. Commonwealth*, 2011-CA-2169-MR, 2010 WL 5457645 (Ky. Ct. App. Nov. 9, 2012).

Statement of Jurisdiction

In March 2020, this Court extended the time for filing all certiorari petitions due on or after March 19, 2020, to 150 days from the date of, as relevant here, the order denying rehearing. 589 U.S. __ (Order dated March 19, 2020). The Sixth Circuit denied rehearing in this case on October 9, 2020. This petition is filed within 150 days of October 9, 2020. This Court has jurisdiction under 28 U.S.C. §1254 (1).

Constitutional Provisions, Statutes, and Rules

U.S. Const. amend. XIV states that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed. R. Civ. P. 52(a)(6) provides:

“[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”

Introduction

Imagine that a litigant's claim depends on the meaning of an ancient hieroglyphic symbol. The litigant produces an expert witness to explain what the hieroglyph means. But, it turns out, the expert has no relevant experience and cannot correctly answer basic questions about the symbol. So, the district court finds the expert unqualified and unreliable. And, because the litigant has no other testimony to support his theory about what the hieroglyph means, the court rejects his claim about the meaning of the symbol.

On appeal, the Court of Appeals reverses. Rather than review the district court's credibility finding for clear error, the appellate court determines that the witness's testimony should have been credited simply because it was not blatantly self-serving or dishonest. Thus, the court concludes, the matter should proceed to a jury for a battle of the experts. No one would disagree that such a decision would flout basic rules of appellate review. Yet that is precisely what the panel did here. Except, in this case, the effect of the decision is to undo a state jury verdict of wanton murder from more than a decade ago.

This case is about the deference owed to district courts when they preside over evidentiary hearings as part of a habeas proceeding. That law is well established, and as Judge Sutton explained in his dissent, applying it here would make this case relatively easy to resolve. App. 30a—31a (Sutton, J., dissenting (citing *Bennett v. Brewer*, 940 F.3d 279, 286 (6th Cir. 2019))). But, rather than resolve this case on such grounds, the panel majority created a new rule—one under which a district court's

expert-witness gatekeeping decisions receive no deference, and an appellate court should credit any expert testimony in support of a *Brady* claim so long as it meets the exceptionally low threshold of being not blatantly self-serving or dishonest. This newfound approach to appellate review is in conflict with this Court’s prior decisions and is a significant departure from the accepted and usual course of judicial proceedings. *See* Sup. Ct. R. 10(a), (c).

Statement of the Case

A. The murder of Phillip Glodo and Phillips’s conviction

On October 18, 2007, Johnny Phillips got into argument with Phillip Glodo. The two men left the residence of a mutual friend in their own vehicles and immediately pulled over in a church parking lot, the victim pulling in behind Phillips. Phillips got out of his truck, pulled out a shotgun, and shot the victim in the back of the head. App. 71a. Phillips claimed the victim came at him with a knife, so he raised his shotgun and pushed the victim back with the gun, which then discharged accidentally. App. 4a—5a.

At the trial, the medical evidence overwhelmingly confirmed that Phillips shot the victim in the back of the head. Dr. Jennifer Schott, the medical examiner who performed the victim’s autopsy, testified that the victim’s head wound was in the middle of the back of the head—not to the left or the right. App. 6a. After her forensic examination, Dr. Schott recovered some of the pellets from inside the victim’s brain and determined that the pellets traveled through the victim’s head from back to front. *Id.* Finally, Dr. Schott testified that the end of the gun was three feet or more from

Glodo's head when he was shot, meaning that Phillips was standing at least five or six feet away from Glodo at the time. *Id.* The jury convicted Phillips of wanton murder. App. 7a.

B. Phillips's direct appeal and post-conviction challenges

Phillips appealed as a matter of right to the Kentucky Supreme Court, which affirmed his conviction and sentence. App. 9a. In 2011 and 2013, Phillips filed post-conviction challenges to his conviction and first raised his *Brady* claim that the medical examiner office's x-ray of the victim's skull was not properly turned over in discovery. App. 9a. This claim was rejected by the Kentucky Court of Appeals as procedurally barred. App. 10a.

C. Phillips's 28 U.S.C. § 2254 petition

Years after his conviction, Phillips filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, claiming that the State violated his due-process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to turn over the x-ray in discovery. The magistrate judge initially recommended denying the claim on the ground that the x-ray would have been cumulative in light of the medical examiner's trial testimony. App. 64a. The district court granted Phillips's motion for an evidentiary hearing to review the x-ray. App. 10a.

At the evidentiary hearing, Phillips produced one witness—Larry Dehus, a forensic scientist and ballistics expert. When testifying about the x-ray, Dehus was unable to accurately explain basic details about the image, such as the direction from which the x-ray was taken. App. 132a. Despite that, Dehus claimed that the x-ray

allowed him to determine the direction from which Phillips fired the shotgun, as well as the approximate number of pellets lodged in the victim's skull. App. 96a—98a.

The State's witness, Dr. Schott, rebutted much, if not all of Dehus's testimony. Most importantly, she confirmed that the x-ray did not change her original autopsy findings about the location of the wound and the path of the pellets. App. 113a—114a. And, she explained that contrary to Dehus's claims, the x-ray could not be used to determine the number of pellets in the skull, the location of the pellets, or the path of the pellets in the skull because of the two-dimensional nature of the image. App. 128a—129a. The district court denied Phillips's habeas petition, concluding that Dehus was an unreliable witness and any conclusions he made about the significance of the x-ray were unreliable as well. App. 41a.

D. The Sixth Circuit decision

On appeal, a divided panel of the Sixth Circuit reversed. The majority reasoned that Dehus's testimony met the "fairly low" threshold under *Brady* to establish that the undisclosed evidence would have been favorable to Phillips's case. App. 19a. But in so doing, the majority did not grant any meaningful deference to the district court's determination that Phillips's expert was not a credible witness and any conclusion he made about the x-ray was not reliable. *Id.* As the panel majority explained:

Even with Dehus's skill somewhat in question, we conclude that we cannot dismiss his basic conclusion that there was not nearly enough shot in the skull to support the Commonwealth's theory. Or to put it another way, the X-ray provides some support for Phillips's theory. We particularly cannot discount this conclusion in view of the Commonwealth's and Dr. Schott's inability to rebut it directly.

App. 17a—18a. Thus, the panel majority found that the x-ray was both favorable and material to Phillips’s case, satisfying the elements of the *Brady* claim. App. 26a—27a.

The Warden moved for panel rehearing and rehearing *en banc*. Rehearing was denied, although Judge Sutton would have granted it for the reasons stated in his earlier dissent. App. 35a. On October 20, 2020, the Sixth Circuit denied the Warden’s motion to stay the mandate pending a petition for writ of certiorari to the United States Supreme Court, and issued its mandate. App. 36a. The district court thereafter entered the conditional writ and ordered the State to either retry or release Phillips within 90 days. The district court granted the State’s motions for extensions of time to comply with the writ because the Kentucky Supreme Court has postponed all jury trials until April 1, 2021, due to the Covid-19 pandemic. Phillips’s new trial must commence by May 1, 2021.

Reasons for granting the petition

As Judge Sutton concisely stated in his dissent, the district court found Dehus’s testimony unreliable and this finding of fact should have been disturbed only if it amounted to clear error. App. 31a. Instead of deferring to the district court’s credibility determination, the panel majority engaged in its own appellate fact-finding. Even though Dehus could not read the x-ray correctly and the district court determined that he was an unreliable witness, the panel decided that it could not dismiss Dehus’s basic conclusion that “there was not nearly enough shot in the skull to support the Commonwealth’s theory.” Clearly, the panel majority did not allow for

any sort of deference, but substituted its own judgment for the district court's credibility determination. This case calls out for the Court's review and summary correction.

I. The Sixth Circuit exceeded its authority under Fed. R. Civ. P. 52(a)(6) when it failed to give heightened deference to the district court's evaluation of the credibility of Phillips's expert.

A. The panel majority conducted improper *de novo* review.

This Court has made abundantly clear the scope of an appellate court's authority in reviewing a lower court's credibility determination. Under Fed. R. Civ. P. 52(a)(6), a district court's factual findings shall not be set aside unless clearly erroneous and the reviewing court must defer to the trial court's opportunity to judge the credibility of the witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands a heightened deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. *Id.* The reviewing court must defer to the lower court's findings, reversing *only* if left with a definite and firm conviction that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Anderson*, 470 U.S. at 573-74; *See also Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

The district court acted within its legal authority when it determined Dehus's testimony about the angle of the x-ray was not credible. The district court presided over the evidentiary hearing and observed the demeanor and tone of the witnesses testifying. It was clear that Dehus did not know how to read the x-ray and he admitted he was not properly trained to do so. App. 134a. Dehus erroneously thought the x-ray was taken from the back and "doubled and then tripled down on this contention." App. 132a. Accordingly, it was reasonable for the district court to find Dehus was not a credible witness and *all* of his conclusions regarding the significance of the x-ray were unreliable.

In its opinion reversing the district court's judgment, the panel majority recited the appropriate standard of review, but did not apply it. *First*, the panel *never* determined that the district court's credibility determination was clear error. In fact, the panel candidly acknowledged Dehus's skill was "questionable." App. 17a. Despite Dehus's lack of credibility, the panel majority made its own finding that a portion of Dehus's opinion "could not be discounted." App. 17a—18a. *Second*, and even more bewildering, the panel relied on its own interpretation of "how x-rays work" to support its conclusion that the x-ray provided some support for Phillips's theory. App. 17a. The panel majority reached this conclusion merely because Dehus's testimony was not "blatantly self-serving or dishonest." App. 19a. This was clearly improper *de novo* review and the Sixth Circuit's decision should be reversed.

B. Improper *de novo* review by a Federal Circuit Court is the type of error this Court has historically addressed

Undoubtedly, Phillips will argue that the Warden's claim involves mere error correction and is not compelling for a grant of certiorari. However, when a reviewing court has employed improper *de novo* review, this Court has corrected it.

In one of its most recent decisions, this Court reversed the Ninth Circuit for evaluating the merits of the case *de novo*, instead of employing the deferential standard demanded by the Antiterrorism and Death Penalty Act of 1996 (AEDPA). *See Shinn v. Kayer*, 141 S.Ct. 517, 523 (2020). In *U.S. Bank National Association ex rel. CWC Capital Asset Management LLC v. The Village at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018), this Court granted certiorari to decide one question—whether the Ninth Circuit was right to review for clear error (rather than *de novo*) the Bankruptcy Court's determination of whether a person qualified as a non-statutory insider. In *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331 (2015), this Court reviewed the appropriate standard of review to be applied, and concluded that the appellate court must apply clear error review (instead of *de novo*) when reviewing subsidiary fact-finding in patent claim construction.

Clearly, this Court has found it proper to accept certiorari petitions in order to correct a Federal Circuit's improper use of *de novo* review. This case is no different, and the panel majority's decision to ignore the required Fed. R. Civ. P. 52(a)(6) deference to the district court's credibility determination should be corrected by this Court.

II. The Sixth Circuit’s decision undermined the district court’s duty to serve as gatekeeper of expert testimony.

A district court has the *duty* to evaluate the reliability—and, therefore, admissibility—of expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Fed. Rule Evid. 702 states an expert may testify in the “form of an opinion” as long as that opinion rests upon “sufficient facts or data” and “the expert reliably applied the principles and methods to the facts.” The rule leaves in place the trial judge’s “gatekeeper” role of screening such evidence to ensure that it is not only relevant, but reliable, *Daubert*, 509 U.S. at 589. “The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Kumho Tire Company, LTD. v. Carmichael*, 526 U.S. 137, 152 (1999). All of this places the trial judge in the best position of determining whether the expert testimony will promote accurate fact-finding.

The district court acted within its legal authority when it determined that Dehus’s conclusions about the significance of the x-ray were unreliable. In sworn testimony, Dehus admitted he was not trained to read the x-ray. App. 134a. His lack of training was unmistakable when he incorrectly testified the x-ray was taken from the back of Glodo’s head, instead of the front. App. 132a. The State objected to his testimony and argued that Dehus was not qualified to read the x-ray. App. 93a. The district court, in its role as gatekeeper of expert testimony, decided to allow Dehus’s testimony. App. 94a. However, after listening to him, the district court determined

Dehus was not a reliable witness and all his conclusions about the significance of the x-ray were also unreliable. App. 41a. In reversing the district court’s judgment, the panel majority decided Dehus’s testimony about the significance of the x-ray was admissible because it was not “blatantly self-serving or dishonest.” App. 19a. Thus, the panel majority created a new rule—one under which a district court’s expert-witness gatekeeping decision receives no deference, and an appellate court can determine any expert testimony is reliable, so long as it meets the exceptionally low threshold of being not blatantly self-serving or dishonest.

Conclusion

Federal habeas review of state convictions “entails significant costs.” *Engle v. Isaac*, 456 U.S. 107, 126 (1982). It “frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Because habeas review intrudes on state sovereignty “to a degree matched by few exercises of federal judicial authority,” *Richter* 562 U.S. at 103, judges must be “vigilant and independent in reviewing petitions for the writ,” *Richter*, 562 U.S. at 91–92. “Judicial resources are diminished and misspent, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance.” *Id.*

It is undisputed that Phillips shot Phillip Glodo in the back of the head and a Kentucky jury found him guilty of wanton murder. The panel majority’s opinion not only intrudes on the finality of this state conviction, but it has “diminished the value

of the writ and misspent” judicial resources because of the Sixth Circuit’s blatant disregard for the proper standard of appellate review under the Federal Rules.

Wherefore, based upon all of the foregoing, this Court should grant the Warden’s petition for writ of certiorari and summarily reverse the Sixth Circuit’s decision.

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