No. 10-8629

IN THE
SUPREME COURT OF THE UNITED STATES

OSCAR SMITH,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED BY THE PETITION

1.a. Did the prosecution violate *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding exculpatory evidence showing that testimony by the prosecution's key witness about the prosecution's most important piece of evidence was scientifically unreliable and/or fabricated?
1.b. Is Oscar Smith entitled to a new trial and/or sentencing hearing given the prosecution's withholding of this critical impeachment evidence?

2. Does it violate due process of law under the Fourteenth Amendment to instruct a jury to convict if it reaches a mere "satisfactory conclusion" or "moral certainty" of guilt, while allowing jurors to convict "as you think justice and truth dictate"?

3. Does Oscar Smith have "cause" for failure to present in state court claims of ineffective assistance of trial counsel, where post-conviction proceedings provided him the first opportunity to present such claims, the state appointed counsel to represent him, but state-appointed counsel then failed to raise such issues which implicate his actual innocence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The June 18, 2010, opinion of the United States Court of Appeals for the Sixth Circuit is unpublished but reported in the Federal Appendix at 381 Fed.Appx. 547. (Pet.Apx. A2) The Sixth Circuit's August 20, 2008, partial grant and partial denial of a certificate of appealability is unreported. (Pet.Apx. A9) The memorandum opinion of the United States District Court for the Middle District of Tennessee is unreported. (Pet.Apx. A11)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner, Oscar Smith, was convicted of three counts of first-degree murder for the October 1, 1989, shooting and stabbing deaths of Judy Smith and her two sons, 16-year-old Jason Burnett, and 13-year-old Chad Burnett. The jury sentenced petitioner to death for all three murders, finding two aggravating circumstances with respect to the murder of Judy Smith, and four aggravating circumstances with respect to the murders of Jason and Chad Burnett. *State v. Smith*, 868 S.W.2d 561, 565 (Tenn. 1993).

At approximately 11:20 p.m., on Sunday, October 1, 1989, Metropolitan Nashville Police received an emergency 911 call from Jason Burnett. As soon as the call was answered, Jason cried, "Help me!" Jason's older brother Chad could be

heard shouting in the background, "Frank, no. God, help me!" The call ended abruptly with Jason stating, "324 Lutie Street." *Id*.

324 Lutie Street in Nashville was the home of Jason and Chad's mother, Judy Smith, who was the estranged wife of petitioner, Oscar Franklin (Frank) Smith.[1] When police arrived at the home five minutes after the 911 call, they found it quiet and received no answer when they knocked on the front door; they assessed the situation as a "false call." At approximately 3:00 p.m. the next day, however, the bodies of Judy Smith and Jason and Chad Burnett were found in the home. *Id*.

Chad was found lying face up on the kitchen floor. He had been shot three times; he had also been stabbed several times with a knife and with a weapon resembling an awl or ice pick, and his neck had been slashed. Judy Smith was found lying on her back on a bed in the front bedroom. She had been shot in the left arm and neck from within a range of two feet; she had also been stabbed with a knife and with a weapon resembling an awl or an ice pick. Her neck had also been slashed. Jason was found lying on his left side on the floor at the foot of that bed. Jason's neck had been slashed, and he had been stabbed in the chest and abdomen. His small bowel protruded from his body through these wounds. *Id*. at 565-66.

There were no signs of forced entry, and the back door had been left open. There were, however, signs of a struggle in the house, particularly in the kitchen,

[1] At petitioner's criminal trial, he testified that he went by both "Frank," his middle name, and "Oscar," his first name. (Pet.Apx. A20, ¶ 32)

where the phone had been ripped off the wall. There were large quantities of blood in the kitchen, and there was blood spattered on the wall next to the bed on which Judy was found. A path of spattered blood led from the den down the hall to the kitchen. Drops of blood in the bathroom indicated that someone had cleaned up in that room. A .22 caliber cartridge was found in the den, and an identical type of bullet was removed from the bodies of Judy and Chad. An awl was found in the kitchen. Police also found a bloody palm print on the bed sheet beside Judy Smith's body. *Id*. at 566, 567.

In addition to a tape recording of Jason's 911 call, evidence at petitioner's criminal trial included testimony showing that a divorce action between petitioner and Judy Smith was pending at the time of the murders and that custody of the couple's three-year-old, twin boys (not Chad and Jason, who were not petitioner's sons) was a key issue in the divorce. Petitioner owned a .22 caliber gun and was known to carry a large knife. He engaged in the craft of leatherworking, in which an awl is a basic tool. A witness testified that he saw petitioner's car parked at Judy Smith's house at approximately 11:00 or 11:15 p.m. on the night of the murders. *Id*. at 566, 567, 576.

Evidence also showed that petitioner had previously threatened to kill, and committed acts of violence against, both Judy and Jason. Within a month of the murders, petitioner had also asked a co-worker if he knew of anyone who would kill

petitioner's family; he also told the co-worker that he would offer $20,000 to have someone kill his wife and stepsons. As a result of supplemental life insurance policies petitioner had purchased within 7 to 8 months of the murders, he was the beneficiary of $88,000 in insurance on the lives of his wife and stepsons at the time of their murders. *Id*. at 566-67.

The bloody palm print found on the bed sheet next to Judy Smith's body was identified as petitioner's. Sgt. Johnny Hunter, a certified latent fingerprint examiner for the Metropolitan Nashville Police Department, testified that the palm print on the sheet was missing the two middle fingers and that petitioner's left hand was also missing the two middle fingers. Using an "alternate light source" (ALS) technique to photograph the palm print, Sgt. Hunter concluded that it matched the print of petitioner's left hand. *Id*. at 567, 576.[2]

The Tennessee Supreme Court affirmed petitioner's convictions and sentences in 1993, characterizing petitioner's crimes as the "intentional, senseless, brutal, gruesome and violent killing of three helpless people." *Id*. at 583. After the conclusion of state post-conviction proceedings, *see Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353 (Tenn.Crim.App. June 30, 1998), petitioner filed a petition for federal habeas corpus relief, raising a multitude of claims. On April 24,

[2] "The 'alternate light source' is a machine that transmits the light from a very bright light bulb through an optic fiber tube to illuminate an object. . . . The machine does not touch the print, 'lift' it or alter it in any way." "[T]he machine is simply a tool, used by an examiner to make a fingerprint clearer for examination and comparison." *Id* at 576.

2003, petitioner secured an evidentiary hearing on four of his claims; at that hearing, petitioner elicited testimony from Sgt. Johnny Hunter regarding the circumstances of his collecting and identifying the bloody palm print evidence. (Pet.Apx. A121-22, A136)

> Sergeant Hunter testified at the evidentiary hearing that, although the ALS equipment was brought to the scene [on October 2, 1989], he did not remember using it on anything. He collected the sheet for use as fiber evidence. . . . [H]e did examine the palm print on the sheet at the scene with a flashlight but did not see enough ridge detail for him to conclude that there would be any evidentiary value to the print on the sheet. . . . Importantly, Sgt. Hunter testified that *he did not notice at the scene that it looked like the hand that made the palm print had two fingers missing*; it simply did not occur to him. Also at the scene, he did not yet know that the petitioner had two fingers missing on his left hand. . . . [H]e never went back to look at the print on the sheet until January 29, ... It was upon this later examination that Sgt. Hunter realized that the palm print looked like it was a left hand that was missing the same two fingers that the petitioner was missing on his left hand.

(Pet.Apx. A136-37 (emphasis added)) *See also* C.A.Resp.Apx. 497 ("I was really amazed when I opened the package up and looked at the impression of the sheet . . . [;] at that time I realized that there was a connection here because the palm print outline indicated that there was two missing fingers. That I didn't even realize on the initial scene.").

Sgt. Hunter had testified similarly at petitioner's criminal trial.[3] Nevertheless, petitioner seized on this aspect of Hunter's federal hearing testimony to claim that Sgt. Hunter had *tested* the bloody palm print at the crime scene using the ALS and found it unidentifiable, that the prosecution had withheld this evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that Hunter had lied at trial when he testified that the first time he had tested the print was on January 29, 1990. (Pet.Apx. A134, 136). *See* C.A.Pet.Apx. 53 (alleging that Hunter "did not test or examine the sheet for the first time on January 29, 1990. He did a thorough examination and all possible testing of the sheet at the scene on October 2, 1989.") On February 12, 2004, the district court granted petitioner's motion to amend his

[3] At trial, Hunter testified that upon observing the print at the scene with the naked eye, he "could tell it was made by a person's hand" and "thought that it was made with blood" and that he had the bed sheet collected; he agreed that it was obviously "a palm print of some sort" and "that the palm print appeared to [him] to be something that may or may not be usable." (C.A.Resp.Apx, 471-72; 477-78) Months later, however, going back to look again at the bed sheet, Hunter now appreciated the significance of the print:

> On January the 29th, as I was reviewing the evidence . . . , I took that bed sheet out. And when I looked at the bed sheet, by this time I already realized that the defendant in this case had two missing fingers. It wasn't evident to me the night that it happened that the impression on the bed sheet was missing two fingers. And I didn't remember it, but when I pulled it out, it was very obvious to me that there was two fingers missing in the impression on the left hand, just like the defendant had two missing fingers on his hand.

(C.A.Resp.Apx. 472) "After [he] observed that it was missing two fingers, Sgt. Hunter then proceeded to photograph the print with the use of the "alternate light source" and compared various points of identification on that photograph to those on petitioner's palm print, enabling him "to identify this palm print to the defendant." (C.A. Resp.Apx. 473-76) *See* Pet.Apx. A23-24, ¶ 51. (Petitioner's passing suggestion that "Hunter's claimed match fails to satisfy accepted standards for a positive fingerprint identification" (Pet. 5) is based on evidence that he never offered, and thus was never admitted, at the federal evidentiary hearing.)

petition to add this claim.

On September 30, 2005, however, in a 144-page memorandum, the district court denied relief on all of petitioner's claims. (Pet.Apx. A11) The district court also denied a certificate of appealability as to all claims. *Smith v. Bell*, No. 3:99-cv-731 (M.D.Tenn.) (Docket Nos. 202, 207). With respect to petitioner's *Brady* claim, the district court found the claim to be procedurally defaulted, because it had not been raised in state court and petitioner had not made a showing of cause and prejudice. (Pet.Apx. A135) The district court also found that the claim had been filed "well beyond the AEDPA's one-year limitations period" and was thus time-barred. Accordingly, "[g]iven the fact that this claim is both procedurally and time barred," the district court further concluded: "it appears in retrospect that the petitioner's motion to amend his petition to add this claim was improvidently granted." (Pet.Apx. A136)

The district court nevertheless addressed the merits of the claim, finding "Sgt. Hunter's testimony eminently credible and his explanations for not having initially given significance to the palm print understandable and, again, credible." (Pet.Apx. A137). The court went on to conclude that "petitioner has failed to establish that the prosecution withheld any material evidence or that it presented perjured testimony." (*Id*.)

> [T]he petitioner has failed to provide any proof whatsoever that any evidence pertaining to the bloody palm print was favorable to him, that

> any evidence pertaining to the bloody palm print was withheld, intentionally or unintentionally, and/or that the petitioner was prejudiced in any way by either Sgt. Hunter or the prosecution team with respect to the manner in which the evidence at issue was discovered or divulged.

(*Id.*)

On June 18, 2010, the Sixth Circuit, having granted a certificate of appealability as to two claims,[4] affirmed. (Pet.Apx. A2) The Court characterized as "surmise[]" and "conjecture[]" petitioner's claim "that Hunter tested the bloody sheet at the scene with the ALS . . . and later performed the same test with the same device at his lab." (Pet.Apx. A7) It further characterized as "speculat[ion]" petitioner's claim "that the prosecution gave specific instructions to reexamine the evidence, thus generating the tainted (in Smith's opinion) lab identification of the print on the sheet." (*Id.*)

> [Petitioner] misconstrues Sgt. Hunter's testimony. Hunter did not change his story; he never stated that he tested the sheet at the scene with the ALS or that the prosecutor ordered a reevalaution of the evidence because of weaknesses in the case. The federal hearing testimony revealed only that Hunter's memory of the events had faded over time, not that the State withheld exculpatory evidence.

(*Id.*)[5]

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[4] The Sixth Circuit granted a certificate of appealability on petitioner's *Brady* claim on August 20, 2008; after a petition for panel rehearing and a subsequent motion for reconsideration, the court granted a certificate on one additional claim on October 9, 2008. *See Smith v. Bell*, No. 05-6653 (6th Cir.).

[5] Hunter's reference to "testing" meant his use of the ALS ("alternate light source") technique to photograph and examine a print, under magnification, and compare it to a known print. (CA.Resp.Apx. 473-476, 496; C.A.Pet.Apx. 125-125a)

The Sixth Circuit went on to hold that "[e]ven if the State failed to reveal the presence of the ALS at the scene or the details of the pretrial meeting [with prosecutors], Smith suffered no prejudice because this information lacks any significant impeachment value." (*Id.*)[6]

> [Hunter] provided convincing answers to rebut [petitioner's] allegations. To him, the bloody hand print initially looked like only a partial print. But after noticing later that Smith was missing two fingers, Hunter realized that the print was, in fact, a complete print of a three-fingered hand. Moreover, Hunter accounted for the difference between the result of his initial investigation and later testing. . . .
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> . . .
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> Hunter's convincing explanation for the superiority of laboratory testing with magnification and description of meeting with prosecutors as normal eliminate any basis for . . . the jury to disbelieve him.

(*Id.* (internal citations omitted))

A petition for rehearing en banc was denied by the Sixth Circuit on August 25, 2010. Petitioner now seeks this Court's review.

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[6] Despite the district court's finding that no evidence pertaining to the bloody palm print had been withheld, as well as its finding that "the facts giving rise to this claim were known to defense, appellate, and post-conviction counsel in time to [raise it in state court] (Pet.Apx. A125, A127), the Sixth Circuit determined that petitioner's claim was timely and that he had cause for his default because the prosecution had "failed to respond to [petitioner's] pre-trial request for all *Brady* material with accurate information regarding Hunter's analysis of the hand print." (Pet.Apx. A6) The court thus proceeded to the merits of the claim, noting that "[t]he prejudice inquiry [of the "cause and prejudice" analysis] tracks our analysis of the materiality of the evidence suppressed." (Pet.Apx. A7)

REASONS FOR DENYING REVIEW

I. QUESTION 1 OF THE PETITION IS NOT PRESENTED BY THE DECISION OF THE SIXTH CIRCUIT REJECTING PETITIONER'S *BRADY* CLAIM, AND THAT DECISION THUS DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR WITH PRIOR DECISIONS OF THE CIRCUIT COURTS.

A. The Sixth Circuit Decision Rejecting Petitioner's *Brady* Claim Does Not Conflict With This Court's *Brady* Jurisprudence.

Petitioner contends that the Sixth Circuit "failed to conduct the thorough *Brady* analysis demanded by this Court in *Cone* [*v. Bell*, __ U.S. __, 129 S.Ct. 1769 (2009);] *Banks* [*v. Dretke*, 540 U.S. 668 (2004);] and *Kyles* [*v. Whitley*, 514 U.S. 419 (1995)]." (Pet. 25) This Court's *Brady* jurisprudence makes clear that "[w]hen the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment." *Cone*, 129 S.Ct. at 1783-84 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The three components of a *Brady* claim are (1) that the evidence at issue was favorable to the accused; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that prejudice ensued. *Banks*, 540 U.S. at 691. Evidence is "material" within the meaning of *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 129 S.Ct. at 1784. "[F]avorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id*.

(quoting *Kyles*, 514 U.S. at 435).

Cone supports the proposition that in assessing materiality, a court should "thoroughly review the suppressed evidence [and] consider what its cumulative effect on the jury would have been." 129 S.Ct. at 1784. *Banks* supports the proposition that prejudice, and thus materiality, may be established where the withheld evidence "vividly contradict[s]" the uncorroborated testimony of a critical trial witness. 450 U.S. at 700-01. And *Cone*, *Banks*, and *Kyles* all support the proposition that the positions advanced in the prosecution's closing arguments may bear on the question of materiality. *See Cone*, 129 S.Ct. at 1784 n.18; *Banks*, 450 U.S. at 700, 701. Contrary to the petitioner's argument, however, the decision of the Sixth Circuit in this case does not run at all afoul of any of these principles.

The gravamen of petitioner's *Brady* claim, and the fundamental premise of his bid for certiorari and, indeed, of the first question he presents for this Court's review, is that the prosecution withheld the fact that the State's fingerprint expert, Sgt. Johnny Hunter of the Metropolitan Nashville Police Department, *tested* the bloody palm print while at the crime scene on October 2, 1989, finding it unidentifiable, and that this testing necessarily tainted the subsequent testing and identification that Hunter performed on the print on January 29, 1990. *See* Pet. 6 ("Hunter told the jury that he first tested the sheet in January 1990, which we know now to be false."); Pet 10 ("Hunter conducted two analyses of the sheet"); Pet. 23 ("Hunter actually lied to

the jury when he claimed that he hadn't tested the sheet at the scene."); Pet. 24 ("Hunter told jurors that he didn't test the sheet at the scene, but that was not true."). Petitioner contends that this Court's review is warranted because the Sixth Circuit "pretended that this exculpatory evidence did not exist," "completely ignored this evidence," and "thus foundered immediately in its *Brady* analysis." (Pet. 20, 21) This contention, however, is wrong.

The Sixth Circuit did not "ignore" such evidence or "pretend" that it did not exist. The Sixth Circuit *found* that it did not exist, relegating petitioner's claim to the contrary to the category of "conjecture" and "surmise." *See* Pet.Apx. A7 ("Smith surmises that Hunter tested the bloody sheet at the scene with the ALS . . . ."). As the Sixth Circuit observed, "[petitioner] misconstrues Sgt. Hunter's testimony. Hunter did not change his story; he never stated that he tested the sheet at the scene with the ALS . . . ." (Pet.Apx. A7). Moreover, the *district court* had previously found that such evidence did not exist, expressly crediting Hunter's testimony that "he did examine the palm print on the sheet at the scene with a flashlight" and that "he did not notice at the scene that it looked like the hand that made the palm print had two fingers missing." (Pet.Apx. A137) *See id*. ("This court found Sgt. Hunter's testimony eminently credible and his explanation for not having initially given significance to the palm print understandable and, again, credible."); *see also id*. ("[P]etitioner has failed to provide any proof whatsoever . . . that any evidence pertaining to the bloody

palm print was withheld, intentionally or unintentionally . . . ."). Just as petitioner insists that a court "must first accurately identify the evidence that was withheld" (Pet. 20), so too must petitioner accurately identify the evidence that was *not* withheld. Petitioner is free to continue to disbelieve Sgt. Hunter's testimony and maintain that he *did* test the print using the ALS at the scene, but his own disbelief is of no legal consequence, given the factual findings and credibility determination of the lower courts.

In short, the evidence petitioner insists was withheld from him—the evidence, in petitioner's words, "showing that testimony by the prosecution's key witness about the prosecution's most important piece of evidence was scientifically unreliable and/or fabricated" (Pet. i, Question 1)—was not withheld from him, because it did not exist; Hunter did not test the print at the crime scene using the ALS. Consequently, the Sixth Circuit decision simply does not present the question whether the prosecution violates *Brady* by withholding such evidence. And because the Sixth Circuit decision does not involve this question, it does not conflict with the prior decisions of this Court in *Cone*, *Banks*, and *Kyles*.

Furthermore, the Sixth Circuit engaged in a *Brady* analysis that was both unremarkable and entirely consistent with this Court's jurisprudence when it went on to conclude that "[e]ven if the State failed to reveal the presence of the ALS at the scene or the details of the pre-trial meeting, Smith suffered no prejudice because this

information lacks any significant impeachment value." (Pet.Apx. A7) Echoing the findings of the district court, the Sixth Circuit found:

> [Sgt. Hunter] provided convincing answers to rebut Smith's allegations. To him, the bloody hand print initially looked like only a partial print. But after noticing later that Smith was missing two fingers, Hunter realized that the print was, in fact, a complete print of a three-fingered hand.

(*Id*.) The court went on to point out that "Hunter accounted for the difference between the results of his initial investigation and later testing," noting that the "ALS at the scene lacked the magnification needed for a proper identification" and that "Hunter described the pre-trial conference between police officers and prosecutors to review evidence before a major case goes to trial as a standard operating procedure." (Pet.Apx. A7-8)

> Hunter's convincing explanations for the superiority of laboratory testing with magnification and description of meetings with prosecutors as normal eliminate any basis for the state trial court to exclude Hunter's testimony or for the jury to disbelieve him. Moreover, other evidence support's Smith's convictions—especially the 911 call, his repeated threats against the victims, and his solicitation of others to murder his family—further reducing the probability of a changed outcome.

(Pet.Apx. A8)

B. <u>The Decision of the Sixth Circuit Does Not Conflict With Prior Decisions of Other Circuits.</u>

In a similar vein, petitioner also contends that "other courts of appeals have been faithful to this Court's *Brady* jurisprudence" and have granted relief "in cases

when the prosecution withheld material, exculpatory evidence showing key prosecution witnesses to be unworthy of belief." (Pet. 26 (citing *Simmons v. Beard*, 590 F.3d 223 (3d Cir. 2009), *cert. dismissed*, 130 S.Ct. 1574 (2010); *Wilson v. Beard*, 589 F.3d 651 (3d Cir. 2009); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009); *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006); *Paradis v. Arave*, 240 F.3d 1169 (9th Cir. 2001))). The decision of the Sixth Circuit here, petitioner says, conflicts with these decisions. It does not.

Contrary to petitioner's assertion, the cases he cites did not involve "similar circumstances." (Pet. 26) In all of these cases, there was either no dispute regarding the existence of the allegedly withheld evidence or information, *see Simmons*, 590 F.3d at 228; *Wilson*, 589 F.3d at 657, 662; *Douglas*, 560 F.3d at 1174; *Graves*, 442 F.3d at 340; *Paradis*, 240 F.3d at 1172, 1173, or, where there was a dispute, the court found that the evidence existed, and was withheld, *see Douglas*, 560 F.3d at 1184-85, 1187. Here, though, as discussed above, the lower courts found that the allegedly withheld evidence did not exist—that the bloody palm print was not tested by Sgt. Hunter at the crime scene—and thus was not withheld. No contrast can be drawn, therefore, between the decision of the Sixth Circuit in this case and the decisions in these other circuits.

II. EVEN IF QUESTION 1 OF THE PETITION WERE PRESENTED BY THE DECISION OF THE SIXTH CIRCUIT, THIS CASE WOULD NOT BE A GOOD VEHICLE FOR RESOLVING IT BECAUSE THE DISTRICT COURT PROPERLY RULED THAT PETITIONER'S *BRADY* CLAIM IS BOTH PROCEDURALLY DEFAULTED AND TIME-BARRED.

In *Banks v. Dretke*, 540 U.S. 668 (2004), this Court reiterated that the "cause and prejudice" necessary to excuse a habeas petitioner's procedural default of a *Brady* claim "parallel[s] two of the three components of the alleged *Brady* violation itself." 540 U.S. at 691 (quoting *Strickler v. Greene*, 527 U.S. 263, 282). "[A] petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence . . . ." *Id*; *see id*. at 692-93 (prosecution's withholding of exculpatory evidence may support a finding of cause). Here, the Sixth Circuit found that "the state failed to respond to [petitioner's] request for all *Brady* material with accurate information regarding Hunter's analysis of the hand print"; citing *Banks*, the court then went on to "necessarily conclude that Smith has demonstrated cause for his default." (Pet.Apx. A6-7) The court similarly held that petitioner's claim, which he had added by way of a post-hearing motion to amend his complaint, had been timely filed under 28 U.S.C. § 2244(d)(1)(D). (Pet.Apx. A6)

But in reaching these holdings, the Sixth Circuit contradicted the relevant findings of the district court and consequently reversed the following rulings of that court:

> As an initial matter, the court notes that this claim was not raised in state court prior to being raised in the instant action, *even though the record shows that the facts giving rise to this claim were known to defense, appellate, and post-conviction counsel in time to do so*. Because the petitioner has not made a showing of cause and prejudice, . . . this claim is procedurally defaulted for purposes of *habeas corpus* review.
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> . . .
>
> [T]he record shows that the petitioner brought this action on August 5, 1999, but did not move to amend his petition until January 20, 2004, nearly four and one-half years later. Because the time during which a petition is pending in the district court does not toll the one-year limitations period, it is clear that this claim was filed well beyond the AEDPA's one-year limitations period.

(Pet.Apx. A135-36 (emphasis added) (internal citations omitted)) The district court also went on to find that "the petitioner has failed to provide any proof whatsoever that any evidence pertaining to the bloody palm print was favorable to him, [or] that any evidence pertaining to the bloody palm print was withheld, intentionally or unintentionally." (Pet.Apx. 137)

As the Sixth Circuit itself recognized, a circuit court "review[s] the district court's legal conclusions *de novo* and its factual findings for clear error. (Pet.Apx. A4 (citing *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005)). Here, the Sixth Circuit made no determination that the district court's factual findings on petitioner's *Brady* claim were clearly erroneous; indeed, though it acknowledged that the "district court denied this claim as untimely, procedurally defaulted, and without merit" (Pet.Apx. A6), it made no mention of the pertinent findings of the district court. In the absence of a determination that those findings were clearly erroneous, the Sixth

Circuit was wrong to find to the contrary and reverse the district court's procedural default and time-bar rulings. Petitioner's *Brady* claim, therefore, remains procedurally barred.

III. NEITHER QUESTION 2 NOR QUESTION 3 OF THE PETITION IS PROPERLY BEFORE THE COURT.

Question 2 of the petition implicates the merits of petitioner's claim that the reasonable doubt jury instruction given at his trial is unconstitutional. But this claim was denied by the district court as procedurally defaulted (Pet.Apx. A36), and the Sixth Circuit denied petitioner's request for a certificate of appealability (COA) on this claim on August 20, 2008. (Pet.Apx. A10) Respondent does not concede that petitioner can now secure this Court's review of that order,[7] but even assuming that he can, the only question that could properly be posed to this Court now would be whether the Sixth Circuit erred in denying a COA as to this claim. Petitioner, of course, does not present such a question; indeed, his only acknowledgement of the procedural default ruling on this claim appears in a footnote to the petition. (Pet. 35 n.68) The question petitioner does present is not properly before the Court.

Question 3 of the petition, in contrast, does directly address the procedural default of several of petitioner's other claims, and thus contemplates this Court's review of the Sixth Circuit's August 20, 2008, decision denying a COA as to these claims. (Pet.Apx. A10) But, again assuming *arguendo* that petitioner can now secure

[7] *See* U.S.Sup.Ct.R. 13.1, 13.3 (petition for certiorari must be filed within 90 days, and the time to file runs from the date of entry of the judgment or order sought to be reviewed). *Cf*. Pet. 31 n.64.

such review, Question 3 is still not properly before the Court. After the district court denied a certificate of appealability on all of petitioner's claims, petitioner applied to the Sixth Circuit for a COA. In that application, petitioner raised certain arguments regarding the propriety of the district court's procedural default rulings on these various claims, but the argument to which Question 3 relates—that the ineffective assistance of petitioner's post-conviction counsel provided cause for petitioner's default—was not among them. *See Smith v. Bell*, No. 05-6653 (6th Cir.) (March 1, 2006, Application for Certificate of Appealability, pp. 54-56). Consequently, petitioner waived this issue in the Sixth Circuit. *See Robinson v. Jones,* 142 F.3d 905, 906 (6th Cir. 1998) (issues raised in the district court but not raised on appeal are considered abandoned and not reviewable on appeal).[8]

Nor, in any event, does petitioner provide adequate reason for this Court to review Question 3. Petitioner suggests that this question is the same as the question presented in *Maples v. Thomas*, No. 10-63 (U.S.), and on which this Court recently granted certiorari. *Maples v. Thomas*, __ S.Ct. __, 2011 WL 940889 (Mar. 21, 2011)

[8] Petitioner's Sixth Circuit application for a certificate of appealability included an omnibus request for a COA "on all issues presented in his amended habeas petition" and purported to "incorporate[] all briefing in the District Court on such issues," attaching copies of such briefing as an appendix. *Smith*, No. 05-6653 (Application for Certificate of Appealability, p. 3). But this was inadequate to preserve this issue. *See Thomas v. Cooley Law School v. American Bar Ass'n*, 459 F.3d 705, 710 (6th Cir. 2006) (citing *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003)) ("a party is not allowed to incorporate by reference into its appellate brief the documents and pleadings filed in the district court"); *see also Benge v. Johnson*, 474 F.3d 236, 245 (6th Cir. 2006) (issues adverted to in a perfunctory manner, without developed argument, are deemed waived); *ATC Distribution Group, Inc., v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 705 n.2 (6th Cir. 2005) (although party's brief stated that its claims on appeal included all claims adjudicated by district court, party nevertheless waived those claims that it failed to argue in its brief).

(certiorari granted limited to Question 2 of the petition). It is not the same, though, as the mere recitation of the question presented in *Maples* adequately demonstrates:

> Whether the Eleventh Circuit properly held . . . that there was no "cause" to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and *petitioner's attorneys of record were no longer functioning as his agents at the time of any default*.

Maples, No. 10-63 (Petition for a Writ of Certiorari, p. *ii*, Question 2) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on petitioner by mailing a true copy, first-class, postage prepaid, to Paul Bottei, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee, 37203, (615) 736-5047, on this 28th day of March, 2011.

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JOSEPH F. WHALEN
Associate Solicitor General