CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OSCAR SMITH,

Petitioner

vs.

RICKY BELL, Warden,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In recent years, we have learned that individuals have been convicted and even sentenced to death based upon supposedly "scientific" proof that was unreliable. Oscar Smith's capital trial was tainted by such "junk science."The prosecution's key witness claimed certainty that Oscar Smith left the key piece of evidence at the scene – an alleged palm print on a bed sheet. All the while, the prosecution withheld the expert's initial expert opinion (made after a meticulous examination of the sheet at the crime scene) that the sheet was completely unidentifiable, and not even worthy of further examination. The prosecution also allowed the witness to lie to the jury that he had not examined the sheet at the scene.

The Sixth Circuit has denied relief under *Brady v. Maryland*, 373 U.S. 83 (1963). In addition, the Court denied relief on: (a) claims challenging the constitutionality of jury instructions equating "reasonable doubt" with a "satisfactory conclusion" and "moral certainty" of guilt, while allowing conviction based upon jurors' views of "justice and truth"; and (b) ineffective assistance of counsel claims which have been held procedurally defaulted, despite Oscar Smith's assertion that ineffectiveness of post-conviction counsel establishes "cause" for any failure to raise such claims in state court.

The questions presented are:

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?

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? Compare Maples v. Allen, 586 F.3d 879 (11th Cir. 2009), *cert. pending*, No. 10-63.

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CITATIONS TO OPINIONS BELOW

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on June 18, 2010. The Sixth Circuit denied rehearing on August 25, 2010. On November 16, 2010, Justice Kagan granted an extension of time, to and including January 22, 2011, within which to file a petition for writ of certiorari. Smith v. Bell, No. 10A493 (Nov. 16, 2010)(Kagan. J.).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

U.S. Const. Amend. XIV, provides in pertinent part: "[N]or 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."

STATEMENT OF THE CASE

I.

The Prosecution Withheld Exculpatory Evidence Impeaching The Prosecution's Key Witness And Showing The Unreliability Or Falsity Of His Opinion About The Prosecution's Key Piece Of Evidence

A.
Fingerprint Expert Johnny Hunter Carefully Examined A Bed Sheet At The Crime Scene And Reached The Expert Conclusion That The Sheet Was Completely "Unidentifiable"

Oscar Smith's ex-wife, Judy, and two stepsons were found dead in their Nashville home the afternoon of October 2, 1989. Metropolitan Davidson County Detective Johnny Hunter, a fingerprint expert in the Identification Section, arrived at the scene and "immediately saw" what he thought might be a fingerprint in blood on the bed sheet next to Judy Smith's body.[1] He examined the sheet visually and concluded that there was some ridge detail that might enable him to identify who left the print.[2] He thus examined the sheet more carefully using a flashlight, but "didn't see enough ridge detail in that print to be able to come up with an identification."[3]

Hunter, a professed expert in using an Alternative Light Source (ALS) to identify latent fingerprints, then requested his ALS sent to the scene to assist him in his crime scene analysis.[4] The ALS shines light of different wavelengths, creates contrast between a substance and the surface on which it is found, and, in the context of fingerprint analysis,

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[1] Fed. Evid. Hr'g Tr. 71 (Johnny Hunter).

[2] Id. at 69 (Johnny Hunter).

[3] Id. at 74 (Johnny Hunter).

[4] Id. at 67, 71, 74 (Johnny Hunter).

enhances latent fingerprints. As Hunter stated, the ALS "is there to assist in the recovery and identification of latent prints" and "enables you to see ridge detail that may not be noticed by the human eye."[5] The ALS enables visualization of prints on cloth, often making an otherwise unidentifiable print on cloth identifiable.[6] Hunter made clear that he rarely requested an ALS brought to a crime scene, but "this [was] kind of a special case" given a possible print in blood, and "that would be the only reason we would have ever used the ALS. . . ."[7]

Hunter "absolutely" used "all the equipment that [he] had to assist [him] in making . . . a thorough examination at the scene."[8] Yet following his visual inspection of the sheet, his examination with the flashlight and the ALS (which was at the scene solely for that purpose and part of "all the equipment" he used),[9] Hunter reached the expert conclusion that any possible print on the sheet was "unidentifiable."[10] Hunter's expert opinion from his

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[5] Id. at 72, 76, 74 (Johnny Hunter).

[6] Id. at 112, 123 (Johnny Hunter).

[7] Id. at 104 (Johnny Hunter).

[8] Id. at 68 (Johnny Hunter).

[9] Hunter made clear that he used all tools at his disposal to try to identify the sheet at the scene (Fed. Evid. Hr'g Tr. 68) and he never denied using the ALS on the sheet at the scene (Id. at 72). All he could say is that he did not remember whether he did so. Id. at 71. But obviously, where he was an expert using the ALS, the ALS is used to enhance prints in blood, and the alleged bloody print was the "only reason" (Id. at 104) he would have used the ALS, he used the ALS on the sheet at the scene in order to find the killer. What competent fingerprint/ALS examiner would not have done so? In fact, Hunter testified that identification through fingerprint analysis was more important to him than DNA analysis (Fed. Evid. Hr'g Tr. 128) which further confirms that he called for the ALS and used it on the sheet at the scene in an attempt to identify the killer.

[10] Fed. Evid. Hr'g Tr. 82 (Johnny Hunter).

careful examination of the sheet at the crime scene was that "[T]here was not enough ridge detail in it to make any type of comparison."[11] As Hunter himself testified in federal court, following examination of the sheet at the scene it "had been my opinion" "on 10/2/89 there wasn't sufficient ridges to ever make a reliable identification."[12] As Hunter stated: "*My initial opinion was when I looked at it on the bed, there was not enough ridge detail in it to make any type of comparison*."[13] Having concluded that the sheet contained no identifiable print or any print that could ever be identified, Hunter thus instructed Officer Pirtle to take the sheet to the property room, and Hunter conducted no further fingerprint examination of the sheet at the crime lab.[14] This of course only makes sense, because Hunter's expert opinion was that there was "not enough ridge detail to make *any type of comparison*."[15]

B.

Hunter Then Changed His Expert Opinion To Say That The Sheet Was Identifiable And That It Contained The Palm Print Of Oscar Smith, A Claimed Match That Doesn't Even Satisfy Settled Standards For Declaring A Positive Identification

It was not until three months later (January 1990) – after Hunter had obtained control prints from Oscar Smith[16] – that Hunter came to a completely new expert opinion about the sheet. The prosecutors later admitted that, at that time, they only had a "weak

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[11] Id. at 102 (Johnny Hunter).

[12] Id. (Johnny Hunter).

[13] Id. (Johnny Hunter).

[14] Id. at 74 (Johnny Hunter).

[15] Id. at 102 (Johnny Hunter).

[16] Id. at 49, 79, 82-83 (Johnny Hunter).

circumstantial case" against Oscar Smith.[17] Meeting with Hunter, they all decided that Hunter should "go back and look at all the evidence."[18] Hunter then re-examined the sheet using the ALS (over three months after he had concluded that there was nothing identifiable on the sheet) and reached a new expert conclusion about the sheet. He now said that it contained ridge detail sufficient to make an identification, which he now said was a partial palm print of Oscar Smith.[19] Hunter's opinion thus changed 180 degrees. What was, in his opinion, a sheet with completely "unidentifiable" prints, now became a sheet containing a palm print from Oscar Smith.

Yet even then, Hunter's claimed match fails to satisfy accepted standards for a positive fingerprint identification. According to Hunter, for there to be a positive identification between a latent palm print and a known palm print, the "points of identification . . . *have to be in the same location on the palm print*."[20] But here, Hunter has claimed a match between the *middle* of the latent palm print on the sheet and the *side* of Oscar Smith's control print.[21] All told, therefore, Hunter reached two diametrically opposed expert conclusions about the very same piece of evidence, and his latest opinion lacks scientific reliability.

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[17] Pet'r. Fed. Evid. Hr'g Ex. 11.

[18] Fed. Evid. Hr'g Tr. 93 (Johnny Hunter).

[19] Id. at 103 (Johnny Hunter).

[20] Trial Tr. 2009.

[21] See R. 181, Petitioner's Post-Evidentiary Hearing Brief, pp. 18-19 & Addendum 3 (Addendum 3 is contained in the Appendix to this petition at A155).

C.

The Prosecution Withheld Hunter's Crime-Scene Examination
And Expert Opinion That Any Prints On The Sheet Were Unidentifiable,
While Allowing Hunter To Lie To The Jury
That He Hadn't Examined The Sheet At The Scene

Any reasonable juror would have found significant the fact that Hunter – the ALS expert who requested the ALS to examine the sheet at the scene – reached two diametrically opposed expert conclusions about the sheet: (1) the sheet contained no prints that could identify anyone; followed by (2) the sheet contained a partial palm print from Oscar Smith. The jury never heard about Hunter's complete flip-flop, however, because he and the prosecution not only withheld the exculpatory evidence about his crime-scene evaluation and expert conclusion, but Hunter also deliberately misled the jury during his testimony.

Specifically, Hunter told the jury that he first tested the sheet in January 1990,[22] which we know now to be false. Not surprisingly, concomitant with this false statement to the jury, neither Hunter nor the prosecution told defense counsel about Hunter's careful examination of the sheet at the scene in October 1989, nor his expert opinion at the scene that supposed prints on the sheet were "unidentifiable."[23] Rather, Oscar Smith and defense counsel were bamboozled into thinking that, at the scene, Hunter had neither examined the sheet nor reached any expert conclusion about its evidentiary value. The prosecution itself reinforced this false version of events in closing argument, deceptively telling jurors that Hunter simply "got the sheet . . . and put it in the Property Room" and didn't examine the

[22] Trial Tr. 2035.

[23] Fed. Evid. Hr'g. Tr. 151, 153, 154, 156-157 (Karl Dean).

sheet until months later because he was a "busy man."[24] That, too, as we now know, is just not true. Contrast this with what Hunter did with the various latent fingerprints he recovered at the scene: He immediately sent those fingerprints to the lab and proceeded to identify such prints the very next day (and as noted *infra*, pp. 14-15 & n.49, one print identified by Hunter actually excludes Oscar Smith as the perpetrator).

D.

In Front Of The Jury, The Prosecution Staked Its Case Against Oscar Smith On Hunter's Testimony And Got The Jury To Convict And Impose The Death Sentence

Hunter's identification testimony of the palm print was the centerpiece of the prosecution's case against Oscar Smith. From the very beginning of the trial, the prosecution focused the jury on Hunter's testimony, telling the jury in opening statement that Hunter would prove that Oscar Smith was the killer because his bloody palm print had been found at the scene.[25] After Hunter testified, the prosecution argued that the jury must convict because Hunter's testimony eliminated all reasonable doubt. Hunter's trial opinion meant there was "no question" Oscar Smith was guilty: "You know that the bloody palm print belongs to this man right here. There is no question . . . . Sergeant Hunter tells you there is *no question* this belongs to that man, Oscar Franklin Smith."[26] "Without question," the prosecution argued, Oscar Smith's print was on the sheet, given Hunter's testimony.[27] In addition, with Oscar Smith having presented testimony that he had not committed this

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[24] Pros. Closing Arg. 33, 60.

[25] Pros. Opening Stmt. Tr. 14.

[26] Pros. Closing Arg. 25, 26.

[27] Id. at 61.

murder, the prosecution told the jurors to use Hunter's testimony to discredit Oscar Smith's defense: "Weigh Sergeant Hunter versus Oscar Smith."[28]

Significantly, the prosecution made clear that the jury should convict Oscar Smith based upon Hunter's testimony alone: "You can convict on that alone . . . You can convict on that alone. . . . [t]he fingerprint testimony is that strong."[29] Not surprisingly, the jury did, and it then sentenced Oscar Smith to death. Through his new and improved expert opinion about the sheet, Johnny Hunter had, as the prosecution itself stated, "changed a weak circumstantial case into a strong circumstantial case which left no doubt in the jury's minds that the defendant was the perpetrator . . . ."[30] The overriding significance of Johnny Hunter's trial testimony cannot be overstated. Indeed, the prosecutors themselves raved about Hunter's testimony concerning what the prosecutors considered to be *the most important piece of evidence* in this case:

> The palm print was the most important piece of evidence presented to the jury, and Sgt. Hunter's articulate and professional testimony regarding his observations and opinions was very impressive to all courtroom observers, in addition to the jury.[31]

E.

The Sixth Circuit Overlooked Or Misrepresented The Withheld Exculpatory Evidence To Conclude That Oscar Smith Received A Fair Trial

In federal habeas corpus proceedings, Oscar Smith alleged that the prosecution

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[28] Id. at 34.

[29] Id. at 61.

[30] Fed. Evid. Hr'g. Ex. 11, p. 1 (Aug. 13, 1990 Letter from prosecutors Tom Thurman and Cheryl Blackburn to Metropolitan Police Chief Kirchner).

[31] Id. at p. 2.

withheld material exculpatory evidence showing the falsity and unreliability of Johnny Hunter's trial testimony.[32] Though Johnny Hunter was, in fact, the key witness about the critical piece of evidence used to convict Oscar Smith and sentence him to death, the Sixth Circuit concluded that Oscar Smith suffered no prejudice at the guilt phase of trial and did not even establish residual doubt for purposes of sentencing (where Tennessee law requires consideration of residual doubt in capital sentencing proceedings). Smith v. Bell, 381 Fed.Appx. at 552-554; A8-10. This, even though Hunter and the prosecution deceived the jury by hiding the fact that Hunter carefully examined the sheet at the scene and came to the expert conclusion that the sheet was unidentifiable – an opinion that completely contradicts his trial testimony.

The Sixth Circuit, however, did not thoroughly review Oscar Smith's *Brady* claims. Compare Cone v. Bell, 556 U.S. ___ (2009)(overturning Sixth Circuit's errant *Brady* analysis and requiring thorough review of *Brady* claim on remand). First, the Sixth Circuit ignored the critical, undisputed withheld evidence that forms the very foundation of Oscar Smith's *Brady* claim, *viz.*, the fact that Hunter carefully examined the sheet at the crime scene and reached an expert opinion that no useable print was on the sheet – or could

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[32] It was only during proceedings in the District Court that Johnny Hunter first revealed that he had carefully examined the sheet at the scene and concluded that the sheet was unidentifiable. Oscar Smith thus promptly amended his habeas petition to include a claim that the prosecution withheld such exculpatory impeachment evidence and presented Hunter's false testimony. The District Court denied relief on the claim, and the Sixth Circuit granted a certificate of appealability. Given the late disclosure of this evidence, the Sixth Circuit concluded Oscar Smith's claim was timely in federal court and that he had "cause" for not presenting his claims to the state courts. Smith v. Bell, 381 Fed.Appx. at 552; A6. The Sixth Circuit thus addressed Smith's *Brady* claim on the merits, to determine whether his claim is meritorious, such that he established "prejudice" to overcome any alleged procedural default. See Banks v. Dretke, 540 U.S. 668, 698 (2004)(where evidence is material under *Brady*, it establishes prejudice sufficient to overcome procedural default).

ever be found on the sheet.

Hunter's withheld opinion from his examination at the crime scene is the very foundation of Oscar Smith's *Brady* claim for it shows that Hunter's purported reliable "science" is no science at all, that Hunter is not a reliable "expert," and that his trial testimony was not credible and/or outright fabricated. Indeed, Hunter's "at-the-scene" opinion shows that Hunter's claimed match at trial is not scientific at all. Replicability is the essence of science, yet Hunter conducted two analyses of the sheet and reached two diametrically opposed results. Disclosure of Hunter's "at-the-scene" opinion would have been devastating to Hunter on cross-examination, as it would have shown that Hunter's opinion changed over time and changed only when he was motivated to find new evidence to convict Oscar Smith.

Rather than considering this undisputed fact and applying the law of *Brady v. Maryland*, 373 U.S 83 (1963) to this undisputed fact, the Sixth Circuit instead said that Oscar Smith merely "surmises that Hunter . . . found that the sheet offered no useable print." Smith, 381 Fed.Appx. at 553; A7. Oscar Smith doesn't "surmise" any such thing. Johnny Hunter specifically testified in federal court that he reached an expert conclusion at the scene that the sheet could never be used to identify anyone: Hunter "knew on 10/2/89 there wasn't sufficient ridges to ever make a reliable identification."[33] That was his expert opinion.[34]

Second, the Sixth Circuit ignored well-settled *Brady* principles to assert that the withheld evidence of Hunter's crime-scene activities and opinion "lacks any significant

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[33] Fed. Evid. Hr'g Tr. 102 (Johnny Hunter).

[34] Id.

impeachment value" and would have provided no "basis . . . for the jury to disbelieve him." Smith, 381 Fed.Appx. at 553, 554; A7, 8. As shown *infra*, this is an untenable assertion, for it flies in the face of well-settled *Brady* jurisprudence: Proof that a witness has changed his or her story is classic impeachment evidence and (as here) can be devastating to a witness' credibility. Indeed, evidence that directly contradicts a witness' trial testimony is of significant impeachment value as it "cast[s] in large doubt" the witness' veracity. See Banks v. Dretke, 540 U.S. at 701.

Third, the Sixth Circuit distorted or ignored critical facts, claiming that "Hunter did not change his story" and that Hunter failed to identify a print at the scene because he claimed that he could only make an identification at the crime lab. Smith, 381 Fed.Appx. at 553; A7. Such assertions also ignore the record. Hunter clearly did change his story: He had two different expert opinions at two different times. And any claim that Hunter needed to examine the sheet in the lab does not explain his changed opinions, for it ignores the fact that Hunter's crime-scene opinion was that the sheet was unidentifiable and he thus *didn't* examine the sheet at the lab, but instead immediately put the sheet into storage.[35]

[35] After carefully examining the sheet at the scene, Hunter concluded that there was no further analysis needed *or even possible* and thus sent the sheet into storage. Had Hunter: (1) concluded at the crime scene that the sheet might yield an identification if examined at the lab, and (2) immediately evaluated the sheet at the lab, then the Sixth Circuit's statement would be plausible. For indeed, Hunter immediately examined other latent prints at the lab (including one which proved *not* to belong to Oscar Smith, *See infra*). Not so with the sheet. Rather, Hunter concluded at the scene that there was *absolutely nothing* he could do at the lab to make an identification from the unidentifiable sheet, which is why he did nothing more.

II.

Jurors Were Instructed To Convict If They Reached
A "Satisfactory Conclusion" Or "Moral Certainty" Of Guilt,
And If They Felt "Justice And Truth" Dictated Conviction

At the guilt phase of Oscar Smith's capital trial, the trial judge told jurors to convict if they merely had a "satisfactory conclusion" and "moral certainty" that Oscar Smith was guilty:

> Before a verdict of guilty is justified, the circumstances, taken together, must be of a conclusive nature and tendency, leading on the whole to a *satisfactory conclusion*, and producing, in effect, a *moral certainty* that the defendant, and no one else committed the offense.[36]

The jurors were again instructed that they only needed to be "morally certain" of guilt before voting to convict:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but *moral certainty is required* as to every proposition of proof requisite to constitute the offense.[37]

They were later instructed to convict or acquit based upon their own sense of justice and truth, i.e., to "render your verdict with absolute fairness and impartiality *as you think justice and truth dictate*."[38]

In state post-conviction proceedings, Oscar Smith alleged that jury instructions defining "reasonable doubt" were unconstitutional and that trial counsel and appellate counsel were ineffective for failing to challenge such instructions. The Tennessee Court of

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[36] Trial Tr. 2974.

[37] Id. at 2975.

[38] Id at 2978 (emphasis supplied).

Criminal Appeals concluded that the claims were not meritorious, and that counsel therefore was not ineffective. Smith v. State, 1998 Tenn.Crim.App.Lexis 680 *76. In federal habeas corpus proceedings, Oscar Smith raised claims that: (1) these "reasonable doubt" jury instructions were unconstitutional;[39] and (2) counsel were ineffective for failing to challenge such instructions at trial and on appeal.[40] The District Court concluded that the substantive claim was procedurally defaulted,[41] and that the state court's decision on the related ineffective assistance of counsel claim was not contrary to, or an unreasonable application of, clearly federal established law.[42] The District Court denied a certificate of appealability on both claims,[43] as did the Sixth Circuit.[44]

III.

The Lower Courts Have Held That
Numerous Claims That Counsel Failed To Investigate And Present Exculpatory Evidence
Are Procedurally Defaulted, Despite Oscar Smith's Arguments To The Contrary

Oscar Smith's trial was not only tainted by Johnny Hunter's junk science, but it was also tainted by trial counsel's failure to investigate and present exculpatory evidence proving that someone other than Oscar Smith committed these murders.

Oscar Smith's federal habeas petition also includes claims (supported by substantial

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[39] R. 18, Amended Petition For Writ Of Habeas Corpus, ¶9, pp. 11-12.

[40] Id., ¶8.k.4., p. 11 (ineffective assistance of trial counsel); ¶24, p. 30 (ineffective assistance of appellate counsel).

[41] R. 201, District Court Memorandum, pp. 26-27; A36-37.

[42] Id., pp. 96-98.

[43] Smith v. Bell, M.D.Tenn.No. 99-731, R. 207, pp. 3-4, 6.

[44] Smith v. Bell, No. 05-6653 (6th Cir. Aug. 20, 2008); A9.

evidence) that Oscar Smith did not kill the victims, and that he was convicted and sentenced to death because, in violation of the Sixth and Fourteenth Amendments, trial counsel ineffectively failed to investigate and present proof of his innocence. Such claims (and supporting proof) include claims that trial counsel failed to establish that others were seen at the crime scene, had motive and opportunity to kill Judy Smith, and left an identifiable fingerprint at the scene; and that the victims were killed the morning of October 2, 1989, when Oscar Smith was, in fact, known to be in Kentucky:

(1) An African-American male (Oscar Smith is Caucasian) was seen near the victims' house around the time police responded to a 9-1-1 call the evening of October 1, 1989 (when the prosecution said the crime occurred);[45]

(2) An African-American male was seen the next day (when the bodies were found) running away from the victims' house and heading toward a nearby bus stop;[46]

(3) Judy Smith had, in fact, been engaged in drug dealing with an African-American male and had stolen his car, and he was trying to find her (apparently to get even);[47]

(4) The killing was drug-related, not the result of a domestic

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[45] R. 18, Amended Petition, p. 5, ¶8.a.2.a. See also R. 103, Pet'r Summ. J. Resp., Ex. 14 (noting that "Frankie" Lane was seen breaking a car window across the street from the victims' house around the time of a 9-1-1 call from the victims' residence late on October 1, 1989).

[46] R. 18, Amended Petition, p. 5, ¶8.a.2.b; R. 103, Pet'r Summ. J. Resp., Ex. 11 (Oct. 2, 1989 report of Detective J. Fuqua's interview with witness William A. Griffey).

[47] R. 18, Amended Petition, p. 5, ¶8.a.2.c; R. 103, Pet'r Summ. J. Resp., Ex. 12 (Oct. 4, 1989 Metropolitan Davidson County Police Department Report).

dispute as the prosecution claimed;[48]

(5) At least one identifiable fingerprint recovered from the scene did *not* match Oscar Smith, but clearly identified someone else;[49]

(6) Shoe print casts taken from outside the victims' house did not match Oscar Smith's shoes;[50]

(7) The victims were killed the morning of October 2, 1989 (not the night of October 1) as shown by proof that:

(a) An alarm clock set for 5:00 a.m. but was not ringing when the bodies were found, thus proving that the victims were killed after awakening at 5:00 a.m.;[51] and

(b) A hair dryer was running when the bodies were found the afternoon of October 2, indicating the victims were killed the morning of October 2, while getting their day started.[52]

Oscar Smith also maintained in federal proceedings that trial counsel was ineffective at the sentencing phase of trial for failing to investigate and present mitigating evidence of Oscar Smith's troubled mental health, including a family history of mental illness (including

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[48] R. 18, Amended Petition, p. 5, ¶8.c.3; R. 103, Pet'r Summ. J. Resp., Ex. 12.

[49] R. 18, Amended Petition, p. 5, ¶8.c.1; R. 103, Pet'r Summ. J. Resp., Ex. 3.

[50] R. 18, Amended Petition, p. 5, ¶8.c.5; R. 103, Pet'r Summ. J. Resp., Exs. 6, 7, 8.

[51] R. 18, Amended Petition, p. 5, ¶8.b.4.

[52] R. 18, Amended Petition, p. 5, ¶8.b.4.

schizophrenia) and Oscar's being treated for mental difficulties.[53]

In state post-conviction proceedings, the state appointed counsel for Oscar Smith, pursuant to Tenn. Code Ann. §40-30-115. State-appointed counsel, however, did not raise each of these significant ineffective assistance of counsel claims. Oscar Smith maintained in federal habeas proceedings that he nevertheless had "cause" for failing to raise such claims in post-conviction: Because such claims could only be raised initially in state post-conviction proceedings,[54] the ineffectiveness of his appointed post-conviction counsel provided "cause" for any alleged default. Pet'r Summ. J. Resp., pp. 24-25. He explained:

> [I]f a constitutional claim can only be brought for the first time in post-conviction, an exception to this rule should apply. Because post-conviction proceedings provide the first opportunity for Oscar Smith to litigate ineffectiveness claims, he was (and is) entitled to effective assistance of counsel for the presentation of such claims. Cf. Coleman v. Thompson, 501 U.S. 722, 756, 111 S.Ct. 2546, 2568 (1991). To conclude otherwise would mean that Oscar Smith was not entitled in any forum to the effective assistance of counsel in presenting a constitutional claim. Oscar Smith therefore has "cause" (and resulting prejudice) for any failure to present such claims in post-conviction.

Id. at 24.

The District Court, however, rejected this argument, concluding that Oscar Smith was wrong to assert that the ineffective assistance of post-conviction counsel could establish "cause" for his procedural defaults. R. 201, District Court Memorandum, p. 42; A52. The District Court held:

> [T]he law is firmly settled that ineffective assistance of counsel in post-conviction proceedings can never establish cause, because there is no

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[53] R. 18, Amended Petition, p. 19, ¶12.a; R. 103, Pet'r Summ. J. Resp., Exs. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28.

[54] Trial counsel were Oscar Smith's counsel on direct appeal and thus could not raise their own ineffectiveness on direct appeal.

> constitutional right to the effective assistance of counsel in such collateral proceedings in the first place.[26] *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see Coleman [v. Thompson]*, 501 U.S. at 742-53; *Ritchie v. Eberhart*, 11 F.3d 587, 590 (6th Cir. 1993).
>
> [26] The petitioner argues that he should be entitled to relief for ineffective assistance of counsel on post-conviction, if post-conviction provides the first opportunity for a claim to be raised. (DE#103, ¶I.B.c.3), p. 24). The petitioner's opinion notwithstanding, the law is well established that there is no constitutional right to effective assistance of counsel on post-conviction or other collateral review.

Id., pp. 42-43 & n. 26; A52-53.

The District Court thus denied these ineffectiveness claims as procedurally defaulted, with Oscar Smith being unable to show "cause."[55] Id. The Court also denied a certificate of appealability.[56] The Sixth Circuit likewise denied a certificate of appealability on such claims.[57]

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[55] The lower courts found additional ineffectiveness claims procedurally defaulted because they were not presented in state post-conviction proceedings. See R. 201, District Court Memorandum, pp. 22-34, A32-44. The Court also found additional non-ineffectiveness claims defaulted for that same reason. Id. To streamline this Court's analysis, Oscar Smith has identified specific ineffectiveness claims by way of example only. Were this Court to conclude that ineffectiveness of post-conviction counsel establishes "cause" for procedural default, this Court should remand to the lower courts for consideration of all such ineffectiveness claims found to be defaulted by the lower courts. And as noted *infra*, the lower courts would also need to consider the cumulative effect of counsel's failures as to all claims that are not procedurally defaulted, not simply those claims for which ineffectiveness of post-conviction counsel establishes cause.

[56] Smith v. Bell, M.D.Tenn.No. 99-731, R. 207, pp. 2-3, 6 (denying certificate of appealability on such claims, concluding that procedural default finding was not debatable among reasonable jurists).

[57] Smith v. Bell, No. 05-6653 (6th Cir. Aug. 20, 2008)(order granting certificate of appealability on *Brady* claim but denying on all remaining claims); A9-10. Later, on reconsideration, the Sixth Circuit granted a certificate of appealability on Smith's claim that counsel was ineffective for failing to investigate the time of death and present expert proof that the victims were killed the morning of October 2, 1989, when Oscar Smith clearly was in Kentucky, many miles away.

REASONS FOR GRANTING THE WRIT

I. Rather Than Providing The Thorough Review Mandated By This Court's *Brady* Jurisprudence, The Court Of Appeals Has Ignored The Very Foundation Of Oscar Smith's Claims, Misapprehended Fundamental *Brady* Principles, And Refused To Acknowledge Critical Facts And The Prosecution's Argument Which Establish A Violation Of Due Process, All In Conflict With This Court's Decisions in *Cone*, *Banks*, and *Kyles*.

Because "dismissal of a first federal habeas petition is a particularly serious matter," Lonchar v. Thomas, 517 U.S. 314, 324 (1996), a court of appeals is obligated to "fully consider" a capital habeas petitioner's constitutional claims, upon pain of reversal. Jefferson v. Upton, 560 U.S. ___, ___ (2010)(per curiam)(slip op. at 1). This Court, too, has a "duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case." Kyles v. Whitley, 514 U.S. 419, 422 (1995).

When the State has withheld exculpatory evidence in a capital case, a court of appeals must therefore "thoroughly review the suppressed evidence [and] consider what its cumulative effect on the jury would have been." Cone v. Bell, 556 U.S. ___, ___ (2009) (slip op. at 23). When a court of appeals fails to do so, this Court appropriately intervenes, as it did in *Cone* and *Kyles*, and as it did in Banks v. Dretke, 540 U.S. 668 (2004)(reversing court of appeals and granting relief under *Brady v. Maryland*, 373 U.S. 83 (1963)). As in *Cone*, *Kyles*, and *Banks*, this Court should grant certiorari, because the court of appeals has not throughly reviewed Oscar Smith's *Brady* claim, leaving the decision below in conflict with decisions of this Court and other courts of appeals.

Indeed, the court of appeals' analysis flouts numerous fundamental precepts of *Brady*, including foundational requirements that a reviewing court actually consider all evidence that was withheld and its impact upon the prosecution's case, and do so in light

of the prosecution's closing arguments. The court of appeals' decision conflicts with this Court's *Brady* jurisprudence, in that:

(1) The court of appeals did not consider all of the withheld exculpatory evidence, instead ignoring the very evidence which forms the foundation of Oscar Smith's *Brady* claim, *viz.*, withheld evidence showing that Johnny Hunter reached an expert opinion at the crime scene that the bed sheet was, and would always be, wholly unidentifiable;

(2) The court of appeals ignored settled law to assert that withheld evidence of a witness' statement or opinion that directly contradicted the witness' trial testimony lacked significant impeachment value; and

(3) The court of appeals failed to thoroughly review the significance of the *Brady* evidence to the jury's decision, because it failed to fully consider: (a) the significance of Hunter's testimony to the prosecution's case; (b) the fact that Hunter lied to the jury that he hadn't examined the sheet at the scene; and (c) the fact that the prosecution capitalized on its withholding of exculpatory evidence in closing argument.

The court of appeals made the very types of analytical errors it made in *Cone*, and more. As in *Cone*, *Banks*, and *Kyles*, this Court should grant certiorari and reverse.

A. *Brady*

"[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 v. Bell, 556 U.S. at ___ (slip op. at 20). "[E]vidence 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." Id.; Banks v. Dretke, 540 U.S. at 698-699; Kyles, 514 U.S. at 433.

B. The Decision Of The Court Of Appeals Conflicts With *Cone*, *Banks*, and *Kyles* And The Fundamental Due Process Principles Enunciated In Those Cases

It goes without saying that before a reviewing court can properly consider a *Brady* claim, the court must first accurately identify the evidence that was withheld. That is exactly what this Court did in *Cone*. See Cone, 556 U.S. at ____ (slip op. at 9-10, 21-22). That is precisely what this Court did in *Banks*. See Banks, 540 U.S. at 675, 682-683, 685-686. It is what this Court did in *Kyles*. See Kyles, 514 U.S. at 423-428.

Contrary to *Cone*, *Banks*, and *Kyles*, the court of appeals failed to accurately identify the withheld evidence in this case. It refused to acknowledge the withheld evidence that forms the very foundation Oscar Smith's *Brady* claim, *viz*. **exculpatory evidence that Hunter carefully examined the sheet at the crime scene and reached the expert conclusion that the sheet was completely unidentifiable**. Hunter's withheld crime scene analysis and crime-scene opinion would have been dynamite before a jury, because they alone prove that Hunter was incredible when he claimed at trial that the sheet actually contained Oscar Smith's palm print.

The court of appeals, however, simply pretended that this exculpatory evidence did not exist, saying that Oscar Smith "surmise[d]" the existence of such withheld evidence. Smith v. Bell, 381 Fed.Appx. at 553; A7. That is not true. Hunter's undisputed federal evidentiary hearing testimony was that after carefully examining the sheet at the scene using "all the equipment that [he] had," (which included the ALS – which he called to the scene precisely to examine blood on cloth) he reached an expert opinion that the sheet was

unidentifiable. See pp. 3-4 & nn. 8-15, *supra*. Johnny Hunter's own federal testimony proves the court of appeals wrong. To quote Hunter: "*My initial* ***opinion*** *was when I looked at it on the bed,* ***there was not enough ridge detail in it to make any type of comparison***."[58]

Having completely ignored this withheld evidence, the court of appeals thus foundered immediately in its *Brady* analysis. It instead claimed that the only evidence withheld was "that Hunter attended a pre-trial conference and cannot remember whether he examined the sheet with an ALS at the scene." Smith v. Bell, 381 Fed.Appx. at 554; A8. The court of appeals thus could not and did not "thoroughly review the suppressed evidence" as required by *Cone* (556 U.S. at ___ (slip op. at 23)), because it didn't even properly identify the most important piece of evidence withheld – Hunter's crime-scene expert opinion.

Also in contravention of this Court's *Brady* jurisprudence, the court of appeals made a fundamental error in considering the significance of the withheld evidence. The court of appeals concluded that evidence withheld from Oscar Smith lacked any significant impeachment value and provided no "basis . . . for the jury to disbelieve him [Hunter]." Smith v. Bell, 381 Fed.Appx. at 554; A8. This, too, conflicts with this Court's pronouncements in *Kyles*, *Banks*, and *Cone*. In *Kyles*, this Court concluded that "the evolution over time" of a witness' testimony "can be fatal to its reliability." Kyles, 514 U.S. at 444. This Court thus concluded that withheld evidence showing that a witness' pretrial statement was "vastly different" from his trial testimony was highly impeaching, because on cross-examination, such evidence would have utterly "destroy[ed] confidence" in the

[58] Fed. Evid. Hr'g Tr. 102 (Johnny Hunter).

witness' testimony. Id. at 442-443. Likewise, in *Banks*, this Court held that withheld evidence which "vividly contradict[ed]" the witness' trial testimony would have led jurors to "distrust" such trial testimony. Banks, 540 U.S. at 701. Even in *Cone*, this Court recognized that withheld evidence that does "not directly contradict" a witness' trial testimony may nevertheless "place it in a different light," thus calling into question its veracity. Cone, 556 U.S. at ___ n. 17 (slip op. at 22 n.17). Here, however, the court of appeals reached an opposite conclusion, thus flouting the well-settled principle that a witness' prior contradictory statement or opinion about a critical matter is quite damaging to his or her credibility.

The court of appeals likewise failed to adhere to this Court's teachings that when assessing materiality, a reviewing court must fully consider the withheld evidence in light of the prosecution's case, especially as demonstrated by the prosecution's closing arguments. Again, *Cone*, *Banks*, and *Kyles* are instructive.

In *Cone*, this Court outlined the prosecution's closing arguments to demonstrate the significance of the withheld evidence, reversing the court of appeals where the court of appeals failed to fully consider the effect of the withheld evidence in light of the prosecution's closing arguments. Cone, 556 U.S. at ___ & nn. 3 & 18 (slip op. at 5-6 & n.3, 23 n. 18). In *Kyles*, this Court noted that under *Brady*, a reviewing court must focus on the prosecution's closing arguments, because the "likely damage" to the prosecution's case "is best understood by taking the word of the prosecutor." Kyles, 514 U.S. at 444. In *Kyles*, therefore, where one witness was "rated" by the prosecution "as its best witness" and the prosecution itself argued that he and another witness "were the State's two best witnesses," exculpatory evidence which impeached both witnesses would have "severely undermined"

those witnesses and, in turn, the prosecution's entire case. Id. at 441, 444. Similarly, in *Banks*, this Court recognized the materiality of withheld evidence showing that a witness lied, where the witness was the "centerpiece" of the prosecution's case and "crucial to the prosecution," and the prosecution "underscored" that witness' testimony in closing argument. Banks, 540 U.S. at 700, 701.

The court of appeals here failed to evaluate Hunter's withheld crime-scene opinion in light of the prosecution's argument, in large part because the court of appeals didn't properly identify Hunter's crime-scene opinion as withheld exculpatory evidence. The court of appeals also did not mention the critical fact that the prosecution itself declared that Johnny Hunter was "very impressive" "to the jury" in his testimony about "the most important piece of evidence presented to the jury."[59] Thus, the court of appeals did not (as required by *Cone*, *Kyles*, and *Banks*) fully evaluate the withheld evidence in light of the prosecution's own words describing the witness' crucial role in the case. See also Cone, 556 U.S. at ____ n.18 (slip op. at 23 n.18)(court of appeals did not properly evaluate *Brady* claim because it failed to consider all of prosecution's arguments).

Further, the court of appeals elided the crucial fact that Hunter actually lied to the jury when he claimed that he hadn't tested the sheet at the scene[60] – and the prosecution not only failed to correct his false statement, but then used it to argue for his credibility.[61]

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[59] Fed. Evid. Hr'g Ex. 11, pp. 2, 1.

[60] Trial Tr. 2035 (Hunter).

[61] The prosecution also allowed Hunter to mislead the jury into thinking that he examined the sheet on his own volition, because he was a competent expert. Hunter told the jury that he alone made the decision to examine the sheet in January 1990. He said there was no "request" to do so by anyone else: "There was no request made. I – I took it (continued...)

In *Banks*, this Court made manifest that a prosecutor has an obligation to set the record straight when a witness testifies falsely, rather than using that false testimony to bolster a misleading argument for conviction or death. Thus, in *Banks*, this Court found a due process violation where the prosecution "remained silent" when a key witness made false statements to the jury to bolster his credibility, but then argued for death based upon the witness' credibility while withholding evidence showing that the witness was unworthy of belief. Banks, 540 U.S. at 680, 681-682, 700-701.

While this Court in *Banks* was careful to identify the fundamental unfairness arising from the prosecution capitalizing upon the witness' false testimony, the court of appeals here did no such thing. Hunter told jurors that he didn't test the sheet at the scene, but that was not true. By telling this lie, Hunter gave the jury a plausible – but unquestionably false – explanation as to why his trial opinion from his January 1990 examination of the sheet should be believed. Yet rather than setting the record straight by disclosing to the jury that Hunter examined the sheet at the scene and reached an opinion about the sheet, the prosecution instead relied on Hunter's false testimony to argue for conviction. As in *Banks*, therefore, the prosecution here used the witness' lie and the withholding of evidence to secure the jury verdict. Rather than giving the jury the truth, the prosecution argued for conviction and death by reinforcing Hunter's false version of events. Exactly as in *Banks* – where the key witness lied and prosecution allowed him to lie while withholding evidence

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[61](...continued)
on myself to re-evaluate the evidence." Trial Tr. 2033 (Johnny Hunter). Hunter never told the jury about his pivotal, private discussion with the prosecutors that led to the January 1990 examination. His trial testimony, if not outright false, was unquestionably misleading, again falsely bolstering his trial testimony.

of his untruthfulness – due process has been violated. [62]

In sum, therefore, the court of appeals failed to conduct the thorough *Brady* analysis demanded by this Court in *Cone*, *Banks*, and *Kyles*. By conducting a wholly inadequate analysis, the court of appeals has allowed Oscar Smith to be sent to his death based upon the false, misleading, and scientifically unreliable testimony of the prosecution's key witness about the prosecution's most important piece of evidence.

The court of appeals did not even acknowledge all of the withheld evidence, and ignored *the* critical piece of withheld evidence, Hunter's crime scene opinion. The court of appeals misunderstood the meaning of impeachment. The court of appeals did not view all of the withheld evidence in light of the prosecution's arguments, instead misstating the withheld evidence and failing to account for the prosecution's own view that Hunter was their best witness, and highly persuasive. The court of appeals did not fully consider the impact upon the jury of Hunter's false testimony about his actions at the crime scene, which grossly misled the jury.

Just as this Court reversed in *Cone*, *Banks* and *Kyles*, this Court should grant certiorari and reverse, because the court of appeals' analysis directly conflicts with this Court's decisions in *Cone*, *Banks*, or *Kyles*. Those cases require the careful review of all withheld impeachment evidence in light of the prosecution's arguments – a review which,

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[62] In eliding the significance of Hunter's at-the-scene opinion that the sheet was unuseable for any purpose, the court of appeals claims that Hunter sent the sheet to the lab for further analysis, because his analysis at the scene was somehow incomplete, "necessitating this additional work at the lab." Smith v. Bell, 381 Fed.Appx. at 553; A7. *This is a patently false statement. Hunter did no such thing*. As already explained, Hunter testified unequivocally that he examined the sheet and reached the expert conclusion that the sheet was unuseable for any purpose, and he therefore *did not* do any "additional work at the lab" on the sheet after examining the sheet at the scene. His opinion changed *only* months later, after he met with prosecutors and was encouraged to re-examine the sheet.

in this capital case, Oscar Smith has not received.

C. The Court Of Appeals' Decision Also Conflicts With Decisions Of The Other Courts Of Appeals Granting *Brady* Relief Where The Prosecution Withheld Exculpatory Evidence Impeaching The Prosecution's Key Witness(es)

The fact that the other circuits have granted capital petitioners new trials under similar circumstances further supports a grant of certiorari. Unlike the court of appeals below, other courts of appeals have been faithful to this Court's *Brady* jurisprudence, having granted relief in similar circumstances by properly applying *Cone*, *Banks*, and *Kyles*. Indeed, other courts of appeals have not hesitated to grant *Brady* relief in capital cases when the prosecution withheld material, exculpatory evidence showing key prosecution witnesses to be unworthy of belief. See e.g., Simmons v. Beard, 590 F.3d 223 (3d Cir. 2009); 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 below thus conflicts with such cases.

Just as Messrs. Simmons, Wilson, Douglas, Graves, and Paradis were entitled to be released from death row pending a new trial, so is Oscar Smith – once given a full and fair consideration of his *Brady* claim. See also Tassin v. Cain, 517 F.3d 770 (5th Cir. 2008) (*Brady* relief in non-capital case); Leka v. Portuondo, 257 F.3d 89 (2d Cir. 2001); Crivens v. Roth, 172 F.3d 991 (7th Cir. 1998); United States v. Service Deli, Inc., 151 F.3d 938 (9th Cir. 1998); United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996).

D. Oscar Smith Was Convicted And Sentenced To Death By A Jury That Was Tricked Into Thinking Junk Science Was Reliable

The need for review is especially pronounced in this capital case because Johnny Hunter made the critical difference to the jury's decision to convict Oscar Smith and

sentence him to death, yet Hunter's opinion at trial is nothing but junk science. His testimony was not credible given the withheld evidence of his crime-scene opinion, and even more significantly, Hunter's claimed match simply doesn't satisfy accepted standards for a "match." See p. 5, *supra*. As Hunter admitted at trial, in finger print analysis, there can only be a "match" between corresponding portions of a print, yet Hunter's claimed match doesn't even meet this standard. See Id.; A155. It is, pure and simple, junk science – the very type of untrue "evidence" that has led to many an erroneous conviction.

The State cannot salvage its unfair prosecution of Oscar Smith by claiming that he would have been convicted and sentenced to death anyway. That is not so. The "reasonable doubt" standard which governs criminal trials necessarily informs the materiality analysis. And in Tennessee, no person can be convicted beyond a reasonable doubt unless the circumstantial evidence excludes all reasonable hypotheses *except* guilt. State v. Wilson, 924 S.W.2d 648, 649 (Tenn. 1996). Thus, the question is whether there is a reasonable probability that a juror would have entertained a reasonable doubt of Oscar Smith's guilt (or the appropriateness of the death sentence) had Hunter been impeached with the withheld evidence. Strickland v. Washington, 466 U.S. 668, 695 (1984).

Oscar Smith easily satisfies this standard, because Hunter's testimony was the focal point of the prosecution's case, and the withheld evidence would have left his testimony in tatters. As this Court recognized in House v. Bell, 547 U.S. 518 (2006) and *Kyles*, relief is required when the cornerstone of the prosecution's case crumbles, even if there remains substantial circumstantial evidence showing an individual's guilt of a capital offense. Compare House, 547 U.S. at 566-568 (Roberts, C.J., dissenting)(discussing circumstantial evidence, including clear evidence that House lied to hide his guilt); Kyles, 514 U.S. at 464-

475 (Scalia, J., dissenting)(recounting evidence against Kyles).

So it is here. There is a reasonable probability jurors would have entertained a reasonable doubt about guilt (and the death sentence) had they known that Johnny Hunter's testimony – the cornerstone of the prosecution's case – was unworthy of belief. There is little question that the prosecution staked its case for conviction and death upon Johnny Hunter's testimony alone. The prosecution said as much to the jury. "Taking the word of the prosecutor" (Kyles, 514 U.S. at 444), Oscar Smith reiterates the prosecution's own pointed words to the jury:

(1) "Weigh Sergeant Hunter versus Oscar Smith;"

(2) "Sergeant Hunter tells you there is no question this [print] belongs to that man . . . ;"

(3) "You can convict on [Johnny Hunter's] testimony alone. . . [t]he fingerprint testimony is that strong"

See pp. 7-8, *supra*.

Thus, "The likely impact of the [withheld] evidence on reasonable jurors" (House, 547 U.S. at 538) would have been devastating. It "would have had seismic impact," (Leka v. Portuondo, 257 F.3d at 106), because the jury was told to rely on Hunter; Hunter was admittedly highly persuasive with his testimony (even as he lied to the jury about his crime-scene activities); and according to the prosecution, Hunter's testimony eliminated all reasonable doubt (in fact *all* doubt) that Oscar Smith should be convicted.

It is also worth noting that in its haste to credit Hunter's trial testimony at any cost, the court of appeals ignored what the jury would see as an equally plausible explanation for the "new" palm print appearing on the sheet. The reason Hunter did not find Oscar Smith's

print on the sheet at the scene was because *it was not on the sheet* at the scene. Rather, it was fabricated by Hunter months later using Oscar Smith's control prints (obtained after Hunter's crime scene examination) when he and the prosecution realized they needed more evidence to convict Smith. This is not beyond the pale. See Buckley v. Fitzsimmons, 509 U.S. 259, 262-263 (1993)(prosecutor and expert fabricated physical evidence to tie accused to crime after initial expert opinions could not link accused to offense). Otherwise, why did Hunter and the prosecution go to such lengths to hide the undisputed fact that Hunter's expert opinion at the scene was that the sheet contained no identifiable prints? The jury was entitled to consider that Hunter's "new and improved" opinion was a complete fabrication.

To be sure, as the court of appeals recognized, in support of their case for conviction and death, the prosecution did present some evidence of motive, as well as a hotly-contested transcript of a garbled 9-1-1 call,[63] which provided circumstantial evidence of Oscar Smith's guilt. Smith v. Bell, 381 Fed.Appx. at 554; A8. The question, however, is not whether there would have remained sufficient circumstantial evidence to convict had the exculpatory evidence been disclosed. Kyles, 514 U.S. at 434-435. Rather, under *Brady*, a reviewing court

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[63] The prosecution claimed that the 9-1-1 recording contained the word "Frank" and thus implicated Oscar Smith. Without question, "Frankie" Lane was seen breaking into a car across the street around the time of the call. See p. 14 n.45, *supra*. That garbled call is thus equally exculpatory to Oscar Smith, for a reasonable juror could conclude that the perpetrator was Frankie Lane, not Oscar Franklin Smith.

It is also clear that the 9-1-1 operator heard no such thing when she answered the phone. Trial Tr. 2103 (Operator Cheryl Dalton testifying that she never heard "Frank" on the 9-1-1 call). Rather, she only "heard" that after a tape of the call was enhanced, and after Detective Terry McElroy went to see Dalton with a police-crafted transcript of the call. She came to this conclusion after McElroy was instructed by the prosecution to have Dalton listen to the enhanced tape and to take as "long as it takes until she agrees this is what it says." P.C.Tr. 497. In other words, the prosecution and police went to any length to get Dalton to "hear" what she never actually heard on the tape, and then testify accordingly, which she did, based upon a written "transcript" of the call.

must carefully consider the withheld evidence in light of the prosecution's case. Where the prosecution withheld exculpatory evidence showing that Hunter's claimed match was rife with doubt, unreliable, and/or fabricated, the prosecution violated Oscar Smith's right to due process. Having been caught red-handed, the State of Tennessee should not now be rewarded for its misdeeds. The prosecution used its primary witness about the key piece of evidence to grossly deceive the jury and thus violated fundamental due process.

E. This Court Should Grant Certiorari

With his life at stake, Oscar Smith is entitled to something decidedly more than the foundationally flawed, factually inaccurate, and wholly inadequate analysis of his *Brady* claim provided by the court of appeals. Because the court of appeals' inadequate analysis conflicts with *Cone*, *Banks*, and *Kyles*, as well as the decisions of the other courts of appeals, this Court should grant certiorari and reverse.

II. Jury Instructions On The Meaning Of Reasonable Doubt Understated The Prosecution's Burden Of Proof: The Sixth Circuit's Denial Of Relief Highlights A Conflict With Decisions Of This Court And Decisions Of The Other Circuits

This Court should also grant certiorari to review the court of appeals' disposition of Oscar Smith's due process challenge to the reasonable doubt instructions. The disposition below conflicts with decisions from this Court and other courts of appeals.

A. The Trial Judge's Instructions Understated The Prosecution's Burden Of Proof, Allowing Conviction Based Upon Something Less Than Proof Beyond A Reasonable Doubt

The jury instructions unconstitutionally understated the prosecution's burden of proof in three separate, but interrelated, ways. First, they allowed conviction based solely upon a "satisfactory conclusion" of guilt, something decidedly less than proof beyond a reasonable doubt. Second, they allowed conviction based upon "moral certainty" of guilt,

a phrase this Court has declared an inadequate substitute for "reasonable doubt." Victor v. Nebraska, 511 U.S. 1 (1994). Third, the instructions allowed jurors to convict based upon their own sense of justice and truth. Together, these instructions "significantly weakened what is perhaps the law's greatest, and certainly its best known, safeguard against wrongly convicting an innocent person." United States v. Colon-Pagan, 1 F.3d 80, 82 (1st Cir. 1993)(Breyer, J.).[64]

1. "Satisfactory Conclusion" Of Guilt

The first erroneous instruction allowed conviction based upon a mere "satisfactory conclusion" of guilt. A "satisfactory conclusion" is a conclusion significantly less certain than the type of conclusion demanded by the reasonable doubt standard. Indeed, quite tellingly, this Court itself has established that a "satisfactory conclusion" is a conclusion that admits of significant doubt – much more than sanctioned by the reasonable doubt standard.

Under 28 U.S.C. §2254(d), a state court judgment must be upheld if it is not "unreasonable," yet this Court has held that a state court decision is not unreasonable – even though erroneous – if the state court has merely reached a "satisfactory conclusion" on the matter. Williams v. Taylor, 529 U.S. 362, 410-411 (2000). See Wright v. West, 505 U.S. 277, 287 (1992)(equating "satisfactory conclusion" with one that is reasonable).

Williams thus makes clear that a conclusion that is "satisfactory" is one that lacks

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[64] The fact that this issue was resolved in an interlocutory order before final judgment is of no significance for purposes of this Court's jurisdiction under 28 U.S.C. §1254. This Court has jurisdiction to review "questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." Major League Players' Association v. Garvey, 532 U.S. 504, 508 n.1 (2001); Mercer v. Theriot, 377 U.S. 152 (1964). See e.g., Cone v. Bell, 556 U.S. ___ (2009) (reviewing *Brady* claim decided at earlier stage of litigation and not reopened by most recent judgment of the court of appeals).

the near certainty required by the reasonable doubt standard. Not surprisingly, the Second Circuit and the New York courts have consistently concluded that a charge requiring a jury to be only "reasonably certain" of guilt, or to find guilt only to a "reasonable degree of certainty," is unconstitutional. Gaines v. Kelly, 202 F.3d 598, 606-607 (2d Cir. 2000); Id. at 607 n.2. (finding reasonable doubt instruction unconstitutional, and citing state appellate decisions striking down such instructions as understating prosecution's burden of proof).

Further, this Court and its Justices have used the term "satisfactory conclusion" to describe the required fact finding in civil disputes – never the burden in a criminal case.[65] The courts of Iowa, New Jersey, Arizona, Wyoming, and Utah likewise agree: A "satisfactory conclusion" is the equivalent of proof by clear and convincing evidence. [66] The "satisfactory conclusion" instruction here suffers that same fatal flaw, and thus the Sixth Circuit's decision conflicts not only with this Court's decision in *Williams*, but the Second Circuit's

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[65] See e.g., Insurance Co. v. Rodel, 95 U.S. 232, 237 (1877); Gray v. Harper, 10 F.Cas. 1010, 1014 (D.Mass. 1841)(Story, J.); Harrison v. Rowan, 11 F.Cas. 658, 660 (D.N.J. 1820) (Justice Washington instructed jury to reach a "satisfactory conclusion" in civil case). Other federal courts have also emphasized that "clear and satisfactory" proof is equivalent (at most) to the "clear and convincing" evidence standard. Finnigan Corporation v. United States International Trade Commission, 180 F.3d 1354, 1366 n. 8 (Fed. Cir. 1999); Woodland Trust v. Flowertree Nursery, Inc., 148 F.3d 1368, 1372 (Fed. Cir. 1998); Compare Connecticut Fire Ins. Co. v. Fox, 361 F.2d 1, 6 (10th Cir. 1966).

[66] "The requirement of clear and satisfactory evidence means more than a preponderance but less than proof beyond a reasonable doubt . . . [and] [w]hen the evidence is such that the mind readily reaches *a satisfactory conclusion* as to the existence or nonexistence of a fact in dispute, then the evidence is, of necessity, clear and satisfactory." Reihe v. District Court of Crawford Co., 184 N.W.2d 701, 704 (Iowa 1971). See Aiello v. Knoll Golf Club, 165 A.2d 531, 534 (N.J. Super. 1960)(equating a jury's "reasonably satisfactory conclusion" with the "clear and convincing" standard which "fall[s] somewhere between the ordinary civil and criminal standards."); Tucson Electric Power Co. v. Arizona Corp. Commission, 645 P.2d 231, 243 (Ariz. 1982)(burden of "clear and satisfactory" evidence is "the same" burden as "clear and convincing" evidence); Thomasi v. Koch, 660 P.2d 806, 811-812 (Wyo. 1983)(to reach a "satisfactory conclusion," one only needs "clear and satisfactory" evidence); Rosenbraugh v. Branch, 213 P.2d 333, 335 (Utah 1949)(same).

decision in *Gaines*, and the decisions of other state high courts. U.S.Sup.Ct.R. 10.

2. "Moral Certainty Of Guilt"

The jury instructions also told the jury, twice, that they needed only to be "morally certain" of guilt. Under Victor v. Nebraska, 511 U.S. 1 (1994), however, the phrase "moral certainty" is "ambiguous in the abstract" and thus, a jury "might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases." Id. at 14. Accordingly, use of "moral certainty" – a phrase which this Court "do[es] not condone" (Id. at 16) – survives constitutional muster only if the "rest of the instruction . . . lends content to the phrase." Id. at 14. In Victor, where jurors were told to have an "abiding conviction to a moral certainty"of guilt, this Court concluded that this additional language saved the instruction. Here, however, there was no such "abiding conviction" language. See Trial Tr. pp. 2974, 2975. On the contrary, "moral certainty" was defined by using the unconstitutional "satisfactory conclusion" standard discussed *supra*: "leading on the whole to a *satisfactory conclusion, and producing, in effect, a moral certainty* that the defendant, and no one else committed the offense." Id. at 2974 (emphasis supplied). Unlike *Victor*, these mutually reinforcing, improper definitions unconstitutionally "invited the jury to convict [Oscar Smith] on proof below that required by the Due Process Clause." Victor, 511 U.S. at 15. The jury instructions thus likewise conflict directly with this Court's dictates in *Victor*.

3. "As You Think Justice And Truth Dictate"

Finally, one cannot overlook one of the last things jurors were told before they left to deliberate: That they should decide the case "as you think justice and truth dictate." Trial Tr. p. 2978. By itself, this instruction allowed jurors to convict without relying upon the

reasonable doubt standard. Jurors enter the jury box with their own individual "sense of justice – their sentiments concerning the law [that] may lead them to hold standards that are different from those of black-letter law," and research confirms that jurors often rely on "nonevidentiary factors, such as jurors' concepts of what was just." Norman J. Finkel, *Commonsense Justice* 53, 61 (1995).

This is precisely why jurors cannot be told (as they were here) that they can rely upon their own sense of "justice" or "truth," and why various federal courts have found such instructions improper. United States v. Glover, 511 F.3d 340 (2d Cir. 2008)(discouraging instruction requiring jurors to find the "truth"); United States v. Hernandez, 176 F.3d 719, 731 (3d Cir. 1999)(granting new trial where jurors were allowed to define reasonable doubt based on their personal views about "what they believed in their own heart, soul and spirit"). The Sixth Circuit's refusal to strike down the "justice and truth" instruction here thus likewise conflicts with the Second Circuit's decision in *Glover* and the Third Circuit's decision in *Hernandez*.

B. This Court Should Grant Certiorari

Taken together, these jury instructions violated due process of law, because there is a reasonable probability that jurors interpreted and applied the instructions in an unconstitutional manner. Estelle v. McGuire, 502 U.S. 62 (1991).[67] These instructions did

[67] Other instructions also failed to "dissipate the error in the challenged portion of the instructions." Francis v. Franklin, 471 U.S. 307, 319-320 (1985). Relief is required because jurors could have indeed based their conviction upon the improper "satisfactory conclusion," "moral certainty," and "justice and truth" instructions, or a combination thereof. Id. at 322 ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied . . . .").

not require a finding of guilt with the "utmost certainty" demanded by the reasonable doubt standard. In Re Winship, 397 U.S. 358, 364 (1970). Where this Court's decisions in *Williams* and *Victor*, and the court of appeals' decisions in *Gaines*, *Glover*, and *Hernandez* all demonstrate the infirmity in the instructions, the court of appeals' ruling conflicts with all of these decisions, and this Court should thus grant certiorari. U.S. Sup. Ct. R. 10.

In addition, many other lower courts have found constitutional violations under similar circumstances when instructions either understated the amount of certainty (or overstated the amount of doubt) required for conviction. See e.g., Gibson v. Ortiz, 387 F.3d 812 (9th Cir. 2004); Wansing v. Hargett, 341 F.3d 1207 (10th Cir. 2003); Jenkins v. Hutchinson, 221 F.3d 679 (4th Cir. 2000); Gaines v. Kelly, 202 F.3d 598 (2d Cir. 2000); Morris v. Cain, 186 F.3d 581 (5th Cir. 1999). Because Oscar Smith is entitled to the same application of *Winship*'s fundamental principles as the petitioners in these other cases, this Court should grant certiorari and reverse the judgment below.[68]

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[68] This claim is not procedurally defaulted:

(1) The Court of Criminal Appeals held that this challenge was "either . . . waived or previously determined." Smith v. State, 1998 Tenn.Crim.App.Lexis 680, *55. This does not constitute a "clear and express statement" of a procedural default (Harris v. Reed, 489 U.S. 255 (1989)) and it is essentially identical to the "previous determination" ruling found not to constitute a bar to federal habeas review in Cone v. Bell, 556 U.S. at ___ (slip op. at 8).

(2) There can be no valid procedural default unless all similarly situated petitioners have been found defaulted by the state courts. Hathorn v. Lovorn, 457 U.S. 255, 263 (1982). The Tennessee courts have not defaulted similarly situated petitioners on such "reasonable doubt" claims, but have addressed such claims on the merits -- even when such claims faced not simply an allegation of "waiver," but the additional default of not having been presented within the applicable statute of limitations -- which is not a problem with Oscar Smith's claims. See e.g., Carter v. State, 958 S.W.2d 620 (Tenn. 1997)(reviewing on merits reasonable doubt claim facing potential violation of "waiver" rule as well as violation of statute of limitations); Henderson v. State, 1997 WL 107704 (Tenn.Cr. App. 1997); Smith (continued...)

III. This Court Should Grant Certiorari To Determine Whether And/Or Under What Circumstances Actions Of Post-Conviction Counsel Provide "Cause" For A Procedural Default, The Issue Left Unresolved In *Coleman v. Thompson*, 501 U.S. 722 (1991)

In Coleman v. Thompson, 501 U.S. 722 (1991), this Court agreed that the ineffective assistance of counsel establishes "cause" for any state procedural default, but that in the main, ineffective assistance of post-conviction counsel does provide "cause" because "[t]here is no constitutional right to an attorney in state post-conviction proceedings." Id. at 752. Nevertheless, this Court left open the question whether there "must be an exception to the rule . . . in cases where state collateral review is the first place a prisoner can present a challenge to his conviction." Id. at 755.

That issue is presented here, in the context of numerous constitutional claims that trial counsel could have secured Oscar Smith's acquittal (or a life sentence) by presenting evidence that Judy Smith's drug dealer, perhaps the same individual seen running away

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[68](...continued)
v. State, 1994 WL 330132 (Tenn.Cr. App. 1994); Pettyjohn v. State, 885 S.W.2d 364 (Tenn.Cr. App. 1994); Caldwell v. State, 1994 WL 716266 (Tenn.Cr. App. 1994). There is no "adequate" state ground barring relief.

(3) In addition, Oscar Smith has "cause and prejudice" for any alleged failure to raise his claim sooner, *viz.*, ineffective assistance of trial and appellate counsel. In post-conviction proceedings, Smith established that trial and appellate counsel failed to challenge these instructions purely out of ignorance and for no legitimate, tactical reason. P. Conv. Tr. 295-297, 818. Counsel's performance was therefore deficient under Strickland v. Washington, 466 U.S. 668 (1984), and he also satisfies the "prejudice" prong of *Strickland* because, as shown *supra*, his challenge is meritorious. Having established ineffective assistance of counsel, he establishes "cause," and since his substantive claim is meritorious, he also establishes "prejudice." As to the ineffectiveness of appellate counsel, the Court of Criminal Appeals said that counsel's failure to raise the issue was reasonable because the issue "would have been considered waived on appeal." Smith, 1998 Tenn.Crim.App.Lexis 680 *78. That was an unreasonable decision under 28 U.S.C. §2254(d)(1) and (d)(2), because Tennessee law *always* allows a capital appellant to raise a claim for the first time on appeal. State v. Martin, 702 S.W.2d 560, 564 (Tenn. 1985); State v. Duncan, 698 S.W.2d. 63, 67-68 (Tenn. 1985).

from the victims' residence and the person who left his footprints at the scene, committed the murder on October 2, 1989, while Oscar Smith was in Kentucky. See pp. 14-15 & nn. 45-52, *supra*.[69]

In Maples v. Allen, 586 F.3d 879 (11th Cir. 2009), *cert. pending*, No. 10-63, this Court is considering whether, after *Coleman*, post-conviction counsel's failures can ever establish "cause" for a procedural default. As *Maples* has argued, *Coleman* does not "categorically bar" a finding of "cause" even if the actions leading to default involve post-conviction counsel. Pet. for Cert. in Maples v. Allen, O.T. 2010, No. 10-63, p. 27. This is so, because actions of post-conviction counsel may not, in justice and fairness, be attributed to the client. There, though new *pro bono* counsel failed to receive notice of the state court's actions (thereby leading to a procedural default for failure to appeal), that default is properly attributable to either: (1) the state court which failed to properly notify the new attorneys of the decision; or (2) the attorneys themselves – not Maples – who effectively left him in the lurch. Id. at 24-29.

As in *Maples*, any exception to *Coleman* applies in Oscar Smith's case because any default is attributable to either the state or counsel, not Oscar Smith. Here, any default is attributable to the state, because the state appointed Smith post-conviction counsel and thus had an obligation to do so competently. Having undertaken the obligation to appoint counsel, the state had an obligation to provide competent counsel under well-settled "good Samaritan" principles. See Restatement (Second) of Torts §§323, 324. Indeed, this Court recognizes the "hornbook law" that one who voluntarily undertakes a duty must discharge

[69] This issue is likewise properly before the Court at this time, where it was decided in an interlocutory order before final judgment. See p. 31 n.64.

that duty without harm. Indian Towing Co. v United States, 350 U.S. 61, 64 (1955). So it is here. Oscar Smith has "cause" because the failure to raise his ineffective assistance of trial counsel claims is attributable to the State, which appointed him counsel. Compare Pet. for Cert. in Maples v. Allen, O.T. 2010, No. 10-63, pp. 24-27; See also Hicks v. Oklahoma, 447 U.S. 343 (1980)(state-created liberty interest protected by due process); Holland v. Florida, 560 U.S. ___ (2010).

In addition, just as Maples did not have counsel acting in the role of counsel, Oscar Smith never had "counsel . . . functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" as to claims involving this exculpatory evidence. Strickland v. Washington, 466 U.S. 668, 687 (1984). At trial, counsel wasn't functioning as counsel, because counsel did not present such evidence to the jury. In post-conviction, counsel wasn't functioning as counsel either, because, again, such evidence was wholly overlooked and not presented on Oscar Smith's behalf. "Counsel's function . . . is to make the adversarial testing process work in the particular case. Id. at 690. In state court, Oscar Smith thus never had the state's case tested through presentation of the exculpatory evidence proving that the murder was committed by someone other than Oscar Smith with motive, opportunity, and/or presence at the crime scene. Any exception to *Coleman* thus subsumes Oscar Smith's claims – because post-conviction counsel's failure to advocate these claims means that the state's case was *never* adversarily tested in state court through the use of such exculpatory evidence. Without any such testing, Oscar Smith never had "counsel" as to any of these claims in state court. He has "cause."

Oscar Smith's petition also provides an appropriate vehicle for resolving the issue left open by *Coleman*. A favorable resolution will allow Oscar Smith his day in federal court

on significant ineffective assistance of trial counsel claims, all of which implicate his actual innocence of a capital offense. See pp. 14-15 & nn. 45-52, *supra*. Moreover, Tennessee not only provides a right to post-conviction counsel, but Tennessee law further provides "minimum standards for performance demanded of counsel in post-conviction cases." Frazier v. State, 303 S.W.3d 674, 682 (Tenn. 2010).[70] Because Tennessee law recognizes some minimum standards governing post-conviction counsel's representation, this case presents the opportunity for the Court to determine whether, under *Coleman*, the federal law governing "cause" continues to impose no standard of appropriate representation by post-conviction counsel; whether it incorporates state law under *Hicks v. Oklahoma, supra*; or whether it incorporates the general Sixth Amendment law of *Strickland*.[71]

The question left unresolved by *Coleman* is not only at issue in *Maples*, but present here. This Court should grant certiorari and reverse, or hold Oscar Smith's petition pending a final resolution of *Maples*, and then grant the petition, vacate, and remand for further proceedings.[72]

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[70] The Tennessee Supreme Court has, for example, concluded that a post-conviction petitioner cannot be given an attorney suffering from a conflict of interest and can seek relief if denied the right to conflict-free post-conviction counsel. Id. at 682-685. See also Id. at 682 n. 6 (noting that the effective assistance of counsel under the Sixth Amendment "includes the corresponding right to conflict-free counsel."); Silva v. People, 156 P.3d 1164 (Colo. 2007)(recognizing a right to effective assistance of post-conviction counsel).

[71] The court can likewise assess whether any right to counsel in capital post-conviction proceedings derives from principles of due process (Mathews v. Eldridge, 424 U.S. 319 (1976) and *Hicks*, *supra*), equal protection (Douglas v. California, 372 U.S. 353 (1963)) or the Eighth Amendment.

[72] Oscar Smith raised numerous other ineffectiveness of trial counsel claims that were not defaulted, including ineffectiveness claims considered by the Tennessee Court of Criminal Appeals, the district court, and even the court of appeals. See e.g., A4-6. Because *Strickland* requires assessment of the cumulative effect of counsel's errors, on remand, the (continued...)

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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Certificate of Service

I certify that a copy of the foregoing petition for writ of certiorari, and accompanying appendix, were served upon counsel for Respondent, Joseph Whalen, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 24th day of January, 2011.

Paul R. Bottei

[72](...continued)
lower courts should be ordered to consider the cumulative effect of *all* non-defaulted ineffectiveness claims.