Supreme Court, U.S.
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CAPITAL CASE

No. 10-8629

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. This Court Should Grant Certiorari On Question 1, Where Respondent Does Not Dispute That The Prosecution Withheld Johnny Hunter's Exculpatory Crime-Scene Expert Opinion That The Sheet Was Unidentifiable, And Where The Court Of Appeals Did Not Acknowledge The Withheld Exculpatory Crime-Scene Opinion Or The Exculpatory Fact That Hunter Examined The Sheet At The Scene

To try to convince this Court not to review Oscar Smith's *Brady* claim, Respondent relies on the fact that the court of appeals said that no evidence was withheld. But that's the reason why this Court must review the claim. As Oscar Smith has carefully explained in his Petition, the court of appeals pretended that the prosecution did not withhold two specific types of evidence, but there is no question that the prosecution withheld such evidence. As such, this Court should appropriately intervene to ensure that Oscar Smith receives an actual review of his *Brady* claim. Youngblood v. West Virginia, 547 U.S. 867, 869 (2006) (per curiam)(granting certiorari and reversing where lower court denied relief under *Brady* "without examining the specific constitutional claims associated with the alleged suppression of evidence.").

Indeed, the record on this from the federal evidentiary hearing is undisputed that the prosecution withheld two types of exculpatory evidence which showed that Johnny Hunter's trial testimony was fabricated and/or false. First, the prosecution withheld ***the exculpatory fact that Johnny Hunter examined the sheet at the scene*** (visually, with a flashlight, and also with the ALS). He said as much in federal court. Hunter testified that he examined it visually.[1] He testified that he also examined the sheet using a flashlight for illumination.[2] And he (the ALS expert who requested the ALS to the scene to examine

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[1] Fed. Evid.Hr'g Tr. 69 (Johnny Hunter).

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

blood on cloth)[3] testified that he "absolutely" used all tools at his disposal to identify any possible print on the sheet.[4] Yet the very fact that he examined the sheet at the scene was withheld at the trial. Instead, he and the prosecution lied to the jury, telling jurors that he merely saw the sheet and then immediately put it into storage in the evidence room.[5] Proof in federal court establishes that *the prosecution withheld the very fact that Hunter examined the sheet at the scene.*[6] Neither Respondent nor the court of appeals can change this critical fact, but instead both Respondent and the court of appeals have ignored it. With the court of appeals having ignored this obvious fact, this Court must properly intervene as it did in *Cone*, *Banks*, and *Kyles*.

Second, and even more significantly, ***the prosecution withheld the exculpatory proof that Johnny Hunter reached an expert conclusion at the scene that the sheet was unidentifiable – an expert conclusion that completely contradicted his trial testimony***. This, too, is undisputed. Hunter admitted more than once in federal court that, at the scene, he reached an expert conclusion that the sheet was unidentifiable and could *never* be identified:

> – "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;"[7]
>
> – It "had been my opinion" "on 10/2/89 there wasn't sufficient ridges

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[3] Id. at 67, 71, 74 104 (Johnny Hunter).

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

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

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

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

to ever make a reliable identification."[8]

Yet Hunter never revealed this exculpatory expert opinion to the defense. Instead, he lied to the jury that he first examined the sheet months after it was collected at the crime scene,[9] thereby completely hiding his exculpatory crime-scene opinion.

It is quite telling that in this Court, *Respondent does not dispute that Hunter's exculpatory crime-scene opinion was withheld.* Respondent's silence on this matter speaks volumes. With Respondent not disputing Oscar Smith's uncontested proof that Hunter's crime scene opinion was withheld, this Court properly recognizes this fact as undisputed and may grant relief accordingly. Because the court of appeals never so much as acknowledged this undisputed, critical, exculpatory evidence, certiorari is warranted – especially where the court of appeals ignored the withheld crime-scene opinion and instead claimed that Hunter did not change his story, an assertion that is unquestionably false and which Respondent doesn't even defend here.

The court of appeals did not acknowledge: (1) the withheld evidence that Hunter examined the sheet at the scene; or (2) the withheld evidence that Hunter reached an exculpatory expert opinion at the crime scene that completely contradicts his trial opinion. Given the court of appeals' inadequate review of this claim, this Court should grant certiorari and reverse where it is apparent that Hunter's testimony – and the prosecution's case – would have been devastated had the jury known that Hunter's critical opinion testimony about *the* critical piece of evidence at trial was false or fabricated. See Petition,

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[8] Id. (Johnny Hunter).

[9] Trial Tr. 2035 (Johnny Hunter).

pp. 21-28. Alternatively, this Court should grant certiorari, conclude that Hunter's crime scene examination and opinion were withheld, and remand to the court of appeals to have it review the materiality of that withheld evidence in the first instance. As Oscar Smith has already explained, this is what is required by this Court's jurisprudence from *Kyles* to *Banks* to *Cone*.

In a final effort to convince this Court to deny Oscar Smith one fair resolution of his *Brady* claim, Respondent claims that this Court should rely on a District Court conclusion that the claim is untimely and/or procedurally defaulted. What Respondent refuses to acknowledge, however, is that the Court of Appeals has concluded that the District Court was wrong on this point and that Oscar Smith's claim was, in fact, timely under 28 U.S.C. §2244(d)(1)(D).[10] Oscar Smith first learned of Hunter's crime-scene examination, crime-scene opinion and his lies to the jury in 2003, and Smith expeditiously filed his claim within one year of uncovering the exculpatory evidence that: (1) Hunter examined the sheet at the scene; and (2) Hunter reached a crime-scene expert conclusion that the sheet was unidentifiable. As the Court of Appeals explained:

> We agree that the state failed to respond to his pre-trial request for all *Brady* material with accurate information regarding Hunter's analysis of the hand print – it was not until his counsel interviewed Hunter in 2003 that he discovered the 'discrepancy.' Thus we find that Smith timely filed his *Brady* claim.

Smith v. Bell, 381 Fed.Appx. 547, 552 (6th Cir. 2010); A6.

Similarly, the Sixth Circuit rightly concluded that given the withholding of the exculpatory evidence until 2003, Oscar Smith has "cause" for any alleged default, and the

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[10] Oscar Smith's claim was also timely under 28 U.S.C. §2244(d)(1)(B), because the state withheld evidence in violation of the Constitution.

only remaining inquiry is the "materiality" of the withheld evidence, which tracks the "prejudice" inquiry of the "cause and prejudice" test. As the Sixth Circuit explained:

> By holding Smith's claims timely as a result of the prosecution's suppression of *Brady* information, we necessarily conclude that Smith has demonstrated cause for his default. The prejudice inquiry tracks our analysis of the materiality of the evidence suppressed, an element of a *Brady* claim itself, so we proceed to the merits.

Id.; A7. Thus, because the claim is timely and Oscar Smith has "cause," all this Court must do is review the claim on the merits, as it did under similar circumstances in *Banks*. See Banks v. Dretke, 540 U.S. 668, 698-699 (2004). Because Oscar Smith's claim is meritorious (See Petition, pp. 21-28), he has established "prejudice" both as to guilt and sentence, and he is thus entitled to habeas corpus relief.[11]

All told, therefore, Respondent's Brief In Opposition simply confirms what Oscar Smith explained in his petition: In contravention of this Court's *Brady* jurisprudence as explicated in *Kyles*, *Banks*, and *Cone*, and in conflict with decisions of the other circuits, Oscar Smith has not received the one fair resolution of his *Brady* to which he is entitled. See Petition, pp. 18-26. Because Respondent does not deny that Hunter's crime-scene opinion was withheld and that Hunter did change his opinion (which he unquestionably did), that is the only reasonable conclusion under the circumstances. Rather than telling the jury the truth, Hunter and the prosecution misled the jury into thinking his testimony about the critical piece of evidence was true, reliable and impeccable. In fact, it was not scientifically reliable and any reasonable juror who heard the exculpatory evidence could

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[11] Because the state courts have not decided this claim on the merits, the "materiality/prejudice" inquiry is subject to *de novo* review in this Court. Cone v. Bell, 556 U.S. ____, ____ (2009).

have easily concluded that Hunter's testimony was wholly fabricated. See Petition, pp. 25-29. In addition, Respondent's procedural objections to review are unavailing.

This Court should therefore grant certiorari on Question 1 and reverse.

II. Oscar Smith's Challenge To The Unconstitutional Reasonable Doubt Instructions (Question 2) Is Properly Before This Court And Worthy Of This Court's Review

It is noteworthy that Respondent nowhere disputes Oscar Smith's argument that the reasonable doubt instructions given to the jury conflict with Williams v. Taylor, 529 U.S. 362, 410-411 (2000), Victor v. Nebraska, 511 U.S. 1 (1994), and In Re Winship, 397 U.S. 358, 364 (1970), and that Oscar Smith's claim implicates a split in the circuits that needs to be resolved. This alone counsels in favor of a grant of certiorari U.S.S.Ct.R. 10.

Unable to present any meaningful argument against the certworthiness or merits of Smith's constitutional challenge, Respondent instead raises but one untenable argument, *viz.* that Oscar Smith's question presented somehow does not implicate the correctness of the court of appeals' denial of a certificate of appealability. Brief In Opposition, p. 18. Such an argument is sophistry, and in a death penalty case, errantly places form over substance.

A court of appeals' denial of a certificate of appealability may be reviewed on certiorari. Hohn v. United States, 524 U.S. 236 (1998).When seeking certiorari following the denial of a certificate of appealability, a habeas petitioner need only request review of the substantive claim on which the certificate has been denied. He need not talismanically use the word "certificate of appealability" in the question presented, for that issue is encompassed by the substantive question itself. This only makes sense since, by definition, if the petitioner is entitled to relief on the substance of the claim, the petitioner is necessarily entitled to the certificate because the lower court decision was "wrong." Miller-

El v. Dretke, 537 U.S. 322, 338 (2003).

Thus, in cases where a petitioner was denied a certificate of appealability, this Court has routinely granted certiorari – and even granted relief – when the petitioner petitioned this court solely to review a substantive claim on which a certificate of appealability was denied. See and compare Penry v. Johnson, 532 U.S. 782, 792 (2001)("After full briefing and argument, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability. 215 F.3d 504 (2000).We stayed Penry's execution and granted certiorari to consider Penry's constitutional arguments regarding the admission of the Peebles report and the adequacy of the jury instructions."); Penry v. Johnson, 2000 U.S.Briefs 6677 (Questions Presented, from Petition For Writ Of Certiorari)(Available on LEXIS);[12] Medellin v. Dretke, 543 U.S. 1032 (2004)(granting certiorari to review substantive claims of entitlement to habeas relief under Vienna Convention On Consular Relations); Medellin v. Dretke, 2004 U.S. Briefs 5928 (Questions Presented, from Brief Of Petitioner)(Available On LEXIS);[13] Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004)(denying certificate of

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[12] The questions presented following the denial of a certificate in *Penry* were: "1. Is the Court of Appeals decision, which approved the repetition of the same procedure condemned as unconstitutional in Penry I, in conflict with Penry I and other relevant decisions of this Court? 2. Is a psychiatrist appointed by the Court on motion of defense counsel, whose report is used as evidence for the prosecution, an "agent of the state" for purposes of the Fifth Amendment holding of Estelle v. Smith?"

[13] The questions presented in *Medellin* following the denial of a certificate of appealability were: "1. In a case brought by a Mexican national whose rights were adjudicated by the International Court of Justice in Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31), must a court in the United States apply as the rule of decision the holding in Avena that the United States courts must review and reconsider the national's conviction and sentence taking account of the violation of his rights under the Vienna Convention on Consular Relations, opened for signature Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, without resort to procedural default doctrines? 2. In the alternative, in a case brought by a foreign national of a State party to the [**2] Vienna Convention, should

appealability).

Having presented his substantive challenge to the reasonable doubt instructions in the lower courts and in the questions presented, Oscar Smith's claim is, indeed, properly before this Court. It is also not "untimely" as Respondent intimates, for as Oscar Smith has already explained in his petition, the law of this Court is clear: An interlocutory order of the court of appeals is always reviewable on certiorari within 90 days of the last and final decision of the court of appeals. Petition For Writ Of Certiorari, p. 31 n. 64, *citing* Major League Players' Association v. Garvey, 532 U.S. 504, 508 n.1 (2001); Mercer v. Theriot, 377 U.S. 152 (1964); 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).

One final note. In his Brief In Opposition, Respondent has *only* argued (erroneously) that Question 2 is not properly before the Court. See Brief In Opposition, pp. ii, 18. Respondent *has not*: (1) disputed Oscar Smith's thorough argument that this claim *is not* procedurally defaulted (See Petition For Writ Of Certiorari, pp. 35-36 & n. 68); (2) argued that Oscar Smith's claim is procedurally defaulted; or (3) argued that certiorari should be denied because the claim is procedurally defaulted. Because Respondent has not raised the issue of procedural default in his Brief in Opposition and only relied on an unsound procedural technicality as grounds for denying certiorari, the issue of procedural default is now waived in this Court. See Trest v. Cain, 522 U.S. 87, 89 (1997); Stop The Beach Renourishment Inc. v. Florida Dept. Of Environmental Protection, 560 U.S. ___,

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a court in the United States give effect to the judgments in Avena and LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), in the interest of judicial comity and uniform treaty interpretation?"

____ (2010)(issues not raised in brief in opposition deemed waived); U.S.S.Ct. R. 15.2.[14] As such, "procedural default" poses no obstacle to this Court granting certiorari and granting Oscar Smith the relief he has requested on his challenge to the unconstitutional jury instructions.

Accordingly, given the undisputed conflict between the lower court's ruling and this Court's decisions in *Williams*, *Victor* and *Winship*; the undisputed conflict between the decision below and the decisions of other courts of appeals (Petition For Writ Of Certiorari, pp. 31-35); and the lack of any procedural barrier to this Court's review of this most serious issue, this Court should grant the petition for writ of certiorari and reverse.

III. On Question 3, This Court Should Hold This Petition Pending A Decision In *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009), *cert. granted sub nom. Maples v. Thomas*,562 U.S. ____ (2011)(U.S.No. 10-63)

Respondent falsely asserts that Oscar Smith failed to raise his *Maples* issue in the Sixth Circuit. Oscar Smith unquestionably did raise the issue below. In his application for certificate of appealability (COA), Oscar Smith specifically asked the Sixth Circuit to grant him a COA on all claims that he "was denied the effective assistance of counsel through counsel's failure to investigate and present exculpatory proof." COA Application, p. 5 & n.3. In doing so, Oscar Smith specifically cited his Amended Habeas Corpus Petition ¶8 (which include the substantive ineffectiveness claims raised here), and he argued that he was entitled to a COA in light of "Petitioner's Summary Judgment Response, pp. 2-27," (COA

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[14] Moreover, the Sixth Circuit denied a COA by concluding only that as to the reasonable doubt claim (like other claims) "reasonable jurists could [not] disagree with the district court's resolution of his constitutional claims or that jurists could conclude that the issues raised are adequate to deserve further review." A10. One, therefore, can assume that the court of appeals denied a COA because it found the issue not debatable on the merits.

Application, p. 5 n.3) which he specifically provided to the Sixth Circuit as Appendix 3 in support of his application. Oscar Smith was also careful to "incorporate[] all [such] briefing in the District Court on such issues in support of this application."COA Application, p. 3. And on pages 24 and 25 of that response before the court of appeals, he argued (unsuccessfully) that he had "'cause' and 'prejudice' for any such alleged default" of his ineffectiveness claims, because his case does not fall within the ambit of Coleman v. Thompson, 501 U.S. 722, 756 (1991) and any procedural default is attributable to his court-appointed counsel who performed ineffectively. Petitioner's Summary Judgment Response, pp. 24-25.

Question Presented 3 thus presents the precise issue which this Court is now considering in *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009), *cert. granted sub nom. Maples v. Thomas*,562 U.S. ____ (2011)(U.S.No. 10-63), *viz.*: When do post-conviction counsel's actions establish "cause" for a procedural default because they are not fairly attributable to the habeas petitioner? The legal issue presented by Question 3 – what constitutes "cause" – is identical to the issue presented in *Maples*. To be sure, as Respondent notes, Oscar Smith's case and *Maples* are not identical on the facts, but in both cases, the *legal question* to be resolved is the same. In *Maples*, this Court will enunciate the standards – if any – under which post-conviction counsel's actions constitute "cause" to excuse a procedural default.

In fact, in requesting reversal of the lower court, Maples challenges a lower court ruling that post-conviction counsel's actions cannot provide "cause" for a procedural default because "this Court's decision in *Coleman v. Thompson* categorically bars a finding of

cause." Pet. for Cert. in Maples v. Thomas, O.T. 2010, No. 10-63, p. 27 & App. 17a. That is the precise lower court holding Oscar Smith challenges here. As in *Maples*, the lower courts here denied relief because: "[P]ost-conviction counsel . . . is responsible for the default. However, the law is firmly settled that ineffective assistance of counsel in state post-conviction proceedings can never establish cause," *citing Coleman v. Thompson*, 501 U.S. at 742-753 and *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). See R. 201, District Court Memorandum, pp. 42-43 & n. 26; A52-53 & n.26. Maples also contends that a petitioner may not be "held responsible for attorney misconduct that renders a proceeding fundamentally unfair." Pet. for Cert. in Maples v. Thomas, O.T. 2010, No. 10-63, p. 31. Again, where Oscar Smith's post-conviction counsel did not raise claims of ineffectiveness of trial counsel that would establish actual innocence, it can be said (as in *Maples*) that Oscar Smith's post-conviction proceedings here were fundamentally unfair, such that any default is attributable to counsel – not Oscar Smith.

For the time being, however, this Court need not delve into the nuances of what actions of post-conviction counsel can, might, or do establish "cause," for the Court will be doing so in due time in *Maples*. It is enough to say that *Maples* will affect the outcome in Oscar Smith's case, given identical rulings of the lower courts in both cases which held that *Coleman* categorically prohibits a finding of "cause." Because the legal principles to be enunciated and applied in *Maples* will affect the ultimate determination whether Oscar Smith has "cause," this Court should hold Oscar Smith's petition pending a decision in *Maples*, re-conference the petition after *Maples* is decided, and then issue a GVR order, as would likely be warranted. See Lawrence v. Chater, 516 U.S. 163 (1996).

Indeed, the situation here is very similar to the situation in Holland v. Florida, 560 U.S. ___ (2010), in which this Court first enunciated standards governing equitable tolling for attorney misconduct, and then granted various certiorari petitions, vacated, and remanded to allow the lower courts to apply those newly-stated standards in the first instance. See e.g., Perkins v. Ammons, 562 U.S. ___ (2010)(GVR in light of *Holland*); Peterson v. McNeil, 562 U.S. ___ (2010)(same); Melson v. Allen, 561 U.S. ___ (2010) (same); Whitfield v. McNeil, 561 U.S. ___ (2010)(same). The Court should follow a similar course here.

CONCLUSION

This Court should grant certiorari and reverse on Questions 1 and 2. On Question 3, the Court should hold the petition pending *Maples*, and then grant, vacate, and remand for further proceedings.

Respectfully Submitted,

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Certificate of Service

I certify that a copy of the foregoing reply was served upon counsel for Respondent, Joseph Whalen, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 4th day of April, 2011.

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