

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

SUPPLEMENTAL BRIEF OF PETITIONER REGARDING
GRANT OF CERTIORARI IN
Smith v. Cain, U.S. No. 10-8145

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Petitioner Oscar Smith files this supplemental brief in light of this Court's intervening grant of certiorari in Smith v. Cain, U.S.No. 10-8145. While it appears that this Court has already held Oscar Smith's petition on Question Presented #3 to await decisions in Maples v. Thomas, U.S.No. 10-63 and/or Martinez v. Ryan, U.S.No. 10-1001, Oscar Smith additionally moves the Court to hold his petition on Question Presented #1 pending a decision in Smith v. Cain, U.S.No. 10-8145.

In *Smith v. Cain*, this Court is deciding whether the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963) by withholding evidence which would have impeached the prosecution's key witness. Because Oscar Smith presents the identical issue in his Question Presented #1, this Court should hold his petition pending disposition of *Smith v. Cain*, and afterwards grant certiorari, vacate, and remand for further proceedings. See e.g., Derry v. Florida, 56 So.3d 774 (Fla. App. 2010), *cert. pending*, U.S. No. 10-1488 (certiorari petition held pending decision in *Smith v. Cain*).¹

***Smith v. Cain*, U.S. No. 10-8145 & Oscar Smith's Question Presented #1:**
Oscar Smith's petition for writ of certiorari queries whether, under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, he is entitled to a new trial and/or sentencing hearing because the prosecution withheld exculpatory evidence that would have impeached the prosecution's key witness. See Question Presented #1. Specifically, the prosecution suppressed material exculpatory evidence showing that the testimony of the prosecution's star witness concerning the prosecution's key piece of evidence was fabricated or false. See Petition, pp. 1-11, 20-26. Oscar Smith has asserted that the judgment below conflicts with this Court's *Brady* decisions and the "fundamental due process principles enunciated in

¹ *Derry* was considered at this Court's October 7, 2011 conference but has not been relisted for a subsequent conference.

those cases” (Petition, p. 20), including Cone v. Bell, 556 U.S. ____ (2009), Banks v. Dretke, 540 U.S. 668 (1984), and Kyles v. Whitley, 514 U.S. 422 (1995). See Petition, pp. 18-26. He has also argued that he has been denied a full and fair consideration of his *Brady* claim:

[T]he 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.

Petition, p. 25.

On June 13, 2011, this Court granted certiorari in Smith v. Cain, U.S.No. 10-8145, which likewise involves a lower court’s failure to apply this Court’s *Brady* jurisprudence in a capital case. Smith v. Cain, 564 U.S. ____ (2011). Like Oscar Smith, Juan Smith sought certiorari because the lower courts denied relief “by disregarding firmly established precedents of this Court regarding the suppression of material evidence favorable to a defendant and presentation of false or misleading evidence by a prosecutor.” Pet. for Cert. in Smith v. Cain, O.T. 2010, No. 10-8145, p. i. Like Oscar Smith, Juan Smith asserted that the lower courts “ignored fundamental principles of due process,” including those enunciated by this Court in *Banks* and *Kyles*. Pet. for Cert. in Smith v. Cain, O.T. 2010, No. 10-8145, pp. 21-23. And just like Oscar Smith, Juan Smith argued that he has been denied the “meaningful consideration” of his claim that *Brady* requires. Id., p. 23.

Juan Smith and Oscar Smith raise nearly identical claims for relief under *Brady*. The prosecution in Juan Smith's case withheld evidence that impeaches the prosecution's key identification witness (Boatner), showing his trial testimony to have been fabricated or false. See Brief for Petitioner in *Smith v. Cain*, O.T. 2010, No. 10-8145, pp. 5-8, 13-18, 34-42 (entitlement to relief under *Brady*). Oscar Smith has alleged a *Brady* violation where the prosecution withheld evidence that would have impeached the prosecution's key witness (Johnny Hunter) about "the most important piece of evidence presented to the jury." Petition, pp. 1-11, 18-30.

Just as the withheld evidence in *Juan Smith* "would have had considerable value in calling into question Boatner's assured identification of petitioner" as the perpetrator (Brief for Petitioner in *Smith v. Cain*, O.T. 2010, No. 10-8145, p. 37), the withheld evidence in Oscar Smith's case would have been devastating to Johnny Hunter's claimed "identification" of Oscar Smith and the prosecution's entire case -- especially since the prosecution staked its argument for conviction on Hunter's testimony alone. Petition, pp. 7-8, 28. Oscar Smith is therefore entitled to a new trial and capital sentencing proceeding.

Oscar Smith's *Brady* claim in Question Presented #1 is thus legally indistinguishable from the *Brady* claim in *Smith v. Cain*. The impending decision in *Smith v. Cain* will address the significance of a prosecutor's failure to disclose evidence impeaching the prosecution's key witness in a capital case. As such, this Court's exposition and application of governing legal principles in *Smith v. Cain* will determine the proper disposition of Question Presented #1.

Consequently, this Court should hold Oscar Smith's petition on Question Presented #1 pending disposition of *Smith v. Cain*, U.S. No. 10-8145, especially where the Sixth Circuit

fundamentally misapprehended the meaning of impeachment under *Brady*. See Petition, pp. 11, 21-22. In fact, it appears that this Court has already held at least one similar *Brady* case pending the decision in *Smith* where the petitioner (like Oscar Smith) has maintained that the prosecution violated *Brady* and *Kyles* by withholding evidence which would have impeached the prosecution's key witness. Derry v. Florida, 56 So.3d 774 (Fla. App. 2010), *cert. pending*, U.S. No. 10-1488; See Pet. for Cert. in Derry v. Florida, O.T. 2010, No. 10-1488, pp. 9-11, 13-15, 21-25.

Because this is a capital case and Oscar Smith has not received one fair consideration of his *Brady* claims, it is imperative that this Court ultimately vacate and remand, so that the lower courts can properly apply the very *Brady* principles which this Court will be announcing and applying in *Smith v. Cain*.

CONCLUSION

Given the intervening grant of certiorari in Smith v. Cain, U.S.No. 10-8145, this Court should hold Oscar Smith's Question Presented #1 pending disposition of *Smith*. See Derry v. Florida, 56 So.3d 774 (Fla. App. 2010), *cert. pending*, U.S. No. 10-1488. Afterwards, this Court should grant Oscar Smith's petition for writ of certiorari, vacate the judgment below, and remand to the Sixth Circuit for further proceedings.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing supplemental brief was served upon counsel for Respondent, Joseph Whalen, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 14th day of October, 2011.



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