

**CAPITAL CASE**

No. 10-8629

IN THE  
SUPREME COURT OF THE UNITED STATES

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OSCAR SMITH,

Petitioner

vs.

RICKY BELL, Warden,

Respondent

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

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SUPPLEMENTAL BRIEF OF PETITIONER #2  
IN LIGHT OF SMITH V. CAIN, 565 U.S. \_\_\_\_ (2012)

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In Question Presented #1, Oscar Smith has maintained that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963) by withholding evidence impeaching the prosecution's key witness concerning the prosecution's key piece of evidence. On October 14, 2011, Oscar Smith filed a first Supplemental Brief regarding this Court's grant of certiorari in Smith v. Cain, U.S. No. 10-8145, requesting that this Court hold his petition and later GVR in light of *Smith v. Cain*. See Petitioner's First Supplemental Brief, p. 4.

On January 10, 2012, this Court decided Smith v. Cain, 565 U.S. \_\_\_\_ (2012). This Court should now GVR in light of *Smith v. Cain*. Alternatively, the Court should continue to hold Oscar Smith's petition pending decisions in Maples v. Thomas, U.S. No. 10-63 and/or Martinez v. Ryan, U.S. No. 10-1001, and then, upon any decision in *Maples* and/or *Martinez*, GVR in light of all three cases: *Smith*, *Maples*, and *Martinez*.

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As this Court explained in Smith v. Cain, 565 U.S. \_\_\_\_ (2012), the prosecution's key witness (Boatner) "identified Smith" as the perpetrator and told the jury that he had absolutely "no doubt" that Smith was the killer. *Id.*, slip op. at 1, 3. The prosecution, however, withheld exculpatory statements from Boatner "that conflict with his testimony identifying Smith as a perpetrator," *viz.*, statements from the night of the crime in which Boatner stated he could not identify the perpetrators. *Id.*, slip op. at 2. This Court had little trouble finding the withheld evidence to be material, where Boatner's withheld statements flatly contradicted his trial testimony and the prosecution's case rested upon Boatner's testimony. "Boatner's undisclosed statements were plainly material." *Id.*, slip op. at 3.

This Court should now GVR in light of *Smith v. Cain*, as Oscar Smith's case is nearly on all fours with *Smith*. Johnny Hunter was *the* key witness at trial. Hunter testified about what the prosecution deemed "the most important piece of evidence presented to the jury,"

the bed sheet. Petition, p. 8. Just as Boatner at trial had “no doubt” that Juan Smith was the killer, Johnny Hunter “identified [Oscar] Smith” as the person who left a palm print on the sheet, leaving jurors with “no doubt” of his guilt. To use the prosecution’s own words, Johnny Hunter “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.” *Id.* (emphasis supplied). Importantly, the prosecution staked its entire case on Johnny Hunter’s misleading testimony, telling jurors to “convict on [Hunter’s testimony] alone . . . the fingerprint testimony is that strong.” *Id.* With Hunter’s seemingly flawless testimony being “very impressive to all courtroom observers” (*Id.*), the prosecution succeeded in getting the jury to convict Oscar Smith and sentence him to death.

Yet we now know that the prosecution withheld from Oscar Smith (and the jury) Hunter’s expert opinion at the crime scene which directly “conflict[s] with his [trial] testimony identifying [Oscar] Smith as a perpetrator.” *Smith v. Cain*, 565 U.S. at \_\_\_\_ (slip op. at 2). Johnny Hunter clearly determined – after a thorough examination of the sheet at the crime scene – that the sheet was completely “unidentifiable.” Petition, p. 3. According to Hunter, “[T]here wasn’t sufficient ridges to ever make a reliable identification.” *Id.* at 4. Yet at trial, Hunter then misled the jury (like Boatner), claiming certainty that there was a print on the sheet and that it belonged to Oscar Smith – without disclosing that his new opinion completely contradicted his expert opinion at the crime scene. As Oscar Smith has argued, as a matter of due process, the jury “was entitled to consider that Hunter’s ‘new and improved’ opinion was a complete fabrication.” Petition, p. 29.

Given the centrality of Johnny Hunter’s testimony to Oscar Smith’s conviction and death sentence, the court of appeals on remand could conclude in light of *Smith v. Cain* that

withheld evidence of Hunter’s examination of the sheet at the scene and inability to identify any print (and his false assertion that he didn’t examine the sheet at the scene) were: (1) material to Oscar Smith’s conviction for first-degree murder and/or (2) material to Oscar Smith’s death sentence. See Cone v. Bell, 556 U.S. 449 (2009)(capital petitioner entitled to new sentencing hearing if reasonable probability one juror would have voted for life absent withholding of evidence); Petition, p. i (Question Presented #1)(querying whether withheld evidence was material to conviction and/or death sentence).

There is a reasonable probability that Oscar Smith would not have been convicted or sentenced to death where, to convict under Tennessee law, the prosecution had to eliminate “all reasonable hypotheses except guilt,” (Petition, p. 27) and where he could not have been sentenced to death absent a unanimous vote for death. See Harries v. Bell, 417 F.3d 631, 642 (6<sup>th</sup> Cir. 2005). Under the circumstances – especially where the prosecution conceded that it had only a “weak circumstantial case” absent Johnny Hunter’s newly-minted (but completely impeachable) expert opinion (Petition, p. 8) – Oscar Smith is entitled to relief, just like Juan Smith.<sup>1</sup>

Because the court of appeals did not undertake the thorough *Brady* analysis required by *Cone*, *Banks*, *Kyles* and *Smith v. Cain* (See Petition, pp. 20-26), and because Oscar Smith could secure relief under the standards discussed and applied in Smith v. Cain, 565 U.S. \_\_\_\_ (2012), this Court should grant the petition for writ of certiorari on Question #1, vacate the judgment below, and remand to the Sixth Circuit for reconsideration in light of

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<sup>1</sup> Oscar Smith has also noted the unreliability of the prosecution’s other circumstantial evidence against him. See Petition, p. 29 & n.63. Given that unreliability, it is no wonder that the prosecution made Hunter’s testimony the cornerstone of its case.

Smith v. Cain, 565 U.S. \_\_\_\_ (2012).

Alternatively, where this Court has apparently held Oscar Smith's petition on Question #3 pending decisions in Maples v. Thomas, U.S. No. 10-63 and/or Martinez v. Ryan, U.S.No. 10-1001, absent an immediate GVR under *Smith*, this Court should continue to hold Oscar Smith's petition, and after decisions in *Maples* and *Martinez*, GVR in light of not only *Smith v. Cain*, but *Maples* and *Martinez* as well.

Respectfully Submitted,



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#### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Supplemental Brief #2 was served upon counsel for Respondent, Joseph Whalen, 425 Fifth Avenue North, Nashville, Tennessee 37243, this 10th day of January, 2012.



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Paul R. Bottei

