

No. 18-8466

**In the
Supreme Court of the United States**

GREGORY HUNT,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED (REPHRASED)

1. Whether this Court should refuse to consider Hunt's claim because the state courts below found the claim untimely, successive, and otherwise procedurally barred.
2. Whether certiorari is unwarranted where the State did not present false evidence and where the evidence against Hunt is overwhelming.

PARTIES

The caption contains the names of all parties in the courts below.

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STATEMENT OF THE CASE

A. The murder of Karen Lane

There is no doubt that Hunt committed the murder here, and it was as brutal as they come. Hunt had been dating the victim, Karen Lane, for about one month before he killed her. At the time of her death, Lane was living in an apartment with Tina Gilliland in Cordova, Alabama. Shortly after 6 p.m. on August 1, 1988, Gilliland and Lane left the apartment in Gilliland's 1986 beige Yugo and drove to Gilliland's fiancé's residence in Parrish, Alabama. When they arrived there, they saw Hunt's van outside. Gilliland got out of her car and went inside the house. Lane left in Gilliland's Yugo. Hunt had seen Lane in the car and asked Gilliland where Lane was going. Gilliland told Hunt that Lane was going to her mother's house. Hunt then left the house. Between midnight and 12:30 a.m., Amy Sheree Long testified that she was standing in a bank parking lot in Cordova and "saw Hunt in his van chasing Lane in a beige Yugo at a high speed."

Shortly before 2 a.m. on August 2, 1988, Mary Turner, who lived in the same apartment complex with Lane and Gilliland heard a noise that sounded like glass breaking. She looked outside and saw Hunt reach his hand into the window of Lane and Gilliland's apartment and enter the apartment through the adjacent door. After Hunt entered the apartment, Turner heard "peculiar

noises.” She described the first noise as follows: “like somebody had hit real hard, hit the floor,” and a second noise “like somebody sitting in a chair and just sliding it across the floor.” Around 2 a.m., Turner heard Lane and Gilliland’s apartment door slam and saw Hunt leaving the apartment. At 2:44 a.m., Hunt called Gilliland’s fiancé, Clinton Cook, from Lane’s apartment and told him that Lane was lying in the kitchen floor and asked him “to get somebody up [t]here to get her to the hospital.”

Lane’s body was found in the apartment later that morning. She had sustained sixty injuries to her body. There were twenty injuries to her head, which included “lacerations, external bruises, bruises to the brain, fractured cheekbones, and nasal bones broken into small pieces.” In addition, she had twelve fractured ribs on each side of her body and a fractured breastbone. “Her heart and lungs were bruised, as was her pancreas, and she had a three-quarter-inch tear in her aorta and three tears in her liver.” There were also numerous bruises and lacerations on her arms, legs, chest, back, and on her neck muscles. There was also semen in the victim’s mouth. According to a serologist with the Alabama Department of Forensic Sciences, the quantity and condition of the sperm found in Lane’s mouth indicated that the semen was deposited “very close ... to the time of death” and no more than an hour

before, “if not postmortem.” A broomstick found between Lane’s legs contained mucus secretions.

In the hours before Lane’s death, Hunt made numerous incriminating statements. On the afternoon of August 1, 1988, Hunt told Shirley Romine that “he was tired of everything and that he was moving back to Miami, Florida.” TT, p. 371. He also said, “She makes me so mad I could kill that [b]itch.” TT, p. 364. Between 8 and 8:30 p.m., Hunt told James Mullinax that “he was going to have to do something about the problem.” He also told Mullinax and Hortencia Ovalle when he left their house that he was going to “fuck somebody up.” TT, pp. 487-488. Around 9:40 p.m., after asking Gilliland where Lane was, he warned her that he “know[s] how you women are. You better tell me where she’s at.” After Gilliland responded that she did not know where Lane was, Hunt once again warned her to tell him where Lane was or it “was going to be detrimental to [Gilliland].” Hunt also told Gilliland that he was ready to go back to prison if that was what it took. TT, p. 318.

After 11:00 p.m., Hunt was with Deborah Twilley. Hunt told Twilley that he was tired of Lane’s crap. He also admitted burning Lane’s house although he was not sure whether it had burned to the ground but he hoped that it had. Finally, Hunt told Twilley that he burned Lane’s house because

he was “just tired of everything.” A little while later Hunt called Clinton Cook and told him that Lane and her family were going to be upset with him because he had done something “materialistically.” He also told Cook that “people didn’t screw him over like this and get away with it.” Hunt called Lane’s mother around 1:00 a.m. and told her that all he wanted to do was talk to Lane but she would not stop. He also threatened violence against Gilliland. Finally, between 7:00 and 8:00 p.m. the next night, Hunt called his brother-in-law and told him that he had been out partying with a woman and they got into a fight. Hunt told his brother-in-law that he did not think he had killed her but that he was not sure how she was when he left her and that he had “checked with the hospitals and newspapers and I can’t find anything else out about her at all.”

The police found a bloody palm print at the crime scene that belonged to Hunt. In addition, fingerprints found from the kitchen window of the apartment were matched to Hunt’s right palm, right index finger, and left ring finger.¹

B. Trial and direct appeal

On June 19, 1990, Hunt was convicted of three counts of capital murder for the brutal murder of Karen Lane. Specifically, Hunt was convicted of two

¹ A more thorough statement of the facts can be found in the January 5, 2012 opinion of the Eleventh Circuit Court of Appeals. *Hunt v. Comm., Ala. Dept. of Corr.*, 666 F.3d 708, 710-714 (11th Cir. 2012).

counts of murder during sexual abuse in violation of Ala. Code § 13A-5-40(a)(8), and one count of murder during a burglary in violation of Ala. Code § 13A-5-40(a)(4). *Hunt v. State*, 659 So. 2d 933, 937 (Ala. Crim. App. 1994).

Following a sentencing hearing, the jury recommended that Hunt be sentenced to death by an eleven-to-one vote. The trial court followed the jury's recommendation and sentenced Hunt to death.

The Court of Criminal Appeals and the Alabama Supreme Court affirmed Hunt's convictions and death sentence. *Hunt v. State*, 659 So. 2d 933 (Ala. Crim. App. 1994), *aff'd*, 659 So. 2d 960 (Ala. 1995). This Court denied Hunt's petition for writ of certiorari. *Hunt v. Alabama*, 516 U.S. 880 (1995).

C. State postconviction proceedings and federal habeas proceedings

Hunt next filed a *pro se* petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. Hunt later amended his petition, with the assistance of counsel. An evidentiary hearing was held on the amended petition. At the hearing, Hunt attempted to present only one witness: his Rule 32 counsel's legal assistant, who was to testify concerning conversations with Hunt's family. The trial court excluded this testimony on hearsay grounds. Hunt also attempted to present affidavits from family members instead of calling them to present live testimony. Again, this

evidence was excluded because it was hearsay and the State was not given prior notice of Hunt's intent to offer hearsay affidavits. In the end, Hunt introduced a few exhibits and his counsel's reading of the amended petition to the court.

The circuit court denied relief on the claims in the amended Rule 32 petition. The Court of Criminal Appeals affirmed the denial of the Rule 32 petition and the Alabama Supreme Court denied Hunt's petition for writ of certiorari. *Hunt v. State*, 940 So. 2d 1041 (Ala. Crim. App. 2005).

Hunt then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. In August 2009, the district court entered a memorandum opinion and final judgment denying and dismissing the habeas petition. The Eleventh Circuit Court of Appeals affirmed the district court's judgment. *Hunt v. Comm., Ala. Dept. of Corr.*, 666 F.3d 708 (11th Cir. 2012). This Court denied Hunt's petition for writ of certiorari. *Hunt v. Dunn*, 135 S. Ct. 1887 (2015).

D. Second state postconviction proceedings

On November 3, 2016, Hunt filed a *pro se* successive Rule 32 petition for post-conviction relief in the Walker County Circuit Court and raised two

grounds for relief. 2 R32, p. 11.² First, Hunt argued that he was denied a fair trial by the prosecution's presentation of false testimony. 2 R32, p. 12. Second, Hunt argued that Alabama's death penalty statute violates the right to trial by jury under the Sixth and Eighth Amendments to the United States Constitution. Carly B. Wilkins filed a notice of appearance on behalf of Hunt on December 2, 2016. 2 R32, p. 61.

On December 7, 2016, the State filed a motion for summary dismissal of Hunt's successive Rule 32 petition. 2 R32, p. 63. Hunt filed a reply to the State's answer and motion to dismiss on April 4, 2017. 2 R32, p. 107. On October 27, 2017, the State filed a proposed order with the Rule 32 circuit court. 2 R32, p. 122. On December 12, 2017, the Rule 32 circuit court summarily denied and dismissed Hunt's successive Rule 32 petition in a 25-page order. 2 R32, p. 144. That court denied relief on Hunt's claim that the prosecution presented false and misleading testimony – the only claim raised in the cert petition – on procedural and substantive grounds. First, the circuit court found that this claim was barred by the Rule 32.2(c) statute of limitations. 2 R32, pp. 151-155. Second, the circuit court found the claim

² References to the record on appeal are as follows: references to the transcript from the successive Rule 32 petition are as follows: 2 R32, p. ____; references to the trial transcript are as follows: TT, p. ____; references to the first Rule 32 transcript are as follows: 1 R32, p. ____.

barred by Rule 32.2(b)'s successive petition rule because Hunt could have raised this claim in his first Rule 32 petition. 2 R32, pp. 155-156. Third, the circuit court found that Hunt could have, but did not, raise this claim at trial or on direct appeal. Ala. R. Crim. P. 32.2(a)(3) and (5). 2 R32, pp. 156-157. Fourth, the circuit court found the claim meritless. 2 R32, pp. 158-162.

Hunt filed a motion to reconsider the circuit court's order dismissing the successive Rule 32 petition on January 11, 2018. 2 R32, p. 170. On this same day, Hunt filed a motion requesting that the circuit court rule on his motion to proceed *in forma pauperis*. 2 R32, Doc. 32. The Court of Criminal Appeals ordered the circuit court to rule on the motion to proceed *in forma pauperis* on January 29, 2018. The circuit court granted Hunt's motion to proceed *in forma pauperis* on February 12, 2018. 2 R32, Doc. 45.

Hunt appealed the denial of his successive petition to the Court of Criminal Appeals. 2 R32, Doc. 34. That court found that Hunt's claim was not sufficiently pleaded because he failed to alleged "that the information 'could not have been discovered by any of those times through the exercise of reasonable diligence.'" Pet. App. A, p. 9. The Court of Criminal Appeals also found that "Hunt would have been aware of the implications of Dr. Embry's testimony in plenty of time to include this claim at trial, on direct appeal, or in his first Rule 32 petition." Pet. App. A, p. 9. The Alabama

Supreme Court then denied Hunt's petition for writ of certiorari and the present petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

Hunt's petition does not present an issue meriting this Court review. And even if it did, this Court should refuse to consider it because the state courts denied Hunt's petition on adequate and independent state law procedural grounds. The petition, therefore, should be denied.

First, this Court should decline to review this claim because the state courts found the claim insufficiently pleaded because Hunt did not comply with Alabama's procedural rule to prove that the claim was based on newly discovered evidence. Alabama's statute requiring that a defendant plead that a newly discovered claim could not have been discovered in time to raise the claim at an earlier time through the exercise of reasonable diligence is an adequate and independent state law ground. This Court, therefore, should refuse to grant cert to consider the merits of this claim.

In addition, Hunt's issue is not cert worthy.

I. The petition is directed to the wrong state appellate court.

Before this Court can consider the merits of Hunt's petition, it needs to resolve a procedural problem: the petition is directed to the wrong state appellate court.

Hunt appealed the summary dismissal of his second Rule 32 petition to the Alabama Court of Criminal Appeals, an intermediate appellate court with statewide jurisdiction. That court affirmed in a thirteen-page opinion. Hunt then petitioned the Alabama Supreme Court for certiorari review, but that court denied review. When a state supreme court denies discretionary review, this Court reviews “the judgment of the intermediate court rather than the order of refusal by the higher court.” *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 179 (9th ed. 2008) (citing *Sullivan v. Texas*, 207 U.S. 416 (1908), and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968)).

Hunt’s petition erroneously seeks a writ of certiorari “to the Alabama Supreme Court.” Pet. cover, 1. This Court must decide whether the petitioner’s failure to identify the proper lower court is a defect of jurisdictional significance.

II. This Court lacks jurisdiction to consider Hunt’s claim because it was dismissed on independent and adequate state law grounds.

This Court “lack[s] jurisdiction to review” “a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997). The reason is simple and fundamental: “Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be

purely advisory.” *Id.* at 523 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945)). Because the state courts below denied Hunt’s claim on independent and adequate state law grounds, the Court should deny the petition.

Hunt asks this Court to review his *Napue/Brady* claim, but even if Hunt’s federal claim had merit (*but see infra* Part III), that would not alter the judgment below, which was also based on the state court’s application of state law. Hunt was convicted of murder in 1990, and his conviction was upheld throughout decades of appellate and collateral review. Then, in 2016, he finally raised this claim in his successive Rule 32 petition. The circuit court found Hunt’s claim barred from review for a myriad of reasons. First, Hunt’s petition was untimely because it was filed well beyond the limitations period found in Rule 32.2(c), Ala. R. Crim. P. and Hunt failed to allege that his claim was based on newly discovered evidence. 2 R32, pp. 151-153. Second, Hunt’s claim was barred by Alabama’s successive petition rule because Hunt did not raise the claim in his first Rule 32 petition and failed to show that the grounds in support of the claim were not known to and could not have been ascertained by reasonable diligence by him when he filed his first petition. 2 R32, pp. 155-156. Third, the claim could have been, but was not, raised at trial and on direct appeal. Ala. R. Crim. P. 32.2(a)(3) and (5). 2 R32, pp. 156-157.

After the circuit court refused to grant relief on the successive petition, Hunt appealed to the Alabama Court of Criminal Appeals. On appeal, the Court of Criminal Appeals found that Hunt failed to sufficiently plead all the requirements to prove that the claim was newly discovered evidence as required by Rule 32.1(e) of the Alabama Rules of Criminal Procedure. Pet. App. A, p. 9. Specifically, that court found: “In fact, Hunt admits in his petition that the defense was provided a copy of Dr. Embry’s autopsy report prior to trial, that the report was admitted into evidence, and that the report indicated that the victim did not have a cervix. Thus, Hunt would have been aware of the implications of Dr. Embry’s testimony in plenty of time to include this claim at trial, on direct appeal, or in his first Rule 32 petition. Nevertheless, Hunt failed to plead any facts indicating that he was unable to obtain the information contained in Dr. Embry’s affidavit until 2016.” Pet. App. A, p. 9.

The Court of Criminal Appeals’ determination that Hunt failed to specifically plead his newly discovered evidence claim is strictly a matter of state law. A state court may apply its own state procedural rules and may defeat a claim based on that independent state law. *See Dretke v. Haley*, 541 U.S. 386, 393-393 (2004) (noting that “an adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a

state court's judgment ..."). In addition, because this claim was decided under an independent and adequate state law rule, Hunt's claim does not present a federal question as required by 28 U.S.C. §1257(a).

Because this Court's determination of the federal issue raised in Hunt's petition would not alter the judgment below, this Court lacks jurisdiction over Hunt's claim and his petition should be denied.

III. Certiorari is unwarranted because Dr. Embry did not testify falsely.

Even if this claim was properly before this Court, it does not entitle Hunt to cert review. As set forth below, there was no *Napue v. Illinois*, 360 U.S. 264 (1950)/*Brady v. Maryland*, 373 U.S. 83 (1963), violation because Dr. Embry did not testify falsely.

A. There was no false testimony.

First, Dr. Embry did not admit in his affidavit that his trial testimony was inaccurate. Dr. Embry stated the following in his affidavit:

3. On June 13, 1990, I testified at Gregory Hunt's capital murder trial. My testimony primarily concerned the physical examination performed on the victim's body. However, I was asked a number of questions about the position of the cervix and cervical mucus. In answering these questions, I provided general anatomical information, but did not intend to refer to Karen Lane specifically.

4. As noted in my autopsy report, Karen Lane's uterus had been removed. The cervix is part of the uterus. Accordingly, the implication that her cervical mucus was present on a

broomstick, as a result of it having been inserted in her vagina, is dubious.

2 R32, pp. 54-55. Dr. Embry never states in his affidavit that his testimony was inaccurate. Instead, Dr. Embry states that any inference – from the prosecutor’s argument – that the victim’s cervical mucus was present on the broomstick is dubious.

In addition, Dr. Embry did not testify falsely. He did not testify, or infer, that the mucus on the broomstick was cervical mucus. As the circuit court found: “Instead, as Dr. Embry sets forth in his affidavit, his testimony was general anatomical information that occurred after Hunt’s trial counsel asked whether the cervix was the outer portion of the uterus and whether mucus could be secreted from the nose and mouth.” 2 R32, pp. 158-159.

The following occurred during the State’s re-direct examination of Dr. Embry:

Q. You said mucus is secreted by the outer part of the cervix; is that right?

A. By the cervix which is the lower part of the uterus.

Q. Okay. For lay persons, how far, if any, would that be inside the vagina?

A. At the top of the vagina.

Q. On the outside or inside?

A. Inside.

Q. On the inside. How far on the inside. If you have a judgment?

A. About four inches.

Q. So, inside the vagina you have to go four inches to get where that mucus is; is that what you're telling me, doctor?

A. To get to where it is produced.

TT, pp. 264-265. Later, on re-cross examination of Dr. Embry, the following occurred:

Q. So, you couldn't tell then about penetration?

A. To get to the heart of the question, I believe it probably did have to go to the cervix to the mucus on it.

Q. If it's that kind of mucus?

A. Correct.

TT, p. 268. On re-direct examination, the following then occurred:

Q. So, we have to have that broom stick four inches inside of the deceased to get the cervical mucus on it?

A. To get the cervical mucus, yes, sir.

TT, p. 268.

Dr. Embry's testimony concerned general anatomical testimony. Dr. Embry never testified that there was cervical mucus on the broomstick and never implied that the mucus on the broomstick was cervical mucus from the

victim. There was no false testimony from Dr. Embry. Because there was no *Napue/Brady* violation, Hunt is not entitled to certiorari review.

B. There was no prejudice.

Even if Dr. Embry's testimony were deemed false, there is not a reasonable likelihood that the outcome of the proceeding would have been different had the State not presented Dr. Embry's testimony. The evidence against Hunt was overwhelming, including the fact that the murder occurred during a sexual abuse. This evidence included the following: a neighbor saw Hunt entering Lane's apartment shortly before 2 a.m. and then heard peculiar noises coming from the apartment; right before 3 a.m., Hunt called Clinton Cook from Lane's apartment and told him that Lane was lying in the kitchen floor and asked him "to get somebody up [t]here to get her to the hospital; Hunt's bloody palm print was found at the crime scene and the fingerprints found on the kitchen window matched Hunt's right palm, his right index finger, and his left ring finger, TT, pp. 154-155; Hunt made numerous incriminating statements both before and after the murder, such as "She makes me so mad I could kill that [b]itch," TT, p. 371, that he was going to have to do something about the problem and that he was going to "fuck somebody up," TT, pp. 487-488, and told his brother-in-law that he had gotten into a

fight with a woman he had been partying with and did not think he had killed her but was not sure how she was when he left her.

There was also ample evidence beyond Dr. Embry's testimony that indicated that the murder occurred during a sexual abuse. That evidence includes: semen found in the victim's mouth that indicated that the semen was deposited "very close ... to the time of death" and no more than an hour before, "if not postmortem;" the broomstick containing the mucus cells was found lying between Lane's legs; and testimony from James Carl Sanders, an inmate with Hunt in the Walker County jail, who told the jury that, before trial, Hunt had stated that he had beaten the victim and that he saw that she was bleeding after he put the stick up her. TT, p. 603.

As set forth above, the evidence against Hunt is overwhelming and there is not a reasonable probability that Hunt was prejudiced by Dr. Embry's testimony. Hunt is not entitled to cert review of his claim.

C. The state courts did not add a due diligence requirement to *Brady*.

Hunt's last argument is that Alabama courts have improperly posed a diligence requirement in several prosecutorial misconduct cases. Instead of arguing that the Alabama courts improperly imposed a diligence requirement in his case, Hunt relies on two other cases to apparently argue that a conflict exists in this case. Pet., pp. 16-18. Because Hunt does not allege that a

conflict exists in this case, this Court should refuse to grant cert to consider a possible conflict in other cases where this Court has already denied certiorari.

In any event, the cases cited by Hunt do not establish a conflict. Hunt relies on cases where courts imposed a due diligence requirement to establish a *Brady* violation. Pet., pp. 18-20. There was no such requirement imposed in Hunt's case. Instead, the Court of Criminal Appeals found that Hunt failed to show that his alleged newly discovered evidence "could not have been discovered by any of those times through the exercise of reasonable diligence" as required by Rule 32.1(e)(1). The Court of Criminal Appeals did not impose a due diligence requirement to prove a *Brady* claim in Hunt's case. There is no conflict, and this Court should deny certiorari review of this claim.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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