No. 18-8466

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY HUNT,
Petitioner,
v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari
to the Alabama Supreme Court

REPLY TO BRIEF IN OPPOSITION

CAPITAL CASE
NO EXECUTION DATE SET

CHRISTINE A. FREEMAN, EXECUTIVE DIRECTOR
John Anthony Palombi
Counsel of Record
Anne Borelli
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: (334) 834-2099
Facsimile: (334) 834-0353
Email: john_palombi@fd.org

June 25, 2019

QUESTION PRESENTED

In pursuit of a capital conviction and death sentence in this case, the prosecutor relied on an inflammatory impossibility. At Gregory Hunt's trial in 1990, the prosecutor insisted that a stick had been inserted into the victim's vagina, obtaining her cervical mucus on it. *See, e.g.*, (Tr. R. 861) ("She is laying there, God, she is beat to a pulp and he takes this broom stick and I suggest to you that evidence is none other than that he put it four inches deep in her vagina, to her cervix and the mucus secreted by the cervix is on it."). However, the State's expert witness now admits that the victim's cervical mucus could not have been on the stick, as her cervix had been previously removed.

This Court has established that the presentation of false evidence violates a defendant's constitutional right to due process under the Fifth and Fourteenth Amendments. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150 (1972). Although the jury was misled in this case, and in such a disturbing fashion, the Alabama Court of Criminal Appeals denied Mr. Hunt's claim. The court reasoned that Mr. Hunt should have challenged the falsity of this evidence at an earlier time, prior to the pathologist's admission in 2016 that his trial testimony was dubious.

This ruling — that Mr. Hunt was obligated to discover the falsity of the State's evidence at an earlier time — is contrary to this Court's precedents. *See Strickler v. Greene*, 527 U.S. 263, 286 (1999) (explaining that defendants have no "procedural

obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred"); *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

Mr. Hunt's case thus presents the following question to this Court:

> May the presentation of false evidence in a capital case be excused for want of diligence, when the evidence was challenged only after the State's expert admitted that his trial testimony was dubious?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutions and Rules

REPLY TO BRIEF IN OPPOSITION

I. There Is No Jurisdictional Defect respecting the Court to Which Mr. Hunt's Petition Is Addressed.

Respondent first argues that the petition directing certiorari review to the Alabama Supreme Court ("ASC"), as opposed to the Alabama Court of Criminal Appeals ("ACCA"), is a defect of jurisdictional significance.[1] Not so. This Court's precedent is clear: "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'"[2]

The ASC is the highest court in the state of Alabama – it "is the final arbiter of Alabama law, with ultimate authority to oversee and rule upon the decisions of the lower State courts."[3] As a result, the certificate of judgment it issued, which denied certiorari review and affirmed the judgment of the ACCA is "the final word of a final court," for purposes of establishing jurisdiction. Because the ASC's summary decision

---

[1] Br. in Opp'n at 9-10.

[2] *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (quoting *Market St. R. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).

[3] *Ex parte James*, 836 So. 2d 813, 834 (Ala. 2002) (emphasis in original).

is "a final judgment rendered by the highest court of the State in which decision may be had,"[4] there is no jurisdictional defect.

II. The State Procedural Rule on Which the Lower Court Denial Rests Is Not Independent of Federal Constitutional Law.

Respondent argues that this Court also lacks jurisdiction to review Mr. Hunt's Petition because the state procedural rule invoked to deny relief is "independent of the federal question."[5] This assertion is incorrect.

The state court rule in question requires a petitioner proceeding under Rule 32.1(e), Ala. R. Crim. P., to plead:

> The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion, pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence ….

The ACCA held only that "[b]ecause this claim was insufficiently pleaded, the circuit court was correct to summarily dismiss it."[6] Any other reasons cited by Respondent as found by the circuit court are not at issue in this appeal, since the ACCA did not adopt them.[7]

---

[4] *Flynt v. Ohio*, 451 U.S. 619, 620 (1981).

[5] Br. in Opp'n at 10-13.

[6] Pet. App. A at 9.

[7] *See*, *e.g.*, *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("We hold that the federal court should 'look through' the unexplained decision to the *last* related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.") (emphasis added).

The ACCA's reason for finding Mr. Hunt's petition not specifically pled is intertwined with the standard for claims arising under *Brady v. Maryland*[8] and *Napue v. Illinois*.[9] The ACCA did not hold that Dr. Embry's (the State's pathologist's) testimony was not false and misleading, but that Mr. Hunt should have been aware of its misleading character at the time of trial, because he was given the autopsy report in discovery. The ACCA found:

> Nothing in Hunt's petition indicates that he was somehow unable to obtain an affidavit from Dr. Embry's [*sic*] prior to 2016. 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.[10] 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. Accordingly, he failed to sufficiently plead all of the requirements of Rule 32.1(e), Ala. R. Crim. P.[11]

So, the question the ACCA decided was whether Mr. Hunt knew or should have known of the *Brady/Napue* violation at some point before he obtained the affidavit from Dr. Embry. This question is clearly tied to the matter of suppression or, here, the false and misleading character of Dr. Embry's testimony. Specifically, the

---

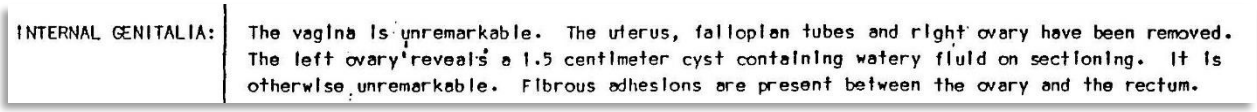
[8] 373 U.S. 83 (1963).

[9] 360 U.S. 264 (1950).

[10] Mr. Hunt did not "admit … that the report indicated that the victim did not have a cervix." That is the issue here, that the State's expert did not disclose that fact, but testified as though she did. The ACCA's statement is a clear factual error.

[11] Pet. App. A at 9.

question is whether Dr. Embry's autopsy report clearly stated "that the victim did not have a cervix." It did not. The relevant entry in the autopsy reports is as follows[12]:



INTERNAL GENITALIA:	The vagina is unremarkable. The uterus, fallopian tubes and right ovary have been removed. The left ovary reveals a 1.5 centimeter cyst containing watery fluid on sectioning. It is otherwise unremarkable. Fibrous adhesions are present between the ovary and the rectum.

The ACCA read between the lines from what we now know, because Dr. Embry confirmed it in his 2016 affidavit: that his notation that the uterus had been removed would have included removal of the cervix. But, as Mr. Hunt explained in his petition, that is not a given.[13] Dr. Embry was the one who performed the autopsy; he was the only one involved in the criminal case who knew the extent of the prior surgery.

As this Court summarized its prior holdings in *Giglio v. United States*[14]:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 … (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." … In *Napue v. Illinois*, 360 U.S. 264 … (1959), we said, "(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269 …. Thereafter *Brady v. Maryland*, 373 U.S., at 87 … held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." … When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.

[12] Tr. C. 1098.

[13] Pet. at 8-9.

[14] 405 U.S. 150, 153–54 (1972) (some citations omitted).

Nonetheless, the ACCA faulted Mr. Hunt for not assuming earlier that Dr. Embry's testimony was false. But defendants are not under any obligation to assume that a State's witness is misstating the facts. Not hounding each State's witness about the truthfulness of their testimony does not render a defendant lacking in diligence: defendants have no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred."[15] "'Ordinarily, we presume that public officials have properly discharged their official duties.'"[16] Rather, the duty lies with the State to correct false testimony.[17] Here, the State, Respondent, through a member of its prosecution team, Dr. Embry,[18] was in complete control of the false evidence, but never disclosed that falsity to the defense.

---

[15] *Strickler v. Greene*, 527 U.S. 263, 286 (1999).

[16] *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)).

[17] *Id.* 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

[18] *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Hill v. State*, 651 So. 2d 1128, 1131–32 (Ala. Crim. App. 1994) ("The duty of disclosure extends not only to the individual prosecutor and the prosecutor's office ... but also to persons working as part of the prosecution team or intimately connected with the government's case, even if not employed in the prosecutor's office, such as police, investigative agencies and officers, and all law enforcement agencies which have participated in the investigation or evaluation of the case and regularly report or have reported to the prosecutor.") (citations omitted).

The ACCA could not decide whether Mr. Hunt met the requirements of Rule 32.1(e) in his state petition without analyzing the second prong of the *Brady* test: "that evidence [favorable to him] must have been suppressed by the State, either willfully or inadvertently …."[19] Though couched in terms of pleading specificity, the real question the court decided was whether the false character of Dr. Embry's testimony had been "suppressed" for *Brady/Napue* purposes. "[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded."[20] This Court has jurisdiction.

III. Dr. Embry's Testimony Was False.

Respondent argues that Dr. Embry did not testify falsely, because his "testimony concerned general anatomical testimony."[21] First, the ACCA did not make such a finding. Once again, Respondent cites to the circuit court's opinion,[22] which it wrote,[23] but the ACCA did not adopt those findings. Therefore, they are not before this Court.

---

[19] *Strickler*, 527 U.S. at 282.

[20] *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

[21] Br. in Opp'n at 15.

[22] *Id.* at 14.

[23] *See*, *e.g.*, Pet. App. A at 13.

Second, this assertion is contradicted by the record, including those portions Respondent quotes. Even if some portions of Dr. Embry's testimony could be considered to be about "general anatomical" matters, he specifically answered the following:

> BY MR. BAKER[24]:
>
> Q. The broom stick in the photograph that I showed you, doctor, is it laying by the deceased's nose?
>
> A. No, sir.
>
> Q. Is it laying in close promixity [*sic*] to her vagina?
>
> A. Yes, sir.
>
> Q. Is it still your opinion that you would have to go approximately four inches inside the vagina before you could get the mucus?
>
> A. My opinion was that the mucus [is] produced by the cervix which is about four inches into the vagina. That was the line of questioning.
>
> MR. BAKER: Thank you.
>
> RECROSS EXAMINATION CONTINUED
>
> BY MR. WILKINSON[25]:
>
> 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 get mucus on it.*
>
> Q. If it's that kind of mucus?

[24] Charles Baker, the District Attorney.

[25] Louis Wilkinson, defense counsel.

A. Correct.

REDIRECT EXAMINATION CONTINUED

BY MR. BAKER:

Q. So, we have to have that broom stick four inches *inside of the deceased* to get the vagina[26] mucus on it?

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

MR. BAKER: Thank you, doctor.[27]

It is clear, that the questions are about Karen Lane specifically, not just "general anatomy." Significantly, when the State misstated the source of the mucus as "vagina mucus," Dr. Embry corrected it to "cervical mucus," but he never corrected the false underlying matter that Ms. Lane's cervix had been removed.

Third, there would be no point in eliciting "general anatomical testimony" of no application to the case at bar. Respondent does not explain how the above testimony can be read generally or hypothetically. Certainly, the discussion rests on an assumption that the mucus on the broomstick was cervical mucus, but Dr. Embry knew that whatever was on the end of the broomstick, it was not cervical mucus from Karen Lane. Yet he did not correct that false assumption.[28]

---

[26] Respondent misquotes this question. Br. in Opp'n at 15.

[27] Tr. R. 267-68 (emphases added).

[28] *See*, *e.g.*, *United States v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2011) ("In this area of the law, the governing principle is simply that the prosecutor may not knowingly use false testimony. This includes 'half-truths' and vague statements that could be

The testimony is false, because Karen Lane did not have a cervix, and Dr. Embry, a member of the prosecution, withheld that information.

IV. Dr. Embry's Testimony Was Prejudicial.

Respondent argues that any falsity in Dr. Embry's testimony is of no matter, because "there is not a reasonable likelihood that the outcome of the proceeding would have been different" without it.[29] Respondent misstates the standard for review of *Napue* claims: "A new trial is required if 'the false testimony could … in any reasonable likelihood have *affected* the judgment of the jury ….'"[30] "*Giglio*'s materiality standard is more defense-friendly than *Brady*'s."[31]

There is more than a reasonable likelihood that Dr. Embry's testimony *could have* affected the judgment of the jury. The State certainly highlighted it in its closing argument:

> She is laying there, God, she is beat to a pulp and he takes this broom stick and I suggest to you that evidence is none other than that he put it four inches deep in her vagina, to her cervix and the mucus secreted by the cervix is on it.[32]

---

true in a limited, literal sense but give a false impression to the jury.") (citation omitted).

[29] Br. in Opp'n at 16.

[30] *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271) (emphasis added).

[31] *Guzman v. Sec., Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011).

[32] Tr. R. 861.

Respondent's prejudice argument here relies on much evidence that proves nothing respecting sexual abuse.[33] Even the evidence cited in support of sexual abuse specifically[34] boils down to one item.

Respondent relies on "the broomstick containing the mucus cells … found lying between Lane's legs."[35] A demonstration that any mucus on it was not from her cervix would eliminate the "sexual abuse" argument. Because any mucus definitely was not from her cervix, there is nothing actually connecting it to the offense here at all.[36] The supposition that the mucus came from Karen Lane rested entirely on identification of it as cervical mucus.

Respondent also argues that the testimony of James Sanders, a jail inmate, that Mr. Hunt confessed using the stick to sodomize the victim would still provide the necessary proof.[37] But the already shaky credibility of Sanders' testimony would have been seriously undercut without Dr. Embry's misleading testimony to bolster it. Sanders came forward with his claim of a "confession" on the fourth day of Mr. Hunt's trial, even though he had been incarcerated with Mr. Hunt for months before the

---

[33] Br. in Opp'n at 16.

[34] *Id.* at 17.

[35] *Id.*

[36] Larry Huys, the serologist, examined material collected from the broomstick under a microscope, but did not conduct any identifying tests. Tr. R. 388-89.

[37] Br. in Opp'n at 17.

trial.[38] He admitted he was facing a third felony conviction,[39] which the DA asserted would subject him to a 15-year sentence under the habitual offender law.[40] Without Dr. Embry's testimony to support it, the jury's view of the "confession's" reliability would have been significantly lessened, in all reasonable likelihood.

The one item remaining, then, was semen in the victim's mouth.[41] But no testing was done to tie it specifically to Mr. Hunt. Huys, the serologist, could say only that 50 per cent of the Caucasian male population could have been the source and that Mr. Hunt was in that 50 per cent.[42] Furthermore, he could not definitively say whether the deposit was pre- or post-mortem.[43] The defense challenged the probative value of this evidence.[44] Without the cervical mucus testimony, it could not provide proof beyond a reasonable doubt that Mr. Hunt sexually abused Ms. Lane.

---

[38] Tr. R. 598, 600, 606, 609, 612-13 (Sanders' trial testimony on June 14, 1990); R32 C. 457 (Sanders' statement to DA's investigator made on June 14, 1990). A story mentioning the broomstick allegations ran in the local paper the same day, but the newspaper does not appear to be included in the trial or post-conviction records. Greg Richter, *Sister: Hunt killed girlfriend, wanted to frame her husband*, Daily Mountain Eagle, June 14, 1990, at A1.

[39] Tr. R. 605.

[40] *Id.* at 617, 619. Sanders was released from jail and returned to probation about three weeks after his testimony in this case. Order, *State of Alabama v. James Carr Sanders*, Walker Cnty. Case Nos. CC-88-50, -51, -52, -487 (Walker Cnty. Cir. Ct. July 5, 1990). (Sanders' middle name is "Carr," not "Carl.")

[41] Br. in Opp'n at 17.

[42] Tr. R. 397-98.

[43] *Id.* at 405-6.

[44] *See, e.g.*, Tr. R. 827-28 (innocence/guilt phase closing argument of defense counsel).

The question here is not whether the State's evidence was sufficient to convict Mr. Hunt of murder, but of *capital* murder, since, to make the offense capital, every count included the element of sexual abuse. "Strong" evidence on other elements does not necessarily negate the harm of a *Napue* violation. As the Seventh Circuit explained in a drug conspiracy case:

> Nor do we agree with the government that the evidence was so overwhelming that it was unreasonable for the district court to find that Williams's false testimony affected the verdict. To be sure, *there was much evidence of the defendants' guilt, some of it very strong*. After all, the defendants did candidly admit to being drug dealers. But despite that, there were three critical impressions affecting the evidence that inform our holding. First, when reading the transcript and the judge's order there is an impression that the case promised by the government – a large and profitable conspiracy – was not what it delivered. Second, Williams's testimony filled in many necessary details that gave flesh and context to the government's evidence. Third, the other parts of the government's case were not so strong that Williams's testimony was mere surplusage.[45]

The question here is whether Dr. Embry's false testimony *could have* affected the jury's judgment.[46] The record demonstrates that it did affect the sentencing judge[47]; it is only logical to conclude that it had the same or a similar effect on the jury.

If the broomstick were not key to the State's proof of sexual abuse, it would not have sought to prove its use through multiple witnesses – Dr. Embry and James

---

[45] *Freeman*, 650 F.3d at 681–82.

[46] *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

[47] Tr. R. 1047 ("Mr. Hunt did insert a broomstick into the vagina of Ms. Lane during the assault which led to her death.").

Sanders – or emphasize it in argument. Dr. Embry's testimony gave a scientific stamp to the other purported evidence of sexual abuse. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[48] Here the expert evidence of cervical mucus on the tip of the broomstick was false. "A new trial is required if 'the false testimony could … in any reasonable likelihood have *affected* the judgment of the jury ….'"[49] A new trial is required here.

V. The State Court Imposed a Diligence Requirement. Respondent Misunderstands or Misrepresents Mr. Hunt's Grounds for Granting the Writ and Argues a Distinction without a Difference.

Mr. Hunt argued in his petition that Alabama courts improperly impose a diligence requirement on claims raised under *Brady* and its progeny. They apply this diligence requirement to dismiss claims as raised too late, even where the disclosure clearly occurred after all previous proceedings had concluded or even never occurred through the State at all, as here.[50] Respondent is factually incorrect in saying that Mr. Hunt did not argue that the ACCA imposed a diligence requirement in his case[51]; rather, he clearly pled: "As these cases reflect, the imposition of a diligence requirement on the defendant — as the Court of Criminal Appeals ruled in this case — is simply inconsistent with this Court's clear approach to prosecutorial

[48] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (citation omitted).

[49] *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271) (emphasis added).

[50] Pet. at 10-12, 16-20.

[51] Br. in Opp'n at 17-18.

misconduct."[52] Because Mr. Hunt clearly pled that a diligence requirement was imposed in his case, as well as the other Alabama cases discussed in Section D of his petition, Respondent's argument that no conflict with this Court's precedent exists here[53] is also factually, as well as legally, incorrect.

In a second attempt to circumvent review, Respondent argues that, although a diligence requirement was applied, that requirement derived from Rule 32.1(e), Ala. R. Crim. P., rather than from misapplying *Brady*.[54] But this is simply another way of arguing that the ACCA applied an independent state procedural rule, i.e., a distinction without a difference from the argument Mr. Hunt addresses above in Section II. Mr. Hunt, therefore, reiterates that the diligence required under Rule 32.1(e), when applied to *Brady/Napue* claims, is not independent of federal constitutional law. Alabama courts must consider that requirement within the context of what constitutes suppression under *Brady*. The ACCA did not do so here.

---

[52] Pet. at 20.

[53] Br. in Opp'n at 17-18.

[54] *Id.* at 18.

CONCLUSION

Mr. Hunt has spent decades on Alabama's death row, pursuant to a conviction and sentence obtained through use of false evidence.[55] The State of Alabama has avoided rectifying this error only by adding on another – faulting Mr. Hunt for a lack of diligence in suspecting the State's expert witness of testifying falsely – contrary to this Court's precedent. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ John Anthony Palombi
John Anthony Palombi
Counsel of Record
Anne Borelli
Federal Defenders
Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: (334) 834-2099
Facsimile: (334) 834-0353
Email: john_palombi@fd.org

[55] *Cf. Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) ("The alternative to granting review, after all, is forcing Wearry to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed.").