CAPITAL CASE

No. 20-507

IN THE
SUPREME COURT OF THE UNITED STATES

TONY MAYS, WARDEN,

Petitioner-Applicant

vs.

ANTHONY DARRELL DUGARD HINES,

Respondent

PETITION FOR REHEARING

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Respondent, Anthony Darrell Dugard Hines, respectfully requests that this Court order rehearing in this case pursuant to Rule 44 of the Court. For the reasons stated below, this Court should either (1) rescind the granting of the writ of certiorari and the summary reversal opinion and allow the fact-bound Court of Appeals' judgment to remain standing; or (2) rescind the summary reversal opinion and allow full briefing and argument.

In support of this petition for rehearing, Respondent submits that: (1) the Court's summary reversal of the Court of Appeals' grant of habeas relief failed to take account of critical facts relevant to a finding of prejudice in an ineffective assistance of counsel claim, in a case where the habeas grant was particularly fact-bound; (2) the grant of habeas relief is necessitated by the sort of extreme malfunction in the state criminal justice system envisioned by the Court in *Harrington v. Richter*, 562 U.S. 86 (2011), as Hines' trial counsel, the prosecutor, the county sheriff, and Ken Jones—a key witness and alternate suspect—colluded to ensure that his counsel did not investigate Jones and instead presented Jones's perjured testimony at Mr. Hines' trial; and (3) full briefing and argument would allow the Court to consider other claims on which Mr. Hines is entitled to relief—claims that were incorrectly rejected by the Court of Appeals.

I. The Court of Appeals' Ruling Was Fact Bound and Did Not Warrant Granting a Writ of Certiorari, Much Less a Summary Reversal.

The Court of Appeals' holding that trial counsel were ineffective for failing to investigate and present evidence regarding Ken Jones and that the state court's judgment to the contrary was an unreasonable application of federal law was a

highly fact-bound holding and does not meet this Court's requirements for granting a writ of certiorari. The state court ruled that Mr. Hines could not satisfy the prejudice requirement of *Strickland v. Washington*, 466 U.S. 668 (1984). *Hines v. State*, No. M2004-01610-CCA-RMPD, 2004 WL 1567120, at *27 (Tenn. Crim. App. July 14, 2004). The state court side-stepped the deficient-performance prong of *Strickland*. As the Sixth Circuit concluded: "Trial counsel's performance was clearly deficient because they abandoned any effort to interview Jones based on nothing more than an assurance by the sheriff that Jones was not involved in Jenkins's murder." App. 83.

As to the prejudice prong, the Sixth Circuit noted that this Court held that "a state court's 'prejudice determination' is 'unreasonable insofar as it fail[s] to evaluate the totality of the available evidence.'" App. 91 (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)) (alteration in original). Yet this Court's recitation of the facts fails to evaluate the totality of the available evidence, as did the state court's decision. In contrast, the Court of Appeals considered the totality of the available evidence, and its judgment is extremely fact-bound.

With respect to the guilt-innocence stage, the Sixth Circuit detailed the information offered by Jones in his deposition that "would have significantly aided Hines's defense at the trial." App. 84–85. Mr. Hines' defense counsel conceded that "the failure to interview Jones presented difficulties with the defense offered at trial, because defense counsel were unable to resolve factual discrepancies between Jones's testimony and that of other witnesses." App. 82–83. For example, the

timeline Jones testified to did not match that given by other witnesses. App. 77–83. Jones testified that he arrived at the motel at 12:30 p.m., drove to a convenience store and back, found the body around 1:20 p.m., and immediately had someone call for an ambulance. App. 77–78. The ambulance driver, in contrast, testified that the call came at 2:36 p.m. App. 76–77. The ambulance driver testified that the caller stated that the victim had been stabbed, but Jones, who supplied the information relayed to the ambulance driver, testified he had been unable to determine whether the victim was male or female, and the body was wrapped in a bedspread when the ambulance arrived. App. 82–83. Jones changed his story during his deposition during post-conviction proceedings, testifying that he arrived at the motel around 10:30 and found the body around 11:00, App. 86.

As the Sixth Circuit concluded, this information "could have provided ample fodder for defense counsel to focus on Jones as a reasonable alternative suspect." *Id.* This would have been "a viable path for the defense, as the evidence of Hines's guilt was not overwhelming." App. 87 (citation omitted). Furthermore, even aside from attempting to affirmatively argue that Jones was an alternative suspect, "pre-trial investigation into Jones could have allowed defense counsel to effectively challenge the prosecution's case by, at the very least, seriously undermining Jones's testimony and calling the prosecution's timeline of events into question." App. 89. There is a "'reasonable probability' that one juror would have voted differently but-for counsel's deficient performance." App. 88.

The failure to investigate Jones pre-trial was particularly devastating at the

sentencing phase. The prosecution zealously argued in closing that the $20 bill found under the victim's wristband showed the kind of depravity of mind necessary to support a sentence of death. At the guilt-stage, the prosecutor argued about the depravity of Mr. Hines' putting the $20 bill in her wristband in both his initial closing argument and again in rebuttal, saying, "it takes a sick and morbid mind to do that." Trial Tr., R. 173-6, PageID# 4378, 4411. At re-sentencing, the prosecutor called the $20 bill "the most important and the most devastating" aggravating factor, and said it showed that Mr. Hines was "a deranged individual" with "a depraved, manic mind." Re-sentencing Tr., R.173-11, Page ID #5026-29.

As post-conviction counsel learned when they deposed Jones, he "usually paid $20" to the victim, every Sunday morning to have a tryst with his young mistress, rather than paying the full rate. App. 85. We now know that Jones arrived at the motel at 10:30 a.m. and asked someone to call an ambulance at 2:36 p.m. Exactly what happened in those four hours is a mystery, but in any event, a simple conversation with Jones likely would have revealed that the person who handed the victim a $20 bill every Sunday morning was *Ken Jones*, not Mr. Hines. There is a reasonable probability that at least one juror would not have accepted the prosecution's insistent depiction of Mr. Hines as depraved on the basis that he put a $20 bill in the victim's wristband. Reasonably competent defense counsel would never have agreed with the request by the sheriff and prosecutor not to investigate Jones. Instead, effective counsel would have been armed with the necessary evidence to rebut this false and most inflammatory of the prosecution's aggravating

factors, likely saving Mr. Hines from a death sentence.

II. The prosecution and defense counsel's collusion to ignore a witness represents an extreme malfunction in the state criminal justice system.

In its summary reversal, the Court did not take account of the critical truth that Mr. Hines' trial counsel colluded with the prosecutor and the county sheriff not to investigate Ken Jones as a potential suspect and to present his perjured testimony. The Court mischaracterized defense counsel's failure in this regard as follows:

> The post-conviction proceedings also revealed that Hines' attorney was generally aware of Jones' affair from the outset, yet had decided to spare him the embarrassment of aggressively pursuing the matter.

Hines, 141 S. Ct. at 1148 (citation omitted).

This assessment of defense counsel's inaction as related to Jones is far oversimplified. It also implies that defense counsel did, in fact, pursue the matter – just not "aggressively." In fact, the truth of the matter is that counsel did not pursue it at all. App. 81-82. As Mr. Hines showed in the state post-conviction proceedings, his defense counsel didn't simply decide on his own to spare Jones. The sheriff told his counsel that Jones "hadn't got a dog in the hunt, don't embarrass the man" "by having it brought out that he had been over there to meet with a lady friend. App. 81–82. Counsel complied with the sheriff's request and went a step farther, deciding not to even speak to Jones, which he later acknowledged "was ridiculous." App. 82. Instead, in an all-too-late recognition of the significance of his failure, trial counsel offered a disjointed rant in his closing argument in which he carelessly tossed around vaguely veiled assertions of suspicion about Jones to the jury. App. 79-80.

On this point, the Court of Appeals could not have been more on point where it correctly noted that, because counsel had conducted no investigation and was therefore unable to establish any facts supporting his veiled accusations, his remarks were haphazard and only served to compromise his credibility. App. 88-89.

Mr. Hines' sentence of death was the proximate result of an extreme malfunction in the state criminal justice system. In concluding that counsel's performance was deficient where they failed to conduct any investigation into Jones based on an assurance by the sheriff, the Court of Appeals held: "In *Strickland*, the Court explained that a reviewing 'court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'" App. 83 (quoting *Strickland*, 466 U.S. at 690).

It is difficult to imagine a more complete breakdown in the adversarial system than occurred here. There is no question that the prosecution was able to fabricate an aggravating circumstance that led to the death sentence in this case only because of defense counsel's adherence to the sheriff and prosecutor's requests to forego even talking to the witness who discovered the victim's body and whose timeline and story failed to line up with other known evidence. Is this type of collusion between the prosecution and defense – resulting in a capital sentence – the type of extreme malfunction in the state criminal justice system envisioned by the Court in *Harrington* which requires federal habeas relief? If not, then it may well be that no such circumstance exists. If so, then rehearing must be granted in this case pursuant to Rule 44.

III. Multiple, Alternative Grounds Justify the Sixth Circuit's Grant of Habeas Corpus Relief.

Mr. Hines raised multiple meritorious claims for habeas corpus relief, beyond ineffective assistance of counsel regarding Mr. Jones, including (1) ineffective assistance of trial counsel for failure to conduct forensic testing that would have revealed that the DNA of two different men was found on Mrs. Jenkins' underwear (while no DNA from Mr. Hines was recovered) and that would have established that multiple fingerprints were found at the murder scene, none of which matched Mr. Hines, App. 12-21; (2) suppression of exculpatory evidence regarding swabs that were taken from Mrs. Jenkins' body to be tested for semen, App. 32-40; and (3) ineffective assistance of trial counsel at the resentencing hearing, which the Court of Appeals reviewed *de novo*, as the underlying Tennessee decision was contrary to clearly established law. App. 40-74. Each of these three issues provides an alternative ground for upholding the Court of Appeals' grant of habeas relief. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 552 (2008); *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 536 (2002); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (requiring that alternative grounds for relief be set forth in the Brief in Opposition). The Court of Appeals' adverse decision on these three grounds was in error.

CONCLUSION

For the foregoing reasons, Mr. Hines respectfully requests that this Court grant rehearing in this case and either rescind the grant of the writ of certiorari or,

alternatively, allow full briefing on the issues presented.

Respectfully submitted,

/s/ James O. Martin, III
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CERTIFICATE OF SERVICE

I certify that a copy of this petition was served upon counsel for Respondent, John Bledsoe, 425 Fifth Avenue North, Nashville, Tennessee 37243 this the 23rd day of April, 2021.

/s/ James O. Martin, III
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