No. 20-7674

In the Supreme Court of the United States

KAUNTAU REEDER
Petitioner

v.

TIMOTHY HOOPER, WARDEN,
Respondent.

ON PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JASON ROGERS WILLIAMS
Orleans Parish District Attorney
G. BEN COHEN*
Chief of Appeals
619 S. White Street
New Orleans, La. 70119
(504) 822-2414
bcohen@orleansda.com
**Counsel of Record for Respondent*

QUESTION PRESENTED

Whether the petition for certiorari is moot based upon the additional disclosures made by Respondent, and the process afforded the Petitioner to address the fact-bound issues in state court?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Comes now the Respondent, Warden Darrel Timothy Hooper[1], through the District Attorney for Orleans Parish, who files this *Brief in Opposition* to Mr. Reeder's *Petition for Certiorari*[2]:

STATEMENT OF THE CASE

Mark Broxton was shot and killed near a phone booth outside of Julien's Grocery store in Algiers, New Orleans on April 13, 1993. Petitioner was indicted for second degree murder on October 7, 1993. His first trial resulted in a hung jury. He was then convicted by a non-unanimous jury[3] at his second trial and sentenced to life without the possibility of parole.

The conviction was based upon the testimony of a single eye-witness, Earl Price. See *Reeder v. Vannoy*, 978 F.3d 272, 274 (5th Cir. 2020) ("Price was the only eyewitness to the shooting who testified at Reeder's trial."). However the testimony

[1] In accordance with Federal Rule 43 (c)(2) of the Federal Rules of Appellate Procedure, Timothy Hooper is substituted for Darryl Vannoy.

[2] Petitioner's cover page indicates that the case is "On petition for a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal." Respondent believes the only opinion available for review is the federal Fifth Circuit's opinion in *Reeder v. Vannoy*, 978 F. 3d 272, 274 (5th Cir. 2020). To the extent petitioner is seeking review of the Fourth Circuit Court of Appeal decision in *State v. Louisiana*, 2012-K-0529 (La. App. 4th Cir. 05/17/2012), the petition is untimely.

[3] Review of contemporaneous notes in the District Attorney's file provided to Petitioner indicated that the jury verdict was 11-1.

was "not the only evidence linking [the defendant] to the crime" as there was no objection to corroborating evidence which "may have qualified as hearsay." *Id.*

In state post-conviction and in federal habeas Petitioner alleged a *Brady* violation arising from the non-disclosure of a single piece of evidence that impeached the credibility of Earl Price.[4] The United States Court of Appeal for the Fifth Circuit rejected petitioner's *Brady* claims, finding the undisclosed federal conviction of Earl Price "cumulative of other evidence disclosed to the defense – including the assault and battery conviction that was revealed to the jury during Price's cross-examination." *Reeder v. Vannoy*, 978 F.3d 272, 279 (5th Cir. 2020).

In preparing to file the State's *Brief in Opposition* in this Court, the office reviewed the file and determined that there was additional exculpatory and impeachment evidence that had not previously been provided to the petitioner. The District Attorney's Office has supplemented its disclosures, and the petitioner has sought leave to file a supplemental application for state post-conviction relief in state court. Because *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) holds that suppressed evidence should be reviewed, not item by item, but

[4] The information alleged as a *Brady* violation in the federal habeas petition was an undisclosed "federal conviction on the charge of a falsified gun application." *Reeder v. Cain*, No. CV 13-6493, 2014 WL 12815163, at *6 (E.D. La. Aug. 15, 2014), report and recommendation adopted, No. CV 13-6493, 2017 WL 1056011 (E.D. La. Mar. 21, 2017), aff'd sub nom. *Reeder v. Vannoy*, 978 F.3d 272 (5th Cir. 2020).

cumulatively, the State has not objected to the Petitioner filing a supplemental petition for post-conviction relief. See Exhibit A, *Second Petition for Post-Conviction Relief*. In state court, the State has entered into a series of stipulations concerning the suppression of favorable evidence. See Exhibit B, *State's Stipulations in Response to Petitioner's Application for Post Conviction Relief*.

The non-disclosed evidence included information that the single eye-witness twice notified prosecutors that he identified a person other than the defendant in a photo line-up. Respondent has stipulated in state court that the non-disclosure of this additional impeachment – constituted the suppression of favorable evidence and warranted the grant of a new trial. See Exhibit B. The claims remain pending in state court.

BRIEF IN OPPOSITION

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED AS MOOT

The petition for certiorari is essentially moot. *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983, 140 L. Ed. 2d 43 (1998) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.... The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–478, 110 S.Ct.

1249, 1254, 108 L.Ed.2d 400 (1990). See also *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334–35, 45 L.Ed.2d 272 (1975).").

Because Respondent has entered stipulations in state court concerning the cumulative effect of suppressed impeachment and exculpatory evidence, further proceedings in this Court are not only a waste of judicial resources, but are tantamount to a request for advisory opinion from the Court on an issue that is no longer before it. "Early in its history, this Court held that it had no power to issue advisory opinions, *Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792), as interpreted in *Muskrat v. United States*, 219 U.S. 346, 351—353, 31 S.Ct. 250, 251—252, 55 L.Ed. 246 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971) citing *Local No. 8—6, Oil Chemical and Atomic Workers Intern. Union v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960).

This Court has made clear: "To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *North Carolina*

v. Rice, 404 at 246, citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240—241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937).

Or as this Court explained in *Aikens v. California*, the issue on which certiorari was granted—the constitutionality of the death penalty under the Federal Constitution—is now moot in his case. Accordingly the writ of certiorari is dismissed." *Aikens v. California*, 406 U.S. 813, 814, 92 S. Ct. 1931, 1932, 32 L. Ed. 2d 511 (1972). Contrast this case, with *Calderon v. Moore*, where the State of California was simultaneously seeking certiorari to review the decision granting a new trial and setting the matter for re-trial. *Calderon v. Moore*, 518 U.S. 149, 149–50, 116 S. Ct. 2066, 2067, 135 L. Ed. 2d 453 (1996) ("The State filed a notice of appeal and sought a stay of the District Court's order pending appeal, but its various stay applications were respectively denied by the District Court, the Ninth Circuit, 56 F.3d 39 (1995), and by Justice O'CONNOR, in her capacity as Circuit Justice for the Ninth Circuit. The State accordingly set Moore for retrial, and simultaneously pursued its appeal of the District Court's order on the merits to the Ninth Circuit.").

Respondent has agreed to waive procedural bars arising from the late disclosure of suppressed evidence, and to allow Petitioner to proceed in state court, and even-so far as stipulating to the relief warranted in this case. The District Attorney's Office is fully committed to generating confidence in the administration

of the criminal justice system in Orleans Parish, and has taken concrete steps in this case to do so. Respondent expected that petitioner would have filed a motion to dismiss the petition for certiorari based upon these concessions. However, absent such a filing, respondent suggests that the Petition is moot.

II. THE PETITION FOR CERTIORARI SHOULD BE DENIED TO ALLOW THE STATE COURT TO ADJUDICATE PENDING ISSUES

While the Petition is pending, petitioner filed two supplemental petitions in state court. One of these petitions attached as Exhibit A involves the same legal claim based upon additional factual allegations. There is now a mixture of exhausted and unexhausted claims, that should be dismissed to allow the state court to fully adjudicate the issue. *Rose v. Lundy*, 455 U.S. 509, 515, 102 S. Ct. 1198, 1201, 71 L. Ed. 2d 379 (1982) ("a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims") citing *Ex parte Royall*, 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed. 868 (1886) (as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act).

III. THE FIFTH CIRCUIT'S DECISION PRESENTS AN ENTIRELY FACT-BOUND QUESTION NOT WORTHY OF THIS COURT'S REVIEW

Petitioner begins by noting the "long and documented" history of *Brady* violations in Orleans Parish. See Petition for Certiorari, at fn 2. For the reasons set forth in Section I of the *Brief in Opposition*, this history does not set out a basis for this Court's intervention in this case. Cf *Wearry v. Cain*, 577 U.S. 385, 401–02, 136 S. Ct. 1002, 1011, 194 L. Ed. 2d 78 (2016) (Alito J., Thomas J., dissenting) ("The State undoubtedly knew that we generally deny certiorari on factbound questions that do not implicate any disputed legal issue. See, e.g., this Court's Rule 10; S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013).").

Unlike in *Weary v. Cain*, this case arises out of federal habeas where the question is not whether state court's opinion was correct but rather whether it was contrary to Supreme Court precedent. *Wearry v. Cain*, 577 U.S. 385, 402, 136 S. Ct. 1002, 1012, 194 L. Ed. 2d 78 (2016) (Alito J., Thomas J., dissenting) ("Under AEDPA, relief could be granted only if it could be said that the state court's rejection of the claim represented an "unreasonable application" of *Brady*. 28 U.S.C. § 2254(d)(1). By intervening now before AEDPA comes into play, the Court avoids the application of that standard and is able to exercise plenary review.").

All parties agreed that the information was suppressed, and should have been turned over; here, the only question was the highly deferential factual question concerning whether the state court appreciation of the materiality prong of *Brady* was unreasonable. The Fifth Circuit Court of Appeals found that it was not:

> The Supreme Court has made clear that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Woods v. Etherton*, —— U.S. ——, 136 S. Ct. 1149, 1151, 194 L.Ed.2d 333 (2016) (citations omitted). Accordingly, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *McAfee v. Thaler*, 630 F.3d 383, 393 (5th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 411, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Reeder v. Vannoy, 978 F.3d 272, 277 (5th Cir. 2020).[5]

As this Court has repeatedly explained, review under the AEDPA standard is constrained to instances where the state court decision is not just a misapplication of Supreme Court precedent, but contrary to that precedent: "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.' … A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts

[5] The Fifth Circuit also correctly held that the *Brady* claim in this case was properly assessed under § 2254(d)(1) rather than § 2254(d)(2) (the state court decision was based on an unreasonable determination of the facts") because this was not an instance where there was a dispute on whether the impeachment evidence was suppressed. *Reeder v. Vannoy*, 978 F. 3d at 279-280.

the governing law set forth in our cases." *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000) (holding "run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s "contrary to" clause."); *Brown v. Payton*, 544 U.S. 133, 141, 125 S. Ct. 1432, 1438 (2005) ("A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result.").

Nor does the case present a vehicle for assessing whether the stringent limitations on habeas corpus undermine the Court's authority under Article III. Indeed, Petitioner has not alleged, and Respondent does not concede, that the stringent limitations on judicial review in 28 U.S.C. § 2254(d)(1) unconstitutionally obstruct "Article III's mandate to exercise the judicial power in cases over which the court properly has jurisdiction." Cf *Davis v. Straub*, 430 F.3d 281, 296 (6th Cir. 2005) (Merritt, J., dissenting) citing *Irons v. Carey*, 408 F.3d 1165 (9th Cir.2005) (ordering parties to file briefs on the constitutionality of § 2254(d)(1)); *Lindh v. Murphy*, 96 F.3d 856, 885 (7th Cir.1996), rev'd 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (Ripple, J., dissenting) (suggesting limitations of § 2254(d)(1) violate Article III).

CONCLUSION

Wherefore, respondent respectfully asks this Court to deny the petition for certiorari.

Respectfully,

Gershon Cohen

JASON ROGERS WILLIAMS
Orleans Parish District Attorney
G. BEN COHEN*
Chief of Appeals
619 S. White Street
New Orleans, La. 70119
(504) 822-2414
bcohen@orleansda.com