

No. \_\_\_\_\_

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*In the Supreme Court of the United States*

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**GARY HUGHBANKS**  
*Petitioner,*

v.

**STUART HUDSON, WARDEN**  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

**THIS IS A CAPITAL CASE**

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**CAPITAL CASE**  
**QUESTIONS PRESENTED**

On the evening of May 13, 1987, William and Juanita Leeman were repeatedly stabbed to death in their residence in Springfield Township Ohio.

Ten years later Arizona authorities arrested Gary Hughbanks for the murder. Six days later, they obtained a statement from Hughbanks in which he incorrectly identified the murder weapon and items taken from the residence. He further misdescribed the victims' residence and the clothes Ms. Leeman was wearing.

During the course of the investigation, the police learned that two other individuals confessed to the murders. Unlike Hughbanks' statement, their statements did not contradict the evidence surrounding the murders. The prosecution failed to provide these statements in discovery.

The Sixth Circuit Panel did not consider either individual's inculpatory statements in conducting the materiality analysis required by *Brady v. Maryland*, 373 U.S. 83 (1963). In addition, the Panel ignored other evidence, discounted yet other evidence and then failed to conduct a cumulative analysis of the suppressed evidence.

This petition contains two important issues:

**Are another individual's repeated statements confessing to the murders for which the defendant is on trial material for purpose of assessing the impact of the suppressed evidence?**

**Does an appellate court err when it conducts a materiality analysis pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and does not consider some of the suppressed evidence and improperly discounts other portions of the suppressed evidence?**

**PARTIES TO THE PROCEEDINGS AND  
CORPORATE DISCLOSURE STATEMENT**

There are no parties to the proceeding other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

## RELATED PROCEEDINGS

All proceedings directly related to this petition include:

### *Federal Habeas Proceedings*

1. *Hughbanks v. Hudson*, 6<sup>th</sup> Cir. Case No. 18-395, 2021 U.S. App LEXIS 24359 (Aug. 13, 2021) (Order denying motion for rehearing)
2. *Hughbanks v. Hudson*, 6<sup>th</sup> Cir. Case No. 18-395. 2 F.4<sup>th</sup> 527 (June 21, 2021) (Opinion affirming decision of district court denying habeas petition)
3. *Hughbanks v. Hudson*, 6<sup>th</sup> Cir. No. 18-395, Order (6<sup>th</sup> Cir. Aug. 15, 2019) (Order granting certificate of appealability)
4. *Hughbanks v. Hudson*, Dist. Crt. No. 1:07-cv-111, Judgment in a Civil Action (S.D. Ohio Sept. 7, 2018) (Entry dismissing habeas petition)
5. *Hughbanks v. Hudson*, Dist. No. 1:07-cv-111, 2018 U.S. Dist. LEXIS 228976 (S.D. Sept. 7, 2018) (Decision and Order Dismissing Petitioner's Third Amended Habeas Petition)

### *Second Post-Conviction Proceedings*

6. *State v. Hughbanks*, Supreme Court of Ohio Case No. 2013-629 (March 20, 2015) (Entry declining to exercise discretionary jurisdiction to hear appeal)
7. *State v. Hughbanks*, Ohio 1<sup>st</sup> App. Dist., Hamilton County Court of Appeal Case No. C-20351 (March 6, 2014 Judgment Entry) (Decision affirming trial court's decision dismissing post-conviction petition).
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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Hughbanks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

### OPINIONS BELOW

#### *Federal Habeas*

The decision of the United States Court of Appeals for the Sixth Circuit denying Hughbanks' timely motion for hearing is reported at *Hughbanks v. Hudson*, 2021 U.S. App. LEXIS 24359 (6<sup>th</sup> Cir. Aug. 13, 2021) and is attached hereto as Appendix A. The opinion of the United States Court of Appeals affirming the District Court's denial of habeas relief reported at *Hughbanks v. Hudson*, 2 F.4<sup>th</sup> 527 (6<sup>th</sup> Cir. 2021) is attached hereto as Appendix B. The order of the United States Court of Appeals granting Hughbanks a certificate of appealability is unpublished, *Hughbanks v. Hudson*, No. 18-3955 Order (6<sup>th</sup> Cir. Aug. 15, 2019) and is attached hereto as Appendix C.

The judgment entry of the Federal District Court denying Hughbanks' habeas petition is unpublished, *Hughbanks v. Hudson*, No. 1:07-cv-111 (S.D. Ohio Sept. 7, 2018) and is attached hereto as Appendix D. The decision and order opinion denying Hughbanks' habeas petition is reported at *Hughbanks v. Hudson*, No. 1:07-cv-111, 2018 U.S. Dist. LEXIS 22976 (S.D. Ohio Sept. 7, 2018) and is attached hereto as Exhibit E.

## *Second State Post-Conviction Proceedings*

The entry of the Supreme Court of Ohio denying discretionary jurisdiction to hear Hughbanks' appeal is reported at *State v. Hughbanks*, 30 N.E.3d 973 (Ohio 2015) and is attached hereto as Appendix F. The Ohio First District Court of Appeals decision affirming the trial court's decision dismissal of Hughbanks' second post-conviction petition is unreported, *State v. Hughbanks*, No. C-120351 (Ohio App. March 6, 2013) and is attached hereto as Appendix G. The decision of the state trial court dismissing Hughbanks' second post-conviction petition is unreported, *State v. Hughbanks*, Hamilton Common Pleas No. B-9706761 (Ohio Com. Pl. April 13, 2012) and is attached hereto as Appendix H.

### **JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Sixth Circuit denied Hughbanks' timely motion for rehearing on Aug. 13, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISION**

This case involves the following Amendment to the United States Constitution:

The Fourteenth Amendment, which provides in pertinent part:

No State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## INTRODUCTION

The prosecution's case at trial relied almost exclusively on Hughbanks' recorded custodial statement made more than ten years after the murders. Most of the prosecution's other testimony attempted to buttress the credibility of Hughbanks' custodial statement by claiming his statement accurately described the interior of the victims' residence. Finally, the remainder of the prosecution's case consisted of hearsay some of which the declarants later recanted.

Hughbanks' recorded custodial statement belies the prosecution's contention that Hughbanks accurately described anything. His statement contained glaring inaccuracies despite the use of leading questions by the Arizona officers. Hughbanks incorrectly identified the murder weapon (it was a knife, not a screwdriver) and the property taken from the residence (it was a wallet, not jewelry). He further incorrectly described the victims' residence (it was a one story, not a two-story residence with beige carpeting upstairs) and the clothing that Mrs. Leeman was wearing.

In the habeas proceedings, the district court ordered that the prosecution and police provide copies of their files and appear for depositions. After reviewing the documents and conducting the depositions, Hughbanks learned for the first time that trial prosecutors failed to disclose voluminous favorable evidence. The undisclosed evidence included: (a) inculpatory statements of two individuals who confessed to the murders, (b) eyewitness accounts of individuals not matching Hughbanks' physical description who were seen in the immediate vicinity of the victims' residence around the time of the murders, (c) evidence and lengthy reports linking one of the victims'

sons to the murders, (d) the findings contained in an FBI report that was totally inconsistent with the prosecution case, and (e) evidence that the police had earlier eliminated Hughbanks as a suspect because his finger and palm prints did not match the prints found at the point in the residence where the assailant gained access.

When it conducted its' analysis of the suppressed evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995) the Sixth Circuit Panel did not consider: (a) the forensic evidence that previously eliminated Hughbanks as a suspect, (b) the inculpatory statement of one of the individuals who confessed to involvement in the murder, and (c) the eyewitness sightings of other individuals at or near the victims' residence around the time of the murders. In addition, the Panel ruled that the statements of the individual who repeatedly confessed to the murder were not material. Finally, the Panel discounted: (a) the evidence implicating the victims' son because it was circumstantial as opposed to direct evidence, and (b) the FBI report that contained findings that contradicted the prosecution's case because some other of the report's findings were consistent with Hughbanks' involvement.

The Sixth Circuit Panel's decision conflicts with this Court's decision in *Kyles*. It creates a circuit split. The Court should grant this petition.

## STATEMENT OF THE CASE

### *The Murders*

On the evening of May 13, 1987, William and Juanita Leeman separately arrived home. (Investigative Report, R. 167-5, PageID 14130). After returning home, they worked in their front yard and later retired to their residence to watch television. (Crime Scene Investigation, R. 167-5, PageID 13998, 14136).

At approximately 9:30 p.m., Officer Pat Kemper of the Springfield Township Police Department drove by the Leeman residence. (Trial Transcript, Trial Phase, R. 163-13, PageID 3192). He saw Mrs. Leeman laying on the driveway waving her arms. (*Id.* at PageID 3194). When he approached her, she attempted to tell him something, but was unable because her throat had been cut. (*Id.* at PageID 3195-96). She had suffered so many cuts and stabbings that the coroner was unable to count them. (Trial Transcript, R. 163-14, Trial Phase, PageID 3322-26).

Officer Kemper entered the residence and found lights on throughout the residence and the television playing loudly. (Kemper Dep. R. 167-2, PageID 11925, 11947). In the master bedroom, Officer McDaniel found the body of Mr. Leeman who had suffered eight cuts and seventeen stab wounds. (Trial Transcript, Trial Phase R. 163-14, PageID 3310). His throat had also been cut. (*Id.* at PageID 3320-21).

### *The Ten Year Investigation*

The Cincinnati Police Department, Federal Bureau of Investigation (“FBI”), and the Springfield Township Police Department conducted a ten-year investigation into the deaths of William and Juanita Leeman.

The investigating officer recovered palm and fingerprints from the window in the bedroom where the assailant entered the residence. (Hillard Dep. R. 167-2, PageID 11651-52, 11678). The officers used that forensic evidence to eliminate suspects including Hughbanks. (Kemper Dep. R. 167-4, PageID 13412).

The investigators received reports that two individuals, Douglas Hayes and Stacy Grisby, confessed to the murders. Hayes confessed numerous times to Thomas Buster, who reported Hayes’ repeated confessions and passed a polygraph.

The FBI prepared a report that concluded the mutilation of both bodies was consistent with a “crime motivated by passion” as opposed to a burglar surprised by the Leemans. (Police Dept. Report Concerning Burt Leeman, R. 167-5, PageID 14061). The FBI report further concluded that the assailant staged the residence to appear to be a burglary to divert attention from him. (FBI VICAP Report, R. 167-5, PageID 14137).

The investigation focused on Burt Leeman, one of the Leemans’ sons. The only item taken from the residence was his father’s wallet. (Investigative Report, R. 167-5, PageID 14002). After the murders, a female called Master Card eight times attempting to use the father’s credit card. (Credit Card History, 167-5, PageID 14005-06). (*Id.*). The caller had the authorization numbers for the stores from which she



claimed to be calling and the telephone number for the Master Card authorization center. (*Id.* at PageID 14006). These numbers are not available to the public. (FBI VICAP Report, 167-5, PageID 14138). Burt Leeman's wife who worked for Discover Card had access to the numbers. (Police Report Concerning Burt Leeman, R. 167-5, PageID 14063).

### *The Interrogation of Hughbanks*

More than ten years after the murders, Hughbanks' brother reported to the police that Hughbanks murdered the Leemans. The brother had been convicted of assault and gross sexual imposition, the latter of which he blamed Hughbanks. (Newspaper Clipping, R. 166-19, PageID 9060). At the time the brother came forward, he had an outstanding arrest warrant for violating the terms of his probation for the offense of aggravated burglary. (L. Hughbanks Affidavit, ¶ 2 R. 167-17, PageID 8490). The prosecution arranged for the outstanding warrant to be withdrawn in exchange for the information the brother provided implicating Hughbanks. (Entry Withdrawing Warrant, 166-17, PageID 8497). After the trial court sentenced Hughbanks, the prosecution arranged for the brother's probation to be terminated. (Entry Terminating Probation, R. 166-17, PageID 8498).

Hughbanks was arrested in Arizona. At his federal discovery deposition, Investigator William Fletcher of the Hamilton County Prosecutor's Office revealed for the first time that while in Arizona he spoke with Hughbanks who stated he "don't want to talk anymore." At that point, Fletcher ceased questioning Hughbanks. (Fletcher Dep, R. 167-3, PageID 12489-90).

Six days later, at the request of the Hamilton County Prosecutor's Office, two Arizona police officers asked Hughbanks if he would submit to a polygraph examination. (Trial Transcript, Trial Phase, R. 163-13, PageID 3263, 3271). Hughbanks agreed. Prior to the polygraph examination, the officers did not advise Hughbanks of his *Miranda* rights, but instead had him sign a release.

At the conclusion of the polygraph examination, without advising Hughbanks of his *Miranda* rights, the Arizona detectives began questioning him about the Leeman murders. Hughbanks repeatedly gave answers that were inconsistent with the facts concerning the murders including, but not limited to, the following:

- The residence contained two stories and the upstairs carpet was beige (Hughbanks' Custodial Statement, R. 193-1, PageID 15598), whereas the victims' residence was a single story residence (State's Trial Exhibits, R. 166-32, PageID 11108-10);
- Mrs. Leeman wore a floral top and slacks at the time of her murder (Hughbanks' Custodial Statement, R. 193-1, PageID 15572), whereas she was wearing a nightgown (Crime Scene Investigation, R. 167-5, PageID 13998);
- The victims were killed with a screwdriver (Hughbanks Custodial Statement, Hughbanks' Statement, R. 193-1, PageID 15546, 15556), whereas both victims were killed with a knife (Trial Transcript, Trial Phase, R. 163-14, PageID 3328-30); and
- Mrs. Leeman's costume jewelry was taken during the burglary including necklaces, earrings, pins, and broaches. (Hughbanks' Custodial Statement, R. 193-1, PageID 15599, 15606, 15610), whereas only Mr. Leeman's wallet was taken during the burglary.

### *The Trial*

Prior to trial, defense counsel made requests for discovery and the disclosure of exculpatory evidence. The prosecution provided no information concerning: (a) the

Hayes confessions, (b) the FBI report, (c) evidence implicating the son, Burt Leeman, and (d) the eyewitness reports.

Hughbanks' trial counsel filed a motion to suppress the custodial statement. Counsel did not raise Hughbanks' request that all questioning cease or cite to the fact that his answers repeatedly conflicted with the facts surrounding the murders.

At trial, the prosecution proceeded on the theory that the individual who murdered the Leemans had no prior connection to them, had entered the residence with purpose of committing a theft offense, and murdered the Leemans as they returned home that evening. (Trial Transcript, Trial Phase. R. 163-13, PageID 3147, 3149, 3155). The suppressed evidence contradicted almost every part of the prosecution theory of the case. Without hearing any of the suppressed evidence, the jury found Hughbanks guilty of aggravated burglary and aggravated murder of the Leemans. The trial court accepted the jury's sentencing recommendation of two death sentences.

### *Initial State Appeals*

On direct appeal both the Ohio First Appellate District, Hamilton County Court of Appeals, and the Supreme Court of Ohio affirmed Hughbanks' convictions and sentences. *State v. Hughbanks*, 1999 Ohio App. LEXIS 5789 (Ohio App. Dec. 3, 1989), *affirmed State v. Hughbanks*, 792 N.E.2d 1081 (Ohio 2003). The Court of Appeals denied Hughbanks' application to reopen his direct appeal. *State v. Hughbanks*, No. C-9080595 (Ohio App. Sept. 7, 2000). The Supreme Court of Ohio affirmed that denial. *State v. Hughbanks*, 800 N.E.2d 1152 (Ohio 2004).

The trial court summarily denied Hughbanks' initial post-conviction petition without discovery or an evidentiary hearing, *State v. Hughbanks*, Ham. Cty. Cm. Pl. No. B-9706761 (Ohio Com. Pl. May 8, 2001) (Findings of Fact, Conclusions, And Entry Dismissing Petition). The state appellate court affirmed the trial court's denial of Hughbanks' post-conviction petition without any factual development. *State v. Hughbanks*, 2003 Ohio App. LEXIS 164 (1st Dist. Jan. 17, 2003). The Supreme Court of Ohio declined to exercise its discretionary jurisdiction to review the decision of the state appellate court. *State v. Hughbanks*, 798 N.E.2d 1093 (Ohio 2003).<sup>1</sup>

### ***Federal Habeas Proceedings***

Hughbanks sought habeas relief. (Habeas Petition for Writ of Habeas Corpus, R. 16). The District Court granted Hughbanks' leave to conduct discovery. (Decision and Ordering Granting Petitioner's Motion for Discovery, R. 24, p. 2). On January 29, 2010, the Court granted Hughbanks' motion to hold the proceedings in abeyance to permit him to return to state court to exhaust the claims and facts he initially identified in the federal discovery. (Decision and Order Granting Petitioner's Motion to Stay Proceedings Pending Exhaustion, R. 106, p. 3).

The state trial court found Hughbanks' *Brady* claims procedurally defaulted because he did not demonstrate by "clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner

<sup>1</sup> Hughbanks unsuccessfully sought relief pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002)

guilty” of capital murder. O.R.C. § 2953.23(A)(1)(b). *State v. Hughbanks*, No. B-9706761 (Ohio Com. Pl. April 13, 2012) (Findings of Fact, Conclusions of Law and Entry Dismissing Gary L. Hughbanks Post-Conviction Petition) (Appx. H). The state appellate court affirmed that decision. *State v. Hughbanks*, No. C-120351 (Ohio App. March 6, 2014) (Judgement Entry (Appx. G)). The Supreme Court of Ohio declined to exercise its discretionary jurisdiction to hear Hughbanks’ appeal. *State v. Hughbanks*, 30 N.E.973 (Ohio 2015) (Appx. F).

After exhausting the claims and facts identified in the federal discovery, Hughbanks returned to federal court. The district court denied his habeas petition. *Hughbanks v. Hudson*, No. 1:07-cv-111, 22018 U.S. Dist. LEXIS 22976 (S.D. Ohio Sept. 7, 2018) (Appx. D and E). The Panel affirmed the decision of the district court *Hughbanks v. Hudson*, 2 F.4<sup>th</sup> 527 (6<sup>th</sup> Cir. 2021) (Appx. B). The Panel denied a motion for reconsideration. *Hughbanks v. Hudson*, 2021 U.S. App. LEXIS 24359 (6<sup>th</sup> Cir. Aug. 13, 2021) (App. A).

### **REASONS FOR GRANTING THE WRIT**

“[T]he suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1993). A *Brady* claim has three elements: “[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”

*Banks v. Dretke*, 540 U.S. 668, 691 (2004). When assessing the materiality of the suppressed evidence, a court should look to the cumulative impact of the suppressed evidence rather than piece by piece. *Kyles v. Whitley*, 51 U.S. 419, 434-36 (1995).

The Court should grant the writ for two reasons. First, the federal Circuit Courts are split on whether inadmissible evidence can meet the *Brady* materiality test. Those courts that have answered the question in the affirmative are divided concerning the circumstances that warrant a finding of materiality. Second, the Panel of the Sixth Circuit Court of Appeals, when conducting its materiality analysis, failed to consider much of the suppressed evidence, improperly discounted other suppressed evidence, and applied an item by item analysis as to the impact of the suppressed evidence.

**I. The Courts Are Divided Concerning the Treatment of Suppressed Evidence**

Douglas Hayes repeatedly made inculpatory statements involving the Leeman murders to Thomas Buster. The suppressed police report provided:

Thomas Buster stated that he first met Douglas Hayes through his sister and her husband (Wanda and Lonnie Hall) when they lived in Hooven.

Thomas Buster further stated that Douglas Hayes first mentioned the homicide to him as they were fishing and drinking near a bridge on Route 50 in Hooven.

Thomas Buster further stated that there were approximately twenty (20) times he fished with Douglas Hayes at that location. Thomas Buster also stated that as Douglas Hayes told him about the homicide he seemed to be proud as if he didn't care if someone knew.

Thomas Buster stated that Douglas Hayes didn't go into much detail about the homicide other than it occurred in Mt. Healthy and that Douglas Hayes was accompanied by other people.

\* \* \* \* \*

Thomas Buster stated that during these [subsequent] conversations [in the Hamilton County Justice Center] Douglas Hayes told him that the homicide was drug related: that Douglas Hayes, "Mink" and "Dugger" drove to the residence looking for the decedent's son who allegedly stole drug money; that the decedents were stabbed or cut with a knife; the knife was taken from a room in the house; and that rings were stolen from the residence; that a police car with siren drove past the residence as the homicide occurred.

(Ralph E. Winters, Polygraph Examiner Memorandum to Detective Kemper, ECF 167-5, PageID 14070-1).

Buster subsequently passed a polygraph concerning Hayes' inculpatory statements (*Id.* at PageID 14070-1) ("[i]t is the opinion of the examiner based on these polygraph records that Thomas Buster was truthful in his answers."). Approximately a year earlier, Hayes admitted to involvement in another murder. (*Id.* at PageID 14047-51).

**A. The Courts of Appeal are divided on whether inadmissible evidence can constitute material evidence.**

The courts of appeal are divided on whether this Court's decision in *Wood v. Bartholomew*, 516 U.S. 1 (1995) precludes a finding that suppressed inadmissible evidence can meet the *Brady* materiality standard. The distinguishing feature in the split involves whether the inadmissible evidence could lead to the discovery of admissible evidence. See *United States v. Morales*, 746 F.3d 310, 314 (7<sup>th</sup> Cir. 2014) (collecting cases) and *Dennis v. Sec'y Pa. Dept. of Corr.* 834 F.3d 263, 310 (3<sup>rd</sup> Cir.

2015) (collecting cases). This case presents this Court with an opportunity to resolve that split.

**B. The Sixth Circuit's determination that Hayes' repeated confessions were not admissible and therefore not material conflicts with the holdings of this Court and the Third Circuit.**

The Sixth Circuit concluded that because Hayes' admissions to Thomas Buster were not admissible pursuant to Ohio Evidence Rule 804(B)(3) they could not be considered in the materiality analysis. Appx. B-8. The Court ruled that the repeated admissions did not contain sufficient corroborating circumstances as required by Ohio Rule of Evidence 804(B)(3). *Id.* Other courts, including this Court, have cited the state evidentiary rules in addressing the materiality issue. *See i.e. Wood v. Bartholomew*, 516 U.S. at 6 (suppressed polygraph results not admissible under state law absent a stipulation of the parties); *Hoke v. Netherland*, 92 F.3d 1350, 1356, n. 3 (4<sup>th</sup> Cir. 1996) (suppressed evidence inadmissible pursuant to Virginia's rape shield law); *Wogenstahl v. Mitchell*, 668 F.3d 307, 325, n. 3 (6<sup>th</sup> Cir. 2010) (suppressed evidence not admissible pursuant to Ohio Evidence Rule 609 (D)); *Jardine v. Dittman*, 658 F.3d 772, 777 (7<sup>th</sup> Cir. 2011) (suppressed evidence inadmissible pursuant to Wisconsin's rape shield law).

In those cases, the question of admissibility was straight forward, the state evidence rules constituted a complete bar to the admission of the suppressed evidence. Here the Ohio evidentiary rule did not create a complete bar but instead created a factual issue on which the state trial courts had considerable discretion. The Sixth Circuit's recent ruling in the Highbanks case contradicted two other recent



Sixth Circuit rulings in capital cases which held, without citation to Ohio Evidence Rule 804(B)(3), that suppressed inculpatory statements of other individuals warranted the granting of habeas relief. *Bies v. Shelton*, 775 F.3d 386, 400 (6<sup>th</sup> Cir. 2014) (“On its face, the nondisclosure of the identities of other suspects – two of whom were reported to have confessed to the murder – was an egregious breach of the State’s *Brady* obligations”); *Gumm v. Mitchell*, 775 F.3d 345, 364 (6<sup>th</sup> 2014) (“Withholding knowledge of a second suspect conflicts with the Supreme Court’s directive”).

Even absent the admission of Hayes’ repeated statements pursuant to Ohio Evid. R. 804(B)(3), trial counsel could have used the statements to call into question the thoroughness of the police investigation. See *Kyles v. Whitley*, 514 U.S. at 446 (“the defense could have examined the police to good effect on their knowledge of Beanie’s [suppressed] statements and so have attacked the reliability of the investigation in failing even to consider Beanie’s possible guilt”); *Dennis v. Sec’y Pa. Dept of Corr.* 834 F.3d at 311 (“*Kyles* makes clear that evidence is material under *Brady* when the defense could have used it to ‘attack the reliability of the investigation.’”). Here, trial counsel could have questioned the investigating officers concerning the reason that charges were pursued against Hughbanks, who could not even identify the most basic facts surrounding the murders, and not Hayes, whose repeated admissions corroborated the most basic facts surrounding the murders.

The Sixth Circuit’s ruling conflicts with this Court’s ruling in *Kyles* and the Third Circuit’s ruling *Dennis*.

**C. The Panel's rejection, as "mere speculation", of the evidentiary potential of Hayes' statements by leading to the discovery of admissible evidence conflicts with the holdings of the Second and Third Circuits.**

Hughbanks asserted that he could have used Hayes' repeated admissions to develop additional admissible evidence including, but not limited to, Hayes' own involvement in the murders. Trial counsel could have interviewed Thomas Buster to identify the corroborating circumstances that would have rendered Hayes' statements admissible. In his statements to Buster, Hayes stated that the murders were drug related and that "Hayes, 'Mink' and 'Dugger' drove to the residence looking for the decedent's son who allegedly stole drug money" as the reason for going to the Leeman house the night of the murders. (Ralph E. Winters, Polygraph Examiner Memorandum to Detective Kemper, ECF 167-5, PageID 14070-1). Trial counsel could have interviewed "Mink" and "Dugger" who Hayes referenced in his statements. Trial counsel could have attempted to develop evidence linking Hayes to Burt Leeman who the police had developed a lengthy file concerning his involvement in the murders. The Sixth Circuit rejected this analysis as a "conclusionary assertion" that was based on "mere speculation." Appx. B-8

Other circuits have reached a contrary conclusion, finding that inadmissible suppressed evidence that others committed the crime could lead to admissible evidence. *United States v. Mahaffy*, 693 F.3d 113, 131 (2<sup>nd</sup> Cir. 2012) ("That [inadmissible hearsay] testimony could have led the defendants to interview and possibly subpoena Geiler, Tiedman, and Shulman, who could have identified the other senior Merrill employees with whom Geiler spoke and who were unaware of

any firm policy that prohibited the direct transmittal of squawks outside the firm.”); *Dennis v. Sec’y Pa. Dept. of Corr.* 834 F.3d at 311 (“had the Commonwealth not suppressed the Frazier documents, Dennis could have presented an “other person” defense at trial . . . The Frazier documents bring to light that Walker admitted to going to Olney High School—the school Williams and Howard attended—and he recognized Williams from school. Thus, the documents not only support an alternative shooter theory . . . Alterations in defense preparation and cross-examination at trial are precisely the types of qualities that make evidence material under *Brady*.”).

**D. Conclusion, the Sixth Circuit’s materiality analysis concerning the Hayes confessions merits the granting of certiorari.**

Disclosure of the suppressed information concerning Hayes to competent counsel would have made a different result reasonably probable.

**II. As a Matter of Law, The Panel Erred Because It Failed to Consider All of the Suppressed Evidence and Improperly Discounted Some of the Other Suppressed Evidence When It Conducted Its Materiality Assessment.**

When assessing whether the information the government suppressed is material, the test focuses on the cumulative impact of the evidence and not the impact of each item. *Kyles v. Whitley*, 514 U.S. 419, 434-36 (1965). A court must examine the entire record in making the materiality assessment. *United States v. Agurs*, 427 U.S. 97, 112 (1976) (“the omission must be evaluated in the context of the entire record”) (footnote omitted). Included in the requirement to review the entire record is the need to consider all of the suppressed evidence.

Here, the Panel recognized the correct test for materiality. Appx. B-8 (“materiality refers to the effect of the suppressed evidence collectively, not item by item. *Kyles v. Whitley*, 514 U.S. at 436”). However, in conducting its materiality assessment, the Panel failed to consider many of the suppressed documents and improperly discounted other documents. At the beginning of its materiality assessment, the Panel identified the following evidence as being suppressed:

“Hayes's confession, Burt's status as a suspect in the murder and in credit-card fraud, favorable eyewitness accounts, the unpublished composite sketch, and the evidence from the investigative materials and the FBI VICAP Report undermining the prosecution's theory of the case. We evaluate these omissions in the context of the entire record.” Appx. B-8

However, that listing was incomplete. As a result, the Panel failed to consider the following exculpatory evidence in making its materiality assessment:

1. The physical evidence that eliminated Hughbanks as a suspect. The officers recovered fingerprints from the crime scene. (Hillard Dep. R. 167-2, PageID 11651-52, 11678). They submitted one-hundred-twenty-six sets of fingerprints from suspects for comparison. (Lists of Fingerprints, R 167-5, PageID 14024-27). The officers submitted Hughbanks' fingerprints for comparison. (*Id.* at PageID 14026). His fingerprints did not match the prints found in the master bedroom at the point where the assailant entered the residence. (Kemper Dep. R. 167-4, PageID 13412).
2. Stacy Grisby's inculpatory statement. He told Eric Birch that Demetrius Carter and he (Grisby) “broke into the Leeman's house.” (ECF 167-5, PageID 14141).

The Panel further erred when it assessed only some of the items included on its incomplete list. It failed to address the following items:

3. The sighting of the African-American male who was seen entering the woods behind the Leeman residence near the time of the murders. (LEAD Sheet, R. 167-5, PageID 14014). An African-American male covered with blood was seen running from Greener Elementary School. (R. 167-5, PageID 14040). The prosecution theorized that the assailant exited the rear of the Leeman residence, fled into the woods, and exited the woods at Greener Elementary School. (ECF 163-14, PageID 3185, 3229). Hughbanks is Caucasian. (Description Sheet, 167-5, PageID 14028-29).
4. The sightings of other individuals whose physical descriptions did not match Hughbanks around the time of the murders in the immediate area of the Leeman residence. Four individuals reported seeing a car parked in the immediate vicinity of the Leeman residence at the time of the murders. (LEAD SHEETS, R. 167-5, PageID 13996, 14008, 14009, 14018). Three individuals saw a motorcycle enter or leave the Leeman residence at about the time of the murders. (LEAD SHEETS, R. 167-5, PageID 14010-11, 14012).

The Panel improperly discounted other items on its incomplete list of suppressed information:

5. The repeated statements of Douglas Hayes confessing to the murders. The Panel incorrectly found that Hayes' inculpatory statements were neither admissible nor would lead to discovery of admissible evidence, even though they more accurately described the details of the crimes than Hughbanks' statement.
6. The evidence linking the victims' son, Burt Leeman, to the murders. He had been discharged from the armed services because of mental health issues and was still receiving counseling at the time of the murders. (Report Concerning Burt Leeman, R. 167-5, PageID 14064). He tried to expedite the transfer of his share of his parents' bequest (two hundred thousand dollars). (*Id.*). Bill Lewis, who administered a polygraph examination to Burt, reported that his "pre-test and the test were like running two different people." (Report Concerning Burt Leeman, R. 167-5, PageID 14063).

The only item missing from the decedents' residence was Mr. Leeman's wallet which contained his credit cards. (Investigative Report, R. 167-5, PageID 14129). A female made eight telephone calls to Master Card attempting to charge purchases to the deceased's credit card. (*Id.* at PageID 14005). The female who made the telephone calls had the authorization numbers for the stores from which she claimed to be calling and the telephone number for the Master Card authorization

center. (*Id.* at PageID 14006). These numbers are not available to the public. (FBI VICAP Report, 167-5, PageID 14138). Burt's wife worked for Discover Card. (Report Concerning Burt Leeman, R. 167-5, PageID 14063).

The Panel found that the items of evidence linking Burt to the murders:

“at best support the potential credit-card fraud as being tangentially related to the murder” and “there was no evidence of Burt, or anyone connected to Burt, physically having the credit cards. Nor was there ever any eyewitness statement, confession, or trace evidence implicating Burt, or any other family member, in the murders...at its best linked Burt to credit-card fraud involving his deceased father's credit card.” Appx. B-9.

This discounting of the link between Burt and his father's death was incorrect. One of the investigating officers prepared a single spaced four-page memorandum listing thirty-one points supporting the conclusion that Burt was involved in the murders. (Report Concerning Burt Leeman, R. 167-5, PageID 14061-64). The FBI report concluded the murders were committed by someone who had a strong personal dislike for the victims and staged the crime scene to make it appear as if the Leemans were killed during a burglary. When Detective Kemper found Mrs. Leeman in the driveway, he immediately asked her who cut her throat. (Transcript, ECF 163-13, PageID 3194). She attempted to answer him but was unable because her throat had been cut. (*Id.*). Assuming that she was attempting to identify her attacker, it was someone she knew which would include her son Burt. In his polygraph exam, Thomas Buster stated that Douglas Hayes told him that the homicide was drug related and that Hayes and others drove to the residence looking for the decedents' son who allegedly stole drug money. (Ralph E. Winters, Polygraph Examiner, Memorandum to Detective Kemper, ECF 167-5, PageID 14070-1).

7. The FBI report concerning the murders concluded that the murders were not the product of a burglary, but instead the “victims were targeted for the homicide.” (FBI Report, R. 167-5, PageID 14135). The report based this conclusion on the fact that only Mr. Leeman's wallet was taken and the homicides constituted overkill, “each victim received approximately 24 stab/incised wounds and each had their throat cut, which we interpret as a personalized attack.” (*Id.*). The report concluded that “[t]he perpetrator may have held a significant amount of anger toward the victims.” [*Id.* at PageID 14137). Finally, the report concluded that “[t]he offender wants others to believe he has gone through the

drawers looking for something to steal. This is a technique used to draw attention away from himself and his motive.” (*Id.*).

The Panel improperly discounted the materiality of the FBI Report:

“The FBI VICAP and investigative reports’ assessments of the evidence in part undermine the prosecution's theory of the case, but at the same time the FBI VICAP report supports the prosecution's theory that Hughbanks committed the murders.” Appx. B-9.

The Panel’s analysis sounds like a manifest weight of the evidence inquiry rather than a *Brady* analysis. Because *some* of the information in the FBI report may not prove favorable does not decrease the value to the defendant of the favorable information contained in the report. *Kyles v. Whitley*, 514 U.S. at 451 (“In assessing the significance of the evidence withheld; one must of course bear in mind that not every item of the State’s case would have been directly undercut if the *Brady* evidence had been disclosed.”).

A reasonable probability exists that if the prosecution had disclosed the suppressed evidence the result would have been different. Hughbanks’ custodial statement was the heart of the prosecution’s case. The Panel found that: (a) “a careful review of the recording of Hughbanks' transcript shows the detectives consistently correcting Hughbanks when he offered details of the crime” and (b) Hughbanks' statements during the confession also demonstrate a diminished mental capacity . . . The circumstances surrounding Hughbanks' statements to police raise a question of whether Hughbanks had the capacity to understand what was happening to him and challenge the legitimacy of his statements.” Appx. B-9.

The Panel's concerns were well founded. Hughbanks could not accurately describe the exterior of the victim's residence, the murder weapon, the clothing Mrs. Leeman was wearing, or the property taken from the residence. Only when the officers asked leading questions was Hughbanks able to accurately answer questions concerning (a) the time of day the murders occurred, (b) the point of entry into the residence, (c) a description of the interior of the residence, (e) the origin of the murder weapon, and (f) the details surrounding the killing of two victims.

The Sixth Circuit's legally flawed materiality analysis warrants the granting of certiorari in this case.

### CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,



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