No. 21-6285

In the Supreme Court of the United States

GARY HUGHBANKS,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

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

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

Did the Sixth Circuit correctly determine that evidence withheld from Hughbanks was not material for purposes of *Brady v. Maryland*, 373 U.S. 83 (1963)?

LIST OF PARTIES

The petitioner is Gary Hughbanks, Jr., an inmate at Chillicothe Correctional Institution.

The respondent is Tim Shoop, the Warden of Chillicothe Correctional Institution, who is automatically substituted for the former Warden. See Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

LIST OF DIRECTLY RELATED PROCEEDINGS

Hughbanks's list of directly related proceedings is incomplete. It should also include the following:

Ohio Court of Appeals:

State v. Hughbanks, No. C-980595, 1999 WL 1488933 (Dec. 3, 1999)

State v. Hughbanks, No. C-010372, 2003-Ohio-187 (Jan. 17, 2003)

State v. Hughbanks, N. C-04001, 159 Ohio App.3d 257 (Dec. 3, 2004)

Ohio Supreme Court:

State v. Hughbanks, No. 2000-0057, 99 Ohio St. 3d 365 (Aug. 20, 2003)

State v. Hughbanks, No. 2003-0411, 100 Ohio St. 3d 1484 (Nov. 19, 2003)

State v. Hughbanks, No. 2000-1868, 101 Ohio St. 3d 52 (Jan. 14, 2004)

State v. Hughbanks, No. 2005-0075, 105 Ohio St. 3d 1500 (April 13, 2005)

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INTRODUCTION

This case involves a routine application of law to fact. It does not implicate the sort of broadly applicable legal question that might warrant this Court's review. *See* Rule 10; *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part). Gary Hughbanks suggests otherwise. He claims that the case implicates a recognized split over whether inadmissible evidence can ever be material for purposes of *Brady v. Maryland*, 373 U.S. 83 (1963). Hughbanks is wrong. While the split exists, *see Dennis v. Sec'y Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016), it has no bearing on this case. That is because the Sixth Circuit *already* applies the more defendant-friendly rule for which Hughbanks argues. In the Sixth Circuit, inadmissible evidence *can be* material for purposes of *Brady*. *See United States v. Phillip*, 948 F.2d 241, 249–50 (6th Cir. 1991). The Circuit rejected Hughbank's *Brady* claim in this case not because the evidence on which his claim rested was inadmissible, but because the evidence was immaterial *regardless of* its admissibility. Pet.App.B-8–B-10. Hughbanks's contrary argument rests on a misreading of the Sixth Circuit's decision. Once that misreading is corrected, one is left with nothing more than a case-specific dispute about the application of *Brady*. That factbound dispute does not deserve this Court's attention, especially since the Sixth Circuit correctly resolved it.

STATEMENT

1. Gary Hughbanks, Jr. murdered William and Juanita Leeman in their home. *State v. Hughbanks*, 99 Ohio St. 3d 365, 366 (2003). The crime began as a burglary. But after Hughbanks broke in, the Leemans returned home and inter-

rupted him. *Id.* When William confronted Hughbanks, Hughbanks stabbed William repeatedly before cutting his throat. *Id.* Hughbanks then chased Juanita into the living room, where he grabbed her and slit her throat as well. *Id.* Bleeding profusely, Juanita stumbled into the yard. *Id.* She collapsed at the end of the driveway, near the street, where she was able to flag down a passing police officer. *Id.* at 366–67. The officer asked who had attacked her. *Id.* at 367. Juanita was unable to answer; though still conscious, "when she started to talk, 'blood was gurgling out of her throat, and the whole side of her face just fell open.'" *Id.*

The Leeman murders went unsolved for ten years. *Id.* at 366. A break in the case came in 1997, when Hughbanks's brother Larry told the police that Hughbanks killed the Leemans. *Id.* at 367. Larry told the police that Hughbanks, discussing the murders, said: "I did it, and threw the knife in some woods." *Id.* (modifications accepted). Hughbanks's father, Gary Hughbanks Sr., confirmed that his son, Gary Hughbanks Jr., was the murderer. *Id.* Further investigation turned up additional incriminating evidence, including the fact that Hughbanks lived near the Leeman home at the time of the murders. *Id.* at 368.

Officials arrested Hughbanks, who was by then living in Arizona, soon after Larry came forward. *Id.* And although Hughbanks initially denied any involvement in the murders during an initial interview with Tuscon police, he changed his story in an interview conducted a few days later. *Id.* During that later interview, Hughbanks admitted to breaking into the Leemans' house. *Id.* At first, he claimed to have been with several accomplices. And he blamed Juanita's murder on another

man. Eventually, however, Hughbanks admitted that he broke into the house by himself and murdered the Leemans alone. *Id.* Hughbanks told the police that he stabbed William and cut William's throat after William confronted him. *Id.* Juanita, Hughbanks said, tried to escape. *Id.* Hughbanks caught her in the living room of the house and "cut her enough" that he figured "she'd bleed to death." *Id.*

A jury convicted Hughbanks of aggravated burglary and two counts of aggravated murder. *Id.* at 369. The murder convictions carried three death penalty specifications, and the jury recommend that Hughbanks be sentenced to death. *Id.* The trial court imposed separate capital sentences for each of the murders and sentenced Hughbanks to a sentence of between ten and twenty-five years for the aggravated burglary. *Id.* at 369-70. A state intermediate appellate court and the Ohio Supreme Court both affirmed Hughbanks's convictions and sentence. *State v. Hughbanks*, No. C-980595, 1999 WL 1488933 (Ohio Ct. App. Dec. 3, 1999); *Hughbanks*, 99 Ohio St. 3d at 366.

2. Once Hughbanks had exhausted his opportunities for direct review, he sought postconviction relief in multiple venues. This case concerns the petition for *federal* habeas relief that Hughbanks filed in federal court. But Hughbanks also filed several state petitions for postconviction relief. Two of those petitions—one of which Hughbanks filed before seeking federal relief—included claims that the State withheld exculpatory, material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In the second of the two petitions, Hughbanks sought relief based on information that came to light during federal-habeas discovery. *See* Pet.App.B-4. In

particular, Hughbanks alleged that the State violated *Brady* by failing to disclose: (1) information identifying other suspects; (2) documents that might implicate one of the Leemans' sons in the murder; (3) the absence of trace evidence implicating Hughbanks; (4) eyewitness statements that did not describe Hughbanks; (5) evidence that could impeach the prosecution's theory of the case; and (6) evidence that could impeach the prosecution's witnesses. Pet.App.B-5.

The state courts rejected Hughbanks's *Brady* arguments. The state trial court held that it did not have jurisdiction to consider Hughbanks's second petition, as that petition did not meet Ohio law's requirements regarding successive petitions. Pet.App.H-4–H-6. It also held that the evidence Hughbanks relied on was not exculpatory and that the State's "failure to disclose such information was not 'material' in that it could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict." Pet.App.H-5. An intermediate state appellate court affirmed on the ground that Hughbanks's petition was untimely. It did not address the trial court's materiality conclusion. *See* Pet.App.G-1–G3. The Ohio Supreme Court denied review. Pet.App.F-1.

After failing to win relief in state court, Hughbanks pressed on in federal court. (Hughbanks had obtained a stay of federal-habeas proceedings while he exhausted his state-court remedies, Order, R.106, and the District Court lifted the stay after the Ohio Supreme Court declined to review the denial of Hughbanks's final postconviction petition, Order, R.158.) Hughbanks filed an amended petition in which he asserted twenty-two grounds for relief. Amended Petition, R.182-1. Rele-

vant here, he argued that the State had violated *Brady* by failing to disclose exculpatory, material information—including the information that was first identified during federal-habeas discovery. *See id.* at PageID#14864–78.

The District Court denied Hughbanks's petition and declined to issue a certificate of appealability on any claims. Pet.App.E-1, E-51. Of particular importance to this case, it held that Hughbanks's various *Brady* claims lacked merit. The District Court denied relief on the *Brady* claim that Hughbanks had raised in his first state petition, reasoning that, even if Hughbanks could show that the State had failed to turn over the evidence in question, he could not show that "its failure to do so undermines confidence in the verdict, as is required." Pet.App.E-35. The District Court denied relief based on the *Brady* claims that Hughbanks had raised in his second state-postconviction petition for similar reasons: "by themselves or as a whole," the supposedly withheld pieces of evidence did not "present a reasonable probability that the jury would have opted not to convict [Hughbanks] or sentence him to death." Pet.App.E-36.

Hughbanks filed a notice of appeal, Notice of Appeal, R.244, and sought a certificate of appealability from the Sixth Circuit, Motion, App.R.15. The Sixth Circuit granted a limited certificate of appealability and allowed Hughbanks to pursue his *Brady* claims as well as a claim that he had received ineffective assistance of counsel. Pet.App.C-2. On appeal, Hughbanks limited "his *Brady* claim to the grounds presented in his second state post-conviction application." Pet.App.B-4.

The Sixth Circuit affirmed the District Court's denial of habeas relief. Pet.App.B-1. It noted that, because the state court had dismissed Hughbanks's *Brady* claim as untimely, Hughbanks's claim was procedurally defaulted and could not be considered unless Hughbanks could establish cause and prejudice to excuse the default. Pet.App.B-4–B-5. But because of the overlap between the elements of a *Brady* claim and the elements of a cause-and-prejudice analysis, the Sixth Circuit held that the two questions were one and the same: if Hughbanks could establish a *Brady* violation, then he could also show cause and prejudice and excuse his procedural default. Pet.App.B-5 (citing *Strickler v. Greene*, 527 U.S. 263, 282 (1999)).

The Sixth Circuit held that Hughbanks could not make that showing. The evidence on which Hughbanks relied, it held, was not material. Pet.App.B-9–10. Considering the evidence "'collectively, not item by item,'" Pet.App.B-8 (quoting *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)), the Sixth Circuit held that "the relatively weak exculpatory nature of the undisclosed evidence" meant that it could not "conclude that the State's failure to disclose the evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Pet.App.B-9–B-10 (quoting *Kyles*, 514 U.S. at 435).

REASONS FOR DENYING CERTIORARI

Hughbanks misreads the Sixth Circuit's decision and, based on that misreading, asserts that the decision implicates a circuit split over whether and when inadmissible evidence can be material for purposes of *Brady*. *See* Pet.13–17. But Hughbanks is wrong about what the Sixth Circuit held. This case therefore

does not involve an important and unsettled question of law. It is a kiln-run dispute over the application of law to fact.

I. The circuit split cited by Hughbanks has no bearing on this case.

Hughbanks asserts that the circuit courts are divided over whether undisclosed evidence can be material for purposes of *Brady* even if the evidence would have been inadmissible at trial. Pet.13–14. He is right about that. Some circuits have held that "suppressed evidence may be material for *Brady* purposes even where it is not admissible," while others "have indicated that inadmissible evidence cannot be material." *Dennis v. Sec'y Pa. Dep't of Corr.*, 834 F.3d 263, 311 (3d Cir. 2016); *see also United States v. Morales*, 746 F.3d 310, 314 (7th Cir. 2014). Hughbanks is wrong, however, about which side of the split the Sixth Circuit is on. As the cases Hughbanks cite acknowledge, the Sixth Circuit applies the majority rule (and the more defendant-friendly one): in the Sixth Circuit, inadmissible evidence *can be* material for purposes of *Brady*. *See United States v. Phillip*, 948 F.2d 241, 249–50 (6th Cir. 1991). Inadmissible evidence, the Sixth Circuit has held, can still be material if it would "lead directly to[] evidence admissible at trial for either substantive or impeachment purposes." *Id.*; *see also Wogenstahl v. Mitchell*, 668 F.3d 307, 325 n.3 (6th Cir. 2012).

The Sixth Circuit applied that rule here. It held that "'inadmissible material might nonetheless be considered 'material' under *Brady* if it would 'lead directly' to admissible evidence.'" Pet.App.B-8 (quoting *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 465 (6th Cir. 2015)). Hughbanks's petition for a writ of certiorari,

therefore, does not implicate the split that he identifies: the resolution of the circuit split will not affect the resolution of this case.

Hughbanks mischaracterizes the Sixth Circuit's decision when he argues otherwise. He asserts, for example, that the Sixth Circuit concluded that some of the evidence against him could not be considered in the materiality analysis because that evidence was inadmissible under state evidentiary rules. *See* Pet.14. That is not what the Sixth Circuit said. It held that inadmissible evidence *can be* material if that evidence could have led directly to admissible evidence. It simply concluded that Hughbanks had failed to make the necessary showing here. Hughbanks had offered only mere speculation and a "conclusory assertion" about how the inadmissible evidence would have aided his defense, and that, the Sixth Circuit held, was not enough to satisfy *Brady*'s materiality requirement. Pet.App.B-8–B-9.

II. The Sixth Circuit correctly determined that the evidence that formed the basis for Hughbanks's *Brady* claim was material.

Hughbanks's real complaint is that the Sixth Circuit erred when it concluded that the evidence that formed the basis for his *Brady* claim was not material. That type of factbound plea for error correction rarely justifies Supreme Court review. Regardless, the Sixth Circuit correctly denied relief to Hughbanks.

As Hughbanks acknowledges, the Sixth Circuit applied the correct legal test for determining materiality under *Brady*. Pet.18. It considered "the effect of the suppressed evidence 'collectively, not item by item.'" Pet.App.B-8 (quoting *Kyles*, 514 U.S. at 436). And it weighed the suppressed evidence against the evidence that was admitted at trial. That evidence included the fact that Hughbanks had con-

fessed to the Leeman murders on multiple occasions; he told the police, his brother, his father, and others, that he had killed William and Juanita. *See* Pet.App.B-9. Hugbanks argues, however, that the Sixth Circuit's analysis was incomplete. The circuit court, he says, overlooked certain evidence and gave insufficient weight to the evidence that it did consider. He is wrong. The Sixth Circuit did not err in either respect.

To begin with, the Sixth Circuit did not overlook any evidence. The reason that it did not consider the evidence that Hughbanks identifies during its materiality analysis was that the evidence failed to satisfy *Brady*'s other requirements. The physical evidence that Hughbanks pointed to, for example, *see* Pet.18, was not withheld. The State *had* disclosed that evidence, including "the results of palmprint and fingerprint analysis." Pet.App.B-7. As the Sixth Circuit recognized, the State had informed Hughbanks "that prints were taken from the crime scene and 'only a few were suitable for comparison. None were matched to the defendant or anyone else.'" *Id.* (citation omitted). The evidence implicating other suspects, by comparison, was not exculpatory. The Sixth Circuit held that, aside from the evidence involving one of the suspects, most of the evidence regarding other possible suspects was too tenuous to be exculpatory. Pet.App.B-5–B-6. The other suspects, it held, were not *legitimate* suspects because there was an insufficient connection between them and the Leeman murders. *See id.*

The Sixth Circuit properly weighed the evidence that it did consider. It simply concluded that the evidence on which Hughbanks's *Brady* claim relied was "rela-

tively weak." Pet.App.B-9. The "amount of undisclosed evidence was slight as opposed to voluminous, did not significantly weaken the case against Hughbanks, and did not reveal that the police conducted a 'shoddy' investigation that could 'lessen the credibility of the State's case.'" *Id.* (quotation omitted). Hughbanks disagrees, arguing that had the evidence been disclosed "a different result" would have been "reasonably probable." Pet.17. But he does little to explain why that is so, and he has no response to the Sixth Circuit's conclusion that, even if his counsel could have relied on the additional evidence to concoct an alternate theory of the case, counsel "would not have been able to produce a name or description of an alternate suspect that any of the undisclosed evidence could corroborate." Pet.App.B-9. He instead offers the same type of speculation that the Sixth Circuit rejected. *See* Pet.16–17.

Hughbanks concludes by attacking one of his confessions to the Leeman murders: the confession that he made to the police. *See* Pet.21–22. Hughbanks never explicitly ties these attacks to his *Brady* claim but, presumably, he means to suggest that the evidence against which the suppressed evidence must be weighed was not strong. If that is in fact his argument, the Sixth Circuit reasonably rejected it. Although it recognized the "shortcomings" in Hughbanks's confession to the police, it concluded that the "suppressed, favorable evidence" *still* did not "present a significant challenge to the prosecution's theory of the case or lead to a reasonable probability that a jury would have found Hughbanks's multiple confessions unreliable." Pet.App.B-9. Hughbanks expresses his disagreement with that conclusion, *see*

Pet.21–22, but he offers no compelling reason why that factbound dispute is worthy of the Court's time or attention.

CONCLUSION

The Court should deny Hughbanks's petition for writ of *certiorari*.

Respectfully submitted,

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