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 STATE COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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REPLY

Hughbanks' petition for certiorari focused on the Sixth Circuit's failure to include Douglas Hayes' repeated confessions in its materiality analysis to determine if habeas relief should be granted.

The Warden restates his same argument; the Sixth Circuit considered all the evidence when conducting it materiality analysis. The Warden's argument contains two fatal flaws. First, it *repeatedly misstates* the Sixth Circuit opinion concerning the Court's materiality analysis. Second, it *never mentions* repeated confessions of Douglas Hayes that the Circuit failed to include in its materiality analysis.

Hughbanks' petition asserts that the Sixth Circuit, while recognizing the existence of Hayes' repeated confessions, exempted them from its materiality analysis. The Warden fails to acknowledge even the existence of those confessions.

I. The Warden's Initial "Statement" Does Not Reference Hayes' Repeated Confessions or Any of the Other Suppressed Evidence.

The Warden, after his one paragraph introductory statement that ignored the repeated confessions, begins his response with a five page "Statement" which includes a combined statement of the case and facts. BIO, pp. 1-6.

The Warden acknowledges that Hughbanks' petition for certiorari focuses on the discovery the prosecution failed to provide trial counsel. BIO, pp. 6-11. Yet, the Warden's "Statement" fails to reference: (a) police awareness of Hayes' repeated confessions during the ten year investigation of the murders; (b) voluminous other favorable evidence noted by the Sixth Circuit that the prosecution failed to provide trial counsel, *Id.* at 3; and (c) the fact that Hughbanks initially accessed the favorable

evidence, including Hayes' repeated confessions, during federal discovery, *Id.* at pp. 4-5.

II. The Warden, Not Hughbanks, Repeatedly Misquotes the Sixth Circuit Decision.

Hughbanks' petition for certiorari focused on the Sixth Circuit's failure to consider Hayes' repeated confessions when it conducted its materiality analysis. He presented two related questions: (a) the Sixth Circuit failed to consider Hayes' confessions when assessing the materiality of the suppressed evidence and (b) the impact that failure had on the Sixth Circuit's assessment of the remaining suppressed evidence.

The Warden incorrectly claims that Hughbanks premises his petition for certiorari on: (a) a misreading of the Sixth Circuit opinion and (b) the argument that the Sixth Circuit did not consider in its materiality analysis all the evidence that the prosecution suppressed. However, it is the Warden, not Hughbanks, who misreads the Sixth Circuit opinion.

The Warden begins his misreading with the following:

> The Circuit rejected Hughbanks' *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' 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*.

BIO, p. 1

The Warden continues his misreading argument throughout the remainder of his brief: (a) "Hughbanks misreads the Sixth Circuit Opinion," (b) "Hughbanks is

wrong about what the Sixth Circuit held," (c) "Hughbanks mischaracterizes the Sixth Circuit's decision", (d) "that is not what the Sixth Circuit said", (BIO, pp. 6, 8), and (e) "[t]he Sixth Circuit did not overlook any evidence", BIO, p. 9.

The Warden is simply incorrect. The Sixth Circuit clearly stated that it would not consider Hayes' repeated confusions because they were inadmissible:

> We can immediately remove one of these pieces of evidence from our review: Hayes's confession. ["*26] "[E]vidence that could have 'no direct effect on the outcome of trial' cannot be considered *Brady* material." *Barton,* 786 F.3d at 465 (quoting *Wood v. Bartholomew,* 516 U.S. l, 6, l 16 S. Ct. 7, 133 L. Ed. 2d I (1995)). But "inadmissible material might nonetheless be considered 'material under *Brady* if it would 'lead directly" to admissible evidence.'" *ld.* (quoting *Wogenstahl v. Mitchell,* 668 F.3d 307,325 n.3 (6th Cir. 2012)). Here Hughbanks has made no such showing regarding [***l5] Buster's inadmissible polygraph examination and hearsay statements of Hayes's confession. Although Ohio Rule of Evidence 804(B)(3) permits an unavailable declarant's statement to be admitted when it is a statement against interest, the statement must be accompanied by "corroborating circumstances (which] clearly indicate the trustworthiness of the statement." Hughbanks points to no such corroborating circumstances such as a spontaneous [*54] confession occurring shortly after a crime or any other additional evidence implicating Hayes in the murder. *See Gumm,* 775 F.3d al 369. Accordingly, Hayes's confession cannot be considered material under *Brady*. *See Wood,* 516 U.S. at 6 (holding that an appellate court must point to specific admissible evidence that could be utilized, otherwise the conclusion that the disclosed inadmissible evidence might have led to some additional evidence "is based on mere speculation" and is not enough to sustain *Brady* [**27] materiality).

Consequently, Hughbanks petition for certiorari is not limited to a case-specific dispute." Instead, it raises a fundamental issue, whether the holding in *Brady* applies to all third party confessions or just those third party confessions the appellate courts speculate might be admissible at trial. This Court's seminal case on suppressed

evidence was premised on the prosecution's suppression of the confession a third party in a capital case. *Brady v. Maryland,* 373 U.S. 83, 84 (1963).

III. The Warden's Reliance on the Portion of the Sixth Circuit Decision Concerning Fingerprint Evidence is Misplaced.

In an effort to defend the Sixth Circuit's decision, the Warden points to the portions of the Sixth Circuit decision addressing the forensic results of the finger and palm prints. BIO, p. 9. The Warden's analogy fails from because the Sixth Circuit misunderstood the significance of that evidence.

The investigating officers recovered finger and palm prints from the window the assailant gained access to the victims' residence. (Hillard Dep. R. 167-2, PageID 11651-52, 11678; Heimpold Letter, R. 167-5, PageID 14053). Police submitted one-hundred-twenty-six sets of fingerprints from suspects for comparison. (Lists of Fingerprints, R 167-5, PageID 14024-27). Early in the investigation, the officers submitted Hughbanks' fingerprints for comparison. (*Id.* at PageID 14026). His fingerprints did not match the prints found in the master bedroom. (Kemper Dep. R. 167-4, PageID 13412). The officers eliminated Hughbanks as a suspect because his prints did not match the prints found at the scene. (Kemper Dep. R. 167-2, PageID 11961).

During pretrial discovery, the prosecution disclosed the prints, but in a fashion that was at best incomplete if not intentionally misleading:

> TESTS AND EXAMINATIONS: Previously provided were results of lab tests for blood on weapons; autopsy reports for victims William and Juanita Leeman; polygraph reports from tests of defendant. In addition numerous lifts were taken from the residence, *only a few were suitable for comparison. None were matched to the defendant or anyone else.*"

App., R. 166-2, PageID 3949 (emphasis added).

The prosecution's discovery response does not reflect that the police used the prints suitable for comparison *to eliminate suspects*, and more importantly, *eliminated Hughbanks as a suspect.* In pretrial discovery the prosecution did not provide the police reports documenting that (a) the police submitted two-hundred-fifty sets of fingerprints from suspects for purposes of comparison, (b) Hughbanks' prints were submitted for comparison, and (c) the comparison eliminated Hughbanks as a suspect. Chart of Fingerprints Submitted for Comparison, ECF 167-5, Page ID 14024-27.[1]

Brady "does not [allow] the State simply to turn over *some* evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs." *Barton v. Warden,* 786 F.3d 450, 468 (6th Cir. 2015). *See also, United States v. Paulus,* 952 F.3d 717 (6th Cir. 2020). There the government placed into evidence statistics that gave the inaccurate impression that fifty percent of the medical procedures the defendant performed were unnecessary when the actual number was seven percent.

[1] At trial, the prosecution continued to hide the ball as to the forensic results that eliminated Hughbanks as a suspect. The prosecution asked the lead detective if the criminalists were "ever able to locate any trace evidence, hair, fiber, fingerprints, anything which could be *used to identify the killer* and tie him to the scene." The detective responded "no." (ECF 163-13, PageID 3228, emphasis added). Although the response is true, it is not the whole truth. Had the prosecution provided the withheld discovery, on cross-examination trial counsel could have asked the detective "Were you able to locate any fingerprints you *used to eliminate suspects*, including Hughbanks, as the killer?" Sworn to tell the whole truth, the lead detective would had to have answered "yes." Without knowledge of this crucial exonerating evidence, trial counsel never asked the question.

The government argued that the defendant could have found the seven percent figure by only minimal investigation. The Sixth Circuit Court rejected the conclusion, "it seems unreasonable to expect much investigation at all, given that Paulus had no reason to think that the KDMC investigation held exculpatory value. . . . Paulus had no reason to follow the trail of crumbs in search of the cookie." *Id.* at 725-26. Here trial counsel had no reason to follow the crumbs provided in discovery in search of the evidence that eliminated Hughbanks as a suspect.

IV. The Prosecution's Case Was Weak Given Its Almost Total Reliance on Hughbanks' Statement.

The Warden argues, "Hughbanks never explicitly ties these attacks [on the reliability of his confession] to his Brady claim, but presumably, he means to suggest that the evidence against which the suppressed evidence was not strong." BIO, p. 10. To the contrary, Hughbanks expressly linked the reliability of the confession to the strength of the prosecution's case.

The detectives who obtained the inculpatory statement from Hughbanks fed him the following information during the course of their questioning: (a) the time of day the crime occurred, Custodial Statement R. 193-1, PageID 15478, (b) the manner in which entrance was obtained into the victims' residence, *Id.* at PageID 15550-51, (c) the description of the interior of the residence, *Id.* at PageID 15514-15, PageID 15544, (d) the source of the murder weapon, *Id.* at PageID 15566, 15668, 15770-71, and (e) the details surrounding the stabbing of the victims, *Id.* at PageID 15502-03, 15601-02.

When not fed the correct answers, Hughbanks was unable to answer correctly the most basic facts involving the burglary and murders:

- He incorrectly answered the officers that the exterior of the victims' residence was a two-story residence with beige carpeting upstairs, *Id.* at PageID 15598. The correct answer: the residence was a single story residence and accordingly did not have beige carpeting in the upstairs, State's Trial Exhibits, R. 166-32, PageID 11108-10

- He incorrectly answered the officers that the murder weapon was a screwdriver, Custodial Statement, R. 193-1, PageID 15610. The correct answer: the assailant killed the victims with a knife, Trial Transcript, Trial Phase, R. 163-14, PageID 3328-30.

- After several leading questions, he incorrectly answered the officers that he took Mrs. Leeman's costume jewelry including her necklaces, earrings, pins, and broaches. R. 193-1, PageID 15546, 15556. The correct answer: the assailant only took Mr. Leeman's wallet, Investigative Report, R. 167-5, PageID 14002.

- He incorrectly answered the officers again after leading questions that he removed the blood from his person in the creek behind the victims' residence, R. 193-1, PageID 15605. The correct answer: the assailant washed the blood from his person and clothes in the sink of the victims' residence (Trial Transcript, Trial Phase, R. 163-13, PageID 3210).

The Warden counters this argument by asserting that the Sixth Circuit recognized these "shortcomings" in Hughbanks' statement. BIO, p. 10, quoting PetAppx.B-9. Given the amount of information the officers fed Hughbanks and the fact he could not get even correctly answer the most basic facts surrounding the murders, the discrepancies in Hughbanks' statement cannot reasonably be brushed aside as "shortcomings."

V. The Warden Does Not Attempt to Defend the Sixth Circuit Decision.

Because the Warden incorrectly concludes that the Sixth Circuit considered *all* of the evidence, including Hayes' confessions in the materiality assessment, the Warden makes no effort to defend the Circuit's refusal to consider Hayes' confessions in its materiality assessment. As set forth in his petition for certiorari, the Sixth Circuit should not have speculated as to the admission of the evidence given the state trial court's discretion to admit Hayes evidence pursuant to Ohio Evid. R. 804(B)(3) and the Fourteenth Amendment. Pet for Cert. pp. 14-15. In the alternative, trial counsel could have used the evidence to impeach the prosecution's case that was almost exclusively dependent on Hughbanks' custodial statement. *Id.* p. 15. The Sixth Circuit labeled the latter as "speculative." Given the weakness of the lynchpin of the prosecution's case, Hughbanks' custodial statement, the case for trial counsel's use of the withheld evidence, especially Hayes' repeated confessions and the fingerprint evidence, was compelling and anything but speculative.

VI. The Sixth Circuit Would Have Reached a Different Result If In Its Materiality Analysis the Court Had Considered Hayes' Statement.

The Sixth Circuit ultimately rejected the Hughbanks' *Brady* claim because "the suppressed evidence falls short of mounting a plausible counter-narrative and offers only tenuous connections at best to other suspects. Defense counsel might have been able to craft a story suggesting that another person committed the crime, but they 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.

Yet, Hayes' repeated confessions did just that. They provided trial counsel with another suspect who connected himself to the murders with his repeated confessions. Hayes' repeated confessions did not contradict the underlying facts of the murders as did Hughbanks' single custodial statement. Reasonable jurists can conclude that Hayes repeated confessions would have had a "profound" and "dramatic effect on the course" of trial. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

VII. Conclusion

For the reasons set forth in petition for certiorari and this reply, this Court should grant Hughbanks' Petition for Certiorari.

Respectfully submitted,

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