IN THE
SUPREME COURT OF THE UNITED STATES

No. 21-7186

JON HALL
Petitioner,

v.

TONY MAYS, Warden,
Respondent.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

*****CAPITAL CASE*****

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I. Introduction

Respondent's Brief in Opposition (BIO) does not dispute Mr. Hall's primary argument that the courts below have reached contradictory results with respect to when entities are "acting on behalf of the government." Nor does he disagree that this Court's guidance is needed to clarify this important issue of federal law. Rather, Respondent contends that this Court should deny the petition because Mr. Hall has allegedly shifted positions during this litigation and the impeachment evidence is immaterial. Neither of these arguments are availing.

Respondent's view that Mr. Hall has taken inconsistent approaches is rooted in a flawed attempt to differentiate between arguments that the prosecutor has an obligation to seek out information held by other entities and that such information may be imputed to the prosecutor. This is a distinction without a difference; the consistent point is that the prosecutor is to blame if such information is not disclosed to the defense. Respondent's confusion on this point does not render Mr. Hall's positions below inconsistent.

As to materiality, Respondent argues the evidence kept from the jury—that the key prosecution witness, who testified to what Mr. Hall told him in jail, was himself delusional and hearing voices—was merely cumulative to evidence of that witness's history of working as a professional informant. This ignores the categorical difference between impeaching a witness on his propensity to deliberately lie to further his own self-interest and impeaching a witness on his dissociation from reality.

There is no dispute that the lower courts have reached inconsistent results when attempting to determine whether an entity is "acting on the government's behalf" and that further guidance is required. The Warden's attempts to cast Mr. Hall's case as an imperfect vehicle are unavailing. This Court should grant certiorari rather than allow the splits in the circuits to multiply and deepen.

II. Respondent does not dispute that there is a circuit split requiring action from this Court.

Notably absent from Respondent's BIO is any disagreement with Mr. Hall's primary argument: that there is confusion among the courts of appeals regarding the scope of the prosecution's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995), to learn of favorable evidence known to entities other than the police.

Kyles provides that the prosecutor must disclose "any favorable evidence known to others acting on the government's behalf in the case," clarifies that the police are among those "acting on the government's behalf," and offers no further guidance. 514 U.S. at 437. Courts have struggled with this undefined inquiry. *See, e.g.*, *Tiscareno v. Anderson*, 639 F.3d 1016, 1021 (10th Cir. 2011) (describing the determination of who was "acting on the government's behalf" to be an "inquiry which defies broad generalizations"). In his petition, Mr. Hall identified several scenarios in which courts have sought to determine who is "acting on the government's behalf" but, in the absence of a clearly defined standard, reached contradictory results. Respondent does not disagree that the lower courts have taken divergent approaches.

He does not disagree that this is a serious issue requiring clarification. Instead, he incorrectly argues Mr. Hall's case is not the proper vehicle for addressing the issue.

The first scenario in which the lower courts have taken incompatible approaches is in cases involving multi-jurisdictional investigations. In the Third, Fifth, and Tenth Circuits, evidence in the hands of a separate investigative sovereign is imputable to the prosecutor. *See United States v. Risha*, 445 F.3d 298 (3d Cir. 2006); *Smith v. Sec'y of N.M. Dept. of Corr.*, 50 F.3d 801 (10th Cir. 1995); *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979). In *Moon v. Head*, 285 F.3d 1301, 1310 (11th Cir. 2002), however, the Eleventh Circuit found that *Brady* information known to a law enforcement officer from a separate jurisdiction who crossed state lines to testify at the defendant's trial was not imputed to the prosecution.

A similar problem concerns *Brady* material in the possession of child welfare agencies. Despite this Court's guidance in *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), the First Circuit has held that child welfare files are "not the type of evidence covered by *Brady*" because such an agency is "not the prosecuting agency and is independent of both the police department and the prosecutor's office." *Lavallee v. Coplan*, 374 F.3d 41, 44–45 (1st Cir. 2004); *but see Love v. Johnson*, 57 F.3d 1305, 1314 (4th Cir. 1995) (recognizing that "[t]he '*Brady*' right, as . . . implemented in *Ritchie*, . . . certainly extends to any in the possession of state agencies subject to judicial control," such as the Department of Social Services).

Confusion also reigns on the question of whether the prosecutor is required to learn of trial witnesses' impeachment evidence. The Third and Fifth Circuits have

held that the prosecutor has a duty to learn of its witnesses' criminal history reports. *See United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (holding "nondisclosure is inexcusable" when evidence is "readily available" to the prosecution); *East v. Scott*, 55 F.3d 996 (5th Cir. 1995). Similarly, the Fifth Circuit determined that a prosecutor violated *Brady* by failing to obtain postal employee witnesses' personnel files. *See United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973), *overruled on other grounds*, *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984). The court explained, "there is no suggestion in *Brady* that different 'arms' of the government" are severable entities, meaning the prosecutor "cannot compartmentalize the Department of Justice and permit it to . . . use a [Post Office employee] as its principal witness, but deny having access to the Post Office files." The First Circuit, however, found no *Brady* violation where a federal prosecutor failed to learn of a witness's state-court convictions. *United States v. Hall*, 434 F.3d 42, 55 (1st Cir. 2006). Directly contradicting its sister circuits, that court reasoned the prosecution's *Brady* "duty does not extend to information possessed by government agents not working with the prosecution." *Id.*

The preceding examples evince the depth of uncertainty concerning prosecutors' *Brady* obligations. Nowhere is this uncertainty more relevant for Mr. Hall than in the context of prosecution witness's jail records. While the Sixth Circuit determined that such records could not be imputed to the prosecutor in Mr. Hall's case, the Seventh and Ninth Circuits take the opposite position. *See Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997); *United States v. Wilson*, 237 F.3d 827 (7th Cir.

2001); *Gonzalez v. Wong*, 667 F.3d 965 (9th Cir. 2011). Sitting en banc in *Carriger*, the Ninth Circuit determined the prosecution was obligated to discover and turn over an inmate-witness's jail file. The court explained that, by relying on a witness with extensive criminal history, the prosecutor triggered an obligation "to turn over all information bearing on that witness's credibility . . . including prison records." *Carriger*, 132 F.3d at 480; s*ee* also *Gonzalez*, 667 F.3d at 981–82. The Seventh Circuit, in *Wilson*, determined that imputation to the prosecutor was proper where impeachment evidence was in the exclusive possession of the United States Marshals Service "even if the role of the Marshal's [sic] Service was to keep the defendants in custody rather than . . . collect evidence." 237 F.3d at 832. The Seventh and Ninth Circuit opinions directly and unambiguously conflict with the Sixth Circuit opinion in Mr. Hall's case.

These various points of divergence between the lower courts constitute circuit splits. Confusion and contradiction will continue to spread without direction from this Court. The scenarios outlined by Mr. Hall are common in criminal trials (particularly the prosecution calling jailhouse informants), and there are countless additional factual circumstances that will crop up and cause divergent results. To stave off unending confusion, this Court should grant certiorari and provide instruction on the scope of the prosecution's obligation to learn of favorable information known to entities other than the police.

III. Respondent's argument that Mr. Hall has taken inconsistent positions is premised on a misunderstanding of the law.

Respondent argues this case is an imperfect vehicle for resolving a circuit split on a constitutional issue because Mr. Hall has taken inconsistent positions in the courts below, which would "severely constrain[]" this Court's review. BIO at 8–10. The purported inconsistency is that Mr. Hall first argued (to the district court) the State had an affirmative duty to review Dutton's prison records and disclose any favorable evidence, and later argued (to the circuit court) that the Tennessee Department of Corrections (TDOC)'s knowledge of Dutton's prison records should be imputed to the prosecution. That is, Respondent maintains Mr. Hall took "different position[s]" in arguing (1) that the prosecutor has an obligation to "discover and disclose" information held by TDOC and (2) that TDOC's knowledge of that same information "should be imputed" to the prosecutor. BIO 9–10. But this is simply two ways of framing the same argument: the consistent point is that the prosecutor is to blame if this information is not disclosed to the defense. Respondent's confusion does not render Mr. Hall's positions inconsistent.

Mr. Hall has consistently maintained that he was entitled to the impeachment material in Dutton's prison records and that the prosecution must be held to account for the suppression of that evidence despite not possessing the prison file. It matters not whether Mr. Hall styled that argument as an affirmative duty on the prosecutor's part or an imputation of knowledge to the prosecutor. These are not separate concepts; they are merely different ways of expressing the singular concept at the heart of *Kyles*: the prosecutor may be held to account when the defense is denied access to favorable evidence "known to others acting on the government's behalf."

Respondent also argues this Court's review "would be hamstrung" by Mr. Hall's positions below because the district court found he had not alleged any connection between TDOC and the prosecution. BIO at 8. But before the district court, Mr. Hall clearly argued that any suggestion of a lack of connection between TDOC and the prosecution "deserves no credence." R. 100, Response to Respondent's Motion for Judgment on the Pleadings, PageID 916. The district court's finding to the contrary was unsupported and, critically, based on an underdeveloped record. After an initial discovery request yielded records establishing a strong inference that TDOC was working in concert with the prosecution to secure Dutton's testimony against Mr. Hall, *see* Petition at 27–30, Mr. Hall followed up on mentions of Dutton's interactions with TDOC Internal Affairs—only to have TDOC respond with the results of a search that excluded the only relevant period: when Dutton and Mr. Hall were housed together. *See* Petition at 28–29. Mr. Hall tried again to gain information on the crucial question of TDOC's role in securing Dutton's testimony, but the district court denied his discovery requests. *See* Petition at 28.

Respondent's argument is essentially that Mr. Hall did not do enough to establish TDOC was working directly with the prosecution team for the explicit purpose of convicting Mr. Hall. This ignores that courts other than the Sixth Circuit have routinely reached conclusions suggesting the jailer's role in detaining an inmate-witness would be sufficient to trigger a *Brady* obligation regardless of a further connection between the two entities. *See, e.g., United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (declining "to draw a distinction between different

agencies under the same government"); *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir. 1997) (holding that the state's decision to call a witness with an extensive criminal history triggered an obligation "to turn over all information bearing on that witness's credibility"); *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006) (finding it determinative that the prosecution had "ready access" to the impeachment evidence). And regardless, Mr. Hall cannot be faulted for not producing additional evidence of TDOC's role in securing Dutton's testimony when the district court barred him from pursuing such evidence. *See* Petition for Certiorari at 27–30.

In short, Mr. Hall has consistently maintained the prosecution should be held to account for its failure to produce Dutton's prison records because TDOC was working on behalf of the government. While TDOC's role housing Dutton should suffice to support this position, Mr. Hall has produced additional evidence tying TDOC specifically to the securing of Dutton's testimony—and it was the district court that prevented this line of inquiry from proceeding further.

IV. Evidence of Dutton's severe mental illness was material.

Respondent also argues this Court should decline to do grant certiorari because Dutton's prison records were immaterial. *See* BIO at 12–13. This is incorrect. Respondent understates the critical import of Dutton's prison records, which detail serious mental illness: decades of auditory hallucinations ("hearing voices telling him all kind of stuff"), delusional thinking, and the belief that he was possessed by a legion of minor demons. *See* Petition at 26.

Respondent makes three arguments regarding materiality:

First, Respondent argues Dutton's prison records were "merely cumulative" to the criminal-history impeachment evidence produced at trial. BIO at ii, 12. This argument ignores the categorical difference between those lines of impeachment. While Mr. Hall was able to examine Dutton on his history of testifying for a benefit, he was unable to examine Dutton on the entirely separate question of whether he had been divorced from reality when he purportedly had conversations with Mr. Hall. Evidence that Dutton's sense of reality was warped by mental illness is not "merely cumulative" to a suggestion that Dutton made the calculated decision to perjure himself in exchange for a reduced sentence.

Respondent's misunderstanding of this critical distinction is made clear by his assertion that "there is no basis to suspect Dutton's cross-examination would have varied greatly had [Dutton's prison] records been disclosed." Respondent suggests Mr. Hall's counsel would not have altered their approach to cross-examining Dutton had they known he was mentally ill. This is risible. Any defense attorney worth her salt would have focused on Dutton's mental illness and made clear to the jury that the prosecution's case concerning premeditation rested on the reliability of a man who heard "voices telling him all kinds of stuff" and believed he was possessed by a legion of minor demons. Dutton's prison records were the only evidence of Dutton's severe mental illness. They were not "cumulative" to anything presented at trial.

Second, Respondent argues Dutton's prison records "did not undermine the substance of Dutton's testimony." BIO at 12. This again fails to understand the role of impeachment evidence pertaining to a witness's mental illness. Respondent's

argument is that, because the prison records do not serve to contradict Dutton's "recounting [of Mr. Hall's] statements to him," they are immaterial. This misses the point that the prison records call into question the veracity of Dutton's testimony—in other words, how he was perceiving reality, not whether those records would somehow establish a discrepancy in his testimony. There is no requirement that evidence must directly contradict a witness's testimony to be considered material.

Third, Respondent argues Dutton's prison records would not have resulted in a different outcome given "the clear evidence of [Mr. Hall]'s guilt." BIO at 13. This argument misunderstands the instant question of materiality, which was limited to premeditation. Mr. Hall's theory at trial was that he acted out of rage and without premeditation, meaning he was not eligible for the death penalty. *See* Petition at 23 n.10. Dutton's testimony was the State's only direct evidence of premeditation. He testified that Mr. Hall discussed his purported motive, saying that he went to his wife's house with the intent to make her "suffer as he did, feel the helplessness that he was feeling because she took his world away from him." *See* Petition at 26. In arguing this evidence had no bearing on Mr. Hall's conviction, Respondent points to other evidence presented to the jury: the extent of the injuries inflicted on the victim, Mr. Hall's statements to his children after he had flown into a rage and begun assaulting his wife, and Mr. Hall's daughter's testimony that she saw her father drag

her mother towards the pool during that assault. This is evidence that Mr. Hall killed his wife (which is not in dispute); it is not evidence of premeditation.[1]

Had the jury heard evidence that Dutton—the source of the State's evidence of premeditation—was not in touch with reality, there is a reasonable likelihood that evidence would have affected the judgment of at least one juror on the question of whether Mr. Hall acted with premeditation. And even had the jury determined Mr. Hall acted with premeditation and was therefore guilty of first-degree murder, there is a reasonable likelihood that evidence of Dutton's mental illness would have injected sufficient residual doubt on the question of premeditation to affect the judgment of at least on juror at sentencing.[2]

Dutton's prison records were material. Respondent's arguments to the contrary are unpersuasive and should not deter this Court from resolving the confusion in the lower courts over the scope of the prosecutor's duty to disclose favorable evidence known to other entities.

V. Conclusion

For the reasons stated above, this Court should grant the writ of certiorari.

[1] Respondent also points to evidence that Mr. Hall had disconnected the phone lines at the victim's house. But, as Mr. Hall's sister stated in a sworn declaration, Mr. Hall's "habit when he wanted your undivided attention was to unplug the phone." R. 102-43 at 7. Mr. Hall's repetition of this misguided approach does not suggest that, on this occasion unlike the others, he went to his wife's home with the intent to kill her.

[2] Tennessee courts have long recognized the power of residual doubt as a mitigating circumstance. *See, e.g.*, *State v. Hartman*, 42 S.W.3d 44, 59 (Tenn. 2001). "[I]n general residual doubt is one of the most compelling mitigating circumstances a capital defendant can establish to improve his chances of receiving a life sentence." *Id.*

CERTIFICATE OF WORD COUNT

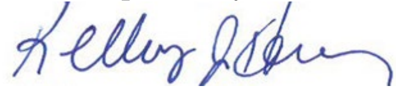
Case name: *Hall v. Mays*
Title: Reply To Respondent's Brief In Opposition

Pursuant to Rule 33.1(h) of the Rules of this Court, I certify that the Reply To Respondent's Brief In Opposition which was prepared using Century Schoolbook 12-point typeface, contains 2,993 words, excluding the parts of the document that are exempted by Rule 33.1(d). This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 5th day of April 2022

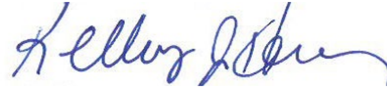
Respectfully submitted,



Kelley J. Henry

CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 29.5(a), I certify a copy of the Reply To Respondent's Brief In Opposition was sent via Federal Express to the Supreme Court of the United States and to counsel for the Respondent on April 5, 2022.



Kelley J. Henry