Nos. 23590 and 23A1064

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JAMIE MILLS,

Petitioner,

v.

JOHN HAMM,
Commissioner of the
Alabama Department of Corrections,

Respondent.

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

PETITIONER'S REPLY

****** Mr. Mills' execution is scheduled from 6:00 p.m. CST on May 30, 2024 until 6:00 a.m. CST on May 31, 2024. ******

CHARLOTTE R. MORRISON
COUNSEL OF RECORD
ANGELA L. SETZER
RANDALL S. SUSSKIND
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
cmorrison@eji.org
asetzer@eji.org
rsusskind@eji.org

Counsel for Petitioner

May 30, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

For seventeen years, Mr. Mills has maintained that the District Attorney made affirmative, false statements at trial that the State offered nothing to its star witness, JoAnn Mills, in exchange for her testimony. The State continued to deny the existence of any agreement with JoAnn in exchange for her testimony throughout Mr. Mills' appeals and postconviction processes, including in his habeas corpus proceedings in the district court, preventing Mr. Mills from receiving merits-review of this claim. New evidence establishes that the State did in fact have an agreement with JoAnn Mills. Because the State's representations that no deal existed are both false and material to critical decisions made by the district court, Mr. Mills filed a motion for a Certificate of Appealability of the district courts' denial of Rule 60 relief.

The State asserts that this evidence has been discovered too late by Mr. Mills, ignoring this Court's precedent that prohibits the State from shifting its duty to disclose to a criminal defendant by requiring the accused to "seek" while the State may "hide." Banks v. Dretke, 540 U.S. 668, 695-96 (2004). It cannot be that the State may conceal critical evidence throughout all stages of capital proceedings—trial, appeals, state and federal postconviction—and then rely on procedural hurdles and arguments of delay to prevent Mr. Mills from obtaining any process on this claim. *The State* has delayed a substantive review of this issue, not Mr. Mills.

Mr. Mills requests that he be granted process as to this long-pursued claim and that this Court hold the State to its duty to pursue truth and justice, over the

finality of an unsound conviction. Giglio v. United States, 405 U.S. 150, 153 (1972); see also United States v. Bagley, 473 U.S. 667, 680 (1985); Berger v. United States, 295 U.S. 78, 87-88 (1935); Mooney v. Holohan, 294 U.S. 103, 112 (1935)

I. REASONABLE JURISTS WOULD DEBATE WHETHER THE PLAUSIBILITY OF TONY GLENN'S AFFIDAVIT CAN BE EVALUATED WITHOUT DISCOVERY AND A HEARING.

The State argues that reasonable jurists would not debate whether the district court erred in concluding—without discovery, a hearing, or any serious inquiry—that Tony Glenn's affidavit was not plausible because he made an error in his fee declaration: Mr. Glenn listed the dates of his attendance of JoAnn's testimony at Mr. Mills' trial as 09/11/07 and 09/12/07, transposing the dates of Mr. Mills' trial, 08/21/07 and 08/22/07. DE 42-1.

A reasonable jurist would conclude that a scrivener's error does not destroy a document's credibility. See, e.g., United States v. Wall, 285 F. App'x 675, 684 (11th Cir. 2008) (finding "a scrivener's error in the indictment is not grounds for reversal"). And a reasonable jurist would conclude that, given the clear transposition of numbers in Mr. Glenn's affidavit, all of the plea discussions with the district attorney take place prior to JoAnn's testimony at trial. See DE 42-1. The meetings that take place after the verdict are regarding "entry of plea" and "ramifications of plea," as opposed to ongoing negotiations. DE 42-1. Tony Glenn's affidavit is the explicit evidence that an understanding was reached prior to JoAnn's testimony at Mr. Mills' trial. DE 42-1. This evidence is corroborated both by the quick dismissal of capital charges against JoAnn after her testimony and the

exposure to capital charges JoAnn's testimony gave her.

A reasonable jurist could also find that Tony Glenn's affidavit was plausible because the affidavits submitted by former District Attorney Jack Bostick and his investigator Ted Smith largely corroborate his affidavit. In his affidavit, Mr. Glenn states that he left that meeting with an assurance that he could safely have his client confess to capital murder under oath and not face the death penalty or life without parole. DE 42-1. In District Attorney Bostick's affidavit, he acknowledges there was a meeting and that the meeting was conducted by Ted Smith. DE 44-1. Ted Smith asserts that he did not have authority to enter into a plea agreement but that he did, in fact, encourage JoAnn to testify. DE 44-2. While Mr. Smith does not give any information about *how* he encouraged JoAnn, what is significant about his affidavit is that it does not contradict Tony Glenn's assertion that he left the meeting with an understanding that the District Attorney's Office would not pursue capital murder charges against JoAnn if she testified against Mr. Mills.

In his affidavit, District Attorney Bostick asserts that "Tony Glenn believed it would be in his client's best interest to testify against Jamie Mills" and this assertion is only credible if there was an agreement. DE 44-1.

A reasonable jurist would also find Tony Glenn's affidavit plausible because ***no attorney would consider exposing their client to the death penalty as being in their client's best interest without some assurance or understanding***.

Further, as the State concedes, days after JoAnn's testimony, the District Attorney quickly moved to dismiss the capital murder charges against JoAnn and allowed her to plead to a non-capital offense with a **parole eligible sentence** just ten days after Mr. Mills was sentenced to death. DE 42-2. While the State is denying that there was an official plea offer, the actions of the District Attorney at the time are more consistent with Tony Glenn's assertion that there was an understanding that JoAnn would benefit from her testimony against Mr. Mills. Because District Attorney Bostick and Mr. Smith's affidavits fail to counter the most important aspects of Mr. Mills' Rule 60 Motion and his underlying claim, reasonable jurists could debate whether the district court erred in refusing to reopen this case to allow Mr. Mills discovery and a hearing on this claim.

Because the State's affidavits do not negate most of the factual allegations raised by Mr. Mills in his Rule 60 Motion, reasonable jurists would find the district court erred in dismissing Mr. Mills' motion, particularly without additional briefing or an evidentiary hearing.

II. MR. MILLS PROPERLY SEEKS RELIEF UNDER RULE 60.

For the first time in these Rule 60 proceedings, the State argues that Mr. Mills may not be entitled to Rule 60 if the AEDPA applies to his claim: "If AEDPA applies, then Mills's Rule 60 motions are either barred as claims presented in a prior application, 28 U.S.C. § 2244 (b)(1), or will fall far short 32 of AEDPA's demanding standard for second or successive petitions based on new evidence, id. § 2244 (b)(2)." See State's Opposition, at 31-32.

Neither the State nor the courts below raised this question because Mr. Mills' claim is properly presented in a motion for relief pursuant to Rule 60. In Gonzalez v. Crosby, 545 U.S. 524 (2005), this Court held that a Rule 60 motion is not a successive habeas petition when it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," it. Id. at 532 A Rule 60 motion that "asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar" is proper. Id. at 532 n. 4.

Mr. Mills' motion is a proper Rule 60 motion. The district court's decision that Mr. Mills was not entitled to discovery, an evidentiary hearing, or a COA, was based on the State's fraudulent representation that the District Attorney and JoAnn had truthfully testified that she had no plea agreement and no hope of a plea agreement. In its order dismissing this claim as procedurally defaulted without an evidentiary hearing or discovery and denying a certificate of appealability, this Court evaluated Mr. Mills' claim against the factual backdrop established by these false statements:

> By way of background, JoAnn testified at trial that she had not made any deals in exchange for her testimony. Mills thoroughly cross-examined her regarding whether she had made any deals in exchange for her testimony. The prosecutor stated that the State had not made any promises to JoAnn; that the State had not suggested that a promise might be made after she testified truthfully; and that there was not any inducement whatsoever for JoAnn's testimony.

Mills v. Dunn, No. 6:17-CV-00789-LSC, 2020 WL 7038594, at *60, 78-79 (N.D. Ala. Nov. 30, 2020).

The State's assertions in federal habeas proceedings that JoAnn in fact did not receive a plea deal in exchange for her testimony and that the District Attorney did not knowingly deceive the trial court and the jury, as well as the district court's reliance on those false assertions, constitutes "a defect in the integrity of the habeas proceedings," and requires Rule 60 relief from the prior judgment in this case.

III. TONY GLENN'S AFFIDAVIT IS DIRECT EVIDENCE OF A BRADY VIOLATION.

The State argues that Mr. Mills is not entitled to process on his claim because an affidavit from a direct witness to a concealed plea agreement is not sufficient evidence of a Brady violation. But if the only way to prove a Brady violation was to force the truth out of the prosecutor's mouth, the State would be insulated from accountability under the law.

The State's argument also ignores the facts of Banks v. Dretke. In Banks, Banks argued that the State concealed that one of its witnesses, Farr, was a paid police informant, and that another witness, Cook, had been intensively coached by prosecutors and law enforcement officers. After Banks obtained affidavits from Farr and Cook supporting his Brady claim, the district court ordered discovery and an evidentiary hearing and "the long-suppressed evidence came to light." Banks, 540 U.S. at 675. Banks' Brady claim did not fail because he obtained the undisclosed evidence from direct witnesses to the Brady violation. Additionally, the State argued (as the State does here) that Banks failed to establish good cause, or diligence,

because he did not attempt to locate and interview these witnesses earlier. This Court's rejection of this argument was unequivocal: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed." Id. at 695.

In the same vein, the State argues that the outcome of Mr. Mills' trial would not have been different even if the jury had known that JoAnn was testifying to save herself from the death penalty. This argument is undermined by what every court, including the district court, has recognized: that JoAnn's testimony, given for no personal gain, was "crucial" to Mr. Mills' conviction, Ex parte Mills, 62 So. 3d 574, 599 (Ala. 2010); see also Mills v. Dunn, No. 6:17-CV-00789-LSC, 2020 WL 7038594, at *17 (N.D. Ala. Nov. 30, 2020) (citing JoAnn's "eyewitness testimony" as the primary piece of "overwhelming evidence" against Mr. Mills). This argument also contravenes this Court's precedent recognizing that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." Giglio v. United States, 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/Charlotte R. Morrison
CHARLOTTE R. MORRISON
COUNSEL OF RECORD
ANGELA L. SETZER

RANDALL S. SUSSKIND
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
cmorrison@eji.org
asetzer@eji.org
rsusskind@eji.org

May 30, 2024

Counsel for Petitioner