No. 23-7736

In the Supreme Court of the United States

CLARENCE MACK,

Petitioner,

v.

MARGARET BRADSHAW, Warden,

Respondent.

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

BRIEF IN OPPOSITION

DAVE YOST
Attorney General of Ohio

T. ELLIOT GAISER
Ohio Solicitor General
MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor General
**Counsel of Record*
JANA M. BOSCH
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
michael.hendershot@ohioago.gov

Counsel for Respondent

CAPITAL CASE – NO EXECUTION DATE SET

QUESTIONS PRESENTED

Did the Sixth Circuit correctly deny Clarence Mack habeas relief because his *Brady* claims failed to show suppression or materiality?

LIST OF PARTIES

The Petitioner is Clarence Mack, an inmate at the Richland Correctional Institution.

The Respondent is Margaret Bradshaw, the Warden of the Richland Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

The petition's list of directly related proceedings is complete and correct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

INTRODUCTION

There are no garden-variety murders, *contra* Pet. 4, but there are garden-variety cert petitions. Clarence Mack's senseless murder of Peter Sanelli left a gaping hole in the lives of his wife and children. His cert petition raises only a typical last-ditch effort to undermine his conviction with a *Brady* claim about evidence he had long ago, or that never existed, or that does not matter. He identifies no circuit split and raises no unsettled question. This case does not warrant this Court's attention.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT

In 1991, Clarence Mack and his friends were prowling the streets of downtown Cleveland, hoping to steal a car. Pet. App. 3a. When they found Peter Sanelli, they shot him to death and took his car. Pet. App. 3a–4a. Ballistics showed that Mack's gun had fired the three fatal shots. Pet. App. 4a. Mack tried to explain away his possession of the murder weapon, but he struggled to keep his story straight and gave conflicting accounts of when and from whom he had acquired the weapon. *Id.*

At trial, Timothy Willis testified about how Mack and his friends Thomas Sowell and Reginald Germany had spoken to him before and after the murder—asking for a gun, showing off the stolen car, and later laughing about crashing the car within hours of stealing it. Pet. App. 3a. He also testified that Mack, while celebrating the murder with his comrade, said, "I shot because you shot." Pet. App. 4a. In return, Mack's alibi included trying to discredit Willis' testimony and blame him for the murder. Pet. App. 4a. But the jury believed Willis—and the forensic evidence—over

Mack's shifting stories. They convicted Mack and recommended the death penalty because the murder happened during an aggravated robbery and Mack was the "principal offender" in the murder. *Id.*; Ohio Rev. Code §2929.04(A)(7).

Mack's appeals wound through the state and federal courts, to no avail. Pet. App. 4a–5a. But thirteen years after the murder, Mack returned to court to develop more claims. Pet. App. 5a. Another two decades of hearings and rulings ensued, but Mack still failed. *Id.* All that remains of his arguments now is a small collection of *Brady* claims, which the lower federal courts both rejected. Pet. App. 6a–13a, 51a–85a. They explained that the state courts were reasonable to hold that each piece of allegedly withheld evidence fell into one of three categories: not withheld, not existent, or not materially favorable. *Id.*

In his cert petition, Mack raises only four of his *Brady* claims: one primary claim and three to support his materiality argument. The primary claim is that prosecutors failed to disclose a tacit agreement with Willis to testify against Mack in exchange for dismissing unrelated charges against Willis. Pet. 22. The other three claims are that the prosecution withheld notes the Sanelli family took when first speaking with Willis, notes on a meeting between Willis and the prosecutor, and police reports about the stolen car being crashed by one man, briefly moved by another, and then abandoned. Pet. 30.

REASONS FOR DENYING THE WRIT

Mack presents no certworthy question for this Court to consider. And even his pleas for error correction ring hollow because the lower courts did not err. This case does not merit this Court's attention.

I. This case presents no certworthy questions.

This Court ordinarily does not grant certiorari to review the factual findings or applications of properly stated rules in the courts below. Sup. Ct. R. 10. Mack gives no reason to believe that this case is anything but that.

Start with his statement of the case. He says that this case is about "an important issue under *Brady*" and "the application of" the habeas statute. Pet. 4. He writes that "the state appellate court and the federal habeas courts have misapplied *Brady* and disregarded this Court's precedent." Pet. 5. And the law that he says the federal court "misapplied" is "clearly established" and "controlling" law. Pet. 20–21. Finally, he states that the Sixth Circuit "failed to recognize" a factfinding error and lacked "clear-eyed appreciation" of the evidence he presented. Pet. 21.

The main portion of his brief repeats those same error-correction themes. Mack cites this Court's precedent as already establishing his main assertion. Pet. 24 (citing *United States v. Bagley*, 473 U.S. 667, 683 (1985)). He recites his view of the facts. Pet. App. 24a–28a. On the issue of materiality, he again cites Supreme Court cases that already establish the law. Pet. App. 32a. In short, Mack offers no reason for this Court to review his factbound case. He essentially asks the Court to repeat itself.

II. The lower courts did not err.

If this Court were to review this case, it would find nothing awry. All of Mack's *Brady* claims have fatal flaws that doom them on the merits.

A. *Brady* claims brought under AEDPA require an undebatable suppression of evidence materially favorable to the defense.

The State violates the Constitution if it suppresses evidence that is "favorable to an accused" and "material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Suppression includes failure to disclose materially favorable evidence even in good faith, and it includes impeachment and exculpatory evidence. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). Evidence is material if the petitioner can show a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *Bagley*, 473 U.S. at 682). (Mack also references *Napue v. Illinois*, 360 U.S. 264 (1959), which addresses false testimony for the State, but here the *Napue* argument is one and the same with the tacit-agreement *Brady* claim. Hence, this brief calls it a "*Brady* claim.")

When a habeas petitioner brings a *Brady* claim that the state courts have already adjudicated on the merits, he must meet the standards of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. §2254(d). To do so, he must show that the state court's ruling was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or was "based on an unreasonable determination of the facts." *Id.*

Both parts of that standard are high, and require more than mere error. "Contrary to" means deciding a case the opposite way the Supreme Court did in an indistinguishable case. *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Unreasonable legal application means "interpreting or applying the relevant

precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.* at 376 (quotation omitted). And a factual determination can be reasonable even if "the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). If " reasonable minds reviewing the record might disagree about the finding in question," the habeas claim fails. *Id.* (brackets and quotation omitted).

The Ohio Supreme Court adjudicated each claim that Mack brings, so AEDPA applies. Pet. App. 157a–73a.

B. The evidence in Mack's petition was either nonexistent, not suppressed, or not materially favorable.

The lower courts were right to uphold the Ohio courts' decision on Mack's claims. The Ohio courts reasonably held that each of the supposedly suppressed pieces of evidence was either nonexistent, not suppressed, or not material.

Tacit Agreement. Mack first claims that the State had (and covered up) a tacit agreement with Willis to testify against Mack in exchange for dismissing unrelated charges against Willis. Pet. 22–29. He believes that revealing the tacit deal between Willis and the prosecutor would have discredited Willis. Pet. 30–32.

In the state court, Mack argued that the court should infer a tacit deal between Mack's prosecutor and Willis: the prosecutor would get Willis' charges dismissed if Willis testified against Mack. Pet. App. 170a. He pointed to the fact that Mack's prosecutor contacted Willis' prosecutor and told him that further investigation was needed in Willis' unrelated case, and later the charges against Willis were dismissed. *Id.* He also pointed to testimony in a later unrelated bail hearing that a police

detective on the witness list for Mack's trial thought Willis had testified against Mack pursuant to a plea deal. *Id.*

The State pointed to contrary evidence. First, it had testimony by Mack's prosecutor and Willis' attorney that no such deal existed. *Id.* It also noted that Mack's prosecutor had called Willis' prosecutor because he was afraid that Willis' charges were a bogus attempt by Mack's friends to discredit Willis before Mack's trial. *Id.* Further, Willis's case was dismissed because the victim died from unrelated causes. *Id.* The state court held that there was no tacit agreement, meaning that there was no evidence to suppress. *Id.*

The Sixth Circuit held that the state court's decision was reasonable. Pet. App. 7a–8a. Mack's prosecutor had a valid reason to contact Willis' prosecutor: he thought Mack's cohort was setting Willis up with bogus charges to derail Mack's trial. Pet. App. 7a. And Willis' prosecutor dismissed Willis' charges because the victim died of unrelated causes. *Id.* And of course, Willis had identified Mack and Sowell before Willis' charges were brought, so his initial identification was not possibly related to a tacit deal. Pet. App. 8a. With that evidence, the state court reasonably held that no agreement existed, so it was also reasonable to reject the *Brady* claim. *Id.*

Mack's petition merely restates his view of the facts. *E.g.*, Pet. 24–28. But while he engages with some of the evidence, he ignores much of the evidence that shows why the state court's decision was reasonable. *Compare id.*, *with* Pet. App. 7a–8a. Nor does he grapple with the fact that the countervailing evidence makes the state court's holding debatable, which alone defeats his habeas petition. For example, his

argument on materiality neatly illustrates his tunnel vision. He claims, "The State's case against Mack was all Willis," which overlooks the forensic evidence and Mack's own incriminating statements. Pet. 32. In the end, Mack is clear that he thinks his inferences from the facts are the best, but that is not enough to overcome AEDPA or to show that this Court should take up his claim for even more review.

Sanelli Family's Notes. Next, Mack claims that the State suppressed notes the Sanelli family took at its first meeting with Willis. Pet. 29–30. He believes that the notes would have undermined Willis' account of his conversations with Mack and Sowell by suggesting that Sowell was likely alone in the car the whole time. Pet. 33–36.

In state court, Mack argued that the notes were wrongly withheld and exculpatory because the family wrote down Thomas Sowell's name but not Mack's. Pet. App. 166a.

The state court held that this evidence was not materially exculpatory. Pet. App. 166a–67a. First, the notes were cumulative of evidence that Mack's counsel did have. *Id.* His counsel interviewed some of the Sanelli family and knew about the meeting memorialized in the notes. *Id.* The notes also had essentially the same content as Willis' first statement to the police. *Id.* Second, the notes were not exculpatory because they say that two people were involved, even though they did not include Mack's name. *Id.* In other words, the notes were perfectly consistent with Willis' account, so they would have only bolstered Willis' credibility. *Id.*

The Sixth Circuit held that the Sanelli family's notes were not material and exculpatory. Pet. App. 9a–11a. The notes say that multiple people were involved, not that Sowell alone committed the murder. *Id.*

Mack is not clear whether he thinks this claim, or either of the other two supporting ("gravy") claims, would merit review or reversal without the tacit-agreement claim. Pet. 30. Either way, Mack merely repeats that these notes, because they do not mention Mack by name, "would have enabled Mack to undermine Willis' claim" that he saw Mack in the car with Sowell before and after the murder. Pet. 33–34. He then posits other possible explanations for the evidence. Pet. 34–35. But those other possible explanations do not support Mack's conclusion that "there is no possibility of fairminded disagreement that Mack was prejudiced," or even the idea that this evidence was *Brady* evidence to begin with. Pet. 35; *contra* Pet. App. 9a–11a.

Prosecutor's Meeting Notes. Mack also claims that the State suppressed the prosecutor's notes from his meeting with Willis before Mack's trial. Pet. 30. These notes, Mack says, would have undermined Willis' testimony the same way as the Sanelli family's notes. Pet. 33–36.

In state court, Mack argued that the prosecutor's notes proved that Willis first recounted Mack's "I shot because you shot" statement just before trial. Pet. App. 167a. He thinks this would have discredited Willis by suggesting that he gradually made up his testimony. *Id.* Mack also argued that the prosecutor made a note of the burglary charges pending against Willis, which he claims supports his argument of an undisclosed deal. *Id.*

The state court pointed out that the notes do not contain the "I shot because you shot" statement that Mack suggested they did. Pet. App. 167a–68a. It also wrote that the notes did not indicate that Willis had any deal with the prosecution. Pet. App. 168a.

The Sixth Circuit held that the prosecutor's notes were not material. Pet. App. 11a–12a. They do not contain the "I shot because you shot" statement, so they do not show the dramatic evolution of Willis' testimony that Mack imagines. Pet. App. 11a. And Mack had the opportunity to address the "I shot because you shot" statement when it came out at trial, Pet. 16, or ask for a continuance if he believed that he had been unfairly surprised by the statement, Pet. App. 12a. He opted to press on and attack Willis' credibility, but the jury simply did not believe Mack.

In his petition, Mack does not appear to make any arguments specific to the prosecutor's meeting notes. *See* Pet. 33–35 (discussing the "Sanelli notes" and "Holton reports," that is, the police reports of the crashed car on Holton Road). At any rate, he does not address the issue that the notes do not contain the "I shot because you shot" statement. Without that, it is unclear how Mack envisions that the notes would help his case.

After-Crash Police Reports. Finally, Mack says that the State suppressed the after-crash police reports detailing how an unknown individual moved the stolen car away from the utility pole before taking the keys and leaving. Pet. 30. He argues that they would have discredited Willis because they establish that Willis' timeline is implausible. Pet. 33.

In the state court, Mack argued that the police report would have helped his case because the description of the man who moved the car matched Sowell but not Mack. Pet. App. 168a. Mack believed that this helped to prove that Sowell was driving the stolen vehicle and that Sowell, not Mack, shot Peter Sanelli. *Id.*

The state court held that this was not evidence favorable to Mack. Pet. App. 169a. Willis testified that Sowell had been driving the stolen car, so the report (if it proved that Sowell was driving) did nothing to impeach Willis. *Id.* Nor does Sowell's driving prove that Sowell rather than Mack shot the victim. *Id.* Since the reports were neither exculpatory nor valuable for impeachment, failing to disclose them did not violate *Brady*. *Id.*

The Sixth Circuit agreed that the crash reports did nothing to help Mack. Pet. App. 8a–9a. Even if the first report proves that only one person was in the car when it crashed, Willis never said that both Mack and Sowell were in the car when it crashed. Pet. App. 8a. (The Sixth Circuit also noted that the State did not suppress the first report either. *Id.*) The second report did not help either because it only established that two people went up to the car and moved it before abandoning it. *Id.* That report neither conflicts with Willis' testimony nor suggests that Mack was not involved in the murder. Pet. App. 9a. Because neither report was exculpatory, and since one was not suppressed, the State court reasonably rejected this *Brady* claim. (Mack also says the crash report proves that someone other than Mack returned to the car to retrieve a nine-millimeter clip and that the other person must therefore be the murderer. The Sixth Circuit pointed out that this was sheer conjecture. *Id.*)

Mack repeats that the police reports would have suggested that Sowell was alone in the car when he met with Willis, since he was alone when he crashed. Pet. 33–34. But nothing he says can transform his possible explanation of the events into the only reasonable explanation. The police reports remain consistent with Willis' testimony, since it is just as possible that Sowell and Mack parted ways shortly before the crash. Mack's preference for his interpretation of the evidence is not enough to overcome AEDPA or call for this Court's review.

The Evidence Taken Together. The state court looked not only at the significance of each piece of evidence; it also considered the materiality of the evidence as a whole. Pet. App. 171a. The Sixth Circuit likewise held that all the suppressed evidence Mack raises, taken together, was weak and duplicative. Pet. App. 12a. It also held that the state court applied the correct standard in its analysis of the overall materiality of any *Brady* evidence. Pet. App. 13a. Mack's rejoinder is that those courts erred because of "their fundamental failures to view the suppressions, and the resulting prejudice, through the proper lens of Willis' singular importance to all the evidence against Mack." Pet. 35. This, again, ignores the forensic and other evidence against Mack and cannot overcome the prior courts' reasonable determinations.

Mack adds a final argument that even if the purported *Brady* evidence could not change the conviction, that evidence might have undermined the death penalty. Pet. 36–37. The Sixth Circuit rejected this claim for several reasons. First, Mack did not "very clearly" show that the state court overlooked this claim rather than rejecting it

on the merits without discussion. Pet. App. 13a (quoting *Rogers v. Mays*, 69 F.4th 381, 388 (6th Cir. 2023) (*en banc*)). Second, it is not clear that the federal court would review this part of the claim without deference even if it did. *Id.* (citing *Hodges v. Colson*, 727 F.3d 517, 537 (6th Cir. 2013)). But most of all, Mack simply failed to show a "reasonable probability" that his sentence would have been different if he had been convicted and had presented the suppressed evidence. *Id.* His death sentence flowed most directly from the forensic evidence, which showed him to be the owner of the gun that killed Sanelli. *Id.* None of the suppressed evidence would have suggested a "configuration of the murder scene" refuting that evidence, even if it had discredited Willis' statements. *Id.* Mack's only response in his petition is to state—without a clear reason—that the suppressed evidence would have "enabled a compelling argument that," notwithstanding his ownership of the murder weapon, he was nothing more than a "befuddled companion" who did not fire the fatal shots. Pet. 36–37. The forensic evidence says otherwise.

* * *

Peter Sanelli has lain in his grave for over thirty-three years while Clarence Mack availed himself of every legal path to challenge his conviction. The system never failed Mack; he lost because he is guilty. It is time to close the book on his campaign.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s/ *Michael J. Hendershot*
T. ELLIOT GAISER
Ohio Solicitor General
MICHAEL J. HENDERSHOT*
Chief Deputy Solicitor General
**Counsel of Record*
JANA M. BOSCH
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
michael.hendershot@ohioago.gov

Counsel for Respondent