No. _____

In The
Supreme Court of the United States

HAYES BACALL,

Petitioner,

v.

CATHLEEN STODDARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a prosecutor's knowingly false assertion of fact that strikes at the heart of the defense in a closely-contested case, and to which the defense had no opportunity to respond, denies due process, and so justifies habeas corpus relief under *Darden v. Wainwright*, 477 U.S. 168 (1986).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

Other than the summary Order of the Michigan Supreme Court of September 30, 2013 denying petitioner's Application for Leave to Appeal, which is published as *People v. Bacall*, 495 Mich. 864 (2013), the opinions of the courts below are unpublished, and have not been designated for publication.

BASIS OF JURISDICTION IN THIS COURT

The decision of the Sixth Circuit Court of Appeals was entered on November 29, 2017. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had subject matter jurisdiction over the proceedings under 28 U.S.C. § 2254. A Timely Notice of Appeal from its denial of the Petition for Writ of Habeas Corpus was filed, and the Court of Appeals was thereby vested with appellate jurisdiction under the provisions of 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

It was undisputed that Petitioner-Appellant Hayes Bacall shot and killed his nephew, Saif Jameel on July 2, 2010, in the office of Mr. Jameel's gas station, where the petitioner had gone to secure the partial payment

of a debt. As the majority opinion for the Sixth Circuit Court of Appeals summarized the facts:

> Bacall treated his nephew, Saif Jameel, like his own son. He loved Jameel so much that he loaned him $400,000 after taking out multiple equity loans against his residence and business. These loans were secured by nothing except for Bacall's trust and sense of family obligation. Unfortunately for both Bacall and Jameel, this feeling was not mutual.

A

> Initially, Jameel paid the monthly interest the banks were charging Bacall on the home equity loans. Jameel paid nothing on the principal, and in time, stopped making the interest payments too. Eventually, Bacall discovered that Jameel's creditors had multiplied, and that he owed close to $1 million to various individuals. Bacall repeatedly pleaded with Jameel to start making payments, out of respect for his promise and the impact the debt was having on Bacall's family. Jameel essentially told his uncle that he would be lucky to get anything.
>
> Welching on his debts was not Jameel's only flaw. Jameel was known to draw his concealed firearms on anyone who made him too angry. Bacall testified that Jameel once used a shotgun to chase off a group of people who tried to cash a check that did not belong to them. He also once stuck his pistol in the face of a valet who told him he couldn't park in the

drive-in loop of a funeral venue, saying, "[D]o you know who you're talking to[?]" The valet fled in terror.

After frequent cajoling, Jameel wrote his uncle a $2,000 check. However, in what must have been a cruel joke, the check was post-dated by about thirty days. Bacall, angry, took the pistol he used for protection in his cash-checking business and went to visit Jameel at his BP gas station in Troy, Michigan. On his way to the station, he called Jameel about ten times. Jameel did not answer.

When Bacall arrived, there were two people at the gas station. One of them (Slieman Bashi) was a longtime friend of both Bacall and Jameel. Another witness (Danielle Iverson) watched Bacall go into the back office where Jameel worked. Eventually, both witnesses heard gunshots. Bacall exited the office, shook Bashi's hand, went outside, and called 911. When the officer arrived, he observed that Bacall "had an eerie calmness to him." He asked Bacall what had happened, and Bacall said, "I shot my nephew, he owes me $400,000." The officer arrested Bacall, secured the empty gun, and placed him in the police cruiser.

Bacall's English was not the best, and the officer struggled to discern whether Bacall understood his *Miranda* rights. At one point, the officer asked, "Okay you know your rights, right?" Bacall responded with a blunt, "Yes I'm right." After the officer tried to clarify what

he meant by saying, "Constitutional rights?", Bacall again responded by saying, "Yes everything's right." Bacall later testified that "[t]here are a lot of phrases that, you know, I don't understand," and that he had completely misunderstood what the officer was asking. After doing his best to Mirandize Bacall, the officer drove him to the police station. During the drive, Bacall received a phone call from Jameel's brother (Samir). The entire conversation was not translated to English, but from the parts that were, it is clear that Bacall confessed to killing Jameel and (at one point) insulted Samir and Jameel's sister.

B

The State of Michigan charged Bacall with first-degree, premeditated murder. While he was in jail awaiting trial, Bacall made at least seven phone calls where he claimed that he shot Jameel in self-defense. He continued to insist upon this defense at trial, and testified on his own behalf. On direct examination, he said that he was afraid of Jameel because of Jameel's reputation, and that when he arrived at the gas station, Jameel got angry and threatened to "put it in your ass." Bacall testified that this anger, combined with the small size of Jameel's office and the fact that Jameel kept weapons in the room, caused him to feel afraid: "I knew I was going to die. I was, I felt in danger. Because he had pulled a gun on, on tons of people[ ] with no reason. So how about, how about a person whom, whom he owes $400,000 – what do you think he will do to

him[?]" After seeing Jameel reach for his cabinet, Bacall fired.

Although the gas station had video surveillance, there was no camera in Jameel's office. Iverson did not see the shooting, and Bashi gave inconsistent testimony about what happened. Ballistics and forensic evidence were equally inconclusive. Samir – Jameel's brother – testified that Bacall had frequently threatened to kill Jameel for defaulting on his debt by "empty[ing] the gun" into Jameel. But Samir admitted on cross-examination that he never reported any of these threats to the police, and his motive to lie is obvious.

During closing arguments, the prosecutor and the defense attorney focused on Bacall's mental state at the time of the shooting. In rebuttal, the prosecutor told the jury:

> In English, the defendant says he killed his nephew for $400,000. That's the first thing out of his mouth when the officer asked him what happened. . . . Defendant never says self-defense to the police officer and the officer gives him three separate chances. . . . [A]fter the *Miranda* rights, the officer asks him again about shooting a nephew. He says – well, he hasn't given me anything in about a year. He never says self-defense or even anything like self-defense. And on the witness stand, defense counsel asked the defendant – well, why did you tell the officer, you know, you shot him because of

> $400,000 – and the defendant slips up, he says – because that was the main reason at the time. So practice though he may, the truth shines through. *Now, at trial is the first time the defendant says self-defense*.
>
> This was false, and the prosecutor knew it. The record shows that the prosecutor was well-aware of the seven calls from jail where Bacall claimed self-defense. In obedience to the judge's instructions, defense counsel raised his objection to this statement after the jury had retired to deliberate. The trial judge overruled the objection and refused to give a curative instruction or to grant a mistrial.

App. 2-6 (footnote omitted; emphasis in original).

Petitioner was found guilty of one count of First Degree Premeditated Murder, in violation of Michigan Compiled Laws (MCL) 750.316 and Possession of a Firearm During the Commission of a Felony, in violation of MCL 750.227b, and sentenced, on September 29, 2011, to consecutive terms of life in prison and two years, respectively.

He appealed his convictions as of right to the Michigan Court of Appeals, which affirmed them in an unpublished opinion filed March 5, 2013, under Docket No. 30629. His timely filed Application for Leave to Appeal therefrom was denied by the Michigan Supreme Court on September 30, 2013, under Docket No. 147010.

On September 4, 2014, he timely filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Michigan, which was denied by an Opinion and Order filed on November 4, 2016.

On appeal, a panel of the Sixth Circuit Court of Appeals affirmed in an opinion written by Senior Circuit Judge David W. McKeague; Senior Circuit Judge Martha Craig Daughtrey filed a concurring opinion.

The majority, while noting that "[i]f this were direct review, we might find that a new trial was necessary," held that habeas relief was not appropriate under this Court's decisions: "We do not mean to suggest that the prosecutor's misstatements were inconsequential or appropriate – they weren't. But we cannot say that they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Darden*, 477 U.S. at 181." App. 17. The majority opinion concluded as follows:

> The trial court ordered Bacall's attorney not to object during the argument and to raise his objections afterward in a motion for a mistrial (which he did). In this motion, Bacall asked the trial court to give a curative instruction regarding the prosecutor's misstatements, but the court refused. Since the problematic statements were made in the prosecutor's rebuttal, the defense had no opportunity to correct them before the jury. The misstatements therefore went into the jury room, unconfronted and uncorrected.

> Disturbing as the situation is, we cannot grant habeas relief on this basis. None of the Court's precedent addresses this precise issue, or even the broader issue of when an unresponded-to statement can unconstitutionally nudge the jury toward conviction in a close case. And as the Court has made abundantly clear, we may not extend or interpret its precedents to award habeas relief, even when we might do so on direct review. We cannot say that the Court's precedent unambiguously forbids a conviction under these circumstances. The Michigan Court of Appeals therefore did not unreasonably affirm Bacall's conviction.
>
> **IV**
>
> The AEDPA standard of review can appear harsh in some cases, including this one. But we cannot rewrite the rules Congress and the Supreme Court have prescribed for us, and those rules dictate the outcome today.

App. 17-18.

The concurring opinion agreed, but further lamented what Judge Daughtrey characterized as the "perversion of habeas corpus principles:"

> I concur in Judge McKeague's well-crafted opinion that – in light of the present state of the law – affirms the district court's denial of Hayes Bacall's application for a writ of habeas corpus. I write separately, however, to emphasize the perversion of habeas corpus principles that has resulted from the

enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Supreme Court interpretations of that statutory scheme.

The extent to which the once-Great Writ has been subverted is underscored by Judge McKeague's recognition that the prosecutor in Bacall's state court trial knowingly and intentionally lied during closing argument in a case with questionable evidence of guilt and in which "the jury struggled deeply with the first-degree murder count." Nor was the prosecution's unethical act of minimal import. Indeed, as Judge McKeague noted, "If this were direct review, we might find that a new trial was necessary."

That we would order a cure for a constitutional violation on direct review but sit powerless to offer relief to Bacall in this collateral proceeding demonstrates just how far Congress and the judiciary have gone since 1996 to eviscerate protections once deemed by the drafters of the Constitution to be essential to "the growth of fundamental rights of personal liberty." *Fay v. Noia*, 372 U.S. 391, 401 (1963). Our Supreme Court once proclaimed that "the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired," *Bowen v. Johnston*, 306 U.S. 19, 26 (1939), and that a state court "cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness,

> may have misconceived a federal constitutional right." *Brown v. Allen*, 344 U.S. 443, 508 (1953) (opinion of Frankfurter, J.). Yet today, even in light of a clear federal constitutional violation that might well have condemned the petitioner to life in prison, we are forced to allow the egregious error by the prosecution to go unpunished.
>
> In *Fay*, Justice Brennan proclaimed that "government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay*, 372 U.S. at 402. Sadly, after the enactment of AEDPA and the Supreme Court's interpretation of that statute, Justice Brennan's words no longer ring true. Rather than sit silently in complicity with the congressional and judicial renunciation of the ideals upon which this country was founded, I concur in today's decision only because of our duty to rule in accordance with the Supreme Court's interpretation of the law of the land.

App. 18-20.



REASONS FOR GRANTING THE WRIT

A. The Court should grant certiorari to clarify the limitations on the grant of federal habeas corpus relief to state prisoners.

As the concurring opinion below noted, the Court has held that the "protections" offered by the writ of habeas corpus were "deemed by the drafters of the Constitution to be essential to 'the growth of fundamental rights of personal liberty.'" *Fay v. Noia*, 372 U.S. 391, 401 (1963). App. 19. Of course, the Court has also recognized that "[c]onsiderations of federalism and comity counsel respect for the ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants," *Cabana v. Bullock*, 474 U.S. 376, 391 (1986), and the scope of review available to habeas corpus petitioners has always been limited by the impact of such considerations.

At the same time, however, the Court has traditionally recognized the importance of the Great Writ as a check against injustice, as illustrated by *Harris v. Nelson*, 394 U.S. 286, 292 (1969):

> There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.

Unquestionably, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), was intended to narrow the scope of habeas corpus review, and has done so – and the opinions of this Court have adopted increasingly restrictive language defining the substantive and procedural bars to habeas relief. *See, e.g.*, *Harrington v. Richter*, 506 U.S. 86, 102 (2011) (AEDPA limits "authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents.").

The question presented by the case at bar is whether the AEDPA, and this Court's decisions under it, should be read as broadly as the Sixth Circuit did – at the cost, in Judge Daughtrey's words, of "eviscerat[ing]" the protections of the "once-Great Writ." App. 19. In petitioner's view, this need not be so, and the Court should act to clarify that fact – since only this Court can effectively stem the receding constitutional tide that will result from the overly restrictive applications of the already-restrictive provisions of the AEDPA and its decisions under it.

It would take no great leap to do so in this case since, at least by negative example, *Darden v. Wainwright*, 477 U.S. 168 (1986), which both the district and circuit courts identified as representing the "governing," "clearly established" decisional law, App. 11, 40, unequivocally establishes petitioner's right to habeas corpus relief – when the holding of that case is properly understood.

B. The Court should hold that a prosecutor's knowingly false assertion of fact that strikes at the heart of the defense in a closely-contested case, and to which the defense had no opportunity to respond, denies due process, and justifies habeas corpus relief under *Darden v. Wainwright*, 477 U.S. 168 (1986).

Under *Darden*, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process,'" *id.*, at 180 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)) – that is to say, "that fundamental fairness essential to the very concept of justice." *Donnelly v. Christoforo*, *supra*, at 642 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941). In holding that the conduct of the state prosecutor in *Darden* did not cross that line, the *Darden* majority pointed to a number of factors which mitigated the damage to the petitioner's fair trial rights by the admittedly improper comments. It is to be noted that *not a single one* of those mitigating factors is present in the case at bar. Thus, *none* of the following observations of the *Darden* opinion – as a result of which the Court there upheld the denial of habeas corpus relief – can be said of petitioner's case:

> **(1) "The prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent."** *Id.*, at 181-182.

Here, however, the prosecutor made an assertion of fact which "was false, and the prosecutor knew it." App. 6. That knowing falsehood – that "at trial is the first time the defendant says self-defense" – went to the very heart of petitioner's defense, and also directly implicated his Fifth Amendment right to remain silent.[1]

(2) "Much of the objectionable content was invited by or was responsive to the opening summation of the defense." *Id.*, at 182.

Here, however, defense counsel did absolutely *nothing* to provoke the improper misrepresentation, and no notion of "invited error" can possibly be held to excuse it.

(3) "The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence." *Ibid.*

Here, the record reflects a single instance in which the state trial judge gave a cursory form instruction to the effect that "[t]he lawyers' statements and arguments are not evidence," but "are only meant to help you understand the evidence and each side's legal

[1] Moreover, as the Sixth Circuit majority opinion recognized, the prosecutor's false statement did not stand alone: "In addition to the 'first time' remark, the prosecutor also referred to Bacall as a 'loan shark' and mentioned inadmissible evidence that Bacall had lied on his concealed-carry-permit application." App. 7.

theories." R. E. 6-13, Transcript, Pg ID # 1905. However, the trial judge's instructions did not specifically address the prosecutor's argument. As such, the instructions not only did not highlight the impropriety of the prosecution's argument, or attempt in any way to correct its factual inaccuracy, and, perhaps more importantly, did nothing to neutralize its potential to suggest that the jury decide the case on an improper basis.

(4) "The weight of the evidence against petitioner was heavy; the overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges, reduced the likelihood that the jury's decision was influenced by argument." *Ibid.* (citation and internal quotation omitted).

In contrast, as the majority opinion below explained, "the evidence presented here was far more equivocal than the evidence in *Darden*. It is clear that the jury struggled deeply with the first-degree murder count. This struggle was understandable, considering that the only eyewitness to the killing contradicted himself, that Bacall had difficulty comprehending police questions about his motives, that the video recordings were inconclusive, and that Bacall had a good reason to be afraid of the victim." App. 13.

(5) "Defense counsel were able to use the opportunity for rebuttal very effectively, turning much of the prosecutors'

closing argument against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against petitioner." *Ibid.*

Here, the prosecutor's knowingly false statement was made in his rebuttal argument, immediately before the trial judge instructed the jury, so defense counsel had no opportunity to respond. As the Sixth Circuit majority noted: "[s]ince the problematic statements were made in the prosecutor's rebuttal, the defense had no opportunity to correct them before the jury. The misstatements therefore went into the jury room, unconfronted and uncorrected." App. 17. And, of course, even if he had, there was no way *to* respond to the falsity without – equally improperly – resorting to evidence which was not before the jury.

(6) Defense counsel "made the tactical decision not to object to the improper comments." *Id.*, at 183, n. 14.

In the case at bar, as the Sixth Circuit majority opinion noted, "[i]n obedience to the judge's instructions, defense counsel raised his objection to this statement after the jury had retired to deliberate. The trial judge overruled the objection and refused to give a curative instruction or to grant a mistrial." App. 6.

If *Darden* may be read for the proposition that it was these six factors which separated the kind of

argumentative misconduct which "so infected the trial with unfairness as to make the resulting conviction a denial of due process" from that which does not, it is hard to see why, in petitioner's case, where the prosecutor's overreaching was willful and deliberate, and struck directly at the heart of the defense, and *none* of the mitigating elements can be found, *any* fairminded application of *Darden* would not command habeas relief. Indeed, one might ask, if this example of argumentative misconduct, under these circumstances, do not justify habeas corpus relief, what would?

The Sixth Circuit majority opinion noted how, "in some sense, this case is worse than *Darden*":

> The prosecutor's false statement that "at trial is the first time the defendant says self-defense" went to the heart of the case. It was a direct, factual claim that the defendant had fabricated his defense at the last minute. The law recognizes the strong probative force of this sort of an accusation. *See* Fed. R. Evid. 801(d)(1)(B) (exempting from the hearsay rule statements "consistent with the declarant's testimony . . . offered to rebut an express or implied charge that the declarant recently fabricated [that testimony]. . . .").

App. 14 (citation omitted). However, the majority apparently felt constrained by the fact that "the Court did not grant relief in *Darden*," nor have any of the court's "post-*Darden* cases." *Ibid.*

The panel's unwillingness to grant relief here appeared to grow from two sources – this Court's reading

of the "unreasonable application" formulation of 28 U.S.C. § 2254(d)(1) to require that "no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents," and, perhaps more directly, from its view of the stringency of the standard for determining what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States" under that section – "the holdings, as opposed to the dicta, of this Court's decisions." *Howes v. Fields*, 565 U.S. 499, 505 (2012) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).[2]

These formulations are, to be sure, well-established features of post-AEDPA habeas corpus jurisprudence, but the decision of the Sixth Circuit – and especially the plaints of the concurring opinion – illustrate the way in which an overly wooden interpretation of them has unfortunately eroded the work of courts administering the Great Writ, and bespeaks the need for further guidance from this Court in how to fairly and evenhandedly apply them, while respecting both the

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[2] This, it would seem, is the thrust of the concluding paragraphs of the Sixth Circuit majority opinion, which includes the following:

> None of the Court's precedent addresses this precise issue, or even the broader issue of when an unresponded-to statement can unconstitutionally nudge the jury toward conviction in a close case. And as the Court has made abundantly clear, we may not extend or interpret its precedents to award habeas relief, even when we might do so on direct review.

App. 18.

historical and real-world need for habeas corpus protections and the historically understood, legitimate, and legislatively mandated, restrictions.

What the Sixth Circuit overlooked, and what the Court should make clear, is that "the holdings, as opposed to the dicta, of this Court's decisions," includes the decisional matrix – both negative and positive – of those decisions. Where particular facts clearly drive the Court's decision, it should not matter whether that decision is to grant or withhold relief. Thus, since *Darden* made clear, as explained above, that the Court's decision to withhold relief hinged on the *presence* of certain mitigating factors, it should be read as also holding that their *absence* justifies the granting of relief – and the failure to recognize can be nothing less than an "unreasonable application" of that decision.

This approach breaks no new ground, and requires no expansion of the Court's jurisprudential analysis. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). The Sixth Circuit's failure to properly apply *Darden* may well have been based on an overly restrictive view of the Court's post-AEDPA decisions, but whatever its genesis, it bears correcting.

CONCLUSION

The Court should grant *certiorari*, and on plenary consideration should reverse the decisions below and remand for the entry of an order granting petitioner a writ of habeas corpus.

Respectfully submitted,

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