No. CAPITAL CASE

In The

# Supreme Court of the United States

KEVIN KEITH,

*Petitioner*,

v.

STATE OF OHIO,

*Respondent.*

*On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Third District*

## PETITION FOR WRIT OF CERTIORARI

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*CAPITAL CASE*

## QUESTION PRESENTED

When a death-sentenced defendant discovers withheld evidence of his innocence, does a state court act contrary to this Court's decisions when it denies relief by relying on the sufficiency of the evidence presented at trial?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Constitution**



**Statutes**

Blank Page

## PETITION FOR A WRIT OF CERTIORARI

Kevin Keith respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals.

## OPINIONS BELOW

The decision of the Supreme Court of Ohio is reported at 917 N.E.2d 811 and is reproduced in the Appendix at 33a. The opinion of the state court of appeals is reported at 2008 Ohio App. LEXIS 5176 and is reproduced in the Appendix at 1a. The opinion of the trial court is reproduced in the Appendix at 18a.

## JURISDICTION

The Supreme Court of Ohio declined jurisdiction on December 2, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Fourteenth Amendment, which provides:

> 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 any person within its jurisdiction the equal protection of the law.

B. Eighth Amendment, which provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## STATEMENT OF THE CASE

Thirteen years after Kevin Keith was convicted and sentenced to death, he discovered that a convicted murderer, Rodney Melton, had told an informant of his own plans to carry out the shootings in this case. Keith also discovered that the prosecution witness who resolved the disputed question of the killer's identity—shifting suspicion from Melton to Keith—does not actually exist. The Ohio courts relied on the sufficiency of the evidence at Keith's trial to deny his request for relief. Keith is scheduled to be executed on September 15, 2010.

### 1. The Crime

The truth of this crime begins with Rodney Melton's plan to punish Rudel Chatman for "snitching" about drug activity. In January 1994, Ohio police were investigating drug trafficking near Crestline, Ohio. Chatman was a police informant who led them to conduct a drug raid on January 21, 1994. Nine people were arrested.

Ten days later, Melton (a convicted murderer), stated his plan to exact revenge on Chatman for his "snitching." Melton told a confidential informant that he "had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week."

Ohio Board of Pharmacy Report, p. 11. And Melton's accomplice in a pharmacy burglary ring would later confirm to police that Melton was paid to kill Chatman.

Two weeks later, on the evening of February 13, 1994, a man with a mask over his mouth and nose (a type of mask that Melton was known to wear) entered an apartment where members of Chatman's family had gathered. This gunman then ruthlessly shot all six people inside. Three were killed: Marichell Chatman; her five-year-old daughter, Marchae; and Marichell's aunt, Linda Chatman. The other three victims survived: Richard Warren, Marichell's boyfriend; and Marichell's young cousins, Quanita and Quinton Reeves. Nancy Smathers, who lived nearby, saw a man run to light-colored car, get stuck in a snow bank, and then drive away.

Police arrived at the scene and committed themselves to the belief that Kevin Keith, who was one of the nine people arrested in the original drug raid, was the shooter. One of the officers specifically brought up Keith's name.

Melton also showed up at the scene after police arrived, and he made sure to tell the officers that his car—a car that matched the physical description given by witness Nancy Smathers—was broken down that night. Oddly, Melton also knew what type of bullets were involved in the killings.

Despite the officers' interest in Keith, the surviving adult, Richard Warren, told no less than four different witnesses—including a police officer—that he did not know who shot him.

The next day, however, the police provided Warren with a name array of four "Kevins." Not surprisingly, Warren chose one of the "Kevins" from the list (Kevin Keith). And despite Warren's statements at the scene that he couldn't see the shooter's face because his face was masked, the police presented Warren with a photo lineup. Picture number five, Keith's photograph, was a much closer-up image than the rest of the images. Warren picked Keith's face out of this lineup. Keith was then arrested.

Suggestions that police had the wrong man continued. Three days after Keith's arrest, seven-year-old Quanita Reeves told the police that she was shot by her "daddy's friend, Bruce." She also excluded the picture of Kevin Keith as the culprit. But young Quanita easily could have mixed up "Bruce" with his brother, Rodney Melton, who was also her "daddy's friend."

Yet the police and prosecution remained focused on Keith, and they put him on trial for the shootings. They kept the jury in the dark about the most damning evidence pointing to Melton.

**2. Keith's Trial**

Trial turned on one question: Who did it? The prosecution had to overcome some big obstacles to prove it was Keith. The gunman's face was covered, and the surviving witnesses could not identify him at the scene. Indeed, as noted, Quanita specifically excluded Keith as a suspect. Moreover, some facts that the jury heard pointed to Melton. But the prosecution would overcome these weaknesses in disturbing ways.

The jury never knew the following: that Rodney Melton told an informant just two weeks before the murders "that he had been paid $15,000 to cripple 'the man' [Chatman] who was responsible for the raids in Crestline, Ohio last week"; that Melton's accomplice in the burglary ring told police that Melton was paid to kill Chatman; nor that Melton was known to mask his face just as the shooter did. This information was withheld by the State.

With what information the defense knew at the time, there were reasons for the jury to at least consider Melton as the killer. For example, defense counsel had been contacted by one of Melton's relatives, who told him that Melton was "in on the killings." Also, a police officer testified that Melton showed up at the crime scene and knew the type of bullets involved in the killings. The jury also learned that Melton made efforts to tell the police that his car was broken down that night. And the jury heard about Quanita's statement that she was shot by her "daddy's friend, Bruce."

The jury further learned that Melton went to the hospital where Chatman was waiting to hear the status of his surviving relatives, and Melton told Chatman that the murders happened because of his snitching. Thus, the jury had some reason to believe that Melton, not Keith, shot Chatman's relatives, even though more-compelling evidence of Melton's guilt was kept from the jury.

Moreover, the prosecution's efforts to pin the murder on Keith faced a severe weakness: the police efforts to have Keith pointed out in the "all-Kevin"

name array and suggestive photo lineup would do little to credibly shift suspicion from Melton.

Keith moved the trial court to suppress the identification, due to the improper suggestion tactics used by the police to obtain it. But when the trial court denied Keith's motion to suppress, Keith called the police captain in his case-in-chief to let the jurors see for themselves what led to Warren identifying Keith.

One witness would ultimately shore up these obvious problems in the prosecution's case, changing the jury's focus from Melton to Keith. That witness was Nurse Amy Gimmets: the unbiased observer who tended to Richard Warren as he fought for his life at the hospital. According to the prosecution, Nurse Gimmets called the police on Warren's behalf and told the police captain about Warren's recollection of the name "Kevin."

The prosecution used this statement to rebut the assertion that the police improperly provided Warren with the name "Kevin." The police captain explained to the jury that it was only in response to Nurse Gimmets' crucial information that the police provided Warren the "all-Kevin" name array. Thus, with the nurse's unbiased account, the jury was able to resolve whatever doubts it harbored about the identity of the shooter. It must have been Keith.

Because Keith did not possess the damaging statements of Melton's guilt, the prosecution was able to characterize Melton's threats to Chatman as a friendly warning:

Q: (by Prosecutor) Isn't it true you warned Rudel to watch his back prior to these killings?

A: (by Rodney Melton) Yeah.

Q: You were concerned about his suspicious activity as an informant?

A: Yes, sir.

Q: Did you warn him that you were going to do him harm?

A: No, sir.

Tr. pg. 763.

The jury then convicted Keith and sentenced him to death for these horrific crimes. The jury never knew that Nurse Amy Gimmets didn't even exist. It never knew that the real nurse would have testified that Keith was not named as the shooter. It never knew that Melton was paid to kill Chatman. And it never knew that Melton was known to mask his face just as the shooter did. These facts—known to the prosecution and discussed in more detail below—were discovered years later.

### 3. Counsel Learns of Withheld Exculpatory Evidence.

Thirteen years after Keith's conviction, Keith's attorneys discovered that no person by the name "Amy Gimmets" has ever been employed by the hospital that treated Warren. In fact, Warren's actual attending nurse—Nurse Amy Whisman, who is listed as the

attending nurse on Warren's medical records *and in the testifying officer's police report*—disproves the claim by police that Warren independently supplied the name "Kevin." Nurse Whisman (now Petryk) swore in her affidavit: "I did not ask Richard Warren for the name of the person who shot him, and Richard Warren never told me the name." Petryk Affidavit. Nurse Whisman stated that she called the police to let them know that the victim had awoken but she did not give the police a name for the shooter. *Id.*

Keith's attorneys also discovered what the police already knew: Rodney Melton—the convicted murderer—likely committed this crime. Counsel obtained this information from the files of the Ohio Pharmacy Board, which was investigating Melton in an elaborate ring of burglaries at the time of the shootings. It was in those documents that counsel discovered the following facts that were never disclosed to Keith's jury:

- Two weeks before the shootings, Melton told a confidential informant "that he had been paid $15,000 to cripple 'the man' who was responsible for the raids in Crestline, Ohio last week."

- It was Melton's habit to wear the type of mask that covered his mouth and nose (in order to hide the distinguishing gap between his teeth), just as the shooter did.

- After Keith was arrested for the murders, Melton's accomplice in the pharmacy burglary ring told the police that Melton was paid to kill Chatman.

### 4. Ohio Courts Deny Relief, Relying on The Sufficiency of Evidence Presented at Trial.

On August 1, 2007, Keith filed a motion in the Ohio trial court for a new trial based on this withheld evidence, under Ohio Criminal Rule 33(A)(6). Keith's motion included two distinct federal claims: (1) the withheld evidence about Melton violated *Brady v. Maryland*, 373 U.S. 83 (1963), and (2) the false testimony about Nurse Gimmets violated *Napue v. Illinois,* 360 U.S. 264 (1959). On July 2, 2008, the trial court denied Keith's request.

On December 1, 2008, the state court of appeals affirmed, concluding that Keith was at fault for not having discovered and raised the evidence earlier. It also recited the *Brady* standard for assessing materiality of withheld evidence, but then concluded that relief was unwarranted because of the sufficiency of evidence presented at Keith's trial. The Ohio Supreme Court denied jurisdiction on December 2, 2009, because Keith's case did not involve a "substantial constitutional question."

## REASONS FOR GRANTING THE WRIT

This Court has repeatedly admonished that it is improper to rely on the sufficiency of evidence at trial when assessing whether evidence discovered after the trial requires reversal. Rather, a reviewing court must assess whether the new evidence is material. For *Brady* claims (newly discovered evidence withheld by the prosecution), the court must reverse when there is a "reasonable probability that the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). For *Napue* claims (where the withheld *Brady* evidence is false testimony), the required showing of materiality is even lower: a reviewing court must assess whether there is "any reasonable likelihood" that the false testimony affected the verdict. *Giglio v. United States*, 405 U.S. 150, 154 (1972). As this Court explained in *Kyles*, "none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone." *Kyles*, 514 U.S. at 435, fn. 8.

But when rejecting Keith's claims regarding withheld *Brady* evidence (e.g., that Melton was paid to kill Chatman) and known false testimony (i.e., that Nurse Gimmets is a real person), the Ohio Court of Appeals relied on the prohibited sufficiency analysis: "[A] jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Ohio v. Keith*, 2008 Ohio 6187, ¶34 (Ohio Ct. App., Crawford County Dec. 1, 2008); Pet. App. 16a.

This Court's "principal responsibility" and "primary basis" for reviewing state-court decisions "is to ensure

the integrity and uniformity of federal law." *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring). The Ohio courts' disregard of federal law here not only violates this uniformity but is setting up the execution of a likely-innocent man.

## I. The Ohio Court's Sufficiency Analysis Conflicts with *Kyles v. Whitley* and *Giglio v. United States*.

### A. The Sufficiency Analysis for the *Brady* Claims Conflicts with *Kyles v. Whitley*.

In *Kyles*, this Court held that the test for materiality under *Brady v. Maryland* "is not a sufficiency of evidence test." *Kyles*, 514 U.S. at 434. Rather, the question is whether there is a reasonable probability that the withheld evidence would have led to a different result at trial. *Id.*

This Court faced that issue directly in *Strickler v. Greene*, 527 U.S. 263 (1999), where the lower court used a sufficiency-of-the-evidence standard. The court below recited the proper materiality test, but relied on the following reasoning to reject a *Brady* claim: "[T]he record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty." *Id.* at 290. This Court held that it was improper to use this sufficiency standard. *Id.* at 291.

The Ohio Court of Appeals employed the same faulty analysis here. When reviewing Keith's *Brady* claim, the court recited the proper standard, but also relied on the conclusion that that the new evidence

was not material because "a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." *Keith*, 2008 Ohio 6187, ¶34; Pet. App. 16a.

The proper materiality analysis under *Kyles* would reveal that a new trial is required. As noted, the jury had some reasons to consider Melton as the killer, including his odd behavior at the crime scene and Quanita's identification of "Bruce," Melton's brother. But nothing at trial definitively suggested that he was the culprit. The new evidence contained in the Pharmacy Board reports would have done just that. Melton's statements that he was paid to kill Chatman would, in themselves, have changed the trial. And had the jury known that he masked his face in the same way as the shooter, the jury would have been able to put two and two together.

This evidence would have taken on particular meaning because Keith had an alibi supported by the trial testimony of two witnesses. Further, there was no forensic evidence conclusively linking Keith to the killings. And as the State's experts admitted at trial, because of the small area in which the victims were shot, the shooter likely would have had blood spatter on him. The experts testified that none of the forensic evidence collected linked Keith—or anything in his home—to the crime.

The withheld evidence about Melton creates a "reasonable probability" that the trial would have come out differently under *Kyles*. Had the Ohio court not tainted its analysis by looking to the sufficiency of the evidence at trial, it would have reached this

conclusion. Regardless, as discussed below, there can be no doubt that the outcome would have been different had the jury known that a key prosecution witness—Nurse Amy Gimmets—never existed.

### B. The Sufficiency Analysis For the False-Testimony Claim Conflicts with *Giglio v. United States*.

The knowing use of perjured testimony is a *Brady* problem that is in a category of its own. "When the Court has been faced with a claim by a defendant concerning prosecutorial use of such evidence, it has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Nix v. Whiteside*, 475 U.S. 157, 185 (1986) (internal quotation marks omitted). This Court has established that a new trial is required if "the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. The required showing of materiality is lower than a typical *Brady* claim because "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair." *United States v. Agurs*, 427 U.S. 97, 103 (1976).

Keith explicitly raised this claim in the Ohio courts. The Ohio Court of Appeals acknowledged as much: "Keith argue[d] that Captain Stanley must have lied when he testified that Gimmets told him that the victim stated 'Kevin' was the assailant." *Keith*, 2008 Ohio 6187, ¶30; Pet. App. 15a. It further accepted Keith's facts showing that the testimony regarding Nurse Gimmets was false: "[T]he fact that no 'Amy

Gimmets' worked at the hospital could have been discovered during that time." *Id.* The court then acknowledged that the actual nurse would have contradicted Stanley's testimony about their conversation, as it stated that "the nurse's identity could have been discovered during the course of the trial and used as impeachment." *Id.*

Yet the Ohio court improperly lumped this *Napue* false-testimony claim together with Keith's *Brady* claim. By doing so, the Ohio court relied on the same forbidden sufficiency analysis to dispose of this claim as well.

Relying on the sufficiency analysis is even worse in this context of false testimony, where the materiality standard is lower. And in Keith's case, it is a matter of life and death: Nurse "Amy Gimmets" shored up a fragile prosecution case that would have otherwise left the jury (properly) focused on Melton as the murderer. As the unbiased observer in this case, she relayed, through police testimony, the answer to the question at the heart of the case: The shooter must have been Keith. But the jury never knew that she didn't exist, and they certainly didn't know that the real nurse would have testified that Keith was never named as the shooter. The Ohio court should have simply asked whether this false testimony "could in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154. Had this proper question been asked, the obvious answer would have stood out: Of course it affected the jury—it changed the entire case.

## II. No State Grounds Bar These Claims.

Before reaching the merits, the state court of appeals erroneously concluded that Keith's *Brady* and *Napue* claims were procedurally barred. The court stated that Keith should have discovered and raised these claims earlier. Pet. App. 14a-15a. That conclusion ignores this Court's jurisprudence.

It is not Keith's responsibility to seek out and present the evidence that the State suppressed from him. "A rule . . . declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Keith discovered the *Brady* evidence in the notes of the investigators who had been building a case against the Meltons for their pharmacy burglary ring. Before the Meltons' convictions were final, Keith could not have obtained the notes of the investigators. *See Ohio ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 94 (Ohio 1994) ("[I]nformation assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in O.R.C. § 149.43(A)(2)(c), excepted from required release as said information is compiled in anticipation of litigation."). Moreover, Keith's counsel certainly had no access to the confidential informants who collected evidence against the Meltons, as their identities had not even been disclosed yet.

Additionally, defense counsel properly assumed that knowingly false testimony was not being presented in reference to the non-existent Nurse Amy Gimmets: "[I]t was appropriate for [Keith] to assume

that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." *Banks*, 540 U.S. at 694. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997).

In sum, there is no adequate state ground to bar Keith's federal claims under *Brady* and *Napue*. The question for this Court is whether the Ohio courts rejected those claims in a way that contradicts federal law.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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