

**CAPITAL CASE
QUESTIONS PRESENTED**

1. Is a federal habeas claim “procedurally defaulted” because it has been presented twice to the state courts?

2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

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OPINION BELOW

The opinion of the court of appeals that is the subject of this petition is published at 492 F.3d 743. (App. 6a) The memorandum opinion of the district court relevant to Cone's *Brady* claim (App. 86a) is unreported.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on June 19, 2007. (Pet. App. 1) The court denied rehearing on September 26, 2007. By order entered December 11, 2007, Justice Stevens extended the time for filing a petition for writ of certiorari from December 25, 2007, until February 23, 2008. (07A486) Petitioner filed a certiorari petition on February 25, 2008. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, which governs federal habeas corpus remedies for applicants in State custody, provides in pertinent part:

(b)(1) 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 unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State. . . .

STATEMENT OF THE CASE

I. Procedural History

In 1982, a Tennessee jury convicted petitioner, Gary Bradford Cone, of two counts of first-degree murder for the murders of Shipley O. Todd and his wife, Cleopatra Todd, on August 10, 1980, in their home in Memphis, Tennessee. The jury sentenced Cone to death for each of the murders. The Tennessee Supreme Court affirmed the judgment, and this Court denied certiorari. *State v. Cone*, 665 S.W.2d 87 (Tenn.), *cert. denied*, 467 U.S. 1210 (1984).

Cone subsequently filed a petition for post-conviction relief in the Shelby County Criminal Court. The court denied relief following an evidentiary hearing, and the judgment was affirmed by the Tennessee Court of Criminal Appeals on November 4, 1987. The Tennessee Supreme Court denied Cone's application for permission to appeal, and this Court denied certiorari. *Cone v. State*, 747 S.W.2d 353 (Tenn. Crim. App. 1987), *cert. denied*, 488 U.S. 871 (1988). Cone then filed a second post-conviction petition. The Tennessee Court of Criminal Appeals declined to address the merits of any of Cone's claims, affirming the trial court's determination that "all of the issues raised by the appellant's amended second petition were either previously determined or

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waived.” *Cone v. State*, 927 S.W.2d 579, 580 (Tenn. Crim. App.), *cert. denied*, 519 U.S. 934 (1996). The state court concluded that Cone “failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined.” *Cone*, 927 S.W.2d at 582.

On July 1, 1997, Cone filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. On May 15, 1998, the district court entered an order of partial dismissal of Cone’s claims and later dismissed the remainder of his claims on January 29, 1999. In its 1998 order, the district court found, *inter alia*, that numerous claims in the petition, including Cone’s claim of prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), were barred from consideration due to procedural default. (App. 86a) The court further found that the specific items cited in support of petitioner’s *Brady* claim were, in any event, not exculpatory. (App. 118a-119a)

On March 22, 2001, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case to the district court with instructions to issue a writ of habeas corpus vacating Cone’s death sentences due to ineffective assistance of counsel at sentencing. *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). This Court granted Warden Bell’s petition for writ of certiorari and, on May 28, 2002, reversed the decision of the Sixth Circuit and remanded for further

proceedings consistent with its opinion. *Bell v. Cone*, 535 U.S. 685 (2002) (*Cone I*).

On remand, the Sixth Circuit again reversed the district court with instructions to issue a writ of habeas corpus vacating Cone's death sentences, this time finding that the trial court's instructions to Cone's jury on the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague. *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004). Again, this Court reversed and remanded with instructions for "further proceedings consistent with this opinion." *Bell v. Cone*, 543 U.S. 447, 460 (2005) (per curiam) (*Cone II*).

II. Facts Relevant to the Petition

1. The proof at Cone's criminal trial and sentencing is accurately summarized in the Tennessee Supreme Court's decision on direct appeal. *Cone*, 665 S.W.2d at 90-92. The murders of Shipley and Cleopatra Todd were the climax of a series of criminal episodes that began on August 9, 1980, when Cone robbed a jewelry store at gunpoint in Memphis, Tennessee. The jewelry store manager gave a description of the suspect to the police, and an officer in an unmarked police car spotted Cone driving his vehicle a short time after the robbery. Cone apparently became alarmed and accelerated in an attempt to escape. A high-speed chase ensued through mid-town Memphis and into a residential neighborhood, where Cone abandoned his automobile and proceeded on

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me, the of his to ra- ue. his for n." m) foot. As he fled from police, Cone shot one of the police officers who attempted to arrest him, shot a citizen who challenged him, and pulled a gun on a third person and demanded that the latter give Cone his automobile. When the owner of the automobile fled, Cone snapped his pistol several times, but the ammunition in the weapon had been exhausted.

Cone managed to elude police on August 9, but appeared at the door of a home in the same neighborhood early the next morning and asked to use the phone. When the elderly resident, Lucille Tuech, refused him admittance, Cone drew his pistol on her. Later that same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, who lived a short distance from Ms. Tuech. Mr. Todd was 93 years of age; his wife was 79. The bodies of both victims were found mutilated and cruelly beaten three days later after authorities were alerted by anxious relatives. Both of the victims had been beaten repeatedly about the head until they died. Cone's fingerprints and hair samples were found in the Todds' home, which had been ransacked, and he was apparently able to steal enough money from their home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Although he admitted killing the Todds and committing the other crimes charged, Cone claimed that he was insane, or lacked the requisite mental capacity to commit the offenses, due to drug abuse and stress arising out of his previous military service in Vietnam. On direct appeal, the Tennessee Supreme

Court found that the evidence “was overwhelmingly sufficient to sustain [Cone’s] conviction on all charges.” *Cone*, 665 S.W.2d 87 (Tenn. 1984).

Likewise, this Court noted that the State presented “near conclusive proof of guilt on the murder charges as well as extensive evidence demonstrating the cruelty of the killings” of two elderly persons in their home. *Bell v. Cone*, 535 U.S. 685, 699 (2002).

III. The Opinions Below

The district court denied Cone’s petition for writ of habeas corpus, finding in pertinent part that Cone had procedurally defaulted those claims raised for the first time in his second petition for post-conviction relief. As to the *Brady* claim, the district court specifically addressed each item cited by Cone and concluded, alternatively, that they were either procedurally defaulted or meritless. (App. 112a-119a) The Sixth Circuit unanimously agreed, affirming the district court’s denial of habeas corpus relief with respect to Cone’s conviction.

Although it is a close question, we believe that Cone’s claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. And even if that were not so, we are satisfied that the documents Cone complains were withheld are not *Brady* material.

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(App. 56a-57a) Cone did not seek rehearing of the 2001 decision or certiorari review by this Court either as to the default or merits determination.

In 2005, following a second remand by this Court, Cone sought to revive his original *Brady* claim, arguing that *Banks v. Dretke*, 540 U.S. 668 (2004), established the “exceptional circumstances” necessary to avoid application of the law-of-the-case doctrine to preclude reconsideration of the 2001 determination. The Sixth Circuit declined to reconsider, reiterating its earlier determination rejecting Cone’s claims on the merits.

We said this before in *Cone*, 243 F.3d at 968-70, and we now say it again. A review of the allegedly withheld documents shows that this evidence would not have overcome the overwhelming evidence of Cone’s guilt in committing a brutal double murder and the persuasive testimony that Cone was not under the influence of drugs. . . . It would not have been news to the jurors that Cone was a “drug user.” They had already heard substantial direct evidence that he was a drug user, including the opinion of two expert witnesses, the testimony of Cone’s mother, drugs found in Cone’s car, and photographic evidence. Despite this evidence, the jurors concluded that Cone’s prior drug use did not vitiate his specific intent to murder his victims and did not mitigate his culpability sufficient to avoid the death sentence. In short, the allegedly withheld evidence catalogued

by the dissent does not “undermine confidence in the verdict because there is [not] a reasonable probability that there would have been a different result had the evidence been disclosed,” . . . and so we reject Cone’s *Brady* claims.

(App. 25a-26a)

ARGUMENT

CERTIORARI IS NOT WARRANTED BECAUSE THE SIXTH CIRCUIT’S PROCEDURAL DEFAULT ANALYSIS, ON WHICH PETITIONER’S ARGUMENT RESTS, IS NOT DISPOSITIVE OF PETITIONER’S APPEAL.

Petitioner seeks a writ of certiorari from the 2007 decision of the Sixth Circuit declining to revisit its March 2001 determination denying federal habeas corpus relief on his claim that the prosecution withheld exculpatory evidence at his capital murder trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner presents two distinct issues related to the question of procedural default and further contends that the Sixth Circuit “refused to consider” his *Brady* claim on procedural grounds. (Petition, p. 2) However, the 2001 and 2007 opinions of the Sixth Circuit demonstrate that the court of appeals’ decision did not rest solely on procedural grounds. Rather, in *both* instances, the court pointedly rejected Cone’s claim on the merits, concluding that the materials in question were not material for *Brady* purposes and thus

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provided no basis for relief regardless of whether Cone had fairly presented the claim during his state post-conviction proceeding. (App. 17a-26a, 56a-64a) The district court likewise addressed each of the allegedly withheld items and found that, in light of the overwhelming evidence of Cone's guilt, the items were not exculpatory. (App. 118a-199a)

On appeal in 2001, the Sixth Circuit affirmed, concluding, "[W]e believe that Cone's [*Brady*] claims are procedurally defaulted and that he cannot show cause and prejudice to overcome the default. *And even if that were not so, we are satisfied that the documents Cone complains were withheld were not Brady material.*" *Cone v. Bell*, 243 F.3d 961, 968 (6th Cir. 2001) (emphasis added). (App. 57a) In its 2007 decision, the Sixth Circuit rejected Cone's contention that this Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004), established the "exceptional circumstances" necessary to avoid application of the law-of-the-case doctrine to preclude reconsideration of the 2001 determination. The court observed that, contrary to Cone's contention, *Banks* did not find cause and prejudice for the petitioner's state-court default on his *Brady* claim "solely because the prosecution withheld evidence." (App. 20a) Rather, the determinative factor in *Banks* was continued "prosecutorial concealment and misrepresentation." Here, however, Cone cannot show the prosecutorial concealment or misrepresentation contemplated in *Banks*. To the contrary, Cone concedes that he had access to the District Attorney files in question at least as early as 1993 while his

second state post-conviction proceeding was pending. Moreover, the court reiterated that the claims lacked merit notwithstanding any questions concerning the default issue. (App. 24a-26a)

The Sixth Circuit has firmly established that the law-of-the-case doctrine precludes a court from reconsideration of issues “decided at an early stage of the litigation” unless there exists one of three “exceptional circumstances,” including a subsequent contrary view of the law as decided by a controlling authority. *Westside Mothers v. Olszewski*, 454 F.3d 532, 537 (6th Cir. 2006) (quoting *Hanover Ins. Co. v. American Engineering Co.*, 105 F.3d 306, 312 (6th Cir. 1997)). *Banks* worked no change in the law regarding “cause” for procedural default. To the contrary, this Court specifically identified *Strickler v. Greene*, 527 U.S. 263 (1999), as controlling precedent on that question and observed that *Banks* was “congruent with *Strickler*” in all material respects.¹ *Banks*, 540 U.S. at 693. The Sixth Circuit’s application of the law-of-the-case doctrine was appropriate under the circumstances of this case.

Given the Sixth Circuit’s consistent rulings on the merits of Cone’s *Brady* claim, his state-court default, in the final analysis, is beside the point.

¹ The Court further made clear that its decision in *Banks* did not alter the standard of materiality for *Brady* claims, stating that “[o]ur touchstone for materiality is *Kyles v. Whitley* . . . ” *Banks*, 540 U.S. at 698 (citation omitted).

Indeed, the Court's majority opinion in *Brady* presents a mere evidentiary hurdle, not a determination of whether the State's case is meritorious. The Court's majority opinion in *Brady* is a mere evidentiary hurdle, not a determination of whether the State's case is meritorious. The Court's majority opinion in *Brady* is a mere evidentiary hurdle, not a determination of whether the State's case is meritorious.

Indeed, petitioner does not challenge the Sixth Circuit's merits determination in either of the questions presented. Instead, he contends that the Sixth Circuit merely "opined in passing" that the suppressed evidence would not have been material and that the court's "passing and unexamined observations . . . do not diminish the imperative" of reviewing the default determination. (Petition, 26) However, that contention is belied by the Sixth Circuit's 2007 opinion, which specifically refers to the 2001 merits determination as an alternative holding of the court – "*In the alternative, we held . . . 'the documents Cone complains were withheld are not Brady material.'*" (App. 19a) (emphasis added) Contrary to Cone's assertion, the federal courts have not "refused to consider" his *Brady* claims; they have repeatedly found them meritless. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). Because the Sixth Circuit has already rejected Cone's *Brady* claim on the merits in both its 2001 and 2007 opinions, further reconsideration of the procedural default issue would have no impact on the ultimate disposition of the case. Therefore, this case does not present an appropriate vehicle for resolution of the questions petitioner has presented for review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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