No. 07-1114

In The
Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,

v.

RICKY BELL, WARDEN
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Respondent proposes to send petitioner to his death based on legal rulings that are so seriously flawed that the State itself has steadfastly declined to defend them both here and in the lower courts. Those undefended legal rulings, moreover, bear directly on the reliability of petitioner's conviction and death sentence, because the Sixth Circuit has closed the courthouse doors to petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed an array of exculpatory evidence that is directly relevant and material to petitioner's only defense at trial and his only argument in mitigation of the death penalty. The Sixth Circuit's holding that the claim was procedurally defaulted did not (as one might expect) rest on any failure by petitioner to present his *Brady* claim in state court. Quite the opposite and quite incorrectly, the court of appeals instead held that the claim was defaulted precisely *because petitioner had presented the claim twice* to the Tennessee courts. Unsurprisingly, the State makes no effort to defend that ruling, because there is plainly nothing to be said in its defense. It is in the teeth of *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991), and the decisions of five circuits that have faithfully adhered to *Ylst*. See Pet. 13-17.

The State instead urges this Court to leave the gravely flawed and undefended controlling precedent of the Sixth Circuit undisturbed, where it will continue to trap habeas petitioners throughout that circuit with the rule that they are, quite literally, defaulted if they do and defaulted if they don't present their claims in state court. The sole justification of-

fered by the State in this Court – at least the third different reason proffered by the State for depriving petitioner of the single federal court adjudication of his claim to which he is entitled (see, *e.g.*, Pet. 8, 12) – is the court of appeals' dicta suggesting that the *Brady* claim would fail on the merits. BIO 8-11. But that argument is more telling for what it does not say. While hinging its entire argument against certiorari on the court of appeals' passing comments, the State tellingly makes no effort to defend the legal or factual correctness of *even that dictum*.

The State thus asks this Court to make its certiorari decision with blinders on, ignoring rulings that directly defy controlling precedent from this Court and the holdings of five other circuits simply because the court of appeals uttered dicta about the possible merits of a claim – dicta that itself is indefensible both legally and factually, as the petition and both *amicus* briefs explained. But the integrity of this Court's decisions and public confidence in the death penalty are at stake when a State seeks to proceed with the denial of habeas relief and resulting execution that it steadfastly refuses to defend as lawful. In these circumstances, this Court's review is warranted, and certiorari should be granted and the case set for plenary review. In the alternative, the judgment should be summarily reversed as in irreconcilable conflict with this Court's decision in *Ylst*, *supra*, and the case remanded to the district court for consideration of the merits of petitioner's *Brady* claim in the first instance after the development of an appropriate record.

1. a. The State's sole argument against certiorari is that, after adopting its two incorrect and indefensible rules of procedural default and holding that it could not entertain petitioner's *Brady* claim, the Sixth Circuit went on to (in the State's words) "pointedly reject[] Cone's claim on the merits." BIO 8. But the court of appeals "pointedly" did precisely the opposite.

In its 2001 opinion, the Sixth Circuit examined each piece of *Brady* material individually and held that petitioner had "procedurally defaulted all four of his *Brady* claims." Pet. App. 62a. The court stressed that, because the default was not excused by cause and prejudice, it had "*no authority* to consider the claims on the merits." *Id.* 64a (emphasis added). The court reiterated "[i]n conclusion" that petitioner's alleged procedural default "foreclose[d] [it] from reaching the merits of those [*Brady*] claims." *Id.*

As the Sixth Circuit subsequently reiterated, its initial opinion "found that each [*Brady* claim] had been procedurally defaulted," Pet. App. 18a, and on that basis "held that Cone's *Brady* claims were not properly before us," *id.* 19a. When petitioner in 2007 asked the court to depart from the law of the case doctrine to reconsider the issue, the Sixth Circuit refused, explaining that "[w]e . . . will not disturb our decision that Cone's *Brady* claims are procedurally defaulted and not before this court." *Id.* 22a. Indeed, the court reaffirmed its prior holding, concluding that "[w]e *again* find that Cone's claims are procedurally defaulted and we *reject* Cone's request to reconsider his *Brady* claims." *Id.* 24a (emphases added).

It is difficult to imagine how the Sixth Circuit could have been more direct in its refusal to consider the merits of petitioner's federal constitutional claim in light of its (now concededly erroneous) finding of a procedural default.

b. The flaws in the State's argument do not stop there. Like the court of appeals' actual legal holdings, the Sixth Circuit's glancing observation about the merits of petitioner's claim is riddled with errors that cannot be defended. Instead, respondent merely waves that dictum as if it magically insulated the court's legal holdings from this Court's scrutiny. That is wrong for three reasons.[1]

First, even if this Court were to conclude that the court of appeals had reached the *merits* of petitioner's *Brady* claim – notwithstanding the Sixth Circuit's own repeated and pellucid disavowals of doing so and insistence that its holding is limited to the procedurally default ruling – then the merits of that *Brady* ruling would properly be before this Court, not immunized from its review. Indeed, the *Brady* issue is encompassed by the questions presented and would properly be briefed by the parties if certiorari were granted. See Pet. 30-31 n.6. The Court accordingly could properly reach the merits of the *Brady* claim itself or could otherwise dispose of the Sixth Circuit's statements as resting on legal errors.

Second, the State cannot defend the court's dicta because it assessed the *Brady* claim in a legal vac-

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[1] The single footnote in the district court's opinion briefly discussing the merits (Pet. App. 118a n.9) suffers from the same flaws.

uum in that the district court's erroneous procedural default decision prevented petitioner from developing any record in support of the merits of his *Brady* claim. See Pet. App. 41a-42a (noting that petitioner was denied a hearing in state court on his *Brady* claim); C.A. J.A. 849-882 (request for evidentiary hearing). As this Court recently reiterated, federal courts should grant habeas petitioners an evidentiary hearing when "such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007). That rule reflects the fundamental principle that prisoners should receive at least one opportunity to fully and fairly air a potentially valid constitutional claim. See *Townsend v. Sain*, 372 U.S. 293, 313 (1963). For that reason, other courts regularly require an evidentiary hearing when a habeas petitioner alleges facts that give rise to a colorable claim. *Marshall v. Hendricks*, 307 F.3d 36, 117 (3d Cir. 2002) (citing *Newell v. Hanks*, 283 F.3d 827, 838 (7th Cir. 2002); *Greer v. Mitchell*, 264 F.3d 663, 669 (6th Cir. 2001); *United States v. Johnson*, 256 F.3d 895, 898 (9th Cir. 2001) (en banc); *Valverde v. Stinson*, 224 F.3d 129, 135 (2d Cir. 2000)).[2] Indeed, this Court has cited a case requiring an evidentiary hearing to remedy an underdeveloped record as a paradigmatic example of when such a hearing is necessary. *See*

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[2] See, *e.g.*, *Morgan v. Gonzales*, 495 F.3d 1084, 1090 (9th Cir. 2007); see also *Apanovitch v. Houk*, 466 F.3d 460, 478 (6th Cir. 2006); *Graves v. Cockrell*, 351 F.3d 156, 159 (5th Cir. 2003); *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992); *Cornell v. Nix*, 921 F.2d 769, 770-71 (8th Cir. 1990).

Landrigan, 127 S. Ct. at 1940 (citing *Mayes v. Gibson*, 210 F.3d 1284, 1286-87 (10th Cir. 2000)).[3]

There is no argument here – neither the court or appeals nor the State asserts – that petitioner's factual contentions were so "insubstantial" as to render an evidentiary hearing pointless. *Landrigan*, 127 S. Ct. at 1940. Thus, the district court's erroneous failure to develop a record in this case deprived the court of appeals of the factual foundation necessary to properly assess – or even improperly assess in dicta – the materiality of the *Brady* evidence in this case. See, *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 675, 684-86 (2004) (describing the evidentiary hearing granted to the petitioner so that he could develop his *Brady* claim); *Herrera v. Collins*, 506 U.S. 390, 397 (1993) (noting the district court's order of an evidentiary hearing on a *Brady* claim); see also *United States v. Pelullo*, 105 F.3d 117, 123 (3d Cir. 1997) (explaining that an evaluation of *Brady* materiality "requires a[n] . . . in-depth analysis"). And absent full factual development through an evidentiary hearing, the Sixth Circuit's passing remarks on the merits of petitioner's *Brady* claim merit no weight because they lack the careful analysis of materiality conducted by this Court in *Banks*, 540 U.S. at 698-703, and *Kyles v. Whitley*, 514 U.S. 419, 441-54 (1995). The judgment accordingly should be reversed and the case remanded for the development of an appropriate factual record.

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[3] Petitioner is entitled to seek an evidentiary hearing, cf. 28 U.S.C. § 2254(e)(2), because he was "diligent in attempting to develop his claims in state court," *Williams v. Taylor*, 529 U.S. 420, 428 (2000). See Pet. 5-6.

Third, while this Court has repeatedly "stressed" that materiality must be assessed by reference to "suppressed evidence considered collectively, not item by item," *Kyles*, 514 U.S. at 436, the Sixth Circuit's brief discussion of the merits of petitioner's *Brady* claim erroneously considered the *Brady* material piecemeal and shorn of context. In its 2001 opinion, the Sixth Circuit underscored that it would "take up each category of documents *separately* and then discuss whether they are *Brady* material at all." Pet. App. 57a (emphasis added). The court's only specific analysis of materiality referred to a single witness statement in isolation and insisted without elaboration that "[t]he statement . . . does not undermine our confidence in the verdict." *Id.* 59a.

Subsequently, in its 2007 opinion, the Sixth Circuit similarly characterized the evidence as relating to "four *separate Brady* claims because [petitioner] asserts that four groups of documents were withheld from him." Pet. App. 18a (emphasis added). The court then considered and dismissed the materiality of each piece of *Brady* evidence item by item, without ever considering the collective effect of the suppressed evidence. *Id.* 25a-26a; see also Pet. 32. That approach is foreclosed by precedent. *Kyles*, 514 U.S. at 440 (reversing when court "dismiss[ed] *particular* items of evidence as immaterial and so suggest[ed] that cumulative materiality was not the touchstone") (emphasis added). Ultimately, the Sixth Circuit's abbreviated analysis was, at most, "compatible with a series of independent materiality evaluations, rather than the cumulative evaluation" required by the Sixth Amendment. *Id.* at 441. The Sixth Circuit

then compounded its error by wholly ignoring critical pieces of evidence. In particular, the 2001 opinion never discussed the materiality of Sergeant Grieco's description of petitioner "as looking 'frenzied' and 'agitated' a few days after the killings," Pet. App. 57a-58a, even though that evidence directly bolstered petitioner's claim that he committed the crimes while in the throes of an amphetamine psychosis and simultaneously would have undermined the prosecution's insistence that petitioner was not a drug addict and was not under the influence of drugs at the time of the offenses. Nor did the court consider that such observations by a police officer would likely have carried particular credibility and weight with a jury. In combination with the other *Brady* evidence, Sergeant Grieco's statement would have enhanced petitioner's sole defense at trial of mental incapacitation and his plea for leniency at his capital sentencing hearing. But no court – including the Sixth Circuit's passing dicta here – has ever considered the significance of Sergeant Grieco's statement, either on its own or combined with other withheld evidence. Thus, to the extent the court of appeals' dicta has any relevance to its judgment, that judgment should be reversed because the court's passing assessment of the merits of petitioner's *Brady* claim failed to engage in the "collective[]" analysis of the suppressed evidence required by *Kyles*, *supra*.[4]

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[4] The Sixth Circuit's discussion of petitioner's *Brady* claim in its 2007 opinion merits even less weight because the court invoked the law of the case doctrine and thus largely deferred to the exceptionally brief 2001 dicta discussing the *Brady* claim. See BIO 9-10 (noting that the 2007 opinion had concluded that

2. Finally, even putting aside the substantial and undefended errors in the dicta uttered by the court of appeals, the court was wrong to conclude that petitioner's *Brady* claim lacked merit. Petitioner's only defense at trial and his sole argument for mitigation at his capital sentencing proceeding was that he was mentally incapacitated at the time of the offenses because he was in the midst of a drug-induced psychosis. The prosecution repeatedly denied that petitioner was under the influence of drugs at the time of the killings or that he suffered from a drug addiction. See Pet. 28. Simultaneously, however, the State suppressed extensive evidence corroborating petitioner's claim of drug abuse, including eyewitness accounts of petitioner's appearance and behavior at the time of the offenses and impeachment evidence that undermined the credibility of State witnesses who contested petitioner's drug use. *Id.* 28-29; Br. for Former Prosecutors as *Amici Curiae* Supporting Pet'r [hereinafter "Prosecutors' Br."] 8-11 (summarizing withheld evidence). In addition to independently establishing petitioner's defense, a record based on this evidence would also have led a factfinder to rely on a powerful body of evidence regarding post-traumatic

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the law of the case doctrine "preclude[d] reconsideration of the 2001 determination"); see also Pet. App. 11a-12a. The court of appeals' discussion of the merits of the claim in 2007 thus does not necessarily reflect how the court of appeals would have decided the issue – or even uttered dicta – on its own. Of course, law of the case doctrine is no barrier to *this* Court's review of the judgment below. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Further, if this Court vacates the court of appeals' judgment, the law of the case doctrine would not apply to further proceedings on remand. *Johnson v. Bd. of Educ.*, 457 U.S. 52, 52-54 (1982).

stress disorder and conclude that petitioner was so afflicted. *See* Br. for Veterans for America as *Amici Curiae* Supporting Pet'r 5. Considered together, all of this evidence was favorable to petitioner, suppressed by the State, and material to guilt and to punishment. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Indeed, in agreeing with the prosecutor's argument that petitioner was a cool, deliberate killer, the Tennessee Supreme Court deemed petitioner's argument a "tenuous defense, at best," in light of the paucity of evidence presented at trial for petitioner's drug-induced psychosis defense. Pet. App. 35a (quoting *Cone v. Bell*, 665 S.W.2d 87, 90 (Tenn. 1984)). Of course, it is now clear that petitioner's sole defense seemed so tenuous to the jury and to the Tennessee Supreme Court precisely *because* the prosecutor had suppressed first-hand evidence from the mouths of the police themselves which would have corroborated and reinforced the defense. See, *e.g.*, Prosecutors' Br. 12-15.

In addition, in light of the prosecution's extensive (and successful) attempts to portray petitioner as a "calm, cool, professional," C.A. J.A. 152; Pet. 28, the withheld evidence establishing that petitioner was in a drug-induced hysteria is potent *Brady* material. Among the suppressed evidence were witness statements that petitioner "'acted real weird' and appeared to be on drugs," Pet. App. 57a, and that he "'looked wild eyed' the day before the killings," *id.* The prosecution further withheld evidence that *police officers* themselves described petitioner as a "heavy drug user," *id.* 58a, and "as looking 'frenzied' and 'agitated' a few days after the killings," *id.* 57a-58a.

The court of appeals dismissively stated that "[i]t would not have been news to the jurors, that Cone was a 'drug user.'" *Id.* 25a. But that misses the point. Whether or not the jurors knew that petitioner had used drugs in the past, the withheld evidence substantially bolstered petitioner's defense that he was in a drug-induced psychosis *when the killings occurred*, a contention the prosecution had pointedly asked the jury to reject.

In short, were a court to apply the law of procedural default as this Court has prescribed, and were a court to then analyze petitioner's *Brady* claim as this Court has directed after developing the type of record this Court has required, cumulative analysis of all of the evidence suppressed in this case that bears directly on the merits of petitioner's defense and the prosecution's theory of the case would "undermine[] confidence" in petitioner's conviction and death sentence, and requires relief on the merits. *Kyles*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). At bottom, the question before this Court is whether petitioner should be sent to death without any court, state or federal, considering his substantial Brady claim on its merits, just because the court of appeals uttered legally and factually indefensible dicta in the course of issuing two legally indefensible rulings refusing to hear his claim. If, as here, the State cannot stomach defending either the court's holdings or the court's dicta, either plenary review, summary reversal, or vacatur for reconsideration in light of controlling precedent is mandated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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