Nos. 13-3412/13-3492

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENESIS HILL,
Petitioner-Appellee/Cross-Appellant,

v.

BETTY MITCHELL, Warden
Respondent-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION
CASE NO. 1:98-cv-00452

BRIEF OF *AMICI CURIAE* FORMER FEDERAL JUDGES AND PROSECUTORS IN SUPPORT OF PETITIONER-APPELLEE

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of numerous former federal judges and prosecutors who believe that the procedural aspects of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), particularly in the context of *Brady v. Maryland*, 373 U.S. 83 (1963), and death penalty cases, must be interpreted and applied in a way that is fair and reasonable. The parties have consented to the filing of this brief.[2]

Brady recognized that an essential constitutional safeguard in the criminal justice process is the requirement that the prosecution must disclose to a criminal defendant all material, favorable evidence in its possession. *Brady* requires prosecutors to share with the accused important exculpatory evidence, including evidence that could be used to impeach vital prosecution witnesses. As determined by the district court, the prosecution in this case breached the constitutional safeguard established in *Brady* in conjunction with at least two critical pieces of evidence.

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[1] The Appendix includes a list of the *amici* filing this brief. Counsel for a party did not author this brief in whole or in part, and no person or entity has made a monetary contribution to the preparation or submission of the brief.

[2] Pursuant to Federal Rule of Appellate Procedure 29, the parties have consented to the filing of this brief. Charles L. Wille is the supervising attorney in the Capital Crimes Unit of the Ohio Attorney General's Office and counsel of record for the Warden in this appeal. Mr. Wille informed Justin Thompson, lead counsel for Genesis Hill, that his office would not oppose the filing of this brief.

Amici submit this brief to address various arguments in the Warden's brief that suggest incorrectly that AEDPA bars relief in this case. Properly interpreted, AEDPA does not bar granting the Petitioner relief under these circumstances. To the contrary, numerous courts (including this one) have properly concluded that a grant of the writ of habeas corpus is appropriate under the circumstances presented in this case.

Amici assert that the history of *Brady* violations in Hamilton County, coupled with the irrevocable nature of the punishment sought in this case, augment the need for meaningful review of the merits of the Petitioner's claims of constitutional error. The preservation of the integrity of our justice system - particularly when it seeks to take a life - requires no less.

SUMMARY OF ARGUMENT

Brady v. Maryland provides that prosecutors must provide all material, favorable evidence to defendants. Where this mandate is violated, that fact should be paramount in determining how courts apply the procedural requirements of AEDPA. This is especially true where, as here, the prosecuting office has a history of *Brady* violations and the defendant has been sentenced to death. In this case, Hamilton County prosecutors failed to comply with *Brady's* requirements by withholding at least two critical pieces of exculpatory evidence that could have been used at trial to impeach or even implicate the victim's mother, who served as

a key witness for the State. This evidence included an initial police report that demonstrated suspicious behavior by the victim's mother that was part of a "homicide book" maintained by the police department, but not provided to the defense. The evidence also included grand jury testimony that differed from the witness's trial testimony. As these materials were not provided to Mr. Hill, in direct violation of *Brady*, he was not able to use them at trial. Instead, Mr. Hill learned of this evidence during habeas proceedings, well after he was convicted and sentenced to death. The district court granted Mr. Hill a conditional writ of habeas corpus based upon the State's failure to disclose this evidence.

The Warden argues that Mr. Hill procedurally defaulted on his *Brady* claim because he did not present this evidence to Ohio's state courts and that the one-year statute of limitations found in AEDPA bars the claim. The Warden's arguments are contrary to established case law. Courts routinely find the necessary cause and prejudice to excuse the requirement to present evidence in the first instance to state courts when a petitioner is able to show that the State suppressed evidence material to a key witness. And it is undisputed that suppression occurred in this case. Contrary to the Warden's assertions, the Petitioner's diligence in pursuing and presenting his *Brady* claim is not relevant to the cause analysis, as the fact that suppression occurred constitutes cause. Further, AEDPA's one-year statute of limitations does not bar relief in this case. The district court properly

concluded that Mr. Hill included a *Brady* claim in a timely petition. In any event, the AEDPA statute of limitations is not a rigid or inflexible bar, and courts have regularly used their discretion to allow equitable tolling when confronted with habeas petitions involving *Brady* violations.

ARGUMENT

I. In The Context Of *Brady v. Maryland*, The Procedural Aspects Of AEDPA Must Be Interpreted And Applied In A Manner That Is Fair And Reasonable, Particularly In Death Penalty Cases.

The Fourteenth Amendment's Due Process Clause protects the rights of the accused to a fair trial by ensuring that they have access to favorable material evidence in the government's possession. *Brady*, 373 U.S. at 87. The broad scope of the government's duty under *Brady* emphasizes the fundamental importance of this constitutional principle in criminal trials. The constitutional safeguard that the Supreme Court recognized in *Brady* is critical to protect against improper prosecutions and to maintain the integrity of the criminal justice system. According to the Supreme Court, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id*.

The importance of the *Brady* obligation has been repeatedly recognized in decisions making clear the extent of the prosecutor's obligation. For example, the Supreme Court has recognized that *Brady* material is not limited to purely

exculpatory evidence, but also includes favorable evidence the defendant may use for impeaching prosecution witnesses. *United States v. Bagley*, 473 U.S. 667, 676 (1985). And the Court has also held that the prosecution bears the burden of learning of any favorable evidence in the possession of those acting on the government's behalf. *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Similarly, the prosecution must turn over *Brady* evidence even if the defendant does not explicitly request it. *Id*.

Where the prosecution has suppressed exculpatory evidence, that fact should be paramount in determining how the procedural requirements of AEDPA are interpreted and applied. This is especially critical where an individual has been sentenced to death. A death-row inmate convicted at a trial in which the prosecution violated *Brady*'s mandate is unlawfully imprisoned in violation of the United States Constitution. Certainly, where the death penalty is at stake, *Brady* and AEDPA's requirements should be applied fairly and reasonably.

The troubling history of *Brady* violations by the Hamilton County prosecutor's office also warrant special consideration, and is a separate basis for ensuring that AEDPA is applied fairly and reasonably in this case. In its 2007 report on the death penalty in Ohio, the American Bar Association noted that Hamilton County prosecutors had engaged in repeated violations of their *Brady* obligations. Specifically, the report explained that, on at least fifteen different

occasions from 1981 to 2004 (a period encompassing Mr. Hill's trial), the Ohio Supreme Court found that Hamilton County prosecutors had engaged in misconduct. *See Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report, An Analysis of Ohio's Death Penalty Laws, Procedures, and Practices*, ABA (Sept. 2007), at 208, n. 254.

In multiple cases, Hamilton County prosecutors withheld exculpatory evidence in direct violation of *Brady*. In *Jamison v. Collins*, 291 F. 3d 380 (6th Cir. 2002), for example, this Court granted habeas relief where the prosecution withheld eyewitness statements from a "homicide book" that contradicted statements of its key witness and pointed to other possible suspects. The *Jamison* case is particularly noteworthy for two reasons. First, the "homicide book" evidence at issue in *Jamison* is the same source for one of the key pieces of evidence (the suppressed initial police report) that the Hamilton County prosecutor failed to turn over to Mr. Hill's trial counsel in this case. Second, the lower court later dismissed all charges against Mr. Jamison in 2005 when prosecutors declined to retry him.

In multiple other cases, this Court found similar failures to turn over exculpatory evidence by Hamilton County prosecutors, though they were not

always prejudicial to the defendants.[3] For example, last month this Court affirmed lower court decisions vacating two capital convictions based on the failure of Hamilton County prosecutors to turn over *Brady* material from its "homicide book." *See Bies v. Sheldon*, No. 12-3431/3457 (6th Cir. Dec. 22, 2014) (State's failure to disclose evidence violated *Brady*); *Gumm v. Mitchell*, No. 11-3363 (6th Cir. Dec. 22, 2014) (same). In these two related cases, the police used the same "homicide book" process at issue in Mr. Hill's case, whereby the police department maintained a binder of evidence, but only provided to prosecutors the materials it believed would aid in prosecution. As a result, prosecutors failed to disclose exculpatory evidence, as required by *Brady*. The evidence was turned over to the defense for the very first time nearly nine years after the criminal trial, as part of a federal habeas proceeding. The withheld material included tips and leads related to other suspects, witness statements that undermined the state's theory of the case, and impeachment material. Similarly, in *Cook v. Anderson*, the U.S. District Court for the Southern District of Ohio granted the defendant a new evidentiary hearing after it was alleged that Hamilton County prosecutors withheld police reports containing information that might have impeached four of the prosecution's eyewitnesses, and another police report that contradicted trial

[3] *See, e.g., Fautenberry v. Mitchell*, 515 F.3d 614, 632 (6th Cir. 2008); *O'Hara v. Brigano*, 499 F.3d 492, 502-03 (6th Cir. 2007); *Zuern v. Tate*, 336 F.3d 478, 485 (6th Cir. 2003).

testimony regarding the alleged murder weapon. *Cook v. Anderson*, 2007 WL 2838959, at *13 (S.D. Ohio Sept. 26, 2007).

The Ohio Court of Appeals has similarly found multiple instances of misconduct by Hamilton County prosecutors. For example, the court granted a new trial on the basis of a *Brady* violation in *State v. Kalejs*, 782 N.E. 2d 112, 116 (Ohio Ct. App. 2002). The court found that the defendants' due process rights were violated when Hamilton County prosecutors failed to disclose the taped statement of a witness, which directly contradicted the witness' later trial testimony. *Id.*; *see also State v. Mills*, Case No. B8802581 (Hamilton Ct. C.P. Sept. 26, 2007) (granting a new trial after *Brady* violation by Hamilton County prosecutors). The Ohio Court of Appeals for the First District, Hamilton County, has also acknowledged failures to turn over exculpatory evidence in a long litany of other cases. *See, e.g.*, *State v. Gumm*, 864 N.E.2d 133, 142 (Ohio Ct. App. 2006); *State v. Wogenstahl*, 970 N.E.2d 447, 451-52 (Ohio Ct. App. 2004); *State v. Hout*, 2003 Ohio 5088, 2003 Ohio App. LEXIS 4590, at *22-23 (Ohio Ct. App. Sept. 26, 2003); *see also State v. Campa*, 2002 Ohio 1932, 2002 Ohio App. LEXIS 1445 (Ohio Ct. App. March 29, 2002) ("The state concedes on appeal that the [Hamilton County] assistant prosecutor committed error in failing to disclose evidence favorable to" the defendant).

II. Federal Courts Routinely Consider *Brady* Claims That Arise As Part Of Federal Proceedings, Even Where Petitioners Have Not Yet Presented These Claims To A State Court.

While procedural default of a claim "generally preclude[s] any subsequent federal habeas review of that claim," *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010) (citation omitted), showing "cause for the default and actual prejudice" can excuse such default. 39 Am. Jur. 2d Habeas Corpus § 26. Here, the Warden's assertion that the district court erred in excusing Petitioner's procedural default of his *Brady* claim, *see* Resp. Br. at 23, is contrary to case law analyzing cause and prejudice in the *Brady* context. For the default of *Brady* claims, courts regularly find the necessary cause and prejudice satisfied when the petitioner can show that the State suppressed impeachment evidence material to a key witness. *See* cases cited *infra* pp. 11-19. The Warden notably does not dispute that the evidence at issue was suppressed, but rather devotes five pages of her brief to arguing about Petitioner's diligence in pursuing and presenting the *Brady* claim as it relates to the police report. *See* Resp. Br. at 23-28. As discussed below, Petitioner's diligence is not relevant to the cause analysis, and the Warden's argument otherwise conflicts with precedent of the Supreme Court and numerous federal courts analyzing the procedural default of *Brady* claims. *See infra* pp. 11-19. The district court made the correct findings below that the Petitioner had established both cause and prejudice.

A. Suppression Constitutes Cause for the Procedural Default of *Brady* Claims.

"Cause is shown when the factual basis of the claim was reasonably unknown to defendant's counsel," *Jamison*, 291 F.3d at 388 (internal quotation marks omitted), or "interference by state officials . . . prevented a petitioner from raising a claim," *Ward*, 592 F.3d at 1176-77 (internal quotation marks omitted). *See also Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012) ("The cause inquiry ordinarily turns on whether some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule, and is satisfied by a showing that the factual or legal basis for a claim was not reasonably available to counsel.") (internal quotation marks and citation omitted). As the Warden acknowledges, *see* Resp. Br at 23, the cause examination looks at factors "*external* to the defense." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.") (emphasis added).

When courts determine whether cause exists for the procedural default of *Brady* claims, the factor external to the defense is itself an element necessary to establish a *Brady* violation – suppression. *Strickler*, 527 U.S. 263 at 282 ("The suppression of the Stoltzfus documents constitutes one of the causes for the failure

to assert a *Brady* claim in the state courts."). A district court recently quoted *Strickler* and stated the standard as follows:

> To prevail on a *Brady* claim, a petitioner must demonstrate that (1) evidence favorable to the petitioner (2) was suppressed by the government and (3) the petitioner suffered prejudice. The Supreme Court observed in *Strickler* that for a *Brady* claim that is procedurally defaulted, cause and prejudice parallel two of the three components of the alleged *Brady* violation itself. First, the suppression of evidence "constitutes one of the causes for the failure to assert a *Brady* claim in the state courts. Second, as with the prejudice prong of the *Brady* analysis, prejudice within the context of the cause and prejudice analysis does not exist unless the suppressed evidence was "material" for *Brady* purposes.

Presnell v. Hall, No. 1:07-CV-1267-CC, 2013 WL 1213132, at *9 (N.D. Ga. Mar. 25, 2013) (citations omitted).

Rather than dispute that the evidence at issue was suppressed, the Warden spends five pages arguing that this Court cannot affirm the district court's holding that there is cause for any procedural default because of action on the part of the *defense* – Petitioner's alleged lack of diligence in presenting the suppressed report to the District Court. Resp. Br. at 23-28. This is a red herring. Courts (including the Supreme Court) have concluded that the focus of the cause analysis in the context of a *Brady* violation is "on prosecutorial misconduct, *not on the defendant's diligence*." *Walker v. Kelly*, 195 F. App'x 169, 175 (4th Cir. 2006) (unpublished) (emphasis added); *see also Banks v. Dretke*, 540 U.S. 668, 695-96

(2004) (the Court's "decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed"); *Hallford v. Culliver*, 379 F. Supp. 2d 1232, 1250 (M.D. Ala. 2004) (same). The Warden repeatedly cites *Harbison v. Bell* in an attempt to find support for its argument, but in that case this Court found "[t]here is no evidence of . . . prosecutorial concealment and misrepresentation in Harbison's case." 408 F.3d 823, 833 (6th Cir. 2005). Thus, Harbison's case is not the one before this Court now.

Rather, just as the district court recognized, it is well-established in courts, including this Court, that cause for the procedural default of *Brady* claims is satisfied by the petitioner's showing of suppression. *See, e.g.*, *Dretke*, 540 U.S. at 691 ("[A] petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence."); *Rocha v. Thaler*, 619 F.3d 387, 394 (5th Cir. 2010) ("[A] petitioner shows 'cause' when the reason for his failure to develop facts in state-court proceedings was the state's suppression of the relevant evidence"); *Brooks v. Tennessee*, 626 F.3d 878, 890 (6th Cir. 2010) ("A state's suppression of *Brady* evidence constitutes cause under the procedural doctrine."); *Hutchison v. Bell*, 303 F.3d 720, 741 (6th Cir. 2002) ("Suppression of exculpatory or favorable impeaching evidence by the state that results in an inability to raise claims relating to that evidence in state court

establishes cause for the ensuing default."); *Lucas v. Upton*, 2011 WL 1375817, at *5 (M.D. Ga. Apr. 12, 2011) ("Petitioner has shown cause, and in doing so he has established the second element of his *Brady* claim—that the "evidence was suppressed by the State. . . . It was not until Petitioner filed his state habeas action that habeas counsel obtained a copy of the Bentley Report pursuant to a request made under the Open Records Act.").

That cause for habeas purposes can be established by showing suppression by the state makes sense because suppression is "interference by state officials that prevent[s] a petitioner from raising a claim." *Ward*, 592 F.3d at 1176-77; *see also id.* at 1176-77 ("The external impediment in this case stems from the failure of the bailiff and/or the trial judge to inform Ward or his counsel about the jury's question concerning parole."). In other words, "the State's concealment of the evidence is an 'objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule.'" *Scott v. Mullin*, 303 F.3d 1222, 1230 (10th Cir. 2002) (quoting *Murray*, 477 U.S. at 488).

The passage of AEDPA did not change the long-standing consensus that showing suppression is adequate to show cause for the procedural default of *Brady* claims. *Compare Jamison*, 291 F.3d at 388 ("Ohio failed to evaluate the case materials for required *Brady* disclosures. Ohio further affirmatively represented to the defense that no favorable evidence existed. Ohio cannot now argue that it was

unreasonable for defense counsel not to have caught it suppressing evidence. Since the factual basis of the claim was reasonably unknown to defendant's counsel, we affirm the district court's judgment as to cause.") (concerning a habeas petition not governed by AEDPA), *with Murphy v. Thaler*, 2010 WL 2381500, at *3 (N.D. Tex. June 8, 2010) ("The prosecution's withholding of *Brady* evidence from the petitioner's attorneys qualifies as a substantial reason for the default that is external to the petitioner.") (internal quotation marks and citation omitted) (concerning a habeas petition governed by AEDPA).

Further, courts recognize there are compelling reasons for the regular finding of cause to excuse the procedural default of *Brady* claims: "[a] rule . . . declaring prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process. Ordinarily, [courts] presume that public officials have properly discharged their official duties." *Dretke*, 540 U.S. at 696. As the Supreme Court has said:

> We have several times underscored the special role played by the American prosecutor in the search for truth in criminal trials. Courts, litigants, and juries properly anticipate that obligations to refrain from improper methods to secure a conviction plainly resting upon the prosecuting attorney, will be faithfully observed. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.

Id.(citations omitted); *see also id.* at 692-93 ("[B]ecause the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in

full with its *Brady* disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceeding."); *id.* at 695-96 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."); *King v. Bell*, 392 F. Supp. 2d 964, 995-96 (M.D. Tenn. 2005) (finding cause for the procedural default of a Brady claim where "defense counsel reasonably relied on the State's representations before the trial judge that it had turned over all requested discovery"). For example, in *Walker v. Kelly*, the Fourth Circuit found that the State confirmed it had turned over all *Brady* material:

> This being the case, it is unnecessary for Walker to establish that the [State] confirmed his reliance again during trial or on appeal. Stated differently, it was reasonable for Walker to assume that the prosecution would comply with a formal *Brady* motion without the need of constant confirmation. Therefore, we find that Walker has established cause such that he may be entitled to an evidentiary hearing on his . . . *Brady* claim.

Walker, 195 F. App'x at 175; *see also Bell v. Poole*, 2003 WL 21244625, at *12 (E.D.N.Y. Apr. 10, 2003) ("[T]he court finds that petitioner reasonably relied the prosecution's representations that it had attempted without success to subpoena the photograph from the DOC, and that the photograph had otherwise been expunged from law enforcement records. Accordingly, petitioner has established cause for the default of his *Brady* claim.").

In this case, the district court followed long-standing precedent in finding cause to excuse procedural default in this case. The court cited *Strickler v. Greene* and *Jamison v. Collins*, both discussed above, and found that "Petitioner offers as 'cause' for the default of his *Brady* claim is the alleged *Brady* violation itself." Mar. 23, 2012 Order at 4. The court stated that "the inquiry of whether evidence was suppressed, (and whether Petitioner can establish cause), turns in part on whether Petitioner's trial counsel knew or reasonably could have known about the undisclosed evidence." *Id.* at 5. The court then held the evidence was suppressed after noting that "Respondent does not appear to dispute that Petitioner's trial counsel never received the police report." *Id.* at 5-6; *see also* Mar. 29, 2013 Order ("The Court concludes that the State suppressed material, exculpatory evidence."). The district court did not, as the Warden would have this Court do on review, delve into judgments about Petitioner's diligence.[4] Rather, the district court appropriately focused on whether there was suppression of the relevant evidence, *see, e.g.*, *Dretke*, 540 U.S. at 691, a question easily satisfied in this case.

[4] Even if counsel's diligence were a factor (which it is not), Mr. Hill presented reasonable explanations for the delay in presenting the suppressed police report to the district court in the briefing on his request for reconsideration of the district court's procedural default ruling. *See* Reply in Support of Motion for Reconsideration. As counsel noted, when the police report was first discovered by Mr. Hill's private investigator, his *Brady* claim had been deemed procedurally defaulted, and they were conducting discovery on an entirely unrelated claim. Moreover, the habeas case was stayed during a significant portion of the delay period.

B. Prejudice Sufficient to Excuse Procedural Default of *Brady* Claims is Found When Suppressed Impeachment Evidence is Material as to a Key Witness.

The district court held in this case, and this circuit as well as a number of sister circuits have previously held, that the prosecution's failure to disclose impeachment material regarding key witnesses is a material *Brady* violation. *Accord Johnson v. Folino*, 705 F.3d 117, 129 (3rd Cir. 2013) (holding that "undisclosed evidence that would seriously undermine the testimony of a key witness may be considered material when it relates to an essential issue"); *Wolfe v. Clark*, 691 F.3d 410, 424-25 (4th Cir. 2012) (same); *Robinson v. Mills*, 592 F.3d 730, 735 (6th Cir. 2010) ("We conclude that withholding the impeachment evidence regarding . . . the State's star witness . . . was material under *Brady* because there is a reasonable probability that disclosure of the evidence would have resulted in a difference outcome for the proceeding."); *Monroe v. Angelone*, 323 F.3d 286, 317 (4th Cir. 2003) ("The Habeas Evidence would have significantly impaired the credibility of Zelma Smith, a key prosecution witness, and, in turn, it would have undermined the prosecution's proof of premeditation and malice."); *Jamison*, 291 F.3d at 388-392 (6th Cir. 2002) (holding *inter alia* that impeachment evidence of key witnesses "presents a significant challenge to the prosecution's theory of the case"). Such material *Brady* evidence establishes prejudice

overcoming procedural default. *See Johnson* 705 F.3d at 128, 132; *Wolfe*, 691 F.3d at 421-422.

Underpinning these holdings is the fundamental concept that procedural hurdles must not foreclose a defendant from asserting a violation of their constitutional rights under such grave circumstances. As summarized by the Fourth Circuit, "it is difficult to take seriously the [State]'s protestations . . . when [the Defendant] had to labor for years from death row to obtain evidence that had been tenaciously concealed by the [State], and that the prosecution obviously should have disclosed prior to [the Defendant's] capital murder trial." *Wolfe*, 691 F.3d at 422.

III. AEDPA's One-Year Statute Of Limitations Does Not Bar *Brady* Claims Where Any Delay Is Due To The State's Failure To Disclose Exculpatory Evidence.

The purpose of the writ of habeas corpus is to protect the liberty of individuals who are unlawfully imprisoned. *Brady* ensures that criminal defendants' due process rights are not violated by prosecutors by requiring the disclosure of favorable evidence in the state's possession. Individuals convicted and sentenced to the death penalty at a trial infected with a *Brady* violation, therefore, are at the core of the purpose of the writ of habeas corpus. This is reflected in both the statutory text of 28 U.S.C. § 2244(d) and courts' decisions that permit the equitable tolling of the one-year statute of limitations. Thus, contrary to

the Warden's assertions on page 16 of her brief, Section 2244(d) does not present a rigid or inflexible bar to Claimant's *Brady* claim.

The district court, consistent with the underlying principles of *Brady*'s constitutional protections and of the writ of habeas corpus, properly concluded that Mr. Hill's June 11, 1999 petition (as well as its subsequent amendments) requested relief based on a *Brady* violation because "the files of the prosecutor and investigating officer contain *Brady* material." Mar. 29, 2013 Order at 17. Through the course of litigation and further investigation, Mr. Hill discovered evidence that buttressed this claim – the evidence which is at issue in this appeal, namely the suppressed evidence from the "homicide book" and the suppressed grand jury transcript. This finding is hardly exceptional – litigants frequently discover during the course of litigation evidence that augment their claims, and applicable statutes of limitations do not bar consideration of that evidence. *See, e.g.,* Wright & Miller, Fed. Prac. & Proc. § 1496 ("Rule 15(c) is based on the notion that once litigation involving particular conduct . . . has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment . . . that arises out of the same conduct . . . as set forth in initiation pleading.")

The district court also properly concluded that AEDPA's one-year statute of limitations does not bar consideration of this evidence, reasoning that, even if for the purposes of argument, Mr. Hill had not sufficiently alleged a *Brady* violation in

a timely habeas petition and was trying to amend his petition, under these circumstances, such an amendment would clearly relate back to the original *Brady* claim. Mar. 23, 2012 Order at 15-20. This approach is entirely consistent with the approach other courts have taken in considering suppressed evidence under *Brady*. For example, in *Mandacina v. United States*, the Eighth Circuit held that a defendant's amended motion to vacate his verdict based, *inter alia*, on a *Brady* violation by the prosecution related back to his original motion. 328 F.3d 995, 1001 (8th Cir. 2003). In his original motion, the defendant had pleaded simply that the government had failed to disclose "'any and all' investigative information obtained by [police]." *Id*. The district court held that the defendant's pleading did not relate back. The circuit court reversed, noting that the petitioner's failure to mention the specific item of evidence that had been withheld in the original motion was not a bar to relating back for the defendant's *Brady* claim. *Id*. Other courts, including this one, have similarly held that subsequent, more specific claims can relate back to general prior allegations that may not have had the benefit of newly discovered information or more experienced counsel. *See, e.g., Cowan v. Stovall*, 645 F.3d 815, 819 (6th Cir. 2011) (holding that specific claims regarding ineffective assistance of counsel relate back to general allegations in *pro se* motion); *Woodward v. Williams*, 263 F.3d 1135, 1142 (10th Cir. 2001) (stating that

an amendment that "'clarifies or amplifies a claim in the original' petition" relates back to the original petition).

These decisions implicitly recognize that strictly construing the Petitioner's initial pleading (as the Warden urges here) does not make sense in the context of a *Brady* violation, because only the prosecution is aware of the precise evidence that has been withheld.

While the district court's ruling is undoubtedly correct, *amici* write further to demonstrate that the Warden's views concerning the application of 2244(d) are unduly rigid and inconsistent with both the purpose of AEDPA and precedent from around the country.

A. Section 2244(d)'s One-Year Statute of Limitations Does Not Alter the Fundamental Purpose of the Writ of Habeas Corpus.

The one-year statute of limitations in Section 2244(d) of AEDPA was intended to promote the finality of criminal convictions by streamlining a habeas petition process that, before AEDPA, was not subject to any statute of limitations. *See Mayle v. Felix*, 545 U.S. 644, 662 (2005); *see also* Brooke N. Wallace, Comment, "Uniform Application of Habeas Corpus Jurisprudence: The Trouble with Applying Section 2244," 79 Temple L. Rev. 703 (2006). Section 2244(d) did not, however, change the substantive requirements for obtaining a writ of habeas corpus.

Section 2244(d)'s statutory language confirms that protecting individuals from unlawful imprisonment and death is still at the heart of the writ's purpose. *See* Jake Sussman, "Unlimited Innocence: Recognizing an 'Actual Innocence' Exception to AEDPA's Statute of Limitations," 27 N.Y.U. Rev. L. & Soc. Chg. 343, 359 n.74 (2001-2002) (citing statements by President Clinton and various United States senators following enactment of AEDPA). Specifically, the date from which the statute runs is the *latest* of four dates: (i) the date on which the petitioner's judgment became final at the conclusion of direct review; (ii) the date an unconstitutional state-created impediment to filing a petition was removed; (iii) the date a new constitutional right asserted by the petitioner was initially recognized by the Supreme Court; or (iv) the date on which a factual predicate to the petitioner's claim could have been discovered through his exercise of due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). Thus, Section 2244's statutory text reflects a congressional purpose to protect the ability of a prisoner who has been unlawfully convicted to file a habeas petition by providing the petitioner the latest possible of all available dates. In other words, AEDPA's statute of limitations provision contains some flexibility to allow a petitioner to file based on, *inter alia*, a new constitutional right or the discovery of a factual predicate.

Thus, while Section 2244(d) imposes a limitation on death penalty petitioners' ability to seek habeas relief, it does not sacrifice a petitioner's ability to assert a valid basis for his petition on the altar of procedural efficiency.

B. Courts Have Not Strictly Enforced Section 2244(d)'s One-Year Statute of Limitation for Habeas Petitions Involving Trials Tainted by *Brady* Violations.

When confronted with petitions involving valid *Brady* violations, courts have applied discretion and principles of fairness and justice when considering the application of Section 2244(d). Most notably, courts have used the language of 2244(d) and the judicial principle of equitable tolling to allow these petitions to clear AEDPA's one-year limitation hurdle.

Section 2244(d)(1)(D) is particularly relevant for habeas petitions involving alleged *Brady* violations. According to this provision, the one-year statute of limitations will not start running until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Because *Brady* violations involve material required to have been disclosed by the prosecution and withheld either inadvertently or purposely, the date of discovery and the petitioner's diligence in the face of an obstinate prosecution can provide flexibility in the one-year statute of limitations. In *Douglas v. Workman*, for example, the Tenth Circuit rejected the state's argument that a petitioner could have obtained *Brady* material earlier than

he did, because the state itself was engaged in thwarting the petitioner's discovery efforts. 560 F.3d 1156, 1181 (10th Cir. 2009). The same is true here.

Section 2244(d)'s statute of limitations is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010) (holding that "like all 11 Courts of Appeals that have considered the question . . . § 2244(d) is subject to equitable tolling in appropriate cases"). According to the Supreme Court, Section 2244(d) "does not set forth an inflexible rule requiring dismissal whenever its clock has run." *Id*. (internal quotation marks omitted). Equitable tolling, therefore, "preserves a plaintiff's claims when strict application of the statute of limitations would be inequitable." *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995). This is particularly relevant for the substantive law governing habeas corpus, which has traditionally been governed by "equitable principles." *Holland*, 560 U.S. at 646. Equitable tolling may apply to situations in which (i) an individual was prevented from asserting habeas claims as a result of the government's wrongful conduct and (ii) extraordinary circumstances beyond individual's control made it impossible to file petition on time. *Id*. This analysis is typically carried out on a case-by-case basis. *See, e.g., Munchinski v. Wilson*, 694 F.3d 308, 329 (3rd Cir. 2012) (noting that equitable tolling is appropriate where state suppressed evidence in violation of *Brady*).

CONCLUSION

For these reasons, *amici curiae* respectfully submit that this Court should affirm the district court's decision granting Mr. Hill a writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici Curiae* hereby certifies that the foregoing brief complies with the 12,375-words limitation under Federal Rule of Appellate Procedure 29 and the Court's August 13, 2014 Briefing Letter. The relevant portions of the foregoing brief contain 5,779 words in Times New Roman (14-point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2015, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notification of such filing to the following at their e-mail addresses on file with the Court:

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