No. 16-9016

IN THE

Supreme Court of the United States

GENESIS HILL,

Petitioner,

v.

BETTY MITCHELL, WARDEN,

Respondent.

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

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal judges and prosecutors. Their names, former titles, and years of service are listed in the Appendix. *Amici* represent a wide range of political affiliations and views on capital punishment. All *Amici* agree, however, that where the State imposes a capital sentence, judges and prosecutors have a shared duty to ensure that the trial is fair and that all fundamental constitutional guarantees are afforded to the defendant. As former law enforcement officials, *Amici* have a strong interest in ensuring that the prosecution provides all material, favorable evidence to the defendant. The failure to do so constitutes a departure from the ethical conduct demanded by the legal profession and compromises the integrity of the judicial system.

Amici share a belief 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 cases where the death penalty is at stake, must be interpreted and applied in a way that is equitable and reasonable. *Amici* also stress the importance of meaningful judicial review with respect to *Brady*

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[1] Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of The Constitution Project's intent to file this brief. Counsel of record for all parties consented in writing to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* curiae or counsel made a monetary contribution to the preparation or submission of this brief.

violations, particularly because those violations here concern not only Petitioner's sentence, but also whether he is, innocent or guilty.

Here, where the police and/or prosecution breached the constitutional safeguards provided by *Brady* in withholding at least two critical pieces of evidence and Petitioner asserted a *Brady* violation in his federal habeas petition, AEDPA should not be interpreted to bar granting the petition.

Amici respectfully urge that this Court grant certiorari to address the important question of how AEDPA's procedural requirements and restrictions should be applied in a capital case involving *Brady* violations where Petitioner was deprived of details regarding suppressed evidence at the time his initial *Brady* claim was asserted.

SUMMARY OF ARGUMENT

This case raises an issue of extraordinary importance: the proper application of AEDPA's one-year statute of limitations in a capital case involving violations of this Court's ruling in Brady v. Maryland. This case is the right vehicle for addressing that issue, as it is undisputed that the prosecution withheld evidence favorable to Petitioner that, as three of the four judges who presided over the habeas proceedings found, was material to the outcome of Petitioner's trial.

As the record reveals, at least two critical pieces of exculpatory evidencewere not provided to Petitioner until long after he had been convicted and sentenced to death.

The State argued below that the Petitioner has procedurally defaulted on his Brady claim because AEDPA's one-year statute of limitation bars that claim. As the district court found and the dissent below recognized, however, the State's argument is contrary to the fairness guarantees of Brady as well as to established case law allowing for review of Brady claims where cause and prejudice to the Petitioner are found.

AEDPA's one-year statute of limitations is not a rigid bar. It clearly was not intended to alter the function of the writ of habeas corpus in protecting capital defendants from unlawful imprisonment and wrongful execution. Accordingly, courts have regularly recognized the need for fair and flexible application of the relation-back doctrine in evaluating habeas petitions.

As recognized by Chief Judge Cole in his dissent, the Sixth Circuit majority's ruling undermines the constitutional safeguards this Court established in Brady: Nothing in AEDPA compels or permits that result. Indeed, the legislative history of AEDPA makes clear that Congress crafted the statute carefully to preserve the most important function of habeas corpus: to guarantee that innocent persons will not be illegally imprisoned or executed, and to permit repeated petitions that present new evidence of innocence.

Also of importance is confirmation that federal courts have properly considered otherwise-untimely Brady claims as part of federal habeas petitions when cause and prejudice to the Petitioner exists.

In light of the Sixth Circuit's failure to apply AEDPA in a manner that is consistent with the principles established by this Court in Brady and with the rulings of other federal courts, this Court should grant review of Petitioner's claims.

ARGUMENT

I. This Case Raises Questions of Exceptional Importance and Is the Right Vehicle for Determining the Proper Application of AEDPA In the Context of *Brady* Claims.

This case raises questions of exceptional importance. Review is warranted to correct the Sixth Circuit's failure to properly apply AEDPA in light of *Brady* and the principles established by this Court.

This case is the right vehicle for examining the application of AEDPA's procedural rules in the context of *Brady* claims. In *Brady*, this Court has recognized that "the suppression of evidence that is favorable to the accused and material to his guilt or punishment denies due process of law." *Brady*, 373 U.S. 83, 87 (1963). It is undisputed that suppression of favorable evidence occurred in this case. Pet. App. For Reh'g *En Banc* at 16 ("There is no question that the State suppressed Officer Givens' police report and Theresa Dudley's grand jury testimony, and all agree that these materials could potentially have been favorable to the defense.").

Three out of four judges who presided over this case in federal habeas proceedings found that the *Brady* violation was material. And the prosecutor's office that handled Mr. Hill's case has a well-documented history of failing to divulge exculpatory

evidence. And four federal judges are evenly split on the application of a procedural rule, which the majority opinion acknowledged was not "fully developed." Indeed, the lack of clarity resulted in three separate opinions by the Sixth Circuit Panel.

Apart from Mr. Hill's case, the uncertainty reflected in the Sixth Circuit decision signals that there is unacceptable lack of clarity on critical issues concerning the right to amend a petition in habeas corpus proceedings and the application of AEDPA that impacts many other capital defendants. The majority's approach to the procedural issues at stake threatens to curtail the constitutional protections afforded by *Brady*. The preservation of the integrity of our justice system – particularly when it seeks to impose capital punishment – requires examination of those issues at the highest judicial level.

II. AEDPA's One-Year Statute of Limitations Does Not Bar *Brady* Claims Where Delay Is Due to the State's Failure to Disclose Exculpatory Evidence.

The Sixth Circuit erred in ruling that AEDPA's statute of limitations is so inflexible as to fail to guarantee fundamental due process for a capital defendant whose proceedings were indisputably marred by prosecutorial misconduct. The appellate court overturned the district court's granting of Mr. Hill's habeas petition, a decision reached by the lower court after granting discovery, reviewing evidence, and finding that the prosecution had committed *Brady* violations and that Mr. Hill had overcome the ostensible procedural bars established by AEDPA.

Specifically, the district court agreed to reconsider the earlier finding of procedural default of the *Brady* claim after the discovery of the suppressed police report. The district court rejected the State's allegation that the motion to reconsider was time-barred, and concluded that Hill's delay in presenting the police report, while troubling, was not dispositive. The district court found that Hill's motion was most appropriately treated as a motion for reconsideration under Fed. R. Civ. P. 60(b)(2), but concluded in the alternative that even if the motion was treated as a motion to amend under Fed. R. Civ. P. 15, it was not barred under the statute of limitations because Hill met the requirements of the relation-back doctrine under *Mayle v. Felix*, 545 U.S. 644 (2005).

The Sixth Circuit's reversal of that district court opinion is predicated on an unduly rigid application of Section 2244(d), one that is inconsistent with both the purpose of AEDPA and precedent from courts across the nation.

AEDPA's one-year statute of limitations was never intended to bar meritorious claims, let alone condone unconstitutional conduct by prosecutors. Yet the Sixth Circuit's decision does exactly that. As Chief Judge Cole stated in his dissent, the "state's decades-long deception" and the "willingness of federal judges to turn a 'blind eye,' will … incentivize 'prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violations as immaterial,' or worse, on prcedural grounds." *Hill v. Mitchell*, 842 F.3d 910, 958 (6th Cir. 2016) (Cole, J., dissenting) (quoting

United States v. Olsen, 737 F.3d 625, 633 (9th Cir. 2013) (Kozinski, J., dissenting)). Where the prosecution has suppressed material exculpatory evidence, that fact should be paramount in determining how the procedural requirements of AEDPA are interpreted and applied. To do otherwise would undermine the very purpose of *Brady* and its goals of equity and fairness.

A. AEDPA'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 itself confirms that AEDPA did not alter the fundamental protection of the habeas writ for individuals from unlawful sentencing to imprisonment or death.. *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, Section 2244(d) provides that 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 relevant dates. Indeed, in discussing the statute, Senator Orrin Hatch stated: "Congress' reforms carefully preserve the most important function of habeas corpus, to guarantee that innocent persons will not be illegally imprisoned or executed, and explicitly permit repeated petitions that clearly and convincingly present new evidence of innocence."[2]

Thus, while Section 2244(d) imposes time limits on a capital prisoner's ability to seek habeas relief, it does not bar, in the name of procedural efficiency or otherwise, an inmate's ability to assert a valid basis for his or her petition – particularly in instances, like the one at bar, where the government has suppressed evidence material to the guilt or innocence of a prisoner sentenced to death.

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[2] Orrin Hatch, *Tighter Rules Were Needed*, USA Today, Jan. 20, 2000, at 16A.

B. Courts Apply the Relation Back Doctrine to *Brady* Claims In Evaluating Habeas Petitions.

When confronted with petitions involving valid *Brady* violations, courts have applied principles of fairness and justice when considering the application of Section 2244(d). For example, in a case presenting virtually the same question as Mr. Hill's petition, 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. *Mandacina v. United States,* 328 F.3d 995, 1001 (8th Cir. 2003). In his original petition, the defendant had pleaded simply that the prosecution 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 other panels in the Sixth Circuit, have similarly held that subsequent, more specific habeas claims can relate back to general prior allegations in the first-filed petition 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).

And in *Douglas v. Workman*, 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 district court's approach in this case is entirely consistent with the approach these appellate courts have taken in considering evidence concealed by prosecutors under *Brady*. The district court properly concluded that AEDPA's one-year statute of limitations does not bar consideration of the suppressed evidence in this case, 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.

III. The Majority Ruling Erroneously and Fatally Undermines *Brady*'s Fairness Guarantees.

"Society 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." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The majority's ruling impermissibly undermines the constitutional safeguard affirmed in *Brady*. In the words of Chief Judge Cole, "a grim game of

'prosecutor may hide, defendant must seek' play[ed] out in the federal courts" as a result of the appellate court's decision. *Hill*, 842 F.3d at 950 (Cole, Chief J., dissenting). The majority's ruling also contradicts the basic principles established by this Court with respect to the requirement that the prosecution divulge *Brady* materials. The Court held in *Giglio v. United States*, 405 U.S. 150 (1972), that prosecutors must disclose impeachment material related to the credibility of government witnesses. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court held that the prosecution has an affirmative duty to search for, learn of, and disclose *Brady* material. And in *Strickler v. Greene*, 527 U.S. 263, 281 (1999), this Court held that the prosecution must produce *Brady* material even if it is not specifically requested by the defendant.

Where, as here, the prosecution failed to disclose exculpatory evidence in violation of its *Brady* obligations, that misconduct should inform the court's determination of how to apply the procedural requirements of AEDPA – particularly when the defendant at issue has been sentenced to death. As discussed below, given the troubling history of *Brady* violations by the very office responsible for prosecuting Mr. Hill, coupled with the fact that Mr. Hill's life is at stake, this Court should interpret the procedural requirements of AEDPA to allow for a meaningful review of the merits of Mr. Hill's claims.

Chief Judge Cole, in his dissent, properly emphasized that Brady claims turn on the "*cumulative effect of all such evidence* suppressed by the government." *Hill*, 842 F.3d at 957) (emphasis

original) (quoting *Kyles*, 541 U.S. at 421). This is especially true where, as here, the procedural default stems from prosecutorial misconduct and the prosecuting office has a history of *Brady* violations, as is the case here. As Chief Judge Cole observed, "[a]t nearly every chance since [his conviction], in both state and federal post-conviction proceedings, Hill has maintained that the state withheld favorable evidence in violation of *Brady* . . . ." *Hill*, 842 F.3d at 950.

Mr. Hill had legitimate reasons for concern, in light of Hamilton County's well-documented history of chronically suppressing *Brady* evidence. 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 161, n. 254.

In multiple capital 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, the Sixth Circuit 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 other cases, the Sixth Circuit found similar failures to turn over exculpatory evidence by Hamilton County prosecutors, though these failures were not always prejudicial to the defendants.[3] For example, the Sixth Circuit 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*, 775 F.3d 386 (6th Cir.2014) (State's failure to disclose evidence violated *Brady*); *Gumm v. Mitchell*, 775 F.3d 345 (6th Cir. 2014) (same). In these two cases, police used the same "homicide book" at issue in Mr. Hill's case, but only selectively provided to prosecutors the materials it believed would aid in prosecution. By doing so, they 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

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[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).

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 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 also found multiple instances of misconduct by Hamilton County prosecutors. In *State v. Kalejs*, 782 N.E. 2d 112, 116 (Ohio Ct. App. 2002), the court found that the defendant's due process rights were violated when Hamilton County prosecutors failed to disclose the recorded statement of a witness, which directly contradicted the witness's later trial testimony. *Id.*; *see also State v. Mills*, Case No. B8802581 (Hamilton Ct. C.P. Sept. 26, 2007) (granting a new trial after finding of *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).

This history raises the troubling prospect that Mr. Hill is being treated differently than similarly situated defendants. It also brings to light significant concerns as to whether the evidence suppressed was material, and whether its suppression prejudiced the outcome of the trial. Surely, those are not results that AEDPA should produce.

IV. Federal Courts Routinely Consider *Brady* Claims That Arise As Part of Federal Proceedings Where Cause and Prejudice Led to Procedural Default.

The State has incorrectly argued throughout this litigation that Mr. Hill's habeas petition is barred from federal court review under 28 U.S.C. § 2254(b) because his *Brady* violation claim is procedurally defaulted under Ohio law. *See State v. Hill*, No. C-961052, 1997 WL 727587, at *1 (Oh. Ct. App. Nov. 21, 1997) (finding Hill's *Brady* claims "barred by *res judicata*"); *Hill v. Mitchell*, No. 1:98-CV-452, 2006 WL 28071017, at 61-66 (S.D. Oh. Sept. 27, 2006) (initially finding Hill's *Brady* claims procedurally defaulted under Ohio law). According to the State, that procedural default should not be excused, and his habeas petition should therefore be unreviewable by the federal courts.

Mr. Hill's habeas petition, however, is barred from federal review only "absent a showing of cause and actual prejudice." *Hill*, 842 F.3d at 952 (Cole, Chief. J., dissenting), quoting *Engle v. Isaac*, 456 U.S.

107, 129 (1982). As this Court is aware, that "cause and actual prejudice" standard aligns with the elements of a meritorious *Brady* claim. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler*, 527 U.S. at 282.

Here, Judge Cole was correct in concluding that Mr. Hill "has simultaneously established cause and prejudice to excuse his procedural default" of his *Brady* claims. Hill, 842 F.3d at 956 (Cole, Chief J., dissenting). As such, Mr. Hill's habeas petition is not barred from review under § 2254(b).

A. The Prosecution's Failure to Divulge Exculpatory Evidence Constitutes Cause for the Procedural Default of *Brady* Claims

When determining whether cause exists for procedural default that otherwise bars federal review of a habeas petition, courts evaluate "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." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

When that cause determination is made with respect to *Brady* claims, the "factor external to the defense" is itself a necessary element of a *Brady* violation – suppression of evidence by the prosecution. *See*, *e.g.*, *Strickler*, 527 U.S. 263 at 282 (suppression of documents "constitutes one of the causes for the failure to assert a *Brady* claim in the state courts").

Courts have recognized that for purposes of § 2254(b), "cause" is established for failure to present a

Brady claims in state court proceedings where a petitioner's shows of suppression of evidence. *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."); *Brooks v. Tennessee*, 626 F.3d 878, 890 (6th Cir. 2010) ("A state's suppression of *Brady* evidence constitutes cause under the procedural doctrine."). It follows that suppression also constitutes cause in the context of a habeas petition because suppression of evidence is "interference by state officials that prevent[s] a petitioner from raising a claim." *Ward v. Hall*, 592 F.3d 1144, 1176-77 (11th Cir. 2010). 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.

Courts also recognize that there are often compelling reasons to excuse for cause 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." *Dretke*, 540 U.S. at 696. Indeed, "[c]ourts, litigants, and juries properly anticipate that obligations to refrain from improper methods to secure a conviction…will be faithfully observed. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id.*; *see also King v. Bell*, 392 F. Supp. 2d 964, 995-96 (M.D. Tenn. 2005) (finding cause for procedural default of *Brady* claim where "defense

counsel reasonably relied on the State's representations before the trial judge that it had turned over all requested discovery"); *Walker v. Kelly*, 195 F. App'x 169, 175 (4th Cir. 2006) (finding that petitioner "has established cause such that he may be entitled to an evidentiary hearing on his…*Brady* claim" because of prosecutorial misconduct").

Here, there is no dispute that the prosecution suppressed evidence in violation of their *Brady* obligations. Given that suppression, Mr. Hill has established cause for any procedural default of his *Brady* claims at the state court level.

B. Suppression of Material Impeachment Evidence Constitutes Prejudice for Purposes of Evaluating Procedural Default of *Brady* Claims.

Failure of the prosecution to disclose impeachment evidence regarding key witnesses is a material *Brady* violation. *See*, *e.g.*, *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 (same); *Robinson v. Mills*, 592 F.3d 730, 735 (6th Cir. 2010) ("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 different outcome for the proceeding").

Courts have recognized that for purposes of § 2254(b), "prejudice" sufficient to excuse failure to

present a *Brady* claim in state court is established where suppressed evidence was material. *See Johnson*, 705 F.3d at 128 ("To demonstrate prejudice excusing the procedural default of a *Brady* claim, a habeas petitioner must show that the undisclosed evidence is material."); *Wolfe*, 691 F.3d at 421-22 ("prejudice within the compass of the 'cause and prejudice' requirement exists when the suppressed evidence is 'material' for *Brady* purposes") (quoting *Dretke*, 540 U.S. at 691).

Here, the materiality of the suppressed evidence was recognized by both the district court and by Chief Judge Cole in his dissent. *Hill v. Mitchell*, 2013 WL 1345831, at *2 (S.D. Oh. Mar. 29, 2013) ("The undisclosed evidence is material; the prejudice to him is compelling."); *Hill*, 842 F.3d at 954-55 (Cole, Chief J., dissenting) ("These suppressed documents are material because they build up Hill's defense, provide a compelling means to undermine the state's most powerful witness, and thus call into question the reliability of the jury's verdict.").

There is both cause and prejudice excusing any procedural default by Mr. Hill of his *Brady* claims at the state court level. His *habeas* petition is therefore not barred from federal court review under 28 U.S.C. § 2254(b).

CONCLUSION

The Sixth Circuit erred in its ruling on this case of extraordinary, nationwide importance. This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

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