No. 20-5941

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES VICTOR THOMPSON,
Petitioner,

-v-

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

Reply Brief of Petitioner Thompson

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I. THE RESPONDENT'S ARGUMENT RELATED TO THE CIRCUIT COURT'S MISAPPLICATION OF 28 U.S.C. § 2254(E)(2) OMITS THE CIRCUIT COURT'S RULING AND ADVOCATES A DEFINITION OF "FAILED" REJECTED BY THIS COURT IN *WILLIAMS V. TAYLOR.*

The Respondent's reply related to the Circuit Court's application of 28 U.S.C. § 2254(e)(2) rests upon an erroneous view of the Circuit Court's initial opinion and a misreading of this Court's previous jurisprudence related to the statute.

The argument begins with a lengthy quote that omits the Circuit Court's actual holding. Br. Opp'n at 10. The Circuit Court specifically held that Thompson was not entitled to an evidentiary hearing because the claim at issue only effects his sentence:

> Here, the disputed factual predicate concerns potential error during Thompson's punishment retrial. Even if Thompson were to prevail on the claim, his guilty verdict would remain untouched. Under the statute, the district court did not have discretion to grant him a hearing. We affirm the district court's denial of the motion for an evidentiary hearing.

Thompson v. Davis, 916 F.3d 444, 458 (5th Cir. 2019). The Court's analysis simply skipped initial inquiry into whether or not Thompson's failure to develop the factual basis of his *Massiah/Brady* claim during his initial state post-conviction proceedings was the result of a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000).[1] Of course, this Court has established that "only a prisoner who has neglected his rights in state court need satisfy" the additional conditions found in 28 U.S.C. §

[1] Footnote 65 of the Circuit's opinion makes clear that the Court believed the district court lacked the discretion to hold a hearing because the *Massiah/Brady* claim was relevant only to sentencing. *See Thompson,* 916 F.3d at 458, n.65.

2254(e)(2)(a)-(b), including the condition that the underlying claim "would be sufficient to establish . . . that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* at 436.

After omitting the actual holding of the Circuit Court, the Respondent urges an interpretation of section 2254(e)(2) which was rejected by this Court in *Williams.* Br. Opp'n at 11-12. According to the Respondent, it is immaterial that Thompson was prevented from including the *Massiah/Brady* claim in his initial state habeas application because of the State's concealment of evidence. *Id.* The Respondent urges that Thompson's "argument is a non sequitur because *Williams* involved a *Brady* claim, yet counsel's lack of diligence triggered section 2254(e)(2)."[2] *Williams*, 529 U.S. at 440. The Respondent urges a "no-fault" interpretation of the opening clause of section 2254(e)(2) where the only inquiry is whether the factual basis of a claim was raised during the initial state post-conviction proceedings.

The Respondent's interpretation was rejected by this Court in *Williams. Williams*, 529 U.S. at 431-32. "[A] person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance. Fault lies, in those circumstances, either with the person who interfered with the accomplishment of the act or with no one at all." *Id.*at 432. The Respondent argues that the "test is not merely whether the petitioner was diligent in 'developing the facts of his case.'" Br. Opp'n at 11. This Court, however, has

[2] Once again, the Respondent is incorrect. In *Williams*, this Court found that the Petitioner lacked diligence in one of his three *Brady* claims, but was sufficiently diligent in two of his three claims to warrant an evidentiary hearing. *Id.* at 16-19.

explained that is exactly the relevant test.[3]

"Diligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Williams*, 529 U.S. at 437. After Thompson established cause for his initial failure to present the *Massiah* claim to Texas's Courts, Thompson was allowed to return to state court where he requested an evidentiary hearing on the claim. *See* Subsequent State Habeas Record at 1, 17, 37-39, 57, 74. The Respondent replies that Thompson did not seek an evidentiary hearing "in the manner prescribed by state law," but the Respondent fails to offer any authority for this statement. In reality, the possibility of the requested hearing was foreclosed by the Texas Court of Criminal Appeals Order dismissing Thompson's subsequent post-conviction application. *Ex parte Thompson*, 2016 WL 922131 (Tex. Crim. App. 2016); *see also* Tex. Code Crim. Pro. Ann. art. 11.071 § 5. By presenting his claim to the state courts and requesting a hearing, Thompson did all he could to further develop the factual basis of these claims at the state level.

The Respondent also argues that Thompson was not sufficiently diligent because he *could* have discovered the factual basis of the Rhodes claim in time to present the claim during his initial state post-conviction proceedings, by, for example, searching public records. Br. Opp'n at 12-13. The Respondent, like the Commonwealth in *Williams*, "misconceives the inquiry mandated by the opening

[3] "Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams,* , 529 U.S. at 432.

clause of § 2254(e)(2). The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." *Williams*, 529 U.S. at 435.

Indeed, the question is not what Thompson could have theoretically discovered, but, instead, is whether Thompson can establish cause for his failure to discover the factual basis of his *Massiah* claim prior to filing his initial state post-conviction proceedings. *Williams* recognized that *Keeney v. Tamayo–Reyes*'s "threshold standard of diligence is codified in § 2254(e)(2)'s opening clause." 529 U.S. 420, 421 (2000). In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Court applied the cause and prejudice standard applicable to procedural default because "it is similarly irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim . . ." *Id.* at 7-8.[4] If a federal habeas petitioner can establish cause for his failure to develop the factual basis for his claim in state court, then a hearing is permissible to further develop those claims in federal court.

Two leading cases related to the cause analysis are *Strickler v. Greene*, 527 U.S. 263 (1999) and *Banks v. Dretke*, 540 U.S. 668 (2004). In *Strickler,* this Court established three factors, each present in Thompson's case, that established cause for the failure to identify certain facts during the initial post-conviction proceedings: "The documents were suppressed by the Commonwealth; the prosecutor maintained an open file policy; and trial counsel were not aware of the factual basis for the claim."

[4] *See also Williams*, 529 U.S. at 444 ("Our analysis should suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the Virginia courts in the first instance.).

527 U.S. at 283. The Court also established that where "it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable." *Id.* at 284.

These factors weigh in favor of a finding of cause in Thompson's case. First, the prosecution in this case concealed relevant evidence about Rhodes. As early as August of 1993 members of the district attorney's office had entered into a contract with Rhodes using his alias Robert Lee. ROA.2061-62. Had the state disclosed Rhodes's alias, defense counsel might have discovered the letter, later discovered in the clerk's record for "Robert Lee," showing the extent of Rhodes's work for law enforcement. ROA.708-09. Thompson requested and the state was required to produce all *Brady* evidence prior to Thompson's first trial. CR1 at 19, 236-38. The state was in possession of a memorandum and handwritten prosecutor notes prior to Thompson's first trial detailing Rhodes's interaction with Thompson (which were not turned over until federal proceedings). ROA.659-660, ROA.2201. Prior to the second trial, the state was required to produce all agreements with witnesses. CR2 at 45-47; 72-75. The prosecutor purported to have an open file policy in regards to Rhodes. 2 RR at 28. The Respondent ignores that the trial prosecutors could have simply turned over the existence of their previous contractual agreement with Rhodes, and the fact that he had worked with the same police handler from 1993 until the time

that he became an informant in Thompson's case. The prosecution could have also turned over the memoranda and notes in their files suggesting that Rhodes had sought out information from Thompson as part of his role as an active police informant.

The Respondent's suggestion that Thompson's previous attorneys should have discovered Rhodes's informant status at an earlier junction by scouring clerk's records under the alias "Robert Lee" flies in the face of this Court's admonition that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. 'Ordinarily, we presume that public officials have properly discharged their official duties.'" *Banks*, 540 U.S. at 696. And, the Respondent is incorrect that Thompson's description of the state post-conviction record was mischaracterized. Br. Opp'n at 13. In arguing that Thompson suffered no harm from the trial court's denial of his motion for continuance, the Harris County District Attorney's Office argued that "the application fails to allege the specific information that could have been garnered had trial counsel had additional time to prepare for Rhodes cross-examination." SHCR-B at 155. This argument was made while the same prosecutor's office was concealing the true nature of Rhodes involvement with law enforcement, and, more specifically, his role in Thompson's case.

The Circuit Court's decision directly conflicts with this Court's decision in *Williams v. Taylor*. In arguing to the contrary, the Respondent both ignores the actual holding of the Circuit Court, and misapplies this Court's precedent. This Court

should grant certiorari on this issue because the Circuit Court's decision directly conflicted with the precedent of this Court.

II. THE RESPONSE TO THE *MASSIAH* CLAIM IGNORES THE TIMING OF CERTAIN DISCLOSURES BY THE STATE AND RAISES NON-EXISTENT PROCEDURAL ISSUES.

The Respondent recognizes that the Fifth Circuit's two-pronged agency test is not directed by this Court's precedent, and that there is a split of authorities regarding the proper *Massiah* framework, but argues the conflict is not meaningful. Br. Opp'n at 15-18 (noting that the Fifth Circuit's test was not established by *Henry* or *Moulton*, and recognizing a split in authorities among the circuits). However, the Respondent argues that Thompson simply lacks any evidence showing that Rhodes was a government agent within the meaning of the Sixth Amendment.

The Respondent also faults Thompson for continuing to challenge the denial of an evidentiary hearing, faulting Thompson for failing to "explain how he could overcome Rhodes's testimony denying that the government instructed him to solicit information from [P]etitioner." Br. Opp'n at 20. Of course, Thompson is not aware of the evidence which would be developed at a hearing which never happened, but the Circuit Court ably explained why a hearing was necessary to develop the factual basis in this case. The Circuit recognized that "Thompson was unable to develop the facts underlying the Rhodes-related *Brady* and *Messiah* claims in state habeas court." *Thompson*, 916 F.3d at 457. The District Court's denial of the motion for a hearing "downplayed the toll of time." *Id.* The records related to Rhodes's informant status had been destroyed by the government prior to the discoveries which led to Thompson

being permitted formal discovery. *Id.*

"Thompson's factual development of these claims has been potentially hampered by the State's nine-year delay in disclosing key aspects of its history with Rhodes. As a result, the district court may not have been provided sufficient facts to make an informed decision as to the merits of the Rhodes-related claims." *Id.* The Circuit Court recognized what the Respondent ignores, it is not clear that the full factual basis of these *Massiah* claims has ever been established. Recent developments in another Harris County case--involving the same to trial prosecutors--show the importance of hearings when dealing with informant-based *Brady* claims. *Prible v. Davis*, 09-CV-1896, 2020 WL 2563544 (S.D. Tex. May 20, 2020). In the *Prible* case, it was only after "significant factual development," including depositions and hearings, that it was revealed trial Prosecutor Siegler had been developing a "ring of informants" to gather information against capital defendants in Harris County. *Id.*at 14-15.

The Respondent's factual arguments overlook that most of the evidence provided after Rhodes's alias was discovered suggest the existence of a Sixth Amendment violation.[5] The 1993 informant contract establishes that, contrary to the statements of trial prosecutor Vic Wisner, Rhodes was working in conjunction with the Harris County District Attorney's Office. *See* ROA2061-2062; 17 RR2 at 154. It also establishes that Rhodes had been controlled by the same "handler," Officer Floyd

[5] The Respondent cites R.588 for the proposition that the "defense knew much of the allegedly suppressed information before trial." Br. Opp'n at 22. This citation relates to the District Court's denial of discovery *prior to the discovery that Rhodes used the alias Robert Lee, and that the district attorney's office previously had a signed contract with Rhodes*. *See* ROA.605-779.

Winkler, from 1993 until the time he elicited information from Thompson in 1998. ROA2061-2062; 17 RR 141. As part of his past agreement with the District Attorney, Rhodes was required to contact Winkler every day. *Id.*

The State was aware of Rhodes' contract under his alias, and had the alias been disclosed then his June 30, 1997 letter to the trial court[6] explaining that he had participated in extensive narcotics investigations, 20-25 in number, and that he had put more people behind bars than he could count, might have been discovered during state proceedings. ROA.2112-2113. The August 25, 1998 memo of DA investigator Mike Kelly proves that Rhodes had spoken to Thompson multiple times prior to obtaining the "hit list" entered at his retrial. ROA.2063-2064. The memorandum establishes that Rhodes specifically spoke to Thompson about the charged offense of capital murder. *Id.* at 2064.

The recent disclosures also include handwritten prosecutor's notes. ROA.605. These notes include "contacted Floyd, get in hand," a clear inference that Rhodes was instructed by his handler to obtain the "hit list" used against Thompson, as well as a note that suggested Rhodes was speaking with Investigator Mike Kelly and interacting with Thompson as early as August 18, 1998, a week before he ever obtained the "hit list." ROA. 2184-2201.

Nor is this claim *Teague*-barred. Br. Opp'n at 26. *Teague v. Lane*, 489 U.S. 288 (1989) prohibits the retroactive application of new constitutional rules of criminal procedure on collateral review. Under *Teague*, a new rule is one which either breaks

[6] The letter was filed in Harris County Cause number 667238, where Rhodes used the alias Robert Lee. ROA.672,708-709.

new ground, imposes a new obligation on the states or the federal government, or was not dictated by precedent existing at the time the defendant's conviction became final. *See Graham v. Collins*, 506 U.S. 461, 467, (1993). "Under this functional view of what constitutes a new rule, our task is to determine whether a state court considering [Thompson's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [Thompson] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

Thompson's first appeal proves this claim is not Teague barred. In that case, the state of Texas specifically believed it was bound to apply *Massiah* to punishment proceedings. *Thompson v. State*, 93 S.W.3d 16, 29 (Tex. Crim. App. 2001). All of the cases Thompson relies upon have been established law for decades. See *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964). The law Thompson relies upon was clearly established years before his conviction became final.

The Respondent relies on *Moulton* for the idea that no Sixth Amendment violation took place. Br. Opp'n at 25. In *Moulton*, the Court stated that "incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." *Moulton,* 474 U.S. at 180. The Court did not hold that other information, obtained in violation of the Sixth Amendment, was admissible in the trial of pending charge. *Id.*

Further, the Respondent's argument ignores that Rhodes specifically discussed the pending capital murder case with Thompson, as shown by his own testimony. The Respondent also mistakenly relies upon *Kansas v. Ventris* to somehow further his argument, but that case is inapplicable because it held that a defendant's statement elicited in violation of Sixth Amendment were admissible to impeach his inconsistent testimony at trial. 556 U.S. 586 (2009). Thompson, of course, did not testify at his trial.

The Respondent recognizes splits between the circuit courts about the proper application of *Massiah* and its progeny, but relies upon an incomplete factual analysis and inapplicable procedural hurdles to argue that certiorari should not be granted. This Court should take this opportunity to grant certiorari to bring the Fifth Circuit's Sixth Amendment analysis into line with the decisions of this Court and the other circuit courts.

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully Submitted

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CERTIFICATE OF MAILING

I hereby certify that on January 5, 2021, this pleading this pleading was served on the Court via mail courier.

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, a true and correct copy of this motion was mailed by first-class U.S. mail to:

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