No. 22-5058

IN THE SUPREME COURT OF THE UNITED STATES

Davel Chinn,

Petitioner,

v.

Warden, Chillicothe Correctional Institution

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

Reply in Support of Petition for Writ of Certiorari

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I. The Sixth Circuit's application of *Brady's* materiality standard is in direct conflict with this Court's precedent, and the Warden's arguments to the contrary lack merit.

The Warden argues that the Sixth Circuit's application of *Brady's* materiality standard is consistent with this Court's precedents. (BIO at 9-11.) That simply is not the case. The Warden's textual arguments cannot overcome the plain language of the Sixth Circuit's decision. The *only* reasonable reading of the Sixth Circuit's opinion is that it required Davel Chinn to demonstrate that he was more likely than not prejudiced. As a result, the decision is in direct conflict with this Court's precedents. This Court should summarily reverse.

The Sixth Circuit extended this Court's precedent to impose a higher burden of *Brady* materiality than that outlined by this Court in its clearly established precedent. The Sixth Circuit painted Chinn's case as one in which relief simply could not be granted due to a lack of applicable clearly established federal law. It cited *White v. Woodall*, 572 U.S. 415, 427 (2014), as if there is no clearly established federal law directly on point. Then it relied upon a mixture of its own precedent and its interpretation of an extension of this Court's case law to determine that Chinn's *Brady* claim fails. *See Chinn v. Warden, Chillicothe Corr. Inst.*, 24 F.4th 1096, 1102-03 (6th Cir.2022).

As this Court recognized in *White*, an "identical factual pattern" is not required before a legal rule must be applied. *White*, 572 U.S. at 427. But Chinn did not ask the Sixth Circuit to "extend a rationale" of this Court's precedent. *Id.* at 426 (internal citation omitted). Chinn's claim is a *Brady* claim. There is no extension of the law necessary for him to obtain relief.

The Sixth Circuit distinguished this Court's *Brady* precedent in its consideration of Chinn's *Brady* claim by misstating the impact of the evidence. For example, beyond the suppressed

evidence showing that star witness Marvin Washington was highly suggestible, had poor memory, and had an IQ as low as 48, the State suppressed evidence that directly contradicted Washington's testimony at Chinn's trial. At trial, Washington responded to questions concerning whether he had been under the influence at the time of the crime, stating that he and "Tony" had only had one beer each and "[s]moked cigarettes. That's it." Trial Tr., R. 132-5, PageID 8965, 8970. But the suppressed evidence demonstrated that, by his own account, Washington was so chemically altered that night *that he may have blacked out*. *See* Post-Conviction Ex. 8, R. 131-6, PageID 6466. He indicated that he "forgot some of the night." *Id.* This alone calls into question how he was able to provide such specific details at Chinn's trial. *See, e.g.*, Trial Tr., R. 132-5, PageID 8931 ("We got the beer and then we walked back downtown to Elder Beerman's, a little platform, and we was up there talking and he was telling me I should go back to school and stay there and get my education, and we was drinking beer and smoking cigarettes. Then we got finished with the beer and we walked to Ludlow."); *id.* at PageID 8933 ("He told me to go in [the bookstore] and see how long it would take for them to put me out and I went in there and I looked for a few minutes and then the guy asked me if I had I.D. Then I said, 'no,' and he said to leave."); *id.* at PageID 8937 ("I was asking him how to put the seat up and everything and he, you know, he was showing me then. He was taking too long. . . . After we got everything straight with the car, then we drove off. We went to the alley, Court Street, the one way and went around."); *id.* at PageID 8939 ("We went up to Germantown and we went way out and then there was like this little street here. He told me to turn, to go to the side of the road.").

But the Sixth Circuit found that the "the exculpatory evidence did not undermine Ward's credibility." *Chinn*, 24 F.4th at 1106. Although it acknowledged that *Wearry v. Cain*, 577 U.S. 385 (2016) could be considered "as illustrative of the proper application of existing law," the Court

dismissed the striking similarity between Chinn's case and *Wearry*. *Chinn.*, 24 F.4th at 1105 (citing *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003)). It used this as a reason why the materiality analysis in *Wearry* was irrelevant, stating, "[t]o put a fine point on it: neither *Wearry* nor any case from the Supreme Court controls with sufficient granularity." *Chinn,* 24 F.4th at 1106. It again cited to *White*, 572 U.S. at 427, to demonstrate that there is no clearly established federal law directly on point. *See Chinn,* 24 F.4th at 1106.

The Sixth Circuit then created its own materiality test for evaluating Chinn's *Brady* claim. That test is at-odds with this Court's precedent. This Court has repeatedly made clear that *Brady* does not require a petitioner to demonstrate that they were more-likely-than-not prejudiced by the government's suppression of evidence. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Smith v. Cain*, 565 U.S. 73, 75 (2012); *Wearry v. Cain*, 577 U.S. 385, 392 (2016). The Sixth Circuit nevertheless required Chinn to do just that: "Thus, 'reasonable probability' for *Brady's* purposes is effectively the same as a more-probable-than-not standard. The *Brady* question now *is whether it is more probable than not that the withheld evidence would have created a different result*." *Chinn,* 24 F.4th at 1103 (6th Cir. 2022) (emphasis added).

To get to this point, the Sixth Circuit relied upon a mixture of its own precedent and its interpretation of an extension of this Court's case law. It cited its own case law and stated that, "*We* have held that *Strickland*'s 'reasonably-likely' prejudice standard is the same as *Brady*'s prejudice standard. *See Montgomery v. Bobby*, 654 F.3d 668, 679 n.4 (6th Cir. 2011) (en banc)." *Chinn,* 24 F.4th at 1102-1103 (emphasis added). It went on to create its own extension of this Court's case law:

> And in *Harrington*, the Supreme Court explained that the difference between *Strickland*'s "reasonably likely" standard and a "more-probable-than-not standard is slight and matters only in the rarest case." 562 U.S. at 111-12 (cleaned up). Thus, "reasonable probability" for *Brady*'s purposes is effectively the same as

> a more-probable-than-not standard. The *Brady* question now is whether it is more probable than not that the withheld evidence would have created a different result.

Chinn, 24 F.4th at 1103.

This Court has unambiguously held that clearly established federal law comes from this Court and this Court only. *See, e.g., Renico v. Lett*, 559 U.S. 766, 778-779 (2010) ("The Court of Appeals also erred in a second respect. It relied upon its own decision in *Fulton* v. *Moore*, 520 F.3d 522 (CA6 2008). The *Fulton* decision, however, does not constitute 'clearly established Federal law, as determined by the Supreme Court,' § 2254(d)(1).").

II. AEDPA does not preclude relief.

With respect to 28 U.S.C. § 2254(d), the Warden argues "Chinn does not even discuss this standard, let alone suggest that the Sixth Circuit's decision created any uncertainty about how to apply it. He simply asserts, without any support, that the state-court decision denying his Brady claim is not entitled to AEDPA deference." (BIO at 12.) Chinn's petition for certiorari, however, explained in detail why § 2254(d) does not preclude relief in this case. (Pet. at 14-16.) The Warden's arguments regarding § 2254(d), (BIO at 11-14), should accordingly be rejected for the reasons that have already been stated in Chinn's petition for *certiorari*.

III. The Warden has waived procedural default as a defense.

Finally, the Warden argues that Chinn's claim is procedurally defaulted. (BIO at 14-15.) The Warden waived any claim of default in his Sixth Circuit brief, however, by conceding that the state appellate court "forgave any default and reached the merits of the claim." (Warden's Sixth Circuit Br., Doc. 17, p. 22 (original pagination).) "[P]rocedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" *Trest v. Cain*, 522 U.S. at 89 (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996).)

The Warden has accordingly waived procedural default as a defense, and it poses no bar to this Court's review.

CONCLUSION

Early on in Chinn's state-court proceedings, the state appellate court noted "the substantial amount of residual doubt" as to whether Chinn committed these crimes. *State v. Chinn*, No. 11835, 1991 WL 289178, at *20 (Ohio Ct. App. Dec. 27, 1991). That was before the suppressed, exculpatory evidence had even been introduced into the case. Chinn has since demonstrated that, even under AEDPA, his *Brady* claim should prevail. But the Sixth Circuit employed an improper materiality standard, increasing Chinn's burden and denying him relief.

Chinn respectfully requests that this Court grant his petition for writ of certiorari and reverse the Sixth Circuit.

Respectfully Submitted,

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