No. 23-5916

IN THE

Supreme Court of the United States

STEVEN RICHARD TAYLOR,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

CAPITAL CASE

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. Respondent's general "delay" and cert-worthiness arguments

Before addressing the petition's substance, Respondent proposes two global reasons to deny it. Neither should sway the Court.

First, Respondent decries "the delay that Taylor has achieved so far," and urges this Court to "deny review simply because this capital case has dragged on so long." BIO at 14-15. But this is a petition for review of the denial of Taylor's initial, timely filed 28 U.S.C. § 2254 petition. Respondent offers no examples of Taylor employing any delay tactics in any proceeding—he merely emphasizes the length of time between the § 2254 petition's filing and the district court's decision. That period is attributable to the district court's rulings and time spent considering the matter, not any tactics by Taylor. This Court does not deny certiorari to punish habeas petitioners for the length of time the district court took to decide their initial § 2254 petition. This is a complex capital case with an extensive record—the district court needed time to analyze Taylor's § 2254 claims.[1] This Court should reject Respondent's "delay" arguments and evaluate Taylor's certiorari petition on its merits.

Second, Respondent suggests denying certiorari because the Eleventh Circuit resolved Taylor's claims primarily on case-specific grounds like *Strickland* prejudice, meaning that Talyor's certiorari petition did not emphasize lower-court conflicts as contemplated by Sup Ct. R. 10. But Respondent ignores that capital cases are

[1] The district court granted limited stays based on a conflict-of-counsel issue and after *Hurst v. Florida*, 577 U.S. 92 (2016). But those stays had been lifted and nothing had been filed for nearly two years before the district court issued its final ruling.

different because death is different, and Rule 10's general guidelines "are neither controlling nor fully measuring the Court's discretion." Sup. Ct. R. 10. Particularly in death cases, it is not uncommon for this Court to engage in case-specific prejudice review in order to prevent such a grievous result as an unjust execution. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 391-93 (2005). Respondent also ignores that, as to Taylor's *Frye* claim, the Eleventh Circuit *chose* to hinge its decision on de novo prejudice review, only after skirting the Florida Supreme Court's deficient-performance ruling, which implicated a conflict with several of this Court's decisions. Taylor's *Brady* and *Miranda* issues implicate important legal questions too. This Court should exercise its discretion to grant certiorari and review all three issues.

II. Respondent's arguments on the *Frye*-ineffectiveness issue

A. No mention of Murray

The first question presented is whether Taylor was prejudiced by trial counsel's failure to move for adversarial testing of the State's novel DNA testing and statistics under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which had been adopted by Florida. Highly probative of that question is the fact that in the case of Taylor's separately tried co-defendant Gerald Murray, the Florida Supreme Court twice found the State's DNA testing and statistics failed *Frye*, and Murray was prejudiced as a result—even though the non-DNA evidence presented against Murray was at least as strong as the non-DNA evidence presented against Taylor. *See* Pet. at 3-4, 15-18.

Respondent is silent on Murray's *Frye* reversals, and with good reason. There is no way to square the Florida Supreme Court twice finding prejudicial *Frye* errors

in Murray's case, and the Eleventh Circuit's finding of no prejudice in Taylor's case even if the DNA were totally excluded under *Frye*. As discussed in the petition, the non-DNA evidence against Murray was arguably stronger. Murray's case featured a jailhouse snitch in addition to physical evidence—microscopic hair analysis—that was untainted by the *Frye* errors on the DNA testing. The Florida Supreme Court ruled that, without the DNA evidence, the remaining evidence against Murray was insufficient to uphold the conviction. The same is true of Taylor's remaining evidence.

B. Deficient performance

Respondent offers no explanation for the Eleventh Circuit's decision to bypass *Strickland*'s deficient-performance prong on the *Frye* issue—the only prong that was reviewed by the Florida Supreme Court and cloaked in AEDPA deference on federal habeas review. But in an effort to dissuade this Court from reviewing the Eleventh Circuit's de novo prejudice analysis, Respondent provides two weak defenses of the Florida Supreme Court's deficient-performance ruling.

First, Respondent says that trial counsel, Frank Tassone, was only equivocal in his postconviction testimony as to whether he was in fact ignorant of *Frye* and failed to do basic research on it at the time of trial despite it being fundamental to Taylor's defense. *See* BIO at 17-18. As noted in the petition, this Court has deemed such failures to be "a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Respondent emphasizes that Tassone testified in postconviction that he had *no recollection* of "doing any research or having any knowledge about the *Frye* test at the

time of Mr. Taylor's case," and only thought that he "probably [did] not." BIO at 17-18. True, Tassone's testimony could be read to leave open the slim possibility that he knew about *Frye*, performed research on it, decided not to invoke it, and forgot all about it by the time of postconviction. But there is nothing in Tassone's postconviction testimony that indicates that is plausible. In state postconviction, the State did not dispute, and the state court never voiced any doubt about, Tassone's ignorance of *Frye* law. PCR 2033-34. And the trial record confirms Tassone did not know about *Frye*—it explains why he awkwardly and improperly used his voir dire of Pollock's qualifications to probe the reliability and acceptance of the DNA methods—which would have been the purpose of a *Frye* hearing. Tassone even described himself as ineffective under the ABA Guidelines for his failures regarding *Frye*. PCR 1393-98. Until Respondent raised the argument for the first time in the Eleventh Circuit, there was never a dispute as to Tassone's ignorance of the critical *Frye* law in Florida.[2]

Second, Respondent argues that the Florida Supreme Court reasonably concluded that Tassone could not have been ineffective in failing to challenge the State's DNA evidence under *Frye* because the Florida Supreme Court had not yet developed precedent applying *Frye* to particular DNA methods. *See* BIO at 24. But this is exactly backwards. The fact that DNA was such a novel science at the time of trial—so new that cases challenging its admissibility had not yet reached the Florida

[2] Respondent ignores that Tassone was found ineffective by the Eleventh Circuit in another case for the same reason. *See Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F.3d 541, 554 (11th Cir. 2015) ("Tassone did not understand mitigation law or the benefit to Hardwick at sentencing.").

Supreme Court—makes it all the more unreasonable for Taylor's counsel to have failed to seek a *Frye* hearing. The point of *Frye* was to provide a mechanism to challenge the reliability and acceptance of brand-new scientific techniques. Taylor's deficient-performance argument has never relied on the Florida Supreme Court's later refinements to *Frye* law as it relates to specific DNA methods or procedures. Taylor's argument is based on trial counsel's ignorance that *Frye* was the established method for challenging novel scientific evidence like the State's DNA evidence and his failure to perform research. Given the Florida Supreme Court's and Respondent's misguided view of Taylor's deficient-performance argument, the Eleventh Circuit understandably bypassed that *Strickland* prong in favor of de novo prejudice review.

C. Prejudice

Respondent argues that the Eleventh Circuit correctly denied relief on no-prejudice grounds because the "DNA testimony, while certainly useful, was not critical to Taylor's conviction, particularly since the probability calculations the State introduced (one in six million or one in twenty-three million if the perpetrator was Caucasian) were not overwhelming." BIO at 25. This goes against common sense—any rational juror who is told the chance is only one-in-23 million that someone other than the defendant left seminal DNA on the victim would find that statistic overwhelming.[3] And it would color the juror's view of all the other evidence. That is what happened here—the DNA evidence and statistics loomed over the entire trial.

[3] The population of Florida at the time of Taylor's trial was less than 14 million. U.S. Census Bureau, Time Series of Florida Intercensal Population Estimates, 1990-

Respondent insists that even without the DNA evidence the "jury still had a wealth of evidence to convict Taylor." *Id.* But even setting aside the fact that the Florida Supreme Court twice found that the very similar non-DNA evidence against Murray was insufficient to defeat prejudice, Respondent fails to address any of the weaknesses in the other evidence against Taylor that were described in the petition. *See* Pet. at 16-17. Without the taint of the DNA evidence, the jury would have given the weaknesses in the State's evidence more meaningful consideration, giving rise to a reasonable probability that Taylor would not have been found guilty. Respondent also misses that almost none of the State's non-DNA evidence inculpated Taylor, as opposed to Murray, in specific criminal acts. Respondent makes much of the fact that Taylor had a different blood and secretor type than Murray, *see* BIO at 3-4, 25, but omits that Taylor shared that type with roughly a third of the population—hardly an overwhelming statistic. Respondent fails to appreciate that, with the DNA evidence removed from the case, there is at least a reasonable probability of a different result.[4]

Finally, Respondent disputes that *Strickland* prejudice includes a reasonable probability of a different result on appeal. *See* BIO at 21-22. But if anything, that uncertainty strengthens the case for granting certiorari here. *Strickland* itself contemplates at least some role for appellate outcomes in prejudice analysis. *See*

2000, *available at* https://www2.census.gov/programs-surveys/popest/tables/1990-2000/intercensal/st-co/co-est2001-12-12.pdf.

[4] Respondent also fails to address the fact that just three years after Taylor's trial, a Florida appellate court reversed under *Frye* in a case where Pollock testified to using the same flawed databases and statistic methodology as in Taylor's case. *See Vargas v. State*, 640 So. 2d 1139, 1144-46, 1150 (Fla. 1st DCA 1994).

Strickland v. Washington, 466 U.S. 668, 695 (1984) ("When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—*including an appellate court*, to the extent it independently reweighs the evidence—would not have concluded that the balance of aggravating and mitigating circumstances did not warrant death.") (emphasis added). And considering what would have happened on appeal makes particular sense when it comes to Taylor's *Frye* claim because Florida law examines "the issue of general acceptance at the time of appeal rather than at the time of trial." *Hadden v. State*, 690 So. 2d 573, 579 (Fla. 1997); *see also Hayes v. State*, 660 So. 2d 257 (Fla. 1995) (reversing under *Frye* based on information not available until appeal). Based on similar cases from the same time period, there is at least a reasonable probability that, even if the trial judge denied Taylor's *Frye* motion, the Florida Supreme Court would have reversed—as it did twice in Murray's case.

III. Respondent's arguments on the *Brady* issue

A. COA violation

The second question presented in the petition is whether the State's obligation under *Brady* to disclose exculpatory DNA analysis from one of its own experts depends on whether the State analyst did any tests or wrote a report. Respondent complains that Taylor's question "obscures the decisional context in which the question arises" because the Eleventh Circuit denied a certificate of appealability (COA) on whether the failure to disclose Zeigler's exculpatory testing violated *Brady*. BIO at 26. But there was no obscuring—the petition discusses the Eleventh Circuit's

COA ruling at length, and describes why it contradicted the grant of a COA on the *Richardson*-ineffectiveness issue stemming from Zeigler's non-disclosure. *See* Pet. at 6-7, 19-21. To the extent Respondent argues that Taylor's question presented was required to specifically reference the COA component, Rule 14(1)(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Taylor's question fairly encompasses the COA issue.

B. State procedural ruling

Respondent also asks this Court to avoid the *Brady* issue because the Florida Supreme Court found it procedurally barred in postconviction. BIO at 29. But that is wrong because the Florida Supreme Court's procedural ruling was neither an independent nor adequate state ground. *See Michigan v. Long*, 463 U.S. 1032 (1983).

The Florida Supreme Court stated that "because Taylor ultimately asserts a discovery violation that was discovered and known during trial, this claim should have been raised pursuant to *Richardson* at trial, not in a *Brady* claim at the postconviction stage." App. 71a-72a; *Taylor v. State*, 62 So. 3d 1101, 1116 (Fla. 2011). Yet the state court's "discovered and known during trial" conclusion is intertwined with the *Brady* analysis and untrue. Zeigler's identity may have been revealed at trial, and counsel may have had her computer readouts, but the exculpatory aspect of Zeigler was not known until she testified in postconviction that her *interpretation* of the readouts would have contradicted Pollock's trial testimony that four probes "matched" Taylor. Zeigler would have testified that, based on her and Pollock's similar computer readouts, two of the probes should have been called inconclusive,

which would have drastically reduced the overall probabilities heard by the jury. *See* Pet. at 18-19 & n. 6; PCR 1254-86. Because that information was not disclosed or revealed until postconviction, Taylor properly raised it as a *Brady* claim.

The Florida Supreme Court further intertwined the *Brady* analysis by stating "this is not a valid *Brady* violation because the State did not suppress the evidence," noting that counsel "possessed Zeigler's initials before trial as they were contained on the calculated fragment reports." App. 72a-75a; *Taylor*, 62 So. 3d at 1117-18. But again, counsel's possession of Zeigler's initials on computer readouts that did not include her interpretation of the results did not fulfill the State's duty. Counsel had no way of knowing from Zeigler's initials that she would have disagreed with Pollock's interpretation of the readouts and Pollock's declaration of a "match" to Taylor on all four probes. Because the Florida Supreme Court's procedural-bar analysis was both intertwined with the *Brady* standard, and because the analysis was fundamentally incorrect, this Court should not be dissuaded from reviewing Taylor's *Brady* issue.

C. *Brady* analysis

Respondent argues that Taylor's *Brady* issue is not cert-worthy on the merits because the "State provided Zeigler's initials and the readout she generated from the computer analyzing the DNA loci. . . . The FSC held that was enough to satisfy the State's *Brady* obligation and Taylor has not presented any inconsistency between this Court's pre-2012 decisions and the FSC's *Brady* holding that would warrant relief." BIO at 30-31. But the petition discussed why, under this Court's precedents, the disclosure of Zeigler's initials on scientific reports provided to counsel on the eve of

trial did not satisfy *Brady*'s requirements. *See* Pet. at 22-25 (citing, *e.g.*, *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Green*, 527 U.S. 263 (1999)). As described in the petition, the State made neither trial counsel nor the jury aware that Zeigler, Pollock's fellow FDLE analyst, would have interpreted half of the probes matched by Pollock to be inconclusive, PCR 1264-65, changing the statistics the jury heard from one-in-23 million to one-in-10 or one-in-100, PCR 1635. That information was not available to Taylor through the State's disclosure of Zeigler's initials or computer readouts alone.

Respondent says this case is "a poor vehicle" to readdress *Brady* "because it does not involve a complete failure to disclose." BIO at 29-30. But this is actually a reason to grant review, in order to clarify that *Brady*'s obligations are not satisfied by such an oblique disclosure. The State may have turned over Zeigler's initials, but it had a duty to do more. Taylor should have been made aware that a second FDLE analyst performed a "second read" of Pollock's DNA testing and did not necessarily agree with his interpretation of the computer readouts, even though her readouts may have been similar. The consequences of this failure to disclose were devastating to Taylor's defense—he was not aware, and had no basis to make the jury aware, that Pollock's statistics were dramatically at odd with the views of a fellow FDLE analyst.

Respondent never actually addresses the *Brady* question presented: whether the Eleventh Circuit correctly concluded that Zeigler was not discoverable in the first place because she did not do any tests or write a report. *See* App. 18a; *Taylor v. Sec'y, Fla. Dep't of Corr.*, 64 F.4th 1264, 1272 (11th Cir. 2023). As Petitioner explained, the

State is required to provide exculpatory evidence before trial so that the defense can adequately prepare. *See Bagley*, 473 U.S. at 683. There is no *Brady* carve-out for State experts like Zeigler who do not conduct independent tests or write reports. If a law enforcement DNA analyst like Zeigler has information that another analyst's "match" testimony to a jury is improper, the State cannot withhold that evidence from the defense based on a lack of additional testing and reporting by that analyst. This Court should grant certiorari and review the Eleventh Circuit's misapplication of *Brady*.

IV. Respondent's arguments on the *Miranda* issue

A. Interrogation

Respondent does not argue the merits of whether Officer Bogers interrogated him within the meaning of *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980)—i.e., whether Bogers "should [have] know[n]" that asking Taylor "why," at the moment he did, was reasonably likely to elicit an incriminating response. Respondent instead argues that review should be denied because the Florida Supreme Court found that Taylor conceded he was not being interrogated. Respondent advanced this theory for the first time in the Eleventh Circuit, which did not accept it, for good reason. The Florida Supreme Court did not find that Taylor conceded the interrogation prong—it addressed the interrogation issue on the merits without finding any procedural bar. App 111a; *Taylor v. State*, 630 So. 2d 1038, 1041 (Fla. 1993).

Respondent's "concession" theory relies on a sentence in the Florida Supreme Court's description of Taylor's argument: "Taylor asserts that, although he was not being interrogated, the police officer's reply to his question regarding how long it

would take to get the test results back was inappropriate and designed to elicit a response." *Id.* The Florida Supreme Court was only noting that Taylor's question about results and Bogers's response did not come in the midst of an interrogation. The court then accurately described Taylor's argument that Bogers's response itself, "why," was inappropriately designed to elicit an incriminating response—making *it* an improper interrogation. Respondent further alleges that Taylor had included a concession in his reply brief, but that is incorrect too. Taylor's reply brief stated:

> [T]he state, relying on [*Innis*], argues that Detective Bogers did not interrogate Taylor, so there was no violation of his Fifth Amendment right to counsel. That case, however, has no relevance to this one because the issue is not whether the police questioned Taylor but if the Defendant's simple question initiated further contact with the detective as required by *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) to justify a belief that he wanted to talk with police. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983).

Reply Br. at 2, No. SC60-79080. That was not a concession that Bogers's question was proper or that Taylor was not being interrogated. The passage does not comment on the propriety of Bogers's question at all. The focus of the above argument is on whether Taylor's question was sufficient to justify a belief that he wanted to talk with police and waive his previously invoked rights under *Edwards* and *Bradshaw*. The statement about *Innis* was in relation to that reinitiation issue and taken out of context by Respondent. Conceding the interrogation prong would make no sense because it would concede the entire claim. Taylor has consistently argued that he did not waive his previously invoked rights, and that Bogers should have known that his question was reasonably likely to elicit an incriminating response.

This is why the Eleventh Circuit did not address Respondent's concession theory. The court instead reached the merits, finding that "[t]he Florida Supreme Court held that Officer Bogers's question to Taylor didn't constitute an 'interrogation.' Applying AEDPA deference, we agree." App. 20a*; Taylor*, 64 F.4th at 1264.

Respondent neither defends the Eleventh Circuit's reasoning nor attempts to apply the *Innis* standard, beyond a generic statement that a reasonable jurist in 1993 could conclude that Bogers's question was not interrogation. *See* BIO at 37. Respondent does not respond to the petition's argument that there was no reason for Bogers, who knew that Taylor had invoked his Fifth Amendment rights, to ask anything further of Taylor in response to Taylor's inquiry about the timing of the blood results, or Taylor's argument that Bogers at least *should have known* that responding "why" when he did was reasonably likely to elicit an incriminating response. Nor did Respondent address the Eleventh Circuit's reasoning that an incriminating response to Bogers's question was exceedingly unlikely, even though that is exactly what happened here. App. 20a-21a; *Taylor*, 64 F.4th at 1273.

Respondent's final attempt to skirt the merits of interrogation is to argue that "[t]his case is a poor one to 'clarify' the contours of interrogation because it comes to this Court under AEDPA deference." BIO at 35. This argument makes little sense—this Court regularly grants review of AEDPA cases and clarifies the contours of the underlying substantive law. *See, e.g.*, *Yarborough v. Alvarado*, 541 U.S. 652 (2002)

(addressing substantive *Miranda* law in an AEDPA case). The Court should grant certiorari and review the interrogation issue on the merits.[5]

B. Reinitiation

Respondent also fails to defend the Florida Supreme Court's reinitiation analysis on the merits, or the Eleventh Circuit's perplexing use of that analysis to justify its own decision on the interrogation issue. Respondent all but concedes that the Florida Supreme Court botched the analysis when it found dispositive that Taylor spoke to Bogers first, without applying the standard of whether the words Taylor spoke were sufficient to constitute a waiver of previously invoked rights. *See Bradshaw*, 462 U.S. at 1044. The Florida Supreme Court unreasonably thought Taylor could "reinitiate" simply by speaking first. Respondent's only defense of that misguided analysis is to suggest the Florida Supreme Court chose its words poorly. Respondent alleges "Taylor wants to impose mandatory opinion writing standards on state courts to use particular language when denying claims." BIO at 38. But all Taylor wants is for the correct reinitiation standard under *Bradshaw* to be applied.

Finally, Respondent argues that the Court should not grant certiorari because, given the Eleventh Circuit's murky discussion of reinitiation, no federal court has

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[5] Respondent also suggests that Taylor was not in custody at the time. *See* BIO at 3-4. But Respondent is confused—Taylor's statement was not made on the car ride home, but while he was still in the jail and police complex. *See* Pet. at 26; R. 383, 757-59. And the Florida Supreme Court's vague suggestion that Taylor was not in custody because "he was not under arrest," and "made the statements in question *after* the samples had been taken and he was free to leave," *Taylor*, 630 So. 2d at 1041, was unreasonable, likely explaining the Eleventh Circuit's decision to ignore it. When Taylor made the statement, his freedom of movement was restrained to a degree associated with arrest. *See New York v. Quarles*, 467 U.S. 649, 655 (1984).

ever truly evaluated the issue's merits, and this Court should generally not be the first to do so. *See* BIO at 38. True, the Eleventh Circuit only briefly and indirectly addressed the Florida Supreme Court's reinitiation mistake by suggesting that if Taylor's question to Bogers was casual enough to not constitute waiver, then Bogers's question was casual enough to not constitute interrogation. App. 20a; *Taylor*, 64 F.4th at 1273. But the Eleventh Circuit had ample opportunity to "truly evaluate" the merits of the reinitiation question, which was fully briefed by the parties. And in any event, this Court always has the option, at any point after granting certiorari, of remanding for the Eleventh Circuit to address the reinitiation issue in the first instance. The Court should grant certiorari and review whether Taylor's question to Bogers constituted a knowing and voluntary waiver of his previously invoked rights.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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