NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BERNARD BELL

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

And

ATTORNEY GENERAL, STATE OF FLORIDA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE
DEATH WARRANT SIGNED
EXECUTION SCHEDULED 6:00 P.M., JULY 15, 2025

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QUESTION PRESENTED

Under *Panetti v. Quarterman*, 551 U.S. 930, 943-44 (2007), the phrase "second-or-successive" as used in 28 U.S.C. 2244, does not apply to every habeas petition (in that case, a competency-to-be executed claim) filed after an initial petition. In *Tompkins v. Sec'y, Fla. Dep't of Corr.*, 557 F.3d 1257, 1260 (2009), the Eleventh Circuit limited *Panetti's* scope *only* to competency-to-be-executed claims; reasoned that any violation of *Brady v. Maryland*, 373 U.S. 83 (1963), necessarily ripened at trial regardless of when it was uncovered; and held that a second-in-time *Brady* claim must therefore be raised in a second-or-successive § 2244 petition. The Eleventh Circuit Court of Appeals denied Bell's Petition for Initial Hearing En Banc to reconsider its decision in *Tompkins*.

Petitioner's initial habeas petition was dismissed without a merits ruling. He discovered, through due diligence and after his death warrant was signed, the factual predicate of a *Brady/Giglio* violation.

The following question is presented:

> Where government action prevented Petitioner from bringing his claims under *Brady* and *Giglio* in his initial § 2254 motion, should a second-in-time motion asserting those claims be deemed non-successive under this Court's analysis in *Panetti*?

PARTIES TO THE PROCEEDING

Petitioner Michael Bernard Bell was the petitioner in the district court and the appellant in the United States Court of Appeals for the Eleventh Circuit.

Respondents, the Secretary, Florida Department of Corrections, and the Attorney General for the State of Florida were the respondents in the district court and the appellees in the United States Court of Appeals for the Eleventh Circuit.

NOTICE OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:
Circuit Court of Duval County, Florida
State of Florida v. Michael Bell, Case No. 1994-9776-CF
Judgment Entered: June 2, 1995

Direct Appeal:
Florida Supreme Court (No. 60-86094)
Bell v. State, 699 So. 2d 674 (Fla. 1997)
Judgment Entered: July 17, 1997
Rehearing Denied: September 17, 1997

Supreme Court of the United States (No. 97-7044)
Bell v. Florida, 522 U.S. 1123 (1998)
Judgment Entered: February 23, 1998

First Postconviction Proceeding:
Circuit Court of Duval County, Florida
State of Florida v. Michael Bell, Case No. 1994-9776-CF
Judgment on (Pro Se) Mot. to Correct Illegal Sentence Entered: June 12, 1998
Judgment on Counseled State Postconviction Mot. Entered: January 13, 2000

Florida Supreme Court (SC00–0318)
Bell v. State, 790 So. 2d 1101 (Fla. 2001)
Judgment Entered (reversing and remanding): April 26, 2001

Circuit Court of Duval County, Florida
State of Florida v. Michael Bell, Case No. 1994-9776-CF
Judgment (on Remand) Entered: May 31, 2002

Florida Supreme Court (SC02–1765, SC05-0610)
Bell v. State, 965 So. 2d 48 (Fla. 2007)
Judgment Entered: June 7, 2007
Mandate Issued: September 17, 2007

Supreme Court of the United States (No. 07-6240)
Bell v. Florida, 552 U.S. 1011 (1998)
Judgment Entered: November 5, 2007

Initial Federal Proceedings:
Bell v. Sec'y, Fla. Dep't of Corr., Case No. 3:07-cv-860-ODE, 2009 WL 10698415 (M.D. Fla. Jan 15, 2009)

Reconsideration Denied: February 11, 2009

United States Court of Appeals for the Eleventh Circuit
Bell v. Sec'y, Fla. Dep't of Corr., 461 F. App'x 843 (11th Cir. 2012)
(No. 09-10782)
Judgment Entered: February 7, 2012

Supreme Court of the United States (No. 13-8415)
Bell v. Florida, 572 U.S. 1118 (2014)
Judgment Entered: May 19, 2014

First Successive Postconviction Proceeding:
Circuit Court of Duval County, Florida
State of Florida v. Michael Bell, Case No. 1994-9776-CF
(Amended) Judgment Entered: March 23, 2011

Florida Supreme Court (SC11-0694)
Bell v. State, 91 So. 3d 782 (Fla. 2012)
Judgment Entered: April 26, 2012
Reh'g Denied: June 21, 2012
Mandate Issued: July 9, 2012

Second Successive Postconviction Proceeding:
Circuit Court of Duval County, Florida
State of Florida v. Michael Bell, Case No. 1994-9776-CF
(Amended) Judgment Entered: March 10, 2017

Florida Supreme Court (SC17-1045)
Bell v. State, 235 So. 3d 287 (Fla. 2018)
Judgment Entered: January 29, 2018
Mandate Issued: February 14, 2018

Supreme Court of the United States (No. 17-9361)
Bell v. Florida, 586 U.S. 856 (2018)
Judgment Entered: October 1, 2018

Third Successive Postconviction Proceeding:
Circuit Court of Duval County, Florida
State of Florida v. Michael Bell, Case No. 1994-9776-CF
Judgment Entered: September 27, 2018

Florida Supreme Court (SC18-1713)
Bell v. State, 284 So. 3d 400 (Fla. 2019)
Judgment Entered: November 7, 2019

Mandate Issued: December 2, 2019

Supreme Court of the United States (No. 19-7503)
Bell v. Florida, 140 S.Ct. 2579 (2020)
Judgment Entered: March 30, 2020

Fourth Successive Postconviction Proceeding:
Circuit Court of Duval County, Florida
State of Florida v. Michael Bell, Case No. 1994-9776-CF
Judgment Entered: June 24, 2025

Florida Supreme Court (SC25-0891)
Bell v. State, No. SC2025-0891, 2025 WL 1874574 (Fla. July 8, 2025)
Judgment Entered: July 8, 2025

Second-in-time Federal Proceedings:
Bell v. Sec'y, Fla. Dep't of Corr., Case No. 3:25-cv-00774, (M.D. Fla. July 10, 2025)

United States Court of Appeals for the Eleventh Circuit
Order of the Court, *Bell v. Sec'y, Fla. Dep't of Corr.*, No. 25-12359 (11th Cir. July 14, 2025), ECF No. 12.

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I. PETITION FOR WRIT OF CERTIORARI

Michael Bernard Bell petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in his case.

II. OPINIONS BELOW

The Eleventh Circuit's opinion is not yet reported but can be obtained on PACER at *Bell V. Sec'y, Fla. Dept Of Corr.,* No. 25-12359 (11th Cir. July 14, 2025), ECF No. 12. and is attached as Appendix (App.) A. The opinion of the District Court for the Middle District of Florida is reported at 2025 WL 1906701 (M.D. Fla. July 10, 2025) and attached as App. B. The opinion of the Florida Supreme Court denying relief on the claim at issue is reported at *Bell v. State,* No. SC2025-0891, 2025 WL 1874574 (Fla. July 8, 2025) and attached as App. C.

III. STATEMENT OF JURISDICTION

The Eleventh Circuit entered its judgment on July __, 2025. There was no motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense. U.S. Const. amend. VI.
>
> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. Const. amend. VIII.
>
> No State shall…deprive any person of life [or] liberty…without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.
>
> This case involves 28 U.S.C. § 2254 and 28 U.S.C. § 2244.

V. STATEMENT OF THE CASE

A. Introduction

For decades, the state concealed crucial, exculpatory, and impeachment information from Mr. Bell. It was not until July 2, 2025, 19 days after Mr. Bell's death warrant was signed and 9 days after his state court post-warrant evidentiary hearing, that Mr. Bell first gained access to notes from the actual "investigator's police activity summary". Those handwritten notes from the police investigator show that at the time of the shooting, an eyewitness, Mark Richardson, described to police that the shooter was 6 feet – to 6 feet 2 inches tall and weighed 155-160 pounds.[1]

The handwritten notes in the investigative summary were contemporaneously dated December 16, 1993. In those same December 16, 1993, investigator's notes, the investigator wrote that Richardson's description of the shooter described a shooter who was too "tall to be Michael Bell [and] didn't weigh enough" to be Mr. Bell. Richardson was friends with the victim, Jimmie West. Yet, at trial, Richardson testified, unimpeached, that Mr. Bell was the same height and weight as the shooter. For decades, the state concealed that it fed witnesses the "evidence" that they later testified to at trial and the initial post-conviction proceeding as the "truth". For decades that state concealed that it threatened and coerced witnesses to force their testimony, to force material witnesses to regurgitate the version of the events that the state fed to those witnesses. For decades the state

[1] Mr. Bell was 5 feet 10 inches tall and weighed 200 pounds.

concealed that, in at least one instance, the lead detective, William Bolena, physically beat a material witness to coerce his testimony. For decades, the state concealed that Bolena had been trying to "get" Mr. Bell from the time Mr. Bell was 10 years old.

This petition arises from Mr. Bell's effort to bring a second petition under 28 U.S.C § 2254 to remedy the government's Brady and Giglio violations, which the government's misconduct prevented him from raising in any of his prior proceedings. As relevant here, Mr. Bell contended that this second § 2254 motion, by virtue of this Court's analysis in *Panetti v. Quarterman*, 551 U.S. 930 (2007), should not be deemed successive. The district court found that Mr. Bell's petition was a successive petition and that it, therefore, lacked jurisdiction to even consider Mr. Bell's claims. The Eleventh Circuit denied Mr. Bell's Emergency Petition for Initial Hearing En Banc Consideration. App. A.

As a result, through no fault of Mr. Bell's, there has never been a complete judicial review and consideration of his claims that the government aggressively concealed *Brady*/*Giglio* material. Absent the constitutional violations committed by the government, there is a reasonable probability that Mr. Bell would not have been sentenced to death and likely would have been acquitted. The overarching consequence of allowing the government to continually engage in *Brady*/*Giglio* concealment until decades after a defendant's case is considered completed is that the government becomes permanently insulated from judicial review. Numerous federal appellate judges have criticized that outcome as directly conflicting with this

Court's decision in *Panetti*. The conflict warrants this Court's review and Mr. Bell's case provides ample reasons for resolving it.

B. Statement of Proceedings

Mr. Bell was convicted of two counts of first-degree murder and sentenced to death. *Bell v. State*, 699 So. 2d 674 (Fla. 1997). The Florida Supreme Court affirmed the convictions and sentences. Id. at 679. The United States Supreme Court denied certiorari. *Bell* v. *Florida*, 522 U.S. 1123 (1998). By statute, Florida guarantees a death sentenced individual access to counsel in postconviction, something not guaranteed in non-capital cases. *See* Fla.Stat. § 27.711 (1998) ("After appointment…the attorney must…represent the capital defendant throughout all postconviction capital collateral proceedings, including federal habeas corpus proceedings…."). The mandate on direct appeal was issued October 17, 1997, but no counsel was appointed to represent Mr. Bell at that time. His 1-year AEDPA statute of limitations began to run on February 24, 1998, when certiorari was denied. Still no counsel was appointed to represent him. On April 8, 1998, Mr. Bell filed a pro se motion to appoint postconviction counsel. Not wanting to wait, Mr. Bell filed a pro se motion under Fla.R.Crim.P. 3.800. The trial court denied the motion and cautioned Mr. Bell that all future pro se filings would be stricken because "he is or should be currently represented by [counsel]." *Bell v. Fla. Atty. Gen.*, 461 F. App'x 843, 846 (11th Cir. 2012).

Postconviction counsel was not appointed until September 3, 1998. That attorney withdrew on October 12, 1998, and a new attorney, Jeanine Sasser, was

appointed that day. For eight months Mr. Bell did not have a lawyer and was ordered by a court, in a dizzying display of circular reasoning, that he could not file pro se because he should have a lawyer, even though he did not. Eight months of Mr. Bell's 1-year AEDPA statute of limitations had run before Mr. Bell was even provided counsel. Sasser eventually sought and received an extension of the 1-year deadline for filing a state postconviction motion under Fla.R.Crim.P. 3.851, and a shell 3.851 motion was filed on June 1, 1999. *See* SC-00-318, Initial Brief of Appellant at *1 (July 26, 2000) ("The Motion was incomplete and was filed to toll the time to file a Petition for Writ of Habeas corpus in federal court"). The 1-year AEDPA statute of limitations in federal court had already passed 17 days before Sasser filed the shell 3.851. Mr. Bell's time to file a timely federal habeas petition was gone.

Mr. Bell moved to have Sasser replaced as counsel. The court denied the motion, finding that, even though she blew Mr. Bell's AEDPA statute of limitations, "Sasser…has done an exemplary job on behalf of the defendant and should not be removed as counsel." *See* 94-cf-9776, Docket #477 (October 3, 2001). Mr. Bell moved for self-representation, which was granted. Ultimately, the postconviction court would deny Mr. Bell's postconviction motion and the Florida Supreme Court affirmed on appeal. *Bell v. State*, 965 So. 2d 48, 74 (Fla. 2007). Because Mr. Bell's court-appointed counsel, Sasser, ignored Mr. Bell's federal habeas deadline, no federal court ever reviewed his conviction and sentence. On June 18, 2025, five days after his death warrant was signed, Bell filed a successive postconviction motion raising a *Brady/Giglio* claim. The trial court denied the motion on June 24, 2025. App. D.

The Florida Supreme Court affirmed. *Bell v. State,* No. SC2025-0891, 2025 WL 1874574 (Fla. July 8, 2025) and attached as App. C. Bell filed a second-in-time federal habeas petition raising his *Brady/Giglio* claim which was dismissed as successive on July 10, 2025. Bell moved the Eleventh Circuit Court of appeals for initial hearing en banc to reconsider its decision in *Tompkins v. Sec'y, Fla. Dep't of Corr.*, 557 F.3d 1257, 1260 (2009), which held that *Brady* claims raised in a second or successive petition must satisfy the gatekeeping requirements of § 2244(b). The Eleventh Circuit denied Bell's Petition for Initial Hearing En Banc on July 14, 2025. *Bell v. Sec'y, Fla. Dep't of Corr.*, No. 25-12359 (11th Cir. July 14, 2025), ECF No. 12. App. A.

C. Facts Relevant to the Question Presented

More than thirty years ago, Michael Bell was convicted of two counts of first-degree murder and sentenced to death. For more than thirty years, the State of Florida suppressed a litany of exculpatory evidence. Within days of his death warrant being signed on June 13, 2025, trial witnesses began coming forward with the same story: their trial testimony had been coerced by Detective William Bolena and Assistant State Attorney George Bateh.

First it was Henry Edwards. Mr. Edwards had testified at trial that he witnessed the shooting in this case and identified Mr. Bell as the shooter. On June 16, 2025, however, he provided a sworn affidavit that not only did he not witness the shooting, but that he did not even know Mr. Bell and could not have identified him. App. F at 55-57. Edwards also said that his false testimony at trial was fed to him by the state and that he was coerced by Detective William Bolena and

Prosecutor George Bateh. *Id.* For his testimony, Edwards received leniency in Edwards' own criminal cases. *Id.* Edwards also received favors from Bolena, money and home visits while incarcerated. Edwards was Bateh's long-time paid confidential informant. *Id.*

On June 17, 2025, trial witness Ned Pryor provided defense investigators with a similar story of the state telling its witnesses what to testify to at trial. App. G at 10-11. At trial, Pryor testified that he witnessed Mr. Bell approach the victims' car with a gun and then heard shots, and that a few days later Mr. Bell admitted to committing the murders. In his statements to investigators on June 17, 2025, Pryor said he was not present at the crime scene and did not see Bell with a gun. *Id.* Critically, Pryor stated that Mr. Bell never made any admissions. *Id.* Prosecutor Bateh "put those words in my mouth," and coerced him in to testifying against Mr. Bell by threatening to charge Pryor in the case if he did not testify as Bateh wanted. At the post-warrant evidentiary hearing, *Id.* Pryor, under oath, said he was not present at the location of the shooting.

Also on, June 17, 2025, state trial witness Dale George spoke with defense investigators. App. G at 7. George was charged as an accessory after the fact to these murders. At trial he testified that he was in Mr. Bell's car on the night of the shooting and that he saw Mr. Bell leave his car, arm himself with an AK-47, and shoot the victims. George initially told Bolena that he did not know anything about the shooting. Later, George was arrested by Bolena and taken to a police interrogation room. George told defense investigators that he was handcuffed and

that, while handcuffed, Bolena physically assaulted him ("clotheslining" him across the room). *Id.* Geoge also told defense investigators that both Bateh and Bolena told him that if he did not play ball with them that he would be charged with first degree murder in this case. *Id.* George told defense investigators that Bateh wanted him to pin everything on Mr. Bell. George added that he was afraid of what Bateh would do to him if he finally told the truth. *Id.*

Next to describe what Bolena and Bateh did to make him testify to their version of the case was Charles Jones. Jones had testified at trial that Mr. Bell had attempted to sell him an AK-47 a few days after the shooting and that Mr. Bell admitted to committing the murders. On June 18, 2025, Jones provided a sworn affidavit that his trial testimony was false and had been coerced by Bolena. App. F at 93-95. Jones said that at the time of his testimony that his sister was in a relationship with Bolena. Jones swore in his June 18, 2025 affidavit that he never saw Mr. Bell attempt to sell an AK-47, and that Mr. Bell had never admitted to shooting anyone. *Id.* Jones said that Bolena told him Bell "tried to sell you the gun, right? Right?" Bolena told Jones that is what he wanted Jones to testify to at trial. Jones also said that Bateh spent 4-5 months telling Jones what to say at Mr. Bell's trial. *Id.* Jones said that he testified falsely because Bateh and Bolena promised to help him with his own federal robbery charges, which they did. *Id.*

Ericka Williams, who had testified at trial that she bought an AK-47 for Mr. Bell shortly before the murder, told defense investigators that detectives interrogated her for 14-16 hours, screamed at her, and threatened her with ten

years imprisonment and having her child taken away from her if she did not testify against Mr. Bell. App. G at 7-8.

Paula Goins, who testified at trial that she overheard Mr. Bell making admissions, testified at the post-warrant evidentiary hearing that she too had been coerced by Bateh and Bolena. Goins testified that Bolena and Bateh put words in her mouth, they fed her what to say and then they threatened her with prison time, losing her job, house, and custody grandchild if she did not testify the way they wanted her to testify against Mr. Bell.

From the date Mr. Bell's warrant was signed on June 13, 2025, until the Mr. Bell's habeas petition was filed in the district court on July 9, 2025, every single witness that provided evidence against Mr. Bell at trial told investigators the same thing: their testimony was coerced by Bolena and Bateh. Those witnesses stated that Bolena and/or Bateh had threatened them and coerced their testimony and that Bolena and Bateh fed them the information for their testimony. But even more exculpatory evidence would continue to surface.

On July 2, 2025, the Jacksonville Sheriff's Office finally produced handwritten detective interview notes that the state had refused to produce at trial and during postconviction proceedings. State's witness Mark Richardson testified at trial that he was an eyewitness to the shooting. At trial, while he could not identify the shooter because the shooter was wearing a mask, Richardson testified that the shooter was the same height and build as Mr. Bell. The handwritten detective notes, dated December 16, 1993, from Richardson's interview with

detectives shortly after the shooting tell a much different story. Richardson described the shooter as 6-6'2" and 155-160lbs. App. I at 23-35. Mr. Bell was 5'10" and 200 lbs. Richardson also told detectives that Mr. Bell could not have been the shooter because Bell was too short and too heavy to be the shooter. *Id.*

After Mr. Bell's death warrant was signed, more witnesses came forward with evidence of Bolena and Bateh's misconduct. Maurice Williams signed a sworn affidavit on June 29, 2025. App. I. at 38-42. Williams said that Bolena came to visit him while he was in jail and attempted to coerce him in to testifying against Mr. Bell. Williams swore that he told Bolena that he knew nothing about the murders, yet Bolena wrote in his police report that Mr. Bell's codefendant Dale George had admitted to Williams that he and Mr. Bell committed the murders. Williams swore in his affidavit that this statement attributed to him was completely fabricated by Bolena, Williams had never even met Dale George let alone obtained a confession from him.

On June 30, 2025, Gary Browder signed a sworn affidavit that also alleged that Bolena had completely fabricated a statement in the police report attributed to Browder. App. I. at 32-36. Browder swore that he did meet with Bolena once to provide information on another criminal case involving Mr. Bell but had never spoken to Bolena at all about this case. Despite this, in his report, Bolena attributed a statement to Browder that Browder claimed that Mr. Bell had admitted to committing the murders. Browder swore that he never made such a statement to Bolena and that Mr. Bell had never made any admissions to him.

On July 1, 2025, Derrick Jones signed a sworn affidavit. He swore that Bolena threatened to pin a murder case on him if he did not say that he overheard Mr. Bell and Dale George admitting to the murders. App. I. at 28-32. Jones swore that he never heard Mr. Bell or George make any admissions, and that Bolena had fabricated the entire statement that he wanted Jones to adopt.

In this case there is no physical or forensic evidence linking Mr. Bell to the murders that put him on death row. The State's case was made on the testimony of the forgoing witnesses. Witnesses that have now admitted that they feared Bolena and Bateh. Witnesses that admit that they were fed what to testify to by Bolena and Bateh. Witnesses that swear that they were threated and coerced by Bolena and Bateh. And, for decades, the Jacksonville Sheriff's Office concealed the handwritten detective interview notes where their own eyewitness, Richardson, told detectives shortly after the shooting that the shooter was not Mr. Bell. Additionally, witnesses who the state did not call to testify at trial have provided sworn affidavits that Bolena attempted to coerce them to testify falsely against Mr. Bell. App. I; App. J.

VI. REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision – deeming Petitioner's second-in-time § 2254 motion to be successive and thus subject to the gatekeeping provisions of § 2244(b)– conflicts with this Court's decision in *Panetti* on an important question of federal law. Equally important, the Eleventh's approach produces an inequitable result, because it rewards the government for its own misconduct, by forever barring

Petitioner's penalty-phase *Brady* and *Giglio* allegations from review. Under the Eleventh Circuit's approach, if the government manages to hide *Brady* material through the completion of a capital defendant's first § 2254 proceeding, and that the defendant can *never* have a court review that *Brady* claim without producing clear and convincing evidence of actual innocence. Although no circuit split yet exists on the issue, a full panel of the Eleventh Circuit and numerous other federal appellate judges have strongly expressed the view that this result is both impossible to square with *Panetti* and creates a dangerous incentive for prosecutors to conceal information they are constitutionally bound to disclose. The conflict with this Court's decision in *Panetti* is genuine, recurring, and important, and Petitioner's case is an excellent vehicle for resolving it.

1. This Court's reasoning in *Panetti* supports the view that a second-in-time application for collateral relief is not improperly "successive" where it presents a claim that could not have been brought earlier, and where the implications for habeas practice and the abuse of the writ doctrine warrant considering its merits.

In *Panetti*, the Court held that a death-sentenced prisoner need not raise in his initial habeas petition the possibility that he may become incompetent at a later date, and thus be barred from execution under *Ford v. Wainwright*, 477 U.S. 399 (1986). Instead, if those circumstances arise, he may litigate his *Ford* claim in a second application. The logic by which the Court reached that result suggests that the same should be true for penalty-phase claims under *Brady* and *Giglio*.

The Court analyzed the question of what constitutes a second or successive motion in light of both AEDPA's purposes (to further "comity, finality, and

federalism") and "the practical effects" of this Court's holdings when interpreting AEDPA, including the "implications for habeas practice" and the abuse of the writ doctrine. *See Panetti*, 551 U.S. at 945-47. The Court observed that focusing on these considerations was especially appropriate in situations where, as here, a proposal to impose a particular procedural hurdle would threaten a petitioner with "forever losing [his] opportunity for any federal review . . ." of a particular constitutional claim. *Id.* at 945-46.

The Court began by examining the implications for habeas practice of a rule requiring a petitioner to raise a speculative claim about possible future incompetency – a claim for which no facts would have existed – in his initial habeas petition, so as to preserve it for possible future review. The Court concluded that such a rule would have a "far reaching and seemingly perverse" impact, since the recognized risk of eventual cognitive deterioration would require a prisoner with no apparent mental problems at the time of his initial habeas filing to assert such a claim anyway. *Panetti*, 551 U.S. at 943 (citation omitted). Such a rule would force conscientious defense attorneys to file unripe and often meritless *Ford* claims. *Id.* The Court rejected this "counterintuitive" approach, *id.*, finding that it would "add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id.* at 931.

The Court then explained that "[t]he phrase 'second or successive' is not self-defining," but instead takes its meaning from the case law, including the dense web of habeas corpus decisional law that predated AEDPA. *Id.* at 943-44. The Court

noted that it had already recognized in other contexts that not every second-in-time habeas application is "second or successive." It emphasized that its precedent required looking to the implications for habeas practice when interpreting that term. *Id.* at 945.

In reaching its conclusion that the second-in-time petition presenting Panetti's *Ford* claim should not be deemed improperly "successive," the Court looked to the AEDPA's purpose of furthering "the principles of comity, finality, and federalism." *Panetti*, 551 U.S. at 945 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 337 (2003). It sought to balance those goals with the need to avoid "forever" denying petitioners the opportunity for any federal review of previously unavailable claims. *See Panetti*, 551 U.S. at 945-46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). The Court noted that absent clear indication of contrary Congressional intent, it would resist interpreting the habeas statute in a way that would "produce troublesome results," "create procedural anomalies," and "close our doors to a class of habeas petitioners seeking review[.]" *Id.* at 946 (quoting *Castro v. United States*, 540 U.S. 375, 380 (2003)). The Court then considered whether requiring prisoners to file unripe *Ford* claims would further AEDPA's goals. It concluded that such a mandate would not "conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Id.* (quoting *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (per curiam) (bracketing in *Panetti*)).

In finding jurisdiction, the *Panetti* Court noted that AEDPA's successive-application bar was designed to restrain "what is called in habeas corpus practice

'abuse of the writ.'" *Id.* at 947 (quoting *Felker v. Turpin*, 518 U.S. 651, 664 (1996)). The "abuse of the writ" doctrine reflected an equitable interest in foreclosing repeated habeas motions from prisoners who lacked good grounds for failing to bring particular claims earlier. *See*, *e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 484-85 (1991). Panetti, of course, had good grounds for not bringing his *Ford* claim earlier, since it was unripe. Thus, allowing Panetti's second-in-time petition in no way frustrated AEDPA's goal of curtailing actual "abuse."

Emphasizing the importance of interpreting the relevant statutory language to reflect the realities of post-conviction practice, the Court concluded that Panetti's claim was properly before the federal district court:

> We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party.

Id. at 947.

2. Under *Panetti*'s analysis, a second-in-time § 2254 motion like Petitioner's, which raises a *Brady* and *Giglio* claim that could not have been brought earlier because the government managed to hide the necessary evidence past the completion of the original § 2254 proceeding, should not be deemed "successive."

Ordinarily, 28 U.S.C. § 2244(b) bars review of "[a] second or successive application" for relief from a prisoner unless it (1) contains newly discovered evidence sufficient to establish his innocence, or (2) relies on a previously unavailable and retroactive "new rule of constitutional law[.]" Its aim is to prevent prisoners from abusing the writ through intentionally prolonging litigation or

repeatedly filing frivolous claims. *See Panetti,* 551 U.S. at 945-47**.** But under the Court's reasoning in *Panetti*, applying § 2244(b) to Petitioner's claims would not only fail to serve those purposes, but would frustrate other important purposes of § 2254, such as ensuring accurate and fair judgments and preventing executions where State misconduct led to the underlying death sentence. As we discuss in greater detail below, *Panetti* thus supports deeming Petitioner's second-in-time § 2254 motion not "successive."

Although *Brady* and *Ford* claims differ in their substance, the *Panetti* analysis applies in the same way to both. One primary focus of *Panetti* was the implications for habeas practice if the Court found it lacked jurisdiction over Panetti's claim. Precluding *Brady* claims that a prisoner could not have discovered through due diligence would adversely affect habeas practice in the same way that a contrary ruling in *Panetti* would have. The nature of *Brady* claims – that they involve evidence that was not properly disclosed by the Government prior to trial – means that even diligent prisoners often cannot discover them unless the government belatedly discloses the evidence. Just as with *Ford* claims, such a regime would require the filing of "unripe (and, in many cases, meritless) [*Brady*] claims in each and every [first § 2254] application." *Panetti*, 551 U.S. at 943. Thus, as with *Ford* claims, such an inflexible rule would force the courts to address an "avalanche of substantively useless *Brady* claims[.]" *Scott v. United States*, 890 F.3d 1239, 1250-51 (11th Cir. 2018). In fact, the burden of treating sentencing-related

Brady claims in this manner would be "even more deleterious" than with *Ford* claims, since *Ford* applies only in capital cases. *Id.* at 1251.

Panetti also addressed finality interests. Finality is generally important because the difficulty in prosecuting a long-past offense can prejudice the State. *See Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986). But allowing a second-in-time filing of a previously unavailable sentencing-phase *Brady* claim, like a comparable *Ford* claim, would not undermine AEDPA's finality concerns. Because the government itself controls whether *Brady* violations occur in the first place, it has in its hands the means to protect the finality of judgments. *See Scott*, 890 F.3d at 1252. Barring such claims as successive "would … allow the government to profit from its own egregious conduct," which "[c]ertainly … could not have been Congress's intent" in enacting AEDPA. *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (en banc) (Wynn, Thacker, and Harris, JJ., concurring) (citation omitted). Furthermore, as with *Ford* claims, finality is "not implicated" because, so long as the Government hides the *Brady* material, courts would not be able to resolve claims based on that material. *See Panetti*, 551 U.S. at 946 (finality "not implicated" where unavailability of evidence would keep courts from resolving relevant claims).

Third, *Panetti* considered the abuse-of-the-writ doctrine. Under that longstanding rule, a claim presented in a second habeas application was not abusive (and thus could be reviewed on the merits) if the prisoner could demonstrate cause for not raising the claim sooner and prejudice from the alleged legal violation. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991). A *Brady* violation that a petitioner

could not reasonably have discovered due to his reliance on a purported open file discovery policy constitutes "cause." *Strickler v. Greene*, 527 U.S. 263, 289 (1999). The built-in materiality component of a *Brady* claim – that no violation exists unless timely disclosure of the evidence would have created a reasonable probability of a different outcome – satisfies the prejudice requirement. *Id.* Thus, a petitioner does not "abuse the writ" by bringing a second motion alleging a *Brady/Giglio* violation, where he could not reasonably have discovered that claim at the time of his first motion, due to continued State action in hiding the *Brady* material. There is "no argument" that such actions would constitute an abuse of the writ. *See Panetti*, 551 U.S. at 947.

In short, all the perspectives from which the Court considered the "second or successive" issue in *Panetti* – the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine – support concluding that second-in-time penalty-phase *Brady* claims should not be deemed "successive" for purposes of § 2244(b).

Some lower courts have resisted applying *Panetti*'s analysis to *Brady* claims because this Court described *Ford* claims as generally not being ripe "until after the time has run to file a first federal habeas petition." 551 U.S. at 943. According to these courts, *Brady* claims by contrast ripen when the violation occurs (*i.e.* when the government initially withholds the *Brady* material).[2] But *Panetti* did not define the term, and in fact "ripeness" typically refers to the point which an issue reasonably

[2] *See, e.g.*, *In re Wogenstahl*, 902 F.3d 621, 627–28 (6th Cir. 2018); *Brown v. Muniz*, 889 F.3d 661, 674 (9th Cir. 2018).

becomes litigable. Black's Law Dictionary says a dispute is ripe when it "has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.'" *Ripeness*, Black's Law Dictionary (10th ed. 2014)).

By that measure, a *Brady* claim is unripe if the wronged defendant cannot make "an intelligent and useful decision" about whether to raise it, and it goes without saying that a defendant who has no idea that particular *Brady* material may exist (like Petitioner prior to June of 2025) is not yet positioned to make such a choice. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359 (2006) ("In the case of a *Brady* claim, it is impossible for the defendant to know as a factual matter that a violation has occurred before the exculpatory evidence is disclosed.") And the exact definition of "ripeness" does not matter in any event. *Panetti* referenced ripeness only in terms of analyzing the implications for habeas practice of treating a claim as second or successive. 551 U.S. at 943-45. In other words, the Court in *Panetti* did not treat "ripeness" as a litmus test, but merely saw it as relevant to the ultimate test – the implications for habeas practice of forever barring from review a claim that could not reasonably have been raised in an initial collateral attack.

It might be argued that treating *Brady* claims as non-successive, even in circumstances like those in Petitioner's case, would unduly reduce the efficacy of § 2244(b), since that section allows merits review of successive petitions based on "newly discovered evidence." But the "newly discovered evidence" in this case is of a special kind, the type of evidence that the State was constitutionally bound to

disclose at trial. When the government fails to fulfill that obligation, there must be a reliable recourse, and one that does not penalize the defendant. This Court has already said as much:

> [T]he fact that such [exculpatory] evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the [otherwise applicable] severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

United States v. Agurs, 427 U.S. 97, 110-11 (1976).

Petitioner here should not have to endure a more severe burden, where the State falsely reassured the § 2254 court that it had maintained open file discovery at trial: defense counsel cannot be forced to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695 (2004); *see also Strickler v. Greene*, 527 U.S. 263, 283 n. 23 (1999) ("if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.").

3. Numerous federal judges have recognized that the approach endorsed by the Eleventh Circuit in Petitioner's case conflicts with *Panetti* because it produces inequitable results in individual cases and creates a destructive systemic incentive for prosecutors to flout *Brady*.

Although technically there is not yet a circuit split on this issue, a panel of the Eleventh Circuit has concluded that *Panetti* requires precisely the result Petitioner urges, although it was bound by an earlier panel's contrary conclusion. *See Scott v. United States*, *supra*. And a strong component of the majority of the full Fourth Circuit, echoing *Scott*'s analysis, has called for the Fourth Circuit to reconsider its contrary precedent. *See Long*, 972 F.3d at 486 (Wynn, Thacker, and Harris, JJ., concurring). A panel from the Ninth Circuit has also recognized the problem. In *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015), the panel recognized that exempting *Brady* claims from the "second or successive" petition doctrine had merit. The panel noted that that Ninth Circuit precedent (which it described as based on a "constrained reading" of *Panetti*) prevented it from reaching Gage's argument that *Brady* claims should warrant such an exemption, lamenting that "under our precedents as they currently stand, prosecutors may have an incentive to refrain from disclosing *Brady* violations related to prisoners who have not yet sought collateral review." A dissenting judge from the Sixth Circuit, too, has criticized the "second or successive" petition doctrine's preclusive effect on *Brady* claims. *See Allen v. Mitchell*, 757 Fed. Appx. 482 (6th Cir. 2018) at *4 (Moore, J. dissenting) ("[T]reating Allen's *Brady* claim as second or successive would incentivize state prosecutors to withhold materially exculpatory evidence until after a petitioner exhausts his initial federal habeas claims; . . . foreclosing adjudication unnecessarily restricts federal habeas review of *Brady* violations.").

Because *Scott* undertakes a very detailed analysis of *Panetti* and how it bears on the question at hand than any other court has conducted, the opinion is worth a close look. The *Scott* court first took account of how this Court in *Panetti* analyzed the issue of what constitutes a "second or successive" petition as to *Ford* claims. *Scott* observed that the Court had examined only three considerations: "(1) the implications for habeas practice if the Court found it lacked jurisdiction over Panetti's claim; (2) the purposes of AEDPA; and (3) the pre-AEDPA abuse-of-the-writ doctrine." *Scott*, 890 F.3d at 1248 (citing *Panetti,* 551 U.S. at 943-47). It then addressed the implications of those three considerations with respect to *Brady* claims.

As to the first consideration, the *Scott* court concluded that "precluding *Brady* claims that a prisoner could not have discovered through due diligence would adversely affect habeas practice." *Scott*, 890 F.3d at 1250. The nature of *Brady* claims – that they involve evidence that was not properly and timely disclosed by the government prior to trial – means that even diligent prisoners often cannot discover them unless the State discloses them or provides access to its files. Just as with *Ford* claims, such a regime would force conscientious defense counsel to preserve "then-hypothetical" *Brady* claims "on the chance that the government might have committed a material *Brady* violation that will eventually be disclosed." *Id.* at 1250 (citing *Panetti*, 551 U.S. at 943). As with *Ford* claims, such an inflexible rule would burden petitioners with presenting and courts with addressing an "avalanche of substantively useless *Brady* claims[.]" *Id.* at 1250-51. The resulting effect on habeas

practice would be "even more deleterious" than with *Ford* claims, since *Ford* applies only in capital cases, while *Brady* applies to any case. *Id.* at 1251.

The *Scott* court then turned to the second *Panetti* consideration, finality interests. For two reasons, it concluded that "the second-in-time filing of a *Brady* claim that a prisoner could not have discovered earlier through the reasonable exercise of due diligence does not negatively implicate AEDPA's finality concerns any more than does the second-in-time filing of a *Ford* claim[.]" *Scott*, 890 F.3d at 1251. First, the *Scott* court pointed out, finality is generally important because a new trial can prejudice the State, given the difficulty in prosecuting a long-past offense. But because "the government alone holds the key to ensuring a *Brady* violation does not occur" in the first place, any such problem would be of the Government's own making. *Id.* "Whatever finality interest Congress intended for AEDPA to promote, surely it did not aim to encourage prosecutors to withhold constitutionally required evidentiary disclosures long enough that verdicts obtained as a result of government misconduct would be insulated from correction." *Id.*[3]

The *Scott* court summarized its discussion of the considerations addressed in *Panetti* as follows:

> In short, all the *Panetti* factors – the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine

[3] The court also observed in passing that precluding a remedy in this situation could undermine the deterrent effect of the criminal law, one of the values that emphasizing finality is supposed to serve. *Scott*, 890 F.3d at 1251. As it pointed out, "[p]rocedural fairness is necessary to the perceived legitimacy of the law," and "legitimacy affects compliance." *Id.*at 1252. In other words, one who fears that the government will cheat to win at trial "actually has less incentive to comply with the law because, in his view, compliance makes no difference to conviction." *Id.*

> – compel the conclusion that second-in-time *Brady* claims cannot be "second or successive" for purposes of § 2255(h). And nothing *Panetti* teaches us to consider so much as hints otherwise.

Id. (footnote omitted). The court went on to express concern that any contrary holding would violate the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2. *Scott*, 890 F.3d at 1243. It summarized its analysis as follows: "Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause . . . require the conclusion that a second-in-time collateral claim based on a newly revealed actionable *Brady* violation is not second-or-successive for purposes of AEDPA." *Id.* at 1259.

Thus, judges from a wide swath of the country – from the Fourth, Sixth, Ninth, and Eleventh Circuits – share a concern that the prevailing narrow reading of *Panetti* blocks federal court review of *Brady* claims that prosecutors have managed to keep hidden through an initial round of post-conviction review. That effect, in turn, incentivizes prosecutors to continue concealing *Brady* material, corrupting both the trial process and the functioning of post-conviction procedural mechanisms for correcting unjust outcomes. Those mechanisms (like proceedings under § 2254) are essential because the record is often underdeveloped to permit such correction on direct appeal. As the *Long* court noted, "*Panetti* elaborated on one such exception (related to mental competency for execution), but left the door open to others." *Long*, 972 F.3d at 486. Indeed, *Panetti* itself held warned against reading the federal habeas statutes in a way that would "produce troublesome results," 510 U.S. at 946 (citation

omitted); as these judges recognize, reading § 2254 in the manner embraced by the Eleventh Circuit in Petitioner's case is doing just that.

The urgent question raised by these numerous federal appellate judges about the proper scope of *Panetti* deserves this Court's attention.

4. The centrality of the *Brady* rule to the integrity of the American criminal justice system supports construing the federal habeas statutes to permit second-in-time, non-successive collateral attacks raising *Brady* claims, where State misconduct made it impossible to raise them in an initial application for post-conviction relief.

It is beyond dispute that a prosecutor's suppression of material exculpatory evidence results in "a proceeding that does not comport with standards of justice[.]" *Brady*, 373 U.S. at 88. As a result, allowing valid *Brady* claims to proceed is critical to "ensuring the integrity of our criminal justice system." *See California v. Trombetta*, 467 U.S. 479, 485 (1984). The importance of complying with *Brady* is reflected in the fact that both houses of Congress recently unanimously passed, and the President signed, the Due Process Protections Act, which amended Fed. R. Crim. P. 5 to require that "on the first scheduled court date when both prosecutor and defense counsel are present," the court must "issue an oral and written order" to both parties that confirms the prosecutor's disclosure obligation under *Brady* "and the possible consequences of violating such order under applicable law." *See* Pub. L. No. 116-182 (2020); Fed. R. Crim. P. 5(f).

The injury to the legitimacy of the legal system inflicted by an initial *Brady* violation is compounded where the State succeeds in concealing the violation

throughout the prisoner's initial § 2254 proceeding. In such circumstances, "precluding the filing of a second-in-time petition addressing the newly discovered violation is doubly wrong." *Scott*, 890 F.3d at 1244. Specifically, barring such a second-in-time motion rewards "prosecutors who engage in the unconstitutional suppression of evidence with a 'win'—that is, the continued incarceration of a person whose trial was fundamentally unfair (and unconstitutional)." *Long*, 972 F.3d at 486 (Wynn, Thacker, and Harris, JJ., concurring). And here the reward awaiting the prosecutors is even more disturbing: Petitioner's long-term incarceration in conditions of psychologically damaging, near-solitary confinement, followed by his death by lethal injection less tomorrow.

And while allowing claims like Petitioner's to proceed would postpone finality, it is important to remember the benefits that such a slight delay will confer: more reliable sentencing judgments, and the elimination of sentences secured through governmental misconduct and outright fraud. Moreover, the State has no basis to complain about any delay necessary to conduct remedial review proceedings. All it must do to avoid delay on the "back end" is comply with *Brady* on the "front end." *See Scott*, 890 F.3d at 1252. Foreclosing consideration of *Brady* claims in the circumstances of Petitioner's case "eliminates the sole fair opportunity for these petitioners to obtain relief," and not only "corrodes faith in our system of justice" but "undermines justice itself." *Id.* at 1243. It "cannot be allowed." *Id.*

5. Petitioner's case is an exceptionally compelling vehicle for considering and deciding this important and unresolved question of federal law.

Petitioner's case presents an excellent vehicle for considering and deciding whether a *Brady* claim asserted in a second 2254 motion, which could not have been included in an initial 2254 motion solely due to State action, should be deemed "successive" and thus required to satisfy the gatekeeping provisions of § 2244(b). For one thing, no procedural barrier other than the one that is the subject of the question presented stands between Petitioner and merits review of his *Brady* and *Giglio* claims (that is, there are no questions of forfeiture, waiver, or retroactivity that the Court would have to address in order to reach the question presented).

Second, the *Brady* information that the State concealed here was plainly material. An eyewitness, Mark Richardson told detectives shortly after the murder that the shooter was 6'-6'2" and weighed 155-160lbs, and could not have been Bell because Bell was too short and too heavy. This evidence was suppressed. It was also corroborated by state witness Laura Hampton who also testified as an eyewitness. She told detectives that the shooter was 6'3". Bell was 5'10" and 200 lbs. The rest of the state's case has been completely eroded by additional suppressed evidence. Henry Edwards, who testified at trial that he witnessed Bell commit the shootings, swore that he lied at trial at the behest of Bolena and Bateh. He never saw Bell commit the murders, and in fact did not even know Bell and could not have identified him. It also came out during 2002 postconviction proceedings that Henry Edwards was a paid informant of Detective Bolena. All of this evidence was suppressed. What an incredible coincidence that after detectives could only find two eyewitnesses, and both could not identify the shooter and gave descriptions that conflicted with Bell's

appearance, that a week later they discovered that Det. Bolena's long time paid informant Henry Edwards was present at the shooting scene and could identify the shooter.

It gets worse from there. Ned Pryor, who testified as an eyewitness at trial, testified under oath that he was not even present at the scene. He also told investigators that his testimony that Bell admitted to the murders and his testimony that he witnessed Bell commit the murders was coerced by Bateh. Supposed eyewitness, and co-defendant, Dale George told investigators in June of 2025 that Det. Bolena beat him and threatened him with first degree murder charges if he did not testify against Bell. George's own brother Julian George testified at a 2002 evidentiary hearing that Dale George had told him the same thing, that Det. Bolena had beat the testimony out of him, and promised him leniency on his own charge, but the postconviction court dismissed the testimony as not credible. If only the postconviction court would have known that every single witness that implicated Bell in the murders would claim the same thing: that Bolena and Bateh coerced their testimony against Bell.

Ericka Williams and Paula Goins would say the same thing. Bolena and/or Bateh threatened them to get them to testify against Bell. At this point, every single witness from trial that provided testimony that incriminated Bell had told investigators that their testimony was coerced by Bolena and Bateh. But that wasn't the end of it. Three more witnesses who Bolena attributed statements to in his police report that incriminated Bell, all signed sworn affidavits that Bolena attempted to

coerce them to testify against Bell and that they refused. Nonetheless, Bolena wrote completely fabricated accounts in his police reports that the witnesses implicated Bell.

The truth is, Bell's investigators have actually obtained sworn affidavits from six witnesses that Bolena attempted to coerce them to testify against Bell, and attributed incriminating statements from them against Bell that each witness swears they never made to Bolena. Three of those affidavits were obtained too late to include in state court filings and thus are not part of the record. Mr. Bell is set to die tomorrow. Regardless of procedural rules, this Court and posterity[4] should know that every single witness in the police report that is alleged to have implicated Bell in the murders has said that their statement was either coerced by Bolena and/or Bateh or completely fabricated when coercion failed. Every one. That is the materiality in this case. There remains no case. Just the stale testimony of group of witnesses that have a few things in common; they all had a lot to lose when they testified at trial, they all claimed at trial and in postconviction that their testimony was not coerced, almost all of them had their own criminal charges that were pending at the time of trial reduced to a sweetheart deal, and all of them, all of them, say that Bolena and/or Bateh coerced their testimony.

Finally, the equities favor Petitioner. Petitioner faces execution and the Court has emphasized that its "duty to search for constitutional error with painstaking care

[4] The additional affidavits are included as Appendix J, although Bell concedes they are not part of the record below.

is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (internal quotation marks omitted; citation omitted); *see also*, *e.g.*, *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (noting that "the severity of [a death] sentence mandates careful scrutiny in the review of any colorable claim of error"). In addition, the Court has a special responsibility to superintend the administration of justice in federal court, which includes setting rules to encourage compliance with *Brady* by prosecutors.

Judge Rosenbaum's concurring opinion from the denial of Bell's Petition for Initial Hearing En Banc below perfectly encapsulates the miscarriage of justice that occurs when, like here, substantial *Brady/Giglio* claims are subjected to § 244(b)'s gatekeeping provisions:

> "The Constitution guarantees criminal defendants a fair trial." *Id.* at 1251. But our precedent, which "prohibits second-intime collateral petitions based on all types of *Brady* claims—actionable and inactionable, alike," *id.* at 1239—effectively allows the prosecution to lower its burden of proof to execute a citizen. That's because "[p]rosecutors who successfully conceal their violations avoid accountability [and can sustain a conviction] so long as they can show that the withheld evidence would not 'be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense.'" *Bernard*, 141 S. Ct. at 507 (Sotomayor, dissenting from the denial of certiorari and application for stay) (quoting 28 U.S.C. § 2255(h)(1)). That's an exponentially higher bar to prove innocence than to defend against a charge of guilt beyond a reasonable doubt in an ordinary criminal trial. So under our precedent, "prosecutors can run out the clock and escape any responsibility for all but the most extreme violations" if they can keep their misconduct concealed for the year a defendant has to file a habeas petition. *Id.*
>
> …
>
> Michael Bell's case shows how our precedent can result in a miscarriage of justice. Bell's habeas petition alleges, supported by interviews, that

the lead detective and prosecutor on the case coerced the testimony of six trial witnesses, including through threats and physical violence. Two witnesses initially recanted their testimony in affidavits. Several others, under threat of prosecution for perjury, rather than confirm their testimony in the June 2025 evidentiary hearing, invoked their right against self-incrimination. They had just minutes to consult with a state-provided attorney about their potential criminal exposure for changing their testimony—seriously calling into question the fundamental fairness of the state's evidentiary hearing. The record gives cause for deep concern that these witnesses otherwise would have recanted or revealed they were coerced.

The unreliability of witness testimony in this case is especially shocking because it's the only evidence supporting Bell's conviction. There's no physical or forensic evidence. Not only that, but a recent public-records request revealed contemporaneous interview notes that recorded an eyewitness telling detectives that the shooter was taller and thinner than Bell. The elaborate tapestry the prosecution wove, it turns out, may be nothing but loose string.

And most troubling of all, Bell learned about this misconduct only when he received a tip the day after the Governor signed his death warrant. So Bell's attorneys had just one month to show his conviction was fatally flawed—not 25 years as the Concurrence suggests. As alleged, the prosecution successfully buried a mountain of exculpatory evidence. Now, with little over 24 hours until Bell's scheduled execution, we deny Bell his day in court and reward the state for its alleged misconduct. As an en banc court, we should have stayed the execution and taken the necessary time to consider what the law requires. Nobody wants the execution of an innocent man.

VII. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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