No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

Freddie McNeill Jr.,

Applicant-Petitioner,

v.

Margaret Bagley, Warden,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

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CAPITAL CASE

QUESTION PRESENTED

Whether a reviewing court considering a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), must assess the reliability and credibility of the witnesses who testified at trial in determining if prejudice under *Brady* has been established.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner Freddie McNeill Jr. respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

JURISDICTIONAL STATEMENT

The Sixth Circuit Court of Appeals rendered its opinion in McNeill's case on August 20, 2021, and denied a timely petition for rehearing on September 22, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the denial of McNeill's petition for a writ of habeas corpus is published as *McNeill v. Bagley*, 10 F.4th 588 (6th Cir. 2021), and is reproduced as Appendix A at A-1. The decision of the district court denying McNeill's petition for a writ of habeas corpus is unreported and available at *McNeill v. Bagley*, no. 1:02-CV-1645, 2019 WL 4017047 (N.D. Ohio Aug. 26, 2019), and is reproduced as Appendix B at A-52.

The decision of the Ohio Supreme Court declining to exercise discretionary review over McNeill's appeal from the affirmance of the denial of his motion for leave to file a delayed motion for a new trial is reported as *State v. McNeill*, 74 N.E.3d 464 (Ohio 2017) (Table), and is reproduced as Appendix C at A-108. The decision of the Ohio Court of Appeals affirming the denial of McNeill's motion for leave to file a delayed motion for a new trial is unreported and available at *State v. McNeill*, No. 15CA010774, 2016 WL 4426416 (Ohio App. Aug. 24, 2016), and is reproduced as Appendix D at A-109. The decision of the Lorain County Court of

Common Pleas denying McNeill's motion for leave to file a delayed motion for a new trial is unreported and is reproduced as Appendix E at A-113.

The decision of the Ohio Supreme Court declining to exercise discretionary review over the partial affirmance of the denial of McNeill's petition for post-conviction relief is reported as *State v. McNeill*, 731 N.E.2d 1140 (Ohio 2000) (Table), and is reproduced as Appendix F at A-119. The decision of the Ohio Court of Appeals partially affirming the denial of McNeill's petition for post-conviction relief, including the denial of McNeill's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), as it was initially raised in McNeill's state court proceedings, is reported as *State v. McNeill*, 738 N.E.2d 23 (Ohio App. 2000), and is reproduced as Appendix G at A-120. The decision of the Lorain County Court of Common Pleas denying McNeill's petition for post-conviction relief is unreported and is reproduced as Appendix H at A-125.

The decision of the Ohio Supreme Court affirming McNeill's convictions and death sentence on direct review is reported as *State v. McNeill*, 700 N.E.2d 596 (Ohio 1998), and is reproduced as Appendix I at A-133. The decision of the Ohio Court of Appeals affirming McNeill's convictions and death sentence on direct review is unreported and available at *State v. McNeill*, no. 95CA006158, 1997 WL 177635 (Ohio App. Apr. 1, 1997), and is reproduced as Appendix J at A-145. The decision of the Lorain County Court of Common Pleas sentencing McNeill to death is unreported and is reproduced as Appendix K at A-157.

The decision of the United States Court of Appeals for the Sixth Circuit denying McNeill's petition for rehearing and suggestion for rehearing *en banc* is unreported and reproduced as Appendix L at A-159.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall … deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254 provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

On May 13, 1994, Blake Fulton was shot inside his car in what was purported to be a drug deal gone bad. He died shortly thereafter. Freddie McNeill was subsequently arrested for this crime and charged with aggravated murder with death specifications.

McNeill has always maintained his innocence. Indeed, there is very little evidence connecting McNeill to the murder. Although he was allegedly inside the victim's car, no fingerprints connected him to the vehicle. (ECF 117-5, PageID 4903-04.) None of McNeill's clothing showed any blood splatter or gunshot residue. (ECF 120-1, PageID 5684-85.) The murder weapon was never found. Nor was there a confession or testimony from a co-defendant. Not one piece of physical evidence was ever presented by the State indicating that McNeill had ever been in contact or communicated in any way with either the victim (Fulton) or the State's star witness (Rushinsky).

To convict, the State instead relied almost exclusively on eyewitness testimony, and Robert Rushinsky in particular, who was sitting next to the victim inside the car when the victim was shot. Rushinsky claimed McNeill got into Fulton's car to sell drugs and then shot him following an argument over money. (ECF 117-4, PageID 4680-81.)

Although the prosecution urged the jury to convict McNeill based on Rushinsky's testimony, he was far from a perfect witness. Rushinsky's trial testimony deviated substantially from his police interview, which occurred in the immediate aftermath of the shooting. In the interview, Rushinsky stated he did not know the shooter. The most important fact demonstrating Rushinsky's unreliability as a witness was suppressed by the State: Rushinsky was unable to identify McNeill in a photo lineup shortly after the murder, a task that should have been easy if he actually knew McNeill and had an established relationship with him, as he claimed at trial. (ECF 137, PageID 6131.) Only in a second photo lineup was Rushinsky able to identify McNeill, and an audio recording of the interview suggests that the police guided him to that answer by knocking on the table as the picture of McNeill was shown to him. (*Id*.) At trial, however, Rushinsky claimed he knew McNeill and had bought drugs from him before. (ECF 117-4, PageID 4675.) Rushinsky further insisted that, based on his history with McNeill, he recognized him by name immediately upon entering Fulton's vehicle, but this was inconsistent with the suppressed portion of the interview where he was unable to make a positive identification of McNeill when first shown a picture of him.

The only other witnesses to the murder were four children—each under the age of nine at the time of the incident—who happened to be playing nearby when the shooting took place. But the children's testimony fails to substantiate Rushinsky's account of the murder. The children's testimony is inconsistent, amounting to four substantially different accounts of the events. Some

children admitted in their testimony that they were indoors at the time of the offense, and this shows that they could not have possibly witnessed the crime. (ECF 117-4, PageID 4845, 4850, 4866-67.) Others indicated coaching by the prosecution in order to identify McNeill. (*Id.* at PageID 4817-18, 4828-33.) Even the prosecutor conceded that the testimony of the children was inconsistent. (ECF 117-5, PageID 4958.) The unreliable nature of the children's testimony, combined with the prosecution's impermissible suppression and misrepresentation of evidence favorable to the defense, seriously undermines the State's theory of the case.

The State's reliance on Rushinsky, and not the inconsistent children, as a means to persuade the jury to convict is best shown by the prosecutor's heavy reliance on Rushinsky in closing arguments. "Who knew Robert Rushinsky, who dealt with him in the past?" (ECF 117-5, PageID 4952.) The prosecution insisted that it was Rushinsky's testimony – when "coupled with" testimony from the child witnesses – that provided "proof beyond a reasonable doubt this man killed Blake Fulton." (*Id*. at PageID 4959.) Even the defense recognized that Rushinsky was "the key element" or "player" in the prosecution's case. (*Id*. at PageID 4960.)

On April 14, 1995, the jury returned a verdict of guilty on aggravated murder on both a robbery-murder specification, R.C. 292.04(A)(7), and a firearm specification, RC. 2941.141. On May 3, 1995, following the penalty phase of the trial, the jury returned a verdict recommending that McNeill be sentenced to death. The trial court sentenced McNeill to death after conducting an independent review.

After trial, McNeill's post-conviction counsel discovered evidence favorable to McNeill's defense. Both pieces of evidence were discovered in 1996 when McNeill's counsel requested files from the Ohio Attorney General related to the victim's compensation suit. Specifically, the prosecution suppressed a police report documenting that on the night of the

murder, Rushinsky was shown a photo of McNeill and informed the detectives that McNeill was *not* the shooter. Rushinsky's failure to identify McNeill in a photo array was never addressed during trial, because it was never disclosed. Rushinsky's inability to identify McNeill when first shown the photo array directly contradicts his testimony at trial that he knew it was McNeill as soon as he got in the car. (ECF 117-4, PageID 4675.)

Rushinsky's interview from the night of the murder was played during trial, but it was recorded only as audio, so his failure to identify McNeill in the photo was suppressed. As a result, defense counsel were never able to cross-examine Rushinsky about his failed out-of-court identification of McNeill. (ECF 118-1, PageID 5068.) Defense counsel had no opportunity to elicit testimony confirming the failed identification from the law enforcement officer who conducted the interview. The jury that convicted McNeill and sentenced him to death never learned that Rushinsky was shown a photograph of McNeill shortly after the murder and informed detectives that McNeill was not the shooter.

Another suppressed report documents that a young man, matching the description of the shooter, was seen acting suspiciously in the same neighborhood of the shooting. This suspect was apprehended and taken into custody. The same report that documented an alternate suspect also included descriptions of a fleeing suspect that was inconsistent with what Rushinsky testified to.

The suppression of these written reports is not in dispute, as the prosecution conceded in state post-conviction proceedings that they were never made available to the defense. In addition to these two written reports, the prosecution suppressed a second recorded interview between Rushinsky and detectives, as well as a recorded interview with a witness who supported McNeill's alibi.

The prosecutor in this case, Jonathan Rosenbaum, is no stranger to misconduct. The Sixth Circuit has previously expressed concern about the "troubling disregard" he has displayed in complying with his *Brady* obligations in capital cases. *Jalowiec v. Bradshaw*, 657 F.3d 293, 313 (6th Cir. 2011). Mr. Rosenbaum has previously engaged in "egregiously improper" misconduct necessitating federal habeas corpus relief. *Hodge v. Hurley*, 426 F. 3d 368, 371-72 (6th Cir. 2005).

Based on this record, McNeill's case presents a classic example of a *Brady* violation, where the prosecution withheld evidence showing that its key witness was not credible. At trial, the prosecutor acknowledged that Rushinsky was the State's most important witness. The prosecutor urged the jury to rely on his identification of McNeill, all the while withholding exculpatory evidence which would have shown that there were substantial reasons to doubt Rushinsky's testimony. The withheld exculpatory evidence establishes significant, reasonable doubt whether McNeill was guilty of aggravated murder.

The Ohio Court of Appeals affirmed on direct review. (ECF 116-1, PageID 1490-1522, *State v. McNeill*, No. 95CA006158, 1997 WL 177635 (Ohio Ct. App. Apr. 1, 1997).) The Ohio Supreme Court also affirmed on direct review. (ECF 116-2, PageID 1907-33, *State v. McNeill*, 700 N.E.2d 596 (Ohio 1998).) McNeill's petition for certiorari was denied. *McNeill v. Ohio*, 526 U.S. 1137 (1999) (Mem).

McNeill also filed a petition for post-conviction relief, which included the *Brady* claim currently at issue in this petition for certiorari. (ECF 116-3, PageID 2067-2117.) The trial court denied McNeill's petition for post-conviction relief. (ECF 116-5, PageID 3268-72.) The Ohio Court of Appeals affirmed. (ECF 116-5, PageID 3431-43, *State v. McNeill*, No. 01CA007800, 2001 WL 948717 (Ohio Ct. App. Aug. 22, 2001).) McNeill's request for discretionary review in

the Ohio Supreme Court was denied. (ECF 116-7, PageID 3810, *State v. McNeill*, 758 N.E.2d 1149 (Ohio 2001) (Table).)

McNeill subsequently filed his initial federal habeas corpus petition. (ECF 21-1, PageID 5722 et seq.) After obtaining discovery, McNeill filed a motion to hold his case in abeyance while he engaged in state court litigation that had already been initiated. (ECF 96, PageID 759-68.) The district court granted the motion. (ECF 99, PageID 821-30, Memorandum of Opinion and Order.)

McNeill filed a motion for leave to file a delayed motion for a new trial in state court. (ECF 118-1, PageID 5053-56.) The motion was accompanied by an "instanter" motion for a new trial. (ECF 118-1, PageID 5057-66.) The trial court denied the motion for leave to file, and alternatively denied the instanter motion for a new trial on the merits. (ECF 118-1, PageID 5270-75, Journal Entry.) The Ohio Court of Appeals affirmed on the ground that the motion for leave to file a delayed motion for a new trial had been properly denied. (ECF 118-1, PageID 5401, *State v. McNeill*, No. 15CA010774, 2016 WL 4426416 (Ohio Ct. App. Aug. 22, 2016).) McNeill's request for discretionary review in the Ohio Supreme Court was denied. (ECF 118-1, PageID 5501, *State v. McNeill*, 74 N.E.3d 464 (Ohio 2017) (Table).) Following the Ohio Supreme Court's denial, McNeill returned to the district court and moved to reactivate his case. (ECF 107; ECF 109.)

McNeill filed his Amended Petition for a Writ of Habeas Corpus on September 6, 2018. (ECF 137.) On August 26, 2019 the District Court issued an Opinion and Order denying relief on all grounds raised in the petition. (ECF 147, *McNeill v. Bagley*, No. 1:02-CV-1645, 2019 WL 4017047 (N.D. Ohio Aug. 26, 2019).) In the same order, the District Court granted a certificate of appealability on McNeill's *Brady* and *Napue* claims. (*Id*. at *64-65.)

McNeill appealed to the Sixth Circuit. All three judges on McNeill's panel agreed that favorable evidence was suppressed by the State. *McNeill v. Bagley*, 10 F.4th 588, 600, 605 (6th Cir. 2021). The panel was also in agreement that Rushinsky was the State's star witness and no forensic evidence substantiated his account. *Id*. at 602, 605. Despite coming to a unanimous agreement on these important issues, the panel split on whether or not the suppressed evidence was material. The majority held that it was not, primarily due to the testimony from four other child eyewitnesses. *Id*. at 602. The dissent concluded the suppressed report was material because the testimony of the young children was inconsistent and unreliable. *Id*. at 617-18.

In finding against materiality, the panel majority relied on a Supreme Court dissent and incorrectly applied sufficiency of the evidence as the standard of review. *Id*. at 602. The majority opinion also relied on the eyewitness testimony of four very young children. *Id*. at 601-02. Two of those children were not even outside at the time of the murder. *Id*. at 617. Another was a six-year-old who needed help remembering his own name and admitted he could not identify McNeill as the shooter when shown a photograph of him. *Id*. A fourth child admitted that his identification of McNeill was aided by one of the children who, according to his own testimony, was not even outside to witness the murder when it took place. *Id*.

If McNeill can present such a compelling claim about his jury being misled as to the credibility of the State's star witness in a capital case, yet still lose on materiality, then his case presents yet another example of "a largely unspoken truth: the once-great writ of habeas corpus now means nothing." *Taylor v. Jordan*, No. 14-6508, 10 F.4th 625, 645 (6th Cir. 2021) (Moore, J., dissenting). Certiorari is accordingly warranted.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case to resolve a conflict of authority between the Circuits, *see* S.Ct. R. 10(a), as well as to consider "an important question of federal law that has not been, but should be, settled by this Court[.]" *See* S.Ct. R. 10(c). Specifically, this Court should consider whether reviewing courts adjudicating claims under *Brady v. Maryland*, 373 U.S. 83 (1963), must assess the reliability and credibility of the witnesses who testified at trial in determining if prejudice has been established, irrespective of whether or not the testimony in question bore any relationship to the suppressed *Brady* material. The Sixth Circuit refused to do so and relied on its refusal as the basis for rejecting McNeill's *Brady* claim:

> McNeill argues that the children's testimony was "inconsistent, unreliable, and in some instances, admittedly coached." CA6 R.24, Appellant's Br., at 35. But the trial judge carefully questioned the children before judging them competent, and McNeill's attorney had ample opportunity to cross examine each child to make the jury aware of any inconsistencies in their testimony. It is not for us to make a determination as to the children's—or any other witness's—credibility. *Walker v. Engle*, 703 F.2d 959, 969 (6th Cir. 1983) ("[C]redibility is not a matter of review for a federal habeas corpus court ...."); *see also Brown v. Davis*, 752 F.2d 1142, 1147 (6th Cir. 1985) ("The issue of credibility, the demeanor of the parties, and the weighing of the evidence were properly for the jury."); *Wilson v. Sheldon*, 874 F.3d 470, 477 (6th Cir. 2017). Rather, we must give due deference to the jury's credibility determinations, as they saw the witness's testimony and cross examination on the stand. *Brown*, 752 F.2d at 1147 ("[T]he jury's resolution of questions of credibility and demeanor ... is entitled to 'special deference.'" (*quoting Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984))).

McNeill v. Bagley, 10 F.4th 588, 602 (6th Cir. 2021).

The majority opinion's refusal to assess the reliability and credibility of the child witnesses who testified against McNeill finds no support in the authorities that the majority cited. *Walker* and *Brown* both dealt with sufficiency of the evidence claims, a context where the jury's credibility determinations are generally unreviewable, rather than *Brady* claims. *Walker*, 703

F.2d at 969-70; *Brown*, 752 F.2d at 1144-47. The third case cited by the majority, *Wilson v. Sheldon*, involved a claim that the admission of hearsay amounted to a due process violation, and as far as counsel for McNeill can tell the decision does not say anything at all about limits on the ability of the federal courts to assess the credibility of trial witnesses. *See Wilson*, 874 F.3d at 475-77.[1]

The Sixth Circuit's refusal to assess trial witness credibility in the *Brady* context conflicts with the precedent of other federal appellate courts. A number of Circuits have found prejudice under *Brady* and related decisions after either explicitly or implicitly considering the reliability and credibility of the trial witnesses whose testimony was not affected by the suppression of the *Brady* material at issue. *See Browning v. Baker*, 875 F.3d 444, 464 (9th Cir. 2017) (finding prejudice under *Brady* where the prosecution's case at trial was "remarkably weak" because it relied on "flawed identifications" and "unreliable testimony"); *Guzman v. Secretary*, 663 F.3d 1336, 1351 (11th Cir. 2011) (finding materiality under *Giglio v. United States*, 405 U.S. 150 (1972), where a witness whose trial testimony was not affected by the state's non-disclosure "was a seven-time convicted felon and recanted before trial"); *McCormick v. Parker*, 821 F.3d 1240, 1248-49 (10th Cir. 2016) (finding materiality under *Brady* based on the false testimony of an examining nurse even though a juvenile witness gave completely unambiguous testimony that the petitioner had sexually assaulted her as a young child); *Simmons v. Beard*, 590 F.3d 223, 238 (3d Cir. 2009) (finding materiality under *Brady* after noting that the witnesses whose

[1] The majority opinion's conclusion that it "must give due deference to the jury's credibility determinations, as they saw the witness's testimony and cross examination on the stand[,]" *McNeill*, 10 F.4th at 602, is particularly indefensible because no one other than the jurors themselves has any way of knowing if the jury actually relied on the children's testimony in returning a conviction. It is entirely possible (and in fact far more likely) that the jury found the children's testimony to be wholly unreliable and instead convicted McNeill based solely on Rushinsky's testimony.

testimony was unaffected by the suppression of *Brady* material identified the petitioner "only belatedly . . . after each had already seen him either in person or in a photograph identified as the person charged with [the] murder"); *Sims v. Hyatte*, 914 F.3d 1078, 1091 (7th Cir. 2019) (finding materiality under *Brady* "[c]onsidering the overall weakness of the prosecution case without" the testimony of the star witness that the suppressed *Brady* material related to, where the prosecution had also called a total of ten witnesses at trial (*id.* at 1081)); *United States v. Ballard*, 885 F.3d 500, 505-06 (7th Cir. 2018) (finding materiality under *Brady* where the government called twelve witnesses in addition to the star witness to whom the *Brady* material related, including multiple witnesses to whom the defendant had allegedly admitted guilt (*see id.* at 506 (Manion, J., dissenting))); *United States v. Butler*, 955 F.3d 1052, 1058 (D.C. Cir. 2020) (finding materiality under *Napue v. Illinois*, 360 U.S. 264 (1959), where false testimony regarding forensic evidence had been presented, and "in the absence of corroborating evidence . . . a reasonable juror could have doubted" the "credibility" of the other important trial witnesses "and thus discounted their testimony"). These decisions show that the Sixth Circuit's refusal to assess the credibility of trial witnesses in the *Brady* context stands in stark contrast with the precedent of other federal appellate courts. This Court should accordingly grant certiorari to resolve the conflict. *See* S.Ct. R. 10(a).

Furthermore, while this Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), did not expressly address the precise question, it is clear that the Sixth Circuit's decision in McNeill's case is simply incompatible with *Kyles's* requirements. The four testifying eyewitnesses in *Kyles* not only identified the petitioner as being the assailant, but also testified that the alternate suspect in the case was not the killer when the prosecution had him brought into the courtroom: "On rebuttal, the prosecutor had Beanie [the alternate suspect] brought into the courtroom. All of the

testifying eyewitnesses, after viewing Beanie standing next to Kyles, reaffirmed their previous identifications of Kyles as the murderer." *Kyles*, 514 U.S. at 431. The trial testimony of two of these eyewitnesses was not undermined by the suppression of the *Brady* material at issue. *Id*. at 453. Indeed, this Court found that "the jury might have found the eyewitness testimony of Territo and Kersh sufficient to convict, even though less damning to Kyles than that of Smallwood and Williams." *Id*. As this Court explained, however, "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others[.]" *Id*. at 445.

This principle necessarily requires a reviewing court to assess the credibility and reliability of prosecution eyewitnesses whose testimony was unrelated to the suppressed *Brady* material, rather than simply accepting their trial testimony as being wholly truthful and not subject to any kind of critical examination. Blindly accepting the eyewitness testimony unaffected by the nondisclosure and failing to subject it to any kind of critical analysis is precisely what the majority opinion in McNeill's case did, however. *See McNeill*, 10 F.4th at 602. This Court should accordingly grant certiorari to consider "an important question of federal law that has not been, but should be, settled by this Court[.]" *See* S.Ct. R. 10(c).

In addition, 28 U.S.C. § 2254(d) poses no bar to relief on McNeill's claim. The Court of Common Pleas rejected McNeill's *Brady* claim on the ground that the suppressed police reports were not discoverable under the Ohio Rules of Criminal Procedure. *McNeill*, 10 F.4th at 624 (Clay, J., dissenting). The Ohio Court of Appeals affirmed but failed to articulate any meaningful analysis with respect to McNeill's *Brady* claim. *Id.* at 623 (Clay, J., dissenting). As a result, federal courts must "look through" the Ohio Court of Appeals' decision and assume that

it adopted the lower court's reasoning. *Id.* (Clay, J., dissenting (citing *Wilson v. Sellers*, 138 S.Ct. 1188 (2018)).

Under the "contrary to" clause of § 2254(d), no deference will be warranted where the state courts denied relief by applying a legal rule that contradicts the governing precedent of this Court. *Lafler v. Cooper*, 566 U.S. 156, 173 (2012). The Ohio courts in McNeill's case undoubtedly contravened the clearly established precedent of this Court by allowing the Ohio Rules of Criminal Procedure to circumscribe the government's disclosure obligations under *Brady*. *McNeill*, 10 F.4th at 624 (Clay, J., dissenting (citing *United States v. Agurs*, 427 U.S. 97 (1976)). This Court has repeatedly made clear that state law must yield to federal constitutional requirements when it impairs the fundamental rights of the accused. *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973). Even the majority opinion in McNeill's case made no attempt to defend the state courts' rejection of McNeill's *Brady* claim in this respect. *McNeill*, 10 F.4th at 600, n.4 (citing *United States v. Armstrong*, 517 U.S. 456, 475 (1996) (Breyer, J., concurring)). Because the state courts rejected McNeill's claim by applying a legal standard that obviously cannot be reconciled with this Court's governing precedent, no deference is warranted under § 2254(d), and this Court may review the question presented *de novo*. *Lafler*, 566 U.S. at 173.

Furthermore, the facts of McNeill's case are materially indistinguishable from those in *Kyles*, and as a result the Ohio state courts contravened this Court's precedent in that respect, as well; this provides an additional basis for *de novo* review in McNeill's federal proceedings. *McNeill*, 10 F.4th at 624 (Clay, J., dissenting) (citing *Williams v. Taylor*, 529 U.S. 362, 405, 412 (2000)). "There is no objective way to distinguish the suppression of evidence in McNeill's case

from that in *Kyles*. In fact, McNeill presents a stronger Brady claim." *Id.* (Clay, J., dissenting). As a result, § 2254(d) poses no bar to this Court's *de novo* review of the question presented. Certiorari is accordingly warranted.

CONCLUSION

For the foregoing reasons, Freddie McNeill, Jr. respectfully requests that this Court grant his Petition for Writ of Certiorari.

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