No. 21-6688 (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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

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INTRODUCTION

The Warden's arguments lack merit and this Court should reject them. Certiorari should be granted in this case.

I. This case is not about factbound error correction.

The Warden claims at the outset that McNeill "seeks factbound error correction" of the Sixth Circuit's ruling in this case. (Brief in Opposition ("BIO") at 1.) With respect, that assertion is completely untenable. As McNeill explained in his petition for certiorari, the Sixth Circuit's decision in this case is a clear outlier among the federal appellate courts, and as a result certiorari is warranted under S.Ct. R. 10(a) to resolve the division of authority. (Petition for Certiorari ("Pet.") at 10-12.) Furthermore, McNeill's case presents "an important question of federal law that has not been, but should be, settled by this Court" under S.Ct. R. 10(c). (*Id*. at 12-13.) The Warden's allegation that McNeill is seeking nothing more than error correction is baseless, and this Court should reject it.

II. 28 U.S.C. § 2254(d) does not preclude review of the merits of the question presented by McNeill's case.

The Warden argues at length that this Court cannot reach the merits of the question McNeill has presented because 28 U.S.C. § 2254(d) forecloses review of it. (BIO at 6-15.) But § 2254(d) clearly does not bar relief in this case because the state court rejection of McNeill's claim is not entitled to deference under AEDPA. (Pet. at 13-15.)

The Warden maintains that the Ohio Court of Appeals' cursory rejection of McNeill's claim qualifies as a "reasoned" decision, (BIO at 9), but this simply cannot be the case. The lack of any meaningful analysis in the Ohio Court of Appeals' disposition of the claim leaves the federal courts without any way of knowing exactly what the state court's basis for denying relief actually was. *McNeill v. Bagley*, 10 F.4th 588, 623 (6th Cir. 2021) (Clay, J., dissenting). The

Ohio Court of Appeals' "perfunctory discussion of McNeill's *Brady* claims provides no 'specific reasons' to which this Court can defer." *Id*. (citing *Wilson v. Sellers*, 138 S.Ct. 1188, (2018)). "Even assuming that the Ohio Court of Appeals applied the correct legal rule, there is no way to know whether it held that the evidence was not favorable, not suppressed, or not material." *Id.* (citation omitted).

Accordingly, the federal courts must "look through" the state appellate court's decision and assume that it adopted the reasoned decision of the lower court. *Id.* (citing *Wilson*, 138 S.Ct. at 1192). And no fairminded jurist could conclude that the Court of Common Pleas' decision is even remotely compatible with this Court's precedents. (Pet. at 13-14.) The Court of Common Pleas rejected McNeill's *Brady* claim on the ground that the *Brady* material at issue was not discoverable under the Ohio Rules of Criminal Procedure; this was despite the fact that this Court has repeatedly made clear that state procedural rules must yield to federal constitutional requirements. (*Id*.) Accordingly, the state court denied relief by applying a legal rule that contradicts the governing precedent of this Court, and as a result no deference is warranted under the "contrary to" clause of § 2254(d)(1). *Lafler v. Cooper*, 566 U.S. 156, 173 (2012). This Court can accordingly conduct *de novo* review of the question that McNeill has presented. *Id*.

Moreover, even assuming that the Ohio Court of Appeals' perfunctory rejection of McNeill's claim qualifies as a "reasoned" decision, no deference is warranted under AEDPA because the facts of McNeill's case are materially indistinguishable from those in *Kyles v. Whitley*, 514 US 419 (1995). (Pet. at 14-15.) The Warden argues that "While both cases involve undisclosed statements relating to witness testimony, they are far from identical. As an initial matter, the cases concerned different investigations of different crimes." (BIO at 11.) Nothing in this Court's precedent suggests that a case is only "materially indistinguishable" under the

"contrary to" clause of § 2254(d)(1) if it was part of the same investigation of the same crime that is at issue in the petitioner's case. The Warden cites no authority for this proposition of law and, as far as McNeill can tell, there isn't any to support it.

As Judge Clay explained in his dissent, "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. . . . Because *Kyles* presents a 'set of materially indistinguishable facts,' for this reason as well, AEDPA is not an impediment to McNeill obtaining relief." *McNeill*, 10 F.4th at 624 (Clay, J., dissenting) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). The Warden's arguments to the contrary, (BIO at 11-12), are unconvincing and this Court should reject them. Because the Ohio Court of Appeals contravened this Court's clearly established precedent by denying relief notwithstanding the presence of facts that are materially indistinguishable from those at issue in *Kyles*, this Court is "unconstrained" by § 2254(d). *Williams*, 529 U.S. at 406. Accordingly, the question that McNeill has presented for review can be reviewed *de novo*. *See id*.

III. The procedural default doctrine does not preclude consideration of the question McNeill has presented.

The Warden also notes the Ohio Court of Appeals' alternative procedural ruling that "McNeill 'failed to demonstrate that he could not have raised this issue at trial or on appeal.'" (BIO at 3, 9.) To the extent that the Warden's brief in opposition can be read to allege that the procedural default doctrine precludes consideration of the question that McNeill has presented, the argument must be rejected.

First, the police reports at issue were not part of the record at trial or on direct appeal, and as a result McNeill simply did not have any way to raise this claim prior to his initial round of state post-conviction proceedings. *See State v. Hunter*, 960 N.E.2d 955, 966, ¶46 (Ohio 2011)

("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter") (citation and internal quotation marks omitted). Exorbitant state procedural rulings are inadequate to bar federal review, *Lee v. Kemna*, 534 U.S. 362, 376 (2002), and the Ohio Court of Appeals' determination that McNeill's claim was defaulted because he didn't raise it at trial or on direct review was undoubtedly exorbitant; as a result, the procedural default doctrine poses no bar to this Court's consideration of the question presented. *See id.; see also Richey v. Bradshaw,* 498 F.3d 344, 359-60 (6th Cir. 2007).

Second, the *Brady* violation in McNeill's case establishes cause and actual prejudice to overcome the purported default in any event. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 691 (2004). Finally, McNeill has made a credible showing of actual innocence such that any procedural default is excused. *See House v. Bell*, 547 U.S. 518, 522 (2006). Accordingly, to the extent that the Warden relies on the procedural default doctrine as a basis for denying certiorari, the Warden's argument lacks merit and should be rejected.

CONCLUSION

McNeill's petition for a writ of certiorari should be granted.

Respectfully submitted,

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