No. 22-686

IN THE

Supreme Court of the United States

CROSLEY ALEXANDER GREEN,

Petitioner,

v.

RICKY DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ASHLEY MOODY, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

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

BRIEF FOR PROFESSORS OF CRIMINAL LAW, CRIMINAL PROCEDURE, AND CONSTITUTIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DEXTER HAMILTON
Counsel of Record
MICHAEL BROADBENT
PHILIP J. FARINELLA
KAMILLE PERRY
EMILY YU
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, Pennsylvania 19103
(215) 665-2000
dhamilton@cozen.com

Counsel for Amici Curiae

319209

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

Page

Cited Authorities

Page

STATUTES

RULES

OTHER AUTHORITIES

Page

INTERESTS OF *AMICI*

In accordance with Supreme Court Rule 37, *amici* respectfully submit this brief in support of the Petition for Writ of Certiorari filed by Petitioner Crosley Green.[1] *Amici curiae* are academics who focus on criminal law, criminal procedure, constitutional law, and related fields. (A list of the *amici curiae* is attached as Appendix A.) Their principal interest in this case is the proper application of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, including the application of *Brady* vis-à-vis the review requirements adopted by and as a result of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *Amici* are concerned that the Eleventh Circuit's decision is a departure from this Court's guidance on prosecutorial suppression, due process, and post-conviction review that will lead to inconsistent and constitutionally erroneous results if allowed to stand. *Amici* therefore write to provide a historical and jurisprudential overview of key questions of materiality, exhaustion, and federalism, and, importantly, to encourage this Court to grant *certiorari* to bring clarity to the issues presented by Mr. Green.

---

1. Pursuant to Rule 37.2, all parties received timely notice of the intent to file this brief. In accordance with Rule 37.6, *Amici* note that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than counsel for *Amici* made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court adopted a framework for identifying and correcting violations of the due process disclosure requirements imposed on criminal prosecutors, whose "role transcends that of an adversary." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). Under *Brady*, a new trial is required if the prosecution withholds material evidence that is favorable to the defendant. Over the last sixty years, this Court has continued to refine the *Brady* analysis by establishing the standards to be applied in review of claims of prosecutorial suppression. Congress has spoken as well, enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to address the post-conviction review process and the critical relationship between state and federal courts with respect to claims of constitutional violations. Mr. Green's Petition for Writ of Certiorari raises important questions regarding *Brady*, AEDPA, and the related underlying principles of federalism. This Court should address those questions now by granting *certiorari*.

As Mr. Green argues, the Eleventh Circuit's decision creates a circuit split on the specific issue here—*i.e.*, whether a state court can end the materiality analysis under *Brady* once it finds that the evidence at issue is not admissible. Ignoring clearly established precedent, the Eleventh Circuit found no error in the Florida court's decision to end its *Brady* materiality analysis after it concluded that the evidence at issue was not admissible. In contrast, the Third Circuit recognized that Pennsylvania courts had erred in concluding that admissibility is a threshold requirement for materiality.

Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 307-11 (3d Cir. 2016). Both circuit courts relied on *Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam), in which this Court examined the materiality of inadmissible polygraph evidence. Importantly, however, there is no meaningful disagreement amongst the circuits over the interpretation of *Wood*, which clearly established the rule that admissibility was not a threshold question for materiality. In fact, *Wood* included an analysis of "the *effect* of suppressing the polygraph results, despite their uncontroverted inadmissibility." *Dennis*, 834 F.3d at 308. This Court has not changed the law in the nearly thirty years since *Wood* was decided, and the Eleventh Circuit should have recognized the Florida state court's error in ignoring this Court's established precedent on admissibility. Given the Court's guidance on this issue, the Eleventh Circuit should not have endorsed the state court's use of an unworkable and problematic admissibility standard that contradicts the meaning of the word "evidence" under *Brady* and runs contrary to the approach in *Wood* and other decisions by this Court.

Mr. Green's petition also invites consideration of the exhaustion requirements under AEDPA, and the Court should address this issue as well. Federal courts throughout the country have applied different tests for determining whether the state court had an opportunity to address post-conviction claims without intervention by the federal courts, but none of those tests have required petitioners to plead their federal claim in substantially the same way throughout the entirety of the state-court process, as the Eleventh Circuit did here. In so holding, the Eleventh Circuit has adopted a rule that allows and encourages federal courts to ignore the state court's own

conclusion that a specific claim had been exhausted. The Eleventh Circuit's disregard of the Florida court's finding that Mr. Green addressed his *Brady* claim in his first post-conviction motion, and that the claim was affirmed on appeal to the Florida appellate court, subverts the principles of federalism underlying AEDPA.

For these reasons, and as further argued herein, *amici* urge the Court to grant *certiorari* to address all of the questions presented by Mr. Green's petition.

REASONS FOR GRANTING THE WRIT

I. The Court should grant *certiorari* because the Eleventh Circuit's approval of the state court's materiality analysis under *Brady* creates the illusion of uncertainty regarding the impact of inadmissible evidence.

In *Brady v. Maryland*, this Court held that a new trial is required if the prosecution suppresses material evidence that is favorable to the defendant. 373 U.S. 83, 87 (1963). As *Brady* doctrine has evolved, suppressed evidence in criminal cases has been evaluated in terms of *materiality*, such that it has come to serve both as a threshold standard and as a necessary element to prove harm. *E.g.*, *United States v. Agurs*, 427 U.S. 97, 104 (1976). The *Brady* doctrine is not a matter of ethics, although such obligations do exist.[2] The prosecutor has a "constitutional

2. In *Kyles v. Whitley*, 514 U.S. 419 (1996), this Court compared the burden of establishing materiality for purposes of *Brady* and the standards imposed on prosecutors by the American Bar Association. *See id.* at 436–37 (explaining that "the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than

duty of disclosure" that is "based on the requirement of due process," and the *Brady* doctrine is designed to identify and correct violations of that constitutional requirement. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (citation omitted).

The Eleventh Circuit's materiality analysis endorses and imposes an admissibility threshold that does not appear in this Court's jurisprudence on prosecutorial disclosure and suppression. The court declared, "the State's nondisclosure of the officers' opinion was immaterial—it would have been of no demonstrable benefit to the defense . . . [b]ecause the opinions of Rixey and Clarke were not admissible under state law." *See Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1139 (11th Cir. 2022) (citing *Wood v. Bartholomew*, 516 U.S. 1, 6–7 (1995)). Clarifying its restrictive view on materiality, the Eleventh Circuit declared that the officers' opinions were "not 'evidence' at all." *Id.*

This decision creates a circuit split on the specific issue presented by Mr. Green: whether a state court can end the materiality analysis under *Brady* once it finds that the evidence at issue is not admissible. *Compare Green*, 28 F.4th at 1139, *with Dennis v. Sec'y, Pa. Dep't of Corrs.*, 834 F.3d 263, 307–11 (3d Cir. 2016) (state court's decision that suppressed evidence was immaterial because it was

---

the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate" (citations omitted)). In contrasting the burdens, the Court indicated that *Brady* imposes a weaker burden than the ABA, as *Brady* requires disclosure *only* of that evidence which is "material" and not all evidence that merely "*tends*" to negate guilt or punishment. *Id.* at 437 (emphasis added).

inadmissible was an unreasonable application of clearly established law). At first glance, the Eleventh Circuit seems to have given life to a dormant circuit split on the interplay between admissibility and materiality based on this Court's decisions in *Brady* and *Wood*. Neither *Brady* nor *Wood* expressly requires admissibility, however, and the Eleventh Circuit cannot avoid the impact of clearly established law by relying on paper-thin disagreements among the federal courts.

To be clear, the vast majority of courts of appeal that have considered the issue of an admissibility requirement have rejected it. *See* Petition for Writ of Certiorari, at 30–33 (collecting cases). Only two circuits, the Fourth Circuit and the Seventh Circuit, have seriously entertained requiring that evidence be admissible in addition to being material in order to trigger a *Brady* violation. *See Jardine v. Dittmann*, 658 F.3d 772, 777 (7th Cir. 2011) (per curiam) ("Logically, inadmissible evidence is immaterial under [the *Brady*] rule."); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (statements inadmissible at trial were "as a matter of law, 'immaterial' for *Brady* purposes"). Yet, even in *Jardine* and *Hoke*, the courts ultimately considered other factors in determining the absence of a *Brady* violation and did not rely solely on whether the evidence sought under *Brady* was inadmissible. *See Jardine*, 658 F.3d at 777 (determining no *Brady* violation occurred only after evaluating alternate ways that inadmissible evidence could be used besides impeachment); *Hoke*, 92 F.3d at 1355–56 (holding that the undisclosed information about the murder victim's sexual history would not have been material given overwhelming physical and other evidence). The Eighth Circuit came close, but it too went far beyond the admissibility threshold endorsed by the

Eleventh Circuit in this case. *See Madsen v. Dormire*, 137 F.3d 602, 604–05 (8th Cir. 1998) (recognizing the problem of inadmissible suppressed evidence under *Wood* before analyzing materiality under the assumption that the evidence was admissible). Thus, even the courts purporting to adopt an admissibility standard conducted a more thorough analysis than the Florida state court did here.

Moreover, any inconsistency in the approach to admissibility is a circuit split in name only, and it cannot be grounds for sowing doubt regarding the clearly established law announced by this Court. For example, in *United States v. Morales*, 746 F.3d 310 (7th Cir. 2014), the Seventh Circuit explored the split seeming to arise out of *Wood*, finding that only itself and the Fourth Circuit held the minority view of requiring admissibility. *See id.* at 314–15 ("Courts on both sides of this question look for support to the Supreme Court's opinion in *Wood* . . . ."). Stopping just short of outright reversing its prior decisions, the Seventh Circuit nevertheless made its view clear by observing that "the [Supreme] Court's methodology in *Wood* [is] more consistent with the majority view in the courts of appeals than with a rule that restricts *Brady* to formally admissible evidence." *Morales*, 746 F.3d at 315 ("[The defendant] would lose no matter what circuit he was in, and so [it was] not the occasion for any such reconsideration.").[3]

3. The Seventh Circuit's analysis leaves only *Hoke* as potential authority in support of the minority view, but *Hoke* carries little persuasive or analytical value. 92 F.3d 1350. Issued just ten months after *Wood*, the Fourth Circuit assessed the materiality of evidence of prior sexual conduct by mirroring the language applied by *Wood* to inadmissible polygraph results. *See id.* at 1357–1358, 1357 n.6. Thus, despite being one of the earliest

In fact, *Morales* specifically named the Eleventh Circuit as one of the circuits adopting the clear majority view—*i.e.*, that *Wood* does not require admissibility. *Id.* at 314; *see also Dennis*, 834 F.3d at 310 (noting that the *Morales* court interpreted Eleventh Circuit law as applying the majority rule); *Bradley v. Nagle*, 212 F.3d 559, 566–67 (11th Cir. 2000), *cert. denied*, 531 U.S. 1128 (2001) (admissibility of suppressed evidence not required).

The underlying state court decisions were issued at a time when ending the *Brady* materiality analysis at admissibility was contrary to this Court's established law *as that law was interpreted and applied by the Eleventh Circuit itself.* The Eleventh Circuit nevertheless found that the state court had not erred by ending its materiality analysis at the admissibility gates. Unless this Court grants the petition and confirms that a state court acts in contravention of clearly established precedent by ending the *Brady* analysis at materiality, federal courts will remain free to deviate from their existing precedent to redefine clearly established law in the *Brady* context, just as the Eleventh Circuit did here. Academics and law students have found cause to comment on the inconsistent treatment of admissibility in the *Brady* materiality analysis for many years. *See, e.g.*, Brian D. Ginsberg, *Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence*, 110 W. Va. L. Rev. 611, 623–35 (2008); Abigail B. Scott, Comment, *No Secrets Allowed: A Prosecutor's Obligation to Disclose*

---

cases to interpret *Wood*, *Hoke* has found almost no support in nearly twenty years, and it remains an outlier case given the clear state law prohibiting the admission of almost all such sexual conduct evidence.

Inadmissible Evidence, 61 Cath. U. L. Rev. 867 (2012). A clear consensus regarding *Wood* and admissibility has emerged, however, and, by diverging from the views of other circuits (as well as its own precedent), the Eleventh Circuit's decision could be read to give new life to that old disagreement at the circuit level. *Amici* urge this Court to grant *certiorari* to bring clarity and finality on the question presented by Mr. Green.

II. Adopting an admissibility threshold for *Brady* materiality is inconsistent with this Court's decisions.

Even if Mr. Green's petition squarely presented the question of admissibility, this Court would find that the Eleventh Circuit's approach—permitting states to create an admissibility threshold—would make little sense under controlling law.

A. Withheld evidence is "evidence" even if it is not admissible.

The Eleventh Circuit's opinion creates a second problem independent of the circuit split: the information withheld by the prosecutor here is clearly "evidence" regardless of its admissibility, meaning it must be analyzed when evaluating materiality under *Brady*.

The law consistently treats the question of whether certain information or materials may be "evidence" as separate from the question of admissibility. The current Federal Rules of Evidence exemplify this approach, eschewing a definition of "evidence" in favor of guidance regarding the admissibility and usage of such material

at trial. For example, Rule 103 addresses "Rulings on Evidence," observing that error can arise "in a ruling to admit or exclude evidence," recognizing the existence of "evidence" beyond its admissibility. Fed. R. Evid. 103. Perhaps more to the point in showing that evidence exists regardless of its admissibility, Rule 402 states that "[r]elevant evidence is admissible" and "[i]rrelevant evidence is not admissible." Fed. R. Evid. 402. The Florida Evidence Code adopts a similar approach. *See* Fla. Stat. §§ 90.104, 90.402.

The Eleventh Circuit's reliance on *Wood* converts a common shorthand use of the word "evidence" into a bright-line rule that is inconsistent with this Court's approach to potential *Brady* violations. Generally, it is true that "evidence" can be used to refer to both the information potentially available for admission at trial as well as the evidence actually admitted in the proceedings. *Compare* Fed. R. Evid. 402 (discussing admissible and inadmissible evidence), *with* Jeremy Bentham & Etienne Dumont, A Treatise on Judicial Evidence 230 (1825) (testimony that "does not serve to prove the fact in question . . . is not evidence"). In declaring the officers' opinions immaterial under *Brady*, the Eleventh Circuit declared them to be "not 'evidence' at all," citing *Wood*, 516 U.S. at 6.

Importantly, *Wood* went on to examine the materiality of the polygraph results *despite their inadmissibility*, which the Court concluded could be part of the materiality analysis but was clearly not determinative. 516 U.S. at 5-8; *cf. Morales*, 746 F.3d at 315 ("[T]he Court [in *Wood*] did not end its opinion with that observation [regarding admissibility], as it would have done if inadmissibility were the end of the matter."). In *Wood*, "[d]isclosure of the polygraph results, then, could have had no *direct effect* on

the outcome of trial, because [Bartholomew] could have made no mention of them either during argument or while questioning witnesses." 516 U.S. at 6 (emphasis added). Contrary to the Eleventh Circuit's analysis here, *Wood* did not require a finding that the suppressed evidence or information be admissible or even likely to lead to admissible evidence; instead, this Court reasoned that the disclosure could have had an indirect effect if it would have led to admissible evidence or led counsel to prepare in a different way. *Id.*

Limiting the *Brady* analysis to whether the withheld information was itself evidence or likely to lead to admissible evidence is an impermissibly narrow standard at odds with *Wood* and other decisions of this Court. *See e.g.*, *Giglio v. United States*, 405 U.S. 150, 154 (1972) (otherwise-inadmissible credibility evidence could form the basis of a *Brady* claim "[w]hen the reliability of [that] witness may well be determinative of guilt or innocence") (quotations omitted); *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (evidence can be material under *Brady* if the defense can use it to "attack[] the reliability of the investigation"). *Wood* confirms this result, even if its use of the word "evidence" could be ambiguous.

B. The purported admissibility test has no governing standard, further proof that it is in violation of clearly established law and that it will create confusion and difficulty if permitted to stand.

The Eleventh Circuit's decision fails to identify or elaborate on the scope and application of an admissibility requirement, and no such requirement exists under federal law, creating an unfair and unworkable procedural burden

on courts and petitioners alike. The Eleventh Circuit did not explain, for example, whether the admissibility requirement would be considered and reviewed under an *ex-ante* or *ex-post* approach to the undisclosed evidence. Nor did the Eleventh Circuit explain whether the burden of admissibility would be satisfied upon a showing of admissibility for all purposes, admissibility for a limited purpose, or the absence of any potential objection to admissibility.

Regardless of the standard applied, by limiting the scope of potentially-material evidence to evidence it deemed admissible, the state court had *carte blanche* to ignore the concealed evidence without justification, and subsequent courts were required by law to defer to that finding in determining whether a due process violation had occurred. This creates an additional and risky proposition, because, under *Harrington v. Richter*, 562 U.S. 86 (2011), federal courts must engage in a process of so-called gap-filling, and apply AEDPA deference to whatever reasonable "arguments or theories . . . could have supported[] the state court's decision," if that decision does not provide reasoning for its conclusions. *Id.* at 102-04. In Mr. Green's case, for example, the federal district court assumed that the circuit court had relied on *Martinez v. State*, 761 So. 2d 1074 (Fla. 2000) (per curiam), because the opinion offered no authority or reasoning for its analysis. The Eleventh Circuit went on to criticize the district court as having "mind read the Circuit Court" in reaching that conclusion. *Green*, 28 F.4th at 1132 n.93 (citing 761 So. 2d at 1079). If the state court can rule on a *Brady* violation by offering nothing beyond the mere admissibility or inadmissibility of the evidence, even on discretionary questions of admissibility, federal district courts and

appellate courts will be compelled to conduct an even more thoroughgoing review of the record, thereby risking an invasion of the state's authority to rule on constitutional defects before habeas review is allowed.

Compared to the facts here, *Wood* arose under markedly different circumstances in which the questions of admissibility were clearly resolved *and* questions of materiality were extensively explored for evidence that was inadmissible. 516 U.S. at 5–8. *Jardine* and *Hoke* are similar, arising out of sexual conduct evidence which was clearly inadmissible except in highly limited circumstances. *Jardine*, 658 F.3d at 777; *Hoke*, 92 F.3d at 1356 n.3. Thus, there was no doubt that the evidence in *Wood* was inadmissible for any purpose whatsoever and the parties did not argue for admissibility—eliminating any need to rely on a trial court's discretionary authority for the *Brady* due process analysis. And, as noted above, this Court in *Wood* did not stop at admissibility, further evidencing that the state court's approach should not have survived federal review.

C. An admissibility test undermines *Brady* through an unworkable standard.

Imposing a *Brady* admissibility requirement further restricts the already limited oversight of a prosecutor's power and the protections offered to criminal defendants seeking to exercise their constitutional right to due process. As the *Brady* doctrine—and its corresponding protections for criminal defendants—is actualized through the prosecutor, with little to no input from the defense, there is a significant risk of consequential error or misconduct. The trial court also plays only a minimal, and sometimes

non-existent, role in the prosecutor's disclosure decisions, while simultaneously affording "great deference" to the prosecutors' integrity. *See Hernandez v. New York*, 500 U.S. 352, 364–65 (1991) (explaining that the deference awarded to prosecutors in the context of peremptory jury strikes, with which courts assume prosecutors act with great integrity and credibility). The lack of judicial oversight makes it nearly impossible to prevent *Brady* violations during the trial phase.

Indeed, absent extraordinary circumstances, it is very likely that the defense will never learn of the existence of favorable evidence. The very nature of the act of withholding evidence ensures that the defense does not know that such evidence is contained in the prosecutor's nonpublic case file. Rather, in the majority of cases, the defense learns of *Brady* evidence by pure accident. *See e.g.*, *Banks v. Dretke*, 540 U.S. 668, 674-75, 683-86 (2004) (noting that "long-suppressed evidence came to light" after attorneys for death row defendant received affidavits from government witnesses detailing that, contrary to trial testimony, and the representations of prosecutors, witnesses were coached, paid for their testimony and threatened with incarceration if they did not provide false inculpatory testimony against the defendant); *State v. Moore*, 969 So. 2d 169, 173 (Ala. Crim. App. 2006) (stating that defense was alerted to exculpatory information by witness who contacted defense counsel after trial); *State v. Cousin*, 710 So. 2d 1065, 1066 & n.2 (La. 1998) (stating that the defense learned "through an anonymous communication" during the penalty phase of a capital case that eyewitness who identified defendant as murderer previously told police that she could not identify the gunman because "she did not get a good look

at [him]," "she was not wearing her glasses" and could only see patterns and "shapes"). This Court has even recognized that "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

The hide-and-seek approach also invites wrongful convictions, creating doubt in the criminal justice system and forcing life-changing consequences on individuals like Mr. Green. There is substantial evidence that prosecutorial misconduct and failure to comply with the obligations of *Brady* contribute to the problem of wrongful convictions. *See, e.g.*, *Alcorta v. Texas*, 355 U.S. 28, 30–32 (1957) (per curiam) (describing a case in which the prosecutor instructed a testifying witness to not volunteer exculpatory evidence); *Mooney v. Holohan*, 294 U.S. 103, 110 (1935) (per curiam) (considering a petition for clemency based on the prosecutor's use of perjured testimony and suppression of evidence that would impeach the lying witnesses). Raw data provided by The National Registry of Exonerations (the "Registry")[4] clearly shows a continuing national problem of prosecutorial misconduct. *See generally* NAT'L REGISTRY OF EXONERATIONS, 2021 ANNUAL REPORT (Apr. 12, 2022), https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf. According to the Registry, 2021 was a record year with 161 exonerations, 102 of which were cases of official misconduct. *Id.* at 3. The Registry further

4. The National Registry of Exonerations is a project of the University of California Irvine Newkirk Center for Science & Society, the University of Michigan Law School, and the Michigan State University College of Law.

reported that of the 161 exonerated persons 2021, 77 were persons convicted of murder and manslaughter, and a staggering 59 of those 77 cases were instances of official misconduct. *Id.* at 3, 7.

When prosecutors err, the system itself becomes suspect, and, while this Court has expressed its hope that "the prudent prosecutor will resolve doubtful questions in favor of disclosure," there is no assurance that all prosecutors will heed the Court's caution and err on the side of disclosure. *Agurs*, 427 U.S. at 108; *accord Kyles*, 514 U.S. at 439. Limiting the *Brady* analysis to only evidence that is *both* material *and* admissible—putting aside the mystery of what "admissibility" might mean in this context—will, at best, further challenge prosecutors that seek to resolve "doubtful questions." At worst, it will invite wrongdoing by allowing prosecutors to withhold evidence they deem inadmissible to deny the defendant and defense counsel any opportunity to pursue admissible evidence or theories based on the suppressed information. Either result would undermine criminal defendants' due process rights under the Fifth and Fourteenth Amendments requiring prosecutors to disclose information that is material, and the Eleventh Circuit's authorization of the state court's approach adds another layer of analysis and requirement that *Brady* and *Bagley* do not impose.

III. The Eleventh Circuit's exhaustion analysis must be reviewed to bring uniformity and fairness to federal court review of habeas petitions.

The writ of habeas corpus is an "essential principle[] of our Government," and a "greater securit[y] to liberty and republicanism than any [the Constitution] contains." Thomas Jefferson, President, First Inaugural

Address (Mar. 4, 1801), *in* Founders Online, Nat'l Archs., https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004; *see also* THE FEDERALIST No. 84 (Alexander Hamilton). For states and state prisoners, the writ of habeas corpus lands on a fault line of federalism by authorizing federal intervention into the state's own criminal proceedings. Accordingly, this Court and Congress each adopted exhaustion requirements to give the state court the "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (cleaned up); *see also Rose v. Lundy*, 455 U.S. 509, 515 (1982) (observing that exhaustion requirements are in furtherance of principles of federalism and comity). This Court initially addressed the question of exhaustion directly, holding that a state prisoner must "exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citing *Ex parte Royall*, 117 U.S. 241 (1886)). The exhaustion requirement was then codified by Congress in AEDPA, 28 U.S.C. § 2254(b)(1)(A), and this Court has continued to explore and define what petitioners must do in order for their federal claims to be considered "fairly presented" for purposes of satisfying the exhaustion requirement.

This Court's fair presentation jurisprudence seems straightforward. For example, in *Gray v. Netherland*, 518 U.S. 152 (1996), this Court explained that a petitioner need only make a "reference to a specific federal constitutional guarantee, as well as a statement of the facts entitling a petitioner to relief" to fairly present a federal claim to the state courts for purposes of the exhaustion requirement. *Id.* at 162–63. In *Baldwin*, this Court further explained that to fairly present a claim for purposes of exhaustion,

a petitioner must present the federal claim, and the federal source of law on which the petitioner relies, in their briefing such that the state court need not "read beyond a petition or a brief (or a similar document)" to be alerted "to the presence of a federal claim." 541 U.S. at 32.

Yet courts throughout the country have applied several different tests for determining whether a federal claim has been fairly presented—and thus whether the state court had an opportunity to address the issue itself without intervention by the federal courts. The Second, Third, and Seventh Circuits employ a set of four factors to aid in determining whether a claim has been exhausted, namely whether the petitioner: (i) "'relied on federal cases that engage in a constitutional analysis'"; (ii) "'relied on state cases which apply a constitutional analysis to similar facts'"; (iii) "'framed the claim in terms so particular as to call to mind a specific constitutional right'"; and (iv) "'alleged a pattern of facts that is well within the mainstream of constitutional litigation.'" *Schmidt v. Foster*, 911 F.3d 469, 486 (7th Cir. 2018) (citation omitted); *see also Rosa v. McCray*, 396 F.3d 210, 217–18 (2d Cir. 2005) (applying same four-factor test); *Evans v. Ct. of Common Pleas*, 959 F.2d 1227, 1231 (3d Cir. 1992) (same). The First and Eighth Circuits have adopted similar factor-based tests with a focus on identifying a specific constitutional right and specific constitutional provision. *See Coningford v. Rhode Island*, 640 F.3d 478, 482 (1st Cir. 2011); *Kelly v. Trickey*, 844 F.2d 557, 558 (8th Cir. 1988). The Fourth, Fifth, Sixth, Ninth, and Tenth Circuits have chosen not to adopt any particular test and, instead, simply recite general statements related to fair presentation. *See, e.g.*, *Gordon v. Braxton*, 780 F.3d 196, 201 (4th Cir. 2022); *Lucio v. Lumpkin*, 987 F.3d 451, 463–64 (5th Cir. 2021); *Bray v.*

Andrews, 640 F.3d 731, 734–35 (6th Cir. 2011); *Walden v. Shinn*, 990 F.3d 1183, 1196 (9th Cir. 2021); *Honie v. Powell*, 58 F.4th 1173, 1184 (10th Cir. 2023).

As more fully explained in Mr. Green's petition, the Eleventh Circuit has now added a new consideration—*i.e.*, whether petitioners have plead their federal claim in substantially the same way throughout the entirety of the state-court process. *Compare* Petition for Writ of Certiorari at 27–28, *with Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1128–30, 1134–37 (11th Cir. 2022). The Eleventh Circuit analyzed the briefs and opinions throughout the entire procedural history of Mr. Green's appeals to re-characterize his claims, rather than simply determine whether the substance of his *Brady* claim was fairly presented by his brief to the Florida Supreme Court or rely on the state court's decision regarding exhaustion. *Green*, 28 F.4th at 1135–37. None of the existing appellate court approaches have required such uniformity in pleading and briefing because it is clearly problematic for both courts and petitioners. Mr. Green exhausted his claims according to Florida law, yet the Eleventh Circuit somehow found that he had not done so based on the numbering of his claims. State courts, not federal appellate courts, should decide when a petitioner has presented his claim under the state processes.

IV. The Eleventh Circuit's decision misapplies and undermines critical principles of federalism that this Court must address.

Each erroneous holding of the Eleventh Circuit is based on a misunderstanding of the principles of federalism that underlie the role of federal courts of appeal in AEDPA

inquiries like the ones here. These misunderstandings—and their life imprisonment consequences for Mr. Green—put into perspective how important it is for the Court to continue to provide guidance to lower courts on applying the amorphous concepts of "comity, finality, and federalism" in their analyses of AEDPA claims. These ideals have indisputably proven difficult for federal courts to make sense of. This Court need look no further than the number of AEDPA cases for which it has granted cert in recent years. *See e.g.*, *Brown v. Davenport*, 142 S. Ct. 1510 (2022); *Harrington*, 562 U.S. 86. The Eleventh Circuit turned a blind eye to the state court's perversion of this Court's case law on whether admissibility determines *Brady* materiality, and then it ignored that same state court's clear pronouncement of exhaustion. This cannot be what federalism under AEDPA entails.

Throughout the years and through different avenues, federal courts have utilized the federalism principle underlying AEDPA to incentivize state courts to get cases right the first time. As one scholar put it, AEDPA inherently contains "a system where federal courts can incentivize more robust state process[es] to protect the rights of defendants consistently with [AEDPA's] federalism and comity purposes." Noam Biale, *Beyond A Reasonable Disagreement: Judging Habeas Corpus*, 83 U. Cin. L. Rev. 1337, 1375 (2015). Indeed, this Court endorsed a similar view in *Teague v. Lane*, in which it recognized that one of the purposes of federal habeas corpus review is to incentivize state courts to "'conduct their proceedings in a manner consistent with established constitutional standards.'" 489 U.S. 288, 306 (1989) (citation omitted), *overruled in part on other grounds by Edwards v. Vannoy*, 141 S. Ct. 1547 (2020). This is especially true when it comes to procedural issues underlying AEDPA

cases, and it is why the Eleventh Circuit's non-exhaustion determination is an especially offensive affront to the principle of federalism: it is a rejection of the state court's view of its own proceedings without any constitutional purpose. Although the state court found that Mr. Green had fully exhausted his claim in Florida, the Eleventh Circuit concluded otherwise, thereby calling into question the state court's analysis of the matter before it despite also finding that federal intervention was not necessary to protect the due process rights afforded to Mr. Green.

Both Congress in crafting AEDPA and this Court in its prior decisions have endorsed an application of AEDPA that allows for habeas cases to reach its court of last resort with a clear line of denials of relief stretching as far back as necessary into the appropriate state courts. The Eleventh Circuit's disregard of the Florida trial court's finding that Mr. Green addressed his *Brady* claim in his first post-conviction motion, and that the claim was affirmed on appeal to the Florida appellate court, is not only a gross misapplication of AEDPA's underlying federalism principle, but it also dis-incentivizes state courts from making such clear pronouncements in future decisions. This erodes the foundation that this Court and other federal habeas courts have built in their previous efforts to encourage state courts to act swiftly to decide matters that are eligible for federal habeas review. In rejecting the state court's view of the proceedings, the Eleventh Circuit "illustrate[d] a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning of and function of habeas corpus in the federal system." *Harrington*, 562 U. S. at 102.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should grant Petitioner's Petition for a Writ of Certiorari.

Dated: February 23, 2023

Respectfully submitted,

Dexter Hamilton
Counsel of Record
Michael Broadbent
Philip J. Farinella
Kamille Perry
Emily Yu
Cozen O'Connor
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, Pennsylvania 19103
(215) 665-2000
dhamilton@cozen.com

Counsel for Amici Curiae

APPENDIX

TABLE OF APPENDICES

APPENDIX — LIST OF *AMICI CURIAE*[1]

Deborah Ahrens
Professor of Law and Vice Dean for Intellectual Life
Seattle University School of Law

Hadar Aviram
Thomas E. Miller '73 Professor of Law
University of California College of the Law,
San Francisco

Lisa Avalos
Associate Professor of Law, Hermann Moyse,
Sr. Professorship
Louisiana State University Paul M. Hebert
Law Center

Bridgette Baldwin
Professor of Law
Western New England University School of Law

W. David Ball
Professor of Law
Santa Clara University School of Law

Barbara Barron
Professor of Skills
Hofstra University Maurice A. Deane School of Law

---

1. This brief presents the views of the individual signers. Their institutional affiliations are listed here for identification purposes only.

Appendix

Valena Beety
Professor of Law and Deputy Director of the
Academy for Justice
Arizona State University Sandra Day O'Connor
College of Law

Aliza Hochman Bloom
Faculty Fellow
New England Law | Boston

Robert Bloom
Professor of Law
Boston College Law School

John Blume
Samuel F. Leibowitz Professor of Trial Techniques
Cornell Law School

Michael Boucai
Professor of Law
University at Buffalo School of Law

Melissa L. Breger
Professor of Law and President William McKinley
Distinguished Professor in Law and Public Policy
Albany Law School

Katherine S. Broderick
Professor of Law, Dean *Emerita*, and
Joseph L. Rauh, Jr. Chair of Social Justice
University of the District of Columbia
David A. Clarke School of Law

Appendix

Gilbert Paul Carrasco
Professor of Law *Emeritus*
Willamette University College of Law

Kami Chavis
Professor of Law and Director of the Center for Criminal Justice Policy and Reform
William & Mary Law School

Gabriel J. Chin
Edward L. Barrett Jr. Chair of Law,
Martin Luther King Jr. Professor of Law,
and Director of Clinical Legal Education
UC Davis School of Law

Donna Coker
Professor of Law
University of Miami School of Law

Doug Colbert
Professor of Law
University of Maryland Francis King Carey School of Law

James E. Coleman, Jr.
John S. Bradway Professor of the Practice of Law and Director of the Center for Criminal Justice and Professional Responsibility
Duke University School of Law

Anna G. Cominsky
Associate Professor of Law and Director of the Criminal Defense Clinic
New York Law School

Appendix

John M. Copacino
Professor of Law and Director of the
Criminal Justice Clinic
Georgetown Law Center

Joseph Daly
Emeritus Professor of Law
Mitchell Hamline School of Law

LaJuana Davis
Professor of Law and Director of the Cumberland
Innocence Clinic
Samford University Cumberland School of Law

Brittany L. Deitch
Assistant Professor of Law
Capital University Law School

Hannah Demeritt
Clinical Professor of Law
Duke University School of Law

Brett Dignam
Clinical Professor *Emerita* of Law
Columbia Law School

Don L. Doernberg
Professor of Law *Emeritus*
Pace University Elisabeth Haub School of Law

Jules Epstein
Professor of Law and Director of Advocacy Programs
Temple University Beasley School of Law

Appendix

Charles P. Ewing
SUNY Distinguished Service Professor
University at Buffalo School of Law

Bryan K. Fair
Thomas E. Skinner Professor of Law
University of Alabama School of Law

Anthony Paul Farley
James Campbell Matthews Distinguished Professor of Jurisprudence
Albany Law School

Linda C. Fentiman
Professor of Law *Emeritus*
Pace University Elisabeth Haub School of Law

Todd Fernow
Professor of Law *Emeritus*
University of Connecticut School of Law

Claire Finkelstein
Algernon Biddle Professor of Law and Professor of Philosophy
University of Pennsylvania Carey Law School

Keith Findley
Professor of Law
University of Wisconsin Law School

Alison Flaum
Clinical Professor of Law
Northwestern University Pritzker School of Law

Appendix

Eric M. Freedman
Siggi B. Wilzig Distinguished Professor of
Constitutional Rights
Hofstra University Maurice A. Deane School of Law

Sarah Gerwig-Moore
Professor of Law
Mercer University School of Law

Evan S. Glasner
Clinical Fellow, Center for Criminal Justice
& Professional Responsibility
Duke University School of Law

Sarah Gottlieb
Clinical Teaching Fellow
University of Baltimore School of Law

Cynthia Godsoe
Professor of Law
Brooklyn Law School

Rashmi Goel
Associate Professor
University of Denver Sturm College of Law

Phyllis Goldfarb
Jacob Burns Foundation Professor of
Clinical Law *Emeritus*
George Washington University Law School

Catherine M. Grosso
Professor of Law
Michigan State University College of Law

Angela P. Harris
Distinguished Professor of Law
UC Davis School of Law

Janet C. Hoffel
Catherine D. Pierson Professor of Law
Tulane University Law School

Darrell D. Jackson
Professor of Law
University of Wyoming College of Law

Marcia Johnson
Professor of Law
Texas Southern University Thurgood Marshall School of Law

E. Lea Johnston
Professor of Law
University of Florida Levin College of Law

Julie Jonas
Professor of Law
University of St. Thomas School of Law

Irving L. Joyner
Professor of Law
North Carolina Central University School of Law

Appendix

Lewis Katz
John C. Hutchins Professor of Law *Emeritus*
Case Western Reserve University School of Law

Rachel Kincaid
Assistant Professor of Law
Baylor University Law School

Alexandra L. Klein
Assistant Professor of Law
St. Mary's University School of Law

Richard Klein
Bruce Gould Distinguished Professor *Emeritus* of Law
Touro University Jacob D. Fuchsberg Law Center

Margery Koosed
Law Professor *Emeritus*
The University of Akron School of Law

Corinna Barrett Lain
S.D. Roberts & Sandra Moore Professor of Law
University of Richmond School of Law

Jamie T. Lau
Clinical Professor of Law (Teaching) and Deputy Director of the Center for Criminal Justice and Professional Responsibility
Duke University School of Law

Sylvia Lett
Associate Clinical Professor of Legal Writing
University of Arizona, James E. Rogers College of Law

Laurie L. Levenson
Professor of Law and founder of Loyola's Project for the Innocent
Loyola Marymount University Loyola Law School

Ken Levy
Professor of Law
Louisiana State University Paul M. Hebert Law Center

Cortney E. Lollar
Norman and Carole Harned Law and Public Policy Professor
University of Kentucky J. David Rosenberg College of Law

Karen Pita Loor
Clinical Professor of Law and Associate Dean for Experiential Education
Boston University School of Law

Katherine Mattes
Clinical Professor of Law and Director of the Criminal Justice Clinic
Tulane University Law School

Julie E. McConnell
Professor of Law and Legal Practice and Director of the Children's Defense Clinic University of Richmond School of Law

Bill Merkel
Professor of Law
Charleston School of Law

Colin Miller
Professor of Law
University of South Carolina School of Law

Binny Miller
Professor of Law and Co-Director of the Criminal Justice Clinic
American University Washington College of Law

David Mills
Professor in the Practice of Law
Stanford Law School

Isis Misdary
Associate Professor of Law
Seton Hall University School of Law

David A. Moran
Clinical Professor of Law, and Founder and Co-Director of the Michigan Innocence Clinic
University of Michigan Law School

Caren Morrison
Associate Professor of Law
Georgia State University College of Law

Steven R. Morrison
Professor of Law
University of North Dakota School of Law

Tiffany Murphy
Professor of Law
University of Arkansas School of Law

Theresa A. Newman
Charles S. Rhyne Clinical Professor *Emerita* of Law
Duke University School of Law

Kenneth B. Nunn
Professor of Law and the Dr. Patricia Hilliard-Nunn
Memorial Racial Justice and the Associate Director
of the Center on Children and Families
University of Florida Levin College of Law

Sean O'Brien
Professor of Law
University of Missouri-Kansas City School of Law

Michelle Oberman
Katherine and George Alexander Professor of Law
Santa Clara University School of Law

Bernard Ortwein
Professor *Emeritus*
Suffolk University Law School

Michael Perlin
Professor of Law, *Emeritus*
New York Law School

LeRoy Pernell
Professor of Law
Florida A&M University College of Law

Jean K. Gilles-Phillips
Clinical Professor of Law, Connell Teaching Professor of Law, Director of the Project for Innocence & Post-Conviction Remedies, and Director of Clinical Programs
The University of Kansas School of Law

Ellen S. Podgor
Gary R. Trombley Family White-Collar Crime Research Professor of Law
Stetson University College of Law

Mae C. Quinn
Professor of Law and Associate Dean for Experiential Education
Pennsylvania State University Dickinson Law

Melanie Regis
Assistant Professor
Charleston School of Law

Glenn Harlan Reynolds
Beauchamp Brogan Distinguished Professor of Law
University of Tennessee College of Law

Judith L. Ritter
Professor of Law
Widener University Delaware Law School

Ira P. Robbins
Professor of Law and Barnard T. Welsh Scholar
American University Washington College of Law

Susan D. Rozelle
Professor of Law
Stetson University College of Law

David Rudovsky
Senior Fellow
University of Pennsylvania Carey Law School

Stephen A. Saltzburg
Professor of Law
The George Washington University Law School

Barry Scheck
Professor of Law and Co-Founder and Special
Counsel at the Innocence Project
Yeshiva University Benjamin N. Cardozo School
of Law

Brenda V. Smith
Professor of Law
American University Washington College of Law

Stephen F. Smith
Diane & M.O. Miller II Professor of Law
Notre Dame Law School

Appendix

David A. Sonnenshein
Professor *Emeritus*
Temple University Beasley School of Law

Vincent Southerland
Assistant Professor of Clinical Law
New York University School of Law

Erica Suter
Professor of the Practice and Director of the
Innocence Project Clinic
University of Baltimore School of Law

Kim A. Taylor-Thompson
Professor of Clinical Law *Emerita*
New York University School of Law

Katie Tinto
Clinical Professor of Law
and Director of the Criminal Justice Clinic
UC Irvine School of Law

Leslie Y. Garfield Tenzer
Professor of Law and Luk-Cummings Family
Faculty Scholar
Pace University Elisabeth Haub School of Law

Rachel A. Van Cleave
Professor of Law and Dean *Emerita*
Golden Gate University School of Law

Anna VanCleave
Associate Professor and Director of UConn's
Criminal Defense Clinic
University of Connecticut School of Law

Madalyn K. Wasilczuk
Assistant Professor of Law
University of South Carolina School of Law

Lindsey Webb
Associate Professor of Law
University of Denver Sturm College of Law

Robert Weisberg
Edwin E. Huddleson, Jr. Professor of Law, Faculty
Co-Director of the Stanford Criminal Justice Center,
and Associate Dean for Curriculum
Stanford Law School

C. Jackson Williams
Professor of the Practice of Law
The University of Mississippi School of Law

Kenneth Williams
Professor of Law
South Texas College of Law Houston

Dr. T. Anansi Wilson
Associate Professor of Law
Mitchell Hamline School of Law

Samuel R. Wiseman
Professor of Law
Penn State Law – University Park

Steven Zeidman
Professor of Law
CUNY School of Law