No. _____

IN THE

Supreme Court of the United States

CROSLEY ALEXANDER GREEN,

Petitioner,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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January 20, 2023

QUESTIONS PRESENTED

Principles of federalism and comity embodied in the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, require deference to state court factfinding and procedures in connection with federal habeas proceedings. Here, a Florida state court determined that Petitioner had exhausted state procedures on the relevant claims. With that as background, the federal district court granted a writ of habeas corpus to Petitioner because the State had unlawfully failed to disclose exculpatory evidence—the prosecutor's notes reflecting material observations and conclusions of the responding officers—as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The Eleventh Circuit reversed, effectively overruling determinations of both fact and of the state's own procedures made by the state court, thereby adopting an approach that stands in stark contrast to the approach set out by this Court and applied in other Circuits. The following questions are presented:

1. Where Petitioner's state high court brief articulated the federal constitutional guarantee relied upon and the facts supporting that claim, and a state trial court determined that Petitioner's *Brady* claim had been presented to that court and "appeal[ed] to the Supreme Court of Florida," is it proper for a federal habeas court on appeal to redefine the claim presented to the state high court, to make it "coincide" with a claim presented in state trial court pleadings, to conclude that the habeas claim was not properly exhausted in the state courts?

2. Does it violate the presumption of correctness of state court factual determinations for a federal

habeas court on appeal to overturn a state court factual determination—that what was revealed in the wrongfully withheld evidence was "far different" from what had otherwise been revealed to the defense—without first overcoming the presumption that the state-court determination was correct?

3. Where the State withheld the prosecutor's notes reflecting that the first officers on the scene identified the sole eyewitness, whose testimony was the basis for Petitioner's conviction, as the likely perpetrator and reported their reasons for that belief to the prosecutor, is it reasonable to end a *Brady* analysis by concluding that the withheld evidence would have been inadmissible, where disclosure of that evidence would likely have led to the development of admissible evidence favorable to the defense?

RULE 29.6 STATEMENT

This document is not filed by or on behalf of a nongovernmental corporation.

STATEMENT OF RELATED PROCEEDINGS

Green v. Secretary, Department of Corrections, et al., No. 18-13254 (United States Court of Appeals for the Eleventh Circuit) (order denying rehearing filed on September 22, 2022; opinion reversing in part and affirming in part district court's judgment entered on March 14, 2022)

Green v. Secretary, Department of Corrections, et al., No. 19-10287 (United States Court of Appeals for the Eleventh Circuit) (appeal from denial of motion for release pending appeal, voluntary dismissal entered August 28, 2019)

Green v. Secretary, Department of Corrections, et al., No. 6:14-cv-330 (United States District Court for the Middle District of Florida) (amended order and judgment granting in part and denying in part petition for habeas corpus entered July 27, 2018)

Green v. Secretary, Department of Corrections, et al., No. 16-10633 (United States Court of Appeals for the Eleventh Circuit) (order reversing dismissal of habeas petition on procedural grounds and remanding to district court entered December 15, 2017)

Green v. Secretary, Department of Corrections, et al., No. 6:14-cv-330 (United States District Court for the Middle District of Florida) (order dismissing habeas petition on procedural grounds entered January 21, 2016)

Green v. State, No. 5D11-3009 (District Court of Appeal of the State of Florida for the Fifth District) (order affirming Florida Circuit Court's denial of successive post-conviction motion entered February 5, 2013)

Green v. Secretary, Department of Corrections, et al., No. 6:11-cv-1873-Orl-22KRS (United States District Court for the Middle District of Florida) (order dismissing habeas petition on procedural grounds entered December 12, 2011)

State v. Green, No. 05-1989-CF-004942 (Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida) (order denying successive post-conviction motion entered August 31, 2011)

Green v. State, No. SC05-2265, and *Green v. McDonough, etc.*, No. SC06-1533 (Supreme Court of Florida) (revised order affirming trial court and denying state petition for post-conviction relief entered January 31, 2008)

State v. Green, No. 05-1989-CF-004942 (Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida) (order granting in part and denying in part motion for post-conviction relief entered November 22, 2005; order granting in part and denying in part request for evidentiary hearing on motion for post-conviction relief entered July 22, 2002)

Green v. State, No. 77,402 (Supreme Court of Florida) (order affirming convictions and sentences on direct appeal entered July 7, 1994)

State v. Green, No. 89-4942-CF-A (Circuit Court of the Eighteenth Judicial Circuit in and for Brevard

County, Florida) (judgments of guilt and sentences entered February 8, 1991)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Crosley Alexander Green ("Green") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals that is the subject of this Petition is dated March 14, 2022, reported at 28 F.4th 1089 (11th Cir. 2022), and reprinted at App. 1. The denial by the Eleventh Circuit Court of Appeals of Green's Petition for Rehearing En Banc is dated September 22, 2022 and reprinted at App. 165. The opinion of the U.S. District Court for the Middle District of Florida under appeal is dated July 27, 2018 and reprinted at App. 167.

JURISDICTION

The order of the Eleventh Circuit Court of Appeals sought to be reviewed was entered March 14, 2022. The Eleventh Circuit Court of Appeals denied rehearing on September 22, 2022. On December 2, 2022, Justice Thomas granted an application extending the time to file this Petition until January 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, … nor be deprived of life, liberty, or property, without due process of law…

The Fourteenth Amendment to the Constitution provides, in pertinent part:

> No state shall … deprive any person of life, liberty, or property, without due process of law…

The Anti-terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, provides, in pertinent part:

> (b)(1) 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 unless it appears that—
> (A) the applicant has exhausted the remedies available in the courts of the State; …
>
> (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.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

This is a case about federalism and comity. It concerns the respect that federal courts owe to state courts when reviewing the claims of state prisoners in federal habeas proceedings. The principles of federalism and comity requiring deference to state courts on factfinding and the interpretation of their own procedures, most frequently invoked to deny habeas relief, here require that the District Court's grant of habeas corpus to Petitioner be affirmed.

In 1990, petitioner Crosley Green was convicted of murdering Charles "Chip" Flynn. No physical evidence connected Green to the crime scene. His conviction was based on the testimony of the sole alleged eyewitness—the victim's ex-girlfriend, Kim

Hallock—a 19-year-old who claimed that "a black guy" kidnapped them and shot Flynn. Crosley Green entered the picture only later, after Hallock picked Green's photo out of a suggestive photo array, even though Green did not fit Hallock's initial description of Flynn's alleged killer, apart from the fact that he is a Black man.

Green's trial might well have had a different outcome, except that the State failed to disclose to the defense two critical pieces of evidence pointing elsewhere: first, the prosecutor's notes[1] showing that the two first-responding officers, Mark Rixey and Diane Clarke, concluded, based on the evidence at the crime scene, that *Hallock* had committed the crime herself; and second, Hallock's initial statement to law enforcement reflected in those notes that *she* had tied the victim's hands behind his back before he was killed, a statement that contradicts her later trial testimony that the "*black guy"* had tied the victim's hands. The Prosecutor's Notes of his interview with the two first-responding officers stated:

> *Mark & Diane suspect girl did it. She changed her story couple times. One thing was she 1st said she tied his hands behind his back …*

App. 230.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the State had a constitutional duty to disclose this material exculpatory evidence to the defense before Green's trial. Its failure to do so fatally undermined

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[1] Herein, "Prosecutor's Notes."

Green's ability to develop and present a robust defense and calls the verdict into serious doubt.

Green sought post-conviction relief in state court, citing *Brady*, based on the State's failure to disclose this evidence. The Florida trial court summarily denied Green's *Brady* claim on the ground that, under Florida law, the investigating officers' opinions regarding Green's innocence were not admissible at trial. The state court did not address the critical next question in the *Brady* inquiry—whether those Prosecutor's Notes, even if inadmissible, might have led to the development of admissible evidence. Neither did it address the significance, in the *Brady* context, of the ex-girlfriend's initial statement regarding the victim's tied hands. We will come back to that.

Green appealed to the Florida Supreme Court, again citing *Brady*, based on the State's failure to disclose this evidence, and that court affirmed.

Green then sought a writ of habeas corpus from the United States District Court for the Middle District of Florida. The district court granted Green's request for relief, finding that the State's failure to disclose the Prosecutor's Notes created a reasonable probability that the trial outcome would have been different had the defense possessed that information. Said the court: "It is difficult to conceive of information more material to the defense and the development of defense strategy than the fact that the initial responding officers evaluated the totality of the evidence as suggesting that the investigation should be directed toward someone other than Petitioner." App. 182.

The State appealed, and a divided panel of the Eleventh Circuit reversed on three grounds.

First, the Panel majority held that Green had not exhausted his state-court remedies because he had not fairly presented his *Brady* claim to the Florida Supreme Court. To reach this conclusion, the Panel majority deconstructed and then reconfigured Green's various state-court briefs and motions *and* ignored that the Florida trial court had already found that Green exhausted his state-court remedies on his *Brady* claim because that claim was "addressed in the first post-conviction motion, and affirmed on appeal to the Supreme Court of Florida." Order at 13, *State v. Green,* No. 05-1989-CF-004942 (Cir. Ct. of the Eighteenth Jud. Cir. in and for Brevard Cnty., Fla. Aug. 31, 2011). By repudiating the state court's finding, the Panel majority's holding violates longstanding precepts of federalism and comity that underpin this Court's jurisprudence.

Second, the Panel majority held that the State's failure to disclose the Prosecutor's Notes regarding the investigating officers' opinions was not material because those opinions were inadmissible under Florida law. Like the Florida courts, however, the Eleventh Circuit failed to meaningfully address, as required by *Brady* and its progeny, whether the Prosecutor's Notes would likely have impacted the defense's preparation and presentation of its case in ways favorable to Green.

Third, the full Panel concluded that Hallock's suppressed, initial statement to the police regarding hand-tying was cumulative of a police report authored by officer Walker that was disclosed to the defense. But in so doing the Panel's decision countermanded

and disregarded an express factual determination made by the Florida trial court that the Walker report contained a different statement than what was in the Prosecutor's Notes. While the Walker report states Hallock said she "was *told* to tie [the victim's] hands," the Florida trial court found this statement not to be evidence that Hallock stated she actually tied the victim's hands. App. 223. The Prosecutor's Notes, however, state that Hallock said she *actually did* tie the victim's hands. App. 230. In other words, the Panel's decision relies on improper disregard of the state court's factual finding that Hallock's statement in the suppressed Prosecutor's Notes stood for a very different proposition than Hallock's statement in the disclosed Walker report and thus was not cumulative of the Walker report.

The Panel majority's opinion raises compelling issues regarding federalism and deference to state-court findings in habeas corpus proceedings, and these issues merit this Court's review. Critical to its holdings on both exhaustion and *Brady* merits, the Panel substituted its own *de novo* finding of fact over that of the state courts and disregarded the state court's conclusion, as a matter of state procedure, that Green had exhausted the *Brady* claim on which the District Court granted him habeas relief. This approach is contrary to principles of comity and federalism, to the required deference to state court findings and judgments required by the Anti-terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, and to this Court's well-settled precedent. Moreover, the Panel's rejection of state court interpretations of state procedure is doubly unjust because it creates a Catch-22 for Green and other similarly situated petitioners where a claim is

both exhausted (according to the state courts) and not exhausted (according to a federal habeas court).

It is vital that this Court reinforce the principle that due deference is owed to state-court findings of fact and state procedure, not only when those findings support the denial of habeas relief, but also when they support the grant of such relief.

BACKGROUND AND FACTS

I. The State Withheld Exculpatory Evidence From Crime Scene Witnesses Favorable to the Defense

On April 3, 1989, Kim Hallock called police from a friend's house reporting that her ex-boyfriend, Chip Flynn, had been shot in an orange grove. Deputy Wade Walker was dispatched to Hallock's location, and Sergeant Diane Clarke and Deputy Mark Rixey searched for and found Flynn at the crime scene. Though still alive and speaking, Flynn repeatedly refused to tell them what had happened or who shot him. Flynn died on the way to the hospital. App. 5-7; App. 229-30.

Hours later, Hallock told officers an unknown "black guy" had abducted her and Flynn at gunpoint and tied Flynn's hands behind his back. She said the "black guy" then drove them in Flynn's truck to the orange grove and, after Flynn fired his own gun Hallock had secretly passed to him, Hallock fled in the truck as shots were fired. App. 3-5.

According to the witness interview notes of lead prosecutor Mark White (the "Prosecutor's Notes"), officers Clarke and Rixey told White the investigation should focus on Hallock and marshalled the evidence underlying their conclusion: "*Mark & Diane suspect*

girl did it. She changed her story couple times. One thing was she 1st said she tied his hands behind his back … [S]he never asked how victim was while at homicide. Didn't see any footprint – didn't see any casings. She wouldn't go down there to the scene. Why wouldn't guy [Flynn] say who shot him[?]." App. 229-30. Despite the information provided by officers Clarke and Rixey, the State never investigated Hallock as a suspect.

It is undisputed that the State did not disclose the Prosecutor's Notes to the defense prior to trial.

Separately, Deputy Walker filed a police report the day after the crime (the "Walker Report") stating, *inter alia*, Hallock said she "was *told* to tie Mr. Flynn's hands" (emphasis added), *although, as the Florida courts would later determine, the report does not evidence that Hallock stated she actually tied Flynn's hands.* App. 223.

In August 1990, Crosley Green, who had been picked out of a suggestive photo array by Hallock, was tried for the murder of Chip Flynn. Hallock provided the sole eyewitness identification and account of the crime at trial. Hallock testified that the "black guy" tied Flynn's hands and while doing so, his gun fired accidentally. Although defense counsel argued Flynn's hands had been tied "for comfort," counsel had no witnesses or evidence to undermine the police investigation or otherwise support the defense's theory that "the girl did it" and the story about "a black guy did it" was a hoax. The defense had no witness to marshal the facts indicating that Hallock had tied Flynn's hands and shot him—and that there was no "black guy." The State's closing argument dismissed the defense theory that Hallock shot Flynn

as so unsubstantiated that counsel could only "allude[] to" it, mocking it as "ludicrous" and "grasping at maybe no straws at all." App. 20-21; App. 223; App. 219. The jury convicted Green of capital murder, kidnapping and robbery, and he was sentenced to death.

II. The State Trial Court Deems Suppression Immaterial

On November 30, 2001, Green filed a Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief in the Circuit Court for Brevard County (the "State Trial Court"). He asserted two claims relevant to this Petition. He alleged that the State's withholding of the Prosecutor's Notes violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). He also alleged that counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to use the Walker Report to impeach Hallock with her inconsistent statements regarding hand-tying. *See* App. 25-26. During the post-conviction process, Green's counsel obtained the Prosecutor's Notes through a public records request. App. 225.

On July 22, 2002, the State Trial Court entered an interim decision summarily denying Green's *Brady* claim. This order cited alternative sources by which some of the "information in the … notes was disclosed and known by defense counsel." App. 226. However, regarding the first-responding officers' belief that that Hallock committed the crime and should be investigated, and regarding the fact that Hallock "1st said she tied [Flynn's] hands," the court cited no such cumulative source. Rather, the court stated only: "The purported opinion of Deputies Rixey

and Clark … would not have been admissible at trial," and declined to permit an evidentiary hearing on the issue. App. 226-27.

The State Trial Court granted evidentiary hearings on other claims while the interim decision on the *Brady* claim remained unappealable until final resolution of all claims. *See*, *e.g.*, *Libertelli v. State*, 775 So. 2d 339, 340 (2d Fla. Dist. Ct. App. 2012). At the evidentiary hearings, Green adduced defense trial counsel's testimony as to how disclosure of the Prosecutor's Notes would have impacted his trial strategy and presentation, including that he would have used the Prosecutor's Notes to impeach Hallock's trial testimony because evidence of her inconsistent account "went to the heart of [his] defense." App. 217-18.

III. The State Trial Court Holds That the Walker Report Does Not Disclose the Suppressed Information That Hallock Tied Flynn's Hands

On November 22, 2005, the State Trial Court readopted its interim denial of Green's *Brady* claim. In that final order, it denied Green's ineffective assistance claim, finding "Deputy Walker's written report specifically states Kim Hallock said she '***was told to*** tie Mr. Flynn's hands behind his back with a shoe string.' This is *far different* than reporting that Kim Hallock stated that she tied Chip Flynn's hands." App. 223 (first emphasis by court, second emphasis added, internal citation omitted).

Thus, as would become relevant before the Eleventh Circuit, the State Trial Court explicitly found that the Walker Report did not disclose that Hallock said she had tied the victim's hands. As it

related to Green's ineffective assistance claim, Hallock's statement in the Walker Report was not inconsistent with her trial testimony, and thus counsel was not ineffective for failing to impeach Hallock with it. *See* App. 223. But as it related to Green's *Brady* claim, the State Trial Court's decision confirmed that Hallock's statement in the Prosecutor's Notes that she said she tied Flynn's hands was not cumulative of other evidence disclosed to the defense.

IV. The Florida Supreme Court Affirms

On August 2, 2006, Green timely appealed the State Trial Court's decision to the Florida Supreme Court. In a section of the appellate brief headed "THE COURT ERRED IN DENYING GREEN'S CLAIM FOR RELIEF BASED ON INDIVIDUAL INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL AND NONDISCLOSURE OF EXCULPATORY EVIDENCE," Green argued: "Where exculpatory evidence was suppressed or concealed, Mr. Green is entitled to relief under *Brady* and/or *Giglio*." App. 214.

In this section, under the subheading "Exculpatory and impeaching evidence relating to the initial police investigation," Green's brief quoted the Prosecutor's Notes verbatim and explained the document "was not disclosed to the defense at trial." App. 216-17. It explained how counsel would have used the information therein to impeach Hallock and support an alternative perpetrator defense, quoting trial counsel's post-conviction testimony that it "went to the heart of my defense." App. 218.

On January 31, 2008, the Florida Supreme Court affirmed. It provided no written reasoning regarding

Green's *Brady* claim on the Prosecutor's Notes. However, it agreed with the State Trial Court that there was no evidence Hallock made the statement she had tied Flynn's hands to Deputy Walker, implicitly agreeing with the State Trial Court that the Walker Report did not disclose that statement. *Green v. State*, 975 So. 2d 1090, 1104 (Fla. 2008).

V. The State Courts Find Green's *Brady* Claim Was "Addressed … and Affirmed on Appeal"

The question of whether Green fairly presented his *Brady* claim for review in state court was answered by the state courts years before federal habeas review. On February 3, 2011, Green raised his *Brady* claim regarding the Prosecutor's Notes in a Successive Postconviction Motion that included new supporting evidence, including affidavits from officers Clarke and Rixey. The State Trial Court dismissed it as successive because the claim had been "raised on appeal of his first post-conviction motion … and affirmed on appeal to the Supreme Court of Florida." App. 84 n.91. The Florida intermediate appellate court affirmed. App. 74-75. Thus, the state courts concluded Green had exhausted his *Brady* claim on the Prosecutor's Notes in the State Trial Court and Florida Supreme Court.

VI. The District Court Grants Habeas Relief on Green's *Brady* Claim

Green timely filed a federal petition for habeas corpus on March 26, 2014. On July 27, 2018, the District Court for the Middle District of Florida conditionally granted the petition based on Green's *Brady* claim regarding the Prosecutor's Notes.

The District Court first found that the Florida courts' decisions were not entitled to AEDPA deference under 28 U.S.C. § 2254(d)(1) because it was an unreasonable application of established Supreme Court law to hold that the Prosecutor's Notes were immaterial under *Brady* simply because officers Clarke's and Rixey's opinions that Hallock "did it" were inadmissible at trial. App. 181 (holding it "contrary to … *Brady*, and objectively unreasonable for the State court to end the prejudice inquiry once it made an admissibility determination"). As the District Court held, "it is not only the admissibility of the note itself that determines the materiality of the withheld information, but what use might be made of its contents if known to the defense." App. 181.

The District Court then held that the Prosecutor's Notes were "clearly material and the failure to disclose it was a *Brady* violation which undermines confidence in the outcome of the trial." App. 182. The Court found that disclosure of the Prosecutor's Notes would likely have enabled defense counsel to "elicit[] the essence of the testimony" to "avoid the 'opinion of innocence' issue," and that use of the Prosecutor's Notes might have influenced the officers' deposition testimony. The Court concluded that it is "difficult to conceive of information more material to the defense … than the fact that the initial responding officers evaluated the totality of evidence as suggesting that the investigation should be directed toward someone other than" Green. App. at 182.

With respect to the statement that Hallock "said she tied his hands," the District Court stated that this was a "critical issue at trial," and held that "[t]his impeachment information contained in the

prosecutor's notes was unquestionably material as it seriously undermined the testimony of Hallock." This is particularly true "considering the totality of the circumstances and the absence of any direct evidence of guilt beyond the identification by Hallock." App. 184-85.

VII. The Eleventh Circuit Reverses the District Court

The Secretary appealed to the Eleventh Circuit Court of Appeals. On March 14, 2022, a Panel of that Court (Judges Tjoflat, Traxler,[2] and Jordan, with Jordan concurring in part and dissenting in part) reversed in a 182-page split decision. App. 1-164. Two members of the Panel held that Green had not exhausted his *Brady* claim in state post-conviction proceedings because he did not appeal the State Trial Court's ruling to the Florida Supreme Court. All three judges (although on different grounds) held that the State's withholding of the Prosecutor's Notes was not "material" under *Brady*.

A. The Panel's Rulings Depend on Disregarding the State Courts' Findings of Fact

Critical to both exhaustion and the merits of Green's *Brady* claim, the Panel determined that the Walker Report disclosed that Hallock initially told police she had tied Flynn's hands.

As detailed above, the State Trial Court had found, and the Florida Supreme Court affirmed, that the Walker Report does not disclose Hallock's statement that she tied Flynn's hands. App. 223. It

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[2] Sitting by designation from the Fourth Circuit.

discloses only that Hallock said she "was told to" tie Flynn's hands, which is "far different." App. 223. The state courts used that finding to deny Green post-conviction relief under *Strickland*.

The Panel, however, found the Walker Report disclosed Hallock's inconsistent statement, reasoning it was "[a] reasonable inference" that, if told to tie Flynn's hands, Hallock did so. App. 46 n.54. *See also* App. 159 (Jordan, J., concurring) ("[T]hat is a fair inference that the state post-conviction court could have drawn."). This is the opposite of what the state court found.

This factual determination by the Panel, overturning a state-court finding of fact, was the linchpin of every ruling it made. On exhaustion, the Panel majority reasoned that Green's Florida Supreme Court argument must have related to an ineffective assistance claim regarding the Walker Report rather than his *Brady* claim on the Prosecutor's Notes. App. 95-96. On the merits, the Panel reasoned the Prosecutor's Notes would have "provided the defense with nothing it did not already have," rendering their suppression immaterial. App. 100.

B. The Panel's Fair Presentation Analysis "Reads Beyond" Green's Florida Supreme Court Brief to Mix-and-Match Elements of Different Claims at Different Stages to Rule Against Green

The Panel split on whether Green had fairly presented to the Florida Supreme Court the *Brady* claim on which the District Court granted relief. While Judge Jordan found that "Green met the exhaustion requirement when he presented his claim

in his [Florida Supreme Court] brief," App. 155 (Jordan, J., concurring), the Panel majority read beyond the four corners of Green's Florida Supreme Court brief to analyze earlier pleadings Green had filed in the State Trial Court and then used that analysis to rewrite the content of Green's Florida Supreme Court argument, ultimately concluding Green had presented a different claim entirely.

The Panel majority's analysis began by comparing Green's Florida Supreme Court brief with his original State Trial Court motion. It found that Green's appellate arguments did not "coincide" with his claims as originally pled, so it sought to "align" Green's arguments in the appeal brief with his State Trial Court pleadings. App. 56-57, 136. Then, although Green's appeal brief expressly relied on *Brady* and the suppression of the Prosecutor's Notes, the Panel interpreted Green's brief as having only appealed the denial of his ineffective assistance claim (pled as "Claim III-F"), not his *Brady* claim (pled as "Claim III-H-4"). App. 37-38 n.50, 49-50, 55-57, 57-58 n.67, 58-59, 92, 94-95.

The Panel majority next reinterpreted Green's arguments in the Florida Supreme Court so that they better "coincided" with "Claim III-F" in the State Trial Court, which allowed the Panel to rule the *Brady* claim had not been fairly presented. It did so in two ways.

First, the Panel majority ignored evidence the brief put front and center. Green's Florida Supreme Court brief quoted trial counsel testimony that the suppressed information "went to the heart of [his] case." The Panel majority ruled that because this testimony was adduced "*after* the [State Trial] Court

adjudicated Claim III-H-4," reliance on it presented "a new Claim … that had not been exhausted." App. 89 n.96 (emphasis in original).

Second, the Panel majority added allegations that did not appear in the brief. "Claim III-F" in the State Trial Court alleged counsel should have used the Walker Report to impeach Hallock. Green's brief in the Florida Supreme Court on his *Brady* claim made no such allegation. But the Panel ruled that the claim Green presented on appeal was predicated on counsel's failure to use the Walker Report. App. 94-96.

The Panel closed by issuing a Rule 11 "notice" requiring state court pleadings more clearly comply with its analytical approach. Green argued in the Eleventh Circuit that his Florida Supreme Court brief expressly relied on *Brady* and focused on the suppression of the Prosecutor's Notes. The Panel majority deemed these arguments to be a deliberately ambiguous strategy obscuring what it saw as the central question: whether that brief had appealed "Claim III-H-4" or "Claim III-F." App. 137-38. It therefore "recommend[ed]" state courts alter their pleading standards to require appellants to clearly align appellate arguments with numbered lower court claims, and it issued explicit "notice" that petitioners that failed to do so *in state court* will face Rule 11 sanctions when they file habeas claims in federal court. App. 141-44.

The concurrence "strongly disagree[d] with the majority's conclusion that Green did not exhaust his *Brady* claim." App. 145 (Jordan, J., concurring). It reviewed the content of Green's Florida Supreme Court brief and concluded "Green met the exhaustion

requirement when he presented the claim in his brief." It noted the state post-conviction court and Secretary on oral argument conceded as much. It then explained, "the majority has focused (fixated might be a better word) on the numbering of the claims in the Florida post-conviction proceedings instead of analyzing the substance of the arguments that Mr. Green presented. That is not the correct approach." *App.* 152-56 (Jordan, J., concurring).

C. The Panel Reverses on *Brady* by Finding that the Evidence Withheld was Inadmissible at Trial and Otherwise Cumulative

On the merits of the *Brady* claim, the Panel split on whether the state courts' ruling that inadmissible evidence cannot be material under *Brady* was an unreasonable application of established federal law under 28 U.S.C. § 2254(d)(1). The majority held that "[b]ecause the opinions of Rixey and Clarke were not admissible under state law, they were 'not "evidence" at all.'" App. 100. Judge Jordan's separate opinion notes that "admissibility is not the touchstone (or a requirement) of Brady materiality." App. 160 (Jordan, J., concurring).

However, both the majority and concurrence concluded the Prosecutor's Notes were not material because they were cumulative of the Walker Report, contrary to the explicit factual determination of the state courts that the Walker Report did not include a statement from Hallock that she tied Flynn's hands. App. 101-02; App. 159-61 (Jordan, J., concurring).

The majority also dismissed as speculation that the defense's preparation and presentation of its case would have been materially strengthened by the

disclosure of evidence that the first-responding officers told the lead prosecutor that the State's sole eyewitness "did it" and had marshalled evidence supporting their conclusion. App. 100-01.

REASONS TO GRANT THE PETITION

This Petition raises serious issues that go to the very heart of federal-state comity underlying post-conviction proceedings and undermine this Court's well-settled *Brady* precedent requiring the prosecution to disclose material, exculpatory evidence.

First, the Panel's reversal of the District Court's habeas grant was based on a determination of fact contrary to the State Trial Court's explicit finding that the Walker Report did not disclose key information contained in the suppressed evidence—without the required deference to that state court finding.

Second, the Panel's reversal on exhaustion not only overrules the state courts' own application of state procedural law—finding that Green presented and appealed, and thereby exhausted his *Brady* claim—but it is contrary to this Court's well-settled precedent regarding fair presentation.

Third, the Panel's reversal on Green's *Brady* claim is contrary to this Court's precedent regarding whether inadmissible evidence can be "material" and whether withholding exculpatory evidence that would have significantly impacted the defense's preparation and presentation of its case violates due process. *See*, *e.g.*, *United States v. Bagley*, 473 U.S. 667, 683 (1985) (reviewing court may consider effect of suppression

"on the preparation or presentation of the defendant's case").

I. Principles of Federalism and Comity Require Deference to State Court Factfinding that Is Supported by Record Evidence

Mr. Green comes as the rare habeas petitioner seeking to protect the interests of federal-state comity and the state courts' established role as factfinder on habeas review. The Panel's "expansion of factfinding in federal court ... conflicts with any appropriately limited federal habeas review," *Shinn v. Ramirez*, 142 S. Ct. 1718, 1379 (2022), regardless of whether it benefits petitioner or respondent. Not only is it contrary to this Court's established precedent, it sets a dangerous precedent undermining the deference owed to state court post-conviction proceedings.

A. The Panel Fundamentally Alters Federal-State Comity on Habeas Review and Erodes AEDPA's Deference to State Courts

The state courts, in denying Green's ineffective assistance claim, determined that the Walker Report lacked a statement that Hallock had tied the victim's hands:

> Deputy Walker's written report specifically states Kim Hallock said she "*was told to* tie Mr. Flynn's hands behind his back with a shoe string." This is far different than reporting that Kim Hallock stated that she tied Chip Flynn's hands.

App. 223. The Panel, in denying Green's *Brady* claim, determined the exact opposite:

> [Defense counsel] Parker had all the information [Prosecutor] White's notes contained including the 'she tied his hands' statement. The statement was in Walker's report that had been disclosed to Parker.
>
> …
>
> The problem for Mr. Green is that his counsel knew about Ms. Hallock saying that she had tied Mr. Flynn's hands from Deputy Walker's report.

App. 40, 161. This contrary finding was the linchpin to the Panel's reversal on both exhaustion and *Brady* merits.

Under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). To obtain habeas relief, "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* However, AEDPA does not specify the burden the petition's *opponent* bears to rebut a state court determination of fact in order to *deny* habeas relief.

Prior to AEDPA, this Court had applied the rule that "a federal court, in ruling on a petition for a writ of habeas corpus, is not to overturn a factual conclusion of a state court unless the conclusion is not 'fairly supported by the record.'" *Wainwright v. Goode*, 464 U.S. 78, 85 (1983). This Court has not yet ruled whether AEDPA altered the *Wainwright* standard for the respondent of a habeas petition, but

at minimum the Panel would have had to find that the state court's ruling regarding the Walker Report was "not fairly supported by the record." The Panel did no such analysis. And the plain language of the Walker Report supports the state court's factfinding, not the Panel's.

The Panel opinion demands this Court's reversal because it alters the fundamental rules governing deference to state courts in habeas cases and usurps the factfinding role of the state courts. The Eleventh Circuit's new rule is in conflict with this Court's repeated commands that federal habeas courts not second guess state-court findings of fact. The Panel's opinion now means that courts in the Eleventh Circuit can ignore any factual finding of a state court that they find inconvenient to deny habeas relief. Federal habeas courts are not the appropriate forum for such a factual debate. They "lack the competence and authority to relitigate a State's criminal case." *Shinn*, 142 S. Ct. at 1739.

Under existing Eleventh Circuit precedent, federal habeas courts may supplement state court opinions with findings of fact the state courts did not make. *See*, *e.g.*, *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025 (11th Cir. 2022) (habeas courts may invent justifications that render the "reasons" for state courts' outcome no longer "unreasonable"). The Panel's opinion takes this federal intervention in factfinding a dramatic step further: in the Eleventh Circuit, federal courts may now *disregard* factual determinations state courts *did* make.

B. The Panel Was Able to Reverse a Habeas Grant Only Because It Disregarded a Critical State Court Finding of Fact

Under established Supreme Court precedent, withheld evidence is "material" under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

The Panel overruled state court findings of fact by concluding that the Walker Report said that Hallock told police *she had tied* Flynn's hands. Based on that novel reading of the Walker Report, the full Panel rejected the obvious materiality of the hand-tying statement in the Prosecutor's Notes because it found that statement "cumulative" of the Walker Report.

Without the Panel's foray into the factual record and its own finding of fact, the Prosecutor's Notes are unmistakably material, as the District Court held, in that they disclose that Hallock first told officers that *she* tied the victim's hands before later changing her story to claim that the "black guy" tied the victim's hands. As Green argued in both state and federal court, defense counsel testified that, had he been aware of this glaring inconsistency in Hallock's statements, he would have used it both for impeachment and to paint Hallock as the true killer because "it went to the heart of [the] defense." App. 218; Petitioner's Memorandum of Law at 32, *Green v. Sec'y, Dep't of Corr. et al.*, No. 6:14-cv-00330 (M.D. Fla Mar. 26, 2014); Brief of Appellee, *Green v. Sec'y, Dep't*

of Corr. et al. at 34, No. 18-13524 (11th Cir. Apr. 18, 2019).

II. The Panel's Approach to Exhaustion Violates Established Precedent and Every Policy the Exhaustion Doctrine Serves

The Panel judged whether Green had "fairly presented" his claim before the state courts under AEDPA by (1) reading beyond Green's Florida Supreme Court brief, (2) identifying the State Trial Court claim it interpreted that brief to be appealing, and (3) defining the thus-identified claim as pled in the State Trial Court to be how the claim was presented to the Florida Supreme Court. As Judge Jordan concluded, "the majority has focused (fixated might be a better word) on the numbering of the claims in the Florida post-conviction proceedings instead of analyzing the substance of the arguments that Mr. Green presented." App. 156. The Panel's analysis warrants *certiorari* because it establishes a new post-conviction pleading standard for state courts that is contrary to this Court's established exhaustion analysis and disregards the principles of federalism and comity that underlie the exhaustion doctrine.

A. The Panel's New Standard Requires State and Federal Courts to Conduct Searching, Complex, and Needless Analysis

This "case is not as complex as the [Panel] majority makes it out to be." App. 145 (Jordan, J., concurring). The sole exhaustion issue before the Panel was whether Green had fairly presented his *Brady* claim to the Florida Supreme Court. *See* App.

92. The four corners of Green's brief in that court are the beginning and end of the analysis. *See Baldwin v. Reese*, 541 U.S. 27, 31-32 (2004). Instead, the Panel conducted a searching, complex analysis far beyond the four corners and read through to State Trial Court briefing to redefine Green's arguments.

The Panel's approach is not only wrong under *Baldwin*, it fundamentally changes exhaustion analysis in two ways that will lead to discord.

First, it requires state appellate judges to engage in the very analysis that *Baldwin* foreswore. The Panel's approach defines the claims presented in the state appellate court not by the briefs before that court but by briefs and opinions in lower courts. As such, it requires state appellate judges to "read through lower court opinions or briefs in every instance" if they are to identify the exhausted federal claim and have an "opportunity to decide that federal claim in the first instance." *Baldwin* 541 U.S. at 31-32. This burden alters the "ordinary review practices" of state appellate judges and "unjustifiably undercut[s] the considerations of federal-state comity that the exhaustion requirement seeks to promote." *Id.*

Likewise, the Panel's approach greatly increases the already "heavy burden on scarce judicial resources" that federal habeas litigation imposes, a burden the exhaustion requirement is designed to mitigate. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992). Rather than assess the four corners of a single state appellate brief, the Panel's fair presentation analysis "portray[s] step by step the complex and confusing litigation history" of Green's claims, tracing their development through multiple rounds of briefs,

hearings, and opinions. App. 3. *See* App. 145 (Jordan, J, concurring) (the majority opinion "says too much about too many things unnecessarily").

The Panel's Opinion has already been cited by courts in the Eleventh Circuit as imposing this burden and created havoc. *See Sinclair v. Sec'y, Fla. Dep't of Corr.*, No. 22-CV-14215-RAR, 2022 U.S. Dist. LEXIS 200769, at *19-20 (S.D. Fla. Nov. 3, 2022) (habeas courts must ordinarily "analyz[e] how each subclaim changed (or not) over time" since the petitioner's lower court "Postconviction Motion"). That court found the requisite analysis so "unnecessarily cumbersome" it analyzed the merits *de novo* because doing so was *easier than analyzing fair presentation*. *Id*.

Second, the Panel's interpretive exercise rewrites the simple test established by this Court and otherwise followed in every Circuit to address the issue, thus creating a Circuit split.

This Court has repeatedly explained that "the *substance* of a federal habeas corpus claim must first be presented to the state courts," *Picard v. Connor*, 404 U.S. 270, 278 (1971) (emphasis supplied), a requirement satisfied by a reasonably recognizable "reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). Every Circuit to address the issue assesses fair presentation with some variation of this simple inquiry. *See*, *e.g.*, *Coningford v. Rhode Island*, 640 F.3d 478, 482 (1st Cir. 2011); *Jackson v. Conway*, 763 F.3d 115, 133 (2d Cir. 2014); *Spanier v. Dir. Dauphin Cnty. Prob. Servs.*, 981 F.3d 213, 222 (3d Cir. 2020); *Folkes v. Nelsen*, 34 F.4th 258,

290 (4th Cir. 2022); *Lucio v. Lumpkin*, 987 F.3d 451, 464 (5th Cir. 2021); *Williams v. Mitchell*, 792 F.3d 606, 613 (6th Cir. 2015); *Schmidt v. Foster*, 911 F.3d 469, 486 (7th Cir. 2018); *Dansby v. Norris*, 682 F.3d 711, 722-23 (8th Cir. 2012); *Walden v. Shinn*, 990 F.3d 1183, 1196 (9th Cir. 2021); *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004) (detailing the Eleventh Circuit standard prior to the Panel's Opinion).

That is no longer true in the Eleventh Circuit. Now, the Panel's Opinion requires a claim to be both unchanged in form and readily traceable from one stage of the state-court process to another, regardless of what state procedures permit. If the "specific federal constitutional guarantee" relied upon and the "statement of the facts that entitle the petitioner to relief" are clear from the state appellate brief, but it is unclear what numbered claim pled in the motion underlying the appeal those arguments correspond to, not only is the claim potentially unexhausted, the petitioner is subject to Rule 11 sanctions.

"The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum." *Keeney*, 504 U.S. at 10. The Panel majority's approach erects a new and substantial procedural hurdle for petitioners. It also supplants a simple test with an interpretive exercise unique to the Eleventh Circuit and prone to error and inconsistent application.

B. The Panel's Decision Violates Principles of Federalism and Comity that Underlie the Exhaustion Doctrine

The Panel's approach disregards principles of federalism and comity that underlie the exhaustion doctrine for two reasons.

First, the Panel majority's approach allows federal courts to re-evaluate and effectively overrule state court application of state procedural law. The only reason to "read beyond" the face of a state appellate brief to determine whether it fairly presents a claim is to verify that it *properly* so presents that claim—a question of state procedural law. *Cf. Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (unnecessary and unbriefed such inquiries are an "unsatisfactory" approach). Here, the state courts already ruled on the issue: Green's *Brady* claim was "raised on appeal of his first post-conviction motion, *and affirmed on appeal to the Supreme Court of Florida*." App. 84-85 n.91 (emphasis added). The Panel majority disregarded this state-court conclusion of state law because it was "unable to identify" the "support" for it. App. 84-85 n.91.

Second, by fixating on the numerical designations of the claims in the state court, the Panel majority effectively rewrites Green's state appellate brief. The exhaustion rule exists to ensure "state courts have had the first opportunity to hear the claim." *Picard*, 404 U.S. at 275-76. That is not the case if exhaustion analysis transmogrifies the exhausted claim into something different than what was "rais[ed] … before the state courts in accordance with state procedures." *Shinn*, 142 S. Ct. at 1732.

In sum, by elevating the form of the pleadings (the numerical designations of the claims) over their substance (the constitutional issues raised) the majority ignored and effectively overruled the state courts' clear rulings that Green had exhausted his *Brady* claim. This creates the unjust, Catch-22 situation where a petitioner has exhausted a claim under state review (thus preventing further relief in state courts) but has not exhausted that claim under federal review (thus preventing habeas relief in federal courts).

III. The Panel's *Brady* Holding Is Contrary to This Court's Precedent and Will Encourage Prosecutors to Withhold Material Exculpatory Evidence

As discussed above, Green was significantly prejudiced by the suppression of the statement in the Prosecutor's Notes that Hallock said she tied Flynn's hands. Just as importantly, the defense was materially prejudiced by suppression of the first-responding officers' statements to the prosecutor that, based on their observations, they concluded "the girl did it" and marshalled for the prosecutor the reasons for their conclusions. The Panel's decision that that this evidence was not material because the officers' opinions were inadmissible and any other value to the defense was speculative or cumulative is contrary to this Court's established *Brady* law.

A. The Panel's Unreasonable Application of This Court's Precedent by Ending the *Brady* Materiality Analysis at Admissibility Creates a Circuit Split

Under established Supreme Court precedent, evidence is "material" under *Brady* "if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. This Court has never erected a barrier to materiality based on whether or not the evidence withheld is admissible at trial. Indeed, the evidence in question in *Bagley*, 473 U.S. 667, and *Kyles v. Whitley*, 514 U.S. 419 (1995), was inadmissible yet still found to be material under *Brady*, and the evidence in *Wood* was inadmissible yet this Court still analyzed its materiality. *Wood v. Bartholomew*, 516 U.S. 1, 6-7 (1995).

The Panel majority contradicts this clearly established precedent by finding the State Trial Court's decision that the Prosecutor's Notes are not material under *Brady* because they were inadmissible at trial was reasonable under 28 U.S.C. § 2254(d)(1). App. 99-101. Accordingly, the Panel majority found that the state court's dismissal of the claim on that basis was not an unreasonable application of law under § 2254(d)(1) and should receive deference under AEDPA. This holding is contrary to clearly established precedent of this Court and is at odds with circuit court application of that precedent.

The District Court recognized that it was an unreasonable application of established Supreme Court law for the Florida courts to tie materiality to the admissibility of the officer's opinions: "the Court finds that it was contrary to established federal law, as set down in *Brady*, and objectively unreasonable for the State court to end the prejudice inquiry once it made an admissibility determination on the prosecutor's notes concerning the Deputies' suspicions that Hallock murdered Flynn. … Of course, it is not only the admissibility of the note itself

that determines the materiality of the withheld information, but what use might be made of its contents if known to the defense." App. 181. Judge Jordan's dissenting opinion agrees with the District Court: "admissibility is not the touchstone (or a requirement) of *Brady* materiality," and "[e]xculpatory information can exist in an inadmissible form … but can be used by the defense to uncover evidence that is admissible or material that can be used at trial." App. 160 (Jordan, J.) (citing *Kyles*, 514 U.S. at 446; *Wright v. Hopper*, 169 F.3d 695, 703 & n.1 (11th Cir. 1999)).

The Panel majority's decision to the contrary creates a circuit split. In *Dennis v. Sec'y, Penn. Dep't of Corr.*, 834 F.3d 263, 307-311 (3d Cir. 2016) (*en banc*), the Third Circuit held it "an unreasonable application of, and contrary to, clearly established law" under § 2254(d)(1) for a state court to hold that because suppressed evidence is inadmissible, it is immaterial under *Brady*. The court explained that the prosecution's withholding of police documents pointing to a different suspect, although inadmissible themselves, were material under *Brady* because they would have allowed defense counsel "to pursue the lead himself or at least inform[] the jury of the police's misguided focus on [the defendant] and failure to pursue the lead," "pursue strategies and preparations he was otherwise unequipped to pursue," and "question the detectives" or otherwise "challenge detectives at trial regarding their paltry investigation of the lead." *Id.* (noting that "[a]lterations in defense preparation and cross-examination at trial are precisely the types of qualities that make evidence material under *Brady*").

Applying *Brady* and *Wood*, the majority of federal circuits have held that inadmissible suppressed evidence may be material. *See, e.g., Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) ("given the policy underlying Brady, we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it," noting that *Wood* "implicitly assumes this is so") (emphasis in original); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002)*; Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013) ("inadmissible evidence may be material if it could have led to the discovery of admissible evidence"); *Nicolas v. Att'y Gen. of Md.*, 820 F.3d 124, 130 n.4 (4th Cir. 2016) ("*Brady* material does not have to be admissible under state evidence rules as long as it could lead to admissible evidence") (*citing Kyles*); *Spence v. Johnson*, 80 F.3d 989, 1005 n.14 (5th Cir. 1996) ("inadmissible evidence may be material under *Brady*"); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991); *Coleman v. Calderon*, 150 F.3d 1105, 116-17 (9th Cir.) ("[t]o be material [under *Brady*], evidence must be admissible or must lead to admissible evidence"), *rev'd on other grounds*, 525 U.S. 141, 119 S.Ct. 500, 142 L.Ed. 2d 521 (1998).[3] In fact, the Eleventh Circuit itself has previously held,

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[3]The law in the Seventh Circuit could be characterized as unsettled. In *United States v. Morales*, 746 F.3d 310, 314-315 (7th Cir. 2014), the court stated in *dicta* that "[w]e find the Court's methodology in *Wood* to be more consistent with the majority view in the courts of appeals than with a rule that restricts *Brady* to formally admissible evidence," but noted prior circuit decisions indicating suppressed evidence must be admissible to trigger *Brady*.

contrary to the Panel majority's decision, that inadmissible evidence may support a *Brady* violation. *Bradley* v. *Nagle*, 212 F.3d 559, 567 (11th Cir. 2000), *cert. denied,* 531 U.S. 1128, 121 S.Ct. 886, 148 L.Ed. 2d 794 (2001).

B. The State's Failure to Disclose the Prosecutor's Notes Materially Prejudiced Green's Defense

This Court has held that suppressed evidence is material under *Brady* when it would raise opportunities for the defense to attack the thoroughness and good faith of the government's investigation. *Kyles,* 514 U.S. 419. In *Kyles*, this Court ruled evidence to be material under *Brady* because it could support findings "that the investigation was limited by the police's uncritical readiness to accept the story" of a witness "whose accounts were inconsistent … and whose own behavior was enough to raise suspicions of guilt." *Kyles*, 514 U.S. at 453.

Here, the withheld Prosecutor's Notes show that officers Clarke and Rixey reported to the prosecutor that Hallock should be the lead suspect and explained, by marshalling the evidence, why. That aspect of the Prosecutor's Notes would have been devastating impeachment material at trial or, even more likely, would have led to Green calling police witnesses to testify *on his behalf*. As in *Kyles*, the Prosecutor's Notes would have laid a foundation for the defense to develop evidence attacking the reliability of the government's investigation and theory of the case, and to present the meaningful possibility of an alternative perpetrator.

As in *Kyles*, we may "tak[e] the word of the prosecutor" as to the materiality of the Prosecutor's Notes on this theory, *id.*, at 444, because the prosecutor's closing argument underscores how different trial would have been had Green's counsel not been deprived of that evidence. The prosecution argued to the jury that Green could only "allude[]" to the theory that Hallock killed Flynn and lied to the police because Green had no testimony to support it. In rebuttal, the prosecution took maximum advantage of its own suppression of evidence to openly mock that theory:

> [Defense counsel] …alluded to[] the fact that the killer in this case may have been Kim Hallock herself, a jealous lover of Chip Flynn; but why wouldn't he say it? Why wouldn't he say it? Because it doesn't make any sense. It's ludicrous, and he doesn't have the courage just to come right out and say it. I think she killed [him]. We all heard the expression "grasping at straws." Ladies and gentlemen, I submit to you that that's the grasping of maybe no straws at all.

Supplemental Excerpt of Record in the Eleventh Circuit, App. B Vol. 2 at 376. The prosecution could only argue there were no "straws" because the prosecution withheld them.

Yet the Panel dismissed the impact of disclosing that Clarke and Rixey urged investigators to focus on Hallock by noting that *defense counsel* had the same theory: "Green failed to show how knowledge of the officers' opinion would have benefitted the defense.

[Defense counsel] Parker had the same opinion; Hallock was the culprit." App. 100. The significance in terms of exculpatory value between the officers' conclusions (and supporting crime scene evidence) and defense counsel's argument—mocked by the State as "ludicrous"—is enormous. The disclosure of the Prosecutor's Notes would have single-handedly transformed two police officers from witness for the prosecution into witness for the defense.

Moreover, at trial, Hallock was the only witness to the crime and the only witness who identified Green as the perpetrator. With no physical evidence tying Green to the crime scene, before an all-white jury with the sole eyewitness claiming a "black guy" did it, Hallock's credibility as well as the credibility of the police investigation was critical to the outcome of the trial. But the first two police officers on the scene knew the teenager's claim that a "black guy" did it was nothing more than a hoax. As the District Court found, it is "difficult to conceive of information more material to the defense … than the fact that the initial responding officers evaluated the totality of the evidence as suggesting that the investigation should be directed toward someone other than" Green. App. 182. Further, finding that the issue of who tied Flynn's hands was a "critical issue at trial," the District Court held that "[t]his impeachment information contained in the prosecutor's notes was unquestionably material as it seriously undermined the testimony of Hallock." App. 185. This is particularly true "considering the totality of the circumstances and the absence of any direct evidence of guilt beyond the identification by Hallock." App. 185.

Either piece of new exculpatory evidence—"*the girl did it*" or "*she 1st said she tied his hands behind his back*"—not otherwise disclosed to the defense would have been material alone. Together, there is no question that there is a "reasonable probability" that the outcome of the trial would have been different had the State disclosed the Prosecutor's Notes to the defense prior to trial. *Bagley*, 473 U.S. at 682.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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