No. 16-9016

IN THE

Supreme Court of the United States

GENESIS HILL,

Petitioner,

v.

BETTY MITCHELL, WARDEN,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The question presented here is critically important to NACDL's members. A uniform standard for Civil-Rule 15's relation back provision is necessary to prevent courts from erecting arbitrary barriers to valid *Brady* claims in the most egregious cases of suppressed evidence and delay by the State. Also, the

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

Sixth Circuit's decision created a circuit split with grave consequences for federal habeas petitioners who, like petitioner here, seek to amend a prior *Brady* claim after obtaining long-suppressed evidence. In such cases, the availability of *Brady's* constitutional protections could turn on whether the petition arises in the Sixth Circuit or the Eighth, Ninth, or Tenth Circuits. That result is fundamentally unfair, particularly in cases with life or death consequences.

Beyond *Brady*, the decision below unsettles the law on the amendment of habeas petitions, and the amendment of pleadings generally. NACDL therefore agrees with petitioner that this Court should grant certiorari in *Hill* v. *Mitchell* to clarify the standard for Rule 15's relation back provision, how it applies to the amendment of habeas petitions, and the implications for amendments presenting specific evidence of *Brady* violations. Because there is no dispute about whether exculpatory material was suppressed in this case, the petition offers the Court a clean vehicle for articulating a uniform standard before the current circuit split widens.

SUMMARY OF ARGUMENT

The Sixth Circuit's new relation back standard erects an arbitrary barrier to the amendment of *Brady* claims. It is irreconcilable with the language of Rule 15, its purpose, this Court's decision in *Mayle* v. *Felix*, the standard applied in civil litigation, and the standards applied in other circuits. Given the grave threat to the integrity and fairness of the criminal justice process, and the importance of consistent application of the Federal Rules, this Court should grant the petition and clarify a uniform standard for Rule 15's relation back provision.

The State acknowledged that it suppressed exculpatory evidence in Mr. Hill's case. And the case arises in Hamilton County, Ohio, where a long history of *Brady* violations has been well-documented and is beyond dispute. The district court judge and two of the three judges on the Sixth Circuit panel agreed that Mr. Hill's *Brady* claim could succeed on the merits. It was the majority's new interpretation of Rule 15 that barred his claim.

Because this case offers the Court a clean shot at resolving a question of great importance that divides the lower courts, the petition should be granted.

I. THE SIXTH CIRCUIT'S DECISION TORTURES THIS COURT'S OPINION IN *MAYLE* V. *FELIX* BEYOND RECOGNITION.

The Sixth Circuit's conclusion that a habeas petitioner's initial pleading must state with specificity the evidence being withheld by the State diverges from this Court's decision in *Mayle* v. *Felix*, 545 U.S. 644 (2005). In *Mayle*, this Court held that an amended petition does not relate back "when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650. But, the court explained, "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order." *Id.* at 664.

The decision below abandons the *Mayle* standard and imposes a far more restrictive one, at least in the context of *Brady* claims. The majority justified its new rule by suggesting that it is necessary in the habeas context. *Hill* v. *Mitchell*, 842 F.3d 910, 926 (6th Cir. 2016). But *Mayle* is clear that the habeas context does not require application of a new or alternative standard for relation back. On the contrary, Con-

gress explicitly provided that a habeas petition "may be amended . . . as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242; *Mayle*, 545 U.S. at 650. For that reason *Mayle* explicitly endorsed a standard for habeas petitions that is consistent with "run-of-the-mine civil proceedings." *Id.* at 657.

The decision below defies *Mayle* because it adopts a standard that diverges from the one applied in the mine run of civil proceedings. In civil proceedings generally, courts routinely permit amendments that add specific factual content that relate back to general allegations in the original pleadings. See, *e.g.*, *Guerrero* v. *RJM Acquisitions LLC*, 499 F.3d 926, 933 (9th Cir. 2007) (permitting amendment to a complaint that "was more specific than the original in identifying" the statutory provisions at issue in that case); *Slayton* v. *Am. Express Co.*, 460 F.3d 215, 229 (2d Cir. 2006) (permitting relation back of a claim that "simply provide[d] a more detailed description of allegations made in the original complaint"). It is fundamentally unfair for Rule 15's relation back provision to be more restrictive in the context of a habeas petitioner's *Brady* claim than in civil litigation generally. Yet that is what the decision below permits. Just as this Court granted certiorari in *Mayle* to reject the "anomal[y]" of a broad reading of Rule 15 in habeas cases, it should grant certiorari in this case to reject the anomaly of an overly restrictive reading of Rule 15 in habeas cases.[2]

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[2] The need for consistent application of Rule 15(c), the Federal Rules generally, habeas procedures, and *Brady* standards have each independently warranted grants of certiorari. The petition implicates all of these critically important areas of the law and therefore warrants review. *See, e.g., Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663 (2016) (resolving circuit split regarding

II. THE SIXTH CIRCUIT'S READING OF RULE 15(c) DEFIES LOGIC.

The Sixth Circuit's new standard makes amendment under Rule 15 practically impossible in an ordinary *Brady* case. As the dissent explained, the Sixth Circuit's new rule is that an initial pleading asserting a *Brady* claim "must now set forth, specifically [what] the State was suppressing and how it would have benefitted [the petitioner] . . . even though, at the time of filing, a habeas petitioner will have limited access to the state's records, and favorable evidence will often remain hidden from sight." *Hill*, 842 F.3d at 958 (Cole, J., dissenting) (citation and internal quotation marks omitted). In such cases, only the police or the prosecutor can know the specific facts that may ultimately form the basis of the petitioner's claim. The very facts that the Sixth Circuit says must be in an initial pleading are facts the defendant cannot know because they have been suppressed.

FRCP Rule 68); *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371 (2013) (resolving circuit split regarding FRCP Rule 54(d)); *Weisgram* v. *Marley Co.*, 528 U.S. 440 (2000) (resolving circuit split regarding FRCP Rule 50); *Rhines* v. *Weber*, 544 U.S. 269 (2005) (resolving circuit split regarding habeas "stay and abeyance" procedure in district courts); *Wall* v. *Kholi*, 562 U.S. 545 (2011) (resolving circuit split regarding tolling of statute of limitations in habeas claims); *Woodford* v. *Garceau*, 538 U.S. 202 (2003) (resolving circuit split on effective date of AEDPA in habeas cases); *Giglio* v. *United States*, 405 U.S. 150, 153–154 (1972) (clarifying that the rule stated in *Brady* applies to evidence undermining witness credibility); *United States* v. *Agurs*, 427 U.S. 97, 110 (1976) (clarifying that prosecutors have a duty to turn over *Brady* material even in the absence of a specific request); *Mayle*, 545 U.S. 644 (addressing the scope of Rule 15(c) in a habeas case); *Krupski* v. *Costa Crociere*, 560 U.S. 538 (2010) (addressing the scope of Rule 15(c) in a personal injury case).

The Sixth Circuit's standard also rewards the State for delaying disclosure of *Brady* evidence. If the State, however intentionally, allows suppressed evidence to trickle out gradually, and delays its responses to interrogatories and document requests (as it did in petitioner's case) a petition may be time barred when the State finally completes that discovery. It is no answer to suggest that a petitioner can simply file under Rule 60 when new evidence is disclosed. As the dissent notes, lodging a *Brady* claim before completion of discovery will generally be imprudent because evidence to support the granting of a habeas petition is generally viewed cumulatively, such that a petitioner will not always be able to state his claim most effectively when discovery requests are outstanding. *Hill*, 842 F.3d at 958 (Cole, J., dissenting).

Overly restrictive relation back standards will harm the public's perception of the integrity of the criminal justice process because a significant number of acknowledged and material *Brady* violations will go unaddressed. Allowing prosecutors acknowledged violations of duty in the criminal justice system to "time out" after merely a year cannot be perceived as anything other than tilting the playing field so far that the equipment, players, and spectators fall off the defensive end. As Chief Judge Cole explained in his dissent, such circumstances create an incentive for "prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violations as immaterial, or worse, on procedural grounds." *Id.* (citation and internal quotation marks omitted).

III. HAMILTON COUNTY, OHIO HAS A HISTORY OF EGREGIOUS *BRADY* VIOLATIONS.

Hamilton County's pattern of *Brady* violations has been extensively documented. For example, Hamilton County regularly employed a "homicide book" system where investigators deliberately excluded exculpatory evidence from the information they handed over to prosecutors for their use in assessing appropriate charges. See *Bies* v. *Sheldon*, 775 F.3d 386, 393 (6th Cir. 2014) (affirming habeas relief on the basis of suppressed "homicide book" evidence); *Jamison* v. *Collins*, 291 F.3d 380, 383 (6th Cir. 2002) (describing the "homicide booking" process and affirming habeas relief on the basis of suppressed evidence). Hamilton County's egregious *Brady* violations are now familiar to the federal courts of the Sixth Circuit.[3] There is no doubt that the exculpatory evidence in Mr. Hill's case was suppressed just as it was in countless other cases in Hamilton County.

Mr. Hill's case turned on the interpretation of Rule 15(c), not on the merits of his *Brady* claim. A majority of the Sixth Circuit panel agreed with the district

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[3] *See, e.g., Bies*, 775 F.3d at 393–95 (suppression of "hundreds of pages" of investigative reports, alternative suspect information, and witness statements); *Gumm* v. *Mitchell*, 775 F.3d 345, 364–67 (6th Cir. 2014) (suppression of evidence, including evidence that others confessed to the crime, and impeachment evidence); *Jamison*, 291 F.3d at 384, 390–91 (eight categories of suppressed evidence related to identification of alternative suspects and eyewitnesses); *Wogenstahl* v. *Mitchell*, 668 F.3d 307, 323–25 (6th Cir. 2012) (discussing suppression of exculpatory arrest of alternative suspect); *Cook* v. *Anderson*, No. 1:96-cv-424, 2011 WL 6780869, at *4 (S.D. Ohio Dec. 22, 2011); *Cook* v. *Anderson*, No. 1:96cv424, 2007 WL 2838959, at *10–11 (S.D. Ohio Sept. 26, 2007) (suppression of impeachment evidence and investigative reports).

court's conclusion that the suppressed police report was material. As the district court explained, the suppressed evidence "would have crippled the prosecution's case against [Hill]" because it could have been used to impeach the prosecution's key witness. *Hill* v. *Mitchell*, No. 1:98-cv-452, 2012 WL 995280, at *10 (S.D. Ohio Mar. 23, 2012). On appeal, Chief Judge Cole "unequivocally agree[d]" with the district court. *Hill*, 842 F.3d at 954. And Judge Batchelder stated, "I believe the withheld police report satisfies the standard for materiality of impeachment evidence under *Brady v. Maryland*." *Id*. at 948 (Batchelder, J., concurring). But for the majority's novel interpretation of Rule 15, the district court's decision to grant habeas relief would stand today.

This case is also an excellent vehicle for review by this Court because it illustrates why Rule 15 must remain a safeguard for habeas petitioners. As *Mayle* recognized, "federal rulemakers" adopted Rule 15 because they understood that there are circumstances in which the full extent and details of a meritorious claim cannot be set out in an initial pleading. See *Mayle*, 545 U.S. at 660. Because *Brady* claims can turn on the cumulative effect of all evidence suppressed by the state in light of the record as a whole, habeas petitioners will not always be in a position to state their claims effectively when the first piece of potentially exculpatory evidence is disclosed. See *Hill*, 842 F.3d at 958 (Cole, J., dissenting).

Here, Mr. Hill sought to amend his pleading three years after his investigator first obtained the exculpatory police report but promptly after the State finally completed its long-delayed production of docu-

ments in this case.[4] *Id*. at 958. During the intervening years, the case was stayed pending a 6th Circuit *en banc* decision[5] and later a Supreme Court decision[6]; the federal public defender's office took over the case; and Mr. Hill's discovery requests remained open and unsatisfied by the State. See Opinion and Order, *Hill* v. *Mitchell*, 1:98-cv-00452-EAS-TPK (S.D. Ohio Sept. 30, 2008, Apr. 6, 2009, June 1, 2009), ECF Nos. 167, 174 and 176. Mr. Hill finally obtained the 449 pages of documents responsive to his requests on October 8, 2010; he filed his petition less than six

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[4] This production did not take place, it should be noted, without a successful motion to compel and an order from the district court judge. Motion for In Camera Review and to Compel Discovery, *Hill* v. *Mitchell*, 1:98-cv-00452-EAS-TPK (S.D. Ohio Mar. 22, 2010), ECF No. 202; Opinion and Order, *Hill* v. *Mitchell*, 1:98-cv-00452-EAS-TPK (S.D. Ohio Sept. 30, 2010), ECF No. 212. To this day, the Attorney General has never produced to petitioner the preliminary report at issue in this case. *See* Brief of Petitioner-Appellee / Cross-Appellant Genesis Hill at 12, *Hill* v. *Mitchell*, Nos. 13-3412/13-3492 (6th Cir. Dec. 29, 2014) ("This production, however, still did *not* include the preliminary police report that Hill's investigator independently obtained from the Cincinnati Police Department, even though the Warden had previously admitted being in possession of that report.").

[5] The case was stayed pending the 6th Circuit's decision to grant en banc review in *Garner* v. *Mitchell*, 502 F.3d 394 (6th Cir. 2007). *See* Opinion and Order at 32-33, *Hill* v. *Mitchell*, 1:98-cv-00452-EAS-TPK (S.D. Ohio Sept. 30, 2008), ECF No. 167 ("Accordingly, the Court will defer consideration of petitioner's motion for an evidentiary hearing on his first ground for relief, and will additionally stay its October 25, 2006 *Scheduling Order* (Doc. #153), pending the outcome of the Sixth Circuit's *en banc* hearing in *Garner*").

[6] Opinion and Order at 4, *Hill* v. *Mitchell*, 1:98-cv-00452-EAS-TPK (S.D. Ohio Apr. 4, 2009), ECF No. 174 (granting Hill's motion to stay pending this Court's decision to grant certiorari in *Garner*).

months later.[7] See Motion for Reconsideration, *Hill* v. *Mitchell*, 1:98-cv-00452-EAS-TPK (S.D. Ohio Feb. 11, 2010), ECF No. 197. Although the core piece of exculpatory evidence turned out to be the police report that Mr. Hill's investigator obtained from the police department in 2007, Mr. Hill had no way of knowing that would be the essential document in his case until the State completed its belated responses to his discovery requests.

From the perspective of a criminal defense lawyer, a three year delay is nothing out of the ordinary in a habeas case. Habeas cases are often low on the totem pole in priority for the busy federal judiciary and unlike a standard criminal trial, there is no Speedy Trial Act pushing habeas cases forward. A delay, like the one experienced in this case, is a normal occurrence in our criminal justice system.

Rule 15 permits relief in such a situation, when the full extent and details of a meritorious claim cannot be specified at the time the claim is first alleged. Like the victims of personal injury accidents described in *Mayle*, 545 U.S. at 660, those with *Brady* claims will not always know all of the key facts that support their claims. As Mr. Hill's case illustrates, discovery delays may conceal the full facts from the petitioner through no fault of his own. This case is

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[7] These documents included the suppressed grand jury testimony of Teresa Dudley. *See* Petitioner Genesis Hill's Motion to Expand the Record, *Hill* v. *Mitchell*, 1:98-cv-00452-EAS-TPK (S.D. Ohio Apr. 4, 2009), ECF No. 237. The district court found that "[t]he undisclosed grand jury testimony by Teresa Dudley casts yet additional suspicion on Dudley's credibility." *Hill* v. *Mitchell*, 1:98-cv-452, 2013 WL 1345831, at *13 (S.D. Ohio Mar. 29, 2013).

thus a clean illustration of why the relation back provision of Rule 15 operates in habeas cases.

This case is also an excellent vehicle for deciding the question presented because it gives this Court an opportunity to resolve a circuit split before confusion spreads. To date, no other court has adopted a standard like the Sixth Circuit's, which requires that the initial pleading state the specific evidence being suppressed for the relation back doctrine to operate in a *Brady* case. Granting the petition would permit the Court to decide the question presented before the Sixth Circuit's decision spawns more problematic opinions or inspires other courts to adopt Rule 15 standards that impede *Brady* claims.

Also, because this case presents an opportunity for this Court to reaffirm what was once settled law, reversal will not open the floodgates to a new breed of claims as the majority suggests. Cf. *Hill*, 842 F.3d at 925. Not all habeas petitions will involve long-suppressed *Brady* evidence, and there is no indication that Circuits applying Rule 15 consistent with this Court's opinion in *Mayle* have been overrun by habeas petitioners with belated *Brady* claims. The suggestion below that applying Rule 15 by its terms would lead petitioners to wait "five, ten, or even twenty years to present *Brady* evidence, even after its discovery," *id.* at 925, would be laughable if it were not so perverse. There is no reason a petitioner would choose to languish in prison, deliberately waiting to present a *Brady* claim after obtaining suppressed evidence. Instead, where discovery stays, delays in document production, and other "vagaries of litigation," *id.* at 958 (Cole, J., dissenting), extend the time between an initial disclosure or discovery of exculpatory material and the completion of discovery, Rule 15 will operate to preserve valid *Brady* claims.

Congress intended for Rule 15 to be available to habeas petitioners in such circumstances, just as it is available to litigants in the civil context.[8]

Finally, Mr. Hill's case is a clean and compelling illustration of why a consistent and administrable standard for Rule 15 is so important. In capital cases like his, a court's interpretation of Rule 15 may be the difference between life or death. By expressly permitting amendment to habeas petitions according to the civil rules, Congress intended to leave open a narrow door to the courtroom for petitioners like Mr. Hill. This case is an ideal vehicle for this Court to explain and confirm that courts cannot and must not close that door.

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[8] In all events, delay in amending a claim is not sufficient reason to deny a motion to amend, as even the decision below acknowledges. *Hill*, 842 F.3d at 957 (Cole, J., dissenting) (citation omitted); *Krupski*, 560 U.S. at 553 ("[T]he speed with which a plaintiff moves to amend her complaint . . . has no bearing on whether the amended complaint relates back".).

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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