No. 17-1241

IN THE

Supreme Court of the United States

COREY DEWAYNE WILLIAMS,

Petitioner,

v.

LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE FAIR PUNISHMENT PROJECT, THE MONROE H. FREEDMAN INSTITUTE FOR THE STUDY OF LEGAL ETHICS AT THE MAURICE A. DEANE SCHOOL OF LAW, THE LOUIS STEIN CENTER FOR LAW AND ETHICS, AND THE ETHICS BUREAU AT YALE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to this Court's Rule 37.3(b), the *Amici* listed in the attached Brief respectfully request leave of the Court to file this *Amici Curiae* Brief. Both parties were notified in a timely manner of the intent of these *Amici* to file the attached Brief as required by Rule 37.3(b). Petitioner granted consent in writing through his counsel. Respondent's counsel declined to grant consent, necessitating the filing of this Motion.

This case presents a stark example of *Brady* violations in a state—Louisiana—with a track record of reversals in *Brady* decisions by this Court. It also raises fundamental questions concerning the approach of prosecutors to their disclosure obligations. *Amici* are research initiatives and centers that focus on making the administration of the criminal justice system fairer and, more generally, on the study of legal ethics. *Amici* have an interest in ensuring that prosecutors act in accordance with their constitutional obligations, as set forth in this Court's precedents, and with relevant ethical rules. *Amici* have studied the pattern of *Brady* violations in Louisiana cases and wish to assist the Court's review in this case by providing relevant background and analysis.

Accordingly, *Amici* respectfully request that this Court grant the Motion for leave to file the attached *Amici Curiae* Brief.

Respectfully submitted,

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Cited Authorities

Page

Cited Authorities

Page

IDENTITY AND INTEREST OF *AMICI*[1]

The Fair Punishment Project ("FPP") is an initiative of Harvard Law School's Criminal Justice Institute. The mission of FPP is to address ways in which our laws and criminal justice system contribute to the imposition of excessive punishment. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess.

The Monroe H. Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law sponsors courses, programs, and events that provoke dialogue and critical thought on ethical and moral issues of professional responsibility. The Institute trains law students to take responsibility for serving others, and it provides practical experiences to do so.

The Louis Stein Center for Law and Ethics works in collaboration with law students, practitioners, judges and legal scholars to study and improve the legal profession by: honoring exemplary lawyers; inculcating ethics into teaching law; training future lawyers "in the service of others"; incorporating ethical and professional values into academic and mentoring programs; and encouraging

1. Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that none of the counsel for any party, nor any person or entity other than *Amici* and their counsel, authored any part of this brief nor made any monetary contribution intended to fund the preparation or submission of this brief. In accordance with Rule 37.2, timely notice was provided to counsel for Petitioner and Respondent. Petitioner consented in writing to the filing of this brief, while Respondent did not.

scholarly inquiry and scholarship on the professional conduct and regulation of lawyers. Above all, the Stein Center fosters an understanding of "ethical legal practice" that goes beyond adherence to the rules set forth in professional codes of conduct.

The Ethics Bureau at Yale drafts *amicus* briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

These organizations respectfully submit this brief because they have an abiding interest in ensuring that courts recognize and enforce prosecutors' constitutional obligation to disclose exculpatory evidence and in promoting the integrity of criminal proceedings as well as public confidence in the legal system overall.

SUMMARY OF THE ARGUMENT

This case provides a clear example of how Louisiana prosecutors' own pre-trial determinations of materiality lead to non-disclosure of *Brady* material. This Court has been compelled to expend substantial resources to enforce *Brady* in Louisiana. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419 (1995); *Smith v. Cain*, 565 U.S. 73 (2012); *Wearry v. Cain*, 136 S. Ct. 1002 (2016). Such judicial enforcement is essential to a functioning criminal justice system, especially in the state that has the nation's highest incarceration rate, and has seen nine exonerations from its death row. Indeed, contrary to this Court's prediction in *Kyles* that prosecutors would steer a "prudent" course

in light of its precedents, 514 U.S. at 439, Louisiana prosecutors' pretrial discovery practices reveal a pattern of "tack[ing] too close to the wind." *Id.*

The Court should grant the petition in order to protect defendants' due process rights and ensure that prosecutors behave in accordance with their professional duties. In Petitioner's case, prosecutors withheld substantial exculpatory information from the defense. Rather than turning over key statements made by several witnesses, the prosecution provided limited "summaries" of these statements, summaries from which the prosecutors purged all relevant exculpatory information. This was a deliberate effort by the prosecutors to omit material information rather than an inadvertent failure to identify it. Prosecutors who had decided that Petitioner was guilty once they obtained an error-riddled confession made disclosure determinations based on their pre-trial assessment that no evidence, no matter how favorable or material, would alter the outcome. This is consistent with other *Brady* cases that have come before this Court, which show a pattern of prosecutors ignoring disclosure obligations based on their subjective beliefs in the strength of their evidence. This approach to disclosure presents a risk that the more obtuse or biased the prosecutor, the more strongly he will believe that the *Brady* doctrine validates his decision to withhold exculpatory evidence. This case has the potential to eliminate this risk and resolve ambiguities that have enabled prosecutors to evade *Brady* in the past.

ARGUMENT

I. THIS COURT'S *BRADY* JURISPRUDENCE PLACES PROSECUTORS IN A POSITION OF CONSIDERABLE POWER OVER DISCLOSURE

A. Under *Kyles*, Prosecutors Have a Significant—and Reviewable—Responsibility to Evaluate Potentially Exculpatory Information

This Court has imposed on prosecutors a duty to identify exculpatory information before trial and to disclose it to the defense. That duty is a significant one. In some cases, the exculpatory quality of information in the state's possession is obvious, but in others, prosecutors must exercise foresight and judgment to anticipate how the defense might use such information. Importantly, under *Kyles* and *Brady*, the prosecutor's duty is linked to the defendant's due process right and is subject to judicial review.

In *Kyles*, the State argued that it needed considerable "leeway" in its disclosure decisions. 514 U.S. at 438. This Court declined to adopt the State's preferred standard, emphasizing that the prosecution must acknowledge and accept that its constitutional responsibilities require active engagement:

> At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to

> be violated by every failure to disclose an item of exculpatory or impeachment evidence . . . the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record.

Id. at 439. This Court in *Kyles* chartered a middle course: by requiring a showing of materiality for the defendant to obtain a reversal, the Court did not require prosecutors to disclose every piece of exculpatory information. At the same time, by keeping the materiality threshold in place and declining to shift the responsibility to identify exculpatory information to the police, it did not absolve the prosecution of its duty. *See id.*

No reading of *Brady* and its progeny supports the authority of a prosecutor to suppress exculpatory information on the basis that he or she subjectively believes the defendant is guilty. The "constitutional duty" of disclosure rather "is triggered by the potential impact of favorable but undisclosed evidence," and does not require the prosecutor to conclude that the information, had it been turned over, would have led to an acquittal. *Id.* at 434. For example, *Kyles* did not provide the prosecutor with "leeway" to suppress information that undermined an eyewitness's claim that he saw the perpetrator commit the crime even though the State had other evidence it considered to be unassailable. Instead, this Court explained that the Constitution requires prosecutors to disclose obviously exculpatory information. *Brady* promotes disclosure, it does not put the question of guilt

in the prosecutor's hands. *See, e.g.*, *id.* at 440 (noting that disclosure "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"); *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

In other words, *Brady* requires even "hard-charging, competitive lawyers whose reputations and satisfactions depend on obtaining convictions" to "help the opposition . . . by crediting a version of the evidence at odds with their understanding." John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 228 (2013). "Both common sense and cognitive psychology confirm the difficulty of that task," *id.*, yet it is essential to the prosecutor's function under this Court's *Brady* jurisprudence.

Moreover, because the Court has conditioned a due process violation upon materiality, even scrupulous prosecutors must engage in some speculation about how exculpatory information might ultimately affect the outcome of a trial. One experienced district judge (and former prosecutor) explained that a great deal remains unknown before a trial begins: among other things, "which government witnesses will be available," "how they will testify," "which objections the trial judge will sustain," "what the nature of the defense will be," and "what instructions the Court will ultimately give." *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). Difficult or not, prosecutors' disclosure decisions cannot be governed primarily by the belief that they possess strong evidence of the defendant's guilt. Permitting prosecutors to diminish

their constitutional obligations in this way saps *Brady* of its force altogether.

B. This Case Exemplifies Louisiana Prosecutors' Routine Flouting of Their Disclosure Obligations

The prosecutors' approach to Petitioner's case does not reflect the "prudent" course; instead, it reflects the approach that Louisiana prosecutors have taken in other cases this Court has reviewed, including *Kyles*, *Smith*, and *Wearry*, favoring non-disclosure and assessing materiality based on the individual prosecutors' own views of the respective defendants' guilt or the strength of the evidence.

In *Kyles*, Louisiana prosecutors suppressed multiple witness statements that called into question the veracity and accuracy of their eyewitnesses' trial testimony. *See* 514 U.S. at 441 (the State's self-proclaimed best witness "would have had trouble explaining how he could have described Kyles, 6-feet tall and thin, as a man more than half a foot shorter with a medium build," and another eyewitness gave an earlier statement in which he said "that he had not seen the actual murder and had not seen the assailant outside the vehicle"). The State also failed to disclose inconsistent statements by the very witness who the defense believed had framed Kyles for the crime. *See id.* at 445 ("Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder."). In its cumulative assessment of the exculpatory evidence, this Court found that the prosecution violated *Brady* and it granted a new trial.

In *Smith*, the State suppressed evidence that the lone eyewitness could not describe or identify the perpetrators shortly after the crime. *See* 565 U.S. at 74-75. The defense also alleged that Louisiana prosecutors improperly failed to disclose other evidence in the police files, but this Court did not reach those claims because it held that the State already violated *Brady* by suppressing the eyewitness's contradictory statements. *See id.* at 76. The Court readily concluded that the eyewitness's "undisclosed statements were plainly material." *Id.*

Finally, in *Wearry*, the prosecutors suppressed "three categories" of exculpatory information. 136 S. Ct. at 1004. First, the State concealed records of interviews of two inmates that cast substantial doubt on the credibility of the prosecution's central witness, an incarcerated informant. *See id.* Second, Louisiana prosecutors did not disclose that their other key witness had sought assistance in reducing a criminal sentence; instead, the State claimed at trial that this witness had nothing to gain from cooperating. *See id.* Third, the State suppressed medical information suggesting that one of the defendant's acquaintances would not have been able to perform physical acts that the State's informant claimed he completed during the crime. *See id.* This Court reversed the conviction after Louisiana state courts denied postconviction relief.

Petitioner's case shares several features with the *Kyles-Smith-Wearry* triad. First, Louisiana prosecutors suppressed several categories of exculpatory information. The prosecution withheld a witness's statement that the murder had to have been committed by two other men, not Petitioner. *See* Petition for Certiorari, *Williams v. Louisiana*, No. 17-1241 at 3 [hereinafter "Petition"].

The prosecutor withheld another statement by a witness who had seen the State's eyewitness with the murder weapon on the day of the crime. *Id.* Prosecutors also withheld statements of multiple witnesses that they were threatened by older men involved in the crime to change their testimony. *Id.* at 4. And prosecutors withheld statements from officers indicating that other witnesses colluded to blame Petitioner. *Id.*

Second, the exculpatory information here directly undermined the State's theory as well as the credibility of indispensable State witnesses. For example, one witness told police he believed his own brother, not Petitioner, shot the victim. *Id.* at 13. Yet, in the summary the prosecution disclosed before trial, police falsely stated that this witness believed Petitioner fired the weapon. Moreover, Louisiana prosecutors withheld evidence that an eyewitness had actually possessed the murder weapon earlier on the day of the crime. *Id.* at 14. Rather than disclose this statement, it elicited testimony from the eyewitness that he had never carried a gun. *Id.* at 8.

Third, the state courts erroneously denied relief in each of these cases. The trial court's ruling, like previous state court rulings, made several missteps in its *Brady* analysis. Among other things, rather than conduct a cumulative materiality analysis as this Court requires under *Kyles*, it analyzed each statement individually. *See id.*, App. C at 9a-14a. Moreover, Petitioner's case comes to this Court as both *Smith* and *Wearry* came: on state postconviction review, making it, like those cases, a clean vehicle in which to address the *Brady* issue without issues of deference under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

II. LOUISIANA PROSECUTORS CONSISTENTLY "TACK TOO CLOSE TO THE WIND" WHEN EVALUATING EXCULPATORY EVIDENCE—REQUIRING COURTS TO PROVIDE MEANINGFUL SUPERVISION

A. Louisiana Prosecutions are Plagued by *Brady* Violations

This case exemplifies the ways in which many prosecutors—especially those in Louisiana—have taken an ungenerous and partisan approach to their disclosure decisions. The challenge inherent in enforcing *Brady* is that undisclosed evidence rarely surfaces. *See, e.g.*, Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2093 (2010) ("The biggest problem is that most violations are never discovered in the first place. Defendants often have no way of knowing whether a prosecutor is in possession of exculpatory evidence that should be disclosed under *Brady*."). Notwithstanding the difficulty in uncovering evidence intentionally withheld, Louisiana's prosecutors have acquired a reputation for *Brady* violations. *See e.g.*, Radley Balko, *New Orleans's persistent prosecutor problem*, Wash. Post, Oct. 27, 2015, https://www.washingtonpost.com/news/the-watch/wp/2015/10/27/new-orleanss-persistent-prosecutor-problem/?utm_term=.3871a748825e (observing that "Louisiana DA's offices have long been ruled with a bloodthirsty, tunnel-visioned culture of conviction").

The lead prosecutor in Petitioner's case, Hugo Holland, has his own history of *Brady* violations. In 1999, the Louisiana Supreme Court found that Holland

suppressed exculpatory evidence in a separate capital prosecution (but held that the suppression did not require reversal). *See State v. Hampton*, 750 So. 2d 867, 882 (La. 1999) (finding that a witness's suppressed "grand jury testimony" was "clearly exculpatory"). Half of the ten death sentences Holland has won as a trial prosecutor have been overturned, and none of the defendants in his cases have been executed. *See* Jim Mustian, *Meet 'controversial' Louisiana prosecutor: an outspoken death penalty champion with a cat named after Lee Harvey Oswald*, The Advocate, June 3, 2017, http://www.theadvocate.com/baton_rouge/news/courts/article_3647e248-4551-11e7-8019-635640ba6b05.html.

In Petitioner's case, Holland and his team withheld favorable information relating to witness statements that clearly implicated other perpetrators and exonerated Petitioner. This Court's prior Louisiana cases make clear that the actions of the prosecutors in this case are part of a deeper culture.

The Court recently confronted that prosecutorial culture in *Smith v. Cain*. At oral argument, Justice Kagan asked the Assistant DA, "Did your office ever consider just confessing error in this case?" Tr. of Oral Argument, *Smith v. Cain*, No. 10-8145, at 50. Shortly thereafter, Justice Scalia "suggest[ed] that . . . [the prosecutor] stop fighting as to whether it should be turned over" because "[o]f course, it should have been turned over." *Id.* at 51-52.

The Orleans Parish District Attorney office's unwillingness to acknowledge fault in *Smith* clearly frustrated this Court. When asked what test governs the disclosure of exculpatory information, the prosecutor

invoked the materiality standard, prompting Justice Kennedy to admonish, "You don't determine your *Brady* obligation by the test for the *Brady* violation [i.e., the materiality standard]. You're transposing two very different things." *Id.* at 49. This observation harkens back to *Agurs* and *Kyles*; there is a constitutional requirement that prosecutors disclose exculpatory information. This Court's precedents have always envisioned a distinction between the "obligation" to turn over exculpatory information and a "violation" of the defendant's due process right.[2]

While an 8-1 majority of this Court left no doubt that *Brady* and its progeny required disclosure in *Smith*, Louisiana prosecutors continue to resist that and other decisions of the Court. Ellen Yaroshefsky, a leading expert on legal ethics and director of *amicus* the Monroe H. Freedman Institute for the Study of Legal Ethics, interviewed several lawyers in the Orleans Parish District Attorney's office after this Court's decisions in *Smith* and *Connick v. Thompson*, 563 U.S. 51 (2011). She wrote, "[r]emarkably, current and some former prosecutors still defend the Orleans Parish DA's argument in *Smith v. Cain*, arguing that the withheld information was not 'material' . . . . Despite the utter

2. Existing precedent unfortunately appears to have left open the possibility of confusion on this point. Judicial intervention is required because too many prosecutors believe that the Orleans Parish DA's Office stated the right legal position in arguing that the post-trial materiality standard informs pre-trial disclosure decisions, even if they would have come to a different decision under the facts in *Smith*. *See, e.g.*, Janet C. Hoeffel & Stephen I. Singer, *Activating a* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. Rev. L. & Soc. Change 467, 468 (2016).

rejection of this interpretation by Justices of the Supreme Court, the view persists." Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 Geo. J. Legal Ethics 913, 942 n.138 (2012). Whether these prosecutors misapply the doctrine because it is confusing or because they seek to exploit any ambiguity to their advantage, the position the State articulated at oral argument in *Smith* was not anomalous.

Several of the Louisiana *Brady* cases this Court has decided in the past twenty-five years arose from New Orleans. *See generally Kyles*, 514 U.S. 419; *Connick*, 563 U.S. 51; *Smith*, 565 U.S. 73. All of them speak to the legacy of misconduct under long-time former Orleans Parish District Attorney Harry Connick. *See, e.g.*, Lyn S. Entzeroth, Brady *Violations Committed by the Prosecutor's Office in Orleans Parish, Louisiana*, 26 Amicus J. 28 (2011); Della Hasselle, *Former Death Row Inmate Calls Out D.A. on* Brady *Violations*, The Louisiana Weekly, Aug. 29, 2016 (noting that under Connick's supervision "favorable evidence was withheld from nine of the 36" of the men sentenced to death during his tenure); *see also Connick*, 563 U.S. at 94 (Ginsburg, J., dissenting) ("[E]ven at trial Connick persisted in misstating *Brady*'s requirements . . . ."). That legacy continues. Connick's immediate successor (who resigned in disgrace for other reasons) defended for years several of Connick's ill-won convictions and failed to reform the office's discovery policies. *See* Yaroshefsky, *supra*, 25 Geo. J. Legal Ethics at 928-29. The current District Attorney, Leon Cannizzaro, has continued Connick's policies of suppressing exculpatory information. *See, e.g.*, Hasselle, *supra* (noting that a *Brady* violation led to the reversal of one capital conviction and exploring how

the District Attorney has defended several troubling Connick convictions). Considering the troubled history in that office, it is inexcusable that Cannizzaro in 2011 explained to a reporter—incorrectly—that a prosecutor's obligation under *Brady* does not kick in unless the defense requests exculpatory information. *See* James Gill, *Just a misunderstanding at the DA's office*, NOLA.com, Nov. 20, 2011, http://www.nola.com/opinions/index.ssf/2011/11/just_a_misunderstanding_at_the.html.

While Orleans Parish has garnered the most public attention for its dismal *Brady* track record, it is not alone. The 21st Judicial District Attorney's Office bears responsibility for the serial *Brady* violations committed in *Wearry*. The U.S. Court of Appeals for the Fifth Circuit has found that prosecutors in Orleans's neighboring jurisdiction, Jefferson Parish, committed *Brady* violations in multiple murder prosecutions. *See, e.g.*, *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008); *DiLosa v. Cain*, 279 F.3d 259 (5th Cir. 2002). And, although a state appellate court reversed a lower court's postconviction finding of a *Brady* violation in one of the high-profile "Angola Five" prosecutions,[3] the evidence suppressed closely resembles the evidence that this Court found exculpatory and material in *Brady* itself. *See* Jordan Smith, *Will the Supreme Court Crack Down on Louisiana's Rogue Prosecutors?*, The Intercept, June 15, 2016, https://theintercept.com/2016/06/15/will-the-supreme-court-crack-down-on-louisianas-rogue-prosecutors/. The Angola Five prosecutions are of particular interest here because Hugo Holland served as one of the special prosecutors on

3. Louisiana's appellate courts frequently misapprehend *Brady*, as explored further below. *See infra* Part II(B).

that case. Petitioner's case presents a critical opportunity for this Court to change the culture of Louisiana prosecutors.

B. Louisiana Courts Have Misinterpreted and Misapplied *Brady*—Requiring the Federal Courts to Provide Relief

The Louisiana judiciary has compounded prosecutors' culture of *Brady* violations by misinterpreting and misapplying *Brady* and its progeny. The lower courts' rulings in *Wearry*, *Smith*, and *Kyles* exemplify judicial obliviousness to *Brady*'s reach and meaning.

Consider, for example, Michael Wearry's case. After courts affirmed his conviction on direct review, "it emerged that the prosecution had withheld relevant information" that would have undermined the State's case. *Wearry*, 136 S. Ct. at 1004. The post-conviction trial court noted that "the State 'probably ought to have' disclosed the withheld evidence" but nevertheless denied relief. *Id.* at 1005. The Louisiana Supreme Court denied Wearry's writ for review over the votes of one justice who would have granted relief on a separate ground and another justice who would have remanded for other reasons. *See State ex rel. Wearry v. Cain*, 161 So. 3d 620 (La. 2015). This Court issued a *per curiam* decision holding that "*[b]eyond doubt*, the newly revealed evidence suffices to undermine confidence in Wearry's conviction." *Id.* at 1006 (emphasis added). Prior to this Court's conclusion, no court in Louisiana had expressed concern about the prosecutor's compliance with *Brady*. Similarly, no Louisiana judge reached the result this Court did in its 8-1 opinion in *Smith* even though the suppressed impeachment evidence

called into question "the *only* evidence linking Smith to the crime." 565 U.S. at 76.[4]

Other federal courts have provided protracted corrective guidance to Louisiana's courts on *Brady* issues. Even under the constraints of AEDPA and with considerations of comity, the Fifth Circuit and federal district courts in Louisiana have overturned state court *Brady* decisions on numerous occasions. *See, e.g.*, *DiLosa*, 279 F.3d at 264 ("The state court['s] . . . ultimate legal conclusion cannot be squared with the command of *Brady* and its progeny."); *Tassin*, 517 F.3d at 776 (holding that the federal district court correctly held that the state court's ruling was "contrary to federal law because it applied a more stringent standard [of what constitutes impeachment evidence] than the one established by Supreme Court precedent"); *Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008) ("[T]he state trial court unreasonably applied clearly established federal law . . . in determining that the witness statements at issue were not material."); *see also LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728 (5th Cir. 2011); *Johnson v. Cain*, 68 F. Supp. 3d 593 (E.D. La. 2014); *Triplett v. Cain*, No. 04-1434, 2011 WL 3678173 (E.D. La. Jul. 7, 2011); *Perez v. Cain*, Civil Action No. 04-1905, 2008 WL 108661 (E.D. La. Jan. 8, 2008), *aff'd,* 529 F.3d 588 (5th Cir. 2008); *Robinson v. Cain*, 510 F. Supp. 2d 399 (E.D. La. 2007); *Faulkner v. Cain*, 133 F. Supp. 2d 449 (E.D. La. 2001). Given that AEDPA significantly limits the circumstances under which a federal court can reverse

4. *See generally State v. Smith*, 45 So. 3d 1065 (La. 2010). Altogether, eleven members of Louisiana's judiciary ruled against Mr. Smith on his *Brady* claims.

a state conviction,[5] the universe of cases in which federal courts ultimately granted habeas relief understates the persistent problems with state court review.

While the nature of Louisiana state courts' deficient *Brady* enforcement confers upon the prosecutors an even greater amount of discretion than the already-permissive federal baseline, rulings like the postconviction court's here further shift power in the prosecution's favor.[6] At multiple points in its decision, the court below opines about the *admissibility* of the suppressed evidence. *See* Petition, App. C at 11a, 12a. This court should resolve the circuit split on the question of whether exculpatory evidence that would be inadmissible can give rise to a *Brady* claim. *See Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (citing cases). Until that issue is resolved, jurisdictions that hold that such evidence cannot form the basis of a *Brady* claim transfer not just difficult questions about materiality to the prosecutor, but also fundamental questions about

5. *See Peters v. Cain*, 34 F. App'x 151, *1 (5th Cir. 2002) (per curiam) ("[E]ven if this court would have concluded that such a probability existed were we looking at the case in the first instance, we cannot reverse the state court's determination that no violation occurred unless it involved an unreasonable application of clearly established federal law.").

6. Weak state court enforcement of *Brady* obligations also emboldens prosecutors because they characterize judicial non-intervention as judicial approval. In defending his office's conduct in *Kyles*, Harry Connick wrote the following in a letter to the editor of the *New Orleans Times Picayune*: "In the *Kyles* case, for example, five separate state and federal courts on seven different occasions concluded that my prosecutors had not violated the duty to disclose before the U.S. Supreme Court in a 5-4 decision reversed Kyles' conviction." Harry Connick, *DA's Office Does Not Suppress Evidence*, Times-Picayune, May 19, 1999.

the admissibility of *the other party's* evidence. Giving prosecutors this additional discretion—another tool for nondisclosure—raises serious concerns about *Brady*'s effect in Louisiana and other states. It is thus critical that the Court grant certiorari in this case to resolve this issue.

C. Other Non-*Brady* Mechanisms for Curtailing the Suppression of Exculpatory Evidence Have Failed in Louisiana

This Court has repeatedly suggested that prosecutors will comply with their constitutional obligations because mechanisms other than judicial review of *Brady* claims will hold them to account. *See, e.g.*, *Connick*, 563 U.S. at 66 ("An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."); *see also Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (citing "checks" that purportedly "undermine" arguments about the need for civil liability, including potential criminal liability and professional discipline). However, criminal courts' limited role in promoting prosecutorial accountability has created a vacuum in which external oversight has ceased to exist. In Louisiana, the attorney disciplinary system defers *Brady* non-compliance to the criminal courts, and district attorneys' offices face potential civil liability only in rare cases.[7] Against this backdrop, decisions like the

7. *See* David Keenan, et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson: *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online 203, 216 (2011) ("*Connick*'s holding that a failure-to-train showing can only be made by demonstrating a pattern of violations—information that might be difficult for individual plaintiffs to access—will make such suits exceedingly difficult to win.").

one reached by the court below relinquish oversight of constitutional rights to the prosecutor's discretion.

The Disciplinary System

Even after this Court's decisions in *Kyles*, *Smith*, and *Wearry*, the prosecutors responsible for those *Brady* violations never faced professional discipline. The prosecutorial abuse that led to the high-profile wrongful conviction of John Thompson resulted in no professional sanctions against those prosecutors.[8] In a state with a long and ignominious history of prosecutors disregarding their constitutional obligations, the body responsible for investigating ethical complaints and making disciplinary recommendations to the Louisiana Supreme Court has only once imposed discipline for prosecutorial misconduct.[9]

Despite the lack of disciplinary action against prosecutors, the Louisiana Supreme Court recently weakened the state's ethical rule governing them, which

8. The lone recipient of professional discipline for the wrongful criminal convictions of John Thompson was a *former* prosecutor who had become a defense attorney by the time he learned of the exculpatory evidence. The Louisiana Supreme Court reprimanded him for failing to disclose that the dying prosecutor confessed to suppressing evidence. *See In re Riehlmann*, 891 So. 2d 1239 (La. 2005); *Connick*, 563 U.S. at 56 n.1.

9. *See In re Jordan*, 913 So. 2d 775, 784 (La. 2005) (imposing a three-month fully-deferred suspension against prosecutor Roger Jordan for knowingly violating *Brady* obligations). In March of 2017, a committee of the Louisiana Attorney Disciplinary Board recommended that another prosecutor be disciplined for violating his ethical disclosure duties. *See In re: Ken Dohre*, No. 16-DB-010 (03/29/17). The Louisiana Supreme Court has yet to act upon that recommendation and report.

had previously appeared to be more rigorous than *Brady* because the disclosure obligation did not turn on materiality. In October 2017, the court rejected the position taken by the Office of Disciplinary Counsel calling for greater disclosure and determined that the prosecution's obligations under Rule 3.8(d) of the Louisiana Rules of Professional Conduct are co-extensive with its obligations under *Brady*. *See In re Seastrunk*, 236 So. 3d 509, 518-19 (La. 2017). In light of *Seastrunk*, the Louisiana Supreme Court will likely decline to discipline prosecutors in every case in which state courts refuse to reverse a conviction—even if, as here, the prosecutor suppressed obviously exculpatory information. Now more than ever, the prospect of professional discipline for failing to disclose exculpatory evidence in Louisiana is a paper tiger.

Even simply lodging a complaint with the disciplinary board becomes almost impossible when the complaint targets a prosecutor. For example, after an Orleans Parish trial court granted a defendant's motion for a new trial because of *Brady* violations in a capital murder case, one highly respected member of the bar filed complaints against every implicated prosecutor.[10] It took two years for the board to acknowledge receipt of these complaints.[11]

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10. *See* Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them*, Huffington Post, Aug. 1, 2013, http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html.

11. *See* Radley Balko, *In Louisiana prosecutor offices, a toxic culture of death and invincibility*, Wash. Post, Apr. 6, 2015, https://www.washingtonpost.com/news/the-watch/wp/2015/04/06/in-louisiana-prosecutor-offices-a-toxic-culture-of-death-and-invincibility/.

Over five years have passed, and the board has still made no recommendations.[12] The continued inefficacy of the disciplinary system in Louisiana amplifies the need for judicial intervention in Petitioner's case now.

Civil Liability

This Court's opinion in *Connick* severely limited the possibility that civil liability will hold prosecutors accountable or deter prospective misconduct. In that case, the Court held that a single *Brady* constitutional violation was insufficient to make the district attorney liable for failing to train line prosecutors to comply with *Brady*. *See Connick*, 563 U.S. at 63-64. The Court rejected liability on Thompson's failure-to-train theory by relying upon the fact that prosecutors' professional judgments are informed by their law school education, the bar exam, continuing education courses, character and fitness requirements, training received while on the job, and the possibility of professional discipline. *See id.* In dissent, Justice Ginsburg pointed out that "[t]he prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility . . . ." *Id.* at 80 (Ginsburg, J., dissenting).

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12. It appears that Louisiana is not alone in its failure to discipline prosecutors. *See, e.g.*, Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. Rev. 275, 288 (2004) (finding that prosecutors who intentionally suppress evidence "are rarely, if ever, disciplined"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 697-98 (1987) (discussing the absence of ethical remedies against prosecutors). Nor are the problems with the disciplinary process in Louisiana unique. *See* Keenan, et al., *supra* note 7, at 234-40.

Unfortunately, *Connick* almost completely insulates prosecuting agencies from civil liability. "While seemingly narrow in its holding, *Connick* is significant because it forecloses one of the few remaining avenues for holding prosecutors civilly liable for official misconduct." Keenan et al., *supra* note 7, at 204. Combined with the absolute immunity conferred to prosecutors for actions taken in their role as prosecutors, "the Court has created a classic catch-22 in which nobody can be held responsible for rights violations." Scott Lemieux, *The Impunity of the Roberts Court*, The American Prospect, Apr. 1, 2011. The curtailment of civil remedies heightens the importance of the traditional remedy of a new trial. Judicial enforcement of *Brady* is the only way to truly deter prosecutors from violating their constitutional obligations.

CONCLUSION

The Court should grant certiorari.

Respectfully Submitted,

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