No. 17-1241

IN THE

Supreme Court of the United States

COREY DEWAYNE WILLIAMS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE FORMER PROSECUTORS AND DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PETITIONER

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Forty-four former prosecutors and Department of Justice officials ("proposed amici") respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as amici curiae in support of Petitioner Corey Williams.

All parties were timely notified of proposed amici's intent to file this amicus brief. Petitioner has consented to the filing of the brief. Respondent State of Louisiana declined to consent unless provided an opportunity to review the brief first. Proposed amici

thus file this motion seeking leave to file the amicus brief.

This case presents issues of constitutional and ethical importance to proposed amici who, during their careers as prosecutors and Department of Justice officials, were responsible for providing disclosures or establishing policy for providing disclosures of potentially material exculpatory and impeaching information to criminal defendants pursuant to *Brady v. Maryland* and its progeny. Amici believe that, in order to ensure that the due process rights of criminal defendants are respected, criminal prosecutions are conducted fairly, and innocent individuals are not convicted while the guilty go free, prosecutors must take a broad view of their *Brady* obligations. Amici are concerned that, in this case, state prosecutors took an overly narrow view of their *Brady* obligations, resulting in their failure to disclose recorded witness statements taken on the night of the murder based on the prosecutors' determination that the statements would not have been admissible or were not material. These statements could have been used to impeach the State's witnesses—including the only person who claimed to have seen the Petitioner shoot the victim—not only by showing inconsistencies, but also by establishing that the Petitioner (who was later found by the trial court to be, in its words, "mentally retarded") may have been set up by others to take the blame. Had the statements not been withheld, there is a reasonable probability that the verdict would have been different.

Amici represent the consensus view that prosecutors, by virtue of their unique role, have a responsibility to take a broad view of their obligation to disclose potentially material exculpatory and impeaching information, regardless of its possible admissibility at trial and without an overly cramped assessment of materiality.

For the foregoing reasons, the motion should be granted.

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BRIEF OF AMICI CURIAE FORMER PROSECUTORS AND DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici are 44 former federal and state prosecutors and U.S. Department of Justice officials.[1] They

[1] Counsel for amici curiae authored this brief in its entirety and no party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of proposed amici's intent to file this amicus brief. Petitioner has consented to the filing of the brief. Respondent *(cont'd)*

include a former U.S. Attorney General and former Acting Attorney General, five former U.S. Deputy Attorneys General, a former U.S. Solicitor General and former Acting Solicitor General, multiple former United States Attorneys and Assistant United States Attorneys, other former high-level Department of Justice Officials, and numerous former state prosecutors. In their careers as prosecutors and Department of Justice officials, amici have been responsible for providing disclosures or establishing policy for providing disclosures pursuant to *Brady v. Maryland* and its progeny. They have understood those obligations to be commensurate with their substantial responsibility and discretion as prosecutors. Amici have sought to ensure, to the best of their ability, that the due process rights of criminal defendants are respected, criminal prosecutions are conducted fairly, and that innocent individuals are not convicted while the guilty go free. Amici believe that these goals, which bring credibility to the criminal justice system, require that prosecutors take a broad view of their obligations to disclose potentially material exculpatory and impeaching information.

SUMMARY OF ARGUMENT

Prosecutors bear a special responsibility to strive for a fair and just result in all criminal prosecutions. *Brady v. Maryland* and its progeny have firmly established that a criminal defendant's constitutional right to due process is violated when the government

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State of Louisiana declined to consent unless provided an opportunity to review the brief first. Proposed amici thus have filed a motion seeking leave to file the amicus brief.

withholds favorable evidence that, considered collectively, undermines confidence in the verdict. Accepting the broad discretion afforded prosecutors carries with it a corresponding duty to ensure that this rule is not violated. That means prosecutors must take a broad view of their obligation to disclose potentially material exculpatory and impeaching information, regardless of its possible admissibility later at trial.

In this case, the prosecutors failed to disclose recorded witness statements that, based on a review of the record, could have been used to impeach the State's witnesses—including the only person who claimed to have seen petitioner Corey Williams shoot the victim—not only by showing inconsistencies, but also by establishing that Corey (who was later found by the trial court to be "mentally retarded") may have been set up by others to take the blame. Had the statements not been withheld, there is a reasonable probability that the verdict would have been different.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW AND REVERSE, REAFFIRMING THE PRINCIPLE THAT WITH PROSECUTORIAL DISCRETION COMES PROSECUTORIAL RESPONSIBILITY TO ENSURE THAT "JUSTICE SHALL BE DONE"

More than 80 years ago, a unanimous Court memorialized the unique role of the prosecutor in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> The [prosecutor] is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Amici include former federal prosecutors and Department of Justice officials who, when taking their oaths of office, promised to fulfill the responsibilities entrusted to them by these words. *See* 5 U.S.C. § 3331 ("I . . . do solemnly swear . . . that I will well and faithfully discharge the duties of the office on which I am about to enter"). Similar words appear inscribed on the walls of the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts," as this Court noted in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Elaborating, the Court in *Brady* continued: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.*

Thus, as *Brady* and its progeny hold, "the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75 (2012). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense,

the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). This Court has drawn no distinction between evidence that is material for purposes of impeachment and evidence that is otherwise exculpatory. *Id.* at 676. The "[r]easonable probability" standard is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

So important are the words of *Berger* to the prosecutor's *Brady* obligations that nearly every leading decision from this Court addressing an alleged *Brady* violation has cited them. *See United States v. Agurs*, 427 U.S. 97, 111 (1976); *Bagley*, 473 U.S. at 675 n.6; *Kyles*, 514 U.S. at 439; *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Banks v. Dretke*, 540 U.S. 668, 694 (2004); *Cone v. Bell*, 556 U.S. 449, 451 (2009); *Connick v. Thompson*, 563 U.S. 51, 71 (2011); *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017). As this Court recognized in *Kyles*, although "the definition of materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden." 514 U.S. at 437. "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Id.* at 439. "This is as it should be," moreover, for "it 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." *Id.* at 440.

This Court should grant review and reverse the judgment in this case, as the favorable information not disclosed by prosecutors, considered cumulatively, puts this case "in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

II. PROSECUTORS ENSURE THAT "JUSTICE SHALL BE DONE" BY TAKING A BROAD VIEW OF THEIR DISCLOSURE OBLIGATIONS

In the experience of amici, acceptance of the awesome responsibilities and discretion of the prosecutor carries with it the concomitant duty to ensure that "justice shall be done" by taking a broad view of their *Brady* disclosure obligations that extends beyond merely evidence admissible at trial. The prosecutor's goal is not only to strive for a fair trial, but also to protect public safety by ensuring that innocent persons are not convicted while the guilty remain free.

Although this Court has made clear that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict," *Strickler*, 527 U.S. at 281, it can be difficult for prosecutors to determine pretrial what information may meet this standard post-trial. Precisely for this reason, in amici's experience, prosecutors contribute to the fairness of the criminal justice system by taking a broad view of their pretrial disclosure obligations. *See Agurs*, 427 U.S. at 108 ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of

evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.")

This broad view is consistent with Department of Justice (DOJ) guidance developed by a working group of experienced DOJ attorneys and prosecutors in 2010. In a Memorandum for Department Prosecutors that addressed criminal discovery generally, then Deputy Attorney General David Ogden explained that "[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error." David W. Ogden, Deputy Att'y Gen., *Memorandum for Department Prosecutors: Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), available at https://www.justice.gov/archives/dag/memorandum-department-prosecutors. Compliance with this guidance, Ogden wrote, "will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing criminal prosecution." *Id.*

Contemporaneously with the 2010 guidance, DOJ also revised its policy on the disclosure of exculpatory and impeachment information. Significantly, the current policy provides: "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy

encourages prosecutors to err on the side of disclosure if admissibility is a close question." U.S. Attorneys' Manual (U.S.A.M.) § 9-5.001(B)(1), (internal cites omitted) available at https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings. Under the policy, federal prosecutors must disclose "information that is inconsistent with any element of any crime charged" "or that establishes a recognized affirmative defense," U.S.A.M. § 9-5.001(C)(1), as well as "information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence," U.S.A.M. § 9-5.001(C)(2). These provisions apply "regardless of whether the information subject to disclosure would itself constitute admissible evidence." U.S.A.M. § 9-5.001(C)(3).

In amici's experience, this broad view of *Brady* is necessary to ensure that the prosecutor—even when acting in good faith—does not view the potential materiality of exculpatory or impeaching information too narrowly, thereby suppressing information that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

As multiple decisions of this Court applying *Brady* establish, prosecutors should be particularly conscientious about disclosing information that could be used to impeach eyewitnesses. *See, e.g.*, *Wearry v. Cain*, 136 S. Ct. 1002, 1004-6 (2016) (summarily

reversing where prosecution failed to disclose: (1) statements of eyewitness's fellow inmates that cast doubt on eyewitness's credibility, (2) medical records of accomplice that would have undermined eyewitness's testimony that accomplice ran into street to flag down victim, and (3) that second eyewitness who saw defendant with victim had twice sought to reduce his existing sentence in exchange for testifying); *Smith*, 565 U.S. at 75-77 (reversing where undisclosed statements of sole eyewitness to five murders that conflicted with eyewitness's identification of defendant at trial undermined confidence in verdict); *Kyles*, 514 U.S. at 441-42, 445 (reversing based on cumulative impact of suppressed information, including prior conflicting statements of eyewitnesses, and noting that "effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others").

It should make no difference whether the evidence undermining eyewitness testimony is inadmissible for other purposes. The importance of eyewitness testimony, and the fact that information which itself may be inadmissible could nevertheless be the basis for effective cross-examination, provide sufficient reason for prosecutors to reject disclosure determinations based on admissibility. *See, e.g.*, *Barton v. Warden*, 786 F.3d 450, 466 (6th Cir. 2015) (reversing where prosecution failed to disclose substance of unrecorded statement of third party that, although inadmissible hearsay, could have been used to cross-examine State's only witness or to call another witness for impeachment), *cert. denied*, 136 S. Ct. 1449 (2016); *United States v. Price*, 566 F.3d 900, 912 (9th Cir. 2009) (reversing where prosecution

failed to disclose police reports documenting eyewitness's prior fraudulent acts because such evidence was admissible to impeach witness's testimony); *United States v. Rodriguez*, 496 F.3d 221, 226 n.4 (2d Cir. 2007) (remanding for government to disclose witness's inconsistent statements, which themselves might not have been admissible, noting "[t]he objectives of fairness to the defendant, as well as the legal system's objective of convicting the guilty rather than the innocent, require that the prosecution make the defense aware of material information potentially leading to admissible evidence favorable to the defense"). Even the Seventh Circuit, which adheres to the minority position that evidence "must actually be admissible in order to trigger *Brady* analysis," recently has critiqued that position, acknowledging, "[i]t is hard to find a principled basis for distinguishing inadmissible impeachment evidence and other inadmissible evidence that, if disclosed, would lead to the discovery of evidence reasonably likely to affect a trial's outcome." *United States v. Morales*, 746 F.3d. 310, 314-15 (7th Cir. 2014).

Similarly, information not otherwise admissible might form the basis for cross-examining police witnesses to challenge the adequacy of their investigation. In *Kyles*, among other suppressed information, the prosecution failed to disclose multiple inconsistent statements of a non-testifying informant, "Beanie," that suggested his own culpability for the murder and his desire to see the defendant arrested. 514 U.S. at 445-46. Recognizing that, had the statements been disclosed, the defense might have elected not to call Beanie as an adverse

witness, this Court described in detail how the statements nevertheless could have been used to "attack[] the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted." *Id.* at 446. *See also Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 302 (3d Cir. 2016) (police activity sheet indicating State's eyewitness gave statement to third party inconsistent with what she told police could have been used not only to impeach eyewitness, but to cross-examine detectives about failure to further investigate).

The potential unfairness of determining a prosecutor's duty to disclose based on admissibility becomes clear when taken to its extreme, as this Second Circuit hypothetical illustrates:

> Assuming, for example, that the prosecution's investigations revealed a reliable informant's inadmissible hearsay statement to the effect that the defendant was innocent and had been framed by a rival gang, and that the true perpetrator was in fact X, who had thrown the murder weapon into the abandoned mine shaft outside of town, it would seriously undermine reliability of the judgment and the fairness of the proceeding to negate the defense's entitlement to be informed of this on the ground that the hearsay statement was inadmissible.

Rodriguez, 496 F.3d at 226 n.4. *See also Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (remanding to determine if withheld intake note in which victim had

made past false accusations of sexual abuse against caretakers could have led to non-hearsay evidence).

Amici do not discount that, when making disclosure decisions, prosecutors must take into account countervailing concerns such as witness security and privacy, protecting the integrity of ongoing investigations, and national security interests, among others, but these concerns may be addressed through the timing and form of disclosures, and must be weighed against the due process rights of the defendant. In such situations, prosecutors may also seek the assistance of the trial court in making disclosures pursuant to protective orders.

III. LOUISIANA PROSECUTORS FAILED TO DISCLOSE INFORMATION THAT COULD HAVE BEEN USED IN THIS CASE TO EFFECTIVELY IMPEACH THE STATE'S WITNESSES AND ATTACK THE ADEQUACY OF THE POLICE INVESTIGATION

After delivering pizza to the home of Renee Iverson, Jarvis Griffin was shot and killed as he began to drive away. No physical evidence linked then-16-year-old Corey Williams ("Corey") to the crime. Only one witness—Chris Moore, a.k.a. "Rapist"—claimed to have seen Corey commit the shooting. Moore's friend, Gabriel Logan ("Gabriel"), robbed Griffin of his money bag and split its contents with Moore. There was no evidence Corey obtained any of the proceeds. The victim's blood was later found on Gabriel's clothing; and fingerprints on the empty clip of the murder

weapon were those of Gabriel's brother, Nathan Logan ("Nathan").[2]

The evidence at trial established that while Iverson was paying Griffin for the pizza at her front door, Gabriel, who had been inside the house with others, slipped out the door. R. 2539. Iverson saw Gabriel hand a gun to Corey, who was in the front yard along with Moore. R. 2539-41.[3] After Iverson closed the door, she and other guests inside the house, including Nathan as well as Patrick Anthony, Trimeka Mack, Walter Shaw, and Derrick White (who had just arrived with Corey and Moore), heard several gunshots. R. 2542, 2610, 2643, 2651, 2657-58.[4] White, who was the first to open the door, saw Gabriel standing outside and Moore and Corey running toward West College. R. 2659. White and others who ran to look outside saw Griffin's car rolling toward a neighbor's house. R. 2543, 2613, 2652, 2659-60. None of them saw who shot Griffin, although Iverson testified that she saw Gabriel standing by a tree in the yard next door, pointing in the direction of

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[2] Unless otherwise supported by a record cite, the facts cited herein come from the Supreme Court of Louisiana's decision on direct appeal, *State v. Williams*, 831 So.2d 835 (La. 2002), or are undisputed. Gabriel Logan was tried separately and found guilty of second-degree murder. Neither Chris Moore nor Nathan Logan were charged with any offense in connection with the shooting.

[3] At trial, Iverson testified that the gun entered into evidence was not the gun she saw Gabriel give to Corey. R. 2553.

[4] At trial, the State called as witnesses Moore, Iverson, Nathan, White, Mack, and Shaw. The State did not call Anthony.

Griffin's car and putting something that "appeared to be a gun" under his shirt. R. 2553-54. She and the others saw Gabriel run to the car, pull Griffin out, and take a green money bag and pizza before fleeing. R. 2544, 2616, 2645-46, 2653, 2660. Nathan told his brother Gabriel to get away from the car. R. 2544, 2617, 2654. Moore came to the gate in front of Iverson's house and told her to call the police. R. 2546, 2654.

Notably, no one except White and Nathan testified that they saw Corey immediately after the shots were fired. R. 2544, 2617, 2653. Nathan claimed he saw Corey running toward West College and Corey's grandmother's house, while Moore ran in the opposite direction. R. 2613-14. Nathan also claimed he saw Gabriel on the step by Iverson's door immediately after the shooting, R. 2611, conflicting with Iverson's testimony that Gabriel was standing by a tree in the neighbor's yard. R. 2553

Shortly after the shooting, Nathan met up with Gabriel and Moore in an alley, where they were dividing the money from the green bag. R. 2618-19. Nathan, Gabriel, and Anthony later retrieved from a barbecue pit near Corey's grandmother's home the gun that had been used in the shooting and hid it in a bag near the Logans' apartment. R. 2622-23.

Based on witness accounts on the scene, police arrested Corey and Gabriel within hours. Corey, who was found by the court to be "mentally retarded" after the trial, Pet.App. 34a, gave a recorded statement during which he told detectives that Gabriel shot Griffin and that Corey had immediately run to his

grandmother's house. Writ-App. 2:242-50. Gabriel was interviewed separately and refused to give a statement. Thereafter, according to police, Corey asked to tell them what had really happened, and said that he shot the pizza delivery man after Gabriel told him, "Man, let's get him." Writ-App. 2:253. Corey also said that he placed the gun in a barbecue pit. Writ-App. 2:255. At the end of his recorded statement, after being awake all night and having just confessed to a murder, Corey said, "I ain't got to answer no more questions, because I'm tired. I'm ready to go home and lay down." Writ-App. 2:263.

During post-conviction proceedings, the State conceded that it did not disclose to the defense the recorded witness statements of Anthony, Nathan, and White, which were taken by the police the night of the murder.[5] The State analyzed each of Corey's *Brady* claims separately, never considering their cumulative effect. With respect to Nathan's undisclosed recorded statement, during which he said that he thought "Gabriel shot him [Griffin]," and "Rapist had to been [sic] set it up," Writ-App. 1:81, 83, the State claimed that this was "mere speculation and opinion," for which "[t]he State would have properly objected at

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[5] At the time of Corey's trial, the State of Louisiana did not have a *Jencks* rule requiring the government to produce to the defendant any statement of a witness in its possession that related to the subject matter of the witness's trial testimony. *Jencks v. United States*, 353 U.S. 657, 672 (1957). Louisiana rules were amended in 2013 to include a requirement that on request of the defendant, the prosecution must provide written or recorded statements of any witness it intends to call at trial. LA Code Crim. Pro. 716 (2013).

trial to any question that elicited a speculative answer." Writ-App. 2:398. The State further maintained that "[i]t is implausible to suggest the jury would have given greater weight to Nathan Logan's opinion of the murder than it did [Corey's] confession." *Id.* With regard to Anthony's undisclosed statement that he saw Nathan give the gun that he later helped hide to "Rapist" earlier "today," Writ-App.1:65, the State argued that the statement was "too attenuated in time to overcome both [Corey's] confession and also the corroborating eyewitness testimonies that Gabriel Logan and [Corey] possessed the murder weapon moments before the shooting." Writ-App.2:397 (emphasis in original). With respect to undisclosed witness statements indicating that the investigating detectives expressed skepticism that Corey committed the murder and suggested that witnesses might be dishonestly blaming it on him, Writ-App. 1: 65-66, 68-69, 119-21, the State argued that Corey's confession confirmed that Gabriel gave Corey the murder weapon just before the murder, as corroborated by Iverson's testimony; forensic evidence that the gunshot entered the victim in the left upper arm and angled downward corroborated Corey's confession that he was in front of the car at the window when he fired three rounds into the victim's vehicle; and Nathan's testimony corroborated Corey's confession that he put the gun in the barbecue pit after the murder. Writ-App. 2:402, 404.

The trial court reviewed the materiality of each suppressed statement individually, without considering their cumulative impact. It held that Nathan's undisclosed statements about who he thought committed the murder were "irrelevant and

not admissible," Pet.App. 11a; Anthony's undisclosed statements about Moore having the gun were immaterial because, if Moore had been asked on cross-examination about possessing the gun, "it is likely Mr. Moore would have denied Patrick Anthony's allegations as untrue," Pet.App. 11a;[6] and undisclosed statements by police during the course of the investigation were "theories, opinions or beliefs [that] are not admissible evidence." Pet.App. 12a.

The arguments of the state prosecutors and conclusions of the state court fail to recognize the many ways that the suppressed statements could have been used effectively at trial. Compounding that error, they fail to assess the collective impact of the statements even if the failure to disclose any single statement alone would not have undermined confidence in the outcome.

Chris Moore was the sole person who claimed to have seen Corey shoot Griffin. R. 2585. But there was good reason to believe that Moore sought to shift blame from himself. Despite Nathan's testimony that he met up with Gabriel and Moore in the alley after the shooting and saw them divide the money stolen from the delivery driver, Moore claimed that he never saw Gabriel after the shooting and did not get any money from the robbery. R.2579. Moore also claimed that he "[d]idn't have a gun" and did not ever carry

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[6] The Court incorrectly found there was no evidence from Patrick Anthony that Moore had the gun on the day of the murder; Anthony said in his undisclosed recorded statement that he saw Nathan give the gun to "Rapist" "today." Writ-App. 1:65.

guns "back then." R.2592. Had Anthony's statement been disclosed, defense counsel could have used it to cross-examine not only Moore about whether Nathan had given him a gun on the day of the shooting, but also to cross-examine Nathan, who may have provided testimony that would have completed the impeachment. And armed with the statement in advance of trial, defense counsel may well have called Patrick Anthony as a witness.

Moreover, in light of the direct contradictions between Moore's testimony and that of Nathan, cross-examination of Nathan with his statement from the night of the murder—i.e., that Moore "had to been [sic] set it up"—could have had a dramatic impact, particularly when combined with cross-examination about giving Moore the gun earlier that day. In light of these facts, had defense counsel been aware of statements made by the police suggesting that the witnesses sought to shift the blame to Corey, counsel could have effectively challenged the adequacy of the police investigation and, in particular, their apparent unquestioning acceptance of Moore's identification of Corey as the shooter while failing to consider Moore's possible complicity. Police did not interview Moore on the night of the shooting, and first interviewed him several days later, but did not record the interview. R. 2590, Writ App. 308-10.

Additional inconsistencies between a number of the witnesses' undisclosed recorded statements and their trial testimony would have added significantly to the undermining effect that the suppressed information would have had on the trial and would have supported the argument that Corey had been set

up to take the blame for Griffin's murder. White, for example, originally lied to detectives during his recorded statement, claiming that he saw Corey "running and shooting." Writ-App. 1:117-18. When asked if he said that to the officers who first responded to the scene, he admitted that he did not. Writ-App.118-19. When asked if he was "trying to stick this gun thing on Corey," and whether his statement would come back to "bite" him later, Writ-App. 1:119, White admitted that he saw Corey running, but did not see who shot the pizza delivery man. Writ-App. 1:120-21. White explained that "[e]verybody else said, 'Corey shot him. Corey shot the pizza man.'" *Id.* He also admitted that he saw Gabriel after the shooting, when Gabriel came back "on the corner with his mother," Writ-App. 1:122, after having earlier described Nathan and Gabriel as "kind of bad. They, they tell you, like, 'I'll kill you,' and all this." Writ-App. 1:119. These details were not included in the summary of White's statement that was provided to the defense. Writ-App. 2:299.

Similar information suggesting that Corey was being set up was also omitted from the summary of Anthony's recorded night-of-the-murder statement given to Corey's counsel. Writ-App. 2:287. During Anthony's recorded statement, he told detectives "[w]hat I heard was that when they was talking, they said that Corey shot the man." Writ-App. 1:66. When detectives told Anthony that it seemed like various people involved in this incident were trying to "blame it on Corey," Anthony responded, "I don't know who did the shooting. That was what Chris [Moore] had came back and said. That's what Chris [Moore] said went in my ear." Writ-App. 68.

Nathan's undisclosed recorded statement, had it been known to the defense, could have been used to further corroborate that there had been an opportunity to build a narrative that Corey committed the murder. Nathan told detectives that after he saw Gabriel and Moore split the money, he went back to the "projects" where he lived, and "[t]hat's when my mama told [Gabriel] that Cor[e]y's grandma called and she said that she was gonna talk." Moreover, Nathan's undisclosed recorded statement would have given defense counsel the opportunity to show how Nathan's trial testimony differed in material respects from his night-of-the murder statement. Not only did Nathan originally tell detectives that he thought "Gabriel shot him [Griffin]," Writ-App. 1-81, he also said that when he "first laid [] eyes on [Gabriel]," after the shooting "[Gabriel] was standing behind that tree right at Ms. Maddox's house," which he described as the house "right next door." Writ-App. 1:84. By the time of trial, Nathan had distanced Gabriel from Griffin's car, and instead testified that he saw Gabriel "standing on the step by [Iverson's] door." R. 2611.

This "evolution" of Nathan's story about his own brother's involvement, had it been known to defense counsel, would have supported further investigation of other suppressed information, also learned only after trial, that Gabriel sought to influence the testimony of witnesses Walter Shaw and Renee Iverson, who each spoke with detectives about these efforts after Gabriel's arrest. *See* Writ-App. 1:36 (statement of Shaw that Gabriel called after his arrest and asked Shaw to "switch [his] story."); Writ App. 1:109-10 (statement of Iverson that Gabriel's

friends had been "throwing threats to [her] on the sly" and that Gabriel had told her friend that his "boys" had been talking about doing something to Iverson).

Although the State below sought to justify nondisclosure of the recorded witness statements as immaterial in light of other witness testimony and Corey's confession, this Court has rejected that kind of speculation. *See Smith v. Cain*, 565 U.S. at 76 ("the State's argument offers a reason that the jury *could* have disbelieved [the eyewitness's undisclosed inconsistent] statements, but gives us no confidence that it *would* have done so," (emphasis in original.); *see also Barton*, 786 F.3d at 466 ("It is not for the State to weigh the evidence and decide what the jury would ultimately find to be material and exculpatory—that is something that the jury itself must decide.").

The State took an overly narrow view of its disclosure obligations. Because the State withheld information that, when considered collectively, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Kyles*, 514 U.S. at 435, amici urge this Court to grant the petition in this case or to summarily reverse. This is especially so in light of Corey's severe intellectual disabilities, which properly should be considered when assessing the materiality of the undisclosed statements.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant the petition or summarily reverse the judgment.

Respectfully submitted,

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