TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE
Supreme Court of the United States

No. 17-1241

COREY DEWAYNE WILLIAMS,
Petitioner,
v.

STATE OF LOUISIANA,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INNOCENCE PROJECT NEW ORLEANS

STATEMENT OF INTEREST[1]

Innocence Project New Orleans (IPNO) is a member of the Innocence Network, an affiliation of organizations from around the world dedicated to providing *pro bono* legal and investigative services to individuals seeking to prove their innocence and working to redress the causes of wrongful convictions. IPNO is one of the largest free-standing

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amicus curiae,* its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

innocence organizations in the country. It exclusively works in Louisiana and south Mississippi and has freed or exonerated thirty innocent prisoners who were serving life or near-life sentence. Of those thirty prisoners, eight had made false confessions or inculpatory statements. Four of those false confessors had documented intellectual disabilities and two of these four were also juveniles.

IPNO is dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on lessons from cases in which innocent people were convicted, IPNO advocates study and reform designed to enhance the truth-seeking functions and procedures of the criminal justice system to ensure that future wrongful convictions are prevented.

IPNO frequently files amicus briefs, either alone or as a member of the Innocence Network, in cases raising important issues of criminal law, including the due process protections afforded by *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g.*, *Turner et al v. United States*, No. 15-1503 (U.S. 2016); *Jackson v. Louisiana*, No. 13-1105 (U.S. 2014); *Smith v. Cain*, No. 10-8145 (U.S. 2011); *Keith v. Ohio*, No. 09-1052 (U.S. 2010).

IPNO submits this brief out of concern that criminal procedures function to protect our most vulnerable citizens. In this case, that would mean following the Sixth Circuit's rule that requires a court to consider a post-trial judicial finding concerning an immutable characteristic of the defendant—his intellectual disability—when adjudicating his *Brady* claim. This rule is consistent with existing law on *Brady* and the protections that should be afforded to intellectually disabled defendants. To do as the

Louisiana courts did and refuse to consider a finding of intellectual disability merely because of when it was made creates an intolerable risk that particularly vulnerable people like Petitioner will be left without a remedy when their rights are violated.

SUMMARY OF ARGUMENT

"We know that it is easier to elicit a confession from a person with mental retardation than from an individual without mental retardation. Further, these confessions frequently play a central role in the prosecution of the case."[2] This Petition presents the Court with an opportunity to address and clarify important, recurring issues concerning the intersection of the government's constitutional duty to disclose material exculpatory evidence, the due process rights of the intellectually disabled,[3] and the need for systems of justice to produce reliable results.

On the morning of January 5, 1998, following several hours of interrogation by the police, Petitioner confessed to the murder of a pizza delivery man. At the time of his confession, Petitioner was just ten

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[2] *See* Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 Mental Retardation 212, 213 (June 1999) [hereinafter "Everington & Fulero"] (internal citations omitted).

[3] As this Court has recognized, the terms "mentally retarded" and "mental retardation" have been generally replaced by the terms "intellectually disabled" and "intellectual disability." *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014). This brief uses the latter terms except when quoting authority that used the former.

days past his sixteenth birthday, and suffering from what the trial court later determined was an intellectual disability. Petitioner's confession was introduced into evidence at trial, along with the testimony of a witness who claimed to have seen him shoot the victim. There was no physical evidence linking Petitioner to the crime and, despite the fact that the putative motive was robbery, there was no evidence that Petitioner received or attempted to receive any of the fruits of the crime.[4]

Petitioner was convicted and sentenced to death, but his death sentence was later vacated under *Atkins v. Virginia*, 536 U.S. 304 (2002) based on a post-trial judicial determination—made after a four-day evidentiary hearing—that Petitioner was "mentally retarded as defined by applicable Louisiana law (and any other universal standard) as he has significant sub-average general intellectual functioning (more than two standard deviations below the mean) existing concurrently with significant deficit adaptive behavior, all of which was manifested during his developmental period." Pet. App. 34a.

Following that determination and in the course of post-conviction proceedings, Petitioner's counsel learned for the first time that prosecutors had failed to disclose critical exculpatory evidence in advance of trial—including evidence from several witnesses and police that both exculpated the defendant and inculpated the sole eyewitness who testified that he saw

[4] The money taken from the victim was split between three other people who were on the scene at the time the victim was shot, including the witness who testified he saw Petitioner pull the trigger.

Petitioner shoot the victim. Notwithstanding that evidence, the court refused to order a new trial on the ground that the withheld information was not material under *Brady* due to Petitioner's confession. In evaluating the weight that should be afforded that confession, the court refused to consider empirical evidence showing that intellectually disabled individuals are particularly prone to giving false confessions, and that this propensity is compounded by youth.[5] The court also failed to give any weight to the prior judicial determination that Petitioner himself is intellectually disabled and was so at the time of his confession. Instead, the court weighed the materiality of the withheld evidence against Petitioner's confession without considering the impact of either his intellectual disability or his youth on the weight afforded to that confession, and concluded that the withheld exculpatory evidence was immaterial.

The approach taken by the court below deprived Petitioner of *Brady*'s protections. This Court has repeatedly recognized that procedural safeguards must be put in place in order to ensure the constitutional rights of vulnerable defendants, including the intellectually disabled. *See, e.g.*, *Atkins*, 536 U.S. at 306-07 (recognizing that an intellectual disability "can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants"). Indeed, "[a] moral and civilized society diminishes itself if its system of justice does not afford recogni-

[5] Petitioner's post-conviction arguments were heard by a different judge than the one that presided over Petitioner's *Atkins* hearing.

tion and consideration of those limitations in a meaningful way." *Id.* at 310 (quoting *Atkins v. Commonwealth*, 534 S.E.2d 312, 325 (Va. 2000) (Hassell & Koontz, J., dissenting). This Court has also stated that the overarching purpose of *Brady* is "to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985). "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt," *United States v. Agurs*, 427 U.S. 97, 112 (1976), and *Brady* materiality must be assessed as if the favorable information was disclosed to "competent counsel." *Kyles v. Whitley*, 514 U.S. 419, 441 (1995). The *Brady* rule is an important protection for innocent defendants. *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993).

Consistent with these principles, the Sixth Circuit has considered post-trial determinations that the defendant was intellectually disabled at the relevant time when assessing the materiality of withheld evidence. *See Bies v. Sheldon*, 775 F.3d 386, 401-03 (6th Cir. 2014); *Gumm v. Mitchell*, 775 F.3d 345, 371-73 (6th Cir. 2014). Because the Louisiana courts did not follow this rule, Petitioner did not receive just consideration of his Brady claim. Instead, the Louisiana courts refused to consider Petitioner's intellectual disability and failed to consider his youth when assessing what weight to give to his confession, resulting in the wrongful denial of Petitioner's *Brady* claim.

Without guidance from this Court concerning the proper role of such information in the *Brady* analysis, intellectually disabled defendants face an unacceptable risk their wrongful convictions will not be remedied because, as set forth below, the inherent

characteristics of the disability itself make these defendants more susceptible to falsely confessing.

ARGUMENT

I. THE PETITION PRESENTS IMPORTANT AND RECURRING ISSUES INVOLVING THE APPLICATION OF *BRADY* TO INTELLECTUALLY DISABLED DEFENDANTS THAT WARRANT THIS COURT'S REVIEW.

Confessions are traditionally viewed as among the most powerful pieces of evidence, in large part because we as a society have long believed that people tend not to confess to things they have not done. *See, e.g.*, *King v. Warickshall*, 1 Leach 262, 263-64 (K. B. 1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt"). This view was applied by the Louisiana courts in this case. In light of the data now available, however, this traditional view is not supportable, particularly in a case involving a confession by someone who was *both* intellectually disabled *and* a juvenile.

False confessions are a significant cause of wrongful convictions. One researcher found that almost sixty percent of false confessions made by a select group of people later exonerated by DNA testing were made by someone who was intellectually disabled, mentally ill, and/or a juvenile.[6] As discussed

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[6] *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 Va. L. Rev. 395, 400 (2015) [hereinafter "Contaminated Confessions Revisited"]; see *also* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1064

below, suspects who suffer from intellectual disabilities are prone to falsely confess because of a variety of well-documented factors inherent to the disability, including: heightened suggestibility, a desire to please authority, a tendency to acquiesce, and adaptive behaviors that rely on cues provided by others rather than on their own problem-solving abilities. For these reasons, the prevalence of the intellectually disabled among those proven to have falsely confessed is striking.

In cases involving confessions by defendants with documented intellectual disabilities, courts must include the disability as part of the materiality analysis under *Brady*. To do otherwise would leave this vulnerable category of defendants inadequately protected.

A. False Confessions Are a Leading Cause of Wrongful Convictions.

"A defendant's confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991) (White, J., dissenting) (citations and internal quotations omitted); *accord Premo v. Moore*, 562 U.S. 115, 131 (2011) (citing *Fulminante* for the "basic proposition that a confession is often powerful evidence"). A confession can change the course of an investigation. *See, e.g.*, Saul M. Kassin*, Why Confessions Trump Innocence*, 67 Am. Psychol. 431, 437 (Sept. 2012). For example, researchers in 1994 found a significant change in how polygraph examiners

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(2010) [hereinafter "Substance of False Confessions"]. These figures combine the results of the two Garrett studies.

classified results that had been originally considered inconclusive after they were told the examinee confessed. *Id.* A 2006 study of fingerprint examiners found the same bias, noting a 17% overall change from previously correct results if the examiner was told the suspect confessed or had been eliminated from the investigation. *Id.* These experiments play out in the real world. A study of 26 recent exonerations of people who confessed found that in eleven of these cases the prosecution proceeded despite the existence of exculpatory DNA evidence.[7] And a confession can cause police to close off other avenues of investigation, even when police themselves did not initially believe the confessor actually committed the crime, as in Petitioner's case. Pet. App. 4.

Despite the clear and understandable bias to rely on confessions, a growing body of empirical evidence demonstrates that false confessions can and do occur. The national Innocence Project maintains data on every DNA-proven wrongful conviction in the country and reports that in 101 of the 354 DNA-proven wrongful convictions the conviction was caused, at least in part, by a false confession or admission.[8] In 2017 alone, the National Registry of Exonerations, which tracks information on all U.S. exonerations (and not just on a DNA-basis), reported that a record

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[7] *See* Contaminated Confessions Revisited, *supra* n.6, at 405.

[8] *See* Innocence Project, *The Cases, Exonerated by DNA*, http://www.innocenceproject.org/all-cases/ (last visited Apr. 3, 2018).

29 of the 139 exonerations added to the Registry that year—more than 22%—involved false confessions.[9]

B. Intellectually Disabled Defendants Are Prone to Falsely Confess.

As this Court has recognized, people who suffer from intellectual disabilities face a disproportionate risk of falsely confessing. *See Hall*, 134 S. Ct. at 1993; *Atkins*, 536 U.S. at 320. Empirical evidence bears that out. Data on 66 DNA proven exonerations in which the defendant confessed, established that at least 22 of the confessors were mentally ill or intellectually disabled and 23 were juveniles.[10] Because several of these confessors—like Petitioner—had one or more than one of these characteristics, in total 39 of the 66 cases (59%) involved individuals who had at least one of these characteristics.[11] Another study found that 69% of wrongfully convicted people with intellectual disabilities had falsely confessed, com-

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[9] *See* Nat'l Registry of Exonerations, *Exonerations in 2017*, 2 (Mar. 14, 2018), https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf.

[10] *See* Contaminated Confessions Revisited, *supra* n.6, at 400; *see also* Substance of False Confessions, *supra* n.6, at 1064. As noted above, these figures combine findings form both Garrett studies. These numbers to do not include individuals who may have had undiagnosed intellectual disabilities of mental illnesses or who may have had measurable characteristics that made them unusually vulnerable to falsely confessing without having IQs in the intellectually disabled range. *See id*.

[11] *See id*.

pared to a false confession rate of only 11% for wrongfully convicted people without a documented intellectual disability or mental illness. Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003,* 95 J. Crim. L. & Criminology 523, 545 (2005). Another found that almost a quarter of false confessions studied were made by individuals with intellectual disabilities. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. Rev. 891, 970-71 (2004). Given this data, it "seems beyond legitimate dispute that mentally retarded suspects are likely to confess falsely . . . far more frequently than do suspects of average and above-average intelligence." Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects,* 69 U. Chi. L. Rev. 495, 503 (2002).

The reasons that intellectually disabled individuals are more prone to confess falsely are unsurprising. As this Court recognized in *Atkins*:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logi-

> cal reasoning, to control impulses, and to understand the reactions of others.

Atkins, 536 U.S. at 318 (citations and internal quotation marks omitted); *see also Hall*, 134 S. Ct. at 1993 (same). Research shows that intellectually disabled individuals are more compliant toward authority figures, exhibit a higher need for approval, and tend to answer 'yes' to a range of questions. Saul M. Kassin et al., *Confessions*, *in* 2 APA Handbook of Forensic Psychol. 245, 254 (B.L. Cutler and P.A. Zapf ed., 2015). They are also more suggestible, more malleable, and more likely to incorporate incorrect information from misleading questions into their reported memories. *Id.*

These tendencies have been attributed to certain personality traits found to a greater degree in those with intellectual disabilities. *See* Everington & Fulero, *supra* n.2 at 212. First, "[b]ecause individuals with mental retardation frequently experience repeated failures in social and academic settings, they often display 'outerdirected' behavior, relying more on social and linguistic cues provided by others than on their own problem-solving abilities." *Id.* at 212-13. Second, people with intellectual disabilities have a "strong desire to please others, particularly those in authority. This bias . . . is so strong that many persons with mental retardation will literally tell the questioner whatever they perceive that he or she wants to hear." *Id.* at 213 (internal citations omitted). Third, people with intellectual disabilities demonstrate "acquiescence," meaning that when they are asked a "yes or no" question, they are "significantly more likely to answer 'yes' regardless of the appropriateness of that response." *Id.* When assessed against a modified Suggestibility Scale in a

simulated interrogation setting, "persons with mental retardation are significantly more likely to respond to leading questions and to coercion," and "much more likely to change or to 'shift' their answers when mild disapproval is given." *Id.* at 218 (noting that "high shift scores are a disturbing finding" because "if this group of individuals is so suggestible in this low-risk questioning situation, then they might be even more likely to respond to suggestible questions and to 'shift' their answers when the pressure is greater"). It is for this reason that the proponents of standard law enforcement interrogation techniques advise "extreme caution" when interrogating intellectually disabled suspects and "extreme diligence" in checking if any confession obtained is corroborated.[12] There is no evidence such care was taken in this case.

IPNO's experience confirms the research and this Court's observations that false confessions occur and that defendants, like Petitioner, are especially vulnerable. For example, Travis Hayes, an IPNO client, was convicted largely based on a taped confession given during a custodial interrogation.[13] Like Petitioner, Mr. Hayes did not confess during his first taped statement. Indeed, Mr. Hayes initially told

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[12] John E. Reid & Assocs., *The Reid Technique: A Position Paper*, (Aug. 2015), https://reid.com/educational_info/r_tips.html?serial=20150501-1&print=[print].

[13] Innocence Project, *Travis Hayes*, https://www.innocenceproject.org/cases/travis-hayes. (last accessed Apr. 2, 2018).

police that he was not in the area where the crime occurred. Like Petitioner, Mr. Hayes was a child when interrogated. And like Petitioner, Mr. Hayes had an IQ consistent with an intellectual disability. Despite his confession, Travis Hayes was innocent, and, after serving nine years in prison, Mr. Hayes was exonerated by DNA evidence in 2007.[14]

IPNO also represented Bobby Ray Dixon, a Mississippi man who suffered from a debilitating intellectual disability.[15] Mr. Dixon confessed to a role in a brutal rape and murder, receiving a life sentence in 1980, even though he was nowhere near the crime scene. Remarkably, two other men, Phillip Bivens and Larry Ruffin, falsely confessed to the same crime. Nearly 30 years later, DNA evidence exonerated all three men and implicated a single serial rapist. Mr. Dixon was terminally ill when the DNA results came back. Though he lived long enough to be released from prison, and to see his conviction reversed, he died before he was formally exonerated. Mr. Ruffin died in prison years before the DNA results cleared him. Only Mr. Bivens lived to see himself and his co-defendants exonerated, but died a few years after. [16]

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[14] *See id*.

[15] Innocence Project, Bobby Ray Dixon, https://www.innocenceproject.org/cases/bobby-ray-dixon/ (last accessed Apr. 2, 2018); see also Contaminated Confessions Revisited, *supra* n.6, at 400 n.15.

[16] *See id*.

IPNO's experience in cases that it has handled is consistent with other false confession cases across the country. A California jury wrongly convicted David Allen Jones of three 1992 murders to which he falsely confessed. Jones had an IQ of 62, and after officers took him to each crime site and interrogated him in custody, he signed a written confession. He served nine years in state prison until DNA evidence exonerated him of the murders.[17] In Florida in 1980, Jerry Townsend, a 26-year-old man with the mental capacity of an eight-year-old, was arrested for the rape of a pregnant woman. During the subsequent investigation, he confessed to committing six additional murders, apparently in an effort to please authorities. Over two decades later, DNA evidence exonerated Townsend of the rape and placed in doubt his additional confessions.[18]

These examples are neither unique, nor exhaustive, of the intellectually disabled defendants who falsely confess. IPNO and many other organizations regularly represent individuals who falsely confessed under the pressure of custodial interrogations. Often the false confession was not procured by any investigative misconduct. Rather, as discussed above, attributes associated with intellectual disabilities combined with the pressure inherent in a custodial

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[17] The Nat'l Registry of Exonerations, *David Allen Jones*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3335 (last accessed Apr. 2, 2018).

[18] The Nat'l Registry of Exonerations, *Jerry Townsend*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3697 (last accessed Apr. 2, 2018).

interrogation often lead inexorably to acquiescence and admissions of guilt.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO CONFIRM THAT THE SIXTH CIRCUIT, NOT THE LOUISIANA COURTS, FOLLOWED THE CORRECT APPROACH WHEN CONSIDERING THE RELEVANCE OF AN INTELLECTUAL DISABILITY TO THE *BRADY* MATERIALITY ANALYSIS.

Petitioner has established that exculpatory information was withheld from him. A court determined that Petitioner suffers from an intellectual disability. This immutable condition existed at the time he confessed to the crime at issue. If Petitioner's case arose in the Sixth Circuit, the court would have considered the fact of his intellectual disability as part of the required materiality analysis. Because Petitioner's case was considered by the courts of Louisiana, however, his confession was treated as unassailable. This case demonstrates a clear split in the law and provides an ideal vehicle for this Court to resolve it. IPNO respectfully urges this Court to resolve the split in favor of the Sixth Circuit's approach and ensure that *Brady*'s protections are properly applied to Petitioner and defendants like him.

A. The Sixth Circuit's Approach Is Consistent with This Court's *Brady* Precedent.

As discussed in Petitioner's brief at 31-32, in *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014), the Sixth Circuit held that evidence withheld from the defense, including "tips, leads, and witness statements" pertaining to other suspects, was material evidence

under *Brady*. The court further found that the failure to disclose this evidence violated the defendant's due process rights even though the defendant confessed to the murder. *Id*. at 394-95. In deciding that a due process violation occurred, the court expressly took account of the fact that Mr. Bies was intellectually disabled at the time he confessed—a fact that had been found by the trial court. *Id.* at 394, 402-03. The court reached the same result *Gumm v. Mitchell*, 775 F.3d 345, 361-62 (6th Cir. 2014).

The Louisiana court's refusal to consider the effect of Petitioner's intellectual disability on his confession when conducting the materiality analysis required by *Brady*, combined with the Louisiana Supreme Court's denial of the writ, conflicts with the approach taken by the Sixth Circuit in *Bies* and *Gumm*. The Sixth Circuit's approach, however, is more consistent with this Court's precedents than Louisiana's approach.

In *Kyles*, this Court made clear that *Brady* materiality must be assessed as if the evidence had been disclosed to "competent" counsel. 514 U.S. at 441. In *Bagley*, this Court instructed that the impact of the State's disclosure failures must be considered "in light of the totality of the circumstances" and this may include "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." *Bagley*, 473 U.S. at 683; *see also Wood v. Bartholomew*, 516 U.S. 1, 7-8 (1995) (reversing circuit court's conclusion that withheld evidence was material because court disregarded post-conviction testimony of trial counsel). Considering a judicially determined fact about a condition that existed at the time of trial, that makes

it more probable the defendant is not guilty is also consistent with the *Brady* rule's protective purpose. *Herrera*, 506 U.S. at 398-99; *Bagley*, 473 U.S. at 675; *Agurs*, 427 U.S. at 112.

Considering a defendant's intellectual disability—even if not judicially determined until after conviction—is consistent with this Court's precedent. The Sixth Circuit's approach reduces the risk that intellectually disabled people who falsely confess to crimes they did not commit will be denied due process protections. Intellectual disabilities of the sort that Petitioner has do not wax and wane; they remain constant over time. They are also fairly easy to discern, and certainly were in this case, as demonstrated by the fact that even the investigating officers thought Petitioner was being set up—until he confessed. Allowing a prosecutor to withhold concededly exculpatory information from an intellectually disabled defendant, who may have falsely inculpated himself due to his disability, and then to escape the consequences of that conduct by reference to that same confession, without permitting the court to consider the fact of the defendant's disability, effectively eviscerates the protections afforded by *Brady* from the category of defendants most in need of it.

The Sixth Circuit's approach does not disturb the finality of convictions by requiring the consideration of evidence that did not exist at the time of trial. In *Apanovitch v. Bobby*, the Sixth Circuit reversed a district court's consideration of DNA results, produced two decades after trial, in its *Brady* analysis. 648 F.3d 434, 437 (6th Cir. 2011). Similarly, in *Turner v. United States*, the petitioners—each convicted of murder in 1985—argued that the D.C. Court of Appeals should consider a remarkably

similar murder that occurred in 1992 to determine materiality under *Brady*. 116 A.3d 894, 917 (D.C. 2015). The court of appeals refused, reasoning that *Brady* does not require the government to do the impossible and disclose evidence that could not have been presented at trial, because it had not occurred. *Id.* at 917-18. And the Supreme Court of Delaware rejected, in a footnote, that an affidavit recanted after trial was relevant under *Brady*. *See Wright v. State*, 91 A.3d 972, 990 n.61 (Del. 2014). Unlike in these cases, Petitioner's intellectual disability existed before, at, and after the time of trial. And most importantly for this case's *Brady* analysis, it existed at the time of his confession. Therefore, as Petitioner explains in his petition, this record is substantially more compelling and troubling than *Apanovich*, *Turner*, and *Wright*. The Louisiana courts' treatment of the issue presents a square conflict with the Sixth Circuit's decisions in *Bies* and *Gumm*.

B. Courts Have Recognized the Importance of Heightened Procedural Safeguards in Cases Involving Intellectually Disabled Defendants.

Consistent with the Sixth Circuit's approach, courts, including this Court, have repeatedly recognized that people with intellectual disabilities warrant special consideration in the criminal justice system. *See, e.g.*, *Hall*, 134 S. Ct. at 1993 (state's rigid rule foreclosing exploration of intellectual disability for IQ scores above 70 "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional"); *Atkins*, 536 U.S. at 321 ("death is not a suitable punishment for a mentally retarded criminal"); *see*

also United States v. Preston, 751 F.3d 1008, 1018 n.13 (9th Cir. 2014); *Bies*, 775 F.3d at 388; *Gumm*, 775 F.3d at 357-58.

In *Preston*, the Ninth Circuit sitting *en banc*, found a defendant's confession to be involuntary, based in part on his intellectual disability and youth at the time of questioning. *See Preston*, 751 F.3d at 1010. The court noted that "although low intelligence does not categorically make a confession involuntary, it is 'relevant . . . in establishing a setting' in which police coercion may overcome the will of a suspect." *Id.* at 1016 (quoting *Procunier v. Atchley*, 400 U.S. 446, 453-54 (1971) (omission in original)). Thus, the court determined that it could not "resolve this case by labeling the questioning either inherently coercive or not. Instead, we must evaluate the law enforcement tactics used in conjunction with Preston's serious intellectual disability." *Id.* at 1017.

Admittedly, the question of whether a confession is voluntary raises different doctrinal considerations than the issue of whether withheld exculpatory evidence is material under *Brady*. Each inquiry, however, requires courts to consider and weigh the totality of the circumstances without resort to talismanic definitions or checklists. *See Dickerson v. United States*, 530 U.S. 428, 434 (2000) (courts must look to "all the surrounding circumstances" in determining the voluntariness of a confession) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (internal quotation marks omitted)); *Agurs*, 427 U.S. at 112 (materiality under *Brady* "must be evaluated in the context of the entire record"). For the Ninth Circuit, that meant that the interrogation techniques employed needed to be considered against the defendant's individual circumstances, including his age

and intellectual disability. *Preston*, 751 F.3d at 1020. Recognizing many of the same traits discussed in this brief—including unusual susceptibility to the perceived wishes of authority figures, a generalized desire to please, and difficulty discerning the adversarial nature of a given situation—the court found that the defendant's confession was involuntary, even though the same interrogation tactics used against a different defendant might have passed constitutional muster. *Id.* at 1021-22, 1027-28; *see also People v. Knapp*, 124 A.D.3d 36, 45-48 (N.Y. App. Div. 2014) (defendant's statements were involuntary "based upon the totality of the circumstances, including defendant's intellectual limitations [and] his suggestibility and compliance tendencies").

C. The Evidence of Petitioner's Intellectual Disability Is Well Developed and Not in Dispute.

When the trial court determined Petitioner was intellectually disabled under "Louisiana law (and any other universal standard)" *see* Pet. App. 34a, it reviewed an evidentiary record beginning when Petitioner was two years old. The court found the evidence of Petitioner's sub-average intellectual functioning was "consistent and compelling" as demonstrated by multiple IQ tests administered periodically over the course of Petitioner's life, including when he was 10 and 14 years old, twice in the years leading up to his trial, and twice in advance of the *Atkins* hearing. *Id.* at 26a-27a. In addition, the court reviewed "voluminous institutional records" reflecting both "low adaptive functioning" and "peculiar and inappropriate misbehavior" on the part of Petitioner over the course of his life,

including acts such as eating dirt, paper, lead paint chips, and other toxins; frequent self-urination that continued until his incarceration; and persistent drooling. *Id.* at 29a-30a. Of the two experts who evaluated Petitioner's habitual or typical behaviors as a measure of his ability to adapt in his environment, one testified that Petitioner's score was "less than the 1st percentile and considered significantly low," and the other testified that Petitioner's adaptive behavior deficits were "in the moderate to severe range." *Id.* at 29a.

The court also looked to collateral interviews conducted by experts, including an interview of a close family member, who reported that throughout Petitioner's life, he was a "wanna be," a "yes man," a "duck" or a "chump," and a "'puppet' that would uncritically do what others said." *Id.* at 31a. That same family member reported that Petitioner "had indeed 'taken the rap' for him on a prior charge and that he was known for this." *Id.* He confirmed Petitioner's records and the experts' own observations that Petitioner "had never fully mastered toileting," "chronically smelled of urine from soiling himself at night and having poor hygiene," and "was known to 'eat dirt' and other nonnutritive substances including toilet paper and school paper." *Id.* at 31a-32a.

All of the experts testified that there were "multiple possible etiologies" for Petitioner's intellectual disability, including a report cited by the court reflecting that Petitioner had "the most extreme case of lead poisoning that I have seen. He had documented lead levels well over the established safe limit. And, he had chronic exposure stretching over many years . . . during a critical phase of brain

development." *Id.* at 32a-33a. While "[l]ead's effects on IQ begin at 10 mg/dl," Petitioner's medical records reflected that from the ages of two to eight, he had lead levels ranging from 35 to 102 mg/dl. *Id*. The court also noted there may be a hereditary component to Petitioner's intellectual disability, as his mother was diagnosed as mentally retarded when she was a child. *Id.* at 34a.

None of the experts believed that Petitioner was malingering. *Id.* To the contrary, one testified that Petitioner "tried his very hardest" on the tests he was given. *Id.* at 34a n.8. The court itself noted that "throughout the hearing, [Petitioner] consistently appeared puzzled, confused and confounded." *Id.* at 30a n.7. Petitioner even "fell asleep, which the Court construed not as a lack of interest or disrespect but, rather, [Petitioner's] lack of ability to engage in the world around him." *Id.* It was on the basis of all of this evidence, amassed from Petitioner's entire life, and presented to the court over a four-day period, that the court determined that Petitioner was intellectually disabled.

D. Petitioner's Confession has Other Hallmarks of Being False.

Several factors taken in conjunction with Petitioner's intellectual disability raise serious doubts about the reliability of his confession. These include:

- *Petitioner's Youth.* Petitioner was barely sixteen when he confessed. As discussed above, youth and intellectual disability are the two best predictors of a person's vulnerability to falsely confessing. Moreover, Petitioner's assigned protector during his interrogation—his mother—also suffered from an intellectual

disability and was scarcely better equipped than him to withstand the pressures of interrogation. *Id.* at 34a.

- *Contamination*. It is routine for false confessions to include some accurate details of the crime.[19] This is usually because the suspect, often inadvertently, learned details of the crime from law enforcement. In this case Petitioner spent unrecorded time with law enforcement, and had a post-crime, pre-confession, phone conversation with one of the older people involved in the crime. Writ App. 2:242.[20]
- *Length of Interrogation*. Petitioner was at the police station for roughly six hours when he confessed. Writ App. 2:242, 252, 284. While his recorded interrogations were relatively brief, it is apparent that at least some unrecorded discussions with police occurred. Writ App. 2:242, 252. Long interrogations are a consistent factor in false confessions.[21]
- *Incorrect and Missing Details*. Petitioner gave incorrect details of the crime when he con-

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[19] *See generally,* Contaminated Confessions Revisited, *supra* n.6; Substance of False Confessions, *supra* n.6.

[20] This brief adopts the petition's style references to the state court records. "'Writ-App. X:Y' refers to volume X, page Y of the appendix filed with the Louisiana Supreme Court. 'R.' refers to the state trial record." Pet. 5 n.1.

[21] *See* Contaminated Confessions Revisited, *supra* n.6, at 402-03.

> fessed such as that the victim was beaten during the crime. Writ App. 2:253. He also appeared unaware of central details of the crime such as the fact the money was robbed from the victim. Writ-App. 2:256; R. 2459-60. These kind of factual errors are a hallmark of false confessions.[22]

The Louisiana courts should have considered this evidence in the context of Petitioner's intellectual disability as would have been done in the Sixth Circuit.

CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should be granted and the judgment below should be reversed.

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Respectfully Submitted,

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[22] *See* Substance of False Confessions, *supra* n.6, at 1086-90.

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