

No. 22-7337

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In The  
**Supreme Court of the United States**

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TOFOREST ONESHA JOHNSON, PETITIONER,

*v.*

ALABAMA  
—◆—

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE COURT OF CRIMINAL APPEALS OF ALABAMA*

—◆—  
**BRIEF FOR DEATH ROW  
EXONEREE ANTHONY GRAVES AS  
AMICUS CURIAE SUPPORTING PETITIONER**

—◆—  
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**BRIEF FOR DEATH ROW  
EXONEREE ANTHONY GRAVES  
SUPPORTING PETITIONER**

Anthony Graves respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.<sup>1</sup>

**INTEREST OF AMICUS CURIAE**

Anthony Graves is one of nearly 200 death row exonerates. He spent 18½ years in prison, 16 of those years in solitary confinement, and 12 of those years on Texas's Death Row. Twice, he was given an execution date. Mr. Graves's conviction was based on the testimony of a purported accomplice whose prior inconsistent statements were concealed from the defense.

Yet Mr. Graves did not commit the crimes of which he was convicted. After the Fifth Circuit vacated his conviction, the new district attorney unequivocally concluded that Mr. Graves is "an innocent man" and that "[t]here is nothing that connects Anthony Graves to th[e] crime."<sup>2</sup> A special prosecutor charged with conducting any retrial found that the original prosecutor's

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<sup>1</sup> All counsel of record were given timely notice of amicus's intent to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or his counsel made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> Brian Rogers & Cindy George, *Texas Sets Man Free from Death Row*, HOUSTON CHRONICLE (Oct. 27, 2010), <http://www.chron.com/news/houston-texas/article/Texas-sets-man-free-from-death-row-1619337.php>.

handling of the case had been a “criminal justice system’s nightmare” and that Mr. Graves’s trial had been a “travesty.”<sup>3</sup>

Because Mr. Graves could have been wrongfully executed but for a *Brady v. Maryland* claim based on suppressed impeachment evidence, he has a strong interest in ensuring that courts do not wrongly deny *Brady* claims that are based on such evidence—as the Alabama courts did in the rulings below.

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<sup>3</sup> Martha Neil, *Prosecutors Blast Ex-DA in ‘Nightmare’ Case of Innocent Man Jailed 18 Years*, ABA JOURNAL (Oct. 28, 2010), [http://www.abajournal.com/news/article/prosecutors\\_blast\\_ex-da\\_in\\_nightmare\\_case\\_of\\_innocent\\_man\\_who\\_served\\_18\\_yea/](http://www.abajournal.com/news/article/prosecutors_blast_ex-da_in_nightmare_case_of_innocent_man_who_served_18_yea/).



## INTRODUCTION AND SUMMARY OF ARGUMENT

This brief tells the stories of Anthony Graves and other death row exonerees. These individuals were wrongfully convicted and sentenced to death based on testimony that would have been discredited had prosecutors not concealed material impeachment evidence. Their experiences demonstrate how *Brady* claims based on such evidence save innocent individuals from wrongful execution. And they highlight the danger of rulings, like that below, that mistakenly deny *Brady* claims based on an unreasonable assessment of that evidence.

The disclosure of material evidence favorable to the defense is a critical safeguard against the erroneous conviction of innocent defendants. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Brady* serves that purpose by requiring prosecutors to disclose such evidence in advance of trial and by requiring that convictions or punishments secured in violation of that duty be set aside. *United States v. Agurs*, 427 U.S. 97, 107-08 (1976).

As this Court has recognized, there is no “difference between exculpatory and impeachment evidence for *Brady* purposes.” *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); see also *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). The suppression of either type of evidence, if material to the defendant’s guilt and favorable to the

defense, creates a substantial risk that an innocent defendant will be convicted.

Because “[t]he guarantees of *Brady* and its progeny serve the vital purpose of insuring that a conviction is consistent with the ‘rudimentary demands of justice,’” courts must be “cognizant of the risks of paying token respect to *Brady*’s mandate.” *United States v. Fields*, 763 F.3d 443, 461 (6th Cir. 2014) (quotation marks omitted). Courts should thus view with suspicion the government’s post-hoc justifications for withholding evidence and characterizations of that evidence. And no court should hesitate to discount implausible findings that fail to recognize the clear significance of evidence under *Brady*. See, e.g., *United States v. Cessa*, 861 F.3d 121, 129 (5th Cir. 2017) (“The district court clearly erred in finding that [certain withheld documents] were not favorable to the defense.”).

Mr. Graves’s own experience reflects the critical importance not just of *Brady*’s protections, but also of courts’ proper application of *Brady*. Mr. Graves spent almost two decades in prison and was sentenced to death for crimes he did not commit. Years after his conviction, he had the opportunity to present favorable impeachment evidence the prosecution had suppressed. Had the court reviewing his *Brady* claim failed to recognize the importance of that evidence—or had it accepted implausible arguments by the State as to the value of that evidence—Mr. Graves might still be incarcerated today. Indeed, he may have been wrongfully executed. Yet those are the precise errors

the Alabama courts committed when rejecting petitioner's *Brady* claim.

Nor is Mr. Graves's story an isolated occurrence. As shown below, he is one of the many death row exonerees who were convicted after prosecutors concealed material impeachment evidence. Collectively, these individuals wrongly spent many decades in prison and on death row. Like in Mr. Graves's case, *Brady's* correct application to concealed impeachment evidence was critical to these exonerees' freedom—and to their lives.

## ARGUMENT

### I. THE STORY OF ANTHONY GRAVES DEMONSTRATES THE IMPORTANCE OF THE PROPER ASSESSMENT OF *BRADY* CLAIMS AND ILLUSTRATES THE ERRORS IN THE RULINGS BELOW

Mr. Graves's experience demonstrates that, for *Brady* to have any meaning, courts must carefully assess the evidence at issue, including the context in which it was withheld, to determine whether it should have been disclosed to the defense. The Alabama courts failed to do so here—effectively nullifying petitioner's *Brady* rights despite his likely innocence.

1. When he was 26 years old, Mr. Graves was arrested for the murder of six people. He was later convicted and sentenced to death. Mr. Graves spent 18½ years in prison, 12 of those years on death row. *Graves v. Dretke*, 442 F.3d 334, 336 (5th Cir. 2006) ("*Graves*

*III*”). He came close to being executed on two occasions. And but for *Brady v. Maryland*, he might have been.

The chain of events leading to Mr. Graves’s wrongful conviction began when six members of the Davis family were murdered in the small town of Somerville, Texas.<sup>4</sup> The family members had been killed in the middle of the night, and their house had been set on fire. *Graves v. Cockrell*, 351 F.3d 143, 147-48 (5th Cir. 2003) (“*Graves I*”). Robert Earl Carter, the father of one of the murdered children, became the prime suspect when he arrived at the funeral heavily bandaged and badly burned. Carter was promptly taken in for questioning. The police did not believe Carter had acted alone. After hours of intense interrogation demanding that Carter name an accomplice, he finally named one: Mr. Graves, his wife’s cousin.<sup>5</sup>

Other than that interrogation-induced statement, no other evidence implicated Mr. Graves. He had no connection to the Davis family. He barely knew Carter. He had no plausible motive to commit the murders.<sup>6</sup> No physical evidence tied him to the crime. *Graves III*, 442 F.3d at 340, 344-45. Unlike Carter, Mr. Graves had no burns. Several people insisted that Mr. Graves had been at his mother’s home when the murders

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<sup>4</sup> Pamela Colloff, *Innocence Lost*, TEXAS MONTHLY (Oct. 2010), <http://www.texasmonthly.com/articles/innocence-lost> (“Innocence Lost”).

<sup>5</sup> Innocence Lost; *Graves III*, 442 F.3d at 337 & n.1.

<sup>6</sup> Innocence Lost.

occurred.<sup>7</sup> And Mr. Graves consistently maintained his innocence. *Id.* at 340.

The state charged him anyway. As the Fifth Circuit later observed, “Carter was the state’s star witness” and the “state recognized that its case depended on the credibility of Carter.” *Id.* at 340-41. But Carter’s credibility was far from assured. He had already been convicted of the six murders, and “[g]iven the number of inconsistent statements Carter had given, the state faced a difficult job of persuading the jury that Carter was a credible witness.” *Id.* at 341.

Of particular concern was Carter’s grand jury testimony. There, he testified that neither he nor Mr. Graves had committed the murders. But the prosecutor explained that away at trial by eliciting testimony that Carter had lied to the grand jury because he was “afraid” after Mr. Graves purportedly “threatened him physically and verbally.” *Id.* at 341 & n.6. And to demonstrate that the inconsistent grand jury testimony was a one-time anomaly, the prosecutor elicited the following testimony from Carter:

Q. With the exception of where you have totally denied everything, have you always implicated Graves as being with you?

A. Yes. \* \* \*

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<sup>7</sup> Pamela Colloff, *Innocence Found*, TEXAS MONTHLY (Jan. 2011), <http://www.texasmonthly.com/articles/innocence-found> (“Innocence Found”); *Innocence Lost*.

Q. With the exception of the time you went to the grand jury and denied any involvement, all the different stories that you told have all involved Anthony Graves, have they not?

A. They have.

*Ex parte Graves*, 271 S.W.3d 801, 822 n.6 (Tex. Ct. App. 2008) (Vance, J., dissenting) (omission in *Ex parte Graves*).

Based on Carter's testimony, the jury convicted Mr. Graves and he was sentenced to death. Without *Brady*, Mr. Graves's story would likely have ended there.

2. As was later revealed, Carter was even less credible than the prosecutor had led the jury to believe. Just hours before testifying, Carter told the prosecutor Mr. Graves had nothing to do with the murders. And Carter revealed a powerful reason for having falsely implicated Mr. Graves: to protect his wife. *Graves III*, 442 F.3d at 336-39, 342.

The evening before he testified, Carter met with the prosecutor. *Id.* at 337. Rather than implicate Mr. Graves, though, Carter told the prosecutor: "I did it all myself, Mr. Sebesta. I did it all myself." *Ibid.* Yet the prosecutor insisted that Carter must have had accomplices. *Ibid.* So Carter changed his story again, implicating Mr. Graves and a person known as "Red." *Ibid.* The prosecutor then suggested "Red" must be Carter's wife, Theresa Carter. But Carter denied his wife was involved and agreed to take a polygraph. *Ibid.*

The polygraph showed that Carter was being untruthful. So Carter altered his story once again. This time, he admitted his wife was involved. *Id.* at 337-38. That admission was significant: it was the first time Carter had implicated her in the murders. *Graves v. Cockrell*, 351 F.3d 156, 158 (5th Cir. 2003) (“*Graves II*”). But to protect her, Carter conditioned his testimony against Mr. Graves on the prosecution’s not questioning him about his wife’s involvement in the murders. None of Carter’s statements that Mr. Graves had nothing to do with the murders—or about Carter’s wife’s involvement—were revealed to the defense. *Ibid.*

Twelve years after Mr. Graves was placed on death row, the Fifth Circuit held that the prosecution’s concealment of Carter’s statements required vacatur of Mr. Graves’s conviction. *Graves III*, 442 F.3d at 345. The Fifth Circuit explained it was “obvious from the record that the state relied on Carter’s testimony to achieve Graves’ conviction,” such that Carter’s credibility was the central issue at trial. *Id.* at 340. The court then concluded that Carter’s suppressed statements would have been “powerful ammunition” with which to impeach Carter. *Id.* at 341 (quoting *Graves I*, 351 F.3d at 155). His statement exculpating Mr. Graves “may well have swayed one or more jurors to reject Carter’s trial version of the events.” *Ibid.* His statement implicating his wife was not only exculpatory, but also “provide[d] a stronger argument to Graves that Carter was lying about Graves['] involvement to save” his wife. *Id.* at 343. In so concluding, the Fifth Circuit expressly “disagree[d]” with the

district court's contrary view that this "statement was not exculpatory." *Id.* at 342.

The Fifth Circuit then determined that the suppressed statements, considered together, were material. *Id.* at 344; *see id.* at 339 ("Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (quoting *Kyles*, 514 U.S. at 433)). Indeed, the court observed, the statements were "particularly important \* \* \* because Graves' conviction rests almost entirely on Carter's testimony and there [was] no direct evidence linking him with Carter or with the murder scene other than Carter's testimony." *Id.* at 344-45.

3. Mr. Graves spent four more years in prison after the Fifth Circuit's ruling. A special prosecutor was appointed to re-investigate the case. Ample evidence supported Mr. Graves's innocence. On numerous occasions, Carter recanted his trial testimony, even admitting he had falsely testified to protect his wife.<sup>8</sup> Indeed, moments before Carter's execution, he stated: "It was me and me alone. Anthony Graves had nothing to do with it. I lied on him in court."<sup>9</sup> Based on this and other evidence, the special prosecutor concluded Mr. Graves was innocent, and Mr. Graves was finally released from prison.<sup>10</sup>

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<sup>8</sup> Innocence Lost; *Graves III*, 442 F.3d at 338.

<sup>9</sup> Innocence Lost.

<sup>10</sup> Innocence Found.



Since his release, Mr. Graves has dedicated himself to helping ensure that what happened to him does not happen to others. Mr. Graves founded the Anthony Graves Foundation, an organization committed to promoting fairness and effecting reform in the criminal justice system. He also established the Nicole Casarez Scholarship at the University of Texas Law School, a scholarship named in honor of his habeas corpus counsel.

4. Mr. Graves's experience illuminates the profound errors made by the Alabama courts in denying petitioner's *Brady* claim.

Petitioner presented ample evidence that the prosecution's key witness, Violet Ellison, had testified in hope of a publicized \$5,000 reward, and that the State knew this at the time of trial. Among other documents, he submitted both a letter from the then-District Attorney to the Governor which stated that "Ellison, pursuant to the public offer of a reward, gave information leading to the conviction of Toforest Johnson" and a copy of the check Ellison received shortly after petitioner's conviction was affirmed. Pet. 9. Petitioner also explained how the State had concealed this evidence for nearly two decades, disclosing the records only after a former state employee told petitioner about their existence in 2018. Pet. 13-14. And he highlighted the inconsistencies between the State's account and Ellison's account—both as to the reward payment and as to the facts of the crime itself. Pet. 6, 19-20.

Had petitioner possessed this evidence before his trial, he could have impeached Ellison's credibility by arguing her testimony was influenced by the promised reward. *Cf. Graves III*, 442 F.3d at 343 (concluding a suppressed statement would have "provide[d] a stronger argument to Graves that Carter was lying about Graves['] involvement to save" his wife). The Alabama courts nonetheless denied petitioner's *Brady* claim. On their reasoning, petitioner had failed to present any evidence suggesting Ellison knew about the reward before she testified. Pet. App. 15a ("The State cannot suppress evidence that does not exist." (quoting *Gavin v. State*, 891 So. 2d 907, 986 (Ala. Crim. App. 2003))). Among other things, the courts concluded that the letter stating that "Ellison, pursuant to the public offer of a reward, gave information leading to the conviction of Toforest Johnson" did *not* indicate Ellison had known about the reward when she gave the information. Pet. 9.

That conclusion defies both the record and common sense. It also incentivizes prosecutors to conceal impeachment evidence, assured that they can avoid *Brady* by offering post-hoc explanations for their concealment—no matter how implausible. Moreover, the Alabama courts' reasoning requires ignoring the many inconsistencies in Ellison's and the State's stories, the years-long concealment of the reward, and the calls for a new trial from the current District Attorney and former prosecutor. *See* Pet. 13-23. By merely "paying token respect to *Brady*'s mandate, while in practice \* \* \* undercut[ing] *Brady*'s promise," *Fields*, 763 F.3d at

461, the Alabama courts' rulings place at risk defendants who have been wrongly convicted yet have meritorious *Brady* claims. Indeed, had the Fifth Circuit similarly taken such a strained and unreasonable view of the evidence in Mr. Graves's case—including by uncritically accepting the district court's view that Carter's statements implicating his wife were not favorable—an innocent person would likely have been executed.

The rulings below should not evade this Court's review simply because they shroud a constitutional violation in a patently unreasonable view of the facts. The Court should once again intervene because while the record evidence here “plainly belie[s] the State's claim,” *Foster v. Chatman*, 578 U.S. 488, 513 (2016), the Alabama courts adopted a “dismissive and strained interpretation of” that evidence to deny petitioner relief, *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003).

## **II. MANY OTHER DEATH ROW EXONEREES HAVE HAD THEIR CONVICTIONS OVERTURNED UNDER *BRADY* ON THE BASIS OF SUPPRESSED IMPEACHMENT EVIDENCE**

Mr. Graves is not the only innocent person wrongfully convicted and sentenced to death after a prosecutor concealed evidence that would have impeached a key prosecution witness. Time and again, *Brady v. Maryland* has served as a necessary safeguard against prosecutorial misconduct—both to protect the integrity of the criminal justice system and to safeguard the

rights of innocent defendants. *Brady* ensures that prosecutors abide by their constitutional, professional, and ethical obligations to turn over material exculpatory and impeachment evidence. And *Brady* affords defendants a vital remedy when prosecutors fail to meet those obligations. Indeed, *Brady* claims have played a significant role in overturning the convictions of death row exonerees. Since 1973, 191 death row inmates have been exonerated.<sup>11</sup> In nearly a quarter of those cases, a prosecutor's *Brady* violation contributed to the exoneree's wrongful conviction. See Appendix: Death Row Exonerees With *Brady* Claims. And in several of those cases, reviewing courts have corrected implausible findings that would have effectively deprived a defendant of his or her *Brady* rights.

These cases underscore the need for this Court's review here. Wrongful denials of *Brady* claims strip away a critical safeguard against the execution of innocent people. If courts—as the Alabama courts did here—disregard facts that impeach a key witness's credibility, the protections guaranteed by *Brady* become illusory. The following are examples of cases in

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<sup>11</sup> A defendant is considered exonerated when (1) the defendant's conviction has been overturned and all charges are dropped or the defendant is acquitted on retrial, or (2) the defendant is absolutely pardoned on the basis of innocence. See The Innocence List, Death Penalty Information Center (“The Innocence List”), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited May 12, 2023). Thousands more defendants with lesser sentences have also been exonerated. See National Registry of Exonerations (listing 3,311 exonerations since 1989), <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited May 12, 2023).

which the prosecution's suppression of material impeachment evidence resulted in the conviction of an innocent person. In each of these cases, the reviewing court carefully and rigorously assessed all the evidence before it, consistent with its obligation under *Brady*.

- ***Yancy Douglas and Paris Powell***. In 1995 and 1997 respectively, Douglas and Powell were convicted of the murder of Shauna Farrow. Derrick Smith testified as an eyewitness to the murder at both trials. "Smith's testimony, and, in particular, his identification of Mr. Powell and Mr. Douglas as the shooters, was the 'linchpin' of the prosecution's case." *Douglas v. Workman*, 560 F.3d 1156, 1163 (10th Cir. 2009). "Had the jury discounted Smith's testimony as not credible, it almost certainly would not have had sufficient evidence on which to convict." *Id.* at 1174.

In both trials, the prosecutor elicited testimony from Smith indicating that there was no deal between the prosecution and Smith for his testimony. *Id.* at 1163, 1165. But, as both Powell and Douglas explained in their habeas petitions, the prosecutor failed to disclose a deal to intervene favorably in Smith's parole process in exchange for his eyewitness testimony. *Id.* at 1183-84. On habeas review, the district court held there was sufficient evidence of a deal between Smith and the prosecutor in connection with

Powell’s trial. But the court also held there was *not* sufficient evidence of the same deal in connection with Douglas’s earlier trial—even though the prosecutor had “sent a letter to the parole board in support of Smith’s application for parole \* \* \* [j]ust one day after Mr. Douglas’s trial concluded.” *Id.* at 1165.

On appeal, the Tenth Circuit granted habeas relief to both Powell and Douglas. *Id.* at 1187. When reversing the district court’s ruling on Douglas’s *Brady* claim, the court rejected the trial court’s conclusion that “the evidence [was] insufficient to demonstrate a deal prior to Mr. Douglas’s trial.” *Id.* at 1184. That view, the court explained, “require[d] belief in” two “exceedingly improbable premises”: that the prosecutor “suddenly became dishonest between the two trials” and that both Smith’s “interest in help and [the prosecutor’s] willingness to provide help suddenly sprang to life between the two trials.” *Ibid.* The Tenth Circuit instead concluded that the evidence “raise[d] the reasonable inference that Smith and [the prosecutor] had an agreement prior to Mr. Douglas’s trial.” *Ibid.* The state dropped the charges against Powell and Douglas.<sup>12</sup>

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<sup>12</sup> National Registry of Exonerations: Yancy Douglas and Paris Powell, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3187> and <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3548> (last visited May 12, 2023).

- ***Debra Milke***. In 1990, Milke was convicted of murdering her four-year-old son and was sentenced to death. Milke spent 22 years on Arizona’s death row. “The trial was, essentially, a swearing contest between Milke and Phoenix Police Detective Armando Saldate, Jr.” *Milke v. Ryan*, 711 F.3d 998, 1000 (9th Cir. 2013). Saldate testified that Milke “had confessed when he interviewed her shortly after the murder.” *Ibid.* But Milke denied confessing, and there were “no other witnesses or direct evidence linking Milke to the crime.” *Id.* at 1000-01. Although “[t]he judge and jury believed Saldate,” “they didn’t know about Saldate’s long history of lying under oath and other misconduct. The state knew about this misconduct but didn’t disclose it.” *Ibid.* The state court rejected Milke’s *Brady* claim in part because it “fail[ed] to consider all the evidence that was presented to it.” *Id.* at 1007-08.

The Ninth Circuit vacated Milke’s conviction. In doing so, it concluded the state court had “seriously mischaracterized key evidence that supported Milke’s claim.” *Id.* at 1007. Namely, the court “either misapprehended or ignored” multiple “court orders” in the record “finding that Saldate had lied under oath or violated the Fifth or the Fourth Amendments during interrogations” in other cases. *Id.* at 1008. Reviewing the record independently, including these court

orders, the Ninth Circuit determined there was ample “evidence that Saldate lied under oath and trampled the constitutional rights of suspects in discharging his official duties.” *Id.* at 1019. And the court concluded that it was “hard to imagine anything more relevant to the jury’s—or the judge’s—determination whether to believe Saldate than [this] evidence.” *Id.* at 1018-19.

In March 2015, the charges against Milke were dismissed. The Arizona Court of Appeals concluded that the violations in Milke’s case were “a severe stain on the Arizona justice system.”<sup>13</sup>

- ***Roderick Johnson.*** In 1997, Johnson was convicted on two counts of first-degree murder and sentenced to death. *See Commonwealth v. Johnson*, 174 A.3d 1050, 1051 (Pa. 2017). Years later, he discovered the prosecution had concealed police reports “that would have cast doubt upon the credibility of a key prosecution witness,” George Robles. *Ibid.* In affirming the grant of a new trial on this basis, the Pennsylvania Supreme Court carefully examined the evidence to determine whether the lower court’s factual findings were “supported by the record.” *Id.* at 1055. The court combed through the

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<sup>13</sup> National Registry of Exonerations: Debra Milke, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4660> (last visited May 12, 2023).



police reports and found they revealed: “that Robles hoped to receive favorable treatment from the authorities in exchange for providing information”; that “Robles had lied or deceived the police when it was in his interest to do so”; and that Robles had motives “to lie to further his ongoing collaboration with the” police and “to eliminate rival drug dealers such as Johnson’s affiliates.” *Id.* at 1057. This thorough review led the court to reject the prosecution’s argument that the reports were “insignificant.” *Id.* at 1058. A court dismissed all charges against Johnson in 2020, deeming the prosecutor’s conduct “egregious” and “contemptuous.” *Commonwealth v. Johnson*, No. 0118-97, at 30-32 (Pa. Ct. Common Pleas Oct. 29, 2020).<sup>14</sup>

- **Joe D’Ambrosio.** D’Ambrosio was convicted in 1989 of murder and sentenced to death. On habeas review, the court granted D’Ambrosio a new trial, holding that the prosecution had suppressed a wealth of exculpatory and impeachment evidence in violation of *Brady*. See *D’Ambrosio v. Bagley*, No. 1:00-CV-2521, 2006 WL 1169926, at \*20-24 (N.D. Ohio Mar. 24, 2006), *aff’d*, 527 F.3d 489 (6th Cir. 2008). The court assessed each item of withheld evidence not in isolation, but holistically, to determine its favorability and materiality. See, e.g., *id.* at \*27

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<sup>14</sup> <https://dpic-cdn.org/production/documents/Johnson-Roderick-PA-Berks-CP-Double-Jeopardy-Opinion-2020-10-29.f1608261054.pdf>

(“While, standing alone, this item has only marginal significance and, thus, would not normally factor-in to the Court’s *Brady* analysis, when considered in conjunction with [other undisclosed facts] \* \* \* the Court finds that the impeachment value of this information was sufficiently strong as to be exculpatory.”). Although the state attempted to retry D’Ambrosio, the Sixth Circuit barred his re-prosecution in 2011 because of the prosecutors’ misconduct, and the state eventually dropped all charges.

- ***James Edward Creamer.*** In 1973, Creamer was convicted of two murders and sentenced to death. See *Emmett v. Ricketts*, 397 F. Supp. 1025, 1047 (N.D. Ga. 1975). In 1975, after his conviction was overturned on the basis of a *Brady* violation, all charges were dropped.<sup>15</sup> Creamer’s conviction had been “obtained almost entirely on the strength of testimony provided by Deborah Ann Kidd.” *Id.* at 1030. Kidd “was the prosecution’s entire case” and “[h]er credibility was the pivotal issue” in determining Creamer’s guilt. *Id.* at 1041. The prosecution nonetheless failed to disclose, and subsequently destroyed, tape recordings of Kidd’s sessions with a county-paid hypnotist to help “reconstruct[]” her memory of the crime. *Id.* at 1037. In granting Creamer habeas relief, the court found

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<sup>15</sup> The Innocence List: Exoneree 5.

that the hypnotist—who “was as much a member of the prosecutorial team as any of the police officers investigating the murders”—“knew and appreciated the value of these tapes”; it also found the hypnotist’s explanation that the tapes were inadvertently destroyed “to be incredible.” *Id.* at 1038, 1041.

- ***Derrick Jamison.*** In 1985, Jamison was convicted of aggravated murder in connection with a robbery and sentenced to death. Charles Howell was “the central witness of the trial.” *Jamison v. Collins*, 291 F.3d 380, 389 (6th Cir. 2002). After Jamison spent 17 years in prison, the Sixth Circuit vacated his conviction because the prosecution had withheld critical evidence from the defense. This evidence included statements from Howell and another eyewitness that were inconsistent with Howell’s trial testimony. The Sixth Circuit explained that “Jamison could not impeach [Howell’s] testimony without access to the prior statements.” *Ibid.* Following the Sixth Circuit’s ruling, the charges against Jamison were dismissed and he was released from prison.<sup>16</sup>

As these exonerees’ stories demonstrate, *Brady* demands that courts meaningfully assess evidence to determine whether it was unlawfully suppressed—and obligates courts to correct rulings that dismiss the

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<sup>16</sup> The Innocence List: Exoneree 119.

value of such evidence for implausible reasons. If courts fail to do so, innocent individuals are put at risk of execution and the integrity of our criminal justice system is undermined.

Six years ago, this Court granted certiorari so that petitioner would have an opportunity to present his *Brady* claim. In casting aside long-concealed evidence that undermined a key witness's credibility, the courts below rendered that opportunity meaningless. That outcome is surely not what this Court intended. Like the exonerees whose experiences are described above, petitioner is entitled to a fair assessment of the suppressed impeachment evidence revealed here.

### CONCLUSION

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

Respectfully submitted,

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