No. _____

SUPREME COURT OF THE UNITED STATES

DICKENS ETIENNE,
Petitioner,

v.

MICHELLE EDMARK
NH STATE PRISON, WARDEN
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The purpose of *Brady* is to ensure that "criminal trials are fair," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and "that a miscarriage of justice does not occur," *United States v. Bagley*, 473 U.S. 667, 675 (1985). Placing the burden on prosecutors to disclose information "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecution is trusted to turn over evidence to the defense because its interest "is not that it shall win a case, but that justice shall be done." *Id.* (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)).

The prosecution in this case suppressed exculpatory material relating to a key prosecution witness in Etienne's murder trial, Jose Gomez. The New Hampshire Supreme Court found that the first two *Brady* prongs were met: that the evidence was favorable to Etienne and suppressed by the State. The State Court, district court, and First Circuit found, however, that the final *Brady* prong, prejudice, was not satisfied. It was Gomez's unparalleled testimony that, if believed, established both motive and intent to commit first degree, premeditated murder as well as undermined Etienne's claim, and only defense, that he acted in self-defense and defense of another. The suppressed exculpatory evidence, a proffer letter offering Gomez consideration for his attempts to cooperate with the State, would have, according to the State Court, "provided evidence that Gomez had attempted to cooperate with the State on the unrelated drug charges, and would have supported the defendant's assertion that Gomez had allegedly joined the prosecution's team."

The question presented—which finds its basis in this Court's clearly established precedent, involves an issue of growing national attention, and is an increasingly recurring issue—is as follows:

Where there was suppressed exculpatory evidence, in the form of a proffer letter demonstrating that a key prosecution witness who provided significant, and the only direct, evidence of premeditation sufficient to support a first degree murder conviction was offered consideration for his "attempts to cooperate with the State," did the First Circuit err in denying habeas relief by finding that the State Court's "no-prejudice determination" was not an unreasonable application of *Brady*?

LIST OF PARTIES

1. Dicken Etienne, Petitioner.

2. Michelle Edmark, NH State Prison, Warden, Respondent.

RELATED PROCEEDINGS

1. Supreme Court of the United States:

   Etienne v. Edmark, No. 23-5180 (Prior Petition Denied, October 2, 2023)

2. First Circuit Court of Appeals:

   Etienne v. Edmark, No. 20-2067 (Prior Judgment, April 20, 2023)

3. United States District Court, District of New Hampshire:

   Etienne v. Edmark, No. 1:18-CV-01156-SM (Summary Judgments, October 21, 2020 and November 2, 2023)

4. New Hampshire Supreme Court:

   State v. Etienne, Nos. 2004–833, 2006–919 (Direct Appeal, Judgment Affirmed, December 21, 2011)

   State v. Etienne, No. 2018-0093 (Discretionary Appeal Denied, March 29, 2018)

5. New Hampshire Superior Court:

   State v. Etienne, No. 04-S-1715 (Verdict and Sentence Entered, November 23, 2004)

   State v. Etienne, No. 216-2004-CR-1715 (Motion for New Trial Denied, January 23, 2018)

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The decision of the New Hampshire Supreme Court denying Mr. Etienne's direct appeal is reported as *State v. Etienne*, 35 A.3d 523, 163 N.H. 57 (2011), and reproduced in Appendix E.

The decision of the New Hampshire Superior Court denying Mr. Etienne's Petition for Writ of Habeas Corpus is unreported and produced in Appendix D. The decision of the New Hampshire Supreme Court denying Mr. Etienne's discretionary appeal of the Superior Court's decision is unreported and produced at Appendix C.

The district court's initial Order and Amended Order, both rejecting Mr. Etienne's federal Petition for Writ of Habeas Corpus, are not yet reported and are produced in Appendix B. The district court's denial of any certificate of appealability was included in its Orders rejecting Mr. Etienne's federal Petition for Writ of Habeas Corpus.

The First Circuit's decision affirming the district court's denial of habeas relief is reported at *Etienne v. Edmark*, 119 F.4th 194 (1st Cir. 2024), and reproduced in Appendix A. The First Circuit's Order granting a certificate of appealability and a prior Order are also unreported and produced in Appendix A.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on October 21, 2024. This Petition timely follows. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2)resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)
>
> (1)In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2)If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A)the claim relies on—
>
> (i)a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii)a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B)the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Amendment XIV, § 1 to the United States Constitution provides, in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Introduction

During his November 2004 murder trial,[1] Etienne claimed to have acted in self-defense and defense of another.[2] Following his conviction, Etienne learned that the State withheld impeachment evidence regarding Jose Gomez, a key State witness who undermined Etienne's defense theory and offered testimony establishing that Etienne premeditated the murder. Specifically, the suppressed evidence was a "proffer letter" that recommended that Gomez receive a suspended sentence on drug charges because of his "attempts to cooperate with the State."[3] As Gomez specifically denied, at trial, receiving any consideration for his cooperation with the State, Etienne filed a motion for a new trial alleging a material *Brady* violation.[4] The trial court denied this motion,[5] and Etienne appealed this decision to the New Hampshire Supreme Court as part of his direct appeal.

On direct appeal, the New Hampshire Supreme Court found that Etienne satisfied the first prong of the *Brady*[6] test, as defense counsel cross-examined Gomez extensively about his claim that he received no consideration for his pending drug charges in exchange for his testimony against Etienne.[7] The New Hampshire Supreme Court also found that Etienne satisfied the second prong of *Brady*, as the

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[1] Doc. 3-1: 2
[2] *State v. Etienne*, 35 A.3d 523, 533, 163 N.H. 57, 69 (2011).
[3] Doc. 28: 22.
[4] *Etienne*, 135 A. 3d at 533, 63 N.H. at 69.
[5] *Id.*
[6] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[7] *Id.*, 35 A.3d at 548, 163 N.H. at 89.

suppressed evidence was imputed to the State.[8] The New Hampshire Supreme Court affirmed Etienne's conviction, however, because it found that the suppressed evidence would not have altered the defense strategy nor would it have altered the outcome, as there was overwhelming additional evidence of premeditation before the jury.[9]

After losing his direct appeal, Etienne filed a pro se motion in state court requesting a new trial, which the Merrimack County Superior Court treated as a petition for writ of habeas corpus.[10] The trial court appointed counsel to represent Etienne, and post-direct appeal counsel discovered significant mental health records.[11] Etienne then consulted with an expert psychiatrist who found that Etienne was likely suffering from undiagnosed and untreated paranoid schizophrenia before and during his murder trial.[12] Counsel thereafter filed an amended pleading which included the claims that were ultimately presented to the federal court, to wit, a claim under *Brady* relating to the suppressed exculpatory evidence and an ineffective assistance of counsel claim relating to Etienne's mental health history.[13] This Court previously denied a Petition for Writ of Certiorari regarding the latter claim, leaving the *Brady* claim as the sole claim currently before this Court.

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[8] *Id.*, 35 A.3d at 550, 163 N.H. at. 91.
[9] *Id.*
[10] Doc. 3-1: 7
[11] Doc. 5-1: 24.
[12] Doc. 3-1: 7
[13] *Id.* at 9-17; 21-23; 29-31. *See also* Doc. Doc. 3-5: 2 (noting, in the order denying his post-direct appeal petition, that Mr. Etienne challenged the State Court's harmless error finding); Doc. 3-1: 2, 29-31 (arguing that newly discovered evidence required revisiting the Gomez issue); Doc. 19: 4 (indicating that Mr. Etienne's post-direct appeal proceedings tolled the limitations period).

There are two ways the jury could have understood the central facts leading up to the shooting of the decedent.[14]

On January 28, 2004, at 2:00am, the decedent, "wired" on ecstasy, invaded the apartment of Jenn Hannaford, the mother of Louis Pierre's children. The decedent and Pierre, who was friends with Etienne, "had issues" with each other. While there was some testimony that the decedent and Etienne had some disagreements, most witnesses—including the decedent's best friend—perceived no issues or hostility between them. Following his entry into Hannaford's apartment, the decedent attempted to sexually assault Hannaford. After ignoring her pleas to stop, refusing to let her answer the phone, and "giggl[ing]" at her request for him to leave, he finally left when Hannaford threatened to call the police. After a phone call with the decedent in which the decedent said, "I'll shoot the fair one with any of y'all bitch ass niggars," Etienne and Pierre went to Hannaford's apartment. Anticipating the decedent's arrival, and fearing for his safety and that of his children, Pierre armed himself with a gun. As did Etienne. Indeed, the decedent was known to regularly carry a gun. They, and others, then went out onto the porch. About a minute later, the decedent arrived.

The decedent approached Pierre on the porch, walking with "a speed, not a normal walk," or, as one State witness testified, a "ghetto walk," a type of walk that would, in part, indicate that he was carrying a weapon. He was "screaming" at Pierre. He got face-to-face with Pierre, about six inches away. His hand was

[14] The following facts are outlined, with record citations, in Doc. 00118121233 (First Circuit Case No. 23-1946), at 5-9.

suspiciously inside his jacket. Witnesses understood that the decedent was likely carrying a weapon. The decedent and Pierre began arguing, Pierre saw the decedent draw his gun and point it at him, and Pierre "was fearful of [his] life, for [his] safety." A witness heard the decedent say, "Fuck it. We can just shoot it out," then saw the decedent raise his arm as if he were drawing something out of his jacket. A second after the decedent made this threat and began drawing the gun out of his jacket, Etienne shot him. The decedent fell to the porch, with a loaded gun "right next to his hand." Pierre testified that Etienne "saved [his] life" by shooting the decedent before the decedent had a chance to kill Pierre. Commotion ensued, and everyone ran. It was hectic because, as Pierre testified, there was no plan to kill the decedent.

This narrative—one of fear, self-defense, and defense of another in response to an armed man, the decedent, who had been acting aggressively and erratically and who made an overt threat of deadly force just before he was shot—changes dramatically when we account for the State's star witness on motive and intent, Jose Gomez.

According to Gomez, and Gomez only, sometime in January 2004, Etienne expressed that he was thinking of killing the decedent. Gomez said Etienne "had a problem" with the decedent and was upset that the decedent was "[t]alking a lot of shit about him" and "hit[ting] on" his girlfriend. Gomez testified that Etienne used various slang meant to convey that he wanted to kill and "dispose of" the decedent.

Then comes the day of the shooting. Gomez testified that he received a call from Etienne, during which Etienne confirmed that he would kill the decedent, because the defendant was "talking shit to [Etienne] directly," and asked Gomez to meet him. Gomez testified that Etienne told him to bring a gun, which he did. Gomez did not "think it's right" for Etienne to want to kill the decedent. Gomez arrived to the apartment, after the shooting, and observed the decedent lying on the porch bleeding. Gomez picked up the decedent's gun and brought it into the apartment because, if the decedent got out of the hospital, Gomez did not "want him to go to jail for having a gun on him."

Gomez's testimony changed the nature of the shooting from an unplanned defensive maneuver to avoid deadly harm caused by a man threatening such, and who had just viciously attacked the mother of Pierre's children, to a premeditated murder that Etienne had been planning all month and apparently executed in the course of a fight between the decedent and another man. While some witnesses offered testimony on Etienne's disagreements with the decedent, most testified that they had no issues, and no other witness testified to hearing Etienne express any intent or motive to kill the decedent. Only Gomez. The State used Gomez at the beginning of their opening statement to portray Etienne as a cold, calculating killer from the start of trial. The State then highlighted Gomez's testimony in its summation. But, as we shall see, the State suppressed evidence establishing that Gomez was incentivized to provide critical evidence of premeditation, intent, and motive. While defense counsel attempted to chip away at the edges of Gomez's

denials of any consideration or incentive for his testimony, their efforts fell flat, as they lacked the necessary and suppressed support for their speculation.

The State Court's decision not only inaccurately characterized the nature of the suppressed evidence—a proffer letter granting the State's star witness on intent and premeditation consideration for his "attempts to cooperate with the State"—as "unrelated" to Etienne's case, but it also minimized the effect that the evidence it acknowledged was "favorable" could have had on the trial and departed from *Brady* and its progeny in doing so.

Further, the State Court employed a standard that is contrary to federal law. The standard used did not reflect the "reasonable probability" of a different result burden clearly established by the Supreme Court and, instead, the State Court employed a standard more akin to a preponderance burden and an analysis more akin to a sufficiency of the evidence test.

Accordingly, where the State Court's conclusion that the suppression of the favorable exculpatory evidence was not prejudicial is at odds with clearly established Supreme Court precedent, where compliance with *Brady* and protection of a criminal defendant's constitutional right to exculpatory evidence are of increasing importance in ensuring just outcomes in criminal proceedings, and where the issue in this case is likely to recur, this Court should grant this Petition and allow the writ.

II. Factual and Procedural Background

A. Factual Background

In January 2004, the defendant lived in a second-floor apartment at 265 Central Street in Manchester, New Hampshire with his girlfriend, Cameo Jette, his friend, Israel Rivera, and Jette's friend, Jenna Battistelli.[15] Etienne's other friends included Louis Pierre, Jose Gomez, Michael Roux and David Garcia.

On January 28, 2004, Etienne shot an acquaintance, Larry Lemieux, in the head, and Lemieux died instantly.[16] Etienne's claimed the decedent was the aggressor and that the shooting was justified to prevent the decedent from killing Louis Pierre.[17] *See* N.H. RSA 627:4 (II)(a). Several trial witnesses offered testimony consistent with this defense, including testimony that there was a loaded gun[18] in the decedent's hand after he was shot and Pierre's testimony that Etienne "saved [his] life" by shooting the decedent before the decedent could kill Pierre.[19]

The State's case was based on the testimony of witnesses who lied to the police, tampered with evidence, had criminal records, and/or ran from the scene of the shooting.[20] These witnesses gave conflicting testimony as to events of the shooting as well as the events leading up to the shooting that were relevant to intent.[21]

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[15] *State v. Etienne*, 35 A.3d at 530, 163 N.H. at 65.
[16] Doc. 37: 1.
[17] Doc. 28: 5.
[18] *Etienne*, 35 A.3d at 531, 163 N.H. at 67.
[19] Doc. 28: 2.
[20] *See* Doc. 28: 1-2.
[21] Doc. 28: 1-4.

While the New Hampshire Supreme Court acknowledged that "witness accounts differed"[22] as to what happened on the porch, witness accounts also differed on nearly every critical event in this case.[23] As the district court observed in Etienne's subsequent federal habeas petition, the New Hampshire Supreme Court found the following facts:

> Lemieux arrived . . . and walked onto the porch with his hands in his pockets. He approached Pierre so they stood face to face, about six inches apart. . . . the defendant and [others] stood in the area behind Lemieux. Pierre's gun was in his waistband, and the defendant's gun was plainly visible in his hand... The witnesses all agreed that the defendant and Pierre spoke to each other in Haitian Creole, and then the defendant stepped behind Lemieux, raised his gun, and shot Lemieux in the head behind his right ear. Lemieux's hands were inside his jacket when he was shot. He died immediately.[24]

This factual summary does not include reference to the testimony of several witnesses who either saw the decedent draw his gun[25] before he was shot or heard statements suggesting he was about to draw his weapon.[26] Even though Etienne ran from the scene,[27] threw away his gun[28] and lied to the police,[29] he did nothing different than most of the witnesses who made up the State's case.

Other evidence supporting Etienne's claim that he shot the decedent to protect Pierre included testimony that the decedent was feeling a "little edgy" as he drove to an expected confrontation with Pierre on January 28, 2004 and that the

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[22] *Etienne*, 35 A.3d at 531, 163 N.H. at 67.
[23] Doc. 28: 5-7, 23-24.
[24] Doc. 37: 6-7 (cleaned up).
[25] Doc. 28: 2.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

decedent was "tired of [Pierre's] mouth."[30] Further, while some of the State's witnesses claimed the decedent said he was only going to Central Street for a fist fight with Pierre, these claims were undermined by other witnesses who saw the decedent with a gun shortly after he arrived at the Central Street address.[31] Not only did Pierre see the decedent's gun, but he and other witnesses also knew that the decedent regularly carried a gun.[32]

Pierre "knew the type of person he was dealing with" and armed himself with a gun when the decedent told him he was heading to Pierre's location at Central Street.[33] Other witnesses testified that the decedent was frequently under the influence of drugs or alcohol.[34] It was also known that the decedent got into fights while he was drunk.[35]

Additional evidence supporting Etienne's defense that he shot the decedent to defend Pierre included testimony that as soon as the decedent arrived at 265 Central Street, he went onto the porch with his hands inside his jacket and walked with a gait, which one witness described as a "ghetto" walk that suggested he was carrying a weapon.[36] There was also testimony that the decedent immediately started arguing with Pierre.[37] The decedent started screaming at Pierre, saying that he was "tired of your shit."[38] Garcia heard someone other than the decedent

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[30] Doc. 28: 5-6.
[31] Doc. 28: 5-7, 23-24.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

say, "Why you reaching?"[39] One of the witnesses heard the decedent say to Pierre, "Fuck it. We can just shoot it out."[40] Pierre's fears that the decedent came to Central Street armed were confirmed when the decedent pulled out his gun and pointed it at Pierre.[41] Even though Pierre had a gun tucked inside his pants, he did not reach for it because he feared the decedent "would kill me quicker."[42] Pierre then watched as the decedent fell to the ground after Etienne shot him behind the ear.[43] Pierre would later explain that Etienne saved his life.[44]

To counter Etienne's defense, the prosecution relied on the testimony of Jose Gomez, who claimed that prior to the shooting, Etienne said of the decedent: "He think he should wrap it up. That's a wrap. He's getting on my nerves. Things are happening, thinking about merking him."[45] Gomez explained that "that's a wrap" means "Killing somebody. Taking him out. Dispose of him," and "merk[ing]" the decedent meant "killing him."[46] Gomez was the only witness who testified to hearing Etienne expressly state an intent to kill the decedent. *See Etienne*, 35 A.3d at 530-31, 163 N.H. at 65-66 ("The defendant later told Gomez that he was thinking about killing Lemieux . . . The defendant telephoned Gomez and said that Lemieux had been disrespectful to him and 'We have to wrap him up,' meaning kill him. The defendant told Gomez to meet him on Central Street and bring a gun."); Doc.

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Doc. 00118121233, at 14.
[46] *Id.* at 14-15

00118121233, at 15 (testifying that Etienne reportedly said, "he can't take this no more. It's a wrap. Tie this shit. We have to wrap him up. It's over. Meet me."). It was also Gomez who alleged that Etienne instructed him to kill a witness to the shooting.[47]

To establish motive for Etienne to shoot the decedent, the State presented evidence that on the way to Central Street, the decedent and Pierre had been arguing about the decedent's attempted sexual assault of Jennifer Hannaford, the mother of Pierre's children.[48] But as to Etienne, while there was some testimony that he was upset with the decedent for "hit[ing] on" Etienne's girlfriend and otherwise disrespecting him,[49] most witnesses perceived no issues or hostility between Etienne and the decedent.[50] In fact, the decedent was involved in a fight the winter of the shooting, and Etienne was the only one to help the decedent.[51]

In addition to testimony regarding Etienne's alleged statements of intent and motive, Gomez interpreted a post-shooting letter authored by Etienne.[52] Without the testimony of Gomez, Etienne's letter could be interpreted as a request to Gomez and others to not be tempted to give false evidence against him and that whoever it was that shot the decedent did so in self-defense because the decedent "pull[ed] out first" and the shooter acted in "self-defense."[53] Through the State's questioning,

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[47] *Etienne*, 35 A.3d at 532, 163 N.H. at 68.
[48] *Id.*
[49] *Etienne*, 35 A.3d at 530-31, 163 N.H. at 65-66.
[50] *See* Doc. 47 (Trial Trans. Day 2, at 178, 249; Trial Trans. Day 3, at 201; Trial Trans. Day 4, at 131, 161, 167-68; Trial Trans. Day 5, at 44, 290).
[51] Doc. 00118121233, at 16.
[52] *Id.*
[53] *Id.*

Gomez presented a narrative that the letter was both an attempt by Etienne to discourage witnesses from telling the truth about the crime (that, according to Gomez, it was a premeditated plan to kill the decedent) and that Etienne was expressing regret about that plan.[54] For example, Gomez interpreted the statement, "I want you to know that it's true that what you said, and I agree with a hundred percent that [the decedent] did not deserve to die that day," as a reference to the pre-shooting conversation Gomez alleged he had with Etienne "about merking [the decedent]."[55]

In addition to the above-mentioned evidence, the State also presented additional letters written by Etienne to witnesses, the NAACP,[56] the local newspaper,[57] the court,[58] and even the governor[59] about his case.[60] These letters, which the State sought to characterize as inculpatory and conspiratorial, alternately claimed that Etienne was not involved in the shooting and that he shot the decedent in defense of himself and Pierre.[61]

Etienne was convicted of first-degree murder on November 23, 2004 following an eight-day jury trial.[62] He continues to serve his sentence of life in prison, without the possibility of parole.[63]

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Doc. 3-2:4.
[58] Doc. 3-2:31.
[59] Doc. 3-2:24.
[60] Doc. 3-2:3-5.
[61] *See Etienne*, 35 A.3d at 532-33, 163 N.H. at 68-69.
[62] Doc. 48:4; Doc. 00118121233, at 17.
[63] *Id.*

"After the defendant's trial was concluded, defense counsel learned of a proffer letter from the Attorney General's Office recommending a suspended sentence on Gomez's drug charges and referencing Gomez's 'attempts to cooperate with the State.'" *Etienne*, 35 A.3d at 547, 163 N.H. at 87. Gomez then met with a defense investigator, telling her that "perjury was done" and that he was "asked to do it." *Id.* The defense then obtained the proffer letter, dated June 30, 2004. *Id.* A State's attorney explained that the letter was in relation to information Gomez provided to Manchester Police regarding drug activities in Manchester. *Id.* The letter, however, stated broadly that "[t]he fact that this recommendation is for a suspended sentence reflects consideration for [Gomez's] attempts to cooperate with the State." *Etienne*, 35 A.3d at 548, 163 N.H. at 89. This, the New Hampshire Supreme Court observed, would have been favorable because defense counsel had cross-examined Gomez about his belief that he had received no deal on his drug charges, attacked his sentence as inadequate, and argued that his testimony was not credible because he had become part of the prosecution's "team." *Id.* Notably, this proffer, and the related favorable treatment by the State, occurred in the period between the shooting (January 2004) and Etienne's trial in which Gomez testified on behalf of the State (November 2004).

In fact, the timeline of Gomez's involvement with police following the shooting is significant with respect to Etienne's trial counsels' unsuccessful attempts at establishing Gomez as an incentivized witness. Despite their attempt to establish that Gomez received consideration for his cooperation with police, and

was on the prosecutor's "team,"[64] Gomez denied it.[65] He testified that he got "smoked" at sentencing and did not receive any consideration in exchange for his testimony.[66] Defense counsel did not have the proffer letter to rebut this. But this proffer letter—incentivizing Gomez to continue cooperating with police, especially in light of the fact that the consideration he had received was a suspended sentence—would have established that Gomez lied when he said that he had not, "in fact, received a plea deal."[67]

What is equally important is *when* Gomez decided to offer information implicating Etienne in a premeditated murder. This is particularly noteworthy because the New Hampshire Supreme Court characterized Gomez's attempt to cooperate with the State, as noted in the proffer letter, as pertaining to "unrelated drug charges."[68]

Gomez spoke to the Manchester Police the evening of the shooting, January 28, 2004, into the early morning hours of January 29, 2004.[69] At trial, Gomez admitted that during this initial contact with the Manchester Police, he "[d]idn't turn Dickens in at that very moment" and "kept [his] mouth shut about everybody."[70] During that initial contact with the police, Gomez did admit to hiding the decedent's gun[71] and was charged with falsifying evidence and felon in

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[64] *Etienne*, 35 A.3d at 548, 163 N.H. at 89.
[65] Doc. 28: 21.
[66] *Id.*
[67] *Etienne*, 35 A.3d at 548, 163 N.H. at 89.
[68] *Etienne*, 35 A.3d at 551, 163 N.H. at 92.
[69] Doc. 00118121233, at 19.
[70] *Id.*
[71] *Id.*

possession of a gun.[72] Gomez was released on bail on the charges related to the shooting[73] without making a claim that Etienne committed premeditated murder.

After Gomez posted bail on the charges related to the shooting, the Manchester Police arrested him a day or two later on "drug charges," and Gomez was again incarcerated.[74] These new charges involved his selling cocaine to an undercover agent of the Manchester Police on January 27, 2004.[75] The Manchester Police went to the jail to talk to Gomez again after his arrest on the drug charges.[76] During this interview, Gomez asked the police "that a deal be worked out."[77] It was during this interview about the drug charges (supposedly the subject of the suppressed proffer letter) that Gomez "flip[ped] the script" and implicated Etienne in the premeditated murder of the decedent, though Gomez specifically denied that he received any consideration from the State for doing so.[78] At trial, Gomez claimed that the Manchester Police officers said that they could not promise any consideration for his post-drug arrest statements implicating Etienne but that they would bring his "cooperation" to the attention of the Attorney General's Office.[79]

Although he begrudgingly admitted that the police said they would bring his cooperation to the attention of the two prosecuting agencies handling his charges related to the decedent's shooting and his drug charges, Gomez repeatedly denied

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[72] *Id.* at 19-20.
[73] *Id.* at 20.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 20-21.

that either of these two prosecution agencies ever gave him any actual consideration for his testimony wherein he claimed that Etienne had made pre-shooting statements about an intent to kill the decedent. And yet, his statements implicating Etienne came after he was re-arrested on the drug charges, ultimately receiving a favorable sentence on those charges for his "cooperation" and later testifying on behalf of the State following receipt of the subject proffer letter.

B. Procedural Background

Following his conviction and the exhaustion of procedures to obtain a remedy in State Court,[80] Etienne filed a habeas petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of New Hampshire on December 13, 2018.[81] Etienne filed an amended petition on May 18, 2020.[82]

The district court (McAuliffe, J.) issued an order agreeing with the New Hampshire Supreme Court's decision denying relief as to all claims and, accordingly, entered a judgment for the Respondent.[83] The First Circuit ultimately issued a certificate of appealability as to the *Brady* claim at issue in this Petition and, after soliciting an Amended Order from the district court,[84] affirmed the denial of habeas relief.[85]

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[80] *See supra* Section I.
[81] Doc. 3.
[82] Doc. 28.
[83] Doc. 37; Appx. B.
[84] The First Circuit initially granted a certificate of appealability on the *Brady* claim, vacated the judgment of the district court, and remanded for reconsideration of Etienne's *Brady* claim in a manner consistent with Rule 5(c), as the trial transcripts had not been presented to the district court prior to its initial judgment. *See* Appx. A (First Circuit Judgment of April 20, 2023).
[85] Appx. A.

C. The First Circuit's Analysis and Ruling

"Under [its] deferential review," the First Circuit deemed the New Hampshire Supreme Court's "second reason for holding that Etienne was not prejudiced—that there was overwhelming independent evidence of premeditation from witnesses other than Gomez before the jury" as alone sufficient to affirm the denial of habeas relief. Appx. A. (Opinion, at 8). The First Circuit highlighted evidence from other witnesses relating to "Etienne's relationship with [the decedent], including Etienne's own statements about [the decedent]; Etienne's actions shortly before killing [the decedent]; and Etienne's statements and actions after killing [the decedent]." *Id.* (Opinion, at 11). The First Circuit then recounted that evidence, noting such circumstances as a "tense" relationship between Etienne and the decedent, the decedent's expressed concern to a witness that either Etienne or another person would kill him and a purported threat relating to same, that Etienne was upset the decedent had attempted to sexually assault a woman, that Etienne was upset and angry on the day of the shooting, that Etienne and others had retrieved guns and expected a fight with the decedent, and that Etienne had written letters after his arrest. *Id.* (Opinion, at 11-14).

It did not recount the evidence undercutting these circumstances, analyze how the proffer letter could have altered the jury's understanding of the case, or acknowledge that Gomez was the only witness to testify that he heard Etienne deliberate as to whether he should murder the decedent and ultimately articulate his decision to do so. Based on the record evidence outlined in its 15-page Opinion,

the First Circuit found "no basis to conclude that the New Hampshire Supreme Court's no-prejudice determination was an unreasonable application of *Brady*." *Id.* (Opinion, at 15).

REASONS FOR GRANTING THE PETITION

I. The State Court's and First Circuit's Decisions involve unreasonable applications of clearly established federal law and are contrary to clearly established Supreme Court precedent in that they apply an incorrect legal standard.

The Antiterrorism and Effective Death Penalty Act of 1996 permits federal habeas relief from a state court judgment "if the state court proceedings 'resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court' or was based on an 'unreasonable determination of the facts.'" *Dugas v. Coplan*, 506 F.3d 1, 7 (1st Cir. 2007) (quoting 28 U.S.C. § 2254(d)).

"Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.*

Etienne's claim, of course, invokes the prosecution's disclosure obligations under *Brady*. To succeed on a claim under *Brady*, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully

or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quotations omitted). As to the prejudice prong—the only prong left to establish in this case[86]—Etienne need only show a "reasonable probability of a different result." *Id.* at 698 (quotations omitted).

Kyles v. Whitley, 514 U.S. 419 (1995), outlines the prejudice or materiality prong in detail. "Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . .." *Id.* at 434. Rather, the

> touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. (citations omitted).

> Nor is the standard "a sufficiency of evidence test." *Id.*
>
> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

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[86] *See* Doc. 48: 5 (noting that the N.H. Supreme Court found that the suppressed evidence was favorable).

Id. at 434-35. *Kyles* rejected the notion that a defendant "must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." *Id.* at 435, n.8.

A. The lower and state courts' decisions are contrary to the clearly established law of this Court because they apply a sufficiency of the evidence test instead of the proper Brady *prejudice standard.*

It bears noting at the outset that the crutch used by the First Circuit to deny habeas relief (and, by extension, the district court's crutch and, by further extension, the State Court's crutch) is in striking contradiction to this Court's admonition in *Strickler*. There, this Court noted that the Fourth Circuit's denial of habeas relief in that case:

> rested on its conclusion that, without considering [the implicated witness's] testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty. The standard used by that court was incorrect.

Strickler, 527 U.S. at 290.

But the First Circuit's denial of Etienne's habeas relief rested exclusively on the conclusion that "there was overwhelming additional evidence of premeditation before the jury." This, too, was an incorrect standard. Its Opinion, like the decisions of the district court and State Court, omits the required analysis as to, and forgoes any answer to the question of, whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (quotations and citation omitted).

B. The lower and state courts' decisions involve an unreasonable application of this Court's caselaw because the prosecution witness whose credibility and testimony the suppressed evidence would have gutted played an outsized role at trial, was the only witness to paint Etienne as a cold, calculating killer, and drew the only direct link to premeditation.

Etienne's trial involved little by way of state-of-mind evidence. The prosecution pieced together some highly attenuated circumstantial evidence,[87] but the only testimony approaching direct evidence of intent and premeditation came from Gomez. By way of illustration, the First Circuit, like the State Court, emphasized that there was "overwhelming independent evidence of premeditation" aside from Gomez's testimony because, in part, another witness testified that Etienne was "upset and angry" on the day of the shooting.[88] Compare that attenuated evidence to Gomez's testimony: claiming, among other things, that Etienne had said, earlier in January 2004, that he had been thinking about killing the decedent,[89] said the day of the shooting, "it's a wrap," and said he was going to "merk" the decedent, meaning Etienne was going to kill the decedent.[90]

Findings such as these are unreasonable. And they brush aside clearly established federal law requiring only a "reasonable probably of a different result." Indeed, as even the State Court acknowledged, the prosecution knew that "Gomez would be an important prosecution witness in the homicide case."[91] It is largely for

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[87] *See, e.g.*, Doc. 48:10-11.
[88] *See, e.g.*, Doc. 00118204577, at 13; *Etienne*, 163 N.H. at 66, 35 A.3d at 530-31.
[89] *Etienne*, 35 A.3d at 530, 163 N.H. at 65.
[90] Doc. 28: 5-7, 23-24.
[91] *Etienne*, 35 A.3d at 550, 163 N.H. at 91.

these reasons that Etienne's habeas claim must succeed and that, preliminarily, this Court should accept this Petition.

We can look first to this Court's decision granting relief in a case quite similar to Etienne's case. *See Banks*, 540 U.S. at 678. In *Banks*, the State suppressed impeachment evidence regarding consideration received by State witnesses. *Id.* at 675. Just like in this case, the State in *Banks* attempted to bolster the credibility of the witness during its closing by arguing facts inconsistent with the suppressed evidence. *Id.* at 678. Just like in this case, the State witness in *Banks* "asserted emphatically that police officers had not promised him anything." *Id.* Just like in this case, the State witness in *Banks* was afraid of the consequences of not cooperating with the State due to a pending drug investigation. *Id.* Just like in this case, defense counsel in *Banks* attempted to discredit the State's witness by implying that the witness was testifying for the State because of his concerns about his illegal drug activity, and the State argued that the witness had been "heavily impeached" at trial. *Id.* at 680, 702. Just like in this case, in *Banks* there was no considerable forensic or physical evidence establishing guilt. *Id.* at 700. This Court in *Banks* stated that "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense" and found that "all three elements of a *Brady* claim are satisfied." *Id.* at 703.

While other witnesses may have provided evidence that there were bad feelings between the decedent and Etienne because the decedent "hit on"[92] Etienne's girlfriend months earlier, it was Gomez's unparalleled testimony that, if believed, established both motive and intent to commit first degree murder and undermined Etienne's claim that he shot the decedent to protect Pierre. It was Gomez who claimed that, prior to the shooting, Etienne articulated his intent to kill the decedent, said "it's a wrap," said he was going to "merk" the decedent, and that these terms meant that Etienne was going to kill the decedent.[93]

As Gomez's testimony was uniquely damaging to their case, defense counsel attempted to undermine his testimony by suggesting that he had some secret deal with the State to receive a more favorable sentence on drug charges.[94]

When trial counsel implied that Gomez received a favorable deal for his testimony, Gomez emphatically disagreed with this assessment and testified that he got "smoked" at sentencing, stating that not only did he not receive any consideration from the police in exchange for his testimony, but he instead received a particularly harsh sentence.[95] Trial counsel took a second shot at implying that Gomez faced a much lengthier sentence by cross-examining him on the fact that he had multiple charges, for which he faced 3½ to 7 years in prison, and, further, that those sentences could have been consecutive to each other.[96] Gomez fought back

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[92] Doc. 28: 21.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*

this line of cross-examination by testifying that a defendant would have to be "like Don Gotti or something like that 'cause they can't smoke for three and a half to seven to run all consecutive. There's no way."[97] Gomez insisted that his testimony against Etienne "wasn't for my own benefit."[98] Trial counsel offered no evidence to rebut this claim.[99]

The defense again attempted to establish that Gomez received a favorable plea bargain when they asked him if the police told him that they would "bring to the attention" of the prosecution his cooperation on the murder charges.[100] Gomez again denied any consideration when he testified, "I asked [the Manchester Police] once and that was it. It's over. No more questions asked about that . . . they already made it clear to me wasn't going to be nothing done for me."[101]

During their closing, defense counsel continued to imply Gomez received consideration for his testimony, though they had no evidence to support this theory.[102] Defense counsel also argued that Gomez was key to the State's case as he alone provided evidence of a plan or motive.[103]

During its closing, the State capitalized on defense counsels' failure to establish that Gomez received consideration for his testimony when it repeated Gomez's claim that he "got smoked" at sentencing and that his three- to six-year

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[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Doc. 28: 22.
[101] *Id.*
[102] Doc. 47 (Trial Trans. Day 7, at 166-168).
[103] *Id.* at 166.

sentence was "not very far from the maximum."[104] While not quite as concerning, this again is similar to *Banks*, where the prosecution knew these statements were, at best, misleading, allowed them to "stand uncorrected," and, in fact, highlighted them. *Banks*, 540 U.S. at 677-78.

The "proffer letter" discovered after trial recommended that Gomez receive a suspended sentence on his drug charges in exchange for his "attempts to cooperate with the State," and that this consideration was a product of his meeting with the Manchester Police. *Etienne*, 35 A.3d at 548, 163 N.H. at 89. This letter establishes that Gomez's committed perjury (as he would later admit post-trial[105]) when he repeatedly denied any consideration for his cooperation with the State and, further, that the State relied on false evidence in their closing arguments. Additionally, the suppressed letter would have bolstered the defendant's theory that the State's case was based on "cops and criminals playing let's make a deal."[106] *See Kyles v. Whitley*, 514 U.S. 419, 446 (1995) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation.").

Accordingly, the suppressed evidence would have established: (1) that Gomez had a relationship with police such that he would receive favorable sentences in exchange for information; and (2) that he lied *at trial* when he denied cooperating with police in exchange for leniency. Both revelations would have nullified Gomez's

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[104] Doc. 28: 22
[105] *Etienne*, 35 A.3d at 547, 163 N.H. at 87.
[106] *See* Doc. 47 (Trial Trans. Day 7, at 145).

testimony, leaving the jury with significantly clouded evidence suggesting that, at one point in time, the decedent and Etienne might not have liked each other. Like in *Banks*, had the jurors known of Gomez's relationship and history of cooperation with the State, and his continued interest in gaining the favor of law enforcement and the prosecution, "they might well have distrusted [Gomez's] testimony, and, insofar as it was uncorroborated, disregarded it." *See Banks*, 540 U.S. at 701. While it is theoretically possible that a juror could have made the inferential leap from dislike to homicidal intent on the day in question, one can hardly be "confident"[107] that the verdict would stand without Gomez's testimony.

The Third Circuit addressed *Banks* in granting a § 2254 petition in a case that, while differing in the nature of the *Brady* evidence, applies an analysis that can be applied here. It noted that in *Banks*, this Court "directly rejected the notion that there can be no *Brady* claim relating to impeachment evidence where a witness was already impeached with other information." *Dennis v. Secretary*, 834 F.3d 263, 279 (3d Cir. 2016). Both the State Court and the district court relied heavily on other impeachment attempts, none of which could be supported beyond speculation, in affirming the conviction. This was erroneous. Instead, "the state court should have focused on whether the defendant received a fair trial in the absence of the disclosed evidence." *Id.* at 280. Further, "the state court had failed to consider the effect of the evidence on trial counsel's investigation, pretrial preparation, decision

[107] *See Banks*, 540 U.S. at 698 (stating that the prejudice prong of *Brady* is satisfied if the suppressed evidence would "undermine confidence in the verdict" (quotations omitted)).

to interview or call certain witnesses, or the effect of cross-examining detectives on their investigation." *Id.*

Like in *Dennis*, the state and lower courts "unreasonably discount[ed] the buttressing effect" Gomez's testimony had on otherwise attenuated, circumstantial evidence. *See id.* at 287. While nothing any other witness said could "definitively" discount Etienne's self-defense and defense of another theories, Gomez's testimony turned the benign or inconsequential into the inculpatory. *See id.* And the drug charges and proffer letter transformed a witness who provided *no* favorable testimony (having refused to offer any statements incriminating Etienne after his prior arrest for the shooting-related crimes) into a key government witness who was incentivized to offer testimony supportive of Etienne's prosecution. Like in *Dennis*, withholding the proffer letter "made testimony by a key government witness, who provided the sole testimony contradicting [Etienne's defense], unassailable. The [State] highlighted how weighty [Gomez's] testimony was at trial." *Id.* at 294. In short, the State Court here, like in *Dennis*, "took an unreasonably narrow view of *Brady* materiality." *Id.* at 295. This is because "*Kyles* explained that *Brady* materiality does not turn on a determination of the sufficiency of the evidence, but instead requires the court to consider the constitutional error in light of all the evidence to determine whether it 'put[s] the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* (quoting *Kyles*, 514 U.S. at 435).

The different light in which the suppressed evidence would have put the case is clear. *See supra* Section I. Knowing that Gomez only created a story of

premeditated murder after the police pressured him with, and interviewed him about, drug charges, for which he received consideration, creates—at the very least—a reasonable probability of a different result.

It bears note that, while the State at trial and the New Hampshire Supreme Court believed that Gomez's testimony was "corroborated," it was *not* corroborated as to the most important issues: intent and premeditation. For example, with respect to a letter Etienne wrote to Gomez, which the New Hampshire Supreme Court (and the State in summation) highlighted as corroborating evidence,[108] it only corroborated Gomez's account because he said it did. *See* Doc. 47 (Trial Trans. Day 7, at 212) (quoting, in summation, a line of the letter referencing a "conversation" and stating, "You remember Jose telling you about was that was the conversation where they talked about merking [the decedent] . . ..").

Further, this case was, unfortunately, greatly vulnerable to bias. Etienne is a Black,[109] Haitian man.[110] Witnesses testified that Etienne and Pierre spoke in Haitian Creole in the moments prior to the shooting.[111] Witnesses spoke of the "streets."[112] They used the word "ghetto."[113] The trial transcripts are replete with the n-word.[114] Gomez's testimony exacerbated the existing racial biases, but also provided the jury with an unsuccessfully impeached account that would avoid reliance upon them.

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[108] *See Etienne*, 35 A.3d at 555, 163 N.H. at 98.
[109] Doc. 3-3: 2.
[110] Doc. 3-7: 16.
[111] *See, e.g., Etienne*, 35 A.3d at 553, 163 N.H. at 95.
[112] *See, e.g.*, Doc. 47 (Trial Trans. Day 2, at 228).
[113] *See, e.g.*, Doc. 47 (Trial Trans. Day 5, at 20, 22).
[114] *See, e.g.*, Doc. 47 (Trial Trans. Day 2, at 228, 250; Trial Trans. Day 3, at 32, 156).

The danger of bias (implicit or unintentional, though it may be), and its effect on the analysis of Etienne's *Brady* claim, can be further seen in the state and district courts' heavy reliance on (and the First Circuit's references to) Etienne's post-shooting conduct. *See, e.g.*, Doc. 48: 11 (referring to Etienne's post-arrest letters); *Etienne*, 35 A.3d at 532-33, 553, 163 N.H. at 67-69, 95 (outlining Etienne's post-shooting behavior including dispersing from the scene, changing clothes, discussing an alibi, and disposing of the gun, as well as post-arrest letters offering varying, and, as the State sought to frame it, inculpatory, versions of events); *see also* Doc. 47 (Trial Trans. Day 6, at 84) (referencing Etienne's letter to the NAACP, left unaddressed by the courts).

While it is tempting to think innocent people would not flee or act as Etienne did, that is simply not true for people of color who, for so long, have rightfully distrusted police. *See, e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting, as "not irrelevant" to the seizure analysis that "the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males"); *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part and dissenting in part) ("Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.").

Etienne's post-shooting behavior could simply be the conduct of a person who justifiably did not trust police to believe him or to not improperly influence witnesses to gain a conviction against him. The latter is supported by the record as well. *See, e.g., Etienne*, 35 A.3d at 532, 163 N.H. at 68 ("The defendant terminated the fifty-five minute interview with the detective by stating that because he thought the detective believed him to be guilty of killing Lemieux, he was ending the conversation."); Doc. 47 (Trial Trans. Day 6, at 82-83) (Etienne stating, in a post-arrest letter, that he had "been subject to a lot of accusations by the M.P.D." for "crimes . . . I had nothing to do with," that he was hesitant to tell the truth during his initial meeting with police "because of my distrust and fear they have instilled in me," and that he "was afraid they would have twisted my words"); Doc. 47 (Trial Trans. Day 3, at 185) (Garcia explaining, as a mere bystander to the shooting, that he ran "[b]ecause I know how the Manchester Police Department was and I believed that we stayed there that they would frame us no matter what. Everyone there would go to jail."). Thus, reliance on Etienne's post-shooting behavior is problematic and, certainly, insufficient to preserve a conviction based largely on a witness who could have been significantly impeached with strong, yet suppressed, *Brady* evidence.

Finally, the State Court unreasonably found that Gomez's testimony was not the "primary, exclusive or crucial evidence of premeditation."[115] This analysis fails to consider that the other, circumstantial evidence of premeditation came from

[115] *Id.* at 10 (citing *Etienne*, 163 N.H. at 93).

witnesses who had received a plea deal,[116] immunity from prosecution,[117] lied to the police,[118] tampered with evidence,[119] were drug dealers,[120] or engaged in some combination of these dishonest activities. None of the other evidence of premeditation relied on by the State Court was credible. And none of it was *direct* evidence of any intent to kill or premeditation.[121] Gomez, and Gomez only, supplied such evidence. The rest leaves significant doubt as to confidence in the conviction. Testimony by some regarding disagreements between Etienne and the decedent (which the State Court characterized as a "tense" relationship[122]) was conflicted with testimony by most witnesses indicating no such issues. And a "tense" relationship, absent specific and repeated statements of a premeditated intent to kill as provided through Gomez's testimony, is an absurdly slim basis upon which one's confidence in the verdict can rest. It is, at best, "unduly speculative." *McCambridge v. Hall*, 266 F.3d 12, 34 (1st Cir. 2001).

The remaining evidence upon which the lower and state courts relied included that the decedent had told someone else he thought Etienne or Pierre would kill him, that a witness overheard Etienne and Pierre saying the decedent would "get his some day," that Etienne banned the decedent from his home, and

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[116] Doc. 28: 23.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *See Wolfe v. Clarke*, 691 F.3d 410, 424 (4th Cir. 2012) (granting relief for a *Brady* violation concerning evidence relating to "the only witness to provide any direct evidence regarding the 'for hire' element of the murder offense and the involvement of Wolfe therein").
[122] *Etienne*, 35 A.3d at 552, 163 N.H. at 94.

that the decedent told a witness that Etienne had threatened to kill him.[123] The decedent's concerns do not amount to direct evidence that Etienne premeditated a murder; that Etienne and Pierre thought the decedent would "get his some day" does not mean that *they* would kill him, or even that anyone would kill him (it could simply mean he would get arrested for acts such as his brutal attempted sexual assault of Hannaford); "banning" someone from a home has no connection to homicidal intent; and a double-hearsay statement about an alleged threat to kill is far too attenuated to surpass reasonable doubt.

Gomez was the only one to testify that he heard the words come straight from Etienne's mouth, the only one to establish a long term "plot"[124] to kill and an expressed intent to kill on the day in question. To say that Gomez's testimony was insignificant, and not the "primary, exclusive, or crucial evidence" of premeditation, overlooks the record in this case and unreasonably minimizes what even the State Court recognized was "an important prosecution witness."

That Gomez was such an "important prosecution witness" and critical to the State proving the required element of intent and premeditation, any impeachment evidence pertaining to Gomez was crucial, and its suppression demands relief under *Brady*. This Court, for instance, has found *Brady* violations where the prosecution failed to disclose impeachment evidence related to the credibility of a "key witness," *see Giglio v. United States*, 405 U.S. 150, 154–55 (1972), or that could have "significantly weakened" key eyewitness testimony. *Kyles*, 514 U.S. at 441. The

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[123] *See Etienne*, 35 A.3d at 552, 163 N.H. at 94; Doc. 48: 10-11; Doc. 00118204577, at 11-13.
[124] *See* Doc. 47 (Trial Trans. Day 2, at 250).

State's case, without a credible Gomez, was highly circumstantial. Any impeachment evidence, especially where Gomez's testimony regarding intent and premeditation was "essential to the conviction," *United States v. Martinez-Medina*, 279 F.3d 105, 126 (1st Cir. 2002), could easily have tipped the scales. The lower and state courts' findings were unreasonable, and the nature of the suppressed *Brady* material demands relief.

II. The issue on appeal—a defendant serving a life sentence in a case involving, as the New Hampshire Supreme Court found, the suppression of exculpatory evidence relating to an important prosecution witness—is an issue of growing national importance and one that is likely to recur.

According to the National Registry of Exonerations,[125] since 1989, 3,619 defendants have been exonerated. Collectively, these cases resulted in more than 32,750 years of unjust incarceration.[126] Of the 3,619 exonerations, a distressing 1,853 (more than 50%) involved withheld exculpatory evidence.[127] Other recent research has confirmed this concerning trend. For instance:

> A recent empirical study of 5,760 capital convictions in the United States found that Brady violations accounted for one in every six death penalty convictions between 1973 and 1995. Additionally, in 2003, thirty-six years after Brady, a study of 11,000 cases involving

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[125] The National Registry of Exonerations is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. It was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. The Registry provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence. The Registry also maintains a more limited database of known exonerations prior to 1989.

[126] *Exonerations Detail List*, Nat'l Registry of Exonerations (Dec. 4, 2024), *available at* https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Dec. 4, 2024).

[127] *Exonerations Detail List: Withheld Exculpatory Evidence*, Nat'l Registry of Exonerations (Dec. 4, 2024), *available at* https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=OM%5Fx0020%5FTags&FilterValue1=WH (last visited Dec. 4, 2024).

> prosecutorial misconduct identified that in just over 2,000 instances, an appeals court found the misconduct material to the defendant's conviction and overturned it; in this same study, nearly 400 state homicide cases were reversed at the post-conviction stage due to these Brady violations. In these scenarios, "prosecutors hid evidence or allowed witnesses to lie." Unnervingly, these statistics account for only a fraction of the serious misconduct, which Brady was meant to prevent. This very conduct continues to remain widely undetected and undeterred.

Russell, Cadene, *When Justice is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of* Brady v. Maryland, 58 How. L.J. 237, 247 (Fall 2014) (internal citations omitted).

A more recent study analyzed five years of *Brady* claims, from 2015 through 2019. Garret, Brandon, et al., *The Brady Database,* 114 J. Crim. L. & Criminology 185 (Spring 2004). Examining only a small subset of *Brady* cases, the study revealed that courts found *Brady* violations in 10% of the cases in which a *Brady* claim was raised. *Id.* at 202-05. Prosecutors, the study found, were responsible for most violations and were almost never referred for discipline. *Id.* at 186. And, for those petitioners lucky enough to discover a *Brady* violation and secure a remedy, they waited an average of ten years for relief. *Id.*

While defendants face nearly insurmountable obstacles in obtaining relief, prosecutors remain unconcerned. Short of vacating convictions, the existing measures to combat the growing pervasiveness of *Brady* violations simply do not work. *See, e.g.*, Keenan, David, et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct,* 121 Yale L.J. Online 203, 203-09

(2011) ("Our study demonstrates that professional responsibility measures as they are currently composed do a poor job of policing prosecutorial misconduct."); Yaroshefsky, Ellen & Green, Bruce A., *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure, in Lawyers in Practice: Ethical Decision Making in Context* 274, 275-77, 283 (Leslie C. Levin & Lynn Mather eds., 2012) (finding, after an extensive study, that professional discipline is ineffective, internal procedures to review *Brady* compliance are often unavailing, the risk of civil liability is not a factor in compliance decisions, and the risk of public opinion backlash is negligible). The current system, and the manner in which courts turn to the sufficiency of "other evidence" in search of a way to uphold a conviction, operates as an incentive to maintain the *Brady*-deficient status quo and comes far too close to a tacit approval of these practices. Yet "[p]rosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks*, 540 U.S. at 696.

Etienne's constitutional rights, and the integrity of the court system, mandate a critical view at the State's egregious *Brady* violation here. The State Court bypassed this Court's precedent and ignored the standard that *Brady* requires. The federal courts made the same mistakes. If prosecutors can rest easy knowing that the odds of losing their conviction are low, and thus a serious exercise of their *Brady* obligation unnecessary, this growing problem will only continue to grow. As Benjamin Franklin opined, at the dawn of our Republic, "it is better a hundred guilty persons should escape than one innocent person should suffer."[128]

[128] Benjamin Franklin, *Letter from Benjamin Franklin to Benjamin Vaughn* (Mar. 14, 1785).

The current trend reverses that formula, and both people like Etienne and society at large suffer accordingly.

CONCLUSION

The State Court found that the prosecution suppressed exculpatory evidence relating to "an important prosecution witness," which would have demonstrated the witness "had received favorable treatment from the State" in a way that would have favorably supported the defense and its assertion that Gomez had "joined the prosecution's team." *Etienne*, 163 N.H. at 91-92, 35 A.3d at 550-51.

While Gomez is not necessarily an "eyewitness," he was the only witness to point to Etienne and tell the jury that Etienne wanted to pursue, talked about, and executed a plot to kill the decedent. He was effectively the only "eyewitness" to Etienne's alleged premeditation. As Justice Brennan noted in a dissent years ago:

> Eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!"

Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quotations and punctuation omitted).

The State used Gomez, from the very beginning of trial, to paint Etienne as a cold, calculating killer; one who not only premeditated the murder of the decedent, but also, according only to Gomez, sought Gomez's help in executing a witness. Gomez changed the tone, narrative, and character of both the trial and Etienne

himself. The suppressed evidence would have altered the light in which Gomez cast the trial and, as a result, the denial of habeas relief—based on a standard contrary to this Court's law—was unreasonable, erroneous, and must be reversed.

Mr. Etienne respectfully asks this Court to accept his Petition.

Dated this 8th day of January, 2025.

Respectfully submitted,

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