No. 10-8145

In the
Supreme Court of the United States

JUAN SMITH,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ of Certiorari to the Orleans Parish Criminal District Court of Louisiana

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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August 19, 2011

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The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 11,000 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in criminal practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring the fairness of criminal proceedings. To promote these goals, NACDL has frequently appeared as *amicus curiae* before this Court in cases concerning criminal law and procedure, including *Connick v. Thompson*, 131 S. Ct. 1350 (2011), and *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).

Criminal trials are, of course, a truth-seeking exercise. The integrity of that process is entirely dependent on prosecutors' compliance with the fundamental constitutional obligation to disclose

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[1] Petitioner has consented to the filing of this brief in a letter on file with the Clerk. Respondent has consented in a letter filed herewith. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Prosecutors' failure to meet their *Brady* obligations inhibits our members' ability to provide meaningful, effective representation to their clients. That increases the likelihood that innocent men and women will be convicted and, as in this case, face the death penalty. NACDL therefore has a strong interest in ensuring *Brady*'s vitality.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rarely will this Court find such comprehensive, clear-cut, and egregious violations of the rule of *Brady v. Maryland*. Petitioner's conviction hinges on a single eyewitness's testimony with no physical evidence to connect him to the crime. It is unconscionable that the prosecution suppressed a clutch of evidence tending to impeach that testimony and refute the eyewitness's identification of petitioner. The simultaneous suppression of other exculpatory evidence—the confession of an alternative suspect and statements exonerating petitioner—undermines confidence in the verdict and also in the investigation itself. Numerous decisions of this Court and the courts of appeals confirm that petitioner is entitled to a new trial—a fair and reliable one that lives up to our Nation's most basic constitutional guarantees.

I. The principles of *Brady* are well settled. The Fifth and Fourteenth Amendments bar prosecutors from suppressing favorable evidence "material either to guilt or to punishment, irrespective of the good

faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Failure to reverse petitioner's conviction would upend decades of precedent from this Court and the courts of appeals granting new trials or habeas relief on facts similar to these. It is virtually a bright-line rule that, where the prosecution's case turns on a critical eyewitness, failure to disclose impeachment evidence demands reversal. Because eyewitness identifications are powerful evidence, casting doubt on such testimony may determine guilt or innocence. For that reason, the courts of appeals consistently hold that suppression of impeachment evidence related to an eyewitness or key witness violates *Brady*.

Evidence suggesting an alternate perpetrator is also classic *Brady* material. A *confession* by an alternative suspect is especially compelling because "'no other statement is so much against interest as a confession of murder.'" *Scott v. Mullin*, 303 F.3d 1222, 1231 n.5 (10th Cir. 2002) (quoting *Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting)). Such evidence may direct the jury's searching gaze away from the defendant or call into question the reliability of the investigation that resulted in the defendant's arrest. Thus, when such evidence has been suppressed, the courts of appeals order new trials even though other evidence may stand unimpeached.

For similar reasons, the courts of appeals have faulted prosecutors for withholding statements by other perpetrators of the crime that exonerate the

defendant. Such statements are highly material and, if withheld, warrant a new trial.

Suppression of evidence in any *one* of these categories takes on even greater significance when the remainder of the case is weak or circumstantial. The cumulative nondisclosures of *all* of those types of evidence here—in the absence of *any* physical evidence—leave no doubt that the prosecution flagrantly violated *Brady*.

II. Because *Brady* violations are hard to catch, and this Court made clear last term that the Orleans Parish district attorney's office ("Orleans Parish") cannot be held liable for failing to train its prosecutors in *Brady* compliance, it is essential to grant the more traditional and targeted form of relief—a new trial—when violations do surface. Otherwise, *Brady* may reflect more aspiration than reality, especially in jurisdictions, like this one, with well-known reputations for disregarding their *Brady* obligations.

ARGUMENT

I. THE *BRADY* VIOLATIONS IN THIS CASE WERE EGREGIOUS.

A. *Brady* Requires Disclosure Of Materially Favorable Evidence.

The legal principles underlying *Brady* claims are well settled. Due process of law, guaranteed to defendants under the Fifth and Fourteenth Amendments, bars prosecutors from suppressing favorable evidence "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

Favorable evidence includes both impeachment evidence and exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Materially favorable evidence must be disclosed, and the touchstone for materiality is 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." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Accordingly, materiality "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 96 (1976). Similarly, courts must review suppressed evidence "collectively" rather than discount it "item by item." *Kyles*, 514 U.S. at 436. Only when the evidence, viewed as a whole—including the undisclosed evidence—is so overwhelming that guilt is undeniable can a court remain confident that the verdict would have been the same if the evidence had been disclosed. *See id.* at 450 (finding violation because "the physical evidence remaining unscathed would, . . ., hardly have amounted to overwhelming proof").

The point of the rule is to do justice. Fundamental fairness imposes a duty on prosecutors to disclose *Brady* material even when the defendant does not request it. *See Agurs*, 427 U.S. at 107. For similar reasons, prosecutors have a duty to discover and disclose favorable evidence known to police. *See Kyles*, 514 U.S. at 438. Those prosecutors' offices that impose on themselves the burden of deciding what to disclose and what to withhold—some offices simply follow "open file" disclosure rules—must make those determinations in light of the

corresponding burden to uphold the public trust, a trust that was badly broken here. *See id.* at 437.

B. This Case Involves Numerous Nondisclosures That This And Other Courts Have Recognized To Be Textbook *Brady* Violations.

Some *Brady* cases raise close questions. This is not one of them. Petitioner's brief details the flood of evidence, both impeachment and exculpatory, suppressed by the prosecution. *See* Pet. Br. 12-25. The suppressed evidence fits within three categories of evidence routinely recognized as *Brady* material under settled precedent. First, there is a host of undisclosed evidence that would have been very useful for impeaching or refuting the testimony of the only eyewitness at trial to identify petitioner, Larry Boatner. Second, the prosecution also suppressed evidence that another person, Robert Trackling, had confessed to the crime. Third, the prosecution failed to disclose police-recorded statements of Phillip Young—apparently among the perpetrators—essentially denying petitioner's involvement in the crime.

1. Prosecutors must disclose evidence tending to impeach important eyewitness testimony.

a. *This Court has emphasized the importance of disclosing impeachment evidence.*

This Court has recognized that suppression of evidence tending to impeach a key witness is a cardinal *Brady* violation. *See Giglio v. United*

States, 405 U.S. 150, 154 (1972). In *Giglio*, the prosecution did not disclose that it had promised "the only witness linking petitioner with the crime" that "he would not be prosecuted if he cooperated with the Government." *Id.* at 151, 153. This Court held that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Id.* at 154. The witness's immunity was indisputably "relevant to his credibility and the jury was entitled to know of it." *Id.* at 154-55. This Court reversed the conviction because "the Government's case depende[d] almost entirely on [the witness's] testimony[.]" *Id.* at 154; *see also Banks v. Dretke*, 540 U.S. 668, 675, 701 (2004) (concealment of impeachment evidence unconstitutional where the relevant witness's "testimony was the centerpiece of the . . . prosecution's penalty-phase case").

Concealment of impeachment evidence concerning *eyewitnesses* is especially prejudicial because eyewitness identifications are "particularly persuasive" to juries. *Boyette v. Lefevre*, 246 F.3d 76, 92 (2d Cir. 2001). Where identification of the assailant is the key issue, impeaching an eyewitness "would take out the heart of the State's case and greatly undermine the guilty verdicts." *Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986); *see also Crivens v. Roth*, 172 F.3d 991, 998, 999 (7th Cir. 1999) (impeachment would have "severely damaged" the "heart of the state's case").

Thus, this Court has explained that, "'[i]f, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely

not its perpetrator, and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness.'" *Agurs*, 427 U.S. at 113 n.21 (quoting Victor Bass, Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 125 (1972)). The violation is all the more evident where, as here, only one eyewitness testified at trial.

In *Kyles*, the concealed impeachment evidence aimed at "the heart of the State's case"—two key eyewitnesses. *Kyles*, 514 U.S. at 429; *see also id.* at 441 ("[T]he essence of the State's case was the testimony of eyewitnesses . . . ." (quotation marks and citation omitted)). The prosecution's "best" witness gave an initial identification that did not match the defendant. *Id.* at 441. A second eyewitness testified at trial that he saw the defendant shoot the victim, contrary to his earlier statement that he had not seen the assailant. This Court emphasized that "the evolution over time of a given eyewitness's description can be fatal to its reliability." *Id.* at 444. Habeas relief was required even though significant forensic evidence—including the murder weapon—tied the defendant to the crime. *Id.* at 427-28.

Petitioner's conviction, like the one in *Giglio*, depends on a single witness. No other evidence ties petitioner to the murders. *See* Pet. Br. 41. Boatner's testimony was therefore at least as indispensible to the prosecution's case as the testimony in *Giglio* and *Kyles*. Boatner's testimony also evolved over time—from inability to identify any perpetrator's face to apparent certitude at trial that petitioner committed

the crimes. *See* Pet. Br. 35-36. Unlike *Kyles*, moreover, no second (or third or fourth) eyewitness confirmed Boatner's trial testimony. To the contrary, two undisclosed eyewitness statements confirmed Boatner's initial, also undisclosed, statements that it was *not* possible to identify the perpetrators.

b. *The courts of appeals have repeatedly ordered new trials in similar circumstances.*

This Court's decisions in cases such as *Giglio* and *Kyles* do not stand alone. The courts of appeals have repeatedly vacated convictions where, as here, suppressed evidence tends to impeach an eyewitness or other important witness. Although *Brady* questions are often fact-intensive, the court of appeals precedent yields what amounts to a bright-line rule: that where the prosecution's case turns on a critical eyewitness, the failure to disclose evidence impeaching that witness's credibility or casting doubt on his recollection demands reversal. Failure to reverse petitioner's conviction would upend decades of precedent on this point.

1. The courts of appeals have recognized that the easiest cases are those, like this one, in which the prosecution puts forward a single eyewitness. Because the undiluted testimony of a single eyewitness carries exaggerated weight, impeachment of such testimony would be self-evidently "crucial to the outcome of the case and the determination of . . . guilt or innocence . . . ." *Robinson v. Mills*, 592 F.3d 730, 736 (6th Cir. 2010).

Impeachment of an eyewitness undermines confidence in a conviction or sentence even where a second eyewitness's testimony may remain undisturbed. *See Lindsey v. King*, 769 F.2d 1034, 1042 (1985) (noting that "positive identification by two unshaken witnesses possesses many times the power of such an identification by one only"); *see also Agurs*, 427 U.S. at 113 n.21. When there is only one eyewitness, therefore, the duty to disclose is especially clear. "[A] defendant suffers prejudice from the withholding of favorable impeachment evidence when the prosecution's case hinges on the testimony of one witness." *Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009) (Sutton, J.). The prosecution "has a duty to disclose evidence in its possession which contradicts the testimony of the only eyewitness to the alleged crime." *Clay v. Black*, 479 F.2d 319, 320 (6th Cir. 1973); *see also D'Ambrosio v. Bagley*, 527 F.3d 489, 498 (6th Cir. 2008); *Horton v. Mayle*, 408 F.3d 570, 581 (9th Cir. 2005).

2. The undisclosed material in this case is particularly compelling because it includes Boatner's own previous inconsistent statements. "Impeachment with a prior inconsistent statement relating to the central issue that the jury was required to decide is a far more serious blow to the prosecution's case than simply pointing out the common situation that . . . testimony resulted from a plea bargain." *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 561 (4th Cir. 1999). Shifting statements open the door to a number of effective counter-attacks—*e.g.*, that a witness is lying or that a witness "did not see [the] attacker well enough to

identify him . . . ." *Boyette*, 246 F.3d at 92; *see also Jacobs v. Singletary*, 952 F.2d 1282, 1289 (11th Cir. 1992). As this Court emphasized, an eyewitness's changing story is therefore undoubtedly material and perhaps "fatal" to his credibility. *Kyles*, 514 U.S. at 444. Indeed, it is "classic *Brady* material." *Boyette*, 246 F.3d at 91.

Thus, a victim's inability to identify the assailant at the time of the offense is crucial impeachment evidence when, at trial, the victim reverses course and makes a positive identification. *See Jamison v. Collins*, 291 F.3d 380, 391 (6th Cir. 2002); *McDowell v. Dixon*, 858 F.2d 945, 949 (4th Cir. 1988). For example, the Fifth Circuit reversed the denial of habeas where a murder conviction rested largely on the basis "of the identification testimony" of two witnesses and the prosecution concealed one witness's prior statement "that he did not see the perpetrator's face . . . ." *Lindsey*, 769 F.2d at 1042. Likewise, the Second Circuit reversed the denial of habeas in a case in which the prosecution suppressed interview notes stating that the victim—and only eyewitness—had initially been unsure of her identification; that her description did not match the defendant; and that she had been unable to identify the defendant from photos. *See Boyette*, 246 F.3d at 91. Similarly, in a Third Circuit case, the prosecution failed to disclose that "perhaps the only credible eyewitness who testified to seeing [the defendant] near the scene of the crime" had previously told police that the perpetrator was *not* the defendant. *Slutzker v. Johnson*, 393 F.3d 373, 387 (3d Cir. 2004).

The Fourth Circuit made the same point in *Spicer*. In that case, the prosecution suppressed the statement of an eyewitness that specifically denied seeing the defendant on the day of the crime. *See* 194 F.3d at 551. The witness testified at trial, however, that he had seen the defendant running from the scene of the crime. *See id.* at 552. Writing for the court, Judge Niemeyer affirmed the district court's grant of habeas because, if the defendant had possessed the conflicting statement, it could have impeached the witness and crippled the prosecution's case. *Id.* at 560-61.

The same is true here. The State's case rested solely on the testimony of Boatner, whose initial statement, as well as statements almost a week later, emphatically denied any ability to describe the assailants. *See* Pet. Br. 13-16. The prosecution had "a duty to disclose [that] evidence" because it directly contradicted his equally emphatic trial testimony identifying petitioner. *Clay*, 479 F.2d at 320. The defense and the jury were entitled to know about Boatner's about-face, especially on an issue so fundamental as whether an identification was even possible. *See Robinson*, 592 F.3d at 736. And impeachment of his testimony would have left the prosecution "without any conclusive, or perhaps even persuasive, identification evidence." *Spicer*, 194 F.3d at 560-61.

3. Boatner's inconsistent statements, while perhaps the most important impeachment evidence, were far from the only conflicting eyewitness evidence suppressed by the State. Two other eyewitnesses stated that the assailants wore masks and could not be identified. Those concealed

statements were consistent with Boatner's initial statements and contradicted his identification of petitioner at trial. *See* Pet. Br. 36-37.

Failing to disclose such evidence is highly relevant. As discussed above, *impeachment* of eyewitness testimony may swing the outcome of a trial because such testimony is particularly persuasive. *See* p. 7, *supra*. *Suppression* of eyewitness testimony is no less damaging to confidence in a conviction. *See, e.g.*, *Goudy v. Basinger*, 604 F.3d 394, 399, 401 (7th Cir. 2010); *Jamison*, 291 F.3d at 389; *McDowell*, 858 F.2d at 950.

Accordingly, prosecutors may not suppress statements of eyewitnesses that contradict the testimony of other witnesses offered at trial. Such evidence could "demonstrate[] that witnesses misidentified" a defendant. *Goudy*, 604 F.3d at 399. In a Sixth Circuit case, as here, prosecutors failed to disclose that a victim's description of his assailant did not match the defendant. *See Castleberry v. Brigano*, 349 F.3d 286, 290 (6th Cir. 2003). The victim in that case—like Shelita Russell here, Pet. Br. 16—died prior to trial, leaving the jury with only the testimony of other witnesses who placed the defendant at the scene. *See Castleberry*, 349 F.3d at 288. The court of appeals reversed the denial of habeas relief because the "description of the assailant would have been highly relevant evidence for the jury to consider had it not been withheld by the government." *Id.* at 293. The fact that the prosecution suppressed *two* contrary eyewitness statements here makes this case even more worthy of reversal.

4. More generally, the courts of appeals find *Brady* violations where evidence undermines a key or crucial witness—even if not an eyewitness. Where "the foundation of the government's entire case rests upon the testimony of one key witness, . . ., the reliability of that witness clearly is determinative of the defendant's guilt or innocence." *United States v. Serv. Deli Inc.*, 151 F.3d 938, 943 (9th Cir. 1998). It is therefore incumbent on the prosecution to disclose a witness's previous statements that conflict with his later trial testimony. *See id.* at 943-44. Simply put, "the government's failure to disclose evidence tending to impeach a crucial witness undermines . . . confidence in the jury's result." *United States v. Campos*, 20 F.3d 1171 (5th Cir. 1994) (Garza, J.) (unpublished table decision) (citing *Giglio*, 405 U.S. at 154-55).

Cases to that effect are legion. *See, e.g.*, *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) (witness was "the linchpin of the prosecution's case"); *Monroe v. Angelone*, 323 F.3d 286, 300, 316-17 (4th Cir. 2003) (affirming grant of habeas due to failure "to disclose five separate items of impeachment material on [prosecution's] key witness"); *Monroe v. Blackburn*, 607 F.2d 148, 152 (5th Cir. 1979) (reversing denial of habeas where "prosecution's first witness . . . provided the most damaging testimony against" the defendant and there was an "absence of other evidence connecting [the defendant] with the robbery"); *United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995) (Posner, J.) ("Although the testimony of the six prisoner witnesses for the prosecution was corroborated, had their testimony been disbelieved the defendants would have had to be acquitted on

most counts."); *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989) (reversing denial of habeas where "the state's case against petitioner depended almost entirely on [one witness's] testimony"); *United States v. Robinson*, 583 F.3d 1265, 1271 (10th Cir. 2009) (reversing conviction because of suppression of mental health records from confidential informant where "his testimony was central—indeed essential—to the government's case"); *see also Jamison*, 291 F.3d at 389 ("central witness of the trial"); *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 829 (10th Cir. 1995) ("critical state's witness").

If a new trial was necessary in these cases, it necessarily follows that one is required here. Boatner's "credibility was not just a major issue; it essentially was the only issue that mattered." *Serv. Deli*, 151 F.3d at 944.

2. The prosecution's suppression of a confession by another person violates *Brady*.

The undisclosed evidence impeaching Boatner's testimony alone warrants reversal. But there is more. The prosecution had evidence that Robert Trackling had confessed to the North Roman murders, yet it failed to disclose that statement prior to petitioner's trial. *See* Pet. Br. 19-21. In *Brady* itself, the Court concluded that suppression of another person's confession was undoubtedly material. *See Brady*, 373 U.S. at 86; *see also Kyles*, 514 U.S. at 445-49 (suppressed inconsistent statements by police informant suggesting informant sought to frame defendant and had committed crime

himself). There is no reason for a different conclusion here.

The courts of appeals agree: "[N]ew evidence suggesting an alternate perpetrator is 'classic *Brady* material.'" *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010); *accord Boyette*, 246 F.3d at 91; *see also, e.g.*, *Mendez v. Artuz*, 303 F.3d 411, 412-13 (2d Cir. 2002); *DiLosa v. Cain*, 279 F.3d 259, 263, 265 (5th Cir. 2002); *Castleberry*, 349 F.3d at 293; *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995). Evidence of a *confession* by an alternative suspect is inestimably more compelling because "no other statement is so much against interest as a confession of murder." *Donnelly*, 228 U.S. at 278 (Holmes, J., dissenting); *accord Scott*, 303 F.3d at 1232.

The reason is obvious: Evidence that someone else committed the crime reduces the likelihood that the defendant did so. Respondent may assert that Trackling and petitioner might have both committed the crime. But at most, that is an argument for a jury to consider and weigh; not one for the prosecution to pre-judge itself. Indeed, evidence of another's confession is so clearly material that suppression violates the rule of *Brady* even if it only partially exonerates the defendant. *See Williams*, 623 F.3d at 1265. Thus, a new trial on such grounds is necessary even when other evidence, such as eyewitness identifications, remains unaffected by the presence of alternative suspects. *See Trammell v. McKune*, 485 F.3d 546, 552 (10th Cir. 2007) (McConnell, J.).

Evidence of alternative suspects may also allow the defense to attack "the reliability of the

investigation" if it shows that investigators were less than energetic in exploring other potential suspects. *Kyles*, 514 U.S. at 446. After all, a "common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant . . . ." *Id.* (quoting *Bowen*, 799 F.2d at 613). Accordingly, writing for the Tenth Circuit, Judge McConnell reasoned that suppressed evidence of alternative suspects "could also have been used to cast doubt on police officers' decision to focus their attention . . . on [the defendant] rather than" the other suspects. *Trammell*, 485 F.3d at 551.

In light of these principles, "[t]his is not a close case." *Banks*, 54 F.3d at 1517. Trackling's confession was plainly material. And the circumstances surrounding that confession cast a cloud over the entire investigation. Police learned of Trackling's confession from another inmate, but rather than pursue Trackling for the crimes, the government urged the inmate to implicate *petitioner*. *See* Pet. Br. 51-52. Armed with that information, petitioner's counsel could have argued that this is a case of not just simple police neglect in declining to pursue Trackling but an outright frame-up.

3. The prosecution should have disclosed exculpatory statements made by witnesses to the police.

If that was not bad enough, the prosecution also concealed a statement by an apparent perpetrator indicating that petitioner was not involved in the crime. A statement by an apparent perpetrator that directly exculpates a defendant is highly material. *See, e.g.*, *Graves v. Dretke*, 442 F.3d 334, 344-45 (5th

Cir. 2006); *Jacobs*, 952 F.2d at 1288-89. In *Jacobs*, for example, the key issue was which of three perpetrators shot two Florida state troopers. *See* 952 F.2d at 1285. The court of appeals reversed the denial of habeas because the prosecution suppressed evidence that one of the perpetrators denied knowing whether the defendant pulled the trigger, despite testifying with certainty at trial that the defendant had done so. *Id.* at 1288-89.

Similarly, in *Graves*, the prosecution's key witness confessed to the killings and testified against the defendant, pursuant to a plea agreement. *See* 442 F.3d at 337. Prosecutors did not disclose that, after reaching the agreement but before testifying, the witness told police at least three different stories: first, that he committed the murders alone; second, that he conspired with his wife and the defendant; and finally, that he committed the murders with just the defendant. *See id.* The Fifth Circuit found the undisclosed statements key because one placed yet another suspect—the witness's wife—at the scene and another exonerated defendant altogether. The court found the statements "particularly important" because the "conviction rest[ed] almost entirely on [the witness's] testimony" with a complete absence of any other "direct evidence." *Id.* at 344-45.

In this case, police interviewed Phillip Young, apparently one of the perpetrators. When asked whether "Short Dog"—which police believed to be petitioner—was present at the murders, Young indicated he was not. *See* Pet. Br. 17-18. Particularly in conjunction with the evidence undermining Boatner's identification of petitioner,

Young's statements exonerating petitioner would have been crucial to the jury's deliberations.

C. Cumulative Nondisclosures Require A New Trial When Little Physical Evidence Connects A Defendant To The Crime.

The prosecution's cumulative *Brady* violations are all the more inexcusable because, apart from Boatner's testimony, nothing connected petitioner to the crime.

Numerous courts of appeals have concluded that circumstantial cases, unsupported by significant physical evidence, are particularly susceptible to reversal for *Brady* violations. *See, e.g.*, *McDowell*, 858 F.2d at 950-51; *DiLosa*, 279 F.3d at 265; *Harris*, 553 F.3d at 1033; *Castleberry*, 349 F.3d at 289; *Williams*, 623 F.3d at 1266; *Gantt v. Roe*, 389 F.3d 908, 909-10, 913 (9th Cir. 2004) (Kozinski, J.); *Banks*, 54 F.3d at 1521; *Jacobs*, 952 F.2d at 1289. The reason is simple: The concealment of even minimal impeachment or exculpatory evidence may undermine confidence in a relatively weak case.

Accordingly, courts routinely grant a new trial where the prosecution suppressed impeachment evidence and the relevant witness's testimony provided "the only evidence against" a defendant. *Boyette*, 246 F.3d at 80; *see also Killian v. Poole*, 282 F.3d 1204, 1210 (9th Cir. 2002) (directing grant of habeas where witness's testimony provided "core facts" establishing guilt). That is especially true where the witness's testimony is uncorroborated by forensic evidence. *See United States v. Aviles-Colon*, 536 F.3d 1, 21 (1st Cir. 2008); *United States v. Jernigan*, 492 F.3d 1050, 1055 (9th Cir. 2007) (en

banc). Thus, the Fourth Circuit affirmed a grant of habeas where "the prosecution presented *no* physical evidence linking [the defendant] to the crime." *Spicer*, 194 F.3d at 560; *accord Harris*, 553 F.3d at 1033.

Because the eyewitness testimony linking the defendant to the crime was the only inculpatory evidence, failure to disclose evidence tending to impeach that testimony was plainly material. *See Spicer*, 194 F.3d at 560; *accord Harris*, 553 F.3d at 1034; *Slutzker*, 393 F.3d at 387.

II. THERE IS NO EXCUSE FOR *BRADY* VIOLATIONS LIKE THESE IN OUR SYSTEM OF JUSTICE.

This case is as important as it is straightforward. The rule of *Brady* is not a mere constitutional flourish. It serves the fundamental aim of our criminal justice system—to convict the guilty and acquit the innocent. "Society wins not only when the guilty are convicted but when criminal trials are fair[.]" *Brady*, 373 U.S. at 87. That means the State's interest "'is not that it shall win a case, but that justice shall be done.'" *Kyles*, 514 U.S. at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). And it is not difficult to comply with *Brady*; when in doubt, a prosecutor should disclose evidence, both to ensure compliance with the law and, more simply, to promote justice.

The Orleans Parish district attorney's office, however, has given the distinct appearance of wishing only to secure convictions. *See* Pet. Br. 31-32 (citing cases). Indeed, even in this Court of last resort, Orleans Parish has become a repeat player on

this issue. *See Kyles*, 514 U.S. 419; *Connick*, 131 S. Ct. 1350. Just last Term, this Court heard argument in a case where an admitted *Brady* violation by Orleans Parish resulted in 18 years of wrongful incarceration. *See Connick*, 131 S. Ct. at 1356-57. The Court held that the egregious constitutional violation did not make Orleans Parish liable for failing to train its prosecutors in *Brady* compliance. *See id.* at 1356. But this Court's decision to eschew that monetary remedy only makes it more important for courts to provide the more traditional and targeted remedy of a new trial.

It is far too easy for *Brady* violations to pass unnoticed—eventually raised in postconviction proceedings or never discovered at all. Thus, awarding new trials when violations are discovered is essential to promote justice in those cases *and all others*, by holding prosecutors to account when infractions surface.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

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August 19, 2011