IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. COA-PET-0290-2022
September Term

JONATHAN D. SMITH,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN SUPPORT OF APPELLANT OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MARYLAND CRIMINAL DEFENSE ATTORNEYS ASSOCIATION, AND THE INNOCENCE NETWORK

David B. Smith
Vice-Chair, Amicus Curiae Committee
National Association of Criminal Defense Lawyers
1660 L Street NW
Washington, DC 20036
T: (202) 872-8600
F: (202) 872-8690
dbs@davidbsmithpllc.com

Counsel to National Association of Criminal Defense Lawyers

Jonathan M. Cohen (9601160003)
Counsel of Record
John Longstreth*
Tre A. Holloway*
K&L GATES LLP
1601 K St. NW
Washington, D.C. 20006
(202) 778-9000
Jonathan.Cohen@klgates.com

Counsel to National Association of Criminal Defense Lawyers
* *Motion for Special Admission Pending*

Megan E. Coleman
MarcusBonsib, LLC
6411 Ivy Lane, Suite 116
Greenbelt, MD 20770
(301) 441-3000
megancoleman@marcusbonsib.com
CPF #0812170011

Counsel to Maryland Criminal Defense Attorneys Association

Tricia Rojo Bushnell
President, The Innocence Network
Midwest Innocence Project
3619 Broadway, Suite 2
Kansas City, MO 64111
(816) 221-2166
trojobushnell@themip.org

Counsel to The Innocence Network

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INTEREST OF AMICI CURIAE

Amici together represent a spectrum of criminal justice advocates, including both defense attorneys and a network of organizations dedicated to the release of the wrongfully convicted. Amici submit this brief because the misconduct in this case far exceeds what a civilized legal system should tolerate. Amici respectfully submit that certiorari should be granted because dismissal of the prosecution is necessary to protect Mr. Smith from the prejudice caused by the "violation of a recognized statutory or constitutional right," to "preserve judicial integrity," and to "deter future illegal conduct." *United States v. Bundy*, 968 F. 3d 1019, 1030 (9th Cir. 2020) (dismissal necessary where government violated its disclosure duties under *Brady v. Maryland,* 373 U.S. 83 (1963)).

Amici include two organizations representing defense attorneys. The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. The Maryland Criminal Defense Attorneys Association (MCDAA) is an association of Maryland-based defense attorneys, and likewise seeks to protect the rights of those accused of crime or misconduct.

Amici also include the Innocence Network and its members, organizations dedicated to providing pro bono services to prisoners for whom evidence discovered post-

conviction can prove innocence.[1] Drawing on lessons from exoneration cases, the Network studies and advocates for reform designed to enhance the accuracy and reliability of the criminal justice system.

Amici share an interest in redressing constitutional violations and inequities within the criminal justice system. Amici come together to show, from their varied experiences, that this case presents the very types of willful government misconduct, false confessions and testimony, and due process violations that are leading causes of wrongful convictions, and that require dismissal to protect the integrity of the criminal justice system.

If the Court grants certiorari, amici intend to seek the consent of the parties to file a brief on the merits supporting dismissal.

SUMMARY OF ARGUMENT

In this extraordinary case, the State conceded that it engaged in "intentional, willful, and/or reckless misconduct" to secure the conviction of Jonathan Smith when it suppressed exculpatory evidence, concealed an agreement involving a key witness who closely assisted in the State's investigation, and repeatedly lied about this misconduct. On remand from this Court, the Attorney General agreed that this egregious and willful misconduct warranted dismissing the charges against Mr. Smith.

[1] The Innocence Project, which represents Mr. Smith, is also a member of the Innocence Network. The Innocence Network files this brief independently of the Innocence Project, and neither the network nor any party or counsel for a party has made any financial contribution to its preparation or drafted any portion of it.

Giving little if any weight to these concessions, the Court of Special Appeals applied an impossibly high constitutional bar for due process dismissals that is contrary to this Court's prior opinion in this matter and to standards in other jurisdictions whose rulings the court purported to survey. Rather than sanctioning the State for its misconduct, the ruling allowed the State to retry Mr. Smith as if its misconduct never occurred and gravely minimized the resulting prejudice to Mr. Smith on any retrial. This is not a meaningful sanction to deter prosecutions, such as this one, that are pervaded from their inception by admittedly egregious and willful prosecutorial misconduct. This Court should grant certiorari to address this issue of first impression, and to devise a standard that adequately deters future prosecutorial misconduct.

ARGUMENT

I. This Court Should Grant Certiorari To Articulate A Clear Standard For Dismissing Indictments Tainted By Egregious And Willful *Brady* Violations.

Amici's collective experience shows that the types of irregularities here are unusually extreme. They include *Brady* violations of the type that have been subject to due process dismissals in other jurisdictions, as well as other admitted egregious misconduct. This Court has never specified when dismissal is an appropriate remedy for egregious and willful prosecutorial misconduct. The Court of Special Appeals acknowledged that this is a question of first impression. 2022 WL 4494166, at *13. This recurring issue of constitutional importance merits this Court's comprehensive and considered review.

In developing a standard, this Court should fully consider the body of case law from other jurisdictions that have contended with this question. *See Harris v. State*, 539 A.2d

637, 644 (Md. 1988) ("Since this is an issue of first impression in Maryland, we must look to other courts for guidance."). The appeals court did not do so. Despite purporting to "look to the reasoning of other courts," the court did not conduct a fulsome survey of the cases. 2022 WL 4494166, at *13–14. The court's analysis relied almost entirely on decisions that refused dismissal by finding no prejudice resulted. *Id.* That reasoning did not account for the substantial body of case law granting due process dismissals to provide effective sanctions for prosecutorial misconduct, including in cases in which the misconduct was far less egregious than it was here. *See, e.g.*, *People v. Velasco-Palacios*, 185 Cal. Rptr. 3d. 286 (Cal. Ct. App. 2015); *State v. Wong*, 40 P.3d 914, 928–29 (Haw. 2002); *Bundy*, 968 F.3d at 1042–45; *United States v. Pasha*, 797 F.3d 1122, 1140–41 (D.C. Cir. 2015); *United States v. Fitzgerald*, 615 F. Supp. 2d 1156, 1160–62 (S.D. Cal. 2009); *Morales v. Portuondo*, 165 F. Supp. 2d 601 (S.D.N.Y. 2001); *Ouimette v. Moran*, 762 F. Supp. 468, 478 (D.R.I..), *aff'd*, 942 F.2d 1 (1st Cir. 1991). The court also understated the prejudice Mr. Smith would suffer at any retrial. *See* Petition for Writ of Certiorari, 8–10.

The Court of Special Appeals' nearly exclusive focus on pro-prosecution case law led it to apply a standard that, in its view, the admitted egregious and willful conduct in this case did not meet. Its ruling effectively granted the State a free pass as to misconduct that, as the Attorney General conceded on appeal, was "willful" and "deprived Smith of his right to a fair trial, the remedy for which can only be dismissal of the charges." Giving no apparent weight to that concession, the court reached a result that conflicts with a body of precedent to which the court gave short shrift, and concluded that the State, despite its prejudicial misconduct, could re-prosecute Mr. Smith after he has already spent over two

decades in prison. That decision offends justice by impinging on the state's constitutional protections, shocks the conscience, and warrants this Court's review.

II. The Court Should Devise A Standard That Meaningfully Deters Prosecutorial Misconduct.

State and federal courts have long recognized the importance of deterring prosecutorial misconduct through adequate remedies. This is because, when a prosecutor willfully denies a defendant's right to due process, "[t]he injury is not limited to the defendant—there is injury . . . to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Ballard v. United States*, 329 U.S. 187 (1946). The magnitude of that injury requires courts "to impose a sanction that will serve to deter future prosecutions from engaging in the same misconduct." *Bundy*, 968 F.3d at 1044. In other words, courts must "affirmatively act to punish and deter particularly egregious prosecutorial acts." *State v. Sherman*, 378 P.3d 1060, 1078 (Kan. 2016). *See also State v. Monday*, 257 P.3d 551, 558 (Wash. 2011) ("If our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests.").

Deterrence is especially significant in cases that involve egregious, willful, and repeated misconduct that is not only difficult to detect and remedy, but that also undermines confidence in the justice system. In cases like this one, granting the prosecution another bite at the apple signals to rogue prosecutors and investigators that they can intentionally break the rules, get away with it for years (or perhaps forever in cases not zealously litigated), then simply get a "do over" under the rules they should have followed in the first

place. And it is much worse in this case, where a "do over" is impossible because so much time has elapsed, preventing the cross-examination of witnesses who have died or suffered loss of memory. The twenty years Mr. Smith has spent in prison have stripped away twenty years of evidence and investigatory opportunity.

These principles apply particularly forcefully here because the State admits that its violations were legion, intentional, and undertaken to shore up a weak case. Allowing this case to proceed to re-trial despite this misconduct would make "the courts themselves accomplices in willful disobedience of law." *McNabb v. United States*, 318 U.S. 332, 345 (1943).

As the California Supreme Court recognized in a case that the appeals court did not cite or discuss, merely granting a new trial is "inadequate since there would be no incentive for state agents to refrain from such violations." *Barber v. Mun. Court*, 598 P.2d 818, 828 (Cal. 1979). To merely exclude the tainted evidence and allow the prosecution to re-try a defendant despite the severity of its misconduct allows the State to "proceed as if the unlawful conduct had not occurred." *Id.*

Other courts have reached similar conclusions, in cases that the appeals court also did not address despite its ostensible survey of the law as to a question of first impression. *See, e.g.*, *Velasco-Palacios*, 185 Cal. Rptr. 3d. at 450 (holding that dismissal was appropriate when prosecutor fabricated a confession); *Wong*, 40 P.3d at 928–29 (holding that dismissal was an appropriate sanction for prosecutor's misconduct before the grand jury); *Bundy*, 968 F.3d at 1042–45 (holding that dismissal was an appropriate sanction for the government's *Brady* violations); *United States v. Pasha*, 797 F.3d at 1140–41

(affirming dismissal of an indictment tainted by *Brady* violations, because "something more than a new trial is required to avoid prejudice to the defendant"); *Fitzgerald*, 615 F. Supp. 2d at 1160–62 (dismissing indictment where government failed to disclose exculpatory evidence, and noting that a new trial would be prejudicial to the defendant because a key witness had died). *See also, e.g.*, *Ouimette*, 762 F. Supp. at 478–80 (granting writ of habeas corpus and ordering defendant's unconditional release and discharge from custody because of prejudicial error resulting from *Brady* violations); *Morales*, 165 F. Supp. 2d at 609, 614–15 (same).

If the only remedy were a new trial after spending two decades in prison, police and prosecutors could engage in misconduct like the violations here, hoping that misconduct would never come to light, as indeed it did not here until over a decade after Mr. Smith's unjust conviction. This is no remedy at all.

CONCLUSION

This Court should grant certiorari to fashion and apply a standard that promotes the purpose and values of the Due Process Clause by providing an effective remedy for repeated and willful prosecutorial misconduct.

Respectfully submitted,

November 22, 2022

By: /s/ JONATHAN M. COHEN

Jonathan M. Cohen (9601160003)
Counsel of Record
John Longstreth*
Tre A. Holloway*
K&L GATES LLP
1601 K St. NW
Washington, D.C. 20006

(202) 778-9000
Jonathan.Cohen@klgates.com
Counsel to National Association of
Criminal Defense Lawyers
* *Motion for Special Admission Pending*

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 1,883 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ Jonathan M. Cohen__
Jonathan M. Cohen (9601160003)

CERTIFICATE OF SERVICE

In accordance with Maryland Rules 20-201(g)(3) and 20-405(b), I certify that on this day, November 22, 2022, I used the MDEC System to electronically file the Brief in Support of Appellant of Amici Curiae National Association of Criminal Defense Lawyers, Maryland Criminal Defense Attorneys Association, and The Innocence Network, which sent electronic notification of filing to all persons entitled to service, and also mailed two hardcopies to counsel for both parties at the following addresses. This document does not contain confidential or restricted information as defined by Maryland Rule 20-101(s).

Cathleen C. Brockmeyer
Assistant Attorney General
Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place
Baltimore, MD 21202

Donald P. Salzman
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

/s/ Jonathan M. Cohen
Jonathan M. Cohen (9601160003)