No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,
Petitioner,
v.
RICKY BELL, WARDEN
Respondent.

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

BRIEF FOR *AMICI CURIAE* FORMER PROSECUTORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are former prosecutors, identified in the Appendix, who have a continuing interest in the fair and effective functioning of the criminal justice system. *Amici* believe that, in order to promote the administration of justice, prosecutors must perform their official responsibilities in strict conformance with applicable standards of conduct and fairness, including their overarching duty "to seek justice, not merely to convict." *ABA Standards for Criminal Justice* 3-1.2(c), at 4 (3d ed. 1993) (*ABA Crim. Justice Stds.*). As this Court has explained, the prosecutor is "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

A fundamental component of the prosecutor's duty to act "as a minister of justice and not simply [as] an advocate" is the obligation to ensure the "consideration of exculpatory evidence known to the prosecution." *ABA Crim. Justice Stds.* 3-3.11 cmt., at 82; *see* ABA, Model Code of Prof'l Responsibility DR 7-103(B). The prosecutor's obligation to disclose exculpatory evidence to the defense is embodied in

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

the constitutional requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

In addition, non-constitutional standards requiring the disclosure of exculpatory evidence generally "go[] beyond the corollary duty upon prosecutors imposed by constitutional law." *ABA Crim. Justice Stds.* 3-3.11 cmt., at 82; *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also*, *e.g.*, Tenn. R. Prof'l Conduct 3.8(d) (requiring "timely disclosure . . . of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"). Those duties concerning the disclosure of evidence favorable to the defense apply to the determination of the appropriate sentence no less than to the determination of guilt or innocence. *See ABA Crim. Justice Stds.* 3-6.2(b); *id.* 3-6.2 cmt., at 116 ("As a minister of justice, the prosecutor also has the specific obligation to see that the convicted defendant continues to be accorded procedural justice and that a fair sentence is imposed upon the basis of appropriate evidence, including consideration . . . of exculpatory information known to the prosecutor."); *see also* Tenn. R. Prof'l Conduct 3.8(d) (requiring disclosure of "all unprivileged mitigating information" "in connection with sentencing").

The prosecution's overarching duty to serve justice—rather than merely to win a case—also extends to appellate and post-conviction proceedings, the very object of which is to assure the fairness of the trial and the reliability of the result. Of particular relevance here, the prosecution has a duty of candor to all courts, including appellate and post-conviction courts. *See ABA Crim. Justice Stds.* 3-2.8(a) ("A prosecutor should not intentionally misrepresent

matters of fact or law to the court."). The prosecutor, that is, "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court. This is not only a basic ethical requirement, but is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice." *Id.* 3-2.8 cmt., at 36 (footnote omitted). Accordingly, it is *amici*'s experience that courts considering claims for appellate or post-conviction relief rely on the prosecution to provide an objective and forthright description of the proceedings under review.

The prosecution's responsibility in that regard is especially pronounced in the context of post-conviction review of capital convictions and sentences. That is not only because of the magnitude of the interests at stake, but also because such cases typically involve a multitude of claims, a highly complicated procedural history, and an intricate set of waiver and default principles governing the consideration of claims. Those factors combined place a substantial premium on the reviewing court's ability to understand completely and accurately what has transpired to date. And they give rise to a considerable risk that a claim may be erroneously deemed procedurally barred—even where, as here, there is substantial merit to the claim.

In this case, for instance, the prosecution failed to disclose to the defense exculpatory evidence that was in the prosecution's possession and that bore directly on the sole defense raised by petitioner at trial and sentencing—*viz.*, that petitioner, during his commission of the charged conduct, was mentally incapacitated as the result of a drug addiction related to

post-traumatic stress from his military service. Then, when petitioner subsequently discovered the prosecution's failure to disclose the exculpatory evidence and sought in post-conviction proceedings to raise a *Brady* challenge based on that evidence, the prosecution failed to give an accurate procedural history of the claim that would have assisted the post-conviction courts in addressing its merits. The state post-conviction courts mistakenly held that petitioner's *Brady* claim had been previously determined, and the federal habeas courts erroneously concluded that the claim had been procedurally defaulted.

Amici fully agree with the reasons stated by petitioner for reversing the decision of the court of appeals. In addition, *amici* write to emphasize that the conduct of the prosecution in this case—both in the trial proceedings by failing to disclose evidence favorable to petitioner, and then in post-conviction proceedings by failing to give a full and accurate account of the procedural history—reinforce the need for this Court to reverse the court of appeals' decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was convicted of capital murder and sentenced to death based on a crime spree that took place on August 9-10, 1980. Petitioner robbed a jewelry store and later killed a couple in their home. Petitioner did not dispute that he had committed the conduct with which he was charged. He instead raised as his sole defense that he was mentally incapacitated at the time because his drug addiction had

induced an amphetamine psychosis. Petitioner sought leniency in his capital sentencing hearing on the same basis. The prosecution argued that petitioner was not a drug addict but rather a calm, cool, and deliberate criminal.

Throughout the trial and sentencing phases, however, the prosecution had withheld from the defense substantial exculpatory evidence of petitioner's drug addiction, including eyewitness descriptions of petitioner's condition around the time of the crimes that supported his argument that he was acting under the influence of drugs. That evidence first came to light during petitioner's post-conviction proceedings, at which point petitioner timely raised a *Brady* claim. The state courts nonetheless declined to examine the claim, erroneously concluding that it had been resolved against petitioner in prior proceedings—when the evidence supporting the claim in fact had not even come to light when those proceedings occurred. The prosecution failed to present an accurate history of the case that would have helped prevent the error, in state or federal court, and the federal court of appeals refused to reverse the States' determination, concluding erroneously that the claim had been procedurally defaulted.

Erroneous determinations of procedural default like the ones in petitioner's case may be caused by a number of factors, such as the complexity of the record before the court on collateral review or the prosecution's failure to present an accurate procedural history of each claim. Regardless of the reason for the error, mistaken rulings of procedural default can result in the unwarranted denial of substantive constitutional rights. In petitioner's case, review of

the state courts' erroneous rulings should have revealed a properly raised and meritorious *Brady* claim. The evidence withheld by the prosecution at trial bore directly on petitioner's only defense—that he had committed the acts in a drug-induced psychosis related to post-traumatic stress from military service—and the prosecution in its arguments to the jury emphasized the seeming lack of evidence supporting petitioner's defense. "[T]aking the word of the prosecution," therefore, as did this Court did in *Kyles v. Whitley,* 514 U.S. 419, 434 (1995), it is plain that the evidence withheld by the prosecution was crucial to the case and undermines confidence in the verdict.

ARGUMENT

A. The Complexity Of Post-Conviction Proceedings Presents A Substantial Risk Of Mistaken Rulings Of Procedural Default, Particularly Where The Prosecution Fails To Give An Accurate Account Of The Procedural History.

As explained *infra*, pages 14-23, the prosecution in this case failed at trial to disclose evidence directly supporting the core of petitioner's defense and his argument that he should be spared a capital sentence. The prosecution then failed, in post-conviction proceedings, to give a full and accurate description of the procedural history of the resulting *Brady* claim. *See* Pet. Br. 5-7. The state courts mistakenly concluded that the claim had been previously determined against petitioner, and the federal courts erroneously ruled variously that the claim had been waived because it had not been properly presented, *see* Pet. App. 112a, 115a (district court

opinion), or that it had in fact been raised in state court but was procedurally defaulted because it was previously determined against petitioner, *see* Pet. App. 59a (court of appeals opinion).

The sequence of conflicting opinions in this case concerning the procedural history of petitioner's *Brady* claim is unsurprising in light of the prosecution's failure to present a full and accurate history of that claim to the state and federal courts. As this case well demonstrates, satisfaction of the prosecution's duty of candor is especially critical in the context of post-conviction and habeas proceedings in capital cases, where substantial layers of review, dozens of legal claims, and substantial procedural complexity present a significant risk that even meritorious claims will be mistakenly deemed procedurally barred.

1. The procedural history of this case demonstrates how a properly raised and meritorious claim nonetheless can slip through the cracks in post-conviction review. Petitioner did not learn of the exculpatory evidence possessed and withheld by the prosecution during trial until after he had filed his second amended petition for post-conviction review years later, in 1993. *See* Pet. Br. 6-7. Petitioner then filed a new amendment to the petition, adding a paragraph (¶ 41) alleging that the prosecution had withheld specified exculpatory evidence demonstrating that he suffered from drug problems and/or drug withdrawal or psychosis at the time of the offense, his defense at trial. J.A. 20-21; Pet. App. 40a. He also submitted an uncontested affidavit explaining that he "did not know of the existence of this claim in earlier proceedings, including post-conviction pro-

ceedings," and that the "facts ha[d] been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding." J.A. 17-18.

The post-conviction trial court nonetheless denied petitioner's amended petition for post-conviction relief. It did not separately explain its denial of petitioner's new *Brady* claim, although it explicitly identified that claim (*i.e.*, ¶ 41), in a list of claims rejected on the ground that they had been "restatements of grounds heretofore determined and denied" on direct appeal or in prior post-conviction proceedings. J.A. 22. The trial court's conclusion that the *Brady* claim in ¶ 41 had been previously determined was plainly erroneous: far from having been previously determined, that claim had in fact never before been raised. *See* Pet. Br. 6-7.

Notwithstanding the trial court's clear error in finding petitioner's *Brady* claim previously determined, the Tennessee Court of Criminal Appeals affirmed. The court's brief opinion did not separately address petitioner's claims but instead summarily observed that the trial court had found that "most of [petitioner's] stated grounds for relief . . . were previously determined." Ct. App. J.A. 2000.[2] The court then stated in its "conclusion" that petitioner had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." Ct. App. J.A. 2002.

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[2] Citations to the Joint Appendix filed in the court of appeals below take the form "Ct. App. J.A. [page]."

When petitioner again raised his *Brady* claim in his federal habeas petition, J.A. 23-30, the State erroneously answered that petitioner had "procedurally defaulted" the claim because it had been "waived." J.A. 39. The State relied on the Tennessee Court of Criminal Appeals' concluding statement that petitioner had "waived all claims" that "had not been previously determined." *Id.* (quotations omitted). In fact, however, both state courts (mistakenly) found petitioner's *Brady* claim to have been previously determined, not to have been waived. *See* Pet. App. 22a (concluding the "Tennessee courts held that [petitioner's] *Brady* claims were previously determined").[3]

The district court, evidently agreeing with the State's erroneous argument of procedural default due to state-court waiver, concluded that the *Brady* claim was procedurally defaulted because the state courts had deemed the claim waived. Pet. App. 102a, 112a. In the district court's view, most of the *Brady* evidence and arguments on which petitioner

[3] Circumstances make plain that both state courts found petitioners' *Brady* claim to have been previously determined rather than waived. The state trial court had explicitly (albeit erroneously) included petitioner's *Brady* claim among of a group of claims that the court deemed previously determined, J.A. 22, and the Tennessee Court of Criminal Appeals affirmed without suggesting any disagreement on that score. To be sure, the Court of Criminal Appeals had stated conclusorily that petitioner had "waived all claims" that "had not been previously determined." But nothing in the court's opinion suggests that it—unlike the trial court—believed that petitioner's *Brady* claim fell in the category of "waived" claims instead of "previously determined" claims. And as petitioner explains, the state courts could not have concluded that the *Brady* claim had been waived. *See* Pet. Br. 7 & n.1.

relied had never been presented in the state courts, and those that had been presented had been raised only through "conclusory" (and hence inadequate) "assertions that the state had generally withheld exculpatory documents." *Id.* at 112a. The district court, however, did not mention, much less consider, the specific *Brady* arguments petitioner had properly presented in ¶ 41 of the second amended petition. *See id.* And the court gained no assistance from the State on that score, because the State erroneously asserted as a blanket matter that petitioner's *Brady* claim had been waived, J.A. 39, without any effort to distinguish among the many items of evidence and subclaims that made up that claim, *see* J.A. 24-30. Indeed, the district court itself observed that "analyzing procedural default has been made more difficult by . . . the [State's] failure to articulate which specific claims are subject to which specific procedural default." Pet. App. 98a.

On appeal, the State argued that the *Brady* claim had been procedurally defaulted because it was "simply never raised in the state court." J.A. 41. The State, like the district court, asserted that petitioner had made "[o]nly a conclusory attempt . . . to raise the allegations in his second post-conviction petition and not the specific claims as now alleged." *Id.* In support of that argument, however, the State cited only the version of the second amended petition for state post-conviction relief that had been in effect *before* petitioner had again amended the petition to add ¶ 41. *Id.* at 41-42 n.7. The State did not acknowledge or make any reference to ¶ 41, which, directly contrary to the State's argument, plainly *did*

raise petitioner's *Brady* claim with substantial specificity.[4]

Notwithstanding the State's misleading argument, the court of appeals recognized that petitioner had raised his *Brady* claim in state court. *See* Pet. App. 59a. But the court of appeals nonetheless held that petitioner had procedurally defaulted the claim on the basis that the state courts had deemed the claim previously determined. *See id.* at 22a, 24a.[5] Of course, the state courts' determination to that effect, as explained, *see* pp. 6-8, *supra,* was flatly incorrect. The court of appeals, however, declined to entertain any argument that the state courts had erred in deeming the *Brady* claim previously determined, reasoning that any such inquiry would raise federalism concerns. *See* Pet. App. 24a-25a. But even assuming *arguendo* the validity of any such federalism-based concerns, *see* Pet. Br. 29-37 (explaining that federal courts plainly have authority to revisit erroneous state court application of procedural rules), such concerns could pose no obstacle if the State itself had accurately and forthrightly acknowledged that the state courts had not previously determined petitioner's *Brady* claim against him.

2. At every step, the state post-conviction courts and federal habeas courts erred in their understand-

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[4] Indeed, the State appeared essentially to acknowledge, in its opposition to the en banc petition, that its failure to discuss (or even cite) ¶ 41 in its brief before the panel had been misleading. J.A. 46-47 & n.7.

[5] As petitioner explains, the court of appeals erred in supposing that a claim that had been previously determined in state court could therefore be procedurally defaulted for purposes of federal habeas review. *See* Pet. Br. 23-29.

ing of the procedural history of petitioner's *Brady* claim. Rather than assisting the post-conviction courts in their understanding, the State's inaccurate account of the procedural history only confused the issue and impeded the courts' consideration of the merits of the claim. Pet. Br. 5-7. The prosecution, however, is held to an especially high standard when communicating with the courts on such matters. *See ABA Crim. Justice Stds.* 3-2.8(a). The prosecutor "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court." *Id.* 3-2.8 cmt., at 36 (footnote omitted); *see United States v. Casas*, 425 F.3d 23, 40-41 (1st Cir. 2005) ("Prosecutors have a duty of candor to the court."); *cf. Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 358 (1963) (recognizing that attorneys for the government have an "unqualified duty of scrupulous candor . . . in all dealings with th[e] Court").

The need for the prosecution to provide a fully objective and complete description of the procedural history of the claims under review is at its premium in the context of post-conviction review of capital sentences. In light of the magnitude of the interests, the multitude of claims, the highly complicated procedural history, and the equally complicated procedural rules concerning waiver and default that typify that context, it is essential that courts be able to rely on the prosecution to supply an entirely complete and accurate description of the proceedings under review. *But cf. Pierre v. Shulsen*, 802 F.2d 1282, 1283 (10th Cir. 1986) (explaining, in capital case, that "State's threshold response based upon procedural default in the state courts" was "mistaken" because petitioner "ha[d] preserved []his claim").

Moreover, state courts, as in this case, occasionally misapprehend the procedural history so as to deny review of a claim on the merits. *See*, *e.g.*, *Washington v. Renico*, 455 F.3d 722, 731 n.4 (6th Cir. 2006) (explaining that "[t]he state court . . . mistakenly[] limited its review of [the petitioner's] claim to the record as presented on appeal because [the court erroneously believed that he had] failed to move for an evidentiary hearing or a new trial") (internal alternation and quotation marks omitted), *cert. denied*, *Washington v. Lafler*, 127 S. Ct. 1877 (2007); *Williams v. Lane*, 826 F.2d 654, 660 (7th Cir. 1987) (affirming grant of habeas relief where the state court had erroneously held that the claim was waived, explaining that the court was "at a loss to imagine . . . what state procedural ground the Illinois Appellate Court could possibly have invoked"); *Silverstein v. Henderson*, 706 F.2d 361, 368 (2d Cir. 1983) (explaining that "the state court denied collateral relief on the mistaken ground that the question of competence had already been fully litigated"); *cf. McMeans v. Brigano*, 228 F.3d 674, 679-80, 681-82 (6th Cir. 2000) (concluding that the state court had erroneously "ruled that appellate counsel had, in fact, raised a Confrontation Clause claim in [defendant's] direct appeal and that [the] claim had been rejected"). It is all the more important in that situation for the prosecution to give an accurate account of the procedural history on federal habeas review, lest the federal courts repeat the error and potentially eliminate any possibility of any court's fully addressing the merits of the claim.

B. The Prosecution Failed To Disclose Exculpatory Evidence Directly Related To Petitioner's Defense And To His Case For Leniency At Sentencing.

The state and federal courts' erroneous understanding of the procedural history of petitioner's *Brady* claim has had the unfortunate consequence of impeding the grant of relief on a meritorious claim. A review of the evidence withheld during petitioner's trial makes plain that the prosecution should have disclosed it, and that the prosecution's failure to do so undermines confidence in both the verdict of guilt and the capital sentence.

1. From the time of opening statements at trial, petitioner raised "only one" defense to the charges against him: that, while he had committed the conduct giving rise to the charges, he did so while in a drug-induced psychosis related to his post-traumatic stress from military service. Ct. App. J.A. 133; *see* Pet. Br. 2-4. Petitioner presented the testimony of a clinical psychologist and neuro-pharmacologist, who testified that petitioner suffered from a serious drug abuse disorder that had developed into a chronic amphetamine psychosis. *State v. Cone*, 665 S.W.2d 87, 92 (Tenn. 1984); Pet. Br. 3, 40. In closing arguments, petitioner's counsel told the jury that the "only one issue in this entire lawsuit" was whether petitioner was "sane under the law," and argued as to that issue that petitioner was "an addict out of control" with "no ability to reason." Ct. App. J.A. 133-34; *see* J.A. 112-13.

The prosecution strongly disputed petitioner's claim that he was addicted to drugs or under the in-

fluence of drugs at the time of the crimes. The officer who processed petitioner after his arrest, Sergeant Ralph Roby, testified that he saw no indication of petitioner's drug use. Pet. Br. 43; Pet. App. 36a. An FBI agent who interviewed petitioner after his arrest, Eugene Flynn, similarly testified that petitioner exhibited no sign of mental illness or drug addiction. Pet. Br. 44; Pet. App. 37a. And an acquaintance of petitioner, Irene Blankman, testified that she was with him one day after the murders and that he used no drugs in her presence and showed no sign of recent drug use. *See Bell v. Cone*, 535 U.S. 685, 705 (2002) (Stevens, J., dissenting); *Cone*, 665 S.W.2d at 91; Pet. Br. 45. The prosecutor argued to the jury that petitioner's claim that he was "a drug addict" was "balony," Pet. Br. 41, contended that the drugs and large amount of money found in petitioner's car suggested that petitioner was a "drug seller" rather than a drug user, J.A. 107, and asked the jury to focus on the testimony of the witnesses who "had the opportunity to hear from [petitioner or] who saw him in or around the time of the offense," which showed petitioner to be "a calm, cool professional robber" rather than in a drug-induced psychosis related to post-traumatic stress. Ct. App. J.A. 151-52; J.A. 112; *see* J.A. 113.

In subsequently arguing in the capital sentencing hearing that petitioner's life should be spared, petitioner's counsel referred the jury to the guilt-phase evidence and reiterated the defense position that petitioner was a "junkie and drug addict" and had a diminished mental state at the time of the crimes. Punishment and Sentencing Hearing Tr. 2117 (Apr. 23, 1982); *see* Pet. 4; *Bell*, 535 U.S. at 691 (majority

opinion), *id.* at 713 (Stevens, J., dissenting). The jury disagreed and imposed a sentence of death.

In affirming petitioner's capital sentence and conviction, the Tennessee Supreme Court emphasized the lack of evidence supporting petitioner's argument that he was acting under the influence of drugs at the time of the crimes. The court explained that "neither of the expert witnesses who testified on [petitioner's] behalf had ever seen or heard of him until a few weeks prior to the trial"; that their testimony had been "based purely upon his personal recitation to them of his history of military service and drug abuse"; that "[l]ay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to . . . his drug abuse"; and, in particular, that the three prosecution witnesses "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 90, 93.

2. During the proceedings on petitioner's second petition for state post-conviction relief, petitioner learned for the first time that the prosecution had failed to disclose evidence and information that directly supported his claim that he was a drug addict and was acting under the influence of drugs at the time of the crimes. That evidence included:

> a. An incident report containing the statements of witnesses who stated that petitioner "looked wild eyed" the day before the homicides. J.A. 50-51.
>
> b. A witness statement responding affirmatively to the question whether petitioner ap-

peared "to be drunk or high on anything" when he robbed a store two days before the murders, and stating: "Well he did, he acted real weird that is the reason I watched him." J.A. 48-49.

c. A police report describing petitioner as "looking about in a frenzied manner" and appearing "agitated" a few days after the killings. J.A. 53.

d. A supplemental report, made one day after the murders by a police officer investigating the crimes, stating that petitioner "was a heavy drug user." J.A. 26.

The prosecution also withheld additional evidence supporting petitioner's claim that he was a drug addict and rebutting the prosecution's argument that petitioner was a "drug seller" rather than a drug user—evidence that also could have been used to impeach the testimony of Sergeant Roby and Agent Flynn:

a. A law enforcement teletype system memo authorized by Sergeant Roby and dated August 12, 1980, which states that petitioner "is a heavy drug user"; two law enforcement teletype system memos authorized by Sergeant Roby and dated August 11, 1980, which describe petitioner as a "drug user"; and a statement made by petitioner's sister to Sergeant Roby on August 23, 1980, that petitioner had "severe psychological problems" and "needed to work on his drug problem." J.A. 55-59.

b. An FBI "Fugitive Index" form (FD-65), apparently authorized by Agent Flynn (Pet. 29), providing as "additional pertinent information" that petitioner is a "DRUG USER"; multiple teletypes issued by the FBI from August 12, 1980 to August 15, 1980, describing petitioner as a "drug user" and as a "heavy drug user"; and an FBI teletype dated August 13, 1980, stating that petitioner was found "in possession of 850 amphetamine pills" when previously in prison. J.A. 63-71.

Finally, the prosecution withheld information that could have been used to impeach the testimony of Ilene Blankman, who testified that she had seen petitioner one day after the murders and that he had no needle marks on his body and exhibited no indication of drug abuse:

a. Notes of a pretrial interview with Blankman in which she failed to reveal, as she later testified at trial, that petitioner had slept in her bed two days after the murders, that she had seen petitioner unclothed at that time, or that she had seen no needle marks on petitioner's arms. J.A. 72-73; *see* Pet. Br. 45.

b. Files indicating that Blankman was the only state witness to receive a thank-you letter and showing that she had had numerous contacts with the prosecution. J.A. 74-75; *see* Pet. Br. 45.

The prosecution should have disclosed the exculpatory and impeachment evidence to petitioner. As this Court has explained, "[t]here are three components of a true *Brady* violation: The evidence at is-

sue 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." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Prejudice exists when the evidence withheld is "material either to guilt or to punishment," *Brady*, 373 U.S. at 87, and the "touchstone" of the materiality inquiry is whether disclosure of the evidence would have given rise to a "reasonable probability of a different result." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). The question, in other words, is whether the evidence "undermine[s] confidence" in the verdict or sentence. *Id.* at 435.

A prosecutor's assessment of whether *Brady* requires disclosure of evidence can turn in certain situations on difficult judgments about materiality. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) (recognizing that the standard is "inevitably imprecise" and that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"), *rev'd on other grounds by United States v. Bagley*, 473 U.S. 667, 682 (1985). For precisely that reason, however, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* As the Court has recognized, "[t]his means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439. "This is as it should be," the Court has explained, given the prosecutor's status as "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution 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)). Accordingly, non-constitutional standards of conduct for prosecutors contemplate a broader range of disclosure than is compelled by the constitutional floor of *Brady*, "call[ing] generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id.* at 437; *see* p. 2, *supra*.

The evidence in this case should have been disclosed under any standard. That evidence bore directly on the sole defense raised by petitioner at trial and on his argument for leniency in his capital sentencing hearing. The importance of the withheld evidence may be "best understood by taking the word of the prosecutor," as this Court did in *Kyles*, 514 U.S. at 444. The prosecutor's closing argument urged the jury to judge petitioner's mental state by "[w]hat . . . [the people] who saw [petitioner] in or around the time of offense had to say," Ct. App. J.A. 151-52—evidence that petitioner would have had if the prosecution had disclosed it. *See United States v. Udechukwu*, 11 F.3d 1101, 1105 (1st Cir. 1993) ("We have no doubt . . . that the prosecutor's persistent theme in closing argument suggesting the nonexistence of this information—and even the opposite of what the government knew—did fatally taint the trial."); *see also Bailey v. Rae*, 339 F.3d 1107, 1117 (9th Cir. 2003) (suppression was "all the more alarming given that the State . . . later showcased to the jury the defense's paucity of evidence" on the issue). The prosecutor's argument to that effect was reinforced by the Tennessee Supreme Court, which contrasted the lack of evidence introduced by petitioner concerning his condition at the time of the crimes with the testimony of the three witnesses for the

prosecution, who "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 93.

The evidentiary picture on that critical issue at trial and at sentencing would have looked far different had it included: (i) eyewitness statements that petitioner, around the time of the crimes, appeared "real weird" and on drugs, "wild-eyed," "frenzied" and "agitated," rebutting the prosecutor's characterization of petitioner as a "calm, cool professional robber"; (ii) multiple police bulletins contemporaneously describing petitioner as a "heavy drug user" or a "drug user," rebutting the prosecutor's argument that any suggestion of petitioner's drug addiction was "balony" and that he was a drug seller rather than a drug user; and (iii) substantial information with which to impeach the testimony of each of the prosecution's three witnesses about their impression of petitioner's condition soon after his crime spree.

It is unlikely, for instance, that Ilene Blankman's testimony would have stood up well to cross-examination had defense counsel known that she had been the subject of special attention from the State or that key parts of her testimony had come out for the first time at trial rather than in her initial interview by prosecutors. *See* Pet. Br. 45. Likewise, the testimony of Sergeant Roby and Agent Flynn suggesting that petitioner did not use drugs and was not "out of his mind" shortly after the crimes were committed likely would have been substantially undermined had defense counsel been armed with the information that both witnesses had authored or authorized several reports contempora-

neously describing petitioner as a "drug user" or "heavy drug user." *See id.* at 43-44. Such evidence, in conjunction with the withheld witness statements, would have given petitioner's expert witnesses more information from which to assess petitioner's mental state at the time he committed the acts alleged. *See id.* at 46. And the witness statements alone might have led petitioner to individuals who could have provided additional testimony to corroborate his defense at trial. *See id.* at 42.

In short, each of the documents suppressed by the prosecution in one way or another supported petitioner's claim that he committed the crimes in a state of drug-induced psychosis. The significance of the withheld evidence is particularly evident with respect to petitioner's capital sentencing proceeding. The conclusion of any one juror that petitioner's life should have been spared because he may have been acting under the influence of drugs and post-traumatic stress at the time of the crimes would have precluded imposition of a capital sentence.

For the reasons explained by petitioner, Pet. Br. 48-51, and as Judge Merritt understood below, Pet. App. 46a, the court of appeals conducted no meaningful assessment of the significance of the withheld evidence. Indeed, the court of appeals' perfunctory analysis of that evidence, *see* Pet. App. 25a-26a, only reinforces the need for a complete and adequate assessment of materiality by some court. The court of appeals asserted that the jurors "had already heard substantial direct evidence that [petitioner] was a 'drug user.'" *Id.* But as the prosecutor himself argued to the jury, and as the Tennessee Supreme Court reiterated in affirming petitioner's conviction

and sentence, there is a world of difference between testimony describing petitioner's condition and appearance at the time of the crimes, on one hand, and testimony based solely on his own statements years after the fact, on the other. The prosecution presented the former, and by failing to disclose evidence favorable to petitioner, left him to rely solely on the latter. In doing so, the prosecution breached its core obligations under *Brady*.

CONCLUSION

For the foregoing reasons, as well as those stated by petitioner, the Court should reverse the decision of the court of appeals.

Respectfully submitted,

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APPENDIX A

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