No. 11-1215

In the Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

ROLAND COLSON, WARDEN,

Respondent.

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

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

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The following former prosecutors file this *amici curiae* brief in support of Petitioner pursuant to Supreme Court Rule 37.3(a)[1]:

- Bates Butler: former First Assistant U.S. Attorney for the District of Arizona; former U.S. Attorney for the District of Arizona.

- Charles W.B. Fels: former Assistant District Attorney for Knox County, Tennessee; former U.S. Attorney for the Middle and Eastern Districts of Tennessee.

- Hal Hardin: former Assistant District Attorney for Davidson County, Tennessee; former U.S. Attorney for the Middle District of Tennessee.

- William J. Hardy: former Litigation Branch Chief of the Criminal Section, U.S. Department of Justice; former Assistant U.S. Attorney for the District of Colombia.

- Michael Pasano: former Assistant U.S. Attorney for the District of Colombia and the Southern District of Florida.

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[1] The parties were notified ten days prior to the due date of this brief, and letters of consent have been filed with the Clerk of the Court. No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than amici curiae and their counsel made a monetary contribution to the preparation or submission of the brief.

- Quenton White: former U.S. Attorney for the Middle District of Tennessee; former Commissioner for the Tennessee Department of Correction.

- Edward M. Yarbrough: former U.S. Attorney for the Middle District of Tennessee; former Assistant District Attorney for Davidson County, Texas.

INTEREST OF AMICI CURIAE

Amici curiae submit that the habeas petition in this case raises serious issues of prosecutorial misconduct that should be reviewed by the federal courts. The Assistant District Attorney General assigned to the case withheld important evidence from the defense in violation of Brady v. Maryland and the basic ethical obligations of a prosecutor.

As former law enforcement officials, we possess a personal appreciation for the unique role of the prosecutor in the American criminal justice system. "We want to make sure that the perpetrators of heinous crimes are caught, tried and punished. But we must also ensure that we have the right person and that the perpetrators are convicted and punished within the guidelines of our Constitution." Michael Cody, The Death Penalty in America: Its Fairness and Morality, 32 U. Mem. L. Rev. 919, 920 (2001).

Prosecutors bear an ethical duty to search for the truth and present only the truth to the jury. The

government's 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).

All of us handled serious felonies and several of us handled capital matters when we served as prosecutors. Those of us that prosecuted cases in which the death penalty was sought carried out that responsibility with a heightened sense of our ethical obligations. It is an awesome task to build a case to take a man's life and to argue that the jury should return a death sentence. While the consequence of prosecutorial misconduct is serious in any criminal prosecution, it is harrowing in a capital case.

Among us, we have personally handled or supervised thousands of criminal prosecutions in the federal courts and in various state courts. This case is atypical. The Petitioner's prosecution fell far short of the standards to which we are all held.

We focus this brief on those prosecutorial actions which fell short of a prosecutor's duties under Brady and the ethical obligations of the office. Amici urge the Court to review the Petitioner's serious claims of prosecutorial misconduct.

STATEMENT OF THE CASE

In state and federal habeas petitions, Petitioner presented evidence of prosecutorial misconduct in his capital trial, specifically the withholding and misrepresentation of evidence on key issues, including: the identity of the person who did the stabbing;

whether Petitioner intended to rob the victim; the circumstances of a prior homicide used as an aggravating circumstance in support of the death penalty; and Petitioner's mental condition, which should have been presented to the jury in mitigation of the death sentence, shedding light on Petitioner's bizarre inculpatory testimony in the penalty phase.

The district court addressed each piece of withheld evidence separately and found that the prosecutor's suppression of this evidence was not material. But the court did not adequately consider the aggregate effect of the misconduct on Petitioner's sentencing-phase defense and on the jury's search for the truth.

First, the district court addressed the prosecutor's failure to provide to trial counsel the lab report finding no blood on the coat and other clothing Petitioner wore on the night of the crime, finding that it was sufficient under Brady that the prosecutor produced the lab reports to Petitioner's first counsel.[2]

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[2] The district court ruled that defense counsel was ineffective for failing to obtain the report from prior counsel, but did not address the misconduct in producing one lab report to trial counsel, while failing to produce the other, when trial counsel had requested a copy of all discovery. Producing only one of two relevant reports "had the effect of representing to the defense that the evidence [did] not exist." Bagley v. United States, 473 U.S. 667, 682-83 (l985) (an incomplete response to a specific discovery request may cause more harm than a complete non-disclosure).

Abdur'Rahman v. Bell, 2009 WL 211133, *10 (M.D. Tenn. Jan. 26, 2009).

Second, the district court addressed the suppressed pre-trial statement of Miller, Petitioner's co-defendant, which contradicted Miller's testimony at trial and the prosecution's theory of the case while corroborating Petitioner's testimony. The court found the failure to disclose was not prejudicial because the Petitioner was already aware of the information contained in Miller's pretrial statements. Id. at 7.

Third, the district court addressed the prosecutor's failure to provide defense counsel a transcript of Petitioner's 1972 trial for murder which would have made clear that the earlier offense did not involve gangs and drugs, as the prosecutor asserted, but was the result of the repeated rape of Petitioner by a prison gang of which the decedent was the ringleader. See id. at 4, 17. In addition, the transcript included testimony from two psychiatrists, including one for the government, that Petitioner was unable to control his behavior, which would have been crucial to show mental illness. Id. at 4. The court found no Brady violation, citing defense counsel's deficient performance for the failure to introduce evidence about the mitigating circumstances of the 1972 murder and Petitioner's mental issues. Id. at 4,17.

Fourth, the district court considered the prosecutor's suppression of the portions of Detective Garafola's police report describing Petitioner's mentally unstable behavior and found that the defense counsel's failure to investigate Petitioner's mental

health could not be attributed to the suppression of this evidence. Id. at 9.

The Sixth Circuit's review was limited to whether the withholding of Miller's pre-trial statements and the redacted portions of Detective Garafola's police report violated Brady. Abdur'Rahman v. Colson, 649 F.3d 468, 473 (6th Cir. 2011). The Sixth Circuit found no violation because the Petitioner already knew the underlying facts in the statement and report. Id.

The prosecutor's conduct in this case bears a disturbing resemblance to more recent conduct by this same prosecutor which required reversal of a different first degree murder conviction. In Garrett v. State, 2001 WL 280145 (Tenn. Cr. App. March 22, 2001), this same prosecutor argued to a jury that the defendant locked the victim in the room of a house and then burned the house down. The Tennessee appellate court reversed the defendant's murder conviction, because the prosecutor suppressed a report in which the Fire Detective said the door to the room was, in fact, unlocked. This misconduct resulted in a public censure of this prosecutor by the Tennessee disciplinary board, In re Zimmermann, No. 24039-5-CH (Tenn. S. Ct, Disciplinary Bd. of Prof. Resp. May 28, 2002), which was the second public censure this prosecutor has received.[3]

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[3] For the prosecutor's history of similar misconduct, see the lower court opinions in this case. State v. Jones, 789 S.W.2d 545 (Tenn. 1990), (Zimmermann's actions in promising not to pass prejudicial indictments

SUMMARY OF ARGUMENT

The prosecutor violated his ethical duties as a prosecutor and his obligations under Brady. The prosecutor masked the many weaknesses in his case by suppressing key documents and presenting misleading testimony, in gross deviation from the standards of the legal profession. The prosecutor's duty is to seek justice, not merely to convict. This duty is sacred when prosecuting a case in which the death penalty is

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to the jury then doing so "bordered on deception"); Abdur'Rahman, 999 F. Supp. at 1089-90 (Zimmermann improperly withheld exculpatory evidence from, and misrepresented facts to, the defense); and in other cases, see e.g., In re Zimmermann, 1986 WL 8586 (Tenn. Cr. App. 1986) (Zimmermann's violation of disclosure rules constituted "abuse of ... proceedings of the court"); Zimmermann v. Board of Prof. Respon., 764 S.W.2d 737 (Tenn. 1989) (Zimmermann reprimanded for improper comments to the press); In re Zimmermann, No. 12128-5-LC (Tenn. S. Ct. Disciplinary Bd. of Prof. Respon. Sept. 30, 1994) (Zimmermann publicly censured for public statements questioning a trial judge's candor); State v. Middlebrooks, 995 S.W.2d 550, 558-59 (Tenn. 1999) (Zimmermann's representations to the jury in a capital case displayed "either blatant disregard for . . . or a level of astonishing ignorance of the law"); State v. Vukelich, 2001 Tenn. Cr. App. LEXIS 734 (2001) (Zimmermann "strongly admonished" for soliciting the same "patently improper" testimony that had prompted a prior reversal).

sought. The deception engaged in by the prosecutor in this case is incompatible with that duty.

The record in this case indicates that the prosecutor engaged in a pattern of deception that deprived Petitioner, and ultimately the jury, of information that would have fundamentally altered the calculus in both the guilt and sentencing phases of Petitioner's trial. No valid interest will be served by allowing Petitioner to be executed without federal review of the full course of prosecutorial misconduct that occurred in this case.

ARGUMENT

As former prosecutors, the signatories to this brief all took an oath to pursue justice, not convictions. In pursuit of this end, we stand by the Brady principle that "society wins not only when the guilty are convicted, but when criminal trials are fair." 373 U.S. at 87-88. Society is not served by the improper withholding of evidence that could exculpate a defendant or reduce his penalty. Id. This type of behavior "casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." Id. In light of the serious prosecutorial misconduct that had a profound impact on the guilt and sentencing phases of Petitioner's prosecution, the case should be reversed and remanded.

I. The Prosecutor Withheld and Misrepresented Evidence Critical to Petitioner's Defense.

A. The Prosecutor Withheld and Misrepresented Evidence that Petitioner, Rather than an Accomplice, Performed the Stabbing.

The evidence presented to the jury that Petitioner was the actual stabber was crucial to its willingness to impose the death penalty. The prosecutor testified in the district court that Nashville jurors will not impose death verdicts unless they can be "sure beyond a shadow of a doubt that the person the state is seeking the death penalty on was in actuality responsible for the murder." H.T. 905. The defendant must be the "shooter or the sticker." Id. at 907. In his sentencing-phase summation, the prosecutor's co-counsel stated that "the main issue in this case was who was the sticker, who wielded that knife." T.T. 1944.

In a 1987 internal memorandum, the prosecutor listed several "Weaknesses in the Case" for "seek[ing] the death penalty." H.Ex. 42. First was the difficulty of proving that Petitioner himself was the stabber. The surviving victim was blindfolded and did not see who stabbed the deceased. Id. She had observed that Petitioner was wearing a full-length black "gangster coat" during the offense, which the prosecutor seized from Petitioner's home and displayed at trial. T.T. 1673. The prosecutor, however, withheld from trial

counsel the lab report stating that no blood was found on the coat. See id. at 277, 292, 322, 331-333, 341.

The prosecutor understood that the lack of blood on the coat cast doubt as to whether Petitioner was the stabber. As he explained to a supervisor, "[p]hotographs of the decedent's house show blood spattering all over the kitchen." H.Ex. 42. Likewise, the police reports and the autopsy report confirmed that the stabbing had produced copious quantities of blood. H.Ex. 1-4; H. Ex 14. The lead detective observed the "large amount of blood splattering on items near the victim [and] on the walls, bar, and divider," H.Ex. 3, and concluded that the blood splatter would have occurred following each blow to the heart. H.Ex. 110 at 42-43. Expert testimony at the hearing confirmed that, if Petitioner had squatted over the decedent as the prosecution contended, he would have been spattered with blood. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1085 (M.D. Tenn. 1998).

The prosecutor concluded in this internal report that there were only two reasonable possibilities for the lack of blood on Petitioner's coat: "Either the defendant removes his coat before he began to stab these people . . . or if the defendant did wear this coat the entire time he obviously was not present when the stabbing occurred." H.Ex. 42.

There was no evidence that Petitioner had removed his coat. On the contrary, the victim's daughter told police that she had "peeped" out of her bedroom into the kitchen during the incident and

Petitioner, the "light skinned" man in glasses, "had on a wool coat." H.Ex. 6.

Petitioner's co-defendant, Devalle Miller, gave police a three-hour confession in which he admitted taking part in the assault but said that Petitioner was the stabber. In numerous interviews about the details of the offense leading up to the trial, Miller never said Petitioner removed his coat and strongly implied he did not. T.T. 1034-38. Instead, the prosecutor presented Miller's testimony that Petitioner "squatted over [the victim] stabbing him," thus creating the misleading impression, contrary to his own understanding of the blood splattering on the walls and the lack of blood on Petitioner's coat, that Petitioner stabbed the victim while wearing the long black coat.

The defense did not receive, and the jury did not hear, any of evidence that Petitioner's long black coat had no traces of blood, the person who did the stabbing would have been covered with blood, and witnesses saw Petitioner wearing the long black coat. The withholding of this evidence is not before this Court. The Amici, however, bring this to the Court's attention to illustrate this prosecutor's pattern of misconduct and the disastrous impact it had on the Petitioner's right to a fair trial. This was critical evidence that Petitioner could not have been the stabber (a necessary condition for a jury to impose the death penalty according to the prosecutor), but the prosecutor withheld this evidence so he could present a version of the facts the prosecutor knew was irreconcilable with the physical and medical evidence.

B. The Prosecutor Withheld and Misrepresented Evidence Suggesting that Petitioner Intended to Rob The Victim.

The suppression of Miller's pre-trial statements to police also allowed the prosecution to misrepresent the Petitioner's intent in going to Daniels' house in order to encourage the jury to find an aggravating factor in support of the death penalty. At the Sentencing phase, the prosecution argued, and the jury found, three aggravating circumstances to impose the death penalty: (1) the murder was especially "heinous, atrocious, or cruel"; (2) petitioner had been convicted of one or more prior violent felonies; and (3) the murder occurred in the course of a robbery.

Petitioner always maintained that he and Miller did not go to Daniels' home with the intent to rob him, but as part of their work with the Southeastern Gospel Ministry ("SEGM") to rid the community of drug dealers. Petitioner testified that SEGM had discussed "cleaning up the community," and the evil influence of "people that take hardened drugs and sell them" but never advocated violence. T.T. at 1839, 1842-43. Petitioner argued in his defense that he and Miller had gone to Daniels' home only to scare him, not to rob or kill him, so that Daniels would no longer deal drugs in the community.

Miller's trial testimony contradicted this statement. He testified that the sole motive for the offense was to rob Daniels and steal his drugs. Relying on Miller, the jury found that Petitioner had committed

the murder in the course of a robbery as an aggravating circumstance to impose the death penalty.

The prosecution did not disclose to defense counsel that Miller had made a pre-trial statement to police which not only contradicted Miller's testimony at trial, but corroborated Petitioner's defense. Miller originally told police that he and Petitioner went to Daniels' home to scare him as part of an effort by SEGM to stop drug dealing in the community and not, as Miller stated at trial, to rob Daniels.

The withholding of Miller's statement was a material Brady violation: this statement completely contradicted the Government's position at trial and bolstered the defense's theory. Nevertheless, the Sixth Circuit found no Brady violation because the Petitioner already knew the facts underlying Miller's statement; i.e., he already knew about SEGM. 649 F.3d 468 at 475.

As discussed further in Section II below, Petitioner's knowledge about SEGM or that Miller may have discussed the organization with the police in no way abates the prosecutor's duty under Brady. Petitioner knew that Miller was lying on the stand, but because Petitioner did not know about his pre-trial statement, Petitioner could not *prove* that Miller was lying. The existence of this evidence, which contradicted the prosecution's position and proved Miller's testimony false, was unknown to the Petitioner.

Second, even if the defense could or should have known about the statement, the prosecutor still has an ethical duty to ensure the fairness of a prosecution and thus a duty to disclose these statements. Not only does the prosecutor have a duty not to mislead the jury into believing Petitioner intended to rob Daniels, when the prosecution knew this to be false, but the prosecutor has a duty to make available any evidence that could reduce defendant's sentence. See Brady, 373 U.S. at 87-88. The prosecutor realized that defense counsel knew little about the facts and exploited that lack of preparation. The prosecutor's conduct is not rendered less improper because competent counsel might have minimized the damage. In fact, in the view of Amici, the prosecutor's exploitation of defense counsel's inadequacies in order to win at any cost is itself a gross deviation from his obligation to seek justice. The prosecutor violated both Brady and his oath of office in failing to disclose this crucial evidence.

C. The Prosecutor Withheld and Misrepresented Evidence to Distort the Nature of Petitioner's 1972 Homicide Conviction.

The state alleged that Petitioner's 1972 conviction for second degree murder while in a federal prison was an aggravating circumstance supporting the death penalty. H.Ex. 59. The prosecutor anticipated, and expressed concern in his memorandum to his supervisor, that the defense would diminish the significance of the prior conviction by explaining that the murder occurred when he was trying to prevent himself from further homosexual

rape. H.Ex. 42 at 679. The prosecutor obtained a transcript of the earlier trial, but did not produce the transcript to the defense. In the presence of an FBI agent who had been involved in the earlier case and was listed as a trial witness, the prosecutor related to defense counsel that the 1972 homicide had resulted from "a turf war in the prison between the two gangs as to who would control the drug trade in the prison" and threatened that the agent would testify as such. H.Ex. 136 at 25. That threat dissuaded defense counsel from presenting the circumstances of the prior homicide, circumstances the district court found could have mitigated the impact of this prior homicide on the jury's decision whether to impose death.[4] See 999 F. Supp. 1073, 1095 n. 27.

At the habeas proceeding, the prosecutor admitted that his purpose was to prevent the defense from "getting into this 1972 murder," H.Ex. 136,and claimed that he had related to defense counsel what he had been told by the FBI agent who investigated the 1972 murder. Yet the prosecutor's "drug turf" version of the 1972 murder directly contradicted the FBI agent's testimony in a deposition. The FBI agent had testified that the killing was in response to a dispute between Petitioner and the decedent concerning

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[4] Because the prosecution theory was that this killing was motivated by drugs as well, the threat that an FBI agent would testify about an earlier killing with the same motivation would have been devastating. See T.T. 1941, 1979 (closing argument linking evidence that the defendant was trying to "take over" drug turf in this case to the 1972 murder).

rumors of homosexual conduct between them. H.Ex. 136 at 18-19. This homosexual conduct was in fact the repeated rape of Petitioner by a prison gang of which the decedent was the ring leader. After Petitioner confronted the decedent, Petitioner lost control and stabbed him. Id. The prosecutor therefore knew the killing was not, as he told defense counsel and the jury, about a drug turf war.

Moreover, the prosecutor failed to provide trial counsel with the transcript of the 1972 trial which would have elucidated everything.

The district court found that the prosecutor had misrepresented the circumstances of the 1972 conviction, and that he had the transcript of the 1972 murder trial in his possession before trial began and failed to provide it to defense counsel. 999 F. Supp. at 1089. The court found the transcript favorable to the Petitioner, but nevertheless found it immaterial because it was persuaded the outcome would not have been any different had defense counsel had this evidence, given that defense counsel failed to investigate his mental illness and his prior convictions. Id. at 1090.

In the experience of Amici, the existence of a prior homicide, particularly one in prison, is a significant factor in the jury's determination whether life imprisonment is sufficient to guarantee the safety of the community. A killing related to gangs and drugs presents a very different picture of the cold-bloodedness and dangerousness of a defendant than an outburst stemming from his repeated rape

when he was incarcerated and unable to escape. In the view of Amici, this suppressed evidence would have swayed the jury's determination whether to impose a sentence of death.

D. The Prosecutor Withheld and Misrepresented Evidence Regarding Petitioner's Mental Health.

The prosecutor's false representation to defense counsel of the facts of the 1972 homicide was part of an even bigger distortion. The prosecutor systematically suppressed and misrepresented the evidence of Petitioner's mental illness and the connection between that mental illness and Petitioner's past and present crimes.

Petitioner has an extensive, well-documented history of mental illness, none of which was presented to the jury and much of which was kept from his counsel. As the district court recognized, Petitioner was diagnosed in 1964 as having a "paranoid personality." 999 F. Supp. at 1098. In 1972, a psychiatrist testified that Petitioner suffered from a Borderline Psychosis that caused him to lose control under stress. Id. at 1100. Petitioner repeatedly had exhibited psychotic symptoms, including banging his head against a wall when he was under stress. H.T. 123-124.

When Petitioner was brought to the police station following his arrest in this case, he began to cry and bang his head against the wall. H.Ex. 7. Reports from the Davidson County Sheriffs Department stated

that Petitioner was banging his head against the floor, requiring that he be placed in a padded cell on "suicide" watch. H.Ex. 8. The prosecutor did not disclose the police reports describing that behavior as discovery. 2009 WL 211133 at 9. When the police report describing petitioner's arrest was turned over at trial as Jencks material, the facts relating to petitioner's extreme emotional distress had been redacted. Id.

The prosecutor expected that Petitioner's mental illness likely would be an issue at trial and sentencing. H.Ex. 72 (defense counsel notice of intent to rely on mental status defense). The prosecutor obtained the transcript of the 1972 homicide trial and sought information from the prosecutor in that trial and from Petitioner's federal parole officer. From those sources, the prosecutor learned that Petitioner had raised an insanity defense in the 1972 trial. A psychiatrist testified at the 1972 trial that Petitioner was insane at the time of the offense due to a mental disease ("borderline" psychosis) that caused him to lose control under stress. H.Ex. 131 at 43-46. The jury in that case rejected first-degree murder, convicting on second degree, and Petitioner was sentenced to a psychiatric facility.

Upon motion of defense counsel in this case, Petitioner was sent to the Middle Tennessee Mental Health Institute ('MTMHI') for evaluation and a report to the court. H.Ex. 22. MTMHI sought information from the prosecutor concerning Petitioner's mental history. The prosecutor replied with information he knew to be false and, due to the prosecution's

withholding of evidence from defense counsel, defense counsel could not properly refute this information. The prosecutor reported to MTMHI that, in the 1972 proceedings, Petitioner "moved the Court for a competency hearing and psychiatric evaluation as to his sanity . . . the Court ruled that the defendant was competent and . . . there appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial." H.Ex. 34 at 3 (emphasis added); see H. Ex 36 (MTMHI report omitting mention of 1972 insanity defense). That representation stands in stark contrast to the prosecutor's earlier report to his supervisors concerning the 1972 trial. There, the prosecutor reported that he had "received a copy of the transcript of the defendant's first trial where he plead not guilty by reason of insanity." H.Ex. 42 at 679.

In addition to his affirmative misrepresentation, the prosecutor falsely informed MTMHI that the 1972 offense was a "cold blooded premeditated murder" committed "to gain control over the victim's gang," H.Ex. 34 at 201, even though the prosecutor knew that the 1972 incident was a response to the Petitioner's repeated rape, and that there was no evidence that gangs or drugs were involved.

The prosecutor also did not inform MTMHI of Petitioner's behavior after his arrest, as outlined in the redacted portions of Detective Garafola's report, or that two days after the offense, Petitioner was placed in a padded cell on suicide watch. H.Ex. 7.

Misled by the prosecutor's representations, the MTMHI evaluators reported to the court that they found no issues regarding competency and no basis for an insanity defense. The prosecutor then moved, *in limine*, to preclude the defense from asserting any mental state defense. The prosecutor cited the MTMHI report "clearly show[ing] that the results of the defendant's evaluation reflect no diagnosis of any mental disease, defect, emotional disturbance or even a personality disorder." H.Ex. 73.[5]

The prosecutor's conduct in giving false information to the MTMHI, an agency directed by the court to report on Petitioner's mental condition, was entirely improper. See American Bar Association, Standards for Criminal Justice: Prosecution Function 3-2.8 (a) (Commentary) (3d ed. 1993).

The prosecutor's conduct also had an effect on the outcome of the sentencing hearing. Having been told that an evaluation in the federal system in 1972 revealed no basis for concerns about competency or insanity, and having no current evidence of mental illness, MTMHI did little to further investigate Petitioner's mental health. This report was also heavily relied upon by the district court when

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[5] The prosecutor's motion also stated that "the co-defendant . . . has no evidence" that Petitioner was suffering from a mental disease. H.Ex.73. Yet, the co-defendant had given the prosecutor a statement in which he said that Petitioner went from day to night" and was acting "crazy" and had suggested "[i]nsanity." Id. at l66-67,171, 177.

evaluating the materiality of Petitioner's Brady claims. See 2009 WL 21133 at 9. Everyone in the court system, including MTMHI, the trial judge and defense counsel, was lulled into the belief that there were no serious issues concerning Petitioner's mental condition.[6]

The consequence of these falsehoods and the suppression of all exculpatory evidence was a sentencing hearing in which the prosecutor had free rein to paint Petitioner as "a depraved man, not someone suffering from severe extreme emotional disturbance." T.T. 1981-82. The prosecutor asserted that the killing was purely for Petitioner's "pleasure and enjoyment," id., without the fear of contradiction by defense counsel because all evidence to the contrary had been suppressed. Defense counsel had been denied access to the police report demonstrating Petitioner's mental condition at the time of the arrest and the transcript from the 1972 murder trial discussing Petitioner's possible Borderline Personality Disorder, so the jury had no context in which to evaluate

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[6] Of course, the district court is correct that defense counsel should have obtained Petitioner's records, but, as explained above, the fact that competent counsel might have been able to limit the damage caused by the prosecutor's suppression of evidence does not change a prosecutor's obligations under Brady or the ethical obligation of a prosecutor to ensure the fairness of a criminal trial, especially when seeking the death penalty.

Petitioner's conduct in this offense or in the former as anything other than cold-blooded killings.

The prosecutor's successful withholding of all evidence of Petitioner's mental illness also deprived the jury of the context in which to evaluate Petitioner's bizarre testimony at the sentencing hearing, in which he testified that he could not remember what happened on the night of the killing and then incoherently "submitted to the fact that [he was] the individual . . . that stabbed Mr. Daniel Patricks." T.T. at 1864; see H.T. 471-72, 488. Dr. Sadoff, the psychiatrist who examined Petitioner for the habeas hearing, testified that Petitioner's behavior on the stand at the sentencing hearing reflected his illness; he fell apart under stress. T.T. at 485-97. Had the jury known of Petitioner's mental history, the jury would have been able to discount that Petitioner was describing what actually happened and likely would not have imposed the death penalty.

II. The Prosecutor's Conduct Violated Basic Standards Governing the Legal Profession And Deprived Petitioner of Due Process of Law.

The Constitution and standards of professional ethics forbid prosecutors from winning convictions or death sentences by deception or by treating the accused unfairly. See Brady, 373 U.S. at 87-88. It bears repeating that "[s]ociety wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Id. Within our

system of justice, "[t]he State's obligation is not to convict, but to see that, so far as possible, the truth emerges." Cues v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment).

Here, the prosecutor engaged in a "deliberate deception of the court and jury," in violation of the most fundamental standards of due process. Mooney v. Holohan, 294 U.S. 103, 112 (1935). He knowingly withheld exculpatory information, Brady, 373 U.S. 83, and knowingly misrepresented the physical evidence in the case. Miller v. Pate, 386 U.S. 1 (1967).

The standards of the legal profession also recognize the special responsibilities of public prosecutors to seek justice. Tennessee Supreme Court, Rule 8, Code of Professional Responsibility, EC-7-13 ('the public prosecutor's duty is to seek justice, not merely to convict"); State v. Spurlock, 874 S.W. 2d 602 (Tenn. Crim. App. 1993); American Bar Association, Standards for Criminal Justice: The Prosecution Function, 3-12(c) (3d ed. 1993) (same); National District Attorney's Association, National Prosecution Standards, 1.1 (2d ed. 1991) ("the primary responsibility of prosecution is to see that justice is accomplished").

The pursuit of justice is incompatible with deception or the withholding of evidence. Prosecutors may not conceal facts or knowingly fail to disclose what the law requires them to reveal. Tennessee Code of Professional Responsibility, DR 7-102(A). Prosecutors should be candid with opposing counsel, and may not "impede opposing counsel's investigation of the case."

National Prosecution Standards, 6.5.a, 53.5.a. Nowhere in our legal system is strict adherence to these principles more vital than in cases in which the prosecution seeks the death penalty.

The prosecutor's role is not to pick and choose what to disclose to defense counsel to enhance the chances of a conviction, but instead to ensure that a defendant will not be convicted unfairly based on an incomplete picture of the evidence. The obligation to turn over exculpatory evidence is not relieved, as the Sixth Circuit and the Warden suggest, by the defendant's knowledge of the underlying facts of the suppressed evidence. See 649 F.3d at 475. The obligation to turn over evidence in the pursuit of justice and fairness is absolute.

Indeed, the Sixth Circuit's view of Brady is contradicted by Brady itself. In Brady, the Petitioner knew the underlying facts of the suppressed evidence; the prosecution had suppressed co-defendant Boblit's confession to police that Boblit – and not Brady – had killed the victim. Id. at 84. This Court found that the suppression of this evidence violated Brady's due process rights even though Brady, of course, not only knew that Boblit had been the one to kill the victim, but Brady had testified as such at the trial and his counsel argued that Boblit was the killer at sentencing. See id. The question was not whether Brady knew the underlying facts of the suppressed evidence – who the killer was – but whether that evidence might have affected the outcome.

In Cone v. Bell, 129 S.Ct. 1769 (2009), this Court overturned a death sentence based on a Brady violation where the petitioner knew the underlying facts of the suppressed evidence. Cone's defense was insanity based on his drug addiction. Id. at 1773. The state argued that he was not addicted. Id. at 1774. Years later, Cone discovered that the state had withheld documents suggesting that he was in fact addicted. Id. at 1783. The Court determined that this evidence undermined confidence in the jury's sentencing recommendation given "the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case." Id. at 1785. Thus, the Court found that the suppression of evidence of Cone's drug addiction, a fact which Cone was well aware of, violated the constitution under Brady.

In addition to the lower court's error in excusing the prosecutorial misconduct because (some of) the underlying facts were known to the defense, the courts below also erred in failing to evaluate the cumulative effect of these violations. In Kyles v. Whitley, 514 U.S. 419 (1995), this Court made clear that undisclosed evidence is to be "considered collectively, not item by item." Id. at 436. Here, the Sixth Circuit erred in declining to consider the suppressed evidence collectively in determining whether this evidence undermines confidence in the jury's finding for a death sentence.

Prosecutorial misconduct such as that in this case requires reversal if there is "any reasonable likelihood [that the misconduct could] have affected the

judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1971); see also Kyles, 514 U.S. at 433. Here, the prosecutor engaged in a pattern of withholding and deception that deprived Petitioner, and ultimately the jury, of information that would have fundamentally altered the calculus in the sentencing phase of Petitioner's trial. There can be no reasonable dispute that the misconduct on the fundamental issues and evidence of the case, as discussed in Section I above, likely had a fundamental effect on the judgment of the jury. It would be a serious miscarriage of justice for Petitioner to be executed without review of the prosecutor's conduct and its impact on the fairness of Petitioner's trial and sentencing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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