No. 11-10189

IN THE
Supreme Court of the United States

CARLOS TREVINO,
Petitioner,
v.

RICK THALER,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are a group of former federal judges who dedicated their judicial careers to promoting the rule of law and enforcing the Constitution of the United States. These former judges, listed in the attached Appendix, are interested in this case because they are gravely concerned about the Fifth Circuit's decision, and in particular the unusual and illegitimate process in arriving at that decision.

This case raises issues that go to the heart of the integrity of the federal judicial process. The Court of Appeals in this death-penalty case acted in a manner inconsistent with proper judicial procedures by going outside the record to find evidence supporting the State's argument. Moreover, the Court then improperly took upon itself the role of weighing its own evidence with the evidence in the record to find that there was no prejudice for Trevino's *Brady* claim. *Amici* believe that these errors warrant this Court's review.[2]

SUMMARY OF ARGUMENT

The Fifth Circuit took on a role as both investigator and factfinder, in violation of well-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

[2] *Amici* address only the second question presented in the petition for certiorari, regarding Trevino's *Brady* claim, and express no opinion on the first question presented, regarding Trevino's *Wiggins* claim.

established judicial norms and in conflict with other courts. This Court should correct the Fifth Circuit's decision, which rejected a death-penalty defendant's appeal based on material outside the record, discovered by the court through its own investigation, and weighed against contrary evidence without the benefit of an actual factfinder. More generally, this Court's review is necessary to make clear that appeals courts must not enlarge their role by investigating extra-record evidence and by making a factual judgment well beyond the proper function and expertise of a federal appellate court.

First, there is a circuit conflict over when appeals courts can consider evidence outside the record. Seven circuits (the First, Second, Third, Fourth, Sixth, Eighth, and Ninth Circuits) seemingly always follow the usual rule that appeals courts are limited to the record in front of them. This approach is consistent with both the Federal Rules of Appellate Procedure and the traditional role of appellate courts. However, five circuit courts (the Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits) do consider extra-record evidence in particular circumstances under so-called inherent authority. Even within these five circuits, there is a conflict over whether the non-record evidence must first be evaluated by the district court (with the Eleventh Circuit holding that it must and the D.C. Circuit holding that it must except for ministerial tasks). And there is a conflict over whether the appeals court can consider non-record evidence on its own, in the absence of a party's request (with the Eleventh Circuit holding that it cannot).

Here, the Fifth Circuit committed an extreme breach of the rule against use of non-record evidence by acting as the State's investigator, searching out evidence on its own. Moreover, this evidence – the conflicting statement of an eyewitness – is the kind of evidence for which judicial notice is plainly improper. The Fifth Circuit compounded its error by failing to remand or otherwise give the parties an opportunity to be heard on the issue. The varying (and often ad hoc) approaches of the circuit courts, and the clearly erroneous approach of the Fifth Circuit here, warrant this Court's review.

Second, the Fifth Circuit also erred in weighing the contradictory statements to find that the withheld statement – which completely exonerated Trevino – was immaterial. There is also a dispute among the circuits on this issue, with the Ninth Circuit holding that it could not evaluate credibility in deciding *Brady* materiality, and the Sixth Circuit holding the contrary. Moreover, this Court recently held that the weighing of conflicting statements is not the proper role of the court in deciding *Brady* materiality. *See Smith v. Cain*, 132 S. Ct. 627, 630 (2012). This Court should grant the petition to resolve the issue, or, at a minimum, grant, vacate, and remand in light of *Smith*.

ARGUMENT

I. THE FIFTH CIRCUIT ERRED, IN CONFLICT WITH OTHER COURTS, IN INVESTIGATING AND CONSIDERING EVIDENCE OUTSIDE THE RECORD.

A. There is a circuit split over the use of evidence outside the record.

It is a basic tenet of judicial decisionmaking that courts will decide matters based on the record before them. This Court has reiterated this principle on many occasions. For example, this Court has held that it could not consider an argument that "appears to rest in large part on facts not part of the record before us," reasoning that "this Court must affirm or reverse upon the case as it appears in the record." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986). Similarly, a written statement that was "not in the record of the proceedings below" and "not . . . considered by the trial court" cannot be "properly considered by [the Supreme Court] during the disposition of the case." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970). Indeed, 100 years ago, this Court stated the principle succinctly: the Court is "not at liberty to travel outside the record." *Red C Oil Mfg. Co. v. Bd. of Agric. of N.C.*, 222 U.S. 380, 393 (1912).

The prohibition on use of extra-record evidence by this Court applies equally to the courts of appeals. There is no plausible basis for a federal appeals court to go outside the record when this Court cannot. Indeed, Rule 10 of the Federal Rules of Appellate Procedure lays out clear rules for supplementing the record with other material, and it allows supplementation only for material that "is omitted

from or misstated in the record by error or accident." Fed. R. App. P. 10(e)(2). Moreover, "the purpose of amendment under [Rule 10(e)(2)] is to ensure that the appellate record accurately reflects the record before the District Court, not to provide this Court with new evidence not before the District Court, even if the new evidence is substantial." *Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003); *see also* 16A Charles Alan Wright *et al.*, Federal Practice & Procedure § 3956.4 ("It should be noted at the outset that the . . . court should not use Rule 10(e) to insert into the record a ruling that the district court did not, in fact, make—or an item that was not, in fact, before the district court—at the time covered by the relevant portion of the record; the purpose of Rule 10(e) is to make the record accurately reflect events, not to provide an opportunity for retroactive alteration of those events." (footnote omitted)).

Nonetheless, there is significant dispute among the circuits on the use of evidence outside the record. Five circuits – the Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits – have held that there is an inherent power to use non-record evidence in certain circumstances. None of the other seven circuits have recognized this supposed inherent power, and seemingly never allow non-record evidence unless it fits within Rule 10(e)'s narrow exception for mistaken or accidental omission.

For example, the Tenth Circuit has held that it has "an inherent equitable power to supplement the record on appeal." *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000). The court held that this power constituted a "rare exception to [Fed. R. App. Proc.] Rule 10(e)," *id.*, applicable where "the

interests of justice would best be served," *id.* at 1192-93. And it exercised this "inherent authority" in *Malone v. Workman*, 282 F. App'x 686 (10th Cir. 2008), where it ruled on the merits of a habeas petition after reviewing the record in a different case. *Id.* at 688 n.2.

The D.C., Seventh, and Eleventh Circuits have also recognized the "inherent equitable power to supplement the record with information not reviewed by the district court, [though] such authority is rarely exercised." *Shahar v. Bowers*, 120 F.3d 211, 212 (11th Cir. 1997) (en banc) (internal quotation marks omitted); *see also Brown v. Watters*, 599 F.3d 602, 604 n.1 (7th Cir. 2010) ("Although we generally decline to supplement the record on appeal with materials not before the district court, we have not applied this position categorically."); *Colbert v. Potter*, 471 F.3d 158, 165–167 (D.C. Cir. 2006). But the ad hoc nature of when and whether to consider such evidence is evident in other Seventh Circuit cases that reject extra-record evidence out of hand. *See, e.g.*, *United States v. Alcantar*, 83 F.3d 185, 191 (7th Cir. 1996) ("The materials Alcantar seeks to add to the record were never before the district court, and they cannot therefore be added to the record on appeal pursuant to Fed. R. App. P. 10(e).").

However, even among these five circuits (including the Fifth), there is a split on whether the non-record evidence must first be evaluated by the district court. The Eleventh Circuit held that the party opposing introduction of the extra-record evidence must be "provided with an opportunity to rebut the evidence" on remand to the district court. *Ross v. Kemp*, 785 F.2d 1467, 1477 (11th Cir. 1986).

The D.C. Circuit agreed that "[n]ormally, supplementation of the record is effected by remanding the case to the District Court," but held that remand was not necessary for "a ministerial task, which this court easily can perform itself." *Colbert*, 471 F.3d at 166. The Seventh Circuit, in contrast, has considered extra-record evidence on its own. *Brown v. Watters*, 599 F.3d at 604 n.1.

The other seven circuits have not recognized any "inherent authority" to depart from Rule 10(e) of the Federal Rules of Appellate Procedure by considering evidence outside the record. Instead, they follow the basic rule that appellate courts cannot consider material outside the record and that new evidence requires a remand. *See, e.g.*, *Leibowitz v. Cornell Univ.*, 445 F.3d 586, 592 n. 4 (2d Cir. 2006) (per curiam) ("We decline to supplement the record, however, because she has failed to satisfy Fed. R. App. P. 10(e)(2), which requires an appellant to provide evidence of an erroneous or accidental omission of material evidence in order for the record to be supplemented.") [3]; *United States v. Rivera-Rosario*, 300 F.3d 1, 9 (1st Cir. 2002) ("A 10(e) motion is designed to only supplement the record on appeal so that it accurately reflects what occurred before the district court. It is not a procedure for putting additional evidence, no matter how relevant, before the court of appeals that was not before the district court." (internal quotation marks omitted)); *Selland v.*

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[3] *See also Eng v. N.Y. Hosp.*, No. 98-9646, 1999 WL 980963, at *1 (2d Cir. Sept. 30, 1999) ("Rule 10(e) is not a device for presenting evidence to this Court that was not before the trial judge.").

United States, 966 F.2d 346, 347 (8th Cir. 1992) (per curiam) ("The general rule is that an appellate court will not enlarge the record to include materials not presented to the district court. … The motion to supplement the record is denied."); *United States v. Walker*, 601 F.2d 1051, 1054–1055 (9th Cir. 1979) ("[I]nasmuch as the affidavits were not part of the evidence presented to the district court, the Government cannot now add these documents to the record on appeal.")[4]; *Salama v. Va.*, 605 F.2d 1329, 1330 (4th Cir. 1979) ("The order was never filed in the district court and for us to consider it at this stage would be facially at odds with Rule 10(e) of the Federal Rules of Appellate Procedure." (internal quotation marks omitted)); *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 784 n.4 (3d Cir. 1978) ("It is hornbook law that this court generally cannot consider evidence which was not before the court below." (internal quotation marks omitted)).

Indeed, two circuits have explicitly considered the possibility of such inherent authority without adopting it. The Sixth Circuit has discussed the fact that "[s]ome courts have also held that the record may be supplemented pursuant to the appellate court's 'equitable authority,'" but insisted that "[t]he Sixth Circuit has of yet not so held." *United States v. Husein*, 478 F.3d 318, 336 (6th Cir. 2007). And even

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[4] The Ninth Circuit has suggested that it can "exercise inherent authority ... in extraordinary cases" to use extra-record evidence. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2002). However, we are not aware of any case where the court has actually done so.

if this power did exist, "the dispositive issue would be whether the evidence sought to be added to the record in a given appeal establishes beyond doubt the proper disposition of [the pending issues]." *Id.* (alterations in original). Similarly, the Third Circuit has "entertained the possibility – but not held – that either Federal Rule of Appellate Procedure 10(e) or some inherent equitable power might afford a basis to supplement an appellate record with evidence not presented below," and held that "such power, if we had it, certainly would not extend to a situation where, as here, a party 'accidentally omitted' documents from the district court record, and provides no further explanation." *Counterman v. Warren County Correctional Facility*, 176 F. App'x 234, 239 n.1 (3d Cir. 2006) (internal citation omitted).

In sum, there is a wide disparity in how the circuits decide whether to consider evidence outside the record – seven seemingly never, or only in extreme circumstances; five seemingly based on the interests of justice or simple expedience. And even among those five, there is further disparity in that two generally require a remand to give the parties an opportunity to present or rebut the evidence in the district court. These differing, often ad hoc approaches are completely divorced from the clear language of Rule 10(e). They also undermine the integrity and fairness of the judicial process.

B. The Fifth Circuit's use of evidence outside the record to decide Trevino's *Brady* claim violated Trevino's rights and basic judicial norms.

The Fifth Circuit departed, in a plainly erroneous manner, from the basic requirement to use only record evidence in deciding cases.

Trevino brought a *Brady* claim because the State failed to produce a second statement from Sam Rey, an eyewitness and supposed accomplice, that exonerated him.[5] Both parties presented their arguments to the Fifth Circuit as to the materiality of that statement. The majority then took it upon itself to bolster the State's argument, by going outside the record presented to both the district court and the court of appeals, to find a third statement from Rey that contradicted the second. As Judge Dennis explained, "[n]either the state nor Trevino had ever before mentioned Rey's [third] statement, let alone litigated the significance of it – for all we know, neither Trevino nor the state's attorneys in Trevino's criminal trial, nor the state's attorneys in Trevino's habeas proceedings, has ever seen or heard of this statement before the majority *sua sponte* obtained a copy of it after this appeal was fully briefed." Pet. App'x at A27.

The Fifth Circuit's reliance on judicial notice for its use of non-record evidence, *see* Pet. App'x at A9 n.3, does not withstand scrutiny. To begin with, judicial notice does not dispense with the usual rule

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[5] While the majority suggests that the statement might actually have been available to Trevino's lawyer at trial, *see* Pet. App'x at A14 n.6, the Fifth Circuit did not so hold and the district court made clear that factual disputes precluded any finding on the issue. Pet. App'x at B25 ("More specifically, there appears to be a genuine issue of material fact regarding whether petitioner's accomplice Rey's statement, which indicated Cervantes admitted to Rey that he stabbed Salinas, was ever made available to petitioner's trial counsel."). Indeed, "[t]he state does not even contend that it disclosed Rey's second statement." Pet. App'x at A46 (Dennis, J., dissenting).

that appeals courts should not consider evidence that was not presented to the district court in the first instance. *See First Nat'l Bank of Wellington v. Chapman*, 173 U.S. 205, 217 (1899) ("The case does not show that the trial court received the report in evidence, and nothing in any finding has reference in any way to that report. We do not think it is a document of which we can take judicial notice, or that we could refer to any statement or alleged fact contained therein, unless such fact were embraced in the finding of facts of the trial court, upon which we must decide this case."); *see also, e.g.*, *U.S. ex rel. Wilkins v. United Health Group*, 659 F.3d 295, 303 (3d Cir. 2011) ("ordinarily a court of appeals should not take judicial notice of documents on an appeal which were available before the district court decided the case but nevertheless were not tendered to that court"); *Zell v. Jacoby-Bender, Inc.*, 542 F.2d 34, 38 (7th Cir. 1976) (refusing to take judicial notice where it would violate the rule that appeals court must consider only evidence before the trial court); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 n.1 (9th Cir. 2010) (same); *Molnar v. Care House*, 359 F. App'x 623, 625 (6th Cir. 2009) (same); *Matthews v. Marsh*, 755 F.2d 182, 183-84 (1st Cir. 1985) (same); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n. 5 (D.C. Cir. 1980) (same). The Fifth Circuit's contrary opinion would make judicial notice so broad that it would effectively swallow the rule against use of non-record evidence.

Furthermore, judicial notice is permitted *only* for "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy

cannot reasonably be questioned." Fed. R. Evid. 201(b). Obviously, the third Rey statement is not "generally known." Also, the source of the statement is not so certain that "its accuracy cannot reasonably be questioned." As Judge Dennis outlined, there are many questionable facts upon which the majority's judicial notice relies: (1) "that Rey made a third written statement [and] that he made it before Trevino's trial"; (2) "that the prosecutors in Trevino's case were aware of the existence of that written statement at the time of Trevino's trial"; and (3) "that the prosecutors in Trevino's trial would have used that statement if defense counsel had called Rey as a witness or used his second written statement to attack the state's case; and that the jury would have given credit to Rey's third written statement in lieu of his second written statement." Pet. App'x at A36.

Taking these in order, first, the fact that the statement appears in the record of another case does not establish that the statement was actually admitted or the timing of the statement. Simply put, the presence of a statement in a court record is not indisputable proof of the truth of that statement.[6] Second, if the prosecutors did not know of the third statement, then it is irrelevant to materiality because the third statement would not have been used to

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[6] While courts do often take judicial notice of court records, they use the records to establish the fact that the record exists, not the truth of the record itself. *See* 21B Charles Alan Wright & Kenneth W. Graham, Federal Practice & Procedure: Evidence 2d § 5106.4 ("It seems clear that a court cannot notice pleadings or testimony as true simply because these statements are filed with the court.") (citing numerous cases).

rebut the second. And there is no evidence that the prosecutor in Trevino's case knew of the third statement at the time of Trevino's trial. Indeed, the process here shows that the contrary is almost certainly true: "It certainly stands to reason that if the state's attorneys in Trevino's case had been aware of this statement, as the majority's argument presupposes, then they would have relied upon it in responding to Trevino's habeas petition; but they did not." Pet. App'x at A35 (Dennis, J., dissenting). Third, there is considerable uncertainty as to whether the third statement would have come into evidence and how the jury would have viewed the conflicting statement. The Fifth Circuit had no way of knowing the circumstances under which the third statement was made, how Rey might have testified at Trevino's trial, how the prosecutor would have used the third statement (if at all), and how the defense attorney would have countered the third statement. In sum, this kind of evidence is not the proper subject of judicial notice for good reason: courts cannot determine its veracity and import without further admissible evidence and argument.

In addition, the Fifth Circuit's approach was particularly erroneous because it investigated the extra-record evidence on its own accord. Even those courts that do (on rare occasions) consider evidence outside the record almost never do so by investigating the outside evidence on their own. *See, e.g.*, *Jones v. White*, 992 F.2d 1548, 1566-67 (11th Cir. 1993) (explaining that, although "[t]his court's inherent equitable powers allow it to supplement the record with information not reviewed by the district court," it "[has] not allowed supplementation when a party has failed to request leave of this [c]ourt to

supplement a record on appeal"). The role of the court, and particularly the appellate court, is not to investigate, but to decide based on the evidence presented by the parties. Here, the court adopted a prosecutorial role in investigating facts that would supposedly prove Trevino's guilt by rebutting the withheld statement. The third statement "was not part of the record before the district court, as the majority acknowledges, nor was it ever once mentioned by the parties below or on appeal." Pet. App'x at A34 (Dennis, J., dissenting) (internal citation omitted). Thus, the court had to search on its own for the third statement in an effort to bolster the State's argument. Did the court also look for a possible fourth statement? Did it investigate whether the prosecution wrongly withheld other evidence from the defense? If it had, the State would be justifiably outraged, and the outrage is no less here because the court acted as an advocate of the State.

Finally, and in all events, the Fifth Circuit erred in refusing to remand to the district court or allow reargument. "On timely request, a party is to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice of a fact before notifying a party, the party, on request, is still entitled to be heard." Fed. R. Evid. 201(e). The Fifth Circuit attempted to evade this requirement by allowing Trevino to "raise any objection he may have by means of a petition for rehearing." Pet. App'x at A9 n.3. Of course, Trevino could have filed a rehearing petition without the court's invitation. More importantly, a petition for rehearing does not substitute for an actual hearing and decision. *See id.* at 37 (the majority has "put the

parties in the untenable position of litigating an issue of fact in a petition for rehearing in an appellate court") (Dennis, J., dissenting). And it certainly failed to do so here because the court did not grant the petition or even request argument from the State. Indeed, under the Fifth Circuit's logic, there is never a problem under Rule 201(e) – or any time the court decides based on an issue the parties did not have an opportunity to argue – simply because a party can always file a petition for rehearing. But such a makeshift approach makes a mockery of the judicial process.

II. THE FIFTH CIRCUIT ERRED, IN CONFLICT WITH OTHER COURTS, IN WEIGHING CREDIBILITY IN DECIDING *BRADY* MATERIALITY.

The Fifth Circuit erred in weighing credibility to come to the conclusion that a statement of an eyewitness exonerating the defendant is not "material." This Court has held that "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith*, 132 S. Ct. at 630 (internal quotation marks omitted). In *Smith*, the State failed to disclose statements from an eyewitness contradicting his inculpatory testimony. *Id.* at 629-30. While "[t]he State . . . advance[d] various reasons why the jury might have discounted [the witness's] undisclosed statements . . . [t]hat merely leaves us to speculate about which of [the witness's] contradictory declarations the jury would have believed." *Id.* at 630.

The Fifth Circuit engaged in precisely the kind of speculation that this Court disapproved in *Smith*.

Here, as in *Smith*, there were contradictory statements from a key eyewitness.[7] And the Fifth Circuit weighed the credibility of the two statements to decide that "[i]ntroduction of Rey's third statement would have destroyed any benefit Trevino would have otherwise gained from the second statement." Pet. App'x at A15. This conclusion that the third statement was somehow more credible than the second – and that the jury would have felt the same way – is improper for any court (let alone an appeals court) in deciding *Brady* materiality. As Judge Dennis accurately put it:

> I do not share the majority's confidence in their ability as appellate judges with nothing but a paper record to neatly reconstruct the likely outcome of this case had all of Rey's statements been disclosed to defense counsel before trial, since Rey's third statement, upon which the majority so heavily relies in affirming the death penalty, has never been introduced or subjected to any trial court adversary proceedings in this case.

Pet. App'x at A28.[8]

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[7] To be sure, in *Smith*, the witness's testimony was the only evidence linking the defendant to the crime. However, regardless of the possible impact of other evidence in Trevino's case, *Smith*'s holding clearly precludes what the Fifth Circuit did here: concluding that one statement was not material simply because there was also a conflicting statement.

[8] *See also* Pet. App'x at A34 (Dennis, J., dissenting) ("[E]ven assuming *arguendo* that we could take judicial notice of Rey's third statement, it would not necessarily prevent the defense

Indeed, there are serious questions about the reliability of Rey's third statement. There is no evidence about the circumstances of its creation and it has not been tested by cross-examination. There also has been no opportunity for Trevino's counsel to inquire about its creation or test its reliability. In short, there is no basis on which to deem Rey's third statement reliable – let alone so reliable that it would make the second statement immaterial.

Before this Court decided *Smith*, other circuits were divided over whether they could assess the credibility of conflicting statements in deciding *Brady* materiality. For example, in *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010), the Ninth Circuit evaluated whether the names of two potential witnesses whose names were withheld from the defendant were material evidence. *Id.* at 1266. The district court held that the witnesses were "presumptively not credible on the basis of inconsistencies in their declarations." *Id.* The Ninth Circuit reversed, and held that an evidentiary hearing was necessary to determine the credibility of the witnesses because inconsistencies in the declarations alone did not conclusively show that the evidence was not material. *Id.*

On the other hand, the Sixth Circuit reached a different conclusion in a similar case. In *Benge v.*

(continued…)

counsel in a hypothetical retrial from effectively using Rey's second statement as tending to exculpate Trevino and challenge the credibility of the state's witnesses against him in the guilt and penalty phases of his capital murder trial.").

Johnson, 474 F.3d 236 (6th Cir. 2007), a witness's favorable, undisclosed statement conflicted with a different statement of the same witness. *Id.* at 243. The court concluded that the evidence was not material under *Brady* because, had it been introduced, the witness's contrary statement "could have been used to impeach his new version of the events," and thus there was "no reasonable probability" that the result would have been different had the evidence been introduced. *Id.*

Given the circuit conflict, and the clear inconsistency between *Smith* and the Fifth Circuit's opinion, this Court should grant certiorari to resolve the issue. At a minimum, the *amici* ask this Court to grant the petition, and vacate and remand for the Fifth Circuit to consider *Smith*.

CONCLUSION

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

Respectfully submitted,

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June 6, 2012

APPENDIX

The following former federal judges are *amici* for this brief:

Hon. John J. Gibbons, Former Judge, United States Court of Appeals for the Third Circuit (1970-90) (Chief Judge, 1987-90)

Hon. Shirley M. Hufstedler, Former Judge, United States Court of Appeals for the Ninth Circuit (1968-79)

Hon. Nathaniel R. Jones, Former Judge, United States Court of Appeals for the Sixth Circuit (1979-2002)

Hon. H. Lee Sarokin, Former Judge, United States Court of Appeals for the Third Circuit (1994-96); Former Judge, United States District Court for the District of New Jersey (1979-94)

Hon. Timothy K. Lewis, Former Judge, United States Court of Appeals for the Third Circuit (1992-99); Former Judge, United States District Court for the Western District of Pennsylvania (1991-92)

Hon. Thomas D. Lambros, Former Judge, United States District Court, Northern District of Ohio (1967-95) (Chief Judge, 1990-95)

Hon. Alfred Wolin, Former Judge, United States District Court for the District of New Jersey (1987-2004)

Hon. William G. Bassler, Former Judge, United States District Court for the District of New Jersey (1991-2006)

Hon. Stephen M. Orlofsky, Former Judge, United States District Court for the District of New Jersey (1995-2003); Former Magistrate Judge, United States District Court for the District of New Jersey (1976-80)