No. 09-717

IN THE

Supreme Court of the United States

DELMA BANKS,

Petitioner,

v.

RICK THALER, Director,
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 THE HONORABLE JOHN J. GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE WILLIAM S. SESSIONS, THOMAS P. SULLIVAN, AND BENNETT L. GERSHMAN, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF AMICI CURIAE

The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable William S. Sessions, Thomas P. Sullivan, and Bennett L. Gershman, through their undersigned counsel, submit this brief as *amici curiae* in support of petitioner Delma Banks.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are former judges and prosecutors who maintain an active interest in the fair and effective functioning of the criminal justice system.[2] *Amici* are

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1. Pursuant to Rule 37.2, counsel for *amici* certifies that counsel of record for all parties received timely notice of the intention to file this brief at least ten days before the due date of the brief. Letters reflecting the parties' consent to the filing of this brief are being lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

2. The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and as a judge of the United States District Court for the Western District of Pennsylvania from 1991 to 1992. The Honorable William S. Sessions served as a judge of the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of (Cont'd)

committed to ensuring that the due process guaranteed a criminal defendant in the Constitution is followed and that a criminal verdict is not procured through prosecutorial misconduct – particularly when the death penalty is at stake. The fair treatment of criminal defendants, particularly in capital cases, is essential to maintaining the integrity of, and public confidence in, the criminal justice system.

This case is now before this Court for a second time. This Court's first decision confirmed that the State purposefully withheld important impeachment evidence related to a key prosecution witness and that the State knowingly relied on perjured testimony in seeking to obtain a conviction in a capital case. *Banks v. Dretke*, 540 U.S. 668 (2004). This kind of prosecutorial misconduct seriously threatens the ability of the adversarial system to produce just results.

> One of the most basic elements of fairness in a criminal trial is that available evidence

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(Cont'd)

Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as Co-Chair of the Illinois Governor's Commission on Capital Punishment. Professor Bennett L. Gershman served as a prosecutor with the Manhattan District Attorney's office from 1967 to 1972. From 1972 to 1977, he served in the Office of the New York State Anti-Corruption Prosecutor. He is a member of the faculty at Pace Law School, where he teaches courses on, among others subjects, prosecutorial ethics, criminal procedure, and death penalty litigation.

> tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him.

United States v. Agurs, 427 U.S. 97, 116 (1976) (Marshall, J., dissenting).

The prosecutor's duty to disclose material exculpatory evidence reflects the notion that prosecutors represent the public, which "wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Or, as the well-known inscription at the Department of Justice puts it, "The United States wins its point whenever justice is done its citizens in the courts." When evidence is wrongfully suppressed, the prosecutor violates his duty to the public. Such conduct corrupts the integrity of the trial and the prosecutorial function. It "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 88. In capital cases, a prosecutor's obligation to ensure a fair and truthful trial is even more important, because, as this Court has emphasized, "death is different." *see Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

Here, notwithstanding the deliberate wrongdoing by the State, in connection with the witness that the State itself characterized as key to its case, the court of appeals has reversed the district court's new trial order, on the ground that the State's intentional suppression of evidence was not material. This decision cannot be

reconciled with this Court's leading decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), or with numerous court of appeals decisions that properly address materiality questions in accordance with the principles set forth in *Kyles*. The court of appeals majority has in essence substituted its judgment for that of the jury at a hypothetical new trial conducted after the wrongfully withheld evidence became known. That is not the correct approach. The question, as *Kyles* explained, is whether, given the State's misconduct, petitioner "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434. Amici submit this brief to urge that that question must be answered in the negative and that reviewing courts should not be permitted to use cramped notions of materiality as a means of excusing prosecutorial misconduct in connection with the State's critical witness.

SUMMARY OF THE ARGUMENT

A State violates a defendant's right to due process when it fails to disclose evidence favorable to the accused prior to trial and "the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Likewise, this Court has long recognized that the knowing use of false testimony or failure to correct such false evidence "is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam)) (internal quotation marks omitted).

As this case returns to this Court, the State's failure to abide by these fundamental principles is established. That was the whole point of the Court's earlier decision.

The prosecution repeatedly touted Charles Cook as the State's key witness and at the same time deliberately withheld prior statements (including an interview transcript) that could have been used to impeach Cook. Then, after Cook had testified untruthfully, the prosecution knowingly failed to correct the record, and indeed affirmatively argued to the jury that Cook had provided the "absolute truth."

Notwithstanding the State's misconduct and this Court's prior ruling, a majority of the court of appeals panel has gone to extraordinary lengths to conclude that the State's deliberate wrongdoing does not matter. Review by this Court is needed to make clear that the materiality of a State's constitutional violation must be evaluated in the context of the trial that actually occurred, giving due weight to the State's own characterization of the importance of particular witnesses and testimony. When, as here, the State chooses to tell the jury that the testimony of a particular witness is critical and at the same time the State intentionally withholds valuable impeachment evidence related to that witness, the State should not be heard, in a later materiality inquiry, to contend that the witness's testimony wasn't important after all. Likewise, a reviewing court, in assessing whether the State's wrongdoing undermines confidence in the fairness of the trial, should focus on the trial as it actually occurred, not on a revisionist re-creation of a trial that supposedly might have been but in fact never was.

Any other result would only provide an incentive for prosecutors to withhold evidence in the future, secure in the knowledge that, even if the misconduct were to be discovered, a reviewing court that itself could be persuaded of defendant's guilt would declare the suppression of

exculpatory or impeaching evidence immaterial. This case illustrates the point well. Witness Cook provided the *only* evidence of petitioner's alleged confession and the *only* evidence that the homicide took place in the course of a robbery (an essential element of the State's case), and yet the court of appeals majority ruled that any reasonable jury would have convicted even if Cook had never testified at all. This kind of revisionist history has no place in a proper determination of materiality. Where the State itself has said that the witness's testimony is central to the State's case, a reviewing court, assessing the effect of the State's misconduct, should take the State at its word. As one court of appeals has correctly acknowledged, "In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case." *Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998).

REASONS FOR GRANTING THE PETITION

I. *Brady* Violations Are A Recurring Problem, Contributing To Wrongful Convictions And Undermining Public Confidence In The Criminal Justice System.

A review of the national headlines from the past year reveals that prosecutorial misconduct continues to be a problem within the American criminal justice system at both the federal and state levels. One of the most prominent examples came to light in April 2009, when United States Attorney General Eric H. Holder, Jr. announced that the government was moving to set aside the verdict and dismiss federal charges against former U.S. Senator Ted Stevens, because prosecutors had failed to provide important and potentially exculpatory information to the defense team. *See Statement of Attorney General Eric Holder Regarding*

United States v. Theodore F. Stevens (April 1, 2009) (available at: http://www.justice.gov/opa/pr/2009/April/09-ag-288.html). Judge Sullivan, who presided over the trial, referred to the government's misconduct as "shocking and disturbing." *See* Transcript of Oral Argument on April 7, 2009 at 3:13-20, *United States v. Stevens* (D.D.C No. 08-231) (Docket No. 374). The judge went on to observe that the problem is not an isolated one: "[I]n several cases recently this court has seen troubling failures to produce exculpatory evidence in violation of the law and this court's orders." *Id.* at 8:14-17.

Later last year, in the first stock-option backdating case to reach trial, the United States Court of Appeals for the Ninth Circuit reversed the conviction of Gregory Reyes, former CEO of Brocade Communications Systems. The court concluded that the jury's verdict could not stand "because of prosecutorial misconduct in making a false assertion of material fact to the jury in closing arguments." *United States v. Reyes*, 577 F.3d 1069, 1073 (9th Cir. 2009). Even though the government's case against Reyes "was relatively strong," *id.* at 1078, the prosecutor's foul play warranted a new trial because: the prosecutor either knew his statements were untrue, or at the very least had strong reason to doubt their veracity; the false statements were directed at a key issue; and the statements were made during closing arguments, "which matter a great deal." *Id.* (quoting *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1983)).

In February 2009, the California State Bar took the unusual step of recommending that Deputy District Attorney Benjamin Field be suspended from the practice

of law for four years due to multiple acts of abuse of prosecutorial power, misconduct, and repeated failures to disclose exculpatory evidence. *In the Matter of Benjamin T. Field*, State Bar Court of California, Hearing Division (No. 05-O-00815) (Feb. 10, 2009) (available at: http://members.calbar.ca.gov/courtDocs/05-O-00815.pdf) (on review before State Bar Court of California, Review Decision) (docket available at: http://apps.statebarcourt.ca.gov/dockets/dockets.aspx). The Bar's action may have been commendable, but it came only after several instances of withholding evidence already had occurred.

And most recently in December 2009, Judge Carney dismissed both the securities fraud indictment and the Securities and Exchange Commission's civil suit against William Ruehle, the former CFO of Broadcom, after finding that prosecutorial misconduct "had distorted the truth-finding process and compromised the integrity of the trial." *See* Transcript of Proceedings on December 15, 2009 at 5195:6-10, *United States v. Ruehle* (C.D. Cal. No. 08-139). In view of the multiple instances of government misconduct in the case, the court entered a judgment of acquittal rather than risk "mak[ing] a mockery of Mr. Ruehle's constitutional right[s]." *Id.* at 5195:11-12, 5199.

Unfortunately, none of these cases is unique, and each represents a troubling reality: in the decades since this Court decided *Brady v. Maryland*, serious *Brady* violations continue to occur. Such violations significantly interfere with a defendant's right to a fair trial and diminish public confidence in the criminal justice system. *See, e.g.*, *State v. Thompson*, 825 So. 2d 552 (La. App.

2002) (granting new trial in capital case, due to prosecution's suppression of exculpatory evidence; defendant subsequently acquitted at new trial).

In *Brady v. Maryland*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). This decision followed earlier rulings condemning government misrepresentation or suppression of the truth in criminal proceedings. *Id.* at 86-87 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam), *Pyle v. Kansas*, 317 U.S. 213 (1942), *Napue v. Illinois*, 360 U.S. 264 (1959)). In the years since *Brady*, the Court has clarified that due process and notions of fundamental fairness dictate that a prosecutor's duty to disclose extends to exculpatory evidence even in the absence of a specific request from the defendant, *United States v. Agurs*, 427 U.S. 97 (1976), impeachment evidence, *United States v. Bagley*, 473 U.S. 667 (1985), and evidence that is in the possession of government actors other than the prosecutor, *Kyles v. Whitley*, 514 U.S. 419 (1995).

The prosecutor's disclosure obligation is an important part of the adversarial process. Prosecutors have at their "disposal a large array of investigative capabilities, [and] generally command[] resources vastly superior to those available to the defense attorney, who most often represents an indigent client." Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev.

693, 694 (1987). Moreover, law enforcement, part of the prosecutor's arsenal, has early access to key evidence. *Bagley*, 473 U.S. at 694 (Marshall, J. dissenting). And, "unlike the government, defense counsel is not in a position to make deals with witnesses to gain evidence." *Id.* Thus, the prosecutor's disclosure obligation is critical to ensuring that available exculpatory evidence is fully explored. Without it, the ability of the criminal justice system to distinguish accurately between the innocent and guilty is greatly diminished; "the trier of fact is deprived of the ingredients necessary to a fair decision." *Id.* In capital cases, of course, the risks associated with an incorrect decision are particularly severe.

Notwithstanding this important element of a properly functioning criminal justice system, the suppression of evidence continues to occur. Capital cases are no exception. Indeed, a study evaluating error rates in capital cases from 1973 to 1995 concluded that prosecutorial suppression of evidence was one of the two most common causes of error resulting in reversal. *See* James Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii (June 12, 2000) (available at http://www2.law.columbia.edu/instructional services/liebman/liebman_final.pdf); *see also* Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, Chi. Trib., Jan. 10, 1999, at C1 (finding that in the years from the *Brady* decision in 1963 through 1999, at least 381 defendants nationally have had a homicide conviction overturned because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false).

But it is not only the defendant who suffers the impact of a *Brady* violation; public confidence in the criminal justice system as a whole is eroded when a prosecutor abuses his position. In 1935, this Court explained that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, 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). The prosecutor stands in for the public at large and tries the defendant on behalf of the people. Prosecutors therefore are entrusted with a "special role" to "search for the truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutor has an obligation to ensure that the accused receives a fair trial. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88.

We know from the Court's prior decision in this case that the prosecutors here fell far short of this standard. The Court held that the prosecution withheld not only material impeachment evidence related to the key witness offered by the State during the penalty phase of Banks' trial, 540 U.S. at 702-03, but also evidence that would have allowed Banks to discredit Charles Cook, an "essential prosecution witness" at the guilt phase of trial, *id.* at 675, 705-06. The State told the jury that Cook was a "very important" witness and indeed the only witness whose testimony was "critical" to the State's case. Yet the State did not disclose "a pretrial transcript revealing that [Cook's] trial testimony had been

intensively coached by prosecutors and law enforcement officers," *id.* at 675, and the prosecution allowed Cook, "a key witness[,] to convey, untruthfully, that his testimony was entirely unrehearsed," *id.*

II. This Court Should Grant Review To Ensure That Strained Determinations Of Non-materiality Do Not Become The Latest Avenue For Excusing Prosecutorial Failures To Comply With Constitutional Disclosure Obligations

On remand from this Court, the district court found that the "combination of the importance of Cook's testimony to the case against [Banks], the coaching by authorities revealed in the transcript, the otherwise unknown inconsistent statements, and the prosecution's failure to correct the record" can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Banks v. Quarterman*, No. 5:96CV353, 2008 WL 906716, at *6 (E.D. Tex. April 1, 2008) (internal quotation marks and citation omitted). On the State's appeal, Judge Dennis likewise concluded that the State's misconduct undermined confidence in the jury's verdict and, therefore, was material under *Brady*.

> In sum, one can hardly be confident that Banks received a fair guilt phase trial, given the jury's ignorance of Cook's triple perjury giving the impression that his testimony was totally unrehearsed; the District Attorney's knowingly allowing Cook's triple perjury to stand uncorrected; the District Attorney's artifice in offering Cook's April 24, 1980 affidavit as Cook's only recorded statement

> in the State's possession; and the assistant prosecutor's compounding the State's deception by arguing that Cook had brought the jury the absolute and complete truth in his testimony.

Banks v. Thaler, 583 F.3d 295, 342 (5th Cir. 2009) (Dennis, J., dissenting).

In contrast, the majority of the court of appeals panel decided that the State's purposeful suppression of impeachment evidence related to a "critical" prosecution witness was *not* material for *Brady* purposes. *Banks v. Thaler*, 583 F.3d at 331-32. To reach this result, the majority discounted the State's own repeated statements about Cook's importance as a witness and instead reviewed the record with an eye to evidence that, in the majority's view, could salvage the conviction. Nothing in the *Brady* line of cases supports such an approach.

This Court's review is needed to correct the court of appeals' misguided – if not defiant – approach to the *Brady* materiality standard. As this Court has made clear, when evaluating the materiality of suppressed evidence, the question "is *not* whether the defendant would more likely than not have received a different verdict with the evidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (emphasis added). Nor should the reviewing court apply a sufficiency of the evidence test. *Id.*; *see also Strickler v. Greene*, 527 U.S. 263, 290 (1999) ("[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the

remaining evidence is sufficient to support the jury's conclusions."). Rather, the relevant question is whether in the absence of the suppressed evidence the defendant "received a fair trial," that is, "a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Thus, wrongly suppressed evidence can require a new trial, even if it is more likely than not that a jury seeing the new evidence would still convict. *Id.*

Despite its recitation of this Court's relevant holdings, the court of appeals in fact employed an improperly constricted version of *Brady* materiality. This erroneous approach is most apparent in the majority's revisionist assessment of the significance of Cook's testimony to the State's case. Instead of accepting the prosecution's own characterization of Cook as the one "critical" witness in the State's case, the majority re-characterizes Cook's role, minimizing it in an effort to preserve Banks' conviction. *Compare Banks v. Thaler*, 583 F.3d at 314-15 (determining that it is "apparent that, had Cook not testified at all, the jury had ample evidence with which to find Banks guilty beyond a reasonable doubt") *with id.* at 327 (quoting the State's opening statement that Cook "is an important witness," and that his testimony "is critical"). Further, the majority pays scant attention to the fact that the State did not stop with telling the jury that Cook was its key witness; rather, the prosecution emphasized that, even though Cook had prior convictions and had made some mistakes in his life, Cook was telling the jury the "absolute truth." *Id.* at 327 (quoting State's closing arguments that "Cook brought you absolute truth"). Entirely apart from the improper vouching, *see United States v. Young*, 470 U.S. 1, 18-19 (1985), the prosecutor's conduct underscored

the centrality of Cook's credibility to its case. As this Court observed in *Kyles*, "[t]he likely damage [of suppressed evidence] is best understood by taking the word of the prosecutor . . . ." 514 U.S. at 444. The majority's conclusion about Cook's minimal importance is contrary to the record, contrary to the State's own theory of its case, and contrary to this Court's prior decision. *Banks*, 540 U.S. at 675.

Where the prosecution itself states that a particular witness is key to its case, and then purposefully suppresses impeachment evidence related to that witness, the State should not be heard later to assert that the evidence is not material under *Brady* and *Kyles*. *See Banks*, at 540 U.S. at 699-703 (concluding that purposeful non-disclosure of paid-informant status of key prosecution witness at penalty stage was material); *Kyles*, 514 U.S. at 444 (concluding that non-disclosed evidence tending to undermine the reliability of key witness testimony was material); *Giglio*, 405 U.S. at 154 -55 (concluding that undisclosed deal with key prosecution witness was material non-disclosure).

The majority's dismissive view of the significance of Cook's testimony overlooks two central features of that testimony for the State's case. As the district court correctly found, "Cook was the only witness to testify that [Banks] confessed to murdering the victim, as well as the only witness to give a motive for [Banks] committing the crime, and importantly, Cook's testimony on these issues was uncorroborated." *Banks v. Quarterman*, 2008 WL 906716, at *4. The purported confession is significant because "[a] confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S.

279, 296 (1991). It is "probably the most probative and damaging evidence that can be admitted against [a defendant]." *Id.* The testimony about motive is significant because it provided the basis for the State's argument that the homicide occurred in the course of a robbery, an element that was essential to Banks' conviction of capital murder.

The panel majority's distorted materiality analysis also fails to evaluate fairly all of the effects that flowed from the prosecution's deliberate wrongdoing. The majority declared that "the availability of the [suppressed] transcript likely would not have changed the approach pursued by either party, nor would it have significantly altered the effectiveness of those approaches." *Banks v. Thaler*, 583 F.3d at 328. This peremptory announcement cannot be reconciled with the record. Having wrongly withheld the evidence of Cook's pretrial interviews, the State's approach at trial was to remain silent when Cook testified, untruthfully, that he had not talked to the State about the case nor given any statements to the State. *See* 540 U.S. at 675. The State then proceeded to rely on Cook's perjury during its closing argument, telling the jury that "Cook didn't budge from the truth and that Cook didn't hide anything from you . . . he brought you the absolute truth." *Banks v. Quarterman*, 2008 WL 906716, at *4 (internal punctuation marks omitted).

Had the suppressed transcript been produced to the defense, the State's approach necessarily would have changed. The State would have been forced to disclose to the jury that Cook had perjured himself at least three times in testifying falsely that he had not discussed his

testimony with anyone prior to trial. The State would have been obliged to acknowledge that Cook discussed his testimony at length with the lead prosecuting attorney *just days before trial* and then lied on the stand in denying that any such conversation took place. *Cf. Napue v. Illinois*, 360 U.S. 264 (1959) (reiterating that a prosecutor is prohibited from using false evidence to obtain a criminal conviction); *see also Alcorta v. Texas*, 355 U.S. 28 (1957) (per curiam) (affirming that a prosecutor is obligated to correct the record when false evidence is introduced, even if unsolicited). The State's reliance on Cook throughout the trial as a "critical witness," *Banks v. Thaler*, 583 F.3d at 327, would have suffered along with Cook's credibility.

Moreover, the majority's approach entirely disregards another important consideration: the cascading effect Cook's perjury would have had on the prosecution's own credibility. Having sponsored Cook's testimony and relied on it repeatedly throughout the trial, the State aligned itself inextricably with Cook. Had Cook been revealed as a perjurer, the disclosure would have had a dramatic effect on the credibility of the rest of the State's case and the willingness of the jury to draw the State's proposed inferences from the rest of the State's evidence. The majority pays no attention to this point, imagining instead that Cook never testified at all and that the State's wrongful reliance on his false testimony therefore can be ignored. *See id.* at 328.

Finally, the majority, in its unswerving determination to sustain Banks' conviction, departs improperly from the basic objective of this Court's decisions in *Kyles* and related cases – ensuring a fair

trial and a verdict worthy of confidence. *Kyles*, 514 U.S. at 434. The trial in this case was not fair. The State obtained the benefit of Cook's testimony when that testimony was perjurious and unreliable. To be sure, *Kyles* recognized that not every violation of the prosecution's broad disclosure obligation under *Brady* should lead inevitably to reversal. *See e.g.*, *Bagley*, 473 U.S. at 675 n.7. At the same time, however, a defendant's entitlement to a fair trial must be protected, and the prosecution should not profit from deliberate wrongdoing such as occurred here. *Kyles*, 514 U.S. at 437-38.

Other courts of appeals have approached the materiality inquiry in a manner much more in keeping with *Kyles*. *See* Petition at 26-27 (listing examples). The Third Circuit's decision in *Slutzker v. Johnson*, 393 F.3d 373 (3d Cir. 2004), for example, contrasts sharply with the panel decision here.

Slutzker held that a suppressed police report of an interview with a "crucial" eyewitness for the State was material for *Brady* purposes. The court reached this result even though it acknowledged that the State had adduced "significant evidence against Slutzker," including the testimony of other eyewitnesses and evidence that Slutzker was planning to kill the victim and had attempted to hire a hit man. 393 F.3d at 376-77, 388. The court explained that the eyewitness in question was neutral as between Slutzker and the victim and therefore she was "perhaps the only credible eyewitness." *Id.* at 387. The police had interviewed the eyewitness three times. Reports of two of these interviews were given to the defense, but a report of the third interview was withheld. *Id.* at 378. In the reports turned over to the defense, the witness was unable to identify the person she saw in front of the victim's house

shortly after the murder. *Id.* In the third, suppressed report, the witness "definitely stated that the man she saw . . . was *not* Slutzker." *Id.*

In these circumstances, the court concluded that, although the defense was able to impeach the witness based on her inability to make an identification in the two interviews whose reports were disclosed, the undisclosed third report would have allowed for a "more convincing" cross examination. *Id.* at 387. In the court's view, Slutzker's inability to impeach the witness with her prior statement that the person she saw was someone else "materially impacted the fairness of his trial." *Id.* at 388. Thus, the court ruled that the suppressed evidence was material, even though the witness had been otherwise impeached and even though the "significant" remaining evidence against Slutzker was unaffected by the suppression issue. Following *Kyles*, the court held that the trial verdict was not "worthy of confidence." *Id.*

Similarly, in *Clemmons v. Delo*, the Eighth Circuit held that suppressed evidence was material because the failure to disclose the evidence undermined the court's confidence in the verdict. 124 F.3d 944 (8th Cir. 1997). The court considered the trial "as it actually occurred" and asked: "What would the evidence have looked like if the defense had been given and used the [suppressed evidence]?" *Id.* at 950. As in *Slutzker*, the evidence against Clemmons was substantial, including the testimony of two corrections officers, one who provided "extremely damaging eyewitness testimony" *id.* at 951, and one who testified about an admission Clemmons made, *id.* at 946. No reason for disbelieving either of these witnesses was given. *Id.* at 951. The suppressed evidence was a statement from another inmate, who told a corrections officer shortly after

the event that he had witnessed the murder and that the assailant was another named inmate, not Clemmons. *Id.* at 947. This statement was consistent with other testimony the defense presented at trial, although the prosecution had effectively impeached those other witnesses. *Id.* at 950. The court decided that, notwithstanding the strength of the State's evidence, the prosecutor's misconduct undermined confidence in the fairness and outcome of the trial.

> There is no question that the State's case would have remained strong even with the new evidence, and that the jury could still have reasonably determined that Clemmons was guilty. Nonetheless, we think there is a reasonable probability that the verdict would have been different were it not for this unquestioned violation of Clemmons's constitutional rights.

Id. at 951.

Slutzker and *Clemmons* are not outliers by any means. Other courts of appeals have applied the *Kyles* materiality standard in similar fashion. In *Singh v. Prunty*, for example, the Ninth Circuit recognized that "conflicting arguments can be made regarding the effect the disclosure of the [suppressed] evidence" may have had at trial. 142 F.3d 1157, 1163 (9th Cir. 1998). The court held, however, that "our fundamental concern remains whether there exists a reasonable probability that given disclosure of the evidence . . . one or more members of the jury would have viewed [the] testimony in a different light." *Id.* (concluding that the prosecution's suppression of evidence undermined confidence in the trial and therefore was material). The

Fourth Circuit likewise has recognized the need to focus on the overall impact of, and the consequences flowing from, the misconduct when evaluating materiality under *Kyles*. In summing up its decision in a recent case, the court stated:

> the [suppressed evidence] would have significantly impaired the credibility of . . . a key prosecution witness, and in turn, it would have undermined the prosecution's proof of premeditation and malice. In these circumstances, it is impossible to say that [the defendant] received a fair trial, or that we should be confident she is guilty of first-degree murder.

Monroe v. Angelone, 323 F.3d 286, 315-16, 317 (4th Cir. 2003) (finding suppressed evidence material and rejecting prosecution's attempt to downplay on appeal the critical nature of the witness it offered at trial: "contrary to the Commonwealth's current position, Smith's trial testimony was not only relevant to Monroe's conviction, it was crucial").

The panel majority's decision in the present case cannot be reconciled with these decisions or with *Kyles* itself. As this Court has admonished, "a prosecutor anxious about tacking too close to the wind . . . [should] disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439. Here, however, the State purposefully suppressed exculpatory evidence concerning a key witness and intentionally failed to correct that witness's untruthful testimony. That wrongdoing was not inconsequential. It deprived Banks of a fair trial and undermined confidence in the jury's verdict. Review should be granted so that the panel

majority's approach to the materiality inquiry does not become the template for future decisions that retrospectively eliminate any meaningful remedy for the prosecution's suppression of exculpatory or impeachment evidence.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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