No. 07-1114

IN THE

Supreme Court of the United States

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

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

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former prosecutors, identified in the Appendix, who have a continuing interest in the fair and effective functioning of the criminal justice system. *Amici* believe that, in order for that system to achieve its objective of promoting the administration of justice, prosecutors must perform their official responsibilities in strict conformance with applicable standards of conduct and fairness, including their overarching duty "to seek justice, not merely to convict." *ABA Standards for Criminal Justice* 3-1.2(c), at 4 (3d ed. 1993) (*ABA Crim. Justice Stds.*). As this Court has explained, the prosecutor is "the representative of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, "[a]lthough the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." *ABA Crim. Justice Stds.* 3-1.2 cmt., at 5.

A fundamental component of the prosecutor's duty to act "as a minister of justice and not simply [as] an advocate" is the obligation to ensure the "consideration of exculpatory evidence known to the prosecution." *ABA Crim. Justice Stds.* 3-3.11 cmt.,

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[1] The parties have given their written consent to the filing of this brief. In accordance with Rule 37.6, counsel for *amici curiae* state that no counsel for either party authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

at 82; *see* ABA, Model Code of Prof'l Responsibility DR 7-103(B). The prosecutor's obligation to disclose exculpatory evidence to the defense is embodied in the constitutional requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

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

The prosecution's overarching duty to serve justice—rather than merely to win a case—of course extends to appellate and post-conviction proceedings, the very object of which is to assure the fairness of the trial and the reliability of the result. Of particular relevance here, the prosecution has a duty of

candor to all courts, including appellate and post-conviction courts. *See ABA Crim. Justice Stds.* 3-2.8(a) ("A prosecutor should not intentionally misrepresent matters of fact or law to the court."). The prosecutor, that is, "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court. This is not only a basic ethical requirement, but is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice." *Id.* 3-2.8 cmt., at 36 (footnote omitted). Accordingly, it is *amici*'s experience that courts considering claims for appellate or post-conviction relief rely on the prosecution to provide an objective and forthright description of the proceedings under review. And the prosecution's responsibility in that regard is especially pronounced in the context of post-conviction review of capital convictions and sentences. That is not only because of the magnitude of the interests at stake, but also because such cases typically involve a multitude of claims, a highly complicated procedural history, and an intricate set of waiver and default principles governing the consideration of claims. Those factors combined place a substantial premium on the reviewing court's ability to understand completely and accurately what has transpired to date.

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

prosecution's failure to disclose the exculpatory evidence and sought in post-conviction proceedings to raise a *Brady* challenge, the prosecution failed to give a complete and accurate procedural history of the claim that would have assisted the post-conviction courts in addressing its merits. As a result, unless this Court grants review, petitioner may be executed with *no* court having adequately considered the merits of his substantial claim that the prosecution failed to abide by its obligation to disclose to him exculpatory information that had a reasonable likelihood of affecting the result of his trial or sentence.

Amici fully agree with the reasons stated by petitioner for granting certiorari in this case. In addition, however, *amici* believe that the conduct of the prosecution in the proceedings to date—both in the trial proceedings by failing to disclose evidence favorable to petitioner, and then in post-conviction proceedings by failing to give a full and accurate account of the procedural history—affords added reason for this Court to grant review. The ability of the criminal process to promote the administration of justice turns in substantial measure on the prosecution's strict adherence to its special obligation to seek justice, rather than merely to obtain a conviction and to protect that result in post-conviction proceedings. This Court should grant certiorari to ensure that those vital principles are vindicated here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was convicted of capital murder and sentenced to death based on a crime spree that took

place on August 9-10, 1980. Petitioner robbed a jewelry store, and later killed a couple in their home. Petitioner did not dispute that he had committed the conduct with which he was charged. He instead raised as his sole defense that he was mentally incapacitated at the time because his drug addiction had induced an amphetamine psychosis. Petitioner sought leniency in his capital sentencing hearing on the same basis. The prosecution vigorously disputed that petitioner was a drug addict or was otherwise under the influence of drugs at the time of the offenses.

Throughout the trial and sentencing phases, however, the prosecution had withheld from the defense substantial exculpatory evidence of petitioner's drug addiction, including eyewitness descriptions of petitioner's condition around the time of the crimes that supported his argument that he was acting under the influence of drugs. That evidence first came to light during petitioner's post-conviction proceedings, at which point petitioner timely raised a *Brady* claim. The state courts nonetheless declined to examine the claim, erroneously (and inexplicably) concluding that it had already been resolved against petitioner in prior proceedings—when the evidence supporting the claim in fact had not even come to light when those proceedings occurred. In the federal habeas proceedings below, the State did not defend the state courts' erroneous conclusion that the *Brady* claim had previously been resolved against petitioner, but instead argued the direct opposite—that petitioner had never even *raised* his *Brady* claim in the state court proceedings. The State's argument in that regard was characterized by the dis-

senting judges below as a blatant falsehood. Pet. App. 2a, 39a.

The upshot is that no court—state or federal—has yet given adequate consideration to petitioner's *Brady* claim on the merits, even though that claim raises serious questions about the fairness of petitioner's trial and the reliability of his sentence. *Amici* believe that the prosecution's failure to disclose exculpatory evidence to the defense in connection with petitioner's trial and capital sentencing proceedings, coupled with the prosecution's failure to give a complete and accurate account of the procedural history of that claim in petitioner's post-conviction proceedings, support the grant of certiorari in this case.

ARGUMENT

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

1. From the time of opening statements at his trial, petitioner raised "only one" defense to the charges against him—that, while he had committed the conduct giving rise to the charges, he did so while in a drug-induced psychosis related to his post-traumatic stress from military service. JA 133.[2] Petitioner presented the testimony of a clinical psychologist and neuro-pharmacologist, who testified that petitioner suffered from a serious drug abuse disorder that had developed into a chronic amphetamine psychosis. *State v. Cone*, 665 S.W.2d 87, 92 (Tenn. 1984); Pet. 3. In closing arguments, peti-

[2] Citations to the Joint Appendix filed in the court of appeals below take the form "JA [page]."

tioner's counsel told the jury that the "only one issue in this entire lawsuit" was whether petitioner was "sane under the law," and argued as to that issue that petitioner was "an addict out of control" with "no ability to reason." JA 133-34.

The prosecution strongly disputed petitioner's claim that he was addicted to drugs or under the influence of drugs at the time of the crimes. The officer who processed petitioner after his arrest, Sergeant Ralph Roby, testified that he saw no indication of petitioner's drug use. Pet. 3, 29; Pet. App. 36a. An FBI agent who interviewed petitioner after his arrest, Eugene Flynn, similarly testified that petitioner exhibited no sign of mental illness or drug addiction. Pet. 3, 29; Pet. App. 37a. And an acquaintance of petitioner, Irene Blankman, testified that she was with him one day after the murders and that he used no drugs in her presence and showed no sign of recent drug use. *See Bell v. Cone*, 535 U.S. 605, 705 (2002) (Stevens, J., dissenting); *Cone*, 665 S.W.2d at 91; Pet. 3-4, 29. The prosecutor argued to the jury that petitioner's claim that he was "a drug addict" was "balony," Pet. 3, contended that the drugs and large amount of money found in petitioner's car suggested that petitioner was a "drug seller" rather than a drug user, Pet. 28; JA 146, and asked the jury to focus on the testimony of the witnesses who "had the opportunity to hear from [petitioner or] who saw him in or around the time of the offense," which showed petitioner to be "a calm, cool professional robber" rather than in a drug-induced psychosis. JA 151-52.

In subsequently arguing in the capital sentencing hearing that petitioner's life should be spared, peti-

tioner's counsel referred the jury to the guilt-phase evidence and reiterated the defense position that petitioner was a "junkie and drug addict" and had a diminished mental state at the time of the crimes. Punishment and Sentencing Hearing Tr. 2117 (Apr. 23, 1982); *see* Pet. 4; *Bell*, 535 U.S. at 691 (majority opinion), *id.* at 713 (Stevens, J., dissenting). The jury disagreed and imposed a sentence of death. In affirming petitioner's capital sentence and conviction, the Tennessee Supreme Court emphasized the lack of evidence supporting petitioner's argument that he was acting under the influence of drugs at the time of the crimes. The court explained that "neither of the expert witnesses who testified on [petitioner's] behalf had ever seen or heard of him until a few weeks prior to the trial"; that their testimony had been "based purely upon his personal recitation to them of his history of military service and drug abuse"; that "[l]ay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to . . . his drug abuse"; and, in particular, that the three prosecution witnesses "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 90, 93.

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

a. An incident report containing the state-

ments of witnesses Charles and Debbie Slaughter, who stated that petitioner "looked wild eyed" the day before the homicides. JA 1171.

b. A witness statement responding affirmatively to the question whether petitioner appeared "to be drunk or high on anything" when he robbed a store two days before the murders, and stating: "Well he did, he acted real weird that is the reason I watched him." JA 1809.

c. A police report describing petitioner as "looking about in a frenzied manner" and appearing "agitated" a few days after the killings. Pet. App. 58a; JA 1919.

d. A supplemental report, made one day after the murders by a police officer investigating the crimes, stating that petitioner "was a heavy drug user." District Attorney File 1030.

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

a. A law enforcement teletype system memo authorized by Sergeant Roby and dated August 12, 1980, which states that petitioner "is a heavy drug user"; two law enforcement teletype system memos authorized by Sergeant Roby and dated August 11, 1980, which de-

scribe petitioner as a "drug user"; and a statement made by petitioner's sister to Sergeant Roby on August 23, 1980, that petitioner had "a severe psychological problem" and "needed to work on his drug problem." JA 513, 515; Pet. 29.

b. An FBI "Fugitive Index" form (FD-65), apparently authorized by Agent Flynn (Pet. 29), providing as "additional pertinent information" that petitioner is a "DRUG USER"; multiple teletypes issued by the FBI from August 12, 1980 to August 15, 1980, describing petitioner as a "drug user" and as a "heavy drug user"; and an FBI teletype dated August 13, 1980, stating that petitioner was found "in possession of 850 amphetamine pills" when previously in prison. JA 526-28, 535, 537, 549.

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

a. Notes of a pretrial interview with Blankman in which she failed to reveal, as she later testified at trial, that petitioner had slept in her bed two days after the murders, that she had seen petitioner unclothed at that time, or that she had seen no needle marks on petitioner's arms. Pet. 29.

b. Files indicating that Blankman was the only state witness to receive a thank-you let-

ter and showing that she had had numerous contacts with the prosecution. Pet. 29.

The prosecution should have disclosed the exculpatory and impeachment evidence to petitioner. As this Court has explained, "[t]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). Prejudice exists when the evidence withheld is "material either to guilt or punishment," *Brady*, 373 U.S. at 87, and the "touchstone" of the materiality inquiry is whether disclosure of the evidence would have given rise to a "reasonable probability of a different result." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). The question, in other words, is whether the evidence "undermine[s] confidence" in the verdict or sentence. *Id.* at 435.

A prosecutor's assessment of whether *Brady* requires disclosure of evidence can turn in certain situations on difficult judgments about materiality. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) (recognizing that the standard is "inevitably imprecise" and that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"), *rev'd on other grounds by United States v. Bagley*, 473 U.S. 667, 682 (1985). For precisely that reason, however, "the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* As the Court has recognized, "[t]his means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable

piece of evidence." *Kyles*, 514 U.S. at 439. "This is as it should be," the Court has explained, given the prosecutor's status as "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Accordingly, non-constitutional standards of conduct for prosecutors contemplate a broader range of disclosure than is compelled by the constitutional floor of *Brady*, "call[ing] generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." *Id.* at 437; *see* p. 2, *supra*.

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

jury the defense's paucity of evidence" on the issue). The prosecutor's argument to that effect was reinforced by the Tennessee Supreme Court, which contrasted the lack of evidence introduced by petitioner concerning his condition at the time of the crimes with the testimony of the three witnesses for the prosecution, who "directly and sharply contradicted the contention of [petitioner] that he was 'out of his mind' as a result of drug abuse on the weekend in question." *Cone*, 665 S.W.2d at 93.

The evidentiary picture on that critical issue at trial and at sentencing would have looked far different had it included: (i) eyewitness statements that petitioner, around the time of the crimes, appeared "real weird" and on drugs, "wild-eyed," "frenzied" and "agitated," rebutting the prosecutor's characterization of petitioner as a "calm, cool professional robber"; (ii) multiple police bulletins contemporaneously describing petitioner as a "heavy drug user" or a "drug user," rebutting the prosecutor's argument that any suggestion of petitioner's drug addiction was "balony" and that he was a drug seller rather than a drug user; and (iii) substantial information with which to impeach the testimony of each of the prosecution's three witnesses about their impression of petitioner's condition soon after his crime spree.[3]

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[3] It is unlikely, for instance, that Ilene Blankman's testimony would have stood up well to cross-examination had defense counsel known that she had been the subject of special attention from the State or that key parts of her testimony had come out for the first time at trial rather than in her initial interview by prosecutors. Likewise, the testimony of Sergeant Roby and Agent Flynn suggesting that petitioner did not use drugs and was not "out of his mind" shortly after the crimes

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

For the reasons explained by petitioner, Pet. 10, 30-34, and as Judge Merritt understood below, Pet. App. 46a, the court of appeals conducted no meaningful assessment of the significance of the withheld evidence. Indeed, the court of appeals' perfunctory analysis of that evidence, *see* Pet. App. 25a-26a, only reinforces the need for a complete and adequate assessment of materiality by some court. The court of appeals asserted that the jurors "had already heard substantial direct evidence that [petitioner] was a 'drug user.'" *Id.* But as the prosecutor himself argued to the jury, and as the Tennessee Supreme Court reiterated in affirming petitioner's conviction and sentence, there is a world of difference between testimony describing petitioner's condition and appearance at the time of the crimes, on one hand, and testimony based solely on his own statements years after the fact, on the other. The prosecution pre-

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were committed likely would have been substantially undermined had defense counsel been armed with the information that both witnesses had authored or authorized several reports contemporaneously describing petitioner as a "drug user" or "heavy drug user."

sented the former, and by failing to disclose evidence favorable to petitioner, left him to rely solely on the latter.

B. The Prosecution Did Not Give A Complete And Accurate Account In Post-Conviction Proceedings Of The Procedural History Of Petitioner's *Brady* Claim.

The prosecution not only failed at trial to disclose evidence directly supporting the core of petitioner's defense and his argument to be spared a capital sentence, but the prosecution then failed in post-conviction proceedings to give a full and accurate description of the procedural history of petitioner's resulting *Brady* claim. Consequently, petitioner first was denied the opportunity at trial and sentencing to present critical evidence supporting his position, and, when he later discovered the prosecution's failure to disclose that evidence and sought relief on that basis, he was then denied the opportunity in post-conviction proceedings to have a court meaningfully address the merits of his claim.

1. Petitioner did not learn of the exculpatory evidence possessed and withheld by the prosecution until after he had filed his second amended petition for post-conviction review in state court. He then, in October 1993, filed a new amendment to the petition adding a paragraph 41, alleging that the State had "withheld exculpatory evidence which demonstrated that petitioner . . . did in fact suffer drug problems and/or drug withdrawal or psychosis both at the time of the offense and in the past." JA 2006; Pet. App. 40a (emphasis omitted). Petitioner stated that the evidence "includ[ed], but [was] not limited to, state-

ments of Charles and Debbie Slaughter," as well as "statements contained in official police reports, and/or contained in other documents unknown and/or through personal recollections of officers and others." JA 2006. Petitioner also submitted an affidavit explaining that he "did not know of the existence of this claim in earlier proceedings, including post-conviction proceedings," and that the "facts ha[d] been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding." JA 2045-46.

The trial court later denied the amended petition for post-conviction relief. While the court did not separately discuss petitioner's new *Brady* claim, the court explicitly identified that claim (*i.e.*, ¶ 41, JA 2045-46), in a list of claims that it rejected on the ground that they had been "re-statements of grounds heretofore determined and denied" on direct appeal or in prior post-conviction proceedings. *Cone v. State*, P-06874, slip. op. at 6 (Tenn. Crim. Ct. Dec. 16, 1993). The court also added summarily that any "grounds not previously determined are presumptively waived." *Id.* at 7. The trial court's conclusion that the *Brady* claim in paragraph 41 had been previously determined was plainly erroneous: that claim, far from having been previously determined, in fact had never before been raised.

Notwithstanding the trial court's clear error in finding petitioner's *Brady* claim previously determined, the Tennessee Court of Criminal Appeals affirmed. The court's brief opinion did not separately address petitioner's claims but instead summarily observed that the trial court had found that "most of [petitioner's] stated grounds for relief . . . were pre-

viously determined." JA 2000. The court then stated in its "conclusion" that petitioner had "failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined." JA 2002.

When petitioner again raised his *Brady* claim in his federal habeas petition, the State answered that petitioner was barred from raising that claim by an adequate and independent state ground. The State contended that the Tennessee Court of Criminal Appeals had found that the *Brady* claim was waived, relying on that court's concluding statement that petitioner had "waived all claims" that "had not been previously determined." JA 645-46 (quotation omitted). In fact, however, the state trial court had explicitly (albeit erroneously) concluded that petitioner's *Brady* claim had been previously determined—not that it had been waived—and the Tennessee Court of Criminal Appeals affirmed without suggesting any disagreement on that score. To be sure, the Court of Criminal Appeals had stated conclusorily that some of petitioner's claims were waived. But nothing in its opinion suggests that the court believed that petitioner's *Brady* claim fell in that category.[4] Rather, the circumstances make plain that both state courts found petitioners' *Brady* claim to have been previously determined, not to have been waived. *See* Pet. App. 22a (concluding the "Tennessee courts held that [petitioner's] *Brady* claims were previously determined," not waived).

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[4] As petitioner explains, the state courts could not have concluded that the *Brady* claim had been waived. *See* Pet. 5-6 & n.1.

In the proceedings in the court of appeals below, the State asserted that petitioner's "*Brady* claims were simply never raised in the state court," arguing that petitioner had made "[o]nly a conclusory attempt . . . to raise the allegations in his second-post conviction petition and not the specific claims as now alleged." State Ct. App. Br. 13 (Feb. 8, 2000). In support of that argument, however, the State cited only the version of the second amended petition for post-conviction relief that had been in effect *before* petitioner had again amended the petition to add paragraph 41. *Id.* at 13 n.7. That new paragraph, directly contrary to the State's argument, plainly *did* raise petitioner's *Brady* claim with substantial specificity (and not merely in a conclusory fashion).[5]

2. Thus, rather than assisting the post-conviction courts in their understanding of the procedural history of petitioner's case, the State's characterization of the procedural history confused the issue and impeded the courts' consideration of the merits of petitioner's *Brady* claim. Judge Merritt concluded, in dissenting from the panel disposition, that the State's arguments in that regard amounted to "misrepresentations," "unacceptable conduct," a "complete falsification of the procedural record," and "a deliberate falsehood." Pet. App. 33a, 39a-40a. Six additional judges joined Judge Merritt in concluding, in his opinion dissenting from the denial of en banc rehearing, that the State's claim of waiver was "bla-

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[5] Indeed, the State appeared essentially to acknowledge, in its response to the en banc petition, that its failure to discuss (or even cite) paragraph 41 in its brief before the panel had been misleading. State Opp. to Pet. for Reh'g 6-7 & n.7 (Aug. 3, 2007).

tantly false." Pet. App. 2a. And even assuming that the State did not deliberately seek to mischaracterize the procedural history concerning petitioner's *Brady* claim, the State's account of that procedural history, at the least, was less than fully accurate and complete.

The prosecution, however, is held to an especially high standard when communicating with the courts on such matters. *See ABA Crim. Justice Stds.* 3-2.8(a). The prosecutor "must be scrupulously candid and truthful in his or her representations in respect to any matter before the court. This is not only a basic ethical requirement, but is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice." *Id.* 3-2.8 cmt., at 36 (footnote omitted); *see United States v. Casas*, 425 F.3d 23, 40-41 (1st Cir. 2005) ("Prosecutors have a duty of candor to the court."); *cf. Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 358 (1963) (recognizing that attorneys for the government have an "unqualified duty of scrupulous candor . . . in all dealings with th[e] Court"). The need for the prosecution to provide a fully objective and complete description of the procedural history of the claims under review is at its premium in the context of post-conviction review of capital sentences. In light of the magnitude of the interests, the multitude of claims, the highly complicated procedural history, and the equally complicated procedural rules concerning waiver and default that typify that context, it is essential that courts be able to rely on the prosecution to provide an entirely complete and accurate description of the proceedings under review.

The dissent below therefore should not have had to engage in what the majority described as an "impressively close scrutiny of [an] enormous state court record," Pet. App. 24a, to gain an accurate understanding of what had transpired in this case. That understanding instead should have been supplied in the first instance by the prosecution. Especially if the prosecution has withheld exculpatory evidence in denial of the defendant's rights at trial, the prosecution should not compound the error by making inaccurate statements that may deny the defendant an opportunity to have his claim heard in post-conviction proceedings. Regardless of whether the prosecution's post-conviction conduct in this case was intentionally misleading, it has confused the issue for so long that, almost a dozen opinions after petitioner initially (and properly) raised his *Brady* claim, that claim still has not received the full consideration on the merits that it warrants.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the Court should grant the petition.

Respectfully submitted,

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