No. 11-6(L)

In the
United States Court of Appeals
for the Fourth Circuit

Justin Michael Wolfe,

Petitioner-Appellee,

v.

Harold W. Clarke,
Director, Virginia Department of Corrections,

Respondent-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia

AMICI CURIAE BRIEF OF FORMER JUDGES, PROSECUTORS, AND SENIOR LAW ENFORCEMENT OFFICIALS SUPPORTING APPELLEE WOLFE AND SEEKING AFFIRMANCE

John P. Elwood
Vinson & Elkins LLP
2200 Pennsylvania Avenue NW
Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Michael A. Heidler
Vinson & Elkins LLP
2801 Via Fortuna
Suite 100
Austin, Texas 78746
(512) 542-8579
mheidler@velaw.com

Counsel for *amici curiae*

February 7, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are former judges, prosecutors, and senior law enforcement officials who are concerned about the possibility that an innocent defendant may have been sentenced to death as a result of the *Brady* violations in this case.

An essential constitutional safeguard in the criminal justice process is the requirement, recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution must disclose to a criminal defendant all material, favorable evidence in its possession. *Brady* requires prosecutors to share with the accused important exculpatory evidence, including evidence that could be used to impeach vital prosecution witnesses. As determined by the District Court following a lengthy evidentiary hearing, the Commonwealth of Virginia in this case breached the constitutional safeguard established in *Brady*.

Amici curiae submit this brief supporting Petitioner Wolfe to ensure that he has the benefit of this critical procedural safeguard. Regardless of the reason for the failure to disclose the evidence at issue, or whether such actions were

[1] The identities of the *amici curiae* are set forth at the end of this brief. FED. R. APP. P. 29(c)(4). *Amici curiae* file this brief with leave of Court. *Id.* No counsel for a party authored this brief in whole or in part. No party or counsel to a party contributed money that was intended to fund preparing or submitting the brief. No person—other than the *amici curiae* and their counsel—contributed money that was intended to fund preparing or submitting the brief. *Id.* Rule 29(c)(5).

intentional or inadvertent, reversal of Petitioner Wolfe's conviction is mandated under well-established law.[2]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitions for habeas corpus often present close questions, and federal courts must take care that petitioners' claims satisfy exacting requirements to ensure that the habeas process does not undermine valid societal interests in the finality of criminal convictions. But based on the District Court's findings, at least two of the *Brady* violations that Wolfe alleges are such plain violations of clearly established federal law that this Court should not hesitate to affirm that court's judgment.

The Commonwealth of Virginia charged Justin Wolfe with capital murder for the killing of Daniel Petrole. It is undisputed that Wolfe was not physically present when Petrole was killed; the shooter was a different man, Owen Barber. The capital murder charge against Wolfe was premised on a murder-for-hire theory—*i.e.*, that Wolfe hired Barber to kill Petrole. But the prosecution had scant evidence linking Wolfe to the crime.

The prosecution's case was entirely circumstantial, with one important exception: Owen Barber, the shooter, testified that Wolfe hired him to kill Petrole. That now-recanted testimony was crucial because it was the *only* direct evidence

[2] *See Strickler v. Greene*, 527 U.S. 263, 288 (1999) ("[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.").

(and the only unequivocal evidence) implicating Wolfe in the crime. Barber's testimony was the only direct evidence offered to support a finding that Wolfe hired Barber—an essential element of the Commonwealth's charge of capital murder based on a murder-for-hire theory. If Wolfe's attorneys had successfully impeached Barber, so as to give the jury reasonable doubts about whether Barber was telling the truth, the jury would have been required to acquit Wolfe.

Based on the District Court's findings of fact, entered following an evidentiary hearing at which the court had the opportunity to observe the witnesses' demeanor, a straightforward application of governing Supreme Court decisions compels the conclusion that the prosecution committed at least two *Brady* violations by suppressing evidence that Wolfe's attorneys could have used to impeach Barber's testimony. First, the prosecution suppressed evidence that Barber originally admitted that he acted alone in killing Petrole, and only later embraced the story (and ultimately testified) that Wolfe hired him. Second, the prosecution suppressed evidence of an off-the-record sentencing deal with Barber. Under that agreement, Barber could avoid the death penalty by implicating a "higher up." Before Barber ever mentioned Wolfe's name, police suggested to Barber that Wolfe was the "higher up." Accordingly, the judgment of the District Court should be affirmed.

ARGUMENT

I. The Supreme Court's *Brady* Line of Cases Is Critical To Maintaining the Integrity of the Criminal Justice System

In the landmark decision of *Brady v. Maryland*, the Supreme Court held that the prosecution violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it withholds material, favorable evidence from a criminal defendant. 373 U.S. 83, 86–87 (1963); *accord Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555 (4th Cir. 1999). To establish a *Brady* violation, the accused must prove three elements: (1) the prosecution suppressed evidence (either willfully or inadvertently), (2) that suppressed evidence was favorable to the accused, and (3) the prosecution's suppression of evidence prejudiced the accused. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012); *Banks v. Dretke*, 540 U.S. 668, 691 (2004). "Evidence that can be used to impeach a witness is unquestionably subject to disclosure under *Brady*." *Spicer*, 194 F.3d at 556; *accord Banks*, 540 U.S. at 691; *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Suppression of evidence causes prejudice to the accused when the evidence withheld is "material," *Banks*, 540 U.S. at 691, meaning that there is a "reasonable probability" that the result of the proceeding would have been different if the prosecution had disclosed it. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The accused can demonstrate materiality by showing that the suppressed evidence,

cumulatively, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

The constitutional safeguard that the Supreme Court recognized in *Brady* is critical to protect against improper prosecutions and to maintain the integrity of the criminal justice system. As the Court explained in *Brady*, "our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. When the prosecution "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty," the prosecution assumes the "role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 87–88. As Justice Sutherland observed more than a half century ago, while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. 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 v. United States*, 295 U.S. 78, 88 (1935). Prosecutors must scrupulously follow *Brady* to promote the reliability of criminal judgments by ensuring that juries have the opportunity to review important exculpatory evidence.

II. The Prosecution Committed Two Clear *Brady* Violations by Suppressing Evidence That Would Impeach the Testimony of Barber, the Prosecution's Key Witness

Based on the District Court's findings of fact, entered following an evidentiary hearing at which the court had the opportunity to observe the witnesses' demeanor, the prosecution in this case violated *Brady* in at least two related ways by suppressing evidence that Wolfe's attorneys could have used to impeach Barber's testimony. In each instance, the prosecution committed a *Brady* violation under clearly established federal law, as determined by the Supreme Court of the United States. Thus, each violation warrants habeas relief. And habeas relief is undoubtedly required when these *Brady* violations are combined and their cumulative effect considered.

A. The Findings of Fact That the District Court Entered Following the Evidentiary Hearing Must Be Accepted as Correct Unless They Are Clearly Erroneous

In accordance with this Court's previous judgment in this case, *Wolfe v. Johnson*, 565 F.3d 140, 171 (2009), the District Court held an evidentiary hearing on Wolfe's *Brady* claims. At that hearing, the District Court heard testimony from Commonwealth attorneys and witnesses who had testified at Wolfe's state trial. The District Court also considered documentary evidence, including investigation reports and interview notes. After the hearing, Wolfe and the Commonwealth both proposed findings of fact and conclusions of law.

The District Court expressly based its conclusion that the prosecution violated *Brady* on the facts that it found after assessing the credibility of the evidence presented at the hearing. Many of those factual findings are expressly designated as numbered "Findings of Fact" in the District Court's memorandum opinion. *See* FED. R. CIV. P. 52(a) ("The findings . . . may appear in an opinion or a memorandum of decision filed by the court."). Those enumerated findings are supplemented by other factual findings set forth in the narrative portion of the District Court's opinion. *S. Pac. Land Co. v. United States*, 367 F.2d 161, 162 n.1 (9th Cir. 1966) ("We may properly consider the opinion's finding where, as here, it is direct and clear and consistent with the formal findings, serving merely to supplement them."); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9C FED. PRAC. & PROC. § 2580 (3d ed. 2008) ("The opinion may be used to supplement the findings but only to the extent that it is consistent with them.").

This Court defers to factual findings that a District Court enters following an evidentiary hearing in a habeas corpus case unless those factual findings are clearly erroneous. *Walker v. Kelly*, 589 F.3d 127, 140 (4th Cir. 2009). The District Court's conclusions of law are reviewed *de novo*. *Id.*

B. The Prosecution Violated *Brady* by Suppressing Evidence That Barber, the Prosecution's Key Witness, Originally Stated That He Acted Alone

The prosecution's failure to disclose evidence that Barber initially admitted to acting alone but later changed his story by claiming that Wolfe hired him prevented Wolfe's attorneys from impeaching Barber with that statement. As noted above, to prove a *Brady* violation, Wolfe must show (1) that the prosecution *suppressed* evidence, (2) that the suppressed evidence was *favorable* to him, and (3) that the suppressed evidence was *material*.

1. The prosecution suppressed evidence that Barber, the prosecution's key witness, changed his story on an essential element of the offense

At the evidentiary hearing in the District Court, Jason Coleman, Barber's roommate, testified that he spoke with Barber after the murder, and Barber admitted that he acted alone in killing Petrole. *Wolfe v. Clarke*, No. 2:05cv432, 2011 WL 3251494, at *10–11 (E.D.Va. July 26, 2011). Coleman also testified "unequivocally" that he informed the Commonwealth's lead prosecutor about Barber's statement and described the circumstances in which he told him. *Id.* at *11. Several Commonwealth witnesses disputed Coleman's claim, contending that they were not told, or did not recall being told, about Barber's statement to Coleman. *Id.* at *10.

The District Court, sitting as trier of fact, resolved the conflict between the testimony of the witnesses by crediting the testimony of Coleman. The District Court explained:

> The Court had an opportunity to examine Coleman on the stand and recalls his unequivocal testimony indicating that he told Ebert about Barber's statement and describing the circumstances under which he told him. The Court finds Coleman's testimony to be credible.

Id. at *11. Regarding the contrary testimony of the Commonwealth attorney, the District Court expressly found it "to lack credibility." *Id.* at *24 n.29. After weighing this evidence, the District Court found that the Commonwealth "suppressed exculpatory evidence in violation of *Brady* by not disclosing the fact that Barber told Coleman he acted alone in committing the murder." *Id.* at *11.

The Commonwealth alleges that the District Court made the wrong credibility determinations in "finding Coleman more credible than all of the prosecutors and police." Commonwealth Br. at 23. Thus, the Commonwealth criticizes the District Court for "reject[ing] the state officials' testimony in favor of admitted liars and drug dealers." *Id.* at 15. Because of the many committed public servants who serve as law enforcement officers and prosecutors, a finder of fact may and often should give their testimony particular weight. But the Commonwealth cites no law for the proposition that a District Court *must always* credit the testimony of state officials, particularly where (as here) the opposing

testimony has been corroborated by the testimony of others (such as Barber's cellmate, Carl Huff).

Whether the Commonwealth knew of Barber's statement to Coleman is a factual issue, and the District Court's finding on that issue is therefore reviewed for clear error. *See Monroe v. Angelone*, 323 F.3d 286, 315 n.57 (4th Cir. 2003) ("[T]he district court found that the prosecution had constructive knowledge of her informant history. This finding is not clearly erroneous."); *see also Walker*, 589 F.3d at 140 (whether the prosecution suppressed evidence is a factual issue that is reviewed for clear error). *Amici* are not in a position to question the District Court's credibility determinations, which were, after all, based on its firsthand observation of the witnesses. But such determinations are entitled to especially deferential review. The District Court, as trier of fact, was in a position to observe the witnesses, to note variations in their demeanor, and to appreciate nuances in their tone of voice—factors that bear "heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985); *accord United States v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012); *United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008). As this Court has stated, "[w]e may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility." *McCrary v. Runyon*, 515 F.2d 1082, 1086

(4th Cir. 1975); *see United States v. Murray*, 65 F.3d 1161, 1169 (4th Cir. 1995) (same).[3]

2. The suppressed evidence was favorable to Wolfe

Barber's statement is unquestionably favorable. The prosecution called Barber to tie Wolfe to the killing—specifically, to testify that Wolfe hired Barber to kill Petrole. Had Wolfe's lawyers known that Barber initially admitted to acting alone, they could have introduced that evidence to impeach Barber.

3. The suppressed evidence was material to a determination of guilt or innocence

The suppressed evidence in this case is unquestionably material. Coleman's testimony indicates that Barber initially said that he acted alone in killing Petrole. A jury might give that testimony particular weight because it was made soon after the shooting to someone with whom Barber had a personal relationship, before Barber had significant time to fabricate a story tailored to suit his interests, and under circumstances when a jury could conclude that Barber had little incentive to deflect blame. Such evidence could have severely undermined the credibility of

[3] "[D]ecisions in every circuit in the federal judicial system have said that a reviewing court must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9C FED. PRAC. & PROC. § 2586 (3d ed. 2008); *see, e.g.*, *Diesel Props. S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 52 (2d Cir. 2011) ("We are not allowed to second-guess the court's credibility assessments.").

Barber's later statements to police that he shot Petrole because Wolfe paid him to do so.

The materiality of that evidence is underscored by the Supreme Court's recent decision in *Smith v. Cain*, 132 S. Ct. 627 (2012). There, Smith was convicted of murder. The testimony of "a single witness, Larry Boatner, linked Smith to the crime." *Id.* at 629. Boatner claimed that he observed Smith commit murder and identified Smith at trial as the perpetrator. *Id.*

The prosecution proffered Boatner's eyewitness identification testimony but suppressed evidence that, on the night of the murder, Boatner was unable to describe the perpetrator. Initially, Boatner "could not . . . supply a description of the perpetrators other then [sic] they were black males." *Id.* Boatner also stated that he "would not know them if [he] saw them." *Id.* at 630. The State agreed that it suppressed Boatner's initial statements, and that those statements were favorable to the accused. The only issue was whether the suppressed statements were "material to the determination of Smith's guilt." *Id.*

The Court held that the statements were material because (1) "Boatner's testimony was the *only* evidence linking Smith to the crime," and (2) "Boatner's undisclosed statements directly contradict his testimony" at trial. *Id.* Although the petitioner alleged that the prosecution violated *Brady* by suppressing a host of other evidence, the Court did not need to consider those allegations because

"Boatner's undisclosed statements alone suffice to undermine confidence in Smith's conviction." *Id.* at 631. Thus, the Court recognized a bright-line rule for materiality: when a witness's testimony is the only evidence to prove an essential element of the offense, and when that witness's prior statements on that essential element directly contradict his trial testimony, the witness's prior inconsistent statements are material as a matter of law.[4] *See also Spicer*, 194 F.3d at 556–57, 560 (holding that change in testimony of one witness on key issue was material even though prosecution presented two *other* witnesses who also identified the defendant in court).

The facts of this case fall neatly within the rule set forth in *Smith*. Just as Boatner's testimony was indispensible in *Smith*, Barber's testimony was essential to the Commonwealth's case against Wolfe. The prosecution's case rested on the theory that Wolfe hired Barber to kill Petrole. To prove that Wolfe committed capital murder, the prosecution had to prove—beyond a reasonable doubt—that Barber killed Petrole at Wolfe's behest. *Wolfe*, 2011 WL 3251494, at *20.

---

[4] The Supreme Court explained:

> Boatner's testimony was the *only* evidence linking Smith to the crime. And Boatner's undisclosed statements directly contradict his testimony . . . . Boatner's undisclosed statements were plainly material.

Id. at 630.

Barber's now-recanted testimony was critical because it was the *only* direct evidence offered to prove that Wolfe hired Barber. The whole case turned on Barber's testimony. If the jury did not believe Barber, it would have been required to acquit Wolfe.

Indeed, as this Court recognized in the prior appeal of this case, "Barber was . . . the only witness to provide any direct evidence regarding the 'for hire' element of the murder offense and the involvement of Wolfe therein." *Wolfe*, 565 F.3d at 144. After reviewing the record, the District Court explained that "Owen Barber's testimony was the only evidence that the Prosecution presented to prove that the Petitioner hired Barber to kill Petrole." *Wolfe*, 2011 WL 3251494, at *20; *accord id.* at *25 ("Barber's testimony was . . . the only evidence establishing the murder for hire element of the charge."). The Commonwealth has candidly admitted that Wolfe probably would not even have been *prosecuted* without Barber's testimony. *Id.* at *6 n.11.

The only other evidence that could have connected Wolfe to the crime was circumstantial, and was just as consistent with innocence as with guilt. The Commonwealth offered evidence that, after the killing, Barber's girlfriend wrote Wolfe a letter asking Wolfe for money. *Id.* at *18. The prosecution also introduced records of phone calls between Barber and Wolfe around the time of the murder. *Id.* Without Barber's testimony, that evidence is at best equivocal. It is

undisputed that Wolfe and Barber were friends; so, it is hardly surprising that they would talk on the phone or that Barber would turn to Wolfe when he needed money. And even assuming *arguendo* that ambiguous, circumstantial evidence could support a conviction, the jury could easily have found Wolfe to be innocent if that circumstantial evidence were the only thing connecting Wolfe to the murder.

As in *Smith*, the key witness here changed his story on an essential element of the offense by first claiming that he acted alone and later testifying that Wolfe hired him. Thus, under *Smith*, Barber's initial statement—that he acted alone in killing Petrole—is material, and the prosecution violated *Brady* by withholding from Wolfe evidence of Barber's statement.

C. The Prosecution Violated *Brady* by Suppressing Evidence That the Prosecution's Key Witness Entered Into an Informal Deal To Avoid the Death Penalty by Testifying Against Wolfe

The prosecution also prevented Wolfe's attorneys from impeaching Barber by suppressing evidence that the police offered Barber an informal sentencing deal: Barber could avoid the death penalty in exchange for his testimony against Wolfe. The withholding of this evidence likewise violated *Brady*.

1. The prosecution suppressed evidence that the police made an informal sentencing deal with Barber, the prosecution's key witness

During Detective Newsome's initial arrest and transportation of Barber, the two had a conversation that Newsome described in a narrative information report.

Wolfe, 2011 WL 3251494, at *4 n.8. Newsome wrote: "I told Barber that we knew he had killed Petrole . . . but that he had killed him for someone else and we believed that person was Justin Wolfe." *Id.* In response, Barber asked, "What do I get out of it if I tell you who the other person, the higher up, is?" *Id.* Detective Newsome explained that "it could simply be the difference between Capit[a]l murder or First Degree, execution or life in prison." *Id.* at *4 n.8. Thus, the District Court found that Newsome "presented Barber with the option of execution or life imprisonment in exchange for implicating someone else." *Id.* at *10. Newsome submitted his report in May 2001, well before Wolfe's January 2002 conviction. *Id.* at *1, *4 n.8.

In finding that the prosecution suppressed Newsome's report, *id.* at *4 & n.8, the District Court implicitly found that the prosecution had access to evidence that the police had an informal sentencing deal with Barber, under which Barber could avoid the death penalty by testifying against Wolfe. The District Court's finding is not clearly erroneous. *Monroe*, 323 F.3d at 301 n.23 (reviewing for clear error the district court's "finding of the Smith sentence deal"). In any event, the prosecution conceded below that it suppressed this evidence. *Wolfe*, 2011 WL 3251494, at *10.

It makes no difference for *Brady* purposes that Barber's deal was with the police, as opposed to Commonwealth attorneys. In *Harris v. Lafler*, 553 F.3d 1028

(6th Cir. 2009), the police made an informal deal with the accused that they would release him if he provided certain testimony. *Id.* at 1030–31. In deciding that the prosecution suppressed evidence of the deal, the Court of Appeals explained that "it makes no difference that the prosecutors did not know about the police officers' statements" because "[t]he *Brady* obligation applies even to evidence known only to police investigators." *Id.* at 1033 (quoting *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999)) (internal quotation marks omitted). Prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf . . . including the police." *Id.*

Nor does it matter that the deal was informal. As the Sixth Circuit explained in *Harris*, "*Brady* is not limited to formal plea bargains, immunity deals, or other notarized commitments." *Id.* at 1034. *Brady* "applies to less formal, unwritten, or tacit agreements, so long as the prosecution offers the witness a benefit in exchange for his cooperation." *Id.* (citation and internal quotation marks omitted); *accord Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) (en banc) ("The existence of a less formal, unwritten or tacit agreement is also subject to *Brady's* disclosure mandate."). As Judge Posner explained in *Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005), *Brady* requires the prosecution to disclose "a tacit understanding [with the defendant] that if his testimony was helpful to the prosecution, the state would give him a break on some pending criminal charge." *Id.* at 323. The *Brady*

obligation to disclose deals with the accused is not limited to formal plea agreements.

2. The suppressed evidence was favorable to Wolfe

The suppressed sentencing deal plainly was favorable to Wolfe. As explained above, Barber was the Commonwealth's key witness. Barber's testimony was the only direct evidence (and certainly the only unequivocal evidence) to support the essential finding that Wolfe hired Barber to kill Petrole. Had Wolfe's attorneys been able to show that Detective Newsome offered to spare Barber's life in exchange for testimony on the *essential issue of Wolfe's involvement in the murder*, the jury could have concluded Wolfe was not guilty based on doubts about the truthfulness of Barber's testimony. As the Sixth Circuit explained in *Harris v. Lafler*, evidence of a police deal with a key witness is favorable to the accused because the accused can "use[] the[] statements [about the deal] to cast doubt on the credibility" on the key witness's testimony. 553 F.3d at 1033.

3. The suppressed evidence was material to a determination of guilt or innocence

Under long-settled *Brady* caselaw, the Commonwealth's suppression of the informal sentencing deal with Barber is material to guilt or innocence. In *Giglio v. United States*, 405 U.S. 150 (1972), the Government adduced the testimony of Taliento, who was the accused's "alleged conspirator in the offense and the only

witness linking [the accused] with the crime." *Id.* at 151. The Government procured the testimony of that essential witness by a "promise . . . that if he testified before the grand jury and at trial he would not be prosecuted." *Id.* at 152.

The Supreme Court held that the Government's promise was material. "Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Id.* at 154. Thus, "evidence of *any understanding or agreement* as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 155 (emphasis added).

Similarly, in *Harris*, the Sixth Circuit explained that Ward was the "key witness for the prosecution" because his testimony "was the *only* piece of eyewitness evidence that directly linked Harris to the shooting." 553 F.3d at 1033. The rest of the prosecution's case was "circumstantial." *Id.* Because the prosecution's deal with Ward was informal, "[t]here was no publicly filed immunity deal," and the accused had "no way to prove" that Ward was "promised something in exchange for his testimony." *Id.* at 1034. The Court of Appeals wrote that "it is exceedingly plausible that the disclosure of [the government's promise] would have cast Ward's testimony, and thus all of the prosecution's case, in a different light—so different, indeed, that it undermines our confidence in the conviction." *Id.* The Court of Appeals thus held that the suppressed deal was

material. *See Banks*, 540 U.S. at 698 ("The materiality standard for *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (citation and internal quotation marks omitted)).

The suppressed police report and informal sentencing deal between the Commonwealth and Barber is material under *Giglio* and *Harris*. As explained above, the determination of guilt or innocence hinged on Barber's credibility. Had the jury disbelieved Barber, it would have been required to acquit Wolfe because no other evidence linked Wolfe to the crime. Evidence that the police offered to spare Barber's life in exchange for his testimony against Wolfe could very well cause the jury to question the truth of Barber's account to such an extent that the jury would have reasonable doubts about whether Wolfe committed the offense.

CONCLUSION

Given the obvious materiality of the withheld evidence in this case, there can be little question that its suppression has "undermine[d] confidence in the verdict," *Kyles v. Whitley*, 514 U.S. at 435, posing an unacceptable risk that an innocent man may have been sentenced to death. This is true regardless of the prosecution's reason for the failure to disclose the evidence at issue in this case, or whether such actions were intentional or inadvertent. *Amici curiae* respectfully submit that this

Court should affirm the judgment of the District Court vacating the conviction and sentence of Petitioner Wolfe.

February 7, 2012

Respectfully submitted,

/s/ John P. Elwood

John P. Elwood
Vinson & Elkins LLP
2200 Pennsylvania Avenue NW
Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Michael A. Heidler
Vinson & Elkins LLP
2801 Via Fortuna
Suite 100
Austin, Texas 78746
(512) 542-8579
mheidler@velaw.com

Counsel for *amici curiae*

LIST OF *AMICI CURIAE*

Titles and affiliations are provided only for identification purposes.

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

former Judge, Superior Court of New Jersey (1988-1991)

2. **Hon. Robert C. Bundy**,
former United States Attorney, District of Alaska (1994-2001)

3. **Hon. A. Bates Butler III**,
former United States Attorney, District of Arizona (1980-1981)

former First Assistant United States Attorney, District of Arizona (1977-1980)

former Deputy Pima County (Arizona) Attorney (1970-1977)

4. **Hon. W.J. Michael Cody**,
former Attorney General, State of Tennessee (1984-88)

former United States Attorney, Western District of Tennessee (1977-1981)

5. **Hon. J. Joseph Curran, Jr.**,
former Attorney General of Maryland (1987-2007)

former Lieutenant Governor of Maryland (1983-1987)

6. **Hon. Robert J. Del Tufo**,
former Attorney General, State of New Jersey (1990-1993)

former United States Attorney, District of New Jersey (1977-1980)

7. **Hon. W. Thomas Dillard**,
former United States Attorney, Northern District of Florida (1983-1987)

former United States Attorney, Eastern District of Tennessee (1981)

former Assistant United States Attorney, Eastern District of Tennessee (1967-1976, 1978-1982)

8. **Conor B. Dugan**,
former Attorney, Appellate Section, Civil Rights Division, U.S. Department of Justice (2004-2011)

former Special Assistant U.S. Attorney in the Eastern District of Virginia (2008)

9. **Hon. John R. Dunne,**
former Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (1990-1993)

10. **Matthew W. Friedrich**,
former Acting Assistant Attorney General, United States Department of Justice, Criminal Division (2008-2009)

former Assistant United States Attorney, Eastern District of Virginia (2001-2005)

former Assistant United States Attorney, Eastern District of Texas (1998-2001)

11. **Bennett L. Gershman**,
Professor of Law, Pace Law School

former Prosecutor, Manhattan District Attorney's Office

former Prosecutor, New York Special State Prosecutor

12. **Hon. John Gibbons**,
former Chief Judge, United States Court of Appeals for the Third Circuit (1987-1990)

former Judge, United States Court of Appeals for the Third Circuit (1970-1990)

13. **Hon. Isabel Gomez**,
former Judge, Fourth Judicial District of Minnesota (1984-2006)

14. **Hon. Stewart Hancock**,
former Associate Judge, New York Court of Appeals (1986-1994)

15. **Bruce R. Jacob**,
Dean Emeritus and Professor of Law, Stetson University College of Law

former Assistant Attorney General, State of Florida

16. **Hon. Gerald Kogan**,
former Chief Justice, Supreme Court of the State of Florida

former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida

17. **Hon. Thomas D. Lambros**,
former Chief Judge, United States District Court, Northern District of Ohio (1990-1995)

former Judge, United States District Court, Northern District of Ohio (1967-1995)

18. **Hon. David W. Ogden**,
former Deputy Attorney General, U.S. Department of Justice (2009-2010)

former Assistant Attorney General, Civil Division, U.S. Department of Justice (1999-2001)

former Chief of Staff to Attorney General Janet Reno (1998-1999)

former Counselor to Attorney General Janet Reno (1997-1998)

former Associate Deputy Attorney General, U.S. Department of Justice (1995-1997)

19. **Hon. Stephen M. Orlofsky**,
former Judge, United States District Court for the District of New Jersey (1995-2003)

20. **Stephanie K. Pell**,
former Senior Counsel to the Deputy Attorney General, U.S. Department of Justice (2008-2009)

former Counsel to the Assistant Attorney General for the National Security Division, U.S. Department of Justice (2007-2008)

former Trial Attorney, U.S. Department of Justice (2002-2007)

former Assistant United States Attorney, Southern District of Florida (1998-2002)

21. **Hon. H. James Pickerstein**,
former United States Attorney, District of Connecticut (1974)

former Chief Assistant United States Attorney, District of Connecticut (1974-1986)

22. **Hon. Richard J. Pocker**,
former United States Attorney, District of Nevada (1989-1990)

23. **Christopher S. Rhee**,
former Assistant United States Attorney, District of Columbia (2001-2002)

former Special Assistant to Deputy Attorney General Eric H. Holder, Jr. (1999-2001)

24. **Jeannie S. Rhee**,
former Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (2009-2011)

former Assistant United States Attorney for the District of Columbia (2000-2006)

25. **Hon. H. Lee Sarokin**,
former Judge, United States Court of Appeals for the Third Circuit (1994-1996)

former Judge, United States District Court for the District of New Jersey (1979-1994)

26. **Harry L. Shorstein**,
former State Attorney for the Fourth Judicial Circuit of Florida (1991-2007)

27. **Gil M. Soffer**,
former Associate Deputy Attorney General (2008)

former Assistant U.S. Attorney, Northern District of Illinois (1994-2000)

28. **Hon. Thomas P. Sullivan**,
former United States Attorney, Northern District of Illinois (1977-1981)

former Chair, Illinois General Assembly's Illinois Capital Punishment Reform Study Committee (2003-2009)

former Co-Chair, Illinois Governor's Commission on Capital Punishment (2000-2002)

29. **Richard S. Ugelow**,
former Senior Trial Attorney, Civil Rights Division, U.S. Department of Justice (1973-2002)

30. **Hon. James K. Vines**,
former United States Attorney, Middle District of Tennessee (2002-2006)

31. **Hon. Atlee W. Wampler III**,
former United States Attorney, Southern District of Florida (1980-1982)

former Miami Strike Force, Attorney-In-Charge, Organized Crime & Racketeering Section, U.S. Department of Justice (1975-1980)

32. **Hon. James West**,
former United States Attorney, Middle District of Pennsylvania (1985-1993)

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

former Presiding Judge, Superior Court of New Jersey, Criminal Division (1983-1987)

former Judge, Superior Court of New Jersey, Civil Division (1982-1983)

former Judge, Superior Court of New Jersey, Juvenile and Domestic Relations Division (1980-1982)

former Judge, Union County (New Jersey) District Court (1980-1985)

34. **William Yeomans**,
former Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (2002)

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 5576 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point.

Dated: February 7, 2012

/s/ John P. Elwood
John P. Elwood
Counsel for *amici curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of February, 2012, a true and correct copy of the foregoing brief was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Michele Jill Brace
2133 Newport Place, NW
Washington, DC 20037-0000
202-223-6380

Daniel James King
KING & SPALDING, LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
404-572-4600

Matthew Scott Owen
KING & SPALDING
Suite 4000
1100 Louisiana
Houston, Texas 77002
713-276-7365

Ashley Charles Parrish
KING & SPALDING, LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006-0000
202-626-2627

Counsel for Justin Michael Wolfe

Matthew P. Dullaghan
Office of the Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219-0000
804-786-4073

Counsel for Harold W. Clarke, Director, Virginia Department of Corrections

/s/ John P. Elwood
John P. Elwood

Counsel for *amici curiae*