IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 32 EM 2023

COMMONWEATH OF PENNSYLVANIA

Respondent

v.

LAVAR BROWN,

Respondent.

PETITION OF FAMILY MEMBERS OF MURDER VICTIMS MICHAEL RICHARDSON AND ROBERT CRAWFORD,

Petitioners.

BRIEF OF *AMICI CURIAE* PROFESSORS OF CRIMINAL LAW AND PROCEDURE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici are leading academics and scholars on the criminal justice system who study, teach, and write about issues of criminal justice and procedure. *Amici* share a professional interest in ensuring the fair and effective functioning of the criminal justice system. *Amici* are interested in this case because the outcome will affect the incentives prosecutors have to comply with their constitutional, legal, and ethical obligations.

Amici believe that, in order to promote the administration of justice, prosecutors must perform their official responsibilities in strict conformance with applicable standards of conduct and fairness. These include their overarching duty "to seek justice, not merely to convict." Am. Bar Ass'n, *Standards for Criminal Justice Prosecution Function and Defense Function* 3-1.2(c) at 4 (3d ed. 1993). The first comment to the ethical rule that governs prosecutors in Pennsylvania provides that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Pa. R. Pro. Conduct r. 3.8, cmt. 1 (2024). *Amici* also believe that Conviction Integrity Units within prosecutorial offices,

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[1] Pursuant to Pa. R. App. P. 531(b)(2), *amici* state that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

which are also sometimes called "Conviction Review Units," promote fairness and the interests of justice, and provide an institutional framework to aid prosecutors in righting wrongs. The current leadership of the Philadelphia District Attorney's Office ("Philadelphia DAO") is carrying out the prosecutor's constitutional and ethical duties to acknowledge wrongful convictions obtained by the office when such concessions are merited under the law. These confessions of error are not undertaken lightly but rather come about after extensive reinvestigation. A list of all *amici* is set forth in the Appendix.

BACKGROUND AND SUMMARY OF ARGUMENT

By conceding error and demonstrating a commitment to overturning wrongful convictions, the Philadelphia DAO is fulfilling the longstanding and noble duty of prosecutors to serve as ministers of justice. A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereign 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 should be done . . . . [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). Taking proactive steps to correct an injustice is not an abdication of a prosecutor's law enforcement responsibilities. On the contrary, prosecutors who

aim to overturn wrongful convictions in their jurisdiction—and to prevent them from occurring to begin with—embody the minister-of-justice ideal.

There are times in our nation's history when prosecutors—and, indeed, entire prosecutorial offices—have forgotten these basic precepts of our criminal justice system. Consider the following infamous examples where a fundamental breakdown in the prosecutorial function led to systemic issues of unconstitutional convictions: the Orleans Parish District Attorney's Office under Harry Connick Sr. and Leon Cannizzaro,[2] the Dallas County District Attorney's Office under Henry Wade,[3] the Shelby County (Memphis, Tennessee) District Attorney's Office under Amy Weirich,[4] the State's Attorney's Office for Baltimore City,[5] and the Orange County, California District Attorney's Office under Tony Rackauckas.[6] These

[2] *See generally* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 161-164 (2004); Rory Fleming, *The Case for Pattern-and-Practice Investigations Against District Attorney's Offices*, 56 U.S.F. L. Rev. 181, 190-195 (2021).
[3] *See generally* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 Wash. L. Rev. 35, 62-64 & n. 136 (2009).
[4] Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* (2019); Fleming, *supra* note 2, at 195-200.
[5] *See, e.g.*, Lara Bazelon, *David Simon Made Baltimore Detectives Famous. Now Their Cases Are Falling Apart. Has Reality Caught Up to the "Murder Police"?*, N.Y. Mag., Jan. 12, 2022, https://nymag.com/intelligencer/2022/01/did-david-simon-glorify-baltimores-detectives.html.
[6] Fleming, *supra* note 2, at 187-190.

jurisdictions have all experienced a pattern of wrongful convictions and spurred a general erosion of confidence in the criminal justice system.

Philadelphia is another notorious example. Recent scholarly work has examined and found longstanding patterns of chronic prosecutorial misconduct in the operations of the Philadelphia DAO, particularly under the leadership of Lynne Abraham, who was the District Attorney at the time of Mr. Brown's prosecution, as well as her predecessor, former Chief Justice Ronald Castille (1986-1991). This scholarly work includes recent studies by the Harvard Law School's Fair Punishment Project, which featured Ms. Abraham in its June 2016 report, *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty*[7] and pioneering work by the Peter L. Zimroth Center on the Administration of Criminal Law at New York University School of Law, which examined prosecutorial practices in the Philadelphia District Attorney's office in its report, *Prosecutorial Misconduct in the Philadelphia District Attorney's Office* (the "Zimroth Report").[8]

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[7] Fair Punishment Project, *American's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty* (June 2016), https://charleshamiltonhouston.org/wp-content/uploads/2021/08/FairPunishment Project-Top5Report_FINAL_2016_06.pdf.

[8] The Peter L. Zimroth Center on the Administration of Criminal Law, *Prosecutorial Misconduct in the Philadelphia District Attorney's Office* (May 14, 2024), https://www.law.nyu.edu/sites/default/files/5.14.2024.Prosecutorial%20Misconduc

The Zimroth Report reviewed and analyzed forty-five years of prosecutorial practices in the Philadelphia DAO, covering prosecutions dating back to the late 1970s. The Zimroth Report concluded that the office historically engaged in significant prosecutorial misconduct in homicide and other violent crime prosecutions, documenting the District Attorney's failure to abide by constitutional or ethical obligations in more than fifty cases, including Mr. Brown's.

The Zimroth Report presents in great detail several historic policies and practices of the Philadelphia DAO that violate a prosecutor's constitutional and ethical responsibilities. As detailed below, several of the specific policy failures of the Philadelphia DAO lie at the heart of the missteps and misconduct underlying Mr. Brown's case.

The efforts of the current District Attorney to rectify decades of prior misconduct follow best practices for public prosecutors.[9] In particular, current

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[9] For instance, the American Bar Association's Model Rules for Professional Conduct now include the following additions in Rule 3.8, which governs prosecutors:

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> (1) promptly disclose that evidence to an appropriate court or authority, and
>
> (2) if the conviction was obtained in the prosecutor's jurisdiction,
>
> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

District Attorney Larry Krasner established a Conviction Integrity Unit in 2018, joining a list of prosecutors determined to comply with their legal and ethical obligations to correct fundamental miscarriages of justice. Public prosecutors around the country have established similar offices to help "ensure that the public has confidence that criminal convictions are of the guilty, not the innocent."[10] Notably, since it was established in 2018, the Philadelphia District Attorney's Conviction Integrity Unit has reviewed allegations of prosecutorial misconduct in hundreds of cases involving homicide and other violent crimes. Zimroth Report at 6. These efforts have led to the exoneration of twenty-four people and the overturning of ten wrongful convictions. *Id.* Dozens of other individuals have had their criminal adjudications invalidated through post-conviction or *habeas*

> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. Model Rules of Pro. Conduct r. 3.8 (g)-(h) (Am. Bar Ass'n. 2024).

[10] N.Y.U. Ctr. on Admin. Crim. L., *Establishing Conviction Integrity Programs in Prosecutors' Offices* 4 (2011), https://www.law.nyu.edu/sites/default/files/upload_documents/2011-CACL-Conviction-Integrity-Programs-Report.pdf; Medwed, *supra* note 3, at 63-67; Medwed, *supra* note 2, at 175-177. *See generally* National Registry of Exonerations, *Conviction Integrity Units*, available at https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx (last updated June 24, 2024) (identifying 6 statewide and 96 municipal conviction integrity units).

proceedings. Collectively, the Zimroth Report discusses more than fifty cases improperly impacted by prosecutorial misconduct, including eight people who received capital sentences through fundamentally flawed proceedings: Jimmy Dennis, James Lambert, Walter Natividad, Walter Ogrod, Anthony Washington, Christopher Williams, and Zachary Wilson. *See generally* Report Appendix.

For the reasons detailed in this brief, the grant of post-conviction relief to Mr. Brown was proper, and the actions of the Philadelphia District Attorney in this case are in accord with their professional and constitutional obligations.

ARGUMENT

I. The Philadelphia District Attorney's Chronic History of Prosecutorial Misconduct.

The Zimroth Report concludes that historically, the Philadelphia DAO maintained certain policies and practices that violated a prosecutor's core constitutional duty to see "that justice should be done."[11] The researchers arrived at this conclusion by conducting an extensive evaluation of public court records from state post-conviction and federal *habeas* proceedings, as well as the files of the Philadelphia DAO. Zimroth Report at 9-10.

The Zimroth Report is a remarkable piece of scholarship that represents the results of thousands of hours of close case file review. It offers a window into how

[11] *Berger,* 295 U.S. at 88.

a prosecutor's office could repeatedly fail to abide by its constitutional and ethical obligations across a wide spectrum of significant cases.

While the Zimroth Report identifies dozens of improper policies and practices, at the heart of these issues was the win-at-all-costs "culture" of the Philadelphia District Attorney's Office. *Id.* at 3-5. Academic literature has long discussed the pernicious effect of institutional cultures in prosecutors' offices that prioritize winning over other considerations.[12] As the Zimroth Center concludes, the Philadelphia "DAs actively shaped the Office into a place where 'doing justice' meant winning convictions . . . . Prosecutors viewed trial as 'a game to win,' and they adopted a distorted view of their constitutional and ethical obligations because of their collective focus on pursuing and defending convictions at all costs." Zimroth Report at 5.

The Zimroth Report identifies many broad failings of the office, three of which are particularly pertinent to Mr. Brown's case.

First, the Zimroth Report identified "several old policies and practices employed by Office prosecutors that appeared to violate *Brady* and *Giglio*."

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[12] *See, e.g.,* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 Geo. J. Legal Ethics 537 (1996); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 Geo. J. Legal Ethics 355, 388 (2001).

Id. at 6. Among different aspects of these policies noted in the report, the Zimroth Center found:

- The office "violated its constitutional and ethical obligations to disclose favorable information, including impeachment information, to defense counsel." *Id.* at 10.
- The Homicide Unit had a policy "of not documenting or disclosing a witness' initial statements whenever the police and/or prosecutor felt that the witness was not being truthful." *Id.* at 7.
- The Homicide Unit also had a policy of only "selectively disclosing a witness' cooperation history" and "oppos[ing] requests for information about a witness' cooperation history." *Id.*

While there is scholarly debate over the extent and scope of *Brady* violations,[13] *Brady* violations are "the most recurring and pervasive of all constitutional procedural violations."[14] The failure to disclose exculpatory evidence is a

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[13] *Compare, e.g.,* Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a Brady Problem*, 16 Ohio St. J. Crim. L. 307, 310-312 (2019) *with* Jerry P. Coleman & Jordan Lockey, *Brady "Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. Rev. 199, 204-208 (2016).

[14] Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play,* 57 Case W. Res. L. Rev. 531, 533 (2007). For the most recent data on official misconduct by prosecutors, see Brandon L. Garrett, Adam M. Gershowitz, & Jennifer Teitcher, *The Brady Database*, 114 J. Crim. L. & Criminology 185 (2024); National Registry of Exonerations, *2023 Annual Report* 3 (March 18, 2024), https://www.law.umich.edu/special/exoneration/Documents/

substantial factor in wrongful convictions—several studies have found the "vast majority" of wrongful convictions arising from prosecutorial misconduct "were cases of destruction or suppression of exculpatory evidence."[15] Even worse, "proven *Brady* errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day."[16]

Brady violations are a common factor in several of the most notorious officewide prosecutorial scandals, including in New Orleans under Harry Connick Sr., in Orange County under Tony Rackauckas, and in Memphis under Amy Weirich.[17] As detailed in the Zimroth Report, the same can be said of Philadelphia under the tenure of prior District Attorneys.

Second, the Zimroth Report found that the office "relied on false evidence to obtain a conviction and/or failed to correct false evidence at trial." Zimroth Report

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2023%20Annual%20Report.pdf (noting that official misconduct contributed to wrongful convictions in more than half of exonerations documented in 2023, including 85% of exonerations in murder cases).

[15] Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. Rev. 275, 278 (2004); *see also* Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, Innocence Project (Oct. 2010).

[16] Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee Rev. 1533, 1540 (2010).

[17] Bazelon, *supra* note 4, at 258-260 (discussing role of widespread *Brady* violations in New Orleans and Memphis); Fleming, *supra* note 2, at 187-200 (discussing role of widespread *Brady* violations Orange County and Memphis).

at 10. Scholars have identified similar behavior by prosecutors in many other wrongful conviction cases.[18] Although it is common (and advisable) practice to prepare witnesses for trial, prosecutors have sometimes gone too far, such as by engaging in "horseshedding," *i.e*., coaching a witness to slant testimony in a particular way[19] or later by neglecting to correct material misstatements by witnesses at trial.[20] Researchers have also found that prosecutorial reliance on incentivized witnesses at trial, often known as informants, are a factor in scores of documented wrongful convictions.[21] The promise of a benefit in exchange for appearing at trial makes an informant's testimony fundamentally suspect in many respects. But prosecutors have aggravated this problem by neglecting to alert the defense about the arrangement with the witness or simply using a "wink-and-a-nod" to convey the prospect of beneficial treatment to a potential witness without the behavior rising to the level of a "promise" of leniency, which would necessitate disclosure to the defense as a matter of constitutional law and the rules of ethics.[22]

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[18] *See, e.g*., Daniel S. Medwed, *Coaxing, Coaching, and Coercing: Witness Preparation by Prosecutors Revisited,* 16 Ohio St. J. Crim. L. 379, 381 (2019); Daniel S. Medwed, *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent* 77-91 (2012).
[19] *See, e.g*., Medwed, *Prosecution Complex*, *supra* note 18, at 80.
[20] *Id*. at 82-83 (discussing the Fernando Bermudez case from New York).
[21] *See, e.g*., Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* (2d ed. 2022).
[22] *See, e.g*., Medwed, *Prosecution Complex*, *supra* note 18, at 86.

Finally, the Zimroth Center found the Philadelphia DAO adopted a "deny first" policy that allowed line prosecutors to "deny misconduct allegations without first reviewing the DAO trial file or H-file to determine if their denials were true or had any factual basis." Zimroth Report at 22. The office also "responded aggressively . . . when people challenged their convictions and alleged misconduct . . . often denying the allegations without investigating whether the convicted person's allegations were plausible or misapplying the law to argue that there were no *Brady* violations." Zimroth Report at 18, 22. Scholars have noted "prosecutorial intransigence" is a common feature in post-conviction proceedings, particularly when claims of prosecutorial misconduct or actual innocence are raised.[23]

As discussed *infra* in Section II, each of these policies and practices is illustrated in Mr. Brown's prosecution and prior post-conviction litigation.

II. The Current District Attorney's Measures to Review the Validity of Convictions are Appropriate and Measured

The current leadership of the Philadelphia DAO demonstrates an officewide commitment to rectifying past injustices through a number of initiatives and programs. One example of this commitment is the work of its Law Division, a unit

[23] *See generally* Medwed, *supra* note 2*;* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 Cal. W. L. Rev. 389 (2002).

that focuses on appellate and post-conviction cases. In particular, the Law Division's Federal Litigation Unit ("FLU") represents the commonwealth in an array of federal actions, most notably, federal *habeas* petitions. The Zimroth Report highlighted that under the Law Division's leadership, the FLU "stopped reflexively defending convictions in favor of individually reviewing each case to decide whether to defend it or concede relief." Zimroth Report at 6. As part of this commendable shift in its orientation—a shift away from automatic defensiveness and toward a more exhaustive, objective, and justice-oriented approach—the FLU agreed to two exonerations between 2021 and 2023. *Id*. The Law Division has also broadly implemented open-file review, including in the instant case.

Another example of the Philadelphia DAO's current dedication to justice lies in the work of its Conviction Integrity Unit ("CIU"). With the widening availability of DNA evidence and exonerations in the late 1990s and early 2000s, a number of prosecutors' offices started to establish conviction integrity or review units focused on evaluating DNA-based claims of innocence.[24] Among these offices, the Dallas County, Texas office is considered a model for how such units should be established and operated.[25] Following Dallas' "atrocious history of

[24] Medwed, *supra* note 3, at 61-62.
[25] *Id.* at 62; *see generally* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 Ohio St. J. Crim. L. 705 (2017); *see generally* John Holloway, Quattrone Center for the Fair Administration of Justice, Univ. Penn. L. Sch., *Conviction Review Units: A National Perspective* (April 2016), https://ssrn.com/abstract=2707809.

wrongful convictions"—*i.e.,* nineteen DNA-related post-conviction exonerations—the chief county prosecutor established a unit in 2007 that reviewed cases involving DNA evidence as well as all cases where evidence identified "different or additional perpetrators."[26] Prosecutors are well-situated to identify post-conviction claims of innocence given their access to case files and the ample investigative resources at their disposal.[27] They are at least better positioned to determine whether an innocent prisoner is languishing behind bars than defense lawyers often working for low or no pay or employed by innocence projects, which lack the resources as well as access to critical internal documents and evidence, to do the heavy digging required for this work.[28] CIUs not only represent a crucial step forward in overturning wrongful convictions, but also embody the effort of some prosecutors to adhere to their ethical obligations to be ministers of justice.

In 2018, District Attorney Krasner established a Conviction Integrity Unit in Philadelphia. As one of the first steps to establish the office, Mr. Krasner hired Patricia Cummings, who had run the Dallas CIU. Zimroth Report at 6. The Philadelphia CIU operates transparently by filing "publicly available pleadings in support of their requests to vacate convictions and/or dismiss criminal charges," which typically "detail the CIU's investigation," and "detail the CIU's conclusions

[26] Medwed, *supra* note 3, at 62-63.
[27] Medwed, *Prosecution Complex*, *supra* note 18, at 136.
[28] *Id*.

regarding whether the convicted person's constitutional rights were violated and whether, as a result, the Office no longer has confidence in the conviction or the underlying charges." *Id.*

Since opening in 2018, the Philadelphia DAO has reviewed hundreds of cases involving allegations of prosecutorial misconduct, focused on cases involving homicides and other violent crimes. *Id.* As discussed in the Zimroth Report, those efforts have "led to the exoneration of 24 people and to the overturning of 10 wrongful convictions." *Id.* But much more work remains to be done. The staff of the Philadelphia CIU has quadrupled since its formation given the heavy volume of cases that demand a close look.[29] Even so, more than 1,000 cases still await review.[30]

III. The Longstanding Patterns of Prosecutorial Misconduct are Evident in Mr. Brown's Case.

Three of the longstanding patterns of prosecutorial misconduct noted in the Zimroth Report are particularly relevant to Mr. Brown's case and demonstrate why the grant of post-conviction relief is appropriate and why he should be afforded a new trial.

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[29] *Conviction Integrity Unit,* Philadelphia District Attorney's Office, https://phillyda.org/safety-and-justice/investigations/conviction-integrity-unit-ciu/ (last visited Sept. 17, 2024).
[30] *Id.*

A. *Brady* Violations

The original prosecution of Mr. Brown was characterized by multiple, flagrant *Brady* violations involving both of the witnesses who implicated Mr. Brown in the homicide. For starters, the Philadelphia DAO in this proceeding has acknowledged constitutional error concerning the suppression of evidence that witness Ronald Vann, during an interview with Detective David Baker, implicated a third party (Kennisha Paige) in the homicide, and only implicated Mr. Brown in his third interview. The original prosecution team failed to turn over the relevant statement from Mr. Vann and Detective Baker's memorandum concerning Ms. Paige to the defense.

Importantly, the *Brady* violations that impacted Mr. Brown's original trial are more pervasive than the conceded violation. As the Zimroth Report details, the original prosecution team failed to disclose at least four other sets of material facts, all of which were inconsistent with testimony from prosecution witnesses and could have been used for impeachment purposes. *See generally* Zimroth Report.

1. *Failure to Disclose the Prosecution's Deal with Mr. Vann*: The lead prosecutor, ADA Tom Malone, "promised to help Vann with his criminal cases . . . and made this promise before Brown's trial. . . so he testifies as to everything he's said so far." Zimroth Report at 165. Contemporaneous emails and a memorandum from other ADAs corroborated that Vann had been offered and accepted a deal

prior to his testimony against Mr. Brown, and at Vann's plea hearing, ADA Malone "admitted to making a pre-trial promise to help Vann with his criminal cases." *Id.* at 162, 165. This is classic impeachment material. Its disclosure would have been important in light of Mr. Vann's trial testimony that he had received immunity but falsely testified "he had not received any other benefits or promises from the prosecution in exchange for his testimony." *Id*. at 161.

2. *Failure to Disclose the Extent of Mr. Vann's Cooperation*: Mr. Vann cooperated in a number of other investigations. The failure to disclose this information was pursuant to an office policy "opposing all requests for information about a witness' cooperation in other cases." *Id.* at 168. This is also impeachment material. And it was important given that during his trial testimony, Mr. Vann denied "he had previously cooperated in other police investigations or prosecutions," which suggests that he testified falsely. *Id.* at 162.

3. *Failure to Disclose Existence of Substance of Mr. Vann's Fourth Statement*: During the initial proceeding, the prosecution turned over three statements by Mr. Vann to the police. *Id.* at 168. The prosecution failed to turn over a fourth statement in which Mr. Vann "denied involvement" in the incident. *Id*.

4. *Failure to Disclose Existence or Substance of Ms. Lyons' Prior Inconsistent Statement*: The only other witness against Mr. Brown was Kiana

Lyons. She provided a statement to Detective Baker during a December 2003 proffer that was inconsistent with Detective Baker's understanding of the facts and that he did not record. *Id.* at 164. The prosecution failed to turn over a copy of Ms. Lyons' proffer letter from this session. *Id.* at 165. During trial, the prosecution even introduced a January 2004 statement from Lyons as a prior consistent statement to bolster her credibility. *Id.* at 161. During examination, both Lyons and Detective Baker testified falsely that the first time Lyons spoke with the police was in January 2004. *Id.*

B. Violations of the Duty of Candor

The original prosecution team repeatedly failed to correct false testimony from prosecution witnesses presented at Mr. Brown's trial. Specifically, the prosecution did not take steps to correct the following statements:

- Detective Baker's false statement that his first contact with Ms. Lyons was in January 2004. This was in furtherance of concealment of Ms. Lyons' prior unhelpful December 2003 proffer. Zimroth Report at 161.
- Ms. Lyons' false testimony that "the first time she spoke with police was January 2004." Again, this helped conceal her prior December 2003 statement. *Id.*

- Detective Baker's false testimony that prior to January 2004 "he did not provide [Ms. Lyons] or her defense counsel with any information about the investigation. *Id.* Detective Baker subsequently told the Law Department that he "recalled sharing information about the investigation with Lyons' defense counsel so that counsel would understand why the police wanted to talk to Lyons." *Id.* at 164.
- Mr. Vann's denial that he had "received any other benefits or promises from the prosecution in exchange for his testimony." *Id.* at 161. As discussed above, this was false.
- Mr. Vann's assertion that the "prosecution did not promise him any help" with his other cases. *Id.* at161. As discussed above, this was false.
- The Zimroth Report observed "the fourth [Vann] statement also suggests that the prosecution elicited misleading testimony from Vann" because prosecutors asked Mr. Vann to review three statements at trial but did not ask about—and Mr. Vann did not testify about—the existence of the fourth suppressed statement. *Id.* at 168.

The failure to correct each of these instances of false testimony by prosecution witnesses reinforced the impact of the failure to disclose *Brady*

information. Had the prosecutors corrected any of these disclosures, defense counsel would have been made aware of significant impeachment evidence.

C. The "Deny First" Policy and Decision to Affirmatively Conceal Prosecutorial Misconduct During the 2009 Post-Conviction Litigation

During the 2009 litigation over Mr. Brown's first post-conviction relief petition, the District Attorney's Law Division discovered the extent of *Brady* violations as well as the failures to correct false trial testimony from prosecution witnesses. Rather than disclose the information to Mr. Brown, the Philadelphia District Attorney actively decided to suppress this information in furtherance of their aggressive defense of Mr. Brown's conviction. Some of this evidence was even brought to the attention of senior supervisors in the office, including the Law Division Supervisor Ronald Eisenberg, the Post-Conviction Relief Supervisor Robin Godfrey, the Major Trial Unit Chief Mark Gilson, and the Homicide Chief Anne Ponterio. *See generally* Zimroth Report at 164-68.

Specifically, during the 2009 litigation over Mr. Brown's first post-conviction relief petition, the Law Division, through the assertions of ADA Cari Mahler, made at least three serious misrepresentations to the court:

1. *The Office's Efforts to Cover Up the Failure to Disclose Ms. Lyons' December 2003 Inconsistent Statement*: Ms. Mahler ultimately represented to the Court hearing Mr. Brown's first post-conviction petition that Ms. Lyons "never

gave a statement at the December 2003 proffer" and "stated nothing to police that was exculpatory or constituted material impeachment information." *Id.* at 163. But ADA Mahler was told by Detective Baker and ADA Malone that "Lyons gave a statement at the December 2003 proffer that they did not think was true." *Id.* at 164. ADA Malone also told Mahler that "he could not believe" that his second chair represented to the court "that January 2004 was the first time Lyons spoke with the police." *Id.*

As detailed in the Zimroth Report, Ms. Mahler raised with supervisors her concerns about the failure to disclose the December 2003 proffer and statements by the prosecutors that Ms. Lyons did not meet with police until January 2004. Zimroth Report at 166. Ultimately, she and the PCRA Chief Robin Godfrey took their concerns to Law Division Supervisor Ronald Eisenberg. As the Zimroth Report notes "the Law Division ultimately decided not to disclose any of this information . . . ADA Mahler's pleadings make no mention of this information and instead argued that (i) Lyons did not make any statement, let alone an exculpatory one, and (ii) there were no documents or other information summarizing or relating to what Lyons might have said." *Id.*

2. *The Office's Efforts to Cover Up the Failure to Disclose Mr. Vann's Deal with Prosecutors*: Ms. Maher represented to the court that "Vann was not promised anything at all until after the trial," and subsequently that "the timing . . .

was uncertain" and would "not constitute impeachment material that had to be disclosed." *Id.* at 163. But ADA Maher wrote to her supervisor PCRA Chief Godfrey that ADA Malone admitted making a promise to Mr. Vann "before Brown's trial," and found contemporaneous communications from two other ADAs reflecting there was a deal. *Id.* at 166. After consultation with her supervisors "The Law Division ultimately chose not to disclose any information about ADA Malone's pretrial promise to help Vann." *Id.* at 167.

3. *The Office's Efforts to Cover Up the Failure to Disclose Mr. Vann's Cooperation History*: Ms. Mahler argued to the court that "Vann's cooperation in other cases was not relevant" and produced a record that redacted discussion of Mr. Vann's participation in seven armed robberies, as well as his cooperation in six of those matters. Zimroth Report at 163. As detailed in the Zimroth Report, Ms. Mahler consulted with various supervisors. She was told by Major Trial Unit Chief Gilson that the information potentially had "impeachment value and constituted *Brady* material" and he would have "disclosed Vann's cooperation history." *Id.* at 167. But Homicide Chief ADA Pontiero opposed disclosure. *Id.* As the Zimroth Report notes, ADA Mahler "ultimately . . . did not disclose the bulk of Vann's cooperation history" and argued that "cooperation need not be disclosed because it was cumulative. . . ." *Id.* at 168.

Mr. Brown's case in many ways represents a microcosm of the past failures of the Philadelphia District Attorney's Office to comply with their constitutional and ethical obligations. The Philadelphia District Attorney was correct in conceding constitutional error.

CONCLUSION

As former Supreme Court Justice and U.S. Attorney General Robert Jackson wrote, "the spirit of fair play and decency should animate" prosecutors and when "the government technically loses its case, it has really won if justice has been done."[31] Sometimes prosecutors and even entire prosecutor offices lose sight of these important principles. The Philadelphia District Attorney's Office did so in Mr. Brown's case and in his prior post-conviction appeal. The current leadership of the office acted according to its constitutional and ethical obligations in seeking to vacate the conviction, which was fatally infected by *Brady* violations and false testimony. Accordingly, the decision below should be affirmed.

[31] Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Judicature Soc'y 18, 18-20 (1940).

Dated: October 7, 2024

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: October 7, 2024 /s/ Jeremy Karpatkin
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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that the foregoing brief contains 4,223 words, in compliance with the 7,000-word limit established by Pa.R.A.P. 531(b)(3).

Dated: October 7, 2024 /s/ Jeremy Karpatkin
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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 32 EM 2023

COMMONWEATH OF PENNSYLVANIA

Respondent

v.

LAVAR BROWN,

Respondent.

PETITION OF FAMILY MEMBERS OF MURDER VICTIMS MICHAEL RICHARDSON AND ROBERT CRAWFORD,

Petitioners.

PROOF OF SERVICE

I hereby certify that this 7th day of October, 2024, I have served the attached document to the following persons via the Court's electronic filing system and United Parcel Service carrier, which service satisfies the requirements of Pa. R.A.P. 121:

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