CAPITAL CASE—EXECUTION DATE MAY 20, 2010
No. 09-1345

IN THE

Supreme Court of the United States

DARICK DEMORRIS WALKER,
Petitioner,

v.

LORETTA K. KELLY, WARDEN,
SUSSEX I STATE PRISON, WAVERLY, VIRGINIA,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, the Constitution Project moves for leave to file the accompanying brief as *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief; counsel for respondent has not.

Amicus curiae is a nonpartisan, nonprofit organization that seeks solutions to legal and constitutional issues through scholarship and public education. Although the Constitution Project takes no position on

whether capital punishment ought to exist in this country, it is deeply concerned with the preservation of our fundamental civil rights, including our Eighth Amendment right to be free from the arbitrary, capricious, and discriminatory imposition of the death penalty.

In 2000, the Project convened a blue-ribbon committee to evaluate current procedural safeguards. The committee comprised a broad spectrum of individuals with extensive experience with the criminal justice system and included both supporters and opponents of capital punishment. After conducting a careful and considered evaluation of the various death penalty systems in this country, the committee concluded that there were insufficient protections in place to ensure fundamental fairness and issued a report recommending 18 reforms to the death penalty. In 2006, the committee issued a further report, *Mandatory Justice: The Death Penalty Revisited*, addressing the problems that continue to plague death penalty litigation. Among other recommendations, those reports make specific proposals to address the need for adequate discovery of exculpatory evidence in capital prosecutions.

Amicus curiae's knowledge of habeas corpus litigation and its goal of helping to ensure predictability and fairness in death penalty litigation give it a strong interest in the resolution of the question raised by the petitioner in this case. Accordingly, *amicus curiae* respectfully requests leave to file the attached brief.

Respectfully submitted,
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Counsel for Amicus Curiae the Constitution Project

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BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

Amicus curiae the Constitution Project respectfully submits this brief in support of petitioner.[1]

[1] This brief is filed more than 10 days prior to the due date. Counsel for each party was informed of *amicus curiae*'s intention to file this brief. Counsel for petitioner consented to the filing of this brief; counsel for respondent did not. Accordingly, *amicus* is filing herewith a motion for leave to file this brief pursuant to Rule

INTEREST OF *AMICUS CURIAE*

The Constitution Project is a nonprofit and nonpartisan organization seeking consensus solutions to difficult legal and constitutional issues. The Project has earned wide-ranging respect for its efforts to promote constructive dialogue across ideological and partisan lines, including through scholarship, activism, and public education efforts.

The Project's blue-ribbon Death Penalty Committee includes both prominent supporters and opponents of the death penalty who are united in their profound concern that procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment be robust, and the flaws in such procedural safeguards corrected. In its 2006 report, *Mandatory Justice: The Death Penalty Revisited* ("*Mandatory Justice*"), *available at* http://www.constitutionproject.org/manage/file/30.pdf (last visited May 12, 2010), the Committee makes specific recommendations for improving the capital process. In particular, *Mandatory Justice* stresses the need to ensure that capital criminal defendants receive all exculpatory evidence, *id.* at 96-100, and that special care be taken to ensure that capital defendants are not convicted on the basis of unreliable eyewitness testimony, *id.* at 101-102.

37.2 of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

REASONS FOR GRANTING THE WRIT

Petitioner was convicted of murder and sentenced to death largely on the basis of testimony from a single individual who claimed to have seen petitioner shoot the victim. Police reports later obtained by habeas counsel strongly suggest that the witness did not see, but only heard, the person who broke into her apartment that evening. The Fourth Circuit found, in *Walker III*, that the State's suppression of this highly material evidence demonstrated both cause and prejudice with respect to petitioner's *Brady* claim. In a subsequent ruling, in *Walker IV*, the court of appeals nonetheless held that petitioner's *Brady* claim failed on the merits. That ruling was error and warrants this Court's review.

This Court's precedent establishes that a habeas petitioner who demonstrates cause and prejudice sufficient to overcome procedural default of a *Brady* claim will necessarily also succeed on the merits of that claim. The court of appeals' separation of those inquiries contravenes that precedent and raises the troubling prospect of inconsistent adjudications. Moreover, the *Walker IV* merits analysis is independently flawed. The decision fails to appreciate the disproportionate weight juries attribute to eyewitness testimony. The court also inappropriately relies on the prosecutor's purported adoption of an open-file policy as creating a presumption that the disputed police reports were included in that file. This Court should grant the petition in order to review those erroneous holdings.

I. THE COURT OF APPEALS' RULING ON PETITIONER'S *BRADY* CLAIM CONTRAVENES THIS COURT'S PRECEDENT AND UNDERMINES THE RULE OF LAW

In *Walker III*, on remand from this Court with directions to reconsider petitioner's *Brady* claim in light of *Banks* v. *Dretke*, 540 U.S. 668 (2004), the court of appeals held that petitioner had "established sufficient cause and prejudice to overcome the procedural default of his Bianca *Brady* claim." Pet. App. 60a. The court of appeals then remanded to the district court to consider the merits of petitioner's *Brady* claim. Under this Court's precedent, the outcome of those further proceedings should have been a foregone conclusion. As other courts of appeals have recognized, under *Banks* and *Strickler* v. *Greene*, 527 U.S. 263 (1999), the cause-and-prejudice inquiry for overcoming procedural default and the ultimate merits determination merge in the *Brady* context.[2] It is not possible for a defendant to "overcome the procedural default hurdle" with respect to a *Brady* claim but fail on the merits of that claim. Pet. App. 18a. Yet that is what the court of appeals held in *Walker IV*.

Severing the two inquiries, as the court of appeals did, not only contravenes this Court's precedent, it subverts respect for the judicial process by inviting inconsistent rulings. As Judge Gregory observed in dissent in *Walker IV*, the court of appeals' ruling creates

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[2] See, *e.g.*, *United States* v. *Lopez*, 577 F.3d 1053, 1060 n.5 (9th Cir. 2009), cert. denied, 176 L. Ed. 2d 200 (2010); *Bell* v. *Bell*, 512 F.3d 223, 231 n.3 (6th Cir. 2008), cert. denied, 129 S. Ct. 114 (2008); *Slutzker* v. *Johnson*, 393 F.3d 373, 385-386 (3d Cir. 2004).

the perception, and in this case the reality, that a habeas petitioner is given the futile task of relitigating his *Brady* claim over and over until he loses. See Pet. App. 33a. The Court should grant the petition for a writ of certiorari and clarify that where, as here, a petitioner has established cause and prejudice sufficient to excuse his procedural default, he has necessarily also prevailed on the merits of his *Brady* claim.

A. The Cause-and-Prejudice Inquiry and Underlying Merits Merge in the *Brady* Context

When a person convicted in state court seeks habeas relief from the federal courts on a claim for which he failed to meet state procedural requirements, he must "demonstrate cause for his state-court default . . . and prejudice therefrom, before the federal habeas court will consider the merits of that claim." *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000). In the distinctive context of a *Brady* claim, however, the cause-and-prejudice standard for overcoming procedural default merges with the underlying merits inquiry.

In *Strickler* v. *Greene*, the Court identified the three elements of a *Brady* claim:

> [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

527 U.S. at 281-282. The Court also observed that "cause and prejudice" in the *Brady* context will generally "parallel two of the three components of the alleged *Brady* violation itself." *Id.* at 282.

In *Banks* v. *Dretke*, the Court confirmed the overlap of the two tests. When a petitioner demonstrates "cause" on the basis of "the State's suppression of the relevant evidence," he also satisfies the "second *Brady* component (evidence suppressed by the State)." 540 U.S. at 691. Similarly, "prejudice" sufficient to overcome procedural default is "coincident with the third *Brady* component (prejudice)." *Ibid.*

Neither *Strickler* nor *Banks* explicitly addressed the interplay of the cause-and-prejudice inquiry and the first element of a *Brady* violation—that the suppressed evidence be "favorable" to the accused. The reasoning of those decisions, however, reflects the Court's understanding that "material" evidence is a subset of "favorable" evidence, such that a finding of "prejudice" sufficient to overcome procedural default necessarily establishes that the suppressed evidence was "favorable" to the accused. In *Strickler*, the Court observed that the term "*Brady* violation" is frequently used to describe the first two *Brady* elements—(1) favorable evidence (2) having been suppressed. The Court made clear, however, "there is never a real '*Brady* violation' unless the nondisclosure was *so serious* that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281-282 (emphasis added). In other words, the requirement that evidence be "favorable" is a "threshold" element, whereas "materiality" defines a subset of cases in which the evidence could have affected the verdict. See *Banks* v. *Thaler*, 583 F.3d 295, 311, 332 (5th Cir. 2009), cert. denied, 2010 WL 1525805 (Apr. 19, 2010). While not all favorable evidence is "material" in the context of the entire case, it is inconceivable that evidence would "undermine confidence" in a conviction

without being "favorable" to the accused.[3] Logically, under *Banks*, a petitioner who establishes cause and prejudice to excuse the default of a *Brady* claim also establishes that he is entitled to prevail on the merits.

B. *Walker III*'s Holding that Petitioner Has Satisfied Cause and Prejudice Necessarily Also Means He Has Established the Merits of His *Brady* Claim

The opinion in *Walker III* states the court of appeals' holding in no uncertain terms: "We . . . hold that Walker has established the cause and prejudice necessary to overcome the procedural default of his *Brady* claim." Pet. App. 46a. Under *Strickler* and *Banks*, as explained above, that holding necessarily means that petitioner has established the merits of his *Brady* claim as well.

1. *Walker III* explained at length its basis for finding that petitioner established cause for failing to raise his *Brady* claim earlier. The court noted that, in *Strickler*, this Court identified three factors that demonstrated cause: "(a) [the] prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the [State] confirmed petitioner's reliance on the open file policy."

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[3] The test for *Brady* materiality adopted in *Kyles* v. *Whitley*, 514 U.S. 419 (1995) (and later borrowed in *Banks* as the standard for establishing "prejudice") *assumes* that the potentially material evidence is "favorable." See *id.* at 434 (articulating materiality inquiry as whether "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

Pet. App. 50a-51a (quoting *Strickler*, 527 U.S. at 289). "[A]pply[ing] the *Strickler* factors to the facts of the instant case," the court found that petitioner met each of them. *Id.* at 51a, 54a, 57a.

As to the first *Strickler* factor, the court observed that the "Commonwealth knew of, but failed to disclose, police reports that contain evidence which challenges the credibility of Bianca Taylor's alleged eyewitness testimony." Pet. App. 51a. Those reports "provide compelling evidence suggesting that Bianca never saw the intruder on the night of the murder and that she based her identification of Walker solely on the intruder's voice." *Id.* at 52a. Police reports of interviews with Bianca do not indicate that she saw the person who shot her father, nor do they provide details—such as a description of his clothes—that might suggest she did see the intruder. *Id.* at 139a. Rather, the reports indicate only that Bianca "heard [a] voice" that "sounded like" petitioner and that she "recognized the voice" as that of petitioner. *Id.* at 32a. The court rejected the State's argument that petitioner had been provided the same information in an autopsy and presentence report. Those files "suggest only that Bianca did not witness *the shooting*," *id.* at 54a (emphasis added), whereas "[t]he withheld [police] reports provide persuasive evidence that Bianca *did not see the shooter*," *ibid.* (emphasis added). Thus, the court of appeals "f[ou]nd the first *Strickler* factor met" on the facts of petitioner's case. *Ibid.*

The court also "f[ou]nd that Walker has met" the second *Strickler* requirement—reasonable reliance on the government's assertion of compliance with *Brady*. *Ibid.* The court noted that petitioner's case with respect to the second factor was "much stronger" than

Strickler or *Banks* because petitioner "filed a formal, explicit request for the disclosure of all *Brady* material." *Ibid.* The prosecutor and trial judge "confirmed" and "reassured" petitioner that the State had provided all required disclosures. *Id.* at 55a. The court of appeals found unavailing the State's argument that the autopsy and pre-sentence report should have put petitioner on notice that the police reports had been withheld. *Id.* at 56a. The court of appeals noted that this Court had rejected the contention that a "prosecutor may hide, [and] defendant must seek" exculpatory evidence. *Ibid.* (quoting *Banks*, 540 U.S. at 696).

Finally, the court of appeals "f[ou]nd that Walker has satisfied" the third *Strickler* factor. Before trial, the prosecutor had informed the defense "that the only *Brady* material . . . was the fact that the victim had drugs in his system," and later "confirmed . . . that [the prosecution] had disclosed all *Brady* materials." Pet. App. 57a. On this basis, the court "f[ou]nd that Walker has established cause." *Ibid.*

2. Having found "cause," the court then turned to the "prejudice" inquiry. The court of appeals applied the standard that *Banks* borrowed from *Kyles* for showing materiality under *Brady*. Considering all the evidence, the court held that the suppressed police reports "put the whole case in such a different light as to undermine confidence in the verdict." Pet. App. 58a (quoting *Kyles*, 514 U.S. at 435).

The court noted that the prosecutor "made repeated references to Bianca's identification of Walker as the shooter" and told the jury "that the case 'comes down to identification and credibility.'" *Id.* at 59a. As Bianca was the only witness to the crime who identified

petitioner, her testimony was "the 'centerpiece' of the case against Walker." *Ibid.* The court observed that "[t]he withheld documents could have been used by Walker . . . to undermine both Bianca's ability to properly identify Walker as the shooter and her overall credibility." *Ibid.* In light of "the dearth of physical evidence and the centrality of Bianca's testimony," the court "f[ou]nd that Walker has established that actual, significant prejudice resulted from his inability to develop" the withheld evidence at trial. *Id.* at 60a.

After its extensive review of the record, the court "h[e]ld that Walker ha[d] established sufficient cause and prejudice to overcome the procedural default of his Bianca *Brady* claim." *Id.* The court then remanded the case for "an evidentiary hearing on the merits of [petitioner's] Bianca *Brady* claim." *Ibid.* Each of the concurring and dissenting judges recognized that, under *Banks* and *Strickler*, the panel majority's "conclu[sion] that Walker has shown both cause and prejudice" necessarily "means that Walker has satisfied [the second and third] elements of a successful *Brady* claim." *Id.* at 74a n.4 (Williams, J., dissenting). See *id.* at 64a (Gregory, J., concurring). Moreover, although the Court's language in *Banks* theoretically left open the possibility that a *Brady* claim might still fail on the merits with respect to the first element—that the evidence was "favorable"—each of the concurring and dissenting judges recognized that the first element was foreordained in this case. *Ibid.* (Gregory, J., concurring); *id.* at 74a n.4 (Williams, J., dissenting) (observing that the majority's conclusion that "[t]he withheld reports provide persuasive evidence that Bianca did not see the shooter the night of [her father's] murder" necessarily "answers [the first *Brady* element] in the affirmative").

C. The Holding in *Walker IV* that Petitioner's *Brady* Claim Failed on the Merits, Though He Had Overcome Procedural Default, Is Inconsistent with *Banks* and the Rule of Law

The remand after *Walker III* should have been a formality. *Banks* holds that a habeas petitioner who "demonstrat[es] cause and prejudice . . . will at the same time succeed in establishing the [second and third] elements" of the *Brady* claim. 540 U.S. at 691. In plain contravention of *Banks*, however, the district court held on remand that petitioner failed on the merits to demonstrate *any* of the three elements of his *Brady* claim. See Pet. App. 14a-16a (summarizing district court's holding). On further appeal, a different panel of the Fourth Circuit affirmed, in *Walker IV*, holding that petitioner failed to satisfy either the suppression or materiality elements of *Brady*. *Id.* at 27a-29a. Significantly, *Walker IV* did not disturb the holding in *Walker III* that petitioner *had* overcome procedural default. *Id.* at 18a-21a.

In an effort to explain why it was free to revisit the questions of suppression and materiality, *Walker IV* characterized *Walker III* as holding only that Walker had established cause and prejudice "assuming the truth of Walker's assertions." Pet. App. 21a. That characterization is inconsistent with the *Walker III* opinion itself and with established law regarding procedural default. Moreover, by severing the cause-and-prejudice and *Brady* merits inquiries, the *Walker IV* opinion invites inconsistent adjudications. The opinion thus undermines the rule of law and raises the specter, both as a matter of perception and reality, that criminal punishment, including the death penalty, is being determined by the personal predilections of individual

judges rather than the impartial application of law to facts.

1. *In holding that petitioner had overcome procedural default,* Walker III *finally resolved the questions of "cause" and "prejudice"*

The suggestion in *Walker IV* that *Walker III* had resolved the cause-and-prejudice inquiry in petitioner's favor solely on the basis of petitioner's allegations is inconsistent with how *Walker III* addressed its task and with established law regarding procedural default. *Walker III* reflects the court's understanding that it was *finally* resolving the cause-and-prejudice inquiry, based on the extensive factual record before it. Moreover, under established law, the court could not, in *Walker III*, have directed the district court to proceed to the *merits* of petitioner's *Brady* claim unless the court of appeals had already resolved the procedural default issue favorably to petitioner.

The *Walker III* panel drew factual conclusions on the basis of the extensive evidentiary record, and did not merely assume. It was able to draw conclusions about the actual facts because, as in many habeas cases, the court had the benefit of a well-developed record, including an 800+ page joint appendix to the parties' briefs that included, among other things, the alleged *Brady* materials and affidavits from Walker's counsel and investigating police officers. See Pet. App. 50a-53a. Notably, none of the opinions in *Walker III*—majority, concurring, or dissenting—anywhere refers to assuming the truth of Walker's allegations. Both the majority and the dissenting opinion are suffused with references to the record evidence (or the record's clarity regarding

the lack of evidence). *E.g.*, *id.* at 46a-47a (summary of events surrounding the murder); *id.* at 51a-52a (suppressed police reports and police officer affidavit); *id.* at 59a ("Here . . . the lack of forensic or other eyewitness evidence made Bianca's testimony crucial."); *id.* at 72a-73a (Williams, J., dissenting) (autopsy report and presentence investigation report); *id.* at 65a-66a (police notes, reports, and affidavits).

Moreover, *Walker III* correctly observed that federal courts are "precluded from reviewing the merits of a claim that was procedurally defaulted . . . 'unless the [petitioner] can *demonstrate* cause for the default and actual prejudice as a result of the *alleged* violation of federal law.'" Pet. App. 49a (quoting *Fisher* v. *Lee*, 215 F.3d 438, 455 (4th Cir. 2000)) (emphasis added). See *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991) ("[F]ederal habeas corpus review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law."). The court's remand for a hearing on the merits of petitioner's *Brady* claim necessarily reflects, therefore, that the court conclusively resolved the procedural default issue in petitioner's favor. Had the existing record not permitted final resolution of that issue, the proper course would have been to remand for an evidentiary hearing to determine whether petitioner could, in fact, "show" or "demonstrate" cause and prejudice. See, *e.g.*, *Dulin* v. *Cook*, 957 F.2d 758 (10th Cir. 1992) (noting that "conclu[sion] that Petitioner sufficiently alleges 'cause'" merely affords petitioner "the opportunity to prove these circumstances did in fact exist"); *Barrientes* v. *Johnson*, 221 F.3d 741, 768 (5th Cir. 2000) (after finding petitioner's allegations sufficient to establish cause if true,

remanding "to the district court with instructions to conduct an evidentiary hearing on the issue of cause").

2. *The distinctions* Walker IV *reintroduces between procedural default and the* Brady *merits invite inconsistent judgments*

Even apart from the *Walker IV* court's conflict with *Banks* and *Strickler* and with established principles of procedural default, the decision warrants this Court's review. The court of appeals' attempt to separate the cause-and-prejudice and merits inquiries with regard to *Brady* claims creates opportunities for inconsistency in judgments that can raise troubling questions about whether capital punishment is being meted out in strict accordance with the rule of law, rather than the personal views of individual jurists.

A central tenet of the rule of law is that one's case will be determined according to its legal merit, and not the views of the individual judge. See, *e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989). That is especially so in death penalty cases, in which the State seeks to exact the ultimate, irreversible, penalty. This Court has "consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness." *Monge* v. *California*, 524 U.S. 721, 732 (1998) (quotation omitted). If the death penalty is to be utilized, it must be "imposed on the basis of 'reason rather than caprice.'" *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980). Capital sentences have thus frequently been struck down in light of the risk that they were "meted out arbitrarily or capriciously." *Turner* v. *Murray*, 476 U.S. 28, 35-36 (1986) (quotations omitted).

Walker IV stated that, while petitioner's "showing was sufficient to overcome the procedural default hurdle," that holding merely "allow[ed] him *to pursue* his *Brady* claim," but "ma[d]e no decision whatsoever with regard to the *merits* of [that] *Brady* claim." Pet. App. 18a. Because of the necessary overlap in the cause-and-prejudice and *Brady* merits inquiries, the court of appeals' treatment of the two as wholly independent invites inconsistent rulings. Indeed, this case demonstrates the risk of such inconsistencies.

The *Walker IV* court's materiality ruling with respect to the merits of petitioner's *Brady* claim cannot be reconciled with the *Walker III* court's holding with regard to prejudice. *Walker IV* pointed to what it characterized as "substantial evidence" that the State would have offered to "rebut[]" the *Brady* material's impeachment of Bianca's testimony. Pet. App. 29a. But that evidence—Bianca's mother's trial testimony, Tameria Patterson's trial testimony, and an unfired round of ammunition that the State had tried to tie to petitioner, *ibid.*—was all part of the record considered in *Walker III*. *Walker III* specifically discussed the "unfired bullet" and discounted its significance, noting the "dearth of physical evidence." *Id.* at 59a-60a. *Walker III* also explicitly considered Tameria Patterson's "uncorroborated testimony," noting that this was "the only evidence linking [petitioner] to the Beale murder" besides Bianca's testimony and concluding that "[t]his lack of evidence underscores the centrality of Bianca's testmony." *Id.* at 60a. Thus, it is clear that, although *Walker IV* attempted to distinguish the cause-and-prejudice and *Brady* merits inquiries, in fact the two panels considered the same evidence with re-

spect to the same legal questions and reached directly opposing conclusions.

The problem of inconsistent rulings is not likely to be unique to this case. By wrongly separating the cause-and-prejudice and *Brady* merits inquiries and thus effectively forcing habeas petitioners to prove the same facts twice, the panel's decision creates the danger that such inconsistencies will often occur. As Judge Gregory noted in his dissent in *Walker IV*, the panel's separation of the two inquiries raises the troubling prospect that habeas petitioners with *Brady* claims will be required to litigate the same issues over and over until they lose. Pet. App. 33a.

II. THE RESOLUTION OF PETITIONER'S *BRADY* CLAIM IN *WALKER IV* RAISES SERIOUS POLICY CONCERNS

Even apart from the conflict with *Strickler* and *Banks*, the court of appeals' resolution of the merits of petitioner's *Brady* claim raises serious policy concerns. The court of appeals' materiality analysis erroneously minimized the critical importance of eyewitness testimony, especially in the absence of other eyewitnesses or physical evidence. Because a single eyewitness's testimony can, standing alone, support a jury's determination to convict, it is critical that the defense have available to it any evidence that undermines eyewitness credibility. The panel also inappropriately relied on the State's purported open-file policy as establishing, in effect, a presumption that contested documents were actually included in the file and therefore available to the defendant. That holding is mistaken and seriously undermines the utility of open-file policies in

increasing the reliability of the administration of the death penalty.

A. Because of the Central Role Eyewitness Testimony Can Play in Convicting a Defendant, Evidence that Impeaches an Eyewitness Will Almost Always Be Material

Eyewitness testimony is often central to a jury's decision to convict a defendant. For that reason, the government's failure to disclose evidence that undermines the credibility of such testimony will almost always be "material" for purposes of *Brady*. The court of appeals' decision fails to appreciate the critical importance of evidence that impeaches the reliability of the prosecution's central eyewitness.

A jury may convict based on no more evidence than the testimony of a single eyewitness, even if the record also contains contrary evidence. "[A] criminal conviction can rest on the testimony of a single eyewitness . . . [e]ven if the eyewitness's testimony is uncorroborated and comes from an individual of dubious veracity." *Foxworth* v. *St. Amand*, 570 F.3d 414, 426 (1st Cir. 2009), cert. denied, 176 L. Ed. 2d 197 (2010). Indeed, "it is black letter law that testimony of a single eyewitness suffices for conviction even if 20 bishops testify that the eyewitness is a liar." *Woods* v. *Schwartz*, 589 F.3d 368, 377 (7th Cir. 2009) (quotations omitted).

At the same time, courts and scholars have observed that eyewitness testimony frequently has a disproportionate influence on juries, especially when the witness appears confident in the identification. *United States* v. *Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) ("To a jury, there is almost nothing more convincing than a live human being who takes the stand, points a finger at

the defendant, and says[,] 'That's the one!'") (quotation omitted); *Newsome* v. *McCabe*, 319 F.3d 301, 305 (7th Cir. 2003) (noting "jurors' heavy reliance on eyewitness testimony"); *United States* v. *Smithers*, 212 F.3d 306, 311-312 (6th Cir. 2000) ("modern scientific studies . . . show that . . . juries rely heavily on eyewitness testimony"); *Richardson* v. *Superintendent of Mid-Orange Corr. Facility*, 639 F. Supp. 2d 266, 293 (E.D.N.Y. 2009) ("numerous research studies have demonstrated that eyewitness certainty has a strong impact on juries, which tend to give witness certainty disproportionate weight in evaluating witness credibility.") (citing Brian Cutler, et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 85 (1990)). Yet even confident eyewitness testimony is often inaccurate. See *Rosario* v. *Ercole*, 601 F.3d 118, 136 (2d Cir. 2010) ("experts estimate that eyewitness error plays a role in half or more of all wrongful felony convictions.") (citing Richard A. Wise, et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 Conn. L. Rev. 435, 440 & n.12 (2009)).

The power of the testimony of even a single eyewitness, combined with the demonstrated fallibility of such evidence, led the Constitution Project's Death Penalty Committee to recommend that prosecutors limit their reliance on eyewitness evidence in capital cases. *Mandatory Justice* at 101-102. For similar reasons, courts have recognized the critical importance of ensuring that defense counsel has available to it, and makes effective use of, potential impeachment materials. A prosecutor's obligation to turn over evidence tending to impeach the prosecution's witnesses is well-established. See *Giglio* v. *United States*, 405 U.S. 150,

155 (1972). And, as courts have recognized, an effective defense requires counsel to impeach eyewitness testimony against the defendant, if at all possible. See, *e.g.*, *Higgins* v. *Renico*, 470 F.3d 624, 628 (6th Cir. 2006) (granting habeas relief to petitioner for ineffective assistance of counsel because his attorney failed to cross-examine the sole eyewitness who testified against him).

In the *Brady* context, in particular, this Court has made clear that the prosecution's failure to turn over evidence that would impeach a witness can require a new trial even if other eyewitnesses also testified. *Kyles*, 514 U.S. at 445 ("the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others"). Where, as here, there is only one "eyewitness" to the crime who identified the defendant, failure to turn over impeaching evidence is even more egregious and material. *E.g.*, *Norton* v. *Spencer*, 351 F.3d 1, 9 (1st Cir. 2003) ("Fuentes's testimony was uncorroborated and essential to Norton's conviction as he was the only witness to testify to the alleged indecent assaults. Therefore, there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome could have been different.").

Habeas relief is routinely granted based on *Brady* violations where the prosecutor failed to turn over impeachment evidence about a critical witness, where the evidence in question merely casts doubt on the witnesses' credibility. See, *e.g.*, *Robinson* v. *Mills*, 592 F.3d 730 (6th Cir. 2010) (granting habeas where prosecutor failed to disclose witness was a confidential informant); *Douglas* v. *Workman*, 560 F.3d 1156, 1163 (10th Cir. 2009) (granting habeas where prosecution did not disclose that key witness testified pursuant to deal

related to prosecution of his own crimes). Undisclosed evidence that suggests, as the police records at issue here did, that the "eyewitness" was not really an eyewitness *at all* is especially probative and material.

Walker IV's materiality analysis fails to appreciate the critical nature of *Brady* evidence that casts in doubt the testimony of the prosecution's central eyewitness. The materiality of such evidence is correlative to its power to sustain a conviction. The *Walker IV* panel nevertheless held that the *Brady* evidence indicating that Bianca only heard and did not see the shooter on the night her father was murdered was not material to petitioner's conviction. In so holding, the court pointed to bits and pieces of other evidence, *none* of which definitively pointed to petitioner as the individual who shot Beale. Bianca was the only eyewitness who "t[ook] the stand, point[ed] a finger at [petitioner], and sa[id] 'That's the one!'" *Brownlee*, 454 F.3d at 142. As the panel held in *Walker III*, "the lack of forensic or other eyewitness evidence made Bianca's testimony crucial to the prosecution and, thus, not cumulative." Pet. App. 59a.

Evidence that undermines the credibility of eyewitness testimony, and even more so evidence that casts in doubt whether the person was an eyewitness at all, will almost always be material for purposes of *Brady*. The Fourth Circuit's failure to recognize the crucial role that eyewitness testimony plays in jury verdicts is intolerable in a death penalty case.

B. *Walker IV* Mistakenly Relied on the State's Purported Open-File Policy to Conclude that the Documents Were in the File to Begin With

The Constitution Project strongly advocates the use of "open-file" procedures in death penalty cases. "In capital cases, avoiding the ultimate horror of executing an innocent person makes expanded discovery essential. The availability of more information will help the jury perform its task more accurately, and, undeniably, it will reduce the chances that the truth will be hidden and an innocent person will be executed." *Mandatory Justice* at 97. Open-file policies are particularly advantageous because a prosecutor, no matter how conscientious, will frequently fail to appreciate the exculpatory nature of evidence and therefore not disclose it. Open-file policies allow the defense to decide for itself which evidence is exculpatory.

As advantageous as open-file policies can be, however, an open-file system can only properly serve its function if the file contains all of the relevant evidence. Indeed, an incomplete file may affirmatively mislead defense counsel. See *Mandatory Justice* at 98 ("[I]f the information in the file is incomplete . . . the fact that information available to investigative sources is not in the file may mislead and deceive the defense in an ostensibly open-file system."). This Court has observed that potential risk. In *Strickler*, the Court recognized that open-file policies "may increase the efficiency and the fairness of the criminal process." 527 U.S. at 283 n.23. At the same time, the Court observed that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the

State is constitutionally obligated to disclose under *Brady*." *Ibid.*

In this case, the court of appeals mistakenly relied on the prosecutor's purported open-file policy as evidence that the disputed documents were, in fact, in the file and thus provided to defense counsel.[4] Such an inference turns a policy designed to facilitate disclosure into a presumption that will allow the State to shield itself in instances when the evidence was not disclosed.

In *Walker IV*, the court of appeals accepted the district court's conclusion that Walker failed to satisfy his burden of showing that the prosecutor did not turn over the exculpatory police reports before trial, even though it was stipulated that the documents were not in defense counsel's files when the files were transferred to habeas counsel a year after Walker's trial, and neither the prosecutor nor defense counsel could recall having the documents during trial. See Pet. App. 10a-12a, 24a-25a. Against this evidence, the district court relied on the prosecutor's testimony that, while she "could not recall whether [the documents] were in her case file" or "say with certainty that these documents had been turned over to defense counsel," she thought "the documents looked familiar" and "*would have been provided* to defense pursuant to the Commonwealth Attorney's open file policy." *Id.* at 143a-144a (emphasis

[4] While we accept for these purposes the court of appeals' statement that the prosecutor followed an "open file policy," we note that the prosecutor did not actually testify that she permitted defense counsel to examine her entire file. See *Walker IV* C.A. J.A. 898-914. *Amicus* takes no position on whether an open-file policy in fact existed in this case.

added). The *Walker IV* panel affirmed the district court's factual determination as "plausible." Like the district court, the panel relied on the fact that the prosecutor supposedly "observed an open file policy," that the reports were the type of item she "commonly received" from the police, and that she "typically" included police materials in her files. *Id.* at 26a.

That type of analysis turns the prosecutor's open-file policy into a presumption that any exculpatory evidence will be included in the file. The effect of such a rule would be to turn the open-file policy from a benefit to defendants into a shield by which a State can avoid the consequences of its failure to supply defense counsel with exculpatory evidence.

A defendant is permitted to rely on the prosecutor's representations regarding an open-file system. *Strickler*, 527 U.S. at 283 n.23 ("[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."). An ostensible open-file system may dissuade overstretched defense counsel from expending time to search for evidence that should already appear, if the evidence exists, in the prosecutor's open file.

Courts must therefore be vigilant to enforce the prosecutor's obligation to make sure the defense receives not only exculpatory evidence known to the prosecutor, but also exculpatory evidence as-yet known only to others within the government—such as, in this case, police investigative reports. See *Kyles*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on

the government's behalf in the case, including the police."). By treating the purported open-file policy as a presumption that the *Brady* material was included in the prosecutor's files, the court of appeals undermined this fundamental constitutional guarantee.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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