No. 15-946

IN THE

Supreme Court of the United States

LAMONDRE TUCKER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* FORMER PROSECUTORS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2(b), *amici curiae* Tim Cole, Mark Early, Gil Garcetti, Luther Scott Harshbarger, Robert M. A. Johnson, Grant Jones, James Petro, and A.M. Stroud, III respectfully move for leave to file the attached brief as *amici curiae* in support of the petition for writ of certiorari. As required by Rule 37.2(a), *amici* provided 10 days' notice to all parties of their intent to file a brief as *amici curiae*. Petitioner has consented to *amici*'s filing of the brief. The State of Louisiana did not consent.

The Interest of the *Amici Curiae* is set forth on page one of the brief. *Amici* have a unique perspective on the issues before the Court. As former prosecutors, we understand the critical need for prosecutorial restraint in death penalty cases, and the miscarriage of justice that may occur when prosecutors exercise their broad discretion without due restraint.

Although imposition of the death penalty is now confined to a small minority of jurisdictions in this country, many of those jurisdictions continue to prosecute capital cases in a largely unrestrained manner that raises serious questions as to the constitutionality of the death penalty.

Amici respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici have a unique perspective on the issues before the Court. As former prosecutors, we understand the critical need for prosecutorial restraint in death penalty cases, and the miscarriage of justice that may occur when prosecutors exercise their broad discretion without due restraint.

Although imposition of the death penalty is now confined to a small minority of jurisdictions in this country, many of those jurisdictions continue to prosecute capital cases in a largely unrestrained manner that raises serious questions as to the constitutionality of the death penalty.

Tim Cole served as District Attorney for the 97th District of Texas from 1993 to 2006, and as an Assistant District Attorney in the 271st District of Texas from 2010 to 2014.

Mark Earley served as the Attorney General of Virginia from 1998 to 2001, and as a member of the Virginia State Senate from 1988 to 1997.

Gil Garcetti served as District Attorney for Los Angeles County, California from 1992 to 2000, after serving in the office for over two decades in other roles.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *See* Supreme Court Rule 37.6.

Luther Scott Harshbarger served as Attorney General of Massachusetts from 1991 to 1999, and as District Attorney of Middlesex County, Massachusetts from 1983 to 1991.

Robert M. A. Johnson served as County Attorney for Anoka County, Minnesota from 1982 to 2010, and was President of the National District Attorneys Association from 2000 to 2001.

Grant Jones served as the District Attorney of Nueces, Kleberg and Kenedy Counties, Texas, from 1983 to 1991, and as a member of the Texas State Senate from 1989 to 1993.

James Petro served as Attorney General for the State of Ohio from 2003 to 2006, and as a member of the Ohio House of Representatives from 1981 to 1984 and 1987 to 1990.

A.M. ("Marty") Stroud, III served as Assistant United States Attorney for the Western District of Louisiana from 1976 to 1982, and as First Assistant District Attorney for Caddo Parish, Louisiana from 1983 to 1989.

SUMMARY OF ARGUMENT

"When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). This constitutionally required restraint rests largely in the

hands of local prosecutors. In the last decade, death sentences have become highly geographically isolated to a small handful of counties that account for the vast majority of death sentences in the United States. Unfortunately, in the dwindling number of jurisdictions that still regularly obtain death sentences, examples abound of local prosecutors pursuing death sentences in a way that does not reflect constitutionally required restraint. Some prosecutors continue to seek the death penalty against particularly vulnerable defendants like Petitioner Lamondre Tucker, who was only 18 at the time of the offense and had a very low IQ. Some prosecutors also aggressively seek the death penalty in cases that do not involve the "worst of the worst." In addition to making aggressive charging decisions, some local prosecutors have also engaged in troubling conduct while prosecuting these cases, including withholding exculpatory evidence from the defense or failing to investigate exculpatory leads.

Amici are gravely concerned about these problems, which are especially evident in the small band of counties that continue to obtain death sentences in large numbers. Most troubling of all, innocent people may be—or have been—executed. Since 1973, 156 people who were wrongfully convicted and sentenced to death have been exonerated. Many of them languished on death row for many years—some for decades—before being exonerated. Some of these individuals came perilously close to losing their lives in an irreversible travesty of justice.

Amici urge the Court to grant certiorari to address these important issues.

ARGUMENT

I. Prosecutorial Restraint Is a Key Factor in Determining Which Defendants Receive the Death Penalty.

This Court has long recognized the critical role that prosecutors play in the administration of justice. A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004) (acknowledging prosecutors' "special role . . . in the search for truth in criminal trials") (citations omitted); *Donnelly v. DeChristoforo*, 416 U.S. 637, 648–49 (1974) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.") (Douglas, J., dissenting). By faithfully serving as ministers of justice and not mere advocates, prosecutors protect society's interests in ensuring not only that the guilty are punished, but that all accused receive a fair trial and due process of law. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

The prosecutor's vital role in seeking truth and justice is particularly critical in capital cases, where life and death are on the line. As Justice Breyer explained in dissent in *Glossip v. Gross*: whether the death penalty is applied

turns in large part on "the decisionmaking authority, the legal discretion, and ultimately the power of the local prosecutor." 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting) (citing numerous studies).[2]

It is the prosecutor who decides whether to seek the death penalty. *See Bordenkircher*, 434 U.S. at 364; Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 227 (2011) (observing that the first, critical decisional point lies with the prosecutor in deciding whether to seek the death penalty). Moreover, whether a prosecutor chooses to seek the death penalty is the most significant factor in determining the ultimate result.[3]

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2. *See Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in his discretion.").

3. *See* Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 311, 320 (2009) (conducting study of death-eligible cases in Missouri between 1997 and 2001, and concluding that "discretionary choice by individual prosecutors is the dominant factor shaping decisions about who will live and who will die"); *see also* Justin Marceau, Sam Kamin & Wanda Foglia, *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1070–74 (2013) (reaching same conclusion based on study of Colorado murder cases between 1999 and 2010).

Accordingly, this Court has emphasized the importance of restraint in capital cases: "It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment." *Kennedy*, 554 U.S. at 435. Prosecutorial restraint is necessary to ensure that capital punishment is reserved for "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at 420 (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

II. The Death Penalty Has Become an Unusual Punishment Sought by Prosecutors in Only a Small Handful of Counties.

In the vast majority of jurisdictions, prosecutors now forgo seeking the death penalty in the vast majority of cases. Recent studies show that death-penalty convictions are highly concentrated in certain counties, even within states thought of as highly supportive of the death penalty. *See, e.g.*, Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. Rev. 227, 232–33, 281–89 (2012) (hereinafter, "Smith, *Geography of the Death Penalty*"); Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 Vand. L. Rev. 307, 308–09 (2010); *see also Glossip*, 135 S. Ct. at 2761 (Breyer, J., dissenting) (citing numerous studies).

Only 10% of all counties in the country imposed even one death sentence between 2004 and 2009. Smith, *Geography of the Death Penalty*, 92 B.U. L. Rev. at 228.

Within those limited jurisdictions, the death penalty was further concentrated: fewer than 1% of all counties were responsible for approximately half of the death sentences imposed during that timeframe. *Glossip,* 135 S. Ct. at 2761 (Breyer, J., dissenting) (citing Smith, *Geography of the Death Penalty*, 92 B.U. L. Rev. at 233).

More recent data continue to show the concentration of the death penalty within certain counties. Between 2010 and June 2015, only 15 counties imposed five or more death sentences: Mobile County, Alabama; Maricopa County, Arizona; Kern, Los Angeles, Orange, Riverside, and San Bernardino Counties in California; Duval, Miami Dade, Pinellas, and Pasco Counties in Florida; Caddo Parish, Louisiana; Clark County, Nevada; and Dallas and Harris Counties in Texas. *Glossip*, 135 S. Ct. at 2774; *id.* at 2780, App'x E (Breyer, J., dissenting).

That death sentences are confined to an ever-diminishing number of counties points away from a consensus that the death penalty is necessary to achieve the legitimate societal goals it has been thought to serve. Indeed, it suggests that the death penalty is not needed for these purposes—if it were, the rest of the country would seek it with greater regularity.[4] Instead, as detailed below, one of the most salient characteristics of the jurisdictions that regularly return death sentences is a lack of prosecutorial restraint in charging and prosecuting capital cases.

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4. Of the more than 3,000 counties in the country, only 59 (fewer than 2%) accounted for *all* death penalties nationwide in 2012. *See* Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, Death Penalty Information Center (2013), at 9.

III. Lack of Prosecutorial Restraint Raises Serious Questions About the Constitutionality of the Death Penalty.

In those counties that still impose the death penalty, some prosecutors' overly zealous desire to "win" death sentences has led to a number of deeply troubling results. In certain cases, prosecutors have chosen to exercise their charging discretion in an overly aggressive manner. Many other cases involve *Brady* violations and other highly prejudicial misconduct. And, most disturbing, these problems have resulted in an alarming number of wrongful death penalty convictions (including the conviction of the actually innocent). The increasing number of exonerations in recent years raises additional, serious questions about the constitutionality of the death penalty.

A. Aggressive Charging Decisions

The vast majority of prosecutors exercise restraint in their charging decisions, including the grave decision to seek the death penalty. But overly zealous prosecutors may seek the death penalty in borderline cases or stretch to characterize a case as death-eligible, even where the defendant is not accused of committing "a narrow category of the most serious crimes" and cannot be described as "the most deserving of execution." *Kennedy*, 554 U.S. at 420 (citations omitted). Prosecutors also may seek a death sentence where factors apart from the strength of the evidence and nature of the crime make a conviction more likely (e.g., where the defendant suffers from cognitive defects or has poor representation).[5]

5. *See* Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 Ind. L. Rev. 495, 511–12 (1996); 60 Minutes, *30*

In Tucker's case, for example, prosecutor Cox chose to seek the death penalty against an 18-year-old with a very low IQ (Pet. App. 2a, 19a) based on aggravating factor theories that were tenuous at best: (1) he intended to kill more than one person, because Ms. Sills was pregnant;[6] and (2) he had committed a "second degree kidnapping" by cajoling her to go with him. (Pet. App. 7a.) The decision to seek the death penalty against Tucker reflected Cox's belief, stated following the exoneration of Glenn Ford, that Caddo County should "kill more people." Campbell Robertson, *The Man Who Says Louisiana Should 'Kill More,'* N.Y. TIMES, July 8, 2015, at A1. Indeed, Cox "does not believe that the death penalty works as a deterrent," but claims it is "justified as revenge," because it "'brings to us a visceral satisfaction.'" Rachel Aviv, *Revenge Killing: Race and the Death Penalty in a Louisiana Parish*, THE NEW YORKER (Jul. 6, 2015), at 32 (hereinafter, "Aviv, *Revenge Killing*").

Cox is not alone in aggressively seeking death sentences. Prosecutors in Maricopa County, Arizona, which leads the nation in the number of death sentences imposed, have displayed similar behavior and attitudes, seeking death sentences even where there were compelling mitigating factors. For example, one prosecutor recently sent a 19-year-old with depression to death row even though he had tried to commit suicide the day before the

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Years on Death Row, CBS NEWS (Oct. 11, 2015) (available at http://www.cbsnews. com/news/30-years-on-death-row-exoneration-60-minutes/) (acknowledging that prosecution was emboldened by inexperience of defendant's appointed counsel).

6. Tucker is the first defendant to be sentenced to death in Louisiana under this theory.

murder, sought treatment, and was turned away. "She also obtained a death sentence against a 21-year-old man with a low IQ who was sexually abused as a child, addicted to drugs and alcohol from a young age, and suffered from post-traumatic stress disorder. She then sent a U.S. military veteran with paranoid schizophrenia to death row." Robert J. Smith, *America's Deadliest Prosecutors*, SLATE (May 14, 2015)[7] (hereinafter, "Smith, *Deadliest Prosecutors*"). The Arizona Supreme Court also labeled her courtroom conduct "inappropriate," "very troubling," and "entirely unprofessional." *Id.*

The death penalty is also aggressively sought by prosecutors in Duval County, Florida, which accounts for only five percent of Florida's population but a quarter of its death sentences. *See* Smith, *Deadliest Prosecutors*. One such prosecutor has personally obtained ten death sentences since 2008. *Id.* In Florida, the ultimate decision to seek death comes from the elected State Attorney, whose office sought the death penalty in the majority of murder cases (42 of 82) and sent 21 people to death row between 2009 and 2014. Larry Hannan, *Angela Corey Has Put More People On Death Row Than Any Other Prosecutor In Florida. Critics Say It Hasn't Reduced the Crime Rate and Is Too Costly – But Victims Aren't Complaining*, THE FLORIDA TIMES-UNION, Mar. 9, 2014, at A1.

A longtime prosecutor in Philadelphia County—another county that leads the nation in the number of

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7. *Available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/america_s_deadliest_prosecutors_death_penalty_sentences_in_louisiana_florida.html.

death sentences—sought the death penalty in virtually every death-eligible case. Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times, Jul. 16, 1995, § 6, at 22. In doing so, she sought and obtained the death penalty in a case involving significant mitigating factors, including a lack of violent history, a history of childhood abuse, and possible mental problems. *Id.* This prosecutor was so aggressive in seeking the death penalty that "she earned the nickname 'Queen of Death.'" Radley Balko, *Counties That Send the Most People to Death Row Show a Questionable Commitment to Justice*, Huffington Post (Nov. 24, 2013).[8] Since this prosecutor retired, death sentences in the county have plummeted. *See* Smith, *Deadliest Prosecutors* (45 death sentences during her tenure compared with three in the last six years).

Some prosecutors also seek death in cases where the evidence is weak, and where other prosecutors would likely seek a lesser sentence or decline to prosecute at all. Cox, for example, recently secured a death sentence against Rodricus Crawford, who was convicted of killing his infant son, notwithstanding substantial uncertainty that the death was even a homicide. *See* Aviv, *Revenge Killing*. Other prosecutors have sought and obtained the death penalty on similarly flimsy grounds. *See* Sara Rimer, *Two Death-Row Inmates Exonerated in Louisiana,* N.Y. Times, Jan. 6, 2001, at A8 (With "a total lack of credible evidence" and conviction based largely on an unreliable jailhouse informant, subsequent prosecutor said the case against death row exonerees Michael Ray Graham Jr. and Albert Ronnie Burrell was "so weak [it] should never have been brought to the grand jury.").

8. *Available at* http://www.huffingtonpost.com/2013/ 11/21/ counties-that-send-the-mo_n_4317245.html.

In all of these cases, whether the death penalty was sought turned not on the heinousness of the crime or the defendant's degree of culpability, but rather on the prosecutor responsible for prosecuting it.

B. Wrongful Convictions

Even more troubling, overly zealous prosecution or outright prosecutorial misconduct has led to numerous wrongful convictions in capital cases. Since 1973, 156 people on death row have been exonerated. *See* Death Penalty Information Center (DPIC), Innocence: List of Those Freed from Death Row, available at http://www.deathpenaltyinfo.org/innocence-cases ("DPIC Innocence List"). In 2015 alone, six people who had been sentenced to death were exonerated. *Id.*; *see also Prisoners Exonerated, Prisoners Exposed*, N.Y. TIMES, Feb. 13, 2016, at A20 (discussing five death-row exonerations in 2015).

Many of these wrongful convictions involved some form of overly aggressive prosecutorial conduct, including most commonly the failure to disclose exculpatory evidence as required by *Brady v. Maryland*.[9] *See generally* DPIC Innocence List. Although this Court has presumed that prosecutors will err on the side of disclosing exculpatory

9. *Brady* requires prosecutors to disclose all evidence that is "favorable to an accused" and "material either to guilt or to punishment." 373 U.S. at 87; *see also* ABA Model Rules of Prof'l Conduct 3.8(d) (8th ed. 2015) (a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

evidence,[10] examples nevertheless abound of death-row inmates exonerated or granted new trials because prosecutors failed to turn over crucial *Brady* material.

Debra Milke, for instance, was released on March 23, 2015, after serving 23 years on death row in Arizona. A Maricopa County judge dismissed all charges against her after the Ninth Circuit reversed her conviction based on prosecutorial misconduct, including withholding of exculpatory evidence. *See Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013); DPIC Innocence List at #151.

In 2015, Harris County, Texas prosecutors dismissed all charges against Alfred Dewayne Brown, who served ten years on death row. The dismissal followed findings by the Texas Court of Criminal Appeals that prosecutors withheld exculpatory evidence. *Ex parte Brown*, No. WR-68,876-01, 2014 Tex. Crim. App. Unpub. LEXIS 984 (Tex. Crim. App. Nov. 5, 2014). News reports indicated that prosecutors withheld a phone record that supported Brown's alibi, and committed other misconduct, including threatening Brown's girlfriend, an alibi witness, into implicating Brown. *See* Brian Rogers, *DA Drops Murder Charge in Killing of HPD Officer; After Agreeing to Retrial, Prosecutors Say They Don't Have Enough Evidence,* Houston Chronicle, Jun. 9, 2015, at A1; Lisa Falkenberg: *Mother of 3 Pressured Into Changing Story, But Jailed Anyway*, Houston Chronicle (Apr. 20, 2015).[11]

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10. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *accord United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

11. *Available at* http://www.houstonchronicle.com/news / columnists/falkenberg/article/In-jail-mother-presented-with-two-

A Georgia superior court dismissed all charges against Lawrence William Lee in 2015, after he spent more than 27 years in prison (more than 20 on death row) for a triple murder during a home robbery. The court found that the prosecution had engaged in a "full spectrum of prosecutorial misconduct," including affirmative misstatements to the defense and the court, as well as the suppression and destruction of exculpatory hair and fingerprint evidence. DPIC Innocence List at #155 (quoting and citing Order, *Lee v. Terry*, Superior Court of Butts County, Case No. 89-V-2325 (May 1, 2008)); *see also* Alyson M. Palmer, *AG Won't Appeal Ruling Lifting Death Penalty; Even Though Judge Called Prosecution's Case 'Flimsy,' Brunswick DA Elects To Retry 1986 Triple Homicide*, Daily Report (Jun. 10, 2008).

Walter McMillian was convicted of murder and sentenced to death after a trial that lasted only a day and a half, notwithstanding numerous alibi witnesses that testified he was at a church picnic at the time of the killing. *See* Sara Rimer, *Life After Death Row*, N.Y. Times Magazine, Dec. 10, 2000, § 6, at 100; DPIC Innocence List at #50. After years on death row, McMillian's conviction and death penalty were reversed after post-conviction investigation revealed that the prosecution had concealed a tape recording (on which the prosecution's chief witness told police that McMillian had nothing to do with the crime), as well as other exculpatory evidence. *McMillian v. State*, 616 So. 2d 933, 942–47 (Ala. Crim. App. 1993).

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options5629355.php?t=12bd14548129c86149 &cmpid=twitter-premium.

And in *Wolfe v. Clarke*, 691 F.3d 410 (4th Cir. 2012), a Virginia murder-for-hire case, the Fourth Circuit affirmed the district court's ruling that the prosecutor's systematic concealment of evidence violated *Brady* and mandated reversal of Justin Wolfe's capital murder conviction. *Id.* at 423–26.

Brady violations are not the only serious concern. Some prosecutors also fail to pursue leads potentially pointing to innocence of the accused, with similarly devastating effects.[12] This is especially so where indigent defendants rely on poorly funded public defenders or inexperienced court-appointed counsel.

Anthony Ray Hinton, for instance, was released on April 3, 2015, after serving 30 years on death row. His conviction for a double murder in Jefferson County, Alabama, was overturned when ballistics testing (reportedly refused for years by the prosecution) could not confirm that crime-scene bullets matched the revolver found in Hinton's home. *See* State's Motion for Order of Nolle Prosequi, *Alabama v. Hinton*, Nos. CC1985-3363, CC1985-3364 (Ala. Cir. Ct. Apr. 1, 2015), ECF No. 56;

12. A prosecutor's duty extends beyond turning over exculpatory evidence: the prosecution must also undertake an appropriate investigation to *discover* potentially exculpatory evidence. *See* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.2(c)(i), (d)(1). Without a proper investigation, the prosecutor cannot be said to have truly "search[ed] for truth." *Banks*, 540 U.S. at 696; *see also United States v. Bagley*, 473 U.S. 667, 692 (1985) (discussing prosecutors' truth-seeking function and noting that "[t]he purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one") (citations omitted).

Kent Faulk, *Anthony Ray Hinton Free After Nearly 30 Years on Alabama Death Row*, AL.com (Apr. 3, 2015).[13]

Prosecutorial "tunnel vision" similarly resulted in the wrongful conviction of Henry McCollum, who spent 30 years on death row for the rape and murder of a young girl in North Carolina. The prosecutor had information pointing to a different perpetrator with a history of violent sexual assaults (and who confessed to raping and killing another teenage girl in similar circumstances only a month later). *See* Order, *North Carolina v. McCollum*, Nos. 83 CRS 15506-07, 158220-23 (N.C. Super. Ct. Sept. 2, 2014); Jonathan M. Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. Times, Sept. 3, 2014, at A1 (hereinafter, "Katz & Eckholm, *DNA Evidence Clears Two Men*"); Richard A. Oppel, Jr., *As Two Men Go Free, a Dogged Ex-Prosecutor Digs In*, N.Y. Times, Sept. 8, 2014, at A1 (hereinafter, "Oppel, *As Two Men Go Free*"). Nevertheless, the prosecutor pursued only McCollum and his half-brother, Leon Brown, two mentally impaired teenagers who gave inconsistent, contaminated, and quickly recanted confessions. *See* Katz & Eckholm, *DNA Evidence Clears Two Men*, at A1; Oppel, *As Two Men Go Free*, at A1. The lead prosecutor has been "dubbed the deadliest prosecutor in America," securing 42 death sentences while in office. Smith, *Deadliest Prosecutors*.

And the case of Glenn Ford provides yet another poignant example of the injustice that can occur when even well-intentioned prosecutors focus too narrowly on obtaining a conviction. Mr. Ford served 30 years on death

13. *Available at* http://www.al.com/news/index.ssf/2015/ 04/anthony_ray_hinton_freed_after.html.

row before finally being exonerated. *See* 60 Minutes, *30 Years on Death Row*. Had former Caddo Parish prosecutor (and *amici*) A.M. ("Marty") Stroud, III followed up on certain leads suggesting others' involvement, Mr. Ford might have been spared this injustice. *See id.* Stroud acknowledged that his role as a prosecutor contributed to this wrongful conviction:

> [M]y inaction contributed to the miscarriage of justice in this matter. Based on what we had, I was confident that the right man was being prosecuted and I was not going to commit resources to investigate what I considered to be bogus claims that we had the wrong man. My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person who I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. And that omission is on me. . . . I end with the hope that providence will have more mercy for me than I showed Glenn Ford. But, I am also sobered by the realization that I certainly am not deserving of it.

A.M. Stroud, III, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, The Shreveport Times (Mar. 20, 2015).[14]

14. *Available at* http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/.

It is impossible to recount here the numerous other instances around the country, both recent and historical, where the prosecution was found to have either intentionally or inadvertently failed to turn over exculpatory evidence in death penalty cases or failed to investigate exculpatory leads. It is similarly impossible to estimate how many others on death row—or already executed[15]—have suffered the same deprivation of due process by prosecutors whose misconduct went undetected. Nevertheless, the powerful examples above demonstrate the grave injustice that all too frequently results when prosecutors fail to exercise restraint in securing death sentences.

These examples underscore the urgent need for this Court to examine the constitutionality of the death penalty carefully.

15. There is reason to believe innocent people have been wrongfully executed. *See Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (collecting examples); *see also* DPIC Executed But Possibly Innocent, available at http://www.deathpenaltyinfo.org/executed-possibly-innocent (identifying ten people who may have been wrongfully executed).

CONCLUSION

For these reasons, *amici* urge the Court to grant the Petition for a Writ of Certiorari.

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