

IN THE FOURTH CIRCUIT COURT OF APPEALS
STATE OF LOUISIANA

No. _____

STATE OF LOUISIANA

v.

EMMITT LEWIS

Supervisory Writ Application to
Criminal District Court, Parish Of Orleans, No. 469-107 M5
Magistrate Commissioner Joe Giarrusso, Jr. Presiding
Ruling of September 14, 2006

BRIEF OF AMICI

THE INNOCENCE NETWORK

Concerning the State's Obligation to Promptly
Provide Exculpatory Evidence
At Preliminary Hearings

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STATEMENT OF AMICI

The Innocence Network (“Network”) is an association of thirty member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners whose actual innocence may be established by post-conviction evidence.¹ The Network currently represents hundreds of prisoners with innocence claims in all fifty States and the District of Columbia. The Network also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

Innocence Project New Orleans (IPNO) is an independent non-profit 501(c)3 organization that is part of the Innocence Network. IPNO is dedicated to remedying the injustice committed when innocent individuals are wrongfully incarcerated. IPNO has observed first hand the cause of wrongful convictions in Louisiana and has concrete empirical evidence of the toll that the failure to promptly disclose exculpatory evidence has on the truth-seeking process of the criminal justice system.

Per capita, Louisiana leads the nation with twenty-six wrongful convictions.² While IPNO works to remedy wrongful convictions, it cannot undo the time that each wrongfully convicted defendant spends in custody. IPNO believes that prompt disclosure of favorable evidence will result in fewer wrongful convictions and enhance the accuracy and fairness of the criminal justice system. Indeed, because this case

¹ The Network’s U.S. member organizations include: Arizona Justice Project; California/Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Florida Innocence Initiative; Georgia Innocence Project; Idaho Innocence Project; Innocence Institute at Point Park University; The Innocence Project, Inc.; Innocence Project Indiana; Innocence Project Midwest; Innocence Project of Minnesota; Innocence Project Northwest; Iowa/Nebraska Innocence Project, Innocence Project New Orleans; Medill Innocence Project; Mid Atlantic Innocence Project; New England Innocence Project; North Carolina Center on Actual Innocence; Northern Arizona Justice Project; Northern California Innocence Project; Ohio Innocence Project; Pace Post-Conviction Project; Rocky Mountain Innocence Project; Second Look Program; Texas Innocence Network; Texas Center for Actual Innocence; and Wisconsin Innocence Project.

²See www.law.northwestern.edu/depts/clinic/wrongful/exonerations/LouisianaList.htm. See also Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2006) (hereinafter Gross) (detailing seventeen wrongful convictions in Louisiana between 1989 through 2003, noting that Louisiana is fifth in numerical number but first per capita in wrongful convictions).

involves a charge that could lead to the imposition of the death penalty, prosecutors should be instructed to be especially complete, forthright and prompt in fulfillment of their discovery obligations.³

As Justice Johnson of the Louisiana Supreme Court has noted, the failure of a prosecutor to closely attend to her discovery obligations has a devastating impact on the accuracy of the criminal justice system. *In re Jordan*, 04-2397 (La. 06/29/2005), 913 So. 2d 775 (concurring and dissenting from punishment imposed in a case in which an Orleans Parish prosecutor withheld favorable evidence from capital defendant Shareef Cousin, and was sanctioned for violating the Rules of Professional conduct). Noting twenty-five (25) cases in which defendants had been wrongfully convicted in Louisiana, Justice Johnson observed that “prosecutorial misconduct” had resulted in “unnecessary and unlawful suffering” in a number of instances.

The magistrate court below refused to conduct an evidentiary hearing on the matter and the state did not dispute the defense presentation that disclosure of exculpatory material was readily feasible under the circumstances. It is, therefore, unclear what basis, if any, the state would articulate for avoiding its obligations.

Regardless of whether the matter is mooted by the prosecution’s indictment or dismissal of charges against this defendant, this issue calls for judicial review.⁴ *Amici*

³ See e.g. The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, Chapter VIII, 2006. In 2000, the Constitution Project created a blue-ribbon committee to guide its new Death Penalty Initiative. The Committee’s members were supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. The Committee has judges, prosecutors, policymakers, victim advocates, defense lawyers, journalists, and scholars. An initial report in 2001 detailed eighteen reforms to the death penalty system. In 2006, the group re-visited the issue narrowing the scope and significance of their prior work. The Blue Ribbon Commission specifically observed that to reduce wrongful convictions, “prosecutors should provide ‘open-file discovery’ to the defense in death penalty cases. Prosecutors’ offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies.” *Id.*

⁴ See e.g. *Weinstein v. Bradford*, 423 U.S. 147, 148-149 (1975) (“*Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911), was the first case to enunciate the “capable of repetition, yet evading review” branch of the law of mootness. There it was held that because of the short duration of the ICC order challenged, it was virtually impossible to litigate the validity of the order prior to its expiration. Because of this fact, and the additional fact that the same party would in all probability be subject to the same kind of order in the future, review was allowed even though the order in question had expired by its own terms. This case was followed by *Moore v. Ogilvie*, 394 U.S. 814 (1969); *SEC v. Medical Committee for Human Rights*, 404 U.S.

respectfully ask this Court to grant writs, accept briefs, and to fully address the matter of whether the state is obligated to provide *Brady* material at a preliminary hearing.

403 (1972); and *Dunn v. Blumstein*, 405 U.S. 330 (1972), which applied the original concept of *Southern Pacific Terminal Co. v. ICC* to different fact situations, including a class action in *Dunn*.”).

ISSUES PRESENTED

Whether this Court should grant writs to consider whether the prosecutor's obligation to provide favorable evidence exists at all critical stages of adversarial court hearings?

Whether the magistrate court erred in finding that the law required him to allow the prosecution to conceal favorable evidence from a tribunal at a preliminary hearing?

Whether the magistrate court erred in refusing to solicit evidence concerning the difficulty, if any, the state would have complying with its legal and ethical obligations?

STATEMENT OF THE CASE

Amici neither adopt nor contest the statement of the case presented by the Petitioner-Applicant. *Amici* have reviewed the transcript of the August 31, 2006, court hearing in the related case of *State v. Amison*, DK 468-233, and observed the magistrate court's assertion of the following comments concerning the prosecution's obligation to comply with *Brady v. Maryland*, at a preliminary hearing prior to indictment:

You know, if I had my druthers, even if *Brady* then exists now or it doesn't you know, but I mean, I can't tell you what to do and what not to do. I mean, as far as I – as far as I'm concerned, my obligation is to uphold the law of this state and the Constitution of this State and the United States. And while I may think you know it would be nice if *Brady* applied, that's not the law, and I'm constrained to follow the law. So if you want to take your writ, you take your writ next Friday. Just make sure that this transcript is there with everything that I've said about this on there, because that will – that is – that will be my *per curiam*.

State v. Amison, DK 468-233, Commissioner Joe Giarrusso, Jr. August 31, 2006, pp. 15-16.

The state concurred with the commissioner, insisting that it was not obligated to disclose favorable evidence at the preliminary hearing stage of the proceeding.

Amici are also familiar with the statement of the same commissioner on September 15, 2006, in the current case, indicating that he would like to order the prosecution to provide favorable evidence but was prevented from doing so:

If it were me, I'll say it again, for the record, I'd say yes, "there's *Brady* now, or yes, there's no *Brady*. I mean, but it ain't me, and everybody says so far that I'm right with regard to the way that I rule. . . . So I mean, you know, if it would be me, I'd say, I have no *Brady* at that time. That's certainly obviates the need for any kind of hearing whatsoever, and it doesn't start a precedence that they have to produce *Brady* at any particular time. But, I mean, that's not me.

State v. Lewis, 469-107 M5, Ruling of September 14, 2006, p. 10.

Amici file this brief, asking the Court to grant writs and docket the matter to address the important question concerning whether *Brady* applies solely at the benevolence or sound judgment of the prosecutor or whether it is compelled by law.

SUMMARY OF ARGUMENT

Amici file this Brief asking this Court to grant writs and consider issuing an appellate ruling instructing the lower court to do what the lower court appeared to believe was proper, and informing the prosecution below that its obligation to disclose exculpatory evidence extends throughout the criminal proceedings. Prompt disclosure of favorable evidence “implement[s] what has been universally regarded as the primary function of that hearing to screen cases, i. e., to eliminate those which for a variety of reasons ought not to be prosecuted:

The object or purpose of the preliminary (hearing) is to prevent hasty, malicious, *improvident*, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.

State v. Sterling, 376 So. 2d 103, 107 (La. 1979) (Tate, J., concurring and dissenting) quoting *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922), quoted approvingly in Kamisar, Yale, Et al., *Modern Criminal Procedure* (4th ed. 1974), p. 957.

Ensuring prompt and timely disclosure of favorable evidence promotes the fairness of the proceedings, allows for the effective guiding hand of counsel, and complies with the constitutional and ethical obligations of prosecutors. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also La. Rule Prof. Conduct, 3.8 (d).

Given the historic difficulty that prosecutors in Orleans Parish appear to have had giving fidelity to the *Brady* rule,⁵ encouraging early disclosure of favorable

⁵ The history of Brady violations in Orleans include *Kyles v. Whitley*, 514 U.S. 419, 441 (1995); *Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979); *Davis v. Heyd*, 479 F.2d 446 (5th Cir. 1973); *State v. Bright*, 02-2793 (La. 5/25/04), _ So.2d _; *State v. Cousin*, No. 96-2973 (La. 4/14/98), 710 So.2d 1065 (in capital murder case, “[t]he prosecutor did not disclose this **obviously exculpatory statement** to the defense prior to the trial”); *State v. Lindsey*, 02-2363 (La. App. 4 Cir. 4/2/03), 844 So.2d 961; Michael Perlstein, Jordan drops charges in 1975 murder; Two men freed on eve of retrial, Times-Picayune (New Orleans, La.), June 24, 2003, at Metro 1; *State v. Thompson*, 02-0361 (La. App. 4 Cir. 7/17/02), 825 So.2d 552; Gwen Filosa, N.O. man cleared in '84 murder; New trial in Liuzza killing brings an emotional end to epic case, Times-Picayune, May 9, 2003, at National 1 (after retrial, Thompson acquitted in less than one hour); *State v. Lee*, 00-2429 (La. App. 4 Cir. 1/4/01); 778 So.2d 656; *State v. Marshall*, 81-3115 (La. App. 4 Cir. 9/5/95), 660 So.2d 819; *State v. Mims*, 94-

evidence enhances the fairness and reliability of the proceedings and reduces the likelihood of wrongful or unfair convictions.⁶

I. THE DISCLOSURE OF FAVORABLE EVIDENCE IS PART OF THE AMERICAN JUSTICE SYSTEM'S DEEP-SEATED VALUE OF FAIRNESS IN CRIMINAL PROCEEDINGS

In *Brady v. Maryland*, the United States Supreme Court held that the prosecution had an obligation to disclose favorable evidence to a defendant, observing that the “administration of justice suffers whenever any accused is treated unfairly” and that the prosecution wins “its point whenever justice is done its citizens in the courts.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In this case, the prosecution seeks an exception to the rule of *Brady*, authorizing – as the State might characterize it – only a “brief delay” in the fulfillment of its constitutional obligations.

However, the prosecutor’s obligation to timely disclose favorable evidence is an essential part of the American justice system’s deep-seated value of fairness in criminal proceedings. As the United States Supreme Court has made clear:

0333 (La. App. 4 Cir. 1994); 637 So.2d 1253; *State v. Falkins*, 356 So.2d 415 (La. 1978); *State v. Parker*, 361 So.2d 226 (La. 1978); *State v. Curtis*, 384 So.2d 396 (La. 1980); *State v. Perkins*, 423 So.2d 1103 (La. 1982); *State v. Evans*, 463 So.2d 673 (La. 1985); *State v. Dozier*, 553 So.2d 931 (La. Ct. App. 1989); *State v. Knapper*, 579 So.2d 956 (La. 1991); *State v. Oliver*, 94-1642, (La. App. 4 Cir. 1996)(“[a] prosecutor should not fail to make timely disclosure, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”) (citing *ABA Standards for Criminal Justice*, Prosecution Function and Defense Function, 3-3.11 (3d ed. 1993)); *State v. Ates*, 418 So.2d 1326, 1329 (La. 1982); *State v. Peters*, 406 So.2d 189 (La. 1981); *State v. Davenport*, 399 So.2d 201, 204 (La. 1981); *State v. Dawson*, 490 So.2d 560, 563 (La. App. 4th Cir. 1986); *State v. Felton*, 522 So.2d 626, 627 (La. App. 4th Cir. 1988); *State v. Rosiere*, 488 So.2d 965, 969-71 (La. 1986) (failure to turn over statements of witnesses inconsistent with the prosecution case); *State v. Carney*, 334 So.2d 415, 418-19 (La. 1976); *State v. Walter*, 514 So.2d 620 (La. App. 4th Cir. 1987) (reversing where possible *Brady* evidence not produced until day of trial). See also *In re Jordan*, 913 So. 2d 775, 783, n. 14 (La. 2005) citing of record communications between Orleans Parish Criminal Court judges and the district attorney’s office concerning difficulties the office had complying with its obligation to disclose favorable evidence.

⁶ Indeed, of the seven men exonerated from Louisiana’s death row since 1981, four were prosecuted in Orleans Parish, and all four of these cases were cited in footnote 1 – *Kyles*, *Cousin*, *Thompson* and *Bright* – involving *Brady* violations.

The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to *conceal their cards until played*. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Wardius v. Oregon, 412 U.S. 470, 474 (1973) quoting *Williams v. Florida*, 399 U.S. 78 (1970).

Here, the prosecution seeks the ability to “conceal their cards until played” in a manner that offends the due process clause of the state and federal constitutions. What *Amici* seek here is not a broad-fashioning of a discovery rule, but rather the basic protections of justice at a preliminary hearing:

By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "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."

United States v. Bagley, 473 U.S. 667, 676 n.6 (1985) quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).

It cannot be gainsaid that the prosecution would seek respite from the rule prohibiting the use of false or perjured testimony at a preliminary hearing. And yet, the Court has made clear, the prosecution's obligation to disclose favorable evidence set out in *Brady v. Maryland* has its roots in the prohibition on the use of perjured testimony:

the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony. In *Mooney v. Holohan*, 294 U.S. 103 (1935), the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id.*, at 112. The Court reaffirmed this principle in broader terms in *Pyle v. Kansas*, 317 U.S. 213 (1942), where it held that allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation.

The Court again reaffirmed this principle in *Napue v. Illinois*, 360 U.S. 264 (1959). In *Napue*, the principal witness for the prosecution falsely testified that he had been promised no consideration for his testimony. The Court held that the knowing use of false testimony to obtain a conviction violates due process regardless of whether the prosecutor solicited the false testimony or merely allowed it to go uncorrected when it appeared. The Court explained that the principle that a State may not knowingly use false testimony to obtain a conviction -- even false testimony that goes only to the credibility of the witness -- is "implicit in any concept of ordered liberty." *Id.*, at 269.

United States v. Bagley, 473 U.S. at 680, n.8.

The prosecution in these cases is seeking to hold a defendant on probable cause of first degree murder - a defendant who may well remain in custody for years prior to trial.⁷ It is not too much to ask that the prosecutor seek out the entire police file on such an incident and review that file for obviously exculpatory material before proceeding to the tribunal. See *Kyles v. Whitley*, 514 U.S. 419 (1995) ("The 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").⁸ Indeed, even aside from the *Kyles* rule, given the rich history of deficiencies, failures, and in some instances out-right criminal behavior of members of the Orleans Police Department, it would seem incongruent to undersigned *Amici*, for an officer of the court to make the bald assertions "that the proceedings were fair" and "that given the totality of the circumstances there was probable cause to arrest the defendant," without an independent assessment of the entire police department's file.

⁷ See e.g. *State v. Eric McCormick* (Orleans Parish defendant released after more than four years in custody without proceeding to trial).

⁸ See also *Kyles* at 438 ("The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.").

II. LOUISIANA'S PRELIMINARY HEARING IS A CRITICAL STAGE IN THE PROCEEDINGS WARRANTING THE FULL PROTECTIONS OF THE DUE PROCESS CLAUSE

Louisiana's preliminary hearing is a critical stage in the proceedings warranting the full protections of the due process clause. In Louisiana, a defendant not only has the constitutional right to a preliminary hearing, See Article I, Section 14 of the Louisiana Constitution of 1974, but also the right to the tools of an effective defense including "the right to subpoena and cross-examine witnesses." *State v. Jenkins*, 338 So. 2d 276, 279 (La. 1976); La. C.Cr.P. art. 294. What *Amici* seek in this case is at essence a rule of fairness, that the preliminary hearing to which a defendant is constitutionally entitled is governed by the rules of fair play and due process outlined by the state and federal courts.

It appears unquestionable as an initial matter of the Louisiana Supreme Court's jurisprudence, that the trial court has the authority to order disclosure of favorable evidence as part of the obligation to ensure fundamental fairness:

There is authority in the trial judge under the due process clauses of the federal and state constitutions to order pre-trial discovery where he considers that fundamental fairness requires it

State v. Walters, 408 So. 2d 1337, 1338 (La. 1982). As such, the trial court was clearly wrong when it indicated that it was precluded from ordering disclosure of favorable evidence. *Amici* seek merely an explanation to the lower courts that fundamental fairness requires disclosure of evidence in the hands of the prosecutor, when that evidence is favorable to the defendant.⁹ What *Amici* seek is nothing more than the full use of the guiding hand of counsel. Over thirty years ago, when the State of Alabama

⁹ It appears that there is confusion arising from the denial of writs in *Amison* by this Court, along with the denial "based upon the showing" in *Amison* by the Supreme Court. *State v. Amison*, 2006-2272 (La. 09/14/06); __ So. 2d __ ("Writ denied on showing made.") denying writs to the Court of Appeal, Fourth Circuit, *State v. Amison*, 2006-K-1211 (La. App. 4th Cir. 2006), __ So. 2d __. \ *Amici* merely ask this Court to grant writs to expound upon the matter. *Amici*, herein, do not seek a specific remedy from the prosecution's failure to honor *Brady* at the preliminary hearing stage in the past, but rather the prospective application of a rule demanding good faith.

attempted to hold a preliminary hearing akin to that employed in Louisiana, without the guiding hands of counsel, the United States Supreme Court held that

[T]he guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell v. Alabama*, supra, at 57.

Coleman v. Alabama, 399 U.S. 1, 9-11 (1970). The question before this Court is whether the state may tie the hand of counsel behind her back by restricting or reducing the tools of due process available a preliminary hearing.

In *State v. Sterling*, the Court addressed (and internally disagreed on) the issue of whether the state could dispense with the need for a preliminary hearing by simply releasing the defendant; and it appears from that ruling that the state could dispense with its obligation to provide favorable evidence by releasing a defendant from custody. *State v. Sterling*, 376 So. 2d 103, 104 (La. 1979). However, the comments of Justice Tate, concurring and dissenting, make clear that the fundamental role of the preliminary hearing belies the State's suggested argument that it can suppress favorable evidence from the defense and the tribunal at that stage:

The substantial protections afforded an accused at the preliminary examination are designed to implement what has been universally regarded as the primary function of that hearing to screen cases, i. e., to eliminate those which for a variety of reasons ought not to be prosecuted: "The object or purpose of the preliminary (hearing) is to prevent hasty,

malicious, *improvident*, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based." *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922), quoted approvingly in Kamisar, Yale, Et al., *Modern Criminal Procedure* (4th ed. 1974), p. 957. . . .

In a full preliminary hearing, the state is forced to examine the strength of its case and may be influenced to dismiss a prosecution found deficient. This process may not be dispensed with upon a concession of no probable cause, for the pretrial release determination is merely a collateral function of the preliminary examination, and to elevate it to a position of exclusive importance is to pervert the primary function of the hearing.

State v. Sterling, 376 So. 2d 103, 107 (La. 1979) (Tate, J., concurring and dissenting). Were the state able to avoid the purpose of a preliminary hearing – to weed out hasty, improvident or oppressive prosecutions – by suppressing favorable evidence known to it, then the preliminary hearing would have no role at all in ensuring the justness of the proceedings.

III. THE SPECIAL RESPONSIBILITIES OF THE PROSECUTOR INCLUDE TIMELY DISCLOSURE OF FAVORABLE EVIDENCE

The special responsibilities of the prosecutor include timely disclosure of favorable evidence. In *State v. Cousin*, a case arising from Orleans Parish, the Court admonished:

A prosecutor anxious about "tacking too close to the wind will disclose a favorable piece of evidence" and "will resolve doubtful questions in favor of disclosure."

State v. Cousin, 710 So. 2d 1065, 1074 (La. 1998) citing *Kyles v. Whitley*.¹⁰ Here the prosecution seeks to motor against the current and withhold favorable evidence in what

¹⁰ The *Brief of the Petitioner* in this case details a lengthy list of cases arising from Orleans Parish in which *Brady* violations have resulted in the reversal of a conviction. See also footnote 4, *supra*. The concern expressed by Amici is that the culture of non-disclosure not be allowed to foster in Orleans. In *In Re Jordan*, this Court noted:

The record contains a letter dated January 5, 1998, authored by the Honorable Calvin Johnson of Orleans Parish Criminal Court addressed to Orleans Parish District Attorney Harry Connick. This letter voices concern over the increase in violations of Rule 3.8(d) by "some of your assistant district attorneys." Judge Johnson reiterates that Rule 3.8 was

can only be described as an unseemly effort to secure tactical advantage or delay professional and constitutional obligations. The stance of the prosecution in this case would appear to run afoul of the Rules of Professional Conduct. See e.g. *Louisiana Rules of Professional Conduct*, Rule 3.8 (Special Responsibilities of the Prosecutor). The rules provide, “The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

...

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to preliminary hearing;

(d) 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Id. It is significant to note that each of these three provisions are relevant to the issue at hand. First, the full disclosure of favorable evidence ensures that a prosecutor will refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. *Id.* at 3.6 (a). Second, the rules reflect the significance of a defendant’s right to a preliminary hearing, and repudiate any effort to limit the significance of that right. *Id.* at 3.6 (b).

Most importantly, the Rules of Professional Conduct make clear that a prosecutor has an obligation to make “timely disclosure” rather than merely disclosure *prior to trial* or disclosure *after indictment*. See *Id.* at 3.8 (d). The Rules of Professional Conduct simply brook no exception for the prosecutor’s obligations at the preliminary hearing stage. These rules have the full effect and force of law. See e.g. *In re Jordan*, 04-2397 (La. 06/29/2005); 913 So. 2d 775, 783-784 (“The violation of Rule 3.8(d) by a

established to ensure not only professional responsibility but also to ensure a criminal defendant's right to due process. He warns that the court will hold the assistant district attorney personally responsible for failure to disclose Brady evidence and will report the assistant to the Disciplinary Counsel to "prosecute that individual to the fullest extent possible." A copy of this letter was hand delivered to the respondent.

In re Jordan, 913 So. 2d 775, 783 (La. 2005).

prosecutor raises a great deal of concern to this Court. Rule 3.8(d) exists to ensure that the integrity of the prosecutorial arm of our criminal justice system is maintained.”).

It is important to note, here, that the Amici are merely seeking an announcement clarifying the extent of the prosecutor’s obligations, and not seeking the reversal of a conviction based upon the untimely disclosure of favorable evidence. Amici seek the recitation of the rule prospectively requiring such disclosure, leaving the issue of establishing prejudice and the appropriate remedy to another day.¹¹

CONCLUSION

Amici respectfully suggest that this Court grant writs to consider the matter fully, and inform the State of Louisiana that its obligation to provide favorable evidence is ongoing and arises from inception of the judicial proceedings. *Amici* are confident that upon understanding that obligation, the prosecutors in Orleans Parish will endeavor to comply with those obligations and ensure the fairness of all proceedings before courts, commissioners, and other tribunals.

Respectfully Submitted,

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¹¹ Reversal of a conviction requires a showing of materiality and prejudice. See *State v. Harris*, 01-2730 (La. 01/19/05); 892 So. 2d 1238 (requiring proof that delay in disclosure until the day before trial caused prejudice).

VERIFICATION AND CERTIFICATION

COMES NOW, Emily Maw, counsel for *Amici*, the Innocence Network, being duly sworn and deposes and states that she has reviewed the foregoing petition, and that all the facts therein are true and accurate to the best of her information and belief, and that she has had the same mailed first class to:

Eddie Jordan
Orleans Parish District Attorney
1340 Poydras Street, Suite 700
New Orleans, Louisiana 70119

Richard Bourke
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636 Baronne Street
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SWORN AND SUBSCRIBED TO BEFORE

ME THIS _____ DAY OF _____, 2006.

NOTARY PUBLIC