No. 18-13524

IN THE
United States Court of Appeals for the Eleventh Circuit

CROSLEY ALEXANDER GREEN,
Petitioner-Appellee,
v.

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA
Respondents-Appellants.

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW SUPPORTING APPELLEE'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, *amicus curiae* Lawyers' Committee for Civil Rights Under the Law certifies that the following is a list of persons and entities that have an interest in the outcome of this case:

Aiken, Benjamin F., Counsel for amicus curiae

Ago, Arthur, Counsel for amicus curiae

Anstead, Harry Lee, Judge

Antoon, John II, Senior United States District Judge

Baker, Hon. David A., United States Magistrate Judge

Baker, Shane, Warden, Hardee Correctional Institution

Bell, Kenneth B., Judge

Bondi, Pam, Attorney General, State of Florida

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No publicly traded company or corporation has an interest in the outcome of this case or appeal.

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INTEREST OF AMICUS CURIAE[1]

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. Much of the Lawyers' Committee's work involves combatting racial inequities in the criminal justice system through litigation, public policy advocacy, and serving as amicus curiae.

[1] No party's counsel authored any part of this brief. No party, party's counsel, or any other person other than *amicus curiae* contributed any money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE

Whether the panel erroneously applied *Brady v. Maryland*, 373 U.S. 83 (1963).[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Crosley Green is an innocent man wrongfully convicted of murdering a stranger in an orange grove. Millions of Americans know it—they have seen the case wilt under the scrutiny of investigative journalism. *See* Erin Moriarity, *Judge rules Crosley Green was wrongfully convicted – is he out of prison for good?*, CBS News (April 18, 2021), https://tinyurl.com/2p9ahj94. The first officers who responded to the scene know it too. As reflected in the prosecutor's contemporaneous notes, the officers told the prosecutor that the evidence shows that there was no Black assailant in this case and that the evidence points to Kim Hallock, the girlfriend of the victim, Charles Flynn. Hallock was with Flynn in the orange grove, she admitted that Flynn had just told her he was sleeping with another woman, and her story of the events that

[2] The petition for rehearing en banc also raises issues concerning exhaustion of claims and habeas corpus review. Pet. 9-16, 23-26. Because the petition ably presents those issues, amicus limits this brief to only the *Brady* issue.

followed make no sense. The notes also say that she admitted to tying Flynn's hands behind his back—a fact that the defense did not know at the time of Mr. Green's trial and was therefore unable to bring to light.

The Constitution's demand of due process required the prosecution to turn this information and these notes over to the defense, consistent with *Brady v. Maryland*, 373 U.S. 83 (1963). If they had, the defense would have had promising leads and devastating material for Hallock's cross-examination. The district court agreed and granted Mr. Green a new trial, but a panel of this Court reversed. The panel held that Mr. Green had not exhausted his claim and that the evidence was not material under *Brady*.

The panel's decision merits reversal by the full court. The panel held that the suppressed notes and information were not material under *Brady* because they were inadmissible, and Green did not specifically identify what evidence they could have led to. That constrained view of *Brady* is an unreasonable application of Supreme Court precedent. Suppressed evidence is material under *Brady* if it could have proven useful on cross-examination or altered the defense's strategy. The information here meets that test.

The panel also overestimated the strength of the case against Mr. Green. Nearly all of that evidence falls into classic categories of evidence that frequently lead to false convictions. The case against Mr. Green was weak, and there is a strong indication that this case is another in a long line of racial hoaxes where an anonymous Black man is accused of a crime he did not commit. The district court was correct to award Mr. Green a new trial, and the en banc court should vacate the panel's decision and issue the same relief.

ARGUMENT

I. The panel's narrow view of *Brady* is an unreasonable application of Supreme Court precedent.

The panel adopted a constrained view of the *Brady* materiality test that is at odds with Supreme Court precedent. A "conviction must be reversed" if the prosecution withholds evidence that "is material in the sense that its suppression undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). There is no "difference between exculpatory and impeachment evidence for *Brady* purposes." *Kyles v. Whitley*, 514 U.S. 419, 428 (1995).

The panel held that Green had failed to show the suppressed evidence was material because the evidence was inadmissible and Mr.

Green had not "demonstrate[d] that the [officers'] suspicions would have led to material evidence." Op. 112. The petition explains why this holding was error: The notes would have led to different questions of one of the officers, an appearance of the other officer on behalf of the defense, and testimony about why these officers suspected Hallock. *See* Pet. 18-23. But those issues aside, the panel also erred by taking too narrow a view of the materiality test.

"Most federal courts have concluded that suppressed evidence may be material for *Brady* purposes even where it is not admissible." *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 310 (3d Cir. 2016); *see, e.g.*, *Spence v. Johnson,* 80 F.3d 989, 1005 n.14 (5th Cir.1996); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002). Most relevantly here, the Second Circuit has held that evidence is material under *Brady* if it "would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise." *Gil*, 297 F.3d at 104. Similarly, the Third Circuit found a *Brady* violation because "[a]lterations in defense preparation and cross-examination at trial are

precisely the types of qualities that make evidence material under *Brady*." *Dennis*, 834 F.3d at 311.

At the very least, the suppressed notes would have played that critical role here. At trial, Hallock testified that Mr. Green had tied Flynn's hands behind his back. App.Vol.1, Doc.3-149 at 604.[3] The suppressed notes, however, reveal that Hallock told responding officers that *she* tied Flynn's hands and had "changed her story." App.Vol.12 at 139. Had the defense had these notes, the defense would have confronted Hallock with her inconsistent statement to the officers, and, if necessary, called those officers to impeach Hallock. *See* Pet. 21-23. The defense also would have been willing to more forcefully pinpoint Hallock as the true perpetrator—and the prosecutor would not have labeled that argument as "ludicrous" or accused defense counsel of "grasping at straws." Op. 24. The majority opinion overlooked these potential uses of the suppressed notes.[4] In doing so, it created tension

[3] All record page numbers refer to the blue ECF-generated page number on the appellate appendices.

[4] To the extent the panel believes that Green already had this information at the time of trial, the petition explains why this view seems to stem from confusion over two different sets of notes. *See* Pet. 23-26. Green's defense possessed notes suggesting that Hallock "was

not only with its own circuit precedent, *see* Pet. 16-18, but also the approach adopted by its sister circuits. En banc review is warranted to bring this Court back into line with the majority rule.

II. The withheld evidence was especially material given the weak case against Mr. Green.

The suppressed notes were especially material because the case against Mr. Green was paper thin. The panel held that the notes were not material because they could not overcome the weight of evidence against Mr. Green. Op. 145-49. The *Brady* materiality test, however, "is not a sufficiency of evidence test," and Mr. Green had no obligation to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. He needed to show only that "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. The suppressed notes satisfy that standard in part because the

told" to tie Flynn's hands, but not the notes saying that she actually did so. *Id.* at 24. The state court found this distinction critical. *Id.*

prosecution's case relied almost exclusively upon categories of evidence that frequently produce wrongful convictions.

Secondary confessions[5]: At the heart of the prosecution's case were three witnesses who testified that Mr. Green confessed to them. Op. 14-16. These confessions were powerful evidence because research has shown that "confessions have more impact on verdicts than do other potent forms of evidence." Saul M. Kassin, *Why Confessions Trump Innocence*, 67 Am. Psych. 431, 433 (2012). "Unfortunately," however, "the problem of invalid or false secondary confessions is widespread," and "[d]emonstrably false secondary confessions provided by informants were present in 46% of the wrongful convictions in death row cases." J.K. Swanner & D.R. Beike, *Incentives Increase the Rate of False but not True Secondary Confessions from Informants with an Allegiance to Suspect*, 34 Law & Human Behavior 418 (2010) ("*Secondary Confessions*"), https://tinyurl.com/bkc99yv6; *cf.* Rob Warden, *The Snitch System*, N.W. School of Law (2004-05), https://tinyurl.com/nhffnxts (identifying secondary confessions as "the leading cause of wrongful

[5] A "secondary confession" occurs when a defendant confesses to a private third party.

convictions in U.S. capital cases"). This is for the simple reason that the prosecution often offers witnesses incentives to testify about alleged confessions, they often lie as a result, and jurors are prone to believe them even when they know about the incentive. *See Secondary Confessions*, 24 Law & Hum. Behavior at 419, 428.

The confessions used against Mr. Green were all secondary confessions given to witnesses with strong incentives to lie. Sheila Green was awaiting sentencing for an unrelated federal crime at the time of her testimony and anticipated that Crosley Green's prosecutor would testify on her behalf at sentencing. Op. 14-15 n.19. Lonnie Hillery was Sheila Green's "lover and the father of her two children," Op. 21-22, also faced charges, and was told that his son would not be placed in foster care if he testified against Mr. Green. App.Vol.12, Doc.3-49 at 221. And the third witness, Jerome Murray, was released from jail after Mr. Green's prosecutor spoke to the judge on his behalf. Op. 22. All three of these witnesses were given strong incentives to fabricate their testimony, a classic ingredient to a false confession. And there is no need to speculate about that possibility here: All three witnesses have *recanted* their testimony and explained they felt coerced

to lie. Supp.App.Vol.3, Doc.3-53 at 18-19 (S. Green); Supp.App.Vol.3, Doc.3-52 at 12-15 (Hillery); App.Vol.13, Doc.3-55 at 6-8, 25 (Murray).

Lineup: When Hallock first attempted to describe Mr. Green, she told a police sketch artist that he had a "big build" with hair "curled like a permanent" with "a little bit of an afro," which did not resemble Mr. Green. App.Vol.12, Doc.3-14 at 65-66; Supp.App.Vol.1, Doc.3-19 at 74. Nevertheless, she soon picked Mr. Green's picture—featuring a thin man with close-cropped hair—out of a six-person photo-lineup. App.Vol.15, Doc.74 at 314. Additionally, Mr. Green's photo made him appear substantially darker than the other men in the array, and Hallock specifically cited the complexion as a reason she selected his photo. Supp.App.2, Doc.3-20 at 9.

Even assuming that Hallock was not Flynn's killer, the photo identification is flimsy evidence. Out of more than 375 wrongful convictions overturned by DNA evidence in the United States, "[m]istaken eyewitness identifications contributed to approximately 69%." *Eyewitness Identification Reform*, The Innocence Project (last visited April 19, 2022), https://tinyurl.com/5n8h6sn6. Hallock's identification in this case was particularly suspect given the many

factors present that reduce the reliability of an identification. The presence of a weapon, high levels of stress and fear, and own-race bias (where the witness and the perpetrator are different races) all reduce the accuracy of an eyewitness identification. *Identifying the Culprit: Assessing Eyewitness Identification*, Nat'l Research Council, at 93-97 (2014), https://tinyurl.com/4xta9py3.

Dog sniff: The prosecution also relied on dog scent evidence. Op. 9-10. A police dog allegedly tracked a scent from shoe prints back to the house of Mr. Green's sister where two dogs were barking. *Id.*[6] The dog later followed a second track looping around a nearby baseball field where Mr. Green had been seen earlier on the evening of Flynn's death. Op. 10-11.

But dog sniff evidence is "profoundly lacking in scientific validation." Peter Andrey Smith, *The Sniff Test*, 374 Science 6565 (Oct. 14, 2021), https://tinyurl.com/495vazca. There is "[a]lmost no published research" that even "indicates just what dogs detect or how they do it," and because "lawyers can't cross-examine a dog … the accused cannot

[6] Hallock told police that the alleged assailant was wearing a "work boot," Op. 11, but the shoe prints were left by a tennis shoe, Op. 10.

scrutinize the evidence or readily confront their accuser[].” *Id.* As a result, “[d]og-sniff evidence has led to wrongful convictions.” *Id.*; *see, e.g.*, *Freed After Six Years, Woman Sues Cops Over Dog Scent Evidence*, NBC News (Feb. 26, 2014), https://tinyurl.com/we5b5m75 (listing multiple reports questioning dog sniff efficacy).

Had the prosecution not suppressed the exculpatory notes, the defense would have tarnished the credibility of the State’s star witness. The remaining evidence largely falls into categories that courts should approach with great caution given their historical unreliability. Given that substantial weakness, “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” and require a new trial. *Kyles*, 514 U.S. at 434-35.

III. There are strong indications that this case was a racial hoax.

Mr. Green’s case bears all the hallmarks of a false accusation. It fits a well-known pattern in which an alleged eyewitness to a crime fabricates a story and claims that an unknown Black man committed the offense. The phenomenon is so pervasive that it has earned the moniker “racial hoax.” Katheryn K. Russell, *The Racial Hoax As Crime:*

The Law As Affirmation, 71 Ind. L.J. 593, 596 (1996); *see id.* at 596-99 (highlighting paradigmatic examples). Infamous examples abound. *See, e.g.,* Diane Bernard, *"They Were Treated Like Animals": The Murder and Hoax that Made Boston's Black Community a Target 30 Years Ago,* Wash. Post (Jan. 4, 2020), https://tinyurl.com/kek8fam6 (recounting Charles Stuart case); Don Terry, *A Woman's False Accusation Pains Many Blacks*, New York Times (Nov. 6, 1994), https://tinyurl.com/5n6fd2m6 (recounting Susan Smith case).

Florida is no stranger to this sordid phenomenon. A century ago, "[a] false claim that a Black man had assaulted a White woman ignited the Rosewood, Florida massacre." Katheryn Russell-Brown, *The Dog Walker, the Birdwatcher and Racial Voice: The Manifest Need to Punish Racial Hoaxes*, 31 U. Fla. J.L. & Pub. Pol'y 1, 3 (2020). And from then until now, Florida has been an unfortunately reliable source for wrongful convictions of Black men. *See, e.g.*, Anthony Hill, *In-depth: Florida leads US with most exonerations from the death penalty*, ABC News (Feb. 9, 2022), https://tinyurl.com/2p8fn4ts.

The result of this disturbing history is that Black defendants constitute 47% of exonerations even though the American population is

only 13% Black. Samuel R. Gross, Maurice Possley & Klara Stephens, *Race and Wrongful Convictions in the United States*, National Registry of Exonerations, ii (March 7, 2017), https://tinyurl.com/ddendvcw. "Many" of these wrongful "convictions of African-American murder exonerees were affected by a wide range of types of racial discrimination." *Id.* "Most wrongful convictions are never discovered," *id.*, but Crosley Green's has been. This Court should grant en banc review and deliver the justice that he deserves.

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CONCLUSION

The petition for rehearing en banc review should be granted.

Date: April 28, 2022

Respectfully submitted,

/s/ Benjamin F. Aiken

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The brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 28, 2022.

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