No. 22-____

IN THE

Supreme Court of the United States

DAVID BROWN,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Where a defendant denies participating in a particular criminal act, is another person's confession stating that he and someone else committed the act—without mentioning the defendant—favorable and material evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)?

PARTIES TO THE PROCEEDING

David Brown is Petitioner here and was Appellant below.

The State of Louisiana is Respondent here and was Appellee below.

STATEMENT OF RELATED PROCEEDINGS

State v. Brown, No. 16-KA-0998 (La.) (opinion issued and judgment entered on January 28, 2022; petition for rehearing denied March 25, 2022)

Brown v. Louisiana, No. 15-8779 (U.S.) (petition for a writ of certiorari denied June 20, 2016)

State v. Brown, No. 15-KK-2001 (La.) (petition for a writ of certiorari denied February 19, 2016)

State v. Brown, No. 2015-0591 (La. Ct. App.) (State's writ application granted September 18, 2015)

State v. Brown, No. W04-3-77 (La. Dist. Ct.) (new trial granted December 11, 2014)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Brown respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINIONS BELOW

The decision of the Louisiana Supreme Court will be reported at __ So. 3d __ and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-197a. The order of the Louisiana Supreme Court denying rehearing is unreported and is reprinted at Pet. App. 220a. A prior decision of the Louisiana Supreme Court is reported at 184 So. 3d 1265 and is reprinted at Pet. App. 198a-207a. The decision of the Louisiana Court of Appeal is unreported and is reprinted at Pet. App. 208a-209a. The oral ruling of the trial court granting a new trial is unreported and is reprinted at Pet. App. 210a-219a.

JURISDICTION

The Louisiana Supreme Court issued its decision on January 28, 2022, Pet. App. 1a, and denied rehearing on March 25, 2022, *id.* at 220a. On June 16, 2022, Justice Alito granted petitioner's application to extend time to file a petition for a writ of certiorari until July 23, 2022. *See* No. 21A821. Because July 23, 2022 is a Saturday, Rule 30.1 makes the petition due on July 25, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

INTRODUCTION

Over the years, this Court has repeatedly granted review where Louisiana prosecutors failed to fulfill their obligations under *Brady v. Maryland*, 373 U.S.

83 (1963), and Louisiana courts failed to remedy these constitutional violations. *See Wearry v. Cain*, 577 U.S. 385 (2016); *Smith v. Cain*, 565 U.S. 73 (2012); *Kyles v. Whitley*, 514 U.S. 419 (1995); *cf. Connick v. Thompson*, 563 U.S. 51, 62 (2011) (discussing other *Brady* violations in Louisiana). This is another such case—one in which a bare majority of the Louisiana Supreme Court has not only allowed a death sentence to stand in contravention of *Brady* but also adopted a new understanding of that doctrine's favorability and materiality concepts that conflicts with the law of other jurisdictions and has wide-ranging implications.

Petitioner David Brown was convicted of murder and sentenced to death for his role in an attempted prison escape involving five other inmates. Petitioner admitted being part of the attempted escape but vigorously denied any intent to kill or playing any role in the killing (of a corrections officer) that led to the capital charges. In fact, petitioner maintained he was not even present when the officer was killed. The State, however, claimed petitioner was lying and that he actively participated in the killing. After petitioner's trial, prosecutors revealed that they had suppressed the confession of one of petitioner's co-defendants, Barry Edge. In that confession, Edge stated that he and another co-defendant had "made a decision to kill" the victim and "flipped a switch and they killed him."

The trial court judge—who had presided over the trials of petitioner and all of his co-defendants—found that the State's failure to disclose Edge's confession violated *Brady* and granted petitioner a new penalty-

phase trial. The trial judge explained that Edge's confession supported petitioner's defense that he did not participate in the actual killing. Pet. App. 217a. But the Louisiana Supreme Court disagreed, holding by a 4-3 vote that the suppressed confession was neither favorable to petitioner nor material to his death sentence because Edge "never stated that [petitioner] was *not* present or *not* involved in the killing." *Id.* at 161a (emphasis added).

This petition thus raises an important and recurring constitutional question: Whether the prosecution violates *Brady* when it fails to disclose a confession that states, without inculpating the defendant, that the declarant and another person committed the relevant criminal act. Six state high courts or federal courts of appeals have held in this basic situation that *Brady* is violated. These decisions align directly with *Brady* itself, in which this Court held that a co-defendant's confession that he committed the relevant killing was favorable and material to the defense because, had the jury known about the confession, it might not have sentenced Brady to death. Yet over a powerful dissent, the Louisiana Supreme Court has now broken from this consensus.

This Court should restore uniformity to the law. The prosecution's obligation under *Brady* to disclose favorable, material evidence is a cornerstone of our Constitution's commitment to a fundamentally fair trial. It is also a regular occurrence that a person confesses to a crime and explains that some (but not all) of the participants in the crime committed a particular criminal act. *See, e.g. Lilly v. Virginia*, 527 U.S. 116, 129-30 (1999) (plurality opinion) (discussing this

category of "exculpatory" evidence). Common sense dictates that such confessions are favorable and material to the guilt or enhanced punishment of the unnamed suspects. Yet the Louisiana Supreme Court's decision treats *Brady* like a computerized logic game: Because such confessions do not expressly *rule out* the defendant's participation, they are not favorable or material. This has never been—and cannot be—the law, least of all where a defendant's life is on the line. This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Factual Background

Petitioner is an inmate at the Louisiana State Penitentiary at Angola. Prior to the events in this case, he was serving a life sentence for second-degree murder, having pleaded guilty to a crime that occurred when he was just twenty years old. Pet. App. 38a.

In late 1999, petitioner and five other inmates—Joel Durham, Jeffrey Clark, Barry Edge, Robert Carley, and David Mathis—attempted to escape from Angola. Pet. App. 4a-5a. The inmates planned to detain certain corrections officers who they believed were unlikely to fight back, take their uniforms, dress as the officers, and then leave the prison in the officers' uniforms. *Id.*

The escape plan failed and led to the death of one of the inmates and a corrections officer named David Knapps. Pet. App. 2a. Directly following the incident, petitioner gave a statement to police. *Id.* at 23a. Petitioner told police that the escape plan involved seiz-

ing corrections officers, "lay[ing] them down," dressing up in their uniforms, leaving the prison gate, and then driving away in a prison personnel vehicle. *Id.* at 23a-24a. Petitioner maintained that no prison personnel were supposed to get hurt. *Id.* at 24a.

According to petitioner, the critical events began when the inmates encountered Knapps in a hallway. Durham fought Knapps, and Edge struck him on the head with a mallet, knocking him to the ground and causing him to bleed. Pet. App. 24a. Petitioner then pulled the bleeding Knapps into the bathroom, with Knapps fighting back. *Id.* Once in the bathroom, petitioner reassured Knapps that "nothing [is] gonna happen to you" and "nobody's going to hurt you," and he offered Knapps water. *Id.*

Petitioner stated that he then left Knapps in the bathroom with Edge and "some white guy." Pet. App. 25a. (Clark is white; "[Petitioner] was the only African American of the five co-defendants accused of killing Capt. Knapps." *Id.* at 78a.) And when he left the bathroom, petitioner maintained, Knapps was bleeding but still talking and moving. *Id.* at 26a. That was the last time that petitioner saw Knapps. *See* Tr. of Brown Statement (Dec. 29, 1999), Vol. 14, R. 3091.[1] Petitioner stated that Edge later told him that he had used petitioner's sweatshirt to wipe up blood in the bathroom. Pet. App. 25a.

Upon leaving the bathroom, petitioner explained, he went to the "bundle room" where he assisted in

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[1] Citations to "Vol. _ R. _" are to the appellate record in *State v. Brown*, No. 2016-KA-998 (La.).

seizing two corrections officers by tying their shoelaces together without injuring them. Pet. App. 25a. At this point, petitioner noted, "everything … erupted," someone on the radio stated that there was a "hostage situation," and the inmates sought to barricade themselves in the building. *Id.* at 25a-26a. Eventually, petitioner surrendered to the warden on the condition that he would not be harmed or prosecuted for participating in the escape attempt. *Id.* at 27a.

After the incident, petitioner told the warden that all the hostages were "okay." Tr. (Oct. 22, 2011), Vol. 40, R. 9134. He expressed disbelief upon learning that Knapps had died. Pet. App. 27a.

B. Petitioner's Trial

A grand jury indicted the five surviving inmates involved in the escape attempt, including petitioner, charging them with first-degree murder. Pet. App. 2a. The State then notified the defendants that it would seek the death penalty. *Id.* The cases were severed, and petitioner's trial began in 2011. The same trial judge presided over each of the trials that resulted in verdicts. *See id.* at 210a-211a.

1. At trial, the State's overarching theory was that petitioner was lying when he told police that he left the bathroom while Knapps was still alive and moving, and that petitioner in fact held Knapps down while his co-defendants fatally beat him. But the State did not dispute that petitioner (unlike his co-defendants) wielded no weapon during the escape attempt. And the State called no witness who testified

directly to petitioner's involvement in Knapps's killing. Rather, the State relied almost exclusively on witnesses who testified about circumstantial physical evidence.

For instance, the State called experts to testify about evidence found at the crime scene. In particular, they testified that Knapps's blood was found on petitioner's hands, pants, an abandoned sweatshirt linked to petitioner (though not the one petitioner wore while being processed, Pet. App. 58a), and the top of petitioner's shoes. *Id.* at 29a, 32a, 34a, 58a. On cross-examination, however, the experts admitted that they could not determine whether petitioner was wearing the sweatshirt when the staining occurred. *Id.* at 32a. And they noted that blood was not found on the soles of petitioner's shoes, *id.* at 35a, and that petitioner's footprints were not found in the blood pool in the bathroom even though Clark's footprint was found there, *id.*; *id.* at 58a n.26.[2]

The State also called as a witness the doctor who conducted Knapps's autopsy. The doctor testified that Knapps had sustained blows to his head and face, as well as penetrating wounds with sharp objects. Pet. App. 20a. He observed that the contusions on the tops of Knapps's shoulders were consistent with someone putting pressure on those areas. *Id.* at 20a-21a. On cross-examination, however, the doctor admitted that he did not see fingerprints on Knapps's shoulders, but

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[2] Evidence at Clark's separate trial showed that there were at least 45 bloodstains on Clark's jeans and 33 bloodstains on Clark's jacket. *See* Tr., Vol. 13, at 169-71, *State v. Clark* (Mar. 13, 2011).

rather a line of bruising, *id.* at 21a, which could have been caused by contact with hard objects, Tr. (Oct. 24, 2011), Vol. 42, R. 9604. And he stated that the fatal blow to Knapps's head likely occurred after he sustained defensive wounds to his hands and wrists. Pet. App. 21a.

Finally, the State called a crime-reconstruction expert to try to support its theory that petitioner participated in the fatal beating. This expert testified that, based on his review of the physical evidence, petitioner "was holding the victim down by both shoulders and that [petitioner], Clark, Carley, and Durham were in the bathroom." Pet. App. 35a. But on cross-examination, the expert admitted that petitioner's sweatshirt was found on the floor by the sinks in the bathroom, and that the transfer of blood to the sweatshirt could have taken place after the sweatshirt had been removed. *Id.* The expert further admitted that the defendants had control of the crime scene for an hour and a half after Knapps's death and made efforts to cover up the scene. *Id.*

In closing, the State emphasized that to support a first-degree murder conviction, it had to prove only a "specific intent to … inflict great bodily harm." Tr. (Oct. 27, 2011), Vol. 44, R. 10105; *see also* La. R.S. § 14:30(A) (first-degree murder requires *either* a "specific intent to kill" or "to inflict great bodily harm"). The State also argued that, at the very least, petitioner harbored such an intent "when he dragged Captain Knapps into that bathroom." Tr. (Oct. 27, 2011), Vol. 44, R. 10106; *see also id.* (asserting that petitioner "was actively participating in the great bodily harm which ultimately led to the murder of

Captain Knapps"). The State further maintained that petitioner "held Captain Knapps down … as [others] continued to beat and stab him." *Id.* But no such additional finding was required to convict.

The jury found petitioner guilty of first-degree murder. Pet. App. 37a.

2. Unlike its guilt-phase argument, the State's death-penalty argument hinged on the premise that petitioner had personally participated in Knapps's murder by holding Knapps down as he was fatally beaten. One of the State's experts—who never interviewed petitioner (Pet. App. 50a)—testified that petitioner's conduct showed that "he was capable of … going eye to eye with a person who had actually been kind to him … and who he knew was going to die, and [petitioner] knew he was going to be party to killing him, and … still went through it all the way." Tr. (Oct. 28, 2011), Vol. 45, R. 10405. According to the expert, petitioner remorselessly "extinguish[ed] the life" of Knapps. *Id.* at R. 10406; *see id.* at R. 10404 (noting that petitioner had "taken Captain Knapps' life").

During closing argument, the State emphasized that there is no distinction between "the person who is wielding the knife or wielding the hammer and the person who actually holds him down." Tr. (Oct. 28, 2011), Vol. 45, R. 10440. It referenced Knapps "bl[eeding] out … as he was held down by [petitioner]." *Id.* at R. 10438. And it called petitioner "a murderer among murderers." *Id.* at R. 10441.

The defense argued that petitioner had not directly participated in the killing of Knapps. *See* Tr.

(Oct. 28, 2011), Vol. 44, R. 10167; *id.* at Vol. 45, R. 10434; *see* La. C. Cr. P. art. 905.5(g) (listing as mitigating circumstance that "[t]he offender was a principal whose participation was relatively minor"). And it "presented voluminous testimony concerning the extreme neglect and abuse [petitioner] suffered as a child, particularly in the care of his mother." Pet. App. 39a.

The jury returned a verdict imposing the death penalty. Pet. App. 54a.

C. The State Discloses Edge's Confession

About four months after the penalty phase of petitioner's trial concluded, the State disclosed a 37-page transcript of a statement by Angola inmate Richard Domingue—a close friend of petitioner's co-defendant, Edge. Pet. App. 54a. The same prosecutors who tried petitioner obtained the statement from Domingue. And they did so four months *before* petitioner's trial began. *See* Interview of Richard Domingue Tr. (June 8, 2011), Supp. Vol. 8, R. 1629.[3] When they finally provided the statement to petitioner (because they were planning on using it against Edge at his trial), the prosecutors admitted that the statement "ha[d] not previously been provided to … [petitioner] by the State." State's Letter (Feb. 10, 2012), Supp. Vol. 8, R. 1667.

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[3] Citations to "Supp. Vol. _, R. _" are to the supplemental record on appeal in *State v. Brown*, No. 2016-KA-0998 (La.).

Domingue's statement describes how "Edge confided [in Domingue] that he and one of the other Angola Five inmates made the decision to kill Capt. Knapps." Pet. App. 154a. Domingue stated:

> I said how did everything turn out so bad to where ya'll had to kill Captain [Kn]apps. Because I just can't see, you had Foot [David Brown], who is huge. That's the black guy that was involved and all the rest of ya'll. Ya'll telling me ya'll couldn't overpower little Captain [Kn]apps, you know, to where you don't have to kill him. And he said oh no, he said we didn't have to kill him. He said we could have let him live. He said we did it. We made a decision to kill him to help our self. It's bigger than you know. …
>
> I said Barry, you telling me by killing a correctional officer in an escape attempt, how are you helping yourself any way, unless you trying to commit suicide by getting on death row. … And he was like you don't, you don't really understand you know, I'm saying there was more involved. But we could have let him live. *But me and Jeff[rey Clark] made the decision at that time because all these other mother fuckers that was involved they couldn't seem to get their head together when they were, you know, everything went down. He [Edge] said me and Jeff decided we're going to kill him. I mean it was just like shhh. It was like he flipped a switch and they killed him*.

Id. at 158a-159a (emphasis added; alterations in original).

The prosecutors then had the following dialogue with Domingue:

> Prosecutor: And Barry Edge told you we could have allowed him to live?
>
> Domingue: Yeah. Barry Edge said we could have let him live. We could have let him live.
>
> Prosecutor: But he had to die.
>
> Domingue: No, he said it was going to help us. It was going to help us so yeah, he had to die.
>
> Prosecutor: And he and, he and Jeffrey [Clark] made the decision.
>
> Domingue: He said him and Jeffrey did, were the only ones that were thinking rationally during this highly charged situation. And they made a decision to help their self to kill Captain [Kn]apps. But they could have let him live. And he bluntly said he didn't have to die.

Pet. App. 159a-160a (alterations in original).

Domingue also characterized Edge as lacking remorse for Knapps's death and "bragging." Interview of Richard Domingue Tr. (June 8, 2011), Supp. Vol. 8, R. 1643. Edge told Domingue: "It's like you resist and you get what you deserve." *Id.* And Edge noted "that Captain [Kn]apps you know, always pushed his weight around… He'd run around you know, like he's all that… And … he was an … asshole." *Id.* at R. 1664.

At the beginning of Domingue's conversation with Edge, Domingue specifically asked about petitioner, noting that "you had Foot [petitioner], who is huge."

Pet. App. 158a-159a. But Edge's description of Knapps's killing never references petitioner.

D. Post-Trial Proceedings

1. After the State disclosed Edge's confession, petitioner moved for a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963). At an evidentiary hearing before the same judge who presided over petitioner's trial, the judge heard testimony from Domingue, who described his friendship with Edge and offered a materially identical account of Edge's confession. *See* Tr. (Sept. 8, 2014), Vol. 48, R. 11191-92, 11205; *id.* at R. 11207 ("he said … everybody else, their head was all messed up when things went awry"); *id.* ("him and Jeff [Clark] decided Captain Knapps had to die"); *id.* at R. 11231 ("he explained to me that we didn't have to kill him; we made a decision to kill him, me and Jeffrey Clark"). Indeed, Domingue clarified at the hearing that when he told prosecutors "they could have let him live," he was referring to Edge and "Jeffrey Clark." *Id.* at R. 11226. Domingue also responded "right" when the State asked him whether Edge told him that Edge "and Clark alone decided to kill Captain Knapps." *Id.* at R. 11227. And Domingue confirmed that Edge "never discussed [petitioner]," and that Edge "never named anyone else" other than "Jeffrey." *Id.* at R. 11217, 11226. That was true even though Domingue himself raised petitioner's name to Edge by referencing "his large size." *Id.* at R. 11231.

Upon hearing Domingue's testimony and reviewing the parties' briefing, the trial judge held, as an initial matter, that Domingue's statement would have been admissible evidence at petitioner's trial. Tr. (Dec. 11, 2014), Vol. 48, R. 11286; *id.* at R. 11289,

11295-96. Turning directly to the *Brady* issue, the judge then found that "the evidence that was withheld was favorable to the defense [and] the prosecution knew of this evidence and did not disclose it to the defendant prior to his trial." Pet. App. 211a.

At the same time, the judge did not deem Edge's confession material to petitioner's guilt. Pet. App. 213a. To prove that petitioner was guilty of first-degree murder, the judge explained, "the State did not necessarily have to prove that [petitioner] had the specific intent to kill" so long as it proved "specific intent to inflict great bodily harm." *Id.*; *see* La. R.S. § 14:30(A).

But as to the penalty phase, the judge recognized that a different calculus applies because "evidence is often presented by the defendant, not to exculpate but to mitigate." Pet. App. 215a. "[L]ooking at the case in a collective and cumulative manner," and with the benefit of having presided over trial, the judge concluded that "there is a reasonable probability that the jury's verdict would have been different had the evidence not been suppressed." *Id.* at 219a. "Throughout the case," the judge explained, "[petitioner] attempted … to present a defense that he was, perhaps, less culpable than others in the case," and that "he did not have the specific intent to kill." *Id.* at 216a. Edge's confession would have "corroborate[d] to some extent [t]his defense." *Id.* at 217a. It would have indicated that "his participation in the crime was relatively minor." *Id.*

2. The State then filed a writ application in Louisiana's First Circuit Court of Appeal.[4] A divided First Circuit panel reversed the new-trial order. In a one-paragraph unpublished ruling, the majority declared that petitioner "ha[d] not shown that there is a reasonable probability that his sentence would have been different had the [Edge] statement … been disclosed." Pet. App. 208a.

3. Petitioner then filed a writ application in the Louisiana Supreme Court. In a 4-3 ruling, the Louisiana Supreme Court denied petitioner's application. Explaining its denial, the majority stated in a per curiam opinion that Edge's confession was "not favorable to [petitioner]" and "the failure to disclose the statement was not prejudicial to him." Pet. App. 201a.

Three Justices dissented. One of the dissenters, Chief Justice Johnson, explained that Edge's confession "supports [petitioner's] defense theory that he was less culpable in the killing of [Knapps]" and thus "could have been used by [petitioner] to persuade the jury that since he was not directly involved in the decision to kill Knapps, he should be sentenced to life imprisonment rather than given the death penalty." Pet. App. 204a-205a.

4. Under Louisiana law, a writ denial by the Louisiana Supreme Court "has no precedential value." Pet. App. 156a n.69 (citing cases). In addition, the filing of a writ does not preclude a defendant from tak-

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[4] Louisiana law provides appellate jurisdiction to review "error[s] of law" in new-trial orders. La. C. Cr. P. art. 858.

ing an ordinary appeal from his conviction and sentence, raising the same issue raised in the writ proceeding just like any other assignment of error.

Petitioner nevertheless sought this Court's review following the Louisiana Supreme Court's writ denial. The State opposed certiorari, largely on the grounds that the Louisiana Supreme Court's writ denial was not final and that the reasons provided for the denial were not precedential. *See* Br. in Opp. at 23-26, No. 15-8779 (May 13, 2016). This Court denied certiorari. *See* 579 U.S. 920 (2016).

E. Decision Below

Petitioner then took a direct appeal to the Louisiana Supreme Court, where the court for the first time considered the "full record and additional arguments advanced on appeal." Pet. App. 156a. As relevant here, a 4-3 majority rejected petitioner's *Brady* claim, holding that Edge's confession did not satisfy *Brady*'s favorability or materiality requirements.

As to favorability, the majority reasoned that Domingue's statement "simply does not exculpate [petitioner] and in that regard is not favorable to him." Pet. App. 160a. "While the statement certainly inculpates Edge and Clark as the individuals who made the decision to kill Capt. Knapps," the majority observed, "it provides no additional information as to who actually killed Capt. Knapps." *Id.* at 160-161a. The majority emphasized that "Edge never stated that [petitioner] was not present or not involved in the killing." *Id.* at 161a.

The majority further held that "the suppressed statement was not material … to the jury's decision to

impose the death penalty." Pet. App. 162a. The majority reasoned that the statement "does not preclude [or] speak to" petitioner's "formation of the necessary specific intent independent of co-defendants Edge and Clark" or "place [petitioner] outside the restroom when the fatal blows were delivered." *Id.* at 163a. The majority also recited the circumstantial physical evidence purportedly linking petitioner to the killing. *Id.* at 161a-162a, 164a. And it stressed that "the jury had the benefit of [petitioner's] statement …, but the jury obviously rejected this account." *Id.* at 164a.

Justice Genovese dissented, joined by Justices Hughes and Griffin. (Chief Justice Johnson, who dissented at the writ stage, was no longer on the court at this time.) The dissenters observed that Edge's confession "supported an otherwise unprovable statement, one in which [petitioner] argued that he had left the bathroom before Edge and Clark fatally attacked and murdered Capt. Knapps." Pet. App. 189a. In fact, the dissent explained, the confession "was the only piece of independent and direct evidence that could have corroborated [petitioner's] statement," *id.* at 193a, and "undermined the state's argument that a portion of [petitioner's] statement was a lie," *id.* at 190a. The dissent noted that petitioner could "have relied on Edge's own statement to Domingue that Clark and Edge were the ones who decided to kill Capt. Knapps, while also pointing to Clark's shoeprint in the blood in the bathroom and evidence that Edge had changed his clothing in order to hide evidence." *Id.*

According to the dissent, the majority also erred in relying on the fact that Domingue's statement "contains no mention of [petitioner], but inculpates co-defendants, Edge and Clark." Pet. App. 191a. Even if the statement does not mention petitioner, the dissent explained, it "corroborates [petitioner's] account and supports the defense theory that [petitioner] was less culpable because he was allegedly not present at the time of Capt. Knapps' death." *Id.*

The dissent further emphasized that Edge's confession would have rebutted the State's arguments "concerning [petitioner's] lack of remorse and his future dangerousness," because these arguments were "based on the premise that [petitioner] had participated in the actual killing." Pet. App. 191a. Petitioner "was deprived of showing a lesser moral culpability for the murder," the dissent maintained, "a defense which remains one of the significant issues in capital sentencing." *Id.* at 193a (internal citations and quotations omitted).

On March 25, 2022, the Louisiana Supreme Court denied rehearing over dissents from Justices Genovese, Hughes, and Griffin. Pet. App. 220a.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's *Brady* precedent and erroneously leaves petitioner sentenced to death. Furthermore, six state high courts or federal courts of appeals have precedent that would have dictated upholding the trial court's order requiring a new sentencing proceeding. But because petitioner's case arose in Louisiana, he sits on death row. Only this Court can rectify that incongruity and

reiterate *Brady*'s teachings to Louisiana prosecutors and courts.

I. The Decision Below Contravenes The Clear Dictates Of *Brady*

1. "Under *Brady* [*v. Maryland*, 373 U.S. 83, 87 (1963)], the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75 (2012). Here, the State does not contest that it withheld Edge's confession from petitioner until four months after his guilt and penalty-phase trials were complete. Pet. App. 152a n.66. The only questions, then, are whether Edge's confession was favorable to petitioner and material to his death sentence.

Evidence is favorable if, had it been "disclosed and used effectively," it "may [have] ma[d]e the difference" in the defendant's case. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Favorable evidence need only have "some weight [or] tendency" to help the defendant. *Kyles v. Whitley*, 514 U.S. 419, 451 (1995).

Evidence is material "when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). A defendant "need not show that he 'more likely than not' would have" received a different result "had the new evidence been admitted." *Id.* (quoting *Smith*, 565 U.S. at 75). In other words, the materiality inquiry does not turn on "whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient

to support the jury's conclusions." *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999). Rather, the defendant "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry*, 577 U.S. at 392 (quoting *Smith*, 565 U.S. at 75).

This Court has also stressed the "distinction between the materiality of … suppressed evidence with respect to guilt and punishment." *Cone v. Bell*, 556 U.S. 449, 473 (2009). In *Brady* itself, for instance, "Brady took the stand and confessed to robbing the victim and being present at the murder but testified that his accomplice had actually strangled the victim." *Id.* (describing the facts of *Brady*). After a jury convicted Brady of first-degree murder and sentenced him to death, he discovered that the State had suppressed a statement by his accomplice stating that although Brady had wanted to strangle the victim, the accomplice had in fact done so. *Brady*, 373 U.S. at 84, 88. Even though the co-defendant's confession implicated Brady as a principal in the murder (and thus was immaterial to Brady's first-degree murder conviction), the Court held the confession *was* material to Brady's death sentence. *See id.* at 87-88.

Similarly, in *Cone*, a capital defendant asserted an insanity defense that he was under the influence of drugs when he committed the murders at issue. The State suppressed evidence that "strengthen[ed] the inference that [the defendant] was impaired by his use of drugs around the time his crimes were committed." *Cone*, 556 U.S. at 470. While the Court concluded that the suppressed evidence "f[ell] short of being sufficient to sustain [the defendant's] insanity de-

fense," it vacated the defendant's death sentence because the lower courts failed to consider whether "the suppressed evidence … may have persuaded the jury that [the defendant's] drug use played a mitigating, though not exculpating, role in the crimes he committed." *Id.* at 474-75. The Court emphasized the "lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case." *Id.* at 474.

In short, *Brady* and *Cone* dictate that evidence is material to the imposition of a death sentence when, "viewed cumulatively," it "may have … played a mitigating, though not exculpating, role in the crimes [the defendant] committed." *Id.* at 475. The ultimate question is "whether the suppressed evidence might have persuaded one or more jurors" to support "imprison[ing] [the defendant] for life rather than sentenc[ing] him to death." *Id.*

2. This is not a close case under these principles. As explained above, at petitioner's penalty-phase trial, the State pressed the theory that petitioner held down the victim as he was beaten to death. *See supra* at 9. Based on this factual allegation, the State argued that petitioner intended to kill the victim and played a primary role in the victim's murder. *See id.* As a result, the State asserted, petitioner bore substantial moral culpability and posed a threat of violence in prison. *See id.* The prosecutor argued, for instance, that petitioner was a "murderer among murderers," and that the victim "bled out … as he was held down by [petitioner]." Tr. (Oct. 28, 2011), Vol. 45, R. 10438, R. 10441.

In contrast, petitioner maintained that he dragged the victim into the bathroom while Knapps was bleeding but still talking and moving; that he then left the bathroom while Edge and "some white guy" remained; and that his co-defendants killed the victim after petitioner's exit. *See supra* at 5-6. Accordingly, petitioner argued that he sought only to assist in detaining the victim and other guards; that he never intended for anyone to get hurt; and that he played a relatively minor role in the events leading to the victim's death. *See id.*; *see supra* at 9-10.

But a key deficiency plagued petitioner's case at trial: it rested exclusively on his own statement to police. Consequently, the State was able to argue that petitioner had lied to the police about leaving the bathroom before the victim was killed. To be sure, the State presented no direct evidence supporting its theory, instead relying on "evidence [that] ultimately is circumstantial as to who killed Captain Knapps." Pet. App. 217a. And petitioner was able to question the value of this circumstantial evidence. But petitioner lacked any independent evidence corroborating his own alternative account of what happened.

Edge's confession would have supplied that missing evidence—and powerfully so. The confession makes clear that once the escape attempt had gone awry, Edge concluded that "these other [prisoners] that was involved they couldn't seem to get their head together." Pet. App. 159a. That account aligns with petitioner's statement that he played no role in the decision to kill the victim. Instead, "at that time"—i.e., *after* petitioner had exited the bathroom—Edge and Clark "made the decision" to kill the victim, and

"flipped a switch and they killed him." *Id.* at 158a-159a. They did so even though they "could have let him live," *id.* at 160a—perhaps because Edge thought the victim "pushed his weight around" and was an "asshole," Interview of Richard Domingue Tr. (June 8, 2011), Supp. Vol. 8, R. 1664.

All in all, there can be no doubt that Edge's confession is favorable and material. It is favorable because it would have had "some weight" or "tendency" to support petitioner's theory that he left the bathroom before two of his co-defendants killed the victim. *Kyles*, 514 U.S. at 451. And it is material because it would have bolstered petitioner's mitigation argument that he did not intend for anyone to die and played a relatively minor role in the victim's death. *See Lockett v. Ohio*, 438 U.S. 586, 597, 604 (1978) (mitigating factors include "lack of specific intent to cause death" and defendant's "relatively minor part in the crime"); La. C. Cr. P. art. 905.5(g) (requiring capital jury to consider whether a defendant is "a principal whose participation was relatively minor"); *id.* art. 905.5(h) (allowing capital jury to consider "[a]ny other relevant mitigating circumstance"). Recognizing as much, the trial judge vacated Brown's death sentence and ordered a new penalty-phase trial. *See* Pet. App. 210a-219a. And three Justices on the Louisiana Supreme Court on direct review would have affirmed that order.

3. A bare four-Justice majority of the Louisiana Supreme Court, however, resisted this straightforward reasoning and held that Edge's confession was neither favorable nor material. Pet. App. 164a. The

majority's analysis flouts precedent and common sense.

As to favorability, the Louisiana Supreme Court reasoned that "[w]hile the statement certainly inculpates Edge and Clark as the individuals who made the decision to kill Capt. Knapps," it does not "state[] that [petitioner] was not present or not involved in the killing." Pet. App. 160a-161a. But the fact that Edge stated that *only* he and Clark "made a decision" to kill Knapps at the very least *strongly implies* that petitioner never made such a decision. And the fact that Edge stated that "he flipped a switch and they killed him" implies that *only* he and Clark killed Knapps. When co-defendant X says that he and co-defendant Y "made a decision" to kill the victim and then "flipped a switch and they killed him," the natural inference is that defendant Z did not also make that decision or carry it out. If Z had also been intimately involved in the killing, co-defendant X likely would have said so.

Ordinary speech confirms this inferential logic. If one person tells her friend that she went with several people to a restaurant for dinner, and that she and one of those persons then went to a movie, the natural inference is that the other dinner attendees did not also go to the movie. Similarly, if a student confesses to the principal that he and another member of the science club stole chemicals from the lab during a club meeting, the natural inference is that other club members—even if also present—did not participate in stealing the chemicals. Finally, if a lawyer practicing before this Court were told that one Justice joined another's concurring opinion, the natural inference

would be that other Justices did not also join. In each of these scenarios, it matters little that the speaker did not explicitly exclude the participation of all potential participants—even absent such an express statement, a listener would conclude that they were not involved.

As to materiality, the Louisiana Supreme Court similarly maintained that Edge's confession "does not preclude, and indeed does not speak to, [petitioner's] formation of the necessary specific intent independent of co-defendants Edge and Clark." Pet. App. 163a. But under the materiality standard, the question is not whether the suppressed evidence *precludes* the jury's verdict, or whether it speaks directly to the defendant's culpability. The proper test is whether "there is *any* reasonable likelihood [the evidence] *could* have affected the judgment of the jury." *Wearry*, 577 U.S. at 392 (emphasis added) (internal quotation marks omitted). And where, as here, the defendant maintains he did not participate in a killing and a co-defendant says he and another person conceived of and committed the killing, there is a reasonable likelihood that the co-defendant's statement could have affected the jury's decision to impose a death sentence.

This proposition follows directly from *Brady* itself. There, as here, the defendant denied participating in the actual killing of a victim. *Brady*, 373 U.S. at 84. And there, as here, the State suppressed a co-defendant's confession that the co-defendant committed that killing. *Id.* at 84, 88. In *Brady*, this Court held that the State's action violated due process because the

suppressed confession could "exculpate [Brady] or reduce [his] penalty." *Id.* at 87-88. The same result should follow here.

The Louisiana Supreme Court also reasoned that Edge's confession was immaterial because "the jury had the benefit of [petitioner's] statement that he reassured Capt. Knapps that he would not be harmed and that Capt. Knapps was alive when []he left the restroom, but the jury obviously rejected this account." Pet. App. 164a. But once again, this reasoning ignores that the jury could have accepted the State's theory that petitioner's account was a lie because he had no independent evidence to substantiate it. The Edge confession would have provided that independent evidence. *See Cone*, 556 U.S. at 472 n.18, 475 (finding suppressed evidence "may well have been material" where the defendant otherwise had "no independent evidence corroborat[ing]" his assertion that he had a substance-abuse problem). With such evidence, it is reasonably likely that the jury could have believed petitioner's statement that he left the bathroom before Knapps was murdered. And in turn, it is reasonably likely that at least one juror could have concluded that life imprisonment—rather than a death sentence—was the proper punishment for petitioner.

II. The Decision Below Conflicts With Decisions From Several Other Courts

In addition to conflicting with this Court's *Brady* precedent, the decision below conflicts with decisions from numerous other courts. Had petitioner's case arisen in one of those jurisdictions, he would not still remain sentenced to death.

In particular, at least four state high courts and two federal courts of appeals have recognized that, when a crime involved multiple perpetrators, a statement that some of the perpetrators committed a particular criminal act—without mentioning the defendant—is material and favorable under *Brady* because it suggests that the defendant did *not* also commit that act. That is true even if the statement does not expressly negate the defendant's involvement. And these courts recognize that statements of this kind can be particularly material to capital proceedings, which often turn on a defendant's relative responsibility vis-à-vis other perpetrators.

In *State v. Brown*, 873 N.E.2d 858 (Ohio 2007), the prosecution suppressed a statement by a man named Donley (not the defendant) claiming that he and two other unidentified men had "shot the two" victims and that Donley "had been responsible for the shooting." *Id.* at 867. The defendant's "theory of the case acknowledged that [he] was involved in the deaths of [the victims], but contested whether he had acted with the level of intent required to support" a death sentence. *Id.* at 860. Even though the suppressed statement by Donley did not explicitly exculpate the defendant—the defendant theoretically could have been one of the unidentified men involved in the shooting—the Ohio Supreme Court held that it was material to the defendant's penalty-phase argument that he lacked "prior calculation and design." *Id.* at 867. The suppressed statement "offer[ed] independent evidence," the court reasoned, suggesting "that [the defendant] did not pull the trigger and that a different party was responsible for the

deaths." *Id.* at 868. And, the court stressed, "two life sentences for murder is a decidedly different outcome from a sentence of death." *Id.* at 867.

In *Goudy v. Basinger*, 604 F.3d 394 (7th Cir. 2010), the prosecution argued that the defendant and one other man each shot the victim in his car, with the defendant shooting from the driver's side. *Id.* at 396-97. The prosecution suppressed a statement from a witness suggesting that a different man shot the victim from the driver's side. *Id.* at 397. The state court held that this statement was not material because it "'does not mean that [the defendant] *could not have been* the other shooter' and 'does not mean that [the defendant] *was not* the other shooter.'" *Id.* at 400 (quoting *Goudy v. State*, 2006 WL 370710, at *7 (Ind. Ct. App. Jan. 12, 2006)). The Seventh Circuit, however, granted habeas relief, holding that the state court unreasonably applied this Court's *Brady* jurisprudence by "requir[ing] that [the defendant] prove the new evidence *necessarily* 'would have' established his innocence." *Id.* (emphasis added). It was enough to mandate relief that the statement's natural import indicated that the defendant was not the shooter.

In *Jones v. Jago*, 575 F.2d 1164 (6th Cir. 1978), the prosecution argued that the defendant led a meeting in which he directed a group to commit certain shootings and supplied one of them with a gun. *Id.* at 1166. The prosecution suppressed a statement by one of the crime participants recounting the incident, which "made no mention at all of any meeting" or of the defendant "having furnished the gun." *Id.* The Sixth Circuit affirmed the district court's grant of habeas relief, holding that a statement by a participant in a

crime that "makes no reference even to the presence of the defendant or his participation must be viewed as a potentially powerful exculpation." *Id.* at 1168. The court reasoned that the statement supported "at least a reasonable inference that [the defendant] did not participate in the discussion … leading to the shootings" or supply the weapon. *Id.*

In *State v. Phillips*, 940 S.W.2d 512 (Mo. 1997), the prosecution suppressed evidence that the defendant's son confessed that "he and [the defendant] killed [the victim]" and that the son "dispos[ed] of the body." *Id.* at 517. While the court held that this evidence was not material to the defendant's guilt, it held that it was material to her sentence because it "undermine[d] confidence in the imposition of the death penalty." *Id.* Specifically, the court reasoned that the son's "admission that he was the one who [disposed of] the body, with the inference that [the defendant] did not do so herself, is both exculpatory and material to the issue of [the defendant's] punishment." *Id.*

In *Commonwealth v. Green*, 640 A.2d 1242 (Pa. 1994), the prosecution suppressed evidence that a co-defendant told someone at a bar "that she did something really big; that she could sit big time for it; that she shot someone; and that she killed a cop." *Id.* at 1244. Because the victim had been shot twice, this suppressed statement did not preclude the possibility that the defendant *also* shot the victim. Still, the court held that the suppressed statement was "clearly relevant and material to the issue of [the defendant's] punishment" because it "implicated only [the co-defendant]" and thus would have "provided the defense with strong evidence of mitigation." *Id.* at 1246.

Finally, in *Rogers v. State*, 782 So. 2d 373 (Fla. 2001), the prosecution suppressed evidence that an informant had overheard a conversation between three individuals "suggesting that they may have been involved in the … robbery and murder" for which the defendant and a co-defendant had been convicted. *Id.* at 382. The Florida Supreme Court held that this evidence was favorable and material because it "could have been used to show that another person … and not [the defendant]" committed the crime. *Id.* at 383. Unlike the Louisiana Supreme Court, the Florida Supreme Court did not find it dispositive that the suppressed statement mentioned only others' involvement without expressly saying that the defendant was not *also* involved.

In sum, all of the jurisdictions just discussed recognize the commonsense inference that the Louisiana Supreme Court denied here—namely, that when one person admits that he and certain others committed a criminal act, a natural assumption is that someone else not named in the confession did not also commit the act. All these other courts would have therefore agreed with the trial court's decision to grant petitioner a new penalty-phase trial. Only this Court can resolve the incongruity with the Louisiana Supreme Court, cure the injustice here, and set straight the law for future prosecutions in Louisiana.

III. The Issue Presented Is Important, And This Case Is An Excellent Vehicle For Expounding On *Brady*

1. The Court regularly grants certiorari in cases where petitioners present strong *Brady* claims. *See Turner v. United States*, 137 S. Ct. 1885 (2017);

Wearry v. Cain, 577 U.S. 385 (2016); *Smith v. Cain*, 565 U.S. 73 (2012). This is because of *Brady*'s "overriding concern with the justice of the finding of guilt" or the imposition of punishment. *United States v. Bagley*, 473 U.S. 667, 678 (1985). Where prosecutors do not faithfully discharge their duty to disclose exculpatory evidence, this Court's supervisory authority is implicated—as it has been in past cases arising in Louisiana. *See Wearry*, 577 U.S. at 392 ("Beyond doubt, the newly revealed evidence suffices to undermine confidence in [defendant's] conviction."); *Smith*, 565 U.S. at 76-77; *Kyles v. Whitley*, 514 U.S. 419, 454 (1995).

That this is a capital case reinforces the need for review. This Court frequently grants certiorari in capital cases even where (unlike here) no split of authority exists. *See, e.g.*, *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022); *Andrus v. Texas*, 140 S. Ct. 1875 (2020); *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Rippo v. Baker*, 137 S. Ct. 905 (2017); *Foster v. Chatman*, 578 U.S. 488 (2016). That practice flows from the Court's recognition that its "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987). "The alternative to granting review," the Court has explained, is risking that a defendant "endure yet more time on [a state's] death row" under a sentence that is constitutionally flawed. *Wearry*, 577 U.S. at 396.

That the decision below creates a split of authority on a recurring constitutional issue only underscores the need for this Court's intervention. Indeed, the depth of the conflict likely underrepresents the issue's

salience. Prosecutors often procure, or learn of, confessions from one participant in a multi-party crime. When those confessions fail to implicate the defendant in a relevant way, they are so plainly exculpatory that prosecutors presumably almost always turn them over. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("the ends of justice" require the admission of third-party confessions where they tend to exonerate the defendant). And when prosecutors disclose evidence, no *Brady* issue can arise. The Louisiana Supreme Court's decision, however, encourages prosecutors in that State and elsewhere to "tack[] too close to the wind," *Kyles*, 514 U.S. at 539, and to withhold favorable and material evidence. This Court should not tolerate that temptation.

2. This case is also an excellent vehicle for the Court's review. The Louisiana Supreme Court's decision affirmed petitioner's conviction and death sentence. The case therefore is unquestionably a "final" judgment for purposes of 28 U.S.C. § 1257(a). And because this case comes to the Court on direct review, it is necessarily free of any complication that might arise on federal habeas review of a state-court judgment. Nor does it arise on the Court's emergency application docket, as capital cases often do.

The *Brady* issue here also squarely implicates the frequently recurring fact pattern that gives rise to the question presented. The killing in this case was potentially committed by multiple persons, and Edge's confession implicates fewer than all of the suspects. The prosecution unquestionably suppressed the confession. And the *Brady* issue is outcome determina-

tive for petitioner: If petitioner is correct that the suppressed confession was favorable and material to his effort to avoid a death sentence, he is entitled to a new penalty-phase trial—just as the trial court awarded him before the Louisiana Supreme Court's flawed decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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