No. 22-77

In The
Supreme Court of the United States

DAVID BROWN,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

The Respondent objects to Petitioner's statement of the "Question Presented," as it frames the issue more broadly that his argument does, and appears to seek a determination that certain types of undisclosed evidence are always favorable and material, contrary to this Court's *Brady* jurisprudence, which requires that the materiality of the undisclosed evidence be determined in the context of the entire record. Respondent submits that the question presented in the instant matter is:

Whether Petitioner received a fundamentally unfair trial of the penalty phase of his case due to the non-disclosure of the Domingue statement?

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STATEMENT OF THE CASE AND RELEVANT FACTS

I. Relevant Facts

A. Guilt Phase of the Trial[1]

On the evening of December 28, 1999, six inmates—Petitioner, Robert Carley, Jeffrey Clark, Joel Durham, Barry Edge, and David Mathis—attempted to escape from the Louisiana State Penitentiary, where they were lawfully confined after being convicted of unrelated homicide offenses. During the course of the escape attempt, Captain David Knapps was beaten, stabbed, and bludgeoned to death in the security restroom of the Camp D Education.

Michael Robinson, an inmate trustee testified that prior to the attack, Petitioner showed an interest in the whereabouts of Captain Knapps and Lieutenant Chaney. He also observed Petitioner loitering in the hallway with Carley and Clark near a window that had been covered with paper. Later, while waiting for Lieutenant Chaney to retrieve the kitchen keys from the Bundle Room, Robinson observed Petitioner, Carley, and Clark loitering in the hallway of the Education Building. As Lieutenant Chaney exited the Education Building, Robinson observed Captain Knapps enter the Education Building and walk in the direction of the Security Restroom, where the offenders were waiting.

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[1] A more detailed statement of the facts is set forth in the Louisiana Supreme Court's opinion addressing Petitioner's appeal on direct review. *See* Pet. App. 2a-59a.

In his statement to law enforcement,[2] Petitioner described the attack from the point that Captain Knapps entered the Education Building:

> "[Captain Knapps] went in one them bundle rooms to put something up or do something, I know he was around the bundle room, goes down the hallway, he goes down the hall, and um, goes to the bathroom, he goes to the bathroom, we all like migrate to the back."

When Captain Knapps exited the bathroom, Joel Durham a/k/a "Miaggi" attacked Knapps from the front while Barry Edge attacked him from behind—with a mallet strike to the head:

> Q: Did he [Knapps] immediately start bleeding from the head [after being hit with the mallet]?
>
> A: Yeah, like I said, I was coming down the hallway he was bleeding, as I got closer to him he was bleeding, shit, uh, he goes to the ground, they still stabbing him, Miaggi [Joel Durham] takes the radio, Miaggi has the radio. Tell me help them with Knapps, Knapps nodding like to them, "Why me, what have I done to y'all." I go in the bathroom. Bring him into the bathroom—
>
> Q: So, you drug him into the bathroom?
>
> A: Yeah.
>
> Q: How, by his heels?

[2] State's Exhibit 76.

Q: Up under his arms?

A: Just, his clothes, just, uh, yeah, um—

Q: Was he face down?

A: Yeah, he was, you know, kicking me and stuff. . . .

* * *

Q: Okay, uh lets go back uh to when uh Knapps was hit in the hall by Barry, you said he was hit by Barry with a mallet in the hall, you drug him to the, into the bathroom?

A: Yeah, he was right there by the men's room.

Q: Did he continue to struggle in the bathroom, you said you held his shoulders down, you said, and then Barry hit him again in the head and then you left?

A: Yeah, soon as Barry left, I seen what was happening I just seen what was happening.

Q: You was kinda holding him, was Captain Knapps struggling, trying to fight y'all?

A: Yeah, he was still, still up.

Q: You was trying to hold him?

A: Yeah.

Q: Okay. After that last hit did he stop moving?

A: No, he didn't stop moving, he still was moving, he still—

> Q: But you saw blood coming from his head?
>
> A: Yeah, I seen blood, you know, that's how I got the blood on my hands because like right then blood was everywhere. . . .

Photographs of the Security Restroom introduced at trial depicted blood spattered and smeared on walls, the floor, in the bathroom stall, and on the toilet. When Petitioner was asked if Knapps was "bleeding and in pretty bad shape" when he left the Officer's Restroom, Petitioner said, "yeah, he was bleeding, he was bleeding. Um, like I told you, last time I was in the room you know, he was still moving."

Upon leaving the Security Restroom, Brown participated in an attack on Lieutenant Chaney, who had returned to the Education Building:

> Chaney and Miaggi [Joel Durham] start fighting, Chaney and Miaggi started fighting in the bundle room, they fighting in the bundle room, Chaney goes down, I help them with that one, Miaggi grabs his radio, uh, one of the inmates, a few, a few of the inmates come down there everybody's like looking and tripping at all this here. So, um, I remember, I remember grabbing an inmate, I'm going to grab him, Axle, what I'm saying, was like grabbing an inmate and uh I just grabbed him, and I just looked at him, I was, the guy, you know the guy got killed, Axle [David Mathis, who was shot in the face] he had, uh, he had a knife and was trying to round everybody up, you know.

[Q: He had what?]

A knife, a knife.

[Q: He was trying to round all the inmates up?]

Yeah, and move everybody back to the building. So I'm like there with everybody, and um, looking around, and I made Chaney come out the door, he wouldn't come out the door like this old girl here, and he came out the door and hollered "Help". So I started walking back up there so I could help. James [sic] pulled back the girl, she was (inaudible). Uh, we go to bring him in the room, um, got him in that room and I tied his shoe laces, told me to gag him, so I gagged him.

[Q: That's in the class room?]

That's in the class room.

[Q: Who told you to gag him, Miaggi?]

Somebody brought me all this right here and told me to gag him, so I got to his side, I go to gag him, take the sock out your mouth, I tied his shoe string. Uh, like I told the officer earlier I don't remember him being handcuffed, sat him up on the pulpit, or what you want to call that thing, looked around and the woman come crawling in, female officer, crawling in the room, get her, remember tying her shoe strings, remember tying her shoe strings, she sat right next to the Lieutenant.

When Robinson went to check on Lieutenant Chaney, he saw the security keys in the bundle room door. Inside the Bundle Room, he saw Lieutenant Chaney on the floor with Petitioner at his feet and Durham at his head, restraining him. Petitioner tried to pull Robinson into the Bundle Room, but Robinson twisted out of his grasp and exited the building. Robinson saw Carley and another inmate grab Sergeant Walker and push her into the building. Lieutenant Chaney managed to make it to the doorway, but was pulled back into the building by Petitioner and Clark. Lieutenant Chaney and Sergeant Walker were secured and placed in a classroom, but not before Sergeant Walker was able to activate her security beeper. Robinson jumped a fence and alerted security.

Theodore Butler and Earl Lowe testified that Petitioner and Clark each had a radio and a pair of keys in their hand when they entered the Band Room. Petitioner spoke into the radio and stated that "they had taken control of the building" and "they had 26, approximately 26 hostages—among which we were included—and that they had some demands." Butler was told: "if we wanted to leave, we could leave, but if we did, it would be at the risk of being shot, because they had men with guns on the building." Lowe testified that Petitioner said, "Look, man, we might as well tell them. We got Knapps in the bathroom. We knocked his bitch ass out in the bathroom."

Dennis Taylor encountered Petitioner and several other perpetrators in the hallway. When he informed

them that he wanted out of the building, Petitioner offered him a set of keys.

Gregory Wimberly testified that Petitioner entered the Legal Office with a set of keys in his hand, asked the inmates if they wanted to watch a movie, and said something like "it's a good time to die."

While detained in Classroom 1, Lieutenant Chaney, observed Petitioner walking in and out of Classroom 1 and talking to Edge, who was guarding him and Sergeant Walker. It appeared that Petitioner was "giving orders," and Petitioner delivered a mallet to Edge.

At some point, Carley, an ice pick in his bloody hands, retrieved Sergeant Reddia Walker from Classroom 1. Holding the ice pick to her throat, he escorted her to the Bundle Room, where Petitioner was waiting, telephone in hand and flanked by Clark, who wanted to know how to access an "outside line." The phone rang, Petitioner answered it, and he spoke with the caller. Subsequently, offenders were advised to dial a number that was dispatched on the radio. Petitioner dialed the number, and directed Clark to get Carley. When Carley returned, he threatened Walker with the knife again and ordered her to speak into the phone. She spoke a few words before Carley snatched the phone. Several other perpetrators entered the Bundle Room before a third telephone call was received. Petitioner answered the call and identified the caller as Warden Cain. As a result of the conversation, three perpetrators—including Petitioner—agreed to surrender.

When Petitioner, Carley, and Clark exited the Education Building and surrendered, law enforcement officers gained entry into the Education Building and found the lifeless body of Captain Knapps in the Security Restroom. Warden Cain then instructed the TACT members to immediately rescue Lieutenant Chaney and Sergeant Walker. The events that followed resulted in the death of co-perpetrator Joel Durham, and the capture of the remaining co-perpetrators (David Mathis and Barry Edge).

In addition to the testimony of individuals present in the Education Building during the incident, the jury was presented with physical evidence and expert testimony establishing Petitioner's direct participation in the fatal attack on Captain Knapps.

Dr. Alfredo Suarez, a forensic pathologist, conducted the autopsy of Captain Knapps. Captain Knapps sustained three major blows to the head—including one to the back of the head that caused the occipital bone to fracture and become embedded into the cerebrum. Dr. Suarez testified that this blow would have rendered Captain Knapps unconscious. Captain Knapps' face had been "badly beaten"—there was bruising around his eyes, lacerations on both lips, loose teeth, and a dislocated dental plate. Captain Knapps had also been stabbed—four times, three times to the "lateral chest wall" (including a stab to the spleen) and one time to the neck. There were defensive wounds on Captain Knapps hands and wrists, and symmetrical bruising to the superior aspect of the top of each of Captain Knapps' shoulders.

Dr. Suarez explained that his ability to state the sequence of events was limited, but that: (i) the defensive wounds must have come before the blow to the back of Captain Knapps' head, confirming that Captain Knapps was indeed attempting to resist his attackers; (ii) that the injuries which resulted in bleeding were inflicted while Captain Knapps was still alive; and (iii) the stab wound to the spleen probably came after Captain Knapps was dead. Dr. Suarez also testified that the symmetrical bruising on the top of Knapps' shoulder was "compatible with somebody putting pressure upon those areas of the body," and that the injuries to Knapps' face were more consistent with punches and kicks than with impact with an inanimate object.

Crime scene evidence presented to the jury included the following:

- The night of the offense, Petitioner was visually inspected by Alejandro Vara of the Louisiana State Police (now with one of several crime laboratories serving the United States Army), who observed "a large blood stain" on the bottom-right portion of Petitioner's jeans, as well as blood on Petitioner's hands and on the nail beds of his fingers. R. 9695-9696.

- The blood on Petitioner's hands and nail beds, according to the DNA, belonged to Captain David Knapps. R. 9742.

- The blood on Petitioner's jeans had soaked all the way through his jeans and through his thermal underwear, and to his socks. That

blood, according to the DNA, belonged to Captain David Knapps. R. 9754-9755.

- A pair of large boots—Size 14D—was abandoned by their wearer and located in Classroom 1. There was blood on those boots, and that blood, according to the DNA, belonged to Captain David Knapps. The "ownership biology" of the boots indicated that they were worn by Petitioner, who was shoeless when he surrendered. R. 9357-9358, 9704, 9744, 9794-9798, 9851-9852.

- The sweatshirt Petitioner wore when processed by Alejandro Vara had no blood on it, which was inconsistent with Brown's statement of having held Captain Knapps down during the beating, but a 2XL sweatshirt was recovered from the Officer's Restroom. The "ownership biology" of the sweatshirt indicated that the sweatshirt was worn by Petitioner. The sleeves of the sweatshirt had spatter patterns consistent with "blood in flight" from a distance of no more than three feet away—and that blood, according to the DNA, belonged to Captain David Knapps. R. 9374-9375, 9808-9809, 9833, 9852, 9930-9931.

- Petitioner attempted to destroy evidence by washing with water, as evidenced by the "dilute blood" on the sleeves of the 2XL sweatshirt recovered in the Officer's Restroom and the relatively small amount of blood on his hands (the testimony established that it is hard to remove blood from the nail beds where

the blood was located). R. 9343-9345, 9930-9932.

- Petitioner's wallet was recovered from the jeans he was wearing, and inside the wallet was an inscription, "Remember, you're nobody until you've beaten the living hell out of somebody." R. 9925-9926

Colonel Timothy Scanlan, an expert in blood stain pattern analysis and crime scene reconstruction, explained that "most of the bloodshed in this case is below three feet. It's pretty low to the ground." From this, he opined that Captain Knapps was not standing up when the blows were inflicted to his person. This opinion was bolstered by the the lack of blood on Captain Knapps' pants and lower body. The presence of blood on top of the Size 14D shoes showed that the wearer of the shoes was in proximity to the victim while the victim was shedding blood. The quantity of blood present on Petitioner's blue jeans showed "secondary transfer"—blood soaked through the jeans, to the long underwear, to the socks—which reflected extended (rather than "casual") contact with "a replenishing blood source." Moreover, "on the left leg, there is—on the front, additional caked-on blood. It's pretty thick. It's not consistent with just a transfer, but it's thick blood on the pants." Blood spatter on the cuffs of the 2XL sweatshirt showed that the wearer's hands were in close proximity to the victim as the victim's blood was shed. Colonel Scanlan testified that the only persons he could link to the Officer's Restroom through blood

evidence were Petitioner, Jeffrey Clark, Robert Carley, and Joel Durham.

Larry Renner testified for the defense as an expert in bloodstain pattern analysis and crime scene reconstruction. He criticized the manner in which the evidence was collected and preserved but acknowledged that he could not disagree with conclusions drawn by State witnesses. He agreed that the Size 14D shoes "came back to wearer biology for David Brown," that the 2XL sweatshirt was "worn by David Brown," that Captain Knapps' blood was on the sweatshirt and on Petitioner's jeans, that the likely source of the blood was Knapps' head, and that the bloodstains could have been deposited "as David Brown was holding Captain Knapps down by both of his shoulders." The following exchange occurred during the prosecutor's cross-examination of Renner:

> Q: Right. In his statement he admits to being an active participant in the murder of Captain Knapps?
>
> A: He's holding him down, he's moving him. Nothing in his statement is saying he's stabbing, beating, hammering.
>
> Q: You don't think that if I'm holding a man down while other people are beating, stabbing, stomping him, that I'm an active participant in his murder?
>
> A: You're involved, you're directly involved, but you're not the one inflicting the wounds.

R. 10038.

B. Penalty Phase of the Trial

The penalty phase of the trial focused on five basic categories of information: (i) the evidence presented during the guilt phase of trial; (ii) victim impact evidence; (iii) evidence of Brown's prior criminality; (iv) testimony concerning the abuse experienced by the Brown as a child; and (v) evidence from "risk assessment" experts. *See* Pet. App. 37a-53a.

II. Proceedings Through Conviction and Sentence

On March 15, 2004, a West Feliciana Parish grand jury returned an indictment charging Petitioner, Barry Edge, Robert Carley, Jeffrey Clark, and David Mathis with the first degree murder of Captain David Knapps. Petitioner and his co-defendants were subsequently severed for trial. A severed, amended indictment was filed on February 5, 2010 as to Petitioner.

Petitioner was tried in October of 2011, with the jury returning a verdict of guilty as charged of first degree murder on October 27, 2011.

On October 28, 2011, the jury returned a verdict of death, finding that five aggravating circumstances had been proven beyond a reasonable doubt: 1) the defendant was engaged in the perpetration or attempted perpetration of the aggravated kidnaping of Lieutenant Douglas Chaney and Sergeant Reddia Walker; 2) the defendant was engaged in the perpetration or attempted perpetration of an aggravated escape; 3) the victim,

Captain David Knapps, was a peace officer engaged in the lawful performance of his duties at the time of the murder; 4) the defendant was previously convicted of an unrelated murder; and 5) the defendant knowingly created a risk of death or great bodily harm to more than one person. The trial court sentenced Brown to death on November 16, 2011.

III. Motion for New Trial

On June 8, 2011, after Clark's trial, but prior to the trials of Carley, Petitioner, and Edge, and prior to the guilty plea of Mathis, prosecutors interviewed an inmate named Richard Domingue, who had no personal knowledge of the events of December 28, 1999. Domingue recounted a conversation he had with Edge when they were tiermates approximately 10 later:

> . . . I brought it up to [Edge] in a serious conversation we were having one day, I wanted to know personally, how did things, you know what, what turn of events made everything turn out so bad and I asked him. I said how did everything turn out so bad to where y'all had to kill Captain [Knapps] Because I just can't see, you had Foot, who is huge. That's the black guy that was involved and all the rest of y'all. Y'all telling me y'all couldn't over power little Captain [Knapps], 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. You know, 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 help our self. It's bigger

than you know. It's really bigger than you think. Bigger than I think or bigger than I know. It's like there's some hidden equation here that I wouldn't understand. And I'm like okay.

. . .

And I told him, no I explained to him. I said Barry, you telling me by killing a correctional officer in an escape attempt, how are you helping yourself any way, unless you just trying to commit suicide by getting on death row. - - - if you don't get killed right after y'all do it. Because you're going to have high energy where a lot of people are going to be very mad at you for taking out a man who was just doing his job. And he was like you don't, you don't really understand, you know, I'm saying there was more involved. He's like there's more involved. But we could have let him live. But me and Jeff 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 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. Now I know there was a struggle involved and everything else. I don't want to speak about anything that I've heard you know. And, and inmates talking about it and everything. I'm telling you specifically what Barry told me.

Supp. R. 1639-1641. During the interview, Assistant District Attorney Holland asked Domingue, "Did he ever give you any specifics of what was his part in the homicide as opposed to any of the other guys that he named?" Supp. R. 1645. Domingue replied, "No, I never asked." *Id.*

In March of 2012, Petitioner filed a motion for new trial alleging in pertinent part that the State failed to disclose the Domingue statement in violation of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963).

The State did not dispute that the Domingue statement was not disclosed to Brown prior to his trial in this matter, but it opposed the *Motion for New Trial* on the grounds that the statement which Domingue recounts Edge as having made was inadmissible hearsay, and that it was neither favorable, nor material with regard to the determination of Petitioner's guilt or punishment under this Court's *Brady* jurisprudence.

At an evidentiary hearing held on September 8, 2014, Domingue testified consistently with the June 8, 2011 statement that he provided to the prosecution team. On cross-examination, he was questioned by a prosecutor and testified as follows:

> Q: Did he ever say to you that David Brown was not involved in the killing of Captain Knapps?
>
> A: No.

Q: Did he ever say that David Brown did not cause any harm to Captain Knapps?

A: No.

Q: Did he ever say that Brown left the bathroom during the killing of Captain Knapps?

A: No.

Q: Okay. Did he ever exclude David Brown from the killing of Captain Knapps?

A: No

On December 11, 2014, the trial court denied Brown's *Motion for New Trial* of the guilt phase of the proceedings, but granted a new trial of the penalty phase. The trial court found that the statement would have been admissible at the guilt or penalty phases. Pet. App. 211a-212a. With regard to the guilt phase, the trial court concluded that the Domingue statement was favorable, but not material because the evidence of Petitioner's guilt was overwhelming, in that his actions "certainly constituted an intent to, at least, inflict great bodily harm on Captain Knapps." *Id.* at 213a. With regard to the penalty phase, however, the trial court stated that the "defendant urged . . . a statutory mitigator, that his participation in the crime was relatively minor."[3] Pet. App. 217a. The trial court asked:

[3] In actuality, the defense did not reference the statutory mitigator of "minor participation" in either its opening or closing penalty phase argument. As previously stated, the defense penalty phase argument focused on the effect of defendant's childhood, convincing the jury that the risk of dangerousness presented by

> If it's considered to be a minor participation because you held someone down and they were ultimately killed, if not by that person but by others, does that make your participation minor?

Pet. App. 217a. Noting that the evidence was "circumstantial" as to who actually "inflicted the fatal blow," the trial court asserted that "*whether it's material or not*, the State caused the defendant to be . . . unable to, at least, corroborate to some extent his defense that he did not kill." Pet. App. 217a (emphasis added). While maintaining that it was not in the position to say whether the information contained in the statement was truthful or factual, the trial court asserted that there was a "reasonable probability that the jury's [sentencing] verdict would have been different[.]" Pet. App. 217a.

The State's application for supervisory writs[4] was granted by the Louisiana First Circuit Court of Appeal in a two-to-one ruling, finding that Petitioner had not shown that there is a reasonable probability that his

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defendant could be managed in a custodial environment, and mercy.

[4] The State submitted numerous exhibits to the First Circuit in connection with its writ application, including, but not limited to the transcripts of the trial and sentencing phases of Brown's trial; copies of certain photographs introduced as exhibits at trial; the complete transcriptions of David Brown's December 29, 1999 statement, Barry Edge's December 29, 1999 statement, and Richard Domingue's statement, and transcript excerpts and documents connected with the cases of several of Brown's co-defendants.

sentence would have been different had the statement been disclosed. Pet. App. 208a-209a.

Petitioner's subsequent writ application was denied by the Louisiana Supreme Court in a per curiam order on February 19, 2016. Three justices dissented, two of whom would have granted the writ for the purpose of docketing it. Pet. App. 198a-204a.

Brown's Petition for Writ of Certiorari was denied by this Court in *Brown v. Louisiana*, 141 S.Ct. 1396 (2016).

IV. Appellate Proceedings and the Decision Below

Petitioner's conviction and sentence were subsequently affirmed on direct appeal, with three justices dissenting in part for reasons assigned by Justice Genovese, who agreed with the portion of the ruling affirming defendant's conviction, but would have vacated the defendant's sentence and remanded for a new trial of the sentencing hearing.[5] Pet. App. 186a.

Concerning Petitioner's claim of a *Brady* violation with regard to the Domingue statement, the majority concluded that the statement "did not exculpate petitioner" and in that regard was "not favorable to him":

> While the statement certainly inculpates Edge and Clark as the individuals who made the decision to kill Captain Knapps, it

[5] The other two dissenters were Justice Hughes and Justice Griffin.

> provides no additional information as to who actually killed Capt. Knapps. *Id.* In fact, when testifying at the evidentiary hearing on defendant's motion for new trial, Domingue agreed that the distinction between the verbs "decided" and "caused" is an important one, and while Edge told Domingue that he and Clark "made the decision to kill Captain Knapps . . . he never told me, and this is what we did." Further, under questioning, Domingue acknowledged that Edge never stated that defendant was not present or not involved in the killing of Capt. Knapps. Other than to implicate defendant as one of the participants, the statement contains little to no elucidation of defendant's role; therefore, the statement is not favorable to defendant.

Pet. App. 160a-161a.

Addressing the question of materiality with respect to the guilt phase, the decision noted the trial court's determination that the evidence at the guilt phase of the trial was "overwhelming," and that the Domingue statement was not material to jury's determination of guilt. Pet. App. 161a. Citing the "abundant evidence linking the defendant to the murder of Capt. Knapps," the majority agreed with the trial court's assessment and found "it . . . highly improbably that the Domingue statement would have altered the outcome of the guilt phase, as the defendant's actions, 'certainly constituted an intent to, at least, inflict great bodily harm on Capt. Knapps.' " Pet. App. 162a; *see* Pet. App. 213a.

Turning to the penalty phase, the majority likewise concluded that the Domingue statement was not material. The majority found that:

> The evidence . . . was not, as defendant argues, material to the statutory mitigator suggested: that defendant's participation in the crime was "relatively minor," and that, as a result, he bears a lesser degree of moral culpability for Capt. Knapps' death. In fact, it does not corroborate defendant's contention that he left the bathroom while Capt. Knapps was still alive and did not share in the specific intent of his co-defendants to kill or inflict great bodily harm on Capt. Knapps. The statement does not preclude, and indeed does not speak to, defendant's formation of the necessary specific intent independent of co-defendants Edge and Clark. Indeed, it was not the state's position at any stage of this trial that defendant acted alone. And the statement does not place defendant outside the restroom when the fatal blows were delivered. The statement is actually silent as to which individuals participated in the physical attack.

Citing the "copious evidence of the significant role defendant played in the fatal attack, including defendant's own statement that he dragged a bloodied and kicking Capt. Knapps into the restroom and held him while an inmate he assumed was Edge struck him a second time, coupled with the fact that the Domingue statement sheds no light on who actually killed Capt. Knapps," the majority found "no reasonable probability of a different result had the undisclosed statement

gotten in" and further expressed its "confidence in the jury's decision to impose the death penalty is not undermined by the suppression of the statement." Pet. App. 164a. The majority noted that its determination that the statement was neither favorable nor material to defendant was made "in the context of the full record." *Id.*

On March 25, 2022, the Louisiana Supreme Court denied Petitioner's application for rehearing with three justices dissenting. Pet. App. 220a.

Petitioner filed his Petition for a Writ of Certiorari in this Court on July 25, 2022 after being granted an extension of time to file. The petition was docketed on July 27, 2002. Petitioner argues that the non-disclosure of the Domingue statement was favorable and material to the sentencing determination in his case.

REASONS FOR DENYING THE PETITION

I. The decision below does not contravene this Court's *Brady* jurisprudence.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the Due Process Clause of the Fifth Amendment requires the government to disclose favorable evidence to the accused where such evidence is "material" either to guilt or to punishment. *Id.* at 87. Favorable evidence includes not only evidence that tends to exculpate the accused, but evidence that is

useful to impeach the credibility of a government witness. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *see Smith v. Cain*, 132 S.Ct. 627, 630 (2012). The failure to disclose material, favorable evidence violates due process "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87.

A *Brady* violation entails three showings: (1) the information not disclosed must be favorable to the accused, either because it is exculpatory or "impeaching"; (2) the information must have been suppressed or withheld by the prosecution; and (3) the information must be "material" to guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999). The "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110 (1976). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see Cone v. Bell*, 556 U.S. 449, 452 (2009). Notably, "a reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 US. 73, 75 (2012), quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see also Weary v. Cain*, 136 S.Ct. 1002, 1006 (2016).

The materiality determination must be made "in the context of the entire record." *United States v. Agurs*, 427 U.S. 97 (1976). A reviewing court determining materiality must ascertain "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

While "[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however, as *Brady* itself demonstrates." *Cone*, 556 U.S. at 473. In *Cone*, a capital case in which the defendant was convicted and sentenced to death, the suppressed evidence supported Cone's claim of drug use. The suppressed evidence was determined to be immaterial to guilt, because the likelihood that the suppressed evidence would have affected the jury's verdict on the issue of insanity was found to be remote, considering that State law required the defense satisfy a high standard to establish insanity, and the defense "utterly failed" to prove insanity. *Cone*, 556 U.S. at 474 However, considering that the jury was statutorily required to consider whether Cone's "capacity . . . to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment[,]" this Court ordered remand for full review of the suppressed

evidence and its effect with regard to the jury's assessment of the proper punishment. *Id.* at 474-475.

This Court provided an example of the application of the *Brady* materiality standard in the capital sentencing context in *Strickler v. Greene*, 527 U.S. 263 (1999). There this Court stated:

> Petitioner also maintains that he suffered prejudice from the failure to disclose the Stolzfus documents because her testimony impacted on the jury's decision to impose the death penalty. Her testimony, however, did not relate to his eligibility for the death sentence and was not relied upon by the prosecution at all during its closing argument at the penalty phase. With respect to the jury's discretionary decision to impose the death penalty, it is true that Stolzfus described petitioner as a violent, aggressive person, but that portrayal surely was not as damaging as either the evidence that he spent the evening of the murder dancing and drinking at Dice's or the powerful message conveyed by the 69 pound rock that was part of the record before the jury. Notwithstanding the obvious significance of Stolzfus' testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

Strickler, 527 U.S. at 294-296.

Another example of the application of the materiality standard in the context of a capital case is found in *Banks v. Dretke*, 540 U.S. 688 (2004), where the Court contrasted:

> In *Strickler*, 527 U.S., at 289, although the Court found "cause" for the petitioner's procedural default of a *Brady* claim, it found the requisite "prejudice" absent, 527 U.S., at 292-296. Regarding "prejudice," the contrast between *Strickler* and Banks's case is marked. The witness whose impeachment was at issue in *Strickler* gave testimony that was in the main cumulative, *id.*, at 292, and hardly significant to one of the "two predicates for capital murder: [armed] robbery," *id*. at 294. Other evidence in the record, the Court found, provided strong support for the conviction even if the witness' testimony had been excluded entirely: Unlike the *Banks* prosecution, in *Strickler*, "considerable forensic and other physical evidence link[ed] [the defendant] to the crime" and supported the capital murder conviction. *Id.*, at 293. Most tellingly, the witness' testimony in *Strickler* "did not relate to [the petitioner's] eligibility for the death sentence"; it "was not relied upon by the prosecution at all during its closing argument at the penalty phase." *Id.* at 295. By contrast, Farr's testimony was the centerpiece of Bank's prosecution's penalty-phase case. . . .

Banks, 540 U.S. at 700-701.

In the instant case, the State's argument during the penalty phase revolved primarily around a single

fact: that death was the only morally reasonable punishment because he was already serving a life sentence for having committed murder:

> He murders a man, and we put him in prison where he can't hurt anybody else or he's not supposed to, and that's exactly what he does. So how many more chances should we give him?
>
> * * *
>
> Mr. Brown was serving a life sentence for the murder of Harvey Reese. What sort of justice would it be for the thousands of men and women that wear this uniform if you return a life sentence. Because let's face it, does a life sentence mean anything to David Brown? He's already doing life.
>
> * * *
>
> When you're looking in the mirror in the morning if you do nothing but return a life sentence, which is nothing to David Brown because he's already doing a life sentence, can you look yourself in the eye and say, We've done justice?

Nothing in Edge's statement to Domingue—even if true—serves to undermine any portion of this argument. Moreover, there was nothing in the undisclosed Domingue statement that was relevant to any of the five aggravating factors that were found by the jury, thereby rendering Petitioner eligible for the death penalty.

In the instant case, Petitioner contends that the undisclosed Domingue statement would have provided "powerful" corroboration of Petitioner's claim that he left the security restroom before the victim was killed and "would have bolstered his mitigation argument that he did not intend for anyone to die and played a relatively minor role in the victim's death." Pet. at 23. He is mistaken on all counts.

First, as recounted by Domingue, the Edge statement does not state who killed Captain Knapps or who was in the room when this occurred. Absent this information, the statement provides no corroboration for Petitioner's claim that he left the security restroom before the victim was killed.

Second, during the penalty phase, Petitioner did not argue that he played a relatively minor role in the offense.[6] Instead, defense counsel's penalty phase

[6] Petitioner is incorrect in stating that defense counsel argued in the penalty phase "that Petitioner had not directly participated in the killing of Knapps." Pet. 9-10, citing R. 10167 and 10434. The cited pages of the record do not appear to support this contention. During Defense counsel's penalty phase opening argument, he states:

> And now that you have been convinced that David Brown was involved in the, in the killing of Captain Knapps in that most horrible and terrible crime scene, I worry that your hearts and minds may now resist what's coming next."

(R. 10167). During defense counsel's penalty phase closing argument, defense counsel states:

> And life is not fair. Life is not fair that Captain Knapps died like that in that bathroom that night. That was

opening argument and closing argument focused upon the general concept of mercy, evidence concerning Petitioner's bad childhood, and risk assessment testimony that the defense presented in an attempt to establish that the defendant did not present a security risk that could not be managed if he were given a life sentence.

Moreover, while Petitioner contended in his statement to police that he did not intend for anyone to die, the evidence shows that *after* Captain Knapps had been hit in the head with a mallet by Edge, and *after* Captain Knapps was already bleeding, Petitioner chose to facilitate the continued attack on Captain Knapps by forcibly removing him from the hallway, placing him in the bathroom, and keeping him there by brute force where the brutal beating could continue in relative privacy. When Petitioner dragged Captain Knapps into the bathroom, he did so with the knowledge that the escape attempt included inflicting at least great bodily harm upon Captain Knapps. Moreover, he continue his participation in the attack to the extent that Captain Knapps' blood "was everywhere" and found its way onto his sweatshirt, into his socks by way of his jeans and longjohns, onto his boots, and underneath his fingernails—which indicates, even according to his own

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> not fair. And I am really, I'm really heartfelt for his family. I can—I can't imagine their pain.
>
> I don't know what to say except that, bottom of my heart, I'm sorry for all of you—all to have lost such a fine man. And I really mean that.

(R. 10434).

bloodstain pattern and crime scene reconstruction expert that he was directly involved. Petitioner's actions in removing a bloodied and struggling Captain Knapps from the hallway and holding him down in the bathroom played a pivotal role in the attack on Captain Knapps, and it also furthered the aims of the attempted escape by preventing Lieutenant Chaney from being immediately alerted to the incident upon re-entering the Education Building and gave the offenders the opportunity to attack him as was entering the Bundle Room.

Finally, the impact the undisclosed hearsay statement would have had on the outcome of the penalty phase must also be considered in the context of the evidence that would be presented by the State to rebut it. Here the decision below recognized that:

> [Edge's December 29, 1999 statement] (which would clearly be admissible in any subsequent retrial) in addition to the lack of any blood evidence connecting Edge to Captain Knapps, directly contradicts the account Domingue recited ten years later, and undermines any favorable inference that might be drawn therefrom.

Pet. App. 163a, fn. 71. In Edge's 1999 statement, he admitted he struck Captain Knapps in the head in the hallway, but denied entering the bathroom where Captain was subsequently brought. *Id.*

Based on the foregoing, the State submits that this Court's *Brady* jurisprudence is not contravened by the

Louisiana Supreme Court majority's findings that the withheld statement is neither favorable nor material to Petitioner in the context of the full record and that the undisclosed statement therefore did not undermine its confidence in the jury's decision to impose the death penalty do not contravene this Court's *Brady* jurisprudence. Therefore, further review is not warranted.

II. The decision below does not conflict with the decisions of the state courts and courts of appeals that are cited by Petitioner.

Petitioner cites four state high court decisions and two federal court of appeals decisions that he says recognize that:

> [W]hen 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 . . . even if the statement does not negate the defendant's involvement.

Pet. at 27.[7] It is unclear whether Petitioner is suggesting that, contrary to this Court's jurisprudence, materiality is to be presumed and need not be determined

[7] In fact, such a rule would conflict with this Court's jurisprudence requiring that "withheld evidence" must be evaluated "in the context of the entire record" in the case. *Turner v. U.S.*, 137 S.Ct. 1885, 1893 (2017). *United States v. Agurs*, 427 U.S. 97, 112.

in light of the entire record in a case. However, Petitioner is incorrect in asserting that the cited decisions conflict with the decision below, given that the inquiry conducted pursuant to this Court's *Brady* jurisprudence is necessarily fact and record specific. A review of the cited cases demonstrates that certiorari to address an alleged "split of authority" in this matter is not warranted.

In *State v. Brown*, 873 N.E.2d 858 (Ohio 2007), the Ohio Supreme Court found that the State violated *Brady* by failing to disclose inculpatory statements made by an "essential" state witness who testified at defendant's trial.[8] The court also found that defense counsel was ineffective for failing to challenge the competency to testify of the defendant's alleged wife and that the "full effect" of the *Brady* violation and the ineffective assistance of counsel claim could not be appreciated isolated from one another. *Brown*, 873 N.E.2d at 70-71.

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[8] Contrary to the Petitioner's representation in brief, the failure to disclose police reports containing the inculpatory statements of "essential witness" James Donley was not found to be material to the defendant's penalty phase argument that he lacked the "prior calculation and design" required to convict him of aggravated murder and thereby render him death eligible. Pet. 27. Instead, it was defense counsel's failure to challenge the competency of defendant's alleged wife (the sole eyewitness to the murders) that was discussed relative to the element of "prior calculation and design" and raised the question of whether, absent her testimony, the jury would still have found Brown guilty of aggravated murder, thereby rendering him death eligible. *Brown*, 873 N.E.2d at 870.

In *Goudy v. Basinger*, 604 F.3d 394 (7th Cir. 2010), the Seventh Circuit's determination that the State violated *Brady* was based upon the suppression of three police reports which contained, among other things, information that *three* of the eyewitnesses to the murder identified the defendant's roommate, Kaidi Harvell, in a photo lineup as the gunman on the driver's side of the victim's car and said he wore brown clothes.[9] *Id.* at 397. At trial, two of those witnesses testified that Goudy was the gunman on the passenger side of the victim's car, and the other testified that Goudy was the gunman on the driver's side of the vehicle. *Id.* at 396. Harvell was the State's primary witness at trial and testified that Goudy shot into the driver's side of the car and wore a brown "prison coat," while a man named Romeo Leo shot into the passenger side of the vehicle. *Id.* at 396-397. Finding that the State court failed to apply a "reasonable probability" standard for the materiality of suppressed evidence and did not recognize *Bagley*'s requirement that the effect of suppressed evidence must be considered cumulatively, the Seventh Circuit granted habeas relief *Id.* at 400-401. *Jones v. Jago*, 575 F.2d 1164 (6th Cir. 1978), was decided prior to the adoption in *Bagley* of the "reasonable probability" formulation of the test for materiality. As such, the Sixth Circuit evaluated the materiality of the undisclosed statement at issue pursuant to the framework established in *United States v. Agurs*, 427

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[9] As such, Petitioner's description of the circumstances at issue in *Goudy* fails to convey the extent of the undisclosed evidence or its materiality in light of the record.

U.S. 97 (1976), which distinguished between three situations involving the discovery, after trial, of information that had been known to the prosecution, but not the defense. In *Jones*, the Sixth Circuit identified the undisclosed statement as falling within the situation where the defense makes a specific request and the prosecutor fails to disclose responsive evidence. While *Agurs* did not define the standard of materiality applicable to situations involving a specific request, it suggested that the standard might be more lenient to the defense than in the situation in which defense makes no request or only a general request, and further stated: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S., at 106. Considering that *Jones* did not involve application of the reasonable probability standard in assessing the materiality of undisclosed evidence, the State submits that *Jones* has no bearing on this matter.

In *State v. Phillips*, 940 S.W.2d 512 (Mo. 1997), the state did not disclose the statement of Joyce Hagar, who told police that the defendant's son told her that he and his mother killed the victim and that his mother drove while he scattered her body. *Id.* at 516. The defendant's son also told Hagar that he killed his grandmother and was the one who cut up all of them. *Id.* The son's statements were found to be exculpatory and material on the issue of punishment, only. Evidence that her son was the one who had dismembered the bodies undermined confidence in the sentencing verdict because the sole aggravating circumstance that

the jury found to support the death sentence—depravity of mind—was based upon the allegation that defendant personally dismembered the victim's body. *Id.*

In *Commonwealth v. Green*, 640 A.2d 1242 (Pa. 1994), Green and Pfugler were charged with murder, kidnapping and conspiracy, but their cases were severed for trial. *Id.* at 1243. Gree was tried first and found guilty of first degree murder, kidnapping, and conspiracy and sentenced to death. *Id.* He subsequently learned that the prosecution failed to disclose a statement made by Thomas Moser, who told investigators that, following the murders, he encountered Pfugler in a bar and she told him she did something really big, she could sit big time for it, she shot someone, and she killed a cop. *Id.* at 1244. The withheld statement was found to be relevant and material under the facts of the case. *Id.* at 1245. The State had sought to establish that the defendant was the actual shooter by referencing the facts that the victim was of a heavy build and the defendant was much bigger than Pfugler, he lifted weights and was therefore the only person strong enough to move the victim, even though there was no evidence suggesting that the victim was shot or killed before having been transferred in the trunk of his car. *Id.* It was also determined to be relevant and material to the penalty phases because the State incorporated the evidence from the guilt phase and argued from it, without any direct evidence supporting the arguments, that defendant alone shot the victim in the head and the defendant alone

transported the officer in the trunk of his car to a secluded area and executed him. *Id.* at 1246.

In *Rogers v. State*, 782 So.2d 373, 374 (2001), the defendant, was convicted of first degree murder at a trial where the State's "chief witness" was a co-defendant who entered into a favorable plea bargain with the State. The witness testified that the defendant shot the victim as they were fleeing from a Winn-Dixie store after abandoning their attempt to rob it. *Id*. at 374. The defendant maintained he was elsewhere at the time of the crime and "presented extensive testimony and evidence of his innocence in his defense at trial." *Id.* at 384. In post-conviction proceedings, the Supreme Court of Florida subsequently found that the defendant was entitled to a a new trial based upon the "individual as well as the cumulative effect" of the suppression of various materials, including: 1) the witness's second confession and resulting police reports, which contained information that "could have been used to show that another person, Cope, and not Rogers was the witness's partner in the Winn-Dixie crime"; and 2) a cassette tape reflecting the State's attempt to influence the witness's testimony. *Id.* at 383-385.

Considering the foregoing, the State submits that the decisions of the courts in the cases cited by Petitioner have little bearing upon the situation presented in the instant case. Petitioner was not convicted upon the testimony of a witness who, unbeknownst to him, had incriminated himself in the offense, as the defendants in *Brown* and *Goudy* were. In Petitioner's case, unlike in *Phillips*, the undisclosed statement was not

relevant to any of the five aggravating circumstances found by the jury to render Petitioner death-eligible. Unlike in *Greene*, extensive physical evidence linked Petitioner to a bleeding Captain Knapps at a time when Captain Knapps' blood was being spattered. Moreover, in Petitioner's case, there was extensive evidence of Petitioner's participation in the offense, including a bloody physical attack on Captain Knapps, unlike in *Rogers*, where the defendant presented extensive evidence of his innocence, and where undisclosed evidence could have been used to impeach the co-defendant/witness who testified that it was Rogers who shot the victim.

In sum, a review of the cases cited by Petitioner does not show the recognition of a "rule" of materiality by the courts in question or establish a conflict or split of authority warranting the grant of certiorari. Instead, the cited cases reflect the ordinary application of this Court's *Brady* jurisprudence with the determination of the materiality of undisclosed evidence being made in the context of the records in the cases.

Based on the foregoing, the State submits that non-disclosure of the Domingue statement does not undermine confidence in the jury's sentencing decision, and that Petitioner has not shown a split of authority warranting the grant of certiorari. The Louisiana Supreme Court majority correctly applied this Court's *Brady* jurisprudence, and certiorari should be denied.

CONCLUSION

The State of Louisiana respectfully requests that, for the foregoing reasons, the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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