No. 22-7197

IN THE

SUPREME COURT OF THE UNITED STATES

BERNARD BRANDON,

PETITIONER

V.

STATE OF CONNECTICUT,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE CONNECTICUT SUPREME COURT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Contrary to the claims in the State's brief in opposition, certiorari is warranted because this case provides the Court with a vehicle to address a question of constitutional significance concerning the rights of both an individual defendant—the Petitioner—and a vulnerable population—the large class of Americans who are on supervised release, either as probationers or parolees.

ARGUMENT

1. The Record Is Sufficient to Reach and Resolve the Questions Presented

The State's basis for arguing the insufficiency of the record below is that the lower courts did not make a finding that the Petitioner's probation officer, Shavonne Calixte, *expressly* ordered him to sit for a meeting with law enforcement. And, indeed, the Connecticut supreme court majority repeatedly cited the lack of an *express* instruction to deny relief to the Petitioner. Citing Connecticut case law that "as long as the facts demonstrate that a reasonable person in the defendant's position would understand that his meeting with law enforcement is consensual, a defendant need not be expressly informed that he [is] free to leave…." *State v. Brandon*, 217 Conn. 702, 736. But the resolution of the questions presented here does not require that the record establish an express instruction; the entire nature of this case is that a reasonable *probationer or parolee* will perceive statements from a supervisor differently, seeking to avoid the disfavor of that supervisor and any concomitant penalty for defiance or noncompliance. What the State and the majority below overlook is that the

dissent below was correct in its analysis of the record, which, even viewed in the light most favorable to the State, is sufficient for purposes of appellate review:

> The issue is not whether Calixte expressly ordered or threatened the defendant to coerce him to attend the interrogation but whether a reasonable person in the defendant's position would have perceived Calixte's request as an order under all of the surrounding circumstances, such that refusal to comply could result in violation of the defendant's probation. The record is devoid of any evidence that Calixte ever informed the defendant that there would be no adverse consequences if he declined to attend the meeting in her supervisor's office. Given the absence of such an advisement, the pervasive restriction on liberty imposed by the conditions of probation, and the additional physical and psychological restraints operative in the probation building following the defendant's mandatory probation meeting, I believe that a reasonable person in the defendant's position would have perceived Calixte's request as a command. By focusing on the absence of evidence of an explicit order or threat, rather than on how Calixte's statements would have been perceived by a probationer in the defendant's position, the majority misapprehends the nuanced and fact intensive nature of the *Miranda* custody inquiry.

Brandon, 217 Conn. at 782-83 (Ecker, J., dissenting). The dissent's analysis cuts directly to the heart of the questions before this Court: probationers in a secured probation office should be presumed to be acting under the direction of those capable of violating their status except when explicitly told otherwise.

> [T]he record is unambiguous with respect to the conditions surrounding the defendant's interrogation, including the fact that the defendant was escorted to a locked and secured area of the building—where he was not permitted to move about freely and where he was questioned in a closed room by two armed police officers. These facts, when considered in combination with the other psychological factors at play in the probation context, clarify any ambiguity in the record regarding whether a reasonable person in the defendant's position would have believed that he had a real and meaningful choice to attend the meeting in the office of Calixte's supervisor.

Brandon, 217 Conn. at 783 n.9 (Ecker, J., dissenting).

2. The Court Below Passed On the Issues Raised in the Second Question Presented in the Petition

The State manifestly has read the opinions below in this matter, as it has cited them in its brief in opposition. How, then, did they miss that the court below, in both the majority and dissenting opinions, examined *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), cited it extensively, and passed on the issue? *See Brandon*, 217 Conn. at 724, 761, 762, 773, and 779. The *Brandon* dissent especially addressed this question in detail, devoting pages to the analysis of how the Petitioner's status as a probationer exposed him to perils not shared by the general public which should be considered in the custody analysis. *Id.* at 779-86. The lower court's opinion is itself a sufficiently broad foundation for this Court to build upon. "Our traditional rule…precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'…[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon…." *United States v. Williams*, 504 U.S. 36, 40-41 (1992)(Opinion of Scalia, J.).

The State's brief is remarkably devoid of any actual examination of the second question presented, relying solely on the incorrect argument that a party cannot press a claim that was passed on by a lower court. This is especially telling because, even if the State's argument were in keeping with this Court's precedents, it overlooks the fact that this Court has always retained the ability to reach important questions of justice, including when those questions were not raised in the briefs below, the courts below, or even in the petitions for certiorari.

See Anderson v. United States, 417 U.S. 211, 222 n.2 (1974)(Opinion of Marshall, J.). This suggests that the State recognizes that the Petition is correct regarding the effect being on supervised release would have on the perceptions of a reasonable person.

3. The State's Brief In Opposition Elides a Split Among Lower Courts Regarding the Class at Issue and Mischaracterizes the Fact of the Instant Case

The State claims that this case is distinguishable from cited precedents which included a defendant being placed in peril of a revocation of probation or parole, but declines to engage with cases cited in the Petition that dealt with parolees, such as *United States v. Ollie*, 442 F.3d 1135 (8th Cir. 2006)(a parolee instructed by his parole officer to meet with police was not present voluntarily) and *United States v. Barnes*, 713 F.3d 1200 (9th Cir. 2013)(a parolee meeting with FBI agents on the direction of his parole officer was in custody for *Miranda* purposes), choosing instead to focus on probationers alone. For *Miranda* purposes, the Court should examine the characteristics of probationers and parolees as a unitary class, as threats such as the one the State is downplaying here carry identical undercurrents of menace when addressed to persons on either form of supervised release. Such undercurrents are entirely absent when such statements are directed at those who are not subject to ongoing conditions of release or supervision.

Further, despite the State's insistence that the Petitioner's interrogation did not create a "penalty situation" as described in *Minnesota v. Murphy*, Opp. 22-23, the facts clearly demonstrate that the Petitioner was threatened with a situation

that would result in the revocation of his release if he did not continue the interview with homicide detectives. For this to not have been a penalty situation, there would have to be some scenario where the detectives could carry out their threat to arrest the Petitioner for murder without causing his release conditions to be violated. Given the standard conditions of release discussed *supra*, that scenario is not possible. The Petitioner had a clear, binary choice: submit to the police interrogating him in a coercive environment, or refuse and face arrest and subsequent revocation.

4. The Decision Below Was in Error as It Dismissed the Coercive Environment and the Implicit Threat of Probation Violation

The majority below mistakenly denied that the threat of a probation revocation was made to coerce cooperation from the Petitioner. The Connecticut supreme court held that, "The defendant presented no evidence that [the Petitioner's probation officer] Calixte ordered him to meet with anyone after his meeting with her had ended or that she threatened to report that he had violated his probation if he refused to do so." *Brandon*, 217 Conn. at 741 (FN 19). Yet the majority overlooked that the Petitioner was actually threatened with revocation if he were to cease cooperating not by his probation officer, but by the police officers questioning him, who repeatedly threatened to obtain an arrest warrant for murder should he end questioning. *Id*. at 766-67. While the court below used those statements to show that the Petitioner should not have felt confinement equivalent to formal arrest, as they implied an ability to leave, they ignored that the conditions of probation are such that any arrest for violating any law will

trigger a revocation proceeding. Pet. App. at A-102. Even if we assume *arguendo* that his probation officer never overtly threatened a revocation if he declined to participate in the interrogation, the threat by the police to initiate an action which would result in revocation created a classic penalty situation that compelled his continued cooperation. It is as if the lower court held that threatening to harm a person, and threatening to have someone else harm a person, are so distinct that only one could truly be considered a threat.

Further, the court below, and the State in its brief, are eliding the significance of the probation office environment and the perilous status of probationers and parolees by circularly arguing around the crux of the question presented by this case as to whether probationers and parolees as a class are to be treated differently in a reasonable-person analysis than non-probationers. The Connecticut supreme court majority acknowledged that, "It is undeniable that the defendant was questioned in a coercive environment," and also that the trial court had agreed that "the atmosphere in the probation office was coercive." *Brandon*, 217 Conn. at 725, 746. Yet paradoxically, in Footnote 9, the same majority asserts that "the record does not reflect that Calixte *in any way coerced* the defendant to attend the meeting." *Id.* at 712. (Emphasis added). By setting the meeting between the police and the Petitioner at the probation office, Calixte did in fact employ coercion, making this observation by the majority below suspect at best. For its part, the State's brief cites *Oregon v. Mathiason*, 429 U.S. 492 (1977) as apposite, noting that in that case an interview conducted under

certain circumstances in a police station was found noncustodial. Opp. 25. The State is overlooking the facts of that case which distinguish it from the present matter, including that Mathiason voluntarily came to the police station (while Brandon was blindsided at his probation office), was immediately told he was not under arrest (while Brandon was interrogated for twenty-one minutes before a similar statement was made, accompanied by a threat of arrest), was not shown in the record to have submitted to security checks or needed an escort, and was released after a half-hour (whereas Brandon was interrogated for over ninety minutes). *Mathiason*, 429 U.S. at 495.

5. The Errors Below Were Not Harmless

The State's reply contends that "deciding the questions presented here would serve little purpose to the petitioner because any error was harmless." Opp. 26. This is demonstrably incorrect.

First, as the State itself concedes, the Petitioner "never confessed to having shot the victim during any of his three interactions with police," but instead altered his story throughout the course of his interrogations. *Id.* Though the State now seems to minimize the significance of those narrative changes, at trial, they took a very different view of the subject, using changes to insist upon a jury instruction regarding consciousness of guilt. During the jury charge, the trial judge made this explicit to jurors:

> In any criminal trial it is permissible for the state to show that conduct or statements made by a defendant after the time of the alleged offense may have been influenced by the criminal act; that is, the conduct or statements show a consciousness of guilt. For example, a

> person's false statements as to his whereabouts at the time of the offense may tend to show a consciousness of guilt…. The state claims that the following conduct is evidence of consciousness of guilt. The defendant's initial statement to the Bridgeport police during his audio interview on February 16th, 2016 regarding his whereabouts on the night of the alleged crime.

Tr. 5/29/19 at 105-06. Under Connecticut precedents, absent specific evidence to the contrary, jurors are presumed by a reviewing court to have followed the trial court's instructions. *State v. Reynolds*, 264 Conn. 1, 131 (2003); *State v. Thompson*, 266 Conn. 440, 485 (2003).

Further, both the defense and prosecuting attorneys made comments to the jury regarding consciousness of guilt during their closing arguments. Tr. 5/29/19 at 47, 84. Had the courts below not erred in admitting the Petitioner's earlier statements to police which were later contradicted, then jurors would not have been instructed regarding consciousness of guilt, nor heard arguments regarding that portion of their charge, and would have based any verdict on other factors.

While the State cites other circumstantial evidence which was presented during the trial, it elides the fact that the jury, in rendering a not guilty verdict to the charge of murder, had rejected the State's interpretation of events, and could very easily have done so again, were they not instructed to consider the Defendant's inconsistent statements as potentially evincing a guilty conscience. To claim that this is harmless error is to do violence to the term.

6. This Case Involves Compelling Interests of Justice Which Warrant Certiorari

This case rests within gaps that this Court recognized in *Murphy*: the questioning was conducted by law enforcement in a secured and coercive probation office environment (*See Murphy*, 465 U.S. 420, 429 n.5.); the facts of the interrogation give rise to the likelihood that Brandon would have believed terminating the meeting would have "jeopardized his probationary status" (*Id.* at 433 n.6.); and Brandon's answers were compelled under the threat of arrest and criminal prosecution, which in turn carried the threat of revocation (*Id.* at 435, n.7.).

On an individual level, Mr. Brandon finds himself facing a 27-year sentence based on information gathered from him by armed law enforcement in a secured, coercive environment where the threat of his release being terminated was ever-present. On a broader level, probationers and parolees everywhere exist under that threat of termination, which has been employed by law enforcement in countless cases to squeeze information from them in a manner that unencumbered persons—ones who still enjoy the presumption of innocence and the full array of criminal due process rights before they face incarceration—would never face. Mr. Brandon's case gives this Court the opportunity to recognize an incontrovertible fact: that where interactions with police are concerned, the stakes are higher for probationers and parolees as a class, and they will perceive these interactions differently than the general public.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

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CLOSING ARGUMENTS

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ATTORNEY JOHN R. GULASH
COUNSEL FOR THE DEFENSE:

ATTY. GULASH: And again, to that -- the matter of time, and the state will -- will argue to you that oh, consciousness of guilt that he didn't initially tell them an accurate admission of him being there when the shooting occurred. All right. Consciousness of guilt, I think, will be the arguments made by the state. Again, randomly, you select a person out of the blue who does what? Basically tells the police, figuratively speaking, to go to hell. Offers no cooperation whatsoever. What, if anything, does that say by way of circumstantial evidence, by way of drawing inferences, by way of just as random -- throwing some guy out of the bus, some random guy under the bus?

[84]

ATTORNEY DAVID APPLEGATE
ASSISTANT STATE'S ATTORNEY:

ATTY. APPLEGATE: So, listen carefully [to] the instruction on consciousness of guilt. Attorney Gulash mentioned it. What we're arguing that you can infer is that these efforts were made to mislead the police by providing false information. By claiming to have worn that coat, that jacket that was seized, you can infer that he committed a criminal act, namely, this homicide and that was the reason that he mislead the police, not for any other reason. But again, there'll be a more specific instruction about that.

JURY INSTRUCTIONS

[105]

HON. EARL B. RICHARDS, III
PRESIDING JUDGE:

THE COURT: In any criminal trial it is permissible for the state to show that conduct or statements made by a

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defendant after the time of the alleged offense may have been influenced by the criminal act; that is, the conduct or statements show a consciousness of guilt. For example, a person's false statements as to his whereabouts at the time of the offense may tend to show a consciousness of guilt. Such acts or statements do not, however, raise a presumption of guilt. If you find the evidence proved and also find that the acts or statements were influenced by the criminal act and not by any other reason, you may, but are not required to, infer from this that the defendant was acting from a guilty conscience -- from a guilty conscience.

The state claims that the following conduct is evidence of consciousness of guilt. The defendants initial statement to the Bridgeport police during his audio interview on February 16th, 2016 regarding his whereabouts on the night of the alleged crime.