No. 22-77

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

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF CURRENT AND FORMER PROSECUTORS AND DEPARTMENT OF JUSTICE OFFICIALS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Forty-one current and former prosecutors and Department of Justice officials ("proposed amici") respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as amici curiae in support of Petitioner David Brown.

All parties were notified of proposed amici's intent to file this motion for leave to file an amicus brief; however, notice was provided fewer than 10 days prior to the due date for the amicus curiae brief. Notwithstanding the lateness of the notice, Petitioner and Respondent have consented to the filing of the motion and brief.

This case presents issues of constitutional and ethical importance to proposed amici who, during their careers as prosecutors and Department of Justice officials, have been responsible for providing disclosures or establishing policy for providing disclosures of potentially material exculpatory information to criminal defendants pursuant to *Brady v. Maryland* and its progeny.

Amici are concerned that, in this case, the Supreme Court of Louisiana took an overly narrow view of the prosecution's *Brady* obligations, resulting in its failure to view as both favorable and material to the defense a statement directly implicating two other individuals—and not Petitioner—in the decision to commit the murder at issue. This statement could reasonably have been interpreted by the penalty-stage jury to undermine the prosecution's case that Petitioner had the specific intent to kill and to therefore mitigate his culpability for the murder. Had the statement not been withheld, there is a reasonable probability that the penalty-stage verdict would have been different and the jury would not have imposed a death sentence.

Amici represent the consensus view that prosecutors, by virtue of their unique role, have a responsibility to take a broad view of their obligation to disclose potentially material exculpatory information, without an overly cramped assessment of materiality.

For the foregoing reasons, the motion should be granted.

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BRIEF OF AMICI CURIAE CURRENT AND FORMER PROSECUTORS AND DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are 41 current and former federal and state prosecutors and U.S. Department of Justice (DOJ) officials.[1] In their careers as prosecutors and DOJ officials, amici have been responsible for providing disclosures or establishing policy for providing disclosures pursuant to *Brady v. Maryland* and its progeny. They have understood those obligations to be commensurate with their substantial responsibility and discretion as prosecutors. Amici have sought to ensure, to the best of their ability, that the due process rights of criminal defendants are respected, criminal prosecutions are conducted fairly, and innocent individuals are not convicted while the guilty go free. Amici believe that these goals, which bring credibility to the criminal justice system, require that prosecutors take a broad view of their obligations to disclose information that is potentially material to guilt or punishment.

SUMMARY OF ARGUMENT

Prosecutors bear a special responsibility to strive for a fair and just result in all criminal prosecutions. *Brady v. Maryland* and its progeny have firmly established that a criminal defendant's constitutional

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[1] Counsel for amici curiae authored this brief in its entirety and no party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund its preparation or submission. All parties were notified of proposed amici's intent to file the motion for leave to file an amicus brief. Petitioner and Respondent have consented to the filing of the motion and brief.

right to due process is violated when the government withholds favorable evidence that, considered collectively, undermines confidence in the verdict, including at the penalty stage. Accepting the broad discretion afforded prosecutors carries with it a corresponding duty to ensure that this rule is not violated. That means prosecutors must take a broad view of their obligation to disclose potentially material exculpatory information.

In this case, the prosecutors failed to disclose a statement directly implicating two other individuals—and not Petitioner—in the decision to commit the murder at issue. This statement could reasonably have been interpreted by the penalty-stage jury to undermine the prosecution's case that Petitioner had the specific intent to kill and to therefore mitigate his culpability for the murder. Had the statement not been withheld, there is a reasonable probability that the penalty-stage verdict would have been different and the jury would not have imposed a death sentence.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW AND REVERSE, REAFFIRMING THE PRINCIPLE THAT WITH PROSECUTORIAL DISCRETION COMES PROSECUTORIAL RESPONSIBILITY TO ENSURE THAT "JUSTICE SHALL BE DONE"

More than 80 years ago, a unanimous Court memorialized the unique role of the prosecutor in *Berger v. United States*, 295 U.S. 78, 88 (1935):

> The [prosecutor] is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Amici include former federal prosecutors and DOJ officials who, when taking their oaths of office, promised to fulfill the responsibilities entrusted to them by these words. *See* 5 U.S.C. § 3331 ("I ... do solemnly swear ... that I will well and faithfully discharge the duties of the office on which I am about to enter."). Similar words appear inscribed on the walls of the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts," as this Court noted in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Elaborating, the Court in *Brady* continued: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.*

Thus, as *Brady* and its progeny hold, "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). Evidence is favorable if it "may [have] ma[d]e the difference" in a defendant's case, and it is material "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, 676, 682 (1985). The "reasonable probability" standard is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

So important are the words of *Berger* to the prosecutor's *Brady* obligations that nearly every leading decision from this Court addressing an alleged *Brady* violation has cited them. *See United States v. Agurs*, 427 U.S. 97, 111 (1976); *Bagley*, 473 U.S. at 675 n.6; *Kyles*, 514 U.S. at 439; *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Banks v. Dretke*, 540 U.S. 668, 694 (2004); *Cone v. Bell*, 556 U.S. 449, 451 (2009); *Connick v. Thompson*, 563 U.S. 51, 71 (2011); *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017). As this Court recognized in *Kyles*, although "the definition of ... materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden." 514 U.S. at 437. "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Id.* at 439. "This is as it should be," moreover, for "it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Id.* at 439-40.

This Court should grant review and reverse the judgment in this case, as the favorable information not disclosed by prosecutors puts this case "in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

II. PROSECUTORS ENSURE THAT "JUSTICE SHALL BE DONE" BY TAKING A BROAD VIEW OF THEIR DISCLOSURE OBLIGATIONS

In the experience of amici, acceptance of the awesome responsibilities and discretion of the prosecutor carries with it the concomitant duty to ensure that "justice shall be done" by taking a broad view of their *Brady* disclosure obligations. The prosecutor's goal is not only to strive for a fair trial, but also to protect public safety by ensuring that innocent persons are not convicted while the guilty remain free.

Although this Court has made clear that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict," *Strickler*, 527 U.S. at 281, it can be difficult for prosecutors to determine pretrial what information may meet this standard post-trial. Precisely for this reason, in amici's experience, prosecutors contribute to the fairness of the criminal justice system by taking a broad view of their pretrial disclosure obligations. *See Agurs*, 427 U.S. at 108 ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the

entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.").

This broad view is consistent with DOJ guidance developed by a working group of experienced DOJ attorneys and prosecutors in 2010. In a Memorandum for Department Prosecutors that addressed criminal discovery generally, then-Deputy Attorney General David Ogden explained that "[p]roviding broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error." David W. Ogden, Deputy Att'y Gen., *Memorandum for Department Prosecutors: Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), https://www.justice.gov/archives/dag/memorandum-department-prosecutors. Compliance with this guidance, Ogden wrote, "will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution." *Id.*

Contemporaneously with the 2010 guidance, DOJ also revised its policy on the disclosure of exculpatory and impeachment information. Significantly, the current policy provides: "Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." U.S. Justice Manual (U.S.J.M.) § 9-5.001(B)(1), https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings (citations

omitted). The policy recognizes that a "fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence." U.S.J.M § 9-5.001(C). Thus, under the policy, federal prosecutors must disclose "information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime." U.S.J.M. § 9-5.001(C)(1). Prosecutors must also disclose "information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged." U.S.J.M. § 9-5.001(C)(2).

As this Court's decisions establish, suppressed evidence may be material to a defendant's punishment even if it does not have a tendency to undermine confidence in the guilty verdict. *See, e.g.*, *Cone*, 556 U.S. at 476 (concluding that although suppressed evidence was not material to guilt, "the lower courts erred in failing to assess the cumulative effect of the suppressed evidence with respect to [the defendant]'s capital sentence"); *Brady*, 373 U.S. at 84, 87-88 (suppression of codefendant's confession to actual commission of murder violated defendant's due process rights at penalty phase even where it would not have reduced defendant's culpability below first-

degree murder at guilt phase). Suppressed evidence is material to the imposition of the death penalty when it "may have ... played a mitigating, though not exculpating, role" and persuaded at least one juror to support a life sentence rather than the death penalty. *Cone*, 556 U.S. at 475.

In amici's experience, taking a broad view of *Brady* is necessary to ensure that the prosecutor—even when acting in good faith—does not view the potential materiality of exculpatory or impeaching information too narrowly, thereby suppressing information that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Although not at issue in this case, amici do not discount that, when making disclosure decisions, prosecutors must take into account countervailing concerns such as witness security and privacy, protecting the integrity of ongoing investigations, and national security interests, among others, but these concerns may be addressed through the timing and form of disclosures, and must be weighed against the due process rights of the defendant. In such situations, prosecutors may also seek the assistance of the trial court in making disclosures pursuant to protective orders.

III. LOUISIANA PROSECUTORS FAILED TO DISCLOSE INFORMATION THAT COULD HAVE BEEN USED IN THIS CASE TO MITIGATE PETITIONER'S CULPABILITY AT SENTENCING

The State took an unduly cramped view of its disclosure obligations, and the Supreme Court of Louisiana erred in holding that the withheld statement was neither favorable to Petitioner nor material at the penalty stage. Had the statement not been withheld, there is a reasonable probability the jury would not have imposed a death sentence.

At the time of the events of this case, Petitioner was serving a life sentence for second-degree murder at the Louisiana State Penitentiary at Angola (Angola).[2] Pet. App. 38a, 135a. In 1999, he and five other prisoners—including Barry Edge and Jeffrey Clark—attempted to escape from Angola by detaining certain corrections officers and stealing their uniforms, with an aim of dressing in those uniforms and leaving the prison in disguise. Pet. App. 2a, 4a-5a. In the course of the unsuccessful escape attempt, corrections officer Captain David Knapps and one of the escaping prisoners were killed. Pet. App. 2a.

In a statement to the police, Petitioner admitted to being part of the escape attempt, but he denied

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[2] Unless otherwise supported by a record cite, the facts cited herein come from the Supreme Court of Louisiana's decision on direct appeal, *State v. Brown*, __ So. 3d __, 2022 WL 266603 (La. 2022), or are undisputed.

having any intent to kill Captain Knapps, playing any role in the killing, or even being present when the killing occurred. Pet. App. 23a-27a, 56a. Although Petitioner acknowledged that he had dragged a bleeding Knapps into a bathroom after one of Petitioner's codefendants had hit Knapps over the head, he contended that he had subsequently reassured Knapps that he would not be killed, offered him water, and left the bathroom while Knapps was still conscious and talking. Pet. App. 23a-27a, 56a, 204a. But the only evidence at trial supporting this defense was Petitioner's own statement.

The State's theory, by contrast, was that Petitioner had personally held Knapps down by the shoulders as he was fatally beaten by others, Pet. App. 34a-35a, and at the penalty stage the State argued that this direct participation warranted a death sentence, Pet. App. 189a-90a. No witnesses testified that Petitioner participated in the murder, and neither Petitioner's DNA nor his fingerprints were on the weapons used in the escape attempt. Pet. App. 66a. Instead, the State relied on the circumstantial evidence of Knapps's blood on Petitioner's hands, pants, and shoes, and on an abandoned sweatshirt linked to Petitioner, as well as testimony from a crime reconstruction expert and the doctor who conducted Knapps's autopsy. Pet. App. 66a-67a. The State argued that Petitioner had simply lied to police when he said he had left the bathroom before the murder took place. Pet. App. 189a-90a. The jury accepted the State's version of events and imposed a death sentence.

Four months after the penalty phase of Petitioner's trial, the State gave notice of its intent to use a statement made by another Angola prisoner, Richard Domingue, at the trial of one of Petitioner's codefendants, Barry Edge. Pet. App. 153a-54a. The State had obtained the statement prior to Petitioner's trial and acknowledged that it had not previously provided the Domingue statement to Petitioner. *Id.*

During an interview with state investigators, Domingue had stated that he was close friends with Edge and described a conversation he had had with Edge implicating Edge and Clark, but not Brown, in Knapps's murder:

> I said how did everything turn out so bad to where y'all had to kill Captain [Kn]apps. Because I just can't see, you had Foot [Petitioner], 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 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.... [W]e could have let him live. But me and Jeff[rey Clark] made the decision at that time because all of 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.

Pet. App. 158a-59a.

State investigators asked Domingue to confirm that "[Edge] and Jeffrey made the decision," and he agreed: "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."[3] Pet. App. 187a.

Petitioner moved for a new trial upon receiving the State's disclosure. Pet. App. 54a. The trial court agreed with Petitioner that he was entitled to a new penalty-stage trial because the Domingue statement was relevant mitigating evidence and it was persuaded that there was a "reasonable probability that the jury's verdict would have been different had the evidence not been suppressed." Pet. App. 219a.

Over a sharp dissent, a majority of the Supreme Court of Louisiana disagreed, ultimately holding that the Domingue statement was not favorable to Petitioner because Edge "provide[d] no additional information as to who actually killed Capt. Knapps" and "never stated that [Petitioner] was not present or

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[3] At Petitioner's hearing on a motion for a new trial, Domingue testified that his statement "they made a decision" was a reference to Edge and Clark: "[H]e told me Jeffrey and him made the decision," and "When I said 'they,' yeah. I mean, Jeffrey, that's what he was referring to." Pet. App. 188a-89a n.2 (alteration in original). On cross-examination, the prosecution asked whether Edge "said that he and Clark alone decided to kill Captain Knapps," and Domingue responded, "Right." *Id.*

not involved in the killing of Capt. Knapps." Pet. App. 160a-61a. The majority further held that the Domingue statement was not material to the jury's decision to impose a death sentence because it did not support Petitioner's mitigation argument that his "participation in the crime was 'relatively minor,' and that, as a result, he bears a lesser degree of moral culpability for Capt. Knapps' death." Pet. App. 162a-63a.

The majority below failed to recognize the clear favorability of the Domingue statement for Petitioner's defense at the penalty phase. Petitioner argued that he did not have the specific intent to kill Knapps and that he was not present for Knapps's murder, having left Knapps still alive in the bathroom with Edge and "some white guy." Pet. App. 189a. As the dissent pointed out, "Edge's confession to Domingue could have been utilized by defense counsel—and likely would have been—to corroborate defendant's statement." Pet. App. 190a. The explanation by Edge that he and Clark alone made the decision to kill Captain Knapps would have supported Petitioner's penalty-phase mitigation argument that he was relatively less culpable in Knapps's killing by showing that certain of Petitioner's codefendants decided *without Petitioner* that Knapps should die. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (discussing relevance of the level of an offender's culpability to retribution and deterrence justifications for death penalty). And, although the Domingue statement does not expressly address whether Petitioner was present when Captain Knapps was killed, it does tend to make more likely Petitioner's overall version of events, including

his claim that he left the bathroom while Captain Knapps was still alive and did not participate in the murder.

The fact that the Domingue statement inculpated Edge and Clark without expressly absolving Petitioner of participation in the murder does not, as the majority thought, negate its favorability. Rather, the reference to Edge and Clark alone as being responsible for the decision to kill Captain Knapps makes it more likely that those two and no others made the decision to commit the murder and then carried it out. Indeed, this is a highly plausible interpretation of the statement. But even if the jury might have interpreted the Domingue statement to allow room for Petitioner to have assisted in committing the murder after Edge and Clark made the decision to kill Captain Knapps, the jury could quite reasonably have thought that Petitioner's noninvolvement in the *decision* to commit the murder was sufficient mitigation to render him less culpable and therefore to undermine the case for a death sentence. At the very least, the Domingue statement undermines confidence in the jury's decision to impose the death penalty.

The majority's view of materiality was similarly cramped. The court concluded that the Domingue statement was immaterial because it did not "preclude" Petitioner's "formation of the necessary specific intent independent of co-defendants Edge and Clark," nor did it "place [Petitioner] outside the restroom when the fatal blows were delivered" or specify "which individuals participated in the physical attack." Pet. App. 163a. But this Court has

made clear that suppressed evidence is material if there is a "reasonable probability" that the result of the proceeding would have been different had it been disclosed, *Bagley*, 473 U.S. at 682—not that the suppressed evidence would have "preclude[d]" the jury's verdict.

Similarly flawed was the majority's determination that the Domingue statement was not material 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. Although it is true that the jury was presented with the defense theory that Petitioner was not involved in Captain Knapps's murder, the only evidence supporting this theory was Petitioner's own statement to the police, which the jury may have discounted as self-serving, as the State encouraged it to do. Far from being redundant, the Domingue statement could have been viewed by the jury as persuasive independent corroborating evidence supporting Petitioner's version of events, in which he left the bathroom before others of his codefendants made the decision to kill Captain Knapps. As the dissent explained, "with Domingue's statement, [Petitioner] could have bolstered his own defense theory demonstrating that because he was not involved in the decision to kill Capt. Knapps, he deserved to be sentenced to life imprisonment rather than receive the death penalty." Pet. App. 192a. Because the state suppressed Domingue's statement, however, "[Petitioner]'s argument had little else to rely on, while the state and the jury w[ere] free to simply write off his statement

as self-serving." Pet. App. 192-93a. *See Cone*, 556 U.S. at 475 (suppressed evidence corroborating defendant's serious drug problem "may have persuaded the jury" at sentencing that his drug use "played a mitigating, though not exculpating, role in the crimes he committed"); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 287 (3d Cir. 2016) ("exculpatory value" of suppressed evidence was "in corroborating testimony of witnesses at trial who otherwise received little objective reinforcement, and whose credibility ... was seriously undermined").

The State took an overly narrow view of its disclosure obligations, and the Supreme Court of Louisiana erred in upholding that view. Because the State withheld information that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Kyles*, 514 U.S. at 435, amici urge this Court to grant the petition in this case and reverse the judgment below.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant the petition and reverse the judgment.

Respectfully submitted,

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