CAPITAL CASE
No. 22-77

IN THE
Supreme Court of the United States

DAVID BROWN,

Petitioner,

v.

LOUISIANA

Respondent.

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

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) IN SUPPORT OF PETITIONER

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The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and boasts a nationwide membership of many thousands of direct members and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and virtuous administration of justice.

NACDL files many amicus briefs each year, including in this Court, seeking to provide assistance in cases that present issues of broad importance to criminal defendants. NACDL and its members have a vital interest in ensuring that that *Brady* v. *Maryland*, 373 U.S. 83 (1963) and its progeny are uniformly applied both by prosecutors and courts around the country, including in Louisiana. Because disclosure decisions by prosecutors are largely self-policed, NACDL respectfully submits that a uniform standard is all more critical.

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[1] Pursuant to this Court's Rule 37, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief. Both Petitioner and Respondent consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

Again[2] and again[3] and again,[4] this Court has been forced to intervene and correct blatant misinterpretations, mischaracterizations, and misapplications of *Brady* and its progeny by Louisiana state courts. After having previously done so in *Kyles* and *Smith*, this Court in 2016 once more instructed the Louisiana Supreme Court to no longer "emphasize[] reasons a juror might disregard new [undisclosed] evidence while ignoring reasons she might not." *Wearry*, 577 U.S. at 394.

Yet the decision below establishes a new, constitutionally untethered definition of "favorable.": to be subject to disclosure, evidence is only "favorable" if it explicitly "preclude[s]" a defendant's involvement in a crime. Pet. App. 163a. This new standard confuses what would constitute a "defense" (e.g., self-defense, alibi) with what *Brady* actually requires. To be "favorable" under *Brady*, evidence need only "lend support" to a defense or—in the capital sentencing context—any mitigating fact that could be a basis for a sentence less than death. This Court has emphasized that this test for favorability is broad. In *Kyles* itself, this Court found the absence of defendant's car from an admittedly incomplete list of cars at the scene of the crime to be favorable. See *Kyles*, 514 U.S. at 450–51. Such a fact plainly did not "preclude" or "elucidate" Kyles' involvement in the crime, thus would not be subject to disclosure based on the decision below. Inconsistent witness statements, such as

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[2] *See Kyles* v. *Whitley*, 514 U.S. 419 (1995).

[3] *See Smith* v. *Cain*, 565 U.S. 73 (2012).

[4] *See Wearry* v. *Cain*, 577 U.S. 385 (2016).

in *Kyles* and *Smith*, do not necessarily preclude the defendant from having committed a crime, nor does a suppressed deal that a jailhouse informant seeks in return for his testimony as in *Wearry*.

Second, this Court has repeatedly held the materiality of suppressed evidence is to be assessed cumulatively in context of the whole record. However, the majority below vastly distorts this inquiry by implementing a constitutionally impermissible "screening test": if a reviewing court decides, piece-by-piece, the undisclosed material does not *affirmatively exclude* the defendant as a perpetrator, the suppressed evidence is *per se* not relevant to guilt or sentencing.

Brown comes on the heels of the resolute refusal by Louisiana to implement and give effect to this Court's *Brady* rulings. In the decade since *Smith* was decided by this Court, the Louisiana Supreme Court has *never* cited that decision. Indeed, reviewing all 130 citations to *Brady*, *Kyles*, and *Wearry* since *Smith*, the Louisiana Supreme Court has not found a single "true *Brady*"[5] violation worthy of overturning a conviction or sentence.

This outcome is not for want of opportunity. The Louisiana Supreme Court's decisions often come over dissent of other members of the Court who perceive, as the dissenters below did, that a material *Brady* violation has occurred. As a result, federal

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[5] In an interlocutory appellate decision below overturning the trial court's granting of a new penalty phase, the Louisiana Supreme Court reserved a "true *Brady* violation" for instances where: (1) favorable evidence (2) withheld by the State (3) that was material. *See* Pet. App. 199a–200a.

courts—including this Court—are continually called to provide supervision and relief.

This most recent distortion of established doctrine will strip defendants of constitutional protections, incentivize prosecutorial non-compliance, and deprive jurors of information essential to their determinations of guilt and punishment—all providing powerful reasons for this Court to grant certiorari.

ARGUMENT

I. THE DECISION BELOW CREATES A FRAMEWORK RADICALLY AT ODDS WITH THIS COURT'S PRECEDENT

A. The Louisiana Supreme Court's New Definition of "Favorable" Vitiates *Brady* and its Progeny

In *Brown*, the Louisiana Supreme Court concocts an entirely new definition of "favorable" that is incongruent with well-established Constitutional precedent from this Court.

Several facts are beyond dispute. At the time of Mr. Brown's trial, the State had in its possession a statement from a witness—taken by the trial prosecutor himself—that Barry Edge confessed that he and Jeffrey Clark "made the decision to kill" Captain Knapps. Pet. App. 159a. This decision was made by "[Edge] and Jeff[rey Clark]" because *"all* of th[ose] other [m-f-s] that was involved they couldn't seem to get their head together." *Id.* (emphasis added). "[*Edge*] *said me and Jeff decided we're going to kill him*." *Id.* (emphasis added). The trial prosecutor then asked the witness, "And [Edge] and, he and Jeffrey made the decision." *Id.* at 160a. The witness responded, "[Edge] said *him and Jeffrey did*, were *the*

only ones that that were thinking rationally during this highly charged situation." *Id*. (emphasis added). The State acknowledges it chose not to disclose this statement to Mr. Brown's trial counsel.

Before even reaching materiality, the majority writes: "[The suppressed statement] simply *does not exculpate defendant* and in that regard *is not favorable to him*." Pet. App. 160a (emphasis added). The Louisiana Supreme Court continues that because the statement "does not preclude" or "speak to" the Mr. Brown's involvement in the actual murder, *Id*. at 163a, it was not favorable to him in the jury's determination of whether to impose the death penalty or not. *Id*. at 163a–164a.

This Court has explicitly rejected this precise framework in the context of guilt and penalty decisions. See *Cone* v. *Bell*, 556 U.S. 449, 475 (2009) (reversing death sentence for failure to disclose evidence was "mitigating, *though not exculpating*, [the defendant's] role in the crimes") (emphasis added). "It is universally recognized that evidence to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue," but merely have "any tendency" to make a fact of consequence "more or less probable." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 345 (1985). "The meaning of relevance is no different in the context of mitigating evidence in a capital sentencing proceeding." *McKoy* v. *North Carolina*, 494 U.S. 433, 440 (1990).

In *Kyles* itself, police compiled a computer printout of the license plate numbers of cars parked at the scene on the night of the murder, which was never disclosed to the defense. 514 U.S. at 419. Curtis Kyles' car was not listed. *Id*. The State argued that

this evidence did not fall under *Brady* because Kyles could have moved his car before the list was created and the list did "not purport to be a comprehensive listing of all cars in the Schwegmann's lot." *Id*. at 450–51. This Court flatly rejected this contention, stating it, "confuses the weight of the evidence with its favorable tendency." *Id*. at 450.

This *expressio unius est exclusio alterius* logic is an exact parallel to what Petitioner argues now: by the exclusion of Petitioner's name in Edge's confession, jurors could draw the inference Petitioner was not among those inmates that decided Captain Knapps "had to die" and then killed him. Pet. App. 160a.

Or, a juror could have concluded that since the decision to kill did not originate with Petitioner, he was less morally culpable thus deserving of a sentence less than death. See *Cone*, 556 U.S. at 475 (favorable evidence need only provide a reason that "might have persuaded one or more jurors" to choose a sentence less than death); *Penry* v. *Lynaugh*, 492 U.S. 302, 327–28 (1989) ("[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to . . . the circumstances of the offense.").

Nevertheless, *Brown*'s entire discussion of this suppressed statement in the context of "favorability" is a repeat of what this Court rejected in *Wearry*—"[E]mphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." 577 U.S. at 394; *compare* Pet. App. 161a (despite Edge confessing *he and Clark* chose to kill Captain Knapps, because Petitioner's role was not explicitly "elucidate[ed]," "the statement is not favorable").

The Louisiana Supreme Court's favorability analysis conflates favorability with weight, mirroring arguments Louisiana prosecutors continue to make—and lose—before this Court. See *Smith*, 565 U.S. at 76 ("The State's argument offers a reason that the jury *could* have disbelieved Boatner's undisclosed statements, but gives us no confidence it *would* have done so." (emphasis in original)); *Wearry*, 577 U.S. at 394 ("Even if the jury—armed with all of this new [*Brady*] evidence—*could* have voted to convict *Wearry*, we have 'no confidence that it *would* have done so.'" (quoting *Smith*, 565 U.S. at 76)).

Recently, when a state court has refused to follow this Court's direction on remand, this Court granted certiorari and reversed again. See *Moore* v. *Texas*, 139 S. Ct. 666, 670 (2019) (overturning lower court for a second time because on remand, there are "too many instances in which, with small variations, it repeats the same analysis we previously found wanting, and these parts are critical to its ultimate conclusion").

This Court has also rejected Louisiana's approach in *Brown* with regards to mitigation evidence. In *Cone*, the defendant did not dispute that he committed the murders. Instead, he argued the State suppressed evidence would have "corroborated his trial defense" and "bolstered his case in mitigation" that he was not deserving of death because he was suffering from "acute amphetamine psychosis" during the killings. 556 U.S. at 451. The undisclosed evidence in *Cone* that warranted certiorari included statements that the defendant looked "drunk or high," "acted real weird," and "looked wild eyed" in the days preceding the murders. *Id*. at 471. Since each withheld statement "strengthen[ed] the inference that

Cone was impaired by his use of drugs" and "lend[ed] support" to his defense, this Court found it favorable—though none of these observations directly "exculpate[d]" as required by the ruling below. *Id.* at 470, 471.

Finally, the Louisiana Supreme Court's new misinterpretation of "favorability" would simply erase large swaths of evidence from constitutional disclosure obligations. Any *Giglio* evidence impeaching a witness due to prior inconsistent statements or evolution of an eyewitness account over time does not "exculpate" a defendant or "preclude" her guilt; nor does evidence of a deal or other motives of a witness hidden by the State, nor does evidence of biased or incompetent policing, nor do many documents—like lists of cars in a parking lot.

In short, under the doctrinal framework created by the decision below regarding "favorability," the Louisiana Supreme Court would have been correct to deny relief in *Kyles*, *Smith*, and *Wearry*.

B. *Brown* Again Procedurally Misapplies this Court's Materiality Analysis

In determining materiality, "suppressed evidence [must be] considered collectively, not item by item." *Kyles*, 514 U.S. at 436. In capital cases, undisclosed favorable evidence is evaluated to determine, in the context of the record as a whole, whether it could have served as a basis for a sentence less than death by one juror or more jurors. *Cone*, 556 U.S. at 475.

The Louisiana Supreme Court was bluntly told this in *Kyles* and again in *Wearry*. In just 2016, this Court wrote that the Louisiana Supreme Court once more erred in viewing the suppressed evidence "in

isolation rather than cumulatively." *Wearry*, 577 U.S. at 394.

While again engaging in hypothetical ways in which a juror could potentially disregard Edge's confession as favorable in *Brown*, the lower court's decision here departs *even further* from this Court's precedent by creating an impermissible "screening test" for *Brady* evidence: If withheld evidence is not directly exculpating, i.e., explicitly precluding one's involvement in a crime, it is *per se* not favorable or material *even as to sentencing*. See Pet. App. 158a–164a. Instead of assessing the evidence cumulatively, the lower court isolates evidence and excludes it as irrelevant.

Such screening tests for mitigating evidence have previously been struck down as having "no foundation in the decisions of this Court." See *Tennard* v. *Dretke*, 542 U.S. 274, 284 (2004). This most recent screening test, and disregard of this Court's materiality precedent, should suffer the same fate.

II. LOUISIANA COURTS CONTINUE TO COUNTENANCE AND ENABLE *BRADY* VIOLATIONS, REQUIRING FEDERAL COURTS REPEATED INTERVENTION

A. The Louisiana Supreme Court Persists in Ignoring or Disregarding this Court's *Brady* Decisions

Louisiana is "descend[ing] to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth." *Kyles*, 514 U.S. at 439. This Court has previously provided numerous examples of what constitutes "favorable and material" evidence in

Louisiana cases: (1) undisclosed inconsistent descriptions of shooter by a witness;[6] (2) undisclosed inconsistent accounts of events by witnesses;[7] (3) evolution of an eyewitnesses' account of his ability to identify a perpetrator[8]or the details of what she saw over time,[9]; (4) bias or incompetent policing;[10] (5) concealed motives for a witness' statements inculpating a defendant,[11] such as receiving a deal in his own case[12] or personal animus against the defendant[13]; and (6) documents in the possession of the State that have some "tendency" to be favorable to a defendant, even if the weight "of its favorable tendency" is at issue.[14]

Yet, in reviewing 130 citations to *Brady*, *Kyles*, *Smith*, or *Cain* by the Louisiana Supreme Court since January 10, 2012,[15] that court has not found a *single Brady* violation necessitating a reversal of conviction or sentence. *Smith* itself has never once been cited by Louisiana Supreme Court. In eighty-six (86) cases that cite to *Brady*, *Kyles*, or *Wearry*,

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[6] *See id*. at 441–42.

[7] *See id*. at 442–43.

[8] *Smith*, 565 U.S. at 73–76.

[9] *See Kyles*, 514 U.S. at 444.

[10] *Id.* at 445.

[11] *Id.* at 445.

[12] *Wearry*, 577 U.S. at 390.

[13] *Id*. at 389–90.

[14] *Id.* at 390; *see also Kyles*, 514 U.S. at 450–51.

[15] This Court handed the State its decisive loss in *Smith* on that date.

the court simply restates *pro forma* language, "[Petitioner] also fails to show the state withheld material exculpatory evidence in violation of *Brady*," *State* v. *Elmore*, 22-423 (La. 04/26/22); 336 So.3d 889, 889 (mem.). Often these summary denials have no further explanation. *Id.*; see also, *e.g.*, *State* v. *Beckley*, 21-1987 (03/15/22); 333 So.3d 1237, 1237; *State* v. *Coleman*, 19-936 (La. 03/09/20); 290 So.3d 1129, 1129 (mem.).

While never itself finding a "true *Brady* violation," the Louisiana Supreme Court has remanded cases for an evidentiary hearing or consideration of a petitioner's *Brady* claims post-*Smith* in six instances. See *State* v. *Skinner*, 19-1427 (La. 02/26/20); 2020 La. LEXIS 507, *1; *State* v. *Hampton*, 19-1429 (La. 02/26/20); 2020 La. LEXIS 504, *1; *State* v. *Robertson*, 18-1006 (La. 05/20/19); 271 So.3d 190, 190; *State* v. *Newton*, 17-926 (La. 02/11/19); 263 So.3d 421, 421 (mem.); *State* v. *Serigne*, , 16-1034 (La. 10/06/17); 232 So.3d 1227, 1232; *Jones* v. *Vannoy*, 17-101 (La. 06/16/17); 221 So.3d 850, 850; *State* v. *Galle*, 15-1734 (La. 03/13/17); 212 So.3d 1164, 1165.

Twice the court overturned favorable pretrial rulings requiring disclosure of information the defense alleged to contain *Brady* material. See *State* v. *Green*, 17-626 (La. 06/29/17); 227 So.3d 818, 818 (finding trial court erred in ordering pretrial disclosure of potential deals with co-defendants to testify); *State* v. *Baumberger*, 12-2053 (La. 12/14/12); 104 So.3d 417, 417 (reversing trial court order to produce social security number of decedent's widow requested to further defense investigation). In one case, the Louisiana Supreme Court held a lower court's pretrial ruling requiring disclosure of materials to be reviewed *in camera* for *Brady* was not an

abuse of discretion. See *State* v. *Robertson*, 15-1911 (La. 01/08/16); 182 So.3d 942, 942.

Another eight decisions contain a cite to *Brady* for various reasons, but the issues presented and ruled upon do not involve alleged *Brady* violation.[16]

The remaining Louisiana Supreme Court decisions post-*Smith* reject the appellants' *Brady* claims, despite numerous cases falling squarely within the examples this Court has provided in *Kyles*, *Smith*, and *Wearry*. The Louisiana Supreme Court has denied relief where an undisclosed statement revealed the key witness initially described the shooter as "markedly different in appearance than the defendant." *Whitmore* v. *State*, 18-1093, (La. 05/06/19); 2019 La. LEXIS 1267, *1 (Johnson, C.J., dissenting). In another case, there were substantial undisclosed discrepancies between the witnesses' original statements and those at trial, post-trial evidence of witness coercion by the State, and inconsistencies between the police officer's undisclosed original report and his trial testimony; nevertheless, the Louisiana Supreme Court found no violations. See *State* v. *Williams*, 19-1293 (La. 08/14/20); 300 So.3d 825, 825–26 (Johnson, C.J., dissenting) (mem.); see also *State* v. *Coleman*, 14-402 (La. 02/26/12); 188 So.3d 174, 203–04 (untimely and limited disclosure of inconsistent

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[16] *See State* v. *Revish*, 19-1732 (La. 10/20/20); 340 So.3d 864; *In re Bokenfohr*, 18-718 (La. 09/21/18); 252 So.3d 872; *Boren* v. *Taylor*, 16-2078 (La. 06/29/17); 223 So.3d 1130; *State* v. *Pierre*, 13-873 (La. 10/15/13); 125 So.3d 403; *State* v. *Bazile*, 12-2243 (La. 05/07/13); 144 So.3d 719; *State* v. *Ross*, 13-175 (La. 03/25/14); 144 So.3d 932; *State* v. *Dyer*, 12-1166 (10/26/12); 101 So.3d 38; *State* v. *Clark*, 12-508 (La. 12/19/16); 220 So.3d 583 (conviction and death sentence vacated for other reasons by *Clark* v. *Louisiana*, 138 S. Ct. 2671 (2018) (mem.)).

witness' grand jury testimony was not material because jury was "well aware" the witness gave differing accounts).

Nor did the Louisiana Supreme Court act on a case remarkably similar to, but even more egregious than, *Kyles*. As described by the intermediate appellate court, in *State* v. *Grace*, the State's star witness was originally suspected by police of committing the murder—the lead detective testified to the grand jury she planned to arrest him for the crime until he implicated the defendant. See *State* v. *Grace*, 17-451 (La. App. 5 Cir.); 2017 La. App. LEXIS 2107, *4. An independent eyewitness identified the State's star witness, rather than Mr. Grace, as the shooter in grand jury testimony *Id*. at *3. The State chose not to disclose this evidence, and its star witness was presented to jurors a normal lay eyewitness, *not the original suspect in the murder*. *Id*. at *3–4. The trial court granted post-conviction relief to the defendant on these grounds. *Id*. at *4. A divided panel of the intermediate appellate court reversed. *Id*. at *13–17. Over the dissent of three justices, the majority of the Louisiana Supreme Court summarily dismissed the defendant's claim writing only, "[r]elator fails to show that the State withheld material exculpatory evidence in violation of *Brady*." *State* v. *Grace*, 17-2070 (La. 02/25/19); 264 So.3d 431, 431–32; see also *id*. at 432 (Hughes, J., dissenting).[17]

[17] As discussed below, this case is one of the numerous in which a defendant finally got relief in federal court. *See Grace* v. *Cain*, No. 02-3818, 2021 U.S. Dist. LEXIS 230654 (E.D. La. Dec. 2, 2021).

Grace is not the only case that a suppressed initial statement by an eyewitness identifying someone other than the defendant as the perpetrator was deemed not material. In *State ex rel. Hampton* v. *Cain*, Justice Johnson dissented from denial of review: "The facts in *Brady* are virtually identical to the instant case." 11-1935 (La. 03/23/12); 82 So.3d 1241 (Johnson, J. dissenting) (quoting *State* v. *Hampton*, 98-331 (La. 04/23/99), 750 So.2d 867, 892 (Johnson, J., dissenting)). Specifically, the State's sole eyewitness to the murder testified to the grand jury that the Mr. Hampton's co-defendant—not Mr. Hampton—was the shooter. See *id*. at1241. This testimony was never disclosed. *Id*.

In the Louisiana Supreme Court's jurisprudence post-*Smith*, *Napue* violations (prosecution's presentation of knowingly false testimony) are not material, merely warranting a single word, "Denied", over the dissent of three justices. See *State ex rel. Bishop* v. *State*, 13-2613 (La. 10/19/16); 202 So.3d 996, 996 (mem.) (Johnson, C.J., writing that she would grant review) ("Considering relator has made a colorable claim that the state presented false testimony which contributed substantially, if not entirely to his verdict," review is warranted); see also *State* v. *Hoffman*, 20-137 (La. 10/19/21); 326 So.3d 232, 240–41 (affirming conviction where State suppressed an initial coroner investigator's report which supported the defense theory rebutting specific intent to kill, and then presented contrary evidence at trial). Over the dissent of two justices, a defendant charged with home invasion was denied relief after he belatedly received 635 pages of text messages between himself and the complainant on the second day of trial. See *State* v. *Green*, 16-107 (La. 06/29/17); 225 So.3d

1033, 1037–39. These messages—obtained by the State well in advance from the defendant's phone that was seized by police—"contained concrete exculpatory evidence," *id*. at 1046 (Johnson, C.J., dissenting joined by Hughes, J.), namely multiple invitations by the complainant for the defendant to come visit her on the night of the alleged "home invasion." *Id*. However, the majority found that the text messages were not a basis for relief because the defendant should have known about them. *Id.* at 1037–39; see also *State* v. *Carter*, 10-614 (La. 01/24/12); 84 So.3d 499, 524 (untimely disclosed audio recording in possession of the State that supported defense theory was not material because defendant was on the call and should have known about the contents).

In the remaining cases, the Louisiana Supreme Court has ruled *Brady* evidence not material because it was cumulative,[18] known by trial counsel,[19] or did not bring into question the defendant's guilt.[20]

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[18] *See State* v. *Garcia*, 09-1578 (La. 11/16/12); 108 So.3d 1, 35–38; *State ex rel. Benn* v. *State*, 11-2418 (La. 06/22/12); 90 So.3d 1045 (mem.).

[19] *See State* v. *Blank*, 16-213 (La. 05/13/16); 192 So.3d 93, 102.

[20] *See State* v. *Lacaze*, 16-234 (La. 12/16/16); 208 So.3d 856, 865 (conviction and death sentence vacated for other reasons by *Lacaze* v. *Louisiana*, 138 S. Ct. 60 (2017)); *State* v. *Chester*, 15-2304 (La. 12/16/16); 208 So.3d 338, 348 (conviction and death sentence vacated for other reasons by *Chester* v. *Vannoy*, No. 16-17754, 2018 U.S. Dist. LEXIS 99219 (E.D. La. June 11, 2018); *State* v. *Broadway*, 17-825 (La. 09/21/18); 252 So.3d 878, 885–86.

B. The Louisiana Supreme Court's Refusal to Follow *Brady* Necessitates Frequent Federal Reversals

In addition to this Court's decisions, federal courts have frequently been required to expend resources reversing Louisiana *Brady* decisions despite their limited parameters under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and considerations of comity.

Jessie Grace—the case frighteningly similar to *Kyles* described above—is a recent example. After being denied relief by the Louisiana Supreme Court in 2019, see *Grace*, 264 So.3d at 431, Mr. Grace filed a 28 U.S.C. §2254 petition. The district court found Mr. Grace's conviction contrary to and an unreasonable application of this Court's precedent. See *Grace*, 2021 U.S. Dist. LEXIS at *31; see also *id*. at *31–34; see also *id*. at *33 ("The State does not point to any instant in the investigation of the [decedent's] murder that [purported witness'] role in the matter reasonably went from co-perpetrator to eyewitness."); *id*. at 34 (independent eyewitness's grand jury testimony suggesting she identified the purported eyewitness —not Mr. Grace—as holding a gun to the decedent's head).

Over three dissenting justices and without an opinion, the Louisiana Supreme Court denied relief to John Floyd. See *Floyd* v. *Cain*, 10-1163 (La. 05/20/11); 62 So.3d 57 (mem.). Mr. Floyd was convicted of two murders at two different scenes. No physical evidence, including fingerprints, tied him to either scene. After being incarcerated for more than twenty-three years, *pro bono* counsel discovered fingerprints results from both crime scenes both

marked "Not John Floyd" that never disclosed this evidence. See *id.* at 59–60 (Johnson, J. dissenting). See *Floyd* v. *Vannoy*, 894 F.3d 143, 152 (5th Cir. 2018). Ultimately, the federal district court found that Mr. Floyd's compelling actual-innocence claim overcame an otherwise procedurally time-barred claim under this Court's decision in *McQuiggin* v. *Perkins*, 569 U.S. 383 (2013). See *Floyd*, 894 F.3d at 152. The district court then conducted "an exhaustive analysis" of Mr. Floyd's *Brady* claims and vacated his conviction. *Id.* at 153. The Fifth Circuit affirmed: "[I]n light of the newly-discovered evidence, no reasonable juror, considering the record as a whole, would vote to convict Floyd of Hines' murder." *Id.* at 160. On remand, the State dismissed all charges against Mr. Floyd.[21]

Douglas DiLosa was likewise exonerated after his life sentence was reversed by federal court. The Fifth Circuit held Louisiana courts "applied a rule of law contrary to" this Court's established precedent by evaluating whether the "four main categories of withheld evidence" were sufficient to factually exculpate Mr. DiLosa rather undermine confidence in the verdict. *DiLosa* v. *Cain*, 279 F.3d 259, 263–64 (5th Cir. 2002). The State dismissed charges after remand.[22]

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[21] *See* Page for John Floyd's Case, THE NATIONAL REGISTRY OF EXONERATIONS, available at: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5454 (last visited August 25, 2022).

[22] *See* Page for Douglas DiLosa's Case, THE NATIONAL REGISTRY OF EXONERATIONS, available at: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3178 (last visited August 25, 2022).

Federal habeas relief has been granted where Louisiana courts have declined to find promises of benefits or leniency to witnesses material under *Brady*. See *Tassin* v. *Cain*, 517 F.3d 770, 775–77 (5th Cir. 2008) (affirming habeas relief due to suppressed leniency agreement between the testifying co-defendant and trial court); *Lacaze* v. *Warden La. Corr. Inst. For Women*, 645 F.3d 728, 731–38 (5th Cir. 2011) (overruling Louisiana Supreme Court's determination that an undisclosed promise that the State would not prosecute of the son of the State's key witness was not material).

Like many other Louisiana Supreme Court *Brady* cases, David Mahler's post-conviction writ application was denied "without setting forth supporting reasons." *Mahler* v. *Kaylo*, 537 F.3d 494, 498 (5th Cir. 2008). Reversing the state courts, the Fifth Circuit held that suppressed witness statements that the victim was killed in the middle of a fight with the defendant, rather than (as the State had claimed at trial) after the fight when the victim turned to run—could have made a difference to the jury's decision whether the defendant was guilty of murder, manslaughter, or was acting in self-defense. *Id.* at 500–03. Similarly, in *Johnson* v. *Cain*, the State's key witness' account of the facts at trial were far different—and far more inculpatory—than the witness' undisclosed initial statement. 68 F. Supp. 3d 593, 612 (E.D. La. 2014). At trial, the witness testified the defendant kicked and shot the complainant after he was already on the ground. *Id.* To the contrary, in his undisclosed initial statement, the witness described a quick exchange where, after seeing the complainant punch the defendant's brother in the mouth, the defendant jumped out of a car and fired

immediately. *Id*. The Louisiana courts denied merits review, deciding the claim was procedurally barred. *Id*. at 610. The district court found this to be an error of "[s]imple math," *Id*. n.11, then granted merits relief on the *Brady* claim.

This is not an exhaustive review of all relevant federal habeas rulings; rather, an exemplary set of cases showing the burden that Louisiana courts' misapplication of *Brady* law places both on federal courts and those with constitutionally infirm convictions awaiting relief. Further, AEDPA significantly limits federal courts corrective oversight meaning that the number of federal habeas grants necessarily understates potential prosecutorial violations of *Brady*.

CONCLUSION

For the reasons set forth herein, *Amici* respectfully requests that the Court grant review in this case.

Respectfully submitted,

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