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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Louisiana Supreme Court held that the coconspirator confession that the State suppressed was neither favorable nor material to petitioner's defense because it did not expressly exclude him from also participating in the killing of the victim. Pet. App. 163a. As the petition for certiorari explains, this conclusion flouts common sense and conflicts with decisions from this Court and several other courts. Indeed, the brief in opposition scarcely defends the Louisiana Supreme Court's reasoning. Instead, the State seeks refuge "in the context of the entire record" of the case. BIO i. But nothing in the full record here makes the Louisiana Supreme Court's rejection of petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), any more defensible or consistent with the law in other jurisdictions. This Court should grant certiorari and reverse.

1. *The merits*. Most of the State's argument on the merits consists of a lengthy recitation of this Court's general *Brady* jurisprudence. *See* BIO 22-27. When the State turns to "the instant case," it attempts to defend the Louisiana Supreme Court's decision on four grounds. BIO 28-30. None is persuasive.

First, the State argues that Edge's confession was not material because it "does not state who killed Captain Knapps or who was in the room when this occurred." BIO 28. This two-sentence argument simply repeats the Louisiana Supreme Court's reasoning—namely, that the confession was neither favorable nor material because "it does not place defendant outside the restroom when the fatal blows were delivered." Pet. App. 163a. Petitioner has already explained how this overly formalistic reasoning contravenes the

Brady doctrine; the question under *Brady* is whether the statement "could have affected" the jury's assessment of the defendant's role in the crime, *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam) (citation omitted), not whether the statement expressly describes the defendant's role. Pet. 24-26. And here, a natural inference from the fact that Edge's confession does not mention petitioner is that petitioner did not directly participate in the killing or intend that Captain Knapps be killed at all. *Id*; Amicus Br. of Current and Former Prosecutors and Dep't of Justice Officials 13-16. The State offers no response to this reality.

Second, the State points to a footnote in the Louisiana Supreme Court's decision suggesting that the State could have "undermine[d] any favorable inference" that could have been drawn from Edge's confession by introducing a prior statement by Edge denying his own participation in the killing. BIO 30 (quoting Pet. App. 163a n.71). This suggestion makes little sense. During petitioner's trial, the State maintained that Edge was among those who struck the fatal blows against Captain Knapps, killing him "in[] the bathroom." 43 R. 10063. The State thus clearly believed that Edge's initial statement falsely elided his role in the killing. Besides, a witness's prior, potentially contradictory statement cannot absolve the prosecution from disclosing a later, otherwise material statement; the *Brady* doctrine leaves such credibilty determinations for the jury. *Smith v. Cain*, 565 U.S. 73, 76 (2012).

Third, the State suggests that "[w]hen 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." BIO 29. That may be so. But while such intent was sufficient for a finding of guilt under Louisiana law, the inquiry regarding intent at the penalty phase was different. The key question at that phase was whether petitioner was deserving of a death sentence because he acted with "the specific intent *to kill*." Pet. App. 216a (emphasis added); *see also* Pet. 8-9, 14. In other words, the question was whether petitioner directly participated in the delivery of the fatal blows upon Knapps or whether, as he insisted, he left the bathroom before Knapps was killed by others. *See* Pet. 8-10, 21-22; 189a-194a (Genovese, J., dissenting). Edge's confession is favorable and material because it indicates petitioner was telling the truth. Pet. 22-23; Pet. App. 190a-193a (Genovese, J., dissenting); Amicus Br. of NACDL 7-9.

Fourth and finally, the State asserts that petitioner "did not argue" during the penalty phase "that he played a relatively minor role in the offense." BIO 28. The record shows otherwise. In the words of the trial court, "*[t]hroughout the case*, [petitioner] attempted at the guilt phase *and at the sentencing phase* to present a defense that he was, perhaps, less culpable than others in the case, that others were far more culpable than him." Pet. App. 216a (emphasis added); *see also* Pet. App. 217a ("[T]he defendant urged one of the mitigators, a statutory mitigator, that his participation in the crime was relatively minor.").

Specifically, during his penalty-phase argument to the jury, petitioner discussed the "terrible crime scene," 44 R. 10167, and how Captain Knapps "died

like that in that bathroom," 45 R. 10434—always phrasing the references to Knapps's death in the passive tense to reinforce his contention that he did not participate directly in the killing. *See* Pet. 5 (guilt-phase evidence); 44 R. 10085-86, 10095-96 (guilt-phase closing argument). The jury was then expressly instructed that it could "consider the evidence presented during the guilt determination trial," 45 R. 10449, and impose only a life sentence if it found that petitioner's "participation was relatively minor," *id.* 10447; *see also* Pet. App. 163a (referencing the "statutory mitigator" of "relatively minor" participation). And even after the jury returned a verdict sentencing petitioner to death, petitioner asked the trial judge to reject that verdict, again asserting that his "participation" in the killing was "relatively minor." Unif. Cap. Sent'g Rev. Rep. at 2; *see also* Dft's Motion for a New Trial at 13 (stressing petitioner's "relatively minor role in the offense").

At any rate, the favorability and materiality inquiries under *Brady* are not limited to whether the evidence that was suppressed would have bolstered an argument that the defendant made during trial. *Brady* also asks whether the evidence would have allowed the defendant to make an *additional* argument that could have "affected the judgment of the jury." *Wearry*, 577 U.S. at 392 (citation omitted). *Kyles v. Whitley*, 514 U.S. 419 (1995), is a textbook example. There, the prosecution suppressed pretrial statements by two eyewitnesses that would have undercut their in-court identifications of the defendant as the perpetrator. This Court did not pause to ask whether the defense had tried to discredit those eyewitnesses

at trial. Rather, the Court found the statements favorable and material because, if they had been disclosed, the defense "would have had a compelling argument" that the eyewitness testimony was unreliable. *Id.* at 441-45. The Court added that the pretrial statements "would have raised opportunities" to attack the prosecution's physical evidence as well, *id.* at 445, and "could have laid the foundation for a vigorous argument"—also never made at trial—"that the police had been guilty of negligence" in their investigation. *Id.* at 447; *see also, e.g.*, *Browning v. Trammell*, 717 F.3d 1092, 1108 (10th Cir. 2013) (suppressed evidence material where, in light of such evidence, a "theory that might otherwise be offensive suddenly must be taken seriously").

This reasoning leaves no doubt that petitioner is entitled to relief. If Edge's confession had been disclosed, petitioner would have had a compelling argument "that others were far more culpable than him." Pet. App. 192a (Genovese, J., dissenting) (quoting trial court's decision).

2. *The conflict.* The State suggests that the Louisiana Supreme Court's decision is incapable of conflicting with decisions from any other jurisdictions because *Brady* review is necessarily "fact and record specific." BIO 32. Of course *Brady* claims depend on particular facts. But the State is mistaken to suggest that the Louisiana Supreme Court's *Brady* holding here can be harmonized with the law in other jurisdictions. The Louisiana Supreme Court held that another person's confession that does not expressly "preclude" the defendant's participation in the criminal act at issue cannot be favorable or material under

Brady. Pet. App. 163a; *see also* Pet. App. 164a (such a statement "sheds no light" on the defendant's culpability). By contrast, at least four state high courts and two federal courts of appeals have rejected this approach, holding that such confessions are favorable and can indeed require *Brady* relief. Only this Court can resolve this disagreement.

a. The State attempts to distinguish *State v. Brown*, 873 N.E.2d 858 (Ohio 2007), and *Goudy v. Basinger*, 604 F.3d 394 (7th Cir. 2010), on the ground that they involved statements made by testifying witnesses. BIO 36. It is true that both cases involved incriminating statements by individuals who testified against the defendant and thus could have been used to impeach those witnesses at trial. *See Brown*, 873 N.E.2d at 866-67; *Goudy*, 604 F.3d at 396-97. But that fact was not the reason both courts held that the statements before them were favorable and material to the defense.

In *Brown*, the prosecution suppressed two statements that implicated the state's key witness in the crime, while not explicitly ruling out the defendant's participation. 873 N.E.2d at 867. The Ohio Supreme Court held that the statements were favorable and material because, had they been disclosed, the defendant could have used them to argue that he "did not pull the trigger and that a different party was responsible for the deaths." *Id.* at 868. What is more, the Ohio Supreme Court made clear that nothing about its analysis "rest[ed] upon how the[statements] might have been used by the defense or how the de-

fense might have altered its trial strategy." *Id.* Instead, "[t]he significance and materiality of the reports" were "inherent in their content." *Id.*[1]

In *Goudy*, the Seventh Circuit agreed with the state court that statements implicating a state witness in a murder involving two shooters were favorable because they "tend *either* to exculpate Goudy *or* impeach witnesses against him." 604 F.3d at 399 (emphasis added). As to the former possibility, the Seventh Circuit explained that the statement—just like Edge's confession here—would have "bolstered [the defendant's] story that he was not at the scene of the shooting." *Id.* Furthermore, the Seventh Circuit rejected the state court's reasoning that the statements were not material because they did "not mean that Goudy *could not have been* the other shooter" or that "Goudy *was not* the other shooter." *Id.* at 400 (citation omitted) (emphasis in original). This holding directly conflicts with the Louisiana Supreme Court's holding

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[1] The State gestures at two further attempts to distinguish *Brown*, but each falls flat. First, the Ohio Supreme Court's observation that the "full effect" of the *Brady* violation could not "be appreciated isolated from" defendant's ineffective-assistance-of-counsel claims, *Brown*, 873 N.E.2d at 871 (BIO 32), in no way undermines the court's holding that the suppressed statements were "inherent[ly]" material, *id.* at 868. Second, the State is wrong to doubt (BIO 32) whether the Ohio Supreme Court's materiality analysis related to the defendant's argument that he "lacked the 'prior calculation and design' required to commit aggravated murder." In analyzing materiality, the court acknowledged that the defendant did not dispute his guilt but noted that he "did, however, deny that he acted with prior calculation and design, and two life sentences for murder is a decidedly different outcome from a sentence of death." *Brown*, 873 N.E.2d at 867.

here that Edge's confession was not material because it does "not place defendant outside the restroom when the fatal blows were delivered," Pet. App. 163a.

b. The State contends that *Jones v. Jago*, 575 F.2d 1164 (6th Cir. 1978), "has no bearing on this matter" because the Sixth Circuit applied a test for materiality that predated the materiality formula this Court adopted in *United States v. Bagley*, 473 U.S. 667 (1985). BIO 33-34. But the precise standard for materiality makes no difference to whether *Jones* conflicts with the Louisiana Supreme Court's decision here.

In *Jones*, the prosecution suppressed a statement by a codefendant that "related in detail his own participation and the participation of others in the shooting spree" but "made no express reference" to the defendant. 575 F.2d at 1166. The prosecution argued that, because the statement did not reference the defendant, "it was neutral and hence not favorable" to him. *Id.* The Sixth Circuit rejected this argument, holding that the statement's silence as to the defendant was not "controlling" as to its favorability under *Brady*. *Id.* at 1167. The court reasoned that there was a "substantial basis for claiming both that [the statement] was exculpatory and for claiming that it was material" because it created "at least a reasonable inference that Jones did not participate in" the shootings. *Id.* at 1168.

This holding is incompatible with the Louisiana Supreme Court's holding that Edge's confession "sheds no light" on who may have killed Captain Knapps. Pet. App. 164a. Had the Sixth Circuit imposed the Louisiana Supreme Court's requirement

that a statement expressly "preclude" guilt or culpability for its suppression to violate *Brady*, Pet. App. 163a, *Jones* would have come out differently regardless of the materiality test applied.

c. The State next notes that the accomplice's statement in *State v. Phillips*, 940 S.W.2d 512 (Mo. 1997), was deemed relevant to an aggravating factor (specifically, depravity of mind), instead of a mitigating factor. BIO 36-37. But that distinction is irrelevant. The Missouri Supreme Court held that the accomplice's statement taking blame for gruesomely disposing of the victim's body was "exculpatory and material to the issue of Phillips' punishment" because it created an "inference" that the defendant's participation in that act "was tangential rather than direct." 940 S.W.2d at 517. This holding directly contradicts the Louisiana Supreme Court's holding that Edge's confession was not favorable or material to petitioner because it does not expressly "preclude" or "speak to" petitioner's involvement in the killing. Pet. App. 163a.

d. Lastly, the State argues that the prosecution presented more "evidence of Petitioner's participation in the offense" than in *Commonwealth v. Green*, 640 A.2d 1242 (Pa. 1994), or *Rogers v. State*, 782 So. 2d 373 (Fla. 2001). BIO 37. But the Louisiana Supreme Court did not find Edge's confession immaterial on the basis of other evidence in the record. Instead, the Louisiana Supreme Court deemed the confession neither favorable nor material because of its own content—specifically, because the statement itself does not "place [petitioner] outside the restroom when the fatal blows were delivered" or otherwise expressly "speak to" petitioner's actions. Pet. App. 163a.

That reasoning and conclusion is irreconcilable with *Green* and *Rogers*. The Pennsylvania Supreme Court held in *Green* that a codefendant's confession that "in no way implicated appellant in the murder" was nevertheless "clearly relevant and material to the issue of appellant's punishment" because it "would have provided the defense with strong evidence of mitigation." 640 A.2d at 1245-46. The Florida Supreme Court held in *Rogers* that a conversation between three individuals "suggesting that they may have been involved in the . . . robbery and murder" was favorable and material, notwithstanding the lack of any mention of the defendant, because it "could have been used to show that another person . . . and not [the defendant]" committed the criminal acts at issue. 782 So. 2d at 382-83. Had the Louisiana Supreme Court followed the lead of these other courts, it would have recognized—just as the trial judge and the three dissenters below did—that Edge's confession was favorable and material, and accordingly that petitioner is entitled to a new penalty-phase proceeding.

Especially given the stakes involved, this conflict should not be allowed to persist. This Court should grant review and make clear that prosecutors must disclose statements indicating that persons other than the defendant committed relevant criminal acts—even if the statements do not explicitly rule out the defendant's participation in those acts.

CONCLUSION

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

Respectfully submitted,

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October 12, 2022