

No. A-__

IN THE
Supreme Court of the United States

DAVID BROWN,

Applicant,

v.

LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

CAPITAL CASE

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

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To: Justice Samuel A. Alito, Jr., Circuit Justice for the Fifth Circuit:

Under this Court's Rules 13.5 and 22, Applicant David Brown requests an extension of thirty (30) days to file a petition for a writ of certiorari in this case. His petition will seek review of the Louisiana Supreme Court's decision in *State v. Brown*, __ So.3d __, 2022 WL 266603 (La. Jan. 28, 2022), in which the court affirmed Applicant's murder conviction and capital sentence. A copy of the Louisiana Supreme Court's decision is attached. *See* App. A at 1-162. In support of this application, Applicant states:

1. The Louisiana Supreme Court issued its decision in this case on January 28, 2022, and it denied a timely petition for rehearing on March 25, 2022. Without an extension, the petition for a writ of certiorari would be due on June 23, 2022. With the requested extension, the petition would be due on July 25, 2022. This Court's jurisdiction will be based on 28 U.S.C. § 1257(a).

2. This case presents the following question: Where a defendant denies participating in a criminal act, is a co-defendant's confession stating that he and another co-defendant conceived of and committed the act—without mentioning the defendant—favorable and material evidence under *Brady v. Maryland*, 373 U.S. 84 (1963)?

Applicant was convicted of murder and sentenced to death for his role in an attempted prison escape involving five other inmates that led to a corrections

officer's death. App. A, Majority at 1. After Applicant's penalty-phase trial, prosecutors revealed that they had suppressed the confession of Applicant's co-defendant, Barry Edge. *Id.* at 126. In that confession, Edge stated that he and another co-defendant, Jeffrey Clark, had "made a decision to kill" the victim and "flipped a switch and they killed him." *Id.* at 131. Edge's confession never mentions Applicant.

After the trial court held that the State had violated *Brady* and granted Applicant a new penalty-phase trial, the Louisiana Supreme Court disagreed. *Id.* at 132. In a 4-3 decision, the Louisiana Supreme Court held that the suppressed confession was neither favorable to Applicant nor material to his death sentence because the confession "never stated that [Applicant] was not present or not involved in the killing." *Id.* at 133. In contrast, the three-Justice dissent would have found the confession both favorable and material even though it "contains no mention of [Applicant]." *Id.*, Dissent at 4.

The Louisiana Supreme Court then denied rehearing, with three Justices again dissenting. App. B.

3. This case is a serious candidate for review. The decision below contravenes the clear dictates of *Brady* and erroneously leaves intact Applicant's death sentence. Under *Brady*, evidence is favorable if it has "some weight [or] tendency" to help the defendant's case, *Kyles v. Whitley*, 514 U.S. 419, 451 (1995), and is material "when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury,'" *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Giglio v. United States*, 450 U.S. 150, 154 (1972)). Where, as here, a co-

defendant's confession expressly implicates certain co-defendants—without mentioning the defendant—that confession will almost always be favorable and material. That is especially true in capital proceedings, which often turn on a defendant's relative responsibility vis-à-vis other perpetrators. *See Cone v. Bell*, 556 U.S. 449, 473 (2009). Indeed, in *Brady* itself, this Court held that a co-defendant's suppressed confession implicating only the co-defendant in the actual killing of a victim was material to Brady's capital sentence. 373 U.S. at 90.

The Louisiana Supreme Court's contrary decision conflicts with decisions from at least four state high courts and one federal court of appeals. Unlike the Louisiana Supreme Court, these other courts recognize that, in a crime involving multiple perpetrators, a statement that some of the non-defendant perpetrators played a particular role suggests that the defendant did not also play that role. *See Goudy v. Basinger*, 604 F.3d 394, 400 (7th Cir. 2010); *State v. Brown*, 873 N.E.2d 858, 867-68 (Ohio 2007); *Rogers v. State*, 782 So.2d 373, 383 (Fla. 2001); *State v. Phillips*, 940 S.W.2d 512, 517 (Mo. 1997); *Commonwealth v. Green*, 640 A.2d 1242, 1246 (Pa. 1994). Had Applicant's case arisen in one of these jurisdictions, he would not still remain sentenced to death.

Finally, the issue presented is important, and this case is an excellent vehicle for resolving it. The Court regularly grants certiorari in cases where the petition presents a strong *Brady* claim, *see Turner v. United States*, 137 S. Ct. 1885 (2017); *Wearry v. Cain*, 577 U.S. 385 (2016); *Smith v. Cain*, 565 U.S. 73 (2012), and this case's capital nature reinforces the need for review. No obstacles

would complicate the Court’s resolution of the question presented: the case arises on direct review; the *Brady* issue was fully litigated at all stages and generated a published decision along with a three-Justice dissent; and the issue is outcome determinative for Applicant.

4. This application for a 30-day extension seeks to accommodate Applicant’s legitimate needs. Applicant has only recently affiliated undersigned counsel at O’Melveny & Myers. The extension is needed for new counsel to fully familiarize themselves with the record, decision below, and relevant case law, and to allow counsel adequate time to prepare the petition for certiorari. The press of other business and deadlines means these tasks will take several weeks.

5. For these reasons, Applicant requests that the due date for his petition for a writ of certiorari be extended to July 25, 2022.

Respectfully submitted,

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