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David Brown versus Louisiana

Charles Ogletree
Fair Punishment Project

Ronald Sullivan
Fair Punishment Project

NO. 15-8779

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 *AMICUS CURIAE* FAIR PUNISHMENT PROJECT & CENTERS FOR ETHICS IN SUPPORT OF PETITIONER

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THIS IS A CAPITAL CASE

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INTEREST OF *AMICI CURIAE*[1]

The Fair Punishment Project is a joint initiative of Harvard Law School's Charles Hamilton Houston Institute for Race & Justice and its Criminal Justice Institute. In seeking to ensure that the U.S. justice system is fair and accountable, we highlight the gross injustices resulting from prosecutorial misconduct, ineffective defense lawyering, and racial bias, and challenge the unconstitutional use of excessive punishment.

The Jacobs Burns Center for Ethics in the Practice of Law at Cardozo School of Law sponsors courses, programs, and events that provoke dialogue and critical thought on ethical and moral issues of professional responsibility. The Center helps prepare students to face, with integrity, the difficult and important questions that arise in all areas of legal practice. In the past five years, the Center's work has focused upon ethical issues in the criminal justice system, and includes conferences, programs, and publications related to the exercise of prosecutorial discretion and ethical obligations of criminal defense lawyers.

The Louis Stein Center for Law and Ethics works in collaboration with law students, practitioners, judges and legal scholars to study and improve the legal profession by: honoring exemplary

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[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties were timely notified of amici's intent to file this brief. Petitioner and Respondent have consented to the filing of this brief. The letters granting consent are filed herewith. Pursuant to Rule 37.6, this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel has made a monetary contribution to the preparation and submission of this brief.

lawyers; inculcating ethics into teaching law; training future lawyers "in the service of others"; incorporating ethical and professional values into academic and mentoring programs; and encouraging scholarly inquiry and scholarship on the professional conduct and regulation of lawyers. Above all, the Stein Center fosters an understanding of "ethical legal practice" that goes beyond adherence to the rules set forth in professional codes of conduct.

The Ethics Bureau at Yale drafts *amicus* briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a *pro bono* basis to not-for-profit legal service providers, courts, and law schools.[2]

Our organizations respectfully submit this brief because we have an abiding interest in ensuring that courts recognize and enforce prosecutors' constitutional obligation to disclose exculpatory evidence. We believe that when courts do not enforce *Brady*, they not only damage the integrity of the proceedings at issue, but also undermine public confidence in the legal system.

SUMMARY OF THE ARGUMENT

Efforts to hold Louisiana prosecutors to account for withholding exculpatory evidence have failed. Every mechanism for accountability—judicial review, attorney discipline, civil liability—is currently unfit for the task. Indeed, in the Angola

[2] The references to *amici*'s affiliations are for identification purposes only. This brief does not necessarily reflect the views of the above-mentioned universities or law schools.

Five prosecutions of Mr. Brown and his co-defendants who were charged with killing a prison guard during an escape attempt, attorneys for one of Mr. Brown's co-defendants filed a disciplinary complaint against the prosecutors who took the suppressed statement that Mr. Brown's attorneys discovered only after his capital trial. The Louisiana Attorney Disciplinary Board's Office of Disciplinary Counsel dismissed the complaint "[b]ecause the same Court that would consider the potential ethics violation has already determined that the statement was not 'favorable' . . . ." Letter from Charles B. Plattsmier, Chief Disciplinary Counsel, La. Attorney Disciplinary Bd., to Lawrence T. Dupre (Feb. 29, 2016) (hereinafter "ODC Letter") (attached at Appendix A) at p. 3-4. The Louisiana Supreme Court's ruling in *Brown* thus not only deprived him of the new penalty phase he deserves, but also precludes the professional accountability Louisiana so clearly needs.

This case presents an important opportunity to ensure both that defendants' due process rights receive the protections they deserve and that prosecutors behave in accordance with their professional duties. Judicial enforcement of *Brady* is a necessary component of a functional criminal justice system, especially in the state with the country's highest incarceration rate. Too often, the Louisiana courts misapprehend the constitutional doctrine, stripping defendants of protections, incentivizing prosecutorial noncompliance, and depriving juries and judges of information essential to the fair determination of both guilt and punishment. Along with the disciplinary process's failure and civil liability's limited reach, the state judiciary's approach amplifies the risk of unfair

outcomes, providing a compelling reason for granting certiorari.

ARGUMENT

I. LOUISIANA COURTS CONSISTENTLY MISINTERPRET AND MISAPPLY *BRADY*—REQUIRING THE FEDERAL COURTS TO PROVIDE SUPERVISION AND RELIEF

The Louisiana judiciary's failure to treat *Brady* claims appropriately warrants attention. The "duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case . . . ." *Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., concurring). That duty, which arises here for this Court, is particularly pressing when the state courts' rulings substantially delay constitutionally warranted relief. *See Wearry v. Cain*, No. 14-10008 (Mar. 7, 2016), slip op. at 11 ("The alternative to granting review, after all, is forcing [the petitioner] to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed.").

The courts in Louisiana have consistently misinterpreted and misapplied *Brady* and its progeny. Indeed, this Court has explicated the doctrine in a number of serious cases arising from Louisiana. Those cases—and the state courts' failure to meaningfully engage them after-the-fact—underscore the urgency of Mr. Brown's petition. Not only do the dispositions in *Wearry v. Cain*, No. 14-10008 (Mar. 7, 2016), *Smith v. Cain*, 132 S. Ct. 627 (2012), and *Kyles v. Whitley*, 514 U.S. 419 (1995), demonstrate that a problem of apperception endures, but the way in which the state courts ruled also reveals a deeper pattern of judicial obliviousness.

The story of Michael Wearry's case underscores the problem with Louisiana state court review. After his conviction was affirmed on direct review, "it emerged that the prosecution had withheld relevant information" that would have unsettled the State's case. *Wearry*, slip op. at 3. The post-conviction trial court noted that "the State 'probably ought to have' disclosed the withheld evidence" but nevertheless denied relief. *Id.*, slip op. at 6. The Louisiana Supreme Court denied Wearry's writ for review over the votes of one justice who would have granted relief on a separate ground and another justice who would have remanded for other reasons. *See State ex rel. Wearry v. Cain*, 161 So. 3d 620 (La. 2015). Yet, this Court issued a *per curiam* decision over the dissent of two justices finding that "*[b]eyond doubt*, the newly revealed evidence suffices to undermine confidence in Wearry's conviction . . . ." *Wearry*, slip op. at 7 (emphasis added). But no Louisiana court had expressed a doubt about the *Brady* claims.[3]

In *Smith*, this Court issued a powerful statement. In an 8-1 decision, it found that the impeachment evidence the State withheld was material because the relevant witness's "testimony was the *only* evidence linking Smith to the crime." 132 U.S. at 630 (emphasis in original). Despite the conspicuous problems with the petitioner's murder convictions, no Louisiana judge reached the result

[3] Although this Court's decision in the petitioner's favor in *Kyles* was accompanied by a four-justice dissent, it is remarkable that no Louisiana judge found that the State's suppression warranted a new trial. *See Kyles*, 514 U.S. at 422. Especially considering that "[b]ecause the State withheld evidence, its case was much stronger, and the defense case much weaker." *Id.* at 429.

this Court did.[4] Yet, this Court made clear that *Brady* must mean something and overturned the five murder convictions at issue.[5] That decision eventually led to the reversal of Smith's death sentence in another murder case because the overturned convictions were at the heart of the State's case for capital punishment.[6]

This Court is not the only federal court that has provided protracted corrective guidance to Louisiana's courts. Even constrained by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and considerations of comity, the Fifth Circuit Court of Appeals and the federal district courts in Louisiana have overturned state court *Brady* decisions on many occasions.

In *DiLosa v. Cain*, 279 F.3d 259 (5th Cir. 2002), the state appealed the Eastern District's grant of *Brady* relief to Douglas DiLosa on his

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[4] *See id.*; *State v. Smith*, 45 So.3d 1065 (La. 2010). Eleven members of Louisiana's judiciary—the trial court judge, a panel of three appellate court judges, and all seven Louisiana Supreme Court justices— ruled against Mr. Smith in what can be described as a rout of his *Brady* claims.

[5] While it appears that several justices were incredulous with the State's position at oral argument—one justice even asked whether the State considered confessing error—this incredulity and the majority opinion contrasts with the fact that the State's position had been a slam-dunk in the state courts. *See* Adam Liptak, *Justices Rebuke a New Orleans Prosecutor*, N.Y. TIMES, Nov. 9, 2011; Lyle Denniston, *Argument Recap: Disaster at the Lectern*, SCOTUSBLOG (Nov. 8, 2011), http://www.scotusblog.com/2011/11/argument-recap-disaster-at-the-lectern/.

[6] *See* John Simerman, *New Orleans judge voids death sentence for inmate convicted of 1995 triple murder*, TIMES-PICAYUNE, June 12, 2012, http://www.nola.com/crime/index.ssf/2012/06/new_orleans_judge_voids_death.html.

murder conviction. At trial, the State persuaded jurors that Mr. DiLosa killed his wife to collect life insurance proceeds. In his defense, DiLosa claimed that two African-American intruders had come into the house and knocked him unconscious before killing his wife. In post-conviction, DiLosa uncovered "four main categories of withheld evidence," including exculpatory non-Caucasian hair found on the rope used to strangle the victim, exculpatory fingerprint evidence, and statements from neighbors suggesting other criminal activity in the neighborhood on the night of the murder. *Id.* at 263. In affirming the federal district court's ruling, the Fifth Circuit—governed by AEDPA—explained:

> The state court exceeded the bounds of permissible application of federal law in two distinct ways. First, it applied an incorrect legal principle in concluding there was no material evidence for *Brady* purposes. Second, its ultimate legal conclusion cannot be squared with the command of *Brady* and its progeny. The state court's legal conclusion was objectively unreasonable.[7]

279 F.3d at 263-64. Moreover, the state court "applied a rule of law contrary to" established Supreme Court precedent because it evaluated the exculpatory evidence by looking at whether it was sufficient to exculpate DiLosa rather than "through

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[7] The post-conviction trial court denied DiLosa's *Brady* claim on November 13, 1996. A panel of the Louisiana Fifth Circuit denied a subsequent supervisory writ application. *State v. DiLosa*, 97-191 (La. App. 5 Cir. 6/2/97). The Louisiana Supreme Court then unanimously denied a subsequent supervisory writ application. *State v. DiLosa*, 709 So.2d 694 (La. 1998).

the lens of [the court's] confidence in the verdict." *Id.* at 264. These unreasonable applications of law required a new trial where "[t]he state [] based its case on the non-existence of evidence it knew existed." *Id.* at 265. Mr. DiLosa was eventually exonerated of the crime for which he once faced life imprisonment.[8]

The Fifth Circuit revisited the Louisiana judiciary's treatment of *Brady* in *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008). In that capital case, the state courts twice refused to grant relief under *Brady*. On the first petition for post-conviction relief, the trial court "reject[ed] Tassin's claim that the State's suppression of the agreement between [testifying co-defendant] Georgina and the trial court violated the Fourteenth Amendment." 517 F.3d at 775. Around the time he filed his federal habeas petition, Tassin discovered new evidence and filed a second post-conviction petition in state court. The state courts denied relief on the supplemented and amended *Brady* claims.[9] *Id.* The Fifth Circuit explained that "the state habeas court had erroneously required Robert to show that the court had 'promised' Georgina a lenient sentence . . . ." *Id.* at 776. The federal district court correctly held that the state court's ruling was "contrary to federal law because it applied a more stringent standard than the one established by Supreme Court precedent."

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[8] *See* Page for Douglas Dilosa's Case, THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3178 (last visited Apr. 25, 2016).

[9] Following the post-conviction court's denial of Tassin's *Brady* claim, the Louisiana Supreme Court denied his supervisory writ application unanimously without opinion. *State ex rel. Tassin v. Cain*, 883 So.2d 995 (La. 2004).

Id. Tassin did not need to show "a firm 'promise'" with the co-defendant existed in order to challenge her credibility. *Id.* at 777. On these grounds, the Fifth Circuit affirmed the grant of a new trial given the "violation of a clear precedent." *Id.* at 781.

Like many other Louisiana *Brady* cases, "David Mahler's state post-conviction proceedings ended when the Louisiana Supreme Court, without setting forth supporting reasons, denied his writ application."[10] *Mahler v. Kaylo*, 537 F.3d 494, 498 (5th Cir. 2008). The State had withheld evidence suggesting that the struggle between the victim and defendant before the homicide was ongoing in nature rather than complete when Mahler inflicted the fatal wound. *See id.* at 503. The post-conviction trial court's denial of the *Brady* claim employed a far-too-narrow view of the suppressed evidence. The Fifth Circuit explained:

> Contrary to the state trial court's conclusion, the withheld pretrial statements do not merely reinforce the fact established at trial that a "struggle" had occurred at some point before Mahler shot Zimmer. Rather, when considered collectively, they suggest that Zimmer's struggle with Christopher Mahler for the shotgun was an ongoing event—the outcome of which remained uncertain—when the shooting occurred. This stands in stark

[10] Following the trial court's denial of post-conviction relief on Mahler's *Brady* claim, supervisory writ applications were denied by a panel of the Louisiana Fourth Circuit, *State v. Mahler,* No. 2004-K-1018 (La. App. 4 Cir. 2004), and by a unanimous Louisiana Supreme Court. *State v. Mahler*, 893 So.2d 85 (La. 2005).

> contrast to the picture painted by the prosecution witnesses' trial testimony that the struggle had conclusively ended and Zimmer had already turned away to run or head toward his truck before Mahler shot him.

Id. In other words, facts about the shooting's circumstances could have made a difference to the jury's determination of whether the crime constituted a murder, manslaughter, or even self-defense. Noting "the deferential standard of review required by the AEDPA," the Fifth Circuit held that "the state trial court unreasonably applied clearly established federal law . . . in determining that the witness statements at issue were not material." *Id.* at 500.

Louisiana state court errors also led to Fifth Circuit action in *LaCaze v. Warden Louisiana Corr. Inst. for Women*, 645 F.3d 728 (5th Cir. 2011). Looking back on Princess LaCaze's second-degree murder conviction, the court assessed impeachment evidence similar to the kind withheld in *Tassin*—evidence of a witness's agreement with the prosecution that would have helped the defense call into question the veracity of that co-defendant's testimony. While the State in *LaCaze* provided notice before trial that it would reduce the charges against co-defendant Robinson in exchange for his testimony at LaCaze's trial, "[t]he State never disclosed, however, that it had assured Robinson that his son would not be prosecuted if he agreed to make a statement implicating LaCaze." *LaCaze*, 645 F.3d at 731. After holding an evidentiary hearing, the post-conviction trial court denied relief, stating that Robinson did not testify because of the prosecutor's assurances regarding potential

prosecution of his son and there was "overwhelming" evidence of the defendant's guilt. *Id.* at 733. The Louisiana Third Circuit found that "the trial court erred in denying her application for post-conviction relief," but "the Louisiana Supreme Court reversed in a two-paragraph, *per curiam* opinion, with two judges noting that they 'would grant [the writ] and docket.'" *Id.* (internal citation omitted). The federal Fifth Circuit overruled the Louisiana Supreme Court's materiality determination, finding—like this Court did in *Smith*—that prosecutorial suppression of exculpatory evidence implicating the trustworthiness of "the only direct evidence presented by the State to show a critical element" of the crime warranted a new trial. *Id.* at 738.

Given that the Fifth Circuit granted new trials in *DiLosa*, *Tassin*, *Mahler*, and *LaCaze* under AEDPA, it is not surprising that the court also reversed Louisiana denials of *Brady* relief in a number of pre-AEDPA cases. *See, e.g.*, *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (granting a new trial to a man sentenced to death); *Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979) (granting a new trial in an armed robbery case); *cf. Blanton v. Blackburn*, 654 F.2d 719 (5th Cir. 1981) (affirming *Brady* relief in murder case granted by federal district court in the Middle District of Louisiana, *see Blanton v. Blackburn*, 494 F.Supp. 895 (M.D.La. 1980)).

So marred is the state courts' track record that federal district court judges have had to expend resources to explain that their determinations of federal law actually bind the state judiciary. For example, in *Monroe v. Blackburn*, 748 F.2d 958 (5th Cir. 1984), the Fifth Circuit affirmed a federal district court ruling that required the state courts to

conduct an evidentiary hearing on Ronald Monroe's *Brady* claim. When the case returned to federal court after remand, the district court pointed out that it had previously decided that "Monroe's due process *Brady* rights were violated." *Monroe v. Butler*, 690 F. Supp. 521, 523 (E.D. La. 1988), *aff'd*, 853 F.2d 924 (5th Cir. 1988) (internal citation omitted). Yet, "when the state court addressed this same issue" on remand it held that the petitioner had no *Brady* interest at stake. *See id.* "Thus, the state court mistakenly rejected [the district court's] *Brady* holding. That the state court erred in this respect is clear." *Id.* Though this case is not recent, the troubles it exemplifies persist today.

The state courts' treatment of *Brady* in *Johnson v. Cain*, 68 F. Supp. 3d 593 (E.D. La. 2014), underscores this reality. As it did in *Mahler*, the prosecution in *Johnson* failed to disclose to the defense evidence suggesting that the petitioner's conduct occurred in a wholly different context than the one the State presented to the jury at trial. The State's key witness initially told police investigators "a very different version of events on the day of the incident." *Johnson*, 68 F. Supp. 3d at 612. Rather than the trial version—in which Johnson purportedly kicked and shot the surviving witness after he was already on the ground—the police report detailed a quick exchange in which Mr. Johnson jumped out of a car and fired at the witness one time immediately after he saw the witness punch his brother in the mouth. *See id.* Instead of deciding on the merits, the state court denied the claim on procedural grounds. *See id.* at 610. Yet, that procedural bar did not impress the federal court, which found that the state court imposed it on the basis of an error in "[s]imple math." *Id.* at 610

n.11. Reviewing the *Brady* claim on the merits, the federal court granted Mr. Johnson relief. *Id.* at 613.

Federal district courts have provided relief on *Brady* claims in several other cases. *See Blanton v. Blackburn*, 494 F. Supp. 895 (M.D. La. 1980), *aff'd*, 654 F.2d 719 (5th Cir. 1981); *Faulkner v. Cain*, 133 F. Supp. 2d 449 (E.D. La. 2001); *Robinson v. Cain*, 510 F. Supp. 2d 399 (E.D. La. 2007); *Perez v. Cain*, 2008 WL 108661 (E.D. La. 2008), *aff'd,* 529 F.3d 588 (5th Cir. 2008); *Triplett v. Cain*, No. 04-1434 (E.D. La. 2011). In other instances, federal district court rulings have paved the way for ultimately favorable *Brady* determinations. *See Hudson v. Whitley*, 979 F.2d 1058, 1060-65 (5th Cir. 1992) (reversing an adverse procedural ruling and remanding for merits determination of *Brady* claim);[11] *cf. Kirkpatrick v. Whitley*, 992 F.2d 491, 497-98 (5th Cir. 1993) (granting an evidentiary hearing on claim that the prosecution failed to disclose exculpatory evidence).

While federal courts have provided a measure of corrective oversight, AEDPA significantly limits the circumstances under which a federal court can reverse a state conviction. *See Peters v. Cain*, 34 F. App'x 151, *1 (5th Cir. 2002) (per curiam) ("even if this court would have concluded that such a probability existed were we looking at the case in the first instance, we cannot reverse the state court's determination that no violation occurred unless it involved an unreasonable application of clearly established federal law"). This means that looking

[11] "Based on the . . . prosecutorial misconduct . . . a Federal District Court vacated Hudson's conviction and remanded the case for retrial in February, 1993." Page for Larry Hudson's Case, THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3313 (last visited Apr. 25, 2016).

only to the universe of cases in which federal courts ultimately granted habeas relief understates the persistent problems with state court review. After all, AEDPA is simply "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (internal citation omitted). Add to AEDPA the fact that *Brady* materiality determinations are often difficult, fact-intensive judgment calls,[12] and it becomes apparent that federal courts only overturn state court *Brady* denials in exceptional circumstances.

This brief does not entail an exhaustive review of all relevant federal habeas rulings. Instead, it gathers an exemplary set to establish the proposition that Louisiana's state courts often misapply *Brady*'s critical constitutional commands.[13]

II. OTHER MECHANISMS FOR CURTAILING THE SUPPRESSION OF EXCULPATORY EVIDENCE HAVE FAILED IN LOUISIANA

Courts have long suggested that prosecutors will comply with their constitutional obligations because mechanisms other than judicial review of

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[12] *See Banks v. Thaler*, 583 F.3d 295, 322 (5th Cir. 2009).

[13] Notably, in defending his office's conduct in *Kyles*, long-serving Orleans Parish District Attorney Harry Connick wrote the following in a letter to the editor of the New Orleans Times Picayune: "In the *Kyles* case, for example, five separate state and federal courts on seven different occasions concluded that my prosecutors had not violated the duty to disclose before the U.S. Supreme Court in a 5-4 decision reversed Kyles' conviction." Harry Connick, *DA's Office Does Not Suppress Evidence*, TIMES-PICAYUNE, May 19, 1999.

Brady claims will hold them to account. *See, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 66 (2011) ("An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."). Unfortunately, minimizing the role of criminal courts in ensuring prosecutorial accountability has created a vacuum in which external oversight ceases to exist. It turns out, perversely, that the Louisiana judiciary's *Brady* rulings undercut the disciplinary process. In the Angola Five prosecutions, the Louisiana Supreme Court's ruling in *Brown* actually led to the dismissal of the disciplinary complaint filed against the prosecutors who took the exculpatory statement. Where a disciplinary body finds itself bound by adverse judicial rulings and district attorney offices can only face civil liability in instances which are virtually impossible to conjure let alone prove,[14] decisions like *Brown* relinquish constitutional rights to the prosecutor's discretion.

A. Professional Sanctions Against Louisiana Prosecutors are a Paper Tiger

Even after this Court's decisions in *Kyles* and *Smith*, the Louisiana Supreme Court did not discipline any of the prosecutors responsible for those *Brady* violations. The prosecutorial

[14] *See* David Keenan, et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson: *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 216 (2011) ("*Connick*'s holding that a failure-to-train showing can only be made by demonstrating a pattern of violations—information that might be difficult for individual plaintiffs to access—will make such suits exceedingly difficult to win.").

wrongdoing that led to the high-profile wrongful conviction of John Thompson also resulted in no professional sanctions against practicing prosecutors.[15] In a state with a long and well-known history of electing aggressive District Attorneys dismissive of their ethical duties,[16] the body responsible for investigating ethical complaints and making disciplinary recommendations to the state supreme court has only once secured professional discipline for prosecutorial misconduct.[17] In Louisiana, the prospect of professional discipline for failing to disclose exculpatory evidence is a paper tiger.

It appears that even the process for registering a complaint with the disciplinary board becomes an insurmountable obstacle when the complaint targets a prosecutor. The process operates differently not on paper but in practice. After an

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[15] The lone recipient of professional discipline for the wrongful criminal convictions of John Thompson was a *former* prosecutor who had become a defense attorney by the time he learned of the exculpatory evidence. The Louisiana Supreme Court reprimanded him for failing to disclose that the dying prosecutor confessed to suppressing evidence. *See In re Riehlmann*, 891 So.2d 1239 (La. 2005); *Connick*, 563 U.S. at 56 n.1.

[16] *See, e.g.*, Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 925 (2012) ("Thus, it is hardly surprising that [under Harry Connick] '[t]he prosecutors' record of compliance with *Brady* remained dismal even after *Kyles*, as evidenced by several *Brady* violations that prosecutors committed in trials after April 1995—including in two capital cases.'" (internal citation omitted)).

[17] *See In re Jordan*, 913 So.2d 775, 784 (La. 2005) (handing down a three-month fully-deferred suspension against prosecutor Roger Jordan for knowingly violating *Brady* obligations).

Orleans Parish trial court granted a defendant's motion for new trial because of *Brady* violations in a murder case that resulted in a death sentence, one highly respected member of the bar filed complaints against every implicated prosecutor.[18] It took two years for the board to even acknowledge receipt of these complaints.[19] To this day—almost five years later—the board has made no recommendations.

Nothing about the state's ethical standards explains the lack of professional accountability. In fact, Louisiana's ethical rules are more rigorous than those in most other jurisdictions. Unlike many states, the Louisiana regime does not contain a willfulness requirement, meaning prosecutors who unintentionally violate ethical rules can be held responsible. *See, e.g.*, LA. ST. BAR ART. 16 RPC Rule 3.8(d); *see also* Brief of *Amicus Curiae* American Bar Association in Support of Petitioner Juan Smith ("ABA Amicus"), 2011 WL 3739380, at *9.[20] With respect to the duty to disclose exculpatory evidence, Louisiana's ethical rules do not maintain a

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[18] *See* Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them*, HUFFINGTON POST, Aug. 1, 2013, http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html.

[19] *See* Radley Balko, *In Louisiana prosecutor offices, a toxic culture of death and invincibility*, WASHINGTON POST, Apr. 6, 2015, https://www.washingtonpost.com/news/the-watch/wp/2015/04/06/in-louisiana-prosecutor-offices-a-toxic-culture-of-death-and-invincibility/.

[20] "To the extent Louisiana has modified Rule 3.8(d), it has done so . . . only to impose more rigorous disclosure obligations on prosecutors. The Louisiana rule thus requires not only disclosure of evidence that the prosecutor 'knows' to be exculpatory but also disclosure of evidence that the prosecutor 'reasonably should know' is exculpatory."

materiality requirement. *See* ABA Amicus, *supra*, at *10; ODC Letter at p. 2 (noting the "sharp debate across the country" about whether prosecutors should consider materiality pretrial to comply Rule 3.8(d)); *id.* (stating "our position that 3.8(d) does not incorporate" materiality considerations). Thus, the failure to turn over any evidence favorable to a criminal defendant represents an ethical breach. Although the rules thus appear reasonably protective of the public interest in regulating prosecutors, we nevertheless see no accountability.

While courts apparently rely on the disciplinary board to keep prosecutors accountable, the board appears to rely on judicial rulings to determine whether some ethical complaints have merit. In the Angola Five prosecutions, the ODC noted that "there does not appear to be any jurisprudence or scholarly analysis suggesting that there is a variance between what is considered to be 'favorable' or 'mitigating' under the *Brady* case-law versus Rule 3.8(d)." ODC Letter at p. 3. Evidently stuck with the Louisiana Supreme Court's finding that the suppressed statement was not even "favorable" to co-defendants Brown, Carley, and Mathis, the ODC closed the investigation and dismissed the complaint while "reserving the right . . . to reopen this matter should a different ruling relevant to the analysis be handed down." ODC Letter at p. 4. The complaint's dismissal corresponds to the nationwide under-enforcement of professional rules requiring prosecutors to disclose exculpatory evidence.[21]

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[21] *See, e.g.*, Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. REV. 275, 288 (2004) (finding that prosecutors who intentionally suppress evidence "are rarely, if ever,

B. Civil Liability is Reserved for Only Extraordinarily Extreme Cases

This Court's majority opinion in *Connick* severely limits the possibility that civil liability will serve to hold prosecutors accountable or deter prospective misconduct. There, the Court held that a single *Brady* constitutional violation was insufficient to make the jurisdiction liable for failing to train its prosecutors to comply with *Brady*. *See Connick*, 563 U.S. at 63-64. The majority opinion rejected liability on Thompson's failure-to-train theory by relying upon the fact that prosecutors' professional judgments are informed by their law school education, the bar exam, continuing education courses, character and fitness requirements, training received while on the job, and the possibility of professional discipline. *See id.* In dissent, Justice Ginsburg pointed out that "[t]he prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility . . . ." *Id.* at 80 (Ginsburg, J., dissenting).

Unfortunately, *Connick* almost completely insulates prosecuting agencies from civil liability. "While seemingly narrow in its holding, *Connick* is significant because it forecloses one of the few remaining avenues for holding prosecutors civilly liable for official misconduct." Keenan et al., *supra* n.14, at 204. Combined with the absolute immunity conferred to prosecutors for actions taken in their role as prosecutors, "the Court has created a classic

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disciplined"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697-98 (1987) (discussing the absence of ethical remedies against prosecutors).

catch-22 in which nobody can be held responsible for rights violations." Scott Lemieux, *The Impunity of the Roberts Court*, THE AMERICAN PROSPECT, Apr. 1, 2011, http://prospect.org/article/impunity-roberts-court. The curtailment of civil remedies heightens the importance of the traditional remedy of a new trial.

III. THE LOUISIANA SUPREME COURT'S RULING IN *BROWN* WILL HAVE SERIOUS CONSEQUENCES IN LOUISIANA IF IT STANDS

A. *State v. Brown* Enables Prosecutors to Make Untestable Decisions About What Constitutes "Favorable" Evidence

Most *Brady* disputes pivot on the question of whether the exculpatory evidence is material. Pre-trial, *Brady* leaves it to the prosecutors to decide materiality questions. *See Kyles*, 514 U.S. at 437-38. As the oral argument in *Smith* revealed to this Court, some prosecutors make highly questionable judgment calls about materiality.[22] In cases where suppressed evidence the prosecutors decided pre-trial was not material is actually turned over after trial, *Brady* provides a framework for courts to determine whether the conviction or sentence should be reversed. While prosecutors somewhat understandably continue to struggle with their pre-

[22] *See* Bidish Sarma, *Do Supreme Court Justices Understand How Prosecutors Decide Whether to Disclose Exculpatory Evidence?*, ACSBLOG, Mar. 17, 2016, https://www.acslaw.org/acsblog/do-supreme-court-justices-understand-how-prosecutors-decide-whether-to-disclose-exculpatory.

trial materiality assessments,[23] *see* Yaroshefsky, *supra* n.16, at 933 n.138,[24] rarely have cases been decided on the doctrinally prior question of whether the evidence was "favorable" to the defendant.

The Louisiana Supreme Court's reasoning in *Brown* opens up the possibility that prosecutors will now utilize their discretion to decide certain types of evidence that once obviously met the favorability threshold no longer do. Equipping prosecutors—who by training learn to see evidence in a light favorable to the prosecution—with this tool for nondisclosure above and beyond the already-difficult materiality assessment raises serious concerns about *Brady*'s continued viability. Making *ex ante* determinations from a place of inherent cognitive bias, prosecutors have no reason to fear civil liability or professional discipline and likely have little concern about state court review; *Brown* will embolden them further.

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[23] "By requiring prosecutors to disclose more than material exculpatory evidence, the ABA Model Rules seek to avoid pitfalls that might arise if a prosecutor attempts to determine materiality before making a disclosure. . . . [A]ssessing materiality pre-trial requires prosecutors to 'anticipate what other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence as issue would place 'the whole case' in a different light.'" ABA *Amicus*, *supra,* at *10.

[24] "Remarkably, current and some former prosecutors still defend the Orleans Parish DA's argument in *Smith v. Cain* . . . ."

B. *State v. Brown* Increases the Risk of Wrongful Conviction and Will Engender Even More Undiscoverable *Brady* Violations

Federal court rulings previously cited demonstrate that Louisiana courts have often read *Brady* so narrowly that evidence that fundamentally challenges the State's trial narrative has been deemed immaterial. *See, e.g.*, *Smith*, 132 S. Ct. 627; *DiLosa*, 279 F.3d 259. In light of *Brown*, state courts may not only look skeptically upon defendants' claims that exculpatory evidence is material, but they will also provide the prosecution with the additional benefit of questioning defendants' contentions that evidence is favorable. Adding an obstacle to the meaningful enforcement of *Brady* increases the risk of wrongful conviction. *See, e.g.*, Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About* Brady v. Maryland, 13 LOY. J. PUB. INT. L 517, 541 (2012) ("nondisclosure of exculpatory evidence may result in the conviction of an innocent person"); Brief of *Amicus Curiae* Innocence Network in Support of Petitioner Juan Smith, 2011 WL 3678809, at *31-32 n.10-11 (documenting *Brady* violations that contributed to wrongful convictions in Orleans Parish).

A significant percentage of the cases in which *Brady* violations have come to light are ones in which defendants were convicted of homicide crimes. This reality presumably reflects the fact that Louisiana provides post-conviction counsel to individuals under a death sentence. *See* LA. RS § 15:169. However, most inmates serving sentences for non-capital crimes will never obtain post-conviction legal representation or gain access to suppressed evidence. The vast majority of inmates

are indigent, and they have no right to counsel after direct appeal. Even those inmates intrepid enough to navigate post-conviction's complexities without a lawyer confront insuperable investigative challenges; they are not even permitted to make requests under Louisiana's public records law. All of these factors compound the tautology that many *Brady* violations never come to light because they involve hidden evidence.[25]

Giving the State the opportunity to decide that possibly exculpatory evidence may not be favorable to the defendant will increase pre-trial suppression. *Brown* will thus engender even more undiscoverable *Brady* noncompliance. Because "[i]t is far too easy for *Brady* violations to pass unnoticed . . . . awarding new trials when violations are discovered is essential to promote justice in those cases *and all others*, by holding prosecutors to account when infractions surface." Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers in Support of Petitioner Juan Smith, 2011 WL 3739472, at *21 (emphasis in original).

CONCLUSION

This case presents a critical opportunity for this Court to prevent the erosion of *Brady* in a jurisdiction with both a high volume of criminal prosecutions and a history of state court difficulty with the doctrine. Considering that the ethical complaint lodged against the very same prosecutors who obtained Mr. Brown's death sentence was

[25] *See* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 306 (2010) (concluding that "it is fair to assume that most *Brady* violations go undiscovered").

dismissed because of the Louisiana Supreme Court's opinion in *Brown*, professional discipline is off of the table. This Court should grant certiorari because the state courts need guidance, other mechanisms for holding prosecutors accountable have not functioned, and, left alone, the *Brown* ruling has the potential to usher in a new, darker age of disregard for *Brady*.

Respectfully submitted,

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Dated: May 2, 2016

APPENDIX

APPENDIX A

LOUISIANA ATTORNEY
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February 29, 2016

Lawrence T. Dupre
19929 Old Scenic Highway
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Re: Respondent: Thomas Stanford Block
(ODC File No. 0029050)
Hugo A. Holland, Jr.
(ODC File No. 0029051)
Complainant: Clayton M. Perkins, Thomas J. Thompson & Lawrence T. Dupre

Dear Mr. Dupre:

The purpose of this correspondence is to address the complaint that you filed with this office pursuant to your obligation under Rule 8.3(a) of the Rules of Professional Conduct against Hugo Holland and Thomas Block regarding their ethical obligations under Rule 3.8(d). Specifically, your complaint brought to the attention of the ODC the facts regarding the failure to disclose a recorded inmate statement, recounting what he had been told

by Angola 5 inmate Barry Edge, regarding the tragic slaying of prison guard Captain David Knapp.

From our investigation we determined that there was no factual dispute that the recorded statement, taken by Block and Holland, was not turned over to the defense in the matter of *State of Louisiana vs. David Brown*. Rather, in our judgment the only dispute was whether or not the contents of the statement was favorable to the accused to be used to mitigate the offense or sentence; and whether or not the provisions of Rule 3.8(d) incorporate the "materiality to outcome" component of the U.S. Supreme Court line of cases including *Brady* and its progeny.

As you may be aware, there is a sharp debate across the country as to whether the "materiality to outcome" component comprises a part of the analysis to be undertaken by prosecutors pretrial who seek to comply with the provisions of Rule 3.8(d). It is our position that 3.8(d) does not incorporate the "materiality to outcome" considerations for many reasons, and that inferentially our court has already spoken to that issue in its disciplinary decision in *In Re: Jordan.* Our initial belief was bolstered by the trial judge's grant of a new trial as to sentence in the *Brown* case where he determined that the withheld recorded statement was favorable to the accused and material as to outcome.

The Court of Appeal reversed that determination on the issue of materiality, but may have used an erroneous standard when analyzing the issue. The Supreme Court on Friday February 19th denied writs in a 4-3 decision. In doing so, a majority of the Court found that the recorded statement was neither 'favorable' nor 'material'. I

note that while the Chief Justice dissented with reasons, two of the other justices dissented without reasons, but would have granted the writ and docketed the matter.

As indicated above, there is a significant debate across the country regarding the scope of Rule 3.8(d) and it has divided states on the issue. At its essence, the cornerstone is whether or not 3.8(d) is 'co-extensive' with *Brady* such that a showing of "materiality to outcome" must be shown, or whether the "materiality to outcome" is not a component of the ethical consideration. Inasmuch as I view the "materiality to outcome" component as a backward looking consideration, I do not hold the belief that "materiality" should be or is a factor in analyzing prosecutor conduct under 3.8(d). However, there does not appear to be any jurisprudence or scholarly analysis suggesting that there is a variance between what is considered to be 'favorable' or 'mitigating' under the *Brady* case-law versus Rule 3.8(d).

Because the Louisiana Supreme Court has found, specifically, that the recorded statement at issue was not 'favorable' in the *Brown* matter, that legal determination pretermits the issue of whether it was "material to outcome". Simply put, the prosecutor's duty to disclose the recorded statement turns on whether it tends to negate guilt, mitigates the offense, or is otherwise mitigating information as to sentencing. If the determination is that it is not 'favorable' in these ways, the failure of the prosecutor to disclose is not a violation of Rule 3.8(d) and the "materiality to outcome" analysis is not reached.

Because the same Court that would consider the potential ethics violation has already determined

that the statement was not 'favorable', the filing of a disciplinary charge in this matter cannot be sustained at this time. I recognize that the defendant may challenge this ruling and that there exists the potential for a different outcome on this threshold issue. For that reason, I have determined that it is appropriate to close this investigation and dismiss this complaint at this time, reserving the right for this office to reopen this matter should a different ruling relevant to the analysis be handed down. A disciplinary prosecution at this juncture is unlikely to be successful and would be in effect 'res judicata' on the disciplinary violation precluding a 'retrial' of the issue should the outcome change on appellate or writ review by a different court. Pursuant to Rule XIX, section 11(b)(3), you nonetheless have the right to request that this dismissal decision be reviewed by an independent hearing committee. To exercise that right you must notify this office in writing within 30 days of this dismissal decision.

I thank you for bringing this issue to the attention of the ODC, and for your concerns for the ethical standards of our legal profession.

Sincerely,

/s/ Charles B. Plattsmier

Charles B. Plattsmier
Chief Disciplinary Counsel

CBP/kgm