



No. 10-8145

---

IN THE  
SUPREME COURT OF THE UNITED STATES

---

JUAN SMITH,

Petitioner,

V.

BURL CAIN, Warden, Louisiana State Penitentiary,  
Respondent.

---

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

---

**BRIEF FOR RESPONDENT IN OPPOSITION**

---

Donna Rau Andrieu  
*Counsel of Record*  
Andrew Milton Pickett  
Orleans Parish District Attorney's Office  
619 South White Street  
New Orleans, LA 70119  
(504) 822-2414

*Counsel for Respondent*

---

### **ISSUES PRESENTED**

1. Did the courts of Louisiana act inconsistently with the usual course of judicial proceedings in summarily denying the petitioner's applications?
2. Would the information not disclosed by the State have given rise to a reasonable probability that the outcome of the petitioner's trial would have been different?
3. Did the non-disclosure by the State amount to subornation of perjury?

## TABLE OF CONTENTS

STATEMENT .....	1
I. Factual Background .....	2
II. Proceedings Below .....	3
REASONS FOR DENYING THE PETITION .....	5
I. The state court's determinations were a result of accepted and usual course of judicial proceedings. ....	5
II. The petitioner's state post-conviction application was properly denied because the petitioner failed to meet his burden of proving that his conviction was obtained in violation of <i>Brady v. Maryland</i> and its progeny. ....	6
A. Withholding of Evidence Regarding Eyewitness Identification .....	7
i. Evidence Allegedly Undermining the Credibility of Larry Boatner .....	7
a. Boatner's statement to Detective Ronquillo on the night of the incident that he could not supply a description of the shooters .....	10
b. Boatner's statement to Detective Ronquillo that he had been too scared to look at anyone during the incident .....	11
c. Boatner's pre-trial statement that he could not identify any of the weapons used .....	11
d. Charity Hospital records documenting Boatner's complaint that he was being harassed by a detective .....	12
e. Unidentified records allegedly demonstrating that Boatner knew that police had already identified the petitioner as a perpetrator of the North Roman Street murders .....	13
f. Shelita Russell's pre-death statement that the first gunman who entered the house ((identified by Boat as the petitioner) wore a mask .....	13
g. Statements by Reba Espadron and neighbor Dale Mims to investigators .....	15
B. Evidence of Phillip Young's Improved Medical Condition .....	17
C. Evidence Regarding Robert Trackling's Involvement in the Murders .....	20
III. Subornation of Perjury .....	25
CONCLUSION .....	26

## TABLE OF AUTHORITIES

Cases	Page
Blackmon v. Scott, 22 F.3d 560, 565 (5 <sup>th</sup> Cir. 1994).....	25
Brady v. Maryland, 373 U.S. 83 (1963) .....	1, 5, 7, 11, 13, 15, 19
Drew v. Collins, 964 F.2d 411, 419 (5 <sup>th</sup> Cir. 1992).....	23
Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763 (1972).....	1, 25
Harrington v. Richter, 562 U.S. ___, 131 S.Ct. 770 (2011) .....	6
Napue v. Illinois, 360 U.S. 264 (1959).....	1
Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989 (1987).....	7
United States v. Agurs, 427 U.S. 97, 96, 103 S.Ct. 2392 (1976) .....	7, 13, 14, 15, 25
United States v. Bagley, 473 U.S. 667, 682, 685, 105 S.Ct. 3375 (1985).....	7
United States v. Newman, 849 F.2d 156, 161 (5 <sup>th</sup> Cir. 1988).....	15
United States v. Prior, 546 F.2d 1254, 1259 (5 <sup>th</sup> Cir. 1977) .....	15
Valles v. Lynaugh, 835 F.2d 126, 127 (5 <sup>th</sup> Cir. 1988).....	25
Wood v. Bartholomew, 516 U.S. 1, 116 S.Ct. 7 (1995) .....	19
 Statutes	 Page
La. R.S. 14:30 .....	3
 Rules	 Page
Louisiana Supreme Court Rule X(1)(A).....	6
Louisiana Uniform Rules of the Court of Appeal 4-7 .....	6

## STATEMENT

The Petitioner seeks to overturn convictions of five counts of first degree murder based on allegations that the state courts disregarded this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), when they denied his application for state post conviction relief. He points to particular incidences of purported evidence suppression as the factual basis for his claims, the aggregation of which he suggests warrants the vacating of his convictions. He bolsters this suggestion with a proposition that any conviction out of the Orleans Parish District Attorney's Office mandates reversal, particularly if a specific assistant district attorney formerly employed with the office tried the case. However, the Petitioner's suggestions are unsubstantiated, and the mere aggregation of individually meritless suggestions cannot prove, as the Petitioner claims, a cognizable violation of *Brady*, *Napue*, or *Giglio*.

The Petitioner argues that this Court should grant his Petition for a Writ of Certiorari because the state courts summarily denied his applications for relief. However, the state district judge, who presided over the Petitioner's trial, heard from ten witnesses over a four day post-conviction hearing and found, as a matter of law, that the Petitioner failed to meet his burden of proving that his convictions were obtained in violation of the Constitution of the United States. Further, although the Petitioner claims that the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court "declined to review [his] claims" (Pet. At 23.), in fact, those courts did review, and summarily denied, his applications for supervisory review, which were appended with copies of the relevant transcripts and exhibits. Considering the unmeritorious nature of

the Petitioner's claims, the decisions of the state courts are reasonable applications of decisions of this Court and consistent with the usual course of judicial proceedings. As such, the instant petition should be denied.

## I. FACTUAL BACKGROUND

The facts at issue in the instant application were summed up by the Louisiana Fourth Circuit Court of Appeal in its opinion affirming the petitioner's convictions and sentences:<sup>1</sup>

On March 1, 1995, Rebe Espadron, her sister, Shelita Russell, and cousin, Robert Simon, were at their home on N. Roman Street, awaiting the arrival of several friends. At approximately 6:00 p.m., Ian Jackson, James Jackson, William Leggett, Larry Boatner and Reginald Harbor arrived at the Espadron house to play cards. Ms. Espadron and Reginald Harbor retired to her bedroom to watch television; the others remained in the kitchen. Shortly after 7:00 p.m., Larry Boatner heard a car stop in front of the house. As he opened the front door and looked out, Juan Smith, Phillip Young and another armed man entered the house demanding drugs and money. Smith ordered Ms. Russell, Robert, Ian, James, William, and Larry to lie on the kitchen floor, and to surrender their money. A short while later, Ms. Espadron went to the kitchen door to investigate the noise. As she opened the door, a man wearing a hat and a bandana over his mouth and nose pointed a gun in her face, and ordered her to lie on the floor. Ms. Espadron ran back into her bedroom and as she did, shooting erupted in the kitchen. She and Harbor cowered in the bedroom. When the gunfire stopped, Harbor made his way into the kitchen/living room area where he found five bodies on the floor. Ms. Espadron ran outside, and flagged down passing police officers. As she re-entered the house, she found Robert Simon's body lying on top of Phillip Young in the living room, and Shelita Russell, James Jackson and William Leggett on the floor in the kitchen.

Officers Joseph Narcisse and Errol Lavasseur were dispatched to Ms. Espadron's residence to investigate a complaint of gunfire and aggravated burglary. As the officers entered, they found three victims in a pool of blood in the kitchen and two others in the adjoining living room. Shelita Russell, one of the victims found in the kitchen, was conscious but unable to provide any information on the incident. The other two victims in the kitchen, James Jackson and William Leggett, exhibited no signs of life. Phillip Young, one of the assailants, who was conscious but unable to

<sup>1</sup> See *State v. Smith*, 2000-KA-1392 (La. App. 4 Cir. 7/18/01), 797 So.2d 193 (Table).

move, was lying face down in the living room with Robert Simon lying partially on top of him. When emergency medical personnel arrived, they rolled Robert Simon's body off of Phillip Young, who was clutching a .25 caliber pistol in his left hand. The EMS personnel pried the loaded and cocked weapon from Young's grip. As the officers secured the premises, they found Larry Boatner in the bathroom. He had not been shot but was suffering from a severe head laceration. Officers Narcisse and Lavasseur discovered the body of Ian Jackson in the alley.

Homicide Detective John Ronquillo found numerous 9-millimeter and AK-47 shell casings at the scene and bullet riddled living room and kitchen floors, walls and windows. He directed the crime scene technicians to photograph and dust the area for fingerprints. Officers discovered a pager on Phillip Young, and retrieved the telephone numbers stored in the unit. One of the numbers was registered to Kintad Phillips at his 2046 Rousseau Street residence. Detective Ronquillo presented a photographic lineup to Larry Boatner from which Boatner identified Juan Smith as one of the assailants.

Detective Kenneth Leary, the State's expert firearms examiner, tested the .25 caliber weapon seized from Phillip Young, and determined that the gun fired three bullet casings retrieved at the scene. He also identified 9-millimeter and AK-47 semi-automatic rifle ammunition fired at the scene.

Drs. William Newman and Alvaro Hunt, experts in autopsy pathology, performed autopsies on the five victims. All of the victims died from multiple gunshot wounds delivered execution style as they lay face down on the floor. Blood toxicological tests on Shelita Russell and James Jackson were negative for alcohol and commonly abused drugs. However, the other victims' blood exhibited the presence of cannabinoids and excessive levels of alcohol. Dr. Newman opined that Ian Jackson's leg wounds suggested he attempted to flee the attackers, which would explain his body being found in the alley, rather than in the house. The doctors retrieved bullets and bullet fragments from the victims' bodies during the autopsies.

## II. PROCEEDINGS BELOW

The petitioner and his co-defendant, Phillip Young, were indicted on August 31, 1995, for five counts of first-degree murder, a capital violation of Louisiana Revised Statute (La. R.S.) 14:30, relating to the March 1, 1995 shooting deaths of Shelita Russell, Willie Legget, Ian Jackson, James Jackson, and Robert Simons (the North Roman Street

murders). In the same indictment, the petitioner, along with Donielle Bannister, Kintad Phillips, and Robert Trackling, was charged with three counts of first-degree murder relating to the February 5, 1995 shooting deaths of Tangie Thompson, Devyn Thompson, and Andre White (the Morrison Road murders). At his September 11, 1995, arraignment the petitioner pleaded not guilty to all eight counts. He was tried in December of 1995 for the North Roman Street murders, and the jury returned verdicts of guilty as charged on all counts. The same jury subsequently recommended that the Petitioner be spared the death penalty and, in accordance with that recommendation, the trial court sentenced the Petitioner, on each count, to imprisonment for life, at hard labor, in the custody of the Louisiana Department of Corrections, without benefit of parole, probation, or suspension of sentence, with the sentences to run concurrently with one another. It is from these convictions that the instant petition arises.

The Petitioner's convictions were affirmed by the Louisiana Fourth Circuit Court of Appeal, and his writs for supervisory review in the Louisiana Supreme Court were denied. The Petitioner thereafter sought a writ of certiorari from this Court, which was denied on February 24, 2003.

The petitioner filed a *pro se* post-conviction relief application in the state district court. Thereafter, counsel appointed to represent the Petitioner filed a supplemental post-conviction relief application, which expanded upon his *pro se* claim that prosecutors had withheld favorable evidence relating to the North Roman Street murders, including eyewitness misidentification of him as the perpetrator; Phillip Young's involvement in the murders; Robert Trackling's confession to, and implication of Donielle Bannister in, the murders; and the existence of numerous other known suspects in the murders.



Counsel also amended the Petitioner's ineffective assistance claims and added claims that prosecutors had knowingly presented false testimony during the guilt phase of trial and had unfairly denied him the ability to secure Phillip Young's testimony.<sup>2</sup>

The State District Court conducted an evidentiary hearing on the petitioner's post-conviction claims over four days in January and February 2009, during which it heard testimony from victim and police witnesses as well as the Petitioner's trial counsel. On February 2, 2009, the State District Court orally denied post-conviction relief without giving reasons. The Petitioner, through counsel, filed a supervisory writ application in the Louisiana Fourth Circuit, which was summarily denied. Again through counsel, he timely sought supervisory review in the Louisiana Supreme Court, which summarily denied relief on September 24, 2010. The instant petition followed.

### REASONS FOR DENYING THE PETITION

The Petitioner claims that this Court should grant his Petition for a Writ of Certiorari because (1) the state courts summarily denied his applications for relief, which, petitioner appears to contend, is inconsistent with the usual course of judicial proceedings; (2) the State withheld material information in violation of this Court's holding in *Brady v. Maryland*; and (3) prosecutors knowingly permitted Larry Boatner to testify falsely at trial, in violation of his due process rights.

#### I. The state courts' determinations were a result of accepted and usual course of judicial proceedings.

Petitioner is aggrieved because the state district judge "orally denied relief. . . without issuing a written opinion, making any factual findings, or providing any reasons for [his]

---

<sup>2</sup> Counsel also included a claim that Petitioner's sentence of death upon conviction for the Morrison Road murders in a separate proceeding was obtained through use of an invalid prior conviction—to wit, the conviction for the North Roman Street murders.

ruling.” (Pet. at 4.) However, the state district judge, who presided over the Petitioner’s trial, heard from ten witnesses over a four-day post-conviction hearing and found, as a matter of law, that the Petitioner failed to meet his burden of proving that his convictions were obtained in violation of the Constitution of the United States. Further, although the Petitioner claims that the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court “declined to review [his] claims” (Pet. At 23.), in fact, those courts did review, and summarily denied, his applications for supervisory review, which were appended with copies of the relevant transcripts and exhibits.

The rules of the Supreme Court of Louisiana and the Louisiana Courts of Appeal provide that a grant or denial of an application for writs at the higher state courts rests within the judicial discretion of the courts, which may act peremptorily on an application. *See*, Supreme Court of Louisiana, Rule X(1)(A); Rule 4-7, Louisiana Uniform Rules of the Court of Appeal. This Court has recently noted, in the context of federal *habeas* petitioners, that every federal Court of Appeals has recognized that “determining whether a state court’s decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court’s reasoning.” *Harrington v. Richter*, 562 U.S. ---, 131 S. Ct. 770 (2011). Accordingly, the summary denial of the Petitioner’s state court applications cannot be said to be inconsistent with the usual course of judicial proceedings.

**II. The Petitioner’s state post conviction application was properly denied because the Petitioner failed to meet his burden of proving that his conviction was obtained in violation of *Brady v. Maryland* and its progeny.**

The Petitioner’s claims that the State withheld evidence seem to fall into three categories: (1) the withholding of evidence regarding eyewitness identification; (2) the withholding of evidence of Phillip Young’s improved medical condition; and (3) the

withholding of evidence regarding Robert Trackling's involvement in the murders. Initially, the Petitioner fails to demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667 (1985) (White, J., concurring). Further, viewing the undisclosed evidence collectively, the Petitioner cannot prove a *Brady* violation by the mere aggregation of individually meritless claims.

To prevail on a *Brady* claim, a petitioner must show that (1) the prosecution suppressed or withheld evidence that was (2) favorable to the accused and (3) material to either guilt or punishment; and although the *Brady* doctrine mandates disclosure of certain evidence, it does not require the prosecution to open its files to the defense. However, the mere possibility that undisclosed information might have helped the defense or affected the outcome does not establish the materiality of that information. *United States v. Agurs*, 427 U.S. 97 (1976). Rather, undisclosed information is material only where the nondisclosure deprives the defendant of a fair trial. *Id.* As this Court has stated, "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. at 682; *id.* at 685 (White, J., concurring). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *Bagley*, 473 U.S. at 682.

**A. Withholding of Evidence Regarding Eyewitness Identifications**

**i. Evidence Allegedly Undermining the Credibility of Larry Boatner**

The Petitioner claims that prosecutors withheld favorable evidence that, if disclosed before trial, could have been used to undermine the credibility and reliability of

Larry Boatner's photographic and in court identifications of the petitioner as the shooter. In support of this claim, the Petitioner points to seven discrepancies between Boatner's trial testimony and undisclosed statements he and others gave to police and hospital staff:

- (1) Boatner's statement to Detective Ronquillo on the night of the incident that he could not supply a description of the shooters except to say that they were black males, allegedly contradicting his trial testimony that he noticed the petitioner's mouth full of gold teeth after the petitioner and the other gunmen burst into the North Roman Street residence;
- (2) Boatner's statement to Detective Ronquillo that he had been too scared to look at anyone during the incident, allegedly contradicting his trial testimony that he had been trying to see who the shooter was;
- (3) Boatner's pre-trial statement that he could not identify any of the weapons used other than that they included an AK-type assault rifle, a Tech Nine-type handgun, and a silver colored handgun, allegedly contradicting his trial testimony that the petitioner carried a .9mm handgun, which was identified by police as the murder weapon;
- (4) Charity Hospital records documenting Boatner's complaint that he was being harassed by a detective to make an identification of the North Roman Street perpetrator(s), which allegedly indicated the coercive nature of Boatner's ultimate identification of the petitioner and the fact that Detective Ronquillo had likely visited Boatner in the hospital prior to the date he made the identification;
- (5) Unidentified records allegedly demonstrating that Boatner knew that police had already identified the petitioner as a perpetrator of the North Roman Street

murders, which implied that his ultimate identification of the petitioner had been unduly suggestive;

(6) Victim Shelita Russell's pre-death statement that the first gunman who entered the house (identified by Boatner as the petitioner) wore a mask, allegedly contradicting Boatner's statement that he saw the face of and could accurately identify his assailant; and

(7) Statements by Reba Espadron and neighbor Dale Mims to investigators, documented in police and newspaper reports, that four masked gunmen invaded the North Roman Street residence, allegedly contradicting Boatner's testimony that the petitioner was unmasked at the time.

Aside from merely recording the above contentions and highlighting his trial counsel's post-conviction testimony that he was not provided with any of the information in question, the Petitioner makes no attempt to argue the materiality of the complained-of discrepancies or to articulate specifically how the State's disclosure of the withheld documents would have created a reasonable probability of a different verdict. Instead, the petitioner merely notes that Boatner was the only eyewitness to the crime and conclusorily presumes that Boatner's trial testimony would somehow have been "impeached" and "refuted" had the jury been presented with such discrepancies, leaving entirely to the imagination the form that such impeachment and refutation would take. Nevertheless, a review of the petitioner's contentions, when measured against the facts of the case, exposes the fatal flaws present in argument that would might tend to support them.

**a. Boatner's statement to Detective Ronquillo on the night of the incident that he could not supply a description of the shooters**

First, the Petitioner contends that Larry Boatner provided a statement to Detective Archie Kauffman that indicated that Boatner could not describe any of the perpetrators. Subsequently, however, Boatner gave a statement to Detective Kaufman, contained in a supplemental police report, indicating, contrary to the Petitioner's representation, that Boatner "could not describe any of the subjects, *other than the subject who put the gun in his face,*" who had "golds in his mouth," and whom he in fact later identified as the Petitioner.

The non-disclosure of this first statement, petitioner alleges, rises to the level of a *Brady* violation. However while testifying during the post-conviction hearing, Detective Ronquillo stated that, while Boatner had initially told him that he could not describe any of the perpetrators except that they were black males, Boatner later gave a formal recorded statement in which he told Detective Kaufman: "I can tell you about one [of the subjects], the one who put the pistol in my face." Although Boatner emphasized that he could only describe that one subject, he noted that the subject had gold teeth. Boatner's description very closely matched that of the Petitioner. Ronquillo attributed Boatner's initial reluctance to provide a description to his being "shook up" after the incident, especially as "at that point . . . he was in the home and there were dead bodies everywhere," as well as to "his not wanting to be involved in this case anymore." Ronquillo noted, however, the accurate description of the Petitioner Boatner had earlier provided. Accordingly, the State's disclosure of Detective Ronquillo's supplemental report would not have served to impeach the credibility of Larry Boatner's identification

in that regard.

**b. Boatner's statement to Detective Ronquillo that he had been too scared to look at anyone during the incident**

Second, the Petitioner represents to this Court that Boatner initially told Detective Kaufman that he had been too scared to look at anybody during the incident. Contrary to the petitioner's mistaken reading of Boatner's statement to Kaufman, Boatner clearly indicated that he was too scared to look at anybody *after he and the other victims had been ordered to the floor*, which does not conflict with his statement and testimony that he was able to see and describe the petitioner prior to that moment. Moreover, Boatner indicated that he was too scared to look at any of the perpetrators *other than* the petitioner, whom he encountered unexpectedly after opening the front door and whose face he therefore could not help seeing. These statements are entirely consistent with Boatner's post-conviction testimony, in which he explained that he closed his eyes after being ordered to the floor by the petitioner, and that he did not open them "until the gunshots." Therefore, because Boatner's statements and testimony were consistent, non-disclosure of the statements did not violate *Brady*.

**c. Boatner's pre-trial statement that he could not identify any of the weapons used**

Third, the Petitioner's argument regarding Boatner's description of the weapons used during the crime also bears no fruit. Boatner consistently described the petitioner as carrying a handgun. In fact, at trial Boatner testified, consistent with his police statement, that the .9 mm gun the petitioner carried was "a silver gun." When asked whether it was a handgun, Boatner replied affirmatively. He confirmed that fact on cross-examination at the post-conviction hearing, stating that the gun in the petitioner's

hand was "a nine millimeter chrome."

**d. Charity Hospital records documenting Boatner's complaint that he was being harassed by a detective**

Fourth, the Petitioner alleges that Boatner's undisclosed Charity Hospital records show that his photographic identification of the Petitioner as a perpetrator was the product of "harassment" by Detective Ronquillo earlier that morning, and thus was unduly suggestive and/or unreliable. However, he provides no factual or legal support for his unwarranted inferential leap that any possible harassment by Detective Ronquillo in some way rendered Boatner's identification of the petitioner unduly suggestive or otherwise affected its reliability. He does not so much as specify the nature of the supposed harassment as it pertained to Boatner's eventual identification.

At the pre-trial hearing on a motion to suppress Boatner's identification, Boatner himself testified that Detective Ronquillo neither forced nor coerced him to make an identification, nor promised him anything in exchange for his identification, nor suggested that he select the petitioner. Hearing that testimony, the trial judge denied the motion to suppress. Subsequently, at the post-conviction hearing, Boatner reiterated that testimony and reaffirmed that he was not visited by detectives prior to the date on which he made his identification. Janie Mills, the psychiatric aid who tended to Boatner during his stay at Charity, also testified at the pre-trial motion hearing, as a defense witness, that Detective Ronquillo did not suggest to Boatner whom he should select from the photographic arrays. She further testified at the post-conviction hearing that Boatner did not appear to be distressed while talking to detectives during his identification. Detective Ronquillo testified at the post-conviction hearing that he had no recollection of visiting Boatner in the hospital prior to the date and time he made his identification of the



petitioner.

**e. Unidentified records allegedly demonstrating that Boatner knew that police had already identified the petitioner as a perpetrator of the North Roman Street murders**

Fifth, the Petitioner alleges that, contrary to his testimony at trial, Boatner made statements to both Espadron and Detective Ronquillo that he observed a picture of the petitioner in *The Times-Picayune* on June 4, 1995, when in fact that picture did not appear in the paper until June 7, 1995. It is true that the picture did not appear until June 7, 1995. It is also true that Mr. Boatner testified accurately and truthfully at trial that he observed the picture in the paper on June 7, 1995. The significance, if any, of this discrepancy is unclear, and the petitioner makes no effort to illuminate it. To the extent it might have served to call into question the credibility of Boatner as a factual witness, it is to be remembered that, to a man who narrowly escaped a brutal assault that left five of his friends dead, a date would likely be an inconsequential detail in the face of once again being confronted with the image of the man who very nearly took his life. Nevertheless, it was for a jury to judge Boatner's total credibility, and nothing about his minor discrepancy as to dates would have undermined confidence in the outcome of the proceedings. Thus, the unidentified records allegedly memorializing this discrepancy were not subject to *Brady*.

**f. Shelita Russell's pre-death statement that the first gunman who entered the house (identified by Boatner as the petitioner) wore a mask**

Sixth, the Petitioner argues that information in a "daily" entry in Detective Ronquillo's supplemental police report noting Shelita Russell's purported pre-death statement that the first subject who entered the North Roman Street residence had a black

cloth across his face, would contradict Larry Boatner's trial and post-conviction testimony that the petitioner—who he maintains was the first perpetrator to enter—did not have his face covered. The notation in question reads, "Said—in kitchen saw people barge in—one—black color across face—first one through door—[No further statement]." The petitioner's trial counsel testified at the post-conviction hearing that had he been provided with Russell's statement he would have used it to "reinforce the fact that Mr. Boatner could not have identified anyone," thus undermining his identification of the petitioner. However, even if favorable, the petitioner fails to demonstrate the materiality of Russell's statement. Had the trial court admitted Russell's statement, the petitioner must still show a reasonable probability that its admission would have served to discredit Boatner's testimony regarding the petitioner's appearance to such an extent that confidence in the outcome would be undermined.

It is not enough, then, for the petitioner to show merely that the jury would have been confronted with competing accounts of whether the petitioner's face was covered when he entered the residence; he must show a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Agurs*, 427 U.S. 97, *supra*. Considering that Boatner's testimony was internally consistent and there was no conflicting physical evidence regarding the condition of the perpetrators' faces, the petitioner cannot show that the result of the proceeding would have been different. The jury could easily have taken into account that Boatner was in immediate proximity to the petitioner—unlike Russell, who was cowering in a room at the back of the house—when he entered the residence and that the face of co-perpetrator Phillip Young, who was left severely injured inside the house, was not

covered. Thus, the petitioner cannot demonstrate a reasonable probability that the admission of Shelita Russell's undisclosed statement would have resulted in the jury's discrediting Boatner's testimony.

**g. Statements by Reba Espadron and neighbor Dale Mims to investigators**

Seventh, the petitioner alleges that undisclosed police and newspaper reports show that Reba Espadron and neighbor Dale Mims gave statements to police that they observed four masked gunmen enter the North Roman Street residence, which contradicts Larry Boatner's testimony that three unmasked men perpetrated the crime.

Initially, it must be noted that prosecutors have no duty under *Brady* to disclose information contained in a newspaper article, as "[t]he government is not obligated to furnish a defendant with information he already has or can obtain with reasonable diligence." *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (citing *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977)). Information contained in a newspaper is readily available to any citizen through reasonable diligence, and thus the petitioner fails to make a showing that prosecutors possessed evidence subject to disclosure under *Brady*. See *Agurs*, 427 U.S. at 103.

Turning to the statement by neighbor Dale Mims, he told Detective Ronquillo that he heard shots and looked out his front door, whereupon he saw three black males armed with AK-47s exit 2230 North Roman (where the murders occurred), get into a white 4-door Buick and drive off. He then heard a shotgun blast and saw a fourth subject get into another vehicle and also leave the scene. Mims stated that all four men were wearing ski masks covering their faces. At the post-conviction evidentiary hearing, Mims testified similarly, but acknowledged that one of the three men he saw exiting the house did not

have a mask. He also admitted that he did not see the men in question arrive at or enter 2230 North Roman, nor did he see them inside the residence. He also recalled that the men wearing masks removed them after they entered the Buick.

Detective Ronquillo's notes indicate that Reba Espadron told Detective James Stewart that she observed only one of the perpetrators, whom she described as being 5' 6" tall and slim with a "thing around his face." At the petitioner's trial she testified accordingly and further described him as carrying a "big gun" that he held with two hands. Ronquillo testified at the post-conviction hearing that the physical description provided by Espadron did not match the petitioner. Moreover, the gun carried by the perpetrator who confronted Espadron (most likely the AK-47) was clearly not a handgun, as was carried by the petitioner.

Mims' and Espadron's undisclosed statements would not have served to impeach the trial testimony of Larry Boatner or his identification of the petitioner. Mims confirmed that he did not see the subjects he described at any time before or during their entrance into 2230 North Roman, and thus would not have been able to testify as to whether their faces were covered when Boatner first encountered them. He further stated that one of the men may not have been masked at all. Espadron described a subject that was clearly not the petitioner, who Boatner testified was the only perpetrator whose face he observed. Her statement thus does not undermine his identification. Therefore, the petitioner cannot show that the undisclosed statements of Dale Mims or Reba Espadron would have aided him at trial.

### **B. Evidence of Phillip Young's Improved Medical Condition**

The petitioner claims that prosecutors withheld material evidence from the defense—namely Detective Ronquillo's supplemental report and "daily" notes indicating that he interviewed Phillip Young in Charity Hospital following the shooting—that would have demonstrated the petitioner's innocence and therefore cast the State's trial evidence in a different light. He further notes that the evidence regarding Young's improved medical condition and the statements made by him contradict Ronquillo's testimony and the prosecution's statement to the jury that Young was in a vegetative state and unable to communicate. These allegations are spurious.

First, the petitioner was well aware of Young's medical condition throughout the proceedings. Young was in fact a co-perpetrator of the North Roman Street murders and was charged in the same indictment as the petitioner. In fact, on October 19, 1995—barely a month after the petitioner was arraigned—the court ruled Young irrestorably incompetent, finding that he "will never be able to assist his counsel in trial due to permanent [*sic*] brain damage."

Second, Ronquillo's notes regarding Young's condition do not conflict with his trial testimony. In fact, in response to the prosecutor's very first question on the issue, Ronquillo confirmed that he had indeed spoken to Young at Charity Hospital. The prosecutor even admonished Ronquillo in his questioning, in light of the hearsay rule, not to "say what [Young] said if he said anything to you." This open court colloquy hardly evidences a prosecutorial conspiracy to conceal from the jury the fact that Young could in fact communicate. Moreover, Ronquillo's testimony that Young could not speak much and could only use his left hand did not conflict with his undisclosed notes; rather, his

notes corroborate that testimony almost word-for-word. Furthermore, Ronquillo's statement at trial that he couldn't understand anything that Young was saying did not refer to Young's inability to communicate at all, merely—when presented in the context of the colloquy as a whole—to his ability to communicate verbally, which inability is acknowledged even by the petitioner. The statement also reflects Ronquillo's own subjective impression of Young's communicative ability and, as such, is not an allegation of objective fact that could be empirically contradicted by the undisclosed report.

In any event, even if Young's "statements" had been disclosed and admissible at trial—despite their constituting hearsay—they would not have served to undermine confidence in the jury's verdict. Detective Ronquillo testified at the post-conviction hearing that he disavowed Young's statements because he was uncertain as to whether they even had any substance. As noted above, the jury would have been free to consider the fact, as prosecutors would no doubt have emphasized, that Young was a known associate and co-defendant of the petitioner, as well as the inherent bias that accompanied that relationship. This was corroborated by Ronquillo's post-conviction testimony that "the whole nature of [Young's] behavior and how he answered questions changed" when he found out Ronquillo was a homicide detective. Young could also reasonably fear that the petitioner—who had just murdered five people in cold blood—would not hesitate to do the same to him if he "snitched." Accordingly, Young had every incentive in the world to deny the petitioner's involvement in the killings or in his wounding, even if he could not deny his own presence on the scene. Therefore, the petitioner cannot show that there was a reasonable probability that confidence in the outcome would have been undermined.

Relatedly, Young had a corresponding incentive to blame his injuries on one of the occupants of the house. However, the jury would also have been free to consider that the .25 calibre handgun that the petitioner ascribes to Robert Simons was found by police clutched in Young's hand and would have been reasonable in finding it unlikely that Young had somehow managed to grab the gun from Simons after having essentially been rendered paralyzed and unconscious by the shot to his head. Even if established, however, the fact that Simons may have shot Young would not have served to exonerate the petitioner. Finally, the statements by Young that do not exculpate the petitioner—"drove in car", "girlfriend's car"—are of no real evidentiary value.

Finally, while the petitioner argues that the undisclosed evidence, even if not admissible itself, constitutes *Brady* material because it could have led to the discovery of admissible evidence favorable to the defense, *see, generally, Wood v. Bartholomew*, 516 U.S. 1(1995), he fails even to speculate what additional evidence could have been discovered to exculpate him based on the disclosure thereof. Detective Ronquillo was examined at length during the post-conviction hearing about numerous other leads and suspects in the North Roman Street murders and testified that through investigation he was able to eliminate everyone but the petitioner as a confirmed perpetrator. Confronted with that testimony at trial, the jury would have been reasonable in discrediting any "alternative suspect" theory that the disclosure of Young's hospital statements may have engendered.

The only evidence of how the defense would have used Young's statements was offered by the petitioner's trial counsel, who testified at the post-conviction hearing that he would have attempted to locate Young or, in the alternative, to introduce Ronquillo's

notes as evidence of police harassment of Young to make an identification. However, Young's whereabouts throughout the proceedings—especially after his remand to the state forensic facility—were hardly a secret and counsel could easily have visited and attempted to interview him with minimal diligence. Finally, as Young never identified any of the alleged actual perpetrators, any evidence as to police "harassment" to that end would have been entirely irrelevant.

The petitioner has utterly failed to demonstrate the materiality of the undisclosed notes regarding Phillip Young's improved medical condition and his "statements" to Detective Ronquillo.

#### **C. Evidence Regarding Robert Trackling's Involvement in the Murders**

The petitioner alleges that prosecutors withheld material evidence of Robert Trackling's confession to having participated in the North Roman Street murders and his implication of Donielle Bannister therein. In one of the undisclosed pieces of information, an inmate named Eric Rogers told police that Trackling had confessed to him that he committed the murders with Bannister and a man nicknamed "Short Dog," whom Rogers indicated was Robert Home. Rogers testified at the post-conviction hearing that Trackling had told him the murders were committed by him, Bannister, and Romalice McGee, and that Detective Byron Adams had coaxed him to implicate the petitioner in exchange for reducing his life sentence for second-degree murder, even though he knew the petitioner had not been involved in the killings. He denied that he had ever spoken to the petitioner directly. The petitioner cites this as material evidence that directly exculpates him from the North Roman Street murders.

The second piece of undisclosed information involves a June 1, 1995, interview



between Detective Adams and Trackling relating to his involvement in the Morrison Road murders, during which Trackling identified the petitioner from a photographic lineup as "Short Dog" and implicated him in the Morrison Road murders. The petitioner notes with suspicion the timing of Adams' interview with Trackling—roughly two weeks after his interview with Rogers—and the fact that Trackling was not asked about his role in the North Roman Street murders, despite the information learned from Rogers. He further points to a notation entry in Detective Ronquillo's supplemental report stating that Adams had interviewed Trackling and that Trackling had denied being involved in the North Roman Street murders, which he contrasts with the fact that Adams did not, as far as is known, ask Trackling about North Roman Street. The petitioner surmises that this proves the existence of an as-of-yet undisclosed interview, even as the District Attorney's file contains no such second interview.

Finally, the petitioner directs this Court to a notation in Ronquillo's supplemental report referring to his interview with Trackling in July of 1995, during which Trackling denied his involvement in the North Roman Street murders and offered the alibi that he was at work when the crimes were committed. The report goes on to note that Ronquillo checked Trackling's time card and discovered that he did not clock out of work until 7:45 pm. The petitioner cites this as proof of Trackling's possible involvement in the North Roman Street murders, which did not occur until 8:30 pm. Police knowledge of Trackling's involvement, according to the petitioner, was evidenced by his being placed in photographic lineups shown to Reba Espadron and Larry Boatner, neither of whom identified him as a perpetrator. Upon that, the petitioner argues that police concealed Trackling's confession to his prejudice.

The petitioner's unwieldy allegation as to evidence of Trackling's supposed involvement in the North Roman Street murders fails to satisfy his burden under *Brady*. As an initial matter, Eric Rogers' testimony at trial—to the extent it tracked his police statement and post-conviction testimony—would have been inadmissible hearsay through Trackling and Detective Adams. Moreover, his undisclosed statement that Trackling admitted to committing the North Roman Street murders with Donielle Bannister and Robert Home is contradicted by his own post-conviction testimony that Trackling told him he committed the murders with Bannister and Romalice McGee. It is also contradicted by the other undisclosed evidence of which the petitioner complains—Trackling's own statements to Adams and Ronquillo denying his involvement in the North Roman Street murders. His statement regarding Romalice McGee's involvement was rebutted by Detective Ronquillo's post-conviction testimony that Larry Boatner was shown a lineup containing McGee's picture and was unable to identify him as one of the perpetrators.

Rogers' statement that "Short Dog" was Robert Home is contradicted by Trackling's identification of the petitioner as "Short Dog" as well as by the testimony of the petitioner's own sister, Trenieze Smith, at his related trial in the Morrison Road case, in which she acknowledged that she thought her brother went by the nickname "Short Dog." At the post-conviction hearing, she similarly testified that the petitioner was known as "Shorty." Furthermore, Rogers' post-conviction testimony that he in fact never received the sentence reduction that Adams allegedly offered him in return for implicating the petitioner contradicts his unsupported allegation—made 14 years after the fact—that Adams had coaxed him to do so. Finally, under Louisiana evidence rules,

Rogers' testimony would have been subject to impeachment through his conviction for second-degree murder, further damaging his credibility. Accordingly, Rogers' inconsistent and controverted statements—to the extent they were even admissible—would carry little evidentiary weight and the petitioner cannot therefore show that the trial jury would have been unreasonable in discrediting his testimony in light of the countervailing evidence.

As to Detective Adams' interview with Trackling, the petitioner fails to demonstrate that its substance is favorable to his defense. Indeed, disclosure of that statement would have only provided additional evidence implicating the petitioner in the North Roman Street murders by introducing another photographic identification and corroboration that his nickname was "Short Dog." Coupled with Eric Rogers' statement that "Short Dog" was involved in the North Roman Street murders, the effect would be highly prejudicial at trial. That Trackling was not questioned by Detective Adams about the North Roman Street murders during his June 1, 1995, interview means nothing; as the interview was explicitly concerned with his role in the Morrison Road case, it is not surprising that Adams did not delve into ancillary investigations. Even if the petitioner's allegation of an undisclosed second interview between Adams and Trackling, in which Trackling denied his involvement in the North Roman Street murders, were substantiated, that information would be merely cumulative of Trackling's interview with Detective Ronquillo, during which he denied the same. *See Drew v. Collins*, 964 F.2d 411, *supra*.

The petitioner further fails to show how Trackling's undisclosed interview with Detective Ronquillo, in which he denied his involvement in the North Roman Street murders, would have exculpated him in the same crime. The only evidence that the

petitioner advances in support of his argument is the fact that Trackling's time card showed that he was not at work, as he had told Ronquillo he was, at the time of the murders. However, Ronquillo testified that he found Trackling's denial credible because he had already confessed to being involved in the Morrison Road murder and Ronquillo "[didn't] see why he would confess to one murder and not the other." Moreover, the effect of disclosing Trackling's possible involvement to the jury would have been soundly rebutted by Ronquillo's testimony that Larry Boatner was shown photographic lineups including Trackling's picture and was unable to identify him as a perpetrator. The petitioner acknowledges that much, but still claims that police concealed the evidence of his supposed confession. However, as noted, the only evidence of Trackling's supposed involvement comes from the mouth of a convicted murderer who's credibility is undermined by the very evidence the petitioner complains was not disclosed to him. That evidence also reflects Trackling's implication of the petitioner in the murders by his nickname. Therefore, the petitioner's own argument defeats itself.

In any event, even assuming, *arguendo*, that the undisclosed evidence was somehow sufficient to convince the jury of Trackling's involvement in the North Roman Street murders, this would still not constitute material or even favorable evidence entitling the petitioner to *habeas* relief. As is by now well documented, both surviving eyewitnesses—Reba Espadron and Larry Boatner—testified that three to four subjects participated in the home invasion and killings, including the petitioner and likely Phillip Young. As noted, Shelita Russell also indicated that more than one subject entered the house, and Dale Mims likewise testified that he observed four men flee the scene after the shootings. Trackling's own alleged confession indicates that he committed the

murders with two other people—Donielle Bannister and “Short Dog,” i.e. the petitioner. Thus, the evidence establishing Trackling’s involvement in the crime would do nothing to negate the petitioner’s own involvement; it would merely add another name to the indictment. The petitioner therefore cannot demonstrate that the jury would have been unreasonable in finding the evidence of his guilt sufficient nonetheless.

### III. Subornation of Perjury

The petitioner alleges that prosecutors knowingly permitted Larry Boatner to testify falsely at trial. “To establish a due process violation based on the government’s use of false or misleading testimony, the [petitioner] must show (1) that the witness’s testimony was actually false, (2) that the testimony was material, and (3) that the prosecution knew the witness’s testimony was false.” *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

It is self-evident that, before all else, the testimonial assertion in question must be demonstrably untrue. Even if proven as false, testimony will not be considered material unless the particular factual issue is a “highly significant factor” in the case, *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994), and there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Agurs*, 427 U.S. at 103; 96 S.Ct. 2392 (citing authorities) (emphasis added). Finally, the petitioner must prove that prosecutors had, or should have had, actual knowledge of the falsity of the complained-of testimony. A showing of record discrepancies does not suffice to do so and “misperceives the burden placed on one who would secure *habeas* relief on this ground.” *Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988).

The petitioner has not met his burden of proving that Larry Boatner’s trial

testimony was false. Moreover, he has not presented any evidence showing that prosecutors were, or should have been, aware of any such falsity. The issue of materiality is therefore moot, and, in any event, meritless.

### CONCLUSION

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

Respectfully submitted,



Donna Rau Andrieu  
*Counsel of Record*  
Andrew Milton Pickett  
Orleans Parish District Attorney's Office  
619 South White Street  
New Orleans, LA 70119  
(504) 822-2414

*Counsel for Respondent*