

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2010

JUAN SMITH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

**REPLY BRIEF TO STATE'S OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI**

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A. Withholding of Evidence Regarding Eyewitness Identifications

The State attempts to argue that Larry Boatner's undisclosed statements to the police were not inconsistent with his trial testimony because he was only "too scared to look at anybody after he 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." Opposition Brief at 11.

Police notes of an interview with Mr. Boatner clearly establish that the State is incorrect and that Larry Boatner initially told police that he could not identify anyone at anytime that evening. In fact, Boatner told the police that he wasn't sure if the man at the door had his face covered or not. See. EX. 2, pg. 3 Post-Conviction Hearing (NOPD dailies and notes):

Could not ID anyone because couldn't see faces. Saw man through door.

....Can't tell if had face covered. Didn't see anyone. "Could not ID.

Would not know them if I saw them."

Id.

This statement is markedly inconsistent with Boatner's trial testimony that he would never forget the face of the gunman as long as he lived.

At the post-conviction hearing eyewitness, Dale Mims seemed unsure if two or three of the men were wearing masks when they exited the home. *Id.* Mr. Mims also did not recall being interviewed by the police. 1/13/09 Tr. 108.

The defense called Detective Ronquillo to testify regarding his interview with Dale Mims shortly after the shooting. According to Ronquillo, Mims told him all of the men were wearing ski masks:

Q. Okay. And, do you recall what Dale Mims told you?

A. Yes. He was in his house. He heard a lot of gunshots at about 8:30. And, he looked out of his window and he saw four men exit the house carrying rifles and having ski masks. He couldn't see any of their face.

Q. Okay.

A. They jumped in their car and they drove off.

1/22/09 Tr. 71-72.

A newspaper article in the Times-Picayune stated that police sources indicated that one woman who survived the Roman street shootings¹ told the police that four masked men committed the killings to avenge an earlier killing in the St. Thomas projects. Ex. 1, DA File, at 2434-35, 2346. Despite repeated requests under the Public Records Act, the State has failed to disclose the interviews that the police conducted with eyewitness Reba Espadron. Petitioner is entitled to these statements which, according to the newspaper accounts exist and impeach both Reba and Larry Boatner's trial testimony. Despite the fact that the trial court ordered the State to produce these interviews the State has not complied.

Larry Boatner first testified at a pre-trial hearing held on December 5, 1995 and later again, during the Roman Street trial, that Juan Smith was the first man who entered the door and that he was not wearing a mask. R. 154. According to the trial testimony, one

¹ Reba Espadron was the sole surviving female of the shootings.

of the victims, Shelita Russell, was conscious but unable to provide the police with any details of what happened.

However, according to notes of Russell's police interview obtained in post-conviction, Russell told police that she saw the first man who came through the door and that his face was covered by a black mask Ex. 2, NOPD Daily Notes and Status Reports, at 44.

The State failed to turn over interviews of four different eyewitnesses claiming that the gunmen were wearing masks and incredulously maintains that it does not understand how this evidence is material in a case where the conviction is based on a single eyewitness identification. Nor does the State seem to understand how evidence that the single eyewitness was harassed and coerced by police prior to making his identification is material. If the State truly does not understand the materiality of this evidence that may explain the number of *Brady* violations committed by the Orleans DA's office.

B. Detective Ronquillo Testified Falsely about Phillip Young's Medical Condition at Trial

During the Roman Street trial, the state maintained that Phillip Young, Juan Smith's codefendant, was in a vegetative state. In his opening statements the prosecutor referred to Young as "pretty much a vegetable". Roman St Transcript 22. Detective Ronquillo testified "[Young] really couldn't talk, he mumbled. He could use his left hand, that was all." Roman St Transcript 102. When the prosecutor asked Ronquillo "Was he able to communicate with you at all?" Ronquillo replied "No. I couldn't understand anything that he was saying. No." Roman St Transcript 103.

The common understanding of a vegetative state is someone who as a result of brain damage has no ability to communicate whatsoever. Webster's Dictionary describes someone in a vegetative state as being only able to breathe and perform bodily functions:

Vegetative

b : characterized by, resulting from, or being a state in which there is total loss of cognitive functioning and in which only involuntary bodily functions (as breathing or blinking of the eyes) are sustained

Documents obtained from the District Attorney file, however, reveal that Phillip Young's medical condition was *not* in a vegetative state at the time of trial. Even more egregious, NOPD daily reports indicate that Detective Ronquillo questioned Young about the events at Roman Street. According to the dailies, Young told police what actually happened at Roman Street, and told Ronquillo that *Short Dog was not present*. Detective Ronquillo thus lied about Phillip Young's medical condition when he testified at Mr. Smith's trial.

Despite having had a fruitful interview with Young, Detective Ronquillo testified at trial that Young was unable to communicate at all. Tr. 103.

The Prosecution Knew the Testimony of Ronquillo was False

The State knowingly presented the perjured testimony of Detective Ronquillo, who testified that Young was unable to communicate with him despite the fact that Ronquillo had personally interviewed Young about the shootings. Notes in the District Attorney file as well as in NOPD dailies indicate that Ronquillo questioned Phillip Young about the events at Roman Street. Ronquillo's trial testimony is contradicted by

his own daily police reports, and testimony at the post-conviction hearing which detail that Ronquillo did, in fact, communicate with Young regarding the Roman Street crimes during his visit. Thus, Ronquillo perjured himself at trial when he denied Young's ability to communicate (Tr. 103) and the State violated *Giglio* and *Napue* when it knowingly presented his perjured testimony.

The State alleging that the defense knew the true state of Young's medical condition is disingenuous. The defense like the jury were told that Phillip Young was practically a vegetable. The defense had no way of knowing that Phillip Young had answered questions regarding the crime and exculpated Mr. Smith. If Detective Ronquillo's testimony was not an outright falsehood it certainly gave a false impression to the jury regarding what Philip Young conveyed to Detective Ronquillo by nodding or shaking his head in response to questions about the crime. The fact that he did not speak does not mean he did not communicate relevant exculpatory information that was favorable to Juan Smith. At the post-conviction hearing, Petitioner called Barbara Riley, the head nurse at the Rehab Institute of New Orleans at the time when Phillip Young was receiving treatment at that facility after the Roman Street incident. 1/13/09 P.C. Hearing at 117. Mrs. Riley remembered Phillip Young, and testified that Young "did not speak" but was able to communicate by shaking his head yes or no when asked questions. *Id.* at 117-18. When questioned by the State about whether Young suffered from amnesia, Ms. Riley responded, "No, I recollect aphasia, a lack of speech." *Id.* at 120-21.

Ms. Riley was present for the entire length of the questioning, and witnessed the detective administer the Miranda rights to Mr. Young. *Id.* According to Ms. Riley, Mr.

Young communicated that he understood his rights and could answer the detective's questions. *Id.*

The False Testimony was Material

The State violated *Giglio*, 405 U.S. 150 (1972) and *Napue*, 360 U.S. 264 (1959), when it presented Ronquillo's perjured testimony that Phillip Young was unable to communicate with him. Both *Napue v. Illinois* 360 U.S. 264 (1959) and *Giglio v. U.S.* 405 U.S. 150 (1972) hold that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. .'" *Id.* at 154 quoting *Napue*.

There is at least reasonably likely that Ronquillo's perjured testimony affected the judgment of the jury. Because of Ronquillo's false testimony, the jury never knew that Phillip Young's medical condition had improved, nor did they hear that police were able to interview Young. Even worse, the jury never heard Young's version of the events, which would have been crucial given that he acted in concert with the gunmen the night of the murders. Most egregious, the jury never heard Young state that Mr. Smith was *not* the shooter, and *was not even present* when the murders took place. It is at least reasonably likely that had the jury known this information, their judgment would have been affected.

In *Graves v. Dretke*, 442 F. 3d 334 (5th Cir.), cert. denied, 127 S. Ct. 374 (2006), the prosecution violated *Brady* when it failed to disclose statements by its critical witness, the alleged co-perpetrator of the murder. In one of the suppressed statements, the witness exonerated the defendant and claimed to have committed the murder by himself. The court found even more egregious than the prosecution's suppression of the statement, the

fact that the prosecutor knowingly elicited false and misleading testimony from the same witness, who testified that he had always implicated the defendant in the crime.

Here, as in *Graves*, the state allowed Detective Ronquillo to mislead the jury into believing that Young was unable to provide police with any statement detailing the true events at Roman Street, in clear violation of *Brady, Giglio and Napue*. *Graves v. Dretke*, 442 F. 3d 334 (5th Cir.). *S*

Accordingly, the prosecution's knowing presentation of Ronquillo's false testimony is a violation of *Giglio* and requires Mr. Smith's conviction be set aside.

The State's misconduct, and the denial of an opportunity to secure Mr. Young's testimony, violated Mr. Smith's right to compulsory process.

Few rights are more fundamental than that of the accused to present witnesses in his own defense. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Indeed, this Court has recognized that "this right is an essential attribute of the adversary system itself," *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

Hence, the Sixth and Fourteenth Amendments to the United States Constitution operate to ensure that no "unnecessary evidentiary rule, ...prosecutor's misconduct, or...arbitrary ruling by the trial judge" interferes with the fundamental right of the accused to present a defense in his own behalf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In this case, egregious misconduct by the prosecutor interfered with Mr. Smith's constitutional right to compel Philip Young, an eyewitness and co-perpetrator of the Roman street murders, to testify as to whether Juan was truly involved in the crime. Even if Mr. Young invoked his Fifth Amendment Rights, the State's failure to turn over interviews conducted with Young by Officer Ronquillo prevented the defense from calling Detective Ronquillo and potential other witnesses at Charity

Hospital with whom Mr. Young may have discussed details of the crime that were exculpatory to Mr. Smith.

In sum, the State alternately presents two misguided arguments. First, the State tries to blink away any *Brady* violation by claiming that Detective Ronquillo's hiding of Young's statements at trial wasn't really a non-disclosure, because it was just the detective's "subjective" interpretation that Young did not "communicate" anything. The State's more audacious alternate argument is that even if Detective Ronquillo *had* fully and accurately disclosed Young's statements, it wouldn't have mattered to the jury. The State here magically claims that it knows exactly how the jury would have reacted if they were told that Young had confirmed that Juan Smith had nothing to do with this crime.

Both arguments reveal that the State arrogantly continues to be out of touch with the reality and the mandates of *Brady*. It is not up to the detective to toss out exculpatory admissions on the flimsy pretext of subjectivity. It is not up to the State to decide how the totality of evidence might be weighed out. Rather, it is the State's obligation to reveal all of the favorable evidence and then it is the jury's role to be the fact-finder. The State failed those obligations, violated *Brady* and its progeny. Juan Smith was denied his rights to a fair trial.

C. Additional *Brady* Evidence Withheld about Robert Tackling's and Other Suspects' Involvement in the Roman Street Homicides

In his post-conviction application, the Petitioner alleged that the State violated its *Brady* obligations by suppressing exculpatory information contained in NOPD police reports and interviews. The State omits mention of these exculpatory reports and interviews in its response to this Court. According to NOPD police reports from May of

1995, Robert Trackling confessed to Eric Rogers, his cellmate at Orleans Parish Prison, that he was involved in both the Roman Street and Morrison Road murders. Post-conviction Ex. 1, DA File, at 3954-65. Trackling told Rogers that he was present in the house when the shooting at Roman Street occurred and that Donielle Bannister was the shooter. *Id.* Police interviewed both Rogers and Trackling about Trackling's involvement in the Roman Street incident but never disclosed these exculpatory statements to defense counsel.

On May 19, 1995, Eric Rogers was interviewed by the New Orleans Police Department and told detectives that Trackling had confessed to involvement in the Roman Street murders and had implicated Donielle Bannister. Ex. 1, DA File, at 3954-65. Roger's interview with police is as follows:

A: Alright. I was on C4 and I got the information from Robert he came up on the (inaudible) where I'm at. And he told me about the first crime they done. He say they done it on N. Roman he said that it was him, Fat, Buckle and a guy they call Short Dog. Say they went up to the door and they knocked on the door and the guy open the door and they went in the house and they had about 7 guys in there. And they made 'em lay down on the floor and they was asking the guys where where's the stuff and the guy didn't say nothing. They say that they had a girl in the um, room she open the door and when she open the door all of 'em turned around and say one of the guys that was on the floor jumped up and grab his gun from under his shirt and went to shooting at her. They say that they raised up the gun and they went to shooting them. They went to shooting back and hit them and say one of the guys who was shooting that got off the floor his gun slid by um Darnell Banister foot, and Darnell Banister picked up his gun and went to shooting the guy with that guy [sic:gun].

Q: Then what transpired then what happened?

A: Then after that he say that they left they left because they couldn't stay long because they had too much of the gun from the fire, they had too much noise and they had left.

Post-Conviction Ex. 1, DA File, at 3956 (*emphasis added*).

Q: When he explain to you about N. Roman incident, did he tell you how they made good their escape were they in a vehicle, did they run off foot, did he explain to you?

A: He said that they got in a car he said that the car was burgundy, a burgundy car.

Ex. 1, DA File, at 3957.

Eric Rogers further elaborated on the identity of the perpetrators of the Roman Street shootings and of the members of the Cut Throat Posse:

Q: Okay do you know who Fat is, what's [sic] his real name is?

A: Yes his real name is Darnell Banister.

Q: Can you describe Buckle to me?

A: Yeah his real name is Contez Phillips...

Q: Do you know Short Dog?

A: No but Robert describe 'em to me.

Q: Do you know Short Dog's real name did he tell you his real name?

A: He say [sic] his real name is Juan but he didn't give me no last name.

Ex. 1, DA File, at 3959.

Q: These guys Fat, Buckle, and Short Dog do they have a name for themselves so they call themselves anything?

A: They call Contez Phillip Buckle, they call Darnell Banister Fat, Short Dog that's what they call him, they call Robert Home.

Q: But do they have a name for their group?

A: Oh yeah, they call their self Cut Throat Posse

Q: And where do they mainly hang out at?

A: They the Cut Throat they was hanging in St. Andrew.

Ex. 1, DA File, at 3960 (emphasis added).

When police questioned Rogers further on the Cut Throat Posse, Rogers gave police a long list of members of the Cut Throat Posse, and a list of murders for which they claimed to have been responsible.² At no point in this laundry list of people associated with the Cut Throat Posse did Rogers bring up Juan Smith's name.

Trackling's own statement places himself, Bannister, and Phillip Young in the house. Trackling did not mention that Phillip Young was present, yet it is clear that Young was involved since he was found wounded at the scene and was a stranger to Rebe Espadron and Larry Boatner. Therefore, either Juan Smith was outside the house when the shooting took place or Phillip Young is the man Trackling called "Short Dog."

If Juan Smith was outside the Espadron residence when the shooting took place, there were five men involved in the incident. Accounts from witnesses that night, however, indicate there were only four men involved, and only three gunmen who went inside the Espadron residence.

Trackling's confession to Eric Rogers that Kincaid Phillips and Donielle Bannister were involved in these shootings was corroborated by other undisclosed *Brady* evidence.

Michelle Branch was the girlfriend of Phillip Young, Mr. Smith's co-defendant in the Roman Street case. On March 6, 1995, she was interviewed by police via telephone

about Phillip Young's participation in Roman Street. According to Branch, the last time she saw Phillip Young was on March 1, 1995 at around 6:00 p.m. when he left her house with her car. DA 3751. Branch described her car as a beige Chrysler LeBaron that is often mistaken for white at night. *Id.* She also said the car had a bad muffler which made the car very loud. She told police "everyone knew when you were coming with that car." *Id.* Branch also told police that the day after the shootings, on March 2, 1995, she received a telephone call from an unknown person who stated that Kintaid Phillips was driving her car around the Calliope Housing Project. *Id.* Branch told police that Phillips was with Donielle Bannister and that they had killed people before. DA file 3751; DA file 3757.

On March 13, 1995, Michelle Branch gave police a tape-recorded statement, which confirmed what she told police on the telephone. DA 3759; 4301-06. She again told police that she had last seen Philip Young when he took her car on March 1, 1995, at about 6:30 pm, and had not heard from him since that date. *Id.* She described her car as a light yellow Chrysler LeBaron, with no muffler, and added that the car would look white at night. *Id.* She also told police that she had received phone calls from unknown individuals who told her that Kintad Phillips had been seen driving her car around. *Id.*

Branch's description of her car matches Boatner's description of the car the suspects were driving. Boatner told police that on the night of the shooting he went to the door and saw three armed men exit an old white four door car with a loud muffler. DA file 3728. Reginald Harbor also reported hearing the gunmen drive off in a car with a very loud muffler. DA 003743.

Moreover, Michelle Branch's statements also reveal that immediately after the shootings, Kintaid Phillips was seen driving the car Philip Young had been driving. This evidence implicates Kintaid Phillips in the Roman Street crimes, which police suspected from the start of their investigation. Indeed, Kintaid Phillips was the prime suspect, as police discovered that he had sent Phillip Young's beeper the message "187" on the night of the shootings. DA 3737. According to police, 187 is the code for homicide in California, "the number used in 'rap' songs to imply murder," and a common slang term for murder on the street. *Id.* Police thus focused on Kintaid Phillips and his known associates in their investigation. DA 3751-3756. Notably, Juan Smith was never included as an associate of Phillips or Bannister. However, Robert Trackling was a known associate, in jail for a shooting of a thirteen year old girl along with Donielle Bannister and Romalice McGee.

At trial, the State argued that four men were involved in the shooting, three inside the house and one outside. Michelle Branch's statement, taken together with Trackling's confession and the message Kintaid Phillips sent to Phillip Young, provides powerful exculpatory evidence that the four men involved in the Roman Street murders were Robert Trackling, Donielle Bannister, Kintaid Phillips and Phillip Young, and not Juan Smith. This evidence obviously exculpates Mr. Smith, and should have been disclosed to the defense prior to trial.

The *Brady* doctrine requires the state to disclose all favorable material evidence, including both exculpatory and impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, (1995); *United States v. Bagley*, 473 U.S. 667, 676 (1985). Where the State possesses

information indicating that another person committed the crime with which the accused has been charged, it must disclose that evidence to the defense. *Scott v. Mullin*, 303 F.3d 1222 (10th Cir. 2002) (finding *Brady* violation where the state suppressed evidence of a third party's confession to the murder); *Miller v. Angliker*, 848 F.2d 1312 (2nd Cir. 1998), cert. denied, 488 U.S. 890 (1988) (granting habeas where the state withheld evidence which indicated that another person had committed the crimes with which defendant was charged); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d (10th Cir. 1995), cert. denied, 116 S. Ct. 272 (1995) (finding *Brady* violation and granting habeas where material evidence relating to another suspect was not disclosed). Similarly, where an individual other than the defendant confessed to the crime with which the defendant has been charged, it is evidence "undeniably favorable" to the defendant, and clearly falls within the purview of *Brady*. *Scott v. Mullin*, 303 F.3d 1222, 1230 (10th Cir. 2002) (an alleged confession by an individual other than the defendant "is undeniably favorable" to the defendant). Even if the evidence of third party guilt could only be used as impeachment evidence, it is still subject to disclosure under *Brady*. *Id.*, at 1231; *See also United States v. Minsky*, 963 F.2d 870 (6th Cir. 1992) (holding that a witness' false statements could have been used by the defense to undermine the witnesses' testimony and should have been disclosed under *Brady*).

Here, Trackling's alleged confession to the Roman Street crimes was favorable evidence that the State should have disclosed, as it both exculpated Mr. Smith and could have been used to impeach the eyewitness testimony. The State's argument that Eric Roger's testimony was inadmissible hearsay ignores this Court's ruling in *Chambers v. Mississippi* 410 U.S. 284 (1973). Both this Court and the Louisiana Supreme Court have

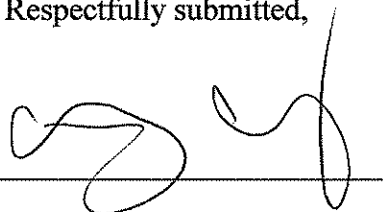
specifically held that rules of evidence, including the hearsay rule, must yield to a criminal defendant's paramount right to present a defense when the evidence he seeks to introduce bears adequate indicia of reliability. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979); *see also Gray v. Klauser*, 282 F.3d 633 (9th Cir. 2002) (*arbitrary* exclusion of hearsay statement implicating third party violated right to present a defense).

Furthermore, the State's argument that Trackling's confession to Eric Rogers was damaging to Juan Smith is unsupported by the record. In the undisclosed police interviews Rogers stated that the only person he know that was called "Short Dog" was Robert Home. Rogers never stated that "Short Dog" was Juan Smith or that Trackling identified "Short Dog" as being Juan Smith. In his post-conviction testimony, Rogers stated that it was Detective Adams who told him that "Short Dog" was involved in the Roman Street murder and was named Juan Smith. Detective Adams told him this prior to speaking to Robert Trackling.

CONCLUSION

Wherefore, for the foregoing reasons, Mr. Smith respectfully moves the Court to grant review of this matter and reverse Mr. Smith's conviction.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Kathleen Kelly', written over a horizontal line.

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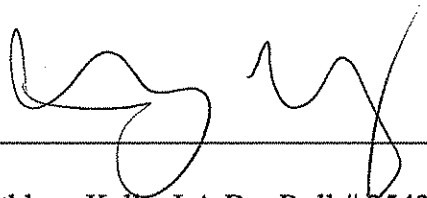
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Writ Certiorari upon counsel for opposing party, by depositing a copy of same by means of U.S. Mail, and sending it to the following address:

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This 31st day of March, 2011.



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