No. 10-8145

In The
Supreme Court of the United States

JUAN SMITH,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari To The Orleans Parish Criminal District Court Of Louisiana

RESPONDENT'S BRIEF

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QUESTION PRESENTED

A small group of friends gathered in the front room of a home. Hearing a disturbance outside, one of the friends opened the front door. Armed men burst in, demanding drugs and money. The friend who opened the door was held standing at gunpoint. The others were ordered to the floor. After an exchange of words, the first intruder struck the standing victim in the head, causing a severe laceration. The victim fell and pretended to be unconscious. The intruders opened fire, executing five of the friends. Only the victim who opened the door survived.

At the scene, the victim provided a first-responding officer with a physical description of the perpetrator who had pointed the gun in his face. While still in the house, standing among the bodies of his friends, and bleeding from his head, the victim provided a second officer with a description of the weapons used in the murders, but stated he could not supply a description of the perpetrators other than that they were black males. Four hours later, after being treated for his head wound, the victim was taken to the Homicide Office, where he provided a formal statement. The formal statement included a physical description of the perpetrator who had pointed the gun in his face as well as the weapons used in the murders. Five days later, when asked by the police if he could identify any of the perpetrators, the victim stated he could not.

QUESTION PRESENTED – Continued

Over the course of the next three months, the victim viewed fifteen photographic lineups from which he identified only one person – petitioner. Petitioner was indicted. At trial, the victim pointed to petitioner as the man who burst into the home and pointed a gun in his face. Petitioner was convicted of five counts of first-degree murder.

Whether the victim's undisclosed pretrial statements undermine confidence in the outcome of petitioner's trial such that petitioner was denied due process under this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases.

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STATEMENT OF THE CASE

I. Proceedings Prior To Trial

Petitioner and co-defendant, Phillip Young, were indicted on August 31, 1995, for five counts of capital murder in connection with the March 1, 1995 shooting deaths of five individuals inside a residence at 2230 North Roman Street in New Orleans, Louisiana.[1] In the same indictment, petitioner and three co-defendants were charged with three counts of capital murder relating to the February 5, 1995 shooting deaths of three individuals inside a home on Morrison Road in New Orleans.[2] Criminal District Court Record ("C.D.C.R."), 1A-L, 2. The two incidents were severed.

A. Petitioner's Motion for Discovery and the *In Camera* Inspection of Disputed Documents Requested in Petitioner's Motion for Discovery

On September 12, 1995, petitioner moved for discovery. J.A. 32-34. The State's reply included the initial police report as an attachment. J.A. 33. The

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[1] Although Petitioner was subsequently brought to trial, Young was not. Young was found by the district court to be an incompetent and "will never be able to assist his counsel in trial due to perm[a]nent brain damage" sustained during the commission of the murders. J.A. 1.

[2] Petitioner was convicted of these murders on December 5, 1996, and sentenced to death on each count. See *State v. Smith*, 793 So.2d 1199 (La. 2001).

supplemental report was requested, but not disclosed.[3]

On October 31, 1995, the court conducted an *in camera* inspection of police reports for *Brady* material. After the inspection, the court ordered that the initial report be turned over to the defense and found that the supplemental report relating to the North Roman Street murders "contain[ed] no *Brady* [material]." Oct. 31, 1995 Motion Hearing Transcript, 20-21.

B. The Hearing on the Motion to Suppress Identification

Three witnesses testified at an October 27, 1995 hearing on petitioner's motion to suppress identification: Detective John Ronquillo, the lead homicide detective assigned to investigate the North Roman Street murders, and eyewitness Larry Boatner, testified for the State. Janie Mills, a psychiatric aide at Charity Hospital, testified for the defense.

Ronquillo testified that, on the afternoon of June 28, 1995, he met with Boatner at Charity Hospital, where Boatner was undergoing treatment for alcohol

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[3] Louisiana law specifically excludes "the discovery or inspection of reports, memoranda or other internal state documents made by the district attorney or by agents of the state in connection with the investigation or prosecution of the case; or of statements made by witnesses or prospective witnesses, other than the defendant, to the district attorney, or to agents of the state." LA. CODE CRIM. PROC. art. 723.

abuse. 2000-KA-1392, Vol. 7, Oct. 27, 1995 Motion Hearing Transcript ("Mot. Hrg. Tr."), 3, 6. When presented with the first of three photographic lineups, Boatner immediately identified petitioner's photograph.[4] Mot. Hrg. Tr. 4. Ronquillo described Boatner's identification as "very positive." Mot. Hrg. Tr. 14. After Boatner's identification of petitioner, Ronquillo presented Boatner with two additional lineups. Mot. Hrg. Tr. 4, 9-10, 13-14. Boatner identified no one in either of those lineups. Mot. Hrg. Tr. 4, 9.

Larry Boatner's testimony confirmed Ronquillo's testimony. Mot. Hrg. Tr. 16-21. In addition, Boatner testified that he had made no formal identifications prior to that of June 28, 1995. Mot. Hrg. Tr. 21-22. He also testified that, on a previous occasion, he had been shown a lineup in which he noted a photograph of "a guy that had a look on his face and his haircut [sic] the same way" as petitioner. Mot. Hrg. Tr. 22. He added that he had merely noted the similarity without making any identification. Mot. Hrg. Tr. 22.

Boatner also testified that while still on the scene of the murders he gave a description of his assailant to a police officer who was not Ronquillo. Mot. Hrg.

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[4] Respectively, these were the thirteenth, fourteenth, and fifteenth lineups prepared by Ronquillo and shown to Boatner during the course of the investigation of the North Roman Street murders. J.A. 132-34. Lineup thirteen included a photograph of petitioner. J.A. 268. Lineup fifteen included a photograph of Robert Trackling, one of petitioner's co-defendants in the Morrison Road murders. J.A. 269; C.D.C.R. 1G-L, 2.

Tr. 23. To that officer Boatner described his assailant as "heavy built with his hair with a fade, with a little small top with a lot of gold teeth in his mouth." Mot. Hrg. Tr. 24.

Janie Mills testified that she worked as a "treatment person" for Boatner while he was on the psychiatric ward at Charity Hospital. Mot. Hrg. Tr. 31. She testified that she escorted Boatner to a meeting with a policeman during which Boatner was shown photographs. Mot. Hrg. Tr. 33. Mills further testified that she witnessed Boatner make a positive identification. Mot. Hrg. Tr., 33-34.

II. The Proceedings At Trial

A. Reopening of the Motion to Suppress Identification

Petitioner's two-day trial for the North Roman Street murders began on December 4, 1995. 2000-KA-1392, Supp. Vol., Trial Transcript ("T. Tr."), 2-A. During the State's opening, defense counsel raised an objection to a comment that Boatner had seen a picture of petitioner in the June 7, 1995 edition of the Times Picayune newspaper prior to making his identification of petitioner. T. Tr., 11. The objection prompted the district court to reopen the hearing on petitioner's motion to suppress identification. J.A. 42. As the district court judge put it, "The essential reason for the reopening of the motion to suppress was to ask . . . what [Boatner] saw in the newspaper and how that affected [his identification]." J.A. 42.

Asked whether he had read the article, Boatner testified he had not. J.A. 42. Rather, Boatner testified he had received a telephone call from a friend informing him that the suspected perpetrators of the Morrison Road murders had been apprehended, that those perpetrators may also have been responsible for the North Roman Street murders, and that photographs of the perpetrators appeared in a newspaper article. J.A. 42-43. At his friend's suggestion, Boatner obtained the article. J.A. 43-44. Upon looking at the four photographs that accompanied the article and recognizing petitioner as the man who assaulted him, he called his friend back to inform him. J.A. 44, 52-53. After Boatner's testimony, counsel presented argument, the district court again denied the motion to suppress the identification, and opening arguments resumed.[5] J.A. 45-57.

B. Testimony

Continuing with trial, the State offered the testimony of, among others, the following witnesses: Officer Joseph Narcisse; Rebe Espadron; Larry Boatner; Detective John Ronquillo; and Officer Kenneth Leary. The defense called one witness: Patrick Kent, a psychologist.

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[5] Petitioner raised the issue of suggestibility in the direct appeal of his conviction to the appellate courts of Louisiana and to this Court, all of which rejected his claim.

1. Officer Joseph Narcisse

Officer Joseph Narcisse was among the first to respond to the scene on North Roman Street. On direct examination, he testified that at 8:33 p.m. on the evening of March 1, 1995, he and his partner received a call dispatching them to the scene of a reported shooting and aggravated burglary, approximately four or five blocks from their position at the time. J.A. 58-59. Upon arriving at the scene, Narcisse encountered a "very, very, terribly hysterical" Rebe Espadron outside the house, still clutching the cordless phone she had used to call for help. J.A. 60. As he entered the house, Narcisse "found five people lying inside, all of them in a pool of blood." J.A. 60. He immediately summoned medical assistance and searched the house for survivors. J.A. 60. In his search he encountered Shelita Russell on the floor of the front room of the house. J.A. 61. She was in "bad condition," "ha[ving] been shot in the hand, the leg, and the abdominal area." J.A. 61-62. Although Russell was sufficiently "conscious and able to talk" to provide her "name, date of birth, and personal information" to Narcisse, "she was not able to give [him] any information or any details of what had happened." J.A. 61-62. In the second room of the house, Narcisse discovered Phillip Young, who, although "he had been shot . . . was conscious, but not able to talk to [him]." J.A. 63. In his continued sweep of the house, Narcisse discovered Larry Boatner in the bathroom, "quite hysterical" and attempting to care for a "severe laceration to the back of his head." J.A. 63.

On cross examination, Narcisse was pressed for the details of any statement Russell, Espadron, or Boatner may have given him. J.A. 72-76. As to Russell, Narcisse reiterated his prior testimony. J.A. 72-73. Narcisse recalled Espadron stating that she "was only able to see . . . one of the perpetrators" and stated his belief that she had mentioned that the perpetrator was "wearing a covering on his face." J.A. 73-74. Asked to elaborate, he testified that he "remember[ed] her saying something about a bandana," but he could not "remember if it was covering his face or around his neck." J.A. 74. Finally, Narcisse testified that Boatner "had a description of the perpetrators," but Narcisse could not recall the details of that description. J.A. 75-76.

2. Rebe Espadron

The events related to the jury by Narcisse took place in the home of Rebe Espadron. Espadron testified that in the early evening of March 1, 1995, a group of friends gathered at her home to celebrate belatedly the birthday of Robert Simons. J.A. 95-97. The celebration consisted of "playing cards, drinking, [and] sitting down chit-chatting." J.A. 98. At a certain point, Espadron retired to her bedroom in the back of the house to watch television with her friend Reginald Harbor. J.A. 97. The others remained in the kitchen at the front of the house. J.A. 98.

Sometime later, Espadron heard "something hit the floor" in the front of the house. J.A. 98. Concerned,

Espadron left her bedroom and proceeded to the living room. J.A. 98. Finding the door between the living room and kitchen to be closed, Espadron began to open it. J.A. 98-99. Before she could fully open the door, a man instructed her to get down on the floor. J.A. 99. In that instant, Espadron noted that the man was wearing a hat and a cloth across his face and was brandishing a "big gun." J.A. 99. Her eyes trained upon this man and the gun, she saw no one else. J.A. 106. Disobeying the command, Espadron closed the door and ran for the safety of her bedroom. J.A. 99. As she ran, gunshots rang out. J.A. 100-01. Espadron remained in her room until a neighbor and a wounded Larry Boatner sought her out and shepherded her out of the house. J.A. 60, 100-02. By then the police had begun to arrive, and Espadron flagged them down. J.A. 103.

3. Larry Boatner

On direct examination, Larry Boatner testified that he was sitting in the kitchen with Willie Leggett, Ian Jackson, James Jackson, and Shelita Russell when he heard a sound outside the house, which he described as "sound[ing] like [a] car [that] needed a muffler on it or either the muffler had a hole in it or something like that. It was real, real loud." J.A. 173-74. Boatner rose and went to the front door of the house. J.A. 174.

As he opened the door, several men "rushed in with guns demanding . . . money and marijuana." J.A. 174. First among them was petitioner, unmasked,

brandishing a "silver" nine-millimeter gun. J.A. 175, 178. Two others entered, one carrying an assault rifle, the other a weapon Boatner described as "a Mac10, it was a Uzi." J.A. 180. Face to face with Boatner, pushing him back and pointing a gun at Boatner's head, petitioner demanded that everyone lie on the floor. J.A. 175. "As everybody was getting on the floor," Boatner testified, "Shelita . . . was still on the phone." J.A. 176. The intruder holding the assault rifle approached her, "snatched the phone out of her hand[,] and told her to get down." J.A. 176. Meanwhile, petitioner held Boatner at gunpoint. J.A. 177. As Boatner expressed it, they were "face to face." J.A. 175.

Eventually, Boatner, too, was ordered to the ground. J.A. 177. While on the floor, Boatner observed the intruder with the assault rifle proceed to the door leading to the living room, open it, and look into the next room. J.A. 177. Thereafter, the intruder approached Boatner, ordering him to stand up. J.A. 177. Boatner complied, but, confused, exclaimed, "Well, what the fuck y'all want me to do?" Petitioner retorted, "You want to be a smart 'lil bitch[?]" Punctuating that thought, he struck Boatner in the head with his gun, causing the severe laceration described by Narcisse. J.A. 178. Boatner took two or three steps and fell to the floor, pretending to have been knocked unconscious. J.A. 178-79. Sometime thereafter, still pretending to be unconscious on the floor, Boatner heard Rebe Espadron open the door between the kitchen and the living room and say, "Man, what y'all doing?" J.A. 179. She was instructed to get on the

floor. J.A. 179. Disobeying, she "slammed the door and ran . . . [and] [w]hen she slammed the door, they just started shooting." J.A. 180. The shooting lasted for "[m]inutes, a long time." J.A. 180. "It seemed like it was never going to stop." J.A. 180. Lying terrified on the floor, "balled up like in a knot," Larry Boatner "wait[ed] to get shot." J.A. 180-81. As he lay there he heard only the sound of bullets, "no screaming, no nothing, just shooting." J.A. 181.

And then it was over. "After the shooting stopped, [Boatner] heard one of them say, 'Come on, man let's go.'" J.A. 181. He "heard three car doors slam and then . . . a car pull[ed] off." J.A. 181. He rose, began to turn, and, "when [he] turned around – an ugly sight." J.A. 181. His friends lay at his feet, "all shot up," dead and dying. J.A. 181. He ran in search of Espadron, "hollering her name, to see if she was okay, to the back where she was." J.A. 182. He found her distraught, asking about her friends and her sister. J.A. 182. He shook his head, "Rebe, they gone." J.A. 182. She asked about Robert Simons.[6] J.A. 182. He, too, was dead. J.A. 182.

Moments later, Boatner found Shelita Russell lying on the floor of the kitchen, severely injured. He instructed Espadron to call for help and assured Russell she would be all right. J.A. 182. That was not

[6] Simons was Boatner's best friend of almost eight years. J.A. 167.

to be; Shelita Russell, at age 17, would die nine days later. J.A. 79.

Not long after the events of March 1, 1995, Boatner "started having dreams, nightmares about what happened. Seeing different people laying on the floor dead and all those kind of things." J.A. 183. These images haunted him. J.A. 183. To find sleep, he began drinking, heavily. J.A. 184.

On June 7, 1995, an article, accompanied by four photographs, appeared in the Times Picayune newspaper.[7] J.A. 188-90. Among the photographs, Boatner was confronted with the image of the man who had held a gun to his face, whom he recognized "[as] soon as [he] looked at the pictures." J.A. 188. A friend informed Boatner that the man was still at large. J.A. 191. In fear for his life, Boatner began wandering. J.A. 190. Two days later, he fled to Mississippi. J.A. 190-91. He remained there for two weeks, until friends called to inform him that petitioner had been apprehended and that he should return home because he would be needed to testify. J.A. 191, 217.

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[7] The photographs were introduced into evidence through a stipulation by the parties that the judge would provide to the jury the context in which the photographs appeared. Addressing the jury at the admission of the photographs, the district court judge stated, "The photographs you see here [are] an array of photographs that appeared in the Times Picayune on June 7, 1995, depicting possible suspects of the March 1st incident that happened on North Roman Street." J.A. 190.

Throughout his wanderings, Boatner's nightmares continued to torment him, and he continued to drink. J.A. 192. One night, after his return to New Orleans, he went to his mother in tears. J.A. 192. She took him to Charity Hospital, where he admitted himself for treatment and remained for about a week. J.A. 192. Ronquillo visited Boatner there on June 28, 1995.

Ronquillo had first encountered Boatner on the evening of March 1, 1995, at the scene of the murders. J.A. 136. By June 28, 1995, Ronquillo had presented Boatner with a series of twelve photographic lineups. In none of those lineups had Boatner recognized any of the intruders. On June 28, 1995, however, Ronquillo showed Boatner a lineup that included a photograph of petitioner. J.A. 194. Boatner testified that he was able to recognize petitioner as soon as he saw his face. J.A. 194. He testified, "I'll never forget [his] face, never." J.A. 194. Asked to identify his assailant for the jury, Boatner pointed to petitioner: "He's right there. Like I say, I'll never forget him." J.A. 195.

Larry Boatner had more to say. When asked whether he had "notice[d] anything else about his [assailant's] character when he came in the house that day," Boatner responded that the man had had a "[m]outh full of gold." J.A. 196. At the State's request, petitioner then stood and revealed his teeth to the jury. J.A. 196, 200. "Same mouth . . . Same face," Boatner observed. J.A. 196. Before the jury, he had "[n]o doubt" that the man sitting at the defendant's

table was the man that "came to the door that day at 2230 North Roman Street." J.A. 196.

On cross-examination, Boatner was questioned about his assailant. Having had the advantage of "see[ing] him face to face . . . [and] looking him dead in his eyes," Boatner testified that he described the man to the police as being "heavy, like built," and as having "golds in his mouth." J.A. 200. He also described the man's haircut. J.A. 200. Asked whether it was "another person in the house that had a nine-millimeter gun," Boatner corrected defense counsel, insisting that it was petitioner who had carried the nine-millimeter gun. J.A. 201. Challenged as to his expertise in the identification of firearms, Boatner cited as the basis of his knowledge "the movies." J.A. 202.

Cross-examination ended with questions regarding Boatner's identification of petitioner in the photographic lineup. Defense counsel asked, "So you picked out a person that you knew who it was because you had seen him in the newspaper, but you didn't tell the policeman?" Boatner rejoined, "I picked out the person I seen come in that house that held a gun to my head and under my chin and the person that was there when all my friends died." J.A. 218-19.

4. Detective John Ronquillo

Lead detective Ronquillo's testimony began with an extended discussion of the fifteen photographic lineups shown to Rebe Espadron and Larry Boatner

between March 13, 1995 and June 28th 1995.[8] J.A. 121-32. Of those lineups, only two are significant: the eighth and the thirteenth lineups. J.A. 131, 134.

Lineup eight was shown to Larry Boatner on March 22, 1995. J.A. 131. Upon viewing that lineup, Boatner pointed to and indicated, in the words of Ronquillo, "that the gentleman that came into the house initially with the gun that he confronted, had this similar haircut and . . . a similar expression on his face." J.A. 131. That expression, Ronquillo testified, Boatner had described as a "smirk." J.A. 131. Nevertheless, and despite the similarities, Boatner "was positive this wasn't the individual." J.A. 131.

Lineup thirteen was shown to Boatner at Charity Hospital on the afternoon of June 28th, 1995. J.A. 132. Boatner was brought by an aide to an office in the hospital. J.A. 133. Ronquillo "asked him how he was feeling." J.A. 138. Satisfied that he was "coherent," Ronquillo seated him at a desk. J.A. 133, 138. Before Boatner were laid six photographs. J.A. 133. Saying he would "never forget that face," "[Boatner] immediately went to [petitioner's photograph]." J.A. 133. He was not coerced. J.A. 133. He was promised nothing. J.A. 133. Petitioner's photograph was not suggested to him. J.A. 133. Instead, Boatner was simply "positive of [his] identification." J.A. 133.

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[8] Of these, only lineup thirteen included a picture of petitioner. J.A. 121-34.

Ronquillo then testified about his interview with Phillip Young, petitioner's co-defendant. J.A. 135. During his investigation of the North Roman Street murders, Ronquillo had the occasion to visit Young at an extended care facility. J.A. 135. "[S]trapped to a chair" and "fed through a tube," he was, as Ronquillo put it, "in really bad shape." J.A. 135. Such was Young's condition that he "really couldn't talk." J.A. 135. Although "[Young] mumbled" during the interview, Ronquillo "couldn't understand anything that he was saying." J.A. 136.

Ronquillo then testified about Boatner's demeanor when he first encountered him on the evening of March 1, 1995. J.A. 136. He testified that Boatner was "[o]bviously . . . shook up from the incident" but did not appear to be drunk or drugged. J.A. 137.

On cross-examination, petitioner's trial counsel questioned Ronquillo as to the article that had appeared in the Times Picayune newspaper on June 7, 1995 – specifically, whether the article had tainted Boatner's subsequent official identification. J.A. 141. Asked whether Boatner had told him the name of the person he saw in the newspaper, Ronquillo responded, "No, I don't believe he knew it." J.A. 142. "He told me that he saw the picture in the newspaper and he said that . . . one of the men in the picture was the man that came in through the door." J.A. 142.

Cross-examination then turned to the subject of Boatner's description of his assailant and the events surrounding the murders on North Roman Street.

Ronquillo testified that, on the scene, Boatner described the man as "brown-skinned" with a "short-type haircut . . . [and] a lot of golds in his teeth." J.A. 145. He also described the man as carrying a "chrome handgun." J.A. 145.

Ronquillo then related the sequence of events leading to the murders as described to him by Boatner on the scene:

> [Boatner] confronted the man face-to-face. He saw the man. He saw the man come through the door, okay. Then, the man presented a gun and they were ordered to go on the floor. He said, at that point, he got down and then, at one point he got back up and the same man ordered him to get back on the floor. So he repeatedly saw him through the incident, and then he was struck in the back of the head.

J.A. 146. Asked to clarify the meaning of "repeatedly," Ronquillo testified that "[Boatner] saw him as he backed up. He was on the floor, he got up. He looked at him quite a while, apparently." J.A. 146. Asked whether Boatner provided details about any other intruders, Ronquillo testified:

> [Boatner] thought there was three people that came in, but he only concentrated on the first person through the door, because he had the gun . . . He told me that he could only identify the first person through that door. That's what he told me. He said he didn't pay that much attention to [the] other two, but

> he was positive he could identify the first man through the door . . . As he told me at later interviews, when he identified him, he said he would never forget that man's face.

J.A. 147-48.

5. Officer Kenneth Leary

Officer Kenneth Leary, a firearms examiner, testified as an expert regarding ballistic evidence recovered from the scene. On direct examination he testified that he tested the following evidence recovered from the scene: (1) twenty-six 9-millimeter cartridge cases; (2) nineteen 7.62-by-39-millimeter cartridge cases; (3) three 25-millimeter cartridge cases; and (4) one 25-caliber semi-automatic pistol. J.A. 153. His analysis of the 25-millimeter cartridge cases revealed that they were fired by the 25-caliber automatic pistol recovered from the scene.[9] J.A. 154. As to the remaining cartridge cases, Leary testified that all twenty-six 9-millimeter cartridge cases were "fired by one particular weapon, one 9-millimeter handgun"; eighteen of the nineteen 7.62-by-39-millimeter cartridge cases were "positively fired by one 7.62 by 39 millimeter [AK 47 semi-automatic] assault rifle." J.A. 154-55. The nineteenth 7.62-by-39-millimeter cartridge case was inconclusive. J.A. 156.

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[9] Because no weapons compatible with the remaining cartridge cases were recovered from the scene, a similar comparison was not possible as to those cartridge cases. J.A. 154.

6. Patrick Kent

Patrick Kent testified as an expert as to Boatner's medical condition as of June 28, 1995, on the basis of Boatner's medical records from Charity Hospital. Prior to Kent's testimony, the judge held an *in camera* discussion to determine the propriety of permitting Kent to testify as an expert. J.A. 236-41. The State objected to the defense calling Kent because it had not been given notice that the defense would be offering expert testimony. J.A. 237. In response to that objection, defense counsel stated that, although he had subpoenaed Boatner's Charity Hospital medical records two weeks prior to trial, he had only just received them.[10] J.A. 237-38. Citing the "broad discretion" conferred on district court judges to determine whether an expert should be permitted to testify and his desire "to be cautious about what we're doing here," the district judge overruled the State's objection and allowed Kent to take the stand. T. Tr. 271.

Kent admitted that, prior to testifying, he had neither examined Boatner nor consulted with any of

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[10] This delay appears to have been caused by a defect in the subpoena presented by defense counsel to the district court for its signature. When defense counsel brought to the district court's attention during trial that he had not yet received the medical records which were the subject of his subpoena, the district court immediately issued an *instanter* subpoena and called Charity Hospital to emphasize the gravity of the court's order. Upon the arrival of the records at the district court, the judge reviewed them *in camera* and determined that petitioner was entitled to them for use in his defense. J.A. 239-41.

Boatner's doctors. T. Tr. 287. Instead, he testified solely from Boatner's medical records. J.A. 244. From those records, Kent testified that, although Boatner experienced nightmares and "feelings of fear and confusion," there was "no evidence of thought disorder or distortion, no delusions, [and] no paranoia." T. Tr. 289.

C. Verdict and Sentencing

The jury returned a verdict of guilty as charged as to all counts. C.D.C.R. 9. The same jury recommended a sentence of life imprisonment. The state district court, in accordance with law, sentenced petitioner to imprisonment for life as to each count.[11] J.A. 2.

III. Collateral Review Of Petitioner's Conviction

On February 6, 2004, after petitioner's conviction became final, petitioner filed a *pro se* application for

[11] Petitioner suggests that the prosecution "heavily relied" on these convictions as aggravating circumstances under LA. CODE CRIM. PROC. art. 905.3 and 905.4 justifying the imposition of a sentence of death for petitioner's three convictions in the Morrison Road murders. Pet. Br. 11. Although it is true that the State relied on these convictions as one of the aggravating circumstances justifying petitioner's death sentence, the jury found these convictions as aggravating circumstances in only two of petitioner's death sentences. J.A. 3.

post-conviction relief in the state district court.[12] C.D.C.R. 416-46. Through appointed counsel, petitioner filed a supplemental application for post conviction relief, claiming that he had been denied due process under *Brady v. Maryland*, 373 U.S. 83 (1953), and *Strickland v. Washington*, 466 U.S. 668 (1984). C.D.C.R. 2217-2310.

Petitioner argued that the State withheld evidence material to his guilt – specifically, evidence allegedly tending to undermine the eyewitness identification of petitioner by Larry Boatner: (1) Boatner's medical records; (2) a conversation between Detective Ronquillo and Officer Leary; (3) a formal statement given by Eric Rogers; (4) an interview of Dale Mims; (5) Ronquillo's notes concerning a description supposedly provided by Shelita Russell; (6) Ronquillo's notes concerning an attempt to interview Phillip Young; and (7) certain pre-trial statements of Larry Boatner.

The district court granted an evidentiary hearing on petitioner's post-conviction claims, which occurred over four days. C.D.C.R. 20-21. During that hearing, petitioner offered evidence in the form of documents and testimony.

During the post-conviction hearing, defense counsel attempted to introduce a page of handwritten notes from Larry Boatner's medical records. The notes were

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[12] The Honorable Frank A. Marullo, District Court Judge, Orleans Parish Criminal District Court, Section "D," presided over both petitioner's trial and post-conviction hearing.

attached to the supplemental post-conviction application and are dated June 28, 1995. J.A. 247. Although the trial court declined to allow introduction of the notes for lack of proper authentication, petitioner's trial counsel, Frank Larré testified that at the time of trial, he "didn't know about" these notes. J.A. 346, 399.[13]

The statement made by Officer Leary to Detective Ronquillo is contained in an exhibit attached to petitioner's post-conviction application. J.A. 264-66. No testimony was adduced at the evidentiary hearing in connection with that statement.

Eric Rogers testified as to the May 19, 1995 formal statement he gave to Detective Byron Adams. J.A. 278-96. As summarized in Ronquillo's supplemental report, "Rogers stated to [Detective] Adams that [Robert] Trackling told [Rogers] that [Trackling], along with 'Buckle,' 'Short Dog,' and 'Fats' went to the house on North Roman Street."[14] J.A. 267.

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[13] The page referred to during post-conviction proceedings as DA 002079, is the same page from which defense witness Patrick Kent testified at trial. *See* T. Tr. 289-90.

[14] Robert Trackling also spoke to Adams. On June 1, 1995, Trackling gave a formal statement to Adams in which he confessed his involvement in the Morrison Road murders. J.A. 266-68. Continuing his statement, Trackling denied involvement in the North Roman Street murders, but implicated Kintad Phillips, Donielle Bannister, and petitioner, who had told Trackling of their involvement. J.A. 268.

Rogers testified that he shared a cell with Robert Trackling while incarcerated in the Orleans Parish Prison and that during that time Trackling relayed information to him concerning the North Roman Street murders. J.A. 427, 429-30. Rogers explained that, after he received this information, he contacted his investigator. J.A. 427-28. The investigator, in turn, contacted Byron Adams, who ultimately took a recorded statement from Rogers.[15] J.A. 428. At the evidentiary hearing Rogers testified that "[Detective Adams] said that if I do him a favor he would go talk to some people and get my life sentence took back. So, he had asked me to involve Short Dog, Juan Smith." J.A. 430, 431, 432-36, 442-43. Although Rogers' life sentence never was "took back," Rogers did not allege the existence of this agreement until nearly ten years after the fact, when Adams had passed away. J.A. 438, 443; C.D.C.R. 1384-86.

Dale Mims testified that he lived two doors from the home of the crime scene. J.A. 406-07. He was home on the night of the offense, and heard "a whole lot of gunshots." J.A. 401. Once the shooting stopped, Mims stepped outside. J.A. 402. He saw two masked men on opposite sides of a four-door white car. J.A.

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[15] According to the transcript of Rogers' statement, it appears the proper spelling of this investigator's name is "Reyne" or "Raene." J.A. 278. During the post-conviction testimony of both Rogers and Larré, however, the court reporter consistently transcribed the phonetic spelling of the name: "Rain." J.A. 317, 431-32, 437.

402-03. When asked, "[d]id you see the two people at the car coming out of the house?," he replied, "No. All I saw was when they were going for the car."[16] J.A. 402. Notes concerning a statement by Mims were introduced during the post-conviction hearing. J.A. 309, 321-23, 513.

During the post-conviction hearing, petitioner introduced handwritten notes, assuming that they were Ronquillo's notes from an interview with Shelita Russell.[17] J.A. 545. Ronquillo testified that the handwriting was his, but were not notes of an interview with Shelita Russell because he had never spoken to Russell. J.A. 544-47. In trying to determine the significance of his notes, Ronquillo pointed out that the pages previously presented to him were from "almost two weeks after the incident," and stated, "There is a page missing here. There has to be." J.A. 546, 547. Although petitioner's counsel indicated that she had a "complete set," she told Ronquillo that she had "only pulled out what [she] would need" and moved on to another line of questioning. J.A. 548.

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[16] Ronquillo testified that Mims had seen four men exit the house. J.A. 567.

[17] The note reads:

> – FACE DOWN PERP – VICTIM #3 LYING ON HANDS AND WRIST OF PERP – FEMALE – FACE DOWN AGAINST CABINETS – CONSCIOUS – SAID – IN KITCHEN SAW PEOPLE BARGE IN – ONE – BLACK CLOTH ACROSS FACE – FIRST ONE THROUGH DOOR – NFS –

J.A. 310.

Ronquillo identified a handwritten note which was created in connection with an attempted interview of Phillip Young.[18] J.A. 549-50. At that time, Young was at an extended-care facility, and was "strapped in[to] a wheelchair because he couldn't sit up on his own," unable to speak.[19] J.A. 550-51. The form of communication suggested by Young's nurse was one blink for "yes" and two blinks for "no." J.A. 272. Ronquillo explained, "I would ask him some questions, and I wasn't really sure if he was [answering in the] affirmative or negative, and I'd ask him to do it again, and he wouldn't do it." J.A. 551. Ronquillo

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[18] That note reads:

2:10 PM: MIRANDA – B. RILEY PRESENT –
ACKNOWLEDGED UNDERSTOOD RIGHTS –
SHORT DOG/BUCKO/FATS – NO – DIDN'T SHOOT ME
NO – NOT WITH ME
WHEN WENT TO HOUSE
YES – ONE OF PEOPLE IN HOUSE SHOT ME
NO – NOT RESPONSIBLE – 'POSSE'
DIDN'T DRIVE TO HOUSE – 'POSSE'
YES – KNOWS NAMES OF PERPS
YES – DROVE IN CAR –
YES – GIRLFRIENDS CAR –

[19] The post-conviction testimony of Barbara Riley, Head Nurse of the Brain Injury and Stroke Unit of the extended care facility, confirms Ronquillo's testimony. J.A. 418. According to Riley, Young was "aphasic" and "did not speak." J.A. 419, 423-24. A more recent evaluation of Young's condition reveals that, as a result of his "traumatic brain injury," Young also suffers from both retrograde amnesia (an "inability to recall things that occurr[ed] before [the] brain injury") and antegrade amnesia (an "inability to recall things that occur after the brain injury"). C.D.C.R. 243-46.

further explained, "[w]hen I was writing these things down, I wasn't quite sure exactly – Well, that's why I kind of disavowed the whole thing because I wasn't really sure of his answers." J.A. 553. Ronquillo testified that ultimately, "I never had hide nor hair actually of what he said or what he was talking about." J.A. 550.

In support of the claim that the State failed to disclose three statements of Larry Boatner, petitioner called Ronquillo during the post-conviction hearing. When questioned about the first statement – a handwritten note memorializing Boatner's statement at the scene that he "could not supply a description of the perpetrators other than they were black males" – Ronquillo explained:

> At the scene he said that – He just supplied the description of the perpetrators other than that [they] were black males. Keep in mind at that point that he was in the home and there dead bodies everywhere. At that point, I think he was a little shook up. He was then transported to the Homicide Division office where he gave a formal statement. When he gave the formal statement, he gave a description which is very close to Mr. Smith, especially with the haircut and the golds and the skin color. And, that particular night, he emphasized that he could only describe and identify the first person that came through the door.

J.A. 529-31.

The second statement, in its entirety, is as follows:

> I can tell you about one, the one who put the pistol in my face, he was a black male with a low cut, gold[s] in his mouth, I don't know how many, that's all, I was too scared to look at anybody, all of the[m] had guns, one who an AK, one had a TEC-9, the one who hit me had a chrome automatic, it was big. I hear the car because it was so loud, the muffler, I know it need a muffler. I opened the door, I see these two guys, one he throws the gun in my face, the other one walked in behind him, he had the AK. I saw him get out of a car, the third guy, I didn't see the guy he had a TEC-9, it was an Uzi. He was pointing it at everyone on the floor. I was too scared to look at them, they was about my complexion, brown skinned.

J.A. 296.

The third statement consists of handwritten notes memorializing a conversation that took place on March 6, 1995. J.A. 308. With respect to that statement, Ronquillo testified:

> [O]n the Sixth, I called him to talk to Mr. Boatner. At that time, he told me he couldn't identify anyone. And to me, that was his not wanting to be involved in this case anymore. Because on the night of the incident he said that he could and he gave a description that

> was very close to Mr. Smith's description that particular night.

J.A. 528.

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to vacate five first-degree murder convictions, claiming that the State suppressed information material to his guilt in violation of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). The information upon which petitioner relies, however, is largely inadmissible, unsuppressed, and unfavorable. Moreover, petitioner cannot demonstrate that the information – individually or cumulatively – undermines confidence in the outcome of his trial, and his claim is therefore meritless.

Petitioner has deeply buried a significant legal issue by misreading the jurisprudence of this Court. The handwritten notes of Ronquillo, allegedly memorializing a dying declaration by Shelita Russell and a statement against interest by Phillip Young, would not have been admissible evidence at petitioner's trial because the statements are hearsay and petitioner has failed to establish the indicia of reliability necessary to bring them within an exception. Moreover, petitioner has failed to point to any admissible evidence to which the alleged statements would have led.

Petitioner has misrepresented and mischaracterized the information upon which he relies. The State did not suppress Larry Boatner's medical records because petitioner possessed the medical records during trial – a fact made obvious by his use of them while examining a defense witness. The State did not suppress a statement made by Dale Mims because defense counsel's choice not to dispatch petitioner's court-appointed investigator to interview nearby neighbors such as Mims is a failure of ordinary diligence, not suppression by the State. The State did not suppress Eric Rogers' formal statement because when Rogers made his formal statement a member of petitioner's defense team was present. Moreover, Rogers' statement is not favorable to petitioner because it inculpates petitioner and would not have led petitioner to admissible evidence. The statement of Kenneth Leary is not favorable to petitioner because it confirms rather than contradicts both Leary's own trial testimony and that of Boatner.

In the end, petitioner is left to argue the materiality of two pre-trial statements by Larry Boatner. Those statements, however, are not material because the jury would have heard and considered the circumstances under which the statements were made and would have balanced Boatner's understandable, temporary equivocation against the strength of his identifications – both in court and out of court – of petitioner as the man who attacked him and murdered five of his friends.

ARGUMENT

I. Petitioner Relies Upon Irrelevant Matters

Petitioner claims the State denied him Due Process by withholding evidence material to his guilt, in violation of this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases. He attempts to conjure support for his claim by invoking "a long and disturbing history of *Brady* violations in Orleans Parish." Pet. Br. 32. That invocation, however, is irrelevant to the factual inquiry presented to this Court. Indeed, even petitioner is constrained to concede that such history "does not compel reversal of petitioner's convictions any more than the prior bad acts of a defendant justify a guilty verdict." Pet. Br. 33. That concession notwithstanding, the accusation which precedes it merits attention.

That there has been even one *Brady* violation in Orleans Parish is to be lamented. In its opinion in *Brady*, this Court articulated the ideal towards which all prosecutorial offices must strive: "[The Government's] chief business is not to achieve victory but to establish justice . . . [and] the Government wins its point when justice is done in its courts." 373 U.S. at 87 n.2. That ideal has resonated in the courts of Louisiana. *See State v. Cordier*, 297 So.2d 181 (La. 1974); *State v. Bailey*, 261 So.2d 583 (La. 1972); *State v. Gladden*, 257 So.2d 388, (La. 1972). Yet it is inarguable that, in striving to comply with the teachings of this Court, the State has not always succeeded in attaining its goal. Seizing upon that recognition,

petitioner makes a base appeal to prejudice, attempting to manipulate the just concerns of this Court.

Truth, however, will not support that attempt. Petitioner has conducted a review of *Brady* violations in Orleans Parish, purporting to find a total of twenty-eight such violations in the forty-eight years since *Brady* was decided. Pet. for Cert. 9-10; *cf.* Pet. Br. 32. However, review of the cases cited by petitioner reveals that only thirteen of those twenty-eight cases actually found *Brady* violations.[20]

There is more. In a bald attempt to incite prejudice, petitioner attacks *ad hominem* the prosecutor who sought his conviction. Pet. Br. 33. As this Court has noted, however, "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 111 (1976).[21] The character of the evidence relied upon by petitioner will not support his claim.

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[20] If petitioner's *amicus*, Orleans Public Defenders Office, is to be credited, all thirteen of those cases would represent only one-tenth of one percent of the cases brought before the Orleans Parish Criminal District Court each year. Brief for the Orleans Public Defenders Office as *Amicus Curiae* Supporting Petitioner 2. See also, *Connick v. Thompson*, 131 S.Ct. 1350, 1367 (2011) (Scalia, J., concurring) (discussing "the Law of Large Numbers").

[21] The American Bar Association (ABA) asks this Court to "again recognize" a prosecutor's disclosure obligations under ABA Model Rule 3.8(d). Brief for the American Bar Association as *Amicus Curiae* Supporting Petitioner ("ABA Br.") 5. That issue is not properly before this Court. Petitioner's argument is

(Continued on following page)

II. Petitioner Relies Upon Inadmissible Information.

In his argument to this Court, petitioner relies heavily upon the handwritten notes of Ronquillo –

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limited to a claim of constitutional error. The ABA's standards for prosecutors and its model attorney ethics rules do not bear on that issue. Although this Court has previously suggested that a prosecutor's disclosure duties "may arise more broadly" under attorney ethics rules or the ABA standards than under substantive *Brady* law, see, e.g., *Cone v. Bell*, 129 S.Ct. 1769, 1783 n.15 (2009), this Court should refrain from doing so here. An alleged *Brady* violation is properly judged "under the *constitutional* standards [this Court] ha[s] set forth, not under whatever standards the American Bar Association may have established. The ABA standards are wholly irrelevant to the disposition of" *Brady* claims. *Id.* at 1787 (Roberts, C.J., concurring in the judgment) (emphasis in original). And this Court's statements, even in dictum, may have unintended wide repercussions. The ABA's suggestion that Model Rule 3.8(d) "mandates disclosure of exculpatory material without regard to materiality" is highly controversial and different jurisdictions treat this issue differently under their own rules and law. ABA Br. 5; compare, e.g., *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 130 (Ohio 2010) ("We decline to construe [Ohio] DR 7-103(B) [predecessor to Rule 3.8(d)] as requiring a greater scope of disclosure than *Brady* and Crim. R. 16 require.") and *In re Jordan*, 913 So.2d 775, 781 (La. 2005) (finding Louisiana Rule 3.8(d) "recognizably similar" to the duties required under *Brady*; when prosecutor failed to disclose exculpatory *Brady* information, he violated Rule 3.8(d) as well); with *United States v. Acosta*, 357 F. Supp. 2d 1228, 1246-47 (D. Nev. 2005) ("Thus, prosecutors in this district and elsewhere are obligated to timely disclose to the defense evidence or information known to the prosecutor that tends to negate guilt of the accused or mitigate the offense, whether or not these disclosures meet *Brady*'s materiality standard."). This Court should not step into that controversy in a case that does not require it to do so.

particularly those notes concerning Shelita Russell and Phillip Young. Those notes, however, would not have been admissible evidence at petitioner's trial for any purpose.

In *Wood v. Bartholomew*, 516 U.S. 1 (1995), this Court held that where information is "inadmissible under state law, even for impeachment purposes," that information "is not 'evidence' at all" and that for that reason, disclosure of such information could not affect the outcome of the trial. *Id*. at 5-6. Notwithstanding the clarity of that statement, petitioner counsels this Court to "consider the possibility that, even if a piece of suppressed [information] would not itself have been admissible at trial, it would have led to admissible evidence if it had been produced." Pet. Br. 31. Petitioner, however, can point to no such evidence and instead forces this Court to speculate as to its existence. This Court has consistently declined to do so:

> To get around [the defendant's evidentiary] problem, the Ninth Circuit reasoned that the information, had it been disclosed to the defense, might have led [the defense] to conduct additional discovery that might have led to some additional evidence that could have been utilized. . . . [However,] because the Court of Appeals did not specify what particular evidence it had in mind[,] [i]ts judgment is based on mere speculation, in violation of the standards [this Court] [has] established.

Wood, 516 U.S. at 5-6. Because the petitioner can demonstrate neither the admissibility of the alleged

statements of Russell and Young nor that those statements would have led him to admissible evidence, those statements cannot be *Brady* material.

A. Ronquillo's Handwritten Notes Concerning Shelita Russell Would Not Have Been Admissible at Petitioner's Trial

Based on Ronquillo's notes, petitioner asserts that Shelita Russell made a dying declaration – that is, a "statement made by a declarant while he believed that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." LA. CODE EVID. art. 804(B)(2). Interpreting that article, the Louisiana Supreme Court has stated that a declaration "that fails to meet either the timing or the content requirement of a dying declaration is inadmissible." *Garza v. Delta Tau Delta Fraternity Nat'l*, 948 So.2d 84, 92-93 (La. 2006). Petitioner has met neither of those requirements.

First, petitioner has failed to satisfy the content requirement because petitioner has offered no witness competent to testify as to what Russell said, if anything. Ronquillo himself testified that he had never spoken to Russell because, by the time he arrived at the scene, she had been transported to the hospital. J.A. 547. As such, his notes merely memorialize something conveyed to him by "someone else." J.A. 546-47. Louisiana Code of Evidence article 602 provides, in relevant part, that "[a] witness may not

testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Additionally, Louisiana Code of Evidence article 901(A) provides in relevant part that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Petitioner has failed to identify any witness with personal knowledge who could testify that Ronquillo's notes are what petitioner claims.

Because petitioner has failed to identify any witness competent to testify as to the content of Ronquillo's notes, petitioner would have been forced to attempt to introduce the handwritten notes themselves. That attempt would have failed. At best, the notes are triple hearsay. Russell is the primary declarant. "Someone else" is the secondary declarant. Ronquillo is the tertiary declarant. Hearsay within hearsay is permissible in Louisiana, but only "if each part of the combined statements conforms with an exception to the hearsay rule provided by legislation." LA. CODE EVID. art. 805. Petitioner has not identified the person to whom Russell allegedly made her statement; thus, a crucial link is missing from the evidentiary chain.

Second, petitioner has not satisfied the timing requirement because petitioner has offered no evidence that, at the time of her alleged statement, Russell believed her death to be imminent. Attempting to offer such evidence, petitioner directs this Court to the

trial testimony of Rebe Espadron, wherein Espadron testified that, prior to the arrival of the police, Russell stated "I'm 'gonna die." Pet. Br. 36-37 (citing J.A. 102). That evidence, however, establishes neither the circumstances under which Russell made her alleged statement, nor does it establish whether she still believed her death to be imminent *at the time she allegedly made the statement*.

Finally, petitioner fails to point to any piece of admissible evidence to which the notes would have led, making petitioner's claim "mere speculation" at best. *See Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). Because the notes petitioner alleges to be the dying declaration of Shelita Russell would not have been admissible for any purpose, Detective Ronquillo's notes cannot be *Brady* material.

B. Ronquillo's Handwritten Notes Concerning Phillip Young Would Not Have Been Admissible at Petitioner's Trial.

Petitioner asserts that, "[i]f Young had been unable or unwilling to testify, the defense could have introduced Young's statement as a statement against interest by an unavailable witness." Pet. Br. 44. First, there is no merit to petitioner's assumption that Detective Ronquillo's notes memorialize a "statement" of any kind by Phillip Young. Second, there is no merit to petitioner's assertion that Ronquillo's notes purportedly memorializing a statement of Phillip Young would have been admissible as a statement against interest.

For petitioner to have succeeded in offering Ronquillo's notes as evidence of Young's purported statement, petitioner would have had to have offered "evidence sufficient to support a finding that the matter in question is what its proponent claims." *See* LA. CODE EVID. art. 901(A). At trial, however, Ronquillo testified that he "couldn't understand anything that [Young] was saying." J.A. 136. Expanding on that answer at post-conviction, Ronquillo explained:

> He couldn't talk. And, that's the whole question of this whole deal is that when I went there to talk to him, after I left I never had hide nor hair actually of what he said or what he was talking about. . . .
>
> He couldn't talk. And, yes and no, and he would try to do things like that. And, a lot of it, he wouldn't even answer. He would just kind of sit there and he would look. And, he didn't say anything.
>
> * * *
>
> And, he kind of like acted like he was nodding off like he was sleeping. It was not anything that I thought had any substance or – The only things that he appeared to be positive of was before he knew that I was from the Homicide Division, and when I asked him questions about his general health. He seemed to be affirmative in his responses, the[n], but after he found out – I could distinguish between yes and no, and then after that – I wrote notes here, and I am really not sure what his – what he was actually saying.

J.A. 550-551. Barbara Riley's post-conviction testimony confirms the truth of Ronquillo's testimony. Riley testified that Young was "aphasic" and "did not speak." J.A. 418-424. Moreover, a more recent evaluation reveals that as a result of Young's "traumatic brain injury" he has both retrograde and antegrade amnesia. C.D.C.R. 243-246. Thus, petitioner's attempt to render competent the ambiguous gestural responses of a severely brain-damaged, aphasic amnesiac is unpersuasive. J.A. 272-273, 550-553.

Second, there is no merit to the argument that Young's statements would be admissible as a "statement against interest." In Louisiana, a statement against interest is:

> A statement which at the time of its making . . . so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

LA. CODE EVID. art. 804(A) & (B)(3).

Even assuming that the notes actually reflect some sort of meaningful interaction between Ronquillo and Young, the notes only establish that Young was present at the time of the shooting, that he drove to the house in his girlfriend's car, that he knew the names of the perpetrators, and that Short Dog,

Bucko, and Fats were not with him when he drove to the house. J.A. 311. Further assuming *arguendo* that this "tend[s] to subject him to civil or criminal liability" and has some exculpatory value, the record is devoid of any "corroborating circumstances clearly indicat[ing] the trustworthiness of [that] statement." *See* LA. CODE EVID. art. 804(B)(3). Petitioner points to Young's alleged remarks "that he had driven to the house in his girlfriend's car and that he had been shot by one of the people in the house. . . ." Pet. Br. 45 n. 15. Such remarks, however, are not the type of corroborating circumstances the law contemplates. As the Louisiana Supreme Court has noted: "Typical corroborating circumstances include statements against the declarant's interest to an unusual or devastating degree, or the declarant's repeating of consistent statements, or the fact that the declarant was not likely motivated to falsify for the benefit of the accused." *State v. Hammons*, 597 So.2d 990, 997 (La. 1992). First, Young's alleged statement is not against his interest to an unusual or devastating degree because it contains no admission of criminal acts and no information the police did not already possess. Second, because Young has only made one "statement" he cannot have repeated consistent statements. Third, because petitioner was an associate of Young, Young had motivation to falsify for the benefit of petitioner. Therefore, because Young's statement lacks any corroborating circumstances, it would not have been admissible at trial as a statement against interest.

III. Petitioner Relies Upon Information That Was Not Suppressed And Is Not Favorable

As this Court has explained, a defendant asserting a *Brady* claim must satisfy three requirements: first, the "evidence must have been suppressed by the State"; second "[t]he evidence at issue must be favorable to the accused"; and third, "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Petitioner observes that "[i]n its brief in opposition to the petition for certiorari, respondent did not dispute that petitioner has satisfied the first two requirements of *Brady*. . . ." Pet. Br. 30. Respondent does so now.

A. The Medical Records of Larry Boatner Were Not Suppressed

Petitioner has consistently represented that the State suppressed the medical records of Larry Boatner.[22] The record reflects, however, that petitioner himself subpoenaed these medical records, retained an expert to evaluate those records, *and actually made use of those records at trial*. J.A. 240; T. Tr. 289-90. Petitioner's trial counsel, Frank Larré, instructed the defense's expert witness, Patrick Kent, to read from them during his testimony:

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[22] Petitioner has repeated this representation in every post-conviction filing, save one: his Brief on the Merits in this Court. See C.D.C.R. 2233; C.D.C.R. 2385; 2009-KP-1164, Application for Supervisory Writ 12; Pet. for Cert. at 16.

[Kent]: I'm not sure I know where you want me to read. Where it says "Feelings of fear?"

[Larré]: Read right here.

[Kent]: Okay. "Patient continue[s"] – this is an entry on 6-28 at 10:00, apparently. "Patient continue[s] to express feelings of fear and confusion."

[Larré]: And, that notation is on 6-28; he had feelings of fear and confusion?

[Kent]: Yeah, that's the recording.

[Larré]: I have no further questions.

T. Tr. 289-90. The notation which Larré directed Kent to read to the jury is on the *same page* and in the *same paragraph* as the statement of Larry Boatner about which petitioner now complains. J.A. 247. The paragraph consists of four sentences; petitioner's counsel had Kent read the *second* sentence to the jury – but petitioner now complains that the *first* sentence was suppressed. That petitioner's trial counsel elected not to make use of that notation at trial is not cognizable as a *Brady* claim.

B. The Statement of Dale Mims Was Not Suppressed and Are Is Favorable

Petitioner asserts that "[i]f the defense had been aware of [Dale Mims'] statement, he could have called

Mims to testify at trial."[23] Pet. Br. 37. While this Court has yet to directly address the intersection of the defense's duty to investigate and the prosecution's duty to disclose, the overwhelming majority of federal appellate courts have held that there is no "suppression" within the meaning of *Brady* when the allegedly suppressed information could have been independently obtained by the exercise of ordinary diligence on the part of the defendant.[24]

Petitioner's trial counsel would have obtained the statement of Dale Mims had he exercised ordinary diligence. Mims lived only two houses down from 2230 North Roman Street in a residential neighborhood that, on the night of the murders, was "like a war zone." J.A. 408. Even the most routine of investigations would have included interviews with neighbors in search of an eyewitness who might have been able to exonerate petitioner. Yet, the record is devoid of any indication that petitioner's trial counsel ever

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[23] That assertion is belied by petitioner's choice not to call Mims to testify at post-conviction.

[24] See generally *State v. Mullen*, slip op. at 18-19 & n. 5, 171 Wash.2d 881, 2011 WL 2474263 (Wash. 2011) (collecting cases from every federal appellate court that hears criminal appeals); see also, e.g., *Boss v. Pierce*, 263 F.3d 734, 743-44 (7th Cir. 2001) (information possessed by a witness is not suppressed where that information is of a type that would have been uncovered by "any investigator worth his or her salt").

dispatched his court-appointed investigator to conduct such interviews.[25]

Moreover, petitioner's assertion that Mims' statement is favorable to petitioner – because it "indicate[s] that the first man who had entered the house was wearing a mask" – is squarely contradicted by Mims' testimony at post-conviction. Pet. Br. 37 (internal quotation marks omitted). He testified that he never saw anyone enter or exit the house. J.A. 402-07. Indeed, it would have been impossible for him to have done so because the door of 2230 North Roman Street was not visible from his vantage point. J.A. 578-81.

C. The Statement of Eric Rogers Was Not Suppressed and Is Not Favorable

On May 19, 1995, Eric Rogers made a formal statement to Byron Adams, who was the lead investigator in the Morrison Road murders. J.A. 277-78. Petitioner alleges that the State suppressed that statement and that "if the defense had been aware of Rogers'[ ] statement relating Trackling's confession, defense counsel (or the private investigator the defense had retained) could have spoken to Rogers. . . ."[26]

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[25] It is also noteworthy that the defendant did not call his investigator as a witness during the post-conviction proceedings.

[26] Petitioner's investigator was court-appointed.

Pet. Br. 27. But the transcript of Rogers' statement establishes that when Rogers made his statement three people were present: Rogers, Adams, and investigator Sam Rain. Rain was *petitioner's investigator in this case*.[27] J.A. 278. Because the statement was made in the presence of a person who was part of petitioner's defense team, it is difficult to comprehend how it can be said to have been suppressed. Nor is the Rogers statement favorable. It is squarely inculpatory. It identifies petitioner as a perpetrator. Inculpatory information does not fall within the scope of *Brady*.

Further, the alleged agreement between Adams and Rogers is not favorable to petitioner because it never occurred. Rogers testified at post-conviction that he first heard the name Juan Smith "when [he] was in the Homicide Office with Byron Adams and Sam Rain" J.A. 437. But by the time Rogers came forward to make his allegation, Adams had died, leaving Rain alone to corroborate Rogers' allegation. Petitioner, however, chose not to call his own investigator as a witness at post-conviction. Instead, petitioner chose

[27] According to the transcript of Eric Rogers' statement, it appears the proper spelling of this name is Reyne. C.D.C.R. 2933. During the post-conviction testimony of both Rogers and Larré, however, the court reporter consistently transcribed the phonetic spelling of this name: "Rain." J.A. 317, 431-32, 437. Mr. Rain was at that time acting in his capacity as court-appointed investigator for Eric Rogers. There is no reason to believe that Rain would not use this information in his capacity as petitioner's investigator as the information was not privileged – the statements made by Rogers to Adams can in no way be deemed "confidential." See LA. CODE. EVID. art. 506(A)(5).

to rely solely on Rogers' testimony, which is inherently suspicious: as this Court has noted, "there is something suspect about a defense witness [such as Rogers] who is not identified until after the 11th hour has passed." *Taylor v. Illinois*, 484 U.S. 400, 414 (1988). Moreover, even assuming the alleged agreement between Adams and Rogers occurred, that agreement is not favorable to petitioner because it is not material to his guilt or punishment and could not have been used for impeachment. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady*, 373 U.S. 83 (1963). The State never relied on Rogers' formal statement to obtain petitioner's conviction. Rather, petitioner makes the fantastic assertion that the police sought to frame petitioner and that if Rogers' uncorroborated accusation had been placed before the jury, the jury would have seen that the entire investigation was corrupt and founded upon a lie. That assertion ignores the fact that, had petitioner attempted to offer Rogers as a witness at trial, the State would have called Rain and Adams – both veteran police officers who were alive at the time – to testify truthfully and contradict Rogers, a convicted murderer recanting a sworn statement.

D. The Statement of Officer Leary Is Not Favorable

Firearms examiner Kenneth Leary testified that, "[a]fter examining all 26 of . . . the 9-millimeter cartridge cases, [he] was able to reach the conclusion that all 26 cartridge cases w[ere] fired by one

particular weapon, one-9-millimeter handgun." J.A. 155. Petitioner alleges that Ronquillo's handwritten notes memorialize a conversation in which Leary informed him that all of the 9-millimeter casings "had been matched to a machine pistol of the Intratec or MAC-11 type." Pet. Br. 48. From this, petitioner claims that Leary intentionally misled the jury into believing that the crimes were committed with a "9-millimeter handgun" and that the State withheld evidence that might have been used to impeach his testimony. Pet. Br. 48. Essentially, petitioner's argument is that "machine pistols such as [those described by Leary to Ronquillo prior to trial] are not 'handguns' [as Leary testified at trial]." Pet. Br. 48.

That argument proceeds from ignorance. The term "handgun" *includes* machine pistols of the Intratec or MAC-11 type. Louisiana law defines "handgun" to mean

> [A] type of firearm commonly referred to as a pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or is capable of firing fixed cartridge ammunition. The term handgun shall not include shotguns or rifles that have been altered by having their stocks or barrels cut or shortened.[28]

[28] This definition accords with federal law. *See* 18 U.S.C. § 921 ("a firearm which has a short stock and is designed to be held and fired by the use of a single hand. . . .").

LA. REV. STAT. 40:1379.3. Thus, contrary to petitioner's assertion, an "Inter Tec, 'Mac 11' model type, semi[-]automatic weapon" comfortably fits within the definition of "handgun." J.A. 266. Although both a Mac 10 and a Mac 11 (a smaller version of the Mac 10) afford purchasers the *option* of a stock, they are designed to be fired by the use of a single hand without a stock and are thus a type of "handgun." *See Jane's Pocket Book of Pistols and Sub-Machine Guns* 189-90 (Denis Archer ed. 1976). Moreover, neither weapon is a rifle or a shotgun such as would be "altered by having their stocks or barrels cut or shortened." Accordingly, Leary's statement does not contradict his trial testimony.

Petitioner further asserts that "based . . . on Leary's pretrial statement that the 9-millimeter casing found at the scene came not from a 9-millimeter handgun but instead from a different type of weapon purportedly carried by another perpetrator, the jury readily could have concluded that petitioner was not one of the shooters." Pet. Br. 49. That argument is irrelevant. The prosecution presented no evidence that petitioner was one of the shooters, and was not required to do so.[29] Under Louisiana law, "a person may be convicted of intentional murder even if he has not personally struck the fatal blows." *State v. Wright*, 834 So.2d 974, 982 (La. 2002) (citing LA. REV. STAT. 14:24). Petitioner's guilt would not be lessened even if

[29] Conspicuously absent from petitioner's assertion that "the prosecution went to great lengths to prove that petitioner was one of the shooters" is a citation to the court record. Pet. Br. 46.

the jury had known for a certainty that petitioner had not been one of the shooters.

IV. Petitioner Has Not Shown Prejudice

Larry Boatner's medical records were not suppressed. The formal statement of Eric Rogers was not suppressed and is not favorable to petitioner. The statement of Dale Mims was not suppressed and is not favorable to petitioner. The statement of Kenneth Leary is not favorable to petitioner. None of the foregoing information, then, factors into the materiality analysis. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

The handwritten notes of Ronquillo concerning statements purportedly made by Shelita Russell and Phillip Young could not have affected the outcome of the trial because they could not have been introduced at trial. *See Wood v. Bartholomew*, 516 U.S. 1 (1995). Nevertheless, to the extent this Court may find otherwise, petitioner is therefore left to argue the materiality only of the handwritten notes pertaining to Shelita Russell and Phillip Young and the statements of Larry Boatner.

A. Ronquillo's Notes Concerning Shelita Russell Do Not Undermine Confidence in the Verdict

Ronquillo's handwritten notes purportedly memorializing a statement by Shelita Russell would not have been admissible at petitioner's trial. Yet, even if the notes were admissible evidence, it does not

"undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Petitioner reads the notes to indicate that Shelita Russell said that the "first person through the door had a black cloth across his face." Pet. Br. 36. That reading is improbable.

At the time the intruders entered, Russell was so distracted by a telephone conversation that to get her attention, it was necessary for one of the intruders, armed with an assault rifle, to cross to Russell's side of the room and forcibly take the telephone from her hand. J.A. 176. Because Russell was distracted, she likely would not have seen the *first* person who came through the doorway; rather, her statement most likely refers only to the first person *she* saw come through the doorway.

Even if Russell's statement is taken for the value petitioner suggests, it may be easily reconciled with Boatner's testimony. The jury would likely have found that Boatner and Russell referred to two different people. While Boatner was standing in the doorway, two people approached nearly simultaneously. J.A. 174-75. Boatner's presence in the doorway likely obstructed Russell's view in such a way as to prevent her from accurately noting who was actually the first person through the doorway. To Boatner it was his unmasked assailant; to Russell it was likely another, masked intruder. The jury would have heard both of these accounts, reconciled them, and still have found petitioner guilty.

B. Ronquillo's Notes Concerning Phillip Young Do Not Undermine Confidence in the Verdict

Petitioner asserts that "[n]ot only was Young's 'statement' powerful exculpatory evidence on its own, but the defense could have used it in cross-examining Officer Ronquillo: . . . to impeach Ronquillo's testimony that Young was not 'able to communicate with [him] at all'. . . ." Pet. Br. 45. This assertion is meritless.

On its own, Young's alleged statement, "Short Dog/Bucko/Fats – No – Not with me when went to house," establishes only that Young did not travel to 2230 North Roman Street with petitioner. It does not preclude the conclusion that they arrived separately and murdered together. Indeed, the formal statement of Eric Rogers (relaying the statement of Robert Trackling) regarding the murders at North Roman Street lends support to this scenario. Trackling (through Rogers) does not mention Young as being with him when he went to the house, although clearly Young participated in the murders. J.A. 278-93. In addition, Rogers' statement suggests there was a second, burgundy car used by the perpetrators to flee the scene. J.A. 283.

As explained earlier, Ronquillo did not testify that "Young was not 'able to communicate with [him] at all'" but rather testified that "[he] couldn't understand anything that [Young] was saying," which is in no way inconsistent with the fact that Ronquillo

memorialized in his notes the questions that he tried to ask Phillip Young. Ronquillo's notes, therefore, would not have served the purposes petitioner claims.

C. Larry Boatner's Pre-Trial Statements Do Not Undermine Confidence in the Verdict

This Court has articulated several factors relevant to the reliability of an eyewitness identification: the opportunity to view the criminal at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972). The factors demonstrate the reliability of Boatner's identification of petitioner.

Opportunity to view. Boatner was "no casual observer." *Biggers*, 409 U.S. at 200. He was a victim. Moreover, he "spent a considerable amount of time with [his] assailant" and "faced him directly and intimately." *Id.* And, although his description "might not have satisfied Proust, [it] was more than ordinarily thorough." *Id.* Boatner was standing in the front doorway of the house when the intruders – petitioner first among them and unmasked – barged into the house. J.A. 175. While others were ordered to the floor, Boatner remained standing, "face to face" with petitioner, who was holding a gun to Boatner's head. J.A.

175. Even when ordered to the floor, Boatner trained his view on petitioner, who hovered over him with the gun. J.A. 176-77. When Boatner was ordered to return to standing, he was once again face to face with petitioner, separated from him only by the length of petitioner's gun. J.A. 178. It was only when petitioner struck Boatner with that weapon that Boatner closed his eyes, fell to the ground, and pretended to be unconscious. J.A. 178-79.

Degree of attention. As Boatner testified at trial, "My concentration was on the guy that had me. I was trying to see who he was." J.A. 177. Moreover, the presence of a gun during the commission of a crime creates in witnesses a heightened degree of attention. *See United States v. Crozier*, 259 F.3d 503, 511 (6th Cir. 2001) (finding heightened degree of attention where robber confronted witnesses with a gun). During the time that Boatner was face to face with petitioner, petitioner had a gun pointed directly at him, and Boatner's attention would thus have been heightened. J.A. 175-78.

Accuracy of prior description. On the night of the murders, Boatner described his assailant to one of the first-responding officers as "heavy built with his hair with a fade, with a little small top with a lot of gold teeth in his mouth." Mot. Hrg. Tr. 24. Approximately four hours later, when giving his formal statement to Kaufman, he again described his assailant as "a black male with a low [hair]cut [and] golds in his mouth." J.A. 257, 296. That description, Ronquillo testified, is "very close to [petitioner], especially with the haircut

and the golds and the skin color." J.A. 530. At trial, when asked if there was any characteristic in particular he recalled about his assailant, Boatner testified that he had a "mouth full of gold." J.A. 196. Pointing to that statement, petitioner asserts that, "[i]n identifying petitioner, Boatner relied heavily on his belief that [his assailant] had a 'mouth full of gold.'" Pet. Br. 5, 35, 37. That assertion is false: There is no evidence that any of the fifteen photographic lineups presented to Boatner contained pictures showing the teeth of the subjects. Indeed, the record provides evidence to the contrary. J.A. 201, 490.

Moreover, it was only *after* Boatner described this attribute of petitioner that counsel requested petitioner to rise and display his teeth to the jury, whereupon Boatner observed, "Same mouth . . . Same face." J.A. 196. Petitioner, it appears, can explain even this away: "Such characteristics [as low fade haircuts and prodigious gold teeth] could hardly have been sufficient to sustain an identification in and of themselves because they were not uncommon for the time and place." Pet. Br. 37-38. That explanation is as convenient as it is unpalatable.

Level of certainty. At trial, Ronquillo testified to Boatner's certainty when identifying petitioner in lineup 13. According to his testimony, Boatner was "positive of [his] identification" and stated "'This is it. I'll never forget that face.'" J.A. 133. To that last comment, this Court has ascribed particular significance. *See Biggers*, 409 U.S. at 201 ("The victim here, a practical nurse by profession, had an unusual

opportunity to observe and identify her assailant. She testified . . . that there was something about his face 'I don't think I could ever forget.' "). When asked how quickly after seeing petitioner's picture in lineup 13 he was able to make a positive identification, Boatner reiterated the reason for his certainty, "I'll never forget Juan's face, never." J.A. 194. Thereafter, he confidently pointed to petitioner in front of the jury and identified him as the man who "barged in and put a .9mm to [his] head." J.A. 195.

Petitioner finally attempts to call Boatner's identification into question by discussing the June 7, 1995 Times Picayune article, alleging that "the article was accompanied by a photograph of petitioner and implicated him as one of the 'primary suspects' in the shootings." Pet. Br. 38. That allegation is false. The article implicates only "Cut Throat Posse alumni" in the March 1, 1995 murders, and the record indicates petitioner was not a member of that organization. Pet. Br. 53 (citing J.A. 285-87). But whether petitioner was a member of the "Cut Throat Posse" is irrelevant because there is no evidence that Boatner had any knowledge of the existence of Cut Throat Posse or its membership. Moreover, even if the article did implicate petitioner by name, that fact, too, would be irrelevant because Boatner did not read the text of the article prior to making his formal identification on June 28, 1995. J.A. 42-43, 492.

Length of time between the crime and the confrontation. The interval of time between the murders and Boatner's identification of petitioner in a photographic

lineup is admittedly the least compelling indicator of his reliability. However, this Court has upheld, under a totality of the circumstances, an identification made after a greater interval. *See Biggers*, 409 U.S. at 201. In *Biggers*, this Court noted that "a lapse of seven months between the [crime] and the confrontation . . . would be a seriously negative factor in most cases." *Id*. However, where "the victim [has] made no previous [incorrect] identification[,] . . . [his] record for reliability [is] a good one." *Id*. Out of the fifteen lineups shown to Boatner during the investigation of these murders, he identified only one person – petitioner. J.A. 134. Indeed, throughout the process, Boatner displayed a discriminating eye, carefully evaluating and then excluding the photograph of a man with physical features similar to those of his assailant. J.A. 131. Moreover, although a photograph of Robert Trackling was displayed alongside petitioner's photograph in the June 7, 1995 Times Picayune article and a lineup containing Trackling's photograph was presented contemporaneously with the lineup containing petitioner's photograph, petitioner did not identify Trackling as having been among the intruders. That fact supports Boatner's resistance to suggestion as well as his testimony that he only saw the face of one man – petitioner.

1. Larry Boatner's statements on March 1, 1995 do not undermine confidence in the verdict

Petitioner observes that "[w]hen [Detective] Ronquillo interviewed Boatner at the scene, Boatner stated that 'he could not supply a description of the perpetrators other than they were black males.'" Pet. Br. 35 (internal alterations omitted). "All that Boatner could tell [Detective] Ronquillo," petitioner continues, "was that the perpetrators were carrying an AK rifle, a TEC-9-type weapon, and a silver handgun of unspecified size." Pet. Br. 35.

The timing and content of Boatner's statement are significant. Immediately prior to his statement to Ronquillo, Boatner had already given one of the first responders a detailed description of his assailant: He was "heavy built with his hair with a fade, with a little small top with a lot of gold teeth in his mouth." Mot. Hrg. Tr. 24. Boatner described no weapons to the first responder. Yet, later, when speaking to Ronquillo, Boatner described weapons but gave no description of his assailant.

In contrast, approximately four hours after he gave his statements to the first responder and to Ronquillo, Boatner made a formal statement at the Homicide Office:

> Boatner then said that he could not describe any of the subjects, *other than the subject who put the gun in his face*. Boatner described him as being a black male, with a low

> [hair]cut, and golds in his mouth. Boatner then added that they had an AK rifle, a Tech Nine, "Uzzi" type gun, and a chrome, automatic pistol, which Boatner said was the gun that struck him in the head.[30]

J.A. 256-57, 296. Thus, from the maelstrom of the scene and able to reflect calmly on the event he survived, he was able to put together the pieces he had earlier hastily related at the scene.

The circumstances under which Boatner made his statement to Ronquillo reinforce that interpretation of events. Petitioner concedes that "a certain degree of imprecision might be expected from a witness in the immediate aftermath of a violent incident." Pet. Br. 35. That apparent concession understates and sterilizes the traumatic circumstances under which the statement was made: Boatner was still in the house, standing among the bodies of friends whose murders he had witnessed at close quarters mere moments before; Boatner himself only narrowly escaped death; and he was bleeding profusely from a severe and untreated laceration to his head. J.A. 75, 212, 530. How those circumstances actually affected Boatner are presently unknown. Nevertheless, it is not unreasonable to suppose that they did affect him, and to a degree beyond what petitioner suggests.

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[30] Petitioner appears to believe that this statement contradicts Boatner's trial testimony as well. Pet. for Cert. 6 (citing J.A. 296). That reading is only possible by taking Boatner's remarks out of context.

Taken together, the time, content, and circumstances of Boatner's statement to Ronquillo would likely have led a jury to see it for what it was: the words of a man straining under grief, trauma, fear, and pain. That he was "coherent" when he made the statement indicates that he is remarkable, not that he is unreliable.

2. Larry Boatner's statement on March 6, 1995 does not undermine confidence in the verdict

At the heart of petitioner's *Brady* claim is a single statement made by Larry Boatner on March 6, 1995, in which he indicated to Ronquillo that he "could not identify any of the perpetrators of the murder."[31] J.A. 259-60.

When questioned about that statement at post-conviction, Ronquillo, an experienced homicide detective and veteran police officer, seemed untroubled: "At that time, [Boatner] told me he couldn't identify anyone. And to me, that was his not wanting to be involved in this case anymore." J.A. 528. The reasons that Boatner would have desired no longer to be involved in the case are not a matter of record, but

[31] Petitioner appears to believe that Larry Boatner made two statements to Ronquillo on March 6, 1995. Pet. Br. 35. As Ronquillo's post-conviction testimony makes clear, petitioner's mistaken belief is the result of a simple typographical error in the supplemental report. C.D.C.R. 2911; J.A. 533.

neither would they have been difficult for a jury to infer.[32]

Boatner knew that several armed men had barged into the house on the night of March 1, 1995 and murdered his friends. J.A. 174-83. Although one of the murderers was left critically injured in the house, an unknown number had escaped, and as of March 6, 1995, they remained at large. Boatner feared for his life. J.A. 191, 214. It may be inferred that he also feared that if it were known that he was assisting the police investigation, his fate effectively would have been sealed. That fear was strong enough to drive him to flee New Orleans for a time, and it was only after learning that the murderers had been apprehended that he felt it safe to return. J.A. 191, 214.

Given what Boatner had already survived and the potential dangers he faced, his statements would not likely have affected the outcome. The jury would have weighed Boatner's words against the circumstances under which he made them, his ability to provide a detailed description on the night of the murders, his positive identification of petitioner in a photographic lineup, and the strength of his testimony and his in-court identification. In so doing, they would have seen the inconsistency of Boatner's statement for what it was: the attempt of a frightened

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[32] See John Simerman, *Retrial of Alleged Crime Kingpin Telly Hankton Highlights Weakness of Witness Protection*, Sept. 8, 2011, http://blog.nola.com/crime_impact/print.html?entry=/2011/09/retrial_of_alleged_crime_kingp.html.

man to retreat from danger and to salvage what remained of his life. That Boatner was able to overcome his fear in order to testify does not lessen his credibility; it augments it.

V. Petitioner's Verdict Is Worthy Of Confidence

Petitioner wrongly attempts to cumulate information which cannot be *Brady* material. Petitioner relies upon *Brady* violations in unrelated cases. Petitioner relies on unreliable and inadmissible hearsay. Petitioner relies upon information which he actually possessed or, with the exercise of ordinary diligence, would have obtained prior to his trial. Petitioner relies upon information which is not material to his guilt or punishment and which could not have been used for impeachment. What remains is insufficient to support petitioner's claims, and the jury's verdict is therefore worthy of confidence.

One final observation is in order. Petitioner suggests that he received "summary" treatment in the courts of Louisiana. Pet. Br. 54. He did not. First, the district judge who presided over both his trial and his post-conviction hearing is a veteran jurist who had served for twenty-one years at the time of petitioner's trial and for thirty-five years at the time of petitioner's post-conviction hearing. At trial, he took extraordinary precautions to protect petitioner's constitutional rights. At post-conviction, he allowed petitioner's counsel great latitude in questioning witnesses – permitting

petitioner's counsel to introduce hearsay, to ask leading questions, and occasionally to use exhibits which had not been properly authenticated and for which no foundation had been laid. He also actively questioned both the State's and petitioner's witnesses. In short, petitioner was given every opportunity to which he was lawfully entitled (and more) to undermine confidence in the outcome of his trial. In the end, however, after having presided over petitioner's two-day trial and his four-day post-conviction hearing, after observing the testimony of witnesses, and after observing all of the evidence, the district judge remained satisfied as to the propriety of the State's prosecution. His ruling, too, is worthy of confidence.

Second, petitioner points to the "summary" denials by the Louisiana Fourth Circuit and the Louisiana Supreme Court of his writs from the district judge's ruling, appearing to suggest that those courts never bothered even to read his applications before rushing to deny them. Pet. Br. 26, 54-55. As this Court has recently noted – and as petitioner appears to concede – that suggestion is baseless. *See Harrington v. Richter*, 131 S.Ct. 770, 784 (2011). The rulings of those courts, too, are therefore worthy of confidence.

In the end, petitioner was convicted, not because he was denied a fair trial, but because he is guilty of the crimes with which he was charged. The information to which he points is irrelevant, inadmissible, unsuppressed and unfavorable. What remains confirms petitioner's conviction.

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CONCLUSION

The judgment of the state district court should be affirmed.

Respectfully submitted,

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