NO. 11-5987

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2011

JOHN FLOYD,
Petitioner

v.

BURL CAIN, Warden,
Louisiana State Penitentiary,
Respondent

On Petition for a Writ of Certiorari
to the Orleans Parish Criminal District Court
of Louisiana

BRIEF FOR RESPONDENT IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceedings.

QUESTIONS PRESENTED

1. Whether the courts of the State of Louisiana erred in their application of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny such that this Court should grant the petitioner a new trial?

2. Whether the petitioner is "actually innocent," and if so, whether the petitioner's continued incarceration violates the Eighth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES – FEDERAL

CASES – LOUISIANA

OTHER: Dillmann, John. *Blood Warning*. New York: G.P. Putnam's Sons (1989) 10

RELEVANT FACTS AND PROCEDURAL HISTORY

I. Statement of the case; trial and appeal.

On February 12, 1981, John Floyd was indicted for the commission of two murders: that of Rodney Robinson and that of William Hines. On April 3, 1981, Petitioner was found competent to stand trial. On January 5, 1982, the petitioner elected trial by judge. The petitioner was, after trial, found not guilty of the murder of Rodney Robinson and found guilty of the murder of William Hines. The petitioner assigned as error the sufficiency of the evidence, the voluntariness of his confession, and the denial of his motion for new trial. The petitioner's conviction was affirmed on appeal by the Louisiana Supreme Court on June 27, 1983. State v. Floyd, 435 So.2d 992 (La. 1983).

II. Statement of the facts; trial.

On November 26, 1980, William Hines, a white male, was discovered lying beside his bed in his apartment, nude, stabbed to death. The coroner's report – introduced by stipulation at the trial – indicates that Hines was stabbed eighteen times. On November 29, 1980, Rodney Robinson, a black male, was discovered in the hallway of a New Orleans hotel, also nude, also stabbed repeatedly and to death.

Detective John Dillmann was assigned to the homicide of William Hines; Detective Michael Rice was assigned to the homicide of Rodney Robinson. Both detectives quickly came to speculate that the murders were committed by the same person because of the similarities between the crimes: both victims were homosexuals, both victims had been stabbed repeatedly in the head, neck, and torso, both crime scenes betrayed no signs of forced entry, and two whiskey glasses were found in each of the rooms where the victims had been stabbed.

Since the body of Hines was discovered approximately thirty-six hours after his death, scientific examination of the body revealed no clues. There were no witnesses, and crime scene personnel recovered no fingerprints from the whiskey glasses. Crime scene personnel also recovered hair of "negroid" origin from the victim's bed.

Examination of Rodney Robinson and his hotel room revealed recent sexual activity. A semen-stained crumpled napkin was found on the floor. A blue knit sock cap was found in the hallway near the victim's body; a hair of negroid origin – which did not belong to the victim – was found within that cap. A black male – without a cap – was seen fleeing from the hotel shortly after the stabbing of Rodney Robinson.

After several weeks of following dead-end leads, the police learned that a man nicknamed "Crazy Johnny" had made statements which linked him with the killings. Crazy Johnny was described as a homeless drifter who exchanged sexual favors for a place to stay overnight, and who became ferociously violent when he combined PCP with alcohol. Ultimately, two persons identified John Floyd as "Crazy Jonny" via photographic lineup. One of those persons, Stephen Edwards, operated a French Quarter bar. He related to police an encounter with Floyd on the sidewalk near Edwards' establishment. Edwards warned Floyd not to enter Edwards' bar because Floyd had been banned from the bar for recent disruptive behavior: "You can't go in there. I don't want you in there because you cause problems." Floyd then told Edwards, "Don't come fucking with me. I already wasted one person." When Edwards asked, "Who? Bill Hines?," Floyd answered, "Yeah. On Governor Nicholls."

Another witness, Gerald Griffin, had accompanied Floyd to the detoxification unit in New Orleans Charity Hospital on the morning of November 29, 1980. On this occasion, Floyd

had asked Griffin if Griffin knew about the hotel killing (which had occurred earlier that day). Floyd then stated that people who were hospitalized as mentally ill were sometimes found not to be responsible for their actions. After the trip to the hospital, Griffin saw a newspaper account of the hotel killing and reported his conversation with Floyd to the police, believing that it might have revealed a connection between Floyd and the murder of Rodney Robinson.

A search of French Quarter bars finally led Detective Dillmann and Officer John Reilly to Floyd at a bar called "The Louisiana Purchase." The officers had a drink with Floyd, talked with him for twenty minutes or so, and ultimately traveled with him to police headquarters, where Floyd confessed to both murders. Although Floyd later claimed to have been beaten into making the confessions, those claims were contradicted by photographs taken shortly after the alleged beating.

The detective who took down Floyd's confession to the murder of William Hines testified at trial: "He described the scene to me vividly. He remembered the iron gate. He was able to describe the position of the victim's body. He was able to describe to me the outlay of the victim's apartment, even to detail the position of the body where it fell off the bed." The fact that the petitioner was able to accurately describe the position of the body is of particular note because that knowledge would not belong to one who had seen the crime photographs, as William Hines's body was moved in order to investigate the victim's injuries prior to the taking of those photographs. Floyd acknowledged his use of PCP, and told the officers that "when I'm on that dope, I go crazy." He stated that, while having intimate relations with William Hines, he "went berserk" and "stabbed him a bunch of times."

The petitioner's confession to the Rodney Robinson murder included a statement that the

victim had provided the petitioner with oral sex, and that afterwards, the petitioner "wiped [his] dick with a pice [sic] of paper and threw it on the floor."

The petitioner presented evidence to the trial court. With respect to the murder of Rodney Robinson, the petitioner presented evidence including the following:

- although the petitioner confessed to having sexual relations with the victim, semen recovered from a piece of paper on the floor of the victim's hotel room could not have come from either the victim or the petitioner (the victim had Type O blood, the petitioner had Type B blood, and the donor of the semen had Type A blood);
- a hair of "negroid" origin was found in a blood-stained cap outside of the hotel room in which the victim was stabbed, and the source of that hair was neither the victim nor the petitioner;
- the security guard at the hotel where the victim was stabbed witnessed a black man running from the hotel shortly after the victim was stabbed;
- opinion testimony that John Floyd was particularly susceptible to suggestive interrogation techniques; and
- the testimony of the petitioner, in which he proclaimed his innocence and claimed to have been beaten into making a confession.

With respect to the murder of William Hines, the petitioner presented evidence including the following:

- hairs of "negroid" origin were found in Mr. Hines's bed, even though William Hines and John Floyd are white; and
- opinion testimony that John Floyd was particularly susceptible to suggestive interrogation techniques; and
- the testimony of the petitioner, in which he proclaimed his innocence and claimed to have been beaten into making a confession.

The petitioner was found not guilty of the murder of Rodney Robinson, and was found guilty of the murder of William Hines.

III. Statement of the case; post-conviction proceedings.

In 1989, some six years after the petitioner's conviction was affirmed on appeal, Detective John Dillmann authored a book concerning the murders of William Hines and Rodney Robinson.[1] In that book, Detective Dillmann detailed the course of his investigation, including suspects other than John Floyd. The first suspect was a black male who had been arrested three times within a block of the hotel in which Robinson had been murdered. He was cleared after being interviewed. The second suspect, a female prostitute, was able to provide an alibi that checked out. The police abandoned their investigation of a third suspect, a white male, following John Floyd's confessions.[2]

In 1998, Detective Dillmann and Dr. Frank Minyard – the Orleans Parish Coroner who was present at the William Hines crime scene but did not perform the autopsy – were interviewed in connection with a true-crime television series.[3] Detective Dillmann explained to the documentary that he had a few tips which "didn't pan out" until learning of "Crazy Johnny." Dr. Minyard opined to the cameraman that "it looks like almost, it might be a stretch to say this, but it could be someone who had some medical knowledge."

In 2006, the petitioner filed an application for post-conviction relief in the state district court. That application was later amended and supplemented on July 9, 2009. The trial court denied the petitioner's application for post-conviction relief on February 19, 2010. The trial court's ruling was maintained by the Louisiana Supreme Court. Floyd v. Cain, 10-1163 (La. 5/20/11), 63 So.3d 57, *reconsideration denied*, 10-1163 (La. 9/02/11), 68 So.3d 532. Three

1 Dillmann, John. *Blood Warning*. New York: G.P. Putnam's Sons, 1989.

2 See id. at pp. 46, 60-64, 131-140 (first suspect); id. at 76-89, 114-115 (second suspect); id. at 99-102, 117-118, 151-157 (third suspect).

3 The television series was City Confidential, which was televised by A&E.

justices dissented from the initial hearing; two dissented from the denial of reconsideration. Id.

IV. Statement of the facts; post-conviction proceedings (Brady claim)

During the post-conviction proceedings, the petitioner urged that the following evidence pertaining to the murder of William Hines was withheld at trial:

- an envelope used for the collection of fingerprints containing hand-written notations that read, "(not victim)" and "(not John Floyd);"
- an affidavit from John Clegg, a friend of William Hines, that Hines's "taste was for black [rather than white] men," contradicting the police report and testimony of the lead detective that, in 1980, John Clegg reported that Hines's taste in men was "indiscriminate;"
- passages from the book authored by the lead detective indicating that the police "initially pursued two black male suspects;" and
- a statement from the Orleans Parish coroner during an interview for a television show that "it looks like almost, it might be a stretch to say this, but [the perpetrator] could be someone who had some medical knowledge."

The petitioner also claimed that additional evidence pertaining to the murder of Rodney Robinson – particularly, the envelope described above (which also indicated that fingerprints had been collected from the whiskey glasses in the room where Rodney Robinson had been stabbed) and hair recovered from Robinson's hotel room that belonged to neither Robinson nor the petitioner.

The State's arguments in the trial court primarily concerned the claim of fingerprints on a whiskey bottle in the home of William Hines. The State argued that the petitioner had presented no competent evidence that a fingerprint comparison had actually been performed – that is, although there are notations on an envelope, the petitioner failed to demonstate *who* made those notations or *when* they were made. See La. C.E. art. 901. The two persons who testified concerning those notations, Ms. Cherie Guggenheim and Mr. Glenn Burmaster, could not provide this information. Detective Dillmann, the lead detective in the Hines case, testified that

he was not aware that any fingerprint comparisons had been conducted in the Hines case.

The State further argued that, even if a fingerprint comparison had been made, it was immaterial because the evidence presented to the trial court at the post-conviction hearing (through the affidavit of John Clegg) provided that William Hines "loved to give parties, and that he would have people over all the time" – and thus the presence of a third person's fingerprints on a whiskey bottle proves nothing with respect to the petitioner's factual guilt or lack thereof. In addition, the crime scene technician's report indicates that multiple whiskey bottles were dusted for latent prints and that latent prints were lifted from only one of those bottles.[4]

Significantly, the petitioner could have conducted its own comparison of the fingerprints found on the crime scene to the petitioner's fingerprints – and thereby produced competent evidence that a fingerprint comparison had been performed – but did not do so. (He did, for example, have DNA analysis of conducted on hair collected from the Rodney Robinson crime scene.) Although the petitioner claimed that a significant amount of evidence was lost or destroyed, the petitioner did not claim that the fingerprint samples had been destroyed.

As to the affidavit of John Clegg, the State noted that Detective Dillmann's police report and testimony are necessarily based on his recollection of his conversation with Mr. Clegg and that Detective Dillmann's investigation could only proceed based upon the facts uncovered during the investigation as he understood them.

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4 The pertinent portion of the crime scene technician's report (page 3 of 10) provides:

2:55pm	Tech T. Seuzeneau dusted several whiskey bottles – neg results
	Dusted 1 – whiskey bottle and lifted – 2 partial latent prints
	Dusted 1 – whiskey glass from night table in bedroom – neg results
	Dusted 1 – whiskey glass from kitchen table – neg results

There is no support in the record for the assertion that "someone else left the prints on the whiskey bottle from which Mr. Hines and his killer poured a drink before the killer struck," *Pet.Writ App.* at 15, insofar as it has not been established *which* whiskey bottle was used for the pouring of the whiskey left in the two whiskey glasses.

The petitioner's claim that the police initially pursued two black male suspects – based on Detective Dillmann's book and a subsequent interview – lacks evidentiary support. The only evidence in the record concerning the course of the investigation is Detective Dillmann's book and the subsequent for-TV interview, neither of which support the assertion that there were two black male suspects. Rather, the initial suspects were a black male, a black female, and a white male. *See* nn. 1-2, *supra*, and accompanying text.[5]

The State further noted that Dr. Minyard did not perform the autopsy on the body of William Hines – Dr. Monroe Samuels actually performed the autopsy – and that Dr. Minyard's statements to a television documentary reflected "impressions" at most and have no persuasive value as opinion evidence.

The State otherwise argued that certain claims were time-barred: Louisiana has a statute of limitations for seeking post-conviction relief, La. C.Cr.P. art. 930.8(A) and newly-discovered claims are subject to that time limitation once discovered, State v. Orman, 925 So.2d 761 (La. App. 2 Cir. 2006).

V. Statement of the facts; post-conviction proceedings (actual innocence claim)

The petitioner's actual innocence claim is essentially a sufficiency of the evidence claim re-raised in light of the record as described above plus testimony from a psychologist the petitioner has an IQ of 59 and a "suggestible" personality. See Pet. App. 25-27 (arguing that the petitioner's guilt is "implausible").

5 The petitioner's assertion is based solely upon an hand-written notation on the evidence described above.

REASONS FOR DENYING THE PETITION

Petitioner has shown no "compelling reasons" for the granting of a writ of certiorari. The petition instead consists of assertions that the district court's factual findings are erroneous combined with a litany of grievances about the administration of justice in the City of New Orleans.[6]

The petitioner's burden at post-conviction relief hearing in Louisiana is to demonstrate the existence of favorable, withheld information that "[can] reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." La. C.Cr.P. 930.2; La. C.Cr.P. 930.3(1); Kyles v. Whitley, 514 U.S. 419, 435 (1995).

In Louisiana, the burden of proof requires both (i) that the party seeking redress produce sufficient evidence to prove each element of his claim and (ii) that the party seeking redress persuade the adjudicative body that relief is in fact warranted. Stroik v. Ponseti, 699 So.2d 1072, 1080 (La. 1997).

The petitioner has met neither requirement. The petitioner failed to produce evidence sufficient to either undermine confidence in the outcome of the trial or to establish his innocence as to the murder of William Hines. To the extent that the petitioner did produce evidence, the petitioner failed to persuade the trial court that relief was in fact warranted.

The Constitution is not violated when a trial court is not persuaded by the evidence presented by the petitioner.

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6 The Brady portion of the petition for certiorari involves three pages of analysis (pp. 13-16) followed by eight pages of complaints about the New Orleans Police Department and Orleans Parish District Attorney's Office (pp. 16-24).

I. General considerations

Initially, the claims of the petitioner that he received "summary" treatment at the hands of the Louisiana courts is without merit. The conclusion that the petitioner's claims were not given studied consideration does not follow from the premise that the courts provided no written reasons for their rulings. Harrington v. Richter, 562 U.S. ---, 131 S.Ct. 770, 784-785 (2011). A logical extension of the petitioner's reasoning would be that this Court does not give studied consideration to the thousands of petitions for certiorari that this Court denies each year without written reasons.

The respondent notes that the same concerns of comity present in the context of federal habeas corpus relief are present when a federal court reviews decisions arising out of state post-conviction proceedings. Providing less deference to *state* collateral proceedings than to *federal* collateral proceedings would effectively penalize the States' interest in repose for concluded litigation for the sole reason that the States have opted to provide greater procedural protections than the Constitution requires. See Pennsylvania v. Finley, 481 U.S. 551, 556-557 (1987) (discussing state post-conviction relief procedures and recognizing that "States have no obligation to provide this avenue of relief") (citation omitted).

The respondent further notes that "[t]his Court has no supervisory jurisdiction over state courts." Chandler v. Florida, 449 U.S. 560, 570 (1981)

Finally, the reason that the petitioner was tried by a judge alone rather than by a jury is because the petitioner voluntarily chose to be tried by a judge rather than by a jury.[7] There is no basis for treating claims under Brady v. Maryland, 373 U.S. 83 (1963), differently depending on whether the petitioner has elected trial by judge or trial by jury.

7 Unlike the federal system, a defendant in Louisiana has the right to be tried by a judge alone. La. C.Cr.P. art. 780.

II. The trial court properly found that the petitioner failed to produce evidence sufficient to undermine confidence in the outcome of petitioner's trial.

A. The trial court properly found that the exculpatory evidence concerning the murder of Rodney Robinson (for which the petitioner was acquitted) does not undermine confidence in the outcome of the verdict concerning the murder of William Hines.

The petitioner starts from the premise that the same person who killed Rodney Robinson killed William Hines, posits that the evidence shows that John Floyd did not kill Rodney Robinson, and concludes that John Floyd therefore did not kill William Hines. The petitioner further argues that his confession to the murder of William Hines is likely false because he falsely confessed to the murder of Rodney Robinson.

These arguments were all fully, fairly, and thoroughly presented and argued at trial. The petitioner at trial adduced evidence that a black man was seen fleeing from the hotel where Rodney Robinson was killed shortly after the commission of the murder and that a hair from an unidentified black man was located near the scene of the crime. The petitioner adduced at trial evidence that the petitioner's confession must have been false because the bodily fluids found on a napkin at the scene were left by someone with a different blood type than the petitioner. The petitioner argued to the trial court that "Mr. Floyd not only did not commit the murders he did not know the people involved, was never seen in their company, was not present, that there is no evidence whatsoever that links him in any way to the murders, save for incriminating statements" which petitioner claimed were coerced. Following trial the petitioner argued "we were able to produce evidence that showed that he could not have committed the crime for which he confessed" and that the confessions "stood together and should fall together" because they were "taken at the same time, under the same circumstances, with the same parties and the same principles." The

petitioner further argued "the only evidence introduced at trial [pertaining to the murder of William Hines] was exculpatory to John Floyd in that it indicated the presence of negroid hair in the bed of the victim wherein both he and the accused are caucasians. No reasonable explanation was provided at trial." The factfinder at trial was able to evaluate these claims, and was able to do so with the benefit of hearing the testimony and viewing the demeanor of each and every witness, including the investigating officers and the petitioner.

The withheld evidence pertaining to the murder of Rodney Robinson – that there were more hairs, and that the petitioner's fingerprints were not located – add only marginal weight to the evidence of third-party guilt already presented at petitioner's trial. Moreover, the relevance of this is not clear, as the petitioner was found not guilty of that murder. The petitioner makes only a conclusory assertion that "[e]vidence of the Robinson homicide remains relevant to the Hines case under the reasoning of a 'reverse 404(b)' theory" (Cert. Petition, p. 9) – which theory has no basis in Louisiana law or jurisprudence.

To the extent that the petitioner argues that he should be deemed not guilty of the murder of William Hines because he is not guilty of the murder of Rodney Robinson, that argument was made and rejected before thet trial court, and rejected again on direct appeal, and state post-conviction relief proceedings are not designed for relitigation of issues addressed on direct appeal. See La. C.Cr.P. 930.4.

B. The trial court properly found that the withheld evidence concerning the murder of William Hines does not undermine confidence in the outcome of the verdict concerning the murder of William Hines.

***i.* The existence of alternate suspects.**

The mere fact that the police initially pursued leads concerning persons other than the

person convicted is not favorable to the petitioner. *Evidence* that a third party committed the crime would be favorable, but speculation is not. Cf. Morris v. Ylst, 447 F. 3d 735, 742 (9th Cir. 2006).[8] To the extent that the police had evidence that a third party had murdered William Hines, that evidence was disclosed to the petitioner – as is demonstrated by the presentation of evidence by the petitioner at trial. The officers' pursuit of alternate suspects was based on tips and hunches which were ultimately unsubstantiated. The existence of alternate suspects against whom no evidence exists need not be disclosed under Brady. See Moore v. Illinois, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."); id. at 809 (opinion of Marshall, J., concurring in part and dissenting in part) (prosecution need not disclose "useless leads").

Because the officers' pursuit of alternate suspects was based on tips and hunches which were ultimately unsubstantiated, and the petitioner has presented no evidence to the contrary, the petitioner has failed to show that the officers' diligent pursuit of fruitless leads falls within the scope of Brady – i.e., how this information is even favorable.

ii. The opinion provided by Dr. Frank Minyard.

Dr. Minyard opined that because of the placement of the stab wounds, the perpetrator "could be someone who had some medical knowledge." This impression of William Hines's corpse – articulated in 1998 – was based solely on a visual inspection of the crime scene in 1980. Dr. Minyard did not perform the autopsy. Although this is an opinion of a person who is an

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8 In Morris, the Ninth Circuit considered the interaction of Brady and the work-product doctrine. The Court reasoned that, since Brady concerns the existence of *evidence*, "a prosecutor's opinions and mental impressions of the case are not discoverable under Brady *unless* they contain underlying exculpatory facts." 447 F.3d at 742 (emphasis in original).

expert, it does not follow that it would be proper opinion testimony within the meaning of the rules of evidence. That a man will be grievously wounded if stabbed in the front upper torso, or if his throat is slit, is hardly information "[necessary to] assist the trier of fact to understand the evidence or to determine a fact in issue." La. C.E. art. 702. Moreover, because the petitioner made no attempt to establish the admissibility of Dr. Minyard's statement in the trial court,[9] the petitioner has failed to show that it "constitutes 'evidence' at all." See Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam). To the extent that it is evidence, its probative value is minimal: no medical knowledge is required to stab a man eighteen times, and the fact that a person who was stabbed eighteen times received wounds to vital organs is to be expected.

iii. The affidavit of John Clegg.

The contents of what John Clegg told Detective Dillmann shortly after the murder of William Hines is a factual matter, and factual disputes lend themselves to resolution by the trial court. Detective Dillmann, after speaking to John Clegg in 1980, was left with the distinct impression that William Hines had no particular preference in sexual partners. He memorialized this answer in a police report, and testified consistently to this through the course of the proceedings. However, in an affidavit executed in 2008, John Clegg claimed that he had made no such statement to Detective Dillmann, but instead said that William Hines preferred black males.

In finding that the petitioner failed to meet his burden of proof, the trial court implicitly found that a police officer's contemporaneous notes of a conversation are far more more likely to

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9 The admissibility of opinion evidence is contingent upon a preliminary finding concerning the findings made by the expert and the methodologies and assumptions upon which the expert's findings rest. La. C.E. art. 702; see generally Cheairs v. State ex rel Department of Transportation and Development, 861 So.2d 536, 541-543 (La. 2003). The petitioner could have, for example, called Dr. Minyard as a witness. He did not do so.

As explained in Wood, *supra*, information that cannot be presented at trial necessarily cannot influence the outcome of a trial.

be accurate than a witness's recollection twenty-eight years after the fact. That is, the trial court made a credibility determination, and resolved the conflicting evidence in favor of the detective's testimony. It follows from this that the claimed information was not withheld because that information was not communicated to Detective Dillmann, i.e., was not in possession of the State.

iv. The handwritten notes on the evidence envelopes.

The documentary and testimonial evidence before the trial court indicates that examination of fingerprints found at the William Hines crime scene was never requested. The portion of the crime scene technician's report concerning the dusting of the whiskely bottles and the whiskey glasses indicate that the column for "laboratory examination" was marked "no." The lead detective testified that he was not aware that any fingerprint examination had occurred. Because the petitioner presented no evidence as to *who* made those notations, or *when* they were made, the trial court would be authorized to reject this information as not "evidence" at all.

Nevertheless, the presence of a third party's fingerprints lack persuasive value. The crime lab technician examined "several" whiskey bottles in addition to the one on which two partial latent fingerprints were lifted, and the evidence before the court included the fact that William Hines "loved to give parties" and "would have people over all the time." Because a whiskey bottle is the type of object that one can reasonably expect to be handled by a number of people – especially at adult social gatherings in a town like New Orleans, which is known for its drinking – the presence of a third person's fingerprints on a whiskey bottle is far more of a *neutral* fact than a favorable one.

C. Cumulative analysis of withheld, favorable evidence.

Under Kyles v. Whitley, 514 U.S. 419 (1995), a "cumulative" analysis of favorable withheld material is required. This analysis, however, necessarily involves an item-by-item analysis. The item-by-item analysis is just the first step. After the item-by-item analysis has been conducted, the relevant items are viewed collectively, and the "net effect" of the items which are cumulated is the extent to which the whole is greater than the sum of its parts. See id. at 436 n. 10.

To be entitled to a new trial, the petitioner must show that "the evidentiary suppression 'undermines our confidence' that the factfinder would have reached the same result." Strickler v. Greene, 527 U.S. 263, 300-301 (1999). Accord Kyles, 514 U.S. at 435 (petitioner must "show[] that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

This necessarily entails a comparison of the evidence actually presented to the factfinder when the factfinder reached the result that it reached with the evidence discovered following the petitioner's conviction.

At the trial of this case, the petitioner did present evidence that the crimes had in fact been commited by a third party, namely, an unknown black male. The prosecution argued that the murders of Rodney Robinson and William Hines were committed by the same person. The petitioner accepted this theory and argued that the murders were committed by someone other than petitioner – namely, an unidentified black male. The petitioner adduced evidence that a black male was seen fleeing from the scene of the murder of Rodney Robinson shortly after the murder occurred and that a cap with a hair of negroid origin and the blood of Rodney Robinson was found near the body of Rodney Robinson. The petitioner further adduced evidence that his

confession must have been false because the details he admitted – namely, the detail concerning the semen on a discarded piece of paper near Robinson's bed – were physically impossible insofar as the semen found on the piece of paper came from a person with a different blood type thatn petitioner. The petitioner further noted that the pubic hair of negroid origin was found in the bed of William Hines. The petitioner himself took the stand and argued that the detectives had engaged in 'third degree' tactics and placed the words of the confession into his mouth. The petitioner argued that there was a common perpetrator based on the M.O., and that that perpetrator was a black male based on the unidentified negroid hair found at each crime scene and the description of the person seen fleeing from the scene of the murder of Rodney Robinson. The petitioner further argued that, since his confession to the murder of Rodney Robinson was demonstrably false, his confession to the murder of William Hines should be deemed incredible. The petitioner was convicted of the murder of William Hines, and his claims concerning the sufficiency of the evidence and the voluntariness of the confession were rejected by the Louisiana Supreme Court.

At the post-conviction hearing, the trial court found that the petitioner failed to produce suficient relevant, competent, or credible evidence to meet its burden of proof. This determination is supported by the record. With respect to the crime in which the petitioner was not convicted, the petitioner adduced evidence that additional hairs of negroid origin were found on the scene of the crime and an envelope with hand-written notes on it from which the petitioner claims a fingerprint analysis was conducted. With respect to the crime for which the petitioner was convicted, the petitioner relied upon handwritten notes from an unidentified person made at an unknown date – rather than on scientific testing that he could have had

performed – to attempt to demonstrate that a fingerprint comparison had occurred. The petitioner otherwise relied upon that which was not withheld (the statements of John Clegg, which were not communicated to Detective Dillmann), that which was not favorable (the existence of alternate suspects against whom no evidence existed) and that which the petitioner failed to establish was evidence at all (the "opinion" of Dr. Minyard).

Under Kyles v. Whitley, *supra*, the evidence to be viewed cumulatively is that which is suppressed and is favorable. Evidence which is not suppressed or is not favorable, and that which is not evidence at all, do not form a part of the cumulative materiality analysis.[10] The item-by-item analysis which is preliminary to the cumulation therefore involves the weeding out of claims that are not properly cumulated.

In this case, the evidence to be cumulated is the purported fingerprint analysis and the additional hairs from an unknown black man found at the scene of the Robinson murder. The factfinder at trial was presented with evidence that hair from an unknown black male was found at both crime scenes; the fact that more hair was found is, by definition, cumulative. Assuming that a fingerprint analysis occurred, the fact that a third person's fingerprints were found on one of several bottles of whiskey in the home of a person who frequently had social gatherings at his home has very little probative value. When this is added to the evidence of third-party guilt already adduced by the petitioner at trial, the case remains in the *same* light: the petitioner's confession and braggadociousness are to be weighed against ambiguous physical evidence

10 This Court explained in Kyles that "tte state's obligation . . . to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government." 514 U.S. at 421 (emphasis supplied). That which is cumulated is "all such evidence" (i.e., "evidence favorable to the defense") which has been "suppressed by the government." If evidence is not favorable to the defense, it is not "such evidence," and if it has not been suppressed by the government it has been "suppressed by the government." See, e.g., United States v. Sipe, 388 F.3d 471, 488 (5th Cir. 2004) ("Because Rodriguez's statements were neither suppressed nor favorable, they cannot be material under Brady and we will not factor them into our cumulative analysis of the impact of the various asserted Brady violations.")

suggesting third-party guilt. There is no reason to believe that "the factfinder would [not] have reached the same result." Strickler, *supra*.

The petitioner was properly denied relief because nothing in Brady v. Maryland or its progeny require that a petitioner be granted a new trial simply because the petitioner hopes a that a different factfinder, hearing substantially the same evidence, will reach a different result.

III. The actual innocence claim.

Because the petitioner has failed to undermine confidence in the outcome of the murder for which he was convicted, he has failed to establish that he is actually innocent. This case is thus not an appropriate vehicle for an explication of the law of "actual innocence".

CONCLUSION

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

Respectfully submitted,

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