No. _____

In the Supreme Court of the United States

John Floyd, Petitioner

v.

Burl Cain, Warden

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

Petition for a Writ of Certiorari

Emily Maw
Counsel of Record for Petitioner
Innocence Project New Orleans
3301 Chartres Street
New Orleans, LA 70117
Tel – 504 943 1902
Email – emilym@ip-no.org

L. Eades Hogue
Lemle & Kelleher, L.L.P
601 Poydras Street, 21st Floor
New Orleans, LA 70130
Tel – 504 584 9431
Email – ehogue@lemle.com

Questions Presented

In yet another *Brady* case from Orleans Parish, Louisiana, the State has withheld significant exculpatory evidence from a criminal defendant. The record in this case establishes a broad pattern of non-disclosure of fingerprint exclusions in Orleans Parish, which the state courts did not address. The *Brady* evidence in this case is only part of the evidence now known that, when viewed *in globo*, establishes that Mr. Floyd is factually innocent of the crime for which he has served 30 years of a life sentence. The following questions are presented:

I. Is Louisiana violating Mr. Floyd's right to due process by not vacating his conviction despite un-rebutted evidence, adduced during post-conviction proceedings, that the State withheld several pieces of exculpatory evidence that, collectively, undermine confidence in the outcome of his trial?

II. Given that the vast majority of states now bar the continued punishment of a convicted prisoner who has proved his factual innocence, is Louisiana's continued punishment of Mr. Floyd despite proof of his factual innocence a cruel and unusual punishment and a violation of his right to due process?

List of Parties

All parties appear in the caption of the case on the cover page.

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Opinions Below

The highest state court to review the merits of the issues presented in this petition was the Criminal District Court for Orleans Parish, Louisiana. The court issued an oral ruling from the bench. The minute entry recording the court's ruling is attached as Appendix A. The transcript of the ruling is attached as Appendix B.

Petitioner timely sought discretionary review in the Louisiana Supreme Court. Petitioner was convicted and sentenced prior to July 1, 1982, and, therefore, the Louisiana Supreme Court was the only state court with jurisdiction to review the district court's ruling. La. Const. art. 5, § 5(E). On May 20, 2011, the Louisiana Supreme Court voted by four votes to three not to review the district court's ruling. A copy of the decision is attached as Appendix D and was published as *Floyd v. Cain*, 62 So. 3d 57 (La. 2011).

Jurisdiction

Petitioner presented the constitutional issues raised in this petition in the district court and in his application for discretionary review attached as Appendix C. As noted above, his application for discretionary review was denied on May 20, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Introduction

John Floyd, a 62-year-old man with an IQ of 59, has served thirty years of a sentence of life without parole in Angola Prison, Louisiana, for a murder he did not commit. His petition for certiorari asks the Court to review the failure of the Louisiana courts to address and remedy one of the latest revelations of *Brady* violations from Orleans Parish, Louisiana, and the decision of the Louisiana courts to allow the State to continue punishing Mr. Floyd for a crime he has proved he is factually innocent of committing.

The *Brady* issue in this case is similar to that in *Smith v. Cain,* 79 U.S.L.W. 3696 (U.S. June 13, 2011) (No. 10-8145). Both are Orleans Parish cases in which the State withheld several pieces of favorable evidence and in both cases, once the evidence was discovered, the Louisiana courts failed, without explanation, to remedy the violation. In Mr. Floyd's case, the Louisiana Supreme Court voted 4-3 not to review the case, with one dissenting justice cogently articulating how the Constitution entitled Mr. Floyd to relief.

All four prosecutors from Mr. Floyd's trial have now stated that the main favorable evidence at issue—that the only fingerprints recovered from the murder scene excluded Mr. Floyd and the victim—should have been disclosed and, to the best of their knowledge, was not. Regrettably, the non-disclosure of the exculpatory evidence is consistent with the long history of *Brady* violations in Orleans Parish (thirty-two such cases are identified in this petition). In this case, evidence was presented of the structural inadequacies in the sharing of evidence between police

and prosecutors, which potentially led to violations of citizens' rights in many other cases. This evidence was ignored by the state courts. Granting certiorari in this case would complement this Court's recent grant of certiorari in *Smith*, by allowing the Court to consider the structural problems in Orleans Parish using evidence that is not before it in the *Smith* case. Alternatively, due to the similarities between the two cases, this Court should at least grant certiorari, vacate Mr. Floyd's conviction and remand this case for proceedings consistent with the eventual outcome in *Smith*.

Underlying the *Brady* claim in this case is the fact that Mr. Floyd has adduced determinative evidence that he is innocent of the murder for which he was convicted; yet Louisiana continues to incarcerate him, in violation of his Eighth and Fourteenth Amendment rights, and will do so for the rest of his life if no federal court intervenes.

It is over eighteen years since this Court addressed whether punishing a convicted prisoner who has presented new evidence of factual innocence violates due process or is a cruel and unusual punishment. *Herrera v. Collins*, 506 U.S. 390 (1993). Since that time, the spread of DNA testing and hundreds of post-conviction DNA exonerations have caused a change in the socio-legal context. This sea change significantly undermines the assumptions on which the *Herrera* opinion was premised. The consequent overwhelming trend towards states allowing relief at any time for prisoners with new evidence of factual innocence, as well as confusion caused by *Herrera* in the lower courts, necessitates that this Court should revisit

the issue. This case provides an ideal vehicle to do so. The evidence of innocence in the record is clear. And, by granting certiorari from a state court ruling, this Court can squarely address the fundamental issue without the constraints of 28 U.S.C. § 2254(d) that would apply if the case arose through a federal habeas application.

Statement of Case

Mr. Floyd was charged with two strikingly similar murders that occurred in New Orleans during the week of Thanksgiving, 1980. William Hines was murdered in his home at 629 Governor Nicholls in the French Quarter. (Ex. 1.)[1] A second man, Rodney Robinson, was murdered later the same week at the Fairmont-Roosevelt Hotel just outside the French Quarter. (Ex. 2.) The two murders occurred only three days apart, barely a mile from each other. Significantly, both victims were homosexual men. (Ex. 3 at 3-4; Ex. 4 at 5.) The two men were murdered in the early hours of the morning in their bedrooms. (Ex. 1; Ex. 2.) Neither scene showed signs of forced entry. (Ex. 3 at 3; Ex. 4 at 5.) Both men were attacked in bed with a knife. (Ex. 3 at 3-6; Ex. 4 at 5-7.) Both men were stabbed several times and suffered stab wounds to the neck and torso. (Id.) Pubic hairs of Negroid origin—which did not come from the victims—were found in both beds. (Ex. 15; Ex. 17; Ex. 18; Ex. 40.) Finally, two half-filled glasses of whiskey were found at both murder scenes, leaving

[1] Citations in the form (Ex. #) refer to exhibits entered at Mr. Floyd's post-conviction hearing. Citations in the form ([DATE] Tr. #) refer to transcripts of proceedings in the state district court.

the conclusion that the killer had shared a drink of whiskey with each of his victims before striking. (Ex. 5 at 3; Ex. 6 at 4.)

Detective John Dillmann of the New Orleans Police Department (NOPD),[2] assigned to investigate the Hines murder, quickly concluded that the murders were "done by one and the same person." (7/17/81 Tr. 60.) After processing the two crime

[2] Since Mr. Floyd's conviction, Det. Dillmann's conduct has been questioned in a number of cases. This Court's decision in *Kyles v. Whitley* directly involved misconduct by Det. Dillmann. Specifically, in *Kyles*, this Court opined that withheld evidence could have been used to "sully the credibility of Detective Dillman [sic]." *Kyles*, 514 U.S. 419, 447 (1995). The Court also held that, but for the withheld evidence, "[t]he jury would have been entitled to find . . . that the lead police detective who testified [Dillmann] was either less than wholly candid or less than fully informed." *Id.* at 453. Dillmann was also the lead detective in another case in which the conviction was reversed due to the State's suppression of favorable evidence that Dillmann gathered during his investigation. *State v. Knapper*, 579 So. 2d 956 (La. 1991). Dillmann was also the lead interrogator in a case in which a confession was suppressed because, "[a]t the least, the evidence preponderately establishes that [the defendant] was beaten." *State v. Seward*, 509 So. 2d 413, 418 (La. 1987). The Orleans Parish District Attorney's Office was employing Dillmann as an investigator at the time of Mr. Floyd's evidentiary hearing. The fact that the published opinions documenting Dillmann's misconduct did not disqualify him from this employment is consistent with the broad problems in Orleans Parish discussed below.

scenes, the evidence known to the police suggested that the same person—an unknown black man[3]—had committed both crimes:

(1) Negroid pubic hairs were found in Mr. Hines's bed. (Ex. 40.) Mr. Hines was white. (Ex. 1.)

(2) A friend of Mr. Hines told Det. Dillmann that Mr. Hines had a sexual preference for black men. (Ex. 21.) (This information was withheld from the defense at trial.)

(3) A Negroid hair was found in a blood-stained cap outside the hotel room in which Mr. Robinson was stabbed. Mr. Robinson was black, but forensic hair analysis determined that the hair did not come from Mr. Robinson. (Ex. 6 at 6; Ex. 10; 1/5/82 Tr. 196.)

(4) The security guard at the Fairmont-Roosevelt hotel witnessed a black man running from the service elevator immediately after Mr. Robinson was murdered. (Ex. 4 at 12.) The security guard reported that the man was not wearing a hat. (1/5/82 Tr. 224.) The detective who interviewed her believed she had "witnessed the perpetrator of the Robinson murder making good his escape." (Ex. 4 at 13.)

Nevertheless, two months later, Det. Dillmann found John Floyd—a white man—in a bar, bought him at least one beer, took him to police headquarters and interrogated him about both crimes.[4] (1/5/82 Tr. 264-65, 356.) Within a few hours,

[3] Many pieces of evidence from different sources point to a black male perpetrator. Due to the different techniques used by some forensic analysts, different terminology may be used to describe this evidence (*e.g.*, a hair analyst may describe a hair as Negroid whereas a geneticist may describe it as consistent with someone who describes themselves as being of African/African-American ethnicity).

[4] Dillmann had apparently been persuaded that Mr. Floyd might be a suspect, in spite of the physical evidence implicating a black man, by a tip from Gerald Griffin. Griffin had been drinking with John Floyd the weekend after the murders. (1/5/82 Tr. 95.) He told

John Floyd had signed remarkably similar typed confessions to both crimes. (Ex. 8; Ex. 9.) The confession to the Hines murder also contains a summary confession to the Robinson murder. The confessions contain many of the hallmarks of false confessions and are notable for their brevity and implausibility. They contain no information about the crimes that the interrogating police did not already know.[5] John Floyd was then charged with both murders.

After Mr. Floyd was charged, serology testing on the Robinson crime scene evidence *excluded John Floyd*. It showed that semen left on anal swabs taken from Mr. Robinson's body and a napkin that had been found on the floor near the bed came from a person with type A blood. (1/5/82 Tr. 197, 215.) Rodney Robinson had type O blood and John Floyd had type B. (1/5/82 Tr. 196, 213, 238.) Nevertheless, the State continued to prosecute Mr. Floyd for both murders, which were tried together.

The prosecution's case at trial depended on the confessions. The State also alleged that Mr. Floyd had made drunken references to the crimes some time before his arrest. Stephen Edwards, a friend of one of the investigating officers, testified to the only such alleged reference to the Hines homicide. (7/17/81 Tr. 46-47.) He stated

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police that Mr. Floyd had talked about needing to go to a detoxification center and that he had mentioned the stabbing at the Fairmont Hotel (which was front-page news at the time). Griffin thought there was a "one in a million" chance his information was relevant. (4/28/81 Tr. 14; 1/5/82 Tr. 49-51.)

[5] A full list of all the problems with the confession that are now known is on pages 25-26.

the reference occurred during an argument Edwards instigated with Floyd outside Edwards's French Quarter bar. (1/5/82 Tr. 55.) He testified that he, not Floyd, was the first person in the argument to refer to Mr. Hines. (1/5/82 Tr. 55-56.) Mr. Floyd's defense was that someone else must have committed the crimes. He argued his confessions were coerced and presented the exculpatory physical evidence. Confronted with the hair evidence suggesting a black perpetrator of the Hines homicide, Det. Dillmann testified that it did not "indicate" he should be looking for a black suspect because he had learned Mr. Hines had "sexual activities with both black and white males." (1/5/82 Tr. 114.) Strangely, and despite the evidence of a common perpetrator, the trial judge, sitting without a jury, convicted Mr. Floyd of the Hines homicide and acquitted him of the Robinson homicide. Mr. Floyd received the mandatory sentence of life without parole. His appeal to the Louisiana Supreme Court was denied on June 27, 1983. *State v. Floyd*, 435 So. 2d 992.

Innocence Project New Orleans (IPNO)[6] began investigating Mr. Floyd's case, believing it was a case in which DNA testing could be performed on the evidence from the Hines crime scene. However, testable evidence from the Hines scene was apparently destroyed years ago. IPNO therefore did as much additional investigation into both homicides as possible. Evidence in the Robinson homicide remains relevant to the Hines case under the reasoning of a "reverse 404(b)" theory:

[6] Innocence Project New Orleans is a non-profit law office that investigates cases of wrongful conviction and represents indigent, life-sentenced prisoners with provable claims of factual innocence in Louisiana and Mississippi. It was established in 2001.

it establishes Mr. Floyd is innocent of a strikingly similar crime to that he was convicted of. And, because Mr. Floyd confessed to both crimes, evidence that he is innocent of the Robinson homicide is also proof that he falsely confessed to that murder during the interrogation by Det. Dillmann for both crimes. IPNO's investigation included DNA testing on the Robinson crime scene evidence and extensive documents and witness research on both crimes. This was hampered by the fact Det. Dillmann illegally removed the case files on each homicide from the NOPD and stored them in his home until they were destroyed in Hurricane Katrina. (Ex. 29.) Nonetheless, the investigation yielded significant new evidence, much of which was withheld by the State at trial.

As a result of its investigation, on March 2, 2006, IPNO filed Mr. Floyd's first state post-conviction application. On July 9, 2009, the application was amended and supplemented. Among other things, the application alleged that Mr. Floyd's conviction violated the Fourteenth Amendment to the United States Constitution due to the State's failure to disclose favorable evidence. It also alleged his continued punishment violated the Eighth and Fourteenth Amendments due to new evidence that, when viewed in light of the record as a whole, proved his factual innocence.

On February 19, 2010, the district court held a hearing on the merits of Mr. Floyd's claims. Counsel for Mr. Floyd presented five witnesses and forty exhibits

that established, among other things, that the following favorable information was withheld during Mr. Floyd's trial:[7]

(1) Mr. Floyd and the respective victims were excluded as the source of fingerprints found on the whiskey bottle at the Hines scene, the whiskey glasses at the Robinson scene, and the passenger side of Mr. Robinson's car.[8] (Ex. 5; Ex. 6; Ex. 13; Ex. 14.) This was proved by analyst's notes listing the prints and stating "NOT VICTIM" and "NOT JOHN FLOYD" which were admitted by stipulation agreed prior to the post-conviction hearing. (Ex. 13.) An NOPD records technician testified the notes had been found in the NOPD Latent Print Unit's records and provided to IPNO. (2/19/10 Tr. 20-21). The State confirmed these notes were not in the District Attorney's Office's files on the cases. (10/20/08 Tr. 7.) Affidavits from all four trial prosecutors, admitted by stipulation, stated they were unaware of the notes and, had they been aware of them, they would have disclosed them. (Ex. 24; Ex. 25; Ex. 26; Ex. 27.)

(2) Mr. Hines's close friend John Clegg told Det. Dillmann that Mr. Hines's "taste was for black men." (Ex. 21.) This was proved by Mr. Clegg's sworn statement which was admitted by stipulation.[9] Mr. Clegg did not testify at trial and, in his testimony and report, Det. Dillmann misstated the information Mr. Clegg provided to him. (1/5/82 Tr. 114; Ex. 3; Ex. 21.)

(3) The police initially pursued two black male suspects. This was proved by Det. Dillmann's post-trial interview for an unaired documentary, the book he wrote about the case, and also the notes obtained from the Latent Print Unit. (Ex. 11; Ex. 13; Ex. 28; Ex. 38.) The interview transcript was admitted by stipulation, the book was admitted during Det. Dillmann's hearing testimony, and the notes were admitted as described above. (2/19/10 Tr. 85.)

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[7] All the favorable information listed was not contained in the State's discovery responses or mentioned at trial. (1/5/82 Passim; Ex. 32; Ex. 35.)

[8] The prints from each scene are unsuitable for cross comparison as they are not from the same part of the same digit.

[9] Mr. Clegg resides in Germany. Floyd was denied funds to have him travel to New Orleans to provide live testimony

(4) The coroner who performed a "preliminary examination" of Mr. Hines at the scene formed an opinion based on the placement of Mr. Hines's wounds that his killer may have had "medical knowledge." (Ex. 3 at 3; Ex. 23; Ex. 34.) The transcript of the post-trial interview in which the coroner provided this opinion was admitted by stipulation (Ex. 23). And, the coroner provided an affidavit confirming the opinion he stated. (Ex. 34.) The State conceded the coroner's opinion was not disclosed at trial. (9/4/09 Tr. 22-23, 29.)

In addition to the withheld evidence, Mr. Floyd also presented other evidence of innocence:

(5) Recently conducted mitochondrial DNA testing excludes Mr. Floyd as the source of all eleven hairs found in the bed Mr. Robinson was killed in. (Ex. 15.) The results are consistent with two people of African ethnicity having shared the bed (presumably Mr. Robinson and his killer).[10] (Ex. 18.) (These reports were admitted by stipulation.) The existence of pubic hairs in the bed at the Robinson scene was kept from the defense at trial, so the hairs could not be cross-compared with the Negroid pubic hairs found in the bed at the Hines scene. (1/5/82 Tr. 341.)

(6) A recent examination by a forensic psychologist determined Mr. Floyd has an IQ of 59, the reading and comprehension abilities of a 7 – 8 year old, and a suggestible personality type. (Ex. 20.) The psychologist testified to these findings at the post-conviction hearing. (2/19/10 Tr. 39-58.) Mr. Floyd's mental attributes combine to make him abnormally susceptible to giving a false confession while in police custody, an attribute he is proven to possess since he signed two false confessions to the Robinson murder.

At the conclusion of the post-conviction hearing, the trial court deliberated for fifteen minutes and then issued the following ruling:

> Ms. Maw and Mr. Park, you did a good job. Ms. Andrieu, you did a good job as well.

[10] Initially, counsel intended to obtain STR DNA testing on the biological evidence from the Robinson crime scene with the intention of obtaining a profile that would be suitable for a comparison in the FBI's CODIS database. However, the condition of the evidence made that impossible, and so the only possible testing was mitochondrial DNA testing of the hairs taken from the bed where Mr. Robinson was killed. (Ex. 16.)

> Based upon the evidence and testimony presented during this hearing, the Court finds the defendant in this matter, Mr. John Floyd, his failed to meet his burden of proof required in his Post-Conviction Application [sic]. Accordingly, sir, at this time, your application is denied. We'll note the Defense's objections, and let the Appellate process begin. Good luck.

(Appendix A; Appendix B.) Mr. Floyd filed an application for supervisory writs in the Louisiana Supreme Court, which incorporated the constitutional issues raised in this application. (Appendix C.) It was summarily denied by four of the seven justices on May 20, 2011. (Appendix D.) Three justices dissented, with one writing separately as follows:

> In my view, the exculpatory value of the fingerprint evidence is sufficient to undermine confidence in the outcome of Floyd's trial, thus satisfying the requirements for a new trial set forth in *Brady v. Maryland*. . . .
>
> Considering all of the evidence, including Floyd's false confession to the murder of Robinson, Floyd's low IQ and susceptibility to suggestion, the missing police records, the lack of evidence linking Floyd to the murder of Hines, the exculpatory value of the fingerprint evidence, defendant is entitled to a new trial.

(Appendix E.) This petition ensues, seeking judicial relief of constitutional violations.

Argument

I. The Failure to Disclose Favorable Evidence

A. The withheld favorable evidence undermines confidence in the outcome of Mr. Floyd's trial.

Mr. Floyd clearly met his burden in state court under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. No state court gave any reasons for denying his

claim. It is therefore unclear on what basis it was denied or how the state courts could have done so while following this Court's precedents.

The State's evidence in the Hines case was weak at trial; it was less than the evidence in the Robinson case, and Mr. Floyd was acquitted of that crime. There was also exculpatory evidence at trial in the Hines case—the Negroid pubic hairs in Mr. Hines's bed. In light of the evidence at trial, the withheld evidence undermines confidence in the outcome.

The withheld fingerprint comparison results from the Hines scene are highly exculpatory. There were two used whiskey glasses at Mr. Hines's apartment and a used whiskey bottle on the kitchen table. (Ex. 5 at 3.) Otherwise, Mr. Hines's apartment was "in perfect order" and "immaculate." (Tr. 92.) Because there were half-filled whiskey glasses at both the Robinson and Hines scenes, the police concluded that the killer had shared a glass of whiskey with each of his victims before stabbing them; they considered this one of the signature aspects of the two crimes. (Ex. 11 at 3; Ex. 38 at 14, 50-51.) The glasses and bottle were the only items dusted for prints at the Hines scene. (Ex. 5 at 3.) No evidence was presented at trial concerning fingerprints lifted. No prints of value were obtained from the glasses, but the previously undisclosed analyst's notes establish that two partial latent prints were lifted from the whiskey bottle in the kitchen and, when they were compared to John Floyd and the victim, the results were "NOT VICTIM" and "NOT JOHN FLOYD." (Ex. 13.)

Mr. Hines drank whiskey with his killer. The State's case was that Mr. Floyd was this killer. However, someone else left the prints on the whiskey bottle from which Mr. Hines and his killer poured a drink before the killer struck. Mr. Floyd has consistently maintained someone else killed Mr. Hines. He should have been able to support this argument at trial with the print comparison results. All four trial prosecutors agree, as they attested they would have disclosed the evidence if aware of it. Louisiana prosecutors frequently use comparable fingerprint comparison results to convict.[11]

The prints from the Robinson scene were found on the passenger side of Mr. Robinson's car, in which he was last seen, and on one of two half-filled whiskey glasses that the killer drank from immediately before striking, which were in Mr. Robinson's room. These were also highly exculpatory because they strongly support Mr. Floyd's defense that someone else committed both of these crimes. The evidence about Mr. Hines's taste in men corroborates the other evidence of a black male perpetrator and directly impeaches Dillmann's trial testimony that he had learned

[11] *See State v. Carmouche*, 508 So. 2d 792 (La. 1987) (State's evidence included fingerprint on check found in murder victim's home); *State v. Whitaker*, 489 So. 2d 998 (La. Ct. App. 1986) (State's evidence included fingerprint on whiskey bottle at murder victim's home); *State v. Divers*, 889 So. 2d 335 (La. Ct. App. 2004) (State's evidence included fingerprints found on drinking glass, beer can and juice bottle at murder victim's home); *State v. McFadden*, 476 So. 2d 413 (La. Ct. App. 1985) (State's evidence included fingerprint on drinking glass at murder victim's home); *State v. Parker*, 696 So. 2d 599 (La. Ct. App. 1997) (State's evidence included fingerprint on paper found at murder scene).

Mr. Hines was "very indiscriminate" and had "sexual activities with both black and white males." (1/5/82 Tr. 114.) The evidence that police pursued black male suspects also supports the other evidence of a black male perpetrator of both crimes and impeaches Det. Dillmann's testimony that the crime scene evidence did not "indicate" he should be looking for a black male perpetrator. (Id.) The evidence that the perpetrator may have had medical knowledge also weighs in Mr. Floyd's favor as he has no such knowledge and lacks the capacity to obtain such knowledge. (Ex. 20.)

All the withheld evidence must, of course, be considered collectively. *Kyles*, 514 U.S. at 436. The only state court judge to explain his or her opinion on the *Brady* claim dissented from the majority's ruling and concluded Mr. Floyd was entitled to a new trial on the basis of this claim. Due to the withheld evidence, there can be no confidence in the verdict in the Hines case.

B. The failure to disclose favorable evidence is a common problem in Orleans Parish.

1. The evidence of systemic problems presented in this case

The evidence presented to the state courts establishes not only that exculpatory evidence was withheld in this case; it also reveals broad, systemic problems that make it likely that favorable print comparison results have been withheld from defendants in many other cases.

At Mr. Floyd's evidentiary hearing, Glenn Burmaster, an employee of the District Attorney's Office and a 27-year veteran of the NOPD Latent Print Unit, testified that "a report was not generated every time the prints were not identified,

or identified." (2/19/10 Tr. 179.) Jack Peebles, a former Assistant District Attorney (ADA) who had been Chief of Trials and First Assistant, stated "[a]t the time that the case went to trial it was possible for the NOPD to have information about a case that was not transmitted to the District Attorney's Office . . . . It was not the regular practice of ADA's at the time to seek out information from the NOPD that was not provided to them." (Ex. 24.) David Plavnicky, a former ADA, stated that "the documents I was shown [the analyst's notes] did not look like something I had ever seen. To the best of my recollection, non-matching prints would mostly not be reported to the District Attorney's Office." (Ex. 25.) Kendall Green, a former ADA, stated "[i]t is my recollection that when I was an assistant district attorney the New Orleans Police Department did not provide the District Attorney's Office with log books and envelopes or copies of them. I have no recollection of ever seeing documents like [the analyst's notes]. Additionally, to the best of my memory, the New Orleans Police Department Latent Print Unit only produced reports if they matched prints to a suspect and information on unidentified prints would not be turned over to the District Attorney's Office." (Ex. 26.)

This evidence gives a clear and consistent picture of defendants not being informed they had been excluded as the source of crime scene fingerprints collected by the NOPD. This could impact a significant number of cases. However, the State's lackluster response and the inaction of the state courts have caused nothing to be done to address the broad problem discovered during this litigation. In 1995, in a case from Orleans Parish, this Court made clear that prosecutors must ensure

police provide them with favorable evidence. *Kyles*, 514 U.S. at 438. The Orleans Parish District Attorney has since testified that he "was satisfied with his Office's practices and saw no need, occasioned by *Kyles*, to make any changes." *Connick v. Thompson*, 131 S. Ct. 1350, 1382 (2011) (Ginsburg, J., dissenting). The record in this case makes clear that the non-disclosures in *Kyles* were not a freak occurrence. The District Attorney's acceptance of constitutionally impermissible prosecutorial practices should not be judicially condoned.

2. Orleans Parish's troubling record of *Brady* violations

Criminal justice agencies in Orleans Parish have a troubling record of withholding exculpatory evidence. Undersigned counsel is aware of thirty-two documented cases of the violations of *Brady* in Orleans Parish.[12] These exclude

[12] **Michael Andersen**, Gwen Filosa*, Suspect in 5 Murders Will Face Trial Again*, Times-Picayune, July 31, 2010, at B03; **Dan Bright**, *State v. Bright*, 875 So. 2d 37 (La. 2004); **Greg Bright***,* Michael Perlstein, *Open to Appeal; Convicted criminals Say DA Policy Change Gives Them Fair Shot*, Times-Picayune, July 20, 2003, at 1 (National); **James Carney**, *State v. Carney*, 334 So. 2d 415 (La. 1976); **Norman Clark**, *Clark v. Blackburn*, 632 F.2d 531 (5th Cir. 1980) (State sent defense witnesses out of state to avoid process); **Shareef Cousin**, *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *see also*, *In re: Jordan*, 913 So. 2d 775 (La. 2005); **Larry Curtis**, *State v. Curtis*, 384 So. 2d 396 (La. 1980); **Linroy Davis**, *Davis v. Heyd*, 479 F.2d 446 (5th Cir. 1973); **Calvin Duncan**, *Duncan v. Cain*, No. 290-908 (Orleans Parish Jan. 7, 2011) (on file with Orleans Parish Criminal District Court); **Floyd Falkins**, *State v. Falkins*, 356 So. 2d 415 (La. 1978); **Roland Gibson**, Dan Bennet, *Jailed Man Granted New Trial in '67 Murder Sues the State*, Times-Picayune, Feb. 17,

1993, at B1; **Norris Henderson**, *State v. Henderson*, 672 So. 2d 1085, 1087 (La. Ct. App. 1996) (prior *Brady* reversal referred to in procedural history); **Isaac Knapper**, *State v. Knapper*, 579 So. 2d 956 (La. 1991); **Curtis Lee Kyles**, *Kyles v. Whitley*, 514 U.S. 419 (1995); **Dwight Labran**, Keith Pandolfi, *Innocence Project New Orleans Investigates Suspected Cases of Wrongful Convictions*, New Orleans City Business, Jan. 13, 2003 (News); **Eugene Lindsey**, *State v. Lindsey*, 844 So. 2d 961 (La. Ct. App. 2003); **Raymond Lockett**, *Lockett v. Blackburn*, 571 F.2d 309 (5th Cir. 1980) (State sent defense witnesses out of state to avoid process; case remanded to hear witness testimony); **David Mahler**, *Mahler v. Kaylo*, 537 F.3d 494 (5th Cir. 2008); **Arthur Monroe**, *Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979); **Ronald Monroe**, *Monroe v. Blackburn*, 748 F.2d 958 (5th Cir. 1984) (State found to have violated *Brady* but new trial not granted due to timing of violation); **Alfred Oliver**, *State v. Oliver*, 682 So. 2d 301 (La. Ct. App. 1996); **Wilbert Parker**, *State v. Parker*, 361 So. 2d 226 (La. 1978); **William Perkins**, *State v. Perkins*, 423 So. 2d 1103 (La. 1982); **Stephen Rosiere**, *State v. Rosiere*, 488 So. 2d 965 (La. 1986); **Tyrone Smith**, *State v. Smith*, 591 So. 2d 1219 (La. Ct. App. 1991); **John Thompson** (armed robbery), *State v. Thompson*, 825 So. 2d 552 (La. Ct. App. 2002) (prior *Brady* reversal referred to in procedural history); **John Thompson** (first-degree murder), *id.*; **Earl Truvia**, Perlstein, *supra*; **Troy Wilkerson**, *Smith*, 591 So. 2d 1219 (La. Ct. App. 1991); **Hayes Williams**, William Pack, *Prison Reformer Faces Challenge of Freedom*, The Advocate (Baton Rouge), May 16, 1997; **Calvin Williams**, *In re: Williams*, 984 So. 2d 789 (La. 2008) (prior *Brady* reversal referred to in procedural history); **Michael Williams**, *Williams v. Butler*, 2:88-cv-05718-PEC (E.D. La. Mar. 11, 1992) (on file with National Archives).

cases in which the court found that the prosecution had withheld significant favorable evidence but found it did not amount to a *Brady* violation. *E.g.*, *State v. Walter*, 675 So. 2d 831 (La. Ct. App. 1996) (State withheld that no secretor activity detected in evidence left by perpetrator; defendant was secretor). There are likely numerous other *Brady* violations that cannot be identified; "many *Brady* violations are not uncovered until years after the event, if they are ever uncovered." *Thompson v. Connick*, 578 F.3d 293, 313 n. 1 (5th Cir. 2009) *rev'd* 131 S. Ct. 1350.

3. Many cases, including this case, show Orleans Parish and the Louisiana courts need instruction concerning *Brady*.

As detailed above, there is a clear history of *Brady* violations in Orleans Parish and significant evidence that favorable fingerprint comparison results were routinely withheld at trial. The problems with evidence-withholding date back decades but continue to this day. They stem from a fundamental miscomprehension of the law.

For example, in its most recent filing in this case, the Orleans Parish District Attorney's Office argued "[u]nder Brady, the prosecution must produce evidence favorable to an accused *upon request*, where the evidence is material to either guilt or punishment of the accused." *State's Opposition* at 4, *Floyd v. Cain*, 62 So. 3d 57 (La. 2011) (emphasis added). However, the State's duty to disclose material evidence *regardless of a request from the defense* has been law for 35 years. *United States v. Agurs*, 427 US 97 (1976). The erroneous belief that the prosecution's *Brady* obligation is triggered by the defense dates back to at least the office's 1987 policy

manual. *Thompson v. Connick*, No. 03-CV-2045, 2005 U.S. Dist. LEXIS 36499, *31-32 (E.D. La. Nov. 15, 2005) *rev'd* 131 S. Ct. 1350. This legal error was not isolated.

In an earlier filing in this case, the same office argued that a *Brady* violation only occurs when the withheld evidence "would have altered the outcome of the trial." *State's Response* at 7, *Floyd v. Cain*, No. 280-729 (Orleans Parish Feb. 19, 2010). However, this Court has clearly held a different standard is the law. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." *Kyles*, 514 U.S. at 434.

Similarly, in *Smith v. Cain*, the State argued "the mere aggregation of individually meritless suggestions cannot prove, as the Petitioner claims, a cognizable violation of *Brady*, *Napue*, or *Giglio*." *Brief of Respondent* at 1, *Smith*, No. 10-8145. However, this Court has held in another case *from Orleans Parish* that "suppressed evidence [must be] considered collectively, not item by item." *Kyles*, 514 U.S. at 436.

This fundamental misunderstanding of *Brady* by the District Attorney's Office is also apparent at the trial level. In *State v. Anderson*, a recent death penalty case, prosecutors withheld a tape of a witness's statement that heavily impeached her trial testimony because "prosecutors only found the tape after the August trial," *but prosecutors had watched the witness give the taped statement*. *See* Filosa, *supra* n. 12. The prosecutors' actions evidence a belief that they can withhold

the substance of a key witness's inconsistent statement, of which they have direct knowledge, because the physical recording of the statement itself is missing.

To compound the problem, pre-trial discovery in Orleans Parish is not an adequate safeguard against evidence being withheld. In an Orleans Parish case, the Louisiana Supreme Court recently ruled that the trial court could not hold a hearing on a possible pre-trial *Brady* issue because the defendant had not shown "that a miscarriage of justice is bound to occur." *State v. Anderson*, 56 So. 3d 236, 237 (2011). On the basis of this ruling, Orleans Parish prosecutors recently argued that a court "lacks the authority to overrule" the State's decisions on pre-trial disclosures in any case. *Writ Application* at 10, *State v. Browder*, 2011-K-528, (La. App. 4 Cir. May 12, 2011).

The District Attorney has recently stated "[h]e wants his cadre of mostly young prosecutors to take the bulk of cases that police send their way . . . . 'We're going to take our shots in cases where we believe someone has committed a felony . . . . Even if we have an eyewitness and no supporting evidence, we will take a chance.'" John Simerman, *New Orleans Juries Aren't Voting 'Guilty' Too Often, Analysis Shows*, Times-Picayune, July 17, 2011. The office prosecutes 3,000 criminal cases at any one time. *Id.* These cases are developed by the NOPD, a police department that has an unfortunate and unforgivable history of choosing not to respect defendants basic constitutional rights and the rule of law.[13]

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[13] *See* Department of Justice, Civil Rights Division, *Investigation of the New Orleans Police Department*, March 17, 2011, *available at* http://www.justice.gov/crt/about/spl/

The Louisiana Supreme Court is also not adequately addressing *Brady* errors when they surface after conviction. In this case and in *Smith*, the Court summarily refused to review a trial court's unexplained oral denial of a substantial *Brady* claim. *Floyd v. Cain*, 62 So. 3d 57 (2011); *State v. Smith*, 45 So. 3d 1065 (La. 2010). The Fifth Circuit recently reversed the Louisiana Supreme Court's denial of a *Brady* claim because the standard it applied was "not the proper legal standard." *Lacaze v. Warden*, No. 08-30477, 2011 U.S. App. LEXIS 13242, *19 (5th Cir. June 29, 2011).

In sum, the NOPD cannot be trusted to provide *Brady* material to prosecutors, prosecutors cannot be relied on to understand when they must provide such material to the defense, discovery proceedings as applied by the state courts are inadequate to ensure such material is disclosed, and the state courts have proved ineffective in addressing *Brady* violations when they do come to light. The circumstances are a recipe for widespread violations of citizens' rights by all the branches of the criminal justice system that operate as the State of Louisiana. This Court should grant certiorari, not only to do justice in this case, but also to give the Orleans Parish District Attorney's Office and Louisiana courts guidance on how to apply the Constitution in thousands of pending cases. Due to the evidence in the

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nopd_report.pdf. *See also* Brendan McCarthy, *New Orleans is at the center of a key federal pursuit*, Times-Picayune, August 8, 2011; Laura Maggi & Brendan McCarthy, *Danziger Bridge guilty verdicts are another strike against New Orleans police*, Times-Picayune, August 5, 2011.

record in this case of a far-ranging systemic problem, a grant of certiorari in this case would complement this Court's grant of certiorari in the similar *Smith* case.

II. The Innocence Issue

A. The record presented to the state courts establishes Mr. Floyd is factually innocent.

The facts of both the Robinson and Hines cases establish Mr. Floyd's innocence of the Hines murder. All of the evidence in both cases should be considered, consistent with this Court's precedent that an innocence enquiry should be based on "all the evidence, old and new, incriminating and exculpatory." *House v. Bell*, 547 U.S. 518, 538 (2006).

The exculpatory evidence in the Robinson case is as follows. A person—not John Floyd or the victim—left fingerprints on the passenger side of the car in which Mr. Robinson was last seen alive shortly before his death. (Ex. 13; Ex. 14.) A person—not John Floyd or the victim—left fingerprints on one of the two whiskey glasses in the hotel room in which the victim was attacked. (Ex. 6; Ex. 13.) A person of African ethnicity—not John Floyd or the victim—left pubic hairs in the bed in which the victim was attacked. (Ex. 15; Ex. 17; Ex. 18.) A person—not John Floyd or the victim—left semen on a tissue found on the floor of the room in which the victim was attacked and on the victim's person. (1/5/82 Tr. 196-97, 213, 215, 238.) A person—not John Floyd or the victim—left a Negroid head hair in a cap stained with blood of the victim's type that was found in the corridor outside the room in which the victim died. (1/5/82 Tr. 196; Ex. 6 at 6; Ex. 10.) A black man who was not

wearing a hat—not John Floyd—was seen fleeing the hotel in which the victim was killed around the time Mr. Robinson was murdered. (1/5/82 Tr. 224.)

The exculpatory evidence in the Hines case is as follows. The crime appeared to have been committed by the person who later in the same week killed Rodney Robinson. Mr. Hines, like Mr. Robinson, was apparently killed by a man he picked up for sex, but Mr. Hines's taste was for black men, and Mr. Floyd is white. (Ex. 21.) A person—not John Floyd or the victim—left fingerprints on a whiskey bottle from which two glasses of half-drunk whiskey had been poured and left at the scene. The bottle was on the kitchen table in the victim's otherwise-immaculate apartment. (Ex. 15; Ex. 13.) A person—not John Floyd or the victim—left Negroid pubic hairs in the bed in which the victim was attacked. (Ex. 40.) The victim's wounds establish he may have been killed by someone who, unlike Mr. Floyd, had medical knowledge. (Ex. 34.)

No physical evidence linked Mr. Floyd to either crime scene, and all the exculpatory evidence listed above is consistent with the same black man having killed both victims.

Mr. Floyd was convicted of the Hines murder because of his confession. But there is significant evidence now suggesting it was a false confession. That evidence is as follows: Mr. Floyd's confession to the Hines murder contained a confession to the Robinson murder, and he also signed a separate confession to the Robinson murder during the same interrogation. (Ex. 8; Ex. 9.) Because Mr. Floyd was innocent of the Robinson murder, we know he falsely confessed twice in the same

police interview, including once during his confession to the Hines murder. Mr. Floyd has an IQ of 59 and a suggestible personality, making him abnormally vulnerable to falsely confessing while in police custody. (2/19/10 Tr. 39-58; Ex. 20.) Mr. Floyd had been drinking, and Dillmann bought him at least one drink before the interrogation. (1/5/82 Tr. 264-65, 356.) Mr. Floyd's written confession was typed by the police, and he was unable to read it at trial. (1/5/82 Tr. 327.) Mr. Floyd's confession contains no information about the crime that was not already known to the police. (Ex. 8.) Mr. Floyd's confession lacks information that the perpetrator would know but the police did not, such as what happened to the murder weapon and the exact date of the crime. (Id.) The information in Mr. Floyd's confession that the State argued corroborated it all concerns the layout of the crime scene, but Mr. Floyd was shown crime scene photos during his interrogation. (1/5/82 Tr. 117-21; 2/19/10 Tr. 58; Ex. 11 at 9; Ex. 38 at 192.) Mr. Floyd has consistently testified he was physically coerced into signing both confessions (7/17/81 Tr. 145-55, 175; 1/5/82 Tr. 266-77.). Det. Dillmann has been found by the Louisiana Supreme Court to have used physically coercive interrogation techniques on a suspect. *See* n. 2.

Since the verdict at trial, the State has never articulated a theory explaining the evidence in the Hines and Robinson cases. It has tried to ignore the Robinson case, so it is unclear whether its theory is that Mr. Floyd is guilty of both murders or just the Hines murder. The only plausible theory is that Mr. Floyd is innocent of both murders. Any theory based on Mr. Floyd having killed both victims is implausible because of the wealth of exculpatory evidence in the Robinson case and

the significant exculpatory evidence in the Hines case. Any theory based on Mr. Floyd having killed Mr. Hines but not Mr. Robinson is implausible because, in addition to its inconsistency with the significant exculpatory evidence in the Hines case, it requires three unlikely coincidences to have occurred. The first coincidence would be that two unusual and highly similar crimes would have to have been committed in the same area in the same week by two different men. The second coincidence would be that Mr. Floyd would have to have come to the police's attention due to an inaccurate tip linking him to a crime he did not commit (the Robinson homicide), but by chance be guilty of the identical Hines homicide that happened during the same week. The third coincidence would be that Mr. Floyd would have to have simultaneously given a false confession to the Robinson murder and a true confession to the Hines murder. The best explanation for all the evidence—an explanation that requires no logical contortions—is that the same black man killed Mr. Hines and Mr. Robinson.

B. This Court's existing precedent on factual innocence as a ground for post-conviction relief should be revisited.

This Court last addressed the issue of a convicted prisoner presenting new evidence of factual innocence in *Herrera v. Collins*, 506 U.S. 390 (1993). This decision has caused confusion in the lower courts and the basis of the decision has been eroded by subsequent events.

C. *Herrera* has caused confusion in the lower courts.

Herrera has left state and federal courts confused as to whether an "actual innocence" claim exists. The Second and Ninth circuits and a district court of the

Eleventh Circuit recognize innocence as a claim. *Triestman v. United States*, 124 F.3d 361, 378-79 (1997); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997); *In re: Davis*, CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010). The First Circuit appears open to innocence as a claim. *See Little v. Murphy*, C.A. 95-10889-RGS, 1998 WL 704415 (D. Mass. May 21, 1998). The Fourth and Eighth Circuits have rejected innocence as a claim, but subsequently considered such claims on the merits. *Compare Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999) *with Hunt v. McDade*, 2000 WL 219755, at *2 (4th Cir. 2000); *compare Meadows v. Delo*, 99 F.3d 280, 283 (8th Cir. 1996) *with Whitfield v. Bowersox*, 324 F.3d 1009, 1020 (8th Cir. 2003). The Seventh Circuit appears similarly conflicted. *Compare United States v. Evans*, 224 F.3d 670, 673-74 (7th Cir. 2000) ("a claim of innocence based on newly discovered evidence is not itself a ground of collateral attack") *with Cooper v. United States*, 199 F.3d 898, 901 (7th Cir. 1999) ("[a] valid claim of actual innocence would be enforceable under § 2241"). The four remaining circuits have rejected innocence as a claim, at least in non-capital cases. *Kinsel v. Cain*, No. 10-30443, 2011 WL 2811535 (5th Cir. July 19, 2011); *Lewis v. Wilson*, No. 10-2978, 2011 WL 1337434 (3rd Cir. Apr. 8, 2011); *Wright v. Stegall*, 247 F. App'x. 709, 711 (6th Cir. 2007); *Sellers v. Ward*, 135 F.3d 1333, 1338-39 (10th Cir. 1998).

The state courts are similarly confused. Three states explicitly recognize factual innocence as a ground for post-conviction relief under the United States

Constitution. *In re: Clark*, 855 P.2d 729, 760 (Cal. 1993);[14] *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 552 (Mo. 2003); *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). As detailed below, thirty-five states have avoided the issue by dealing with it as a matter of state law, as has the District of Columbia. Of the remaining twelve states, two have apparently expressly rejected innocence as a claim under the Constitution. *State v. Schwieterman*, 2010 Ohio 102 (Ct. App. 2010); *State v. Soto*, 766 N.W.2d 242 (Wis. App. 2009). Several others of the twelve, including Louisiana, have expressly left the federal constitutional issue open. *Walker v. State*, 54570, 2010 WL 3502583 (Nev. July 15, 2010); *Dellinger v. State*, 279 S.W.3d 282, 290-291 (Tenn. 2009); *In re: Towne*, 2007 VT 80, P8 (Vt. 2007); *State v. Conway*, 6 So. 2d 290, 291 (La. 2002).

Even among those courts that have recognized the validity of innocence as a claim, there is no consistent standard as to what a defendant must prove. The criteria range from "a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment," *Amrine*, 102 S.W.3d at 543, to requiring that "the evidence is such that it would 'undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'" *Clark*, 5 Cal. 4th at 798 (internal citations omitted). Opinions as to the standard of relief

[14] Discussing innocence claims in capital cases. *See* Cal. Pen. Code § 1181 (2011), *supra* n. 23, for California's broader recognition of new evidence of innocence as a basis for post-conviction relief.

even differ within the same circuit. *Compare Marino v. Miller*, 2002 WL 2003211 (E.D.N.Y. 2002) *with Newton v. Coombe*, 2001 WL 799846 (S.D.N.Y. 2001).

A number of scholars have commented on this uncertainty and its implications. *See, e.g.*, J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 Ariz. St. L.J. 317, 337-38 (1993); Kathleen Cava Boyd, *The Paradox of "Actual Innocence" in Federal Habeas Corpus After* Herrera v. Collins, 72 N.C. L. Rev. 479 (1994) Kathleen Callahan, *In Limbo: In* Re Davis *and the Future of* Herrera *Innocence Claims in Federal Habeas Proceedings*, 53 Ariz. L. Rev. 629, 636 (2011).

D. Much of the rationale for *Herrera* has been eroded by subsequent developments in forensic science and the identification of wrongful convictions.

When this Court last addressed whether factual innocence is a freestanding claim, a significant assumption underlying its rejection of Herrera's claim was the fact that "the passage of time only diminishes the reliability of criminal adjudications." *Herrera*, 506 US at 403, 419. That assumption may have been a legitimate position to take in 1993, but it is now known to be incorrect in many cases, including Mr. Floyd's.

The ability of a court to accurately determine guilt or innocence improves as time passes if new evidence that has not been rendered unreliable by the passage of time is discovered or new if information develops that relates to the reliability of the existing evidence. The most widely recognized situation in which this happens is when new forensic evidence, most commonly DNA test results, becomes available.

At the time this Court issued its opinion in *Herrera*, eleven convicted prisoners had been exonerated by DNA testing. Today, 273 such exonerations have occurred.[15] Clearly, in these cases, the ability of the courts to accurately determine guilt or innocence improved after DNA testing was performed (this applies equally in the many other cases in which post-conviction DNA testing confirms guilt). This is also true when other kinds of forensic test results become available for the first time after trial. Forensic evidence does not deteriorate in the way witnesses' memories do. *See United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002) *rev'd* 313 F.3d 49 (2d Cir. 2002) ("[*Herrera*] was premised on a series of factual assumptions about the unlikelihood that proof of actual innocence would emerge long after conviction that no longer seem sustainable.").

It is also possible to better assess guilt or innocence when new evidence surfaces about the reliability of evidence already considered by the fact-finder—for example, new evidence that impeaches a witness or new research impeaching an entire class of evidence. Of course, absent evidence of factual innocence, impeaching the evidence of guilt alone could not satisfy any burden of proof to show innocence. Nonetheless, new impeachment evidence can make an adjudication of guilt or innocence more reliable than it was at the time of the conviction. Since *Herrera* was decided, research has uncovered new information impeaching the reliability of

[15] *See* Innocence Project Case Profiles, *available at* http://www.innocenceproject .org/know/Search-Profiles.php.

eyewitness identifications,[16] confessions given during custodial interrogations,[17] arson investigation,[18] the identification of homicide by shaken baby syndrome,[19] and many other forensic techniques.[20] New information about the reliability of certain classes of evidence may be particularly important in certain cases—*e.g.*, new information shows false confessions are a particular danger with juvenile or mentally retarded suspects. *See Atkins v. Virginia*, 536 U.S. 304, 321 n.25 (2002).

Mr. Floyd's case is a perfect example of how new developments apply in practice. We now have the benefit of DNA test results produced using technology that did not exist at the time of the trial, fingerprint comparison results which were

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[16] National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), *available at* www.ncjrs.gov/pdffiles1/nij/178240.pdf; Jon B. Gould and Richard A. Leo*, One-hundred Years Later: Wrongful Convictions After a Century of Research,* 100 J. Crim. L. & Criminology 825, 841-44 (2010).

[17] Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions*, 88 J. Crim. L. & Criminology 429, 492 (1998); see Gould, *supra* n. 16, at 844-51 (describing the current state of research).

[18] Craig L. Beyler, *Analysis of the Fire Investigation Methods and Procedures Used in the Criminal Arson Cases Against Earnest Ray Willis and Cameron Todd Willingham*, 1 (2009), *available at* http://www.docstoc.com/docs/document-preview.aspx?doc_id=10401390.

[19] Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1 (2009).

[20] *See* National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009), *passim*.

hidden from the attorneys at the trial, information about the surprising prevalence of false confessions which had not been collected at the time of the trial, and evidence of Mr. Floyd's abnormal vulnerability as a mentally retarded man to giving a false confession, which was not developed at the time of trial. While it is still true that in many cases the "passage of time only diminishes the reliability of criminal adjudications," we now know of enough situations in which exactly the opposite is true that this underlying assumption in *Herrera* should be revisited.

E. Developments in state law since 1993 reflect the erosion of the rationale for the *Herrera* decision.

The fact that courts are often able to reliably determine guilt or innocence long after a crime has occurred is reflected by changes in state law. In *Herrera*, this Court stated "[o]nly 15 States allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction." *Herrera*, 506 U.S. at 411. Now, 38 states and the District of Columbia allow an innocence claim based on new evidence to be brought at any time. As noted above, three of these states allow the claim under the U.S. Constitution. Three other states rely on their state constitutions.[21] 11 states recognize the claim under the common law.[22] 21 states and

[21] **Illinois**, *People v. Washington*, 665 N.E.2d 1330, 1336 (1996); **New Mexico**, *Montoya v. Ulibarri*, 163 P.3d 476, 483-84 (2007); **New York**, *People v. Bermudez*, 906 N.Y.S.2d 774 (N.Y. Sup. Ct. 2009).

[22] **Connecticut**, *Summerville v. Warden, State Prison*, 229 Conn. 397, 422 (1994); **Delaware**, *Downes v. State*, 771 A.2d 289, 291 (2001); **Florida**, *Jones v. State*, 591 So. 2d 911, 915 (1991); **Georgia**, *Hester v. State*, 282 Ga. 239, 241-42 (2007); **Kansas**, *McHenry v.*

the District of Columbia recognize the claim by statute.[23] And, all of the remaining 12 states at least allow convicted prisoners who prove their innocence with DNA testing alone to get relief.[24]

State, Kan. App. 2d 117, 124 (2008); **Kentucky**, *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (1996); **Michigan**, *People v. Woods*, 2004 Mich. App. LEXIS 3119, at *4-3 (Ct. App. 2004); **Minnesota**, *Gustafson v. State*, 754 N.W.2d 343, 348 (2008); **Montana**, *State v. Graham*, 311 Mont. 500, 504 (2002); **Nebraska**, *State v. El-Tabech*, 259 Neb. 509, 517 (Neb. 2000); **South Dakota**, *Gregory v. Class*, 584 N.W.2d 873, 878 (1998).

[23] **Alabama**, Ala. R. Crim. P. Rule 32.1 (2010); **Alaska**, Alaska Stat. § 12.72.010 (2010); **Arizona**, A.R.S. § 13-4231 (2010); **California**, Cal. Pen. Code § 1181 (2011); **Colorado**, C.R.S. 18-1-410 (2009); **Hawaii**, Haw. R. Penal P. Rule 40 (2011); **Idaho**, Idaho Code § 19-4901 (2011); **Indiana**, Ind. R. P. Post-Conviction Remedies 1 (2011); **Iowa**, Iowa Code § 822.2 (2010); **Maryland**, Md. Crim. Proc. § 8-301; **Massachusetts**, ALM R. Crim. P. Rule 30 (2011); **Mississippi**, Miss. Code Ann. § 99-39-5 (2010); **New Jersey**, N.J. Court Rules, R. 3:20-1 (2011); **North Carolina**, N.C. Gen. Stat. § 15A-1415(c) (2011); **North Dakota**, N.D. Cent. Code, § 29-32.1-01 (2011); **Oklahoma**, 22 Okl. St. § 1080 (2010); **Pennsylvania**, 42 Pa.C.S. § 9543 (2011); **Rhode Island**, R.I. Gen. Laws § 10-9.1-1 (2010); **South Carolina**, S.C. Code Ann. § 17-27-20 (2010); **Utah**, Utah Code Ann. § 78B-9-104 (2011); **Virginia**, Va. Code Ann. § 19.2-327.11 (2011); **Washington**, Wash. CrR 7.8 (2011); **Washington, D.C.**, D.C. Code § 22-4135 (2011).

[24] **Arkansas**, Ark. Code Ann. § 16-112-202 (2011); **Maine**, Me. Rev. State. Tit. 15 § 2137 (2010); **Nevada**, Nev. Rev. Stat. § 176.0918 (2010); **New Hampshire**, N.H. Rev. Stat. Ann. § 651-D:2 (2011); **Louisiana**, La. C. Cr. P. art. 926.1, 930.3(7) (2011); **Ohio**, Ohio Rev. Code Ann. § 2953.72 (2011); **Oregon**, Or. Rev. Stat. § 138.690 (2009); **Tennessee**, Tenn. Code

This Court has looked to significantly less pronounced state trends when considering other Eighth Amendment issues. *E.g. Roper v. Simmons*, 543 U.S. 551, 565-66 (2005) (attaching significance to five states changing their laws); *Atkins*, 536 U.S. at 315-16 (attaching significance to fifteen states changing their laws). The developments in state law reflect that the basis for *Herrera* has eroded.

F. Louisiana is an outlier among states in continuing to punish prisoners who prove their factual innocence.

Louisiana law only provides for a new trial based on new evidence within a year of trial unless the new evidence is previously untested DNA evidence. La. C. Cr. P. art. 853, 926.1, 920.3(7). It makes no provision for cases like Mr. Floyd's where DNA evidence only forms part of an innocence claim and reliable evidence has surfaced decades after trial. The Louisiana Supreme Court has hypothetically assumed that "a claim of 'actual innocence' . . . . is cognizable on collateral review," *Conway*, 6 So. 2d at 291, but not decided the issue and did not address it in the present case. Unlike Louisiana, 38 states and the District of Columbia do not continue to punish convicted prisoners who present new evidence proving their innocence more than a year after trial. Such an arbitrary deadline not only undermines the public's confidence in the criminal justice system, but also infringes upon constitutional rights.

Ann. § 40-30-304 (2010); **Vermont**, Vt. Stat. Ann. Tit. 13 § 5561 (2010); **West Virginia**, W. Va. Code § 15-2B-14 (2011); **Wisconsin**, Wis. Stat. § 974.07 (2011); **Wyoming**, Wyo. Stat. Ann. § 7-12-303 (2011).

G. Mr. Floyd's case provides an ideal opportunity for the Court to hold that continuing to punish an individual for something they have proved they did not do violates the Constitution.

This application for a writ of certiorari asks the Court to decide that Louisiana is inflicting a cruel and unusual punishment upon Mr. Floyd in violation of the Eighth Amendment and denying him due process in violation of the Fourteenth Amendment by continuing to punish him for the murder of William Hines despite the clear evidence he did not commit the crime. Granting certiorari will resolve the nationwide uncertainty in this area of law and allow this Court to establish precedent reflecting the knowledge about wrongful convictions that has come to light since *Herrera*. The procedural posture of Mr. Floyd's case makes it ideal for clarifying the law.

Evidence of factual innocence was presented in state court. The evidence was largely forensic and document-based and much of it was introduced by stipulation. The result of this is that, unlike in *Herrera*, the Court is not being asked to base its ruling on the credibility of witness recollections that the State has not had the chance to challenge at a hearing. The State had every opportunity to rebut the evidence of innocence in this case.

Granting certiorari will also allow this Court to consider the issue without being constrained by AEDPA's procedural rules. Mr. Floyd seeks review from a state district court's denial of his claim on the merits that the state court of last resort declined to review, which allows this Court to address the merits of the issue. Mr. Floyd could also seek relief in the district court under 28 U.S.C. § 2254 (and will

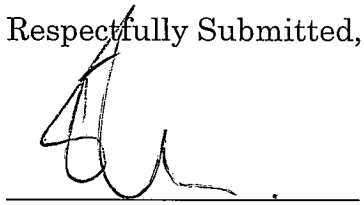
do so to preserve his right to federal review), but in a case brought under 28 U.S.C. § 2254 the reviewing court would also have to address the constraints of subsection (d)(1). Several justices of this Court have recently expressed divergent opinions as to the application of 28 U.S.C. § 2254(d)(1) to an innocence claim. *In re: Davis*, 130 S. Ct. 1, 1 (2009) (Stevens, J., concurring); *id.* at 3 (Scalia, J., dissenting). Just weeks ago, the Fifth Circuit expressed frustration at the limitations of AEDPA when considering a case involving a possible wrongful conviction:

> It is beyond regrettable that a possibly innocent man will not receive a new trial in the face of the preposterously unreliable testimony of the victim and sole eyewitness to the crime for which he was convicted. But, our hands are tied by the AEDPA, preventing our review of Kinsel's attack on his Louisiana postconviction proceedings, so we dutifully dismiss his claim.

Kinsel, No. 2011 WL 2811535, *23-24. This Court can avoid these procedural obstacles by granting certiorari from a state court ruling such as this one. This would be consistent with other recent cases in which the Court has considered Eighth Amendment issues. *See Graham v. Florida*, 130 S. Ct. 2011 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

The record and procedural posture of Mr. Floyd's case make it an ideal vehicle for this Court to consider the pressing issue of whether a state can continue to punish a prisoner despite proof of factual innocence. Mr. Floyd respectfully urges this Court to take this opportunity and make clear that his continued punishment is unconstitutional.

Respectfully Submitted, August 17, 2011,



Emily Maw
Counsel of Record for Petitioner
Innocence Project New Orleans
3301 Chartres Street
New Orleans, LA 70117
Tel – 504 943 1902
Email – emilym@ip-no.org

L. Eades Hogue
Lemle & Kelleher, L.L.P
601 Poydras Street, 21st Floor
New Orleans, LA 70130
Tel – 504 584 9431
Email – ehogue@lemle.com