No. 11-5987

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

Reply to Brief in Opposition to Petition for a Writ of Certiorari

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Introduction

The State of Louisiana does not dispute that it withheld the evidence at issue in this case. It does not dispute Orleans Parish's shameful history of *Brady* violations that the Louisiana courts have failed to curb. Nor does it dispute that the specific evidence in this case reveals a systemic problem with the disclosure of exculpatory fingerprint comparison results that the Louisiana courts uniformly failed to address. Instead, the State reinforces the existing impression that it simply does not understand its *Brady* obligation. It does this first by arguing that its appellate lawyers may substitute their post-hoc justifications for the favorable evidence that the State withheld for Mr. Floyd's right to have the evidence considered by the fact-finder at a fair trial. It then suggests that the prejudice a defendant suffers is less when the withheld evidence corroborates the strong defense presented at trial. Finally, it misstates the record of this case with startling frequency.

In addition, the State's brief demonstrates the importance of this Court clarifying the legal standard for an actual innocence claim; the brief suggests two incompatible governing legal standards, both wrong, in the seven lines of its brief it devotes to responding to the claim. It also avoids addressing the strong factual case for Mr. Floyd's innocence.

There is clear value to this Court reviewing the Louisiana courts' actions in Mr. Floyd's case. This is true, notwithstanding the State's apparent belief that the

state district court's 15 minutes of consideration of a 1000-page record before its unexplained oral ruling constitutes a "studied consideration," and the State's repeated invention of "findings" by the court below.

I. Despite the State's entreaties, this Court has the power to remedy a grievous injustice inflicted by a state in violation of the country's Constitution.

The State is asking this Court to ignore an illogical and inexplicable injustice simply because it has been ignored by the state courts, but the state court verdict in this case violates the federal constitution and is ripe for this Court's review.

Using a misleadingly truncated citation, the State argues this Court "has no supervisory jurisdiction over state courts." *Resp. Brief at 15 citing Chandler v. Florida*, 449 U.S. 560, 570 (1981). However, the sentence the State cites concluded that this Court could review a state court judgment "in relation to the Federal Constitution." *Chandler*, 449 U.S. at 570. This is exactly the review Mr. Floyd seeks.

More perniciously, the State continues to urge reviewing courts not to consider the Robinson murder. *Resp. Brief at 16-17.* The underlying rationale for this appears to be that because the trial court convicted Mr. Floyd of the Hines murder and acquitted him of the Robinson murder, a court cannot now take into account the Robinson murder when considering the new evidence. This makes no sense. The Robinson murder was considered at the trial which led to the conviction Mr. Floyd challenges. It would be considered at any new trial as evidence of "identity" of the perpetrator. La. C.E. art. 404(b). The fact that the Robinson case is now an embarrassment to the State and impeaches the Hines conviction in a

manner the State cannot rebut, is no justification for pretending the crime—and Mr. Floyd's false confession to it—never happened.

II. The State's response to Mr. Floyd's *Brady* claim corroborates the need for this Court's review.

A. The State wrongly argues that evidence is not favorable if it can suggest a counter-argument it might have used at trial.

Throughout its brief, the State appears to take the position that evidence is not favorable if there is a possible counter-argument that the prosecution could have used if the evidence was presented at trial. As detailed below, many of the arguments the State now offers to justify withholding the exculpatory evidence are based on factual misstatements, and others are based on speculation. However, the more fundamental point, a point indicative of the systemic ignorance of *Brady* in Orleans Parish, is that the State appears to believe that decisions about the weight to be ascribed to favorable evidence should be made by police and prosecutors (or appellate lawyers if the evidence emerges after conviction) and not judges and juries. Sixteen years ago, this Court specifically admonished the Orleans Parish District Attorney's Office about this very mistake. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (Rejecting "any argument . . . to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."). The State's brief suggests it is necessary for this Court to do so again.

B. The State wrongly argues that a *Brady* violation does not occur if the withheld evidence corroborates the strong defense presented at trial.

Even the State's description of the case at trial leaves a reader with the impression that the original verdict in this case was borderline-inexplicable. *Resp. Brief at 6-9*. The State goes on to argue that withheld favorable evidence is merely "cumulative" of the strong defense at trial so does not undermine confidence in verdict. *Id. at 21-23*. However, in every other jurisdiction, the State's *Brady* obligation is most acute when evidence it possesses corroborates the defense theory at trial and the State's case for guilt is already flawed. *United States v. Agurs*, 427 U.S. 97, 113 (1976) ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."). This Court should clarify that the same is true in Orleans Parish.

C. The State repeatedly misstates facts in the record.

The State's repeated misstatements of fact indicate its cavalier attitude towards Mr. Floyd's rights and the accuracy of proceedings in this case. Some of the glaring misstatements are as follows:

1. The State invents corroboration of the confession.

The State's brief argues:

> 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 scene photographs, as William Hines's body was moved in order to investigate the victim's injuries prior to the taking of those photographs.

Resp. Brief at 8. This argument cannot be reconciled with the evidence. The NOPD Supplemental Report describes that Mr. Hines's body was found in the following position: "The body was nude and in a fetal position on its right side. The victim's

head was observed lying in a river direction with both legs outstretched under the . . . bed. Both arms were bent at the elbow and lying under the upper torso." (Ex. 3 at 3.) The crime scene photographs depict the victim lying on his back and clear of the bed. (State's Ex. 1.) This was because, as the State points out in its brief, the body had been moved prior to the photographs being taken. *Resp. Brief at 8.* The confession that Mr. Floyd signed states, "[h]e fell on the floor next to the bed . . . when I left he was still lying there." (Ex. 8 at 5.) So, contrary to the State's assertion, the confession contains no information that was not in the photographs Mr. Floyd was shown during his interrogation and, in fact, is a better description of the crime scene photographs than the crime scene. If anything, this is further proof that Mr. Floyd had absolutely no independent knowledge of the crime scene.

2. The State inaccurately describes the tip that made Mr. Floyd a suspect.

The State argues that the police received a tip stating Mr. Floyd mentioned the Robinson murder on the morning of November 29, 1980, mere hours after it occurred. *Resp. Brief at 6-7.* In fact, Mr. Robinson was murdered over 24 hours earlier, on November 28, and the crime had been widely reported by the time Mr. Floyd mentioned it. (Ex. 2.)

3. The State's inaccurately describes the fingerprint comparison evidence.

The State does not dispute that the evidence adduced in state court proceedings shows that fingerprint comparison results in Orleans Parish have routinely been withheld in criminal trials (and not even disclosed to prosecutors by the police). In response to the specific instances of this in Mr. Floyd's case, the State

first argues that the notation "NOT JOHN FLOYD" does not establish that its analyst concluded the prints were not John Floyd's. *Resp. Brief at 11-12, 20.* It fails to mention the notations appeared, not just on the envelopes storing the fingerprints, but also in the police department's print unit logbook (where results are recorded). (Ex. 13.) And, it fails to mention that its own witness testified that such notes were exactly how New Orleans Police Department fingerprint analysts recorded the results of comparisons they had performed. (2/19/10 Tr. 176-77.)

The State next argues Mr. Floyd should have had the prints compared when he discovered the State's comparison results. *Resp. Brief at 12.* This argument presupposes some ambiguity as to the existing notations and, more importantly, omits to mention that it was due to the State's ultimately successful objection that the prints could not be released to an independent expert for analysis. (10/20/08 Tr. Passim; 12/09/08 Tr. Passim.)

Finally, the State argues that the print exclusions are not favorable to Mr. Floyd because the prints could have been left on an earlier occasion. *Resp. Brief at 20.* The State in incorrect in stating Mr. Clegg's affidavit introduced at the post-conviction hearing states Mr. Hines hosted parties.[1] *Id. at 12.* However, the wider point is that Mr. Floyd is not required to prove that the only explanation for the third-party prints is that they were left by the perpetrator; only that this was a good

[1] An investigator at undersigned counsel's office was told this by a neighbor of Mr. Hines, but no evidence to this effect beyond the investigator's affidavit was introduced at the post-conviction hearing. (Ex. 22.)

explanation that Mr. Floyd had the right to present to the fact-finder at his trial. Apparently, all the prosecutors responsible for Mr. Floyd's conviction agree with Mr. Floyd's argument on this point, as they have *all* stated that, if they had been aware of them, they would have disclosed the notes containing the print comparison results that were presented to the state courts. (Ex. 24; Ex. 25; Ex. 26; Ex. 27.)

4. The State inaccurately describes the evidence from Mr. Clegg.

Despite the State's suggestions otherwise, no court has made any findings as to Mr. Clegg's credibility. *Resp. Brief at 19-20.* Moreover, the State's imagined rationale for a court finding Mr. Clegg less credible than Dillmann is deeply flawed. The State claims that Dillmann's description of what Clegg told him was based on "contemporaneous notes" (*Id. at 19*), but no such notes have ever been presented and, if such notes ever existed, they were destroyed after Dillmann illegally took the file on the investigation. (Ex. 29.) The only evidence in the record that contradicts Mr. Clegg's account is Dillmann's supplemental report. However, this report was written six weeks after the conversation with Mr. Clegg and after the police had arrested a man, John Floyd, who was white (and therefore whose guilt was incompatible with the information Mr. Clegg attested to giving Dillmann). (Ex. 3.) Moreover, Mr. Clegg insists the information Dillmann claims he provided is untrue, and it is hard to imagine why Mr. Clegg would have provided false information to the police who were investigating his close friend's murder. (Ex. 21.) The creditability determination the State urges is unsupported by the record and cannot be inferred from the court's silence.

5. The State inaccurately describes the coroner's expert opinion.

The State describes the opinion formed by the coroner who examined the victim at the scene as "impressions." *Resp. Brief at 13.* The coroner never uses this word to describe his opinion and, in an affidavit introduced at Mr. Floyd's post-conviction hearing, expressly states the withheld information was his "expert opinion." (Ex. 23; Ex. 34.) The State would be free to challenge this opinion at a trial, it is not free to dismiss it based on misstatements of fact.

6. The State inaccurately describes and misunderstands the evidence about other suspects.

The State misstates that the only evidence concerning other suspects is Dillmann's book about the case. *Resp. Brief at 13.* In fact, the print log books and envelopes show the prints of someone called O.W. Carter were compared to the prints from Mr. Robinson's hotel room and his car (the comparison to the car establishes the comparison was for a suspect and not just to eliminate a hotel employee). (Ex. 13.) The print card for Mr. Carter establishes he is a black male. (Ex. 28.)

Also, the State fails to understand the relevance of the NOPD's initial pursuit of black male suspects, arguing that the existence of other suspects is not *Brady* material under *Moore v. Illinois*, 408 U.S. 786 (1972). While this may be true in some cases, in this case the existence of one or more black male suspects is not favorable because they potentially committed the crimes, but because their existence directly contradicts Dillmann's testimony. Dillmann testified the evidence at the scene of the crimes did not "indicate" a black male perpetrator. (1/5/82 Tr.

114.) Combined with the evidence that Dillmann misrepresented the information about Mr. Hines's sexual preferences that he learned from John Clegg, a fact-finder would clearly be entitled to find that Dillmann was "less than wholly candid or less than fully informed." *Kyles*, 514 U.S. at 453.

7. The State misunderstands the relevance of the Robinson evidence.

The State incorrectly argues that evidence from the Robinson case cannot be relevant because Mr. Floyd was acquitted of that crime. *Resp. Brief* at 17. The verdict at trial must have been a result of the judge believing either that different men committed the two similar crimes or that Mr. Floyd was guilty of both, but the State did not meet its burden in the Robinson case. *See Dowling v. United States*, 493 U.S. 342, 349 (1990) ("The acquittal did not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt." (internal quotation omitted)). The former explanation is unlikely as, as detailed on page 27 of Mr. Floyd's petition, it relies on a trio of unlikely coincidences, including Mr. Floyd giving two remarkably similar confessions to two remarkably similar crimes to the same detective in the same interrogation, only one of which was true. The latter explanation is made less likely by the new evidence of Mr. Floyd's innocence of the Robinson homicide which proves it is virtually impossible he committed both crimes. As such, the new evidence is relevant in exculpating Mr. Floyd in the Hines murder and critically impeaching his confession to that crime.

III. The State's response to Mr. Floyd's innocence claim corroborates the need for this Court's review.

The State's brief tidily illustrates the confusion *Herrera v. Collins*, 506 U.S. 390 (1993), has caused. In less than seven lines of analysis, it urges two different standards for this court to apply. *Resp. Brief at 13, 24.* The standards the State suggests are "sufficiency of evidence" and "undermine confidence in the outcome." *Id.* Neither standard is correct. The issue is, regardless of what occurred at trial, whether Mr. Floyd has now sufficiently proved his innocence to render his continued punishment unconstitutional. In addition to failing to understand the issue, the State at no point explains how Mr. Floyd can be guilty in light of the evidence as a whole. This case remains an ideal vehicle for the Court to clarify this area of law.

IV. The State's unsupported attacks on Mr. Floyd's character are no reason for this Court not to review his case.

Without citation to the record, the State describes Mr. Floyd as a "homeless drifter . . . who became ferociously violent when he combined PCP with alcohol." *Resp. Brief at 7.* Even if this was an accurate description of Mr. Floyd at the time of the crime, he would still be entitled to the full protections of the federal courts and the federal constitution. However, the description of Mr. Floyd is neither true nor fairly supported by the record. The only mentions of PCP in the record are one reference in the confession Dillmann typed for Mr. Floyd to sign, and several lurid sections of the book Dillmann wrote about how he "solved" the Hines and Robinson murders by obtaining a confession from Mr. Floyd. (Ex. 8 at 3; Ex. 38 at 119-20, 143-47, 149, 180-81, 193-94.) In truth, no witness has ever testified to seeing Mr. Floyd use PCP or a weapon. Further, no witnesses who can corroborate Dillmann's

description of Mr. Floyd, a description now adopted by the State, are identified in Dillmann's report of the investigation leading to Mr. Floyd's arrest. (Ex. 3.) Mr. Floyd candidly admitted his drug use at trial, and specifically denied ever taking PCP. (1/5/82 Tr. 264-65, 276.) While an intellectually disabled drifter like Mr. Floyd was undoubtedly an easy target for police under pressure to solve two high profile murders, the monster the State now describes only exists in Dillmann's self-justifying book about the case.

Conclusion

Mr. Floyd's conviction and continued punishment are unconstitutional. His case presents two issues of wide importance; something the State's brief serves to demonstrate. He respectfully urges this Court grant his petition for a writ of certiorari.

Respectfully Submitted, November 3, 2011,

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