No. 10-8145

In the Supreme Court of the United States

JUAN SMITH, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI
TO THE ORLEANS PARISH CRIMINAL DISTRICT COURT
OF LOUISIANA

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In 1995, a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire; five people were killed. Petitioner was the only person brought to trial. He was tried in Orleans Parish, Louisiana, a jurisdiction whose district attorney's office has a long and disturbing history of failing to produce exculpatory evidence to criminal defendants.

Petitioner was linked to the crime solely on the basis of an identification by one of the survivors. At trial, the witness testified he was certain about his identification. But materials disclosed by the state after trial revealed that the witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators. Other subsequently disclosed materials included statements by other witnesses casting doubt on the witness's testimony; a statement by an apparent perpetrator seemingly denying petitioner's involvement; a statement by a firearms examiner that contradicted his trial testimony implying that petitioner was one of the shooters; and a confession from another individual. The question presented is as follows:

Whether the failure of the Orleans Parish district attorney's office to produce the foregoing information before petitioner's trial violated his right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases, because the information was material to the issue of guilt.

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OPINIONS BELOW

The trial court's oral ruling denying petitioner's application for state postconviction relief (Pet. App. A18) is unreported. The orders of the Louisiana Court of Appeal (Pet. App. B1) and the Louisiana Supreme Court (Pet. App. C1) denying petitioner's applications for supervisory writs are also unreported.

JURISDICTION

The order of the Louisiana Supreme Court was entered on September 24, 2010. The petition for a writ of certiorari was filed on December 20, 2010, and granted on June 13, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

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

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

After a jury trial, petitioner was convicted in Louisiana state court on five counts of first-degree murder. The testimony at trial established that a group of men burst into a house, ordered the occupants to lie down on the floor, and opened fire, resulting in five deaths. Petitioner was the only person tried for the crime; the only evidence linking him to the crime was an identification by one of the survivors. Petitioner was sentenced to life imprisonment without parole; his conviction and sentence were affirmed on direct review.

Petitioner then applied for state postconviction relief, contending, *inter alia*, that the Orleans Parish district attorney's office had withheld material evidence in violation of his right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. In connection with that application, petitioner obtained materials revealing that the key witness had made numerous conflicting statements to the police concerning his ability to identify any of the perpetrators. Other newly disclosed materials included statements by other witnesses casting doubt on the key witness's testimony; a statement by an apparent perpetrator seemingly denying petitioner's involvement; a statement by a firearms examiner that contradicted his trial testimony implying that petitioner was one of the shooters; and a confession from another individual.

After an evidentiary hearing, the trial court summarily denied petitioner's application for postconviction re-

lief from the bench. Pet. App. A18. The Louisiana Court of Appeal denied petitioner's application for discretionary review without comment, *id.* at B1, as did the Louisiana Supreme Court, *id.* at C1.

A. Background And Trial Proceedings

1. On the evening of March 1, 1995, officers from the New Orleans Police Department (NOPD) responded to a report of gunshots at 2230 Roman Street, a house in New Orleans's Eighth Ward. J.A. 58-61. Upon arriving, they found five people lying inside, all of whom had been shot. J.A. 60-61. James Jackson, Willie Leggett, and Shelita Russell were found in the kitchen; Jackson and Leggett were dead, and Russell was critically injured. J.A. 61-62, 67-70. Robert Simons and Phillip Young were found in an adjoining living room; Simons was dead, and Young was critically injured with multiple gunshot wounds (including a wound to the head). J.A. 62-68, 71, 135-136. In addition, officers found a sixth person, Ian Jackson, in an alley behind the house; Jackson was also dead, with injuries suggesting that he was shot as he was trying to flee the house. J.A. 65-66, 71, 83-86. About a week later, Russell died of her injuries, bringing the total number of deaths to five. J.A. 76, 79.

There were three persons at the scene who had not been shot: Rebe Espadron, Reginald Harbor, and Larry Boatner. J.A. 60, 63, 101-104. Espadron lived at the house with Simons, her cousin, and Russell, her sister; Espadron and Simons used the house to sell crack cocaine and marijuana to neighborhood residents. J.A. 93-94, 113, 170.

2. On August 31, 1995, a grand jury in Orleans Parish, Louisiana, indicted petitioner and Young on five counts of first-degree murder. R. 1A-1D, 1I. Because of

his injuries, Young was adjudged to be incompetent to stand trial. J.A. 11.

a. Before trial, petitioner filed a comprehensive motion for "discovery of information necessary to a fair trial." J.A. 17-31. In response, the state produced a limited set of materials and represented that, aside from those materials, "[n]o exculpatory or favorable evidence is available to the State at the present time." J.A. 32-34.

b. The case proceeded to trial before a jury. At trial, the prosecution presented the following evidence.

i. Espadron testified that, on the evening of March 1, she and the others found at the scene (apart from Young) had assembled at the house for a social gathering. J.A. 95-97. Most of the invitees stayed in the kitchen, where they smoked marijuana, drank, and played cards; Espadron and Harbor were in a bedroom off the living room watching television. J.A. 97-98, 117. Hearing a commotion in the kitchen, Espadron walked through the living room and cracked open the door to the kitchen to see what was going on. J.A. 98-99. When she opened the door, she encountered a man pointing a gun in her face; he ordered her to lie on the floor. J.A. 99. Espadron shut the door and ran back into the bedroom, at which point she heard gunshots. J.A. 100-101. She hid in the bedroom with Harbor until the shooting stopped. J.A. 100-102.

Espadron conceded that she had been unable to see the face of the man pointing the gun, because his mouth was covered and only his eyes were visible. J.A. 99, 110. Espadron was shown fourteen photographic lineups over the course of four months, but was never able to identify the man. J.A. 108. In addition, because she had only cracked open the door and the man pointing the gun had blocked her view, she could not observe any other perpetrators. *Ibid.* Espadron was able to testify only that the

weapon pointed at her was a "big gun, like a big handgun." J.A. 110.

ii. Harbor testified that he was "loung[ing]" in the bedroom with Espadron when they heard a commotion and Espadron went to investigate. J.A. 231-232. When Espadron returned to the bedroom, Harbor heard the shooting. J.A. 232. He grabbed a gun and hid in a corner with Espadron. He then heard a car drive away; the car was noisy, as if it had a bad muffler. J.A. 232-233. Harbor testified that he did not see any perpetrators. J.A. 235.

iii. The sole witness linking petitioner to the crime was Boatner. He testified that he was sitting in the kitchen drinking when he heard a loud noise in front of the house, resembling that of a car without a muffler. J.A. 171-174. Boatner got up to investigate and opened the front door. J.A. 174. When he did, "some guys just rushed in with guns," demanding "money and marijuana." *Ibid.* Within "[s]econds," Boatner testified, the men ordered everyone to the ground. J.A. 175, 199.

According to Boatner, the first man who had entered the house forced him to the floor and kept a gun to his head. J.A. 175-177. One of the other perpetrators then ordered him to get back up. J.A. 177. When Boatner asked what he should do, the first man struck him on the head with his gun, causing a laceration. J.A. 178, 212. Boatner fell to the ground and was lying there when Espadron opened the door to inquire about the commotion. J.A. 178-179. After Espadron shut the door, according to Boatner, the perpetrators began shooting. J.A. 180. Once the shooting stopped, Boatner heard one of the perpetrators say "let's go," then heard three car doors slam and a car drive away. J.A. 181.

Boatner testified that, in the "[s]econds" between opening the front door and being forced to the ground,

he could "[d]efinitely" see the face of the first man who rushed in. J.A. 176, 199. During that brief moment, he said, he and the man were "[f]ace to face." J.A. 175. Boatner testified that the man was not wearing a mask, though he was unsure whether any of the other perpetrators was wearing one. J.A. 175, 177. He further testified that he had told the police that the man had a low-cut haircut and "golds in his mouth." J.A. 186, 200.[1]

Boatner also testified that the first man who had entered the house was carrying a silver 9-millimeter handgun. J.A. 175, 178. He added that there were two other perpetrators, one who carried an AK rifle and another who carried a MAC-10 machine pistol. J.A. 180.[2] Boatner stated that he "kn[e]w" what a 9-millimeter handgun "looks like" and that he "kn[e]w all about" the other guns as well. J.A. 178, 201.

Over the course of several months, Boatner was shown numerous photographic lineups but was unable to make an identification. J.A. 184-187. On or around June 7, 1995, Boatner obtained a copy of the New Orleans

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[1] In this context, the term "golds" refers to cosmetic jewelry, often made of gold, worn over the teeth. "Golds" (or "grills," as they are also known) are commonly associated with hip-hop culture, particularly in the South. See J. Freedom du Lac, *Cutting-Edge Choppers; Brace Yourselves: Designer 'Grills' Have Rappers Smiling*, Wash. Post, Jan. 17, 2006, at C1.

[2] "AK" is the popular shorthand for a series of well-known Soviet-made Kalashnikov assault rifles, including the AK-47 and AK-74; "MAC-10" is the popular shorthand for the Ingram Model 10 machine pistol. See, *e.g.*, *United States* v. *Miles*, 772 F.2d 613, 615 (10th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); Richard D. Jones & Andrew White, *Jane's Guns Recognition Guide* 221, 304-307 (5th ed. 2008) (Jones & White); Ian V. Hogg & John S. Weeks, *Military Small Arms of the 20th Century* 166, 271 (7th ed. 2000) (Hogg & Weeks).

Times-Picayune that contained an article implying that petitioner was a suspect in the shootings (along with Donielle Bannister, Kintad Phillips, and Robert Trackling); the article was accompanied by a photograph of petitioner. J.A. 160-161, 190, 582-584. After seeing the newspaper, Boatner testified, he identified petitioner as the first man who had entered the house. J.A. 187-190. Boatner, however, took no action to alert the police of that alleged identification, but instead left town for Mississippi. J.A. 190-191, 213-214. Two weeks later, Boatner returned to New Orleans. J.A. 191. Even then, Boatner did not contact the police; instead, he checked into a drug-rehabilitation program at a local hospital. J.A. 191-193, 218-219.

While Boatner was at the hospital, he was visited by Officer John Ronquillo, the principal detective assigned to the case. Ronquillo showed Boatner a lineup containing petitioner's photograph, and Boatner identified petitioner as the first man who had entered the house. J.A. 174-175, 192-195. According to contemporaneous notes by a hospital aide, Boatner had expressed concern on that same day about "'being harassed by an NOPD (Detective Steve Ruffilo)' to identify a suspected perpetrator or perpetrators" involved in the shootings. J.A. 247. According to the notes, Boatner had expressed "feelings of 'fear and confusion'" and had been "offered assurance" that "the officer would not be permitted on th[e] [hospital] unit" in the future. *Ibid.*

From the witness stand, Boatner identified petitioner as the first man who had entered the house. J.A. 174-175, 195-196. Boatner testified that he had repeatedly tried to look at the man; that there was "[n]o doubt" that petitioner was that man; and that he would "never forget [petitioner's] face." J.A. 177, 194, 196. In identifying petitioner, Boatner heavily relied on his belief that the first man had a "[m]outh full of gold." J.A. 196. After the

prosecutor asked petitioner to show his teeth to the jury, Boatner said that it was the "[s]ame mouth" he had seen on the evening of the shootings. *Ibid.*

iv. The remainder of the prosecution's case at trial consisted almost entirely of testimony from various officials.[3] Officer Ronquillo testified that he had spoken with Boatner at the crime scene and that Boatner appeared to be "coherent" and "articulated very well the events that had transpired." J.A. 137. At the same time, Ronquillo acknowledged that no one other than Boatner had identified petitioner. J.A. 139. Ronquillo also conceded that, "as amazing as it may seem," officers had failed to recover any of petitioner's fingerprints from the scene. *Ibid.*

Another responding officer, Joseph Narcisse, testified that he had spoken with Boatner, Espadron, and Shelita Russell at the scene. Narcisse testified that Russell had provided her name, address, and date of birth, but "was unable to give any further details about the incident." J.A. 72-73.

The prosecution called the two pathologists who had performed the autopsies on the victims. Alvaro Hunt, who had performed Russell's autopsy, testified that her wounds "could" have been "consistent with gunshots from a 9 millimeter handgun," but conceded that it was "just a guess" and that he could not state his opinion "with any degree of certainty." J.A. 76, 79-81. William Newman, who had performed the autopsies on the other four victims, stated that he could not identify the caliber of bullet that caused any of their wounds. J.A. 81, 88.

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[3] Eddie Young, Phillip Young's brother, briefly testified that Phillip Young knew petitioner. J.A. 149-150.

The prosecution also called Kenneth Leary, a police firearms examiner. Leary testified that officers had recovered three types of casings from the scene: (1) twenty-six 9-millimeter casings; (2) nineteen 7.62-by-39-millimeter casings; and (3) three .25-caliber casings. J.A. 153. Leary further testified that, "[a]fter examining all 26 of * * * the 9-millimeter cartridge cases, [he] was able to reach the conclusion that all 26 cartridge cases w[ere] fired by one particular weapon, one 9-millimeter handgun." J.A. 155. According to Leary, the 7.62-by-39-millimeter casings came from a single AK-47 assault rifle, and the .25-caliber casings came from a .25-caliber pistol that officers had also recovered from the scene. J.A. 153-156.

v. The prosecution presented substantial evidence that Phillip Young, who had been found critically wounded at the scene, was one of the perpetrators. Espadron and Boatner both testified that they had never seen him before and expressed their belief that he was a perpetrator; in fact, after the gunfire had subsided, Boatner was going to shoot Young until Espadron interceded. J.A. 103-104, 114, 182-183. Young was found with the .25-caliber pistol in his hands. J.A. 63-64. Young had been shot three times; Espadron testified that Simons, whose body was found on top of Young's, had been carrying a .25-caliber pistol that day. J.A. 62-63, 104, 112, 135-136.

In addition, Officer Ronquillo testified that officers had found a beeper on Young's person. J.A. 119. One phone number was in the beeper several times along with the number "187"—slang for murder. J.A. 119-120. The phone number was traced to Kintad Phillips, who was named in the Times-Picayune article as another potential suspect in the shootings. J.A. 120-121. Despite the evidence linking Young to the shootings, Ronquillo

conceded that he had never shown a photographic lineup with Young in it either to Espadron or to Boatner. J.A. 125.

At petitioner's trial, Officer Ronquillo testified that he had visited Young at the extended-care facility where he was being treated for his injuries. J.A. 135. According to Ronquillo, Young was in "really bad shape" and was not "able to communicate with [him] at all." J.A. 135-136.

3. Petitioner's defense rested on the insufficiency of the prosecution's evidence against him. The defense called only a single witness in its case in chief, the regional director for the Louisiana Office of Alcohol and Drug Abuse. J.A. 241-242. That witness testified that the hospital where Boatner was being treated at the time of his initial identification only admitted persons with "life-threatening" substance-abuse problems. J.A. 245.

4. Petitioner was convicted on all five counts of first-degree murder and sentenced to life without parole. J.A. 13-14. The Louisiana Court of Appeal affirmed petitioner's conviction and sentence, 797 So. 2d 193 (2001) (Table), and the Louisiana Supreme Court denied review, 824 So. 2d 1189 (2002). This Court also denied review. 537 U.S. 1201 (2003).

B. Other Proceedings

1. One year after the trial in this case, petitioner was tried in the same court on three counts of murder stemming from a separate incident that occurred at 8130 Morrison Road approximately one month before the Roman Street shootings. J.A. 14-15; R. 1G-1L. The three other individuals who had been named in the Times-Picayune article concerning the Roman Street shootings—Donielle Bannister, Kintad Phillips, and Robert Trackling—were also indicted for the Morrison

Road shootings. R. 1G-1L. After pleading guilty to manslaughter, Trackling testified against petitioner, describing petitioner's alleged involvement in the shootings. See *State* v. *Smith*, 793 So. 2d 1199, 1202-1203 (La. 2001). Based largely on Trackling's testimony, petitioner was convicted on all three counts. J.A. 14-15.[4]

The prosecution then sought the death penalty against petitioner. In the penalty phase, the prosecution heavily relied on evidence of petitioner's prior convictions for the Roman Street shootings; testimony concerning those shootings constituted the vast majority of the testimony offered by the prosecution in its case in chief. See *Smith*, 793 So. 2d at 1208. Unusually, the prosecution called Officer Ronquillo—who appears not to have participated in the investigation of the Morrison Road shootings—to testify at length about the grisly scene of the Roman Street shootings. See *ibid.* Over a defense objection, the prosecution used Officer Ronquillo's testimony to introduce photographs of the Roman Street crime scene. See *ibid.* Petitioner was subsequently sentenced to death. J.A. 5.

2. The Louisiana Supreme Court affirmed petitioner's conviction and sentence. See *Smith*, 793 So. 2d at 1208. Although it acknowledged that Officer Ronquillo's testimony "injected an arbitrary factor" into the jury's deliberations in the penalty phase, it concluded that the error in permitting the testimony "d[id] not undermine

[4] Bannister pleaded guilty to murder and was sentenced to life without parole; Phillips was tried after petitioner, convicted, and sentenced to life without parole; and Trackling was sentenced to ten years of imprisonment. J.A. 5-7.

confidence in the jury's sentencing verdict." *Id.* at 1210. This Court denied review. 535 U.S. 937 (2002).[5]

C. Application For Postconviction Relief And Disclosure Of *Brady* Information

1. In 2004, petitioner filed a *pro se* application in the trial court for state postconviction relief in the Roman Street case; the application was assigned to the same judge who had tried the case. Petitioner contended, *inter alia*, that the Orleans Parish district attorney's office had withheld material evidence in violation of his right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. R. 438-439. Petitioner moved for the production of files from the district attorney's office, R. 439-440, and separately sought production under Louisiana's public-records law, R. 471-472. Petitioner also filed a motion for the appointment of counsel. R. 447-449.

2. Petitioner was appointed counsel, R. 3209-3210, and counsel made renewed requests for materials from the district attorney's office and also from the police department, see, *e.g.*, R. 3201-3213, 3237-3242. The state disclosed some materials in response to counsel's requests and other materials under compulsion of court order. R. 488. The disclosed materials revealed a wealth of information favorable to petitioner. A summary of those materials follows.

a. The state disclosed abundant information calling into question Boatner's identification of petitioner. Boatner himself spoke to the police on four separate oc-

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[5] In the Morrison Road case, petitioner has not yet filed an application for state postconviction relief; the trial court has stayed the deadline for filing the application pending the Court's decision in this case. See Pet. App. A19.

casions in the immediate aftermath of the shootings. On those occasions, he gave conflicting accounts of whether, and to what extent, he could identify any of the perpetrators.

i. At 9:05 p.m. on March 1, 1995, shortly after the shootings, Officer Ronquillo interviewed Boatner at the scene. The notes summarizing that interview provide in relevant part:

> Boatner advised Ronquillo that he opened the door of the residence after hearing a knock, and observed three black males with rifles and guns, exit an old, white, four door automobile, with a loud muffler. Boatner was confused if he heard a knock or opened the door after hearing the loud muffler on the vehicle.
>
> Boatner continued by telling Ronquillo that the subjects demanded money, and then hit him in the back of the head. Boatner then added that everyone [in] the kitchen began to lie down on the floor and it was then that they began shooting. Boatner stated that he was lying by Willie Legget[t], and just closed his eyes and waited to be shot.
>
> Boatner then said that he heard three car doors slam and heard the vehicle with the loud muffler drive away in an unknown direction.
>
> * * *
>
> Boatner described the guns as being one AK type assault rifle, one Tech Nine type handgun, and a silver colored handgun. *Boatner could not supply any additional information on the weapons, or supply a description of the perpetrators other th*[*a*]*n they were black males*.

J.A. 251-253 (emphasis added).

ii. At 1:15 a.m. on March 2, Officer Archie Kaufman[6] interviewed Boatner at the police station. The transcript of that interview provides in relevant part:

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

---

[6] Kaufman was recently convicted of orchestrating a cover-up of a police shooting that left two civilians dead; the cover-up involved, *inter alia*, framing innocent civilians and inventing fake witnesses. See Laura Maggi & Brendan McCarthy, *Jury Gives NOPD Another Strike; Prosecutors Garner Nearly a Clean Sweep on Charges Against Five Danziger Defendants*, New Orleans Times-Picayune, Aug. 6, 2011, at A1.

A: No, I can't.

* * *

Q: Have you been forced or coerced into giving this statement?

A: No man, *I wish I could give y*[*'a*]*ll a description.*

J.A. 293-297 (emphases added). Officer Kaufman relayed the contents of the interview to Officer Ronquillo; a brief summary of the interview is contained in the police department's notes. J.A. 256-257.

iii. Five days later, on March 6, Officer Ronquillo again spoke to Boatner. Ronquillo's handwritten notes state as follows:

> Larry Boatner — saw three n/m[7] coming in — guy on floor had to be with them making four guys — when left heard three doors slam — and car with bad muffler drove off — got up and saw people shot — *could not ID anyone because couldn't see faces* — Rebie in back room — heard Rebie open door — don't know Marty — *glanced at 1st one — saw man — through door — can't tell if had faces covered didn't see anyone* —
>
> Could identify car if running — .25 —
>
> Microwave — no dope — heroin —
>
> Saw 3 n/m come in and hit me in head — laid on ground pretended to be shot — closed eyes and waited for a bullet —
>
> *Could not ID — would not know them if — I saw them* —

[7] In Officer Ronquillo's notes, "n/m" appears to be short for "Negro males."

J.A. 308 (emphases added).

iv. Seemingly later that same day, Officer Ronquillo called both Boatner and Espadron, who were residing at the same address. The notes summarizing that conversation provide in relevant part:

> *Both subjects advised Ronquillo that they could not identify any of the perpetrators of the murder.* Boatner added that he could identify the car if the motor was running.

J.A. 259-260 (emphasis added).

v. The state also disclosed notes from interviews of two other witnesses who provided information bearing on the validity of Boatner's identification of petitioner. Shelita Russell, who was critically injured in the shootings and died about a week later, spoke to police at the scene. According to handwritten police notes, Russell provided the following information:

> Female — face down against cabinets — conscious —
>
> Said — in kitchen saw people barge in — one — *black cloth across face — first one through door* — nfs

J.A. 310 (emphasis added).

In addition, on March 6, the police interviewed Dale Mims, a neighbor who provided additional details concerning the perpetrators. The handwritten police notes state as follows:

> Dale Mi[m]s * * * — heard shots, plenty — looked out door saw 3 n/m — 3 with AK's get in white car, Buick/Olds 4 door — heard 3 shotgun blast — 4th guy came out drove off
>
> *All wearing mask*[*s*] *— mask ski type covers whole face* — can't remember clothes

> 4th subject didn't see him get in car — drove to Elysian Fields[8] right — saw 4 n/m in car w/ mask[s] = NVD on subjects
>
> Just remember guns — all rifles — one w/ banana clip

J.A. 309 (emphasis added).

b. The state also disclosed information suggesting that Phillip Young had absolved petitioner of responsibility for the shootings.

i. According to police notes, on June 26, 1995, Officer Ronquillo received a phone call from Barbara Riley, the nurse treating Young at his extended-care facility. J.A. 271. Riley informed Ronquillo that, about a week earlier, Young "had begun talking and communicati[ng] with others." J.A. 272. Ronquillo went to visit Young less than three hours later. *Ibid.* Young's speech was "very slurred," but he could answer yes-or-no questions by blinking. *Ibid.*

Although the more formal police notes do not indicate that Officer Ronquillo interrogated Young concerning the Roman Street shootings, Ronquillo's handwritten notes disclose the following:

> Miranda — B. Riley present —
>
> Acknowledged understood rights —
>
> Short Dog/Bucko/Fats — No — Didn't shoot me
> *No — Not with me when went to house*
>
> Yes — one of people in house shot me

[8] "Elysian Fields" refers to Elysian Fields Avenue, which intersects Roman Street near the location of the shooting.

No — Not responsible — 'Posse'

Didn't drive to house — 'Posse'

Yes — Knows names of perps —

Yes — Drove in car —

Yes — girlfriend[']s car —

J.A. 311 (emphasis added). Of the people whom Young said were "[n]ot with [him] when [he] went to [the] house," the police believed that "Short Dog" was petitioner; "Bucko" was Kintad Phillips; and "Fats" was Donielle Bannister. J.A. 261, 284, 312.

ii. On March 13, Officer Ronquillo had interviewed Michelle Branch, Young's girlfriend. In the transcript of the interview, Branch stated that Young had driven away from their house in her car around 6:30 on the evening of the shootings. J.A. 299-303. She described the car as a light yellow Chrysler LeBaron that would "look white" at night. J.A. 301. According to Branch, the car "didn't have a muffler" and made a lot of noise. J.A. 301-302.

Branch told Officer Ronquillo that she had not seen her car since the night of the shootings, but that she had received telephone calls informing her that Kintad Phillips had been spotted driving it. J.A. 304-305. When Ronquillo asked Branch about Phillips's associates, she responded, "Fats, just Fats" (the presumed nickname for Bannister). Branch did not mention petitioner during the interview. J.A. 305.

c. In addition, the state disclosed information calling into question the proposition that the 9-millimeter casings found at the scene had come from a 9-millimeter handgun—the gun that Boatner testified petitioner had been carrying. According to police notes summarizing their conversations, in May 1995, Officer Ronquillo asked

Kenneth Leary, the police firearms examiner who later testified against petitioner, to conduct testing to determine whether the 9-millimeter casings matched a 9-millimeter handgun that had been seized from Donielle Bannister when he was arrested on another charge. J.A. 266. On May 15, Leary responded as follows:

> Leary advised Ronquillo that *the 9mm ammunition confiscated from the Roman Street murder was typed to have been fired from a Inter Tec, "Mac 11" model type, semi automatic weapon*, and not from the handgun confiscated from Bannister at the time of his arrest.

Ibid. (emphasis added).[9] Because Leary had already matched the casings to an Intratec or MAC-11 gun, he did not conduct the testing of the 9-millimeter handgun that Ronquillo had requested. *Ibid.*

d. Finally, the state disclosed evidence that arguably inculpated others and helped to explain how the police identified petitioner as a suspect in the first place. On May 19, 1995, Eric Rogers, an inmate at the Orleans Parish Prison, provided a statement to Officer Byron Adams concerning a conversation he had previously had with Robert Trackling, who was his cellmate. Rogers stated that, during their conversation, Trackling had confessed to carrying out the Roman Street shootings

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[9] A MAC-11 is a slightly smaller version of the MAC-10 machine pistol. See Hogg & Weeks 166. Intratec is a now-defunct firearms manufacturer best known for the TEC-9 machine pistol, which is similar in size and function to a MAC-10 or MAC-11. See, *e.g.*, *Navegar, Inc.* v. *United States*, 914 F. Supp. 632, 633-634 & n.2 (D.D.C. 1996), aff'd in part and rev'd in part, 103 F.3d 994 (D.C. Cir. 1997); *Merrill* v. *Navegar, Inc.*, 28 P.3d 116, 119 & n.3 (Cal. 2001); Jones & White 430.

with several associates. The transcript of the interview provides in relevant part:

> Q: In your own words why don't you tell me what knowledge you possess about th[e] * * * crimes. Start from the beginning when you first learned the information, from who you learned the information from and where you were.
>
> * * *
>
> A: I was on C4 and I got the information from Robert [Trackling]. [H]e came up on the (inaudible) where I'm at. And he told me about the first the first crime they done. He say they done it on N. Roman[,] he said that um it was him, Fat, Buckle and a guy they call uh, Short Dog. Say that they went up to the door and they knocked on the door and the guy open the door and they went in the house, and they had about 7 guys in there. And they made 'em lay down on the floor and they was asking the guys where where's the stuff and the guy didn't say nothing. They say that they had a girl in the um, room[,] she open the door and when she open the door all of 'em turned around and say one of the guys that was on the floor jumped up and grab his gun from under his shirt and he went to shooting at her. They say that they raised up the gun and they went to shooting them. They went to shooting back and hit them and say one of the guys who was shooting that got off the floor[,] his gun slid by um Darnell Ban[n]ister['s] foot, and Darnell Ban[n]ister picked up his gun and went to shooting the guy with that gu[n].
>
> Q: Then what transpired[,] then what happened?

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

J.A. 277-278, 281-282.

Officer Adams then asked Rogers if he could identify "Fat," "Buckle," and "Short Dog." J.A. 284. Rogers said that "Fat" was "Darnell Ban[n]ister," whom he described as having a "low fade haircut" and "golds in his mouth." *Ibid.* Rogers said that "Buckle" was "Contez Phillips," who also had a "faded haircut" and "golds in his mouth." *Ibid.* Rogers initially said that Trackling had told him that "Short Dog" was "Juan," but that Trackling "didn't give [him] no last name." J.A. 285. By contrast, when Adams later asked Rogers whether the three men "call themselves anything," he answered: "They call Contez Phil[l]ip[s] Buckle, they call Darnell Ban[n]ister Fat, Short Dog that's what they call him, they call Robert Home." *Ibid.* When Adams asked Rogers whether the men "have a name for their group," he replied that they called themselves the "Cut Throat Posse." *Ibid.* In response to a follow-up question asking him to name the members of that group, Rogers listed nine people, including Bannister and Phillips, but did not list petitioner. J.A. 286-287.

Officer Adams relayed the contents of the interview to Officer Ronquillo, who subsequently conducted an interview with Trackling. J.A. 266-267, 275. After being informed of his rights, Trackling, on the advice of counsel, asserted his right to remain silent. J.A. 275. At the same time, Trackling offered an unsolicited statement that he had been at work at a pizza shop on the night of the shootings. *Ibid.* Trackling's time card for that evening, however, showed that he had left work at 7:45; the shootings took place around 8:30. J.A. 248, 277.

D. Supplemental Application For Postconviction Relief

1. In the wake of the disclosures of the foregoing material, petitioner, proceeding through counsel, filed an 88-page supplemental application for postconviction relief. R. 38. In that application, petitioner contended that the failure of the Orleans Parish district attorney's office to produce the foregoing materials (among others) before trial violated his right to due process under *Brady* and related cases. R. 285-378.

2. The trial court held an evidentiary hearing on the supplemental application.

a. At the hearing, petitioner's trial counsel, Frank Larre, testified that he had not received any of the foregoing materials before trial. J.A. 322-338, 348-350, 353, 356, 358-360, 364. Larre further testified that he had practiced law in Louisiana for thirty-four years and, at the time of petitioner's trial, had represented approximately thirty-six defendants in murder trials. J.A. 314, 317-318. Larre noted that, in petitioner's case, he had retained a retired police officer as a private investigator, whom he "would have used" to follow up on any potentially material information. J.A. 317, 362.

Larre confirmed that petitioner's defense at trial rested on the insufficiency of the prosecution's evidence against him, because there was "no direct evidence" of petitioner's involvement in the shootings apart from Boatner's identification. J.A. 318, 369-370. As Larre explained, the state had "no weapon," "no fingerprints," and "no property taken from the place, nothing." J.A. 318. Larre maintained that the previously undisclosed materials, consisting as they did of materials that could have been used to impeach Boatner's crucial testimony and other exculpatory and impeachment materials, would "[a]bsolutely" have affected his approach to the

case. J.A. 323, 327-328, 333, 337-338, 349, 353, 360, 369-370.

b. Petitioner offered two other primary witnesses at the evidentiary hearing. Barbara Riley, Phillip Young's nurse, confirmed that, during the interview of Young conducted by Officer Ronquillo, Young had been able to answer yes-or-no questions through body movement. J.A. 420-421. Riley added that, as a general matter, Young "appeared to understand what you were saying to him" and could communicate with her in the same way. J.A. 423-424. Riley denied that Young was suffering from amnesia; instead, he was suffering from "aphasia, a lack of speech." J.A. 424.

Eric Rogers confirmed that, when he and Robert Trackling were cellmates, Trackling had told him about a multiple murder on Roman Street that he had committed with several associates. J.A. 428-429. Troublingly, however, Rogers testified that Trackling had never mentioned petitioner or "Short Dog." J.A. 429. Instead, Rogers said that, in his own interview with Officer Adams, he had mentioned petitioner and "Short Dog" only after Adams asked him to implicate petitioner:

> [W]hen I talked to Byron Adams, he asked me about a Short Dog. Did I know a Short Dog? So, I told him no. So, he said, did I hear of a Juan Smith? So, I told him no. And, he said that this was one of the guys that was supposed to have been in a murder.
>
> So, he said that if I do him a favor he would go talk to some people and get my life sentence took back. So, he had asked me to involve Short Dog, Juan Smith.

J.A. 430. When Rogers so testified, the trial judge intervened and repeatedly pressed him to confirm his testimony. Rogers did so, culminating in the following exchange with the judge:

Q: Just tell me exactly what you agreed to do.

A: He wanted me to implicate Juan Smith saying that Juan Smith was the shooter.

Q: Did you implicate Juan Smith?

A: Yes, sir.

Q: And, he took a statement from you saying that Juan Smith was part of the shooting on North Roman Street?

A: Yes.

J.A. 433. Rogers added that Adams had asked him to implicate petitioner before Adams "turned on the tape" to begin the interview. J.A. 435. Under continued questioning, Rogers steadfastly maintained that Adams had promised to help him "get [his] time took back" if he implicated petitioner. J.A. 437-443. After the interview was over, according to Rogers, Adams brought him food from McDonald's. J.A. 443.[10]

c. The state offered two primary witnesses at the evidentiary hearing. Boatner testified and offered largely the same version of events that he had at trial, though he conceded that he "d[id]n't know how many [perpetrators] was in there"—only that there were "two, for sure." J.A. 461-469, 477. Although the newly disclosed materials indicated that Boatner had spoken to the police on four separate occasions in the immediate aftermath of the shootings, Boatner testified that he could recall talking to the police about the events of that evening only once before his conversation with Officer Ronquillo months later at the hospital. J.A. 475-476.

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[10] By the time of the evidentiary hearing, Officer Adams had died. J.A. 438.

Dale Mims, the neighbor whose interview with the police had previously been undisclosed, also testified. He said that, after hearing the gunshots, he looked out his front door and saw two men wearing masks and carrying AK rifles get in a white car. J.A. 402-403, 413-414. When the car drove past, he saw three men in the car; by then, none of the men was wearing a mask. J.A. 403, 413-414, 416.

d. Petitioner also called Officer Ronquillo. He testified that he had communicated with Boatner "probably for about at least a good month" following the shootings and that, "over the course of [those] communications," Boatner "would supply different things." J.A. 510. Ronquillo confirmed that he had identified petitioner as a suspect in the Roman Street shootings only after speaking with Officer Adams, who relayed the contents of the interview in which Rogers purportedly implicated petitioner. J.A. 525-527. Prior to that conversation, Ronquillo had not investigated petitioner and had been unaware that he was allegedly known as "Short Dog." J.A. 552, 555. Ronquillo also confirmed that Trackling had refused to speak with him about the shootings. J.A. 527.

3. At the close of the hearing, the trial court denied petitioner's application for postconviction relief. The trial court issued no written ruling and made no findings of fact or conclusions of law. Instead, ruling from the bench, the trial court stated in full as follows:

> I am ready to rule in the case.
>
> I don't have to take any time for this.
>
> I have been listening to this for quite a while. I am denying postconviction relief.

Pet. App. A18.

4. The Louisiana Court of Appeal denied petitioner's application for discretionary review without comment, Pet. App. B1, as did the Louisiana Supreme Court, *id.* at C1.[11]

SUMMARY OF ARGUMENT

This is the latest in a series of cases in which the Orleans Parish district attorney's office has failed to disclose information material to a criminal defendant's guilt or punishment before trial, in violation of the defendant's right to due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and related cases. In this case, the favorable information that the prosecution withheld is remarkable both in its scope and in its materiality. The prosecution's case against petitioner rested entirely on the testimony of a single witness, Larry Boatner, who confidently claimed at trial that, in the course of a few seconds, he saw petitioner's face and thus could identify petitioner as the first man to rush into the house where the shootings at issue occurred. Materials disclosed by the state after trial, however, revealed that Boatner had repeatedly been unable to provide any identifying information to the police. Statements from other witnesses further contradicted Boatner's identification of petitioner. And Boatner's own prior statements revealed other material in-

[11] The one-year limitations period on petitioner's federal habeas petition was tolled during the pendency of his application for state postconviction relief, but began running again after the Louisiana Supreme Court denied his application for discretionary review. See 28 U.S.C. 2244(d); *Lawrence* v. *Florida*, 549 U.S. 327, 329 (2007). Accordingly, on October 14, 2010, petitioner filed a federal habeas petition in the United States District Court for the Eastern District of Louisiana. That court has stayed further proceedings pending the Court's decision in this case. See *Smith* v. *Cain*, Civ. No. 10-3378, 2011 WL 2682823, at *1 (E.D. La. July 8, 2011).

consistencies that underscored his general unreliability as a witness.

The subsequently disclosed information also included a statement by Phillip Young, one of the presumed perpetrators, that seemingly contradicted the belief of the police and prosecution that petitioner had participated in the murders. Although the principal detective assigned to the case testified at trial that Young had been unable to communicate with him, the detective's handwritten notes disclosed that he had in fact interviewed Young—and that Young had informed him that "Short Dog" (whom police believed to be petitioner) was not with Young at the house where the shootings occurred.

Other subsequently disclosed materials cast substantial doubt on the prosecution's theory of the case: *viz.*, that petitioner was one of the actual shooters. The prosecution solicited testimony from Boatner and a police firearms examiner to establish that petitioner was carrying a 9-millimeter handgun and that all of the 9-millimeter casings at the scene came from that handgun. But subsequently disclosed materials revealed, first, that Boatner had never mentioned a 9-millimeter handgun at any time before trial, and second, that the firearms examiner had previously concluded that the casings came not from a 9-millimeter handgun but instead from a different type of weapon allegedly carried by another perpetrator.

Finally, the prosecution failed to disclose a statement in which Eric Rogers relayed a confession by another individual, Robert Trackling, to the murders. Had that confession been disclosed, the defense could have learned what later came out at the postconviction evidentiary hearing: namely, that a police officer had allegedly encouraged Rogers to implicate petitioner in the shootings.

It is now undisputed that *none* of the foregoing materials was disclosed to the defense before trial. And there can be little dispute that the prosecution's suppression of the materials undermines confidence in the outcome of petitioner's trial. There is surely a reasonable probability that, if the materials had been disclosed, the result of petitioner's trial would have been different. What took place in this case was a miscarriage of justice. Petitioner was denied due process, and he is entitled to a new trial.

ARGUMENT

THE FAILURE OF THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE TO DISCLOSE FAVORABLE INFORMATION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BECAUSE THE INFORMATION WAS MATERIAL TO THE ISSUE OF GUILT

A. Due Process Requires The Prosecution To Disclose Favorable Information Material To The Issue Of Guilt Or Punishment

1. One of the most cherished principles of our criminal justice system is that "[the state's] interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). Consistent with the state's "special role * * * in the search for truth in criminal trials," *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), "[i]t is as much [the state's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. Based on that overarching principle, this Court has long held that it violates a defendant's right to due process for the state to withhold favorable evidence that is material to a defendant's guilt or punishment, see *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), or knowingly to use false evidence to procure a

conviction or sentence, see *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

This case involves application of the rule of *Brady* to a particularly egregious set of facts. And almost fifty years after *Brady* was decided, the governing legal principles are largely settled. As the Court has explained, a defendant asserting a *Brady* claim must satisfy three requirements: first, that "[t]he evidence at issue must be favorable to the accused"; second, that the "evidence must have been suppressed by the State"; and third, that "prejudice must have ensued." *Strickler*, 527 U.S. at 281-282. The Court has repeatedly made clear that the prosecution's responsibility to disclose evidence under *Brady* extends to exculpatory and impeachment evidence alike. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667, 676-677 (1985). A criminal defendant, moreover, need not demand favorable evidence before trial; instead, the prosecution has an "affirmative duty" to disclose any such evidence "regardless of request." *Kyles* v. *Whitley*, 514 U.S. 419, 432-433 (1995). And the rule of *Brady* encompasses evidence "known only to police investigators and not to the prosecutor," *id.* at 438, and applies "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87.

Under *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and to disclose that evidence *sua sponte* to the defense. *Kyles*, 514 U.S. at 437. To be sure, that obligation requires a prosecutor to "gauge the likely net effect" of favorable evidence *ex ante* and to make a predictive judgment as to whether the failure to disclose the evidence would be prejudicial to the defense. *Ibid.* As the Court has stressed, however, "the govern-

ment simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome." *Id.* at 439. Instead, the Court has admonished that "a prosecutor anxious about tacking too close to the wind" should "disclose a favorable piece of evidence," *ibid.*, and "resolve doubtful questions in favor of disclosure," *United States* v. *Agurs*, 427 U.S. 97, 108 (1976).

2. In its brief in opposition to the petition for certiorari, respondent did not dispute that petitioner has satisfied the first two requirements of *Brady*, and for good reason: petitioner's trial counsel testified at the evidentiary hearing that the relevant documents had not been disclosed to the defense before trial, see p. 22, *supra*, and those documents unquestionably contained abundant evidence favorable to petitioner. As this case comes to the Court, therefore, the sole question is whether the failure to disclose that evidence was prejudicial: *i.e.*, whether the withheld evidence was "material to [the defendant's] guilt or punishment." *Cone* v. *Bell*, 129 S. Ct. 1769, 1782 (2009); see Pet. ii.

As the Court has repeatedly explained, "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 129 S. Ct. at 1783; see *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 433-434. Under that standard, a defendant need not demonstrate either that "disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal" or that, "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-435. Instead, a "reasonable probability" of a different result exists when the prosecution's suppression of evidence "undermines confidence in the

outcome of the trial": that is, when the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Ibid.* (citation omitted); see *Cone*, 129 S. Ct. at 1783; *Banks* v. *Dretke*, 540 U.S. 668, 698 (2004); *Strickler*, 527 U.S. at 290.

For purposes of this case, three subsidiary principles are also pertinent. First, a court should evaluate the prosecution's suppression of evidence "in the context of the entire record"—and, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient" to satisfy the materiality standard. *Agurs*, 427 U.S. at 112-113. Second, in conducting the materiality inquiry, a court should consider the possibility that, even if a piece of suppressed evidence would not itself have been admissible at trial, it would have led to admissible evidence if it had been produced. See *Wood* v. *Bartholomew*, 516 U.S. 1, 5-6 (1995) (per curiam). Third, because materiality is assessed "in terms of the cumulative effect of suppression," a court should consider the suppressed evidence "collectively, not item by item." *Kyles*, 514 U.S. at 436-437.

Under a faithful application of those principles, this is not a close case. If the extraordinary amount of favorable material had been disclosed before trial rather than withheld, there is a "reasonable probability"—indeed, a high likelihood—that the outcome of petitioner's trial would have been different. The trial court's summary rejection of petitioner's *Brady* claim was erroneous.

B. The Chronic Failure Of The Orleans Parish District Attorney's Office To Disclose *Brady* Information Is Well Documented

Although the principle that it offends due process to convict a defendant based on an incomplete picture of the evidence is now well established, it has not been uni-

versally observed. That is especially true in Orleans Parish, Louisiana, whose district attorney's office has developed an unrivaled reputation for its disregard of *Brady*'s requirements.

This Court is already familiar with the long and disturbing history of *Brady* violations in Orleans Parish during the tenure of district attorney Harry Connick. See, *e.g.*, *Connick* v. *Thompson*, 131 S. Ct. 1350, 1356-1357 (2011); *id.* at 1382 (Ginsburg, J., dissenting) (describing the "culture of inattention to *Brady* in Orleans Parish"). In four cases in which defendants were sentenced to death during Connick's tenure, appellate courts (including, on one occasion, this Court) have found *Brady* violations and overturned the convictions. See *Kyles*, 514 U.S. at 421-422; *State* v. *Bright*, 875 So. 2d 37, 44-45 (La. 2004); *State* v. *Cousin*, 710 So. 2d 1065, 1066 n.2 (La. 1998); *State* v. *Thompson*, 825 So. 2d 552, 557 (La. Ct. App. 2002). In numerous other cases, moreover, appellate courts have vacated non-capital convictions for *Brady* violations. See, *e.g.*, *State* v. *Knapper*, 579 So. 2d 956, 961 (La. 1991); *State* v. *Rosiere*, 488 So. 2d 965, 969-971 (La. 1986); *State* v. *Perkins*, 423 So. 2d 1103, 1107-1108 (La. 1982); *State* v. *Curtis*, 384 So. 2d 396, 398 (La. 1980); *State* v. *Falkins*, 356 So. 2d 415, 417 (La.), cert. denied, 439 U.S. 865 (1978); *State* v. *Carney*, 334 So. 2d 415, 418-419 (La. 1976); *State* v. *Lindsey*, 844 So. 2d 961, 969-970 (La. Ct. App. 2003).

In *Kyles*—decided shortly before petitioner's trial—this Court overturned an Orleans Parish capital conviction based on the prosecution's failure to disclose multiple pieces of exculpatory evidence. See 514 U.S. at 421-422. In so doing, the Court warned prosecutors to err on the side of disclosure in order to avoid *Brady* violations. See *id.* at 439. That warning, however, appears to have gone unheeded in Orleans Parish: when Connick was

asked many years later about the effects of *Kyles* on his office's practices, he responded that he "saw no need, occasioned by *Kyles*, to make any changes." *Connick*, 131 S. Ct. at 1382 (Ginsburg, J., dissenting). Connick's successor as district attorney, Eddie Jordan, confirmed that "[t]he previous administration had a policy of keeping away as much information as possible from the defense attorney." Gwen Filosa, *Jordan Targets Backlog of Cases; Volunteer Lawyers To Pitch In, DA Says*, New Orleans Times-Picayune, Feb. 25, 2003, at A1.

In addition, the lead prosecutor in petitioner's case, Roger Jordan, was sanctioned by the Louisiana Supreme Court for committing the underlying *Brady* violation in *Cousin*, one of the cases in which capital convictions were overturned during Connick's tenure. See *In re Jordan*, 913 So. 2d 775, 782 (La. 2005). The Louisiana Supreme Court noted that it had never previously disciplined a prosecutor for a *Brady* violation. *Id.* at 781. The court observed, however, that the evidence at issue—as in this case, a prior statement by the prosecution's only eyewitness casting doubt on the veracity of that witness's identification—was "clearly exculpatory." *Id.* at 782. The court accordingly suspended Jordan from the practice of law for three months. *Id.* at 784. Notably, Jordan was assigned the case for which he was sanctioned in the summer of 1995, *id.* at 778—roughly the same time he was assigned petitioner's case.

To be sure, the long history of misconduct by the Orleans Parish district attorney's office does not compel reversal of petitioner's convictions, any more than the prior bad acts of a defendant justify a guilty verdict. But even a brief account of that history underscores the need for rigorous enforcement of *Brady*'s requirements when substantial evidence of a violation comes to light. And even by its own standards, the district attorney's office

suppressed an exceptional amount of information in this case that was material to the issue of guilt. As we will now demonstrate, on the facts of this case, a new trial is amply warranted.

C. In This Case, The Orleans Parish District Attorney's Office Suppressed Favorable Information Material To The Issue Of Guilt

The array of favorable information that the Orleans Parish district attorney's office failed to disclose in this case is breathtaking both in its scope and in its exculpatory and impeachment value. That information falls into four primary categories. When the information is considered as a whole, as this Court's jurisprudence requires, there can be no doubt it was material for purposes of *Brady*, because the information "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-435.

1. The District Attorney's Office Suppressed Information Impeaching The Testimony Of The Only Witness Linking Petitioner To The Crime

Most significantly, the district attorney's office suppressed abundant information that could have been used to impeach the testimony of Larry Boatner. That testimony was the "essence of the State's case" at trial, *Kyles*, 514 U.S. at 441 (citation omitted), and was "crucial to the prosecution" because it was the only evidence linking petitioner to the crime, *Banks*, 540 U.S. at 700. As the prosecution conceded in its opening statement, the two other survivors of the shootings "didn't see anybody, so they can't identify anybody, 'cause they were in the back." J.A. 57-58. And as the detective leading the investigation conceded on the stand, there was no forensic evidence associating petitioner with the shootings or

even placing him at the scene: the prosecution did not introduce any DNA or fingerprint evidence, any weapon linked to petitioner, or any other physical evidence. J.A. 139.

a. At trial, Boatner identified petitioner as the first man who had entered the house. J.A. 174-175, 195-196. Boatner repeatedly expressed confidence in his identification: he said he had "[n]o doubt" that petitioner was the first man who had entered the house, because he was "[f]ace to face" with that man and could "[d]efinitely" see his face. J.A. 175-176, 196. In identifying petitioner, Boatner heavily relied on his belief that the first man had a "[m]outh full of gold" and a low-cut haircut. J.A. 186, 196, 200. Boatner also testified that the first man who had entered the house was carrying a silver 9-millimeter handgun, whereas the two other perpetrators carried an AK rifle and a MAC-10 machine pistol. J.A. 178, 180.

On three separate occasions, however, Boatner had provided "vastly different" statements to the police in which he unambiguously asserted that he was unable to identify any of the perpetrators. *Kyles*, 514 U.S. at 442. When Officer Ronquillo interviewed Boatner at the scene, Boatner stated that he "could not * * * supply a description of the perpetrators other th[a]n they were black males." J.A. 252-253. All that Boatner could tell Ronquillo was that the perpetrators were carrying an AK rifle, a TEC-9-type weapon, and a silver handgun of unspecified size. J.A. 252. Although a certain degree of imprecision might be expected from a witness in the immediate aftermath of a violent incident, Ronquillo testified that, at the time, Boatner appeared to be "coherent" and "articulated very well the events that had transpired." J.A. 137.

In addition, five days later, Boatner again told Officer Ronquillo that he "could not ID anyone because [he] couldn't see faces." J.A. 308. According to Ronquillo's notes, Boatner had only "glanced" at the first man who had entered the house, "c[ould]n't tell" if the men had their faces covered, and "didn't see anyone." *Ibid.* In conclusion, Boatner said, he "could not ID" the men and "would not know them if [he] saw them." *Ibid.* Seemingly later that same day, Boatner told Ronquillo yet again that he "could not identify any of the perpetrators of the murder." J.A. 260. At most, he said, he could "identify the car if the motor was running." *Ibid.*

It is simply impossible to reconcile those prior statements, in which Boatner repeatedly denied that he could identify any of the perpetrators, with his confident identification of petitioner at trial. The statements therefore constitute the epitome of impeachment evidence: if the defense had been provided those statements, it inevitably would have used them in cross-examining Boatner, and Boatner "would have had trouble explaining" how those statements could be squared with his testimony that there was "[n]o doubt" he saw petitioner at the scene. *Kyles*, 514 U.S. at 441.

There is more. The prosecution withheld not only the notes recording Boatner's prior statements, but also the notes from interviews of two other witnesses who provided information undermining Boatner's identification of petitioner. According to those notes, Shelita Russell, who was critically injured in the shootings and later died, indicated to the police that the "first one through [the] door" had a "black cloth across [his] face." J.A. 310. Russell's statement would have been admissible at trial as a dying declaration, because there was evidence that she made the statement believing her death was imminent. See La. Code Evid. Ann. art. 804(A), (B)(2) (2006

& Supp. 2011); J.A. 102. And it directly contradicted testimony by Officer Joseph Narcisse, who told the jury that Russell had not provided "any further details about the incident" aside from her name, address, and date of birth. J.A 72-73. Similarly, Dale Mims, a neighbor (and the only witness who was not in the house at the time), told the police that, immediately after the shooting, he saw a group of men exit the house, "[a]ll" of whom were wearing "ski type" masks that "cover[ed] [the] whole face." J.A. 309. If the defense had been aware of that statement, it could have called Mims to testify at trial (as he did at the postconviction evidentiary hearing, J.A. 402-417).

Because Russell's and Mims's prior statements indicate that the first man who had entered the house was wearing a mask, they would have had considerable value in calling into question Boatner's assured identification of petitioner as that man. Particularly when considered in conjunction with Boatner's own prior statements, those accounts would likely have generated substantial doubts in the jury's mind about the accuracy of Boatner's identification—the linchpin of the prosecution's case against petitioner.

b. The suppressed information is all the more clearly material because Boatner's identification was "already of questionable validity." *Agurs*, 427 U.S. at 113. By his own account, Boatner had just "[s]econds" to see the perpetrators, who "rushed in" when he opened the front door and almost immediately forced him and the others to the ground. J.A. 174-177, 199. In addition, in identifying petitioner, Boatner heavily relied on his belief that the first man had a "[m]outh full of gold" and a low-cut haircut—a belief that Boatner had conveyed on one previous occasion to the police. J.A. 186, 196, 200, 296. But those characteristics could hardly have been sufficient to

sustain an identification in and of themselves, because they were not uncommon for the time and place. Indeed, according to other undisclosed materials, no fewer than *five* other suspects (including Phillip Young, Donielle Bannister, and Kintad Phillips) had gold teeth and similar haircuts. J.A. 259, 264, 284, 298. Those characteristics therefore constituted an insufficient basis for Boatner's in-court identification of petitioner.

To the extent Boatner had previously identified petitioner as the first man who had entered the house, the circumstances surrounding that earlier identification were equally dubious. Boatner claimed to have first identified petitioner on or around June 7, 1995, after seeing an article about the case in the New Orleans Times-Picayune. J.A. 187-190. As the court noted at trial, however, that article was accompanied by a photograph of petitioner and implicated him as one of the "primary suspects" in the shootings. J.A. 160-161. In addition, Boatner took no action to alert the police to his alleged identification; instead, he left town and, upon his return, checked into a rehabilitation program at a local hospital for patients with "life-threatening" substance-abuse problems. J.A. 190-193, 213-214, 218, 245. It was only at the hospital—almost four months after the shootings, and some three weeks after he allegedly had first identified petitioner—that Boatner was visited by the police and identified petitioner from a photographic lineup. J.A. 193-194. Contemporaneous notes by a hospital aide, moreover, reveal that Boatner had felt "harassed" by the police to identify a suspect. J.A. 247. Boatner's purported prior identification of petitioner thus provides scant support for his confident in-court identification. And given the "questionable validity" of Boatner's identification of petitioner, even "relatively minor" impeachment evidence would suffice to undermine it, *Agurs*, 427

U.S. at 113—much less the overwhelming evidence that the prosecution here suppressed.

c. In addition to undermining Boatner's identification, the suppressed information reveals other inconsistencies in Boatner's trial testimony—inconsistencies that would have cast doubt on Boatner's credibility as a witness more generally.

For example, Boatner testified at trial that the first man who had entered the house was carrying a silver 9-millimeter handgun. J.A. 178. In his numerous prior statements, however, Boatner nowhere described the handgun as a 9-millimeter; instead, he merely referred to the gun generically as a "silver colored handgun" or a "chrome automatic." J.A. 252, 296. Given Boatner's testimony at trial that he "kn[e]w" what a 9-millimeter handgun "looks like," J.A. 178, Boatner's consistent failure to identify the gun as a 9-millimeter before trial would have served as a valuable basis for impeachment.

In one of his prior statements, Boatner also described the handgun carried by the first man who had entered the house as "big." J.A. 296. In his trial testimony, however, Boatner did not so describe the gun, instead referring to it only as a 9-millimeter handgun. J.A. 178. That inconsistency is particularly significant when it is understood in conjunction with other trial testimony, because it casts further doubt on the validity of Boatner's ultimate identification of petitioner. At trial, Rebe Espadron testified that the sole perpetrator she saw—the man who had pointed the gun at her—was carrying a "big gun, like a big handgun." J.A. 110. Espadron also testified that she was unable to see that man's face because he had something covering his mouth. J.A. 99, 110. If Boatner had been confronted with his prior statement that the handgun carried by the first man who had entered the house was "big," the jury would likely have

wondered whether the man he was describing was the same man who had pointed a "big" handgun at Espadron—and, if so, whether Boatner was being accurate when he testified that he had seen that man's face, despite Espadron's testimony that the man she saw had his mouth covered (testimony consistent with the undisclosed statements of Russell and Mims).

There were still more inconsistencies between Boatner's trial testimony and the suppressed information. To take but two further examples, Boatner told the jury that the third perpetrator he had observed was carrying a MAC-10. J.A. 180. In his prior statements, however, Boatner nowhere mentioned a MAC-10; instead, he repeatedly told investigators that the third perpetrator carried a TEC-9—which has a noticeably different appearance from the MAC-10. J.A. 252, 296.[12] That discrepancy would have served as another basis for impeachment, particularly in light of Boatner's testimony that he "kn[e]w all about" the guns the perpetrators had been carrying. J.A. 201. In addition, Boatner told the jury that there had been three perpetrators. J.A. 180. In his prior statement, however, Dale Mims told the police he had seen four. J.A. 309.[13]

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[12] On a MAC-10, the magazine inserts into the grip handle itself, behind the trigger; on a TEC-9, the magazine attaches separately, forward of the trigger guard. The MAC-10 thus has only one protrusion extending downward from the barrel, whereas the TEC-9 has two. See, *e.g.*, Violence Policy Center, *The Gun Industry Evades the Assault Weapons Ban* <tinyurl.com/gunpicture> (last visited Aug. 12, 2011).

[13] At the postconviction hearing, Boatner himself admitted that "d[id]n't know how many [perpetrators] was in there"—only that there were "two, for sure." J.A. 477.

To the extent there is any residuum of doubt whether the suppressed information directly impeaching Boatner's identification of petitioner satisfies *Brady*'s materiality standard, therefore, the numerous additional inconsistencies in Boatner's testimony eliminate it. In the hands of petitioner's experienced counsel, the undisclosed materials would have "fueled a withering cross-examination" of Boatner and "resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Kyles*, 514 U.S. at 441, 443.

d. It bears repeating that, aside from Boatner's identification, *there was no evidence linking petitioner to the crime*. This case therefore crucially differs from ones in which "[o]ther evidence in the record * * * [would] provide[] strong support for the conviction even if the witness' testimony had been excluded entirely." *Banks*, 540 U.S. at 701 (citing *Strickler*, 527 U.S. at 293). For example, in *Strickler*, the testimony of the witness who could have been impeached "was not the only evidence that the jury had before it," and "there was considerable forensic and other physical evidence linking [the defendant] to the crime." 527 U.S. at 293. By contrast, far from being "overwhelming," *Wood*, 516 U.S. at 8, the other evidence linking petitioner to the crime in this case was nonexistent.

Indeed, the prosecution's case against petitioner was far weaker—and more dependent on evidence undercut by the suppressed information—than in other cases in which this Court has *found* violations of a defendant's right to due process. In *Kyles*, the prosecution's case included four eyewitness identifications and the murder weapon, which had been found in the defendant's home. See 514 U.S. at 427-428, 431; *id.* at 475 (Scalia, J., dissenting) (contending that the prosecution had "presented to the jury a massive core of evidence * * * showing

that petitioner was guilty of murder"). The Court nevertheless concluded that the disclosure of inconsistent statements by two of the eyewitnesses and a police informer "would have made a different result reasonably probable." 514 U.S. at 441. Similarly, in *Banks* (which involved a claim of *Brady* error in capital sentencing), the jury heard uncontradicted testimony that the defendant had killed the victim "for the hell of it"; had supplied a weapon to another person for the purpose of carrying out robberies; and had threatened to kill a relative a week before the murder in question. See 540 U.S. at 677, 679-681. But the Court concluded that the disclosure of a witness's status as an informant made it reasonably probable that the jury would have imposed a lesser sentence. *Id.* at 703.

At bottom, this case is far simpler. The prosecution's case hinged entirely on the testimony of a single witness. That testimony, in turn, was thoroughly undermined by inconsistent and contradictory statements made by that witness and others to the police—statements that the prosecution failed to disclose to petitioner before trial. If those statements had been made available, the defense would have laid waste to the witness's testimony on cross-examination, "destroying confidence in [the witness's] story" and taking down the prosecution's case with it. *Kyles*, 514 U.S. at 443; see *Napue*, 360 U.S. at 269 (noting that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"). Based on the abundant evidence impeaching that witness's testimony alone, "one could not plausibly deny the existence of the requisite 'reasonable probability of a different result,'" and petitioner is accordingly entitled to a new trial. *Banks*, 540 U.S. at 703 (citation omitted).

2. The District Attorney's Office Suppressed Information From An Apparent Perpetrator Suggesting That Petitioner Had Not Been Involved In The Crime

Although the suppression of the information that could have been used to impeach Boatner is itself sufficient to warrant a new trial, the district attorney's office also suppressed police notes indicating that Phillip Young, who was suspected of (and later charged with) being one of the perpetrators of the shootings, had provided information suggesting that petitioner was not involved. Far from disclosing that statement, the prosecution affirmatively created the misleading impression that Young had been unable to communicate with police. The failure to disclose the notes recording Young's exculpatory statements further "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (citation omitted).

a. At trial, the prosecution presented substantial evidence that Young was one of the perpetrators: Young had been found critically wounded at the scene, and Espadron and Boatner both testified that they had never seen him before and expressed their belief that he was involved in the shootings. J.A. 103, 114, 182-183. At the same time, the prosecution suggested that Young had been unable to provide any information concerning petitioner's involvement in the shootings. Officer Ronquillo testified that he had visited Young at the extended-care facility where he was being treated for his injuries. J.A. 135. According to Ronquillo, Young was in "really bad shape" and was not "able to communicate with [him] at all." J.A. 135-136.

Unbeknownst to the defense, however, Officer Ronquillo *had* been able to communicate with Young, who provided significant information concerning the shoot-

ings. According to police notes, Officer Ronquillo visited Young after receiving a call from Young's nurse informing him that Young "had begun talking and communicating with others." J.A. 271-272. Although Young's speech was "very slurred," he could answer yes-or-no questions by blinking. J.A. 272.[14] According to the police notes, after Ronquillo administered the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), Young answered a series of questions concerning the shootings. J.A. 311. Most importantly, when Ronquillo asked Young whether certain individuals (including "Short Dog") were with him when he went to the house where the shootings occurred, Young answered no. *Ibid.*

At the time, the police believed "Short Dog" to be petitioner. According to police notes, "Short Dog" was listed as petitioner's alias. J.A. 312. At the postconviction hearing, moreover, petitioner's trial counsel testified that the police had referred to petitioner as "Short Dog." J.A. 365.

b. It can hardly be disputed that the fact that Young had denied the involvement of "Short Dog" in the shootings would have been material to a jury determining petitioner's guilt. If the defense had been aware of that fact, it could have called Young to testify at trial. If Young had been unable or unwilling to testify, the defense could have introduced Young's statement as a statement against interest by an unavailable witness. See La. Code Evid. Ann. art. 804(A), (B)(3) (2006 &

[14] At the postconviction hearing, Barbara Riley, Young's nurse, confirmed that Young could answer yes-or-no questions through body movement; "appeared to understand what you were saying to him"; and was not suffering from amnesia. J.A. 421, 424.

Supp. 2011).[15] Not only was Young's statement powerful exculpatory evidence on its own, but the defense could have used it in cross-examining Officer Ronquillo: for example, to impeach Ronquillo's testimony that Young was not "able to communicate with [him] at all," J.A. 136; to verify that the police believed that "Short Dog" was petitioner; and to explore the police's reasons for so believing.

However the information would have been introduced, if the notes of Officer Ronquillo's interrogation of Young had been produced before trial, the jury would have been privy to a statement by an apparent perpetrator seemingly absolving petitioner of responsibility for the shootings. Particularly when that information is combined with the information undermining Boatner's identification of petitioner as one of the perpetrators, "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 129 S. Ct. at 1783.

3. The District Attorney's Office Suppressed Information Undermining The Prosecution's Theory Of The Case

The prosecution in this case withheld information casting doubt not only on petitioner's presence at the scene of the shootings, but also on the prosecution's very

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[15] To the extent that Young's statement tended to inculpate him at the same time as it exculpated petitioner, it would have been admissible because there were other indicia of the statement's trustworthiness: specifically, because Young's answers to other questions (*e.g.*, that he had driven to the house in his girlfriend's car and that he had been shot by one of the people in the house) were consistent with other evidence in the case. See La. Code Evid. Ann. art. 804(B)(3) (2006 & Supp. 2011); J.A. 300-303.

theory of the case: *viz.*, that petitioner was one of the actual shooters. Specifically, the withheld information contradicted the proposition that, assuming that Larry Boatner's identification of petitioner was accurate, at least one of the victims was shot and killed by a bullet fired from the 9-millimeter handgun purportedly carried by petitioner. Together with the other suppressed information, that information—pertinent to one of the central issues at trial—is material for purposes of *Brady*.

a. At trial, the prosecution went to great lengths to prove that petitioner was one of the shooters.[16] The prosecution's theory, in turn, had three components. First, the prosecution sought to establish that petitioner, and no other perpetrator, carried a 9-millimeter handgun. To that end, Boatner testified that the first man who had entered the house—allegedly petitioner—was carrying a silver 9-millimeter handgun, whereas the two other perpetrators were carrying an AK rifle and a MAC-10 machine pistol. J.A. 178, 180. The prosecution sought to bolster Boatner's credibility in identifying the firearms by eliciting testimony that Boatner "kn[e]w" what a 9-millimeter handgun "looks like" and that he "kn[e]w all about" the other weapons as well. J.A. 178, 201.

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[16] The prosecution seemingly relied on that theory for purposes of establishing that petitioner had a "specific intent to kill or to inflict great bodily harm," as is required under Louisiana law in order to obtain a conviction for first-degree murder. See La. Rev. Stat. Ann. § 14:30(A) (2007 & Supp. 2011); cf. La. Rev. Stat. Ann. § 14:10(1) (2007) (defining "[s]pecific criminal intent" as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act").

Second, the prosecution sought to establish that the 9-millimeter casings found at the scene came exclusively from a 9-millimeter handgun. The prosecution did so through the testimony of Kenneth Leary, a police firearms examiner. Leary stated that, "[a]fter examining all 26 of * * * the 9-millimeter cartridge cases, [he] was able to reach the conclusion that all 26 cartridge cases w[ere] fired by one particular weapon, one 9-millimeter handgun." J.A. 155.

Third, the prosecution sought to establish that at least one of the victims was shot and killed by a bullet fired from a 9-millimeter handgun. The prosecution asked Alvaro Hunt, the pathologist who had performed Shelita Russell's autopsy, whether Russell's wounds were "consistent with gunshots from a 9 millimeter handgun." Hunt answered, "[t]hey could be, yes," though he conceded that he could not be certain. J.A. 79-81.

Undisclosed materials cast serious doubt on the validity of at least two components of the prosecution's theory. As discussed above, in his numerous prior statements, Boatner never once described the handgun carried by the first man as a 9-millimeter; instead, he referred to the gun only as a "silver colored handgun" or a "chrome automatic." See p. 39, *supra*. Despite his confident assertion that he "kn[e]w" what a 9-millimeter handgun "looks like," Boatner did not describe the handgun as a 9-millimeter until trial. J.A. 178.

Even more significantly, undisclosed police notes demonstrate that, although Leary testified at trial that all of the 9-millimeter casings found at the scene came from one 9-millimeter handgun, he had told Officer Ronquillo something quite different in the course of the investigation. According to those notes, Ronquillo asked Leary to conduct testing to determine whether the 9-

millimeter casings found at the scene matched a 9-millimeter handgun that had been seized from Donielle Bannister when he was arrested on another charge. J.A. 266. Leary, however, responded that the 9-millimeter casings had already been matched to "a Inter Tec, 'Mac 11' model type, semi automatic weapon." *Ibid.* Because Leary had already determined that the casings came from that type of weapon, he did not conduct the testing of the 9-millimeter handgun that Ronquillo had requested. *Ibid.*

b. The notes of Leary's conversations with Officer Ronquillo squarely contradict Leary's testimony at trial—and, in so doing, directly undermine the prosecution's theory of the case. Leary's statement that the 9-millimeter casings had been matched to a machine pistol of the Intratec or MAC-11 type cannot be reconciled with his trial testimony that they came from a 9-millimeter handgun: although they also use 9-millimeter cartridges, machine pistols such as the Intratec TEC-9 and Ingram MAC-10 and MAC-11 are automatic or semiautomatic weapons, not handguns.[17] Indeed, Leary was so sure that the casings did not come from a 9-millimeter handgun that he refused to conduct testing to determine whether the casings matched a 9-millimeter handgun that the police had seized. In addition, at least according to Boatner, an "Inter Tec, 'Mac 11' model type" weapon *was* on the scene—but it was carried by a

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[17] See Jones & White 221; cf. *United States* v. *Miles*, 772 F.2d 613, 615 (10th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); *Navegar, Inc.* v. *United States*, 914 F. Supp. 632, 633-634 & n.2 (D.D.C. 1996), aff'd in part and rev'd in part, 103 F.3d 994 (D.C. Cir. 1997); *Merrill* v. *Navegar, Inc.*, 28 P.3d 116, 119 & n.3 (Cal. 2001); see generally Duncan Long, *The Terrifying Three: Uzi, Ingram, and Intratec Weapons Families* 21-58 (1989).

different perpetrator, whom Boatner variously described as carrying a TEC-9 (a machine pistol manufactured by Intratec), J.A. 252, 296, or a MAC-10 (a slightly larger version of the MAC-11), J.A. 180.

If the defense had been aware of the prior statements by Boatner and Leary, it surely would have used those statements on cross-examination to attack the prosecution's theory of the case. And based either on Boatner's failure to mention the 9-millimeter handgun before trial or on Leary's pretrial statement that the 9-millimeter casings found at the scene came not from a 9-millimeter handgun but instead from a different type of weapon purportedly carried by another perpetrator, the jury readily could have concluded that petitioner was not one of the shooters—assuming, *arguendo*, that the jury would have concluded that petitioner was even present at the scene in the first place.

In short, Boatner's and Leary's prior statements thoroughly undercut the prosecution's theory of the case, and the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Particularly when coupled with the suppressed evidence concerning whether petitioner was even present at the scene, that evidence is material for purposes of *Brady*.

4. The District Attorney's Office Suppressed Information Indicating That Other Individuals Were Responsible For The Shootings

Finally, the district attorney's office suppressed the confession of another individual, Robert Trackling, to participation in the shootings. If the notes of the interview recording that confession had been disclosed before trial, the defense could have used them to exculpate peti-

tioner—and, indeed, to develop the argument that the police had framed petitioner for the shootings.

a. Eric Rogers, Trackling's cellmate, told Officer Byron Adams that Trackling had confessed to the Roman Street murders. J.A. 281-282. According to Rogers, Trackling said that he had committed the murders with three others: "Fat, Buckle and a guy they call uh, Short Dog." J.A. 281. When Officer Adams asked Rogers to identify those individuals, Rogers immediately identified "Fat" as "Darnell Ban[n]ister" (presumably Donielle Bannister) and "Buckle" as "Contez Phillips" (presumably Kintad Phillips). J.A. 284. As to "Short Dog," however, Rogers gave conflicting answers. Rogers initially said that Trackling had told him that "Short Dog" was "Juan" (but that Trackling "didn't give [him] no last name"), but later, when asked whether the three men "call themselves anything," he said, "Short Dog that's what they call him, they call Robert Home." J.A. 285. Rogers then said the men were members of a group that called itself the "Cut Throat Posse"—but when he listed the members of the group by name, he did not list petitioner. J.A. 285-287.

Officer Adams relayed the contents of the interview to Officer Ronquillo, who subsequently conducted an interview with Trackling. J.A. 266-267, 275. Trackling asserted his right to remain silent but offered an unsolicited statement that he had been working at a pizza shop on the night of the shootings. J.A. 275. That alibi, however, did not check out: Trackling's time card showed that he had left work before the shootings occurred. J.A. 248, 277.

b. The notes recording Rogers's and Trackling's statements before trial would have been materially helpful to the defense in two respects.

First, to the extent that Rogers's equivocal statement cast doubt on the proposition that "Short Dog" was petitioner, Trackling's statement would have been affirmatively exculpatory as to petitioner, given Trackling's identification of "Short Dog" as one of the perpetrators. If the defense had possessed Rogers's and Trackling's statements, it could have called them to testify at trial. If Trackling had refused to testify, the defense could have introduced Trackling's statement through Rogers as a statement against interest by an unavailable witness. See La. Code Evid. Ann. art. 804(A), (B)(3) (2006 & Supp. 2011).[18]

Second, if the defense had been aware of Rogers's statement relating Trackling's confession, defense counsel (or the private investigator the defense had retained) could have spoken to Rogers and learned of Rogers's bombshell allegation that Officer Adams had asked him to implicate petitioner. At the postconviction hearing, Rogers testified that Adams had spoken with him before Adams began recording his statement. J.A. 435.[19] In that conversation, according to Rogers, Adams asked Rogers if he knew a "Short Dog" or petitioner; Rogers said he did not. J.A. 430. At that point, Adams "asked [him] to involve Short Dog, Juan Smith," and promised

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[18] To the extent that Trackling's statement tended to inculpate him at the same time as it exculpated petitioner, it would have been admissible because there were other indicia of the statement's trustworthiness: specifically, because Trackling's statement contained numerous details that were verified by other witnesses (such as Rebe Espadron). See La. Code Evid. Ann. art. 804(B)(3) (2006 & Supp. 2011); J.A. 98-100.

[19] That testimony was consistent with the transcript of Rogers's recorded statement, in which Officer Adams referred to an "oral interview" that had taken place earlier. J.A. 286.

him that, if he "d[id] [Adams] a favor," Adams "would go talk to some people and get [his] life sentence took back." *Ibid.* Under persistent questioning, Rogers consistently maintained that Adams "wanted [him] to implicate Juan Smith[,] saying that Juan Smith was the shooter," J.A. 433, and that Adams promised to help him "get [his] time took back" if he implicated petitioner, J.A. 443.

There is good reason to credit Rogers's version of events. At trial, Officer Ronquillo testified that he first identified petitioner as a suspect in the Roman Street shootings in late May 1995, but he did not explain how he came to do so. J.A. 131. At the postconviction hearing, however, Officer Ronquillo was more forthcoming, testifying that he had identified petitioner as a suspect only after speaking with Officer Adams, who relayed the contents of his interview with Rogers. J.A. 525-527. Prior to that conversation, Ronquillo conceded, he had not investigated petitioner. J.A. 552, 555. Notably, at that time, Ronquillo had not yet spoken to Trackling, and Boatner had not yet identified petitioner. There was therefore no basis for suspecting petitioner of involvement in the Roman Street shootings apart from Adams's account of his interview with Rogers.

Various features of Rogers's statement, moreover, are consistent with his contention that he had never believed that petitioner was "Short Dog" but had been asked by Officer Adams to implicate petitioner as "Short Dog" shortly before the statement was recorded. Although Rogers was immediately able to identify "Fat" and "Buckle" as associates whom Trackling identified as participants in the shootings, Rogers hesitated upon mentioning "a guy they call uh, Short Dog." J.A. 281. When Adams asked Rogers to identify those individuals, Rogers again immediately identified "Fat" and "Buckle," but was unable to put a consistent name to "Short

Dog"—at first calling him "Juan" but later failing to make the same association. J.A. 285. And in naming the members of the "Cut Throat Posse," Rogers conspicuously failed to mention petitioner. J.A. 285-287. Rogers was therefore far from confident in implicating petitioner in the shootings—a lack of confidence that tends to confirm Rogers's account of how he came to be aware of petitioner in the first place.

In any event, Rogers's contention that the police had sought to frame petitioner would readily qualify as information that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. If the defense had learned of Rogers's contention, it could have called Rogers to testify at trial—or, at a minimum, cross-examined Officer Ronquillo about how petitioner came to be identified as a suspect. As with other suppressed evidence, Rogers's statement would have enabled the defense to obtain information that would have undercut the "thoroughness and even the good faith" of the investigation and prosecution, dramatically weakening the prosecution's already threadbare case against petitioner. *Id.* at 445.

In sum, when the foregoing statements by Rogers and Trackling are considered together with the abundant other information that the state withheld, there can be no doubt that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, 129 S. Ct. at 1783. The failure to disclose any of that information compels a new trial.

* * * * *

This Court has often observed that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). As in *Kyles*, however, "'fairness' cannot be stretched to the point of calling this a fair trial." 514 U.S. at 454. The prosecution's case against petitioner depended on a single witness whose testimony was inconsistent with numerous undisclosed statements he and others had previously provided to the police. An undisclosed statement by an apparent perpetrator seemingly denied petitioner's involvement. The prosecution's whole theory of the case was contradicted by an undisclosed statement by its own firearms examiner. And an undisclosed jailhouse confession revealed an unsettling explanation for petitioner's presence in the case in the first place. In light of the systematic withholding of favorable information by the Orleans Parish district attorney's office in this case, it is simply impossible to have confidence in the outcome of petitioner's trial.

One final observation is in order. The unfairness of petitioner's trial was compounded by the summary treatment that his *Brady* claim received in the Louisiana courts. Without issuing a written ruling or making any findings of fact or conclusions of law, the trial judge summarily rejected petitioner's claim from the bench, dismissively stating that he "ha[d] been listening to this for quite a while" and "d[id]n't have to take any time for this." Pet. App. A18. The Louisiana appellate courts then denied petitioner's applications for discretionary review. See *id.* at B1, C1. To be sure, state courts are busy places, and "[t]he issuance of summary dispositions * * * can enable a state judiciary to concentrate its resources on the cases where opinions are most needed." *Harrington* v. *Richter*, 131 S. Ct. 770, 784 (2011). But we

respectfully submit that it is inappropriate for state courts to issue such summary rulings in the face of what is indisputably a substantial claim for postconviction relief. Petitioner was the victim of a miscarriage of justice at trial and of rough justice thereafter. Under established principles of due process, petitioner is entitled to a new, fair trial.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted.

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