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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*

REPLY BRIEF FOR THE PETITIONER

KATHLEEN KELLY
MATILDE J. CARBIA
CAPITAL POST-CONVICTION PROJECT OF LOUISIANA
1340 Poydras Street, Suite 1700
New Orleans, LA 70112

DAVID E. KENDALL
KANNON K. SHANMUGAM
Counsel of Record
THOMAS H.L. SELBY
GEORGE W. HICKS, JR.
APRIL R. RIEGER
KRISTIN A. FEELEY*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

* Admitted in Illinois and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Bar Rule 49(c)(8).

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Respondent does not dispute the following propositions: (1) the only evidence at trial linking petitioner to the crime was Larry Boatner's identification; (2) on multiple occasions, Boatner had told police he could not identify any of the perpetrators; and (3) Boatner's prior statements were withheld from the defense before trial. Those propositions are all that is required for petitioner to be entitled to relief under *Brady* v. *Maryland*, 373 U.S. 83 (1963). There can be no serious dispute that, if Boatner's prior statements had been disclosed, there is a reasonable probability that the result of petitioner's trial would have been different. Despite respondent's imaginative efforts to conjure up explanations for Boatner's repeated failure to provide any identifying details, Boatner's prior statements directly contradict his testimony

at trial. What is more, those statements were riddled with additional inconsistencies, and the suppressed statements of other witnesses undermined Boatner's identification of petitioner still further.

With no real answer to the core of petitioner's claim, respondent picks away at the margins, contending as to other withheld information that petitioner failed to satisfy the threshold requirements of *Brady*. As respondent candidly admits (Br. 39), however, he did not make any of those arguments in opposing the petition for certiorari, which presented only the question whether the suppressed information was material for *Brady* purposes. Respondent's arguments are therefore forfeited. See S. Ct. R. 15.2. As we will explain, however, those arguments also fail on the merits. If the defense had possessed all of the other information that was suppressed in this case, it could have used that evidence to cast doubt on petitioner's involvement in the murders; on the prosecution's theory that petitioner was one of the shooters; and on the police's motives in identifying petitioner as a suspect in the first place.

When all of the suppressed information is considered together, as *Brady* requires, this is not a close case. The trial court's rejection of petitioner's *Brady* claim was erroneous; the Louisiana courts' summary disposition of that claim verges on the inexplicable. Because the Court can have no confidence in the verdict in this case, it should reverse the judgment of the trial court and order a new trial.

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

1. With regard to Boatner's prior statements—the most important *Brady* material on which petitioner relies—respondent does not contend either that the statements were disclosed before trial or that the statements would not have constituted admissible evidence favorable to petitioner. Instead, in the very last section of his brief, respondent contends (Br. 55-59) that petitioner suffered no prejudice from the failure to disclose the statements—statements that respondent admits were "inconsisten[t]" with Boatner's identification of petitioner at trial (Br. 58). Respondent's contention is invalid.

a. On the evening of March 1, 1995, Officer Ronquillo interviewed Boatner at the scene of the shootings; according to Ronquillo's notes, Boatner told him that he "could not * * * supply a description of the perpetrators other th[a]n they were black males." J.A. 252-253. Although respondent suggests that Boatner merely "gave no description of his assailant" to Ronquillo, Br. 55, Ronquillo's notes reflect that Boatner affirmatively indicated he was *unable* to provide any identifying details at the scene.[1]

[1] Respondent claims that, "[i]mmediately prior to his statement to [Officer] Ronquillo," Boatner had "already given one of the first responders a detailed description of his assailant." Br. 55; see Br. 3-4, 51. In support of that claim, respondent cites Boatner's testimony at a pretrial suppression hearing. See 10/27/95 Tr. 24 (reproduced in volume 7 of the record received on July 28, 2011). But no other evidence indicates that Boatner provided a statement at the scene other than the one he provided Ronquillo, and Boatner did not repeat that testimony at trial or at the postconviction hearing. It appears, therefore, that Boatner was actually recounting his statement later that evening to Officer Archie Kaufman, in which he stated that the

Respondent does not dispute that, if the defense had been provided the notes in question, it could have used Boatner's statement to contradict his confident identification of petitioner at trial. Instead, respondent suggests that, if the defense had used Boatner's statement for impeachment, the prosecution could have downplayed the statement by arguing that Boatner was "straining under grief, trauma, fear, and pain" at the time he made it. Br. 57. By respondent's own recognition, however, that argument is entirely speculative, because Boatner did not so testify at the postconviction hearing. See Br. 56 (noting that "[h]ow th[e] circumstances actually affected Boatner are presently unknown"). And the mere possibility that the jury *could* have credited such a conjectural argument, in the face of an unambiguous statement directly contradicting the only evidence linking petitioner to the crime, is insufficient to defeat petitioner's *Brady* claim. To obtain a new trial, petitioner need not prove to a certainty that the jury *would* have acquitted him; instead, he need only show that 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* v. *Whitley*, 514 U.S. 419, 435 (1995).

In any event, respondent's speculative argument is utterly refuted by the record. At trial, Officer Ronquillo testified that, while Boatner was "shook up" when Ronquillo met him at the scene, he appeared to be "coherent" and "articulated very well the events that had transpired." J.A. 137. Ronquillo added that Boatner "held up very well for what had happened"; "just like any other

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first man through the door had gold teeth and a low-cut haircut. J.A. 296.

witness," Boatner "seemed pretty normal" and "didn't seem out of the ordinary." J.A. 137-138. Respondent is thus asking the Court to discredit what *its own witness* said about Boatner's state of mind at the time of his statement—an invitation the Court should decline.

b. On March 6, Boatner again told Officer Ronquillo that he "could not identify any of the perpetrators of the murder," J.A. 260, and "would not know them if [he] saw them," J.A. 308; that he could not see their faces, *ibid.*; and that he could not even tell if their faces were covered, *ibid.* Although respondent quibbles about whether Boatner made two separate statements to Ronquillo on March 6 or only one,[2] he concedes that Boatner was unable to provide any identifying details as of that date.

As with the March 1 statement, respondent does not dispute that, if the defense had been provided the notes recording Boatner's March 6 statements, it could have used them to contradict Boatner's identification of petitioner. Instead, respondent suggests that, if the defense had used Boatner's statements for impeachment, the prosecution could have minimized those statements' significance by arguing that, having been too traumatized to provide any identifying details at the scene on March 1, Boatner was "frightened" on March 6—and refused to "assist[] the police investigation" in order to "retreat from danger." Br. 58-59. Again, however, respondent acknowledges that his argument is entirely speculative. See Br. 57 (noting that "[t]he reasons that Boatner

[2] The suppressed documents indicate that Boatner talked to Officer Ronquillo on March 6 at 2:30 p.m. and again at 4 p.m. J.A. 259-260, 308. At the postconviction hearing, Ronquillo testified that the latter indication was "[a]pparently a typo," but did not assert that he had spoken to Boatner only once on that date. J.A. 533.

would have desired no longer to be involved in the case are not a matter of record"). And again, the mere possibility that the jury *could* have credited such a speculative argument cannot defeat petitioner's *Brady* claim.

At any rate, as with the March 1 statement, respondent's explanation for the March 6 statements does not hold water. At the postconviction hearing, Officer Ronquillo testified that Boatner continued to communicate with him for "at least a good month" following the shootings. J.A. 510. During that time, Boatner repeatedly met with Ronquillo to view photographic lineups, including on March 13—just one week after he was purportedly too frightened to cooperate with police. J.A. 122, 184-186. And Boatner himself testified that, upon seeing petitioner's photograph in the New Orleans newspaper in June, he wanted to go looking for petitioner, J.A. 489, 494—hardly the action of a "frightened" person seeking to "retreat from danger."

Respondent suggests that Boatner's fear was "strong enough to drive him to flee New Orleans for a time, and it was only after learning that the murderers had been apprehended that he felt safe to return." Br. 58. But Boatner did not leave New Orleans until June—some *three months* after making the statements at issue. J.A. 190-191. And he returned to New Orleans *before* petitioner was arrested—an arrest that took place only after Boatner himself identified petitioner to Officer Ronquillo. J.A. 273-274; R. 745. There is therefore no valid basis for believing that Boatner was acting out of fear at *any* stage of the investigation—much less on March 6.

2. Confronted with Boatner's facially material prior statements, respondent argues at length (Br. 50-54) that Boatner's identification of petitioner was reliable under *Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). In so arguing, respon-

dent is tilting at windmills, because petitioner is not arguing here that Boatner's identification was constitutionally *impermissible* (with the result that it should have been excluded from evidence). See Pet. Br. 37-39. Instead, petitioner is arguing only that the identification, while admissible, was of "questionable validity"—and that, as a result, even "additional evidence of relatively minor importance" (much less the considerable evidence adduced here) would be sufficient to undermine the identification and satisfy the *Brady* materiality standard. *United States* v. *Agurs*, 427 U.S. 97, 112-113 (1976).

Respondent cannot seriously contest that more modest proposition, because numerous aspects of Boatner's identification of petitioner as the first man through the door are questionable. To begin with, Boatner had only a limited opportunity to see any of the perpetrators. Although respondent contends that Boatner "spent a considerable amount of time with [his] assailant[s]," Br. 50 (citation omitted), Boatner testified at trial that the perpetrators "rushed in" and he had just "[s]econds" to see them. J.A. 174, 199. Far from getting a good look at the first man, moreover, Boatner was "looking out the corner of [his] eye" while the man was holding a gun to his head, J.A. 177; was "trying to see [the man's] face" after the man forced him to the ground, *ibid.*; and was "look[ing] up at the ceiling" after he got up, J.A. 178.

Consistent with his fleeting glimpse of the first man, Boatner did not provide a "detailed description," as respondent suggests (Br. 55), but instead provided only limited identifying details to the police: namely, that the first man had gold teeth and a low-cut haircut. J.A. 296. Respondent inexplicably takes umbrage (Br. 52) at the suggestion that those characteristics were insufficient to sustain an identification. But respondent does not dispute that at least *five* other suspects had gold teeth and

similar haircuts, thus effectively nullifying the identifying value of those characteristics. J.A. 259, 264, 284, 298.

To the extent Boatner had previously identified petitioner as the first man, moreover, the circumstances surrounding that identification were dubious. First of all, Boatner did not identify petitioner to the police until June 28—nearly four months after the shootings. J.A. 248, 273. And Boatner did so at a time when he was recuperating at a local hospital for patients with "life-threatening" substance-abuse problems, J.A. 192-195, 245—and when, according to notes from a hospital aide, he was feeling "harassed" by the police to identify a suspect, J.A. 247.[3]

In addition, Boatner's ultimate identification of petitioner came almost three weeks after he had allegedly first identified petitioner (upon seeing an article about the case in the New Orleans newspaper). J.A. 187-190, 273. Respondent attempts to bolster that earlier purported identification by arguing that the article did not implicate petitioner. Br. 53. After reviewing the article, however, the trial court squarely concluded otherwise, J.A. 160-161, and the state even stipulated to an instruction at trial that the photographs accompanying the article "depict[ed] possible suspects of" the incident, J.A. 190. Although respondent further argues that the contents of the article are irrelevant because Boatner merely looked at the accompanying photographs, and "did not read the text" of the article, before making his identifica-

[3] Respondent argues (Br. 39-40) that those notes were available to the defense at the time of trial. Why respondent devotes space to that argument is a mystery, because he acknowledges (Br. 39 n.22) that petitioner did not argue in his opening brief that the notes constitute *Brady* material.

tion, Br. 53, Boatner was plainly aware of the article's contents: he repeatedly testified that the same person who had told him to look at the newspaper had informed him that the article implicated the photographed individuals in the shootings. J.A. 42-43, 487, 497, 501. In short, there is little support for Boatner's confident in-court identification of petitioner—and thus little reason to believe that the jury would have credited that identification if confronted with Boatner's contradictory statements.

3. Respondent makes no effort to explain the other inconsistencies in Boatner's trial testimony revealed by the suppressed statements—inconsistencies that only enhance those statements' materiality. For example, the prior statements demonstrate that Boatner had never previously described the gun carried by the first man as a 9-millimeter handgun, despite so testifying at trial, and that he had previously identified the gun carried by the third perpetrator as a TEC-9, despite testifying at trial that the gun was a MAC-10. See Pet. Br. 39-40. Defense counsel could have used those and other inconsistencies to cast still further doubt on Boatner's credibility as a witness.

4. The prosecution in this case withheld not only the notes recording Boatner's prior statements, but also notes recording statements of two other witnesses, Shelita Russell and Dale Mims, who provided information undermining Boatner's identification of petitioner. Respondents' efforts to discount those notes are unavailing.

a. With regard to Shelita Russell, respondent first contends (Br. 33-35) that her statement would not have been admissible at trial. That contention is forfeited because it was not raised in respondent's brief in opposition and does not appear to have been raised in the Louisiana courts (which would have been better placed to consider

the nuances of Louisiana evidentiary law). But in any event, it lacks merit.

To invoke Louisiana's "dying declaration" exception to the hearsay rule, a party must show that the declarant "believ[ed] that his death was imminent" and that the declarant's statement "concern[ed] the cause or circumstances of what he believed to be his impending death." La. Code Evid. Ann. art. 804(B)(2) (2006 & Supp. 2011). Respondent contends that the former requirement is not satisfied here because "petitioner has offered no evidence that, at the time of her alleged statement, Russell believed her death to be imminent." Br. 34. That is a ludicrous contention. Russell had been shot at least six times, J.A. 77-78, and two witnesses testified at trial that Russell told them in the wake of the shooting that she believed she was about to die, J.A. 102, 182. In addition, the notes clearly reflect that Russell's statement was made at the scene, before she was taken to the hospital (where she lost consciousness and later died). J.A. 310.

Respondent contends (Br. 33-34) that, even if the statement constituted a "dying declaration," it still would have been inadmissible because the notes contained an additional layer of hearsay: *i.e.*, because Officer Ronquillo, who took the notes, allegedly was merely recording what another officer told him Russell had said. If the notes had been disclosed, however, defense counsel could readily have determined which officer had interviewed Russell, whether by seeking that information before trial or by questioning Officer Ronquillo (and, if necessary, other responding officers) at trial. Because the notes either would have been admissible themselves or likely would have led to admissible evidence if they had been produced, they count toward materiality for purposes of *Brady*. See *Wood* v. *Bartholomew*, 516 U.S. 1, 5-6 (1995) (per curiam).

As to materiality, respondent charges that petitioner's reading of the notes—that Russell said the "first person through the door had a black cloth across his face"—is "improbable." Br. 48. *But that is exactly what the notes say.* See J.A. 310 ("black cloth across face — first one through door"). In an effort to reconcile Russell's statement with Boatner's identification, respondent suggests (Br. 48) that, by the "first" man through the door, Russell actually meant the second—either because she was distracted by a telephone call or because Boatner blocked her view of the man who was actually first. But that suggestion is so wildly speculative as to flunk the straight-face test. Russell's statement would have had obvious value in calling into question Boatner's identification of petitioner, and respondent's explanation for the statement borders on "desperate implausibility." *Kyles*, 514 U.S. at 461 (Scalia, J., dissenting).

b. With regard to Dale Mims, respondent first argues (Br. 40-42) that the notes recording his prior statement were not "suppressed" for purposes of *Brady* because defense counsel could have obtained the underlying information through the exercise of "ordinary diligence." That argument is also forfeited because it was not raised in respondent's brief in opposition and does not appear to have been raised in the Louisiana courts. But it too lacks merit.

To be sure, lower courts have recognized a limited range of circumstances in which undisclosed information can nevertheless be said not to have been suppressed for *Brady* purposes because of defense counsel's lack of diligence: for example, where the defense "was fully aware of [a witness's] existence and the substance of his likely testimony." *United States* v. *Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009). In this case, however, there is no evidence that defense counsel was aware that Mims existed,

much less that he had provided favorable information to the police. Respondent cites no case, and we are aware of none, in which a court has held that *Brady* permits the suppression of a material statement by a witness whose existence is unknown to the defense. And respondent's argument is ultimately academic, because his proposed rule would merely convert what would otherwise be a *Brady* claim into a claim of ineffective assistance of counsel—a distinction without a difference, because the materiality standard for *Brady* claims is equivalent to the prejudice standard for ineffective-assistance claims. See *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in the judgment).[4]

Remarkably, respondent argues (Br. 42) that Mims's statement not only was irrelevant to the materiality analysis, but was not even favorable to petitioner. That is yet another newly minted and patently meritless argument. Mims told the police that, immediately after the shooting, he saw a group of men leave the scene and get into the getaway car, "[a]ll" of whom were wearing "ski type" masks that "cover[ed] [the] whole face." J.A. 309; see J.A. 402, 567. Like Russell's statement to the same effect, Mims's statement that the men were masked would have called into question Boatner's identification of petitioner. Respondent suggests (Br. 42) that Mims's statement was consistent with Boatner's identification because Mims testified at the postconviction hearing that "he never saw anyone enter or exit the house." J.A. 402-407. Respondent is seemingly advancing the theory that petitioner could have entered the house *without* a mask,

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[4] In fact, before the trial court, petitioner advanced precisely such an ineffective-assistance claim in the alternative. See R. 367-370.

only to put one on at some point before leaving the scene. But the jury would have been unlikely to credit that theory, because it would be an exceedingly peculiar way to go about an armed robbery.[5]

Mims's statement was only one in a series of suppressed statements that would have thoroughly undermined the testimony of the single witness linking petitioner to the crime. The suppression of those statements alone is sufficient to warrant a new trial.

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

Respondent does not dispute that the district attorney's office also suppressed police notes indicating that Phillip Young had provided information affirmatively suggesting that petitioner was not involved in the shootings. Instead, respondent contends (Br. 35-38, 49-50) that the notes would have been inadmissible at trial and that Young's statement adds nothing to petitioner's showing of materiality. Respondent is incorrect in each respect.

1. Respondent did not directly challenge the admissibility of the notes in his brief in opposition, cf. Br. in Opp. 18 (arguing only that, "even if Young's 'statements' had been disclosed and admissible at trial," they would

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[5] Respondent also contends that Mims could not have seen anyone enter or exit the house "because the door of [the house] was not visible from his vantage point." Br. 42. But Mims testified at the post-conviction hearing that he saw the men only after opening the front door of his house, J.A. 402, and the door of the house where the shootings occurred (the middle house depicted on J.A. 581) is plainly visible from the elevated front stoop of Mims's house (the duplex on the right).

have been immaterial), and does not appear to have done so in the Louisiana courts. Insofar as he belatedly does so now, his arguments are flawed.

As a preliminary matter, respondent suggests that the notes would have failed Louisiana's authentication rule on the ground that Officer Ronquillo testified he "couldn't understand anything that [Young] was saying." Br. 36 (citation omitted). Louisiana's authentication rule, however, merely requires a showing that "the matter in question is what its proponent claims." La. Code Evid. Ann. art. 901(A) (2006 & Supp. 2011). And that rule would have been satisfied here because there has never been any doubt that Officer Ronquillo's notes of his interaction with Young are, in fact, his notes; at the post-conviction hearing, Ronquillo readily admitted as much. J.A. 549.

Respondent next disputes (Br. 37-38) whether, if the defense had called Young and he had been unable or unwilling to testify, Young's statement would have been admissible as a "statement against interest." Specifically, respondent suggests that the statement did not sufficiently "tend[] to subject [Young] to * * * criminal liability" to qualify as a "statement against interest" under Louisiana law. La. Code Evid. Ann. art. 804(B)(3) (2006 & Supp. 2011). In his statement, however, Young did not simply confirm that he was present at the scene of the crime; after acknowledging he understood his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), Young indicated that he had driven his girlfriend's car to the scene (a car that other witnesses identified as the getaway car) and that he knew who the perpetrators were. J.A. 311. All of those answers tended to inculpate Young in the shootings.

In a related vein, respondent suggests (Br. 38) that petitioner could not show that "corroborating circums-

tances clearly indicate the trustworthiness of the statement," as is required for a "statement against interest" of the type at issue here. La. Code Evid. Ann. art. 804(B)(3). But that requirement can be satisfied by "evidence independent of the statement which tends, either directly or circumstantially, to establish a matter asserted by the statement." *State* v. *Hammons*, 597 So. 2d 990, 997 (La. 1992). There was ample corroboration here, because Young's statements that he had driven his girlfriend's car to the scene and that he had been shot by one of the people in the house were consistent with other evidence in the case. J.A. 300-303, 534-536.

2. In challenging the relevance of Young's statement to the materiality analysis, respondent again enters the realm of fantasy. Respondent suggests that Young's negative answer to Officer Ronquillo's question whether "Short Dog" was with him when he went to the house would not "preclude the conclusion that [he and petitioner] arrived separately and murdered together." Br. 49. That is technically true, but it is hard to believe that such a speculative and unsupported theory would have gained any currency with the jury. And a statement need not definitively exculpate the defendant before it can count toward materiality for purposes of *Brady*. See p. 4, *supra*.

In addition, the defense could have used Young's statement not only as exculpatory evidence, but also as evidence calling into question Officer Ronquillo's testimony. Notwithstanding respondent's perplexing assertion to the contrary (Br. 49-50), Ronquillo unequivocally told the jury that Young was not "able to communicate with [him] at all." J.A. 136. Although respondent correctly states (Br. 49-50) that Ronquillo's testimony was "in no way inconsistent with * * * the questions that

he tried to ask Phillip Young," it was indisputably inconsistent with the *answers* he received.[6]

Particularly when combined with the statements undermining Boatner's identification of petitioner as one of the perpetrators, Young's statement seemingly absolving petitioner of responsibility for the shootings would have "undermine[d] confidence in the verdict." *Kyles*, 514 U.S. at 435. The suppression of that statement was also improper.

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

Respondent does not dispute that the district attorney's office withheld information relating to the allegation that, assuming that Boatner's identification of petitioner was accurate, petitioner shot and killed at least one of the victims with a 9-millimeter handgun he was carrying. Instead, respondent argues (Br. 44-47), again apparently for the first time in this litigation, that the information was irrelevant and not favorable. Those arguments lack merit.

1. Respondent contends that any withheld information concerning whether petitioner was one of the shooters was "irrelevant" because the prosecution was not

[6] Respondent implies (Br. 36-37) that, if the defense had used Young's statement, Officer Ronquillo would have testified that Young's answers were potentially inaccurate due to his incapacitation. At the postconviction hearing, however, Young's nurse testified that, although Young could not speak, he "appeared to understand what you were saying to him" and could answer yes-or-no questions through body movement. J.A. 421, 424. Indeed, police records indicate the very reason Ronquillo visited Young was that Young's nurse had told him Young had begun "communicati[ng] with others." J.A. 272.

required to show that petitioner was one of the shooters. Br. 46-47. To obtain a conviction for first-degree murder under Louisiana law, however, the prosecution must show that the defendant had a "specific intent to kill or inflict great bodily harm." La. Rev. Stat. Ann. § 14:30(A) (2007 & Supp. 2011). It is true that the prosecution can make the necessary showing even where the defendant "has not personally struck the fatal blows." *State* v. *Wright*, 834 So. 2d 974, 982-983 (La. 2002), cert. denied, 540 U.S. 833 (2003). But the prosecution's whole theory as to how the intent element was satisfied *in this case* was that petitioner was one of the shooters. Significantly, respondent identifies no alternative theory for proving the requisite intent, and the record would not support one.[7] Contrary to respondent's contention, therefore, "if the jury had known for a certainty that petitioner had not been one of the shooters," Br. 46-47, it would have been required to acquit him.

2. At trial, the prosecution went to great lengths to prove that petitioner was one of the shooters. Through the testimony of Boatner, the prosecution sought to establish that petitioner was carrying a 9-millimeter handgun—even though, in his numerous undisclosed prior statements, Boatner had never once described the handgun carried by the first man through the door as a 9-millimeter. J.A. 178, 252, 296. Through the testimony of Kenneth Leary, a police firearms examiner, the prosecution sought to establish that casings found at the scene

[7] The mere fact that petitioner was involved in an attempted armed robbery would be insufficient, because the act of killing in the attempted perpetration of an armed robbery, without more, constitutes only second-degree murder under Louisiana law. See La. Rev. Stat. Ann. § 14:30.1 (2007 & Supp. 2011); *Wright*, 834 So. 2d at 983.

came exclusively from a 9-millimeter handgun—even though, according to undisclosed police notes, Leary had told Officer Ronquillo that the casings had been matched to a machine pistol of the Intratec or MAC-11 type (which another perpetrator had allegedly been carrying), *rather than* a 9-millimeter handgun. J.A. 155, 266. And through the testimony of Alvaro Hunt, a pathologist, the prosecution sought to establish that Russell was shot and killed by bullets fired from a 9-millimeter handgun. J.A. 79-81. The sole purpose of the foregoing testimony was to create the misleading impression that petitioner used a 9-millimeter handgun to kill at least one of the victims.

As to Boatner's failure previously to identify the gun petitioner was allegedly carrying as a 9-millimeter handgun, respondent has no answer. And as to Leary's prior statement matching the casings to a machine pistol of the Intratec or MAC-11 type, respondent's sole contention (Br. 45-46) is that the statement was not favorable to petitioner because such a gun would properly be understood to be a "handgun." In support of that contention, however, respondent relies solely on a definition of "handgun" contained in (and by its terms restricted to) the Louisiana "concealed carry" statute—a statute that had not even been enacted at the time of petitioner's trial. See La. Rev. Stat. Ann. § 40:1379.3(J) (2007 & Supp. 2011) (enacted 1996). Respondent does not dispute that, as a colloquial matter, machine pistols of the Intratec or MAC-11 type would be considered automatic or semiautomatic weapons, rather than handguns. See Pet. Br. 48 n.17. Indeed, that is how Leary himself apparently considered them: in his prior statement, Leary expressly distinguished between "a Inter Tec, 'Mac 11' model type, semi automatic weapon," on the one hand, and a 9-millimeter "handgun" of the type previously seized from Donielle Bannister, on the other. J.A. 266. It is there-

fore clear that Leary's trial testimony matching the casings to a 9-millimeter handgun was inconsistent with his prior statement matching the casings to a machine pistol of the Intratec or MAC-11 type.

If the defense had possessed Leary's and Boatner's prior statements, it would have used them on cross-examination to attack the prosecution's theory of the case, enabling the jury to conclude that petitioner was not one of the shooters and thus lacked the requisite intent for first-degree murder. As with the statements concerning whether petitioner was even present at the scene in the first place, the suppression of those statements was improper.

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

Finally, respondent contends (Br. 42-44) that the police notes of the interview in which Eric Rogers relayed the confession of Robert Trackling to participation in the shootings were not suppressed and not favorable. That contention is erroneous.

1. Respondent does not dispute that the district attorney's office did not make the notes of the interview available to petitioner until he sought their production in connection with his application for postconviction relief. Respondent nevertheless argues (Br. 42-43) that the notes were not "suppressed" for *Brady* purposes because the interview was conducted in the presence of Rogers's investigator, Samuel Reine, who also served as petitioner's investigator. That argument is forfeited because it was not raised in respondent's brief in opposition and does not appear to have been raised in the Louisiana courts. But in any event, it lacks merit.

To begin with, it is clear that, as of May 19, 1995 (when Officer Byron Adams interviewed Rogers, J.A.

277), Reine was not yet petitioner's investigator, because *petitioner was not even a suspect in the case*—and, *a fortiori*, he had not been arrested, indicted, or appointed counsel or an investigator. Contrary to respondent's disingenuous implication, Reine was therefore not "part of petitioner's defense team" at the time Rogers gave his statement. Br. 43.

In light of the timing of Reine's appointment as petitioner's investigator, respondent's argument rests on an implausible supposition: namely, that when Reine was appointed, he would have recalled, and appreciated the relevance of, a statement of another client several months earlier in which only petitioner's first name was even mentioned. Under those circumstances, Reine's presence at Rogers's interview is surely insufficient to constitute a "disclosure" of *Brady* information, and respondent cites no authority suggesting otherwise. In fact, at least one lower court has squarely held that the presence at an interview of an *attorney* who later comes to represent the defendant is insufficient to constitute a *Brady* disclosure. See *Schledwitz* v. *United States*, 169 F.3d 1003, 1013 (6th Cir. 1999). In the event the Court even considers respondent's forfeited argument, therefore, it should reject it.

2. Respondent also argues (Br. 43) that Rogers's statement was not favorable to petitioner because it "identifie[d] petitioner as a perpetrator" and was therefore "squarely inculpatory." As a preliminary matter, if that were true, one would expect that the prosecution would have tried to use the statement at trial—which it did not. To the contrary, if the notes in question had been disclosed, *the defense* could have used the statement to cast doubt on the proposition that petitioner was "Short Dog"—and thus on the proposition that he was involved in the shootings. According to Rogers, Track-

ling confessed to his own involvement and implicated three others, including "Short Dog." J.A. 281. When Officer Adams asked Rogers to identify "Short Dog," however, Rogers equivocated, initially stating only that Trackling had told him that "Short Dog" was "Juan," and later stating as follows: "Short Dog that's what they call him, they call Robert Home." J.A. 285. And tellingly, when Adams asked Rogers to identify members of the group that was suspected of carrying out the shootings, Rogers listed a number of individuals but not petitioner. J.A. 285-291. To the extent respondent argues that the statement could be given an alternative, inculpatory interpretation, lower courts have consistently held that evidence that "ha[s] both an inculpatory and exculpatory effect" must be disclosed under *Brady*. *E.g.*, *United States* v. *Rivas*, 377 F.3d 195, 199 (2d Cir. 2004).

In addition, if the defense had been provided the notes in question, defense counsel could have spoken to Rogers and learned of Rogers's bombshell allegation that Officer Adams had asked him to implicate petitioner. Respondent contends that, if Rogers had so testified at trial, "the [s]tate would have called [Reine] and Adams * * * to testify truthfully and contradict Rogers." Br. 44. But there is no reason to believe that Reine and Adams would have contradicted Rogers—much less that the jury would have believed them if they did. Significantly, although Adams was by then deceased, respondent did not call Reine at the postconviction hearing to rebut Rogers's contention that the police had sought to frame petitioner. Rogers's statement would therefore have enabled the defense to obtain information that would have undercut the "thoroughness and even the good faith" of the investigation and prosecution—and thereby generated even further doubt about the state's already threadbare case. *Kyles*, 514 U.S. at 445.

* * * * *

When the abundant information that the state withheld in this case is considered as a whole, there is not just a "reasonable probability," but an exceptionally high one, that "the result of the proceeding would have been different" if the information had been disclosed. *Cone* v. *Bell*, 129 S. Ct. 1769, 1783 (2009). In fact, this may be the clearest example of a *Brady* violation that the Court has ever seen. The systematic suppression of favorable information by the Orleans Parish district attorney's office in this case, as in all too many others, was unfair and unjust. It should be remedied with a new trial.

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the trial court should be reversed.

Respectfully submitted.

KATHLEEN KELLY
MATILDE J. CARBIA
CAPITAL POST-CONVICTION PROJECT OF LOUISIANA
1340 Poydras Street, Suite 1700
New Orleans, LA 70112

DAVID E. KENDALL
KANNON K. SHANMUGAM
THOMAS H.L. SELBY
GEORGE W. HICKS, JR.
APRIL R. RIEGER
KRISTIN A. FEELEY[*]
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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[*] Admitted in Illinois and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Bar Rule 49(c)(8).