

No. 10-8145

**In the
Supreme Court of the United States**

JUAN SMITH, PETITIONER

v.

BURL CAIN, WARDEN, RESPONDENT

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

**BRIEF OF THE INNOCENCE NETWORK AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

KEITH A. FINDLEY
President
INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

DAVID B. HIRD
Counsel of Record
M. JARRAD WRIGHT
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, N.W.
Washington, D.C. 20005
(202) 682-7000
david.hird@weil.com

NADYA SALCEDO
ERICK FLORES
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

TABLE OF CONTENTS

	<u>Page</u>
Interest of <i>Amicus Curiae</i>	1
Summary of Argument	3
Argument.....	7
I. The Prosecution’s Withholding of Information that Undermined the Truthfulness, Credibility and Reliability of its Single Eyewitness Is Material Under <i>Brady</i>	7
A. The Prosecution Impermissibly Preserved Boatner’s Truthfulness, Credibility and the Reliability of His Identification in the Eyes of the Jury By Withholding Exculpatory Information	7
B. Confident Eyewitness Identifications Can Be Powerful Evidence, But Are Often Wrong.....	9
C. Eyewitness Testimony that Results in Convictions Is Frequently Mistaken or False.....	13
D. The Prosecution Withheld Prior Statements by Boatner and Others that Would Have Allowed the Jury to Fully Evaluate the Truthfulness, Credibility and Reliability of Boatner’s Identification of Petitioner	14

II

**TABLE OF CONTENTS
(continued)**

	Page
E. Social Science Research Suggests that Boatner’s Identification of Petitioner May Have Been a Result of Intervening Factors and Not Independent Recollection	18
F. Social Science Research Shows that the Witnessing Conditions in Boatner’s Situation Weaken an Eyewitness’ Ability to Identify a Perpetrator.....	21
G. All of the Withheld Information in This Case Provide a Reasonable Basis for a Jury to Determine Boatner’s Identification Was Unreliable or that Boatner Was Not Credible.....	24
H. In a Single Eyewitness Case, Evidence Undermining the Credibility and Truthfulness of a Witness and the Reliability of His Identification Is Highly Material under <i>Brady</i>	25
I. Eyewitness Misidentification Takes a Harsh Toll on Those Wrongfully Convicted	28

III

TABLE OF CONTENTS
(continued)

	Page
II. The History of The Orleans Parish District Attorney's Office Demonstrates a Pattern of Withholding Evidence that Would Undermine The Credibility of Key Witnesses and the Reliability of Their Identifications.....	31
A. The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Key Witnesses that Conflicts With Their Trial Testimony or Undermines Their Credibility and Reliability.....	34
B. The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Other Witnesses that Contradicts Key Witnesses' Testimony.....	37
Conclusion	39
Appendix.....	A-1

IV

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	passim
<i>Connick v. Thompson</i> , 131 S. Ct. 1350 (2011) ...	31, 32
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	29
<i>Ex parte Blair</i> , Nos. AP-75954, AP-75955, 2008 WL 2514174 (Tex. Crim. App. June 25, 2008) (per curiam)	32
<i>Gibson v. State</i> , 731 So. 2d 379 (La. Ct. App. 1999).....	5, 25
<i>Giglio v. United States</i> , 405 U.S. 150 (1972).....	32, 36, 37
<i>In re Jordan</i> , 913 So. 2d 775 (La. 2005)	31
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	passim
<i>Mayes v. City of Hammond</i> , 442 F. Supp. 2d 587 (N.D. Ind. 2006).....	28, 29
<i>Napue v. Illinois</i> , 360 U.S. 264 (1959).....	5, 25
<i>State v. Bagley</i> , 473 U.S. 667 (1985)	7
<i>State v. Bright</i> , 875 So. 2d 37 (La. 2004)	32, 37
<i>State v. Carney</i> , 334 So. 2d 415 (La. 1976)	37

TABLE OF AUTHORITIES
(continued)

<i>State v. Cousin</i> , 710 So. 2d 1065 (La. 1998)	32, 35, 36
<i>State v. Curtis</i> , 384 So. 2d 396 (La. 1980).....	35
<i>State v. Falkins</i> , 356 So. 2d 415 (La. 1978)	35
<i>State v. Knapper</i> , 579 So. 2d 956 (La. 1991).....	32, 38
<i>State v. Lindsey</i> , 844 So. 2d 961 (La. Ct. App. 2003).....	34
<i>State v. Oliver</i> , 682 So. 2d 301 (La. Ct. App. 1996).....	38
<i>State v. Perkins</i> , 423 So. 2d 1103 (La. 1982)	38
<i>State v. Rosiere</i> , 488 So. 2d 965 (La. 1986)	38
<i>State v. Thompson</i> , 825 So. 2d 552 (La. Ct. App. 2002).....	33, 34
<i>United States v. Agurs</i> , 427 U.S. 97 (1976)	26, 27
<i>United States v. Wade</i> , 388 U.S. 218 (1967).....	10
<i>Watkins v. Sowders</i> , 449 U.S. 341 (1981)	10

VI

TABLE OF AUTHORITIES

<u>Other Authorities</u>	<u>Page</u>
Victor Bass, Comment, <i>Brady v. Maryland and the Prosecutor's Duty to Disclose</i> , 40 U. Chi. L. Rev. 112 (1972)	27
Dan Bennet, <i>Jailed Man Granted New Trial in '67 Murder Sues the State</i> , Times-Picayune (New Orleans), Feb. 17, 1993, at B1	32
Tanja Rapus Benton et al., <i>Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts</i> , 20 Appl. Cognit. Psychol., 116 (2006)	32
Garrett L. Berman et al., <i>Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability and Verdicts</i> , 19 Law & Hum. Behav. 79 (1995)	17
Garrett L. Berman & Brian L. Cutler., <i>Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making</i> , 81 J. of Applied Psychol. 170 (1996)	17
Michael Blair, Innocence Project, http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Aug. 15, 2011)	29

VII

TABLE OF AUTHORITIES
(continued)

Amy Breadfield et al., *The Damaging Effects of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. of Appl. Psychol. 112 (2002) 19

Edward Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Pub. No. NCJ 161258, U.S. Dep’t of Justice, Nat’l Inst. of Justice 24 (1996)..... 4, 12

Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Hum. Behav. 287 (2006) 19, 20

Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004)..... 22

Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011) 4, 10, 11

VIII

TABLE OF AUTHORITIES
(continued)

Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Online Appendix 40-41 (2011), *available at* http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf 28

Matthew P. Gerrie et al., *False Memories, in Psychology and Law: An Empirical Perspective* (Neil Brewer & Kip Williams, eds., 2007) 21

Samuel L. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005)..... 13

Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for Jury*, 32A Crim. L. Rev. 1013 (1995)..... 22

Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification 3* (2009)..... 11, 12

Elizabeth Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 4-14 (2007) 19

IX

TABLE OF AUTHORITIES
(continued)

C. A. Elizabeth Luus & Gary L. Wells,
Eyewitness Identification Confidence, in
Adult Eyewitness Testimony, 348 (David
Frank Ross et al. eds. 1994) 10, 13

Amina Memon, et al., *Exposure Duration:
Effects on Eyewitness Accuracy and
Confidence*, 94 *Brit. J. of Psychol.* 339 (2003) 23

Charles A. Morgan III et al., *Accuracy of
Eyewitness Memory for Persons
Encountered During Exposure to Highly
Intense Stress*, 27 *Int'l J.L. & Psychiatry* 265
(2004)..... 22

Nat'l Inst. of Justice, U.S. Dep't of Justice,
*Eyewitness Evidence: A Guide For Law
Enforcement*, (1999) 12

William Pack, *Prison Reformer Faces Challenge
of Freedom*, *The Advocate* (Baton Rouge),
May 16, 1997 28

Keith Pandolfi, *Innocence Project New Orleans
Investigates Suspected Cases of Wrongful
Convictions*, *New Orleans City Business*,
Jan. 13, 2003 33

TABLE OF AUTHORITIES
(continued)

Michael Perlstein, <i>Open to Appeal: Convicted Criminals Say DA Policy Change Gives Them Fair Shot</i> , Times-Picayune (New Orleans), July 20, 2003.....	32
Profile of Michael Blair, Innocence Project, http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Aug. 15, 2011).....	24
Profile of Larry Mayes, Innocence Project, http://www.innocenceproject.org/Content/Larry_Mayes.php (last visited Aug. 15, 2011).....	24
Daniel L. Schacter, <i>The Seven Sins of Memory</i> , 54 Am. Psychol. 182 (1999)	21
Nancy Mehrkens Steblay, <i>A Meta-Analytic Review of the Weapon Focus Effect</i> , 16 Law & Hum. Behav. 413 (1992)	23
Gary L. Wells et al., <i>Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads</i> , 22 Law & Hum. Behav. 1, (1998).....	13

TABLE OF AUTHORITIES
(continued)

Gary L. Wells & Amy L. Bradfield, “*Good, You Identified the Suspect*”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 *J. of Applied Psychol.* 360 (1998) 19

Bernard E. Whitley Jr., *The Effects of Discredited Eyewitness Testimony: A Meta-Analysis*, 127 *J. Soc. Psychol.* 209 (1987) 24

INTEREST OF *AMICUS CURIAE*¹

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members² are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

The Innocence Network works to ensure that innocent persons are not wrongfully convicted or incarcerated and thus has an interest in the enforcement of obligations under *Brady v. Maryland*,

¹ Pursuant to Rule 37.3, the parties have both consented to the filing of this amicus brief. The letters of consent from both parties accompany this filing. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

² The member entities are listed in the appendix.

373 U.S. 83 (1963). In the experience of Innocence Network member, New Orleans Innocence Project, the consistent and repeated violations of *Brady* in Orleans Parish have led to an alarming rate of wrongful convictions. Since 1990, ten convicted prisoners have been exonerated from prison in Orleans Parish. All of those prisoners were exonerated due to violations of *Brady* by the prosecution at their trial.³

Equally as critical, the experience of the Innocence Network has also found the unfortunate but substantial role that mistaken eyewitness identifications play in wrongful convictions. Indeed, Innocence Project research shows that eyewitnesses misidentified 75 percent of people who were wrongfully convicted and exonerated by DNA evidence. The *Brady* exonerations in Orleans Parish and the prevalence of eyewitness identifications among exoneration cases highlight the degree to which violations of *Brady* in eyewitness cases can undermine our system of justice, and the concomitant necessity of enforcing defendants' rights to evidence in the government's possession that is material and favorable to their defense.

³ See cases discussed *infra*, note 11.

SUMMARY OF ARGUMENT

While the application of the *Brady* doctrine's requirement that prosecutors disclose impeachment and exculpatory evidence is important for all criminal cases, its significance cannot be overstated in those cases in which prosecutors rely upon a single eyewitness for identification of the defendant and have no corroborating forensic evidence. In those cases, any information that casts doubt on the reliability or credibility of that eyewitness' identification is by its nature material. By withholding *Brady* information that could be used to challenge the credibility of the prosecution's single eyewitness and the reliability of that witness' identification of the defendant, the prosecution undercuts the defendant's right to due process and undermines the integrity of the trial.

As described in detail in petitioner's brief,⁴ only a single eyewitness identified petitioner and no forensic evidence linked petitioner to the crime. Therefore, the jury's consideration of the truthfulness and credibility of the testimony of that witness, Larry Boatner, and the reliability of his identification were the fundamental factual issues in dispute. The jury either had to decide to believe his identification or not. But the jury heard a seemingly confident Boatner make his identification without knowing that three times previously Boatner had told the police that he could not make an

⁴ The Innocence Network hereby adopts by reference the statement of the case and the facts set forth in petitioner's brief, as well as the Joint Appendix adopted by petitioner.

identification. J.A. 252-253, 25-260, 308. The jury also did not hear contradictory statements from other witnesses (including a dying victim) about whether the assailant in question wore a mask, J.A. 309, 310, and a statement from a suspected perpetrator suggesting that petitioner was not involved in the crime. J.A. 311. This undisclosed information, both individually and collectively, would have undermined the reliability and credibility of the prosecution's single eyewitness.

Social science has repeatedly shown that while juries place substantial weight on an eyewitness' identification, such eyewitness identifications are often wrong. For example, the U.S. Department of Justice previously analyzed twenty-eight cases involving convicted defendants who were later exonerated by DNA evidence. The Department found that "eyewitness testimony was the most compelling evidence" but that "[c]learly, however, those eyewitness identifications were wrong." See Edward Connors et al., U.S. Dep't of Justice, Pub. No. NCJ 161258, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 24 (1996). Similarly, a recent study of the first 250 cases in which defendants were exonerated by DNA evidence found that eyewitnesses misidentified 76 percent of the exonerees.⁵ See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011).

⁵ Professor Garrett's findings are consistent with the Innocence Project's own findings. See *infra*, note 6.

Memory is malleable. An eyewitness' seemingly confident identification is affected by intervening factors such as police statements that the correct suspect was identified or whether the eyewitness previously had seen a photo of a police suspect. Although the advent of DNA evidence has exonerated many in recent years, innocent people are still convicted in the United States on the testimony of a single eyewitness, especially in cases, such as this one, that do not involve DNA evidence or other forensics. *Brady* acts as a firewall in these cases by preventing the prosecution from withholding evidence that would impeach or contradict the testimony of the single witness upon which it relies. Particularly in cases "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Application of *Brady* in single (or few) eyewitness cases ensures that defendants are provided access to evidence that contradicts or undercuts otherwise seemingly confident, but mistaken, or even false, identifications.

The *Brady* standard is clearly met in this case, where the testimony of a single eyewitness was critical and the prosecution withheld information that could have been used to impeach and contradict that eyewitness. The jury should have been allowed to consider and evaluate *all* evidence concerning the reliability and credibility of Boatner's identification. Withholding that evidence may lead to an easy

conviction, but this tactic does not lead to verdicts in which the courts should have confidence.

ARGUMENT

I. THE PROSECUTION'S WITHHOLDING OF INFORMATION THAT UNDERMINED THE TRUTHFULNESS, CREDIBILITY AND RELIABILITY OF ITS SINGLE EYEWITNESS IS MATERIAL UNDER *BRADY*

A. *The Prosecution Impermissibly Preserved Boatner's Truthfulness, Credibility and the Reliability of His Identification in the Eyes of the Jury By Withholding Exculpatory Information*

This case demonstrates the critical importance of disclosing *Brady v. Maryland* material in cases involving the identification of a defendant by a single eyewitness. 373 U.S. 83 (1963). *Brady* provides that suppression of evidence favorable to the accused violates due process where the evidence “is material either to guilt or to punishment.” *Id.* at 87. Withheld evidence is material under *Brady* “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)). The Court clarified in *Kyles* that the reasonable probability standard does not test “whether the defendant would more likely than not have received a different verdict with the evidence,” but rather “whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* There can be no confidence in the verdict in a case such as petitioner’s, where the

prosecution hinged its case on a single eyewitness and artificially preserved that witnesses' credibility, truthfulness and reliability by withholding evidence that specifically undermined those virtues.

As detailed in petitioner's brief, the only evidence connecting petitioner to the crime of which he was convicted was the eyewitness testimony of Larry Boatner identifying petitioner. Pet'r's Br. 34-35. No other witnesses testified to corroborate Boatner's identification of the petitioner, and there were no fingerprints or other forensic evidence linking petitioner to the crime. Rather, the jury was asked to convict the petitioner based solely on the testimony of this single eyewitness. Accordingly, the critical issues of fact before the jury were: is Boatner's testimony credible and truthful, and is his identification of a man at whose face he claimed to have "glanced" for only a few moments reliable? J.A. 308.

Yet the information withheld by the prosecution from the defense went precisely to these issues: the credibility and truthfulness of that eyewitness, and the reliability of his identification. Among other favorable evidence, the prosecution withheld prior statements by Boatner that conflicted with his trial testimony, J.A. 252-253, 259-260, 308, and evidence of the statements of other witnesses that contradicted Boatner's testimony. J.A. 309, 310, 311.

In a case involving a horrific crime scene with five dead victims, a severely injured perpetrator, and no forensic evidence linking petitioner to the crime, J.A. 139, the prosecution obtained a conviction on

the basis of a single eyewitness' identification, but did not provide the defense with the information necessary to cross-examine that witness effectively or to introduce testimony from other witnesses that contradicted his statements. Without having seen the evidence that would undermine the credibility and reliability of Boatner's identification, the jury convicted petitioner.

B. *Confident Eyewitness Identifications Can Be Powerful Evidence, But Are Often Wrong*

The impact of Boatner's identification of petitioner at trial was overwhelming and the effect on the jury was no doubt dramatic. Boatner testified:

Q: Larry, do you see the person in the court today who barged through that door that day and put a .9mm to your head?

A: Yes, I do.

Q: Point him out for the jury.

A: He's right there. Like I say, I'll never forget him.

* * *

Q: Larry, is there any doubt in your mind whatsoever, any doubt at all, that Juan Smith is the man that came to the door that day at 2230 North Roman Street?

A: No doubt.

J.A. 195-196.

An unequivocal identification by a witness is powerful evidence in the mind of a juror. Justice Brennan discussed the effect of a confident eyewitness on a jury in his dissent in *Watkins v. Sowders*:

Eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says “that’s the one!”

449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (citations omitted); see also C. A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence, in Adult Eyewitness Testimony* 348, 348 (David Frank Ross at al. eds., 1994) (“jurors tend to rely heavily on eyewitness confidence to infer witness accuracy”).

Jurors place a great weight on the apparent confidence of an eyewitness despite the long recognized fact, as this Court has acknowledged, that “the annals of criminal law are rife with instances of mistaken identifications.” *United States v. Wade*, 388 U.S. 218, 228 (1967). In a recent study of the first 250 cases in which defendants were exonerated after conviction by DNA evidence, Professor Brandon L. Garrett found that eyewitnesses misidentified 76 percent of the

exonerees (190 of 250 cases).⁶ See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011). Of these 190 cases, Professor Garrett found that as many as 64 percent involved conviction based on the identification of a single eyewitness. *Id.* at 50. Professor Garrett's analysis of these cases demonstrates that eyewitness identifications are highly fallible and yet play a major role in the wrongful convictions of exonerees.⁷ In its own study published two years before Professor Garrett's, the Innocence Project found that not only was eyewitness misidentification a prevalent occurrence in DNA exoneration cases, but the eyewitness misidentification alone was the central cause of conviction in 50 percent of DNA exoneration cases where eyewitness misidentification was a factor.⁸

⁶ These figures are consistent with the Innocence Project's own findings that 75 percent of DNA exonerations were at least partially supported by eyewitness testimony. Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 3 (2009).

⁷ As Professor Garrett noted, exoneration through DNA evidence is most likely to occur in rape cases where DNA material can be collected, and that exoneration is less likely to occur in other types of cases, such as murder, not because eyewitnesses are more reliable in murder cases, but because DNA evidence is less likely to be available in those cases. Garrett, *supra*, at 81.

⁸ The other examined factors that contributed to wrongful convictions were invalidated or improper forensic science, false confession or admission, and informant testimony. These causes played a role in the conviction of the other 50 percent of eyewitness misidentification cases. Innocence Project, *Reevaluating Lineups*, *supra* note 6, at 17.

Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 17 (2009).

The U.S. Department of Justice in its own analysis of exoneration cases found that not only are eyewitness misidentifications prevalent, but they are often the most significant evidence that supported the wrongful convictions. In its study of twenty-eight cases involving convicted defendants who were later exonerated by DNA evidence, the Department of Justice found that “eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong.” Edward Connors et al., U.S. Dep’t of Justice, Pub. No. NCJ 161258, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 24 (1996). In a subsequent Department of Justice report, Attorney General Janet Reno explained:

Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory.

Nat’l Inst. of Justice, U.S. Dep’t of Justice, *Eyewitness Evidence: A Guide For Law Enforcement*, at iii (1999).

C. *Eyewitness Testimony that Results in Convictions Is Frequently Mistaken or False*

Although Boatner was unequivocal in his trial testimony that petitioner was the perpetrator, a large body of research has shown that witness certainty in an identification bears minimal if any correlation to its accuracy or reliability. See, e.g., Luus & Wells, *supra*, at 348-61; Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Hum. Behav.* 1, 15-16 (1998). In his book, Professor Garrett analyzed the trial transcripts of those convicted and later exonerated by DNA evidence. In the trials with eyewitness testimony, by the time of the trial almost all of the eyewitnesses were positive that they had identified the right person. Garrett, *supra*, at 68. However, in 57 percent of these trials, the witnesses had earlier not been certain at all about their identification, “a glaring sign that the identification was not reliable.” *Id.* at 64.

Moreover, analysis of exoneration cases has shown that in a significant percent of cases, exonerees were convicted on the basis of eyewitnesses who were lying. In a study of 340 exoneration cases from 1989 to 2002, researchers concluded that in at least sixty cases, persons who claimed to have witnessed the crime falsely accused the defendant deliberately at trial. Samuel L. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 *J. Crim. L. & Criminology* 523, 543 (2005). In murder cases, especially, Professor Gross and his colleagues found that exonerees had

been falsely accused by eyewitness in forty-three percent of the cases (44 out of 102). *Id.*

D. The Prosecution Withheld Prior Statements by Boatner and Others that Would Have Allowed the Jury to Fully Evaluate the Truthfulness, Credibility and Reliability of Boatner's Identification of Petitioner

In contrast to Boatner's unequivocal identification of petitioner at trial, the newly disclosed materials reveal that on three prior occasions, Boatner provided statements to the police in which he unambiguously asserted that he could not identify any of the perpetrators. Police records reflect that on the day of the crime, Boatner told Officer John Ronquillo that he "could not . . . supply a description of the perpetrators other th[a]n they were black males." J.A. 252-253. On a second occasion, police notes taken five days after the crime state that Boatner only "glanced" at the first man who had entered the house, that he could not tell if the men had their "faces covered" and he "didn't see anyone," and that he "could not ID anyone because [he] couldn't see faces." J.A. 308. Under the same caption, the notes describe that Boatner told Ronquillo again that he "could not ID" and that he "would not know them if [he] saw them." *Id.* A third piece of withheld evidence concerns a statement made by Boatner to Ronquillo that he "could not identify any of the perpetrators of the murder." J.A. 259-260. Each of these three undisclosed prior statements all dramatically conflict with the certainty with which Boatner claimed to be able to identify petitioner at trial. J.A. 196.

The prosecution also withheld prior statements of two other eyewitnesses that contradict Boatner's testimony and undermine his identification of petitioner. Police notes of an interview with Shelita Russell, who was critically injured and later died as a result of the shootings, reveal that she told police that the "first one through [the] door" had a "black cloth across [his] face." J.A. 310. Given Ms. Russell's subsequent death, this statement could only be found in the police notes. Also withheld were notes from a police interview with Dale Mimms, a neighbor, which reveal that he told the police that all of the men he saw exit the house were wearing "ski type" masks that "cover[ed] [the] whole face." J.A. 309. Both of these statements contrast heavily with Boatner's testimony at trial that the first perpetrator who came to the door was petitioner and that that person was not wearing a mask. J.A. 175; see also Petr'r's Br. 36-37.

Further, the prosecution withheld notes of Officer Ronquillo's conversation with Phillip Young, a suspected perpetrator who was severely injured at the scene of the crime but survived. J.A. 271-273, 311. The notes reflect that Young was not only able to communicate – in conflict with Ronquillo's testimony at trial that Young could not communicate, J.A. 136 – but also that he indicated to police that a specified group of people (including a person whom the police believed to be petitioner) was "not with [him] when [he] went to the house." J.A. 311. A statement by an apparent perpetrator seemingly absolving petitioner of responsibility for the shootings would have combined well with other information undermining Boatner's identification of

petitioner as one of the perpetrators. See also Petr'r's Br. 43-45.

Other undisclosed information undermines Boatner's trial testimony about the weapon that he alleged petitioner used at the crime. Boatner testified at trial that the first man who entered the house was carrying a 9-millimeter handgun and that he "kn[e]w" what a 9-millimeter "looks like." J.A. 178. But police notes disclose that in prior statements he had only ever described the gun as a "silver colored handgun," J.A. 252, or a "chrome automatic." J.A. 256-257. He also had told police "that he could not supply any additional information" on the weapon other than that it was "a silver colored handgun." J.A. 252-253.

The prosecution also withheld notes of Officer Ronquillo's conversation with Firearms Examiner Kenneth Leary, J.A. 266, which directly undermine the reliability of Boatner's testimony at trial. J.A. 178. The notes show that Leary had "advised Ronquillo that the 9MM ammunition confiscated from the Roman Street murder was typed to have been fired from a[n] Inter Tec, 'Mac 11' model type, semi automatic weapon" and thus not a 9-millimeter handgun. J.A. 266. However, Boatner testified at trial that the petitioner was carrying a 9-millimeter handgun. J.A. 178. This information suggests that Boatner's trial testimony about the weapon was a product not of his own recollection, but of influencing

conduct by police and prosecutors. See also Petr's Br. 45-49.⁹

Research has confirmed that mock jurors exposed to inconsistent statements by witnesses are significantly less likely to convict and find the defendant less culpable and the eyewitness less effective. See Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. Applied Psychol. 170, 170 (1996). Inconsistent statements affect juror conviction rates not only in instances where the witness contradicted himself, but also when the witness provided information on the stand that it did not provide in pretrial investigations. *Id.* at 173. In one study, the conviction rate when mock jurors were exposed to inconsistent testimony regarding central details like the target's appearance was less than half of the conviction rate than when they were exposed to consistent testimony regarding those central details. Garrett L. Berman et al., *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability and Verdicts*, 19 Law & Hum. Behav. 79, 85 (1995). When the eyewitness gave inconsistent statements going to both central and peripheral details, the conviction rate by the mock jurors was then halved again. *Id.*

⁹ Other inconsistencies between his descriptions of the guns at trial and in prior undisclosed statements, discussed more fully in the Petitioner's Brief, pages 39-40, further reveal a significant fault line in the credibility of Boatner's testimony and the reliability of his identification of petitioner.

E. Social Science Research Suggests that Boatner's Identification of Petitioner May Have Been a Result of Intervening Factors and Not Independent Recollection

At trial, Boatner was confident about his identification of petitioner, and that his assailant was brandishing a 9-millimeter gun, both pieces crucial to the prosecution's theory that led to petitioner's conviction. J.A. 178, 195-196. However, the undisclosed information reveals that far from being certain, when Boatner spoke to police just after the incident, he was uncertain of his ability to identify his assailant and gave vague and conflicting descriptions about the gun his assailant carried. J.A. 252, 256-257. The undisclosed notes from Firearms Examiner Leary further reveal that the lethal weapon in the shootings might not have been a 9-millimeter at all. J.A. 266. Boatner's progression from undisclosed uncertainty to overt and persuasive confidence at trial suggests that his identification of petitioner was influenced by suggestive police behaviors and other intervening factors, and not his independent recollection.

Social science research has shown that eyewitness certainty in identifications is not only fallible, it is one of the most malleable features of human memory, and DNA exoneration cases provide solid illustration. Much research has gone into the intervening reasons for the certainty progressions, such as the one that the newly disclosed materials reveal regarding Boatner's testimony. Suggestive behaviors by police in the identification procedures account heavily for this progression. In the DNA

exoneration cases for which he was able to obtain trial records, Professor Garrett found that 78 percent of trials with eyewitness testimony involved at least one form of police suggestion. Garrett, *supra*, at 55. Police feedback upon correct identification is one type of suggestive behavior that social scientists have directly accredited with creating confident but mistaken eyewitness. For example, witnesses are especially likely to say they had an adequate or excellent view of the culprit or paid special attention to the culprit's face if police confirm their choice out of a lineup with positive feedback, like "Good, you identified the actual suspect." Gary L. Wells & Amy L. Bradfield, "*Good, You Identified the Suspect*": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998); see also Amy Breadfield et al., *The Damaging Effects of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112, 117 (2002) ("feedback significantly diminishes the strength of the certainty-accuracy relation"). The notes from the hospital where Boatner was treated relating to the harassment and pressure he felt surrounding the police identification procedures suggest that Boatner's identification of petitioner was similarly coaxed by police behavior. J.A. 247; see also Pet'r's Br. 38.

Another intervening factor that may lead to eyewitness misidentification is a phenomenon called "unconscious transference," or more colloquially the "mugshot exposure effect." See Elizabeth Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 4-14 (2007); Kenneth A. Deffenbacher et al., *Mugshot*

Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287 (2006). This effect occurs when a witness confuses or recalls a person seen in one situation with a person seen in a second situation. Deffenbacher et al., *Mugshot Exposure Effects*, *supra*, at 289. It has been studied in relation to criminal trials because witnesses are often exposed to a suspect's photograph either in the media or by the police in such forms as mugshot books before they are asked to make an identification. The witness then makes an unconscious commitment to that picture and later identifies that suspect based on recognition from the prior picture and not independent recollection. Thus, “[i]f a witness is exposed to mugshots subsequent to viewing a perpetrator and prior to an additional test of recognition memory, there is a possibility that exposure to that mugshot may bias the witness’s decision at that test.” *Id.* at 287.

In this case, there is substantial reason to believe that the “mugshot exposure effect” influenced Boatner’s belated identification of petitioner. On or around June 7, 1995, Boatner obtained a copy of the New Orleans Times-Picayune that contained an article accompanied by a picture of petitioner and three others. J.A. 160-161, 190, 582-583. The article implied that petitioner was a suspect in the shootings. *Id.* It was only after Boatner saw this picture, and almost four months after the shootings, that he made his identification to police—and even then, only after police visited him in the hospital; Boatner never went to the police on his own. J.A. 193-194. A large body of research has shown that

the ability of witnesses to retain identifying information decreases substantially even after only a few days, much less several months. See Matthew P. Gerrie et al., *False Memories, in Psychology and Law: An Empirical Perspective* (Neil Brewer & Kip Williams eds., 2007) (“We have known for over 100 years that memories fade, sometimes rapidly, in a function known as the forgetting curve . . . [and] that as memories fade, they also become more susceptible to suggestion.”); Daniel L. Schacter, *The Seven Sins of Memory*, 54 *Am. Psychol.* 182, 184 (1999) (“It has also been established that forgetting can occur quite rapidly. . .”).

Evidence going to the existence of intervening factors such as police harassment and mugshot exposure become all that much more potent in cross-examination when accompanied by evidence that a witness, while certain in his identification on the stand, was vague and not at all certain in his initial recollection of the perpetrator. It is precisely this type of evidence that the prosecution withheld by failing to disclose Boatner’s previous statements about his ability to identify his assailant. See Section I.D.

F. *Social Science Research Shows that the Witnessing Conditions in Boatner’s Situation Weaken an Eyewitness’ Ability to Identify a Perpetrator*

In the notes of Boatner’s March 2, 1995 interview with Detective Arthur Kaufman, which were withheld from the defense, Boatner said that he was “too scared to look at anybody” and was only able to recall the complexion of the perpetrators’ skin

and that the first person who put a gun to him had “a low cut” and “gold[s] in his mouth.” J.A. 295-296. At the end of the interview, he lamented that he “wish[ed he] could give [the police] a description.” J.A. 297. Boatner described the immense stress and fear he felt during the perpetration of the crime, which prompted a biological reaction even before the shooting began. J.A. 177-178.

Studies have found that heightened stress situations such as the one in which Boatner found himself produce a debilitating effect on the accuracy of an eyewitness’ recall of details of the event, as well as on the accuracy of any identification of the target that the witness is able to make. See Garrett, *supra*, at 72; Kenneth Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004); Roger B. Handberg, *Expert Testimony on Eyewitness Identification*, 32A Crim. L. Rev. 1013, 1019 (1995) (“when one is concerned with self-preservation, there is a tendency to ignore anything not necessary for survival”); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int’l J.L. & Psychiatry 265, 274 (2004) (“Contrary to popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them for more than 30 min, a large number of subjects in this study were unable to correctly identify their perpetrator.”)

Other studies have shown that when a crime is committed with a weapon, the witness’ attention becomes focused on the weapon and substantially less on the characteristics and appearance of the

perpetrator. See Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 *Law & Hum. Behav.* 413 (1992). The undisclosed materials suggest that a weapons focus effect might have played a role in Boatner's witnessing conditions. In contrast to his initial inability to identify a perpetrator, Boatner was able to describe each of the guns that the perpetrators were carrying, including such characteristics as gun type, color and the type of clip (though even then, Boatner gave different descriptions of the guns over time). *J.A.* 296.

In addition, the overwhelming majority of eyewitness identification experts agree that the less time an eyewitness has to observe an event, the less well he or she will remember it. See Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psychol.* 115, 120 (2006); see also Amina Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 *Brit. J. Psychol.* 339 (2003). 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, 199.

G. *All of the Withheld Information in this Case Provide a Reasonable Basis for a Jury to Determine Boatner's Identification Was Unreliable or that Boatner Was Not Credible*

As social science has shown, eyewitness identification testimony, while highly effective with juries, may often be unreliable. In this case, the withheld information directly implicated the credibility and truthfulness of the witness and the reliability of the identification including inconsistent prior statements by Boatner himself and the conflicting statements of other witnesses. But because of the prosecution's decision to withhold this information, the jury only saw the confident Boatner, not the equivocal Boatner who could not initially identify petitioner, or the other witnesses who contradicted him.

“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974). By withholding the contested evidence, the prosecution was able to present a credible version of Boatner's story, and denied petitioner the ability to seek out the truth through cross-examination in the process of defending himself. See *id.* at 320. Social science research finding that a discredited eyewitness is not as influential as one that is unchallenged buttresses the value of cross-examination at trials. See Bernard E. Whitley Jr., *The Effects of Discredited Eyewitness Testimony: A Meta-Analysis*, 127 J. Soc. Psychol. 209 (1987).

Had the withheld information been made available, there is a reasonable probability that the defense would have been able to cross-examine, impeach and ultimately “destroy[] confidence in [Boatner’s] story.” *Kyles*, 514 U.S. at 443; see *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence”). Instead, in this single eyewitness case, the government hobbled the defense, created a one-sided trial, and, ultimately, undermined confidence in the verdict.

H. *In a Single Eyewitness Case, Evidence Undermining the Credibility and Truthfulness of a Witness and the Reliability of His Identification Is Highly Material under Brady*

The Court has repeatedly looked at whether a witness is central to the prosecution in determining whether previously undisclosed evidence going towards the witness’s credibility is material. In *Giglio v. United States*, the Court recognized that “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule.” 405 U.S. 150 (1972) (citing *Napue*, 360 U.S. at 269). In *Kyles*, this Court suggested that there is a heightened expectation of consistency in the testimony of a witness when, “by the State’s own admission, [the witness is] essential to the investigation and indeed ‘made the case’ against [the defendant].” 514 U.S. at 445. The existence of several inconsistencies in that witness’ testimony was “[c]ontrary to what one might hope

for from such a source.” *Id.* The Court assessed the “likely damage” of inconsistent statements by two other eyewitnesses in *Kyles* by referring first to the fact that the prosecution contended during closing arguments that they were “the State’s two best witnesses.” *Id.* at 444.

In *United States v. Agurs*, as well, the Court described a scaled approach to materiality based on how critical a witness is to the prosecution: the more essential a witness’ testimony is, the more likely undisclosed impeachment information would be material. 427 U.S. 97 (1976). This Court held that a reviewing 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. *Id.* at 112-113. As an illustration, the Court referred to a comparison of examples discussed in a law review comment:

If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not

be sure as he had only had a brief glimpse, the result might well be different.

Id. at 112 n. 21 (citing Victor Bass, Comment, *Brady v. Maryland and The Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 125 (1972)).

In petitioner's case, Boatner was not only the State's principal witness, but its *only* witness linking petitioner to the crime scene. Thus, the situation was very much like the hypothetical from the law review comment discussed in *Agurs*: the prosecution introduced the testimony of a single eyewitness identifying the defendant, but withheld evidence that would undermine the key witness' testimony, including testimony from other eyewitnesses.

Where there is only a single witness linking a suspect to a crime, withholding information concerning the credibility of that witness is more likely to be material than in a case such as *Kyles*, in which four eyewitnesses identified the defendant, but the *Brady* material did not relate to all of these eyewitnesses. In his dissent in *Kyles*, Justice Scalia reasoned that, even if the prosecution's key witness had been thoroughly impeached by the undisclosed evidence, and the jury did not believe his testimony, the jury still could have convicted the defendant "because it could not believe that *all four* of the eyewitnesses were similarly mistaken." 514 U.S. at 463 (Scalia, J. dissenting). By contrast in this case, Boatner was not simply the prosecution's key witness; rather, he was the *only* witness who linked petitioner with the crime.

I. ***Eyewitness Misidentification Takes a Harsh Toll on Those Wrongfully Convicted***

Eyewitness misidentification has led to the wrongful conviction of many individuals who have served lengthy sentences only to later be exonerated through the discovery of exculpatory evidence. In fact, The Innocence Project, has assisted in the exoneration of many such individuals.

Larry Mayes received a 110-year sentence for crimes he did not commit based on a witness's unreliable identification. *Mayes v. City of Hammond*, 442 F. Supp. 2d 587, 617-18 (N.D. Ind. 2006) (discussing history of Mayes's case in his § 1983 suit against the city and officials arising out of his wrongful conviction); Profile of Larry Mayes, Innocence Project, http://www.innocenceproject.org/Content/Larry_Mayes.php (last visited Aug. 15, 2011). Similar to petitioner's case, the victim and sole eyewitness was only able to give a basic description of her assailant. *Mayes*, 442 F. Supp. 2d at 602. The victim was initially unable to identify Mayes in a live lineup, relating that "[she] was nervous. [That she] wanted to get it over with and get out of there." *Mayes*, 442 F. Supp. 2d at 616; Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Online Appendix 40-41 (2011), available at http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf. Subsequent police testimony in related civil cases revealed that the victim's initial photo identifications had been "tentative," a fact that the prosecution had not disclosed in violation of its *Brady* obligations.

Mayes, 442 F. Supp. 2d at 631-32. *Mayes* was incarcerated for nearly twenty-one years for a crime he did not commit.

In another case of witness misidentification, Michael Blair was sentenced to death after being wrongfully convicted of capital murder in Texas. *Ex parte Blair*, Nos. AP-75954, AP-75955, 2008 WL 2514174, at *1 (Tex. Crim. App. June 25, 2008) (per curiam); Profile of Michael Blair, Innocence Project, http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Aug. 15, 2011). The prosecution's main evidence against Blair was the testimony of three eyewitnesses who claimed to have seen Blair on the same day the victim disappeared and in the same park where the victim was discovered dead. See Profile of Michael Blair, *supra*. However, these witnesses did not identify Blair in a photo lineup until after his picture had already appeared in the media, and at least two of the witnesses testified that they had seen Blair's photo on the television before identifying him to police. *Id.*; Garrett, Online Appendix, *supra*, at 8. Subsequent evidence pointed to Blair's innocence for that crime, and eventually he was removed from death row. *Ex Parte Blair*, 2008 WL 2514174, at *2.

Like the *Mayes* and *Blair* cases, petitioner's situation is one in which the prosecution rested much of its case on an eyewitness—Boatner—despite the unreliability and inconsistency that newly disclosed materials now reveal. Such unreliability becomes particularly problematic when its existence is wrongfully withheld by the prosecution at trial, rendering a defendant incapable of adequately defending himself in violation of his constitutional

due process rights. In such circumstances, there can be no confidence in the verdict.

Eyewitness identification testimony will, of course, continue to play an important role in criminal trials, but given the increasing understanding that this form of evidence is less reliable than it may seem, it is critical that defendants be given access to materials that may be used to impeach or contradict these witnesses. The protections in *Brady* are significant resources for defendants in combating the highly prejudicial effect of mistaken eyewitness identifications and resulting testimony. Providing the defense with access to information that may be used to impeach or contradict eyewitnesses may be the most effective means to combat eyewitness misidentifications in cases in which DNA evidence is not available.

II. THE HISTORY OF THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE DEMONSTRATES A PATTERN OF WITHHOLDING EVIDENCE THAT WOULD UNDERMINE THE CREDIBILITY OF KEY WITNESSES AND THE RELIABILITY OF THEIR IDENTIFICATIONS

The Orleans Parish District Attorney's Office under the prior leadership of Harry Connick has a long and documented history of disregarding *Brady* obligations.¹⁰ Since 1990, the discovery of *Brady*

¹⁰ The failure of the Orleans Parish District Attorney's Office to observe *Brady's* mandates under Connick's tenure are well-documented in this Court's recent decision in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). There, Connick's office admitted that it had improperly withheld evidence in violation of *Brady*, which resulted in the wrongful conviction of John Thompson, who spent 18 years in prison, including 14 years on death row. *Id.* at 1355. The Court recognized that "during the ten years preceding [Thompson's] armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office." *Id.* at 1360. In fact, Connick's own "testimony exposed a flawed understanding of a prosecutor's *Brady* obligations," as he misstated *Brady's* requirements and even admitted to previously withholding evidence, which resulted in the U.S. Attorney's Office indicting him for doing so. *Id.* at 1378 (Ginsburg, J., dissenting). Other prosecutors in Connick's office were similarly – or even further – deficient in their understanding of their *Brady* obligations. One senior prosecutor erroneously testified that impeachment evidence was not *Brady* material and that there was no obligation to turn over police reports revealing inconsistent descriptions of the perpetrator. *Id.* Another senior prosecutor "admitted that he never reviewed police files, but simply relied on police to flag any potential *Brady* information." *Id.* The lack of *Brady* understanding is unsurprising as Connick's attorney manual

violations committed by Orleans Parish prosecutors at trial has contributed to the exoneration of ten individuals following reversal of their convictions.¹¹

included only four sentences on *Brady* which were “notably inaccurate, incomplete, and dated,” and the manual did not even acknowledge that impeachment evidence is material under *Brady*. *Id.* As the Court noted, “Connick resisted an effort to hold prosecutors accountable for *Brady* compliance because he felt the effort would ‘make his job more difficult.’” *Id.* at 1381 (quoting trial record).

¹¹ The Orleans Parish *Brady* exonerees are: **Dan Bright**, see *State v. Bright*, 875 So. 2d 37 (La. 2004) (murder conviction reversed by state supreme court after nine years due to undisclosed evidence impeaching the State’s main witness; Bright was released from prison and later exonerated); **Greg Bright and Earl Truvia**, see Case No. 252-514 (on file with Orleans Parish Criminal District Court); see also Michael Perlstein, *Open to Appeal: Convicted criminals Say DA Policy Change Gives Them Fair Shot*, Times-Picayune (New Orleans), July 20, 2003, at 1 (murder convictions reversed by state trial court after twenty-seven-and-a-half years due to undisclosed evidence impeaching the State’s main witness; Bright and Truvia were released from prison and later exonerated); **Shareef Cousin**, see *State v. Cousin*, 710 So. 2d 1065 (La. 1998); see also, *In re Jordan*, 913 So. 2d 775 (La. 2005) (murder conviction reversed by state supreme court after four years due to trial record errors, but disciplinary proceedings against prosecutor cited numerous *Brady* violations; Cousin was released from prison and later exonerated); **Roland Gibson**, see Case. No. 203-904 (on file with Orleans Parish Criminal District Court); see also Dan Bennet, *Jailed Man Granted New Trial in ‘67 Murder Sues the State*, Times-Picayune (New Orleans), Feb. 17, 1993, at B1; *Gibson v. State*, 731 So. 2d 379 (La. Ct. App. 1999) (civil case) (murder conviction reversed by state trial court after twenty-six years due to undisclosed evidence implicating another person in the crime; Gibson was released from prison and later exonerated); **Isaac Knapper**, see *State v. Knapper*, 579 So. 2d 956 (La. 1991) (murder conviction reversed by state supreme court after twelve years due to

A closer examination of Orleans Parish cases involving *Brady* violations in general reveals an alarmingly common practice of withholding material impeachment information in cases that are built primarily on the testimony of eyewitnesses, including cases in which only a single eyewitness testifies. In these cases, information impeaching the credibility and reliability of eyewitness testimony is critical, and the prosecution's suppression of this information undermines confidence in the verdicts.

undisclosed evidence implicating other people in the crime and impeaching the state's main witness; Knapper was released from prison and later exonerated); **Curtis Lee Kyles**, see *Kyles v. Whitley*, 514 U.S. 419 (1995) (murder conviction reversed by Supreme Court after eleven years due to undisclosed evidence impeaching the state's witnesses and implicating another person in the crime; the state dropped charges against Kyles after unsuccessful efforts to retry him); **Dwight Labran**, Case No. 388-287 (on file with Orleans Parish Criminal District Court); see also Keith Pandolfi, *Innocence Project New Orleans Investigates Suspected Cases of Wrongful Convictions*, New Orleans City Business, Jan. 13, 2003 (murder conviction reversed by state trial court after four years due to undisclosed evidence impeaching the State's main witness; Labran was released from prison and later exonerated); **John Thompson**, see *State v. Thompson*, 825 So. 2d 552 (La. Ct. App. 2002) (murder and robbery convictions reversed by state trial and appellate courts after seventeen years due to undisclosed forensic evidence; Thompson was acquitted at a retrial); **Hayes Williams**, Case No. 199-523 (on file with Orleans Parish Criminal District Court); see also William Pack, *Prison Reformer Faces Challenge of Freedom*, The Advocate (Baton Rouge), May 16, 1997 (murder conviction reversed by state trial court after thirty years due to undisclosed exculpatory witness statements; Williams was released from prison and later exonerated). This data was collected by the Innocence Project New Orleans; none of these exonerations occurred through the use of DNA evidence.

A. *The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Key Witnesses that Conflicts With Their Trial Testimony or Undermines Their Credibility and Reliability*

In several cases, Orleans Parish prosecutors have withheld statements of critical key witnesses which contradicted their trial testimony, thereby preventing impeachment and impermissibly preserving the credibility of that witness.

One recent case, *State v. Lindsey*, is particularly noteworthy. Eugene Lindsey was convicted of murder for killing the mother of his girlfriend after engaging in a domestic dispute. 844 So. 2d 961, 961-62 (La. Ct. App. 2003). Counsel for Lindsey put forth a combined defense of intoxication and accidental shooting, but prosecution witnesses testified that Lindsey was not intoxicated and that the family had not consumed alcohol that evening. *Id.* at 962-63. Following Lindsey's conviction, however, it was discovered that two of the state witnesses provided pretrial statements to police that contradicted their trial testimony and corroborated Lindsey's claim that he was intoxicated. *Id.* at 964-65. The Court of Appeal of Louisiana held that the evidence withheld was material exculpatory evidence under *Brady* and reversed the district court's denial of post-conviction relief. *Id.* at 969.

Orleans Parish prosecutors have also withheld prior statements of its key witnesses which could strongly show that their trial testimony is unreliable. Of particular note are two cases similar

in core aspects to petitioner's. In both cases, the prosecution hinged its case on a single eyewitness identification, and withheld evidence that severely undercut the reliability of that witness' identification.

In *State v. Curtis*, Larry Curtis was convicted of second-degree murder based on testimony of the victim's brother, who was the only witness to identify Curtis as the shooter. 384 So. 2d 396, 397 (La. 1980). Another witness testified to seeing the defendant flee the scene. *Id.* The withheld *Brady* material in that case consisted of evidence that the sole eyewitness identifying the defendant as the shooter had failed to identify the defendant from a photographic display before trial. *Id.* The Louisiana Supreme Court reversed the conviction finding that that the reliability of the sole eyewitness was likely the "crucial factor" in determining the guilt of the defendant and that the prior failure to identify the defendant weakened the reliability of that identification. *Id.* at 398; see also *State v. Falkins*, 356 So. 2d 415, 418-20 (La. 1978) (holding that the state's failure to produce witnesses' initial misidentification of the defendant deprived the defendant of a fair trial where the sole basis of the conviction was the eyewitness testimony).

In the second case, *State v. Cousin*, 710 So. 2d 1065 (La. 1998), the *Brady* violation largely tracks the facts of the suppression of evidence in petitioner's case. Shareef Cousin was convicted of first-degree murder and sentenced to death. *Id.* at 1066. The victim and Connie Babin were returning to the victim's car after dinner when three individuals confronted them. *Id.* At trial, Babin

testified that while she was fleeing she turned briefly towards the assailants and witnessed the defendant shoot the victim in the face. *Id.* No physical evidence was presented. *Id.*

The prosecution team in *Cousin* was headed by Roger Jordan, who was also the lead prosecutor in petitioner's case. Although the reliability of Babin's identification was the key issue in *Cousin*, Jordan withheld from the defense Babin's prior statements which indicated that she did not have a good recollection of the gunman's features. *Id.* at 1066. In a pretrial statement taken immediately following the shooting, Babin told police that she "did not get a good look at the perpetrators and probably could not identify them." *In re Jordan*, 913 So. 2d 775, 777 (La. 2005). In a statement a few days later, Babin further elaborated:

I don't know, it was dark and I did not have my contacts nor my glasses so I'm coming at this at a disadvantage. . . . I keep getting this vision of a young man with, with an older mans face.. I don't know that if this is coming . . . somewhere, or if I really did see this person . . . if this is just coming from my imagination or what, but I . . . every time I go over it and close my eyes . . . I remember thinking that he had an older man's face or a young body, on a young person . . . how I visualize that, I don't know[.]

Id. at 777. In post-trial proceedings, Jordan testified that he believed these pretrial statements, replete with qualifications and stammering confusion, "tended to corroborate her identification of Mr. Cousin" as the gunman and did not constitute *Brady*

material. *Id.* at 778. Roger Jordan was personally sanctioned by the Louisiana Supreme Court for failing to disclose the key witness' prior statements. See *id.*

The Supreme Court of Louisiana determined that the withholding of this information was a *Brady* violation because it cast doubt on Babin's veracity as the key eyewitness, and defense counsel could have easily used the pretrial statements to impeach her testimony during trial. *Id.* at 782. Cousin was released from prison and later exonerated.

In other cases, Orleans Parish prosecutors have withheld information that went directly to a key witness' credibility, such as a witness' criminal record or plea arrangement. See *State v. Bright*, 875 So. 2d 37, 42-44 (La. 2004) (holding that the state's failure to disclose the prior criminal record of its star witness violated *Brady* and warranted remand for a new trial); *State v. Carney*, 334 So. 2d 415, 417-19 (La. 1976) (holding that the State's failure to disclose its arrangement with a chief witness to drop battery charges against the witness resulted in a *Brady* violation); *State v. Thompson*, 825 So. 2d 552, 555-57 (La. Ct. App. 2002) (holding that the state improperly withheld evidence that witnesses had been promised reward money for testimony implicating the defendant in the crime).

B. *The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Other Witnesses that Contradicts Key Witnesses' Testimony*

In still other cases, Orleans Parish prosecutors have withheld favorable statements by

other potential witnesses in police records which would have contradicted the testimony of prosecution witnesses at trial. See *State v. Knapper*, 579 So. 2d 956, 959-61 (La. 1991) (holding that undisclosed witness statements in a detective's report that contradicted witness testimony would have created reasonable doubt as to guilt and therefore established a *Brady* violation); *State v. Rosiere*, 488 So. 2d 965, 970-71 (La. 1986) (holding that nondisclosure of eyewitness statements constituted a *Brady* violation where they corroborated the defendant's testimony and impeached the testimony of a key witness for the State); *State v. Perkins*, 423 So. 2d 1103, 1108 (La. 1982) (holding that the failure to produce an eyewitness statement which substantially corroborated the defendant's version of events was reversible error under *Brady*); *State v. Oliver*, 682 So. 2d 301, 310-12 (La. Ct. App. 1996) (holding that withholding three police reports containing witness statements inconsistent with trial testimony violated the defendant's due process right to a fair trial).

Collectively, these cases show that, in situations in which a conviction turns on the credibility or reliability of a single or few eyewitnesses, the Orleans Parish District Attorney's Office, has frequently withheld from the defense information that would contradict or impeach the testimony of those witnesses. This conduct undermines confidence in the verdicts obtained in these cases.

CONCLUSION

For the foregoing reasons, and those presented by petitioner, the judgment of the trial court should be reversed.

Respectfully submitted,

KEITH A. FINDLEY
President
INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

DAVID B. HIRD
Counsel of Record
M. JARRAD WRIGHT
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, N.W.
Washington, D.C. 20005
(202) 682-7000
david.hird@weil.com

NADYA SALCEDO
ERICK FLORES
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

Dated: August 19, 2011

APPENDIX

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review

A-2

Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

INTEREST OF *AMICUS CURIAE*¹

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members² are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

The Innocence Network works to ensure that innocent persons are not wrongfully convicted or incarcerated and thus has an interest in the enforcement of obligations under *Brady v. Maryland*,

¹ Pursuant to Rule 37.3, the parties have both consented to the filing of this amicus brief. The letters of consent from both parties accompany this filing. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

² The member entities are listed in the appendix.

373 U.S. 83 (1963). In the experience of Innocence Network member, New Orleans Innocence Project, the consistent and repeated violations of *Brady* in Orleans Parish have led to an alarming rate of wrongful convictions. Since 1990, ten convicted prisoners have been exonerated from prison in Orleans Parish. All of those prisoners were exonerated due to violations of *Brady* by the prosecution at their trial.³

Equally as critical, the experience of the Innocence Network has also found the unfortunate but substantial role that mistaken eyewitness identifications play in wrongful convictions. Indeed, Innocence Project research shows that eyewitnesses misidentified 75 percent of people who were wrongfully convicted and exonerated by DNA evidence. The *Brady* exonerations in Orleans Parish and the prevalence of eyewitness identifications among exoneration cases highlight the degree to which violations of *Brady* in eyewitness cases can undermine our system of justice, and the concomitant necessity of enforcing defendants' rights to evidence in the government's possession that is material and favorable to their defense.

³ See cases discussed *infra*, note 11.

SUMMARY OF ARGUMENT

While the application of the *Brady* doctrine's requirement that prosecutors disclose impeachment and exculpatory evidence is important for all criminal cases, its significance cannot be overstated in those cases in which prosecutors rely upon a single eyewitness for identification of the defendant and have no corroborating forensic evidence. In those cases, any information that casts doubt on the reliability or credibility of that eyewitness' identification is by its nature material. By withholding *Brady* information that could be used to challenge the credibility of the prosecution's single eyewitness and the reliability of that witness' identification of the defendant, the prosecution undercuts the defendant's right to due process and undermines the integrity of the trial.

As described in detail in petitioner's brief,⁴ only a single eyewitness identified petitioner and no forensic evidence linked petitioner to the crime. Therefore, the jury's consideration of the truthfulness and credibility of the testimony of that witness, Larry Boatner, and the reliability of his identification were the fundamental factual issues in dispute. The jury either had to decide to believe his identification or not. But the jury heard a seemingly confident Boatner make his identification without knowing that three times previously Boatner had told the police that he could not make an

⁴ The Innocence Network hereby adopts by reference the statement of the case and the facts set forth in petitioner's brief, as well as the Joint Appendix adopted by petitioner.

identification. J.A. 252-253, 25-260, 308. The jury also did not hear contradictory statements from other witnesses (including a dying victim) about whether the assailant in question wore a mask, J.A. 309, 310, and a statement from a suspected perpetrator suggesting that petitioner was not involved in the crime. J.A. 311. This undisclosed information, both individually and collectively, would have undermined the reliability and credibility of the prosecution's single eyewitness.

Social science has repeatedly shown that while juries place substantial weight on an eyewitness' identification, such eyewitness identifications are often wrong. For example, the U.S. Department of Justice previously analyzed twenty-eight cases involving convicted defendants who were later exonerated by DNA evidence. The Department found that "eyewitness testimony was the most compelling evidence" but that "[c]learly, however, those eyewitness identifications were wrong." See Edward Connors et al., U.S. Dep't of Justice, Pub. No. NCJ 161258, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 24 (1996). Similarly, a recent study of the first 250 cases in which defendants were exonerated by DNA evidence found that eyewitnesses misidentified 76 percent of the exonerees.⁵ See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011).

⁵ Professor Garrett's findings are consistent with the Innocence Project's own findings. See *infra*, note 6.

Memory is malleable. An eyewitness' seemingly confident identification is affected by intervening factors such as police statements that the correct suspect was identified or whether the eyewitness previously had seen a photo of a police suspect. Although the advent of DNA evidence has exonerated many in recent years, innocent people are still convicted in the United States on the testimony of a single eyewitness, especially in cases, such as this one, that do not involve DNA evidence or other forensics. *Brady* acts as a firewall in these cases by preventing the prosecution from withholding evidence that would impeach or contradict the testimony of the single witness upon which it relies. Particularly in cases “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.” *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Application of *Brady* in single (or few) eyewitness cases ensures that defendants are provided access to evidence that contradicts or undercuts otherwise seemingly confident, but mistaken, or even false, identifications.

The *Brady* standard is clearly met in this case, where the testimony of a single eyewitness was critical and the prosecution withheld information that could have been used to impeach and contradict that eyewitness. The jury should have been allowed to consider and evaluate *all* evidence concerning the reliability and credibility of Boatner's identification. Withholding that evidence may lead to an easy

conviction, but this tactic does not lead to verdicts in which the courts should have confidence.

ARGUMENT**I. THE PROSECUTION'S WITHHOLDING OF INFORMATION THAT UNDERMINED THE TRUTHFULNESS, CREDIBILITY AND RELIABILITY OF ITS SINGLE EYEWITNESS IS MATERIAL UNDER *BRADY*****A. *The Prosecution Impermissibly Preserved Boatner's Truthfulness, Credibility and the Reliability of His Identification in the Eyes of the Jury By Withholding Exculpatory Information***

This case demonstrates the critical importance of disclosing *Brady v. Maryland* material in cases involving the identification of a defendant by a single eyewitness. 373 U.S. 83 (1963). *Brady* provides that suppression of evidence favorable to the accused violates due process where the evidence “is material either to guilt or to punishment.” *Id.* at 87. Withheld evidence is material under *Brady* “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)). The Court clarified in *Kyles* that the reasonable probability standard does not test “whether the defendant would more likely than not have received a different verdict with the evidence,” but rather “whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* There can be no confidence in the verdict in a case such as petitioner's, where the

prosecution hinged its case on a single eyewitness and artificially preserved that witnesses' credibility, truthfulness and reliability by withholding evidence that specifically undermined those virtues.

As detailed in petitioner's brief, the only evidence connecting petitioner to the crime of which he was convicted was the eyewitness testimony of Larry Boatner identifying petitioner. Pet'r's Br. 34-35. No other witnesses testified to corroborate Boatner's identification of the petitioner, and there were no fingerprints or other forensic evidence linking petitioner to the crime. Rather, the jury was asked to convict the petitioner based solely on the testimony of this single eyewitness. Accordingly, the critical issues of fact before the jury were: is Boatner's testimony credible and truthful, and is his identification of a man at whose face he claimed to have "glanced" for only a few moments reliable? J.A. 308.

Yet the information withheld by the prosecution from the defense went precisely to these issues: the credibility and truthfulness of that eyewitness, and the reliability of his identification. Among other favorable evidence, the prosecution withheld prior statements by Boatner that conflicted with his trial testimony, J.A. 252-253, 259-260, 308, and evidence of the statements of other witnesses that contradicted Boatner's testimony. J.A. 309, 310, 311.

In a case involving a horrific crime scene with five dead victims, a severely injured perpetrator, and no forensic evidence linking petitioner to the crime, J.A. 139, the prosecution obtained a conviction on

the basis of a single eyewitness' identification, but did not provide the defense with the information necessary to cross-examine that witness effectively or to introduce testimony from other witnesses that contradicted his statements. Without having seen the evidence that would undermine the credibility and reliability of Boatner's identification, the jury convicted petitioner.

B. *Confident Eyewitness Identifications Can Be Powerful Evidence, But Are Often Wrong*

The impact of Boatner's identification of petitioner at trial was overwhelming and the effect on the jury was no doubt dramatic. Boatner testified:

Q: Larry, do you see the person in the court today who barged through that door that day and put a .9mm to your head?

A: Yes, I do.

Q: Point him out for the jury.

A: He's right there. Like I say, I'll never forget him.

* * *

Q: Larry, is there any doubt in your mind whatsoever, any doubt at all, that Juan Smith is the man that came to the door that day at 2230 North Roman Street?

A: No doubt.

J.A. 195-196.

An unequivocal identification by a witness is powerful evidence in the mind of a juror. Justice Brennan discussed the effect of a confident eyewitness on a jury in his dissent in *Watkins v. Sowders*:

Eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says “that’s the one!”

449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (citations omitted); see also C. A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence*, in *Adult Eyewitness Testimony* 348, 348 (David Frank Ross at al. eds., 1994) (“jurors tend to rely heavily on eyewitness confidence to infer witness accuracy”).

Jurors place a great weight on the apparent confidence of an eyewitness despite the long recognized fact, as this Court has acknowledged, that “the annals of criminal law are rife with instances of mistaken identifications.” *United States v. Wade*, 388 U.S. 218, 228 (1967). In a recent study of the first 250 cases in which defendants were exonerated after conviction by DNA evidence, Professor Brandon L. Garrett found that eyewitnesses misidentified 76 percent of the

exonerees (190 of 250 cases).⁶ See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011). Of these 190 cases, Professor Garrett found that as many as 64 percent involved conviction based on the identification of a single eyewitness. *Id.* at 50. Professor Garrett's analysis of these cases demonstrates that eyewitness identifications are highly fallible and yet play a major role in the wrongful convictions of exonerees.⁷ In its own study published two years before Professor Garrett's, the Innocence Project found that not only was eyewitness misidentification a prevalent occurrence in DNA exoneration cases, but the eyewitness misidentification alone was the central cause of conviction in 50 percent of DNA exoneration cases where eyewitness misidentification was a factor.⁸

⁶ These figures are consistent with the Innocence Project's own findings that 75 percent of DNA exonerations were at least partially supported by eyewitness testimony. Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 3 (2009).

⁷ As Professor Garrett noted, exoneration through DNA evidence is most likely to occur in rape cases where DNA material can be collected, and that exoneration is less likely to occur in other types of cases, such as murder, not because eyewitnesses are more reliable in murder cases, but because DNA evidence is less likely to be available in those cases. Garrett, *supra*, at 81.

⁸ The other examined factors that contributed to wrongful convictions were invalidated or improper forensic science, false confession or admission, and informant testimony. These causes played a role in the conviction of the other 50 percent of eyewitness misidentification cases. Innocence Project, *Reevaluating Lineups*, *supra* note 6, at 17.

Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 17 (2009).

The U.S. Department of Justice in its own analysis of exoneration cases found that not only are eyewitness misidentifications prevalent, but they are often the most significant evidence that supported the wrongful convictions. In its study of twenty-eight cases involving convicted defendants who were later exonerated by DNA evidence, the Department of Justice found that “eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong.” Edward Connors et al., U.S. Dep’t of Justice, Pub. No. NCJ 161258, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 24 (1996). In a subsequent Department of Justice report, Attorney General Janet Reno explained:

Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory.

Nat’l Inst. of Justice, U.S. Dep’t of Justice, *Eyewitness Evidence: A Guide For Law Enforcement*, at iii (1999).

C. ***Eyewitness Testimony that Results in Convictions Is Frequently Mistaken or False***

Although Boatner was unequivocal in his trial testimony that petitioner was the perpetrator, a large body of research has shown that witness certainty in an identification bears minimal if any correlation to its accuracy or reliability. See, e.g., Luus & Wells, *supra*, at 348-61; Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 1, 15-16 (1998). In his book, Professor Garrett analyzed the trial transcripts of those convicted and later exonerated by DNA evidence. In the trials with eyewitness testimony, by the time of the trial almost all of the eyewitnesses were positive that they had identified the right person. Garrett, *supra*, at 68. However, in 57 percent of these trials, the witnesses had earlier not been certain at all about their identification, “a glaring sign that the identification was not reliable.” *Id.* at 64.

Moreover, analysis of exoneration cases has shown that in a significant percent of cases, exonerees were convicted on the basis of eyewitnesses who were lying. In a study of 340 exoneration cases from 1989 to 2002, researchers concluded that in at least sixty cases, persons who claimed to have witnessed the crime falsely accused the defendant deliberately at trial. Samuel L. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543 (2005). In murder cases, especially, Professor Gross and his colleagues found that exonerees had

been falsely accused by eyewitness in forty-three percent of the cases (44 out of 102). *Id.*

D. *The Prosecution Withheld Prior Statements by Boatner and Others that Would Have Allowed the Jury to Fully Evaluate the Truthfulness, Credibility and Reliability of Boatner's Identification of Petitioner*

In contrast to Boatner's unequivocal identification of petitioner at trial, the newly disclosed materials reveal that on three prior occasions, Boatner provided statements to the police in which he unambiguously asserted that he could not identify any of the perpetrators. Police records reflect that on the day of the crime, Boatner told Officer John Ronquillo that he "could not . . . supply a description of the perpetrators other th[a]n they were black males." J.A. 252-253. On a second occasion, police notes taken five days after the crime state that Boatner only "glanced" at the first man who had entered the house, that he could not tell if the men had their "faces covered" and he "didn't see anyone," and that he "could not ID anyone because [he] couldn't see faces." J.A. 308. Under the same caption, the notes describe that Boatner told Ronquillo again that he "could not ID" and that he "would not know them if [he] saw them." *Id.* A third piece of withheld evidence concerns a statement made by Boatner to Ronquillo that he "could not identify any of the perpetrators of the murder." J.A. 259-260. Each of these three undisclosed prior statements all dramatically conflict with the certainty with which Boatner claimed to be able to identify petitioner at trial. J.A. 196.

The prosecution also withheld prior statements of two other eyewitnesses that contradict Boatner's testimony and undermine his identification of petitioner. Police notes of an interview with Shelita Russell, who was critically injured and later died as a result of the shootings, reveal that she told police that the "first one through [the] door" had a "black cloth across [his] face." J.A. 310. Given Ms. Russell's subsequent death, this statement could only be found in the police notes. Also withheld were notes from a police interview with Dale Mimms, a neighbor, which reveal that he told the police that all of the men he saw exit the house were wearing "ski type" masks that "cover[ed] [the] whole face." J.A. 309. Both of these statements contrast heavily with Boatner's testimony at trial that the first perpetrator who came to the door was petitioner and that that person was not wearing a mask. J.A. 175; see also Petr'r's Br. 36-37.

Further, the prosecution withheld notes of Officer Ronquillo's conversation with Phillip Young, a suspected perpetrator who was severely injured at the scene of the crime but survived. J.A. 271-273, 311. The notes reflect that Young was not only able to communicate – in conflict with Ronquillo's testimony at trial that Young could not communicate, J.A. 136 – but also that he indicated to police that a specified group of people (including a person whom the police believed to be petitioner) was "not with [him] when [he] went to the house." J.A. 311. A statement by an apparent perpetrator seemingly absolving petitioner of responsibility for the shootings would have combined well with other information undermining Boatner's identification of

petitioner as one of the perpetrators. See also Petr'r's Br. 43-45.

Other undisclosed information undermines Boatner's trial testimony about the weapon that he alleged petitioner used at the crime. Boatner testified at trial that the first man who entered the house was carrying a 9-millimeter handgun and that he "kn[e]w" what a 9-millimeter "looks like." J.A. 178. But police notes disclose that in prior statements he had only ever described the gun as a "silver colored handgun," J.A. 252, or a "chrome automatic." J.A. 256-257. He also had told police "that he could not supply any additional information" on the weapon other than that it was "a silver colored handgun." J.A. 252-253.

The prosecution also withheld notes of Officer Ronquillo's conversation with Firearms Examiner Kenneth Leary, J.A. 266, which directly undermine the reliability of Boatner's testimony at trial. J.A. 178. The notes show that Leary had "advised Ronquillo that the 9MM ammunition confiscated from the Roman Street murder was typed to have been fired from a[n] Inter Tec, 'Mac 11' model type, semi automatic weapon" and thus not a 9-millimeter handgun. J.A. 266. However, Boatner testified at trial that the petitioner was carrying a 9-millimeter handgun. J.A. 178. This information suggests that Boatner's trial testimony about the weapon was a product not of his own recollection, but of influencing

conduct by police and prosecutors. See also Petr's Br. 45-49.⁹

Research has confirmed that mock jurors exposed to inconsistent statements by witnesses are significantly less likely to convict and find the defendant less culpable and the eyewitness less effective. See Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. Applied Psychol. 170, 170 (1996). Inconsistent statements affect juror conviction rates not only in instances where the witness contradicted himself, but also when the witness provided information on the stand that it did not provide in pretrial investigations. *Id.* at 173. In one study, the conviction rate when mock jurors were exposed to inconsistent testimony regarding central details like the target's appearance was less than half of the conviction rate than when they were exposed to consistent testimony regarding those central details. Garrett L. Berman et al., *Effects of Inconsistent Eyewitness Statements on Mock-Jurors' Evaluations of the Eyewitness, Perceptions of Defendant Culpability and Verdicts*, 19 Law & Hum. Behav. 79, 85 (1995). When the eyewitness gave inconsistent statements going to both central and peripheral details, the conviction rate by the mock jurors was then halved again. *Id.*

⁹ Other inconsistencies between his descriptions of the guns at trial and in prior undisclosed statements, discussed more fully in the Petitioner's Brief, pages 39-40, further reveal a significant fault line in the credibility of Boatner's testimony and the reliability of his identification of petitioner.

E. Social Science Research Suggests that Boatner's Identification of Petitioner May Have Been a Result of Intervening Factors and Not Independent Recollection

At trial, Boatner was confident about his identification of petitioner, and that his assailant was brandishing a 9-millimeter gun, both pieces crucial to the prosecution's theory that led to petitioner's conviction. J.A. 178, 195-196. However, the undisclosed information reveals that far from being certain, when Boatner spoke to police just after the incident, he was uncertain of his ability to identify his assailant and gave vague and conflicting descriptions about the gun his assailant carried. J.A. 252, 256-257. The undisclosed notes from Firearms Examiner Leary further reveal that the lethal weapon in the shootings might not have been a 9-millimeter at all. J.A. 266. Boatner's progression from undisclosed uncertainty to overt and persuasive confidence at trial suggests that his identification of petitioner was influenced by suggestive police behaviors and other intervening factors, and not his independent recollection.

Social science research has shown that eyewitness certainty in identifications is not only fallible, it is one of the most malleable features of human memory, and DNA exoneration cases provide solid illustration. Much research has gone into the intervening reasons for the certainty progressions, such as the one that the newly disclosed materials reveal regarding Boatner's testimony. Suggestive behaviors by police in the identification procedures account heavily for this progression. In the DNA

exoneration cases for which he was able to obtain trial records, Professor Garrett found that 78 percent of trials with eyewitness testimony involved at least one form of police suggestion. Garrett, *supra*, at 55. Police feedback upon correct identification is one type of suggestive behavior that social scientists have directly accredited with creating confident but mistaken eyewitness. For example, witnesses are especially likely to say they had an adequate or excellent view of the culprit or paid special attention to the culprit's face if police confirm their choice out of a lineup with positive feedback, like "Good, you identified the actual suspect." Gary L. Wells & Amy L. Bradfield, "*Good, You Identified the Suspect*": *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998); see also Amy Breadfield et al., *The Damaging Effects of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112, 117 (2002) ("feedback significantly diminishes the strength of the certainty-accuracy relation"). The notes from the hospital where Boatner was treated relating to the harassment and pressure he felt surrounding the police identification procedures suggest that Boatner's identification of petitioner was similarly coaxed by police behavior. J.A. 247; see also Pet'r's Br. 38.

Another intervening factor that may lead to eyewitness misidentification is a phenomenon called "unconscious transference," or more colloquially the "mugshot exposure effect." See Elizabeth Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 4-14 (2007); Kenneth A. Deffenbacher et al., *Mugshot*

Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287 (2006). This effect occurs when a witness confuses or recalls a person seen in one situation with a person seen in a second situation. Deffenbacher et al., *Mugshot Exposure Effects*, *supra*, at 289. It has been studied in relation to criminal trials because witnesses are often exposed to a suspect's photograph either in the media or by the police in such forms as mugshot books before they are asked to make an identification. The witness then makes an unconscious commitment to that picture and later identifies that suspect based on recognition from the prior picture and not independent recollection. Thus, “[i]f a witness is exposed to mugshots subsequent to viewing a perpetrator and prior to an additional test of recognition memory, there is a possibility that exposure to that mugshot may bias the witness's decision at that test.” *Id.* at 287.

In this case, there is substantial reason to believe that the “mugshot exposure effect” influenced Boatner's belated identification of petitioner. On or around June 7, 1995, Boatner obtained a copy of the New Orleans Times-Picayune that contained an article accompanied by a picture of petitioner and three others. J.A. 160-161, 190, 582-583. The article implied that petitioner was a suspect in the shootings. *Id.* It was only after Boatner saw this picture, and almost four months after the shootings, that he made his identification to police—and even then, only after police visited him in the hospital; Boatner never went to the police on his own. J.A. 193-194. A large body of research has shown that

the ability of witnesses to retain identifying information decreases substantially even after only a few days, much less several months. See Matthew P. Gerrie et al., *False Memories, in Psychology and Law: An Empirical Perspective* (Neil Brewer & Kip Williams eds., 2007) (“We have known for over 100 years that memories fade, sometimes rapidly, in a function known as the forgetting curve . . . [and] that as memories fade, they also become more susceptible to suggestion.”); Daniel L. Schacter, *The Seven Sins of Memory*, 54 *Am. Psychol.* 182, 184 (1999) (“It has also been established that forgetting can occur quite rapidly. . .”).

Evidence going to the existence of intervening factors such as police harassment and mugshot exposure become all that much more potent in cross-examination when accompanied by evidence that a witness, while certain in his identification on the stand, was vague and not at all certain in his initial recollection of the perpetrator. It is precisely this type of evidence that the prosecution withheld by failing to disclose Boatner’s previous statements about his ability to identify his assailant. See Section I.D.

F. *Social Science Research Shows that the Witnessing Conditions in Boatner’s Situation Weaken an Eyewitness’ Ability to Identify a Perpetrator*

In the notes of Boatner’s March 2, 1995 interview with Detective Arthur Kaufman, which were withheld from the defense, Boatner said that he was “too scared to look at anybody” and was only able to recall the complexion of the perpetrators’ skin

and that the first person who put a gun to him had “a low cut” and “gold[s] in his mouth.” J.A. 295-296. At the end of the interview, he lamented that he “wish[ed he] could give [the police] a description.” J.A. 297. Boatner described the immense stress and fear he felt during the perpetration of the crime, which prompted a biological reaction even before the shooting began. J.A. 177-178.

Studies have found that heightened stress situations such as the one in which Boatner found himself produce a debilitating effect on the accuracy of an eyewitness’ recall of details of the event, as well as on the accuracy of any identification of the target that the witness is able to make. See Garrett, *supra*, at 72; Kenneth Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004); Roger B. Handberg, *Expert Testimony on Eyewitness Identification*, 32A Crim. L. Rev. 1013, 1019 (1995) (“when one is concerned with self-preservation, there is a tendency to ignore anything not necessary for survival”); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int’l J.L. & Psychiatry 265, 274 (2004) (“Contrary to popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them for more than 30 min, a large number of subjects in this study were unable to correctly identify their perpetrator.”)

Other studies have shown that when a crime is committed with a weapon, the witness’ attention becomes focused on the weapon and substantially less on the characteristics and appearance of the

perpetrator. See Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 *Law & Hum. Behav.* 413 (1992). The undisclosed materials suggest that a weapons focus effect might have played a role in Boatner's witnessing conditions. In contrast to his initial inability to identify a perpetrator, Boatner was able to describe each of the guns that the perpetrators were carrying, including such characteristics as gun type, color and the type of clip (though even then, Boatner gave different descriptions of the guns over time). J.A. 296.

In addition, the overwhelming majority of eyewitness identification experts agree that the less time an eyewitness has to observe an event, the less well he or she will remember it. See Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psychol.* 115, 120 (2006); see also Amina Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 *Brit. J. Psychol.* 339 (2003). 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, 199.

G. *All of the Withheld Information in this Case Provide a Reasonable Basis for a Jury to Determine Boatner's Identification Was Unreliable or that Boatner Was Not Credible*

As social science has shown, eyewitness identification testimony, while highly effective with juries, may often be unreliable. In this case, the withheld information directly implicated the credibility and truthfulness of the witness and the reliability of the identification including inconsistent prior statements by Boatner himself and the conflicting statements of other witnesses. But because of the prosecution's decision to withhold this information, the jury only saw the confident Boatner, not the equivocal Boatner who could not initially identify petitioner, or the other witnesses who contradicted him.

“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974). By withholding the contested evidence, the prosecution was able to present a credible version of Boatner's story, and denied petitioner the ability to seek out the truth through cross-examination in the process of defending himself. See *id.* at 320. Social science research finding that a discredited eyewitness is not as influential as one that is unchallenged buttresses the value of cross-examination at trials. See Bernard E. Whitley Jr., *The Effects of Discredited Eyewitness Testimony: A Meta-Analysis*, 127 J. Soc. Psychol. 209 (1987).

Had the withheld information been made available, there is a reasonable probability that the defense would have been able to cross-examine, impeach and ultimately “destroy[] confidence in [Boatner’s] story.” *Kyles*, 514 U.S. at 443; see *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence”). Instead, in this single eyewitness case, the government hobbled the defense, created a one-sided trial, and, ultimately, undermined confidence in the verdict.

H. *In a Single Eyewitness Case, Evidence Undermining the Credibility and Truthfulness of a Witness and the Reliability of His Identification Is Highly Material under Brady*

The Court has repeatedly looked at whether a witness is central to the prosecution in determining whether previously undisclosed evidence going towards the witness’s credibility is material. In *Giglio v. United States*, the Court recognized that “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule.” 405 U.S. 150 (1972) (citing *Napue*, 360 U.S. at 269). In *Kyles*, this Court suggested that there is a heightened expectation of consistency in the testimony of a witness when, “by the State’s own admission, [the witness is] essential to the investigation and indeed ‘made the case’ against [the defendant].” 514 U.S. at 445. The existence of several inconsistencies in that witness’ testimony was “[c]ontrary to what one might hope

for from such a source.” *Id.* The Court assessed the “likely damage” of inconsistent statements by two other eyewitnesses in *Kyles* by referring first to the fact that the prosecution contended during closing arguments that they were “the State’s two best witnesses.” *Id.* at 444.

In *United States v. Agurs*, as well, the Court described a scaled approach to materiality based on how critical a witness is to the prosecution: the more essential a witness’ testimony is, the more likely undisclosed impeachment information would be material. 427 U.S. 97 (1976). This Court held that a reviewing 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. *Id.* at 112-113. As an illustration, the Court referred to a comparison of examples discussed in a law review comment:

If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not

be sure as he had only had a brief glimpse, the result might well be different.

Id. at 112 n. 21 (citing Victor Bass, Comment, *Brady v. Maryland and The Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 125 (1972)).

In petitioner's case, Boatner was not only the State's principal witness, but its *only* witness linking petitioner to the crime scene. Thus, the situation was very much like the hypothetical from the law review comment discussed in *Agurs*: the prosecution introduced the testimony of a single eyewitness identifying the defendant, but withheld evidence that would undermine the key witness' testimony, including testimony from other eyewitnesses.

Where there is only a single witness linking a suspect to a crime, withholding information concerning the credibility of that witness is more likely to be material than in a case such as *Kyles*, in which four eyewitnesses identified the defendant, but the *Brady* material did not relate to all of these eyewitnesses. In his dissent in *Kyles*, Justice Scalia reasoned that, even if the prosecution's key witness had been thoroughly impeached by the undisclosed evidence, and the jury did not believe his testimony, the jury still could have convicted the defendant "because it could not believe that *all four* of the eyewitnesses were similarly mistaken." 514 U.S. at 463 (Scalia, J. dissenting). By contrast in this case, Boatner was not simply the prosecution's key witness; rather, he was the *only* witness who linked petitioner with the crime.

I. ***Eyewitness Misidentification Takes a Harsh Toll on Those Wrongfully Convicted***

Eyewitness misidentification has led to the wrongful conviction of many individuals who have served lengthy sentences only to later be exonerated through the discovery of exculpatory evidence. In fact, The Innocence Project, has assisted in the exoneration of many such individuals.

Larry Mayes received a 110-year sentence for crimes he did not commit based on a witness's unreliable identification. *Mayes v. City of Hammond*, 442 F. Supp. 2d 587, 617-18 (N.D. Ind. 2006) (discussing history of Mayes's case in his § 1983 suit against the city and officials arising out of his wrongful conviction); Profile of Larry Mayes, Innocence Project, http://www.innocenceproject.org/Content/Larry_Mayes.php (last visited Aug. 15, 2011). Similar to petitioner's case, the victim and sole eyewitness was only able to give a basic description of her assailant. *Mayes*, 442 F. Supp. 2d at 602. The victim was initially unable to identify Mayes in a live lineup, relating that "[she] was nervous. [That she] wanted to get it over with and get out of there." *Mayes*, 442 F. Supp. 2d at 616; Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Online Appendix 40-41 (2011), available at http://www.law.virginia.edu/pdf/faculty/garrett/convicting_the_innocent/garrett_eyewitness_appendix.pdf. Subsequent police testimony in related civil cases revealed that the victim's initial photo identifications had been "tentative," a fact that the prosecution had not disclosed in violation of its *Brady* obligations.

Mayes, 442 F. Supp. 2d at 631-32. *Mayes* was incarcerated for nearly twenty-one years for a crime he did not commit.

In another case of witness misidentification, Michael Blair was sentenced to death after being wrongfully convicted of capital murder in Texas. *Ex parte Blair*, Nos. AP-75954, AP-75955, 2008 WL 2514174, at *1 (Tex. Crim. App. June 25, 2008) (per curiam); Profile of Michael Blair, Innocence Project, http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Aug. 15, 2011). The prosecution's main evidence against Blair was the testimony of three eyewitnesses who claimed to have seen Blair on the same day the victim disappeared and in the same park where the victim was discovered dead. See Profile of Michael Blair, *supra*. However, these witnesses did not identify Blair in a photo lineup until after his picture had already appeared in the media, and at least two of the witnesses testified that they had seen Blair's photo on the television before identifying him to police. *Id.*; Garrett, Online Appendix, *supra*, at 8. Subsequent evidence pointed to Blair's innocence for that crime, and eventually he was removed from death row. *Ex Parte Blair*, 2008 WL 2514174, at *2.

Like the *Mayes* and *Blair* cases, petitioner's situation is one in which the prosecution rested much of its case on an eyewitness—Boatner—despite the unreliability and inconsistency that newly disclosed materials now reveal. Such unreliability becomes particularly problematic when its existence is wrongfully withheld by the prosecution at trial, rendering a defendant incapable of adequately defending himself in violation of his constitutional

due process rights. In such circumstances, there can be no confidence in the verdict.

Eyewitness identification testimony will, of course, continue to play an important role in criminal trials, but given the increasing understanding that this form of evidence is less reliable than it may seem, it is critical that defendants be given access to materials that may be used to impeach or contradict these witnesses. The protections in *Brady* are significant resources for defendants in combating the highly prejudicial effect of mistaken eyewitness identifications and resulting testimony. Providing the defense with access to information that may be used to impeach or contradict eyewitnesses may be the most effective means to combat eyewitness misidentifications in cases in which DNA evidence is not available.

II. THE HISTORY OF THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE DEMONSTRATES A PATTERN OF WITHHOLDING EVIDENCE THAT WOULD UNDERMINE THE CREDIBILITY OF KEY WITNESSES AND THE RELIABILITY OF THEIR IDENTIFICATIONS

The Orleans Parish District Attorney's Office under the prior leadership of Harry Connick has a long and documented history of disregarding *Brady* obligations.¹⁰ Since 1990, the discovery of *Brady*

¹⁰ The failure of the Orleans Parish District Attorney's Office to observe *Brady's* mandates under Connick's tenure are well-documented in this Court's recent decision in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). There, Connick's office admitted that it had improperly withheld evidence in violation of *Brady*, which resulted in the wrongful conviction of John Thompson, who spent 18 years in prison, including 14 years on death row. *Id.* at 1355. The Court recognized that "during the ten years preceding [Thompson's] armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office." *Id.* at 1360. In fact, Connick's own "testimony exposed a flawed understanding of a prosecutor's *Brady* obligations," as he misstated *Brady's* requirements and even admitted to previously withholding evidence, which resulted in the U.S. Attorney's Office indicting him for doing so. *Id.* at 1378 (Ginsburg, J., dissenting). Other prosecutors in Connick's office were similarly – or even further – deficient in their understanding of their *Brady* obligations. One senior prosecutor erroneously testified that impeachment evidence was not *Brady* material and that there was no obligation to turn over police reports revealing inconsistent descriptions of the perpetrator. *Id.* Another senior prosecutor "admitted that he never reviewed police files, but simply relied on police to flag any potential *Brady* information." *Id.* The lack of *Brady* understanding is unsurprising as Connick's attorney manual

violations committed by Orleans Parish prosecutors at trial has contributed to the exoneration of ten individuals following reversal of their convictions.¹¹

included only four sentences on *Brady* which were “notably inaccurate, incomplete, and dated,” and the manual did not even acknowledge that impeachment evidence is material under *Brady*. *Id.* As the Court noted, “Connick resisted an effort to hold prosecutors accountable for *Brady* compliance because he felt the effort would ‘make his job more difficult.’” *Id.* at 1381 (quoting trial record).

¹¹ The Orleans Parish *Brady* exonerees are: **Dan Bright**, see *State v. Bright*, 875 So. 2d 37 (La. 2004) (murder conviction reversed by state supreme court after nine years due to undisclosed evidence impeaching the State’s main witness; Bright was released from prison and later exonerated); **Greg Bright and Earl Truvia**, see Case No. 252-514 (on file with Orleans Parish Criminal District Court); see also Michael Perlstein, *Open to Appeal: Convicted criminals Say DA Policy Change Gives Them Fair Shot*, Times-Picayune (New Orleans), July 20, 2003, at 1 (murder convictions reversed by state trial court after twenty-seven-and-a-half years due to undisclosed evidence impeaching the State’s main witness; Bright and Truvia were released from prison and later exonerated); **Shareef Cousin**, see *State v. Cousin*, 710 So. 2d 1065 (La. 1998); see also, *In re Jordan*, 913 So. 2d 775 (La. 2005) (murder conviction reversed by state supreme court after four years due to trial record errors, but disciplinary proceedings against prosecutor cited numerous *Brady* violations; Cousin was released from prison and later exonerated); **Roland Gibson**, see Case. No. 203-904 (on file with Orleans Parish Criminal District Court); see also Dan Bennet, *Jailed Man Granted New Trial in ‘67 Murder Sues the State*, Times-Picayune (New Orleans), Feb. 17, 1993, at B1; *Gibson v. State*, 731 So. 2d 379 (La. Ct. App. 1999) (civil case) (murder conviction reversed by state trial court after twenty-six years due to undisclosed evidence implicating another person in the crime; Gibson was released from prison and later exonerated); **Isaac Knapper**, see *State v. Knapper*, 579 So. 2d 956 (La. 1991) (murder conviction reversed by state supreme court after twelve years due to

A closer examination of Orleans Parish cases involving *Brady* violations in general reveals an alarmingly common practice of withholding material impeachment information in cases that are built primarily on the testimony of eyewitnesses, including cases in which only a single eyewitness testifies. In these cases, information impeaching the credibility and reliability of eyewitness testimony is critical, and the prosecution's suppression of this information undermines confidence in the verdicts.

undisclosed evidence implicating other people in the crime and impeaching the state's main witness; Knapper was released from prison and later exonerated); **Curtis Lee Kyles**, see *Kyles v. Whitley*, 514 U.S. 419 (1995) (murder conviction reversed by Supreme Court after eleven years due to undisclosed evidence impeaching the state's witnesses and implicating another person in the crime; the state dropped charges against Kyles after unsuccessful efforts to retry him); **Dwight Labran**, Case No. 388-287 (on file with Orleans Parish Criminal District Court); see also Keith Pandolfi, *Innocence Project New Orleans Investigates Suspected Cases of Wrongful Convictions*, New Orleans City Business, Jan. 13, 2003 (murder conviction reversed by state trial court after four years due to undisclosed evidence impeaching the State's main witness; Labran was released from prison and later exonerated); **John Thompson**, see *State v. Thompson*, 825 So. 2d 552 (La. Ct. App. 2002) (murder and robbery convictions reversed by state trial and appellate courts after seventeen years due to undisclosed forensic evidence; Thompson was acquitted at a retrial); **Hayes Williams**, Case No. 199-523 (on file with Orleans Parish Criminal District Court); see also William Pack, *Prison Reformer Faces Challenge of Freedom*, The Advocate (Baton Rouge), May 16, 1997 (murder conviction reversed by state trial court after thirty years due to undisclosed exculpatory witness statements; Williams was released from prison and later exonerated). This data was collected by the Innocence Project New Orleans; none of these exonerations occurred through the use of DNA evidence.

A. *The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Key Witnesses that Conflicts With Their Trial Testimony or Undermines Their Credibility and Reliability*

In several cases, Orleans Parish prosecutors have withheld statements of critical key witnesses which contradicted their trial testimony, thereby preventing impeachment and impermissibly preserving the credibility of that witness.

One recent case, *State v. Lindsey*, is particularly noteworthy. Eugene Lindsey was convicted of murder for killing the mother of his girlfriend after engaging in a domestic dispute. 844 So. 2d 961, 961-62 (La. Ct. App. 2003). Counsel for Lindsey put forth a combined defense of intoxication and accidental shooting, but prosecution witnesses testified that Lindsey was not intoxicated and that the family had not consumed alcohol that evening. *Id.* at 962-63. Following Lindsey's conviction, however, it was discovered that two of the state witnesses provided pretrial statements to police that contradicted their trial testimony and corroborated Lindsey's claim that he was intoxicated. *Id.* at 964-65. The Court of Appeal of Louisiana held that the evidence withheld was material exculpatory evidence under *Brady* and reversed the district court's denial of post-conviction relief. *Id.* at 969.

Orleans Parish prosecutors have also withheld prior statements of its key witnesses which could strongly show that their trial testimony is unreliable. Of particular note are two cases similar

in core aspects to petitioner's. In both cases, the prosecution hinged its case on a single eyewitness identification, and withheld evidence that severely undercut the reliability of that witness' identification.

In *State v. Curtis*, Larry Curtis was convicted of second-degree murder based on testimony of the victim's brother, who was the only witness to identify Curtis as the shooter. 384 So. 2d 396, 397 (La. 1980). Another witness testified to seeing the defendant flee the scene. *Id.* The withheld *Brady* material in that case consisted of evidence that the sole eyewitness identifying the defendant as the shooter had failed to identify the defendant from a photographic display before trial. *Id.* The Louisiana Supreme Court reversed the conviction finding that that the reliability of the sole eyewitness was likely the "crucial factor" in determining the guilt of the defendant and that the prior failure to identify the defendant weakened the reliability of that identification. *Id.* at 398; see also *State v. Falkins*, 356 So. 2d 415, 418-20 (La. 1978) (holding that the state's failure to produce witnesses' initial misidentification of the defendant deprived the defendant of a fair trial where the sole basis of the conviction was the eyewitness testimony).

In the second case, *State v. Cousin*, 710 So. 2d 1065 (La. 1998), the *Brady* violation largely tracks the facts of the suppression of evidence in petitioner's case. Shareef Cousin was convicted of first-degree murder and sentenced to death. *Id.* at 1066. The victim and Connie Babin were returning to the victim's car after dinner when three individuals confronted them. *Id.* At trial, Babin

testified that while she was fleeing she turned briefly towards the assailants and witnessed the defendant shoot the victim in the face. *Id.* No physical evidence was presented. *Id.*

The prosecution team in *Cousin* was headed by Roger Jordan, who was also the lead prosecutor in petitioner's case. Although the reliability of Babin's identification was the key issue in *Cousin*, Jordan withheld from the defense Babin's prior statements which indicated that she did not have a good recollection of the gunman's features. *Id.* at 1066. In a pretrial statement taken immediately following the shooting, Babin told police that she "did not get a good look at the perpetrators and probably could not identify them." *In re Jordan*, 913 So. 2d 775, 777 (La. 2005). In a statement a few days later, Babin further elaborated:

I don't know, it was dark and I did not have my contacts nor my glasses so I'm coming at this at a disadvantage. . . . I keep getting this vision of a young man with, with an older mans face.. I don't know that if this is coming . . . somewhere, or if I really did see this person . . . if this is just coming from my imagination or what, but I . . . every time I go over it and close my eyes . . . I remember thinking that he had an older man's face or a young body, on a young person . . . how I visualize that, I don't know[.]

Id. at 777. In post-trial proceedings, Jordan testified that he believed these pretrial statements, replete with qualifications and stammering confusion, "tended to corroborate her identification of Mr. Cousin" as the gunman and did not constitute *Brady*

material. *Id.* at 778. Roger Jordan was personally sanctioned by the Louisiana Supreme Court for failing to disclose the key witness' prior statements. See *id.*

The Supreme Court of Louisiana determined that the withholding of this information was a *Brady* violation because it cast doubt on Babin's veracity as the key eyewitness, and defense counsel could have easily used the pretrial statements to impeach her testimony during trial. *Id.* at 782. Cousin was released from prison and later exonerated.

In other cases, Orleans Parish prosecutors have withheld information that went directly to a key witness' credibility, such as a witness' criminal record or plea arrangement. See *State v. Bright*, 875 So. 2d 37, 42-44 (La. 2004) (holding that the state's failure to disclose the prior criminal record of its star witness violated *Brady* and warranted remand for a new trial); *State v. Carney*, 334 So. 2d 415, 417-19 (La. 1976) (holding that the State's failure to disclose its arrangement with a chief witness to drop battery charges against the witness resulted in a *Brady* violation); *State v. Thompson*, 825 So. 2d 552, 555-57 (La. Ct. App. 2002) (holding that the state improperly withheld evidence that witnesses had been promised reward money for testimony implicating the defendant in the crime).

B. *The Orleans Parish District Attorney's Office Has Withheld Evidence of Prior Statements of Other Witnesses that Contradicts Key Witnesses' Testimony*

In still other cases, Orleans Parish prosecutors have withheld favorable statements by

other potential witnesses in police records which would have contradicted the testimony of prosecution witnesses at trial. See *State v. Knapper*, 579 So. 2d 956, 959-61 (La. 1991) (holding that undisclosed witness statements in a detective's report that contradicted witness testimony would have created reasonable doubt as to guilt and therefore established a *Brady* violation); *State v. Rosiere*, 488 So. 2d 965, 970-71 (La. 1986) (holding that nondisclosure of eyewitness statements constituted a *Brady* violation where they corroborated the defendant's testimony and impeached the testimony of a key witness for the State); *State v. Perkins*, 423 So. 2d 1103, 1108 (La. 1982) (holding that the failure to produce an eyewitness statement which substantially corroborated the defendant's version of events was reversible error under *Brady*); *State v. Oliver*, 682 So. 2d 301, 310-12 (La. Ct. App. 1996) (holding that withholding three police reports containing witness statements inconsistent with trial testimony violated the defendant's due process right to a fair trial).

Collectively, these cases show that, in situations in which a conviction turns on the credibility or reliability of a single or few eyewitnesses, the Orleans Parish District Attorney's Office, has frequently withheld from the defense information that would contradict or impeach the testimony of those witnesses. This conduct undermines confidence in the verdicts obtained in these cases.

CONCLUSION

For the foregoing reasons, and those presented by petitioner, the judgment of the trial court should be reversed.

Respectfully submitted,

KEITH A. FINDLEY
President
INNOCENCE NETWORK
University of Wisconsin
Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

DAVID B. HIRD
Counsel of Record
M. JARRAD WRIGHT
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, N.W.
Washington, D.C. 20005
(202) 682-7000
david.hird@weil.com

NADYA SALCEDO
ERICK FLORES
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

Dated: August 19, 2011

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review

A-2

Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.