No. ______

In the Supreme Court of the United States

DARREL VANNOY, WARDEN,
Petitioner,
v.
JOHN DAVID FLOYD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LEON A. CANNIZZARO, JR.
District Attorney
Parish of Orleans
CHRISTOPHER J. PONOROFF
Counsel of Record
Assistant District Attorney
619 South White Street
New Orleans, Louisiana 70119
(504) 822-2414
cponoroff@orleansda.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the court of appeals failed to apply due deference under 28 U.S.C. § 2254(d) and (e)(1) to the ruling of the Louisiana Supreme Court.

2. Whether the court of appeals misapplied the actual-innocence standard of *McQuiggin v. Perkins*, 569 U.S. 383 (2013) and *Schlup v. Delo*, 513 U.S. 298 (1995).

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PETITION FOR WRIT OF CERTIORARI

Darrel Vannoy, Warden of the Louisiana State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The final opinion and order denying rehearing *en banc* of the Fifth Circuit Court of Appeals is reported as *Floyd v. Vannoy* at 894 F.3d 143 and reproduced at App. 1-56. The Fifth Circuit's original opinion, formerly reported at 887 F.3d 214, was superseded thereby. App. 58. The opinion of the district court granting habeas corpus relief (App. 59-102) is unpublished, as is an earlier opinion of the district court (App. 104-84). The Louisiana Supreme Court's order denying relief (App. 185-92) is reported as *Floyd v. Cain* at 62 So.3d 57. The oral ruling of the Orleans Parish Criminal District Court (App. 194) is unpublished. The Louisiana Supreme Court's affirmance of the conviction and sentence on direct appeal (App. 195-202) is reported as *State v. Floyd* at 435 So.2d 992.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered June 25, 2018, the day the court issued its final opinion and denied a petition for rehearing. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
>> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>>
>> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence in the State court proceeding.
>
> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

I. Background

1. William Hines, Jr., and Rodney Robinson were murdered within a few days of each other in November 1980 in New Orleans—Hines in his apartment, Robinson in the Fairmont Hotel. Both were stabbed to death while nude. App. 2, 5. Police subsequently learned of incriminating statements about the murders made by John David Floyd. Floyd had moved to New Orleans after splitting up with his wife and was a "'street person'" who "'ma[de] his living . . . by accommodating to the wishes of other people.'" *Id.* at 110 (quoting testimony of Dr. Marvin Miller) (footnote omitted); R.595. He was a heavy drinker and drug-user, and was known as "Crazy Johnny" for his behavior while intoxicated. App. 6, 110-11.

Beginning about 10:00 p.m. on November 28, 1980 (approximately 17 hours after Robinson's body was found), Floyd spent several hours drinking with an acquaintance named Harold Griffin. *Id*. at 6-7. He then asked Griffin to accompany him to the detoxification center at a nearby hospital. Griffin later reported that Floyd said that "perhaps going to the Detox Center would be the next best thing to keep from being held accountable for doing something wrong," then asked if Griffin had "heard of the stabbing at the Fairmont" (which Griffin had not). *Id.* at 7. Also in late November 1980, Floyd was involved in a verbal altercation with bar owner Steven Edwards. Floyd told Edwards, "'[d]on't come f…ing with me. I already wasted one person'; Edwards asked, 'Who? Bill Hines?'; and Floyd

replied, 'Yeah, on Governor Nichol[l]s.'"[1] *Id.* In late December 1980, Floyd asked his acquaintance Byron Gene Reed for money; when Reed refused, he threatened to "'take care of [Reed] like he did the one at the Fairmont.'" *Id.* at 125 (footnote omitted). On January 19, 1981, Floyd was brought to police headquarters for questioning and confessed to murdering both Hines and Robinson, stating he had gone "berserk" when the men wanted to penetrate him during sex. *Id.* at 118-20.[2]

2. Floyd was prosecuted in the Criminal District Court for Orleans Parish. After entering pleas of guilty and not guilty by reason of insanity, he was examined by Dr. Marvin Miller of the Louisiana State Medical Center and found competent to stand trial. State Court Record, Volume 1 of 14, Minute Entries of 03/06/1981 & 04/18/1981; *id.*, Volume 2 of 14, Letter of Dr. Miller dated 04/02/1981. Floyd subsequently filed a motion to suppress that alleged he had been beaten into making his confessions. The motion was heard over the course of four days, during which Floyd's booking photo was introduced as well as several photographs (taken by a photographer for the *Times-Picayune* newspaper) and a video (recorded by a local news crew) that show Floyd as he was led from police headquarters to the parish prison. The trial court also heard testimony from the *Times-Picayune* photographer, from Floyd, and from three officers who were present for one or both of the

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[1] Hines's apartment was located on Governor Nicholls Street. App. 2.

[2] Floyd also said that on the night of the Hines murder he had been drinking heavily and was on PCP. R.156.

recorded confessions.[3] The motion was ultimately denied. App. 198-200; R.2093-2323 (hearing transcript).[4]

Floyd proceeded to a joint bench trial in January 1982. For the Hines murder, the State presented Floyd's confession, testimony from Detective John Dillman in support of the confession's credibility, and the testimony of Steven Edwards that Floyd claimed to have "wasted" Hines. App. 8. Floyd testified on his own behalf, again alleging physical abuse, and Dr. Miller testified for the defense that Floyd may have been "vulnerable to even minimal coercion" at the time he confessed. *Id.* at 9, 158-59. The defense presented evidence that Floyd was excluded from blood in Hines's apartment and from hairs found in Hines's bed sheets, which had been left by a black person. *Id*. at 9*,* 79-80. (Floyd is Caucasian, as was Hines; Robinson was African-American. *Id.* at 2, 5, 6.) For the Robinson charge, Floyd presented evidence that he was excluded from blood and seminal fluid at the scene, that hairs collected there were those of a black person, and that a security guard had reported seeing a black male run out of the hotel shortly before police arrived. *Id.* at 9, 10-11. The trial court found Floyd not guilty of Robinson's murder and guilty of the second-degree murder of Hines. *Id.* at 11. The conviction became final

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[3] Floyd's recorded statement about the Hines murder was taken by Detective John Dillman and witnessed by Officer John Reilly and Detective Michael Rice. R.159.

[4] *See also* R.2953 (booking photo). The third-party photographs and video were filed in the district court by hand. *See* R.2954 (Notice of Manual Attachment).

after the Louisiana Supreme Court affirmed it in 1983. *Id.* at 195.

3. In 2006, Floyd initiated a collateral-review proceeding in state court in which he alleged, *inter alia*, that the following evidence had been withheld in contravention of *Brady v. Maryland* and its progeny:

i. The results of a pre-trial analysis of fingerprints lifted from the passenger-side door of Robinson's car and from a drinking glass found next to the bed in his hotel room that excluded Floyd, Robinson, and a friend of Robinson's. App. 11-12, 20.

ii. The results of a pre-trial analysis of two fingerprints lifted from a "'Puglia's scotch whiskey bottle in [the] kitchen'" of Hines's apartment that excluded Floyd and Hines. *Id.* at 19, 83 (footnote omitted). There were "several [other] whiskey bottles" in the apartment that had also been dusted for fingerprints, as had two "whiskey glasses," but with negative results. *Id.* at 3. One of the two glasses was on a kitchen table while the other was in the bedroom where Hines was murdered. *Id.* at 2-3.

iii. A statement made to Detective Dillman on November 30, 1980, by Hines's friend John Rue Clegg (the "Clegg Statement"). This statement was not contemporaneously recorded or transcribed, but Dillman wrote in a police report produced before trial that Clegg had told him Hines "frequently had sexual relations with both black and white

males." *Id.* at 5. Conversely, in a statement dated June 14, 2008, Clegg wrote that "the subject of sex per se did not come up during our interview" and that he had "t[old] Detective Dillman that [Hines's] taste was for black men[.]" *Id.* at 37, 90-91; R.220-21.

II. Rulings Below

The state trial court denied relief on February 19, 2010, after an evidentiary hearing, finding that Floyd "failed to meet his burden of proof[.]" App. 194. The Louisiana Supreme Court denied Floyd's subsequent writ application on May 20, 2011, without assigning reasons, and denied an application for reconsideration on September 2, 2011. *Id.* at 185; *State v. Floyd*, 68 So.3d 532 (La. 2011). This Court denied a petition for a writ of certiorari on February 21, 2012. *Floyd v. Cain*, 565 U.S. 1203 (2012).

On November 11, 2011, Floyd filed a petition for habeas relief under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Louisiana. App. 105 n. 3. After this Court held in *McQuiggin v. Perkins*, 569 U.S. 383 (2013) that a habeas petitioner may be exempted from the statute's limitations period if he introduces new evidence to prove actual innocence, Floyd argued that the following evidence established his innocence under *McQuiggin*:

a. The fingerprint-comparison results in the Hines and Robinson cases;

b. The Clegg Statement;

c. DNA analysis of hair found at the scene of the Robinson murder that excluded Floyd;

d. A statement by Detective Dillman that he had shown Floyd "two of the grisliest" photographs from the Hines scene in an effort to "crack him";

e. A finding by the Louisiana Supreme Court in a later case that a preponderance of evidence showed that Detective Dillman had physically abused the defendant in that case; and

f. A medical report from 2009 in which Dr. Gregory DeClue wrote that Floyd was intellectually disabled and would have been highly susceptible to influence and coercion at the time he confessed.

App. 11-12.

A magistrate judge concluded that Floyd failed to meet *McQuiggin*'s high standard; however, on September 14, 2016, the district court rejected this conclusion and made a contrary finding. *Id.* at 104-84. On May 8, 2017, the district court granted Floyd's habeas petition, finding that he had established meritorious *Brady* claims based upon the fingerprint comparisons and the Clegg Statement. *Id.* at 59-102.[5]

On April 6, 2018, a divided panel of the Fifth Circuit affirmed. *Id.* at 58. The panel denied a petition for rehearing *en banc* on June 25, 2018, with a *per curiam* order and opinion that superseded its opinion of April 6. *Id.* at 1-56. While a majority of the panel found no

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[5] Two other claims were denied: a substantive claim of actual innocence and a claim of improper destruction of evidence.

error in the analysis and ruling of the district court, Judge Jerry Smith dissented with respect to the *Brady* claims, writing that the majority "allows its analysis to become colored by the gateway question of whether Floyd proved actual innocence under [*McQuiggin*]" and "accords insufficient AEDPA deference to the state court." *Id.* at 45, 47. He maintained that, when undertaken with due deference to the state court ruling, "[r]eview of the fingerprint analysis rightly ends . . . on the favorability prong," while the Clegg Statement "fails under the final prong of *Brady*—materiality." *Id.* at 51, 54.

REASONS FOR GRANTING THE PETITION

Habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation and internal quotation marks omitted). Over 20 years ago, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which comprehensively overhauled federal habeas corpus legislation. AEDPA imposes limitations upon the scope of habeas review that "some federal judges find too confining, but that all federal judges must obey." *White v. Woodall*, 572 U.S. 415, 417 (2014). The Court has found itself obliged to make this point repeatedly. *See also Cavazos v. Smith*, 565 U.S. 1, 2 (2011) ("[T]he inevitable consequence of [AEDPA] is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold."); *Woodford v. Visciotti*, 537 U.S. 19, 26-27 (2002) (*per curiam*). In spite of such admonishments, however, overreach in the habeas arena remains a recurrent problem. *See, e.g., Sexton v.*

Beaudreaux, 138 S. Ct. 2555 (2018) (*per curiam*); *Dunn v. Madison*, 138 S. Ct. 9 (2017) (*per curiam*); *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) (*per curiam*); *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (*per curiam*). Here, in affirming the judgment of the district court, a majority of the Fifth Circuit panel has misapplied the law twice over: first in concluding that Floyd established actual innocence, then in finding that the Louisiana Supreme Court's application of *Brady v. Maryland*, 373 U.S. 83 (1963) was objectively unreasonable.

Having arrived at one view of the facts pertaining to Floyd's *Brady* claims, the majority fails to afford more than token deference to the Louisiana Supreme Court in considering reasonable alternatives. Fair-minded jurists could easily balk at the chain of speculation required to view the fingerprints from the Hines scene as exculpatory, while the majority ascribes impeachment value to the prints for reasons that have nothing to do with them. In turn, because the trial court had already determined that Floyd's confession to the Robinson murder was unreliable, it is reasonable to think that the court would not have found cumulative evidence to that effect significant. The majority also fails to account for the uncertainty surrounding the Clegg Statement and refuses to acknowledge evidence that weighs against Floyd's claims. A few "perfunctory statement[s]" notwithstanding, *Sexton*, 138 S. Ct. at 2560, the majority "analyzed respondent's arguments without any meaningful deference to the state court." *Id.* at 2557.

The majority's decision also conflicts with the decisions of this Court holding that a credible claim of innocence must be supported by "new reliable

evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Specifically, the majority relies upon evidence which is of limited significance and reliability (*e.g.*, the Clegg Statement) or is cumulative of evidence presented at trial (*e.g.*, the DNA testing that excluded Floyd from hair found at the Robinson scene).

The ruling below frustrates Louisiana's fundamental interest in the execution of state court judgments. It is also an egregious example of how lower courts continue to overstep the bounds of habeas review, upsetting the careful balance between state and federal interests established by Congress and the Court. The Court is therefore asked once more to affirm that AEDPA and related jurisprudence must be obeyed.

I. Certiorari Should be Granted on the First Question Presented.

The panel majority erred in finding that "the state court's application of clearly established [*Brady*] law was objectively unreasonable." App. 43-44 (brackets in original; citation and internal quotation marks omitted). To be "objectively unreasonable," a court's application of the law must be "not merely wrong; even 'clear error' will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014). Rather, the court's ruling must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond *any possibility* of fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (emphasis added). Where, as here, the rulings of the state courts are unexplained, "a habeas court must

determine what arguments or theories supported or . . . could have supported" the rulings, then ask whether there is any possibility fair-minded jurists could disagree that those arguments or theories are inconsistent with the Court's precedents. *Id.* at 98, 102.

A. The majority attributes undue significance to the fingerprint-comparison results and fails to consider alternate perspectives.

According to the panel majority, the analysis of fingerprints lifted from a whiskey bottle in Hines's kitchen could have been used to impeach Detective Dillman's testimony that police found drinking glasses on either side of Hines's bed. App. 34, 41. This is a complete non-sequitur. While the majority correctly notes that the report of the crime-scene technician refers to only one glass in Hines's bedroom (as well as another in the kitchen), *id.* at 3,[6] this has nothing to do with the fingerprints. Yet the majority found the fingerprint-comparison results favorable and material under *Brady* due in part to the fallacious belief that these results ("not John Floyd," "not victim" (*id.* at 11)) speak to the location of objects in Hines's apartment. This is a glaring and inexplicable error.

The majority also states that "the relatively close proximity of the whiskey glass and the dusted whiskey bottle from which two prints were lifted (the whiskey bottle) is critical in our analysis [*sic*]." *Id.* at 3. This "close proximity" is the majority's own assumption. The technician noted that a whiskey glass and the print-

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[6] It is undisputed that Floyd received the technician's report before trial.

bearing scotch bottle were both in the kitchen, and that the glass was on the kitchen table; but he gave no indication where in the room the scotch bottle was. *Id.* at 3; R.179. Nor is this apparent in the single photograph police took of the kitchen, which shows part of the kitchen table. R.2956. Six bottles can be seen, three atop the table and three beneath it. One of the bottles on the table has the shape of a wine bottle; another has a label identifying its contents as bourbon whiskey and bearing the name "Martin's 'NH' Private Stock." The third bottle is almost entirely obscured from view. It could be the bottle of Puglia's scotch. Or it could be something else entirely—for instance, one of the "several" other whiskey bottles that were in the apartment. App. 3.

While it is possible that the Puglia's scotch bottle was next to the glass on the kitchen table, it is equally possible that the glass was next to another bottle (or bottles) whereas the scotch was across the room. The probability that the glass was filled from the scotch bottle would be considerably lower in the latter scenario. The majority, however, does not even consider it, and instead assumes some form of the first scenario. The facts do not justify this assumption. Multiple whiskey bottles were at the scene, and the Martin's bourbon (not the Puglia's scotch) is the only one to have been clearly photographed, is at the center of the only photograph of the kitchen, and appears at least one-third empty. R.2956.

The majority compares the print analysis to a list of license-plate numbers in *Kyles v. Whitley*, 514 U.S. 419

(1995), but the comparison is inapt.[7] In that case an informant claimed that Kyles had left his car in a parking lot and that he (the informant) assisted Kyles in retrieving the car at a later date. Yet police had compiled a list of license-plate numbers of cars in the lot that excluded Kyles's vehicle, and this necessarily called the informant's credibility into doubt. Here, the fingerprint evidence has no bearing on Dillman's testimony about drinking glasses, and it contradicts Floyd's confession only if one assumes the perpetrator (i) went into the kitchen and (ii) picked up a whiskey bottle which (iii) happened to be the bottle of Puglia's scotch, and that (iv) the prints found on this bottle were his (although neither he *nor Hines* left prints on any of the other bottles or glasses that were dusted), rather than those left by a different person at an earlier time. A reasonable jurist could find this string of conjectures a bridge too far.

Regarding evidence from the Robinson scene, the majority writes that "evidence demonstrating Floyd falsely confessed to murdering Robinson supports his assertions he likewise did so for Hines." App. 18. But such evidence was presented at trial, and led the judge to acquit Floyd of Robinson's murder—but not Hines's. One can reasonably conclude that the trial court,

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[7] Of note, *Kyles* was decided before the enactment of AEDPA, when it was not clear whether state-court determinations regarding materiality under *Brady* were entitled to deference. *E.g., Carter v. Rafferty*, 826 F.2d 1299, 1306 (3d Cir. 1987) (collecting cases); *see also Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("acknowledg[ing]," as to the scope of the pre-AEDPA § 2254(d) deference, "that the Court has not charted an entirely clear course in this area.").

having *already* discounted the Robinson confession, and having concluded that this did *not* discredit the Hines confession, would have found cumulative evidence on this point insignificant.

B. The majority ignores the uncertainty surrounding the contents of the Clegg Statement.

In considering the statement Clegg made to Detective Dillman on November 30, 1980, the majority accepts without question the accuracy and completeness of Clegg's recollections in 2008 while rejecting Dillman's nearly contemporaneous account out of hand. Even when ostensibly applying AEDPA deference, the majority fails to consider that "there is no reason to believe that Clegg's recollection of a conversation from decades earlier is any more reliable than Dillman's records completed at the time of the investigation,"[8] or to acknowledge the slightest uncertainty regarding the contents of the Clegg Statement. *See, e.g.,* App. 37 (referring to "those portions of Clegg's [pre-trial] statement . . . contained in the [2008] affidavit");[9] *id.* at 26 (asserting Clegg's "reliability is not affected by the passage of time").

This peremptory insistence upon a view of the evidence that reasonable jurists could question is contrary to AEDPA and to the repeated admonishments of this Court. It also ignores important

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[8] R.2878 (Knowles, M.J.)

[9] While the majority refers to Clegg's 2008 statement as an affidavit, the statement is not notarized and does not purport to be an affidavit. R.220-21

questions. Even assuming Clegg's recollections are broadly accurate, it does not necessarily follow that his actual words to Dillman would have contradicted the detective's account, as he might easily have said or suggested more at the time than he later recalled. Details are especially critical to any assessment of what Clegg told Dillman about Hines's taste in men. Expressed in the terms "Hines's taste was for black men," this preference tends to sound exclusive; yet that is not the case with the nearly identical statement, "Hines had a taste for black men." Tastes are not necessarily exclusive. And Hines having "a" (non-exclusive) taste for black men is consistent with Dillman's account. The majority errs in ignoring such possibilities and instead summarily resolving all uncertainty in a manner contrary to the Louisiana Supreme Court's ruling.

C. The majority ignores evidence contrary to Floyd's claims.

Finally, the majority shows insufficient deference to the state court's ruling by ignoring evidence that supports it. The original trial court judge reviewed photographs and a video depicting Floyd's physical condition immediately after his interrogation and heard testimony from the *Times-Picayune* photographer, from Floyd, and from all three officers who were present when Floyd confessed. In denying Floyd's motion to suppress, the judge evidently found the officers' testimony credible. The judge would also have observed that, although Floyd claimed to have been heavily intoxicated on the night he confessed, and that he was beaten for approximately 20 minutes (during which he claimed to have been punched and

kicked in the head and face (R.2262-70)), no injuries are apparent in the post-interrogation photos, while the video shows him walking without difficulty. The *Times-Picayune* photographer likewise testified that he saw no signs of injury on Floyd and nothing unusual about his gait or demeanor. R.2246-47; App. 199. The majority's opinion does not even acknowledge these facts, let alone address them.

II. Certiorari Should be Granted on the Second Question Presented.

In recognizing an actual-innocence exception to the limitations period provided by 28 U.S.C. § 2244(d)(1), the Court "caution[ed]" that this exception will not apply unless a petitioner shows that "in light of new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). *See also House v. Bell*, 547 U.S. 518, 538 (2006) ("[I]t bears repeating that the *Schlup* standard is demanding and permits review only in the 'extraordinary' case.") (citation omitted). *Schlup* affirmed that in order to be viable, an actual-innocence claim must be supported by "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." 513 U.S. at 534.

In this case, the majority erred in finding the following to be new and reliable: the fingerprint-comparison and DNA-testing results for the Robinson investigation, findings from 2009 as to Floyd's susceptibility, a statement by Detective Dillman that he had shown two crime-scene photographs to Floyd,

evidence that Detective Dillman mistreated another suspect, the fingerprint-comparison results from the Hines investigation, and Clegg's 2008 statement. App. 18-19, 24. Each of these items falls short of the *McQuiggin* standard because it is of questionable significance and reliability or else sheds no new light on the case.

1. Neither the DNA-testing nor the fingerprint-comparison results for the Robinson murder provide new information. The DNA testing merely showed that hair from the scene is attributable to an African-American—a point that was established at trial. App. 92, 186. So was the presence of an unknown third party, based upon testing of seminal fluid that excluded both Floyd and Robinson. *Id.* at 9, 10-11. The fingerprint and DNA analyses have no *new* exculpatory value.

2. The issue of susceptibility to influence or coercion was also addressed at trial, where Dr. Miller testified that when Floyd confessed he may have been "'vulnerable to even minimal coercion . . . with a degree of vulnerability to suggestions [and] coercions, very likely greater than the average person would have.'" App. 158-59 (footnote omitted). Additional findings along the same lines are not "new evidence." *Compare Rues v. Denney*, No. 5:09–CV–06056–DGK, 2010 WL 1729181, at *2 (W.D. Mo. Apr. 29, 2010) ("While this particular report may be new, the arguments it advances are not. The gist of the report—that forensic methodologies have not been sufficiently studied in peer reviewed journals to be accepted as scientifically accurate—is not new.") (applying § 2244(d)(1)(D)), *aff'd*, 643 F.3d 618, 622 (8th Cir. 2011), *cert. denied*, 132 S.

Ct. 1145 (2012); *Jackson v. Vannoy*, Civ. Action No. 17-0265, 2018 WL 1441154, at *10 (E.D. La. Feb. 27, 2018) (reaching the same conclusion with respect to an actual-innocence claim), *adopted*, 2018 WL 1409270 (E.D. La. Mar. 21, 2018).

3. In considering Detective Dillman's statement in a subsequent book that he had shown Floyd "two of the grisliest shots" from the Hines scene, the majority states that "Floyd's descriptions regarding the position of Hines' body do not accurately describe the scene as found by police, but, rather, correspond to crime-scene photographs taken after Hines' body was moved." App. 24. As noted by the district court, police discovered Hines's body lying with the legs beneath the bed and moved the body in order to examine it before taking photographs. *Id.* at 175. This supposedly contradicts the statement in Floyd's confession that Hines "'fell on the floor next to the bed. I got dressed and when I left he was in the same position.'" *Id.* (footnote omitted). The lack of detail in this statement does not necessarily establish a contradiction at all. Even if it did, this would not constitute new evidence: the position in which police found Hines's body was described by Dillman in the manner summarized above both at trial and in a supplemental police report that Floyd received before trial. *Id.*; R.109.

4. Detective Dillman's alleged "subsequent mistreatment of suspects," App. 23, as reported in *State v. Seward*, 509 So.2d 413 (La. 1987), is not, and is not comparable to, exculpatory scientific evidence, a trustworthy eyewitness account, or critical physical evidence. Furthermore, as noted above, the majority gives no consideration to the significant body of

evidence refuting Floyd's claim of abuse: the post-interrogation photographs and video, the testimony of the *Times-Picayune* photographer, the testimony of three police officers (not Dillman alone), and (on two separate occasions) the testimony of Floyd himself, which the trial court clearly rejected.

5. Regarding the fingerprint-comparison results for the Hines scene, it should be noted that while documentation of those results may not have been viewed by the prosecutor or Floyd's attorney, the record shows that defense counsel was aware the prints did not inculpate Floyd. Counsel argued the point in his opening statement and again in a motion for new trial, where he stated that "No fingerprints or other physical evidence taken from the scene of the Hines homicide point in any way to the presence of John Floyd at Bill Hines apartment [*sic*]." R.429.

Furthermore, the comparison results are not exculpatory. The bottle of Puglia's scotch that yielded the fingerprints was in a different room from that in which the murder occurred and, again, was only one of "several" whiskey bottles at the scene. App. 3. There is no evidence the perpetrator handled a whiskey bottle at all (nor, in his confession, did Floyd claim to have done so), and no evidence that the fingerprints were connected to Hines's murder. The majority's conclusion that the fingerprint comparisons "could be found by a reasonable juror to refute Floyd's confession[] [and] link a third-party to the crime scene," *id.* at 22, is manifestly inadequate to support its application of *McQuiggin*: actual innocence is not established by conclusions that a reasonable juror "could" reach.

The majority likewise errs in relying upon the conclusion that the fingerprint comparisons "could be found" to impeach Dillman's testimony about glasses, *id.*, and this Court has recognized that "latter-day evidence brought forth to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account[.]" *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992). More importantly, the print comparisons do not in fact provide any basis for impeaching Dillman's testimony. *See supra* Part I.A.

6. Finally, there is Clegg's written statement from 2008—what the majority calls his affidavit, although it is not notarized and does not purport to be an affidavit. R.220-21. The majority found that this statement points to actual innocence because "Hines' preference for black males casts doubt on Floyd's guilt," and because the statement rebuts Detective Dillman's testimony that he had learned Hines engaged in sexual relations with both white and black men. App. 26. The second conclusion is unwarranted: Clegg's actual words to Dillman are unknown, and "Dillman's testimony suggests he relied on more than just one person for his belief that Hines had indiscriminate preferences." *Id.* at 53 n. 17 (Smith, J., dissenting). The first conclusion is also unwarranted, because Clegg had limited knowledge of Hines's sexual preferences. Stating that "[a]t the time I worked with Bill we did occasionally go to gay bars together," Clegg wrote, "I know that Bill's taste was for black men because when we were at gay bars he would sometimes point out the men he found attractive and they were always black." R.221. But Clegg left New Orleans in 1970; by the time Hines was

murdered, the two had not worked together in over ten years. R.220. Moreover, far from denying that Hines engaged in sexual relations with white men, Clegg wrote that he "was never, in fact, aware of the frequency of [Hines's] sexual relations with anyone." R.220-21. The probative value of the 2008 statement is modest at best; it does not bear comparison to the caliber of evidence identified in *Schlup*. Nor does any of Floyd's other "new evidence."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON A. CANNIZZARO, JR.
District Attorney
Parish of Orleans
CHRISTOPHER J. PONOROFF
Counsel of Record
Assistant District Attorney
619 South White Street
New Orleans, Louisiana 70119
(504) 822-2414
cponoroff@orleansda.com

Counsel for Petitioner