No. 18-380

In the Supreme Court of the United States

Darrel Vannoy, Warden, Petitioner

v.

John David Floyd

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

Brief in Opposition
to
Petition for a Writ of Certiorari

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Question Presented

Faced with evidence of another *Brady* violation by the Orleans Parish District Attorney's Office, the court of appeals found that the State "withheld evidence undermining the only evidence supporting Floyd's guilt[,]" including "evidence that a third party, not Floyd, touched an item that was singled out for dusting by investigators and linked to the commission of the crime through Detective['s] . . . testimony." The withheld evidence was not the only newly discovered evidence presented. The court of appeals also found that Mr. Floyd "presents substantial exculpatory evidence" and "in the light of the newly-discovered evidence, no reasonable juror, considering the record as a whole, would vote to convict Floyd." The Warden, through the Orleans Parish District Attorney's Office, maintains that none of the withheld evidence was favorable to Mr. Floyd and that no new reliable evidence of innocence has been presented. It asks this Court to grant *certiorari* to consider the following questions:

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).

While one of the questions presented cites to 28 U.S.C. § 2254(e)(1), this provision is cited nowhere else in the petition for *certiorari*.

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Introduction

This case is very important to John Floyd, but nothing about it necessitates this Court's intervention. Mr. Floyd was granted *habeas* relief by the district court, a decision affirmed by the court of appeals, after an exhaustive and fact-intensive review. The courts below correctly found that Mr. Floyd's application was timely under *McQuiggin v. Perkins*, 569 U.S. 383 (2013), and that *Brady v. Maryland*, 373 U.S. 83 (1963), compelled that he be granted *habeas* relief under the deferential standard that governs review of state convictions under 28 U.S.C. § 2254(d). Mr. Floyd was released from prison last year pursuant to Rule 23 of the Federal Rules of Appellate Procedure and, for the last year, has led a quiet and blameless life on a farm in Carencro, Louisiana.

The Warden, through the Orleans Parish District Attorney's Office, [hereinafter OPDA] petitions for *certiorari*. OPDA largely uses its petition to reargue some of the facts of this case. Other than factual arguments, the only reason OPDA gives for this Court to intervene is that lower courts in *some other cases* erred in granting *habeas* relief, which tells this Court nothing about the actions of the lower courts in *this case*. OPDA identifies no legal question that would justify this Court's review, misinterprets the settled law upon which the courts below ruled for Mr. Floyd, and does not accurately describe the factual questions it argues. OPDA provides no reason to review, let alone disturb, the grant of relief.

In addition, OPDA's petition does not mention that it is only days until the State of Louisiana's deadline for releasing or retrying Mr. Floyd. No stay is in place and OPDA has not taken any steps to comply with the deadline. The procedural complications resulting from the looming deadline are another reason this Court should not intervene in this case.

Statement of Case

The facts underlying this case are complex. They cover two murders with seven different sets of forensic comparisons from the scenes of these murders (all of which exclude Mr. Floyd). There are 499 separate factual citations to the record in the district court's two opinions finding that (1) Mr. Floyd met the miscarriage of justice standard and so had timely filed his application and (2) was entitled to relief on his *Brady* claim. In affirming the district court, the court of appeals stated that the district court "provide[d] far greater, and much more graphic, factual detail than does this opinion." *App.14*.[1] Nevertheless, the court of appeals' 44 page opinion is highly fact-intensive.

A full recitation of the facts is not necessary to establish that OPDA's petition lacks merit. However, because OPDA's petition considers each case fact in isolation, whereas the governing legal tests used to decide the *Perkins* and *Brady* issues require collective consideration of the facts, Mr. Floyd provides this summary to provide context for his responses to OPDA's arguments. Given the nature of *certiorari* review, this summary does not address the facts in the detail used in the briefing in the courts below.

William Hines was stabbed to death in his bed on November 25, 1980, during a sexual encounter with a man he appeared to have invited home for a drink. *App.111-14*. Mr. Hines's friend, John Rue Clegg, told police that Mr. Hines's "taste" was for black men. *App.37*. Fingerprints that were not from Mr. Hines were found on a whiskey bottle at the scene. *App.32*. Hairs from a black man were found in Mr. Hines's bed. *App.4*.

Later the same week and a little over a mile from Mr. Hines's home, Rodney Robinson was stabbed to death in his bed during a sexual encounter with a man he appeared to have picked

[1] Citations in the form "*Pet.#*" refer to OPDA's petition filed with this Court. Citations in the form "*App.#*" refer to the appendices filed with OPDA's petition. Citations in the form "*ROA.#*" refer to the record on appeal filed with the court of appeals.

up in his car and invited to his hotel room for a drink. *App.114-16*. Based on the similarities between the murders, police believed the two murders were done by the same man. *App.6, 178-79*. Fingerprints that were not from Mr. Robinson or his last known passenger were found in and on Mr. Robinson's car and on a whiskey glass in his hotel room.[2] *App.20*. Hairs with genetic markers indicating African ancestry that were not from Mr. Robinson were found in the bed in which he was stabbed. *App.20, 150-51*. A seminal stain that was shown by blood typing to not be from Mr. Robinson was found on a tissue by the bed. *App.6, 96-97*. Spermatozoa and seminal fluid were also found in his body. *App.6.* A hair from a black man who was not Mr. Robinson was found on a blood stained hat in the corridor outside Mr. Robinson's room. *App.5-6*. A hatless black man was seen fleeing the hotel around the time of the murder. *App.6, 117-18*. Police believed this was the perpetrator "making good his escape." *App.6*.

Mr. Floyd—a white man who was excluded as the source of the fingerprints and seminal stains/fluid, and who could not have been the source of any of the hairs at either scene or the man seen fleeing the Robinson scene—was arrested and tried for these murders. *App.32, 42-43.* No physical evidence linked Mr. Floyd to either crime and no witness has ever claimed to have seen Mr. Floyd with either victim or at either scene. *App.94.* Instead, Mr. Floyd was prosecuted entirely based on things he supposedly said, including, most importantly, his custodial confessions to each crime. Mr. Floyd is intellectually disabled, abnormally suggestible, and his lifestyle at the time left him vulnerable to even minimal coercion. *App.24, 95, 148-49.* He was drinking in a bar when NOPD Detective John Dillmann and Officer John Reilly found him, brought him drinks, arrested him without a warrant, and then took him to police headquarters and placed him in an office for Det. Dillmann to interrogate alone. *App.8, 118, 200*.

[2] The dissent below made a factual error on this point. It speculated that the unidentified fingerprints in Mr. Robisnon's car may have came from the friend he gave a ride to before the crime. *App.52*. As both courts below recognized, the police had eliminated this friend as the source of the fingerprints. *App.20, 74*.

A few years after Mr. Floyd's interrogation, the Louisiana Supreme Court suppressed a statement secured by Det. Dillmann because the evidence preponderantly established the defendant was beaten by police. *App.23-24, 146-47*. Det. Dillmann is also known to this Court. *Kyles v. Whitley*, 514 U.S. 419, 428, 447, 453 (1995) (finding withheld evidence could have been used to "sully the credibility of Detective Dillman[n]" and would have entitled the jury to find "that the lead police detective who testified was either less than wholly candid or less than fully informed"). In Det. Dillmann's account of the interrogation of Mr. Floyd, Mr. Floyd protested his innocence but then Dillmann "broke" or "crack[ed]" him by showing him gory crime scene photos and, following a period of hysteria, Mr. Floyd confessed to both murders. *App. 8, 118, 145, 176; ROA.549*. In Mr. Floyd's account, Dillmann beat him. *App.94-95*. While Det. Dillmann has always denied beating Mr. Floyd during the interrogation, in one post-trial account of Mr. Floyd's arrest, he recalled "I grabbed a handful of his hair with my left hand and the collar of his shirt with my right. I slammed him into the front of the building, keeping him disabled by yanking back on his head and neck." *ROA.3059*.

No part of the interrogation was recorded, so police documented the matter by typing two confessions for Mr. Floyd to sign. *App.199*. When Mr. Floyd tried to read from one of these confessions in court, he failed. *ROA.746*. The confessions contain false information. For example, one confession stated that Mr. Floyd ejaculated on the tissue found at the Robinson scene, but post-interrogation blood type testing proved that Mr. Floyd could not be the source of the seminal stain. *App.160-61*. The other confession described Mr. Hines's body as falling where it was depicted in the crime scene photographs, but the body had been moved before the photographs were taken.[3] *App.24, 126-27*.

[3] At trial, Det. Dillmann asserted that Mr. Floyd's knowledge of the appearance of the Hines scene corroborated his confessions. *App.24, 127.*

Other than the confessions, the prosecution had (1) an account from an offshore worker, Gerald Griffin, who had been drinking with Mr. Floyd and told police that Mr. Floyd had mentioned a stabbing at the Fairmont hotel (the Robinson murder), but this mention came *after* the murder was front-page news (*App.6-7*); (2) an account from a bar owner, Stephen Edwards, who recounted a drunken John Floyd agreeing with Edwards' suggestion that Floyd had "wasted" Mr. Hines (an account that Mr. Edwards could not repeat consistently, described as a "fairly common" kind of encounter in his line of work, and did not report to police until they came to him seeking information on Mr. Floyd) (*App.7, 124, 180-81*); and (3) an account from Byron Gene Reed who, on the eve of trial and after several conversations with defense counsel during which he did not mention anything, claimed that Mr. Floyd once told him that he would "take care of [Reed] like he did the one at the Fairmont" (*App.9, 61, 125-26*).

In 1982, Mr. Floyd was tried at a bench trial and convicted of the Hines murder, but acquitted of the Robinson murder. The convicting court did not learn about the fingerprint comparison results from both scenes or Mr. Clegg's statement because the information was withheld by the State. *App.19-20, 25, 32-33, 38.* It also did not learn about the hairs in Mr. Robinson's bed, as their presence was not disclosed at trial and DNA testing on them was not performed until after trial. *App.20.* It did not learn about Mr. Floyd's IQ or suggestibility, as he was not tested until 2009. *App.24*. It did not learn about Dillmann's violence in the *Seward* case, as the opinion was not issued until 1987. *App.23-24*. And, it did not learn of Dillmann's use of crime scene photographs during the interrogation as he did not reveal this until after trial. *App.24*.

Notwithstanding Mr. Floyd's acquittal of that crime, as the courts below recognized, the "overwhelming" evidence Mr. Floyd did not commit the Robinson murder is relevant for two

reasons. *App.178.* First, the similarities between the crimes mean that it is likely that they were committed by the same person.[4] This means that, if someone other than Mr. Floyd murdered Mr. Robinson, it is likely that someone other than Mr. Floyd also murdered Mr. Hines. *App.87-88, 178.* Second, Mr. Floyd simultaneously confessed to both murders. This means that, if Mr. Floyd did not do the Robinson murder, his confession to it is false. This lessens the persuasive weight of the "intertwined" Hines confession.[5] *App.18, 168-170.*

The courts below found that Mr. Floyd met the *Schlup-Perkins* miscarriage of justice standard based on all the evidence. They went on to find that, under the deferential 28 U.S.C. § 2254(d) standard, his *Brady* claim warranted relief based on the trial record and the withheld fingerprint comparison result and Clegg evidence.

Reasons To Deny the Petition

I. OPDA does not identify a reason to grant *certiorari*.

OPDA is asking this Court to perform error correction based on factual questions that the courts below made no error in answering. Despite the fact that it does not object to Mr. Floyd being free, it is asking for this in order to try and re-impose Mr. Floyd's life without parole sentence and re-incarcerate him. This is not a reasonable basis for granting *certiorari*.

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[4] The investigating police only considered Mr. Floyd as a suspect in the Hines murder because of Mr. Griffin's tip about Mr. Floyd mentioning the Robinson murder. *App.6*.

[5] Similarly, if Mr. Floyd is innocent of the Robinson murder, then Mr. Reed's allegation against him is false. This lessens the persuasive weight of Mr. Edwards' similar allegation against Mr. Floyd in the Hines case. As explained in detail by the district court:

> If a reasonable juror concluded that Floyd did not kill Robinson, the juror would be forced to conclude that Floyd's statement to Reed was also false—either Floyd was falsely boasting or Reed's retelling of the out of court statement is unreliable. Just as with the two confessions, the similarity of this boast to the Edwards threat links the two statements' persuasive weight: if Floyd falsely boasted of killing Robinson, it is more likely that his claim to killing Hines was fabricated as well.

App.180.

A. OPDA does not identify conflicting authority from the lower courts, a novel and significant legal question, or any other reason for this Court to intervene.

OPDA makes no showing that this case warrants review under this Court's published guidelines for applications for *certiorari*. OPDA identifies no split among the lower courts or unsettled question of law. The only argument OPDA attempts that relates to whether *certiorari* should be granted is that appellate courts around the country have sometimes erred in granting *habeas* relief. *Pet.9-11*. This is true, but tells this Court nothing about this case.

OPDA cites four recent cases in which this Court has issued *per curiam* opinions reversing lower courts for failure to correctly defer to the state courts in *habeas* cases. *Pet.9-10*. It does not discuss these cases or provide any justification as to why this case should be similarly handled. The cited cases are dissimilar to this case.

In *Sexton v. Beaudreaux*, 138 S. Ct. 2555 (2018) (*per curiam*), the Ninth Circuit had granted *habeas* relief on an ineffective assistance of counsel claim due to trial counsel's failure to move to suppress the identification of the defendant. This Court reversed and found that the Ninth Circuit failed to consider that trial counsel might have reasonably decided that such a motion would have failed and that this provided a reason for a fair-minded jurist to reject the claim. *Id.* at 2359. *Beaudreaux* involved the doubly deferential standard by which federal courts must review claims that defense counsel was ineffective. *Id.* at 2560. This case involves a *Brady* claim. In *Beaudreaux*, the court below failed to consider any theories that might support the state court's decision. *Id*. In this case, the courts below considered and rejected theories that might support the state court's decision. *See Section I(B)*. In *Beaudreaux*, "the Ninth Circuit considered arguments against the state court's decision that Beaudreaux never even made in his state habeas petition." *Id.* In this case, the *Brady* claim was fully briefed in state court. This case is not like *Beaudreaux*.

In two of the other cases cited by OPDA—*Dunn v. Madison*, 138 S. Ct. 9 (2017) (*per curiam*), and *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (*per curiam*)—this Court reversed because the appellate courts had granted relief by extending this Court's precedents beyond what had been clearly established. In *Madison*, the Eleventh Circuit had extended competency to be executed precedent to include a case in which the petitioner could understand that he was to be executed for a murder for which he had been found guilty, but did not recall the murder as a result of dementia. 138 S. Ct. at 12. In *LeBlanc*, the Fourth Circuit had extended the requirement that juvenile offenders be given a meaningful chance of release to find that a geriatric parole program that employed normal parole factors did not satisfy this requirement. 137 S. Ct. at 1729. This case is unlike *Madison* and *Leblanc*, as it concerns the well-settled *Brady* rule.

In the remaining case cited by OPDA, *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017) (*per curiam*), the Sixth Circuit misapplied *Sawyer v. Whitley*, 505 U.S. 333 (1992). It considered "whether the alleged error might have affected the jury's verdict, not whether a properly instructed jury could have recommended death." *Hutton*, 137 S. Ct. at 1772. There is no similar issue in this case.

There is no basis to find that the district court and Fifth Circuit in this case made errors comparable to those made by the Fourth, Sixth, Ninth, and Eleventh circuits in the cases cited by OPDA. The courts below correctly decided this case and there is no reason to grant *certiorari*.

B. The courts below correctly decided this case.

The courts below decided this case correctly by applying settled law to the complex facts. With regard to the timeliness of the petition, every judge below found the application timely under the miscarriage of justice rule that this Court announced was an exception to the 28 U.S.C. § 2244(d) time bar in *McQuiggin v. Perkins*, 569 U.S. 383 (2013). *App.27, 45-46, 182-84.* Both

courts began their analysis by identifying new and reliable evidence of innocence. *App.18-25 142-51, 157-60.* Both courts then considered all the evidence and determined that no reasonable factfinder would find that Mr. Floyd's guilt had been proved beyond a reasonable doubt. *App.18-27, 160-84*. Both courts also found that the passage of time did not render the evidence unreliable. *App.20, 21, 26, 155-60*. In sum, both courts below did exactly what was required of them by *Perkins*, 569 U.S. 383, and this Court's earlier applications of the miscarriage of justice rule in *Schlup v. Delo*, 513 U.S. 298 (1995), and *House v. Bell*, 547 U.S. 518 (2006).

Having decided that Mr. Floyd's *Brady* claim was timely, both courts then found that the withheld evidence satisfied the three prongs of *Brady*. *App.27-44, 72-102*. The district court cited the state court's entire unexplained ruling disposing of the state post-conviction application containing the *Brady* claim. *Ap.63.* It began its analysis by discussing the deferential standard that 28 U.S.C. § 2254(d) requires when no state court has given reasons for denying the claim.[6] *App.69-71*. It cited this standard throughout its analysis. *App.89-90; 102*. It also considered and rejected every justification that OPDA offered for the state court's decision, including justifications the district court could have treated as waived due to earlier concessions by OPDA. *App. 76-81, 84, 86-89, 92, 96, 97.*

The court of appeals also gave full consideration to the deferential standard it was required to apply. It began its legal analysis by citing the deferential standard as one of the three legal standards it must consider in reviewing the case. *App.15*. It began its analysis of the *Brady* claim, as the district court did, with a discussion of how deference applied in this case. *App. 29-31*. It considered and rejected all possible justifications for finding that the evidence was not

[6] Mr. Floyd also raised alternate arguments for why 28 U.S.C. § 2254(d) deference did not apply. *ROA.81-85, 2427-28, 2469-71*. The district court stated it that did not need to consider these arguments because Mr. Floyd met the deferential standard. *App.102*. Mr. Floyd properly preserved these arguments on appeal under *Jennings v. Stephens*, 135 S. Ct. 793 (2015).

withheld (*App.33-34, 38*), not favorable (*App.36-37, 38-39*), or not material (*App.41-44*). The majority specifically explained, with reference to this Court's decision in *Kyles*, 514 U.S. 419,[7] why it rejected the dissent's suggestion that a state court could have found the withheld evidence non-favorable. *App.36* ("[A]lthough the fingerprint-comparison results do not conclusively establish that Floyd was not present at the Hines scene, any such contention would again confuse weight with favorability, and also misapply the relevant standard for materiality.").

OPDA makes a conclusory argument that the courts below's deference analysis is comparable with the "few 'perfunctory statements'" that this Court criticized in *Sexton v. Beaudreaux*, 138 S. Ct. at 2560. *Pet.10*. This is not accurate. In *Beaudreaux*, the Ninth Circuit had completed a *de novo* analysis of the claim without any reference to deference and then, having decided the claim had merit, gave a couple of hundred words of purported deference analysis that was merely a summary of the existing *de novo* analysis. *See Beaudreaux v. Soto*, 734 Fed. Appx. 387 (9th Cir. 2017). In contrast, in this case, both courts below raised the deference issue prior to analyzing Mr. Floyd's *Brady* claim, discussed deference throughout their analyses, and considered and rejected possible grounds for denying Mr. Floyd's claim.

C. OPDA "does not take issue with Floyd being permanently released from custody," so it is unclear what legitimate prosecutorial objective further review would serve.

The federal courts have given this complicated and exceptional case extensive review and recognized a decades-old injustice. Mr. Floyd has been released from prison. OPDA's last hope of retaining its unconstitutional 1982 conviction of Mr. Floyd and the accompanying life without parole sentence is this petition. However, despite the fact that its current litigation posture is that Mr. Floyd should spend the rest of its life in prison, OPDA admits that "it does not take issue

[7] OPDA implies that the court of appeals made some error in relying on *Kyles* because it pre-dates AEDPA (*Pet.14 n. 7*), but this has no bearing on whether *Kyles* is clearly established law as determined by this Court.

with Floyd being permanently released from custody." *App. 16* (quoting *State's Reply Brief on Appeal*). In fact, while Mr. Floyd was still in prison, OPDA twice offered Mr. Floyd deals that would have secured his immediate release from prison if he would plead guilty to a lesser crime. Mr. Floyd rejected both offers because he is innocent. *See App.64* ("Let the D.A. know what every he come up, with it is a NO. Justice got to be done for this innocent man, John Floyd.") (quoting *Floyd's Letter to Counsel*).

Not only is there no legal reason for granting *certiorari*, as a practical matter, this Court need not use its limited resources to consider whether to impose a mandatory life without parole sentence on a man who, according to the prosecuting office, does not need to be in prison.

II. OPDA misinterprets the governing legal tests.

While OPDA's arguments are principally factual, these factual arguments are predicated on a misunderstanding of the governing legal tests. This Court should not grant *certiorari* based on a petition that misunderstands this Court's settled precedents.

A. The *Schlup-Perkins* Test

OPDA complains that the courts below erred in their miscarriage of justice analysis because *some* of the items of new evidence of innocence considered are not of the type listed by this Court as reliable kinds of evidence in *Schlup*. *Pet.11*. In light of this Court's subsequent decision in *House*, 547 U.S. at 548-553, several courts have understood the list in *Schlup* to be illustrative rather than exhaustive. *Munchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012); *Souter v. Jones*, 395 F.3d 577, 593 n. 8 (6th Cir. 2005). Further, even if the courts below erred in determining how many different pieces of new evidence were sufficiently reliable to trigger the analysis, as long as *any* new and reliable evidence of innocence is presented, the reviewing court must go on to consider "*all* the evidence, old and new." *House*, 547 U.S. at 538 (emphasis added,

internal citation omitted). Therefore, even if OPDA is correct and *some* of the new evidence is of a type that is insufficiently reliable to trigger an analysis, there could have been no error in considering *all* the evidence once *some other* of the new evidence triggered the analysis.

Similarly, OPDA complains that individual pieces of new evidence do not, alone, establish that no reasonable juror would convict Mr. Floyd. *Pet.20-21*. This, again, misunderstands the legal test. The assessment of what a reasonable juror could do must be based on all the evidence. *Schlup*, 513 U.S. at 328.

B. The Favorability Prong of *Brady*

OPDA argues that a reasonable jurist could have found the withheld evidence non-favorable for *Brady* purposes because there are arguments that they could make to a factfinder that "could" cause it to discount the evidence. *Pet.10, 13, 14*. As discussed below, the factual assertions underlying these arguments are wrong or incomplete. Beyond this, however, OPDA's entire framing misunderstands the law.[8]

Evidence does not cease to be favorable because the prosecutor can articulate a counter argument that it could have presented to the jury if the favorable evidence had been disclosed to

[8] This is the same misunderstanding that the dissenting judge made in the court of appeals. *App.50-53.* The dissent compared the withheld print comparison results to evidence in three case with non-comparable facts— *United States v. Sipe*, 388 F. 3d 471 (5th Cir. 2004) (*App.51*), *Lines v. Terrell*, No. 07-CV-3532, 2009 WL 2870162 (E.D. La. 2009), *report and recommendation adopted*, No. 07-CV-3532, 2009 WL 2929334 (E.D. La. 2009) (*App.51*), and *Sosa v. Dretke*, 133 F. App'x 114 (5th Cir. 2005) (*App.52*). *Sipe* discusses neutral evidence. This evidence was a statement from an acquaintance of the defendant labeling him a "nice guy" who she had not heard refer to aliens derogatorily. *Sipe*, 388 F. 3d at 487. This is truly neutral evidence; it had no arguable bearing on the crime charged—the use of excessive force in making a border arrest—so could not help the defense. *Lines* does involve alleged print comparison evidence. In *Lines*, however, there was no evidence that a print comparison was actually performed, the court based its legal analysis on the materiality rather than favorability prong of *Brady*, and the trial defense was the defendant's claimed lack of knowledge of narcotics found in his possession (not third-party guilt). *Lines*, 2009 WL 2870162. at *6, 14-15. The same district judge presided over *Lines* and this case, so the district court was well aware of the differences between the cases when it granted Mr. Floyd relief. In *Sosa*, the court of appeals denied a certificate of appealibility, so merely summarized the district court's opinion. The district court's own, more detailed opinion shows that (1) the prints at issue were from a highly public place (a bank) that also did have a print from the petitioner, and (2) the single mention of prints from a car refers to a public vehicle (an officer's stolen patrol car) that the defendants wiped to remove their prints. *Sosa v. Dretke*, No. Civ.SA-00-CA-312-XR, 2004 WL 1124949, *4, 10-12, 15, 15 n. 115, 19 n. 134 (W.D. Tex. 2004). OPDA, rightly, does not cite any of these cases in its filing with this Court. *Pet.iv-v*.

the defense and used at trial. The district court compiled authority that explains that evidence is favorable if it "tends" to help the defendant. *App.82*. The court of appeals used *Kyles v. Whitley* to explain this point. *App.34-36*. In *Kyles*, the perpetrator had left the scene (the parking lot of Schwegmann's store) in the victim's car, which meant the investigating police believed that the perpetrator may have left his car at the scene. 514 U.S. at 423. The State had argued at trial that "a grainy enlargement of a photograph of the crime scene showed Kyles's [the defendant] car in the background." *Id.* at 450. The withheld evidence was list of the cars in the lot that police made seven hours after the crime, which did not include Kyles's car. *Id.* at 429. Post-trial, the State argued that "the list was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does not purport to be a comprehensive listing of all the cars in the Schwegmann's lot." *Id.* at 450-51. This Court rejected this argument because it "confuses the weight of the evidence with its favorable tendency." *Id.* at 51.

Kyles is not the only Orleans Parish case that makes this point. More recently, in *Smith v. Cain*, "[t]he State and the dissent advance[d] various reasons why the jury might have discounted" the undisclosed evidence. 565 U.S. 73, 76 (2012). In response, this Court explained that material is not excepted from the *Brady* rule just because "the State's argument offers a reason that the jury could have disbelieved" the undisclosed evidence. *Id.* Fifth Circuit precedent, with which OPDA does not take issue, also illustrates how this rule applies in practice. *United States v. Cessa*, 861 F.3d 121, 132 (5th Cir. 2017) (finding "maybe the jury would have credited that [prosecutorial] explanation [for the evidence, b]ut it would have been favorable to the defense to be able to demand that explanation and test it with the jury"); *DiLosa v. Cain*, 279 F.3d 259, 264-65 (5th Cir. 2002) (rejecting state court's decision that arguably inconsistent

statements were not favorable because "any possible inconsistency . . .is up to the jury to decide" and also finding favorable unknown person's fingerprints at the scene that "potentially" support defense of third-party guilt). This Court has made clear that competing theories about defense evidence are to be decided by the jury and that to hold otherwise would be to "substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Kyles*, 514 U.S. at 438.

The courts below handled the favorability issue as mandated by this Court's precedents. OPDA continues to misunderstand favorability, but the fact that OPDA persists in the unsuccessful arguments it made in *Smith v. Cain* and *Kyles v. Whitley* is not a reason to grant *certiorari*.

C. The Materiality Prong of *Brady*

Aside from its favorability argument, OPDA argues that the courts below ignored evidence presented at Mr. Floyd's trial. *Pet.16-17*. OPDA does not identify which legal test this purported error relates to, but, as it is contained in the argument regarding OPDA's first question presented, it appears to be part of OPDA's *Brady* argument. If it is an argument about the materiality prong of *Brady*, which it is not clear that it is, then it rests on a legal error.

OPDA's argument is that the courts below should have given weight to trial evidence that Mr. Floyd did not have visible injuries when he was filmed walking from police headquarters to the jail while being held on each side by police officers. *Pet.16-17*. Presumably, OPDA raises this to suggest that Mr. Floyd's confession to the Hines murder was evidence of guilt that could not be rebutted and so any withheld evidence is non-material. Leaving aside the limited probative value of the evidence to which OPDA points, it is not responsive to whether there is a "reasonable probability" of a different outcome at trial. *Kyles*, 514 U.S. at 422.

This probability of a different outcome is related to the persuasive weight of the confession, not its admissibility. An admissible confession is not a guarantee of a conviction. *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) ("Confessions, even those that have been found to be voluntary, are not conclusive of guilt."); *Bram v. United States*, 168 U.S. 532, 546 (1897) ("I have known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession . . ." (quoting 2 Matthew Hale, *Pleas of the Crown* 284 (1st ed. 1736))). As both courts below explained, Mr. Floyd's confession to the Robinson murder had insufficient persuasive weight to guarantee a conviction. *App.42-43*; *101*. The Robinson confession was admitted at trial and was given in identical circumstances to the Hines confession.[9] The non-persuasiveness of the Robinson confession at trial shows the fallibility of the Hines confession. The courts below did not err on this point when considering whether confidence in the outcome of trial had been undermined.

III. OPDA's petition fails to accurately describe the facts.

OPDA does not provide a complete and accurate description of the factual issues that it asks this Court to review. The detailed factual discussion on the following pages, which is necessary to address OPDA's factual arguments and the findings of the courts below, illustrates the fact-bound nature of OPDA petition. *Certiorari* is not warranted for this Court to provide OPDA another forum to litigate its flawed factual arguments.

A. The Hines Fingerprint Comparison Results

The courts below found that the withheld fingerprint comparison results were favorable to Mr. Floyd as impeachment and exculpatory evidence. OPDA misstates why the courts below

[9] Mr. Floyd orally confessed to both murders simultaneously. *App.199*. Police elected to type two written confessions. *App.199*. The written Hines confession, which was completed first, contains a summary confession to the Robinson murder. *App.120*.

found the fingerprints were usable impeachment evidence and provides an incomplete explanation of why the courts found the print results tended to exculpate Mr. Floyd.

OPDA claims that "[a]ccording 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." *Pet.12*. This not accurate. In parenthetical asides, the court noted that the crime scene technician's report shows that the detective misstated the location of one of the glasses in his trial testimony. *App.34, 41*. This is not, however, the impeachment value the court ascribed to the fingerprint comparison results.

Detective Dillmann testified that Mr. Floyd confessed to drinking with Mr. Hines at his house and that this was corroborated by the evidence that two people had been sharing whiskey drinks at the scene. *App.34, 84*. I.e. Dillmann testified that the glasses corroborated the confession based on the number, not location, of the glasses.[10] In light of this, the court found that "the fingerprint-comparison results excluding Floyd from the fingerprints lifted from the whiskey bottle 'would obviously have helped [Floyd] and would have had some value in countering' the detective's testimony and the State's theory that Floyd *shared a drink* with Hines." *App.35* (quoting *Kyles*, 514 U.S. at 450) (emphasis added); *see also App.41* ("The fingerprint-comparison results undermine Floyd's confessions to each murder, and impeach Detective Dillmann's testimony for the Hines murder that the 'glasses filled with a liquid' (in fact, discovered in Hines' bedroom and kitchen) corroborated Floyd's confession.").

OPDA also asks this Court to revisit the significance of the whiskey bottle on which prints were found based on a crime scene photograph. *App.12-13*. OPDA's argument focuses on

[10] The location of the two glasses was irrelevant to the supposed corroboration of the confession, as the confession is silent on this point. The confession just states, "We went throught [sic] a gate and into his apartment. We were both drinking." *App.119.*

a photograph depicting one part of the victim's kitchen from one angle. *ROA.2956*. It is unclear whether the photo even depicts how the scene looked when police arrived since the contemporaneous photos depicting the victim's body were taken after the body was moved. *App.24, 126-27*.

The glass that police found on the kitchen table is not visible in the photo. The most prominent whiskey bottle in the photo is labeled as being from the brand "Martin's N.H." OPDA argues that the bottle with the fingerprints (designated as a "Puglia's" bottle) is not this bottle and so the bottle with the fingerprints may have been remote from the glass at the scene and potentially unrelated to the drinking that immediately preceded the murder. *Pet.13*. This argument ignores that Puglia's was a French Quarter store, not a whiskey distillery. *App.83.* A bottle could be given the visible Martin's N.H. label by the distiller, but also have a Puglia's store label or marking elsewhere on the bottle.

OPDA omits the courts below's reason for attaching significance to the whiskey bottle; that the crime scene technician specifically selected it to dust for prints.[11] The district court found the print comparison results were "particularly favorable to the defense" because of this:

> Evidence Technician Seuzeneau selected a small number of items on the Hines scene to dust for prints, and these items were all related. This choice suggests that—of all the many surfaces in Hines' home—Seuzeneau or a superior believed it particularly likely that Hines' killer touched the whiskey bottles and glasses.

App.84. Similarly, the court of appeals found it significant that the bottle was "an item that was singled out for dusting by investigators." *App.36*.

[11] In addition to the courts below, the prosecutors who handled the discovery, pre-trial proceedings, and trial in this case have all attested that they would have disclosed the fingerprint comparison results to the defense if they had known about them and believe defense counsel, if aware of the results, would have used them at trial. *ROA.231-48.* This further evinces the favorable nature of the fingerprint comparison results.

OPDA asks this Court to revisit a factual issue, but does not address that the basis upon which this factual issue was previously decided. The courts below were not moved to second-guess the technician at the crime scene based on a single photo that gives an incomplete and imperfect view of the scene. This was the correct decision.

B. John Rue Clegg's Statement

OPDA also challenges the reliance of the courts below on the sworn statement of John Rue Clegg. *Pet.15-16, 21-22*. Mr. Clegg gave a statement to police in 1981, which is documented by a 2008 written statement. The 2008 statement was admitted with OPDA's agreement during state court proceedings. *ROA.2971*. Neither state court made any findings concerning the statement. *App.185, 194*. In the federal *habeas* proceeding, the court of appeals and district court each explained that they found Mr. Clegg reliable because he "was a close friend of Hines' and has no apparent connection to Floyd." *App.25, 92*. The dissent also agreed that the statement "could only reasonably be labeled as favorable."[12] *App.53*. Mr. Clegg's statement to police suggested a black male perpetrator and so was of value to Mr. Floyd because it "dovetails with evidence from both scenes" about the perpetrator. *App.100.* Also, "the fact that the statement was misrepresented in Detective Dillmann's report could have been used to impeach his testimony and call into question the 'thoroughness and even the good faith of the investigation.'" *App.39* (quoting *Kyles*, 514 U.S. at 445).

OPDA criticizes the court of appeals for referring to the 2008 statement as an affidavit. *Pet..15, 21.* In state court proceedings, OPDA agreed to the statement being "authentic and

[12] The dissent argued that, though favorable, the information provided by Mr. Clegg to police was not material on its own. *App.54-55*. As explained above, the dissent incorrectly categorized the fingerprint comparison results as non-favorable. This meant that the dissent's analysis of materiality is not based on collective consideration of all the withheld favorable evidence. *See Kyles*, 514 U.S. at 436. Additionally, the materiality analysis does not consider the weaknesses in the prosecution's case at trial. *See United States v. Agurs*, 427 U.S. 97, 113 (1976) (holding "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt"). OPDA does not raise the dissent's materiality argument in this Court.

admissible for the purposes of any hearing on the merits of Mr. Floyd's claims for relief." *ROA.2971*. Further, the statement was made under penalty of perjury without a notary (because Mr. Clegg lives in Germany). *ROA.220-21*; *see* 28 U.S.C. § 1746. OPDA also questions the credibility determinations of the courts below, but both courts justified their findings on this point. *App.25;App.92*. Lastly, OPDA argues a hypothetical that involves different and imaginary evidence being in the record. *Pet.16*. The courts below properly decided the case based on the actual evidence in the record. This Court need not grant *certiorari* to reconsider credibility findings, speculate about how the case might be different if the evidence was different, or parse the nomenclature used to identify a sworn statement that OPDA agreed was "authentic and admissible."

C. The Evidence from the Robinson Case

OPDA's main approach to the Robinson evidence is to argue that it should be ignored because Mr. Floyd was acquitted of that crime. *Pet.14-15*. OPDA misunderstands the issue. The question in this litigation is not the verdict in the Robinson case, but how the withheld evidence and other new evidence in the Robinson case could influence a verdict in the Hines case. As explained in the Statement of Case, *supra*, and by both courts below (*App.18, 87-88, 168-70, 178*), evidence in the Robinson case is relevant to the identity of the perpetrator of the Hines murder and the reliability of the Hines confession. If new evidence shows that it is more probable than was known at trial that Mr. Floyd did not murder Mr. Robinson, which it does, then this makes it more probable that he did not murder Mr. Hines and that the Hines confession is not reliable. The courts below properly considered the withheld fingerprint comparison results from the Robinson murder in their *Brady* analyses and all the evidence concerning the Robinson murder in their *Schlup-Perkins* analyses.

With regard to the specifics of the new forensic evidence from the Robinson scene, OPDA claims that the evidence has no "*new* exculpatory value" because there were already forensic results at trial. *Pet.18*. At trial, the forensics consisted of a hair from a hat in the corridor outside the crime scene and the seminal fluid at the scene. *App.130-34*. The new forensic evidence is fingerprint comparison results from the passenger side of the victim's car and items in the car, fingerprint comparison results from the whiskey glasses in the victim's hotel room, and DNA results from hairs from the victim's bed. *App.150-51*. The courts below correctly found that this evidence had new exculpatory value. *App.20-21, 41, 160-66*. The new forensic comparison results are all from items that were not part of the trial evidence, so clearly these results have exculpatory value beyond what was heard at trial. At trial, the verdict was that there was a reasonable doubt as to Mr. Floyd's guilt for the Robinson murder. Now, there is "overwhelming evidence that Robinson was killed by an African-American man." *App.178*.

D. The Evidence that the Confessions are Unreliable

OPDA also argues that the courts below erred in considering new evidence about Det. Dillmann's interrogation tactics and Mr. Floyd's vulnerability to falsely confessing as part of their *Schlup-Perkins* analyses. *Pet.18-20*.

OPDA argues that the judicial finding that Dillmann beat a suspect during interrogation in a manner similar to that alleged by Mr. Floyd is not new reliable evidence because it is not of the kind of evidence specifically listed in *Schlup*. *Pet.19-20*. As discussed above, the list in *Schlup* is illustrative, not exhaustive. Further, even if the judicial finding did not qualify as new reliable evidence, it would still be evidence that the courts had to consider when reviewing all the evidence, old and new. Regardless, OPDA gives no reason why a specific factual finding of the Louisiana Supreme Court should not be treated as reliable.

OPDA argues that Det. Dillmann's post-trial revelation that he showed Mr. Floyd crime scene photographs should not have been considered. *Pet.19*. The courts below found it significant that Mr. Floyd's description of where Mr. Hines's body fell matched where it was positioned when the police took crime scene photographs, which was *after* the body had been moved by police. *App.24, 126-27*. Other than simply disagreeing with this factual finding, OPDA's argument is that this is not new evidence because the position of the body was discussed at trial. The new evidence is *not* the position of the body, it is the fact that Mr. Floyd was shown photographs depicting the position of the body before he signed the confessions that matched the state of the scene as it was photographed rather than the state of the scene when police found it.

OPDA argues that the psychological test results are not new based on *Rues v. Denney*, No. 5:09–CV–06056, 2010 WL 729181 (W.D. Mo. 2010), and *Jackson v. Vannoy*, No. 17-CV-0265, 2018 WL 1441154 (E.D. La. Feb. 27, 2018). *Pet.18-19*. *Rues* and *Jackson* concern whether a recently published non-case-specific report that repeated existing general criticisms of toolmark evidence constitutes new evidence in a case in which the prosecution used toolmark evidence at trial. This is not relevant to whether the post-trial results from psychological tests performed on Mr. Floyd himself—the only tests of these type performed in this case—are new for the purposes of *Schlup-Perkins*. The district court gave a clear explanation as to why the results of post-trial psychological tests performed on Mr. Floyd constituted new evidence as compared to the trial evidence:

> [The trial testimony] does not address Floyd's mental capacity and what effect, if any, his intellectual capabilities had on his suggestibility or vulnerability to police pressure, the subject of Dr. Gregory DeClue's expert opinion. Dr. DeClue's expert opinion is also based on the results of psychological testing which did not exist in 1982.

App.159. OPDA offers nothing new on this point and identifies no error in this finding. As with most of its arguments, it simply reasserts the flawed factual positions it has taken throughout this litigation. These positions have been considered and rightly rejected by the courts below.

IV. The lack of stay and the October 29, 2018, deadline by which the State of Louisiana must release or retry Mr. Floyd make this case a poor vehicle for this Court's review.

At the time of filing, there is ongoing pre-trial state court litigation in this case and the State of Louisiana's deadline for retrying or releasing Mr. Floyd to comply with the federal district court's deadline is only days away. OPDA has not sought a stay of the federal district court's deadline pending *certiorari* review from any federal court. Further, OPDA has thus far been unsuccessful in its attempts to secure a stay in state court. This means that this case could soon be rendered moot or otherwise unsuitable for this Court's review.

The 120 days that the federal district court gave the State of Louisiana "to either retry Floyd or release him" expires on October 29, 2018.[13] Since the court of appeal denied OPDA's petition for rehearing *en banc*, OPDA has had the opportunity to seek a stay of the mandate from the court of appeal or object to Mr. Floyd's motion that led to the district court lifting the stay. It did neither of these things. *Floyd v. Vannoy*, 2:11-CV-2819 at 5-6 (E.D. La. Aug. 15, 2018) (Docket Entry 159). OPDA has also not asked this Court for a stay.

OPDA's most recent position, as expressed in its state court filings, is that the federal district court's deadline is inoperative because Mr. Floyd has been released on his own

[13] On May 8, 2017, the district court ordered that "the State of Louisiana is to either retry Floyd or release him within 120 days of this order." *App.102*. On June 22, 2017, the court issued a further order stating that (1) Mr. Floyd was to be released on his own recognizance with conditions and under federal supervision pursuant to Rule 23 of the Federal Rules of Appellate Procedure while the State sought review of the May 8, 2017, judgment and (2) the State's deadline for releasing or retrying Mr. Floyd was stayed pending review of the case by the Court of Appeals. *Floyd v. Vannoy*, 2:11-CV-2819, 2017 U.S. Dist. LEXIS 96387 (E.D. La. June 22, 2018). The Court of Appeals ruled for Mr. Floyd and issued its mandate on July 17, 2018. *Floyd v. Vannoy*, 2:11-CV-2819 at 4 (E.D. La. Aug. 15, 2018) (Docket Entry 159). On August 15, 2018, the district court lifted the stay on the State's deadline for retrying or releasing Mr. Floyd. *Id.* at 6.

recognizance. *See State v. Floyd*, No. 2018-KK-1651 (La. Oct. 5 2018) (OPDA's Writ Application). This position is inconsistent with this Court's precedents recognizing that release of a person on their own recognizance with conditions does not necessarily constitute release for the purposes of *habeas corpus*.[14] *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300-01 (1984); *Hensley v. Municipal Court*, 411 U.S. 345 (1973). Given OPDA's interpretation of the State of Louisiana's duty, it seems probable that, at some point after October 29, 2018, the district court will be called upon to decide if the deadline has been complied with.

The ongoing pre-trial proceedings in state court began when, in order to protect his rights should the State of Louisiana attempt to retry him, Mr. Floyd filed pre-trial motions.[15] These include potentially dispositive motions (i.e. motions to quash the underlying indictment). Over OPDA's objections, these motions are currently set for December 17, 2018. The state district court has also indicated that it would have the case tried in February 2019. OPDA has unsuccessfully sought a stay from the state district court and court of appeals. *State v. Floyd*, 2018-K-0785 (La. App. 4 Cir. Sept. 25, 2018). At the time of filing, OPDA is seeking a stay from the Louisiana Supreme Court and Mr. Floyd has filed his opposition to such a stay.

OPDA's position is that, as far as the State of Louisiana is concerned, Mr. Floyd is still convicted pursuant to the judgment resulting from his 1982 trial. Prior to the October 29, 2018, deadline, this is a position that OPDA can take without being in violation of the federal district court's judgment. But, this deadline is fast approaching.

[14] The conditions of Mr. Floyd's release include that he must live at a specified address, can only be absent from this address for limited periods, cannot leave the State of Louisiana without the federal district court's permission, and must regularly report to a probation officer. *Floyd*, 2017 U.S. Dist. LEXIS 96387 at *8-9.

[15] The Orleans Criminal District Court docket for Mr. Floyd's case is available online. http://www.opcso.org/dcktmstr/666666.php?&docase=280729 (last accessed Oct. 6, 2018).

The deadline from the federal district court and the state court proceedings mean one of the following could happen in the coming days and months:

- The State of Louisiana could choose to release Mr. Floyd in order to comply with the the federal district court's deadline. This would mean a state court issuing an order vacating the 1982 judgment of conviction. If a state court vacates Mr. Floyd's conviction, this would render the case before this Court moot, as Mr. Floyd would no longer be "a person in custody pursuant to the judgment of a State court" pursuant to 28 U.S.C. § 2254(a).
- If October 29, 2018, passes with no action from the State of Louisiana, the federal district court could compel the State of Louisiana to obey its order. This could lead to Mr. Floyd's 1982 judgment of conviction being vacated by a state court. This would render the case before this Court moot.
- The state district court could grant one of Mr. Floyd's dispositive motions and so terminate the state prosecution in Mr. Floyd's favor by dismissing the underlying indictment.[16] This would render the case before this Court moot.
- The underlying state prosecution could be terminated by dismissal of the charge or the acquittal of Mr. Floyd at trial. This would render the case before this Court moot.

In addition to all of the other reasons why a grant of *certiorari* is not warranted, this case is a particularly poor vehicle for this Court's review because of the uncertainty about whether this will remain a live case for this Court to decide. In its own filings, OPDA concedes that the procedural situation is "problematic" and "may cause constitutional and legal complication." *State v. Floyd*, 2018-K-0785 (La. App. 4 Cir. Sept. 19, 2018) (State's Reply to Opposition).

[16] Mr. Floyd has motions pending in the state district court related to the fact that the grand jury that indicted him in 1981 was chosen pursuant to a statute that has been found to violate the state constitution, the composition of the 1981 grand jury, and the impossibility of him receiving a fair trial due to the passage of time and destruction of evidence, including potential *Brady* material.

Further, even if none of the scenarios described above occur while this Court is considering OPDA's *certiorari* petition, this may be because the State of Louisiana, at OPDA's direction, did not seek a stay from any federal court and is yet to obey the federal district court's order. If a case has only avoided mootness because a party has not complied with a lower court's order, this would be a poor basis for this Court's review.

Conclusion

This is the exact kind of rare case for which the federal courts have their *habeas corpus* power to review a person's imprisonment as a result of a state prosecution. The State of Louisiana inflicted a miscarriage of justice upon Mr. Floyd in violation of the Constitution and, when given the opportunity to correct this, did not do so. The courts below exhaustively reviewed the complex facts of this case and then ruled for Mr. Floyd based on well-settled legal principles. The courts below were not careless or casual in their rulings; they did precisely what the law requires. The legal system has *finally* worked for Mr. Floyd. No further review of this case is necessary to ensure a just result and no wider legal principle would be served by this Court's review. Mr. Floyd requests this that Court deny the petition for *certiorari*.

Respectfully submitted:

/s Richard Davis
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