APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30421

[Filed June 25, 2018]

JOHN DAVID FLOYD, Petitioner - Appellee	)
v.	)
DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, Respondent - Appellant	)

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC

Before SMITH, BARKSDALE, and HIGGINSON, Circuit Judges.

PER CURIAM:

Appellant's Petition for Rehearing *En Banc* is DENIED. This opinion is substituted in place of the prior opinion, *Floyd v. Vannoy*, 887 F.3d 214 (5th Cir. 2018).

For two murders in New Orleans, Louisiana, in 1980, within days of, and in close proximity to, each

other and involving extremely similar facts, John David Floyd was convicted in a state-court joint bench trial of the first, but acquitted of the second, murder, with state post-conviction relief's being denied for the first time in 2011, but federal *habeas* relief's being granted in 2017 because, after concluding the *habeas* application was not time-barred, the district court concluded: material evidence, favorable to Floyd, had been withheld prior to trial; and the state courts' contrary decisions had unreasonably applied clearly-established federal law, as proscribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). For the State's challenge to that relief, at issue is whether: Floyd established "actual innocence" to overcome the statute of limitations for his application; and, in denying Floyd's claim that the State withheld favorable, material evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the Louisiana state courts unreasonably applied clearly-established federal law. AFFIRMED.

I.

On 26 November 1980, William Hines, a white male, was found nude, stabbed to death inside the bedroom of his apartment on Governor Nicholls Street, in the French Quarter. The apartment had no signs of forced entry or evidence of burglary. One glass of alcohol was in Hines' bedroom; another, in his kitchen; and his wounds indicated he was stabbed while lying down.

Detective John Dillmann, the lead detective for the murder investigation, found the scene demonstrated a strong likelihood Hines was murdered by a welcome visitor with whom he shared a drink and had sexual

relations. Accordingly, police dusted for fingerprints whiskey bottles, the glass of alcohol in Hines' kitchen, and the glass of alcohol on his nightstand.

Along that line, a crime-scene photograph of Hines' kitchen shows, among other items, a wine bottle and two whiskey bottles on the kitchen table. In addition, the crime-scene technician's report states:

> TECH. T. SEUZENEAN DUSTED SEVERAL WHISKEY BOTTLES - Neg. RESULTS
> DUSTED / - WHISKEY BOTTLE AND LIFTED – 2 PARTIAL LATENT PRINTS
> DUSTED / - WHISKEY GLASS FROM NIGHT TABLE IN BEDROOM - Neg. RESULTS
> DUSTED / - WHISKEY GLASS FROM KITCHEN TABLE - Neg. RESULTS

Accordingly, it appears the "DUSTED. . .WHISKEY GLASS FROM KITCHEN TABLE", but not shown in the photograph, was on the table where the dusted whiskey bottles were located. (To repeat, and as emphasized by the dissent at 5, no whiskey glass is visible on the table in the photograph. Myriad items shown on the table prevent conclusively determining whether a whiskey glass was there. But, as shown above, the technician's report states: "DUSTED / - WHISKEY GLASS FROM KITCHEN TABLE".)

In any event, 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. This is especially true for Detective Dillmann's erroneous related testimony at trial, in which he: stated "there were two highball

glasses filled with a liquid on each side of the bed"; and made no reference to the whiskey glass in the kitchen.

Along that line, the dissent at 5 states "the majority has decided, because it fits its narrative, to credit the tech over Dillmann". The dissent's conclusion that the detective's testimony and the technician's report have comparable credibility is contrary to the State's narrative, not ours. The State, in its opening brief at 16, acknowledges that the detective's testimony about the glasses, "rendered for the first time a full year and a half after the crime, [and] directly contradicted by Crime Scene Tech Tim Suzeneau's report", is less credible than the technician's report. Likewise, at oral argument in our court, the State maintained the technician's report, "generated on the day of the offense", was more accurate than the detective's testimony, "recollected at trial . . . a little over a year after the incident".

In the alternative, the dissent at 5 asserts a possibility the detective's testimony and contradictory technician's report were both accurate because there may have been one glass in the kitchen and two in the bedroom. But, nothing in the record supports this theory of three whiskey glasses being discovered at the Hines scene.

In sum, in its opening brief and at oral argument, the State maintained the crime scene technician's report included a detailed list of all collected evidence. Again, the report included only two whiskey glasses: one from the kitchen and one from the bedroom.

Police also collected hair, appearing to be a black person's, from Hines' bedsheets. But, because Hines

had been dead for at least 24 hours prior to his body's being discovered, any evidence of seminal fluid or spermatozoa on, or in, his body was undetectable.

Following multiple interviews, Detective Dillmann learned Hines was gay and frequented gay establishments in the French Quarter. And, the detective's report, and subsequent testimony, provided that John Clegg, a close friend of Hines and the last known person to see him alive, had advised the detective that Hines "frequently had sexual relations with both black and white males".

At 4:45 a.m. on 28 November, only two days after the discovery of Hines' body, Rodney Robinson, a black male, was found dead at the Fairmont Roosevelt Hotel in downtown New Orleans, just one mile from Hines' apartment. In the hours preceding his death, Robinson had visited several bars with his friend David Hennessy. After Robinson, according to Hennessy, drove him to his home at around 3:15 a.m., Robinson said he was returning to his hotel for the night. Just 90 minutes later, he was found nude, stabbed to death, in a hallway in his hotel.

In their investigation, officers found the locks on Robinson's hotel-room door functional; glasses containing alcohol remained on end tables next to his bed; and articles of clothing were scattered about the room. Consequently, they believed Robinson was murdered after sharing a drink and having sexual relations with his killer. Detectives' interview of Hennessey revealed Robinson was gay.

Police discovered physical evidence of: blood stains along the hallway wall; a blood-stained blue-knit cap in

the hallway relatively near Robinson's body; seminal fluid on a tissue discovered near his bed; and spermatozoa and seminal fluid in his body. Additionally, police discovered a black person's hair—determined later not to be Robinson's—on the blue-knit cap. Further, hotel guests staying nearest Robinson's room reported hearing screams and rapid footsteps in the hallway; and a hotel security guard reported seeing a black male running from the back door of the hotel shortly before the police arrived. Detective Michael Rice, lead detective for the murder investigation, believed the guard "witnessed the perpetrator . . . making good his escape".

Detective Dillmann considered the similarities in the Hines and Robinson crimes—comparable defensive wounds, lack of forced entry, each victim's being gay, glasses of alcohol near each victim's bed (again, for Hines' murder, only one glass was near his bed; the other was in the kitchen, as was the whiskey bottle), and evidence of sexual relations between the perpetrator and victim—to conclude the same perpetrator was responsible for both murders. Initially, investigators unsuccessfully pursued black, male suspects. John Floyd, a white male, then 32, lived as a "drifter" in New Orleans at the time of the murders. He was a heavy drinker and drug-user, and frequented numerous bars in the French Quarter. On 29 November, one day after the discovery of Robinson's body, Detective Dillmann received a tip from Harold Griffin that Floyd had recently made incriminating statements linking him to Robinson's murder.

Griffin reported that, after drinking with Floyd at the Louisiana Purchase Bar from 10:00 p.m. on 28

November (approximately 17 hours after Robinson's body was found) until 5:00 a.m. the next day, 29 November, Floyd asked Griffin to accompany him to the detoxification center at Charity Hospital. Griffin testified that, during their walk to the hospital, Floyd told him "he heard that perhaps going to the Detox Center would be the next best thing to keep from being held accountable for doing something wrong"; Floyd then asked Griffin if he had "heard of the stabbing at the Fairmont"; and he replied "No".

Later that day, Griffin learned of Robinson's murder as covered in the 29 November morning edition of the *Times Picayune*, and reported his conversation with Floyd to the New Orleans Police Department (NOPD), finding it peculiar Floyd knew of the murder prior to the paper's publication. But, the paper had published a story on Robinson's murder in its 28 November evening edition, *prior* to Floyd's statements to Griffin on the 29th.

Following up on Griffin's tip, Detective Dillmann questioned French Quarter bar owner Steven Edwards, who advised that Floyd made incriminating statements linking him to Hines' murder. According to Edwards, in late November he encountered Floyd "drinking heavily" and refused him service at the Mississippi River Bottom bar. Edwards testified: he told Floyd, "you know you are barred from the f…ing bar"; Floyd then threatened, "[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".

Based on these statements to Griffin and Edwards, Floyd was made a suspect in the two murders. After

receiving a positive identification from both Griffin and Edwards, Detective Dillmann and a NOPD officer found Floyd drinking at the Louisiana Purchase Bar. They purchased Floyd at least one drink before arresting and transporting him to NOPD's homicide office.

There, Detective Dillmann began interrogating Floyd. He testified Floyd initially denied any involvement in the two murders, but, within 30 minutes, became very emotional about his drinking and drug-use, and confessed verbally to killing Hines and Robinson.

Following Floyd's admissions, the detective called Detective Rice, and they procured Floyd's signed confessions to both murders. Detective Rice witnessed Detective Dillmann take the Hines confession, and Detective Dillmann did the same for Detective Rice's taking the Robinson confession. The confessions were taken on the evening of 19 January 1981, and had markedly similar descriptions such as: drinking and having sexual relations with the victims before fatally stabbing them in response to each man's wanting to "f… [him]".

Indicted on two counts of second-degree murder, Floyd waived his right to a jury trial, and proceeded to a joint bench trial in Orleans Parish Criminal District Court, maintaining a defense of third-party guilt. For the Hines murder the State presented: Floyd's confession to murdering Hines; Detective Dillmann's testimony that the confession was credible; and Edwards' testimony regarding Floyd's threats to him. For the Robinson murder, the State presented: Floyd's confession to murdering Robinson; Detective Rice's

testimony related to Floyd's Robinson confession; Griffin's testimony regarding Floyd's statements to him; and testimony by Byron Reed, Floyd's acquaintance and former sexual partner, that Floyd made an incriminating statement about the Robinson murder to him.

For the Hines charge, the defense presented NOPD criminalist Daniel Waguespack's testimony that Floyd was excluded from the blood and hair discovered at Hines' residence. (The hair from the Hines scene has since been lost, preventing DNA testing. It appears this was part of the evidence destroyed during Hurricane Katrina in 2005, after Detective Dillmann took the police files to use in writing a book about, *inter alia*, the investigation, as discussed *infra*.) For the Robinson charge, the defense presented: NOPD criminalist Alan Sison's testimony, discussed *infra*, that the blood and seminal fluid from the Robinson scene were not attributable to Floyd; testimony from Patricia Daniels, the Parish of Orleans coroner's office's medical technologist, that Floyd was excluded from all seminal fluid discovered in Robinson's body; and the Fairmont's security guard's testimony that she repeatedly attempted to report seeing a black male running from the hotel on the night of the murder. For both charges, the defense presented: Floyd's testimony his confessions were untrue and a result of Detective Dillmann's "beating" him during the interrogation; and testimony by Dr. Marvin Miller about Floyd's susceptibility to coercion.

In short, the State did not present any physical evidence linking Floyd to Hines' murder. Rather, Detective Dillmann testified the evidence of the glasses

of whiskey discovered in Hines' apartment (as discussed *supra*, the detective erroneously testified the glasses were discovered "on each side of the bed"; instead, the crime-scene technician's report demonstrates one glass was found in the kitchen, where the whiskey bottle was located, and one glass was found in the bedroom), the placement of clothing in his residence, and the position of Hines' body corroborated "perfectly" the descriptions in Floyd's confession, and supported its credibility. For example, the detective testified: Floyd's statement in his confession that "[w]e were both drinking" was consistent with the fact that investigators "found two drinking glasses in the bedroom of the apartment"; and Floyd's descriptions in his confession of Hines' falling "on the floor next to the bed" after he stabbed him, corroborated the "position of the body where it fell off the bed".

And, as noted, Edwards testified about Floyd's incriminatory threats to him. The trial judge found Floyd's incriminating statements, including in his confession, sufficient to support his guilt for Hines' murder, and convicted him of second-degree murder.

Analogous to the Hines charge, the State did not present any physical evidence linking Floyd to Robinson's murder. To support his guilt, the State presented evidence of Floyd's confession, and of the incriminating statements linking him to that murder.

The defense presented physical evidence to contradict Floyd's confession to murdering Robinson after sexual relations. NOPD Criminalist Alan Sison testified the seminal fluid discovered in Robinson's hotel room was attributable to an individual with type-

A blood; medical technologist Daniels, the seminal fluid found in Robinson's body was also attributable to an individual with type-A blood. Floyd, however, has type-B blood; Robinson had type-O. Further, Sison testified the black person's hair discovered in the blue-knit cap, found in the hallway relatively near Robinson's body, was "dissimilar" to Floyd's long blonde hair.

Obviously, there was more exculpatory evidence to present for Robinson's murder than for Hines', in part because Hines' body was not discovered until at least 24 hours after his death. Although Floyd contemporaneously confessed to murdering Hines and Robinson, and investigators presumed the same perpetrator committed both crimes, the trial judge found Floyd's confession and alleged incriminating statements insufficient to support his guilt for the Robinson murder.

After Floyd was found guilty of Hines' murder, but simultaneously acquitted of Robinson's, he was sentenced to life imprisonment without parole. The Supreme Court of Louisiana affirmed his conviction and sentence. *State v. Floyd*, 435 So. 2d 992 (La. 1983).

From 1983 until 2006, Floyd wrote numerous letters to individuals and organizations, asserting his innocence. In 2006, 23 years after his conviction was affirmed by the Supreme Court of Louisiana, the Innocence Project of New Orleans (IPNO) assisted Floyd in filing his first state-court application for post-conviction relief. It was supported by newly-discovered evidence, including: pre-trial fingerprint-comparison results from the Hines scene marked "NOT JOHN FLOYD" and "NOT VICTIM"; pre-trial fingerprint-comparison results from the Robinson scene listed

"NOT DAVID HENNESSEY", "NOT VICTIM", and "NOT JOHN FLOYD"; post-trial DNA-test results from hair discovered at that scene; Clegg's post-trial affidavit, stating Detective Dillmann misrepresented Clegg's pre-trial statement that Hines had a distinct sexual preference for black males (the Clegg statement); Detective Dillmann's post-conviction statements, including the statement in his 1989 book, *Blood Warning: The True Story of the New Orleans Slasher*, that he showed Floyd "two of the grisliest shots" in an attempt to "crack him"; evidence of the detective's subsequent mistreatment of suspects; and Floyd's I.Q. score of 59, discovered through tests not existing at the time of trial.

In 2010, the Criminal District Court for the Parish of Orleans denied relief from the bench, without providing reasons. Likewise, the Supreme Court of Louisiana denied relief in a 4-3 decision, without providing reasons. *Floyd v. Cain*, 62 So. 3d 57 (La. 2011). But, reasons were assigned in a detailed dissent, which opined, *inter alia*, "the exculpatory value of the fingerprint evidence is sufficient to undermine confidence in the outcome of Floyd's trial, thus satisfying the requirements for a new trial set forth in *Brady*". *Id*. at 59. (Johnson, J., dissenting).

Following the state-court decisions, Floyd filed in 2011 for federal *habeas* relief under 28 U.S.C. § 2254, maintaining, *inter alia*, the State withheld favorable, material evidence in violation of *Brady*. But, in December 2012, the district court adopted the magistrate judge's report and recommendation (R&R) to deny Floyd's petition as untimely under AEDPA.

Floyd's January 2013 motion to alter and amend the decision was considered in the light of the Supreme Court's superseding *McQuiggin v. Perkins* decision. 569 U.S. 383, 386 (2013) (holding AEDPA's time-bar overcome by a valid actual-innocence claim). To overcome the time-bar, Floyd presented such a claim: in the light of newly-discovered exculpatory evidence related to the Hines and Robinson murders, he was actually innocent of murdering Hines. The district court vacated the denial and remanded the petition to the magistrate judge for a R&R in the light of *McQuiggin*.

The magistrate judge's resulting R&R recommended: Floyd failed to meet his burden to demonstrate actual innocence; and, accordingly, his petition should be dismissed with prejudice, without considering the merits of his constitutional claims. *Floyd v. Cain*, 2016 WL 4799093, at *26 (E.D. La. 14 Sept. 2016). But, in a 67-page opinion providing an exhaustive analysis of Floyd's actual-innocence claim, the district court concluded that, in the light of the newly-discovered evidence, "any reasonable, properly instructed juror, evaluating this case with the requisite caution and care, would reasonably doubt Floyd's guilt of the murder of William Hines". *Id*. Having concluded that Floyd had overcome the time-bar, the court remanded the petition to the magistrate judge for a R&R on the merits. *Id*.

Regarding Floyd's constitutional claims, the subsequent R&R recommended granting Floyd's *Brady* claim. *Floyd v. Vannoy*, 2017 WL 1837676, at *4 (E.D. La. 8 May 2017). In a 33-page opinion, the district court approved and adopted the R&R, but added

additional reasons for the decision. *Id*. at *1. For example, although the R&R did not find it necessary to consider Clegg's affidavit and his pre-trial statement in the light of the fingerprint-comparison results' being sufficient to support Floyd's *Brady* claim, the district court opinion considered them to conclude Clegg's statement to Detective Dillmann was additional *Brady* material. *Id*. at *12–16.

The two district-court opinions, totaling 100 pages, provide far greater, and much more graphic, factual detail than does this opinion. As with its decision regarding the time-bar, the district court's merits opinion provides an exhaustive analysis of Floyd's *Brady* claims and the unreasonableness of the state courts' contrary decisions. *Id*. at *5–16. In granting relief, the court concluded: the State withheld favorable, material evidence in violation of *Brady* (the fingerprint-comparison results from the Hines scene and the Clegg statement); and the state-court decisions denying relief were an unreasonable application of clearly-established federal law. *Id.* at *16. Accordingly, Floyd was awarded *habeas* relief, with the State's being ordered to retry, or release, him within 120 days of the decision. *Id*. The district court stayed its order, pending resolution of this appeal. *Floyd v. Vannoy*, 2017 WL 2688082, at *2–4 (E.D. La. 22 June 2017).

II.

"In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo*." *Lewis v. Thaler*, 701 F.3d 783, 787 (5th Cir. 2012) (quoting *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004)). The State claims: Floyd failed to meet the necessary actual-innocence burden to

overcome the time-bar for his *habeas* application; and, in the alternative, the state-court denials of post-conviction relief were, pursuant to AEDPA, neither "contrary to", nor "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". 28 U.S.C. § 2254(d)(1).

Accordingly, our review encompasses three legal standards. First, actual innocence is established through demonstrating that, in the light of newly-discovered evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt". *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also McQuiggin*, 569 U.S. at 399. Second, *Brady* is violated when: the State suppresses evidence; that is favorable to his defense; and material to guilt or punishment. *E.g.*, *Brady*, 373 U.S. at 87. And third, a state-court decision is an unreasonable application of clearly-established federal law only if fairminded jurists could not disagree that the decision was inconsistent with Supreme Court precedent. *E.g.*, *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

A.

Floyd filed for state post-conviction relief in March 2006, over 23 years after his conviction became final, and contrary to AEDPA's requiring seeking such relief within one-year of the conviction. 28 U.S.C. § 2244(d)(1). Moreover, where, as here, the conviction preceded AEDPA's 26 April 1996 enactment, the limitations period expired one-year from that date. *Flanagan v. Johnson*, 154 F.3d 196, 200 (5th Cir. 1998) (citing *United States v. Flores*, 135 F.3d 1000, 1006 (5th Cir. 1998)).

Nonetheless, in the "extraordinary case", *McQuiggin*, 569 U.S. at 393 (quoting *Schlup*, 513 U.S. at 324), in which a prisoner asserts a "credible showing of actual innocence", he may overcome the time-bar, and have his claims considered on the merits, *id.* at 392; *House v. Bell*, 547 U.S. 518, 537 (2006); *Schlup*, 513 U.S. at 316. In that regard, the district court concluded: Floyd's actual-innocence claim was valid; and, accordingly, his petition was not time-barred. *Floyd*, 2016 WL 4799093, at *26.

Of considerable note, in its reply brief on appeal, the State does not expressly challenge Floyd's innocence. Instead, it has offered him two pleas during the pendency of his federal *habeas* application, and concedes "it does not take issue with Floyd being permanently released from custody". The State also concedes it challenges the actual-innocence ruling only because of the precedent it sets. (A strong argument can be made that, for the actual-innocence ruling, the State's concessions constitute judicial estoppel, precluding its being challenged.)

In any event, the "fundamental miscarriage of justice exception" permits prisoners with an otherwise untimely application to pursue their constitutional claims. *McQuiggin*, 569 U.S. at 392–93. This exception's demanding standard requires "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error". *Id*. at 401 (quoting *Schlup*, 513 U.S. at 316). The standard is seldom met. *House*, 547 U.S. at 538 (citing *Schlup*, 513 U.S. at 327).

An actual-innocence claim is only established when it is shown that, in the light of newly-discovered evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt". *Schlup*, 513 U.S. at 327; *see also McQuiggin*, 569 U.S. at 399. Therefore, a credible 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". *Schlup*, 513 U.S. at 324. Actual innocence is then demonstrated only when the court scrutinizes the likely impact on reasonable jurors of "the overall, newly supplemented record", *House*, 547 U.S. at 538, to conclude that, in the light of all evidence—both the evidence presented at trial and that newly discovered—"no juror, acting reasonably, would have voted to find [petitioner] guilty beyond a reasonable doubt", *McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). As re-stated in *McQuiggin*, the court must conclude "it is more likely than not that no reasonable juror would have convicted [the petitioner]". *Id*. at 395 (quoting *Schlup*, 513 U.S. at 329) (alteration in original).

Our court does not consider *habeas* relief based on "freestanding claims of actual innocence". *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). Instead, a successful actual-innocence claim provides a "gateway" for the petitioner to proceed on the merits. *House*, 547 U.S. at 536. (Therefore, as also discussed at length in the dissent at 1–2, Floyd's successful actual-innocence claim permits our considering the merits of his constitutional claim: the State withheld favorable, material evidence, in violation of *Brady*. *McQuiggin*, 569 U.S. at 386. And, for review of the *Brady* claim and

the concomitant AEDPA unreasonableness standard for that claim, a great deal of the newly-discovered evidence and the withheld evidence overlaps.)

To establish actual innocence, Floyd presents substantial exculpatory evidence related to both murders. As discussed *supra*, although he confessed to murdering Hines and Robinson, he was convicted solely of Hines' murder. Therefore, his *habeas* petition centers on that conviction. But, the district court concluded, and we agree, that, because Floyd's confessions are intertwined, evidence demonstrating Floyd falsely confessed to murdering Robinson supports his assertions he likewise did so for Hines. *Floyd*, 2016 WL 4799093, at *2. In other words, newly-discovered evidence further and conclusively exculpating Floyd of Robinson's murder—undermining both confessions—is relevant to his actual-innocence claim because it supports Floyd's assertions his confessions were false.

At trial, the State did not present any physical evidence linking Floyd to either murder. His conviction for Hines' murder was based solely on his confession and threat to Edwards. Accordingly, Floyd's actual-innocence claim hinges on whether, in the light of the items he advances as newly-discovered evidence, any reasonable juror could rely solely on the evidence presented at trial—Floyd's confession and threat to Edwards—to find Floyd guilty beyond a reasonable doubt. *McQuiggin*, 569 U.S. at 386 (citing *Schlup*, 513 U.S. at 329).

The claimed newly-discovered evidence is: fingerprint-comparison results of fingerprints lifted from the Hines scene; fingerprint-comparison results and DNA-test results from fingerprints and hair

discovered at the Robinson scene and on his vehicle; Detective Dillmann's misconduct in later interrogations and tests demonstrating Floyd's susceptibility to coercion; and an affidavit from Clegg.

1.

The fingerprint-comparison results exclude Floyd and Hines as contributors of the fingerprints lifted from the whiskey bottle discovered at the Hines crime scene. In 2008, IPNO obtained an envelope containing the fingerprints, and copies of the NOPD logbook chronicling them. The envelope and logbook conveyed that police initially lifted the fingerprints from the Hines scene, performed a fingerprint-comparison test, and logged the fingerprints "NOT VICTIM" and "NOT JOHN FLOYD". Although police possessed this information at the time of trial, it was neither presented as evidence nor disclosed to the defense.

For the requirement that actual-innocence claims be supported by "new reliable evidence", *Schlup*, 513 U.S. at 324, the State's assertion that this fingerprint evidence is not "new", and, therefore, cannot support Floyd's claim, distorts the clear meaning of the *Schlup* standard. *Id*. at 332–33, 339–40. Although the fingerprint-comparison results existed at the time of the joint bench trial, the results were not presented, were withheld from both the prosecution and the defense, and could not, therefore, have affected the trial judge's analysis of Floyd's guilt. Accordingly, because this information was not presented at trial, and remained unknown to the prosecution, defense, and trial judge throughout the trial, it is "new" evidence. *Id.* at 339.

Along that line, the Court, in *McQuiggin*, held no threshold diligence requirement applies to actual-innocence claims; the delay is simply a factor in the court's reliability evaluation. 569 U.S. at 399. Scientific-based evidence, like the fingerprint-comparison results, is less susceptible to manipulation and, therefore, is appropriately considered reliable evidence despite the time lapse. *See id*. at 399–400.

2.

The Robinson DNA-test results and fingerprint-comparison results exclude Floyd and Robinson as the contributors of the hair and fingerprints discovered at the Robinson scene. Parallel to the Hines charge, the State did not present physical evidence linking Floyd to Robinson's murder, and his defense centered on third-party guilt. The newly-discovered evidence of the fingerprint-comparison results exclude Robinson, Hennessey, and Floyd as contributors of the fingerprints lifted from the drinking glasses next to Robinson's bed and the passenger-side door of his vehicle.

Although not presented at trial, police recorded the fingerprint-comparison results of fingerprints lifted from the glasses as belonging to neither Robinson, Hennessey, nor Floyd. Additionally, police labeled the fingerprints lifted from Robinson's vehicle, "NOT . . . DAVID HENNESSEY", "NOT VICTIM", and "NOT JOHN FLOYD". Further, NOPD's initial analysis of hair lifted from Robinson's bed concluded it belonged to a black male other than Robinson; and Floyd presents the post-trial DNA evidence, further excluding him as the source of that hair.

Similar to the earlier-discussed newly-discovered evidence of fingerprint-comparison results from the Hines scene, this evidence meets the "new reliable" *Schlup* standard because: it is scientific-based evidence that is not easily manipulated; was unknown to the defense at the time of the trial; and was not presented at trial. *McQuiggin*, 569 U.S. at 400; *Schlup*, 513 U.S. at 324.

Regarding the requirement that evidence presented at trial must be considered in the light of all newly-discovered evidence, *House*, 547 U.S. at 538, any evidence exculpating Floyd of Robinson's murder—undermining his confession—supports his assertion he falsely confessed to, and is actually innocent of, Hines'. Floyd confessed to killing Robinson after having sexual relations with him. The physical evidence presented at trial by the defense, however, refuted Floyd's confession, and demonstrated a likelihood Robinson was killed by a black male with type-A blood. Floyd's newly-discovered evidence regarding Robinson further excludes him from the Robinson scene, invalidates his confession, and links a third party to that scene.

At trial, no physical evidence was presented to contradict Floyd's confession about Hines. Detective Dillmann testified the evidence discovered at the Hines scene corroborated Floyd's statements, and proved his confession credible. Specifically, the detective testified the evidence of the "glasses filled with a liquid on each side of the bed" corroborated Floyd's confession to drinking with Hines before killing him.

But, as discussed *supra*, the testimony about the location of the glasses is incorrect; one was found in Hines' bedroom and one in his kitchen, where the

whiskey bottle was found. According to the detective's testimony, these glasses were one of the three details proving Floyd's confession credible. Again, however, his testimony was incorrect regarding the location of the glasses: one of the glasses, which Detective Dillmann testified corroborated Floyd's statement that he and Hines had been drinking together, was found not by the bed, but in the kitchen with the whiskey bottle, which had partial prints from neither Floyd nor Hines but a third party.

The newly-discovered evidence of the fingerprint-comparison results from the whiskey bottle in Hines' residence could be found by a reasonable juror to refute Floyd's confession, link a third-party to the crime scene, and impeach the detective's testimony. (Although the dissent at 4 states the murder scene excluded the kitchen, investigators considered Hines' entire apartment in their crime-scene investigation. Moreover, police selected multiple items from the kitchen to dust for prints, and Detective Dillmann testified about the importance of the evidence of "two highball glasses filled with a liquid". Again, one of the glasses, according to the State and the crime scene technician's report, was discovered in Hines' kitchen.)

Confessions are generally considered strong evidence of guilt, and a sound confession alone may significantly influence a juror's decision. *Murray v. Earle*, 405 F.3d 278, 295 (5th Cir. 2005). "Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone." *Id*. Nonetheless, the credibility of Floyd's confession must be evaluated in the light of the newly-discovered evidence excluding the possibility

Floyd committed the crimes to which he confessed. *McQuiggin*, 569 U.S. at 386 (citing *Schlup*, 513 U.S. at 329). It follows that, in the light of this newly-discovered contradictory physical evidence, it is more than likely a reasonable, informed juror would reasonably doubt the credibility of Floyd's confessions.

3.

Floyd testified at trial that Detective Dillmann "slapp[ed] [him] on the side of the head"; "hit [him] a bunch of times"; "kick[ed] [him] on the side of the head with his boots" and "threatened to put [his] head through the brick wall and throw [him] out through the window". He further testified he immediately began agreeing to anything the detective asked of him after the detective told him that he "could kill [Floyd] and get by with it".

In that regard, Floyd asserts newly-discovered evidence of, *inter alia*, the detective's abuse during an interrogation for a crime after the Hines and Robinson murders, his later admissions to showing Floyd crime-scene photographs, and Dr. Gregory DeClue's related examination, discussed *infra*, undermine the validity of Floyd's confession, in support of his actual-innocence claim.

Floyd presents newly-discovered evidence of the detective's subsequent mistreatment of suspects. In *State v. Seward*, the Supreme Court of Louisiana ruled a confession coerced, finding the State failed to prove the defendant was not beaten during an interrogation led by Detective Dillmann. 509 So. 2d 413, 415–18 (La. 1987). The suspect testified to similar descriptions of

being hit in the head, kicked, and forced to the floor during the interrogation. *Id*. at 415.

Further, at trial, the State asserted Floyd's detailed descriptions of both crimes proved his confessions credible. Now, Floyd asserts newly-discovered evidence of Detective Dillmann's subsequently published 1989 book, *Blood Warning: The True Story of the New Orleans Slasher*, in which the detective describes showing Floyd "two of the grisliest shots" of the Hines crime scene in an effort to "crack him".

Along that line, the State asserted at trial that the credibility of Floyd's confessions was demonstrated through his volunteering specific crime-scene details. These assertions are severely weakened by evidence that, during the interrogation, detectives provided Floyd with significant details about the crime scenes. Notably, 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.

Additionally, evidence of forensic psychologist Dr. DeClue's 2009 examination of Floyd, employing methods not available at the time of trial, found Floyd had an I.Q. of 59 and communication skills of a "second or third grade[r]", rendering him "extremely vulnerable" to police coercion.

The credibility of Floyd's confessions, and his trial testimony he was coerced by Detective Dillmann, are appropriately considered in the light of the newly-discovered evidence of: the detective's conduct during a subsequent interrogation; Floyd's observing photographs of the crime scene; and Dr. DeClue's

findings regarding Floyd's susceptibility to coercion. *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327). Although jurors are likely to find confessions compelling, our court must make a "probabilistic determination" of the hypothetical jurors' opinions of the newly-discovered evidence, and voluntariness of Floyd's confession. *Id.* (quoting *Schlup*, 513 U.S. at 329). Considering the evidence as a whole, it is likely a reasonable juror would doubt Floyd's confession was "freely and voluntarily made", *State v. Trudell*, 350 So. 2d 658, 661 (La. 1977), and, therefore, lacked credibility to alone establish his guilt beyond a reasonable doubt, *House*, 547 U.S. at 538.

4.

The final newly-discovered evidence is presented through Clegg's 2008 affidavit. According to Floyd, it undermines his guilt and casts doubt on Detective Dillmann's investigative practices. At trial, the State supported Floyd's guilt with the detective's testimony that Clegg, a friend of Hines', stated Hines "frequently had sexual relations with both black and white males". But, in his 2008 affidavit, Clegg maintained: Hines' preference was for black males; pre-trial, he informed the detective of that preference; and Clegg was "very surprised" when Floyd (a white male) was arrested.

Regarding our court's considering only "new reliable evidence" to support a claim of actual innocence, *Schlup*, 513 U.S. at 324, Clegg asserts in his affidavit that the detective manipulated Clegg's initial statements. He was a close friend of Hines' and has no apparent connection to Floyd. The reliability of this new evidence is strengthened by the unlikelihood Clegg, a friend of the murder victim, would falsely

assert a particular defendant did not fit the profile of the likely killer, in order to support the defendant's innocence. *House*, 547 U.S. at 551 (ruling witness' disinterest in aiding defendant supports credibility of post-conviction testimony). Further, reliability is not affected by the passage of time as Clegg has neither died, nor otherwise become unavailable for further questioning. *E.g.*, *McQuiggin*, 569 U.S. at 399–400 & n.4.

The likely impact on reasonable jurors of Clegg's pre-trial statements, as presented at trial by the detective, is considered with the newly-discovered evidence of Clegg's contradictory affidavit. *Id.* at 386. It is more than likely the evidence of the detective's testimony, asserting a possibility Floyd's profile aligned with that of men with whom Hines frequently had sexual relations, would have little persuasive value in the light of Clegg's pre-trial statement that he understood his friend to have a distinct preference for black males. In other words, in the light of the newly-discovered evidence through Clegg's affidavit, no reasonable juror would have relied upon Clegg's pre-trial statement—that Floyd did not fit the likely profile of the perpetrator—to adequately support Floyd's guilt.

Additionally, a statement from the victim's friend, asserting the defendant did not fit the profile of the likely killer, would more than likely affect a reasonable juror's analysis of Floyd's guilt. In the light of the newly-discovered evidence of the detective's alleged misrepresentations, Clegg's stating Hines' preference for black males casts doubt on Floyd's guilt, and supports his third-party-guilt defense.

In sum, for the actual-innocence claim, Floyd's guilt was contingent solely on his confession and alleged threat to Edwards. And, the persuasive impact of Floyd's confessions must be scrutinized in the light of all the evidence, presented at trial and new. *Id.* at 386 (citing *Schlup*, 513 U.S. at 329). Floyd overcomes the time-bar if, in the light of the newly-discovered evidence, no reasonable juror would determine the confession and alleged threat to Edwards were sufficient to establish Floyd's guilt beyond a reasonable doubt. *Id*. at 395 (citing *Schlup*, 513 U.S. at 329).

In the light of the newly-discovered evidence of: the fingerprint-comparison analysis excluding Floyd from the Hines scene; the Robinson-related fingerprint-comparison results and DNA tests further discounting Floyd's confession; Detective Dillmann's improper interrogation techniques; Floyd's vulnerability to coercion; and Clegg's affidavit maintaining Floyd did not fit the likely profile of the perpetrator, no reasonable juror would find Floyd's confession and Edwards' testimony about a threat sufficient to support Floyd's guilt beyond a reasonable doubt. Re-stated, because, in the light of the newly-discovered evidence, no reasonable juror, considering the record as a whole, would vote to convict Floyd of Hines' murder, Floyd's actual-innocence claim is sufficient to overcome the untimeliness of his *habeas* application. *Id*. at 386.

B.

Having opened the "actual innocence" gateway, we proceed now to consider the merits of Floyd's *Brady* claim. *See Herrera v. Collins*, 506 U.S. 390, 404 (1993) (holding that "actual innocence" is not a freestanding constitutional claim but a gateway to assert otherwise

barred claims). "[T]he only question that matters under § 2254(d)(1) [is] whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). Because our own *de novo* view of the correctness—or incorrectness—of the state court's decision is a distinct question, *see Richter*, 562 U.S. at 101 (emphasizing that correctness and reasonableness are different questions); *Williams v. Taylor*, 529 U.S. 362, 410 (2000) ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law."), "we do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief," *Lockyer*, 538 U.S. at 71. We conclude that it does not.

A state prisoner seeking federal *habeas* relief pursuant to 28 U.S.C. § 2254 carries the heavy burden of demonstrating entitlement to that relief. *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir. 2009); *Lockett v. Anderson*, 230 F.3d 695, 707 (5th Cir. 2000); *Orman v. Cain*, 228 F.3d 616, 619 (5th Cir. 2000). Prior to Floyd's seeking such relief, state-court post-conviction relief was denied by both the Criminal District Court for the Parish of Orleans, and the Supreme Court of Louisiana. *Floyd*, 62 So. 3d at 57. In granting relief, the district court concluded: the State withheld material evidence in violation of *Brady*, and the state-court contrary decisions were an unreasonable application of clearly-established federal law. *Floyd*, 2017 WL 1837676, at *16. In reviewing *de novo* the district court's granting relief, we "apply[] the same standards to the state court's decision[s] as did the district court".

Lewis, 701 F.3d at 787 (quoting *Busby*, 359 F.3d at 713).

When reviewing, as here, the reasonableness of an unexplained state-court decision, our court applies the "look-through" presumption to examine the last reasoned state-court decision, with the presumption that all later unexplained (unreasoned) decisions "rest upon the same ground". *Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (2015) (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)). But, as discussed *supra*, in this instance the two state-court denials are unexplained. Therefore, because there is *no* reasoned state-court opinion, our court must hypothesize the reasons or theories that could have supported the denial of relief. *Id.* (citing *Richter*, 562 U.S. at 98.) AEDPA's standards control the review of the state-court decision where, as here, the petition was filed after its effective date. *Williams v. Taylor*, 529 U.S. 362, 402 (2000). Under AEDPA, federal *habeas* applications centered on claims "adjudicated on the merits in State court proceedings" are denied unless the adjudication: (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 presented in the State court proceeding". 28 U.S.C. § 2254(d). Because *Brady* claims involve mixed questions of law and fact, § 2254(d)(1), instead of subpart (d)(2), is applied. *DiLosa v. Cain*, 279 F.3d 259, 262 n.2 (5th Cir. 2002) (citing *Trevino v. Johnson*, 168 F.3d 173, 184 (5th Cir. 1999)).

The Criminal District Court for the Parish of Orleans denied, without reasons, Floyd's petition from the bench; similarly, the Supreme Court of Louisiana provided no explanation for its denial. *Floyd*, 62 So. 3d 57 (denial of Floyd's writ application in a 4-3 vote without assigning reasons). The only state-court reasoning available on review is the dissent from the state-supreme-court denial, with the dissent's stating Floyd was entitled to a new trial because the fingerprint evidence "undermine[s] confidence in the outcome of Floyd's trial". *Id*. at 60.

In any event, "[28 U.S.C.] § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been adjudicated on the merits". *Richter*, 562 U.S. at 100 (internal quotation omitted). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication[,] or state-law procedural principles[,] to the contrary". *Id*. at 99. Therefore, where, as here, the state-court denial has no explanation, we review the "ultimate decision" for reasonableness. *Charles v. Thaler*, 629 F.3d 494, 501 (5th Cir. 2011) (quoting *Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (en banc)).

The state court's "adjudication of the claim result[s] 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", 28 U.S.C. § 2254(d)(1), when: it "reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or . . . it reaches a different conclusion than the Supreme Court based on

materially indistinguishable facts", *Miller v. Dretke*, 404 F.3d 908, 913 (5th Cir. 2005).

Because the state courts provided no explanation for their denial of post-conviction relief, we must hypothesize the reasons that supported, or could have supported, the denial consistent with Supreme Court precedent. *Richter*, 562 U.S. at 98, 102. The decision is an "unreasonable application" under 28 U.S.C. § 2254(d) only if, after this hypothetical inquiry, we determine there was no reasonable basis for it. *Id.* at 98, 101.

Under *Brady* and its progeny, due process requires that the prosecution disclose evidence that is both favorable to the defendant and material to guilt or punishment. 373 U.S. at 87. This duty to disclose exists irrespective of a request from the defense, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and extends to all evidence known not just to the prosecutors, but "to the others acting on the government's behalf in the case, including the police", *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The district court concluded that the fingerprint-comparison results from the Hines scene, fingerprint-comparison results from the Robinson scene, and Clegg's pre-trial statement all satisfied *Brady*'s three requirements of suppression, favorability, and materiality. Our task now is to determine whether there is any reasonable theory, consistent with clearly established federal law as determined by the Supreme Court, to support the state courts' conclusions to the contrary. Because the materiality of "suppressed evidence [is] considered collectively, not item by item", *Kyles*, 514 U.S. at 436, we first separately consider *Brady*'s requirements of

suppression and favorability with respect to the fingerprint-comparison results and the Clegg statement before collectively considering their materiality.

1.

Floyd's first *Brady* claim stems from the State's failure to disclose the fingerprint-comparison results. Prior to trial, the State disclosed police and crime-scene reports related to the two murders. Additionally, the State proffered a partial list of the evidence seized from each scene. As discussed *supra*, the crime-scene technician report for Hines' murder established an NOPD evidence technician dusted for fingerprints the whiskey bottles, the whiskey glass from the kitchen table, and the whiskey glass from the night table in the bedroom, but simply listed the fingerprints as "Laboratory-Exam – No". Likewise, the crime-scene technician report for the Robinson murder established an NOPD evidence technician dusted for prints: a drinking glass containing alcohol on each of the nightstands in Robinson's hotel room; the passenger side of his vehicle; and a glass, a cup, and a whiskey bottle inside the vehicle. Like the fingerprints lifted from the Hines scene, these fingerprints were marked "Laboratory-Exam – No".

However, the State did not disclose the logbook noting Floyd was excluded from the fingerprints collected from both crime scenes, the envelope registering the lifted fingerprints from the Hines scene as "NOT VICTIM" and "NOT JOHN FLOYD", and the envelope registering the lifted fingerprints from the Robinson scene as "NOT VICTIM", "NOT JOHN FLOYD", and "NOT . . . DAVID HENNESSEY".

a.

First, we find no reasonable theory to support the conclusion that the evidence at issue was properly disclosed. *Brady* requires the prosecution disclose evidence when it is "of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request". *Agurs*, 427 U.S. at 110. The State's assertion the fingerprint-comparison results were effectively disclosed through the crime-scene report and list of evidence distorts *Brady*'s requiring prosecutors to offer exculpatory evidence absent a specific request by the defense. *E.g.*, *id.* Floyd's *Brady* claim does not stem from the fingerprints themselves, but from the *results* of the State's fingerprint-comparison test.

The State does not demonstrate compliance with *Brady*'s disclosure requirement by asserting a possibility Floyd could deduce that, based on the general evidence provided to him, additional evidence likely existed. *E.g.*, *Starns v. Andrews*, 524 F.3d 612, 619 (5th Cir. 2008). To the contrary, the State's nondisclosure may have reasonably led the defense to conclude no additional evidence existed. *United States v. Bagley*, 473 U.S. 667, 682–83 (1985). Further, the State's assertions the evidence was not withheld because Floyd could have conducted his own analysis are in direct contrast to clearly-established *Brady* law rejecting the defense's ability to conduct their own analysis as justification for prosecutorial non-disclosure. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (holding "a rule thus declaring 'prosecutor may hide, defendant must seek', is not tenable in a system constitutionally bound to accord defendants due

process"). Consequently, the state court could not have reasonably relied on that theory to find the evidence was not suppressed.

b.

As for *Brady*'s favorability prong, it would be an unreasonable application of *Brady* and its progeny to conclude that the withheld evidence was not favorable. It was favorable because it supported Floyd's third-party-guilt defense, and impeached Detective Dillmann's testimony that the "two highball glasses filled with a liquid on each side of [Hines'] bed" corroborated the details of Floyd's confession. (As noted repeatedly, the detective erroneously stated the glasses were found in the bedroom; instead, one was found in the bedroom and one was found in the kitchen, where the whiskey bottle was also located.)

"[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Kyles*, 514 U.S. at 439. Supreme Court precedent defines evidence tending to strengthen a defense as favorable evidence under *Brady*. *Cone v. Bell*, 556 U.S. 449, 470 (2009). And, again, the Court has held evidence impeaching a prosecution witness is favorable *Brady* evidence. *Bagley*, 473 U.S. at 676. Any reason to support a conclusion the evidence was not favorable to Floyd is contrary to Court precedent, and, therefore, an unreasonable application of clearly-established federal law. For example, the *Kyles* Court in 1995 held a withheld list of license-plate numbers, which excluded defendant's vehicle from the crime scene—interestingly, the investigation was led by Detective

Dillmann—was exculpatory and impeachment evidence. 514 U.S. at 450.

> On the police's assumption, argued to the jury, that the killer drove to the lot and left his car [at the crime scene] during the heat of the investigation, the list without [defendant's] registration would obviously have helped [defendant] and would have had some value in countering an argument by the prosecution that a grainy enlargement of a photograph of the crime scene showed [defendant's] car in the background.

Id. Likewise, 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. *Id*. Because, in the context of the detective's testimony, this evidence is favorable for impeaching the prosecution's witness, it would be unreasonable to conclude that it is anything other than favorable under *Brady*. *Bagley*, 473 U.S. at 676 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

Along that line, and as the dissent maintains at 4–5, the state court could have concluded that the withheld fingerprint-comparison results from the Hines scene do not impeach Detective Dillmann's testimony because he did not testify that the whiskey bottle, from which the prints were lifted, corroborated Floyd's confession. But that conclusion would be an unreasonable application of Supreme Court law.

First, the Court has been clear that favorability depends on context. The detective testified that the whiskey glasses found at the Hines scene—one of which was actually found in the kitchen, as was the whiskey bottle—corroborated Floyd's statement that the two were drinking together. Evidence that a third person—neither Floyd nor Hines—touched the whiskey bottle undermines Detective Dillmann's testimony that the confession was credible based on Floyd's statement that he and Hines were drinking together. Second, although the detective did not specifically reference the whiskey bottle, to conclude that that negates the favorability of the fingerprint-comparison results "confuses the weight of the evidence with its favorable tendency". *Kyles*, 514 U.S. at 450.

The dissent also asserts at 5–6 that the state court could reasonably have concluded that the fingerprints lifted from the whiskey bottle were only neutral evidence. We disagree. The presence of a third party's fingerprints at a crime scene does not itself prove Floyd was not present; but, it is 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 Dillmann's testimony. *See id*. (holding that a list of cars at the crime scene that did not include the defendant's car "would obviously have helped" the defendant in countering investigator's assumption, argued to the jury, that the killer had driven to the scene and left his car there). Furthermore, although 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. *See id.*

at 434 ("[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ."). Accordingly, no reasonable theory supports the conclusion that the fingerprint-comparison results were not favorable.

2.

Floyd's second claimed *Brady* violation stems from Clegg's 2008 affidavit. The detective reported and testified that Clegg stated Hines "frequently had sexual relations with both black and white males". But, in his 2008 affidavit, Clegg maintained that "Bill[] [Hines'] taste was for black men"; he knew "Bill's taste was for black men"; he "saw Bill with black men on several occasions"; "Bill was often attracted to rough-looking black men"; that he had advised the detective that Hines preferred black men; and that the detective's report misrepresented his statements. (Although the dissent at 8–10 considers this affidavit in its analysis of the reasonableness of the state courts' application of *Brady*, only Clegg's pre-trial statement to Detective Dillmann, as presented in Clegg's post-trial affidavit, not his entire affidavit, is properly considered favorable, material evidence withheld by the prosecution in violation of *Brady*. In short, and contrary to the dissent's contention at 10 that we "cherry-pick[ed] certain sentences from Clegg's affidavit", it is only those portions of Clegg's statement, as contained in the affidavit, that are favorable to impeach the detective's testimony that are relevant to our *Brady* analysis.)

a.

As with the fingerprint-comparison results, the State's assertions the Clegg statement was not suppressed is also counter to the Court's *Banks* decision. *Id*. The State contends the Clegg statement was effectively disclosed through the detective's report's naming Thomas Bloodworth as a reporting witness; Bloodworth identified Clegg and advised the detective to speak with him. The State claims the Clegg statement was effectively disclosed because "a reasonably diligent defense attorney would have similarly interviewed Bloodworth and, through him, learned of Clegg" and interviewed him. As discussed *supra*, the prosecutor's *Brady* duty is not absolved through asserting various opportunities available for the defense to have uncovered the evidence. *Banks*, 540 U.S. at 696. Therefore, the state court was presented with no reasonable theory for concluding the State did not withhold the Clegg statement; nor were we presented with any; nor do we perceive any.

b.

In addition, it would be unreasonable to conclude that the Clegg statement is not favorable. Under clearly-established Supreme Court precedent, evidence that could have been used to impeach a witness's testimony is favorable. *Strickler*, 527 U.S. at 281–82. Clegg's statement, that Hines' sexual preference was for black males, could have been used to impeach Detective Dillmann's testimony that he "had learned that Mr. Hines' sexual preferences was not to any one race". (The dissent at 8 asserts Detective Dillmann's testimony "suggests he relied on more than just one person" for his determinations regarding Hines' sexual

preferences. Nonetheless, regarding Hines' sexual preferences, the detective's report, in the record for this *habeas* proceeding, states only that "Mr. Clegg stated that to his knowledge the victim was homosexual and frequently had sexual relations with both black and white males".) Any assertion that Clegg's knowledge of Hines' sexual preferences may not have been exhaustive again would go to weight, not favorability.

The Clegg statement is also favorable evidence because 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". *Kyles*, 514 U.S. at 445; *accord id.* at 446 ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation" (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986))). Moreover, the Clegg statement could have been used to impeach Detective Dillmann's testimony that, despite the fact that only hairs from a black person had been found at the Hines scene, he did not "under the circumstances" think that investigators "ought to be looking for a black" male because he "had learned that [] Hines' sexual preference was not to any one race". No reasonable theory supports the conclusion that the Clegg statement was not favorable.

3.

For the final prong, we consider whether any reasonable theory could have supported a conclusion that the withheld evidence was collectively immaterial. *Kyles*, 514 U.S. at 436. The materiality of Brady

evidence is *not* considered in the light of the probability of acquittal. *Bagley*, 473 U.S. at 680; *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) ("To prevail on his *Brady* claim, Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted."). Rather, evidence is understandably material under *Brady* where it simply demonstrates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (quoting *Strickler*, 527 U.S. at 280). A reasonable probability is a likelihood sufficient to "undermine confidence in the outcome", *Bagley*, 473 U.S. at 682 (quoting *Strickland*, 466 U.S. at 694). Accordingly, withheld evidence is more likely material when the State presents a weaker case for guilt, *e.g.*, *Smith v. Cain*, 565 U.S. 73, 76 (2012) (eyewitness "testimony was the *only* evidence linking [the petitioner] to the crime", and, therefore, the undisclosed statements contradicting this testimony were "plainly material"); *Agurs*, 427 U.S. at 113 ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

Floyd was indicted for the second-degree murder of Hines and Robinson. In the joint trial, Floyd's incriminating statements (confession and threat to Edwards) were the only evidence presented to support his guilt for Hines' murder. And, that evidence was contradicted by the suppressed evidence at issue, analogous to the evidence at issue in *Cain*. 565 U.S. at 76.

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. The fingerprint-comparison evidence contradicts the physical evidence purported to corroborate Floyd's confessions to each murder, such as the glasses containing whiskey being on each side of Robinson's bed, undermining "confidence in the verdict". *Kyles*, 514 U.S. at 435. Likewise, the Clegg statement impeaches the detective's testimony that Hines' sexual preference was for black and white males, and further challenges the credibility of Floyd's confession. In the light of the entire case, the fingerprint-comparison results and the Clegg statement significantly impact the only evidence supporting Floyd's guilt (his incriminating statements, including, most especially, his confession), rendering it material under *Brady*. *Id.* In other words, the fingerprint-comparison results and the Clegg statement create a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different". *Id.* at 433 (quoting *Bagley*, 473 U.S. at 682).

Any conclusion to the contrary would be an unreasonable application of Supreme Court law. The state court could have concluded that neither the fingerprint-comparison results nor the Clegg statement conclusively prove Floyd did not commit the Hines murder. But that would constitute an unreasonable application of the Supreme Court's holding that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed

evidence would have resulted ultimately in the defendant's acquittal". *Id.* at 434.

The state court could also have concluded that, despite the withheld evidence, the trial judge could still have convicted Floyd on the basis of his incriminating statements to Edwards. But that, too, would be an unreasonable application of Supreme Court law. "[M]ateriality . . . is not a sufficiency of evidence test." *Id.*

Floyd "need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict". *Id*. at 434–35. Where the proof on which a conviction was based was thin to begin with, the Supreme Court has been clear that withheld evidence undermining that proof is material. *See Wearry*, 136 S. Ct. at 1006; *Cain*, 565 U.S. at 76; *Agurs*, 427 U.S. at 113. In short, while the trial judge *could* have convicted Floyd of the Hines murder on the basis of Floyd's incriminating statement to Edwards, or *could* have continued to credit his confession, there can be "no confidence that [the trial judge] *would* have done so", and that is all that *Brady* requires. *Wearry*, 136 S. Ct. at 1007 (quoting *Cain*, 565 U.S. at 76).

Materiality of the suppressed Hines evidence is further demonstrated by the simultaneous acquittal at the bench trial for Robinson's murder. After considering the exculpatory physical evidence from the Robinson scene, the trial judge found Floyd not guilty of that murder. *Floyd*, 435 So. 2d at 994 (1983). ("[Floyd] was found not guilty of the murder of Robinson (evidence showed that Robinson's assailant had been a black man with Type A blood; Floyd is

white with Type B blood")). Because the trial judge determined the physical evidence rendered Floyd's incriminating statements, including his confession, insufficient to support his guilt for Robinson's murder, there is a "reasonable probability" that, had the similarly favorable physical evidence from the Hines scene been disclosed, "the result of the proceeding would have been different". *Cain*, 565 U.S. at 75 (quoting *Cone*, 556 U.S. at 469–70). Re-stated, there is a "'reasonable probability' that the [trial judge] would have been [similarly] persuaded by the undisclosed evidence" undermining Floyd's Hines confession. *Id.* at 77 (Thomas, J., dissenting) (citing *Bagley*, 473 U.S. at 682).

In the light of the withheld evidence undermining the only evidence supporting Floyd's guilt for Hines' murder, and the trial judge's simultaneously acquitting Floyd of Robinson's murder after considering similar physical evidence excluding Floyd from the Robinson scene, there is no sound theory, considering the record as a whole, to support the conclusion that the evidence of the fingerprint-comparison results and the Clegg statement were not reasonably likely to affect Floyd's trial for Hines' murder. *Id.*; *Kyles*, 514 U.S. at 435. Accordingly, any theory supporting the conclusion that the withheld, favorable evidence was immaterial is an unreasonable application of *Brady*'s materiality standard.

In sum, "fairminded jurists could [*not*] disagree" that the state-court denial of post-conviction relief was contrary to Supreme Court precedent. *Richter*, 562 U.S. at 88. Re-stated, "the state court's application of clearly

established [*Brady*] law was objectively unreasonable". *Williams*, 529 U.S. at 409.

III.

For the foregoing reasons, the judgment is AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

For the first time ever, this court finds a meritorious claim of actual innocence under *McQuiggin v. Perkins*, 569 U.S. 383 (2013). But, given the panel majority's errant analysis under *Brady v. Maryland*, 373 U.S. 83 (1963), I would reverse and deny habeas corpus relief. I therefore respectfully dissent from the cogent and well-intended majority opinion.

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."[1] That "is [a] difficult [standard] to meet . . . [and] it was meant to be."[2] Meeting that standard can become even more unlikely where, as here, a claim is adjudicated on the merits but lacks a written opinion elucidating the state court's reasons. Floyd "can satisfy the 'unreasonable application' prong of [28 U.S.C.] § 2254(d)(1) *only by* showing that 'there was *no reasonable basis*' for the

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[1] *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

[2] *Id.* at 102.

[Louisiana] Supreme Court's decision."[3] "[A] habeas court must determine what arguments or theories supported or, as here, *could have supported*, the state court's decision."[4]

Though the majority recites the appropriate standards, its *Brady* methodology fails to apply them rigorously. Instead, it allows its analysis to become colored by the gateway question of whether Floyd proved actual innocence under *Perkins*. This is one of the rare occasions where we must cope with the tension between a meritorious gateway actual-innocence claim and the strong deference AEDPA accords to a state court's resolution of the underlying constitutional claim—the latter being the only type of claim that can justify relief.[5]

To understand why it is possible to find a petitioner, such as Floyd, "actually innocent" while simultaneously denying him habeas relief, it is important to recognize exactly what an actual-innocence claim is. First, it is a gateway claim. Neither this circuit nor the Supreme Court has recognized a freestanding claim of innocence. Instead, a petitioner can assert actual innocence only

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[3] *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011) (quoting *Richter*, 562 U.S. at 98) (emphasis added).

[4] *Richter*, 562 U.S. at 102 (emphasis added).

[5] *See Perkins*, 569 U.S. at 392 ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence."); *United States v. Fields*, 761 F.3d 443, 479 (5th Cir. 2014) ("[O]ur caselaw does not recognize freestanding actual innocence claims.").

to overcome a procedural bar, such as limitations.[6] After establishing actual innocence, the petitioner must still prove a meritorious constitutional violation while overcoming § 2254's mandated deference. Without a meritorious constitutional violation, an actual-innocence claim is meaningless.

Second, the postures in which we review the actual-innocence claim and the underlying constitutional claim are different. Because an actual-innocence claim is a gateway claim asserted to overcome some procedural barricade, it is a claim that has not been reviewed by a state court and thus is accorded no AEDPA deference. A federal court independently determines whether the *Perkins* standard is met. Conversely, the *Brady* claims here were adjudicated on the merits by the Louisiana Supreme Court and thus are accorded AEDPA deference. We cannot independently determine whether the *Brady* standard is met. Instead, we must add an additional layer and decide whether "'there was *no reasonable basis*' for the [Louisiana] Supreme Court's decision."[7]

Finally, but importantly, when reviewing Floyd's *Brady* claims, we cannot consider much of the new evidence presented in the actual-innocence analysis. Under *Perkins*, we can take into account old and new (reliable) evidence alike. To determine materiality

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[6] *Perkins*, 569 U.S. at 386 (holding that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations").

[7] *Pinholster*, 563 U.S. at 188 (quoting *Richter*, 562 U.S. at 98) (emphasis added).

under *Brady*, however, we can consider only the evidence presented at trial and the suppressed evidence. Thus, new and arguably strong evidence favoring Floyd, such as the fact that he was shown photos of the crime scene, cannot, as a matter of law, color our review of the alleged *Brady* violations.

I commend the majority for rectifying the bifurcation concerns originally raised by my initial dissent. But, even without the initial taint of de novo review, the majority still accords insufficient AEDPA deference to the state court."[C]lear error [does] not suffice" to show an "unreasonable application." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (internal citation and quotation marks omitted).[8] Instead, "'the state court's ruling on the claim being presented in federal court [must be] so lacking in justification that there [is] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103).

When its decision is viewed in the proper light, the state court plainly had a reasonable basis for denying relief under *Brady*. To prove a *Brady* violation, the petitioner must show that the evidence was withheld, favorable, and material.[9] I agree in full with the majority's analysis in regard to suppression. Thus, I

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[8] *See also Williams v. Taylor*, 529 U.S. 362, 410 (2000) ("an *unreasonable* application of federal law is different from an *incorrect* application of federal law").

[9] *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *see also United States v. Sipe*, 388 F.3d 471, 477–78 (5th Cir. 2004).

address only the other two *Brady* prongs, favorability and materiality.

Floyd says that the following evidence is *Brady* material: analysis of fingerprints found on a whiskey bottle in Hines's kitchen; analyses of fingerprints lifted from two drinking glasses in Robinson's hotel room, on the passenger side of Robinson's car, and on a glass, cup, and whiskey bottle in Robinson's car; and John Clegg's statement concerning Hines's sexual preferences. The majority classifies the fingerprint analysis from the whiskey bottle as favorable because the analysis could be used to impeach state witness Detective Dillmann. Of note, neither Floyd nor the district court ever contended that the fingerprint analyses could constitute impeachment evidence. Those analyses, however, could reasonably be viewed as not impeaching Dillmann.

The majority avers that the analysis impeaches Dillmann because he testified that the presence of glasses corroborated Floyd's confession, in which Floyd stated, "We were both drinking." Dillmann, however, never mentioned the whiskey bottle or even whiskey. Instead, he testified only that "there were two highball glasses filled with a liquid on each side of the bed." And, the whiskey bottle was not found at the murder scene[10] but in the kitchen.

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[10] Hines was murdered in his bedroom. No testimony or evidence was provided that indicated he or the murderer ever entered the kitchen. The majority says that "Detective Dillmann testified about the importance of evidence discovered in Hines' kitchen." As with its discussion of the whiskey bottle, the majority again fails to address Dillmann's testimony with precision.

The majority does not address these details with enough precision,[11] so let me emphasize this: The unidentified fingerprints were found on the whiskey bottle, not the highball glasses, and Dillmann never mentioned the "whiskey bottle" or "whiskey" generally. Reviewing with AEDPA deference, it is easy to see that the presence of an unidentified third party's partial prints on a whiskey bottle located in the kitchen could reasonably be interpreted as not impeaching Dillmann's testimony that the presence of glasses in the bedroom (the murder scene) corroborated Floyd's confession that he and Hines shared a drink.[12]

Dillmann never even mentioned the kitchen. The one time the word "kitchen" was used during his examination, it was by Floyd's attorney asking whether Floyd's confession contained any specific details about the layout of the apartment, such as where the bedroom and kitchen were located. Dillmann did not even reply because the court interrupted and asked the attorney to allow Dillmann to finish his testimony on a previous line of questioning.

[11] *See, e.g.*, "Rather, Detective Dillmann testified the evidence of the *glasses of whiskey* discovered in Hines' apartment . . . corroborated 'perfectly' the descriptions in Floyd's confession, and supported its credibility." (emphasis added).

[12] The majority responds by claiming that Dillmann provided "erroneous" testimony, given that he said there were two glasses in the bedroom. The majority points to a tech report that says the tech dusted a glass in the bedroom and a glass in the kitchen. First, the majority has decided, because it fits its narrative, to credit the tech over Dillmann. That is curious because, as the majority admits, the photograph from the kitchen depicts two bottles of whiskey but no whiskey glass (or glasses of any sort). Thus, the glass was not "with the whiskey bottle" as the majority states. Second, it is possible for Dillmann and the tech report both to be accurate, as maybe there were a glass in the kitchen and two

The majority also contends that the fingerprint analysis is "favorable because it supported Floyd's third-party-guilt defense." Though the majority is correct that evidence strengthening a defense can be favorable under *Brady*, the majority again fails to view the issue through the proper lens.

We must review whether it would be reasonable for the Louisiana courts to conclude that the presence of an unidentified third party's partial prints on a whiskey bottle not directly connected to the murder scene does not strengthen Floyd's third-party defense. Without a stronger connection between the item containing the fingerprints and the crime, it is not unreasonable for the Louisiana courts to conclude the

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glasses in the bedroom. Third, even assuming Dillmann mischaracterized where the glasses were, that does not undermine the fact that there is no evidence connecting the kitchen to the murder scene, and Dillmann still never testified about "whiskey."

evidence did not strengthen the defense[13] and thus was only neutral evidence of innocence or guilt.[14]

AEDPA deference requires us to test for any reasonable explanation. And it is plausible to characterize the fingerprint analysis "as neutral evidence." *Sipe*, 388 F.3d at 487. Review of the fingerprint analysis rightly ends here, on the favorability prong.

Regarding the analyses of the fingerprints from the Robinson crime scene, all of the prints on one glass in the hotel room belonged to Robinson, while all others belonged to an unidentified person. Unlike the prints

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[13] *See, e.g.*, *Lines v. Terrell*, No. CIV. A. 07-3532, 2009 WL 2870162, at *15 (E.D. La.), *report and recommendation adopted*, No. CIV. A. 07-3532, 2009 WL 2929334 (E.D. La. 2009) ("While evidence regarding the lack of petitioner's fingerprints might have been helpful to the defense, that is not the standard for required disclosure. *Brady* is not violated simply because potentially *helpful* information is withheld. . . . [T]he negative fingerprint analysis would not show that petitioner never handled the evidence, but rather only that there were no fingerprints proving that he had done so. That information is not exculpatory and does not put the whole case in such a different light as to undermine confidence in the verdict.").

[14] *See* BLACK'S LAW DICTIONARY 675 (10th ed. 2014) (defining exculpatory evidence as "[e]vidence tending to establish a criminal defendant's innocence."); *United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("[E]xculpatory evidence is evidence the suppression of which would 'undermine the confidence in the verdict.'" (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995))); *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Such evidence is evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." (internal quotation marks and citations omitted)).

discovered at the Hines crime scene, some but not all of the prints at the Robinson crime scene were on items potentially connected to the murder. The prints on the drinking glasses in the hotel room (the murder scene) certainly could serve as exculpatory evidence—for the Robinson murder. Some may believe that *additional* evidence exculpating Floyd of the Robinson murder could potentially favor exculpation from the Hines murder. But it is also reasonable to believe that evidence exculpating Floyd of one murder—a murder that he was previously acquitted of because there was already evidence presented in the joint case exculpating him of that murder—does not tend to show innocence of the other murder.

And, the prints from the vehicle suffer largely the same fate as the prints at the Hines crime scene. The vehicle has never been directly connected to the crime, and it would not be unreasonable for there to be numerous third-party prints (including those of Robinson's friend whom he drove home earlier in the evening) within a vehicle.[15] Thus, the prints from the vehicle could easily be classified as neutral, and, after we accord AEDPA deference, so too could the prints on glasses found at the Robinson crime scene.

Even if the fingerprints on the glasses should have properly been deemed favorable, they would still fail the materiality prong. Throughout the joint trials, the defense undermined Floyd's confession to the Robinson

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[15] *Accord Sosa v. Dretke*, 133 F. App'x 114, 121–22 (5th Cir. 2005) (explaining that the presence of other fingerprints in putative getaway car was not exculpatory because it "merely shows . . . that others had been in the car at some point in time").

murder with numerous other pieces of evidence, such as the fact that though Floyd claimed he wiped himself with a tissue after receiving oral gratification from Robinson, that tissue actually contained semen that could not belong to either Floyd or Robinson.

So, ample evidence at trial indicated the presence of a third party and undermined the credibility of Floyd's confession. A state court could thus deem any additional evidence to be cumulative and not material under Fifth Circuit precedent.[16]

As for Clegg's statement, I agree that it could only reasonably be labeled as favorable, because it could be used to weaken Dillmann's testimony that during his "follow-up investigation, initially after the homicide," he spoke "with several people . . . [and] had learned that Mr. Hines' sexual preferences was not to any one race. He was involved with both black and white males, and he was very indiscriminate . . . ."[17] Dillmann interviewed Clegg and reported that Clegg stated Hines was indiscriminate in his tastes. Thus, Clegg's contradictory statement—that Hines had only ever pointed out black men the few times Clegg and Hines

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[16] *See*, *e.g.*, *Sipe*, 388 F.3d at 478 ("Thus, 'when the undisclosed evidence is merely cumulative of other evidence [in the record], no *Brady* violation occurs.'" (quoting *Spence v. Johnson*, 80 F.3d 989, 995 (5th Cir. 1996))); *Jackson v. Johnson*, 194 F.3d 641, 650 (5th Cir. 1999) ("When *Brady* evidence would have only a cumulative or marginal impact on the jury's credibility assessment, habeas relief is not in order because the evidence is not material . . . .").

[17] Of note, Dillmann's testimony suggests he relied on more than just one person for his belief that Hines had indiscriminate preferences.

went to gay bars together—would serve as impeachment evidence.

That statement, however, fails the final prong of *Brady*—materiality. As the majority notes, under that prong we consider "the cumulative effect of all [suppressed] evidence." *Sipe*, 388 F.3d at 478. But, "[w]e include in this cumulative materiality analysis only the evidence that survived *Brady*'s other prongs . . . ." *Id*. at 491. As the only piece of evidence to clear the first two prongs, the Clegg statement is correctly evaluated by itself.[18]

The state court could have reasonably concluded that Clegg's statement was not material. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* "[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[19] "'The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.'"[20]

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[18] As previously explained, the Hines fingerprint analysis fails the favorability prong. The Robinson fingerprint analyses also fails it, or at the very least is cumulative of evidence presented at trial.

[19] *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 435).

[20] *Sipe*, 388 F.3d at 478 (quoting *Smith v. Black*, 904 F.2d 950, 967 (5th Cir. 1990), *vacated on other grounds*, 503 U.S. 930 (1992)).

Clegg admitted he had limited knowledge of Hines's sexual preferences.[21] The state court could conclude that Clegg's statement does not significantly dispel the possibility that Hines was open to relations with a white male nor that a white male could have committed the murder. At least Thomas Bloodworth, another good friend of Hines's, testified he had never seen Hines "socially in the company of a black person" other than one friend who had moved away.

Regardless, learning that Clegg (who had moved out of the state ten years before and had been back only for visits)[22] had, in the few instances they were at gay bars together, only heard Hines point out specific black men as attractive, can easily be regarded as not throwing the case into a whole new light or undermining confidence in the verdict. That is especially true in comparison to the value of the opposing evidence—Floyd's separate confessions to the police and to bar owner Steven Edwards. Thus, when we apply AEDPA deference, the state court reasonably could have discounted Clegg's statement.[23]

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[21] Clegg stated in his affidavit, "I was never, in fact, aware of the frequency of [Hines's] sexual relations with anyone."

[22] In fact, Clegg's statement implies that he and Hines had not visited a gay bar together in ten years. That further illustrates why it would be reasonable for a state court to determine that an opinion based on ambiguous statements made ten years before the murder are not material.

[23] Even assuming the majority is correct–that we can only cherry-pick certain sentences from Clegg's affidavit instead of analyzing its reliability as a whole to determine whether the differing statement "put the whole case in such a different light as to

In sum, we are bound by AEDPA and *Brady*. Under AEDPA, we accord strong deference to the state court and test for any reasonable basis on which its decision could rest. Under *Brady*, we look only at evidence presented at trial and any allegedly suppressed evidence—but no more. For these reasons, the district court erred, and I respectfully dissent.

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undermine confidence in the verdict"–the fact that one friend believed Hines had a penchant only for black men does not inarguably "undermine confidence in the verdict." *Strickler*, 527 U.S. at 290 (internal citations and quotation marks omitted).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30421
D.C. Docket No. 2:11-CV-2819

[Filed June 25, 2018]

JOHN DAVID FLOYD,	)
Petitioner - Appellee	)
	)
v.	)
	)
DARREL VANNOY, WARDEN,	)
LOUISIANA STATE PENITENTIARY,	)
Respondent - Appellant	)
	)

Appeal from the United States District Court
for the Eastern District of Louisiana

Before SMITH, BARKSDALE, and HIGGINSON, Circuit Judges.

JUDGMENT ON PETITION
FOR REHEARING EN BANC

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that respondent-appellant pay to petitioner-appellee the costs on appeal to be taxed by the Clerk of this Court.

JERRY E. SMITH, Circuit Judge, dissenting.

APPENDIX B

Floyd v. Vannoy, 887 F.3d 214 (2018)
Withdrawn for N.R.S. bound volume

United States Court of Appeals, Fifth Circuit.

No. 17-30421

[Filed April 6, 2018]

John David FLOYD, Petitioner-Appellee	)
v.	)
Darrel VANNOY, Warden, Louisiana State Penitentiary, Respondent-Appellant	)

Editor's Note: The opinion of the United States Court of Appeals, Fifth Circuit, in *Floyd v. Vannoy*, published in the advance sheet at this citation, 887 F.3d 214, was withdrawn from the bound volume because it has been superseded on denial of rehearing en banc. For superseding opinion, see 2018 WL 3115935.

All Citations

887 F.3d 214

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 11-2819
SECTION "R" (3)

[Filed May 8, 2017]

JOHN D. FLOYD	)
	)
VERSUS	)
	)
DARREL VANNOY, WARDEN	)
	)

ORDER AND REASONS

John D. Floyd was convicted of second degree murder in Louisiana state court in January, 1982 and sentenced to life in prison. He now petitions this Court for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Magistrate Judge Knowles issued a Report and Recommendation, recommending that Floyd's petition be granted on grounds that the State withheld material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the Louisiana courts' contrary decision was an unreasonable application of clearly established federal law.

Having reviewed the parties' briefing, the Magistrate Judge's Report, and the parties' objections to the Report and related responses, the Court

approves the Report and adopts it as its opinion with the following additional discussion.

I. BACKGROUND

The Court has already given a full procedural and factual background of this case.[1] In short, William Hines, Jr. and Rodney Robinson were murdered in November 1980, approximately three days and one mile apart in downtown New Orleans.[2] The victims, both gay men,[3] were stabbed to death while lying naked in bed.[4] Evidence recovered from both scenes suggested that in each case the perpetrator was a welcome visitor,[5] and that both victims had shared a drink with their killer.[6]

On January 19, 1981, petitioner John D. Floyd confessed to murdering both Hines and Robinson.[7] Floyd was tried for both murders in the same proceeding in Louisiana state court in January 1982.[8] The State's case as to both victims rested entirely on

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[1] R. Doc. 78.

[2] Floyd Ex. 3; Floyd Ex. 4.

[3] Floyd Ex. 3 at 3-4; Floyd Ex. 4 at 8.

[4] Floyd Ex. 3 at 3, 5; Floyd Ex. 4 at 4-5.

[5] Floyd Ex. 3 at 3 (no signs of forced entry); Floyd Ex. 4 at 4 (same).

[6] Floyd Ex. 5 at 3; Floyd Ex. 4 at 4; Floyd Ex. 11 at 3.

[7] Floyd Ex. 8, Floyd Ex. 9.

[8] Floyd Ex. 45.

Floyd's own inculpatory statements. Floyd did not only confess to both murders, but witnesses also testified that Floyd made incriminating statements regarding the murders to acquaintances in New Orleans' French Quarter.

Bar owner Steven Edwards testified that around the time of Hines' murder, Edwards spotted Floyd trying to enter Edwards's bar.[9] According to Edwards, he said to Floyd:

> "Johnny, you know you're barred from the fucking bar." [Edwards] said, "You can't go in there. I don't want you in there because you cause problems." And [Floyd] said, "Don't come fucking with me. I already wasted one person." . . . and [Edwards] said, "Who? Bill Hines?" And [Floyd] said, "Yeah, on Governor Nichol[l]s." And [Edwards] said, "I don't give a shit. Get away from here." And [Floyd] turned and left.[10]

As to Robinson, Floyd's acquaintance and former sexual partner Byron Gene Reed, testified that Floyd once threatened to "take care of [Reed] like he did the one at the Fairmont."[11] Another acquaintance, Harold G. Griffin, testified that he encountered Floyd the day

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[9] *Id.* at 55.

[10] *Id*. at 55-56. Hines was killed in his apartment on Governor Nicholls Street. Floyd Ex. 1.

[11] Floyd Ex. 45 at 77. Robinson was killed in his room at the Fairmont hotel. Floyd Ex. 2.

after the Robinson murder.[12] According to Griffin, Floyd asked Griffin to walk with him to the Detoxification Center at Charity Hospital.[13] During the walk, Floyd said something to the effect "that he heard that perhaps going to the Detox Center would be the next best thing to keep from being held accountable for doing something wrong."[14] Later on the same walk, Floyd asked Griffin if Griffin "heard of the stabbing at the Fairmont," and Griffin said "No."[15]

At the conclusion of his joint bench trial, Floyd was convicted of second-degree murder of William Hines, but acquitted of second-degree murder of Rodney Robinson. *State v. Floyd*, 435 So. 2d 992, 992 (La. 1983). Despite Floyd's confession and other statements, he was acquitted of the Robinson murder based on evidence suggesting that Robinson was killed by an African-American man with Type A blood. *Id.* at 994. Floyd is white and has Type B blood. *Id*. Floyd's conviction became final when the Louisiana Supreme Court affirmed the ruling of the trial court on June 27, 1983. *Id.* at 992.

Floyd first filed an application for habeas corpus relief in state court on March 2, 2006, twenty-three years after the Louisiana Supreme Court finalized his

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[12] Floyd Ex. 45 at 40, 43.

[13] *Id.* at 40.

[14] *Id.* at 40-41. Griffin "couldn't quote the precise conversation [or] quote [Floyd's] exact words [because] he wasn't paying that much attention at the time." *Id.* at 41.

[15] *Id.*

conviction.[16] On February, 19 2010, following an evidentiary hearing, the Criminal District Court for the Parish of Orleans denied Floyd's petition from the bench.[17] The presiding judge offered no written reasons, but briefly explained his decision on the record:

> Based upon the evidence and testimony presented during this hearing, the Court finds that the Defendant in this matter, Mr. John Floyd, has failed to meet his burden of proof required in his Post-Conviction Application. Accordingly, sir, at this time, your application is denied. We'll note the Defense's objections, and let the Appellate process begin. Good luck.[18]

Without assigning additional reasons, the Louisiana Supreme Court denied Floyd's writ application by 4-3 vote. *Floyd v. Cain*, 62 So. 3d 57 (La. 2011).[19]

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[16] R. Doc. 1 at 16.

[17] Floyd Ex. 47 at 181.

[18] *Id.*

[19] Justice Bernette Johnson dissented to the denial and assigned reasons. *See Floyd*, 62 So. 3d at 59-60 (Johnson, J. dissenting) ("In my view, the exculpatory value of the fingerprint evidence is sufficient to undermine confidence in the outcome of Floyd's trial, thus satisfying the requirements for a new trial set forth in *Brady* . . . . Considering all of the evidence, including Floyd's false confession to the murder of Robinson, Floyd's low IQ and susceptibility to suggestion, the missing police records, the lack of evidence linking Floyd to the murder of Hines, the exculpatory value of the fingerprint evidence, defendant is entitled to a new trial.").

At the conclusion of his post-conviction proceedings in state court, Floyd promptly petitioned this Court for habeas corpus relief under 28 U.S.C. § 2254.[20] To overcome the untimeliness of his petition, Floyd argued that, in light of newly discovered evidence exculpating him of the murders of both Robinson and Hines, he is actually innocent of the murder of Hines. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) ("[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations."). While Floyd's case was pending before this Court, the State offered Floyd a negotiated settlement, including a possible *Alford* plea.[21] Floyd rejected the offer.[22]

On September 14, 2016, this Court—considering both old and new evidence[23]— found that Floyd had preponderantly established that no reasonable juror would find him guilty beyond a reasonable doubt of the

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[20] R. Doc. 1.

[21] Floyd Ex. 83; Floyd Ex. 84.

[22] Floyd Ex. 85 ("Dear Richard[,] I have been thanking what you said. 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." (emphasis and errors in original)).

[23] In evaluating a claim of actual innocence, "[t]he habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that govern at trial.'" *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

murder of William Hines.[24] The Court summarized its reasoning:

> [T]he Court finds that it is unlikely that any reasonable juror weighing the evidence in this case would vote to convict Floyd of the murder of William Hines.
>
> Police uncovered no physical evidence and no eyewitness testimony linking Floyd to the scene of the crime. No weapon or other inculpatory item was found in Floyd's possession, and no coherent motive has ever been suggested. Rather, Floyd's conviction was based entirely on his own statements: a signed confession and an alleged barroom boast. But Floyd did not only confess to and boast about killing Hines; Floyd confessed to and boasted about killing Robinson as well. And the considerable forensic evidence found on the Robinson scene excludes the possibility that Floyd killed Robinson as described in his confession and strongly suggests that Floyd did not kill Robinson at all.
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> Physical evidence recovered on the scene of the Robinson murder suggests to a near certainty that Robinson was stabbed to death by an African-American man with type A blood shortly after Robinson and the man had sex. The evidence therefore excludes Floyd, who is white and has type B blood. Semen produced by a type A male was found both in Robinson's body and on a tissue beside Robinson's hotel room bed. A

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[24] R. Doc. 78.

cap stained with Type O blood—matching Robinson—was found near Robinson's body. The cap contained hairs from an African-American male, and the hairs did not match Robinson, who was African American. Fingerprints taken from the scene, and not revealed until years after trial, do not match Floyd's. Hairs—also new evidence—found in Robinson's bed, on the semen-stained tissue, and around Robinson's hotel room were produced by two different African-American men. Finally, an eyewitness saw an African-American male running from the scene with one hand in his pocket and looking over his shoulder as if "he believed someone was following him."

Floyd's confession to the Robinson murder, which the evidence before the Court strongly suggests Floyd did not commit, is strikingly similar to his confession to the Hines murder, and the two confessions were obtained together. The persuasive force of the two confessions are linked: if Floyd was willing—for whatever reason—to confess falsely to killing Robinson, then it is significantly more likely that he falsely confessed to the Hines murder too. The credibility of Floyd's confession is further undermined by new evidence supporting Floyd's consistent allegation that [New Orleans Police Department] officers beat him to coerce his confession, and new evidence of Floyd's vulnerability to suggestion and limited mental capacity.

> Floyd also presents further evidence of his innocence of the Hines murder. This evidence includes: 1) the striking similarity between the Robinson and Hines murder, which suggests that the same African-American male with type A blood committed both murders; 2) new evidence that, contrary to the lead detective's trial testimony, Hines had a preference for African-American men; 3) African-American hair found in Hines' bed; and 4) fingerprints found at the scene of Hines' death that match neither Hines nor Floyd.

Floyd v. Cain, No. 11-2819, 2016 WL 4799093, at *2-3 (E.D. La. Sept. 14, 2016) (citations omitted). Accordingly, the Court found that Floyd had satisfied the standard necessary to overcome the untimeliness of his habeas petition and remanded Floyd's petition to the Magistrate Judge for an evaluation on the merits. *Id.*

Floyd's original habeas petition asserted three bases for relief: the State suppressed material, favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); the State destroyed evidence in violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988); and Floyd is entitled to habeas relief because he is actually innocent.[25] In support of his *Brady* claim, Floyd points to the following evidence as allegedly withheld: (1) fingerprint comparison results from the Hines scene; (2) fingerprint comparison results from the Robinson scene and Robinson's car; (3) a witness statement concerning Hines' racial preference in sexual

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[25] R. Doc. 1.

partners; (4) evidence that police identified other potential suspects; (5) an alleged expert opinion, developed by the State's coroner, that the perpetrator of the murder possessed medical knowledge, and (6) evidence that detectives bought Floyd more than one beer before interrogating him.[26]

In his Second Supplemental Report and Recommendation, Magistrate Judge Knowles recommended that Floyd's *Youngblood* and actual innocence claims be denied, but that his *Brady* claim be granted.[27] In doing so, Magistrate Judge Knowles found that fingerprint comparison results pertaining to both the Hines and Robinson murders were material, withheld from the defense, and favorable to Floyd, and that the Louisiana courts' contrary finding constituted an unreasonable application of clearly established federal law.[28] Because Magistrate Judge Knowles found that Floyd satisfied his burden on the strength of the fingerprint evidence alone, he did not decide whether the other allegedly withheld evidence could support a *Brady* claim.[29]

Both Floyd and the State objected to the Report and Recommendation. Floyd's objection advances two arguments: (1) the Court need not defer to the state court's habeas ruling because the state court failed to consider important evidence; and (2) the Court could

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[26] *Id.* at 53-64.

[27] R. Doc. 81.

[28] *Id.*

[29] *Id.* at 12 n.23.

find that Floyd prevailed on his *Brady* claim based on the other evidence not considered by Magistrate Judge Knowles.[30] The State objects primarily to Magistrate Judge Knowles' conclusion that Floyd's fingerprint evidence constitutes *Brady* material.[31]

II. LEGAL STANDARD

The Court applies de novo review to the parties' objections to the Report and Recommendation. Federal Rule of Civil Procedure 72(b)(3). The Court is, however, limited to plain error review of any part of the report not subject to a proper objection. *Starns v. Andrew*s, 524 F.3d 612, 617 (5th Cir. 2008).

The Antiterrorism and Effective Death Penalty Act of 1996 defines "[t]he statutory authority of federal courts to issue habeas corpus relief for persons in state custody." *Premo v. Moore*, 562 U.S. 115, 120 (2011). Under AEDPA, a federal habeas court may not grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court unless the state court adjudication resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law if the state court arrives at a

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[30] R. Doc. 85.

[31] R. Doc. 89.

conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). "A state court decision involves an unreasonable application of federal law if it 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Cobb v. Thaler*, 682 F.3d 364, 373 (5th Cir. 2012) (quoting *Williams*, 529 U.S. at 407-08). This demanding standard is "met only 'in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). The state court's findings of fact are entitled to a presumption of correctness, and they can be rebutted only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

Section 2254(d) applies with equal force to a summary denial. *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011). Where, as here, state courts have offered only summary denials of the petitioner's claim, the prisoner "can satisfy the 'unreasonable application' prong of § 2254(d)(1) only by showing that 'there was no reasonable basis' for the" state court's decision. *Id.* at 188 (quoting *Richter*, 562 U.S. at 98). In considering whether any reasonable basis could support the state court's decision, the Court "must determine what arguments or theories could have supported the state court's decision" and then analyze those theories under section 2254(d). *Id.*

As noted, the Magistrate Judges' Report and Recommendation concluded that the state courts'

denial of Floyd's habeas petition constituted an unreasonable application of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Under *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Prosecutors must disclose material, favorable evidence "even if no request is made" by the defense, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). To prevail on his *Brady* claim, Floyd "must show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material to his guilt or punishment." *Mahler v. Kaylo*, 537 F.3d 494, 500 (5th Cir. 2008).

III. DISCUSSION

A. *Youngblood* and Actual Innocence.

Floyd did not object to the Magistrate Judge's recommendation that his *Youngblood* and actual innocence claims be denied. The Court therefore reviews these conclusions for clear error. It finds none.

Floyd's *Youngblood* claim fails because he asserts that evidence was destroyed *after* trial, rather than before. Such a claim is not cognizable on habeas review. *See Morris v. Cain*, 186 F.3d 581, 585 n.6 (5th Cir. 1999) ("[W]e must find constitutional error at the trial or direct review level in order to issue the writ."); *see*

also Ferguson v. Roper, 400 F.3d 635, 638 (8th Cir. 2005) ("*Youngblood* stated the applicable constitutional principle when potentially useful evidence is lost or destroyed *before trial*." (emphasis in original)). As to actual innocence, the Fifth Circuit has expressly declined to recognize such a claim. *See In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009) ("The Fifth Circuit does not recognize freestanding claims of actual innocence on federal habeas review."). Because the Court finds no clear error in the Magistrate Judge's resolution of Floyd's *Youngblood* and actual innocence claims, these claims are denied.

B. *Brady*

Floyd alleges that the State withheld six types of evidence in violation of its *Brady* obligation. As noted, Magistrate Judge Knowles found that fingerprint comparison results pertaining to both the Hines and Robinson murders were material, withheld from the defense, and favorable to Floyd, and that the Louisiana courts' opposing conclusion constituted an unreasonable application of clearly established federal law.[32] Reviewing the Magistrate Judge's findings de novo, the Court concludes that Floyd's evidence concerning fingerprint comparison results satisfies Floyd's burden as to each of *Brady*'s three prongs. The Court also finds that John Rue Clegg's affidavit, which the Magistrate Judge did not consider,[33] is additional

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[32] R. Doc. 81.

[33] *Id.* at 12 n.23.

Brady material.[34] Floyd is therefore entitled to a new trial.

1. The Fingerprint Evidence

i. Fingerprints at the Hines Crime Scene

Police found two used whiskey glasses in Hines' apartment, and several bottles of whiskey in Hines' kitchen.[35] Police lifted two partial prints from one of the whiskey bottles.[36] On September 29, 2008, Floyd's habeas counsel obtained copies of the NOPD Latent Print Unit's logbook and the envelope in which the prints were stored.[37] Regarding prints on the bottle, someone noted "NOT VICTIM" and "NOT JOHN FLOYD."[38] NOPD was unable to recover prints from the two glasses.[39]

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[34] As noted, Floyd also points to evidence that police identified other potential suspects, an alleged expert opinion that the perpetrator of the murder possessed medical knowledge, and evidence that detectives bought Floyd more than one beer before interrogating him. The Court finds, for the reasons identified by the Magistrate Judge, that these items are not *Brady* material.

[35] Floyd Ex. 5 at 3; Floyd Ex. 45 at 118.

[36] Floyd Ex. 5 at 3.

[37] R. Doc. 1 at 32.

[38] R. Doc. 13 at 1, 3 (NOPD Fingerprint Results).

[39] Floyd Ex. 5 at 3.

ii. Fingerprints at the Robinson Crime Scene

Police found fingerprints on two drinking glasses containing alcohol next to the bed in Robinson's hotel room.[40] Police also found fingerprints on the passenger side of Robinson's car and on a glass, a cup, and a whiskey bottle inside the vehicle.[41] Floyd's habeas counsel recovered the logbook and envelopes corresponding to these prints. According to notations in the logbook and on the envelope, all of the fingerprints on one of the glasses next to the bed belonged to Robinson.[42] Three of the fingerprints on the other glass were noted not to belong to Floyd, Robinson, or Robinson's friend David Hennessy.[43] The fingerprints from Robinson's car were similarly labeled, "NOT . . . DAVID HENNESSY," "NOT VICTIM," and "NOT JOHN FLOYD."[44]

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[40] Floyd Ex. 4 at 4; Floyd Ex. 6 at 4.

[41] Floyd Ex. 14 at 2.

[42] Floyd Ex. 13 at 3 ("I.D. 6 THRU 14 VICTIM").

[43] *Id.* Hennessey and Robinson had spent Robinson's last day together. Floyd Ex. 4 at 8-10.

[44] Floyd Ex. 13 at 3. More specifically, the relevant envelope lists prints "#1-#6" as "partial prints from drinking glass on night stand nearest window" and prints "#7-#14 as "partial prints from drinking glass on night stand nearest door." *Id*. The envelope also says "I.D. 6 THRU 14 VICTIM," and "#1 #4 #5 Not Victim Not . . . David Hennessey." *Id.* Finally, written in the bottom corner of the envelope is "Not John Floyd." *Id.*

2. The Fingerprint Comparison Results Were Withheld

Neither party objected to Magistrate Judge Knowles' finding that NOPD did, in fact, analyze fingerprints found on both the Robinson and Hines scenes prior to Floyd's trial and this analysis excluded Floyd as a potential match.[45] The Court finds no clear error in this finding. The State disputes the Magistrate Judge's conclusion that the fingerprint comparison results were withheld. The State's objection fails for several reasons.

First, the State did not advance this argument before the Magistrate Judge, and the argument is therefore waived. *Warren v. Bank of Am., N.A.*, 566 F. App'x 379, 381 n.1 (5th Cir. 2014) ("[A] party who objects to the magistrate judge's report waives legal arguments not made in the first instance before the magistrate judge."). In fact, in its initial briefing, the State conceded that "[t]he record supports Floyd's contention that neither the envelopes nor the results of any testing that may have been done on the lifted fingerprints were disclosed to the defense pretrial."[46]

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[45] R. Doc. 81 at 14 (the fingerprint comparison evidence "showed not only that Floyd's fingerprints were not found at either crime scene, but also that unexplained fingerprints of an unknown person or persons were found at both").

[46] R. Doc. 13 at 63. The State made a similar admission in state court. Floyd Ex. 46 at 4 ("What wasn't apparently turned over was the analysis cards that were done.").

The State's attempt to reinterpret this clear language is unavailing.[47]

Second, even if the Court were to consider the State's new position, Floyd has met his burden to show that the fingerprint comparison results were withheld. In Floyd's state court habeas proceeding, attorneys for the State conceded that the fingerprint comparison results were not present in the District Attorney's file on Floyd's cases.[48] Floyd submits affidavits from four former assistant district attorneys who worked on his case.[49] All four support Floyd's assertion that the

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[47] The State's effort to erase its concession is particularly bold given its previous argument—advanced in both this Court and state court—that the "NOT VICTIM" and "NOT JOHN FLOYD" notations on the fingerprint envelopes do not, in fact, mean that an NOPD technician analyzed the prints and excluded Floyd as a potential match. R. Doc. 13 at 64-66, Floyd Ex. 47 at 175-80. The State has apparently abandoned this position, and now maintains that not only was such an analysis performed, but Floyd's attorney "knew that [the fingerprints] had been compared, could not be linked to his client, and therefore belonged to an unknown person or persons." R. Doc. 89 at 25.

[48] Floyd Ex. 46 at 7 ("Your Honor, in terms of what was in the State's record, the crime scene technician report did exist. I was unable to locate any copy of the fingerprint cards as presented by the petitioner.").

[49] The State argues in its objection that these affidavits were "never properly introduced into evidence" at Floyd's state habeas evidentiary hearing. This assertion is meritless. *See* R. Doc. 93-1 ("The exhibits filed by Mr. Floyd with his Amended and Supplemental Application for Post-Conviction Relief and subsequent Reply to State's response are hereby deemed authentic and admissible for the purposes of any hearing on the merits of

fingerprint comparison results were unknown to the prosecutors working the case, and were therefore never disclosed to Floyd's attorney.

David J. Plavnicky, the State's trial attorney, reports "no recollection of ever seeing [the fingerprint envelopes] before or being aware of the information contained in them."[50] Plavnicky further states that, to the best of his recollection, "non-matching prints would mostly not be reported to the District Attorney's office" and that "the absence of information on the fingerprint comparison from the District Attorney's Office's file on the case supports my recollection that I was unaware of the comparison information when I tried the case."[51]

In another affidavit, Kendall Green, who represented the State at Floyd's pre-trial hearings, attests to his belief that he saw the fingerprint analysis results for the first time in 2009.[52] Green continues:

> In my experience it is highly unlikely that potentially exculpatory information could have been disclosed to the defense, yet not contained in the district attorney's file . . . . Overall, I am virtually certain that the fingerprint comparison

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Mr. Floyd's claims for relief."); *see also* Floyd Ex. 47 at 110 (specifically admitting the Peebles affidavit).

[50] Floyd Ex. 25 at 1.

[51] *Id.* at 2.

[52] Floyd Ex. 26 at 1.

> results in this case were not disclosed to the defense by me, or apparently by anyone else.[53]

Finally, Jack Peebles, who served as Assistant District Attorney at the hearing concerning Floyd's motion to suppress his confession, reports no recollection of the fingerprint comparison results and states: "If the fingerprint comparison results were not mentioned in the District Attorney's Office's file, then I believe it is likely that none of the attorneys prosecuting the case were aware of their existence."[54] Nancy Sharpe, Peebles' assistant during Floyd's pretrial hearing, also attests that she does not recall seeing the comparison results, and echoes her former colleagues by saying that "it is highly unlikely for information to be disclosed to the defense but not contained in the district attorney's file."[55]

To resist the conclusion that the fingerprint comparison results were withheld, the State points to statements made by Walter Sentenn, Floyd's defense attorney during trial and a subsequent hearing. At trial, Sentenn stated: "there is no evidence whatsoever that links [Floyd] in any way to the murders" and "save for incriminating statements . . . . [t]here is no other evidence whatsoever that is inculpatory—whatsoever, that is inculpatory as to Mr. Floyd."[56] In support of Floyd's motion for new trial, Sentenn made a similar

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[53] *Id.* at 2.

[54] Floyd Ex. 24 at 1-2.

[55] Floyd Ex. 27 at 1-2.

[56] Floyd Ex. 45 at 10.

argument: "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."[57] The State contends that these statements show that Sentenn knew that Floyd's fingerprints had been compared to prints taken from the Hines and Robertson scenes, and that Floyd had been excluded as a match.

The State's argument confuses evidence tending to exculpate Floyd with the mere absence of evidence tending to inculpate Floyd. In the State's quotations, Sentenn asserts that no evidence found at the scenes tends to inculpate Floyd. This is plainly different from an affirmative argument that the presence of unknown, third-party fingerprints on both scenes tends to exculpate Floyd. The quotes therefore do not support a finding that the State disclosed the fingerprint comparison results.

On the contrary, the conspicuous absence of any affirmative argument based on fingerprint evidence supports, rather than undermines, Floyd's position. Sentenn argued in opening remarks:

> [T]here are numerous pieces of evidence that would tend to link a different party to the crime, and those pieces of evidence will be brought out to the Court, including hair samples in both cases, which indicate that there was a Negro

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[57] State Record, Volume 2, Motion for New Trial.

> involved, as the Crime Lab indicates the hair is of Negro origin.[58]

Similarly, immediately after saying that "[n]o fingerprints . . . point in any way to . . . John Floyd," Sentenn raised the affirmative exculpatory value of the hair evidence: "In fact, the only evidence introduced at trial was exculpatory as to John Floyd in that it indicated the presence of negroid hair in the bed of the victim wherein both he and the accused are caucasians. No reasonable explanation was proved at trial."[59]

Despite his stated strategy of highlighting evidence tending to "link a different party to the crime"—and his repeated reference to the similarly-probative hair evidence— a review of the trial transcript reveals that Sentenn never elicited testimony regarding NOPD's exclusion of Floyd from the fingerprints found on either scene. Former Assistant District Attorneys Plavnicky,[60] Green,[61] and Peebles[62] all assert that, based on their

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[58] Floyd Ex. 45 at 12.

[59] State's Record, Vol. 2, Motion for New Trial.

[60] Floyd Ex. 25 at 2 ("In my experience [Walter Sentenn, Floyd's attorney] was meticulous with the evidence he had. I believe that had he been aware of evidence that was relevant to his client's defense, such as an exclusionary fingerprint comparison from the crime scene, he certainly would have raised it at trial.").

[61] Floyd Ex. 26 at 2 ("I certainly believe that Walter Sentenn, John Floyd's attorney, would have mentioned this information at trial had he been aware of it.").

[62] Floyd Ex. 24 at 2 ("In my experience Walter Sentenn, John Floyd's trial attorney was a good attorney who would make use of

knowledge of Sentenn's practices, Sentenn would have raised the fingerprint comparison results at trial if he had been aware of them. The trial record therefore supports a finding that the fingerprint comparison results at issue were withheld.

Lastly, the Court finds no merit to the State's novel suggestion that a prosecutor may withhold fingerprint comparison results that are favorable to the defense because a defendant could request access to the underlying prints and perform his own testing. The State cites no analogous authority, and the Court has identified none. *Brady*, of course, "does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." *Cobb*, 682 F.3d at 378 (quoting *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002)). But the State's conception of reasonable diligence stretches the concept beyond its breaking point, and undermines "the *Brady* rule's purpose of ensuring a fair trial." *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000).

For these reasons, the Court finds that the State has waived any argument that the fingerprint comparison results were disclosed to the defense. Further, even if the Court were to consider the State's argument, it would conclude that Floyd has met his burden to show by clear and convincing evidence that the fingerprint comparison results were withheld.

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the evidence available to him. I believe that if he was aware of the information provided to me concerning the fingerprint comparison then he would have raised it at trial.").

3. The Fingerprint Comparison Results Are Favorable

Favorable evidence "is evidence that 'is exculpatory or impeaching.'" *United States v. Stanford*, 823 F.3d 814, 841 (5th Cir. 2016) (quoting *United States v. Barraza*, 655 F.3d 375, 380 (5th Cir. 2011)). Exculpatory evidence is "[e]vidence tending to establish a criminal defendant's innocence." Black's Law Dictionary (10th ed. 2014); *see also Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001) (evidence which "could have helped the defense suggest an alternative perpetrator" was favorable); *United States v. Slough*, 22 F. Supp. 3d 1, 8 (D.D.C. 2014) ("The meaning of the term 'favorable' under *Brady* is not difficult to discern. It is any information in the possession of the government . . . that relates to guilt or punishment and that tends to help the defense bolstering the defense case or impeaching potential prosecution witnesses.").

In his report, Magistrate Judge Knowles found that "it can hardly be doubted that the fingerprint evidence was 'favorable' to the defense."[63] The State objects, and the Court therefore reviews this finding de novo. The Court considers the fingerprint comparison evidence from each scene in turn.

i. The Hines Scene

According to the Crime Scene Technician Report for the Hines scene, NOPD Evidence Technician Seuzeneau dusted several whiskey bottles found in

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[63] R. Doc. 81 at 14.

Hines' kitchen for fingerprints.[64] Seuzeneau also dusted two "whiskey glass[es]"—one from Hines' kitchen table and one from his nightstand.[65] Seuzeneau lifted two "partial latent prints" from one of the whiskey bottles.[66] The other bottles, and the two glasses, yielded "neg[ative] results."[67] The fingerprint result envelope corresponding to the two recovered prints describes them as "from Puglia's scotch whiskey bottle in kitchen."[68] Notations on the envelopes and a related logbook, discovered by Floyd's habeas counsel in 2008, say "NOT VICTIM" and "NOT JOHN FLOYD."[69]

The Court finds that the fingerprint comparison results from the Hines scene are favorable to Floyd's

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[64] Floyd Ex. 5 at 3.

[65] *Id.* Detective Dillman's statements regarding the two glasses found on the Hines scene are somewhat inconsistent with Seuzeneau's report. Rather than one glass in the bedroom and one in kitchen, Dillman testified that police found "two highball glasses filled with a liquid on each side of the bed" Floyd Ex. 45 at 118; *see also* Floyd Ex. 11 at 3 (August 26, 1998 Jupiter Entertainment Interview with John Dillman) ("[T]here was [sic] two glasses on the nightstand near the bed with alcoholic beverages in the glasses so it appeared that whoever had killed Mr. Hines (A) . . . knew him and (b) that they had been drinking together.").

[66] Floyd Ex. 5 at 3.

[67] *Id.*

[68] Floyd Ex. 13 at 3. Floyd submits evidence that Puglia's Quality Food Store was a French Quarter grocery store operating at the time of Hines' death. R. Doc. 1 at 33 n.10.

[69] Floyd Ex. 13 at 1, 3.

defense, and that any contrary conclusion would be an unreasonable application of clearly established federal law. As an initial matter, the Court notes that a fingerprint comparison result that excludes both the defendant and the victim from contributing a print recovered from the scene of a murder would, in most cases, be favorable to the defense for a simple reason: the result suggests that another person was at the scene. This other person is an obvious alternative suspect that the defense may point to as the true killer.

Beyond this general observation, the Court finds that the test results withheld in this case are particularly favorable to the defense. First, 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. Second, Detective John Dillman, lead detective on the Hines murder, believed that Hines shared a drink with his killer, and this theory was elicited at trial. In his testimony, Dillman pointed to the statement that "We were both drinking" as one of several details in Floyd's confession that matched the Hines murder scene as Dillman observed it.[70] This statement matched the scene, according to Dillman, because police found "two highball glasses filled with a liquid on each side of the bed" at Hines' apartment.[71]

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[70] Floyd Ex. 45 at 118.

[71] *Id*. As noted, an NOPD Crime Scene Technician Report suggests that one of the glasses was found in the kitchen rather than the

Accordingly, the Court finds that Floyd has met his burden to show that the fingerprint comparison results from the Hines scene were favorable to his defense.

ii. The Robinson Scene

Police recovered 14 partial fingerprints from Robinson's hotel room—6 from the drinking glass on the nightstand nearest the room's window, and 8 from the drinking glass on the nightstand nearest the door.[72] Notations on the envelope containing these prints suggest that the prints were compared to Floyd, Robinson, and Robinson's friend David Hennessey.[73] All of the prints on one glass matched Robinson.[74] Three prints from the other glass were marked "NOT Victim," "NOT . . . David Hennessey," and "NOT John Floyd."[75]

Police also recovered prints from Robinson's car and from objects inside it.[76] NOPD found three prints above

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bedroom. Floyd Exhibit 5 at 3. In his 1998 interview with Jupiter Entertainment, Dillman reaffirmed his belief that Hines had shared a drink with the killer, stating: "[T]here was [sic] two glasses on the nightstand near the bed with alcoholic beverages in the glasses so it appeared that whoever had killed Mr. Hines (A) he knew him and (B) that they had been drinking together." Floyd Ex. 11 at 3.

[72] Floyd Ex. 6 at 4.

[73] Floyd Ex. 13 at 3.

[74] *Id.* ("6 THRU 14 VICTIM").

[75] *Id.*

[76] Floyd Ex. 14 at 2.

the passenger side door and two prints on a bottle of Evan Williams whiskey located in a satchel on the left rear floorboard.[77] Single prints were recovered from the passenger side door handle, a glass on the vehicle's console, and a plastic cup on the back floorboard.[78] These prints were also noted to not match Robinson, Hennessey, or Floyd.[79]

The withheld fingerprint evidence from the Robinson scene is similar to the evidence from the Hines scene, and would be favorable to Floyd's defense in the Robinson murder for similar reasons. Floyd was, however, acquitted of the Robinson murder. The Court therefore must consider whether Floyd has met his burden to show that the Robinson-scene prints would be favorable to Floyd's defense *in the Hines case*. The Court finds that he has.

The fingerprint results from the Robinson scene are favorable to Floyd's defense in the Hines murder for two reasons. First, Floyd confessed to both murders, and the persuasive weight of the two confessions is therefore linked. If Floyd falsely confessed to one murder, it is more likely that his other confession is false as well. Evidence tending to exculpate Floyd from the Robinson murder therefore impugns the reliability of Floyd's confession in the Hines murder. This is particularly true because the two statements are highly similar. As the Court explained in its earlier order:

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[77] *Id.*

[78] *Id.*

[79] Floyd Ex. 13 at 3.

> Floyd's confession to the Robinson murder is closely linked with his confession to the Hines murder. The two statements were taken one after the other, and the two accounts feature striking similarities. For instance, the Hines confession states, "I went to the bathroom and when I came back, he was naked in the bed." The Robinson confession states, "I think I went to the bathroom and I think by the time I got out of the bathroom he had his cloths [sic] off." The Hines confession: "We both got into bed and we had sex. Then he told me that he wanted to fuck me and I went crazy. . . . I went berserk." The Robinson confession: "He told me he wanted [to] fuck me and thats [sic] when I went berserk." The Hines confession: "I had a knife in my boot and I stabbed him a bunch of times. Then I ran out of the house and I went back down on bourbon st. [sic] too [sic] the bar." The Robinson confession: "[I] pulled my knife from my left boot and started stabbing him . . . . I pulled my pants up and ran out the room . . . . After I left the hotel I ran to Bourbon Street."

Cain, 2016 WL 4799093, at *21 (citations omitted). Given this overlap, the Court finds that evidence tending to discredit Floyd's confession to the Robinson murder also undermines Floyd's account of killing Hines. Exculpatory fingerprint results from the Robinson scene are therefore favorable to Floyd's defense in the Hines case.

The second reason that exculpatory evidence from the Robinson scene is favorable to Floyd's defense in the Hines matter is that the significant similarities

between the two murders suggest that they were committed by the same person. In addition to their temporal and physical proximity, the two murders featured several overlapping elements. Both victims were gay men, and both were attacked in their bedrooms.[80] There was no sign of forced entry on either scene.[81] Both victims were found naked.[82] Both victims were stabbed with knives, and suffered wounds to the neck and torso.[83] Finally, the detectives found two whiskey glasses on both scenes.[84] The Hines police report shows that NOPD detectives quickly realized the possible connection:

> Rodney Robinson[] was also homosexual and was killed much in the same manner as William Hines, Jr. Both victim's [sic] were stabbed numerous times in the upper torso and head and both victim's [sic] were nude at time of their deaths. Additionally, both murder scenes were splattered with blood. Both victim's [sic] were apparently stabbed while in bed and both victim's [sic] suffered stab wounds to the neck. *It became evident to the investigating detectives at*

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[80] Floyd Ex. 3 at 3-5; Floyd Ex. 4 at 4, 5, 8.

[81] Floyd Ex. 3 at 3; Floyd Ex. 4 at 4.

[82] Floyd Ex. 3 at 3; Floyd Ex. 4 at 4.

[83] Floyd Ex. 1 at 2; Floyd Ex. 2 at 2; Floyd Ex. 3 at 2; Floyd Ex. 4 at 5.

[84] Floyd Ex. 4 at 3; Floyd Ex. 5 at 3.

> *this time that the same person might possibly be responsible for the deaths of both victim's* [sic].[85]

As found by the investigating detectives, the similarity of the two murders suggests that one person committed both crimes. Evidence tending to show that an unknown third party—and not Floyd—killed Robinson therefore also points to the *same* unknown third party—and not Floyd— as Hines' killer.[86] Accordingly, even ignoring Floyd's parallel confessions, the Robinson print comparison results are "[e]vidence tending to establish" Floyd's innocence of the Hines murder, Black's Law Dictionary (10th ed. 2014), and are favorable to Floyd's defense.

For these reasons, the Court finds fairminded jurists could not disagree that the fingerprint analysis results from both the Hines and Robinson scenes are favorable to Floyd under *Brady* and its progeny. *See*

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[85] Floyd Ex. 3 at 5 (emphasis added). Detective Dillman described reaching the same conclusion in his interview with Jupiter Entertainment. Floyd Exhibit 11 at 4. ("As soon as I walked into [the Robinson] crime scene I knew again from intuition and working these cases year in and year out . . . that [this was] the same perpetrator. The [M.O.] was just there, no forced entry #1, a blood bath, blood everywhere, the same type of defensive wounds that Bill Hines had, the blood splattered all over the wall, all over the carpeting, nothing stolen from the room . . . and glasses with alcohol beverage in them, same exact [M.O.]").

[86] Of course, that evidence from the Robinson scene is *relevant* to the Hines case does not mean that the evidence carries equal *weight* in both cases. A rational finder of fact would likely discount the persuasive effect of Robinson evidence on the Hines determination by the perceived probability that the two victims were not, in fact, killed by the same person.

Bailey v. Lafler, No. 09-406, 2016 WL 5027562 (W.D. Mich. Sept. 20, 2016) (granting writ of habeas corpus in case where prisoner was convicted of one of two similar murders and finding that fingerprint analysis from first, uncharged murder was favorable to defense in second).

4. John Rue Clegg's Affidavit

In addition to the fingerprint comparison results, Floyd asserts that a statement by John Rue Clegg to Detective Dillman was *Brady* material. Dillman interviewed Clegg in the days following Hines' death.[87] According to Dillman's police report regarding the Hines murder, Clegg, a close friend of Hines' and the last person to see Hines alive, told Dillman that Hines "frequently had sexual relations with both black and white males."[88]

In an affidavit executed on June 14, 2008, Clegg declares that Dillman's report "does not accurately reflect the information [Clegg] gave Detective Dillman."[89]According to Clegg's affidavit:

> [T]he subject of sex per se did not come up during [Clegg and Dillman's] interview and [Clegg] did not tell Detective Dillman that Bill "frequently had sexual relations with both black and white males." [Clegg] was never, in fact, aware of the frequency of his sexual relations

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[87] Floyd Ex. 3 at 5.

[88] *Id.* at 6.

[89] Floyd Ex. 21 at 1.

> with anyone. [Clegg told] Detective Dillman that Bill's taste was for black men as I knew this to be true. . . . [Clegg] know[s] that Bill's taste was for black men because when [Clegg and Hines] were at gay bars [Hines] would sometimes point out the men he found attractive and they were always black. [Clegg] also saw Bill with black men on several occasions. From [Clegg's] observations, Bill was often attracted to rough looking black men . . . .[90]

Floyd contends that Clegg's new statement shows that Clegg provided Dillman with favorable evidence which was not disclosed to the defense. Floyd argues that Clegg's statement that "Bill's taste was for black men" is favorable both because it suggests that Hines' killer was African American and because Floyd's lawyer could have used it to impeach Detective Dillman's trial testimony that "[Hines] was involved in sexual activities with both black and white males, and he was very indiscriminate and it didn't make a difference."[91]

5. Clegg's Statement was Withheld and is Favorable

The Court finds that Floyd has met his burden to show that Clegg told Dillman that Floyd's taste was for black men. Floyd has also met his burden to show that this information was withheld by the prosecution and favorable to his defense. The Court acknowledges that

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[90] *Id.* at 1-2.

[91] Floyd Ex. 45 at 114. Detective Dillman testified that his knowledge concerning Hines' sexual preferences was acquired from "several people [he] had spoken to . . . ." *Id.*

in a previous order it found that Clegg's affidavit was not exculpatory. *Floyd v. Cain*, No. 11-2819, 2012 WL 6162164, at *2 (E.D. La. Dec. 11, 2012). Upon greater reflection, the Court finds that its previous analysis was flawed. The Court failed to consider the Clegg affidavit in the context of the full trial record, and thereby undervalued its exculpatory effect.

In evaluating the reliability of Clegg's account, the Court considers Clegg's relationship to the parties and his motivation, if any, to lie on Floyd's behalf. *See House*, 547 U.S. at 551 (crediting post-conviction witness testimony when "the record indicate[d] no reason why [they] would have wanted . . . to help [the defendant]"); *Schlup*, 513 U.S. at 316 (finding "particularly relevant" newly-obtained affidavits by "black inmates attesting to the innocence of a white defendant in a racially motivated killing"). Clegg was a close friend of Hines', and has no apparent connection to Floyd. The Court therefore finds it highly unlikely that Clegg would execute an untruthful affidavit in support of Floyd's innocence. There is also little doubt that the statement was withheld, as the police report provided to the defense directly contradicts Clegg's affidavit.

Clegg's account also bolsters the defense case, and is therefore favorable *Brady* material. At trial, both prosecution and defense argued that Hines had been killed by a sexual partner, and this theory was strongly supported by the evidence on the scene. The prosecution argued that Floyd, a white man, killed Hines. Floyd maintained that an African-American man killed Hines, and supported his theory with the African-American pubic hair found in Hines' bed, and

the evidence that Robinson had been killed by an African-American man. Clegg's statement to Dillman fully aligns with the defense theory of the case. Clegg's statement that Hines' "taste was for black men" increases the likelihood that Hines' sexual partner, and murderer, was African American. Clegg's statement to Dillman was therefore favorable to the defense.

6. Floyd's *Brady* Evidence is Material

Under *Brady*'s final prong, Floyd must show that all of the withheld evidence is collectively material. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Cobb*, 682 F.3d at 377 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In determining materiality, exculpatory evidence must be "considered collectively, not item by item." *Kyles*, 514 U.S. at 434. The Supreme Court has further explained that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the [undisclosed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434; *see also Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) ("Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Determining materiality under *Brady* is a mixed question of law and fact. *Cobb*, 682 F.3d at 377.

Whether exculpatory evidence is material depends largely on its value in relation to the strength of the government's case for guilt. *See United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004) ("The materiality of

Brady material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state."). Accordingly, when there is "considerable forensic and other physical evidence linking petitioner to the crime," a *Brady* claim is likely to fail. *See Strickler v. Greene*, 527 U.S. 263, 293 (1999). Conversely, if "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Wearry*, 136 S. Ct. at 1007 (quoting *Agurs*, 427 U.S. at 113). The Court therefore begins its materiality analysis by considering the prosecution's case against Floyd for the murder of Hines.

As explained more fully in the Court's *McQuiggen* order, the State's case against Floyd had evidentiary holes. No physical evidence linked Floyd to Hines' murder. Police identified no eyewitnesses and recovered no murder weapon. Instead, the State's case against Floyd rested entirely on Floyd's confession and his boast to Steven Edwards.

At trial, Floyd attacked the validity of his confession both explicitly and implicitly. Floyd explicitly attacked his confession by his own testimony denying the statement's veracity and asserting that he was beaten into confessing by Detective Dillman.[92] Floyd testified

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[92] The State asserts that "this Court's decision [in its *McQuiggin* order] to accord no deference to the state trial court findings that Floyd's confessions were not the product of coercion . . . is of questionable correctness." R. Doc. 89 at 30. This argument both misconstrues the Court's holding and conflates the judge's pretrial *voluntariness* determination with the fact finder's *reliability* analysis. As the Supreme Court has explained at length, a judge's finding that a confession is voluntary, does not relieve the jury of

that Detective Dillman "slapp[ed Floyd] on the side of the head," "kick[ed Floyd] on the side of the head with his boots," "knock[ed Floyd off his chair] on[to] the floor," and "threatened to put [Floyd's] head through the brick wall and throw [Floyd] out through the window."[93] Floyd also alleged that on the day of his arrest and confession he took Quaaludes in the morning[94] and started drinking before noon.[95] Floyd asserted that Detective Dillman and another officer "drank with [Floyd] for a long time" and bought Floyd "about five or six beers" before arresting him.[96]

Floyd also presented testimony from Dr. Marvin F. Miller, who was accepted by the trial court as an expert in psychiatry and clinical medicine. Dr. Miller testified that if Floyd was intoxicated, "even subclinically," at the time of his confessions, "this could have made him . . . vulnerable to even minimal coercion."[97] According to Dr. Miller, Floyd's lifestyle left him "with a degree of vulnerability to suggestions, coercions, very likely

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its duty to decide whether the statement ought to be believed. *Crane v. Kentucky*, 476 U.S. 683, 687 (1986). Accordingly, although the *McQuiggin* framework required the Court to weigh the reliability of Floyd's confession, the Court's actual innocence determination did not require—or involve—any inquiry into the statement's voluntariness.

[93] Floyd Ex. 45 at 270-272.

[94] *Id.* at 264.

[95] *Id.* at 261-62.

[96] *Id.* at 262, 265.

[97] *Id.* at 174.

greater than the average person."[98] As to Floyd's boasting regarding the two murders, Dr. Miller stated that Floyd admitted during examination that he "talk[ed] about killing people—putting holes in their heads, to his acquaintances, because of having read about the offenses in question in the paper."[99]

In addition to explicitly attacking his Hines confession, Floyd implicitly undermined it by pointing to the considerable physical and eyewitness evidence suggesting that an African-American man with Type A blood killed Robinson. This evidence included: (1) a knit cap stained with Type O blood—Robinson's blood type—and containing African-American hairs[100] that did not match Robinson's hair;[101] (2) Robinson's rectal swab, which was positive for seminal fluid produced by a person with Type A blood, indicating that Robinson

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[98] *Id.*

[99] *Id.* at 176

[100] In its objection, the State asserts that these hairs were not in fact African-American, but rather Caucasian. In briefing before the Magistrate Judge the State conceded that the hairs were African-American, and this new argument is therefore waived. *Warren*, 566 F. App'x at 381 n.1. Even if it were not, the State's reliance on a visual inspection performed 27 years after the hairs were recovered—a result which conflicts with both the NOPD Criminalist's conclusions at trial and subsequent DNA testing—is unpersuasive.

[101] Floyd Ex. 10. The cap was recovered further down the hallway from Robinson's room than the body. Floyd Ex. 45 at 157-56; Floyd Ex. 6 at 13. Robinson collapsed before he reached the point where the cap was found, suggesting that it was worn by his fleeing assailant.

had sex with a man with Type A blood within hours of his death;[102] (3) a tissue paper found next to Robinson's bed stained with semen produced by a person with Type A blood;[103] and (4) the account of hotel security guard Gladys McKinney, who described an

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[102] Floyd Ex. 45 at 213-215.

[103] Floyd Ex. 6 at 5; Floyd Ex. 45 at 194, 197. At trial NOPD Criminalist Alan E. Sison testified that he performed a blood type test on the semen-stain on the tissue found in Robinson's room. *Id.* Sison found that the semen was produced by a man in the "Group A blood type." *Id.* Patricia Daniels, a Medical Technologist with the Orleans Parish Coroner's Office, testified that she had performed a "rectal swab" and "rectal smear" on Robinson's body. *Id.* at 213. These tests were positive for seminal fluid and spermatozoa respectively. *Id*. Daniels also conducted a "secretor test" on the rectal swab and determined that the seminal fluid belonged to a person with Type A blood. *Id.*

In its objection, the State insists that the Court erred in its *McQuiggen* order by crediting the trial testimony of these State experts. In support, the State points to "factual conflicts" between reports prepared by Sison and Daniels and their testimony. R. Doc. 89 at 36. The State's argument fails for several reasons. First, the State may not raise new arguments in its objection. *Warren*, 566 F. App'x at 381 n.1. Second, there is no factual conflict. Rather, as the State concedes, the reports simply "contain[] no mention" of the test results. R. Doc. 89 at 36. Third, to the extent the absence requires explanation, Daniels provided one during a pretrial hearing. Floyd Ex. 73 at 189 ("[The report] does not indicate what the swab came out . . . . I do my own typing so I would have to type all that again . . . ."). Fourth, the Court—unlike, it appears, the State—finds it unlikely that two State-aligned experts flubbed or fabricated the results of separate, routine blood tests at a pretrial hearing, and then both made the same error again at trial.

African-American male running from the premises a few minutes before police arrived on the scene.[104]

The evidence concerning the tissue is particularly probative regarding the reliability of Floyd's confession to the Robinson murder. In his statement, Floyd claimed that Robinson performed oral sex on Floyd shortly before Floyd stabbed Robinson to death.[105] Floyd stated: "after [Robinson] was finished I wiped my dick with a pi[e]ce of paper and threw it on the floor."[106] As the Court observed in its *McQuiggen* order:

> Floyd's statement regarding the tissue in the Robinson case matches the physical evidence as perceived by detectives at the time of interrogation—after the tissue had been discovered but before the blood type had been compared to Floyd's—but not the scene as it actually existed. In other words, Floyd's apparent knowledge of this key detail at the time of his confession went only as far as what detectives already "knew," even when that supposed knowledge would later be contradicted by forensic analysis.

Floyd, 2016 WL 4799093, at *23.

Thus, Floyd introduced exculpatory evidence at trial that challenged the persuasive weight of the State's only two pieces of inculpatory evidence in the Hines

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[104] *Id.* at 222-25.

[105] Floyd Ex. 9 at 2.

[106] *Id.*

murder: Floyd's confession and his boast to Steven Miller. The Robinson confession and, by extension, the very similar Hines confession, was undermined by the significant evidence tending to establish Floyd's innocence of the Robinson murder. Because Floyd allegedly boasted about both murders, this evidence also implicitly undercut the probative value of Floyd's boast about the Hines murder. Floyd's confession was further attacked with evidence of Floyd's vulnerability to coercion and his own account of the circumstances of his interrogation. In short, the State's case for guilt beyond a reasonable doubt was relatively weak: the prosecution had nothing to corroborate Floyd's inculpatory statements, and the reliability of those statements was vigorously contested by the defense.

Viewed through the lens of the nature of the State's evidence, Floyd has shown more than the required "any reasonable likelihood" that his *Brady* material could have "affected the judgment" of the trial judge. *Wearry*, 136 S. Ct. at 1006 (quoting *Giglio*, 405 U.S. at 154). All of Floyd's new evidence supports Floyd's own account at trial: that his confession is false and that someone else killed Hines. First and foremost, the fingerprint comparison results from the Hines scene directly bolster Floyd's theory by suggesting that an unknown third party killed Hines. This is particularly true because the print was recovered from a whiskey bottle in Hines' kitchen, and Detective Dillman's trial testimony and Evidence Technician Seuzeneau's actions confirm that the trained investigators who viewed the scene believed it likely that Hines shared a drink with his killer.

The fingerprint comparison results from the Robinson scene also support Floyd's theory. The results suggest that an unknown person was in Robinson's car and hotel room before Robinson's death. The prints were, as in the Hines case, recovered from items that Robinson's killer were likely to have touched.

As the Court has repeatedly noted, exculpatory evidence in the Robinson case is relevant to the Hines case. First, because the two murders are strikingly similar, evidence suggesting that an unknown person—not Floyd—killed Robinson also suggests that the same unknown person—not Floyd—killed Hines. Second, such evidence tends to contradict Floyd's inculpatory statements in the Robinson case. Because the inculpatory statements in the two cases are similar, the same evidence suggests that Floyd's confession and boast regarding the Hines murder are false as well.

Finally, Clegg's statement to Detective Dillman lends additional force to Floyd's materiality argument. Floyd was convicted on the theory that he murdered Hines during a sexual encounter. The physical evidence on the Hines scene, while revealing no trace of Floyd, supported this theory. Clegg's account, which speaks directly to Hines' sexual preferences, is therefore probative. Like the fingerprint evidence, it matches Floyd's theory that Hines was killed by someone else. More specifically, it suggests that Hines was killed by an African-American man. In that way, the affidavit dovetails with evidence from both scenes, including the African-American pubic hair recovered from Hines' bed and the physical evidence and witness statement from the Robinson scene.

Considering the full trial record, the Court finds that the withheld fingerprint results are—standing on their own—material to Floyd's guilt, and that no reasonable application of clearly established federal law could support a contrary conclusion. Even if the prints alone were not enough, Clegg's statement to Detective Dillman provides additional exculpatory evidence. This result is compelled by the persuasive force of the withheld evidence in the context of the limits in the State's case against Floyd. *Compare United States v. Sumner*, 171 F.3d 636, 637 (8th Cir. 1999) (exculpatory fingerprint analysis immaterial where "[i]n addition to [the victim], two other witnesses testified that Sumner attacked [the victim] and left with her car"), *with Bailey*, 2016 WL 5027562, at *12 (exculpatory fingerprint evidence material where "the strength of the State's case against Bailey was relatively weak").

Finally, the Court's materiality analysis is also informed by Floyd's acquittal in the Robinson case. In acquitting Floyd, the trial judge appeared to find that the inculpatory evidence at issue—Floyd's confession and other statements—could not eliminate reasonable doubt of Floyd's guilt in the face of exculpatory, primarily physical, evidence. This suggests a "reasonable likelihood" that additional exculpatory physical evidence found at the Hines scene, such as the fingerprints at issue, could have "affected the judgment" of the trial judge in the Hines case as well. *Wearry*, 136 S. Ct. at 1006 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

Accordingly, the Court finds that Floyd has met his burden to show that the State withheld favorable,

material evidence in violation of *Brady* and its progeny. Because the Court finds the Louisiana state courts' contrary decision to be an unreasonable application of clearly established federal law, the Court does not consider Floyd's alternative argument that it may review the findings with less deference.

IV. CONCLUSION

For the foregoing reasons, John D. Floyd's petition for habeas corpus relief is GRANTED. The State of Louisiana is hereby ordered to either retry Floyd or release him within 120 days of this order.

New Orleans, Louisiana, this 8th day of May, 2017.

/s/Sarah Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 11-2819
SECTION "R" (3)

[Filed May 8, 2017]

JOHN D. FLOYD	)
	)
VERSUS	)
	)
DARREL VANNOY, WARDEN	)
	)

JUDGMENT

Considering the Court's order and reasons on file herein,

IT IS ORDERED, ADJUDGED AND DECREED John D. Floyd's petition for habeas corpus relief is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the State of Louisiana is to either retry Floyd or release him within 120 days of this order.

New Orleans, Louisiana, this 8th day of May, 2017.

/s/Sarah Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO: 11-2819
SECTION: R (3)

[Filed September 14, 2016]

JOHN D. FLOYD	)
	)
VERSUS	)
	)
BURL CAIN	)
	)

ORDER AND REASONS

Following a joint bench trial in Louisiana state court in January 1982, petitioner John Floyd was convicted of second-degree murder of William Hines, but acquitted of second-degree murder of Rodney Robinson. Floyd's conviction became final when the Louisiana Supreme Court affirmed the ruling of the trial court on June 27, 1983. *State v. Floyd*, 435 So. 2d 992 (La. 1983). Floyd first filed an application for habeas corpus relief in state court on March 2, 2006, twenty-three years after the Louisiana Supreme Court finalized his conviction.[1] At the conclusion of his post-

[1] R. Doc. 1 at 16 ("Petition for a Writ of Habeas Corpus by a Prisoner in State Custody"). The Innocence Project New Orleans (IPNO) assisted Floyd in submitting his first habeas petition to

conviction proceedings in state court, Floyd promptly petitioned this Court for habeas corpus relief under 28 U.S.C. § 2254.[2] To overcome the untimeliness of his petition, Floyd argues that, in light of newly discovered evidence exculpating him of the murders of both Robinson and Hines, he is actually innocent of the murder of Hines.[3] *See McQuiggin v. Perkins*, 133 S. Ct.

Louisiana state court. Between 1983 and 2006, Floyd wrote over 500 letters to IPNO and countless letters to other individuals, including the Orleans Parish Criminal District Court, the District Attorney, United States congressmen, the United States Department of Justice, the FBI, the NAACP, Southern Poverty Law Center, the Center for Constitutional Rights, and others. Floyd Exhibit 51; Floyd Exhibit 57; Floyd Exhibit 65. It appears that the habeas petition filed by IPNO on Floyd's behalf is the first time his requests for relief have been submitted in proper legal form.

[2] *See generally* R. Doc. 1.

[3] R. Doc. 61 ("Petitioner's Brief Regarding *McQuiggin v. Perkins*"). Floyd filed his original petition in this Court on November 11, 2011. *See id.* The Magistrate Judge issued a report on September 28, 2012, recommending that Floyd's petition be dismissed with prejudice as untimely. R. Doc. 36. Floyd objected to the Magistrate Judge's R&R on several grounds, and this Court overruled Floyd's objections and dismissed the petition with prejudice on December 11, 2012. R. Doc. 52. On January 4, 2013, Floyd asked the Court to alter or amend its earlier judgment under Rule 59(e) of the Federal Rules of Civil Procedure. R. Doc. 54. In light of the intervening decision of the United States Supreme Court in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), holding that proof of a habeas petitioner's actual innocence overcomes any untimeliness of his petition, the Court granted Floyd's Rule 59(e) motion and remanded the case to the Magistrate Judge to determine whether *McQuiggin* provided Floyd an avenue for relief. R. Doc. 59. Floyd and the State then submitted supplemental briefing on the issues

1924, 1928 (2013) ("[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations).

Finding that Floyd failed to meet the high standard of actual innocence, the Magistrate Judge issued a supplemental report recommending that Floyd's petition be dismissed with prejudice as untimely.[4] Floyd objects to the Magistrate Judge's Report and Recommendation (R&R) on several grounds.[5] First, Floyd argues that, contrary to the Magistrate Judge's view, the evidence overwhelmingly demonstrates that Floyd did not, in fact, murder Robinson. Floyd also argues that because the Magistrate Judge did not find Floyd factually innocent of the Robinson murder, the Magistrate Judge underestimated the connection between the murder of Robinson and the murder of Hines, which were committed within days of each other and under substantially similar circumstances. In addition, Floyd contends that all of the evidence completely undermines the credibility of Floyd's confession to the murder of Hines. Finally, Floyd argues that the Magistrate Judge departed from the correct legal standard and neglected to consider the facts of this case in light of a number of other actual innocence cases.

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of *McQuiggin* and Floyd's actual innocence. R. Doc. 61; R. Doc. 63; R. Doc. 66.

[4] R. Doc. 67.

[5] *See generally* R. Doc. 68.

Having reviewed the parties' original briefing, the parties' supplemental briefing regarding Floyd's actual innocence, the Magistrate Judge's R&R, and Floyd's objections to the R&R, the Court sustains Floyd's objections and rejects the Magistrate Judge's finding that Floyd's petition is untimely. In doing so, the Court remains mindful that the actual innocence standard confronted by Floyd "permits review only in the 'extraordinary' case." *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Nonetheless, the Court finds that it is unlikely that any reasonable juror weighing the evidence in this case would vote to convict Floyd of the murder of William Hines.

Police uncovered no physical evidence and no eyewitness testimony linking Floyd to the scene of the crime. No weapon or other inculpatory item was found in Floyd's possession, and no coherent motive has ever been suggested. Rather, Floyd's conviction was based entirely on his own statements: a signed confession and an alleged barroom boast. But Floyd did not only confess to and boast about killing Hines; Floyd confessed to and boasted about killing Robinson as well. And the considerable forensic evidence found on the Robinson scene excludes the possibility that Floyd killed Robinson as described in his confession and strongly suggests that Floyd did not kill Robinson at all.

Physical evidence recovered on the scene of the Robinson murder suggests to a near certainty that Robinson was stabbed to death by an African-American man with type A blood shortly after Robinson and the man had sex. The evidence therefore excludes Floyd,

who is white and has type B blood. Semen produced by a type A male was found both in Robinson's body and on a tissue beside Robinson's hotel room bed. A cap stained with Type O blood—matching Robinson—was found near Robinson's body. The cap contained hairs from an African-American male, and the hairs did not match Robinson, who was African American. Fingerprints taken from the scene, and not revealed until years after trial, do not match Floyd's. Hairs—also new evidence—found in Robinson's bed, on the semen-stained tissue, and around Robinson's hotel room were produced by two different African-American men. Finally, an eyewitness saw an African-American male running from the scene with one hand in his pocket and looking over his shoulder as if "he believed someone was following him."[6]

Floyd's confession to the Robinson murder, which the evidence before the Court strongly suggests Floyd did not commit, is strikingly similar to his confession to the Hines murder, and the two confessions were obtained together. The persuasive force of the two confessions are linked: if Floyd was willing—for whatever reason—to confess falsely to killing Robinson, then it is significantly more likely that he falsely confessed to the Hines murder too. The credibility of Floyd's confession is further undermined by new evidence supporting Floyd's consistent allegation that NOPD officers beat him to coerce his confession, and new evidence of Floyd's vulnerability to suggestion and limited mental capacity.

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[6] Floyd Exhibit 2 at 7.

Floyd also presents further evidence of his innocence of the Hines murder. This evidence includes: 1) the striking similarity between the Robinson and Hines murder, which suggests that the same African-American male with type A blood committed both murders; 2) new evidence that, contrary to the lead detective's trial testimony, Hines had a preference for African-American men; 3) African-American hair found in Hines' bed; and 4) fingerprints found at the scene of Hines' death that match neither Hines nor Floyd.

As more fully explained below, the Court recognizes that a confession is generally strong evidence of guilt, but finds that the inculpatory statements at issue in this case are unreliable and are therefore unlikely to, standing alone in the face of considerable exculpatory evidence, cause any reasonable, properly instructed juror to vote to convict Floyd of the murder of William Hines. The Court therefore finds that Floyd has met the demanding standard of actual innocence and remands this case to the Magistrate Judge for a report and recommendation on the merits of Floyd's petition.

I. BACKGROUND

A. The Petitioner

At the time of the murders of William Hines and Rodney Robinson, petitioner John Floyd, then thirty-two years old, was a "drifter," living in the French Quarter of New Orleans.[7] According to Floyd, he moved to New Orleans in 1975 and intermittently worked as

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[7] Floyd Exhibit 45 at 241 (Trial Transcript, *State v. Floyd*) (testifying as to his age).

a furniture refinisher and deckhand.[8] Although at one time Floyd maintained a permanent residence, he mostly lived in motels or stayed with friends in the French Quarter.[9] According to NOPD Detective John Dillman, Floyd was a prostitute with "no means of support" and who would have sex with men in exchange for a place to stay.[10] Floyd testified that he "never hustled on the street," because he "always had money [from] work[ing] on the boats and stuff."[11] Floyd also said people let him stay at their homes because he would "help them out," not because they expected sex, although sometimes Floyd had sex with the people he stayed with because he "wanted to."[12] Dr. Marvin F. Miller, a psychiatric and clinical medicine expert who examined Floyd's competence to stand trial, referred to Floyd as a "street person," "in the sense of having only transient relationships, drinking a lot [and] using drugs . . . making his living, if you will, by accommodating to the wishes of other people."[13] It is undisputed that Floyd was an alcoholic and a drug user at the time of the murders. He was known in the

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[8] *Id.* at 242-43.

[9] *Id.* at 243-44, 252.

[10] *Id.* at 103.

[11] *Id.* at 278.

[12] *Id.* at 279.

[13] *Id.* at 175.

French Quarter as "Crazy Johnny" because when Floyd drank heavily, "[h]e caused a lot of problems."[14]

B. The Crimes

1. The Murder of William Hines

At the time of his death, William Hines was a middle-aged Caucasian man who worked as an editor for the Times-Picayune newspaper.[15] Police found Hines's body in the bedroom of his home, located on Governor Nicholls Street in the French Quarter, at approximately 1:25 p.m. on November 26, 1980.[16] Orleans Parish Coroner Frank Minyard determined that Hines had been dead for at least twenty-four hours before police found his body, which means that Hines was murdered—at the latest—on November 25, 1980.[17] Hines was last seen alive at approximately 9:10 p.m. on

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[14] *Id.* at 56. The witness who explained the background behind Floyd's nickname testified that these "problems" were "altercations" with other bar customers. *Id.* at 54-55. When Floyd's counsel referred to Floyd's getting into "fights" at bars, the witness corrected defense counsel to say, "[n]ot fights. Most of them were verbal." *Id.* at 66.

[15] Floyd Exhibit 3 at 3 (NOPD Supplemental Report, Murder of William Hines); Floyd Exhibit 11 at 4 (describing Hines as "middle-aged"). At the time of his death, Hines had worked for the Times Picayune newspaper for approximately twenty years. Floyd Exhibit 45 at 16.

[16] Floyd Exhibit 1 (NOPD Incident Report, Murder of William Hines).

[17] Floyd Exhibit 3 at 3.

November 24, 1980.[18] A friend and co-worker of Hines told police on the day the body was discovered that Hines "had not reported for work in the past two days."[19]

John Dillman served as lead detective for the Hines murder investigation. According to his police report, Hines's friend Thomas Bloodworth reported that Hines was gay and "frequented several of the gay bars in the French Quarter area."[20] Bloodworth also told Detective Dillman that Hines "would frequently attempt to pick-up sexual partners while in an intoxicated condition."[21] Another friend, Nobert Raacke, "stated essentially the same information."[22] According to Detective Dillman's report, John Rue Clegg, a close friend of Hines and the last person to see Hines alive,[23] told Detective Dillman that Hines "frequently had sexual relations with both black and white males" and that he "frequented several of the gay bars in the French Quarter area, often in the early morning hours."[24]

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[18] *Id.* at 5.

[19] *Id.* at 2.

[20] *Id.* at 4.

[21] *Id.*

[22] *Id.*

[23] *Id.* ("[Bloodworth] went on to say that to his knowledge the last person to see the victim alive was another friend, one John Clegg.").

[24] *Id.* at 6.

Based on their assessment of the crime scene, police believed Hines was murdered by a welcomed visitor. There were no signs that the perpetrator forced entry into Hines's home.[25] The police report notes that "the victim had apparently undressed and folded his clothing on a chair next to the bed."[26] Police also found "two highball glasses [containing alcohol] on each side of the bed," as if Hines had shared a drink with his killer.[27] The NOPD Crime Laboratory analyzed evidence recovered from the crime scene and found hairs belonging to an African-American person on Hines's bed sheets.[28] Hines had apparently been in bed with his killer, because "[f]rom all indications, the victim had been stabbed while in the bed, jumped from the bed and began to run through the room, falling to the floor on the right side of the bed."[29] Detective

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[25] *Id.* at 3 ("Entrance into the victim's apartment was gained through a wooden door, which led into the living room of the apartment. This door was found ajar and no forced entry was visible.").

[26] *Id.*

[27] Floyd Exhibit 45 at 118; *accord* Floyd Exhibit 11 at 3 (August 26, 1998 Jupiter Entertainment Interview with John Dillman) ("[T]here was [sic] two glasses on the nightstand near the bed with alcoholic beverages in the glasses so it appeared that whoever had killed Mr. Hines (A) . . . knew him and (b) that they had been drinking together."). An NOPD Crime Scene Technician Report, however, suggests that one of the glasses was found in the kitchen rather than the bedroom. Floyd Exhibit 5 at 3.

[28] Floyd Exhibit 40 (December 3, 1980 NOPD Crime Laboratory Report).

[29] Floyd Exhibit 3 at 3.

Dillman later described the scene as "one of the bloodiest that [he has] ever seen" and stated that "it was obvious that there had been a struggle for some time in the room."[30] The Coroner opined that Hines's cause of death was "multiple stab wounds of the head and chest."[31]

2. The Murder of Rodney Robinson

Approximately three days after the Hines murder, on November 28, 1980, a guest at the Fairmont Hotel in New Orleans found a naked African-American man stabbed to death in the hallway of the hotel's tenth floor shortly before 4:45 a.m.[32] At the time of his death, Rodney Robinson worked as the Personnel Director for the Hilton Hotel in Houston, Texas. He was in New Orleans visiting his family for Thanksgiving.[33] Robinson left the Fairmont Hotel on the morning of November 27, Thanksgiving Day, to spend the day with his grandmother and uncle in Uptown New Orleans before meeting a friend named David Hennessy around 5:30 p.m. at Hennessy's home.[34] Robinson and Hennessy went to several bars that night before Robinson drove Hennessy home to the Lakeview

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[30] Floyd Exhibit 11 at 2-3.

[31] Floyd Exhibit 3 at 2-3.

[32] Floyd Exhibit 4 at 2 (NOPD Supplemental Report, Murder of Rodney Robinson).

[33] *Id.* at 8.

[34] *Id.* at 8-9.

neighborhood of New Orleans at 3:15 a.m.[35] Robinson told Hennessy that he was returning to his hotel for the night.[36] Robinson was found dead less than ninety minutes later.

Robinson was found lying just outside of hotel room number 1091.[37] The police report listed Robinson's estimated time of death as 4:35 a.m.[38] Police noticed a blood smear along the wall "leading to room 1095," which was later determined to be Robinson's room.[39] Police also found a blue knit cap, stained with blood, in the same hallway as Robinson's body.[40] Analysis by the NOPD crime laboratory found that the blood on the cap was type O.[41] Hair belonging to an African American—but not, according to the NOPD lab, belonging to Robinson—was also found on the blue knit cap.[42]

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[35] *Id.* at 10.

[36] *Id.*

[37] Floyd Exhibit 3 at 4.

[38] *Id* at 1.

[39] *Id.*

[40] *Id.* at 6.

[41] Floyd Exhibit 10 (December 12, 1980 NOPD Crime Laboratory Report).

[42] *Id.*

The locks on Robinson's hotel room door were functional, and there was no sign of forced entry.[43] Inside the room, police found drinking glasses, containing "what appear[ed] to be bourbon," on each end table next to the hotel bed.[44] "Several articles of clothing" were found lying around the room.[45] The bed was stained with blood, and police found blood spatter throughout the room.[46] Officers also found a white tissue paper stained with seminal fluid on the floor next to the bed.[47] According to the police report, Hennessy told NOPD detectives that Robinson was gay and that "all of Robinson's lovers were white males."[48] Per the report, Hennessy also said that Robinson would never have sex with a black man.[49]

The assistant coroner noted that Robinson had suffered multiple stab wounds to his neck, shoulders, and chest.[50] According to Detective Dillman:

> As soon as [he] walked into that crime scene [he] knew again from intuition and working these

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[43] Floyd Exhibit 3 at 4.

[44] *Id.*

[45] Floyd Exhibit 4 at 5.

[46] Floyd Exhibit 3 at 4.

[47] *Id.* at 5.

[48] Floyd Exhibit 4 at 10.

[49] *Id.*

[50] Floyd Exhibit 3 at 5.

> cases year in and year out . . . that [this was] the same perpetrator. The [M.O.] was just there, no forced entry #1, a blood bath, blood everywhere, the same type of defensive wounds that Bill Hines had, the blood splattered all over the wall, all over the carpeting, nothing stolen from the room . . . and glasses with alcohol beverage in them, same exact [M.O.][51]

Hotel guests in the rooms nearest Robinson's reported hearing someone in the hallway screaming for help, "someone running in the hallway and the sound of someone falling."[52] Another guest reported hearing "a door opening, rapid footsteps in the hallway, and the screams."[53] A hotel security guard named Gladys McKinney reported to the Fairmont Hotel's in-house detective that she saw an African-American man running from the back door of the hotel shortly before the police arrived.[54] According to McKinney, the man was wearing blue jeans and a blue jacket and was "not dressed neatly."[55] McKinney saw the man run out of the hotel's service elevator and away from the hotel, toward the street. As he ran, the man kept his right hand in his jacket pocket, and he turned around twice,

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[51] Floyd Exhibit 11 at 4.

[52] Floyd Exhibit 2 at 6.

[53] *Id.* at 7.

[54] Floyd Exhibit 4 at 7.

[55] *Id.* at 12.

as if "he believed someone was following him."[56] According to the police report, NOPD Detective Michael Rice, lead investigator for the Robinson murder, believed "McKinney witnessed the perpetrator . . . making good his escape."[57]

C. Floyd's Conviction

Police arrested John Floyd on January 19, 1981. Detective Dillman and NOPD Officer John Reilly found Floyd drinking at the Louisiana Purchase Bar in the French Quarter sometime that afternoon.[58] At the bar, Detective Dillman and Officer Reilly bought Floyd at least one drink before taking him outside to arrest him.[59] After transporting Floyd to NOPD's Homicide Office, Detective Dillman and Officer Reilly, joined later by Detective Rice, interrogated Floyd about both murders.[60] Initially, Floyd denied any involvement in either murder. At some point during the interrogation, according to Detective Dillman, Floyd became "very emotional . . . sobbing that he needed help [and] that he was, in fact, involved in these murders."[61] The officers

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[56] *Id.* at 7.

[57] *Id.* at 12.

[58] *Id.* at 7.

[59] Floyd Exhibit 73 at 56 (Pre-Trial Evidentiary Hearing, *State v. Floyd*) (testifying that "I think that Officer Reilly had bought a couple of beers and, in fact, bought Mr. Floyd a beer.").

[60] *Id.* at 13-14.

[61] *Id.* at 59.

then obtained from Floyd signed confessions to the murders of Rodney Robinson and Williams Hines.

Floyd's signed confession to the Hines murder, taken by Detective Dillman at 8:35 p.m., states that Floyd confessed to the officers because he "killed two people and [he was] sick and needed help."[62] The confession describes Floyd's encounter with Hines as follows:

> During October and November of [1980] I was strung out on dope and whiskey. . . . I met this guy on Bourbon . . . and I was drinking a[]lot. . . . He took me home with him and I was going to spend the night with him. He lived on Gov. Nicholls [S]t. We went through[] a gate and into his apartment. We were both drinking. We both got into bed and we had sex. Then he told me that he wanted to fuck me and I went crazy. I had a knife in my boot and I stabbed him a bunch of times. Then I ran out of the house and I went back down on [B]ourbon [Street] to the bar. I stayed drinking and the next day I heard on the street that he was dead.[63]

According to the confession, Floyd stated that the sex occurred "[i]n his bed in the bedroom."[64] When asked to describe the sexual activity, Floyd stated: "We sucked one another and I fucked him. Then he tried to fuck

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[62] Floyd Exhibit 8 at 1 (January 1, 1980 [sic] Statement of John D. Floyd, Murder of William Hines).

[63] *Id.* at 3.

[64] *Id.* at 4.

me."[65] When officers asked Floyd what Hines did with his clothing, Floyd said, "I undressed and placed my cloth[e]s on the bed. Then I put them on a chair. I went to the bathroom and when I came back, he was naked in the bed."[66] Floyd's confession also states that during the stabbing, Hines "fell on the floor next to the bed. [Floyd] got dressed and when [Floyd] left [Hines] was still lying there."[67] The officers also asked whether Floyd was "involved in any other similar incidents," to which Floyd responded, "Yes. A few days after I stabbed the guy on Gov. Nicholls [S]t[.], I stabbed a black dude in the Fairmont hotel."[68]

Floyd's signed confession to the Robinson murder, taken by Detective Rice at 10:45 p.m., states as follows:

> I met [Robinson] on Bourbon Street next to that gay bar. I think its Orleans where I was standing at. He came up and started to talk to me and then we went up to the Pubb Bar, that's on Saint Ann and Bourbon Street. After we got in the bar—I knew he was gay because he had his hand on my leg and he kindaof [sic] told me he was gay. We stayed in the bar for a little while and we left and walked to another bar and had a drink. I don't remember exactly because I was on L.S.D. and half out of my mind. We walked somewhere and got into a car be, [sic] I

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[65] *Id.* at 5.

[66] *Id.* at 4.

[67] *Id.* at 5.

[68] *Id.* at 6.

> don't remember where it was parked becaused [sic] by this time I was really fucked up. We got into the car and he drove down close to his hotel and parked the car, but it was not in a parking lot. We walked up the steps into the lobby of the hotel and I saw some people on the other side of the lobby. I remember getting into the elevator and it seemed we went up for a long distance. I remember walking down a long hallway and following him to his room. He opened the door with the key then I walked in behind him and I think he locked it, I am not sure. I think I went to the bathroom and I think by the time I got out of the bathroom he had his cloth[e]s off. He told me he wanted to suck my dick and after he was finished I wiped my dick with a pi[e]ce of paper and threw it on the floor. He told me he wanted [to] fuck me and that[']s when I went berserk and pulled my knife from my left boot and started stabbing him, man I just went blank. I pulled my pants up and ran out the room and ran down the hall. I got on one of the elevators and went to the lobby and ran from the hotel. After I left the hotel I ran to Bourbon Street. I talk [sic] to this guy, I don't know his name. I was talking to him about the killings and I told him I had just killed a dude. I asked him for help and he took me to Charity Hospital to the Detoxification Center . . . .[69]

Floyd waived his right to a jury trial and proceeded to a joint trial on the second-degree murder charges

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[69] Floyd Exhibit 9 at 2 (January 19, 1981 Statement of John D. Floyd, Murder of Rodney Robinson).

before a judge in Orleans Parish Criminal District Court.[70] At trial, the State called five key witnesses.[71]

Harold G. Griffin testified that he knew Floyd from meeting him "several times at the Louisiana Purchase in the French Quarter."[72] Griffin also said that on November 29, 1980, the day after the Robinson murder,[73] he and Floyd were drinking at the Louisiana Purchase Bar when Floyd asked Griffin if he would walk with Floyd to the Detoxification Center at Charity Hospital.[74] Griffin had been drinking at the bar from 10:00 p.m. to approximately 5:00 a.m., when he left with Floyd.[75] According to Griffin, on the walk, Floyd "mentioned that he had been treated in some type of mental health facility a couple of times and that he heard that perhaps going to the Detox Center would be the next best thing to keep from being held accountable for doing something wrong."[76] Griffin said that he "couldn't quote the precise conversation [or] quote [Floyd's] exact words [because] he wasn't paying that

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[70] Floyd Exhibit 45 at 1, 5.

[71] *Id.* at 2. The State's first two witnesses—Thomas Bloodworth and Coral Rodriguez—merely identified the victims. *Id.* at 15-37.

[72] *Id.* at 38.

[73] Griffin originally stated that this encounter occurred on December 29, 1980, but later corrected himself. *Id.* at 39, 43.

[74] *Id.* at 40.

[75] *Id.* at 47.

[76] *Id.* at 40-41.

much attention at the time."[77] After a few minutes and more "general chatting along," Floyd asked Griffin if Griffin "heard of the stabbing at the Fairmont," and Griffin said "No."[78] According to Griffin, "that was all that was said" and Griffin did not "make any attempt" to follow up with Floyd about it.[79] After Griffin read about the Robinson murder in the morning edition of the newspaper that day, Griffin told NOPD about his conversation with Floyd.[80] Griffin testified that he called NOPD to report the conversation because he was "surprised" that Floyd knew about the Robinson murder before Griffin read the newspaper article about it on November 29.[81] On cross-examination, Griffin admitted that the Times Picayune newspaper had apparently published a story about Robinson in its evening edition the day before, on November 28—several hours before Floyd asked whether Griffin had heard about the murder.[82] Griffin did not know about the evening edition of the paper until after he notified the police.[83]

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[77] *Id.* at 41.

[78] *Id.*

[79] *Id.* at 42.

[80] *Id.* at 43-45.

[81] *Id.* at 50-51.

[82] *Id.* at 50.

[83] *Id.* at 51-52.

The State also called Steven Edwards, owner of the Mississippi River Bottom Bar in the French Quarter.[84] Floyd had been to Edwards's bar a few times before Edwards asked Floyd not to come back anymore because he "caused a lot of problems with the customers and got in a couple altercations."[85] Sometime in "the latter part of November" 1980, Edwards spotted Floyd, who had been "drinking heavily,"[86] trying to enter Edwards's bar. According to Edwards, he shouted at Floyd,

> You can't go in there. I don't want you in there because you cause problems. And [Floyd] said, "Don't come fucking with me. I already wasted one person." . . . and [Edwards] said, "Who? Bill Hines?" And [Floyd] said, "Yeah, on Governor Nichol[l]s." And [Edwards] said, "I don't give a shit. Get away from here." And [Floyd] turned and left.[87]

Edwards testified that he suggested Bill Hines's name to Floyd because Hines's murder had been reported in the newspaper that week.[88] On cross-examination, Edwards testified that he did not immediately report this conversation to police and that it is "fairly common" for certain barroom patrons to make these

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[84] *Id.* at 53.

[85] *Id.* at 54-55.

[86] *Id.* at 63.

[87] *Id.* at 55-56.

[88] *Id.* at 70.

types of comments.[89] Edwards also testified that he did not "know[] Floyd to carry a knife" and that he had never seen Floyd show a knife to anyone.[90]

Floyd's acquaintance and former sexual partner Byron Gene Reed also testified.[91] Reed testified that he had known Floyd for about three years.[92] He said that after Christmas of 1980, Reed encountered Floyd on his way home, and Floyd asked Reed for money.[93] When Reed refused, Floyd said that "he'd take care of [Reed] like he did the one at the Fairmont."[94] Reed also testified that Floyd threatened him "a couple of times" in the past, but that Reed "didn't pay [any] attention to it."[95] Regarding the Fairmont comment, Reed "didn't

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[89] *Id.* at 59, 65. This line of questioning and Edwards's testimony was apparently a reference to Edwards's earlier testimony at a pre-trial evidentiary hearing. At that time, Edwards explained that he didn't think anything of Floyd's comments because "that happens in the barroom business a lot. . . . People come in and say things, 'I beat the piss out of this guy down the street.'" Floyd Exhibit 73 at 45-46. Edwards said that he would "brush it off. . . . just let it go." *Id.* at 46.

[90] Floyd Exhibit 45 at 66. According to his pre-trial hearing testimony, Edwards had known Floyd for about four years. Floyd Exhibit 73 at 43.

[91] Floyd Exhibit 45 at 75.

[92] *Id.* at 76.

[93] *Id.* at 77.

[94] *Id.*

[95] *Id.*

report it [and] just forgot about it."[96] Reed also testified that he had never seen Floyd with a knife or "known him to carry a knife."[97] According to Reed, Floyd was "very gentle" and "a very nice person."[98]

Detective Dillman testified about the murder of William Hines. As Detective Dillman explained the layout of the crime scene, he noted that police found Hines's body, specifically his legs, "underneath the bed and [police] had to pull the body out from it to check . . . for signs of injuries."[99] When shown a photograph of Hines's body on the floor next to the bed, Detective Dillman noted that "in th[e] photograph, the body had been moved because . . . the body was directly on the floor on the right-hand side of the bed, near the phone. However, [police] were unable to photograph or check the victim for his injuries until the body was moved."[100] Detective Dillman also noted that "[t]he victim's clothing was on a chair directly next to the bed"[101] and that this chair and the victim's clothes were not visible in the photograph of the victim lying on the floor next to the bed.[102]

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[96] *Id.* at 81.

[97] *Id.* at 84-85.

[98] *Id.* at 80.

[99] *Id.* at 92.

[100] *Id.* at 93.

[101] *Id.* at 92.

[102] *Id.* at 95.

Detective Dillman also testified that when he and the other officers took Floyd's confession, "it was evident that [Floyd] had been drinking, but . . . [h]e was not intoxicated at all."[103] Detective Dillman did not know how long Floyd had been drinking in the Louisiana Purchase Bar before he and Officer Reilly arrested Floyd.[104]

In testifying about the details of Floyd's confession, Detective Dillman noted that Floyd "was able to describe the position of the victim's body. [Floyd] was able to describe . . . the outlay of the victim's apartment, even to detail the position of the body where it fell off the bed."[105] Detective Dillman emphasized that Floyd "was able to describe the victim's residence and the surrounding area perfectly . . . the living room, the desk, the bedroom, even the position of the victim's clothing," which Detective Dillman said Floyd had indicated were "on the chair in the bedroom."[106]

Regarding the African-American hairs found on Hines's bed sheets, Detective Dillman testified that this evidence did not indicate that an African-American person was involved in Hines's murder. According to Detective Dillman, Hines was "very indiscriminate" in his sexual preferences "and [race] didn't make a difference," so the hair samples "could have been from

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[103] *Id.* at 102.

[104] *Id.* at 134.

[105] *Id.* at 108.

[106] *Id.* at 108-09.

the perpetrator or anyone who was in his apartment night after night."[107] Detective Dillman also testified that "various people," whose names he did not know, told him that Floyd carried a knife.[108]

The State's last witness was NOPD Detective Michael Rice, the lead investigator for the Robinson murder. Detective Rice testified that, at the time of taking Floyd's confession, Floyd did not "appear" intoxicated.[109] On cross-examination, Detective Rice testified that the blue knit cap from the Robinson crime scene was located further down the hotel hallway from Robinson's body, away from his hotel room.[110] If one were to leave Robinson's room (1095), pass the door to room 1091 where his body was found, and then keep going past where the blue knit cap was found, the Fairmont Hotel's service elevator was on the right side of the same hallway.[111]

Detective Rice also testified that he was "positive" that Floyd volunteered the statement from his confession that, after having sex with Robinson, Floyd wiped himself with a piece of paper and threw it on the floor.[112]

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[107] *Id.* at 114-15.

[108] *Id.* at 135-36.

[109] *Id.* at 151.

[110] *Id.* at 157-58.

[111] *Id.*

[112] *Id.* at 162.

When the State rested its case, the defense presented testimony from seven witnesses, including Floyd. The first witness, Dr. Marvin F. Miller was accepted by the trial court as an expert in psychiatry and clinical medicine.[113] The presiding judge had previously appointed Dr. Miller to determine Floyd's competency to stand trial.[114] Dr. Miller testified that if Floyd was intoxicated, "even subclinically," at the time of his confessions, "this could have made him . . . vulnerable to even minimal coercion."[115] According to Dr. Miller, based on Floyd's lifestyle and "that he was pretty much dependent on other people and pretty much accountable to them as a consequence, that too would, in [Dr. Miller's] opinion, provide [Floyd] with a degree of vulnerability to suggestions, coercions, very likely greater than the average person . . . ."[116] On cross-examination, Dr. Miller revealed that during his examination, Floyd admitted that he "talk[ed] about killing people—putting holes in their heads, to his acquaintances, because of having read about the offenses in question in the paper."[117]

Arthur Huddick, an expert on "the detection and treatment of alcoholics and drug addicts" and an

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[113] *Id.* at 171.

[114] *Id.* at 172.

[115] *Id.* at 174.

[116] *Id.*

[117] *Id.* at 176.

acquaintance of Floyd's, also testified for the defense.[118] Huddick had invited Floyd to an alcohol program at the St. Louis Community Center in the French Quarter, but Floyd never attended.[119] Sometime after Floyd's no-show, Huddick encountered Floyd in the French Quarter, and Floyd appeared high.[120] Huddick testified that he confronted Floyd about being under the influence, and Floyd "got real belligerent, apparently appeared out of control."[121] Huddick testified that this frightened him, and he did not "frighten easily."[122] Huddick felt "threatened" and "scared."[123]

The defense next called NOPD Criminalist Alan E. Sison to testify.[124] Sison testified that the tissue paper next to the hotel bed at the Robinson crime scene was stained with seminal fluid, that the blue cap found in the hallway was stained with type O blood and contained hair from an African-American person, and that the bed sheet was stained with type O blood.[125] Sison then testified that he analyzed Floyd's blood type

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[118] *Id.* at 186-87.

[119] *Id.* at 188.

[120] *Id.*

[121] *Id.* at 188, 192.

[122] *Id.* at 188.

[123] *Id.*

[124] *Id.* at 193.

[125] *Id.* at 194-95.

and took saliva and hair specimens from him.[126] Sison determined that Floyd has type B blood and that Floyd's saliva showed "secretor activity."[127] "Secretor activity" refers to a person's secreting his blood type into his body fluid, such as saliva, semen, or "even . . . the fluid in [one's] eyes."[128] Scientific analysis, such as that performed by Sison, can therefore determine a "secretor's" blood type from a stain of bodily fluid left at a crime scene.[129]

Sison determined that the seminal fluid on the tissue paper next to Robinson's bed belonged to a secretor with type A blood.[130] Based on this finding, Sison testified that the seminal fluid on the tissue could not belong to Floyd—a secretor with type B blood.[131] Sison also testified that the African-American hair found in the blue cap was "dissimilar" to Floyd's hair, which at the time was long and blonde.[132]

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[126] *Id.* at 196.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 197.

[131] *Id.*

[132] *See id.* at 198; *accord id.* at 12 ("This man obviously of somewhat dirty blonde hair and is Caucasian."); Floyd Exhibit 42 (Black-and-White Booking Photograph of John Floyd).

Another NOPD Criminalist, Daniel Waguespack, testified for the defense.[133] Waguespack testified that all of the blood found at the Hines crime scene was type A blood; there was no evidence of type B blood on the samples obtained from Hines's home.[134] Waguespack noted that he found African-American pubic hairs on Hines's bed sheets.[135] Waguespack also found hairs "[bearing] characteristics of the Caucasion [sic] race," but Waguespack found it unnecessary to include in his report "that Caucasion [sic] hairs were found on the scene of a crime where a Caucasion [sic] person was murdered."[136]

The trial court judge asked Alan Sison to conduct additional analyses of some of the physical evidence found at both crime scenes. When Sison returned to report his findings, Sison explained that several hairs were found on Hines's bed sheet—"some Caucasion-like [sic] grayish hairs, and . . . some black pubic hairs or dark pubic hairs."[137] Sison testified that he did not have enough hair from the crime scene to properly compare it with Floyd's hair.[138] Sison also explained that he could not compare the African-American hairs from

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[133] Floyd Exhibit 45 at 202.

[134] *Id.* at 204.

[135] *Id.* at 205-07.

[136] *Id.* at 208.

[137] *Id.* at 340. Hines was 57 at the time of his death. Floyd Exhibit 7.

[138] *Id.* at 341.

each crime scene, because the hair found at the Hines crime scene was pubic hair, while the hair found at the Robinson crime scene was head hair.[139] There was no way to analyze whether the hairs were similar because the specimens came from different areas of the body.[140]

Patricia Daniels, a Medical Technologist with the Orleans Parish Coroner's Office, testified next. Daniels tested an "oral swab," "oral smear," "rectal swab," and "rectal smear" collected from the Hines crime scene—all of which tested negative for seminal fluid and spermatozoa.[141] Daniels tested the same types of swabs and smears collected from the Robinson crime scene.[142] Robinson's rectal swab was positive for seminal fluid, and his rectal smear was positive for spermatozoa.[143] According to Daniels, that the swab and smear tested positive indicated that the specimen was "relatively fresh"—only "a couple of hours" old.[144] Daniels also conducted a "secretor test" on the rectal swab and determined that the seminal fluid belonged to a person with type A blood.[145] Daniels testified that if a "secretor" with type B blood, like Floyd, had

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[139] *Id.*

[140] *Id.*

[141] *Id.* at 212.

[142] *Id.* at 213.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 215-16.

recently had sex with Robinson and expelled seminal fluid, Daniels should have found evidence of that, but testing confirmed that the fluids at the scene were only from a person with type A blood.[146] Daniels also analyzed Robinson's blood and determined that he had type O blood—the same type as the blood found on the hotel bed sheet and the blue cap from the hallway.[147]

At this point, the judge asked Daniels to test Floyd's blood again to determine his blood type.[148] After Daniels conducted another blood test of Floyd, she confirmed that Floyd has type B blood.[149]

Gladys McKinney, the security guard from the Fairmont Hotel, then testified.[150] According to McKinney, she attempted to report seeing an African-American man running from the rear of the hotel, but "nobody paid attention to [her]" and NOPD "didn't believe [her]."[151] McKinney testified that as she was working in the early morning of November 28, she heard the bell of the service elevator and heard someone running; McKinney then saw "the man running close by . . . he turned around, turned left and

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[146] *Id.* at 216-17.

[147] *Id.* at 213.

[148] *Id.* at 217-18.

[149] *Id.* at 238.

[150] *Id.* at 220-21.

[151] *Id.* at 222.

kept going."[152] McKinney also testified that the man was African American and that he was not wearing a hat.[153]

Floyd was the final defense witness to testify.[154] Regarding Floyd's whereabouts at the times of the murders, Floyd testified that in 1980, he was "working in California in different places and doing odd work here in New Orleans."[155] On or about November 20, 1980, Floyd left California to return to New Orleans by bus, and he stopped in multiple cities along the way.[156] Floyd testified that the bus trip between each city—San Francisco to San Jose to "Hollywood" to San Antonio to Houston—took several hours, and in some cities, Floyd missed the next available bus because he "was out drinking."[157] Floyd estimated that he arrived in New Orleans on November 25 around lunchtime and stayed at the bus station for a couple of hours because he lost his luggage.[158] Floyd testified that when he finally left the bus station, he went straight to the

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[152] *Id.* at 223.

[153] *Id.* at 224.

[154] *Id.* at 239.

[155] *Id.* at 244.

[156] *Id.* at 245.

[157] *Id.* at 245-49.

[158] *Id.* at 250.

Louisiana Purchase Bar and "started drinking."[159] Defense counsel introduced into evidence some of Floyd's bus tickets to support his testimony. Floyd testified that on Thanksgiving, November 27, he went to the Louisiana Purchase Bar's "Thanksgiving party."[160] He spent the night with either Byron Gene Reed or his friend Morris, and when he left the next day he went back to the Louisiana Purchase Bar to meet his friend Carl, the bartender.[161]

Floyd said that on the day Detective Dillman and Officer Reilly arrested him, he had been drinking at the Louisiana Purchase Bar since before noon.[162] Floyd also took Quaaludes when he woke up that morning.[163] According to Floyd's testimony, Detective Dillman and Officer Reilly "drank with [Floyd] for a long time" and bought Floyd "five or six beers."[164] Floyd also testified that, during his interrogation, he insisted he was not involved in the murders of Hines and Robinson and "that's when [Detective Dillman] started beating him."[165] Floyd recalled Detective Dillman "slapping

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[159] *Id* at 251.

[160] *Id.* at 256.

[161] *Id.* at 256-58.

[162] *Id.* at 261-62.

[163] *Id.* at 264.

[164] *Id.* at 262, 265.

[165] *Id.* at 270.

[Floyd] on the side of the head,"[166] "kicking [Floyd] on the side of the head with his boots,"[167] and "knocking [Floyd] off his chair on[to] the floor."[168] Floyd also said that Detective Dillman "threatened to put [Floyd's] head through the brick wall and throw [Floyd] out through the window."[169] After that, Floyd testified, he began responding "yes" to all of Detective Dillman's questions about the murders. For example, according to Floyd, Detective Dillman asked, "did [you] meet them on Bourbon Street, and [Floyd] said, 'Yes, I met them on Bourbon Street[,]'" or Detective Dillman "would say something and [Floyd would] say, 'Yes, that's the way it happened.'"[170] Floyd said he began complying with the officers because he "was scared" of "get[ting] killed or messed up."[171] On cross-examination, Floyd testified that he "never killed nobody [sic] in his life," but that occasionally, he "talked about" killing people while he was out drinking.[172]

In his testimony, Floyd denied that he boasted about killing Hines or Robinson. As noted, Byron Gene

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[166] *Id.*

[167] *Id.* at 272.

[168] *Id.*

[169] *Id.* at 271-72.

[170] *Id.* at 273.

[171] *Id.*

[172] *Id.* at 295.

Reed, an acquaintance of Floyd's, testified when he refused to give Floyd money, Floyd said that "he'd take care of [Reed] like he did the one at the Fairmont."[173] Steven Edwards, owner of the Mississippi River Bar, testified that when he tried to keep Floyd out of his bar, Floyd responded, "Don't come fucking with me. I already wasted one person." Edwards then said, "'Who? Bill Hines?' And [Floyd] said, 'Yeah, on Governor Nichol[l]s.'"[174] The trial court judge asked Floyd:

> You said that you talked about killing people with others. What about the conversation Mr. Reed testified to, Byron Gene Reed? Did that conversation take place as he said it did, that you told him after a confrontation about the guy at the Fairmont?
>
> A: No, sir, I never did say that to him. I cussed him out on the street but I never told him that.
>
> The Court: You never told him about wasting a guy at the Fairmont?
>
> A: No, sir.
>
> The Court: Never said that?
>
> A: I think he got that from the guy who owned the Mississippi River Bar, because they were good friends.
>
> The Court: Do you think he came in here and lied about that?

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[173] *Id.*

[174] *Id.* at 55-56.

> A: Yes, sir, he's good about lying. I been knowing him for a long time.[175]

Floyd also testified about his walk to the Charity Hospital Detoxification Center with Harold G. Griffin. Floyd said that he learned of the Robinson murder when he saw his friend reading an article about it in the November 28 evening edition of the Times Picayune.[176] Floyd then testified that—consistent with Griffin's account of their conversation—Floyd asked Griffin if he had "heard about the killing at the Fairmont?[]

And [Griffin] said, 'No,' he hadn't, and that's all I told him."[177] The trial court judge then asked Floyd:

> Did you tell Mr. Griffin, according to what he testified, that you said to him that you wanted to go to Charity Hospital to Detox because going to Detox would be the next best thing for being accountable for doing something wrong?
>
> A: I didn't quite put it like that. I just told him that most mental people in New Orleans –
>
> The Court: John, did you believe that you had done something wrong?
>
> A: No, sir.

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[175] *Id.* at 298-99.

[176] *Id.* at 329-30.

[177] *Id.* at 330.

> The Court: And what were you talking about then when you discussed that with Mr. Griffin?
>
> A: I was just talking about my health, is what I was talking about.
>
> The Court: What were you doing wrong with your health? You testified . . . that you might have had a drinking problem, but you [sic] that you don't really think that anything really was wrong with you then.
>
> A: Well, sometimes my drinking gets out of hand, and I have to go to Charity and get straightened out.
>
> The Court: Was it out of hand then?
>
> A: Well, yes, it was.
>
> The Court: Did you do things when your drinking got out of hand that you thought were wrong at a later time?
>
> A: Not nothing [sic]. I can remember everything that I did while I was drinking.
>
> The Court: John, we're talking about a very serious matter here. You saw the pictures of those two men. Did you have anything to do with that?
>
> A: No, sir.[178]

The State called NOPD Officer John Reilly as a rebuttal witness. Officer Reilly testified that, during

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[178] *Id.* at 332.

Floyd's interrogation, Floyd was alone in an office with Detective Dillman for approximately twenty-five minutes.[179] Officer Reilly said that he could not hear the conversation between Detective Dillman and Floyd, but that he was "sure if [Floyd] had been beaten, cajoled, or threatened, or whatever, [Floyd] would have had marks on him."[180] Officer Reilly also testified that he bought Floyd "one beer" before arresting him outside of the Louisiana Purchase Bar and that he was sure that they shared "only one round."[181]

At the close of the case, on January 6, 1982, the trial court judge found Floyd not guilty of the second-degree murder of Rodney Robinson, but guilty of the second-degree murder of William Hines. On January 21, 1982, the judge sentenced Floyd to life imprisonment without the benefit of probation, parole, or suspension of sentence.[182]

D. Floyd's New Evidence

In his habeas petition to this Court, Floyd asserts that an investigation into his case by Innocence Project New Orleans (IPNO) has uncovered significant

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[179] *Id.* at 348.

[180] *Id.* at 349.

[181] *Id.* at 356.

[182] State Record, Volume I, page 3, Docket Master entry dated 01/21/1982.

exculpatory evidence unknown to the convicting judge at trial.[183] Floyd's new evidence is summarized below.

1. Newly-Discovered Evidence in the Hines Case

Floyd asserts that the following evidence is relevant to the Hines murder, newly-discovered, and exculpatory.[184]

Fingerprints at the Hines Crime Scene

Police found two, used whiskey glasses in Hines' apartment and a bottle of whiskey on Hines's kitchen table. On September 29, 2008, IPNO obtained copies of the NOPD Latent Print Unit's logbook and the envelope in which the prints were stored.[185] Regarding prints on the bottle, someone noted "NOT VICTIM" and

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[183] R. Doc. 1 at 30.

[184] Floyd emphasizes that despite numerous requests, beginning in 2004, the State has been unable to produce any evidence from the Hines investigation for DNA testing. R. Doc. at 49-50. During the investigation of the crime scene, police found African-American hairs on Hines's bed sheets and "scrapings" from under Hines's fingernails. Floyd Exhibit 40. Apparently, the State was unable to locate this evidence in 2004, and it was likely destroyed by Hurricane Katrina in 2005. R. Doc. 1 at 68-69 & n.18.

[185] R. Doc. 1 at 32.

"NOT JOHN FLOYD."[186] NOPD was unable to recover prints from the two glasses.[187]

Affidavit of John Rue Clegg

According to Detective Dillman's police report of the Hines murder, "Mr. Clegg stated that to his knowledge the victim was homosexual and frequently had sexual relations with both black and white males."[188] In an affidavit executed on June 14, 2008, Clegg declares that this report "does not accurately reflect the information [Clegg] gave Detective Dillman."[189] According to Clegg's affidavit:

> [T]he subject of sex per se did not come up during our interview and [Clegg] did not tell Detective Dillman that Bill "frequently had sexual relations with both black and white males." [Clegg] was never, in fact, aware of the frequency of his sexual relations with anyone. [Clegg told] Detective Dillman that Bill's taste

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[186] R. Doc. 13 at 1, 3 (NOPD Fingerprint Results). During an evidentiary hearing in state court on Floyd's post-conviction relief application, there was some dispute as to the authenticity of the handwritten notes on the envelope and whether these notes actually reflected the results of any fingerprint analyses. Floyd Exhibit 47 at 119-22. NOPD apparently re-analyzed the fingerprints and fingerprint comparisons in 2011 to confirm that Floyd was excluded as the source of the fingerprints found at both crime scenes. Floyd Exhibit 80 at 11-13.

[187] Floyd Exhibit 6 at 3.

[188] Floyd Exhibit 3 at 6.

[189] Floyd Exhibit 21 at 1.

> was for black men as I knew this to be true. . . . [Clegg] know[s] that Bill's taste was for black men because when [Clegg and Hines] were at gay bars [Hines] would sometimes point out the men he found attractive and they were always black. [Clegg] also saw Bill with black men on several occasions. From [Clegg's] observations, Bill was often attracted to rough looking black men . . . .[190]

Jupiter Documentary and *Blood Warning* Evidence

In 1998, Jupiter Entertainment interviewed several people involved with the investigations of the murders of Robinson and Hines, including Coroner Minyard and Detective Dillman, for a potential A&E documentary.[191] According to Floyd, some statements made during these interviews either reveal new information or contradict evidence presented at trial. Detective Dillman also authored a book about the murders in 1989, *Blood Warning: The True Story of the New Orleans Slasher*. Details in the book coincide with Detective Dillman's statements to Jupiter Entertainment.

During Detective Dillman's interview with Jupiter Entertainment, he described how he and Officer Reilly arrested Floyd:

> We located him drinking in a bar . . . and once we located him and identified him at the bar we made a conscious decision of rather than

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[190] *Id.* at 1-2.

[191] Floyd Exhibit 31.

> walking in yelling police and having him pull a gun and whole lot of people get hurt that we would wait until the time was right where everything was perfect before we arrested him. We went into the bar, we ordered drinks. We started drinking at the bar and actually befriended him. *We started buying him drinks.* We had a code between myself and the other undercover officer at the right point and time when we felt we could apprehend him and consider the safety of all the patrons. . . . [T]hen finally when that time came we made the arrest.[192]

According to Floyd, Dillman's statement that he and Officer Reilly "started buying [Floyd] *drinks*" contradicts trial testimony that they bought Floyd only one beer and that he was sober when he confessed. According to Floyd, this statement also supports his own account of his arrest—that the officers bought him "five or six" drinks before they arrested him.

Detective Dillman also described Floyd's interrogation in his interview:

> I spent hours with him. . . . Finally we got to the point, I think what finally broke him was I showed him some of the scene photographs and I think when he, a lot of the times when he committed these murders he was drinking alcohol on top of PCP and I don't think he really realized the damage that he had done, certainly he knew he killed someone. . . . [B]ut I don't

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[192] Floyd Exhibit 11 at 8 (emphasis added).

> think he knew the extent of the multiple stab wounds, the slashing of the neck . . . and finally when he did look at it I forget which one I showed him, I shown him one of the scene photographs and one of the bodies and for the first time he dropped his head . . . and then looked back to me and his eyes had welled a little and I knew I had him at that point.[193]

In *Blood Warning*, Detective Dillman recounted showing Floyd "two of the grisliest shots" of the Hines crime scene in an effort to "crack him."[194] According to Floyd, evidence that Detective Dillman showed him crime scene photos before he confessed undermines the theory that his confession was credible because it contained details about the crime scene. Floyd contends that this evidence also supports his position that he was highly suggestible and therefore vulnerable to police coercion.

Judicial Findings Regarding Detective Dillman

In 1987, approximately six years after Floyd confessed to the murders, the Louisiana Supreme Court reversed a trial court's admission of a confession obtained by Detective Dillman into evidence. In *State v. Seward*, the defendant contended that to obtain his confession, his interrogators—led by Detective Dillman—"repeatedly hit him in the head, kicked and hit him in the chest and back, pushed him to the floor, and placed a plastic bag over his head. The officers also

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[193] *Id.* at 9-10.

[194] Floyd Exhibit 38 at 192 (Excerpts from John Dillman, *Blood Warning: The True Story of the New Orleans Slasher* (1989)).

allegedly threatened, swore and screamed at Seward in an effort to elicit a confession." 509 So. 2d 413, 415 & n.5 (La. 1987).[195] An officer also "slapped and threatened [the defendant] that more beatings would be forthcoming if he informed anyone of the prior beatings." *Id.* at 416. The Louisiana Supreme Court held that the defendant's account of his interrogation, corroborated by a co-defendant and a physician, "at the least . . . preponderantly establishe[d] that Seward was beaten" and that Seward did not voluntarily confess to the crime. *Id.* at 419.[196]

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[195] During a pre-trial evidentiary hearing, the defendant in *State v. Seward* testified that Dillman started the beating and that Dillman "seemed to be the boss. He's the one who was doing all the hard hitting." Floyd Exhibit 81 at 2-3.

[196] Floyd also cites *Kyles v. Whitley*, 514 U.S. 419 (1995), and *State v. Knapper*, 579 So. 2d 956 (La. 1991), as relevant to his case. In *Kyles*, the U.S. Supreme Court reversed a denial of a defendant's habeas petition, which asserted various *Brady* violations. 514 U.S. at 419. Detective Dillman was the lead detective on the case, *id.* at 428, and the Court noted that, had the suppressed evidence been introduced, "[t]he jury would have been entitled to find (a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of a [less-than-reliable] informant [and] (b) that the lead police detective who testified was either less than wholly candid or less than fully informed . . . ." *Id.* at 453.

In *Knapper*, the Louisiana Supreme Court found that the prosecution committed a *Brady* violation by failing to disclose a police report to the defense. 579 So. 2d at 960-61. Detective Dillman had written the report that the prosecution failed to disclose. *Id.* at 958. The court's opinion in *Knapper*, however, does not criticize or otherwise call into question the credibility or reliability of Detective Dillman.

Assessment of Floyd by Dr. Gregory DeClue

In 2009, Dr. Gregory DeClue, a forensic psychologist, examined Floyd. Dr. DeClue conducted various psychological tests, which had not been developed at the time of Floyd's trial.[197] According to the results of Dr. DeClue's testing, Floyd has a full scale IQ of 59, within the "Mentally Deficient (Mentally Retarded) range."[198] Floyd's "perceptual reasoning" skills score "was near the cutoff between Borderline and Mentally Deficient."[199] All of Floyd's other scores—verbal comprehension, working memory, and processing speed skills—are in the "Mentally Deficient (Mentally Retarded) range."[200]

Dr. DeClue also found that Floyd's oral language, oral expression, listening comprehension, and reading skills are at a second- or third-grade level, "comparable to those of a 7- or 8-year-old child."[201] Dr. DeClue emphasized that Floyd's "ability to understand and

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[197] R. Doc. 1 at 44.

[198] Floyd Exhibit 63 at 2. (Affidavit of Dr. Gregory DeClue). For the purpose of this order, unless quoting an external source, the Court uses the term intellectual "ability" or "disability." *See* Rosa's Law, Pub. L. No. 111-256 (2010) (changing legal references to "mental retardation" to "intellectual disability").

[199] *Id.*

[200] *Id.*

[201] *Id.* at 3.

communicate with others is at about the same level."[202] In addition, during his examination, Floyd "talked about, with some pride," that he developed greater reading and writing skills while incarcerated over the last two decades.[203] In his report, Dr. DeClue emphasized that Floyd "yielded to misleading questions more than the average person does" and "shifted his answers . . . in response to subtle pressure" more than the average person does.[204]

In analyzing Floyd's intellectual ability, Dr. DeClue conducted certain psychological tests to determine whether Floyd was meaningfully participating in Dr. DeClue's examination—in other words, Dr. DeClue tested whether Floyd was "faking it" and therefore deliberately distorting the test results.[205] Dr. DeClue determined that Floyd was giving his "best effort" and trying to answer Dr. DeClue's questions correctly.[206] Dr. DeClue's final conclusion, based on all of his testing, was that at the time officers obtained Floyd's confessions, Floyd "was extremely vulnerable to police influence and extremely susceptible to police pressure."[207]

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[202] Floyd Exhibit 20 at 5 (June 23, 2009 Report of Psychological Assessment).

[203] Floyd Exhibit 47 at 47.

[204] Floyd Exhibit 20 at 4.

[205] *Id.* at 2.

[206] *Id.*

[207] *Id.* at 10.

2. Newly-Discovered Evidence in the Robinson Case

Floyd also asserts that the following evidence pertaining to the murder of Rodney Robinson is newly discovered and should be considered with the other evidence of his innocence in the Hines murder:

Fingerprints at the Robinson Crime Scene

Police found two drinking glasses containing alcohol next to the bed in Robinson's hotel room. Police also found fingerprints on the passenger side of Robinson's car and on a glass, a cup, and a whiskey bottle inside the vehicle. On September 29, 2008, IPNO obtained test results for these fingerprints. All of the fingerprints on one of the glasses next to the bed belonged to Robinson.[208] Three of the fingerprints on the other glass were noted not to belong to Robinson's friend, David Hennessy, or to Floyd.[209] The fingerprints from Robinson's car were labeled, "NOT . . . DAVID HENNESSY," "NOT VICTIM," and "NOT JOHN FLOYD."[210]

DNA Testing of Hairs at the Robinson Crime Scene

At trial, Floyd and his counsel knew that African-American hair that did not match Robinson's had been found on the blood-stained knit cap in the hotel hallway. Since then, Floyd has learned that evidence recovered from the Robinson crime scene

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[208] Floyd Exhibit 13 at 3 ("I.D. 6 THRU 14 VICTIM").

[209] *Id.*

[210] *Id.*

included "two hairs" found on the semen-stained tissue, "several small hairs" obtained from Robinson's bloody bed sheets, and "one hair" found on an envelope in Robinson's hotel room.[211] DNA testing excluded Floyd as the source of any of the hairs.[212] Four of the hairs were "consistent with one source," and five of the hairs were "consistent with a second source"—that is, the hair samples belong to two different people.[213] All of the hairs "fall into groups of profiles" belonging to someone who is "African or African-American."[214] Floyd emphasizes that by the time he discovered the additional hairs from the Robinson scene, the State had lost or destroyed the physical evidence from the Hines scene, making any comparison between the two impossible.[215]

Floyd contends that all of this newly-discovered evidence, when viewed with the original evidence presented at trial, supports his position that he is actually innocent of the murder of William Hines.

II. THE REPORT AND RECOMMENDATION

In his supplemental Report and Recommendation regarding whether the Supreme Court's holding in *McQuiggin v. Perkins* afforded Floyd relief, the

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[211] Floyd Exhibit 16 at 2.

[212] Floyd Exhibit 15 at 5.

[213] *See id.* at 5.

[214] Floyd Exhibit 18.

[215] R. Doc. 1 at 68-69.

Magistrate Judge concluded that Floyd "failed to make a convincing showing of 'actual innocence' as required in *McQuiggin*" and that therefore this Court should dismiss his petition as untimely.[216] In arriving at this conclusion, the Magistrate Judge relied on the facts articulated by the Louisiana Supreme Court in its 1983 opinion affirming Floyd's conviction. In its opinion, the Louisiana Supreme Court emphasized that both victims were "active homosexual[s]," that Floyd made incriminating statements to two non-police officers, and that Floyd confessed to both crimes.

The Magistrate Judge then explained that the Court's task is not "to determine with absolute certainty whether petitioner killed William Hines .... [R]ather, the *only* question this Court needs to decide is whether, based on th[e] evidence, it is *more likely than not* that *no* reasonable, properly instructed juror would find petitioner guilty beyond a reasonable doubt."[217] Nonetheless, in analyzing all the evidence, the Magistrate Judge seemed to focus on absolutes—reasoning that the lack of physical evidence pointing to Floyd "is not determinative," "is not proof of petitioner's innocence," and "in no way precludes petitioner's presence" at the crime scenes.[218] The Magistrate Judge also explained that, in general, "confessions are compelling evidence of guilt," and that "a reasonable juror *could* find that both of petitioner's confessions were unreliable given petitioner's low IQ

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[216] R. Doc. 67 at 3.

[217] R. Doc. 67 at 10.

[218] *Id.* at 11.

and purported susceptibly to suggestion, [but that] another equally reasonable juror could validly reach the contrary conclusion."[219] Before concluding his report, the Magistrate Judge noted that he "remain[ed] troubled" by the facts of this case.[220]

Floyd objects to the R&R on five grounds.[221] First, Floyd argues, the Magistrate Judge failed to properly consider the overwhelming weight of evidence that Floyd is factually innocent, as opposed to merely "not guilty," of the Robinson murder. Second, Floyd contends that, due to the relatedness of the crimes, his factual innocence of the Robinson murder indicates that he is also innocent of the Hines murder. Third, Floyd argues that newly-discovered evidence further exculpates him as the perpetrator. Floyd's fourth and fifth objections are related: he argues that the Magistrate Judge strayed from the proper legal standard by requiring Floyd to conclusively prove his innocence, and failed to consider dispositive case law.[222]

III. LEGAL STANDARD

The Antiterrorism and Effective Death Penalty Act of 1996 imposes a one-year statute of limitations period on a prisoner who applies for a writ of habeas corpus from federal court. 28 U.S.C. § 2244(d)(1). In "extraordinary" cases, however, a criminal defendant

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[219] *Id.* at 12.

[220] *Id.* at 13 & n.27.

[221] *See generally* R. Doc. 68.

[222] *Id.*

whose habeas petition is untimely may overcome this procedural bar if he can prove his "actual innocence." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (citing *House v. Bell*, 547 U.S. 518, 538 (2006); *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

"Actual innocence" does not require "conclusive exoneration." *House*, 547 U.S. at 553. Rather, a petitioner asserting his actual innocence "must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 536-37 (quoting *Schlup*, 513 U.S. at 327). In other words, a petitioner must prove that it is more likely than not that any reasonable, properly instructed juror would have reasonable doubt. *Id.* at 538.

The actual innocence standard encompasses three important principles. First, a "credible [actual innocence] claim requires new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 537 (quoting *Schlup*, 513 U.S. at 324). Second, although a petitioner asserting his actual innocence must present new evidence, the court's analysis "is not limited to such evidence." *Id.* "The habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that govern at trial." *Id.* at 538 (quoting *Schlup*, 513 U.S. at 327). Third, the "demanding" actual innocence standard "permits review only in the extraordinary case." *Id.* (citation omitted); *see also Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999) ("[O]ur

precedent confirms that the mountain . . . a petitioner must scale in order to prove a fundamental miscarriage claim is daunting indeed.").

"At the same time, though, the [actual innocence] standard does not require absolute certainty about the petitioner's guilt or innocence." *House*, 547 U.S. at 538. The court must determine whether the facts of innocence are so atypical or remarkable that "no juror, acting reasonably, would have voted to find [the petitioner] guilty beyond a reasonable doubt." *McQuiggin*, 133 S. Ct. at 1928 (citations omitted). In doing so, the court must "assess the likely impact" of "the overall, newly supplemented record" on a jury and make "a probabilistic determination about what reasonable, properly instructed jurors would do." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 299).

IV. DISCUSSION

A. Floyd Did Not Unreasonably Delay Presenting Sufficiently "New" Evidence to the Court

The State contends that Floyd unjustifiably delayed presenting his actual innocence claims to this Court and that the timing of Floyd's habeas petition should undermine the credibility of his actual innocence claim.[223]

In *McQuiggin*, the Supreme Court held that there is no threshold diligence requirement for a petitioner wishing to assert a claim of actual innocence to

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[223] R. Doc. 63 at 12.

overcome the applicable statute of limitations. 133 S. Ct. at 1935-36. Rather, "unexplained delay" is merely a factor habeas courts should consider in "evaluating the reliability of a petitioner's proof of innocence." *Id.* at 1935. A court should consider, for example, "how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of that evidence." *Schlup*, 513 U.S. at 332; *see also Dowthitt v. Johnson*, 230 F.3d 733, 742 (5th Cir. 2000) (finding petitioner's newly-discovered evidence "particularly suspect" because he presented only affidavits consisting of hearsay that were inconsistent with the physical evidence).

Here, the timing of Floyd's petition does not seriously undermine the reliability or credibility of his newly-discovered evidence. Much of the evidence (fingerprint analyses, DNA testing, and Dr. DeClue's expert opinion) is science-based and therefore less susceptible to manipulation by a petitioner "l[ying] in wait [to] use stale evidence." *McQuiggin*, 133 S. Ct. at 1936; *see also Schlup*, 513 U.S. at 324 (listing "exculpatory scientific evidence" as an example of "new reliable evidence"). As for the newly-discovered statements by Detective Dillman and John Rue Clegg, the State does not argue that any of these people have died or otherwise cannot rebut new evidence upon further questioning. *McQuiggin*, 133 S. Ct. at 1936. Notably, NOPD Detective John Dillman is aligned with the State and thus has no reason to concoct evidence tending to undermine the State's interest in Floyd's conviction. *Cf. House*, 547 U.S. at 552 (noting that "incriminating testimony from inmates, suspects, or friends or relations of the accused" may have questionable probative value). Similarly, Clegg was a

close friend of one of the victims, and has no apparent connection to Floyd, which makes it unlikely that Clegg would execute an untruthful affidavit in support of Floyd's innocence. *See House*, 547 U.S. at 551 (crediting post-conviction witness testimony when "the record indicate[d] no reason why [they] would have wanted . . . to help [the defendant]"); *Schlup*, 513 U.S. at 316 (finding "particularly relevant" newly-obtained affidavits by "black inmates attesting to the innocence of a white defendant in a racially motivated killing"). Therefore, none of the new evidence on which Floyd depends is facially unreliable, and the Court does not consider it to be so merely because it was allegedly discovered years after Floyd's conviction.

The State also argues that the "vast majority" of Floyd's evidence is "not new, but was available and in fact introduced at Floyd's trial" and that therefore the Court should not consider it in its evaluation of Floyd's actual-innocence claim.[224] As an initial matter, this argument rests on a misstatement of the facts. For example, the State contends that "the lack of Floyd's fingerprints at either crime scene was introduced at his trial and properly discounted."[225] The record reveals, however, that the word "finger" or "fingerprint" was mentioned only three times, none of which pertained to evidence found at either crime scene.[226]

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[224] *Id.* at 4.

[225] *Id.* at 4-5.

[226] Floyd Exhibit 45 at 209 ("Q: How specific can you be in comparing hairs? Is a hair like a fingerprint?" "A: No, sir."), 217 ("Q: You didn't blood type the defendant, did you? . . . How hard is

Additionally, the State argues that Floyd's "claims of retardation" are not new because Floyd originally pleaded not guilty by reason of insanity and, following a "lunacy hearing," the court found Floyd competent to stand trial.[227] The State also notes that Dr. Marvin Miller, one of the doctors who evaluated Floyd, testified in response to a single question that Floyd "may well have [been] vulnerable to even minimal coercion."[228] Read in context, Dr. Miller's testimony was that Floyd's habitual intoxication and drug dependence (as well as his "homosexual activity") indicated that Floyd was vulnerable to coercion. Dr. Miller explained:

> [I]f, in fact, [Floyd] were intoxicated, even subclinically, this could have well have [sic] made him vulnerable to even minimal coercion. I would say as well that, given the lifestyle that he described, given the fact that he was pretty much dependent on other people and pretty much accountable to them as a consequence that that too would, in my opinion, provide him with a degree of vulnerability to suggestions, coercions, very likely greater than the average

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that to do?" "A: To blood group the defendant? You just have to stick him in the finger."), 333 ("Q: Don't you remember when you were booked . . . they took your fingerprints and they took a picture of you?" "A: Yes, sir."), 334 ("Q: And you remember they took your fingerprints and they got some information about where you're from and they took your picture, do you remember that?" "A: Yes, sir, okay.").

[227] R. Doc. 63 at 5-6; *see* State Record, Volume 1, page 1, Docket Master entry dated 04/08/1981.

[228] R. Doc. 63 at 6.

> person would have, or someone who was not living in this particular lifestyle, someone who was not abusing drugs and/or alcohol, and someone who was not apparently involved in some kind of homosexual activity.[229]

This 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.

The State also describes Floyd's newly-discovered evidence of additional hairs at Robinson's crime scene and the DNA testing of those hairs as "absurd" because it is "patently obvious" that African-American hairs could not belong to Floyd, who is white. At trial, however, it appeared the only hair discovered at the Robinson crime scene was the head hair found on the blue knit cap—there was no mention of hair on the semen-stained tissue, on Robinson's bloody bed sheets, or on an envelope found in Robinson's room. In addition, Floyd's DNA testing does more than merely exclude Floyd as the source of the hairs; it points to a new, albeit unidentified, suspect because the hairs came from two different African-American men: one presumably Robinson, and the other a man who was in his bed at some point before his death.[230] *See House*, 547 U.S. at 548-49 (finding actual innocence when

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[229] Floyd Exhibit 45 at 174.

[230] Floyd Exhibit 18.

petitioner's newly-discovered evidence pointed to a different suspect).

Regardless of the State's opinion of what evidence is "new" enough, if Floyd has presented any "new reliable evidence," which he has, the Court "must consider *all the evidence, old and new,* incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that govern at trial." *Id.* at 537-38 (emphasis added).

B. The Combined New and Old Evidence Excludes The Possibility That Floyd Killed Robinson in the Manner Described in his Confession and Strongly Suggests that Floyd Did Not Kill Robinson At All.

The physical evidence found at the scene of Robinson's death excludes the possibility that Floyd killed Robinson in the manner described in his confession. The same evidence strongly suggests that Robinson was not killed by Floyd, and was instead killed by an African-American man with type A blood shortly after Robinson and the man had sex.

In his confession, Floyd states that he "wiped [his] dick with a pi[e]ce of paper and threw it on the floor."[231] Detective Rice testified at trial that he was "positive" Floyd said this.[232] The statement matches the physical evidence as detectives found it on the scene: a tissue

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[231] Floyd Exhibit 9 at 2

[232] Floyd Exhibit 45 at 109.

stained with seminal fluid was found next to the bed.[233] Forensic analysis, however, excludes the possibility that the seminal fluid belonged to either Floyd or Robinson. The seminal fluid was produced by a man with type A blood;[234] Floyd has type B blood,[235] and Robinson had type O blood.[236] The conclusion that the tissue was not used by Floyd is further bolstered by new evidence that hairs found on the tissue do not belong to Floyd, but are rather African American in origin.[237] This fact alone demonstrates that Floyd's confession is inconsistent with the evidence found at the Robinson scene and therefore does not accurately describe the circumstances surrounding Robinson's death.

A second clear factual inaccuracy in the Robinson confession involves Floyd's visit to Charity Hospital. Robinson was killed at approximately 4:35 a.m. on November 28, 1980.[238] In his confession, Floyd describes his actions immediately following the murder:

> After I left the hotel I ran to Bourbon Street. I talk [sic] to this guy, I don't know his name. I

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[233] Floyd Exhibit 3 at 5.

[234] Floyd Exhibit 45 at 197.

[235] *Id.*

[236] *Id*. at 213.

[237] Floyd Exhibit 16 at 2; Floyd Exhibit 15 at 5.

[238] Floyd Exhibit 2 at 1.

> was talking to him about the killings and I told him I had just killed a dude. I asked him for help and he took me to Charity Hospital to the Detoxification Center and then left.[239]

This passage plainly suggests that Floyd went to Charity Hospital on the morning of the 28th, immediately following the murder. This account superficially matches what Harold Griffen told detectives months earlier: Floyd spoke about Robinson's murder during a walk from Bourbon Street to Charity Hospital.[240] In reality, however, Hospital records obtained by Floyd's trial attorney confirm that Floyd was admitted to Charity over 24 hours after the murder, on the morning of November 29.[241]

The remaining physical evidence casts further doubt on Floyd's confession and other alleged inculpatory statements. Medical technologist Daniels testified that a swab of Robinson's rectum tested positive for seminal fluid.[242] The fluid was produced by a man with type A blood.[243] According to Daniels, that the swab and smear tested positive indicated that the specimen was "relatively fresh"—at most only "a couple of hours"

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[239] Floyd Exhibit 9 at 2.

[240] Floyd Exhibit 3 at 4.

[241] Floyd Exhibit 45 at 48.

[242] *Id.* at 213.

[243] *Id.* at 215-16.

old.[244] Hennessey, Robinson's friend, told police that Robinson left Hennessey's home in the Lakeview neighborhood of New Orleans at 3:15 a.m., approximately 80 minutes before his death.[245] The physical evidence therefore conclusively demonstrates that Robinson had sex with a type A man within hours of his death, and—because the tissue was found in Robinson's room—suggests to a level of near certainty that the sex occurred in Robinson's room. Furthermore, crediting Hennessey's account, the sexual encounter with a man other than Floyd occurred less than 80 minutes before Robinson's death.

Hair and fingerprint evidence found at the scene—much of it new evidence unavailable to the trial court—strengthens the inference that someone other than Floyd killed Robinson. None of the considerable forensic evidence found on the scene could have been produced by Floyd. Fingerprints found on drinking glasses in Robinson's room and on the passenger side of Robinson's car did not match Floyd's, Hennessy's, or Robinson's.[246] A DNA test revealed that hairs found on the tissue, bed sheets, and envelope in Robinson's room are not attributable to Floyd.[247] The hairs were rather produced by two different African-American men.[248]

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[244] *Id.* at 213.

[245] Floyd Exhibit 4 at 10; Floyd Exhibit 3 at 2-3; R. Doc. 1 at 29 n.11.

[246] Floyd Exhibit 13 at 3

[247] Floyd Exhibit 15 at 5.

[248] *See id.*

Perhaps most compellingly, the knit cap found by police contained type O blood, matching Robinson, and hairs from an African-American man other than Robinson.[249] The cap was found approximately ninety feet from Robinson's body, and was recovered further down the hallway from Robinson's room than the body.[250] In other words, Robinson collapsed before he reached the point where the cap was found. This fact, combined with the type O blood and hairs on the cap, strongly suggests that the cap was worn by the killer, rather than Robinson, and that the killer was African American. This inference is further supported by the account of hotel security guard Gladys McKinney. McKinney described an African-American male with short hair running from the premises with his right hand in his pocket and looking back as if he was being followed.[251] According to the police report, Detective Rice believed at the time that "McKinney witnessed the perpetrator of the Robinson Murder making good his escape."[252]

To explain the evidence suggesting that a man other than Floyd was in Robinson's room before the murder, the Magistrate Judge theorized that someone else's presence in Robinson's room "in no way precludes

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[249] Floyd Exhibit 3 at 6; Floyd Exhibit 10.

[250] Floyd Exhibit 45 at 157-56; Floyd Exhibit 6 at 13.

[251] Floyd Exhibit 4 at 11-12.

[252] *Id.* at 12

petitioner's presence at a different time"[253] This "different time" theory is difficult to square with the evidence and Floyd's confession. As noted above, the physical evidence and Hennessey's account strongly suggest that Robinson had sex with a man with type A blood in his room less than 80 minutes before his death. As a result, for Floyd's confession to be truthful, the following sequence of events would need to have occurred over the span of those 80 minutes: 1) Robinson leaves Hennessey's home in the Lakeview neighborhood of New Orleans, drives back to the Fairmont, parks his car nearby, and returns to his room; 2) Robinson undresses and has anal sex in his room with a man with type A blood; 3) Robinson dresses, leaves his room, returns to his car, and drives to Bourbon Street; 4) Robinson parks his car and walks to a bar, where he meets Floyd;[254] 5) the two men talk, and then go to the Pubb bar at the corner of Saint Ann and Bourbon Streets;[255] 6) the two men stay in the Pubb bar for "a little while," and then walk to another bar and get a drink;[256] 7) the two men walk to Robinson's car, drive back to the Fairmont, park near the hotel on Common Street,[257] and walk to Robinson's

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[253] R. Doc. 67 at 11.

[254] Floyd Exhibit 9 at 2.

[255] *Id.*

[256] *Id.*

[257] Floyd Exhibit 4 at 10.

room on the tenth floor;[258] 8) Robinson undresses and Floyd uses the bathroom;[259] 9) Floyd partially undresses, and Robinson performs oral sex on Floyd;[260] 10) Floyd wipes himself with a tissue,[261] 11) Floyd stabs Robinson multiple times and the two men struggle, 12) Robinson staggers out of the room and into the hallway, walking several feet before he collapses and dies.[262] Completing this sequence in the time allotted appears implausible, but even assuming that Robinson could have done all this in 80 minutes, the "different time" theory cannot explain the absence of Floyd's semen on the tissue, the African-American hairs and type O blood found on the knit cap, or McKinney's account of the fleeing African-American man.

In short, the considerable physical evidence discovered at the scene of Robinson's death, including evidence never presented to the trial judge, both contradicts key details of Floyd's confession and strongly suggests that Floyd did not murder Robinson.

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[258] Floyd Exhibit 9 at 2.

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.*

C. The Combined New and Old Evidence Greatly Undermines the Persuasive Weight of Floyd's Confession and Evidence of his Boast in the Hines Murder.

As was true of the Robinson scene, there is no physical evidence linking Floyd to the Hines scene. Instead, as with Robinson, hairs recovered from Hines' bedsheets place an African-American person in Hines' bed some time before the murder.[263] The only other forensic evidence found on the scene, excepting Hines' own blood, was a number of fingerprints on a whiskey bottle discovered on Hines' kitchen table.[264] These prints matched neither Floyd nor Hines,[265] further confirming the presence of another person in Hines' home sometime before his death.

Because of the dearth of physical evidence linking him to the crime, Floyd was, as noted by the Magistrate Judge, convicted of murdering Hines based only on his self-incriminating statements—his confession to Detective Dillman, and his alleged threat to Steven Edwards. As a result, the State's case rises and falls with these two pieces of evidence: if no reasonable, properly instructed juror would conclude that this evidence is persuasive enough—on its own—to eliminate any reasonable doubt that Floyd murdered Hines, then Floyd's untimeliness is excused based on a showing of actual innocence.

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[263] Floyd Exhibit 40.

[264] R. Doc. 13 at 1, 3; Floyd Exhibit 80 at 11-13.

[265] R. Doc. 13 at 3.

Floyd submits several pieces of newly-discovered evidence that he contends undercuts the reliability of his inculpatory statements and the credibility of police testimony at his trial. *See House*, 547 U.S. at 538-39 ("If new evidence so requires, [an actual innocence claim] may include consideration of the credibility of the witnesses presented at trial." (quoting *Schlup*, 513 U.S. at 330)). This new evidence—combined with the old and new evidence from the Robinson scene—significantly undermines the persuasive weight of Floyd's confession and alleged boasting.

1. The Credibility of the Two Confessions is Intertwined.

Despite Floyd's alleged boasts and his confession to the Robinson murder, the physical evidence at the Robinson scene, as noted above, strongly suggests that Floyd did not murder Robinson at all. Furthermore, undisputed evidence directly contradicts crucial and detailed elements of Floyd's story: Floyd's claim that he wiped himself with a piece of paper after ejaculating and threw the paper on the floor, and his claim that he went to Charity hospital after killing Robinson.

Floyd's confession to the Robinson murder is closely linked with his confession to the Hines murder. The two statements were taken one after the other, and the two accounts feature striking similarities.[266] For

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[266] R. Doc. 1 at 46-47 (charting the similarities between the two confessions). According to police testimony, the officer officially taking the statement transcribed what Floyd said as he spoke. Floyd Exhibit 45 at 111 ("I would ask the defendant a question, type the question, receive his answer, and then type the answer in it.").

instance, the Hines confession states, "I went to the bathroom and when I came back, he was naked in the bed."[267] The Robinson confession states, "I think I went to the bathroom and I think by the time I got out of the bathroom he had his cloths [sic] off."[268] The Hines confession: "We both got into bed and we had sex. Then he told me that he wanted to fuck me and I went crazy. . . . I went berserk."[269] The Robinson confession: "He told me he wanted [to] fuck me and thats [sic] when I went berserk."[270] The Hines confession: "I had a knife in my boot and I stabbed him a bunch of times. Then I ran out of the house and I went back down on bourbon st. [sic] too [sic] the bar."[271] The Robinson confession: "[I] pulled my knife from my left boot and started stabbing him . . . . I pulled my pants up and ran out the room . . . . After I left the hotel I ran to Bourbon Street."[272]

Even discounting the similarities between the confessions, and that they were obtained together, a reasonable fact finder would conclude that the persuasiveness of the two statements is intertwined. If Floyd was willing—for whatever reason—to falsely confess to one murder, it is far more likely that his

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[267] Floyd Exhibit 8 at 4.

[268] Floyd Exhibit 9 at 2.

[269] Floyd Exhibit 8 at 3, 5.

[270] Floyd Exhibit 9 at 2.

[271] Floyd Exhibit 8 at 3.

[272] Floyd Exhibit 9 at 2.

other confession is false as well. The considerable evidence tending to undermine the Robinson confession, therefore, also serves to undercut the Hines confession.

2. Floyd's New Evidence Further Undercuts the Persuasive Weight of the Hines Confession.

The persuasive weight of Floyd's confession to the Hines murder is further eroded by Floyd's new evidence of his own vulnerability to coercion, and evidence suggesting that Detective Dillman coerced a confession by beating a suspect in another case. In support of his claimed vulnerability, Floyd presents the expert opinion of Dr. Gregory DeClue. Dr. DeClue concludes that Floyd's deficient cognitive ability makes him "extremely vulnerable" and "extremely susceptible" to police pressure or influence.[273] In June 2009, Dr. DeClue determined that Floyd had a full-scale IQ of 59, which places Floyd in the bottom 0.3 percentile of all adults.[274] At Floyd's post-conviction evidentiary hearing in state court, Dr. DeClue testified that the "cutoff for mental retardation is, typically, set at 70."[275] Floyd's cognitive abilities in other areas, like verbal comprehension, perceptual reasoning, working memory, and processing speed, were all in the

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[273] The State has not argued that Dr. DeClue's opinion or methodology is in any way unreliable to the point of inadmissibility, and a review of his CV, report, affidavit, and testimony, reveals he is well-credentialed.

[274] Floyd Exhibit 20 at 3.

[275] Floyd Exhibit 47 at 45.

"Mentally Deficient (Mentally Retarded) range."[276] Floyd tested highest in perceptual reasoning, where he scored a 71.[277] *See generally* Steven A Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 971 (2004) (noting that "[t]he unique vulnerability of the mentally retarded to psychological interrogation techniques and the risk that such techniques when applied to the mentally retarded may produce false confessions is well-documented in the false confession literature"). Dr. DeClue noted that Floyd's scores on the Woodcock-Johnson Tests of Achievement-III were comparable to those of a seven- or eight-year-old child. Dr. DeClue also emphasized that Floyd reported "with some pride" that his skills in these areas have increased since he has been incarcerated over the last twenty years.[278]

The State argues that Dr. DeClue's expert opinion on Floyd's mental deficiency is unpersuasive because "Floyd clearly had the mental acuity to craft an alibi defense . . . as well as to concoct a story about having been beaten into confessing."[279] The State emphasizes that Floyd's testimony "stretched for 100 transcribed pages."[280] The State's argument is circular because it assumes Floyd's guilt: if Floyd is innocent then he need

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[276] Floyd Exhibit 20 at 3.

[277] *Id.*

[278] Floyd Exhibit 47 at 47.

[279] R. Doc. 63 at 9.

[280] *Id.*

not have the ability to "concoct" a story at all. Furthermore, a review of Floyd's testimony reveals that the State's characterization of his testimony as "cogent and coherent" is generous. At trial, Floyd often appeared confused and had difficulty expressing himself when answering straightforward questions.[281]

Dr. DeClue also found that, in addition to exhibiting mental deficiency, Floyd is highly suggestable. Floyd's test scores on the Gudjonsson Suggestibility Scale and Gudjonsson Compliance Scale indicate that Floyd "yield[s] to misleading questions," "shift[s] answers . . . in response to subtle pressure," and "compl[ies] with interpersonal pressure from authority figures" more than the average person would.[282] *See also* Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 Temp. L. Rev. 1, 14 (2008) ("Certain characteristics common among mentally retarded persons make them particularly prone to confess falsely. For example, mentally retarded suspects are often motivated by a strong desire to please authority figures, even if to do so requires them to lie and confess to a crime that they did not commit."). According to Dr. DeClue, all of Floyd's test results support the conclusion that Floyd

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[281] For example, the prosecutor, defense counsel, and the court repeatedly asked Floyd to clarify whether when he said that his bus to New Orleans on November 25, 1980, arrived at "1:00 a.m." meant one o'clock in the morning or the afternoon. When asked if he arrived in the afternoon, Floyd responded affirmatively. When asked if he arrived at "1:00 a.m.," Floyd responded affirmatively. Floyd Exhibit 45 at 302-304.

[282] Floyd Exhibit 20 at 4-5.

is highly suggestible.[283] Dr. DeClue also ruled out the possibility that Floyd was faking his cognitive abilities or otherwise distorting the results on which Dr. DeClue relied.[284]

Floyd's evidence that he was vulnerable to coercion is particularly relevant given Floyd's consistent allegations that he was beaten before he gave his confession. *See State v. Trudell*, 350 So. 2d 658, 662 (La. 1977) (finding when defendant had "an I.Q of about 60, or a mental age of about nine years . . . and was easily led and very suggestible . . . the state had a heavy burden of proving, beyond a reasonable doubt that [defendant's] confession was voluntary . . . trustworthy and the product of a free and rational choice"). At trial, Floyd testified that Detective Dillman "slapp[ed Floyd] on the side of the head,"[285] "kick[ed Floyd] on the side of the head with his boots,"[286] "knock[ed Floyd] off his chair on[to] the floor,"[287] and "threatened to put [Floyd's] head through the brick wall and throw [Floyd] out through the window."[288] Floyd's trial testimony is supported by new evidence regarding Detective Dillman's treatment of another suspect. In *State v. Seward*, the Louisiana Supreme

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[283] Floyd Exhibit 47 at 50.

[284] *Id.* at 42-44, 76; *accord* Floyd Exhibit 20 at 2.

[285] *Id.*

[286] *Id.* at 272.

[287] *Id.*

[288] *Id.* at 271-72.

Court found that the defendant had preponderantly established that he was beaten by Detective Dillman during his interrogation. 509 So. 2d 413, (La. 1987). Seward's description of his beating was similar to Floyd's—Detective Dillman "repeatedly hit him in the head, kicked and hit him in the chest and back, pushed him to the floor, and placed a plastic bag over his head. The officers also allegedly threatened, swore and screamed at Seward in an effort to elicit a confession." *Id.* at 415, n.5.

The State correctly argues that the Louisiana Supreme Court's finding, under a preponderance of the evidence standard, that Detective Dillman coerced a confession in another case is far from conclusive on its own. But "a brick is not a wall," and evidence of Detective Dillman's treatment of Seward supports Floyd's allegation of physical abuse and further erodes the persuasive weight of Floyd's confession.

3. The Evidence Undermines the State's Argument that Floyd's Confession is Reliable Because Floyd Volunteered Specific Information About the Scene.

At trial, the State attempted to bolster the credibility of Floyd's confessions by presenting evidence that Floyd volunteered specific details about both crime scenes. This argument is weakened, however, by the substantial evidence that detectives, knowingly or otherwise, provided Floyd with significant information about the crime scenes during the combined interrogation. Perhaps most notably, Floyd's statement regarding the tissue in the Robinson case matches the physical evidence as perceived by detectives at the time of interrogation—after the tissue had been discovered

but before the blood type had been compared to Floyd's—but not the scene as it actually existed. In other words, Floyd's apparent knowledge of this key detail at the time of his confession went only as far as what detectives already "knew," even when that supposed knowledge would later be contradicted by forensic analysis. *See Garrett*, *supra*, at 1059 ("[U]nless interrogations are recorded in their entirety, courts may not detect contamination of facts . . . .").

Similarly, Floyd's confession about the position of Hines's body appears to accurately describe a crime scene photo, but not the scene as actually found by police. In the relevant photo, Hines's whole body is shown lying on the right side of his bed[289] and Floyd's confession states, "[h]e fell on the floor next to the bed. I got dressed and when I left he was still lying there."[290] But, as Detective Dillman testified at trial, Hines's "legs were actually underneath the bed and [police] had to pull the body out from it to check the body for signs of injuries."[291] Detective Dillman stated that the photograph depicted Hines's body after it had already been moved because the photograph shows "the body . . . directly on the floor on the right-hand side of the bed."[292]

Floyd's description of a crime scene photo rather than the scene itself may be explained by Detective

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[289] *See* Floyd Exhibit 41.

[290] Floyd Exhibit 8 at 5.

[291] Floyd Exhibit 45 at 92.

[292] *Id.* at 93.

Dillman admission, made only after Floyd's conviction, that in order to "crack" Floyd, he showed Floyd photos of Hines's dead body *before* Floyd confessed.[293] This admission blunts the effect of Detective Dillman's testimony that Floyd:

> described the scene . . . vividly. He remembered the iron gate.[294] He was able to describe the position of the victim's body. He was able to describe to me the outlay of the victim's apartment, even to detail the position of the body where it fell off the bed.[295]

Detective Dillman further stated that Floyd "was able to describe the victim's residence and the surrounding area perfectly, the inside of the residence, the living room, the desk, the bedroom, even the position of the victim's clothing," which, according to Detective Dillman, Floyd said was "on the chair in the bedroom."[296] But Floyd's confession, which Detective Dillman said he contemporaneously transcribed,[297] says

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[293] Floyd Exhibit 38 at 192 ("I selected two of the grisliest shots: one depicting multiple stab wounds, the smeared, dried blood everywhere on the victim's body . . . ."); *accord* Floyd Exhibit 11 at 9-10 ("I spent hours with him. . . . Finally we got to the point, I think what finally broke him was I showed him some of the scene photographs . . . .")

[294] On this point, Floyd's confession says only: "We went throught [sic] a gate and into his apartment." Floyd Exhibit 8 at 3.

[295] Floyd Exhibit 45 at 108.

[296] *Id.* at 108-09.

[297] *Id.* at 111.

nothing about the location of Hines's clothing. Rather, when asked whether he recalled what Hines did with his clothing, Floyd responded "*I undressed and placed my cloths [sic] on the bed. Then I put them on a chair.* I went to the bathroom and when I came back, he [Hines] was naked in the bed."[298] Similarly, Floyd's supposed ability to describe the "residence and surrounding area perfectly"[299] is not reflected in the confession. According to that document, when asked if he could "furnish . . . a description of the Hines residence," Floyd responded: "All I remember, is that it was on Gov. Nicholls st [sic], near the river." Detective Dillman inquired further, asking "[d]o you recall the interior of the residence?"[300] Floyd answered: "All I remember was that there was a living room and a bedroom."[301]

Finally, John Rue Clegg's recent statement casts further doubt on both Floyd's guilt and Detective Dillman's investigative practices. As noted above, Clegg's recent affidavit alleges that, in contrast to Detective Dillman's representations both in the police report and at trial, Clegg never stated that Hines "frequently had sexual relations with both black and white males."[302] Rather, Clegg, according to his affidavit, told Detective Dillman that "Bill's taste was

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[298] Floyd Exhibit 8 at 4.

[299] Floyd Exhibit 45 at 108.

[300] Floyd Exhibit 8 at 4.

[301] *Id.*

[302] Floyd Exhibit 3 at 6.

for black men."[303] Clegg, as noted above, is a friend of Hines's and an apparent stranger to Floyd, and has lived in Germany since 1970. He appears to have little reason to concoct a story on Floyd's behalf, and his credible account therefore provides an additional reason to doubt Detective Dillman's reliability. Furthermore, Clegg's statement regarding Hines's preferences suggests that an African-American man, rather than Floyd, killed Hines. This inference is supported by the striking similarities between the Robinson and Hines murders and the overwhelming evidence that Robinson was killed by an African-American man.[304] It is further strengthened by

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[303] Floyd Exhbit 21 at 2.

[304] Indeed, State actors have consistently taken the position that Robinson and Hines were killed by the same person. This assumption animated the early investigation. *See, e.g.*, Floyd Exhibit 3 at 5 ("It became evident to the investigating detectives . . . that the same person might possibly be responsible for the deaths of both victims."); Floyd Exhibit 11 at 4 ("As soon as I walked into [the Robinson] crime scene I knew again from intuition and working these cases year in and year out I knew that we had the same perpetrator."). Detective Dillman appears to have maintained this belief. Throughout his 1998 interview with Jupiter Entertainment, Detective Dillman noted that Floyd's "rage" and poor judgment "cost two people their lives." Floyd Exhibit 11 at 9, 12. Detective Dillman also commented, "there's no doubt in my mind that he was responsible for both, but since we convicted him of the first case you know he is given life[. H]e just would have been given double life." *Id.* at 11; *see also* Floyd Exhibit 38 at 253 ("[T]he Rodney Robinson case gathers dust in Homicide's bottom drawer, technically an 'open' investigation, but no officer who worked it believes the matter unsolved."). When Floyd appeared before the Louisiana Pardon Board in 1995, then-District Attorney Harry Connick wrote a letter "strongly urg[ing] that [Floyd's]

the forensic evidence at the Hines scene: African-American pubic hair recovered from Hines's bed[305] and fingerprints that matched neither Floyd nor Hines on the whiskey bottle in Hines's kitchen.[306]

4. Floyd's Alleged Statement to Steven Edwards is similarly unreliable.

As noted above, the only evidence corroborating Floyd's confession to Detective Dillman is his alleged admission to Steven Edwards. Floyd allegedly told Edwards, owner of the Mississippi River Bottom Bar, that he had killed a person.[307] When Edwards suggested Hines' name, Floyd responded "Yeah, on Governor Nichol[l]s."[308]

Like the confession evidence, the persuasiveness of Floyd's alleged boast to Edwards is affected by the presence of similar evidence in the Robinson case. In that case, Reed, an acquaintance of Floyd's, testified that Floyd once threatened to "take care of [Reed] like he did the one at the Fairmont."[309] Floyd was apparently referring to Robinson, who was killed at the

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request for clemency be denied" because Floyd "murdered Rodney Robinson" and "took the life of two innocent victims in cold blood." Floyd Exhibit 12.

[305] Floyd Exhibit 40.

[306] Floyd Exhibit 13 at 3.

[307] Floyd Exhibit 45 at 55-56

[308] *Id.*

[309] *Id.* at 75

Fairmont Hotel. 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.

The doubt engendered by the evidence in the Robinson case is compounded by Edwards's inconsistent testimony regarding Floyd's alleged statement. At trial Edwards insisted that after Floyd said he had killed someone, 1) Edwards suggested Hines's name, and Floyd agreed;[310] and 2) Floyd offered further detail, by confirming that the murder occurred on Governor Nicholls Street.[311] At a pre-trial evidentiary hearing conducted several months earlier, however, Edwards's testimony differed. According to this earlier account, Floyd, after being told he was barred from entering Edwards's bar, said:

> "Well, don't get me ruffled." [Floyd] said something to the point, "I already wasted one guy," or something, and I read it in the paper. I said, "Are you talking about the guy around the corner?" And he said, "Yeah." And that was the extent of our conversation. I said, "You know you

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[310] *Id.* at 55-56, 71-72.

[311] *Id.* at 58.

> cannot go into the bar. You are barred. You have to stay out of it."[312]

Edwards was then asked if anyone "ever call[ed] the names of any individuals during that conversation."[313] Edwards answered: "If we did, I might have mentioned Bill, and then later when I read in the paper it was Bill Hines. Bill had been into my bar once or twice."[314] Edwards further testified that he "didn't even think about" Floyd's statements because "[t]hat happens in the barroom business a lot . . . . People come in and say things, 'I beat the piss out of this guy down the street.' I brush it off. I just let it go . . . . [S]ometimes it's true and sometimes it's not."[315]

Finally, Dr. DeClue's findings provide further insight into the credibility of Floyd's alleged boast. Edwards consistently states that he, rather than Floyd, raised Hines—or "the guy around the corner"—as the person that Floyd "wasted." Given Floyd's suggestibility and overall mental acuity, that Edwards rather than Floyd allegedly suggested Hines' name takes on additional significance.

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[312] Floyd Exhibit 75 at 44.

[313] *Id.*

[314] *Id.*

[315] *Id.* at 45-46.

D. No Reasonable, Properly Instructed Juror Would Likely Vote to Convict Floyd of Murdering Hines Based on Only His Confession and Alleged Boast

Viewing all of the evidence here—both new and old, exculpatory and inculpatory—the State's case against Floyd for the murder of Hines is tenuous. The Court finds, as an initial matter, that any reasonable juror presented with the Robinson murder evidence would conclude that it is highly unlikely that Floyd killed Robinson. The Court further finds that this conclusion would inform the juror's evaluation of the State's only evidence in the Hines murder—the confession and statement to Steven Edwards. A confession is generally powerful evidence, and juries may be persuaded to convict on the basis of only a confession. *See Murray v. Earle*, 405 F.3d 278, 295 (5th Cir. 2005) (quoting Drizin & Leo, *supra*, at 923). But, even discounting the shadow cast by the similar Robinson confession, the specific confession at issue in this case is unreliable for the many reasons outlined above. Floyd's alleged drunken boasting provides similarly thin evidence of Floyd's guilt. When further discredited by their association with the Robinson evidence, Floyd's flawed confession and dubious boast, standing alone against significant exculpatory evidence, are insufficient to expel all reasonable doubt from the mind of a reasonable juror.

In his recommendation, the Magistrate Judge correctly articulated the relevant legal standard and ably applied it. Nonetheless, this Court disagrees with two of the Magistrate Judge's core findings. First, as noted above, the Court finds that the Magistrate

Judge's "different time" theory cannot explain the overwhelming evidence that an African-American man, rather than Floyd, killed Robinson. Second, and relatedly, the Magistrate Judge's recommendation appears to exaggerate the persuasiveness of Floyd's inculpatory statements in the mind of a reasonable juror. Although the Magistrate Judge is no doubt correct that confessions are "compelling evidence of guilt, perhaps especially in the mind of lay jurors,"[316] this Court finds that Floyd's confession to the Hines murder—as discredited by its association with the false Robinson confession, Floyd's vulnerability, and evidence of Detective Dillman's improper interrogation techniques—is an especially unreliable confession. Although lay jurors may find the average confession compelling, the Court must make a "probabilistic determination" concerning a hypothetical juror's opinion of the specific statements at issue in this case. *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 299). For the reasons offered above, the Court finds that such a juror would not find Floyd's confession or alleged boast to be compelling evidence of guilt.

Accordingly, the Court concludes that any reasonable, properly instructed juror, evaluating this case with the requisite caution and care, would reasonably doubt Floyd's guilt of the murder of William Hines. Proof beyond a reasonable doubt is proof that leaves a juror "firmly convinced of the defendant's guilt." Federal Judicial Center, Pattern Criminal Jury Instructions (1987); *United States v. Williams*, 20 F.3d 125, 129 n.2 (5th Cir. 1994) (approving the FJC

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[316] R. Doc. 67 at 12.

instruction on reasonable doubt). It is unlikely that any reasonable juror would find that the State's murder case rises to this demanding standard. Floyd has therefore preponderantly established that no reasonable juror, after carefully and impartially considering all of the evidence, would find him guilty beyond a reasonable doubt.

V. CONCLUSION

Because Floyd has satisfied the standard necessary to overcome the untimeliness of his habeas petition, the Court remands Floyd's petition to the Magistrate Judge for an evaluation on the merits.

New Orleans, Louisiana, this 14th day of September, 2016.

/s/Sarah Vance

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

APPENDIX E

Floyd v. Cain, 62 So.3d 57 (2011)

Supreme Court of Louisiana.

No. 2010–KP–1163.

[Filed May 20, 2011]

John FLOYD	)
	)
v.	)
	)
Burl CAIN, Warden.	)
	)

In re Floyd, John D.; – Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of Orleans, Criminal District Court Div. C, No. 280–729.

Opinion

Writ application denied.

JOHNSON, J., would grant with reasons.

KNOLL, J., would grant.

WEIMER, J., would grant.

JOHNSON, J., would grant and assigns reasons.

John D. Floyd (Floyd) was indicted for two counts of second degree murder, the first count for the murder of William Hines, Jr., and the second count, for the murder of Rodney Robinson. *State v. Floyd,* 435 So.2d

992, 993–94 (La.1983). He was ultimately tried by a judge alone, found not guilty of the murder of Robinson and convicted for the second degree murder of Hines. Despite confessing to both crimes, the evidence conclusively proved that Robinson's assailant was not Floyd, a Caucasian with Type B blood, but instead, a black male with Type A blood. *Id.* at 994.

FACTS

On November 26, 1980, William Hines, Jr. was discovered lying beside his bed in his apartment, dead from multiple stab wounds. Three days later, on November 29, 1980, Rodney Robinson was discovered in the hallway of a New Orleans hotel, stabbed to death. Both victims were homosexual men, murdered in the early morning hours, in their bedrooms. Pubic hairs of Negroid origin, not belonging to either of the victims, and not belonging to Floyd, were found at both crime scenes. Two half-filled glasses of whiskey were found at both murder scenes. Because of the similarities, investigating police officers theorized that the two homicides were linked and that one individual committed both crimes.

The pubic hair evidence in the Robinson murder was left by the perpetrator in a blood-stained plastic cap. Pubic hair was also found on a napkin containing semen next to Robinson's body. A black male was seen fleeing the scene of the Robinson murder immediately after the murder. Floyd was ultimately excluded by forensic hair comparison as the donor of the biological evidence found at the Robinson crime scene.

Hines' apartment revealed no signs of a struggle, no evidence of burglary, and no evidence that the

apartment had been entered by force. Hines' clothes were found neatly draped over a chair. His body was discovered approximately thirty-six hours after his death, and scientific examination of the body revealed no clues. Pubic hair, from an black male was found at the Hines' crime scene. Both the victim and defendant were excluded as donors of the pubic hair by forensic hair comparison. Additionally, the coroner believed that Hines' killer may have had medical knowledge.

The police learned that a man called "Crazy Johnny" had made statements which linked him to the killings. Two French Quarter residents who also knew "Crazy Johnny" identified him as John D. Floyd and selected his photograph from a picture lineup presented by the New Orleans police. One of those persons, Stephen Edwards, who identified the defendant as "Crazy Johnny," operated a French Quarter bar. Edwards related to police an encounter with Floyd on the sidewalk near Edwards' establishment. Edwards had warned Floyd not to enter his bar because Floyd had been banned from the bar for recent disruptive behavior. According to Edwards, Floyd then told him to leave him alone, and suggested that "I already wasted one person." Edwards then asked if the victim had been the man who lived around the corner (Hines) and Floyd answered, "Yeah. On Governor Nicholls."

Another witness, Gerald Griffin, had accompanied Floyd to the detoxification unit in New Orleans Charity Hospital on the morning of November 29, 1980. Griffin stated that Floyd had asked him if he knew about the hotel killing (which had just occurred on November 29), and Floyd then stated that people who were hospitalized as mentally ill were sometimes found not

to be responsible for their actions. After the trip to the hospital, Griffin saw an account of the hotel killing of Robinson and reported his conversation with Floyd to Detective John Dillmann, (Dillmann), believing that there might be a connection between Floyd and the Robinson killing.

Detective Dillmann and Officer John Reilly located Floyd at a bar called The Louisiana Purchase. They had a drink with Floyd, talked with him for about twenty minutes, asked him to step outside, handcuffed him, walked him a few blocks to the officers' automobile, and took him to police headquarters where Floyd confessed to both the Hines and Robinson murders.

The Innocence Project of New Orleans discovered fingerprint evidence that had not been previously turned over to the defendant, and had been in the custody of the State for over thirty years. Police files relating to the murder contained a set of latent fingerprints taken from a whiskey bottle and glasses found at the scene of the Hines murder. Although there was speculative testimony regarding whether the print identification might have been inconclusive, the prints are undisputably marked by law enforcement as "Not John Floyd" and "Not victim." The available evidence also included an affidavit of the victim's friend, John Clegg who claimed that he told the investigating officer, Detective Dillmann, that Hines had a preference for black men which is consistent with pubic hair found at the Hines' crime scene.

There are few police records in either of these homicide cases because in 1988, Detective Dillmann apparently took the original police files of both cases from the New

Orleans Police Department in order to write a book about his investigation. John Dillmann, *Blood Warning: The True Story of the New Orleans Slasher,* (1st ed 1989). Dillmann stored the files in the trunk of his car and in his home until the files were destroyed during Hurricane Katrina.

The defense suggests that Floyd has an IQ of 59 (well below the threshold for mental retardation). Dr. Gregory DeClue, a forensic psychologist, who testified at Floyd's post-conviction hearing, administered the WAIS IV IQ test to Floyd at the Louisiana State Penitentiary in Angola in June 2009, and that test indicated Floyd has a full scale IQ of 59. The generally accepted cut off for mental retardation is 70. According to DeClue, 99% of all adults in the United States score higher on the test than Floyd.

Additionally, DeClue administered the Woodcock Johnson test to Floyd to assess his language and reading comprehension skills. DeClue testified that, based on the test results, Floyd can read at a second or third grade level. DeClue stressed that these results indicate Floyd cannot communicate at the complex level an average adult can.

DeClue also administered the Gudjonsson Suggestibility Scale to determine Floyd's levels of suggestibility and compliance. DeClue found that relator displayed a high level of suggestibility, and that Floyd's "self-reported description was that he's more compliant than the average person." DeClue testified that people classified as mentally retarded are 10 times more likely to give a false confession, that in many false confession cases, the confessor included details of

the crime scene presumed to be known only by the police and the perpetrator.

Although mental retardation or illiteracy, alone, do not prevent a person from being able to knowingly and intelligently waive his rights, this Court has held that a mentally retarded 17–year–old with an IQ between 50 and 69 was not able to understand his rights and was incapable of knowingly and intelligently waiving his Miranda rights,[1] and thus his confession should have been suppressed. *State v. Anderson,* 379 So.2d 735, (La.1980). See also *State v. Raiford,* 03–0098 (La.App. 4 Cir. 4/23/03) 846 So.2d 913, where we held a suspect must have the capacity to understand the rights explained before there can be a valid waiver of his rights. *State v. Brown,* 414 So.2d 689 (La.1982); *State v. Young,* 576 So.2d 1048 (La.App. 1st Cir.1991); *State v. Tart,* 672 So.2d 116 (La.1996).

BRADY VIOLATION

In my view, the exculpatory value of the fingerprint evidence is sufficient to undermine confidence in the outcome of Floyd's trial, thus satisfying the requirements for a new trial set forth in *Brady v. Maryland.*[2] For purposes of *Brady's* due process rule, a

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[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *State v. Loyd,* 425 So.2d 710 (La.1982); *State v. Ned,* 326 So.2d 477 (La.1976).

[2] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the Supreme Court held that the suppression by the prosecution of evidence favorable to the accused after receiving a request for it violates a defendant's due process rights where the evidence is

reviewing court determining materiality must ascertain: not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) (citing *Bagley,* 473 U.S. at 678, 105 S.Ct. at 3381); *see also State v. Strickland,* 94–0025, p. 38 (La.11/1/96), 683 So.2d 218, 234 (quoting *State v. Marshall,* 81–3115, p. 13–15 (La.9/5/95), 660 So.2d 819, 825 (quoting *Kyles*)). Therefore, the reviewing court does not put the material to an outcome-determinative test in which it weighs the probabilities that the petitioner would have obtained an acquittal at trial or might do so at a second trial. Instead, a *Brady* violation occurs when, as in this case, the "evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Kyles,* 514 U.S. at 434, 115 S.Ct. at 1566 (quoting *Bagley,* 473 U.S. at 678, 105 S.Ct. at 3381). The State is charged with knowledge of the collective information in possession of the investigating officers. *Strickler v. Greene,* 527 U.S. 263, 280–81, 119 S.Ct. 1937, 1948, 144 L.Ed.2d 286 (1999)("The [*Brady*] rule encompasses evidence known

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material either to guilt or punishment, without regard to the good or bad faith of the prosecution. *Id.,* 373 U.S. at 87, 83 S.Ct. at 1196–97. The *Brady* rule encompasses evidence which impeaches the testimony of a witness when the reliability or credibility of that witness may determine guilt or innocence. *United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985); *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 756, 31 L.Ed.2d 104 (1972); *State v. Knapper,* 579 So.2d 956, 959 (La.1991).

only to police investigators and not to the prosecutor .... [who] has the duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.")

Considering all of the evidence, including Floyd's false confession to the murder of Robinson, Floyd's low IQ and susceptibility to suggestion, the missing police records, the lack of evidence linking Floyd to the murder of Hines, the exculpatory value of the fingerprint evidence, defendant is entitled to a new trial.

All Citations

62 So.3d 57 (Mem), 2010-1163 (La. 5/20/11)

APPENDIX F

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

CASE NO: 280-729
SECTION "C"

[Dated February 19, 2010]

STATE OF LOUISIANA)
VERSUS)
JOHN D. FLOYD)
)

Transcript of the Post-Conviction Relief Hearing in the above referenced matter, as heard before the Honorable Benedict Willard, Judge presiding under date of February 19, 2010.

APPEARANCES:

FOR THE STATE:

Donna Andrieu, Esq. ADA

FOR THE DEFENSE:

Emily Maw, Esq.
David Park, Esq.

REPORTED BY: LINDA B. LEGAUX, CCR
SECTION "C"

* * *

[p.181]

That's all.

MS. ANDRIEU:

No further questions, Your Honor.

Thank you.

THE COURT:

Thank you, Mr. Burmaster.

Are y'all done?

(AT WHICH POINT A SHORT BREAK WAS TAKEN.)

THE COURT:

I've had an opportunity to go over the documents once again.

Ms. Maw and Mr. Park, you did a good job. Ms. Andrieu, you did a good job as well.

Based upon the evidence and testimony presented during this hearing, the Court finds that the Defendant in this matter, Mr. John Floyd, has failed to meet his burden of proof required in his Post-Conviction Application. Accordingly, sir, at this time, your application is denied. We'll note the Defense's objections, and let the Appellate process begin. Good luck.

(END OF PROCEEDINGS)

APPENDIX G

State v. Floyd, 435 So.2d 992 (1983)

Supreme Court of Louisiana

No. 82–KA–0992

[Filed June 27, 1983]

STATE of Louisiana)
)
v.)
)
John D. FLOYD.)

Synopsis

Defendant was convicted in the Criminal District Court, Parish of Orleans, Jerome M. Winsberg, J., of second-degree murder, and he appealed. The Supreme Court, Dixon, C.J., held that: (1) probable cause existed for defendant's arrest; (2) State bore its burden of proving that confession was free and voluntary, and not forced by fear, duress, inducements, or promises; (3) evidence was sufficient to sustain convictions; and (4) alleged past misconduct of detective in obtaining confessions from suspects was not relevant, where detective was not even on scene at time that defendant was assertedly beaten and threatened by officers and made original confession.

Affirmed.

Dennis, J., concurred.

Watson, J., dissented and assigned reasons.

Attorneys and Law Firms

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Harry F. Connick, Dist. Atty., John Craft, David Plavnicky, Asst. Dist. Attys., for plaintiff-appellee.

Walter Sentenn, Dwight Doskey, Orleans Indigent Defender Program, New Orleans, for defendant-appellant.

Opinion

DIXON, Chief Justice.

John D. Floyd was indicted for two counts of second degree murder, the first count for the murder of William Hines, Jr., and the second count, for the murder of Rodney Robinson. He was ultimately tried by a judge alone, convicted for the second degree murder of Hines, and found not guilty of the murder of Robinson. He was, in due course, sentenced, and now appeals, arguing four assignments of error.

On November 26, 1980, William Hines, Jr. was discovered lying beside his bed in his apartment, nude, dead from multiple stab wounds. On November 29, 1980, the body of Robinson was discovered in the hallway of a New Orleans hotel, nude, stabbed to death.

Police investigation developed similar factors in the two killings. Both victims were homosexuals. Scientific examinations of one of the victims and his room revealed recent sexual activity. Hines' apartment revealed no signs of struggle, no evidence of burglary,

and no evidence that the apartment had been entered by force. Hines' clothes were found neatly draped over a chair. Since the body of Hines was discovered approximately thirty-six hours after his death, scientific examination of the body revealed no clue; background information, however, disclosed that Hines had been an active homosexual. Investigating police theorized that the two homicides were linked and that one individual might have committed both crimes.

The police learned that a man called "Crazy Johnny" had made statements which linked him with the killings. One of the investigating policemen was familiar with the man called "Crazy Johnny," but did not know his name. Two French Quarter residents who also knew "Crazy Johnny" selected John D. Floyd's photograph from a picture lineup presented by the New Orleans police. One of those persons, Stephen Edwards, who identified the defendant as "Crazy Johnny," operated a French Quarter bar. He related to police an encounter with Floyd on the sidewalk near Edwards' establishment. Edwards warned Floyd not to enter Edwards' bar because Floyd had been banned from the bar for recent disruptive behavior. Floyd, according to Edwards, then told Edwards to leave him alone, that "I already wasted one person." Edwards then asked if the victim had been the man who lived around the corner (Hines) and Floyd answered, "Yeah. On Governor Nicholls."

Another witness, Gerald Griffin, had accompanied Floyd to the detoxification unit in New Orleans Charity Hospital on the morning of November 29, 1980. On this occasion, Floyd had asked Griffin if Griffin knew about the hotel killing (which had just occurred on

November 29). Floyd then stated that people who were hospitalized as mentally ill were sometimes found not to be responsible for their actions. After the trip to the hospital, Griffin saw an account of the hotel killing and reported his conversation with Floyd to the police, believing that it might have revealed a connection between Floyd and the Robinson killing.

A search of French Quarter bars finally led Detective Dillman and Officer Reilly to Floyd at a bar called "The Louisiana Purchase." These policemen had a drink with Floyd, talked with him for twenty minutes or so, asked him to come outside, handcuffed him, walked him a few blocks to the officers' automobile, and carried him to police headquarters, where Floyd confessed.

Floyd gave two confessions, one to the murder of Hines and one to the murder of Robinson. Since he was found not guilty of the murder of Robinson (evidence showed that Robinson's assailant had been a black man with Type A blood; Floyd is white with Type B blood), there are no issues before us in that case.

Assignment of Error No. 1

This assignment relates to the denial of motions to suppress the confession. The confession was attacked as having been coerced, fabricated, and the product of an illegal arrest for which there was no probable cause.

The defendant claimed that he had been beaten during his interrogation, that he had been struck and kicked and that his head had been split open and was bleeding.

The police denied the use of any force. Pictures were introduced which apparently showed no evidence of the

beating described by the defendant. A news photographer testified, and his pictures were introduced. The photographer saw no evidence of violence having been used upon the defendant, and his photographs apparently disclosed none.

The evidence showed that the defendant first denied any knowledge of the killing, explained his public bragging about killing to have been mere exhibitionism, but eventually began to weep, when the officers probed his drug abuse, and confessed.

The officers had taken Floyd in custody at 5:00 p.m. When the arresting officers had been told enough by Floyd to confirm their belief that Floyd was guilty of the two murders, they sent for Detective Rice, to whom the Robinson case had been assigned. While they waited in the detective headquarters, they sent for a supper of fried chicken, and sent for some chewing tobacco at Floyd's request. Floyd and the police ate their evening meal together, after which Floyd gave two separate written statements, which were typed by the police officers as Floyd answered their questions. The first was a confession to the murder of Hines, the second to the murder of Robinson.

There was clearly probable cause for the arrest of the defendant Floyd. He had been identified as the "Crazy Johnny" who had bragged in French Quarter bars about having killed the two men, and who had made statements to Edwards that he had killed Hines and to Griffin a statement which indicated a connection to the murder of Robinson. Both victims were homosexuals. The investigation of Floyd showed that he was homosexual, that he picked up sexual companions in

bars, had no regular place of abode, and, as a practice, exchanged homosexual relations for places to stay.

Murder had been committed. Floyd claimed to have killed one victim and made statements which connected him with the other victim. There was no lack of probable cause for the warrantless arrest.

The state bore its burden of proving that the confession was free and voluntary, and not forced by fear, duress, inducements or promises. The defendant was thoroughly and adequately advised of his constitutional rights. He was not intoxicated at the time the confessions were given. He was able to understand the warnings, and that the statements would be used against him.

There was no error in the ruling of the trial judge in denying the motion to suppress, and admitting the confession into evidence.

Assignment of Error No. 2

Defendant asserts that the trial court erred in finding that there was sufficient evidence to convict him of Hines' murder.

The evidence against the defendant consisted of his confession in which he described the killing of Hines. He had bragged publicly about the killing. Homosexual activity brought the victim and the defendant together. He had threatened another witness, one of his sexual partners who had refused to give him money, that he would "take care" of him "like I did the one at the hotel."

This assignment of error lacks merit.

Assignment of Error No. 3

This assignment of error complains of the denial of a motion for a new trial, for reasons discussed in Assignments of Error Nos. 1 and 2, and lacks merit.

Assignment of Error No. 4

Defendant contends that the trial court erred in refusing to allow him to question Detective Rice regarding past cases where confessions he had obtained from suspects were suppressed due to his misconduct.

Evidence is admissible in a criminal case only if it is relevant to a material issue. R.S. 15:435. Relevant evidence is defined in R.S. 15:441 as:

> "... that tending to show the commission of the offense and the intent, or intending to negative the commission of the offense and the intent.
>
> Facts necessary to be known to explain a relevant fact, or which support an inference raised by such fact, are admissible."

Although the prior record of a police officer regarding his misconduct may be relevant, the past conduct of Detective Rice was not relevant to the admissibility of Floyd's confession to the murder of Hines. Floyd testified that he was beaten and threatened by Detective Dillman during the period he and Dillman were alone. Rice did not arrive at the homicide office until approximately 7:30 p.m., after Floyd had indicated that he wanted to confess to both the Hines and the Robinson murders. Rice was present when the written statements were taken from Floyd. It therefore appears that Rice was not only absent when Floyd

originally confessed to Dillman and Officer Reilly, but he was also not present during the time period Floyd claims that he was beaten and threatened. Accordingly, any evidence of Rice's past misdeeds would have no relevance to the admissibility of Floyd's confession in the Hines case.

Evidence of prior misconduct on the part of Rice is not relevant to a material issue in this case, since only the admissibility of the confession to the Hines murder is at issue. The admissibility of the confession to the Robinson murder is not at issue in this case; defendant has been acquitted of the Robinson murder.

For these reasons, the conviction and sentence of the defendant, John D. Floyd, are affirmed.

All Citations

435 So.2d 992