OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CURTIS LEE KYLES, Petitioner v. JOHN P. WHITLEY, WARDENS

CASE NO: 93-7927

PLACE: Washington, D.C.

DATE: Monday, November 7, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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CURTIS LEE KYLES, :

Petitioner :

v. : No. 93-7927

JOHN P. WHITLEY, WARDENS :

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Washington, D.C.

Monday, November 7, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

JAMES S. LIEBMAN, ESQ., New York, New York; on behalf of the Petitioner.

JACK PEEBLES, ESQ., Assistant District Attorney for Orleans Parish, New Orleans, Louisiana; on behalf of the Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 93-7927, Curtis Lee Kyles v. John P. Whitley.

Mr. Liebman.

ORAL ARGUMENT OF JAMES S. LIEBMAN

ON BEHALF OF THE PETITIONER

MR. LIEBMAN: Mr. Chief Justice and may it please the Court:

Curtis Lee Kyles is on death row for a robbery-murder he steadfastly claims he did not commit, and that his initial accuser, Beanie Wallace, did commit.

The issue here is whether the jury had a reliable opportunity to assess the evidence on that identity question, notwithstanding the quantity of evidence that the prosecution suppressed.

Both sides agree that the materiality standard of United States v. Bagley controls. Under that standard, Mr. Kyles' conviction must be overturned if disclosure of the evidence suppressed by the State would have created a reasonable probability of a reasonable doubt in the mind of one or more of the jurors, and a reasonable probability is a probability sufficient to undermine confidence in the outcome.

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Although legally narrow, the case is factually complicated, and I'd like to take a couple of minutes, if I could, to give the background. When Dolores Dye resisted a thief in the parking lot of a Schwegmann's supermarket in New Orleans, the thief shot her once in the face at point blank range, walked to her car, and drove off.

The State's evidence that Kyles was the killer was in four categories. First were four eye-witness identification of Kyles as the killer, all of them confirmed by an in-court viewing of Kyles standing side-by-side with Beanie Wallace.

Second was the portion of a vinyl roof of a car in a blurry, blown-up photograph of the crime scene which prosecutors argued resembled Kyles' car.

Third was physical evidence that the State claimed that Kyles had possessed but Kyles said he did not possess, mainly the victim's Ford LTD which Beanie Wallace claimed Kyles had sold to him, the victim's purse and personal effects the police found in a large, plastic trash bag outside the Kyles' home, and a gun, the murder weapon, found behind the stove in the Kyles kitchen.

And fourth, then, were physical evidence that Kyles admitted possessing, a 2-inch square Schwegmann's receipt with Kyles' fingerprints on it found in the LTD

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and 15 cans of dog and cat food found in the Kyles' kitchen, some of which matched the brands that the victim bought.

Kyles then offered the testimony of seven witnesses tending to show that all of the State's evidence was consistent with Kyles' innocence and Beanie Wallace's guilt.

First, one of the eye witnesses admitted she only saw the perpetrator from the side and back and had not identified a photo of Kyles in a photo array, and the other three eye witnesses who had identified Kyles in a photo array admitted that they saw the same picture of Kyles five times before they testified at trial and identified him in court.

Second, Kyles himself testified that you couldn't tell the color, make, model, or any attributes of the car in the blurry, blown-up photograph and, in any event, it wasn't his car.

Third, defense witnesses testified that they saw Beanie driving the victim's car within an hour of the killing and furtively changing its license plates, that Beanie had the opportunity to plant the purse and gun when he was at the Kyles' home and alone in the Kyles' kitchen on the Sunday prior to the police search on Monday, and then, as to the sales receipt, Kyles testified to hitching

a ride with Beanie in the LTD to buy cigarettes and transmission fluid, and as to the pet food, his witnesses testified that the Kyles family kept a cat and a dog, and a police photograph was introduced showing a bottle of Hartz dog shampoo in a closet in the Kyles' home.

As I will shortly show in detail, there are four separate reasons why there would have been a reasonable probability of a reasonable doubt if the State had disclosed the evidence it suppressed rather than suppressing and misrepresenting it.

First are the suppressed --

QUESTION: Before you get onto that, was Beanie called at trial?

MR. LIEBMAN: He was not called to testify at trial. He was present in that courtroom, but he was not called to testify.

QUESTION: But you assert that the defendant's main hope for acquittal was that Beanie did it, yet the defense did not call Beanie?

MR. LIEBMAN: That is true, Your Honor, and that is the subject of the ineffective-assistance portion of this claim which has been addressed in the lower courts and is part of the cert petition here, though we did not address in our brief, and that is --

QUESTION: -- purposes we have to assume that

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that was not incompetent assistance of counsel, I assume?

MR. LIEBMAN: Well, on the Brady claim -- that's right. On the Brady claim, we -- what we assume is that had the State disclosed the suppressed evidence, the use of that evidence would be the use that competent counsel would make of it, but we assume that it would be the effect of that evidence in the trial.

The court below found that a strategically reasonable attorney would not call Beanie Wallace no matter what. Now, on the ineffective assistance portion of our claim, we disagreed with that, but it is a matter of the determination of the court below, and in fact a number of courts in the State and Federal system have said in this case any attorney wouldn't want to get anywhere near Beanie. You'd want to just present the theory that he did it and let the jury achieve a reasonable doubt on that basis.

I want to talk about the suppressed eye-witness statements. As their photos reveal, and I have brought copies, Kyles and Beanie were facially similar in bone structure, profile, coloring. Stood side-by-side, however, the two men clearly and distinctly did not resemble each other. Kyles was a maypole, 6-foot tall, 125 pounds, Beanie Wallace a fire plug, 5-foot 5-inches tall, 140 pounds.

The controlling issue, then, was whether the witnesses saw the killer's build as the killer attacked the victim outside her car, or whether they only saw the victim's -- the killer's face when he fled in the victim's car, and on that issue, contrary to the testimony at trial, the suppressed statements show that only one witness got a good look at the killer's height, size, and build, and that witness in a suppressed statement exactly described fire plug Beanie Wallace, not maypole Curtis Kyles.

Second, based on the chance discovery of a portion of a car's vinyl roof in the corner of a blown-up photo, the district attorney argued that Kyles' car was parked near the victim -- near the crime scene moments after the killer fled in the victim's car. Confidence in a verdict premised on this self-described key element -- the prosecutor called it a key element of his case -- is undermined by the State suppression of a police memorandum showing that, if anything, the police knew exactly the opposite of what the prosecution argued, namely that the police did not leave matters to chance, that they systematically listed the license numbers of "vehicles parked in the Schwegmann's parking lots around Schwegmann's on September 20, 1984," and it showed that the petitioner's car was not on the list. The list was

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suppressed.

QUESTION: I thought the rebuttal to that was that they didn't list all of the cars. Is that --

MR. LIEBMAN: Your Honor --

QUESTION: Is there a factual dispute about that?

MR. LIEBMAN: There is a factual dispute about that, but I don't think it's important. The memorandum itself disputes the factual finding.

The factual statement was that they only searched one part of one lot. The memorandum itself said, here are the cars parked in the Schwegmann's lots, plural, at the particular time. It was done by three detectives, and they had 19 cars, and the thought that there were too many cars that three detectives couldn't get more than 6 each is a little bit hard to understand.

Nonetheless, it doesn't matter, because the testimony was that the part of the lot that they did search was in the immediate area of the crime scene, and the picture itself, the blown-up photograph itself, shows the very edge of the crime scene, because there's the police cruiser right there on the edge of the crime scene, and you can see that the only thing that separates the crime scene from the blurry photograph that's obscured is one row of parked cars, so it's in essence the second row

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of parked cars over.

They took the list down at 9:15 after the store had closed. One can predict that this car shown in the photograph would have been probably the closest car. Certainly it would have been one of the closest cars to the crime scene. So the finding was that they only looked in the immediate area, but the picture shows that the car in question was in the immediate area, so I don't think it really matters what we do with that factual issue.

Third, had the State disclosed only its evidence about Beanie Wallace, there is also a reasonable probability of a reasonable doubt, for the jury would have seen that most everything the police witnesses testified and that the prosecutors argued about Beanie Wallace was false. It also would have shown that most everything the otherwise not entirely believable defense witnesses said about Beanie was true, and most importantly, that the police had substantial, affirmative evidence in their files that Beanie Wallace was the killer.

Finally, a reasonable probability of a reasonable doubt arises from the suppressed evidence, notwithstanding the only two untainted pieces of evidence, the receipt and the pet food.

Now for the details, beginning with the eye-witness identifications, and I'm going to focus here, as

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did the majority below, on the three identifications that seemed most reliable to the court below, because they were predicated on a photo array.

Although similar of face, as I said, as the photographs reveal, maypole Curtis Kyles and fire plug Beanie Wallace were unmistakably different in build, so the State's case depended on the witnesses' opportunity to see the killer before he got in the victim's car.

At trial, the testimony claimed that the opportunity was present for the witnesses, and the prosecutor then bragged in summation that "all of them had an excellent opportunity to view the homicide and the person who did it. Nobody changed his story. Nobody was trapped in a lie."

QUESTION: Yes, but all we have for it is your word that the two are not recognizable one from the other except when you see them both standing up. I mean, is that --

MR. LIEBMAN: No.

QUESTION: -- conceded by everybody?

MR. LIEBMAN: No, that's not right, Your Honor. First of all, you have the photographs, and of course --

QUESTION: Are they part of the record?

MR. LIEBMAN: Yes, the photographs are a part of the record, and I'd be glad to give you the exhibit

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numbers, if you'd like the -- Kyles is S-45, trial exhibit, and D-19 in the postconviction, and then Beanie's mug shot has two numbers at trial, either D-4 or S-44.

But it's not only that, every one of the courts below made a determination. They all tell you, we looked at the photographs and this is what we saw, and you will see at the trial court, Fifth Circuit, the district court, and even the State's brief in this court, everybody says they don't look alike, because they are different in physical build. One is much thinner and much taller, one is -- and it all goes to height, weight, and build in each of course.

There's only one judge in this record that said, I'm going to just look at the two faces and see what they look like, and that's Judge King below, and in footnote 55 at the Joint Appendix, 120 through 21, she says, "I looked at the faces alone and they resemble each other."

In addition, there is trial testimony from -- it's uncontradicted. The only trial testimony about how the two people looked was from defense witnesses, and they testified, and this is quoting the Fifth Circuit. They said, "Kyles and Beanie resembled one another in profile and from the side, and had similar complexions." That's at page 55, quoted in the -- or, paraphrasing the testimony in the -- that was at trial, but it's in the

Fifth Circuit opinion.

QUESTION: There were witnesses who said they didn't look alike?

MR. LIEBMAN: There were witnesses who -- no, there were no witnesses who said they didn't look alike. The eye witnesses looked at them side by side and said it's him and it's not him, and I'm sure, but they didn't characterize what it was that led them to that, but of course, if you looked at them you couldn't possibly think that they could be the same person, because one was so much taller than the other.

But what the suppressed statements show is that the witnesses, only one witness did have the excellent opportunity that the prosecutor claimed. That witness described Beanie Wallace to the T. The other witnesses did change their stories, and one of them could have been trapped in a lie if the statement had been released.

And let me start with Isaac Smallwood. On page 35 of our blue brief we have laid out his testimony. He said that he got a good opportunity to see the assailant's build as he watched the assailant shoot the victim, walk, then, he said nonchalantly to the victim's car, get in the car, and drive away.

This testimony was very important to Smallwood, because he testified over and over again that once the

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killer was in the car, he could only see the side of the killer's face and nothing else, but as the State now accepts in his brief, Smallwood's testimony was false.

QUESTION: But isn't it also the case -- isn't it also the case that you were in, or the trial counsel was in just as good a position to go after Smallwood at the second trial as he would have been if the disclosure had been made?

MR. LIEBMAN: No, that's not true.

QUESTION: Why not?

MR. LIEBMAN: Because at the first -- you're referring, I assume, to the first trial, the testimony at the first trial to which the State refers in its brief, and the difference --

QUESTION: The difference between -- that's right, yes.

MR. LIEBMAN: There was no difference on the critical point. What Smallwood said at the first trial -- and the State only gives you page 51 of the transcript. A lot of it's on page 52. What he says was, I heard the shot and I turned around, and I watched the man walk from his car, walk from the crime scene, the murder scene, and get into his car, and he was asked, well, how did he walk? Well, he walked nonchalantly.

So both at the first trial and at the second

trial and, in fact, in the suppression hearing, Smallwood said, I saw the man outside the car. I got a good look at him outside the car.

The only thing that was different was whether he actually saw the shooting, but of course nobody's disagreeing -- there's no issue about whether there's a shooting and somebody got killed. The only issue is whether they got a chance to see the man before he got in the car.

In addition, Justice Souter, trial counsel did attempt to impeach Smallwood on that minor discrepancy, did he see him from the beginning or only part of the way, and he did it by asking Henry Williams, who was Smallwood's partner, standing right next to him, isn't it true that Smallwood didn't turn around until after the shot was fired, and his partner says no, that's not true, so there was no way to impeach that, because you didn't have the statements which would have permitted that, but the critical point was whether they saw him out of the car.

The same thing is really true, and in Smallwood's testimony he says --

QUESTION: Well, I -- just to follow up on that one point, why is it that the first trial testimony was not wholly sufficient for the impeachment purposes without

the statement?

MR. LIEBMAN: Because the first trial said that Smallwood -- both trials, his testimony at both trials was that he saw the assailant outside the car, standing up, walking, clear shot at him. I could see -- he could see his physique. The question was, could you see the characteristic on which Beanie and Kyles differ? One's tall and thin, one's short and fat. They have a similar face.

And he says, yes. In both trials he said yes, I saw him walking from the crime scene to the car. The only difference is whether he actually also saw the shooting or not, but that did not undermine his capacity, his opportunity to see the difference between the two that makes the two absolutely -- you couldn't mistake them, but you could mistake them in face and that's --

QUESTION: But you haven't explained -- I'm not sure -- is that also -- is that different from the suppressed statement?

MR. LIEBMAN: Yes, I'm sorry. In the suppressed statement, and I'm coming to that, what Smallwood says is, I heard a loud pop. When I looked around, I saw a lady lying on the ground and there was a red car coming towards me. Question: When you heard the shot and looked, was the black man standing near her? No, he was already in

the car, coming toward me.

So he test -- his statement, his contemporaneous statement was that he never saw the man outside the car.

QUESTION: He must have taken a long time to turn around after the pop.

MR. LIEBMAN: Well, what --

QUESTION: There's a gunshot, and he turns around, and the fellow who did the gunshot at close range had already gone to the car, gotten in the car, and is driving by?

MR. LIEBMAN: You might have -- Your Honor, he doesn't say -- he says he heard the gunshot, and then he's trying to --

QUESTION: -- he sort of stood there and --

MR. LIEBMAN: The police officer asked him exactly that question, Your Honor, in the -- it's at Joint Appendix 189 through '90. The police officer said, well, when you heard the shot and looked, was the black man standing near her? He wanted to know, tell me what you saw, and the answer was no, he was already in the car coming towards me, and he'd already said earlier that that was the case. There's a lot -- you have to understand, he was actually --

QUESTION: It doesn't make any sense, is all I'm saying.

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MR. LIEBMAN: Well, let me explain. He was standing at a construction site. Essentially they were trying to get cars going past the construction site. There's a lot happening. He hears a gunshot. You know, in traffic and things he may not immediately know exactly what it is, and what he said in the earlier trial was that he didn't turn around until his friend told him, hey, look, something's going on over there, and that's when he turned around, and that's when he saw the person in the car.

But in any event, he was very clear -- the police explored exactly this point with him, and he said, no, no, no, I just didn't see him outside the car, only in the car.

Territo's testimony, the second, is the same, is similar in that he testified at trial that his only good look at the assailant was when the killer pulled the victim's car around Territo's truck, stopped next to Territo's car, they exchanged looks, and then the car went on and made a right turn.

But Territo's contemporaneous statement was that the light turned green and the killer pulled continuously around him and made the right turn, and that while that was happening, Territo was focusing on getting the license plate number, which he did.

So this made the critical witness Henry Williams, who was, as the district attorney described him as his best witness. He told the jury, this is my best witness, and indeed, by all accounts Williams did get the best look at the robbery and shooting, and a few hours later he described the man he saw commit it, and this is the description he gave at page 197 of the Joint Appendix: a black male, about 19 or 20 years old, about 5 foot 4 or 5 foot 5 inches, 140 to 150 pounds, medium build, dark complexion, and plaited hair, short.

Williams thus gave an identical description of Beanie Wallace. On that very same day that Williams gave this statement, the police got information and reflected it in a police report that said that Beanie Wallace had committed another murder, and in it they gave Beanie Wallace's height and weight, and it was 5 foot 5 inches, 140 pounds, same day.

The description was not of -- and also 21 years old, which is much closer than Kyles, who was a 25-year-old man at the time, 6-foot tall, 125 pounds.

So -- and the materiality of Williams' description of a short, stocky killer, like Beanie Wallace, and not a tall man like Curtis Kyles, a tall, thin man, is compounded by the length the State went to conceal it.

Because at a pretrial suppression hearing to identify, the defense counsel asked the chief detective, he said, I know you're not going to turn over the statements to me, but I want to know, tell me "in any single point, were there discrepancies in the physical descriptions given of the assailant," and chief detective Dillman said that the only discrepancy besides a few years in age was 3 inches in height, ranging, he said, from 5 foot 8 inches to just under 6 feet, and beyond that he said explicitly, because defense counsel kept pushing, he said there were no other discrepancies.

Confidence in the outcome is undermined, whatever might have been the case here had the State offered the identifications and then turned over the witnesses for fair cross-examination, on the basis of the eye-witness statements. They instead decided to conceal those statements, which included clear evidence that somebody else had committed it, and to present demonstrably false testimony by Smallwood, and that simply cannot instill confidence in the outcome but only misgivings.

Let me move --

QUESTION: It's not necessarily false evidence by Smallwood. You don't -- one of the two was in error. It's either the later or the earlier.

MR. LIEBMAN: Your Honor, the reason I am prepared to draw that conclusion, although that's possible, is that State has acknowledged in its brief that it was false, and it seems to me that if the State can draw that inference, I can draw it, but the most important thing, obviously, is that a juror could draw the inference that the contemporaneous statement is the better description than one several months later.

I'd like to move now to the evidence that Beanie Wallace pointed the police to that seemed to implicate Kyles. In theory, defense witnesses explained all that witnesses by saying that it was Beanie who had the car at a time when Beanie said Kyles had it, that Beanie had furtively changed the license plates on it, and that Beanie was in a position to plant the purse and the gun when he visited the Kyles' home and was seen alone in the kitchen.

The problem, of course, was that the State impeached all of the defense witnesses by showing that all of them were friends of the defendant and two of them had criminal records, and then the State's witnesses resolutely refused to corroborate the defense claims about Beanie, and in cross-examination the prosecutors ridiculed those claims and valorized Beanie Wallace.

According to Detective Dillman in testimony, or

the prosecutors in argument, there was no evidence that Beanie had a criminal record. That's a quote from the prosecutor. Beanie had not informed for money in the past, they said, and he was a good citizen informant with the courage to call the police and leave his name.

There was no evidence, the police said, that Beanie changed the license plate on the LTD. It was not Beanie who told the police to search the garbage for themselves but, rather, the police who thought it up themselves and, they said, the police did not direct Beanie to go to the Kyles' home on Sunday, nor, so far as they knew, did he go to the home on Sunday, nor was it logical, argued the prosecutor in closing, for Beanie to go to a house that he thought was about to be raided by the police.

Every one of those statements by the prosecutor or the chief detective was false in ways in which the testimony of seemingly impeached defense witnesses turned out to be true, and so the jury was dispossessed not only of evidence that impeached the investigation in the case, the police investigation in the case, but also affirmatively showed that Curtis Kyles did not commit the killing but that Wallace did.

And if I can give just a couple of examples of this, the tape reveals that -- and the detectives

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testified in postconviction, that the police did not think up the garbage search, but that Beanie Wallace told them to go search the garbage.

That the police were taking their cues from the likes of Wallace might itself have created doubts about the investigation, given Wallace's character, his prior record, the fact that he informed for money and all of that, he was a known murderer, admitted murderer.

But the evidence is much more important because it incriminates Beanie at the same time as it impeaches the investigation for, inexplicably, Beanie somehow knew that only the purse and the bags and some personal effects -- he said exactly that. That's what's going to be in the garbage bag, but the gun won't be there. The eight bags of discarded groceries, they won't be -- he knew exactly what was going to be in there, and he knew it 24 hours before the garbage bag even went out.

Beanie's handler, Detective Miller, said, he admitted in postconviction that he thought at the time that Beanie may have planted the incriminating evidence in the garbage. That the detective could have thought that I think suggests that a juror could have thought that and formed a reasonable doubt on that basis.

In addition, Prosecutor Strider recorded his interview with Beanie in between the two trials. In that,

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Beanie admitted that he did go to the Kyles' home on Sunday, he admittedly was in the Kyles home -- this is all on page 262 of the Joint Appendix. He admitted he was in the Kyles home and in the kitchen by himself, and he admittedly went there not only with the knowledge but at the behest of the police.

They asked him, they called him up, as page 262 reveals, and said, what about the gun, and he said, I'll find out, and he went over to the Kyles home, he left, he called Detective Miller, he went back to the Kyles home, he was there for 2 hours, in the kitchen alone, he leaves, and he meets Detective Miller by prearrangement on a corner, and they talk about the gun. Detective Miller testifies in postconviction, we learned where the gun was from Beanie.

So what you have here is evidence that Beanie knew that he could get in the house, put the gun wherever he wanted, because the police were waiting for him to come out with information about the gun before he was -- they were going to move in.

Finally, we have three statements by Beanie which are totally inconsistent with each other in every particular, and what they reveal is a pattern that as each new fact came out that the police knew something, Beanie changed his story either to pin something more on Kyles or

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to blame a witness against Beanie with having been implicated, though that person had never been implicated before.

QUESTION: Mr. Liebman --

MR. LIEBMAN: Yes.

QUESTION: -- before you finish that, I ask you just to clarify two legal points. I take it from your argument you are pressing only the Brady point and not the Strickland point. Everything in your argument seems to indicate that, is that correct?

MR. LIEBMAN: That is correct, Your Honor, because the Brady claim encompasses everything that was lost to the jury by the ineffectiveness claim, but then so much more, the narrow ground for the court, is the Brady claim, because the prejudice analysis is the same.

QUESTION: My other question is there's a peculiar reference in the Fifth Circuit opinion, two references to Brecht, and you started out by saying Bagley is the standard. Is it your position that Bagley is the standard and Brecht shouldn't enter into this case at all?

MR. LIEBMAN: Brecht would enter into the case only if there were an error, in which case it might be analyzed as a -- on the harmless error, but the Fifth Circuit's second reference to Brecht says that since we didn't find an error, we don't have to get to the Brecht

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standard.

My position would be that the Bagley standard is sufficiently strong that once you've met the Bagley standard you could also meet the Brecht standard, but that's not really an issue before the Court. Traditionally, the Court lets the lower courts apply harmless error analysis in the first instance, once there's been an error.

The issue before the Court is whether there was an error, not whether, if there was, something might follow from that.

If I may --

QUESTION: Mr. Liebman, could you comment on the dog food evidence?

MR. LIEBMAN: Yes, I'd be glad to do that, Justice Stevens.

There are really three things that the State might have wanted to prove with the dog food. The first was, was it strange that Kyles would have pet food, and the answer to that is on the theory of both parties at trial Kyles' family had an interest in dog food.

The Kyles family said they had cats and dogs, and had four witnesses to say it, but the State's theory was that they took eight bags of groceries and threw out everything but the dog and cat food, and of course their

photograph showed the Hartz flea shampoo, so of course there's really no question both sides were claiming that there was a need for dog food in this family. There was an interest in having dog food in this family.

So then the second question becomes, is there something about the brands of dog food that is inculpatory, but there were three brands, actually four brands in interest. There were two matching brands, and the two matching brands that she bought and that they had were the standard brands, Kal Kan, 9-Lives. She, however, bought a third brand, and expensive brand for a finicky cat, but the third brand that the Kyles family had was a cheap brand that she -- there was no evidence that she would ever buy.

So there were a lot of families in New Orleans on that day who would have Kal Kan and 9-Lives dog and cat food in their house, so maybe it's some evidence, but it certainly doesn't overcome the rest of the defects caused by the suppression.

Finally is Kyles' testimony.

QUESTION: But what was withheld that would have destroyed that was simply the photograph of --

MR. LIEBMAN: No, Your Honor, the photograph was presented at trial.

Our point about this evidence is, it's the only

untainted evidence --

QUESTION: Oh, I see.

MR. LIEBMAN: -- and you can't build a case on that.

QUESTION: I see. I see. I see.

MR. LIEBMAN: Finally is Curtis Kyles' testimony about the food, and all I can say on that, Your Honor, is that if you look at the Schwegmann's advertising manager, he confirmed every specific of what Curtis Kyles said.

Kyles said, I went there, there was a little white shelf tag, the prices were two-for-something, three-for-something, I thought it was on sale, and I bought it, and what the manager said was, small white shelf tag, two-for-something, three-for-something, it wasn't on sale, but we used the multiple price because it made customers think it was cheaper than it otherwise would.

So the only discrepancy is that the manager said we used a sales gimmick, Kyles in a sense said I fell for the sales gimmick, but otherwise it's absolutely -- and Kyles is a man of dull normal intelligence in this record, so it makes clear that the testimony was quite the same.

I'm going to reserve the remainder.

QUESTION: Very well, Mr. Liebman.

Mr. Peebles, we'll hear from you.

ORAL ARGUMENT OF JACK PEEBLES

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ON BEHALF OF THE RESPONDENT

MR. PEEBLES: Mr. Chief Justice and may it please the Court:

The issues upon which you granted certiorari include the question of ineffectiveness of representation as well as misconduct and nondisclosed evidence, but the petitioner's brief did not go into the question of Strickland, so I will -- I'll not argue that point unless the Court has some questions on it.

The principal issue in this case is whether nondisclosed information by the police in this case would have created a reasonable probability of a different verdict had it been disclosed. The State suggests as strongly as we can that it would not. The police in this case were in good faith, the prosecutors were in good faith, they presented an extremely strong case of evidence, and the defendant was duly convicted.

Both the U.S. district court below and the Fifth Circuit held that the evidence in this case was overwhelming, and they both analyzed the very items that counsel has been talking about here, and I would like to go into those myself and give you the State's perspective as to this same evidence, again on the thesis that Bagley is essentially the criterion we're using, and the law that we're working under.

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QUESTION: Mr. Peebles, before you get into that, is it common ground that there was a duty to disclose the suppressed statements and the information that Mr. Liebman talked about?

MR. PEEBLES: No, Your Honor. In Louisiana we do not agree that the statements, which were not disclosed, were exculpatory. In Louisiana, the --

QUESTION: No, but -- excuse me just a minute. If one assumes, just -- I know you disagree with it, but one assumes that they contained impeaching material that might have helped the other side's case, would you agree there would have been a duty to disclose?

MR. PEEBLES: No, Your Honor.

QUESTION: You would not.

MR. PEEBLES: As we interpret Bagley, the mere fact that evidence might be favorable, or potentially favorable to the other side, does not create a duty to disclose.

The constitutional duty to disclose only arises when the failure to turn over that evidence would create an unfair trial, or would undermine confidence in the outcome of the decision, and one of the footnotes in Bagley, Justice Blackmun, I believe, pointed out that if you required a prosecutor to turn over anything that's potentially favorable, then you create an impossible

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situation for prosecutors in trying to make that decision.

And in fact I believe that in Bagley they expressly rejected the view taken by two of the -- by the dissent in that case which would have created an obligation on the part of the State to turn over anything that was potentially exculpatory.

QUESTION: Well, do you agree that anything that would amount to substantial impeaching evidence in relation to evidence the State had put in would be subject to disclosure?

MR. PEEBLES: I think it should be -- if it was substantially impeaching, I think it should be turned over, Your Honor, as a matter of ethical obligation, and I believe that in this case, had the prosecutors believed that these statements contained substantial impeachment material, they would have turned them over, but whether or not they acted correctly ethically in making their decision not to turn these statements over, we submit that the issue before the Court is whether the Constitution was violated by this action.

QUESTION: When you say, you think they were under an ethical obligation of under some -- you do not say that is the same thing as what the Constitution requires?

MR. PEEBLES: That's correct, Your Honor. That

is the State's position.

QUESTION: So that it is not your view that substantial impeaching testimony would be subject to the Brady obligation?

MR. PEEBLES: It would not be unless the failure to disclose that information would create a reasonable probability that you might have a different outcome in either the penalty hearing or the guilt --

QUESTION: Well, you -- I take it from the way you answer that you believe this judgment should be made on an item-by-item basis. Therefore, for example, if the testimony impeaching Smallwood would not by itself have risen to the standard of undermining the verdict, there would be no obligation to turn that over. Am I correct that you do it on an item-by-item basis?

MR. PEEBLES: Your Honor, when the prosecutor is making these decisions, it unfortunately is usually on an item-by-item basis, but when a reviewing court --

QUESTION: Your view is that that is the standard that we should apply?

MR. PEEBLES: No. No, Your Honor.

QUESTION: Okay.

MR. PEEBLES: The standard for the reviewing court, we submit, is to consider all of the trial and all of the evidence which was presented at trial, and the

nondisclosed evidence, and consider the evidence cumulatively, and that's what the Fifth Circuit did, and they said that.

QUESTION: That standard does not give much guidance to the prosecutor as to what its constitutional obligation is --

MR. PEEBLES: It certainly does not.

QUESTION: -- under Brady, it seems to me.

MR. PEEBLES: It certainly does not, Your Honor. It makes it difficult for a prosecutor to know, in the perspective that he is faced with when he goes to trial, as to exactly what might become important later on, and that's why we submit that a prosecutor must be given a certain amount of leeway in making a judgment call of this type.

To come back much, much later and say, well, in view of the evidence that was presented, you made the wrong decision, I submit that it's not proper to really call his judgment unethical unless there's a clear showing that he used very bad judgment and that he did withhold evidence that should have been disclosed.

QUESTION: Well, I'm -- I want to get back to this point about ethics. We're not concerned directly here with ethics, we're concerned with the Brady obligation, and do I understand you to agree that the

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appropriate test for the violation of Brady is a test which considers the cumulative effect of all the evidence claimed to have been withheld in relation to the cumulative effect of all the evidence that in fact did go in?

MR. PEEBLES: Yes, Your Honor.

QUESTION: Okay.

MR. PEEBLES: That's my position.

QUESTION: May I ask one other preliminary question? Am I correct in understanding that some of the -- call it suppressed material, undisclosed materials, whatever term you want to use, was known to the police but not actually disclosed to the prosecutor?

MR. PEEBLES: Yes, that's correct, Your Honor.

QUESTION: Now, is -- was there a duty on the part of the police to disclose to the prosecutor -- how do we measure what the prosecutor would have done if he'd --

MR. PEEBLES: Yes.

QUESTION: -- known about it, or are the police allowed to withhold sort of in a separate -- is there a separate standard for that?

MR. PEEBLES: Your Honor, I don't think the police are entitled to a separate standard. That's the old problem we have in police enforcement.

Here we have a case that was tried less than 3

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months after the murder occurred. The prosecutor dealt primarily with the chief homicide detective and his assistant, and the police were doing all kinds of investigations, and they didn't actually deliver the homicide report to the prosecutors until 2 days after the trial.

Now --

QUESTION: And didn't one of the prosecutors testify that had some of this material been presented to him, he would have turned it over?

MR. PEEBLES: He would have turned it over.

QUESTION: Yes.

MR. PEEBLES: Yes, Your Honor.

I don't think there's any question but that the defense would have used some of this material, and I don't think there's any question but that had the prosecutor known about some of this material, they would have turned it over simply to avoid the kind of problem that they actually ran into in this case, but that had to do, we submit, with the ethics of the prosecutor at that time, which we're prepared to defend in this case.

QUESTION: Well, take a specific example. What about the Smallwood statement that was inconsistent --

MR. PEEBLES: Yes.

QUESTION: -- with an important part of the

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trial.

MR. PEEBLES: Yes, Your Honor.

QUESTION: Was there a duty to disclose that?

MR. PEEBLES: The -- it should have been disclosed, in my opinion --

QUESTION: Was there a constitutional duty to disclose that?

MR. PEEBLES: There was a -- no.

QUESTION: No.

MR. PEEBLES: Not under the context of this case.

QUESTION: Mr. Peebles, I --

MR. PEEBLES: If I may elaborate -- I'm sorry.

QUESTION: I don't understand the test you're giving us. I can understand using a cumulative test after there has been an established violation of Brady. You look at each -- not just each single piece of evidence that should have been turned over one by one, but you look at all of them and see whether that would have made a difference.

But you're not just urging that, you're saying that there isn't even a violation until you consider all of the evidence cumulatively.

MR. PEEBLES: As we appreciate the Bagley test, Your Honor, that is the rule. Five justices of the Court,

as we appreciate --

QUESTION: So you can never say that any single piece of evidence has to be turned over.

MR. PEEBLES: Yes. I'm sure there are single pieces of evidence which, by themselves, could be of sufficient importance --

QUESTION: Let me put it the other way. You can never say that any single piece of evidence didn't have to be turned over.

MR. PEEBLES: A prosecutor might have a duty to disclose it, but I don't think it would create a constitutional violation.

QUESTION: He would not know before the fact. You can never say, before the fact, I clearly have no obligation to turn this over, because it all depends -- whether you do or do not depends upon whether, at the end of the trial, that piece of evidence plus all the other ones that might help a little bit here, a little bit there, whether they all together would have made a difference. If so, then retroactively, you had an obligation to turn it over.

MR. PEEBLES: I think that's what Bagley says.

QUESTION: That's crazy, isn't it?

MR. PEEBLES: Well, I think that's what Bagley says, Your Honor.

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QUESTION: I don't.

MR. PEEBLES: I submit --

QUESTION: Wasn't Bagley concerned, in that respect, simply with the issue of substantially undermining the verdict, and wasn't that the sense in which Bagley was getting into cumulativeness?

MR. PEEBLES: Yes. Bagley didn't really speak to the issue of the cumulative effect of the evidence. We would suggest that the cumulative effect of the evidence is that which is properly considered would come from the fact that whether due process is violated depends upon whether the defendant received a fair trial, and the only way you can determine whether he received a fair trial on review is to look at all of the evidence.

QUESTION: So on a Brady proceeding, where the prosecution denies it has to turn something over, the trial court does make an evidence-by-evidence ruling, as to whether or not each bit of evidence is inculpatory or exculpatory?

MR. PEEBLES: Yes. It usually doesn't come up in the trial context, Your Honor, because if it's not disclosed, it's usually not revealed until later, but the reviewing court judge, if it gets pointed out to them before the appeal --

QUESTION: But the standards the prosecutors

have to use is on an evidence-by-evidence --

MR. PEEBLES: Yes, case --

QUESTION: -- standard?

MR. PEEBLES: -- evidence -- that's the only one we can use, Your Honor, because we don't know what the evidence is going to be --

QUESTION: Precisely.

MR. PEEBLES: -- until after the case is over, and it's so much easier to look at a case after it's over, especially long after it's over, than it is at the time.

In this case, for instance, there is just no question, I submit from a reading of all of the transcripts, that these prosecutors did a conscientious job, and they never considered Beanie to be a suspect in this case, and they never considered these statements to present a substantial conflict insofar as the evidence that they presented was concerned.

If I may go into that briefly, unless the Court had other preliminary --

QUESTION: May I just ask one more preliminary question, and I thought it was clear, but maybe it isn't. What the police knew and what the prosecutors knew were different things in relation to some of these items as evidence, as you have mentioned.

MR. PEEBLES: Yes, Your Honor.

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QUESTION: Isn't the State held to a disclosure standard based on what all State officers at the time knew?

MR. PEEBLES: The State is, Your Honor.

QUESTION: Yes. That's what I --

MR. PEEBLES: No question about that. We're not trying to differentiate between them.

QUESTION: So there might well be a Brady violation, even though there was no -- as you were saying earlier, there was no unethical conduct on the part of a given prosecutor.

MR. PEEBLES: If by a Brady violation you mean the obligation to turn over anything that is of potential value to the defendant, we -- our argument is that if you want to define the Brady violation that way, that's fine.

But from the standpoint of determining whether the denial or refusal to turn over this information is a violation of the defendant's constitutional rights, the criterion set up for doing that in Bagley is to look at all of the evidence, determine whether or not the nondisclosure of this evidence created a reasonable probability that, had the evidence been disclosed, you would have had a different result. That's the test, we submit.

QUESTION: No, but my only point was whatever

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the test is, there could be a Brady violation and still not be any unethical conduct on the part of a prosecutor if he did not know --

MR. PEEBLES: If it was inadvertent --

QUESTION: That's right.

MR. PEEBLES: -- that's correct, and I think that's probably what happened in this case. The prosecutors were never aware of the existence of the tape that was made of Beanie in this case by the police. The prosecutors were never aware of the printout of the license plates that occurred in this case. They so testified at the trial.

And in fact this printout was never in the DA's file. It was located 4 years after the trial was over in a police department file, and I'm sure the reason it remained in the police department file was, when they saw that it was a printout which did not include the defendant's car, and they did not feel that it would assist in the prosecution, they just left it there.

QUESTION: How was it discovered 4 years afterwards?

MR. PEEBLES: On postconviction relief, the entire DA's file and the police files were made available to counsel for the petitioner.

QUESTION: Was that, what, by court order of the

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State court?

MR. PEEBLES: I don't recall whether there was a court order, but we did it voluntarily, I do know that. There was no -- there was no attempt to withhold any of this information pertaining to the printout or any other aspect of this case.

QUESTION: Well, isn't it rather clear that if the printout had been available to the prosecutor, that the prosecutor could not have made the argument about the picture, which was right near to the scene, that he did make?

MR. PEEBLES: No, Your Honor, I submit that it's not clear. The -- Detective Miller at the postconviction hearings testified that the printout represented license plates from vehicles in the immediate area.

QUESTION: Right, and the picture was also the immediate vicinity, wasn't it?

MR. PEEBLES: I submit that the picture represented a car that was not in the immediate area, Your Honor. You can look at the picture and perhaps make your own mind up about that.

QUESTION: Your opponent just misrepresented the record to us, then.

MR. PEEBLES: It's a -- it's a question of interpretation of the evidence, the interpretation of the

pictures and that, but that picture of that car was not a major part of the State's case.

This case -- the problem with this case from our perspective is --

QUESTION: It was part of the State's affirmative case, though, wasn't it?

MR. PEEBLES: It was. It was, but from our perspective, we have a tremendously overwhelming case of eye-witness testimony here, plus additional hard, factual, tangible evidence, and the other side is attempting to get the Court to look at what were really very minor parts --

QUESTION: How many of the eye witnesses --

MR. PEEBLES: -- of this trial.

QUESTION: -- were able to identify the height of the perpetrator?

MR. PEEBLES: They all gave opinions, Your Honor, regarding the height of the perpetrator, as I recall.

Robert Territo said that he was close to 6 feet, Henry Williams said he was 5-4 to 5-5, Willie Jones, who tentatively identified the perpetrator, said he was about 5-9, and Lionel Plick, who was another witness who did not testify, said he was about 5-10. There is no hard evidence in the record comparing the heights of these two people, Beanie and the defendant.

Now, in the statement that was taped, they asked Beanie to describe Kyles and he said, he's about my height, and the officer then said well, it appears to be about 6 feet tall, but if you look at the photographs, and I think it's pretty clear and the Fifth Circuit commented on this, Beanie appears to be taller than Kyles. I'm sorry, Kyles appears to be taller than Beanie, their complexions are different, and their facial structure is quite different.

But all of that simply goes to the question of how well each of these people could see this perpetrator, and the fact is that in this case the perpetrator had seven people look at him, or at least six people look at him, when he caused the victim to scream. Two of these people were in automobiles right close by on a road right next to the parking lot, three people were working on the parking lot, and two people were standing at a bus stop some distance away.

Now, the two people standing at the bus stop were about 200 feet away, and they could see the actions of the person, give a general description of him, but they could not identify -- could not identify Curtis Kyles as the perpetrator.

Now, the others, however, two people in the cars, were -- had occasion to be very close to the

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perpetrator, and the three people working --

QUESTION: You're talking about just based on their statements, not on the trial testimony?

MR. PEEBLES: The trial testimony, Your Honor.

QUESTION: The trial -- seven eye witnesses testified --

MR. PEEBLES: No, no. No, no. I'm basing the -- of the four people who testified at trial, both their statements --

QUESTION: But there were --

MR. PEEBLES: -- three of those gave statements.

QUESTION: When you refer to seven, it was seven --

MR. PEEBLES: Their statements.

QUESTION: -- statements given to the police.

MR. PEEBLES: Six statements were given to the police.

QUESTION: Six, and how many of those six were turned over, (a) to the prosecutor, and (b) to the defense?

MR. PEEBLES: We're not certain that the prosecutor saw those statements, but for purposes of this case, I think we have to assume that they either saw the statements or that they should have seen them.

QUESTION: What you're saying in part is that it

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is possible the prosecutors were not aware of the statements and any possible discrepancies between the statements and the --

MR. PEEBLES: Yes. Yes. They testified 4 years --

QUESTION: So they wouldn't have had a duty to correct the errors in the witness' statements.

MR. PEEBLES: Yes. They testified 4 years after the event, and they said we probably saw the statements. We're not certain. At one point they said, I'm sure I did see the statements, but he didn't presently remember seeing them. But they did state clearly that their conviction was that there was nothing in the statements that was of substantial value to the defense, and therefore they felt no obligation ethically to turn the statements over.

The State presented four eye witnesses, three of whom testified that they saw the shooting, saw the defendant leave the area, and some of them were as close as 15 feet to the defendant as he slowly drove by them, and they testified positively that this defendant was the person.

And after the defendant's attorneys took the position that another person, Beanie, was the perpetrator, the State brought all of these witnesses back, had Beanie

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come into the courtroom, had the defendant stand next to him, and then each of these four defendants again positively identified Curtis Kyles as the perpetrator, and they said that Beanie was not the perpetrator.

Beanie does not look anything like Curtis Kyles. The State trial judge commented on this in his opinion on postconviction and emphasized the fact that they don't resemble each other. The Fifth Circuit, in its opinion, said that if you look at the photographs, you can tell they don't resemble each other.

Your Honor, we -- Your Honors, we submit that there is no close question here but that you have two separate individuals, and that they did not appear alike, and that the State, as a result, had a very strong case.

Now, the defense, the petitioner here had complained about the statement particularly of Isaac Smallwood. Mr. Smallwood was one of three workers who was on the Schwegmann's lot at the time. When he originally was questioned by the police at the scene, he said, I heard a pop, I looked up and I saw this car coming toward me, and the fellow came very close to me and I think I can recognize him.

Now, when they tried the case the first time, he said that same thing. I saw the -- I heard a pop, I saw the car coming, and I could recognize the man as he came

by me.

At the second trial, he said he saw the entire thing. Now, neither the State nor the defense picked upon -- picked up on the fact that there was this discrepancy, and the reason, I submit, that they didn't pick up on this fact was that the discrepancy was essentially unimportant. The discrepancy involved simply whether -- at what point he first started viewing the perpetrator.

As the Fifth Circuit pointed out there was no part of Mr. Smallwood's statement in which he made a statement which would challenge his ability to recognize and identify the defendant, or the petitioner in this case. The identification was not in question there.

QUESTION: Well, but according to your opponent, he -- if he -- it makes a big difference if you -- if you rely on the size of the perpetrator, whether he saw him outside the car or not.

MR. PEEBLES: Well, we submit --

QUESTION: There is that discrepancy, isn't there?

MR. PEEBLES: We submit that there -- it doesn't make that much difference. Most --

QUESTION: No, but is it not correct that there is a discrepancy between the suppressed statement and the

testimony as to whether he saw him outside the car?

MR. PEEBLES: Yes.

QUESTION: There is.

MR. PEEBLES: Yes.

QUESTION: And your point is that that's not --

MR. PEEBLES: That didn't make any difference, and then he came within 15 feet of him and drove slowly by.

QUESTION: Of course, driving by in a car, you couldn't tell how tall he was.

MR. PEEBLES: No. That's correct. As to Smallwood, it would be difficult for him to tell how tall he was. According to my notes --

QUESTION: If we'd have had time to ask the petitioner's counsel, both of the -- Beanie and the defendant were in court, and all four witnesses looked at both of them in court and said that it's definitely not Beanie.

MR. PEEBLES: That's correct, Your Honor.

QUESTION: What has the defense, or the petitioner's response been to that in previous proceedings, that --

MR. PEEBLES: The response is that there was a misidentification --

QUESTION: -- to say that this was suggestive --

MR. PEEBLES: They are saying that because there had been one prior trial, which it ended in a mistrial, and there had been prior pretrial hearings in which Kyles had appeared in court and was seen by these witnesses, that this -- this influenced them in deciding at this trial, the previous occasions on which they had seen Beanie had influenced them on this occasion. That was the -- that was the argument that they have persistently maintained. However, that --

QUESTION: Was Beanie seen in the first trial?

MR. PEEBLES: No, Your Honor.

QUESTION: Or was not identified?

MR. PEEBLES: He was not identified at the first trial. He was present outside the courtroom, but he was not brought into the courtroom.

QUESTION: Mr. Peebles, I don't know why you concede that once inside a car a fire plug and a bean pole look alike. I mean, is all the discrepancy --

MR. PEEBLES: I don't concede that.

QUESTION: -- in the height of these two people in the legs? I mean --

MR. PEEBLES: I don't concede that, Your Honor.

QUESTION: -- the torsos are the same height, and one of them has very short legs and the other inordinately long?

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MR. PEEBLES: I'm sorry, Your Honor, I didn't intend to concede that point.

QUESTION: Ah, you did. You did, though. You said once they're in the car you can't tell the difference in height. I think a very short person in a car doesn't come up as high on the window as a very tall person.

MR. PEEBLES: I would rephrase it, Your Honor, to say that it would be more difficult to determine the height of a person in the car.

If I may suggest to Justice Kennedy, the fact is that within 4 days after this trial, though, aside from the court appearances, the police presented eye -- I'm sorry, photographic line-ups to these people, and according to the testimony at the pretrial hearings, the witnesses immediately and without hesitation picked out of this photographic line-up Kyles.

QUESTION: And Beanie was in the line-ups?

MR. PEEBLES: He was not, but they all picked out Kyles.

QUESTION: Were the witnesses ever shown mug shots of Beanie?

MR. PEEBLES: I think one of them was, Your Honor, my recollection is, I can't tell you which one, and that that one said -- on postconviction, that one said that it was not -- it was not Beanie. That was Jones, if

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I recall correctly, Willie Jones. The defense showed Willie Jones a photograph of Beanie, I believe with the hairpiece from Kyles, and Jones said no, it was not.

So we submit that the evidence was very strong by the State there with these eye-witness identifications, but we would point out that in addition to these identifications --

QUESTION: There's no indication why the police didn't show -- didn't put Beanie in the line-up, is there?

MR. PEEBLES: He was not a suspect, Your Honor. He was never a suspect. We had both the chief homicide detective --

QUESTION: Well, has everybody in the line-up got to be a suspect?

MR. PEEBLES: No. No, but they had --

QUESTION: So, then, why was that an answer to Justice Ginsburg's question?

MR. PEEBLES: Well, he was not under arrest or anything. He was just a citizen. We had no reason to put him in the line-up.

QUESTION: I presume neither do --

QUESTION: Well, he was an informant.

QUESTION: Excuse me.

QUESTION: He was the informant, though, wasn't he?

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MR. PEEBLES: Yes, he was the informant, but the police at no time suspected Beanie of being a suspect in this case. That was their conscientious conclusion. In addition to the evidence of the eye witnesses --

QUESTION: Well, it's pretty clear that he was complicit in this taking of the stolen automobile, or in the use of a stolen automobile, that he knew that it was stolen.

MR. PEEBLES: I think -- I would suggest that probably that is a conclusion that could be drawn by a rational person.

That's why I think the State steered clear of presenting Beanie as a conscientious person that we could rely upon. We didn't call him as a witness. We didn't make his character a witness, as a subject of the case, and we did not present a theory of the case which required the jury to believe Beanie.

The only time Beanie's name was mentioned was when the defense attorney cross-examined the police officials with regard to how they obtained some of the evidence, and that evidence included the sales slip found in the --

QUESTION: About the sales slip, I was curious, is it the State's position that the sales slip was the slip of the victim's purchases?

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MR. PEEBLES: Your Honor, we can't know that for sure. All we can --

QUESTION: What was their theory in presenting it? It was a very small --

MR. PEEBLES: The theory was that it probably was the --

QUESTION: Even though it was much -- then smaller than her normal amount of purchases.

MR. PEEBLES: Yes.

QUESTION: Yes, that she did not make her typical purchases that week.

MR. PEEBLES: Yes. That was only conclusion that could be drawn from --

QUESTION: But she did make her typical purchases of dog food.

MR. PEEBLES: I'm sorry?

QUESTION: But she did make her typical purchases of dog food but of nothing --

MR. PEEBLES: Yes.

QUESTION: -- else in her weekly shopping.

MR. PEEBLES: Yes. That was the State's thesis, and in addition to that fact, the murder weapon was filed in Kyles' residence. Now, it is true that the defense claims that Beanie planted that weapon, but a close examination of the record shows that would be extremely

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difficult to do.

When the police came to Kyles' house, they found not only the weapon, but they found a holster for the weapon in a separate room, they found bullets that fit the weapon in a separate dresser drawer, they found a number of these things, which indicated that Kyles possessed this weapon, and that it would have not been easy for all this to be planted.

But in -- not just the weapon, the petitioner is claiming that Beanie planted the lady's purse in Kyles' garbage.

In order to do this, Kyles, according to the theory of the petitioner, Beanie would have had to tell the police on Saturday you better check his garbage, and then, before the police checked the garbage on Sunday, Kyles -- I'm sorry, Beanie would then have had to go to Kyles' house the next day and plant the evidence. That's an unlikely scenario for anyone who's planting evidence.

QUESTION: Well, as to the garbage, he might have planted that first.

MR. PEEBLES: He might have. He might have, but anyone could have planted it, but it's speculative. It's so speculative that --

QUESTION: But of course, the prosecutor argued that he wasn't even there on Sunday when they knew he was,

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if I remember --

MR. PEEBLES: Well, I don't think the prosecutor knew that as a fact.

QUESTION: The police knew he was. This is another thing the police didn't tell the prosecutor.

MR. PEEBLES: The police said that they -- the police contact with this man was Detective Miller, and Detective Miller didn't even inform his -- the principal homicide detective in this case of most of the things that he did with his informant. That seems to be the way that police operate with informants, and that's not to say the State shouldn't be held responsible for everything the informant tells the police, but that's simply the situation here.

Now, with regard to the pet food, that is, again, a fairly minor part of the State's case. The fact is, though, that when the police came to the Kyles' apartment, they found stacks of Kal Kan dog food and 9-Lives cat food, and that just happened to be the same kind of cat food and dog food that the victim traditionally purchased, so testified her husband.

However, I don't want to take this out of perspective. Our case did not rely upon the pet food or the victim's purse being found in the garbage, or these pieces of tangible evidence. The heart of the State's

case was eye-witness identification, which was strong and was never broken, in spite of vigorous cross-examination.

The argument of the petitioner here that the witnesses only saw the defendant or the petitioner from the side, and that sort of thing, we submit is taking a very narrow view of what these witnesses saw.

The fact is that they saw this petitioner from the moment of the shooting until after he got in his car, drew off the lot and onto the highway and then even waited for a red light before he finally escaped beyond. They all said they got a very good view of him. They all positively identified him.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Peebles. The case is submitted.

MR. PEEBLES: Thank you very much.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

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CURTIS LEE KYLES, Petitioners v. JOHN P. WHITLEY, WARDENS

CASE NO.:93-7927

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)