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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 10-8145, Smith v. Cain.

5 Mr. Shanmugam.

6 ORAL ARGUMENT OF KANNON K. SHANMUGAM

7 ON BEHALF OF THE PETITIONER

8 MR. SHANMUGAM: Thank you, Mr. Chief  
9 Justice, and may it please the Court:

10 In Brady v. Maryland, this Court established  
11 the now-familiar principle that the prosecution must  
12 hand over all favorable material evidence to the defense  
13 before trial. This case presents a flagrant violation  
14 of that principle.

15 The Orleans Parish district attorney's  
16 office produced almost no relevant evidence to the  
17 defense before Petitioner's trial, and Petitioner was  
18 convicted of first-degree murder based solely on the  
19 testimony of a single eyewitness. Unbeknownst to the  
20 defense, however, that eyewitness had told the police on  
21 multiple occasions that he could not identify any of the  
22 perpetrators or, as he put it, that he would not know  
23 them if he saw them.

24 The suppression of those statements alone  
25 justifies a new trial, but the district attorney's

1 office in this case also engaged in the wholesale  
2 suppression of statements of numerous other witnesses,  
3 statements that further undermined the sole eyewitness  
4 identification of Petitioner and, more broadly, cast  
5 doubt on Petitioner's involvement and role in the  
6 shootings.

7           If all of that information had been  
8 disclosed to the defense before trial, the jury surely  
9 would have viewed this case in a completely different  
10 light. The trial court therefore erred by rejecting  
11 Petitioner's Brady claim, and its judgment should be  
12 reversed.

13           In our view, in order to conclude that  
14 Petitioner is entitled to a new trial here, this Court  
15 need do nothing more than to consider the suppressed  
16 statements of the key eyewitness, Larry Boatner.  
17 Respondent concedes that those statements were withheld  
18 from the defense before trial, and argues only that the  
19 failure to disclose those statements was not  
20 prejudicial.

21           Those statements, however, could not have  
22 more clearly contradicted Boatner's confident  
23 identification of Petitioner at trial --

24           JUSTICE GINSBURG: Well, he saw a picture.  
25 Boatner saw a picture in a newspaper, and that turned on

1 the light for him, right? It wasn't any police  
2 suggestion.

3 MR. SHANMUGAM: That is correct. The basis  
4 for Boatner's identification was that he saw a  
5 photograph in the New Orleans newspaper of Petitioner.  
6 It was in connection with an article describing the  
7 shootings and suggesting that Petitioner was one of the  
8 suspects in the case. And that was what led to his  
9 prior identification out of court.

10 But just to be clear, Justice Ginsburg,  
11 we're not arguing today that the identification was  
12 somehow constitutionally problematic. At most, we're  
13 arguing that the identification was of questionable  
14 validity in light of the fact that Boatner had only a  
15 limited opportunity to see the perpetrators and in light  
16 of the circumstances that led to his identification.

17 Now, even if his identification were more  
18 clearly reliable, our argument today would be the same.  
19 In a case such as this one, in which the sole basis for  
20 linking the defendant to the crime is the testimony of a  
21 single eyewitness, and there is evidence that the single  
22 eyewitness said on multiple occasions that he couldn't  
23 identify anyone, we believe that, absent extraordinary  
24 circumstances, that will be sufficient to --

25 JUSTICE ALITO: Well, aren't you

1 exaggerating a little bit about the value of the  
2 impeachment evidence regarding Boatner? Now, my  
3 understanding is that he made his first statement to the  
4 effect that he couldn't identify anybody at the scene  
5 when he had been at the scene where five people that he  
6 knew very well had been killed.

7           He was lying on the floor with a big gash on  
8 his head. He was questioned at the scene, and at that  
9 time -- and this was in the evening -- he said: I can't  
10 identify anybody. But then, later that very day, wasn't  
11 it, that very evening, after midnight, he was questioned  
12 at the police station; am I correct?

13           MR. SHANMUGAM: Yes, that's correct.

14           JUSTICE ALITO: And at that point he gave a  
15 description. He did make an -- he did provide a  
16 description of the person that he said was the one who  
17 first came through the door. So, you know, that -- I  
18 don't know -- and then later, he said he -- there were  
19 statements to the effect that he couldn't identify  
20 anybody.

21           But in light of the fact that he did provide  
22 a pretty, you know, somewhat detailed description on the  
23 very evening of the event, doesn't that -- aren't you  
24 exaggerating when you say that he said numerous times --  
25 the effect of these statements that he couldn't

1 identify --

2 MR. SHANMUGAM: Justice Alito, it is true  
3 that Boatner provided identifying details in the later  
4 statement that night. I would respectfully submit that  
5 they were relatively limited identifying details, simply  
6 the fact that the first man through the door had a  
7 low-cut haircut and gold teeth. And as we indicate in  
8 our brief, those were characteristics shared by numerous  
9 other suspects in the case.

10 But I think more broadly, with regard to  
11 both sets of statements at issue here, the State's  
12 explanations for those statements are at best plausible.  
13 And we really think that in a case such as this one, in  
14 which the evidence on its face is so clearly of high  
15 exculpatory or impeaching values, it takes something  
16 more than that. It is not sufficient for Respondent to  
17 argue here simply that, even taking into account these  
18 statements, a rational juror could still reach the same  
19 result and return a verdict of guilty here, because this  
20 Court made clear in *Kyles v. Whitley* that the standard  
21 for Brady claims is not a *Jackson v. Virginia* type  
22 sufficiency of the evidence standard.

23 So, again, where you have statements that on  
24 their face are not simply statements calling a witness's  
25 credibility into question, but statements that really

1 directly contradict the confident in-court  
2 identification, it would take an exceedingly persuasive  
3 explanation for those statements to defeat a showing of  
4 materiality. Now, with regard --

5 JUSTICE KENNEDY: The standard is a  
6 reasonable probability that the result would have been  
7 different, reasonable probability?

8 MR. SHANMUGAM: Yes, that's correct. And  
9 this Court made clear in *Kyles v. Whitley* that that's  
10 not a more likely than not standard. That is  
11 essentially the same standard that this Court has  
12 articulated for prejudice for ineffective assistance of  
13 counsel claims under *Strickland v. Washington*, and by  
14 now it's a quite clearly established standard. And,  
15 again, it requires something less than a showing of more  
16 likely than not and perhaps something slightly more than  
17 the showing required for harmless error under *Chapman v.*  
18 *California*.

19 But I do want to touch upon the State's  
20 explanations for these statements and explain very  
21 briefly why we think that those explanations are frankly  
22 not even plausible. With regard to the first statement  
23 to which Justice Alito referred, the statement that was  
24 made at the scene approximately half an hour after  
25 initial -- officers initially responded to the scene,



1 the State's argument is that Boatner was somehow too  
2 traumatized to make an identification at the time.

3 But not only did Boatner not so testify at  
4 the postconviction hearing -- in fact he testified that  
5 he couldn't recall the statement at all -- but the very  
6 officer who took the statement himself testified at  
7 trial in this case that at the time of the statement  
8 Boatner was, quote, "coherent and articulated very well  
9 the events that transpired." And that is at pages 137  
10 to 138 of the joint appendix.

11 JUSTICE ALITO: That may be true, but if you  
12 were a juror and Boatner testified and he was  
13 cross-examined and they attempted to impeach him based  
14 on his failure to make an identification right at the  
15 scene, and he said, well, that was because five of my  
16 friends had just been killed and I was lying on the  
17 floor and I thought I was going to be shot too and I had  
18 a big gash on my head, and then a couple of hours later  
19 when I collected myself and they asked me the same  
20 question at the police station, I provided a description  
21 and didn't say I couldn't identify anybody -- do you  
22 think jurors would just dismiss that and say, well, he  
23 couldn't identify him at the scene so he must have been  
24 lying when he identified -- when he provided a  
25 description later at the police station?

1                   MR. SHANMUGAM: Justice Alito, I think that  
2     it's possible that a juror could credit that explanation  
3     in any retrial, though I --

4                   JUSTICE GINSBURG: Wasn't there also an  
5     intervening -- didn't he say 5 days after that he  
6     couldn't identify? And that was after what he said on  
7     the night, the same night.

8                   MR. SHANMUGAM: That is --

9                   JUSTICE GINSBURG: Five days later he said:  
10    I couldn't -- I couldn't identify him.

11                  MR. SHANMUGAM: That is correct, Justice  
12    Ginsburg. But even if we didn't have the March 6th  
13    statement or statements, I would frankly be happy to  
14    take my chances with the jury, even with regard solely  
15    to the March 1st statement, in light of that testimony  
16    of Officer Ronquillo that Boatner was in fact coherent,  
17    articulated very well the events that transpired, just  
18    like any witness, and so on and so forth.

19                  So, again -- -

20                  JUSTICE SOTOMAYOR: Counselor --

21                  MR. SHANMUGAM: -- we don't think that it's  
22    our burden to show that no juror could credit the  
23    State's explanation. It's simply that we think that  
24    that explanation doesn't hold water.

25                  JUSTICE SOTOMAYOR: Counselor, your argument

1 now and in your brief suggests that you're relying most  
2 heavily on the failure to provide the impeachment  
3 materials of the only witness to this crime and the only  
4 piece of evidence that ties your client to the crime.  
5 But you also mention other things, and Respondents spend  
6 90 percent of their brief arguing against the other  
7 things. But I just want to clarify those other things.

8               Number one, was the testimony mixed  
9 testimony about whether the assailants wore a mask  
10 across their face or over their entire head?

11               MR. SHANMUGAM: There --

12               JUSTICE SOTOMAYOR: What's the best take on  
13 what the evidence showed that was presented on that  
14 issue?

15               MR. SHANMUGAM: There was some degree of  
16 variation in what the witnesses said. Now, in the main,  
17 we're talking, again, about statements that were  
18 withheld. And I want to lay out those statements very  
19 briefly, if I may. There were two eyewitnesses who made  
20 statements to the police indicating that some or all of  
21 the perpetrators, including the first man through the  
22 door, were wearing masks. Those were the statements of  
23 Shelita Russel and the statement of Dale Mims.

24               Now, with regard to the statement of Shelita  
25 Russell -- and this was what we believe was the dying

1 declaration that she made at the scene in the immediate  
2 aftermath of having been shot multiple times -- Russell  
3 said she saw people barge into the kitchen; one had a  
4 black cloth across the face, first one through the door.  
5 So, it is at least theoretically possible --

6 JUSTICE SOTOMAYOR: Could I ask you  
7 something? Who determines that issue of whether that's  
8 a dying declaration? Do we determine that in deciding  
9 whether the withholding of the Brady materials was  
10 harmful or not? Do we give deference to the lower  
11 court's determination of that? Do they have to decide  
12 whether it was a dying declaration? What's the standard  
13 on something like this?

14 MR. SHANMUGAM: The lower court did not make  
15 such a determination in this case on this or any of the  
16 other evidentiary issues that Respondent now advances,  
17 at least in part because it does not appear that  
18 Respondent advanced any of those arguments below. But I  
19 think more broadly, Justice Sotomayor, in terms of the  
20 role of this Court or any other court considering a  
21 Brady claim, this Court hasn't quite spoken to the  
22 specific issue of whether a Brady court is supposed to  
23 itself make an evidentiary determination where there's a  
24 question about admissibility, but the closest that this  
25 Court came was in Wood v. Bartholomew, in which this

1 Court indicated that with regard to Brady material, it  
2 either has to itself be admissible or be reasonably  
3 likely to lead to admissible evidence. And the Court's  
4 reasoning in Wood v. Bartholomew was somewhat spare on  
5 that score. That was a summary reversal in a per curiam  
6 opinion.

7 But I do think that it would be appropriate  
8 for a Brady court to make that determination itself or,  
9 at a minimum, make a determination as to whether it  
10 appears that it's reasonably likely that the evidence  
11 would be admissible.

12 Here, we really don't think that it's a  
13 close question, particularly with regard to the  
14 statement of Shelita Russell, because the context of the  
15 handwritten notes makes clear that the statement was  
16 taken at the scene of the crime. Shelita Russell was  
17 taken to the hospital approximately a half an hour after  
18 the shootings occurred. She told two witnesses that she  
19 believed that she was dying. And so, under the law on  
20 dying declarations -- and I have no reason to believe  
21 that the law is any different in Louisiana from the  
22 Federal system or the 49 other States -- that would  
23 comfortably satisfy that requirement.

24 JUSTICE SOTOMAYOR: Now, Mr. Mims was the  
25 neighbor who saw the two -- there were three assailants

1 in total, right, and two left the scene?

2 MR. SHANMUGAM: There's some doubt as to  
3 whether or not there were three or four assailants. And  
4 Mims himself, in all candor, was a little bit  
5 inconsistent on that point. But he consistently said,  
6 both in the handwritten notes and in his testimony at  
7 the postconviction hearing, that all of the assailants,  
8 however many there were, were wearing masks and that --  
9 that he saw them as they were getting into the car. He  
10 didn't say anything further other than that the masks  
11 were ski-type masks.

12 But the State's argument with regard to the  
13 materiality of Mims's statement is that it is possible  
14 that the men would not have been wearing masks when they  
15 entered the house to allegedly commit the armed robbery;  
16 and, therefore, the fact that Boatner saw the first man  
17 unmasked can be reconciled with his statement. And,  
18 again, we would be happy to take our chances with the  
19 jury and make the argument that that would be an  
20 exceedingly unconventional way to go about committing an  
21 armed robbery.

22 And, again, with regard to the Russell and  
23 Mims statements, I think it's important to remember that  
24 we view those statements as going directly to and  
25 contradicting Boatner's in-court identification. And

1 so, in some sense, we view those statements as being of  
2 a piece with Boatner's own prior statements in which he  
3 indicated that he could not identify anyone and that he  
4 did not --

5 JUSTICE ALITO: Does the defense have any  
6 theory as to why Boatner would lie about whether he  
7 could identify this individual?

8 MR. SHANMUGAM: First of all, Justice Alito,  
9 it would, of course, not be the defense's burden in any  
10 subsequent retrial to come up with a theory of its own.  
11 The defense could simply argue, as it did at the first  
12 trial, that the prosecution simply didn't bear its  
13 burden on reasonable doubt. But --

14 JUSTICE ALITO: But, yes -- but the -- the  
15 impact of your impeachment evidence would be related  
16 certainly to if a juror would ask, well, why would he  
17 lie about this? And I -- I'm just asking, would -- did  
18 the defense have any theory about what his motive would  
19 be about whether he could identify somebody, whether  
20 this first person had a mask or not?

21 MR. SHANMUGAM: As this Court will be aware  
22 from its recent consideration of eyewitness evidence, it  
23 doesn't necessarily follow from the fact that an  
24 eyewitness identification is mistaken that the  
25 eyewitness was somehow lying about it. It may very well

1 have been that Boatner made a mistaken identification in  
2 good faith out of a desire to identify the person who  
3 killed several of his friends.

4 And, indeed, as the amicus brief of the  
5 Innocence Project explains in this case, there is a  
6 phenomenon known as "mug shot exposure effect," where an  
7 individual who sees a mug shot in some other context is  
8 more likely to identify that same person when confronted  
9 with a subsequent line-up. Of course, where, as here,  
10 the individual is exposed to the mug shot for the first  
11 time in seeing a newspaper article that depicts the  
12 individual in question and suggests that that individual  
13 is a suspect in the crime, it would not at all be  
14 unusual for the individual, when confronted with that  
15 photograph again in a line-up a few weeks later, to pick  
16 that individual.

17 JUSTICE ALITO: But the first time he -- he  
18 said that the person wasn't masked and provided a  
19 description was long before he saw any mug shots. It  
20 was the evening of the event. It was when he was  
21 questioned at the police station.

22 MR. SHANMUGAM: Well, on the evening of the  
23 event, he provided those limited details about the gold  
24 teeth and the low-cut haircut.

25 JUSTICE ALITO: Yes, but by doing that he's



1 saying this person wasn't wearing a mask. That's the  
2 critical point.

3 MR. SHANMUGAM: Well, that may suggest that  
4 the person was not wearing a mask. Of course, it's  
5 possible that the person somehow had part of his face  
6 covered.

7 But I think it's important to realize,  
8 Justice Alito, that even with regard to that statement,  
9 while it is true that Boatner provided those limiting  
10 details, he also made statements suggesting that he was  
11 not confident of his ability to actually make an  
12 identification. And in that statement, which is found  
13 at page 296 of the joint appendix, he says: I was too  
14 scared to look at anybody. I wish I could give y'all a  
15 description.

16 So, in some sense, we think that the focus  
17 on the gold teeth and the low-cut haircut in this case  
18 is a bit of an aside, because the question here is not  
19 whether he saw enough to support the subsequent  
20 identification; the question is whether his suppressed  
21 statements in which he repeatedly said, I can't make an  
22 identification, contradict his in-court confident  
23 identification of Petitioner.

24 And we think that in order to decide this  
25 case, all that the Court essentially need say in an

1 opinion is that in a case such as this one, in which all  
2 you have is the identification of a single eyewitness,  
3 where you have statements in which that eyewitness said  
4 I can't make an identification, and those statements  
5 have concededly been suppressed, the Brady materiality  
6 threshold is satisfied.

7 JUSTICE SOTOMAYOR: Am I right --

8 JUSTICE KENNEDY: In looking at the  
9 appendix, there are some asterisks. Were these  
10 statements, the first two -- the one at 252 in the joint  
11 appendix and then the statement on March the 2nd, which  
12 is the one you just referred to, 296, were parts of  
13 those statements given to the defense counsel or none of  
14 the statements? And how long were the documents? Were  
15 they 20 or 30 pages? Can you tell me a little bit about  
16 that?

17 MR. SHANMUGAM: First of all, none of those  
18 statements were given to the defense. The only  
19 relevant --

20 JUSTICE KENNEDY: I shouldn't have said  
21 "statements." None of the reports.

22 MR. SHANMUGAM: Yes. None of the statements  
23 or the surrounding materials was given to the defense at  
24 all. The only even remotely relevant thing that was  
25 given to the defense was the initial police report,

1    which was a five-page document prepared by the officers  
2    who initially responded to the scene, with a one-page  
3    narrative of what took place.  And that document, for  
4    the Court's reference, is in volume 10 of the initial  
5    record that was received from the district court at  
6    pages R1907 to 1911.

7                   Now, with regard to these specific  
8    statements, both the narrative statements and the  
9    handwritten notes, the narrative statements were  
10   contained in a relatively voluminous document -- I  
11   believe it was an 83-page document -- that was a  
12   narrative prepared by Officer Ronquillo that set out  
13   everything that took place over the course of the  
14   investigation.  And none of that was disclosed.

15                  Respondent makes the argument that the trial  
16   court reviewed that document in camera, but we think  
17   that it is somewhat unclear what, if anything, the trial  
18   court actually reviewed in camera.  There's no dispute  
19   that that document was not handed over to the defense.

20                  With regard to the handwritten notes, there  
21   actually are a relatively small number of relevant  
22   handwritten notes in this case, but all of them were  
23   contained in the police files, and none of them, none of  
24   the ones at issue on which we're relying, was handed  
25   over before trial.

1           So, this is not a case in which selective  
2 materials were handed over. None of this material was  
3 handed over, and that's why we really think that this is  
4 a case that involves the categorical withholding of  
5 documents and not simply the withholding of selected  
6 documents that may subsequently turn out to be relevant.

7           JUSTICE KENNEDY: Can you just tell me, how  
8 does Brady work? Is there some obligation for the  
9 defense counsel to say please give me all relevant  
10 reports?

11           MR. SHANMUGAM: No. This Court has made  
12 clear that a request is unnecessary to trigger the Brady  
13 obligation, and this Court has made clear in cases  
14 dating back to Brady itself that the good faith or bad  
15 faith of the prosecutor is irrelevant. And, of course,  
16 the prosecutor has a duty under Brady to hand over not  
17 only materials in the prosecutor's own possession but  
18 also materials in the possession of the police as well.

19           JUSTICE SOTOMAYOR: Counsel, is -- this  
20 group or gang, all of them had gold teeth and faded hair  
21 cuts?

22           MR. SHANMUGAM: There were five other  
23 suspects who had gold teeth or -- and low-cut haircuts.  
24 Three of the other individuals who were primarily in the  
25 frame for this murder had those characteristics. I

1 believe that the three were Bannister, Phillips, and  
2 Young. The only other suspect who is a reasonably  
3 likely suspect who didn't was Robert Trackling, the  
4 suspect whose confession to involvement in these  
5 shootings was withheld.

6 JUSTICE SOTOMAYOR: In short, faded hair  
7 cuts and gold teeth were not a unique characteristic.

8 MR. SHANMUGAM: They were not uncommon in  
9 the 1990s.

10 JUSTICE SCALIA: Yes, what were these --  
11 (Laughter.)

12 JUSTICE SCALIA: They're uncommon to me.  
13 These --

14 (Laughter.)

15 JUSTICE SCALIA: These were not gold teeth  
16 that were implanted, right? They -- what was it? Some  
17 kind of a mouthpiece of gold?

18 MR. SHANMUGAM: I have to admit that my  
19 familiarity with this practice is perhaps not that much  
20 greater than yours, Justice Scalia. But my  
21 understanding is --

22 JUSTICE SCALIA: I'm sorry to hear that.  
23 (Laughter.)

24 MR. SHANMUGAM: My understanding is that  
25 these are gold teeth that are worn either as temporary

1 or perhaps semipermanent implants, and that in hip-hop  
2 culture in the 1990s, this was relatively common. But  
3 whatever the provenance of this practice, it is  
4 undisputed on this record that multiple other suspects  
5 had those characteristics.

6 Justice Sotomayor, there was one thing you  
7 asked that I just want to get back to with regard to the  
8 remaining categories of evidence. I just want to set  
9 them out, and then I'd be happy to answer any questions  
10 that the Court has about them. And if there are no  
11 further questions, I'll reserve the balance of my time.

12 As we explain in our brief, there are three  
13 other categories of evidence at issue here. There was  
14 the statement of Phillip Young, Petitioner's  
15 co-defendant, suggesting that Petitioner was not  
16 involved in the shootings. There were also the  
17 statements that would have called into question the  
18 prosecution's theory that Petitioner was one of the  
19 shooters, a theory that was essential to establishing  
20 the intent required for first-degree murder under  
21 Louisiana law. Louisiana is somewhat different from  
22 other States in that it doesn't require premeditation,  
23 but that it -- but it does require a specific intent to  
24 kill or inflict great bodily harm.

25 JUSTICE ALITO: Well, on that point, the

1 State says that you're drawing a meaningless distinction  
2 between a hand -- a 9-millimeter handgun and a  
3 9-millimeter automatic pistol.

4 MR. SHANMUGAM: Well, we don't think that  
5 that's a meaningless distinction, and we cite numerous  
6 sources in our brief that draw precisely that  
7 distinction.

8 But I think that what's noteworthy with  
9 regard to the statements at issue is that both Boatner,  
10 who identified the weapon that the perpetrator whom he  
11 believed to be Petitioner was carrying, and the State's  
12 ballistics expert, Kenneth Leary, who identified the  
13 weapon that was responsible for the firing of the  
14 casings at issue, conspicuously failed to say that the  
15 weapon at issue was a 9- millimeter handgun. But at  
16 trial their testimonies suddenly converged, and Boatner,  
17 who had previously said only that the perpetrator was  
18 carrying a handgun, said that the perpetrator was  
19 carrying a 9-millimeter handgun; and Leary, who said  
20 that the casings at issue had come from a machine pistol  
21 of the Intratec or MAC-11 type, suddenly said that they  
22 came from a 9-millimeter handgun instead.

23 And so, at a minimum, if the defense had  
24 possessed those statements, it could have sown doubt on  
25 whether the firearm was in fact one and the same and,

1     therefore, sown doubt on a critical element of the  
2     offense at issue.

3                     And finally, the only other category --

4                     JUSTICE SOTOMAYOR: I'd just like to go back  
5     to that because I'm not sure I understand the argument.  
6     Both the ballistics expert at trial said that the  
7     casings were consistent with a 9-millimeter? And I know  
8     that Boatner said that it was a 9-millimeter that was  
9     used. And the issue was whether anybody would call a  
10    MAC gun a handgun as opposed to an automatic pistol,  
11    correct?

12                    MR. SHANMUGAM: Well, that's right with  
13    regard to Leary's testimony. I think the thing that was  
14    a little bit odd with regard to Boatner's testimony was  
15    the sudden degree of specificity. Having said only that  
16    it was a handgun or a chrome automatic in his prior  
17    statements, he said at trial that it was a 9-millimeter  
18    handgun, which he had not previously said in the  
19    statements that were withheld.

20                    And, finally, the last category of evidence  
21    consists of the notes of the interview in which Eric  
22    Rogers relayed Robert Trackling's confession to  
23    involvement in the shootings. As the amicus brief of  
24    the NACDL points out, courts have routinely held that  
25    confessions by other perpetrators constitute exculpatory



1 evidence, even with regard to offenses that may have had  
2 multiple perpetrators. And we certainly believe that at  
3 a minimum the suppression of those notes, when  
4 considered in conjunction with all of the other  
5 evidence, comfortably satisfies the Brady materiality  
6 standard, and it's for that reason that we think that  
7 the judgment of the trial court should be reversed.

8 JUSTICE KAGAN: Mr. Shanmugam, just a quick  
9 one. Was -- is all the evidence that you're discussing  
10 here today -- was that presented to the State  
11 postconviction court?

12 MR. SHANMUGAM: Yes. We believe that all of  
13 this evidence was before the State postconviction court.

14 Thank you, and I'll reserve the balance of  
15 my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Ms. Andrieu.

18 ORAL ARGUMENT OF DONNA R. ANDRIEU

19 ON BEHALF OF THE RESPONDENT

20 MS. ANDRIEU: Yes. Mr. Chief Justice, and  
21 may it please the Court:

22 The only survivor who could identify the  
23 assailant who led the massacre in the small home at 2230  
24 North Roman Street was Larry Boatner. He identified --  
25 Larry -- he identified the Petitioner after having

1 searched the faces of 72 individuals who were presented  
2 to him in photo line-ups, one after the other. And,  
3 yes, Justice Sotomayor, several of the -- those faces or  
4 several of those individuals bore short fade haircuts.  
5 And, yes, some of the individuals who were pictured in  
6 those photo line-ups were other suspects. The record  
7 reflects that Mr. Boatner scrutinized those 72 faces.  
8 At one point, line-up 11 was shown to him on March 22nd,  
9 and he remarked about the haircut. He said: My  
10 assailant wore his hair like this --

11 JUSTICE GINSBURG: Does this -- was this  
12 line-up -- was this after Boatner saw the photograph in  
13 the newspaper?

14 MS. ANDRIEU: No, it was not. I believe  
15 the -- Mr. Smith's photograph was pictured in the  
16 Times-Picayune newspaper on June 7th, and this  
17 particular line-up was shown to Mr. Boatner on March  
18 22nd. So, at that point, line-up 8, he stopped and  
19 remarked about the hair --

20 JUSTICE SOTOMAYOR: Could you tell me why  
21 Boatner waited 2 weeks to -- or never told the police  
22 that the face that he saw in the newspaper was the face  
23 of his assailant? I -- as I understand the facts, he  
24 says he saw the newspaper, recognized his assailant, and  
25 remained silent.

1 MS. ANDRIEU: Yes, he did.

2 JUSTICE SOTOMAYOR: It wasn't until they  
3 presented him with the line-up including Mr. Smith's  
4 face that he identified Mr. Smith. What's the reason  
5 for the delay?

6 MS. ANDRIEU: His reason, Your Honor, is --  
7 it's contained most specifically on page 191 of the  
8 joint appendix, and it is frankly that he was afraid.  
9 He -- and I think the jury would have understood that.  
10 He obviously knew what Mr. Smith was capable of. He --  
11 I'm sure he feared --

12 JUSTICE SOTOMAYOR: And so what turned --  
13 what changed his mind once the police showed him the  
14 line-up?

15 MS. ANDRIEU: Well, I don't know that he  
16 changed his mind, but he was presented with a line-up,  
17 and when he was presented with the line-up, he very  
18 quickly identified Juan Smith and said: That is him; I  
19 will never forget his face. So --

20 JUSTICE GINSBURG: And that was before or  
21 after the picture in the paper?

22 MS. ANDRIEU: That was after. And all of  
23 this, by the way, was vetted during -- during a motion  
24 to suppress hearing. When the trial judge learned or --  
25 that the photograph had been shown in the newspaper, he

1 reopened the hearing on the motion to suppress to  
2 determine -- and over the State's objection. We argued  
3 that this was not State action. But he reopened the  
4 motion to suppress to determine for himself whether or  
5 not that newspaper had in any way tainted the later  
6 identification of Juan Smith.

7 JUSTICE BREYER: What is this? I mean, I  
8 thought -- I may -- I thought the issue is that there  
9 were some notes, and the first note, which was made on  
10 the day, the policeman says that Boatner said he could  
11 not supply a description of the perpetrator, other than  
12 to say they were black males. Then he said they had  
13 golden teeth and a low-cut haircut.

14 And 5 days later, he said he could not ID  
15 anyone because he couldn't see faces. Then he said he'd  
16 only glanced at the first man. He couldn't tell if they  
17 had their faces covered and didn't see anyone. Then he  
18 said, I could not ID, would not know them if I saw them.  
19 And another set of police notes says he said that he  
20 could not identify any of the perpetrators of the  
21 murder.

22 So, I guess those are all notes that the --  
23 the prosecution did not give to the defense. So, if you  
24 were a defense lawyer, whatever this other stuff is, I  
25 guess you would have been pretty happy to have those

1 notes because you might have tried to impeach his  
2 identification.

3 MS. ANDRIEU: Yes, and --

4 JUSTICE BREYER: And so, what are -- you're  
5 saying that I guess it would have made no difference?

6 MS. ANDRIEU: That's correct, Your Honor.

7 JUSTICE BREYER: Then I'd like to hear that  
8 because it seems on its face that it certainly could  
9 have made a difference, that if he had those notes that  
10 he could have tried to impeach him and said where did  
11 this sudden recognition come from.

12 MS. ANDRIEU: And I can appreciate your  
13 concern. This Court has held that favorable evidence --  
14 well, this Court has held that favorable evidence which  
15 is not material need not be turned over to the defense.  
16 And if I could --

17 JUSTICE GINSBURG: But how could it not be  
18 material? Here is the only eyewitness --

19 MS. ANDRIEU: Yes.

20 JUSTICE GINSBURG: -- and we have  
21 inconsistent statements. Are you really urging that the  
22 prior statements were immaterial?

23 MS. ANDRIEU: Yes, Your Honor. If I may put  
24 them in perspective. Mr. Boatner provided two  
25 statements -- I'm sorry. Mr. Boatner provided a

1 statement on the scene, two statements the day of the  
2 incident. To a first responding officer who was not  
3 Detective Ronquillo, he gave a description, and that  
4 description was heavy built, with a hair with a fade  
5 with a little small top, with a lot of gold in his  
6 mouth. That was while he was at the scene.

7 Later, homicide Detective John Ronquillo  
8 arrived at the scene, and apparently, according to his  
9 notes and, most importantly, according to his  
10 postconviction testimony, he asked Larry -- he asked  
11 Larry Boatner for a description. And Larry Boatner  
12 said, I can't give you a description.

13 I'll put them all in perspective and then go  
14 back to what Detective Ronquillo and Mr. Boatner had to  
15 say about that. But in any case, Mr. Boatner's severe  
16 laceration was treated, and then he was escorted to the  
17 homicide office, where he gave his formal statement.  
18 And in that statement, part of which has been reproduced  
19 here by opposing counsel, Mr. Boatner said: I can tell  
20 you about the one, the one who put the pistol in my  
21 face. He was a black male with a low cut, golds in his  
22 mouth. I don't know how many; that's all. I was too  
23 scared to look at anybody. All of them had guns, one  
24 with an AK; one with a TEC-9. The one who hit me had a  
25 chrome automatic. It was big. So --

1 CHIEF JUSTICE ROBERTS: Well, and you  
2 could argue, presumably you did argue, that before the  
3 jury, and that would be compelling evidence for the  
4 jury. And if you were the defense lawyer, you really  
5 would like to have that statement where he said: I  
6 couldn't identify them.

7 MS. ANDRIEU: You would like to have it, but  
8 it's not material because, sandwiched between two  
9 descriptions -- and he's -- between two descriptions, he  
10 says, I can't identify. And taken in --

11 JUSTICE GINSBURG: How does that make it not  
12 material? You can argue that it should be given  
13 diminished weight. But an inconsistent statement by the  
14 only eyewitness seems to me most material and useful to  
15 the defense in cross-examining the eyewitness. I really  
16 don't understand how you can -- you can argue that the  
17 jury shouldn't put much weight on it because there were  
18 these other things; but to say that it's immaterial I  
19 find that that is -- is not plausible.

20 JUSTICE SCALIA: And not only the only  
21 eyewitness but, if I understand it correctly, the only  
22 evidence against the defendant. This was the only  
23 evidence against him, this one eyewitness  
24 identification, right? Was there anything else?

25 MS. ANDRIEU: There was -- the

1 identification of Juan Smith was bolstered by evidence,  
2 by testimony of the brother of Phillip Young. The  
3 perpetrator who was left at the scene is an aphasic  
4 amnesiac. So, he established a link that the two were  
5 known to each other, Juan Smith and --

6 JUSTICE SCALIA: Well --

7 MS. ANDRIEU: -- but yes.

8 JUSTICE KENNEDY: But just on the  
9 materiality point, I -- I just have to agree with  
10 Justice Ginsburg. What you're telling us is that when  
11 the defense stands up and said, and isn't it true that,  
12 in this statement which you just have testified to on  
13 direct and which the police have put in on direct, you  
14 also said you could not identify any perpetrators of the  
15 murder -- and then the prosecutor says immaterial, and  
16 the judge says strike it.

17 MS. ANDRIEU: But that's not --

18 JUSTICE KENNEDY: I just can't believe that.

19 MS. ANDRIEU: But that's not what he says.  
20 He says: I can tell you about the one, the one who put  
21 the pistol in my face.

22 JUSTICE BREYER: So, I take it that your --

23 JUSTICE KENNEDY: I'm talking about the  
24 Boatner statement of 3/6/95, in which Boatner told  
25 police he could not identify any of the perpetrators of



1 the murder, JA 259-60.

2 MS. ANDRIEU: Yes.

3 JUSTICE KENNEDY: And you say that's  
4 immaterial. I find that just incredible.

5 JUSTICE BREYER: Is it that you mean  
6 immaterial, or is it that you mean that it wasn't  
7 prejudicial because there's so much other evidence,  
8 there was no reasonable probability it would have made a  
9 difference in the trial?

10 MS. ANDRIEU: That is what I mean, yes.

11 JUSTICE BREYER: Okay. So, we can forget  
12 the word "material."

13 Now, you're saying there's so much other  
14 evidence here against him that it wouldn't have made any  
15 difference.

16 MS. ANDRIEU: Yes.

17 JUSTICE BREYER: Now, I can understand that  
18 argument.

19 JUSTICE KAGAN: Well, I --

20 JUSTICE BREYER: But I don't know if it's  
21 right. That is -- that is -- now I think I can go back  
22 to Justice Kennedy's question, put it in those terms,  
23 and say, well, why wouldn't -- this could have made a  
24 difference. I mean, here, we have this witness who said  
25 all of these great things for your side, and within a

1 space of hours, he has been telling the policemen that  
2 he can't identify anybody, he doesn't know. I mean,  
3 what -- that sounds like there's a probability that  
4 would have made a difference. Why not?

5 MS. ANDRIEU: The -- among the most  
6 important evidence in this case is the testimony or the  
7 transcript from the postconviction relief hearing. John  
8 Ronquillo, whose notes these are, was asked about the  
9 March 6th statement. And I guess we are  
10 fast-forwarding. The next -- the statement after the  
11 statement made -- the one made in the homicide office  
12 was made on March 6th. And at that time, Detective  
13 Ronquillo called Larry Boatner, and Larry Boatner said,  
14 I can't identify anyone.

15 Based -- and what Detective Ronquillo had to  
16 say about that -- first of all, Larry Boatner didn't  
17 remember saying that. But what Detective Ronquillo had  
18 to say about it -- and he was the person who was --  
19 whose impressions -- about whose impressions we're  
20 speaking -- was that at that point, Mr. Boatner, like  
21 many murder witnesses, was retreating, temporarily  
22 equivocating, as we wrote in brief. He was retreating  
23 somewhat from his assistance with the police. Not an --  
24 not an abnormal phenomenon --

25 JUSTICE SOTOMAYOR: What if -- what if --

1     could the jury be entitled to reject that conclusion?  
2     They have four statements by this man who Ronquillo  
3     described as very coherent, very with it at the scene of  
4     the crime. Would a jury be entitled to -- to reject  
5     that excuse by Ronquillo?

6                   MS. ANDRIEU: They would, Your Honor.

7     And --

8                   JUSTICE SOTOMAYOR: And if they were  
9     entitled to do that, why would the absence of four  
10    statements that I can't identify someone not have been  
11    an argument that defense counsel could have used, number  
12    one, and that had a reasonable probability of making a  
13    difference?

14                  MS. ANDRIEU: First of all, there were not  
15    four statements that were made where Boatner said he  
16    couldn't identify anyone, again. He gave two statements  
17    the day of where he described, and one statement --

18                  JUSTICE SOTOMAYOR: At different hours.

19                  MS. ANDRIEU: I'm sorry.

20                  JUSTICE SOTOMAYOR: At different hours.

21                  MS. ANDRIEU: Yes.

22                  JUSTICE SOTOMAYOR: And to different  
23    officers.

24                  MS. ANDRIEU: Yes.

25                  JUSTICE SOTOMAYOR: So, that's two

1 statements. My math is wrong?

2 MS. ANDRIEU: I'm sorry. Those are  
3 statements where he inculcated the defendant. There are  
4 two statements. Starting on the scene, there is a  
5 statement provided to the first responding officer,  
6 where he provides a description. Larry Boatner provides  
7 a description --

8 JUSTICE GINSBURG: But it is a description  
9 that others, other suspects, fit. The close-cut hair,  
10 the gold teeth. That didn't identify Smith, as opposed  
11 to the other suspects who had those same  
12 characteristics.

13 MS. ANDRIEU: Yes. And those other  
14 suspects' photographs were all contained -- were  
15 contained in photo IDs -- in photo line-ups, and  
16 Mr. Boatner never selected one of them.

17 The other thing is he -- gold teeth. He  
18 knew that his perpetrator had gold teeth. The next time  
19 he saw Mr. Smith was at trial in court. Mr. Smith  
20 revealed his teeth, and he had gold teeth. But as far  
21 as the other suspects having the haircut or physical --  
22 similar physical attributes --

23 JUSTICE GINSBURG: It was a prior  
24 inconsistent statement, and we can argue about whether  
25 there were more consistent statements than inconsistent

1 statements, but to say that this was not Brady material,  
2 we -- we're not saying that Larry Boatner made up a  
3 story on the stand that wasn't -- didn't conform to the  
4 truth. The question is, should the prosecutor -- should  
5 the defense attorney have access to a prior inconsistent  
6 statement?

7 MS. ANDRIEU: And this Court has said that  
8 Brady is a reflective -- is a reflective analysis. He  
9 did not --

10 JUSTICE ALITO: Well, can you explain how  
11 this -- how this took place? You have a case in which  
12 you're -- you're relying almost entirely on the  
13 testimony of one witness, and you have these notes that  
14 were taken by, and are presumably in the possession of,  
15 the lead investigator. Wouldn't any prosecutor ask the  
16 lead -- the lead investigator, do you have any  
17 statements of this witness?

18 MS. ANDRIEU: Absolutely.

19 JUSTICE ALITO: They have to be examined,  
20 and if there's anything in them that's -- that is  
21 impeachment material, they have to be turned over to the  
22 defense. And under Louisiana law, is there are a rule  
23 that requires the turning over of statements by  
24 witnesses, prior statements by witnesses?

25 MS. ANDRIEU: Under Louisiana law, prior

1 statements of witnesses are not discoverable. But of  
2 course, under this Court's decision in Brady v.  
3 Maryland, if the prosecutor makes a determination that  
4 they would materially affect the outcome of --

5 JUSTICE SOTOMAYOR: But you have to --

6 MS. ANDRIEU: -- guilt or innocence --

7 JUSTICE SOTOMAYOR: You have to supply  
8 statements by a witness when they take the stand, don't  
9 you? Those are immaterial? Don't you have to turn  
10 over --

11 MS. ANDRIEU: No. No.

12 JUSTICE SOTOMAYOR: Not in the State of  
13 Louisiana?

14 MS. ANDRIEU: No. Not --

15 JUSTICE SOTOMAYOR: You don't have to turn  
16 over witness statements when they're taking the stand?

17 MS. ANDRIEU: No. And these statements were  
18 provided in camera. There was -- defense filed a motion  
19 for discovery, and he asked for Brady material. He  
20 asked specifically for the supplemental report, which is  
21 where these statements are contained.

22 JUSTICE SOTOMAYOR: So, you -- are you  
23 claiming that the judge's failure to catch these  
24 inconsistencies excuses your Brady obligation?

25 MS. ANDRIEU: Not at all. The Brady

1 obligation is ours. In fact, we believe that that's  
2 actually a poor practice. But it is one --

3 JUSTICE KAGAN: Ms. Andrieu, if I could go  
4 back to Justice Alito's question, was the problem here  
5 that the prosecutors never received these statements  
6 from the police officers, or did the prosecutors make a  
7 determination similar to the kind of argument that  
8 you're making today -- make a determination that these  
9 statements simply should not be turned over because they  
10 are not material?

11 MS. ANDRIEU: The prosecutor in this case  
12 actually turned them over to the trial court for an in  
13 camera inspection. And article -- Louisiana Code of  
14 Criminal Procedure article 718 actually provides for  
15 that practice.

16 JUSTICE BREYER: It's so odd that -- I mean,  
17 look, it seems like here it is 5 days after the shooting  
18 and well before, I guess, that this witness saw any mug  
19 shots or did anything. And he says, I could not  
20 identify anyone, because he couldn't see the faces of  
21 the people. And now you're saying later, which you  
22 introduce into trial, his having looked at the faces of  
23 people and identified them from their faces.

24 Now, previously, he said he couldn't see  
25 their faces. All right. And in Louisiana, the State of

1 Louisiana, the prosecution and the judges say that  
2 isn't -- you don't have to turn over that statement that  
3 he couldn't see the faces made earlier.

4 MS. ANDRIEU: No. What he --

5 JUSTICE BREYER: What?

6 MS. ANDRIEU: I'm sorry. When he's saying  
7 that he could not see the faces, he is not referring to  
8 Juan Smith. He and Detective Ronquillo testified at  
9 postconviction that he always said he could identify the  
10 one, the one whose face appeared a handgun's length from  
11 his own, unmasked, when he opened that front door at  
12 2230 North Roman.

13 Detective Ronquillo put this in perspective  
14 at postconviction. And as I said, he --

15 JUSTICE BREYER: Oh, you mean all these --  
16 all these statements that we have here, you're saying,  
17 all referred to people other than the defendant.

18 MS. ANDRIEU: Juan. Yes.

19 JUSTICE BREYER: All right. Well, was there  
20 a finding on that?

21 MS. ANDRIEU: There was -- the judge did not  
22 give express findings of fact or finding of law, but --

23 JUSTICE BREYER: Perhaps the defense would  
24 have liked to say they did apply to the defendant.

25 JUSTICE SCALIA: You don't say all of them.



1 All of them didn't apply to the --

2 MS. ANDRIEU: No. The one at the scene,  
3 when he says I can't describe anyone here, clearly --

4 JUSTICE BREYER: This was not at the scene.

5 JUSTICE SCALIA: That applied to everyone,  
6 right?

7 MS. ANDRIEU: I'm sorry.

8 JUSTICE SCALIA: The one at the scene  
9 applied to everyone.

10 MS. ANDRIEU: To everyone.

11 JUSTICE SCALIA: "I can't identify anyone."

12 MS. ANDRIEU: March 6th --

13 JUSTICE SCALIA: Yes.

14 MS. ANDRIEU: -- applied to everyone --  
15 everyone except Juan Smith.

16 JUSTICE SCALIA: Okay.

17 JUSTICE BREYER: So, you're --

18 CHIEF JUSTICE ROBERTS: Wait, wait. I'm  
19 sorry. You've lost me there. When he says I can't  
20 identify anyone, Smith is out of that group already?

21 MS. ANDRIEU: Oh, I'm sorry. No. He's --

22 CHIEF JUSTICE ROBERTS: Okay.

23 MS. ANDRIEU: I'm sorry. In both  
24 circumstances, he is saying -- the first time, he's  
25 saying, I can't describe. The second time, he is

1 saying, I can't help you; I can't identify everyone.

2 But the jury would have --

3 JUSTICE BREYER: All right. He says, I  
4 can't identify --

5 CHIEF JUSTICE ROBERTS: Excuse me. I can't  
6 identify everyone or everyone?

7 MS. ANDRIEU: Anyone.

8 CHIEF JUSTICE ROBERTS: Okay.

9 MS. ANDRIEU: And the jury would have  
10 heard --

11 JUSTICE BREYER: He says, I can't identify  
12 anyone because I couldn't see faces. Okay? That's what  
13 it says here, at least in my notes that my law clerks  
14 gathered. And --

15 (Laughter.)

16 JUSTICE BREYER: All right, I -- and my  
17 point then is this seems very odd, I mean, really  
18 unusual that in the State of Louisiana that they have  
19 some kind of system that doesn't turn that statement  
20 over to the defense.

21 MS. ANDRIEU: It was turned over to the  
22 judge under article 718 for in-camera inspection.

23 JUSTICE ALITO: Where's that reflected in  
24 the record? I --

25 MS. ANDRIEU: That's on October 31st of

1 1995. There is a hearing.

2 JUSTICE ALITO: What you said in your brief  
3 was that the judge determined that the supplemental  
4 report relating to the North Roman Street murders  
5 contains no Brady material.

6 MS. ANDRIEU: Yes. Mr. Smith --

7 JUSTICE ALITO: I didn't understand the  
8 record to be that all of Boatner's statements -- that  
9 all the statements of Boatner that we're concerned about  
10 now were examined by the judge before--

11 MS. ANDRIEU: Yes.

12 JUSTICE ALITO: -- trial?

13 MS. ANDRIEU: Yes.

14 JUSTICE ALITO: And the record reflects that  
15 where?

16 MS. ANDRIEU: The transcript of October  
17 31st, 1995. The --

18 JUSTICE KAGAN: And is it the view of the  
19 prosecutor's office that because those materials were  
20 turned over to the judge, assuming that they were turned  
21 over to the judge, that that obviates the Brady  
22 obligation?

23 MS. ANDRIEU: Not at all.

24 JUSTICE KAGAN: Is that the view of the  
25 prosecutor's office?

1 MS. ANDRIEU: Not at all. We believe it's a  
2 bad practice. But it is --

3 JUSTICE KENNEDY: Did you concede there was  
4 a Brady violation in this case?

5 MS. ANDRIEU: Did we concede?

6 JUSTICE KENNEDY: Do you now concede--

7 MS. ANDRIEU: No.

8 JUSTICE KENNEDY: -- there was a Brady  
9 violation in the case?

10 MS. ANDRIEU: No. If the --

11 JUSTICE KENNEDY: You're telling the Court  
12 that this should have been kept from the defense, all of  
13 it?

14 MS. ANDRIEU: Under this --

15 JUSTICE KENNEDY: Under Brady.

16 MS. ANDRIEU: -- Court's decision in Kyles,  
17 I believe a prudent prosecutor would have disclosed it.  
18 I do not --

19 JUSTICE GINSBURG: But Kyles is a decision  
20 saying what the prosecutor must disclose, not it's a  
21 good practice.

22 MS. ANDRIEU: No. But --

23 JUSTICE SOTOMAYOR: So, is there a violation  
24 under our holding in Kyles?

25 MS. ANDRIEU: I'm sorry.

1 JUSTICE SOTOMAYOR: Is there a Brady  
2 violation under our holding in Kyles?

3 MS. ANDRIEU: No, there is not.

4 JUSTICE SOTOMAYOR: So, explain why what is  
5 on its face seemingly inconsistent statements are not  
6 required to be turned over.

7 MS. ANDRIEU: With regard to the March 6th  
8 statement where Larry Boatner tells John Ronquillo at  
9 that point, I can't identify anyone, what Mr. -- what  
10 Detective Ronquillo had to say about that is  
11 dispositive. And he said, at that point Larry Boatner  
12 was withdrawing from -- he was afraid -- he was  
13 withdrawing from police assistance.

14 JUSTICE SOTOMAYOR: I don't understand how  
15 he becomes the arbiter of what's Brady. You said to me  
16 earlier that a jury would be entitled to reject his  
17 conclusion. All right? Tell me what -- how his  
18 conclusion makes it non-Brady if a juror could decide  
19 differently.

20 MS. ANDRIEU: The -- the postconviction  
21 testimony is pivotal because there is a petition that's  
22 filed with attachments, with exhibits. That is what  
23 gets, and that is what got, Mr. Smith his day in court,  
24 his four-day postconviction hearing testimony --  
25 postconviction hearing. Larry Boatner took the stand.

1   What Larry Boatner had to say and what John Ronquillo  
2   had to say -- because after all, these are John  
3   Ronquillo's notes -- I think they are important. And I  
4   think they're important in a Brady analysis because  
5   those are --

6               JUSTICE SOTOMAYOR: There are two components  
7   to Brady. Should they have been turned over? And if  
8   they had, is there a reasonable probability of a  
9   different outcome?

10              MS. ANDRIEU: There is not.

11              JUSTICE SOTOMAYOR: Should they have been  
12   turned over? That's the question that I think my  
13   colleague asked you, and you're saying no.

14              MS. ANDRIEU: No. I believe that a prudent  
15   prosecutor would have. I believe we're tacking a little  
16   bit too close to the wind, but a prudent prosecutor  
17   would have. I also think that --

18              JUSTICE SOTOMAYOR: All right. Now  
19   articulate what legal theory --

20              MS. ANDRIEU: Because it -- because Mr. --

21              JUSTICE SOTOMAYOR: -- would say these are  
22   not -- these are not materials that needed to be turned  
23   over, when they say: Could not ID; would not know them  
24   if I saw them; can't tell if had faces covered; didn't  
25   see anyone. That's one of the notes. The other one: I

1 don't know how many, that's all; I was too scared to  
2 look at anybody. And --

3 What makes any of those statements --

4 MS. ANDRIEU: If Mr. Boatner could not  
5 identify anyone, Mr. Boatner would not have viewed 15  
6 lineups. When the lineups were presented to him --

7 JUSTICE SOTOMAYOR: This is all a jury  
8 argument.

9 MS. ANDRIEU: I'm sorry --

10 JUSTICE SOTOMAYOR: Tell me why they didn't  
11 on their face constitute Brady materials that needed to  
12 be turned over. What's the legal principle that doesn't  
13 make them Brady?

14 MS. ANDRIEU: Because if they had been  
15 presented -- if those statements had been presented to  
16 defense -- or presented to a jury, the -- the outcome  
17 would have remained the same. The jury --

18 JUSTICE GINSBURG: How do you know? How do  
19 you know? How can you possibly know? The jury is  
20 supposed to decide on the credibility of this witness.  
21 There's a statement that he made a prior inconsistent  
22 statement. The -- Mr. Shanmugam outlined five  
23 categories of what he called Brady material. Is -- are  
24 you maintaining that none of those categories, that  
25 there was no Brady material at all in this case?

1                   MS. ANDRIEU: Yes. You're speaking of the  
2 other pieces of evidence?

3                   JUSTICE GINSBURG: Yes.

4                   MS. ANDRIEU: Yes. Well, I'm -- I'm not  
5 sure if the Charity Hospital's medical records of  
6 Mr. Boatner are still being urged to this Court as --

7                   JUSTICE GINSBURG: I'm talking about Mims  
8 and -- what was the woman's name? Russell?

9                   MS. ANDRIEU: Shelita Russell. Well --

10                  JUSTICE GINSBURG: And Young and the snitch,  
11 the one who said that his cellmate told him that his  
12 cellmate was the perpetrator.

13                  MS. ANDRIEU: Well, to be clear, Ms. Russell  
14 never made a dying declaration. What the defense is  
15 presenting to this Court as evidence of a dying  
16 declaration are words and dashes of Detective Ronquillo  
17 written at some point where he -- written at some  
18 point --

19                  JUSTICE GINSBURG: Was it a determination by  
20 the judge that it wasn't a dying declaration?

21                  MS. ANDRIEU: The judge, again, did not make  
22 specific facts of finding or law. The judge -- I'm  
23 sorry.

24                  JUSTICE GINSBURG: And how about Mims?

25                  JUSTICE KENNEDY: Because it was not --



1 because it was not turned over. And with all respect, I  
2 think you misspoke when you -- you were asked what is --  
3 what is the test for when Brady material must be turned  
4 over. And you said whether or not there's a reasonable  
5 probability -- a reasonable likelihood -- pardon me -- a  
6 reasonable probability that the result would have been  
7 different. That's the test for when there has been a  
8 Brady violation. You don't determine your Brady  
9 obligation by the test for the Brady violation. You're  
10 transposing two very different things.

11 And so, that's incorrect.

12 MS. ANDRIEU: And I'm sorry, Justice  
13 Ginsburg, your -- Shelita Russell did not give a dying  
14 declaration. The notes are --

15 JUDGE GINSBURG: All right. Let's go to  
16 Mims, who said, I saw them -- I saw the perpetrators go  
17 to their car when they were exiting. They had ski  
18 masks.

19 MS. ANDRIEU: And that information -- Dale  
20 Mims testified at postconviction. He testified he did  
21 not see the assailants arrive. He did not see them --

22 JUSTICE GINSBURG: But isn't it most  
23 unlikely, as your -- as Mr. Shanmugam said, that  
24 robbers -- I mean, the people who are entering,  
25 intruding on another's premises to rob, or whatever else

1 they're going to do, would wear masks going out but not  
2 going in? I mean, they don't want anybody -- they don't  
3 want anybody to be able to identify them.

4 MS. ANDRIEU: And it's plausible that  
5 Mr. Boatner -- I'm sorry -- that Mr. Smith masked  
6 himself upon escape after --

7 JUSTICE GINSBURG: Well, is that maybe --

8 CHIEF JUSTICE ROBERTS: I thought -- I'm  
9 sorry. I thought the idea was they were going to kill  
10 everybody who might have seen them inside. Their only  
11 worry would be someone who would see them outside,  
12 right?

13 MS. ANDRIEU: Yes. So worried that the car  
14 that they arrived in had no license plate. They were  
15 definitely looking not to be identified.

16 JUSTICE KAGAN: Ms. Andrieu, did your office  
17 ever consider just confessing error in this case?

18 MS. ANDRIEU: I'm sorry.

19 JUSTICE KAGAN: Did your office ever  
20 consider just confessing error in this case? You've had  
21 a bunch of time to think about it. You know? We took  
22 cert a while ago. I'm just wondering whether you've  
23 ever considered confessing error.

24 MS. ANDRIEU: Your Honor, we believe that we  
25 have an argument that these statements of Larry Boatner

1 are not material. The other evidence that Mr. Shanmugam  
2 has put before this Court were either not suppressed or  
3 not favorable. The -- Larry Boatner gave several -- he  
4 -- he did describe Juan Smith. He described him on  
5 several occasions, and he ultimately identified him, and  
6 he identified him after scrupulously viewing 13  
7 line-ups.

8 So, the suggestion that he said at one  
9 point -- because he's equivocating because his name is  
10 on -- his name, address, contact information are on the  
11 police report. It is not a surprise -- and I don't  
12 think it would be a surprise to Orleans Parish jurors --  
13 to find that, early in an investigation, a murder  
14 witness equivocates. He --

15 JUSTICE GINSBURG: But you're taking that  
16 judgment away from the jury. There was a prior  
17 inconsistent statement. Shouldn't that be the end of  
18 it? A prior inconsistent statement, one that is  
19 favorable to the defense, has to be turned over, period.  
20 I thought was what Brady requires.

21 MS. ANDRIEU: And in this case --

22 JUSTICE SCALIA: I -- may I suggest that --

23 MS. ANDRIEU: Yes.

24 JUSTICE SCALIA: -- you stop fighting as to  
25 whether it should be turned over? Of course, it should

1 have been turned over. I think the case you're making  
2 is that it wouldn't have made a difference.

3 MS. ANDRIEU: Made a difference. Yes.

4 JUSTICE SCALIA: And -- and that's a closer  
5 case, perhaps, but surely it should have been turned  
6 over. Why don't you give that up?

7 MS. ANDRIEU: Well, I -- and I actually  
8 thought I had when I said a prudent prosecutor would,  
9 but in making a sort of over-the-shoulder, rear-window  
10 Brady analysis, I don't think that these statements --  
11 that the statements made to -- the statement made to  
12 Ronquillo at the scene where he's all shook up and he  
13 says, I can't describe anybody; then he goes to the  
14 hospital, gets his severe laceration taken care of --

15 JUSTICE SOTOMAYOR: Counsel, my worry is the  
16 following: You've read Cullen.

17 MS. ANDRIEU: I'm sorry?

18 JUSTICE SOTOMAYOR: You read Cullen.

19 MS. ANDRIEU: Yes.

20 JUSTICE SOTOMAYOR: You read the dissent in  
21 Cullen. There has been serious accusations against the  
22 practices of your office, not yours in particular but  
23 prior ones. It is disconcerting to me that when I asked  
24 you the question directly should this material have been  
25 turned over, you gave an absolute no. It didn't need to

1 be. It would have been prudent, but it didn't need to  
2 be. That's really troubling.

3 MS. ANDRIEU: And I think I misunderstood  
4 your question -- I think I misunderstood your question.  
5 Should it have been turned over? Yes. Now that we are  
6 here 16 years later, and the Court is making --

7 JUSTICE SOTOMAYOR: That's the second prong  
8 of Brady. I said there were two prongs to Brady. Do  
9 you have to turn it over, and, second, does it cause  
10 harm. And the first one you said not. That -- it is  
11 somewhat disconcerting that your office is still  
12 answering equivocally on a basic obligation as one that  
13 requires you to have turned these materials over --

14 MS. ANDRIEU: Your Honor --

15 JUSTICE SOTOMAYOR: -- whether it caused  
16 harm or not.

17 MS. ANDRIEU: If -- if I may explain. I  
18 obviously misunderstood your question. Present-day  
19 prosecutors -- oh, I'm sorry. May I --

20 CHIEF JUSTICE ROBERTS: You can, very  
21 briefly.

22 MS. ANDRIEU: We would have -- today we turn  
23 all of this over. Our only concern is redacting victim  
24 information, identifying information, so that -- for  
25 victims' safety. But it -- it should have been turned

1 over. I guess what I was addressing or attempting to  
2 address was the materiality prong of Brady.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MS. ANDRIEU: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Shanmugam, 4  
6 minutes.

7 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

8 ON BEHALF OF THE PETITIONER

9 MR. SHANMUGAM: Thank you, Mr. Chief  
10 Justice.

11 Just three very quick points. First of all,  
12 with regard to Larry Boatner's statements on March the  
13 6th, Justice Breyer, you'll be happy to know that your  
14 law clerks' notes were correct. Boatner on March the  
15 6th said -- and this is at page 308 of the joint  
16 appendix -- could not ID anyone because couldn't see  
17 faces; can't tell if had faces covered; didn't see  
18 anyone; would not know them if I saw them.

19 JUSTICE BREYER: I'm not surprised they're  
20 correct.

21 (Laughter.)

22 MR. SHANMUGAM: It is quite clear that that  
23 statement applies to all of the perpetrators. The State  
24 advances the argument today, as it did in its brief,  
25 that Boatner must have been too scared to cooperate by

1 March the 6th, but that is utterly belied by the record  
2 in this case. Boatner continued to cooperate with the  
3 police investigation in the following weeks, reviewing  
4 police line-ups. He even testified that he wanted to go  
5 looking for Petitioner after seeing his photograph in  
6 the New Orleans newspaper, pages 489 and 494 of the  
7 joint appendix. He didn't leave New Orleans until June,  
8 3 months later, and he actually returned to New Orleans  
9 before Petitioner was even apprehended. So, again --

10 JUSTICE ALITO: It is your understanding  
11 that the -- that all of Boatner's -- all the notes about  
12 Boatner's statements were turned over to the judge  
13 before trial for in camera inspection?

14 MR. SHANMUGAM: Justice Alito, it is  
15 entirely unclear based on this record. Counsel for  
16 Respondent cites the transcript from October 31st, 1995,  
17 a transcript that wasn't even prepared until after cert  
18 was granted in this case.

19 It's clear that the court reviewed  
20 something, but it is entirely unclear from that  
21 transcript what the court reviewed. And, of course,  
22 even if the court had made an in camera determination,  
23 it would no way -- in no way affect our claim after the  
24 fact here.

25 My second point: The State today for the

1 first time says, in response to the question from  
2 Justice Scalia, that there was more evidence here  
3 linking Petitioner to the crime and relies on the  
4 testimony of Eddie Young, the brother of Phillip Young,  
5 the individual who was found at the scene. But the sole  
6 substance of that testimony was that Phillip Young knew  
7 Petitioner. And we would respectfully submit that that  
8 is scarcely inculpatory, and if it was, anyone in New  
9 Orleans who knows a felon ought to be worried. And,  
10 therefore, we really don't think that that adds anything  
11 to the evidence in this case. The sole evidence linking  
12 Petitioner to the crime was the statement -- the  
13 testimony of Larry Boatner.

14 Third, there has been some discussion about  
15 the language in this Court's cases in Kyles and Agurs  
16 suggesting that prosecutors should err on the side of  
17 caution. That is part of the constitutional standard  
18 because, after all, the materiality requirement is part  
19 of the requirement for a constitutional violation under  
20 Brady. But all of the evidence at issue here, including  
21 Boatner's statements, was withheld from the defense,  
22 leaving aside this question of what the trial court may  
23 have reviewed in camera.

24 And the prosecutor's conduct in this case,  
25 with all due respect to Ms. Andrieu, was not, quote, "a



1 little too close to the wind." The Orleans Parish  
2 district attorney's office acted with flagrant disregard  
3 for its obligations under Brady in this case. The Brady  
4 standard has been around for half a century. There is  
5 no real ambiguity about what that standard requires, and  
6 we think that the conduct in this case was in fact  
7 egregious and clearly violated that standard. We think  
8 that the trial court erred by rejecting Petitioner's  
9 Brady claim, and for that reason, we think that its  
10 judgment should be reversed.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel,  
13 counsel.

14 The case is submitted.

15 (Whereupon, at 12:12 p.m., the case in the  
16 above-entitled matter was submitted.)

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