SUPREME COURT OF THE UNITED STATES

No. 93–7927

CURTIS LEE KYLES, PETITIONER *v.*
JOHN P. WHITLEY, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 19, 1995]

JUSTICE SCALIA, with whom the CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt)—not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed. The defect of the latter system was described, with characteristic candor, by Justice Jackson:

> "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring).

Since this Court has long shared Justice Jackson's view, today's opinion—which considers a fact-bound claim of error rejected by every court, state and federal, that previously heard it—is, so far as I can tell, wholly unprecedented. The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i.e.*, except in cases of the plainest error) be denied. *United States* v. *Johnston*, 268 U. S. 220, 227 (1925).

That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, *Sumner* v. *Mata*, 449 U. S. 539, 543 (1981); and under what we have called the "two-court rule," the policy has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires. See, *e.g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949). How much the more should the policy be honored in this case, a federal habeas proceeding where not only both lower federal courts but also the state courts on postconviction review have all reviewed and rejected precisely the fact-specific claim before us. Cf. 28 U. S. C. §2254(d) (requiring federal habeas courts to accord a presumption of correctness to state-court findings of fact); *Sumner*, *supra*, at 550, n. 3. Instead, however, the Court not only grants certiorari to consider whether the Court of Appeals (and all the previous courts that agreed with it) was correct as to what the facts showed in a case where the answer is far from clear, but in the process of such consideration renders new findings of fact and judgments of credibility appropriate to a trial court of original jurisdiction. See, *e.g., ante*, at 5 ("Beanie seemed eager to cast suspicion on Kyles"); *ante*, at 23, n. 12 ("Record photographs of Beanie . . . depict a man possessing a medium build"); *ante*, at 30–31, n. 18 ("the record photograph of the homemade holster indicates . . .").

The Court says that we granted certiorari "[b]ecause `[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,' *Burger* v. *Kemp*, 483 U. S. 776, 785 (1987)." *Ante*, at 2. The citation is perverse, for the reader who looks up the quoted opinion will discover that the very next sentence confirms the traditional practice from which the Court today glaringly departs: "Nevertheless, when the lower courts have found that [no constitutional error occurred], . . . deference to the shared conclusion of two reviewing courts prevent[s] us from substituting speculation for their considered opinions." *Burger* v. *Kemp*, 483 U. S. 776, 785 (1987).

The greatest puzzle of today's decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol, to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. At, and during the week preceding, our February 24 Conference, for example, we considered and disposed of 10 petitions in capital cases, from seven States. We carefully considered whether the convictions and sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately*, to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise.

Straining to suggest a legal error in the decision below that might warrant review, the Court asserts

that "[t]here is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence," *ante*, at 21. In support of this it quotes isolated sentences of the opinion below that supposedly "dismiss[ed] particular items of evidence as immaterial," *ibid.* This claim of legal error does not withstand minimal scrutiny. The Court of Appeals employed *precisely* the same legal standard that the Court does. Compare 5 F. 3d 806, 811 (CA5 1993) ("We apply the [*United States* v.] *Bagley* [473 U. S. 667 (1985)] standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different") with *ante*, at 22 ("In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"). Nor did the Court of Appeals announce a rule of law, that might have precedential force in later cases, to the effect that *Bagley* requires a series of independent materiality evaluations; in fact, the court said just the contrary. See 5 F. 3d, at 817 ("We are not persuaded that it is reasonably probable that the jury would have found in Kyles' *[sic]* favor if exposed to any *or all* of the undisclosed materials") (emphasis added). If the decision is read, shall we say, cumulatively, it is clear beyond cavil that the court assessed the cumulative effect of the *Brady* evidence in the context of the whole record. See 5 F. 3d, at 807 (basing its rejection of petitioner's claim on "a complete reading of the record"); *id.*, at 811 ("Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit"); *id.*, at 813 ("We must bear [the eyewitness testimony] in mind while assessing the probable effect of other undisclosed information"). It is, in other words, the Court itself which errs in the manner that it accuses the Court of

Appeals of erring: failing to consider the material under review as a whole. The isolated snippets it quotes from the decision merely do what the Court's own opinion acknowledges must be done: to "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Ante*, at 17, n. 10. Finally, the Court falls back on this: "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*," *ante*, at 22. In other words, even though the Fifth Circuit plainly enunciated the *correct* legal rule, since the outcome it reached would not properly follow from that rule, the Fifth Circuit must in fact (and unbeknownst to itself) have been applying an *incorrect* legal rule. This effectively eliminates all distinction between mistake in law and mistake in application.

What the Court granted certiorari to review, then, is not a decision on an issue of federal law that conflicts with a decision of another federal or state court; nor even a decision announcing a rule of federal law that because of its novelty or importance might warrant review despite the lack of a conflict; nor yet even a decision that *patently* errs in its application of an old rule. What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err —precisely the type of case in which we are *most* inclined to deny certiorari. But despite all of that, I would not have dissented on the ground that the writ of certiorari should be dismissed as improvidently granted. Since the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case of this sort will often be repeated— which is to say little fear that today's grant has any generalizable principle behind it. I am still forced to dissent, however, because, having improvidently decided to review the facts of this case,

the Court goes on to get the facts wrong. Its findings are in my view clearly erroneous, cf. Fed. R. Civ. Proc. 52(a), and the Court's verdict would be reversed if there were somewhere further to appeal.

Before proceeding to detailed consideration of the evidence, a few general observations about the Court's methodology are appropriate. It is fundamental to the discovery rule of *Brady* v. *Maryland*, 373 U. S. 83 (1963), that the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States* v. *Agurs*, 427 U. S. 97, 112 (1976). It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to "destro[y]," *ante*, at 22, the *particular* prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates. It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt. See *United States* v. *Bagley*, 473 U. S. 667, 682 (1985); *Agurs*, *supra*, at 112–113. The Court's opinion fails almost entirely to take this principle into account. Having spent many pages assessing the effect of the *Brady* material on two prosecution witnesses and a few items of prosecution evidence, *ante*, at 22–33, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante*, at 33–35. This partiality is confirmed in the Court's attempt to "recap . . . *the suppressed evidence* and its significance for the prosecution," *ante*, at 35 (emphasis added), which omits the required comparison between that evidence and the evidence that was disclosed. My discussion of the record will present the half of the analysis that the Court omits, emphasizing the evidence concededly

unaffected by the *Brady* violation which demonstrates the immateriality of the violation.

In any analysis of this case, the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind. The first half of that theory—designed to neutralize the physical evidence (Mrs. Dye's purse in his garbage, the murder weapon behind his stove)—was that petitioner was the victim of a "frame-up" by the police informer and evil genius, Beanie. Now it is not unusual for a guilty person who knows that he is suspected of a crime to try to shift blame to someone else; and it is less common, but not unheard-of, for a guilty person who is neither suspected nor subject to suspicion (because he has established a perfect alibi), to call attention to himself by coming forward to point the finger at an innocent person. But petitioner's theory is that the guilty Beanie, who *could* plausibly be accused of the crime (as petitioner's brief amply demonstrates), but who was *not* a suspect any more than Kyles was (the police as yet had no leads, see *ante*, at 4), injected both Kyles and himself into the investigation in order to get the innocent Kyles convicted.[1] If this were not stupid enough, the wicked

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[1]The Court tries to explain all this by saying that Beanie mistakenly thought that he had become a suspect. The only support it provides for this is the fact that, *after having come forward with the admission that he had driven the dead woman's car*, Beanie repeatedly inquired whether he himself was a suspect. See *ante*, at 23, n. 13. Of course at that point he well *should* have been worried about being a suspect. But there is no evidence that he erroneously considered himself a suspect beforehand. Moreover, even if he did, the notion that, a guilty person would, on the basis of such an erroneous belief, come forward for the reward or in order to "frame" Kyles (rather than waiting for the police to approach him first) is quite simply implausible.

Beanie is supposed to have suggested that the police search his victim's premises *a full day before he got around to planting the incriminating evidence on the premises*.

The second half of petitioner's theory was that he was the victim of a quadruple coincidence, in which four eyewitnesses to the crime mistakenly identified him as the murderer—three picking him out of a photo-array without hesitation, and all four affirming their identification in open court after comparing him with Beanie. The extraordinary mistake petitioner had to persuade the jury these four witnesses made was not simply to mistake the real killer, Beanie, for the very same innocent third party (hard enough to believe), but in addition to mistake him *for the very man Beanie had chosen to frame*—the last and most incredible level of coincidence. However small the chance that the jury would believe any one of those improbable scenarios, the likelihood that it would believe them all together is far smaller. The Court concludes that it is "reasonably probable" the undisclosed witness interviews would have persuaded the jury of petitioner's implausible theory of mistaken eyewitness testimony, and then argues that it is "reasonably probable" the undisclosed information regarding Beanie would have persuaded the jury of petitioner's implausible theory regarding the incriminating physical evidence. I think neither of those conclusions is remotely true, but even if they were the Court would still be guilty of a fallacy in declaring victory on each implausibility in turn, and thus victory on the whole, without considering the infinitesimal probability of the jury's swallowing the entire concoction of implausibility squared.

This basic error of approaching the evidence piecemeal is also what accounts for the Court's obsessive focus on the credibility or culpability of Beanie, who did not even testify at trial and whose credibility or innocence the State has never once

avowed. The Court's opinion reads as if either petitioner or Beanie must be telling the truth, and any evidence tending to inculpate or undermine the credibility of the one would exculpate or enhance the credibility of the other. But the jury verdict in this case said only that petitioner was guilty of the murder. That is perfectly consistent with the possibilities that Beanie repeatedly lied, *ante*, at 27, that he was an accessory after the fact, cf. *ibid*, or even that he planted evidence against petitioner, *ante*, at 29–30. Even if the undisclosed evidence would have allowed the defense to thoroughly impeach Beanie and to suggest the above possibilities, the jury could well have believed *all* of those things and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken.[2]

Of course even that much rests on the premise that competent counsel would run the terrible risk of calling Beanie, a witness whose "testimony almost certainly would have inculpated [petitioner]" and whom "any reasonable attorney would perceive . . . as a `loose cannon.'" 5 F. 3d, at 818. Perhaps because that premise seems so implausible, the Court retreats to the possibility that petitioner's counsel, even if not calling Beanie to the stand, could have used the evidence relating to Beanie to attack "the reliability of the investigation." *Ante*, at 27. But

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[2] There is no basis in anything I have said for the Court's charge that "the dissent appears to assume that Kyles must lose because there would still have been adequate [*i.e.* sufficient] evidence to convict even if the favorable evidence had been disclosed." *Ante*, at 16, n. 8. I do assume, indeed I expressly argue, that petitioner must lose because there was, is, and will be *overwhelming* evidence to convict, so much evidence that disclosure would not "have made a different result reasonably probable." *Ante*, at 22.

that is distinctly less effective than substantive evidence bearing on the guilt or innocence of the accused. In evaluating *Brady* claims, we assume jury conduct that is both rational and obedient to the law. We do not assume that even though the whole mass of the evidence, both disclosed and undisclosed, shows petitioner guilty beyond a reasonable doubt, the jury will punish sloppy investigative techniques by setting the defendant free. Neither Beanie nor the police were on trial in this case. Petitioner was, and no amount of collateral evidence could have enabled his counsel to move the mountain of direct evidence against him.

The undisclosed evidence does not create a "`reasonable probability' of a different result." *Ante*, at 15 (quoting *United States* v. *Bagley*, 473 U. S., at 682). To begin with the eyewitness testimony: Petitioner's basic theory at trial was that the State's four eyewitnesses happened to mistake Beanie, the real killer, for petitioner, the man whom Beanie was simultaneously trying to frame. Police officers testified to the jury, and petitioner has never disputed, that three of the four eyewitnesses (Territo, Smallwood, and Williams) were shown a photo lineup of six young men four days after the shooting and, without aid or duress, identified petitioner as the murderer; and that all of them, plus the fourth eyewitness, Kersh, reaffirmed their identifications at trial after petitioner and Beanie were made to stand side-by-side.

Territo, the first eyewitness called by the State, was waiting at a red light in a truck 30 or 40 yards from the Schwegmann's parking lot. He saw petitioner shoot Mrs. Dye, start her car, drive out onto the road and pull up just behind Territo's truck. When the light turned green petitioner pulled beside Territo and stopped while waiting to make a turn. Petitioner

looked Territo full in the face. Territo testified, "I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him." Tr. 13–14 (Dec. 6, 1984). Territo also testified that a detective had shown him a picture of Beanie and asked him if the picture "could have been the guy that did it. I told him no." *Id.*, at 24. The second eyewitness, Kersh, also saw petitioner shoot Mrs. Dye. When asked whether she got "a good look" at him as he drove away, she answered "yes." *Id.*, at 32. She also answered "yes" to the question whether she "got to see the side of his face," *id.*, at 31, and said that while petitioner was stopped she had driven to within reaching distance of the driver's-side door of Mrs. Dye's car and stopped there. *Id.*, at 34. The third eyewitness, Smallwood, testified that he saw petitioner shoot Mrs. Dye, walk to the car, and drive away. *Id.*, at 42. Petitioner drove slowly by, within a distance of 15 or 25 feet, *id.*, at 43–45, and Smallwood saw his face from the side. *Id.*, at 43. The fourth eyewitness, Williams, who had been working outside the parking lot, testified that "the gentleman came up the side of the car," struggled with Mrs. Dye, shot her, walked around to the driver's side of the car, and drove away. *Id.*, at 52. Williams not only "saw him before he shot her," *id.*, at 54, but watched petitioner drive slowly by "within less than ten feet." *Ibid.* When asked "[d]id you get an opportunity to look at him good?", Williams said, "I did." *Id.*, at 55.

The Court attempts to dispose of this direct, unqualified and consistent eyewitness testimony in two ways. First, by relying on a theory so implausible that it was apparently not suggested by petitioner's counsel until the oral-argument-*cum*–evidentiary-hearing held before us, perhaps because it is a theory that only the most removed appellate court could love. This theory is, that there is a reasonable probability that the jury would have changed its mind

about the eyewitness identification because the *Brady* material would have permitted the defense to argue that the eyewitnesses only got a good look at the killer when he was sitting in Mrs. Dye's car, and thus could identify him, not by his height and build, but *only by his face*. Never mind, for the moment, that this is factually false, since the *Brady* material showed that only *one* of the four eyewitnesses, Smallwood, did not see the killer outside the car.[3] And never mind, also, the dubious premise that the build of a man six feet tall (like petitioner) is indistinguishable, when seated behind the wheel, from that of a man less than five and one-half feet tall (like Beanie). To assert that unhesitant and categorical identification by four witnesses who viewed the killer, close-up and with the sun high in the sky, would not eliminate reasonable doubt if it were based *only* on *facial* characteristics, and not on height and build, is quite simply absurd. Facial features are *the primary means* by which human beings recognize one another. That is why police departments distribute "mug" shots of wanted felons, rather than Ivy-League-type posture pictures; it is

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[3]Smallwood and Williams were the only eyewitnesses whose testimony was affected by the *Brady* material, and Williams's was affected not because it showed he did not observe the killer standing up, but to the contrary because it showed that his estimates of height and weight based on that observation did not match Kyles. The other two witnesses did observe the killer in full. Territo testified that he saw the killer running up to Mrs. Dye before the struggle began, and that after the struggle he watched the killer bend down, stand back up, and then "stru[t]" over to the car. Tr. 12 (Dec. 6, 1984). Kersh too had a clear opportunity to observe the killer's body type; she testified that she saw the killer and Mrs. Dye arguing, and that she watched him walk around the back of the car after Mrs. Dye had fallen. *Id.*, at 29–30.

why bank robbers wear stockings over their faces instead of floor-length capes over their shoulders; it is why the Lone Ranger wears a mask instead of a poncho; and it is why a criminal defense lawyer who seeks to destroy an identifying witness by asking "You admit that you saw only the killer's face?" will be laughed out of the courtroom.

It would be different, of course, if there were evidence that Kyles's and Beanie's faces looked like twins, or at least bore an unusual degree of resemblance. That facial resemblance *would* explain why, if Beanie committed the crime, all four witnesses picked out Kyles at first (though not why they continued to pick him out when he and Beanie stood side-by-side in court), and would render their failure to observe the height and build of the killer relevant. But without evidence of facial similarity, the question "You admit that you saw only the killer's face?" draws no blood; it does not explain *any* witness's identification of petitioner as the killer. While the assumption of facial resemblance between Kyles and Beanie underlies all of the Court's repeated references to the partial concealment of the killer's body from view, see, *e.g., ante*, at 24, 25, n. 14, 26, 36, the Court never actually says that such resemblance exists. That is because there is not the slightest basis for such a statement in the record. *No* court has found that Kyles and Beanie bear any facial resemblance. In fact, quite the opposite: *every* federal and state court that has reviewed the record photographs, or seen the two men, has found that they do not resemble each other in any respect. See 5 F. 3d, at 813 ("Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face"); App. 181 (District Court opinion) ("The court examined all of the pictures used in the photographic line-up and compared Kyles' and Beanie's pictures; it finds that they did not resemble one another"); *id.*, at 36 (state trial court findings on

postconviction review) ("[Beanie] clearly and distinctly did *not resemble* the defendant in this case") (emphasis in original). The District Court's finding controls because it is not clearly erroneous, Fed. R. Civ. Proc. 52(a), and the state court's finding, because fairly supported by the record, must be presumed correct on habeas review. See 28 U. S. C. §2254(d).

The Court's second means of seeking to neutralize the impressive and unanimous eyewitness testimony uses the same "build-is-everything" theory to exaggerate the effect of the State's failure to disclose the contemporaneous statement of Henry Williams. That statement would assuredly have permitted a sharp cross-examination, since it contained estimations of height and weight that fit Beanie better than petitioner. *Ante*, at 22–23. But I think it is hyperbole to say that the statement would have "substantially reduced or destroyed" the value of Williams' testimony. *Id.*, at 22. Williams saw the murderer drive slowly by less than 10 feet away, Tr. 54, and unhesitatingly picked him out of the photo lineup. The jury might well choose to give greater credence to the simple fact of identification than to the difficult estimation of height and weight.

The Court spends considerable time, see *ante*, at 24–25, showing how Smallwood's testimony could have been discredited to such a degree as to "rais[e] a substantial implication that the prosecutor had coached him to give it." *Ibid.* Perhaps so, but that is all irrelevant to this appeal, since *all* of that impeaching material (except the "facial identification" point I have discussed above) was available to the defense independently of the *Brady* material. See *ante*, at 25, n. 14. In sum, the undisclosed statements, credited with everything they could possibly have provided to the defense, leave two prosecution witnesses (Territo and Kersh) totally untouched; one prosecution witness (Smallwood)

barely affected (he saw "only" the killer's face); and one prosecution witness (Williams) somewhat impaired (his description of the killer's height and weight did not match Kyles). We must keep all this in due perspective, remembering that the relevant question in the materiality inquiry is not how many points the defense could have scored off the prosecution witnesses, but whether it is reasonably probable that the new evidence would have caused the jury to accept the basic thesis that all four witnesses were mistaken. I think it plainly is not. *No* witness involved in the case ever identified *anyone* but petitioner as the murderer. Their views of the crime and the escaping criminal were obtained in bright daylight from close at hand; and their identifications were reaffirmed before the jury. After the side-by-side comparison between Beanie and Kyles, the jury heard Territo say that there was "[n]o doubt in my mind" that petitioner was the murderer, Tr. 378 (Dec. 7, 1984); heard Kersh say "I know it was him. . . . I seen his face and I know the color of his skin. I know it. I know it's him," *id.*, at 383; heard Smallwood say "I'm positive . . . [b]ecause that's the man who I seen kill that woman," *id.*, at 387; and heard Williams say "[n]o doubt in my mind." *id.*, at 391. With or without the *Brady* evidence, there could be no doubt in the mind of the jury either.

There remains the argument that is the major contribution of today's opinion to *Brady* litigation; with our endorsement, it will surely be trolled past appellate courts in all future failure-to-disclose cases. The Court argues that "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Ante*, at 26 (citing *Agurs* v. *United States*, 427 U. S., at 112–113, n. 21). It would be startling if we *had* "said [this] before," since it assumes irrational jury conduct. The weakening of one witness's testimony does not weaken the

unconnected testimony of another witness; and to entertain the possibility that the jury will give it such an effect is incompatible with the whole idea of a materiality standard, which presumes that the incriminating evidence that would have been destroyed by proper disclosure can be logically separated from the incriminating evidence that would have remained unaffected. In fact we have said nothing like what the Court suggests. The opinion's only authority for its theory, the cited footnote from *Agurs*, was appended to the proposition that "[a *Brady*] omission must be evaluated in the context of the entire record," 427 U. S., at 112. In accordance with that proposition, the footnote recited a hypothetical that shows how a witness's testimony could have been destroyed by withheld evidence *that contradicts the witness*.[4] That is worlds apart from having it destroyed by the corrosive effect of withheld evidence that impeaches (or, as here, merely weakens) *some other corroborating witness*.

The physical evidence confirms the immateriality of the nondisclosures. In a garbage bag outside petitioner's home the police found Mrs. Dye's purse

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[4]"`If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only a brief glimpse, the result might well be different.'" *Agurs*, 427 U. S., at 112, n. 21 (quoting Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 125 (1972)).

and other belongings. Inside his home they found, behind the kitchen stove, the .32 caliber revolver used to kill Mrs. Dye; hanging in a wardrobe, a home-made shoulder holster that was "a perfect fit" for the revolver, Tr. 74 (Dec. 6, 1984) (Detective Dillman); in a dresser drawer in the bedroom, two boxes of gun cartridges, one containing only .32 caliber rounds of the same brand found in the murder weapon, another containing .22, .32, and .38 caliber rounds; in a kitchen cabinet, eight empty Schwegmann's bags; and in a cupboard underneath that cabinet, one Schwegmann's bag containing 15 cans of pet food. Petitioner's account at trial was that Beanie planted the purse, gun and holster, that petitioner received the ammunition from Beanie as collateral for a loan, and that petitioner had bought the pet food the day of the murder. That account strains credulity to the breaking point.

The Court is correct that the *Brady* material would have supported the claim that Beanie planted Mrs. Dye's belongings in petitioner's garbage and (to a lesser degree) that Beanie planted the gun behind petitioner's stove. *Ante,* at 29–30. But we must see the whole story that petitioner presented to the jury. Petitioner would have it that Beanie did not plant the incriminating evidence until the day *after* he incited the police to search petitioner's home. Moreover, he succeeded in surreptitiously placing the gun behind the stove, and the matching shoulder holster in the wardrobe, while *at least 10 and as many as 19 people* were present in petitioner's small apartment.[5] Beanie, who was wearing blue jeans and either a "tank-top" shirt, Tr. 302 (Dec. 7, 1984) (Cathora Brown), or a short-sleeved shirt, *id.*, at 351 (peti-

[5]The estimates varied. See Tr. 269 (Dec. 7, 1984) (Johnny Burns) (18 or 19 people); *id.*, at 298 (Cathora Brown) (6 adults, 4 children); *id.*, at 326 (petitioner) ("about 16 . . . about 18 or 19"); *id.*, at 340 (petitioner) (13 people).

tioner), would have had to be concealing about his person not only the shoulder holster and the murder weapon, but also a different gun with tape wrapped around the barrel that he showed to petitioner. *Id.*, at 352. Only appellate judges could swallow such a tale. Petitioner's only supporting evidence was Johnny Burns's testimony that he saw Beanie stooping behind the stove, presumably to plant the gun. *Id.*, at 262–263. Burns's credibility on the stand can perhaps best be gauged by observing that the state judge who presided over petitioner's trial stated, in a postconviction proceeding, that "[I] ha[ve] chosen to totally disregard everything that [Burns] has said," App. 35. See also *id.*, at 165 (District Court opinion) ("Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of [Burns]"). Burns, by the way, who repeatedly stated at trial that Beanie was his "best friend," Tr. 279 (Dec. 7, 1984), has since been tried and convicted for killing Beanie. See *State* v. *Burnes*, 533 So.2d 1029 (La. App. 1988).[6]

Petitioner did not claim that the ammunition had been planted. The police found a .22 caliber rifle under petitioner's mattress and two boxes of ammunition, one containing .22, .32, and .38 caliber rounds, another containing only .32 caliber rounds of

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[6] The Court notes that "neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials." *Ante*, at 31–32, n. 19. That is obviously true. But it is just as obviously true that because we have no findings about Burns's credibility from the jury and no direct method of asking what they thought, the only way that *we* can assess the jury's appraisal of Burns's credibility is by asking (1) whether the state trial judge, who saw Burns's testimony along with the jury, thought it was credible; and (2) whether Burns was in fact credible—a question on which his later behavior towards his "best friend" is highly probative.

the same brand as those found loaded in the murder weapon. Petitioner's story was that Beanie gave him the rifle and the .32 caliber shells as security for a loan, but that he had taken the .22 caliber shells out of the box. Tr. 353, 355 (Dec. 7, 1984). Put aside that the latter detail was contradicted by the facts; but consider the inherent implausibility of Beanie's giving petitioner collateral in the form of a box containing *only* .32 shells, if it were true that petitioner did not own a .32 caliber gun. As the Fifth Circuit wrote, "[t]he more likely inference, apparently chosen by the jury, is that [petitioner] possessed .32 caliber ammunition because he possessed a .32 caliber firearm." 5 F. 3d, at 817.

We come to the evidence of the pet food, so mundane and yet so very damning. Petitioner's confused and changing explanations for the presence of 15 cans of pet food in a Schwegmann's bag under the sink must have fatally undermined his credibility before the jury. See App. 36 (trial judge finds that petitioner's "obvious lie" concerning the pet food "may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire defense in this case"). The Court disposes of the pet food evidence as follows:

> "The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id.*, at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he was right in describing the way it was priced at Schwegmann's market, where he commonly

shopped." *Ante*, at 33–34; see also *id.*, at 34, n. 20.

The full story is this. Mr. and Mrs. Dye owned two cats and a dog, Tr. 178 (Dec. 7, 1984), for which she regularly bought varying brands of pet food, several different brands at a time. *Id.*, at 179, 180. Found in Mrs. Dye's home after her murder were the brands Nine Lives, Kalkan and Puss n' Boots. *Id.*, at 180. Found in petitioner's home were eight cans of Nine Lives, four cans of Kalkan, and three cans of Cozy Kitten. *Id.*, at 188. Since we know that Mrs. Dye had been shopping that day and that the murderer made off with her goods, petitioner's possession of these items was powerful evidence that he was the murderer. Assuredly the jury drew that obvious inference. Pressed to explain why he just happened to buy *15 cans* of pet food that very day (keep in mind that petitioner was a very poor man, see *id.*, at 329, who supported a common-law wife, a mistress, and four children), petitioner gave the reason that "it was on sale." *Id.*, at 341. The State, however, introduced testimony from the Schwegmann's advertising director that the pet food was *not* on sale that day. *Id.*, at 395. The dissenting judge below tried to rehabilitate petitioner's testimony by interpreting the "on sale" claim as meaning "for sale," a reference to the pricing of the pet food (*e.g.*, "3 for 89 cents"), which petitioner claimed to have read on a shelf sign in the store. *Id.*, at 343. But unless petitioner was parodying Sir Edmund Hillary, "because it was *for* sale" would have been an irrational response to the question it was given in answer to: Why did you buy *so many* cans? In any event, the Schwegmann's employee also testified that store policy was not to put signs on the shelves at all. *Id.*, at 398–399. The sum of it is that petitioner, far from explaining the presence of the pet food, doubled the force of the State's evidence by perjuring himself before the jury, as the state trial

judge observed. See *supra*, at 19.[7]

I will not address the list of cars in the Schwegmann's parking lot and the receipt, found in the victim's car, that bore petitioner's fingerprints. These were collateral matters that provided little evidence of either guilt or innocence. The list of cars, which did not contain petitioner's automobile, would only have served to rebut the State's introduction of a photograph purporting to show petitioner's car in the parking lot; but petitioner does not contest that the list was not comprehensive, and that the photograph was taken about six hours before the list was compiled. See 5 F. 3d, at 816. Thus its rebuttal value would have been marginal at best. The receipt—although it showed that petitioner must at some point have been both in Schwegmann's and in the murdered woman's car—was as consistent with petitioner's story as with the State's. See *ante*, at 34.

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[7]I have charitably assumed that petitioner had a pet or pets in the first place, although the evidence tended to show the contrary. Petitioner claimed that he owned a dog or puppy, that his son had a cat, and that there were "seven or eight more cats around there." Tr. 325 (Dec. 7, 1984). The dog, according to petitioner, had been kept "in the country" for a month and half, and was brought back just the week before petitioner was arrested. *Id.*, at 337–338. Although petitioner claimed to have kept the dog tied up in a yard behind his house before it was taken to the country, *id.*, at 336–337, two *defense* witnesses contradicted this story. Donald Powell stated that he had not seen a dog at petitioner's home since at least six months before the trial, *id.*, at 254, while Cathora Brown said that although Pinky, petitioner's wife, sometimes fed stray pets, she had no dog tied up in the back yard. *Id.*, at 304–305. The police found no evidence of any kind that any pets lived in petitioner's home at or near the time of the murder. *Id.*, at 75.

The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that petitioner was guilty of murder, and that he lied about his guilt. The effect that the *Brady* materials would have had in chipping away at the edges of the State's case can only be called immaterial. For the same reasons I reject petitioner's claim that the *Brady* materials would have created a "residual doubt" sufficient to cause the sentencing jury to withhold capital punishment.

I respectfully dissent.