

Louisiana
Capital
Assistance
Center

A Non-Profit Law Office

June 6, 2012

Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *State of Louisiana v. Jonathan Boyer* No. 11-9953

Dear Sir or Madam,

Enclosed please find for filing in the above matter the original and copies of Mr. Boyer's *Reply in Support of Petition for Writ of Certiorari* and a certificate of service reflecting service on all relevant parties.

Thank you for your assistance in this matter.

Title:
SCOTUS - Reply in
Support of Cert

Sincerely,



Richard Bourke
Counsel for Petitioner

Enc.

CC: John DeRosier, Calcasieu Parish District Attorney (w/enc.)

No. 11-9953

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN BOYER, *Petitioner*,

v.

STATE OF LOUISIANA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
LOUISIANA THIRD CIRCUIT COURT OF APPEAL

REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

RICHARD BOURKE*
ADA A. PHLEGER
EMILY M. WASHINGTON
Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, LA 70113
Telephone: (504) 558-9867
Facsimile: (504) 558-0378

* *Counsel of Record*

TABLE OF CONTENTS

Table of Contents	i
Reply to Respondent’s Brief in Opposition.....	1
I. [Question 1] The state court found, and the State of Louisiana in its Brief in Opposition maintains, that delay caused by a failure to adequately fund the state’s indigent defense system does not count against the State for speedy trial purposes.	1
II. [Question 2] Respondent’s argument is unsupported by the record and fails to respond to the question presented.	3
A. Respondent fundamentally misconstrues the ruling of the court below. The writ decision did not disturb the trial court’s finding that the proposed evidence met the Daubert criteria of relevancy and reliability....	3
B. The writ decision of the Louisiana Third Circuit Court of Appeal was provided to this Court in Appendix C to the Petition for a Writ of Certiorari.	4
Conclusion.....	4

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

- I. [Question 1] The state court found, and the State of Louisiana in its Brief in Opposition maintains, that delay caused by a failure to adequately fund the state's indigent defense system does not count against the State for speedy trial purposes.

Respondent's Brief in Opposition confirms that the question presented is squarely raised in this case. In its opposition, Respondent has endorsed the position taken by the Louisiana courts: delay caused by the failure of the State of Louisiana to adequately fund indigent defense cannot count against the State in a speedy trial analysis. The court below found that the majority of the seven-year delay in this case was caused by a lack of funding, and that but-for the lack of funding the case would have proceeded in a timely fashion. The court nevertheless found that the delay caused by the lack of funding for indigent defense could not be attributed to the District Attorney's office and concluded that it could not be assessed against the State in a speedy trial analysis.

Lack of adequate funding is not a neutral cause of delay in a system like Louisiana's where the state has systematically underfunded indigent defense for decades, despite innumerable warnings and calls for reform. Respondent's position and the judgment of the state court squarely present to this Court the question of how delay caused by a failure to adequately fund indigent defense is to be assessed in a speedy trial analysis.

Respondent's Brief in Opposition attempts to confuse the issue with the mention of other factors immaterial to the constitutionally-relevant period of delay – the five years of delay occasioned by lack of funding. Respondent mentions in

passing the occurrence of Hurricanes Katrina and Rita, events which were not noted by the court below to have impacted or delayed Mr. Boyer's case. Respondent also notes that once Mr. Boyer was provided with counsel, five years after his arrest and indictment, numerous motions were filed and litigated on his behalf. The court below found that these motions "appeared to be legitimate motions and not filed for the purpose of delay of trial." Appendix B, Petition for a Writ of Certiorari at A-39, *Boyer v. State of Louisiana*, No. 11-9953 (April 19, 2012); *State v. Boyer*, 56 So.3d 1119, 1143 (La. App. 3 Cir. 2011).

Respondent's Brief in Opposition quarrels with the characterization that Mr. Boyer was without counsel for those five years, but in the same breath notes that during this period the State "could not ethically try" Mr. Boyer because of failure to fund counsel. See Respondent's Brief in Opposition at 8, *Boyer v. State of Louisiana*, No. 11-9953 (May 24, 2012). While it is true that an attorney, Thomas Lorenzi, was enrolled on Mr. Boyer's case throughout this five-year period, the Court below confirms that Mr. Lorenzi engaged exclusively in litigation to determine a source of funding. See Appendix B, Petition for a Writ of Certiorari at A-37, *Boyer v. State of Louisiana*, No. 11-9953 (April 19, 2012). No discovery was sought, no subpoenas were issued, no motions were filed, and no hearings were held on any issue beyond when, whether, and by whom Mr. Lorenzi would be paid.¹

This Court has made clear that the right to representation by counsel

¹ Minutes of Court Proceedings at I:1-154 (proceedings from June 6, 2002 to November 23, 2009). Citations to the appellate record in state court consist of a roman numeral indicating the volume number, followed by the page number in the record.

constitutes more than “mere formal appointment,”² and all parties and each court to review the case have acknowledged that Mr. Boyer’s case could not proceed without a resolution to the funding issue.

II. [Question 2] Respondent’s argument is unsupported by the record and fails to respond to the question presented.

A. *Respondent fundamentally misconstrues the ruling of the court below. The writ decision did not disturb the trial court’s finding that the proposed evidence met the Daubert criteria of relevancy and reliability.*

In the present case the trial court conducted an extensive *Daubert* hearing and explicitly found that the proffered evidence met the *Daubert* standard. This finding was not disturbed by the appellate court which ruled the evidence inadmissible despite the fact that it satisfied *Daubert*, holding that the evidence invaded the province of the jury.

It is for this reason that the question presented is whether a state may categorically ban *relevant and reliable* expert testimony as to the psychology of interrogations and false confessions.

Respondent’s sole argument in opposition is that the evidence excluded did not meet the *Daubert* standard. *See*, Respondent’s Brief in Opposition at 7, *Boyer v. State of Louisiana*, No. 11-9953 (May 24, 2012). This argument fails to respond to the question presented, is unsupported by the record, and was unsuccessful at each stage it was raised in the state court.

² *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (*citing Strickland v. Washington*, 466 U.S. 668, 685 (1984)) (“As we have made clear, the guarantee of counsel ‘cannot be satisfied by mere formal appointment.’ ‘That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.’”).

B. The writ decision of the Louisiana Third Circuit Court of Appeal was provided to this Court in Appendix C to the Petition for a Writ of Certiorari.

Contrary to Respondent's statement that Petitioner failed to provide this Court with the interlocutory writ decision of the Court of Appeal, this decision is found at Appendix C to the Petition for a Writ of Certiorari. Petitioner did not provide Respondent's writ application to the Court of Appeal as this would have been inconsistent with the Rules of this Court regarding the contents of applications for writs of certiorari. *See* SUP. CT. R. 14(i).

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issue.

Respectfully submitted,



RICHARD BOURKE, *Counsel of Record*
Attorney for Petitioner

Dated: June 6, 2012

No. 11-9953

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN BOYER, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

CERTIFICATE OF SERVICE FOR PETITIONER'S
REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD BOURKE*
ADA A. PHLEGER
EMILY M. WASHINGTON
Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, LA 70113
Telephone: (504) 558-9867
Facsimile: (504) 558-0378

* *Counsel of Record*

CERTIFICATE OF SERVICE

I, Richard Bourke, a member of the Bar of this Court, declare under penalty of perjury that on this date, June 6, 2012, as required by Supreme Court Rule 29, I have served the *Reply in Support of Petition for Writ of Certiorari* enclosed on each party to the above proceeding required to be served, or that party's counsel, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

John DeRosier, Calcasieu Parish District Attorney
Attn: Carla Sigler, Assistant District Attorney
1020 Ryan Street
Lake Charles, LA 70601

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 6, 2012.



RICHARD BOURKE, *Counsel of Record*
Attorney for Petitioner