No.

In the
Supreme Court of the United States

DANIEL T. IRISH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

GARY CLEMENTS
ELIZABETH BAKALE-WISE
CAPITAL POST-CONVICTION
PROJECT OF LOUISIANA
1340 Poydras Street,
Suite 1700
New Orleans, LA 70112
(504) 212-2110

FRANK H. PENSKI
Counsel of Record
DANIEL HURTEAU
ABIGAIL T. REARDON
HOLLY J. BARCROFT
NIXON PEABODY LLP
437 Madison Avenue
New York, NY 10022
(212) 940-3000

Attorneys for Petitioner

CAPITAL CASE

QUESTION PRESENTED

The issue presented on this appeal is one of unwarranted concealment, that is, whether Petitioner's conviction for capital murder can stand where he was convicted on the word of one witness who the lead prosecutor called a liar prior to the trial and where the prosecutor did not disclose that fact to the defense until years later during post-conviction proceedings.

In August 1999, Petitioner was convicted and sentenced to death based on the testimony of Audy Keith, a 16 year-old co-defendant who had pleaded guilty to second degree murder and agreed to testify against Petitioner so that he could avoid the death penalty. At trial, the prosecution argued vociferously that Keith was worthy of belief.

Ten years later, in November 2009, in the course of post-conviction proceedings, the lead prosecutor at Petitioner's trial voluntarily wrote to Petitioner's counsel disclosing that in November 1998, following an interview with Keith, he had written a letter to Louisiana State Penitentiary officials at their request. In that letter, the prosecutor stated that Keith had a "bad attitude," that Keith "had shown no remorse," and that Keith's assertion, that the prosecutor or his investigator at the interview physically threatened him, was a "blatant lie."

Where a prosecutor voluntarily discloses during post-conviction proceedings that he withheld impeachment evidence from the defense during the course of a capital case, and that he believed from his personal interaction with the key witness in the case

that he was a liar, Due Process requires that the conviction be vacated and a new trial ordered. *See Napue v. Illinois*, 360 U.S. 264 (1959). Petitioner submits that this issue of unwarranted concealment merits the attention of this Court.

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Daniel T. Irish, Plaintiff/Appellant

2. Burl Cain, Warden, Louisiana State Penitentiary

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES AND RULES

PETITION FOR A WRIT OF CERTIORARI

Daniel T. Irish respectfully petitions for a writ of certiorari to review the order of the Louisiana Supreme Court denying Petitioner's application for a supervisory writ of review in this case.

OPINIONS DELIVERED IN THE COURT BELOW

The ruling and judgment of the First Judicial District Court in Caddo Parish, Louisiana, was issued on February 6, 2013, denying Petitioner's application for post-conviction relief. App. A, *infra*, 1a-14a. The summary order of the Louisiana Supreme Court denying Petitioner's application for a supervisory writ of review, one justice dissenting without opinion, was issued on May 16, 2014 and is reported at *State v. Irish,* 2013-1483 (La. 05/16/14); 2014 La. LEXIS 1180. App. B, *infra*, 15a.

On August 27, 1999, Petitioner Daniel T. Irish was convicted of first degree murder in the Caddo Parish District Court. On August 28, 1999, he was sentenced to death. The Louisiana Supreme Court affirmed his conviction. *State v. Irish*, 807 So.2d 208 (2002). This Court denied certiorari. *Irish v. Louisiana*, 537 U.S. 846 (2002).

JURISDICTION

The Louisiana Supreme Court issued its denial of Petitioner's application for a supervisory writ of review on May 16, 2014 (App. B, *infra*, 15a), and that order became final upon expiration of the 14 day rehearing period. The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The case involves § 1 of the Fourteenth Amendment, which provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, §1.

ARGUMENT ON PETITION FOR CERTIORARI AND REASONS FOR GRANTING THE WRIT

STATEMENT

On December 30, 1996, at a mobile home in a trailer park outside Shreveport, Louisiana, Russell Rowland was shot twice, first with a shotgun and then with a rifle, and he died. App. C, 18a-19a; App. I, *infra*, 131a-132a. Rowland's truck was parked in front of the mobile home, and his wallet containing $141 was later found by police under a sofa cushion inside the mobile home. App. C, *infra*, 18a-19a.

Petitioner Daniel Irish, then 18 years old, and his 17-year-old girlfriend, Kristee Kline, were living in the mobile home. App. C, *infra*, 18a; App. I, *infra*, 124a. Audy Keith, who was then 16 years old, was also there, as he often was. App. I, *infra*, 124a. Petitioner, Kline, and Keith were interviewed by police. Petitioner said that Keith shot Rowland with both the shotgun and the rifle, but Keith claimed that Petitioner pulled the trigger on the shotgun as Keith held it, and then shot Rowland with the rifle.[1] App. C, *infra*, 75a-76a.

---

[1] Though Kline was in the mobile home at the time of the shooting, she did not witness it. App. C, *infra*, 19a.

A grand jury indicted both Petitioner and Keith with one count of first degree murder, and the State advised that it would seek the death penalty against each of them, which was then an option for a minor convicted of first degree murder under Louisiana law. Keith pleaded guilty to second degree murder to avoid the death penalty, and he was sentenced to life imprisonment without possibility of parole, to be served at the Louisiana State Penitentiary ("LSP") at Angola.[2] App. I, *infra*, 131a-132a.

Irish's case proceeded to trial. *Id*.

The State's lead prosecutor was Ross Owen, then of the Caddo Parish District Attorney's office. App. G, *infra*, 114a; App. I, *infra*, 124a, 139a. Keith was brought to court in the custody of two prosecution investigators, who sat in the front row while he testified.[3] App. I, *infra*, 146a.

---

[2] Audy Keith was then 17 years old. He was incarcerated at LSP having pled guilty to second degree murder and accepted a sentence of life without possibility of parole to avoid facing the death penalty. At his sentencing on January 27, 1999, Keith agreed to testify truthfully for the State at the trial of any co-defendants, including Daniel Irish.

[3] Before Keith began his testimony at the trial, Irish's defense attorney objected:

> Your Honor, I'd like to make a motion at this time. At this time, we would object to Don Ashley, investigator for the Caddo Parish sheriff's office, sitting on the front row of the courtroom today, particularly Mr. Ashley sitting directly in front of the witness, Mr. Audy Keith.
>
> This is the first instance that Mr. Ashley has been in the courtroom during this trial. We think it's just—it could have some bearing on Mr. Keith's testimony, and it concerns me greatly that the D.A.'s investigator is sitting there eyeballing him as he testifies. Mr. Keith is in

Keith testified that he shot Rowland first with the shotgun, because Petitioner forced him to do so, and then Irish fired the second shot with a rifle. App. C., *infra*, 75a-76a; App. I, *infra*, 147a. Keith also testified that Petitioner told him to search Rowland's truck and that Keith discovered Rowland's wallet there and gave it to Petitioner, who hid it in the sofa cushions. App. C, *infra*, 75a-76a. This testimony was markedly different than the statements Keith made when he was arrested and initially interviewed. *Id.* at 76a.

The only evidence the State offered to prove that Petitioner was a shooter or that Petitioner had taken the wallet and placed it under the sofa cushions was Keith's testimony. App. C., *infra*, 75a-77a; App. I, *infra*, 132a-133a, 136a. There was no physical or forensic evidence to prove that Petitioner had fired one or both of the guns or taken the wallet, and no other witness corroborated Keith's version of the shootings or explained how the wallet ended up in the sofa cushions. *Id.*

> custody, the D.A. investigator has access to him because he is in custody, and I just have a lot of concern for Mr. Keith having to set there and testify with Mr. Ashley, who is a big man and an extremely experienced investigator, having worked with the Shreveport Police Department, now working for the D.A.'s office, sitting there eyeballing him while he testifies. And we would ask that Mr. Ashley be removed, as well as Mr. McKinley, who is seated two people between them. But also on the front row, who is also an investigator with the District Attorney's Office.

Trial Tr. 3223-3224. The trial court overruled defense counsel's motion. *Id. See* App. I, *infra*, 146a.

At trial, the jury had to believe Keith to convict. *Id.* No forensic or other evidence was available to prove who fired the weapons which killed Russell Rowland or who committed the robbery. *Id.* Keith's credibility and the voluntary nature of his testimony were crucial issues at trial. *Id.* The defense focused its cross examination on the marked contradictions between Keith's statements to the police after arrest and his trial testimony, and also on his plea to second degree murder and agreement to testify so that he could avoid the death penalty. *Id.* The State argued that Keith was a credible witness who had no incentive to lie for the State and was testifying voluntarily, truthfully and should be believed. Petitioner was convicted because the jury believed Keith's testimony. App. C, *infra*, 75a-78a.

On direct appeal, the Louisiana Supreme Court affirmed the conviction, holding that the evidence was legally sufficient to prove Irish's "identity" as the shooter and the robber. App. C, *infra*, 75a-78a. The Louisiana Supreme Court recognized that "the only direct evidence of defendant's guilt is the trial testimony of Audy Keith, a co-perpetrator turned state's witness" (*Id.* at 75a) and that the "state is required to negate any reasonable probability" that Keith's identification of Petitioner as the shooter and the robbery was wrong. *Id.* at 76a. However, the Louisiana Supreme Court continued, "positive identification by only one witness is sufficient to support a conviction." *Id.* Thus, the Louisiana Supreme Court concluded, "the jury heard Keith's testimony implicating the defendant and evidently believed Keith's version [sic] events." *Id.*

This Court denied certiorari. *Irish,* 537 U.S. 846. State post-conviction proceedings followed.[4]

A. The November 2009 Disclosure of Former Prosecutor Ross Owen.

On November 16, 2009, the lead prosecutor at Petitioner's criminal trial, Ross Owen, sent an unsolicited letter to Petitioner's assigned post-conviction counsel, with a copy to Petitioner's defense counsel and the District Attorney's office. App. D, *infra*, 105a-107a (the "2009 Letter").[5] In the letter, Mr. Owen revealed that he and an unnamed investigator from the Caddo Parish District Attorney's office went to see Keith on November 18, 1998 at the Louisiana State Penitentiary in Angola, Louisiana shortly before Irish's trial was originally scheduled to commence. *Id.* at 106a. The trial

---

[4] The Capital Post-Conviction Project of Louisiana filed original and supplemental writs on Irish's behalf in the Louisiana Supreme Court on June 24, 2003 and February 4, 2004 respectively, asserting that the Caddo Parish District Court erred in summarily denying his *pro se* post-conviction petition and by not granting Irish sufficient time to file his supplemental state post-conviction petition with the assistance of appointed counsel. The Louisiana Supreme Court granted Irish's writ application on April 2, 2004. *See State ex rel. Irish v. Cain*, 2003-KP-1810 (La. 04/02/04); 869 So.2d 865.

With the assistance of the American Bar Association, the Capital Post-Conviction Project of Louisiana sought to recruit *pro bono* counsel who could actively represent Irish, and the firm of Nixon Peabody LLP agreed on August 12, 2009.

[5] On the basis of the information disclosed in the 2009 Letter, on December 29, 2009, Applicant filed a *Motion to Recuse the Office of the Caddo District Attorney*, which the district court denied on May 5, 2010. On June 3, 2010, Applicant filed a writ with the Louisiana Supreme Court, which was denied on June 16, 2010.

actually took place in August 1999. The 2009 Letter states:

> I was the lead assistant district attorney assigned during the trial of this matter. During the period prior to trial of Mr. Irish myself and an investigator from the district attorney's office went to see the co-defendant Audy Keith at Angola. Mr. Keith had entered a guilty plea in exchange for a life sentence and agreed to testify at any trial. Shortly after the visit began Mr. Keith became upset and we ended the meeting and returned home. Sometime thereafter I received a call from someone at Angola asking me to write a letter indicating what had happened during our meeting and I did so.

Id.

Based on the 2009 Letter, Petitioner moved to obtain disclosure of the LSP files at Angola that relate to the revealed meeting. The trial court granted the motion and ordered release of the LSP file. The file was produced. It contained a November 19, 1998 letter from Mr. Owen to a Captain Robert Jones at LSP. App. E, *infra*, 109a-110a. In pertinent part, this letter, written the day after the meeting on November 18, 1998, stated:

> He [Keith] has consistently had a bad attitude and has shown no remorse. He had a bad attitude again yesterday when we met with him and thus we cut the interview short at about 15 minutes before five. At no time did either Mr. McDonald [the D.A.'s investigator] or myself touch the prisoner in any way whatsoever and any statement to the contrary is a blatant lie.

Id. at 109. Thus, the lead prosecutor at Petitioner's trial stated in writing prior to Petitioner's trial that the sole witness able to identify Petitioner as the "shooter" had a "bad attitude," "has shown no remorse," and had told "a blatant lie." *Id*. Had this information been available to the defense for cross examination, the testimony of Keith would have been seriously undermined.

B. The LSP Investigative Report Confirms the Ross Owen Letter.

The LSP file also contained an investigative report (App. F, *infra*, 111a-112a) that states:

> On 11/18/98 at approximately 2015 L. Captain Robert Jones, was contacted by Lieutenant Carlos Rabb and informed of allegations of abuse filed by inmate Andy Keith 393128. Inmate Keith alleges that during an interview with Assistant District Attorney Ross S. Owen and Investigator Ricky McDonald in the Main Prison Court Room, that he (Keith) attempted to break off the interview by walking out of the court room when Mr. McDonald struck him (Keith) in the left arm and grabbed him by his shirt slamming him (Keith) against the wall. Inmate Keith accused Mr. McDonald of causing the bruise on his (Keith's) left arm, located approx. mid-way between his shoulder and elbow. Inmate Keith reported the alleged confrontation to Lieutenant Jimmy Smith at Camp D. Eagle. Lt. Smith sent inmate Keith to the R.E. Barrows Treatment Center for examination. Upon his arrival the R.E.B.T.C. inmate Keith was examined by Doctor Robert Barnes. Doctor Barnes' examination revealed no injuries. The

> examination did show a bruise on the left arm of inmate Keith. Doctor Barnes did say this bruise did not appear to be a recent injury.
>
> Assistant District Attorney Owen was contacted on 11/19/98 concerning the allegations made by inmate Keith. Mr. Owen explained inmate Keith's hostility toward his office over him (Keith) receiving a life sentence. During the interview of inmate Keith on 11/18/98 inmate Keith also expressed his extreme dislike of Mr. McDonald and Mr. Owen. It has been concluded from the interview of inmate Keith, Assistant District Attorney Owen, and Doctor Robert Barnes findings [sic] no truth can be found to substantiate his claims. No further action is being taken in this matter.

Id. In short, Investigative Services at LSP concluded that there was "no truth" to allegations made by Keith that he was struck and grabbed by D.A. Investigator McDonald when he wanted to break off an interview with McDonald and prosecutor Ross Owen. *Id.* None of these documents were disclosed to the defense prior to trial or anytime thereafter for a period of 11 years.

Fairly viewed, the documents produced by the State showed that Keith had complained about physical mistreatment at the hands of a District Attorney investigator in the presence of the prosecutor when he refused to testify against Irish and that the prosecutor and the Angola Prison authorities believed Keith's complaint was a lie. This undisclosed information permits at least one of three conclusions: (1) the State had undisclosed, and fundamental, doubts about Keith's credibility and

the voluntary nature of his testimony, and nonetheless withheld this information from the defense meanwhile arguing that Keith was being truthful, had no incentive to lie, and should be believed so that Petitioner's conviction could be secured; (2) Keith actually was not a liar, and his complaints about State intimidation at Angola to coerce favorable testimony so that Petitioner would be convicted were true; or (3) Keith believed that he was in physical danger if he did not testify as the State wanted, even if it was untrue that he was physically assaulted, as he had claimed. In any case, the failure to disclose the conclusions of the LSP authorities and the trial prosecutor deprived the defense of an opportunity to cross-examine Keith at trial on these issues, which manifestly cast grave doubt on the testimony Keith offered and thus on the fundamental evidence supporting Petitioner's conviction. It was for the trial jury to hear and determine the truth of Keith's testimony in light of all the known evidence including that the lead prosecutor and prison authorities believed Keith lied about events which had occurred prior to the trial.

C. Late Disclosure of Known Documents Does Not Effect a Cure.

The prosecution's argument that the late disclosure of the information in the LSP file somehow cured the wrong of withholding it all these years makes a mockery of justice.[6] In its brief to the

---

[6] In the post-conviction proceedings, former Assistant District Attorney Ross Owen provided an affidavit, dated May 2010, which states that he was lead prosecutor at Petitioner's capital trial, that he wrote the 2009 Letter, that he monitored the status of Petitioner's case over the years, that he had doubts whether the November 19, 1998 letter to the Angola officials was in the files of the District Attorney (notably his wife was employed in that office as an Assistant District Attorney), that he wrote the 2009 Letter to advise everyone about the letter he had written to the Angola officials about the visit with Keith and the investigator, and that he did not recall sending copies of that 1998 letter to anyone, nor did he keep a copy himself. App. G, *infra,* 113a-115a. It is obvious that Mr. Owen wanted the incident with Keith disclosed, because he believed it was material and relevant to the process by which Petitioner was convicted and sentenced to death. For this reason alone, the relevance and materiality of this late disclosure is unquestionable.

Keith also provided an affidavit in the post-conviction proceedings in which he stated, in essence, that the assertions that he made during the interview with former Assistant District Attorney Owen and the investigator were true. App.H, *infra*, 117a-118a. In particular, Keith states that when he told Mr. Owen that he would not testify against Petitioner, the D.A.'s investigator who was there "copped an attitude" with him and "I felt threatened and worried about what would happen to me if I did not testify against [Petitioner] Danny Irish at his trial." *Id*. Thus, whether or not Keith's affidavit is true, had the incident at the LSP been disclosed, Keith's credibility as the sole witness against Petitioner would have been presented to the jury for consideration, and in a case where the co-conspirator is the sole witness, this surely would have affected the jury's assessment of the credibility of Keith.

Caddo Parish District Court, the State attempted to rationalize the 2009 Letter:

> The fact that [the lead prosecutor] tendered the [2009 Letter] voluntarily to defense counsel shows his candor and honesty toward this Court and all counsel. It is clear from the tone of the letter that his only concern was a fair judicial determination of petition's claims.

Petitioner submits that he was entitled to "candor and honesty" and a "fair judicial determination" at all times, not just in post-conviction proceedings.

In his post-conviction petition for relief, Petitioner made a specific point of raising the issue of the prosecution's late disclosure of documents located at LSP. App. I, *infra,* 138a-150a. He asserted that the failure was a violation of his Constitutional Rights citing *Brady*, *Agurs*, *Giglio* and other cases.

Further, in the post-conviction proceedings, Petitioner's two trial counsel submitted affirmations. Mr. Glassell, the lead defense counsel, stated that his notes of an interview with Keith in January of 1999 showed that Keith told him of an incident at Angola and accused D.A. Investigator Ricky McDonald of hitting him in the presence of Mr. Owen. However, Mr. Glassell did not recall Mr. Owen informing him about writing a letter to LSP or an investigative report involving Mr. Owen, an investigator, and Keith. He did not recall being shown or given a copy of the investigative report, and further, having now seen the letter and report, he had no memory of the documents. Likewise, Michelle Andrepont, co-trial counsel for Petitioner, who cross-examined Keith, averred that she did not recall Mr. Owen informing her about the November 19, 1998 letter or the investigative report, nor did she have or recall seeing a copy of either document.

In denying post-conviction relief, the Caddo Parish District Court merely stated its conclusory determinations that it did "not find a *Brady* violation" and that "the evidence in this case does *not* create a reasonable doubt as to petitioner's guilt." App. A, *infra*, 2a. This statement of the standard for decision under *Brady* is less than accurate. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), teaches that "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," a Due Process violation occurs. Likewise, *United States v. Agurs*, 427 U.S. 97, 107 (1976), states that an omission which "results in the denial of the defendant's right to a fair trial" requires that a defendant be afforded relief.

Petitioner was denied Due Process and a fair trial. It cannot be divined how Keith would have testified or how the jury would have judged him had he been confronted with the report of the incident at LSP and the investigative file during his cross-examination at Petitioner's trial. Keith could have admitted that the incident took place, as he explained in his affidavit in post-conviction proceedings. App. H, *infra*, 117a-118a. Alternatively, Keith could have denied that there was any intimidation or threatening conduct by the State that day, and thereby admitted to making a false claim. Or Keith could have said that he was fearful of what was going to happen to him if he did not testify as the prosecution desired, no matter what really happened at the LSP in the November 18, 1998 meeting. The only logical conclusion is that whatever testimony Keith gave would have substantially, if not drastically, influenced the jury's view of his testimony, and

hence the sole basis for Petitioner's capital murder conviction.

REASONS FOR GRANTING THE WRIT

Like *Napue v. Illinois*, 360 U.S. 264 (1959) and its progeny, this case presents the Court with the opportunity to correct an egregious error involving the right to Due Process, and in so doing, provide guidance to lower courts and prosecutors concerning what constitutes unwarranted concealment. In the determination under review, the Louisiana Supreme Court, one justice dissenting, refused to review the Caddo Parish District Court's refusal to order a new trial even though the prosecutor labeled the sole witness at trial a "liar" prior to trial but did not disclose that fact to those who represented Petitioner at trial. Where the trial prosecutor himself has plainly recognized that justice was not served, albeit some 11 years after the fact, it is most appropriate that review be granted. As *Banks v. Dretke*, 540 U.S. 668, 696 (2004) recognized, "unwarranted concealment should attract no judicial approbation." Here, where a trial prosecutor has taken steps to encourage post-conviction counsel to raise what he must believe was substantial error, this Court should grant review and provide a level of guidance for courts addressing such issues. This is all the more true here, because this is a capital case.

There is, Petitioner submits, far more than a reasonable probability that "the result of the proceeding would have been different," *Kyles*, 514 U.S. at 434, if in fact the lead prosecutor had been honest, candid and intent on a fair judicial determination of Petitioner's case—when it was being tried, and not just many years later. The

disclosure of the investigative file and the facts it contained, and cross-examination of Keith based on that file and those facts, would have further undermined the credibility of an already shaky teenaged witness, whose testimony was the beginning and end of the prosecution's case.

It is plain that the Louisiana courts, and arguably all courts, require additional guidance that a late arriving prosecution suggestion of error necessitates judicial exploration of the legal issues raised. A determination of this Court based on the facts of this case would likely operate to effect a cure.[7]

---

[7] Under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the State violates Due Process whenever it withholds "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." 373 U.S. at 87. Evidence is "material" under *Brady* if there is a reasonable probability that the evidence would have led to a different result or resulted in an unfair trial. *United States v. Agurs*, 427 U.S. 97, 107 (1976) (stating that a *Brady* violation occurs not when the omitted evidence would have led to an acquittal, but when the "omission . . . result[s] in the denial of the defendant's right to a fair trial"). A "reasonable probability" of a different result is shown "when the Government's evidentiary suppression undermines confidence in the outcome" of the proceeding. *Id.* We note that the trial court here applied an incorrect standard when deciding to deny Irish's *Brady* claims, and its decision was contrary to well-established federal law as set forth clearly by this Court in its case law on the suppression of evidence. This is not a typical *Brady* case, however, but depends instead on the fundamental precept that there is a deprivation of Due Process whenever "the truth-seeking function of the trial process" is corrupted. *United States v. Agurs,* 427 U.S. 97, 104, *supra*. This case is therefore analyzed here under the Court's clear precedents beginning with *Mooney v. Holohan*, 294 U.S. 103 (1935) and continuing with *Napue* and *Giglio v. U.S.*, 405 U.S. 150 (1972).

A. When a Prosecutor Raises the Issue that Justice Was Not Served, Due Process Requires a New Trial.

Fundamental fairness is a hallmark of justice in this country and is based on the Due Process Clause of the Fourteenth Amendment. A seminal case in point is *Napue v. Illinois*, 360 U.S. 264, *supra*. There, as here, the principal witness for the prosecution was an accomplice who was effectively serving a life sentence for the same murder. He testified that he had received no promise of consideration in exchange for his testimony at trial. However, the Assistant State's Attorney had promised the witness consideration, namely a recommendation for a reduction in the sentence "and, if possible, effectuated." *Id*. at 267. In his post-conviction petition, Napue, who had learned of the promise, alleged that the principal witness against him had lied and that the Assistant State's Attorney who tried the case knew the testimony was false. This Court granted certiorari and reversed Napue's conviction, noting the longstanding precept that a conviction based on false evidence known to be false by the State cannot stand; it was likewise true that a conviction must be overturned where the State allows false evidence to go uncorrected, even though the State did not solicit the false evidence. *Id*. at 268. Further, this Court reasoned that the principle that the State may not use false evidence does not end because the false testimony goes only to the credibility of the witness. Quoting a state court decision, the Court pointed out that "[a] lie is a lie, no matter what its subject . . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was

the same, preventing as it did, a trial that could in any real sense be fair." *Id*. at 269-70.

These same legal principles apply to Petitioner's case. The lead prosecutor knew that he himself had concluded, and an LSP investigative report had agreed, that Keith, then 17 years old, had alleged prior to trial that the District Attorney's investigator had threatened Keith when he indicated that he was unwilling to testify against Petitioner and that the prosecutor believed that Keith's allegations of this threat were a lie. In summation at trial, the prosecution argued that the jury should believe Keith's trial testimony because he had no motive to lie. However, the State made that argument knowing full well that Keith did have a motive to lie, namely fear that physical harm would befall him if his testimony did not support the prosecution. Because the prosecutor himself had been a witness to the incident and had himself accused Keith of a blatant lie, it defies Due Process and fundamental fairness for the prosecutor to have failed to disclose those known facts to the jury. It ill-behooves justice for the prosecution to argue to the jury on the one hand that a witness should be believed, while on the other asserting to prison authorities that he is a liar (and to withhold from the jury and the defense the full truth of the conflicting positions).

The prosecution itself argued in the post-conviction proceedings below that the "tendering of the [2009 Letter] to post-conviction defense counsel shows [the lead prosecutor's] candor or honesty" and "concern for the fair judicial determination of Petitioner's claims." However, the prosecution did not say where that candor, honesty, and concern were at or prior to the trial. *Napue* instructs that where falsity and lack

of candor by the prosecution mark a trial result, there must be a reversal.

B. *Napue* and *Giglio* are Founded on Solid Due Process Footings.

This case presents the Court with an opportunity to reaffirm the fundamental principles which underlie *Napue* and *Giglio v. U.S.*, 405 U.S. 150, *supra*, which closely follows *Napue*. This case focuses on the special role played by the prosecutor in the search for truth in criminal trials. *Berger v. United States,* 295 U.S. 78, 88 (1935). Prosecutors should not engage in dishonest conduct or unwarranted concealment. *Kyles*, 514 U.S. at 440. Due Process requires vigilance that Constitutional rights are not eroded by a casual concern about, or disdain for, disclosures that go to the fairness of a proceeding. The cited Due Process cases draw their focus from the requirement that fair disclosures be made by prosecutors at the appropriate time, for an untimely disclosure is no disclosure at all. This case, and those like it, can be distinguished from those cases where a prosecutor's files are combed after a trial in an effort to find evidence that might possibly have been useful to the defense but would have been unlikely to change the result.

As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, *supra*, this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence was incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue*, this Court said that "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it

appears." 360 U.S. at 269. Thereafter, the *Brady* Court held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue*, 360 U.S. at 269. The Court does not, however, automatically require a new trial. A finding of materiality of the evidence is essential. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Id*. at 271.

What this Court said in *Giglio* applies here:

> The Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

405 U.S. at 153-55. The same can be said of Keith's testimony against Petitioner. As the Louisiana Supreme Court recognized, without Keith's testimony, there would have been no conviction. App. C, *infra*, 75a-78a. Keith's unreliability was a key issue at trial, serious questions going to his honesty were relevant, and the jury was entitled to a full exploration of Keith's candor (or lack thereof). Under authority of *Giglio*, there must be a reversal here.

In fact, the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony. In *Mooney*, this Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of Due Process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Id*. at 112. The Court reaffirmed this principle in broader terms in *Pyle*, and *Napue* and *Giglio* are additional exemplars.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. *See Agurs*, 427 U.S. at 108. "The prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id*. at 108. This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88. It will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. *See Rose v. Clark*, 478 U.S. 570 (1986); *Estes v. Texas*, 381 U.S. 532, 540 (1965); *United States v. Leon*, 468 U.S. 897, 900-01 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'" (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)). The prudence of

the careful prosecutor should not therefore be discouraged. *Kyles*, 514 U.S. at 439-440.

In short, this case presents a crisp issue for the Court to consider. The prosecutor had the opportunity to disclose at or prior to trial what he had observed about the key witness in the case and the conclusions that he had reached about him and set forth in writing. These were matters that must have gnawed at him over the years as he did not make a clean breast of what he knew until 10 years afterward when he became aware through his monitoring of the post-conviction process that what he knew were highly significant non-disclosures had not come to light. At that juncture, he volunteered information designed to elicit the truth that had remained hidden. Petitioner submits that Due Process and the obligations incumbent on prosecutors to seek justice, and not to deceive the jury or the court, merits the attention of this Court and asks that the Court grant his petition to be heard.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted and the case set for briefing and oral argument.

Respectfully submitted,

GARY CLEMENTS
ELIZABETH BAKALE-WISE
CAPITAL POST-CONVICTION
PROJECT OF LOUISIANA
1340 Poydras Street,
Suite 1700
New Orleans, LA 70112
(504) 212-2110

FRANK H. PENSKI
Counsel of Record
DANIEL HURTEAU
ABIGAIL T. REARDON
HOLLY J. BARCROFT
NIXON PEABODY LLP
437 Madison Avenue
New York, NY 10022
(212) 940-3000

Attorneys for Petitioner

APPENDIX

APPENDIX TABLE OF CONTENTS

Appendix A — Ruling of the First Judicial District Court, Caddo Parish, Louisiana, Filed February 6, 2013

STATE OF LOUISIANA

VERSUS

DANIEL T. IRISH

NUMBER 186,209

SECTION 4

FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

RULING

These matters come before this court regarding the remaining claims for post-conviction relief in this First Degree Murder case wherein the jury reached a unanimous sentence of death. Based on the remaining issues herein in this case, this court believes and finds that it can rule on the remaining issues without an evidentiary hearing as to said claims.

NOTE: By way of background, on May l, 2012, this court made and filed rulings regarding a set of other post-conviction relief claims which addressed another set of claims in the instant case herein. This court based those earlier rulings on all of the filings on the respective issues in the other category, based on all of the filings on those claims.

Thus, this court make the following rulings on the claims as follows:

Claim I: Alternates may have participated in premature deliberations

Based on this court's review of the entire record and all filings by both petitioner and the stated on this issue, the Court finds that any intra-jury communications in this case do not rise to the level of misconduct on the part of the jury. If there were any communications among the jurors, although in violation of court orders, said communications do not amount to "outside influences" or "extraneous" information. *State v. Home*, 28,327 (La. App. 2 Cir. 8/21/96); 679 So.2d 953, 958 writ denied, 96-2345 (La. 2/21/97); 688 So.2d 521; see also *State v. Weaver*, 05-169 (La. App. 5 Cir. 11/29/05); 917 So.2d 600, 613, writ denied, 2006-0695 (La. 12/15/06); 944 So.2d 1277.

Thus, this claim is hereby **DENIED**.

Claim II: Prosecution violated *Brady* by failing to produce Impeachment Evidence on Audy Wayne Keith, Jr.

Based on the context of the entire record, this court rules that the evidence in this case does not create a reasonable doubt as to the petitioner's guilt.

In the instant case, this court does not find a *Brady* violation on the part of the state; further finds that the materiality, credibility of the evidence nor the presence or absence of suppression create(s) a reasonable doubt as to petitioner's guilty. *Brady v. Marilyn*, 373 U.S. 83 (1963).

Thus, this claim is **DENIED**.

Claim III: Ineffective Assistance of Counsel for Failure to Investigate & Present Complete & Accurate Social History

Based on the review of the entire record by this court, the petitioner does not show that trial counsel's performance was deficient nor that it prejudiced the petitioner in accordance with *Strickland v. Washington*, 466 U.S. 688 (1984).

Thus, this claim is **DENIED**.

Claim IV: Prosecution violated *Brady* by failing to produce Impeachment Evidence on Jason Guin

In the instant case, this court based on the entire record does not find that there was suppression of subject matter requested for which there was a substantial basis for claiming that materiality existed (here prior criminal history, mental health issues and inconsistent statements of a witness). This judge finds no such materiality exists. Further, this court finds that even if the state violated *Brady* by failing to produce impeachment evidence on Jason Guin, there is no reasonable doubt as to the defendant's guilt in the context of the entire record. *State v. Harvey*, 358 So.2d 1224, 1233 (La. 1978) and its progeny.

Thus, this claim is **DENIED**.

Claim V: Ineffective Assistance of Counsel for Failure to Investigate Criminal History of Jason Guin

Regarding petitioner's urging a claim of ineffective assistance of counsel for failure to investigate the criminal history of Jason Guin, this claim has no merit. Petitioner fails to show that trial counsel's performance was deficient and that the deficiency prejudiced the petitioner as required in *Strickland v. Washington*, 466 U.S. 688 (1984). This court bases this ruling on the entire record of this case.

This claim is **DENIED**.

Claim VI: Ineffective Assistance of Counsel because the Penalty Phase Expert did not comply with Psychological Standards and Failed to Present Mitigating Evidence

Based on a review of the entire record of this case to include all filings by the petitioner and the state post-conviction, this court finds that petitioner failed to show that his trial counsel's performance was deficient, and that the alleged deficiency prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. 688 (1984). This court finds that the penalty phase expert did comply with psychological standards as required and presented the requisite mitigation evidence.

Thus, this claim is **DENIED**.

Claim VII(C): Prosecution violated *Brady* by failing to produce Penalty Phase Impeachment Evidence

Based on a review by this court of the entire record, this court does not find that the State violated *Brady* by failing to produce penalty phase impeachment evidence (here mental health evaluations of witness). There has been no creation of reasonable doubt as to the petitioner's guilt. *State v. Harvey*, 358 So.2d 1224, 1233 (La. 1978) and its progeny.

Thus, this claim is **DENIED**.

Claim VIII: Ineffective Assistance of Counsel for Failure to See Change of Venue

This court does not find that there was ineffective assistance of counsel by petitioner's trial counsel for not seeking a change of venue, based on the entire record.

In accordance with applicable law regarding change of venue, this judge finds no merit to this claim in this case.

Thus, this claim is **DENIED**.

Claim IX(B): Ineffective Assistance of Counsel for Failure to Quash Petit Venire (pleaded in the alternative)

Petitioner urges, in the alternative, ineffective assistance of counsel claim regarding failure to quash the petit jury venire. However, based on the record in this case, this court finds that the petitioner can not and does not show that trial counsel's performance was deficient, and that the

deficiency prejudiced the petitioner. *Strickland v. Washington,* 466 U.S. 688 (1984).

This court **DENIES** this claim herein.

Claim X(E): Ineffective Assistance of Counsel for Failure to Raise *Batson* Issue on Race Based Challenges (pleaded in the alternative)

Regarding *Batson*, as pleaded by petitioner in the alternative, this court does not find any ineffective assistance of counsel. This petitioner fails to show that trial counsel's performance was deficient and that the deficiency prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. 688 (1984), *Batson v. Kentucky*, 476 U.S. 79 (1986) and their progeny.

This court **DENIES** this claim.

Claim XI(D): Ineffective Assistance of Counsel for Failure to Raise *J.E.B.* Issue on Gender Based Challenges (pleaded in the alternative)

Based on the entire record, this court finds no ineffective assistance of counsel as alleged regarding the lack of raising *J.E.B. v. Alabama* issues on gender based challenges by trial counsel, as pleaded in the alternative. Based on the number of women on the jury, this court finds that this claim is without merit.

Thus, this claim is **DENIED** herein.

Claim XIII: Ineffective Assistance of Counsel for Failure to Adequately Question Jurors about Death Penalty & Failure to Object to Challenges for Cause

This court finds through its review of the entire record, that trial counsel did not fail to adequately question prospective jurors regarding the death penalty. Further, this court does not find that trial counsel failed to object to challenges for cause in accordance with applicable law. Thus no ineffective assistance of counsel existed regarding these issues. Petitioner fails to show that trial counsel's performance was deficient and that any alleged deficiency prejudiced the petitioner. *Strickland v. Washington*, 466 U.S. 688 (1984).

This court finds that defense counsel thoroughly questioned the prospective jurors regarding the death penalty and objected to challenges for cause regarding same in accordance with applicable law.

Thus, this claim is **DENIED**.

Claim XIV(B): Ineffective Assistance of Counsel for Failure to Strike Jurors Who Refused to Consider Certain Mitigating Factors (pleaded in the alternative)

In this claim, petitioner alleges that trial counsel's performance was deficient and that the deficiency prejudiced the petitioner.

However, this court finds no such ineffective assistance of counsel based on the record, on the issue of jurors strikes based on their consideration of certain mitigating factors based on applicable law. Contrary to what is urged by petitioner, this court finds that the prospective jurors who expressed that

they would not consider certain mitigatory factors, were ultimately struck from the jury.

This claim is **DENIED**.

Claim XV: Ineffective Assistance of Counsel for Failure to Object to State's Misstatements of the Law during Voir Dire

Based on the entire record herein, this court finds that the defense counsel did not fail to object to state's misstatements of law during voir dire. No such ineffective assistance of counsel is detected by this court. No deficiency of performance by counsel and no prejudice to petitioner is found. *Strickland v. Washington*, 466 U.S. 688 (1984).

This claim is therefore **DENIED**.

Claim XVII: Ineffective Assistance of Counsel for Failure to Object to "Egregious Prosecutorial Misconduct" in the Penalty Phase

This court finds no egregious prosecutorial misconduct committed by the state during the penalty phase in this case based on the record. Thus, there was no ineffective assistance of counsel for failure to object to something that does not exist.

This claim is **DENIED**.

Claim XVIII (E): Ineffective Assistance of Counsel for Failure to Object to "Egregious Prosecutorial Misconduct" in the Penalty Phase (pleaded in the alternative)

For the same reasons as stated in the ruling regarding the previous claim, this court found no egregious prosecutorial misconduct by state. Therefore, no ineffective assistance of counsel for failure to object to misconduct that did not occur or exist.

This claim is **DENIED** based on the evidence in the entire record.

Claim XX - Ineffective Assistance of Counsel for Failure to Object to Defendant's Appearance Wearing a Leg Brace

Based on the record, this court finds no ineffective assistance of counsel as urged by petitioner regarding objection to or lack of objection to defendant by wearing a leg brace. There was not deficiency in trial counsel's performance and no prejudice to petitioner.

This claim is hereby **DENIED**.

Claim XXII: Cumulative Error Requires Reversal of Conviction and Sentence

Based on this court's review of the entire record, this claim is **DENIED**.

The conviction and sentence have already been upheld on appeal, and there is no indication or evidence that an injustice is being done to the defendant or that the ends of justice would be served by reversing defendant/petitioner's conviction and sentence. This court finds no such cumulative error.

State v. Irish, 00-2086 (1/15/02); 807 So.2d 208, *reh'g denied*, *cert. denied*, 53 7 U.S. 846 La.C.Cr. P. art. 851.

Thus, this claim is **DENIED**.

Claim XXIII: Cumulative IAC and *Brady* Issues Renders Trial Unfair

This court finds that there is no indication that an injustice is being done to the defendant or that the ends of justice would be served by reversal of his conviction and sentence in accordance with La.C.Cr. P. art. 851.

This claim is hereby **DENIED**.

Claim XXIX: Inadequate Appellate Review

Petitioner amended this claim to re-urge his position that in this case the state's proportionality review failed to protect against the arbitrary and capricious infliction of the death penalty, and that as a result this court should set it aside. This court, however, finds that this claim is repetitive as petitioner's sentence underwent proportionality review at the appellate level, where the proportionality was affirmed. La.C.Cr. P. art. 930.4.

Thus, this claim is **DENIED**.

2nd Supplemental I: Ineffective Assistance of Counsel for Failure to Investigate & Present Complete & Accurate Social History

As to petitioner's 2nd supplemental I claim regarding lack of investigation and presentation of social history, this court finds that the petitioner's trial counsel's performance was not deficient and further finds no prejudice to the petitioner. *Strickland v. Washington*, 466 U.S. 688 (1984).

This claim is **DENIED**.

2nd Supplemental II: Ineffective Assistance of Counsel for Failure to Investigate Co-Defendant, Audy Keith

This court has reviewed the record regarding a lack of investigation of co-defendant, Audy Keith, in its 2nd supplemental II claim.

This court finds no ineffective assistance of counsel that shows trial counsel's performance was deficient and that the deficiency prejudiced the petitioner. This court finds no merit in this claim.

Thus claim is **DENIED**.

STATE OF LOUISIANA

VERSUS

DANIEL T. IRISH

NUMBER 186,209

SECTION 4

FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

ORDER

Considering the foregoing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petitioner's post-conviction relief claims included herein are hereby DENIED as they are not supported by law or the evidence, and

FURTHER, as to each of the claims brought by the petitioner and responded to by the state, the Motion for Evidentiary Hearing as to all claims herein is **DENIED**. Said claims do not require said hearing based on this court's review of the entire record including all of post-conviction relief filings made by the petitioner and the state to date.

THUS DONE AND SIGNED in Shreveport, Caddo Parish, Louisiana on this Chambers on this 6th day of February, 2013.

/s/

RAMONA L. EMANUEL
DISTRICT JUDGE

DISTRIBUTION:

Atty. Gary P. Clements
Atty. Carol R. Camp
Atty. Kristin Traicoff
Capital Post-Conviction Project of Louisiana
1340 Poydras Street, Suite 1700
New Orleans, LA 70112
Phone: (504) 212-2110
Fax: (504) 212-2130

Atty. Frank H. Penski
Atty. Abigail T. Reardon
Nixon Peabody LLP
437 Madison Avenue
New York, NY 10022
Phone: (212) 940-3000
Fax: (212) 940-3111

Atty. Daniel J. Hurteau
Nixon Peabody LLP
677 Broadway, 10th Floor
Albany, NY 12207
Phone: (518) 427-2650
Fax: (518) 427-2666

Atty. Holly J. Kilibarda
Nixon Peabody, LLP
900 Elm Street
Manchester, NH 03101
Phone: (603)428-4085
Fax: 1-866-491-8958

Atty. Brady O'Callaghan
Appeals Division
Caddo Parish District Attorney's Office
501 Texas Street, 5th Floor
Shreveport, LA 71101
Phone: (318) 429-7618
Fax: (318) 841-4020

Appendix B — Order Denying Defendant's Application for Supervisory and/or Remedial Writs, Dated May 16, 2014

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2013-KP-1483

STATE OF LOUISIANA

VS.

DANIEL T. IRISH

IN RE: Irish, Daniel T.; – Defendant; Applying For Supervisory and/or Remedial Writs, Parish of Caddo, 1st Judicial District Court Div. 4, No. 186,209;

May 16, 2014

Denied.

MRC
BJJ
JPV
JTK
GGG
JDH

WEIMER, J., would grant.

Supreme Court of Louisiana
May 16, 2014

/s/
Deputy Clerk of Court
For the Court

Appendix C — Decision of the Supreme Court of Louisiana, Dated January 15, 2002

JAN 15 2002

SUPREME COURT OF LOUISIANA

No. 00-KA-2086

STATE OF LOUISIANA

v.

DANIEL T. IRISH

On Appeal from the First Judicial District Court,
Parish of Caddo,
Honorable Ramona L. Emanuel, Judge

VICTORY, J.*

On February 13, 1997, a Caddo Parish grand jury indicted the defendant, Daniel Irish, with one count of first degree murder in violation of La. R.S. 14:30. A jury found the defendant guilty as charged, and after a sentencing hearing, unanimously recommended a sentence of death based on the aggravating circumstance that the offender was engaged in the perpetration or attempted perpetration of an armed robbery. La.C.Cr.P. art. 905.4(A)(1). The defendant now appeals his conviction and sentence, raising 15 assignments of error.[1]

---

* Retired Judge Robert L. Lobrano, assigned as Associate Justice Pro Tempore, participating in this decision.

[1] Assignments of error not treated in this opinion are addressed in an unpublished appendix to this opinion.

FACTS

In December 1996, the then 18-year-old defendant and his 17-year-old girl friend, Kristee Kline, were living in a mobile home owned by Russ Rowland, a local building contractor. Because the defendant and Kline were unemployed, they had not paid their rent for two months and thus owed Rowland $500.00. In addition, they had numerous overdue bills and recently had their phone service disconnected. Faced with financial hardship, the defendant often talked about robbing and killing someone with a lot of money. Approximately three days before the instant offense, the defendant told Kline and friends Audy Keith and Jason Guin that he wanted to rob and kill Rowland. The defendant informed them that he planned to lure Rowland to the trailer, kill him, and dispose of the body in a nearby swamp. On the morning of December 30, 1996, the defendant went to Rowland's office and asked Rowland to come to the trailer to collect the overdue rent. Rowland arrived shortly thereafter, but the defendant did not follow through with his plan and instead told Rowland that he had misplaced his checkbook and asked Rowland to come back that afternoon. Later that day, while driving home from a local Wal-Mart store with Kline, Keith and Guin, the defendant reiterated his need for money and his intent to rob and kill Rowland. The defendant stopped at a convenience store and called Rowland's office from a pay phone, leaving a message with Rowland's secretary that he "had what Russ needs," and that if Rowland would come by the trailer he would "take care of it."

At approximately 3:00 p.m., Rowland arrived at the trailer and ascended the steps to the front door. When he approached the open door, Keith fired one

shot from the defendant's twelve-gauge shotgun, hitting Rowland in the abdomen. Rowland collapsed on the porch outside the front door and began screaming in pain. The defendant then took the shotgun from Keith and attempted to shoot Rowland again, but the gun malfunctioned and would not fire. The defendant then picked up his 30-30 rifle, pointed it at Rowland and, despite Rowland's repeated pleas that the defendant not shoot him, fired the rifle into Rowland's right eye, blowing away a large portion of his head. Thereafter, the defendant told Keith to search Rowland's truck for Rowland's wallet, which Keith found and turned over to the defendant. The defendant subsequently removed $141.00 from the wallet and hid the wallet and money under a couch cushion.

The defendant next asked Keith to help drag Rowland's body into the trailer, but Keith refused. Kline, who had hidden in the bedroom when Rowland approached the trailer, emerged and began cleaning up the blood on the carpet where the defendant had dragged Rowland's body down the hallway. Guin, who had seen Rowland's truck drive by and then heard two gunshots, came over to the trailer to see what had happened. Guin noticed that the front porch was wet and that there was a "big black mark like a trail" going down the hall. Guin also observed Kline on her knees scrubbing at the black mark. Guin asked where the defendant was and Keith pointed to the back of the trailer. Guin walked down the hall and saw Rowland's body on the floor. When the defendant asked Guin to help him move the body, Guin refused. The defendant then picked up the shotgun and began to load it. When the defendant turned toward Guin with the shotgun, Guin ran out the back door and into the wooded area

behind the trailer. Guin eventually went to a neighbor's house and called 911 to report the murder.

During this time, one of the defendant's neighbors called 911 to report that she had heard two gunshots coming from the west of her trailer and that one shot had hit her mobile home. She also reported that she saw someone searching Rowland's white pickup truck, which was parked in front of the defendant's trailer. Two deputies responded to the call and searched her trailer for a bullet hole. The deputies eventually walked over to the defendant's trailer and observed that the front porch had recently been washed with a nearby garden hose that was still running. Upon closer inspection, the deputies discovered shotgun wadding, blood, tissue, and bone fragments on the ground near the porch. While trying to determine whether the blood, tissue and bone fragments were of human origin, the deputies received information from headquarters of Guin's report of a homicide at the defendant's trailer. Sheriff's investigators soon arrived and entered the unlocked back door of the trailer to see if anyone inside was injured. Once inside, they discovered Rowland's body, and later his wallet and the $141.00 in cash hidden under the couch cushion. In addition, deputies discovered Rowland's receipt book which contained a receipt made out to the defendant in the amount of $500.00.

Immediately after the shooting, Keith left the trailer and went to a neighbor's house where he stayed until his parents delivered him to the authorities later that evening. In addition, the defendant and Kline left the trailer in Kline's car and drove to the office of a local bondsman, Steve

Dement, and then to Dement's house. The defendant informed Dement that there was a dead body in his trailer and Dement instructed the defendant to "go back and check your house out ... [because t]here may not be anybody there." While driving back to the trailer, the defendant was spotted by a sheriff's deputy and taken into custody. The defendant informed the deputy that Kline was still at Dement's house and deputies arrested her without incident. In their several statements, Kline and the defendant maintained that Keith shot Rowland with both the shotgun and the rifle, but Keith maintained that the defendant pulled the trigger of the shotgun as Keith held it and then shot Rowland with the rifle.

On February 13, 1997, a Caddo Parish grand jury separately indicted the defendant and Keith with one count of first degree murder in violation of La. R.S. 14:30. Before the defendant's trial, Keith pled guilty to second degree murder and was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Keith eventually turned state's witness and testified at the defendant's trial that he had indeed fired the first shot, but that the defendant forced him to do so at gunpoint, and that the defendant then shot Rowland in the head with the rifle. The jury found the defendant guilty of first degree murder. Kline pled guilty to accessory after the fact to first degree murder and received the maximum sentence of five years imprisonment at hard labor, with the sentence to run consecutively to a one year sentence she received as an accessory to burglary in an unrelated case.

At the sentencing hearing, the state called Rowland's 17-year-old daughter and 14-year-old son to testify briefly regarding victim impact evidence. The state also called one of Rowland's former tenants in an apparent attempt to introduce evidence of the victim's good character; the witness testified that when she and her husband fell behind on their rent Rowland "would work with us. He [Rowland] would get my husband jobs so we could get some money to pay [the rent]." In addition, the state called Kristee Kline, who described in detail the events of December 30th. The defense presented four witnesses at the sentencing phase, including the defendant's wife, Brandy Irish, who married the defendant five days before the trial began, his mother, his aunt, and a forensic psychologist. In mitigation, the defense focused on the defendant's troubled childhood, low IQ, and exposure to violence in the media. Following this testimony, the jury returned with a death recommendation based on the aggravating circumstance that the defendant was engaged in the perpetration or attempted perpetration of an armed robbery. La.C.Cr.P. art. 905.4(A)(1). The defendant now appeals his conviction and sentence to this Court urging 15 assignments of error.

GUILT PHASE ERRORS

ARGUMENT NO. 3

(Assignment of Error No. 3)

The defendant claims that the trial court erred in allowing an investigator qualified as an expert in crime scene reconstruction, blood splatter, and fingerprint analysis, to offer his opinion that the person who shot the victim in the head "intended" to

cause immediate death. During the direct examination of Lieutenant Mark Rogers, the state elicited the following testimony:

STATE: Lieutenant Rogers, based on your experience, your education, and the thousands of death scenes that you've investigated, and your review of all the evidence in this case, what purpose would there be for administering the second shot which was to this victim's head?

WITNESS: The first shot struck the upper abdomen and was what was termed a through-and-through wound. It entered, crossed the abdomen, and exited. The evidence, the direct physical evidence support the fact that for some period after that wound was inflicted he was still at least somewhat mobile, able to move his right arm, at any rate, and apply pressure to the bleeding area of that wound. His head was also inclined somewhat at the second shot. Given the fact that he had suffered a serious shotgun wound to the abdomen and he is inclined on the front porch and his head is inclined upwards at the time, the indications are that he's still alive at the time the second shot was fired. The second shot was fired at the head, the point of entry being the right eye. That indicates that the purpose of the second shot was to cause immediate death.

As a general matter, "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a qualified expert may testify in the form of an opinion. La.C.E. art. 702. Under La.C.E. art. 704, a trial judge may admit expert testimony which embraces an ultimate issue to be decided by the trier of fact," but the expert witness is not permitted to testify to the ultimate issue of a defendant's guilt. *State v. Deal,* 00-0434 (La. 11/27/01); *State v. Hamilton,* 92-1919, p. 13 (La. 9/5/96), 681 So.2d 1217, 1226 (question posed by prosecution at capital sentencing proceeding to state witness, a pathologist, as to whether murder victim's death was heinous, atrocious, and cruel, and witness's affirmative answer were both improper; doctor's response was not a medical opinion but a legal conclusion that was solely within the jury's province).

The first degree murder statute, La. R.S. 14:30, requires a finding of specific intent and, therefore, a defendant lacking this cannot be found guilty under the statute. Thus, the expert's opinion that the person who shot the victim "intended" to cause immediate death came "exceedingly close to testimony that [in his opinion] the accused was guilty of the crime charged." *State v. Deal, supra* at p. 7 (citing Pugh, Handbook on Louisiana Evidence Law, 1998, art. 704, p. 442). However, the testimony about which the present defendant complains was little more than the expert's assessment of the likely medical impact of a gunshot wound to the head, and not a legal assessment of the defendant's state of mind at the time of the shooting or an opinion of his guilt or innocence. Further, unlike *Deal,* the jury in

this case had to determine that the defendant was the shooter.

In any event, assuming any error occurred, it was harmless. *See Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993) ("The inquiry [for purposes of harmless-error analysis] is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.") Regardless of what words the expert chose to use in responding to the prosecutor's question, credit should be given to the common sense and fairmindedness of the jurors who understand that the likely purpose of shooting someone in the head at close range with a high-powered rifle is to cause immediate death. *State v. Green,* 446 So.2d 539, 541 (La. 1982) (recognizing "the common sense and fairmindedness of jurors and their ability to distinguish meaningful evidence from unwarranted comments"). The fact that the expert underscored this obvious result in no way prejudiced the defendant. *State v. Deal,* supra (expert's "testimony regarding the defendant's intent was merely stating the obvious"); (emphasis in original); *State v. Sanders,* 93-0001, p. 18 (La. 11/30/94), 648 So.2d 1272, 1286-1287; *State v. Code,* 627 So.2d 1373, 1384-1385 (La. 1993). This assignment of error lacks merit.

PENALTY PHASE ERRORS

ARGUMENT NO. 10

(Assignment of Error No. 1)

In this assignment of error, the defendant claims that the trial court erred in allowing the prosecutor to question a defense psychologist, Dr. Michael Johnson, about other capital cases in which he and/or his partner, Dr. Mark Vigen, had testified in an attempt to show Johnson's bias against the death penalty. Specifically, he argues that this line of questioning was improper because: 1) it introduced facts and circumstances of other capital cases that were irrelevant to the present jurors' sentencing decision; 2) it attempted to show Dr. Johnson's bias against the death penalty based on his testimony in unrelated capital cases with facts and circumstances different from the present case; 3) it attempted to show Dr. Johnson's bias against the death penalty based on Dr. Vigen's testimony in cases in which Dr. Johnson did not testify and of which he had little knowledge of the facts; and 4) it undermined Dr. Johnson's credibility by associating him with other notorious capital defendants. Specifically, the defendant complains of a nine-page exchange between the prosecutor and Dr. Johnson found at Volume XVI, pages 170-178, of the record.

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. La.C.E. art. 61 l(B). The trial court has broad discretion in controlling the examination of witnesses. *State v. Coleman,* 406 So.2d 563, 566 (La. 1981). The right to cross-examine a witness includes the right to question the witness concerning any bias or self-interest attached to the witness's testimony.

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Senegal,* 316 So.2d 124, 127 (La. 1975) (how state witness came about being a state police narcotics agent was not irrelevant, and refusal to permit defense counsel to cross-examine witness in order to establish bias, interest, or corruption was improper, in prosecution for distribution of marijuana); La.C.E. art. 607(D).

In the present case, the prosecutor's questions were designed to elicit Dr. Johnson's possible bias for testifying on the defendant's behalf. The state had the right to question Dr. Johnson about his role as a mitigation expert in other cases to establish a testimonial pattern and thus to expose a possible bias for or against the death penalty. A brief synopsis of the facts and circumstances of those prior cases was necessary to establish a proper context for evaluating the soundness of Dr. Johnson's opinions. Moreover, though Dr. Johnson did not testify in each of the above capital cases, the prosecutor had reason to believe that Dr. Johnson had some knowledge of the facts of those cases and likely formed an opinion whether a death sentence was warranted. The instant record reveals that Dr. Johnson and Dr. Vigen frequently collaborated on psychological evaluations, and that although they both interviewed this defendant, only Dr. Johnson testified at trial. Because Drs. Johnson and Vigen frequently testify in capital cases in Caddo Parish, the prosecutor was well aware that they often work together to prepare psychological evaluations of defendants but that only one of them presents their findings at trial. Accordingly, the prosecutor had a reasonable basis to delve into the opinions of both doctors' work on these previous cases.

At any rate, the colloquy complained of takes up only nine pages of the 217-page sentencing phase, during which the defendant presented four mitigation witnesses. A review of the colloquy reveals that the prosecutor did not recite the facts of the previous cases in any great detail, but rather provided a brief synopsis of the cases. In this context, even assuming that the court erred in allowing the prosecutor to delve too deeply into the circumstances of the other capital cases in exploring the witness's bias and interest, the error was not of such magnitude that it undermines confidence in the jury's sentencing verdict. *See Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (the reviewing court must be able to declare that the error was harmless beyond a reasonable doubt, namely, that no reasonable possibility exists that the error contributed to the verdict). This assignment of error lacks merit.

ARGUMENT NO. 11

(Assignment of Error No 2)

In this assignment, the defendant argues that the state improperly introduced evidence of the victim's character during the penalty phase. Specifically, the defendant complains of the following testimony: 1) one of the victim's former tenants testified that when she and her husband fell behind on their rent, "He [the victim] would work with us. He would get my husband jobs so we could get some money to pay."; 2) the victim's 17-year-old daughter testified that her mother called her home from a friend's house to inform her of the victim's death; and 3) the victim's 14-year-old son testified that the day before his father died they went hunting together, and that

when he turns 25 years old he gets ownership of his father's Harley-Davidson motorcycle.

As a general matter, there are two categories of victim impact evidence that the state may properly introduce: l) information revealing the individuality of the victim; and 2) information revealing the impact of the crime on the victim's survivors. *State v. Taylor,* 93-2201 (La. 2/28/96), 669 So.2d 364, *cert. denied,* 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996) (citing *Payne v. Tennessee,* 501 U.S. 808, 834, 111 S.Ct. 2597, 2614, 115 L.Ed.2d 720 (1991)). In *State v. Bernard,* 608 So.2d 966, 972 (La. 1992), this Court stated that:

> [S]ome evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense or the character and propensities of the offender. To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability, and is relevant to his character and propensities as well as to the circumstances of the crime. However, introduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the

> murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision.

Contrary to the defendant's claims, the complained-of testimony falls within the confines set out by *Bernard*. The three witnesses did not give detailed lists or descriptions of the victim's good qualities, nor did they give a lengthy particularized narration of the emotional and psychological sufferings of themselves or the other survivors. *See State v. Taylor, supra* at 371 (in finding the victim impact evidence was harmless, the Court noted "surely the jury regarded the testimony of these victim impact witnesses as normal human reactions to the death of a loved one"). The witnesses' testimony combined composes only five pages in the record of the over 217-page penalty phase. Accordingly, the defendant does not show that this seemingly innocuous testimony introduced arbitrary factors into the jury's sentencing decision. This assignment of error lacks merit.

CAPITAL SENTENCE REVIEW

Under La.C.Cr.P. art. 905.9 and La.S.Ct.R. 28, this Court reviews every sentence of death imposed by the courts of this state to determine if it is constitutionally excessive. In making this determination, the Court considers whether the jury imposed the sentence under influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender. In the instant case, the trial court has submitted a Uniform Capital

Sentence Report ("UCSR"), and the Department of Public Safety and Corrections ("DOC") has submitted a Capital Sentence Investigation ("CSI"). In addition, the defendant has submitted a memorandum entitled "Opposition to Capital Sentencing Investigation."

The CSI indicates that the defendant is a white male born on February 12, 1978. He was 18 years old at the time of the offense. The defendant married his childhood sweetheart a few days before his trial began. The defendant's other immediate family includes his mother and a younger brother. Testimony taken at the sentencing hearing reveals that the defendant was born into a turbulent marriage, that during the first few years of the defendant's life his parents were separated at least five times, and that when the defendant was four years old they divorced. The defendant has had little contact with his father since the divorce. During the remainder of his childhood, his mother had numerous husbands and boyfriends, some of whom were convicted criminals that encouraged the defendant to engage in criminal activity.

The CSI further reveals that the defendant quit school when he was 16 years old and that he has an IQ of 81. Moreover, the CSI states that the defendant has never held any significant employment for any length of time, and that he relied on his mother for financial support. The CSI also indicates that the defendant is in good health, takes no medication, and has had no surgeries. Concerning his criminal history, the CSI reveals that he has no juvenile record, but that he has three adult convictions for hit and run, simple robbery, and felony theft.

The defendant's psychiatric evaluation reveals that the defendant has low average intelligence, is aggressive and angry, and prone to overestimate his abilities. In addition, the defendant has a poor self-esteem, an impaired capacity to trust and care for others, and suffers from anti-social personality disorder. According to the UCSR, a psychiatric evaluation was conducted which indicated that the defendant was able to distinguish right from wrong, and was capable of cooperating in his own defense.

Aggravating Circumstances

At trial, the state argued one aggravating circumstance: that the offender was engaged in the perpetration or attempted perpetration of an armed robbery. See La.C.Cr.P. art. 905.4(A)(1). The jury found the existence of this circumstance. Though the defendant argues that the aggravating factor was not supported by the evidence, as explained in the unpublished appendix, this allegation has no merit.

Proportionality

Although the federal Constitution does not require a proportionality review, *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell,* 561 So.2d 692, 710 (La. 1990), *cert. denied,* 498 U.S. 1074, 111 S.Ct. 799, 112 L.Ed.2d 861 (1991). This Court, however, has vacated only one capital sentence on the ground that it was disproportionate to the offense and the circumstances of the offender, *State v. Sonnier,* 380 So.2d 1, 7 (La. 1979), although it effectively de-capitalized another death penalty reversed on other grounds. *See State v. Weiland,* 505

So.2d 702 (La. 1987) (on remand, the state reduced the charge to second degree murder and the jury returned a verdict of manslaughter).

This Court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier, supra.*

The state's Sentence Review Memorandum reveals that since 1976, jurors in the First Judicial District Court have returned a guilty verdict in 31 capital cases, including this one, and recommended the death penalty nine times before this.[2] Of those nine cases in which the juries recommended death, two of those juries found as one of their aggravating circumstances that the offender was engaged in the perpetration or attempted perpetration of an armed robbery, *see State v. Cooks,* 97-0999 (La. 9/9/98), 720 So.2d 637, *cert. denied,* 526 U.S. 1042, 119 S.Ct.

---

[2] *State v. Deal, supra; State v. Edwards,* 97-1797 (La. 7/2/99), 750 So.2d 893; *State v. Hampton,* 98-0331 (La. 4/23/99), 750 So.2d 867, *cert. denied,* 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999); *State v. Cooks,* 97-0999 (La. 9/9/98), 720 So.2d 637, *cert. denied,* 526 U.S. 1042, 119 S.Ct. 1342, 143 L.Ed.2d 505 (1999); *State v. Tyler,* 97-0338 (La. 9/9/98), 723 So.2d 939, *cert. denied,* 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999); *State v. Davis,* 92-1623 (La. 5/23/94), 637 So.2d 1012, *cert. denied,* 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359; *State v. Code, supra; State v. Ford,* 489 So.2d 1250 (La. 1985), *vacated,* 479 U.S. 1077, 107 S.Ct. 1272, 94 L.Ed.2d 133 (1987); *State v. Felde,* 422 So.2d 370 (La. 1982), *cert. denied,* 461 U.S. 918, 103 S.Ct. 1903, 77 L.Ed.2d 290 (1983).

1342, 143 L.Ed.2d 505 (1999); *State v. Tyler,* 97-0338 (La. 9/9/98), 723 So.2d 939, *cert. denied,* 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999), and three juries returned a death sentence based on the sole aggravating factor that the offender was engaged in the perpetration or attempted perpetration of an armed robbery. *See State v. Hampton,* 98-0331 (La. 4/23/99), 750 So.2d 867, *cert. denied,* 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390 (1999); *State v. Davis,* 92-1623 (La. 5/23/94), 637 So.2d 1012, *cert. denied,* 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359; *State v. Ford,* 489 So.2d 1250 (La. 1985), *vacated,* 479 U.S. 1077, 107 S.Ct. 1272, 94 L.Ed.2d 133 (1987).

Moreover, on a statewide basis, cases are legion in which this Court has affirmed capital sentences based primarily on the jury's finding that the defendant killed the victim in the course of an armed robbery or attempted armed robbery. *See, e.g., State v. Wessinger,* 98-1234 (La. 5/28/99), 736 So.2d 162, *cert. denied,* 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999) (defendant shot and killed two people, and injured two people during the course of an armed robbery); *State v. Broadway,* 96-2659 (La. 10/19/99), 753 So.2d 801, *cert. denied,* 529 U.S. 1056, 120 S.Ct. 1562, 146 L.Ed.2d 466 (2000) (defendant and co-defendant shot and killed police officer escorting grocery store manager who was making a night deposit); *State v. Brumfield,* 96-2667 (La. 10/20/98), 737 So.2d 660, *cert. denied,* 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999) (Broadway's co-defendant); *State v. Williams,* 96-1023 (La. 1/28/98), 708 So.2d 703, *cert. denied,* 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998) (defendant murdered victim while attempting to rob him in his truck; earlier that day, defendant had shot and

wounded another victim during the attempted perpetration of an armed robbery); *State v. Taylor, supra* (during armed robbery of the Cajun Fried Chicken restaurant where defendant had previously been an employee, he shot and killed one employee and shot and permanently disabled and paralyzed another); *State v. Scales,* 93-2003 (La. 5/22/95), 655 So.2d 1326, *cert. denied,* 516 U.S. 1050, 116 S.Ct. 716, 133 L.Ed.2d 670 (1996) (defendant, while engaged in the armed robbery of a Church's Fried Chicken, shot and killed one of the employees).

A comparison of the defendant's case with the above-referenced cases, indicates that the death penalty as applied to this defendant is not disproportionate considering the offender and the offense.

DECREE

For the reasons assigned herein and in the unpublished appendix, the defendant's conviction and sentence are affirmed. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under their prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this Court under La. Code Crim. Proc.art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board

and provide the Board with reasonable time in which: (1) to enroll counsel to represent defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

AFFIRMED.

JAN 15 2002

SUPREME COURT OF LOUISIANA

No. 00-KA-2086

STATE OF LOUISIANA

v.

DANIEL T. IRISH

On Appeal from the First Judicial District Court,
Parish of Caddo,
Honorable Ramona L. Emanuel, Judge

UNPUBLISHED APPENDIX

VICTORY, J.*

VOIR DIRE

ARGUMENT NO. 1

(Assignments of Error Nos. 4 and 5)

In these assignments of error, the defendant, Daniel Irish, claims that the trial court erred in denying his challenges for cause of two potential jurors, Rusty Reed and Dudley McArty, and granting the state's cause challenge of one potential juror, Johnnie Leary. As to Juror Reed, the defendant argues that the juror showed a bias towards police officers because he went on two police ride-alongs and had a close family member who was a police officer. As to Juror McArty, the defendant alleges that the juror indicated that he would not consider

* Retired Judge Robert L. Lobrano, assigned as Associate Justice Pro Tempore, participating in this decision.

the following mitigating factors in deciding whether to vote for a death sentence: 1) that the defendant was a youth at the time of the offense; 2) that the defendant had no significant criminal history; and 3) that the defendant had a bad childhood. Concerning Juror Leary, the defendant argues that though the juror expressed some reservations about imposing the death penalty, her entire voir dire testimony reveals that she did not harbor views that would have impaired her ability to perform her duties in accordance with the judge's instructions and her oath.

Prejudice is presumed when a defendant's challenge for cause is denied erroneously and the defense exhausts it peremptory challenges. *State v. Howard,* 98-0064 (La. 4/23/99), 751 So.2d 783, 794-95, *cert. denied,* 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999); *State v. Hart,* 96-0697 (La. 3/7/97), 691 So.2d 651, 656; *State v. Robertson,* 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280-81; *State v. Ross,* 623 So.2d 643, 644 (La. 1993). An erroneous ruling depriving an accused of a peremptory strike violates his substantial rights and constitutes reversible error. *Hart, supra; Robertson, supra; Ross, supra; State v. Bourque,* 622 So.2d 198, 225 (La. 1993). In the present case, the defense exhausted its peremptory challenges and thereby preserved its objection to the trial court's rulings for review.

District court judges are accorded broad discretion when ruling on cause challenges. Even so, this Court has cautioned that a venireman's responses cannot be considered in isolation and that a challenge should be granted, "even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias,

prejudice or inability to render judgment according to law may be reasonably implied." *State v. Jones,* 474 So.2d 919, 929 (La. 1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 999 (1986). *See State v. Frost,* 97-1771 (La. 12/1/98), 727 So.2d 417, 423; *State v. Maxie,* 93-2158 (La. 4/10/95), 653 So.2d 526, 535; *State v. Hallal,* 557 So.2d 1388, 1389-90 (La. 1990); *State v. Smith,* 430 So.2d 231 (La. 1983). Yet a refusal to disqualify a venireman on grounds he is biased does not constitute reversible error or an abuse of discretion if, after further examination or rehabilitation, the juror demonstrates a willingness and ability to decide the case fairly according to the law and evidence. *Howard, supra* at 795-97; *Robertson, supra* at 1281.

The standard for excluding a potential juror from a capital case based on his opinions regarding capital punishment is whether those views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.'" *Frost, supra* at 423 (quoting *Wainwright v. Witt,* 469 U.S. 4424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985)). The "substantial impairment" standard applies both to those who would vote automatically against capital punishment, i.e., those excludable under *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), as clarified by *Witt,* as well as those who would vote automatically for capital punishment under the factual circumstances of the particular case, i.e., reverse-Witherspoon excludable jurors. *State v. Divers,* 94-0756, p. 8, n. 5 (La. 9/5/96), 681 So.2d 320, 324, *cert. denied,* 520 U.S. 1182, 117 S.Ct. 1461, 137 L.Ed.2d 564 (1997) (citing *Morgan v. Illinois,* 504 U.S. 719, 727-29, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992)) (juror who would vote automatically for the death penalty must

be removed for cause because lacking impartiality as to punishment violates defendant's due process rights). Such jurors are "not impartial," and cannot "accept the law as given ... by the court." La.C.Cr.P. art. 797(2),(4); *Maxie, supra* at 534-35. *See State v. Miller,* 99-0192, p. 8 (La. 9/6/00), 776 So.2d 396, 402, *cert. denied,* 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2000).

The failure to disqualify a venireman unable to consider both life and death as penalties constitutes reversible error. *Divers, supra* at 324-27 (challenges to two jurors who felt that any "deliberate" or "intentional" killing merited the death penalty should have been granted); *Maxie, supra* at 537-38 (error not to disqualify juror who could listen to mitigating evidence but viewed death as the only appropriate penalty "[o]nce the crime guilt is established."); *Robertson, supra* at 1283-84 (error not to grant challenge for juror who would vote automatically for death if the accused were convicted of the double murders charged); *Ross, supra* at 643 (error to deny challenge for juror who felt that the "only penalty" upon conviction of first degree murder was death).

Juror Reed

First, the defendant argues that the trial court erred in denying his cause challenge of Juror Reed, and thereby forced him to exercise unnecessarily a peremptory challenge. During voir dire, the following exchange occurred:

> DEFENSE: Do any of you know any police officers in general? City police, deputy sheriffs, state troopers?

JUROR: I don't know him personally, but Mike McConnell is a Shreveport police officer that lets me ride with him once a quarter.

DEFENSE: So you get to hit the street?

JUROR: Yes.

DEFENSE: What part of town?

JUROR: Allendale.

DEFENSE: That is interesting, I bet?

JUROR: It's busy.

DEFENSE: How many times have you been with him when he worked a serious crime?

JUROR: Never. Just traffic stops and domestic calls, nothing more serious.

DEFENSE: Sometimes domestic calls can be just as serious?

JUROR: These went fairly smooth.

DEFENSE: If police officers do testify at this trial, you understand that you are to weigh and balance what they say just like you would balance and consider anybody else's testimony. Would you give their testimony a lot more weigh[t] than you might give an ordinary citizen's testimony? Anybody here?

JURORS: (Indicating no.)

DEFENSE: Mr. Reed?

JUROR: My uncle is a Texas DPS officer.

DEFENSE: Department of public safety?

JUROR: Yes. He's an investigator.

DEFENSE: All right. You ever go over there and follow him around?

JUROR: No. He doesn't let me.

Moments later, defense counsel challenged the juror for cause and the following colloquy occurred:

DEFENSE: The motion is a challenge for cause. He rides with police officers. He's got a good friends [sic] that's a police officer and he might I probably didn't develop it any further. If the State wants to develop it we can. That worries me if he's kind of a want to be cop in this case. So we offer a challenge for cause.

STATE: Your Honor, State would oppose any challenge for cause. There is no information before the Court that Mr. Reed is a want to be cop. None whatsoever. He has a friend that he honestly admitted was a Shreveport police officer. He has an uncle that's at Texas DPS. He is qualified to be a juror under article 797. He's not impartial [sic] in any way based on background or family ties. We questioned him — defense counsel questioned him about his relationship with Officer McConnell and the answers he gave were that he was not

biased or prejudiced in any way. There is absolutely no grounds for a challenge for cause for Mr. Reed.

COURT: Court denies the challenge for cause.

DEFENSE: Your Honor, may I be given the opportunity to try to develop it a little further?

COURT: You may.

DEFENSE: We do need Mr. Reed.

COURT: I'll reconsider my ruling. Mr. Reed, if we can get you to take a seat on the front row in the jury box, the first chair you reach. The lawyers want to ask you some more questions outside the hearing of the others.

DEFENSE: Mr. Reed, I want to follow up on something with you. You indicated that you have a neighbor that's a police officer. What is his name?

JUROR: He's not a neighbor. He was a security guard at a place I used to work when I was in high school. His name is Mike McConnell. He is a Shreveport police officer.

DEFENSE: Is he a narc now? Narcotics officer?

JUROR: Oh. I wouldn't know. I haven't talked to him in probably over a year.

DEFENSE: You haven't ridden with him in the last year?

JUROR: No.

DEFENSE: When was the last time you rode with him?

JUROR: I want to say September or October of last year maybe.

DEFENSE: He was a patrol officer at that time?

JUROR: Yes, sir.

DEFENSE: He wore a uniform?

JUROR: Yes, sir.

DEFENSE: Have you gone to the police academy or anything like that?

JUROR: No, sir.

DEFENSE: What do they call it, citizens police academy?

JUROR: No, sir. It was just a ride along deal. I just signed a piece of paper saying I wouldn't sue if got hurt.

DEFENSE: Did they let you carry a gun?

JUROR: No. I couldn't get out of the car. I just rode.

DEFENSE: Do you have an interest in law enforcement?

JUROR: Somewhat. That's not what I'm going to school for.

DEFENSE: What are you going to school for?

JUROR: Right now it's general studies....

DEFENSE: Do you think at some point in time in the future that you might want to go into law enforcement?

JUROR: I've considered it. I definitely don't know for sure. I would have to get in shape.

DEFENSE: You might be strong enough to do it. They get you in shape and you definitely appear to have the intelligence to do it. You might want to consider it.

JUROR: I might. You know, just working, going to school figuring out what I would like to do.

DEFENSE: I have a son 29 now. He has drifted for a number of years in various things. You can drift a little bit at that age. That's good. That's all. Thank you.

STATE: Does your current job have anything to do with law enforcement?

JUROR: No, sir.

STATE: And it has been well over a year since you last saw Officer McConnell?

JUROR: Yes, sir.

STATE: Have you seen him socially since then?

JUROR: No, sir.

STATE: You are not even sure what he is doing now?

JUROR: No, sir.

STATE: Would anything about your experience or your friendship with Mr. [McConnell] influence your decision in this case in any way?

JUROR: No, sir. Like I say, I don't know anything personal about him. There was a ride along program that the police department had and he let me ride. I just rode with him, I think, two times.

STATE: And you never got out of the car?

JUROR: No, sir.

STATE: And you didn't have a uniform?

JUROR: No. It was strictly riding with him.

STATE: Could you base any decision that you make in this case on evidence and the law of the judge? Could you do that?

JUROR: Yes, sir.

STATE: And could you ignore for the next week any influence or any feelings you might have from friends or family or anything like that?

JUROR: Oh. Yes, sir.

STATE: And certainly when you were deciding to execute a man, you would base that on the evidence and facts?

JUROR: On the facts, yes, sir.

STATE: Circumstances?

JUROR: Yes, sir.

STATE: And not on any friendship with Mr. McConnell or any relationship with your uncle?

JUROR: No, sir.

STATE: Okay. Thank you.

DEFENSE: No other questions, Your Honor.

COURT: Mr. Reed you may take a place outside of the courtroom.

DEFENSE: I would like to re-urge my challenge for cause at this time. This young man is 21. He has a possible interest in law enforcement in the future and even though he denies it would affect his ability to serve on the jury I think he's gotten a little bit of a taste of it by riding with a police officer. We would just like to re-urge our challenge for cause.

STATE: Defense counsel didn't develop anything that wasn't present when he heard it the first time, Your Honor. There is no grounds for a challenge for cause. He hasn't even seen this particular officer in over a year, hasn't been involved in any ride alongs in over a year. He's not going to school studying any time [sic] of law enforcement. Defense counsel suggested he would be good at it. He simply replied that he might think about it.

COURT: The Court denies the challenge for cause.

DEFENSE: Your Honor, we would like our objection noted to your denial at this point as well as you prior denial to our challenge for cause.

COURT: It is already noted.

DEFENSE: Thank you.

Although a juror's association with law enforcement personnel is not grounds for automatic disqualification, courts have closely scrutinized such associations for potential bias and influence that may justify a challenge for cause. *State v. Lewis,* 391 So.2d 1156, 1158 (La. 1980). Louisiana courts have held that it is not an abuse of discretion to deny a challenge for cause based on a juror's relationship with law enforcement if voir dire questioning reveals that the relationship will not influence the juror's impartiality. *See, e.g., State v. Morris,* 96-1008, pp. 13-16 (La. App. 1st Cir. 3/27/97), So.2d 792, 800-01, *writ denied*, 97-1077 (La. 10/13/97), 703 So.2d 609 (trial court did not abuse its discretion when it denied a challenge for cause of a juror whose mother was employed at the district attorney's office); *State v. Ledet,* 96-0142, p. 4 (La. App. 1st Cir. 11/8/96), 694 So.2d 336, 339 (trial court did not abuse its discretion when it denied a challenge for cause of a juror whose cousin was a sergeant with the Louisiana State Police); *State v. Ross,* 96-1240, pp. 3-4 (La. App. 1st Cir. 5/10/96), 674 So.2d 489, 492 (trial court did not abuse its discretion when it denied a challenge for cause of a juror whose husband was in the Louisiana State Police Academy); *but see State v. Neil,* 540 So.2d 554, 555-56 (La. App. 3d Cir. 1989)

(trial court abused its discretion in failing to excuse a juror who was married to an assistant district attorney and whose uncle was the district attorney). Though Juror Reed admitted to participating in two police ride-alongs and expressed a slight interest in pursuing a career in law enforcement, the prospective juror stated unequivocally that his relationship with law enforcement would not influence his impartiality and that he could render a judgment according to the law. Accordingly, because the juror's testimony as a whole indicates that he could be a fair and impartial juror, the trial court properly denied defense counsel's challenge for cause. *Cf. Maxie, supra* (trial court should consider prospective jurors' responses in the entirety and not rule on basis of isolated "correct" or "incorrect" answers).

Juror McArty

Next, the defendant argues that the trial court erred in denying his cause challenge of Juror McArty because "the totality of [the juror's] answers show that Mr. McArty could not apply relevant mitigating factors .... " The following exchange took place during voir dire:

> DEFENSE: And it's up to the jury to determine what they consider to be significant prior history of criminal activity. Okay. Now, are you willing to consider that as a mitigating circumstance if you find that the offender has no significant prior history of criminal activity ...?
>
> DEFENSE: Mr. McArty?

JUROR: Well, there could have been an activity that wasn't overturned. I mean, there wasn't — He wasn't caught.

DEFENSE: He wasn't caught.

JUROR: He may have killed ten people and they didn't catch him. So just because he has no history that was found by the Court does not mean that he had no — doesn't have a history of violence or a crime.

DEFENSE: Okay. Then would it be fair to say that you would — that you don't consider this to be a mitigating circumstance?

JUROR: No. It could — I mean, it's — it could or it could not be true. It doesn't hold as much weight as some of the other circumstances would.

DEFENSE: So are you likely to think, well, I found him guilty of first degree murder, and maybe he doesn't have any convictions in his record, but I bet he's got some other stuff that he just wasn't caught. Do you think you'd be thinking that way?

JUROR: Well, now, should we — we shouldn't be considering his guilt on any previous guilt. Correct?

DEFENSE: Well, let's say you have already found him guilty.

JUROR: Okay.

DEFENSE: Right. And that's right. You should not be considering his guilt or any prior guilt. You're right.

JUROR: Well, it says only on this crime.

DEFENSE: Yeah. You're right.

JUROR: Not on any other crime.

DEFENSE: Yeah. That's right. That's right.

JUROR: Well, you are not going to present any other crime until the sentencing phase ....

DEFENSE: So would it be fair for me to say then that you would not give any weight to this mitigating circumstance?

JUROR: Little weight.

DEFENSE: A little weight?

JUROR: Very little weight.

DEFENSE: Very little weight? Next to no weight?

JUROR: Uh-huh.

DEFENSE: Is that correct?

JUROR: Uh-huh ....

DEFENSE: Would you consider youth as a mitigating circumstance ... ?

JUROR: Of course, youth and maturity are two different things. Most of us think of an 18-year-old as being a kid, but definitely is of legal age. So if he were younger than 17.

DEFENSE: Pardon?

JUROR: If he were younger than 17, I would consider it.

DEFENSE: Younger than 17, you would consider it? But older than 17, you would not consider it?

JUROR: I don't think so ....

DEFENSE: If you are presented mitigating circumstances that I'll generally characterize as a bad childhood and adolescent life, which deals with family instability, family dysfunction, poor role models, that type of evidence, would you be willing to consider that as mitigating factors in making the decision ... ?

JUROR: I think so.

Shortly after this exchange, defense counsel challenged Juror McArty for cause and the following colloquy occurred:

DEFENSE: Your Honor, we'd like to challenge Mr. McArty for cause. He could not accept the mitigating circumstances of youth if a person was over 18 years of age — over 17 years of age. And that's one of our key arguments. And in light of the fact that he could not accept it for somebody over the age of 17, and our client was 18 at the time of the commission of the offense, he is unwilling to accept the law and apply the law as would be charged to him.

And we'd make it for that cause. Furthermore, he could not accept the mitigator I call generally bad childhood too, which is another mitigator that we'll offer in this case. And there was one other thing as well. The prior history that he would — again, prior history is going to be something the jury will have to determine whether they consider it to be – the fact our client has, you know, a couple of felony convictions, one for burglary, one for theft, whether that's a significant prior history. But I think he — the basis of his answer was that he would not give any weight to that mitigator as well. So we think that there's adequate basis for challenge for cause on him.

COURT: State's response, if any?

STATE: Your Honor, the State disagrees with defense counsel's conclusions. Mr. McArty indicated clearly that he would give weight to each of those things. He simply indicated they would be a little weight, or that the weight he would give them would be on a sliding scale pursuant to the facts of the case and the facts of the crime. But he clearly indicated he would give a little weight to the significant prior history. And he clearly indicated that he would give weight to the youth of the offender at the time he did it. And under my

questioning, certainly, and then again he reiterated under Mr. Glassell's [defense counsel] questions. His concerns, I think, went more to the weight that he would give them, not the fact that he would totally disregard them. And if your Honor has any question about this, we would request to question him further.

COURT: Let me ask you this. Do you recall Mr. McArty saying that in response to Mr. Glassell's question with regard to Mitigating Circumstance (A), I believe the question was: Would you give it any weight or no weight? And I think he said no weight. Did he say that?

STATE: Yes, your Honor. But I believe he came back under additional questioning from Mr. Glassell and said, "I will give it a little weight."

COURT: I don't recall the latter. It's not so much that I have a question about it. Do either of you wish to question him further on that?

STATE: Yes, your honor. The State would request to question him in private.

* * *

STATE: True. So the question is: Can you consider the absence of any reported criminal activity when you are making your decision?

JUROR: That's a hard question to answer?

STATE: I understand. Can you give me an answer? The best that you can answer it.

JUROR: Well, since the word "significant" is in there, I could say yes. I can consider that. If it were significant, you would have proof of it.

STATE: Well, I mean, that would be what I would to you, or that would be what I would assert to you. But that's what I was trying to give an example of, the offender has no significant prior history of criminal activity. And after the penalty phase is completed, okay, hypothetically — okay? Hypothetically, after the criminal phase is completed, no one, not us, not defense, no one has come forward with any testimony or any records or any arrest sheets or anything that would indicate that the defendant has any type of prior run-in with the law. We haven't brought in any police officers to testify that I arrested him once or I stopped him for speeding once. You got nothing. Okay? So, obviously, that would be a situation that would be even better than this. There would be no history. There would be no history. Right?

JUROR: Right.

STATE: All right. And so this is no significant prior history. Could you follow this aspect of the law? Could you give that — put that in the pot, put that in the mixture on the balancing scale when you are trying to make a decision?

JUROR: I guess I would consider it....

STATE: Okay. The youth of the offender. What do you think about that? Should that be considered as a mitigating circumstance?

JUROR: I would probably go by what the law said on that.

STATE: Okay. Well —

JUROR: And maybe consider his maturity level.

STATE: As well as an age, what is his biological age?

JUROR: Right.

* * *

STATE: Okay. And then any other relevant mitigating circumstance. Now, here, the situation — the word is "relevant." Okay? And relevancy will be decided by the jury under the supervision of the judge. You are not required to accept everything that the defense might assert to be mitigating. Okay? You are only required to consider and only accept it then if it is relevant in the eyes of the jury as a

whole. And Mr. Glassell mentioned the media. And I forgot what your response was to that.

JUROR: Would media would have any

STATE: Yeah. I mean, would —

JUROR: They could use it?

STATE: Right. And I think he used it in the Columbine incidents. Right. I mean, not as a defense, but as a mitigating circumstance. And, really, I think what we're — where we're headed with this is we take a youthful offender, okay, who might not understand, you know, everything about what he is doing. And then you've got some strong media influence here. Now, we are at penalty.

JUROR: I would give it less weight.

STATE: But you would consider it?

JUROR: Well, depending on the age too. The younger might have more.

STATE: Right. So now you are considering (F) and (H) mixed together. Or (F), (H), and (A). So you've got no prior history. You've got a young person. Well, that may be why he didn't have a prior history, because he was young. So you should consider that. Would you agree?

JUROR: Exactly.

After the prosecutor concluded his questioning of Juror McArty, defense counsel was given an opportunity to question the prospective juror and the following exchange took place:

DEFENSE: One of the reasons we brought you back in here is that I had made a note that with respect to your answer on this one right here, the youth of the offender at the time of the offense, that you would only consider that if the offender was under the age of 17 at the time of the offense. Is that —

JUROR: I think I said that because I thought that's what the law was. And I would — I would take the recommendation of what the law says concerning age and the appropriate punishment.

DEFENSE: Well, there's no — there is nothing in the law. The law says that anybody over the age of 15 can be prosecuted for first degree murder, if, you know, the facts are there. So, I mean, anything over 15.

JUROR: I would change my answer then.

DEFENSE: So there's no, like, break-even point of considering somebody. For criminal law purposes, you cannot be — for like burglary, you cannot be prosecuted as an adult unless you are over 17 — DWI as an adult.

JUROR: But part of my beliefs follow the law.

DEFENSE: So you would be told any age.

JUROR: If the law said 16, I would be more apt to say 16.

DEFENSE: All right. Well, the law really doesn't say any age. That's what I am getting at. When this — the law that we are dealing with here where it says youth of the offender does not specify any age with it. And what I'm getting at, would you, in your own mind, just sort of say, well, I'm going to consider somebody, you know if they are under 17, I'll consider this. But if they are over 17, I'm not going to consider it.

JUROR: Well, I think everyone would have a harder time proposing the death penalty on a younger person. The younger they are, the more reservation you would have.

DEFENSE: I understand.

JUROR: And it all depends on the maturity of the person and state of mind that they were in.

DEFENSE: Now, let me go back and ask you — the answer you gave the, with respect to your answer that if somebody was under 17, you would consider this to be — in other words, you put the age of 17 as sort of your line in the sand.

JUROR: I was trying to say that I would have trouble putting a 16-year-old to death.

DEFENSE: Okay. How about a 19-year-old?

JUROR: Less trouble.

DEFENSE: And, you know, when you come up with age 17, that is generally the breaking point for whether you are prosecuted as an adult or as a juvenile in Louisiana. Did you understand that? Do you understand that?

JUROR: Yes. That's what I believed.

DEFENSE: That's what you believe. So would you sort of think in your own mind that anybody under 17, that you would apply this factor here. But if they are over 17, you would not apply the factor?

JUROR: I'd have to say I'd have to let the law help me make my decision. But it would be hard. The younger the person would be, the more consideration I would give it. I would think that a 19-year-old, though, should have the capacity to know right from wrong because he's probably at the point to where he's not listening to the parents anymore.

DEFENSE: Well, do you think 17 is a good breaking point for whether you are an adult or a juvenile under our law?

JUROR: I think it's like a mean or median. But different people are different maturity levels.

DEFENSE: Of course, the Legislature set the age of 17 way before any of us were born. You know, it's been the law for a long, long time. But in your own mind, do you sort of have the 17 age-old as sort of your line in the sand on whether or not you would consider the youth of the offender at the time of the offense to be a mitigator?

JUROR: I think I'd have to say that I'd give a 19-year-old — I'd consider him an adult, and he would have to be treated fairly. The same as I would treat a 25-year-old.

DEFENSE: What about an 18-year-old?

JUROR: Well, with each number it gets harder.

DEFENSE: I know.

JUROR: I mean — surely. I'm considering the youth of the offender at all times.

DEFENSE: At all times?

JUROR: Right. But I would consider a 19-year-old to be an adult, certainly.

DEFENSE: What about an 18-year-old?

JUROR: Sure. Yeah.

DEFENSE: What about a 17-year-old?

JUROR: That would be questionable. That would have to be — I'd have to maybe use other factors to make my decision.

DEFENSE: Okay. Let me back up. On an 18-year-old, you would consider them to be an adult?

JUROR: For instance, like some of the others, like the under the domination of another person, a younger person would be more apt to be under the domination of another person. A younger person would be more apt to be — well, l guess that's the only place it applies there.

DEFENSE: Okay. But I think you would say that you would consider this to be a mitigating circumstance, the youth of the offender, it he was 16 — 15 years old?

JUROR: But I couldn't use it as my sole —

DEFENSE: I understand. I understand. I'm just asking you. I guess I'm asking you what age would you not consider this to be a mitigating circumstance?

JUROR: Well, really, chronological age is not as important as maturity to me.

DEFENSE: Okay.

JUROR: Because there's 15-year-olds that act a lot more mature than a lot of 25-year-olds.

DEFENSE: Let me go back up here and ask you about the first — the offender has no significant prior history of criminal activity — and whether or not you would consider that as a mitigating

circumstance. And, again, it says — it doesn't say has no prior history. It says no significant prior history, which leaves the door open to where you are to consider this if the offender has some history of criminal activity.

JUROR: I can give it some weight. But I can't trust it entirely because, like I say, I'm trusting something that doesn't exist.

* * *

DEFENSE: Okay. Do you think any of it would have any bearing on your decision, or do you think you would just say, well, I found him guilty, I want to give him the death penalty now?

JUROR: No, I wouldn't. I wouldn't be as cold-hearted as that. I mean, I value human life very highly. I think people that don't value it deserve the death penalty.

DEFENSE: Okay. Well, do you think somebody that would do a coldblooded killing should deserve the death penalty?

JUROR: Cold-blooded?

DEFENSE: Uh-huh.

JUROR: Surely.

DEFENSE: Okay. And if you were —

JUROR: No respect for human life.

DEFENSE: And if you were sitting on the jury and found somebody that had done a cold-blooded killing, however you might define that, would you even be willing to listen to mitigation, or would you just say let's vote for the death penalty?

JUROR: Oh, I wouldn't — nothing would make me automatically vote for the death penalty. Nothing.

DEFENSE: Okay. We thank you for your candor and your honesty in answering our questions. Thank you.

COURT: Mr. McArty, you may take a place outside of the courtroom. Mr. Bailiff?

After this exhaustive exchange between the defendant and the attorneys for the state and the defendant, defense counsel reiterated his challenge for cause, and this dialogue ensued:

COURT: Mr. Glassell, I think you were about to re-urge your challenge on Mr. McArty?

DEFENSE: Yes, your Honor. 1 would like to re-urge my challenge on Mr. McArty. I will acknowledge that he tried to, I think, clean up some of his answers. But I think the totality of his answers would clearly indicate that he would have a hard time accepting the youth of the offender at the time of the offense as a mitigating circumstance for somebody over the age of 17, that he would have a hard time accepting

the offender has no significant prior history of criminal activity as a mitigating circumstance, and he would have a hard time accepting violence in the media as a mitigating circumstance. I think those three combined, being three of our mitigators, would basically be just cause for excusing him from service at this time. Again, considering the totality of his answers, I think there is sufficient basis to excuse him for cause.

COURT: Does the State have anything further?

STATE: Briefly, you Honor. Mr. McArty clearly answered to each (A) through (H) that he would give all of those consideration. The fact that he might struggle with how much weight is not relevant in deciding whether he is an appropriate juror or not. He gave very thoughtful answers. He gave very considerate answers, and he clearly stated that he would consider each of these mitigating circumstances. As a matter of fact, he said he would never under any circumstance automatically impose the death penalty; and he said everything should be a consideration. For that reason, the State would oppose any challenge for cause to Mr. McArty.

COURT: Based on the totality of the responses of Mr. McArty, particularly those during individual voir dire, the Court denies the challenge for cause.

DEFENSE: We'd like our objection noted to the Court's ruling.

COURT: So noted....

La.C.Cr.P. art. 905.5 lists seven mitigating circumstances a juror must consider in deciding whether to impose a death sentence including: 1) the offender has no significant prior history of criminal activity; and 6) the youth of the offender at the time of the offense. In addition, jurors may consider any other relevant mitigating circumstance, La.C.Cr.P. art 905.5(h). The United States Supreme Court has stated that any prospective juror who fails to consider the evidence of aggravating and mitigating circumstances violates the impartiality requirement of the Due Process Clause and should be removed for cause. *Morgan v. Illinois,* 504 U.S. at 734-39, 112 S.Ct. at 2233-34.

Although Juror McArty' s responses revealed that he had some misgivings about a few of the mitigating circumstances defense counsel intended to present to the jury, the juror indicated on numerous occasions that he would follow the law and consider such mitigating evidence, and that he would not "automatically reject" any mitigating factors. Moreover, Juror McArty's responses did not indicate that he would refuse to consider the defendant's youth, criminal history, or exposure to media violence as mitigating circumstances, but only, and appropriately, that he could not say before hearing all of the evidence in the case how much weight he

would attach to those circumstances. Perhaps most critically, the prospective juror stated unequivocally that he would "want to hear as much" as he could and that "nothing" would make him vote for death automatically. Accordingly, in light of the juror's entire testimony, and the trial judge's opportunity to view the prospective juror during examination and to assess the overall tenor of the juror's responses, the court did not abuse its discretion in finding that the juror could follow the judge's instructions and render a judgment according to the law. *See State v. Lee,* 93-2810, p. 9 (La. 5/23/94), 637 So.2d 102, 108 (A trial judge is accorded broad discretion in ruling on cause challenges because he or she "has the benefit of seeing the facial expressions and hearing the vocal intonations of the members of the jury venire as they respond to questioning by the parties' attorneys.").

Juror Leary

Finally, the defendant argues that the trial court erred in granting the state's challenge for cause of Juror Leary who "expressed reservations about imposing the death penalty." The defendant maintains that though the prospective juror "showed a reluctance to impose the death penalty ... she clearly stated that it would be appropriate in the right circumstances," and thus was "merely follow[ing] the law, which does not make every homicide eligible for the death penalty." The following colloquy occurred during voir dire:

STATE: Ms. Leary?

JUROR: I don't really believe in the death sentence.

STATE: ... Ms. Leary, you had said that you don't believe in the death penalty?

JUROR: Right.

STATE: Why do you feel that way?

JUROR: Well, I feel that I would not be able to vote for the death penalty. I realize there are circumstances that may call for that. But I feel that a person would be punished more living and let their conscience be their guide by what they've done.

STATE: Do you think that all people are bothered by their actions? Do you think that everybody has a conscience that makes them worry about it?

JUROR: Yes, I do. I do.

STATE: Okay. Is there any circumstance under which you think you could personally say that you [could] sentence someone to die?

JUROR: Well, I suppose there could be circumstances. If, say, it was a family member, you know, then I suppose I could.

STATE: Okay. Well, it's not going to be a family member, 'cause you wouldn't be a juror if that's the case. I promise you that. Not that I wouldn't want you. As a juror in a reasonable case where you are not going to know anyone involved, can you see yourself sentencing somebody to die?

JUROR: No.

STATE: Okay. I appreciate you being honest....

JUROR: Well, I could not vote for the death penalty. Not to say that maybe they would not have deserved that. But I could not have voted for the death penalty.

Defense counsel later engaged in the following dialogue with Juror Leary:

DEFENSE: Okay. And Ms. Leary, I believe you said that you just — it was your opinion you could not vote for the death penalty?

JUROR: No.

DEFENSE: Under any circumstances?

JUROR: No.

DEFENSE: Can you think of any circumstances where you could vote for it?

JUROR: Well, I said earlier that that couldn't be. So, no.

DEFENSE: Okay. I think at one time you told Mr. Owen [the prosecutor] there could be some circumstances where you could vote for the death penalty.

JUROR: If it was a family member.

DEFENSE: Oh, a family member. I got you.

JUROR: And they said, well, that couldn't be. So that's why I said no.

DEFENSE: I got you. Okay. Well, let me ask you this, if you were sitting up here and it had been your family member that had been killed, say during a robbery, and your family member of yours had been killed, your family member, would you want the person who killed him to get the death penalty?

JUROR: Now, that's a good question. And, really, I don't know whether I would even want that person to get a death penalty.

DEFENSE: You don't know?

JUROR: I can't answer that right now.

DEFENSE: You'd want to know more about the person?

JUROR: Person, yes.

DEFENSE: Can you envision a circumstance where you would want the person to get the death penalty?

JUROR: Well, now, I can envision a circumstance where I would want them to. But I'm not sure I would be able to vote for them to get it.

Thereafter, defense counsel questioned numerous other jurors but did not ask any follow-up questions of Juror Leary. However, when the state later challenged the prospective juror for cause the following discussion occurred:

COURT: Any challenges for cause?

STATE: Yes, your Honor. The State would challenge prospective juror ... Mrs. Leary .... Her attitude toward the death penalty would prevent her from making an impartial decision as to this defendant's guilt. Further, it would substantially impair her from making an impartial decision in accordance with her oath and instructions; and, further, that she would vote against the death penalty without regard to any evidence that might be developed at trial before her.

COURT: Defense's response to the challenge for cause?

DEFENSE: I think we are going to object on this one. She — even though she did at one point say it could be circumstances she could impose the death penalty even though she modified that a little bit later on. She indicated that [the] death penalty might be [an] appropriate punishment in a case involving a family, one of her family members. So we are going to oppose the challenge for cause on her.

STATE: Do counsel wish to ask any further questions of Mrs. Leary?

COURT: The State does not, your Honor. But I do wish to note for the record that the — the instant — she said there were circumstances in which she would be

in favor of it, but in none of those would she actually be able to vote for the death penalty. Her quote was: I would not vote for the death penalty. The only exception was one of her family members.

COURT: Anything further by [the] defense?

DEFENSE: Nothing further.

COURT: The State's recollection and representation to the Court regarding Ms. Leary's statements and views accord with the Court's recollection. Further, the Court also seems to recall that Ms. Leary indicated that she may not even want or may not be able to even vote for the death penalty if the victim were her family member, which was a further explanation of her previous statement. So for those reasons, the Court will grant the challenge for cause by the State.

DEFENSE: We ask our objection to be noted.

COURT: It's noted.

A defendant is guaranteed an impartial jury and a fair trial. La. Const. art. I, § 16; *State v. Brown,* 496 So.2d 261, 263 (La. 1986); *State v. Bell,* 315 So.2d 307 (La. 1975). If a prospective juror's inclination toward the death penalty (or life imprisonment) would substantially impair the performance of the juror's duties, a challenge for cause is warranted. *State v. Ross, supra* at 644. Juror Leary candidly stated that she could not vote to impose the death

penalty under the circumstances of the present case. Though she said she might be able to consider imposing the death penalty in the extraordinary case of one her own family members being murdered, she subsequently equivocated and stated that even in such a circumstance she was not sure she could vote for the death penalty. As such, her answers as a whole suggested that she might have been unable to render a judgment according to the law since she did not definitively state whether she could consider imposing a death sentence in this case. *State v. Jones, supra* at 929; *see State v. Lindsey,* 543 So.2d 886, 896 (La. 1989) (when a prospective juror would automatically vote against the death penalty except in very specific cases, as in the case of a person who killed 35 elementary school children, trial court may properly exclude the juror for cause); *State v. Nicholson*, 437 So.2d 849, 853 (La. 1983) (trial court properly excluded for cause juror who could return the death penalty only in the case of mass murderers such as Adolf Hitler or Charles Manson). Because her uncertainty likely would have prevented or substantially impaired her ability to make an impartial sentencing decision, *see Wainwright v. Witt, supra,* the trial court properly granted the state's challenge for cause. *Cf. State v. Tart,* 93-0772, pp. 15-16 (La. 2/9/96), 672 So.2d 116, 124, *cert. denied,* 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 277 (1996) (a challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied). This assignment, as a whole, lacks merit.

GUILT PHASE

ARGUMENT NO. 2

(Assignment of Error No. 7)

In this assignment of error, the defendant claims that the state presented insufficient evidence to prove he killed the victim during an armed robbery. He maintains for the most part that the state failed to present any credible evidence that he shot and robbed the victim, as the only direct evidence of his guilt is the testimony of a co-perpetrator turned state's witness "who stood much to gain by testifying ... [since] he will someday likely request commutation and no doubt expects no opposition from local authorities."

"In reviewing the sufficiency of the evidence to support a conviction, an appellate court in Louisiana is controlled by the standard enunciated by the United States Supreme Court in *Jackson v. Virginia,* 433 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) .... [T]he appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt." *State v. Captville,* 448 So.2d 676, 678 (La. 1984). When circumstantial evidence is used to prove the commission of the offense, La. R.S. 15:438 requires that "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." This statutory test works with the *Jackson* constitutional sufficiency test to evaluate whether all evidence, direct and circumstantial, is sufficient to

prove guilt beyond a reasonable doubt to a rational jury. *State v. Rosiere,* 488 So.2d 965, 968 (La. 1986).

To convict the defendant of first degree murder, the prosecution was required to prove that the defendant specifically intended to kill the victim during the perpetration or attempted perpetration of an armed robbery. La. R.S. 14:30(A)(1). Armed robbery is defined as "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. R.S. 14:64. Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant. La. R.S. 14:10(1); *State v. Butler,* 322 So.2d 189, 192-93 (La. 1975); *State v. Martin,* 92-0811, p. 3 (La. App. 5th Cir. 5/31/94), 638 So.2d 411, 413-14. Specific intent to kill may be inferred from a defendant's act of pointing a gun and firing from close range at a person. *State v. Williams,* 383 So.2d 369, 373 (La. 1980), *cert. denied,* 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981); *State v. Procell,* 365 So.2d 484, 492 (La. 1978), *cert. denied,* 441 U.S. 944, 99 S.Ct. 2164, 60 L.Ed.2d 1046 (1979).

The question before us is not whether the evidence was legally sufficient to prove the shooter's specific intent (clearly an offender who shoots someone in the head with a rifle specifically intends to kill the victim), but whether the evidence was legally sufficient to prove the defendant's identity as the perpetrator. To that end, the only direct evidence of the defendant's guilt is the trial testimony of Audy Keith, a co-perpetrator turned state's witness. As explained previously, Keith testified that he shot the victim in the abdomen with a shotgun and that the

defendant shot the victim in the head with a rifle. Keith further testified that after they killed the victim, the defendant told Keith to search the victim's pickup truck for the victim's wallet, which Keith found and turned over to the defendant, and that the defendant hid the wallet and money under a couch cushion. The defendant, however, alleges that Keith shot and robbed the victim and then falsely implicated the defendant to avoid the death penalty. In support, the defendant argues that because Keith admitted at trial that he lied to deputies about his own participation in the instant offense during a taped statement in which he implicated the defendant, Keith's incriminating testimony should be viewed "with considerable suspicion."

As a general matter, when the key issue is the defendant's identity as the perpetrator, rather than whether the crime was committed, the state is required to negate any reasonable probability of misidentification. *State v. Smith,* 430 So.2d 31, 45 (La. 1983); *State v. Brady,* 414 So.2d 364, 365 (La. 1982); *State v. Long,* 408 So.2d 1221, 1227 (La. 1982). However, positive identification by only one witness is sufficient to support a conviction. *See State v. Mussall,* 523 So.2d 1305, 1311 (La. 1988) (generally, one witness's positive identification is sufficient to support the conviction); *State v. Ford,* 28,724 (La. App. 2d Cir. 10/30/96), 682 So.2d 847, 849-50, *writ denied,* 99-1215 (La. 6/4/99), 745 So. 2d 12. In the instant case, the jury heard Keith's testimony implicating the defendant and evidently believed Keith's version of events. The trier of fact makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness; thus, a reviewing court may impinge on the "fact finder's discretion only to

the extent necessary to the fundamental due process of law." *Mussall,* 523 So.2d at 1310 (La. 1988).

Moreover, though Keith testified pursuant to a favorable plea agreement, the jurisprudence in Louisiana generally holds that an accomplice is qualified to testify against a co-perpetrator even if the prosecution offers him inducements to testify; such inducements would merely affect the witness's credibility. *State v, Gunter,* 208 La. 694, 23 So.2d 305 (1945); *State v. Jenkins,* 508 So.2d 191, 194 (La. App. 3d Cir. 1987), *writ denied,* 512 So.2d 438 (La. 1987); *cf. State v. McCullough,* 98-1766 (La. App. 3d Cir. 12/29/98), 737 So.2d 49, *writ denied,* 99-0259 (La. 2/26/99), 738 So.2d 590 (testimony of co-defendant, who pled guilty to reduced charge of manslaughter, against other defendants in first degree murder trial did not violate the public bribery statute).[1] As the United States Fifth Circuit has found, "a conviction may be based even on uncorroborated testimony of an accomplice or of someone making a plea bargain with the government, provided that the testimony is not incredible or otherwise insubstantial on its face." *United States v. Osum,* 943 F.2d 1394, 1405 (5th Cir. 1991).

---

[1] The 10th Circuit panel opinion in *United States v. Singleton,* 144 F.3d 1343 (10th Cir. 1998), which held that a plea agreement between a witness and the government violated the federal public bribery statute, 18 U.S.C. 201, provided the impetus for similar arguments made by defendants in Louisiana. The panel opinion is now a dead letter. *United States. v. Singleton,* 165 F.3d 1297 (10th Cir. 1998) (en banc), *cert. denied,* 527 U.S. 1024, 119 S.Ct. 2371, 144 L.Ed.2d 775 (1999).

In the instant case, defense counsel knew of Keith's agreement with the state and its terms; and though counsel cross-examined Keith about it in an effort to undermine his credibility, the jury apparently determined that he told the truth about his and the defendant's involvement in the instant offense. The jury's assessment of the veracity of Keith's testimony appears reasonable in light of the overwhelming circumstantial evidence presented by the state, most notably the testimony of numerous witness who stated that a few days before, and on the day of, the instant offense the defendant talked about his need for money and his desire to rob and kill "somebody" (later specifically the victim). Accordingly, based on Keith's incriminating testimony and the defendant's repeated statements that he intended to rob and kill the victim, the state presented sufficient evidence to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt" *State v. Captville, supra* at 678. This assignment of error lacks merit.

ARGUMENT NO. 4

(Assignment of Error No. 10)

In this assignment of error, the defendant claims that the trial court erred in admitting the following irrelevant evidence: 1) during the guilt phase, the state introduced evidence of a *dation en paiment* executed between the victim and the defendant's mother and stepfather that showed the defendant's parents owed back rent on the trailer to the victim; 2) during the guilt phase, the state introduced evidence that the defendant's brother had skipped bail, leaving the aforementioned bail bondsman,

Steve Dement, liable on a $22,000 bond; and 3) at the penalty phase, the state introduced a photograph of a swamp located behind Dement's house.

La.C.E. art. 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Further, all relevant evidence is admissible unless constitutionally prohibited. La.C.E. art. 402. Finally, relevant evidence may be excluded if its probative value is outweighed by "the danger of unfair prejudice." La.C.E. art. 403. The trial court is given great discretion in determining whether evidence is relevant, and absent a clear abuse of discretion, rulings on relevancy of evidence should not be disturbed on appeal. *State v. Stowe,* 93-2020 (La. 4/11/94), 635 So.2d 168, 173; *State v. Mayeux,* 570 So.2d 185, 189-90 (La. App. 5 Cir. 1990), *writ denied*, 575 So.2d 386 (La. 1991).

Concerning the *dation en paiment,* the defendant argues that because the state never alleged that "the back rent was what was taken by force from the victim when he was killed," and because "the back rent was something owed to the victim, which [the defendant] could not have taken from the victim on the day of his death," this evidence was not necessary to prove the "taking anything of value" element of the charged offense. La. R.S. 14:30; R.S. 14:64. The defendant further maintains that this evidence "does not demonstrate any motive for [the defendant] to kill the victim ... [because t]he state never proved that [he] even knew of the existence of the agreement between the victim and his mother and stepfather."

Defense counsel did not object to the introduction of this evidence and thereby failed to preserve the issue for appeal. *See State v. Williams,* 96-1023, p. 4 (La. 1/21/98), 708 So.2d 703, 709, *cert. denied,* 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed.2d 79 (1998) (failure to object to errors during guilt phase of a capital case waives any complaint on appeal); *State v. Taylor,* 93-2201, p. 7 (La. 2/28/96), 669 So.2d 364, 369, *cert. denied,* 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996) (same).

Concerning the evidence of the forfeited bond, the defendant alleges that "[w]hile the prosecutor argued that this was relevant to the motive, this record fails to reveal any support for such a theory." Contrary to the defendant's claim, the state elicited testimony from the bondsman, Steve Dement, that Dement was pushing the defendant to help the bondsman find the defendant's brother so that Dement would not have to forfeit the brother's $22,000 bond; Dement further testified that the defendant had agreed to travel to Nevada with Dement to help locate his brother. This testimony suggests that the defendant may have felt pressured to ensure that Dement did not suffer considerable financial loss by having to pay his brother's bond. Accordingly, the testimony was yet more evidence of financial pressures the defendant experienced, and thus relevant to prove the state's contention that the defendant had a financial motive to rob and kill the victim. Cf. 1 W. LaFave, A. Scott, Substantive Criminal Law, § 3.6, p. 324 (West 1986) ("[W]hen the prosecution's case against the criminal defendant is circumstantial, the fact that the defendant had some motive, good or bad, for committing the crime is one of the circumstances which, together with other circumstances, may lead the fact-finder to conclude that he did in fact commit

the crime; whereas lack of any discernible motive is a circumstance pointing in the direction of his innocence.") (footnote omitted); *State v. Williams,* 93-2707 (La. 3/11/94), 633 So.2d 147, 149 (La. 1994) ("Motive is not an essential element of murder, but 'a lack of motive may properly be considered as a circumstance mitigating against specific intent.'") (quoting *State v. Mart,* 352 So.2d 678, 681 (La. 1977)).

Concerning the photograph of the swamp behind Dement's house, generally photographs which illustrate any fact, shed light upon any factors in the case, or are relevant to describe the person, place or thing depicted, are generally admissible. *State v. Thorton,* 94-1740, p. 7 (La. App. 1 Cir. 10/6/95), 671 So.2d 481, 486; *State v. Sterling,* 95-0673, p. 5 (La. App. 5 Cir. 2/27/96), 670 So.2d 1316, 1319. The photograph must be similar to the scene in order to have probative value. *See State v. Boyer,* 406 So.2d 143, 149 (La. 1981). In the instant case, the photograph helped shed light on Audy Keith's (the co-perpetrator turned state's witness's) testimony that the defendant intended to dispose of the victim's body in the swamp behind Dement's house. This entire assignment lacks merit.

ARGUMENT NO. 5

(Assignment of Error No. 10)

In the same assignment of error, the defendant claims that the trial court erroneously admitted gruesome photographs taken of the crime scene in which the victim's body is visible. During the direct examination of Caddo Parish Sheriff's Deputy Owen McConnell, the state introduced five 8" x 10" photographs of the crime scene which showed: l) the

right arm of the victim; 2) the open back door and porch of the trailer; 3) a view of the victim's body from the back porch looking into the hallway; 4) a view of the blood trail in the hallway leading to the back bedroom; and 5) a view of the victim's body from the doorway of the back bedroom.

The state is entitled to the moral force of its evidence, and post-mortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing cause of death, as well as location and placement of wounds and to provide positive identification of the victim. *State v. Koon,* 96-1208, p. 34 (La. 5/20/97), 704 So.2d 756, 776 (orig. hrg), *cert. denied,* 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997); *Maxie, supra* at 532, fn. 8 (citing *State v. Martin,* 93-0285, p. 14 (La. 10/17/94), 645 So.2d 190, 198); *State v. Watson,* 449 So.2d 1321, 1326 (La. 1984), *cert. denied,* 469 U.S. 1181, 105 S.Ct. 939, 83 L.Ed.2d 452 (1985). Photographic evidence will be admitted unless it is so gruesome that it overwhelms jurors' reason and leads them to convict without sufficient other evidence. *State v. Koon, supra* (citing *State v. Perry,* 502 So.2d 543, 558-59 (La. 1986), *cert. denied,* 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987)).

The five photographs of the crime scene were relevant to show the manner of death and the location of the victim's body. These photographs are not repetitive or cumulative in that they depict the crime scene from different angles and distances. While these photographs were certainly unpleasant, they were not excessively gruesome. *Cf. State v. Morris,* 157 So.2d 728, 732 (1963) (gratuitous introduction of "gruesome and ghastly" photographs depicting the progress of an autopsy in an

"increasing grotesque and revolting" manner constituted reversible error when the defendant admitted that he killed the victim and contested only his state of mind). Accordingly, the defendant fails to show that the photographs were clearly more prejudicial than probative and that this Court should interfere in the trial court's exercise of its broad discretion to admit the evidence. This assignment of error lacks merit.

ARGUMENT NO. 6

(Assignment of Error No. 12)

In this assignment of error, the defendant claims that the trial court erred in not taking any remedial action on his motion that two investigators from the Caddo Parish District Attorney's Office be removed from the courtroom during Audy Keith's testimony to prevent them from "eyeballing" Keith from the front row of the courtroom. The defendant alleges that the "'eyeballing' was intended to threaten or intimidate the witness" into giving testimony the state wanted the jury to hear.

Before the state called Keith to testify, the following discussion took place outside the presence of the jury:

COURT: Are we ready?

STATE: Yes, your Honor, we are.

DEFENSE: Your Honor, I'd like to make a motion at this time. At this time we would object to Don Ashley, investigator for the Caddo Parish Sheriff's Office, and Rusty McKinley, investigator for the Caddo Parish Sheriff's Office, sitting

on the front row of the courtroom today, particularly Mr. Ashley sitting directly in front of the witness, Mr. Audy Keith. This is the first instance that Mr. Ashley has been in the courtroom during this trial. We think it's just — it could have some bearing on Mr. Keith's testimony, and it concerns me greatly that the D.A.'s investigator is sitting there eyeballing him as he testifies. Mr. Keith is in custody, the D.A. investigator has access to him because he is in custody, and I just have a lot of concern for Mr. Keith having to sit there and testify with Mr. Ashley, who is a big man and an extremely experienced investigator, having worked with the Shreveport Police Department now working for the D.A.'s office, sitting there eyeballing him while he testifies. And we would ask that Mr. Ashley be removed, as well as Mr. McKinley, who is seated two people between them, but also on the front row, who is also an investigator with the District Attorney's Office.

COURT: The state's response, if any?

STATE: Your Honor, there's no basis in law for his objection. I'll respond to Mr. Glassell's attack after this witness testifies. They are employees with the Caddo D.A.'s office, and they're there for a reason, but not the one Mr.

Glassell suggests. If anyone is doing intimidation, that would be on the part of Mr. Glassell, and we'll discuss that after this witness's testimony.

COURT: The Court denies the — is it a request or a motion?

DEFENSE: It was a motion.

COURT: The Court denies the motion and/or request of defense.

DEFENSE: We'd like our objection noted.

COURT: Duly noted for the record. We're ready for the jury.

Contrary to the defendant's claim that the investigators' presence in the courtroom would intimidate the witness, a review of Keith's trial testimony reveals that he asked the investigators to sit in the courtroom while he testified because he apparently found their presence reassuring. This assignment of error lacks merit.

ARGUMENT NO. 7

(Assignment of Error No. 13)

In his next assignment of error, the defendant alleges that the trial court erred in failing to address "meaningfully" whether defense counsel Michelle Andrepont had a conflict of interest in representing him. During Andrepont's cross-examination of Audy Keith, the following colloquy occurred:

WITNESS: Your Honor, may I ask you a question, please?

COURT: Just a moment. Will counsel come up?

(Conference at the bench between the Court and counsel.)

COURT: The Court is going to take a recess in just a moment. At this time, though, I want the jury to take a place outside the courtroom.

(Whereupon the jury left the courtroom and the proceedings continued as follows:)

COURT: Do counsel wish the Court to inquire as to what the witness wants to ask the Court?

STATE: I would like it noted for the record that everybody is present with the exception of the jury.

COURT: All right, Mr. Keith. What is it that you wanted to ask the Court?

WITNESS: Yes. I would like to know if it would conflict this case by this woman named Michelle Andrepont.

COURT: Will counsel come up?

(Conference at the bench between the Court and counsel.)

COURT: The Court is going to take a fifteen-minute break, and then we'll come back and pick up where we left off.

(Whereupon a brief recess was taken, after which the proceedings continued outside the presence of the jury:)

COURT: In response to the question asked by the witness, the Court for the record is unaware of any conflict of interest in this case. Is there anything further by [the] defense or the state at this time?

STATE: Your Honor, on behalf of the state, we are unaware of any conflict of interest at this time.

DEFENSE: Your Honor, I've discussed the possibility that someone somewhere may deem that there's a conflict. Though I do not believe there is any conflict in this case, I have discussed that possibility with Mr. Irish, and at this time he would expressly waive that conflict on the record. I would ask him to do so.

COURT: Is that correct, Mr. Irish?

IRISH: Yes, ma'am.

COURT: So noted. Are we ready to proceed?

STATE: The state is, Your Honor.

COURT: Bring in the jury.

The record contains no explanation of what Audy Keith had in mind when he interjected the issue of a conflict with his question to the court about Ms. Andrepont, co-counsel for the defense. The defense brief on appeal similarly lacks any explanation. The United States Supreme Court and this Court have thoroughly examined the relationship between conflicting interests and effective assistance of counsel. *See Cuyler v. Sullivan,* 446 U.S. 335, 100

S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *State v. Wille,* 595 So.2d 1149, 1153 (La. 1992), *cert. denied,* 506 U.S. 1016, 113 S.Ct. 645, 121 L.Ed.2d 575 (1992); *State v. Carmouche,* 508 So.2d 792, 797 (La. 1987); *State v. Edwards,* 430 So.2d 60, 62-63 (La. 1983); *State v. Marshall,* 414 So.2d 684, 687-88 (La. 1982), *cert. denied,* 459 U.S. 1048, 103 S.Ct. 468, 74 L.Ed.2d 617 (1982). If a defendant (or a witness) raises the issue of ineffective counsel because of a conflict of interest before trial, a trial judge must "either ... appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel." *Holloway,* 435 U.S. at 484, 98 S.Ct. at 1178. If a defendant does not raise the issue until after trial, he "must establish that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan,* 446 U.S. at 350-51, 100 S.Ct. at 1719. *See also Wille,* 595 So.2d at 1153. A mere possibility of a conflict of interest is insufficient to reverse a conviction. *Cuyler v. Sullivan, supra.*

The instant case falls between *Holloway* and *Sullivan.* Neither the defendant nor counsel brought any conflict to the attention of the court before trial. The alleged conflict first came to the court's attention during trial, when it was no longer feasible to appoint different counsel but when it was also feasible for the court to take some remedial steps, including a mistrial, to protect the defendant's interests before the jury returned its verdict. In this situation, "the judge should require the attorney to disclose the basis of the conflict" and determine whether it is too remote to have an actual bearing on counsel's performance. *State v. Carmouche, supra* at 805. If the conflict is not too remote, the court must

explain the problem to the defendant outside the presence of the jury and inform him of his right to conflict-free representation. The defendant remains free to make on the record a fully informed waiver of his right to conflict-free counsel. *Id.* (Citing *United States v. Winkle,* 722 F.2d 605, 609-12 (10th Cir. 1983), and *United States v. Martinez,* 630 F.2d 361, 362-64 (5th Cir. 1980)); *see also Wheat v. United States,* 486 U.S. 153, 160, 108 S.Ct. 1692, 1698, 100 L.Ed.2d 140 (1988) ("[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all of those who observe them.").

In the present case, it appears that the court determined on the basis of an off-the-record discussion with counsel that the alleged conflict was too remote to have any influence on the trial. Although the court and defense counsel should have left a much better record, the transcript reveals that defense counsel did discuss the problem with the defendant, who then made an explicit waiver of his right to conflict-free counsel. Given the present state of the record and the completely obscure nature of the alleged conflict, no error appears on the present record and the defendant will have to pursue this claim in post-conviction proceedings. For purposes of direct appeal, this claim lacks merit.

ARGUMENT NO. 8

(Assignment of Error No. 14)

In this assignment or error, the defendant claims that the trial court erred in allowing the state to elicit testimony from witnesses Audy Keith and Michael Stewart that Keith's in-court testimony that

the defendant had talked about robbing and killing the victim was consistent with an out-of-court statement Keith made to Stewart that the defendant "was talking about robbing and killing his landlord, Russ Rowland." The defendant maintains that the state improperly bolstered Keith's credibility in violation of La.C.E. art. 607(B)'s provision that "the credibility of a witness may not be supported unless it has been attacked."

As an initial matter, the defendant properly recites the general rule that the state may not introduce evidence to bolster the credibility of a witness before that credibility has been attacked. La.C.E. art. 607(8). However, the defendant erroneously attributes the above testimony and out-of-court statement to Keith; the record reveals that Jason Guin, and not Keith, testified that he told Stewart that the defendant was talking about robbing and killing the victim, and that following Guin's testimony, Stewart testified that Guin did in fact make that out-of-court statement. As such, the complained-of testimony was not an improper attempt by the state to bolster Keith's credibility, but was yet more circumstantial evidence of the defendant's intent to commit the instant offense. La.C.E. art. 803(3) (excepting from the hearsay rule "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) offered to prove the declarant's then existing condition or his future action."); *see State v. Martin, supra* at 460 ("If the statement is a direct assertion of the speaker's state of mind, then it is offered for the truth of the matter asserted, but it usually falls within an exception to the hearsay rule for declarations of a then existing

state of mind.") In any event, defense counsel did not object to the introduction of this testimony and thereby failed to preserve the issue for appeal. *See State v. Williams, supra* at 709 (failure to object to errors during guilt phase of a capital case waives any complaint on appeal); *State v. Taylor, supra* at 369. This assignment of error lacks merit.

ARGUMENT NO. 9

(Assignment of Error No. 8)

In his next assignment of error, the defendant alleges that the trial court erred in not instructing the jury that proof of unpaid rent does not satisfy the "anything of value" element of the armed robbery statute. He maintains that though the prosecution tried to satisfy this element by introducing evidence that he owed the victim $500 in overdue rent, such evidence had nothing to do with whether he took something of value from the victim by use of force or intimidation while armed with a dangerous weapon.

La.C.Cr.P. art. 802 requires the trial court to charge the jury as to the law applicable to the case. As a general matter, a trial judge has the duty to instruct jurors as to "every phase of the case supported by the evidence whether or not accepted by him as true," and that duty extends to "any theory ... which a jury could reasonably infer from the evidence." La.C.Cr.P. art. 802; *State v. Marse,* 365 So.2d 1319, 1323 (La. 1979). Under La.C.Cr.P. Art. 807, a requested special jury charge shall be given by the court if it does not require qualification, limitation or explanation, and if it is wholly correct and pertinent to the case. The special charge need not be given if it is included in the general charge or in another special charge to be given. *State v. Segers,*

355 So.2d 238 (La. 1978). Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. *Marse,* 365 So.2d at 1324; La.C.Cr.P. art. 921.

Here, the defendant misrepresents the purpose for which the state introduced evidence of the overdue rent owed to the victim. As explained in a previous assignment of error, the state introduced such evidence to establish the defendant's motive for robbing and killing the victim, not to prove the "anything of value" element of the armed robbery statute. To prove that element, the state introduced evidence that after the defendant and Audy Keith shot the victim, the defendant instructed Keith to search the victim's truck for a wallet, which Keith found and turned over to the defendant, and that the defendant removed $141 from the wallet and hid the wallet and money under a couch cushion. As such, the requested jury instruction probably would have confused the jury by muddying the purposes for which the state introduced evidence of the overdue debt and the theft of the wallet. To avoid this result, the trial court would likely have had to give a lengthy explanation of what evidence the jury could consider in determining the "anything of value" element of the charged offense. *Cf. State v. English,* 367 So.2d 815, 823 (La. 1979) ("Arguably, the extinction of a debt by killing the creditor is the gaining of something of value .... "). The trial court thus wisely chose not to give the requested special instruction. This assignment of error lacks merit.

PENALTY PHASE

ARGUMENT NO. 12

(Assignment of Error No. 6)

In this assignment of error, the defendant claims that the trial court erred in denying his numerous motions for a mistrial on grounds that he was denied due process of law when the prosecutor wept during his opening statement and made numerous improper comments during his opening statement and closing argument. Specifically, he alleges that the prosecutor: 1) wept during his opening statement and thus introduced passion and prejudice into the jury's deliberation; 2) argued improperly to the jury during his opening statement and closing argument that "evil will prosper" if the jury did not impose the death penalty; 3) argued improperly to the jury during his closing argument that certain mitigating circumstances enumerated in La.C.Cr.P. art. 905.5 did not apply to the defendant, but did apply to the co-perpetrator turned state's witness (Audy Keith) and the defendant's girlfriend; 4) solicited testimony from Keith that he accepted responsibility for his role in the instant offense by pleading guilty, and later commented improperly during his closing argument that "[t]he defense would love this world with no responsibility," thereby implying that the defendant be should punished for exercising his right to trial; 5) vouched improperly for Keith's credibility by commenting during his closing argument, "What do you think happens to snitches in Angola, where he has to live the rest of his life?"; and 6) commented improperly during his closing argument that defense counsel's job, regardless of the circumstances of the case, was to argue that it was not appropriate to kill

the defendant and encourage the jury to "let the defendant off."

As a general matter, La.C.Cr.P. art. 766 limits the scope of the state's opening statement to "explain the nature of the charge, and set forth, in general terms, the nature of the evidence by which the state expects to prove the charge." When a district attorney makes an improper remark, La.C.Cr.P. art. 771(1) permits the court to "promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant. ... " Similarly, La.C.Cr.P. art. 774 limits the scope of the closing argument to evidence, the lack of evidence, and conclusions which may be drawn therefrom. It specifically states that "[t]he argument shall not appeal to prejudice." La.C.Cr.P. art. 775 provides for a mistrial in a jury case when prejudicial conduct makes it impossible for the defendant to obtain a fair trial. Louisiana jurisprudence on prosecutorial misconduct allows prosecutors broad latitude in choosing closing argument tactics. *See, e.g., State v. Martin,* 539 So.2d 1235, 1240 (La. 1989) (closing argument referring to "smoke screen" tactics and defense "commie pinkos" held inarticulate but not reversible); *State v. Copeland,* 530 So.2d 526, 545 (La. 1988) (prosecutor's waving a gruesome photo at jury and urging jury to look at it if they become "weak kneed" during deliberations held not improper). Even if a statement is undesirable it may not "rise to the level of prejudice necessary to constitute reversible error." *State v. Martin*, *supra.*

The granting of a mistrial is a "drastic remedy," which, unless mandated by La.C.Cr.P. art. 770, is warranted only if substantial prejudice results that would deprive the defendant of a fair trial. *State v. Jarman,* 445 So.2d 1184 (La. 1984); *State v. Smith,* 430 So.2d 31 (La. 1983); *State v. Robinson,* 342 So.2d 183 (La. 1977). In this case, the defendant fails to show that the complained-of comments warrant reversal of his conviction. First, as to the prosecutor's display of emotion and comment that "evil will prosper" if the jury does not impose the death penalty, the record reveals that the court admonished the jurors that they "should not be swayed or influenced by sympathy, passion or displays of emotion by the attorneys, witnesses, or observers in the courtroom ... [and] that the attorneys' statements and arguments are not evidence." Thus, even if the prosecutor's conduct did exceed the proper scope of acceptable opening statement, the defendant has not thoroughly and convincingly shown that the jurors disregarded the trial judge's admonition and allowed the complained-of conduct to influence them and contribute to their verdict. Similarly, as to the claimed improper comments the prosecutor made during his closing argument, the defendant merely recites the complained-of statements and some applicable jurisprudence, but does nothing to show how these comments substantially prejudiced the jury and made it impossible for him to receive a fair trial. Accordingly, given the broad latitude afforded to the prosecutor during his closing argument, it cannot be said that these few comments sprinkled over a nine-page closing argument were so egregious as to warrant the drastic remedy of a mistrial. This assignment of error lacks merit.

ARGUMENT NO. 13

(Assignment of Error No. 15)

In his next assignment, the defendant claims that the trial court gave erroneous jury instructions during the penalty phase. Specifically, he argues that the trial court erred in failing: 1) to instruct the jurors that they must consider mitigating evidence individually, in violation of the rule of *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); 2) to instruct the jurors that they were allowed to be non-unanimous in deciding whether to impose a death sentence or life imprisonment; and 3) to instruct the jurors that the governor's power of clemency should not affect their sentencing decision.

As to the claimed *Mills* violation, the jury instruction in the instant case was unlike the charge in *Mills*. In *Mills,* the Court was analyzing Maryland's three-part sentencing scheme. In part one, the jury found whether any aggravating circumstances existed. In part two, the jury found whether any mitigating circumstances existed. In the final part, the jury weighed the aggravating against the mitigating circumstances. *Id.,* 108 S.Ct. at 1870-1874. The Supreme Court found that instructions that emphasized the need for unanimity in decision making could have led jurors to believe that unanimity among the jury was required to find the existence of a mitigating circumstance. It was not made clear to the jury that any juror alone could find the presence of a mitigating factor and vote for life, thus preventing a death sentence. The Court vacated *Mills'*s sentence on the ground that one or more of the jurors might have been precluded from considering mitigating factors. *Id.,* 108 S.Ct. at 1870.

In Louisiana, aggravating factors are not to be weighed against mitigating circumstances found by the jury according to any particular standard. La.C.Cr.P. art. 905.3. Likewise, this Court has noted that "[t]he capital sentencing procedure does not establish any presumption or burdens of proof with respect to mitigating circumstances." *State v. Jones*, 474 So.2d 919, 932 (La. 1985), *cert. denied*, 470 U.S. 1178, 100 S.Ct. 2906, 90 L.Ed.2d 982 (1986); *see also State v. Sonnier,* 402 So.2d 650, 657 (La. 1981), *cert. denied,* 463 US. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983). Accordingly, not one of the proscribed elements in *Mills* is present in the instant instructions.

Here, the trial court gave the following instruction:

> If you find beyond a reasonable doubt that an aggravating circumstance existed, you may consider imposing a sentence of death. The finding of an aggravating circumstance does not mean that you must impose the death penalty. If, however, you do not unanimously find beyond a reasonable doubt that a statutory aggravating circumstance existed, then life imprisonment without benefit of probation, parole, or suspension of sentence is the only sentence that may be imposed. Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed.

Thereafter, the judge informed the jury that they must consider any mitigating circumstances and listed all of the statutory mitigating factors. Notably, the above-quoted instructions track verbatim the

language of the Louisiana Judges' Criminal Bench Book,§ 7.03, pp. 105-106. The defendant makes no showing that the jurors mistakenly applied the wrong burden in their deliberations as to mitigation.

As to the "lack of unanimity" instruction, this Court held in *State v. Jones,* 474 So.2d 919, 936 (La. 1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 992 (1980), that "the second sentence of Article 905.8 (requiring a life sentence in the event of the jury's failure to agree unanimously) has no pertinence when the jury retires to deliberate and immediately returns a unanimous recommendation. Only when the jury is unable to agree unanimously ... does the second sentence of Article 905.8 come into play. In such a case, an instruction on the consequences of inability to agree is dictated by the need to avoid jury confusion and to prevent an arbitrary result."

Jones went on to hold that under the circumstances of the case, (i.e., that the jury took only 74 minutes to return a verdict and that there was "no suggestion of the possibility of jury confusion"), "there [was] no justification for reversal of the death penalty, either on the basis that defendant had a legislative right to the instruction or on the basis that he was prejudiced by the court's failure to give the instruction." *Id. Cf. State v. Loyd,* 459 So.2d 498, 503 (La. 1984) (when jury asked to be told whether their recommendation of the death sentence had to be unanimous and defense counsel requested an instruction on the consequences of a non-unanimous vote, it was reversible error for trial court to refuse the requested instruction); *State v. Williams,* 392 So.2d 619, 640 (La. 1980) (on rehearing) (jurors in capital sentence hearing had to

be informed by trial judge that defendant would be sentenced to life if they were unable to be unanimous on recommendation, at least when jury had deliberated three hours, making substantial attempt to achieve unanimity and when jury foreman asked trial court if jury's recommendation had to be unanimous).

In the instant case, the jury retired to deliberate and returned with a verdict of death some 45 minutes later. The record does not reflect that the jury ever inquired about non-unanimity or that defense counsel requested such an instruction. As such, under *Jones,* the trial court was not required to give the requested instruction.

Finally, concerning the governor's power of clemency, La.C.Cr.P. art. 905.2(B) authorizes a jury instruction on the governor's power to commute both a life and death sentence. This Court has upheld La.C.Cr.P. art. 905.2(B) against challenges that the statute violates state and federal ex post facto laws, the United States Eighth Amendment and the federal Due Process Clause. *State v. Loyd,* 96-1805 (La. 2/13/97), 689 So.2d 1321, 1331 ("Louisiana's instruction is an even-handed one which accurately informs jurors that a death sentence as well as life sentence remains subject to executive revision. The present record reveals that after instructing the jurors on the governor's clemency power, the judge inquired if there was "any further reading asked by the state or by defense," and counsel for both parties responded negatively. Though the trial court did not specifically instruct the jurors that the clemency power of the governor should not be a factor in their determination of the appropriate penalty, nowhere in Article 905.2(B) or *Loyd* does it state that the trial

court must give such an instruction. Arguably, the trial court has an affirmative duty to give such an instruction only in cases in which the prosecutor makes a blatant appeal to jurors to return the death penalty as a means of foreclosing any possibility of early release on a life sentence. *See Loyd,* 689 So.2d at 1336 (Lemmon, J., concurring) ("[T]he instruction very well may lead to due process violations if the prosecutor, by evidence or argument, ventures into the possible consequences of commutation, or if the prosecutor and defense counsel over-emphasize the issue to such an extent that the jury's attention is diverted from its function of determining the sentence based on the circumstances of the murder and the character and propensities of the murderer.") Such was not the case here. This assignment of error lacks merit.

ARGUMENT NO. 14

(Assignment of Error No. 9)

In this assignment, the defendant maintains that a death sentence based on a single aggravating factor for an 18-year-old defendant who presents numerous mitigating factors is unconstitutionally excessive.

As an initial matter, this Court and the United States Supreme Court have held repeatedly that the death penalty, when imposed on an individual convicted of murder, is not per se unconstitutional because cruel, unusual or excessive. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Myles,* 389 So.2d 12 (La. 1979); *State v. Williams,* 383 So.2d 369 (La. 1980); *State v. Martin,* 376 So.2d 300 (La. 1979).

Moreover, this Court has held that only one aggravating circumstance is needed to return a verdict of death. *State v. Welcome,* 458 So.2d 1235 (La. 1983), *cert. denied,* 470 U.S. 1088, 105 S.Ct. 1856, 85 L.Ed.2d 152 (1985); *State v. Sawyer,* 422 So.2d 95, 101-02 (La. 1982) (the "adequately supported finding of the existence of one aggravating circumstance is alone sufficient to place the defendant in the category of offenders properly exposed to the possibility of the death sentence."). Finally, this Court has affirmed death verdicts for defendants as young as 17 years old at the time of the offense. *State v. Craig,* 95-2499 (La. 5/29/97), 699 So.2d 865, *cert. denied,* 522 U.S. 935, 118 S.Ct. 343, 139 L.Ed.2d 266 (1997); *State v. Comeaux,* 93-2729 (La. 7/1/97), 699 So.2d 16, *cert. denied,* 522 U.S. 1150, 118 S.Ct. 1169, 140 L.Ed.2d 179 (1998); *State v. Prejean,* 379 So.2d 240 (La. 1979), *cert. denied,* 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119. This assignment of error lacks merit.

MISCELLANEOUS

ARGUMENT NO. 15

(Assignment of Error No. 11)

In this assignment of error, the defendant claims that this Court erred in refusing to supplement the appellate record with transcripts of two pretrial hearings and numerous bench conferences. Though the defendant notes that "one of the problems with missing portions of an appellate record is that counsel does not know what is in the missing records and [thus] cannot always state why the requested records are important," he nonetheless argues that the requested records are necessary because: l) the transcripts of the pretrial hearings apparently

contain testimony from the co-perpetrator turned state's witness that is inconsistent with the witness's trial testimony; and 2) many important matters during trial were discussed and resolved at the bench.

As a general matter, the constitutional right of appeal on a complete record in Louisiana extends only to "all of the evidence upon which the judgment is based ...," i.e., trial testimony and exhibits. La. Con.st 1974, art. L § 19. Counsel's statutory right to designate the portions of a record for appeal is far broader under La.C.Cr.P. art. 914.1, but he must still limit the designation to those portions of the record necessary to the appeal "in light of the assignment of errors to be urged." Although this Court has found reversible error when material portions of the trial record were unavailable or incomplete, "[a] slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal w[ill] not cause ... " reversal of a defendant's conviction. *State v. Parker,* 361 So.2d 226, 227 (La. 1978); *State v. Ford,* 338 So.2d 107, 110 (La. 1976). Moreover, a defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcripts. *State v. Castleberry,* 98-1338, p. 29 (La. 4/13/99), 758 So.2d 749, 773, *cert. denied,* 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999) (holding that the defendant failed to show any prejudice resulting from bench conferences not being transcribed and, therefore, there was no reversible error).

Aside from the defendant's blanket allegation that the requested transcripts of the pretrial hearings and bench conferences are necessary to fully perfect

his appeal, nothing in his application or in the record indicates that this Court's refusal to supplement the record has deprived him of a fair opportunity to prepare this appeal. Though the defendant complains that the transcripts of the pretrial proceedings might contain testimony taken from Audy Keith that is inconsistent with the witness's trial testimony, the present record reveals that defense counsel conducted an extensive cross-examination of Keith concerning statements he made to the police that were inconsistent with his trial testimony, and Keith admitted at trial that he lied to authorities at the outset of the investigation about his involvement in the instant offense. Based on this testimony, appellate counsel briefed an assignment of error discussed above attacking Keith's credibility and arguing that his testimony implicating the defendant should not be believed. Thus, in light of the testimony and argument regarding Keith's credibility that is already before this Court, further evidence of his untruthfulness (if it even exists in the pretrial transcripts) would be merely cumulative of evidence already in the record and would not meaningfully assist this Court in making a proper determination of this appeal. Concerning the bench conferences, the defendant does nothing to show that the conferences had a discernible impact on the proceedings, nor does he point to any specific prejudice. This assignment of error lacks merit.

Appendix D — Letter from Ross Owen, Dated November 16, 2009

ROSS OWEN
ATTORNEY AT LAW, L.L.C.
820 JORDAN SUITE 480
SHREVEPORT, LA 71101
TEL (318) 221-7999
FAX (318) 425-1644

November 16, 2009

Gary Clements
Carol Camp
Capital Post-Conviction Project of Louisiana
1340 Poydras Street, Suite 1700
New Orleans, LA 70112

Daniel J. Hurteau, Esq.
Nixon Peabody, LLP
677 Broadway, 10th Floor
Albany, New York 12207

Holly J. Kilibarda, Esq.
Nixon Peabody, LLP
900 Elm Street
Manchester, New Hampshire 03101

Suzanne M. Owen
Assistant District Attorney, Appellate Section
Caddo Parish Courthouse
501 Texas Street
Shreveport LA 71101

Frank H. Penski, Esq.
Nixon Peabody, LLP
437 Madison Avenue
New York, New York 10022

Abigail T. Reardon, Esq.
Nixon Peabody, LLP
437 Madison Avenue
New York, New York 10022

Re: State of Louisiana, Ex Rel. Vs. Danny T. Irish
Number 186209, Div. 4
First Judicial District Court — Caddo Parish, Louisiana

Ladies and Gentlemen:

I was the lead assistant district attorney assigned during the trial of this matter. During the period prior to trial of Mr. Irish myself and an investigator from the district attorney's office went to see the co-defendant Audy Keith at Angola. Mr. Keith had entered a guilty plea in exchange for a life sentence and agreed to testify at any trial. Shortly after the visit began Mr. Keith became upset and we ended the meeting and returned home. Sometime thereafter I received a call from someone at Angola asking me to write a letter indicating what had happened during our meeting and I did so.

Not long before the trial of Mr. Irish a family member of Mr. Keith's approached me and indicated Mr. Keith wished to testify after all. Mr. Keith met with investigators from the District Attorney's office as well as an investigator from the counsel for Mr. Irish. I did not tender a copy of the letter I wrote to counsel for Mr. Irish though they were aware of an allegation that Mr. Keith had made indicating either myself or the investigator had either hit or threatened to hit him.

A month or two after the trial of Mr. Irish I left the District Attorney's office. After that time I recalled having written the letter and called Ms. Estoppinal to advise her of its existence. I write now in case the letter is not in the original file. If I recollect correctly there were no office computers at the time with word processing and thus I would have had a very basic personal computer that has long since been retired and thus the only copy would be in some record at Angola.

Sincerely,

s/ Ross Owen
Ross Owen

cc: Steven Glassell
Michelle Andrepont

Appendix E — Letter from Ross Owen, Dated November 19, 1998

PAUL J. CARMOUCHE
District Attorney
First Judicial District
Caddo Parish

5th Floor Caddo Courthouse
501 Texas Street
Shreveport, Louisiana 71101-6400

11/19/98

Captain Jones
Angola State Penitentiary

RE: Interview of Audy Keith on 11-18-98
Murder of Russ Rowland

Dear Capt. Jones

I am an assistant district attorney here in Shreveport, LA. I prosecuted the above defendant for the murder and robbery of Russ Rowland. This defendant shot the victim at point blank range in the stomach with a twelve-gauge shotgun loaded with a 50 cal. slug. He pleaded guilty to the reduced charge of second degree murder and agreed to testify in return for us giving up the first degree charge and the chance at a death sentence.

He has consistently had a bad attitude and has shown no remorse. He had a bad attitude again yesterday when we met with him and thus we cut the interview short at about 15 till five. At no time did either Mr. McDonald or myself touch the prisoner in any way whatsoever and any statement to the contrary is a blatant lie.

If you have any questions about this or any other case I may handle please do not hesitate to contact me at the numbers below. I appreciate the help and courtesy we were shown while there and hope this incident won't prohibit my visiting in the future.

Sincerely,

s/ Ross S. Owen
Ross S. Owen
Asst. Dist. Atty.
Section Four (226-6877 ext. 3050)

Appendix F — Letter from Captain Robert Jones, Dated November 19, 1998

LOUISIANA STATE PENITENTIARY

M.J. "Mike" Foster, Jr.
Governor

Richard L. Stalder
Secretary

Burt Cain
Warden

TO: RICHARD PEABODY
DEPUTY WARDEN

FROM: CAPTAIN ROBERT JONES
INVESTIGATIVE SERVICES

DATE: NOVEMBER 19, 1998

RE: INMATE AUDY KEITH
CASE #AIS98K024

On 11/18/98 at approximately 2015 I, Captain Robert Jones, was contacted by Lieutenant Carlos Rabb and informed of allegations of abuse filed by inmate Audy Keith 393128. Inmate Keith alleges that during an interview with Assistant District Attorney Ross S. Owen and Investigator Ricky McDonald in the Main Prison Court Room, that he (Keith) attempted to brake off the interview by walking out of the room when Mr. McDonald struck him (Keith) in the left arm and grabbed him by his shirt slamming him (Keith) against the wall. Inmate Keith accused Mr. McDonald of causing the bruise on his (Keith's) left arm, located approx. mid way between his shoulder and elbow. Inmate Keith reported the alleged confrontation to Lieutenant Jimmy Smith at Camp D

Eagle. Lt. Smith sent inmate Keith to the R.E. Barrows Treatment Center for examination. Upon his arrival at the R.E.B.T.C. inmate Keith was examined by Doctor Robert Barnes. Doctor Barnes examination revealed no injuries. The examination did show a bruise on the left arm of inmate Keith. Doctor Barnes did say this bruise did not appear to be a recent injury.

Assistant District Attorney Owen was contacted on 11/19/98 concerning the allegations made by inmate Keith. Mr. Owen explained inmate Keith's hostility toward his office over him (Keith) receiving a life sentence. During the interview of inmate Keith on 11/18/98 inmate Keith also expressed his extreme dislike of Mr. McDonald and Mr. Owen. It has been concluded from the interview of inmate Keith, Assistant District Attorney Owen, and Doctor Robert Barnes findings no truth can be found in the allegation filed by inmate Keith nor has there been any evidence found to substantiate his claims. No further action is being taken in this matter.

/s Capt. Robert Jones
Captain Robert Jones
Investigative Services

cc: Assistant District Attorney Owen

Appendix G — Affidavit of Ross Owen, Sworn to May 5, 2010

IN THE FIRST JUDICIAL DISTRICT COURT
FOR THE PARISH OF CADDO

STATE OF LOUISIANA

STATE OF LOUISIANA

EX REL.

DANNY T. IRISH,

Petitioner

vs.

BURL CAIN,

Warden.

No. 186,209
Div. 4
Judge Ramona Emanuel

CAPITAL CASE

AFFIDAVIT OF ROSS OWEN

STATE OF LOUISIANA
PARISH OF CADDO

BEFORE the undersigned Notary Public, came and appeared:

ROSS OWEN

who, being duly sworn, did depose and state as follows:

1. That he is over the age of majority, is competent to testify to the matters set forth herein, and has personal knowledge of the matters expressed in this affidavit.

2. That he was lead prosecutor in the capital prosecution of Danny Irish, who was convicted of first degree murder and sentenced to death in an August 1999 trial.

3. That on November 16, 2009, he wrote a letter to current post-conviction counsel and sent copies of this letter to his wife, Suzanne Owen, who is the current prosecutor in the Irish post-conviction case, and to Mr. Irish's trial attorneys, Stephen Glassell and Michelle Andrepont. The November 16, 2009 letter specifically referred to a letter he sent to Angola officials prior to Mr. Irish' s trial.

4. He has monitored the status of Mr. Irish's case for several years, checking in with Caddo Assistant District Attorney Catherine Estopinal several times.

5. He had some doubts whether a copy of the pre-trial letter was within the Caddo District Attorney's files, because he recalls that he wrote that pre-trial letter to Angola officials on his own personal computer, and not on a computer in the Caddo District Attorney's Office.

6. When he found out that Mr. Irish's capital post-conviction litigation had actively begun, he wrote the November 16, 2009 letter to advise everyone that he had written a letter to officials at Angola after a visit he and an investigator had at Angola with Mr. Audy Keith before Mr. Irish's trial. He wrote the 2009 letter because he did not have the ability to obtain the letter himself and wanted to alert the Defendant as to the existence of the letter.

7. When he wrote the pre-trial letter to Angola officials, he does not recall sending copies of that letter to anyone else, nor did he keep a copy for himself.

FURTHER AFFIANT SAYETH NOT.

s/ Ross Owen
Ross Owen

SWORN TO AND SUBSCRIBED BEFORE ME,
NOTARY PUBLIC, ON THIS 5TH
DAY OF MAY, 2010.

s/ Karen K. Seymour #67308
NOTARY PUBLIC

Appendix H — Affidavit of Audy Wayne Keith, Jr., Sworn to December 17, 2009

State of Louisiana
Parish of West Feliciana

AFFIDAVIT OF AUDY WAYNE KEITH, JR.

Audy Wayne Keith, Jr., having been duly sworn, hereby states the following:

1. My name is Audy Wayne Keith, Jr. I am over eighteen (18) years of age and competent to testify to the facts stated herein.

2. I am Danny Irish's co-defendant in *State v. Danny Irish*. I testified for the State during Danny Irish's death penalty trial in Caddo Parish, Louisiana in August 1999.

3. I pleaded guilty to second-degree murder and agreed to testify against Danny Irish. I went to court in Caddo Parish and pleaded guilty in January 1998.

4. I was brought back to court in Caddo Parish in early 1999 because the State wanted me to testify against Danny Irish. The trial was continued and I was taken back to Angola.

5. A few months later, Ross Owen, who was the D.A. in Danny Irish's case, and an investigator from the D.A.'s office came to visit me at Angola.

6. Mr. Owen asked me if I was going to testify against Danny Irish. I told him no, I was not going to testify against Danny Irish.

7. When I told Mr. Owen that I was not going to testify against Danny Irish, the D.A.'s investigator who was there copped an attitude with me. The investigator had gray hair from what I can remember.

8. I talked with Mr. Owen and the investigator for fifteen to twenty minutes. I got tired of listening to them so I told them I was going to leave.

9. As I was leaving, the D.A.'s investigator pushed me up against the wall and pinned me against the wall by putting his forearm against my chest.

10. After this happened, I immediately notified one of the guards. Mr. Owen and the D.A.'s investigator quickly left as I was doing this.

11. I felt threatened and worried about what would happen to me if I did not testify against Danny Irish at his trial.

Further affiant sayeth naught.

That I swear and affirm that the above information is based on personal knowledge or where stated on personal information or belief.

s/ Audy Wayne Keith, Jr.
Audy Wayne Keith, Jr.

Subscribed and sworn to before me this 17th day of December, 2009.

s/
Notary Public

Appendix I — Petitioner's Supplemental Petition for Post-Conviction Relief and Motion for Evidentiary Hearing, Filed October 4, 2010

IN THE FIRST JUDICIAL DISTRICT COURT
FOR THE PARISH OF CADDO

STATE OF LOUISIANA

STATE OF LOUISIANA

EX REL.

DANNY T. IRISH

Petitioner

vs.

BURL CAIN,

Warden.

No. 186,209
Div. 4
Judge Ramona Emanuel

CAPITAL CASE

PETITIONER'S SUPPLEMENTAL PETITION FOR POST-CONVICTION RELIEF AND MOTION FOR EVIDENTIARY HEARING

Frank H. Penski, Esq.
Abigail T. Reardon, Esq.
Daniel J. Hurteau, Esq.
Holly J. Kilibarda, Esq.
Admitted pro hac vice
Nixon Peabody LLP
437 Madison Avenue
New York, NY 10022
(212) 940-3000 (phone)
(212) 940-3111 (fax)

Resource Counsel:

Carol R. Camp, Bar Roll #32282
Gary P. Clements, Bar Roll #21978
Kristin Traicoff, Bar Roll #32733
Capital Post-Conviction Project of Louisiana
1340 Poydras Suite 1700
New Orleans, LA 70012
Telephone: (504) 212-2110
Facsimile: (504) 212-2130

Counsel for Petitioner Danny T. Irish

TABLE OF CONTENTS

Page

[pages ii through x of original are omitted]

JURISDICTION

Mr. Irish's Supplemental Petition for Post-Conviction Relief and Motion for Evidentiary Hearing is made pursuant to La. Const. art. V, § 2 and La.C.Cr. P. arts. 924-30.

INTRODUCTION

Danny Irish, 18 at the time of the crime, was convicted of first-degree murder and sentenced to death in August 1999. Audy Keith, his 16 year-old co-conspirator, had pleaded guilty to avoid the death penalty and was serving a life sentence at Angola. Mr. Keith's testimony was the sole evidence that Danny Irish had committed murder. It was also the sole evidence that Danny Irish had committed armed robbery, the single aggravating circumstance in support of the death penalty.

The State, through Ross Owen, the prosecutor who tried the case against Danny Irish, knew that Audy was a liar. Ross Owen had independently concluded that this was true, and other officials of the State, including a captain at Angola, had confirmed this to Ross Owen, in writing, before Mr. Irish's trial. Nonetheless, ADA Owen withheld this and other critical information from defense counsel and the jury. Had Audy's testimony not been credited by the jury, Danny Irish could not have been convicted and sentenced to death.

On direct appeal, ADA Owen then argued that Audy *was* worthy of belief and asked the Louisiana Supreme Court to conclude that Audy's testimony *was* sufficient support for both the guilty verdict and the capital penalty imposed. The Louisiana Supreme Court's opinion reflects that it agreed. Nonetheless,

it was Mr. Owen's firm but undisclosed belief all along that Audy was a liar.

The jury was not given the opportunity to know what Mr. Owen knew, and neither was the Louisiana Supreme Court, because Mr. Owen never told defense counsel and certainly never told the Court. For this reason alone, Mr. Irish did not receive a fair trial.

As shown more fully below, both phases of Mr. Irish's trial were tainted by the misconduct of ADA Ross Owen and other State officials. For these and other reasons, this Court cannot maintain any confidence in Mr. Irish's conviction and death sentence.

PROCEDURAL HISTORY

On February 13, 1997, Mr. Irish was indicted by a Caddo Parish grand jury for one count of first-degree murder, in violation of La. R.S. § 14:30, for the December 30, 1996 homicide of Russell Rowland. He subsequently entered a not guilty plea. At trial, he was represented by Stephen Glassell (lead counsel) and Michelle Andrepont (associate counsel) who were both appointed by the Court. Mr. Irish's trial began in August, 1999, the Honorable Ramona Emanuel presiding. Jury selection commenced on August 16, 1999, and the guilt phase began on August 25, 1999. On August 27, 1999, Petitioner was convicted of the first-degree murder of Russell Rowland in the First Judicial District Court for the Parish of Caddo (the "District Court"). One day later, the jury sentenced Petitioner to death.

On November 4, 1999, the trial court formally imposed a sentence of death. The Louisiana Supreme Court affirmed Petitioner's conviction and death sentence on October 7, 2002 in *State v. Irish,* 00-2086 (La. 01/15/02); 807 So.2d 208, and the United States Supreme Court denied a petition for writ of certiorari. *Irish v. Louisiana,* 123 S. Ct. 185 (2002). Mr. Irish remains in custody at the Louisiana State Penitentiary at Angola.

On or about December 19, 2002, Mr. Irish filed a *prose* application for post-conviction relief in the District Court, requesting that counsel be appointed, because he could not afford to hire an attorney. The State answered Mr. Irish's *pro se* application on January 8, 2003, requesting that it be denied for failing to specify the factual basis for his claims. In his response, Mr. Irish contended that, given the circumstances, the *pro se* petition was pled with "reasonable" particularity. La.C.Cr.P. art. 926(3). Mr. Irish also requested that the District Court stay all proceedings in his case until qualified counsel could be secured, and grant him leave to amend his *pro se* petition with the assistance of counsel. On January 23, 2003, the same day that Mr. Irish filed his response, this Court denied his *pro se* petition for post-conviction relief on the ground that it was filed prematurely.

Mr. Irish then filed a *Motion to Vacate the Adjudication on the Merits and Grant Leave to Amend the Application through Counsel* on February 21, 2003. This Court issued an *Order* on February 25, 2003 refusing to vacate its previous *Order* denying Mr. Irish's *pro se* petition and setting a one hundred and twenty (120) day return date on Mr. Irish's writ application.

Undersigned resource counsel, the Capital Post-Conviction Project of Louisiana, then filed original and supplemental writs on Mr. Irish's behalf in the Louisiana Supreme Court on June 24, 2003 and February 4, 2004, respectively, asserting that the District Court erred in summarily denying Mr. Irish's *pro-se* post-conviction petition and by not granting Mr. Irish sufficient time to file his supplemental state post-conviction petition with the assistance of appointed counsel. The Court granted Mr. Irish's writ application on April 2, 2004. *See State ex rel. Irish v. Cain,* 2003-1810 (La. 04/02/04); 869 So.2d 865.

With the assistance of the American Bar Association, undersigned resource counsel actively sought to recruit *pro bono* counsel who could actively represent Mr. Irish. No *pro bono* firm agreed to take on the representation until the firm of Nixon Peabody LLP agreed on August 12, 2009. The District Court enrolled *pro bono* Nixon Peabody attorneys Frank Penski, Abigail Reardon, Daniel Hurteau, and Holly Kilibarda *pro hac vice* on September 1, 2009. The District Court subsequently enrolled *pro bono* Nixon Peabody attorney Todd Toral *pro hac vice* on November 25, 2009.[1]

After several status conferences and hearings, as well as the Louisiana Supreme Court's denial of an *Application for Writ of Error* on Petitioner's motion to recuse the Caddo Parish District Attorney's Office from representing the State in Mr. Irish's post-conviction proceedings, 2010-1268 (La. 06/16/10), the District Court set September 5, 2010 as the deadline to file Petitioner's supplemental post-conviction

[1] Mr. Toral is no longer employed by Nixon Peabody.

petition. At a status hearing on August 12, 2010, the Court granted Petitioner's unopposed oral motion to extend the deadline for filing his supplemental post-conviction petition to the current filing deadline of October 1, 2010. Petitioner now timely files his Supplemental Petition for Post-Conviction Relief.

REQUEST FOR EVIDENTIARY HEARING AND FOR BIFURCATION

Mr. Irish requests an evidentiary hearing on the claims for relief asserted herein, under La.C.Cr. P. art. 930. These claims raise issues of fact that cannot be resolved on the face of the pleadings or by affidavits, depositions, or exhibits. Especially where, as here, allegations of ineffective assistance of counsel are at issue, an evidentiary hearing is necessary to fully develop the facts through testimony. *See State v. Strickland,* 94-0025 (La. 11/01/96); 683 So.2d 218, 231, 239-39 (nothing that "[g]enerally, claims of counsel ineffectiveness are more properly reviewed in post-conviction applications *after an evidentiary hearing,* " and remanding for hearing on penalty phase ineffectiveness)(emphasis added).

In every claim below, Mr. Irish asserts claims from voir dire to the jury's penalty phase deliberations, which, if proven, require the reversal of his conviction and death sentence. Mr. Irish pleads facts that require demonstration to this Court, and alleges upon information and belief, facts that require development. Without the power to subpoena and examine witnesses, and the opportunity to present developed and substantiated claims for relief, Mr. Irish is unable to avail himself of the procedures for obtaining relief in post-conviction that the Louisiana

Code of Criminal Procedure mandates. These procedures ensure that no Louisiana citizen loses his life to the State without thorough review of the process by which he was sentenced to death.

Undersigned counsel respectfully urge this Court to bifurcate the *Batson v. Kentucky* claim (Claim X), the *J.E.B. v. Alabama* claim (Claim XI), and the *Duren v. Missouri* claim (Claim IX), because these claims arc either schematic challenges or require the State to show that they are harmless beyond a reasonable doubt. These claims should be adjudicated first, as they would be dispositive of the Petitioner's entire litigation.

SUMMARY OF ARGUMENT

The prosecution committed multiple *Brady* violations, the most severe of which was ADA Ross Owen's decision to conceal from defense counsel and the Court evidence, and his personal conviction, that Audy Keith did not tell the truth.

Second, Mr. Irish did not receive effective assistance of counsel at any phase of his trial. Trial counsel failed to develop and present an alternate theory of guilt through the testimony of available witnesses, though there was ample evidence tending to prove that Mr. Keith alone was guilty of first-degree murder. Trial counsel failed to conduct an adequate voir dire, neglecting to raise meritorious *Batson* and *J E. B.* objections.

Finally, trial counsel rendered ineffective assistance during the penalty phase of Mr. Irish's trial, by delegating their entire mitigation case to Dr. Mark Vigen and Dr. Allan Michael Johnson, who had previously evaluated both of Mr. Irish's

co-defendants and made adverse findings against Mr. Irish in those evaluations. Additionally, when Dr. Johnson testified for the defense during Mr. Irish's penalty phase, he presented aggravating evidence of antisocial personality disorder and violence in the media. Defense counsel also unreasonably failed to pursue avenues of investigation that would have uncovered a wealth of mitigating evidence, including evidence that Mr. Irish suffers from brain damage to both hemispheres of his brain, as well as frontal lobe damage, and evidence of Mr. Irish's family history of domestic violence, neglect, abuse, mental illness and alcoholism.

The many other serious flaws in the proceedings resulting in this capital conviction, as set forth fully below, must leave this Court with serious doubt about the fairness of Mr. Irish's conviction and death sentence.

STATEMENT OF FACTS

A. Reservation of Rights and Bases for Relief

In this Supplemental Petition, some claims include all facts necessary for their resolution; others require a contextual understanding, and so the facts are briefly stated in this section. Several claims are pled in the alternative. All facts pled go to all claims; in all sections of this Supplemental Petition, the *Pro Se* Petition, and all briefs and supplemental pleadings, whether to the trial court pre-trial, during trial, on direct review, or in post-conviction. Petitioner incorporates by reference all facts and all authority pled herein and previously. Petitioner asserts as authority for the relief requested herein his rights

under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as his rights under the Louisiana Constitution, art. I, §§ 1, 2, 3, 5, 13, 14, 15, 17 & 20, and all jurisprudential and statutory authorities cited below. Should any claim be defaulted, it is hereby pled alternatively as ineffective assistance of counsel under the Sixth Amendment, ineffective assistance of appellate counsel under the Fourteenth Amendment, and a violation of due process. For all the reasons pled, Petitioner requires a new trial in the interests of justice, and a new sentencing hearing under the Eighth Amendment.

B. The Evidence at Trial

On December 30, 1996, when Mr. Irish was just 18 years old, Russell Rowland suffered two fatal gunshot wounds and died. The State charged three individuals with first-degree murder as a result: Petitioner, Audy Wayne Keith, Jr., and Kristee Kline. R. 15-17. Mr. Keith was initially charged as a juvenile on a murder charge, before he was charged as an adult for first-degree murder, who was eligible (at that time) for the death penalty. R. 3245. Kristee Kline pled guilty to accessory after the fact to first-degree murder. R. 793.

Mr. Keith reached a plea agreement with the State and agreed to offer truthful testimony at Mr. Irish's trial in exchange for pleading guilty to second-degree murder and serving a life without parole sentence. R. 3225. Mr. Keith was the sole eyewitness to Mr. Rowland's murder to testify at Mr. Irish's trial. Indeed, the Louisiana Supreme Court relied heavily upon Mr. Keith's version of events in affirming Mr. Irish's conviction and death sentence. *State v. Irish,*

00-2086, p. 1-8 (La. 01/15/02); 807 So.2d at 209-211. As Justice Victory stated in the unpublished appendix to the Louisiana Supreme Court's opinion, "the only direct evidence of the defendant's guilt is the trial testimony of Audy Keith, a co-perpetrator turned state's witness." *Id.* (unpublished appendix, at 26).

Mr. Keith admitted that he shot Mr. Rowland in the abdomen with a twelve-gauge shotgun. R. 3230. This was a fatal wound. R. 3260-61. Mr. Keith claimed that he shot Mr. Rowland because Mr. Irish was pointing a rifle at him and telling him that if he did not shoot Mr. Rowland, Mr. Irish would shoot him. R. 3229. Mr. Keith testified that Mr. Irish shot Mr. Rowland in the head with a 30-30 rifle as Mr. Rowland repeatedly begged Mr. Irish not to shoot him. R. 3231. Mr. Keith, however, also admitted that he did not actually see Mr. Irish shoot Mr. Rowland. R. 3230. Mr. Keith testified that Mr. Irish told him to go outside to Mr. Rowland's pickup truck to sec what he could find. R. 3233. Mr. Keith testified that he found Mr. Rowland's wallet in the pickup truck. *Id.* Mr. Keith further testified that Mr. Irish removed cash from Mr. Rowland's wallet and stuffed the money and the wallet under a sofa cushion. R. 3233-34.

Mr. Keith's testimony was critical to the State's case for two reasons: 1) aside from his eyewitness testimony, the State had no direct evidence establishing that Mr. Irish had committed the crime against Mr. Rowland; and 2) there was evidence that Mr. Keith himself had in fact fired both shots and was solely responsible for Mr. Rowland's death. Steve Dement testified that on the day of the murder, Mr. Irish told him that Mr. Keith shot Mr.

Rowland in the chest with a shotgun, which then jammed and that Mr. Keith then picked up a 30-30 rifle and shot Mr. Rowland in the head. R. 3291.

At trial, the State's theory was that Mr. Irish had manipulated both Mr. Keith and Mr. Irish's then-girlfriend, Kristee Kline, into going along with his plan to rob and kill Mr. Rowland and to steal his pickup truck. R. 3309-10. Defense counsel failed to investigate the background of and to effectively cross-examine not only Mr. Keith, but also two other crucial State's witnesses, Jason Guin and Kristee Kline. To make matters worse, the State made trial counsel's job even more difficult by actively concealing material *Brady* impeachment evidence concerning these three witnesses.

Although eyewitness testimony from the unreliable Mr. Keith constituted the State's only direct evidence of Mr. Irish's guilt, the jury found Mr. Irish guilty of first-degree murder. R. 3360. During the penalty phase, the State argued that Mr. Irish deserved the death penalty because he was a "cancer" who needed to be permanently removed from society. R. 3570. The jurors learned of Mr. Irish's two previous felony convictions for felony high-grade theft and simple burglary of an inhabited dwelling. R. 3385. The State also presented victim impact evidence from one of Mr. Rowland's former tenants (R. 3402-03), as well as his two surviving teenaged children and then argued that because of Mr. Irish, Mr. Rowland's daughter would never walk down the aisle with her father and his son would never learn how to ride a Harley. R. 3550.

Defense counsel's key mitigation witnesses were Mr. Irish's mother, Patricia Barbo, and psychologist Dr. Allan Michael Johnson.

Ms. Barbo testified at the penalty phase and discussed some aspects of her son Danny's upbringing. However, most of the things she testified to were not corroborated by any other witness or by the introduction of any contemporaneous documentation. Although emotional, Ms. Barbo's testimony thus gave the jury precious few verifiable facts about Danny's life for the jury to use in their decision as to his sentence.

Defense counsel supplemented the uncorroborated testimony of Ms. Barbo with the testimony of psychologist Dr. Allan Michael Johnson. Unfortunately, instead of corroborating *any* earlier lay testimony, Dr. Johnson presented aggravating evidence that Mr. Irish had antisocial personality disorder. R. 3507. Dr. Johnson for all practical purposes forgot what his role was, and instead of presenting mitigation for the jury to consider, switched over and reinforced the graphic nature of Mr. Rowland's murder by showing them multiple video clips of the movie *Young Guns,* in which victims were shot with high-powered rifles in the abdomen and head. R. 3510-12. The jury took forty-five minutes to find that Mr. Irish killed Mr. Rowland during the perpetration or attempted perpetration of an armed robbery and to sentence him to death. R. 3576.

C. The Case in Post-Conviction: Evidence the Jury Should Have Heard

Defense counsel's failed to investigate and to present a readily-available, compelling social history. As will be seen more fully *infra,* Mr. Irish's jurors never learned that he suffers from brain damage in both hemispheres of his brain, as well as frontal lobe damage. Ex. 49 at ¶4. Nor did the jury receive documented proof of his extensive family history of domestic violence, mental illness and alcoholism. Rather than wrongly being perceived as a manipulative criminal mastermind who preyed on younger children to engage in violent criminal activities, a thorough investigation and effective presentation of mitigation evidence by competent counsel would have revealed that Mr. Irish was a brain-damaged, abused, neglected, and abandoned child who functioned not as an adult but as an immature, vulnerable adolescent.

[pages 8–12 and part of page 13 of original are omitted]

II. THE STATE VIOLATED ITS *BRADY* OBLIGATIONS DURING THE GUILT PHASE OF MR. IRISH'S TRIAL BY FAILING TO DISCLOSE MATERIAL IMPEACHMENT EVIDENCE CONCERNING PETITIONER'S CODEFENDANT, AUDY WAYNE KEITH, JR.

A. Introduction

The State violated its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) by failing to disclose material impeachment evidence to Mr. Irish's trial counsel concerning Audy Keith, one of Mr. Irish's two

co-defendants and the sole eyewitness to the Rowland homicide. As sole eyewitness, Mr. Keith's testimony was crucial to the State's ease. It would have been *impossible* for the State to secure a conviction against Mr. Irish without Mr. Keith's testimony, because the State's forensic evidence did not establish that either Mr. Irish or Mr. Keith fired the shots that killed the victim.[4] Had the jury known of Mr. Keith's documented history of dishonesty, the outcome of Mr. Irish's trial would have been different.

B. *Brady* Requires the State to Disclose Material Impeachment Evidence

In *Brady v. Maryland,* 373 U.S. 83 (1963), the Supreme Court of the United States held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." *Brady,* 373 U.S. at 87. The Supreme Court extended a prosecutor's affirmative duty to disclose exculpatory evidence to include impeachment evidence. *Giglio v. United States,* 405 U.S. 150 (1972); *see also United States v. Bagley,* 473 U.S. 667, 676 (1985). Information must be disclosed to defense counsel regardless of whether a request

---

[4] The Louisiana Supreme Court relied extensively upon Mr. Keith's testimony to affirm Mr. Irish 's conviction and death sentence. State v. Irish, 0-2086, p. 1-8 (La. 01/15/02), 807 So.2d at 209-211. As Justice Victory stated in the unpublished appendix to the opinion, "the only direct evidence of the defendant's guilt is the trial testimony of Audy Keith, a co-perpetrator turned state's witness." *id.* (unpublished appendix, at 26).

for the disclosure has been made. *United States v. Agurs,* 427 U.S. 97, 107 (1976).[5]

In particular, *Brady* requires the prosecutor to disclose material evidence favorable to the defense where (1) the evidence reveals that the prosecution introduced perjured testimony, (2) the defense specifically requests some particular category of evidence, or (3) the government has in its possession material evidence that was never requested by the defense, or was requested only in a general way. *See United States v. Agurs,* 427 U.S. 97, 103-08 (1976). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley,* 514 U.S. 419. 433 (1995) (internal quotation marks omitted). Under this standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434. Accordingly, a "reasonable probability" of a different result is "shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* (internal quotation marks omitted). The *Brady* rule encompasses both "exculpatory" and "impeachment" evidence. *United States v. Bagley.* 473 U.S. 667, 676 (1985).

---

[5] Similarly, La.C.Cr.P art. 718 requires the State to disclose to the defendant any relevant exculpatory material in its possession or control, including specifically impeachment evidence.

A true *Brady* violation has three components: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Green,* 527 U.S. 263, 281-82 (1999).

C. The State Violated *Brady* in Mr. Irish's Case

1. Former Caddo Assistant District Attorney Ross Owen Acknowledged That He Failed to Turn Over Material Impeachment Evidence Concerning Audy Wayne Keith, Jr., More Than a Decade After Mr. Irish's August 1999 Capital Trial

Co-defendant Audy Keith's testimony was the *only* evidence at trial demonstrating Mr. Irish's alleged role in the victim's death. The State's ability to prove its case against Mr. Irish beyond a reasonable doubt, therefore, made Mr. Keith *the* crucial witness for the prosecution. Pursuant to negotiations between the State and Mr. Keith's indigent defender, Alan Golden, Mr. Keith pled guilty to second-degree murder on January 27, 1998 and agreed to testify truthfully on behalf of the State at Mr. Irish's trial. R. 768.

But the road to Audy Keith's testimony at Danny Irish' s trial was a bumpy one, and Audy's penchant for lying came to the State's attention *months before* the Irish trial. Audy's lying was not just heard about by the State, it was documented by prison officials. The State, however, never revealed this documentation of Audy's lying to trial counsel. The

defense could have handily impeached Audy Keith with such documentation, but the State committed a *Brady* violation and withheld that impeachment documentation from the defense.

The State's failure to provide the defense with the documentation of Audy Keith's lying was prejudicial to Danny Irish because there is a reasonable probability that its disclosure to the defense would have produced a different result, as the State would have lacked *any means* to establish that Danny Irish committed first-degree murder if the jury failed to believe Audy Keith.

a. The Documentation Which the State Failed to Disclose

On November 18, 2009, more than ten years after trial, Petitioner's post-conviction counsel received an unsolicited letter from the lead trial prosecutor, former Caddo Parish Assistant District Attorney Ross Owen. Ex. 3. Therein, Mr. Owen disclosed (for the first time) a meeting between himself, an investigator from the Caddo Parish District Attorney's office, and Mr. Keith, which took place at some unspecified time at the Louisiana State Penitentiary ("LSP") before Mr. Irish' s trial. *Id.* at 1.

In his November 2009 letter, ADA Owen explained that Mr. Keith had become upset shortly after the meeting began. At that point, ADA Owen and his investigator left. *Id.*

ADA Owen also disclosed that, at some time after this incident, he received a telephone call from an LSP employee who requested that Owen write a letter to LSP, documenting and describing his recent

meeting with Mr. Keith. *Id.* ADA Owen explained that he complied with the LSP request. *Id.*

Significantly, ADA Owen wrote on November 19, 1998, in pertinent part:

> [Audy Keith] has consistently had a bad attitude and has shown no remorse. He had a bad attitude again yesterday when we met with him and thus we cut the interview short at about 15 till five. *At no time did either Mr. McDonald or myself touch the prisoner in any way whatsoever and any statement to the contrary is a blatant lie.*

Ex. 1. (Emphasis added).

Fast forwarding eleven years, ADA Owen further explained in his November 2009 letter, that although

> I did not tender a copy of the letter that I wrote to counsel for Mr. Irish ... they were aware of an allegation that Mr. Keith had made indicating that either myself or the investigator had either hit or threatened to hit him.

Ex. 3 at 2. ADA Owen claimed that after he left the District Attorney's office, he told Assistant District Attorney Catherine Estopinal about his previous letter to LSP. *Id.* ADA Owen, however, asserted that the only remaining documentation of his letter " ... would be in some record at Angola." *Id.*[6]

---

[6] Furthermore, ADA Owen claimed that before Mr. Irish's trial began on August 16, 1999, an unidentified family member of Mr. Keith's approached him" ... and indicated that Mr. Keith wished to testify after all." *Id.* at 1. ADA Owen stated that Mr. Keith then met with investigators from the District Attorney's Office, as well as an investigator from Mr. Irish's defense team. *Id.*

As will be explained more fully below, post-conviction counsel, with no assistance from the prosecution,[7] obtained actual copies not only of ADA Ross Owen's letter to LSP, dated November 19, 1998 (Ex. 1), but also of a document copied and sent to Owens by LSP Captain Robert Jones, consisting of his November 19, 1998 investigative memo *finding no basis to the allegation by Keith of his having been attacked* by Owen and his investigator. Ex. 2.

Specifically, Captain Jones concluded:

> It has been concluded from the interview of inmate Keith, Assistant District Attorney Owen, and Doctor Robert Barnes' findings, *no truth can he found in the allegation filed by inmate Keith nor has there been any evidence found to substantiate his claims.* No further action is being taken in this matter.

Id. (emphasis added).

On May 5, 2010, ADA Ross Owen signed an affidavit (Ex. 20) acknowledging that he did not send copies of his November 19, 1998 letter (Ex. 1) "to anyone else, nor did he keep a copy for himself.'" Ex. 20 at ¶7. Mr. Irish's trial attorneys Stephen A. Glassell and Michelle M. Andrepont have also signed affidavits (Ex. 21; Ex. 22) stating that ADA Owen did not inform them of either his November 19, 1998 letter to Capt. Jones (Ex. 1) or Capt. Jones'

---

[7] The State reported earlier in 2010 that it had telephoned the prison for any such records, but was unable to get anything. Only when undersigned counsel pushed farther and contacted the LSP Office of Investigative Services, did the relevant documents surface, which were then promptly copied to all parties.

November 19, 1998 investigative memo (Ex. 2), and that ADA Owen did not provide them with copies of either document. Ex. 21 at ¶¶5-6; Ex. 22 at ¶¶5-6.

In conclusion, although the State tried to make it look like he covered his obligations by orally telling defense counsel about Audy's claims, the State failed to give counsel the written corroboration that the lead prosecutor in this ease personally filed a report to LSP and called Audy Keith a liar, and that LSP officials, including a doctor conducting a thorough physical examination, established an independent official finding that Audy Keith's charges were totally false. The State's failure to produce these corroborating documents to the defense violated *Brady*.

2. The State Failed to Provide Copies of ADA Owens' November 19, 1998 Letter and LSP Captain Robert Jones' Related Investigative Report to Petitioner's Counsel, Either Pre-Trial or Even in Post-Conviction

Any doubts as to the propriety of the State's failure to disclose the evidence described above are resolved by the fact that the defense specifically requested all evidence either favorable to Mr. Irish or relevant to the issue of guilt or punishment. Defense counsel filed an initial *Motion for Discovery* (R. 646-48) on May 7, 1998, seeking materials which (a) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment... " R. 647. On August 6, 1999, defense counsel filed a *Motion for Evidence Favorable to the Defendant,* (R. 870-71), which specifically requested that the District Court issue an order "that the State of

Louisiana, through the Caddo Parish District Attorney's Office supply [Mr. Irish's] attorney with all evidence which it has in its possession or within its knowledge which would be considered favorable to the defendant, under the guidelines of *Brady v. Maryland,* 83 S.Ct. 1194 (1963), and the subsequent cases interpreting that decision." R. 870.

The State did not provide the evidence at issue, though it was specifically requested by the defense. Moreover, even if evidence had not been specifically requested by the defense, the State was still obliged to reveal it pre-trial. Whether the State's failure to provide the evidence was willful or inadvertent is of no matter the State violated *Brady,* and post-conviction relief is necessary to remedy the violation.[8]

In addition, the Caddo Parish District Attorney's Office has failed to comply with its ongoing obligation to make this material impeachment evidence available to Petitioner's post-conviction counsel. The prosecution's file that Petitioner's post-conviction counsel received pursuant to a public records act request included neither ADA Owen's 1998 letter to LSP or the responsive investigative memo from LSP Captain Robert Jones. Undersigned counsel did not obtain copies of either until this

---

[8] The State also failed to provide Mr. Irish's trial counsel and current post-conviction counsel with a memo dated July 10, 1997 from the file of Mr. Keith's attorney, Alan Golden. Ex. 19. This memo contains yet another version of the crime which is inconsistent with Mr. Keith's grand jury and trial testimony. In this version of events, Mr. Keith apparently failed to mention that Mr. Irish threatened to shoot him if Mr. Keith did not shoot Mr. Rowland. According to the memo, *"Audy authorized me to share this info with the D.A.* " *Id.* at 2. (emphasis added).

Court ordered LSP to produce the investigative file concerning this incident on March 15, 2010. Ex. 75.

3. Mr. Irish's Trial Counsel Could Have Used The Evidence of Mr. Keith's Documented History of Lying to Impeach Him at Trial

Perhaps nothing is more fatal to the confidence in a verdict than to learn that the only piece of direct evidence supporting that verdict was offered by a witness known to the prosecution to be a liar. The fact that Mr. Irish was never given the opportunity to impeach Mr. Keith with the above-described evidence destroys any confidence in the outcome of Mr. Irish 's trial.

ADA Owen's November 19, 1998 letter to LSP Capt. Jones cast substantial doubt upon Mr. Keith's credibility:

> He has consistently had a bad attitude and has shown no remorse. He had a bad attitude again yesterday when we met with him and thus we cut the interview short at about 15 till five. At no time did either [DA investigator] Mr. McDonald or myself touch the prisoner in any way whatsoever *and any statement to the contrary is a blatant lie.*

Ex. 1 (emphasis added).

Not surprisingly, once ADA Owen discovered that his key witness was a liar, he announced to the local media that he would not be calling upon Mr. Keith to

testify during Mr. Irish's trial. Ex. 73.[9] Somewhere, somehow, this state of affairs changed, and Mr. Keith ended up testifying at the August 1999 trial.

4. The Suppressed Evidence Was Material

Given that the State did not have a single witness competent to assign guilt to Mr. Irish, other than Mr. Keith, "there is a reasonable probability that, had the [impeachment] evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles,* 514 U.S. at 433 (quotation marks omitted).

The information contained in both former ADA Owen's November 19, 1998 letter to LSP Captain Jones (Ex. l) and Captain Jones' investigative report of the same date (Ex. 2) contained material information that Mr. Irish's trial counsel could have used to impeach Mr. Keith's trial testimony. In his letter to Capt. Jones, ADA Owen disputed the abuse allegations that Mr. Keith had made against D.A. Investigator Ricky McDonald, stating that *"[a]t no time did either Mr. McDonald or myself touch the prisoner in any way whatsoever and any statement to the contrary is a blatant lie."* Ex. 1 (emphasis added). Capt. Jones' investigative report concluded that *"no truth can be found in the allegation filed by inmate*

---

[9] On January 21, 1999, ADA Owen apparently again changed his mind and announced to Mr. Irish's trial attorneys in open court that he *would* be calling Mr. Keith as a witness after all. R. 840. This sudden about-face caught Mr. Irish's trial counsel off guard and became a basis for the motion they filed to continue Mr. Irish 's original January 25, 1999 trial date. R. 838-41. This Court granted defense counsel's request and continued Mr. Irish's trial to August 16, 1999. R. 3.

Keith nor has there been any evidence found to substantiate his claims. " Ex. 2 (emphasis added).

At trial, Mr. Irish's defense counsel objected to two investigators from the Caddo Parish D.A. 's Office, Don Ashley and Rusty McKinley, sitting in the front row as Mr. Keith testified. R. 3223-24. The District Court overruled the objection. R. 3224. During cross-examination, Mr. Keith testified that he had asked for the two investigators to be present during his testimony. R. 3246. *This exchange was completely inconsistent with the assertions that both ADA Ross Owen and LSP Captain Jones made on November 19, 1998.* Ex. 1; Ex. 2.

In his November 19, 1998 letter to Capt. Jones, ADA Owen complained that "[h]e [Mr. Keith] had a bad attitude ... [h]e had a bad attitude again yesterday when we met with him .... " Ex. 1. Captain Jones' investigative report stated that "Mr. Owen explained inmate Keith's hostility toward his office over him (Keith) receiving a life sentence. During the interview of inmate Keith on 11/18/98 inmate Keith also expressed his extreme dislike of Mr. McDonald and Mr. Owen." Ex. 2. If trial counsel had this report at the time of trial, they could have used it to impeach Mr. Keith's credibility on cross-examination.

Even more troubling is the fact that, despite both ADA Owen and LSP Captain Jones having concluded that Mr. Keith had been proven to be a liar, ADA Owen relied *exclusively* upon Mr. Keith's testimony to secure Mr. Irish's conviction and death sentence. Without Mr. Keith's testimony, ADA Owen knew that he would not be able to get a conviction, *much less* a death sentence against Mr. Irish. Mr. Keith

was the only eyewitness to Russ Rowland's homicide. R. 3230. Mr. Keith was the only person who testified that he shot Mr. Rowland in the abdomen because Mr. Irish was pointing a rife at him and telling him that if he did not shoot Mr. Rowland, Mr. Irish would shoot him. R. 3229. Mr. Keith was the only person who testified that Mr. Irish shot Mr. Rowland in the bead with a 30-30 rifle as Mr. Rowland begged Mr. Irish not to shoot him. R. 3231. Mr. Keith was the only person who testified that it was Mr. Irish who told him to go outside to Mr. Rowland's pickup truck to sec what he could find. R. 3233. Mr. Keith was the only person who told the jury that it was Mr. Irish who removed the cash from Mr. Rowland's wallet and stuffed the money and wallet under a sofa cushion. R. 3223-24.

Unlike any other witness who testified during Mr. Irish's trial, Mr. Keith provided the Jurors with corroboration of the State's circumstantial evidence so that Mr. Irish could be convicted of first-degree murder and sentenced to death. As the U.S. Supreme Court noted in *Giglio*:

> Here, the Government's case depended almost entirely on Taliento' s testimony; without it, there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it.

405 U.S. at 154-55.

If Mr. Irish's jurors had learned that an independent governmental agency-in this instance, LSP-had previously determined that Mr. Keith made false allegations against ADA Owen and D.A. Investigator McDonald-there is more than a "reasonable probability that...the result of the proceeding would have been different." *Bagley,* 473 U.S. at 682.

If Mr. Irish's jurors had seen the recent letter by lead prosecutor Owen calling Audy Keith a blatant liar, there is more than a "reasonable probability that...the result of the proceeding would have been different." *Id.*

One of Mr. Irish's jurors, Michael Long and one alternate juror, Eric Nelson, have stated that evidence of the alleged incident involving ADA Owen, investigator McDonald and Mr. Keith was information that they should have been allowed to hear. Juror Long stated that if he "had known about Audy Keith having accused ADA Ross Owen and his assistant of roughing him [Mr. Keith] up at Angola before Danny's trial, and that Angola officials said that was not true, that would have been important to know, just because I would have wanted to know more about Audy's character." Ex. 51 at ¶9. Alternate Nelson agreed, stating that "I would have liked to have known if he [Mr. Keith] was threatened with the death penalty to testify, since that could be another way to get someone to testify." Ex. 52 at 2.

Moreover, both the State and the Louisiana Supreme Court have expressly recognized that the jury's verdict of Mr. Irish's guilt hinged on the credibility of Mr. Keith's testimony *State v. Irish,* 00-2086, p. 1-8 (La. 01/15/02); 807 So.2d at 209-211 and

unpublished appendix at 26; Ex. 74 (Transcript from KTBS Archive dated 8/27/99, statement of Assistant District Attorney Jason Waltman that "There were only three people in that trailer and two people in the room when the victim was shot and one of them pointed the finger directly at Danny Irish.").[10]

Without Mr. Keith, the State simply had no case against Mr. Irish. Mr. Keith's documented history of making false allegations, therefore, constituted material impeachment evidence that *Brady* required ADA Owen to turn over to Mr. Irish's trial counsel. Had ADA Owen complied with his constitutional duties, there is more than a reasonable probability

---

[10] During Mr. Keith's 2001 post-conviction proceedings, the State continued to assert that Mr. Keith was not credible. In his April 19, 2001 *pro se* Post-Conviction Petition, Mr. Keith contended that his public defender, Alan Golden, was ineffective because Mr. Golden had allegedly told Mr. Keith that he would be parole-eligible after serving ten years, but that if he did not plead guilty to second-degree murder, he would be facing the death penalty. Ex. 16 at 15. In the State's *Answer* to Mr. Keith's post-conviction petition, Caddo Assistant District Attorney Thomas Butler attached an affidavit from Attorney Golden (Ex. 17 at 9), in which Mr. Golden denied Mr. Keith's assertion. Additionally, ADA Butler emphasized that Mr. Keith had made inconsistent statements about what Mr. Golden had allegedly stated to him regarding parole eligibility in *pro se* motions he had previously filed in this Court. *Id.* at 5. ADA Butler argued that "[s]uch inconsistencies emphasize the likelihood that such advice ***never occurred***." *Id.* (emphasis in original).

In its July 10, 2001 *Opinion* denying Mr. Keith's Post-Conviction Petition, this Court adopted ADA Butler's language, holding that "Petitioner has also made several similar, yet inconsistent claims regarding such statements. *Such inconsistencies suggest that the likelihood of such advice never occurred* ... " Ex. 18 at 4 (emphasis added).

that Mr. Irish would not have been convicted and/or sentenced to death.

D. Conclusion

The State's failure to disclose to Mr. Irish at the time of trial evidence that could have been used to impeach its most essential witness undoubtedly violated Mr. Irish's constitutional rights, as set forth in *Brady*. Taken together with the State's improper suppression of additional favorable evidence, it is inevitable that these violations cumulatively undermine confidence in the verdict. A new trial is merited.

[part of page 22 and pages 23–209 of original are omitted]

PRAYER FOR RELIEF

Therefore, considering the foregoing, Mr. Irish requests the following: a new trial; a new capital sentencing hearing; alternatively, an evidentiary hearing on all claims; that this Court grant additional discovery as necessary; and grant leave to amend this petition if necessary.

Dated: October 1, 2010

Respectfully submitted,

Admitted Pro Hac Vice as pro bono counsel for Petitioner

s/ Frank H. Penski
Frank H. Penski, Esq.
Abigail T. Reardon, Esq.
Nixon Peabody LLP
437 Madison Avenue
New York, NY 10022
(212) 940-3000 (phone)
(212) 940-3111 (fax)

Daniel J. Hurteau, Esq.
Nixon Peabody LLP
677 Broadway, 10th Floor
Albany, NY 12207
(518) 427-2650 (phone)
(518) 427-2666 (fax)

Holly J. Kilibarda, Esq.
Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101
(603) 628-4085 (phone)
(603) 628-4041 (fax)

Carol R. Camp, Bar Roll #32282
Gary P. Clements, Bar Roll #21978
Kristin Traicoff, Bar Roll #32733
Capital Post-Conviction Project of Louisiana
1340 Poydras Suite 1700
New Orleans, LA 70012
Telephone: (504) 212-2110
Facsimile: (504) 212-2130

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by United States mail, postage prepaid and properly addressed, to: the Honorable Ramona Emanuel, Judge, 1st Judicial District Court for the Parish of Caddo, Caddo Parish Courthouse, Suite 300 A, 501 Texas St., Shreveport, La. 71101; and Ms. Suzanne Owen, Assistant District Attorney, Caddo Parish District Attorney's Office, Caddo Parish, Courthouse, 501 Texas St., 5th Floor, Shreveport, La. 71101 on this the 1st day of October, 2010.

s/ Carol R. Camp
Carol R. Camp

[Appendix to Petitioner's Supplemental Petition is omitted]