No. 14-182

In The
Supreme Court of the United States

DANIEL T. IRISH,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CONCISE STATEMENT OF THE CASE

On the morning of December 30, 1996, Petitioner Daniel Irish telephoned Russ Rowland, his landlord, and told Rowland that he had $500.00 of the back rent he owed him. Little did Rowland know that Irish had been talking for several days about how he intended to rob and kill "someone who had a lot of money," and had settled on Rowland as his victim. When Rowland arrived at the trailer early that morning, however, Irish did not follow through with his plan and instead told Rowland that the checkbook had been misplaced and Rowland would have to come back later. (Trial Transcript pp. 3035-3037, 3052-3053, 3084, 3227-3228, 3407-3408)

Later that day, Irish, his girlfriend Kristee Kline and friends Audy Keith and Jason Guin drove to the local Wal-Mart store. All four young people lived in the same trailer park and had been hanging out together for the few months since Irish's mother and stepfather had moved out of town. Kline had been living with Irish in the trailer, which was without phone service. On the way back from Wal-Mart, Irish again began to talk about how he needed money, and that they should rob and kill someone to get it. Irish, driving Kline's car, stopped at a convenience store and used the pay phone to call Rowland's office again. (Trial Transcript pp. 3035-3037, 3094-3095, 3408-3409) He left a message with Rowland's secretary that he "had what Russ needed," and that if Rowland would come by he'd "take care of him." (Trial Transcript p. 3113)

Irish, Kline and Keith waited at Irish's trailer home for Russ Rowland to arrive. They didn't have to wait long. When Rowland arrived around 3:00 p.m., Audy Keith was sitting in a chair in the living room and, as Rowland stepped to the open door, Keith fired one blast from Irish's twelve-gauge shotgun, hitting Rowland in the abdomen. Rowland collapsed on the wooden porch outside the front door. Irish took the shotgun and attempted to fire it, but it had misloaded and would not fire. Irish then picked up his 30-30 rifle while Rowland was begging for his life, stepped up to the door and fired the rifle down into Rowland's right eye, blowing away a large portion of his head. (Trial Transcript pp. 3229-3231, 3410) Appellant sent Keith out to the truck to look for Rowland's wallet, which contained less than $200.00. He took the wallet and money from Keith and put them under the cushion of a loveseat. (Trial Transcript pp. 3233-3234, 3413)

Keith, now sitting at the table with his head in his hands, refused to help Irish drag the body into the trailer. (Trial Transcript pp. 3042-3043, 3231) Kline, who had hidden in the bedroom, emerged and began cleaning up the blood on the carpet where Irish had dragged Rowland's body down the hallway. (Trial Transcript pp. 3410-3411) Jason Guin had seen Rowland's truck drive by, heard two shots and came over to see what had happened. Guin noticed that the front porch was now wet and that there was a "big black mark like a trail" going down the hall. He saw Kline on her knees scrubbing at the black mark. Guin

asked where Irish was and Keith pointed to the back. Guin walked down the hall and saw Rowland's body on the floor and Irish emerging from the bathroom. When Irish asked him to help him with the body, Guin couldn't speak. He saw Irish pick up the shotgun and begin to load it. Then Guin saw a sheriff's car entering the subdivision. When Irish turned toward Guin with the shotgun, Guin ran out the back door and into the wooded area behind the trailer, emerging at a neighbor's house and calling first his parole officer, then Sheriff's Investigator Hensley, whom he knew and, failing to reach them, he finally called 911 to report the murder. (Trial Transcript pp. 3040-3047) Keith, Kline and Irish soon left as well, Keith going over to another neighbor's house until his parents delivered him to the authorities, and Irish and Kline leaving in her car to find Steve Dement, a local bondsman. (Trial Transcript pp. 3232-3233, 3412-3413)

Sheriff's deputies walked over to Irish's trailer and observed that a hose was running water by the front porch, which had been washed down. The deputies saw blood, tissue and bone fragments, as well as shotgun wadding, around the porch area and on the ground. Rowland's white pickup truck was parked at the front of the trailer, but the trailer appeared unoccupied. (Trial Transcript pp. 3169-3171) As the deputies realized that the blood, tissue and bone fragments might be human, they received information from headquarters of Jason Guin's report of a homicide at that address. (Trial Transcript

pp. 3171-3172, 3174-3175) Sheriff's investigators soon arrived and entered the unlocked back door of the trailer to see if anyone was injured inside, finding Rowland's body. (Trial Transcript pp. 3175-3176) Rowland's wallet and $141.00 in cash were found under the cushion of a loveseat in the living room. Rowland's receipt book was also found in the trailer. A receipt was found made out to Danny Irish for $500.00 of back rent. The self-carbon copy of the receipt was still in the book as well. (Trial Transcript pp. 3177, 3200-3202, 3118-3121, 3233-3234)

Deputies had received a description of Kline's car so when Irish drove back toward the trailer park around 6 p.m. to lock the back door, he was noticed by the deputies and taken into custody. Kline was picked up at Steve Dement's house. In their several statements Kline and Irish maintained that Keith had fired both shots from the two different weapons. (Trial Transcript pp. 76, 84, 88, 105-106, 110, 3290-3291) . . . note Dement's interesting slip where he relates that "Danny . . . shot him in the chest.") Kline later testified that she had not seen either shot fired. (Trial Transcript pp. 3210, 3216)

Keith, who first claimed that Irish had pulled the trigger of the twelve-gauge as Keith only held it, testified at trial that he had indeed fired the first shot, but that Irish had forced him to do so at gunpoint and that Irish had fired the rifle shot to Rowland's head. (Trial Transcript pp. 3229-3231) At the time of the murder Audy Keith, who is "mentally slow," was 16 years old. Kristee Kline was 17 years

old and Daniel Irish was 18. Before Irish's trial, Audy Keith pled guilty to second degree murder and was sentenced to life imprisonment without benefit of probation, parole or suspension of sentence. Kristee Kline pled guilty to accessory after the fact to first degree murder and received the maximum sentence of five years at hard labor, to run consecutively with one year she received as an accessory to burglary in an unrelated case. Keith testified for the State during its case in chief, and Kline testified for the State during the penalty phase. (Trial Transcript pp. 3223-3253, 3404-3419)

Daniel Irish was convicted of first degree murder and sentenced to death on August 27 and August 28, 1999, respectively. The Louisiana Supreme Court affirmed Petitioner's conviction and sentence. *State v. Irish*, 807 So.2d 208 (2002). This Court denied certiorari. *Irish v. Louisiana*, 537 U.S. 846 (2002).

After filing a *pro se* shell application for post-conviction relief and intervening proceedings not relevant here, Petitioner (through counsel) filed the instant application for post-conviction relief. Claim II of that petition asserted the allegation at issue here – that the lead prosecutor had failed to disclose *Brady* evidence to trial counsel and that Petitioner's conviction was thus irretrievably tainted. Petitioner's Appendix I, pp. 135a-150a.

This allegation stemmed from an incident that occurred prior to Petitioner's August 1999 trial. On November 1, 1998, lead prosecutor Ross Owen

and district attorney investigator Ricky McDonald drove to Louisiana State Penitentiary (hereinafter "Angola") to interview Audy Keith. The State had agreed to Keith's guilty plea to second degree murder with the condition that he would testify truthfully against Petitioner in Petitioner's trial.

By the time Owen and McDonald went to see Keith at Angola, Keith had apparently had a change of heart and the meeting did not go well. Owen and McDonald left Angola and returned to Shreveport. Soon after, Owen received a phone call from an Angola staff member who asked Owen to write a letter about what transpired during the meeting with Keith. Owen did so and mailed the letter, set forth below, to Captain Jones at Angola.

> 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 future.

Petitioner's Appendix E, pp. 109a-110a.

A contemporary investigative report about the incident authored by Captain Robert Jones from Angola states the following:

> 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 [sic] 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.EB.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 finding 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.

Petitioner's Appendix F, pp. 111a-112a.

Trial counsel for Petitioner were made aware of the alleged incident although not given a copy of Owen's letter to Capt. Jones or the subsequent investigative report. See Petitioner's Appendix D, Letter from Ross Owen, Dated November 16, 2009, p. 106a. Trial counsel apparently did not deem it important enough to mention to appellate counsel. Post-conviction counsel became aware of Keith's accusation, and that Owen

labeled it a lie, via a letter Owen wrote November 16, 2009, and sent to Petitioner's current counsel. The letter is set forth in its entirety below.

> 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*. (emphasis added)
>
> 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. Estopinal 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.

Petitioner's Appendix D, pp. 105a-107a.

Owen later executed an affidavit in which he stated that he did not recall sending a copy of the pre-trial Angola letter to anyone else. Petitioner's Appendix G, pp. 113a-115a. Audy Keith also executed an affidavit, in which he stood by his original contention that the district attorney investigator had pushed him up against a wall during the meeting at Angola. Petitioner's Appendix H, pp. 117a-118a.

The trial court denied relief on February 6, 2013. Petitioner sought a supervisory writ of review from this decision with the Louisiana Supreme Court, but relief was denied without comment on May 16, 2014. *State v. Irish*, 2013-1483 (La. 05/16/14); 139 So.3d 1019. The instant application for writ of certiorari followed.

MISSTATEMENTS OF FACT BY PETITIONER

While Audy Keith's testimony incriminated Petitioner in the murder of Rowland, his was not the only testimony on which Petitioner's conviction was based: numerous witnesses testified to Petitioner's repeated

conversations about killing and robbing Rowland in the days preceding the murder. Furthermore, the trial record reveals several witnesses' corroborating testimony, which in the absence of Keith's testimony was sufficient to convict Petitioner of the murder.

Moreover, while Petitioner alleges that Owen knew Audy Keith was a liar and hid that knowledge from the jury, a review of the trial transcript shows that both defense counsel argued and the prosecution conceded that Keith and Kline had lied repeatedly throughout the investigation. Defense counsel pointed this out to the jury on numerous occasions and alluded to it repeatedly throughout his closing argument. As the trier of fact, it was up to the jury to determine witness credibility. As such, the jury was made aware of witness inconsistencies and Petitioner was afforded a fair trial.

ARGUMENT

I. Considerations For Granting Writ Of Certiorari

A writ of certiorari shall only issue from this Court when the Petitioner shows that the case meets one or more of the considerations set forth in the court rules. The consideration for granting a writ of certiorari that is possibly applicable here is set forth in United States Supreme Court Rule 10.

> Rule 10
> . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In his petition for writ of *certiorari*, Petitioner contends that his conviction for capital murder should be reversed because he was denied his right to due process as set forth in this Court's ruling in *Napue v. Illinois*, 360 U.S. 264 (1959).[1] Petitioner fails to persuade that the Louisiana courts' decisions have resulted in a due process violation, much less error that warrants consideration by this Court. The facts of the instant matter are not violative of the *Napue* rule as Petitioner alleges.

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[1] After noting, and disagreeing with, the trial court's analysis of his post-conviction claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), Petitioner goes on to state, "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. *U.S. v. Agurs*, 427 U.S. 97, 104 (1976). 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)." Petitioner utterly failed to even cite *Napue* and *Giglio* in his post-conviction memorandum on this claim, thus denying the trial court the opportunity to consider the specific issue raised here. Petitioner's Appendix I, pp. 135a-150a.

Napue v. Illinois, 360 U.S. 264 (1959) involved a prosecutor who knowingly allowed a State witness to commit perjury and failed to notify the court or defense counsel of the false testimony or true facts of the matter. *Napue* held that where an important witness for the State in a murder prosecution falsely testified that the witness had not received any consideration for his testimony, although the prosecutor had in fact promised such consideration, and the prosecutor failed to correct this false testimony, the defendant was denied due process of law in violation of the Fourteenth Amendment even though the jury was apprised of other grounds for believing that the witness may have had an interest in testifying against the defendant.

Petitioner asserts that a *Napue*-type violation occurred when 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 the pendency of the post-conviction proceedings. Petitioner also alleges that the lower courts and prosecutors need guidance concerning what constitutes unwarranted concealment.

There is nothing in the facts before this Court to show that this prosecutor deceived the judge, defense counsel, or jury, either directly or indirectly through Keith's testimony. Petitioner's argument also lacks candor with this Court as it blatantly ignores and/or gives adequate weight to the facts that (a) the facts of the Angola incident were disclosed to defense counsel

prior to the witness' testimony, (b) the witness repeatedly admitted to having lied about other matters that were actually relevant to the case, and (c) Petitioner's guilt was proven by overwhelming circumstantial evidence in addition to the witness' testimony. Thus, Petitioner has failed to set forth either a due process violation that needs correction or a convincing argument that either unwarranted concealment occurred or that prosecutors and courts need guidance on that point. As the considerations for granting a writ of certiorari found in Rule 10(c) are lacking in this case, the petition for writ of certiorari should be denied.

II. No Unwarranted Concealment Occurred

As a starting point, the State of Louisiana strongly objects to Petitioner's contention that "unwarranted concealment" occurred. As pointed out by Owen, defense counsel were aware of the alleged incident at Angola. Petitioner's Appendix D, Letter from Ross Owen, Dated November 16, 2009, p. 106a. Owen's affidavit neglects to address how, when, and where trial counsel were made aware of Keith's accusations or what Owen's response was, perhaps because Owen's affidavit was prepared in consultation with post-conviction defense counsel. The appendix to petitioner's post-conviction relief application also included affidavits from Petitioner's trial counsel, Stephen Glassell and Michelle Andrepont. Both affidavits carefully avoid the issue of whether counsel had knowledge of the Angola incident at the time of trial –

the affidavits only address the issue of whether the attorneys knew about Owen's letter to Angola and the subsequent investigative report prepared at Angola. See Affidavit of Michelle Andrepont, Appendix A, and Affidavit of Stephen Glassell, Appendix B. Common sense compels the conclusion, especially in light of Glassell and Andrepont's reticence on the subject, that the topic of Keith's accusation against Owen must have been discussed between Owen and defense counsel. It is impossible to believe that defense counsel would have failed to act upon this knowledge had they any belief whatsoever that it was true. Thus, while the fact that Owen wrote a letter to Angola officials about the incident may not have been specifically disclosed, there can be no doubt that (a) defense counsel knew about Keith's accusation and (b) knew that Owen refuted Keith's veracity on this point.

III. Petitioner's Due Process Rights Under *Napue* Were Not Violated

Petitioner relies upon *Napue v. Illinois*, 360 U.S. 264 (1959) to establish his claim that his due process rights were violated; however the situation in *Napue* is inapposite to the facts before the Court in this case. In *Napue*, an important State witness committed perjury by testifying that he had not received any promise of consideration from the prosecutor in exchange for his testimony. The prosecutor had promised such consideration and failed to correct the witness' false testimony. This Court held that the defendant was denied due process of law in violation

of the Fourteenth Amendment to the U.S. Constitution by the prosecutor's failure to act, even though the jury had been apprised of other grounds for believing that the witness may have had an interest in testifying against the defendant.

Napue was relied upon in *Giglio v. U.S.*, 405 U.S. 150 (1972), where this Court considered a similar set of circumstances. The difference between the two is that in *Napue* the prosecutor knowingly allowed the witness to commit perjury. In *Giglio*, the trial prosecutor was unaware of the promises made to the testifying witness. Giglio discovered after his conviction that an important government witness was promised leniency in exchange for his testimony. The Assistant United States Attorney who tried the case was unaware of the promise, which was made by a different Assistant who failed to inform the trial prosecutor about the agreement. This Court held that the due process requirements enunciated in *Napue* required a new trial, as disclosure of the agreement was the responsibility of the government and not a particular attorney. In reaching its decision, this Court summarized the jurisprudence leading to its conclusion:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317

> U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, "(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id., at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function § 3.11(a). 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*, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ." *U.S. v. Keogh*, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under *Brady*, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . " *Napue*, supra, at 271, 79 S.Ct., at 1178.

Giglio v. U.S., 405 U.S. 150, 153-54, 92 S.Ct. 763, 766, 31 L. Ed. 2d 104 (1972).

Thus, the jurisprudence relied upon by Petitioner in seeking a writ of certiorari addresses the consequences flowing from the presentation by the State of perjured testimony, known by at least someone in the prosecution team to be false. Even in such a case, a defendant is only entitled to a new trial upon a finding that the evidence was likely to have changed the verdict. *Keogh*, *supra*.

***Napue* and *Giglio* Not Analogous**

The differences in the facts underlying *Napue* and *Giglio* from those in the instant case are such that Petitioner's reliance upon those cases for justifying his petition for writ of certiorari is misplaced. Both *Napue* and *Giglio* dealt with the effects of outright perjury by a key state witness that was known to a government attorney, even if not the trial prosecutor. Nowhere in this case has it been shown that perjury occurred in this case. The affidavit obtained by post-conviction counsel from Audy Keith, the witness at issue, avoids comment on the veracity of his trial testimony just as the affidavits from his trial counsel avoid the question of actual knowledge of the Angola incident. Petitioner's Appendix H, pp. 117a-118a. The inescapable conclusion is that Keith still stands by his testimony at trial. Thus, Petitioner has failed to show that "rudimentary demands of justice" were violated because there is no proof that Owen committed a deliberate deception of the trial court and jurors by knowingly presenting false evidence.

Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935).

Reliability Of Keith Not Determinative Of Guilt Or Innocence

Another requirement to find a *Napue* violation for nondisclosure of evidence affecting credibility is a determination that the "reliability of a given witness may well be determinative of guilt or innocence." *Giglio*, supra at 154, citing, *Napue*, 360 U.S. 264, 269 (1959). While Keith's testimony at Petitioner's trial did fill in some details of the murder, it is telling that Owen planned to try Petitioner's case even without Keith's testimony after the incident at Angola. As Owen stated in his letter to post-conviction counsel, "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." Petitioner's Appendix D, p. 106a. Thus while Audy Keith's testimony incriminated the Petitioner in the murder of Rowland, his was not the only testimony on which Petitioner's conviction was based and the prosecution felt confident enough about the strength of its case to go forward without him. After all, numerous witnesses were prepared to (and ultimately did) testify to Petitioner's repeated conversations about killing and robbing Rowland in the days preceding the murder. Furthermore, the trial record reveals several witnesses' corroborating testimony, which in the absence of Keith's testimony was sufficient to convict Petitioner of the murder.

The State proved at trial that Petitioner lured the victim, Russell Rowland, to his trailer under the false pretense of paying the victim back-rent, having left a message with Rowland's secretary stating that "I have what Russ needs. . . ." (Trial Transcript p. 3113) Rowland owned the trailer and lot in which Petitioner Irish and his then-girlfriend, Kristee Kline, were living. Rowland had previously attempted to sell the property via a credit sale deed to Petitioner's parents, Robert Rice and Gail Gilcrease Rice, but they had failed to make the necessary payments. Evidence was presented that the victim forgave previous non-payment in an effort to allow the Rices a clean start. (Trial Transcript p. 3112)

Shortly thereafter, Robert Rice and Gail Gilcrease Rice moved to Houston, leaving the Petitioner living in the trailer with no apparent source of income. Despite the fact that Petitioner's name was not on the deed, Rowland's personal secretary testified that Petitioner's mother, Gail Rice, had stated in late November of 1996 that Petitioner and Kline were living in the trailer and that they were the ones responsible for the payment of the rent. (Trial Transcript p. 3123)

At the time of this murder, neither Irish nor Kline were employed. (Trial Transcript p. 3031) Both had dropped out of school and Irish had recently had his vehicle repossessed and his phone service discontinued for nonpayment. (Trial Transcript p. 3034) As of December 30, 2006, Rowland's personal secretary testified that the modest rent of $250/month had not

been paid since November of that year. (Trial Transcript p. 3116)

Several days prior to the murder, Irish brought up the idea of robbing and killing a wealthy person in the community as a means to getting money and mentioned the victim, Rowland, his family's benefactor, as a potential target. (Trial Transcript p. 3036) Multiple witnesses testified as to Irish's statements regarding the robbing and killing of Rowland. Jason Guin, a friend of Irish's and a State's witness, testified that both Irish and Kristee Kline discussed their need for money and the possibility of killing Rowland the morning of the murder. (Trial Transcript p. 3052) Guin also testified that Petitioner had an interest in stealing the victim's new Z-71 truck.

Guin's friend and neighbor, Michael Stewart, also testified that Guin had come to him with a story that a mutual acquaintance of theirs, Danny Irish, had discussed robbing and killing Rowland the morning of the murder. Stewart testified that Guin asked him if he thought there was any truth to Irish's talk but Stewart told Guin he thought Petitioner was joking and not serious. (Trial Transcript p. 3070) Stewart also testified that this was not the first time Guin had told him that Petitioner had discussed with him a plan to rob and kill his landlord, Rowland. (Trial Transcript p. 3070)

Steve Dement, a local bail bondsman, testified that Danny Irish had told him several weeks prior to the murder that he had just purchased a new Z-71

truck (the same enhancement package as the truck the victim owned) and that he was waiting for the bumper to be put on it before he could use it. (Trial Transcript p. 3183) He added that he and Danny had even discussed taking the truck to Nevada to pick up Danny's brother who had skipped town on a bond Dement made. Dement also testified that a few weeks prior to the murder, Petitioner had asked him how to sink something in water and asked Dement if had an anchor or a weight he could use to that end. (Trial Transcript p. 3183)

Tana Bond, Rowland's personal secretary, testified that Danny Irish called her the morning of the murder and requested that Rowland come over to his trailer between two and three p.m. to "pick up what he needs." (Trial Transcript p. 3013) Jason Guin testified that on the afternoon of December 30, 2006, he was in the yard of a neighbor of Petitioner's, helping the neighbor look for lost car keys. He saw Rowland's white, Z-71 truck drive by and a few minutes later he heard two gunshots. (Trial Transcript p. 3041) A few minutes after hearing the gunshots, Guin decided to walk down to Petitioner's trailer to find out what had happened. (Trial Transcript p. 3041)

Upon walking onto the property, Guin testified that he saw Rowland's truck parked outside of Petitioner's trailer. He approached the porch and noticed that the porch was wet although it had not rained. (Trial Transcript p. 3042) Guin testified that the front door was open and that when he went into the trailer, there was a "big black mark" near the entrance to the

trailer with a trail extending off of it. Guin saw Kristee Kline on her knees scrubbing the black mark. (Trial Transcript p. 3042) Guin testified that he saw Audy Keith sitting down in the trailer with his head in his hands and that he was non-responsive. (Trial Transcript p. 3043) Guin then testified that he saw Petitioner emerge from the back of the trailer and that Petitioner asked him for assistance in moving Rowland's body into the bathroom. (Trial Transcript p. 3044)

Jason Guin testified that he was shocked by the presence of the body and the injuries to it. He said that Petitioner walked past him and began to load a shotgun and turned towards Guin. (Trial Transcript p. 3044) Guin stated that he was frightened of Petitioner and that after Petitioner loaded the shotgun, he looked out the bay windows of the trailer and saw a Caddo Parish Sheriff's car in the neighborhood. Guin then ran out the back door and ran through the woods to a neighbor's house, where he eventually called 911. (Trial Transcript p. 3045)

This 911 tape was played for the Court and in it, Guin could be heard saying that he wanted to report a murder. When asked at trial why he used the term "murder," Guin responded, "Because that's what it was, wasn't it? I mean, when you kill somebody, ain't that murder?" (Trial Transcript p. 3047) Guin also was heard on the 911 recording asking that an unmarked police car be sent out to the trailer. When questioned at trial as to why he specified that an unmarked car be used, Guin indicated that he didn't know if

Petitioner had followed him. Guin testified he was frightened of Petitioner and he didn't want Petitioner to know that he had called the police. (Trial Transcript p. 3047)

Jarod Jennings, a neighbor of Petitioner's, testified that on the day of the murder and several days prior, Petitioner had discussed robbing someone with Kristee Kline. (Trial Transcript p. 3084) Jennings testified that Petitioner was talking about robbing people because Petitioner needed money to pay his bills. Sometime in the hour following Rowland's death, Petitioner and Kline walked over to Jennings' home to use his phone and then left on foot. Jennings testified that about twenty minutes after they left his home, Petitioner called him and asked him if there were police at his trailer and if they had gotten into his trailer (Jennings' home was across the road from Petitioner's trailer and Jennings was able to see police at Petitioner's trailer). (Trial Transcript p. 3087)

Kristee Kline testified during the penalty phase for the State. She testified that the morning of the murder, Petitioner woke her up and told her that Russ Rowland was at the trailer and that he was planning on shooting him and robbing him. The Petitioner was holding a twelve gauge shotgun while he told her this. (Trial Transcript p. 3408) She testified that Petitioner became too frightened and was not able to shoot him so he asked Rowland to return later that day. Petitioner told Kline that he was going to try and contact his mother to get the money to pay Rowland. Kline also testified that if there was a

leader amongst the group in the planning of this crime that it was Petitioner. (Trial Transcript p. 3409) Kline also testified that she was in the bedroom at the time of the shooting. She testified that Petitioner alerted her to the fact that the victim had arrived.

The testimony at trial painted a clear picture of Petitioner as being desperate for money, without transportation or phone and in danger of losing a place to live, and actively planning to rob his landlord to alleviate this situation. The murder took place in Petitioner's home, at his instigation and with his participation, and with Petitioner directing cover-up efforts within minutes of the killing. While Keith's testimony was helpful, the testimony presented through other witnesses was sufficient to obtain a conviction without it. It is obvious that even in the absence of Keith's direct testimony, any rational jury would conclude that Petitioner was guilty beyond a reasonable doubt. The evidence clearly established that Petitioner was the leader in this crime: he brought up the entire idea of robbing and killing a wealthy community leader; he specifically named Rowland as a target because Rowland was his landlord and he was several months behind in his rent; he repeatedly referenced robbing and killing someone in conversations with others in an attempt to garner assistance; he claimed that he was about to have a new truck that was identical to the victim's; he asked others to help him conceal the body immediately after the victim was killed and asked his friend the best manner in which to sink an object. In addition, he

called the victim to his home **twice in one day** in an attempt to kill and rob him and told his girlfriend that he was going to kill him. Both of the weapons used to shoot the victim were in the home of Petitioner and belonged to either Petitioner or Petitioner's step-father. All of these facts were established without one word from Keith.

Letter Not Material Evidence Under *Brady*

In addition to the criteria discussed above which Petitioner has failed to meet, a due process violation can only be found when the evidence at issue is deemed material under *Brady*.

> We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ." *U.S. v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968). A finding of materiality of the evidence is required under *Brady*, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . " *Napue*, supra, at 271, 79 S.Ct., at 1178.

Giglio v. U.S., 405 U.S. 150, 153-54, 92 S.Ct. 763, 766, 31 L. Ed. 2d 104 (1972).

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held 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 punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, *supra*, at 87. When determining whether a *Brady* violation has occurred, there are three factors that must be shown: the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the prosecutor, either intentionally or inadvertently; and prejudice must have ensued. *Strickler v. Green*, 527 U.S. 263 (1999).

When courts assess whether the evidence is material, the question is one of determining if the defendant received Due Process rather than whether the evidence would have resulted in a different verdict. The question of materiality 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*. [Emphasis supplied.] To that end, a *Brady* violation 'occurs when the "evidentiary suppression" undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1565 (1995), citing *U.S. v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381 (1985).

In *U.S. v. Agurs*, 427 U.S. 97, 107 (1976), this Court sensibly noted that this material standard is an "inevitably imprecise standard." *Agurs* at 108. In an effort to further clarify this imprecise standard, this Court found that materiality is present when "there are situations in which evidence is obviously of

such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." *Id.* at 110. The Court in *Agurs* further held that, "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Id.* at 112-113.

Petitioner has failed to demonstrate that Owen's letter to Angola or the Angola investigative report meet this standard for materiality. The alleged incident had no relevance as far as Petitioner's guilt or innocence was concerned. Whether an investigator had grabbed Keith's arm or not could have no impact on the jury's finding of Petitioner's guilt or sentence, and testimony in this regard would have been irrelevant at trial.

As set forth above, defense counsel were aware of Keith's accusation before trial. Regardless of whether Owen contested Keith's veracity or not, defense counsel had the option of questioning Keith about the incident or calling Investigator McDonald or Angola officials to testify. That they chose not to do so is indicative that, in their judgment, there was not much to be gained by presenting it. Keith had already, through his various inconsistent statements, subjected himself to so many attacks on his credibility that further efforts could have been seen as redundant and obnoxious to the jury.

Even though Petitioner alleges that Owen knew Audy Keith was a liar and hid that knowledge from the jury, a review of the trial transcript shows that both defense counsel argued and the prosecution conceded that Keith and Kline had lied repeatedly throughout the investigation. On direct examination, the following exchange took place.

> Q. When you were first arrested for this you were asked questions by the detectives, and you didn't tell the truth, did you?
>
> A. No, I didn't.
>
> Q. And you lied about a bunch of different things involved, didn't you?
>
> A. Yes.
>
> Q. Do you have any reason to lie today?
>
> A. No.
>
> (Trial Transcript p. 3230)

Once on cross-examination, Keith proved to be a difficult witness and repeatedly denied having made statements or having any recall of having made them. Keith then again admitted to having lied.

> Q. Did you tell the detectives that you had the shotgun and that Danny reached over and pulled the trigger?
>
> A. Yes, I recall saying that.
>
> Q. That wasn't true, was it?
>
> A. No.

Q. According to you today?

A. No, it was not true. I lied to them.

Q. Did you lie to the detectives throughout your statement?

A. Excuse me?

Q. Did you lie to the detectives throughout your statement?

A. Off and on I lied, and I told the truth, too.

Q. You told the detectives the truth?

A. And lied, too, at the same time. I lied and then I told some of the truth.

(Trial Transcript p. 3242)

And,

Q. You then told detectives you had the shotgun and you didn't pull the trigger?

A. I told them I didn't do it, and then I told them that I did shoot him with the shotgun, yes.

Q. And in there you told numerous other lies?

A. I'm quite sure, yes.

(Trial Transcript p. 3247)

Defense counsel pointed this out to the jury on numerous occasions and alluded to it repeatedly throughout his closing argument. Petitioner concedes

this point in brief, stating "The defense focused its cross examination on the marked contradictions between Keith's statements to the police after arrest and his trial testimony. . . ." Petitioner's Brief, p. 5. Thus, the letter and investigative report would only have reiterated what everyone in the courtroom already knew – Audy Keith was a liar at least some of the time. In light of the overwhelming evidence of guilt substantiated by other witnesses as set forth above and the voluminous impeachment fodder available for Keith's cross-examination, the letter and investigative report are not sufficiently material to warrant a new trial under the principles set forth in *Brady*, *Napue*, and *Giglio*.

IV. No Basis For Issuance Of Writ Of Certiorari

The holding of the trial court, which Louisiana Supreme Court declined to review, found that there was not a violation of Petitioner's Due Process rights as alleged by Petitioner. The State did not conceal any material evidence from defense counsel in violation of *Brady* and its progeny. Even with the jury's knowledge of Keith's propensity to lie, Petitioner was convicted and sentenced to death because of the overwhelming evidence supporting the State's case. Keith's testimony, for whatever weight the jury gave it, came from the mouth of a self-admitted liar. As such, the letter and investigative report are not material under the *Brady* standard because that evidence does not undermine the due process afforded

the defendant or the confidence that the outcome resulted in a fair trial. Thus, there is no basis for the issuance of a writ of certiorari.

CONCLUSION

WHEREFORE, the State of Louisiana prays that Danny Irish's application for writs of certiorari be denied as without merit.

Respectfully submitted,

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Caddo Parish District Attorney
Counsel of Record
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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 MICHELLE M. ANDREPONT

(Filed May 25, 2010)

STATE OF LOUISIANA)
)
PARISH OF CADDO)

BEFORE the undersigned Notary Public, came and appeared:

MICHELLE M. ANDREPONT

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

1. That she 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 she served as second chair defense counsel in State of Louisiana v. Daniel Thomas Irish, Number 186,209, Section 4, First Judicial District Court, Caddo Parish, Louisiana.

3. That she cross-examined Mr. Irish's co-defendant, Audy Wayne Keith, Jr., when he testified during the guilt phase of Mr. Irish's capital murder trial in August 1999.

4. That she received a copy of the November 16, 2009 letter that former Assistant District Attorney Ross Owen wrote to Mr. Irish's present post-conviction counsel.

5. That she does not recall Mr. Owen informing her about a November 19, 1998 letter that an unidentified person from Louisiana State Penitentiary asked Mr. Owen to write about the incident involving Mr. Owen, the D.A. investigator, and Mr. Keith, nor does she have a copy of the letter in her files.

6. That she does not recall Mr. Owen informing her about a November 19, 1998 Louisiana State Penitentiary investigative report concerning the incident involving Mr. Owen, the D.A. investigator and Mr. Keith, nor does she have a copy of the investigative report in her files.

FURTHER AFFIANT SAYETH NOT.

/s/ Michelle M. AndrePont
Michelle M. AndrePont

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY PUBLIC,
ON THIS 20th DAY OF April, 2010.

/s/ Lisa Akins
NOTARY PUBLIC

LISA AKINS
NOTARY PUBLIC, #57238
BOSSIER PARISH, LOUISIANA
MY COMMISSION IS FOR LIFE

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 STEPHEN A. GLASSELL

(Filed May 25, 2010)

STATE OF LOUISIANA)
)
PARISH OF CADDO)

BEFORE the undersigned Notary Public, came and appeared:

STEPHEN A. GLASSELL

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 served as lead defense counsel in State of Louisiana v. Daniel Thomas Irish, Number 186,209, Section 4, First Judicial District Court, Caddo Parish, Louisiana.

3. That he received a copy of the November 16, 2009 letter that former Assistant District Attorney Ross Owen wrote to Mr. Irish's present post-conviction counsel.

4. That he has reviewed his notes of an interview of Audy Keith on January 25, 1999, when Keith told him about the incident at Angola and accused D.A. Investigator Ricky McDonald of hitting him in the presence of Mr. Owen.

5. That he does not recall Mr. Owen informing him about a November 19, 1998 letter that an unidentified person from Louisiana State Penitentiary asked Mr. Owen to write about the incident involving Mr. Owen, the D.A. investigator, and Mr. Keith. He does not recall being shown or given a copy of the November 19, 1998 letter to Captain Jones prior to the trial.

6. That he does not recall Mr. Owen informing him about a November 19, 1998 Louisiana State Penitentiary investigative report concerning the incident involving Mr. Owen, the D.A. investigator and Mr. Keith. He does not recall being shown or given a copy of the investigative report written by Captain Jones prior to the trial.

7. That he has now seen both the letter and the investigative report and has no memory of these documents being shown or given to him prior to the trial.

FURTHER AFFIANT SAYETH NOT.

/s/ Stephen A. Glassell
STEPHEN A. GLASSELL

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY PUBLIC,
ON THIS 16th DAY OF April, 2010.

/s/ Angela Rhodes
NOTARY PUBLIC

ANGELA RHODES #69481
NOTARY PUBLIC
BOSSIER PARISH, LOUISIANA
MY COMMISSION IS FOR LIFE