No. 21-7718

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARK A. WINGER, K97120 — PETITIONER
(Your Name)

vs.

PEOPLE OF THE STATE OF ILLINOIS — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Appellate Court of Illinois, Fourth Judicial District
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark A. Winger, K97120
(Your Name)

Western Illinois Correctional Center
2500 Rt. 99, South
(Address)

Mt. Sterling, IL 62353
(City, State, Zip Code)

QUESTION(S) PRESENTED

Whether a State prisoner's post-conviction petition claim of a Brady violation alleging perjury by a State's witness at trial, whose false testimony prosecutors relied upon and failed to correct must be reviewed under the lower standard of "materiality" established by United States v. Agurs, 427 U.S. 97 (1976).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- People v. Winger, No. 01-CF-798, 7th Judicial Circuit Court of Sangamon County, Illinois. Sentence date: August 1, 2002.
- People v. Winger, App.Ct.No. 4-02-0631, Fourth Judicial District Court of Appeals of Illinois. Judgement unpublished. Dated: May 14, 2004. 347 Ill.App.3d 1127 (4th Dist. 2004).
- People v. Winger, Il.S.Ct.No. 98570 , Illinois Supreme Court. Judgement dated October 6, 2004. 211 Ill.2d 613 (2004).
- People v. Winger, No. 01-CF-798, 7th Judicial Circuit Court of Sangamon County, Illinois, JudgementNovember 13, 2007.
- People v. Winger, App.Ct.No. 4-07-1026, Fourth Judicial District Court of Appeals of Illinois. Judgement November 25, 2009. Unpublished Order. 234 Ill.2d 550 (2009)
- People v. Winger, Il.S.Ct.No.109260 , Judgement dated November 25, 2009, Unpublished. 234 Ill.2d 550.
- People v. Winger, No. 01-cf-798, 7th Judicial Circuit Court of Sangamon County, Illinois. Judgement November 1, 2005.
- People v. Winger, App.Ct.No. 4-05- 0968,Fourth Judicial District

Court of Appeals of Illinois. Judgement August 28, 2007. unpublished. 375 Ill.App.3d 1158 (4th Dist. 2007). 375 Ill.App.3d 1158 (4th Dist. 2007).

- People v. Winger, No. 01-CF-798, 7th Judicial Circuit Court of Sangamon County, Illinois. Judgement November 26, 2013.
- People v. Winger, No. 01-CF-798, 7th Judicial Circuit Court of Sangamon County, Illinois. Judgement , 2013.
- People v. Winger, No. 01-CF-798, 7th Judicial Circuit Court of Sangamon County, Illinois. Judgement April 17, 2014.
- People v. Winger, App.CtNo. 4-13-1113-U [consolidated], Fourth Judicial District Court of Appeals of Illinois. Judgement dated . Unpublished. 2016 IL App (4th) 131113-U.
- People v. Winger, No. 01-CF-798, 7th Judicial Circuit Court of Sangamon County, Illinois. Judgement dated June 26, 2019.
- People v. Winger, App.Ct.No. 4-19-0599, Fourth Judicial District Court of Appeals of Illinois,Judgement dated August 11, 2021. Unpublished.
- People v. Winger, Il.S.Ct.No. 127833. Supreme Court of Illinois. Judgement dated January 26, 2022.
- People v. Winger, Il.S.Ct No.98570 , Supreme Court of Illinois. Judgement dated October 6, 2004 . 211 Ill.2d 613.
- Winger v. Greene , No. 10-CV-03169, United States District Court for the Central District of Illinois, Springfield Division. Judgement dated March 30, 2021.
- Winger v. Greene, No. 21-1592, United States Seventh Circuit Court of Appeals. Judgement: COA pending judgement.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the 7th Circuit Court, Sangamon Cty., IL court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 1-26-2022. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment V to the United States Constitution, which provides:

> ARTICLE [V]: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Amendment is enforced by Amendment XIV to the United States Constitution, which provides:

> Section 1.All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Overview: After a jury trial in May/June 2002, the Court found Petitioner, Mark Winger, guilty of the August 29, 1995, first-degree murders of wife Donnah Winger and airport shuttle van driver Roger Harrington, in violation of §9-1(a)(1) (West 1994).

The indictment charged that Petitioner intentionally killed his wife in their home by striking her multiple times in the head with a hammer, and that he intentionally lured and killed her airport shuttle driver in their home by shooting him in the head with a handgun.

Jury Trial Proceedings: Evidence at trial showed that on Wednesday August 23, 1995, Donnah Winger and infant daughter, Bailey, were driven from the St. Louis airport to the Winger's home at 2305 Westview Drive, Springfield, Illinois by Roger Harrington, a shuttle van driver for BART Transportation Company, while husband Mark [Petitioner] was away on business in Chattanooga, Tennessee, preparing for an examination related to his job. Donnah was disturbed by the van driver, known only to her as Roger, because, among other things he drove recklessly and spoke to her about being controlled by a manevolent spirit named, "Dahm" who commanded him to do bad things to poeple and would punish Roger if he disobeyed Dahm.[1] Donnah waited for two days until Friday, August 25,1995 to tell Petitioner about the strange van ride because she didn't want to upset him before he took his test.

---

1. These facts are summerized by the Appellate Court in Peaople v. Winger, App.Ct.No. 4-02-0631, unpublished Order, May 14, 2004. (see Appendix F at F-1 thru F-20)

On Friday, August 25,1995, BART owner, Ray Duffy, received a phone call from Petitioner around 4:00 pm "to lodge a complaint concerning a ride his wife had with one of our vans." Petitioner complained about the driver's behavior and his driving and alleged that the Winger's believed that the driver was the source of hang-up phone calls they had received since the van ride. Duffy agreed to check out the allegations. Duffy spoke to Roger[Harrington] about the allegations, which Harrington denied, but agreed to speak with the Petitioner to straighten things out. Duffy gave Harrington's phone number to Petitioner, Monday, August 28th, 1995.

On the morning of August 29, 1995, Petitioner called Harrington at home from Petitioner's office to tell Harrington that the Wingers are not his friend and to stay away. Petitioner abruptly ended the phone conversation after Harrington began to behave oddly. Later that afternoon Petitioner called 911 from his home to report that he had just shot a man who was attacking his wife. When police arrived, they found Donnah Winger and Roger Harrington and a bloody scene.

In September, 1995, Detective Doug Williamson and his partner Detective Charles Cox were present at the Coroner's Inquest, where Detective Cox gave the police testimony to the jury, saying:

> COX: [All] evidence on the bodies as well as the evidence at the scene all corroberate each other...the evidence and marks on the bodies, the angle of the wounds. All wounds on Mrs. Winger were blows from above and behind her...We investigated all angles of this case to try to prove or disprove anything. There was nothing else that came to light on this case in any way other than what had been related by the husband as far as this unknown person to him, came into his residence and was beating his wife with a hammer and that he shot him. The distances, the position the husband was at when he fired, everything fit perfectly with the evidence at the scene. There is nothing to indicate anything other than what the husband had described.

Consistent with the police investigation and the medical and scientific findings, the Coroner's Jury ruled that Roger Harrington killed Donnah Winger and that Petitioner shot and killed Harrington justifiably. The case was officially closed on December 11, 1995. There was no further activity on this case until February 19, 1999.

On the morning of February 19,1999, DeAnn Schultz (Donnah Winger's friend) contacted the Springfield Police Department and met with detectives to provide them with new information about Donnah Winger's murder. Schultz told detectives that she and the Petitioner had been involved in an affair about a month before Donnah was murdered and that Petitioner had made comments to her both before and after the murders that made her suspect that the Petitioner was involved in Donnah's murder. Later, that same afternoon, detective Doug Williamson went to Springfield attorney Michael Metnick's office to retrieve some of the evidence that they had released to Metnick years earlier after Petitioner filed a law suit against BART Transportation Company. The items detective Doug Williamson recovered were the bloody T-shirts worn by Roger Harrington and the Petitioner.

DeAnn Schultz testified that Petitioner's comments to her both before and after the murders suggested to her that Petitioner wanted to and did kill his wife. But, Schultz had a long history of serious psychological and deep emotional problems that long predated Donnah's death. She saw Dr. Lauer regularly in 1998, and engaged in four attempted suicides. Schultz had an axe to grind against Petitioner. She was "hurt by the break up" between her and Petitioner in March, 1996. She became deeply depressed and began to drink, and her mental state spiraled downward. Schultz underwent Electro-

Convulsive Therapy. After a chance encounter with Petitioner and his new wife and children in October, 1998, even though Schultz knew Petitioner was remarried, she began to pursue him again. Schultz told Dr. Lauer about the affair and Dr. Lauer told Schultz that this information was the source of her problems and that she would never get better or stop trying to kill herself until she went forward to the police. Schultz spoke with detectives on February 19, 1999 and returned on March 8, 1999 to provide a formal written statement. Schultz was given a grant of immunity in exchange for her testimony on April 15, 2002. Despite Schultz' new and evolving revelations, she testified that she has "never concluded that" Petitioner was guilty.

Both the State and the Defense put forth forensic psychologist expert testimony that described Roger Harrington as having suffered from several possible personality disorders. Defense expert Dr. Cavanaugh opined that Harrington was a danger to himself and society because of his fascinations with knives and weapons, his paying homage to a manevolent spirit that Harrington believed had manifested in the form of a dragon mask kept in his room, and because he had been off of his medications. Moreover, Harrington had a very violent background including interactions with police, and a violent attack against his own wife of two weeks that left her with broken cartilge in her chest where he stomped on her and pointing a shotgun at her face told her to "say goodbye." The last entry in Harrington's psychiatric records shows that he told his therapist, "My destiny is murder."

Other evidence included a note found on the back of an old bank deposit slip. It read, "Mark Winger" (in pencil) and Petitior's

address (in ink pen), in differnt locations and in different handwritings. Also on the note was a notation "4:30." The State's theory was that this note was evidence of a meeting set up by Petitioner to luer Harrington to his residence. But, the State's witnesses---Susan Collins, Trisha Ray, and Shane Ray--- gave conflicting accounts about how the note came to be. Furthermore, detective Cox admitted that his investigative report dated August 30, 1995, reflected the fact that even before the police had discovered the note in Harrington's car, Petitioner had told detectives at the crime scene thatwhen he had spoken to Harrington on the phone that morning Harrington recited Petitioner's address to Petitioner as if he was reading something written.

The most crucial evidence introduced by the prosecution was the forensic testimony of the State's purported expert on blood-stain pattern analysis, Mr. Tom Bevel. Although Bevel's pre-trial forensic report of findings addressed to detective Cox, opined that none of Donnah Winger's blood was found on Harrington's clothing nor was any of Harrington's blood found on Donnah's clothing, these opinions were all proven wrong after DNA testing done on the eve of trial. Bevel was forced to revise his opinion to offer a different explanation for the presence of sub-millimeter size bloodstains found on the back of Donnah's jean shorts consistent with Harrington's DNA. Bevel described a "fairly uncommon" phenomenon in which blood that has pooled in the initial head wound is then ejected by the force of the second gun shot. But, defence expert, Tery Laber, categorically rejected Bevel's theory due to the fact that sub-millimeter size blood drops lack the mass required to overcome the air resistance to travel beyond four feet

through air no matter how much force is applied. Donnah was about six feet away from Harrington. Terry Laber opined that the blood matching Harrington's DNA found on the back of Donnah's jean shorts and the blood spatter matching Donnah's DNA found on Harrington's shorts, T-shirt, and over the right shoulder of Harrington's T-shirt were consistent with the statements Petitioner gave to the police at the 1995 crime scene.

Tom Bevel did not, nor could he prove directly that Petitioner killed his wife. Instead, and with the assistance of detective Doug Williamson, set out to prove that Petitioner's statements to police at the 1995 crime scene as to how Harrinton was shot and killed were inconsistent with the crime scene photographs. According to detective Williamson, Petitioner told detectives that Roger Harrington was on one knee facing directly east about to strike Donnah---Harrington looks up at "Mark right in the eyes, sees him, looks down and begins to to beat Donnah in the head again. At this point Mark fires one round. He said [Harrington] rolled onto his back and indicated straight back...everything was in a straight line."

However, none of the contemporaneous police reports reflect the re-enactment purported by detective Williamson who was addmittedly relying on seven-year-old memory. None of the supposed discrepencies or red flags were indicated in a single police report written in 1995 or even after the case was re-opened in 1999. Yet, detective Williamson's testimony on these uncorroborated matters were essential to the State's forensic case. It allowed Tom Bevel to offer a different theory of what happened, where Harrington was standing when he was initially shot, and the

orientation of Donnah's attacker relative to the crime scene--- where Bevel opined that Donnah's attecker was facing the south wall. This was also critical to the State's forensic case, because other testimony that there were no blood spatter in the east hallway was inconsistent with Donnah's attacker facing squarely east. Because detective Williamson's testimony about Petitioner's alleged statements were uncorroborated by any police reports, detective Williamson's credibility was essential to the forensic case.

Post-Conviction Proceedings: In his initial post-conviction petition Petitioner raised a supplemental issue on police perjury grounds alleging that detective Williamson lied in his testimony at trial when he adamantly denied that the investigation was re-opened in February 1999, because DeAnn Schultz came forward with information about Petitioner. It was further alleged that prosecutors failed to correct Williamson's testimony they knew was false in violation of Petitioner's Due Process rights under Napue v. Illinois, 360 U.S. 264 (1959) Petitioner argued that it was very important for the prosecution to diminish Schultz's role in the decision by authorities to re-open the murder investigation after they learned of Schultz'z serious emotional and psychiactric problems, which included her alcohol and prescription narcotics abuse, and her multiple attepts at suicide and ECT treatments, especially since the evidence against Petitioner was weak and circumstantial. Furthermore, Williamson's adamant denial on Schulz' new information causing the case to be re-opened fostered the sense that the police had never stopped looking at the evidence in the case, which they now proclaim was inconsistent with the Petitioner's statements, despite the detectives testimony before the Coroner's

jury in September, 1995. (see supra at p. 5) It was clear that it was important to the prosecutor to diminish any notion of Schultz' role in re-opening the case, because the prosecutor on Re-Direct Examination got Williamson to clarify his testimony by claiming that Schultz' coming forward was only one of several factors that led the police decision to re-open the investigation. The other factors included completely uncorroborated testimony that the permission to send out "some evidence for testing" came about only because of a change of command within the Major Case Unit; and, three polaroid photographs that were allegedly overlooked in 1995---even though this was debunked by the fact that the investigation was already re-opened before the three polaroid photographs were allegedly uncovered. Nevertheless, Williamson's testimony on Re-Direct examination was the last tesimony the jury heard on the subject.

Petitioner supported his post-conviction claims of police perjury and prosecutorial misconduct with evidence of five instances where individuals close to the investigation actually admitted that the case was re-opened on account of the information Schultz brought forward to the authorities. They included sworn testimony by one of the prosecutors in a different case, statements and testimony from the two lead detectives from the 1995 investigation and the 1999 investigation, respectively, as well as an open letter penned by Donnah's step-father who claimed that it was detective Williamson who contacted him in February 1999, to alert him that the case was being re-opened because a woman had just come forward claiming to have had an affair with Petitioner. Despite the overwhelming evidence in support of Petitioner's claims, the

Illinois Court of Appeals (4th Dist.) held the following:

> Contrary to defendant's claim, we find no evidence Williamson committed perjury...[Williamson] testified the case was re-opened when he received permission from a superior "to send a couple of items off for testing." Williamson stated he was only allowed to get the items tested because of a change in command. Shortly thereafter, Schultz came forward, and Williamson became aware of three polaroid photographs taken at the crime scene. These factors allowed the police to "totally reopen this case" and obtain evidence.
>
> The record in this case does not suggest detective Williamson was lying at defendant's trial or knew his testimony was false. Defendant has shown nothing more than witnesses giving different interpretations as to why, in their minds, the case was reopened. Defendant has failed to demonstrate a substantial violation of his constitutional rights.

(App.Ct.No. 4-07-1026, unpublished Order, August 7, 2009, People v. Winger, 391 Ill.App.3d 1135)

Successive Post-Conviction Petition: Petitioner filed a motion in the State trial court asking leave of the court to file his Successive Post-Conviction Petition. The petition raised a claim of a violation of his Due Process rights under Brady v. Maryland, 373 U.S. 83 (1963) and a claim of Prosecutorial Misconduct under Napue v. Illinois, 360 U.S. 264 (1959).

In support of Petitioner's Brady claim, Petitioner included an affidavit written and signed by detective Williamson, dated September 20, 1999, which detective Williamson attached as an exhibit in support of his request to a judge for a subpoena to obtain a copy of Petitioner's medical records. Petitioner obtained a copy of detective Williamson's affidavit pursuant to a request under the Freedom of Information Act (FOIA) in 2012 after his previous three FOIA requests throughout the preceeding years to the Springfield Police Department went unanswered. A plain reading of the text of detective Williamson's affidavit (See Appendix-G) shows that in detective Williamson's mind on September 20, 1999,

he believed that the case had been re-opened because of the information brought forward by DeAnn Schultz in February 1999, which Schultz included in her written formal statement in March, 1999.

On appeal of the Circuit Court's denial of Petitioner's motion requesting leave to file a successive post-conviction petition, the Fourth Judicial District of Illinois Court of Appeals affirmed, saying:

> Defendant contends that Detective Williamson's 1999 affidavit demonstrates the detective was lying during his trial testimony when he denied the murder investigation was reopened when Schultz came forward and stated she had an affair with defendant. While the affidavit mentions Schultz coming forward, it also mentions testing on clothing worn by the victims and defendant. The affidavit does not expressly state the case was reopened based on Schultz's coming forward... Even if the affidavit expressly said the case was reopened based on Schultz's coming forward, the reasoning for reopening the murder case is insignificant to defendant's guilt...We note that Detective Williamson was thoroughly cross-examined about the timing and circumstances surrounding the reopening of the murder case and was even impeached on the date Schultz came forward. As such, the evidence is not material.

(App.Ct.No. 4-19-0599. Judgement dated August 11, 2021; Rehearing denied, September 22, 2021. Unpublished Order. see Appendix-A and Appendix-C, respectively.)

A plain reading of the text of detective Williamson's September 20, 1999, affidavit clearly lays out the chronology of the murder case's history. It was closed because the authorities in 1995 believed Roger Harrington murdered Donnah Winger and the murder case was re-opened in 1999 after DeAnn Schultz came forward with information implicating Petitioner in Donnah's murder. Moreover, the purpose of the fact section of Williamson's affidavit was to explain to the Court the justification to issue the subpoena being requested, which in this case was to obtain the Petitioner's medical records to ascertain his blood type for

comparative analysis of bloodstains found on the clothing worn by the victims and Petitioner---none of which would have occurred had DeAnn Scultz not come forward to the authorities first. The significance of the Brady claim is not when the case was re-opened, but rather the credibility of detective Williamson who was a key witness in the prosecution's forensic case against Petitioner.

REASONS FOR GRANTING THE PETITION

A. The State Court of last resort has decided an important federal question in a way that conflicts with the decisions of several United States Courts of Appeals.

The holding by the Court below[2] that, "Even if the affidavit expressly said that the case was reopened based on Schultz's coming forward," in other words, even if Williamson was lying, "the reason for reopening the murder case is insignificant to defendant's guilt...As such the evidence is not material" is contrary to the holdings in at least six different United States Courts of Appeals. See United States v. Gambino, 59 F.3d 353, 364-65 (2nd Cir. 1995)(holding that although a Brady violation occurred, the prosecutor did not rely on perjury, and thus "the lower standard of materiality is not triggered"); Gilday v Callahan, 59 F.3d 257, 268 (1st Cir. 1995)(explaining thet "in the non-perjury setting all that is required or appropriate is the one-step Bagley inquiry into reasonable probability," but that "a pros-

2. In Illinois, a Petitioner must first file a motion requesting leave of the Circuit Court to file a Successive Post-conviction petion. The petition is not properly filed unless and until the Circuit Court has granted the motion seeking leave to file the petition nor is the pettition reviewed on its merits. See 725 ILCS 5/122-1(f).

ecutor's knowing use of false testimony presents a different analytical situation"); United States v. Duke, 50 F.3d 571, 577 (8th Cir. 1995)(describing the difference in standards); United States v. Alzote, 47 f.3d 1103, 1109-10 (11th Cir. 1995)(noting the Bagley standard and explaining that "[a] different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony"); Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir. 1993)(observing that "different standards in materiality apply to Brady claims and claims that the prosecution has knowingly used perjured testimony or false evidence" and describing the standard of the latter as "considerably less onerous"); United States v. O'Dell, 805 F.2d 637, 641 (6th Cir. 1986)(acknowledging the difference in standards).

B. Importance of the question presented.

This case presents a fundamental question of the interpretation of Kyles v. Whitley, 514 U.S. 419, 433-34 (1995). The question presented is of great public importance because it affects the standard of analysis of the question of the "materiality" of the undisclosed evidence in prisoners' Brady claims in all 50 States. It is of particular importance in Illinois where Illinois Courts have noted an "intolerance of purvasive prosecutorial misconduct that deliberately undermines the process we use to determine a defendant's guilt or innocence." People v. Wheeler, 226 Ill.2d (2007)(quoting People v. Johnson, 208 Ill.2d 53, 66 (2003) Additionally, the Court noted that "threats of reversal and words of condemnation and disapproval have been less than effective in curbing prosecutorial misconduct" Id.

The issue's importance is enhanced by the fact that the lower Court in this case has seriously misinterpreted Kyles. This Court held in Kyles that that there are three situations in which a Brady claim might arise, citing United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976):

> [F]irst, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured. 427 U.S. at 103-104, 96 S.Ct. at 2397-2398; second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, id., at 104-107, 96 S.Ct. at 2398-2399; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of significance to result in the denial of the defendant's right to a fair trial." Id., at 108, 96 S.Ct., at 2400.

In Petitioner's case, the Court below analyzed his Brady claim under People v. Beaman, 229 Ill.2d 56, 890 N.E.2d 500 (2008), stating that:

> A Brady claim requires a showing of the following:"(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching;(2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." People v. Beaman, 229 Ill. 2d 56, 73-74, 890 N.E.2d 500, 510 (2008). Evidence is material if it creates a reasonable probability the result of the preceeding would have been different had the evidence been disclosed. Beaman, 229 Ill.2d at 74, 890 N.E.2d at 510.

(App.Ct.No. 4-19-0599. Judgement dated August 11,2021, unpublished. Appendix A at A-5)

The Illinois Court in Beaman held that "Evidence is material if there is a reasonable probability that the result of the trial would have been different had the evidence been disclosed." relying on People v. Harris, 206 Ill.2d 293, 311 (2002), citing Kyles, 514 U.S. at 434, and United States v. Bagley, 473 U.S. 667, 682 (1985) The Beaman Court goes on to say that:

> To establish materiality, an accused must show "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." People v. Coleman, 183 Ill.2d 366, 393, 233 Ill. Dec. 789, 701 N.E.2d 1063 (1998), quoting Kyles, 514 U.S. at 435, 115 S.Ct. at 1566, 131 L.Ed.2d at 506.

Beaman, 229 Ill.2d at 74 (2008).

The reliance on Beaman by the Court below on its analysis of materiality of the undisclosed evidence in Petitioner's Brady claim is misplaced, because Beaman only considers the "second" and "third" instances where Brady claims arise discussed in Kyles, 514 U.S. 419 at 433-34 (1995), which specifically do not involve the use of false testimony at trial. The below Court's misinterpretation of Kyles on materiality of the evidence involved in Petitioner's Brady claim is evident where the Court below held that:

> Even if the affidavit expressly said that the case was reopened based on Schultz's coming forward, the reason for reopening the murder case is insignificant to defendant's guilt...As such the evidence is not material."

(App.Ct.No 4-19-0599. Judgement dated August 11, 2021, Unpublished. Appendix A, at A-5 to A-6)

In other words, the Court below determined that even if detective Williamson's trial testimony was false on the authorities' decision to re-open the case not being due to Schultz' coming forward with new information, such false testimony is insignificant to the Petitioner's guilt or innocence. But, as already explained, detective Williamson was a critical factor in the prosecution's forensic case at trial. Detective Williamson's credibility was extremely important.

This Court held in Napue v. Illinois, that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon

such subtle factors as the possible interest of a witness in testifying falsely that a defendant's life or liberty may depend." Napue, 360 U.S. 264, 269 (1959). This Court further stated that "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie no matter *270 what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." Id., at 269-270.

Thus, the Court below seriously misinterpreted Kyles by failing to distinguish between the diferrence in materiality standards between Brady claims that involve allegations of the prosecutor's use of perjured testimony at trial and Brady claims that do not invlolve the use of perjured testimony. The Court should correct that misinterpretation and make clear that a defendant's Brady claim that alleges the prosecutor's use of perjured testimony at trial that defendant supports with some evidence to support his allegation of false testimony should be analyzed under the less onerous standard of materiality under United States v. Agurs, 427 U.S. 97 (1976) and not the standard of materiality used under United States v. Bagley, 473 U.S. 667 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/S:/ Mark A. Winger

Mark A. Winger, #K97120
Western Illinois Correctional Center
2500 Rt. 99, South
Mt. Sterling, IL 62353

Date: April 06, 2022