No.: _____

In The
Supreme Court of the United States
_____ Term, _____

JOSEPH BARNES,
(Petitioner)

versus

DARREL VANNOY, Warden, Louisiana State Penitentiary,
(Respondent)

Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

Joseph Barnes #326483
MPWY/Oak-3
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

April 9, 2018

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QUESTIONS PRESENTED

1. **Whether reasonable jurists would have found that the district court denied Mr. Barnes a fair trial when it allowed other crimes evidence and/or bad acts to be introduced during the trial.**
2. **Whether reasonable jurists would have found that the courts abused their discretion in denying relief where Mr. Barnes proved that his trial counsel was ineffective for failure to file a Motion to Quash due to the State's untimeliness in commencement of trial.**
3. **Whether reasonable jurists would find that the state courts failed to acknowledge that the State knew of Mr. Barnes' whereabouts and failed to serve a subpoena ordering him to appear in court.**
4. **Whether reasonable jurists would find that the State's failure to secure the presence of Mr. Barnes for court appearances did not interrupt the time limitations of La.C.Cr.P. Art. 578.**
5. **Whether reasonable jurists would find that the State of Louisiana failed to prove that Mr. Barnes was a quadruple offender since there were no fingerprints on one of the convictions and the State had produced an "imperfect" guilty plea colloquy on one of the predicates.**

INTERESTED PARTIES

District Attorney's Office
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Darrel Vannoy, Warden
Louisiana State Penitentiary
General Delivery
Angola, LA 70712

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"5" Letter to Ms. Trish Foster (Legal Programs Director);

"6" Letter to Ms. Trish Foster (Legal Programs Director);

"7" Probable Cause Affidavit;

"8" Traffic Ticket(s);

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Pro Se Petitioner, Joseph Barnes respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on February 28, 2018; that the issue presented to the Fifth Circuit was: whether rather reasonable jurists would find it debatable whether the "new" evidence that he presents is such that no juror, acting reasonably would have voted to find him guilty beyond a reasonable doubt.

OPINIONS BELOW

The opinion of the Fifth Circuit was assigned Docket No.: 17-30542, and the decision of the District Court was assigned Docket No.: 16-5986.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2018. This Court's Certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth, Fifth and Sixth Amendments to the United States Constitution and 28 U.S.C. § 2254, as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat.

1214 are reproduced in the Appendix. (App. C-F).

STATEMENT OF THE CASE

DUE DILIGENCE/EQUITABLE TOLLING

On May 1, 2014, defense attorney Peter John mailed Mr. Barnes a copy of the Post-Conviction he filed March 31, 2014. On January 10 and 15, 2014, Mr. Barnes wrote his retained attorney, Peter "Q" John, informing him that he has to file his Post-Conviction before February 9, 2014 to preserve his federal one time limitation to file Habeas Corpus review into that Court. (See Exhibit "1"). On February 17, 2014, his counsel responded, which shows Mr. Barnes attempted vigilantly to comply with AEDPA's one year time limitation. (See Exhibit "2"). On November 20, 2015, Mr. Barnes wrote a letter to the Director of Legal Programs, Mrs. Trish Foster, at the Louisiana State Penitentiary for legal assistance for a trained Inmate Counsel Substitute to help him file a writ of review into the circuit court from the denial of his Post-Conviction. Foster failed to respond. (See Exhibit. "3").

Again, on December 12, 2015, while in Solitary Confinement, Mr. Barnes wrote another letter to Foster requesting for assistance to prepare a writ petition in the circuit court from the denial by the trial court on his Post-Conviction Relief. Foster again failed to respond or give him assistance. (See Exhibit "4"). On January 25, 2016, Mr. Barnes wrote Foster a third time requesting for a trained Inmate Counsel's assistance to help him prepare a habeas corpus in the federal court off the denial of his writ of certiorari by the Louisiana Supreme Court. Foster failed to respond. (See Exhibit "5"). On February 14, 2016, Mr. Barnes wrote a complaint to Foster requesting for an Inmate Counsel assistance in filed a habeas corpus in the federal court, and that they do not have enough trained inmate counsels at Camp D, to help him. (See Exhibit "6"). Mr. Barnes noted in his complaint that there were only four Inmate Counsel Substitutes assigned to Camp D. Camp D inmate population house over a thousand inmates. Mr. Barnes submits that it was virtually impossible for him to get any help because of the Inmate Counsel's heavy work load, and the fact that there were not enough qualified counsels. Still, Foster assigned no one to help him. This within itself are circumstances beyond Mr. Barnes' control, making

filing impossible, for which equitable tolling is available. *Laws v. Lamarque*, 351 F.3d 919 (CA 9 2003).

In *Holland v. Florida*, 560 U.S. ___, 130 S.Ct. 2549 (2010), the Supreme Court ruled that the lower federal courts should not apply AEDPA's one-year time limitation too rigidly to State prisoners seeking federal habeas relief. To say Mr. Barnes claims are procedurally barred, due to this attorney's inability to understand and apply AEDPA's one year limitation period would be to say that the **general rule trumps** Mr. Barnes' constitutional right that have been violated, as well as his right to judicial review by way of his initial habeas corpus.

This case is similar to the one that the United States Supreme Court recently ruled on concerning procedural default. In *Maples v. Thomas*, 132 S.Ct. 912, 181 L.Ed.2d 807 (1/18/11), the Court held that, "The Supreme Court, Justice Ginsburg, held that cause existed for procedural default of habeas claim" due to the attorney's "abandonment" of the client.

The Court further noted that, "For purposes of determining whether a habeas Petitioner has procedurally defaulted a Claim, under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him, and neither can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, or not representing him."

Procedural History:

Joseph Barnes was charged by Bill of Information with two counts of Sexual Battery, in violation of LSA-R.S. 14:43.1 (Rec. p. 110).[1] On June 18, 2010, he entered a plea of not guilty (Rec. p. 2). Discovery was marked satisfied on August 6, 2010. Private counsel withdrew and IDB was appointed to the case (Rec. p. 7). Motions were heard and the Motion to Suppress the statement was denied. The State's motion to have the evidence of Mr. Barnes' other bad acts with the juvenile's older sister was allowed in under the theory of *res gestae* (Rec. pp. 11, 83-5, 120-135, 162-5). On October 7, 2010, Mr.

[1]A second count was added by the Assistant District Attorney on August 6, 2010.

Barnes' motion to continue trial was denied. On October 14, 2010, a jury was selected and trial commenced. Mr. Barnes was found guilty as charged on both counts. A motion for new trial was denied and after hearing a victim impact statement from the juvenile, Mr. Barnes was sentenced to served ten years on each count. These sentence were ordered to be served concurrently. (Rec. pp. 102-4, 109). The State filed a multiple offender bill and on November 4, 2010, Mr. Barnes was found to be a quadruple felony offender. His original sentence was vacated and he was sentenced to life in prison. (Rec. pp. 107-8, 117).[2] The motion for appeal was granted on December 1, 2010. (Rec. pp. 105-6).

On February 12, 2011, Mr. Barnes' appellate attorney Jane L. Beebe timely filed an Appeal Brief. June 27, 2011, Mr. Barnes appellate attorney, Martin Regan, Jr., filed a Supplemental Appeal Brief. On July 19, 2011, the State Answered.

On December 13, 2011, the Louisiana Fifth Circuit Court of Appeal rendered a decision VACATING Mr. Barnes multiple offender adjudication and REMANDED the matter to the trial court. On December 16, 2011, the trial court issued a PER CURIUM opinion. On December 22, 2011, the State sought rehearing and was granted. On March 27, 2012, the Court affirmed Mr. Barnes' conviction and sentences, and receding its previous vacation of the multiple offender sentence. On or about April 16, 2012, Mr. Barnes filed a Writ of of Certiorari to the Louisiana Supreme Court, which was denied on November 9, 2013.

In January 2013, Mr. Barnes hired attorney Peter "Q" John to prepare and filed his Post-Conviction relief petition. On May 1, 2014, defense attorney Mr. John mailed Mr. Barnes a copy of the Post-Conviction which he had filed March 31, 2014 on Mr. Barnes behalf. On November 20, 2014, Mr. Barnes received a copy of the trial court's decision denying Post-Conviction relief dated October 21, 2014. Mr. Barnes sought Supervisory Writ in the Circuit Court of Appeals. The Court of Appeal denied relief. Mr. Barnes then sought Supervisory Writs in the Louisiana Supreme Court. On November, 16, 2015, Mr. Barnes was denied relief. Mr. Barnes had filed for habeas relief in the U.S. Eastern District

[2]Mr. Barnes was offered a 22 years sentence which he declined. He also was held in contempt and given an additional 6 months to his life sentence. (Rec. pp. 347, 370-4).

of Louisiana, which had been denied on June 15, 2017.

This timely Petition for Writs of Certiorari now follows, with Mr. Barnes requesting that this Honorable Court Grant him relief for the following reasons to wit:

SUMMARY OF THE ARGUMENT

Mr. Barnes contends that as the State was untimely in commencement of trial, the Court lacked jurisdiction to proceed to trial in this matter. As **a Jurisdiction error cannot be procedurally barred**, the Courts have abused their discretion with the use of such.

Mr. Barnes has fully exhibitized his pleadings to ensure the Courts that he had not absconded from the law, and that there was never a warrant placed against him for "Failure to Appeal" at any time prior to him being detained during a traffic stop.

Had retained Post-Conviction counsel timely filed the original pleadings in the course of the collateral review, there would have been no question as to the timeliness of the Petition before this Court. As Mr. Barnes attorney had ample time to timely file the PCR into the district court, along with the fact that Mr. Barnes had informed his attorney of the Issue he wish to pursue on collateral review, this Honorable Court should not hold him responsible for his retained attorney's tardiness.

The United States Supreme Court, in *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), held that: (1) inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel at trial; (2) Anti-terrorism and Effective Death Penalty Act (AEDPA) did not bar Petitioner from using ineffectiveness of his post-conviction attorney to establish "cause" for his procedural default; and, (3) remand was required to determine whether Petitioner's attorney in his first State collateral proceeding was ineffective, whether underlying ineffective assistance of trial counsel claim was substantial, and whether Petitioner was prejudiced.

Most recently, in *Coleman v. Goodwin*, 833 F.3d 537 (U.S. 5 (La.) 8/15/16), the United States Fifth

Circuit Court of Appeals held that: "... but Louisiana prisoners can benefit from the ***Martinez/Trevino*** procedural-default rule if they can show that they have submitted an IATC claim and received IAC from state habeas counsel;" overruling their own decision in ***Sepulvado v. Cain***, 707 F.3d 550 (C.A. 5 (La.) 2013).

The Courts have failed to consider that Mr. Barnes' collateral review attorney failed to meet his AEDPA deadline, even after being informed of such.

LAW AND ARGUMENT

ISSUE NO. 1

Whether reasonable jurists would have found that the district court denied Mr. Barnes a fair trial when it allowed other crimes evidence and/or bad acts to be introduced during the trial.

The trial court erred in admitting evidence of other crimes. Prior to trial there was a hearing regarding the State's request to admit testimony of Mr. Barnes' improper contact alleged to have been a hug and an attempted kiss, with the juvenile's older sister. This incident was not a charge in the Bill of Information even thought the older sister was 16 years old at the time. Both counts were for acts alleged against the 13 year old juvenile. (Rec. pp. 83-5), 110). The State filed a notice of intent to use evidence of other crimes pursuant to LSA-C.E. Art. 412.2 and at the same time argued notice was unnecessary under the *res gestae* exception of La.C.Cr.P. Art. 720. *Res gestae* is defined in LSA-R.S. 15:447 and 448:

§ 447. *Res gestae* defined; admissibility

Res gestae are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events. What forms part of the res gestae is always admissible in evidence.

§ 448. Relation of *res gestae* to criminal act

To constitute *res gestae*, the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction.

The trial court erroneously ruled that it was admissible under the res gestae exception because it was part of how the charged incident was revealed to their father and eventually the police (Rec. pp. 162-5)(However, evidence regarding the older sister is completely prejudicial to Mr. Barnes and was not "related and intertwined with the charged offense to such an extent that the State could not have accurately presented its case without reference to it)." ***State v. Brewington***, 601 So.2d 656, 657 (La. 1992); ***State v. Curtis***, 99-45 (La.App. 5 Cir. 07/27/99); 739 So.2d 931. The State did not need to explain the events leading up to the juvenile reporting this to her father. There was no relevant reason to start the story two days before and allow in prejudicial evidence of other bad acts.

Had the State simply said the incident was reported and that Mr. Barnes was confronted by the father, the relevant facts related to this charge would have been presented. Oftentimes in trial the State must present their case in a way that certain chronological events are omitted. A common example is when dealing with police officer testimony. Certain steps in the investigation can not be told in detail to the jury because it is hearsay. The story is still told but skipping over the parts that infringe on the defendant's most basic of rights, the right to confront one's accusers.

The evidence of other crimes or bad acts was merely put before the jury to inflame the jury into believing that Mr. Barnes was a pedophile. It served to take the jury's focus off the fact that the juvenile in question was suspended from school and mad at Mr. Barnes for telling on her parents that he saw her in the backyard kissing a boy.

Even if the notice and hearing of LSA-C.E. 412.2 was necessary the State failed to overcome the extreme prejudice the evidence caused. According to LSA-C.E. Art. 412.2:

Art. 412.2 Evidence of similar crimes, wrongs, or acts in sex offense cases

A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was commission of another crime, wrong, or act involving sexually assaultive behavior may or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.

It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. Art. 404(B)(1). Evidence of other crimes, wrongs, or acts committed by the defendant is generally inadmissible because of the substantial risk of grave prejudice to the defendant. The State may introduce evidence of other crimes, wrongs, or acts if it establishes an independent and relevant reason such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See Article 404(B)(1).

Upon request by the accused, the State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. Even when the other crimes evidence is offered for a purpose allowed under Art. 404(B)(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. The State also bears the burden of proving that the defendant committed the other crimes, wrongs, or acts. ***State v. Rose***, 06-0402, p. 12 (La. 2/22/07), 949 So.2d 1236, 1243.

Although a defendant's prior bad acts may be relevant and otherwise admissible under La.Code Evid. Art. 404(b)(1), the court must still balance the probative value of the evidence against it's "prejudicial" effects before the evidence can be admitted. LSA-C.E. Art. 403. Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. ***State v. Germain***, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. Id., See also ***Old Chief v. United States***, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997)("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some

concededly relevant evidence to LURE the factfinder into declaring guilt on a ground *630 different from proof [2007-1720 La.App. 1 Cir. [pg. 11] specific to the charged") *Rose*, 06-0402 at p. 13, 949 Sp.2d at 1243-44.

The trial court did not really even require the State to prove why it should be allowed to come in under this article. Before getting to it or making the State prove anything, the trial court allowed the evidence in under the theory of *res gestae*. (Rec. pp. 125-31, 162-5). The other crimes evidence should not have been admitted as it served no purpose other than to depict Mr. Barnes as a pedophile.

Further, the trial court error was not harmless because it completely deflated the theory of defense which was that the juvenile was making the allegations out of spite. Louisiana adopted the federal test for harmless error enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The test it complained of did not contribute to the verdict obtained." 386 U.S., at 24; 87 S.Ct. At 828. *Chapman* was refined in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The *Sullivan* inquiry "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." Id., 113 S.Ct., at 2081.

In the present case, the error was not harmless because it was the only way to persuade a jury that Mr. Barnes, a 30 year old family member just in town from overseas would do something like this. He had a criminal record from his youth, none of them of a sexual nature, but he had turned his life around. The only way the State could do that was to make him appear like he was a pervert hitting on both the 16 year old cousin and the 13 year old cousin. (Rec. pp. 269-73). By this implication, the State was able to distract the jury from the fact that Mr. Barnes had been successfully rehabilitated and had put the errors of his youth behind him. They also were able to distract the jury from nothing that this was a vengeful 13 year old girl, suspended from school for bad behavior, who was angry at Mr. Barnes for telling her parents she was in the backyard kissing a boy. The evidence erroneously admitted was not only extremely prejudicial, the jury's verdict can not be considered "unattributable" to this error.

ISSUES NO. 2, 3 & 4

(Two) Whether reasonable jurists would have found that the trial courts abused their discretion in denying relief where Mr. Barnes proved that his trial counsel was ineffective for failure to file a Motion to Quash due to the State's untimeliness in commencement of trial.

(Three) Whether reasonable jurists would find that the state courts failed to acknowledge that the State knew of Mr. Barnes' whereabouts and failed to serve a subpoena ordering him to appear in court.

(Four) Whether reasonable jurists would have found that the state court's failure to secure the presence of Mr. Barnes for court appearances did not interrupt the time limitations of La.C.Cr.P. Art. 578.

Mr. Barnes contends that the State courts abused their discretion in denying his ineffective assistance of counsel claim where his trial attorney failed to file a Motion to Quash the indictment as the State failed to meet the time limitation for prosecution of his non-capital case, a violation of La.C.Cr.P. Arts. 578 and 572; Sixth and Fourteenth Amendments to the United States Constitution.

A review of the established record indicates that institution of prosecution was invoked at the time the State filed the Bill against Mr. Barnes on January 27, 2007. Up until August 6, 2010 the State took no further steps in prosecuting Mr. Barnes. It is important to point out the fact that the State contends that it acted diligently in securing the presence of Mr. Barnes, but given no type of documentation to support that contention makes it a **bare assertion not supported by evidence**.

Since the burden of proof is on the State, some type of evidence is required to meet that burden. In contrast to the State's contention, Mr. Barnes provided the State courts with a voluminous amount of supporting documents to support his claim that the State was not prosecuting him for said offense(s). It appears that due to the State's failure to prosecute, the State played fast and loose with the law and amended the Bill to include a second count to interrupt the time limitation in order to prosecute, stressing to the court that Mr. Barnes was somehow unavailable and could not be found.

Attached hereto as an Exhibit "7," is a copy of the Probable Cause Affidavit where the Magistrate Judge concluded that no probable cause existed to formally charge Mr. Barnes with the first court of Sexual Battery charged in the 2007 Bill. Therefore, Mr. Barnes had no knowledge that the prosecution

was ongoing, or that he was to appear in court. Also contrary to the States allegations that Mr. Barnes' presence could not be obtained, Mr. Barnes has included evidence, attached hereto as Exhibits to show otherwise, contradicting the lower court's decision in denying relief which includes evidence that Mr. Barnes had received several traffic citations (from both State and local police) that includes his address, phone number, and other necessary contact information on December 31, 2009, April 8, 2010, and also a copy of Mr. Barnes' passport that was issued for him to work in Afghanistan, along with a Common Access Card (CAC). Also included is Mr. Barnes' Texas driver's license and Social Security Card to corroborate his federal credentials and his whereabouts (See: Exhibit "9").

No authorities are needed to sustain the proposition that, had Mr. Barnes failed to appear at a scheduled court appearance, the trial court would have issued a warrant of arrest. However, no warrant existed. This is highlighted by the fact that the "Department of Defense" (DOD) of the United States of America had approved, by way of "Letter of Authorization" (LOA), Mr. Barnes departure from the Country for work related issues. A review of the letter will disclose that "prior to issuance of a DOD Common Assess Card (CAC), the government sponsor MUST ensure a completion of the FBI fingerprint check with favorable results and a submission of a National Agency check with inquiries to the Office of Personal Management (OPM), or a DOD determined equivalent investigation. (See Exhibit "9").

Additionally, Mr. Barnes contends that he was approved to leave to Country and enter the Middle Eastern Country of Afghanistan to work aside NATO and U.S.A Armed Forces. The Department of Homeland security, given the state of crises regarding terrorism based incidents from extremist Islamic groups, implemented policies mandating certain security protocols. One of the those protocols is a mandatory check with the National Crime Information Center (NCIC) for, among other things, warrants issued for citizens attempting to enter these parts of the Middle East. As noted, this was done prior to the issuance of the Passport.

As additional support to prove that no warrant existed, Mr. Barnes has attached a copy of his

passport **#445870168**, which would expire on November 17, 2018. Had any warrants existed, Mr. Barnes would have been denied a passport. There is simply no way to support the allegation that Mr. Barnes was attempting to avoid authorities and prosecution which would be required to establish an interruption of time limitation which is necessary to make La.C.Cr.P. Art. 532A(7) inapplicable to Mr. Barnes' case. As stated above, Mr. Barnes had no knowledge that the prosecution was ongoing and in no way, shape, form or fashion was he trying to evade authority. Additional proof to help support that fact is, Mr. Barnes regularly visited Louisiana, especially Orleans and Jefferson Parishes where the allege warrant was issued. Mr. Barnes applied and worked for jobs that required mandatory fingerprint and background checks. After his arrest on June 18, 2010 and bail on June 20, 2010, he appeared at every court appearance while free on bail. Those court appearances were on July 15, 17, 29, of 2010, and August 2 and 6 of 2010. If Mr. Barnes had the mindset of evading the authorities, he would not have put himself in these many positions to be detected or apprehend **especially appearing at every court date after making bail**.[3] This type of behavior does not fit the description of one who is trying to avoid apprehension, detection or prosecution. However, the State may contend that Mr. Barnes was avoiding detection, apprehension or prosecution, fled from the State, is outside of the State, or is absent from his usual place of abode within the State. La.C.Cr.P. Art. 575. Such attempt by the State would have no merit because as indicated above, Mr. Barnes had received several traffic tickets by local and State officers with at least 3 being in Louisiana, and had several background checks done in his employment with the U.S. Government, and yet no warrants existed suggesting that Mr. Barnes was a fugitive, or that he was wanted for failure to appear in court.

In *State v. Caracno*, 03-589 (La.App. 5th Cir. 2003), 860 So.2d 220, 223-224, the Court held that in order to satisfy it's "heavy burden" of establishing interruption on the basis of La.C.Cr.P. Art. 579A(2), the prosecution was required to show it had "exercised due diligence in discovering the whereabouts of the defendant as well as taking appropriate steps to secure his presence for trial once it has found him."

[3] The Court was aware that Mr. Barnes was living in Texas, and was aware of his whereabouts. Mr. Barnes had consistently appeared in Court prior to being informed that the State was not pursuing the charges.

This burden remains even where the prosecution has made numerous attempts at service and the defendant has moved out of the State jurisdiction. *State v. Chadbourn*, 98-1998 (La. 1/8/99, 728 So.2d 832; *State v. Estill*, 614 So.2d 709, 710 (La. 1993); *State v. Sorden*, 43 So.3d 181, 2009-1416 (La.App. 4 Cir. 8/4/10); *State v. Taylor*, 439 So.2d 410 (La. 1983); *Carcno*, supra, 860 So.2d 220.

Accordingly, mere absence from the state where offense was committed is insufficient to make accused a "fugitive from Justice" so as to suspend the running of prescription; but such absence must be for the purpose of avoiding prosecution. LSA-R.S. 15:8. In other words, to put this matter in common parlance, the accused must be hiding from the criminal authority of this State. Mr. Barnes has shown record proof that he could have easily been located had the State had actually issued a Warrant in this matter.

Mr. Barnes contends that the information attached as Exhibits was at his trial attorney's disposal and counsel failed to use this information and file the proper Motion to Quash the Bill because the time limitation to commence trial had elapsed. Had counsel filed said motion, the Court would have been obligated to grant the Motion to Quash.

In order for Mr. Barnes to establish a claim of ineffective assistance of counsel, "he must show that" (A) counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; and (B) that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. A trial whose results is reliable. To demonstrate prejudice in the context of this case, under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), the defendant must show that there is a reasonable probability that, absent the error, the fact-finder would have had a reasonable doubt respecting guilt. See: *United States v. Cronic*, 466 US. 648, 654 n. 11, 104 S.Ct. 2039, 2044 n. 11, 80 L.Ed.2d 657 (1984); and, *Lockhart v. Fretwell*, __ U.S. __, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The Court asserted that the prejudice component requires a showing the results of the proceeding was

fundamentally unfair or unreliable, is defective. Id., 113 S.Ct., at 842. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of a substantive or procedural right to which the law entitles him. Id., 113 S.Ct., at 844.

The evidence that was readily available, and counsel failed to discover and present in this case is "substantial." At least, defense counsel in a criminal case should understand the elements of the offenses with which his client is charged and should display some appreciation of the recognized defenses thereto. Unless counsel brings these rudiments to the table, a defendant likely will be deprived of a fair "opportunity to meet the case of the prosecution." ***Strickland***, 466 U.S., at 685, and, thus, will be placed at undue risk of having no effective advocate for his cause. Phrased another way, if an attorney does not grasp the basics of the charges and the potential defenses to them, an accused may well be stripped of the very means that are essential to subject to the prosecutions case to adversarial testing.

In the instant case, the State courts abused their discretion in denying relief without a hearing, where Mr. Barnes has as indicated, facts that, when offered in an effective manner would warrant the Bill of Information filed in the above styled cause to be Quashed. Attached as Exhibits is evidence which shows that since 2007, Mr. Barnes has had numerous traffic tickets, that demanded particular instances, none existed and Mr. Barnes was free to go.

Moreover, Mr. Barnes has attached as Exhibit, documentation from the United States Government that helps corroborate the fact that Mr. Barnes had no existing warrants. (See attached as Exhibits Letter of Authorization [Exhibit "10"]; Traffic Tickets [Exhibit "8"]). The lower courts did not involve this evidence when accepting the State's theory of what transpired throughout the criminal proceedings.

Attached as an Exhibit is a verbatim copy of the new evidence that Mr. Barnes did not have in his possession at the time of the initial filing of this issue. As it appears at face value, that it was decided as "No Probable Cause" (See: Exhibit "7"). Knowing this was a pretrial issue, once again, the State played fast and loose with the law by blackening the section of the probable cause affidavit where the

Magistrate Judge decides to accept or refuse the charges (See: Exhibit "7"). Under the La. Constitution of 1974, Art. 1, § 5, and the Fourteenth Amendment to the United States Constitution; Right to privacy, every person shall be secure in his person, property, communications, houses, papers and effects against unreasonable searches, seizures, or invasions of privacy. "No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or, reason for the searched. Any person adversely affected by a searched or seizure conducted in violation of this section "Shall Have" standing to raise it's illegality in the appropriate court. Mr. Barnes assumes that such documentation was given to counsel during discovery and counsel failed to use this crucial evidence to have the charges dismissed, or in legal terms quashed, by filing the proper motion when the time for commencement of trial has elapsed.

Here, the State of Louisiana filed a Bill of Information against Mr. Barnes alleging one count of Sexual Battery in 2007. After such filings, the State took no further action in the case, and Mr. Barnes was never notified of the existence of pending charges; or arrested for any outstanding warrants that would have existed if the State's position in this matter were true. Being knowledgeable of the fact that the time period for commencement of trial had elapsed, the State amended the original Bill of Information to include a second count to allegedly cause an interruption and/or suspend the time. Accordingly, as the time had elapsed on the original Bill of Information, no Amendment could have been allowed by the law.

Mr. Barnes contends that had counsel filed a timely Motion to Quash, the trial court would have had to quash said bill, because the time period for commencement of trial had expired due to no fault of Mr. Barnes. Counsel was provided the evidence by the State during discovery that sets out that the State was way beyond the time for trying the fist count of the Bill of Information added an additional count of Sexual Battery in order to resume prosecution of a Bill of Information that had already surpassed the time limitation for commencement of trial.

Mr. Barnes avers that counsel's actions or inaction in this matter cannot be termed effective and counsel cannot hide behind the shield of trial strategy when it is clear that the time period for commencement of trial had elapsed a year and a half prior to the filing of the second count of Sexual Battery. Counsel's deficient performance arises from his unwillingness to effectively prepare for trial and evaluate all plausible lines of defense to defend against the allegations alleged by the State. The trial court would have been obligated to grant the Motion to Quash had counsel filed one in a timely manner.

The prejudice stemming from counsel's errors are substantial and subjected Mr. Barnes to irreparable harm, where, according to the law, the 2007 Bill of Information charging Mr. Barnes with one count of Sexual Battery should have been quashed for many reasons. First and foremost, it was well after three years when the State decided to bring Mr. Barnes to trial for the first count of Sexual Battery. Second, new facts that were not known to Mr. Barnes establishes that the Magistrate Judge found no probable cause in this case, therefore stripping the State of all jurisdiction to prosecute until probable cause had been established.

The lower state courts erred when deciding that Mr. Barnes somehow eluded prosecution or failed to appear for scheduled court appearances. The lower state court's oversight of material facts caused an abuse of discretion in said courts denying relief without a hearing to determine whether or not the State was within the required time in prosecuting Mr. Barnes for count one of the Bill of Information filed January 2007. Moreover, the lower state courts failed to venture into why the State never issued warrants for Mr. Barnes to secure his presence for the purpose of this prosecution if he had indeed failed to appear in court and was eluding prosecution. Nothing in the record supports the State or the lower state courts findings in this regard.

Instead, Mr. Barnes offers evidence from other police agencies and the United States Government, that establishes that background checks were done on him during and after January, 2007 and surprisingly, Mr. Barnes had no outstanding warrants related to any crimes or wrongdoings. And each

piece of documentation has Mr. Barnes' full address and contact information if the State had wanted to inform him of a pending prosecution.[4] The State has failed to provide the Court or Mr. Barnes with any kind of evidence that would suggest that the State even tried to subpoena Mr. Barnes in relations to any criminal matter that his presence was required in open court.

Mr. Barnes also asserts that the state court's ruling is a manifest abuse of discretion when considering the overall facts surrounding this legal issue. Where the State alleges that Mr. Barnes' presence was not available or that Mr. Barnes may have been eluding prosecution, is trumped by the evidence presented here where the Magistrate Judge found no probable cause to prosecute on the 2007 Bill of Information. And the fact that the State amended the 2007 Bill of Information in 2010 to include a second count of Sexual Battery does not bring the 2007 Bill of Information up to date. It merely suggests that the State amended a Bill of Information that was no longer valid because the prescriptive time period for commencement of trial had elapsed.

Mr. Barnes argues that had his counsel filed a timely Motion to Quash the 2007 Bill of Information, the trial court would have been mandated by law to grant such motion because the time to prosecute had expired and the State was without jurisdiction to institute prosecution. If not for counsel's deficient performance, the proceedings cannot be termed fair and reasonable.

DEFICIENT PERFORMANCE:

The Supreme Court has recognized generally that criminal defendants are entitled to expect that their counsel understand applicable law. It would follow that failure to pursue meritorious claims and defenses owing not to strategic considerations, but to a misapprehension of controlling law or relevant facts generally, will be found deficient.

There is an additional safeguard against miscarriages of justice in criminal cases . . [it] is the right to effective assistance of counsel, which, as the United States Supreme Court has indicated, may in a particular case be violated by even an isolated error if that error is sufficiently egregious and

[4] It must be noted that this is the same address which Mr. Barnes had listed during his prior court appearances and for his posting of the bond.

prejudicial. See *Nero v. Blackburn*, 597 F.2d 991; Also see *Connick v. Thompson*, 132 S.Ct. 1350, 1362-63 and *Murray v. Carrier*, 477 U.S. 496; *United States v. Cronic*, 466 U.S. 648. In summary counsels failure to act on one instance can amount to deficient performance. La.C.Cr.P. Art. 532. Provides the general statutory grounds under which a motion to quash may be based. Art. 532A(2), which provides:

> A motion to quash may be based one or more of the following grounds: (7) the time limitation for the institution of prosecution or for commencement of trial has expired. This is directly applicable in Mr. Barnes case. As stated above, Mr. Barnes was entitled to expect his counsel to understand applicable law and his (counsels) failure to pursue this meritorious claim/defense was not due to a strategic decision, but to a misapprehension of controlling law and relevant facts which amounted to deficient performance.

PREJUDICE:

Any deficiencies in counsels performance must be prejudicial to the defense in order to constitute ineffective assistance under the constitution. See *Strickland* at 691-92, 104 S.Ct. 2052. The prejudice prong of the *Strickland* test governing a claim of ineffective assistance requires the Court to determine if there is a reasonable probability that, but for counsels error, the result of the proceeding would have been different.

Had Mr. Barnes' counsel taken legal action clearly allowable under color of state law then the proceedings initiated against him would have never even taken place. Counsel's in-actions clearly had an effect on the outcome, because had counsel acted in Mr. Barnes interest, there would have been no trial.

Under Louisiana Law, defense counsel had an opportunity to file a Motion to Quash the Bill of Information. Given the amount of evidence submitted by Mr. Barnes, to avoid error, the State court would have had to grant said motion. Had said motion been granted, the State could not have been legally able to prosecute Mr. Barnes.

If defense counsel is in a position to take legal action allowed under the law to assist a criminal defendant in avoiding a criminal trial altogether, then his failure to act would automatically be

contributed to the outcome of the case and would amount to ineffective assistance under the constitution and under the two prong test of ***Strickland*** ***Lockhart v. Fretwell***, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). Sixth and Fourteenth Amendments to the United States Constitution.

Of course the Supreme Court has subsequently refined the second prong of the ***Strickland*** test, stating the test is not just whether the outcome would have been different, but looking to both the outcome and whether the result was fundamentally unfair or unreliable, with an eye toward avoiding the grant of a windfall to a defendant.

Well, from an evidentiary standpoint, the result of the proceedings is already unreliable. The State relied exclusively on the testimony of the allege victim in this case. However, that testimony was partially favorable to Mr. Barnes.

It is no secret that, when assessing a claim of ineffective assistance, that the court will view counsel's **ENTIRE** performance to determine if counsel acted in a manner that comports with constitutional principles. That is to say that counsel subjected the States case to a meaningful adversarial testing process.

In an out of court statement D.B. told police that Mr. Barnes "assaulted" her in certain ways. However, in contrast to this statement, which was played to the jury, D.B. testified, specifically, that certain portions of her initial statements to police were untrue. This is, in and of itself, enough to call into question the reliability of her trial testimony, especially since the portions that were recanted was relied exclusively upon by the State to purportedly prove it's case. Had counsel done a proper investigation, he would have discovered that D.B. had made false allegations on previous occasions similar to that which was made toward Mr. Barnes.

Had counsel taken the time to investigate, he would have found/discovered impeaching evidence which, if utilized correctly, would have with a reasonable probability, changed the outcome of the trial itself.

Mr. Barnes is not asserting these allegations as new evidence, but is merely arguing cumulative

errors in counsel's overall performance which will be asserted by the courts anyway.

What Mr. Barnes is asserting is that, though the majority of defendants are not entitled to windfalls because of their guilt, that, in certain instances, the granting of a windfall may be the only way to secure true justice in our system. Not all convictions are just. Not all acquittals are just. Our system of justice is not perfect, but if we allow prosecutors to seek a "**WIN**" and not justice. If we allow a lawyer to inadequately represent his client, then if a "windfall," that small "window of opportunity" is the only thing a defendant can rely upon, then, in such a case, a windfall can serve to accomplish what our system has failed to do.

Though Mr. Barnes relies on an isolated error by counsel in regards to this specific claim, the cumulative effect of the lack of actions taken by counsel, though not asserting as "new claims" compounds this error when assessing counsels overall performance, which is required by ***Strickland*** in the first instance.

Though the granting of a windfall can pervert justice, in many cases it can, in certain instances, serve to promote it as well. To say that it cannot would defy law, reason and common sense.

THE PREJUDICIAL EFFECT OF THE OUTCOME:

Mr. Barnes' instant conviction ultimately resulted in a life sentence without the possibility of parole, probation or suspension of sentence. He has been sent to prison until he "dies".

The outcome has led to a deprivation of the general liberties enjoyed by the majority of our citizens. It has led Mr. Barnes into a position where he cannot provide for his children financially, emotionally and spiritually. It has led to misplaced relationships. It has limited communication with loved ones. It has led to an environment that is dehabilitative in nature. These are some of the things that could have been avoided had defense counsel taken action clearly allowable under the law. Prejudicial can be defined in many aspects where, like here, the prejudicial effect of the [outcome] itself speaks volumes. [Was this the type of "justice" foreseen by our founding fathers?]

ISSUE NO. 5

Whether reasonable jurist would find that the State of Louisiana failed to prove that Mr. Barnes was a quadruple offender since there were no fingerprints on one of the convictions and the State had produced an "imperfect" guilty plea colloquy on one of the predicates.

The district court abused its discretion in finding that Mr. Barnes was a Multiple Offender during these proceedings. The State failed to sufficiently prove this fact beyond a reasonable doubt. The State failed to support one of the previous convictions, as they failed to submit fingerprints to prove this allegation of a prior conviction (Rec. p. 368). LSA-R.S. 15:529.1(B) specifically States that "[m]ultiple convictions obtained on the same day prior to October 19, 2004, shall be counted as one conviction for purposes of this Section." However, the State also "**failed to provide satisfactory proof for any of these prior convictions**."

One important issue that must be reviewed by this Court is the fact that the state court in Mr. Barnes' guilty plea colloquy dated January 29, 1996, in Docket Number: 373-389, the State alleged that Mr. Barnes had plead guilty to Attempted Armed Robbery. However, after a careful review of the colloquy (p. 5, lines 28-32), this Court will note that Mr. Barnes **was not** advised of this right to remain silent. Although the other constitutional rights are specifically quoted by the trial Judge, the Court failed to inform Mr. Barnes that he would be waiving his right to remain silent in these proceedings.

In the case at bar, the admissibility of a plea agreement must be based on a reliable determination on the voluntariness issue which satisfies the constitutional rights of the Petitioner. Failure to notify Mr. Barnes of these important constitutional rights have rendered guilty plea infirm and violates Mr. Barnes' constitutional rights. In order to secure a guilty plea, there must be a perfect transcript taken, one which reflects a colloquy between the Judge and defendant wherein the defendant is informed of, and specifically waives his right to the three federally mandated constitutional rights. In such, a reversal is warranted in this case because there is a failure by the State Judge to make an "adequate" record.

A guilty plea will not be considered free and voluntary unless, at the very least, the Court advises the defendant of the three constitutional rights as annunciated in ***Boykin***, supra; and Louisiana jurisprudence. Indeed, an express and knowing waiver of those rights must appear on the record, and an unequivocal showing of a free and voluntary waiver cannot be presumed. ***Boykin***, supra; ***State v. Morrison***, 599 So.2d 455 (La. App. 2nd Cir. 1992); ***State v. Dodson***, 2006 La. App. LEXIS 2266 (La. App. 2nd Cir. 10/16/06); ***State v. Jones***, 935 So.2d 323 (La. App. 2nd Cir. 6/28/06).

Further, courts have held that when the State failed to prove a "... defendant was advised of and waived his constitutional privilege(s) against self-incrimination, right to trial by jury, and right to confront his accusers," such prior offense(s) could not be used as predicate offenses at habitual offender hearing. LSA-R.S. 15:529.1 (D)(1)(b). See: ***State v. Dickerson***, 760 So.2d 573 (La. App. 2nd Cir. 2000).

Since such time, the Fifth Circuit Court of Appeals, in a more recent decision of ***State v. Domino***, 60 So.3d 659 (La. App. 5th Cir. 2011), concluded that:

> In ***Boykin v. Alabama***, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court emphasized three federal constitutional rights that are waived by a guilty plea; the privilege against self-incrimination, the right to trial by jury, and the right to confront accusers. ***State v. Davis***, 03-488 (La. App. 5th Cir. 11/12/03), 861 So.2d 638, *writ denied*, 03-3401 (La. 4/2/04), 869 So.2d [10-661 La. App. 5 Cir.] 874. Because a plea of guilty waives these fundamental rights of an accused, Due Process requires that the plea be voluntary and intelligent waiver of known rights in order to be valid. The record of the plea must show that the defendant was informed of these three basic rights and then knowingly and intelligently waived them. ***State v. Galliano***, 396 So.2d 1288, 1290 (La. 1981).
>
> Under ***Boykin v. Alabama***, the decision to plead guilty will not be considered voluntary unless, at the very least, the defendant has been advised of his privilege against self-incrimination, and his rights to a trial by jury and confrontation. ***State v. Payton***, 04-1024, p. 4 (La. App. 5th Cir. 1/11/05), 894 So.2d 362, 365. The record must also show that defendant freely and voluntarily waived those rights.

The record does not reflect that Mr. Barnes was even made aware of his constitutional rights in accordance with ***Boykin***. Mr. Barnes avers that he was never made known of his constitutional rights, and therefore, could not have made an intelligent and voluntary waiver of such rights that he was not made aware of.

The law is quite firm on this and Mr. Barnes' argument is that he was never made aware of the constitutional rights and a procedural irregularity in the taking of the plea.

Furthermore, Mr. Barnes contends that ***State v. Lewis***, 421 So.2d 224 (La. 1982), the Louisiana Supreme Court reviewed the contents of the Motion to Vacate the Plea and stated that the style of pleading was not vital to determine if it was a request for a Post-Conviction remedy, which allows a defendant to attack the constitutionality of the plea under La.C.Cr.P. Art. 930.3.[5]

LSA-R.S. 15:529.1 sets out the burden of proof for a Multiple Offender Adjudication. The statute requires the State to file a multiple Bill of Information, alleging the defendant's prior convictions. If the offender denies the allegations, the burden then shifts to the district attorney to prove the prior convictions. LSA-R.S. 15:529.1(D)(1)(b), ***State v. Perkins***, 99-1084 (La.App. 5 Cir. 1/25/00), 751 So.2d 403; ***State v. Conrad***, 94-232 (La.App. 5 Cir. 11/16/94), 646 So.2d 1062, 1064, writ denied, 94-3076 (La. 4/7/95), 652 So.2d 1345; ***State v. Shelton***, 621 So.2d 769 (La. 1993).

In ***State v. Shelton***, the Louisiana Supreme Court set out the specific requirements for burdens of proof in an habitual offender proceeding. The Supreme Court noted that adequate proof of a valid prior guilty plea required the State to either produce a "perfect transcript" of the ***Boykin*** colloquy between the defendant and the judge, or a combination of a guilty plea form, a well-executed Minute Entry, or an imperfect transcript. Id., at 777.

In ***Shelton***, at the habitual offender hearing, the State produced a Minute Entry simply alleging that the "judge gave the Defendant his rights", and a plea/ waiver of rights form, which separately listed the rights the defendant was waiving, including his right to trial by jury, the privilege against self-incrimination and the right to confront his accusers. After each of those rights were the defendant's initials, indicating he signed the waiver of those rights. Further, the form stated that the defendant understood the legal consequences of pleading guilty and wished to plead guilty because he was in fact

[5] ***State v. Farvieux***, 28 So.3d 1132 (09-396, La. App. 5th Cir. 11/24/09), the Court held that: "Pro-Se filings are subject to less stringent standards than formal pleadings filed by lawyers. ***State ex rel. Egana v. State***, 00-2351 (La. 9/22/00), 771 So.2d 638 (per curiam). A Pro-Se Petitioner is not to be denied access to the courts for review of his case on the merits by the overzealous application of form in pleading requirements or hyper-technical interpretations of court rules."

guilty of this crime. Last, and what the court in ***Shelton*** stated was more important, was that the form stated that the court had addressed the defendant, his attorney and the trial judge. The court found that this detailed of a plea form, with a more general Minute Entry, would suffice in the absence of a perfect transcript. Id., at 777.

In the present case, proof of the third conviction in Orleans Parish Case No. 373-389 was defective. There were no fingerprints on the conviction for comparison, and it was clearly insufficient to prove that Mr. Barnes had previously been convicted of this charge. The fingerprint analyst used the arrest register; but that is a comparison with who was arrested, but nothing showing a conviction of Mr. Barnes in this charge, and thus invalid proof of the conviction. (Rec. pp. 364-70). At the hearing, the trial court noted that "**it was unusual**" but still found the proof sufficient. (Rec. pp. 369-70). This ruling was made despite the fact that the State failed to comply with the minimum requirements of proof to prove that Mr. Barnes was a multiple offender and that the prior conviction in Orleans Parish Case No. 373-389 was lawfully obtained against him. The Court abused its discretion in accepting the State's theory that there was no need for the trial court to advise Mr. Barnes of his multiple offener rights; his right to a hearing, and his right to remain silent as required by LSA-R.S. 15:529.1 (D)(1)(a), stating that, "offender multibill offender status was established by competent evidence." Evidence presented by the State cannot be termed as competent, as the ***Boykin*** transcripts for either of the priors was not part of the multiple bill proceeding; and the trial court failed to advise Mr. Barnes of his right to remain silent, and to conduct an admit/deny hearing in this matter.

Also, the Court abused its discretion in accepting the State's theory that there was no need to conduct an admit/deny hearing which requires "the defendant to say whether the allegations [in the multiple bill] are true, stating that, "defendant waives his right to admit or deny the allegations in the multiple offender hearing" without an objection.

Assuming the State has met its burden of proving the existence of the prior guilty plea pleas and that defendant was represented by counsel when the plea was accepted, the burden shifts to defendant

to produce affirmative evidence showing an infringement of his rights or a "**procedural irregularity**" in the taking of the pleas. Only if the defendant does this, does the burden shift to the State to prove that the pleas were constitutional through a "perfect" transcript. ***State v. Shelton***, supra

Mr. Barnes avers that it should have been part of the proceeding to determine whether he was properly ***Boykinized***. ***Boykin v. Alabama***, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274, 279-80 (1969). These important rudiments should have been presented by counsel. Had they been, it's a strong probability that Mr. Barnes would have discovered evidence favorable to him. Evidence that could have prohibited the prior(s) from being used for multiple bill purposes. In light of due diligence, since 2011, Mr. Barnes has requested by mail, the ***Boykin*** transcripts from the Orleans Parish District Court Sections B & D (See Exhibit "11").

Mr. Barnes was finally able to obtain his transcript of this proceeding. After reading through the transcript, Mr. Barnes discovered that his right against self-incrimination (right to remain silent), was never discussed during the colloquy. Therefore, it cannot be said that Mr. Barnes made a knowing and voluntary waiver of his right to remain silent. Also, this is the same conviction that the State failed to produce fingerprints as proof of conviction.

Concerning the other 2 priors, cases #363-670 and 367-287, Sec. "B," Orleans Parish; Mr. Barnes has been diligently attempting to obtain the ***Boykin*** transcripts, but to no avail.

The record fails to reflect that Mr. Barnes was properly advised of his constitutional rights as afforded in ***Boykin***. Counsel should have objected, as there should have been an admit/deny hearing as required by LSA-R.S. 15:529.1(D)(1)(2), which requires "the offender to say whether the allegations [in the multiple bill] are true." Mr. Barnes was deprived of a fair opportunity to force the State to meet its burden of proof. As a result, Mr. Barnes was sentenced to serve the rest of his life in prison. Accordingly, the adjudication and sentence should be reversed and the matter remanded to the trial court.

Mr. Barnes contends that the guilty plea forming the basis of the prior offenses used to adjudicate

him as a habitual offender was inadequate. Mr. Barnes argues that his Jan. 1996 guilty plea for Attempted Armed Robbery could not be used as a predicate in these proceedings, as he was advised at that time that he had the right to remain silent. Thus, he could not have made a knowing and voluntary waiver of that right.

Under the statute, before a defendant chooses to acknowledge, or confess, in Open Court, that he has been previously convicted of a felony, he **MUST** first be cautioned by the Court as to his rights. LSA.R.S. 15:529.1 (D); ***State v. Johnson***, 423 So.2d 815 (La. 1983).

Specifically, a defendant **MUST** be advised by the Court of his right to a "formal" hearing and to have the State prove its case. ***State v. Johnson***, supra, at 817. Further, this section "implicitly provides" that the defendant should be advised by the Court of his constitutional and statutory right to remain silent. ***State v. Johnson***, supra, at 817.

In this case, the Court failed to reveal affirmatively that the trial court advised Mr. Barnes of his privilege of his right of self-incrimination before accepting his stipulation to the allegations in the habitual offender bill. "In all recent Louisiana felony cases, the record **MUST** affirmatively show that the defendant was adequately advised of the three rights prescribed by ***Boykin v. Alabama***, supra.

A guilty plea cannot be considered "free and voluntary" unless, at the very least, the Court advises the defendant of the triad of rights as enunciated in ***Boykin***, supra, and Louisiana jurisprudence. Indeed, an express and knowing waiver of those rights **MUST** appear on the record, and an unequivocal showing of a free and [31,976 La. App. 2nd Cir. 14] voluntary waiver cannot be presumed. ***Boykin***, supra; ***State v. Nuccio***, 454 So.2d 93 (La. 1984); ***State v. Morrison***, 599 So.2d 455 (La. App. 2nd Cir. 1992). Furthermore, the trial court cannot rely on an assumption that defense counsel adequately informed the defendant of his rights. *121, ***State v. Williams***, 384 So.2d 779 (La. 1980); ***State v. Morrison***, supra.

In ***State v. Age***, 417 So.2d 1183 (La. 1981), the defendant contended that he was not properly ***Boykinized*** before he plead guilty to a prior offense of Simple Robbery; and, accordingly, the prior

conviction could not be used to convict him of being a second felony offender. Specifically, he was not informed of his right to a jury trial. In *Age*, the trial court did not have the benefit of reviewing the transcript from the defendant's prior guilty plea, but only had the Waiver of Rights Form, "Which the Louisiana Supreme Court has found to be "**deficient**"). Justice Calogero determined that there was no affirmative showing that the defendant in *Age* was either advised of his right to a jury trial, or that he waived that right. Therefore, "he did not make a knowing and voluntary waiver of his right to a jury trial." The Court concluded that the guilty conviction should not have been used as a basis for multiple offender charge against him. The habitual offender adjudication was reversed.

Mr. Barnes avers that the privilege against self-incrimination, as opposed to the right to a jury trial and the right to confront one's accusers, "**is Broader in scope**" than the other two constitutional rights because it is not only a right that a defendant has during a trial, but it also applies to the interrogation, pre-trial stages, and every aspect of the court proceedings as well.

The record fails to reflect that Mr. Barnes was properly advised of his constitutional rights as afforded in *Boykin*. Counsel should have objected, as there should have been an admit/deny hearing as required by LSA-R.S. 15:529.1(D)(1)(2), which requires "the offender to say whether the allegations [in the multiple bill] are true." Mr. Barnes was deprived of a fair opportunity to force the State to meet its burden of proof. As a result, Mr. Barnes was sentenced to serve the rest of his life in prison. Accordingly, the adjudication and sentence should be reversed and the matter remanded to the trial court.

CONCLUSION

WHEREFORE, after a careful review of the merits of these Claims, Mr. Barnes contends that this Honorable Court could not find that reasonable jurists would allow these convictions to stand.

Counsel's failures were so unreasonable as not to amount to strategy at all. Mr. Barnes is entitled to reversal of the denials by both the District Court (Writ of Habeas Corpus) and the U.S. Fifth Circuit Court of Appeals (Certificate of Appealability).

Respectfully submitted,

Joseph Barnes #326483
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 9th day of April, 2018. upon counsel of record for Respondent, pursuant to Rule 29 at the following address:

Matthew B. Caplan
Assistant District Attorney
22nd Judicial District Court
P.O. Box 1090
Covington, LA 70434-1090

(Signature of Petitioner)