18-9088

NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

Charles Gray - Petitioner;

v.

State of Indiana - Respondent;

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

Charles Gray #900702
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

Petitioner / *pro se*

QUESTIONS PRESENTED

I. Whether the State of Indiana has erred whether Petitioner received ineffective assistance of counsel in violation of his the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve, Thirteen and Twenty-three of the Indiana Constitution?

II. Whether the State of Indiana has erred whether Petitioner, was deprived of effective assistance of Appellate Counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana Constitution when Appellate Counsel failed to raise every possible error?

LIST OF PARTIES

☒ 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:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**: **N/A**

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 reporter; 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☐ is unpublished.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 reporter; or,

☐ is unpublished.

☒ **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- (Indiana Supreme Court)

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

The opinion of the Indiana Court of Appeals appears at **Appendix B** to the petition and is-

☐ reported at _____; or,

☐ has been designated for publication but is not yet reporter; or,

☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**: **N/A**

The date on which the United States court of appeals decided my case was _____.
A copy of that decision appears at Appendix ____.

☐ 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: _____ ____, 20__, 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 _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

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

☒ **For cases from state courts:**

The date on which the highest state court decided my case was _____ ___, 2019.
A copy of that decision appears at **Appendix A**.

☒ No petition for rehearing was timely filed in my case. (Not Permitted by Indiana Rules of Court).

☐ A timely petition for rehearing was denied on the following date: _____ ____, 20__, 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 _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

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

CONSTITUTIONAL PROVISIONS AND STATUTES

STATEMENT OF THE CASE

This is an appeal from the denial of State Post-Conviction Relief.

Prior Proceedings:

Appellant was charged, tried and sentenced in the Marion County Superior Court for Murder and Robbery. Appellant's appeal was affirmed November 16, 2001.

Post-Convictions Proceedings:

Appellant *pro se*, filed a Petition for Post-Conviction Relief March 26, 2015 and his Amended Petition for Post-Conviction Relief on January 20, 2016 and an evidentiary hearing was held. Appellant's Finding of Fact and Conclusion of Law was filed and on September 2, 2016, State's Proposed Finding of Fact and Conclusion of Law (May 9, 2017) and Post-Conviction Relief was denied on June 21, 2018.

On February 11, 2019 the Indiana Court of Appeals affirmed and transfer to the Indiana Supreme Court was denied on _____ __, 2019.

Petitioner therefore now seeks review of this Honorable Court.

Appellant had post-Conviction Relief evidentiary hearing on May 17, 2016. Petitioner subpoenaed Ellen O'Connor and Luther Garcia Petitioner's Trial Attorneys, and Janice Stevens, Petitioner's Appellate Attorney to testify at his hearing. Luther Garcia did not appear being deceased and Janice Stephens did not appear living out-of-state. Petitioner sought to have her answer an interrogatory, but she would not reply.

During the evidentiary hearing held on May 17, 2016, Ellen O'Connor testified concerning the allegations of ineffective assistance of counsel against her and counsel's

testimony concerning her decisions made during trial support she was operating below the professional norm and her decisions cannot be deemed as good strategy

REASONS FOR GRANTING THE WRIT

ARGUMENT I

Petitioner raises he was deprived effective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that: (1) defense counsel's performance was deficient by falling below an objective standard of reasonableness based on professional norms; and (2) counsel's performance prejudiced the defendant so much that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Segura v. state,* 749 N.E. 2d 496, 500-01 (Ind. 2001) quoting *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984).

Petitioner alleges both defense counsel's, Ellen O-Connor and Luther Garcia, performance was deficient by falling below an objective standard of reasonableness based on professional norms creating prejudice and unprofessional errors, which without the result of the proceeding would have been different. *Segura v. state, Supra*, quoting *Strickland v. Washington, Supra.*, when both counsels' failed to object to and request the trial judge strike from the record the State's Handwriting Expert's numerous conclusions that violated Indiana Evidence Rule 702(a) admonishing the jury to disregard it; failed to object to and request the trial judge strike from the record repeated testimony referencing the victim's beating during robbery as "the day of the killing" and "the chair where he was killed," when he didn't die until a day later; failed to object Medical Examiner's manipulated autopsy photos admitted into evidence; object to improper jury instructions; to object to the State's *Brady* violation for failing to turn over full and complete medical records concerning the victim during its investigation; failing to request a

lesser included offense instruction; and failing to object to Sixth Amendment right to confront violation.

First, prior to trial Defense Counsels filed a Motion In Limine Regarding Testimony of Handwriting Analysis. In the Trial Court's "ORDER DENYING DEFENDANT'S MOTION IN LIMINE REGARDING TESTIMONY OF HANDWRITING ANALYSIS" dated February 14, 2000, the Judge stated as follows:

> Comes now the Court and denies Defendant's Motion In Limine referencing testimony of a handwriting analysis. The Court finds that testimony of Ronald Blacklock will be admissible under 702(a); if said witness can be qualified as an expert by knowledge, skill, experience, training or education.
> The Court finds that specialized knowledge of handwriting analysis **will assist the trier of fact in understanding the evidence and to determine a fact in issue.**
> The Court will, therefore, **allow the witness to testify in the form of an opinion if so qualified. (Emphasis Added)**
> (Tr. 163)

After this ruling which set forth the Trial Judge was allowing the Handwriting Expert to only "**assist the trier of fact in understanding the evidence and to determine a fact in issue...in the form of an opinion,**" both defense counsel's, Ellen O-Connor and Luther Garcia, failed to object to and request the trial judge strike from the record the State's Handwriting Expert's numerous conclusions that violated Indiana Evidence Rule 702(a) on which the Trial Judge had based her above ruling admonishing the jury to disregard it. This was prejudicial and allowing it was outside the Indiana Rules of Evidence covering Expert Testimony under Rule 702 which reads as follows:

> **Indiana Rules of Evidence Rule 702. Testimony by expert witnesses.**
> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education **may testify in the form of an opinion** or otherwise if the expert's scientific, technical, or other

> specialized knowledge **will help the trier of fact to understand the evidence or to determine a fact in issue.** ***(Emphasis Added)*** (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles. [Amended September 13, 2013, effective January 1, 2014.]

Although handwriting analysis itself may be considered a comparison not subjected to a 702(b) analysis when rendered as an opinion, the conclusions herein should be subjected to Rule 702(b). The Post-Conviction Judge in addressing this stated:

> "Defendant's argument on point is fundamentally flawed and applies to an overly rigid reading of the Court's order. As noted, by its very terms, the Court's order referenced and tracked the language of IRE 702. [Findings of Fact and Conclusions of Law denying Post-Conviction Relief, Pg. 6; P.C. Appx. 131].

Appellant maintains a Court's order must be followed by its language and this Order only allowed this witness to testify under IRE 702(a) giving an opinion and not under IRE 702(b) giving a conclusion. The Post-Conviction Judge erred in stating, "Opinions and conclusion are virtually indistinguishable and arise naturally from one another" [Findings of Fact and Conclusions of Law denying Post-Conviction Relief, Pg. 6; P.C. Appx. 131]. If this is true IRE 702 would not be separated into sections (a) and (b) distinguishing between the two.

This trial began with Ronald Blacklock, Indianapolis Marion County Forensic Service Agency, Quality Assurance Supervisor for the Crime Lab stating that handwriting analysis is a "Forensic science being over 100 years old." (Tr. 905, L. 10). This bolstered handwriting analysis to the jury as something that has been accepted by the State or Federal courts as a recognized forensic science for over 100 years, when in fact to this day the state and federal circuit courts cannot agree whether to recognize it or not. It is this uncertainty that puts handwriting analysis experts under Indiana Evidence Rule 702(a) limiting their testimony to

opinion only and not conclusions. The Seventh Circuit Court of Appeals in *Deputy v. Lehman Brothers, Inc.* 345 F.3d 494 (7th Cir. 2003) stated,

> Every circuit that has considered the issue has allowed expert testimony on handwriting analysis. *United States v. Crisp*, 324 F.3d 261, 270 (4th Cir. 2003); *United States v. Jolivet*, 224 F.3d 902, 906 (8th Cir. 2000); *United States v. Paul*, 175 F.3d 906, 911 (11th Cir. 1999); *United States v. Jones*, 107 F.3d 1147, 1161 (6th Cir. 1997); *United States v. Velasquez*, 33 V.I. 265, 64 F.3d 844, 848-49 (3d Cir. 1995). Several district courts, however, have rejected handwriting analysis, finding it lacks scientific reliability. *United States v. Hines*, 55 F. Supp. 2d 62, 68 (D. Mass. 1999); *United States v. Saelee*, 162 F. Supp. 2d 1097, 1102-03 (D. Alaska 2001); *United States v. Lewis*, 220 F. Supp. 2d 548, 555 (S.D.W.Va. 2002); *United States v. Brewer*, 2002 U.S. Dist. LEXIS 6689, 2002 WL 596365 (N.D. Ill. 2002).

One of the cases cited above by the Seventh Circuit Court of Appeals, *U.S. v. Hines*, 55 F.Supp.2d 62 (D.Mass. 1999) states applying *Daubert* and *Kumho*, handwriting analysis testimony which points out similarities and differences between defendant's exemplar and note are admissible but analyst's conclusions are not because ability to draw these conclusions has not been subjected to empirical testing.

Since the *Daubert* decision mentioned above, a number of courts have scrutinized the field of handwriting analysis under its standards with differing results. Prior to *Kumho*, the Sixth Circuit affirmed a district court decision allowing handwriting identification testimony, relying largely on Evidence Rule 901. *United States v. Jones*, 107 F.3d 1147, 1158-60 (6th Cir. 1997). Since *Kumho*, a number of district courts have excluded expert opinions on handwriting identification, while sometimes permitting handwriting experts to testify about handwriting itself to assist the jury in making its own determination. *See United States v. Rutherford*, 104 F. Supp. 2d 1190 (D. Neb. 2000); *United States v. Santillan*, 1999 U.S. Dist. LEXIS 21611, 1999 WL 1201765 (N.D.Cal. 1999); *United States v. Hines*, 55 F. Supp. 2d 62 (D.Mass. 1999). *But see*

United States v. Paul, 175 F.3d 906, 910-11 (11th Cir.), *cert. denied*, 528 U.S. 1023, 120 S. Ct. 535, 145 L. Ed. 2d 415 (1999).

Handwriting analysis does not stand up well under the *Daubert* standards. Despite its long history of use and acceptance, validation studies supporting its reliability are few, and the few that exist have been criticized for methodological flaws. Further, as discussed in *Hines, supra* at 68, there has been no peer review by an unbiased and financially disinterested community of practitioners and academics; the acceptance of handwriting identification expertise has largely been driven by handwriting experts. It potential rate of error is almost entirely unknown. This is why the expert testimony given in this case by the above Order was to be an opinion only and not to offer conclusions.

In this case the handwriting analysis expert, Lee Ann Harmless, Indianapolis Police Department Crime Laboratory Document Examiner, was handed the case by Donald Blacklock, who bolstered handwriting as a 100 year old science, and she did not have the training to qualify her as a scientific expert in handwriting analysis, nor was she a member of the three associations devoted to document examination: American Society of Question Document Examiners, Association of Forensic Document Examiners, or the National Association of Document Examiners. (Tr. 986, L. 7-25) Yet, Ms. Harmless, during her testimony concerning a Post-It Note left by the person alleged to have committed these crimes and was the only link to them stated as follows:

> **DIRECT EXAMINATION OF LEE ANN HARMLESS**
>
> A. I **concluded** that Charles Gray was the writer of the question material.
> (Tr. 967, L. 6-7) (**Emphasis Added**)
>
> **CROSS EXAMINATION**

Q. Okay, when you say **positively** identified, does that mean nobody else in the world could have written that?
A. That's right.
Q. And no one.
A. That's right.
Q. Four dozen people. And no one else.
A. That's right.
(Tr. 1005, L. 6-12) **(Emphasis Added)**

A. If I was not **absolutely certain** that that Charles Gray was the writer of the questioned material, I wouldn't be sitting up here today.
(Tr. 1006, L. 12-14) **(Emphasis Added)**

A. I'm **100 percent certain** that Charles Gray was the writer of the questioned material.
(Tr. 1016, L. 2-3) **(Emphasis Added)**

In Ms. Harmless' testimony she starts offering not an opinion but a conclusion saying, "I concluded" moving to "positively" meaning, "Admitting no doubt, irrefutable," to "absolutely certain," meaning "Positive; Without a doubt", progressing each time until she is "100 percent certain" which needs no definition from the American Heritage Dictionary to understand she's formed a legal conclusion not permitted violating the Indiana Rules of Evidence covering Expert Testimony under Rule 702(a). Ms. Harmless by her last two (2) statements told the jury she wouldn't be sitting there if she wasn't 100 percent certain, was not assisting the "trier of fact" (jury) to reach their own conclusion but rendered the conclusion for them causing substantial prejudice to this Petitioner's defense denying him a fair trial.

The State understood the prejudicial effect of these statements by their expert handwriting analyst upon this jury and the fact that defense counsels failed to object and move to have them stricken from the record. During the State's closing argument the prosecutor stated:

The note. The note; the note; the note. What Mr. Perry said, we'll get him with that note. And ladies and gentlemen, that is what happened. Because you heard Lee Ann Harmless testify that she

> was a hundred percent sure – a hundred percent sure that Charles Gray wrote this note. Nobody else. Charles Gray wrote this note. (Tr. 1100, L. 9-10)

As stated above, State's expert, Ronald Blacklock, bolstered handwriting analysis as a 100 year old recognized science to this jury, when in fact it is still being debated among the state and federal courts concerning whether it is reliable or not. After his bolstering handwriting analysis his colleague, Lee Ann Harmless testified giving a conclusion of 100 percent certainty Charles Gray wrote this note. Harmless' testimony was not an opinion but conclusion violating Rule 702(a) and triggering 702(b) which required a hearing and higher standard to qualify her to give this testimony. Her conclusions left nothing for the jury to decide concerning this Post-It Note and sealed this Petitioner's fate as the person whom had committed these crimes even though he is innocent. The Post-Conviction Court's interpretation of IRE 702 and how its Order was to be read by the parties is in error and must be corrected at this time.

Second, both defense counsels failed to object to and request the trial judge to strike from the record repeated testimony referencing the victim's beating during robbery as "the day of the killing" and "the chair where he was killed," when he didn't die until a day later admonishing the jury to disregard them. The Post-Conviction Judge states, "Defendant has failed to show how his counsel's alleged failure to act or choice of strategy harmed his case" [Findings of Fact and Conclusions of Law denying Post-Conviction Relief, Pg. 7; P.C. Appx. 132]. Appellant below does show how it harmed him and counsel was ineffective just as it showed the Post-Conviction Court.

During trial the victim's daughter, Patsy Hunt, testified concerning the above mentioned Post-It Note. The victim was beaten on September 10, 1997 and was taken to the hospital where he died the next day on September 11, 1997 without proving it was from injuries as a result of

the alleged robbery. When the victim was transported to the hospital he merely had a cut on his ear and therefore his other injuries he apparently died from was a result of hospital treatment during and after transport. During direct examination Pasty Hunt repeatedly made prejudicial statements that were not factual or supported by evidence and defense counsel should have been objected to them and moved to have them stricken from the record admonishing the jury to disregard. The follow is that testimony:

DIRECT EXAMINATION OF PATSY HUNT CONCERNING POST-IT NOTES

A. Ah—he kept them on the night stand where he was killed.
(Tr. 516, L. 17)

A. No, the night table was right by his chair that he was killed—in the living room."
(Tr. 517, L. 1-2)

A. I don't need for this, but I might. Ah—that was the chair he had—that he was murdered in."
(Tr. 531, L. 2-3)

A. A. Ah—on the day of the killing?
(Tr. 545, L. 15)

A. I did not talk to Mr. Smith on the day of the killing.
(Tr. 545, L. 17)

During each of these statements made by the victim's daughter, Pasty Hunt, neither defense counsel objected to these prejudicial statements not supported by the evidence in this trial, nor did they move to have them stricken from the record each time the jury heard them. It is defense counsel's objective standard of reasonableness based on professional norms to object to this testimony and to move to have it stricken from the record admonishing the jury to disregard it during deliberations. Allowing this testimony left in the minds of the jury that this wasn't a beating which resulted in a death possibly caused by other factors like medical

treatment, but that it was murder and the victim was killed at the time of the alleged beating and robbery. Defense counsels were ineffective by not objecting to this testimony. The Post-Conviction Court erred in stating this was not ineffective assistance of counsel.

Third, defense counsels failed to object to the Medical Examiner's manipulated autopsy photos admitted into evidence. The Post-Conviction Judge does not address the actual claim that these photographs had been manipulated and were not originals maintaining there was no basis for an objection. Appellant states his argument herein as presented to the Post-Conviction Court does prove a basis for an objection and counsel as ineffective for not objecting under the "best evidence rule."

During trial the Marion County Medical Examiner presented autopsy photographs to the jury of his examination of the victim during his autopsy. These photographs were not accurate and had been magnified making the wounds appear to be much worse than they actually appeared. These photographs further reflected damage to the wounds cause by the Medical Examiner during his probing and investigating the Cause of Death. This was extremely prejudicial when combined with the prejudicial comments made by, Lee Ann Harmless, Document Examiner, tying the Post-It Notes to this Petitioner and the comments made by the victim's daughter during direct examination leading the jury to believe he had been murdered in his house. Defense counsels were ineffective by not objecting to these photographs moving to have them stricken from the record.

Indiana Rules of Evidence 1001, 1002, 1003 and 1004 collectively make up the "best evidence rule." A better term is the "original documents rule." *Hudson v. State*, 443 N.E.2d 834 (Ind. 1983). Rule 1001 defines the terms used in Article 10 of the Indiana Rules of Evidence. For purposes of Article 10 of the Rules of Evidence only, the term "photographs" includes still

photographs, X-ray films, video tapes, and motion pictures. *DesJardins v. State*, 759 N.E.2d 1036 (Ind. 2001). The original document rule does apply when the proponent is seeking to prove the contents of the photograph. *See, e.g., U.S. v. Stockton*, 968 F.2d 715 (8th Cir. 1992).

Trial counsel(s) were required to object to these photographs and request they be stricken from the record since they were manipulated and were not the "best evidence" (originals that accurately reflected the wounds suffered). Indiana Evidence Rule 403; Excluding relevant evidence for prejudice, confusion, or other reasons; states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. [Amended September 13, 2013, effective January 1, 2014.] These photographs caused unfair prejudice, confused the issues and clearly mislead the jury into believing the wounds were much worse than they actually were. The Post-Conviction Court erred in ruling this was not ineffective assistance of counsel.

Fourth, defense counsels failed to object to improper jury instructions. The instructions pertinent to this issue are Preliminary Instruction 4 and Final Instruction 23 which instructed the jury as follows:

> If the State failed to prove each of these elements beyond a reasonable doubt, you **should** find the Defendant not guilty of Murder, a Felony as charged in Count 1 of the Information.
>
> If the State did prove each of these elements beyond a reasonable doubt, you **should** find the Defendant guilty of Murder, a Felony as charged in Count 1 of the Information.
>
> **(Emphasis added)**

The term "should" lacks the absolute quality present in "must." The term "should" conveys a necessity it also means "probability" (American Heritage Dictionary), which lessened the standard for the State to prove to convict. The term "must" coveys the "necessity or

obligation; insistence" (American Heritage Dictionary), which properly states the standard for the State to have to prove for a conviction. In *Burgett v. State,* 758 N.E.2d 571 (Ind. 2001) *trans denied,* the court suggests that the use of "should" rather then "must" is problematic when instructions are not explained well to the jury as a whole. The petitioner in this case insist it was absolutely problematic in his verdict since it lessened the State's burden of proof to convict and the instruction were not fully explained as a whole concerning these terms ("should" and "must").

The Post-Conviction Judge in denying this was ineffective assistance of trial counsel maintains as long as the "other instruction also inform the jury as to the elements of the crime and as their duties as triers of the facts" [Findings of Fact and Conclusions of Law denying Post-Conviction Relief, Pg. 8-9; P.C. Appx. 133-34], even though the above cited instruction it did not matter. Appellant disagrees and moves this court to resolve this dispute.

Fifth, defense counsels failed to object to the State's *Brady* violation for failing to turn over full and complete medical records concerning the victim during its investigation. The Post-Conviction Judge in denying this claim states, "Defendant did not introduce any of the allegedly missing medical records and there is no basis for the claim that such records, if they existed, were exculpatory" [Findings of Fact and Conclusions of Law denying Post-Conviction Relief, Pg. 10; P.C. Appx. 135]. The Post-Conviction Court fails to address it denied every motion filed to subpoena these record filed by this Appellant prior to the evidentiary hearing including a Motion for Duces Tecum for Romeo M. Pineda, M.D., Pathologist with Autopsy Report authored by him in this case [P.C. Appx.175]. The Post-Conviction denied subpoenas for these documents and then cites not having them as the reason to deny this claim.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), due process requires the prosecution to disclose evidence material to issue of guilt or punishment in its possession or control. The *Brady* rule is applicable to trials in state courts by action of the 14th Amendment. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The prosecutor's responsibility under *Brady* extends to evidence known to police investigators but not disclosed to the prosecutor. Even though police investigators sometimes fail to inform a prosecutor of all they know, "procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant [*Brady*] information on each case to every lawyer who deals with it." *Kyles v. Whitley*, 514 U.S. 442, 115 S.Ct. 1555, 1568, 131 L.Ed.2d 490 (1995). Indiana recognized the *Brady* rule in *Fair v. State* (1969), 252 Ind. 494, 250 N.E.2d 744, and the State has a duty to disclose to defendant any evidence which tends to exculpate him. This duty exists independent of any specific discovery proceedings or court order. *Ottinger v. State* (1977), Ind.App., 370 N.E.2d 912. Any evidence which would affect credibility of a government witness could be construed as *Brady* material. This includes any information which shows bias of witness, motive for witness to lie or exaggerate testimony, credibility concerns of a government witness (i.e., prior bad acts of dishonesty, felony convictions), and lack of memory by witness. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (impeachment evidence can often make the difference between acquittal and conviction).

In this case the State failed to turn over all of the medical records concerning the victim's treatment after being taken to the hospital after his alleged robbery and beating during the robbery. It can be proven that over one hundred (100) documents exist concerning the treatment of the victim, yet in the State's Supplemental Notice of Discovery Compliance (Tr. 65) it states:

IV. Wishard Hospital certified medical records of Earl Perry, 61 page(s).

The missing documents which appear to be at least 39 or more in number are believe to have exculpatory evidence that could have been used to impeach the State's expert witnesses on the stand while under oath. This is vital since the medical examiner used manipulated photographs during his testimony that did not accurately reflect the injuries to the victim after this crime. Any evidence which would affect credibility of a government witness could be construed as *Brady* material. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (impeachment evidence can often make the difference between acquittal and conviction). The missing documents could have made the difference between acquittal and conviction.

Petitioner has proven his ineffective assistance of counsel claims for counsels' failing to object to this testimony and to move to have it stricken from the record admonishing the jury to disregard it and the Post-Conviction Court denied this because these documents were not presented at the evidentiary hearing knowing it had denied all motion to subpoena them for the hearing.

Sixth, defense counsel failed to request an instruction on reckless homicide as a lesser included offense. There should have been a lesser included offense instruction given with both the murder and felony murder instructions. Where the alleged lesser included offense may be established "by proof of the same material elements or less than all the material elements" defining the crime charged as in I.C. 35-41-1-16(1) or by the only feature distinguishing the alleged lesser included offense from the crime charged is that a lesser culpability is required to establish the commission of the lesser included offense under I.C. 35-41-1-16(3), then the lesser included offense is inherently included in the charge crime.

The Post-Conviction Judge in denying this claim stated:

> "*Webb* is not applicable given that given that the defense counsel's testimony at the evidentiary hearing established that the defense strategy was that Defendant was not the one who committed the crime and the only issue at trial was identification. [Findings of Fact and Conclusions of Law denying Post-Conviction Relief, Pg. 10; P.C. Appx. 135].

Appellant maintains that counsel's thinking was ineffective because if the jury decided he was the one who did this crime, they should have had an opportunity to decide if it was Reckless Homicide or Murder that was committed. Since the victim was alert and cooperating with medical staff during transportation to the hospital, at the hospital and did not die until the next day possible due to treatment and not the possible injury from the crime, they would have not found him guilty of murder.

With the charge of murder, there should have been a reckless homicide instruction, because the only feature distinguishing murder from reckless homicide is the lesser culpability required to establish the commission of reckless homicide making it an inherently included offense of murder. In *Aschliman v. State,* 589 N.E. 2d 1160, 1161 (Ind. 1992) it states that "information charging murder cannot be drafted so as to preclude an instruction on reckless homicide." In this case, with the evidence presented and part of the murder instruction given stating, "by striking at and against the head and body of Earl Perry with a cane and with another blunt object, thereby inflicting mortal injuries upon Earl Perry, causing him to die" shows that the evidence and lesser culpability were present which makes it factually included. There was no evidence presented to show that the assailant either intended or knowingly killed Earl Perry where the victim was alert and responsive when EMT's arrived and he was further responsive in transport to and at the hospital.

In *Owens v. State,* 659 N.E. 2d 466 (Ind. 1995) and *Anderson v. State,* 681 N.E. 2d 703 (Ind. 1997), the Indiana Supreme Court made it clear that the length of time and the severity of the beating must be considered in concluding a person was knowingly killed. In this case, there was no extended period of time nor was there a severe beating. The evidence proves that the assault was in an attempt to escape and nothing else, which lacks *mens rea* for murder giving serious evidentiary dispute as to whether the assailant committed reckless homicide or murder. In *Wright v. State,* 658 N.E. 2d 563 (Ind. 1995), the Indiana Supreme Court stated when the question to instruct is a close one, it is prudent for a trial court to give the instruction and where there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense, and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error not to give the instruction. In this case the *mens rea* for reckless homicide is showing of disregard of harm that might result from conduct, I.C. 35-42-1-5; Murder as charged here in I.C. 35-42-1-1 requires the killing to be knowing and there was no evidence presented to prove this fact when the victim was alive and alert when discovered, was mobile and did not die until a day later.

Defense counsel(s) were ineffective by not requesting a lesser included offense instruction on reckless homicide. In *Web v. State,* 963 N.E. 2d 1103 (Ind. 2012) the Indiana Supreme Court stated, "It is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense if there is such an evidentiary dispute." Further in *Web, supra*, the Supreme Court stated:

> As to the first two prongs of the Wright test the only element distinguishing murder and reckless homicide is the defendant's state of mind: reckless homicide occurs when the defendant "recklessly" kills another human being, and murder occurs when the killing is done "knowingly" or "intentionally," Ind. Code 35-42-1-5, 35-42-1-1(1). Reckless conduct is action taken in plain,

> conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct, Ind. Code 35-41-2-2(c). By contrast, a person engages in conduct "knowingly" if the person is aware of a "high probability" that he or she is doing so, 35-41-2-2(b). Thus, reckless homicide is an inherently included lesser offense of murder. The determinative issue here is whether the evidence produced a serious evidentiary dispute concerning Webb's state of mind that would justify giving the requested instruction.

Like in *Web, supra,* the determinative issue here is whether the evidence produced would have created a serious evidentiary dispute concerning Appellant's state of mind that would justify giving the requested instruction. The facts presented in the record establish that it would have and defense counsel was ineffective for requesting a lesser included instruction on reckless homicide when precedent dictates this instruction is not discretionary. Had defense counsel requested a lesser included offense instruction on reckless homicide the trial court would have granted it and the jury would not have found this Appellant guilty of murder. The Post-Conviction Court erred in its denial and counsel was ineffective for not requesting a Reckless Homicide instruction for the jury to consider.

Lastly, The autopsy in this case was performed by Romeo M. Pineda, M.D., Pathologist, yet he did not testify during trial rather Michael A. Clark, Ph.D., Pathologist did even though he did not perform the autopsy nor was he present in the room. The State during Closing Arguments verify this claim stating, "Uh – you heard extensive testimony from Dr. Clark – not only did the victim have a broken neck, he had – at the – the blows to the chest were so severe that it actually bruised his heart as well." (Tr. 1159) Dr. Clark's testimony was prejudicial and should not have been allowed since it was Romeo M. Pineda, M.D., Pathologist who performed the autopsy.

The Post-Conviction Judge in denying this claim states, "It is clear that trial counsel elected to 'not make perfunctory objections having little ... or no direct and substantial relationship to the main position" [Findings of Fact and Conclusions of Law denying Post-Conviction Relief, Pg. 11; P.C. Appx. 136]. Appellant maintains this was ineffective assistance in two ways. First, it denied his right to confront his accuser, and secondly, it would have proven reckless homicide and supports counsel's ineffectiveness for both no reckless homicide instruction and right to face his accuser.

The Petitioner states, the Confrontation Clause of the Sixth Amendment provides: in all criminal prosecutions the accused shall enjoy the right to confront the witness against him. *Roberts v. State*, 894 N.E. 2d 1018 (Ind. Ct. App. 2008). Counsel should have objected to Dr. Clark not being the actual Doctor who performed the autopsy nor was he present when it was performed raising this denied his client the right to confront the doctor who did the autopsy.

In *Crawford v. Washington,* 541 U.S. 36, 53-55, 124 S. Ct. 1354, 1365, 158 L.Ed 2d 177 (2004), the Supreme Court held that the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The actual doctor, Romeo M. Pineda, M.D., Pathologist, who did the autopsy, filed his official autopsy report which was testimonial in nature, yet he did not appear at trial and a second doctor discussed this report as though he was the author. When a Lab Technician who prepared an autopsy report does not testify at trial and the defendant does not have opportunity to depose prior to trial, it is reversible error. *Jackson v. State,* 891 N.E. 2d 657 (Ind. Ct. App. 2008). Defense counsel was ineffective for not objecting and then moving to have Dr. Clark's testimony stricken from the record and the autopsy report stricken as well.

Trial counsel's testimony during the Post-Conviction Relief evidentiary hearing supports counsel's decisions were made while operating below the professional norm and cannot be deemed as good strategy and therefore counsel must be found to be ineffective prejudicing Appellant and a new trial ordered. The Post-Conviction Court erred denying this claim.

ARGUMENT II

Petitioner was deprived of effective assistance of Appellate Counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana constitution when Appellate Counsel failed to raise every possible meritorious error. The Post-Conviction Court in denying Appellant's Ineffective Assistance of Appellate Counsel claims that because his trial counsel was deemed by the Post-Conviction Court to not be ineffective, his Appellate Counsel cannot be ineffective for not raising the claims on appeal cited under ineffective assistance of trial counsel.

Appellant states this is not the proper standard to review an ineffective assistance of appellant counsel claim. In *Bieghler*, our supreme court identified three categories of appellate counsel ineffectiveness claims, including: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. *Bieghler v. State*, 690 N.E.2d 188, 193-95, *reh'g denied, cert. denied*, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 457 (1998). Appellate Counsel had a duty to raise and argue every possible issue on appeal and failed to do so in this case. In evaluating these claims, the courts use the following two part test: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are clearly stronger than the raised issues. *Bieghler*, 690 N.E.2d at 194. Otherwise stated, to prevail on a claim of ineffective assistance of appellate counsel, a defendant must show from the information available in the trial record or otherwise known to appellate counsel that appellate

counsel failed to present a significant and obvious *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000), *reh'g denied, cert. denied*, 534 U.S. 1164, 122 S. Ct. 1178, 152 L. Ed. 2d 120 (2002).issue and that this failure cannot be explained by any reasonably strategy.

Appellant maintains his unraised issues are significant and obvious from the face of the record; and the unraised issues are clearly stronger than the raised issues. *Bieghler*, 690 N.E.2d at 194.

In the interest of economy of this court's time since the Post-Conviction Court summarily denied his claims without addressing them, Petitioner incorporates by reference all of the above claims with legal authorities listed under paragraph 9. (a) (Ineffective Assistance of Trial Counsel) concerning the State's Handwriting Expert's numerous conclusions that violated Indiana Evidence Rule 702(a); the repeated testimony referencing the victim's beating during robbery as "the day of the killing" and "the chair where he was killed," when he didn't die until a day later; the Medical Examiner's manipulated autopsy photos admitted into evidence; the improper jury instructions; the State's *Brady* violation for failing to turn over full and complete medical records concerning the victim during its investigation; denial of a lesser included offense instruction; and a Sixth Amendment right to confront violation.

If this Appellate Court decides that trial counsel was ineffective in the above claims, then it must under the Post-Conviction Court's reasoning decide that his Appellate Counsel was ineffective as well.

CONCLUSION

The petition for a writ of certiorari should be granted. Indiana has violated Petitioner's United States Constitutional rights to effective counsel, a fair trial and exculpatory evidence that would have changed the outcome and therefore he is entitled to have his conviction vacated and for all other relief deemed proper by law.

Executed on: APRIL 4, 2019,

Respectfully submitted,

Charles Gray
Petitioner / *pro se*