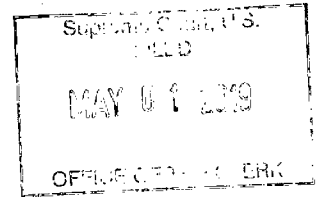


No. 18-9177

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



ROBERT A.C. MURPHY-PETITIONER

VS.

RON NEAL-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Case No. 18-1901

PETITION FOR WRIT OF CERTIORARI

ROBERT A.C. MURPHY

INDIANA STATE PRISON

ONE PARK ROW

MICHIGAN, CITY 46360

QUESTION(S) PRESENTED

- 1) Whether Murphy's Fifth, Sixth, Fourteenth Amendment rights and his Miranda were violated.
- 2) Whether the court of Appeals violated Murphy's due process by denying him the right to complete the record.
- 3) Whether Appellate counsel Performance violated Appellant's Sixth and Fourteenth Amendments, when counsel refuse to remove himself.
- 4) Whether the state committed a Brady violation, when the state failed to turn over Exculpatory material Evidence.
- 5) Whether the State committed Prosecutor Misconduct when state failed to correct false testimony which violated Murphy due process and right to a fair trial.
- 6) Whether Appellant Murphy's Six and Fourteenth Amendment was violated when Appellate Counsel failed to Raise Eyewitness account.
- 7) Whether the Trial and Appellate Counsel were ineffective for failing to raise and Investigate the D.N.A that was never found, and the unknown D.N.A. that was found.
- 8) Whether Appellant Murphy's Sixth Amendment was violated when his was not inform of the true nature of the charges.
- 9) Whether Trial Counsel and Appellate Counsel was ineffective for failing to investigate the mental history of the states witness and object to the testimony at Trial, And raise on direct appeal.

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is reported at No. 18-1901.

The opinion of the United States district court appears at Appendix A to the petition and is reported a No: 3:16-cv-00606-PPS-MGG.

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is unpublished. at No: 18A02-1507-PC-849.

The opinion of the Circuit Court appears at Appendix B to the petition and is reported at No. 18CO5-0903-MR-01.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 26, 2018.

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

On January 23, 2019. Appellant Murphy, filed his Petition for Rehearing in the Seventh Circuit of Appeals of the United States. On February 7th, 2019. The Seventh Circuit of Appeals, GRANTED, Mr. Murphy's petition. For a re-hearing. On February 8th, 2019. The Seventh Circuit of Appeals denied. Mr. Murphy's rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant Murphy has the right under the Fifth Amendment not to be a witness against himself, Murphy was force, by Investigator Al Williams and James Johnson at the Muncie Police Department to make a statement. Both Investigators took Murphy into a holding cell with a working camera that they neglected to turn on so that the threats and questioning would 'not be recorded. Murphy has the right under the Sixth Amendment to have the Assistance of Counsel for his defense once he asked for an attorney, by Investigator Al Williams own statement he kept questioning Murphy to make sure that's what Murphy really wanted. Nor deny to any person within its jurisdiction the equal protection of the law under the Fourteenth Amendment. The law is to protect everybody, no matter race, color, or the accused crime with an Effective Assistance of Counsel. Murphy received Ineffective Trial and Appellate Counsel, which he will show in the Statement of the Issue and Reasons for Granting the Petition.

STATEMENT OF THE CASE

On March 21, 2009, Robert A.C. Murphy was charge by information with count 1 murder, pursuant to Ind. Code 35-42-1-1, and count II, Felony murder. Defendant Murphy filed a motion for Discovery pursuant to LR19-CROO-DLR-011(discovery material) was granted.

On December 12, 2009, the trial court advised defendant of his right to trial by jury and defense counsels filed a motion to waive jury trial, a requested a bench trial which was granted by the court. On February 09, 2010, Murphy was found guilty. March 09, 2010, the court sentenced Murphy to 65, years. On March 15, 2010, the Appellate filed notice of Appeals for Appellant. On January 27, 2011 the Court of Appeals affirmed the conviction and sentence. On February 28, 2011, Appellate Counsel filed a petition to transfer to the Indiana Supreme Court,

On April 07, 2011, Supreme denied transfer. On December 05, 2011, Petitioner filed his Post-conviction relief and requested a change of venue, which was denied by the court, motion for reconsideration was file and denied December 27, 2011, On January 24, 2012, and Petitioner filed a request for issuance of subpoena Judge Thomas A Cannon Counsel John Brooke and Ross L Rowland. On May 07, 2012, Petitioner filed Motion for Discovery of evidence favorable to the accused. Court denied motion May 17, 2012. On September 10, 2014, Petitioner filed Amended petition for post-conviction relief. On September 16, 2014, Petitioner filed request for issuance of subpoena Team Verizon wireless, Ameritech, and Sprint corporate office, which was denied by the court. On December 02, 2014, Petitioner Murphy filed his Motion to Release Mental Health Records, pursuant to Ind. Code 16-39-2-6 (a) (14) and 16-39-2-8 (16-39-3-3). Which was denied. On December 17, 2014, an evidentiary hearing was conducted. On May 04, 2015, Petitioner Murphy filed his finding of facts and conclusion of law. On June 1st, 2015, Petitioner Murphy filed his appellant's objection(s) on part to the states finding of facts. On June, 2015, Trial order Judgment against Petitioner and in favor of the state. On June 17, 2015, Petitioner filed his motion for leave to proceed on appeal in forma pauperis by mail. On July 8th, 2015, Petitioner Murphy filed his notice of appeal. On August 6, 2015, Michael A. King the clerk of the Circuit Courts of Delaware County filed Notice of completion of Record attached to this notice of completion, states the following documents are missing from file. On August 28, 2015, Petitioner Murphy filed his request for access to public record.to the Indiana State police Laboratory #90F-963. **On September 30, 2015, Mr. Ryan A. Locke, for the Indiana State police, Legal Counsel at 100 N. Senate Ave IGCN 340 Indianapolis, In 46204 Respondent stated: If, Murphy needs, the records, other avenues exist by which he can lawfully obtain protected information for specific purposes. Post-conviction Rule provides a mechanism**

for any person who has been convicted of a crime and claims that there exists evidence of material facts, not previously presented and heard to request the court to institute a post-conviction proceeding in the interest of Justice. See Indiana Post-Conviction Rule PC 1 (a)

(4). On November 13, 2015, Murphy filed his Pro se, Petition Motion to compel. On November 25, 2015, motion was denied. On December 10, 2015, Murphy filed Motion to Reconsider. On December 16, 2015, Motion was denied. On January 13, 2016, Murphy filed his Pro se, Motion for Leave to stay in the Court of Appeals. On January 21, 2016 Motion was denied. On February 04, 2016, Petitioner Murphy filed his Appellants Brief. On May 13, 2016, Appeal was denied. On June 30, 2016, Murphy's petition for transfer was denied. Other collateral attacks. On March 17, 2016, Murphy filed his Successive PC. On May 11, 2016, Motion was denied. On July 21, 2017, Appellant Murphy filed his Habeas Corpus petition with the Northern District of Indiana, South Bend Division On April 17, 2018. The Court denies the habeas corpus petition. On April 17, 2018, Appellant Murphy filed his notice of appeal to the United States Court of Appeals for the Seventh Circuit. On May 16, 2018, Appellant Murphy filed his Verified Motion to Alter\ Amend Judgment. On June 4th, 2018 Appellant Murphy filed his Travers with his Memorandum of law Supporting Facts for issuance of Certificate of Appealability. On December 26, 2018. The Seventh Circuit denied Murphy's Certificate of Appealability. On January 23, 2019 Murphy filed his Motion for a Rehearing. On February 7th, 2019, Motion is GRANTED. On February 8th, 2019 Motion for Rehearing was denied.

REASONS FOR GRANTING THE PETITION

1). Appellant Murphy was denied his rights to have counsel present during his custodial interrogation, under the Fifth and Fourteenth Amendments to the United States Constitution. Once Murphy had asked for an attorney the questioning continue on by Investigator Williams

(Tr. Pg. 92), stating that he kept questioning Murphy to make sure he wanted an attorney;

Investigating officer Johnson stated that Murphy was not re-read his Miranda rights nor asked to sign another waiver for the second interview(Tr. Pg. 160-161). Johnson also agreed that Murphy didn't have an attorney and the police department wasn't going to get an attorney for him. (Tr. Pg. 164, line 12-14). Which is a Miranda rights violation. When the questioning never stop and nobody go get or look for an attorney, Murphy's rights was re-moved by both officers.

2). Appellant Murphy's due process was violated when he was denied the right to complete the record. On January 21, 2016, Murphy's Verified motion for leave to stay post-conviction Appeal Proceedings was filed, after being inform on August 6, 2015, Michael A King, the Clerk Deputy Clerk of the Circuit Courts of Delaware County filed Notice of completion of Clerk Record stating the following documents are missing from file, 2\2\2010 stipulation concerning testimony of DNA Expert Serafina Salmo. 1) On April 1st 2009, Murphy filed his pro se Motion for Discovery Material (LR19-CR00-DLR-011). Trial court granted. 2) On April 28-29, 2009, Motion to Produce and Motion for Disclosure of Brady information was filed by counsel (See Ex. R; Ex. S). 3) Supp. Ex 1. A). that is attached to Murphy's Verified Motion for Leave to stay PCR. Under the Rule of the United States Supreme Courts Rules 23, stay an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. On Certiorari, the United States v. Jencks 353 U.S. 657, 1 L Ed 2d 1103, 77 S.Ct. 1007 (1957), reversed stating: that the defendant was entitled to an order directing the government to produce the reports for his inspection, it being sufficient that they contained statements of government witness relating to the events and activities to which these witnesses testified at the trial; the practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused,

was disapproved. It was also held that if the government exercised its privilege to withhold the reports in the public interest, the criminal action must be dismissed. In *Giglio v. United States*, 405 U.S. 150, 31 L.Ed.2d 104(1972). States: when reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the rule that suppression of material evidence justify a new trial irrespective of good faith or bad faith of the prosecution. Appellant Murphy was denied his due process rights to properly prepare his defense to prove his innocence.

3). Appellant Murphy's Sixth and Fourteenth Amendments right which guarantee criminal defendants the right to effective assistance of counsel at trial and in direct appeals under *Strickland v. Washington* 466 U.S.668 (1984) was taken away when Murphy Appellate counsel Mr. Ross L Rowland refuse to remove himself do to life threatening illness that took his ability to give a hundred percent. The Indiana court of appeals stated that in their finding of Murphy's direct appeal brief that was done by Mr. Rowland, Murphy failed to comply with Indiana Appellate Rule 46(a) (8). Murphy sole development of this issue amounts to the enumeration of case law regarding the assertion of Miranda right and the voluntariness of a statement blatantly missing from his brief is the application of those precedents to the facts presented to us by way of cogent reasoning .(See #4 Ex. D. Brief of the Appellee). Murphy was blame for his counsel mistake's which violated his Sixth and Fourteenth constitution under professional conduct Rule 1.16(a) (2).

4). Appellant Murphy's due process was violated when the state failed to turn over all Exculpatory evidence, which is a Brady violation, after a Motion for Disclosure of Brady information was filed in April 23, 2009. This cannot be ruled as a harmless error. Two things in which the state and the trial judge cannot take away from the facts.

- 1). When Murphy was out of town calls was still being made, No pings came from Flint, Mi.
- 2). When Murphy was arrested on March 21, 2009, cell phone calls were still being made off the victims cell phone up to two more days, after Murphy was in jail. The state failed to release the pings locations of the cell tower, in which denied Murphy his due process to having a fair trial.
- 5). Appellant Murphy's due process for a fair trial was violated after the state failed to correct the false testimony and the judge refuse to order the state after it was pointed out to the judge. Which leads to Abuse of discretion after when the trial judge repeated the false testimony of both investigating officer's. (See. #3.Ex.C. Appellants brief Pg. 9, 10) ;(Tr.218, 19, 20, 21). A conviction abstained through use of false evidence known to be such by representations of the state must fall under the Fourteenth Amendment, U.S. Cont. Amend. XIV. (See Trial judge sentencing order Ex. C Pg. 5). This issue falls within Napue v. Illinois, 360 U.S. 264(1959) A lie is a lie no matter what. Murphy's was cause great harm during his bench trial by the state the states witness's and judge this took away Murphy's fair trial.
- 6). Appellant Murphy's Sixth and Fourteenth Amendment was violated when his Appellate Counsel failed to raise, argue and investigate the Eye witness.(See Police case report CR#09-375). Murphy's appellate counsel was not competent, due to the fact that he was fighting for his life. This issue would have help proved Murphy's innocence a long with the DNA that was found. Murphy never had a chance at winning his direct appeal with his counsel illness taking over.
- 7). Appellant Murphy's Trial and Appellate Counsel was ineffective for failing to Investigate and have their own DNA Expert for testing. To disclaim the states personal opinion of the DNA that was found. The state failed to support their claim with facts. A). Murphy wishes to exercise his

rights under the Fourteenth Amendment of the United States Constitution and the Indiana Constitution to have his own DNA testing done under IC.35-38-7-8.

All of Murphy's issues show that he was never given his due process right and effective assistance of trial and appellate counsel. Murphy pray that he is given a new trial so he can prove his innocence.

8). Appellant Murphy's Sixth Amendment rights was violated when he was denied the right to know the true nature of the charges against him.

9). Appellant Murphy Trial counsel was ineffective for failing to object to the testimony of Kenneth Watson once counsel was inform of Mr. Watson mental illness.

Reason for Granting Appellant Murphy's Petition. Murphy's Miranda rights were taken from him when he ask for an attorney after stepping into the police department. Murphy's trial counsel failed to investigate the charging information, the eyewitness report, the finger prints, the DNA that was found, and when the state didn't found any DNA on Murphy's shoes, counsel failed to investigate the pings of the cell towers. After his client was accused of making calls, Murphy's. Appellate counsel failed to investigate and to remove himself from Murphy's case. Murphy's 5th, 6th and 14th Amendment were violated, which causes ineffective Trial and Appellate counsel.

Murphy's due process rights was taken from him when he was denied the right to DNA testing, no hearing was held. Murphy is seeking DNA testing, and that the DNA that was found to be check once again in the DNA data base for a match to find the killer, history have shown that DNA has proven innocence and guilt, of an Accuse. And false testimony of the State. There was a fight in order for the DNA to have been found next to the victim's head in a fist shape print on the bed and pants, this person cannot be ruled out. Murphy is innocence of this crime, DNA, Eye

witness, finger prints (See case #: 09-0003758) and the call's from the victim cell phone. These issues cannot be ruled and over look as a harmless error.

STATEMENT OF THE ISSUE

Appellant Murphy's First issue

Whether Murphy's Fifth, Sixth, Fourteenth Amendment Rights and his Miranda were violated.

In 1964, This Honorable U.S. Supreme Court ruled in (Escobedo v. Illinois, 12 LED2D 977, 378 US 478. (1964) that counsel is necessary at police interrogation to protect the rights of the defendant, and should be provided.

In Appellant Murphy case like (Mr. Escobedo) Murphy asked for an attorney more than onces.in Escobedo claimed that while he repeatedly ask for his lawyer he was told "your lawyer doesn't want to see you. Eventually Escobedo confessed. On March 21, 2009 Murphy came down to the Muncie police department to answer questions. Within a few min's Murphy asked for an attorney and was place in a holding cell with a working camera, which both investigating officers elected not to turn on while they continue to interrogate Murphy.,(Tr. Pg. 88 through 103).

On January 25, 2010 Lieutenant Allen Williams testified that the defendant (Murphy) while in the holding cell, there was an exchange between him and the defendant, (in the holding cell officer Williams inform Murphy that his Grandkids would be picked up by C.P.S. in Flint Michigan, and his son will be charge in the case), but it was not recorded although it was capable of being videotaped (Tr. 92). Investigator Williams stated that even after Murphy's requested an attorney again, he kept questioning Murphy to make sure he wanted an attorney (Tr. Pg. 100-103). There was never a new waiver signed for the second interview (Tr. Pg. 117) Investigator Johnson (Tr. Pg.137) stated when he took the stand, he also

confirmed that no attempts were made to provide a public defender or any other attorney for the defendant. (Tr. Pg. 160-161) Johnson further testified that the defendant was not re-read his Miranda rights nor asked to sign another waiver for the second interview (after Murphy had requested an attorney) Johnson also agreed that Murphy didn't have an attorney and the police department wasn't going to get an attorney (Tr. Pg. 164, line 12-14) On January 1, 2011 A New Rule of Evidence Article VI Ind. R. Evid. 617 History: Adopted September 15, 2009. States Unrecorded statements during custodial interrogation. (a) In a felony criminal prosecution, evidence of a statement made by a person during a custodial Interrogation ("I wish to continue") in a place of Detention shall not be admitted against the person unless an Electronic Recording of the statement. This issue cannot be rule as a harmless error it is obvious there was no counsel call for Murphy's defense, both Investigating officer's admitted to violating Murphy's Miranda rights. Appellant Murphy is seeking his relief by asking for a new trial.

Appellant Murphy Second issue:
Whether the Court of Appeals violated Murphy's
Due process by denying him the right to complete the record.

In Zer-Ilan v. Frankford 221 F.3d 693,698(5th cir 2000) the court held that the burden of creating an adequate record rests with the Appellant because the purpose of the record designation requirements is to prove reviewing court with and adequate basis for evaluation the Appellant's claims on Appeal. On August 6th, 2015 Deputy Clerk of the Circuit Court County of Delaware, Michael A. King filed a Notice of Completion, it states as following documents are missing from file 2-2- 2010 stipulated concerning testimony of Seratina Saline(DNA Expert) Murphy was never given this information at his trial nor, was Murphy aware of any hearing on this matter. The state did knowingly withheld exculpatory evidence. (See. Ex. T dated 6/9/2009Supp. Ex C)

(case no. 18Co5-0903-MR-1 and cause number 18A02-1603-SP-610) when Murphy filed his pro se Motion for Discovery material (LR19-CROO-DLR-011) on April 1st, 2009. In June 6, 2009 and July 9th, 2009, In the States response **there are no other issues outstanding concerning discovery in this cause at this point. (See Ex. T).** Appellant Murphy took every step to obtain the missing document during his Appeals. On January 20, 2016, Murphy filed his Verified Motion for Leave to Stay Post-Conviction Appeal Proceedings with attaching exhibits (see document 19-1 filed 04\18\17, page 23 of 44 USDC INND case 3:16-CV-00606-PPS-MGG, Appellate Case No.18A02-1507-PC-849).

In Jencks v. United States, 353 U.S. 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007 (1957), This Honorable Court Ruled that the necessary essentials of a foundation for an accuser's right to the production for inspection of documents in the governments possession are that his demand is production of specific documents containing statement taken from person or informants offered by the government as witness at trial and not for any fishing expedition, **(Ryan A. Locke, Legal Counsel for the Indiana State Police, 100 N. Senate Ave, IGCN 340 Indianapolis, IN 46204. Stated. If Mr. Murphy needs the records, other avenues exist by which he can lawfully obtain protected information for specific purposes. Citing Post- Conviction rules PC.1(a)(4) provide a mechanism for any person who has been conviction of a crime and claims that there exists evidence of material facts, not previously presented and heard, to request the court to institute a post- conviction proceeding in the interest of justice).** On the chance that something impeaching the testimony of the witnesses may turn up for production purposes it need only appear that the evidence is relevant, competent and outside of any exclusionary rule. **Under the Rule of this United States Supreme Court stated Rule 23 stays an application for a stay will not be entertained unless the relief requested was first sought in the appropriate**

court or courts or from a judge or judges thereof. Murphy's Sixth and Fourteenth Amendment to the United States Constitution and Indiana Constitution, Article 1,12 were violated when the state failed to turn over all evidence, when Appellant Murphy filed his motion for discovery that was granted by trial judge on April 1st, 2009. Federal Rule 43, of the Criminal Procedure states "the defendant shall be present at the arraignment, at the time plea, at every stage of the trial, (any hearing). Appellant Murphy Trial Attorney never inform him of any hearing about D.N.A. expert Seratina Saline stipulation concerning her testimony. Which is a violation of Murphy's 6th and his 14th Amend. On May 07, 2012, and January 30, 2015, Appellant Murphy filed his Motion for Discovery and inspection and Disclosure of Evidence Favorable to the Accused. On May 17th 2012, the trial court, Order denying Petitioners Motion for Discovery, stating Petitioner does not have a right to fish through official's files and any post-conviction relief discovery order should be appropriately narrow and limited. No order was giving for the January 30th motion. (See Appellant's PCR Appendix volume 1 of 2 page 155, and volume 2 of 2 page 378 through 388), The State prosecutor violated Murphy's Sixth and Fourteenth Amendment when they refused to follow trial court order which is a discovery violation had the state turn over all evidence to the defendant no judge or jury would have found Murphy guilty. In Brady v, Maryland the United States Supreme Court held: the suppression by the prosecutor of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith of the prosecution. 373 U.S. at 87, S. Ct. at 1196-97, 10 L.Ed.2d at 218. To prevail on a claim that the prosecution failed to disclose exculpatory evidence, the defendant must establish 1) that the prosecution suppressed evidence. 2) That the evidence was favorable to the defense. 3) That the evidence was material to an issue at trial. A Brady violation will warrant a reversal only if there

is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. The state committed a Brady and discovery violation and violated Murphy's due process. When reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the rule that suppression of material evidence justify a new trial irrespective of good faith or bad faith of the prosecution. [10] For these reasons, the due process requirements enunciated in Napue and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion. Reversed and remanded. Giglio v. United States, 405 U.S.150, 31 L.Ed. 2d 104 (1972). On March 10, 2017 Appellant Murphy filed his Motion for Discovery and Inspection of the States records. With the U.S. District Court Northern District case: 3:16-CV-00606. On March 14th, 2017, Motion was denied. Section 753(b) provides that "[t]he original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge." Inmates like Chavez cannot visit the clerk's office to inspect a court file, yet we recognized in Rush v. United States, 559 F.2d 455, 458 (7th Cir. 1977), that unrepresented, indigent inmates "have an absolute personal right to reasonable access to the pre-existing files and records of their underlying case." The "statutory inspection rights granted by 28 U.S.C. § 753(b)," we reasoned, apply equally to inmates, and thus we concluded that "requests for the pre-existing record in the underlying criminal proceeding should be granted as of right by the district courts to prisoners seeking to use the record to prepare a collateral attack on their conviction." Id. at 459-60; see also Smith v. U.S. District Court Officers, 203 F.3d 440, 441 (7th Cir. 2000). ("The public, including the parties to a suit, have a right of access to the records of a judicial proceeding."). Had the evidence been

disclosed to Murphy the result of the proceeding would have been different in Murphy's favor, that no juror or judge would have found him guilty.

Appellant Murphy's Third issue:

Whether Appellate Counsel Performance

Violated Appellant's Sixth and Fourteenth Amend

When Counsel Failed to Remove Himself

The Sixth and Fourteenth Amendments which guarantee criminal defendants the right to effective assistance of counsel at trial and in direct appeal. *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts v. Lucy*, 469 U.S. 387 (1985) the standard's for assessing trial and appellate counsel's performance are the same. 1.) The Petitioner must establish that counsel's performance was deficient and that the deficiency prejudiced him. (a) Under professional conduct Rule 1.16 (a) (1) (2) **Professional Conduct Rule 1.16 (a) (2) the lawyer physical or mental condition materially impairs the lawyer ability to represent the client.** In which Murphy raised in his issue that counsel failed to properly raise and argue meritorious issues that is clearly from the face of the record. (b) The Indiana court of Appeals stated that in their finding of Murphy's direct appeal brief that was done by Counsel Ross L. Rowland, Murphy failed to comply with **Indiana Appellate Rule 46 (a) (8)**. Murphy sole development of this amounts to the enumeration of case law regarding the assertion of Miranda right and the voluntariness of a statement blatantly missing from his brief is the application of those precedents to the facts presented to us by way of cogent reasoning. (See. #4 Ex. D Brief of Appellee) (c) Murphy was denied effective assistance of appellate counsel and his due process was violated when counsel failed to remove himself from Murphy's case, as counsel health kept getting worst.

Mr. Rowland was not competent and was not able to give a hundred percent due to his life threatening illness that took his life the following couple of Months. Murphy was blame for his counsel mistake, this can't be ruled as a harmless error. Appellant Murphy is seeking a new trial in this matter. And be giving the right to inspect the missing documents and a hearing to prove his innocence.

Appellant Murphy's Fourth issue:
Whether the State Committed a Brady
Violation when the State Failed to
Turn over Exculpatory Material Evidence

The proper role of the criminal prosecution is not simply to obtain a conviction. In *Brady v. Maryland*, (1963) 373 U.S.83, 10 L.Ed. 2d 215, S.Ct. 1194, it was to insure that defendants are not subjected to unfair trial that the limits on prosecutorial misconduct evolved, accordingly, when exculpatory evidence is withheld, attention focuses on it is effect on the defendant's right to due process, the process, the prosecutors intentions are irrelevant. *United State v. Agurs*, 427 U.S.97, 110. On December 17-18, 2014, Murphy submitted evidence at his evidentiary hearing on all three phone companies that had the information that Murphy was seeking. (See Ex.4, 5 and 6, case number 18A03-1507-PC-849) On October 16 and December 4th, 2014 Murphy filed his request for issuance of subpoenas for "Team Verizon wireless" Ameritech and Sprint. **The PC Courts denied stating: that the testimony from this business entity would be required other than to repeat what is already in the record, and therefore, further testimony from this witness would not be relevant and probative. (See Appellant Murphy's Appendix's volume 1, Of 2 page 202.** On December 9th, 2014 Murphy's Motion Demand to Produce Trial Rule 26(a) (3) was filed with the PC Courts (See page 180 of Murphy's Appendix's Volume 1,) **The State responded by stating that "the state is not in possession of true and accurate**

complete original recordings and other demoralization of every test [sic] messages and cell site location from law enforcement resources team Verizon wireless, **thus none can be produced.** In Jencks v. United States 353 U.S. 657, 1 L. Ed 2d. 1103, 77 S.Ct 1007 (1957). This Honorable Court Ruled, It was held that the defendant was entitled to an order directing the government to produce the reports for his inspection, it being sufficient that they contained statements of government witness relating to the events and activities to which these witnesses testified at the trial; the practice of producing government documents to the trial Judge for his determination of relevancy and materiality, without hearing the accused, was disapproved, it was also held that if the government exercised its privilege to withhold the reports in the public interest, the criminal action must be dismissed. Necessary to his defense. The accused is given an opportunity to argue that the privilege asserted by the Government is inapplicable and that, even if applicable, his need for the evidence, under the circumstances of the case, outweighs the Government's interest in maintaining secrecy. The problem is closely related to that involved in Roviario v United States, 353 US 53, 1 L. E.D. 2d 639, 77 S Ct 623, supra, dealing with the necessity of the disclosure of an informer's identity in a criminal case. There this Court said "[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 US at 62. The trial judge exercises his discretion with knowledge of the issues involved in the case, the nature and importance of the Government's interest in maintaining secrecy, and the defendant's need for disclosure. By vesting this discretion in the trial judge, the

conflicting interests are balanced, and a just decision is reached in the individual case without needless sacrifice of important public interests. 5 [353 US 678]. The State Prosecutor violated its duty to inform defense counsel for the defendant of material exculpatory evidence when the state failed to report to the Court, Defense counsel, and Law enforcement that phone call were still being made on the victims cell phone while the accused (Murphy) was in jail, no attempt to place a trace on the victims phone was made. **The state stated that Murphy had the victim's cell phone, (Tr. 1204) during trail and in there closing argument. During Murphy's sentencing hearing, The Trial Judge stated, "Murphy placed calls on the victim's cell phone so that it appeared that she was still alive."**(See Ex. C pg. 5 sentencing hearing). In Quercia v. United States, 77 L.ed.2d 1321,289 u.s.466 (1933) [4][5] this privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. **He may analyze and dissect the evidence, but he may not either distort it or add to it.** His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence **"should be so given as not to mislead, and especially that it should not be one-sided;" that "deductions and theories not warranted by the evidence should be studiously avoided."** Starr v. United States, 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919; Hickory v. United States, 160 U. S. 408, 421-423, 40 L. ed. 474, 478, 479, 16 S. Ct. 327. He may not charge the jury "upon a supposed or conjectural state of facts, of which no

evidence has been offered." In Murphy's bench trial, in which the trial judge become the keeper and referee of the law. This cannot be ruled as a harmless error. A reason probability is one sufficient to undermine confidence in the outcome. (Murphy 6th and 14th Amendment was violated by both trial judge and state prosecutor) Murphy was denied his rights to discovery material pursuant to LR.18-CROO-DLROLL, when the state failed to comply with the trial court order on or about April 1, 2009. A prosecutor may not suggest that other supportive exist which the government chose not to develop. Ginsberry v. United States, (Murphy made all those phone calls, "look who had the phone Tr.1204 lines20,25 to 1205 line1,4") this can't be ruled as a harmless error- nor- no constitutional violation. Appellant Murphy is seeking a new trial do to the facts that the state withheld exculpatory evidence, when the state knowingly kept evidences of calls that was still being made on the victim's cell phone while Murphy was in jail.

Appellant Murphy's Fifth issue:

Whether the State Committed Prosecutor Misconduct

When State failed to correct false testimony

Which violated Murphy due process

A conviction obtain through evidence which the state knows to be false violates a defendants due process rights. St. Johns v. State, 523 N.E.2d 1353, 1357 (Ind. 1988) citing Napue v. Illinois, 360

U.S. 264, 79 S. Ct. 1173, 3 L.ED.2d 1217 (1959). Appellant Murphy trial counsel notified the

Trial court of the false testimony of both officers for the state. (S.H.Tr. line 3-6 pg. 155).

On January 28, 2010, defense enter into evidence defendants Exhibit A (S.H.Tr. pg. 220); See State's objection on State page 220, lines 5-10). Defense counsel explained on pg. 220, lines 12-24. The state withdraws there objection. (See S.H.Tr. line 1 pg. 221. Murphy's trial counsel failed to move or file for an interlocutory appeal to have both officers testimony removed after

the trial judge was informed, and refuse to order the state to correct the false testimony. The principle that a state may not knowingly use false evidence including false testimony to obtain a tainted conviction implicating any concept of ordered liberty does not cease to apply merely because the false testimony goes only to the witness, *People v. Savvides*, 1 NY. 2d 554, 557, NYS 2d 885, 887, 136 NE.2d 853-55. The trial courts repeated the false testimony of both officers in his finding of guilty. (Ex. C, pg. 5). A conviction obtained through use of false evidence known to be such by representations of the state must fall under the Fourteenth Amendment, U.S. Const. Amend. XIV. The same result obtains when the state, although not soliciting false evidence allows it to go uncorrected when it appears. It is of no consequence that the falsehood bore upon the witness's credibility rather than directly upon defendant's guilt. **A lie is a lie no matter what.** It was held that under the circumstances described above the conviction violated the due process clause of the Fourteenth Amendment *Napue v. Illinois*, 360 U.S.264 (1959).

Appellant Murphy's Sixth issue:

Whether Appellant Murphy Sixth and Fourteenth

Amendment, were violated when Appellate Counsel

Failed to Raise Eyewitness Account

When counsel fails to function as a vigorous advocate of the defendant, the adversarial process loses its character as a confrontation between adversaries and the constitution guarantee is violated. See *US v. Cronin*, 462 U.S. 648 104 S.Ct. 2039, 2045, 2046 (1984). Appellate counsel failed to raise and argue this issue, of the Eyewitness Account. Murphy's constitutional rights were violated because of counsel ineffectiveness, which can't be ruled as a harmless error.

When on the face of the record, evidence reveals that there was someone else's D.N.A that was discovered next to the victim's head, in a fist print and on her pants. In conjunction with the evidences that the appellate counsel failed to raise and argue. In Appellant Murphy's supplement case report which stated that on March 19, 2009, Melissa Hargars informed her husband Chris Hargars that she observed a white short stocky built subject leaning up against [a] dark blue vehicle smoking a cigarette. He advised she stated she thought the subject looked suspicious, she went inside her house, and when she looked back outside the vehicle was gone"(See Police case report CR# 09-375) Also see witness testimony, Tr. Pg. 1111 lines 9-23); Tr. Pg. 1112 line 9). **The truth of the matter is had the eyewitness which is the victim's neighbor had seen a short stocky black male, then the state would be all over this issue, stating it was Murphy that was seen outside the victim's house.** [5] When an attorney errs in initial- review collateral proceedings it is likely that no state court at any level will hear the prisoner (Murphy) claim Brown v. Brown, Nov. 16-1014 (2017). Murphy argues the purpose of the Sixth Amendment effective assistance guarantees to ensure that criminal defendants receive a fair trial. (Hearing on direct appeal) Strickland v. Washington, 466 US 104 S.Ct. 2052, 2065 (1984). Counsel was not competent, he was fighting the illness that took his life. Murphy was denied his rights to have a competent Appellate Counsel for his Direct Appeal, The Sixth and Fourteenth Amendments which guarantee criminal defendants the right to effective assistance of counsel at trial and in direct appeal. Strickland v. Washington, 466 U.S. 668 (1984); Evitts v. Lucy, 469 U.S 387 (1985) the standard's for assessing trial and appellate counsel's performance are the same. And eyewitness has been use in many case's to show innocence or guilt in violent and non-violent cases. This can't be ruled as a harmless error, Murphy's rights were violated.

Appellant Murphy Seventh issue:

Whether the Trial and Appellate Counsel
were ineffective for failing to raise and investigate

The DNA that was found

On March 22, 2009 the state sought a court order to remove DNA from Murphy and his property. The state was seeking for a match to the DNA that was found next to the victim's head and on her pants. Both Trial and Appellate Counsel were ineffective for failing to investigate and to have their own DNA expert to test the victim's car, and to have states witness Jason Osborn tested also Lamont Gardner, the victim's son which the state mention in there closing argument and during trial (Tr. Pg. 1206 lines 16-25) that the DNA found next to the victim's head belong to her son, (stating that's where he lay and sleep at). No objection was given by the defense when the state made their statement. No further testing was order. **(On Dec. 18, 2014) five years later during Murphy's evidentiary hearing the PC court ordered that (item number 131)(one white pair of Nike Athletic shoes) in the Muncie Police Department case report (number 09-3785) shall be returned back to the defendant.** No match was found of the victim's overwhelming DNA that the state mention. **The state failed to mention the fact that the DNA was not a match to the victim's son which they stated in their personal opinion.** (Tr. Pg. 847-48). As stated before Mr. Murphy can be excluded (Tr. Pg. 837. Line 13-23; Tr. Pg. 15-17) Tr. Pg. 846 lines 19-23). On February 25, 2015, Murphy filed his pro se motion for DNA testing. (See#2, Ex R- Successive petition for PCR #3, Ex C order denying successive petition #4, Ex D- petition for rehearing #5 Ex E-order denied. Appellant Murphy has taken every step for DNA testing to take place under IC 35-38-7 seg.

The Indiana Legislature has recognized the power and importance of DNA testing in criminal cases through the passage of I.C. 35-38-7, et. DNA testing may demonstrate that a defendant is not guilty of the charge, and if that is the case testing should be done. Appellant Murphy Sixth and Fourteenth Amendment to the United States constitution and Indiana constitution Article 1, 12 were violated when he was denied the right to DNA testing. Appellant Murphy seeks to have the victim's car tested for matching DNA since the state stated that DNA was found in the victim's back seats. This can't be ruled as a harmless error. Murphy Respectfully request that this Honorable Court would order testing done on the following:

1). Jason Osborn 2). Lamont Gardner 3). The victim's son and the front and back seats of the car which is in the Muncie police department evidence property room, along with checking the DNA data base.

Appellant Murphy's Eight issue:

Whether Murphy's due process was violated

Under Ineffective Trial and Appellate Counsel

Under the Sixth Amendment of the United States Constitution states that "[i]n [all] criminal prosecutions the accused [shall] enjoy the right to a speedy and public trial by an impartial jury of the state, **and to be informed of the nature and cause of the accusation;** to be confronted with the witness against him; to have compulsory process for obtaining witness in his favor and to have the assistance of counsel for his defense (emphasis added). Appellant Murphy raised ineffective trial and appellate counsel both failed to raise and argue the charging information that was filed against him. 1). Murder and 2). Felony murder. As stated in Article 1 section 13 of the United States Constitution and the Indiana Constitution, entitles a criminal defendant to be advised of the nature and cause of the accusation against him and to have a copy thereof of the

information which must be include in an indictment or information alleging a criminal offense is delineated in Indiana code 35-34-1-2, murder, felony murder, Attempted robbery must be separately and distinctly alleged in the charging information. Murphy was never charged with robbery or attempted robbery, as a class A, B, C, or D. The victim's property was used as evidence even without Murphy being charged with the property. A person who knowingly or intentionally take property from another person or from the presence of another person: (1) By using or threatening the use of force on any person; or (2) By putting any person in fear: commits robbery, a class C felony. However, the offense is a class B felony if it is committed while armed with a deadly weapon and class A felony if it results in either bodily injury or serious bodily injury to any other person. See Burris v. Farley, 845 f. sup. 636, (N.D. Ind. 1994). A person who knowingly or intentionally kills another human being, or kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery, commits murder, a felony. Ind. Code 35-42-1-1. A defendant cannot be convicted of both murder and felony murder when both arise from a single homicide. Shield v. state 493 N.E.2d 460 (1986) shields committed one homicide, yet he was convicted of murder and felony murder. Murder and felony murder constitute the same offense, and one may not be twice punished for a single homicide. Bean v. state (1978). 267 Ind. 528, 371 N.E.2d 713. Prevailing authority is to the contrary. A record of conviction has potential social and legal consequences which operate irrespective of whether a sentence is imposed Benton v. Maryland (1969). 395 U.S. 784, 89 S.Ct. 2056, 23 L.E.d 2d 707. Clearly, a judgment of conviction alone, without imprisonment there on, constitutes punishment. Ball v. United States (1985), 470 U.S. 856, 105 S.Ct. 1668,84 L.Ed.2d 740. Appellant Murphy's Trial judge did knowingly transfer intent of a **ROBBERY** that was never charge against Murphy. in order to get around the DNA

that proves Murphy's innocence. 2) When conviction for a greater crime cannot be had without conviction for a lesser crime, 1) Where under state law, proof of the underlying felony (robbery with firearms) is needed to prove the intent necessary for a felony-murder conviction. *Harris v. Oklahoma* 53 LED2D 1054, 433 US 682 (1977). This was done in order to get a conviction for murder and felony murder without any underlying felony to accompany the felony murder, as a class A, B, C. this cannot be ruled as a harmless error. Murphy's trial counsel was ineffective and his due process was violated. Before the court may enter judgment and impose sentence upon multiple counts the facts giving raise to the various offenses must be independently supportable separate and distinct. A lesser included offense of murder should have been included in the charging information.

Appellant Murphy's Ninth Issue:

Whether Murphy Trial Counsel and Appellate was Ineffective

For failing to object and raise on Direct Appeal

On February 02, 2010, the state witness Kenneth Watson took the stand stating that he don't want to testify (Tr. Pg. 612. Line 3). The state stated, Okay, but you understand that you have to under our subpoena. Murphy's Trial Counsel failed to object, to the state statement and the trial court failed to explain to Mr. Watson his. Murphy's trial counsel Mr. Brooke, failed to investigate the mental history of Mr. Watson after he was inform by Nicole Watson which is the mother of Kenneth Watson. She stated that her son suffers from paranoid schizophrenia. Murphy raised this issue at his evidentiary hearing, Murphy's filed subpoena on all parties involved with Mr. Watson treatment. However, the court denied each subpoena. (See Exhibits 7, 8, and 13). On February 04, 2010, Nicole Watson took the stand to explain that she know her son because she is primary care giver. (Tr. Line 5-13, pg. 1129; pg. 1130 line 4 to 6) also (pg. 1131 line 4- 14; pg.

1132 line 9-12). Trial counsel failed to object to the testimony of Mr. Watson as being incompetent as a witness because he had mental problems. The following colloquy took between defense counsel and the trial court judge.

MR. BROOKE: Kenny did testify that he had been under doctor's care and that- but he wasn't on medication at the time.

TRIAL COURT: Right.

MR. BROOKE: During Cross- Examination.

TRIAL COURT: You didn't object to his testimony on

MR. BROOKE: No, I ask him about it.

TRIAL COURT: I understand. But you didn't object to his testimony as being incompetent as a witness.

Mr. Watson was the states only witness that stated he seen, Mr. Murphy driving the victim's vehicle. The state witness stated that Mr. Murphy was going to stripe the victim's car. The motor, windows, doors, gas tank, tires, transmission, etc., Was still in tack. Investigator Henry and Rodney Fraiser both examined the vehicle and not once did they state that the victim's car was strip (P.E. 9405: 03-24-2009). Mr. Murphy was arrested On March 21, 2009. For two to three days, somebody was still driving the victim's car, until March 24, 2009. It was stated that the victim's car damage on the rear of the vehicle that appeared to be fresh with yellow and red paint transfer. (See Exhibit P.E. 9405). This shows that Mr. Murphy was not driving the victim's car like Mr. Watson testified too. In Michael L. Owens v. State 750 N.E.2d 403; 2001. Court of Appeals of Indiana Second District. Stated in there overview, Failure to object at trial made trial counsel's actions ineffective, while failure to raise these issues on direct appeal made appellate counsel's action ineffective. The outcome: the appellate court reversed

the denied of defendant's motion for post-conviction relief and remanded the case for a new trial. The Sixth Amendment to the United States Constitution guarantees the right of a defendant in a criminal case to the effective assistance of counsel. When reviewing a claim of ineffective assistance of counsel, a reviewing court initially presumes that counsel's representation was within the wide range of reasonable professional assistance. The test to be applied when ineffective assistance of counsel is alleged is two-pronged. First, the defendant must prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and, second, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. It has become a Fourteenth Amendment violation when the State Courts refuse to give any person within its jurisdiction the equal protection of the law. Mr. Murphy raise this issue in his Petitioner's Proposed Findings of Fact and Conclusions of law, cause no.18C05-0903-MR-01; and his Appellant's Brief Appellate Cause No.18A02-1507-PC-849. This can't be ruled as a harmless error, for this is a Constitution violation.

CONCLUSION

In Petitioner Murphy's relief, requested that his Writ of certiorari be granted, to reverse the conviction and sentence to release him from prison, in alternative, Petitioner Murphy pray that the case be remanded for a new trial.