No. 19-5065

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



CHESTER RAY CRANK — PETITIONER, *pro se*

vs.

STATE OF OHIO — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SIXTH CIRCUIT COURT OF APPEALS

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

FIRST QUESITON PRESENTED FOR REVIEW:

IS A PETITIONER PROVIDED DUE PROCESS OF LAW WHEN HE IS CONVICTED ON EVIDENCE INSUFFICIENT TO SUSTAIN A CONVICTION WHEN SAID EVIDENCE WAS WHOLLY BASED ON ILLEGAL RECORDINGS OF PETITIONER WHILE SEVERELY INTOXICATED AT THE HANDS OF POLICE ACTORS?

SECOND QUESTION PRESENTED FOR REVIEW:

IS A PETITONER PROVIDED A FAIR TRIAL AND DUE PROCESS WHEN HE IS CONVICTED BASED ON THE DENIAL OF CONFRONTATION OF THE WITNESSES USED AGAINST HIM AT TRIAL AND THE ERROR WAS NOT HARMLESS?

THIRD QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS AND A FAIR TRIAL WHEN SEVERELY PREJUDICIAL PRIOR CRIMINAL ACTS WERE IMPROPERLY INTRODUCED TO THE JURY?

FOURTH QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL WHEN HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL?

A. TRIAL COUNSEL INTRODUCED PETITIONER'S PRIOR CRIMINAL CONVICTIONS TO THE JURY.
B. TRIAL COUNSEL FAILED TO INVESTIGATE AND PROVIDE CONTRADICTING EVIDENCE OF THE STATE'S ASSERTIONS THAT WOULD MAKE THEM IMPOSSIBLE AND PROVIDE AN ALIBI DEFENSE.
C. TRIAL COUNSEL DID NOT PROVIDE AN EXPERT WITNESS TO ATTEST TO THE LEVEL OF PETITIONER'S INTOXICATION AT THE HANDS OF POLICE ACTORS WHEN STATEMENTS WERE MADE THAT WERE USED AS A CONFESSION.

## LIST OF PARTIES

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

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

## TABLE OF CONTENTS



## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES



OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

## OPINIONS BELOW

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

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

[X] reported at *Crank v. Bracy*, 2018 U.S. App. LEXIS 32423; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Unites States district court appears at Appendix B to the petition and is

[X] reported at *Crank v. Bracy*, 2018 U.S. Dist. LEXIS 77546; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

The opinion from the last state court to review the merits appears at Appendix ____ to the petition and is

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

The opinion of the _____ court appears at Appendix ____ to the petition and is

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

## JURISDICTION

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

The date on which the United States court of appeals decided my case was September 11, 2018.

[ ] No petition for rehearing was timely filed in my case.
[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 14, 2018, and a copy of the order denying rehearing appears at Appendix C, *Crank v. Bracy,* 2018 U.S. App. LEXIS 32331.

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

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

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

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

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____ .
[ ] An extension of time to file the petition for a writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ___ A _____ .

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein is the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution:

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

Amendment VI
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV
"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

On Sunday, January 7, 2007, about 1:00 a.m., the Canton Fire Department was dispatched to a home on Endrow Avenue N.E. in Canton in response to a structure fire call. The body of Bennie Angelo was found in one of the bedrooms of the residence. Mr. Angelo died of multiple gunshot wounds and had signs of being choked. Evidence of blunt force trauma were also present, along with some lower level superficial burns.

A large reward ($15,000.00) was offered by the victim's family for information regarding the homicide. The enticement of the reward generated many tips and a Det. George investigated all leads, none of which led to an arrest. Det. George had never had any dealings with Petitioner.

Five years later, in May 2012, Alicia Culberson was in the Stark County Jail for a theft charge. She stated that she wanted to talk with Det. George about the Bennie Angelo killing. Culberson reported that in the fall of 2011, she was at the home of her boyfriend, Robert Cassidy. Petitioner was to have been there talking with a Tony Tucker about a killing where she claimed she heard a conversation about a break-in to a home on Endrow, a theft, which was to have been repeated three times, a struggle and a shooting where the house was set on fire.

In March 2013, Culberson was released from jail. Det. George contacted her and asked her to contact Petitioner wearing a recording device. She agreed but was not successful in making a tape.

In July 2012, Brenda Haywood—who was in the same jail at the same time as Culberson—contacted George about the homicide case involving Mr. Angelo. Haywood was incarcerated and cleaning cells at the jail and also saw the reward poster. She called Det. George when she got out of jail and told him about the story she allegedly overheard, which mirrored Culberson's story. She stated that while she was waiting to make a drug transaction, she allegedly overheard the drunk Petitioner and Tony Tucker talking where Petitioner was to have made a comment that he "offed" some man. Later, while committing the fraudulent crime of "boosting" (returning unpaid-for merchandise to a store for financial gain) with Petitioner, she claimed Petitioner would get drunk and talk about killing a man who was a child molester. No evidence was ever presented that the victim was a child molester.

Det. George then got a call from Rob Cassidy (Culberson's boyfriend)—whose statements were used at trial even though he never testified—with information that conveniently and conspicuously "paralleled" what Det. George was told by the duo of Haywood and his girlfriend Culberson. Det. George still believed there were four persons involved in the killing and then believed that Petitioner was one of them.

In January 2013, Det. George heard from a Robert Race, who was to have met with Petitioner at Race's home on Christmas Day of 2012, where Petitioner was drunk at the time and was to have confessed to a homicide. The statement by Race was shown to be a falsehood, as a meeting could not possibly have occurred due to Petitioner having been incarcerated for an unrelated offense at the time.

Regina Lyons is Petitioner's first cousin, who lived with him in 2013 and saw him almost every day until she was incarcerated at Stark County Regional Correction Center (SRCCC) for a forgery charge. She attended a party with Petitioner, where he got drunk, and was to have stated that he shot somebody. When Lyons went to SRCCC, she contacted Det. George and he came to see Lyons in prison. Lyons confirmed her conversation with Petitioner Crank and agreed to wear a digital recording device and tape future conversations with Petitioner, as she was trying to regain custody of her children; two of the five children were returned to her prior to her giving testimony against Petitioner at trial. Lyons would get Petitioner drunk from the liquor improperly provided for by police, and then record the inconsistent and irreconcilable comments related to a homicide.

There were close to twenty hours of recordings and only short excerpts of the recordings were played during the testimony of Lyons. In the drunken rants, Petitioner was linked to the crime by the State's selective inclusion of miniscule excerpts from the recordings that appeared to be consistent with the crime, ignoring the vast inconsistencies that were present.

Any "blanks" in the twenty hours of recordings were, amazingly, filled in by Lyons, claiming that Petitioner made the comments when she was not taping him, but always while he was drunk. No physical evidence linked Petitioner to the crime, and all evidence presented at trial was statements made by Petitioner while heavily intoxicated; "obliterated." Petitioner never mentioned the name of the person he was talking about in the twenty hours of recordings.

Mark Villegas heard that Petitioner was charged with the murder of Mr. Angelo. Villegas knew Petitioner when he lived across the street from him. He stated that Petitioner drank a lot and got emotional when he drank. He would start to cry and say that he killed someone, an old man. Villegas said this drunken conversation took place several times, and Villegas thought Petitioner was lying. When he heard Petitioner was charged with the crime, he contacted Det. George, who visited Villegas in prison while he served time for burglary, and gave him a written statement with hopes for an early release.

All of the alleged witnesses in this case came forward more than five years after the crime, and all less than one year apart, with all witnesses having an interest in the reward money or a stake in the case. Petitioner interviewed by George on September 18, 2013, and he denied any part in the killing and robbery.

After the state rested, and Petitioner's motion for acquittal was overruled, defense counsel rested without submitting any evidence.

In 2014, an Ohio jury found Petitioner guilty of aggravated murder, aggravated burglary, aggravated robbery, and aggravated arson, as well as firearm specifications attached to the murder, burglary, and robbery charges. His convictions pertained to the robbery and killing of Bennie Angelo. The trial court merged Petitioner's burglary, robbery, and murder charges for sentencing purposes, and sentenced him to consecutive terms of imprisonment of eight years for his arson conviction, three years for each of his firearm specifications, and life without the possibility of parole for his aggravated murder conviction, for an aggregate sentence

of life without parole plus seventeen years. The Ohio Court of Appeals affirmed, and the Ohio Supreme Court denied his application for delayed leave to appeal. *State v. Crank*, 2015-Ohio-1909, 2015 WL 2376007 (Ohio Ct. App. May 18, 2015), perm. app. denied, 143 Ohio St. 3d 1498, 2015-Ohio-4468, 39 N.E.3d 1269 (Ohio 2015) (table). Petitioner filed a motion to reopen his appeal, see Ohio App. R. 26(B), which the Ohio Court of Appeals denied. The Ohio Supreme Court declined to accept jurisdiction. *State v. Crank*, 2016 Ohio LEXIS 183, 144 Ohio St. 3d 1461, 2016-Ohio-172, 44 N.E.3d 289 (Ohio 2016). Petitioner also sought post-conviction relief in the trial court, which the court denied. The Ohio Court of Appeals affirmed, and the Ohio Supreme Court did not accept jurisdiction of his appeal. *State v. Crank*, 2016-Ohio-7203 (Ohio Ct. App. Sept. 30, 2016), perm. app. denied, 148 Ohio St. 3d 1428, 2017-Ohio-905 (Ohio 2017).

In 2016, Petitioner filed a § 2254 petition, in which he raised the following claims: (1) appellate counsel was ineffective; (2) there was insufficient evidence to sustain his convictions; (3) his Confrontation Clause rights were violated by the admission of certain testimony; (4) the trial court erroneously denied his motion for a mistrial; (5) he was denied due process and a fair trial due to cumulative error; and (6) trial counsel was ineffective. In an amended petition, Petitioner argued further that (7) trial counsel was ineffective in additional instances; and (8) the trial court improperly denied his motion seeking post-conviction relief for constitutional violations. A magistrate judge recommended dismissal of the petition. Over Petitioner's objections, the district court adopted the report, denied the petition,

declined to issue a COA, and denied Petitioner leave to proceed IFP on appeal. Petitioner filed a motion seeking reconsideration, which the court denied.

Petitioner then filed a Motion for COA to the Sixth Circuit Court of Appeals, where the judicial panel altered witness testimony to refute Petitioner's claims, and denied his request to appeal. *Crank v. Bracy*, 2018 U.S. App. LEXIS 32423 (6th Cir., Sep. 11, 2018).. A motion for rehearing was filed, which was also denied. *Crank v. Bracy*, 2018 U.S. App. LEXIS 32331 (6th Cir., Nov. 14, 2018) It is from these denials that Petitioner now seeks a Writ of Certiorari from this Honorable Court as his last resort for justice.

## REASONS FOR GRANTING PETITION

Petitioner, Chester Ray Crank, *pro se*, asserts that the instant Petition should be heard due to the important constitutional issues represented herein. He avers that the constitutional violations suffered represent those that may appear common or unworthy of review, but that his circumstances are quite unique with regard to the type and severity of violations suffered. The Court should accept review of this case to further refine constitutional law and prevent the manifest injustices incurred herein from being repeated. The Court should hear the issues presented based on the following law, argument and reasoning:

**FIRST QUESTION PRESENTED FOR REVIEW:**

**IS A PETITIONER PROVIDED DUE PROCESS OF LAW WHEN HE IS CONVICTED ON EVIDENCE INSUFFICIENT TO SUSTAIN A CONVICTION WHEN SAID EVIDENCE WAS WHOLLY BASED ON ILLEGAL RECORDINGS OF PETITIONER WHILE SEVERELY INTOXICATED AT THE HANDS OF POLICE ACTORS?**

It is irrefutable that Petitioner's convictions were based wholly on the drunken rants of Petitioner that were surreptitiously recorded and used as a confession. The recording was made by a State informant after two prior attempts with different individuals were unsuccessful. TrT., pgs. 430-432. The Petitioner was unable to find case law that precisely addresses his claim, which may make the question to the Court—in its entirety—one of first impression. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. In a federal trial, such an occurrence has

traditionally been deemed to require reversal of the conviction. *Glasser v. United States*, 315 U.S. 60, 80; *Bronston v. United States*, 409 U.S. 352. Under *Winship*, 397 U.S. 358, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand. *Jackson v. Virginia*, 443 U.S. 307.

The drunken, surreptitiously recorded statements were represented as a confession and used exclusively to obtain Petitioner's convictions, whether recorded or given orally to a witness. There was no forensic evidence that linked Petitioner to the crime; there were no eyewitnesses in this case that was committed six years prior to Petitioner being charged. Petitioner asserts that the applicable standard as determined by this Honorable Court is found in *Townsend v. Sain*, 372 U.S. 293 and *Columbe v. Connecticut*, 367 U.S. 568, that a confession is admissible only if it is a product of the defendant's "rational intellect and a free will." Id. Intoxication to the point of slurring words, crying, vomiting, and blacking out cannot be found to be rational intellect by any definition of the word. (This level of drunkenness was conceded by the District Court Magistrate Judge, Doc# 29, PageID# 1769, as Petitioner was "drinking really heavy," and "obliterated" during all recordings.)

Incredibly, the lower federal courts believed this to be irrelevant. Petitioner highlighted the impropriety of the use of the drunken rants as not meeting the high burden of proof under the reasonable doubt standard and the denial of fundamental fairness via the Equal Protection required under federal law. Doc# 26, PageID#s 1680-81.

With regard to equal protection, Petitioner cited to Ohio's rape statute, R.C. 2907.02, as an example as to how a person is not able to exercise a rational intellect or free will to consent to sexual conduct when a person has "impaired judgment" due to intoxication as a clear violation of the Constitution. To use Petitioner's statements made while intoxicated, "obliterated"—whether the intoxication was voluntary or not—would violate Equal Protection as his judgment was surely "impaired" as shown by Ohio law and the U.S. Supreme Court. *Townsend, Columbe,* supra.

The lower courts opined, "Evidence of intoxication, without more, does not compel the conclusion that a statement to police was made involuntarily and must be suppressed." Doc# 29, PageID# 1746. Petitioner asserts that the lower courts ignored the "more" as presented by Petitioner.

Petitioner showed the "more" to be that the statements made were not consistent with the crime committed in the instant case. If his drunken statements were a "confession," as deemed by the lower courts, it would be a false confession indeed. Petitioner provided no less than nine (9) statements that were made—purposefully omitted or ignored by the state and reviewing courts—that were totally inapplicable to the crime at issue. Doc#26, PageID# 1682. The obviously contradictory statements were found in the record even though Petitioner has been deprived of the 20 hours of recordings by the Respondent, or a transcript thereof, so that he could glean further incongruities in his defense.

Even if the statements were made in relation to the crime in this case, the intoxicated state of Petitioner and the incongruities make the statements unreliable. *State v. Masci*, 2012 Ohio 359 (testimony must be consistent and believable for the factfinder to accept.); "Drunk witnesses are generally not reliable ones, as a witness's intoxication at the time of the events in question could affect the determination of the jury's verdict." *Blackston v. Rapelje*, 769 F.3d 411 (6th Cir. 2014); *Rivers v. United States*, 777 F.3d 1306 (11th Cir. 2015), (federal courts generally will not disturb a credibility determination unless it is "so inconsistent or improbable on its face that no reasonable factfinder could accept it.").

Testimony showed that over 20 hours of recordings were made of Petitioner while severely intoxicated. None of Petitioner's recorded statements mentioned the name of the victim in this case, contrary to the reviewing courts' claims, with few statements that could be interpreted to nominally relate to the case. The prosecution used a cherry-picked, piecemeal, short collection of statements gleaned from the 20 hours of recording that did not reflect the true nature or totality of the comments made by Petitioner while drunk as the sole means of his conviction. Doc# 26, PageID#s 1702.

Although the lower courts were to have applied a sufficiency standard, and not the "devoid of evidence" standard, it is clear that the courts did not actually apply the *Jackson v. Virginia* standard because it based its finding on mere speculation and piles of inferences related to elements of the offenses, which is plainly not evidence that supports the constitutionally high standard of finding of

proof of every element of the offenses "beyond a reasonable doubt." Thus, the lower courts, despite their contrary representation, did not apply, but abandoned the *Jackson v. Virginia* sufficiency-of-the-evidence test and have in fact applied what could be labeled an "any evidence," "scintilla of evidence," or "modicum of evidence" test.

Therefore, the convictions were based on unreliable evidence fashioned into an unreliable but convenient statement biased in favor of the State that ignored the entirety of the evidence to the prejudice of Petitioner, which is improper and erroneous and certainly outside the realm of fundamental fairness constitutionally required to obtain a conviction.

All parties and courts agreed that Petitioner was intoxicated when the state agent interacted with him and recorded his drunken statements. As shown above, the voluntariness of intoxication does not decrease its effect on the reliability of the statements. The intoxication was shown to have been orchestrated, at least in part, through police misconduct.

The record clearly shows that the state's chief witness, Regina Lyons, testified that police would meet with her and, in the context of discussing the recording of Petitioner after he was intoxicated, also attested that police "would sometimes give me money to buy the liquor." Doc# 29, PageID# 1748. She also testified that he was drunk every time they met, as "We [she and Petitioner] only hang out when we drink." Id.

This Court has previously found "that coercive police activity is a necessary predicate to . . . finding that a confession is not 'voluntary,'" *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), and the Eighth Circuit has read that holding to mean "that police coercion is a necessary prerequisite to a determination that a waiver was involuntary and not as bearing on the separate question whether the waiver was knowing and intelligent." *United States v. Turner*, 157 F.3d 552, 555 (8th Cir. 1998) (quoting *United States v. Bradshaw*, 935 F.2d 295, 299, 290 U.S. App. D.C. 129 (D.C. Cir. 1991)).

It is not discernible as to which comments were made while the Petitioner was drunk due to the state's obvious and irrefutable misconduct, making every statement obtained questionable and tainted by the inconceivable and improper misconduct by the state; a potential variation of the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471 (1963) ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959).")

The District and Sixth Circuit Courts found that the testimony does not establish that the witness met with Petitioner before he was drunk on *every* occasion, to which Petitioner agrees. However, a judicial travesty occurred at the

U.S. District Court and the Sixth Circuit Court of Appeals when the courts intentionally misquoted witness testimony regarding the police misconduct to support their rulings that no police misconduct occurred. The courts inconceivably opined that the testimony does not establish that the witness "used the money from detective George to buy liquor to get [Petitioner] drunk." Id.

The courts then erroneously found no cause for police misconduct in the presence of the testimony of the state's witness who wore the wire to record the drunken statements. The witness clearly and unequivocally attested that police would meet with her and "would sometimes give me money to buy *the* liquor." Doc# 29, PageID# 1748. The courts wholly ignored the context of the witness's testimony, which was related to the method used for obtaining the recordings at issue—the sole source of evidence in Petitioner's conviction.

The statement was made by the state's chief witness, whom the State put forth as being credible, that she used the money given to her by police to buy the liquor to get Appellant drunk. Query: Why else would police be giving the witness money other than to buy the liquor used to intoxicate the Appellant? Due to the testimony having implicated police, the lower courts seem wont to change the interpretation of the obvious context, content and clear meaning of the testimony by the purposeful and prejudicial omission of part of the witness's testimony, misquoting it as the police "would sometimes give me money to buy...liquor," purposely omitting the word "*the*." *Crank v. Bracy*, 2018 U.S. App. LEXIS 32423. The specificity of the phrase "*the* liquor" instead of just "liquor" or "for liquor" shows

that the witness was given money by the police to purchase "*the* liquor" used to intoxicate Petitioner.

This Honorable Court is well aware that this was an improper and prejudicial use of an ellipsis. An ellipsis is defined in The American Heritage Dictionary, 4th Edition, as "1) The omission of a word or phrase that is not necessary for understanding; 2) A mark or series of marks, often three periods, used to indicate an omission." [emphasis added.] Black's Law Dictionary, Sixth Edition, defines ellipsis as "An omission of words or clauses necessary to complete construction, but not necessary to convey the meaning." The word "the" in the phrase, along with the context of the quote, is certainly "necessary for understanding" and "necessary to convey the meaning" of the phrase.

The statement was made by the state's chief witness, whom the state put forth as being credible, that she used the money given to her by police to buy the liquor used to get Petitioner drunk. When her testimony implicated police, the lower courts sought to discredit or change the interpretation of the obvious content and clear meaning of her statements. The specificity of the phrase "the liquor" instead of just "liquor" or "for liquor" shows that she was given money by the police to purchase "the liquor" used to intoxicate Petitioner. This is misconduct, improper and constitutionally unacceptable. The State should not be permitted to have it both ways; either the police committed misconduct according to the State's witness, or the witness was unreliable and the evidence insufficient to convict Petitioner.

The courts' incomplete quotation to clearly alter the context of the quote is inexplicable, prejudicial and troubling; it is without any logical, legal or ethical basis as it would take just as many key strokes to type the word "the" as it did to type "...". The Court should not permit to stand this blatant, purposeful and prejudicial omission.

The error cannot be deemed harmless, as the evidence—as unreliable and inconsistent as it was—was used as the sole means of supporting Petitioner's guilt. The issue was certainly based on constitutional error, prejudicial and had a "substantial and injurious effect or influence" on the verdict. *Kotteakos v. United States,* 328 U.S. 750. Reasonable jurists could disagree with the decision in this case and the issue is "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell,* 537 U.S. 322.

Petitioner respectfully clarifies that it is only if "a federal habeas corpus court [is] faced with a record of historical facts that supports conflicting inferences" where the conflicts should be resolved in favor of the prosecution. *Jackson v. Virginia,* 443 U.S. 307 at 326 [emphasis added]. If the facts do not support conflicting inferences, the judgment should fall to the Petitioner. There was no conflicting testimony that the police did not pay for the liquor to get Petitioner drunk. Therefore, there is no conflicting inference of the historical facts that would benefit the prosecution, making the coercion initiated by police through intoxication improper and misconduct. When police conduct is causally related to a confession, the state actors

have deprived a criminal defendant of due process of law. *Colorado v. Connelly*, 479 U.S. 157.

With regard to sufficiency of the drunken rants, no reasonable or rational person would deem the statements of a severely intoxicated individual, or those of felons with interest in a reward or stakes in the case relating statements of a severely intoxicated person as the only "proof of such character that an ordinary person would be willing to rely and act upon in the most important of his or her affairs." Doc# 32, PageID# 1788. Query: Could a person even be considered among the ordinary if he or she relied on evidence from a severely intoxicated person, whether outright or relayed by felons who admitted to having a stake in the issue, for their most important affairs? Any answer in the affirmative would be inconceivable. This practice is surely not supportable under the auspices of the U.S. Constitution and requires further review. The Court's review would also provide an opportunity to restate. reaffirm and refine the high bar required to meet the constitutional standard of "beyond a reasonable doubt." Petitioner asserts that he has been deprived of a right which the court has jurisdiction to recognize and preserve, and his case is unique with regard to the constitutional sufficiency standard.

**SECOND QUESTION PRESENTED FOR REVIEW:**

**IS A PETITIONER PROVIDED A FAIR TRIAL AND DUE PROCESS WHEN HE IS CONVICTED BASED ON THE DENIAL OF CONFRONTATION OF THE WITNESSES USED AGAINST HIM AT TRIAL AND THE ERROR WAS NOT HARMLESS?**

The lower federal courts conceded that the Ohio Court of Appeals found that constitutional error occurred, but deemed it harmless. The issue involves testimony by the State's chief police witness, Det. George, who repeatedly used hearsay comments made by a "Mr. Cassidy" and many other witnesses who did not testify to corroborate other witnesses' testimonies that lacked credibility.

The State appellate court stated the error was harmless due to "the jury [having] had the benefits of [Petitioner's] recorded statements to establish his guilt." Doc# 29, PageID# 1755. Petitioner has shown previously that the "recorded statements" were wholly unreliable and contradictory and given by a person who was inarguably heavily intoxicated through police misconduct and being led to say things by state actors.

Whether an error is harmless depends on the prejudice to the Petitioner, not the weighing of any additional evidence of guilt, which is certainly feeble herein. This Court has previously held:

> Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." *Yates v. Evatt*, 500 U.S. 391, 404, 114 L. Ed. 2d 432, 111 S. Ct. 1884 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee.
> *Sullivan v. Louisiana*, 508 U.S. 275; *Kotteakos*, supra. (The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.)

With the conviction resting solely on Petitioner's drunken statements, there can be no doubt that the error affected the outcome. As the State's witnesses totally lacked any credibility, the State suborned a plethora of hearsay statements into Det. George's testimony made by unknown entities that were not present at trial to bolster the feckless credibility of the state's witnesses. Defense counsel immediately and repeatedly objected, which was overruled on the basis that "this is a police investigation" and "as long as [the detective] is not repeating what was told to him." TrT., pgs. 425-429. The detective then testified that what Mr. Cassidy told him "paralleled what I was told by the other two women earlier in the year," repeating to the jury what he was told in a subversive, roundabout manner while corroborating the other witnesses' testimonies without confrontation of the non-testifying witness or curative jury instruction. TrT., pg. 425-427. The questioning regarding "Mr. Cassidy" and other witnesses who were not present at trial was allowed to continue. Id. To say that this was not improper, unconstitutional and prejudicial is incredible.

The detective also testified regarding five (5) other witnesses whom the prosecutor labeled as having "come forward" to "provide additional information," which was used to substantiate the State's theory of prosecution without confrontation or corrective instruction, making the violation far from an isolated incident. "Mr. Cassidy" and the other referenced witnesses were provided as corroborative and supportive with unchallengeable credibility due to their absence at the proceedings. The related testimony also mentioned that Mr. Cassidy was

"told by another person" regarding the allegations in the case, improperly adding yet another of untested and unchallenged testimony and credibility to a case where the evidence is tenuous, at best. The admission of testimony when the witnesses are not present for confrontation is constitutionally prohibited, requiring reversal of the conviction. *Crawford v. Washington*, 541 U.S. 36. This is true even when a trial judge gives instructions to the jury regarding the matter, which did not adequately occur here. *Cruz v. New York*, 481 U.S. 186.

In this case, any evidence bolstering the credibility of the state's witnesses without confrontation was certainly constitutional error, prejudicial and had a "substantial and injurious effect or influence" on the verdict. *Kotteakos v. United States*, 328 U.S. 750. Therefore, Petitioner asserts that the issue requires further review. The Court would be well-served to bolster and further clarify its holdings in Crawford and Cruz, supra., and defend the right to confront witnesses during a fundamentally fair trial proceeding that was absent herein. Petitioner asserts that he has been deprived of a right which the court has jurisdiction to recognize and preserve.

**THIRD QUESTION PRESENTED FOR REVIEW:**

**IS A PETITIONER DENIED DUE PROCESS AND A FAIR TRIAL WHEN SEVERELY PREJUDICIAL PRIOR CRIMINAL ACTS WERE IMPROPERLY INTRODUCED TO THE JURY?**

Petitioner's third issue was based on the violation of Due Process when a mistrial was not granted after requested when the jury was told that Petitioner had beaten his mother in a crime of domestic violence that was wholly unrelated to the

instant case. The testimony was highly prejudicial, due to the violent nature of the crime related against Petitioner's mother. Brenda Haywood testified she saw "pictures of [Petitioner's] mom when he beat her up." (Doc# 10-5, pgs. 47-48) The violent nature of the domestic violence crime in a case where the evidence was tenuous and the crime at issue being brutally violent surely prejudiced Petitioner. That error occurred was agreed to by the trial and reviewing courts. The appellate court found the error was present, but claimed correction via jury instruction.

Defense counsel immediately objected and requested a mistrial. The trial court gave a minimal instruction to the jury, but, as stated by defense counsel, "You can't unring the bell." TrT., pg. 760; *Federal Deposit Ins. Corp. v. Singh*, 140 F.R.D. 252 ("Once persons not within the ambit of the confidential relationship have knowledge of the communication, that knowledge cannot be undone. One cannot "unring" a bell.") It would be incredible, Petitioner would assert absurd, to believe that a jury would be able to simply forget that a witness saw pictures of a mother's injuries after being beaten by her son and that defendant was convicted with the beating of his mother—a criminal domestic violence offense—and not have that in the forefront of their minds in a prejudicial manner when deciding a murder case.

It is clear that the appellate court found that there is no "precise, inflexible standard" to grant a mistrial. Doc# 29, PageID# 1757. The same court held that the granting of a mistrial is necessary "when a fair trial is no longer possible." Id. The evidence was not just a generic mention that Petitioner had been arrested or imprisoned previously, but had committed the crime of beating his mother, an

offense of domestic violence. The relating of a regular case of domestic violence in a case such as this would be prejudicial, a violent crime against one's mother would be extremely and unforgivably so.

Other evidence in the case—which was certainly not overwhelming—should not be considered in determination of the error in this case. The late and Honorable Justice Scalia provided the following with a unanimous court:

> Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." *Yates v. Evatt*, 500 U.S. 391, 404, 114 L. Ed. 2d 432, 111 S. Ct. 1884 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee. See *Rose v. Clark*, 478 U.S. 570, 578, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986); id., at 593 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509-510, 95 L. Ed. 2d 439, 107 S. Ct. 1918 (1987) (STEVENS, J., dissenting).
> *Sullivan v. Louisiana*, 508 U.S. 275

Minimally, the standard the state appellate court used to deem the error harmless should be addressed. Petitioner did not invite this error. Petitioner had a jury trial, not a bench trial. The state appellate court did not state the standard used to determine the harmlessness of the error. To simply agree with the appellate court without a constitutional analysis under the proper standard is inappropriate. *Fry v. Pliler*, 551 U.S. 112 (an error is harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, supra, at 631, 113 S. Ct. 1710, 123 L. Ed. 2d 353, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (quoting *Kotteakos*, supra, at 776, 66 S. Ct. 1239, 90 L. Ed. 1557)). In a case

of this magnitude, it cannot be said that the errant and illegal testimony did not have a "substantial and injurious effect" on the jury's determination of the verdict.

**FOURTH QUESTION PRESENTED FOR REVIEW:**

**IS A PETITIONER DENIED DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL WHEN HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL?**

- **A. TRIAL COUNSEL INTRODUCED PETITIONER'S PRIOR CRIMINAL CONVICTIONS TO THE JURY.**
- **B. TRIAL COUNSEL FAILED TO INVESTIGATE AND PROVIDE CONTRADICTING EVIDENCE OF THE STATE'S ASSERTIONS THAT WOULD MAKE THEM IMPOSSIBLE AND PROVIDE AN ALIBI DEFENSE.**
- **C. TRIAL COUNSEL DID NOT PROVIDE AN EXPERT WITNESS TO ATTEST TO THE LEVEL OF PETITIONER'S INTOXICATION AT THE HANDS OF POLICE ACTORS WHEN STATEMENTS WERE MADE THAT WERE USED AS A CONFESSION.**

The standard of review is the Court's well-known standard set forth in *Strickland v. Washington*, 466 U.S. 668, where the Supreme Court identified the two components to any ineffective-assistance claim: (1) deficient performance and (2) prejudice. *Lockhart v. Fretwell*, 506 U.S. 364. Further, the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial" and be shown to have "deprive[d] the defendant of a fair trial, a trial whose result is reliable." Id., citing *Strickland*. In other words, counsel's errors amount to the ineffective assistance of counsel when they "upset the adversarial balance between defense and prosecution [and] the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374.

### A. TRIAL COUNSEL INTRODUCED PETITIONER'S PRIOR CRIMINAL CONVICTIONS TO THE JURY.

It is without question that a defendant's prior history of incarceration is prejudicial when it is conveyed to a jury. Petitioner did not testify at his trial. Petitioner's own defense counsel revealed to the jury that Petitioner had been previously incarcerated in an unrelated case. The trial court categorized the impropriety as "an unusual defense strategy." TrT., pg. 538. The error cannot be considered trial strategy according to *Strickland*, as *Strickland* requires the strategy to be "sound trial strategy." *Strickland v. Washington*, 466 U.S. 668 at 689. There was no strategic advantage to telling the jury about a prior incarceration; it only prejudiced the Petitioner. It is axiomatic that counsel "may not introduce evidence of a defendant's prior convictions where the defendant does not testify at trial and the defendant's character is not otherwise at issue." *United States v. Terry*, 729 F.2d 1063, 1070 (6th Cir. 1984). It is also erroneous for counsel to "make statements which may have informed the jury of [a petitioner's] prior criminal history." *United States v. Penson*, 141 Fed. Appx. 406 (6th Cir. 2005) (The issue in *Penson* was regarding the state prosecutor introducing the evidence; after performing an extensive legal search, it is unheard of for defense counsel to do so, magnifying the oddity, the error and the prejudice.)

The state prosecutor pointed out the improper action by trial counsel, stating "...it has no relevance to this case. It should never have been brought up. As the Court says, we go to great lengths to make sure this jury does not know he is in jail. It is an improper question. There is no relevance...and has no place in this." TrT.,

pgs. 538-539. Dumbfounded, the absence of strategy was also pointed out by the trial court, who stated, "I am sorry to take so much time. But talking about this whole defense strategy here and I am trying—if he is certainly in here in orange cuffs, we would have no reason—they could have brought him in here in his oranges, they don't have to dress him up; and the jury would have known. They could have used that as their strategy." TrT., pg. 540. The trial court made obvious the question, "Why would counsel have Petitioner dress in street clothes—protecting the fact that he was incarcerated—and then tell the jury of a prior incarceration?" There was no sound strategy from counsel, only prejudice to the Petitioner.

The state appellate court based their denial of this ground on the inapplicable standard of a defendant wearing oranges into the courtroom, claiming them to be analogous. Doc# 29, PageID# 1762-3. This was not the issue. The Magistrate Judge also stated that no prejudice could be afforded to Petitioner because "the jury already knew that he was incarcerated. Doc. 10-4, p. 76." Doc# 29, PageID# 1764. This is wholly without merit, as the citation to the record by the lower courts was the defense counsel's introduction of the incarceration to the jury at issue, which initiated the statements of incredulity by the prosecutor and trial court, above! The inference that the jury had prior knowledge of the incarceration is unsupported by the record. This was compounded by the jury knowing of Petitioner's offense related to his mother.

The conflicting and prejudicial acts by counsel cannot be considered sound trial strategy under any definition. The errors are obvious and constitutional, the prejudice manifest, making the lower courts' rulings improper. The Court should accept jurisdiction to support and clarify its prior holdings and address the novel circumstances herein.

### B. TRIAL COUNSEL FAILED TO INVESTIGATE AND PROVIDE CONTRADICTING EVIDENCE OF THE STATE'S ASSERTIONS THAT WOULD MAKE THEM IMPOSSIBLE AND PROVIDE AN ALIBI DEFENSE.

There are several issues related to this subsection. The issues were related to the ineffective assistance of trial counsel and presented in a petition for postconviction relief.

The lower courts cited to *Cress v. Palmer*, 484 F.3d 844, 853 (citing *Kirby v. Dutton*, 794 F.2d 245, 246-47 (6th Cir. 1986)), to show the issue was not cognizable. The lower courts claimed the grounds were not cognizable as the claims were misconstrued as relating to the ineffective assistance of counsel on a postconviction petition, which Petitioner never argued, as a petitioner is not entitled to counsel on a postconviction petition. Petitioner asserts that his claim involved the ineffective assistance of trial counsel. Post-conviction relief is the only means whereby a defendant can claim ineffective assistance of counsel from evidence *de hors* the record, which has been recognized by the U.S. Supreme Court.

> "To prevail on a claim for post-conviction relief, the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction that rendered the conviction void or voidable under the Ohio or United States Constitutions. R.C. 2953.21(A)(1)....The purpose of the post-conviction relief statute is to provide criminal defendants with a

clearly defined method by which they may raise claims of denial of federal rights. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 1999 Ohio 102, 714 N.E.2d 905, citing *Young v. Ragen* (1949), 337 U.S. 235, 239, 69 S.Ct. 1073, 1074, 93 L.Ed. 1333."
*State v. Group*, 2011-Ohio-6422.

The subsections of the issue presented for review are as follows:

**1.** In a postconviction petition, Petitioner raised the issue of his being incarcerated during the time that Robert Race stated that Petitioner met with him and supposedly "confessed" to the crimes in the case. Petitioner submitted evidence that was *de hors* the trial record; a police interview with Mr. Race. Post-conviction relief is the only means whereby a defendant can claim ineffective assistance of counsel and other constitutional violations from evidence *de hors* the record, which has been recognized by the U.S. Supreme Court. *Group*, supra.

As such is true, to deny the issue of ineffective assistance of trial counsel would be to unfairly deny a federal constitutional right, not merely state law issues. See also *Martinez v. Ryan*, 566 U.S. 1 (while Petitioner is not arguing for the assistance of counsel on his post-conviction petition, *Martinez* shows that post-conviction issues are clearly cognizable on habeas corpus.)

At trial, Mr. Race was vague—a "year and a half" prior to meeting with police—about when the meeting was to have occurred. The appellate court improperly used his vagueness in the *trial record* to deny the issue and denied Petitioner's appeal of the issue as "speculative," finding no prejudice for this reason. Doc# 29, PageID# 1765. If the trial testimony was the only evidence, then Petitioner would agree with the appellate court's ruling.

The impropriety of the denial was that the appellate court ignored the evidence submitted with the post-conviction petition. The evidence at issue was an interview regarding the exact testimony which was clearly submitted with his post-conviction petition. Doc# 10-1, PageID#s 400-401. The evidence was a police interview that showed that Mr. Race gave a very precise date as to when he was to have met with and heard the "confession" of the Petitioner. The date for the alleged interaction and "confession" by Petitioner was impossible, as he was incarcerated on an unrelated case at the time.

The lower courts stated that to question Mr. Race regarding the issue would force counsel to reveal that Petitioner had been previously incarcerated, which would prejudice Petitioner and was trial strategy. Doc# 29, PageID# 1766. The fact is that trial counsel had already pointed out to the jury that Petitioner had been previously incarcerated prior to Mr. Race's testimony, abandoning any trial strategy to protect Petitioner's status, ibid., so no prejudice could come from the inquiry at that point. It is also significant that the lower courts opined that the use of the fact of a prior incarceration would be prejudicial on this issue, but also argued that trial counsel telling the jury of a prior incarceration was not prejudicial, supra. The argument shows obvious conflict of the adopted argument to unfairly favor the Respondent and a biased, prejudicial, unreasonable and inconsistent application of law in regard to Petitioner.

The lower courts then made the weak claim that "the jury may well have believed that Race had been mistaken about the specific date he originally told

police that [Petitioner] had come over." id. The speculation is improper unfounded and begs the query, "How could a jury have believed a witness was mistaken about date related evidence that was never presented at trial?" The assertion by the lower courts should not be permitted to stand.

The lower courts also claimed the evidence by Mr. Race that Petitioner "confessed to killing a man" (note he did not say the victim's name in this case) was "cumulative to other witness testimony." Doc#29, PageID# 1766. The cumulative nature of the testimony is not at issue, nor the fact that the jury found Petitioner guilty, as the standard provided by the Supreme Court is "[t]he inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan,* supra. In a case where every witness was a prior felon with a stake in the case who relayed the drunken statements of Petitioner, the evidence was wholly based on those statements made in drunken rants, and the state introduced corroborative statements from witnesses who were not present at trial, every bit of testimony could have contributed to the verdict. The error was not harmless. Id., *Kotteakos,* supra.

The errors are obvious and constitutional, the prejudice manifest, making the issue ripe for review by this Honorable Court.

**2.** The lower courts did not grant relief on the issue in regard to trial counsel's failure to present evidence that Petitioner was under curfew in a half-way

house, the Phoenix House, at the time the crime in this case was committed and could not have committed the crime which was to have occurred between 12:00 a.m. and 1:00 a.m.

The lower courts appear to have confused several issues to Petitioner's prejudice. There was an issue regarding Petitioner being placed in the Phoenix House, a halfway house where Petitioner was residing following his release from a prior incarceration. As stated previously, Petitioner was ordered to serve time in the Phoenix House until his "restitution was paid in full" on an unrelated case. Doc# 10-1, PageID# 328. Trial counsel failed to investigate to provide witnesses or records of sign-ins or bed-checks to verify that Petitioner was at the Phoenix House at the time of the crimes.

The absence of the investigation and presentation of witnesses and/or records from the Phoenix House were prejudicial, as counsel would have been able to show that Petitioner was at the Phoenix House at the time the offenses were committed. Defense counsel's failure to investigate was a failure to provide a proper defense; namely, alibi.

Petitioner provided the state courts with the evidence of his residency in the Phoenix House by the docket sheet of his prior incarceration. Doc# 10-1, PageID# 328. The state appellate court's assumption that Petitioner was released from the Phoenix House prior to the crime at issue was unfounded and unsupported by the record. The date of the crime was January 7, 2007. The appellate court erroneously found that Petitioner was released from the Phoenix House "after he completed

TASC" on 8/29/2006, alleging that he was not housed at Phoenix House during the time of the crime.

TASC is an out-patient drug program. The completion of TASC had no bearing on Petitioner's release from the Phoenix House, as he was confined to the halfway house due to his not having met his obligation for restitution on that case. The docket sheet clearly shows that restitution was not paid, and Petitioner was not released from his probation at the Phoenix House until 6/27/2007, more than five months after the crime was committed in the instant case, making the appellate court decision a clear error of fact. The trial court clearly and unequivocally stated that Petitioner was on probation and was ordered to "continue with Phoenix House" on 6/21/2006 as a requirement of his probation. Doc# 10-1, PageID# 328. Petitioner was not released from the Phoenix House until nearly six months after the crimes were to have been committed when the trial court clearly ruled that Petitioner "be and is hereby discharged." Id.

Petitioner again asserts that there is nothing in the record that would support the appellate court's errant and unsupported finding of his release from the Phoenix House after completing the TASC program. The record from the court's docket is clear and convincing that he was not discharged until 6/27/2007. Doc# 10-1, PageID# 328.

The errors are obvious and constitutional, the prejudice manifest, making the issue ripe for review by this Honorable Court.

There was a separate issue of other witnesses not related to the Phoenix House (Tony Tucker, Cristal Franklin, Toni Crank, and Sophie Kunitch, Doc# 10-1, PageID# 1660) that were not called at trial who could provide exculpatory testimony. The lower courts confused the issues, claiming that the four witnesses were related to the Phoenix House when they were not. Petitioner tried to clarify the issue by telling the Court that these four witnesses were not "from the halfway house where he was living at the time of the offense." Doc# 26, PageID# 1698, Doc# 29, PageID# 1767. The lower courts then incorrectly and unreasonably stated that Petitioner has "abandoned this argument" with regard to failure of counsel to provide witnesses from the Phoenix House. Doc# 29, PageID# 1767. This is, yet again, an error prejudicial to Petitioner.

The witnesses were not investigated. The state court ruled that the evidence would be speculative. Petitioner stated he could not get the evidence as the court denied him the assistance he needed to obtain it, a legal Catch 22. Petitioner is indigent with no outside resources and asked the trial court for assistance in the form of an investigator to provide him the evidence required. *Ake v. Oklahoma*, 470 U.S. 68.

The errors are obvious and constitutional, the prejudice manifest and within the jurisdiction of the Court, making the issue ripe for review.

### C. TRIAL COUNSEL DID NOT PROVIDE AN EXPERT WITNESS TO ATTEST TO THE LEVEL OF PETITIONER'S INTOXICATION AT THE HANDS OF POLICE ACTORS WHEN STATEMENTS WERE MADE THAT WERE USED AS A CONFESSION.

The lower courts found against the issue of defense counsel's failure to call an expert witness to show Petitioner's level of inebriation and discredit the statements made while recorded after police induced intoxication. This was critical to the case. Petitioner submitted applicable case law:

> Given the body weights of Tevaga and Lelei, the amounts of alcohol and marijuana they said they consumed, and the time frame in which they did so, [Dr.] Pittel opined that their blood alcohol levels would put a person in a "confusional," if not stuporous, state. He testified that increased intoxication decreases a person's ability to make good judgments, accurately perceive what is happening, and consider alternate courses of conduct. A person in a "confusional" state of intoxication manifests the following symptoms: "Disorientation and mental confusion; dizziness, exaggerated emotional states, exaggerated emotional reactions, or acting upon those states; great mood swings or emotional instability; disturbances of sensations, like double vision; disturbances of perception; decreased pain sets; impaired balance and muscular coordination and staggering gait and slurred speech." He opined that such a person would lack rational thought.
> *People v. Falala Lelei, et al.*, No. H021125, 2003 Cal. App. Unpub. LEXIS 9267, at *2-10 (Cal. Ct. App. Sep. 26, 2003) (footnotes omitted).

Petitioner was shown to have all of the attributes shown above throughout the recordings played as a "confession" at his trial. An expert witness would have testified that Petitioner "lack[ed] rational thought" throughout the entirety of the recordings and wholly discredited the only evidence used to convict him. The failure to call an expert witness to at least mitigate the effect of the evidence was unquestionably consistent with the ineffective assistance of counsel. The failure, especially in light of all the other errors made by counsel in the trial, was surely prejudicial as it allowed the State to claim unchallenged credibility of Petitioner's drunken statements as the sole means of his conviction where no credibility existed.

The errors are obvious and constitutional, the prejudice manifest, making the issues ripe for review by this Honorable Court.

## CONCLUSION

The petition for a writ of certiorari should be granted for the foregoing reasons and argument.

Date: FEBRUARY 4

Respectfully submitted,

Chester Ray Crank, #A66-0-156