19-8880

NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

David Harman - Petitioner;

v.

Dushan Zatecky - Respondent;

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

Attorney for Petitioner:

David Harman #231831
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

Petitioner / *pro se*

QUESTIONS PRESENTED

GROUND ONE: Whether the State of Indiana denied Harman's due process right under the 14th Amendment to the United States Constitution committing reversal error when it denied Harman's counsel opportunity to make an offer of proof?

GROUND TWO: Whether the State of Indiana erred Harman received Ineffective assistance of trial counsel at trial in violation of the 5th Amendment, 6th Amendment and 14th Amendment to the United States Constitutional, and under Article One of the Indiana Constitution, Sections 12 & 13?

GROUND THREE: Whether the State of Indiana erred Harman received Ineffective assistance of appellate counsel in violation of the 5th Amendment, 6th Amendment and 14th Amendment to the United States Constitutional, and under Article One of the Indiana Constitution, Sections 12 & 13?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

☐ reported at _____; or,

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

☒ is unpublished.

The opinion of the United States district court appears at **Appendix B** to the petition and is-

☐ reported at _____; or,

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

☒ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at _____ to the petition and is-

☐ reported at _____; or,

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

☐ is unpublished.

The opinion of the Indiana court of Appeals appears at _____to the petition and is-

☐ reported at _____; or,

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

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States court of appeals decided my case was April 21, 2020.

A copy of that decision appears at **Appendix A**.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States court of appeals on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____ ___, 20__. A copy of that decision appears at Appendix ____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied on the following date: _____ ____, 20__, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ ____, 20__, on _____ ____, 20__, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

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

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution Fifth Amendment

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.

United States Constitution Sixth Amendment

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.

United States Constitution Fourteenth Amendment, Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article One, Section Twelve of the Indiana Constitution

All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay.

Article One, Section Thirteen of the Indiana Constitution, Rights of accused.

(a) In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

(b) Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused.

STATEMENT OF THE CASE

Prior Proceedings:

The trial court held a five-day jury trial from January 28, 2013 to February 1, 2013. The jury found Harman guilty as charged. At sentencing, the trial court determined that there were no mitigating circumstances. The trial court found aggravating circumstances. The trial court merged Counts II and III into Count I due to double jeopardy concerns, entered judgment of conviction on the attempted murder conviction only, and imposed a forty-five (45) year sentence in the Department of Correction. Harman appealed and it was affirmed on February 24, 2014.

Post-Convictions Proceedings:

Harman filed a Petition for Post-Conviction Relief. The public defender was assigned and withdrew and Harman withdrew his petition without prejudice. Harman, *pro se,* re-filed his petition on September 15, 2015 and an evidentiary hearing was held September 20, 2016 and September 29, 2016. Harman subpoenaed Adam Tavitas, Trial Counsel and Mark Small, Appellate Counsel, and the trial/appellate record was entered as evidence. Post-Conviction relief denied on July 7. 2017 and a Notice of Appeal was filed July 19, 2017 and the Indiana Court of Appeals Affirmed on March 13, 2018. The Indiana Supreme Court denied transfer on May 1, 2014.

Petition for Writ of Habeas Corpus was denied July 15, 2019. Seventh Circuit Court of Appeals denied Certificate of Appealability on April 21, 2020.

REASONS FOR GRANTING THE WRIT

GROUND ONE: Whether Indiana denied Harman's due process rights under the 14th Amendment to the United States Constitution committing reversal error when it denied Harman's counsel opportunity to make an offer of proof?

The trial court denied Harman's counsel the opportunity to make an offer of proof. The trial court earlier had granted the State's motion in limine that precluded Harman's counsel from inquiring as to prior wrongful acts of the State's complaining witness, J.R. Jenkins. These included conviction in Illinois in 1982 for Conspiracy, attempted murder, aggravated battery, and two counts of solicitation to murder. Jenkins had been found in violation of a protective order, against Harman's girlfriend, who was Jenkins's ex-wife. The trial court refused to allow Harman's counsel to make an offer of proof. Harman's counsel was allowed to have Exhibit Group C labeled and filed with the trial court, but the trial court did not allow those documents into evidence even to be considered as an offer of proof. The refusal to allow Harman to make an offer of proof denied Harman's due process rights under the United States Constitution which should reverse this conviction.

In a sidebar at the bench, counsel for Harman objected to the testimony of the alleged victim J.R. Jenkins, and asked to make an offer of proof as to protect orders issued against the victim and in favor of Harman and his Girlfriend-J.R. Jenkins's ex-wife Cathy Jenkins-by an Illinois court. The trial record contains a lengthy discussion between Harman's counsel, State's counsel and the Court concerning this claim (Tr. 341-346; 352-359).

Therefore, in this case, Harman's counsel was not allowed to elicit testimony related to the violation of the protective order, as such testimony had been subject to the motion in limine previously granted by the trial court (Tr. 343-44; App. 72). The trial court did "not accept...as an exhibit for an offer of proof" the documents Harman's counsel offered the trial court to

review. (Tr. 358-59). The trial court did not consider it – the first aspect of why an offer of proof is important: for the trial court's consideration. Because Harmon's counsel was not allowed to delve into the testimony that, arguably, would have made the matter relevant. Without such a record the appellate court had no information from which to make a ruling.

The United States Supreme Court stated in *Chessman v. Teets*, 354 US 156, 1 L Ed 2d 1253, 77 S Ct 1127 (1957), "the requirements of the Due Process Clause of the Fourteenth Amendment must be respected.," An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough. *McCandless v. McCandless*, 298 U.S. 342, 346, 80 L. Ed. 1205 (1936).

GROUND TWO: Whether the Indiana erred Harman received Ineffective assistance of trial counsel at trial in violation of the 5th Amendment, 6th Amendment and 14th Amendment to the United States Constitutional, and under Article One of the Indiana Constitution, Sections 12 & 13?

Petitioner raises he was deprived effective assistance of counsel. Claims of ineffective assistance of counsel are analyzed under the two-part test in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 674, 104 S.Ct. 2054 (1984). To prevail on an ineffective assistance claim, one must show both deficient performance and resulting prejudice. A deficient performance is a performance that falls below an objective Standard of reasonableness. See: *Strickland*, 466 U.S. at 687. Prejudice exist when a defendant/Petitioner shows "there is reasonable possibility that, but for Counsel's unprofessional errors, the result of the proceeding would have been different.

Defense counsel is obligated to determine what potential defenses are available, evaluate their merit, and advise the client of his or her options. *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986), quoting *Strickland.*

A. Failure to Investigate

1. The State of Indiana ruled this claim *res judicata* which is an erroneous ruling. This claim raises that trial counsel failed to investigate J.R. Jenkins's criminal record/history and Protection Order. If trial counsel had properly investigated Jenkins's criminal history and Protection Order he would have been able to argue why it was relevant beyond the argument made to the court in the hearing concerning a Motion In Limine. Therefore, ineffective assistance concerning this claim is not *res judicata.* The State's argument was these criminal offenses committed by the alleged victim, J.R. Jenkins, were not impeachable offenses which is not true. Jenkins's attempted murder conviction is an impeachable offense. The Post-Conviction Court stated, "Mr. Tavitas also testified he always brings a copy of the Indiana Rules of Evidence and Criminal Statute book for consultation" (Findings of Facts and Conclusions of Law, p.7 **[App. Vol. 2, 21]**). Counsel had this Evidence Rule during trial and failed to utilize it.

If trial counsel had utilized his Evidence Rules, he would have pointed out the State's error getting the attempted murder conviction into evidence to impeach Jenkins at trial. Jenkins's attempted murder conviction is an impeachable offense under Ind. Evid. R. 609(a)(1), "*General rule.* For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement." *Banks v. State,* 761 N.E. 2d 403, 405 (Ind. 2002). Indiana's Evid. R. 609 **is more strict than the Federal rule in listing specific crimes and Harman was denied this evidence meeting this stricter standard.**

2. In addition, when the trial court stated the Protection Order had nothing to do with Harman, instead of stating "Correct, your Honor," counsel should have pointed out Harman was listed as a witness on this Order and in that proceeding. Since the defense in this case was self-

defense/reasonable doubt (**which contradict each other**), the Protective Order was relevant in this Petitioner was cited as involved in it, and it was further relevant to establish Jenkins was the initial aggressor in this case and previously had a propensity and history of violence. Since counsel did not investigate J.R. Jenkins's criminal record/history and Protection Order properly, rather than pointing out the above information, he made an incriminating statement that Harman would testify that Cathy Jenkins had put him up to the crime. Counsel was ineffective during pre-trial proceedings leading to prejudice during trial as a result.

3. Trial counsel failed to investigate a Hammond Police Department Detective Supplemental Report dated June 13, 2011, that stated:

> On June 2, 2011 Detective Fulk received an anonymous telephone call from a male that stated "Red" informed him that Kevin had given "Red" a ride to the guy's house and parked in the alley. "Red" said that he beat the guy in the head with a broken chair and cut his throat from ear to ear. Lori then picked him up in a red Buick and that there was blood in the car. "Red" threw the knife out of the car window by the expressway ramp by 175th St. (Pg. 6)

Failing to investigate this report proved to be prejudicial since Kevin Hanshew's testimony at trial established that it was at the expressway ramp by 175th street where he pulled over to listen to the phone calls from Red. His actual testimony on cross-examination is (Tr. Vol. 1, Pg. 173, L. 9-18).

If trial counsel had investigated the "anonymous telephone call," counsel would have been able to question Hanshew concerning the fact he was the only one who admitted pulling over at the alleged spot at 175th Street where the weapon from this crime was allegedly thrown out of a car window. Counsel could have further questioned Hanshew concerning if he had made this "anonymous telephone call" to incriminate Red in this crime which was important

considering Lori Jones's testimony concerning picking up this petitioner on the day of the crime. (Tr. 229, 17 – Tr. 230, L. 3).

Trial counsel's failure to investigate this report was ineffective assistance of counsel and prejudiced this Petitioner during trial by not presenting this information to the jury. During the Post-Conviction evidentiary hearing on September 20, 2016, Mr. Tavitas, trial counsel, stated concerning this report and Kevin Hanshew, "It doesn't sound like Kevin would have been a very good witness for your trial. But, again, I don't remember if I spoke to Kevin or not, but –" [P.C. Tr. 24, L. 19-22]. Mr. Tavitas concerning this report further stated, "So, I don't know that I wanted to speak to them if it could prove the case against you" [P.C. Tr. 25, L. 7-9]. Trial counsel totally missed the fact that Kevin Henshew should have been investigated for making this anonymous call to take the focus off of himself and on to Harman, thus proving a third party defense for trial. Evidence of a third party in this case would have made sense since an unknown male's finger prints and DNA were found at the scene of this crime. Evidence of a third party motive tends to make it less probable that the defendant committed the crime. Harman continued to tell Tavitas he was innocent and therefore an investigation into Hanshew was vital as a possible third party for the jury to consider in rendering this verdict. Harman maintains 'a specific constitutional right has been violated, and a federal court can issue a writ of habeas corpus when a state evidentiary ruling violates the defendant's right to a fundamentally fair trial under the due process clause." *Haas v. Abrahamson*, 910 F.2d 384, 389; 1990 U.S. App. LEXIS 13375 (7th Cir. 1990).

B. Not Interviewing or Subpoenaing Witnesses

Trial counsel failed to interview and subpoena witnesses to aid in his defense. Petitioner had informed trial counsel of friends and family members who wanted to testify at trial giving

the jury information concerning his character, temperament and mental stability, yet counsel failed to do this.

During the Post-Conviction evidentiary hearing held September 20, 2016, Mr. Tavitas stated concerning not calling friends and family members who wanted to testify at trial giving the jury information concerning his character, temperament and mental stability was, stated, "it's -- often times its strategic whether it is to call a witness or sometimes to not call the witness" [P.C. Tr. 19, L. 13-15]. Tavitas did not testify what his strategy was in this case not calling these witnesses and since the State used evidence harpooning in characterizing Harman as an "Outlaw Biker" throughout this trial, his character, temperament and mental stability was important and there were no better witnesses than friend and family members to present this testimony to the jury. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986), quoting *Strickland.*

C. Battery Charges

Trial counsel failed to file motion to dismiss or make objection to aggravated battery and battery charges. These charges were not lesser included offenses with instructions to the jury reflecting this, so they should not have been allowed to be included at trial violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution reads, in part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." *U.S. CONST. Amend. V.* These twenty words generally mean that a defendant may not receive multiple punishments for the same offense. *North Carolina v. Pearce* (1969) 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656.

The trial court attempted to remedy this error by merging the two lesser-convictions with the greater attempted murder. The trial court should have vacated these convictions. When the trial court recognized this double jeopardy error and did not properly correct it, Tavitas should have move to dismiss but did not. During the Post-Conviction evidentiary hearing held on September 20, 2016, Tavitas' testimony proves he knew what double jeopardy is (P.C. Tr. 50, L. 5 - 21) and still failed to act.

However, even this remedy was not sufficient to eliminate the prejudice Harman suffered at trial by having the jury believe he committed three crimes rather than one, when in fact he could not prove he did not commit any of them due to ineffective assistance of counsel.

Misspeaking at Motion in limine hearing.

Trial Counsel made prejudicial remarks concerning guilt of Harman at the Motion In Limine hearing. Mr. Tavitas suggested Harman's guilty by stating Mr. Harman would even testify he believes that Miss Jenkins, Cathy Jenkins, Jenkins' third wife, may have actually had some part in putting Mr. Harman up to this crime." [Tr. 21, L. 9-14] During the Post-Conviction evidentiary hearing held September 20, 2016, Tavitas down played his statement in question stating:

> A. Again, if that wasn't presented to the jury, it's up to the jury, not the prosecutor or the judge to determine whether or not the evidence – that there was evidence beyond a reasonable doubt against you.
> P.C. Tr. 51, L. 15-19

Tavitas tries to avoid the fact that this statement was the beginning of a pattern where there was no established defense in this case which continued throughout this trial regardless whether the jury heard this statement or not. During trial it is unclear whether Mr. Tavitas is trying to present "self-defense" or "reasonable doubt" **(which contradict each other)** Harman

committed this crime. By making the prejudicial statement to the court above, both defenses were going to receive unfavorable rulings throughout this trial with the judge being privy to such information. The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure ``that 'justice shall be done' '' in all criminal prosecutions. *United States v. Agurs*, 427 U.S. 97, 111, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

Mr. Tavitas's statement concerning motive prior to trial combined with eliciting testimony from the victim to a second motive [TR. 372, L. 20 – Tr. 385, L. 23] doomed any defense before this judge and jury rendering this trial constitutionally unfair.

D. Not calling Harman as a witness.

Trial counsel failed to put Harman on the stand to support defense theory of self-defense and reasonable doubt (**which contradicted each other**); and, it appears he was uncertain trying to argue between self-defense and reasonable doubt. Without putting Harman on the stand self-defense could never be proven. Further, Harman had continued to state he was not the person who committed this crime, and therefore self-defense would never be a viable defense. Trial counsel should have raised a defense of third party motive for this crime. Trial counsel did not have a strategy or defense that could put the State's case to a proper adversarial test as required. During the Post-Conviction evidentiary hearing held September 20, 2016, Mr. Tavitas, Trial Counsel, when asked:

> Q. Because what defense did you have for my jury trial?
>
> A. I don't believe – again, I don't believe that there was an attempt – I'm sorry, a self-defense. I believe it was more the insufficiency of the evidence. [P.C. Tr. 34, L. 22 – P.C. Tr.35, 2]

The trial record reflects that the defense in this case was self-defense/reasonable doubt (**which contradict each other**) and not simply "insufficiency of the evidence" as Tavitas alleged during his testimony. During the Post-Conviction evidentiary hearing held September 20, 2016, Tavitas, when asked, "How can you explain how self-defense and reasonable doubt work together to prove innocence? [P.C. Tr. 40, L. 4-6] Tavitas answered this question with:

> A. Well, I'm not a legal scholar; but, again, as far as reasonable doubt, it's the burden of the State to prove its case beyond a reasonable doubt...[P.C. Tr. 40, L. 11-14]
>
> Again, with self-defense, usually with self-defense the defendant is going to have to testify and put himself there at the scene. So, I think that's how – and its my recollection – the best of my recollection is that you did not testify in this case. [P.C. Tr. 40, L. 24 – P.C. Tr. 41, L. 4]

Tavitas did not answer the question concerning how these two work together to prove innocence supporting Harman's claim Tavitas was ineffective in his defense at trial because he did not know how there could work together to prove his client's innocence; because they could not! Tavitas was correct in stating, "I 'm not a legal scholar."

Further, trial counsel did not put on the defense that Harman wanted. Harman wanted to proceed to trial with the defense he did not commit this crime, someone else did, yet this was never fully investigated or pursued at trial. If trial counsel had properly investigated, then a defense of reasonable doubt or third party motive may have succeeded by establishing someone else committed the crime and not Harman. Evidence of a third party in this case would have made sense since an unknown male's finger prints and DNA were found at the scene of this crime. Evidence of a third party motive would have tended to make it less probable that the Harman committed the crime. Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth

Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense" and the right to present relevant evidence in their own defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). Evidence of potential third-party culpability must be admitted when, under the "facts and circumstances" of the individual case, its exclusion would deprive the defendant of a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 303, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Eliciting Testimony from Victim.

Trial Counsel elicited prejudicial testimony from victim concerning motive for the crime, which was invoked by the trial court in the testimony below, putting Harman in grave peril before the jury rendering defense of self-defense void which was not good strategy for the defense. During trial on cross-examination of the victim, J.R. Jenkins, Tavitas had the victim state Harman's motive for this crime reflected in the record **(TR. 372, L. 20 – Tr. 385, L. 23).**

This elicited testimony was prohibited by motion in limine and trial counsel was ineffective by eliciting it even after the judge's warning it had already provided motive for why the victim was attacked in front of the jury. This testimony was highly prejudicial placing this Petitioner in grave peril and self-defense was no longer a viable defense with this jury, yet the judge invoked this prejudicial line of questioning.

During the Post-Conviction evidentiary hearing held September 20, 2016 there was confusion by the Post-Conviction Judge why this questioning concerning the insurance policy was important and it wasn't cleared up (P.C. Tr. 50 -56). The fact is, as stated above, the victim admitted since the money would go to the boys "the mother would have definitely got her fair share of that money and so would he." Tavitas had pointed out that motive when he made the

victim state in front of the jury that the boy's mother and Harman would get a "fair share of that money." This important fact was not clarified during the Post-Conviction evidentiary hearing, but is prejudicial and ineffective assistance of counsel during trial.

Trial counsel eliciting the above testimony and continuing to pursue it after the trial Judge's warning it had already provided motive for why the attack happened proves his representation fell below an objective standard of reasonableness counsel's performance prejudiced the defendant such that it rendered the proceeding fundamentally unfair or made the result unreliable by undermining the trial strategy of self-defense in this case. Here, counsel's performance was deficient and Harman suffered prejudice from counsel's deficient performance giving the jury a reason to believe he committed the crime. *Strickland*, 466 US at 688.

Not presenting expert witnesses.

Trial counsel failed to consult or present an expert witness(s) for the defense to challenge the State's forensic evidence, electronic evidence or voice analysis concerning evidence. Counsel's failure to call an expert could not be deemed strategic because counsel lacked the education and experience necessary to make a determination without advice from an expert. *Javel v. Hollins*, 261 F. 3d 210, 217 (CA2 2001); *Miller v. Anderson*, 255 F. 3d 455 (CA7 2001). During the Post-Conviction evidentiary hearing held September 20, 2016, Tavitas was asked, "What education do you have concerning forensic evidence, electronic evidence or voice analysis?" [P.C. Tr. 43, L. 11-12] Tavitas' answer was, "I don't have any specific training for that." [P.C. Tr. 43, L. 22-23] In this case the State presented electronic evidence of a video tape of a phone playing a voice message, rather than the original phone itself with this recording, which was not the best-evidence. Further, this video couldn't be heard clearly having to be continually played on different devices to attempt clarity. An expert witness would have

challenged this evidence as reliable. In this case the State presented electronic evidence of a video tape of a phone playing a voice message, rather than the original phone itself, which was not the best-evidence. Further, this video was not clear having to be continually played on different devices to attempt clarity. An expert witness would have challenged this evidence as reliable.

The State further did not test other evidence that could have established someone else was involved in this crime and actually in the house when it occurred. The State's DNA Expert Dawn Powers (Tr. 595-597) testified that hair found on the telephone at the scene of this crime was not tested for DNA concerning whose it was. This hair had root material and should have been tested. If the State didn't want it tested, it more likely than not contained exculpatory evidence for this Petitioner and trial counsel was ineffective by not having an independent expert for the defense test this hair sample since Dawn Powers stated further skin cells from the cordless phone was tested detecting an unknown male [Tr. 599-602]. During the Post-Conviction evidentiary hearing held September 20, 2016, Tavitas was asked, "What education do you have concerning DNA analysis, as far as your schooling? [P.C. Tr. 43, L. 11-12] Tavitas' answer was, "I am not a medical doctor. I have gone to various continuing legal education, various seminars regarding DNA. I can't tell you specifically how many I've been to or which ones. But, again, it's just – I'm not a scientist." [P.C. Tr. 43, L. 13-18]

Last, Detectives testified that Jenkins mouthed the word "Red" in the hospital (Tr. 730) concerning who committed this crime, which counsel failed to object to since Detectives were not experts in reading lips. On page 2 in an Affidavit of Probable Cause dated June 14, 2011 Detective Fulk stated concerning talking with J.R. Jenkins the following:

> On June 7, 2011 I went to Advocate Christ Hospital in Oak Lawn, Illinois where J.R. Jenkins was being treated for injuries he had

> suffered in the above incident. He had a tracheotomy tube in his throat and was unable to speak. I asked him to tell me who hurt him and he mouthed the words "David Harman." I asked him if he had a nickname and he mouthed the word "Red" and "came inside my house." ... Medical personnel informed me that Mr. Jenkins airway was swollen and his brain was swollen. I was also informed that he had fifteen centimeter slash across his throat.

Trial counsel should have keyed in on the fact J.R. Jenkins's airway and brain was swollen consulting with an expert to determine if it was medically possible to first think clearly enough to answer and secondly to mouth these answers. These are factors that should have been presented to the jury through expert testimony. Counsel's failure to call an expert could not be deemed strategic because counsel lacked the education and experience necessary to make a determination without advice from an expert. *Id. at 217.* During the Post-Conviction evidentiary hearing held September 20, 2016, Tavitas was asked, "Did you consider hiring experts to review the evidence in this case to assist you in preparing a defense? [P.C. Tr. 44, L. 14-16] The following occurred at this hearing concerning his answer:

> A. I'm not sure what experts that I would have been able to –
>
> Q. DNA experts, forensic experts, electronic evidence experts, voice analysis experts. Any of those?
>
> A. I don't recall specifically. I don't believe I – we eventually ever hired any. But, again, if there was a particular reason why – I know, even though I'm a public defender, I have requested and we get, on other cases, the authority to hire various investigators, if I deem that – or I believe that they were going to be helpful to the case.
>
> Q. Do you know if you had asked for experts in this case?
>
> A. I don't believe I did.
>
> Q. Okay. Did you ever consider consulting on of the experts for guidance in preparing a defense?
>
> A. I've been a lawyer for over twenty years. I don't – each lawyer

has their different style, different things that they – you know, every lawyer is going to do things differently. So, no, I didn't consider asking a second lawyer to review the case.

Q. All right, I didn't say lawyer. I said an expert.

A. I don't even know what kind of expert you're referring to

Q. Experts in DNA analysis, forensics, electronics, voice analysis. Any experts that may help in defense of me as your client?

Again, I'm just – I'm trying to recollect the actual evidence. As far as like voice analysis, I don't believe there was – I don't recall ever – I don't – I don't think there was a DNA analyisis that the State called to testify. So, again, I'm not just going to hire a DNA expert or voice, unless I believe it's relevant to the defense of the case.

Q. The State did call one.
[P.C. Tr. 44, L. 17 – P.C. Tr.]

Tavitas admitted in his testimony he could have obtained funds for experts if he deemed them necessary

H. Not objecting to voice mail recording.

Trial counsel failed to file Motion to Suppress Voice Mail recording under the Best-Evidence rule. In the present case, the State entered a video tape of a State's witness's phone voice message being played on the phone rather than entering the phone itself to be played. The result was a muffled recording that had to be manipulated by placing it on a laptop in an attempt for the jury to better hear it. These "circumstances make it unfair to admit the duplicate." The record reflects this video tape being played to the jury with trouble hearing it and attempts to clarify using different devices.

The federal best evidence rule, codified and expanded to cover recordings and photographs in Rules 1001 through 1004, requires only that party seeking to prove contents of document introduce original document or explain why it cannot be produced. *United States v.*

Rose (7th Cir. Ill. Dec. 20, 1978), 590 F.2d 232, 4 Fed R Evid Serv (CBC) 374, cert. denied, (U.S. June 11, 1979), 442 US 929, 99 S Ct 2859, 61 L Ed 2d 297. In this case the original evidence could be obtained and should have if possible, but trial counsel failed to force the State to do so.

During the Post-Conviction Evidentiary hearing held September 20, 2016, Tavitas when asked why he did not move to suppress this recording stated:

> A. It wasn't in evidence against you. But, again, the witness testified that he got the message and that he recognized your voice.
>
> Q. But as a defense attorney, shouldn't you have suppressed it, or motioned to suppress it?
>
> A. Again, I'm not certain under what grounds I would have been able to suppress it..."
> (P.C. Tr. 58, L. 12-18)

Tavitas during the Post-Conviction hearing testified he did not know what grounds to move to suppress when the trial record proves this recording first was not the "Best evidence" being a recording of another recording that could not be heard well by the jury, and secondly, it contained no probative value since it doesn't have a statement Harman committed this crime. Tavitas had grounds but due to his ineffectiveness he did not pursue them prejudicing Harman at trial.

Further, there was testimony by Henshew that there was two voice messages left on his phone on the day of this crime (Tr. 173), yet only one was played for the jury. Defense had the right to have both entered into evidence under the "Doctrine of Rule of Completeness."

Again, this was another attempt by the State to exclude possible exculpatory evidence for the defense which trial counsel was ineffective by not investigating this other voice message and demanding it be played under the doctrine of completeness.

I. Not objecting to leading questions or hearsay

This claim was initiated by the trial judge himself *sua sponte* bringing it to trial counsel's attention. The Indiana Court of Appeals heard this claim on its merits and it was presented to the Indiana Supreme Court on Transfer.

Trial counsel failed to object to numerous leading questions and hearsay having to be continually addressed by the Judge. The following references were found by petitioner who is not an attorney in the trial record reflecting either "leading" or "hearsay" questions (Tr. 83, 84, 85, 86, 87, 143, 144, 146, 157, 158, 234, 236 & 277). It was at this point in the trial the judge warns there's been a number of leading questions and some hearsay has come in with "**No Objections**" (Tr. 278, L.11-12). Trial counsel admits to wanting to object but simply didn't think the answers would hurt, so he chose not to (Tr. 278-279). Clearly, trial counsel was ineffective using this reasoning if the judge felt it necessary to stop and give this warning. This pattern continued throughout this trial by trial counsel (Tr. 318, 670, 671, 725, 726, 727, 728, 730, 731, 732, 733, 743) On Tr. 731-732, the Judge states there is a "fundamental" hearsay issue when Tavitas objected to speculation and the Judge points out counsel isn't objecting to the statement as a hearsay issue. This is fundamental error pointed out to Tavitas before overruling the objection. Tavitas did not attempt to object to hearsay even after the Judge tried to help him see it, or he did see it and refused to address it anyway.

During the Post-Conviction evidentiary hearing held September 20, 2016, the Judge was shocked that the trial judge had pointed out these error *sua sponte* (**P.C. Tr. 61, L. 6-25**). The above reference in the trial record established that the trial judge did act *sua sponte* and Tavitas stated the judge was saying avoid using them and it was strategy (P.C. Tr. 62, L. 7-15).

The fact that Tavitas blames it on strategy does not eliminate the fact that his ineffectiveness during trial required the trial judge to repeatedly give warnings admonishing him. *United States v. Agurs*, 427 U.S. 97, 111, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). As reflected above, Tavitas did on the record admit he had admits to wanting to object but simply didn't think the answers would hurt, so he chose not to (Tr. 278-279). Yet, the trial judge thought it was harmful enough to repeatedly address it *sua sponte* during trial. Here, counsel's performance was deficient and Harman suffered prejudice from counsel's deficient performance. *Strickland*, 466 US at 688.

J. Not objecting to excited utterance.

Trial counsel failed to challenge "Excited Utterance" after it was allowed over his objection for hearsay (Tr. 418, L. 2-15). Evidence Rule 803(3) creates an exception to the hearsay rule when the statement concern "the declarant's then existing state of mind . . . such as intent . . . but not including a statement of memory or belief to prove the fact remembered or believed . . . ." The Advisory Committee Note to Rule 803(3) states that the rule "is essentially a specialized application of Rule 803(1)." The Advisory Committee Note to Rule 803(1) explicitly requires a "substantial contemporaneity of event and statement [to negate] the likelihood of deliberate or conscious misrepresentation." Because of this, we require that statements offered under Rule 803(3) must be "contemporaneous with the . . . event sought to be proven; [therefore] it must be shown that the declarant had no chance to reflect-- that is, no time to fabricate or misrepresent his thoughts . . . ." *United States v. Jackson,* 780 F.2d 1305, 1315 (7th Cir. 1986). Further, an excited utterance must be spontaneously given and not be responses to question.

In the present case, the statement made by Jenkins was not contemporaneous with the event sought to be proven and he did have time to reflect in order to either fabricate or misrepresent his thoughts concerning who had beat him up. On Cross-Examination Jenkins stated during the alleged scuffle, "I was trying to get my bearings, get up or something and I couldn't" [Tr. 377, L.12-16]. Jenkins states during direct examination after the alleged scuffle he was thinking clearly and knew he had to get out of the house to get help (Tr. 316, L. 2-3), so in the time it took him to leave his house making his way four houses down to Jackie's house after stopping at a neighbor's (Tr. 317, L. 1-3), his statement cannot be considered a contemporaneous "excited utterance" any longer at this point. Further, Jenkins testified and therefore it was error to allow Jackie to testify to what the victim could in person. Trial counsel failed to challenge this excited utterance during cross-examination (Tr. 432-436) getting to the heart of the timeliness of them and whether Jenkins was coherent and thinking clearly.

During the Post-Conviction Evidentiary hearing held September 20, 2016, Mr. Tavitas, Trial Counsel, when asked if he had visited the scene of this crime stated, "Again, I believe I actually drove by the area, and I familiar with that area. But as far as going into the alleged victims home? No, I did not" [P.C. Tr. 33, L.23 – P.C. Tr. 34, L. 1]. Without visiting the scene of this crime counsel could not effectively determine any timelines and or distances to challenge the victim's version of this crime and whether the victim's statements after the crime occurred was not an excited utterance made contemporaneously with the actual crime.

The federal courts have made clear as well that to be admissible as present sense impression, statement must be made contemporaneously with event prompting statement. *Pfeil v. Rogers* (7th Cir. Wis. Mar. 8, 1985), 757 F.2d 850, 1 Fed R Serv. 3d (Callaghan) 1219, 17 Fed R

Evid. Serv. (CBC) 823, cert. denied, (U.S. Apr. 7, 1986), 475 US 1107, 106 S Ct 1513, 89 L Ed 2d 912. This is not the situation in this case violating Harman's right to a fair trial.

K. Not objecting to the hospital note.

Indiana ruled this issue is waived at trial yet, the claim now is ineffective assistance of counsel when he failed to object to "note" written by J.R. Jenkins in the hospital with the name "Red" written on it (Tr. 789-790) as not being the original note as required under Best-Evidence rule. Trial counsel was made aware the note offered at trial as evidence was not the original as required by Evidence Rules.

The federal best evidence rule, codified and expanded to cover recordings and photographs in Rules 1001 through 1004, requires only that party seeking to prove contents of document introduce original document or explain why it cannot be produced. *United States v. Rose* (7th Cir. Ill. Dec. 20, 1978), 590 F.2d 232, 4 Fed R Evid Serv (CBC) 374, cert. denied, (U.S. June 11, 1979), 442 US 929, 99 S Ct 2859, 61 L Ed 2d 297. In this case the original evidence could be obtained and should have if possible, but trial counsel failed to force the State to do so.

The trial court made it clear the State should have to produce the original note, yet trial counsel did not object allowing it admitted into evidence and not putting the State's case to adversarial testing as required. During the Post-Conviction evidentiary hearing held September 2, 2016, when asked why he failed to object to this note, Tavitas stated:

> A. I believe the witness was able to testify that that's what he wrote in the hospital. It's his writing. He recalled doing it. I don't remember if it was an original or not, but I do believe that the witness was able to testify, "Yeah, this is what I wrote in the hospital."
>
> Q. The witness did not testify to that.

BY MR. HARMAN:

Q. Did the witness testify to that under your cross-examination?

A. I don't recall.
(P.C.Tr. 68, L. 6-25)

Tavitas' testimony during Post-Conviction contradicts itself when he first stated the victim testified, "Yeah, this is what I wrote in the hospital," and then when asked again stated, "I don't recall." Tavitas could not explain why he did not object to this note being admitted into evidence as a copy after the trial judge pointed out it wasn't the original and the original wasn't present but the State could be forced to produce it.

L. Not objecting to juror question.

Trial counsel failed to make objection to jury questions that were prejudicial, some which were encouraged by the trial judge which the Court of Appeals have stated should not be permitted. This question was irrelevant and prejudicial. Where these two met had nothing to do with the crimes charged and it prejudiced Harman because its answer portrayed him as someone who hangs out in bars combined with a question asked concerning what type of motorcycle Harman owned (Harley Davidson) (Tr. 670-671) it began the State's "outlaw biker" character of Harman they wanted the jury to judge him by. Tavitas was ineffective by not objecting to this question, its lack of relevance had a prejudicial effect. All of this is important because later during trial [Tr. 766], the State has Harman's booking photo on the back of Henshew's driver's license photo attempting to show the jury he looks like an outlaw biker which had no relevance other than simply to cause prejudice to the defense. The State claimed this photo was paper clipped as part of a packet, which there is no proof of this.

During the Post-Conviction evidentiary hearing held September 20, 2016, Tavitas admitted he knew to object if a question was improper stating:

> A. I think it is up to the Judge to decide when a jury specially writes a question? Whenever there are jury questions, I know we – usually what will happen is we'll meet with the prosecutor and the judge says, this is the question; and if we have any legal objections to it or reasons that we didn't want it answered, then I would state it for the record.
> **(P.C. Tr. 69, L. 17-25)**

Tavitas couldn't explain why he did not object to this prejudicial question that supported the State's evidence harpooning portraying Harman as an "Outlaw Biker." Here, counsel's performance was deficient and Harman suffered prejudice from counsel's deficient performance allowing the jury to hear evidence concerning Harman that had nothing to do with the alleged crime and was merely to prejudice him with the jury for his alleged lifestyle as an outlaw biker who rode a Harley and hung out in bars. *Strickland*, 466 US at 688.

M. Not objecting to prosecutorial misconduct.

Trial Counsel failed to object to prosecutorial misconduct. To prevail on an ineffective assistance of counsel claim because of prosecutorial misconduct, a post-conviction relief petitioner must first establish that prosecutorial misconduct in fact occurred. *Pruitt v. State*, 903 N.E.2d 899, 928 (Ind. 2009). When reviewing a properly preserved claim of prosecutorial misconduct, it must be determined 1) whether the prosecutor engaged in misconduct, and if so, 2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. *Baer v. State*, 866 N.E.2d 752, 756 (Ind. 2007). The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct. *Baer*, 866 N.E.2d at 756. In *Hannon v. Cooper*, 109 F.3d 330 (7th Cir. 1997) it states, "The due process clause has

been interpreted to forbid prosecutors to obtain jury verdicts by means of statements that are seriously misleading or that otherwise prevent the jury from deliberating rationally about the defendant's guilt.

During the State's case, State's Prosecutor utilized "evidentiary harpooning" when it did the following: 1) prosecution asked a witness did Mr. Harman carry a knife which was irrelevant and prejudicial since other witnesses had already stated they did not see Harman with a weapon, and then asked other improper question or made statements concerning facts not in evidence. 2) The State intentionally entered into evidence State's Exhibit #2 (BMV Record of Hanshew) to reflect a photo line-up shown to a neighbor to this crime, and the reverse side of this exhibit contained the "Booking Photo" of this Petitioner. The Post-Conviction Court states, these "were offered and admitted to show a lack of defensive wounds on the head area of Mr. Harman" (Findings of Fact & Conclusions of Law, p. 18 **[App. Vol. 2, 32]**).Harman maintains the only reason to include this "Booking Photo" was to prejudice him with the jury showing him with an appearance of a biker. 3) Mr. Tavitas failed to object after the jury had asked where Harman and Cathy Jenkins met to the State's inquiry into whether Harman owned a motorcycle and what brand it was. This question was irrelevant and prejudicial. The jury had already inquired as to where Harman and Cathy Jenkins had met which had nothing to do with the crimes charged and it prejudiced Harman because it portrayed him as someone who hangs out in bars combined with a question asked concerning what type of motorcycle Harman owned (Harley Davidson) (Tr. 670-671) used only to prejudice this jury against Harman as a violent outlaw biker. Ineffective trial counsel and Court allowed the Prosecutor to make Harman defend against uncharged acts and possible prior character issue that did not pertain to the charges in this trial.

During the Post-Conviction evidentiary hearing held September 20, 2016, When Tavitas was asked why he did not object to the jury question concerning the kind of motorcycle Harman rode, he testified, "Whether or not you road a bike I don't think is a big deal" (P.C. Tr. 71, L. 25 – Tr. 72, L. 1). Tavitas proved his ineffectiveness by missing the point again here, as at trial, it wasn't that Harman rode a motorcycle (still not relevant), but that he rode a Harley supporting the State's evidence harpooning Harman is an "Outlaw Biker." When Tavitas allowed this irrelevant evidence to be presented to the jury, it prejudiced Harman and aided the State's case.

In *Bagnell v. State*, 413 N.E. 2d 1072 (Ind. Ct. App. 1980) the Prosecutor tried this same trick attempting to show the jury Bagnell was associated with "underworld connections."

Tavitas was ineffective by not objecting to these instances of Prosecutorial misconduct painting his client as an outlaw biker, who hung out in bars where he met Cathy Jenkins, possibly carried a knife, and as elicited from Lori Jones by the Prosecutor this Petitioner had allegedly told her, "Once a biker bitch, always a biker bitch." Harman was compelled to defend against an offense for which he was not charged and for which no charge exists, that of being an "outlaw biker." Just like Bagnell, such circumstances was grossly unfair and a mockery of justice. This was "evidentiary harpooning" by the State.

The Indiana courts in determining if evidentiary harpooning has occurred, courts must first determine the probative value of the evidence, including the proponent's need for that evidence. Second, courts must determine the likely prejudicial impact of the evidence. In particular, courts will look for the dangers that the jury will substantially overestimate the value of the evidence or that the evidence will arouse or inflame the passions or sympathies of the jury. *Stone v. State* (1989), Ind. App. 536 N.E.2d 534. The federal courts have determined "[A]n 'evidentiary harpoon' is a metaphorical term used to describe an attempt by a government witness

to deliberately offer inadmissible testimony for the purpose of prejudicing the defendant." *United States v. Cavely*, 318 F.3d 987, 996 n. 2 (10th Cir. 2003); *Oldham v. State*, 779 N.E.2d 1162 (Ind. Ct. App. 2002).

In the present case much like Oldham's, the State used evidence of petitioner's alleged character or character traits that is not admissible to prove that he acted in conformity with that character of an "outlaw biker." The State went further by attempting to put into evidence that this Petitioner was known to carry a knife after testimony had already been admitted he was not seen with a knife in this case. This evidence harpooning was fundamental error. A fundamental error that invalidates a criminal proceeding is one that undermines our confidence that the defendant is actually guilty. *See United States v. Morgan*, 346 U.S. 502, 511, 74 S. Ct. 247, 98 L. Ed. 248 (1954). Petitioner maintains that the jury was influenced by the State's "evidence harpooning," and due to ineffective assistance of counsel and the Court's abuse of discretion, the jury relied upon prejudicial evidence that should not have been admitted in finding him guilty.

Petitioner maintains that his jury was influenced by false extraneous prejudicial information provided to his jury by the State in the form of him being an "Outlaw Biker" which had nothing to do with the allegations at trial and that his jury found him guilty as a result of this false extraneous prejudicial information.

N. Not protecting Harman from a civil conspiracy.

Counsel was either ineffective or part of the conspiracy. Harman maintains that a conspiracy to deny a fair trial is ineffective assistance of counsel if not addressed by counsel. The Post-Conviction refused to address this issue because a federal right was alleged. Petitioner maintains that there was a "conspiracy to convict" through the action of the prosecutor's office, investigating police officers and several witnesses. Part of this conspiracy to convict included

portraying him as an "outlaw biker" making him defend against an uncharged crime hindering his defense against the crime he was charged with while this conspiracy further manipulated the alleged evidence against him.

Under Federal law that does apply to State cases, federal code 42 U.S.C. § 1985 states:

> **42 .S.C. § 1985. Conspiracy to interfere with civil rights**
> (1) **Preventing officer from performing duties**;
> (2) **Obstructing justice; intimidating party, witness, or juror**;
> (3) **Depriving persons of rights or privileges.**

Petitioner alleges that two or more persons conspired for the purpose of impeding, hindering, obstructing, and defeating the due course of justice in his State trial and conviction. Petitioner recognizes a conspiracy under Section 1985(2) is not actionable unless it is motivated by some racial animus or other type of class-based discrimination, *Lowe v. Letsinger*, 772 F.2d 308, 311 (7th Cir. 1985), and maintains the State's classification of him as an "outlaw biker" meets this requirement. During the Post-Conviction evidentiary hearing held September 20, 2016, when Tavitas was asked why he did not object to this prosecutorial misconduct, stated, "I don't believe that actually happened, but I don't believe there was a conspiracy" (P.C. Tr. 71, L. 11-12). Tavitas' testimony again proves he was ineffective and unaware of what was actually happening during trial and he did not properly defend Harman and protect his right to a fair trial. During the Post-Conviction evidentiary hearing held September 20, 2016, Appellate counsel, Mark Small, when answering a question concerning evidence harpooning stated:

> Q. Did you see the improper evidence and testimony the State interjected at trial to prejudice this jury against me as a violent Outlaw biker?
>
> A. Well, I remember portions of the testimony that the State elicited, but I don't recall counsel noting an objection.
> (P.C. Tr. 101, L. 1-7)

While each error of counsel individually may not be sufficient to prove ineffective representation, an accumulation of such failures may amount to ineffective assistance. The Post-Conviction Court failed to address trial counsel's ineffectiveness due to an accumulation of such failures.

Wherefore, Trial counsel must be found ineffective in representing Harman during trial and sentencing requiring reversal of his conviction and the granting of a new trial, and for all other relief deemed just and fair under law.

GROUND THREE: Whether Indiana erred Harman received Ineffective assistance of appellate counsel in violation of the 5th Amendment, 6th Amendment and 14th Amendment to the United States Constitutional, and under Article One of the Indiana Constitution, Sections 12 & 13?

Petitioner was deprived of effective assistance of Appellate Counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Indiana constitution. The Indiana standard by which claims of ineffective assistance of appellate counsel are reviewed is the same standard applicable to claims of trial counsel ineffectiveness. *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008), *reh'g denied, trans. denied*; *Bieghler v. State*, 690 N.E.2d 188, 193-95, *reh'g denied, cert. denied*, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 457 (1998).

Harman maintains he is entitled to relief because the state appellate court's decision was contrary to or an unreasonable application of clearly established federal law-here the Sixth Amendment right of the accused to effective counsel as interpreted in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 674, 104 S.Ct. 2054 (1984). On habeas review, a federal court determines whether the state court's application of the ineffective assistance standard was unreasonable, not whether defense counsel's performance fell below *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), standards. *See Harrington v. Richter*,

562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law."

A. Ineffective assistance for inadequately challenging Harman's sentence.

The State of Indiana ruled this issue *res* judicata. The issue is not that raised on direct appeal, but that Appellate counsel failed to properly present the issue of inappropriate sentence and abuse of discretion of trial/sentencing court to take mitigating circumstances into account properly and well. Appellate counsel argued through Appellate Rule 7(B) Harman's sentence should have been revised due to "The character of the offender in this case is such that the sentence was excessive" (App. Br. P. 21). Appellate counsel merely cites the criminal history and the basic military service of Harman without presenting well why these matter and how they were mitigating during sentencing. Small further did not bring to the Court's attention that during trial the Prosecutor Massa stated to the Judge concerning a requested jury question, "he does not really have a criminal history, but he does have DUI's and things like that," (Tr. 785) which would have aided the Court in addressing the sentencing claims on appeal.

During the Post-Conviction evidentiary hearing held September 20, 2016, Appellate Counsel, Mark Small, when asked why he did not state in his brief "how they were mitigating during sentencing," stated, "I thought by simply putting in there what the Court had said about your military service record, was an effective way of raising it for the court of appeals" (P.C. Tr. 88, L. 20-23). The Indiana Court of Appeals in its opinion on direct appeals stated:

> Harman first contends that the trial court erred by failing to find his prior military service as a mitigating circumstance. We acknowledge that the presentence investigation report indicates that Harman served three years in the United States Marines and

> was honorably discharged, and we recognize that service to our country is a commendable act. However, military service is not necessarily a mitigating circumstance, *see Forgey v. State*, 886 N.E.2d 16, 23-24 (Ind. Ct. App. 2008) (finding trial court was within its discretion in rejecting defendant's military record as a mitigating factor), and ***Harman fails to explain why it should be considered so in this case. (Emphasis Added)*** *Harman v. State,* 4 N.E.3d 209 (Ind. Ct. App. 2014).

The Court pointed out Small's ineffectiveness by not explaining why this should be considered in this case, unlike Small's testimony during Post-Conviction Relief, "I thought by simply putting in there what the Court had said about your military service record, was an effective way of raising it for the court of appeals" (P.C. Tr. 88, L. 20-23). Small was ineffective on appeal.

Further, Small alleges abuse of discretion by the sentencing judge, but then never explain in detail why or how the judge abused his discretion other than it appeared to disregard Harman's minimal criminal history, military history and the support his family and friends expressed (App. Br. P. 22). The Court of Appeals again stated as follows:

> Accordingly, the trial court did not abuse its discretion by not finding Harman's military service to be a mitigating circumstance. *See Forgey*, 886 N.E.2d at 23-24; *see also Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (**finding no abuse of discretion where the defendant failed to show that proposed mitigating factor of military service was significant and clearly supported in the record**); *Garrison v. State*, 575 N.E.2d 700, 704 (Ind. Ct. App. 1991) (determining that the trial court appropriately exercised its discretion when refusing to consider the defendant's honorable discharge from the military as a mitigating circumstance), *trans. denied.* (***Emphasis Added)*** *Harman v. State,* 4 N.E.3d 209 (Ind. Ct. App. 2014).

Again, the Court pointed out Small did not properly present this issue and if appellate counsel had properly presented Harman's sentencing issue the Indiana Court of Appeals may have revised his sentence, and this court should Order at this time Harman's appellate counsel

was ineffective and he be allowed to properly present his mitigating factors during a re-sentencing.

B. Not arguing trial counsel was ineffective.

Harman did not raise this as a claim and does not know where the Respondent's counsel found it in the record to argue against it at this time?

C. State court concluded appellate counsel not ineffective for the same reasons trial counsel was not ineffective.

Harman was denied due process by the Indiana Court of Appeals for not reviewing his claims because it didn't find trial counsel ineffective.

Appellate counsel failed to raise Harman was placed in grave peril by trial counsel eliciting prejudicial testimony from victim concerning motive for the crime rendering self-defense void before the jury. This issue is significant and obvious from the face of the record and it is clearly stronger than the raised issues.

Trial Counsel elicited prejudicial testimony from victim concerning motive for the crime putting Harman in grave peril before the jury rendering defense of self-defense void which was not good strategy for the defense. During trial on cross-examination of the victim, J.R. Jenkins, trial counsel elicited prejudicial testimony concerning motive for this crime **(TR. 372, L. 20 – Tr. 385, L. 23)(full quote above under ineffective assistance of trial counsel claim).**

This elicited testimony was prohibited by motion in limine and trial counsel was ineffective by eliciting it even after the judge's warning it had already provided motive for why the victim was attacked in front of the jury. This testimony was highly prejudicial placing this Petitioner in grave peril and self-defense was no longer a viable defense with this jury.

Trial counsel eliciting the above testimony and continuing to pursue it after the trial Judge's warning it had already provided motive for why the attack happened is significant and

obvious from the face of the record and it is clearly stronger than the raised issues proving appellate counsel's representation fell below an objective standard of reasonableness by failing to raise this on direct appeal.

During the Post-Conviction evidentiary hearing held September 20, 2016, when Small was questioned concerning not raising this issue even though clear and significant on the face of the record, he stated, "What you're describing would be an aspect of ineffective assistance of counsel. And if I were to raise that in the direct appeal brief, in all likelihood we wouldn't be here today for the post conviction relief hearing" (P.C. Tr. 90 L. 7-12). So, Small in essence admitted he could have raised this issue under fundamental error "and if I were to raise that in the direct appeal brief, in all likelihood we wouldn't be here today for the post conviction relief hearing" (P.C. Tr. 90 L. 7-12). Small's testimony proves this claim for Harman's ineffective assistance of appellate counsel claim since Harman would have rather had this issue resolved prior to Post-Conviction Relief saving time and money for himself and the State.

Appellate counsel failed to raise two vital Best-Evidence Rule violations under abuse of discretion by trial court.

The first concerned a "note" written by J.R. Jenkins in the hospital with the name "Red" written on it (Tr. 789-790) as not being the original note as required under Best-Evidence rule. The trial record makes clear the note offered at trial as evidence was not the original as required by Indiana Evidence Rules. The trial court made it clear the State should have to produce the original note, yet allowing it admitted into evidence.

The second piece of evidence admitted improperly was a video violating Indiana Evidence Rules. In the present case, the State entered a video tape of a State's witness's phone voice message being played on the phone rather than entering the phone itself to be played. The

result was a muffled recording that had to be manipulated by placing it on a laptop in an attempt for the jury to better hear it. These "circumstances make it unfair to admit the duplicate." The record reflects this video tape being played to the jury is quoted above in full under ineffective assistance of trial counsel.

The message in these recording when played states nothing in it that the Petitioner committed any crime. There is only someone saying that someone or something is dead on the front lawn. Since the alleged victim in this case is not dead, it leaves only speculation as to what this recording was referring to. No specific conclusion can be made without speculation or assumption. Therefore, there is no probative value to this voice mail recording that was highly prejudicial and it should have been suppressed prior to trial. During the Post-Conviction evidentiary hearing held September 20, 2016, when Small was questioned concerning not raising this issue even though clear and significant on the face of the record, he stated, There was no objection to it, and so I don't have a basis on the record to argue it, for the most part" (P.C. Tr. 9, L. 5-7). Small here admits he actually did have a basis, "for the most part" under fundamental error which he seemed reluctant to use on direct appeal.

Appellate counsel failed to raise prejudicial leading questions and hearsay allowed by trial counsel after numerous warnings by trial court *sua sponte*. The following references were found by petitioner who is not an attorney in the trial record reflecting either "leading" or "hearsay" questions (Tr. 83, 84, 85, 86, 87, 143, 144, 146, 157, 158, 234, 236 & 277). It was at this point in the trial the judge warns there's been a number of leading questions and some hearsay has come in with **"No Objections"** (Tr. 278, L.11-12). Trial counsel admits to wanting to object but simply didn't think the answers would hurt, so he chose not to (Tr. 278-279). Clearly, if the judge felt it necessary to stop and give this warning fundamental error was

committed. This pattern continued throughout this trial by trial counsel (Tr. 318, 670, 671, 725, 726, 727, 728, 730, 731, 732, 733, 743). Appellate counsel, Mark Small, had these references in the trial record and failed to raise them under fundamental error. During the Post-Conviction evidentiary hearing held September 20, 2016, when Small was questioned concerning not raising this issue even though clear and significant on the face of the record denying due process, he stated:

> They could, but I didn't view that as being – again, as my recollection of the record, as being a strong basis for an argument. Because raising it as fundamental error in direct appeal, also opens it to being claimed as res judicata in post conviction.
> (P.C. Tr. 97, L. 9-14

Petitioner does state this rises to the level of fundamental error the trial court committed, Small failed to address, and it must be corrected. Small continues to rely upon waiting to raise a possible fundamental error claim under ineffective assistance of counsel even when fundamental error is clear and significant on the face of the record denying due process. This is fundamental error that was never corrected and must be corrected at this time. The Petitioner's right to due process has been denied and must be corrected by reversal of his conviction since his jury was misled by the State being allowed to consistently use leading questions and hearsay throughout this trial, thus rendering his trial unfair and unconstitutional.

Appellate counsel failed to raise allowing "Excited Utterance" testimony over objection as hearsay by trial counsel. During the Post-Conviction evidentiary hearing held September 20, 2016, when Small was questioned concerning not raising this issue even though clear and significant on the face of the record, he stated:

> If there was no objection, and I don't recall that there was, then, no. I keep – I'm not trying to go to a default, but if counsel didn't raise an objection, then I would not raise it on appeal, except in very rare circumstance.

P.C. Tr. 98, L. 18-23

In the present case, trial counsel did object to hearsay. The statement made by Jenkins was not contemporaneous with the event sought to be proven and he did have time to reflect in order to either fabricate or misrepresent his thoughts concerning who had beat him up. On Cross-Examination Jenkins stated during the alleged scuffle, "I was trying to get my bearings, get up or something and I couldn't" [Tr. 377, L.12-16]. Jenkins states during direct examination after the alleged scuffle he was thinking clearly and knew he had to get out of the house to get help (Tr. 316, L. 2-3), so in the time it took him to leave his house making his way four houses down to Jackie's house after stopping at a neighbor's (Tr. 317, L. 1-3), his statement cannot be considered a contemporaneous "excited utterance" any longer at this point. Further, Jenkins testified and therefore it was error to allow Jackie to testify to what the victim could in person. Trial counsel failed to challenge this excited utterance during cross-examination (Tr. 432-436) getting to the heart of the timeliness of them and whether Jenkins was coherent and thinking clearly. Small failed to raise this issue on direct appeal even though there was an objection by counsel.

Appellate counsel failed to raise lesser charged offenses Count II, Class B felony aggravated battery; and Count III, Class C felony battery should have been dismissed prior to trial. These charges were not presented as lesser included offenses with instructions to the jury reflecting this, so they should not have been allowed to be included at trial violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. This Petitioner in the present case cannot be convicted of all three charges of attempted murder, aggravated battery and battery when the three offenses are based upon the same conduct.

The trial court attempted to remedy this error by merging the two lesser-convictions with the greater attempted murder. During the Post-Conviction evidentiary hearing held September 20, 2016, when Small was questioned concerning not raising this issue even though clear and significant on the face of the record, he stated: "I believe that the Court, by addressing the double jeopardy issue, as having been addressed by merging those issue, addressed those issue" (P.C. Tr. 100, L. 17-20). Appellate counsel was ineffective by not raising on direct appeal the trial court should have vacated these convictions. However, even this remedy was not sufficient to eliminate the prejudice Harman suffered at trial by having the jury believe he committed three crimes rather than one. Appellate counsel was ineffective by not raising this issue on direct appeal.

Appellate counsel failed to raise Prosecutorial misconduct using evidence harpooning when State's Prosecutor did the following: 1) prosecution asked witness did Mr. Harman carry a knife when this was irrelevant and asked other improper question or made statements concerning facts not in evidence. 2) The State intentionally entered into evidence State's Exhibit #2 (BMV Record of Hanshew) to reflect a photo line-up shown to a neighbor to this crime, and the reverse side of this exhibit contained the "Booking Photo" of this Petitioner. The only reason to include this "Booking Photo" was to prejudice the Petitioner with the jury. 3) Mr. Tavitas failed to object after the jury had asked where Harman and Cathy Jenkins met to the State's inquiry into whether Harman owned a motorcycle and what brand it was. This question was irrelevant and prejudicial. The jury had already inquired as to where Harman and Cathy Jenkins had met which had nothing to do with the crimes charged and it prejudiced Harman because it portrayed him as someone who hangs out in bars combined with a question asked concerning what type of motorcycle Harman owned (Harley Davidson) (Tr. 670-671) used only to prejudice this jury

against Harman as a violent outlaw biker. The Trial counsel and Court allowed the Prosecutor to make Harman defend against uncharged acts and possible prior character issue that did not pertain to the charges in this trial.

During the Post-Conviction evidentiary hearing held September 20, 2016, when Small was questioned concerning if he knew what evidence harpooning is, he stated, "Generally, yes" (P.C. Tr. 100, L. 25). When further questioned concerning evidence harpooning Small stated as follows:

> Q. Did you see the improper evidence and testimony the State interjected at trial to prejudice this jury against me as a violent Outlaw biker?
>
> A. Well, I remember portions of the testimony that the State elicited, but I don't recall counsel noting an objection.
> (P.C. Tr. 101, L. 1-7)

Again, Small testified that he remembered the State eliciting testimony that was prejudicial and because no objection was made by trial counsel, he did not raise it under fundamental error denying due process and a fair trial.

Appellate counsel was ineffective by not raising these instances of Prosecutorial misconduct rising to fundamental error painting Petitioner as an outlaw biker, who hung out in bars where he met Cathy Jenkins, possibly carried a knife, and as elicited from Lori Jones by the Prosecutor this Petitioner had allegedly told her, "Once a biker bitch, always a biker bitch." Harman was compelled to defend against an offense for which he was not charged and for which no charge exists, that of being an outlaw biker. Just like Bagnell, such circumstances was grossly unfair and a mockery of justice. This was "evidentiary harpooning" by the State.

During the Motion In Limine hearing denying the victim's criminal history the judge stated, "The Court has an obligation to make sure that the jury hears relevant evidence and that it

does not get confused or sidetracked on collateral matters or minutia that have no bearing on the case." (Tr. 26) The court failed here.

In the present case, the State used evidence of petitioner's character or character trait that is not admissible to prove that he acted in conformity with that character of an "outlaw biker." The State went further by attempting to put into evidence that this Petitioner was known to carry a knife after testimony had already been admitted he was not seen with a knife in this case. This evidence harpooning was fundamental error.

Wherefore, appellate counsel must be found ineffective in representing Harman during direct appeal, and for all other relief deemed just and fair under law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Executed on: June 02, 2020 .

Respectfully submitted,

X _____

David Harman
Petitioner / *pro se*