No. 20-7055

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

==========

BERNARD F. VERRETT -- PETITIONER, PRO SE

VS.

DARREL VANNOY, WARDEN
STATE OF LOUISIANA, -- RESPONDENT

==========

ON PETITION FOR WRIT OF CERTIORARI TO:
U.S. FIFTH CIRCUIT COURT OF APPEAL

==========

PETITION FOR WRIT OF CERTIORARI

==========

Respectfully submitted,

Bernard F. Verrett
DOC# 598285, Cyp. 2
Louisiana State Penitentiary
Angola, La. 70712

QUESTIONS PRESENTED

QUESTION 1: Whether *Strickland* requires counsel to procure an adequate defense expert to negate or mitigate the intent element of the crime when that was the only defense available at trial, in violation of the Sixth And Fourteenth Amendment.

QUESTION 2: Whether the Sixth and Fourteenth Amendment Rights to Due Process require the court to grant funds for a defense expert to Assist In Preparing and Presenting His Defense, other than as provided in *Ake v. Oklahoma*, to negate or mitigate the intent element of the crime when that was the only defense available at trial, in Violation of the Fifth, Sixth and Fourteenth Amendment to the Constitution.

QUESTION 3: Whether Verrett was Denied His Sixth Amendment Right To Due Process and A Fair and Impartial Jury Trial When, After Learning of The Victim's Family Contacts Throughout the Parish as Well as Wide Publicity of The Case, He Was Denied A Change of Venue, in Violation of the Fifth, Sixth and Fourteenth Amendment to the Constitution.

LIST OF PARTIES

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

[x] 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:

Hon. Joseph L. (Joe) Waitz, Jr., District Attorney
7856 Main Street
Houma, Louisiana 70361

There are no other parties to this action within the scope of Supreme Court Rule 29.1.

_____
Bernard F. Verrett

TABLE OF CONTENTS

INDEX TO APPENDICES

Appendix A: 10-22-20	The U.S. Fifth Circuit Court of Appeal denied COA, Bernard F. Verrett v. Darrel Vannoy, 5th Cir. No: 19-30707, U.S.D.C. 2:19-CV-351.
Appendix B: 8-13-19	U.S. District Court, Middle District of Louisiana, Judgment and Order (2 pgs.) dismissing with prejudice §2254 petition. Bernard F. Verrett v. Vannoy, USDC No. 2:19-CV-351.
Appendix C: 7/29/19	U.S. District Court, Middle District of Louisiana, Magistrate's Report & Recommendation. Verrett v. Vannoy, USDC No. 2:19-CV-351.
Appendix D: 0011/19	Pro se application for certificate of appealability.

CASE LAW CITED

CODES AND STATUTES

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

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

OPINIONS BELOW

For cases from **federal courts:**

The opinion(s) of the United States Fifth Circuit Court of Appeal appear at **Appendix A** to the petition and is unpublished.

The opinion(s) of the United States District Court, Middle District of Louisiana, appear at **Appendix B** and is unpublished.

The Magistrates Report and recommendation in the U.S. Middle District Court, appear at **Appendix C** of the petition and is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeal decided my case was October 23, 2020, a copy of that decision appears at **Appendix A.**

[X] No petition for rehearing was timely filed in my case.

[X] An extension of time to file the petition for a writ of certiorari was granted by order of this court entered March 19, 2020, extending the Rule 13.1 and 13.3 time (90 days) to 150 days.

The jurisdiction of this Court is invoked under **U.S.C.A. Const. Art. 3 § 2, cl. 2; 28 U.S.C. § 1254(1); Supreme Court Rule 9, 17.1(b),** and **22.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, **AMENDMENT V** provides in pertinent part:

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 offense 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 take for public use, without just compensation.

The United States Constitution, **Amendment VI** provides in pertinent part:

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 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 defense.

The United States Constitution, **Amendment XIV, § I** provides in pertinent part:

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 November 18, 2010, Bernard Franklin Verrett was indicted on a charge of Second Degree Murder of Kristi Verrett, which occurred on July 17, 2010. Mr. Verrett pled not guilty. The matter was tried before a jury on February 27, 28, and 29, and on March 2 and 3, 2012. The jury found Mr. Verrett guilty as charged of Second Degree Murder.

The Court denied Mr. Verrett's motion for Post-Verdict Judgment of Acquittal. The Court then sentenced Mr. Verrett to Life Imprisonment without the

benefit of parole, probation, or suspension of sentence. A Motion for Reconsideration of Sentence was also denied.

On May 24, 2013, Attorney Bertha M. Hillman of the Louisiana Appellate Project, filed Mr. Verrett's Direct Appeal with the First Circuit Court of Appeal. On June 7, 2013, the State of Louisiana, filed its Response. On December 27, 2013, the First Circuit Court of Appeal Affirmed the Conviction and Sentence. On January 1, 2014, Mr. Verrett filed a Writ of Certiorari with the Louisiana Supreme Court which was denied June 20, 2014.

On September 2, 2015, Mr. Verrett filed his Application for Post Conviction Relief which was denied February 15, 2017. He filed a notice of intent and was granted a return date of April 7, 2017. He filed his related writ application on March 14, 2017. On May 25, 2017, Verrett's supervisory writ application was "denied on the showing made" by the Louisiana First Circuit Court of Appeal. Therein the court of appeal allowed him until July 20, 2017 to file a new application with the court. Verrett timely did so on July 18, 2017. On September 15, 2017, The Court of Appeal denied writ application. On October 10, 2017, he filed a writ application with the Louisiana Supreme Court. On January 8, 2019 the Louisiana Supreme Court denied relief.

Mr. Verrett timely filed for a writ of habeas corpus under 28 U.S.C.A. § 2254, January 14, 2019, asserting three claims for relief. On July 29th, 2019 Magistrate judge Michael B. North, U.S. Magistrate judge issued his report and

recommendation (R &R). Verrett filed his objections. On August 13, 2019 Judge Lance M. Africk entered judgment and order denying Habeas relief. After proper notice and time set Verrett filed an application for COA in the U.S. Fifth Circuit Court of appeals. The same denied COA October 23, 2020. (App. A). Petitioner herein request a writ of certiorari issue to review the denial of Certificate of Appealability (COA).

STATEMENT OF THE FACTS

Bernard and Kristi Verrett were married and the parents of three children: nineteen year old Nicholas; sixteen year old Nicole and ten year old Nathan (Rec. 359, 362, 415). On Friday, July 16, 2010, Bernard and Kristi attended a wedding and reception together. Following the reception, they went to Cajun Country Lounge. At about 2:00 a.m., (July 17, a Saturday), they arrived home at Morello Court in Houma.

Bernard had drunk twelve or thirteen beers in a six or seven hour period. His children, Nicholas and Nicole, testified that he was drunk but coherent when he and Kristi returned home. (Rec. pp. 365, 373, 423). At about 3:30 a.m., Mr. Verrett and Kristi left the house to go get something to eat. (Rec. 373, 423).

When they had not returned after an hour and a half, Nicholas became concerned and went to look for them. At approximately 4:30 a.m., he found his father sitting in their parked car, Kristi was not in the car. Bernard told Nicholas that his mother had gotten out of the car. (Rec. pp. 374-376, 424). Nicholas went to look for his mother and Bernard returned to the house. (Rec. pp. 378, 425).

At 6:30 on Saturday morning, Bernard went to his sister's house. He told

his sister. Michelle Parfait, that he and Kristi had a fight because she told him that he was trash and would always be trash. He told his sister that Kristi admitted that she was "messing around" with someone (Rec. p. 462). He saw Michelle again at 5:30 p.m. Michelle testified that he was talking out of his head and told her he wanted to kill himself. (Rec. p. 483).

On Saturday afternoon when Kristi had not returned home, Nicholas went to Wal-Mart where his mother worked. Her co-workers told him that she was scheduled to work that day but had not reported to work. Nicholas called 911.

The police began searching for Mr. Verrett, but were unable to find him on Saturday. On Sunday, July 18, 2010, the police proceeded to Shrimper's Row near Butch Court after receiving information that Mr. Verrett had been sighted there. As the police approached Mr. Verrett, he ran and hid in a scrap yard.

As more deputies arrived and commanded he come out, Mr. Verrett complied. Mr. Verret was arrested and Mirandized. During questioning, Mr. Verrett told deputies that he had attempted suicide because he lost his wife. (Rec. p. 497). Mr. Verrett then admitted he stabbed Kristi, and took the police to the location where he left her body.

Dr. Susan Garcia, a forensic pathologist, performed the autopsy on Kristi. She testified at trial that Kristi had eighteen sharp-force injuries, caused by a single-edge blade, to her chest, abdomen, back, neck, shoulder, and arm. Four of the more serious wounds were the two in her chest and the two in her abdomen.

REASONS FOR GRANTING THE PETITION

The lower courts erred in denying a COA, finding that Verrett failed to state a constitutional claim. There are two key constitutional claim presented in Mr. Verrett's application: (1) Whether counsel was ineffective in failing to procure an adequate defense expert to negate the intent element of the crime of second degree murder; (2) was the trial court in err denying funds for the defense expert and when counsel procured a cheap expert the court would not allow him to testify. The constitutional right to effective counsel and the right to present a defense long held by this court to be fundamental Constitutional rights.

In *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985), the United States Supreme Court construed the fourteenth Amendment's due process clause to guarantee that, in a prosecution against an indigent defendant, the state "take steps to assure that the defendant has a fair opportunity to present his defense." One "step" the state must take is to ensure that the indigent defendant is provided with effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A further component of the state's obligation to provide effective assistance of counsel is to also furnish the indigent defendant's counsel with all the " 'basic tools of an adequate defense.'" *Ake*, 470 U.S. at 77, 105 S.Ct. At 1093 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct.431, 433, 30 L.Ed.2d 400 (1971).

The court in *Ake* held that a state-funded psychiatric expert is a "basic tool" for defendant's case, "when the defendant demonstrates to the trial judge that his sanity at the

time of the offense is to be a significant factor at trial . . ." 470 U.S. at 83, 104 S.Ct. at 1096. The Louisiana Supreme Court has extended the constitutional right of indigent defendants recognized in *Ake* to other types of expert assistance considered crucial to an indigent's defense.

For example, the court has held that the right to a private investigator may in many cases be an adjunct to the right to counsel, because furnishing counsel to the indigent defendant is not enough if counsel cannot secure information on which to construct a defense. *State v. Madison*, 345 So.2d 485, 490 (La.1977) (Citing *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956) (Frank, J., dissenting); Note, The Indigent's Right to an Adequate Defense: Expert and investigational assistance in Criminal Proceedings, 55 Cornell L.Rev. 632 (1970); Note, Right to Aid in Addition to Counsel for Indigent Criminal defendants, 47 Minn.L. Rev. 1054 (1963); ABA Standards for Criminal Justice relating to Providing Defense Services (1967), § 1.5 and Commentary). In *Madison*, the court reiterated the fundamental principle that the kind of trial a man gets cannot be made to depend on the amount of money he has. Id. (Citing *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956)). Therefore, when an indigent defendant shows that his attorney is unable to obtain existing evidence crucial to the defense, the means to obtain it should be provided for him. Id. (Finding that indigent defendant in that case had not made a sufficient showing of need to justify the procurement of an investigator).

In *State v. Craig*, 93-2515, 93-2589, p. 13 (La.5/23/94), 637 So.2d 437, 446-47,

the court upheld a trial court decision ordering payment for the services of an investigator, a psychologist, and a mitigation expert, finding that those services were necessary to provide the indigent defendant with an adequate opportunity to present his defense. The court emphasized that an indigent defendant wishing to obtain funding for the production or gathering of any evidence must make a showing of the necessity for those services. Id. at 447.

The court addressed the specific issue of what showing an indigent needs to make in order to obtain state-funded expert assistance in more detail in *State v. Touchet*, 93-2839 (La.9/6/94), 642 So.2d 1213. In that case, the court elaborated on its holding in Craig, stating that:

Henceforth, for an indigent defendant to be granted the services of an expert at the expense of the state, he must establish that there exists a reasonable probability both that an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamental unfair trial. To meet this standard, a defendant must ordinarily establish, with a reasonable degree of specificity, that the assistance is required to answer a substantial issue or question that is raised by the prosecution's case or to support a critical element of the defense. If the trial court finds that the indigent defendant is able to meet this standard, it is to authorize the hiring of the expert at the expense of the state. Id. at 1216.

Further, the Court of appeal misapplied the basic principle of *Hinton v. Alabama*, 571 U.S. ___, 134 S.Ct. 1081, 188 L.Ed.2d 1, No. 13-6440 (2014); "[T]he only inadequate assistance

of counsel here was the inexcusable mistake of law - the unreasonable failure to understand the resources that state law made available to him - that caused counsel to employ an expert that he himself deemed inadequate."

In *Hinton v. Alabama*, 571 U.S. ___, No. 13-6440 (2014); the Supreme Court vacated the lower court's judgment and remanded the case for reconsideration of whether the attorney's deficient performance was prejudicial. Hintons attorney was granted $1,000 by the court to hired an expert. Counsel did not understand Alabama law allowed him to get additional funding, that misunderstanding of the law caused counsel to employ an expert that *he himself* deemed inadequate. With the facts in this case no reasonable counsel would have gone to trial without an expert – short of selling the defendant all the way out.

THE TRIAL COURT DENIED AN EVIDENTIARY HEARING.[1]

While there is a record on the denial of the pre trial motion for funds and the court not allowing the defense expert to testify at trial, the trial court denied an evidentiary hearing to put counsel's testimony on the record on the post conviction claims. Apparently as in *Hinton* counsel did not understand Louisiana law allowed him to get additional funding, that misunderstanding of the law caused counsel to employ an expert that *he himself* deemed inadequate.

Further, the Court of appeal misapplied the basic principle of *Hinton v. Alabama*, 571 U.S. ___, 134 S.Ct. 1081, 188 L.Ed.2d 1, No. 13-6440 (2014); "[T]he only inadequate assistance of counsel here was the inexcusable mistake of law - the unreasonable failure to understand the resources that state law made available to him -

1 September 2, 2015 Verrett filed motions for evidentiary hearing, motion for funds for the hiring of ineffective assistance of counsel experts, motion for funds to hire forensic experts, motion for funds to hire mental health experts.

that caused counsel to employ an expert that *he himself* deemed inadequate." The lower court erred in denying a hearing to determine why counsel did not object and procure a qualified expert expert. Without counsel's testimony the defendant and the reviewing court can only conjecture why he failed to hire a qualified expert after arguing for funds for independent testing and the court denied that request. Again the second issue involving the admissibility of the defense or the trial court ruling the expert could not testify was raised but the court denied a hearing to make a record for review.

Therefore, petitioner respectfully suggest he made a sufficient prima facia showing for the need for an evidentiary hearing to put defense counsel's testimony on the record and an expert to carry his burden to support prejudice on his ineffective assistance of counsel claim.

Petitioner submits that defense counsel, were grossly ineffective. Bottom line, as a result of failure on part of defense counsel, and trial courts rulings related to experts petitioner was deprived of Effective assistance of counsel, independent expert(s) and independent testing, and the right to present the only available defense.

Other courts have granted relief under similar facts and law.[2]

The petition for a writ of certiorari should be granted on these questions.

---

2. See *State v. Coker*; 412 N.W.2d 589 (Iowa 1987)(applying standard that trial court should approve request for expert where "counsel's request [for a given type of expert] is reasonable under the circumstances and may lead to the development of a plausible defense," court held that denial of request for expert to assist in intoxication defense violated due process rights of defendant who had history of alcohol abuse and who experienced withdrawal seizures and delirium after arrest) (although intoxication was not a defense to the crime charged, expert could be used to show that condition rendered defendant unable to form necessary intent)

QUESTION ONE

WHETHER STRICKLAND REQUIRES COUNSEL TO PROCURE AN ADEQUATE DEFENSE EXPERT TO NEGATE OR MITIGATE THE INTENT ELEMENT OF THE CRIME WHEN THAT WAS THE ONLY DEFENSE AVAILABLE AT TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT.

The Court Of Appeal denied COA on whether the magistrate misapplies or misinterpreted *Ake v. Oklahoma* and *State v. Touchet*, in its analysis of ineffective assistance of counsel and claim two (He Was Refused An Expert to Assist In Preparing and Presenting His Defense). "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Harrington v. Richter*, 562 U.S. ___, ___, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011). This was such a case.

First the magistrate overlooks the trial court denied funds for a defense expert on the grounds it was to expensive. The court's unreasonable determination of the facts does not stop there, when the court would not allow the defense expert, Mr. Kent, which would have testified defendant suffered from stress or depression to mitigate the intent element of the crime. The Magistrate finds "other than that suffered by a husband who believes, mistakenly, that his wife is having an affair," is purely conjecture by the court as there was no fact finding hearing.

The court further states the "[E]ven if the court were to find [] counsels performance was deficient for failure to offer expert testimony regarding the adverse psychological effects of steroids, stress and depression ... the court does

not believe that the defendant suffered prejudice []. ... [I]t is highly unlikely, based on the evidence of the defendant's behavior immediately following the murder of his wife, that expert testimony would have persuaded the jury that the defendant had less that the specific intent to kill or inflict great bodily harm required for conviction of second degree murder. The court's reasoning erroneously overlooks that manslaughter is second degree murder where the defense presents sufficient mitigation evidence. Counsel's failure to procure a qualified expert prejudiced the defendant leaving the defendant with no defense and no assistance by counsel. See *Hinton v. Alabama*, 571 U.S. 263, 134 S.Ct. 1081, 188 L.Ed.2d 1.

Intoxication is a defense to a prosecution for second degree murder if the circumstances indicate the intoxication, whether voluntary or involuntary, precludes the presence of specific criminal intent. See La. R.S. 14:15(2). When defenses that could defeat an essential element of an offense, such as intoxication, are raised by the evidence, the state must overcome beyond a reasonable doubt that the mental element was present despite the alleged intoxication. *State v. Lutcher*, 96-2378, pp. 17-18 (La.App. 1 Cir. 9/19/97), 700 So.2d 961, 973, *writ denied*, 97-2537 (La. 2/6/98), 709 So.2d 731.

It is well settled that voluntary intoxication can only be considered as a defense where specific intent is an essential element of the crime. *State v. Boleyn*, 328 So.2d 95 (La. 1976). Where defendant contends that the trial court

improperly denied him the opportunity to present his defense of voluntary intoxication, the trial court erred because the intoxication defense was available to rebut the prosecution of second degree murder, and such evidence was material and the trial judge abused his discretion in denying the admission of that evidence.

Further the court erred reviewing the ineffective assistance of counsel claim under the wrong standard of review. While the magistrate finds the state court applied "the familiar *Strickland* standard," Mr. Verrett submitted in his application that the "The [State] Court completely failed to apply the *Strickland* standard and relied instead on the direct appeal opinion application of the standard in *Jackson v. Virginia*[3] "light most favorable to the prosecution," applicable to a sufficiency of evidence claim. The court further erred in relying on Mr. Verretts children testimony to make a negative determination that specific intent was present, without holding a hearing and allowing the defendant to present testimony to support his claims." The magistrate overlooks the law in regards to this claim and instead compounds the same error.

Further, the court erred denying this claim without affording petitioner a full and fair evidentiary hearing to put on evidence in support of his claim, and then relying through out the opinion on the direct appeal decision, which as stated above was a sufficiency of evidence claim reviewed under the *Jackson* standard.

---

3. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979).

While the court must examine the "totality of circumstances and the entire record" to assess counsel's performance, "[s]ometimes a single error is so substantial that it alone causes the attorney's performance to fall below the Sixth Amendment standard." *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cir. 1979) (counsel's failure to request a mistrial to which he was automatically entitled is sufficient to establish ineffective assistance of counsel).

Counsel's Ineffectiveness Must Not Be Judged Incrementally But in Terms of its Overall Cumulative Impact on the Trial:

The question of ineffective assistance of counsel is a cumulative one. It is not proper to divide each issue up in an effort to "conquer" it; rather, this Court must review the totality of the circumstances and the cumulative effect of Defense Counsel's lapses. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066 (When viewing counsel's effectiveness, courts must look to "all circumstances" of the trial). Therefore, all of the issues discussed below must be viewed in their cumulative context, rather than in isolation.

Failure to Prepare and Present a Defense:

In denying the ineffective assistance of counsel claim the court notes that defense counsel advised the court that Mr. Kent was an expert in substance abuse and the effects of substance abuse on a human being. The defendant intended to offer his testimony at trial to show that the defendant's voluntary use of alcohol and steroids could have precluded the formation of specific intent to commit the crime. The trial court would not permit Mr. Kent to testify based on a finding that "he lacked the requisite knowledge,

skill, or experience to testify about the physical effects of substance abuse on the functioning of the human body."

The defendant alleges the jury should have been offered expert testimony to show the "adverse psychological effects of steroids, stress and depression.

The Sixth Amendment and LSA-Const. art. 1, § 16 guarantees the right to present a defense. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Van Winkle*, 658 So.2d 198 (La. 1995); *State v. Gremillion*, 542 So.2d 1074 (La. 1989); *State v. Vigee*, 518 So.2d 501 (La. 1988).

Deficiency:

As a result of counsel's deliberate failure to act as counsel demanded by the Sixth and Fourteenth Amendments, Verrett was denied the constitutional right to present a defense. Verrett avers that any reliable and competent defense attorney would have properly performed pre-trial discovery and investigation, interviewed and called witnesses, used the available evidence and witnesses, secured an expert, and then combine all of the facts, evidence, and witnesses to properly prepare and present a viable defense.

Prejudice:

Trial counsel failed to secure an expert witness, a witness who could testify to the adverse psychological effects of steroids, stress and depression. Verrett's state of mind played a major role in this case, and counsel deprived him of the right to defend himself. An expert could have assisted the defense in establishing mitigation to reduce the jury finding to negligent homicide or manslaughter

rather than second degree murder. Verrett also requested and was denied a forensic expert to assist in his defense.

As a result of counsel's deficient performance, Verrett was unable to prove his defense and now faces the remainder of his natural life in prison.

Cumulative Effect of Defense Counsel's Errors:

In *Taylor v. Kentucky*, 436 U.S. 478, 487 n. 15, 98 S.Ct. 1930 (1978) the Court accepted the notion that several errors, none of which individually rise[s] to constitutional dimensions, may have the cumulative effect of denying a defendant a fair trial. Indeed, in *Taylor* the Court reversed a state conviction upon a finding that "the cumulative effect of the potential damaging circumstances of the case violated the due process guarantee of fundamental fairness." In the case sub judice this is exactly what occurred. Counsel's performance was deficient prior to and during trial.

In every instance complained of herein, Verrett has demonstrated that counsel, Robert J. Pastor, was not rendering effective assistance as guaranteed by the Sixth Amendment. Verrett entrusted his life to someone who sat by idly and watched his client be convicted without subjecting the state's case to "any" meaningful adversarial testing.

Deficiency:

Had counsel conducted: adequate investigation, discovery, interviewed and called witnesses, requested the necessary funds to acquire expert assistance in

preparation and presentation of the defense and scientific evidence, and then properly prepared and presented Verrett's defense utilizing the facts, evidence, and testimony for confrontation, thus placing the state's case to meaningful adversarial testing – there is more than a reasonable probability that the outcome of the trial would have been different. *Kyles, supra.*

The Court held in *Kyles, supra*, that, in order to determine if there is a reasonable probability that the errors complained of might have affected the outcome, a reviewing court must consider the cumulative effect of all errors together as a whole rather than evaluating each error against the other admissible evidence. *Kyles*, 115 S.Ct. at 1577, 1578; *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884 (1991).

Prejudice:

Counsel's cumulative failures taken as a whole, clearly demonstrate deficient performance, and it is through counsel that the accused secures his rights. *Maine v. Mouton*, 474 U.S. 159, 163-170, 106 S.Ct. 477, 483-484, 88 L.Ed. 481 (1985); *United States v. Cronic*, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657 (1984). Counsel's actions and/or inactions resulted in denial and deprivation of due process, right to a fair impartial trial, the right to present a defense, and the right to effective assistance of counsel.

Because of these failures, Verret's trial was rendered unfair, unreliable and

violative of his rights under the Fifth, Sixth, and Fourteenth Amendments. The deficient representation provided Verrett by his counsel fell woefully short of the "range of competency demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771, 90 S.Ct. at 1449.

For all that appears from the record, counsel inexplicably failed to recognize the significance of, and did not contemplate for the defense, facially exculpatory, demonstrative evidence. And, unless explained by other circumstances not developed, the matter is left in a quandary.

QUESTION TWO

WHETHER THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS REQUIRE THE COURT TO GRANT FUNDS FOR A DEFENSE EXPERT TO ASSIST IN PREPARING AND PRESENTING HIS DEFENSE, OTHER THAN AS PROVIDED IN *AKE V. OKLAHOMA*, TO NEGATE OR MITIGATE THE INTENT ELEMENT OF THE CRIME WHEN THAT WAS THE ONLY DEFENSE AVAILABLE AT TRIAL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE CONSTITUTION.

On multiple occasions, trial counsel argued that he was denied several requests for expert funding. The funding would secure a psychotherapist or psychiatrist and a forensic expert, But all requests were denied because it was too expensive. See Rec. pp. 109, 121, and 160. So counsel procured a cheap expert – Mr. Kent and the court refused to allow him to testify to negate the specific intent element. As stated above Verrett was denied COA on whether the magistrate misapplies or misinterpreted *Ake v. Oklahoma* and *State v. Touchet*, and their progeny.

This court has long held: A criminal defendant had the constitutional right to present a defense. U.S. Const. Amend. 6. And that evidentiary rules may not supersede fundamental right to present defense. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Further in *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); "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.'" *Crane*, supra, at 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). (at L.Ed.2d 509) Also see *Kittelson v. Dretke*, 426 F.3d 306, 318-319 (5th Cir. 2005); quoting *U.S. v. Scheffer*, 523 U.S. 303, 329 n.16, 140 L.Ed.2d 413, 118 S.Ct.1261 (1998). "The trial court limited both his right to challenge the testimony of the State's witnesses and his right to present the testimony of his own witnesses.") Id. at 318.

"In pertinent part, the Sixth Amendment provides that in all criminal prosecutions the defendant shall "have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI. The compulsory process clause is not limited to providing a subpoena power, but extends to the right to present evidence to the fact finder. *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 649-651, 98 L.Ed.2d 798 (U.S. 1988). In *Washington v. Texas*, 388 U.S. 14, 87 S.Ct.

1920, 18 L.Ed.2d 1019 (1967), the Supreme Court held that this clause prohibits a state from arbitrarily denying a defendant "the right to put on the stand a witness . . . whose testimony would have been relevant and material to the defense." 87 S.Ct. At 1925." *Roussell v. Jeane*, 842 F.2d 1512 (5th Cir. 1988).

The magistrate overlooks that on multiple occasions, trial counsel argued that he was denied several requests for expert funding. The funding would secure a psychotherapist or psychiatrist and a forensic expert, But all requests were denied because it was too expensive. See Rec. pp. 109, 121, and 160.

In denying the claim based on the denial of experts for the defense, the court stated:

> "As noted above with regard to the defendant's first assignment of error, the uncontradicted evidence in this case was to the effect that immediately after stabbing his wife eighteen times, the defendant did not contact the police, but instead fled, lied to everyone about her where-a-boughts (sic), and tried to cover up and destroy evidence, that and fled. Under these circumstances, it is highly unlikely that expert evidence would have persuaded the jury that he lacked the requisite intent to commit the crime of second degree murder. The absence of the expert testimony the defendant now contends was crucial to his defense, does not cause reasonable people to doubt the validity of his conviction and the fairness of his trial.

The *Ake* error prevented petitioner from developing his own psychiatric evidence to rebut the State's evidence and to enhance his defense in mitigation. Therefore, the court erred limiting its review of the claim based on the court of appeal's view of the trial evidence, without the defense.

In *Ake v. Oklahoma*, 470 U.S. 68, 71, 105 S.Ct. 1087, 84 L.Ed.2d 53, (1985), the Supreme Court recognized that indigent defendants are entitled to

Independent experts when their assistance "may well be crucial to the defendant's ability to marshal a defense." *Ake*, 470 U.S. at 80. The Court conducted a Fourteenth Amendment due process analysis, Id. at 87, and held that without independent experts defendants could be denied "meaningful access to justice." Id. at 76-77. This was because, while jurors may disregard a defendant's testimony or a lawyer's argument, experts assist lay jurors, who generally have no training in scientific or medical matters to make a sensible and educated determination about the contested issues. Id. 470 U.S. at 81.

By organizing. . . [data], interpreting in light of their expertise, and then laying out their investigative and analytic process to the jury, the [expert] for each party enables the jury to make its most accurate determination of the issue before them. Id. at 81. See also, *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir.)(en banc), *cert. denied*, 499 U.S. 970 (1991); *Blake v. Kemp*, 758 F.2d 523 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985). This is clearly true, because jurors do listen to, are influenced by, and rely on the testimony of such experts. Thus, a trial may be fundamentally unfair when a party is left without expert assistance. *Ake*, 472 U.S. at 80.

The expert could have rendered his/her opinion of the facts and assisted Defense Counsel with preparation and presentation of the defense and with questions for direct and/or cross-examination. Moreover, another expert for the defense in this case would have been important as testing could have been

performed to validate psychological effects of steroids, stress, and depression on Mr. Verrett's state of mind at the time of the offense. Verrett also requested a forensic expert.

Independent experts to assist with preparation and presentation of the facts was necessitated under the provisions of *Ake v. Oklahoma*, 470 U.S. 68, 71, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The accused is entitled by statute to at least twelve witnesses at the expense of the parish. *State v. Clark*, 387 So.2d 1124, 1129 (La. 1980) (could have summoned a doctor at parish expense). In addition, ". . .art. 739 provides a method by which he may apply to the court for additional witnesses." Id. at 1129.

Because Verrett was denied expert assistance and testimony, he was ultimately denied due process and a fair trial.

QUESTION THREE

WHETHER VERRETT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO DUE PROCESS AND A FAIR AND IMPARTIAL JURY TRIAL WHEN, AFTER LEARNING OF THE VICTIM'S FAMILY CONTACTS THROUGHOUT THE PARISH AS WELL AS WIDE PUBLICITY OF THE CASE, HE WAS DENIED A CHANGE OF VENUE, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Prior to trial Counsel filed a Motion for Change of Venue, due to publicity and the victim's contacts throughout the parish. On that same day, Counsel filed a Motion for Recusal of the District Attorney, due to victim's relative having contacts within the District Attorney's Office. Both Motions were denied by the trial court. See Rec. pp. 37-38.

This case was widely published and known by the members of the city. The jury members were so familiar with the case that they were sharing information from their phones concerning the case. There was no way that Verrett would receive a fair and impartial trial. Plainly stated, Mr. Verrett was tried and convicted before his trial ever started.

The Magistrate report relied on *Skilling v. United Sates*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619, finding defendant was not prejudiced by the denial of a change of venue. Relying on the jury venire colloquy, and not considering the factors in *Skilling* such as Houma is a small town made up of permanent residence tied to the fishing industry or the offshore oil business. The initial complaint that the victims brother had undo influence based on his earlier ties to law enforcement was denied because he did not testify. His influence however affected the investigation and prosecution, as well as Verrett family members testimony, which went to the heart of the case. All this created an atmosphere for conviction.

The trial court denied the claim stating "The court has reviewed the jury selection proceedings in this matter, and the original reasons given for denial of the motion for change of venue. The court sees no reason to change its ruling. The defendant's right to a fair and impartial jury trial was not violated." The court's abused its discretion and applied the wrong standard of review in denying this claim based on reasons given after jury selection that related to grounds for challenging cause.

In *State v. Scott*, 237 La. 71, 85, 110 So.2d 530, 535 (1959), the court stated the test to be as follows:

> "The test is whether there can be secured with reasonable certainty from the citizens of the parish a jury chose members will be able to try the case on the law and the evidence, uninfluenced by what they may have heard of the matter and who will give the accused the full benefit of any reasonable doubt arising either from the evidence or the lack of it".

The courts have long recognized this problem See *State v. Factance*, 233 La. 1028, 99 So.2d 333 (1958), and cases cited therein. The difficulty with the test in the *Scott* case is that it confuses the grounds for challenges for cause with grounds for change of venue. In effect the test is nothing more than valid grounds for challenges for cause. This leads to the conclusion that if the defendant cannot successfully challenge for cause he has no grounds for a change of venue and furthermore, that if he does challenge for cause and the objectionable jurors are thus removed he has no grounds for change of venue. Logically, therefore, change of venue did not exist as a concept separate from challenge for cause. It may be noted, however, that other states having statutory language similar to that of Louisiana have also refused changes of venue reasoning that it was possible ultimately to empanel a jury, each member of which was not subject individually to the charge of unfairness or partiality so as to subject them to a challenge for cause. See *People v. Mendes*, 35 Cal.2d 537, 219 P.2d 1 (1950); *Powell v. State*, 131 Fla. 254, 175 So. 213 (1937); *People v. Sleezer*, 9 Ill.2d 57, 136 N.E.2d 808 (1956).

The foregoing suggests that the emasculated change of venue test as announced by the supreme court has no value. It is thus clear that the change of venue concept must be

one which overrides the challenge for cause concept and is to be superimposed upon the entire proceeding. A change of venue ought to be available even though individually, each juror is not susceptible to a valid challenge for cause, if the defendant can show that overriding all of these things and superimposed upon all of them he still cannot get a fair trial. The change of venue concept should operate where the state of the public mind against the defendant is such that jurors will not completely answer honestly upon their voir dire, or witnesses will be so affected by the public atmosphere that they will not testify freely and frankly.

It is the purpose of the second paragraph of this article to effect such a policy and to overcome the jurisprudence in the cases cited above.

Bernard Verrett did not receive an impartial trial. Long before Verrett's jury heard the first piece of evidence in this case, they were passing around news clips of the alleged offense. As for the victim, she was acquainted with the District Attorney's office. The victim and her family were also well know, and well liked in their small community. Mr. Verrett should have been granted a change of venue in this case.

The law provides for a change of venue when a defendant establishes that he will be unable to obtain an impartial jury or fair trial at the place of original venue. *State v. Logan*, 986 So.2d 772 (La. App. 5 Cir. 5/27/08), writ denied, 5 So.2d 117 (La. 3/13/09). The defendant generally bears the burden of showing actual prejudice; however, in unusual circumstances, prejudice against the

defendant may be presumed. *State v. Williams*, 708 So.2d 703 (La. 1/21/98).

The right to an impartial jury and a fair trial is guaranteed to every defendant. See: Sixth and Fourteenth Amendment; La. Const. Art. I, § 16; *State v. Magee*, 11-0574, 103 So.3d 285 (La. 9/28/12), cert. denied, --- U.S. ---. 134 S.Ct. 56, 187 L.Ed.2d 49 (2013); *State v. Sparks*, 88-0017, 68 So.3d 435 (La. 5/11/11), cert. denied, --- U.S. ---, 132 S.Ct. 1794, 182 L.Ed.2d 621 (2012).

To effect this guarantee, the law provides for a change of venue when a defendant establishes that he or she will not be able to obtain an impartial jury or a fair trial at the place of original venue. *Id.* It is only in exceptional circumstances, such as the presence of a trial atmosphere that is utterly corrupted by press coverage or that is entirely lacking in solemnity and sobriety, that prejudice against a defendant may be presumed. *Magee*, supra. Otherwise, it is the defendant's burden to demonstrate actual prejudice. *Id.*

In *State v. Bell*, 315 So.2d 307 (La. 1975), the Louisiana Supreme Court enumerated several factors to be considered in the change of venue determination. These factors include: (1) the nature of pretrial publicity and the degree to which it has circulated in the community; (2) the connection of government officials with the release of the publicity; (3) the length of time between the dissemination of the publicity and the trial; (4) the severity and notoriety of the offense; (5) the area from which the jury is to be drawn; (6) other events occurring in the community, which either affect or reflect the attitude of the community toward

the defendant; and (7) any factors likely to affect the candor and veracity of the prospective jurors on the voir dire.

In setting out these factors, the *Bell* court emphasized that in deciding whether to change venue, the district court must extend its focus beyond the prejudices and attitudes of individual venire persons. The defendant must be allowed to show that, even if it would be possible to select a jury whose members were not subject to a challenge for cause, prejudice or influences exist within the community at large that would affect the jurors' answers during voir dire or the witnesses' testimony, or that for any other reason, a fair and impartial trial could not be obtained in that venue. The district court's ultimate determination must rest on the community's attitude toward the defendant. *Bell*, supra.

In *State v. Walker*, 128 So.3d 581 (La.App. 2Cir. 11/20/13), the Court stated:

> In reviewing a denial of change of venue, the primary test of the Court is to inquire as to the nature and scope of publicity to which prospective jurors in a community have been exposed and examine the lengths to which a court must go to impanel a jury that appears to be impartial in order to ascertain whether prejudice existed in the minds of the public which prevented the defendant from receiving a fair trial.
>
> In performing this review, courts must distinguish largely factual publicity from that which is invidious or inflammatory, as the two present real differences in the potential for prejudice. While, ultimately, there is no bright line test for ascertaining the degree of prejudice existing in the collective mind of the community, the seven *Bell* factors help facilitate the inquiry.

Walker, supra.

As such, this Honorable Court should grant habeas relief, reverse this case

with a change of venue, and order that Verrett be granted a new trial.

PRO SE LITIGANT CONSIDERATION

Verrett prays the instant pleading be given the benefit of liberal construction, and that he not be held to the same stringent standards as an attorney.[4] Verrett should not be held to the same standard of review as formal attorneys.[5]

CONCLUSION

The constitutional claims were not fully and fairly adjudicated and reasonable jurists would find the Court of Appeal's assessment of the constitutional claims debatable or wrong. Petitioner suggests he has presented questions of constitutional substance that adequately deserve encouragement to proceed further. 28 U.S.C.A.§2253(c)(2).

The petition for a writ of certiorari should be granted.

WHEREFORE the lower courts erred finding petitioner failed to state a constitutional claim, this Honorable court may grant certiorari or remand to the U.S. Fifth Circuit for further proceedings.

Respectfully submitted on this 4th day of January 21, 2021.

Bernard F. Verrett
D.O.C. # 598285, Cyp. 2
Louisiana State Penitentiary
Angola, Louisiana 70712

4 *Register v. Thaler*, 681 F.3d 623, 628 (5th Cir. 2012).

5 See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam) (pro se complaints are entitled to liberal construction).