ORIGINAL

No. 21-5452

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2021

In re **Elliot Joseph.**,
Petitioner

Versus

Tim Hooper, Warden
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT

Respectfully Submitted By:

Elliot Joseph. #_____
Louisiana State Penitentiary
Angola, Louisiana 70712

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the lower courts incorrectly found petitioner's petition for writ of habeas corpus failed to demonstrate a substantial showing of the denial of a constitutional right?

II.

Whether the Federal District Court resolved petitioner's claim's in a manner that was blatantly contrary too or involved an unreasonable application of clearly established Federal Law as set forth by this Honorable Court in *Miranda v. Arizona* and *Strickland v. Washington* a violation of the petitioner's equal protection and due process rights pursuant to the 5th, 6th, and 14th Amendments, which, in effect, denied him due process and equal protection of the law to have a fair adjudication of his claims in Federal Court?

III.

Whether the District Court lost jurisdiction and erroneously determined that petitioner was untimely and made no Rulings on the merits of his 28 U.S.C. § 2254 petition? The COA determination under § 2253© requires an overview of the claims in the habeas petition and a general assessment of the merits. The threshold inquiry does not require full consideration of the factual basis or legal basis adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of the appeal, and then justifying its denial of COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

PETITIONER:

1. Elliot Joseph. #328928
   Ash-4
   Louisiana State Penitentiary
   Angola, Louisiana 70712

RESPONDENT:

2. **Tim Hooper**, Warden
   Louisiana State Penitentiary
   Angola, LA 70712

3. **Hillar Moore, III**
   East Baton Rouge Parish District Attorney
   222 ST. LOUIS STREET
   Baton Rouge, LA. 70802

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

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"N"	Order directing DA, to file response / procedural objects.	-	7/14/2016
"O"	Federal habeas filed with Middle Dist. Of La.	-	5/06/2016
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United States Constitution

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State Constitution

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No.

In the
SUPREME COURT OF THE UNITED STATES
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In re **Elliot Joseph.,**
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Versus

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Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT

On Petition for Writ of Certiorari from the Fifth Circuit Court of Appeals.

Petitioner, Elliot Joseph., pursuant to 28 U.S.C. § 2241, 28 U.S.C. § 2254, and Rule 20 of the Rules of the Supreme Court, respectfully invokes this Court's original jurisdiction, and prays that it issue a writ of habeas corpus directed to Tim Hooper, Warden, who presently has custody of Elliot Joseph., pursuant to a judgment of a court of the State of Louisiana. As shown below, this writ would be in aid of the Court's appellate jurisdiction and would permit the Court to address the important questions of Federal Law presented herein and to resolve the conflict among the Federal Courts of Appeal on this question. Petitioner, Elliot Joseph, further show that adequate relief cannot be obtained in any other form, or from any other court.

~~OPINIONS DELIVERED IN THE COURT BELOW~~

Appendix A, Ruling Fifth Circuit Court of Appeals:

Court: United States Court of Appeals
Fifth Circuit
Docket Number: 19-30603
Date Decided: April 19, 2021 (Mandate)
U.S. Cir. Judge: Hon. Carl E. Stewart
Disposition: Denied

Appendix B, Ruling & Federal Memorandum Order

Court: Middle District of Louisiana,
Docket Number: USDC NO. 16-311-BAJ-RLB
Date Decided: July 22, 2019
Magistrate: Hon. Erin Wilder-Doomes
Judge: Hon. Brian A. Jackson
Disposition: Denied

Appendix C, Ruling

Court: Supreme, State of Louisiana
State of Louisiana
Docket Number: 2015-KH-1012
Date Decided: March 24, 2016
Justices: JTK, JLW, GGG, MRC, JDH, SJC
Disposition: Denied Without Written Reasons

Appendix D, Ruling, Post Conviction Relief:

Apellate Court: First Circuit Court of Appeal
State of Louisiana
Ct. App.. No: 2014-KW-1382
Date Denial of PCR: December 23, 2014
Judge: ECD, JMG, MRT
Disposition: Denied

Appendix D, *Elliot Joseph v. Darryl Vannoy*, Ruling, Post-Conviction Relief:

District Court: 19th Judicial District Court
State of Louisiana
Parish of East Baton Rouge
Dis. Ct. Doc. No: 03-01-0202
Date Denial of PCR: April 1, 2014
Judge: Hon. Louis R. Daniel
Disposition: Denied

JURISDICTION

The United States Court of Appeal, Fifth Circuit, denied my Application for a Certificate of Appealability on 3/8/20, pursuant §2253(c)(1). No petition for rehearing was filed in this case. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

The Fourteenth Amendment to the United States Constitution, provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On March 7, 2001, petitioner Elliot Joseph was indicted for the 1stt degree murder of

one K. J. . On , 200 petitioner entered a plea of not guilty. On April 27, 2005, a twelve person jury found petitioner guilty as charged. On May 2, 2005, the trial court imposed the mandatory life sentence at hard labor without benefits.

Petitioner filed a motion for a new trial, which the trial court denied. Thereafter, petitioner moved for an appeal which the trial court granted.

In his application for Post Conviction Relief, petitioner raised two claims:

(1) Insufficiency of the Evidence

(2) Ineffective assistance of counsel

The First Circuit Court of Appeal denied the relief sought, State of Louisiana v. Elliot Joseph, 05/KA/2169, (La. App. 1 Cir. 12/29/06) (unpublished), conviction and sentence affirmed as imposed.

Petitioner filed his first PCR, on or about January 13, 2009. On December 3, 2012, the Court granted the State's procedural objections in part, and denied in part. Commissioner's recommendation. 5/23/12; Court Order 12/3/12.

The state was notified to answer PCR claims 3, 4, 5, 6, and 7, on March 6, 2013. The state complied and submitted answers to said claims on April 4, 2013. On April 29, 2013, the Commissioner recommended dismissal of petitioner's remaining claims. Consequently, on April 1, 2014, petitioner's PCR was dismissed.

Petitioner sought writs to the First Circuit Court of Appeal on April 24, 2014. Petitioner was required to made some corrections to his pleading an given until October 6, 2014 to do so. Petitioner filed a new writ on September 18, 2014. Writs were denied by the Court on November 20, 2014. State v. Elliot Joseph 14/KW/1382 (La. App. 1 Cir. 11/20/14. (unpublished) Petitioner sought rehearing before the 1st Circuit, the said rehearing was denied as "not considered" on

12/23/14. Supervisory Writs were taken to the State Supreme Court which ultimately denied the same on 12/7/2015 as untimely.

Petitioner filed his federal habeas on or about May 5, 2016, which ultimately gives rise to the claims currently before this Honorable Court.

Wherefore petitioner in this matter respectfully prays that this court, in the interest of justice and plain fairness entertain petitioner's application of Habeas Corpus Relief and Memorandum in Support.

Petitioner delivered his Petition for Writ of Habeas Corpus to prison officials for mailing on, alleging several claims for relief:

1. **Petitioner was denied his Fifth Amendment right when he was questioned first and gave *Miranda* warnings only after being interrogated;**

2. **Petitioner was denied his Sixth Amendment right to counsel when trial court denied him the right to counsel of choice; and denied him the right to qualified counsel; and**

3. **Petitioner was denied his Sixth and Fourteenth Amendment right when the trial court did not allow the jury take there time to deliberate. Trial court forced the jury to come up with a verdict or he will have to sequester them and put them in a hotel, forcing them to find Defendant guilty.**

Magistrate Judge Erin Wilder-Doomes entered a report and recommendation denying Petitioner's Petition for Habeas Corpus and urged the following:

REASONS FOR GRANTING THE PETITION

The petitioner contends that the lower courts have grossly departed from proper constitutional proceedings by ruling that petitioner's had no established himself entitled to the relief sought as prescribed by the Constitution of the United States.

ASSIGNMENT OF ERROR #1

The Trial Judge Interfered With Elliot Joseph's Sixth Amendment Right To Counsel. He Denied Elliot Joseph The Right To Counsel Of His Choice, Denied Him The Right To Have Qualified Appointed Counsel Despite His Indigency And Denied Him The Represent Himself, Compelling Him To Go To Trial With Unqualified Counsel.

When Mr. Joseph first appeared in court following his indictment, h declared himself to be indigent. After questioning Mr. Joseph, Judge Daniel agreed and appointed the Office of the Public Defender to represent him. (R.pp. 1-2).

However, despite the fact that Mr. Joseph was charged with a capital offense and despite the fact that it was anticipated that the State would seek the death penalty, Mr. Joseph was appointed a single counsel who admitted later during the proceedings that he was qualified only to be "second chair" in a capital case. (R.pp. 70, 657). Mr. Joseph was never appointed a "first chair" capital counsel.

Several weeks after being appointed, Mr. Joiner began filing preliminary pleadings, including several related to the death penalty, despite the fact that the State had not filed written notice that it intended to seek the death penalty. (R.pp. 57-77).

On June 7, 2001, Mr. John Martin, an attorney for less than two years at the time (admitted to practice 10/1999), filed a motion asking to be allowed to enroll **as co-counsel with Mr. Joiner**, to sit as **second chair** with Mr. Joiner's permission. (R.p. 78).

On July 1, 2001, R. Neal Wilkinson, retained by Mr. Joseph's family, also filed a

motion to enroll as counsel of record.

On August 24, 2001, Judge Daniel named Mr. Wilkinson as counsel, John Martin as co-counsel and ordered the Office of the Public Defender, over an objection by the Chief Public Defender, to provide assistance in the form of resources and investigative services. Mr. Joiner was permitted to withdraw.

A third counsel (Donald Dobbins) filed a motion to enroll on September 21, 2001, that was quickly followed by a motion to withdraw. (R.pp. 141-142).

Mr. Joseph and Mr. Wilkerson had difficulty communicating and Mr. Wilkerson ultimately moved to withdraw from the case on January 4, 2002, the same day that the State filed formal notice that it intended to seek the death penalty. (R.pp. 155, 160).

Mr. Martin, the attorney who had enrolled as second chair, was left on the record as lead counsel in the now capital case. Mr. Joiner, also a second chair, was reappointed. (R.pp. 6-7). By this time, Mr. Martin had moved from the Baton Rouge area and was practicing law in Marrero.

In April 2003, Mr. Joseph began filing motion on his own behalf, the first seeking funds to hire various experts, requesting suppression of the statements and dismissal of the prosecution and asking for discovery. (R.pp. 210-233).

Mr. Joseph filed a second set of pleading in June. (R.pp. 240-246). In addition, the minutes reflect that, in addition to the motions appearing in the record, there was a motion from Elliot Joseph to act as co-counsel. That specific pleading, however, is not in the record for review. (R.p. 6). On July 24, 2003, Judge Daniel ordered both sides to

submit memoranda on the issue of Mr. Joseph's with to act as co-counsel.

The Court took up the issue of self-representation on October 28, 2003. According to the minutes, the transcripts was not provided, Judge Daniel explained that Mr. Joseph did not have the right to be both represented and representative. At that time, Mr. Joseph asked that his "retained" counsel be relieved. Judge Daniel ordered the counsel to file a written motion to withdraw and re-set the matter. (R.pp. 13-14).

Mr. Martin, and Mr. Bryan[1] filed a motion to withdraw containing a memorandum on the Mr. Joseph's right to have counsel of his choice. (R.pp. 271-273). Within the motion to withdraw/memorandum, counsel noted that Elliot was not cooperating with counsel and had failed to pay them for their services. (R.p. 271). The motion was filed on October 30, 2003. The record reflects that on the date, Mr. Joseph withdrew his request and asked to maintain his counsel. The transcript of the hearing is also not contained in the record.

But by November 23, 2003, Mr. Joseph had again asked to represent himself, but not waive appointed counsel. He implied he had not retained any attorneys and owed no money on any contract. (R.p. 274).

Judge Daniel set the motion for December 18, 2003, a year and a half before the ultimate trial date. At the hearing, Elliot told the court that "I am not waiving my rights, but I wish to represent myself."

Despite the number of times Mr. Joseph state he wanted to represent himself or

[1]According to information received from Mr. Bryan, he knew Mr. Martin from law school and had volunteered to help him with research, as an unpaid assistant. He was released from the case by Judge Daniel when he obtained employment with the Attorney General's Office.

have access to other counsel, the judge took Mr. Joseph's response as an equivocal rather than unequivocal request to represent himself, holding that Mr. Joseph's request were in an effort to manipulate the system. (R.p. 617). The judge then denied all of Mr. Joseph's pro se pleadings. Elliot took offense at the judge's remarks and a heated discussion ensued during which Mr. Joseph unequivocally fired the lawyers his family had never paid. (R.pp. 617-620).

Mr. Joiner of the public Defender's Office also again tried to withdraw, but following an unrecorded status conference formally withdrew the motion. (R.p. 18).

Mr. Joseph filed more pleadings that were denied without hearing. He sought writs to have the trial court act on them. (R.pp. 304-321, 333).

By 2004, Mr. Martin was practicing in Slidell. (R.p. 290). By the time of the trial in 2005, he would be practicing outside of Atlanta.

On the second day of trial, Mr. Joseph again tried to remove Mr. Martin from the case indicating a lack of confidence and trust in him as the lead attorney. (R.pp. 655-656). Once again, Mr. Joseph asked to have Mr. Joiner act as lead counsel or again to represent himself. Interestingly, Judge Daniel did not direct any inquiry to Mr. Martin. Rather, he spoke solely to Mr. Joiner. When it became evident that Mr. Joiner was not qualified as "first chair" in a capital case, Judge Daniel denied both requests. The judge again found Mr. Joseph's requests to act as his own counsel equivocal and informed him that he could be gagged if he made outbursts in court. (R.pp. 655-661).

Elliot Joseph's Right To Capital Qualified Counsel

As evidenced from the pleadings, it was anticipated from the inception of this case that the State would seek the death penalty.

Mr. Joseph was declared indigent and remained indigent throughout the proceedings. He is indigent on appeal. While his family sought representation for Mr. Joseph from various counsels, they paid none of them, including John Martin. Judge Daniel refused to release Mr. Martin despite his requests and his frequent moves, each further from the Baton Rouge area.

Supreme Court Rule 31 defining Indigent Defender Standards reads pertinently:

> (1) Capital Litigation. – In all capital cases, the following standards shall be applicable to the defense of indigents:
>
> (a) In any capital case in which a defendant is found to be indigent, **the court shall appoint no less than two attorneys to represent the defendant. At least two of the appointed attorneys must be certified as qualified to serve in capital cases as provided below.** The Court shall designate one of the appointed attorneys to be lead counsel, the other(s) as associate counsel. The court shall only designate as lead and associate counsel those attorneys who have either been previously certified by the Louisiana Indigent Defender Board and whose certification is still in good standing or those attorneys who, after December 31, 1997, may be certified by the district court judge handling the case pursuant to Paragraph (b) of Subsection 1 of this Section . . . . [emphasis added]

Admittedly, the Rule "shall not be construed to confer substantive or procedural rights in favor of any accused beyond those rights recognized or granted by the United States Constitution, the Louisiana Constitution, the laws of the state, and the

jurisprudence of the courts. [and] ... shall not form a basis for a procedural or substantive attack in any case or proceeding pending or instituted in the Louisiana criminal justice system on or after the date this Rule is promulgated." See also ***State v. Gradley***, 745 So.2d 1160 (La. 1998).

Nevertheless, the Rule does at least demonstrate that the quality of representation that Elliot Joseph, an indigent, was compelled by the trial court to maintain against his express wishes, was not the representation he would have been entitled to had he been allowed to dismiss the "retained" attorney whom he had not retained, whom he did not want, who had not been paid, who had asked to withdraw from the case, who had participated only minimally in the trial of the pretrial motions, who was not capital qualified and who had only enrolled as "second seat." See motions, pp. 78, 271, transcripts of 1/10/03, 11/4/03, 11/7/03 and 12/18/03.

The right to counsel of choice is a recognition that attorneys "are not fungible, as are eggs, apples and oranges" and because these differences will impact on a defendant's constitutional rights, he must be allowed to "chose an individual in whom he has confidence." ***United States v. Laura***, 607 F.2d 52, 55-56 (3rd Cir. 1979). A defendant's confidence in his counsel is critical because, notwithstanding a defendant's entitlement to determine the type of defense offered in his case, counsel makes many strategic determinations that invariably impact the outcome of a trial. ***Faretta v. California***, 422 U.S. 806, 820 (1975).

The improper denial of a defendant's right to counsel of choice cannot be harmless

error. *Flanagan v. United States*, 465 U.S. 259, 268 (1984); *United States v. Rankin*, 779 F.2d 956, 960 (3rd Cir. 1986). The right to counsel of choice "is either respected or denied; its deprivation cannot be harmless." *Id.* at 960 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8 (1984)). If a defendant is indigent he has the right to court appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); See also **La. Const. Article 1, Section 13**.

In applying the above principles to this case, Judge Daniel's actions deprived Mr. Joseph, an indigent, of the right to either counsel of his choice or qualified appointed counsel. Judge Daniel compelled Elliot Joseph to accept a private attorney who was not his counsel of choice, in whom he had little confidence and who had limited experience[2] in order to defeat the necessity of appointing capital-qualified counsel. The judge's actions likewise compelled counsel to remain on the case even though he stated he had not been paid for his services. The Supreme Court in *State v. Citizen*, 04-1841 (La. 4/1/05), 898 So.2d 325, recognized that pro bono representation, when reasonably imposed, is a professional obligation burdening the privilege of practicing law, but also stated that any assignment of counsel from the private bar to defend an indigent defendant must provide reimbursement. The Court however also observed that "budget exigencies cannot serve for the oppressive and abusive extension of attorneys' professional responsibilities and that this court ... has the power to take corrective

[2]It is also noted that until October 2004, Mr. Martin, even without regard to his lack of capital-qualification could not even been appointed in this case pursuant to La. C.Cr.P. Art. 512.

The ineffectiveness of trial counsel is reserved for post-conviction relief where evidence can be introduced regarding the impact of counsel's errors and omissions.

measures to ensure that indigent defendants are provided with their constitutional and statutory rights."

In the briefs before the United States Supreme Court in ***United States v. Gonzalez-Lopez***, the following is noted:

> "The framers of the Sixth Amendment understood 'the inestimable worth of free choice.' ***Faretta v. California***, 422 U.S. 806, 834 (1975). Among other things, they were well aware that in the notorious 1735 trial of John Peter Zenger, Zenger's original attorneys were disbarred by the court for vigorous advocacy, see ***United States v. Barnett***, 376 U.S. 681, 715 (1964), and that the court had initially tried to force him to trial with an inferior lawyer. See James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, Printer of the New York Weekly Journal 21 (Stanley N. Katz ed. 1972). . . ."

United States v. Gonzalez-Lopez, 2005 U.S. Briefs 352, 15 (U.S. S.Ct. Briefs 2006) (Brief of Respondent).

This is not the case where an indigent requested a particular counsel. While Mr. Joseph indicated he would accept Mr. Joiner, already on the case as counsel, he made no other specific request. Compare ***State v. Scott***, 2004-1312 (La. 1/19/06), 921 So.2d 904.

Nor did Mr. Joseph make the request at the last minute. Even though his last request to remove Mr. Martin was made on the second day of trial, he had been trying for over a year and a half to either remove Mr. Martin or be allowed to represent himself.

Judge Daniel's interference in Mr. Joseph's right to counsel should constitute structural error warranting a new trial.

Denial of Mr. Joseph's Requests To Represent Himself

Mr Joseph was frustrated. His attempts to remove the attorney his family had

asked to represent him, but had not paid, were met with denials by Judge Daniel. In the alternative, Mr. Joseph asked to represent himself. Judge Daniel found Mr. Joseph's request to act as his own counsel equivocal and denied him that relief as well.[3]

The United States Supreme Court, in ***Faretta v. California***, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) determined that in a criminal trial a defendant has an independent constitutional right to defend himself without counsel when he voluntarily and intelligently elects to do so. The Court's view was shaped by the historical view that the Sixth Amendment right to the assistance of counsel implicitly embodies a correlative right to dispense with a lawyer's help and that the Constitution does not "force a lawyer upon a defendant." ***Faretta***, *supra*, at 814-815. The Court reasoned that the right to counsel, if anything, was intended to aid a willing defendant and should not be used as "an organ of the State interposed between an unwilling defendant and his right to defend himself properly." ***Id.*** at 820.

Before an accused can choose the right to defend himself, he must make a knowing and intelligent waiver that shows he appreciates the possible consequences of mishandling the core functions that lawyers are more competent to perform. ***United States v. Kimmel***, 672 F.2d 720 (9th Cir. 1982).

"The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances

[3]A motion to supplement the record with the transcripts of the hearings on Mr. Joseph's request to represent himself and the subsequent withdrawal of the request is being file contemporaneously with this brief. Within the motion, counsel has also asked to be able to file a supplemental brief fully addressing this Assignment of Error.

surrounding that case, including the background, experience, and conduct of the accused." ***Johnson v. Zerbst***, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); ***State v. Harper***, 381 So.2d 468 (La. 1980).

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation he should be made aware of the dangers and disadvantages of self-representation st that the records will establish that "he knows what he is doing and his choice is made with eyes open."

Before a trial judge can allow a defendant to represent himself, he must determine whether defendant's waiver of counsel is intelligent and voluntarily made, and whether his assertion of his right to represent himself is clear and unequivocal. Excerpted from ***State v. Dupre***, 500 So.2d 873 (La. App. 1st Cir. 1986), *writ denied*, 505 So.2d 55 (La. 1987).

At the hearing on December 18, 2003, Judge Daniel stated that he had gone over with Mr. Joseph at length concerning his wish to represent himself at the last court appearance. These two transcripts are missing from the record and are being requested. Nevertheless, after the judge told Mr. Joseph that he needed an unequivocal request from Mr. Joseph to represent himself, Mr. Joseph gave him one and fired both counsel. (R.pp. 618-620). Judge Daniel refused to consider his waiver and went on to set motions with counsel.

Judge Daniel also ignored the request made on the second day of trial.

Mr. Joseph is literate. He filed several pleadings during the trial that showed

comprehension of the legal system. Judge Daniel also had the option of allowing Mr. Joseph the right to represent himself with legal assistance and "backup" counsel.

Rather, Judge Daniel ramrodded the case so that Mr. Joseph was denied his right to counsel of his choice, denied the right to capital qualified indigent counsel and denied the right to represent himself.

ASSIGNMENT OF ERROR #2

The trial judge erred in denying the motion to suppress.

Sergeant Vick asked Latonya Joseph to call Elliot Joseph and tell him to come to the police station. (R.p. 424). By the time, Sergeant Vick had interviewed the emergency room physician, Dr. Beasley who told him that the injuries to Kendrick were the result of child abuse. (R.pp. 458-459, 482-484). He had personally seen the injuries to Kendrick, including the bruising on the buttocks and legs and the sections of his legs that appeared as though the skin had ruptured. (R.pp. 458-459). He had spoken to Monica Johnson, Kendrick's mother who told him that she had sent Kendrick to visit his father, Elliot Joseph. (R.p. 460). He had spoken with Latonya Joseph, Elliot's wife, who had told him that Elliot had used a belt and once a hairbrush when Kendrick had soiled himself. (R.p. 461). He had also learned that Elliot Joseph, not Latonya, was home with Kendrick when Kendrick went into the seizure and that he had left the house before EMS had arrived. (R.pp. 462-463). By 4:05 p.m. Sergeant Vick had taken a taped statement from Mrs. Joseph and from her had obtained consent to search the Joseph residence for the belt and hairbrush used to spank Kendrick. The statement Sergeant Vick had obtained from Andy

Lewis likewise confirmed that Elliot Joseph had at least whipped Kendrick, even if he had not been responsible for the other injuries. (R.p. 481).

Yet, Sergeant Vick assured Latonya that he "had no reasons or logic to arrest anyone" when he asked her to get Elliot to come to the police station. (R.p. 465). And the Sergeant insisted that Elliot was free to leave when he entered the interview room, despite what Sergeant Vick had seen and what he had been told. (R.p. 470). He denied that he had any information, even though the record disputes it, that it was Elliot who had whipped Kendrick, causing the marks and bruising that the physician had classified as abuse, although admitting he could have obtained an arrest warrant based on the information he had. (R.pp. 482, 491). Sergeant Vick also denied that he handcuffed Elliot prior to placing him formally under arrest at the conclusion of the statement. The social workers could not remember seeing Elliot's hands, but noticed no other restraint. Elliot testified he was handcuffed in the interview room. There are sounds on the first taped statement, when Elliot is emphasizing facts, that may be handcuff noises.

Whether a person has been taken into custody, detained or deprived of his freedom of action in a significant way must be decided by an objective test. Any formulation making the need for ***Miranda*** warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor any one else possesses. On the other hand, a standard hinging on the inner intentions of the police would fail to recognize ***Miranda***'s concern with the coercive effect of the "atmosphere" from the point of view of the person being questioned.

A request to appear at t police station may easily carry an implication of obligation, while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for ordinary citizen. Excerpted from ***State v. Menne***, 380 So.2d 14 (La. 1980), citations omitted.

The circumstances in this case, as in ***Menne***, *supra*, dictate a finding that even without any physical restraint or express declaration that he was under arrest Elliot Joseph necessarily and reasonably must have understood that he was under compulsion to remain and submit to questioning.

Despite Sergeant Vick's assertions to contrary, it does appear that Elliot Joseph was in custody from the time he entered the police station. He was told to come to the station, isolated when he arrived, and based upon the information that Sergeant Vick had at the time, subject to arrest.

As the Court noted in ***Menne***, *supra*, "The practical significance of the safeguards provided for custodial or detentional interrogations would be greatly undermined if it were open to the police to contend that none of those safeguards applied since the accused had appeared and remained at the police station voluntarily, although the accused reasonably may have thought that he was under constraint."

Pursuant to La. R.S. 15:451 and La. C.Cr.P. Art. 703(D), before a confession or an inculpatory statement can be introduced into evidence, the state must affirmatively prove that it is not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises; the state must also establish that an accused who makes a

statement during custodial interrogation is first advised of his ***Miranda*** rights. ***State v. Turner***, 37162 (La. App. 2nd Cir. 10/29/03), 859 So.2d 911, *writ denied*, 2003-3400 (La. 3/26/04), 871 So.2d 347.

The ***Miranda*** warnings in this case were not given until after Elliot had been through pre-interview questioning for about approximately eight minutes with Sergeant Vick and the two social workers and then, on tape, without ***Miranda*** warnings, had denied being at the house when Kendrick was injured. See S-3, Time of interview 5:35 p.m., D-2 and recorded statement, ***Miranda*** warnings given approximately 5:43 p.m. The second statement admitting that he had pushed Kendrick who had fallen into a dresser was given the following night, after Kendrick had died.

Under the circumstances similar to those in this case, the Supreme Court has found that subsequent statements after a mid-statement ***Miranda*** warning is given are inadmissible. See ***Missouri v. Seibert***, 159 L.Ed.2d 643, 124 S.Ct. 2601 (2004). The Court recognized that using the "question-first" technique, i.e., not to give warnings until a confession or incriminating statement is obtained, will result in warnings that will be ineffective in preparing the suspect for successive interrogations, close in time and similar in content. It is noted in this case, buttressing the argument that Sergeant Vick intentionally used this "technique," to secure a statement is the fact that no time was taken to secure a written waiver of rights. Compare the waiver for the second statement.

Under the theory enunciated in the above case, both Elliot Joseph's statements should have been suppressed.

ASSIGNMENT OF ERROR #3

The trial judge erred in failing to obtain a joint waiver of jury sequestration.

There is no joint motion in the record stating that it is the agreement of the state and the defense that the jury not be sequestered. Judge Daniel told the first panel of potential jurors on the second day of jury selection that the lawyers had agreed that they would not be sequestered during jury selection [4] and that there was "also a chance" that they may not be sequestered during the evidence phase of the trial. He additionally warned them that he could change the sequestration decision any time if he deemed it appropriate. (R.pp. 666-668). The judge reiterated the implied warning to the next panel telling them that "... You will not be sequestered during jury selection. Also, as of this time, the attorneys have told me they do not expect to request sequestration during the evidence phase of the trial ... But that could change at any moment, or the court for any reason whatsoever, I could change my mind and order a sequestration at any time in the case." (R.pp. 790-791).

However, while the judge stated that the attorneys had agreed on the issue of sequestration, at least during the selection process, there never appears of the record any affirmative waiver by the defense of the right to a sequestered jury, either during the jury selection or trial. There is no joint motion, no minute entry and no colloquy with Mr.

[4]While trial counsel had asked for the transcripts of all pretrial and trial proceedings, the motion for the days of voir dire where there was no objection or overruling of any defense motion was denied by Judge Daniel. (R.p. 374). Accordingly, since the minutes of the first day of voir dire reflect no objections and no rulings, the transcript for that portion of the jury selection was not included in the appellate record. It cannot be determined therefore what was said to the first jury panel on the issue of sequestration.

Joseph or his counsel concerning the issue of sequestration in the transcript. Compare ***State v. Porter***, 99-1722 (La. App. 3rd Cir. 5/3/00), 761 So.2d 115. Moreover, the judge's comments appear to reflect his belief that the decision on the issue of sequestration was his to make as opposed to counsels'.

La.C.Cr.P. Article 791 states that:

> A. A jury is sequestered by being kept together in the charge of an officer of the court so as to be secluded from outside communication, except as permitted by R.S. 18:1307.2.
>
> **B. In capital cases, after each juror is sworn he shall be sequestered, unless the state and defense have jointly moved that the jury not be sequestered.**
>
> C. In noncapital cases, the jury shall be sequestered after the court's charge and may be sequestered at any time upon order of the court.
>
> [*emphasis added*]

There were two versions of **La.C.Cr.P. Article 791 B** passed in 1995. The first, Act 1172,[5] mandate sequestration from the jury charge during the guilt phase to the verdict during the penalty phase and gave authority to the trial judge to alter the sequestration order at any time. The second, Act 1277, is the version appearing above.

As the later expression of the Legislative will, Act 1277 takes precedence. The act

[5]The version of C.Cr.P. Article 791 arguably used by Judge Daniel in this case was that of the superseded Act 1172 which read as follows:

> Art. 791. Sequestration of jurors and jury
>
> B. (1) In capital cases, after each juror is sworn he shall be sequestered, unless the court grants a joint state and defense motion that the jury not be sequestered.
>
> (2) When the court grants the state and defense motions as provided for in Subparagraph (1) of this Paragraph, the jury shall be sequestered after the court's charge until the completion of the sentencing hearing. The jury may be sequestered at any time upon order of the court.

does not mandate sequestration from the jury charge to the conclusion of the penalty phase as Judge Daniel stated following the rendition of the verdict. (R.p. 1698). It also removed the judge's specific authority to alter the sequestration order agreed to in a capital case.

The article makes it clear that the default mode of trying a capital case is with a sequestered jury. Elliot Joseph had a right to have the jury sequestered from outside influences in this highly charged and emotional case. There is nothing affirmative in the record to show that either he or his counsel knowingly waived the right by filing a joint motion with the prosecutor.

The record shows that this jury had problem deliberating together, with strong beliefs on either side of the issue of guilt. See letters from the jury during deliberation, it was unable to recess for the evening to its sequestered lodgings following instruction or at a reasonable hour and return to deliberate fresh the following morning. Rather, the jury, with no place to go, deliberated for over nine hours, until almost 2:00 a.m. and then were compelled to make sequestration arrangements. The uninterrupted lengthy deliberation arguably had the effect of causing those voters to relinquish their beliefs just to be able to end the deliberation process, to the prejudice of Elliot Joseph.

SUMMARY

At the investigation stage, Mr. Joseph was denied his Fifth Amendment right when Detective Vick questioned first and gave *Miranda* warnings only after an incriminating response was obtained, a practice recognized and forbidden by the United States Supreme

Court in *Missouri v. Seibert, supra.*

At the pretrial and trial stage, Mr. Joseph was denied his Sixth Amendment right to counsel when the trial judge denied him the right to counsel of his choice, denied him the right to qualified indigent counsel despite his indigency and of his right to represent himself.

The errors in this case are not harmless ones. The interference with the right to counsel is a structural defect that mandates a new trial. Mr. Joseph should be granted one.

POST CONVICTION RELIEFCLAIMS

INEFFECTIVE COUNSEL [VIA] DEFICIENT UNREASONABLE PERFORMANCES CLAIMS #1

On the second day of trial defendant was told by counsel that the A.D.A. wanted the Defendant to take a plea of life in prison. Defendant then told counsel "John Martin" that he was fired at that time, Author Joiner who worked for the Public Defender's Office told Defendant that he could not represent him without Martin because he was only "second chair" qualified, Defendant then told Joiner that he was fired.

INEFFECTIVE COUNSEL [VIA] DEFICIENT UNREASONABLE PERFORMANCES CLAIMS #2

Defendant received a folder with medical records, witnesses' names, and other exculpatory documents of the Court that the Defendant had asked his counsel for more than two years before the trial so he could research. It was given to Defendant on the second day of trial. Defendant did not have time to research, investigate and prepare these documents for trial, being that the trial had started.

INEFFECTIVE COUNSEL [VIA] DEFICIENT UNREASONABLE PERFORMANCES CLAIMS #3

Counsel failed investigate witnesses that would prove the Defendant's case; Counsel failed to call his son mother, Monica Johnson, as well as Monica's boyfriend as to what happened to Defendant's son. For Counsel to not call two other people that was at Defendant's house at the time Defendant had his son; Counsel did not investigate Defendant's case because these witnesses were critical.

INEFFECTIVE COUNSEL [VIA] DEFICIENT UNREASONABLE PERFORMANCES CLAIMS #4

Counsel failed to subpoena expert witnesses to rebut "State's" expert witnesses in a capital case where as the State was seeking death upon the Defendant. Even though Counsel should have had said expert witnesses. Counsel deprived Defendant the right to a fair trial.

INEFFECTIVE COUNSEL [VIA] DEFICIENT UNREASONABLE PERFORMANCES CLAIMS #5

Counsel failed to subpoena Jerald Brown, Monica's brother, that was willing to provide an affidavit and/or take the stand in the defense of Defendant's behalf on knowledge of abuse towards K.J. In the care of Monica, Monica's mother and Monica's boyfriend.

INEFFECTIVE COUNSEL [VIA] DEFICIENT UNREASONABLE PERFORMANCES CLAIMS #6

Counsel allowed the State to produce Defendant's past conviction to the jury, without Defendant taking the stand; the counsel did not object to it; and from that point, the trial was unfair and the Defendant's rights were violated and prejudiced Defendant's case.

INEFFECTIVE COUNSEL [VIA] DEFICIENT UNREASONABLE PERFORMANCES CLAIMS #7

Counsel failed in allowing the State to display gruesome photographs, some of which were unnecessary, and the size of their display to be shown to the jury without reservation, Court did not object concerning only about the reaction of Monica, K.J.'s mother.

ARBITRARY ABUSE OF DISCRETION CLAIM #1

Trial court denied Defendant's Sixth Amendment right to counsel of his choice; denied Defendant's right to have qualified counsel despite his indigency compelled Defendant to go to trial with unqualified counsel rendering the trial non-impartial as well as invalid.

ARBITRARY ABUSE OF DISCRETION CLAIM #2

Trial Court erred in allowing the State counsel to play illegally obtained tapes to the jury made by the Defendant as well as Defendant's brother-in-law.

ARBITRARY ABUSE OF DISCRETION CLAIM #3

Trial Court erred by failing to sequester the jury in a capital case where as the State counsel was seeking the death penalty upon the Defendant. Trial was not a fair one.

ARBITRARY ABUSE OF DISCRETION CLAIM #4

Trial court erred by not letting the jury take there time to deliberate. Trial court told the jury to come up with a verdict or he will have to sequester them and put them in a hotel, forcing them to find Defendant guilty.

ARGUMENT IN CLAIM #1

On the second day of trial when counsel came to the Defendant to say that the Assistant District Attorney said that if he (Defendant) took a plea of "Life" that he would not have to worry about the death penalty. That was when the Defendant knew that his counsel was not willing to assist him to the best of their ability. The Defendant could not put his life in the hands of someone he could not trust that is why he told them that they were fired and that they could not go on with the trial.

The Sixth Amendment guarantees a defendant reasonably effective assistance. See: ***Cuyler v. Sullivan***, 466 U.S. 335, 344, 100 S.Ct. 1708, 1716 (1980).

ARGUMENT IN CLAIM #2

Defendant received his "discovery" on the same second day of trial. Defendant had ask for these documents for over two years before trial. In these documents it shows that counsels did not investigate the witnesses that Defendant had told counsels that were there at his (Defendant's) house when Defendant's son, K.J., came and was already abused.

Trial counsel's failure to investigate and prepare for trial amounted to ineffective assistance. By and through ***Ramseyer v. Wood***, 64 F.3d 1432 (9th Cir. 1995).

Trial counsel's failure to learn the facts and familiarize themselves with this exculpatory evidence constitutes ineffective assistance and renders the verdict unworthy of confidence. Trial counsel's failure to do basic legal research. To review testimony of key witnesses, and to be familiar with readily available documents necessary to

understanding his client's case, constitutes ineffective assistance of counsel. ***Hyman v. Aiken***, 824 F.2d 1405 (4th Cir. 1987).

ARGUMENT IN CLAIM #3

Counsel failed to investigate witnesses that would prove that the Defendant got his son already abused and that Monica was not telling the true story, Monica's own brother told the Defendant that he saw "Monica abused her son (K.J.)". Counsel did not investigate **Leco Cole**, the man that had been in jail for abusing the Defendant's son (K.J.). Had counsel did investigate Leco, counsel would have found out that when the Defendant pick-up his son that he was there. That he was around his son and that he did still live there and would always watch (K.J.) and that Monica was lying to the Courts. Monica was protecting someone that she cared about more than her own son.

On cross-examination, Monica admitted that she was not watching Leco, her boyfriend, and when she went to work during December 2000, the time Defendant picked up his son (K.J.), contradicting her testimony to the contrary. (R.pp. 1207, 1212). It shows that she was protecting herself and/or someone else. Had counsel subpoenaed Monica's mother (Lucille Johnson), the Court would have found out that "Lucille" in the past had sexually molester the Defendant's daughter (Kayla) when Defendant and Kayla went back over and told Monica what she (Kayla) had told her Daddy (the Defendant), Monica told Defendant that Kayla was lying. She did not want to call 911 and/or go to the hospital. Whereas, the Defendant did call 911 and when they said it was a child protection matter, Defendant then asked for that number and called; told them everything

names, addresses and what had happened to (Defendant's) daughter. Had counsel called Kayla to the stand, counsel would have found this to be true. This was indeed deficient/unreasonable performance by counsel of the Defendant.

Deficient Performance:

Reasonable counsel subjecting the State's case to the adversarial testing process would have conducted effective pretrial investigation to discover exculpatory evidence favorable to his client, would have filed proper discovery motions, conducted effective pre-trial interviews, and obtained the documents and witnesses needed to effectively present his client and advocate his cause. Reasonable counsel is one who ensures that his client receives a fair trial and the guarantee of Due Process of Law articulated in the Fifth and Fourteenth Amendment to the United States Constitution and Article I § 2, 13 and 16 of the Louisiana Constitution of 1974; ***Moore v. Johnson***, 194 F.3d 586 (5th Cir 1999).

Whereas, in this case, counsel's performance prejudiced the Defendant by depriving him of a fair trial, a trial that the results are reliable. Because of counsel's unprofessional errors, the outcome would have been different. This Court should **grant** Defendant a fair trial.

ARGUMENT IN CLAIM #4

Counsel failed by not subpoenaing "Forensic Experts" to rebut counsel for the State's forensic expert. Had counsel subpoenaed the same expert, the jury would have had a chance to hear both sides and see which ones that they could count on, not just one. If Defendant had these expert's other than it would show that the Defendant had not been

the one to abuse his son. Whereas, he did admit that he spanked his kids when they were doing wrong. But never abused any child. Counsel should have had these expert's to show the time frame of said injuries. These injuries (the State expert's) say had to happen no more than 5 to 10 days. Whose to say that they were right? The trial judge? The State's counsels? The defense counsels? None of which are experts in that field. That being the case, counsel deprived Defendant the right to a fair trial, whereas, this Court should **grant** the Defendant one. See Trial Transcript when asked to said expert: Did he use his blue light that "forensic" use? To see if the witnesses and/or the defendant was telling the truth about he (K.J.) hit his head on the dresser when he stated he didn't feel it was necessary. Had counsel subpoenaed said expert for the Defendant, it would have shown that it was necessary and the outcome would have been different.

ARGUMENT IN CLAIM #5

Counsel failed by not calling Monica's brother. Defendant was at the Parish Prison on Line Q 3-4 in 2004 and met a Jerald Brown which is Monica's father son. He ask the Defendant what was he in jail for. He did not know nothing about the Defendant being in jail for his own son and/or accused. After he was told Brown then told the Defendant that he even witnesses abuse by Monica and her mother and that he witnessed and/or knew that they were the ones that should be in jail for abusing (that Baby (K.J.)) - his words. Right then, Defendant asked him if he would tell (the Defendant counsels) John Martin and Author Joiner what he told to the Defendant. He (Jerald Brown) stated: I will do that and do an affidavit. This was because he knew that the Defendant would not hurt a child

his or nobody else child.

Counsel's performance prejudiced the Defendant by depriving him a fair trial, had counsel subpoenaed this witness, the outcome would have been different. This Court should **grant** the Defendant a new and fair trial.

ARGUMENT IN CLAIM #6

Counsel did not object to State counsel (Wick Cooper) using Defendant's past conviction (possession of cocaine, possession of marijuana, and even his juvenile charge, #63.394 illegal discharge of a weapon) was irrelevant to the jury unless the the Defendant took the stand. Counsel told Defendant not to take the stand and he would make sure that the State counsel would not bring up his past conviction. Counsel deprived the Defendant rights to fair trial by allowing the State (Wick Cooper) to do what he said that would not happen. If counsel would have objected the outcome would have been different. This Court should **grant** a new trial. See: Records of Trial.

ARGUMENT IN CLAIM #7

Counsel failed to object to horribly disfigured photographs of child that was shown to the jury. Both via the small photographs introduced into evidence and on a 6' x 6' screen in the courtroom. Counsel objected only about the reaction of Monica who remained in the courtroom throughout the trial. Prosecutor displayed all photos in large format throughout the trial. Photos S-5 was the only one that counsel objected to. See trial Records pp. 1178-1179. Both the burn photographs and the autopsy photos were displayed on the screen during the testimony of Corporal Pamela Young, Dr. Beasley and

the Coroner. See Trial Records pp. 42, 45, 460. Counsel ineffective deficient/unreasonable performance was further cause by failing to object both the repetitive showing of the gruesome photographs. Some of which were unnecessary, and the size of their display, without reservation. These photos was so graphic that one juror had to ask to be excused to compose herself even after the small photographs displaying the injuries were passed.

Errors that indicates ignorance of basic procedures as shown herein, constitutes ineffective assistance. ***Veia v. Estell***, 708 F.2d 954, 963-964 (5th Cir. 1983). Had counsel at least objected, he would have preserved these errors for appeal. But he failed to do so. ***Veia v. Estell***, at 962; ***Washington v. Estell***, 648 F.2d 276 (5th Cir. 1981); ***Lyons v. McCotter***, 770 F.2d 529 (5th Cir. 1985); and ***Gray v. Lyons***, 6 F.3d 265 (5th Cir. 1992). The mere presence of counsel does not satisfy the constitutional guarantee of counsel. As the Supreme Court has often stated, an accused is entitled to representation by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

According to ***Strickland***, a defendant must show that counsel's performance was deficient within the range of competence required of attorney's in criminal cases. Defendant must next show that this deficient performance prejudiced his defense by depriving him of a fair trial.

Where as in this case, Defendant has shown that because of counsel's unprofessional errors the outcome would have been different. ***Strickland v. Washington***, 466 U.S. 668, 685, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

ARBITRARY ABUSE ARGUMENT AS TO CLAIM #1

Trial court interfered with the Defendant's Sixth Amendment right to counsel. He denied Defendant the right to counsel of his choice. Trial court denied the Defendant the right to have qualified appointed counsel, compelling Defendant to go to trial with unqualified counsel. When Defendant first appeared in Court following his indictment, he declared himself to be indigent. After the trial court agreed, trial counsel (Joiner) asked to be put on the case. Trial court then appointed the Officer of the Public Defender to represent the Defendant. (R.pp. 1-2). However, despite the fact that Defendant was charged with a capital offense and despite the fact that it was anticipated that the State would seek the Death Penalty. Defendant was appointed a single counsel who admitted during the proceedings that he was qualified only to be "second chair" in a capital case. (R.pp. 70, 657). Defendant was never appointed a "first chair" capital qualified counsel.

On June 7, 2001, a Mr. John Martin, an attorney for less than two (2) years at the time (admitted to practice 10/1999), filed a *Motion to Enroll as Co-counsel* with Mr. Joiner as second chair. (R.p. 78). Had Defendant been able to have capital qualified counsel and was not compelled to go to trial with unqualified counsel, the outcome would have been different.

ARBITRARY ABUSE ARGUMENT AS TO CLAIM #2

Trial court erred in allowing the State's counsel to use illegally obtain tapes made by the Defendant and/or Defendant's brother-in-law. Before Defendant came to the police station, Sgt. Vick had an interview with Defendant's wife (LaTonya Joseph) and wife's

brother (Andy Lewis) without an attorney and/or his mother. At the time of the interview, Andy was only 14 years old and had to have his mother or an attorney or someone that knew the law, present with him. Sergeant Willie Vick had obtained a statement from Andy "illegally" and confirmed that the Defendant had at least whipped K.J., even if he had not been responsible for the injuries. (R.p. 481). Sergeant Vick assured the Defendant's wife (LaTonya) that he "had no reason or logic to arrest anyone" when he asked to get the Defendant to come to the police station. (R.p. 465) and Vick insisted that the Defendant was free to leave when he entered the interview room. Despite what Vick had seen and what he had been told. (R.p. 470). He denied that he had any information, even though the record disputes it. Sergeant Vick denied that he handcuffed the Defendant prior to placing him formally under arrest at the conclusion of the taped statement. Defendant testified that he was handcuffed as soon as he got to the police station. On the first taped statement, there are sounds when Defendant is emphasizing facts that is handcuffed noises.

ESCOBEDO RULE

Under this rule, where police investigation begins to focus on a particular suspect, the suspect is in custody, the suspect requests for counsel is denied, and the police have not warned him of his rights to have counsel and to remain silent. The accused will be considered to have been denied assistance of counsel and "no statement" elicited during such interrogation may be used in a criminal trial.

Spontaneous and voluntary statement made while the Defendant is in custody and

not given as a result of police interrogation or compelling influence and inadmissible as evidence even when made without the ***Miranda*** warning. ***State v. Robinson***, 384 So.2d 332 (La. 1980).

In the above case, trial court should have not allowed these tapes to been played in the eyes and/ears of the jury, had the trial court suppressed the illegally obtained tapes, the outcome of the trial would have been different.

In ***State v. Collier***, *supra*, at 500. (384 U.S. 436, 444 (1966)), the Court held that unless the Defendant was informed of his Fifth Amendment right before questioning, any pre-trial statements elicited from the defendant during custodial interrogation were inadmissible at trial.

ARBITRARY ABUSE ARGUMENT AS TO CLAIM #3

Trial court erred in failing to obtain a joint waiver of jury sequestration. There is no joint motion in the record stating that it is the agreement of the State and/or the Defense that the jury not be sequestered. Trial court told the first panel of potential jurors on the second day of jury selection that the lawyers had agreed that they would not be sequestered during jury selection and that there was "also a chance" that they were not sequestered during the evidence phase of the trial. (R.pp. 666-668). Trial court reiterated the implied warning to the next panel telling them that "...You will not be sequestered during jury selection. Also, as of this time, the attorney's have told me they do not expect to request sequestration during the evidence phase of the trial ... but that could change at any moment, or the court for any reason whatsoever, I could change my mind and order

sequestration at any time in the case." (R.pp. 790-791).

However, while the trial court stated that the attorneys had agreed on the issue of sequestration, at least during the selection process, there never appears of the record any affirmative waiver by the Defense of the right to a sequestered jury, either during the jury selection or trial. There is no joint motion, no minute entry and no colloquy with the Defendant and/or his counsel concerning the issue of sequestration in the transcript. Had trial court sequestered the jury in this capital case, the outcome would have been different and the Defendant would have had a fair trial.

ARBITRARY ABUSE ARGUMENT AS TO CLAIM #4

Trial court erred by not letting the jury take there time to deliberate. Trial court told the jury to come up with a verdict or he will have to sequester them and put them in a hotel. The trial court force the jury to find the Defendant guilty.

In:

Code of Judicial Conduct

CANON-2

READS: A judge shall avoid impropriety and appearance of impropriety in all activities.

> A. A judge shall respect and comply with the law and shall act at all time in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

CANON-3

A judge shall perform the duties of office impartially and diligently.

A. Adjudicative Responsibilities.

(1) A judge shall be faithful to the law and maintain professional competence in it. - A judge be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge shall maintain order and decorum in judicial proceedings.

(3) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(4) A judge shall perform judicial duties without bias or prejudice. A judge shall not in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so.

(5) A judge shall require lawyers in proceeding before the judge to refrain from manifesting, by words or conduct, bias or prejudice against parties, witnesses, counsel or others.

Trial court erred by not declaring a mistrial when the jury foreman was seen upstairs on the 10th floor smoking around Defendant's family. That same juror after they found Defendant guilty in the guilt phase had to (his words) "persuade jurors to find the Defendant guilty." After that had happened, the trial court still did not sequester the other jurors. See: Trial Record.

This being the case, the trial court did not follow the Rules of the Court (Code of Judicial Conduct) and this Court should **grant** the Defendant a new and fair trial.

SUMMARY

At the police station during the investigation stage, Defendant was denied his Fifth Amendment right when he was questioned first and gave ***Miranda*** warnings only after, a practice recognized and forbidden by the United States Supreme Court in ***Missouri v.***

Seibert, supra.

At the pre-trial and trial stage, Defendant was denied his Sixth Amendment right to counsel when trial court denied him the right to counsel of choice; and denied him the right to qualified counsel.

The errors in this case are not harmless ones. The structural mandates that it is a defect and Defendant should be **granted** a new and fair trial.

CONCLUSION

Petitioner has exhausted all state court remedies, and now seeks long overdue relief from this Honorable Court. 28 U.S.C. § 2254 provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

For the foregoing reasons, Petitioner Elliot Joseph respectfully requests that this Honorable Court grant consideration to his claims. He was wrongfully convicted of First Degree Murder, in violation of La. R.S. 14:30, and sentenced to Life imprisonment. 28 U.S.C. § 2254 further provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented in the State court proceeding.

Petitioner herein submits claims to this Honorable Court based on egregious violations of his constitutional rights, and thus requests the granting of this petition under 28 U.S.C. § 2254(d)(1) and (2). Relief is specifically requested to vacate his conviction and sentence and order him released from custody. Petitioner humbly beseeches this Honorable Court for long-overdue consideration of the constitutional violations raised herein.

WHEREFORE, Petitioner prays that this Honorable Court grant his *Petition for Writ of Habeas Corpus* and reverse the decisions of the Louisiana Supreme Court, the Louisiana First Circuit Court of Appeal, and the trial court, and grant relief to which he may be entitled. All claims alleged herein are based on clear violations of Petitioner's constitutional rights and Petitioner requests that this Honorable Court consider this petition pursuant to the mandate of 28 U.S.C. § 2254.

Respectfully submitted this _____ day of Aug., _____, 2021.

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