21-8119

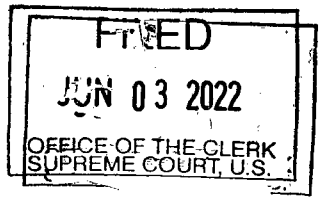
IN THE
UNITED STATES SUPREME COURT

ORIGINAL

WAYMON J. STEPHERSON, §
(Petitioner)

vs. § Cause No. 21A532

BOBBY LUMPKIN,
Director Of TDCJ-ID,
(Respondent) §



PETITION FOR
WRIT OF CERTIORARI

Appeal From The United States Court of Appeals
For The Fifth Circuit, Cause No. **20-40703**

United States District Court, Southern District
Of Texas, Galveston Div., Cause No. **3:19-cv-0247**

Respectfully submitted,

WAYMON J. STEPHERSON
Petitioner Pro Se
TDCJ #2109879
Memorial Unit
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X

QUESTIONS OF THE ISSUES PRESENTED

1. Whether Or Not The Lower Court Erred And Abused Its Discretion In NOT Finding Petitioner Was Deprived Of His 5th And 14th Amendment Rights When The Trial Court Misquoted and Misapplied The "5th AMENDMENT RIGHT AGAINST SELF-INCRIMINATION", To Petitioner's Detriment, And In Conflict With This Court's And Other Court Of Appeals Precedent.

2. Whether Or Not The Lower Court Erred And Abused Its Discretion In NOT Finding The "VOIR DIRE" Proceedings Were So Tainted As To Deprive Petitioner Of His Right To A Fair And Impartial Adjudicator, And By Extension, His Right To A Fair And Impartial Trial, When Its Ruling Was A Far Departure From This Court's Accepted And Usual Course Of Action Governing VOIR DIRE Proceedings.

3. Whether Or Not The Lower Court's Ruling On Petitioner's Claim Of "INEFFECTIVE ASSISTANCE OF COUNSEL" Conflicts With This Court's And Other Court Of Appeals Precedent, And Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings Governing I.A.C. Claims, As To Warrant This Court's Exercist Of Its Supervisory Power To Correct The Error.

4. Whether Or Not The Lower Court Erred And Abused Its Discretion in NOT Finding A Breach Of Petitioner's "BRADY RIGHTS", When The Non-Disclosed And Non-Produced Evidence Was "MATERIAL" And Deprived Petitioner Of His Right To A Fair And Impartial Trial, In Conflict With Precedent From This Court And Other Courts Of Appeal.

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LIST OF ALL PARTIES

1. UNITED STATES COURT OF APPEALS
   (For The Fifth Circuit)
   JUDGE GREGG J. COSTA

2. UNITED STATES DISTRICT COURT
   Southern District Of Texas
   JUDGE JEFFREY VINCENT BROWN

3. OFFICE OF THE TEXAS ATTORNEY GENERAL
   Mr. EDWARD MARSHALL
   (Assistant Attorney General)

4. Mr. BOBBY LUMPKIN
   Director Of TDCJ-ID
   (Respondent)

5. Hon. JOSHUA RICE
   (Criminal Defense Attorney)
   Houston, Texas

6. Mr. WAYMON J. STEPHERSON
   TDCJ #2109879
   (Petitioner)

REQUEST FOR ORAL ARGUMENT

That your Petitioner asserts Oral Argument should occur only upon the request of this Court, and the appointment of Counsel, for clarity on the issues presented; however, your Petitioner asserts this case can and should be resolved on the Merits, along with the Arguments, Authorities and Discussions advanced in this his Writ of Certiorari.

IN THE
UNITED STATES SUPREME COURT

WAYMON J. STEPHERSON, (Petitioner)	§	
vs.	§	Cause No. 21A532
BOBBY LUMPKIN, Director Of TDCJ-ID, (Respondent)	§	

PETITION FOR
WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, WAYMON J. STEPHERSON, Petitioner, Pro Se, in the above styled and numbered cause, files this his 'Petition For Writ Of Certiorari', in good faith, contending due process and the interest of justice would be best served by this Court GRANTING the same, and in support thereof, your Petitioner would show unto this Honorable Court the following:

I.

PLEA FOR LIBERAL SCRUTINY

That your Petitioner seeks the 'protection' that comes with Pro Se litigation, and respectfully request of this

Court to construe said Writ liberally, as required by Haines v. Kerner, 92 S.Ct. 594, (1972). Petitioner is a layman and should not be held to the same stringent standards demanded of practicing Attorneys. It appears that the lower courts deprived Petitioner of his 'protection' that comes with pro se litigation by requiring and demanding stringent pleadings on his many points of error that should be only expected of Attorneys. Petitioner present claims that, if given liberal scrutiny, would establish the unconstitutionality of his conviction. Haines v. Kerner, supra; Erickson v. Pardus, 127 S.Ct. 2197, (2007); Bourne v. Gunnells, 921 F.3d 484, (C.A. 5 - 2019).

II.

JURISDICTION

That this Court has Jurisdiction to entertain said 'Writ of Certiorari', pursuant to Rules 10, 14, 33, Rules of the Supreme Court; U.S.C.A., Amend. 5; 14. Moreover, Petitioner asserts this case is "Certworthy" and ripe for the Court's intervention and Review, in light of a split of Authority between the Circuits this Court has typically sought to resolve, Reyes Mata v. Lynch, 135 S.Ct. 2150, 2156, (2015); "Compelling reasons" exist, which includes the existence of conflicting decisions on issues of law among Federal Courts of Appeals, among State Courts of last resort, or between Federal Courts of Appeals [and] State Courts of last resort, City & County Of San Franscico

v. Sheehan, 135 S.Ct. 1765, 1779, (2015); Brown v. United States, 139 S.Ct. 14, (2018); Gee v. Planned Parenthood Of Gulf Coast, Inc., 139 S.Ct. 408, (2018). See also this Court's Ruling in the case of Nguyen v. United States, 123 S.Ct. 2130, 2134 (2003)(The Court of Appeals had "so departed from the accepted and usual course of judicial proceedings" as to call for an exercise of this Court's Supervisory Power); Rule 10(a)(c), Rules Of Supreme Court. Petitioner additionally relies upon the Constitutional mandates of Slack v. McDaniel, 120 S.Ct. 1595, (2000); Williams v. Taylor, 120 S.Ct. 1495, (2000).

III.

PROCEDURAL HISTORY OF THE CASE

That your Petitioner was charged with the offense of Aggravated Robbery, alleged to have been committed on or about 7th day of May, 2015, in Pearland, Texas. Petitioner pleaded not guilty. Trial commenced, after the Granting of a Mistrial, (10/10/16), on November 14, 2016, Cause No. 77949-CR. Petitioner pleaded Not Guilty! A Jury subsequently found Petitioner guilty, 11/18/16, and punishment was assessed at thirty-eight (38) years. Petitioner Appealed! The Appeal was advanced to the 1st District Court of Appeals, Cause No. 01-16-00936-CR. Said Court Affirmed the conviction on 02/08/18. Thereafter, Petitioner filed a P.D.R., Cause No. Pd-0298-18. Said

P.D.R. was refused 8/22/18. Petitioner then sought to collaterally challenge his conviction via State Habeas Petition, WR #89,781-01. Said Writ was denied 5/15/19. Thereafter, Petitioner sought Federal review, via Federal Habeas Petition, Cause No. 3:19-cv-00247, to the United States District Court, Southern District of Texas, Galveston Division. The Court rendered a decision granting Summary Judgment against Petitioner on September 30, 2020. Your Petitioner sought to challenge the District Court's decision and advanced an Appeal to the United States Court of Appeals, Fifth Circuit, Cause No. 20-40703. A single Judge denied relief on 11/16/21. Petitioner advanced a 'Petition For Reh'g En Banc', and said Reh'g was denied 01/06/22. Petitioner contends his claims are 'Certworthy', and advanced an 'Extension Of Time' to file his 'Petition For Writ Of Certiorari.' This Court, Hon. Judge ALITO, in an Order dated 3/22/22, extended Petitioner's filing time to and including June 5, 2022. Petitioner presents this his 'Writ of Certiorari' in a timely manner.

IV.

STATEMENT OF THE FACTS

That your Petitioner was charged with committing two (2) counts of Aggravated Robbery, alleged to arise out of the same criminal episode, against the Complainants, JACLYN and JEREMY BOND. (R. VI - 9-10). Said Robbery occurred inside of a well lit garage at the home of the bonds,

located at 3703 Boulder, Pearland, Tx., May 7, 2015. (R. VI - 29).

Petitioner asserts actual innocence, stemming from tainted out-of-court identification proceedings that infringed upon the validity of the in-court identification proceedings that were not independent in origin. (See argument, infra). Petitioner's first trial commenced October 10, 2016. Since your Petitioner alleged he was a victim of irreparable misidetification, deriving primarily from police misconduct and other out-of-court proceedings, that directly effected the independent origin of the subsequent in-court proceeding, your Petitioner moved the Court for a 'Suppression Hearing,' to be heard prior to the presemtment of the case before the Jury. On October 11, 2016, the Court conducted the 'Suppression Hearing.' (R. I - 7). The description of the Robber, given by the Bonds' were: an African-American male, dark skinned, slightly taller than the Bonds, [who stood at 5'8" and 5'9" respectively], wearing a white T-shirt, dark jeans, and a black baseball cap with a long brim, round face with no facial hair. (R. I-36, 50)(R. VI - 52). During trial, and seeking to establish irreparable misidentification, Trial Counsel moved the Court to allow Petitioner to stand beside Complainant, JEREMY BOND, to compare their heights before the Jury, since said Complainant asserted the Robber was slightly taller than he, (5'9")(R. I - 50). Petitioner, who is but 5'6", is considerably 'shorter' than the BONDS. In

addition, Officers tainted the identification proceedings by forwarding the BONDS four pictures of Petitioner via e-mail, entering Walmart. In the pictures, Petitioner had 'facial hairs', was wearing a distinctive gold watch, was not wearing dark jeans, but instead, jogging pants with a grey stripe down the side, and was not wearing a baseball cap at all. (R. I - 16).

A photo-array were conducted. Mrs. BOND' did not point out Petitioner in the photo line-up. Instead, said Complainant picked out Pictutre #1, (not Petitioner, who was #4). The Complainant immediately said 'no' when she observed Petitioner's photo. (R. I - 49, 52). Mr. BOND' picked photo #4, (Petitioner's picture), but stated he was 85% sure. (R. I - 77); however, during trial, it is significant to note Mr. BOND', stated he was <u>not</u> even 85% sure after seeing Petitioner in person at trial, stating, "He looks entirely different than, you know, the <u>picture</u> that I picked out." (R. VI - 56).

Applicant asserts police misconduct, and a clear breach of police policies, in forwarding the BONDS' four distinct pictures, via e-mail to their home, was calculated to fix in their mind a picture of Petitioner, even though the Court has long condemned 'single-man line up' proceedings. Moreover, the photo array conducted by Detective MORTON, consisted of a photo of Petitioner's driver's license which was clearly distinct, brighter and more defined than the mug shots of the other five members of the photo array. (R. I -

40, 42). Having the BONDS' to see several pictures of Petitioner, several times, joint viewings, along with more than one viewing of the photo array, violated, from their own admission, pearland police department standards governing line-ups, and breached Department Standard of Proceedings of Identification and Witness contamination. (R. I - 60, 67, 70). The tainted out-of-court proceedings made it all but inevitable for the Complainants to pick out Petitioner, but notwithstanding, Ms. BOND did not pick out Petitioner, and Mr. BOND stated that he was now less than 85% sure after seeing Petitioner at trial. Mr. BOND was asked during trial, if his identification of Petitioner was influenced by the photos impermissibily and unlawfully e-mailed to him and his wife by Officer ROGERS, and the Complainant answered: **"I Can't Say For Sure!"**. (R. VI - 55).

During trial, Petitioner sought to additionally establish he was a victim of irreparable misidentification by seeking to move the Court to permit him to display his highly identificable **Tattoos**, prominently displayed from his wrist to his elbows on his arms. Since the Complainant, Ms. BOND specifically and pointedly put emphasis on the Robber's arms, stating the Robber's arms were toned and muscular, (R. VII - 32), but did not see or recognize any distinct or readily identificable tattoos on the Robber's arms, which she states she was specifically looking at his arms. (id)(See Error #1, #3, infra).

Petitioner was accused of abusing the Complainant's

credit cards at a Walmart. (R. VI - 41). The credit cards were obtained from a Robbery of the Complainant at their home, in the garage area, which was well lighted. Petitioner asserts he obtained the credit cards from a female at the Walmart parking lot. Surveillance footage should have captured this purchase. Petitioner sought to establish, throughout trial, that he was not the Robber, but instead, a victim of irreparable misidentification. Peititioenr asserts this case is 'Certworthy', in light of the enclosed errors at trial, that leads into a conflict among the circuits and have so departed from 'accepted' norms as to warrant this Court intervention and exercist of its Supervisory Power. (Rule 10).

V.

REASONS FOR GRANT OF CERTIORARI

1. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING PETITIONER WAS DEPRIVED OF HIS 5th AND 14th AMENDMENT RIGHTS WHEN THE TRIAL COURT MISQUOTED AND MISAPPLIED THE 5th AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, IN CONFLICT WITH DECISIONS OF OTHER COURT OF APPEALS;

2. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING THE "VOIR DIRE" PROCEEDINGS IN PETITIONER'S CRIMINAL TRIAL WAS A "CRITICAL STAGE" AND THE RIGHT TO A FAIR AND IMPARTIAL ADJUDICATOR, DERIVING FROM "VOIR DIRE" IS CRUCIAQL FOR AN CONSTITUTIONAL FAIR AND IMPARTIAL TRIAL. THE LOWER COURT DEPARTED FROM THIS ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING:

3. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING TRIAL COUNSEL RENDERED UNREASONABLE, INEFFECTIVE ASSISTAQNCE OF COUNSEL, AND THE LOWER COURT'S RULING HAS SO FAR DEPARTED FROM ACCEPTED JUDICIAL NORMS GOVERNING COUNSEL GUARANTEE, AS TO WARRANT THIS COURT'S INTERVENTION;

4. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING A BREACH OF PETITIONER'S BRADY RIGHTS OCCURRED, WARRANTING THIS COURT'S INTERVENTION IN DETERMINING THE ACCEPTABLE JUDICIAL PROCEEDINGS GOVERNING THE RIGHT TO DISCLOSURE OF EVIDENCE, PIVOTAL TO PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL.

Petitioner contends the United States Court of Appeals, in Granting Summary Judgment when there patently still exist material, unresolved facts in dispute, and when a Court of Appeals has decided an important question of Federal Law that should be settled by this Court, and conflicts with relevant decisions by this Court, as to warrant the Grant of Certiorari for this Court's resolution.

VI.

POINT OF ERROR NUMBER ONE (RESTATED)

PETITIONER'S 5th AND 14th AMENDMENT RIGHTS WERE BREACHED WHEN THE TRIAL COURT DEPRIVED PETITIONER OF HIS RIGHT TO PROVE INNOCENCE BY MISAPPLYING AND MISQUOTING THE 5th AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

ARGUMENTS, AUTHORITIES and DISCUSSIONS

That Petitioner asserts a United States Court of

Appeals has rendered a decision in conflict with other Court of Appeals, and has decided an important question of Federal Law that has not been, but should be, settled by this Court. (See Rule 10 (a)(c), RULES OF THE SUPREME COURT.

During trial, Petitioner sought to establish he is a victim of irreparable misidentification, and that the evidence was insufficient to prove the first element of the offense, i.e., that he is the 'person'. The Complainants were robbed, at gun point, in a well lighted garage area of their home. (R. VI - 29). The Complainants gave a general description of the person who they claimed robbed them: An African-American male, dark skinned, slightly taller than the BONDS, (who stand at 5'8"), wearing a white t-shirt, dark jeans, a black baseball cap with a long brim, round long face with no facial hairs. (R. I - 36, 50)(R. VI - 52). Petitioner stands at 5'6", had facial hair at the time of the Robbery, wore jogging pants with a grey stripe on the side, was not wearing a baseball cap, and had on a distinctive gold watch. (R. I - 16). This actual **description** of Petitioner was captured as he entered Walmart on the night of the Robbery.

Police engaged in misconduct and violated Standards of Operation Proceedings when it comes to identification and contamination of evidence, by e-mailing four (4) photos of Applicant to the Complainants. Counsel moved the Court to have the identification 'suppressed', in a 'Motion To

Suppress tainted out-of-court Identification Proceedings.' (R. I - 60, 67, 70). Said 'Motion' was denied. At Trial, Petitioner sought to establish additional proof that he was a victim of 'irreparable misidentification' in light of the police out-of-court proceedigs, that resulted into a non-independent in-court identification proceeding. Your Petitioner sought to advance argument that he has clearly visible and distinct **Tattoos** on his arms, from his Wrist to his Elbows. The Complainant testified that she was concentrating on the Robber's arms, which she described as tone and muscular, but did not see visible Tattoos. (R. VII - 50). As a defensive strategy to establish mistaken identification, Trial Counsel moved the Judge for leave to have the Petitioner roll up his sleeves to display his heavily tattooed and non-muscular forearms, since the Complainant testified to specifdically concentrating on the Robber's forearms. The Trial Court responded to Petitioner's Motion as follows:

> 25 Mr. RICE: Your Honor, may I have the
>
> 01 Defendant come roll his sleeves up to display his
> 02 tattoos to the jury?
> 03 THE COURT: As long as he understand that
> 04 by testifying he's waiving his fifth amendment right to
> 05 remain silent.

The Trial Court erred and abused its discretion in denying Petitioner leave to display his Tattoos under the erroneous premise that Petitoiner would be 'testifying' and 'waiving' Rights to remain silent. Courts have rendered decisions in

conflict with the Court's determiation Petitioner relied upon the case of United States v. Bay, 762 F.2d 1314, 1316, (C.A. 9 - 1984). Said Circuit ruling on this point is persuasive. In Bay, supra, the Defendant sought to proffer tattoos for the purpose of impeaching the witnesses identification and the 9th Circuit HELD:

> "IF [the display of tattoos] can be compelled by the government when it is to the government's advantage, surely the Defendant can make the same showing without taking the stand, when such a showing is to his advantage. We have been cited no such case that so holds, it is proper to apply the "sauce for the goose is sauce for the gander" maxim."

See Bay, 762 F.2d at 1315. This Court should settle this important question of Federal Law, (Rule 10 (c)), in that, Circuits appear to be in conflict on whether or not the display of Tattoos infringes upon the 5th Amendment guarantee against self-incrimination.

In Bay, supra, a witness described the robber's slender fingers, Id., at 1316, but failed to mention the tattoos on his hands. The Court found this to be implausible. See Dispensa v. Lynaugh, 847 F.2d 211, 221, (C.A. 5 - 1988), wherein the 5th Circuit Held: "Overwhelming more significant are those features that Barthel failed to include in her description of the assailant, particularly .. . striking tattoos." Petitioner sought to establish, asx a sound trial strategy, Petitioner's tattoos were so prominently displayed on his arms as to not be overlooked by the Complainant, who was focused on the Robber's forearms. In addition, the Trial Court's misapplication and misquote of

the 5th Amendment guarantee against self-incrimination deprived Petitioner of a viable defense. Trial Counsel attested in his Affidavit that one of the Jurors spoke with him and stated that he requested to view the Video to determine the visibility of the Tattoos on Petitioner's arms, but stated the Video display was too dark to make a good determination. (See **EXHIBIT "A"**, annexed hereto - Affidaqvit of Attorney JOSHUA RICE).

The lower court, instead of determining the Trial Court's Constitutional breach, put emphasis on fact the Juror's comments to Counsel did not indicate he'll acquit. (See lower court's opinion, pg. .8 - U.S.D.C. Opinion). The lower court further erred in concluding "Stephenson fails to demonstrate that the non-display of his forearms to the jury had a 'substantial or injurious effect" on the Jury's verdictg. Citing Brecht v. Abrahamson, 507 U.S. 619, 637, (1993). The Court is mistaken. The Right to a fair and impartial trial is pivotal to Constitutional compliance. In addition, the lower court relied upon the case of United States v. Velasquez, 881 F.3d 314, 317, (C.A. 5 - 2018), in its denial of Petitioner's claim, (See pg. 14-15, U.S.D.C. Ruling), thereby pitting the Velasquez case in conflict with Bay, supra. This conflict warrants resolution by this Court. See Rule 10, supra.

The Fourteenth Amendment Due Process Clause protects a state's Defendant's right to a fundamentally fair trial. Darden v. Wainwright, 477 U.S. 168, 181, (1986);

U.S. v. Bagley, 473 U.S. 667, (1985). Said error had an injurious and substantial effect or influence in determining the Jury's verdict, warranting this Court's Grant of Certiorari and REVERSAL. The Court of Appeals, in its Ruling of 11/16/21, denying relief on this point of error, concedes error, but sought to categorize said harmful 'Constitutional' error as non-prejudicial, in words as follows: "Although the state trial court **likely erred** in believing a display of tattoos would waive the right against self-incrimination, the district court explained why any such error was not prejudicial." (See Appendix, Court of Appeals Ruling, pg. 1-2). Petitioner's use of the Complainant's credit cards is clearly distinct from the Robbery of the Complainant. The lower court's departure of 'accepted' Constitutional judicial standards, pertaining to Constitutioal error, warrasnts this Court's intervention and intercession.

WHEREFORE, PREMISES, ARGUMENTS and AUTHORITIES CONSIDERED, your Petitioner prays this Court would Grant Certiorari relief, in light of the above argument, and REVERSE his conviction. Petitioner further prays this Court would find said claim is 'Certworthy' in light of Rule 10, Rules OF The Supreme Court. Alternativerly, Petitioner prays for a 'remand', appointment of counsel, or any other, further or different relief this Court deem is just and proper, in the intereest of justice. IT IS SO PRAYED FOR.

VII.

POINT OF ERROR NUMBER TWO (RESTATED)

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING THE "VOIR DIRE" PROCEEDINGS WERE SO TAINTED AS TO DEPRIVE PETITIONER OF HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL

ARGUMENTS, AUTHORITIES and DISCUSSIONS

Petitioner asserts a United States Court of Appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort, and the Court of Appeals decision on this important question of federal law should be, but has not been, settled by this Honorable Court. (Rule 10 (a)(c)), RULES OF THE SUPREME COURT.

In the instant case, Petitioner contends biased, unwarranted and inflammatory comments by prospective veniremen so 'tainted' the trial proceedings as to cause the resulting trial to come out 'stillborn'. Petitioner, as guidance to this Court, and helpful to this Court in its analysis of his claim is the case of Knight v. State, 839 S.W. 2d 505, 510, (Tex. App. - Beaumont 1992). Said state court of last resort addressed a factually similar claim, and held the comments of potential jurors may be so prejudicial and inflammatory against a defendants right to a fair and impartial trial, as to render the resulting conviction a violation of due process. Knight, 839 S.W. 2d at 510.

It has been long recognized a defendant is entitled to the right of a fair and impartial trial. U.S.C.A., Amend. 5; 14. Moreover, this Court has long recognized "Voir Dire" is a critical stage of a criminal trial for Constitutional purposes. Gomez v. United States, 109 S.Ct. 2237, 2246, (1989). In addition, this Court has consistently recognized the Constitutional right to a fair and impartial jury. Gray v. Mississippi, 107 S.Ct. 2045, 2056, (1987). Said right is so regarded and respected by this Court that the Court opined: "Because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless-error analysis cannot apply, as the Constitutional right to a fair and impartial adjudicator are so basic to a fair trial that their infraction can never be treated as harmless error." Gray, supra; Knight, supra; Chapman v. California, 87 S.Ct. 824, (1967).

Petitioner contends, like the defendant in Knight, supra, that his Voir Dire proceedings and the right to a fair and impartial adjudicator were breached by what was tantamount to an atmosphere of such extreme prejudice that its no stretch of hyperbole to conclude that the voir dire atmosphere was circus-like. Jurors were allowed to express their biased opinion, in open court, without objection, clearly depicting Petitioner as guilty. A prospective juror, in open court, expressed his disdain for Petitioner committing an Aggravated Robbery, even though the facts were not yet presented the Juror: (R. V - 100):

"[he] used harm against somebody or a weapon against somebody to get what he wants, where I go to work and pay for what I want, is how I feel."

This comment, of course, suggests said potential Juror has already found Petitioner guilty of Aggravated Robbery, and said comment could reasonably impact the thoughts of other prospective jurors. Another Juror stated the following: (R. V - 102):

JUROR ALLEN: Yes, sir. I told the prosecutor earlier that I was probaqbly -- I will be biased because in the aggravated robbery he was picked in a line-up and there was enough evidence to be indicted.

Equally chilling are the comments of prospective jurors on Petitioner's exercist of his 'right to not testify' and 'presumption of innocence'. The record evidence establishes the following: (R. V - 49, 50):

Ms. SHARP: 32 Mr. -- how do you say your last name?
Juror DEMOUY: Demouy.
Ms. SHARP: Demouy?
Juror DEMOUY: Yes, Ma'am.
Ms. SHARP: Okay. Can you presume him innocent as he sits here?
Juror DEMOUY: I'm sorry. If he went to this extent right now to be sitting in a courtroom, he's already [DID] somthing to warrant being here.
Ms. SHARP: So you're not sure that you could follow the 'Presumption Of Innocence?'
Mr. DEMOUY: No, Ma'am.
Ms. SHARP: Thank you. Anybody else feel like Mr. Demouy up here? Number 41, Mr. Allen?
Juror ALLEN: With aggravasted, that means its face-to-face, correct?
Ms. SHARP: Yes, sir. Well, I'll do the definition later; but yes.
Juror ALLEN: So, to my understanding of the law, face-to-face means (inaudible) --
COURT REPORTER: I can't hear you, sir.

Ms. SHARP: I'm sorry.
Juror ALLEN: From my understanding, I would

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guess that he was [Picked] in a lineup by the people who made the charge. So, I would think that he's guilty, as well.

Petitioner contends said comments, without the State or Defense moving to immediately strike the prospective veniremen, were calculated to poison the entire panel, and was bolstered by the State's questioning. In addition, Ms. SHARP questioned three more perspective Jurors. (R. V - 51, 52):

Yes, Mrs. WIGGINS.
Juror WIGGINS: What if it prejudices you?
Ms. SHARP: What?
Juror WIGGINS: What if it prejudices you?
am I saying it right? What if it starts you out feeling kind of prejudiced towards the situation?
Ms. SHARP: Well, right now, we don't know if he's going to testify or not. That's a decision he get to make later. But are you saying that if he doesn't testify, that is going to prejudice you towards --
Juror WIGGINS: I think it would.
Ms. SHARP: Okay. That's -- that's exactly what we need to know. Thank you -- you're number 23, correct?
Juror WIGGINS: (Nodding).
Ms. SHARP: Yes, number 69 Mrs. Thomas?
Juror THOMAS: I believe it would prejudice

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prejudice my decision as well. If I don't hear his side.
Ms. SHARP: So, if he didn't testify, you might use that as evidence of guilt?
Juror THOMAS: Yes.
Ms. SHARP: Okay. Number 33, Mr. Townsend.
Juror TOWNSEND: I think its important for a person to speak their peace.

At no time did the State nor defense state, "I Have A

Motion' to strike. Instead, the State Attorney, Ms. SHARP, permitted the biased and inflammatory comments to fester in the minds of the prospective jurors. Another prospective Juror, Juror RHODES, piggy backing off the comments of Juror SMITH, was asked if he felt the same as SMITH, and said Juror stated: "I believe if there was enough evidence to indict him on these charges, that I would be biased. I am biased." Counsel, in his questioning, sought to re-question Mr. SMITH, who had already poisoned the air with his biased comments, without objection and without a 'Motion'. SMITH stated the following: (R. V - 121):

> Mr. ROBERTS: Okay. And you're telling us that you're not that person.
> Juror SMITH: Well, I feel like he's here for a reason already. And like I said a while ago, its not just a Robbery, but an Aggravated Robbery and why did [he] have to go to the extent and do that.

Said comments were made without a 'Motion' by either the State or Defense. Counsel solicited additional biased commentary from Juror DEMOUY, wherein said prospective veniremen stated: (R. V - 145):

> "If he went through a Grand Jury and was indicted, there's enough evidence. If you're sitting on trial here, odds are you're **very guilty**. We're talking about Aggravated Assault with possibility -- no, there is not a possibility. Lethal force could have been perpetrated on someone."

Mr. ROBERTS, (Defense Counsel), instead of 'moving' to immediately strike a clear biased perspective juror, who had tainted the air with his prejudicial comments and flagrant disregasrd towards the 'presumption of innocence', asked

other prospective jurors if they felt the same as Juror DEMOUY, listing a slew of Jurors whom were already biased, stating: "I know you do Mr. SMITH, I know you do Mrs. EATON, Ms. RHODES, Mr. JAMES, Mr. TOWNSEND, BRINKLY, Mr. ALLEN. See (R. II - 147).

Petitioner asserts its clear the atmosphere in which his Jury would be born was far too tainted by biased Jurors to accord Petitioner the right to a fair and impartial adjudicator, and hence, the resulting trial came out stillborn. The atmosphere in Petitioner's case is not at all distinguiishable from the atmosphere that was created from biased perspective Jurors in Knight, supra; Gray v. Mississippi, supra; Gomez v. United States, supra. See also Virgil v. Dretke, 446 F.3d 598, 607, (C.A. 5 - 2006. In Virgil, the Court noted:

> "We can not know the **effect** of Sumlin's and Sim's bias had on the ability of the remaining the jurors to consider and deliverate **fairly** and **impartially** upon the testimony and the evidence presented at Virgil's trial. Each ultimate juror heard Sumlin's and Sim's **bias statements** during Voir Dire; each watched as Virgil's representation failed to make any comment in response."

id., at 613. Petitioner contendsd, like in Virgil, supra, its impossible to know the effects of eight (8) prospective Jurors biased comments had on the other perspective Jurors, but clearly, the atmosphere was tainted and reasonably deprived Petitioner of his right to a fair and impasrtial adjudicator. Gray v. Mississippi, supra; Knight, supra.

Said comments, without objection and without a 'motion', clearly impacted other jurors on the panel. It has been long recognized this type of poisoning of the Jury is incurable. See Dunn v. United States, 307 F.3d 883, 886, (C.A. 5 - 1962), wherein the Court of Appeals Held:

> "It is better to follow the rules then to undo what has been done. Otherwise stated, one can not 'Unring' a bell; after the thrust of the saber it is difficult to say 'forget' the wound; and finally, if you throw a skunk into a jury box, you can't instruct the Jury to 'not smell' it."

The lower court sought to dismiss the Constitutionality of Petitioner's argument, and his assertion that he was deprived of his right to a fair and impartial adjudicator, and by extension, the right to a fair and impartial trial, guaranteed by the 5th and 14th Amendment, by asserting "none of the prospective jurors Stephenson identifies in his petition as being biased were actually seated on his jury. (See U.S.D.C. Ruling, pg. 21). The United States Court of Appeals did not address this error at all. (See Appendix). The argument is not whether or not a biased jurur served on the Jury. the issue is whether or not ill comments, intentionally biased comments and flagrant disregard to the rules of Law had a impact on the other prospective jurors, due tothe biased atmoshere created during Voir Dire. This issue was never resolved by the lower courts.

In addition, the Brazoria County Courthouse, in which Petitioner's case derived from, is currently under Federal

Investigation for the Clerks clear breach of law regarding Jury Selection, in that, the Clerks method of Jury selection were calculated to produce 'conservative' veniremen, who would more likely convict, and produce the type of prospectie Jurors complained of herein. It was the Clerk's tatic in not following the Law to have a fair cross representation from the community that enable to type of biased and pro-conviction jurors that were evident in Petitioner's case. See the Chronicle's Austin Bureau news clippinng highlighting "press conference Monday, August 30, 2021, at the Brazoria County Courthouse in Angleton. The Brazoria County District Attorney Office and the Texas Rangers Public Integrity Unit are investigasting allegations that the district clerk's office, until last week led by Rhonda Barchak, improperly conducted juror selection. Families affected by the alleged misconduct gathered on the steps of the Courthouse to call for federal investigastion)." (See also Article in Houston Chronicle, Jon Shapley). The prospective jurors that eventually served in Petitioner's case were particularly selected by Clerk BARCHAK' for their conservative and pro-conviction position. (See investigation of Clerk's Office, and her non-compliance with Texas Rules governing random jury selection to reflect a fair cross representation of the community). Said Clerk has since resigned but the investigation is ongoing.

Because the United States Court of Appeals decision conflicts with a decision by a state court of last resort, and because said Court has so far departed from the accepted and usual course of judicial proceedings governing the right to a fair and impartial trial, due process and the interest of justice warrants this exercist of this Court's supervisory power. Rule 10 (a), RULES OF THE SUPREME COURT.

WHEREFORE, PREMISES, ARGUMENTS and AUTHORITIES CONSIDERED, your Petitioner prays and respectfully urge for this Honorable Court to find said claim is 'Certworthy' and warrants this Court's intervention and exercist of its Supervisory Power, to correct the lower Court's clear error in its resolution of said claim. Petitioner prays this Court would find his right to a fair and impartial trial was breached, warranting REVERSAL. Alternatively, Petitioner prays for the appointment of Counsel, a hearing on the merits, or any other, further or different relief this Court deem is just and appropriate. IT IS SO PRAYED FOR.

VIII.

POINT OF ERROR NUMBER THREE (RESTATED)

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN NOT FINDING TRIAL COUNSEL RENDERED UNREASONABLE, INEFFECTIVE ASSISTANCE OF COUNSEL, AND SAID MALFEASANCE AND NONFEASANCE ON BEHALF OF COUNSEL PREJUDICE PETITIONER'S 6th AMENDMENT RIGHTS

ARGUMENTS, AUTHORITIES and AUTHORITIES

The lower court decision governing Petitioner's claim of Ineffective Assistance of Counsel, has so far departed from the accepted and usual course of judicial proceedings, governing 6th Amendment violations, and its prejudice to a defendant's case, as to call for this Court's exercist of its intervention and Supervisory Power. Rule 10(a), Supra.

In the case at bar, Petitioner advanced to the lower court four (4) distinct claims of Ineffective Assistance Of Counsel, to wit:

(1) Counsel Failed To Have A Firm Grip On The Law Regarding The Fifth Amendment Protection Against Self Incrimination And Its Application To His Client's Case:

(2) Counsel Failed To Move For A Dismissal Of The Jury Panel, In Light Of Clearly Biased, Inflammatory And Prejudicial Comments From Prospective Veniremen, Whose Comments Tainted Petitioner's Right To A Fair And Impartial AdJudicator, And His Right To A Fair And Impartial Trial;

(3) Trial Counsel Failed To File The Necessary Pre-Trial Motions To Protect His Client's Rights And Ensure His Client's Right To A Fair And Impartial Trial;

(4) Trial Counsel Failed To Preserve Error Concerning The Tainted, Unnecessary Suggestive Out-Of-Court Identification Procedures That Impacted The Required Independence Of In-Court Identification Proceedings;

Petitioner contends the lower court's ruling on the merits of his claim were a clear departure from the acceptable and usual norm of JJudicial Proceedings governing the application of this Court's Precedent on claims of Ineffecdtie Assistance of Counsel.

(a) Failure To Have Grip On Law Governing Application Of 5th Amendment.

Pivotal to the establishment of irreparable misidentification and Applicant right to a fair and impartial trial was the display of tattoos. (See Error No. 1, supra). See also the case of United States v. Bay, supra; Dispensa v. Lynaugh, supra. During state habeas proceedingns, this claim was one of three claim the Court designated for resolution. Trial Counsel was caused to respond to said claim. The lower court, United States District Court, quoted Counsel's response, wherein, Counsel completely disregarded the main thrust of Petitioner's argument, i.e., Counsel knew or should have known the display of Tattoos are not 'testimonial' and that the Trial Court erred and abused its discretion by asserting Petitioner would be giving up his 5th Amendment Right against Self-Incrimination if he stands before the Jury and

display his highly visible and identifiable tattoos. (See R. VII - 122,123). The Trial Court was mistaken! Even the U.S. Court of Appeals, Judge COSTA acknowledge the same in his Ruling.of 1/6/22.

Counsel's malfeasance and nonfeasance, in not objecting to the Trial Court's misquote and misapplication of the 5th Amendment Right to Petitioner's case, deprived Petitioner of a viable and well planned defensive strategy. See Error No. 1, supra. In response, Counsel, clearly cognizant of fact Petitioner sought to use the display of his tattoos for exculpatory purposes, twisted the facts to make it seem the display of tattoos would prove inculpatory, and hence, seek to justify why he did not object to the Trial Court's misapplication of the Law. On page 8 of the lower court's 'memorandum and order' addressing this point, the Judge highlight Counsel's response wherein he states:

> "To the best of my recollection, I asked the Judge during this point in the case whether Defendant could expose his forearms to show that **He Had NO TATTOOS** thereon. The Judge informed me that so doing would waive Defendant's right to remain silent. At this point Defendant, co-counsel and I decided not to display Defendant's Forearms. This was a mutually agreed upon decision based on the Judge's aforementioned cautionary statement. I agreed that this decision was in the best interest of my client. In a post-trial interview one juror told me that he had been interested to see my client's forearms. That juror, however, did not make clear to me that seeing said forearms would have changed his decision in the jury room"

Clearly, Petitioner is not an Attorney and is not expected to know the Law governing the 5th Amendment Right, for the purposes of entering into a 'mutual' agreement. Secondly,

Counsel seek to justify his clear deficient performance by twisting the facts, making it appear as if Petitioner had **NO Tattoos**, and that it would, somehow, be detrimental to the defense if Petitioner were to display his forearms to the Jury. Counsel's malfeasance and nonfeasance deprived Petitioner of the right to present a viable defense, and but for Counsel's deficient performsance and his complete ignorance towards the application of the 5th Amendment, there exist a reasonasble probability the entire outcome of the trial would have altered. Strickland v. Washington, 104 S.Ct. 2052, (1984); U.S. V. Cronic, 104 S.Ct. 2039, (1984). A Juror made it clear that he was interested in seeing Petitioner's tattoos, and even though Counsel alleged said Juror did not make 'clear' if seeing Petitioner's forearms would have changed his decision, the interest, alone, establishes a 'reasonable probability' said Juror might not have voted to convict, thereby changing the entire outcome of the trial. Strickland, supra.

The lower court's ruling on this point "conflicts with relevant decisions of this Court". See Rule 10(c), making said claim "Certworthy'. See also Brown v. United States, 139 S.Ct. 14, (2018); Nguyen v. United States, 123 S.Ct. 2130, 2134, (2003).

(b) Trial Counsel rendered ineffective assistance of Counsel for omitting to move to quash the entire Jury Panel in light of clearly tainted, biased and prejudicial comments from prospective veniremen, that deprived Petitioner of his right to a fair

and impartial adjudicator and right to fair and impartial trial

The repeated prejudicial comments from prospective jurors were so harmful to Petitioner's right to a fair and impartial trial, as to cause the resulting trial to come out 'stillborn.' (See Error No. 2, supra).

Counsel knew or should have known that effective represetation and the 6th Amendment guarantee warranted his moving to quash the entire Jury Panel, in light of the potential for irreparable damage, and the infringement on Petitioner's right to a fair and impartial adjudicator, and the right to a fair and impartial trial. See Gray v. Mississippi, supra; Knight, supra. Trial Counsel, like the Counsel in Knight, supra, sat idly by while the State, through its poisonous veniremen, tainted the entire atmosphere with its biased comment against 'the presumption of innocence'; 'the right to remain silent' and their assertion of 'guilt', for Petitioner being merely indicted, and without hearing any evidence. See Error No. 2.

Counsel was clearly not functioning as the Counsel guarantee demanded of the 6th Amendment, and but for Counsel's omission, in failing to quash the entire Jury panel, in light of clear taint and poison of the atmosphere, induced by biased and pro-state Jurors, there exist a reasoable probability the entire outcome of the trial would have altered. Strickland, supra. Hence, the lower court's rulig on this particular point is clearly in conflict with this Court's precedent governing ineffecitve Counsel. The

lower court, on page 8,9 of its 'memorandum and order', acknowledges that this point, too, was a designated issue to be resolved by the Trial Judge, but seek to placate said error by summarily concluding the prospective jurors comments were not harmful, Petitioner never objected, and Petitioner allegedly told Counsel he was 'satisfied' with the empanaling of the Jury. Again, Trial Counsel sought to sloth off his duties on Petitioner, who is clearly untrained, unguarded and knew of no defense to protect his rights to a fair and impartial adjudicator, and by extension, the rights to a fair and impartial trial. Your Petitioner gave wholesale reliance on Counsel's ability to represent him appropriately, trusting him, a trained professional at Law, to protect his Constitutional Rights. Trial Counsel was clearly cognizant of the fact Petitioner knew nothing about Voir Dire proceedings, the tainting of the atmosphere, nor of his rights to have a fair and impartial adjudicator unpoisoned and uninfluenced by willful and intentional ill-comments, calculated to taint the Jury Panel that would eventually serve. It was not until Petitioner's study of the Law governing Counsel's 6th Amendment duties and responsibilities when he learned of Counsel gross deficiencies and clear flaws in his representation of Petitioner.

Because the lower court's ruling is in confluct with the state court's ruling in Knight, supra, as well as this Court's precedent, accepted and usual address of claims

governing 6th Amendment breach, this Court should determine said claim is 'certworthy' and warrants favorable resolution on this claim. See Strickland, supra; U.S. v. Cronic, supra; Knight, supra; Nguyen v. United States, supra; Rule 10 (c), RULES OF THE SUPREME COURT, warranting REVERSAL.

(c) TRIAL COUNSEL FAILED TO FILE THE NECESSARY PRE-TRIAL MOTION TO PROTECT PETITIONER'S RIGHTS AND TO ENSURE A FAIR AND IMPARTIAL TRIAL.

On this point, the lower court, on page 25, 26 of its 'memoradum and order' of 9/30/20, acknowledge Counsel's complete failure to advance the required pre-trial 'Motion in Limine' and 'Motion to Suppress' in a timely manner for the Court's resolution.

Petitioner's first trial commenced 10/10/16. Counsel filed the necessary pre-trial motions in preparation for trial. The Court addressed Petitioner's "Motion To Suppress" on 10/11/16. The Court subsequently granted a 'Motion For Mistrial' on said date. The 2nd trial commenced on 11/14/16. All pre-trial motions, filed during the first trial proceedings, were required to be filed in the 2nd trial. See Thomas v.Varner, 428 F.3d 491, (C.A. 3 - 2005). Counsel filed a slew of pre-trial motions during the first trial, including motions to challenge the State's violation of Rule 107, Tex. R. Evidence "optional completeness." Counsel filed a 'Motion In Limine' to preclude the State from showing part of an act, and not the entire act, to

accord the Jury the chance to see the entire picture. See Sauceda v. State, 129 S.W. 3d 116, 123, (Tex. Cr. App. En Banc 2004). The lead detective on the case, from his own admission, neglected to collect the entire video footage from three locations where alleged criminal activity occurred, and instead, chose to make still shots from the videos. (R. VI - 110-112, 116, 119). A picture, taken out of contents, can give the Jury the wrong impressio. See Credille v. State, 925 S.W. 2d 112, 117, (Tex. App. Houston 14th Dist. 1996).

During the 2nd trial, Counsel wholly shirked his duty and failed to advance all pre-trial motions filed during the first trial into the second trial, which included a 'Motion To Suppress' displaying part of an act, and not the whole picture for the Jury's determination, along with a 'Motion In Limine' to limit the State's breach of Rule 107. Said omission were harmful to the defense and Petitioner's right to a fair and impartial trial. The record evidence establishes the following: (R. VI - 11):

> The COURT: The only thing that's filed is a motion for disclosure of favorable evidence, which was filed on November 10th, 2016, not set for a hearing.
> Ms. SHARP: I have that.
> Mr. RICE: Maybe she didn't file the Motion to suppress along with it.
> but the idea is that they only show parcels of one of the videos; and it was, you know, for identification purposes of the car. But we need that entire video because it has exculpatory information on it. And so, if the State can find it, we need -- we need it to be found.

The Trial Court sought to address and resolve Counsel's 'Motion to Suppress', but was unable, due to the non-filing of said motion before the Court. (R. VI - 138):

> The COURT: I"m looking for your Motion to Suppress.
> Mr. RICE: I understand, Your Honor.
> The COURT: You did'nt file one, did you?
> Mr. RICE: **I Did Not**.

Petitioner was crippled in addressing a 'Motion To Suppress' in-court identification proceedings that were not independent in origin, as well as the Rule 107 violation, according the State leave to only show part of an act, in breach of "Optional Completion."

Petitioner was deprived of the opportunity to establish the identification proceedings against him violates this Court precedent in Simmons v. United States, 390 U.S. 377, (1968)(condemnation of single-man lineup) and Manson v. Brathwaite, 97 S.Ct 2243 (1977)(no degree of certainty as Complainant was now less than 85% sure after seeing Petitioner at trial). See also Tibbs v. Florida, 102 S.Ct. 2211, 2218, (1982); Neil v. Biggers, 409 U.S. 188, 189, (1972)(likelihood of irreparable misidentification that violates due process rights). The Trial Court denied Counsel leave to file a 'new motion', stating, "your timing on this is late," and your 'Motion In Limine' was never presented. The lower court opined Petitioner "failed to show prejudice under Strickland," (See Appendix, pg. 26 of lower court ruling. Petitioner met the two-prong

requirement of Strickland, supra, and the lower court's ruling was contrary this Court's precedent and the accepted and usual standards in resolving claims of Ineffective assistance, making said claim 'Certworthy'.

(D) COUNSEL FAILED TO PRESERVE ERROR OF SUGGESTIVE AND UNLAWFUL IDENTIFICATION PROCEEDINGS.

On this point, Petitioner asserts Counsel rendered ineffective assistance for failure to preserve error of the State's out-of-court tactics when it presented the Complainant with the photo array lineup that clearly distinguishes Petitioner's picture from the other five pictures. Petitioner's picture were of his driver's license, while the others were mug shots. Said driver's licence picture were more defined, brighter and distinct. In addition, Petitioner challenged the 'single-man lineup' proceeding, condemned in Simmons, supra, in light of police misconduct in forwarding the Complainant, via e-mail, four (4) pictures of Petitioner entering Walmart.

The lower court dismissed said point of error, contending "Further in reviewing the photo lineup ... I will find that the photos that were used were not dissimilar." As a result, the lower court opined "Stephenson presents no facts sufficient to overcome this state-court decision, and fails to show that he is entitled to relief under Strickland or 2254(d)." (lower court ruling, pg. 27). An **In Camera** examination of the photo array would find the Court's

determination debatable or wrong. Its obvious a picture of one's driver license would be distinct from a picture of a mugshot. Moreover, the out-of-court identification proceedings, from the State's own admission, violates Standard of Operation procedures. Counsel's omission to challenge the out-of-court identification proceedings violated the 6th Amendment guarantee. See U.S. v. Cronicle, 104 S.Ct. 2039, (1984)(single error or omission may be the focus of a claim if Ineffective Counsel as well). The lower court ruling is in conflict with this Court's precedent, warranting the Grant of Certiorari on this claim, in that, the Strickland mandate is met, in that, but for Counsel's omission in challenging the out-of-court identification proceedings, which infringed upon the non-independent origin of the in-court identification proceedings, there exist a reasonable probability the entire outcome of the trial would have altered. Strickland, supra.

IX.

POINT OF ERROR NUMBER FOUR (RESTATED)

THE STATE'S VIOLATION OF PETITIONER'S "BRADY RIGHTS" DEPRIVED PETITIONER OF HIS RIGHTS TO A FAIR AND IMPARTIAL TRIAL

ARGUMENTS, AUTHORITIES and DISCUSSIONS

This Court has long recognized the due process guarantee of the 14th Amendment requires the State to disclose evidence, inculpatory as well as exculpatory, to accord a defendant his right to a fair trial. See Brady v. Maryland, 373 U.S. 83, (1963), and its progeny. Because the lower court's ruling on this claim has so far departed from the accepted and usual judicial proceedings governing Brady Violations, the interest of justice demands this Court's intervention and exercist of its Supervisory Powers to correct such a sanction by the lower court. See Rule 10 (a)(c), RULES OF SUPREME COURT.

On this claim, Petitioner asserts the prosecution violated his due process rights when it failed to disclose surveillance video from WALMART, SHELL and MURPHY that would have been exculpatory. Due Process demands the State, and its agents, (including police officers), to disclose 'Material' evidence that is favorable to the defense and 'material' to either guilt or punishment. Brady, supra; Floyd v. Vanney, 894 F.3d 143, 161-62, (C.A. 5 - 2018); Kyle v. Whitley, 514 U.S. 419, 437, (1995). Evidence is 'material' under Brady "where it simply demonstrates a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Floyd, 894 F.3d at 166; Youngblood v. West Virginia, 547 U.S. 867, 870, (2006).

Petitioner asserts Brady was violated in light of the

State, and its agents, complete failure to obtain and disclose exculpatory surveillance video clippings, that would establish Petitioner's innocence, and were essential to his right to a fair and impartial trial. Your Petitioner was connected to said offense in light of his use of the Complainant's credit cards, that apparently derived from a robbery. Detective ROGERS, in his investigative work, contacted your Petitioner by phone. Petitioner explained to said detective how he came into possession of the victim's credit cards, contending he purchased said cards from a women in the Walmart Parking Lot. This purchase could have been easily corroborated by ROGERS examining the surveillance video footage of activities at Walmart Parking Lot, at or near the time of the purchase. In addition, video footage from the Shell and Murphy establishment would have equally proven exculpatory, in that, the video would have established the presence of Petitioner's vehicle at the Shell Station during the approximate time of the robbery, and would have shattered the prosecution timeline in its attempt to place Petitioner at the crime scene, which were in two distinct locations. ROGERS testified that he did not go back and get the surveillance video from Walmart, Shell or Murphy, and stated, at the Shell Station, "I admit I should have gone back and got the videos," (R. VII - 102, 103, 161). Said video of the Shell Station is always preserved for police viewing, and owner, ABDUL MASJID testified: (R. VII - 67):

> "We -- we get approached by many law enforcement anytime there is an activity like crime happening. They want us to give the video or pictures if we can, and **We Never Deny Them.** We always go way out to give them the video, if possible, or pictures, to help them out."

The surveillance video footage at Shell Station establishes Petitioner's vehicle was parked there from 21:30 to 21:51, (See State's Exhibits 25, 27)(R. VII - 157). This is according to the 'time' stamped on one of the still shots from the Shell Station. A time stamp also capture Petitioner's vehicle at Shell Station 9:24 pm. (id)(See also State's Exhibit #16). The Robbery of the Complainants took place at 9:15 - 9:24 pm., twenty to twenty-five (20 to 25) miutes away from the Shell Station, Walmart and Murphy. Detective ROGERS conceded Petitioner could not have arrived at the Shell Station in six (6) minutes, (R. VII - 158), and could not be at two places at the same time. (R. VII - 159).

The lower court, United States Court of Appeals denied relief, erroneously concluding Petitioner's vehicle was spotted at the crime scene. (See Appendix). The time line makes this impossible. Couunsel moved the Court for the disclosure of the video evidence at Walmart, Shell and Murphy, asserting the same is exculpatory and vital to the defense. (R. VI - 12). The lower court, (U.S.D.C.), denied Petitioner's Brady claim cotending Petitioner has not shown the prosecution 'suppressed' the videos, and that the videos had been destroyed. Said destruction of 'material' evidence violates Arizona v. Youngblood, 109 S.Ct. 333, 335, (1988):

> "When idenity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such a loss is material to the defense and is a denial of due process."

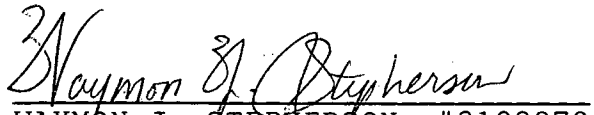
Petitioner was denied his Brady Claim, when it was the State who either permitted evidence to be destroyed and failed to disclose, knowing the exculpatory nature of the video footage. Hence, Petitioner asserts the lower court ruling conflicts with This Court's determination on Brady Claims, and that the decision to deny relief departs from the accepted and usual standards governing Brady Claims, warrantig this Court's intervention. Rule 10 (a)(c).

X.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES, ARGUMENTS and AUTHORITIES CONSIDERED, your Petitioner prays and respectfully urge for this Hoorable Court to find his claims 'Certworthy', pursuant to Rule 10, and encourasge further proceeding. Petitioner prays this Court would REVERSE his Constitutionally infirmed conviction, pursuant to the above argument. Alternatively, Petitioner prays this Court would remand said case back to the lower court, resolve the case on the merit, appoint Counsel, or any other, further or different relief this Court deem is just and proper, in the interest of justice, IT IS SO PRAYED FOR.

Respectfully submitted,



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