No. 21-8176

IN THE SUPREME COURT OF THE UNITED STATES

MARICE NALLS
Petitioner

v.

STATE OF LOUISIANA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

APPENDIX TO
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FILED ON BEHALF OF THE STATE OF LOUISIANA

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DISTRICT ATTORNEY

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Counsel of Record
ASSISTANT DISTRICT ATTORNEY

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
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Counsel for Respondent

APPENDICES

Exhibit 1: Petitioner's pro se Memorandum in Support of Application for Post Conviction Relief with Request for Appointment of Counsel and an Evidentiary Hearing, filed October 11, 2011

Exhibit 2: State's Procedural Objections, Answer, and Memorandum in Opposition to Application for Post-Conviction Relief, filed February 27, 2012

Exhibit 3: Commissioner's Report and Recommendation, issued August 9, 2012

Exhibit 4: Trial court order, signed October 3, 2012

Exhibit 5: State's Supplemental Brief on Petitioner's Claim of Ineffective Assistance of Counsel for Failure to File a Motion to Quash Indictment for Armed Robbery as Untimely, filed November 13, 2012

Exhibit 6: Petitioner's counseled Brief in Support of Application

Exhibit 7: Commissioner's Recommendation, issued January 31, 2013

Exhibit 8: Trial court's order, signed March 15, 2013

Exhibit 9: Petitioner's counseled Notice of Intent to File a Writ

Exhibit 10: Petitioner's counseled Writ for Supervisory Review filed in the Court of Appeal, First Circuit, State of Louisiana on April 15, 2013

Exhibit 11: Ruling of the Court of Appeal, First Circuit, State of Louisiana, issued July 1, 2013

Exhibit 12: Petitioner's pro se Motion to Re-File Supervisory Writ According to Instructions From this Court filed in the Court of Appeal, First Circuit, State of Louisiana on July 24, 2013

Exhibit 13: Ruling of the Court of Appeal, First Circuit, State of Louisiana, issued on November 4, 2013

Exhibit 14: Petitioner's pro se Application for Writ of Certiorari or Review filed in the Louisiana Supreme Court on November 26, 2013

Exhibit 15: State's Opposition to Application for Supervisory Writs filed in the Louisiana Supreme Court on October 9, 2014

Exhibit 16: Ruling of the Supreme Court of the State of Louisiana, issued November 7, 2014

Exhibit 17: Petitioner's counseled Application for Supervisory and/or Remedial Writ to Review Ruling of Nineteenth Judicial District Court filed at the Court of Appeal, First Circuit on October 5, 2021

Exhibit 18: Petitioner's counseled Application for Supervisory Writ and Original Brief in Support filed at the Supreme Court of Louisiana on January 19, 2022

IN THE
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DOCKET NO.:

State ex. rel., **MAURICE NALLS**
Petitioner

- Versus -

BURL CAIN, Warden
Louisiana State Penitentiary
Respondent

MEMORANDUM IN SUPPORT OF APPLICATION FOR POST CONVICTION RELIEF WITH REQUEST FOR APPOINTMENT OF COUNSEL AND AN EVIDENTIARY HEARING

Title 31-A
Louisiana Code of
Criminal Procedure

Respectfully submitted, *pro se*, this 11 day of October, 2011.

Marice Nalls

Marice Nalls, # 423240
M.P. - Walnut 1
Louisiana State Penitentiary
Angola, Louisiana 7071

APPENDIX "A"
Adopted October 14, 1976
Effective January 1, 1977

UNIFORM APPLICATION FOR POST-CONVICTION RELIEF

Maurice Nalls
NAME OF PETITIONER

No. _____
(To be filled in by the clerk)

423240
PRISON NUMBER

19th JUDICIAL DISTRICT

LA. State Prison
PLACE OF CONFINEMENT

IN THE PARISH OF East Baton Rouge
STATE OF LOUISIANA

VS.

BURL CAIN, Warden
WARDEN, LOUISIANA
STATE PENITENTIARY

Please Serve CUSTODIAN and Hillar C. Moore, III **DISTRICT ATTORNEY,** 19th **JUDICIAL DISTRICT, STATE OF LOUISIANA.**

INSTRUCTIONS --- READ CAREFULLY

(1) This petition must be legibly written or typed, signed by the petitioner and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for a criminal prosecution. All questions must be answered concisely in the proper space on the form. Additional pages are not permitted except with respect to the facts which you rely upon to support your claims for relief. No citation of authorities or legal arguments are necessary.

(2) Only one judgment may be challenged in a single petition except that convictions on multiple counts of a single indictment or information may be challenged in one petition.

(3) YOU MUST INCLUDE ALL CLAIMS FOR RELIEF AND ALL FACTS SUPPORTING SUCH CLAIMS IN THE PETITION.

(4) When the petition is completed, the original must be mailed to the clerk of the district court in the parish where you were convicted and sentenced.

(5) You must attach official documentation showing your sentence and the crime for which you have been convicted. You may obtain that documentation for the clerk of court of the district court of the parish where you were sentenced or form the institution where you are confined. If that documentation is not attached, you must allege that steps were taken to obtain it.

(6) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction challenged:
19th Judicial District Court, East Baton Rouge Parish, State of Louisiana
Docket # 7-07-0697

2. Date of judgment of conviction: October 1, 2008

3. Length of sentence: Life without benefits on aggravated rape, and 15 years at hard labor on armed robbery running concurrently

4. Nature of offense involved (all counts)_____

5. What was your plea? (check one)
   (a) Not guilty (X)
   (b) Guilty ( )
   (c) Not guilty and not guilty by reason of insanity ( )

If you entered a guilty plea to one or more counts and not guilty to other counts, give details:_____

N/A

   (d) Name and address of the lawyer representing you at your plea (if you had no lawyer please indicate): **Dele A. Adebamiji, 1724 Dallas Drive, Suite 14 (70806) P.O. Box 80712, Baton Rouge, Louisiana 70898-0712**

   (e) Was the lawyer appointed ( ) or hired (X)? (check one)

6. Kind of trial: (check one)

   (a) Jury ( )

   (b) Judge only (X)

7. (a). Name and address of lawyer representing you at trial: _____
SAME AS ABOVE

   (b). Was the lawyer appointed ( ) or hired (X)? (check one)

8. Did you testify at trial? Yes (X) No ( )

9. (a) Give the name and address of the lawyer who represented you at sentencing for the conviction being attacked herein: **Dele A. Adebamiji, 1724 Dallas Drive, Suite 14 (70806) P.O. Box 80712, Baton Rouge, Louisiana 70898-0712**

   (b) Was the lawyer appointed ( ) or hired (X)? (check one)

10. Did you appeal from the judgment of conviction? Yes (X) No( )

11. If you did appeal, give the following information:

   (a) Citation, docket number, and date of written opinion by the Supreme Court or Court of Appeal (if known) **First Circuit Court of Appeal, # 2009-KA-0772, 24 So.3d 1030 Affirmed, October 23, 2009 before Justices Carter, C.J., Guidry, and Pettigrew /// Louisiana Supreme Court # 2011-KH-1489 (no ruling yet made)**

   (b) Name and address of lawyer representing you on appeal: _____
Dele A. Adebamiji, 1724 Dallas Drive, Suite 14 (70806) P.O. Box 80712, Baton Rouge, Louisiana 70898-0712

12. Other than direct appeal from the judgment of conviction and sentence, have you previously filed any application for post-conviction relief with respect to this judgment in any state or federal court. Yes ( ) No (X).

13. If your answer to 12 is "yes", give the following information:

   (a) (1) Name of court _____

   (2) Nature of proceeding _____

(3) Claims raised: _____
_____
_____
_____
_____
_____

(4) Did you receive an evidentiary hearing on your application? Yes ( ) No ( )

(5) Was relief Granted or denied? _____

(6) Date of disposition: _____

(7) Citation of opinion (if known) _____

(8) Name and address of lawyer representing you: (if none, so state) _____
_____
_____

(9) Was the lawyer appointed ( ) or hired ( )? (check one)

(b) Have you filed any other applications for post- conviction relief with respect to the challenged conviction? Yes ( ) No ( )
If "yes", set forth the details (as above) on separate paper and attach.

(c) Did you appeal or seek writs of review from the denial of any post-conviction application?
(1) First petition, etc. Yes ( ) No ( ).
(2) Second Petition, etc. Yes ( ) No ( ).

(d) If you did not appeal or seek writs from the denial of any post-conviction application, explain briefly why you did not:_____
_____
_____

(e) Name of the lawyer who represented you on appeal from the denial of any post-conviction application (if none, so state):

(1) First petition _____

(2) Second petition _____

CLAIMS FOR RELIEF

State concisely facts supporting your claim that you are being held unlawfully. If necessary, you may attach extra pages stating additional claims and supporting facts. Do not argue points of law.

The following is a list of those claims, and only those claims, that may provide you with grounds for relief:

(1) You conviction was obtained in violation of the constitution of the United States or the State of Louisiana;

(2) The court exceeded its jurisdiction;

(3) Your conviction or sentence subjected you to double jeopardy;

(4) The limitations on prosecution had expired;

(5) The statute creating the offense for which you were convicted and sentenced is unconstitutional;

(6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the State of Louisiana.

A REMINDER: THE ABOVE LIST CONTAINS ONLY THOSE CLAIMS THAT YOU MAY RAISE FOR RELIEF. YOU MUST SET FORTH ALL OF YOUR COMPLAINTS ABOUT YOUR CONVICTION IN THIS APPLICATION. YOU MAY BE BARRED FORM PRESENTING ADDITIONAL CLAIMS AT A LATER DATE. Remember that you must state the FACTS upon which your complaints about your conviction are based. MERE CONCLUSORY ALLEGATIONS WILL NOT SUFFICE.

REPETITIVE APPLICATIONS

The above claims may not provide grounds for relief if any of the following applies to you:

(1) Unless required in the interest of justice, any claim for relief which you fully litigated in an appeal shall not be considered.

(2) Any claim of which you had knowledge and inexcusably failed to raise in the proceeding leading to conviction may be denied by the court.

(3) Any claim which you raised in the trial court and inexcusably failed to pursue on appeal may be denied by the court.

(4) A successive application may be dismissed if it fails to raise a new or different claim.

(5) A successive application may be dismissed if it raises a new or different claim that was inexcusably omitted form a prior application.

This application will provide space for you to explain the reasons why you failed to raise your claims in the proceedings leading to conviction, or failed to urge the claim on appeal, or failed to include the claim in a prior application.

CLAIM[S]

YOU MAY ATTACH ADDITIONAL PAGES SETTING FORTH THE REQUIRED INFORMATION (BELOW) IF ADDITIONAL CLAIMS ARE ASSERTED.

Claim: **SEE ATTACHED MEMORANDUM OF LAW**

(a) Supporting FACTS (tell your story briefly without citing cases or law):
SEE ATTACHED MEMORANDUM OF LAW

(b) List names and addresses of witnesses who could testify in support of your claim. If you cannot do so explain why:

SEE ATTACHED MEMORANDUM OF LAW

(c) If you failed to raise this ground in the trial court prior to conviction, on appeal, or in a prior application, explain why:

SEE ATTACHED MEMORANDUM OF LAW

A. Do you have in a state or federal court any petition or appeal now pending as to the judgment challenged? Yes ( ) No (X). If "yes", name the court.

_____

B. Do you have any future sentence to serve after you complete the sentence imposed by the judgment challenged? Yes ( ) No (X)

(1) If so, give name and location of court which imposed sentence to be served in the future: _____

_____

(2) Give date and length of sentence to be served in the future: _____

_____

_____

(3) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( ).

C. If a copy of the court order sentencing you to custody is not attached, explain why._____

_____

_____

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled.

/Marion A Walls
Signature of Petitioner

11 Oct 11
Day / Month / Year

APPLICATION FOR APPOINTMENT OF COUNSEL

I am unable to employ counsel to represent me in this matter because I have no assets or funds except:

_____

_____

_____

NONE

_____

(Write "None" above if you have nothing; otherwise, list your assets including funds in prison accounts.)

/Marion A Walls
Signature of Petitioner

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF **WEST FELICIANA**

I, **Marice Nalls**, being first duly sworn says that
(Name of Petitioner)
he has read the foregoing application for post-conviction relief and swears or affirms that all of the information therein is true and correct. He further swears or affirms that he is unable to employ counsel because he has no assets or funds which could be used to hire an attorney except as listed above.

Marice A Nalls
Signature of Petitioner

SWORN TO AND SUBSCRIBED before me this 11th day of October, 2011 at Angola, Louisiana

Reginald Lockwood 60508
Notary Public
Reginald Lockwood 60508
Ex officio Notary

TABLE OF CONTENTS

Page Number

TABLE OF AUTHORITIES

Page Number

CONSTITUTION

FEDERAL CASES

STATE CASES

CODE

IN THE
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

State of Louisiana,
Ex rel., MARICE NALLS,
Petitioner

Versus

BURL CAIN, Warden
Respondent

Docket No: 7-07-0697

DATE FILED:_____

_____
CLERK

MEMORANDUM IN SUPPORT OF APPLICATION FOR POST CONVICTION RELIEF WITH REQUEST FOR APPOINTMENT OF COUNSEL AND AN EVIDENTIARY HEARING

MAY IT PLEASE THE COURT:

NOW INTO COURT COMES **Marice Nalls,** Petitioner *pro se*, who files the instant petition for Post Conviction Relief and Memorandum in Support, pursuant to **La.C.Cr.P. Arts. 924**, *et seq*. Petitioner respectfully moves this Court for an order vacating the judgment of conviction and sentence imposed upon him by this Court.

JURISDICTION

Jurisdiction and venue of this proceeding are conferred upon this Court by **Articles 924-925** of the **Louisiana Code of Criminal Procedure**.

STATEMENT OF THE CASE

Petitioner was charged with Aggravated Rape and Armed Robbery by Bill of Indictment on July 26, 2007. (Exhibit I).

On June 19, 2007, Petitioner was arrested by the Baton Rouge Police Department for Aggravated Rape and Armed Robbery. On July 26, 2007, Petitioner was indicted by the Grand Jury of the Parish of East Baton Rouge, State of Louisiana of committing Aggravated Rape and Armed Robbery on the alleged victim, Melissa Vascocu.

Petitioner was convicted of Aggravated Rape and Armed Robbery on October

1, 2008 and sentenced on January 12, 2009 to a sentence of life without benefits and 15 years to run concurrently. (Exhibit J).

On June 12, 2009, Petitioner's trial and appellate attorney, Mr. Dele Adabamiji, filed an appellate brief in the First Circuit (2009-KA-0772). Petitioner filed a *pro se* supplemental brief on August 12, 2009. The appeal was denied on October 23, 2009. Petitioner was not notified of this ruling by the court or by his attorney.

On July 1, 2011, Petitioner filed a Motion for Out-of-Time Appeal and Certiorari in the Louisiana Supreme Court. (Docket No. 2011-KH-1489).

The Louisiana Supreme Court has not yet ruled on his Motion for Out-of-Time Certiorari or Review. However, Petitioner must file the instant PCR at this time to preserve timeliness under **La. C.Cr.P. art. 930.8**.

Petitioner is currently being held in custody at the Louisiana State Prison, Angola, Louisiana, Burl Cain, Warden.

This timely filed Application for Post Conviction Relief follows.

STATEMENT OF THE FACTS

It was alleged that on September 24, 1998, Petitioner, Marice S. Nalls, and an unknown person, went to Warren House on Greenwell Springs Road, Baton Rouge, Louisiana and picked out one of the apartments, specifically Apartment # 12, to rob or rape the occupant.

According to Melissa Vascocu the alleged victim, her boyfriend left for work about five a.m. that morning and she went back into her bedroom after her boyfriend had left. She then heard the bolt on the front door unlock, even though her bedroom door was closed. (Tr.p. 271).

She further stated that as soon as she walked out of the bedroom to see if her boyfriend had come back, she was immediately confronted by the alleged perpetrators, with one of them pointing a gun at her face. (Tr.pp. 271, 273).

However, she later testified that she heard the front door unlock, then she saw two men enter the apartment and she ducked behind a door. Then one of the men came over to her and placed the gun to her head (Tr.p. 273), and made her "come out from behind there."

This conflict was never sorted out, and the only DNA evidence collected from the alleged crime scene did not belong to Petitioner. This DNA evidence was a semen stain on the comforter that Ms. Vascocu was allegedly raped on top of, and proven by DNA analysis to belong to someone else.

According to the victim, she was ordered at gun point to enter her bedroom and ordered to take her clothes off. She stated that she begged the perpetrator not to hurt her. She said that before she was raped, the perpetrator asked her for money and she told him that she did not have any money. She also stated that this was when the perpetrator changed his mind and decided to rape her. (Tr.p. 274).

It is interesting that she carried out a conversation with the perpetrator, yet could not identify him, or pick him out. She further testified that the perpetrator told her that he had been inside the apartment before, and saw a man and then waited until the man had left so that he could come back in. (Tr.p. 274). She didn't see him and her boyfriend did not see him, nor did she or her boyfriend hear the bolt unlock at any time. The lock was not picked, nor were there any signs of a break in. The door was intact when the police arrived, and there were no latent prints which could be attributed to the perpetrators.

Moreover, Ms. Vascocu stated that the perpetrator raped her anally and vaginally. She stated that the ordeal lasted almost an hour, and at all times the perpetrator held the gun to her head, but that at a certain time, he "got agitated, got off of me, stepped back, extended his arm. At that point, I was - - my eyes were cracked open. Extended the gun, cocked it. And I turned my head away." (Tr.p. 274).

However, she could not describe the perpetrator, nor did she know who he was. This is another conflict in Ms. Vascocu's story that has not been reconciled.

Petitioner states that he has shown that he did not rape the alleged victim nor did he rob her. He could not have stayed in the apartment for almost two hours and not leave any trace that he was in the apartment. Further, that the DNA found inside the alleged victim was that of two men, and the sexual encounter with him happened at Ten Flags Motel on Airline Highway, not in Ms. Vascocu's apartment.

None of the evidence collected in that apartment, including latent fingerprints and DNA, was ever shown to belong to Petitioner. There was absolutely nothing that connected him to the apartment except the conflicting, impeached statements of the alleged victim.

Petitioner does not deny that he had consensual sex with Ms. Vascocu. However, that encounter happened at the Ten Flags Motel the night before. The presence of inactive (dead) spermatozoa in her vagina corroborates Petitioner's version of events, and shows that Ms. Vascocu has made up a story that she cannot keep straight.

ISSUES PRESENTED

Ineffective Assistance of Counsel

1. TRIAL COUNSEL FAILED TO SECURE EXPERT TESTIMONY TO AID DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

2. TRIAL COUNSEL FAILED TO CALL WITNESSES FOR DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. FURTHER, ALLOWING TESTIMONY OF WITNESSES NOT CALLED AT TRIAL, THROUGH POLICE TESTIMONY AT TRIAL, VIOLATES *CRAWFORD V. WASHINGTON*.

3. TRIAL COUNSEL FAILED TO NOTIFY THE COURT HE HAD WITHDRAWN FROM PETITIONER'S CASE, FAILED TO NOTIFY PETITIONER OF COURT RULING, AND LIED TO PETITIONER ABOUT NOTIFYING THE COURT THAT HE HAD WITHDRAWN FROM THE CASE.

4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ARGUE ISSUES OF FLAWS IN INDICTMENT.

5. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ARGUE THAT THE STATUTE OF LIMITATIONS ON THE INSTITUTION OF PROSECUTION HAD EXPIRED. APPELLATE COUNSEL FAILED TO ARGUE ISSUE ON APPEAL.

6. TRIAL COUNSEL FAILED TO ENSURE THAT THE TRIAL JUDGE COMPLIED WITH THE REASONABLE DOUBT STANDARD OF *IN RE WINSHIP*, AND ALLOWED THE TRIAL JUDGE TO DISREGARD PETITIONER'S DEFENSE.

ARGUMENT

1. TRIAL COUNSEL FAILED TO SECURE EXPERT TESTIMONY TO AID DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that his trial counsel was ineffective assistance of counsel at trial for failing to secure expert testimony to aid the defense. An expert would have given trial counsel the opportunity to fully develop and address all issues raised at trial concerning: 1) D.N.A. evidence; 2) expert opinion on the issue of untested DNA evidence; 3) medical testimony regarding the alleged victim's injuries; 4) the inaccurate description of the alleged perpetrator given to police sketch artists; 5) photographic evidence at trial; 6) opinion evidence given to the jury; and 7) other reasonable hypotheses of the incident.

The alleged victim, Melissa Vascocu was living in an apartment with her boyfriend, Mr. Burgess. She was in the midst of a divorce, and her ex-husband had their 3 children at the time of this alleged rape. This was reported to have happened at Ms. Vascocu & Mr. Burgess's apartment, while Mr. Burgess was at work, between 5 and 7 am on September 24, 1998. A mysterious person later called Ms. Vascocu, she testified, and said her purse and its contents had been found. However, the contents consisted of Ms. Vascocu's driver's license with a long outdated address, and a checkbook with her ex-husband's address and telephone number. Her ex-husband knew her apartment number, however she was not called there, but was called at her sister's home number. Ms. Vascocu could not explain how this could have happened:

A. I -- I do not remember how that took place. I really, honestly, do not. (R.p. 326) (Exhibit M).

Petitioner states that he was prejudiced when there was no expert presented to rebut and to explain the D.N.A. evidence introduced at trial. The D.N.A. evidence in the apartment consisted of — as proven by analysis — only DNA samples of someone other than Petitioner.

This semen sample came from the comforter on Ms. Vascocu's bed, where she was allegedly raped. This evidence is inconsistent with the testimony of Ms. Vascocu, and an expert for the defense would easily point out other reasonable hypotheses consistent with Petitioner's defense of consensual sex. A reasonable hypothesis, counter to the State's, is that Ms. Vascocu did go to the Ten Flags Motel and have consensual sex with Petitioner. This is why Petitioner's semen was found only in her vagina, and nowhere in her apartment. She also had sex at home with someone else, whether consensual or not, where a semen sample was left on the comforter on top of her bed, her underwear, and her t-shirt.

The dead spermatozoa from Petitioner proves two things: 1) Petitioner had sex with Ms. Vascocu at approximately 9 pm the night before this alleged rape thirteen hours prior to the time the doctor did her exam (R.p. 344) (Exhibit R); and 2) if Ms. Vascocu was indeed raped between 5 and 7 am the next morning, the semen from that rape could not possibly have come from Petitioner, but had to come from someone else, and ended up on Ms. Vascocu's comforter, underwear, and t-shirt.

Additionally, it is common knowledge that emission of semen is not necessary to complete a rape. If this alleged rapist did not ejaculate inside of Ms. Vascocu during the morning hours, Petitioner's dead spermatozoa from the night before would still be present in her vagina. Indeed, this alleged rapist did not ejaculate inside Ms. Vascocu's rectum, though she claims anal rape as well.

This also means that the alleged perpetrator may have ejaculated somewhere else, namely the comforter (which was proven not to be Petitioner's DNA), and on Ms. Vascocu's underwear and t-shirt which were not tested for DNA, even though they tested positive for semen. Clearly, an expert was needed to clarify the exculpatory nature of these facts and evidence at trial, especially the consensual aspects.

Further, the fact that only the vaginal swabs were tested and produced DNA of

Petitioner implicates the failure of the underwear and t-shirt semen stains to be tested as potential exculpatory evidence that was prejudicially abandoned. An expert would have shed light on the subject of Petitioner's hypothesis as being the most realistic scenario.

The prosecutor told the judge that the State's expert testified that it is not unusual to find dead spermatozoa in a rape victim's vagina. (R.pp. 469-494) (Exhibit N). However, an expert for the defense would have pointed out that this would be true only if many hours had passed since the semen was presented. In this case, only two hours at most since the first alleged sexual assault, and half and hour after a second assault allegedly elapsed, and would present active, live spermatozoa in the vagina upon examination.

On cross-examination, Ms. Vascocu told the court:

A. It -- all I can tell you is that it started close to five o'clock in the morning, and by the time I reached the hospital, it was close to seven. What time it was when anything was taking place in-between five and seven, I cannot tell you. I do not know.

Q. Okay. But you're positive, though, that every -- all this incident happened between five and seven o'clock in the morning; correct?

A. Approximate times. Yes.

(R.pp. 315-316) (Exhibit O).

Another critical fact is that Ms. Vascocu described a suspect to police sketch artists that did not look like the instant Petitioner in any regard. This was done right after the alleged incident, when the details would still be fresh in her mind.

Q. So you did get a look when — when this was happened [sic].

A. Initially I got an initial look but not long enough to be able to recall what this person looked like to — to do a composite and to say absolutely one hundred percent I am positive this is him. I could not do it and I wasn't going to submit that.

Q. So what you're telling me right now is that the composite composed by the police was their own imagination, not what came from you.

A. I don't — I don't know.

Q. Did you take a look at the composite when they were finished?

A. I did. And I— I could — I could not be a hundred percent sure that that was the perosn so I asked him not to submit it.

(R.p. 318) (Exhibit P).

An expert for the defense would have shed light on this anomoly.

Ms. Vascocu further stated that after the alleged rape, she did not call 911, but called her boyfriend, Ronnie Burgess, who was at work in New Orleans, then drove herself to the hospital.

The State's expert testified that Ms. Vascocu was calm and cooperative when she got to the hospital, and that this was not unusual. (R.p. 350) (Exhibit Q). Without an expert to explain that such behavior, immediately after an alleged traumatizing two hour vaginal and anal rape, would be extremely unusual and failure to present such expert testimony is prejudicial to Petitioner. It allowed the State to present expert opinion favorable to the State, and only expert opinion favorable to the State. Without rebuttal of the State's expert, the State could develop prejudicial assumptions that would ordinarily be held in check by an expert for the defense.

An expert to testify for the defense at trial would have effectively rebutted the prejudicial assumptions erroneously elicited by the State. The State's theory of the case was only that — a theory. This theory should have been subjected to rebuttal, especially through the use of expert testimony, which is Petitioner's right that was neither utilized, nor honored by his trial counsel. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), quoting *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431 (1971).

Where the prosecution experts were given leeway to testify, the Petitioner's expert would have been allowed to testify as well, had Petitioner's attorney called for one. See, *U.S. v. Riddle*, 103 F.3d 423 (5th Cir. 1997); *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001). And see, *U.S. v. Lueben*, 812 F.2d 179 (5th Cir. 1987), where the *Lueben* Court held it to be reversible error for the trial court to disallow a defendant's

rights to due process, and to offer witnesses / rebuttal evidence. Clearly, Petitioner's counsel was ineffective assistance of counsel for failing to do so.

Petitioner asserts that it cannot be a "trial strategy" to completely disregard this area of defense, especially in light of the fact that expert testimony encompassed several areas of expertise throughout the trial as enumerated above. A "strategic" decision is a decision "that . . . is expected . . . to yield some benefit or avoid some harm to the defense." *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

Petitioner contends that the only harm avoided by his trial counsel's failure to utilize expert testimony was to the prosecution. The prosecution also received the benefit of prejudice to the Petitioner caused by his trial counsel's errors.

Under the **Sixth Amendment**, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Linstadt v. Keane*, 239 F.3d 191, 200 (2nd Cir. 2001) (quoting *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052).

An expert was essential to the defense in order to relate the Petitioner's version of events as the more probable scenario to the jury. Viewing the evidence in light of both the State's theory versus the Petitioner's may have caused a reasonable finder of fact to believe that Petitioner's version of events was the most probable, and realistic version according to the facts and evidence. *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005).

Of course, an expert to further impeach Ms. Vascocu's inconsistent, uncorroborated story would have called into question Ms. Vascocu's veracity, as well as effectively rebutting the State's experts. Plus, exposing a more logical scenario — a more reasonable hypothesis — to the judge would have undermined the State's theory, as well as the State's whole case-in-chief.

Obviously, expert testimony in this regard was a necessary defense, and trial

counsel was completely inert regarding these critical issues. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

2. TRIAL COUNSEL FAILED TO CALL WITNESSES FOR DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. FURTHER, ALLOWING TESTIMONY OF WITNESSES NOT CALLED AT TRIAL, THROUGH POLICE TESTIMONY AT TRIAL, VIOLATES *CRAWFORD V. WASHINGTON*.

On direct examination, Sgt. Lynn Ferguson testified that Ms. Vascocu called the police station and reported that someone had found her purse. Sgt. Ferguson then dispatched Officer Katrel (phonetic) to the place Ms. Vascocu said her purse was located. (R.pp. 375-379) (Exhibit S).

On cross-examination, Sgt. Ferguson stated that Ms. Vascocu told her that the guy who found her property was named Jessie Straughter. (R.p. 380-381) (Exhibit T). Sgt. Ferguson never interviewed him, and further testified:

Q. So all y'all did was just go to there and pick up this property and maybe - -

A. Officer Katrel (phonetic) talked to him.

Q. Officer Katrel (phonetic). Okay. Officer Katrel just went there, picked up the property, and maybe — that was the end of it.

A. Yes.

Q. Correct?

A. Correct.

(R.pp. 380-381) (Exhibit T).

Jessie Straughter was never called to the stand at trial, nor was Officer Katrel. Only Sergeant Ferguson's testimony <u>for them</u> was ever admitted at trial, and heard by the judge. This violates the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). It further violates the mandate of *Crawford* which specifically disallowed a trial court from allowing statements by proxy, via the police, under the guise of state evidentiary rules stating:

> Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitional practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court."

Id. at 1364.

In "the crucible of cross-examination" *Crawford*, *supra*, Jessie Straughter and Officer Katrel would have been able to expound upon the facts, and answer the questions as to 1) who actually found Ms. Vascocu's purse; 2) does Jessie Straughter know Ms. Vascocu; 3) what was found, and where was it found; 4) how did Jessie Straughter know that Ms. Vascocu was at her sister's house, and how did he get that phone number; 5) what questions did Officer Katrel ask, and what were the answers given at theat time; and 6) where is Officer Katrel's report, and what was listed in that report.

Since Sergeant Ferguson testified that "Officer Katrel (phonetic) talked to him," that conversation becomes crucial to the defense. By not calling either witness, Petitioner's trial counsel failed to render effective assistance of counsel. Trial counsel questioned the lack of information surrounding this incident, yet never interviewed these witnesses, or otherwise investigated the matter. If found to be a set-up, as the partial facts suggest, then testimony in this regard would have further impeached Ms. Vascocu's veracity.

Their testimony is probative evidence of a contested fact, and is essential to the defense in this case. On the other hand, "The probative value of the mere fact that an out-of-court declaration was made is generally outweighed greatly by the likelihood that the jury will consider the statement for the truth of the matter asserted." *State v. Hearold*, 603 So.2d 731, 737 (La. 1992).

Therefore, the State was required to call these witnesses at trial in order to introduce the evidence. Failure to do so violated Petitioner's Confrontation Clause rights. *Crawford*, *supra*.

The fact that the testimony was introduced, whether erroneously or not, underscores trial counsel's failure to investigate the facts and witnesses involved in this issue. *Lindstadt v. Keane, supra* at 239 F.3d 200.

3. TRIAL COUNSEL FAILED TO NOTIFY THE COURT HE HAD WITHDRAWN FROM PETITIONER'S CASE, FAILED TO NOTIFY PETITIONER OF COURT RULING, AND LIED TO PETITIONER ABOUT NOTIFYING THE COURT THAT HE HAD WITHDRAWN FROM THE CASE.

Petitioner was precluded from raising an ineffective assistance of counsel claim on direct appeal. Louisiana courts have held that ineffective assistance of counsel claims are better dealt with on Post Conviction Relief, where an evidentiary hearing can be held to develop the facts of the claim. *State v. Lacaze*, 824 So.2d 1063 (La. 2002), citing *State v. Strickland*, 683 So.2d 218 (La. 1996) (remand for hearing to determine if counsel's actions and inactions were strategy or dereliction), and citing *State v. Sullivan*, 559 So.2d 1356 (La. 1990) (remand for hearing to determine if Brady material was suppressed and if counsel was ineffective); *State v. Voorhies*, 623 So.2d 1320 (La. 1993); *State v. Jacobs*, 596 So.2d 200 (La. 1992); *State v. Robinson*, 577 So.2d 5 (La. 1991).

Ineffective assistance of counsel must be raised on Post Conviction Relief because determination requires an evidentiary hearing. *State v. Robinson*, 816 So.2d 846 (2001-1373 La. 4/26/02) citing *State v. Allen*, 664 So.2d 1264 (La. App. 1 Cir. 1995); *State v. Martin*, 607 So.2d 775 (La. App. 1 Cir. 1992); *State v. Ratcliff*, 416 So.2d 528 (La. 1982). *See also*, *State v. Mims*, 552 So.2d 664 (La. App. 2 Cir. 1989); *State v. Green*, 562 So.2d 35 (La. App. 3 Cir. 1990); *State v. Moody*, 779 So.2d 4 (La. App. 1 Cir. 2000); *State v. Prudholm*, 446 So.2d 729 (La. 1984).

On June 10, 2009, Petitioner's attorney, Dele A. Adebamiji, filed a direct appeal brief on his behalf. (Exhibit W). The case was on direct appeal from conviction in the 19th Judicial District Court (Docket No. 07-07-0697, Section "7") on the charges of

aggravated rape and armed robbery, with a sentence of life imprisonment without benefits, and 15 years to run concurrently, respectively.

On June 16, 2009, Petitioner's attorney sent him a copy of the appellate brief filed, a *pro se* briefing notice, and a letter stating that he was withdrawn from the case, and that he would have no further contact with the instant Petitioner. (Exhibit A).

Specifically, Mr. Adebamiji stated in his letter,

> "However, I must withdraw from your case at this point. I will no longer represent you on this matter. My representation stops at the filing of your appeal and I have given your name and address to the court of appeal. So please watch out for all and any other important dates in the future. Don't forget that you have two years to do a post-conviction relief as stated by the judge. Once again, please note that I have withdrawn from your case with this letter as I cannot longer bear such expenses."

Petitioner avers that his counsel of record withdrew from the case, and unequivocally stated that he notified the appellate court of Petitioner's address for notification. Indeed, Petitioner subsequently filed a Supplemental Brief, with leave to do so from the appellate court. (Exhibit B). However, Petitioner received no other correspondence from the appellate court. He was his own (*pro se*) attorney at this point, and should have been timely served a copy of any ruling(s) in his case.

Petitioner sent four letters to his attorney on October 13, 2009, February 11, 2010, July 27, 2010, and April 11, 2011, asking Mr. Adebamiji to please forward any ruling to him from the court when they ruled. (Exhibit C). Petitioner has received no response or ruling from the court, nor has he received an answer to any of his letters to Mr. Adebamiji asking about the status of his case. (Exhibit C).

After prolonged waiting for a response from the appellate court, and no answer from the attorney, Petitioner asked his mother to inquire about the time frame in which he could expect a ruling in his case. His mother was told by the appellate court's Clerk of Court that Petitioner's appeal had been denied. Petitioner was never notified of any

rulings or orders issued.

Additionally, Petitioner's mother, Gale Edwards, has sworn an affidavit (Exhibit H) stating that she has never received a copy of the ruling from the appellate court, nor from Mr. Adebamiji. Indeed, Mr. Adebamiji told Ms. Edwards during her inquiries in 2010-2011 that he had not received a ruling from the court.

Petitioner filed a "Motion for Official Status of Defendant's Case Pending in the First Circuit Court of Appeal" (Exhibit D) stating that the official status of his case must be received by him in order to initiate a response, or to put Petitioner on notice that he must seek writs in subsequent courts. Petitioner points to "a substantial delay" in Petitioner "receiving notice of denial," citing *Varnado v. Cain*, [2003 U.S. Dist. LEXIS 3351 (E.D. La. 2003)] citing *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

Petitioner has maintained that in order for a defendant to proceed further with his case, he must be notified of rulings in his case. Further, Petitioner asked that his time limitations be considered as still tolled. *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000): "'The doctrine of equitable tolling preserves a plaintiff's claim when strict application of the statute of limitations would be inequitable.'" (quoting *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998). Petitioner maintains that it would not be fair to start the limitations clock until Petitioner has been notified of a denial, and put on notice that he must move to the next step in exhausting his avenues of appeal.

Petitioner further maintains that it was unreasonable to notify Mr. Adebamiji of any rulings in the case expecting him to notify this Petitioner, especially since Petitioner would file any further documents *pro se*, and was the last person to file any documents (supplemental *pro se* brief) with the appellate court. It is only logical that the appellate court should notify Petitioner of its rulings, regardless of whether the

Court notified Mr. Adebamiji. It is Petitioner who must know when it is time to advance his case, and have possession of the official documents to legally do so.

In response to Petitioner's 'Motion for Official Status of Defendant's Case Pending in the First Circuit Court of Appeal' (Exhibit D) (mailed on April 25, 2011), the Clerk of Court for the First Circuit returned his motion UNFILED and included a copy of the ruling dated October 23, 2009. (Exhibit E & F). Petitioner received this ruling on April 29, 2011 and signed for it as legal mail. The Clerk's letter was dated and postmarked April 27, 2011. (Exhibit E).

It should be noted that the First Circuit's Ruling (Exhibit F) contains the addresses of the District Attorney, Mr. Adebamiji, and Petitioner as interested parties, yet Petitioner was never served a copy of the ruling by the court. Petitioner presented his Motion within 30 days of being served a copy of the First Circuit's ruling, which was sent with the Clerk's letter.

Proper procedure includes notification, and simultaneous service of copies of all filings and rulings, to all concerned parties in court cases. The First Circuit has denied the instant Appellant of his constitutional right to appeal by failing to timely notify Appellant of their ruling, which denied him the opportunity to timely pursue certiorari or review in the Louisiana Supreme Court.

> "A defendant's right to the assistance of counsel is basic to our legal system and guaranteed by both federal and state law. U.S. Const.Amend. VI; La. Const. Art. I § 13 (1974); La. Code Crim. Proc. Art. 511. However, the right cannot be manipulated to obstruct the orderly procedure of the courts or to thwart the administration of justice. *State v. Seiss*, 428 So.2d 444 (La. 1983); *State v. Champion*, 412 So.2d 1048 (La. 1982); *State v. Johnson*, 389 So.2d 1302 (L.a 1980); *State v. Harper*, 381 So.2d 468 (La. 1980)."

State v. McClintock, (La. App. 3 Cir. 1988), 535 So.2d 1231, 1233.

Since Petitioner was abandoned by his attorney at a critical time, and the First Circuit failed to serve a copy of its October 23, 2009 ruling to Petitioner until April 25, 2011, leave to file an out-of-time Application for Certiorari or Review was filed for.

(Exhibit L). No decision has been made on this Application at the time of filing the instant PCR.

However, the facts of this issue, and the record evidence, show that Mr. Adebamiji lied to Petitioner, ignored the rules of the court, and rendered ineffective assistance of counsel by sabotaging Petitioner's ability to timely file for certiorari in the Louisiana Supreme Court.

4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ARGUE ISSUES OF FLAWS IN INDICTMENT.

First, an indictment may contain one or more of several acts, intents or results charged under one offense, when that offense may be committed by doing one or more of several acts, intents, or results. But it must be conjunctively charged; **La. C.Cr.P., Article 480.**

In the instant case, the State erroneously amended the grand jury's indictment to include more than one crime for one count (Count 1) of the indictment. The State further added the element of "principle" to the indictment's armed robbery charge. (R.p. 473) (Exhibit N).

Petitioner is charged with one count of aggravated rape. To that one charge, though the indictment states only **R.S. 14:42**, the State added **R.S. 14:42(A)(2)** and **(A)(3)**. However, they are not conjunctively charged, but unconstitutionally disjunctively, and alternatively charged. Also, they are not related to one offense, but to two separate alleged offenses in one count. Next, one offense cannot be committed by doing both of these acts. Each one is a separate and distinct crime, with different elements to each. Charging both crimes under one count makes the indictment duplicitous.

Alternatively, Petitioner contends that this is double jeopardy. The Double Jeopardy Clause prohibits government from subdividing a single criminal conspiracy

into multiple violations or separate charges, and/or pursuing successive prosecutions against defendant. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969); *United States v. Stoddard*, 111 F.3d 1450 (9th Cir. 1997); *United States v. Aguilera*, 179 F.3d 604 (8th Cir. 1999).

Further, Petitioner was not indicted by the grand jury and charged with **R.S. 14:42(A)(2)** and/or **(A)(3)**. Both **(A)(2)** and **(A)(3)** were added by the prosecutor, and not found by the grand jury as required by the U.S. and Louisiana Constitutions. Neither has the added charge of "principle" by the State. This indictment has never been legally amended. (Exhibit I).

A defendant confronted with an accusation which referred to a statute which denounced different possible acts was considered in *State v. McQueen*, 230 La. 55, 87 So.2d 727 (1955); "A reference to the statute furnished no aid in ascertaining just what act [the grand jury] (was) considered to have contravened its provision(s)."

Though a district attorney is a legal advisor to the grand jury, he is not in authority over them. Their authority comes from the court, and they can charge what the district attorney asks for, not charge at all, or anything in between that it finds. *United States v. Stephens*, 510 F.2d 1101, 1106 (5th Cir. 1975), citing *Brown v. United States*, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609 (1959).

If the grand jury finds charges different than what the district attorney was seeking, he can opt to refuse to endorse it, but he cannot change it one iota, because he is not the one instituting the criminal prosecution, the grand jury is. *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), John R. Brown, (Circuit Judge, concurring specially), at 184-185.

> "There are a number of reasons why it is essential that the Grand Jury's conclusions be reflected in language which is legally sufficient and in proper form. First, and perhaps foremost, in no other way can the Grand Jury effectively carry out its obligations as charged to it by the Judge . . . Although, as the Court holds, the 'indictment'

> thus returned would be ineffective without the signature of the District Attorney, reporting its conclusions in the traditional legal form would do two things. First, it would clearly reflect the conscientious conclusion of the Grand Jury itself. And, second, it would, at the same time, sharply reveal the difference of view as between the Grand Jury and the prosecuting attorney." At 176; "When a United States Attorney prepares and signs an indictment, he does not adopt, approve, or vouch for the charge, nor does he institute a criminal prosecution . . . only the Grand Jurors themselves have that power. It would be grossly wrong for it to be usurped." (Emphasis in original).

In the instant case, the prosecutor decided which elements to charge. He is not in a position to even hazard a guess as to the grand jury's intentions as to which "act (was) considered to have contravened its provision(s)." *State v. McQueen, supra.* This is a clear violation of the right to a grand jury, and to Due Process.

Instead, the prosecutor simply disregarded any "difference of view as between the grand jury and the prosecuting attorney," and just charged what he wanted to. Further, this prejudiced Petitioner since the judge was specified which charge was used to find guilt or acquit as to one particular charge.

Count 1 was sliced into 2 separate elements — Immediate bodily harm, and armed with weapon — during closing Arguments by the State. (R.pp. 469-474). (Exhibit N). Simply put, aggravated rape under the statute **R.S. 14:42(A)(3)**, is a crime in which a weapon is essential to the offense. It cannot be committed unless the offense is committed while the perpetrator is using a weapon. Under **R.S. 14:42(A)(2)**, a rape is considered to be under aggravating circumstances when the victim is threatened with "immediate bodily harm with apparent power of execution"; no weapon is involved in this distinct crime.

Therefore, the prosecutor's illegal amendment to the indictment allowed a judge or jury to convict the Petitioner of the element **14:42(A)(2)**, or **14:42(A)(3)**. Six jurors may have voted for conviction on the element **(A)(2)**, and the rest of the jury may have voted for conviction on **(A)(3)**, but the requisite number of jurors may not have voted

to convict on the same charge. In a judge trial, which of the two (duplicitous) elements were proven on the one charge? The fact that a jury (or judge in this situation) can choose between them violates Due Process.

This is true as well for the alleged vaginal rape, as opposed to the alleged anal rape, which are two separate elements that constitute "rape" outside any "aggravating circumstances." The indictment fails to specify either one, or both (two separate crimes) of these essential elements. How many jurors found there was vaginal rape? How many jurors found anal rape? In a judge trial, which of the two elements was proven in the one count? This cannot be determined from the record, and violates Due Process.

Trial counsel failed to raise these issues, and allowed Petitioner's rights to be violated. The record evidence shows trial counsel's lapses to constitute ineffective assistance of counsel.

5. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ARGUE THAT THE STATUTE OF LIMITATIONS ON THE INSTITUTION OF PROSECUTION HAD EXPIRED. APPELLATE COUNSEL FAILED TO ARGUE ISSUE ON APPEAL.

On the non-capital crime of aggravated rape, the State had six years in which to institute prosecution. **La. C.Cr.P., Art. 572**. However, the State exceeded the prescriptive period of **Article 572**, and prosecuted the instant case after a 10 year period. This is true for the armed robbery charge as well as in the instant case. The July 26, 2007 indictment clearly states September 24, 1998 as the date of these alleged crimes. (Exhibit I).

Further, as the prosecutor told the court:

MR. MORRIS: Judge, as I said in opening, this case involves a man that ran and eluded justice for just over ten years to the day. September Twenty-Fourth, 1998, is when this event happened.

(R.p. 469) (Exhibit N).

Clearly, the prescriptive period elapsed before prosecution was instituted, and Due Process was violated by the State in this case. It appears that the State feels that an armed robbery charge can "ride along" with a crime that is not prescribed. However, that is an erroneous assumption because both charges are prescribed according to the law.

The issue here is that aggravated rape, as charged herein, was not a capital crime. The record clearly reflects that Petitioner was not given a capital trial. The provisions of **C.Cr.P. Art. 782** were not applied to the instant case. This has never been addressed in any court by trial counsel or appellate counsel.

Neither has the fact that since "death or life imprisonment" is merely the sentencing range of the jury in a capital case — **Article 571** — it is unreasonable to dissect the phrase, and apply part of it ("life imprisonment") to a non-capital crime. This was never the legislative intent of this statute; as the Official Revision Comment clearly shows, it applies only to capital offenses.

OFFICIAL REVISION COMMENT (Article 571) (1966);

(a) Although there are serious considerations for establishing a prescriptive period on the prosecution of capital crimes (See A.L.I. Model Penal Code, p.17 (Tent. Draft No.5, 1956)), the above article reflects the basic policy that there should be no prescriptive period on the prosecution thereof. This is also the policy of most of the other states of the union and of the United States.

(b) Under Art. 8 of the 1928 Louisiana Code of Criminal Procedure the following crimes were specifically excepted from the prescriptive period: murder, aggravated rape, aggravated kidnapping, aggravated arson, aggravated burglary, armed robbery, and treason. Under Art. 571 above, only crimes punishable by death are excepted from prescription; therefore, Art. 571 changes the law by making aggravated arson, aggravated burglary, and armed robbery subject to a prescriptive period.

This official revision comment was adopted in 1966 to clarify that all crimes that were not capital crimes are subject to prescription. In 1966, when this article was amended, the crime of aggravated rape was still a capital offense, and still included under **571**. However, when the death penalty (capital crime status) for aggravated rape

was found unconstitutional, it automatically joined aggravated arson, aggravated burglary, and armed robbery as being excluded from the statute, and subject to prescription as non-capital crimes under Article 572.

This is easily shown by the legislature's language, in this same code book, when referring to both capital and non-capital crimes at the same time:

La. C.Cr.P., Article 382(A): A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. (In pertinent part). (**Emphasis added**).

La. C.Cr.P., Article 571 was mandated as a capital crime statute. The phrase "death or life imprisonment" merely tracks the language of the capital crimes statutes.

> R.S. 14:30(C) First Degree Murder
> Whoever commits the crime of first degree murder shall be punished by "death or life imprisonment" at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the determination of the jury. (Emphasis added).

> R.S. 14:42(D)(2)(a) Aggravated Rape
> And if the district attorney seeks a capital verdict, the offender shall be punished by "death or life imprisonment" at hard labor without benefit of probation, parole, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply. (Emphasis added).

Further, untimely prosecution is a Federal claim. Exceeding the prescriptive period of prosecution violates Due Process, which is applicable to the states through the Fourteenth Amendment.

Article 572 applies to all non-capital offenses during the time this crime was alleged to have happened. Applying a capital crime statute here violates federal due process, applicable to the states through the **Fourteenth Amendment**.

Petitioner contends that the only life sentences covered by **Article 571** are the ones that a jury in a capital case decides to give when it reviews its options given in this capital crime statute; "death or life imprisonment." A "life sentence" in other than

capital crime statutes, are not subject to the protection of C.Cr.P. Art. 782, and not subject to the capital crime statute of Article 571.

Therefore, in the instant case, the time limit for institution of prosecution had prescribed, and Petitioner's rights to Due Process have been, and are being violated.

6. TRIAL COUNSEL FAILED TO ENSURE THAT THE TRIAL JUDGE COMPLIED WITH THE REASONABLE DOUBT STANDARD OF *IN RE WINSHIP*, AND ALLOWED THE TRIAL JUDGE TO DISREGARD PETITIONER'S DEFENSE.

While the credibility of a witness is a matter for the finder of fact, once impeached, that witness's testimony becomes suspect under the law and must be corroborated in order to be convincing evidence of guilt or innocence. This is especially true in a swearing contest, where the credibility of the witnesses on both sides is paramount to the outcome of the case.

Some examples of impeachment are that no police report was given by Ms. Vascocu that the alleged perpetrator cocked his gun as though he was about to shoot her, but she irreconcilably altered her story and added this at trial. Ms. Vascocu testified at trial that she did not tell the police that Petitioner lived at the Ten Flags Motel, however, the police testified that Ms. Vascocu did report that fact to them. Further, the police testified that Ms. Vascocu described the alleged weapon (gun) to them, however, Ms. Vascocu testified that she did not describe this gun to the police because it was too dark for her to see it.

The record shows that the trial testimony of Ms. Vascocu is impeached testimony. Because her testimony is the only evidence that places Petitioner in her apartment at any time, whatsoever, it is clearly improper to use it as the exclusive evidence of guilt beyond a reasonable doubt. Further, it underscores the value, under *Brady*, of the untested semen stains on Ms. Vascocu's underwear and t-shirt, which would further impeach her claims.

Impeached testimony, as a general rule, cannot stand alone to convict. *State v. Chism*, 591 So.2d 383, 386 (La. App. 2 Cir. 1991), citing *State v. Laprime*, 437 So.2d 1124 (La. 1983); *State v. Lott*, 535 So.2d 963 (La. App. 2 Cir. 1988).

In *State v. Kennedy*, 803 So.2d 916 (La. 2001), in Justice Traylor's dissenting opinion, it is stated that the Louisiana Supreme Court has found that, "The victim's testimony, standing alone, can prove that the act occurred, . . ." but is qualified in FN9, "However, we have also ruled post-trial that impeached testimony of a witness, standing alone, cannot prove the offense."

In the instant case, the judge's decision to convict was based "primarily" on the issue of credibility, and the judge used impeached testimony of the alleged victim, standing alone, in order to convict.

THE COURT: The Court's called upon to decide, primarily, credibility issue, coupled with scientific evidence. There's no doubt, beyond reasonable doubt, that Mr. Nalls had sex with Ms. — I'm sorry. What's the — I'll use the initial M.L. There's no doubt. There was sex. The issue I'm called upon to decide is how did that contact occur? Who's story is true? Is it unreasonable, as articulated by the defense? Is it absurd, as argued by the State? Is it ridiculous, as argued by the State? And who's the liar in this case? Motel Six, Warren House, Waffle House, or Airline Highway, Greenwell Springs Road, Ronnie Burgess, the issues of the key entrance, inconsistencies moderately. Marice, let's go. As to the conduct of Count One, Aggravated Rape, I find the Defendant guilty. As to the conduct of Count Two, Armed Robbery, I find the Defendant guilty. We'll set a sentencing date. We stand at recess.

(R.pp. 493-494) (Exhibit N).

The judge here found that there was sex between Petitioner and Ms. Vascocu, beyond areasonable doubt. That has not been contested, indeed, Petitioner's defense was that it was consensual sex the night prior to the alleged rape.

The judge, however, did not find guilt beyond a reasonable doubt based on the elements of the crime charged, and the evidence produced at trial. The judge simply decided that all he need do is decide: "Who's story is true? Is it unreasonable, as articulated by the defense? Is it absurd, as argued by the State? Is it ridiculous, as

argued by the State? And who's the liar in this case?"

The reasonable doubt standard as articulated by the United States Supreme Court in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) does not require the State's case to be "absurd," or "ridiculous," but that the State prove each element of the crime charged beyond a reasonable doubt.

The judge found this to be a swearing contest, yet failed to give Petitioner the benefit of every reasonable doubt that arises out of the evidence.

"The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. C.Cr.P. R.S. 15:438. Petitioner's reasonable hypothesis of innocence was not overcome by the State. The law dictates that the evidence be applied in a certain manner. By misapplying the evidence and the law violated Due Process, and did not meet the reasonable doubt standard at trial under *In re Winship, supra.*

In fact, at sentencing the judge stated that it was doubtful there was consensual sex because "That was not your defense. That was not your defense." Consensual sex was Petitioner's defense from the beginning, and is clearly demonstrated throughout the record; in opening statement, during trial, and in closing argument, as well as before sentencing.

Just prior to sentencing, the judge stated:

> THE COURT: Mr. Nalls, the only way — based upon the evidence I've heard — that your version of what took place could have been doubtful to me, is that if there was some form of consensual sex. That was not your defense. That was not your defense. Then maybe I'd have some degree of concern about this sentence. But your semen was in her vagina. It got there without her consent or with it. The evidence showed to me beyond a reasonable doubt that it got there without her permission.

(R.p. 505) (Exhibit U).

Prior to sentencing, defense counsel had just told the judge, "But the question

we're — we want this court to judge is: how did the DNA gets (sic) there? If the did the DNA gets there, was it consensual or how did that incident happen?"

(R.p. 501) (Exhibit V).

During closing arguments, defense counsel told the judge:

> You had the word from Marice Nalls. He didn't say yes, I knew her. I had sex — sexual — casual sex with her. He said I had casual sex with some woman, and I worked at the Waffle House. Yes, I know where the Waffle House is, and I know where the Ten Flags Motel is, close to the Waffle House.

(R.p. 477) (Exhibit N).

The prosecutor hit the nail on the head in closing argument:

> Like I said in opening, there's three defenses to rape: it didn't happen, it wasn't me, or it was consent. You can't use one and two when your DNA is in the victim's vagina, so they got to go with consent.

(R.p. 471) (Exhibit N).

Further, the prosecutor stated during closing argument:

> MR. MORRIS: He's got no defense, other than consent, so he has to come in here and disparage this woman.

(R.p. 493) (Exhibit N).

It is obvious that the judge not only failed to consider evidence that pointed to consensual sex, and the uncontested reasonable hypothesis of innocence, but the judge failed to even consider consensual sex as a defense at trial deciding the verdict !

Further, trial counsel failed to object to this constitutional error, and failed to require the trial court to comply with the reasonable doubt standard at trial under *Winship*, *supra*.

It is clear that the trial judge failed to comply with the law regarding impeached testimony being insufficient, by itself, to convict, and further disregarded Petitioner's established defense at trial, and did not consider it in reaching a verdict. This violates Petitioner's right to Due Process.

Petitioner's trial counsel rendered ineffective assistance of counsel by failing to

ensure that the trial judge complied with the reasonable doubt standard as articulated in the United States Supreme Court case of *In re. Winship*, *supra*.

REQUEST FOR EVIDENTIARY HEARING AND APPOINTMENT OF COUNSEL

Petitioner moves this Honorable Court to grant an evidentiary hearing on his claims, with appointed counsel, to ensure the maintenance of his rights to due process and equal protection of the law. It is necessary to appoint counsel to aid Petitioner because of the complex issues involved, the need to competently develop the facts, and to properly present them in court.

Petitioner contends that he has pointed to record facts that raise sharply contested issues between the State and Petitioner. These sharply contested issues cannot be properly addressed without a full and fair evidentiary hearing. **La. C.Cr.P., Art. 929.**

CONCLUSION

Wherefore, Petitioner avers that his trial counsel, and his appellate counsel's actions and inactions deprived Petitioner of his right to effective assistance of counsel, and due process as guaranteed by the United States Constitution, Amendments **Five, Six** and **Fourteen**, and the Louisiana Constitution of 1974, **Article I, § 13**.

Further, Petitioner asserts that he has brought forth viable claims, and has pointed to sufficient record evidence, which entitles him to Post Conviction Relief. Petitioner's convictions should be reversed and remanded for a new trial.

Alternatively, Petitioner should be granted an evidentiary hearing, with appointed counsel, and discovery, in order to fully and fairly develop his claims.

Respectfully submitted *pro se* this 11 day of October, 2011, at Angola, Louisiana.

Marice Nalls, # 423240
M.P. — Walnut 1
Louisiana State Penitentiary
Angola, Louisiana 70712

AFFIDAVIT / CERTIFICATE OF SERVICE

I, Maurice Nalls, the foregoing Applicant, do hereby attest and affirm that the information contained herein is true to the best of my knowledge. Further, that all allegations in the foregoing are those of Maurice Nalls.

Additionally, I hereby certify that a copy of the foregoing has been sent, via U.S. Mail, postage pre-paid and properly addressed to Hillar C. Moore, III, District Attorney of East Baton Rouge Parish.

Done this 11 day of October, 2011, at Angola, Louisiana.

Marice A Nalls

Marice Nalls
423240, Walnut 1
Louisiana State Prison
Angola, Louisiana 70712

IN THE
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DOCKET NO.: 7-07-0697

State of Louisiana, Ex. rel., **MARICE NALLS**
Petitioner

- Versus -

BURL CAIN, Warden
Louisiana State Penitentiary
Respondent

EXHIBITS

Exhibit A	6-16-09	Letter from Mr. Adebamiji
Exhibit B	7-16-09	First Circuit granting permission to file supplemental brief and Pro Se Briefing Notice
Exhibit C	10-13-09 2-11-10 7-27-10 4-11-11	Four letters to defense attorney, Mr. Adebamiji
Exhibit D	4-25-11	Motion for Official Status of Defendant's Case Pending in the First Circuit Court of Appeal
Exhibit E	4-27-11	Letter from First Circuit Court of Appeal Clerk of Court to return motion UNFILED
Exhibit F	10-23-09	Denial from First Circuit Court of Appeal
Exhibit G		Certified and Priviledged Mail Log from Louisiana State Penitentiary (three pages)
Exhibit H	6-27-11	Affidavit from Gale Edwards (defendant's mother)
Exhibit I		Bill of Information.
Exhibit J		Sentencing Minutes.

Exhibits (continued next page)

Nalls v. Cain — Exhibits (continued)

Exhibit K	5-10-11	Letter from Louisiana Court of Appeal, First Circuit
Exhibit L	7-1-11	Motion for Leave to File an Out-of-time Application for Certiorari or Review
Exhibit M		R.p. 326
Exhibit N		R.pp. 469-494
Exhibit O		R.pp. 315-316
Exhibit P		R.p. 318
Exhibit Q		R.p. 350
Exhibit R		R.p 344
Exhibit S		R.pp. 375-379
Exhibit T		R.pp. 380-381
Exhibit U		R.p. 505
Exhibit V		R.p. 501
Exhibit W	6-10-09	Direct Appeal Brief

IN THE
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

State of Louisiana,
Ex rel., MARICE NALLS,
Petitioner

Docket No: 7-07-0697

Date Filed:_____

Versus

BURL CAIN, WARDEN
Louisiana State Penitentiary
Respondent

_____
CLERK

MOTION TO COMPEL ANSWER

Petitioner, Marice Nalls, who respectfully submits that the allegations presented herein, if established, would entitle him to post-conviction relief, and respectfully moves this Honorable Court to require the District Attorney for the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, to file an answer in opposition within the specified period pursuant to Louisiana Code of Criminal Procedure Article 927 (A).

Respectfully submitted this 11 day of October, 2011.

Marice A Nalls

Marice Nalls, # 423240
M.P. - Walnut 1
Louisiana State Penitentiary
Angola, Louisiana 70712

ORDER

IT IS ORDERED that, the District Attorney for the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, file an answer to the foregoing Application for Post-Conviction Relief with this Court on or before the ____ day of _____, 201__.

THUS DONE AND SIGNED ON _____, 201__.

_____
DISTRICT JUDGE

IN THE
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

State of Louisiana,
Ex rel., MARICE NALLS
Petitioner

Versus

BURL CAIN, WARDEN
Louisiana State Penitentiary
Respondent

Docket No: 7-07-0697

FILED:_____

_____
CLERK

PETITION AND ORDER FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM

MAY IT PLEASE THE COURT:

NOW COMES MARICE NALLS, Petitioner, *pro se*, who respectfully requests the Court to order the respondent Warden to produce the Petitioner for an evidentiary hearing pursuant to the Louisiana Code of Criminal Procedure, **Article 930 (A)**.

The instant Petitioner is incarcerated in the Louisiana State Prison at Angola, Louisiana, Burl Cain, Warden.

WHEREFORE, your Petitioner requests that a Writ of Habeas Corpus Ad Testificandum be issued and directed to Burl Cain, Warden, Louisiana State Prison at Angola, Louisiana, to produce the person of your Petitioner for an evidentiary hearing to be held at the 19th Judicial District Court, East Baton Rouge Parish, Baton Rouge, Louisiana.

Petitioner prays this Honorable Court will grant his request, and that a Writ of Habeas Corpus Ad Testificandum be issued so that Petitioner will be present for the hearing set herein.

Respectfully submitted this 11 day of October, 2011, at Angola, Louisiana.

Marice A Nalls

Marice Nalls, # 423240
M.P. - Walnut 1
Louisiana State Penitentiary
Angola, Louisiana 70712

ORDER

Considering the foregoing, it is hereby ordered that a Writ of Habeas Corpus Ad Testificandum be issued in the foregoing petition, and be directed to Burl Cain, Warden, Louisiana State Prison at Angola, Louisiana to produce the person of the Petitioner, Marice Nalls, for an evidentiary hearing to be held at the 19th Judicial District Court, Parish of East Baton Rouge, Baton Rouge, Louisiana on the ____ day of _____, 2011, at the time of _____ o'clock, ___.m.

THUS DONE AND SIGNED this ____ day of _____, 201__, at Baton Rouge, Louisiana.

_____
DISTRICT JUDGE

MARICE NALLS

VERSUS

N. BURL CAIN, WARDEN

FILED:_____

NO. 7-07-0697

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

_____

DEPUTY CLERK

MOTION TO STAY AN ABEY

NOW INTO COURT comes, in pro se capacity, Marice Nalls [Petitioner], requesting that this Honorable Court stay and hold in abeyance his application for post conviction relief for the following reasons, to-wit:

1.

Petitioner is filing, concurrently with the instant motion to stay and abey, an application for post conviction relief alleging that his conviction and sentence in the matter of State of Louisiana v. Marice Nalls, under Docket No. 7-07-0697, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, is in violation of the constitutions of the United States and the state of Louisiana.

2.

Petitioner has pending before the Louisiana Supreme Court under Docket No. 2011-KH-1489 a motion for out of time certiorari requesting that the Court grant him leave to file an out of time certiorari because of circumstances that occurred beyond his control.

3.

As of the filing of the instant application for post conviction relief the Louisiana Supreme Court has not ruled on his motion for out of time certiorari.

4.

Should the Supreme Court grant his motion for out of time certiorari Petitioner's application for post conviction relief will be premature.

5.

In an abundance of caution, should the Supreme Court deny Petitioner's motion for out of time certiorari, Petitioner is filing his application for post conviction relief within one year of the affirmation of his conviction and sentence by the Court of Appeal, First Circuit, under Docket No. 2009-KA-0772 in order to protect his rights under the AEDPA to seek federal habeas corpus

relief. State v. Nalls, 2009-0772 (La.App. 1 Cir. 10/23/09), 24 So.3d 1030.

WHEREFORE, Marice Nalls respectfully prays that this Honorable Court will grant his motion to stay and abey, filing his application for post conviction relief into the record and taking no action until his motion for out of time certiorari in the Louisiana Supreme Court has be adjudicated.

Respectfully Submitted By:

Marice Nalls
423240, Walnut 1
Louisiana State Penitentiary
Angola, LA 70712

AFFIDAVIT / CERTIFICATE OF SERVICE

I do hereby swear and affirm that the foregoing is true and correct to the best of my knowledge and belief.

I do hereby certify that the above application for supervisory writ has been served upon:

Opposing Counsel:
Hillar C. Moore, III, District Attorney
5th Fl. Governmental Bldg.
222 St. Louis St.
Baton Rouge, LA 70802

by placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Drawslip made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for legal mail.

Done this 11 day of October, 2011.

Marice Nalls

MARICE NALLS

VERSUS

N. BURL CAIN, WARDEN

FILED:_____

NO. _____

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

_____
DEPUTY CLERK

ORDER

Considering the foregoing:

IT IS HEREBY ORDERED that the Clerk of Court for the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, is to file Petitioner's application for post conviction relief into the record and said application for post conviction relief will be held in abeyance until such time as the Louisiana Supreme Court adjudicates Petitioners motion to file an out of time certiorari.

Baton Rouge, Louisiana, this _____ day of _____, 201___.

_____
JUDGE — 19th JUDICIAL DISTRICT COURT

MARICE NALLS #423240 - Walnut 3
LA State Penn.

VERSUS

N. BURL CAIN, WARDEN

DOCKET NO. 07-07-0697, SEC. VII

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

STATE'S PROCEDURAL OBJECTIONS, ANSWER, AND MEMORANDUM IN OPPOSITION TO APPLICATION FOR POST-CONVICTION RELIEF

STATEMENT OF THE CASE

On July 26, 2007, an East Baton Rouge Grand Jury indicted petitioner, Marice Nalls, for the aggravated rape and armed robbery of Melissa Vascoco Conklin, in violation of La. R.S. 14:42 and 14:64, respectively.[1] After a two-day bench trial, the trial court found petitioner guilty as charged on October 1, 2008.[2]

On January 12, 2009, the trial court denied petitioner's Motion for Post Verdict Judgment of Acquittal and/or Motion for New Trial.[3] The court then sentenced petitioner to serve a life sentence on his aggravated rape conviction, and fifteen years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on his armed robbery conviction.[4]

Petitioner appealed, citing the following counseled assignments of error:

1. The State failed to carry its burden of proof to establish defendant was guilty of aggravated rape.

2. The State failed to carry its burden of proof to establish defendant was guilty of armed robbery.

3. The trial court erred by denying defendant's Motion for Post Verdict Judgment of Acquittal and/or New Trial.

Petitioner also filed a pro se brief, raising the following assignments of error:

1. Whether defendant made a knowing, intelligent, and voluntary waiver of his rights to a jury trial.

2. Whether the trial court violated the defendant's rights to a fair trial and deprived him of his right to defend himself when his counsel was broadsided by the introduction of evidence of which he had never been made aware.

3. Whether any errors were committed such as would be discovered by the appellate court in conducting a patent error review of this matter pursuant to La. C.Cr.P. art. 920(2).

The Court of Appeal, First Circuit, affirmed petitioner's convictions and sentences in an unpublished opinion rendered October 23, 2009.

[1] R. p. 10.
[2] R. p. 494.
[3] R. pp. 502-503.
[4] R. p. 506.

Ap D

EXHIBIT 2

APPENDIX D

Petitioner filed the present timely application for post-conviction relief on October 18, 2011, presenting the following claims:

1. Trial counsel failed to secure expert testimony to aid defense at trial, and constitutes ineffective assistance of counsel.

2. Trial counsel failed to call witnesses for defense at trial, and constitutes ineffective assistance of counsel. Further, allowing testimony of witnesses not called at trial, through police testimony at trial, violates *Crawford v. Washington.*

3. Trial counsel failed to notify the court he had withdrawn from petitioner's case, failed to notify petitioner of court ruling, and lied to petitioner about notifying the court that he had withdrawn from the case.

4. Trial counsel was ineffective for failing to properly argue issues of flaws in indictment.

5. Trial counsel rendered ineffective assistance by failing to argue that the statute of limitations on the institution of prosecution had expired. Appellate counsel failed to argue issue on appeal.

6. Trial counsel failed to ensure that the trial judge complied with the reasonable doubt standard of *In Re Winship*, and allowed the trial judge to disregard petitioner's defense.

For reasons contained in argument below that state submits that petitioner's claims are either procedurally barred, or without merit, and should be summarily dismissed.

STATEMENT OF FACTS

On September 24, 1998, Melissa was living with her boyfriend, Ronnie Burgess, in the Warren House apartments in Baton Rouge. Around 5:00 A.M. Ronnie left for work and Melissa started to return to her bedroom when she heard her deadbolt unlock. Thinking Ronnie must have forgotten something, she opened her bedroom door and saw defendant standing in her apartment with a gun. She tried to hide, but defendant approached her and put the gun to her head,[5]

Defendant then asked Melissa for money. He told her that he had already been in the apartment, but left to wait for her boyfriend to leave. He then told her to take her clothes off and get on the bed. After begging him to take the money and leave, Melissa finally did as he said because he kept the gun to her head.[6]

Defendant proceeded to rape Melissa vaginally and anally, all the while keeping his gun to her head. He told her several times to keep her eyes shut. When he asked her to perform oral

[5] R. pp. 271-273.
[6] R. p. 274.

sex on him, Melissa told him that she would, but that it would make her throw up. Defendant decided to rape her again instead.[7]

At some point defendant became agitated, got off of Melissa, extended his arm with the gun and cocked it. Melissa testified that she turned her head away because she thought she was going to die. She then heard the gun click as if it had been released and defendant told her that she was not worth his time.[8]

Defendant then put the gun back to Melissa's head and forced her into the living room to look for money. After they both looked for her purse, Melissa realized that both her purse and television were missing. Defendant became angry and forced Melissa on her hands and knees on the living room floor where he raped her again.[9]

While he raped her again vaginally and anally, Melissa realized her front door was cracked open when she heard a male voice yell, "Marice, come on. You're so stupid. Come on. Let's go." Defendant continued to rape her while his accomplice continued to yell for him.[10]

When defendant decided he was finally finished, he told Melissa to get up, walk to her room, shut the door, and not to come out or call the police or he would kill her. She did as she was told. After hearing her front door close, Melissa peeked out of her room and saw no one. She called Ronnie to tell him what had happened and to meet her at the hospital. She grabbed her car keys and drove straight to the hospital.[11]

At the hospital, Dr. Sterling Sightler examined Melissa and prepared a rape kit. She also spoke to the police and gave them her underwear and shirt. Her boyfriend Ronnie also gave police a blood sample.[12]

Melissa received a phone call a few days later from someone claiming to have found her credit cards and check book in a field. Not knowing who was calling her, she contacted the police to retrieve her items.[13]

It was not until 2007 that Baton Rouge City Police contacted Melissa to inform her that they had new information in her case. Janaki Vaidyanathan, the Louisiana Codis Administrator

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[7] R. p. 274.
[8] R. pp. 274-275.
[9] R. p. 275.
[10] R. p. 276.
[11] R. p. 276.
[12] R. p. 276-277, 280.
[13] R. p. 280.

and DNA Supervisor at Louisiana State Police Crime Lab had matched defendant's DNA to the vaginal swabs taken from Melissa's rape kit and contacted the police.[14]

ARGUMENT

It is well established that the petitioner bears the burden of proving an ineffective assistance of counsel claim. According to Strickland v. Washington, 466 U.S. 668, 680, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the petitioner must first show that the counsel's performance was deficient such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Secondly, petitioner must prove that the counsel's errors were "so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." *Id.*, 466 U.S. at 680, 104 S.Ct. at 2064.

A petitioner urging ineffective assistance of counsel has failed to establish such a claim if either of the two prongs required by *Strickland* are not proven. This has been interpreted by the United States Fifth Circuit to mean that courts cannot even consider deficiencies in attorney performance outside of a specific showing of prejudice. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988), Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988). The court in *Strickland* declared that the petitioner must show that his counsel's actions "fell below an objective standard of reasonableness" in order to prove deficiency. Strickland v. Washington, 466 U.S. at 682, 104 S.Ct. at 2066. Further, petitioner must prove prejudice by demonstrating that "a reasonable probability" exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 682, 104 S.Ct. at 2066. *Strickland* requires that a petitioner must affirmatively demonstrate prejudice and demands that a heavy measure of deference be given to counsel's judgments. *Id.*, 466 U.S. at 682, 104 S.Ct. at 2066.

Finally, in Knighton v. Maggio, the United States Fifth Circuit Court of Appeal noted: "One claiming ineffective assistance of counsel must identify specific acts or omissions; general statements and conclusionary charges will not suffice." Knighton v. Maggio, 740 F.2d 1344, 1349 (5th Cir. 1984).

> **CLAIM ONE:** "Trial counsel failed to secure expert testimony to aid defense at trial, and constitutes ineffective assistance of counsel."

Petitioner's claim is without merit. Petitioner has not shown his trial counsel to be deficient. Petitioner avers that "he was prejudiced when there was no expert presented to rebut and explain the D.N.A. evidence introduced at trial." D.N.A. Analyst Alyson Saadi testified that

[14] R. pp. 285, 412-413.

"the probability of finding the same D.N.A. profile from anyone other than Marice Nalls was approximately one in fifty-seven point eight billion" and that the Earth's population was approximately six billion. (R. Vol. III, p. 438) Petitioner has not shown this evidence to be rebuttable. Faced with the hard scientific facts petitioner's trial counsel understood that the only theory of defense available to petitioner was consent. The fact that his trial counsel was unsuccessful does not render his performance deficient.

Petitioner goes on to state at the bottom of page six of his brief, that "The D.N.A. evidence in the apartment consisted of – as proven by analysis – only DNA samples of someone other than Petitioner." The state could find absolutely no support for this assertion anywhere in the record.

Petitioner alleges that "an expert for the defense would easily point out other reasonable hypothesis consistent with Petitioner's defense of consensual sex." Petitioner is confused as to the purpose and scope of expert testimony. (See La. C.E. Art. 701 et, seq.) It is in fact defense counsel's job to point out "other reasonable hypothesis" of innocence.

In the second paragraph of page seven of his brief, petitioner alludes to evidence that allegedly proves that "Petitioner had sex with Ms. Vascocu at approximately 9 pm the night before this alleged rape thirteen hours prior to the time the doctor did her exam." There is absolutely no support for this assertion anywhere in the record.

On page eight of his brief, petitioner continues to allude to "potentially exculpatory evidence" in the form of other semen found in the apartment. Petitioner had consensual sex with her boyfriend the night before this brutal rape. The fact that semen might have been found in the apartment, other than petitioner's semen found in the victim's vagina does not exculpate him.

At the bottom of page eight of his brief, petitioner takes issue with a sketch artist rendering which was not even introduced into evidence by the state. In fact Ms. Vascocu was compelled to attempt to give a description of her attacker to police but stated emphatically that "I could not identify him. They tried to get me to do a sketch. I could not do it." (R. Vol. II, p. 317) In any event, as identity was not an issue in the case the sketch is irrelevant to petitioner's claim of "consensual sex."

Petitioner claims ineffectiveness for failure to retain an expert to testify that the victim's behavior post-rape was unusual. Absent any showing whatsoever that Dr. Sightler, who had performed up to two hundred rape exams, was lying when she testified that rape victims brought

in for examinations are usually calm, cooperative, and coherent, petitioner has failed to show his counsel was deficient. (R. Vol. II, pp. 337, 345)

At the bottom of page ten of his brief, petitioner avers that "An expert was essential to the defense in order to relate the Petitioner's version of events as the more probable scenario to the jury," and to "...impeach Ms. Vascocu's inconsistent, uncorroborated story..." Once again, petitioner is confused as to the purpose and scope of expert testimony. It was defense counsel's duty to attempt to present a reasonable hypothesis of innocence and to attempt to impeach the victim's testimony through cross-examination. Though unsuccessful in this regard, a reading of the record in this matter makes *abundantly clear* that trial counsel was willing to, and in fact did go to extraordinary lengths to zealously attempt to discredit and disparage the victim in this case.

Lastly, even if petitioner were able to prove deficient conduct for counsel's failure to procure expert testimony, petitioner cannot show prejudice. Suffice it to say that the evidence of petitioner's guilt was simply overwhelming, while the petitioner's defense, which consisted of his self-serving testimony that "I remember having, like, casual sex with a female, but it wasn't no rape," was simply ridiculous.[15] (R. Vol. III, p. 455)

For all of the foregoing reasons, petitioner's claim should be dismissed as without merit.

CLAIM TWO: "Trial counsel failed to call witnesses for defense at trial, and constitutes ineffective assistance of counsel. Further, allowing testimony of witnesses not called at trial, through police testimony at trial, violates *Crawford v. Washington.*"

First, the state did in fact issue a subpoena to Jessie Strawder. The service return, contained in the court record indicates the sheriff's office was unable to locate him at his last known address. Also, petitioner's reliance on Crawford v. Washington is clearly misplaced. In that case, the defendant's wife's statement to police was introduced into evidence at the trial on the merits. The wife did not testify at trial because of Washington's marital privilege. The Supreme Court of the United States found that the defendant's Sixth Amendment right to confrontation was violated when the court allowed the statement into evidence. The actual holding of Crawford v. Washington however, is quite narrow and has no application to petitioner's case: ***Testimonial statements*** of a witness who does not appear at trial are inadmissible unless: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness. Although the Court left for another day "any effort to spell out a comprehensive definition of testimonial", it did state, "Whatever else the term covers, it applies

[15] According to petitioner, he is actually innocent of *all* of the crimes of which he has been convicted and the rape charge was just another charge, "the state put...on me." (R. Vol. III, p. 463)

at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." As noted by the United States Supreme Court in *Crawford*:

> The text of the Confrontation Clause...applies to "witnesses" against the accused-in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a *specific type of out-of-court statement*...Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it...

Suffice it to say that Jessie Strawder's phone call to the victim to tell her he had found some of the items stolen from the victim's apartment during the attack is ***not*** a testimonial statement. Furthermore, petitioner does not even identify any statements made by Sergeant Lutrell which were introduced into evidence allegedly in violation of his right to confrontation.

Secondly, petitioner cannot show deficient conduct for failure of his trial counsel to call these witnesses at trial. Sergeant Luttrell was deceased and therefore could not have been called at trial. (R. Vol. II, p. 375) The state cannot possibly imagine what, and petitioner does not specify anything that Jessie Strawder could have contributed to bolster petitioner's case. In fact, had he been called, trial counsel would not have been able to point to alleged questions surrounding the circumstances of the recovery of the victim's property as some sort of evidence of "scheming" on her part, as ridiculous as that argument may have been. (R. Vol. III, pp. 475-476)

Thirdly, for reasons already stated in state's response to claim one above, petitioner cannot show he was prejudiced. And lastly, the law is clear that "Under certain circumstances, the testimony of a police officer may encompass information provided by another individual without constituting hearsay if offered to explain the course of a police investigation and the steps leading to the defendant's arrest." State v. Smith, 400 So.2d 587 (La.1981), State v. Young, 99-1264 (La.App. 1st Cir. 3/31/00), 764 So.2d 998.

For all of the foregoing reasons, petitioner's claim should be dismissed as without merit.

> **CLAIM THREE:** "Trial counsel failed to notify the court he had withdrawn from petitioner's case, failed to notify petitioner of court ruling, and lied to petitioner about notifying the court that he had withdrawn from the case."

The state submits that petitioner's claim is procedurally barred for failure to state a claim for which relief can be granted. Assuming the truth of petitioner's allegations, for the sake of argument only, the state is unaware of any remedy available to the petitioner at the trial court level. Petitioner's complaint is that he was essentially denied the opportunity to pursue review in the Louisiana Supreme Court on direct appeal due to his counsel's alleged ineffectiveness. Supreme Court Rules govern the timely filing of writ applications to review a judgment of the court of appeal after an appeal to that court. (Rule X, Section 5) The state is unaware of any authority granting a trial court jurisdiction to suspend that time period. As such, petitioner's claim is procedurally barred for failure to state a claim upon which relief can be granted.[16]

> **CLAIM FOUR:** "Trial counsel was ineffective for failing to properly argue issues of flaws in indictment."

Petitioner's argument consists of a record reference and exhibit reference that do not correspond to anything in the record related to the indictment, as well as a string of case citations that are ancient and/or of questionable relevance. In any event, petitioner herein has waived any claim he may have had regarding the indictment by failing to file a motion to quash pursuant to La. C.Cr.P. art. 531 et. seq. Our jurisprudence has held that the failure to timely object, by motion to quash, to a defect in the form of the indictment results in waiver of the objection. Deloach v. Whitley, 684 So.2d 349 (La. 1996), State v. Porche, 2000-1391 (La.App. 4th Cir. 2/14/01), 780 So.2d 1152, State v. Lee, 94-2584 (La.App. 4th Cir. 1/19/96), 668 So.2d 420. Petitioner's claim is procedurally barred.

> **CLAIM FIVE:** "Trial counsel rendered ineffective assistance by failing to argue that the statute of limitations on the institution of prosecution had expired. Appellate counsel failed to argue issue on appeal."

As to the aggravated rape charge, there is no time limitation upon the institution of prosecution pursuant to La. C.Cr.P. Art. 571. The armed robbery charge is subject to the six year prescriptive period contained in La. Art. 572(A)(1). However, even if trial counsel was deficient in failing to file a motion to quash pursuant to La. C.Cr.P. Art. 532, as petitioner's

[16] Petitioner has addressed a "Motion for Leave to File an Out-of-Time Application For Certiorari or Review" directly to the supreme court. The status of that motion is not known.

sentence on the armed robbery conviction was fifteen years concurrent, he cannot show prejudice. As such, the claim should be dismissed as without merit.

CLAIM SIX: "Trial counsel failed to ensure that the trial judge complied with the reasonable doubt standard of *In Re Winship*, and allowed the trial judge to disregard petitioner's defense."

Petitioner's claim is procedurally barred. The Court of Appeal, First Circuit specifically found the evidence to support petitioner's convictions for aggravated rape and armed robbery. Petitioner's claim should be dismissed as procedurally barred pursuant to La. C.Cr.P. Art. 930.4(A).

CONCLUSION

For all of the foregoing reasons, petitioner's claims should be dismissed as either procedurally barred, or as without merit. In the event one or more of the state's procedural objections to petitioner's claims are overruled, the State of Louisiana reserves the right to file an answer on the merits of those claims.

RESPECTFULLY SUBMITTED,

HILLAR C. MOORE, III
DISTRICT ATTORNEY

By: Stacy L. Wright

Stacy L. Wright, #25307
Assistant District Attorney
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana
222 St. Louis Street
Baton Rouge, Louisiana 70802

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed, postage prepaid, to Marice Nalls, #423240, Walnut 1, Louisiana State Penitentiary, Angola, Louisiana, 70712.

Baton Rouge, Louisiana, this 27th day of February 2012.

Stacy L. Wright

Stacy L. Wright
Assistant District Attorney

MARICE NALLS	*** NUMBER: 07-07-0697 SEC: VII**
	*** 19TH JUDICIAL DISTRICT COURT**
VS.	*** PARISH OF EAST BATON ROUGE**
N. BURL CAIN, WARDEN	*** STATE OF LOUISIANA**

COMMISSIONER'S REPORT

The Petitioner, Marice Nalls, was charged with one count of aggravated rape, and one count of armed robbery on July 26, 2007.[1] He entered pleas of not guilty and waived his right to a jury trial.[2] The trial court found him guilty of both counts[3] and on January 12, 2009, he was sentenced to life imprisonment without benefit on the aggravated rape and 15 years without benefit on the armed robbery, both concurrent.[4] His appeal was denied on October 23, 2009.[5]

On October 11, 2011, the Petitioner filed the instant application for post-conviction relief claiming ineffective assistance of counsel, as follows: **1) IAC – Trial Counsel Failed to Secure Expert Testimony; 2) IAC – Trial Counsel Failed to Call Witnesses and Allowed Witnesses to Testify in Violation of His Right of Confrontation; 3) IAC – Trial Counsel Failed to Notify Petitioner About Withdrawing From the Case and of Court Rulings, and Lied to Petitioner; 4) IAC – Trial Counsel Failed to Properly Argue Issues of Flaws in Indictment; 5) IAC- Trial Counsel Failed to Argue That the Statute of Limitations on the Institution of Prosecution Had Expired & Appellate Counsel Failed to Raise the Issue on Appeal; and 6) Trial Counsel Failed to Ensure That the Trial Judge Complied With the Proper Reasonable Doubt Standard and Allowed the Trial Judge to Disregard Petitioner's Defense.**

STATEMENT OF FACTS

In 2007, the Petitioner was indicted for an aggravated rape and armed robbery that occurred in September 1998. He was identified by DNA evidence in 2003-2007 and convicted in 2009. In the early morning hours of September 24, 1998, the victim was raped at gunpoint in an apartment she shared with her boyfriend. While the Petitioner was raping her, her purse and television were taken from the apartment by another unidentified individual.[6] Thereafter, the victim went to the hospital for a rape examination. Because the victim had kept her eyes closed during the rape, she was unable to provide a detailed description of her attacker to police. However, she testified that, during the rape, she heard a voice calling "Marice, come on. You're

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[1] R. pp. 10-13, Indictment No. 07-07-097, filed July 26, 2007.
[2] R. p. 6, Minutes of Court dated September 29, 2008.
[3] R. p. 7, Minutes of Court dated October 1, 2008.
[4] R. pp. 8-9, Minutes of Court dated January 12, 2009.
[5] *State v. Nalls*, 2009 KA 0772 (La. App. 1 Cir., 10/23/2009).
[6] *State v. Nalls*, 2009 KA 0772, pp. 11-12 (La. App. 1 Cir., 10/23/2009).

EXHIBIT 3

so stupid. Come on. Let's go." Some five years later around 2003, DNA from the victim's vaginal swab was positively matched to the Petitioner's profile then in the police database.

At trial the Petitioner testified he had no recollection of ever meeting the victim, but he admitted that he had sex with prostitutes at a hotel near where she lived and stated that since he had consensual sex with a white woman at that hotel on the night in question, it must have been the alleged victim. In rebuttal, the victim denied knowing the Petitioner, ever engaging in prostitution or ever going to the hotel named by the Petitioner. The trial court apparently accepted her version of events.

IAC CLAIMS

Claims of ineffective assistance of counsel are evaluated by the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*[7]. Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both that counsel's performance was deficient and that the deficiency prejudiced the defense.[8] One claiming ineffective assistance of counsel must identify specific acts or omissions and general statements and conclusionary charges will not suffice.[9] There is a strong presumption that the conduct of counsel falls within a wide range of responsible, professional assistance.[10] Hindsight is not the proper perspective for judging the competence of counsel's trial decisions, and an attorney's level of representation may not be determined by whether a particular strategy is successful.[11] In evaluating whether counsel's alleged error has prejudiced the defense, it is not enough for the defendant to show that an error had some conceivable effect on the outcome of the proceeding; rather, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.[12] Claims of ineffective assistance of counsel may be disposed of for either reasonable performance of counsel or lack of prejudice and, if one is found dispositive, it is not necessary that the court address the other.[13] A claim that an attorney was deficient for failing to raise an issue is without merit, when the substantive issue the attorney failed to raise is without merit.[14]

Once a defendant has the assistance of counsel, a vast array of trial decisions, strategic and tactical, must be made. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel.[15]

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7 466 U. S. 668, 104 S. Ct. 2052, 80 L.Ed.2d. 674 (1984).
8 *Celestine v. Blackburn*, 750 F. 2d 353 (5th Cir. 1984).
9 *Knighton v. Maggio*, 740 F. 2d 1344 (5th Cir. 1984).
10 *State v. Myers*, 583 So. 2d 67 (La. App. 2nd Cir. 1991).
11 *State v. Brooks*, 505 So. 2d 714 (La. 1987).
12 *Sawyer v. Butler*, 848 F. 2d 582 (5th Cir. 1988).
13 *Murray v. Maggio*, 736 F. 2d 279 (5th Cir. 1984).
14 *State ex rel. Roper v. Cain*, 763 So.2d 1, 5, 99-2173, p. 6 (La. App. 1 Cir. 10/26/99), writ denied, 773 So.2d 733, 2005-0975 (La. 11/17/00).
15 *State v. Folse*, 623 So.2d 59, 71 (La. App. 1st Cir.1993).

1) IAC – Trial Counsel Failed to Secure Expert Testimony at Trial

In this first claim, the Petitioner suggests that an expert was necessary to explain the significance of the DNA evidence introduced at trial and to support his defense that the victim had consensual sex with him at a local motel—not in her apartment and not at gunpoint.[16] His allegations ramble somewhat, but it appears that he contends that an expert might have agreed that since the Petitioner's sperm from the victim's vagina was non-motile, it proves he had consensual sex with the victim several hours before the alleged rape occurred. He alleges that DNA found on the victim's comforter was not his, and that since the victim's underwear and t-shirt were not tested for DNA despite that they tested positive for semen, an expert would have essentially "shed light on the ...Petitioner's hypothesis as being the most realistic scenario." I note that the Petitioner asserts that the evidence (semen sample) recovered from the comforter "...was proven not to be Petitioner's DNA.", but he does not point to any test results or evidence in the record to support this conclusion.[17] His allegations of need for an independent expert rely entirely on speculation as to what an expert might have found or said that could have "rebutted the prejudicial assumptions erroneously elicited by the State."[18]

After reviewing this claim, I find that the allegations are based on speculation and conclusions that are not factually supported and do not indicate that counsel was deficient for failing to call an independent expert, much less to show that another expert's testimony would have likely have resulted in a different verdict. Such is the burden of proof in an IAC claim. Without facts alleged to show that another expert would have disagreed with the State's expert or with the DNA results and would have supported the Petitioner's theory of consensual sex—which the Petitioner does not allege—this IAC claim should be dismissed in accordance with Art. 926 and 928-9 C.Cr.P.

The Petitioner states that the victim's underwear and t-shirt were ***not*** tested for DNA despite that they tested positive for semen. The record shows the Trial Judge was aware of this fact, and in fact, Defense counsel emphasized this to the Court. Counsel urged the Court to consider that other than DNA from the vaginal swab, there was a lack of physical evidence in the apartment to connect the Petitioner to the crime. He noted that there was no biological material or fingerprints of the Defendant taken from the victim's apartment, comforter, t-shirt, or

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[16] *See* PCR, pp. 6-10 (The Petitioner's allegations are somewhat confusing in that he alleges that DNA analysis of samples collected from the apartment excluded him as the donor, but then asserts that unidentified analysis of biological material from the comforter excluded him as the donor while other items – underwear and t-shirt - were not tested.).
[17] *See* PCR, p. 7 & p. 3.
[18] *See* PCR, p. 9.

underwear.[19] Nevertheless, apparently based on the victim's testimony that she did not know her attacker, did not ever go to the local motel near her apartment, and did not consent to sex with the Petitioner, together with the fact that his DNA profile showed up on her vaginal swab after the alleged attack, the Court found the Petitioner guilty.[20]

The Petitioner attempts here, as defense counsel did at trial, to emphasize the significance of the State's expert's [Dr. Sightler's] testimony that she did not observe motile sperm in connection with her examination of the victim.[21] In other words, the Petitioner suggests that any semen deposited by the perpetrator of the rape should have contained live sperm when the victim was examined by the physician within hours of the rape. This, of course, is speculation. In addition, he fails to assert facts that would show another expert would have disputed Sightler's testimony, much less have supported the Petitioner's assertion of consensual sex or sex the night before the early morning rape. Additionally, the Court, as trier of fact, was made aware of the possible significance of motile sperm as opposed to non-motile sperm by the defense. The Petitioner's conclusion, that a defense expert would have supported his claims and contradicted the State's expert, is factually unsupported and fails to show either deficient conduct or prejudice, particularly as it inconsistent with the record and the testimony of witnesses at the trial in this matter.[22]

Petitioner also contends an expert was needed to "shed light on the anomaly", that being the victim described a suspect to sketch artists that did not resemble the Petitioner. However, he admits in his brief that the victim candidly stated that she was not sure what the perpetrator looked like and was not sure that the composite sketch even looked like the perpetrator.[23] In sum, the allegations in this IAC claim are insufficient to show that counsel was deficient or that prejudice occurred by his failure to obtain an "expert" or experts.

For the reasons stated, claim 1 should be dismissed in its entirety, without the necessity of further proceedings.

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[19] *See* R. pp. 445-449 (defense counsel's motion for directed verdict); R. pp. 474-488 (defense counsel's closing argument). *See also* Petitioner's Exhibit W, submitted with his application (appellate brief filed on behalf of Petitioner).

[20] *See* Testimony of Dr. Sterling Sightler, R. pp. 337-350. *See also* Testimony of Serologist, Joseph Brisolara, R. pp. 351-365, 353 (indicating the presence of seminal fluid on the comforter, t-shirt, and underwear); Testimony of DNA Analyst, Susan Bach R. pp. 395-411, 406 (indicating that the profile from the sperm fraction eliminated the victim's boyfriend, Ronnie Burgess, as the donor of biological material from the vaginal swab); Testimony of Janaki Vaidyanathan, DNA Supervisor for the State Police Crime Lab, R. pp. 411-421, 413 (indicating that the DNA profile from the victim's vaginal swab was entered into the CODIS database and matched to Petitioner).

[21] *Id.*

[22] According to the victim's testimony, she was raped between 5 and 7 a.m. Doctor Sightler, testified that she examined the victim at 9:50 a.m. Thus, from the information in the record, it appears that biological material from the perpetrator could have been present in the victim's vagina over 4 and a half hours prior to Sightler examining the victim, contrary to Petitioner's apparent contention that the examination (Sightler's observation/determination of motility) took place within 2 hours of the sexual assault. Therefore, even assuming any witness/expert would testify that presence of non-motile sperm is evidence of intercourse that occurred more than 2 hours before, such testimony would not establish Petitioner's innocence in this case.

[23] PCR, pp. 8-9.

2) IAC – Trial Counsel Failed to Call Witnesses and Allowed Witnesses to Testify in Violation of His Right of Confrontation

The record shows that the victim's purse (stolen during the rape) was later found by a man identified at trial as Jesse Straughter and given to a police officer, Officer Katrell. Sgt. Lynn Ferguson testified to these facts and that she had dispatched officer Katrell to pick up the purse.[24] Ferguson testified that Katrell was deceased at the time of trial in this matter.[25]

The Petitioner, in this claim, contends that Ferguson's testimony violated his right of confrontation and that his lawyer was ineffective for failing to raise this objection and for not calling these two witnesses himself to determine whether they knew the victim; and how or where the purse was found and turned in. At the outset, I note that the record shows that Counsel *did* object to Ferguson's testimony regarding Straughter as hearsay, so that claim is belied by the record itself.[26] Thus, the record contradicts the Petitioner's claim that counsel was deficient for allowing hearsay. I note further that the Petitioner does not particularly identify any statement of Katrell or Straughter that was erroneously admitted or indicate how any such statement might have influenced the verdict.

In *Crawford v. Washington,* the Supreme Court held that "testimonial statements of witnesses absent from trial" are admissible "only where the declarant's is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]"[27]. However, confrontation errors are subject to a harmless-error analysis, and thus, even if not objected to, it is clear that the verdicts in this case were not attributable to Ferguson's limited testimony.[28]

As for the complaint that counsel was deficient for not calling Straughter as a witness for the defense, there are no facts alleged to support a finding that Straughter's testimony would have been helpful or even useful.[29] The Petitioner suggests that his testimony *might* have revealed a "set up". However there is neither indication in the record, nor any facts alleged that would indicate a conspiracy existed, nor that the witness would have supported such a theory. Speculation is insufficient to support this claim that the Petitioner's constitutional right was violated by not calling Mr. Straughter.

Therefore, this claim should be dismissed in its entirety without the necessity of a hearing.

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[24] R. pp. 375-385, Testimony of Officer Lynn Ferguson.
[25] *Id.*
[26] R. p. 376.
[27] *See Whorton v. Bockting*, 549 U.S. 406, 413, 127 S.Ct. 1173 (U.S., 2007), *citing Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
[28] See *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986).
[29] *See State v. Castaneda*, 658 So.2d 297, 306 (La.App. 1 Cir.,1995) citing *United States v. Green*, 882 F.2d 999, 1003 (5th Cir.1989) (A defendant who asserts a claim of ineffective counsel based upon a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of a trial.); *See also generally Alexander v. McCotter*, 775 F.2d 595, 602 (C.A.5 (Tex.),1985) (noting that presentation of witnesses is within the ambit of trial strategy, speculation as to what a witness would testify is uncertain, and to establish prejudice under *Strickland* showing must be made that uncalled witnesses would have testified favorably).

3) IAC – Trial Counsel Erred by Withdrawing from Appeal without Notice

In this claim, the Petitioner argues that either his attorney was ineffective or the First Circuit erred when neither notified him that his appeal was denied, thus preventing him from timely seeking writs to the Supreme Court. According to Petitioner, while his direct appeal was pending (and after counsel had filed the appellate brief), counsel sent him a letter telling him he was withdrawing from Petitioner's appeal, but provided him with contact information for the Court of Appeal and a pro se briefing notice. Despite this, he claims he only discovered that his appeal had been denied after his mother inquired about it. The Petitioner does not identify any facts that would support that he was prejudiced by the actions of counsel or the appellate court, even if the writ delays had elapsed. There is no constitutional right to seek writs of review following a direct appeal, nor any constitutional right to have counsel seek writs, and absent a showing that writs would likely have been successful, he cannot meet his burden under *Strickland*.[30]

In sum, the Petitioner fails to offer any facts to show that his conviction or appeal was prejudiced as a result of Counsel's actions after appealing, and there are none apparent from my review of his application and record. Therefore, claim 3 should be dismissed pursuant to Arts. 926 and 928-929, for Petitioner's failure to set forth sufficient facts to state a claim that would entitle him to relief in this matter, and for failure to state a ground for post conviction relief pursuant to Art. 930.3.

4) IAC – Failure to Object to Flawed Indictment

In this claim, the Petitioner argues counsel failed to object when the State added the element of "principal" to the armed robbery charge, and added Subsections A(2) and A(3) to the charge of rape under R.S. 14:42. He contends that these changes violated double jeopardy, changing a single count of rape into two counts.[31] This claim is factually and legally insupportable. Adding subsections A(2) & (3) simply further explain the nature of the rape, i.e. that the victim was prevented from resisting by threats and/or by the offender being armed with a dangerous weapon. This addendum does not add a second charge as alleged by the Petitioner. He was indicted for a single count of rape, tried for a single count and convicted of a single count. R.S. 14:42 defines aggravated rape as one that occurs under *one* ***or*** *more of multiple enumerated circumstances*, including those argued by the State at Petitioner's trial. The State was entitled to proceed under alternative theories of the aggravated rape.

This claim lacks merit on the face of the record, and does not support either a double jeopardy claim or an ineffective assistance of counsel for failure to file a motion to quash.

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[30] *State v. Nalls*, 2011-KH-1489 (La. April 9, 2012), writs denied.
[31] PCR, pp. 17-18.

In addition, there is no error, reversible or not, in the State's adding the word "principal" to the charge of armed robbery. As this Court is aware, all persons concerned in the commission of a crime are "principals". This word does not violate any of the Petitioner's rights, and thus, entitles him to no relief on this claim. The fact that he was charged for the offense itself evidences that he was charged as a principal.[32] There is nothing to indicate Petitioner was unaware of the charges against him, or that he was otherwise prejudiced as a result of the alleged failure to argue flaws in the indictment.

For any or all of the reasons stated, claim 4 should be dismissed in its entirety, without the necessity of a hearing.

5) IAC- Failure Of Trial Counsel To Object To Expiration Of Statute Of Limitations On The Institution Of Prosecution & Appellate Counsel's Failure To Raise It On Appeal

In claim 5, the Petitioner contends trial counsel failed to file a motion to quash the indictment based the failure to institute prosecution within the 6 year time limit set in Art. 572 C.Cr.P. The crimes were committed in 1998, and the indictment was issued in 2007 because the Petitioner was not identified as the assailant until DNA matched his profile .

The State concedes that the statute of limitations for armed robbery is 6 years, but objects to any relief on the basis that the Petitioner suffers no prejudice because the 15 year sentence on the armed robbery was concurrent to the life sentence for aggravated rape. The State cites no authority for this conclusion, and while there may be some non-authoritative support for this contention, the issue warrants additional briefs from the parties on the issue of deficient conduct and prejudice based on a failure of trial counsel to file a motion to quash the armed robbery. Therefore, I suggest that any ruling on this portion of Claim #5, as it relates to the armed robbery conviction only, should be deferred to allow both parties to address, by brief, the issue of deficient conduct *and* prejudice, based on counsel's failure to file a motion to quash the armed robbery indictment.

As to the other portion of this claim—that the time limit for prosecution had also elapsed on the aggravated rape, this claim is without any legal basis. Aggravated Rape at all pertinent times herein carried a life sentence. In 1998, when the crime was committed, Art. 571 C.Cr.P. specifically stated (and still does) that "there is *no time limitation* upon the institution of prosecution for any crime for which the *punishment may be death or life imprisonment*". Aggravated rape carried (and does still carry) a mandatory life sentence. The Petitioner's argument that Art. 571 only applies to death penalty cases (with an alternative life sentence) is not a logical or reasonable interpretation of the statute. Too, the Petitioner relies on the 1966 version of Art. 571, which is clearly inapplicable, as that version was replaced years before these

[32] *State v. Peterson*, 290 So.2d 307, 308 (La. 1974).

crimes to read as it does now, (except for the addition of recent amendments to include other serious sex offenses as well).[33] The law was designed to allow prosecution of the most serious crimes without time limitations—such as life and/or death cases, (and more recently, several other serious sex offenses). Thus, at the time the offense of aggravated rape was committed in 1998 there was no limitation upon the time for institution of prosecution for the crime of aggravated rape. [34] Therefore, it can not be said that either trial or appellate counsel was ineffective for failing to challenge the aggravated rape indictment as untimely, and this portion of the IAC claim must be dismissed without necessity for further proceedings.

For reasons stated, Petitioner's portion of claim 5--alleging IAC for failure of counsel to challenge the aggravated rape indictment on the basis of untimely prosecution-- should be dismissed without further proceedings or relief.

As to the portion of claim #5—alleging IAC for failure to file a motion to quash the armed robbery charge as untimely prosecuted—I recommend that ruling be deferred hereon pending receipt of briefs from both parties on the issues of whether counsel's omission was deficient conduct and also, more importantly, whether the Petitioner was prejudiced by the conviction and/or sentence on the armed robbery, considering that he is serving a concurrent, but greater life sentence for aggravated rape.

6) Trial Counsel Failed To Ensure That The Trial Judge Complied With The Proper Reasonable Doubt Standard And Allowed The Trial Judge To Disregard Petitioner's Defense.

In this claim, the Petitioner asserts that the Judge did not observe the reasonable doubt standard, as evidenced by his failure to give credence to the Petitioner's defense, instead relying on the victim's unreliable testimony as a basis for decision to convict. Here, he merely reiterates his defense and urges the Court to reverse itself based on the Petitioner's interpretation of the evidence and testimony. His allegations are conclusory and insufficient to establish that the trial judge did not follow the law—i.e. did not find guilt *beyond a reasonable doubt.* This is simply a sufficiency of the evidence claim, and considering the victim's testimony that she did not know the Petitioner and the fact that the Petitioner's DNA was found in her vaginal cavity, such facts are clearly sufficient for any reasonable trier of fact to find guilt on the charge of aggravated rape and robbery.

This claim is couched as an IAC claim, but there are no facts to indicate that counsel could have "ensured" the trial court accepted the defense theory over that of the State. Further, as stated by the First Circuit, the evidence supported the conviction for aggravated rape.

> In finding the defendant guilty of aggravated rape, the trial court accepted that the defendant's DNA found on M.C.'s vaginal

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[33] Acts 1984, No. 926, Section 1. *See generally State v. Bilbo*, 719 So.2d 1134, 1137 (La. App. 1 Cir., 1998).
[34] *See* LSA R.S. 14:42.

> swab established that they had engaged in sexual intercourse. The trial court also found M.C.'s testimony that she had not consented to sexual intercourse, but had been raped at gunpoint, to be more credible than defendant's testimony that the two had engaged in consensual sexual relations at a location near M.C.'s apartment.[35]

Findings of credibility belong solely to the factfinder, and the Petitioner has not alleged any facts that would warrant relief on this IAC claim. Thus, Claim 6 should be dismissed without further proceedings.

SUMMARY

For the reasons stated hereinabove, with the exception of a portion of claim #5, I suggest that the instant application for post-conviction relief should be dismissed without the necessity of further proceedings as the allegations and/or argument are either without legal merit or factually insufficient to state a claim that would entitle him to relief. Should this Court agree, my formal recommendation follows.

COMMISSIONER'S RECOMMENDATION

Considering the Petitioner's application for post-conviction relief, and the law applicable, for reasons stated hereinabove, I recommend that, with one exception, this application be dismissed entirely, without further proceedings as it is without merit and/or for failure to state a claim that would warrant a hearing or relief. Further, as to the portion of Claim #5 alleging ineffective assistance of counsel for failure to file a motion to quash the indictment for armed robbery as untimely, I recommend deferral of the Court's final ruling, pending briefs submitted by the parties on the limited issue of deficient conduct and/or prejudice. Upon submission of the briefs or the passage of the delays therefor, either party may inform the court in writing that the matter is ripe for final review and/or hearing on the remaining issue in Claim #5.

Respectfully recommended, this 9th day of Aug 2012, in Baton Rouge, Louisiana.

RACHEL P. MORGAN
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS/JUDGMENT/ORDER/ COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED TO: ALL PARTIES.
DONE AND SIGNED THIS 9th DAY OF Aug 2012

Nancy B. Dawson
Deputy Clerk Of Court

[35] *State v. Nalls*, 2009 KA 0772, 10 (La. App. 1 Cir.,2009).

MARICE NALLS

VS.

N. BURL CAIN, WARDEN

* NUMBER: 07-07-0697 SEC: VII

* 19TH JUDICIAL DISTRICT COURT

* PARISH OF EAST BATON ROUGE

* STATE OF LOUISIANA

ORDER ON COMMISSIONER'S REPORT

Having considered the application for post conviction relief, the record, arguments of the parties, including procedural objections, for the reasons stated in the Commissioner's Report dated August 9, 2012, and adopted herein as the Court's,

IT IS ORDERED that the Petitioner's application for post conviction relief is dismissed without further proceedings, in accordance with Arts. 926-929 C.Cr.P., with the exception of a portion of Claim #5, regarding ineffective assistance on the armed robbery charge. As to that issue alone,

IT IS FURTHER ORDERED that final ruling thereon is deferred pending briefs submitted by both parties, within 40 days, on the issue of whether counsel's failure to file a motion to quash (or appeal) the indictment for armed robbery based on untimely prosecution pursuant to Art. 572 C.Cr.P. could support the claim of constitutionally ineffective assistance of counsel. The parties are specifically ordered to address the issue of whether counsel's omission was deficient conduct and/or prejudicial, based on the circumstances of this case.

THUS ORDERED this 3rd day of October 2012 in Baton Rouge, Louisiana.

DON JOHNSON, JUDGE
SECTION VII
19TH JUDICIAL DISTRICT COURT

FILED

OCT 04 2012

DY. CLERK OF COURT
COMMISSIONER CT. SEC. A

HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS/JUDGMENT/ORDER/ COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED TO: ALL PARTIES.
DONE AND SIGNED THIS 4th DAY OF October 20 12

Deputy Clerk Of Court

EXHIBIT 4

MARICE NALLS	**DOCKET NO. 07-07-0697, SEC. VII**
	19TH JUDICIAL DISTRICT COURT
VERSUS	**PARISH OF EAST BATON ROUGE**
N. BURL CAIN, WARDEN	**STATE OF LOUISIANA**

SUPPLEMENTAL BRIEF ON PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO FILE A MOTION TO QUASH INDICTMENT FOR ARMED ROBBERY AS UNTIMELY

STATEMENT OF THE CASE

On July 26, 2007, an East Baton Rouge Grand Jury indicted petitioner, Marice Nalls, for the aggravated rape and armed robbery of Melissa Vascoco Conklin, in violation of La. R.S. 14:42 and 14:64, respectively.[1] After a two-day bench trial, the trial court found petitioner guilty as charged on October 1, 2008.[2]

On January 12, 2009, the trial court denied petitioner's Motion for Post Verdict Judgment of Acquittal and/or Motion for New Trial.[3] The court then sentenced petitioner to serve a life sentence on his aggravated rape conviction, and fifteen years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on his armed robbery conviction.[4]

Petitioner appealed, citing the following counseled assignments of error:

1. The State failed to carry its burden of proof to establish defendant was guilty of aggravated rape.

2. The State failed to carry its burden of proof to establish defendant was guilty of armed robbery.

3. The trial court erred by denying defendant's Motion for Post Verdict Judgment of Acquittal and/or New Trial.

Petitioner also filed a pro se brief, raising the following assignments of error:

1. Whether defendant made a knowing, intelligent, and voluntary waiver of his rights to a jury trial.

2. Whether the trial court violated the defendant's rights to a fair trial and deprived him of his right to defend himself when his counsel was broadsided by the introduction of evidence of which he had never been made aware.

3. Whether any errors were committed such as would be discovered by the appellate court in conducting a patent error review of this matter pursuant to La. C.Cr.P. art. 920(2).

The Court of Appeal, First Circuit, affirmed petitioner's convictions and sentences in an unpublished opinion rendered October 23, 2009.

[1] R. p. 10.
[2] R. p. 494.
[3] R. pp. 502-503.
[4] R. p. 506.

Petitioner filed the present timely application for post-conviction relief on October 18, 2011, presenting the following claims:

1. Trial counsel failed to secure expert testimony to aid defense at trial, and constitutes ineffective assistance of counsel.

2. Trial counsel failed to call witnesses for defense at trial, and constitutes ineffective assistance of counsel. Further, allowing testimony of witnesses not called at trial, through police testimony at trial, violates *Crawford v. Washington.*

3. Trial counsel failed to notify the court he had withdrawn from petitioner's case, failed to notify petitioner of court ruling, and lied to petitioner about notifying the court that he had withdrawn from the case.

4. Trial counsel was ineffective for failing to properly argue issues of flaws in indictment.

5. Trial counsel rendered ineffective assistance by failing to argue that the statute of limitations on the institution of prosecution had expired. Appellate counsel failed to argue issue on appeal.

6. Trial counsel failed to ensure that the trial judge complied with the reasonable doubt standard of *In Re Winship*, and allowed the trial judge to disregard petitioner's defense.

On February 27, 2012, the state filed "State's Procedural Objections, Answer, and Memorandum in Opposition to Application For Post-Conviction Relief." On August 9, 2012, the Commissioner issued a Recommendation that ***all*** of petitioner's claims be dismissed, with the exception of "the portion of Claim #5 alleging ineffective assistance of counsel for failure to file a motion to quash the indictment for armed robbery as untimely." With regard to this sub-claim, the Commissioner recommended "deferral of the Court's final ruling, pending briefs submitted by the parties on the limited issue of deficient conduct and/or prejudice."

Thereafter, on October 3, 2012, this Honorable Court issued an Order adopting the Commissioner's Report, and further ordering: "that final ruling thereon is deferred pending briefs submitted by both parties, within 40 days, on the issue of whether counsel's failure to file a motion to quash (or appeal) the indictment for armed robbery based on untimely prosecution pursuant to Art. 572 C.Cr.P. could support the claim of constitutionally ineffective assistance of counsel. The parties are specifically ordered to address the issue of whether counsel's omission was deficient conduct and/or prejudicial, based on the circumstances of this case."

STATEMENT OF FACTS

On September 24, 1998, Melissa was living with her boyfriend, Ronnie Burgess, in the Warren House apartments in Baton Rouge. Around 5:00 A.M. Ronnie left for work and Melissa started to return to her bedroom when she heard her deadbolt unlock. Thinking Ronnie must

have forgotten something, she opened her bedroom door and saw petitioner standing in her apartment with a gun. She tried to hide, but petitioner approached her and put the gun to her head.[5]

Petitioner then asked Melissa for money. He told her that he had already been in the apartment, but left to wait for her boyfriend to leave. He then told her to take her clothes off and get on the bed. After begging him to take the money and leave, Melissa finally did as he said because he kept the gun to her head.[6]

Petitioner proceeded to rape Melissa vaginally and anally, all the while keeping his gun to her head. He told her several times to keep her eyes shut. When he asked her to perform oral sex on him, Melissa told him that she would, but that it would make her throw up. Petitioner decided to rape her again instead.[7]

At some point petitioner became agitated, got off of Melissa, extended his arm with the gun and cocked it. Melissa testified that she turned her head away because she thought she was going to die. She then heard the gun click as if it had been released and petitioner told her that she was not worth his time.[8]

Petitioner then put the gun back to Melissa's head and forced her into the living room to look for money. After they both looked for her purse, Melissa realized that both her purse and television were missing. Petitioner became angry and forced Melissa on her hands and knees on the living room floor where he raped her again.[9]

While he raped her again vaginally and anally, Melissa realized her front door was cracked open when she heard a male voice yell, "Marice, come on. You're so stupid. Come on. Let's go." Petitioner continued to rape her while his accomplice continued to yell for him.[10]

When petitioner decided he was finally finished, he told Melissa to get up, walk to her room, shut the door, and not to come out or call the police or he would kill her. She did as she was told. After hearing her front door close, Melissa peeked out of her room and saw no one. She called Ronnie to tell him what had happened and to meet her at the hospital. She grabbed her car keys and drove straight to the hospital.[11]

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[5] R. pp. 271-273.
[6] R. p. 274.
[7] R. p. 274.
[8] R. pp. 274-275.
[9] R. p. 275.
[10] R. p. 276.
[11] R. p. 276.

At the hospital, Dr. Sterling Sightler examined Melissa and prepared a rape kit. She also spoke to the police and gave them her underwear and shirt. Her boyfriend Ronnie also gave police a blood sample.[12]

Melissa received a phone call a few days later from someone claiming to have found her credit cards and check book in a field. Not knowing who was calling her, she contacted the police to retrieve her items.[13]

It was not until 2007 that Baton Rouge City Police contacted Melissa to inform her that they had new information in her case. Janaki Vaidyanathan, the Louisiana Codis Administrator and DNA Supervisor at Louisiana State Police Crime Lab had matched petitioner's DNA to the vaginal swabs taken from Melissa's rape kit and contacted the police.[14]

ARGUMENT

It is well established that the petitioner bears the burden of proving an ineffective assistance of counsel claim. According to Strickland v. Washington, 466 U.S. 668, 680, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the petitioner must first show that the counsel's performance was deficient such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Secondly, petitioner must prove that the counsel's errors were "so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." *Id.*, 466 U.S. at 680, 104 S.Ct. at 2064.

A petitioner urging ineffective assistance of counsel has failed to establish such a claim if either of the two prongs required by *Strickland* are not proven. This has been interpreted by the United States Fifth Circuit to mean that courts cannot even consider deficiencies in attorney performance outside of a specific showing of prejudice. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988), Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988). The court in *Strickland* declared that the petitioner must show that his counsel's actions "fell below an objective standard of reasonableness" in order to prove deficiency. Strickland v. Washington, 466 U.S. at 682, 104 S.Ct. at 2066. Further, petitioner must prove prejudice by demonstrating that "a reasonable probability" exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 682, 104 S.Ct. at 2066. *Strickland* requires that a petitioner must affirmatively demonstrate prejudice and demands that a heavy measure of deference be given to counsel's judgments. *Id.*, 466 U.S. at 682, 104 S.Ct. at 2066.

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[12] R. p. 276-277, 280.
[13] R. p. 280.
[14] R. pp. 285, 412-413.

With regard to deficiency, the state concedes that counsel rendered ineffective assistance of counsel when he failed to file a motion to quash the indictment for armed robbery. This crime occurred on September 24, 1998. Pursuant to La. C.Cr.P. Art. 572(1), prosecution for the crime of armed robbery must be instituted within six years. Due to new information in the case, (DNA evidence), petitioner herein was finally indicted on July 26, 2007, more than six years after the crimes were committed.

With regard to prejudice, the state stands by its previous argument that petitioner herein cannot show prejudice. All of petitioner's claims with regard to the aggravated rape conviction have been dismissed by this Honorable Court. Petitioner's fifteen year sentence on his armed robbery conviction was ordered to be served concurrently with the life sentence on the aggravated rape conviction. Therefore, petitioner has failed to prove prejudice by demonstrating that "a reasonable probability" exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." The end result of these proceedings, for petitioner, is life imprisonment. That fact remains unchanged even if counsel had filed a motion to quash the charge of armed robbery, and that motion had been granted.

Alternatively, if this court finds ineffective assistance of counsel for failure to file a motion to quash the charge of armed robbery, the remedy to which petitioner is entitled is an order vacating his conviction and sentence for that charge only.

CONCLUSION

For all of the foregoing reasons, petitioner's claim of ineffective assistance of counsel should be dismissed as without merit. Alternatively, the only remedy to which petitioner herein is entitled is an order vacating his conviction and sentence for armed robbery.

RESPECTFULLY SUBMITTED,

HILLAR C. MOORE, III
DISTRICT ATTORNEY

By: Stacy L. Wright

Stacy L. Wright, #25307
Assistant District Attorney
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana
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Baton Rouge, Louisiana 70802

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed, postage prepaid, to Marice Nalls, #423240, Walnut 1, Louisiana State Penitentiary, Angola, Louisiana, 70712, and to Nalls' recently enrolled post-conviction counsel, Cate L. Bartholomew, 303 South Broad Street, New Orleans, Louisiana, 70119.

Baton Rouge, Louisiana, this 13th day of November 2012.

Stacy L. Wright

Stacy L. Wright
Assistant District Attorney

19th JUDICIAL DISTRICT COURT

FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

DOCKET NO. 07-07-0697 **DIVISION "VII"**

MARICE NALLS, Applicant

Versus

BURL CAIN, WARDEN, Respondent
LOUISIANA STATE PENITENTIARY at Angola, Louisiana

PLEASE SERVE CUSTODIAN AND DISTRICT ATTORNEY, EAST BATON ROUGE PARISH, STATE OF LOUISIANA

BRIEF IN SUPPORT OF APPLICATION:

May it Please the Court:

The Petitioner timely filed his original post-conviction application. In an Order on Commissioner's Report, the court requested additional briefing on the portion of Claim #5 relating to Petitioner's ineffective assistance of counsel claim based on his trial counsel's failure to file a motion to quash the indictment based on issues of prescription as to the armed robbery charge. Undersigned counsel notes that Mr. Nalls retained the same attorney for both trial and direct appeal. Said counsel likewise failed to raise the issue of prescription of the armed robbery charge on appeal. Therefore, ***Mr. Nalls now amends and supplements his original application for post-conviction relief to include an additional claim of ineffective assistance of counsel on appeal for failure of his appellate counsel to raise this issue on appeal.*** Mr. Nalls notes that the same legal and factual standards of review and the same legal and factual arguments apply to both his ineffective assistance claims at trial and appeal. Hence, in this memorandum, Mr. Nalls address the issue only once and request this Honorable Court consider th argument as applied to both issues.

Ap C

EXHIBIT 6

APPENDIX C

LAW AND ARGUMENT

Ineffective assistance of trial counsel

Ineffective assistance of counsel claims are best addressed in post-conviction applications because this process affords the trial court an opportunity to hold an evidentiary hearing and to review evidence that is not readily available in the record. *State v. Howard*, 751 So.2d 783 (La. 4/23/99). The *Sixth Amendment to the United States Constitution* guarantees a criminal defendant the right to effective assistance of counsel at all parts of the proceedings. "The right to counsel is a fundamental right of a criminal defendant; it assures the fairness, and the the legitimacy, of our adversarial process. The essence of an ineffective-assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between the defense and the prosecution that the trial was rendered unfair and the verdict rendered suspect." *Williamson v. Ward,* 110 F.3d 1508 (10th Cir. 1997).

While effective assistance may be difficult to define, Louisiana Courts have adopted a two pronged inquiry into the issue. First, the petitioner must show that counsel failed to perform some essential duty or function that reasonably competent counsel would have performed. *State v. Berry*, 430 So.2d 1005, 1007 (La. 1983). "The right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668 (1984). Reasonableness is viewed in light of the prevailing professional norms at the time of trial or appeal. Id. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The duty to investigate a criminal case is considered to be an essential function. *State v. Berry* at

1008; *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). This duty derives from the most basic functions of counsel, to make the adversarial process work. *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997). Investigation of a criminal case is such an essential function that even a lack of co-operation from the defendant will not excuse trial counsel's duty to thoroughly investigate a case. *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009), Similarly, counsel has a Constitutional duty to consult with the client on all important decisions and to keep the client informed of all important developments. *Hill v. Lockhart*, 474 U.S. 52,57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir., 2003). Mere review of the record with nothing more is per se unreasonable. *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994).

Second, the petitioner bears the burden of showing that counsel's ineffective assistance prejudiced his defense. Id. However, the Petitioner does not have to prove that the result of the trial would have been different, but only that there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In making a determination as to whether or not prejudice occurred, reviewing courts look to the entirety of the record to determine the "relative roll that the alleged trial errors played in the total context of trial." *Crockett v. McCotter*, 796 F.2d 787, 793 (5 Cir. 1986). Ineffective assistance of counsel claims are most properly addressed in an application for post-conviction relief which "enables the district judge . . . to order a full evidentiary hearing on the matter." *State v. Seiss*, 428 So.2d 444,449 (La. 1983). The remedy for ineffective assistance of trial counsel is to grant the petitioner a new trial. Similarly, the right to effective assistance of counsel is the same on appeal as it is at trial. Thus, the rule for determining whether or not appellate counsel was ineffective is the same as

it is for determining whether or not trial counsel was ineffective. Court's apply the same two part test in either case. *See, State v. Collins*, 677 So.2d 500, 95-1503 (La.App. 3 Cir. 5/8/96). The remedy for ineffective assistance of appellate counsel is to grant the petitioner an out of time appeal.

A criminal defendant has a Constitutional right to present a defense. *State v. Van Winkle*, 658 So.2d 198, 201,94-0947 (La. 6/30/95). The Louisiana Constitution Article I, section 16 provides that a criminal defendant has the right "to compel the attendance of witnesses, to present a defense, and to testify in his own behalf." "[I]t is the policy of the law to give to every man accused of a crime a reasonable opportunity to prepare and present his defense to the court or the jury." In fact, "It is difficult to imagine rights more inextricably linked to our concept of a fair trial." *VanWinkle*, 658 So.2d at 202.

The Louisiana Supreme Court, sitting in *Van Winkle,* addressed the significance of the defendant having the ability to contradict the evidence in a homicide case. *Van Winkle* involved the homicide by strangulation death of a twelve year old boy. The boy's mother was charged and convicted of the homicide. In *Van Winkle* the State theorized that the mother and the boy had gotten in an argument regarding the mother's drinking. The mother had then stomped on the boy's chest, stabbed him with a knife repeatedly, held a pillow over his face and strangled him causing his death.

In reversing the conviction and ordering a new trial, the *Van Winkle* Court placed great emphasis on the possible alternative explanations of some of the physical findings. The *Van Winkle* defense argued that the mother's homosexual roommate along with another man had killed the boy during the course of an anal rape. The *Van Winkle* Court held that exclusion of this alternative explanation of the evidence was not harmless beyond a

reasonable doubt as there was a reasonable probability that the exclusion of the alternate theory may have contributed to the verdict.

Petitioner notes that the question of ineffective assistance of counsel is a cumulative one. It is not proper to divide up each issue in an effort to conquer it; rather, the court must review the totality of the circumstances and the cumulative effect of trial counsel's lapses. *Strickland v. Washingon*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). "[I]nstances of cumulative trial errors may 'fit the Supreme Court's description of a denial of due process as 'the failure to observe that fundamental fairness essential to the very concept of justice.'" *Perez v. Dretke*, 172 Fed. Appx. 76, 81-82 (5th Cir. 2006) (*quoting Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992)).

Here, Mr. Nalls argued that his counsel failed to file a motion to quash based on prescription for the charge of armed robbery of which he was ultimately convicted. Typically, the failure to file a motion to quash bars relief unless the issue is a jurisdictional defect. *State v. Washington*, 900 So. 2d 1072 (La. 2005); *State v. Wilson*, 968 So.2d 776 (La.App. 2007). Prescription is generally a jurisdictional defect which requires reversal. *La.C.Cr.P. art. 532; State v. Price,* 461 So2d 503 (La.App.3Cir. 1984); *State v. Dillion*, 72 So.3d 473 (La.App.2011); *State v. Nicolosi,* 128 La. 836, 550 So. 475 (1910). Likewise, an invalid indictment is generally a jurisdictional defect. Where there is such a defect in one portion of an indictment the jurisdictional defect is pervasive and requires the entire case be reversed. *See, Price, Supra.* Here, all parties agree that the armed robbery charge was prescribed at the time the matter was called to trial. The only question is whether or not Mr. Nalls was prejudice by his counsel's failure to file a timely motion to quash. The answer to that question is "YES!".

Where there is a constructive denial of counsel, prejudice is presumed. A constructive denial of counsel occurs when counsel completely fails to

79

subject the accused's case to meaningful testing in the adversarial process or where circumstances surrounding the trial prevent the petitioner's attorney from rendering effective assistance. *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152* L.Ed.2d 914 (2002); *State v. Allen,* 800 So.2d 378 (La.App. 4Cir. 2001); *State v. Haider,* 777 So.2d 189 (La.App. 3Cir. 2000). Here, the State asserts that because the fifteen (15) year sentence on the armed robbery runs concurrent to the sentence on the rape charge, there is no prejudice to the Defendant. However, the State's simplistic view of prejudice is inherently wrong. It is not prejudice at sentencing that is at issue; it is prejudice infused throughout the trial process that requires reversal here. Because of trial counsel's failure to move to quash the armed robbery charge, the jury was allowed to hear and to consider evidence of armed robbery in an aggravated rape trial where the sole defense was consent. While we can never know what is in the minds of an individual juror, it is obvious that this added non-consensual element of the armed robbery served to thwart Mr. Nalls consent defense significantly and the prejudice is obvious on its face.

In considering the prejudice to Mr. Nalls, this court must reconsider the issues raised in Petitioner's Claim One relating to expert testimony and DNA evidence in this case. To begin, Petitioner notes that in confidential correspondence that Petitioner's trial counsel did not seek expert assistance because Petitioner did not have the funds to afford such assistance. Due to the nature of the correspondence, counsel will make the correspondence available to this Honorable Court and opposing counsel under seal at the request of the court. Because of the nature of the correspondence, no further public disclosure can be ethically or professionally made by undersigned counsel. To follow, Petitioner notes that counsel failed to file an *Ake* request

for funding; another manner in which trial counsel was constitutionally deficient. Even an indigent defendant has a Constitutional right to obtain an investigator or an expert witness to assist in his defense. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087,84 L.Ed.2d 53 (1985). The *Ake* Court stated, "When a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

Petitioner and this Honorable Court have previously discussed the issues relating to the DNA on the vaginal swab which was non-motile, the fact that other DNA on the scene belonged to another party, and the fact that some sources of DNA were not tested at all. According to a book published by the Cambridge University Press, motile sperm remains in the vaginal cavity no more than thirty-five (35) minutes following ejaculation. Grudzinskas, J.G. & Yovich, J.L., *Cambridge Reviews in Human Production: Gametes: The Spermatozoon,* Cambridge University Press at 159 (1995). Hence, Petitioner's contention that the lack of motility of his sperm given the quick report of the victim in this matter was critical to his consent defense has some scientific support and was worthy of exploring. The lack of explanation of the critical scientific evidence combined with the added non-consensual element of the armed robbery charge certainly impacted the fundamental fairness of the adversary process and casts serious doubt as to the integrity of the conviction. As such, Mr. Nalls should receive a new trial.

CONCLUSION AND PRAYER

For the reasons set forth above, Mr. Nalls is entitled to and should be granted both a new trial or in the alternative an evidentiary hearing regarding his claims. Wherefore, Mr. Nalls respectfully prays this Honorable Court grant his request as set forth above.

Respectfully,

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87

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY, that a copy of the above and foregoing pleading has been served via United States mail, postage pre-paid, via hand delivery, courier service or via facsimile upon the District Attorney of record or his designated representative this _____day of _____, 2012.

Respectfully,

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83

MARICE NALLS	*** NUMBER: 07-07-0697 SEC: VII**
	*** 19TH JUDICIAL DISTRICT COURT**
VS.	*** PARISH OF EAST BATON ROUGE**
N. BURL CAIN, WARDEN	*** STATE OF LOUISIANA**

COMMISSIONER'S RECOMMENDATION

The Petitioner, Marice Nalls, was charged with one count of aggravated rape, and one count of armed robbery on July 26, 2007.[1] He entered pleas of not guilty and waived his right to a jury trial.[2] After hearing all of the evidence, the trial court determined the Petitioner was guilty of both counts.[3] On January 12, 2009, the trial court sentenced Petitioner to a term of life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence for his aggravated rape conviction.[4] For his conviction for armed robbery, the trial court sentenced Petitioner to a term of fifteen years at hard labor without benefit of probation, parole, or suspension of sentence.[5] The trial court ordered that the sentences be served concurrently with each other.

On October 23, 2009, the First Circuit Court of appeal affirmed the Petitioner's convictions and sentences.[6]

On or about October 11, 2011, the Petitioner filed the instant application for post-conviction relief wherein he claims he received ineffective assistance of counsel, as follows: **1) IAC – Trial Counsel Failed to Secure Expert Testimony at Trial; 2) IAC – Trial Counsel Failed to Call Witnesses and Allowed Witnesses to Testify in Violation of His Right of Confrontation; 3) IAC – Trial Counsel Failed to Notify Petitioner About Withdrawing From the Case and of Court Rulings, and Lied to Petitioner; 4) IAC – Trial Counsel Failed to Properly Argue Issues of Flaws in Indictment; 5) IAC-Trial Counsel Failed to Argue That the Statute of Limitations on the Institution of Prosecution Had Expired & Appellate Counsel Failed to Raise the Issue on Appeal; and 6) Trial Counsel Failed to Ensure That the Trial Judge Complied With the Proper Reasonable Doubt Standard and Allowed the Trial Judge to Disregard Petitioner's Defense.**

On August 9, 2012 it was recommended that the application, with the exception of a portion of Claim 5, should be dismissed. In accordance with that recommendation, the Court

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[1] R. pp. 10-13, Indictment No. 07-07-097, filed July 26, 2007.
[2] R. p. 6, Minutes of Court dated September 29, 2008.
[3] R. p. 7, Minutes of Court dated October 1, 2008.
[4] R. pp. 8-9, Minutes of Court dated January 12, 2009.
[5] *Id.*
[6] *State v. Nalls*, 2009 KA 0772 (La. App. 1 Cir., 10/23/2009).

EXHIBIT 7

subsequently dismissed the Petitioner's application, with the exception of the portion of Claim 5 alleging IAC for counsel's failure to challenge the armed robbery charge. As to the remaining claim the parties were ordered to submit briefs on the issue of whether the failure to challenge the armed robbery charge constitutes ineffective assistance of counsel.

For the reasons more fully explained herein, it is the recommendation of this Commissioner that the remaining portion of Claim 5 be dismissed without the necessity of further proceedings or a hearing.

Statement of Facts

The Petitioner was convicted in connection with an aggravated rape and armed robbery that occurred in September 1998. In the early morning hours of September 24, 1998, the victim was raped at gunpoint, in her apartment where she resided with her boyfriend. While the Petitioner was raping the victim, her purse and television were taken from the apartment by another individual.[7] After the rape occurred the victim went to the hospital. Police were notified and a rape examination was performed. Because the victim had kept her eyes closed during the rapes, she was unable to provide a detailed description of her attacker, but she did testify that, after several minutes of being raped she heard a voice calling "Marice, come on. You're so stupid. Come on. Let's go." Some years later, the DNA profile from the vaginal swab collected from the victim was matched to one of the profiles in the CODIS database. The match was identified as belonging to the Petitioner.

At trial Petitioner testified he had no recollection of ever meeting the victim, but maintained that his DNA was found on the victim's vaginal swab because they had engaged in consensual sex at a nearby motel the night before the rape occurred.

Remaining Claim 5 – IAC for failure to challenge the armed robbery charge

Claims of ineffective assistance of counsel are evaluated by the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*[8]. Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both that counsel's performance was deficient and that the deficiency prejudiced the defense.[9] One claiming ineffective assistance of counsel must identify specific acts or omissions and general statements and conclusionary charges will not suffice.[10] There is a strong presumption that the conduct of counsel falls within a wide range of responsible, professional assistance.[11] Hindsight is not the proper perspective for judging the competence of counsel's trial decisions, and an attorney's

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[7] *State v. Nalls*, 2009 KA 0772, pp. 11-12 (La. App. 1 Cir., 10/23/2009).
[8] 466 U. S. 668, 104 S. Ct. 2052, 80 L.Ed.2d. 674 (1984).
[9] *Celestine v. Blackburn*, 750 F. 2d 353 (5th Cir. 1984).
[10] *Knighton v. Maggio*, 740 F. 2d 1344 (5th Cir. 1984).
[11] *State v. Myers*, 583 So. 2d 67 (La. App. 2nd Cir. 1991).

level of representation may not be determined by whether a particular strategy is successful.[12] In evaluating whether counsel's alleged error has prejudiced the defense, it is not enough for the defendant to show that an error had some conceivable effect on the outcome of the proceeding; rather, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.[13] Claims of ineffective assistance of counsel may be disposed of for either reasonable performance of counsel or lack of prejudice and, if one is found dispositive, it is not necessary that the court address the other.[14] A claim that an attorney was deficient for failing to raise an issue is without merit, when the substantive issue the attorney failed to raise is without merit.[15]

I note that once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel.[16]

In the instant matter, the State concedes that counsel was deficient for failing to file a motion to quash the indictment for armed robbery. The State argues however that the Petitioner was not prejudiced as a result of the alleged failure because his armed robbery sentence is run concurrent to his life sentence on his aggravated rape conviction. Alternatively, the State asserts that a finding of ineffectiveness would only entitle the Petitioner to relief on the armed robbery conviction only. The Petitioner, through attorney Cate L. Bartholomew, claims trial/appellate counsel was ineffective for failing to challenge the armed robbery on the basis of prescription. The Petitioner argues that counsel's failure to raise the issue warrants a new trial, suggesting that the failure to file a motion to quash the armed robbery charge allowed the jury to consider evidence of the armed robbery in connection with the aggravated rape charge.

As part of its response the State appears to acknowledge that the statute of limitations for armed robbery is 6 years but suggests that there was no prejudice because the Petitioner's sentence on the armed robbery was concurrent to his life sentence for aggravated rape. The State offers no statutory or jurisprudential authority to support this assertion, though it appears to be consistent with federal jurisprudence pertaining to the concurrent sentence doctrine.[17]

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[12] *State v. Brooks*, 505 So. 2d 714 (La. 1987).
[13] *Sawyer v. Butler*, 848 F. 2d 582 (5th Cir. 1988).
[14] *Murray v. Maggio*, 736 F. 2d 279 (5th Cir. 1984).
[15] *State ex rel. Roper v. Cain*, 763 So.2d 1, 5, 99-2173, p. 6 (La. App. 1 Cir. 10/26/99), writ denied, 773 So.2d 733, 2005-0975 (La. 11/17/00).
[16] *State v. Folse*, 623 So.2d 59, 71 (La. App. 1st Cir.1993).
[17] *See Generally Scott v. State of La.*, 934 F.2d 631, 635 (C.A.5 (La.),1991) (The two 50-year sentences for attempted murder, which run concurrently with the life sentence, have no adverse collateral consequences for Scott because of his life sentence without benefit of parole, probation, or suspension of sentence. *Williams v. Maggio*, 714 F.2d 554 (5th Cir.1983), *cert. denied*, 465 U.S. 1035, 104 S.Ct. 1306, 79 L.Ed.2d 704 (1984). We therefore affirm the district court's dismissal of habeas corpus relief on the attempted murder counts under the concurrent sentence doctrine).

Incidentally, the State does not suggest that it would be prejudiced by the vacating of the lesser concurrent sentence.

Pursuant to Art. 577 C.Cr.P., the issue that a prosecution was not timely may be raised at any time.

> **Art. 577. Pleading of limitation; burden of proof**
>
> The issue that a prosecution was not timely instituted may be raised at any time, but only once, and shall be tried by the court alone. If raised during the trial, a hearing thereon may be deferred until the end of the trial.
>
> The state shall not be required to allege facts showing that the time limitation has not expired, but when the issue is raised, the state has the burden of proving the facts necessary to show that the prosecution was timely instituted.

However, the Petitioner does not seek to raise the issue of prescription in his instant application for post-conviction relief, nor does he suggest that he was prejudiced because he was sentenced to a concurrent 15-year sentence on the armed robbery charge. Rather, he claims that counsel's failure to challenge the armed robbery charge allowed the jury to consider evidence of the armed robbery in connection with the aggravated rape charge.

His allegations, however, are insufficient to establish deficient performance and prejudice. As indicated in the decision rendered on the Petitioner's direct appeal, the evidence supported the Petitioner's conviction for aggravated rape.

> In finding the defendant guilty of aggravated rape, the trial court accepted that the defendant's DNA found on M.C.'s vaginal swab established that they had engaged in sexual intercourse. The trial court also found M.C.'s testimony that she had not consented to sexual intercourse, but had been raped at gunpoint, to be more credible than defendant's testimony that the two had engaged in consensual sexual relations at a location near M.C.'s apartment.[18]

Despite that the Petitioner complains that counsel's alleged failure allowed the **jury** to consider inadmissible evidence, the Petitioner waived his right to a jury and elected to be tried by the judge. There is nothing to indicate that any error in admitting evidence pertaining to the armed robbery influenced the verdict on the aggravated rape charge.[19] Therefore, even allowing for the possibility that counsel's performance was somehow deficient for failing to challenge the

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[18] *State v. Nalls*, 2009 KA 0772, 10 (La. App. 1 Cir.,2009).

[19] *See generally State v. Marshall*, 479 So.2d 598, 604 (La. App. 1 Cir.,1985) citing *State v. Marshall*, 359 So.2d 78 (La.1978) (Articles 770 and 771 of the Louisiana Code of Criminal Procedure are designed to guard against improprieties in the presence of the jury. These articles do not mandate a mistrial in a bench trial when a prohibited question is propounded.); *State v. Anderson*, 824 So.2d 517, 521, 2002–273 (La. App. 5 Cir. 7/30/02), *writ denied*, 847 So.2d 1254, 2002–2519 (La.6/27/03)(the admissibility of evidence in a judge trial is different from the requirements of jury trials.... A judge, unlike a jury, by virtue of the judge's training and knowledge of the law is fully capable of disregarding any impropriety); *State v. Lewis*, 359 So.2d 123, 125 (La.1978). *See also generally State v. Johnson*, 664 So.2d 94, 100–01, 94–1379, pp. 14–15 (La. 11/27/95) citing *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993) (errors leading to improper admission of evidence are subject to harmless-error analysis; error is harmless if verdict is "surely unattributable" to error).

armed robbery charge, the Petitioner fails to show how he may have been prejudiced as a result of the alleged deficiency.

Incidentally, I do not discount entirely that the failure to challenge the armed robbery may have involved trial strategy. As stated previously, the vast array of trial decisions, strategic and tactical, that must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel.[20]

In sum, even assuming that the time limitation for institution of prosecution for the armed robbery charge had expired, such that counsel's performance could be deemed deficient, there is nothing that would indicate any resulting prejudice relative to the aggravated rape conviction. Thus, even if counsel was deficient for failing to file a motion to quash or otherwise assert that the time limitation on the armed robbery charge had expired, the Petitioner has failed to show that prejudice resulted from the deficiency. The Petitioner's claim, that he was denied effective assistance of trial/appellate counsel for counsel's failure to argue that the time limitation on the armed robbery charge had expired, should be dismissed as without merit.

For the reasons stated herein, it is the recommendation of this Commissioner that the remaining portion of Claim 5 be dismissed without the necessity of further proceedings as his allegations are either without merit or factually insufficient to state a claim that would entitle him to relief. Should this Court agree, my formal recommendation follows.

COMMISSIONER'S RECOMMENDATION

Considering the Petitioner's application for post-conviction relief, the State's response thereto, the Court's October 3, 2012 Order dismissing the Petitioner's entire application except for that portion of Claim 5 alleging IAC for failure to challenge the armed robbery charged based on untimely prosecution and ordering briefs on that issue, the briefs submitted by the parties, the record and the law applicable; it is the recommendation of this Commissioner that the Petitioner's remaining claim(s), that portion of Claim 5 alleging IAC of trial/appellate counsel for failure to challenge the armed robbery charge based on untimely prosecution, should be dismissed without the necessity of further response and without a hearing, pursuant to La. C.Cr.P. arts. 926 and 927-929.

Respectfully recommended, this 31st day of January, 2013, in Baton Rouge,

HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS/JUDGMENT/ORDER/ COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED TO: ALL PARTIES.
DONE AND SIGNED THIS 31ST DAY OF January 2013.
Debbie Hucks
Deputy Clerk Of Court

NICOLE ROBINSON
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

[20] *State v. Folse*, 623 So.2d 59, 71 (La.App. 1st Cir.1993).

FILED
JAN 31 2013
Debbie Hucks
DEPUTY CLERK OF COURT

MARICE NALLS	*** NUMBER: 07-07-0697 SEC: VII**
	*** 19TH JUDICIAL DISTRICT COURT**
VS.	*** PARISH OF EAST BATON ROUGE**
N. BURL CAIN, WARDEN	*** STATE OF LOUISIANA**

ORDER ON COMMISSIONER'S REPORT

Having considered the Petitioner's application for post-conviction relief, this Court's Order dated October 3, 2012 dismissing the Petitioner's entire application except for that portion of Claim 5 alleging IAC for failure to challenge the armed robbery charge and ordering briefs on that remaining issue, the parties' subsequent briefs on Claim 5 (alleging IAC for failing to challenge the armed robbery charge), the Commissioner's Recommendation dated January 31, 2013, the record and law applicable, and

For the reasons set forth in the Commissioner's Recommendation, which the Court hereby adopts as its own;

IT IS ORDERED that the Petitioner's remaining claim(s) (that portion of Claim 5 alleging IAC for failing to challenge the armed robbery charge) is hereby **DISMISSED** pursuant to La. C.Cr.P. arts. 926 & 927-929.

THUS ORDERED this 15th day of March 2013 in Baton Rouge, Louisiana.

DON JOHNSON, JUDGE
SECTION VII
19TH JUDICIAL DISTRICT COURT

EXHIBIT 8

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DOCKET NO: 07-07-0697

STATE OF LOUISIANA
VERSUS
MARICE S. NALLS

****

NOTICE OF INTENT TO FILE A WRIT

NOW INTO COURT comes Defendant through undersigned counsel and does hereby respectfully inform this Honorable Court that he is aggrieved by this Honorable Court's ruling in the above captioned matter and does hereby desire to seek writs with the appeals court for the following reasons:

The defendant is aggrieved that the trial court denied his application for post-conviction relief.

WHEREFORE, for the reasons set forth above, the Defendant prays this Honorable Court set a date for the return of his writ application for Thirty (30) days from this Honorable Courts ruling or until April 15, 2013.

Respectfully submitted,

CATE L. BARTHOLOMEW, BAR NO. 24956
303 South Broad Street
New Orleans, Louisiana 70119
Telephone: (504) 822-1359
Direct: (504) 210-4990
Facsimile: (504) 822-1364
Email: catelaw@live.com

App
J

****

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the Defendant's notice of intent to seek writs is **HEREBY SET FOR A RETURN DATE OF** this _____ day of _____, 2013.

East Baton Rouge Parish, LOUISIANA, this _____ day of _____, 2013.

_____

JUDGE

IN THE

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

NO. 2013-KO-0599

STATE OF LOUISIANA

VERSUS

MARICE S. NALLS

ON WRIT OF CERTIORARI AND PROHIBITION FROM
THE 19TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
THE HONORABLE, DON JOHNSON
JUDGE PRESIDING
CASE NO. 07-07-0697 SEC. VIII

ORIGINAL APPLICATION OF THE DEFENDANT,

MARICE S. NALLS, PETITIONER

A CRIMINAL CASE ON APPLICATION OF POST-CONVICTION

Respectfully Submitted,

CATE L. BARTHOLOMEW, BAR NO. 24956
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Direct: (504) 210-4990
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Email: catelaw@live.com

Dated: APRIL 15, 2013

Ap. K

EXHIBIT 10

APPEN K

TABLE OF CONTENTS

TABLE OF EXHIBITS

TABLE OF AUTHORITIES

IN THE

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

NO.

STATE OF LOUISIANA

VERSUS

MARICE S. NALLS

May It Please The Court:

JURISDICTION OF THE COURT

This Honorable Court has jurisdiction over this case pursuant to *Article 5, Section 10 of the Louisiana Constitution of 1974.*

PROCEEDINGS OF THE COURT BELOW

This writ application arises from a denial of Petitioner's post-conviction application on March 15, 2013. There are no further court dates set in this matter at this time.

STATEMENT OF THE CASE

Mr. Nalls was charged by bill of indictment with one count of aggravated rape and one count of armed robbery. He waived his right to trial by jury and elected a judge trial. At the conclusion of the case, the trial court found Mr. Nalls guilty as charged on both counts. He was sentenced to life in prison without the possibility of parole on the aggravated rape count and to an additional term of fifteen years concurrent on the armed robbery charge. Sentencing occurred on or about January 12, 2009. Mr. Nalls filed a direct appeal with the Louisiana First Circuit Court of Appeals. The First Circuit affirmed his conviction and sentence on October 23, 2009. Mr. Nalls

filed pro se his application for post-conviction relief on October 11, 2011. A final decision deny Mr. Nalls application was rendered on March 15, 2013. This writ application follows timely.

STATEMENT OF FACTS[1]

On September 24, 1998, a woman alleged that she was raped at gunpoint inside her apartment. The woman kept her eyes closed during the rape and was unable to provide a description of her attack. However, she testified as to hearing one of the two individual's who broke into her home say, "Marice, come on. You're so stupid. Come on. Let's go." Following the rape, the woman discovered that her purse and her television were missing. She went to the hospital for a medical examination. Some years later, a DNA profile from the vaginal swab of the rape kit was identified in the CODIS data base as belonging to Marice Nalls. At trial, Mr. Nalls maintained that any sexual encounter with the woman was consensual.

ASSIGNMENT OF ERROR

1. **The trial court erred when it denied the defendant's application for post-conviction relief without the benefit of an evidentiary hearing.**

ISSUES PRESENTED FOR REVIEW

1. **Whether trial counsel's failure to file a motion to quash for reasons of prescription constituted ineffective assistance of counsel?**

2. **Whether trial counsel's failure to seek funds for and to hire or consult with an expert witness constituted ineffective assistance of counsel?**

3. **Whether appellate counsel's failure to argue prescription issues on appeal constituted ineffective assistance of counsel?**

LAW AND ARGUMENT

In his pro se application for post-conviction relief petitioner argued that his trial counsel was ineffective for cumulative reasons, that his

[1] While Mr. Nalls continues to maintain his innocence of these charges, the summary of the facts herein is taken from the recent opinions and judgments issued by the 19th Judicial District Court.

appellate counsel was ineffective and that a violation of *Crawford v. Washington* occurred in his trial. In his writ application, Mr. Nalls focuses on two issues of ineffective assistance of counsel: failure to file a motion to quash for purposes of prescription and failure to hire or consult with expert witnesses. Mr. Nalls also argues the prescription issue as to his appeal.

Ineffective assistance of counsel claims are best addressed in post-conviction applications because this process affords the trial court an opportunity to hold an evidentiary hearing and to review evidence that is not readily available in the record. *State v. Howard*, 751 So.2d 783 (La. 4/23/99). The *Sixth Amendment to the United States Constitution* guarantees a criminal defendant the right to effective assistance of counsel at all parts of the proceedings. "The right to counsel is a fundamental right of a criminal defendant; it assures the fairness, and the the legitimacy, of our adversarial process. The essence of an ineffective-assistance of counsel claim is that counsel's unprofessional errors so upset the adversarial balance between the defense and the prosecution that the trial was rendered unfair and the verdict rendered suspect." *Williamson v. Ward,* 110 F.3d 1508 (10th Cir. 1997).

While effective assistance may be difficult to define, Louisiana Courts have adopted a two pronged inquiry into the issue. First, the petitioner must show that counsel failed to perform some essential duty or function that reasonably competent counsel would have performed. *State v. Berry*, 430 So.2d 1005, 1007 (La. 1983). "The right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668 (1984). Reasonableness is viewed in light of the prevailing professional norms at the time of trial or appeal. Id. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness

of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The duty to investigate a criminal case is considered to be an essential function. *State v. Berry* at 1008; *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). This duty derives from the most basic functions of counsel, to make the adversarial process work. *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997). Investigation of a criminal case is such an essential function that even a lack of co-operation from the defendant will not excuse trial counsel's duty to thoroughly investigate a case. *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009). Similarly, counsel has a Constitutional duty to consult with the client on all important decisions and to keep the client informed of all important developments. *Hill v. Lockhart*, 474 U.S. 52,57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir., 2003). Mere review of the record with nothing more is per se unreasonable. *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994).

Second, the petitioner bears the burden of showing that counsel's ineffective assistance prejudiced his defense. Id. However, the Petitioner does not have to prove that the result of the trial would have been different, but only that there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In making a determination as to whether or not prejudice occurred, reviewing courts look to the entirety of the record to determine the "relative roll that the alleged trial errors played in the total context of trial." *Crockett v. McCotter*, 796 F.2d 787, 793 (5 Cir. 1986). Ineffective assistance of counsel claims are most properly addressed in an application for post-conviction relief which "enables the district judge . . . to order a full evidentiary hearing on the matter." *State v. Seiss*, 428 So.2d

444,449 (La. 1983). The remedy for ineffective assistance of trial counsel is to grant the petitioner a new trial.

Petitioner notes that the question of ineffective assistance of counsel is a cumulative one. It is not proper to divide up each issue in an effort to conquer it; rather, the court must review the totality of the circumstances and the cumulative effect of trial counsel's lapses. *Strickland v. Washingon*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). "[I]nstances of cumulative trial errors may 'fit the Supreme Court's description of a denial of due process as 'the failure to observe that fundamental fairness essential to the very concept of justice.'" *Perez v. Dretke*, 172 Fed. Appx, 76, 81-82 (5th Cir. 2006) *quoting Derden v. McNeel*, 978 F.2d 1453, 1457 (5th Cir. 1992).

Here, Mr. Nalls argued that his counsel failed to file a motion to quash based on prescription for the charge of armed robbery of which he was ultimately convicted. Typically, the failure to file a motion to quash bars relief unless the issue is a jurisdictional defect. *State v. Washington*, 900 So. 2d 1072 (La. 2005); *State v. Wilson*, 968 So.2d 776 (La.App. 2007). Prescription is generally a jurisdictional defect which requires reversal. *La.C.Cr.P. art. 532*; *State v. Price*, 461 So2d 503 (La.App.3Cir. 1984); *State v. Dillion*, 72 So.3d 473 (La.App.2011); *State v. Nicolosi*, 128 La. 836, 550 So. 475 (1910). Likewise, an invalid indictment is generally a jurisdictional defect. Where there is such a defect in one portion of an indictment the jurisdictional defect is pervasive and requires the entire case be reversed. *See, Price, Supra.* Here, all parties agree that the armed robbery charge was prescribed at the time the matter was called to trial. The only question is whether or not Mr. Nalls was prejudice by his counsel's failure to file a timely motion to quash. The answer to that question is "YES!".

Where there is a constructive denial of counsel, prejudice is presumed. A constructive denial of counsel occurs when counsel completely fails to

subject the accused's case to meaningful testing in the adversarial process or where circumstances surrounding the trial prevent the petitioner's attorney from rendering effective assistance. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *State v. Allen,* 800 So.2d 378 (La.App. 4Cir. 2001); *State v. Haider*, 777 So.2d 189 (La.App. 3Cir. 2000). Here, the State asserts that because the fifteen (15) year sentence on the armed robbery runs concurrent to the sentence on the rape charge, there is no prejudice to the Defendant. However, the State's simplistic view of prejudice is inherently wrong. It is not prejudice at sentencing that is at issue; it is prejudice infused throughout the trial process that requires reversal here. Because of trial counsel's failure to move to quash the armed robbery charge, the court was allowed to hear and to consider evidence of armed robbery in an aggravated rape trial where the sole defense was consent. Petitioner avers this added non-consensual element of the armed robbery served to thwart Mr. Nalls' consent defense significantly and the prejudice is obvious on its face.

A criminal defendant has a Constitutional right to present a defense. *State v. Van Winkle*, 658 So.2d 198, 201,94-0947 (La. 6/30/95). The Louisiana Constitution Article I, section 16 provides that a criminal defendant has the right "to compel the attendance of witnesses, to present a defense, and to testify in his own behalf." "[I]t is the policy of the law to give to every man accused of a crime a reasonable opportunity to prepare and present his defense to the court or the jury." In fact, "It is difficult to imagine rights more inextricably linked to our concept of a fair trial." *VanWinkle*, 658 So.2d at 202.

The Louisiana Supreme Court, sitting in *Van Winkle,* addressed the significance of the defendant having the ability to contradict the evidence in

a homicide case. *Van Winkle* involved the homicide by strangulation death of a twelve year old boy. The boy's mother was charged and convicted of the homicide. In *Van Winkle* the State theorized that the mother and the boy had gotten in an argument regarding the mother's drinking. The mother had then stomped on the boy's chest, stabbed him with a knife repeatedly, held a pillow over his face and strangled him causing his death.

In reversing the conviction and ordering a new trial, the *Van Winkle* Court placed great emphasis on the possible alternative explanations of some of the physical findings. The *Van Winkle* defense argued that the mother's homosexual roommate along with another man had killed the boy during the course of an anal rape. The *Van Winkle* Court held that exclusion of this alternative explanation of the evidence was not harmless beyond a reasonable doubt as there was a reasonable probability that the exclusion of the alternate theory may have contributed to the verdict.

In considering the prejudice to Mr. Nalls, this court must all reconsider the ineffective assistance of counsel issues raised in Petitioner's Claim One relating to expert testimony and DNA evidence in this case. To begin, Petitioner notes that in confidential correspondence that Petitioner's trial counsel did not seek expert assistance because Petitioner did not have the funds to afford such assistance. Due to the nature of the correspondence, counsel will make the correspondence available to this Honorable Court and opposing counsel under seal at the request of the court. Because of the nature of the correspondence, no further public disclosure can be ethically or professionally made by undersigned counsel. To follow, Petitioner notes that counsel failed to file an *Ake* request for funding; another manner in which trial counsel was constitutionally deficient. Even an indigent defendant has a Constitutional right to obtain an investigator or an expert witness to assist in his defense. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087,84 L.Ed.2d 53

(1985). The *Ake* Court stated, "When a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

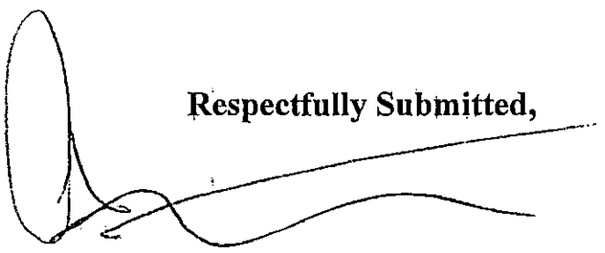
Petitioner and this Honorable Court have previously discussed the issues relating to the DNA on the vaginal swab which was non-motile, the fact that other DNA on the scene belonged to another party, and the fact that some sources of DNA were not tested at all. According to a book published by the Cambridge University Press, motile sperm remains in the vaginal cavity no more than thirty-five (35) minutes following ejaculation. Grudzinskas, J.G. & Yovich, J.L., *Cambridge Reviews in Human Production: Gametes: The Spermatozoon,* Cambridge University Press at 159 (1995). Hence, Petitioner's contention that the lack of motility of his sperm given the quick report of the victim in this matter was critical to his consent defense has some scientific support and was worthy of exploring. The lack of explanation of the critical scientific evidence combined with the added non-consensual element of the armed robbery charge certainly impacted the fundamental fairness of the adversary process and casts serious doubt as to the integrity of the conviction. As such, Mr. Nalls should receive a new trial and it was error to deny his post-conviction application without the opportunity for a hearing.

The right to effective assistance of counsel is the same on appeal as it is at trial. Thus, the rule for determining whether or not appellate counsel

was ineffective is the same as it is for determining whether or not trial counsel was ineffective. Court's apply the same two part test in either case. *See, State v. Collins*, 677 So.2d 500, 95-1503 (La.App. 3 Cir. 5/8/96). The remedy for ineffective assistance of appellate counsel is to grant the petitioner an out of time appeal. Here, Mr. Nalls retained the same attorney for both trial and direct appeal. Said counsel likewise failed to raise the issue of prescription of the armed robbery charge on appeal. The same legal and factual arguments apply to Mr. Nalls ineffective assistance of appellate counsel claim as to his ineffective assistance of trial counsel claim. Hence, Mr. Nalls should also be granted a new appeal.

CONCLUSION AND PRAYER

For the reasons stated above the Defendant prays this Honorable Court reverse the ruling of the trial court and grant his application for post-conviction relief.



Respectfully Submitted,

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Direct: (504) 210-4990
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY, that a copy of the above and foregoing pleading has been served upon opposing counsel of record by United States Mail postage pre-paid, by facsimile, by hand delivery, by electronic filing, or by courier service.

So Certified,

Cate L. Bartholomew, Bar No. 24956
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Direct: 504-210-4990
Fax: 504-822-1364

Opposing Counsel:
District Attorney
Parish of East Baton Rouge
222 St. Louis St.
Baton Rouge, LA 70802

Trial Court Judge:
Honorable Don Johnson
19th Judicial District Court-East Baton Rouge Parish
300 North Boulevard
Baton Rouge, LA 70802

STATE OF LOUISIANA V. MARICE S. NALLS

AFFIDAVIT OF VERIFICATION

I, undersigned counsel, do hereby certify, that all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate lower court, to the respondent judge, and to all other counsel and unrepresented parties.

The Parties are as follows:

For the Petitioner:

Cate L. Bartholomew, Bar No. 24956
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Opposing Counsel:
District Attorney
Parish of East Baton Rouge
222 St. Louis St.
Baton Rouge, LA 70802

Trial Court Judge:
Honorable Don Johnson
19th Judicial District Court-East Baton Rouge Parish
300 North Boulevard
Baton Rouge, LA 70802

Attorney for Petitioner

Signed this 15th day of April, 2013

Witnessed by: Robin Lawrence Jaspin, Notary Public

15

INDICTMENT

THE NINETEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

ED #932541

STATE OF LOUISIANA

VERSUS

MARICE S. NALLS
(B/M) DOB 2/8/76
5459 Prescott Road #165
Baton Rouge, LA 70805

Filed July 26, 2007
Deputy Clerk

19TH JUDICIAL DISTRICT COURT
EAST BATON ROUGE PARISH, LA
2007 JUL 26 PM 2:05
DEPUTY CLERK OF COURT

AGGRAVATED RAPE,
ARMED ROBBERY

A TRUE BILL

By: JOHN MACUS, JR.
FOREPERSON

Impaneled August 10, 2006

NO. 07-07-0697, SEC. VII

On this, the 26TH DAY OF JULY, 2007, the Grand Jury of the Parish of East Baton Rouge, State of Louisiana, charges that:

COUNT I on or about the 24TH DAY OF SEPTEMBER, 1998, at and in the Parish, District, and State aforesaid, MARICE S. NALLS, committed the offense of AGGRAVATED RAPE as defined by Louisiana Revised Statutes 14:42 in that HE COMMITTED AGGRAVATED RAPE UPON M.L (DOB 11/19/70).

COUNT II on or about the 24TH DAY OF SEPTEMBER, 1998, at and in the Parish, District, and State aforesaid, MARICE S. NALLS, committed the offense of ARMED ROBBERY as defined by Louisiana Revised Statutes 14:64 in that HE, WHILE ARMED WITH A DANGEROUS WEAPON, ROBBED M.L (DOB 11/19/70).

contrary to the law of the State of Louisiana and against the peace and dignity of the same.

DOUG MOREAU, DISTRICT ATTORNEY

William K. Morris
Assistant District Attorney

EXHIBIT
I

16

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NUMBER 2013 KW 0599

VERSUS

MARICE S. NALLS JUL 01 2013

In Re: Marice S. Nalls, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 07-07-0697.

BEFORE: WHIPPLE, C.J., GUIDRY AND HIGGINBOTHAM, JJ.

WRIT NOT CONSIDERED. Relator failed to comply with Uniform Rules of Louisiana Courts of Appeal, Rules 4-5(C)(6), (7), (8), (10), and (11) by failing to provide this Court with a copy of the March 15, 2013, ruling by the trial court, the trial court's reasons, if any, pertinent court minutes, all motions and court documents pertinent to the prescription issue, and a signed return date order. Additionally, in violation of Rule 4-5(A) the affidavit of service does not include the telephone numbers of opposing counsel and the trial court judge. Furthermore, although it is not a violation of the Uniform Rules, we note that relator failed to include a copy of the pertinent transcripts, which would be necessary to review his claims. See **City of Baton Rouge v. Plain**, 433 So.2d 710 (La.), cert. denied, 464 U.S. 896, 104 S.Ct. 246, 78 L.Ed.2d 235 (1983).

Supplementation of this writ application and/or an application for rehearing will not be considered. See Uniform Rules of Louisiana Courts of Appeal, Rules 2-18.7 & 4-9. Any future filing on this issue should include the entire contents of this application, the missing items noted above, and a copy of this ruling. In the event relator elects to file a new application with this Court, the application must be filed on or before July 30, 2013.

JMG
TMH
VGW

COURT OF APPEAL, FIRST CIRCUIT

Elizabeth D. Nantz

DEPUTY CLERK OF COURT
FOR THE COURT

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L

EXHIBIT
tabbies
11

APPENDIX
L

IN THE
COURT OF APPEALS, FIRST CIRCUIT
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

MARICE S. NALLS

NUMBER: 2013 KW 0599

FILING DATE: _____

_____
CLERK OF COURT

MOTION TO RE-FILE SUPERVISORY WRIT
ACCORDING TO INSTRUCTIONS FROM THIS COURT

MAY IT PLEASE THE COURT, Marice S. Nalls, *pro se* Petitioner herein, is applying for Supervisory Writs. Applicant, through his counsel of record, submitted Writ Application with this Court, and this Court entered order No. 2013-KW-0599, on July 01, 2013 with the option to refile by July 30, 2013. (Exhibit B).

Due to a personal situation, counsel withdrew as attorney of record on May 8, 2013. (Exhibit C). Applicant is submitting her original writ as Exhibit A with hand written corrections to include phone numbers of judge and district attorney. Please accept Exhibit A as the writ to be reviewed by this Honorable Court. Additionally, the omitted trial court ruling of March 15, 2013 is included as Exhibit M. Other Exhibits, including transcripts, are listed on the exhibit listing.

Applicant moves this Court to review the denial of post conviction relief by the Honorable Donald R. Johnson pursuant to applicable constitutional and statutory provisions.

Marice S. Nalls

Marice S. Nalls, Applicant, *pro se*
423240, Oak 2
Louisiana State Penitentiary
Angola, Louisiana 70712

A
M

EXHIBIT
tabbies
12

APPENDIX
M

AFFIDAVIT / CERTIFICATE OF SERVICE

I, Maurice S. Nalls, the foregoing Applicant, do hereby attest and affirm that the information contained herein is true to the best of my knowledge. Further, that all allegations in the foregoing are those of Maurice S. Nalls.

Additionally, I hereby certify that a copy of the foregoing has been sent, via U.S. Mail, postage pre-paid and properly addressed to Hillar C. Moore, III, District Attorney of East Baton Rouge Parish.

Done this 24 day of July, 2013, at Angola, Louisiana.

Marice S. Nalls

Marice Nalls
423240, Walnut 1
Louisiana State Prison
Angola, Louisiana 70712

Interested parties:

Opposing Counsel:

Hillar C. Moore, III, District Attorney
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Trial Court Judge:

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phone: 225-389-4717
FAX: 225-389-8941

Applicant (*pro se*):

Marice S. Nalls
423240, Oak 2
Louisiana State Penitentiary
Angola, Louisiana 70712

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NO. 2013 KW 1360

VERSUS

MARICE S. NALLS NOV 04 2013

In Re: Marice S. Nalls, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 07-07-0697.

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

WRIT DENIED.

MRT
JEK
TMH

COURT OF APPEAL, FIRST CIRCUIT

Elizabeth D. Nanta

DEPUTY CLERK OF COURT
FOR THE COURT

EXHIBIT
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APP
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IN THE
SUPREME COURT OF LOUISIANA
STATE OF LOUISIANA

ORIGINAL

NUMBER: _____ 13 KH 2806

P.B. 11/27/13

State of Louisiana
Ex rel., MARICE NALLS
Relator / Petitioner

Versus

BURL CAIN, Warden
Louisiana State Prison at Angola, LA
Respondent

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW

From the Denial of Supervisory Writ of Review in the First Circuit Court of Appeal , Docket No. 2013-KW-1360, before Kuhn, Higginbotham, and Theriot, JJ.; on denial of Post Conviction Relief in the 19th Judicial District Court, Docket No. 07-07-0697, Judge Donald Johnson, Presiding.

Respectfully submitted *pro se* this 26th day of November, 2013.

Marice Nalls
#423240, Oak 1
Louisiana State Penitentiary
Angola, Louisiana 70712

EXHIBIT 14

CRIMINAL POST CONVICTION PROCEEDING

ATTACHED AND FILED IN THE ORIGINAL ONLY

INPUT BY:

TMS

APPENDIX C. **SUPREME COURT OF LOUISIANA**
WRIT APPLICATION FILING SHEET

No._____

TO BE COMPLETED BY COUNSEL
or PRO SE LITIGANT FILING APPLICATION

TITLE

State ex rel. Marice Nalls

V.

Burl Cain, Warden

Applicant: Marice Nalls
Have there been any other filings in this Court in this matter? ☐ Yes [X] No

Are you seeking a Stay Order? NO
Priority Treatment? NO
If so you MUST complete & attach a Priority Form

LEAD COUNSEL PRO SE LITIGANT INFORMATION

APPLICANT:
Name: Marice Nalls. # 423240
Address: Oak 1 LA. State Prison
Angola, Louisiana 70712
Phone No. N/A Bar Roll No. N/A
Pleading being filed: [ ] In proper person

RESPONDENT:
Name: Hillar C. Moore, III, District Attorney
Address: 5th Fl. Gov. Bldg. 222 St. Louis St.
Baton Rouge, LA 70802
Phone No. _____ Bar Roll No._____
[X] In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

[ ] Civil, [X] Criminal, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: N/A Docket No. _____
Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: East Baton Rouge, 19th JDC Docket Number: 07-07-0697
Judge and Section: Judge Donald Johnson, Section "7" Date of Ruling/Judgment: March 15, 2013

APPELLATE COURT INFORMATION

Circuit: First Circuit Filing Date: 4-14-13 & 7-24-2013 Docket No. 2013-KW-1360
Applicant in Appellate Court: Marice Nalls
Ruling Date: November 04, 2013 Panel of Judges: Kuhn, Higginbotham, & Theriot, JJ. En Banc: ☐

REHEARING INFORMATION

Applicant: N/A Date Filed: _____ Action on Rehearing: _____
Ruling Date: _____ Panel of Judges:_____ En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date:_____, ☐ Trial in Progress, [X] Post Trial
Is there a stay now in effect? NO Has this pleading been filed simultaneously in any other Court? NO
If so, explain briefly:

_____

_____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

11-26-13
DATE

Marice A Nalls
SIGNATURE

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

TABLE OF AUTHORITIES

CONSTITUTION

CODE

FEDERAL CASES

STATE CASES

OTHER

IN THE
SUPREME COURT OF LOUISIANA
STATE OF LOUISIANA

State of Louisiana, EX REL.
MARICE NALLS,
Relator / Petitioner

Number:_____

FILED:_____

VERSUS

BURL CAIN, WARDEN
Respondent

_____
CLERK

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW

From the Denial of Supervisory Writ of Review in the First Circuit Court of Appeal , Docket No. 2013-KW-1360, before Kuhn, Higginbotham, and Theriot, JJ.; on denial of Post Conviction Relief in the 19th Judicial District Court, Docket No. 07-07-0697, Judge Donald Johnson, Presiding.

MAY IT PLEASE THE COURT:

NOW COMES Marice Nalls, Petitioner, *pro* se, who respectfully submits the instant Application for Writ of Certiorari or Review, pursuant to the denial of his Application for Supervisory Writ of Review in the First Circuit Court of Appeal, on denial of Post Conviction Relief in the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana. In support, Petitioner respectfully presents the following:

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Honorable Court pursuant to LSA-Const. 1974, Art. 5, § 5(A) and Louisiana Rules of Court, Rule X.

WRIT GRANT CONSIDERATIONS – RULE X

The ruling of the District Court is an erroneous and unreasonable application of established State and Federal laws, and departs from the legal precedents set by the United States Supreme Court and the Louisiana Supreme Court. The District Court's ruling in this case is sanctioned by the First Circuit Court of Appeal through the denial of Supervisory Writs.

Further, this sanctions and perpetuates violations of Petitioner's United States Constitutional rights under the Fifth, Sixth, and Fourteenth Amendments, and the Louisiana Constitution of 1974, Art. I, §§ 2, 13, 15, 19, and 22.

Wherefore, this Honorable Court should intervene on behalf of Petitioner, and after fair review of his claims, grant Petitioner the requested Post Conviction Relief.

In support of Petitioner's assertion of these Rule X violations, Petitioner presents the following:

STATEMENT OF THE CASE

Petitioner was charged with Aggravated Rape and Armed Robbery by Bill of Indictment on July 26, 2007. (Exhibit I).[1]

On June 19, 2007, Petitioner was arrested by the Baton Rouge Police Department for Aggravated Rape and Armed Robbery. On July 26, 2007, Petitioner was indicted by the Grand Jury of the Parish of East Baton Rouge, State of Louisiana of committing Aggravated Rape and Armed Robbery on the alleged victim, Melissa Vascocu.

Petitioner was convicted of Aggravated Rape and Armed Robbery on October 1, 2008 and sentenced on January 12, 2009 to a sentence of life without benefits and 15 years to run concurrently. (Exhibit J).

On June 12, 2009, Petitioner's trial and appellate attorney, Mr. Dele Adabamiji, filed an appellate brief in the First Circuit (2009-KA-0772). Petitioner filed a *pro se* supplemental brief on August 12, 2009. The appeal was denied on October 23, 2009. Petitioner was not notified of this ruling by the court or by his attorney.

On July 1, 2011, Petitioner filed a Motion for Out-of-Time Appeal and Certiorari in the Louisiana Supreme Court. (Docket No. 2011-KH-1489).

1 All Exhibits cited herein are contained in Appendix A, attached to the instant Application for Writ of Certiorari or Review (see Appendices & Exhibits page).

The Louisiana Supreme Court has not yet ruled on his Motion for Out-of-Time Certiorari or Review. However, Petitioner must file the instant PCR at this time to preserve timeliness under La. C.Cr.P. art. 930.8.

On October 10, 2011, post conviction was filed; final ruling was issued on March 15, 2013. Supervisory writ was filed on April 15, 2013. The Circuit Court issued orders for refiling and it was refiled on July 24, 2013. Ruling on this was issued on November 04, 2013.

This timely filed Application for Writ of Certiorari or Review, with attached Appendices, follows.

Petitioner avers that he has remained in continued custody since his arrest, and is currently an inmate at Louisiana State Prison at Angola, Louisiana, Burl Cain, Warden.

Wherefore, Petitioner asks that his efforts herein be liberally construed as he has made a good faith effort to follow form. See *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000) *citing Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595 (1972).

STATEMENT OF THE FACTS

It was alleged that on September 24, 1998, Petitioner, Marice S. Nalls, and an unknown person, went to Warren House on Greenwell Springs Road, Baton Rouge, Louisiana and picked out one of the apartments, specifically Apartment # 12, to rob or rape the occupant.

According to Melissa Vascocu the alleged victim, her boyfriend left for work about five a.m. that morning and she went back into her bedroom after her boyfriend had left. She then heard the bolt on the front door unlock, even though her bedroom door was closed. (Tr.p. 271).

She further stated that as soon as she walked out of the bedroom to see if her boyfriend had come back, she was immediately confronted by the alleged perpetrators, with one of them pointing a gun at her face. (Tr.pp. 271, 273).

However, she later testified that she heard the front door unlock, then she saw two men enter the apartment and she ducked behind a door. Then one of the men came over to her and placed the gun to her head (Tr.p. 273), and made her "come out from behind there."

This conflict was never sorted out, and the only DNA evidence collected from the alleged crime scene did not belong to Petitioner. This DNA evidence was a semen stain on the comforter that Ms. Vascocu was allegedly raped on top of, and proven by DNA analysis to belong to

someone else.

According to the victim, she was ordered at gun point to enter her bedroom and ordered to take her clothes off. She stated that she begged the perpetrator not to hurt her. She said that before she was raped, the perpetrator asked her for money and she told him that she did not have any money. She also stated that this was when the perpetrator changed his mind and decided to rape her. (Tr.p. 274).

It is interesting that she carried out a conversation with the perpetrator, yet could not identify him, or pick him out. She further testified that the perpetrator told her that he had been inside the apartment before, and saw a man and then waited until the man had left so that he could come back in. (Tr.p. 274). She didn't see him and her boyfriend did not see him, nor did she or her boyfriend hear the bolt unlock at any time. The lock was not picked, nor were there any signs of a break in. The door was intact when the police arrived, and there were no latent prints which could be attributed to the perpetrators.

Moreover, Ms. Vascocu stated that the perpetrator raped her anally and vaginally. She stated that the ordeal lasted almost an hour, and at all times the perpetrator held the gun to her head, but that at a certain time, he "got agitated, got off of me, stepped back, extended his arm. At that point, I was - - my eyes were cracked open. Extended the gun, cocked it. And I turned my head away." (Tr.p. 274). However, she could not describe the perpetrator, nor did she know who he was. This is another conflict in Ms. Vascocu's story that has not been reconciled.

Petitioner states that he has shown that he did not rape the alleged victim nor did he rob her. He could not have stayed in the apartment for almost two hours and not leave any trace that he was in the apartment. Further, that the DNA found inside the alleged victim was that of two men, and the sexual encounter with him happened at Ten Flags Motel on Airline Highway, not in Ms. Vascocu's apartment.

None of the evidence collected in that apartment, including latent fingerprints and DNA, was ever shown to belong to Petitioner. There was absolutely nothing that connected him to the apartment except the conflicting, impeached statements of the alleged victim.

Petitioner does not deny that he had consensual sex with Ms. Vascocu. However, that encounter happened at the Ten Flags Motel the night before. The presence of inactive (dead) spermatozoa in her vagina corroborates Petitioner's version of events, and shows that Ms. Vascocu has made up a story that she cannot keep straight.

ISSUES PRESENTED

1. TRIAL COUNSEL FAILED TO SECURE EXPERT TESTIMONY TO AID DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

2. TRIAL COUNSEL FAILED TO CALL WITNESSES FOR DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. FURTHER, ALLOWING TESTIMONY OF WITNESSES NOT CALLED AT TRIAL, THROUGH POLICE TESTIMONY AT TRIAL, VIOLATES *CRAWFORD V. WASHINGTON.*

3. TRIAL COUNSEL FAILED TO NOTIFY THE COURT HE HAD WITHDRAWN FROM PETITIONER'S CASE, FAILED TO NOTIFY PETITIONER OF COURT RULING, AND LIED TO PETITIONER ABOUT NOTIFYING THE COURT THAT HE HAD WITHDRAWN FROM THE CASE.

4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ARGUE ISSUES OF FLAWS IN INDICTMENT.

5. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ARGUE THAT THE STATUTE OF LIMITATIONS ON THE INSTITUTION OF PROSECUTION HAD EXPIRED. APPELLATE COUNSEL FAILED TO ARGUE ISSUE ON APPEAL.

6. TRIAL COUNSEL FAILED TO ENSURE THAT THE TRIAL JUDGE COMPLIED WITH THE REASONABLE DOUBT STANDARD OF *IN RE WINSHIP,* AND ALLOWED THE TRIAL JUDGE TO DISREGARD PETITIONER'S DEFENSE.

ARGUMENT

1. TRIAL COUNSEL FAILED TO SECURE EXPERT TESTIMONY TO AID DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner contends that his trial counsel was ineffective assistance of counsel at trial for failing to secure expert testimony to aid the defense. An expert would have given trial counsel the opportunity to fully develop and address all issues raised at trial concerning: 1) D.N.A. evidence; 2) expert opinion on the issue of untested DNA evidence; 3) medical testimony regarding the alleged victim's injuries; 4) the inaccurate description of the alleged perpetrator given to police sketch artists; 5) photographic evidence at trial; 6) opinion evidence given to the jury; and 7) other reasonable hypotheses of the incident.

The alleged victim, Melissa Vascocu was living in an apartment with her boyfriend, Mr. Burgess. She was in the midst of a divorce, and her ex-husband had their 3 children at the time of this alleged rape. This was reported to have happened at Ms. Vascocu & Mr. Burgess's apartment, while Mr. Burgess was at work, between 5 and 7 am on September 24, 1998. A mysterious person later called Ms. Vascocu, she testified, and said her purse and its contents had been found. However, the contents consisted of Ms. Vascocu's driver's license with a long outdated address, and a checkbook with her ex-husband's address and telephone number. Her ex-husband knew her apartment number, however she was not called there, but was called at her sister's home number. Ms. Vascocu could not explain how this could have happened:

A. I -- I do not remember how that took place. I really, honestly, do not.
(R.p. 326) (Exhibit M).

Petitioner states that he was prejudiced when there was no expert presented to rebut and to explain the D.N.A. evidence introduced at trial. The D.N.A. evidence in the apartment consisted of — as proven by analysis — only DNA samples of someone other than Petitioner.

This semen sample came from the comforter on Ms. Vascocu's bed, where she was allegedly raped. This evidence is inconsistent with the testimony of Ms. Vascocu, and an expert for the defense would easily point out other reasonable hypotheses consistent with Petitioner's defense of consensual sex. A reasonable hypothesis, counter to the State's, is that Ms. Vascocu did go to the Ten Flags Motel and have consensual sex with Petitioner. This is why Petitioner's semen was found only in her vagina, and nowhere in her apartment. She also had sex at home with someone else, whether consensual or not, where a semen sample was left on the comforter on top

of her bed, her underwear, and her t-shirt.

The dead spermatozoa from Petitioner proves two things: 1) Petitioner had sex with Ms. Vascocu at approximately 9 pm the night before this alleged rape thirteen hours prior to the time the doctor did her exam (R.p. 344) (Exhibit R); and 2) if Ms. Vascocu was indeed raped between 5 and 7 am the next morning, the semen from that rape could not possibly have come from Petitioner, but had to come from someone else, and ended up on Ms. Vascocu's comforter, underwear, and t-shirt.

Additionally, it is common knowledge that emission of semen is not necessary to complete a rape. If this alleged rapist did not ejaculate inside of Ms. Vascocu during the morning hours, Petitioner's dead spermatozoa from the night before would still be present in her vagina. Indeed, this alleged rapist did not ejaculate inside Ms. Vascocu's rectum, though she claims anal rape as well.

This also means that the alleged perpetrator may have ejaculated somewhere else, namely the comforter (which was proven not to be Petitioner's DNA), and on Ms. Vascocu's underwear and t-shirt which were not tested for DNA, even though they tested positive for semen. Clearly, an expert was needed to clarify the exculpatory nature of these facts and evidence at trial, especially the consensual aspects.

Further, the fact that only the vaginal swabs were tested and produced DNA of Petitioner implicates the failure of the underwear and t-shirt semen stains to be tested as potential exculpatory evidence that was prejudicially abandoned. An expert would have shed light on the subject of Petitioner's hypothesis as being the most realistic scenario.

The prosecutor told the judge that the State's expert testified that it is not unusual to find dead spermatozoa in a rape victim's vagina. (R.pp. 469-494) (Exhibit N). However, an expert for the defense would have pointed out that this would be true only if many hours had passed since the semen was presented. In this case, only two hours at most since the first alleged sexual assault, and half and hour after a second assault allegedly elapsed, and would present active, live spermatozoa in the vagina upon examination.

On cross-examination, Ms. Vascocu told the court:

> A. It -- all I can tell you is that it started close to five o'clock in the morning, and by the time I reached the hospital, it was close to seven. What time it was when anything was taking place in-between five and seven, I cannot tell you. I do not know.

Q. Okay. But you're positive, though, that every -- all this incident happened between five and seven o'clock in the morning; correct?

A. Approximate times. Yes.

(R.pp. 315-316) (Exhibit O).

Another critical fact is that Ms. Vascocu described a suspect to police sketch artists that did not look like the instant Petitioner in any regard. This was done right after the alleged incident, when the details would still be fresh in her mind.

Q. So you did get a look when — when this was happened [sic].

A. Initially I got an initial look but not long enough to be able to recall what this person looked like to — to do a composite and to say absolutely one hundred percent I am positive this is him. I could not do it and I wasn't going to submit that.

Q. So what you're telling me right now is that the composite composed by the police was their own imagination, not what came from you.

A. I don't — I don't know.

Q. Did you take a look at the composite when they were finished?

A. I did. And I — I could — I could not be a hundred percent sure that that was the person so I asked him not to submit it.

(R.p. 318) (Exhibit P).

An expert for the defense would have shed light on this anomaly.

Ms. Vascocu further stated that after the alleged rape, she did not call 911, but called her boyfriend, Ronnie Burgess, who was at work in New Orleans, then drove herself to the hospital.

The State's expert testified that Ms. Vascocu was calm and cooperative when she got to the hospital, and that this was not unusual. (R.p. 350) (Exhibit Q). Without an expert to explain that such behavior, immediately after an alleged traumatizing two hour vaginal and anal rape, would be extremely unusual and failure to present such expert testimony is prejudicial to Petitioner. It allowed the State to present expert opinion favorable to the State, and only expert opinion favorable to the State. Without rebuttal of the State's expert, the State could develop prejudicial assumptions that would ordinarily be held in check by an expert for the defense.

An expert to testify for the defense at trial would have effectively rebutted the prejudicial assumptions erroneously elicited by the State. The State's theory of the case was only that — a theory. This theory should have been subjected to rebuttal, especially through the use of expert testimony, which is Petitioner's right that was neither utilized, nor honored by his trial counsel. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), quoting *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431 (1971).

Where the prosecution experts were given leeway to testify, the Petitioner's expert would have been allowed to testify as well, had Petitioner's attorney called for one. See, *United States v. Riddle*, 103 F.3d 423 (5th Cir. 1997); *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001). And see, *United States v. Lueben*, 812 F.2d 179 (5th Cir. 1987), where the *Lueben* Court held it to be reversible error for the trial court to disallow a defendant's rights to due process, and to offer witnesses / rebuttal evidence. Clearly, Petitioner's counsel was ineffective assistance of counsel for failing to do so.

Petitioner asserts that it cannot be a "trial strategy" to completely disregard this area of defense, especially in light of the fact that expert testimony encompassed several areas of expertise throughout the trial as enumerated above. A "strategic" decision is a decision "that . . . is expected . . . to yield some benefit or avoid some harm to the defense." *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999).

Petitioner contends that the only harm avoided by his trial counsel's failure to utilize expert testimony was to the prosecution. The prosecution also received the benefit of prejudice to the Petitioner caused by his trial counsel's errors.

Under the Sixth Amendment, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Lindstadt v. Keane*, 239 F.3d 191, 200 (2nd Cir. 2001) (quoting *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052).

An expert was essential to the defense in order to relate the Petitioner's version of events as the more probable scenario to the jury. Viewing the evidence in light of both the State's theory versus the Petitioner's may have caused a reasonable finder of fact to believe that Petitioner's version of events was the most probable, and realistic version according to the facts and evidence. *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005).

Of course, an expert to further impeach Ms. Vascocu's inconsistent, uncorroborated story would have called into question Ms. Vascocu's veracity, as well as effectively rebutting the State's experts. Plus, exposing a more logical scenario — a more reasonable hypothesis — to the judge would have undermined the State's theory, as well as the State's whole case-in-chief.

Obviously, expert testimony in this regard was a necessary defense, and trial counsel was completely inert regarding these critical issues. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

2. TRIAL COUNSEL FAILED TO CALL WITNESSES FOR DEFENSE AT TRIAL, AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. FURTHER, ALLOWING TESTIMONY OF WITNESSES NOT CALLED AT TRIAL, THROUGH POLICE TESTIMONY AT TRIAL, VIOLATES *CRAWFORD V. WASHINGTON.*

On direct examination, Sgt. Lynn Ferguson testified that Ms. Vascocu called the police station and reported that someone had found her purse. Sgt. Ferguson then dispatched Officer Katrel (phonetic) to the place Ms. Vascocu said her purse was located. (R.pp. 375-379) (Exhibit S).

On cross-examination, Sgt. Ferguson stated that Ms. Vascocu told her that the guy who found her property was named Jessie Straughter. (R.p. 380-381) (Exhibit T). Sgt. Ferguson never interviewed him, and further testified:

Q. So all y'all did was just go to there and pick up this property and maybe - -

A. Officer Katrel (phonetic) talked to him.

Q. Officer Katrel (phonetic). Okay. Officer Katrel just went there, picked up the property, and maybe — that was the end of it.

A. Yes.

Q. Correct?

A. Correct.

(R.pp. 380-381) (Exhibit T).

Jessie Straughter was never called to the stand at trial, nor was Officer Katrel. Only Sergeant Ferguson's testimony <u>for them</u> was ever admitted at trial, and heard by the judge. This violates the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). It further violates the mandate of *Crawford* which specifically disallowed a trial court from allowing statements by proxy, via the police, under the guise of state evidentiary rules stating:

> Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitional practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court."

Id. at 1364.

In "the crucible of cross-examination" *Crawford, supra*, Jessie Straughter and Officer Katrel would have been able to expound upon the facts, and answer the questions as to 1) who actually found Ms. Vascocu's purse; 2) does Jessie Straughter know Ms. Vascocu; 3) what was

found, and where was it found; 4) how did Jessie Straughter know that Ms. Vascocu was at her sister's house, and how did he get that phone number; 5) what questions did Officer Katrel ask, and what were the answers given at theat time; and 6) where is Officer Katrel's report, and what was listed in that report.

Since Sergeant Ferguson testified that "Officer Katrel (phonetic) talked to him," that conversation becomes crucial to the defense. By not calling either witness, Petitioner's trial counsel failed to render effective assistance of counsel. Trial counsel questioned the lack of information surrounding this incident, yet never interviewed these witnesses, or otherwise investigated the matter. If found to be a set-up, as the partial facts suggest, then testimony in this regard would have further impeached Ms. Vascocu's veracity.

Their testimony is probative evidence of a contested fact, and is essential to the defense in this case. On the other hand, "The probative value of the mere fact that an out-of-court declaration was made is generally outweighed greatly by the likelihood that the jury will consider the statement for the truth of the matter asserted." *State v. Hearold*, 603 So.2d 731, 737 (La. 1992).

Therefore, the State was required to call these witnesses at trial in order to introduce the evidence. Failure to do so violated Petitioner's Confrontation Clause rights. *Crawford*, *supra.*

The fact that the testimony was introduced, whether erroneously or not, underscores trial counsel's failure to investigate the facts and witnesses involved in this issue. *Lindstadt* v. *Keane*, *supra* at 239 F.3d 200.

3. TRIAL COUNSEL FAILED TO NOTIFY THE COURT HE HAD WITHDRAWN FROM PETITIONER'S CASE, FAILED TO NOTIFY PETITIONER OF COURT RULING, AND LIED TO PETITIONER ABOUT NOTIFYING THE COURT THAT HE HAD WITHDRAWN FROM THE CASE.

Petitioner was precluded from raising an ineffective assistance of counsel claim on direct appeal. Louisiana courts have held that ineffective assistance of counsel claims are better dealt with on Post Conviction Relief, where an evidentiary hearing can be held to develop the facts of the claim. *State v. Lacaze*, 824 So.2d 1063 (La. 2002), citing *State v. Strickland*, 683 So.2d 218 (La. 1996) (remand for hearing to determine if counsel's actions and inactions were strategy or dereliction), and citing *State v. Sullivan*, 559 So.2d 1356 (La. 1990) (remand for hearing to

determine if Brady material was suppressed and if counsel was ineffective); *State v. Voorhies*, 623 So.2d 1320 (La. 1993); *State v. Jacobs*, 596 So.2d 200 (La. 1992); *State v. Robinson*, 577 So.2d 5 (La. 1991).

Ineffective assistance of counsel must be raised on Post Conviction Relief because determination requires an evidentiary hearing. *State v. Robinson*, 816 So.2d 846 (2001-1373 La. 4/26/02) citing *State v. Allen*, 664 So.2d 1264 (La. App. 1 Cir. 1995); *State v. Martin*, 607 So.2d 775 (La. App. 1 Cir. 1992); *State v. Ratcliff*, 416 So.2d 528 (La. 1982). *See also*, *State v. Mims*, 552 So.2d 664 (La. App. 2 Cir. 1989); *State v. Green*, 562 So.2d 35 (La. App. 3 Cir. 1990); *State v. Moody*, 779 So.2d 4 (La. App. 1 Cir. 2000); *State v. Prudholm*, 446 So.2d 729 (La. 1984).

On June 10, 2009, Petitioner's attorney, Dele A. Adebamiji, filed a direct appeal brief on his behalf. (Exhibit W). The case was on direct appeal from conviction in the 19th Judicial District Court (Docket No. 07-07-0697, Section "7") on the charges of aggravated rape and armed robbery, with a sentence of life imprisonment without benefits, and 15 years to run concurrently, respectively.

On June 16, 2009, Petitioner's attorney sent him a copy of the appellate brief filed, a *pro se* briefing notice, and a letter stating that he was withdrawn from the case, and that he would have no further contact with the instant Petitioner. (Exhibit A).

Specifically, Mr. Adebamiji stated in his letter,

> "However, I must withdraw from your case at this point. I will no longer represent you on this matter. My representation stops at the filing of your appeal and I have given your name and address to the court of appeal. So please watch out for all and any other important dates in the future. Don't forget that you have two years to do a post-conviction relief as stated by the judge. Once again, please note that I have withdrawn from your case with this letter as I cannot longer bear such expenses."

Petitioner avers that his counsel of record withdrew from the case, and unequivocally stated that he notified the appellate court of Petitioner's address for notification. Indeed, Petitioner subsequently filed a Supplemental Brief, with leave to do so from the appellate court. (Exhibit B). However, Petitioner received no other correspondence from the appellate court. He was his own (*pro se*) attorney at this point, and should have been timely served a copy of any ruling(s) in his case.

Petitioner sent four letters to his attorney on October 13, 2009, February 11, 2010, July 27, 2010, and April 11, 2011, asking Mr. Adebamiji to please forward any ruling to him from the

court when they ruled. (Exhibit C). Petitioner has received no response or ruling from the court, nor has he received an answer to any of his letters to Mr. Adebamiji asking about the status of his case. (Exhibit C).

After prolonged waiting for a response from the appellate court, and no answer from the attorney, Petitioner asked his mother to inquire about the time frame in which he could expect a ruling in his case. His mother was told by the appellate court's Clerk of Court that Petitioner's appeal had been denied. Petitioner was never notified of any rulings or orders issued.

Additionally, Petitioner's mother, Gale Edwards, has sworn an affidavit (Exhibit H) stating that she has never received a copy of the ruling from the appellate court, nor from Mr. Adebamiji. Indeed, Mr. Adebamiji told Ms. Edwards during her inquiries in 2010-2011 that he had not received a ruling from the court.

Petitioner filed a "Motion for Official Status of Defendant's Case Pending in the First Circuit Court of Appeal" (Exhibit D) stating that the official status of his case must be received by him in order to initiate a response, or to put Petitioner on notice that he must seek writs in subsequent courts. Petitioner points to "a substantial delay" in Petitioner "receiving notice of denial," citing *Varnado v. Cain*, [2003 U.S. Dist. LEXIS 3351 (E.D. La. 2003)] citing *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

Petitioner has maintained that in order for a defendant to proceed further with his case, he must be notified of rulings in his case. Further, Petitioner asked that his time limitations be considered as still tolled. *United States v. Patterson*, 211 F.3d 927, 930 (5th Cir. 2000): "'The doctrine of equitable tolling preserves a plaintiff's claim when strict application of the statute of limitations would be inequitable.'" (quoting *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998). Petitioner maintains that it would not be fair to start the limitations clock until Petitioner has been notified of a denial, and put on notice that he must move to the next step in exhausting his avenues of appeal.

Petitioner further maintains that it was unreasonable to notify Mr. Adebamiji of any rulings in the case expecting him to notify this Petitioner, especially since Petitioner would file any further documents *pro se*, and was the last person to file any documents (supplemental *pro se* brief) with the appellate court. It is only logical that the appellate court should notify Petitioner of its rulings, regardless of whether the Court notified Mr. Adebamiji. It is Petitioner

who must know when it is time to advance his case, and have possession of the official documents to legally do so.

In response to Petitioner's 'Motion for Official Status of Defendant's Case Pending in the First Circuit Court of Appeal' (Exhibit D) (mailed on April 25, 2011), the Clerk of Court for the First Circuit returned his motion UNFILED and included a copy of the ruling dated October 23, 2009. (Exhibit E & F). Petitioner received this ruling on April 29, 2011 and signed for it as legal mail. The Clerk's letter was dated and postmarked April 27, 2011. (Exhibit E).

It should be noted that the First Circuit's Ruling (Exhibit F) contains the addresses of the District Attorney, Mr. Adebamiji, and Petitioner as interested parties, yet Petitioner was never served a copy of the ruling by the court. Petitioner presented his Motion within 30 days of being served a copy of the First Circuit's ruling, which was sent with the Clerk's letter.

Proper procedure includes notification, and simultaneous service of copies of all filings and rulings, to all concerned parties in court cases. The First Circuit has denied the instant Appellant of his constitutional right to appeal by failing to timely notify Appellant of their ruling, which denied him the opportunity to timely pursue certiorari or review in the Louisiana Supreme Court.

> "A defendant's right to the assistance of counsel is basic to our legal system and guaranteed by both federal and state law. U.S. Const.Amend. VI; La. Const. Art. I § 13 (1974); La. Code Crim. Proc. Art. 511. However, the right cannot be manipulated to obstruct the orderly procedure of the courts or to thwart the administration of justice. *State v. Seiss*, 428 So.2d 444 (La. 1983); *State v. Champion*, 412 So.2d 1048 (La. 1982); *State v. Johnson*, 389 So.2d 1302 (L.a 1980); *State v. Harper*, 381 So.2d 468 (La. 1980)."

State v. McClintock, (La. App. 3 Cir. 1988), 535 So.2d 1231, 1233.

Since Petitioner was abandoned by his attorney at a critical time, and the First Circuit failed to serve a copy of its October 23, 2009 ruling to Petitioner until April 25, 2011, leave to file an out-of-time Application for Certiorari or Review was filed for. (Exhibit L). No decision has been made on this Application at the time of filing the instant PCR.

However, the facts of this issue, and the record evidence, show that Mr. Adebamiji lied to Petitioner, ignored the rules of the court, and rendered ineffective assistance of counsel by sabotaging Petitioner's ability to timely file for certiorari in the Louisiana Supreme Court.

4. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ARGUE ISSUES OF FLAWS IN INDICTMENT.

First, an indictment may contain one or more of several acts, intents or results charged under one offense, when that offense may be committed by doing one or more of several acts, intents, or results. But it must be conjunctively charged; La. C.Cr.P., Article 480.

In the instant case, the State erroneously amended the grand jury's indictment to include more than one crime for one count (Count 1) of the indictment. The State further added the element of "principle" to the indictment's armed robbery charge. (R.p. 473) (Exhibit N).

Petitioner is charged with one count of aggravated rape. To that one charge, though the indictment states only R.S. 14:42, the State added R.S. 14:42(A)(2) and (A)(3). However, they are not conjunctively charged, but unconstitutionally disjunctively, and alternatively charged. Also, they are not related to one offense, but to two separate alleged offenses in one count. Next, one offense cannot be committed by doing both of these acts. Each one is a separate and distinct crime, with different elements to each. Charging both crimes under one count makes the indictment duplicitous.

Alternatively, Petitioner contends that this is double jeopardy. The Double Jeopardy Clause prohibits government from subdividing a single criminal conspiracy into multiple violations or separate charges, and/or pursuing successive prosecutions against defendant. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969); *United States v. Stoddard*, 111 F.3d 1450 (9th Cir. 1997); *United States v. Aguilera*, 179 F.3d 604 (8th Cir. 1999).

Further, Petitioner was not indicted by the grand jury and charged with R.S. 14:42(A)(2) and/or (A)(3). Both (A)(2) and (A)(3) were added by the prosecutor, and not found by the grand jury as required by the U.S. and Louisiana Constitutions. Neither has the added charge of "principle" by the State. This indictment has never been legally amended. (Exhibit I).

A defendant confronted with an accusation which referred to a statute which denounced different possible acts was considered in *State v. McQueen*, 230 La. 55, 87 So.2d 727 (1955); "A reference to the statute furnished no aid in ascertaining just what act [the grand jury] (was) considered to have contravened its provision(s)."

Though a district attorney is a legal advisor to the grand jury, he is not in authority over them. Their authority comes from the court, and they can charge what the district attorney asks for, not charge at all, or anything in between that it finds. *United States v. Stephens*, 510 F.2d

1101, 1106 (5th Cir. 1975), citing *Brown v. United States*, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609 (1959).

If the grand jury finds charges different than what the district attorney was seeking, he can opt to refuse to endorse it, but he cannot change it one iota, because he is not the one instituting the criminal prosecution, the grand jury is. *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965), John R. Brown, (Circuit Judge, concurring specially), at 184-185.

> "There are a number of reasons why it is essential that the Grand Jury's conclusions be reflected in language which is legally sufficient and in proper form. First, and perhaps foremost, in no other way can the Grand Jury effectively carry out its obligations as charged to it by the Judge . . . Although, as the Court holds, the 'indictment' thus returned would be ineffective without the signature of the District Attorney, reporting its conclusions in the traditional legal form would do two things. First, it would clearly reflect the conscientious conclusion of the Grand Jury itself. And, second, it would, at the same time, sharply reveal the difference of view as between the Grand Jury and the prosecuting attorney." At 176; "When a United States Attorney prepares and signs an indictment, he does not adopt, approve, or vouch for the charge, nor does he institute a criminal prosecution . . . only the Grand Jurors themselves have that power. It would be grossly wrong for it to be usurped." (Emphasis in original).

In the instant case, the prosecutor decided which elements to charge. He is not in a position to even hazard a guess as to the grand jury's intentions as to which "act (was) considered to have contravened its provision(s)." *State v. McQueen*, *supra*. This is a clear violation of the right to a grand jury, and to Due Process.

Instead, the prosecutor simply disregarded any "difference of view as between the grand jury and the prosecuting attorney," and just charged what he wanted to. Further, this prejudiced Petitioner since the judge was specified which charge was used to find guilt or acquit as to one particular charge.

Count 1 was sliced into 2 separate elements — Immediate bodily harm, and armed with weapon — during closing Arguments by the State. (R.pp. 469-474). (Exhibit N). Simply put, aggravated rape under the statute R.S. 14:42(A)(3), is a crime in which a weapon is essential to the offense. It cannot be committed unless the offense is committed while the perpetrator is using a weapon. Under R.S. 14:42(A)(2), a rape is considered to be under aggravating circumstances when the victim is threatened with "immediate bodily harm with apparent power of execution"; no weapon is involved in this distinct crime.

Therefore, the prosecutor's illegal amendment to the indictment allowed a judge or jury

to convict the Petitioner of the element 14:42(A)(2), or 14:42(A)(3). Six jurors may have voted for conviction on the element (A)(2), and the rest of the jury may have voted for conviction on (A)(3), but the requisite number of jurors may not have voted to convict on the same charge. In a judge trial, which of the two (duplicitous) elements were proven on the one charge? The fact that a jury (or judge in this situation) can choose between them violates Due Process.

This is true as well for the alleged vaginal rape, as opposed to the alleged anal rape, which are two separate elements that constitute "rape" outside any "aggravating circumstances." The indictment fails to specify either one, or both (two separate crimes) of these essential elements. How many jurors found there was vaginal rape? How many jurors found anal rape? In a judge trial, which of the two elements was proven in the one count? This cannot be determined from the record, and violates Due Process.

Trial counsel failed to raise these issues, and allowed Petitioner's rights to be violated. The record evidence shows trial counsel's lapses to constitute ineffective assistance of counsel.

5. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO ARGUE THAT THE STATUTE OF LIMITATIONS ON THE INSTITUTION OF PROSECUTION HAD EXPIRED. APPELLATE COUNSEL FAILED TO ARGUE ISSUE ON APPEAL.

On the non-capital crime of aggravated rape, the State had six years in which to institute prosecution. La. C.Cr.P., Art. 572. However, the State exceeded the prescriptive period of Article 572, and prosecuted the instant case after a 10 year period. This is true for the armed robbery charge as well as in the instant case. The July 26, 2007 indictment clearly states September 24, 1998 as the date of these alleged crimes. (Exhibit I).

Further, as the prosecutor told the court:

> MR. MORRIS: Judge, as I said in opening, this case involves a man that ran and eluded justice for just over ten years to the day. September Twenty-Fourth, 1998, is when this event happened.
> (R.p. 469) (Exhibit N).

Clearly, the prescriptive period elapsed before prosecution was instituted, and Due Process was violated by the State in this case. It appears that the State feels that an armed robbery charge can "ride along" with a crime that is not prescribed. However, that is an erroneous assumption because both charges are prescribed according to the law.

The issue here is that aggravated rape, as charged herein, was not a capital crime. The

record clearly reflects that Petitioner was not given a capital trial. The provisions of C.Cr.P. Art. 782 were not applied to the instant case. This has never been addressed in any court by trial counsel or appellate counsel.

Neither has the fact that since "death or life imprisonment" is merely the sentencing range of the jury in a capital case — Article 571 — it is unreasonable to dissect the phrase, and apply part of it ("life imprisonment") to a non-capital crime. This was never the legislative intent of this statute; as the Official Revision Comment clearly shows, it applies only to capital offenses.

OFFICIAL REVISION COMMENT (Article 571) (1966);

> (a) Although there are serious considerations for establishing a prescriptive period on the prosecution of capital crimes (See A.L.I. Model Penal Code, p.17 (Tent. Draft No.5, 1956)), the above article reflects the basic policy that there should be no prescriptive period on the prosecution thereof. This is also the policy of most of the other states of the union and of the United States.
> (b) Under Art. 8 of the 1928 Louisiana Code of Criminal Procedure the following crimes were specifically excepted from the prescriptive period: murder, aggravated rape, aggravated kidnapping, aggravated arson, aggravated burglary, armed robbery, and treason. Under Art. 571 above, only crimes punishable by death are excepted from prescription; therefore, Art. 571 changes the law by making aggravated arson, aggravated burglary, and armed robbery subject to a prescriptive period.

This official revision comment was adopted in 1966 to clarify that all crimes that were not capital crimes are subject to prescription. In 1966, when this article was amended, the crime of aggravated rape was still a capital offense, and still included under 571. However, when the death penalty (capital crime status) for aggravated rape was found unconstitutional, it automatically joined aggravated arson, aggravated burglary, and armed robbery as being excluded from the statute, and subject to prescription as non-capital crimes under Article 572.

This is easily shown by the legislature's language, in this same code book, when referring to both capital and non-capital crimes at the same time:

La. C.Cr.P., Article 382(A): A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. (In pertinent part). (**Emphasis added**).

La. C.Cr.P., Article 571 was mandated as a capital crime statute. The phrase "death or life imprisonment" merely tracks the language of the capital crimes statutes.

> R.S. 14:30(C) First Degree Murder
> Whoever commits the crime of first degree murder shall be punished by "death or life imprisonment" at hard labor without benefit of parole, probation, or

suspension of sentence in accordance with the determination of the jury. (Emphasis added).

R.S. 14:42(D)(2)(a) Aggravated Rape
And if the district attorney seeks a capital verdict, the offender shall be punished by "death or life imprisonment" at hard labor without benefit of probation, parole, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art. 782 relative to cases in which punishment may be capital shall apply. (Emphasis added).

Further, untimely prosecution is a Federal claim. Exceeding the prescriptive period of prosecution violates Due Process, which is applicable to the states through the Fourteenth Amendment.

Article 572 applies to all non-capital offenses during the time this crime was alleged to have happened. Applying a capital crime statute here violates federal due process, applicable to the states through the Fourteenth Amendment.

Petitioner contends that the only life sentences covered by Article 571 are the ones that a jury in a capital case decides to give when it reviews its options given in this capital crime statute; "death or life imprisonment." A "life sentence" in other than capital crime statutes, are not subject to the protection of C.Cr.P. Art. 782, and not subject to the capital crime statute of Article 571.

Therefore, in the instant case, the time limit for institution of prosecution had prescribed, and Petitioner's rights to Due Process have been, and are being violated.

6. TRIAL COUNSEL FAILED TO ENSURE THAT THE TRIAL JUDGE COMPLIED WITH THE REASONABLE DOUBT STANDARD OF *IN RE WINSHIP*, AND ALLOWED THE TRIAL JUDGE TO DISREGARD PETITIONER'S DEFENSE.

While the credibility of a witness is a matter for the finder of fact, once impeached, that witness's testimony becomes suspect under the law and must be corroborated in order to be convincing evidence of guilt or innocence. This is especially true in a swearing contest, where the credibility of the witnesses on both sides is paramount to the outcome of the case.

Some examples of impeachment are that no police report was given by Ms. Vascocu that the alleged perpetrator cocked his gun as though he was about to shoot her, but she irreconcilably altered her story and added this at trial. Ms. Vascocu testified at trial that she did not tell the police that Petitioner lived at the Ten Flags Motel, however, the police testified that Ms. Vascocu did report that fact to them. Further, the police testified that Ms. Vascocu described the alleged

weapon (gun) to them, however, Ms. Vascocu testified that she did not describe this gun to the police because it was too dark for her to see it.

The record shows that the trial testimony of Ms. Vascocu is impeached testimony. Because her testimony is the only evidence that places Petitioner in her apartment at any time, whatsoever, it is clearly improper to use it as the exclusive evidence of guilt beyond a reasonable doubt. Further, it underscores the value, under *Brady*, of the untested semen stains on Ms. Vascocu's underwear and t-shirt, which would further impeach her claims.

Impeached testimony, as a general rule, cannot stand alone to convict. *State v. Chism*, 591 So.2d 383, 386 (La. App. 2 Cir. 1991), citing *State v. Laprime*, 437 So.2d 1124 (La. 1983); *State v. Lott*, 535 So.2d 963 (La. App. 2 Cir. 1988).

In *State v. Kennedy*, 803 So.2d 916 (La. 2001), in Justice Traylor's dissenting opinion, it is stated that the Louisiana Supreme Court has found that, "The victim's testimony, standing alone, can prove that the act occurred, . . ." but is qualified in FN9, "However, we have also ruled post-trial that impeached testimony of a witness, standing alone, cannot prove the offense."

In the instant case, the judge's decision to convict was based "primarily" on the issue of credibility, and the judge used impeached testimony of the alleged victim, standing alone, in order to convict.

> THE COURT: The Court's called upon to decide, primarily, credibility issue, coupled with scientific evidence. There's no doubt, beyond reasonable doubt, that Mr. Nalls had sex with Ms. — I'm sorry. What's the — I'll use the initial M.L. There's no doubt. There was sex. The issue I'm called upon to decide is how did that contact occur? Who's story is true? Is it unreasonable, as articulated by the defense? Is it absurd, as argued by the State? Is it ridiculous, as argued by the State? And who's the liar in this case? Motel Six, Warren House, Waffle House, or Airline Highway, Greenwell Springs Road, Ronnie Burgess, the issues of the key entrance, inconsistencies moderately. Marice, let's go. As to the conduct of Count One, Aggravated Rape, I find the Defendant guilty. As to the conduct of Count Two, Armed Robbery, I find the Defendant guilty. We'll set a sentencing date. We stand at recess.
>
> (R.pp. 493-494) (Exhibit N).

The judge here found that there was sex between Petitioner and Ms. Vascocu, beyond a reasonable doubt. That has not been contested, indeed, Petitioner's defense was that it was consensual sex the night prior to the alleged rape.

The judge, however, did not find guilt beyond a reasonable doubt based on the elements of the crime charged, and the evidence produced at trial. The judge simply decided that all he need do is decide: "Who's story is true? Is it unreasonable, as articulated by the defense? Is it

absurd, as argued by the State? Is it ridiculous, as argued by the State? And who's the liar in this case?"

The reasonable doubt standard as articulated by the United States Supreme Court in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) does not require the State's case to be "absurd," or "ridiculous," but that the State prove each element of the crime charged beyond a reasonable doubt.

The judge found this to be a swearing contest, yet failed to give Petitioner the benefit of every reasonable doubt that arises out of the evidence.

"The rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. C.Cr.P. R.S. 15:438. Petitioner's reasonable hypothesis of innocence was not overcome by the State. The law dictates that the evidence be applied in a certain manner. By misapplying the evidence and the law violated Due Process, and did not meet the reasonable doubt standard at trial under *In re Winship, supra.*

In fact, at sentencing the judge stated that it was doubtful there was consensual sex because "That was not your defense. That was not your defense." Consensual sex was Petitioner's defense from the beginning, and is clearly demonstrated throughout the record; in opening statement, during trial, and in closing argument, as well as before sentencing.

Just prior to sentencing, the judge stated:

> THE COURT: Mr. Nalls, the only way — based upon the evidence I've heard — that your version of what took place could have been doubtful to me, is that if there was some form of consensual sex. That was not your defense. That was not your defense. Then maybe I'd have some degree of concern about this sentence. But your semen was in her vagina. It got there without her consent or with it. The evidence showed to me beyond a reasonable doubt that it got there without her permission.
> (R.p. 505) (Exhibit U).

Prior to sentencing, defense counsel had just told the judge, "But the question we're — we want this court to judge is: how did the DNA gets (sic) there? If the did the DNA gets there, was it consensual or how did that incident happen?"

(R.p. 501) (Exhibit V).

During closing arguments, defense counsel told the judge:

> You had the word from Marice Nalls. He didn't say yes, I knew her. I had sex — sexual — casual sex with her. He said I had casual sex with some woman, and I worked at the Waffle House.

> Yes, I know where the Waffle House is, and I know where the Ten Flags Motel is, close to the Waffle House.

(R.p. 477) (Exhibit N).

The prosecutor hit the nail on the head in closing argument:

> Like I said in opening, there's three defenses to rape: it didn't happen, it wasn't me, or it was consent. You can't use one and two when your DNA is in the victim's vagina, so they got to go with consent.

(R.p. 471) (Exhibit N).

Further, the prosecutor stated during closing argument:

> MR. MORRIS: He's got no defense, other than consent, so he has to come in here and disparage this woman.

(R.p. 493) (Exhibit N).

It is obvious that the judge not only failed to consider evidence that pointed to consensual sex, and the uncontested reasonable hypothesis of innocence, but the judge failed to even consider consensual sex as a defense at trial deciding the verdict !

Further, trial counsel failed to object to this constitutional error, and failed to require the trial court to comply with the reasonable doubt standard at trial under *Winship, supra.*

It is clear that the trial judge failed to comply with the law regarding impeached testimony being insufficient, by itself, to convict, and further disregarded Petitioner's established defense at trial, and did not consider it in reaching a verdict. This violates Petitioner's right to Due Process.

Petitioner's trial counsel rendered ineffective assistance of counsel by failing to ensure that the trial judge complied with the reasonable doubt standard as articulated in the United States Supreme Court case of *In re. Winship, supra.*

REQUEST FOR EVIDENTIARY HEARING AND APPOINTMENT OF COUNSEL

Petitioner moves this Honorable Court to grant an evidentiary hearing on his claims, with appointed counsel, to ensure the maintenance of his rights to due process and equal protection of the law. It is necessary to appoint counsel to aid Petitioner because of the complex issues involved, the need to competently develop the facts, and to properly present them in court.

Petitioner contends that he has pointed to record facts that raise sharply contested issues between the State and Petitioner. These sharply contested issues cannot be properly addressed without a full and fair evidentiary hearing. La. C.Cr.P., Art. 929.

CONCLUSION

It is clear that the trial court erred in this case, and that the First Circuit Court of Appeal has sanctioned these errors by denying Supervisory Writs. This Honorable Court should intervene on behalf of Petitioner and grant him the requested relief.

Petitioner maintains that his trial counsel, and his appellate counsel's actions and inactions deprived Petitioner of his right to effective assistance of counsel, as guaranteed by the United States Constitution, Amendments Six and Fourteen, and the Louisiana Constitution of 1974, Article I, § 13.

Further, Petitioner asserts that he has brought forth viable claims, of which he has pointed to sufficient record evidence, and is entitled to Post Conviction Relief. Petitioner's conviction(s) should be reversed and the charges dismissed with prejudice, or, at least reversed and remanded for a new trial.

Alternatively, Petitioner should be granted an evidentiary hearing, with discovery and appointment of counsel, to aid Petitioner to fairly, and properly develop his claims.

Respectfully submitted, *pro se*, this 26th day of November, 2013, at Angola, Louisiana.

Marice Nalls
#423240, Oak 1
Louisiana State Penitentiary
Angola, Louisiana 70712

VERIFICATION / CERTIFICATE OF SERVICE

I, Marice Nalls, the aforementioned Petitioner, do hereby attest and affirm that the information contained herein is true to the best of my knowledge. Further, I verify that all allegations in the foregoing writs are those of Marice Nalls.

Additionally, I hereby certify that a copy of the foregoing has been sent, via U.S. Mail, postage pre-paid and properly addressed to the respondent court, via the Clerk of Court for the First Circuit Court of Appeal, and to Hillar C. Moore, III, District Attorney of East Baton Rouge Parish

Done this 26th day of November, 2013, at Angola, Louisiana.

Marice Nalls
#423240, Oak 1
Louisiana State Penitentiary
Angola, Louisiana 70712

SUPREME COURT
STATE OF LOUISIANA

13 KH 2806

ORIGINAL

NO. 2013-KH-2806

STATE EX REL. MARICE S. NALLS
APPLICANT/ RELATOR

VERSUS

STATE OF LOUISIANA
RESPONDENT

ON WRITS FROM THE FIRST CIRCUIT COURT OF APPEAL
DOCKET NUMBER 2013-KW-1360
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
HONORABLE DON JOHNSON
JUDGE PRESIDING
DOCKET NUMBER 07-07-0697, SECTION VII

OPPOSITION TO APPLICATION FOR SUPERVISORY WRITS FILED ON BEHALF OF THE STATE OF LOUISIANA

HILLAR C. MOORE, III
DISTRICT ATTORNEY

By: STACY L. WRIGHT, #25307
ASSISTANT DISTRICT ATTORNEY
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
222 ST. LOUIS STREET
BATON ROUGE, LOUISIANA 70802
TELEPHONE: (225) 389-3462

INPUT BY:

EXHIBIT
15

SUPREME COURT
STATE OF LOUISIANA

NO. 2013-KH-2806

STATE EX REL. MARICE S. NALLS
APPLICANT/ RELATOR

VERSUS

STATE OF LOUISIANA
RESPONDENT

ON WRITS FROM THE FIRST CIRCUIT COURT OF APPEAL
DOCKET NUMBER 2013-KW-1360
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
HONORABLE DON JOHNSON
JUDGE PRESIDING
DOCKET NUMBER 07-07-0697, SECTION VII

RESPONSE IN OPPOSITION TO WRIT APPLICATION FILED BY MARICE S. NALLS

STATEMENT OF THE CASE

On July 26, 2007, an East Baton Rouge Grand Jury indicted petitioner, Marice Nalls, for the aggravated rape and armed robbery of M. C., in violation of La. R.S. 14:42 and 14:64, respectively.[1] After a two-day bench trial, the trial court found petitioner guilty as charged on October 1, 2008.[2]

On January 12, 2009, the trial court denied petitioner's Motion for Post Verdict Judgment of Acquittal and/or Motion for New Trial.[3] The court then sentenced petitioner to serve a life sentence on his aggravated rape conviction, and fifteen years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on his armed robbery conviction.[4]

Petitioner appealed, citing the following counseled assignments of error:

1. The State failed to carry its burden of proof to establish defendant was guilty of aggravated rape.

2. The State failed to carry its burden of proof to establish defendant was guilty of armed robbery.

3. The trial court erred by denying defendant's Motion for Post Verdict Judgment of Acquittal and/or New Trial.

Petitioner also filed a pro se brief, raising the following assignments of error:

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[1] R. p. 10.
[2] R. p. 494.
[3] R. pp. 502-503.
[4] R. p. 506.

1. Whether defendant made a knowing, intelligent, and voluntary waiver of his rights to a jury trial.

2. Whether the trial court violated the defendant's rights to a fair trial and deprived him of his right to defend himself when his counsel was broadsided by the introduction of evidence of which he had never been made aware.

3. Whether any errors were committed such as would be discovered by the appellate court in conducting a patent error review of this matter pursuant to La. C.Cr.P. art. 920(2).

The Court of Appeal, First Circuit, affirmed petitioner's convictions and sentences in an unpublished opinion rendered October 23, 2009. Petitioner filed an untimely writ in this Honorable Court on July 8, 2011, seeking review of the first circuit's ruling on direct appeal. Petitioner's writ application was denied on April 9, 2012.

Petitioner filed an application for post-conviction relief on October 18, 2011, presenting the following claims:

1. Trial counsel failed to secure expert testimony to aid defense at trial, and constitutes ineffective assistance of counsel.

2. Trial counsel failed to call witnesses for defense at trial, and constitutes ineffective assistance of counsel. Further, allowing testimony of witnesses not called at trial, through police testimony at trial, violates *Crawford v. Washington.*

3. Trial counsel failed to notify the court he had withdrawn from petitioner's case, failed to notify petitioner of court ruling, and lied to petitioner about notifying the court that he had withdrawn from the case.

4. Trial counsel was ineffective for failing to properly argue issues of flaws in indictment.

5. Trial counsel rendered ineffective assistance by failing to argue that the statute of limitations on the institution of prosecution had expired. Appellate counsel failed to argue issue on appeal.

6. Trial counsel failed to ensure that the trial judge complied with the reasonable doubt standard of *In Re Winship*, and allowed the trial judge to disregard petitioner's defense.

On February 27, 2012, the state filed "State's Procedural Objections, Answer, and Memorandum in Opposition to Application For Post-Conviction Relief." On August 9, 2012, the Commissioner issued a Recommendation that ***all*** of petitioner's claims be dismissed, with the exception of "the portion of Claim #5 alleging ineffective assistance of counsel for failure to file a motion to quash the indictment for armed robbery as untimely." With regard to this sub-claim, the Commissioner recommended "deferral of the Court's final ruling, pending briefs submitted by the parties on the limited issue of deficient conduct and/or prejudice."

Thereafter, on October 3, 2012, the trial court issued an Order adopting the Commissioner's Report, and further ordering: "that final ruling thereon is deferred pending briefs submitted by both parties, within 40 days, on the issue of whether counsel's failure to file a motion to quash (or appeal) the indictment for armed robbery based on untimely prosecution pursuant to Art. 572 C.Cr.P. could support the claim of constitutionally ineffective assistance of counsel. The parties are specifically ordered to address the issue of whether counsel's omission was deficient conduct and/or prejudicial, based on the circumstances of this case."

The state filed a supplemental brief on November 13, 2012, conceding that counsel was deficient in his failure to file a motion to quash the indictment for armed robbery, but asserting that the petitioner failed to show that he was prejudiced by his counsel's deficiency. On January 31, 2013, the Commissioner issued her Recommendation that petitioner's remaining claim be dismissed as without merit. On March 15, 2013, the trial court dismissed petitioner's remaining post-conviction claim for the reasons stated in the Commissioner's Recommendation.

On or about April 15, 2013, petitioner filed a counseled writ application in the Court of Appeal, First Circuit, alleging, in relevant part, ineffective assistance of counsel for failure to quash the indictment of armed robbery. On July 1, 2013, the first circuit issued a ruling that the writ application would not be considered due to the failure to comply with the Uniform Rules of Louisiana Courts of Appeal. The court ordered that "In the event relator elects to file a new application with this Court, the application must be filed on or before July 30, 2013."

On or about July 24, 2013, the petitioner filed a pro se "Motion to Re-File Supervisory Writ According to Instructions From This Court" in the Court of Appeal, First Circuit. Petitioner submitted, as Exhibit "A," his previously filed counseled writ application, with handwritten corrections and implored the court to "Please accept Exhibit A as the writ to be reviewed by this Honorable Court." Petitioner further attached documents omitted from the previously filed writ application. Although the undersigned cannot locate a ruling granting the motion, presumably the first circuit granted the motion, and considered the arguments contained in the previously filed writ application. Petitioner's writ was denied on November 4, 2013.

On December 3, 2013, the petitioner filed the writ application presently before this Honorable Court. Claim five of that application alleges that "Trial counsel rendered ineffective assistance by failing to argue that the statute of limitations on the institution of prosecution had expired." On October 1, 2014, this Honorable Court requested an opposition be filed on behalf

of the state, specifically addressing petitioner's claim that counsel erred in failing to file a motion to quash on grounds that the prosecution for the armed robbery charge was not timely instituted.

STATEMENT OF FACTS

On September 24, 1998, the victim was living with her boyfriend in the Warren House apartments in Baton Rouge. Around 5:00 A.M. her boyfriend left for work and the victim started to return to her bedroom when she heard her deadbolt unlock. Thinking her boyfriend must have forgotten something, she opened her bedroom door and saw petitioner standing in her apartment with a gun. She tried to hide, but petitioner approached her and put the gun to her head.[5]

Petitioner then asked the victim for money. He told her that he had already been in the apartment, but left to wait for her boyfriend to leave. He then told her to take her clothes off and get on the bed. After begging him to take the money and leave, the victim finally did as he said because he kept the gun to her head.[6]

Petitioner proceeded to rape the victim vaginally and anally, all the while keeping his gun to her head. He told her several times to keep her eyes shut. When he asked her to perform oral sex on him, the victim told him that she would, but that it would make her throw up. Petitioner decided to rape her again instead.[7]

At some point petitioner became agitated, got off of the victim, extended his arm with the gun and cocked it. The victim testified that she turned her head away because she thought she was going to die. She then heard the gun click as if it had been released and petitioner told her that she was not worth his time.[8]

Petitioner then put the gun back to the victim's head and forced her into the living room to look for money. After they both looked for her purse, the victim realized that both her purse and television were missing. Petitioner became angry and forced the victim on her hands and knees on the living room floor where he raped her again.[9]

While he raped her again vaginally and anally, the victim realized her front door was cracked open when she heard a male voice yell, "Marice, come on. You're so stupid. Come on. Let's go." Petitioner continued to rape her while his accomplice continued to yell for him.[10]

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[5] R. pp. 271-273.
[6] R. p. 274.
[7] R. p. 274.
[8] R. pp. 274-275.
[9] R. p. 275.
[10] R. p. 276.

When petitioner decided he was finally finished, he told the victim to get up, walk to her room, shut the door, and not to come out or call the police or he would kill her. She did as she was told. After hearing her front door close, the victim peeked out of her room and saw no one. She called her boyfriend to tell him what had happened and to meet her at the hospital. She grabbed her car keys and drove straight to the hospital.[11]

At the hospital, Dr. Sterling Sightler examined the victim and prepared a rape kit. She also spoke to the police and gave them her underwear and shirt. Her boyfriend also gave police a blood sample.[12]

The victim received a phone call a few days later from someone claiming to have found her credit cards and check book in a field. Not knowing who was calling her, she contacted the police to retrieve her items.[13]

It was not until 2007 that Baton Rouge City Police contacted the victim to inform her that they had new information in her case. Janaki Vaidyanathan, the Louisiana Codis Administrator and DNA Supervisor at Louisiana State Police Crime Lab had matched petitioner's DNA to the vaginal swabs taken from the victim's rape kit and contacted the police.[14]

ARGUMENT

First, the state would simply note that, petitioner's claim before this court bears very little resemblance to his claims in the trial court and first circuit. Petitioner's primary argument before this court seems to be that the prosecution for ***the aggravated rape charge*** was not timely instituted. This argument clearly has no merit, and, in any event, this court has requested an opposition to petitioner's claim of ineffective assistance of counsel for failure to file a motion to quash the indictment for armed robbery. This claim, too, is without merit.

It is well established that the petitioner bears the burden of proving an ineffective assistance of counsel claim. According to Strickland v. Washington, 466 U.S. 668, 680, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the petitioner must first show that the counsel's performance was deficient such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Secondly, petitioner must prove that the counsel's errors were "so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." *Id.*, 466 U.S. at 680, 104 S.Ct. at 2064.

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[11] R. p. 276.
[12] R. p. 276-277, 280.
[13] R. p. 280.
[14] R. pp. 285, 412-413.

A petitioner urging ineffective assistance of counsel has failed to establish such a claim if either of the two prongs required by *Strickland* are not proven. This has been interpreted by the United States Fifth Circuit to mean that courts cannot even consider deficiencies in attorney performance outside of a specific showing of prejudice. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988), Byrne v. Butler, 845 F.2d 501 (5th Cir. 1988). The court in *Strickland* declared that the petitioner must show that his counsel's actions "fell below an objective standard of reasonableness" in order to prove deficiency. Strickland v. Washington, 466 U.S. at 682, 104 S.Ct. at 2066. Further, petitioner must prove prejudice by demonstrating that "a reasonable probability" exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 682, 104 S.Ct. at 2066. *Strickland* requires that a petitioner must affirmatively demonstrate prejudice and demands that a heavy measure of deference be given to counsel's judgments. *Id.*, 466 U.S. at 682, 104 S.Ct. at 2066.

With regard to deficiency, the state conceded, in post-conviction proceedings, and concedes now, that counsel rendered ineffective assistance of counsel when he failed to file a motion to quash the indictment for armed robbery. This crime occurred on September 24, 1998. Pursuant to La. C.Cr.P. Art. 572(1), prosecution for the crime of armed robbery must be instituted within six years. Due to new information in the case, (DNA evidence), petitioner herein was finally indicted on July 26, 2007, more than six years after the crimes were committed.

However, petitioner has not shown prejudice. Petitioner's fifteen year sentence on his armed robbery conviction was ordered to be served concurrently with the life sentence on the aggravated rape conviction. Therefore, petitioner has failed to prove prejudice by demonstrating that "a reasonable probability" exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." The end result of these proceedings, for petitioner, is life imprisonment. That fact remains unchanged even if counsel had filed a motion to quash the charge of armed robbery, and that motion had been granted.

In his writ application before the first circuit, petitioner argued in relevant part that, "Because of trial counsel's failure to move to quash the armed robbery charge, the court was allowed to hear and to consider evidence of armed robbery in an aggravated rape trial where the sole defense was consent. Petitioner avers this added non-consensual element of the armed

robbery served to thwart Mr. Nalls' consent defense significantly and the prejudice is obvious on its face."

Petitioner's suggestion that, had the indictment for armed robbery been quashed, evidence of the armed robbery would have been inadmissible, is incorrect. As this Honorable Court explained, in State v. Odenbaugh, 2010-KA-0268 (12/6/2011), 82 So.3d 215, *rehearing denied*, (1/20/12), *cert. denied*, Odenbaugh v. Louisiana, 133 S.Ct. 410 (2012):

> Under Louisiana Code of Evidence Art. 404(B), other crimes evidence is also admissible "when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." For other crimes to be admissible under this exception, they must bear such a close relationship with the charged crime that the indictment or information as to the charged crime can fairly be said to have given notice of the other crime as well. *State v. Schwartz*, 354 So.2d 1332, 1334 (La. 1978). Thus, evidence of other crimes forms part of the *res gestae* when said crimes are related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it. It is evidence which completes the story of the crime by showing the context of the happenings. *State v. Brewington*, 601 So.2d 656, 657 (La. 1992). Evidence of crimes committed in connection with the crime charged does not affect the accused's character because the offenses are committed as parts of a whole. *Id.* The inquiry to be made is whether the other crime is "part and parcel" of the crime charged, and is not offered for the purpose of showing that the accused is a person of bad character. *State v. Prieur*, 277 So.2d 126 (La. 1973).
>
> The *res gestae* doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also the testimony of witnesses and police officers pertaining to what they heard or observed during the commission of the crime if a continuous chain of events is evident under the circumstances. *State v. Huizar,* 414 So.2d 741, 751 (La. 1982); *State v. Kimble*, 407 So.2d 693, 698 (La. 1981). In addition, as this Court has observed, integral act (res gestae) evidence in Louisiana incorporates a rule of narrative completeness without which the state's case would lose its "narrative momentum and cohesiveness, 'with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict." *Colomb*, supra, 98-2813 at 4, 747 So.2d at 1076 (quoting *Old Chief v. United States,* 519 U.S. 172, 186, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997).

To recap, the petitioner entered the victim's apartment, put a gun to her head, and asked for money. He then told her to take her clothes off and get on the bed. The victim begged the petitioner to take her money in lieu of raping her, but the petitioner proceeded to rape her vaginally and anally in the bedroom. He then forced her at gunpoint into the living room to look for money. When the victim could not find her purse he became angry and raped her again in the living room. The first circuit, on direct appeal, found that petitioner's cohort, who called out to the petitioner by name to "come on," while he was raping her a second time, "had probably stolen the television and M.C.'s purse from the apartment while defendant raped M.C." State v. Nalls, 2009-KA-0772 (La.App. 1st Cir. 10/23/09). Not only were the crimes of armed robbery and aggravated rape "intertwined," and/or part of "a continuous chain of events," it appears the

crimes in this case occurred simultaneously. As such, petitioner's assertion that this evidence would have been inadmissible, is clearly erroneous. Having failed to prove prejudice as a result of counsel's deficient conduct in failing to file a motion to quash the indictment for armed robbery, petitioner's claim is without merit.

Alternatively, if this court finds ineffective assistance of counsel for failure to file a motion to quash the charge of armed robbery, the remedy to which petitioner is entitled is an order vacating his conviction and sentence for that charge only.

CONCLUSION

For all of the foregoing reasons, petitioner's claim of ineffective assistance of counsel should be dismissed as without merit. Alternatively, the only remedy to which petitioner herein is entitled is an order vacating his conviction and sentence for armed robbery.

RESPECTFULLY SUBMITTED,

HILLAR C. MOORE, III
DISTRICT ATTORNEY

/s/ Stacy L. Wright, #25307
Assistant District Attorney
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana
222 St. Louis Street
Baton Rouge, Louisiana 70802
Telephone (225) 389-3462
Email: stacy.wright@ebrda.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed, postage prepaid, to Marice Nalls, #423240, Oak 1, Louisiana State Penitentiary, Angola, Louisiana, 70712.

Baton Rouge, Louisiana, this ~9th~ day of October 2014.

/s/ Stacy L. Wright
Assistant District Attorney

Louisiana Supreme Court
400 Royal St. | New Orleans, La. 70130

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The Supreme Court of the State of Louisiana

STATE EX REL. MARICE S. NALLS

NO. 2013-KH-2806

VS.

STATE OF LOUISIANA

- - - - - -

IN RE: Nalls, Marice S.; - Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. B, No. 07-07-0697; to the Court of Appeal, First Circuit, No. 2013 KW 1360;

- - - - - -

November 7, 2014

Writ granted in part; otherwise denied. Given that the time limitations for instituting prosecution on the armed robbery count had prescribed, relator's trial counsel rendered ineffective assistance when he failed to file a motion to quash on that basis. See La.C.Cr.P. art. 572(A)(1); R.S. 14:64(B); La.C.Cr.P. art. 532(7). Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Washington, 491 So.2d 1337 (La. 1986). The application is therefore granted for the sole purpose of vacating relator's armed robbery conviction and sentence. Relator's conviction for aggravated rape and sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence remain undisturbed. In all other respects, the application is denied.

GGG

BJJ

JPV

JLW

JDH

KNOLL, J., would deny.

CLARK, J., would deny.

Supreme Court of Louisiana
November 7,2014

Carmen B. Young
Deputy Clerk of Court
For the Court

EXHIBIT
tabbies
16

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

DOCKET NO. 2021-KW-

2021KW1195

STATE OF LOUISIANA

VERSUS

MARICE NALLS

APPLICATION FOR SUPERVISORY AND/OR REMEDIAL WRIT TO
REVIEW RULING OF
NINETEENTH JUDICIAL DISTRICT COURT, SECTION VII
PARISH OF EAST BATON ROUGE
HON. BEAU M. HIGGINBOTHAM, DISTRICT JUDGE
NO. 07-07-0697
(DENYING APPLICATION FOR POST-CONVICTION RELIEF)

ORIGINAL BRIEF ON BEHALF OF THE DEFENDANT-APPLICANT, MARICE NALLS

Brooke Delaune #38720
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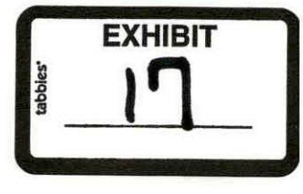
Post-conviction relief counsel for the defendant-applicant, Marice Nalls

CRIMINAL WRIT (ON APPLICATION FOR POST-CONVICTION RELIEF)



INDEX

I. JURISDICTIONAL STATEMENT

This is an application for supervisory writ from an Nineteenth Judicial District Court/East Baton Rouge Parish judge's denial of the defendant's Application for Post-Conviction Relief. East Baton Rouge Parish is within the supervisory jurisdiction of this court pursuant to Article 5, Section 10 of the Louisiana Constitution. The denial of an application for post-conviction relief is explicitly reviewable pursuant to La. Code Crim. P. art. 930.6.

II. STATEMENT OF THE CASE

The defendant-applicant, Marice Nalls, was charged with Armed Robbery and Aggravated Rape by Bill of Indictment on July 26, 2007 for an incident alleged to have occurred on September 24. 1998. Mr. Nalls was tried in Section VII of the 19th Judicial District Court in East Baton Rouge Parish and convicted on October 1, 2008, after a judge trial. On January 12, 2009, Mr. Nalls was sentenced to life imprisonment without benefits for the aggravated rape and 15 years for the armed robbery to run concurrently.

On June 12, 2009, Mr. Nalls' trial and appellate attorney, Mr. Dele Adebamiji filed an appellate brief in the First Circuit. State v. Nalls, 24 So. 3d 1030 (La. App. 1 Cir. 2009). Mr. Nalls filed a pro se supplemental brief on August 12, 2009. The appeal was denied October 23, 2009. Mr. Nalls was not notified of this ruling by the court or by his attorney.

On October 10, 2011, his post-conviction relief application was filed, and a final ruling was issued on Mach 15, 2013. Application for Supervisory Writs was filed on April 15, 2013. The First Circuit Court of Appeals issued orders for refiling, and it was refiled on July 24, 2013. Ruling on the refiling was issued on November 4, 2013. On November 26, 2013, certiorari was filing into the Louisiana Supreme Court. On November 7, 2014, the Louisiana Supreme Court ordered that Mr. Nalls'

armed robbery conviction and sentence be vacated because the time limitation for the institution of prosecution had expired. *Nalls v. State,* 152 So. 3d 164 (La. 2014).

On November 19, 2014, Mr. Nalls filed a petition for Habeas Corpus Review in the United States District Court, Middle District of Louisiana. On November 7, 2017, a Magistrate Report and Recommendation was filed. On November 17, 2017, an Objection to the Magistrate's Report and Recommendation was filed.

On December 6, 2017, the United State's District Court denied Mr. Nalls' Petition for Habeas Corpus, with prejudice as untimely. On December 12, 2017, Mr. Nalls filed his Notice of Appeal in the District Court. On January 8, 2018, the District Court denied IFP and COA.

On January 22, 2018, Mr. Nalls filed an Application for Certificate of Appealability in the United States Fifth Circuit Court of Appeal, which was granted. On January 30, 2020, the United States Fifth Circuit Court of Appeal reversed the judgment of the federal district court and remanded the case for a ruling on the merits. On August 3, 2020, the district court denied Mr. Nalls' Petition for Habeas Corpus. On September 8, 2020, the district court denied Mr. Nalls' motion for a certificate of appealability.

On October 19, 2020, Mr. Nalls' filed a Motion for Certificate of Appealability and Supporting Memorandum to the United States Fifth Circuit Court of Appeal. On July 26, 2021, the motion was denied.

On March 31, 2020, Mr. Nalls filed a second Application for Post-Conviction Relief with claims that focus on having been improperly made to stand trial for a prescribed charge. On June 12, 2020, the Commissioner issued an order requiring Mr. Nalls to provide reasons to justify the successive application considering he filed an application in 2011. On June 30, 2020, Mr. Nalls filed his Answer to Court's Order for Reasons. On April 6, 2021, the Commissioner's Recommendation was

argue issues of flaws in indictment. Fifth, trial counsel was ineffective for failing to argue the statute of limitations on the institution of prosecution had expired. Finally, trial counsel was ineffective for failing to ensure the trial judge complied with the reasonable doubt standard of *In Re Winship*.

The District Court denied the application and the appellate court denied writs. On November 7, 2014, the Louisiana Supreme Court granted writ in part stating that trial counsel rendered ineffective assistance when he failed to file a motion to quash on the basis that the time limitations for instituting prosecution on the armed robbery count had prescribed. The application was granted for the sole purpose of vacating Mr. Nalls' armed robbery conviction and sentenced. The Court left the other conviction and sentence undisturbed.

On March 2, 2020, Mr. Nalls filed a second application for Post-Conviction Relief. It presented one issue: "Mr. Nalls was prejudiced at his trial by his attorney's ineffective assistance of counsel, as determined by the Louisiana Supreme Court, who failed to file a motion to quash the prescribed armed robbery charge, which had a prejudicial effect or influence on the verdict at trial."

Based on the Commissioner's Recommendation, it appears that the Commissioner misinterpreted Mr. Nalls' presented issue as one of ineffective assistance of counsel and concluded that that issue had been fully litigated at the Louisiana Supreme Court. In actuality, Mr. Nalls was raising a new and different issue, which he clarified in his objection to the Commissioner's recommendation. Mr. Nalls was denied the right to a fair trial because the jury was exposed to evidence of the prescribed charge of armed robbery when the jury should have only been tasked with the issue of judging the evidence of the aggravated rape.

The fact that during the trial, the jury was exposed to the prejudicial effect of the prescribed charge that should not have been presented to them, is itself a

constitutional violation. *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L.Ed. 2d 518 (2000). Mr. Nalls was brought to trial on both aggravated rape and armed robbery charges, even though the time limitations of the armed robbery charge had long since prescribed. This allowed the prescribed armed robbery charge to be used as evidence against him at the trial on the aggravated rape charge. That was improper evidence introduced that was unduly prejudicial that it renders the trial fundamentally unfair.

This is a separate and distinct claim of ineffective assistance of counsel – not simply that trial counsel failed to file a motion to quash the armed robbery charge which prejudiced Mr. Nalls at his trial for the armed robbery charge, but that Mr. Nalls was additionally prejudiced at his trial for the aggravated rape charge as well. The Louisiana Supreme Court did choose to leave the aggravated rape conviction and sentence undisturbed. However, it did so having only been presented with the argument that trial counsel's failure to file a motion to quash the armed robbery charge was ineffective assistance of counsel and prejudiced Mr. Nalls with respect to the armed robbery charge. The Louisiana Supreme Court was not then presented with the issue of whether trial counsel's ineffectiveness prejudiced Mr. Nalls and violated his right to a fair trial of the aggravated rape charge. That is the issue Mr. Nalls brought before the District Court, and that issue has not yet been fully litigated.

VI. CONCLUSION AND PRAYER FOR RELIEF

Mr. Nalls prays that the trial court's judgment denying his Application for Post-Conviction Relief be vacated, and the matter remanded to the trial court for an evidentiary hearing.

Respectfully submitted:

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Post-conviction relief counsel for the defendant-applicant, Marice Nalls

VIII. VERIFICATION AND CERTIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

Before me, the undersigned notary, personally appeared Brooke Delaune, who after being duly sworn by me, deposed and stated as follows:

That she is the attorney for the defendant-applicant, Marice Nalls, in the above captioned matter, and

That all of the allegations of the foregoing application are true and well-grounded in fact and in law to the best of her knowledge, information and belief, and

That the trial court and opposing counsel have been mailed (and opposing counsel has been emailed) a copy of this application with all attachments, and that their contact information is as follows:

Hon. Beau M. Higginbotham
Judge, 19th Judicial District Court
300 North Blvd., Ste. 6401
Baton Rouge, LA 70802
Phone: (225) 389-4706
Fax: (225) 389-7666

Hillar Moore, District Attorney
Appellate Division
222 St. Louis Steet, Suite 550
Baton Rouge, LA 70802
Phone: (225) 389-3453
Fax: (225) 389-8751

Brooke Delaune
Brooke Delaune

Sworn to and subscribed before me this 5th day of October, 2021.

#133766
Notary Public

SUPREME COURT OF LOUISIANA

DOCKET NO.

STATE OF LOUISIANA

VERSUS

MARICE NALLS

ON APPLICATION FOR SUPERVISORY TO REVIEW RULING OF COURT OF APPEAL, FIRST CIRCUIT 2021-KW-1195, ON APPLICATION FOR SUPERVISORY WRIT FROM NINETEENTH JUDICIAL DISTRICT COURT, SECTION VII
PARISH OF EAST BATON ROUGE
HON. BEAU M. HIGGINBOTHAM, DISTRICT JUDGE
NO. 07-07-0697
(DENYING APPLICATION FOR POST-CONVICTION RELIEF)

APPLICATION FOR SUPERVISORY WRIT AND ORIGINAL BRIEF IN SUPPRORT FILE BEHALF OF THE DEFENDANT-APPLICANT, MARICE NALLS

James P. Manasseh #19022
Brooke Delaune #38720
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Post-conviction relief counsel for the defendant-applicant, Marice Nalls

SUPREME COURT OF LOUISIANA

WRIT APPLICATION FILING SHEET

NO.

STATE OF LOUISIANA

VERSUS

MARICE NALLS

APPLICANT: MARICE NALLS

Have there been any other filings in this Court in this matter? YES (APPEAL)
Are you seeking a stay order? NO. Priority treatment? NO.

LEAD COUNSEL FOR APPLICANT,
MARICE NALLS:
James P. Manasseh # 19022
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TYPE OF PLEADING: CRIMINAL

DISTRICT COURT INFORMATION:

Parish of East Baton Rouge, 19th Judicial District Court No.: 07-07-0697
Hon. Beau Higginbotham
Date of ruling: 09/13/21

APPELLATE COURT INFORMATION:

First Circuit Docket No. 2021-KW-1195
Action: Writ Denied
Applicant in appellate court: Marice Nalls
Filing date: 10/05/21 Ruling date: 12/22/21
Panel of judges: McClendon, Welch, and Holdridge.

PRESENT STATUS:

The defendant's post-conviction application was denied without a hearing at the district court level. That decision was affirmed by the circuit court of appeal.

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the Court of Appeal, First Circuit, to the trial court, and to the District Attorney.

James P. Manasseh #19022

1/19/22
Date

INDEX

RULE X STATEMENT: WRIT GRANT CONSIDERATION

The lower courts erred by denying Mr. Nalls successive application for post-conviction relief on the basis that Mr. Nalls failed to raise a new or different issue. Mr. Nalls filed his first Post-Conviction Relief Application in October 2011. The District Court denied the application and the appellate court denied writs. On November 7, 2014, the Louisiana Supreme Court granted writ in part stating that trial counsel rendered ineffective assistance when he failed to file a motion to quash on the basis that the time limitations for instituting prosecution on the armed robbery count had prescribed. The application was granted for the sole purpose of vacating Mr. Nalls' armed robbery conviction and sentence. On March 2, 2020, Mr. Nalls filed a second application for Post-Conviction Relief, raising a new issue that, in light of the Louisiana Supreme Court's ruling, he was denied the right to a fair trial because the jury was exposed to evidence of the prescribed charge of armed robbery when the jury should have only been tasked with the issue of judging the evidence of the aggravated rape.

The due process clause of our state and federal constitutions requires fair trials. In this case, Mr. Nalls should have been given the opportunity to have this new issue heard via an evidentiary hearing with the trial court level rather than have it outright dismissed as successive. With this writ application, this court need not decide the merits of the case. The defense merely seeks an evidentiary hearing to develop the evidence not presented or proffered at trial in support of his application for post-conviction relief.

STATEMENT OF THE CASE

The defendant-applicant, Marice Nalls, was charged with Armed Robbery and Aggravated Rape by Bill of Indictment on July 26, 2007 for an incident alleged to have occurred on September 24. 1998. Mr. Nalls was tried in Section VII of the 19th Judicial District Court in East Baton Rouge Parish and convicted on October 1, 2008, after a judge trial. On January 12, 2009, Mr. Nalls was sentenced to life imprisonment without benefits for the aggravated rape and 15 years for the armed robbery to run concurrently.

On June 12, 2009, Mr. Nalls' trial and appellate attorney, Mr. Dele Adebamiji filed an appellate brief in the First Circuit. *State v. Nalls*, 24 So. 3d 1030 (La. App. 1 Cir. 2009). Mr. Nalls filed a pro se supplemental brief on August 12, 2009. The appeal was denied October 23, 2009. Mr. Nalls was not notified of this ruling by the court or by his attorney.

On October 10, 2011, his post-conviction relief application was filed, and a final ruling was issued on Mach 15, 2013. Application for Supervisory Writs was filed on April 15, 2013. The First Circuit Court of Appeals issued orders for refiling, and it was refiled on July 24, 2013. Ruling on the refiling was issued on November 4, 2013. On November 26, 2013, certiorari was filing into the Louisiana Supreme Court. On November 7, 2014, the Louisiana Supreme Court ordered that Mr. Nalls' armed robbery conviction and sentence be vacated because the time limitation for the institution of prosecution had expired. *Nalls v. State,* 152 So. 3d 164 (La. 2014).

On November 19, 2014, Mr. Nalls filed a petition for Habeas Corpus Review in the United States District Court, Middle District of Louisiana. On November 7, 2017, a Magistrate Report and Recommendation was filed. On November 17, 2017, an Objection to the Magistrate's Report and Recommendation was filed.

On December 6, 2017, the United States District Court denied Mr. Nalls' Petition for Habeas Corpus, with prejudice as untimely. On December 12, 2017, Mr. Nalls filed his Notice of Appeal in the District Court. On January 8, 2018, the District Court denied IFP and COA.

On January 22, 2018, Mr. Nalls filed an Application for Certificate of Appealability in the United States Fifth Circuit Court of Appeal, which was granted. On January 30, 2020, the United States Fifth Circuit Court of Appeal reversed the judgment of the federal district court and remanded the case for a ruling on the merits. On August 3, 2020, the district court denied Mr. Nalls' Petition for Habeas Corpus. On September 8, 2020, the district court denied Mr. Nalls' motion for a certificate of appealability.

On October 19, 2020, Mr. Nalls filed a Motion for Certificate of Appealability and Supporting Memorandum to the United States Fifth Circuit Court of Appeal. On July 26, 2021, the motion was denied.

On March 31, 2020, Mr. Nalls filed a second Application for Post-Conviction Relief with claims that focus on having been improperly made to stand trial for a prescribed charge. On June 12, 2020, the Commissioner issued an order requiring Mr. Nalls to provide reasons to justify the successive application considering he filed an application in 2011. On June 30, 2020, Mr. Nalls filed his Answer to Court's Order for Reasons. On April 6, 2021, the Commissioner's Recommendation was filed and recommended Mr. Nalls' application be denied based on the petition that his claims have been fully litigated. On April 27, 2021, Mr. Nalls filed an objection

and traverse to the commissioner's recommendation.

On September 13, 2021, the District Court denied Mr. Nalls' application without a hearing, citing the reasons in the Commissioner's Recommendation. On October 5, 2021, Mr. Nalls filed a supervisory writ with the First Circuit. On December 22, 2021, the First Circuit denied writ.

ASSIGNMENT OF ERROR

The First Circuit Court of Appeal erred in denying Petitioner's supervisory writ based upon the trial court's dismissal of Petitioner's application for post-conviction relief based upon the assertion that the application was successive and failed to raise a new or different claim that was excusably omitted from the prior application.

STATEMENT OF FACTS

On June 19, 2007, Mr. Nalls was arrested by the Baton Rouge Police Department for aggravated rape and armed robbery. It was alleged that nearly 10 years earlier, on September 24, 1998, the instant Petitioner, Marice Nalls, and an unknown person went to Warren House on Greenwell Springs Road, Baton Rouge, Louisiana and picked one of the apartments, specifically Apartment #12, to rob and rape the occupant.

On July 26, 2007, Mr. Nalls was charged by Grand Jury indictment of committing aggravated rape and armed robbery on the alleged victim. After a judge trial, Mr. Nalls was found guilty as charged on October 1, 2008, and was sentenced on January 12, 2009, to life without benefits and 15 years to run concurrently.

SUMMARY ARGUMENT

Mr. Nalls' successive application for post-conviction relief raised a new or different issue and should not have been procedurally dismissed as successive. Mr. Nalls filed his first Post-Conviction Relief Application in October 2011. The District Court denied the application and the appellate court denied writs. On November 7, 2014, the Louisiana Supreme Court granted writ in part stating that trial counsel rendered ineffective assistance when he failed to file a motion to quash on the basis that the time limitations for instituting prosecution on the armed robbery count had prescribed. The application was granted for the sole purpose of vacating Mr. Nalls' armed robbery conviction and sentence. On March 2, 2020, Mr. Nalls filed a second application for Post-Conviction Relief, raising a new issue that, in light of the Louisiana Supreme Court's ruling, he was denied the right to a fair trial because the jury was exposed to evidence of the prescribed charge of armed robbery when the jury should have only been tasked with the issue of judging the

evidence of the aggravated rape. That issue has not been fully litigated as the trial court suggested.

ARGUMENT

1. PETITIONER'S SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF RAISES A NEW OR DIFFERENT CLAIM THAT WAS EXCUSABLY OMITTED FROM HIS PRIOR APPLICATION.

La. Code Crim. P. art. 930.4(F) requires that "a successive application shall be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application." The District Court incorrectly concluded that Mr. Nalls failed to raise a new or different claim in his second application.

Mr. Nalls filed his first Post-Conviction Relief Application in October 2011. In the first application, Mr. Nalls raised six different claims. First, trial counsel was ineffective for failing to secure expert testimony. Second, trial counsel was ineffective for failing to call witnesses for the defense. Third, trial counsel was ineffective for failing to notify the court he had withdrawn from the case, failing to notify Mr. Nalls of court rulings, and lying to Mr. Nalls about notifying the court that he had withdrawn. Fourth, trial counsel was ineffective for failing to properly argue issues of flaws in indictment. Fifth, trial counsel was ineffective for failing to argue the statute of limitations on the institution of prosecution had expired. Finally, trial counsel was ineffective for failing to ensure the trial judge complied with the reasonable doubt standard of *In Re Winship*.

The District Court denied the application and the appellate court denied writs. On November 7, 2014, the Louisiana Supreme Court granted writ in part stating that trial counsel rendered ineffective assistance when he failed to file a motion to quash on the basis that the time limitations for instituting prosecution on the armed robbery count had prescribed. The application was granted for the sole purpose of vacating Mr. Nalls' armed robbery conviction and sentence. The Court left the other conviction and sentence undisturbed.

On March 2, 2020, Mr. Nalls filed a second application for Post-Conviction Relief. It presented one issue: "Mr. Nalls was prejudiced at his trial by his attorney's ineffective assistance of counsel, as determined by the Louisiana Supreme Court, who failed to file a motion to quash the prescribed armed robbery charge, which had a prejudicial effect or influence on the verdict at trial."

Based on the Commissioner's Recommendation, it appears that the Commissioner misinterpreted Mr. Nalls' presented issue as one of ineffective assistance of counsel and concluded

that that issue had been fully litigated at the Louisiana Supreme Court. In actuality, Mr. Nalls was raising a new and different issue, which he clarified in his objection to the Commissioner's recommendation. Mr. Nalls was denied the right to a fair trial because the jury was exposed to evidence of the prescribed charge of armed robbery when the jury should have only been tasked with the issue of judging the evidence of the aggravated rape.

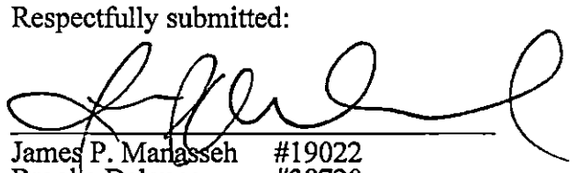
The fact that during the trial, the jury was exposed to the prejudicial effect of the prescribed charge that should not have been presented to them, is itself a constitutional violation. *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L.Ed. 2d 518 (2000). Mr. Nalls was brought to trial on both aggravated rape and armed robbery charges, even though the time limitations of the armed robbery charge had long since prescribed. This allowed the prescribed armed robbery charge to be used as evidence against him at the trial on the aggravated rape charge. That was improper evidence introduced that was unduly prejudicial that it renders the trial fundamentally unfair.

This is a separate and distinct claim of ineffective assistance of counsel – not simply that trial counsel failed to file a motion to quash the armed robbery charge which prejudiced Mr. Nalls at his trial for the armed robbery charge, but that Mr. Nalls was additionally prejudiced at his trial for the aggravated rape charge as well. The Louisiana Supreme Court did choose to leave the aggravated rape conviction and sentence undisturbed. However, it did so having only been presented with the argument that trial counsel's failure to file a motion to quash the armed robbery charge was ineffective assistance of counsel and prejudiced Mr. Nalls with respect to the armed robbery charge. The Louisiana Supreme Court was not then presented with the issue of whether trial counsel's ineffectiveness prejudiced Mr. Nalls and violated his right to a fair trial of the aggravated rape charge. That is the issue Mr. Nalls brought before the District Court, and that issue has not yet been fully litigated.

CONCLUSION

In conclusion, justice will not be served if the First Circuit's ruling is permitted to stand. Mr. Nalls prays that the trial court's judgment denying his Application for Post-Conviction Relief be vacated, and the matter remanded to the trial court for an evidentiary hearing.

Respectfully submitted:



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Post-conviction relief counsel for the defendant-applicant, Marice Nalls

VIII. VERIFICATION AND CERTIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

Before me, the undersigned notary, personally appeared James P. Manasseh, who after being duly sworn by me, deposed and stated as follows:

That he is the attorney for the defendant-applicant, Marice Nalls, in the above captioned matter, and

That all of the allegations of the foregoing application are true and well-grounded in fact and in law to the best of his knowledge, information and belief, and

That a copy of the same, together with all attachments has been served on the Trial Court, the Court of Appeal, and the District Attorney, by mail, as follows:

Hon. Beau M. Higginbotham
Judge, 19th Judicial District Court
300 North Blvd., Ste. 6401
Baton Rouge, LA 70802
Phone: (225) 389-4706
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Hillar Moore, District Attorney
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Court of Appeal, First Circuit
1600 N. 3rd Street
P.O. Box 4408
Baton Rouge, LA 70821-4408
Phone: (225) 382-3000
Fax: (225) 382-3010

James P. Manasseh

Sworn to and subscribed before me this 19th day of January, 2022.

Notary Public

TANNER C. WOODS
NOTARY PUBLIC
NOTARY ID #149162
LSBA # 37376
EAST BATON ROUGE PARISH
LOUISIANA

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Clerk of Court

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Notice of Judgment and Disposition

December 22, 2021

Docket Number: 2021 - KW - 1195

State Of Louisiana
versus
Marice Nalls

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Hon. Beau Higginbotham
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Baton Rouge, LA 70802

In accordance with Local Rule 6 of the Court of Appeal, First Circuit, I hereby certify that this notice of judgment and disposition and the attached disposition were transmitted this date to the trial judge or equivalent, all counsel of record, and all parties not represented by counsel.

RODD NAQUIN
CLERK OF COURT

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NO. 2021 KW 1195

VERSUS

MARICE NALLS **DECEMBER 22, 2021**

In Re: Marice Nalls, applying for supervisory writs, 19th Judicial District Court, Parish of East Baton Rouge, No. 07-07-0697.

BEFORE: McCLENDON, WELCH, AND HOLDRIDGE, JJ.

WRIT DENIED.

PMc
JEW
GH

COURT OF APPEAL, FIRST CIRCUIT

Peggy J. Landry

DEPUTY CLERK OF COURT
FOR THE COURT