IN THE

SUPREME COURT OF THE UNITED STATES

No.: _____

BOBBY CHARLES BYRD
Petitioner

Versus

TIM HOOPER, Warden
Louisiana State Penitentiary
Respondent

EXHIBITS

Exhibit A	05/31/18	Original Pro-Se Petition for Writ of Habeas Corpus
Exhibit B	---	State's Response
Exhibit C	10/30/20	Traverse to State's Response
Exhibit D	06/15/21	Magistrate's Report and Recommendation
Exhibit E	06/30/21	Objection to Magistrate's Report and Recommendation
Exhibit F	07/23/21	Federal District Court Denied Habeas Relief
Exhibit G	09/30/21	Application for COA
Exhibit H	02/24/22	5th Circuit Denied COA
Exhibit I	03/07/22	Motion for Rehearing
Exhibit J	03/29/22	5th Circuit Denied Rehearing

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

CIVIL ACTION

BOBBY BYRD, Petitioner

VERSUS

DARREL VANNOY, Warden
Louisiana State Penitentiary, Respondent

PETITION FOR WRIT OF HABEAS CORPUS RELIEF WITH MEMORANDUM IN SUPPORT

Submitted and Prepared by;

Mr. Bobby Byrd, DOC #299312
Main Prison Complex
Louisiana State Penitentiary
Angola, LA 70712

EXHIBIT
A

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are seeking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite case law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $_____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   CLERK'S OFFICE, U.S. DISTRICT COURT
   WESTERN DISTRICT OF LOUISIANA
   500 POYDRAS STREET, ROOM C-151
   NEW ORLEANS, LA 70130

9. **CAUTION:** You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

10. **CAPITAL CASES:** If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF

HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	Western District of Louisiana
Name (under which you were convicted): Bobby Byrd	Docket or Case No.:
Place of Confinement: Louisiana State Penitentiary	Prisoner No.: 299312
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)
BOBBY BYRD V. DARREL VANNOY, WARDEN	
The Attorney General of the State of Louisiana: Attorney General Jeff Landry	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: First Judicial District Court, Parish of Caddo, Louisiana

   (b) Criminal docket or case number (if you know): Docket Number 305, 105.

2. (a) Date of the judgment of conviction (if you know): January 16, 2013.

   (b) Date of sentencing: March 27, 2013.

3. Length of sentence: Life imprisonment pursuant to LSA-R.S. 15:529.1.

4. In this case, were you convicted on more than one count or of more than one crime? No.

5. Identify all crimes of which you were convicted and sentenced in this case: Aggravated flight from an officer.

6. (a) What was your plea? (Check one)

   [X] (1) Not guilty [ ] (3) Nolo contendere (no contest)

   [ ] (2) Guilty [ ] (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A.

(c) If you went to trial, what kind of trial did you have? (Check one)

X Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes X No

8. Did you appeal from the judgment of conviction?

☐ Yes X No

9. If you did appeal, answer the following:

(a) Name of court: Court of Appeal, Second Circuit.
(b) Docket or case number (if you know): No. 49, 142-KA.
(c) Result: Affirmed.
(d) Date of result (if you know): June 25, 2014.
(e) Citation to the case (if you know): State v. Byrd, 49, 142 (La.App. 2 Cir. 2014), 145 So.3d 536.
(f) Grounds raised: Insufficiency of the evidence and excessive sentence.

(g) Did you seek further review by a higher state court? X Yes ☐ No

If yes, answer the following:

(1) Name of court: Louisiana Supreme Court.

(2) Docket or case number (if you know): No. 2014-KO-1613.

(3) Result: Denied.

(4) Date of result (if you know): March 6, 2015.

(5) Citation to the case (if you know): State v. Byrd, 2014-1613 (La. 3/6/15), 161 So.3d 14.

(6) Grounds raised: Insufficiency of the evidence and excessive sentence.

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes X No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes X No

11. If your answer to Question 10 was "Yes," give the following information:

(1) Name of court: First Judicial District Court.

(2) Docket or case number (if you know): No. 305, 105.

(3) Date of filing (if you know): May 16, 2016.

(4) Nature of proceeding: Post-Conviction Relief.

(5) Grounds raised:

a) Ineffective assistance of appellate counsel;
b) Prosecution knowing use of false evidence to obtain a conviction;
c) Ineffective assistance of counsel; and
d) Denial of counsel of choice.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes X No

(7) Result: Denied.

(8) Date of result (if you know): November 10, 2016.

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: X Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attached additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Ineffective assistance of appellate counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition? ☐ Yes X No

(4) Did you appeal from the denial of your motion or petition? X Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? X Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: Prosecution knowing use of false evidence to obtain a conviction.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition? ☐ Yes X No

(4) Did you appeal from the denial of your motion or petition? X Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? X Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE: Ineffective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition? ☐ Yes X No

(4) Did you appeal from the denial of your motion or petition? X Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? X Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: Prosecution knowing use of false evidence to obtain a conviction.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition? ☐ Yes X No

(4) Did you appeal from the denial of your motion or petition? X Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? X Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

GROUND FIVE: Insufficiency of evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(c) **Direct Appeal of Ground Five:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes X No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? X Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them: N/A.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes X No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? X Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

First Judicial District Court, Parish of Caddo, Louisiana; Docket No. 305,105; application for post conviction relief; Illegal search and seizure, suppression of favorable and material evidence, and knowing use of false evidence to obtain conviction.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(b) At arraignment and plea: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(c) At trial: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(d) At sentencing: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(e) On appeal: Douglas Lee Harville, Appellate Counsel, Louisiana Appellate Project, 400 Travis Street, Suite 1702, Shreveport, LA 71101-3144.

(f) In any post-conviction proceeding: N/A.

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A.

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes X No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year of limitation as contained in 28 U.S.C. §2244(d) does not bar your petition.*

On May 29, 2013, Mr. Byrd filed a Motion for Appeal, and the order of appeal was entered on September 12, 2013 (R. p. 6, 211-12, 219). On February 17, 2014, counsel for Mr. Byrd filed the Original Appellate Brief on the behalf of Mr. Byrd. The Louisiana Court of Appeal for the Second Circuit affirmed Mr. Byrd's conviction and sentence. *State of Louisiana v. Bobby Charles Byrd,* No. 49, 142-KA (La.App. 2 Cir. 6/25/14), 145 So.3d 536. On Jul 24, 2014, Mr. Byrd filed a timely Writ of Certiorari in the Louisiana Supreme Court. The Louisiana Supreme Court denied certiorari on March 6, 2015. *State of Louisiana v. Bobby Charles Byrd,* No. 2014-KO-1613 (La. 3/6/15), 161 So.3d 14.

On May 16, 2016, Mr. Byrd filed a timely application for post-conviction relief in the First Judicial District Court. **Exhibit "1."** On September 1, 2016, he supplemented the application for post-conviction relief. **Exhibit "2."** The district court denied Mr. Byrd's application for post conviction relief on November 10, 2016, but filed on November 14, 2016. **Exhibit "4."** Mr. Byrd received a copy of the ruling on November 22, 2016. He then filed a notice of intent to apply for supervisory writs. On December 11, 2016, Mr. Byrd filed his application for supervisory writ of review in the Court of Appeal, Second Circuit. **Exhibit "5."** The Court of Appeal, Second Circuit denied writs on February 9, 2017. **Exhibit "6."** On March 8, 2017, Mr. Byrd filed an application for supervisory writs to the Louisiana Supreme Court. **Exhibit "7."** The Louisiana Supreme Court denied writs on March 18, 2018. **Exhibit "8."** This Writ of Habeas Corpus now follows.

---

*The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. §2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: Reverse his conviction and sentence.

or any other relief to which petitioner may be entitled.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 5-31-18.

Executed (signed) on 5-31-18, 2018.

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

CIVIL ACTION

BOBBY BYRD, Petitioner

VERSUS

DARREL VANNOY, Warden
Louisiana State Penitentiary, Respondent

PETITION FOR WRIT OF HABEAS CORPUS RELIEF WITH MEMORANDUM IN SUPPORT

Submitted and Prepared by;

Mr. Bobby Byrd, DOC #299312
Main Prison Complex
Louisiana State Penitentiary
Angola, LA 70712

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are seeking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite case law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $_____, you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and two copies to the Clerk of the United States District Court at this address:

   CLERK'S OFFICE, U.S. DISTRICT COURT
   WESTERN DISTRICT OF LOUISIANA
   500 POYDRAS STREET, ROOM C-151
   NEW ORLEANS, LA 70130

9. <u>CAUTION:</u> You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

10. <u>CAPITAL CASES:</u> If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF

HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	Western District of Louisiana	
Name (under which you were convicted): Bobby Byrd		Docket or Case No.:
Place of Confinement: Louisiana State Penitentiary	Prisoner No.: 299312	
Petitioner (include the name under which you were convicted)	Respondent (authorized person having custody of petitioner)	
BOBBY BYRD V. DARREL VANNOY, WARDEN		
The Attorney General of the State of Louisiana: Attorney General Jeff Landry		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: First Judicial District Court, Parish of Caddo, Louisiana

   (b) Criminal docket or case number (if you know): Docket Number 305, 105.

2. (a) Date of the judgment of conviction (if you know): January 16, 2013.

   (b) Date of sentencing: March 27, 2013.

3. Length of sentence: Life imprisonment pursuant to LSA-R.S. 15:529.1.

4. In this case, were you convicted on more than one count or of more than one crime? No.

5. Identify all crimes of which you were convicted and sentenced in this case: Aggravated flight from an officer.

6. (a) What was your plea? (Check one)

   [X] (1) Not guilty [ ] (3) Nolo contendere (no contest)

   [ ] (2) Guilty [ ] (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A.

(c) If you went to trial, what kind of trial did you have? (Check one)

X Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes X No

8. Did you appeal from the judgment of conviction?

☐ Yes X No

9. If you did appeal, answer the following:

(a) Name of court: Court of Appeal, Second Circuit.
(b) Docket or case number (if you know): No. 49, 142-KA.
(c) Result: Affirmed.
(d) Date of result (if you know): June 25, 2014.
(e) Citation to the case (if you know): State v. Byrd, 49, 142 (La.App. 2 Cir. 2014), 145 So.3d 536.
(f) Grounds raised: Insufficiency of the evidence and excessive sentence.

(g) Did you seek further review by a higher state court? X Yes ☐ No

If yes, answer the following:

(1) Name of court: Louisiana Supreme Court.

(2) Docket or case number (if you know): No. 2014-KO-1613.

(3) Result: Denied.

(4) Date of result (if you know): March 6, 2015.

(5) Citation to the case (if you know): State v. Byrd, 2014-1613 (La. 3/6/15), 161 So.3d 14.

(6) Grounds raised: Insufficiency of the evidence and excessive sentence.

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes X No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes X No

11. If your answer to Question 10 was "Yes," give the following information:

(1) Name of court: First Judicial District Court.

(2) Docket or case number (if you know): No. 305, 105.

(3) Date of filing (if you know): May 16, 2016.

(4) Nature of proceeding: Post-Conviction Relief.

(5) Grounds raised:

a) Ineffective assistance of appellate counsel;
b) Prosecution knowing use of false evidence to obtain a conviction;
c) Ineffective assistance of counsel; and
d) Denial of counsel of choice.

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes X No

(7) Result: Denied.

(8) Date of result (if you know): November 10, 2016.

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: X Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attached additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: **Ineffective assistance of appellate counsel.**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground One, explain why:

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition? ☐ Yes X No

(4) Did you appeal from the denial of your motion or petition? X Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? X Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: Prosecution knowing use of false evidence to obtain a conviction.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

(c) **Direct Appeal of Ground Five:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes X No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Five:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? X Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them: N/A.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes X No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? X Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

First Judicial District Court, Parish of Caddo, Louisiana; Docket No. 305,105; application for post conviction relief; Illegal search and seizure, suppression of favorable and material evidence, and knowing use of false evidence to obtain conviction.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(b) At arraignment and plea: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(c) At trial: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(d) At sentencing: B. Gerald Weeks (13306), 1150 Expressway Drive, Suite 205, Pineville, LA 71360.

(e) On appeal: Douglas Lee Harville, Appellate Counsel, Louisiana Appellate Project, 400 Travis Street, Suite 1702, Shreveport, LA 71101-3144.

(f) In any post-conviction proceeding: N/A.

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A.

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes X No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year of limitation as contained in 28 U.S.C. §2244(d) does not bar your petition.*

On May 29, 2013, Mr. Byrd filed a Motion for Appeal, and the order of appeal was entered on September 12, 2013 (R. p. 6, 211-12, 219). On February 17, 2014, counsel for Mr. Byrd filed the Original Appellate Brief on the behalf of Mr. Byrd. The Louisiana Court of Appeal for the Second Circuit affirmed Mr. Byrd's conviction and sentence. *State of Louisiana v. Bobby Charles Byrd*, No. 49, 142-KA (La.App. 2 Cir. 6/25/14), 145 So.3d 536. On Jul 24, 2014, Mr. Byrd filed a timely Writ of Certiorari in the Louisiana Supreme Court. The Louisiana Supreme Court denied certiorari on March 6, 2015. *State of Louisiana v. Bobby Charles Byrd*, No. 2014-KO-1613 (La. 3/6/15), 161 So.3d 14.

On May 16, 2016, Mr. Byrd filed a timely application for post-conviction relief in the First Judicial District Court. **Exhibit "1."** On September 1, 2016, he supplemented the application for post-conviction relief. **Exhibit "2."** The district court denied Mr. Byrd's application for post conviction relief on November 10, 2016, but filed on November 14, 2016. **Exhibit "4."** Mr. Byrd received a copy of the ruling on November 22, 2016. He then filed a notice of intent to apply for supervisory writs. On December 11, 2016, Mr. Byrd filed his application for supervisory writ of review in the Court of Appeal, Second Circuit. **Exhibit "5."** The Court of Appeal, Second Circuit denied writs on February 9, 2017. **Exhibit "6."** On March 8, 2017, Mr. Byrd filed an application for supervisory writs to the Louisiana Supreme Court. **Exhibit "7."** The Louisiana Supreme Court denied writs on March 18, 2018. **Exhibit "8."** This Writ of Habeas Corpus now follows.

---

*The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. §2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claims presented could have been discovered through the exercise of due diligence.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition? ☐ Yes X No

(4) Did you appeal from the denial of your motion or petition? X Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? X Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two:

GROUND THREE: Ineffective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Three, explain why:

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition?	☐	Yes	X	No
(4) Did you appeal from the denial of your motion or petition?	X	Yes	☐	No
(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?	X	Yes	☐	No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: Prosecution knowing use of false evidence to obtain a conviction.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? No

(2) If you did not raise this issue in your direct appeal, explain why: The issue is based on appellate counsel's ineffective assistance.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

X Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Application for post-conviction relief.

Name and location of the court where the motion or petition was filed:
First Judicial District Court, Parish of Caddo, State of Louisiana.

Docket or case number (if you know): No. 305,105.

Date of the court's decision: November 10, 2016.

Result (attach a copy of the court's opinion or order, if available): Denied.

(3) Did you receive a hearing on your motion or petition? ☐ Yes X No

(4) Did you appeal from the denial of your motion or petition? X Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? X Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Court of Appeal, Second Circuit, State of Louisiana.

Docket or case number (if you know): 51,483-KH.

Date of the court's decision: February 9, 2017.

Result (attach a copy of the court's opinion or order, if available): Denied.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

GROUND FIVE: Insufficiency of evidence.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
See Memorandum in support.

(b) If you did not exhaust your state remedies on Ground Five, explain why:

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

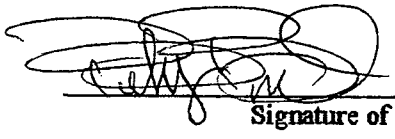
Therefore, petitioner asks that the Court grant the following relief: Reverse his conviction and sentence.

or any other relief to which petitioner may be entitled.

_____
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 5-31-18.

Executed (signed) on 5-31-18, 2018.



Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BOBBY BYRD, *Petitioner* — CIVIL ACTION

VERSUS — CASE NO.: _____

DARREL VANNOY, WARDEN, *Respondent* — SECTION: _____

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

MAY IT PLEASE THE COURT:

NOW INTO COURT, comes Mr. Bobby Byrd, who with respect submits this Memorandum in Support of Petition for Writ of Habeas Corpus.

JURISDICTION

This Honorable Court has jurisdiction of this matter pursuant to the provisions of **28 U.S.C. § 2254.**

STATEMENT OF THE CASE

On May 15, 2012, the Caddo Parish District Attorney filed a Bill of Information charging Mr. Bobby Charles Byrd with Aggravated Flight From an Officer (R. pp. 1, 7). Specifically, the State alleged that Mr. Byrd intentionally refused to bring a vehicle to a stop, under circumstances wherein a human life was endangered, to wit, "he ran through four (4) red lights on Traffic Street and drove

through two (2) stop signs without stopping" (R. p. 7). Mr. Byrd entered a plea of not guilty on May 15, 2012, after waiver of formal arraignment (Rec.p. 1). On January 15, 2013, the Caddo Parish District Attorney filed an amended Bill of Information charging Bobby Charles Byrd with Aggravated Flight From an Officer (R. pp. 2-3, 299-304, 315-316). Specifically, the State alleged that Mr. Byrd intentionally refused to bring a vehicle to a stop, under circumstances wherein human life was endangered, to wit, he drove through red lights and stop signs without stopping (R. pp. 8, 299-304, 315). Mr. Byrd entered a plea of not guilty on January 28, 2013, after waiver of formal arraignment (Rec.pp. 2-3). Jury selection commenced on January 15, 2013. (R. pp. 2-3). A jury trial followed on January 16, 2013. (R. pp. 3-4, 307-456). The jury returned a verdict of guilty as charged, by a vote of 11 guilty and 1 not guilty (R. pp. 3-4, 143, 451-452).

On January 28, 2013, he State filed a Fourth and Subsequent Felony Habitual Offender Bill (R. pp. 4, 144-145). Bobby Charles Byrd entered a plea of not guilty on January 28, 2013, after waiver of formal arraignment. (R. p. 4). On January 28, 2013, Mr. Byrd filed a Motion for New Trial, which was denied on March 27, 2013 (R. pp. 4, 146-48, 464). On March 27, 2013, a multiple offender hearing commenced in the presence of Mr. Byrd and his counsel. (R. pp. 4, 457-500). On March 27, 2013, the trial court found that Mr. Byrd was a Fourth Felony

Offender (R. pp. 4-5, 492). On March 27, 2013, the trial court sentenced Mr. Byrd to 25 years of imprisonment at hard labor without the benefit of Parole, Probation or Suspension of Sentence, a lesser sentence then the mandatory of life imprisonment (R. pp. 4-5, 496-98). On July 15, 2013, after the State and Mr. Byrd filed Motions to Reconsider Sentence, the trial court then sentenced Mr. Byrd to life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence (R. pp. 5-6, 189-91, 203-10, 501-17).

On May 29, 2013, Mr. Byrd filed a Motion for Appeal, and the order of appeal was entered on September 12, 2013 (R. p. 6, 211-12, 219). On February 17, 2014, counsel for Mr. Byrd filed the Original Appellate Brief on the behalf of Mr. Byrd. The Louisiana Court of Appeal for the Second Circuit affirmed Mr. Byrd's conviction and sentence. *State of Louisiana v. Bobby Charles Byrd,* No. 49, 142-KA (La.App. 2 Cir. 6/25/14), 145 So.3d 536. On Jul 24, 2014, Mr. Byrd filed a timely Writ of Certiorari in the Louisiana Supreme Court. The Louisiana Supreme Court denied certiorari on March 6, 2015. *State of Louisiana v. Bobby Charles Byrd,* No. 2014-KO-1613 (La. 2015).

On May 16, 2016, Mr. Byrd filed a timely application for post-conviction relief in the First Judicial District Court. **Exhibit "1."** On September 1, 2016, he supplemented the "PCR." **Exhibit "2."** The district court denied Mr. Byrd's

application for post conviction relief on November 10, 2016. **Exhibit "4."** Mr. Byrd received a copy of the ruling on November 22, 2016. He then filed a notice of intent to apply for supervisory writs. On December 11, 2016, Mr. Byrd filed his application for supervisory writ of review in the Court of Appeal, Second Circuit. **Exhibit "5."** The Court of Appeal, Second Circuit denied writs on February 9, 2017. **Exhibit "6."**

On March 8, 2017, Mr. Byrd filed an application for supervisory writs to the Louisiana Supreme Court. **Exhibit "8."** The Louisiana Supreme Court denied writs on March 18, 2018. **Exhibit "9."** This Writ of Habeas Corpus now follows.

STATEMENT OF FACTS

In July 2011, Detective Robert Gordon of the Shreveport Police Department was investigating a string of burglaries, including a burglary of the Tiki Bar and Grill by a white or Hispanic male who was possibly driving a white or light colored, 1990's model, Dodge or Chrysler minivan, missing the right front hubcap (R. pp. 369-71). On July 20, 2011, officers acting on a BOLO, told Detective Gordon they spotted a car being driven by a white male in the Allendale neighborhood. (R. pp. 372, 404). Detective Gordon, found a Plymouth van at the Livingston Hotel, 400 Pete Harris (R. pp. 366, 372). The vehicle was unoccupied and was registered to a female out of Minden (R. p. 372).

After spotting the vehicle, Detective Gordon moved to the entrance of the hotel and continued his observation. (R. pp. 372-73). The vehicle then left the parking lot of the hotel. (R. pp. 372-73). Because Detective Gordon could not see the driver, he ordered officers to stop the vehicle so he could determine who was driving. (R. p. 373). When the police approached, however, Mr. Byrd drove away. (Rappel. 343-48, 358-61, 373-75). Corporal Garrett testified that at 500 yards away (1500 feet), she observed Mr. Byrd running red lights. (R. 345). Corporal Garrett also testified that the speed limit on the bridge was thirty-five (35) and that she was traveling at fifty-nine miles per hour and that Mr. Byrd was getting farther away. (R. p. 346-347).

During the hearing for the motion to quash, Detective Gordon admitted he made an error in reporting that Mr. Byrd had ran a red light as it turned out to be a stop sign. (R.p. 276). Detective Gordon's report was based on a map of the City of Shreveport as he was "unaware there was a stop sign and not a red light." (R. 276). Although there was testimony that Mr. Byrd ran stop signs and red lights; the video do not show the necessary stop signs and res lights were ran or human life being in danger. (R. pp. 343-48, 358-61, 373-75). There existed no reasonable grounds to believe that Mr. Byrd had committed an offense prior to the stop.

ISSUES PRESENTED

PCR ISSUES

1. Mr. Byrd was denied his right to effective assistance of appellate counsel when counsel failed to litigate nonfrivolous issues in his merits brief in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

2. Mr. Byrd was denied a fair trial when the prosecution knowing used false evidence to obtain his conviction in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. Mr. Byrd was denied his right to effective assistance of counsel when counsel failed to pursue the viable defense that Chad Morris was the driver of the vehicle in the aggravated flight and not Mr. Byrd.

PCR SUPPLEMENTAL ISSUE

1. Mr. Byrd's right to be represented by counsel of choice was infringed upon in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the Louisiana Constitution Article 1 § 13.

DIRECT APPEAL ISSUE

1. The State presented insufficient evidence to establish Mr. Byrd committed an aggravated flight from an officer in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

LAW AND ARGUMENT

PCR ISSUE NO. 1: Ineffective assistance of appellate counsel.

Mr. Byrd contends that he received ineffective assistance of appellate counsel when appellate counsel failed to present critical facts and law on appeal regarding his Sixth and Fourteenth Amendments right to be represented by counsel of choice and failing to litigate Mr. Byrd's Fourth Amendment claim.

STANDARD OF REVIEW

According to the United States Supreme Court, the standard for evaluating a claim of ineffective assistance of appellate counsel enunciated in ***Smith v. Robbins,*** 528 U.S. 259, 120 S.Ct. 746 (2000); ***citing Smith v. Murray,*** 477 U.S. 527, 535-536, 106 S.Ct. 2661 (1986).

The **Robbin's** Court explained that:

> Respondent must first show that his counsel was objectionably unreasonable, ***see, Strickland***, 466 U.S., at 687-691, 104 S. Ct. 2052, in failing to find arguable issues to appeal--that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [Respondent] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal. [528 U.S. 286] ***See, Id.***, at 694, 104 S.Ct. 2052 (defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). (FN14).

Id. at U.S. 285-286.

1. Counsel of Choice

Mr. Byrd have protected constitutional rights to be represented by counsel of choice under the Sixth and Fourteenth Amendments to the United States Constitution.

A defendant has a constitutional right to retain counsel of their own choosing. ***See Wheat v. United States,*** 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). In ***Kaley v. United States,*** 134 S.Ct. 1090 (2014), the Supreme Court has:

> described that right as separate and apart from the guarantee to effective representation, as "the root meaning" of the Sixth Amendment. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 147-148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); cf. *Powell v. Alabama,* 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.ed.2d 158 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Court also held that the wrongful deprivation of choice of counsel is "structural error," immune from review for harmlessness, because it "pervades the entire trial." *Gonzalez-Lopez,* 548 U.S., 150, 126 S.Ct. 2557. Different lawyers do all kinds of things differently, sometimes "affecting whether and on what terms the defendant ... plea bargains, or decides instead to go to trial" – and if the latter, possibly affecting whether she gets convicted or what sentence she receives. So for defendants like the Kaheys, having the ability to retain the "counsel [they] believe to be best" – and who might in fact be superior to any existing alternatives – matters profoundly. Id., at 146, 126 S.Ct. 2557.

Kaley v. United States, 134 S.Ct., at 1102-1103 (2014).

In the instant case, Petitioner was represented by retained counsel of choice, Attorney Phillip Terrell. R. 129-131. Mr. Terrell was initially enrolled as counsel of

record to represent Mr. Byrd in this criminal matter. Sometime before trial, a motion for continuance was filed so that Mr. Byrd could be represented by counsel of choice, Mr. Phillip Terrell. (Transcript of continuance hearing). Attorney B. Gerald Weeks, however, was appointed and enrolled as counsel to represent Mr. Byrd. (R.1). Mr. Weeks then represented Mr. Byrd throughout the trial and sentencing. (R. 1-5). The evidence is clear that Mr. Byrd desired to be represented by Attorney Phillip Terrell, but his right to be represented by his counsel of choice was totally ignored.

Clearly, Mr. Byrd's appellate counsel was ineffective in failing to raise this nonfrivolous issue in a merits brief on direct appeal. The only resolution to this matter is to reverse Mr. Byrd's convictions and sentence.

2. Fourth Amendment Claim

Mr. Byrd also contends that his appellate counsel also failed to litigate this nonfrivilous issue in his merits brief on direct appeal regarding the motion to suppress evidence based on lack of probable cause or reasonable cause for an investigatory stop.

Standard of Review

To demonstrate actual Prejudice in a counsel's failure to litigate a Fourth Amendment claim, a defendant must prove a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate

actual prejudice. *Kimmelman v. Morrison,* 106 S.Ct. 2574 (1983). Probable cause to arrest exist where facts and circumstances within the arresting officer's knowledge which they have reasonable trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested. *Dunaway v. New York,* 442 U.S. 200, 98 S.Ct. 2248 (1979).

In the matter before the Court. the basis for the officer stopping Mr. Byrd was not supported by probable cause nor was there even evidence to conduct a Terry stop. Therefore, the alleged incriminating statement made by Mr. Byrd should have been suppressed as it prejudiced his defense. Specifically, Detective Gordon testified that Mr. Byrd stated "boss, you really ought to reduce that charge because I wasn't really going that fast and all those lights were green...."

Reasonable cause for an investigatory stop or detention, officers must "have articulate knowledge of particular facts significant reasonably to suspect the detained person of criminal activity." *State v. Dasall,* 385 So.2d 207, 209 (La. 1980). In establishing reasonable cause, a critical element is knowledge that an offense has been committed. "When the officer making the stop knows a crime has been committed, he has only to determine whether the additional trustworthy information justifies a man of ordinary caution to suspect the detained person of

the offense." *State v. Bickman,* 404 So.2d 929, 932 (La. 1981); *State v. Louis,* 496 So.2d 563, 566 (La.App. 1 Cir. 1986).

In July 2011, Detective Robert Gordon of the Shreveport Police Department was investigating a string of burglaries, including a burglary of the Tiki Bar and Grill by a white or Hispanic male who was possibly driving a white or light colored, 1990's model, Dodge or Chrysler minivan that was missing the right front hubcap. (R. pp. 369-71). On July 20, 2011, officers acting on a BOLO, told Detective Gordon they spotted a car being driven by a white male in the Allendale neighborhood. (R. pp. 372, 404). Detective Gordon, then, found a Plymouth van at the Livingston Hotel. (R. pp. 366, 372). The vehicle was unoccupied and registered to a female out of Minden. (R. p. 372).

After spotting the vehicle, Detective Gordon moved to the entrance of the hotel and continued his observation. (R. pp. 372-73). Sometime thereafter, the vehicle left the parking lot of the hotel (R. pp. 372-73). Because Detective Gordon could not see the driver, he ordered officers to stop the vehicle so that he could determine who was driving. (R. pp. 351-52, 366, 373). After officers activated their lights, Mr. Byrd stopped the van. (R. p. 373). When the police approached, however, Mr. Byrd drove away. (R. pp. 343-48, 358-61, 373-75). There was no evidence that officers had reasonable grounds to believe that the driver of the van, Bobby Charles Byrd, was involved in criminal activity to justify stopping Mr.

Byrd. (R.pp. 351-52, 366, 272-73). Clearly, there existed no reason for officers to stop Mr. Byrd.

The Fourth and Fourteenth Amendments prohibition of searches and seizures that are supported by some objective justification governs all seizures of the person, "including seizures that involve a brief detention short of traditional arrest. *Terry v. Ohio,* 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-1878, 20 L.Ed.2d 889 (1968). While the Supreme Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *See Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 2640 (1979).

The amount of evidence, the quality of the evidence and the contents of the evidence all fall short of indicia supporting reasonable suspicion or reasonable belief that the driver of the van had committed any crime. There was no testimony at all that indicated the driver of the van had anything to do with the alleged burglary. The only thing that the video showed was a dark and grainy photo of a van entering and exiting a parking lot, which may or may not have been the Tiki Bar and Grill. There was never any evidence put on that showed anyone coming from the van or from the bar to the van.

No officer actually observed who was driving the vehicle prior to, during or after the chase. Detective Gordon testified that he could not see the driver of the vehicle. (R. pp. 351-52, 366, 373). Corporal Garrett testified that she did not see who initial was in the van, who was driving the van or got out of the van. R. 351. Corporal Garrett also admits that she did not know how many people were in the van. *Id.* Corporal Morman also could not identify the individual driving the van prior to, during or after the chase. R. 355-368.

Chad Morris was driving the minivan that Mr. Byrd was alleged to have been driving which resulted in Mr. Byrd being charged with aggravated flight from an officer. Had counsel investigated, he would have discovered that officers had obtained the fingerprints of Chad Morris being located on the drivers side of the vehicle. Exhibit "3." Armed with this evidence, Mr. Byrd would have had a valid defense to the crime of which he was convicted as the state would not have been able to present to the jury that Mr. Byrd was the only occupant of the vehicle during the chase. This evidence would have proved that Chad Morris was driving the vehicle during the chase and managed to get away from officers.

Other than the evidence obtained from the poisonous tree, Mr. Byrd's alleged statement to Detective Gordon that he was driving the vehicle, R. 395, the remaining evidence does not support that Mr. Byrd committed the crime of

aggravated flight. Thus, his counsel was ineffective for failing to litigate this Fourth Amendment claim.

The exclusionary rule generally prohibits the receipt of evidence at trial which was acquired as a result of an illegal arrest. All evidence which is derived or tainted by an illegal arrest is inadmissible as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Thus, Mr. Byrd's conviction and sentence should be reversed.

PCR ISSUE NO. 2: Prosecution knowing use of false evidence to obtain a conviction.

Mr. Byrd's right to a fair trial was violated when the state knowingly used false evidence to obtain his conviction. Fourteenth Amendment.

Standard of Review

The prosecution's knowing use of false evidence to obtain a conviction is governed by the Fourteenth Amendment to the United States Constitution. In ***Napue v. Illinois***, 360 U.S. 264, 79 S.Ct. 1173, the Supreme Court reasoned that if the false evidence effect the outcome of the trial, the judgment must be reversed. Moreover, that it does not merely cease to apply because the false evidence goes only to the credibility of the witness. Id. at U.S. 270, S.Ct. 1177.

During pre-trial motion to suppress or quash, Detective Gordon testified that he was investigating a string of burglaries. R. p. 261. That he obtained information

on the burglary at the Tiki Bar, in the form of a grainy video of a white or Hispanic male inside the building, but he could not make an identification from the video because of the darkness inside. R. p. 262. He obtained a video of "the suspect vehicle [that] was captured on ... camera at the same business, in a parking lot, and it was noted that it was an early to mid '90s Dodge or Plymouth minivan that was white or light colored, and was missing the right front hubcap. *Id.* Detective Gordon alleged to have obtained information that the van was spotted in the Allendale area being driven by a white male. R. 262. He then proceeded to the Allendale area where he spotted the van at the Livingston Motel. R. 262-263.

Needing to identify the driver, he backed away and gained a vantage point down the street. R. 263. The van exited the parking lot so he called on the radio for officers in marked units to conduct a traffic stop in an attempt to identify the driver. *Id.* The purpose of the stop was to identify the driver and see if the vehicle was actually the one that was on the video of the bar that had been burglarized, and to try to gain as much information as possibly could. R. 263. Detective Gordon admitted he did not see the person that was driving the van. R. 264.

At trial, however, Detective Gordon testified falsely that he advised officers to stop the vehicle because he had a possible burglary suspect that was operating the vehicle that he needed to identify. R. 373. Prior to trial, at no time did Detective

Gordon mention that he believed that the driver of the van was a possible burglary suspect. Note that the burglary at the Tiki Bar had occurred three of four days prior to this incident. R. 267. To add, there no License plate from video. R. 267. Moreover, the vehicle registered to a white female in Minden. R. 268. According to Detective Gordon, he did not see who was driving the vehicle and only asked officers to stop the vehicle so that they could identify the driver. R. p. 269.

Without the false evidence, the prosecution would not have been able to meet their burden of proving aggravated flight from an officer as the element of reasonable grounds to believe that the driver of the van had committed the offense of burglary.

To sustain Mr. Byrd's conviction for aggravated flight from an officer, the State had to establish that Mr. Byrd "intentionally refused ... to bring the vehicle to a stop, under circumstances wherein human life is endangered, knowing the ... [Mr. Byrd] has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe .... [Mr. Byrd] had committed the offense." *State v. Ashley, supra* (citing LSA-R.S. 14:108.1).

Since the false evidence tainted Mr. Byrd's trial, his conviction and sentence should be reversed.

PCR ISSUE NO. 3: **Ineffective assistance of counsel.**

Mr. Byrd was denied his right to effective assistance of counsel when counsel failed to investigate his only viable defense that Chad Morris was the driver of the minivan that Mr. Byrd was convicted of driving resulting in his conviction for aggravate flight from an officer in violation of the Sixth and Fourteenth Amendments.

Standard of Review

Trial counsel's ineffective assistance is govern by the **6th and 14th Amendment of the United States Constitution.** To make a successful claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694, 104 S.Ct. At 2068.

Mr. Byrd's counsel failed to investigate evidence that shows that Chad Morris was driving the minivan that Mr. Byrd was alleged to have been driving which resulted in Mr. Byrd being charged with aggravated flight from an officer. An investigation would have lead to the discovery that officers had obtained the

fingerprints of Morris on the drivers side of the vehicle. Exhibit "3." Armed with this evidence, Mr. Byrd would have had a valid defense to this crime. The evidence would have proved that Mr. Byrd was not the only occupant of the vehicle during the chase. This evidence would also have proved that Morris was driving the vehicle during the chase, but he managed to get away from officers once crossing over the levee and escaping through the river bank's brush.

No officer actually observed who was driving the vehicle prior to, during or after the chase. Detective Gordon testified that he could not see the driver of the vehicle. (R. pp. 351-52, 366, 373). Corporal Garrett testified that she did not see who initially was driving the van or who got out of the van. R. 351. Corporal Garrett also admits that she did not know how many people were in the van. *Id.* Corporal Morman also could not identify the individual driving the van prior to, during or after the chase. R. 355-368. Although she alleged to have looked down on the driver of the van as the basis of her identification of Mr. Byrd as being the driver, the video implicitly shows that as soon as Corporal Morman walked up to the driver side door of the van, the van pulled off leaving her with no opportunity to obtain a description of the driver. See MSV Video.

Clearly, trial counsel's failure to investigate into Chad Morris driving the minivan at the time of this incident prejudiced Mr. Byrd's defense. Mr. Byrd is

entitled to a reversal of his conviction and sentence as a result of ineffective assistance of counsel.

PCR SUPPLEMENTAL ISSUE NO. 4: Counsel of choice

Mr. Bobby Byrd's right to be represented by counsel of choice was clearly violated when the trial court mistakenly forced Attorney B. Gerald Weeks who has limited experience in criminal law which experience occurred early in Mr. Weeks's legal career sometime in the 1970's.

STANDARD OF REVIEW

In *United States v. Gonzalez-Lopez,* 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), the Court explained that:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Cf. *Powell v. Alabama,* 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Government here agrees, as it has previously, that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624-625, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).
>
> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue

> otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.
>
> The Court also had "little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"

Id. at U.S. 147-150.

Likewise, Louisiana Constitution Article 1 § 13 provides in pertinent part, "At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." The Louisiana Supreme Court has also determined that "the right to counsel of choice extends to a criminal defendant who has hired his own counsel." *State v. Reeves,* 2006-2419 (La. 5/5/09), 11 So.3d 1031. In addition, the right to counsel of choice extends to a criminal defendant who has had an attorney hired for him by a collateral source." Citing *State v. Jones, 1997-2593* (La. 3/4/98), 707 So.2d 975. The Court also recognized that "the right to counsel extends under the state constitution to a criminal defendant for whom an attorney volunteers his services." Citing *State v. Sims,* 2007-2216 p. 1 (La. 11/16/07), 968 So.2d 721, 722.

In May 2012, Attorney B. Gerald Weeks attended the initial arraignment in Attorney Phillip Terrell's stead, because Mr. Terrell sought inpatient treatment at Palmetto facility for personal problems. **Exhibit "7, p. 2, para. 8" (Affidavit of**

Attorney B. Gerald Weeks). Mr. Weeks "never intended to represent Byrd through the conclusion of the criminal proceedings, but because of the situation with Terrell, and the progressing criminal proceedings, he continued to appear on Byrd's behalf. **Exhibit "7, p. 2, para. 9" (Affidavit of Attorney B. Gerald Weeks).** According to Mr. Weeks, he "recalls on two (2) occasions, he raised the problem of Byrd not having his chosen counsel to represent him in his criminal proceedings with the Trial Court. **Exhibit "7, p. 2, para. 10" (Affidavit of Attorney B. Gerald Weeks).** At the beginning of trial, Mr. Weeks again "recalls making a similar motion on the issue that Byrd was not represented by his chosen criminal counsel to the Trial Court. **Exhibit "7, p. 3, para. 12" (Affidavit of Attorney B. Gerald Weeks).** Mr. Weeks attempts of having Mr. Byrd represented by his counsel of choice were fruitless, as the Trial Court was steadfast in Mr. Weeks representing Byrd.

Mr. Byrd has tried every possible avenue in obtaining a true copy of the trial record or minute entries regarding the hearings and discussions regarding being represented by his counsel of choice (Attorney Phillip Terrell), to no avail.

Nonetheless, the law is unambiguous, "deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." ***United States v. Gonzalez-Lopez,*** 548 U.S. 140, 147-150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

Mr. Byrd further submits as evidence of Attorney Phillip Terrell as counsel of Mr. Byrd's choosing, the contract that is a part of the trial record which Attorney Phillip Terrell provided to Mr. Byrd prior to Mr. Terrell seeking in-patient treatment at Palmetto facility. As can be seen, Mr. Byrd endorsed the contract prior to trial. Mr. Byrd doubtlessly had chosen Attorney Phillip Terrell to represent him in this matter. (R. 129-131). In fact, a total of $4000.00, was paid to Mr. Terrell by Mr. Weeks from a settlement that Mr. Weeks had represented Mr. Byrd in prior to this incident.

The only resolution available is to reverse Mr. Byrd's conviction and sentence.

DIRECT APPEAL ISSUE NO. 1: Insufficient Evidence

The testimony at trial established that the police did not know who was driving the van, which was being operated by Mr. Byrd, when the police pulled over the van and before Mr. Byrd drove off. While the police may have had reasonable cause to believe that the van had been involved in a burglary, they did not know who was driving the van, they knew that the van was owned by a female from Minden, and they knew that the van was a different model than in the BOLO. Before the stop, there was no evidence that this particular van was being driven by a male, much less a white or Hispanic male. Accordingly, when Mr. Byrd was

pulled over, officers had no reasonable grounds to believe that the driver of the van had committed the offense, all they knew was that the van was of a different model than the one used in a burglary.

While this knowledge may have been sufficient for a ***Terry*** stop, it was insufficient to establish an element of Aggravated Flight From an Officer. Accordingly, the evidence introduced at the trial of this case, when viewed under the ***Jackson*** standard, was insufficient to prove all of the elements of the offense of Aggravated Flight From an Officer beyond a reasonable doubt.

To sustain Mr. Byrd's conviction for Aggravated Flight From an Officer, the State had to establish that Mr. Byrd "intentionally refused ... to bring the vehicle to a stop, under circumstances wherein human life is endangered, knowing the ... [Mr. Byrd] has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe .... [Mr. Byrd] had committed the offense." ***State v. Ashley***, supra (citing LSA0R.S. 14:108.1). Further, the State had to prove that "the signal ... [was] given by an emergency light and a siren on a vehicle marked as a police vehicle." 33,880, at **5-6 768 So.2d 820 (citing LSA-R.S. 14:108.1). Finally, the State had to establish that Mr. Byrd engaged in "circumstances wherein human life is endangered include: leaving the roadway; forcing another vehicle to leave the roadway; exceeding the posted speed limit by

25 miles per hour or more; ... traveling against the flow of traffic;" running stop signs; or running red lights. 33,880, at *6; 768 So.2d at 820 (citing LSA-R.S. 14:108.1; two of these listed elements must be established).

As set forth above, the State failed to offer any evidence that officers had reasonable grounds to believe that the driver of the van, Bobby Charles Byrd, had committed an offense at the time they gave the van he was driving a visual and audible signal to stop by officers (Rec.pp. 351-52, 366, 272-73).

Further, there was evidence that Mr. Byrd ran red lights in Caddo Parish (Rec.pp. 343-48, 358-61, 373-75). However, there was no evidence that he ran a stop sign in Caddo Parish. ***Id.***, ***but see*** Rec.p. 244.

Given the evidence at trial, the State failed to meet its burden of proof. Accordingly, Mr. Byrd's conviction of Aggravated Flight From an Officer must be reversed and his sentence should be vacated.

WHEREFORE, for the above and foregoing reasons, the conviction and sentence entered as to Bobby Charles Byrd should be vacated.

CONCLUSION

Faced with the predicament presented in this case, both the United States Supreme Court and the Louisiana Supreme Court would conclude as in previous cases that not only was Mr. Byrd's right to counsel of his own choosing been

violated but also his right to the effective assistance of counsel and his right to a fair trial have been violated.

Respectfully Submitted,

Mr. Bobby Byrd, DOC #299312
Main Prison Complex
Louisiana State Penitentiary
Angola, La. 70712

CERTIFICATE OF SERVICE

I, Mr. Bobby Byrd, hereby certify that I have served a true and correct copy of the above and foregoing application for writ of habeas corpus and memorandum in support upon James E. Stewart, District Attorney, 501 Texas Street, Shreveport, LA 71101, by hand delivering the same to prison authorities at the Louisiana State Penitentiary, postage prepaid and correctly addressed and certified on this 31st day of May, 2018.

Mr. Boby Byrd

PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. SECTION 2254

Prisoner's Name:	Bobby Byrd
Prison Number:	#299312
Place of Confinement	Louisiana State Penitentiary, Angola, LA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BOBBY BYRD #299312 **PETITIONER,**	**CIVIL ACTION NO. 5:18-CV-0748 SEC P**
VERSUS	**CHIEF JUDGE HICKS**
WARDEN DARREL VANNOY, LA. STATE PENITENTIARY **RESPONDENT.**	**MAGISTRATE JUDGE HORNSBY**

RESPONSE TO WRIT OF HABEAS CORPUS

EXHIBIT
B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BOBBY BYRD #299312 PETITIONER,	CIVIL ACTION NO. 5:18-CV-0748 SEC P
VERSUS	CHIEF JUDGE HICKS
WARDEN DARREL VANNOY, LA. STATE PENITENTIARY RESPONDENT.	MAGISTRATE JUDGE HORNSBY

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BOBBY BYRD #299312 PETITIONER,	**CIVIL ACTION NO. 5:18-CV-0748 SEC P**
VERSUS	**CHIEF JUDGE HICKS**
WARDEN DARREL VANNOY, LA. STATE PENITENTIARY RESPONDENT.	**MAGISTRATE JUDGE HORNSBY**

INDEX OF AUTHORITIES

Statute

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

BOBBY BYRD #299312 PETITIONER,	CIVIL ACTION NO. 5:18-CV-0748 SEC P
VERSUS	CHIEF JUDGE HICKS
WARDEN DARREL VANNOY, LA. STATE PENITENTIARY RESPONDENT.	MAGISTRATE JUDGE HORNSBY

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. §2254 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Bobby Byrd ("Byrd") petitions for habeas corpus relief from his conviction for aggravated flight from an officer, a violation of La. R.S. 14:108.1(C). The State of Louisiana ("the State") on behalf of Warden Darrel Vannoy of the Louisiana State Penitentiary opposes the petition. As set forth in the Answer and herein, habeas corpus relief should be denied and the petition dismissed with prejudice.

Statement of the Case

On July 20, 2011, Byrd fled from a stop by patrol officers in Shreveport. He led them on a chase through downtown Shreveport and into Bossier City, where he crashed his van by the levee. He fled on foot to the Red River, from which he was forcibly removed and taken into custody.

On May 15, 2012, the State charged Byrd by bill of information with one count of aggravated flight from an officer (Vol. I, pp. 7-8). Attorney Gerald Weeks ("Weeks") enrolled as counsel for Byrd and represented him through his trial and adjudication as a fourth felony offender (Vol. I, pp. 1-5).

After a preliminary examination, the Honorable Ramona Emanuel ("Judge Emanuel") found probable cause for the charges, and the parties agreed to a November 12, 2012, trial date (Vol. I, pp. 252-53). Weeks filed a motion to continue the trial date because he would be attending Veterans' Day events in Washington, D.C., and would not have adequate time to prepare (Vol. I, p. 116). The motion was granted, and the trial was reset for January 14, 2013 (Vol. I, p. 1).

On January 10, 2013, Weeks filed a "Motion to Suppress and/or Quash" by which he sought suppression of all testimonial and physical evidence on the grounds that the police lacked either probable cause or a warrant for the stop that preceded Byrd's flight. On that same date, Weeks filed another motion to continue due to his having flu-like symptoms and a doctor's appointment (Vol. I, p. 126). However, Weeks was present with Byrd on January 14, 2013, announced ready for trial, and began jury selection (Vol. I, p. 2). Filed into the record on that same date was a purported fee agreement between Byrd and attorney Phillip Terrell ("Terrell"). (Vol. I, pp. 129-31). Terrell had not signed the agreement, and it was not dated.

On January 15, 2013, Judge Emanuel denied both the motion to suppress/quash and Weeks's request for a stay to take an emergency writ. She ruled that a statement made by Byrd during the investigation would be admissible at trial (Vol. II, pp. 293-97). She also granted the State's motion in limine to prohibit the defense from informing the jury that Byrd might be sentenced as a multiple offender if convicted (Vol. I, p. 132; Vol. II, pp. 301-04).

Testimony began on January 16, 2013, after Byrd rejected on the record an offer to plead guilty as a fourth offender with a 20-year sentence (Vol. II, pp. 313-14). Corporal Mary Jo Coburn Garrett ("Cpl. Garrett") testified that she was on downtown patrol on July 20, 2011, when Detective Robert Gordon ("Det. Gordon") requested a stop of a van that he had under

surveillance (Vol. II, pp. 338, 354). Cpl. Garrett initiated the stop by activating the lights and sirens on her patrol car, which automatically activated the MVS system. The video from her patrol car was played for the jury (Vol. II, pp. 339-41). Cpl. Garrett testified that the van came to a stop after turning onto Louisiana Avenue. Corporal Morman ("Cpl. Morman") pulled up behind her, and both exited their patrol cars. Cpl. Morman went to the driver's side of the van, and Cpl. Garrett went to the passenger side. According to Cpl. Garrett, the video showed Cpl. Morman beside the van for a few seconds before it sped off (Vol. II, pp. 339-43).

The van turned onto Texas Street with Cpl. Garret in pursuit. She noted a light that had been red but changed to green as she was turning (Vol. II, p. 344). Cpl. Garrett testified that she drove through three green lights on Texas Street and that she had one red light just before the Texas Street Bridge. She was about 500 yards behind the van and observed it drive through lights that were red (Vol. II, pp. 344-45).[1] Cpl. Garrett testified that she was driving 59 miles per hour at the bridge where the speed limit is 35 mph miles per hour, and that the van was getting farther away from her (Vol. II, pp. 346, 353). She saw the van turn onto Traffic Street in Bossier City and run stop signs without even braking (Vol. II, pp. 347-48). She parked at the levee where Traffic Street dead-ends and exited her patrol car. After going over the levee, she saw the van stopped by the river. She began establishing a perimeter for a search (Vol. II, pp. 349-50). Though she did not get a good look at the driver, Cpl. Garrett described him as a white male with brown hair (Vol. II, pp. 350-51).

Cpl. Morman testified that the stop was made at Det. Gordon's request in reference to some burglaries that had occurred (Vol. II, p. 356). Cpl. Morman approached the driver's side

[1] Cpl. Garrett explained on cross-examination that the camera of her MVS was turned at an angle and did not show the van during much of the chase. However, she could see the van throughout the chase (Vol. II, p. 354). In her direct testimony, Cpl. Garret said that she had turned the camera at the time of the traffic stop so that it would be recorded (Vol. II, p. 343).

and asked the driver to shut it off. She described the driver as a slender white male with short brown hair and noted that he appeared very nervous. She did not see anyone else in the van, and she testified that the driver was the same person who was later apprehended from the river (Vol. II, pp. 358, 364). Instead of complying with her request, Byrd put the van in drive and headed quickly toward Texas Street where he took a left (Vol. II, pp. 358-59). Cpl. Morman testified that it was 2:20 p.m. on a workday and that Texas Street was very busy with cars and people. She was behind Cpl. Garrett's patrol car during the chase. She testified that the van ran red lights and then ran stop signs after turning into a residential neighborhood in Bosier City and driving past a school (Vol. II, pp. 360-61). Cpl. Morman drove up to the abandoned van and pursued Byrd on foot. Two fishermen on the river bank pointed out the direction in which Byrd ran. It led to a dense brush. At that point, Cpl. Morman helped establish a perimeter (Vol. II, pp. 361-62). She also helped apprehend Byrd, who had jumped into the river. She described Byrd as "very difficult" in that he refused to follow commands or allow them to cuff his hands (Vol. II, pp. 363-64).

Det. Gordon of the Shreveport Police Department's Property Crimes Bureau testified that he had been investigating a string of nightclub burglaries and had obtained security footage from a Detective Courtney that was associated with a burglary of the Tiki Bar on Kings Highway on July 17, 2011. Security footage from a parking lot showed a light-colored minivan with a missing right front hubcap, and security footage from inside the bar showed either a white or Hispanic male (Vol. II, pp. 370-71, 398). Det. Gordon distributed copies of the images at roll call the morning of July 20, 2011. Later that day, he was notified that the van was spotted in the Allendale neighborhood. Det. Gordon located the van parked at the Livingston Motel, a location noted for drugs and prostitution. The van was unoccupied. He looked up the tag number and

learned it was registered to a woman in Minden.[2] He conducted surveillance of the van until it left the parking lot at 2:15 in the afternoon. He did not see who was in the van. He radioed for a patrol unit to stop the van so that the driver could be identified and information obtained (Vol. II, pp. 372-73). He came up behind Cpl. Garrett and Cpl. Morman at the stop and joined in the pursuit behind their marked units after the van fled (Vol. II, pp. 373-74).

Det. Gordon testified that the van traveled at a high rate of speed, running red lights and stop signs with blatant disregard for public safety. Det. Gordon recalled traveling at about 50 miles per hour along Texas Street and losing ground on the van (Vol. II p. 375). He drove over the levee where the van had crashed into a tree and been abandoned. After a protective sweep of the van, he went down a trail where he encountered the fishermen and learned that a white male had headed upstream a few seconds ahead of him (Vol. II, pp. 374, 376-77).

Corporal Yarborough and his K-9, Mico, arrived on scene along with Officer Short from Bossier City. As they went down a steep bank, the ground caved in under Mico, causing him to fall into the water. At that point, Byrd's head popped up out of the brush, and he swam into the current with Mico after him. Mico grabbed Byrd's arm, but let go once his head went under water (Vol. II, pp. 377-79). Cpl. Yarbrough managed to get Mico back to the bank, but was bitten in the process. Det. Gordon and Officer Short commanded Byrd to come ashore, but he refused even though he claimed he could not swim. Officer Short went in after Byrd, who grabbed a fallen tree limb and pushed Short away. Det. Gordon got into the water and administered a "distractionary blow" to get Byrd to let go of the tree limb. Though they were in deep water, Byrd continued to fight the officers. Even once cuffed, he refused to cooperate and had to be dragged to the bank (Vol. II, pp. 379-83, 388). Due to Byrd's lack of cooperation, officers obtained use of a party barge to transport Byrd to an area by the Bass Pro Shop at the

[2] The woman was later identified as Byrd's mother (Vol. II, p. 403).

Louisiana Boardwalk where they could take him ashore without having to drag him over the steep levee (Vol. II, p. 383).

Byrd was taken to LSU Medical Center where he was listed as "John Doe" until a Bossier detective recognized him and confirmed his identity (Vol. II, pp. 383, 392). Det. Gordon went to see Byrd after his release from the hospital but did not interview him. Byrd claimed that everything was a blur because he had been mainlining cocaine and heroin (Vol. II, p. 392). Det. Gordon returned to see Byrd a week later. Byrd was acting lethargic and as if mentally challenged. After asking Byrd some qualifying questions, Det. Gordon did not proceed with the interview (Vol. II, p. 394). As he was leaving, he told Byrd that he would forward the case to the district attorney's office for prosecution. Det. Gordon testified that Byrd looked at him and said, "Boss, you really ought to reduce that charge because I wasn't really going that fast and all those lights were green[,]" (Vol. II, pp. 394-95).

When the prosecution rested, Weeks moved for a dismissal on the ground that the evidence did not proved the officers had reasonable grounds to believe Byrd had committed any offense when they stopped the van (Vol. II, p. 408). Judge Emanuel denied the motion as not supported by law or evidence (Vol. II, p. 411). After Byrd confirmed that he would not testify, the defense rested. The jury returned a verdict of guilty as charged by a vote of eleven to one (Vol. I, p. 143; Vol. II, pp. 451-52).

The State then charged Byrd as a fourth felony offender (Vol. I, p. 144). Weeks filed a motion for a new trial. One of the alleged grounds was that Judge Emanuel had denied a "motion seeking to continue the trial to allow the engaged defense counsel to actually conduct the trial" (Vol. I, p. 146). Byrd also filed a *pro se* motion seeking production of various documents (Vol. I, p. 162). On March 27, 2013, Judge Emanuel denied both motions,

adjudicated Byrd a fourth felony offender, and sentenced him to 25 years at hard labor (Vol. III, pp. 465, 492-95). Arguing that Byrd was subject to a mandatory life sentence as a fourth felony offender, the prosecution filed a motion to reconsider the sentence (Vol. I, p. 189). Weeks withdrew as Byrd's counsel and requested appointment of appellate counsel (Vol. I, pp. 192-94). Attorney Murray Salinas enrolled as counsel for Byrd for the reconsideration of sentence and requested a continuance, which was granted (Vol. I, pp. 201-02). Byrd filed a *pro se* motion to reconsider sentence (Vol. I, pp. 203-08). On July 15, 2013, Judge Emanuel denied the *pro se* motion to reconsider sentence, granted the State's motion, and imposed the mandatory sentence of life imprisonment (Vol. III, pp. 501-15).

Assigning as error the sufficiency of the evidence and excessiveness of the sentence, the Louisiana Appellate Project filed Byrd's appeal before the Louisiana Second Circuit Court of Appeal ("2nd Circuit") on February 19, 2014 (Vol. III, pp. 524-37). Finding the assignments of error to be meritless, the 2nd Circuit affirmed Byrd's conviction and sentence on June 25, 2014 (Vol. III, pp. 570-83).[3] Byrd filed an application for supervisory review before the Louisiana Supreme Court ("LSC"), alleging ineffective assistance of counsel and denial of counsel of choice (Vol. IV, pp. 584-93). He supplemented his application with the same sufficiency of the evidence and excessive sentence claims that had been denied by the 2nd Circuit (Vol. IV, pp. 635-47). On March 6, 2015, the LSC denied the writ without comment (Vol. IV, p. 708).[4] See

[3] Caddo Parish District Attorney James E. Stewart, Sr., was on the bench of the 2nd Circuit and served on the panel that affirmed Byrd's conviction. However, Stewart was the not the writer of the opinion, and the undersigned, who then served as Judge Stewart's law clerk, had no involvement in reviewing Byrd's appeal. The State has informed Byrd twice of the apparent conflict under the Louisiana Rules of Professional Conduct. First, he was informed during some of his state-court post-conviction proceedings (Vol. V, pp. 1160). Byrd was again informed in this matter, and the State filed into the record District Attorney Stewart's affidavit regarding the conflict and the fact that he is screened from participation in this matter. See Documents 34. To the undersigned's knowledge, Byrd has not waived the conflict. As such, District Attorney Stewart remains screened from this matter.

[4] Chief Justice Johnson would have granted the writ (Vol. IV, p. 708).

State v. Byrd, 49,142 (La. App. 2 Cir. 6/25/14), 145 So.3d 536, *writ denied*, 2014-1613 (La. 3/6/15), 161 So.3d 14.

Byrd filed a post-conviction relief application ("PCRA") on May 31, 2016; the affidavit in the application was dated March 16, 2016 (Vol. IV, pp. 717, 721). Byrd asserted three claims: (1) ineffective assistance of appellate counsel in failing to assert as error denial of counsel of choice and the denial of the motion to suppress; (2) the use of false evidence by the prosecution; and (3) ineffective assistance of counsel in failing to investigate evidence that a Chad Morris was the driver of the van (Vol. IV, pp. 722-34). Byrd supplemented his application with a fourth claim alleging a denial of counsel of choice and an affidavit by Weeks (Vol. IV, pp. 787-93). On November 14, 2016, Judge Emanuel denied Byrd's claims on the merits (Vol. IV, pp. 797-800).

Asserting the same four claims, Byrd filed a writ application (No. 51,483-KH) post-marked December 27, 2016, before the 2nd Circuit (Vol. IV, pp. 807-24). The 2nd Circuit denied the writ on February 9, 2017. The court cited La. C. Cr. P. arts. 930.2 and 930.4(A), *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984), and two state cases (Vol. IV, p. 955).[5] Next, Byrd asserted the same four claims in a writ application (2017-KH-533) before the LSC that was mailed on March 9, 2017 (Vol. V, pp. 956-77). On May 18, 2018, the LSC denied the writ because Byrd failed to show he received ineffective assistance of counsel under *Strickland, supra*, and failed to satisfy his post-conviction burden of proof as to his other claims (Vol. V, pp. 1125-26). See *State ex rel. Byrd v. State*, 17-0533 (La. 5/18/18), 242 So.3d 1222.

[5] La. C. Cr. P. art. 930.2 provides that a petitioner who files a PCRA "shall have the burden of proving that relief should be granted." La. C. Cr. P. art. 930.4(A), provides that "[u]nless required in the interest of justice, no claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered."

Again claiming that the prosecution presented false evidence at trial, Byrd filed a second PCRA in the trial court on June 18, 2018. He claimed that the three witnesses who had testified at his criminal trial conceded during their testimony in his federal civil trial that he had not committed the traffic violations that supported his aggravated flight conviction (Vol. V, pp. 1127-43).[6] In conjunction with this second PCRA, Byrd filed a motion for production of documents to obtain the transcripts from the federal civil trial (Vol. V, pp. 1148-55). After the State filed procedural objections, Judge Emanuel denied relief on December 6, 2018. She noted that the PCRA had a "myriad of procedural errors," that Byrd did not have new evidence, and that he was not entitled to the transcripts he sought (Vol. V, pp. 1177-79).

Byrd asserted the same claim in a writ application (No. 52,758-KH) before the 2nd Circuit. He also complained that he was denied an evidentiary hearing and the requested transcripts (Vol. V, pp. 118-120). On March 18, 2019, the 2nd Circuit denied the writ as time-barred and noted that Byrd failed to establish a claim for relief under the newly discovered evidence exception to the time limitation of La. C. Cr. P. art. 930.8(A)(1). The court also advised Byrd that he had to seek the transcripts from the federal district court (Vol. V, p. 1248).

Byrd presented the same three claims in a writ application (No. 19-KH-622) e-filed on April 17, 2019, before the LSC (Vol. V, pp. 1249-69). On January 14, 2020, the LSC denied the writ because Byrd "previously exhausted his right to state collateral review and fails to show that any exception permits his successive filing (Vol. V, p. 1330).[7]

---

[6] Following his arrest, Byrd brought an action under 28 U.S.C. §1983 alleging use of excessive force during his arrest. A jury trial resulted in dismissal of his claims. The federal district court denied a motion for a new trial and appointment of counsel. The ruling was affirmed on appeal. *Byrd v. Lindsey*, 736 Fed. Appx. 465 (5th Cir. 2018), *cert. denied*, 139 S.Ct. 1565, 203 L.Ed.2d 729 (2019).

[7] Both Chief Justice Johnson and Justice Hughes would have granted the writ (Vol. V, p. 1330).

Byrd filed the instant petition for writ of habeas corpus on June 4, 2018. Though it was stricken by order issued August 28, 2018, due to Byrd's failure to pay the filing fee or submit an IFP application, the case was reinstated on September 12, 2018 (See Documents 10 and 15 of federal habeas record). The State does not dispute the timeliness of Byrd's petition under 28 U.S.C. §2244(d).

Exhaustion of State Remedies and Procedural Default

To obtain habeas relief, a petitioner must first exhaust available state court remedies by giving the State the opportunity to address alleged violations of a prisoner's federal constitutional rights. 28 U.S.C. §2254(b)(1)(A); *Baldwin v. Reese,* 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004); *O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *Duncan v. Henry,* 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). A prisoner satisfies the exhaustion requirement when he fairly presents the substance of his federal habeas claim to the state courts, including the highest state court, in a procedurally proper manner according to the rules of the state courts. *Baldwin v. Reese*, at 29-33, 124 S.Ct. 1347.

Byrd's claims alleging ineffective assistance of appellate counsel (Claim 1), use of false evidence (Claim 2), ineffective assistance of counsel (Claim 3), and denial of counsel of choice (Claim 4) were exhausted during Byrd's first post-conviction relief proceeding. He asserted Claims 1, 2, and 3 in his initial PCRA filed before the state trial court (Vol. IV, pp. 726-34). He asserted Claim 4 in a supplement to that PCRA (Vol. IV, pp. 787-90). After the trial court denied relief, Byrd asserted Claims 1 through 4 in a writ application before the 2nd Circuit (Vol. IV, pp. 813-24). After the 2nd Circuit denied relief, Byrd asserted the same four claims in a writ application before the LSC (Vol. V, pp. 966-77). Byrd presented Claims 1 through 4 to the state courts in a procedurally proper manner and afforded the state courts the opportunity to address

the alleged violations of his federal constitutional rights. *Baldwin, supra*; *O'Sullivan, supra.* Claims 1 through 4 are exhausted.

Byrd exhausted state remedies as to his sufficiency of the evidence claim (Claim 5) in his direct appeal. The same claim was presented in Byrd's appeal to the 2nd Circuit and thereafter in a writ application to the LSC (Vol. III, pp. 525, 534-36; Vol. IV, pp. 635, 644-47). Byrd afforded the appropriate state courts by way of his direct appeal the opportunity to address Claim 5 and resolve the alleged constitutional violation of insufficient evidence to support his conviction. *Baldwin, supra*; *O'Sullivan, supra.* Claim 5 is exhausted.

Claim 6, a false evidence/actual innocence claim, is an exhausted claim. Byrd presented this claim to the state trial court in this second PCRA (Vol. V, pp. 1135-43). After the trial court denied relief, Byrd presented the same claim in a writ application before the 2nd Circuit and thereafter in a writ application before the LSC (Vol. V, pp. 1193-201; Vol. V, pp. 1260-67). Byrd presented Claim 6 to the state courts in a procedurally proper manner and afforded the state courts the opportunity to address the alleged federal constitutional violation. *Baldwin, supra*; *O'Sullivan, supra.* Claim 6 is exhausted.

Additionally, Claim 6 is a procedurally defaulted claim and should be barred from federal habeas review. The procedural default doctrine bars federal habeas review in instances where a state court declines to address a state prisoner's federal claim because he has failed to follow or has been defaulted by the state's procedural rules. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). For purposes of Claim 6, a claim is procedurally defaulted – and review of a petitioner's federal habeas claim forfeited - where the state court clearly and expressly based its dismissal of the petitioner's federal constitutional claim on a state procedural rule that constitutes an independent and adequate ground for dismissal. *Bledsue v.*

Johnson, 188 F.3d 250, 254-55 (5th Cir. 1999), *rehearing denied by* 198 F.3d 243 (5th Cir. 1999). Grounds for procedural default must be based on the judgment rendered by the last state court. *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

As stated, this claim was presented by Byrd in his second PCRA. The last state court to render judgment on Byrd's second PCRA was the LSC, which denied Byrd's writ application on the ground that he had "previously exhausted his right to state collateral review and fails to show that any exception permits his successive filing" (Vol. V, p. 1330). The LSC dismissed Byrd's second PCRA on procedural grounds and thereby declined to address the federal constitutional issue he raised concerning the alleged use of false evidence by the prosecution at his trial in violation of his rights under the Fourteenth Amendment of the United States Constitution. Though the LSC did not expressly cite the relevant state law provision, it did refer to the filing as "successive." Successive applications are prohibited by paragraphs D and E of La. C. Cr. P. art. 930.4. Paragraph D requires dismissal of a successive application that fails to raise a new or different claim, and Paragraph E requires dismissal of a successive filing that fails to raise a new or different claim that was inexcusably omitted from a prior application. Both provisions have been found to constitute independent and adequate state procedural grounds for dismissal that bar habeas review. See *Dargin v. Wilkinson*, 2008 WL 5574663 *6-7 (W.D. La. 2008) (finding La. C. Cr. P. art. 930.4(D) to be an independent and adequate procedural bar); *Ardison v. Cain*, 264 F.3d 1140 (5th Cir. 2001) (finding La. C. Cr. P. art. 930.4(E) to be an independent and adequate state procedural ground barring habeas review).

Because the LSC rejected Byrd's claim on the basis of an independent and adequate state procedural rule, "federal habeas review is barred unless [Byrd] demonstrates cause and prejudice or that a failure to address the claim will result in a fundamental miscarriage of justice." *Hughes*

v. Johnson, 191 F.3d 607, 614 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145, 120 S.Ct. 1003, 145 L.Ed.2d 945 (2000). As discussed *infra*, this claim is based on testimony from a federal action stemming from Byrd's apprehension from the Red River. As discussed fully under Claims 2 and 6 *infra*, there is no new evidence to support Byrd's claim that his conviction was based on false evidence. He will not be able to show cause and prejudice, or that a fundamental miscarriage of justice would result, if this procedurally barred claim is not reviewed. Claim 6 should be dismissed as procedurally barred without further review.

Claims Not Cognizable on Federal Habeas Review

In supplemental claims to his habeas petition, Byrd complains that the state courts denied him post-conviction relief without conducting an evidentiary hearing (Claim 7) and denied his post-conviction motion requesting the transcripts from the federal civil trial (Claim 8). Both claims arise from his second PCRA and related writ applications (Vol. V, pp. 1144, 1148-55, 1201-04, 1267-69). These claims are not cognizable on federal habeas review.

Federal habeas corpus relief is available "only on the ground that [the state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a). "[A]n attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself." *Rudd v. Johnson*, 256 F.3d 317, 320 (5th Cir. 2001), *cert. denied by Rudd v. Cockrell*, 534 U.S. 1001, 122 S.Ct. 477, 151 L.Ed.2d 391 (2001). Regarding claims arising from post-conviction proceedings, the United States Fifth Circuit Court of Appeals ("Fifth Circuit") has explained:

> "[O]ur circuit precedent makes abundantly clear that errors in state post-conviction proceedings will not, in and of themselves, entitle a petitioner to federal habeas relief. See *e.g.*, *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir. 1997) ("[I]nfirmities in state habeas proceedings do not constitute grounds for relief in federal court."); *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995) ("An attack on a state habeas proceeding does not entitle the petitioner to habeas

relief in respect to his conviction, as it is an attack on a proceeding collateral to the detention and not the detention itself.") (internal quotations omitted). Rather, we must find constitutional error at the trial or direct review level in order to issue the writ." *Morris v. Cain*, 186 F.3d 581, 585 n.6 (5th Cir. 1999).

The federal courts are without jurisdiction and barred under the AEDPA from reviewing alleged constitutional infirmities in state post-conviction proceedings. *Kinsel v. Cain*, 647 F.3d 265, 273-74 (5th Cir. 2011) (footnote omitted), *cert. denied*, 565 U.S. 1094, 132 S.Ct. 854, 181 L.Ed.2d 551 (2011).

Claims 7 and 8 are attacks on the state post-conviction process and not on the proceedings leading to Byrd's conviction and detention. Moreover, the state courts are without authority to order the federal courts to provide transcripts from a federal civil trial.[8] Both Claims 7 and 8 are not cognizable on federal habeas review and should be dismissed with prejudice without further consideration.[9]

Habeas Review Standards

Claims that were adjudicated on the merits in state court must be reviewed under the deferential standard of 28 U.S.C. §2254(d). *E.g., Corwin v. Johnson*, 150 F.3d 467, 471 (5th Cir. 1998), *cert. denied*, 525 U.S.1049, 119 S.Ct. 613, 142 L.Ed.2d 548 (1998). *Habeas corpus* relief shall not be granted as to any claim that was adjudicated on the merits by the state courts unless the adjudication either "resulted in a decision that was contrary to, or involved an unreasonable

[8] This federal habeas court has previously rejected a prisoner's claim under *State ex rel. Bernard v. Criminal District Court Section "J"*, 653 So.2d 1174 (La. 1995) alleging error in the state trial court's denial of transcripts from his trial. The court noted that there is no federal constitutional right to state post-conviction review and that alleged infirmities in that process do not raise a cognizable constitutional issue for federal habeas review. See *Williams v. Warden*, 2013 WL 4413743 *5 (W.D. La. 2013). Inasmuch as there was no cognizable claim where the state courts denied the request for state trial transcripts, there is no cognizable claim where the state courts denied Byrd's request for transcripts from his federal civil trial. Moreover, as discussed in the Merits section of this memorandum, Byrd's claims alleging false evidence are meritless, and the federal civil trial transcripts upon which he relies do not support his claim.

[9] Because Claims 7 and 8 are not cognizable on federal habeas review, the State will not further address them in the merits section of the memorandum.

application of, clearly established Federal law as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(1) and (2). The "contrary to" or "unreasonable application" standard applies to questions of law and mixed questions of law and fact, and the "unreasonable determination of facts" standard applies to pure questions of fact. *Bolden v. Warden, West Tennessee High Sec. Facility*, 194 F.3d 579, 583 (5th Cir. 1999), *cert. denied*, 529 U.S. 1112, 120 S.Ct. 1969, 146 L.Ed.2d 799 (2000).

The Fifth Circuit in *Simmons v. Epps*, 654 F.3d 526, 534 (5th Cir. 2011), *cert. denied*, 566 U.S. 990, 132 S.Ct. 2374, 182 L.Ed.2d 1025 (2012), explained the §2254(d) standards as follows:

> "A decision is contrary to clearly established federal law under §2254(d)(1) if the state court (1) "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law"; or (2) "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and reaches an opposite result. The state court makes an unreasonable application of clearly established federal law if the state court (1) "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts"; or (2) "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." In order to find that the state court's application of law to facts was unreasonable, its result must have been "more than incorrect or erroneous" but must be "objectively unreasonable." We presume that factual determinations of the state court are correct; the petitioner must rebut this presumption by clear and convincing evidence." [Citations omitted.]

In light of these review standards, the State will address Byrd's claims.

CLAIM ANALYSIS

Ineffective Assistance of Counsel (Claims 1 and 3)

Claim 1, which alleges ineffective assistance of appellate counsel, and Claim 3, which alleges ineffective assistance of trial counsel, are governed by the clearly established federal law

set forth in *Strickland*, *supra*. Moreover, both claims were adjudicated on the merits in state court during Byrd's first post-conviction proceedings. As a reason for its writ denial, the LSC specifically found that Byrd failed to show he received ineffective assistance of counsel under the *Strickland* standard (Vol. V, p. 1126).

Strickland is a general standard, which means that the state courts have even more latitude to reasonably determine that a petitioner did not satisfy it. Thus, the federal court's review must be "doubly deferential." *Knowles v. Mirzayance,* 556 U.S. 111, 123, 129 S.Ct. 1411, 1420, 173 L.Ed.2d 251 (2009). "[T]he question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011).

To satisfy *Strickland*, a petitioner must demonstrate that (1) counsel's performance was deficient, meaning that counsel's errors were so serious that he failed to function as "counsel" guaranteed by the Sixth Amendment, and (2) that the deficiency prejudiced the defense in that the errors were so serious as to deprive defendant of a fair trial, meaning one with a reliable result. *Id.*, at 687, 104 S.Ct. 2052. The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness. *Id.*, at 688, 104 S.Ct. 2052. The reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997), *cert. denied*, 522 U.S. 1120, 118 S.Ct. 1061, 140 L.Ed.2d 122 (1998). The second prong requires a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* The petitioner must show prejudice great enough to create a substantial, not merely conceivable, likelihood of a different result. *Pape v. Thaler*, 645 F.3d 281, 288 (5th Cir. 2011), *cert. denied*, 565 U.S. 1162, 132 S.Ct. 1100, 181 L.Ed.2d 987 (2012). The petitioner must satisfy both prongs to prevail on his claim. *Williams v. Stephens*, 761 F.3d 561, 566-67 (5th Cir. 2014), *cert. denied*, 575 U.S. 952, 135 S.Ct. 1735, 191 L.Ed.2d 706 (2015).

Claim 1: Ineffective Assistance of Appellate Counsel

Byrd claims that appellate counsel failed to litigate two nonfrivolous issues, namely, denial of counsel of choice and denial of the motion to suppress. Persons convicted of a crime are entitled to effective assistance of counsel on their first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Appellate counsel's performance is judged under the *Strickland* standard. *Smith v. Robbins*, 528 U.S. 259, 287, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Effective appellate counsel is not required to argue every nonfrivolous ground available, but counsel may exercise professional judgment to select among them so as to maximize the likelihood of success on appeal. *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). It is within appellate counsel's discretion to exclude nonfrivolous issues if such issues were unlikely to prevail. *Anderson v. Quarterman*, 204 Fed. Appx. 402, 410 (5th Cir. 2006), *cert. denied*, 549 U.S. 1249, 127 S.Ct. 1368, 167 L.Ed.2d 156 (2007). Thus, to prevail on an ineffective assistance of appellate counsel claim, a petitioner must show that appellate counsel unreasonably failed to discover and assert a nonfrivolous issue and that there is a reasonable probability that he would have prevailed on the issue on appeal but for counsel's deficient performance. *Smith v. Robbins, supra*; *Briseno v. Cockrell*, 274 F.3d 204, 207 (5th Cir. 2001).

Byrd did not prevail in state court on the claim that appellate counsel was constitutionally ineffective in failing to argue denial of counsel of choice. He does not show that the state court adjudication of this claim was unreasonable or contrary to *Strickland* or related clearly established federal law on ineffectiveness of appellate counsel. Contrary to Byrd's memorandum argument, Weeks was not appointed as counsel for Byrd. He was private counsel who enrolled in the case and represented Byrd through trial and the habitual offender adjudication (Vol. I, p. 1). Nothing in the record suggests that Weeks was not Byrd's "counsel of choice." Only on January 14, 2013, the day set for trial to begin, did Byrd file into the record the alleged fee agreement with Terrell. However, the purported fee agreement, which was not signed by Terrell and was not dated, does not support his claim (Vol. I, pp. 129-31). Considering that trial was to begin that day, Byrd's filing of the purported fee agreement was nothing more than a last minute tactic to delay his trial. Though none is shown in the record, to the extent there was any argument or oral motion for a continuance based on Byrd's last minute effort to delay trial by claiming that Weeks was not his counsel of choice, the trial court properly rejected the dilatory tactic and proceeded to trial with Weeks as counsel for Byrd. For these reasons and for those more fully set forth under Claim 4 herein, there is no merit to the claim that Byrd was denied counsel of choice.

The alleged denial of counsel of choice would have been a wholly frivolous appeal issue. It was unsupported by anything other than the purported fee agreement that had not been signed by Terrell, was not dated, and was not filed until the start of trial proceedings over six months after Weeks enrolled as counsel. Moreover, Byrd does not show any probability that he would have prevailed on this claim if it had been raised on appeal. The purported fee agreement does not provide evidentiary support for Byrd's claim. Absent evidentiary support, Byrd's claim is

conclusory. Conclusory allegations of ineffective assistance of counsel that lack evidentiary support do provide a basis for habeas relief. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000), *cert. denied*, 531 U.S. 849, 121 S.Ct. 122, 148 L.Ed.2d 77 (2000). For these reasons, the claim that appellate counsel was constitutionally ineffective in failing to assert denial of counsel of choice as an issue on appeal is meritless and was reasonably rejected by the state courts.

Byrd's claim that appellate counsel rendered ineffective assistance by failing to assert as error on appeal the denial of the motion to suppress is also meritless. He asserts that there was no basis for a *Terry* stop of the van and, as a result, his incriminating statement to Det. Gordon should have been suppressed.[10] To prevail on his ineffective assistance of counsel claim, Byrd had to show that this is a nonfrivolous issue that should have been raised on appeal and that there is a reasonable probability that he would have prevailed on this issue but for counsel's deficient performance. *Smith v. Robbins*, *supra*. Because the LSC adjudicated this claim on the merits, he must also meet the high burden under doubly deferential habeas review of showing that its determination was unreasonable. He does not satisfy that burden.

Weeks litigated a motion to suppress in the trial court (Vol. I, pp. 122-24; Vol. II, pp. 261-81, 287-92). Det. Gordon testified that he obtained video evidence from the Tiki Bar burglary showing a white or Hispanic male in the building and the suspect's vehicle, an early to mid 1990s white or light colored Dodge or Plymouth style minivan with a missing right front hubcap (Vol. II, p. 262).[11] He circulated photos of the van to patrol officers on July 20, 2011, and received information that a matching van being driven by a white male was spotted in the Allendale neighborhood. He then located the van parked at the Livingston Motel, which he

---

[10] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[11] During his trial testimony, Det. Gordon described the suspect van as a light colored early 90s Dodge or Chrysler minivan. The arrest and search warrants included in the discovery filings in the record indicate that the van was a 1994 Plymouth Voyager (Vol. I, pp. 49, 53, 56).

described as an area noted for narcotics, prostitution, and other criminal activity. When the van exited the motel at 2:15 p.m., he requested marked patrol units to stop it (Vol. II, pp. 262-63). Det. Gordon testified that he requested the stop because he had a reasonable suspicion that the driver may have been responsible for the burglary (Vol. II, p. 270). As set forth in the "Statement of the Case," the van fled after the officers who made the stop approached it. Weeks argued that no reasonable grounds justified a *Terry* stop of the van and, specifically, that the officers had no reasonable grounds to believe the driver (Byrd) had committed an offense (Vol. II, pp. 287-91). Denying the motion to suppress, Judge Emanuel foumd that there was a valid *Terry* stop in a high crime area and that the motion to suppress was not supported by the law or evidence (Vol. II, pp. 293-94).

Although the trial court's denial of a motion to suppress is arguably a nonfrivolous appeal issue, appellate counsel is not required to assert every nonfrivolous issue and was not ineffective in failing to assert this particular issue on appeal. The motion to suppress was properly denied by the trial court, and Byrd does not show any reasonable probability that he would have prevailed on appeal but for appellate counsel's failure to urge the alleged error.

The United States Supreme Court has made it clear that the Fourth Amendment applies to investigative stops of vehicles. *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985), and cased cited therein. An investigative stop of a vehicle is permissible under *Terry v. Ohio*, *supra*, when an officer has a "reasonable suspicion supported by articulable facts that criminal activity may be afoot." *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). This requires a minimal level of objective justification for the stop. *Id.* Whether or not an officer had reasonable suspicion to justify the stop is a determination

made based on the totality of the circumstances, including all the information that was available to the officer at the time of the stop. *United States v. Jaquez*, 421 F.3d 338, 341 (5th Cir. 2005).

In *Jacquez*, a vehicular stop was determined to be unlawful because the only basis for the stop was information that a red vehicle had been involved in a shooting incident 15 minutes earlier in the area where the stop was made. In determining that the officer lacked reasonable suspicion required under *Terry*, the Fifth Circuit noted that other than the color of the vehicle, the officer had no other information about the vehicle, such as its make or model, and no description of its occupant. *Id.* Here, the stop was supported by much more than information about the color of the suspected vehicle.

The totality of the circumstances show that the officers who made the stop had reasonable suspicion based on objective articulable facts that the van and driver may have been involved in a burglary under investigation. As previously stated, Det. Gordon had obtained images from the recent Tiki Bar burglary showing a white or Hispanic male in the building and a van believed to be used by the suspected burglar. He had a description of the van that included the color, the likely make and model, and the distinguishing feature of a missing right front hubcap. This information was relayed to patrol officers within days of the burglary, and an alert officer spotted a van matching that description and being driven by a white male in a part of the city noted for criminal activity. Det. Gordon located the van and then requested an investigatory stop by a marked unit. Because the stop was supported by reasonable suspicion linking the van and driver to a recent burglary, the motion to suppress was properly denied. Byrd's argument that someone else was driving the van and somehow managed to get away has no bearing on whether there was reasonable suspicion to stop the van in the first instance. Because there is a reasonable

argument that appellate counsel was not ineffective in failing to assert the denial of the motion to suppress as error on appeal, Byrd is not entitled to habeas relief.

Byrd's ineffective assistance of appellate counsel claim is meritless, and habeas relief should be denied.

Claim 3: Ineffective Assistance of Trial Counsel

Byrd alleges trial counsel was ineffective in failing to investigate the defense that another person, Chad Morris, was the actual driver of the van. He alleges that officers obtained Morris's fingerprints on the driver's side of the van and that this evidence would have proved that Morris drove the van and managed to elude capture.

A petitioner who claims that counsel was ineffective in failing to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of trial. *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010), *cert. denied*, 562 U.S. 911, 131 S.Ct. 265, 178 L.Ed.2d 175 (2010). Although Byrd alleges that trial counsel should have investigated and discovered evidence of Morris's fingerprints on the van, his claim that such evidence would have provided him a viable defense is highly speculative. The circumstantial fingerprint evidence does not prove that Morris was driving the van or even inside the van at the time of the offense. Moreover, the fingerprint evidence upon which Byrd relied in his state post-conviction filings shows that his prints were also identified on the driver's side of the vehicle as well as on two bottles inside the vehicle (Vol. IV, pp. 827-28). Byrd's prints both on the exterior driver's side and inside the van corroborates the identification of him as the driver.

Contrary to Byrd's assertion that no one identified him as the driver, Cpl. Morman testified that she saw Byrd alone in the van. Because the van window was not tinted, she could

see inside it as she approached the driver's side after making the stop. No one but the driver was inside the van. She looked at the driver in the face and asked him to turn the van off. She described the driver as a slender white male with short brown hair and said that he was acting nervous. She also testified that the person she saw in the van was the same person apprehended at the river (Vol. II, pp. 358, 364). Finally, Byrd's unprompted statement to Det. Gordon constitutes an admission that he was the driver (Vol. II, pp. 394-95).

In light of Cpl. Morman's positive identification and Byrd's own statement, Byrd cannot show that the fingerprint evidence would have altered the outcome of his trial. The state court's denial of this claim was proper and not an unreasonable application of *Strickland.* Claim 3 is meritless, and habeas relief should be denied.

Denial of Counsel of Choice (Claim 4)

Byrd claims he was denied counsel of choice in violation of the Sixth Amendment. He claims that Weeks represented him at the arraignment because his alleged counsel of choice, Terrell, was in an inpatient facility. He relies on an affidavit by Weeks and the previously discussed fee agreement as support for his claim that Terrell was his chosen counsel. This claim was adjudicated by the LSC, which denied Byrd's writ application upon concluding that he failed to satisfy his post-conviction burden of proof under La. C. Cr. P. art 930.2 (Vol. IV, p. 1126). Thus, this claim must be reviewed under the deferential standards of 28 U.S.C. §2254(d) and denied as meritless.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." This guarantee includes the right of a defendant who does not require appointed counsel to retain the attorney of his choice. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557, 126 L.Ed.2d 409 (2006); *Powell v.*

Alabama, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932). However, "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

Discussing trial continuances in the context of Sixth Amendment claims, the Supreme Court has stated:

> "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel. *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964)." *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983).

"[T]rial courts must necessarily be wary of last minute requests to change counsel lest they impede the prompt and efficient administration of justice." *United States v. Pineda Pineda*, 481 Fed. Appx. 211, 212 (5th Cir. 2012), quoting *McQueen v. Blackburn*, 755 F.2d 1174, 1178 (5th Cir. 1985).

In *Gonzalez-Lopez*, *supra*, the defendant was deprived of his counsel of choice because of the trial court's erroneous interpretation of a rule governing professional conduct of attorneys. Here, Byrd suffered no erroneous deprivation of counsel of choice. As discussed under Claim 1, the purported fee agreement was not signed by Terrell and was not dated. It was not filed into the record until the day set for the start of trial, January 14, 2013 (Vol. I, p. 129). Weeks's affidavit, which was filed in the state trial court in support of Byrd's post-conviction claim, provides scant support for this claim (Vol. IV, pp. 792-94). According to the affidavit, Weeks represented Byrd in a civil matter and informed Byrd that he would speak with another lawyer

with experience in criminal defense. Weeks says that he contacted Terrell, but his affidavit gives no specifics regarding his communication with Terrell. The affidavit states that Weeks had "no actual knowledge" of the (alleged) agreement between Byrd and Terrell. The affidavit states that Weeks attended Byrd's arraignment due to Terrell's admission for inpatient treatment and that, though he never intended to represent Byrd to the conclusion of the criminal proceedings, he continued to appear on his behalf due to Terrell's situation. Weeks recalls raising the counsel of choice issue with the trial court on two occasions, but he does not say in what fashion he raised this issue or at what point in the proceedings. His affidavit suggests he made an oral motion to continue with the purported fee agreement attached as an exhibit. Based on the filing date stamped on the purported agreement, the oral motion would have been made at the start of trial.

Weeks's weak affidavit does not support the claim that Byrd suffered a constitutional violation based on denial of counsel of choice. Though Weeks's affidavit portrays him as reluctant advocate assisting Byrd while chosen counsel resolved his personal problems, the record shows that he was a zealous advocate for Byrd and was fully prepared to go to trial. Nothing in the record prior to the January 14, 2013, trial date suggests that Weeks was not Byrd's chosen advocate. Though Weeks had previously filed two written motions to continue, neither claimed the necessity of a continuance for Byrd to be represented by counsel of choice. Weeks filed a written motion to continue a November 12, 2012, trial date on the ground that he had the opportunity to attend Veterans' Day celebrations in Washington, D.C. and would not have adequate time to prepare (Vol. I, p. 116). Weeks filed a second written motion on January 10, 2013, to continue a January 7 hearing date. The reason for this motion was that Weeks was suffering from a flu-like illness and had not been able to drive to the correctional facility to meet

with Byrd so as "to make the necessary preparations to adequately prepare for trial and represent his client in these proceedings" (Vol. I, p. 126).

On January 14, 2013, Weeks announced ready for trial (Vol. I, p. 2). Neither the record nor the minutes refer to any oral motion to continue the trial; the minutes of January 15, 2013, refer only to the motion to continue filed January 10, 2013 (Vol. I, p. 3). Even if there was an undocumented last minute oral motion to continue the trial made when with purported fee agreement was filed on January 14, 2013, it was within Judge Emanuel's broad discretion to deny that motion and proceed with trial.[12] *Morris v. Slappy*, *supra*; *United States v. Pineda*, *supra*. As discussed under Claim 1, any such motion to continue was properly rejected as a dilatory tactic, particularly in light of Weeks's past representations to the court and the absence of any competent evidence that Byrd had some other counsel of choice who was prepared to represent him at trial.

Byrd does not show that the state court adjudication of this claim was contrary to or an objectively unreasonable application of clearly established federal law governing the right to counsel of choice under the Sixth Amendment. He does not show that there was an unreasonable determination of the facts in light of the evidence presented in the state court post-conviction proceedings. See 28 U.S.C. §2254(d). Claim 4 is meritless, and habeas relief should be denied.

Use of False Evidence (Claim 2)

Citing *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), Byrd claims he was denied a fair trial in violation of the Fourteenth Amendment by the prosecution's knowing use of false evidence. The alleged false evidence is supposed differences

[12] The motion for a new trial alleged as one of the grounds the trial court's denial of a "motion to continue the trial to allow the engaged defense counsel to actually conduct the trial" (Vol. I, p. 146). Nothing in the record shows that Terrell had actually been "engaged" as counsel.

in Det. Gordon's testimony at the pretrial motion suppress/quash hearing and at trial about the reason for stopping the van. According to Byrd, Det. Gordon testified during the pretrial motion hearing that he requested the stop to identify the driver, determine if the vehicle was the one shown in the video, and gain as much information as possible. He then testified falsely at trial that the stop was made to identify a possible burglary suspect. Byrd argues that this "false testimony" enabled the prosecution to prove an element of aggravated flight, namely, that the officers had reasonable grounds to believe he had committed an offense.

This claim was adjudicated on the merits in state court when the LSC denied Byrd's writ application in his first post-conviction proceeding on the ground that he failed to satisfy his burden of proof under La. C. Cr. P. art. 930.2 (Vol. V, pp. 972-73, 1125-26). The state court adjudication is reviewed under the deferential standards of 28 U.S.C. §2254(d). Byrd cannot show that the state court's ruling was contrary to or objectively unreasonable application of *Napue*, upon which he bases this claim. *Napue* explained that convictions obtained through false evidence, which the state's representatives knows to be false and fails to correct, violates the Fourteenth Amendment and must fall. *Id.*, at 269, 79 S.Ct. 1173. This principle extends to evidence that goes to a witness's credibility. *Id.* In *Napue*, a witness testified falsely that he had not been promised any sentencing consideration. The prosecutor knew this was false and did not correct the record. Because a jury apprised of the true facts might have concluded that the witness fabricated his testimony to gain favor with the prosecution, the Supreme Court determined that this false testimony had an effect on the trial's outcome and required reversal. *Id.*, at 270-74, 79 S.Ct. 1173.

The error present in *Napue* is not present here. Byrd does not show that the prosecution used false evidence to convict. Rather, he parses the testimony of Det. Gordon to argue wrongly

that he gave different reasons at the pretrial hearing and at trial for requesting the stop. Review of Det. Gordon's testimony shows that his explanation for the stop was the same at both hearings. Testifying during the pretrial hearing, he explained that he requested the stop in order to identify the driver because the van matched the one believed to have been used during the Tiki Bar burglary (Vol. II, pp. 262-63). He also testified that the stop was based on reasonable suspicion that the white male, who was seen operating the van, might be the man shown in the video image from the Tiki Bar and thus responsible for the burglary (Vol. II, pp. 270-71). In the same vein, Det. Gordon testified at trial that he called for marked patrol units to stop the van in order to identify the driver, determine if it was the same vehicle used in the burglary, and obtain information because he was a possible burglary suspect (Vol. II, pp. 373, 399-400). Det. Gordon's explanation for the stop was substantially the same both pretrial and at trial.

Byrd fails to show that Det. Gordon's testimony was false, that the prosecution knew his testimony was false, and that the prosecution failed to correct false testimony. Thus, he cannot show that the state court's denial of this claim was contrary to or involved an objectively unreasonable application of *Napue*. Claim 2 is meritless, and habeas relief should be denied.

Use of False Evidence/Actual Innocence (Claim 6)

Byrd alleges that Det. Gordon, Cpl. Garrett, and Cpl. Morman conceded during the federal civil trial that their testimony at his criminal trial was false. He alleges that their civil trial testimony and the enlarging of the MVS while it was played in his civil trial constitutes new evidence of his actual innocence and shows that his conviction was based on false evidence in violation of *Napue*, *supra*. As previously discussed, Claim 6 is procedurally defaulted and should not be reviewed. Alternatively, it is meritless.

Actual innocence is not a freestanding claim for federal habeas relief. *Floyd v. Vannoy*, 894 F.3d 143, 155 (5th Cir. 2018), *cert. denied*, 139 S.Ct. 573, 202 L.Ed.2d 415 (2018); *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). Rather, a credible actual innocence claim provides a gateway for overcoming a procedural default or an untimely federal habeas claim to allow for review on the merits. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013). A threshold requirement is that a petitioner must "support his allegations of constitutional error with new reliable evidence ... that was not presented at trial." *Hancock v. Davis*, 906 F.3d 387, 389 (5th Cir. 2018), *cert. denied*, 139 S.Ct. 2714, 204 L.Ed.2d 1110 (2019), citing *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Evidence that "was always within reach of [petitioner's] personal knowledge or reasonable investigation" does not qualify as new evidences under the *Schlup* standard. *Hancock, supra*, citing *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008).

Byrd does not present a credible actual innocence claim that would allow him to overcome the procedural default of this claim. His claim is not based on new evidence. Byrd admits that the MVS, which he says was enlarged at the civil trial and allegedly showed that he did not run red lights, was the same MVS that was played at his criminal trial. The MVS, even if enlarged for viewing at the civil trial, is not new evidence. It was evidence available to Byrd prior to his criminal trial and does not qualify as new evidence for purposes of the *Schlup* standard. See *Hancock, supra.* Moreover, Byrd cannot satisfy a *Napue* claim. Nothing in transcript excerpts from Byrd's unsuccessful civil trial show that the witnesses conceded that their testimony at the criminal trial was false (See Document 36 filed by Byrd into the habeas record.)

The excerpt of Cpl. Garrett's testimony during Byrd's civil suit shows that she stood by her criminal trial testimony and insisted that Byrd ran four red lights. She explained that the MVS from her vehicle showed the color of the lights when her vehicle, not Byrd's van, drove past them (See Document 36, p. 106). Even if Byrd ran only one red light, as he seemed to admit during the civil trial, that alone with the testimony that he ran stop signs would have been enough to support his conviction and belies his actual innocence claim (See Document 36, p. 107). During Byrd's cross-examination of Cpl. Morman about her report and the statement that he disregarded all traffic lights, she explained that Byrd disregarded all traffic lights by traveling at a high rate of speed without checking for other traffic. As at the criminal trial, Cpl. Morman testified that Byrd ran red lights on Texas Street. She did not change her testimony from the criminal trial. (See Document 36, pp. 143-45). Regarding Det. Gordon, Byrd seems to make the same meritless false testimony claim as in Claim 2. Nothing in Byrd's argument shows that Det. Gordon's trial testimony was false. All of these witnesses were subject to cross-examination during the criminal trial, and none provided testimony that constitutes new evidence under *Schlup* at the civil trial.

In summary, Byrd does not present any new evidence to support his actual innocence claim. He does not establish a *Napue* violation. He does not show that any witness testified falsely at his criminal trial or that the prosecution knew of any false testimony and failed to correct it. Claim 6 is meritless and, if reviewed, should be denied.

Sufficiency of the Evidence (Claim 5)

Byrd claims the evidence was insufficient to prove all the elements of aggravated flight from an officer. He argues that the prosecution did not prove the officers had reasonable grounds to believe he had committed an offense. He also argues that, because the witnesses

testified he ran stop signs in Bossier Parish rather than in Caddo Parish where he ran red lights, the prosecution did not prove that he engaged in the required circumstances endangering to human life.

This claim was adjudicated on the merits in the state courts, with the 2nd Circuit rendering the last reasoned opinion when it denied Byrd's appeal (Vol. III, pp. 570-83).[13] *State v. Byrd, supra.* Byrd presented the same arguments in his appeal as are presented here (Vol. III, pp. 534-35; Vol. IV, pp. 646-47). The 2nd Circuit reviewed the trial testimony under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires the court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." This inquiry "does not focus on whether the trier of fact made the correct guilt or innocence determination but rather whether it made a rational decision to convict or acquit." *Herrera v. Collins*, 506 U.S. 390, 402, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Review under the standards of *Jackson* and 28 U.S.C. §2254(d) is doubly deferential. The state court's decision on a sufficiency of the evidence claim may not be overturned unless it was an objectively unreasonable application of the deferential *Jackson* standard. *Parker v. Matthews*, 567 U.S. 37, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012); *Harrell v. Cain*, 595 Fed. Appx. 439 (5th Cir. 2015).

For purposes of Byrd's conviction, La. R.S. 14:108.1 provides:

> "C. Aggravated flight from an officer is the intentional refusal of a driver to bring a vehicle to a stop or of an operator to bring a watercraft to a stop, under circumstances wherein human life is endangered, knowing that he has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe that the driver or operator has committed an

[13] Because the Louisiana Supreme Court provided no reasons for its writ denial, the federal habeas court is required to look to the last reasoned state court decision that provides a relevant rationale and presume the unexplained LSC decision adopted the same reasoning. *Wilson v. Sellers*, 138 S.Ct. 1188, 1192, 200 L.Ed.2d 530 (2018).

offense. The signal shall be given by an emergency light and a siren on a vehicle marked as a police vehicle or marked police watercraft.

D. Circumstances wherein human life is endangered shall be any situation where the operator of the fleeing vehicle or watercraft commits at least two of the following acts:
(1) Leaves the roadway or forces another vehicle to leave the roadway.
(2) Collides with another vehicle or watercraft.
(3) Exceeds the posted speed limit by at least twenty-five miles per hour.
(4) Travels against the flow of traffic[.]
(5) Fails to obey a stop sign or yield sign.
(6) Fails to obey a traffic control signal device."

The LSC has held that proving a defendant committed "at least two of the following acts" does not require proof of two of the enumerated acts but "encompasses the commission of one of the acts enumerated in that provision more than once." *State v. Turner*, 2018-0780, p. 5 (La. 5/8/19), 283 So.3d 997, 1000. Evidence of flight indicates consciousness of guilt and is a circumstance from which a jury may infer guilt. *State v. Ashley*, 33,880 (La. App. 2 Cir. 10/4/00), 768 So.2d 817, *writ denied*, 2000-3122 (La. 12/8/00), 776 So.2d 466.

Finding the evidence sufficient under *Jackson* to convict, the 2nd Circuit reasoned as follows:

"In the case *sub judice*, Defendant intentionally refused to remain at the site of the initial stop and, instead, drove away as the police officers approached his vehicle. The officers all testified that Defendant was given visual and audible signals, i.e., lights and sirens, by the police units to stop his vehicle before the investigatory stop and during the pursuit. Human life was endangered during the pursuit of Defendant because he failed to stop at several stop lights in downtown Shreveport at approximately 2:20 in the afternoon on a busy work day with both pedestrian and automobile traffic. The officers testified that they were concerned about other drivers in downtown Shreveport and feared that the pursuit of Defendant would lead to accidents due to Defendant's speed and failure to stop at stop lights. The officers had reasonable grounds to believe that Defendant committed an offense because the vehicle he was driving matched the description of a vehicle that was involved in several recent burglaries, i.e., a tan-colored minivan with a missing front right hubcap. Therefore, it was reasonable for the officers to believe that the driver of this vehicle committed the offense of burglary. Furthermore, Defendant's flight from the officers indicates his consciousness of guilt and provided the Officers with reasonable grounds to believe Defendant

committed an offense." *State v. Byrd*, at p. 9, 145 So.3d at 542-43. (Vol. III, pp. 579-80).

Byrd does not show that the state court adjudication of this claim was an objectively unreasonable application of the *Jackson* standard. See *Parker v. Matthews*, *supra*. Much of his argument focuses on whether the prosecution proved the officers had reasonable grounds to believe he – the driver of the van – had committed a crime. The same reasons set forth in Claim 1 regarding the validity of the stop apply here and show that the requisite reasonable suspicion was present. The van matched the one believed to have been used during the recent Tiki Bar burglary, and the officer who first spotted the van in the Allendale area observed a white male driving it. Thus, viewed in the light most favorable to the prosecution, the evidence showed that it was reasonable for officers to believe that the driver of the van may have committed the Tiki Bar burglary and to initiate the stop to investigate further.

Byrd's second argument is that there was evidence that he ran red lights in Caddo Parish, but not that he also ran stop signs there. Presumably, he is suggesting that the prosecution could not prove the commission in Caddo Parish of two of the enumerated circumstances where human life is endangered. This argument is meritless. As stated, the LSC had held that proving a defendant committed one of the acts enumerated in La. R.S. 14:108.1(D) more than once suffices to prove aggravated flight from an officer. *State v. Turner*, *supra*. Testimony that Byrd ran multiple red lights on Texas Street in Caddo Parish – or multiple stop signs in Bossier Parish - would suffice to prove the offense (Vol. II, pp. 345, 359-60, 375). Additionally, the fact that Byrd ran stop signs in Bossier Parish does not mean that his actions there could not be used to prove the offense. The evidence established that the flight began in Caddo Parish and concluded in Bossier Parish. La. C. Cr. P. art. 611 provides, in relevant part, that "[i]f acts constituting an offense or if the elements of an offense occurred in more than one

place, in or out of the parish or state, the offense is deemed to have been committed in any parish in this state in which any such act or element occurred." Similarly, when "an offense is committed on a train, vessel, aircraft, or other public or private vehicle while in transit in this state and the exact place of the offense in this state cannot be established, the offense is deemed to have been committed in any parish through or over which the ... vehicle passed, and in which the crime could have been committed." La. C. Cr. P. art. 612. Thus, Byrd's actions in Bossier were part of the same offense that began in Caddo Parish, and the prosecution did not have to prove that he ran both red lights and stop signs in Caddo in order to prove beyond a reasonable doubt that Byrd committed aggravated flight from an officer. For all these reasons, Claim 5 is meritless, and habeas relief should be denied.

Conclusion

As set forth above and in the Answer to the Petition for Writ of Habeas Corpus, the State prays the Byrd's petition be denied and dismissed with prejudice.

Respectfully submitted,

Rebecca A. Edwards

Rebecca A. Edwards

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BOBBY CHARLES BYRD
Petitioner

Versus

DARREL VANNOY, Warden
Respondent

CIVIL ACTION

CASE NO.: 2018-cv-0748

CHIEF JUDGE HICKS

MAG. JUDGE HORNSBY

TRAVERSE TO DISTRICT ATTORNEY'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES Bobby Charles Byrd, *pro se* Petitioner, who respectfully submits the instant Traverse to District Attorney's Answer to Petition for Writ of Habeas Corpus, and presents and avers the following:

I

The District Attorney's Answer to Petition for Writ of Habeas Corpus was filed on October 20, 2020, and was signed for and received on October 26, 2020 by Mr. Byrd, who has 14 days to file a Traverse to the State's Answer.

EXHIBIT
C

II

Mr. Byrd takes exception to the District Attorney's Answer for ignoring and omitting facts and misquoting record evidence that would put its case in a bad light. Further, Mr. Byrd avers that:

1) The Caddo Parish District Attorney, James Stewart, must recuse himself from the case - and does do so - because he was a judge on the Louisiana Second Circuit Court of Appeal when Mr. Byrd's case went through the appellate court. Therefore, any person working under James Stewart at the appellate court, and/or at the Caddo Parish D.A.'s Office should not be allowed to represent the State in this case;

2) Mr. Byrd wrote a letter to the D.A.'s Office specifically asking for the Attorney General to hear the case because of this disqualification;

3) The Assistant District Attorney who actually filed the State's Answer, Rebecca A. Edwards, was:

a) a clerk for District Attorney James Stewart when he was an appellate judge and worked on Mr. Byrd's case (Appendix A);

b) she works directly under District Attorney James Stewart at the D.A.'s Office as an assistant district attorney; and

c) acts as District Attorney James Stewart's notary public in this case (Appendix B), therefore she is doubly disqualified and in need of recusal. Ms. Edwards' statement that she was "not involved," in the case in no way precludes her disqualification on this case since she was an attorney acting as the clerk for James Stewart at the time he was judge and handled this case at the appellate court, and still works for District Attorney James Stewart.

Further, Ms. Edwards' disclosures were not made until August 05, 2020, the same date as the filing of the State's motion for an extension of time to file their Answer. (Appendix C). It should be noted that Mr. Byrd has not signed any waiver of conflict in this case.

III

Additionally, District Attorney James Stewart's Affidavit, notarized by Rebecca A. Edwards, cites the Louisiana Rules of Professional Conduct, Rule 1.12, however, District Attorney James Stewart has never represented Mr. Byrd as his attorney.

The law that controls this situation is La.C.Cr.P. Art. 680 (1), Grounds for Recusation of District Attorney, where District Attorney James Stewart has a personal interest in the case in conflict with fair and impartial administration of Justice in this case.

The Official Revision Comment states, in pertinent part, that:

> (a) Arts. 8 and 934(5) provide that district attorney includes assistant district attorney except where the context clearly indicates otherwise. The recusation procedures clearly contemplate recusation of the district attorney himself and the appointment of a district attorney *ad hoc* by the judge.

In short, if an assistant district attorney must be recused, the District attorney may assign a different assistant district attorney. However, if the District Attorney himself must be recused, the judge must appoint a different District Attorney, altogether.

While it is commendable that District Attorney James Stewart has recused himself in this case, due to a conflict of interest, the recusal must include his assistants, and particularly Ms. Edwards since she also was an assistant to him while he was a judge in this very same case.

Mr. Byrd's request that the Attorney General be asked to handle this case should have been followed, and Mr. Byrd maintains that request to this Honorable Court.

CONCLUSION

Petitioner has exhausted all state remedies for relief, and this case is not subject to any state procedural bar since all pleadings have been filed within the statutory limits set by the law.

Further, Petitioner has shown that he has been timely filed in all courts throughout his case, and has diligently pursued his right to Federal Habeas Corpus Review.

Petitioner maintains that he has stated claims, and has pointed to record evidence that entitles him to Habeas Corpus Relief, pursuant to U.S.C. § 2254.

Additionally, Petitioner takes exception to the District Attorney's Answer for ignoring and omitting facts and misquoting record evidence that would put its case in a bad light.

Further, there is no one in the Caddo Parish District Attorney's Office working for James Stewart, District Attorney, who is immune from mandatory recusal on Mr. Byrd's case since the District Attorney has recused himself due to conflict of interest. This is especially true of Assistant District Attorney Rebecca A. Edwards, since she was an attorney acting as clerk for James Stewart while he was a judge in the appellate court and worked on this case.

Therefore, Petitioner asserts that he should be granted the Habeas Corpus Relief requested in his Application, or at least granted an evidentiary hearing in this matter.

Alternatively, Petitioner asks this Honorable Court to call for an *ad hoc* District Attorney to be appointed to this case as District Attorney James Stewart has self-recused due to a conflict of interest.

Respectfully submitted, *pro se*, this 30 day of October, 2020.

Bobby Charles Byrd #299312
M.P. - Hickory 2
LA State Prison
Angola, LA 70712

CERTIFICATE OF SERVICE

I, Bobby Charles Byrd, *pro se* Petitioner, do hereby certify that a copy of the foregoing has been properly filed on this date by placing same in this institution's designated mail box to be forwarded to this Honorable Court via electronic mailing, and a copy has been sent via U.S. Mail to:

James Stewart, District Attorney
1st Judicial District
501 Texas Street, 5th Floor
Shreveport, LA 71101-5408

Done and signed this 30 day of October, 2020, at Angola, Louisiana.

Bobby Charles Byrd #299312
M.P. - Hickory 2
LA State Prison
Angola, LA 70712

Byrd v. Vannoy
United States District Court, W.D. Louisiana, Shreveport Division. June 15, 2021 Slip Copy 2021 WL 3134678 *(Approx. 11 pages)*

2021 WL 3134678
Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Shreveport Division.

Bobby BYRD #299312
v.
Darrel VANNOY

CIVIL ACTION NO. 18-cv-748
Signed 06/15/2021

Attorneys and Law Firms

Bobby Byrd, Angola, LA, Pro Se.

Rebecca Armand Edwards, D A's Office, Shreveport, LA, for Darrel Vannoy.

REPORT AND RECOMMENDATION

SEC P

Mark L. Hornsby, U.S. Magistrate Judge

Introduction

*1 **Bobby Byrd** ("Petitioner") was charged in Caddo Parish with aggravated flight from an officer. The jury found him guilty by a vote of 11-1. He was adjudicated a fourth felony habitual offender and given a mandatory life sentence. His conviction and sentence were affirmed on appeal, and his post-conviction application was denied. He now seeks federal habeas corpus relief on several grounds. For the reasons that follow, it is recommended that his petition be denied.

Sufficiency of the Evidence

A. Introduction

Police officers attempted an investigatory stop of the van Petitioner was driving, but he then sped away through downtown Shreveport and into Bossier City, where he was eventually captured. He was charged with aggravated flight from an officer, La. R.S. 14:108.1, which includes the intentional refusal of a driver to bring a vehicle to a stop when an officer has reasonable grounds to believe the driver has committed an offense, the officer has given a visual and audible signal to stop, and the driver endangers human life by committing at least two of certain enumerated acts. The list of acts includes failing to obey a stop sign or traffic signal, and speeding in excess of 25 mph over the limit.

B. Relevant Facts

Shreveport Police Detective Robert Gordon testified (Tr. 368-404) that he was assigned to the property crimes bureau and in July 2011 was investigating a string of burglaries of Shreveport night clubs. He learned from grainy surveillance video that either a white or Hispanic male likely committed a burglary of the Tiki Bar and Grill, and a photo showed that the suspect drove a light-colored early 90's model Dodge or Chrysler minivan that was missing the right front hubcap. The photos were distributed to the patrol division, and an officer soon reported that the van had been spotted in the Allendale area.

Detective Gordon began searching the area and found the van at the Levingston Motel, which is noted for drug activity and prostitution. The van matched the surveillance photo, including having a missing right front hubcap. The van was unoccupied, and a license plate check indicated that it was registered to a woman from Minden. Detective Gordon parked his unmarked unit nearby and watched until he saw the van leave the parking lot. Gordon could not see the driver to determine whether it was a white or Hispanic male, but he called for marked units to make a traffic stop "so that I could try to identify the driver and obtain

EXHIBIT
D

more information." He advised his fellow officers that he had a possible burglary suspect operating the vehicle, and he needed to identify the person.

Two or three blocks away, Corporal Morman and Corporal Garrett, in separate cars, made the stop. Gordon also arrived at the scene. Gordon testified that he got out of his car and was approaching the van when it sped away. Gordon activated the lights and siren in his unmarked car, and he was third in the line of three police cars who began to pursue the van down Texas Street, where the speed limit is 25 miles per hour, in front of the Caddo Parish courthouse and through all of the major downtown intersections. The group crossed the Texas Street bridge across the Red River into Bossier City, where the van turned left on Traffic Street. It went through a residential area where "there was five, or six or so stop signs through there, possibly more," and Gordon slowed down to make sure that he was not T-boned by cross-traffic at the intersections. Gordon said he was not paying close attention to his speedometer, but he thought he was probably going "around 50 miles an hour" while "losing ground pretty rapidly" because he was trying to avoid accidents at the intersections. Detective Gordon was asked if he saw the van commit any traffic infractions. He said that he witnessed:

> *2 stop sign violations, red light violations, travelling at a very high rate of speed. Just blatant disregard for public safety. I never saw brake lights come on at any time he went through an intersection.

Gordon found the van, abandoned after it crashed into a tree near the levee. The two marked police cars that led the pursuit were stopped nearby.

Detective Gordon did a protective sweep of the van to make sure there was no one inside. After finding the van empty, he went down a nearby trail where he encountered two fishermen who said a white male had just run that way a few seconds earlier. A K-9 officer and his dog arrived a few minutes later, and the dog followed a scent in the direction indicated by the fishermen. The trail eventually became impassable due to thick vegetation and large treetops across the trail. The dog was trying to find his way around when the bank caved in and he fell in the river. The handler went in after the dog to try to get him out safely. Petitioner's head soon popped up out of a brush top, and he began to swim into the current. The dog went after Petitioner, despite his handler's calls for the dog to come back. Petitioner resisted the dog and the officers, who eventually took him into custody after a great deal of dangerous resistance. Petitioner refused to give his name, and he was admitted to the hospital as John Doe until another officer identified him.

Detective Gordon testified that he talked to Petitioner a few weeks after Petitioner was released from the hospital, and Petitioner said that he had been mainlining, using heroin and cocaine intravenously, at the time of the chase so he did not remember anything. Gordon went back some time later, and Petitioner then acted as if he was confused and lethargic. Gordon decided not to attempt questioning him in that state but explained that he was going to forward all of his information to the district attorney for prosecution for aggravated flight. As Gordon was leaving, Petitioner said, "Boss, you really ought to reduce that charge because I wasn't really going that fast and all those lights were green."

Corporal Mary Jo Garrett testified (Tr. 337-54) that she heard Detective Gordon's request to stop the van because it matched the description of a suspect vehicle in other criminal matters. She was in the area and soon saw the van on Caddo Street as it crossed Common Street. She turned on her lights and siren on her marked vehicle, which activated her video recording system.

The van turned from Caddo onto Louisiana and stopped. Corporal Morman pulled up behind Garrett, and Morman approached the driver's door while Garrett approached the passenger side. As Morman reached the driver's door, she spoke to the driver, who then immediately put the van into drive and sped off. The officers returned to their cars and gave chase.

Garrett explained that she had changed the angle of her camera to better capture the traffic stop, but this apparently affected the view of the ensuing chase. The video was played for the jury, and Garrett testified about the events. The video showed that Garrett, who said she was about three blocks behind the van, encountered three green lights and one red light,

which turned green as she arrived. The van was not visible in the distance on the video, but Garrett testified that she could see it and that the lights the van went through were red.

*3 The video depicted Garrett's speed based on GPS. It indicated she was going 59 miles per hour across the bridge, where the speed limit was 35, and Garrett said the van was getting farther away. When she turned on Traffic Street, the van was "quite a ways ahead of me." Her speed varied from 26 to 47, as she stopped for stop signs. Garrett testified that she never saw Petitioner brake or stop at any of the signs, and he continued to go at the same speed and get farther away. No one was inside the van when Garrett found it stopped behind the levee. Garrett recalled from the initial traffic stop that the driver was a white male with brown hair, and she did not see any other people inside the van. Garrett conceded that the van did not commit any traffic offense before the traffic stop was initiated.

Corporal Morman testified (Tr. 356-68) that she heard Detective Gordon on the radio at about 2:15 p.m. say that he had come across a vehicle that he was looking for, possibly in reference to some burglaries, and officers were asked to stop the vehicle in a marked unit. Morman described the stop of the van on Louisiana Avenue. She approached the driver's window, where she saw a white male, very slender, very nervous acting, with short brown hair. She said this was the same man who was also later pulled from the river, and "there was nobody else in the vehicle." Petitioner put the van in gear and drove away towards Texas Street, where he took a left and drove through the "very busy" downtown area in the middle of the workday. Morman stated that there were "lots of cars, lots of people" and the officers had to avoid several possible crashes. She recalled that the van went around some cars to get through one intersection.

Morman was asked if the van ran any red lights. She said, "Yes, ma'am, he did." She said that she encountered some green lights, but there was at least one red light because she remembered being anxious about getting through the intersection safely. She said the officers were driving slower than the van, not wishing to make it go faster, and just trying to keep it in sight. Morman was asked if the van ran any stop signs on Traffic Street. She said, "Several. He never stopped." She said she never saw the van brake at any time. She described Traffic Street as a residential area with cars parked along the street and a 25 mph speed limit. She estimated that the officers were going about 45 mph, and the van was much faster. Morman said that the man pulled from the river was the same man she saw driving the van.

C. Jackson and Habeas Corpus

In evaluating the sufficiency of evidence to support a conviction "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 99 S.Ct. 2781, 2789 (1979). The Jackson inquiry "does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." Herrera v. Collins, 113 S.Ct. 853, 861 (1993). And "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." Cavazos v. Smith, 132 S.Ct. 2, 4 (2011).

Habeas corpus relief is available with respect to a claim that was adjudicated on the merits in the state court only if the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). Thus a state-court decision rejecting a sufficiency challenge is reviewed under a doubly deferential standard. It may not be overturned on federal habeas unless the decision was an objectively unreasonable application of the deferential Jackson standard. Parker v. Matthews, 132 S.Ct. 2148, 2152 (2012); Harrell v. Cain, 595 Fed. Appx. 439 (5th Cir. 2015).

D. Analysis

*4 Aggravated flight from an officer "is the intentional refusal of a driver to bring a vehicle to a stop or of an operator to bring a watercraft to a stop, under circumstances wherein human life is endangered, knowing that he has been given a visual and audible signal to stop by a police officer *when the officer has reasonable grounds to believe that the driver or operator*

has committed an offense." La. R.S. 14:108. 1(C) (Emphasis added). Petitioner argues that the police may have had reasonable cause to believe that the van had been involved in a burglary, but they did not know who was driving the van, which was registered to a female from Minden, and they knew that the van was a different model than in a BOLO. Petitioner argues that this knowledge may have been sufficient for a Terry stop, but he contends it was not sufficient to establish the element of the crime that requires the officer have reasonable grounds to believe that the driver has committed an offense.

The jury was instructed on this element of the offense and found that the officers had reasonable grounds to believe that the driver had committed an offense. Petitioner raised this issue on direct appeal, and the state appellate court held that the "officers had reasonable grounds to believe that Defendant committed an offense because the vehicle he was driving matched the description of a vehicle that was involved in several recent burglaries, i.e., a tan-colored minivan with a missing front right hubcap." Therefore, the court concluded, "It was reasonable for the officers to believe that the driver of this vehicle committed the offense of burglary." Furthermore, Petitioner's flight from the officers indicated his consciousness of guilt and provided the officers with grounds to believe he committed an offense. State v. **Byrd**, 145 So.3d 536, 543 (La. App. 2d Cir. 2014), writ denied, 161 So.3d 14 (La. 2015).

The appellate court applied the Jackson standard and found, when the evidence was construed in the light most favorable to the prosecution, that the jury's verdict was supported by sufficient evidence. Petitioner apparently takes the view that the police must see the driver and have reason to believe that the particular driver committed an offense, but the statute is not written that narrowly. It is reasonable to construe it to allow conviction if the police have reasonable grounds to believe that the driver of a vehicle, whoever he or she may be, committed an offense. And that reason to believe can be based on the fact that the vehicle is suspected of being used in multiple crimes. The state courts appear to have employed that reasonable construction, and they have the last word on interpreting state law. This issue is foreclosed from being grounds for habeas relief because the state court's decision was not an objectively unreasonable application of the deferential Jackson standard.

Petitioner also challenges the sufficiency of the evidence to prove that he refused to stop "under circumstances wherein human life is endangered," which Section 14:108.1(D) states is any situation where the operator of the fleeing vehicle "commits at least two of the following acts: ... (3) Exceeds the posted speed limit by at least twenty-five miles per hour ... (5) Fails to obey a stop sign or a yield sign" or "(6) Fails to obey a traffic control signal device."

Petitioner argues that there was evidence that he ran red lights in Caddo Parish (Shreveport) but there was no evidence that he ran a stop sign in Caddo Parish. His argument implies that the traffic offenses that occurred in Bossier Parish, after he crossed the Red River, could not be considered. The State points out that Louisiana Code of Criminal Procedure Article 611(A) provides: "If acts constituting an offense or if the elements of an offense occurred in more than one place, in or out of the parish or state, the offense is deemed to have been committed in any parish in this state in which any such act or element occurred." Article 612 adds that if an offense is committed on a vehicle while in transit and the exact place of the offense in the state cannot be established, the offense is deemed to have been committed in any parish through which the vehicle passed and in which the crime could have been committed. Furthermore, the State did not have to prove that Petitioner ran both red lights and one or more stop signs. The Supreme Court of Louisiana has interpreted the statute and found that it "plainly encompasses the commission of one of the acts enumerated in that provision more than once. State v. Turner, 283 So.3d 997, 1000 (La. 2019). Accordingly, running two red lights or two stop signs would suffice with respect to this element.

*5 The state appellate court affirmed the verdict over this challenge. It determined that human life was endangered during the pursuit because Petitioner "failed to stop at several stop lights in downtown Shreveport at approximately 2:20 in the afternoon on a busy work day with both pedestrian and automobile traffic." State v. **Byrd**, 145 So.3d at 543. This is supported by Officer Garrett's testimony that she saw Petitioner run multiple red lights on Texas Street in Shreveport. Accordingly, habeas relief is not allowed on this claim.

Knowing Use of False Evidence

Petitioner argues that the prosecution knowingly used false testimony from Detective Gordon. He bases this argument on slight differences between Gordon's testimony at a pretrial hearing and at the trial. Gordon testified at a hearing on a motion to quash/suppress that, when the van left the motel, he "called on the radio for officers in marked units to conduct a traffic stop so that I could attempt to identify the driver of the van." He was asked the purpose of the traffic stop, and he said it was, "To try to identify the driver, and see if the vehicle was actually the one that was on the video of the bar that had been burglarized, and to try to gain as much information as I possibly could." Tr. 263. At trial, Gordon testified that the van left the parking lot "and I called for marked units to conduct a traffic stop so that I could try to identify the driver and obtain more information." He said he made a request on the radio. When asked if he indicated why the stop was needed, he said, "That I had a possible burglary suspect that was operating the vehicle that I needed to identify." Tr. 373.

Petitioner argues that Detective Gordon testified falsely at trial that he told officers to stop the van because he had a possible burglary suspect who was operating the van. He contends that prior to trial Gordon never mentioned that he believed the driver of the van was a possible burglary suspect. And he argues that the prosecutor knowingly used this alleged perjury to get a conviction.

"The Supreme Court has held that the Due Process Clause is violated when the government knowingly uses perjured testimony to obtain a conviction." Kinsel v. Cain, 647 F.3d 265, 271 (5th Cir. 2011) (citing Napue v. Illinois, 79 S.Ct. 1173 (1959)). To establish a denial of due process through the use of perjured testimony, a petitioner must show "that (1) the witness gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." Reed v. Quarterman, 504 F.3d 465, 473 (5th Cir. 2007).

Petitioner presented this claim in his post-conviction application. The trial court cited Napue and denied the claim on the grounds that Petitioner made only "general conclusory allegations" that did not prove any false statements by Detective Gordon. And, the court reasoned, if false statements were made, Petitioner had not shown that the prosecution was aware of them or that they were material to his conviction. Tr. 798. The state appellate court summarily denied a writ application "on the showing made," citing the rule regarding a petitioner's burden. Tr. 955. The Supreme Court of Louisiana denied a writ application, citing that same rule, and noting that Petitioner "fails to satisfy his post-conviction burden of proof." Tr. 1125-26.

The state court's denial of this claim was a reasonable application of Napue to the facts. There was negligible if any difference between Gordon's testimony at the hearing and at trial. There is not enough difference between his statements to even begin to characterize his trial testimony as perjury or to demonstrate that any slight difference in his testimony would have affected the jury's verdict. Habeas relief is not permitted on this claim.

Counsel of Choice

***6** Petitioner argues that he retained attorney Phillip Terrell, but the court violated his right to be represented by counsel of choice by forcing attorney Gerald Weeks to handle the trial. The minutes show that Petitioner made his first court appearance "present with B. Gerald Weeks" who enrolled as counsel. (Weeks was not appointed.) Weeks appeared in court four times before finally appearing and announcing ready for trial. The minutes do not indicate that Terrell or any other attorney ever enrolled or appeared for the defense. Tr. 1-2. After completing some pretrial matters, including the rejection of a plea offer, the court asked if the parties were ready for trial. Mr. Weeks answered, "We are, your honor." Tr. 314-15.

On the day jury selection began, Petitioner filed in the record a fee agreement that stated he employed "Phillip Terrell and his law firm" to represent him in connection with criminal charges in Caddo and Bossier parishes. The agreement was signed by Petitioner, who also placed his initials next to an arbitration clause. There were spaces for attorney Terrell to sign and initial, but they remained blank, and the agreement was not dated. Tr. 129-31. The filing of the agreements was not accompanied by any motion, and Petitioner has not pointed to any mention of it in the trial transcript.

Three years later, Petitioner filed an affidavit from attorney Gerald Weeks in support of his

post-conviction application. Weeks stated that he had been licensed in Louisiana since 1977 and had represented Petitioner in a civil case about a year before being consulted regarding this criminal matter. Weeks said his practice was concentrated in personal injury, with only limited criminal defense work early in his career. Weeks said that he told Petitioner that he would speak with another lawyer, who had experience in criminal defense, and that Petitioner might retain him if they both agreed. Weeks then contacted Phillip Terrell, but he had no knowledge of the specifics of the agreement between Petitioner and Terrell.

Weeks testified that, after criminal charges were filed in Caddo Parish, Terrell sought inpatient treatment for personal problems. Because no one knew the length of his treatment, and because Weeks had some familiarity with the criminal case, he attended the initial arraignment. Weeks stated that he never intended to represent Petitioner through the conclusion of the criminal proceedings, but, because of the situation with Terrell, he continued to appear for Petitioner.

Weeks stated that he recalled that on two occasions he raised the problem of Petitioner not having his chosen counsel, and he believes he filed the fee agreement in conjunction with an oral motion to continue. He also said that he recalled, at the beginning of the trial, making a similar motion on the issue that Petitioner was not represented by his chosen criminal counsel. Tr. 792-94. Neither Weeks nor Petitioner has pointed to any indication in the minutes or transcript that such requests or objections were made. Petitioner states in his memorandum (p. 21) that he has tried every avenue of obtaining a copy of the record or minute entries regarding these discussions, to no avail.

*7 One element of the Sixth Amendment right to counsel is "the right of a defendant who does not require appointed counsel to choose who will represent him." United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561 (2006). A defendant has the "right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." Caplin & Drysdale, Chartered v. United States, 109 S.Ct. 2646, 2652 (1989). If the right is wrongly denied, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Gonzalez-Lopez, 126 S. Ct. at 2564-65.

But the right is not absolute. Gonzalez-Lopez stated that nothing in its decision "casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice.... We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Id. at 2565-66. The Fifth Circuit applied these principles in U.S. v. Jones, 733 F.3rd 574 (5th Cir. 2013) and affirmed the denial of a motion to substitute that came 13 days before trial and would have required a continuance of a complicated trial and might have compromised the availability of a key witness.

The trial court addressed this claim when it was raised in a post-conviction application. The court cited Gonzales-Lopez and determined that the right to counsel was not wrongfully denied because Petitioner provided no evidence that there was an actual agreement of representation with a different attorney or, assuming such an agreement, that the court in any way wrongfully denied the participation of such counsel. The evidence showed only that the allegedly retained Terrell entered treatment for an unknown length of time, which was not within the control of the court. Tr. 798-99. The appellate court and supreme court denied writ applications based on Petitioner's failure to carry his burden. Tr. 955, 1126.

Habeas relief is not permitted on this claim. The state court reasonably applied Gonzales-Lopez to deny the claim. The record contains no minutes or transcript to support the contention that the defense sought a continuance. The alleged retainer agreement is not signed by Terrell, and there is no evidence that Terrell ever attempted to enroll in the case or that he was willing and able to conduct the trial within any reasonable time. Given the lack of supporting evidence, this claim must be denied.

Ineffective Assistance of Trial Counsel

A police officer gathered 18 fingerprints from the van and was able to associate a person with 12 of them. Ten were determined to belong to Petitioner, and they were in places

including two bottles found in the van, the driver door, passenger window glass, and fenders and body panels on both sides of the van. Two of the prints were determined to belong to a Chad Morris; one print was on the driver-side hood and the other on the exterior shell on the driver-side front door. Tr. 827-28. (The van also held a crowbar, hammer and gloves. Officer Gordon testified that a common element of the burglaries was that the perpetrator broke into jukeboxes and other coin-operated devices in the bars.)

*8 Petitioner argues that trial counsel was ineffective because he failed to investigate the viable defense that Chad Morris was really the driver of the van. He contends that an investigation would have led to the discovery of the fingerprints, which would prove that Morris was driving the van during the chase but managed to escape the officers after he crossed the levee and was out of their sight.

To establish ineffective assistance of counsel, Petitioner must demonstrate both deficient performance by his trial counsel and prejudice resulting from that deficiency. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). To show that his trial counsel's performance was deficient, he must show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., 104 S.Ct. at 2064. To demonstrate prejudice from his trial counsel's deficient performance, he must show that his attorney's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. A petitioner "who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." Gregory v. Thaler, 601 F.3d 347, 352 (5th Cir. 2010), quoting U.S. v. Green, 882 F.2d 999, 1003 (5th Cir. 1989).

Petitioner presented this issue in his post-conviction application. Tr. 726, 733-34. The trial court recited the Strickland standard and held that Petitioner had not met his burden of proof by offering mere general allegations and assumptions of a different result. Tr. 797-98. The appellate and supreme courts summarily denied writs on the merits. 955, 1126.

Habeas relief is available only if the state court's decision on the merits was an objectively unreasonable application of Strickland to the facts. It was not. Corporal Morman testified that she saw Petitioner driving the van and "there was nobody else in the vehicle." There was no hint at trial of any evidence of a second person in the van or its vicinity. Petitioner does not allege what counsel could have found through additional investigation that would have gone beyond the fingerprints and provided a viable defense that Corporal Morman was mistaken and that Chad Morris was actually driving. The state court's decision was a reasonable one, and habeas relief must be denied.

Ineffective Assistance of Appellate Counsel

A. Introduction

Petitioner argues that appellate counsel was ineffective when he did not argue on appeal that (1) Petitioner was denied his right to be represented by counsel of choice and (2) the traffic stop violated the Fourth Amendment. The Strickland requirements of deficient performance and prejudice also apply to this claim. Amador v. Quarterman, 458 F.3d 397, 411 (5th Cir. 2006).

To establish that appellate counsel's performance was deficient, the petitioner must show that counsel was objectively unreasonable in failing to argue issues. Smith v. Robbins, 120 S.Ct. 746, 764 (2000). If he makes such a showing, he must establish actual prejudice by demonstrating a reasonable probability that he would have prevailed on appeal but for counsel's deficient performance. Id. Review of the state court's application of the Strickland standard is doubly deferential when Section 2254(d) applies, as it does in this case. Carmell v. Davis, 707 Fed. Appx. 295, 296 (5th Cir. 2017), citing Harrington v. Richter, 131 S.Ct. 770 (2011).

B. Counsel of Choice

*9 Petitioner first argues that appellate counsel should have raised the counsel of choice issue discussed above. As discussed above, the trial record contained no support, beyond an unsigned retainer agreement, for the contention that attorney Phillip Terrell planned to enroll to represent Petitioner or that he was ready and able to try the case within a reasonable time. Appellate counsel would have had an insufficient basis for such a claim. The state court rejected this Strickland claim on the merits (Tr. 797-98, 955 & 1126), and

that decision was not an objectively unreasonable application of Strickland to the record.

C. Motion to Suppress

Petitioner next argues that appellate counsel should have argued that the trial court erred in denying his motion to suppress. "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." Kimmelman v. Morrison, 106 S.Ct. 2574, 2583 (1986); Shed v. Thompson, 2007 WL 2711022, *5 (W.D. La. 2007). This is a habeas challenge under Section 2254(d)(1), so the Petitioner must establish not only that suppression of the evidence would be the correct result, but also that it would be contrary to or an unreasonable application of clearly established federal law for the state habeas court to rule otherwise. Evans v. Davis, 875 F.3d 210, 219 (5th Cir. 2017).

Trial counsel filed a motion to suppress and/or quash that asked the court to suppress any statements or physical evidence because the police did not have probable cause to stop the van. Tr. 122-23. The court held a hearing, at which Detective Gordon testified about the surveillance evidence he obtained from the Tiki Bar that provided the description of the van and suspect. He described how he located the van at a motel known for criminal activity, and how he asked patrol officers to stop the van because he "had reasonable suspicion that the person driving that van was responsible for committing numerous burglaries in my jurisdiction." Tr. 270. He conceded that the driver of the van committed no traffic offense and that he could not determine whether the driver was a white or Hispanic male. After hearing argument, the court denied the motion based on a finding "that there was a valid Terry stop," noting that the stop was in a high crime area. Tr. 293-94.

For a traffic stop to be justified under Terry, an officer must have an objectively reasonable suspicion, before stopping the vehicle, that some sort of illegal activity has occurred or is about to occur. U.S. v. Breeland, 53 F.3d 100, 102 (5th Cir. 1995). Officers Garrett and Morman made the stop based on the direction of a fellow officer who had investigated a case and determined that the van matched the description of one that was likely involved in several burglaries. The stop was consistent with Fourth Amendment jurisprudence that allows an officer to make an investigatory stop based on a police bulletin or dispatcher report issued on the basis of articulable facts supporting reasonable suspicion that the person has committed an offense. U.S. v. Hensley, 105 S. Ct. 675, 682 (1985); see also United States v. Ibarra-Sanchez, 199 F.3d 753, 759–60 (5th Cir. 1999) (upholding a traffic stop and search by officers acting on a police dispatcher's bulletin under the "collective knowledge" doctrine) (citations omitted); United States v. Gonzalez, 190 F.3d 668, 672 (5th Cir. 1999) (noting that "an alert or BOLO report may provide the reasonable suspicion necessary to justify an investigatory stop").

*10 Detective Gordon had articulable facts that presented a good case for establishing reasonable suspicion to stop the van. The trial court made a finding that such reasonable suspicion existed, and appellate counsel would have had a difficult time persuading the appellate court to overturn that finding. Considering the deferential standard of Strickland as it applies to appellate counsel, together with the deference Section 2254(d) requires to be afforded the state court's decision to deny the post-conviction application, habeas relief is not allowed on this claim.

Supplemental Claims

A. State Court Proceedings

Petitioner filed a civil rights complaint in this court that alleged excessive force during his arrest. Judge Foote held a trial, the jury returned a verdict for the defendants, and the verdict was affirmed on appeal. **Byrd** v. Lindsey, 736 Fed. Appx. 465 (5th Cir. 2018), cert. denied, 139 S.Ct. 1565 (2019). Petitioner later filed a second post-conviction application in state court and claimed that the three officers who testified at his criminal trial "conceded" during the federal civil trial "that their testimonies in Mr. **Byrd's** criminal trial for aggravated flight from an officer was false." Tr. 1127, 1137. He contended that an enlargement of the video that was shown at the federal trial showed that he did not run any red lights or stop signs, so the state court prosecutors who possessed the video knowingly used false testimony from the officers at his criminal trial. Tr. 1138. Petitioner also filed in the state court

a motion for production of evidence that asked the court to order the federal court to provide a transcript of the three officers' testimony from the civil rights trial. Tr. 1148-55.

The trial court stated that the post-conviction application "possesses a myriad of procedural errors," including a lack of affidavit of verification, being successive, and being untimely. The court also denied the request for transcripts. Tr. 1177-79. The appellate court held that the claims were time-barred and that the proper avenue for seeking a copy of the transcripts was with the federal court. Tr. 1248. The Supreme Court of Louisiana denied a writ application and noted that Petitioner had "previously exhausted his right to state collateral review and fails to show that any exception permits his successive filing." Tr. 1330.

Petitioner then filed with this court a supplemental habeas petition to support newly exhausted claims. He argued that (1) the prosecution knowingly used false evidence, (2) the trial court abused its discretion by denying his post-conviction application without conducting an evidentiary hearing, and (3) the trial court abused its discretion by not granting his motion that requested copies of the federal transcript.

The State asserts a procedural bar defense to these claims, and it likely has merit. But the court need not decide a procedural bar issue if it instead chooses to deny a claim on the merits. King v. Davis, 883 F.3d 577, 585 (5th Cir. 2018) (electing to ignore the procedural bar and cut to the "core of the case," the merits of the underlying claims). That is the course that will be followed here.

B. Knowing Use of False Testimony

1. Corporal Garrett

Petitioner has filed transcripts of the federal civil testimony given by Officers Garrett, Morman, and Gordon in response to Petitioner's questions (but not in response to questions from defense counsel). Petitioner questioned Corporal Garrett with the benefit of an enlarged display of the video from her patrol car. He questioned Garrett about various intersections, asking if the light was green or red, and Garrett said green except in response to one light which she agreed with Petitioner was red. Doc. 32-1, Garrett Testimony at pp. 19-23. There were questions about the speed of Garrett's car as she crossed the bridge. pp. 23-26.

**11* Petitioner argues that this testimony shows that the prosecution knew that he did not run any red lights or stop signs because the video was in the State's possession before trial. Petitioner contends that Garrett "admitted" that her testimony in the criminal trial was false, but that is not accurate. Garrett testified in the federal trial that she wrote in her narrative supplement, based on her memory, that Petitioner ran four red lights. Petitioner repeatedly attempted to get Garrett to say that her memory was incorrect, but she refused to do so. He asked, "Did I go through four red lights?" She answered, "Yes." She later added, "I remember you went through four red lights." pp. 36-38.

There is obviously a discrepancy between what Petitioner believes the video depicts and what Corporal Garrett recalls seeing. Petitioner may have been able to do a better job of cross-examining Garrett at the civil trial, but that is a far cry from Garrett conceding that she gave false testimony at the criminal trial. She made no such concession, and the State's mere possession of the videotape that did not fully depict each of the violations testified to by Garrett does not amount to knowing use of false testimony. As for Petitioner's quibbles about the speed of the cars, it is not critical because the state appellate court that affirmed his conviction did not rely on a finding that he was speeding in excess of 25 mph to support his conviction.

2. Corporal Morman

Petitioner argues that Corporal Morman "admitted that Mr. **Byrd** did not run the stop lights as indicated in her testimony in Mr. **Byrd's** criminal trial." Morman testified in the federal trial that she wrote in her report that the driver of the van "disregarded all traffic lights as he proceeded eastbound on Texas Street." Petitioner asked if it was her testimony that he ran every single light. Morman said that when she wrote that he "disregarded" the signals, it meant that Petitioner "never even stopped to check any other traffic; you just kept going, you had the same speed and kept speeding the whole time." She added that when Petitioner had a green light "you were still travelling at a high rate of speed." After she and Petitioner quibbled over the meaning of disregarded and what one should do at a traffic signal, she

clarified, "You disregarded all red lights. How's that?" She later added that she could see the traffic lights and she never saw the van's brake lights come on. Doc. 32-1, Morman Testimony at pp. 26-29 & 55. Once again, Petitioner overstates what happened at the federal trial. Morman did not admit that Petitioner did not run stop lights. Rather, she stuck to her testimony that he ran all lights that were red. There is nothing in her testimony that would allow habeas relief based on knowing use of false testimony.

3. Detective Gordon

Petitioner argues that Detective Gordon admitted at the federal trial that there were no reasonable grounds to believe or suspect that Petitioner was involved in past or present criminal activity, which Petitioner says is important regarding whether he committed aggravated flight from an officer and whether there were grounds for a traffic stop. Petitioner contends that Gordon testified falsely that he told other officers to stop the van because he had a possible burglary suspect that he needed to identify, yet Gordon admitted that he did not know who was driving the van.

Petitioner questioned Gordon at the federal trial about the photo of the van that was the basis for his investigation. Gordon explained that he did not actually see the video from the Tiki Bar camera system. Rather, another officer obtained the photo from someone at the bar. Petitioner wanted to know whether there had been forensic computer work done to verify the authenticity of the video and photo. He also asked whether it was possible that the person who drove the van into the bar parking lot and left about 14 minutes later could have been stopping to change a tire, and Gordon allowed that it was possible. Petitioner also contends that it is important that Gordon testified at the federal trial that the person driving the van could have been a mere witness to the burglary, and Gordon admitted that he would have pulled over anyone who was driving that van. Doc. 32-1, Gordon Testimony at pp. 4-12.

*12 Nothing in that testimony establishes that Gordon's testimony at the criminal trial was false. Petitioner developed some additional facts regarding the investigation, but Gordon's testimony on those points was generally consistent with his testimony at the criminal trial. The additional facts also did not undermine the existence of reasonable suspicion to make the traffic stop and satisfy the element of aggravated flight. Much of Petitioner's argument on this claim is like earlier ones; it is based on his implied view that police cannot reasonably suspect a driver of a vehicle of committing a crime unless they have identified the driver and link him by name or description to a crime. But police routinely and legally stop vehicles that match the description of a vehicle used in a crime, and they would often be derelict in their duty if they failed to do so. That police may have no idea who is driving does not deprive the stop of a legal basis or preclude the unknown driver from being considered a suspect.

C. No Evidentiary Hearing

Petitioner argues that the state court abused its discretion by denying his post-conviction application without an evidentiary hearing to allow him an opportunity to present his new evidence. The federal habeas court does not sit to correct procedural errors alleged to have happened in the postconviction process. "[I]nfirmities in State habeas proceedings do not constitute grounds for relief in federal court." Rudd v. Johnson, 256 F.3d 317, 319 (5th Cir. 2001). See Kinsel v. Cain, 647 F.3d 265, 273 (5th Cir. 2011).

These rules have been relied upon to reject habeas claims that the state court should have held an evidentiary hearing on a post-conviction application. Mathis v. Dretke, 124 Fed. Appx. 865, 871-72 (5th Cir. 2005). There is no requirement that the state court hold a full and fair hearing before it denies a postconviction application, and the federal court applies a presumption of correctness to state court findings even absent such a hearing. Id., citing Valdez v. Cockrell, 274 F.3d 941, 949 (5th Cir. 2001). Petitioner is not entitled to habeas relief based on the lack of an evidentiary hearing in the state post-conviction process.

D. Denial of Transcripts

Petitioner argues that the state court erred when it denied his Bernard motion to produce a copy of the transcript of the federal civil trial. The motion relied on State ex rel. Bernard v. Crim. Dist. Ct. Section J., 653 So. 2d 1174 (La. 1995), which held that an inmate may file a post-conviction application and identify with factual specificity constitutional claims, even absent supporting documents, and make a request for the documents in the application. The trial court then determines whether the documents are necessary to resolve the claims fairly under state procedure.

The habeas statute provides that a federal court may issue a writ of habeas corpus to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). The Supreme Court has "stated many times that federal habeas corpus relief does not lie for errors of state law." Swarthout v. Cooke, 131 S.Ct. 859, 861 (2011). Habeas relief is not available even if Petitioner were correct on this state law issue.

Furthermore, the state court had no authority to order the federal court to produce federal civil transcripts for a prisoner to use for his post-conviction application. And, finally, Petitioner was able by other means to get the federal transcripts he wanted. He filed them with this court, they were reviewed above, and the undersigned found that they do not provide a basis for a valid claim of knowing use of false testimony. Thus, Petitioner suffered no prejudice from the lack of the transcripts during his state post-conviction proceedings.

Accordingly,

It is recommended that Petitioner's petition for writ of habeas corpus be denied.

Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

***13** A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

An appeal may not be taken to the court of appeals from a final order in a proceeding under 28 U.S.C. § 2254 unless a circuit justice, circuit judge, or district judge issues a certificate of appealability. 28 U.S.C. § 2253(c); F.R.A.P. 22(b). Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Section 2253(c)(2). A party may, within fourteen (14) days from the date of this Report and Recommendation, file a memorandum that sets forth arguments on whether a certificate of appealability should issue.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 15th day of June, 2021.

All Citations

Slip Copy, 2021 WL 3134678

End of Document

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BOBBY CHARLES BYRD
Petitioner

Versus

DARREL VANNOY, Warden
Respondent

CIVIL ACTION

CASE NO.: 2018-cv-0748

CHIEF JUDGE HICKS

MAG. JUDGE HORNSBY

OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

MAY IT PLEASE THE COURT:

NOW COMES Bobby Charles Byrd, *pro se* Petitioner, who respectfully submits the following:

Mr. Byrd presents his objection to the Report and Recommendation (R&R) filed by Magistrate Judge Mark L. Hornsby on June 15, 2021, stamped as received by the Legal Programs Department on June 18, 2021, (See attached Exhibit 1), and signed for and received by Mr. Byrd on June 21, 2021. This written objection timely follows within fourteen (14) days of receipt as required under 28 U.S.C. § 636(b)(1) and *Douglass* v. *United States Auto. Assoc.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc). Mr. Byrd respectfully objects to the Report and Recommendation (R&R) issued by Magistrate Hornsby, requests review, and habeas corpus relief from this Honorable Court for the following reasons:

EXHIBIT
E

1. MAGISTRATE JUDGE MARK L. HORNSBY ERRED IN RECOMMENDING THAT THE CLAIMS IN MR. BYRD'S 28 U.S.C. § 2254 FEDERAL HABEAS CORPUS APPLICATION BE DENIED.

First, Magistrate Hornsby's R&R attacks Mr. Byrd's Habeas Corpus Petition as though he should be held to the standards of a professional attorney. A *pro se* Petitioner should not be held to such a standard, and his efforts should be liberally construed. See: *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000); *United States v. Kayode*, 777 F.3d 719, 741, n. 5 (5th Cir. 2014):

> [FN 5] See, e.g., *McNeil v. United States*, 508 U.S. 106, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (acknowledging that the Supreme Court has "insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed") (citing *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), and *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). See also *Hernandez v. Thaler*, 630 F.3d 420, 426 (5th Cir. 2011) ("The filings of a federal habeas petitioner who is proceeding *pro se* are entitled to the benefit of liberal construction."); *Johnson v. Quarterman*, 479 F.3d 358, 359 (5th Cir. 2007) (Briefs by *pro se* litigants are afforded liberal construction...."); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (reasoning that the *pro se* habeas petitioner's argument that he should not be punished for the improper setting of the return date should be construed as a request for equitable tolling, despite his failure to "explicitly raise the issue of equitable tolling").

Nonetheless, Mr. Byrd has stated viable claims, and has pointed to enough record evidence, to show that he is entitled to federal habeas corpus relief, or at least be afforded an evidentiary hearing in order to more fully present his claims.

As to Mr. Byrd's Claims involving Ineffective Assistance of Counsel and Appellate Counsel, Mr. Byrd states that Magistrate Hornsby's R&R is in error. A procedural default by trial counsel is not imputable to a Petitioner. This is a viable claim on habeas corpus review. *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 1591, 146 L.Ed.2d 518 (2000): "In other words, ineffective assistance

adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim."

"The Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 16 of the Louisiana Constitution guarantee the criminally accused a meaningful opportunity to present a complete defense." *State v. Dressner*, 08-1366 (La. 07/06/10); 45 So.3d 127, 137, citing *State v. Blank*, 04-0204 (La. 04/11/07), 955 So.2d 90, 130, *cert. denied*, 552 U.S. 994 (2007).

Further, Mr. Byrd raised the issue of denial of transcripts as a constitutional violation, and not as a question of state law, and did so in his Original Application for Post Conviction Relief, in his Application for Supervisory Writs in the Louisiana Second Circuit Court of Appeal, and in his Application for writ of Certiorari or Review in the Louisiana Supreme Court.

Mr. Byrd maintains his original arguments and relies on his habeas petition as if copied herein *in extenso*. Mr. Byrd contends that Magistrate Hornsby has either ignored, glossed over, or mischaracterized his original claims, and adopted the State's argument which completely misconstrues the issues presented. Therefore, Mr. Byrd respectfully objects to Magistrate Hornsby's R&R, and asks for a *de novo* review of his habeas corpus claims.

CONCLUSION

Wherefore, Bobby Charles Byrd, *pro se* Petitioner, respectfully objects to Magistrate Judge Mark L. Hornsby's Report and Recommendation, and prays that this Honorable Court will conduct a *de novo* review of the claims and the record, and after the law and facts being found in his favor, grant his petition for federal habeas corpus.

Alternatively, this Honorable Court should grant Bobby Charles Byrd an evidentiary hearing with appointed counsel wherein evidence, documents and witnesses will be present to support the claims raised herein.

Respectfully submitted, *pro se*, this 30 day of June, 2021.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

CERTIFICATE OF SERVICE

I, Bobby Charles Byrd, the aforementioned Petitioner, do hereby attest and affirm that the information contained herein is true to the best of my knowledge and belief. Further, I verify that all allegations in the foregoing are those of Bobby Charles Byrd.

Additionally, I hereby certify that a copy of the foregoing has this date been placed in the federal mailbox at this institution to be scanned and electronically filed in this Court, and a copy has been sent, via U.S. Mail, postage prepaid and properly addressed to:

James Stewart, District Attorney
1st Judicial District
501 Texas Street, 5th Floor
Shreveport, LA 71101-5408

Done and signed this 30 day of June, 2021, at Angola, Louisiana.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

CLERK, UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
TOM STAGG UNITED STATES COURT HOUSE
300 FANNIN ST., SUITE 1167
SHREVEPORT, LOUISIANA 71101-3083

OFFICIAL BUSINESS

UNITED STATES POSTAGE
ANGOLA, LA
$ 01.90
JUN 18 2020
MAILED FROM ZIP CODE 71101

70712

Bobby Byrd (PrisID: 299312)
Louisiana State Penitentiary
17544 Tunica Trace
Angola, LA 70712
US

JUN 18 2020

EXHIBIT
1

Byrd v. Vannoy
United States District Court, W.D. Louisiana, Shreveport Division. July 23, 2021 Slip Copy 2021 WL 3132730 *(Approx. 1 page*

2021 WL 3132730
Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Shreveport Division.

Bobby BYRD #299312

v.

Darrel VANNOY

CIVIL ACTION NO. 18-cv-748
Signed 07/22/2021
Filed 07/23/2021

Attorneys and Law Firms

Bobby Byrd, Angola, LA, Pro Se.

Rebecca Armand Edwards, D A's Office (1st JDC), Shreveport, LA, for Darrel Vannoy.

JUDGMENT

SEC P

S. MAURICE HICKS, JR., CHIEF JUDGE

*1 For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the written objections filed, and concurring with the findings of the Magistrate Judge under the applicable law;

It is ordered that Petitioner's petition for writ of habeas corpus be **DENIED**.

Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The court, after considering the record in this case and the standard set forth in 28 U.S.C. Section 2253, **DENIES** a certificate of appealability because the applicant has not made a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 22nd day of July, 2021.

EXHIBIT
F

All Citations

Slip Copy, 2021 WL 3132730

End of Document

Full Copy.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 21-30512

BOBBY CHARLES BYRD
Petitioner

Versus

DARREL VANNOY, Warden
Louisiana State Penitentiary
Respondent

APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND MEMORANDUM IN SUPPORT

From Denial of COA in the United States District Court, Western District of Louisiana, Case No. 2018-cv-0748, Chief Judge S. Maurice Hicks, Jr.

Respectfully submitted, *pro se*, this 30 day of September, 2021.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

EXHIBIT
G

TABLE OF CONTENTS:

TABLE OF AUTHORITIES:

Page

U.S. CONSTITUTION:

FEDERAL CASES:

LA. CONSTITUTION:

STATUTORY PROVISIONS:

STATE CASES:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 21-30512

BOBBY CHARLES BYRD
Petitioner

Versus

DARREL VANNOY, Warden
Louisiana State Penitentiary
Respondent

U.S.D.C. No. 2018-cv-0748

CHIEF JUDGE HICKS

MAGISTRATE HORNSBY

REQUEST FOR ORAL ARGUMENTS

Mr. Byrd believes that oral arguments are not necessary in this case unless this Honorable Court mandates otherwise. The issues of law and the record of the facts is sufficient to support the issues raised on appeal. Therefore, no oral argument will be requested by Mr. Byrd unless Respondent insists upon the matter.

At that time, Mr. Byrd would seek appointment of counsel to argue in his behalf.

Done and signed this ____ day of September, 2021, at Angola, Louisiana.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 21-30512

BOBBY CHARLES BYRD
Petitioner
Versus

DARREL VANNOY, Warden
Louisiana State Penitentiary
Respondent

U.S.D.C. No. 2018-cv-0748

CHIEF JUDGE HICKS

MAGISTRATE HORNSBY

CERTIFICATE OF INTERESTED PERSONS

Mr. Byrd herein certifies that the following persons have an interest in the outcome of this cause. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

James Stewart, District Attorney
1st Judicial District
501 Texas Street, 5th Floor
Shreveport, LA 71101-5408

Done and signed this ____ day of September, 2021, at Angola, Louisiana.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 21-30512

BOBBY CHARLES BYRD
Petitioner

Versus

DARREL VANNOY, Warden
Louisiana State Penitentiary
Respondent

U.S.D.C. No. 2018-cv-0748

CHIEF JUDGE HICKS

MAGISTRATE HORNSBY

APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND MEMORANDUM IN SUPPORT

From Denial of COA in the United States District Court, Western District of Louisiana, Case No. 2018-cv-0748 , Chief Judge S. Maurice Hicks, Jr.

MAY IT PLEASE THE COURT:

NOW COMES Bobby Charles Byrd, *pro se* Petitioner who respectfully seeks a Certificate of Appealability from this Honorable Court, pursuant to Federal Rules of Appellate Procedure, Rule 22(b), and 28 U.S.C. § 2253(c)(2).

Mr. Byrd presents this Application for a Certificate of Appealability (COA) and Memorandum in Support of Application for Certificate of Appealability (COA), and avers the following:

1.

On July 22, 2021, the U.S. District Court, Western District of Louisiana, issued a final order denying Mr. Byrd's Petition for Writ of Habeas Corpus. (Appendix E). Mr. Byrd timely submitted to the U.S. District Court his Notice of Appeal. (Appendix F). Mr. Byrd filed in the U.S. District Court A Motion to Proceed *In Forma Pauperis*, and a Motion for a Certificate of Appealability. Mr. Byrd

received a copy of an order denying COA signed by Judge Hicks on August 26, 2021.

Mr. Byrd must file an application for a certificate of appealability to comply with 28 U.S.C. § 2253, and that a brief in support of application for COA and a motion requesting permission to proceed in *forma pauperis* must also be filed, all within 40 days of October 5, 2021, in order to proceed on appeal.

2.

Mr. Byrd now seeks COA in this Honorable Court, pursuant to AEDPA §§ 102 and 103, amending 28 U.S.C. § 2253, and Federal Rules of Appellate Procedure, Rule 22(b), to proceed on appeal.

JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction to entertain this appeal and issue a Certificate of Appealability (COA) pursuant to the Federal Rules of Appellate Procedure, Rule 22(b); 28 U.S.C. § 2253; and 28 U.S.C. § 1291, so that a Petitioner may appeal a Federal District Court's judgment denying Federal Habeas Corpus Relief.

STATEMENT OF THE CASE

On May 15, 2012, the Caddo Parish District Attorney filed a Bill of Information charging Mr. Bobby Charles Byrd with Aggravated Flight From an Officer (R. pp. 1, 7). Specifically, the State alleged that Mr. Byrd intentionally refused to bring a vehicle to a stop, under circumstances wherein a human life was endangered, to wit, "he ran through four (4) red lights on Traffic Street and drove through two (2) stop signs without stopping" (R. p. 7). Mr. Byrd entered a plea of not guilty on May 15, 2012, after waiver of formal arraignment (Rec.p. 1). On January 15, 2013, the Caddo Parish District Attorney filed an amended Bill of Information charging Bobby Charles Byrd with Aggravated Flight From an Officer (R. pp. 2-3, 299-304, 315-316). Specifically, the State alleged that Mr. Byrd intentionally refused to bring a vehicle to a stop, under circumstances wherein human life was endangered, to wit, he drove through red lights and stop signs without stopping (R. pp. 8, 299-304, 315). Mr. Byrd entered a plea of not guilty on January 28, 2013, after waiver of formal arraignment

(Rec.pp. 2-3). Jury selection commenced on January 15, 2013. (R. pp. 2-3). A jury trial followed on January 16, 2013. (R. pp. 3-4, 307-456). The jury returned a verdict of guilty as charged, by a vote of 11 guilty and 1 not guilty (R. pp. 3-4, 143, 451-452).

On January 28, 2013, he State filed a Fourth and Subsequent Felony Habitual Offender Bill (R. pp. 4, 144-145). Bobby Charles Byrd entered a plea of not guilty on January 28, 2013, after waiver of formal arraignment. (R. p. 4). On January 28, 2013, Mr. Byrd filed a Motion for New Trial, which was denied on March 27, 2013 (R. pp. 4, 146-48, 464). On March 27, 2013, a multiple offender hearing commenced in the presence of Mr. Byrd and his counsel. (R. pp. 4, 457-500). On March 27, 2013, the trial court found that Mr. Byrd was a Fourth Felony Offender (R. pp. 4-5, 492). On March 27, 2013, the trial court sentenced Mr. Byrd to 25 years of imprisonment at hard labor without the benefit of Parole, Probation or Suspension of Sentence, a lesser sentence then the mandatory of life imprisonment (R. pp. 4-5, 496-98). On July 15, 2013, after the State and Mr. Byrd filed Motions to Reconsider Sentence, the trial court then sentenced Mr. Byrd to life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence (R. pp. 5-6, 189-91, 203-10, 501-17).

On May 29, 2013, Mr. Byrd filed a Motion for Appeal, and the order of appeal was entered on September 12, 2013 (R. p. 6, 211-12, 219). On February 17, 2014, counsel for Mr. Byrd filed the Original Appellate Brief on the behalf of Mr. Byrd. The Louisiana Court of Appeal for the Second Circuit affirmed Mr. Byrd's conviction and sentence. ***State of Louisiana v. Bobby Charles Byrd***, No. 49, 142-KA (La.App. 2 Cir. 6/25/14), 145 So.3d 536. On July 24, 2014, Mr. Byrd filed a timely Writ of Certiorari in the Louisiana Supreme Court. The Louisiana Supreme Court denied Certiorari on March 6, 2015. ***State of Louisiana v. Bobby Charles Byrd***, No. 2014-KO-1613 (La. 2015).

On May 16, 2016, Mr. Byrd filed a timely application for post-conviction relief in the First Judicial District Court. On September 1, 2016, he supplemented the "PCR." The district court denied Mr. Byrd's application for post conviction relief on November 10, 2016. Mr. Byrd received a copy of the ruling on

November 22, 2016. He then filed a notice of intent to apply for supervisory writs. On December 11, 2016, Mr. Byrd filed his application for supervisory writ of review in the Court of Appeal, Second Circuit. The Court of Appeal, Second Circuit denied writs on February 9, 2017.

On March 8, 2017, Mr. Byrd filed an application for supervisory writs to the Louisiana Supreme Court. The Louisiana Supreme Court denied writs on March 18, 2018. On May 31, 2018, Mr. Byrd timely filed his Writ of Habeas Corpus. On October 26, 2020, the State filed its Answer, and Mr. Byrd filed his Traverse to the State's Response.

On June 15, 2021, the Magistrate filed its Report and Recommendation, and Mr. Byrd timely filed his Objection.

On August 26, 2021, Mr. Byrd was informed that he had 40 days in which to file his COA to this Honorable Court, which would be due on or before October 5, 2021. At this time, Mr. Byrd timely files for COA, requesting that this Court grant him relief for the following reasons to wit:

STATEMENT OF TIMELINESS

Mr. Byrd has been timely filed in all courts throughout the case at bar, and shows he has diligently pursued his right to Federal Habeas Corpus Review. *Howland v. Quarterman*, 507 F.3d 840 (5th Cir. 2007); *Dolan v. Dretke*, 168 Fed.Appx 10 (5th Cir. 2006); *Gordon v. Dretke*, 107 Fed. Appx. 404 (5th Cir. 2004); *Goodwin v. Dretke*, [2004 U.S. App.Lexis 13433 (5th Cir. 2004)]; *United States v. Wynn*, 292 F.3d 226 (5th Cir. 2002), (all citing *Phillips v. Donnelly*, 216 F.3d 508 (5th Cir. 2000)).

ISSUES PRESENTED ON HABEAS CORPUS

Direct Appeal:

Reasonable jurists would determine that Mr. Byrd's conviction was obtain with Insufficient Evidence.

Collateral Review Claims:

Reasonable jurists would conclude that Mr. Byrd was denied effective assistance of appellate counsel

Reasonable jurists would determine that Mr. Byrd was denied a fair trial when the State knowingly used false evidence to obtain Mr. Byrd's conviction;

Reasonable jurists would conclude that Mr. Byrd was denied effective assistance of trial counsel;

Reasonable jurists would determine that Mr. Byrd was denied the right to counsel of choice

Supplemental Issues on Habeas:

1. Mr. Byrd's conviction for the crime of Aggravated Flight From an Officer rests on violations of due process and the equal protection cause of the 14th Amendment to the United States Constitution because the prosecution knowingly used false evidence to obtain Mr. Byrd's conviction resulting in the wrongful conviction of an innocent man; and reasonable jurists would conclude that he is entitled to a new trial.

2. The district court abused its discretion by denying Mr. Byrd's Application for Post Conviction Relief without conducting an evidentiary hearing to provide Mr. Byrd an adequate opportunity to present his new evidence fairly, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

3. The district court abused its discretion, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution, by denying Mr. Byrd's motion pursuant to *State ex Rel. Bernard v. Orleans Parish Criminal Dist. Court Section J,* 653 So.2d 1174 (LA. 1995), because the trial transcripts of the civil trial are necessary to adequately review the claims presented.

STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 2253(c)(2), a COA is to be granted if the Petitioner makes: "a substantial showing of the denial of a Constitutional right." This Court has held that the standard for obtaining a COA is the same as that for obtaining a Certificate of Probable Cause, (CPC) under prior law. *Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir. 1996). In order to obtain a COA, Petitioner has to make a "substantial showing of the denial of a federal right." *Barefoot v. Estelle,* 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)(internal quotation marks and citations omitted). A "substantial showing" required the Petitioner to "demonstrate that the issues are debatable among jurists of reason; that a court **could** resolve the question in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot,* 463 U.S., at 893 n. 4 (emphasis in original; internal quotation marks and citation omitted), also See, *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Any doubt regarding whether to grant a COA should be resolved in favor of a Petitioner, and the Court may consider the severity of the penalty in making the determination. *Fuller v. Johnson,* 114 F.3d 491, 495 (5th Cir. 1997),

Mr. Byrd's *pro se* claims demonstrate "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253 (C)(2); ***Slack v. McDaniel***, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Further, since the district court's denial of relief is based upon procedural grounds, without analysis of the underlying constitutional claims, "a COA should issue when a prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* 529 U.S. at 484.

Mr. Byrd submits that he meets the standard of review, and can demonstrate that reasonable jurist could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, and requests a COA on each of the claims presented herein.

ARGUMENT

PCR ISSUES

1. Mr. Byrd was denied his right to effective assistance of appellate counsel when counsel failed to litigate nonfrivolous issues in his merits brief in violation of the Sixth and Fourteenth Amendments to the United States Constitution.
2. Mr. Byrd was denied a fair trial when the prosecution knowing used false evidence to obtain his conviction in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
3. Mr. Byrd was denied his right to effective assistance of counsel when counsel failed to pursue the viable defense that Chad Morris was the driver of the vehicle in the aggravated flight and not Mr. Byrd.

PCR SUPPLEMENTAL ISSUE

1. Mr. Byrd's right to be represented by counsel of choice was infringed upon in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the Louisiana Constitution Article 1 § 13.

DIRECT APPEAL ISSUE

1. The State presented insufficient evidence to establish Mr. Byrd committed an aggravated flight from an officer in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

SUPPLEMENTAL HABEAS ISSUES

1. Mr. Byrd's conviction for the crime of Aggravated Flight From an Officer rests on violations of due process and the equal protection cause of the 14th Amendment to the United States Constitution because the prosecution knowingly used false evidence to obtain Mr. Byrd's conviction resulting in the wrongful conviction of an innocent man.

2. The district court abused its discretion by denying Mr. Byrd's Application for Post Conviction Relief without conducting an evidentiary hearing to provide Mr. Byrd an adequate opportunity to present his new evidence fairly, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

3. The district court abused its discretion, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution, by denying Mr. Byrd's motion pursuant to *State ex Rel. Bernard v. Orleans Parish Criminal Dist. Court Section J,* 653 So.2d 1174 (LA. 1995), because the trial transcripts of the civil trial are necessary to adequately review the claims presented.

LAW AND ARGUMENT

PCR ISSUE NO. 1: Ineffective assistance of appellate counsel.

Mr. Byrd contends that he received ineffective assistance of appellate counsel when appellate counsel failed to present critical facts and law on appeal regarding his Sixth and Fourteenth Amendments right to be represented by counsel of choice and failing to litigate Mr. Byrd's Fourth Amendment claim.

STANDARD OF REVIEW

According to the United States Supreme Court, the standard for evaluating a claim of ineffective assistance of appellate counsel enunciated in *Smith v. Robbins,* 528 U.S. 259, 120 S.Ct. 746 (2000); *citing Smith v. Murray,* 477 U.S. 527, 535-536, 106 S.Ct. 2661 (1986).

The *Robbin*'s Court explained that:

> Respondent must first show that his counsel was objectionably unreasonable, *see, Strickland,* 466 U.S., at 687-691, 104 S. Ct. 2052, in failing to find arguable issues to appeal--that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [Respondent] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal. [528 U.S. 286] *See, Id.*, at 694, 104 S.Ct. 2052 (defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). (FN14).

Id. at U.S. 285-286.

1. Counsel of Choice

Mr. Byrd have protected constitutional rights to be represented by counsel of choice under the Sixth and Fourteenth Amendments to the United States Constitution.

A defendant has a constitutional right to retain counsel of their own choosing. *See Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). In *Kaley v. United States*, 134 S.Ct. 1090 (2014), the Supreme Court has:

> described that right as separate and apart from the guarantee to effective representation, as "the root meaning" of the Sixth Amendment. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); cf. *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.ed.2d 158 (1932)("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Court also held that the wrongful deprivation of choice of counsel is "structural error," immune from review for harmlessness, because it "pervades the entire trial." *Gonzalez-Lopez*, 548 U.S., 150, 126 S.Ct. 2557. Different lawyers do all kinds of things differently, sometimes "affecting whether and on what terms the defendant ... plea bargains, or decides instead to go to trial" – and if the latter, possibly affecting whether she gets convicted or what sentence she receives. So for defendants like the Kaheys, having the ability to retain the "counsel [they] believe to be best" – and who might in fact be superior to any existing alternatives – matters profoundly. Id., at 146, 126 S.Ct. 2557.

Kaley v. United States, 134 S.Ct., at 1102-1103 (2014).

In the instant case, Petitioner was represented by retained counsel of choice, Attorney Phillip Terrell. R. 129-131. Mr. Terrell was initially enrolled as counsel of

record to represent Mr. Byrd in this criminal matter. Sometime before trial, a motion for continuance was filed so that Mr. Byrd could be represented by counsel of choice, Mr. Phillip Terrell. (Transcript of continuance hearing). Attorney B. Gerald Weeks, however, was appointed and enrolled as counsel to represent Mr. Byrd. (R.1). Mr. Weeks then represented Mr. Byrd throughout the trial and sentencing. (R. 1-5). The evidence is clear that Mr. Byrd desired to be represented by Attorney Phillip Terrell, but his right to be represented by his counsel of choice was totally ignored.

Clearly, Mr. Byrd's appellate counsel was ineffective in failing to raise this nonfrivolous issue in a merits brief on direct appeal. The only resolution to this matter is to reverse Mr. Byrd's convictions and sentence.

2. Fourth Amendment Claim

Mr. Byrd also contends that his appellate counsel also failed to litigate this nonfrivilous issue in his merits brief on direct appeal regarding the motion to suppress evidence based on lack of probable cause or reasonable cause for an investigatory stop.

Standard of Review

To demonstrate actual Prejudice in a counsel's failure to litigate a Fourth Amendment claim, a defendant must prove a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. *Kimmelman v. Morrison,* 106 S.Ct. 2574 (1983). Probable cause to arrest exist where facts and circumstances within the arresting officer's knowledge which they have reasonable trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested. *Dunaway v. New York,* 442 U.S. 200, 98 S.Ct. 2248 (1979).

In the matter before the Court. the basis for the officer stopping Mr. Byrd was not supported by probable cause nor was there even evidence to conduct a *Terry* stop. Therefore, the alleged incriminating statement made by Mr. Byrd should have been suppressed as it prejudiced his defense. Specifically, Detective Gordon testified that Mr. Byrd stated "boss, you really ought to reduce that charge because I wasn't really going that fast and all those lights were green...."

Reasonable cause for an investigatory stop or detention, officers must "have articulate knowledge of particular facts significant reasonably to suspect the detained person of criminal activity." *State v. Dasall,* 385 So.2d 207, 209 (La. 1980). In establishing reasonable cause, a critical element is knowledge that an offense has been committed. "When the officer making the stop knows a crime has been committed, he has only to determine whether the additional trustworthy information justifies a man of ordinary caution to suspect the detained person of the offense." *State v. Bickman,* 404 So.2d 929, 932 (La. 1981); *State v. Louis,* 496 So.2d 563, 566 (La.App. 1 Cir. 1986).

In July 2011, Detective Robert Gordon of the Shreveport Police Department was investigating a

string of burglaries, including a burglary of the Tiki Bar and Grill by a white or Hispanic male who was possibly driving a white or light colored, 1990's model, Dodge or Chrysler minivan that was missing the right front hubcap. (R. pp. 369-71). On July 20, 2011, officers acting on a BOLO, told Detective Gordon they spotted a car being driven by a white male in the Allendale neighborhood. (R. pp. 372, 404). Detective Gordon, then, found a Plymouth van at the Livingston Hotel. (R. pp. 366, 372). The vehicle was unoccupied and registered to a female out of Minden. (R. p. 372).

After spotting the vehicle, Detective Gordon moved to the entrance of the hotel and continued his observation. (R. pp. 372-73). Sometime thereafter, the vehicle left the parking lot of the hotel (R. pp. 372-73). Because Detective Gordon could not see the driver, he ordered officers to stop the vehicle so that he could determine who was driving. (R. pp. 351-52, 366, 373). After officers activated their lights, Mr. Byrd stopped the van. (R. p. 373). When the police approached, however, Mr. Byrd drove away. (R. pp. 343-48, 358-61, 373-75). There was no evidence that officers had reasonable grounds to believe that the driver of the van, Bobby Charles Byrd, was involved in criminal activity to justify stopping Mr. Byrd. (R.pp. 351-52, 366, 272-73). Clearly, there existed no reason for officers to stop Mr. Byrd.

The Fourth and Fourteenth Amendments prohibition of searches and seizures that are supported by some objective justification governs all seizures of the person, "including seizures that involve a brief detention short of traditional arrest. ***Terry v. Ohio,*** 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-1878, 20 L.Ed.2d 889 (1968). While the Supreme Court has recognized that in some circumstances a person may be detained briefly, without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. *See* ***Brown v. Texas,*** 443 U.S. 47, 51, 99 S.Ct. 2637, 2640 (1979).

The amount of evidence, the quality of the evidence and the contents of the evidence all fall short of indicia supporting reasonable suspicion or reasonable belief that the driver of the van had committed any crime. There was no testimony at all that indicated the driver of the van had anything to do with the

alleged burglary. The only thing that the video showed was a dark and grainy photo of a van entering and exiting a parking lot, which may or may not have been the Tiki Bar and Grill. There was never any evidence put on that showed anyone coming from the van or from the bar to the van.

No officer actually observed who was driving the vehicle prior to, during or after the chase. Detective Gordon testified that he could not see the driver of the vehicle. (R. pp. 351-52, 366, 373). Corporal Garrett testified that she did not see who initial was in the van, who was driving the van or got out of the van. R. 351. Corporal Garrett also admits that she did not know how many people were in the van. *Id.* Corporal Morman also could not identify the individual driving the van prior to, during or after the chase. R. 355-368.

Chad Morris was driving the minivan that Mr. Byrd was alleged to have been driving which resulted in Mr. Byrd being charged with aggravated flight from an officer. Had counsel investigated, he would have discovered that officers had obtained the fingerprints of Chad Morris being located on the drivers side of the vehicle. Exhibit "3." Armed with this evidence, Mr. Byrd would have had a valid defense to the crime of which he was convicted as the state would not have been able to present to the jury that Mr. Byrd was the only occupant of the vehicle during the chase. This evidence would have proved that Chad Morris was driving the vehicle during the chase and managed to get away from officers.

Other than the evidence obtained from the poisonous tree, Mr. Byrd's alleged statement to Detective Gordon that he was driving the vehicle, R. 395, the remaining evidence does not support that Mr. Byrd committed the crime of aggravated flight. Thus, his counsel was ineffective for failing to litigate this Fourth Amendment claim.

The exclusionary rule generally prohibits the receipt of evidence at trial which was acquired as a result of an illegal arrest. All evidence which is derived or tainted by an illegal arrest is inadmissible as "fruit of the poisonous tree." ***Wong Sun v. United States***, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441

(1963).

Thus, Mr. Byrd's conviction and sentence should be reversed.

PCR ISSUE NO. 2: Prosecution knowing use of false evidence to obtain a conviction.

Mr. Byrd's right to a fair trial was violated when the state knowingly used false evidence to obtain his conviction. Fourteenth Amendment.

Standard of Review

The prosecution's knowing use of false evidence to obtain a conviction is governed by the Fourteenth Amendment to the United States Constitution. In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, the Supreme Court reasoned that if the false evidence effect the outcome of the trial, the judgment must be reversed. Moreover, that it does not merely cease to apply because the false evidence goes only to the credibility of the witness. Id. at U.S. 270, S.Ct. 1177.

During pre-trial motion to suppress or quash, Detective Gordon testified that he was investigating a string of burglaries. R. p. 261. That he obtained information on the burglary at the Tiki Bar, in the form of a grainy video of a white or Hispanic male inside the building, but he could not make an identification from the video because of the darkness inside. R. p. 262. He obtained a video of "the suspect vehicle [that] was captured on ... camera at the same business, in a parking lot, and it was noted that it was an early to mid '90s Dodge or Plymouth minivan that was white or light colored, and was missing the right front hubcap. *Id.* Detective Gordon alleged to have obtained information that the van was spotted in the Allendale area being driven by a white male. R. 262. He then proceeded to the Allendale area where he spotted the van at the Livingston Motel. R. 262-263.

Needing to identify the driver, he backed away and gained a vantage point down the street. R. 263. The van exited the parking lot so he called on the radio for officers in marked units to conduct a traffic stop in an attempt to identify the driver. *Id.* The purpose of the stop was to identify the driver and see if the vehicle was actually the one that was on the video of the bar that had been burglarized, and to try to

gain as much information as possibly could. R. 263. Detective Gordon admitted he did not see the person that was driving the van. R. 264.

At trial, however, Detective Gordon testified falsely that he advised officers to stop the vehicle because he had a possible burglary suspect that was operating the vehicle that he needed to identify. R. 373. Prior to trial, at no time did Detective Gordon mention that he believed that the driver of the van was a possible burglary suspect. Note that the burglary at the Tiki Bar had occurred three of four days prior to this incident. R. 267. To add, there no License plate from video. R. 267. Moreover, the vehicle registered to a white female in Minden. R. 268. According to Detective Gordon, he did not see who was driving the vehicle and only asked officers to stop the vehicle so that they could identify the driver. R. p. 269.

Without the false evidence, the prosecution would not have been able to meet their burden of proving aggravated flight from an officer as the element of reasonable grounds to believe that the driver of the van had committed the offense of burglary.

To sustain Mr. Byrd's conviction for aggravated flight from an officer, the State had to establish that Mr. Byrd "intentionally refused ... to bring the vehicle to a stop, under circumstances wherein human life is endangered, knowing the ... [Mr. Byrd] has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe .... [Mr. Byrd] had committed the offense." *State v. Ashley, supra* (citing LSA-R.S. 14:108.1).

Since the false evidence tainted Mr. Byrd's trial, his conviction and sentence should be reversed.

PCR ISSUE NO. 3: Ineffective assistance of counsel.

Mr. Byrd was denied his right to effective assistance of counsel when counsel failed to investigate his only viable defense that Chad Morris was the driver of the minivan that Mr. Byrd was convicted of driving resulting in his conviction for aggravate flight from an officer in violation of the Sixth and Fourteenth Amendments.

Standard of Review

Trial counsel's ineffective assistance is govern by the **6th and 14th Amendment of the United States Constitution.** To make a successful claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. At 2068.

Mr. Byrd's counsel failed to investigate evidence that shows that Chad Morris was driving the minivan that Mr. Byrd was alleged to have been driving which resulted in Mr. Byrd being charged with aggravated flight from an officer. An investigation would have lead to the discovery that officers had obtained the fingerprints of Morris on the drivers side of the vehicle. Exhibit "3." Armed with this evidence, Mr. Byrd would have had a valid defense to this crime. The evidence would have proved that Mr. Byrd was not the only occupant of the vehicle during the chase. This evidence would also have proved that Morris was driving the vehicle during the chase, but he managed to get away from officers once crossing over the levee and escaping through the river bank's brush.

No officer actually observed who was driving the vehicle prior to, during or after the chase. Detective Gordon testified that he could not see the driver of the vehicle. (R. pp. 351-52, 366, 373). Corporal Garrett testified that she did not see who initially was driving the van or who got out of the van. R. 351. Corporal Garrett also admits that she did not know how many people were in the van. *Id.* Corporal Morman also could not identify the individual driving the van prior to, during or after the chase. R. 355-368. Although she alleged to have looked down on the driver of the van as the basis of her identification of Mr. Byrd as being the driver, the video implicitly shows that as soon as Corporal Morman walked up to the driver side door of the van, the van pulled off leaving her with no opportunity to obtain a description of the driver. See MSV Video.

Clearly, trial counsel's failure to investigate into Chad Morris driving the minivan at the time of this incident prejudiced Mr. Byrd's defense. Mr. Byrd is entitled to a reversal of his conviction and sentence as a result of ineffective assistance of counsel.

PCR SUPPLEMENTAL ISSUE NO. 4: Counsel of choice

Mr. Bobby Byrd's right to be represented by counsel of choice was clearly violated when the trial court mistakenly forced Attorney B. Gerald Weeks who has limited experience in criminal law which experience occurred early in Mr. Weeks's legal career sometime in the 1970's.

STANDARD OF REVIEW

In *United States v. Gonzalez-Lopez,* 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), the Court explained that:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Cf. *Powell v. Alabama,* 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932)("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Government here agrees, as it has previously, that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624-625, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).
>
> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.
>
> The Court also had "little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"

Id. at U.S. 147-150.

Likewise, Louisiana Constitution Article 1 § 13 provides in pertinent part, "At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." The Louisiana Supreme Court

has also determined that "the right to counsel of choice extends to a criminal defendant who has hired his own counsel." *State v. Reeves,* 2006-2419 (La. 5/5/09), 11 So.3d 1031. In addition, the right to counsel of choice extends to a criminal defendant who has had an attorney hired for him by a collateral source." Citing *State v. Jones, 1997-2593* (La. 3/4/98), 707 So.2d 975. The Court also recognized that "the right to counsel extends under the state constitution to a criminal defendant for whom an attorney volunteers his services." Citing *State v. Sims,* 2007-2216 p. 1 (La. 11/16/07), 968 So.2d 721, 722.

In May 2012, Attorney B. Gerald Weeks attended the initial arraignment in Attorney Phillip Terrell's stead, because Mr. Terrell sought inpatient treatment at Palmetto facility for personal problems. **Exhibit "7, p. 2, para. 8" (Affidavit of Attorney B. Gerald Weeks).** Mr. Weeks "never intended to represent Byrd through the conclusion of the criminal proceedings, but because of the situation with Terrell, and the progressing criminal proceedings, he continued to appear on Byrd's behalf. **Exhibit "7, p. 2, para. 9" (Affidavit of Attorney B. Gerald Weeks).** According to Mr. Weeks, he "recalls on two (2) occasions, he raised the problem of Byrd not having his chosen counsel to represent him in his criminal proceedings with the Trial Court. **Exhibit "7, p. 2, para. 10" (Affidavit of Attorney B. Gerald Weeks).** At the beginning of trial, Mr. Weeks again "recalls making a similar motion on the issue that Byrd was not represented by his chosen criminal counsel to the Trial Court. **Exhibit "7, p. 3, para. 12" (Affidavit of Attorney B. Gerald Weeks).** Mr. Weeks attempts of having Mr. Byrd represented by his counsel of choice were fruitless, as the Trial Court was steadfast in Mr. Weeks representing Byrd.

Mr. Byrd has tried every possible avenue in obtaining a true copy of the trial record or minute entries regarding the hearings and discussions regarding being represented by his counsel of choice (Attorney Phillip Terrell), to no avail.

Nonetheless, the law is unambiguous, "deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the

representation he received." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

Mr. Byrd further submits as evidence of Attorney Phillip Terrell as counsel of Mr. Byrd's choosing, the contract that is a part of the trial record which Attorney Phillip Terrell provided to Mr. Byrd prior to Mr. Terrell seeking in-patient treatment at Palmetto facility. As can be seen, Mr. Byrd endorsed the contract prior to trial. Mr. Byrd doubtlessly had chosen Attorney Phillip Terrell to represent him in this matter. (R. 129-131). In fact, a total of $4000.00, was paid to Mr. Terrell by Mr. Weeks from a settlement that Mr. Weeks had represented Mr. Byrd in prior to this incident. The only resolution available is to reverse Mr. Byrd's conviction and sentence.

DIRECT APPEAL ISSUE NO. 1: Insufficient Evidence

The testimony at trial established that the police did not know who was driving the van, which was being operated by Mr. Byrd, when the police pulled over the van and before Mr. Byrd drove off. While the police may have had reasonable cause to believe that the van had been involved in a burglary, they did not know who was driving the van, they knew that the van was owned by a female from Minden, and they knew that the van was a different model than in the BOLO. Before the stop, there was no evidence that this particular van was being driven by a male, much less a white or Hispanic male. Accordingly, when Mr. Byrd was pulled over, officers had no reasonable grounds to believe that the driver of the van had committed the offense, all they knew was that the van was of a different model than the one used in a burglary.

While this knowledge may have been sufficient for a *Terry* stop, it was insufficient to establish an element of Aggravated Flight From an Officer. Accordingly, the evidence introduced at the trial of this case, when viewed under the *Jackson* standard, was insufficient to prove all of the elements of the offense of Aggravated Flight From an Officer beyond a reasonable doubt.

To sustain Mr. Byrd's conviction for Aggravated Flight From an Officer, the State had to establish

that Mr. Byrd "intentionally refused ... to bring the vehicle to a stop, under circumstances wherein human life is endangered, knowing the ... [Mr. Byrd] has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe .... [Mr. Byrd] had committed the offense." ***State v. Ashley***, supra (citing LSA-R.S. 14:108.1). Further, the State had to prove that "the signal ... [was] given by an emergency light and a siren on a vehicle marked as a police vehicle." 33,880, at **5-6 768 So.2d 820 (citing LSA-R.S. 14:108.1). Finally, the State had to establish that Mr. Byrd engaged in "circumstances wherein human life is endangered include: leaving the roadway; forcing another vehicle to leave the roadway; exceeding the posted speed limit by 25 miles per hour or more; ... traveling against the flow of traffic;" running stop signs; or running red lights. 33,880, at *6; 768 So.2d at 820 (citing LSA-R.S. 14:108.1; two of these listed elements must be established).

As set forth above, the State failed to offer any evidence that officers had reasonable grounds to believe that the driver of the van, Bobby Charles Byrd, had committed an offense at the time they gave the van he was driving a visual and audible signal to stop by officers (Rec.pp. 351-52, 366, 272-73).

Further, there was evidence that Mr. Byrd ran red lights in Caddo Parish (Rec.pp. 343-48, 358-61, 373-75). However, there was no evidence that he ran a stop sign in Caddo Parish. *Id.*; *but see* Rec.p. 244.

Given the evidence at trial, the State failed to meet its burden of proof. Accordingly, Mr. Byrd's conviction of Aggravated Flight From an Officer must be reversed and his sentence should be vacated.

SUPPLEMENTAL ISSUE No. 1 (Habeas)

1. Mr. Byrd's conviction for the crime of Aggravated Flight From an Officer rests on violations of due process and the equal protection cause of the 14th Amendment to the United States Constitution because the prosecution knowingly used false evidence to obtain Mr. Byrd's conviction resulting in the wrongful conviction of an innocent man.

Mr. Byrd maintains that he is actually innocent of the crime for which he was convicted and that constitutional violations resulted in a manifest miscarriage of justice. Mr. Byrd contends that the

prosecution knowingly used false evidence to obtain his conviction in violation of the United States Constitution, Amendment 14.

STANDARD OF REVIEW

A petitioner is entitled to avail himself of the provisions of La. C.Cr.P. Art. 930.3, on the ground that he is actually innocent. ***State v. Conway***, 816 So.2d 290 (2002); See Also, ***House v. Bell***, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). The *Conway* Court explained that "a bona fide claim of actual innocence must involve 'new, material, noncumulative,' and 'conclusive' evidence' which meets an 'extraordinarily high' standard and which 'undermines the prosecution's entire case.'" Similarly, the innocence standard expressed in *House* requires a Petitioner to establish that:

> ... in light of new evidence, 'it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt.' This formulation... ensures that Petitioner's case is truly 'extraordinary,' while providing Petitioner a meaningful avenue by which to avoid a manifest injustice.... Yet a petition supported by a *Schlup* gateway showing 'raise[s] sufficient doubt about [the Petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error...
>
> To be credible...the claim requires "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," the...analysis is not limited to such evidence. If new evidence so requires, this may include consideration of "the credibility of the witnesses...."

The exception to the time limits of Article 930.8(A), provided by La. C.Cr.P. Art. 930.8(A)(1) for claims based upon "new facts discovered pursuant to this exception [that was not known to the petitioner or his attorney] shall be submitted to the court within two years of discovery]. La. C.Cr.P. Art. 930.8(A)(1)

The United States Supreme Court has recognized that a prosecutor's knowing presentation of false testimony is inconsistent with the rudimentary demands of justice. ***Mooney v. Holohan***, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935). it is also a violation of the Due Process Clause for a prosecutor to fail to correct testimony he knows to be false. ***Alcorta v. Texas***, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957), even when the falsehood in the testimony goes only to the witness' credibility. ***Napue v. Illinois***, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). *See Also* ***Gigilio v. United***

States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)(new trial required when Government witness testified falsely on matters relating to credibility and the prosecutor who served as trial counsel should have been aware of the falsehood). See also *State v. Deruise,* 1998-0541 (La. 4/3/01), 802 So.2d 1224; and *State v. Broadway,* 96-2659 (La. 10/19/99), 753 So.2d 801.

The Court in *Broadway* explained that:

> To prove a *Napue* claim, the accused must show that the prosecutor acted in collusion with the witness to facilitate false testimony. When a prosecutor allows a state witness to give false testimony without correction, a conviction gained as a result of that perjured testimony must be reversed, if the witness's testimony reasonably could have affected the jury's verdict, even though the testimony may be relevant only to the credibility of the witness.

Broadway, 753 So.2d 801, 814 (La. 1999).

In the instant case, the prosecution failed to correct the false testimonies of officers Ms. Mary Garrett, Corporal Kelly Mormon, and retired Detective Robert Gordon in Mr. Byrd's trial for aggravated flight from an officer. Mr. Byrd discovered that these witnesses had testified falsely during his civil trial which occurred between the dates of June 12, 2017 through June 16, 2017. *Bobby Charles Byrd v. City of Bossier, Et al.*, No. 5:12-CV-01956 (U.S. Dt. Ct, W. Dt. La.) During the civil trial, officers Ms. Mary Garrett, Corporal Kelly Mormon, and retired Detective Robert Gordon conceded that their testimonies in Mr. Byrd's criminal trial for aggravated flight from an officer was false. See Motion for Production of Transcripts pursuant to *State ex rel. Bernard v. Orleans Parish Criminal Dist. Court Section J,* 653 So.2d 1174 (1995).

Detective Robert Gordon of the Shreveport Police Department was investigating a string of burglaries, including a burglary of the Tiki Bar and Grill by a white or Hispanic male who was possibly driving a white or light colored, 1990's model, Dodge or Chrysler minivan, missing the right front hubcap (R.pp. 369-71). Officers acting on a BOLO, told Detective Gordon they spotted a car being driven by a white male in the Allendale neighborhood. (R.pp. 372, 404). Detective Gordon found a Plymouth van at the Livingston Hotel, 400 Pete Harris (R.pp. 366, 372). The vehicle was unoccupied

and registered to a female from Minden, Louisiana. (R.p. 372).

Detective Gordon moved to the entrance of the hotel and continued his observation. (R.pp. 372-73). The vehicle then left the parking lot of the hotel. (R.pp. 372-73). Because Detective Gordon could not see the driver, he ordered officers to stop the vehicle so he could determine who was driving. (R.p. 373). When the police approached, however, Mr. Byrd drove away. (R.pp. 343-48, 358-61, 373-75). Corporal Garrett testified that at 500 yards away (1500 feet), she observed Mr. Byrd running red lights. (R.p. 345). Corporal Garrett also testified that the speed limit on the bridge was thirty-five (35) and that she was traveling at fifty-nine miles per hour and that Mr. Byrd was getting farther away. (R.pp. 346-347). Although these officers testified that Mr. Byrd ran stop signs and red lights, an enlargement of the Motor Vehicle Surveillance ("MVS video") which captured the whole incident shows that Mr. Byrd did not run any red lights or stop signs. ***Bobby Charles Byrd v. City of Bossier, Et al.***, No. 5:12-CV-01956 (U.S.D.C., W.D. La. June 16, 2017).

In Mr. Byrd's criminal trial, the prosecution relied heavily on these officer's testimonies and the MVS video to obtain Mr. Byrd's conviction. The prosecution knew these officers were testifying falsely because the prosecution had viewed the contents of the MVS video prior to trial. (R.p. 214). In fact, the prosecution offered the MVS video as evidence in Mr. Byrd's trial. Ibid. In opening arguments the prosecution spoke in great length regarding the incident. (R.pp. 222-255).

The quagmire presented here involves the fact that the MVS video was enlarged during Mr. Byrd's civil trial to reveal that Mr. Byrd did not commit any traffic violations.[1] After the prosecution's chief witnesses in Mr. Byrd's criminal trial viewed the enlarged video in Mr. Byrd's civil trial, they conceded that Mr. Byrd did not commit any traffic violations. (See Footnote 1).

---

1 Mr. Byrd has submitted a Motion for Production of Transcripts for the transcripts in ***Bobby Charles Byrd v. City of Bossier, Et al.***, No. 5:12-CV-01956 (U.S. Dt. Ct, W. Dt. La. June 16, 2017), pursuant to ***State ex rel. Bernard v. Orleans Parish Criminal Dist. Court Section J,*** 653 So.2d 1174 (La. 1995), as evidence to adequately establish his claim that the prosecution knowingly used false evidence to obtain Mr. Byrd's conviction.

To convict Mr. Byrd of aggravated flight from an officer, the prosecution was required to prove that Mr. Byrd's "intentionally refused ... to bring the vehicle to a stop, under circumstances wherein human life is endangered, knowing that ... [Mr. Byrd] has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe .... [Mr. Byrd] had committed the offense." *State v. Ashley*, 768 So.2d 817, 819-820 (La.App. 2 Cir. 2000), citing La. R.S. 14:108.1. The Prosecution also had to prove that "the signal ... [was] given by an emergency light and a siren on a vehicle marked as a police vehicle." *Id.* at 768 So.2d 820 (citing La. R.S. 14:108.1). In addition, the Prosecution had to establish that Mr. Byrd engaged in "circumstances wherein human life is endangered which includes: leaving the roadway; forcing another vehicle to leave the roadway; exceeding the posted speed limit by 25 miles per hour or more; ... traveling against the flow of traffic;" running stop signs; or running red lights. *Id.* at 768 So.2d at 820 (citing La. R.S. 14:108.1; two of these listed elements must be established).

According to the Court of Appeal, Second Circuit, in *State v. Byrd*, 49, 142, p. 6, (La. App. 2 Cir. 2014), 145 So.3d 536, Mr. Byrd exceeded the speed limit by more than twenty-five miles per hour, failed to stop at stop lights, and failed to stop at stop signs.

As Mr. Byrd stated above, new evidence proves that he did not commit any traffic violations under circumstances wherein human life is endangered, knowing that he had been given a visual and audible signal to stop by a police officer when the officer had reasonable grounds to believe Mr. Byrd had committed an offense. The facts developed in his civil trial which occurred between the dates of June 12, 2017 through June 16, 2017, implicitly establish that the prosecution's chief witnesses testified falsely during Mr. Byrd's criminal trial. ***Bobby Charles Byrd v. City of Bossier, Et al.***, No. 5:12-CV-01956 (U.S.D.C. W.D.La.)(See Footnote 1). During the civil trial, officers Ms. Mary Garrett, Corporal Kelly Mormon, and retired Detective Robert Gordon conceded that their testimonies in Mr. Byrd's criminal trial were false (See Footnote 1).

On direct examination of Corporal Garrett in the civil trial, Attorney Robert Kennedy enlarged the MVS video for the Court at Mr. Byrd's request. (See Footnote 1). The enlarged MVS video showed clearly that the stop lights that Ms. Mary Garrett, Corporal Kelly Mormon, and retired Detective Robert Gordon testified to in Mr. Byrd's criminal trial as being red, were actually green. (R.pp. 256-264). The prosecution knew that Mr. Byrd did not run any stops signs or red lights as the MVS video was in his possession prior to trial. The prosecution, however, allowed these witnesses to testify falsely without correction or even graver, the prosecutor acted in collusion with the witness to facilitate false testimony. In the civil trial, Ms. Mary Garrett and Corporal Kelly Mormon conceded that the lights that were alleged to have been red when Mr. Byrd traveled through them were actually green when Mr. Byrd traveled through them. (See Footnote 1).

During Mr. Byrd's civil trial, Ms. Mary Garrett admitted that her testimony in Mr. Byrd's criminal trial was false regarding Mr. Byrd running red lights as the traffic signals were actually green when Mr. Byrd passed them. (See Footnote 1). This new admission establishes that Ms. Garrett falsified evidence which affected the outcome of Mr. Byrd's trial. In addition, Ms. Garrett testified that the reading of the speed odometer as stated being forty-nine (49) mph at Mr. Byrd's trial was incorrect, because it was shown that Ms. Garrett's vehicle has a digital speed odometer that upon initial acceleration it reads at a higher speed than the actual speed of the vehicle prior to leveling out to the correct speed. (See Footnote 1). This fact also affected the outcome of Mr. Byrd's trial as this evidence proves that Mr. Byrd was not traveling at a speed over twenty-five mph over the speed limit.

Likewise, Corporal Kelly Mormon admitted that Mr. Byrd did not run the stop lights as indicated in her testimony in Mr. Byrd's criminal trial. (See Footnote 1). Specifically, Mr. Byrd asked Corporal Mormon, "is it her testimony that a green light means stop?" She said, "yes you still should have stopped and at least looked both ways." (See Footnote 1). Corporal Mormon's admission also affected the outcome of Mr. Byrd's criminal trial as it disproves the State's case that Mr. Byrd ran stop lights.

Retired Detective Robert Gordon admitted there was no reasonable grounds to believe or reasonably suspected Mr. Byrd was involved in past, present, or imminent criminal activity, committed an offense, was in the process of committing an offense, or was about to commit an offense. (See Footnote 1). This fact is imperative not only in proving that Mr. Byrd committed the aggravated flight from an officer but also to establish grounds for a Fourth Amendment stop.

Retired Detective Gordon admitted in Mr. Byrd's civil trial that he did not know where Detective Courtney got the video. Gordon thought Detective Courtney picked it up from the owner that morning (4 days later). (See Footnote 1). Gordon also admitted that he did not know whether the video had been scientifically tested as authentic or downloaded by the crime lab. (See Footnote 1). Gordon admitted that he had not actually seen the video. Gordon testified that he had only been told of the contents of the video. (See Footnote 1). Gordon also admitted that he could not see the driver's side tire when entering the parking lot and that the person driving the car could have had a flat and merely pulled in to change a tire. (See Footnote 1).

Gordon testified that it was possible that the person driving the minivan could have been a witness. (See Footnote 1). Gordon admitted that he would have pulled over anyone driving the minivan. (See Footnote 1). Gordon testified that he would have pulled over his lawyer, the judge, anyone in the jury, anyone driving the van that day. (See Footnote 1). Gordon testified that he intended to stop and frisk the person driving the minivan and to search the vehicle. Gordon testimony showed there intention was to arrest as all officers involved had drawn their weapons prior to knowing whether Mr. Byrd was involved in any criminal activity. (See Footnote 1). Gordon testified that the other cruiser's video (video in Mormon's vehicle) was review, recorded, tagged, and downloaded. (See Footnote 1). Gordon and his supervisor then burnt a D.V.D. and forwarded both to the D.A.'s Office. (See Footnote 1).

At trial, however, Detective Gordon testified falsely that he advised officers to stop the vehicle because he had a possible burglary suspect that was operating the vehicle that he needed to identify.

(R.p. 373). Prior to trial, at no time did Detective Gordon mention that he believed that the driver of the van was a possible burglary suspect. Note that the burglary at the Tiki Bar had occurred three of four days prior to this incident. (R.p. 267). To add, there no License plate from video. (R.p. 267). Moreover, the vehicle registered to a white female in Minden. (R.p. 268). According to Detective Gordon, he did not see who was driving the vehicle and only asked officers to stop the vehicle so that they could identify the driver. (R.p. 269).

Without the false evidence, the prosecution would not have been able to meet their burden of proving aggravated flight from an officer as the element of reasonable grounds to believe that the driver of the van had committed the offense of burglary.

To sustain Mr. Byrd's conviction for aggravated flight from an officer, the State had to establish that Mr. Byrd "intentionally refused ... to bring the vehicle to a stop, under circumstances wherein human life is endangered, knowing the ... [Mr. Byrd] has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe .... [Mr. Byrd] had committed the offense." ***State v. Ashley***, 768 So.2d 817, 819-820 (La.App. 2 Cir. 2000), citing La. R.S. 14:108.1.

The prosecution clearly knew that Mr. Byrd did not run any stop signs or red lights. The prosecution also knew that Mr. Byrd did not intentionally refuse to stop under circumstances wherein human life is endangered. In addition, the prosecution knew that the police officers did not have reasonable grounds to believe that he had commit an offense for purpose of conducting a stop of the vehicle. Since the false evidence tainted Mr. Byrd's trial, his conviction and sentence should be reversed.

SUPPLEMENTAL ISSUES Nos. 2 and 3 (Habeas)

The district court abused its discretion by denying Mr. Byrd's Application for Post Conviction Relief without conducting an evidentiary hearing to provide Mr. Byrd an adequate opportunity to present his new evidence fairly, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

The district court abused its discretion, in violation of the due process and equal protection clauses of the 14th Amendment to the United States Constitution, by denying Mr. Byrd's motion pursuant to *State ex Rel. Bernard v. Orleans Parish Criminal Dist. Court Section J,* 653 So.2d 1174 (LA. 1995), because the trial transcripts of the civil trial are necessary to adequately review the claims presented.

Mr. Byrd contends that the district court abused its discretion when it denied his application for post conviction relief and motion for evidence under *State ex rel. Bernard v. Orleans Parish Criminal Dist. Court Section J,* 653 So.2d 1174 (La. 1995).

STANDARD OF REVIEW

In *Pierre v. East Baton Rouge Parish Clerk of Court,* 2017-0688 (La. App. 1 Cir. 11/1/17), 233 So.3d 92, the court interpreted a prisoners right to access of public records as:

> The right of access to public records is a fundamental right guaranteed by Louisiana Constitution, Article XII, § 3. *Johnson v. Stalder*, 97-0584 (La App. 1 Cir. 12/22/98), 754 So.2d 246, 248. An inmate in custody following a felony conviction, however, is only permitted access to public records if he has exhausted his appellate remedies and the request is limited to grounds upon which the inmate could file for post conviction relief. See La. R.S. 44:31.1. If an inmate has identified specific constitutional errors in the proceedings leading to his conviction and sentence, and he specifies with reasonable particularity the factual basis for such relief, he thereby meets the initial requirements set for invoking post conviction relief. See *State ex rel. Bernard v. Criminal Dist. Court Section "J"*, 94-2247 (La. 4/28/95), 653 So.2d 1174, 1175 (per curiam).

Id. at 94-95.

In the instant case, Mr. Byrd properly filed an application for post conviction relief in the district court which alleged an identifiable constitutional violation, that is, his rights to Due Process and Equal Protection under the Fourteenth Amendment of the United States Constitution were violated when the prosecution knowingly used false evidence to obtain Mr. Byrd's conviction resulting in the wrongful conviction of an innocent man. Exhibit "9." Mr. Byrd also filed a *Bernard* motion requesting a copy of

the trial transcripts of his civil trial, ***Bobby Charles Byrd v. City of Bossier, Et al.,*** No. 5:12-CV-01956 (U.S. Dt. Ct, W. Dt. La.), which contains the evidence of the prosecution knowingly using false evidence to obtain Mr. Byrd's conviction.

The district court, however, misinterpreted Mr. Byrd's ***Bernard's*** request as a request for "Transcript of ***Boykin*** Examination, Verbatim Copy, filed July 27, 2017", which the district court granted prior to Mr. Byrd's June 12, 2018 filing of the instant application for post conviction relief and *Bernard* motion. Mr. Byrd has provide a particularized need for the documents necessary to establish the claims presented in his application for post conviction relief.

Moreover, this Honorable Court has the supervisory power to either grant Mr. Byrd relief on "P.C.R." or to order an evidentiary hearing in order to further develop the facts of the case. Mr. Byrd avers that he has set forth a claim which, if proven, would entitle him to Habeas Corpus Post Conviction Relief. His Original Application for Post Conviction Relief sets out a specific claim of constitutional error that require the discovery of documents for support and development of these claims. ***State ex rel. Bernard v. Crim.Dist.Court***, 653 So.2d 1174 (La. 1995), at 1175. The evidence obviously has exculpatory and/or impeachment value.

Additionally, Mr. Byrd asserts that a denial of the foregoing request(s) would deprive him of an "adequate opportunity to present [his] claims fairly." ***United States v. McCollom***, 426 U.S. 317, 324, 96 S.Ct. 2086, 2091 (1976). To this end, he specifically reserves the right to supplement these claims, once he acquires the requested documents and records, with additional argument and relevant facts developed from said records. He 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 also necessary to have counsel appointed to aid him because of the complex issues involved, the need to competently develop the facts, and to properly present them in court.

Mr. Byrd claims that this discovery is necessary whether this Honorable Court decides to grant him

relief or grant an evidentiary hearing.

Wherefore, Mr. Byrd, contends that his right to a fair trial was violated when the prosecutor allowed the witnesses to testify falsely without correction, or acted in collusion with the witnesses to facilitate false testimony, in order to obtain Mr. Byrd's conviction for aggravated flight from an officer. Mr. Byrd asserts that he has brought forth viable claims, and he has pointed to sufficient record evidence, therefore, he is entitled to the relief he seeks in his federal habeas corpus petition.

Mr. Byrd's conviction should be reversed and the charges dismissed with prejudice, or, at least reversed and remanded for a new trial.

CONCLUSION

Wherefore, Petitioner prays this Honorable Court will issue a Certificate of Appealability in accordance with 28 U.S.C. § 1291 and 28 U.S.C. § 2253, which gives this Court authority to entertain this appeal and to issue a COA.

Petitioner has raised substantial issues regarding constitutional violations that makes his State conviction and sentence unconstitutional and worthy of Federal Habeas Corpus Relief. Petitioner states that he has pointed to enough procedural errors in the lower courts, and enough questionable law and facts to warrant a COA, where the issues can be decided by a panel of judges - whether Petitioner has made a "substantial showing of the denial of a federal right." ***Barefoot v. Estelle***, 463 US 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 185 (1982).

Petitioner has shown, on the record before this Honorable Court, that he has satisfied the COA standard with respect to averring a facially valid constitutional claim. U.S. Constitution, Amendments 5, 6, and 14. *See, **Houser v. Dretke***, 395 F.3d 560, 562 (5th Cir. 2004).

This Honorable Court should vacate the district court's judgment of being barred by the statute of limitations, and remand to the district court to address the merits of Petitioner' habeas corpus claims in the first instance. *See, **Womack v. Thaler***, 591 F.3d 757, 757-758 (5th Cir. 2009); ***Whitehead v.***

Johnson, 157 F.3d 384, 388 (5th Cir. 1998).

Finally, Petitioner contends that his Application clearly meets the requirements of the U.S. Supreme Court in order to proceed, and that these issues could be resolved in a different manner by jurist of reason. Petitioner maintains the position that, among jurists of reason, it could be found that he is timely filed and should be reviewed on Habeas Corpus by this Court. Therefore, the requested COA should be issued by this Honorable Court.

Respectfully submitted, *pro se*, this ____ day of September, 2021.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

VERIFICATION OF WRITS / CERTIFICATE OF SERVICE

I, Bobby Charles Byrd, the aforementioned Petitioner, do hereby attest and affirm that the information contained herein is true to the best of my knowledge and belief. Further, that all allegations in the foregoing are those of Bobby Charles Byrd.

Additionally, I hereby certify that a copy of the foregoing has been sent, via U.S. Mail, postage prepaid and properly addressed to:

James Stewart, District Attorney
1st Judicial District
501 Texas Street, 5th Floor
Shreveport, LA 71101-5408

Done and signed this ____ day of September, 2021, at Angola, Louisiana.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 21-30512

BOBBY CHARLES BYRD
Petitioner

Versus

DARREL VANNOY, Warden
Louisiana State Penitentiary
Respondent

U.S.D.C. No. 2018-cv-0748

CHIEF JUDGE HICKS

MAGISTRATE HORNSBY

STATEMENT OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 & .3, the undersigned certifies this application for COA complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. Exclusive of the Exempted Portions in 5th Cir. R. 32.2 the Brief Contains **10,386** words, out of the 14,000 words allowed.

2. The Brief Has Been Prepared in Proportionally Spaced Typeface Using **LibreOffice, version 4.4.7.2 in Times New Roman, 12 Point.**

3. The Undersigned Understands a Material Misrepresentation in Completing this Certificate, or Circumvention of the Type-volume Limits in Fed. R. App. P. 32(a)(7), May Result in the Court's Striking the Brief and Imposing Sanctions Against the Person Signing the Brief.

Done and signed this ____ day of September, 2021, at Angola, Louisiana.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 24, 2022
Lyle W. Cayce
Clerk

No. 21-30512

BOBBY BYRD,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Western District of Louisiana
USDC No. 5:18-CV-748

ORDER:

Bobby Byrd, Louisiana prisoner # 299312, requests a certificate of appealability (COA) to challenge the denial of his 28 U.S.C. § 2254 application. Byrd filed the § 2254 application to attack his jury trial conviction for aggravated flight from an officer.

In his COA filing, Byrd renews several claims he raised in the district court. He argues that the evidence was insufficient to support his conviction because it did not establish that police officers had reasonable grounds to believe he had committed an offense and because the evidence did not show that he failed to obey a stop sign in Caddo Parish. He claims that he was

EXHIBIT
H

unconstitutionally denied his right to the counsel of his choice. Making use of testimony at his criminal trial, as well as testimony at a later civil trial on a claim of excessive force, Byrd argues that the prosecution knowingly used false evidence. He asserts that his trial counsel was ineffective for failing investigate a defense that the driver of the van was Chad Morris. He claims that his appellate counsel was ineffective for failing to raise the issue that he was denied his counsel of choice and for failing to challenge the denial of his motion to suppress. Finally, Byrd attacks alleged defects in his state postconviction proceedings based on the failure of the state court to conduct an evidentiary hearing and its failure to grant his motion for the production of transcripts of his civil trial.

To obtain a COA, Byrd must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Byrd has not made the requisite showing. *See id.* Accordingly, his application for a COA is DENIED. To the extent that Byrd moves this court for an evidentiary hearing with the assistance of appointed counsel, that motion is likewise DENIED.

JAMES C. HO
United States Circuit Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 21-30512

BOBBY CHARLES BYRD
Petitioner
Versus

TIM HOOPER, Warden
Louisiana State Penitentiary
Respondent

MOTION FOR REHEARING BEFORE THE COURT EN BANC

MAY IT PLEASE THE COURT:

NOW COMES Bobby Charles Byrd, *pro se* Petitioner, who respectfully moves this Honorable Court to grant the instant Motion for Rehearing Before the Court En Banc, to reconsider his Application for a Certificate of Appealability (COA) which was denied on February 24, 2022, for the following reasons:

EXHIBIT
I

The gist of Mr. Byrd's argument for rehearing of his Application for COA is that the U.S. District Court, Western District of Louisiana, (Case No. 2018-cv-0748), failed to properly review the record in the instant case. Both the Magistrate Judge and District Judge denied habeas corpus relief based upon procedural grounds, without analysis of the underlying constitutional claims.

Mr. Byrd's *pro se* claims demonstrate "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253 (C)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Further, since the district court's denial of relief is based upon procedural grounds, without analysis of the underlying constitutional claims, "a COA should issue when a prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* 529 U.S. at 484.

Ultimately, the Fifth Circuit Judge's ruling was not based on any findings of the Federal District Court, since no evidence was reviewed or considered. Jurists of reason would look to the evidence to first see if there was, indeed, a procedural violation amounting to a default. Only then would cause and prejudice come into play.

If no default actually occurred, jurists of reason would look to the laws and statutes, of which Mr. Byrd relies on in his Application for COA.

Burden v. Zant, 510 U.S. 132, 114 S.Ct. 654, 126 L.Ed.2d 611 (1994) (Federal Court of Appeal held to have mistakenly upheld denial of habeas relief where; 1) denial was based on finding not made by Federal District Court; and 2) evidence supported Petitioner's claims).

Mr. Byrd submits that he meets the standard of review, and has demonstrated that reasonable jurists could debate whether his petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, and requests a COA on each of the claims presented in his habeas petition.

II

Mr. Byrd has raised substantial issues regarding constitutional violations that makes his State conviction and sentence unconstitutional and worthy of Federal Habeas Corpus Relief. Mr. Byrd states that he has pointed to enough procedural errors in the lower courts, and enough questionable law and facts to warrant a COA, where the issues can be decided by a panel of judges - whether Petitioner has made a "substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 US 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 185 (1982).

Mr. Byrd has shown, on the record before this Honorable Court, that he has satisfied the COA standard with respect to averring a facially valid constitutional claim. U.S. Constitution, Amendments 5, 6, and 14. See, *Houser v. Dretke*, 395 F.3d 560, 562

(5th Cir. 2004).

This Honorable Court should vacate the district court's judgment of being barred by the statute of limitations, and remand to the district court to address the merits of Mr. Byrd's habeas corpus claims in the first instance. *Womack v. Thaler*, 591 F.3d 757, 757-758 (5th Cir. 2009); *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998).

> Unfortunately, the Court underestimates the significance of the fact that petitioner was effectively shut out of federal court — without any adjudication of the merits of his claims — because of a procedural ruling that was later shown to be flatly mistaken. As we have stressed, "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996); see also *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional rights"). When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived — contrary to congressional intent — of his valuable right to one full round of federal habeas review.
>
> *Gonzalez v. Crosby*, 545 U.S. 524, 541, 125 S.Ct. 2641, 2653 (2005) (Justice Stevens and Justice Souter dissenting in part, concurring in part.

Further, Mr. Byrd contends that his Application for COA clearly meets the requirements of the U.S. Supreme Court in order to proceed, and that these issues could

be resolved in a different manner by jurist of reason. Mr. Byrd maintains the position that, among jurists of reason, it could be found that he is not procedurally barred and should be reviewed on Habeas Corpus by this Court. Therefore, the requested COA should be issued by this Honorable Court.

III

Additionally, the Fifth Circuit Judge's ruling deals with Mr. Byrd's Application for COA as though he should be held to the standards of a professional attorney. A *pro se* Petitioner should not be held to such a standard, and his efforts should be liberally construed. See: *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000); *United States v. Kayode*, 777 F.3d 719, 741, n. 5[1] (5th Cir. 2014).

Tennard v. Dretke, 542 U.S. 274, 124 S.Ct. 2562, 2569, 159 L.Ed.2d 384 (2004):

> Despite paying lip service to the principles guiding issuance of a COA, *Tennard v. Cockrell*, 284 F.3d at 594, the Fifth Circuit's analysis proceeded along a distinctly different tack. . . .
>
> - - - - - - - - - - - - - - - - - -
>
> We hold that the Fifth Circuit's "uniquely severe permanent handicap" and "nexus" tests are incorrect, and we reject them. We

1 [FN 5] See, e.g., McNeil v. United States, 508 U.S. 106, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (acknowledging that the Supreme Court has "insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed") (citing Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), and Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). See also Hernandez v. Thaler, 630 F.3d 420, 426 (5th Cir. 2011) ("The filings of a federal habeas petitioner who is proceeding pro se are entitled to the benefit of liberal construction."); Johnson v. Quarterman, 479 F.3d 358, 359 (5th Cir. 2007) (Briefs by pro se litigants are afforded liberal construction...."); Melancon v. Kaylo, 259 F.3d 401, 407 (5th Cir. 2001) (reasoning that the pro se habeas petitioner's argument that he should not be punished for the improper setting of the return date should be construed as a request for equitable tolling, despite his failure to "explicitly raise the issue of equitable tolling").

> hold that reasonable jurists would find debatable or wrong the District Court's disposition of Tennard's low-IQ-based Penry claim, and that Tennard is therefore entitled to a COA. The judgment of the United States Court of Appeals for the Fifth Circuit is reversed and the case is remanded.

Id. 124 S.Ct. at 2573.

Again, the Fifth Circuit Judge's ruling was not based on any findings of the Federal District Court, since no evidence was reviewed or considered. Further, any doubt regarding whether to grant a COA should be resolved in favor of a Petitioner, and the Court may consider the severity of the penalty in making the determination. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997).

Mr. Byrd's *pro se* claims meet the requirement of the United States Supreme Court which held: "Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner need only demonstrate 'a substantial showing of the denial of a constitutional right,' 28 U.S.C. § 2253 (C)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 1034, 154 L.Ed.2d 931 (2003).

Further, since the district court's denial of relief is based upon procedural grounds, without analysis of the underlying constitutional claims, "a COA should issue when a prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel, supra*, 529 U.S. at 484, 120 S.Ct. 1595.

CONCLUSION

Wherefore, Mr. Byrd prays that this Honorable Court will hold a Rehearing En Banc to review the record evidence which shows that no procedural default occurred, and that they review whether jurists of reason would find it debatable whether the Federal District Court was correct, that the Fifth Circuit Judge's ruling was not based on any findings of the Federal District Court, and whether Mr. Byrd's rights to procedural due process and access to the courts would be violated if a COA is not granted.

Respectfully submitted, *pro se*, this 7 day of March, 2022.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

VERIFICATION / CERTIFICATE OF SERVICE

I, Bobby Charles Byrd, the aforementioned Petitioner, do hereby attest and affirm that the information contained herein is true to the best of my knowledge and belief. Further, that all allegations in the foregoing are those of Bobby Charles Byrd.

Additionally, I hereby certify that a copy of the foregoing has been sent, via U.S. Mail, postage prepaid and properly addressed to:

James Stewart, District Attorney
1st Judicial District
501 Texas Street, 5th Floor
Shreveport, LA 71101-5408

Done and signed this 7 day of March, 2022, at Angola, Louisiana.

Bobby Charles Byrd #299312
M.P. - Oak 2
LA State Prison
Angola, LA 70712

United States Court of Appeals for the Fifth Circuit

No. 21-30512

BOBBY BYRD,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary,*

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:18-CV-748

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

Before STEWART, HAYNES, and HO, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

EXHIBIT
J

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 29, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-30512 Byrd v. Hooper
USDC No. 5:18-CV-748

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk
Mary Stewart

By: _____
Mary C. Stewart, Deputy Clerk
504-310-7694

Mr. Bobby Charles Byrd
Ms. Rebecca Edwards