No. 22-5579 ORIGINAL

In The
SUPREME COURT OF THE UNITED STATES

In re **William Baham**,
Appellant

Versus

Tim Hooper, Warden, et. ux,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE U.S. FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted By:

William Baham. #601802
CBC, _____
Louisiana State Penitentiary
Angola, Louisiana 70712

IV. QUESTIONS PRESENTED

I.

Whether the 14th Amendment, imposes upon the States of Louisiana the obligation to refrain from systemic, purposeful deprivations of substantive federal constitutional rights, as a settled matter federal law?

II.

What impact, if any, does known use of perjured testimony have on the fair administration of justice in this case and the compliance with substantive 14th Amendment Protections?

III.

Whether, when the state court forum condones ineffective assistance of counsel, at that point, are criminal defendants obligated to fend for themselves or do they have substantive constitutional standing to demand that the State Court forum conform to the mandates of the 6th Amendment or else no conviction can be had?

IV.

Whether the State of Louisiana can cherry-pick when it conforms with substantive Federal Constitutional Protections? Or Whether it can choose to disregard them at will knowing no superior federal court will intervene to preserve the Supremacy of the Federal Constitution?

V.

Whether the Federal Constitution, prohibits the State of Louisiana from enforcing its manufactured Judicial Orders for maintaining the "forced" physical custody of William Baham under the auspices of an imposed sentence wherein all were secured in violation of substantive protections which no state can legally abridge, diminish, nor disregard?

VI.

Whether deprivations of the Right of Confrontation results in a violation of substantive Due Process and substantive Equal protection as provided for in the 14th Amendment?

VIII.

Pursuant the substantive nature of 6th and 14th Amendments, does a person have a right to defend themselves against criminal accusations by way of placing before the trial jury DNA and GSR expert witnesses on his own behalf?

V. PARTIES TO THE PROCEEDINGS

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

[X] All Parties **do not** appear in the caption of the case on the cover page. A list all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Appellant:

1. William Baham. #601802
   CBC, Upper Right #_____
   Louisiana State Penitentiary
   Angola, Louisiana 70712

RESPONDENTS:

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

3. Jason Williams, District Attorney
   619 South White Street
   New Orleans, Louisiana 70119

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

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Appendix A -	**Ruling Denying COA**
Court:	United States Fifth Circuit Court of Appeal
Docket Number:	21-30286
Date Decided:	June 16, 2022
Judge:	Jennifer Walker Elrod
Disposition:	**Denied COA**

Appendix B -	**Brief Requesting COA**
Court:	United States Fifth Circuit Court of Appeal
Docket Number:	21-30286
Date Decided:	June 16, 2022 – On July 8, 2022, judgment issued as mandate.
Judge:	Jennifer Walker Elrod
Disposition:	**Denied (Direct Review)**

Appendix C -	**Order Denying Habeas relief and dismissing with prejudice**
Court:	United States District Court, Eastern District of Louisiana
Docket Number:	19-2157
Date Decided:	May 6, 2021
Judges:	Hon. Millazzo
Disposition:	**Denied**

Appendix D -	**Traverse to Magistrate's Report and Recommendation**
Court:	United States District Court, Eastern District of Louisiana
Docket Number:	19-2157
Date Decided:	May 6, 2021
Judge:	
Disposition:	**Recommended denial and dismissal of habeas petition.**

Appendix E -	**Magistrate Report and Recommendation**
Court:	United States District Court, Eastern District of Louisiana
Docket Number:	19-2157
Date Decided:	May 6, 2021
Judge:	
Disposition:	Recommended denial and dismissal of habeas petition.

Appendix F -	**Federal Habeas Petition**
Court:	United States District Court, Eastern District of Louisiana
Docket Number:	19-2157
Date Decided:	May 6, 2021
Judge:	
Disposition:	Had just been lodged and was under intake review at that time.

VIII.

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State of Louisiana v. William Baham,	179 So.3d 613 (La. Supreme Court,)ct. 30, 2015) On Rehearing?
State of Louisiana v. William Baham,	178 So.3d 138 (La. Supreme Court, Sept. 18, 2015)
State of Louisiana v. William Baham,	151 So.3d 698, (4th Circuit, Oct. 1, 2014)

X. JURISDICTION

The Louisiana Supreme Court as well as the State-level Fourth Circuit Court of Appeal, erroneously, denied Appellant's Request for Federal Habeas Relief.

The jurisdiction of this Honorable court is hereby invoked pursuant *28 § 1254(1)* and/or *28 U.S.C. § 1257(a)* and/or *28 U.S.C. § 2101(e).*

XI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

> In all criminal prosecutions, the accused shall enjoy a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

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

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

XII. STATEMENT OF THE CASE

The instant petitioner has been charged and prosecuted for the offense of 2nd Degree Murder, contrary to the laws of Louisiana. At the close of the prosecution the trial jury returned a verdict of guilty, the trial court accepted the verdict and set a date for sentencing. Petitioner was hailed into court once more and the sentence of life imprisonment without the benefit of probation, parole and suspension of sentence were denied to him.

The petitioner exhausted state court direct appeal procedures and the conviction and sentence were upheld. Petitioner subsequently invoked the State-level post-conviction process, none of which netted petitioner the relief sought. After exhausting his claims throughout the state court forum,

petitioner invoked the Federal Habeas process for state prisoners. Despite the attempt to activate the substantive protections of the Federal Constitution by presenting the deprivations of constitutional rights to Article III judges, still, relief was withheld. It is for this reason, the instant petitioner presents his claims to this Honorable Court of the United States in an attempt to vindicate his rights and have this Honorable make it known through its opinion that the Constitution of the United States remains the Law of the Land, and no state is allowed to subordinate it through its laws or practices.

XIII. REASONS FOR GRANTING THE PETITION

The Appellant contends that the lower courts have grossly departed from proper constitutional proceedings *as described in S.Ct. Rule 10(a), 10(b) and 10(c)*, by ruling that: Appellant's had not established himself entitled to the relief sought as prescribed by the Constitution of the United States on the merits of his issues raised. It is likely that a majority of the court will vote to reverse the judgment below, as the applicant has exhausted all state remedies and thoroughly presented Federal Questions of Law which affect the rights of those accused of crimes throughout the State of Louisiana.

Appellant remains in custody in violation of the Constitution or laws and/or treatise of the United States. This Appellant has no other remedy available before any other court wherein he can obtain the relief besides this one. Lastly, since the questions raised go beyond petitioner as an individual and involve national substantive federal constitutional protections, it would be both in furtherance of this Honorable Court's Supervisory and Appellate Jurisdiction to make decisions upon which other courts can rely when confronted with the same question of Federal Law.

Further, **the decisions of the State Courts squarely raise several Federal Constitutional Questions, call into question the efficacy of this court's decisions within the geographical boundaries of the State of Louisiana, at raise concerns of a state ability to thwart fundamental constitutional protections. These questions, to the satisfaction of the Louisiana form of government and its traditions and practices, have not previously been decided by this Honorable Court** in a direct manner. This Honorable Court is called upon to decide whether a State which signed on to be a part of the greater Union known as the United States, can opt in and out of compliance with

federal Constitutional mandates at will, when and how it sees fit to either recognize, disregard, or partially conform to interpretations of the United States Constitution and how that applies within the borders of each individual state which is party to the union, or set the stage for only partial occasional compliance, if and when desired.

STATEMENT OF FACTS

William Baham was indicted by an Orleans Parish Grand Jury for the offense of 2nd Degree Murder of Errol Meeks. Petitioner tendered a not guilty plea on May 24, 2011. There were trial proceedings, the jury returning a guilty verdict and an appeal pursued to no avail.

The State's case summary is that the instant petitioner and a man named Donald had a physical altercation in the restroom at Friar Tucks which was broken up by a bouncer Darnell Lawrence. Several people stated that it was petitioner who left, return and shot the victim. Petitioner was tried July 16-18, 2012. Post-trial motions were filed and denied. Direct appeal was pursued and remedies exhaust in each available court until arriving at this one at this time.

Petitioner maintains his exhausted claims, especially those regarding the suppression of Brady Material, prosecutorial misconduct Ineffective assistance of counsel (Trial and Appellate), Gunshot Residue and DNA's ability to exonerate him, insufficiency Of Evidence, Violation of Right to Confrontation, and Felonious Prosecution due to bill of Information to charge him with 2nd Degree Murder.

The facts and circumstances raises additional Federal Constitutional Questions which all are incorporated within the realm of this pleading.

1. Does the Supremacy Clause of the United States Constitution continue to reign supreme over state law and the state's attempt's to interpret and apply federal law?

2. Are State Court Judges bound by a U.S. Supreme Court precedent on facts and circumstances present in a case which involves the same settled principle of law which was heard in a prior case before this Honorable Court?

3. Is there a Federal remedy on direct review when the State Courts arrive at a decision which is "contrary to" clearly established Federal Law as determined by the United States Supreme Court?

4. Whether Louisiana Courts have established a pattern of adherence or defiance towards prior decisions of this Honorable Court?

RELEVANT HISTORY OF CASE

The claims presented in this petition for Writ of Certiorari to the United States 5th Circuit Court of Appeal, have all been exhausted through the direct review process for the State of Louisiana, the Collateral Review Process as embodied within Louisiana Law and the Federal Judiciary which was accessed through the *AEDPA*.

The federal district court, denied relief and COA. Petitioner subsequently sought and was denied COA by the U.S. 5th Circuit Court of Appeal and hereby presents to this Honorable Court his timely Writ of Certiorari.

QUESTIONS OF LAW

Can the local practices of the State of Louisiana, which defy Federal Constitutional protections, be permitted to usurp prior decisions of this Honorable United States Supreme Court?

THE ISSUES

Appellant alleges the unavailability of a state court remedy and gross deviation from federal constitutional protections in the following areas of constitutional law:

> (1) Felonious prosecution due to the use of a bill of Information to charge him with second degree murder;
>
> (2) Prosecutorial misconduct and fraud upon the court based upon the prosecution improperly introducing hearsay testimony, perjured testimony, withholding Brady evidence and vouching for witness credibility;
>
> (3) the trial court abused its discretion by failing to sequester the jury, depriving Baham of a fair trial by interfering without providing the defense an opportunity to confront his accuser under the confrontation clause, forcing a witness by threat to testify, and improperly ruling on inadmissible perjury testimony;
>
> (4) The right to confrontation was violated;
>
> (5) Insufficient evidence supported the identification of Baham as the perpetrator.;
>
> (6) Gunshot residue and DNA testing would exonerate him;

(7) Ineffective Assistance of trial Counsel for failing to file a motion to quash, failing to investigate, and pleading Baham guilty before the jury; and

(8) Ineffective assistance of appellate counsel in failing to raise insufficiency of the evidence and other issues on appeal

IN THE ABSENCE OF AVAILABLE STATE COURT REMEDY

Your appellant herein has presented his claims to the several court of the State, no effort resulting in a remedy which comports with the requirements and/or minimal standards of constitutional protections due to one accused of a crime. Because no remedy is available at the state court level, appellant's only remedy lies with this Honorable Court on Writ of Certiorari to this Honorable Court.

NOW INTO COURT comes, William Baham, who respectfully moves this Honorable Court to grant Certiorari and consider and the Federal Question(s) presented:

CLAIM 1

In his presentation of his issues to this Honorable Court, Mr. Baham, contended that the prosecution committed fraud upon the court by introducing:

1.) improper hearsay testimony,

2.) perjured false testimony, withholding *Brady* exculpatory evidence, and

3.) vouching for its witnesses credibility.

STANDARD OF REVIEW

Under *Brady* and its progeny, exculpatory and impeachment evidence is material and its suppression violates due process if there is any reasonable likelihood it could have affected the judgment of the jury. *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016). The Magistrate's failure to afford petitioner the full benefits of these holdings are the premise for this challenge to the Magistrate's report.

The evidence suppressed by the prosecution in this case is material under that standard.

A. As this the United States Supreme Court's decisions applying and elaborating on Brady make

clear, materiality depends in part on the strength of the government's case. Where the governments case against the defendant is already weak, even evidence of "relatively minor importance" may be enough to change the outcome of the trial – and therefore be material. *United States v. Agurs*, 427 U.S. 97, 113 (1976).

Although this is an old principle of law, the Magistrate simply by-passed application of this standard to petitioner's case. As a result of this, petitioner is requesting that the Honorable District Judge review this matter anew. Although petitioner's first pleading may not have been the most eloquent, it cannot be said that in the expertise of the reviewing court, that no set of facts can be discerned which may entitle petitioner to the relief sought.

Amazingly, this case and the turn of the facts do not perfectly match what occurred in the *Wearry* case, but, they do not run completely afoul of the *Wearry* situation, as there are many similarities which should inspire a second look at the instant case.

Notably, in the State of Louisiana, which is bound to the protections set forth in the Constitution of the United States pursuant the *Supremacy Clause*, the coded *Art. 2004*, from the State's Civil Code provides that:

"any judgment obtained by fraud or ill practices may be annulled."

As the petitioner sufficiently set forth, said Article is not limited to cases of actual fraud or intentional wrongdoing, but is sufficiently broad to encompass all situations wherein a judgment is rendered through some improper practice or procedure. *Kem Search Inc v. Sheffield*, 434 So.2d 1067 (La. 1983).

In the record of this case, the record bears that, Prosecutor Napoli' committed misconduct by knowingly having witnesses testify falsely and further were allowed to give damaging hearsay testimony. In addition thereto, Detective Robert Ponson misrepresented in his testimony that nothing significant existed, except he spoke with Friar Tuck's bartender Kaitlin Walsh, who collected the shell

casings from the scene in a towel, to keep them from being kicked around by people outside. (Tr. Trans., pg. 20, 24-25). This officer did not get any identification information from anyone.

Next, witness Detective Kevin Williams, (Tr. Trans., pg. 31), only alleges he spoke to the Friar Tucks bouncer Mr. Darnell Lawrence. Who alleges Mr. Lawrence stated to him "Will" shot Meeks. This amounted to testimony which would tend to carry the weight of proving guilt, and as such was inherently subject to the *6th Amendment's* Confrontation Clause.

In a series of statements Mr. Lawrence, gave statements which tended to provide motive and the precursor to the ultimately tragic outcome. According to Mr. Lawrence, Errol told him someone was fighting in the men's room. He proceeded to explain that one of "Will's" friends tried to keep him out by blocking the door. Will is alleged to have sat at the bar and finished a drink. He testified that after Will left, he heard gunshots. At this point, Mr. Lawrence was the only one on the bar's porch and never saw anyone fleeing, he simply spoke of just seeing Errol laying on the ground. (Tr. Trans. pg. 143-146).

Detectives reviewed the video in this case and concluded that the video showed nothing significant. And this aligns with Det. Hurst statement; He had no clear depictions from the video, he relied on other information.

Names came later, video did not specifically show who was who (Tr. Trans. pg. 38, 55-56). Det. Hurst alleges that Robert Lotz gave him Will's real name (Trans. pg. 59). The issue here is one of the necessity of being able to confront and cross-examine this person pursuant the *6th Amendment* and the holdings in **Davis v. Alaska**.

In providing his verbal narrative, D. Lawrence stated that Robert Lotz called Austin on cellphone (Tr. Trans. pg. 155 to 156), who never mentions any names to Austin or Austin to police Jan. 17, 2011, or during trial. Petitioner argues here that, Mr. Robert Lotz did not testify and much of the information leading to any names came from this person. **Ohio v. Roberts**, 448 U.S. 56, 63 (1980), confrontation and hearsay violations involving Mr. Baham's *6th Amendment* privileges. In fact, Mr. R.

Lotz's nephew Derrick Lotz stated; He was told Wills name by him, he didn't know his name (Tr. Trans. p. 167).

In review of the arguments already presented where this matter was presented in full, there are:

1.) critical inconsistencies;

2.) there are instances where the testimony cannot be reconciled with the evidence, and

3.) where the testimony goes completely afoul of the evidence, Mr. Marks was allowed to falsely declare before the jury, while under oath that he did not know Pop or Ruff.

A review of the record, the reports from the pre-trial record and the facts of the case show this testimony was known to be false the moment it came out of the witness's mouth and the prosecution, using this witness to make their case did nothing to correct the testimony. The Government's case against Baham was not strong to begin with, even without the suppressed evidence to undermine it. There was no physical evidence beyond shell casings. The governments case instead depended on three purported eyewitnesses and would be co-defendants who allegedly claimed that Baham was the person who fired the shot(s) which took the life of the deceased.

If the state's case was so strong, why would the State withhold evidence that multiple witnesses described someone else as being the shooter, and that person wore a red sweater? Those witnesses declared that they saw someone else other than your instant petitioner running away after the shooting.

The sharing of this evidence with a jury takes on a new meaning in Louisiana because, had petitioner been tried under the *6th Amendment* premise, he only would have had to convince a single juror to vote a different way. Despite petitioner maintaining his innocence, he only had to prove to that single juror that he was not guilty of the grade of offense charged. That could have been achieved had the State not suppressed and redacted critical evidence necessary for the attorney representing petitioner as an accused preparing for trial, to prepare a defense making use of the suppressed Brady material.

The United States Supreme Court has long held that "the special role played by the American Prosecutor in the search for truth in criminal trials. "**Strickler v. Greene**, 527 U.S. 263, 281 (1999); see id. (prosecutors do not merely represent "an ordinary party to a controversy" (quotation omitted)) The government's interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." **Berger v. United States**, 295 U.S. 78, 88 (1935). it is thus "as much [the government's] duty to refrain from improper methods calculated to product a wrongful conviction as it is to use every legitimate means to bring about a just one." Id.

In Brady, the court held that the government's suppression of evidence favorable to a criminal defendant violates due process where the evidence is material to guilt or punishment. id. at 87; see **Smith v. Cain**, 132 S.Ct. 627, 630 (2012) (Under **Brady**, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment."). The "overriding concern" of the **Brady** Rule is "the justice of the finding of guilt." **Agurs**, 427 U.S. at 112. **Brady** protects defendant's fair trial rights by "preserv[ing] the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." **Kyles v. Whitley**, 514 U.S. 419, 440 (1995) And court's must consider the cumulative effect of all the suppressed evidence favorable to the defense. **Kyles**, supra, **Wearry**, supra.

What needs to be brought to the forefront of the instant record and the Honorable Court's considerations is the fact that the materiality inquiry is not the same as a sufficiency of the evidence test. See (**Kyles**, supra At 434-35 & 435 n.8; **Strickler**, 527 U.S. at 290). Nor is the question one "whether the defendant would more likely than not have received a different verdict with the evidence." *Kyles*, 514 U.S. at 434. The question instead is "whether the likelihood of a different result is great enough to 'undermine confidence in the outcome of the trial.'" **Smith**, 132 S.Ct. at. 630 (alteration in original) (quoting **Kyles**, 514 U.S. at 434). A defendant accordingly "can prevail" on a **Brady** claim even if ... the undisclosed information may not have affected the jury's verdict. " **Wearry**, 136 S.Ct. at

1006 n. 6. All that is necessary is a "reasonable likelihood" that it would have.

Mr. Marks had his statement read and given to the jury because it places him on the scene in the "blue vehicle" with Mr. Robert Lotz, another person who never testified. The statements he makes, says; "he don't know Pop or Ruff, and met them that night (Jan. 17, 2011, (Tr. Trans. pg. 221), is contrary to the state's entire case.

The suppressed evidence of the alternative shooter dressed in the red sweater coupled with the suppressed evidence and accessibility to other crime scene witnesses, Baham was deprived of his most critical opportunity to put forth before the trial jury a much stronger defense, Baham would have been able to challenge the very core of the state's case and pointed to a convincing alternative perpetrator who could have committed this crime as the witnesses (who did not have self-interests with avoiding charges) have so alluded. These statements place another at the crime scene, fleeing before police arrived. And several of the witnesses provided similar accounts of this alternative perpetrator and his actions which incite the belief of probable guilt. It has not been unheard of for the government agreeing at post-conviction evidentiary hearing that "when an eyewitness says someone else did it, that is core **Brady** material") **Lambert v. Beard**, 537 F. App'x 78, 86 (3rd Cir. 2013), **Brady** and **Kyles**, 514 U.S. at 445-49.

Applying these principles in the instant case, Detective Hurst identified someone other than Mr. Baham as the shooter from the video. If this is true, the Magistrate has taken the position that petitioner should be found or deemed guilty without a full and fair trial. Detective D. Pratt, took the statement (**Brady** material) from a person that saw the shooter and gave a description of him which corroborated Mr. Derrick Lotz as the guy with red sweater and certain head shape (Tr. Trans. pg. 171). Donald Oliver is the person "Will" got into a fight with, not Meeks.

Throughout this case we find that, petitioner had no reason to want to harm Meeks the victim in this case. So, at this junction in the case, the proper question before the Magistrate is not whether

petitioner's claims should be dismissed as meritless. The actual question before the court or which should be considered from the existing or from an expanded record is, "Whether William Baham is even the actual shooter in this case?" Because if not, all the factual and constitutional deprivations are of the greatest importance before, they all worked together to deprive the wrong person of their liberty for a crime committed by another.

To show the prosecution's use of perjury, contrary to their testimony, the video in the club would show:

1.) The bouncer gave false testimony because no one broke up the fight;

2.) Errol Meeks never came to the men's room;

3.) This witness never saw a gun, the shooting, nor knew any of these people before that night (Jan. 17, 2011); and that was conceded to and

4.) Mr. Oliver doesn't know Mitchell Marks.

Therefore, prosecution knew these witnesses were going to testify falsely. He knew Mr. Marks was going to perjure himself which is why he would not give him immunity or assert his *5th Amendment* privileged. Mr. Pelfry was not at Friar Tucks Bar, he is a witness directly impounding the hearsay nature of the state's case. No one actually saw who shot Mr. Meeks. Lawrence heard this, Oliver heard this; and Derrick Lotz heard this from the only witness who never shows up to testify- Robert Lotz. Detective Hurst never followed Det. Desmond Pratt's witness information. The Friar Tucks Bar videos disclose a guy with a hat shooting victim Errol Meeks, and Larry Brown handing that person something. The prosecution/Detectives simply chose to go with the simpler case.

Since the Supreme Court decided **Mooney v. Holohan**, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935), it has been firmly established that the prosecution's knowing use of perjured testimony, or of fabricated evidence, as well as its failure to take remedial measures to mitigate the damaging effect of such testimony and evidence, violates the *Fourteenth Amendment's Due Process Clause*. See:

Miller v. Pate, 386 U.S. 1-7, 87 S.Ct. 785-788, 17 L.Ed.2d 690 (1967); Pyle v. Kansas, 317 U.S. 213-216, 63 S.Ct. 177-179, 87 L.Ed.2d 214 (1942).

In a previous filing **Mr. Baham submitted newly obtained evidence (a Newspaper clipping) from a relative, which contains information Mitchell Marks was prosecuted for committing perjury in his trial (See Attached document to Habeas Memorandum of Law)**. This is additional information which the prosecution in this case has withheld all along despite its ethically mandated duty under Brady to disclose such information even after trial.

Amazingly, the Magistrate mentions nothing of this. The prosecution, but prosecuting Mitchell Marks for the commission of perjury in the trial of this case, that means that the prosecution believed in this so much until it through all its resources behind prosecuting Mr. Marks after trial but NEVER disclosed this to petitioner as a matter of ethical obligation and the ongoing obligation to reveal Brady material even after the fact of a trial.

This clearly establishes why prosecution would not give Mr. Marks immunity, and that he knew this witness was giving false testimony at the trial itself. Again, this is un-refuted evidence that the prosecution knowingly used false testimony in order to secure the conviction under challenge. The Magistrate should re-review this matter with an eye slighted towards justice, not simply affirming a conviction and/or sentence. Before trial, the prosecution had already recorded a phone conversation of Marks and his girlfriend; Marks had just come from being forced to give an audio statement and was already in jail. (Tr. Trans. pg. 102 to 109).

Further, prosecutor Napoli was clearly aware that there was a report overflowing with the names and identities of the witnesses never brought to court who actually did see who the shooter was whom shot Mr. Meeks. These undisclosed witnesses and give a detailed description of that shooter. (Tr. Trans. pg. 79 to 80). This information had been taken down by Det. Pratt. In order to stifle the accused efforts to prove that he was not the shooter in the instant case, the State-Actors deliberately

Scratched out these names because they were in direct conflict with what his witnesses were going to allege.

Counsel Fuller identified the report and what it contains (Tr. Trans. pg. 81 to 83), state objected and trial judge stated counsel was not entitled to witnesses names or statements (Tr. Trans. pg. 83). These statements contain favorable material to Mr. Baham's defense of innocence. Still the state failed to turn them over, even after discovery had been filed. This would constitute violations of **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d. 215 (1963); see also **Giglio v. U.S.**, 405 U.S. 150 to 154, 92 S.Ct. 763 to 766, 31 L.Ed.2d 104 (1972), which requires disclosure of evidence regarding the credibility of the witness that may be determinative of guilt or innocence. Citing; **Napue v. Illinois**, 360 U.S. 262 to 269, 79 S.Ct. 1173 to 1177, 3 L.Ed.2d. 1217 (1959) which holds;

> "Non-disclosure of evidence affecting credibility constitutes a denial of Due Process."

Under *Brady*, evidence is material, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. **U.S. v. Bagley**, 473 U.S. 667 to **682**, 105 S.Ct. 3375 to 3383, 87 L.Ed.2d 481 (1985), which holds:

> "Taken together, these undisclosed items would not only radically have affected the defense at petitioner's trial."

Det. Pratt's witness information conveys, but would in their totality, have affected the entire truth gathering enterprise before the court. Under **Schlup v. Delo**, 513 U.S. 298, 115 S.Ct. 851, at 862, as under **Bagley**, supra. The court holds a clear and convincing evidence test which challenges the confidence in the outcome.

This non-disclosure and the videos of Friar Tucks Bar, clearly exonerate Mr. Baham. As a result of the prosecution's suppression of exculpatory evidence of the actual perpetrator, the wrong person stands convicted of a crime which the prosecution has footage of another committing. The state's

admittance of false perjured testimonies, and the commission of fraud upon the court are the pillars which hold up this erroneous conviction. The record bears that the trial judge never read Mr. Marks statement before admitting it into evidence and nor before allowing the jury to have it for deliberations (Tr. Trans. pg. 102 to 109). Still the State had the court force witnesses Derrick Lotz and Mitchell Marks to testify falsely. *La. R.S. 14:68*, and *R.S.14:121*, See: **State v. Newton**, 328 So.2d 110 (La 1976); **In re Parker**, 357 So.2d 302 (La. 1978).

Further, Det. Hurst fabricated his testimony, Darnell Lawrence fabricated his testimony, Damon Harris, Mr. Baham's Uncle, verified Det. Hurst committed perjury because a warrant was issued and there are some clothing taken from Mr. Baham's Grandmother's home. These items were admitted into evidence after Mr. Baham's trial, which is also contained in Det. Hurst report. The lingering questions are: Who identified Mitchell Marks? Mr. Napoli!, who did Mr. Napoli show picked Mr. Baham from the only evidence of the crime (the video)? He did!. Therefore, Mr. Napoli transgressed against trial court orders to, not deal with any issues that affects Mr. Marks *5th Amendment* right by involving him. Mr. Napoli, read an unadmitted statement to establish guilt against his fraudulent contentions that, this witness was only admitted for identification purposes. (Tr. Trans. pg. 271 to 279).

Because Mr. Baham could not receive a fair trial due to prosecutions misconduct this case must be reversed, for a new trial. In conclusion of prosecution misconduct, Mr. Napoli vouched for its witnesses credibility attacking defense counsel, attacking defense failure to put on Grandmother, who he knows was not allowed by the court (Tr. Trans. pg. 296), violating Mr. Baham's Due Process right to a fair and impartial trial, and his *6th Amendment* right to confrontation through illegal practices. **In re Winship**, supra; **Kem Search v. Sheffield**, supra; **Herrera v. Collins**, 506 U.S. 390 to 399, 113 S.Ct. 853,122 L.Ed.2d 203, and **Medina v. California**, 505 U.S. 437, 446 to 468, 112 S.Ct. 2572, 120 L.Ed.2d 353.

***Confrontation**

Mr. Baham contends that his right to confront his accuser was violated.

Prosecutor Napoli introduced statements through the perjured testimony of Det. Robert Hurst, of the person; "Robert Lotz", who allegedly gave critical information that supposedly implicates Mr. Baham. Only Det. Hurst alleges what: Robert Lotz stated. However, other witnesses like, Derrick Lotz, his nephew. Who was threatened by police, prosecution, and his family, mention R. Lotz too. No names other than that were given (Trans. pg. 155 to 169). The state's suggestion through Det. Hurst, is this is where he got Mr. Baham's address or identification but this detective clearly stated; "he did not execute a warrant, because no one could give him that information" (Trans. pg. 72 to 74). What was vital about Mr. Robert Lotz is that, state's witness Mitchell Marks had a previous inadmissible statement read to the jury against his *5th Amendment* privilege that; "alleges he was in the car (blue) with Robert Lotz (Ruff), and Mr. Baham was in the truck, (white) with Derrick Lotz (Pop) (Trans. pg. 170, 218).

The R.S. 15:499 – 501(B)(1) requires that prosecution give prior notice that its witness will not appear to testify, and give petitioner a prior opportunity to cross examine that witness. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597; Crawford v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1973). State continually introduced "testimonial communications" of witnesses knowing they would not be testifying. Mr. Robert Lotz was for the purpose of imparting guilt of Mr. Baham in this crime, through Mr. Marks; Det. Hurst, and Gregory Pelfrey.

(A). First, Mr. Gregory Pelfrey alleges he overheard Mr. Baham confessing to crime (Tr. Trans. pg. 238 to 240).

How did he know "Will's" name, and that his charge was still open? In continuing; Prosecutor Napoli never set a foundation to admit Mr. Gregory. In this episode, the government's counsel is equally faulted for not having corrected counsel's deficiency and for violating defendant's basic right to confrontation. Petitioner was denied his right to confront the witnesses against him as well as the need

for an objection during this proceeding when the State introduced hearsay evidence as the truth of the matter asserted, thereby violating defendant's right to confront the evidence against him. These failures together deprived Petitioner of a fair trial and denied him of the opportunity to present a defense. Therefore, "cause should be found for defendant's default in light of counsel's deficient performance." See: **Murray v. Carrier**, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Hence, this court should be reluctant to Petitioner's mistakes made by his attorney. **Whitaker v. Assoc. Credit Services, Inc.**, 946 F.2d 1222 (6th Cir. 1991); **State v. Knight**, 611 So.2d 381 (La. 1993) (Justice Watson J: "The Failures, if any, may warrant attorney sanctions but any such failures cannot imputed to the accused."). Petitioner's claim "is transparently of the variety falling without **Stone v. Powell**, 428 U.S. 465 (1976) since it attempts to measure the breach of a right arising under the confrontation rather than presenting a claim primarily relying on the exclusionary or another Judge-made rule." *Cf.* **Stone**, 428 U.S. 495, 96 S.Ct. 3052; **Kimmelman v. Morrison**, 477 U.S. 365, 106 S.Ct. 2574, 2583-87 (1986).

As held in **Kimmelman**, *supra*, it is the State that was required to give the defendant counsel. Therefore, the State is at fault for not providing Petitioner with an advocate for his cause. Of course, this means fault must fall on the State or with no one at all. This is especially true when we consider that in a large majority of the cases defendant are unaware of counsel's failure until they secure the aid of another lawyer. Generally, they do not know that trial counsel's performance was deficient until they have talked with other to proceed in post-conviction proceedings. It is in their research for PCR that they first learn of Counsel's deficient and prejudicial performance and harm caused by counsel's unprofessional performance. See: **Kimmelman**, *supra*.

Pelfrey's hearsay testimony, *La. C.E. 801 to 808(B)*, what Mr. Pelfrey stated; He did to obtain this information, fits the compulsion requirements, but lacks authentication, that he tried to report this information to any prison authorities. Prosecutor Napoli over-shadowed this burden of production, to introduce this witness by giving him information to make him reliable or believable. Disregarding the

fact that, Mr. Pelfrey6 was given a deal (Tr. Trans. pg. 245-246), that he got probation (3) three years suspended and(2) two years active probation for simple burglary.

As to Det. Robert Hurst, He could not say, who led him to Robert Lotz or Mitchell Marks. He did not show or establish; what gave him probable cause. However, he did state: He got "Will's"real name from Robert Lotz. Defense objected to identification (Tr. Trans. pg. 59-60). The difficulty is that Mr. Lotz was not present, and no identification line-up were ever conducted with Robert Lotz. Hence, at the suppression hearing, where Det. R. Hurst testified, its unclear who these witnesses were and state took advantage to appeal this as being Mr. Robert Lotz, who was not going to testify. The only time identification came up during trial of photo line-ups, was concerning Det. R. Hurst, it was not in questioning Darrell Lawrence, Kaitlin Walsh, Donald Oliver, Gregory Pelfrey, Larry Brown, but Derrick Lotz and Mitchell Marks. State's inadmissible reference to guilt based on Robert Lotz for identification was prejudicial. If Mr. Baham was directly identified by Robert Lotz as implied, which affects his guilt, to be charged with this offense.

Mr. Baham have a 6^{th} *Amendment* right to face-to-face confrontation and examination of that witnessed **Ohio v. Roberts**. supra. The impact of Mr. R. Lotz identification, naming a "suspect" or Mr. Baham, is only verified by Det. Robert Hurst, who committed perjury and established he had no physical evidence to link Mr. Baham. (Tr. Trans. pg. 83). This gave the appearance of guilt weight. This was the only purpose for which Det. Robert Hurst sought to arrest Mr. Baham. Still, Mr. Baham was not given a prior opportunity to cross examine Robert Lotz, where state knew it would not allow him to testify. Further, without this presence at trial, Mr. Baham could not defend against any hearsay statements made regarding him (R. Lotz) which impacted his guilt.

It was never verified by any other state witness that, Mr. Baham was observed shooting "Mr. Errol Meeks" victim. To identify Mr. William Baham in this offense, clearly impacted the jury's verdict of guilt beyond a reasonable doubt See: **Harper v. Kely**, 916 F.2d 54, 57 (1990); **Monachelli v.**

Warden, 884 F.2d 749, 745-755 (1989). For example; D. Oliver never witnessed it (Tr. Trans. pg. 136); D. Lawrence never witnessed it (Tr. Trans. pg. 217); Derrick Lotz never witnessed it (Tr. Trans. pg. ____); Mitchell Marks never witnessed it, and Gregory Pelfrey never witnessed it (Tr. Trans. pg. 181 to 191). Further, in violation of Mr. Baham's right to confront and cross examine his accuser, La. Const., Art. 1 § 2 and 13; U.S. Const., Amend 6 and 14. See: **Duncan v. Louisiana**, 391 U.S. 45, 88 S.Ct. 1444 (La. 1968); **Malloy v. Hogan**, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); **In re Oliver**, 333 U.S. 257, 60 S.Ct. 499, 92 L.Ed.2d 682 (1948); and **Pointer v. Texas**, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Not overwhelming evidence existed of Mr. Baham's guilt, therefore the numerous introductions of hearsay testimony, prejudiced Mr. Baham's trial, where prosecution introduced; Darrell Lawrence; who called the name "Will "through Det. Maggie Darling, but could not say where he got it or that he saw "Will" shoot anyone (Tr. Trans. pg. 143 to 145).

Identification is what prosecution sought to establish. The videos were obviously insufficient to meet this end. The prosecution introduced more "Hearsay" testimonies (Dr. Marianna Sanomirski, Dep. Coroner, Jefferson Parish) to testify to another doctor's report (Dr. Cynthia Gardner); See: *LSA-R.S. 15:501(B)(1)*, not that it was relevant, but that it was only the states intent to support its witnesses credibility to the jury. Mr. Baham had no way of confronting the person (Dr. Gardner), who did the report, as to what she meant by some of the things she wrote (Tr. Trans. pg. 118-119). Further, prosecution introduced Mr. Gregory Pelfrey, who could not be disputed, where state illegally sought prisoners help to prosecute its case, with phone taps and making witnesses, only for the purpose of identification to establish the guilt of Mr. Baham. State introduced Det. Robert Hurst, the lead investigator, who received information identifying a person other than Mr. Baham, interviewed by Det. G. Pratt (Tr. Trans. pg. 79-81). That evidence was withheld and the state never showed the clothing collected. At the end of Mr. Baham's trial, a special hearing was had to accept clothing from the NOPD Central Evidence and Property Records (Tr. Trans. pg. 299-306).

Mr. Baham argues that, because it could not be established that he shot and killed Errol Meeks and state introduction of "hearsay" testimonies on the issue of identification, it violated Mr. Baham's right to confront his accuser "Robert Lotz", which is not harmless as it does affect Mr. Baham's *14th Amendment Due Process Right* pursuant to the U.S. Constitution, to a fair trial. This case must be reversed.

***Trial court abused its discretion.**

It is for further consideration of this Honorable Court, beyond what the Magistrate has responded to, that Mr. Baham maintains his contention that his right to a fair trial was violated when the trial court abused its discretion violating Mr. Baham's *Due Process* when it did not sequester jurors, allowed the State to direct jury's verdict by fraud, imposed no remedy for the State withholding of **Brady** evidence, nor required accountability from the State for having interfered with Mr. Baham's right to present a defense. These acts, either individually or collectively have deprived an innocent man of his freedom and cause him to suffer the rigors of illegal detainment in State custody.

Standard of Review

In the instant case, the trial judge abused its discretion violating Mr. Baham's Constitutional right to a fair trial, when he allowed Mr. Baham's jury to separate and return to their own homes, after hearing numerous state witnesses testimonies (Tr. Trans. pg. 90), without being sequestered as mandated by *La. C.Cr.P. Art. 791.*

First, a Judge has inherently power to assure dignity in the Judicial Proceeding being maintained with integrity, expeditiousness, orderly and in manner that seeks Justice. *La. C.Cr.P. Art. 17*; State v. Mims, 329 So.2d 686 (La. 1976). The trial Judge has a wide range of discretion, that will not be disturbed absent clear abuse. State v. Mitchell, 275 So.2d 98 (La. 1973). Even though the court has this discretion, it does not come without limitations due to Constitutional restrictions.

Article 791 reads pertinently:

(A) A jury is sequestered by being kept together in charge of an officer of the court, so as to be secluded from outside communications. See: **State v. Luquette**, 275 So.2d 396 (1973); **State v. Craighead**, 114 La. 85, 38 So. 28 (1905); and **State v. Thomas**, 705 La. 550, 17 So. 814 (La. 1944).

The jury sequestration procedures and non-instructions employed by the trial court failed to properly insulate the jurors from extraneous influences, or the possibility thereof, and at no time did the trial court adhere to the mandatory instructions required in all criminal cases. See, **Hale v. United States**, 435 F.2d 737 (1970). The the locality of Orleans, a city steadily on the rise in population and serious felony crimes, where conversation of non-juror third parties and jury members more than likely resulted in the jury verdict being based upon, and affected by, influences extraneous of the legal evidence introduced at trial.

La.C.Cr.P. art. 791 C provides that "In non-capital cases, the jury shall be sequestered after the court's charge and may be sequestered at any time upon order of the court." The purpose of this instruction is to insulate the jurors from outside influence, or the possibility thereof, and to insure that their verdict will based upon the evidence developed at trial. **State v. Parker**, 372 So.2d 1037 (La.1979). *Due process* requires that the accused receive a trial by an impartial jury free from outside influences. **Sheppard v. Maxwell**, 384 U.S. 333, 362, 86 S.CT. 1507, 1522, 16 L.Ed.2d 600 (1966). Stated differently, "the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent jurors'. The failure to accord an accused a fair trial violates even the minimal standards of due process." **Irvin v. Dowd**, 366 U.S. 717, 722, 81 S.CT. 1639, 1642, 6 L.Ed.2d 751 (1961).

Petitioner argues that he was deprived of due process because the jury was swayed by influences outside the courtroom, it is the duty of the Court to independently review the trial records and hold an evidentiary hearing with members of the jury present, so that their testimony will be heard that their verdict was not based upon the influence of third parties to convict an alleged violent offender as a having committed second degree murder, that it is believed to have occurred subsequent to a fight.

When juror misconduct concerns influences from outside sources, the complete failure to hold a hearing constitutes an abuse of discretion and is reversible error because a presumption of prejudice arises when the trial court learn of such influences. **United States v. Phillips**, 664 F.2d 971 (5th Cir. 1981); **Marshall v. United States**, 360 U.S. 310, 312, 79 S.CT. 1171, 3 L.Ed.2d 1250 (1959). The traditional rule in such cases has been that there must exist a nexus between the community prejudice and jury prejudice; there must be a showing that "prejudice found its way into the jury panel." **Pamplin v. Mason**, 364 F.2d 1, 6 (5th Cir. 1966). Several Supreme Court decisions have fashioned the principle that in certain extreme circumstances where there has been "inherently prejudicial publicity," **McWilliams v. United States**, 394 F.2d 41, 44 (8th Cir. 1968), the actual existence of prejudice in the jury box need not be shown.

The courts further holds, "it was not necessary to complain of injury, evidence of the fact in the record was sufficient to justify the court's taking action with reference to it, reversing any case with such posture placed upon the conviction or trial proceedings. See" **Craighead**, supra.

Mr. Baham further argues trial court abuse of discretion, in that it allowed state to fraudulently direct Mr. Baham's jury verdict. **Sullivan v. Louisiana**. 508 U.S. 275, 278 (1993). At the state's attempt to introduce Derrick Lotz and Mitchell Marks as witnesses, objections were lodged (Tr. Trans. pg. 102 to 109). State fraudulently alleged it was introducing them only for the purpose of identification (Tr. Trans. pg. 102 to 106). Defense offered that state give these witnesses immunity or that the court instruct the state, on its questioning of these witnesses as to their involvement, not conflicting with their Fifth Amendment right of silence (Tr. Trans. pg. 110). State rejected to issue immunity and denied its purpose was anything other than identification (Tr. Trans. pg. 111).

The trial judge ruled that, counsels objections are denied and noted, and that the state cannot question these witnesses concerning anything that deals with their involvement (Tr. Trans. pg. 110 to 114), stating also, as he allows the state to read a statement of Mitchell Marks", "I have never read the

statement". (Tr. Trans. pg. 102 to 109). If the judge had not read what the statement contains, he erroneously denied counsel's motions to limit and instruct state's questioning, because the statement specifically deals with Mr. Mitchell Marks involvement (Tr. Trans. pg. 109 to 114). The trial judge further abused his discretion by allowing the prosecution to introduce the statement, reading through it without asking questions, and allowing the jury to have this statement, which clearly directed their verdict. Sullivan, supra. Petitioner argues that, Judge admits he never read Mr. Marks' statement (Tr. Trans. pg. 102). If he never read the statement, how could he know what impact it would have? State knew, because it was his intent to deceive the court on the nature of introducing Mr. Marks, who could not be shown in the videos of being at Friar Tucks Bar, nor did anyone else mention Mr. Marks, as being with them or Mr. Baham. Only Det. Maggie Darling under the direction of Det. Robert Hurst could say, where this witness fits in the investigation, - they did not. Defense objected, advising the statement deals exclusively with Mark's involvement. (Tr. Trans. pg. 102 to 110).

The Court erroneously denied counsel's proffered reasons and state argued it did not and was only for the identification (Tr. Trans. pg. 109 to 112). The jury never heard how Mr. Baham became a suspect or how he was involved until the publishing of this statement to read. Directing the verdict of guilt. See: *Sullivan*, supra. Further, trial judge error allowing state to withhold evidence in violation of the Discovery Rule, *La. C.Cr.P. Art. 716 to 729.6* (a list of names blacked out), one in particular dealing with a direct witness to the shooting, who gave a vivid description of the shooter (Tr. Trans. pg. 83). Against discovery requirements, the trial judge stated that counsel was not entitled to this information (Tr. Trans. pg. 83). The obligations placed upon prosecution in pore-trial discovery of evidence. On a "Brady Request", citing **Brady v. Maryland**, supra were established in **Washington v. Watkins**, 655 F.2d 1346, 1355-56, (5th Cir. 1981); and **Rummel v. Estelle**, 590 F.2d 1214, 1217.

Mr. Baham according to **State v. Talbot**, 490 So.2d 861 (La. 1980), is entitled to the names and substance, if its exculpator6y or inculpatory, even those falling within res gestate of the offense **State v.**

Jones, 408 so.2d. 1285 (La. 1982). The state must disclose exculpatory evidence, even though it has no intent to use it at trial. *La. C.Cr.P. Art. 719.*

In the instant case, the trial judge interfered in Mr. Baham's defense; where the only issue before it in prosecution case-in-chief was identification. To not allow production of a witness statement, who did witness the crime, that is within possession of prosecution. Defense objected requesting mistrial. This case must be reversed, remanded. See: **State v. Davis**, 399 So.2d. 1168 (La. 1981).

In this situation, trial judge did not act neutral to safeguard that Mr. Baham received in accordance with the *Due Process Clause*, a fair administration of justice, depriving him of a fair trial. *U.S.C.A., Const. Amend. 14*, **In re Winship**, supra; **Duncan v. Louisiana**, 391 U.S. 145,88 S.Ct. 1444,(La. 1968); **Arizona v. Fulminate**, 499 U.S. 279, 111 S.Ct. 1246. Trial Judge further deprived Mr. Baham of his constitutionally guaranteed right to the effective assistance of counsel. *United States Constitutional Amendments Six and Fourteen.* This case must be reversed.

***Ineffective assistance of counsel.**

Mr. Baham has no alternative other than to maintain that he remains the victim of ineffective assistance of counsel, a violation of the *Sixth and Fourteenth Amendments* to the United States Constitution. Despite the Magistrate's summation, a close review of the re-worked arguments in the previously contested issues reveal better for the Court to assess the claims presented. **Now, although some of the arguments remain the same, the court needs to re-read them, because though most of the arguments remain intact, there are both significant and impacting considerations brought to the forefront in a way that had not been before.**

STANDARD OF REVIEW

Upon learning of the *Brady* violations and the ways in which the State had undermined trial counsel's development of the defense. The State's knowing and deliberate use of perjury and even

manufactured testimony, defense counsel engaged in no relevant motion practice to prevent his client's conviction.

Instead, defense counsel sought to allow his innocent client's conviction and well-wishes of said client being able to somehow get the conviction overturned at some point in the future. This is the only perceivable excuse for counsel's actions. Let the record reflect that these were not the wishes of the innocent accused, as he wished to suffer no illegal, unjust nor unwarranted conviction.

The seemingly greatest error suffered by the instant petitioner is having relied upon the so-called experience and expertise of his defense counsel to secure his substantive federal constitutional rights through. Here, counsel for the defense not only had an ethical obligation, but, in order to circumvent the commission of fraud upon his client, he was obligated to execute the full-measure of his expertise to prevent the conviction of his client. Defense counsel failed.

Had defense counsel's requested a stay in the trial proceedings, in order to taken such important matters as: Suppression of Evidence, Injecting Known Perjured testimony into the trial Mechanism, and allowing perjured testimony to go uncorrected, up to the Circuit Court of Appeal on Writs of review, these actions could have easily altered the outcome of the case. So, for counsel to forgo these options and allow his innocent client to be convicted in inexcusable. There is no way to reconcile these deficiencies with trail strategy. And for these reasons, the Magistrate erroneously determined that the instant petitioner is not eligible for Federal Habeas Relief. Consequently, petitioner is compelled to request that the presiding District Judge either reject, modify, or order further proceedings in this matter as justice does so require.

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. The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. Under **Strickland** *supra*, counsel has a "duty to make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary . . . a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691, 104 S.Ct. at 2066. However, counsel's acts or omissions must not be "outside the wide range of professionally competent assistance."

When it is apparent that alleged acts of attorney incompetence were in fact conscious strategic or tactical decisions, review of these actions must be "highly deferential." **Kimmelman v. Morrison**, 474 U.S. 815, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). But counsel should not be allowed to shield his failure to investigate simply by raising a claim of "trial strategy and tactics." **Crisp v. Duckworth**, 743 F.2d 580, 584 (7th Cir. 1984). Certain defense strategies or decisions may be "so ill-chosen" as to render counsel's overall representation constitutionally defective. **Washington v. Watkins**, 665 F.2d 1346 (5th Cir. 1981).

In considering a claim of ineffective assistance of counsel, the reviewing court must examine counsel's conduct in light of "all the circumstances" of the case and from the point of view of "counsel's perspective at the time" so as to "eliminate the distorting effects of hindsight." **Strickland**, at 689, 104 S.Ct. at 2065.

DIRECT APPEAL ISSUES

DIRECT APPEAL ISSUE NO. 1

Prosecutorial Misconduct/Personal Attacks on Defense Counsel

While questioning Mitchell Marks, the prosecutor made numerous personal attacks on defense counsel. Specifically, the prosecutor repeatedly asked Mr. Marks whether Mr. Fuller had told

him not to come to testify. Defense counsel repeatedly objected to the prosecutor's comments and questions. Although the trial court sustained some of the defense's objections and gave a cautionary instruction to the jury, the admonition was inadequate, and left the jurors with the impression that it was entirely possible that defense counsel has sent a message to Mr. Marks through Mr. Baham telling him not to trial. The prejudicial effect of the prosecutor's remarks and question was not outweighed the other evidence in the case. The State's case was weak, considering that both Mitchell Marks and Derrick Lotz recanted their statements to police and Gregory Pelfory's story was uncorroborated. It must be concluded that the prosecutor's improper remarks and questions substantially affected Mr. Baham's right to a fair trial as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, § 16 of the Louisiana Constitution.

At trial, Mr. Marks recanted the statements which he had made to Detective Darling.[1] He claimed he could not recall stating that Mr. Baham told him he was going to get his gun and "smash" the "dude" he fought with in the bathroom.[2] He claimed he could not recall telling Detective Darling that he went back to the bar with Derrick Lotz ("Pop") and Robert Lotz ("Rough" or "Ruffy"), that they heard shots, and that Mr. Baham afterward ran out and got in the truck with them. Mr. Marks testified that he did not have a truck, and that Mr. Baham did not get in the truck with him that night; he stated he made up the story about the truck. He stated he also made up the story about Mr. Baham having a gun. Mr. Marks testified that he told Detective Darling whatever she wanted to hear so he could avoid a murder charge.[3]

After Mr. Marks recanted his statement to Detective Darling, the prosecutor asked Mr. Marks whether he told this girlfriend on the phone from prison that he was "going to play dumb in

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[1]The audiotape of Mr. Marks' statement to Detective Darling (exh. S-40) was played for the jury during Detective Darling's testimony and, again, during Mr. Marks' testimony. Trial trans, pp. 127, 185 (Vol. 2).
[2]Id. at 188.
[3]Id. at 189-194.

court."When Mr. Marks denied it, the State was allowed to play the jail tape for the jury. At that point, the prosecutor (Mr. Napoli) began asking Mr. Marks whether defense counsel (Mr. Fuller) had told or encouraged him not to come to court to testify. [4] The following colloquy occurred:

MR. NAPOLI: ... Isn't it a fact that on these jail tapes that you talk about how this defense attorney has been encouraging you not to come to court?

MR. FULLER: Objection! That's a lie! That's a bad lie! I have never seen this man before in my life!

THE COURT: Whoa, whoa, whoa,! This is cross-examination of a hostile witness. He can ask him whatever he wants.

MR. MARKS: I don't know that man.

MR. NAPOLI: You never said that on the jail tapes?

MR. MARKS: I don't know what I said, but I don't know him.

MR. NAPOLI: Judge at this time I would request permission to play the jail calls as impeachment.[5]

A while later, the following occurred:

MR. NAPOLI: Judge, we would like to play the part now about the attorney.

MR. FULLER: Yeah I would like to hear that part actually.

THE COURT: Well that makes all of us. We all want to hear.

(Tape played at this time.)

MR. FULLER: Objection!

MR. NAPOLI: Excuse me!

THE COURT: Stop it! Stop it!

MR. FULLER: They specifically said that I said that I said and that is clearly no the case.

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[4]Id. at.195-197.

[5]Trail Trans., pp. 195-96 (Vol. 2).

THE COURT: That's sustained.

MR. NAPOLI: Let me ask you this. Isn't it true that William Baham told you that his attorney didn't want you to come to court.

MR. MARKS: No.

MR. NAPOLI: Play it.

THE COURT: William Baham told you that his attorney - - that's sustained.

MR. NAPOLI: Judge- -

THE COURT: There is no foundation for the conversion between Baham and Fuller.
It would be attorney client privilege. It's sustained.

MR. NAPOLI: While you were on the docks - - has there every [sic] been a time when you are on the docks with William Baham.

MR. MARKS: One time.

MR. NAPOLI: When he came up to you that one time didn't he encourage you not to come to court?

MR. MARKS: No.

MR. NAPOLI: He didn't?

MR. MARKS: No.

MR. NAPOLI: Judge, at this time we would request to play that call now considering that that is directly- -

THE COURT: You can play anything that has something to do with Baham and this man, but I certainly didn't didn't hear anything that placed counsel Fuller in any way shape or form. Counsel Fuller would not be bound by anything that his client allegedly told somebody else when he wasn't present or knew about.

MR. NAPOLI: But if he instruct him you do it though, Judge.

THE COURT We don't have that and strike that. Ignore that. Be careful. You are getting ready to start treading water.

(Tape played at this time.)

MR. NAPOLI: So when you were on the docks with William he told you that the instructions of his attorney was for you not to come to court?

MR. Marks: **No. I asked him - - I asked him what was it because I thought his lawyer sent me a subpoena.**

MR. NAPOLI: I have no further questions, Judge.

THE COURT: I want you to put it out of your head that there was any wrongdoing whatsoever by Mr. Fuller. This witness could or could not be telling the truth. He may or may not have spoken with the accused on this matter. His voice is not on the tape and for Mr. Fuller to be responsible for something this man allegedly had a conversation with this man that we have not heard. I ask you to take it with a grain of salt relative to Mr. Fuller.[6]

Afterward, defense counsel tried to show the context in which Mr. Marks asked Mr. Baham whether his attorney wanted him to come to court. The context was that Mr. Marks was handed a subpoena and mistakenly thought it was from defense counsel. On cross-examination, Mr. Marks explained that, one day when he was in court for a probation violation hearing, a woman walked up to him and gave him a subpoena.[7] At trial, the female Ms. Berthelot, admitted that she gave Mr. Marks the subpoena and admitted that she deliberately tried to confuse him. In her closing/rebuttal, Ms. Berthelot stated as follows:

> You did hear how it works in New Orleans though. You heard it form [sic] Mitchell Marks jail tapes. And you heard when he got up here he said it too and he pointed at me.

[6]Id. at 202-205 (Vol. 2)(emphasis added).
[7]Id. at 220.

> **I came into court and I gave him a subpoena. Yeah, I gave him a subpoena. Come to court and tells us what you know. But you hear when he goes downstairs and he says I talked to Will. I asked was it your attorney or was it the State because I actually didn't talk to him. I just tried to hand him a subpoena so he doesn't know if I am with Mr. Fuller or if I'm with the State. So he asks Will. Will, your attorney wants to subpoena me?** He told me to tell you don't fuck with that. Don't go. That's how it done in New Orleans.[8]

Thus, the procedure knew full well that Mr. Marks, in his conversation with Mr. Baham about coming to court, raised the subject because he confused about whether defense counsel wanted him to testify for the defense. Mr. Baham would have been responding to Mr. Mark's inquiry when he told him that his attorney did not subpoena him and did not want to testify. At trial, the prosecutor deliberately gave false impression that defense counsel had communicated to Mr. Marks, through Mr. Baham, that he should not testify for the State. In her rebuttal argument, the prosecutor seems to reveal in having confused Mr. Marks telling him he should avoid testifying.[9]

Regardless of the prosecutor's motivation, the result of the prosecutor's inproper comments and questions was to undermine defense counsel and the defense's case. The prosecutor's actions damaged counsel's credibility before the jury, caused the jury to defense counsel's arguments. The prosecutor dealt a "low blow."

Louisiana's jurisprudence on prosecutorial misconduct requires the prosecutor to refrain from making personal attacks on defense strategy and counsel. State v. Brumfield, 96-2667 (La. 10/20/98), 737 So.2d 660, 663. The attack on defense counsel in the present case is particularly egregious because the prosecutor repeatedly suggested that defense counsel had told the State's witness not to come to court to testify. This type of prosecutorial misconduct amounts to reversible error.

The United States Court of Appeal for the Fifth Circuit has concluded that it constitute reversible error for the prosecutor to attack defense counsel by arguing to the jury that defense counsel was hiding witnesses. In United States v. Murrah, 888 F.2d 24 (5 Cir. 1989), the federal appellate court stated as follows:

> The prosecutor continued with an attack on the defendant and his counsel, charging them with conduct which border onto obstruction of justice and constituted unethical conduct for a trial attorney. An ethical trial attorney does not hide witnesses possessed of relevant and material evidence. The prosecutor's suggestion that Murrah and his counsel did so must be taken as damaging to counsel's argument on the facts and the law. That is

[8]Closing Arg. Trans., p. 86 (Supp. R.)(emphasis added).

[9]Mr. Marks could not avoid coming to court to testify because, as it happened, he was in jail at the time of the trial. See Trial Trans. p. 199 (Vol. 2).

a low blow in any trial, but it is particularly egregious in a criminal case bottomed on circumstantial evidence.

Rules of fair play apply to all counsel and are to be observed by the prosecution and defense alike. No counsel is to throw verbal rocks at opposing counsel. The court will not accept such conduct from any lawyer. If anything, the obligation of fair play by the lawyer representing the government is accentuated. "Prosecutors do not have a hunting license exempt from the ethical constraints on advocacy." **United States v. Bursten**, 453 F.2d 605, 610-611 (5th Cir. 1971), quoting **Patriarca v. United States**, 402 F.2d 314 (1st Cir. 1968), cert. Denied, 393 U.S. 1022, 21 L.Ed.2d 567, 89 S.Ct. 633 (1969). In recognition of the respected position held by prosecutors, the Supreme Court has warned that a prosecutor's improper suggestions "carries with it the imprimatur of the Government may induce the jury to trust the Government judgment rather than its own view of the evidence." **United States v. Young**, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1, 14 (1985).

We recognize the onerous burden borne by the prosecution in any criminal case, and we seek not to dampen prosecutorial enthusiasm. But as the Supreme Court observed a half century ago, the government's representative "may prosecute with earnestness and vigor - - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones." **Berger v. United States**, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). The prosecutorial comments contained in this record have no place in the proper administration of justice. 888 F.2d at 27

The Court, in *Murrah*, determined that the prosecutor's remark had substantially affected the defendant's right to a trial. In reaching this conclusion, the Court stated that the pertinent factors to consider included (1) the magnitude of the prejudicial effect, (2) the efficacy of any cautionary instruction, and (3) the strength of the evidence of guilt. The Court, found that the damaging effect of these remarks was not neutralized by the trial court's generic instructions, since the government's case was based largely on circumstantial evidence. Id. At 28.

The magnitude of the prejudicial effect in the present case is at least as great as in, **Murrah**, because, just as in **Murrah**, the prosecutor is suggesting that defense counsel wants to prevent witnesses from coming to trial. Here, the prosecutor repeatedly asked the witness (Mr. Marks) if defense counsel told him not to come to court, and then tried to play a tape recording of the witness's phone conversation which supposedly proved it. The tape recording did not prove Mr. Fuller's involvement and served only to create further prejudice.

Moreover, the judge curative instruction was inadequate and left the jury with the impression that it was entirely possible that defense counsel had sent a message to Mr. Marks, through Mr. Baham, telling him not to come to trial. The trial court instructed the jury as follows:

I want you to put it out of your head that there was any wrongdoing whatsoever by Mr.

> Fuller. This witness could or could not be telling the truth. He may or may not have spoken with the accused on this matter. His voice is not on the tape and for Mr. Fuller to be responsible for something this man allegedly had a conversation with this man that we have not heard. I ask you to take it with a grain of salt relative to Mr. Fuller.[10]

In other words, the judge advised the jury that, even though defense counsel might have told Mr. Marks not to testify, they should forget about it. By adding that the jurors should take the matter with a "grain of salt," the judge is inadvertently telling the jury to consider it, albeit, with some skepticism. The jury was left to believe that Mr. Fuller is an unethical lawyer who, behind the scenes, subverted the testimony of the witnesses. Under these circumstances, the jury could reasonably have believed that Mr. Marks recanted his statement to Detective Darling only because defense counsel did not want him to testify about what he knew. As in **Murrah**, the prosecutor's suggestion that defense counsel tried to prevent witnesses from testifying "must be taken as damaging counsel's credibility before the jury, prompting the jury to summarily reject defense counsel's arguments on the facts and the law." *See* **Murrah**, *supra.*

In the present case, the prejudicial effect of the prosecutor's comments and questions was not outweighed by other evidence introduced by the State. The State's case was weak, considering that both Mitchell Marks and Derrick Lotz recanted their statement to police. Darnell Lawrence, the bouncer, did not see the shooting and his story which Mr. Marks gave to police insofar as when the shots were fired; Mr. Lawrence implied that the shots were fired soon after the fistfight, whereas Mr. Marks claimed that the shooting occurred later, after Mr. Baham went to his grandmother's house to get a gun. And while Gregory Pelfrey claimed he overheard Mr. Baham admit that he committed the murder, there was no one to corroborate his claim. Certainly, there was no physical evidence to link Mr. Baham to the crime. The shooter could not be identified from various videotapes. Moreover, the State's theory of the case made little sense; the prosecutor argued that, even though William Baham was angry with Donald Oliver, a/k/a "Diesel," over a fistfight they had that evening, Mr. Baham shot Errol Meeks, who had done nothing to him, supposedly because Mr. Meeks was at the bar with friends of Diesel.[11]

For the foregoing reasons, it must be concluded that the prosecutor's remarks and questions substantially affected William Baham's right to a fair trial as guaranteed by the Due Process Clause of the *Fifth* and *Fourteenth Amendments* of the United States Constitution and Article 1 § 16 of the Louisiana Constitution.

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[10]Id. at 204-205 (Vol. 2)(emphasis added).
[11]See Closing Arg. Trans., p. 31 (Sup. R.).

ISSUE NO:2

Petitioner respectfully requests that in light of the arguments previously presented, this Honorable Court revisit the Magistrate's assessment of this claim. Petitioner is not attempting to be redundant in his arguments by leaving them mostly intact, rather it is the contention of the petitioner that the Magistrate did not view these claims and their interrelationship with one another to inject unacceptable and unconstitutional realities into the trial mechanism of this particular case.

The law of the State and the United State's prohibits the trial jury in a criminal case, from taking into the jury room testimonial evidence to read. On the State level, the statute governing such an event speaks in mandatory language. But, the Magistrate seeks to must the mandatory language of the governing statute. If the laws which govern criminal trials can be disregarded at will, why do our law makers consume tax-payer dollars in the creation of these laws. If a law will not be given the full measure of its intent, then such law should have no legal existence if it will only be occasionally recognized through wit and whim.

It is petitioner's remaining contention that he was denied a fair trial when the trial court allowed the jury to have, in the jury room during deliberations, the transcript of Mitchell Marks' statement to police in which he claimed, among other things, that he saw Mr. Baham with a gun seconds after the shooting. Over objections by the defense, the trial court permitted the jury to take the transcript into the jury room in violation of *La. C.Cr.P. Art. 793.* This allowed the jury to give undue weight to the statement, despite the fact that Mr. Marks had recanted and disavowed the statement, despite the fact that Mr. Marks had recanted and disavowed the statement during the trial.

Mr. marks statement to Detective Darling (exh. S-40) was played for the jury during Detective Darling's testimony and, again, during Mr. Mark's testimony.[12] When Mr. Marks testified, he claimed that the statement was untrue. He admitted that he was with Mr. Baham at the bar on the night of the incident and that Mr. Baham told him on the way home that he had been in a fight in the bathroom.

[12]Trial trans., pp. 127, 185 (Vol. 2).

However, Mr. Marks denied that Mr. Baham told him he was going to get a gun. He denied seeing Mr. Baham with a gun seconds after shots were fired.[13] Mr. Marks claimed how told Detective Darling whatever she wanted to hear so he could avoid a murder charge.[14] Over objection by the defense, the trial court allowed the prosecution to publish pages 4 through 7 of the transcript of the statement, and the prosecutor was allowed to read those pages to the jury.[15]

During deliberations, the jury sent a note to the trial court asking to hear the taped statement of Mitchell Marks. The trial court decided to send the jury the transcript of Mr. Marks' statement. Defense counsel objected on the ground that written documents cannot be taken in the jury room. The trial court overruled the objection. See transcript of trial court's response to the jury questions and rulings.[16]

Louisiana Code of Criminal Procedure, Article 793(A) provides an explicit legislative mandate as to what evidence is allowed into the jury room during deliberations:

> Except as provided in Paragraph B of this Article, a juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence. Testimony shall not be repeated to the jury. Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.

In *State v. Perkins,* 423 So.2d 1103 (La. 1982), the Louisiana Supreme Court reversed the defendant's conviction for the first degree murder, concluding that there had been a violation of **La. C.Cr.P. Art. 793.** The Court reasoned as follows:

> This Court has recognized that jurors may inspect physical evidence in order to arrive at a verdict, but they cannot inspect written evidence to assess its verbal contents. **State v. Passman,** 345 So.2d 874, 885 (La. 1977); **State v. McCully,** 310 So.2d 833 (La. 1975); **State v. Freetime,** 303 So.2d 487, 489 (La. 1974); **State v. Arnaudville,** 149 La. 151, 127 So. 395 (1930); **State v. Harrison,** 149 La. 83, 88 So. 696 (1921).

The general rule expressed by *La. C.Cr.P. Art. 793* is that the jury is not to inspect written

[13]Id. at 180, 181, 182.
[14]Id. at 192.
[15]Id. a 209-214.
[16]Trial trans. pp. 3-4 (Sup. R.).

evidence except for sole purpose of a physical examination of the document itself to determine an issue which does not require the examination of the verbal contents of the document. For example, a jury can examine a written statement to ascertain or compare the signature, or to see or feel it with regard to its actual existence. *State v. Freeman, supra,* at 489. The legislature has made an express choice in this instance, and the Louisiana Supreme Court, "written evidence during deliberations, except for the sole purpose of physical examination." As stated by this court in *State v. Freeman, supra,* at 488-89:

> The policy choice thus represented is to require jurors to rely on their own memory as to verbal testimony, without notes and without reference to written evidence, such as to depositions or transcribed testimony. The general reason for the prohibition is a fear that the jurors might give undue weight to the limited portion of the verbal testimony thus brought into the room with them...."
>
> In *State v. Freeman, supra,* this court found reversible error when the trial court permitted the jury to read the defendant's confession after retiring to deliberate. The written statement in this case, although not a confession, is an inculpatory statement made by the defendant, and the same danger is that undue weight may be given to this particular piece of evidence. The legislature designed article 793 to prevent this precise danger. This legislative directive has not been amended, nor has *Freetime* been overruled: this court is bound to find that the sending of this written statement to the jury deliberation room is reversible error. The trial court should have granted the defendant's motion for a mistrial based upon this ground.

423 So.2d 1109-10. *See also State v. Freetime,* 303 So.2d 487, 489 (La. 1974).

In the present case, there can be no doubt that the trial court committed reversible error in allowing the jury to have the transcript of Mr. Marks' statement in the jury room during deliberations. This permitted the jury to give undue weight to the statement, which Mr. Marks had recanted in court. The jury was thus allowed to give more weight to the statement than to Mr. Marks' testimony.

The trial court's error in allowing the jury to have the transcript during deliberations was not harmless under the circumstances. The Court of Appeal, Fourth Circuit has previously concluded that a violation of *La. C. Cr.P. Art. 793* should be reviewed under harmless error analysis. *State v. Sellers,* 001-1903 (La. App. 4 Cir. 5/17/02), 818 So.2d 231, 239, writ denied, 03-1322, 862 So.2d 974 (La. 1/9/04); *State v. Johnson,* 97-1519 (La. App. 4 Cir. 1/27/99), 726 So.2d 1126, 1134-35, writ denied,

99-0646, 747 So.2d 56 (La. 8/25/99). However, the cases where the error has been found to be harmless can be easily distinguished from the present case. In *Sellers,* where the defendant was charged with distribution of cocaine, the trial court allowed the jury during deliberations, to view and hear a videotaped recording made from a camera mounted inside an informant's car. In determining whether the error was harmless, the Court of Appeal, Fourth Circuit stated as followed:

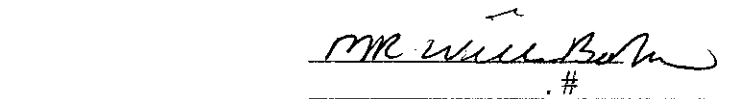
> The principal evil or danger that La. C.Cr.P. art. 793 seeks to avoid is that the testimony or written evidence in question will be given undue weight. However, that danger is not present under the circumstances of this case. Implicit in a consideration of undue influence is the concern that the testimony or written evidence will be accorded greater weight than other evidence present in the course of the trial. In the instant case, the testimony of Barrios and the tape were the only evidence introduced to demonstrate defendant's guilt.

818 So.2d 231, 239. In the present case, the evidence in question, Mr. mark's statement, was not the only evidence introduced by the State and, as previously mentioned, Mr. marks recanted the statement at trial. In *State v. Johnson,* where the defendant was charged with the aggravated rape of minors, the Court found that the trial court erred in allowing the jury to examine the medical records of the defendant and the victims during deliberations. The Court found error to be harmless based on the fact that the defense did not object and the fact that the evidence, while admitted, had not been viewed in the courtroom, so it was not "re-examined, had not been viewed in the jury room. 726 So.2d at 1133-35. In the present case, the defense made an objection and moreover, the evidence had been viewed and read by the jury in the courtroom. In addition, as discussed above, the State's case was weak and the prosecution's theory of the case made little sense.

CONCLUSION

The William Baham has done his best to make it clear to this Honorable Court that the below court violated petitioner's substantive rights. The issues are clear and the records support all the contentions placed before this Higher Court of Honor. Let the Constitution of the United States speak loudly for all of it's citizens.

Respectfully submitted,



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