APPENDIX

Appendix "A" - June 16, 2022, Denial of Certificate of Appealability

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Appendix "A"

June 16, 2022, Denial of Certificate of Appealability

United States Court of Appeals
for the Fifth Circuit

No. 21-30286

WILLIAM BAHAM,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary,*

Respondent—Appellee.

Application for a Certificate of Appealability from the
United States District Court for the Eastern District of Louisiana
USDC No. 2:19-CV-2157

ORDER:

William Baham, Louisiana Department of Corrections # 601802, seeks a certificate of appealability to appeal the denial of his 28 U.S.C. § 2254 petition. In 2012, Baham was convicted by a jury of second degree murder and sentenced to life imprisonment.

Baham argues that his rights (1) to confront his accusers; (2) to a fair trial; (3) to effective assistance of counsel; and (4) to due process have been violated. Baham also alleges prosecutorial misconduct—including personal attacks on defense counsel, introducing hearsay evidence and false testimony at trial, and failure to disclose exculpatory evidence—as a ground for a certificate of appealability.

An applicant for a COA must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires showing that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied the constitutional claims on the merits, the movant must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338. Baham has failed to make the required showings.

IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED.

IT IS FURTHER ORDERED that Appellant's motion for production of documents is DENIED.

\s\ Jennifer Walker Elrod

JENNIFER WALKER ELROD
United States Circuit Judge

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

June 16, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-30286 Baham v. Hooper
USDC No. 2:19-CV-2157

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Majella A. Sutton, Deputy Clerk
504-310-7680

Mr. William Baham
Mr. Gershon Benjamin Cohen
Ms. Carol L. Michel

Appendix "B"

Brief Requesting Certificate of Appealability from denial of Habeas Relief

No. 21-30286

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM BAHAM
Petitioner-Appellant

vs.

TIM HOOPER, Warden
Louisiana State Penitentiary
Respondent-Appellee

****

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
USDC NO. 19-2157

****

REQUEST FOR A CERTIFICATE OF APPEALABILITY
FROM THE DENIAL OF HABEAS CORPUS RELIEF

****

MR. WILLIAM BAHAM #704426
CAMP C JAGUAR 1 RIGHT
LOUISIANA STATE PRISON
ANGOLA, LOUISIANA 70712

REQUEST FOR CERTIFICATE OF APPEALABILITY

BAHAM v. HOOPER – 21-30286

NOW INTO COURT comes William Baham, Pro Se Petitioner-Appellant, requesting this Honorable Court to issue a certificate of appealability on the ground that he has made a substantial showing that jurists of reason would find it debatable:

[1] Confrontation

[2] Trial Court Abused Its Discretion

[3] Ineffective Assistance Of Counsel

[4] Prosecutorial Misconduct / Personal Attacks On Defense Counsel

[5] Denial Of A Fair Trial

This Honorable Court should grant review in this case.

Respectfully submitted this 6th day of August, 2021.

Mr. William Baham ~~#704426~~ 601802
Camp C Jaguar 1 Right
Louisiana State Prison
Angola, Louisiana 70712

AFFIDAVIT / CERTIFICATE OF SERVICE

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

I do hereby certify that the foregoing has been served upon:

Opposing Counsel
Jason Williams, D.A.
District Attorney's Office
Parish of Orleans
619 S. White St.
New Orleans, Louisiana 70119

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

Done this 6th day of August, 2021.

M.K. William Baham

Mr. William Baham ~~#704426~~ 601802

No. 21-30286

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM BAHAM
Petitioner-Appellant

vs.

TIM HOOPER, Warden
Louisiana State Penitentiary
Respondent-Appellee

****

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
USDC NO. 19-2157

****

MEMORANDUM IN SUPPORT
OF
REQUEST FOR A CERTIFICATE OF APPEALABILITY
FROM THE DENIAL OF HABEAS CORPUS RELIEF

****

MR. WILLIAM BAHAM #704426
CAMP C JAGUAR 1 RIGHT
LOUISIANA STATE PRISON
ANGOLA, LOUISIANA 70712

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations, as described in the fourth sentence of *5th Cir. Local Rule 28.2.1*, other than those listed below which have an interest in the outcome of this particular case:

William Bahsm, Petitioner-Appellant

Tim Hooper, Warden, Respondent-Appellee

Jason Williams, D.A., District Attorney's Office, Attorney for Respondent-Appellant

/s/ William Bahsm
William Bahsm, Petitioner-Appellant

REQUEST FOR ORAL ARGUMENT

Oral argument is requested, as William Baham has not received the opportunity to present these claims, in the form of additional testimony and argument, to any court, and in light of the legal complexity of the issues raised. Oral argument will aid this Court in resolution of these issues. *F.R.A.P. 34(a); 5th Cir. Local Rule 34.2.*

Mr. William Baham

William Baham, Petitioner-Appellant

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STATEMENT OF THE FACTS AND CASE

Petitioner-Appellant William Baham is incarcerated in the Louisiana State Penitentiary in Angola, Louisiana. Petitioner was charged by a bill of indictment in Orleans Parish with second degree murder of Errol Meeks. Baham pled not guilty on May 24, 2011. Taken from the Louisiana Fourth Circuit Court of Appeal redaction of events: On January 17, 2011, Mr. Meeks and other were at Friar Tuck's Bar. Donald Oliver (nicknamed "Diesel"), a friend of Meeks, Derrick Lote (nicknamed "Pop"), and Mitchell Marks were among the people mentioned to be at the bar on January 17, 2011, along with Mr. Baham.

Darnell Lawrence, a bouncer at Friar Tucks Bar, was on duty January 17, 2011. During that evening, Mr. Baham and Oliver were involved in a fight in the bar's men's room. After the fight, Oliver and Baham went separate ways, with Oliver leaving the bar.

Mr. Meeks was shot. No one at the bar saw the shooting. It was later learned from Friars Tuck's bouncer, Mr. Lawrence to Detective Williams that: Will shot Meeks. No further questions were asked by Detective Williams also turned his case information over to lead Detective Hurst that was given to him by Detective Robert Ponson, which was casings collected by Ms. Katlin Walsh, the Friar Tuck's bartender. The bar owner was called to review bar cameras. No arrest were made. The next day, Detective Hurst alleges Derrick Lote confirmed he was standing behind Mr. Baham when he allegedly shot Mr. Meeks. Detective Hurst took statements and did identifications. No other information is relayed as to how Mr. Mitchell Marks became a person of interest. Detective Hurst sent Detective Maggie Darling to visit him in jail, to take his statement and do a photographic lineup.

May 19, 2011 Statement. Alleging that:

> After that we went – we would go and we were trying to talk him out of it. He was on his way there... We got to Ruffy's house. Me and Ruffy was in a car, and him and Pops was in the truck. I mean the car and they went around there. Me and Ruffy was about to go outside. As we got out

of the truck, we just heard gun shots. Everybody got scared. We got back in the truck. He ran our way. He jumped in the truck with us.

Mr. Baham was not arrested until June 22, 2011 his Uncle (an NOPD officer) after being called by investigating detectives, who were at the Grandmother's home searching for evidence.

Mr. Baham went to trial July 16 thru 18, 2012, being found guilty as charged. Baham filed a Motion for New Trial and for Post-Verdict Judgment of Acquittal. On August 16, 2012, the state trial court denied Baham's Motions. After Baham waived legal delays, the court sentenced him to life imprisonment without the benefit of parole, probation or suspension of sentence.

On direct appeal to the Louisiana Fourth Circuit Court of Appeal, Baham's appointed counsel asserted two errors:

(1) His right to a fair trial was substantially affected by the prosecutor's improper remarks and questions attacking defense counsel; and

(2) His right to a fair trial was violated when the trial court allowed the jury to take the transcript of Marks' statement into the jury room during deliberations.

On October 1, 2014, the Louisiana Fourth Circuit Court of Appeal affirmed Baham's conviction and sentence. The court found that Baham had not shown prejudice as a result of the prosecutor's statements because (1) the objectionable comments were not pervasive; (2) the defense objections were sustained; (3) the trial court instructed the jury that defense counsel did nothing wrong; and (4) there was substantial evidence of Baham's guilt such that the verdict was not attributable to the prosecutor's statements. The court found that the trial court erred in allowing the jury to review the transcript of Marks' statement in the jury room, but found the error was harmless given the extensive evidence of Baham's guilt and neither contributed to the verdict nor deprived Baham of a fair trial.

On September 18, 2015, without stated reasons, the Louisiana Supreme Court denied the pro se writ of application filed by Baham. On October 30, 2015, the Louisiana Supreme Court denied Baham's application for rehearing. Baham did not file an application for writ of certiorari with the

United States Supreme Court withing ninety (90) days, thus, the conviction and sentence become final on January 2, 2016.

On February 18, 2016, Baham filed an application for post-conviction relief asserting eight claims:

> (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 on the prosecution improperly introducing hearsay testimony, perjured testimony, withholding *Brady* evidence and vouching for witnessed 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) His 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.

On September 12, 2016, the state trial court denied the application. On December 16, 2016, the Louisiana Fourth Circuit Court of Appeal denied Baham's October 25, 2016, writ application. The Louisiana Supreme Court denied Baham's related writ application on August 31, 2018.

On March 6, 2019, Baham filed a petition for federal habeas corpus. The State's response in opposition conceded timeliness and exhaustion of claims. On May 6, 2021, The United States District Court, Eastern District of Louisiana denied Petitioner.

Petitioner now seeks Certificate of Appealability (COA) to this Honorable Court.

Standard of Review in Applying for COA

In a habeas corpus proceeding brought pursuant to *28 U.S.C. § 2254*, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability (C.O.A.) pursuant to *28 U.S.C. § 2253(c)*. "[A] C.O.A. may not issue unless 'the applicant had made a substantial showing of the denial of a constitutional right.'" *Slack v. McDaniel*, 529 U.S. 473 (2000) (*quoting* 28 U.S.C. § 2253(c)). In order to secure a C.O.A. when his application for habeas relief is denied on the merits, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. This Court has held that to make a substantial showing "requires the applicant to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000) (quoting *Slack v. McDaniel*, 529 U.S. 473 (2000)); *Hill v. Johnson*, 210 F.3d 481, 484 (5th Cir. 2000) (*quotes and citations omitted*). For a substantive claim, this determination is made from an overview of the claim rather than after full consideration of the claims' merits. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003).

In this case, the District Court found Petitioner's habeas application was timely filed but that he failed to demonstrate that his state conviction and sentence present grounds for the relief requested. Petitioner asserts that a C.O.A. should be granted in this matter, as he was denied substantial constitutional rights when the District Court found that he failed to demonstrate that his state conviction and sentence present grounds for the relief requested. Petitioner asserts that the C.O.A. must be granted under *Hill*, as reasonable jurists would find the issues he presents are debatable; a court could resolve the issues in a different manner; and the questions are adequate to require further proceedings.

MEMORANDUM IN SUPPORT OF ISSUES AND ARGUMENTS PRESENTED

Under *Brady* and its progeny, exculpatory and impeachment evidence is material and its suppression violated 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.

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

A. As this 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 Courts have simply by-passed application of this standard to Petitioner's case. As a result of this Petitioner is requesting that the Honorable Court of Appeals 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 protection 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 "whther 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 origonal) (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 comitting. The stat'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

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 exculpatory 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

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

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.

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 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

3 Id. at 189-194.
4 Id. at 195-197.
5 Trail Trans., pp. 195-96 (Vol. 2).

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.

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]

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6 Id. at 202-205 (Vol. 2)(emphasis added).

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. **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 improper 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."

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7 Id. at 220.

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).

Louisiana's jurisprudence on prosecutorial misconduct requires the prosecutor to refraim 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 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 Murah, 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

10 Id. at 204-205 (Vol. 2)(emphasis added).

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.

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

11 See Closing Arg. Trans., p. 31 (Sup. R.).

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. 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]

12 Trial trans., pp. 127, 185 (Vol. 2).
13 Id. at 180, 181, 182.
14 Id. at 192.
15 Id. a 209-214.
16 Trial trans. pp. 3-4 (Sup. R.).

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 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.

WHEREFORE, considering the claims asserted above, Petitioner requests that this Honorable Court preserve his constitutional rights by granting a *Certificate of Appealability* in this matter.

Respectfully submitted this **6th** day of **August, 2021**.

Mr. William Baham #704426 6 of 8 pg 2
Camp C Jaguar 1 Right
Louisiana State Prison
Angola, Louisiana 70712

AFFIDAVIT / CERTIFICATE OF SERVICE

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

I do hereby certify that the foregoing has been served upon:

Opposing Counsel
Jason Williams, D.A.
District Attorney's Office
Parish of Orleans
619 S. White St.
New Orleans, Louisiana 70119

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

Done this 6th day of August, 2021.

William Baham, Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to *5th Cir. Local Rule 32.2.7(c)*, the undersigned certifies this brief complies with the type volume limitations of *F.R.A.P. 32(a)(7)*.

1. This brief complies with the type-volume limitation of *F.R.A.P. 32(a)(7)(B)* because this brief contains (unknown number) words, including the parts of the brief exempted by *F.R.A.P. 32(a)(7)(B)(iii)*.

2. This brief complies with the typeface requirements of *F.R.A.P. 32(a)(5)* and the type style requirements of *F.R.A.P. 32(a)(6)* because this brief has been prepared in a proportionally spaced typeface using *WordPerfect 6.1* in *14 point Times New Roman* type face.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in *F.R.A.P. 32(a)(7)* may result in the court's striking the brief and imposing sanctions against the person signing the brief.

Mr William Baham

William Baham, Petitioner-Appellant

Appendix "C"

Judgment of the United States District Court

WESTLAW

Baham v. Vannoy
United States District Court, E.D. Louisiana. May 6, 2021 Slip Copy 2021 WL 1820975 *(Approx. 1 page)*

2021 WL 1820975
Only the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.

William BAHAM

v.

Darrel VANNOY

CIVIL ACTION NO. 19-2157
Signed 05/06/2021

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SECTION "H"(2)

ORDER

JANE TRICHE MILAZZO, UNITED STATES DISTRICT JUDGE

***1** The court, having considered the complaint, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge, and the objection to the Magistrate Judge's Report and Recommendation, hereby approves the Report and Recommendation of the United States Magistrate Judge and adopts it as its opinion in this matter. Therefore,

IT IS ORDERED that the petition of William Baham for issuance of a writ of habeas corpus under 28 U.S.C. § 2254 be **DENIED** and **DISMISSED WITH PREJUDICE**.

All Citations

Slip Copy, 2021 WL 1820975

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Appendix "D"

Petitioner's Objection to Magistrate's Report and Recommendation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM BAHAM	CIVIL ACTION
VERSUS	No. 19-2157
DARREL VANNOY	SECTION "H"(2)

OBJECTION TO MAGISTRATE JUDGE'S REPORT

NOW INTO COURT, comes Mr. William Baham, who respectfully submitted this Objection on the thirteen (13th) of fourteen (14) days to file an objection after receipt as required by *Rule 72(b)(2)*. Magistrate Judge's Pre-trial Order (*FCRCP Rule 72*). Petitioner received the Magistrate's Report on October 14, 2020 or October 15, 2020, which made his deadline to reply either the 28th or 29th of October. (See duplicate of envelope affixed to the front of this pleading. Hence, petitioner submits these objections to the Magistrate Judge's Findings and Recommendation for the following reasons:

INVOCATION OF RIGHTS AT THIS STAGE IN THE PROCEEDINGS

Where a party makes "specific, written objections" within 14 days after being served with a copy of the Magistrate's recommendations, the district court must undertake *de novo* review of those contested aspects of the report. *28 U.S.C. § 636(b)(1)(C)*, see also *Fed.R.Civ.P. 72(b)*. The district judge may then "accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." *Fed.R.Civ.P. 72(b)*.

LAW AND DISCUSSION

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 "whther 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 origonal) (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 stat'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. Pelfreyó 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 *6th 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 exculpatory 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

ISSUE NO. 1

Prosecutorial Misconduct/Personal Attacks on Defense Counsel

Whiling 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

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.

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 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

3 Id. at 189-194.
4 Id. at 195-197.
5 Trail Trans., pp. 195-96 (Vol. 2).

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.

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]

6 Id. at 202-205 (Vol. 2)(emphasis added).

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. **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 improper 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."

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7 Id. at 220.

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).

Louisiana's jurisprudence on prosecutorial misconduct requires the prosecutor to refraim 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 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 Murah, 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

10 Id. at 204-205 (Vol. 2)(emphasis added).

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.

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

11 See Closing Arg. Trans., p. 31 (Sup. R.).

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. 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]

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12 Trial trans., pp. 127, 185 (Vol. 2).
13 Id. at 180, 181, 182.
14 Id. at 192.
15 Id. a 209-214.
16 Trial trans. pp. 3-4 (Sup. R.).

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 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.

WHEREFORE, Mr. Baham prays that if this Honorable Court either modify the findings of the magistrate or alternatively recommit this matter to the Magistrate for further development of the record.

Respectfully Submitted,

Mr. William Baham, DOC #601802
Main Prison Complex, CBA – General Delivery
Louisiana State Penitentiary
Angola, LA 70712

CERTIFICATE OF SERVICE

I, Mr. William Baham, hereby certify that a copy of this objection to the Magistrate Judge's Report or writ of habeas corpus has been delivered to prison authorities to be forwarded to:

District Attorney's Office
Leon A. Cannizzaro, D.A. (Interim)
619 South White Street
New Orleans, LA 70119

Done this **27th** day of **October 2020.** which is precisely twelve (12) days after the date stamp on the outside of the envelope reflecting when this report was received by the institution before tendering to petitioner.

Mr. William Baham

Appendix "E"

Magistrate's Judge's Report and Recommendation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WILLIAM BAHAM	CIVIL ACTION
VERSUS	NO. 19-2157
DARREL VANNOY	SECTION "H" (2)

REPORT AND RECOMMENDATION

This matter was referred to a United States Magistrate Judge to conduct hearings, including an evidentiary hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing § 2254 Cases. Upon review of the entire record, I have determined that a federal evidentiary hearing is unnecessary.[1] For the following reasons, I recommend that the petition for habeas corpus relief be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. FACTUAL BACKGROUND

Petitioner William Baham is a convicted inmate incarcerated in the Louisiana State Penitentiary in Angola, Louisiana.[2] Baham was charged by a bill of indictment in Orleans Parish with second degree murder of Errol Meeks.[3] Baham pled not guilty on May 24, 2011.[4] The Louisiana Fourth Circuit Court of Appeal summarized the established facts at trial as follows:

> On the night of January 17, 2011, Meeks was at Friar Tucks bar with Larry Brown, a relative. Donald Oliver (nicknamed "Diesel"), who knew Meeks through

[1] A district court may hold an evidentiary hearing only when the petitioner shows either the claim relies on a new, retroactive rule of constitutional law that was previously unavailable (28 U.S.C. § 2254(e)(2)(A)(i)) or the claim relies on a factual basis that could not have been previously discovered by exercise of due diligence (*id.* § 2254(e)(2)(A)(ii)) *and* the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have convicted the petitioner. *Id.* § 2254(e)(2)(B).

[2] ECF No. 1, at 1.

[3] State Record Volume (hereinafter "St. R. Vol.") 3 of 6, Bill of Indictment, 1/17/11.

[4] St. R. Vol. 1 of 6, Min. Entry, 5/24/11.

a friend, was also at the bar. Defendant and two acquaintances, Derrick Lotz (nicknamed "Pops") and Mitchell Marks were among the other patrons at Friar Tucks that night.

Darnell Lawrence, a bouncer at Friar Tucks, was on duty the night of January 17, 2011. During the evening, defendant and Oliver were involved in a fight in the bar's men's room. Upon learning of the fight, Lawrence broke it up and returned to his position at the door. After the incident, Oliver left the bar. Defendant and his friends also left. However, defendant left to retrieve his gun because "[h]e was mad and he wanted to smash" Oliver. Derrick Lotz, Marks, and Robert Lotz (nicknamed "Rough" or "Ruffy") "tr[ied] to talk [defendant] out of it," but they eventually drove back to Friar Tucks in Derrick Lotz's white Chevrolet Monte Carlo. Derrick Lotz (the driver) and defendant (the front passenger) exited the vehicle and approached the bar.

Lawrence, who was still stationed at the door, saw Meeks leave the bar. Defendant walked into the bar for a few seconds, abruptly turned around and walked out, following Meeks and trailed by Derrick Lotz. A few seconds later, as Marks and Robert Lotz were exiting Robert Lotz's vehicle, multiple gunshots rang out, and Meeks fell to the ground. Marks and Robert Lotz immediately got back in their vehicle, and defendant ran from the bar and "jumped in the truck" with them. Defendant had a gun, "silver with a black handle" and "[b]etween a 9 and a 40" caliber, in his hand. Robert Lotz drove them to defendant's grandmother's house, and defendant's grandmother then drove defendant across the river.

New Orleans Police Department (NOPD) Officer Robert Ponson arrived on the scene outside Friar Tucks shortly after 11:00 p.m., and a Friar Tucks employee handed him several cartridge casings that were fired from of a 40–caliber handgun. Lawrence approached NOPD Detective Kevin Williams, an investigator on the scene, and identified the shooter as a man named "Will" who frequented Friar Tucks once or twice a week. Detective Williams relayed the identification information to NOPD Detective Robert Hurst, the lead detective on the case. Lawrence also identified Derrick Lotz as the man standing behind defendant at the time of the shooting in the video of the incident recorded by the bar surveillance system.

The following day, Detective Hurst interviewed Derrick Lotz about the shooting. Derrick Lotz confirmed that he was standing on the bar's porch behind defendant when defendant shot Meeks. He identified defendant as the shooter and picked him out of a photographic lineup.

NOPD Detective Maggie Darling visited Marks in prison on May 19, 2011, to interview him about the shooting. Marks gave Detective Darling a detailed statement of the incident, which was audio-recorded. Marks confirmed that defendant was involved in an altercation in the bar bathroom with another patron who pushed defendant's head in the toilet. According to Marks, defendant had a

swollen face, was very mad, and told him that he wanted to get his gun "to smash that dude." Marks then left the bar with defendant and accompanied him to his grandmother's house, where defendant retrieved his gun. Marks continued:

> [A]fter that we went—we would go and we were trying to talk him out of it. He was on his way there.... We got by Ruffy's house. Me and Ruffy was [sic] in a car and him and Pops was [sic] in the truck. I mean the car and they went around there. Me and Ruffy was [sic] about to go inside. As we get [sic] out of the truck we just heard gunshots. Everybody got scared. We got back in the truck. He ran our way. He jumped in the truck with us.

Marks described the gun as between a nine or a forty caliber and silver with a black handle. After he gave his statement, Marks placed a call from prison that same day to his girlfriend and told her that he was going to play dumb at trial.

On November 4, 2011, both defendant and Gregory L. Pelfrey, another Orleans Parish Prison inmate, had hearings scheduled in Orleans Parish Criminal District Court, Section L. Consequently, they, along with three other inmates, were held in the same holding cell, or dock, just outside the courtroom while they awaited their respective hearings. Defendant and Pelfrey had never met each other before that day, and did not see each other again until the day of defendant's trial.

While waiting in the Section L dock, defendant admitted to the murder, announcing to the other inmates that the police had no evidence against him because he threw his gun into the river. He also told the other inmates that one of the key witnesses in his case was an acquaintance who was not going to show up for trial. Defendant told the inmates that his attorney was John Fuller. Around noon, Mr. Fuller came into the docks. At that point, defendant and Mr. Fuller moved toward the toilet, and defendant handed Mr. Fuller a document. Defendant then came back to the other inmates and said that his next court date was on December 15, 2011. After returning to his prison cell, Pelfrey filled out a grievance form, declaring what he had heard from defendant, and passed it to a deputy. From that point until the trial, Pelfrey had no contact with law enforcement about defendant's case.

On a phone call from the prison around 2:00 p.m., on November 4, 2011, defendant stated that he had given something to Mr. Fuller, his attorney, earlier that day. Additionally, defendant stated that his next court date was December 15, 2011.[5]

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[5] *State v. Baham*, 151 So. 3d 698, 699-701 (La. App. 4th Cir. 2014); St. R. Vol. 1 of 6, Louisiana Fourth Circuit Court of Appeal Opinion, 2013-KA-0058, at 1-4, October 1, 2014.

Baham went to trial before a jury on July 16 through 18, 2012. The jury unanimously found Baham guilty as charged.[6] Baham filed a Motion for New Trial and for Post-Verdict Judgment of Acquittal.[7] On August 16, 2012, the state trial court denied Baham's Motion for New Trial and Post-Verdict Judgment of Acquittal.[8] After Baham waived legal delays, the court sentenced him to life imprisonment without the benefit of parole, probation or suspension of sentence.[9]

On direct appeal to the Louisiana Fourth Circuit Court of Appeal, Baham's appointed counsel asserted two errors:

> (1) His right to a fair trial was substantially affected by the prosecutor's improper remarks and questions attacking defense counsel; and
>
> (2) His right to a fair trial was violated when the trial court allowed the jury to take the transcript of Marks' statement into the jury room during deliberations.[10]

On October 1, 2014, the Louisiana Fourth Circuit affirmed Baham's conviction and sentence.[11] The court found that Baham had not shown prejudice as a result of the prosecutor's statements because (1) the objectionable comments were not pervasive; (2) the defense objections were sustained; (3) the trial court instructed the jury that defense counsel did nothing wrong; and (4) there was substantial evidence of Baham's guilt such that the verdict was not attributable to the prosecutor's statements.[12] The court found that the trial court erred in allowing the jury to review the transcript of Marks' statement in the jury room, but found the error was harmless given the

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[6] St. R. Vol. 1 of 6, 7/16/12 Trial Mins. (2 pages); 7/17/12 Trial Mins. (1 page); 7/18/12 Trial Mins. (2 pages); St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr.
[7] St. R. Vol. 1 of 6, 8/16/12 Motion for New Trial and For Post-Verdict Judgment of Acquittal;
[8] *Id.*, 8/16/12 Sentencing Mins.
[9] St. R. Vol. 1 of 6, 8/16/12 Sentencing Mins.; St. R. Vol. 4 of 6, 8/16/12 Sentencing Tr.
[10] St. R. Vol. 4 of 6, Appeal Brief, 2013-KA-0058, at 2, 3/5/14.
[11] *State v. Baham*, 151 So. 3d 698, 704, 706 (La. Ct. App. 4th Cir. 2014); St. R. Vol. 1 of 6, 4th Cir. Opinion, 2013-KA-0058, at 10, 13, 10/1/14.
[12] 151 So. 3d at 702-04.

extensive evidence of Baham's guilt and neither contributed to the verdict nor deprived Baham of a fair trial.[13]

On September 18, 2015, without stated reasons, the Louisiana Supreme Court denied the pro se writ application filed by Baham.[14] On October 30, 2015, the Louisiana Supreme Court denied Baham's application for rehearing.[15] Baham did not file an application for writ of certiorari with the United States Supreme Court within ninety (90) days, thus, this conviction and sentence became final on January 2, 2016.[16]

On February 18, 2016, Baham filed an application for post-conviction relief asserting eight claims:

> (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 on the prosecution improperly introducing hearsay testimony, perjured testimony, withholding *Brady*[17] 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) His right to confrontation was violated;
>
> (5) Insufficient evidence supported the identification of Baham as the perpetrator;

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[13] *Id.* at 704-05.

[14] *State v. Baham*, 178 So. 3d 138 (La. 2015); St. R. Vol. 6 of 6, La. Sup. Ct. Order, 2014-KO-2176, 9/18/15; ECF No. 1-4, at 3-25 (undated).

[15] *State v. Baham*, 179 So. 3d 613 (La. 2015); St. R. Vol. 6 of 6, Request for Rehearing of Constitutional Merits, 10/7/15 (dated 9/28/15).

[16] *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (period for filing for certiorari with the Supreme Court is considered in the finality determination under 28 U.S.C. § 2244(d)(1)(A); *Wilson v. Cain*, 564 F.3d 702, 707 (5th Cir. 2009) (motion for reconsideration must be considered in determining finality of conviction); SUP. CT. R. 13(1).

[17] *Brady v. Maryland*, 373 U.S. 83 (1963) (due process requires the prosecution to disclose exculpatory evidence within its possession).

(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.[18]

On September 12, 2016, the state trial court denied the application finding that Baham's first claim lacked merit as he was charged by a bill of indictment.[19] The court also found meritless Baham's claims of prosecutorial misconduct, explaining that Baham failed to present any evidence that any testimony was false or that the prosecution knew or should have known the testimony was false and that he failed to provide any evidence supporting a claim that the prosecution withheld exculpatory *Brady* evidence.[20] The court found that Baham's third claim did not raise a violation of any state or federal constitutional right.[21] As to his claim alleging he was denied the right to confront his accusers, the trial court found Baham was offered an opportunity to cross-examine every witness called by the State and had the opportunity to subpoena his own witnesses.[22] The trial court denied Baham's claim relating to misidentification, finding the evidence and arguments were presented to the jury who determined credibility and found him guilty.[23] Baham's claim relating to sequestration was found to lack merit as there was no requirement that the jury be sequestered and the court did not believe there was any reason to sequester the jury.[24] The trial court found Baham's sixth claim relating to Marks' statement was previously addressed by the

[18] St. R. Vol. 1 of 6, Application for Post-Conviction Relief, 2/22/16 (dated 2/18/16).
[19] St. R. Vol. 1 of 6, Ruling at 1, 9/12/16.
[20] *Id.* at 1-2.
[21] *Id.* at 2.
[22] *Id.*
[23] *Id.*
[24] *Id.*

Louisiana Fourth Circuit.[25] The trial court found that Baham failed to demonstrate his counsel's performance was deficient or resulted in prejudice with regard to his long list of ineffective assistance of counsel claims.[26] Finally, the trial court found that Baham failed to show prejudice as a result of his appellate counsel's failure to raise sufficiency of evidence on appeal, and there was no evidence that appellate counsel missed any errors that should have been raised.[27]

On December 16, 2016, the Louisiana Fourth Circuit denied Baham's October 25, 2016, writ application.[28] The Louisiana Supreme Court denied Baham's related writ application on August 31, 2018, finding that he failed to show that the State withheld material exculpatory evidence in violation of *Brady*, and that, as to his remaining claims, he failed to satisfy his post-conviction burden of proof under LA. CODE CRIM. PROC art. 930.2.[29]

II. FEDERAL HABEAS PETITION

On March 6, 2019, Baham filed a petition for federal habeas corpus relief styled under 28 U.S.C. § 2254 and challenged his current custody.[30] Broadly construing his *pro se* pleadings, Baham asserts the following claims before the court:

> (1) The prosecution committed fraud upon the court by introducing improper hearsay and perjured testimony, withholding *Brady* evidence, and vouching for witness credibility;
>
> (2) He was denied his right to confront his accuser;
>
> (3) The trial court denied him his rights to due process and a fair trial by failing to sequester the jury, allowing the State to direct the jury's verdict by fraud,

[25] *Id.* at 2-3.
[26] *Id.* at 3-4
[27] *Id.* at 4.
[28] St. R. Vol. 5 of 6, 4th Cir. Order, 2016-K-1115, 12/16/16; *id.*, 4th Cir. Writ Application, 2016-K-1115, 10/25/16.
[29] *State ex rel. Baham v. State*, 251 So. 3d 1069 (La. 2018); St. Rec. Vol. 6 of 6, La. Sup. Ct. Order, 17-KH-0207, 8/31/18; ECF No. 1-6, at 20-41, La. Sup. Ct. Writ Application, St. Rec. Vol. 2 of 6, Supreme Court letter confirming receipt of writ application dated 1/13/17.
[30] ECF No. 1.

withholding *Brady* evidence, and interfering with Baham's right to present a defense;

(4) Ineffective assistance of counsel;

(5) Prosecutorial misconduct; and

(6) He was denied his right to due process when the trial court allowed the jury to have a copy of the transcript of Marks' statement in the jury room during deliberations.[31]

The State's response in opposition conceded timeliness and exhaustion.[32] The State asserts that Baham's claims are meritless and the denial of relief was not contrary to or an unreasonable application of Supreme Court law.[33] Baham filed a reply to the State's opposition response re-urging the merits of some, but not all, of his claims.[34]

III. GENERAL STANDARDS OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, comprehensively revised federal habeas corpus legislation, including 28 U.S.C. § 2254. The AEDPA went into effect on April 24, 1996,[35] and applies to habeas petitions filed after that date.[36] The AEDPA therefore applies to Baham's petition filed on March 6, 2019.

The threshold questions in habeas review under the amended statute are whether the petition is timely and whether petitioner's claims were adjudicated on the merits in state court. In other words, has the petitioner exhausted state court remedies and is the petitioner in "procedural

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[31] ECF No. 1-2, at 8, 24. Baham utilizes the same numbering scheme he used in his direct appeal and application for post-conviction relief. Specifically, he refers to issues two, four, six, and seven from his application for post-conviction relief and issues one and two from his direct appeal. *See id.* For ease of reference, I use a sequential numbering scheme.

[32] ECF No. 21.

[33] *Id.*

[34] ECF No. 23.

[35] The AEDPA was signed into law on that date and did not specify an effective date for its non-capital habeas corpus amendments. Absent legislative intent to the contrary, statutes become effective at the moment they are signed into law. *United States v. Sherrod*, 964 F.2d 1501, 1505 (5th Cir. 1992).

[36] *Flanagan v. Johnson*, 154 F.3d 196, 198 (5th Cir. 1998) (citing *Lindh v. Murphy*, 521 U.S. 320 (1997)).

default" on a claim.[37] Here, the State concedes, and the record shows, that Baham's federal habeas petition is timely, state court review has been exhausted, and no claim is in procedural default.[38]

This federal habeas court is thus not barred from reviewing Baham's claims. Nevertheless, for the reasons that follow, Baham is not entitled to federal habeas relief.

A. Standards of a Merits Review

Sections 2254(d)(1) and (2) contain revised standards of review for questions of fact, questions of law, and mixed questions of fact and law in federal habeas corpus proceedings.[39] Determinations of questions of fact by the state court are "presumed to be correct . . . and we will give deference to the state court's decision unless it 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[40] The statute also codifies the "presumption of correctness" that attaches to state court findings of fact and the "clear and convincing evidence" burden placed on a petitioner who attempts to overcome that presumption. 28 U.S.C. § 2254(e)(1).

A state court's determination of questions of law and mixed questions of law and fact are reviewed under 28 U.S.C. § 2254(d)(1). The determination receives deference, unless the state court's decision "'was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent.]'"[41] The United States Supreme Court has clarified the § 2254(d)(1) standard as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of

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[37] *Nobles v. Johnson*, 127 F.3d 409, 419-20 (5th Cir. 1997) (citing 28 U.S.C. § 2254(b), (c)).
[38] ECF No. 21.
[39] *Nobles*, 127 F.3d at 419-20 (citing 28 U.S.C. § 2254(b) and (c)).
[40] *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000) (quoting 28 U.S.C. § 2254(d)(2)).
[41] *Penry v. Johnson*, 215 F.3d 504, 507 (5th Cir. 2000) (brackets in original) (quoting *Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000)), *aff'd in part, rev'd in part on other grounds*, 532 U.S. 782 (2001); *Hill*, 210 F.3d at 485.

> materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.[42]

The "critical point" in determining the Supreme Court rule to be applied "is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question."[43] "Thus, 'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'"[44]

"'[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [a Supreme Court case] incorrectly.'"[45] Rather, under the "unreasonable application" standard, "the only question for a federal habeas court is whether the state court's determination is objectively unreasonable."[46] The burden is on the petitioner to show that the state court applied the precedent to the facts of his case in an objectively unreasonable manner.[47]

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[42] *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000); *Penry*, 532 U.S. at 792-93 (2001) (citing *Williams*, 529 U.S. at 405-06, 407-08); *Hill*, 210 F.3d at 485.

[43] *White v. Woodall*, 572 U.S. 415, 427 (2014) (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)); *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (quoting *Harrington*, 562 U.S. at 103).

[44] *White*, 572 U.S. at 426 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)); *Shoop*, 139 S. Ct. at 509 (habeas courts must rely "strictly on legal rules that were clearly established in the decisions of this Court at the relevant time.")

[45] *Price v. Vincent*, 538 U.S. 634, 641 (2003) (brackets in original) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (citations omitted)).

[46] *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002).

[47] *Price*, 538 U.S. at 641 (*quoting Woodford*, 537 U.S. at 24-25); *Wright v. Quarterman*, 470 F.3d 581, 585 (5th Cir. 2006).

B. AEDPA Standards of Review Apply in this Case

As discussed above, the AEDPA's deferential standards of review under § 2254(d) and *Williams*[48] apply only to claims adjudicated on the merits by the state courts. 28 U.S.C. § 2254(d). Thus, the deferential AEDPA standards of review do not apply to claims that are not adjudicated on the merits in state court.[49] In that instance, the federal habeas court will consider the claims (not addressed on the merits) under pre-AEDPA *de novo* standards of review.[50]

To determine whether to apply the highly deferential AEDPA standards, a federal habeas court must look to the last reasoned state court decision to determine whether that ruling was on the merits of the claim and "lack[ed] in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[51] In well-settled Supreme Court doctrine, when faced with an unexplained state court decision, the federal habeas court "should 'look through' the unexplained decision to the last related state-court decision providing" particular reasons, both legal and factual, "presume that the unexplained decision adopted the same reasoning," and give appropriate deference to that decision.[52]

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[48] 529 U.S. at 362.

[49] *Cullen v. Pinholster*, 563 U.S. 170, 185-86 (2011); *Henderson v. Cockrell*, 333 F.3d 592, 597 (5th Cir. 2003).

[50] *Henderson*, 333 F.3d at 598 (citing *Jones v. Jones*, 163 F.3d 285, 299-300 (5th Cir. 1998) (applying de novo standard of review to ineffective assistance of counsel claims asserted in state court, but not adjudicated on the merits)); *Carty v. Thaler*, 583 F.3d 244, 253 (5th Cir. 2009).

[51] *White*, 572 U.S. at 419-20 (quoting *Harrington*, 562 U.S. at 103).

[52] *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018); *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991) (when last state court judgment does not indicate whether it is based on procedural default, the federal court will presume that the state court has relied upon the same grounds as the last reasoned state court opinion).

IV. BAHAM'S SPECIFIC CLAIMS

A. Claim One: Prosecutorial Misconduct/Fraud upon the Court[53]

Baham claims that the prosecution committed "fraud upon the court" by introducing hearsay and perjured testimony, withholding *Brady* evidence, and vouching for its witnesses' credibility. While it is difficult to decipher his rambling, disorganized arguments, it appears that Baham claims that Detectives Ponson, Williams and Hurst as well as Darnell Lawrence gave hearsay testimony.[54] He appears to further claim that Detectives Williams and Hurst, Mitchell Marks, Darnell Lawrence, Damon Harris, and Donald Oliver testified falsely.[55] He also claims that the prosecution withheld the names of witnesses who were interviewed at the crime scene.[56] Finally, he mentions that the prosecution vouched for its witnesses' credibility.[57]

The trial court, in addressing these issues, among others, on post-conviction relief, found as follows:

> Defendant's second claim alleges that his conviction is based upon prosecutorial misconduct. More specifically alleged is that the State knowingly allowed fraudulent testimony to be presented to the jury as well as hearsay that should have been excluded. The defendant provides nothing in support of his claim that any testimony was false or that the prosecutor knew or should have known that any testimony presented was false. Defendant argues that the testimony presented did not match any information contained in the video. However, the jury was presented with the testimony and video evidence. The jury, as the fact finder, believed that the defendant was the shooter. This Court is not in a position to second guess the fact finder post-verdict. Nor does this Court find that inappropriate evidence, in any form, was allowed to be presented to the jury in violation of defendant's constitutional rights.
>
> In addition, this case, on appellate review, was reviewed not only for issues presented but for any errors patent review. None were found. *State v. Baham*, 151 So. 3d 698, 701 (La. App. 4 Cir. 2014).

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[53] Baham refers to this issue in his habeas memorandum as "ISSUE TWO". ECF No. 1-2, at 8.
[54] *Id.* at 9-10.
[55] *Id.* at 10-16.
[56] *Id.*
[57] *Id.* at 8, 16-17.

> Defendant presents many arguments which would be more properly used in a closing argument. They are just that, this theories of why testimony and/or evidence may or may not have been presented to the jury by the State. In addition, the fact that the defense did not call witnesses that the defendant believes should have been called, including himself, does not warrant a reversal of conviction and new trial. This Court does not now second guess defense counsel's reasons and strategy.
>
> Defendant further claims that a statement providing an alternate description of the shooter was improperly withheld by the State in violation of *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. No evidence has been presented in support of this claim. Additionally, this alternate description was provided to the defense and presented to the jury for consideration during trial. (Trial Transcript pp. 79-80). Therefore, defendant failed to provide supporting evidence of withheld exculpatory information and this *Brady* claim is denied. Defendant's prosecutorial misconduct allegation for failure to turn over the alleged *Brady* evidence is therefore also denied.[58]

The Louisiana Supreme Court denied the related writ application finding that Baham failed to show that the State withheld material exculpatory evidence in violation of *Brady*, and that, as to the other claims, he failed to satisfy his post-conviction burden of proof under LA. CODE CRIM. PROC. art. 930.2.[59]

Federal courts apply "a two-step analysis to charges of prosecutorial misconduct."[60] A court first decides whether the prosecutor's actions were improper and, if so, the court then determines whether the actions "prejudiced the defendant's substantive rights."[61] Under the second step, the Supreme Court explained that prosecutorial misconduct violates the Constitution only when the misconduct "'so infected the trial with unfairness as to make the resulting conviction a

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[58] St. R. Vol. 1 of 6, Ruling at 1-2, 9/12/16.
[59] *State ex rel. Baham*, 251 So. 3d at 1069; St. Rec. Vol. 6 of 6, La. Sup. Ct. Order, 17-KH-0207, 8/31/18.
[60] *United States v. Duffaut*, 314 F.3d 203, 210 (5th Cir. 2002).
[61] *Id.*

denial of due process.'"[62] "[T]he *Darden* standard is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations.'"[63]

1. Hearsay Testimony[64]

Baham claims that the prosecution committed fraud by introducing improper hearsay testimony, pointing to Detective Robert Ponson's testimony regarding collecting shell casings from Kaitlyn Walsh and Detective Williams' testimony related to his discussion with Darnell Lawrence.[65] Baham also cites the testimony of Detective Robert Hurst who he claims testified that Robert Lotz provided Baham's name.[66]

Although "hearsay rules and the Confrontation Clause are generally designed to protect similar values," the United States Supreme Court has been "careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements."[67] Hearsay is defined by LA. CODE EVID. art. 801(C) as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally inadmissible at trial.[68]

To obtain relief, the petitioner must show that the state trial court's error in allowing hearsay testimony, if any, had a "substantial and injurious effect or influence in determining the jury's verdict."[69] The petitioner must show that "there is more than a mere reasonable possibility that [the error] contributed to the verdict. It must have had a substantial effect or influence in

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[62] *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).
[63] *Parker*, 567 U.S. at 48 (quoting *Yarborough*, 541 U.S. at 664).
[64] Baham does not appear to raise a Confrontation Clause issue with regard to this claim.
[65] *Id.* at 9.
[66] *Id.* at 10.
[67] *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (citations omitted).
[68] LA. CODE EVID. art. 802.
[69] *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

determining the verdict."[70] In determining harm based on inadmissible testimony, the court should consider (1) the importance of the witness' testimony; (2) whether the testimony was cumulative, corroborated, or contradicted; and (3) the overall strength of the prosecution's case.[71]

Initially, when Detective Ponson, one of the initial responding officers, started to testify as to what Kaitlyn Walsh told him, defense counsel objected and the objection was sustained.[72] Detective Ponson testified that Walsh provided him with shell casings wrapped in a towel that she had picked from the scene.[73] Detective Ponson testified that Walsh did not give him the name of the shooter of any description.[74] Detective Ponson simply did not provide hearsay testimony.

Detective Kevin Williams testified on both direct and cross-examinations that Darnell Williams, the security guard at the bar, provided the name of the shooter as "Will."[75] "Under the Louisiana Rules of Evidence, an investigating officer may be permitted to refer to statements made to him by other persons involved in the case without it constituting hearsay if it explains his own actions during the course of an investigation and the steps leading to the defendant's arrest."[76] Furthermore, even if Williams' testimony constituted hearsay, it does not constitute a constitutional violation that would warrant relief. Darnell Williams himself testified at trial, described the sequence of events, and identified persons depicted on surveillance video, including Baham.[77] Lawrence confirmed that he spoke to several law enforcement officers and gave them the name Will."[78] To the extent that Lawrence gave hearsay testimony regarding Derrick Lotz

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[70] *Woods v. Johnson*, 75 F.3d 1017, 1026 (5th Cir.1996) (emphasis omitted).
[71] *Sherman v. Scott*, 62 F.3d 136, 142 n.6 (5th Cir.1995).
[72] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 24.
[73] *Id.* at 24-25.
[74] *Id.* at 29.
[75] *Id.* at 33-34, 36-37.
[76] *Woodfox v. Cain*, 609 F.3d 774, 814 (5th Cir. 2010).
[77] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 141-150.
[78] *Id.* at 149, 154.

calling a bar employee named "Austin," this testimony was elicited by the defense and not objected to by the prosecution. Further, given the insignificance of the testimony and the strength of the prosecution's case, Baham is not entitled to relief as to this portion of his claim.

Finally, Baham cites the testimony of Detective Robert Hurst whom he claims testified that Robert Lotz provided Baham's name. As described in detail in Section B, Detective Hurst did not testify that Robert Lotz identified Baham as the shooter. Rather, defense counsel objected before Hurst could testify regarding any statement made by Robert Lotz, and the objection was sustained.[79]

For the foregoing reasons, the denial of relief on this issue was not contrary to or an unreasonable application of federal law. Baham is not entitled to relief on this claim.

2. False Testimony

Baham appears to claim that Detective Robert Hurst, Detective Kevin Williams, Darnell Lawrence, Mitchell Marks, Damon Harris, and Donald Oliver all testified falsely.[80] Baham alleges that portions of the testimony of each of these witnesses was contradictory of one another, and, therefore, must have been false.[81]

A State denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected.[82] To obtain relief, the petitioner must show that (1) the testimony was actually false, (2) the State knew it was false, and (3) the testimony was

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[79] *Id.* at 59-60.
[80] *Id.* at 9-15.
[81] *Id.*
[82] *Giglio v. United States*, 405 U.S. 150, 766 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996).

material.[83] False testimony is "material" only if there is any reasonable likelihood that it could have affected the jury's verdict.[84]

A claim of prosecutorial misconduct, including use of perjured testimony, presents a mixed question of law and fact.[85] This court must determine whether the state courts' rulings were contrary to or an unreasonable application of federal law.

Again, Detective Kevin Williams testified that he spoke with Darnell Lawrence, and Lawrence told him the name of the shooter was "Will," which name Williams gave to Hurst.[86] Williams testified that he did not know whether someone told Lawrence who shot the victim.[87]

Detective Hurst testified that, upon arriving at the scene, he met with Detective Williams and learned that a possible suspect was identified as an individual known as "Will."[88] Hurst further testified that Lawrence identified "Will" and "Pops" first to Detective Williams and then to Hurst.[89] Hurst testified that he himself spoke to Lawrence and clarified that Lawrence was not a witness to the shooting but rather a witness to Baham's entrance into the bar.[90] Hurst testified that he was able to see the clothing Baham was wearing by viewing the video.[91] He also testified that he was not able to determine Baham's address during the investigation because the address he had

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[83] *Duncan v. Cockrell*, 70 F. App'x 741, 744 (5th Cir. 2003); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993).
[84] *Duncan*, 70 F. App'x at 744 (citing *Nobles*, 127 F.3d at 415).
[85] *Brazley v. Cain*, 35 F. App'x 390, 2002 WL 760471, at *4 n.4 (5th Cir. Apr. 16, 2002) (citing *United States v. Emueqbunam*, 268 F.3d 377, 403-04 (6th Cir. 2001); *Jones v. Gibson*, 206 F.3d 946, 958 (10th Cir. 2000); *United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir. 1997), *United States v. Spillone*, 879 F.2d 514, 520 (9th Cir. 1989)); *Thompson*, 161 F.3d at 808.
[86] St. Rec. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 32-34.
[87] *Id.* at 38.
[88] *Id.* at 52, 63-65.
[89] *Id.* at 57.
[90] *Id.* at 67.
[91] *Id.* at 73.

was several years old and he could not determine whether Baham still resided at the address.[92] As a result, no search warrant was executed at an address that he could attribute to Baham.[93]

Officer Damon Harris, Baham's uncle, testified that he arrested Baham.[94] Harris explained that he learned that there was a warrant for Baham's arrest and that the warrant squad had gone to Baham's grandmother's home to arrest Baham.[95] While Harris initially testified that he believed a search of the house was conducted, Harris admitted that he did not know whether a search of the grandmother's home occurred.[96] Harris further admitted that he told the warrant squad to "lay off" and that he would get Baham to turn himself in.[97]

Donald Oliver, also known as "Diesel" and an acquaintance of the victim, testified that Oliver got into a fight with Baham in the bathroom of the bar earlier on the night of the murder.[98] Oliver did not recall seeing either the victim or the bouncer enter the bathroom.[99] He admitted that three or four people separated them, but testified that the victim was not one of them.[100] Oliver left the bar because he was angry and later learned that the victim had been murdered.[101]

Darnell Lawrence testified that he was working the door of the bar when the victim, who was a regular at the bar, told him that there was a fight in the bathroom.[102] Lawrence recalled that one of Baham's friends attempted to prevent Lawrence from entering the bathroom.[103] Lawrence

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[92] *Id.*
[93] *Id.* at 74, 84.
[94] *Id.* at 91-93.
[95] *Id.* at 94, 97.
[96] *Id.* at 96-97.
[97] *Id.*
[98] *Id.* at 133-35, 139.
[99] *Id.* at 135.
[100] *Id.* at 139.
[101] *Id.* at 136.
[102] *Id.* at 142-44.
[103] *Id.* at 144.

claimed that he yanked the door open and found Oliver hanging Baham upside down in the toilet.[104] Lawrence told them they had to leave.[105] Later, when Lawrence was back at the door of the bar, he saw the victim leave the bar as Baham re-entered.[106] Baham stayed in the bar a few moments and then followed the victim out.[107] A few seconds later, Lawrence heard four gunshots and went outside to find the victim on the ground.[108] Lawrence identified the victim, Baham, and "Pops" (Derrick Lotz) from a video depicting the shooting.[109] According to Lawrence, the video showed the victim fall, the shooter run away, and Pops get into his vehicle.[110]

To the extent Baham disagrees with the foregoing witnesses' testimony and contends that it conflicted with other testimony and/or was not corroborated by physical evidence, the mere existence of a conflict in testimony and evidence does not make the evidence false or perjured.[111] Rather, perjury is the offering of "false testimony concerning a material matter with the *willful intent* to provide false testimony, rather than as a result of confusion, mistake, or faulty memory."[112] The evidence in this case presents, at most, differing recollections or perceptions that require the jury to assess credibility and appropriate weight to be afforded such evidence, which frequently occurs at trial and which is the jury's exclusive function to resolve.

Mitchell Marks testified that he did not see Baham get into a fight at the bar, but that Baham told him about the fight after they left.[113] Marks denied that Baham told him he was going get a

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[104] *Id.*
[105] *Id.* at 144.
[106] *Id.* at 145.
[107] *Id.* at 145.
[108] *Id.* at 146.
[109] *Id.* at 147.
[110] *Id.* at 147.
[111] *See United States v. Wall*, 389 F.3d 457, 473 (5th Cir. 2004) ("Wall has not established that McDowell's testimony was actually false. He has merely shown that Ristau's testimony would establish a conflict in the testimony, a far cry from showing that it was 'actually false.'"), *cert. denied*, 544 U.S. 978 (2005).
[112] *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (emphasis added).
[113] St. R. Vol. 6 of 6, 7/16-18/12 Trial Tr. at 181-82.

gun to "smash the dude."[114] Marks further denied returning to the bar and testified that he never saw Baham with a gun seconds after the murder.[115] Marks admitted that he gave a recorded statement to detectives that contradicted his trial testimony, but claimed he made up the statement because he was scared that he would be charged with the murder.[116] The prosecutor read portions of Marks' statement wherein Marks admitted that Baham's face was swollen and Baham told him "Diesel" knocked him out and put his head in the toilet.[117] According to the statement, Marks stated that Baham said he was going to get his gun and wanted to "smash that dude."[118] Marks testified he could not recall making the statement.[119] Marks further denied making a statement that, after Baham retrieved a gun from his grandmother's house, he and others tried to talk Baham out of it.[120] Marks testified that he did not recall making a statement that, upon returning to the bar, he heard gunshots and that Baham jumped in the truck with Marks and "Ruffy" and that they returned to Baham's grandmother's house.[121] He testified that he made up a description of a gun.[122] Marks denied telling his girlfriend, while on a telephone call, that he planned on "playing dumb" at trial.[123] The prosecution played a recording of the telephone call.[124]

While Marks' testimony *was* material to the State's case, Baham has failed to prove that the prosecution directed or procured Baham's alleged perjured testimony. Further, the State did not allow his untrue testimony to go uncorrected. In light of the detailed questioning by the

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[114] *Id.* at 182.
[115] *Id.* at 182.
[116] *Id.* at 183-186, 191-192, 208.
[117] *Id.* at 188, 190.
[118] *Id.* at 188.
[119] *Id.* at 188, 191.
[120] *Id.* at 189.
[121] *Id.* at 189-190, 192.
[122] *Id.* at 194.
[123] *Id.* at 195.
[124] *Id.* at 202

prosecutor into the statement made by Marks to detectives, there is no showing that the prosecutor knowingly or otherwise intended to promote false or perjured testimony. On the contrary, the prosecutor placed all of Marks' inconsistent testimony before the jury during questioning and through the introduction of his typed and audio recorded statement.[125]

Based on the record and as found by the state courts, Baham has not established that the witnesses presented false testimony or that the State suborned perjury through such testimony. The denial of relief on this issue was not contrary to or an unreasonable application of federal law. Baham is not entitled to relief on this claim.

3. Failure to Disclose Exculpatory Evidence

Baham also claims that the prosecution withheld exculpatory evidence in violation of *Brady*.[126] He claims that Detective Hurst testified that he was not in possession of the clothes Baham was wearing at the time of the murder and did not perform gunshot residue or DNA testing.[127] He references a discrepancy in the clothing descriptions of the murderer and asserts the State "withheld" the name of the person who provided a different description.[128] He further claims the State redacted from a report the names of witnesses interviewed by law enforcement on the night of the murder.[129]

The State responds that Detective Hurst admitted that no scientific testing was done to connect Baham to the crime.[130] It further argues that the jury was made aware of the discrepancies in clothing descriptions, that the police reports were redacted for witness safety purposes in

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[125] *Id.* at 205-06, 209-14.
[126] ECF No. 1-2, at 8, 11, 1516.
[127] *Id.* at 11, 16.
[128] *Id.* at 11.
[129] *Id.* at 11, 15.
[130] ECF No. 21, at 22.

accordance with Louisiana law, and that the trial court did not abuse its discretion in failing to order the State to provide unredacted copies.[131]

The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[132] The duty to disclose this kind of evidence exists even though there has been no request by the defendant.[133] The prosecution's duty to disclose includes both exculpatory and impeachment evidence.[134] *Brady* claims involve "the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense."[135] To prove a *Brady* violation, Baham must establish that the evidence is favorable to the accused as exculpatory or impeachment, that the evidence was suppressed by the State, *and that prejudice resulted from the non-disclosure*.[136]

Detective Hurst testified that he included a clothing description of what Baham was wearing in his report.[137] He agreed that one place in his report he described the clothing as "a brown dicky short sleeve top, matching pants and black long sleeved shirt underneath."[138] However, he also included the description from a witness who was at home looking through his window and reported seeing a black male running from the bar wearing a black hoodie sweatshirt.[139] Hurst explained that they did not have the clothing the shooter was wearing because,

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[131] *Id.* at 22-24.
[132] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[133] *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)); *Hall v. Thaler*, 504 F. App'x 269, 273 (5th Cir. 2012) (citing *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)).
[134] *Strickler*, 527 U.S. at 280 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)); *United States v. Valas*, 822 F.3d 228, 236–37 (5th Cir. 2016).
[135] *Lawrence v. Lensing*, 42 F.3d 255, 257 (5th Cir. 1994) (quoting *Agurs*, 427 U.S. at 103) (emphasis added); *accord Reed v. Stephens*, 739 F.3d 753, 783 (5th Cir. 2014).
[136] *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citing *Strickler*, 527 U.S. at 281–82); *Reed*, 739 F.3d at 782.
[137] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 72-73.
[138] *Id.* at 79-80.
[139] *Id.* at 80-81, 89.

at the time of the murder, they did not have a current address for Baham.[140] He admitted that no gunshot residue testing was performed because they had nothing to test.[141]

While Baham contends that law enforcement took clothing from his grandmother's house and that it was admitted into evidence after trial,[142] there is no evidence supporting his contention. The record does reflect a July 18, 2012, Minute Entry indicating that Baham and his counsel appeared for "UNSCHEDULED JUDICIAL ACTIVITY" during which the court received from NOPD Central Evidence and Property an itemized list of clothing including: (1) red and green hoodie; (2) black t-shirt: (3) blue jeans; (4) black socks; (5) Adidas tennis shoes; (6) brown boxers; (7) towel; (8) gray under shirt; and (9) hat.[143] However, there is no evidence regarding whether that clothing was gathered from Baham's grandmother's house or whether it was the clothing Baham was wearing when he turned himself in on January 22, 2011.[144] Regardless, the jury was clearly made aware that no clothing was tested for DNA or gunshot residue.

It is uncontested that the names of witnesses in Detective Hurst's Supplemental Report were redacted.[145] According to the State, the names were redacted from the report to protect the safety of those interviewed.[146] Under Louisiana law, a defendant generally does not have a right to an unredacted police report including the names of witnesses unless the defendant demonstrates "a peculiar distinctive reason why fundamental fairness dictates discovery of the names of these witnesses."[147] At trial, the trial court found that defense counsel was not entitled to the redacted

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[140] *Id.* at 74-75, 84.
[141] *Id.* at 75, 84.
[142] ECF No. 1-2, at 16.
[143] St. R. Vol. 1 of 6, 7/18/12 Mins. (1 page).
[144] *See* St. R. Vol. 1 of 6, 1/22/11 New Orleans Police Department Report, (1 page) (indicating Baham was arrested wearing 'RED LONG SLEEVE SHIRT, BLUE JEANS, WHITE SHOES.").
[145] *See* St. R. Vol. 1 of 6, 7/15/11 Inventory of Discovery; St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 82.
[146] ECF No. 21, at 23.
[147] *State v. Weathersby*, 29 So. 3d 499 (La. 2010) ("Simply stating 'this is a murder case' and defendant should 'have the benefit of eyewitnesses who can articulate who were the aggressors' does not constitute a

names.[148] It is clear from the record that the defense had the redacted report and utilized the alternate clothing description and the video surveillance in an attempt to exonerate Baham. Thus, Baham has not shown that prejudice resulted from the non-disclosure of the name of the witness who gave the alternate clothing description or any or any other witness' name that was redacted. Denial of relief on this issue was not contrary to or an unreasonable application of federal law. Baham is not entitled to relief on this claim.

4. Vouching for Witness Credibility

Baham generally alleges that the prosecution vouched for the credibility of its witnesses.[149] However, his only allegation regarding this claim is that the prosecution attacked defense counsel and attacked the failure to call Baham's grandmother as a witness.[150]

A prosecutor cannot vouch for a witness' credibility because it implies that he has additional personal knowledge about the witness which he has garnered from an extrajudicial investigation.[151] Neither action of which Baham complains, however, constitutes vouching for the credibility of a witness. Further, a review of the trial transcript shows that the prosecution did not vouch for the credibility of any witness.

The denial of relief on this issue was not contrary to or an unreasonable application of federal law. Baham is not entitled to relief on this claim.

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peculiar distinctive reason why fundamental fairness dictates discovery of the names of these witnesses. This is especially so given the State's and this Court's concern for the witnesses' safety.")

[148] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 82-83.

[149] ECF No. 1-2, at 8, 16.

[150] *Id.* at 16.

[151] *United States v. Ajaegbu*, 139 F.3d 898 (5th Cir.1998) (per curiam) (citing *United States v. Carter*, 953 F.2d 1449, 1460 (5th Cir.1992)).

B. Claim Two: Violation of Right of Confrontation[152]

Baham claims his confrontation rights were violated when he was not allowed to cross-examine certain witnesses. Baham claims that the State introduced the statement of Robert Lotz through the testimony of Detective Hurst, violating his right to confront and cross-examine Robert Lotz. He further contends that he was denied the right to confront Dr. Cynthia Gardner, the forensic pathologist who performed the autopsy, because the State called a different coroner to testify regarding the contents of the report.

In opposition, the State contends that Detective Hurst never explicitly testified that Robert Lotz gave him the name "Will" as the perpetrator. Even if he had, the State continues, any error was harmless. As for Baham's inability to examine the coroner who conducted the autopsy, the State contends that the United States Supreme Court has not determined whether an autopsy report is testimonial for purposes of the right to confrontation. Even if the report were testimonial, the State argues that it is unlikely the testimony contributed to the verdict as the only issue in dispute was identity of the perpetrator. Thus, any error was harmless.

The trial court, in addressing the issue regarding Robert Lotz, found no violation of the confrontation clause, although it did not address the coroner testimony.[153] It found that Baham failed to identify any State witnesses at trial that he was not permitted to cross-examine, and that he was at liberty to subpoena any witnesses he wished to call to testify at trial.[154] The Louisiana Fourth Circuit found that the issue was not reviewable under LA. CODE CRIM. PROC. art. 930.4(C) because Baham did not raise it on direct appeal and that he was free to subpoena witnesses for

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[152] Baham refers to this issue as "ISSUE FOUR." ECF No. 1-2, at 17.
[153] St. R. Vol. 1 of 6, 9/12/16 Ruling at 2.
[154] *Id.*

trial. The Louisiana Supreme Court found Baham failed to meet his post-conviction burden of proof, citing LA. CODE CRIM. PROC. art 930.2.[155]

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[156] This right ensures reliability of the evidence by requiring statements under oath, submission to cross-examination, and the opportunity for the jury to assess witness credibility.[157] The Supreme Court has long held that testimonial statements, those statements made for the purpose of establishing or proving a particular fact, are *in*admissible in criminal prosecutions, unless the declarant is unavailable for trial and the defendant had a prior opportunity for cross-examination.[158] Simply put, "the Confrontation Clause prohibits (1) testimonial out-of-court statements; (2) made by a person who does not appear at trial; (3) received against the accused; (4) to establish the truth of the matter asserted; (5) unless the declarant is unavailable and the defendant had a prior opportunity to cross examine him."[159]

However, the Confrontation Clause does not prohibit the admissibility of non-testimonial statements.[160] It applies only to "'witnesses' against the accused . . . those who 'bear testimony[,]'"[161], and only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."[162] "It is the testimonial character of the statement that

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[155] *State ex rel. Baham*, 251 So. 3d at 1069; St. Rec. Vol. 6 of 6, La. Sup. Ct. Order, 17-KH-0207, 8/31/18.
[156] U.S. Const. amend. VI.
[157] *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).
[158] *Crawford v. Washington*, 541 U.S. 36, 59 & 68-89, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).
[159] *United States v. Gonzales*, 436 F.3d 560, 576 (5th Cir. 2006).
[160] *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).
[161] *Crawford*, 541 U.S. at 51, 124 S. Ct. 1354.
[162] *Davis*, 547 U.S. at 821, 126 S. Ct. 2266.

separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[163]

A Confrontation Clause claim presents a mixed question of law and fact.[164] Therefore, this court must defer to the state courts' decision rejecting the claim unless petitioner demonstrates that the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[165]

Here, there simply was no violation. At trial, when asked how he developed Baham as a suspect, Hurst testified, "By speaking – initially we developed Will. We knew Will. We were provided with the name Will. We spoke with Robert Lotz-- . . . and he advised us that Will's--."[166] Defense counsel then objected.[167] After an unrecorded sidebar during which the objection was sustained, the prosecution asked Hurst to focus on Darnell Williams and Derrick Lotz.[168] Hurst explained that *Derrick Lotz* identified Baham from a six-pack line up.[169] Upon recall, Hurst again testified the *Derrick Lotz* identified Baham as the shooter.[170] It is clear from the record that Hurst did *not* testify that Robert Lotz gave the police Baham's name as the perpetrator or identified him as the perpetrator.

Even if there were a Confrontation Clause violation, multiple witnesses as well as the physical evidence implicated Baham as the perpetrator of the crime. Lawrence testified that he witnessed Baham follow the victim out of the bar.[171] Seconds later, he heard gunshots and then

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[163] *Id.*
[164] *Fratta v. Quarterman*, 536 F.3d 485, 499 (5th Cir. 2008).
[165] 28 U.S.C. § 2254(d)(1).
[166] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 59.
[167] *Id.*
[168] *Id.* at 60.
[169] *Id.*
[170] *Id.* at 223.
[171] *Id.* at 145.

found the victim on the ground.[172] He identified Baham from the video of the shooting.[173] He testified that he gave the detective the name "Will."[174] The State also presented the statement of Mitchell Marks from May 2011, during which he identified Baham as the shooter, as well as a jail telephone call between Marks and his girlfriend during which Marks stated he planned to "play dumb" at trial.[175]

The State also presented powerful testimony from Gregory Pelfrey, who testified that, while Pelfrey, Baham and other defendants were waiting in a holding cell in the courthouse for hearings on November 4, 2011, Baham openly admitted to the other defendants that he committed a murder but that the gun was in the river.[176] According to Pelfrey, Baham told the others that a key witness was his acquaintance and that he did not plan to show up for court.[177] Pelfrey also heard Baham say that the witness was around the corner when Baham shot the victim so there was no way he could have seen Baham commit the murder.[178] Pelfrey testified that he saw Baham give his counsel a piece of paper that either was a writing or drawing related to the witness' sight line.[179] Pelfrey completed a grievance form detailing the information when he returned to jail.[180] Finally, the State introduced multiple surveillance videos throughout the trial so the jury was able to determine if Baham was the murderer.

Baham also raises a Confrontation Clause claim with regard to the coroner testimony. Dr. Cynthia Gardner's autopsy report of the victim was reviewed and interpreted by Dr. Sandomirski

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[172] *Id.* at 145-46.
[173] *Id.* at 147.
[174] *Id.* at 154.
[175] *Id.* at 183-85, 188-90, 194, 202, 206, 209-14.
[176] *Id.* at 236, 239, 241, 247, 251, 253, 255.
[177] *Id.* at 240.
[178] *Id.* at 241.
[179] *Id.* at 254-55.
[180] *Id.* at 243-44, 256.

because Dr. Gardner was out of the country.[181] Dr. Sandomirski testified that the victim's cause of death was multiple gunshots to the head and chest and that the injuries were not survivable.[182] She testified that the manner of death was classified as a homicide.[183] Defense counsel elected not to cross-examine the witness.[184]

The Supreme Court did not specifically define testimonial or nontestimonial in *Crawford*. It did make clear that the Confrontation Clause was concerned with "testimony," which "is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact," and noted that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[185] "[W]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[186]

The Supreme Court expanded the definition of testimonial statements to include statements that are "functionally identical to live, in-court testimony" in *Melendez–Diaz v. Massachusetts*.[187] Circuit Courts are split on whether autopsy reports are testimonial or not.[188] Thus, there is no clearly established law by the United States Supreme Court that would require Dr. Gardner to testify regarding the autopsy.[189] Even if the autopsy report were testimonial under clearly

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[181] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 118-121.
[182] *Id.* at 120.
[183] *Id.* at 120-21.
[184] *Id.* at 121.
[185] *Crawford*, 541 U.S. at 51.
[186] *Id.* at 68.
[187] *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009).
[188] *See e.g. United States v. James*, 712 F.3d 79, 88 (2d Cir. 2013) (deciding that the autopsy report at issue was not testimonial "because it was not prepared primarily to create a record for use at a criminal trial.") (footnote omitted); *United States v. Ignasiak*, 667 F.3d 1217, 1231 (11th Cir. 2012) (concluding admission of autopsy reports through medical examiner who did not conduct or observe the autopsies violated Confrontation Clause)
[189] *See Murray v Cain*, Civ. No. 15-0827-BAJ-EWD, 2019 WL 141744, at *7 (M.D. La. Mar. 3, 2019); *Green v. Cain*, Civ. No. 14-2073, 2016 WL 6477038, at *14 (E.D. La. May 13, 2016) (the state courts'

established law, a Confrontation Clause violation is subject to a harmless error analysis.[190] Harmlessness depends on whether an error caused actual prejudice in that it "had substantial and injurious effect or influence in determining the jury's verdict."[191] To obtain federal habeas relief under *Brecht*, petitioner (not the State) has the burden of demonstrating that the error was not harmless.[192]

No one contested that fact that the victim died from gunshot wounds. Baham's defense was that he was not the perpetrator. Neither the autopsy report nor Dr. Sandomirski offered any information about the identity of the perpetrator. Baham has not shown that any error in the admission of Dr. Sandomirski's testimony had a substantial and injurious effect or influence in determining the jury's verdict.

For these reasons, any error was harmless error and the state courts' denial of relief was neither contrary to, nor an unreasonable application of, Supreme Court precedent. Baham is not entitled to relief on this issue.

C. Claim Three: Sequestration of Jurors/Right to Present a Defense[193]

Baham claims the trial court violated his right to a fair trial when it failed to sequester the jurors pursuant to LA. CODE CRIM. PROC. art. 791.[194] He further claims that the trial court allowed

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denial of claim relating to inopportunity to cross-examine the doctor who performed the autopsy on the victim was not error given the absence of clearly established law relating to the Confrontation Clause's application to autopsy report by non-testifying experts), *Order adopting report and recommendation*, 2016 WL 6441232 (E.D. La. Nov. 1, 2016)

[190] *Davis v. Ayala*, 576 U.S. 257, 270, 135 S. Ct. 2187, 2199 (2015); *Fry v. Pliler*, 551 U.S. 112, 120 (2007).

[191] *Brecht v. Abrahamson*, 507 U.S. 619, 637-638 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[192] *Id.* at 637; *see Basso v. Thaler*, 359 F. App'x 504, 509 (5th Cir. 2010) (*Brecht* places the burden on the habeas petitioner to prove the error was not harmless).

[193] Baham refers to this issue as "ISSUE SIX: Trial court abused its discretion." ECF 1-2, at 21. Among his claims, Baham again argues that the State withheld evidence by redacting names of witnesses in its police reports provided to defense counsel. As the court has previously addressed this issue above, it will not readdress it.

[194] In Louisiana, "[i]n noncapital cases, the jury shall be sequestered after the court's charge and may be

the State to direct a verdict by fraud by forcing Derrick Lotz and Mitchell Marks to testify over defense counsel's objection without giving the witnesses immunity, in violation of their Fifth Amendment right against self-incrimination.[195] Baham generally argues that the trial court interfered with his right to present a defense.[196]

The State responds that Baham's sequestration claim under state law is not cognizable, and there was no violation of article 791.[197] It further argues that Baham fails to cite to any federal law supporting his claim that the trial court acted unreasonably in failing to sequester the jury.[198] As to the claims relating to the testimony of Marks and Derrick Lotz, the State argues that it is entitled to call the witnesses necessary to meet its burden of proof and that it was not required to give either witness immunity as it did not ask any questions that would violate either witness' Fifth Amendment privilege.[199] It further argues that neither witness was a suspect in the case, so the Fifth Amendment right against self-incrimination was not applicable.[200] The State claims that it questioned both witnesses about their prior statements and properly impeached them with their previous statements.[201]

The trial court rejected these arguments when raised in Baham's application for post-conviction relief:

> Defendant's sixth claim alleges that this court abused its discretion in failing to sequester the jury in accordance with La. C.Cr.P. Art. 791. However, because the defendant was not charged with a capital crime there was no requirement that the jury be sequestered. Nor was there a request by the defendant to sequester the

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sequestered at any time upon order of the court." LA. CODE CRIM. PROC. art. 791(C)

[195] ECF No. 1-2, at 22-24.

[196] *Id.* at 21, 24.

[197] ECF No. 21, at 28-29.

[198] *Id.* at 29..

[199] *Id.*.

[200] *Id.*

[201] *Id.*

> jury. This Court did not believe any reason existed to warrant a sequestered jury. This allegation is without merit.[202]

The trial court did not address Derrick Lotz, but with regard to Marks found:

> Defendant further complains that Mitchel Marks' statement was read to the jury in violation of Mr. Marks' Fifth Amendment right. Mr. Marks made a prior statement to an investigator and then told his girlfriend that he was going to play dumb at trial. Mr. Marks cannot refuse to testify in another defendant's trial based on the Fifth Amendment when his statement or testimony does not implicate him in a crime. Additionally, this Court proceeded with great caution during the questioning of Mr. Marks to ensure that the State's questions did not implicate him in any criminal activity.[203]

The Louisiana Supreme Court found that Baham did not meet his burden of proof.[204]

With regard to Baham's argument that the state courts' denial of relief violated Louisiana law relating to sequestration of jurors, Baham was not charged with a capital crime. Thus, jury sequestration was not required by state law. Further, Baham does not show that either party even requested that the jury be sequestered. More significantly, this claim cannot support federal habeas relief. A federal court does "not sit as [a] 'super' state supreme court in a habeas corpus proceeding to review errors under state law."[205] In short, federal habeas review does not lie for errors of *state* law.[206]

Under federal law, to warrant relief, a petitioner must show that the refusal to sequester the jury resulted in a substantial likelihood of prejudice.[207] Baham has neither alleged nor provided any evidence that the jury was exposed to outside influences or that the failure to sequester the

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[202] St. R. Vol. 1 of 6, 9/12/16 Ruling at 2-3.
[203] *Id.* at 2.
[204] *State ex rel. Baham*, 251 So. 3d at 1069; St. Rec. Vol. 6 of 6, 8/31/18 La. Sup. Ct. Order, 17-KH-0207.
[205] *Wilkerson v. Whitley*, 16 F.3d 64, 67 (5th Cir.1994) (quotation omitted);.
[206] *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011); *see Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *see also Hogue v. Johnson*, 131 F.3d 466, 506 (5th Cir. 1997) (a disagreement as to state law is not cognizable on federal habeas review).
[207] *United States v. Greer*, 806 F.2d 556, 557-58 (5th Cir. 1986) (citation omitted).

jury otherwise interfered with his right to a fair trial.[208] He has not shown that the state courts' decision was an unreasonable application of or contrary to of Supreme Court precedent.

Baham's argument that the trial court allowed the State to direct a verdict by fraud by allowing Derrick Lotz and Mitchell Marks to testify over defense counsel's objection without requiring the State to give them immunity similarly fails. Before the testimony of Derrick Lotz and Mitchell Marks, defense counsel objected.[209] With the jury removed from the courtroom, the trial court explained that the issue was whether any questions would trigger a Fifth Amendment privilege.[210] The prosecution explained that Marks was subpoenaed due to his knowledge of what took place on the evening of the shooting.[211] The prosecutor stated that it had "absolutely no information whatsoever that would inculpate [Marks] in the murder" and absolutely did not intend on pursuing any sort of principal or conspiracy theory as to Marks.[212] The State said it would not consider giving Marks immunity because he had not made any statements inculpating himself.[213] The trial court advised it would be the "gatekeeper" and determine whether any question would violate the witnesses' Fifth Amendment rights and disallow questioning on a question by question basis, as necessary.[214] The trial court reiterated that it would not require Marks to answer questions

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[208] *See Goudeau v. Cain*, Docket No. 16-cv-732, 2017 WL 946726, at *6 (W.D. La. Jan. 18, 2017) (citing *Lathers v. Cain*, 2011 WL 1793274 (M.D. La. Apr. 7, 2011)), *Order adopting report and recommendation*, 2017 WL 951632 (Mar. 8, 2017), *certificate of appealability denied*, 17-30259 (5th Cir. Feb. 6, 2018); *Howard v. Warden, Louisiana State Penitentiary*, Civ Action No. 1:14-CV-00514, at *12 (W.D. La. June 18, 2015) (petitioner failed to demonstrate a constitutional claim for habeas relief where he neither alleged nor showed "his trial atmosphere was utterly corrupted by press coverage or that his trial was rendered fundamentally unfair by any discussion or misconduct by the jurors during jury recesses."), *certificate of appealability denied*, 15-30586 (5th Cir. Sept. 16, 2016).

[209] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 101-03.

[210] *Id.* at 103.

[211] *Id.* at 104-05.

[212] *Id.* at 104.

[213] *Id.*

[214] *Id.* at 106-11.

that would violate his Fifth Amendment privilege.[215] After reviewing Marks' statement, the trial court again stated it would not allow the State to ask questions that infringed upon Marks' right to remain silent.[216]

As for Derrick Lotz, the prosecution explained it intended to ask him everything he observed the night of the murder.[217] The trial court similarly ruled that, while Lotz had been placed on the scene by video surveillance and witnesses, Lotz did not have Fifth Amendment privilege not to testify and he would prevent him from answering any question that might violate the privilege.[218] Defense counsel objected to the rulings as to both witnesses.[219]

Neither Derrick Lotz nor Marks were suspects in the murder and the State had no intention of charging them in the murder. Upon questioning them, the State asked them about the statements they had given to law enforcement identifying Baham as the shooter, and properly impeached their testimony when they both claimed to have lied previously. None of the questions posed to either of those witnesses implicated their rights against self-incrimination. Baham has not demonstrated a violation of applicable federal constitutional law by the trial court's rulings regarding these witnesses' testimony.

As for his claim that the trial court interfered with his right to present a defense, under federal law, a defendant has a constitutional right to present a complete defense.[220] While the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, this right is not absolute.[221] Broad latitude is granted to states to establish rules excluding

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[215] *Id.* at 109-11.
[216] *Id.*.
[217] *Id.* at 112.
[218] *Id.* at 113-14.
[219] *Id.* at 114-15.
[220] *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).
[221] *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

evidence from criminal trials.[222] The Supreme Court has "[o]nly rarely . . . held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence."[223] The Court has instead recognized that the Due Process Clause does not guarantee the right to introduce all evidence the defendant deems relevant, because the right to present even relevant evidence is not "absolute."[224] The right to present a complete defense is not "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[225]

While the trial court allowed Marks and Derrick Lotz to testify, those rulings, which did not violate the witnesses' Fifth Amendment right against self-incrimination, did not impact Baham's right to present his mistaken identity/actual innocence defense. The defense attempted to bolster the testimony of Marks by eliciting testimony that the statement he gave to Detective Darling was uncounseled and coerced because Marks was afraid that law enforcement would attempt to charge him with the murder.[226] Similarly, the defense elicited testimony from Derrick Lotz that his family pressured him to talk to detectives and that the detectives threatened to arrest him if he did not give a statement.[227] Derrick Lotz also appeared to suggest that his uncle, Robert Lotz, appeared on the surveillance video rather than Derrick Lotz.[228] Baham also effectively presented his defense through the cross-examination and attempt to discredit certain State's witnesses.

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[222] *Id.*; *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013).
[223] *Jackson*, 133 S. Ct. at 1992 (citations omitted).
[224] *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996).
[225] *Taylor*, 484 U.S. at 410.
[226] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 217-20.
[227] *Id.* at 169-170.
[228] *Id.* at 171.

While the defense was unable to identify, and thus call at trial, a witness who gave a different clothing description of the alleged perpetrator, that limitation did not effectively prevent him from presenting his defense. The jury heard evidence that Detective Hurst was given two different clothing descriptions, both of which Detective Hurst documented in his report, and the jury was able to view the clothing Baham was wearing from the video surveillance evidence.[229] Additionally, the video surveillance was played many times throughout the trial and defense counsel questioned the witnesses about the identities of the persons depicted on the videos.[230] After hearing all the testimony and viewing the evidence, the jury apparently found more credible the evidence that contradicted Baham's misidentification/actual innocence defense.

Accordingly, Baham has not shown that the state courts' determination was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. He is not entitled to federal habeas relief on these claims.

D. Claim Four: Effective Assistance of Counsel[231]

Baham generally alleges that he was denied effective assistance of counsel.[232] He, however, makes no arguments about either his trial or appellate counsel performing deficiently. Rather, as the State points out, the entirety of his claim is identical to his previous claim relating to the trial court's abuse of discretion.[233]

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[229] *Id.* at 72-73, 75, 79-81, 89.
[230] *Id.* at 47-50, 54-59, 146-49, 159-60, 229.
[231] Baham refers to this claim as "ISSUE SEVEN" in his habeas petition. ECF No. 1-2, at p. 24.
[232] ECF No. 1-2, at 24-25.
[233] ECF No. 21, at 30.

Baham must present more than a presumptive, conclusory assertion to establish a claim for ineffective assistance of counsel.[234] He has not, and therefore, is not entitled to relief for that reason alone.[235]

Before the state courts, however, Baham did raise specific claims of ineffective assistance of trial and appellate counsel. In this case, he has referred to his ineffective assistance of counsel claim as "ISSUE SEVEN," which, in his application for post-conviction relief, alleged *only* ineffective assistance of trial counsel.[236] As he does not refer to "ISSUE EIGHT" which alleged ineffective assistance of appellate counsel,[237] I will not address that issue.

In his post-conviction application, Baham claimed in issue seven that he was denied effective assistance of counsel when his trial counsel: (1) failed to file a motion to quash the bill of information charging him with second degree murder; (2) failed to request discovery, investigate the case, and inadvertently admitted Baham's guilt to the jury through stipulations related to Pelfrey; (3) failed to prepare a defense of innocence; and (4) failed to seek funding for DNA or gunshot residue testing of clothing taken from his grandmother's home.[238]

The state trial court found that Baham's claim regarding the failure to file a motion to quash was meritless as he was charged by a bill of indictment.[239] It also found that defense counsel did not stipulate to the truthfulness or trustworthiness of Pelfrey's statement or testimony, but rather

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[234] *Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998) ("Mere conclusory allegations in support of a claim of ineffective assistance of counsel are insufficient to raise a constitutional issue.").
[235] *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000); *accord United States v. Holmes*, 406 F.3d 337, 361 (5th Cir. 2005) ("To succeed on [an] ineffective assistance claim, [a petitioner] bears the burden of demonstrating that counsel's performance was deficient and that the deficient performance prejudiced his defense. [A petitioner] cannot escape this burden merely by stating his conclusion.").
[236] ECF No. 1-2, at 24; St. R. Vol. 1 of 6, 2/18/16 Memorandum of Law in Support of Application for Post-Conviction Relief, at 27-32.
[237] St. R. Vol. 1 of 6, 2/18/16 Memorandum of Law in Support of Application for Post-Conviction Relief, at 32-34.
[238] *Id.* at 31.
[239] St. R. Vol. 1 of 6, 9/12/16 Ruling at 3.

defense counsel cross-examined Pelfrey and the jury determined his credibility.[240] The trial court found that the record contradicted Baham's claim that defense counsel failed to request discovery and investigate the case.[241] As for the failure to seeking funding for DNA and gunshot residue testing, the trial court found that testing the clothing and presentation of the result to the jury may not have changed the outcome of the trial.[242] The court explained that Baham had traveled to Houston after the shooting and that the clothing could have been cleaned or replaced with new items by the time it was collected.[243] Ultimately, the Louisiana Supreme Court denied Baham's related writ application denying relief for Baham's failure to meet his post-conviction burden of proof under LA. CODE CRIM. PROC art. 930.2.[244]

The issue of ineffective assistance of counsel is a mixed question of law and fact.[245] Thus, under the AEDPA, this court must determine whether the state courts' denial of relief was contrary to or an unreasonable application of Supreme Court precedent.

The United States Supreme Court established a two-part test for evaluating claims of ineffective assistance of counsel, requiring petitioner to prove both deficient performance and resulting prejudice.[246] The Supreme Court first held that "the defendant must show that counsel's representation fell below an objective standard of reasonableness."[247] Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[248]

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[240] *Id.*
[241] *Id.*
[242] *Id.* at 3-4.
[243] *Id.*
[244] *State ex rel. Baham*, 251 So. 3d at 1069; St. Rec. Vol. 6 of 6, La. Sup. Ct. Order, 17-KH-0207, 8/31/18.
[245] *Strickland v. Washington*, 466 U.S. 688, 698 (1984); *Clark v. Thaler*, 673 F.3d 410, 416 (5th Cir. 2012); *Woodfox v. Cain*, 609 F.3d 774, 789 (5th Cir. 2010).
[246] 466 U.S. at 697
[247] *Id.* at 687-88.
[248] *Id.* at 694; *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999).

In deciding ineffective assistance of counsel claims, a court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test.[249] A habeas corpus petitioner "need not show that 'counsel's deficient conduct more likely than not altered the outcome in the case.' . . . But it is not enough under *Strickland*, 'that the errors had some conceivable effect on the outcome of the proceeding.'"[250]

On habeas review, the United States Supreme Court has clarified that, under *Strickland*, "[t]he question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom."[251] "Even under de novo review, the standard for judging counsel's representation is a most deferential one."[252] The courts must therefore apply the "strong presumption" that counsel's strategy and defense tactics fall "within the wide range of reasonable professional assistance."[253]

Federal habeas courts presume that litigation strategy is objectively reasonable unless clearly proven otherwise by the petitioner.[254] "It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence."[255] In assessing counsel's performance, a federal habeas court must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

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[249] *Kimler*, 167 F.3d at 893.

[250] *Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994) (citation omitted) (quoting *Strickland*, 466 U.S. at 693); *Harrington*, 562 U.S. at 112 (*Strickland* requires a "substantial" likelihood of a different result, not just "conceivable" one.)

[251] *Harrington*, 562 U.S. at 105.

[252] *Id.*

[253] *Strickland*, 466 U.S. at 690.

[254] *Id.* at 689; *Geiger v. Cain*, 540 F.3d 303, 309 (5th Cir. 2008); *Moore v. Johnson*, 194 F.3d 586, 591 (5th Cir. 1999).

[255] *Harrington*, 562 U.S. at 105.

perspective at the time of trial.[256] Tactical decisions, when supported by the circumstances, are objectively reasonable and do not amount to unconstitutionally deficient performance.[257]

1. Failure to File a Motion to Quash

Baham claims his counsel failed to file a motion to quash the bill of information charging him with second degree murder. He claims he was required to be charged by a bill of indictment issued by a grand jury.[258]

Louisiana law provides that prosecutions for offenses that are punishable by life imprisonment, such as second degree murder, or death, shall be instituted by indictment by a grand jury.[259] The record reflects that Baham was in fact charged by a bill of indictment.[260] Thus, there was no need for counsel to file a motion to quash, and a motion to quash would have been meritless. Counsel does not act deficiently when he fails to file a meritless motion.[261] Baham is not entitled to relief as to this claim.

2. Pelfrey's Testimony

Baham claims his trial counsel admitted Baham's guilt through the stipulations relating to Pelfrey. He claims his counsel should have required the prosecution to "authenticate" Pelfrey's testimony.[262]

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[256] *Strickland*, 466 U.S. at 689; *Neal*, 286 F.3d at 236-37; *Clark v. Johnson*, 227 F.3d 273, 282-83 (5th Cir. 2000), *cert. denied*, 531 U.S. 1167 (2001).

[257] *Lamb v. Johnson*, 179 F.3d 352, 358 (5th Cir. 1999), *cert. denied*, 528 U.S. 1013 (1999) (citing *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997); *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir. 1994)).

[258] St. R. Vol. 1 of 6, 2/18/16 Memorandum of Law in Support of Application for Post-Conviction Relief, at 28-29.

[259] La. Code Crim. Proc. art. 382(A).

[260] St. R. Vol. 3 of 6, 1/17/11 Bill of Indictment.

[261] *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002) (concluding that counsel is not required to make futile motions or frivolous objections); *Smith v. Puckett*, 907 F.2d 581, 585 n.6 (5th Cir. 1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990) ("[C]ounsel is not required to make futile motions or objections.").

[262] St. R. Vol. 1 of 6, 2/18/16 Memorandum of Law in Support of Application for Post-Conviction Relief,

Gregory Pelfrey testified that he had a court date on November 4, 2011, in Section L.[263] He sat in a cell with other defendants who were waiting for their cases to be called.[264] Pelfrey identified Baham as one of the defendants in the cell with him.[265] Pelfrey testified that other defendants began questioning Baham about his case and that Baham stated that he was charged with murder but that the prosecution had no evidence.[266] Pelfrey recalled that Baham openly admitted that he had committed the murder and said the gun had been thrown in the river.[267] According to Pelfry, Baham said that one of the key witnesses was an acquaintance from the neighborhood and that he was not going to show up to court.[268] Baham said that the witness was around the corner and could not have seen him kill the victim.[269] He advised that his attorney's name was John Fuller and that his court date was re-set for December 15, 2011.[270] Baham advised that he was housed in A-1 in Orleans Parish prison and had been in jail for nine months.[271] When Pelfrey went back to his cell, he handwrote a grievance form and gave it to a guard a few days later.[272] Pelfrey identified a typed version by the Sheriff's Department of his statement and testified that it was memorialized word for word.[273] Defense counsel did not object to the admission of the typed statement.[274] Pelfrey stated that had never spoken to law enforcement about Baham and that he left Orleans Parish for Kansas on January 12, 2012.[275] Pelfrey testified that he

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at 29.
[263] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 237.
[264] *Id.* at 237-38.
[265] *Id.* at 238-39, 247.
[266] *Id.* at 239-40, 251.
[267] *Id.* at 240, 241, 251, 253, 255.
[268] *Id.* at 240.
[269] *Id.* at 241, 254-55.
[270] *Id.* at 241-42, 247, 256.
[271] *Id.* at 243-44, 246.
[272] *Id.* at 243.
[273] *Id.* at 245-46.
[274] *Id.* at 245.
[275] *Id.* at 246.

had already been sentenced on his case and that no one offered him anything in exchange for his testimony.[276] He stated that he had learned a few days before Baham's trial that he was subpoenaed to testify.[277] Pelfrey admitted he had never met Baham before November 4, 2011.[278] On cross-examination, Pelfrey testified that he saw Baham hand defense counsel a piece of paper that Baham had drawn or written about the witness' line of sight.[279]

After Pelfrey finished testifying, the parties stipulated that on November 4, 2011, both Pelfrey and Baham were in Section L for hearings on motions.[280] They further stipulated that Baham was on the Section L docket for December 15, 2011.[281] Finally, they stipulated that Baham was housed in Orleans Parish Prison A-1.[282]

Where a stipulation is a concession of facts which the State could have easily established at trial and no advantage would have inured to a petitioner had counsel refused to enter the stipulation, counsel is not ineffective when he enters into such a stipulation.[283] Here, the prosecution could have easily established that both Pelfrey and Baham were on the docket for November 4, 2011, and that Baham, was on the docket for December 15, 2011. In fact, the Docket Master and the minutes included in the record indicates that Baham was set for hearing on both days and that his November 4, 2011 hearing was continued on that date until December 15, 2011.[284] The State could have presented similar evidence that Pelfrey was on the docket for

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[276] *Id.* at 245.
[277] *Id.*
[278] *Id.* at 246, 252.
[279] *Id.* at 254-55, 265.
[280] *Id.* at 266.
[281] *Id.* at 266-67.
[282] *Id.* at 267.
[283] *See Berry v. King*, 765 F.2d 451, 454–55 (5th Cir. 1985); *McGee v. Cain*, Civ. No. 06–11360, 2007 WL 4591227, at *12 (E.D. La. Dec. 26, 2007); *Parker v. 24th Judicial District Court*, Civ. No. 06–10551, 2007 WL 2893852, at *6 (E.D. La. Sept. 27, 2007).
[284] St. R. Vol. 1 of 6, 7/28/17 Docket Master at 1; *id.*, 11/4/11 Mins. (one page); *id.*, 12/15/11 Mins. (one page).

"'A defendant 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.'"[288] A petitioner cannot show prejudice as to a claim that his counsel failed to investigate without adducing what the investigation would have shown.[289] To prevail on such a claim, petitioner must provide factual support showing what exculpatory evidence further investigation would have revealed.[290]

As an initial matter, Baham's claim that his counsel failed to request discovery is patently false. The record reveals that defense counsel filed a motion for bill of particulars, discovery and inspection, and a motion to compel.[291] The State responded to the request for discovery and an inventory of discovery was provided to defense counsel, with both documents signed by the prosecutor and defense counsel.[292]

Baham also failed to establish that counsel's investigation was inadequate in any respect. In fact, he presented no evidence whatsoever as to what investigative steps counsel actually took.[293] Without such evidence, he cannot show that counsel performed deficiently. While Baham claims that defense counsel failed to seek funds to have his clothing tested for gunshot residue or DNA, as the state trial court explained, Baham fled to Houston after the murder and was missing for days during which time any clothing could have been cleaned or replaced by the time it was

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[288] *Moawad v. Anderson*, 143 F.3d 942, 948 (5th Cir. 1998) (emphasis added, citation omitted); *accord Druery v. Thaler*, 647 F.3d 535, 541 (5th Cir. 2011).

[289] *Diaz v. Quarterman*, 239 F. App'x 886, 890 (5th Cir. 2007) (citing *Strickland*, 466 U.S. at 696, recognizing that some evidence is required to show that "the decision reached would reasonably likely have been different.").

[290] *Moawad*, 143 F.3d at 948; *Brown v. Dretke*, 419 F.3d 365, 375 (5th Cir. 2005); *Davis v. Cain*, 2008 WL 5191912, at *10 (E.D. La. Dec. 11, 2008) (Order adopting report and recommendation).

[291] St. R. Vol. 1 of 6, Motion for Bill of Particulars (undated); *id.*, 7/9/12 Motion to Compel Evidence.

[292] St. R. Vol. 1 of 6, 7/10/12 State's Response to Defense Motion for Discovery; *id.*, 7/15/11 Inventory of Discovery.

[293] *Netter v. Cain*, 2016 WL 7157028, at *11 (E.D. La. Oct. 6, 2016), *R&R adopted*, 2016 WL 7116070 (E.D. La. Dec. 7, 2016).

collected. Baham provided no evidence that the clothes Baham was wearing the night of the murder were actually seized, that the clothing in custody was the same clothing that he was wearing at the time of the crime, or that the clothing worn on the night of the crime had not been laundered. In short, Baham has not shown that any beneficial information would have been revealed by such testing. Rather, his assertions are entirely speculative. Such bare speculation is not sufficient to meet his burden of proof.[294]

Further, it is well settled that " '[c]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative.'"[295] To prevail on such a claim, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense.[296] These requirements apply to both expert and lay witnesses.[297] "[T]he seemingly technical requirements of affirmatively showing availability and willingness to testify '[are] not a matter of formalism.'"[298]

Baham offers only self-serving, speculative and conclusory allegations that an expert in DNA and/or gunshot residue would have in fact testified and would have done so in a manner consistent with Baham's version of the facts. Therefore, he has failed to meet his burden of proof with respect to this claim.[299]

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[294] *See Thomas v. Cain*, Civ. No. 09-4425, 2009 WL 4799203, at *9 (E.D. La. Dec. 9, 2009).
[295] *Graves v. Cockrell*, 351 F.3d 143, 156 (5th Cir.2003) (quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir.1978)); *Bray v. Quarterman*, 265 F. App'x 296, 298 (5th Cir.2008).
[296] *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir.2009) (citing *Bray*, 265 F. App'x at 298).
[297] *Woodfox v. Cain*, 609 F.3d 744, 808 (5th Cir. 2010).
[298] *Hooks v. Thaler*, 394 F. App'x 79, 83 (5th Cir. 2010) (quoting *Woodfox*, 609 F.3d at 808).
[299] *See, e.g., United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983) (courts view "with great caution claims of ineffective assistance of counsel when the only evidence of a missing witness's testimony is from the defendant"); *Buniff v. Cain*, Civ. No. 07-1779, 2011 WL 2669277, at *3 (E.D. La. July 7, 2011); *Anthony v. Cain*, Civ. No. 073223, 2009 WL 3564827, at *8 (E.D. La. Oct. 29, 2009) ("This Court may not speculate

Finally, Baham claims his counsel failed to formulate a defense of actual innocence. To prevail on a claim that counsel was ineffective for failing to pursue a certain defense, a petitioner must show that the defense in question was in fact a viable one.[300]

In this case, counsel actually presented the defense that Baham urges (i.e., that he was innocent and that it was a case of misidentification). During trial, defense counsel both attacked the credibility of the State's witnesses and presented defense witnesses. There is no evidence that any other witnesses were available to testify and that they would have done so in a manner beneficial to the defense. Defense counsel therefore cannot be deemed ineffective for attempting to prevent the State's from proving its case beyond a reasonable doubt through effective defense cross-examination of the State's witnesses and the presentation of defense witnesses. The fact that the defense was not successful, i.e., that Baham was convicted as charged, does not mean that counsel's actions leading to the conviction were deficient.[301] "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."[302]

Baham has failed to establish any deficiency or prejudice arising from his counsel's alleged failure to request discovery, investigate, request funds for gunshot residue and DNA testing, and

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as to how such witnesses would have testified; rather, a petitioner must come forward with evidence, such as affidavits from the uncalled witnesses, on that issue."); *Combs v. United States*, Nos. 3:08-CV-0032-n, 3:03-CR-0188-N(09), 2009 WL 2151844, at *10 (N.D. Tex. July 10, 2009) ("Unless the movant provides the court with affidavits, or similar matter, from the alleged favorable witnesses suggesting what they would have testified to, claims of ineffective assistance of counsel fail for lack of prejudice."); *Harris v. Director*, Civ. No. 6:06cv490, 2009 WL 1421171, at *7 (E.D. Tex. May 20, 2009) ("Failure to produce an affidavit (or similar evidentiary support) from the uncalled witness is fatal to the claim of ineffective assistance.").

[300] *See, e.g., Otero v. Louisiana*, Civ. No. 12-1332, 2013 WL 6072716, at *14-15 (E.D. La. Nov. 18, 2013); *Higgins v. Cain*, Civ. No. 09-2632, 2010 WL 890998, at *9 n. 24 (E.D. La. Mar. 8, 2010), *aff'd*, 434 F. App'x 405 (5th Cir. 2011).

[301] *See Martinez v. Dretke*, 99 F. App'x 538, 543 (5th Cir. 2004) ("Again, an unsuccessful strategy does not necessarily indicate constitutionally deficient counsel.").

[302] *Strickland*, 466 U.S. at 689 (citations omitted).

to formulate a defense. The denial of relief on these issues was not contrary to or an unreasonable application of *Strickland.*

E. **Claim Five: Prosecutorial Misconduct – Personal Attacks on Defense Counsel**[303]

In his next claim, Baham claims that the prosecution made numerous personal attacks on defense counsel during his questioning of Mitchell Marks. He specifically claims that the prosecutor repeatedly asked whether defense counsel had told Marks not to come to trial to testify. Baham concludes that the State's case was weak and that the prosecution's remarks, which implied that Baham communicated to Marks defense counsel's desire that he not testify at trial caused the jury to find him guilty.

The State responds that the comments were isolated and that the trial court instructed the jury to disregard them. The State continues that the case against Baham was strong and that the Louisiana Fourth Circuit did not misapply the law in denying the claim on direct appeal. It further contends that Baham has not established that the Fourth Circuit's ruling that the prosecutor's comments did not contribute to the verdict is unreasonable.

Baham raised this issue on direct appeal. The Louisiana Fourth Circuit, in denying relief, explained as follows:

> In the first assignment of error, defendant contends that his right to a fair trial was violated when the prosecutor, Mr. Napoli, made numerous personal attacks on defense counsel, Mr. Fuller, during the testimony of Mitchell Marks, a state witness.
>
> At trial, Marks recanted his prior recorded statement to Detective Darling, claiming he was coerced with the threat of a murder charge. He denied returning to the bar with defendant or having any knowledge of events related to the shooting. In an attempt to refresh Marks' memory, the following dialogue occurred among the prosecutor, the defense attorney and the trial court:

[303] Baham refers to this claim as "ISSUE NO. 1" in his habeas petition. ECF No. 1-2, p. 28.

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.

Later during the questioning of Mr. Marks, 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!
MS. BERTHELOT: Excuse me!
THE COURT: Stop it! Stop it!
MR. FULLER: They specifically said that I said and that is clearly not the case.
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 conversation 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 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 instructed him to 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.

On cross examination by defense counsel, Marks explained that he was served a subpoena while in court on a probation violation hearing. He identified Ms. Berthelot, one of the prosecutors, as the person who handed him the subpoena. During closing arguments, Ms. Berthelot stated:

> I came into court and I gave him [Marks] a subpoena.... Come to court and tell us what you know. But you hear when he goes downstairs and he says I talked to Will. I asked Will was it your attorney or was it the State because I [Berthelot] actually didn't talk to him.... So he asks Will. Will, your attorney wants to subpoena me? Hell, no. My attorney doesn't want to hear anything you have to say. He told me to tell you don't fuck with that. Don't go.

As the record reflects, defense counsel repeatedly objected to the prosecutor's comments and questions. The trial court sustained the defense's objections and gave a cautionary instruction to the jury. Defendant asserts the admonitions were inadequate given that the prosecutor deliberately gave the false impression that defense counsel had communicated to Marks, through defendant, that he should not testify for the state. Regardless of the motive, defendant argues, the prosecutor's comments and questioning undermined the defense and damaged defense counsel's credibility, causing the jury to reject his arguments.

In *State v. Brumfield*, 96–2667 (La.10/20/98), 737 So.2d 660, the prosecutor argued during closing argument that " 'during the course of this trial those very police officers who go about and try to protect us every day have been assailed [on cross-examination by defense counsel], have been defamed through the allegations of this defendant when he is the person who is on trial.'" *Id.* at p. 9, 737 So.2d at 666. The Louisiana Supreme Court found that the prosecutor's argument was not improper, finding that although the State should refrain from making personal attacks on defense strategy and counsel, "the prosecutor's statement about defense counsel's cross-examination of police officers was a fair comment pointing out the frequently used strategy of attempting to shift the focus from the accused to the accuser." *Id.*

In *State v. Tassin*, 11–1144 (La. App. 5 Cir. 12/19/13),129 So.3d 1235, the court stated:

> The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Consequently, the aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982); *State v. Ortiz*, 11–2799 (La.1/29/13), 110 So.3d 1029, 1034, *cert. denied*, —— U.S. ——, 134 S.Ct. 174, 187 L.Ed.2d 42 (2013). While a prosecutor should prosecute with "earnestness and vigor" and "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).

Tassin, 11–1144, pp. 19–20, 129 So. 3d at 1249.

In *Tassin*, defendant argued that his rights to counsel, due process, and a fair trial were violated when the prosecutor attacked defense counsel's integrity and denigrated the defense throughout trial. The defendant argued that the trial court erred by overruling the defense objections, refusing to give a remedial instruction, and denying requests for a mistrial. The appellate court noted that the prosecutor's conduct during the trial went beyond the bounds of "earnestness and vigor," and that the prosecutor, at times, clearly made inappropriate and unprofessional comments. However, the court found that the comments and unprofessional conduct of the prosecutor did not affect the fairness of defendant's trial and therefore did not require the reversal of defendant's conviction. *Id.* The court reached this conclusion, citing *United States v. Jones*, 839 F.2d 1041, 1049–50 (5th Cir.1988), a case in which the prosecutor had accused defense counsel of suborning perjury. In considering whether this amounted to reversible error, the *Jones* court considered three factors: the magnitude of the prejudicial effect of the statement, the efficacy of any cautionary instructions, and the strength of the evidence of the defendant's guilt. The *Jones* court determined that the prosecutor's comment, " 'while it no doubt impugned the integrity of [defense counsel], had little chance of

affecting the determination of guilt.'" *Tassin*, 11–1144, p. 22, 129 So.3d at 1250–1251.

In *United States v. Murrah*, 888 F.2d 24 (5th Cir.1989), a case cited by defendant, the United States Fifth Circuit Court of Appeal considered serious complaints of prosecutorial misconduct focusing on comments made by the prosecutor in opening statements and closing argument. "The comments involved two discrete matters: evidence which was discussed but not produced, and charges the defendant and/or his counsel hid a witness." *Id.* at 25. The Court stated that the trial court in response to the prosecutor's improper remarks "opted to rectify this improper comment by merely reminding the jury to 'recall what the evidence was in the case.'... In such a setting the court should have provided more effective instructions to offset the prosecutor's comments...." *Id.* at 26. The Court proceeded to apply the three factors analysis performed by the courts in *Jones* and *Tassin*: "the magnitude of the prejudicial effect, the efficacy of the cautionary instructions, and the strength of the evidence of defendant's guilt." *Id.* at 28. The Court found that due to the circumstantial nature of the case and the pervasiveness of the improper conduct by the prosecutor, the trial court's instructions did not neutralize the damaging effect of the remarks. *Id.* at 26. The Court found the remarks tainted the trial, reversed the conviction, and remanded the case. *Id.* at 28.

The *Murrah* case is distinguishable from the present case because the complained of conduct was pervasive throughout the trial. Here, the objectionable remarks by the prosecutor occurred during Marks' testimony and his attempt to recant his earlier statement. The trial court sustained all of the defense counsel's objections and instructed the jury that defendant's counsel did nothing wrong. In addition, contrary to defendant's assertions, the state presented substantial evidence at trial from which the jury could have found the defendant guilty. Detective Hurst testified that the videos from both the bar and a neighbor down the street captured the murder and defendant fleeing the scene. Lawrence identified the victim and defendant in the bar video and related it to his personal observation from that night. Furthermore, defendant has failed to show how he was prejudiced by the statements of the prosecutor. Thus, the verdict was not attributable to the prosecutor's statements. This assignment of error is meritless.[304]

The Louisiana Supreme Court denied relief without stated reasons.[305]

To establish a due process violation arising from the actions of the prosecutor, be it improper animosity or other misconduct, the habeas petitioner must demonstrate that his trial was

[304] *Baham*, 151 So. 3d at 701-704; St. R. Vol. 1 of 6, Louisiana Fourth Circuit Court of Appeal Opinion, 2013-KA-0058, at 4-10, October 1, 2014.
[305] *Baham*, 170 So. 3d at 613; St. R. Vol. 6 of 6, La. Sup. Ct. Order, 2014-KO-2176, 9/18/15.

rendered fundamentally unfair by the prosecutor's specific actions.[306] The Supreme Court has recognized this as a "highly generalized" standard that requires proof of prejudice to the defense during trial.[307] Even in the case of the most "egregious prosecutorial misconduct," the petitioner is entitled to relief only "upon a showing of actual prejudice to the accused."[308]

Federal courts apply "a two-step analysis to charges of prosecutorial misconduct."[309] A court first decides whether the prosecutor's actions were improper and, if so, the court then determines whether the actions "prejudiced the defendant's substantive rights."[310] Prosecutorial misconduct violates the Constitution only when the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[311] "[T]he *Darden* standard is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations.'"[312]

For purposes of federal habeas review, a claim of prosecutorial misconduct presents a mixed question of law and fact.[313] The Court must determine whether the denial of relief was contrary to or an unreasonable application of Supreme Court law.

The first inquiry is whether the prosecutor asked improper questions or made an improper remark. In this case, the prosecution questioned Marks about whether defense counsel had

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[306] *See Darden v. Wainwright*, 477 U.S. 168 (1986).

[307] *Parker v. Matthews*, 567 U.S. 37, 45 (2012) (the *Darden* standard for evaluating claims of prosecutorial misconduct is "highly generalized"); *see Gallego v. McDaniel*, 124 F.3d 1065, 1079 (9th Cir. 1997), *cert. denied*, 524 U.S. 917 (1998) (petitioner failed to show prejudice in his trial based on prosecution teams post-trial book contract entered into after trial); *Jones v. Hedgpeth*, No. 07-3906, 2011 WL 5221878, at *20 (C.D. Cal. Mar. 18, 2011), *report adopted*, 2011 WL 5323514, at *1 (C.D. Cal. Nov. 2, 2011) (petitioner failed to show that the fairness of his trial was affected by an alleged relationship between the prosecutor and his ex-mother in law or by his lawsuit against the county sheriff's office).

[308] *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

[309] *United States v. Duffaut*, 314 F.3d 203, 210 (5th Cir. 2002).

[310] *Id.*

[311] *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

[312] *Parker*, 567 U.S. at 48 (quoting *Yarborough*, 541 U.S. at 664).

[313] *Brazley v. Cain*, 35 F. App'x 390, 2002 WL 760471, at *4 n. 4 (5th Cir. Apr. 16, 2002).

encouraged him not to appear at trial.[314] The State played the audio of a jail telephone call between Marks and his girlfriend during which Marks apparently told her defense counsel told him to not come to court.[315] The trial court sustained defense counsel's objection.[316] The trial court also sustained the objection to Marks' statement on the telephone that Baham told him defense counsel did not want Marks to come to court.[317] The trial court explained that there was no foundation for a conversation between Baham and his attorney and that defense counsel was not bound by anything Baham told someone else that his attorney allegedly said.[318] The trial court further instructed the jury that they were not to consider any alleged wrongdoing by defense counsel.[319]

On cross-examination, Marks confirmed that Baham's counsel never came to see him at that jail, and that the cross-examination at trial was the first time they had ever spoken.[320] He further confirmed that the prosecution had presented him with a subpoena to testify at trial when he was in a courtroom for violation of probation proceedings.[321]

While the prosecution's questions and remarks relating to defense counsel's alleged desire that Marks not appear at trial were improper, Baham has not shown that the prosecution's misconduct "so infected the trial with unfairness that it denied the defendant due process."[322] The questions and comments were not persistent nor pronounced. Rather, they occurred during the questioning of one witness out of seventeen State witnesses and those questions were struck. Not only did the trial court strike them, but it admonished the jury, explaining that defense counsel was

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[314] St. R. Vol. 2 of 6, 7/16-18/12 Trial Tr. at 195.
[315] *Id.* at 200-03.
[316] *Id.* at 203.
[317] Id.
[318] *Id.* at 203-04.
[319] *Id.* at 205.
[320] *Id.* at. 215.
[321] *Id.* at 200.
[322] *Darden*, 477 U.S. at 181.

not bound by anything that Baham told someone defense counsel said outside of defense counsel's presence and that they should "put it out of [their] head[s] that there was any wrongdoing by Mr. Fuller."[323] Absent extraordinary circumstances, jurors are presumed to follow the instructions given them by the court.[324]

When viewed as a whole, the record contains ample evidence apart from the prosecutor's remarks upon which the jury justifiably concluded that Baham was guilty of second degree murder. In the overall context of the trial, it cannot be concluded that Baham's conviction would not have resulted but for the prosecutor's questions and comments during the examination of Marks.

The denial of relief by the state courts on this issue was not contrary to, or an unreasonable application of, Supreme Court precedent. Baham is not entitled to federal habeas corpus relief on this claim.

F. Claim Six: Marks' Transcript[325]

Baham claims that the trial court denied him due process when it allowed the jury to have a transcript of Marks' statement to police in the jury room during deliberations. Baham cites LA. CODE CRIM. PROC. art. 793[326] along with various Louisiana cases.[327] The State responds that Baham's state law arguments are not cognizable, and alternatively argues that Baham failed to cite

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[323] St. R. Vol. 2 of 6, 7/16/18/12 Trial Tr. at 204-05.

[324] *See Greer v. Miller*, 483 U.S. at 766 n.8.

[325] Baham identifies this issue as DIRECT APPEAL "ISSUE NO:2." ECF No.1-2, at 8.

[326] LA. CODE CRIM. PROC. art. 793(A) provides:

> 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.

[327] ECF No.1-2, at 38-40.

any federal law that is contrary to the Louisiana Fourth Circuit's decision that allowing the statement in the jury room was harmless error.[328]

Baham raised this same issue on direct appeal. The Louisiana Fourth Circuit, in rejecting the claim, explained as follows:

> In the second assignment of error, defendant contends the trial court violated his right to a fair trial by allowing the jury to take the transcript of a witness's statement into the jury room during deliberations.
>
> During deliberations, the jury sent a note to the trial court requesting to see the statement of Mitchell Marks. The trial court agreed to send the transcript of the statement to the jury. Defendant objected. The trial court reasoned that under La.C.Cr.P. art. 793(A) it would have been permissible to replay the audio of Marks's statement to the jury during deliberation, but that it was easier to allow them to read the statement rather than deal with the technical difficulties of the recorder.
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> Article 793(A) of the Louisiana Code of Criminal Procedure provides:
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> > 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.
>
> The Louisiana Supreme Court has held that it is permissible for the jury to view videotapes properly admitted into evidence during deliberation. *State v. Brooks*, 2001–0785, p. 5 (La. 1/14/03), 838 So.2d 725, 729. The Court reasoned that videotapes of crimes as they happen are neither testimony nor written evidence. Id. at p. 3, 838 So.2d at 727. However, as this Court stated in *State v. Johnson*, 97–1519 (La.App. 4 Cir. 1/27/99) 726 So.2d 1126:
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> > Louisiana courts have reversed many convictions where the jury viewed a defendant's confession or written statement or reexamined verbal testimony during deliberations. *State v. Adams*, 550 So.2d 595 (La.1989) (jury reviewed defendant's confession to police); *State v. Perkins*, *supra* [423 So.2d 1103 (La.1982)] (conviction for first degree murder reversed based on a *Brady* violation and because

[328] ECF No. 21, at 34-5.

during deliberations the jury examined the defendant's written statement); *State v. Buras*, 459 So.2d 756 (La. App. 4th Cir.1984) (aggravated kidnapping reversed because during deliberations the jury was given a transcript of recorded telephone calls between the kidnappers and the victim's family); *State v. Gracia*, 527 So.2d 488 (La. App. 5th Cir.1988) (jury reviewed the defendant's written statements). Gracia noted that prejudice was presumed, quoting *State v. Freetime*, 303 So.2d at 489.

Johnson, 97–1519, p. 13, 726 So.2d at 1133.

The evidence provided to the jury in *Johnson* consisted of medical records with written notations. This Court concluded that the trial court erred by allowing the jury access to the written evidence during deliberation. In light of the cases cited above and this Court's ruling in *Johnson*, we find that the trial court erred in allowing the jury to review the transcribed statement of Marks.

However, as this Court stated in *Johnson*, citing *State v. [Saul] Johnson*, 541 So.2d 818 (La.1989), such errors may not necessitate reversal. This Court stated:

> Under La.C.Cr.P. art. 921, an appellate court shall not reverse a judgment because of any error "which does not affect substantial rights of the accused." Whether substantial rights of the accused were violated is determined under federal harmless error standards, i.e., whether the guilty verdict in this trial was surely unattributable to the error. *State v. [Silas] Johnson*, 94–1379, p. 14 (La.11/27/95), 664 So.2d 94, 100, citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). *[Silas] Johnson* distinguished between "trial errors," which may be reviewed for harmless error, and "structural errors," which defy analysis under the harmless error doctrine. *Johnson* at p. 14, 664 So.2d at 100, citing *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).
>
> The Court [in *Silas Johnson*] stated that trial error is error which occurs during presentation of the case to the trier of fact and may be quantitatively assessed in the context of the other evidence. The Court further explained:
>
> > A structural error is one which affects the framework within which the trial proceeds.... Structural defects include the complete denial of counsel ...; adjudication by a biased judge....; exclusion of members of defendant's race from a grand jury ...; the right to self-representation at trial ...; the right to a public trial ...; and the right to a jury

court in a habeas corpus proceeding to review errors under state law."[332] As a result, Baham is not entitled to habeas relief even if the state trial court violated LA. CODE CRIM. PROC. art. 793.[333]

This court's analysis must instead focus on due process considerations, which requires that the court grant habeas relief only when the errors of the state court make the underlying proceeding fundamentally unfair.[334] The Due Process Clause guarantees an accused the right to an impartial jury that will determine guilt based on the evidence and the law as instructed, rather than on preconceived notions or extraneous information.[335] Baham fails to show that the Marks transcript, which was admitted into evidence, was extraneous information. Furthermore, Baham cited no federal law in support of his argument that allowing the jury to use an admitted transcription of a witness' statement during deliberations violates the right to due process. Absent Supreme Court precedent to control a legal issue raised by a habeas petitioner, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, rendering federal

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[332] *Wilkerson v. Whitley*, 16 F.3d 64, 67 (5th Cir.1994) (quotation omitted);.

[333] *McKinney v. Warden, Louisiana State Penitentiary*, No. 08–CV–1263, 2012 WL 1424506, at *8 (W.D.La. Mar. 14, 2012) ("The habeas statute allows a federal court to issue a writ of habeas corpus to a state prisoner only on the ground that he is in custody and in violation of the Constitution or laws or treaties of the United States. The Supreme Court has stated many times that federal habeas corpus relief does not lie for errors of state law. Accordingly, any violation of La. C. Cr. P. art. 793 is not a basis for relief." (citation and quotation marks omitted)), *Order adopting report and recommendation*, 2012 WL 1429385 (W.D.La. Apr. 23, 2012)

[334] *Neyland v. Blackburn*, 785 F.2d 1283, 1293 (5th Cir. 1986).

[335] *Morgan v. Illinois*, 504 U.S. 719, 726-27, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992); *Patton v. Yount*, 467 U.S. 1025, 1037 n.12, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984).

habeas relief unwarranted.[336] Indeed, several courts have rejected claims similar to that raised by Baham in this petition on that basis.[337]

Accordingly, the denial of relief on this issue by the state courts was not contrary to, or an unreasonable application of, Supreme Court law. Baham is not entitled to federal habeas corpus relief as to this issue.

RECOMMENDATION

For the foregoing reasons, it is **RECOMMENDED** that Baham's petition for issuance of a writ of habeas corpus under 28 U.S.C. § 2254 be **DENIED** and **DISMISSED WITH PREJUDICE.**

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within fourteen (14) days

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[336] *See Woods v. Donald*, 575 U.S. 312, 135 S. Ct. 1372, 1376, 191 L. Ed. 2d 464 (2015) ("Because none of our cases confront 'the specific question presented by this case,' the state court's decision could not be "contrary to" any holding from this Court.") (citing *Lopez v. Smith*, 574 U.S. 1, 135 S. Ct. 1, 4, 190 L. Ed. 2d 1 (2014) (per curiam)); *Wright v. Van Patten*, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (quotation omitted) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law."); *Pierre v. Vannoy*, 891 F.3d 224, 228 (5th Cir. 2018) ("Without a Supreme Court case holding that the State's unknowing use of false testimony violates the Due Process Clause, Pierre cannot show that the Louisiana Supreme Court unreasonably applied clearly established federal law as determined by the Supreme Court of the United States."); *Higginbotham v. Louisiana*, 817 F.3d 217 (5th Cir. 2016) (No violation of clearly established law where "the Supreme Court does not appear to have addressed this issue or a 'materially indistinguishable' set of facts"), *cert. denied*, —— U.S. ——, 137 S. Ct. 506, 196 L. Ed. 2d 415 (2016); *Gomez v. Thaler*, 526 F. App'x 355, 359-60 (5th Cir. 2013) (citing *Van Patten*, 552 U.S. at 126, 128 S. Ct. 743) (When no Supreme Court precedent directly addressed the presented issue, it could not be said that the state court unreasonably applied clearly established federal law.).

[337] *Sharp v. Warden, Louisiana State Penitentiary*, Civ. No. 08-0989-P, 2011 WL 4551166, at *11 (W.D. La. Sept. 6, 2011) (rejecting petitioner's claim that the trial court's violation of Article 793 deprived him of due process where petitioner failed to cite to "any clearly established Supreme Court precedent that bars jurors in criminal trials from viewing written evidence, as Section 2254(d) requires for relief on such a claim."), *Order adopting report and recommendation*, 2011 WL 4550938 (W.D. La. Sept. 29, 2011); *Gray v. Tice*, Civ. No. 17-71 Erie, 2019 WL 824045, at *18 (W.D. Pa. Feb. 21, 2019) (petitioner failed to show that trial court's decision to permit jury, during its deliberation, to review three threatening letters petitioner sent to victims did not violate his right to due process where he failed to show the state court's determination was contrary to or an unreasonable application of due process precedent).