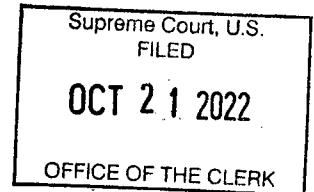


No.: 22-5908

In The
Supreme Court of the United States
Term, _____

GILES MCGHEE v. TIM HOOPER, Warden



On Petition for a Writ of Certiorari to
U. S. FIFTH CIRCUIT COURT OF APPEALS

Giles McGhee #129433
MPEY/Cypress-3
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

October 19, 2022

PREPARED BY

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Angola, LA 70712

QUESTION PRESENTED

1. Reasonable jurists would determine that Mr. McGhee was denied his right to Due Process of Law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution where the State failed to meet its burden of proof beyond a reasonable doubt that Mr. McGhee was guilty of two Counts of First Degree Murder. Jackson v. Virginia; In re: Winship; Fifth, Sixth and Fourteenth Amendments to the United States Constitution.;
2. Reasonable jurists would determine that Mr. McGhee was denied his right to Due Process of Law under the Sixth and Fourteenth Amendments to the United States Constitution where he was denied effective assistance of trial counsel.

LIST OF PARTIES

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

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

District Attorney's Office
21st Judicial District Court
P.O. Box 639
Amite, LA 70422-0639

Attorney General's Office
P.O. Box 94005
Baton Rouge, LA 70805

Tim Hooper, Warden
Louisiana State Penitentiary
General Delivery
Angola, LA 70712

RELATED PROCEEDINGS

On May 2011, Giles McGhee was indicted by the Tangipahoa Parish Grand Jury on two counts of First Degree Murder, in violation of LSA-R.S. 14:30 (Vol. 1, p. 11). On May 16, 2012, the State notified the trial court and Mr. McGhee that it would not seek the death penalty (Vol. 1, p. 14).

A four day jury concluded on February 6, 2014 (Vol. 1, pp. 4-9). By a vote of 11-1, the jury found Mr. McGhee guilty as charged (Vol. pp. 8-9).

On March 12, 2014, the trial court sentenced Mr. McGhee to life in prison on each of the Counts, to be served consecutively, without the benefit of Probation, Parole, or Suspension of Sentence (Vol. 1, p.9).

On October 16, 2014, Mr. McGhee timely filed the Original Brief on Appeal. On March 6, 2015, the Louisiana First Circuit Court of Appeals affirmed Mr. McGhee's conviction and sentence. On April 2, 2015, Mr. McGhee, filed Writs to the Louisiana Supreme Court, which were denied on May 2, 2016.

On January 30, 2017, Mr. McGhee timely filed his Application for Post-Conviction Relief. On January 30, 2019, the district court denied Mr. McGhee. Mr. McGhee timely filed his Supervisory Writ to the Louisiana First Circuit Court of Appeal.

Mr. McGhee timely filed his Application for Writ of Review to the Louisiana Supreme Court, which was denied on Docket No.: 2019-01712 on July 24, 2020.

On September 1, 2020, Mr. McGhee filed his Petition for Writ of Habeas Corpus. Report and Recommendation was made by U.S. Magistrate Judge Douglas on March 9, 2021, which Mr. McGhee had filed Objections to on March 22, 2021. On June 10, 2021, the Magistrate filed a Second Recommendation. Mr. McGhee filed his objections. The District Court denied the Habeas Application July 7, 2021with prejudice. On July 12, 2021, Mr. McGhee timely filed his Notice of Intent to Appeal and Certificate of Appealability with the Louisiana Eastern District Federal Court.

On November 8, 2021 Mr. McGhee filed for Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal, which was denied on August 25, 2022.

TABLE OF CONTENTS:

	Page
QUESTIONS PRESENTED	
LIST OF PARTIES	
RELATED PROCEEDINGS	
INDEX OF AUTHORITIES.....	ii
OPINIONS.....	1
JURISDICTION.....	2
Petition for Writ of Certiorari.....	1
NOTICE OF PRO-SE FILING.....	1
OPINIONS.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE FACTS.....	2
REASONS FOR GRANTING THE WRIT.....	6
LEGAL ARGUMENT.....	7
LAW AND ARGUMENT.....	7
V. Argument(s).....	7
ISSUE NO. 1.....	7
Reasonable jurists would determine that the State failed to meet its burden of proof beyond a reasonable doubt that Mr. McGhee was guilty of two Counts of First Degree Murder. <i>Jackson v. Virginia; In re: Winship</i> ; Fifth, Sixth and Fourteenth Amendments to the United States Constitution.....	7
ISSUE NO. 2.....	13
Reasonable jurists would determine that Mr. McGhee was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. <i>Strickland v. Washington</i>	13
Failure to Request a Voice Recognition test.....	16
Failure to have the 911 recording analyzed for background noise.....	18
Failure to Investigate.....	18
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	20
PROOF OF SERVICE.....	21

APPENDIX:

Original Petition for Writ of Habeas Corpus	“A”
Magistrate's Report and Recommendation	“B”
Objection to Magistrate's Report and Recommendation	“C”
District Court Ruling	“D”
Application for Certificate of Appealability	“E”
Court of Appeal Ruling	“F”

INDEX OF AUTHORITIES:

Page

U.S. CONSTITUTION:

Fifth, Sixth and Fourteenth Amendments to the United States Constitution.....	1, 2, 7
Fourteenth Amendment to the United States Constitution.....	1, 7, 8, 10
Sixth Amendment to the United States Constitution.....	13, 14
Sixth and Fourteenth Amendments to the United States Constitution.....	1, 2, 7

FEDERAL CASES:

Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942).....	13
Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981).....	14
Deutscher v. Whitley, 884 F.2d 1152, 1162 (9th Cir. 1989).....	14
Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983).....	14, 15
Duckworth v. Dillon, 751 F.2d 895 (7th Cir. 1984).....	14
Dupuy v. Cain, 210 F.3d 582 (5th Cir. 2000).....	8
Evitts v. Lucey, 469 U.S. 387, 395-96, 105 S.Ct. 830, 835-36, 83 L.Ed.2d 821 (1985).....	16
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	13
Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982).....	14, 15
Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).....	1
House v. Balkcom, 725 F.2d 608 (11th Cir. 1984).....	15
In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2D 368 (1970).....	7, 8
Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 60 (1979).....	passim
Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).....	13
Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986).....	15
Manson v. Brathwaite, 432 U.S. 98, 109-14, 97 S.Ct. 2243, 2250-53, 53 L.Ed.2d 140 (1977).....	9, 16
McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 5 L.Ed.2d 763 (1970).....	14
Palmer v. Peyton, 359 F.2d 199 (U.S. 4th Cir. 4/6/66).....	10
Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986).....	15
Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).....	13
Shrader v. Riddle, 401 F.Supp. 1345 (W.D. Virginia, Roanoke Division, 8/25/75).....	10
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	passim
Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).....	15
U.S. v. Oriakhi, 57 F.3d 1290 (U.S. 4th Cir. 6/22/95).....	10

U.S. v. Recendiz, 557 F.3d 511 (CA 7 2009).....	16
U.S. v. Recendiz, 557 F.3d 511, 527-8 (CA 7 (Ill.) 2009).....	17
U.S. v. Simpson, 479 F.3d 492 (CA 7 (Ill.) 2007).....	17
United States v. Alvarez, 860 F.2d 801, 810 (7th Cir. 1988).....	16, 17
United States v. Carrasco, 877 F.2d 794, 806 (7th Cir. 1989).....	16
United States v. Otero, 848 F.2d 835, 837, 839 (7th Cir. 1988).....	14
Wade v. Armontrout, 798 F.2d 304 (8th Cir. 1986).....	15
Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982).....	14

STATUTORY PROVISIONS:

28 U.S.C. § 1257 (a).....	2
La.C.Cr.P. Art. 821.....	8
LSA-R.S. 14:30.....	3, 9
LSA-R.S. 15:438.....	8
Rule X, § (b) and (c).....	6
Section 3 of LSA-R.S. 14:30.....	9

STATE CASES:

Frett v. State, 378 S.E.2d 249, 251 (S.C. 1988).....	15
State v. Fuller, 454 So.2d 119 (La. 1984).....	15
State v. Harvey, 692 S.W.2d 290 (Mo. 1985).....	14
State v. Myles.....	14
State v. Sparrow, 612 So.2d 191, 199 (La. App. 4 Cir. 1992).....	15

MISCELLANEOUS:

Rule 29.....	20
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Appellant respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished (but cited at 2022 WL 1101753)

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished (but cited at 2021 WL 4398982)

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is the Louisiana Supreme Court in Docket Number _____.

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 25, 2022.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

IN THE
SUPREME COURT OF THE UNITED STATES
TERM, _____

No.: _____

GILES MCGHEE V. TIM HOOPER, Warden

Petition for Writ of Certiorari to the U.S. Court of Appeal

Pro Se Petitioner, Giles McGhee respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Fifth Circuit Court of Appeal, entered in the above entitle proceeding on August 25, 2022.

NOTICE OF PRO-SE FILING

Mr. McGhee requests that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Mr. McGhee is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court. Therefore, he should not be held to the same stringent standards as those of a trained attorney.

OPINIONS BELOW

The opinion(s) of the Louisiana First Circuit Court of Appeal was denied on January 30, 2019, and the Louisiana Supreme Court was denied on September 17, 2019. These pleadings were filed as collateral review, Supervisory Writ, and Supreme Court Supervisory Writs.

Mr. McGhee's federal petition to the U.S. Eastern District of Louisiana was denied on July 24, 2020. Mr. McGhee's Certificate of Appealability in the U.S. Fifth Circuit Court of Appeal was denied on August 25, 2022.

JURISDICTION

The U.S. Fifth Circuit Court of Appeal denied Mr. McGhee's Request for COA on August 25, 2022. On March 19, 2020, this Court issued an order automatically extending the time to file any petition for a Writ of Certiorari to 150 days from the date of the lower court judgment, order denying discretionary

review, or order denying a timely petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE FACTS

Giles McGhee was found guilty of two Counts of First Degree Murder in the shooting deaths of Tamica Muse and Karum Smith (Vol. 5, pp. 1095-6). Mr. McGhee knew Ms. Muse because she had been his girlfriend in a long-term, on-and-off relationship, and they had lived together 7 months (Vol. 4, p. 855). Karum Smith was Ms. Muse's new boyfriend (Vol. 4, p. 857). Mr. McGhee was implicated in the killings by Ms. Muse's teenaged daughter, Tremecia Matthews, who had been in her bedroom in the apartment at the time of the shootings. Ms. Matthews told police, that on the morning of April 5, 2012, she awoke to the sound of a man's voice yelling, "mother ---," and then heard shots fired (Vol. 4, pp. 859, 867). She claimed she recognized the voice to be that of Mr. McGhee (Vol. 4, p. 858).

Ms. Matthews told the police that, after she heard the shots, she heard the front door slam. She went into her mother's bedroom, and saw that her mother and Mr. Smith had been shot while laying in bed. Her mother appeared to be dead. Mr. Smith had blood coming from his mouth and was moving his eyes (Vol. 4, p. 859). Ms. Matthews grabbed her mother's cell phone from the dresser and ran to hide in the closet of her bedroom. She had her own cell phone, so she telephoned 911 on one phone and her father on the other phone (Vol. 4, p. 860).

At around 5:52 am, Officer Daniel Boudreaux of the Hammond Police Department received the call to go to the apartment on Mallard Drive (Vol. 4, p. 490). When he and Lt. Schivique arrived, they found the front door unlocked, but saw no signs of forced entry. They checked the premises to make certain the shooter was not still there (Vol. 4, pp. 792-3). Officer Boudreaux found the two victims in Ms. Muse's bed (Vol. 4, p. 792). Lt. Schivique found Ms. Matthews hiding in the closet and took the

hysterical young woman out of the house (Vol. 4, pp. 793-4). A few minutes later, EMS arrived and determined that Ms. Muse was dead. Mr. Smith was still breathing, so EMS removed him (Vol. 4, p. 795). It was later determined that Mr. Smith died from a gunshot wound that entered near his lip and severed his carotid artery (Vol. 4, p. 906). It was determined that Ms. Muse received two gunshot wounds and died from the one which entered her cheek and passed through her brain (Vol. 4, pp. 901-2).

At 8:31 am, Mindy Buratt of the Louisiana State Police Crime Lab and her team arrived to process the scene and take photographs (Vol. 4, pp. 803, 810, 844). Ms. Buratt collected two cartridges from a .380 pistol on the floor in Ms. Muse's bedroom, another casing from underneath Ms. Muse, and a bullet from the pillow where Ms. Muse's head had been (Vol. 4, pp. 815-6, 819, 827). The team photographed the outside mailbox area because the mailbox had been opened and some mail was on the ground (Vol. 4, p. 822). Later in the day, Ms. Buratt processed the van, and collected, among other things, a letter addressed to Giles McGhee at Ms. Muse's apartment address. *Id.*, at 354, 358, 364-65 (Vol. 4, pp. 821, 825, 831-2).

In the meantime, Det. Michael Mercante of the Hammond Police Department, who became the lead detective, arrived on the scene at about 6:20 am (Vol. 4, pp. 988, 996-7). Det. George Bergeron arrived at about 6:30 am and took possession of Ms. Muse's cell phone (Vol. 4, pp. 923-5). The detective developed Mr. McGhee as a suspect based on Ms. Matthew's claim that she heard his voice moments before the shots were fired (Vol. 4, pp. 926-7). After obtaining Mr. McGhee's cell phone number, he contacted Sprint, the service provider, and made an E-911 request to trace the location of Mr. McGhee's phone based on exigent circumstances (Vol. 4, p. 928). Sprint granted the request and sent "pings" to the phone to locate its GPS coordinates (Vol. 4, pp. 928-9).

The detective learned that, at approximately 8:00 am, Mr. McGhee's cell phone was headed westbound on I-12, and that it stopped moving at a certain location in Baton Rouge (Vol. 4, p. 930). The detective requested the State Police and the East Baton Rouge Sheriff's Office to drive by the

location. They were able to confirm that a maroon and gray van, which matched the description of the vehicle Mr. McGhee had been driving, was parked behind a residence at that location (Vol. 4, p. 931). Deputies from the East Baton Rouge Sheriff's Department observed the van leaving the residence, and engaged in a pursuit which lasted for about three miles (Vol. 4, p. 932). The van ultimately crashed. The deputies busted the glass and pulled the driver, Mr. McGhee, out of the vehicle (Vol. 4, p. 933). Mr. McGhee was transported to the Louisiana State Police Headquarters (Vol. 4, p. 934).

It must be noted that upon the officers approaching Mr. McGhee, Mr. McGhee was on Silverleaf Drive. The officer had drawn his weapon while approaching Mr. McGhee's van, ordering Mr. McGhee to place his hand on top of his head. At that time, a loud sound, which sounded like a weapon discharging, was heard and the driver's side window was shattered. After the sound, Mr. McGhee felt something graze him in his back which resulted him in believing that he was being shot at.

The chase then presumed due to the fact that Mr. McGhee was not aware of whether the officers had shot at him; or someone else. The chase then proceeding to Joor and Greenwell Springs Road, where Mr. McGhee stopped, exited the vehicle, and followed the orders given by the officers.

At 2:16 pm, Det. Edward Bergeron of the Hammond Police Department (no relation to Det. George Bergeron) informed Mr. McGhee of his rights and took a two-part videotaped statement from him at the State Police Headquarters (Vol. 4, pp. 956-7, 962, 964, 966). Sgt. Poe of the State Police conducted the second part of the interview (Vol. 4, p. 971). In his statement, Mr. McGhee claimed that on the night before, he was at his niece's house in Independence, when he received a call from his daughter (Nicole Flippen) asking him to come to her house because she was having a problem with her boyfriend. He stated that he arrived at her house (in Baton Rouge) after 11:00 pm, and dozed off while he was there (Vol. 2, pp. 318-20).

He stated that, the next morning, as he was heading back to Independence, he received a call from a "girl baby dad" (Ma. Matthew's father) accusing him of murdering Ms. Muse and threatening to kill

him (Vol. 2, pp. 320-1). He stated that he also received a call from Ms. Muse's brother threatening to kill him (Vol. 2, pp. 321-2). Mr. McGhee stated that he decided to head back to his daughter's house in Baton Rouge (Vol. 2, p. 323). Mr. McGhee denied that he was in Hammond that morning (Vol. 2, pp. 333-4). He denied that he was in Ms. Muse's house (Vol. 2, p. 358). He denied knowing that she had a new boyfriend (Vol. 2, p. 18).

The Hammond Police interviewed Nicole Flippen, Mr. McGhee's stepdaughter, who at first confirmed Mr. McGhee's story that he spent the night at her house in Baton Rouge and that he was still there at the time of the incident (Vol. 4, pp. 1004, 1007-8). Ms. Flippen changed her story after she was threatened with jail, and told them she had not heard from Mr. McGhee until the morning of April 5, 2012, when he called and told her he was on his way to her house (Vol. 4, p. 1004).¹ Ms. Flippen told the police that Mr. McGhee confessed to her that he had shot "them" (Vol. 4, p. 1007).

The Hammond Police Department subsequently obtained a warrant to search Mr. McGhee's cell phone, which had been recovered from the van (Vol. 4, pp. 934, 991). William Williams of the FBI Cellular Analysis Survey Team examined the phone records and conducted a "cell phone site analysis" (Vol. 5, pp. 1029, 1036). Mr. Williams determined that the last phone call on April 4, 2012, occurred at 9:22 pm utilizing a tower located several miles north of Hammond near I-55. He determined that the calls made from, and received by, that phone on the morning of April 5, 2012, which began at 6:39 am, utilized the same tower, which was seven miles from where the murders occurred "as the crow flies" (Vol. 5, p. 1046).

At trial, the parties stipulated that there were no latent prints or DNA evidence found at the crime scene or in the van which connected Mr. McGhee with them. They further stipulated that, while ballistics testing revealed that all of the shots were fired by the same gun, there was no weapon

¹ *Id.*, at 539 (Vol. 4, p. 1005). In his Closing Argument, defense counsel admitted that Mr. McGhee lied to police about his whereabouts, explaining that Mr. McGhee was afraid of Ms. Muse's family due to the death threats he was receiving from them. *Id.*, at 607 (Vol. 5, p. 1073).

recovered for comparison (Vol. 4, pp. 919-21).

Furthermore, during the investigation, there was no evidence that Mr. McGhee had been outside during the "storm" that was occurring during the time that this murder had transpired. There was no water in his van, on his clothes, or even on the mail that the State alleges Mr. McGhee had taken at the time of the murder.

The evidence also failed to produce evidence such as "blood splatter" on Mr. McGhee, his clothes, or even inside his vehicle. Evidence shows that a .380 caliber pistol was used at "close range" in this murder. Had Mr. McGhee committed this crime, there would have been ample blood evidence either on him, his clothes, or inside his vehicle.

The investigators had also found a footprint in the mud outside of the house which could not be linked to Mr. McGhee due to the difference in sizes. Mr. McGhee's fingerprints were not found anywhere on the scene.

REASONS FOR GRANTING THE WRIT

In accordance with this Court's *Rule X, § (b) and (c)*, Mr. McGhee presents for his reasons for granting this writ application that:

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

LEGAL ARGUMENT

Reasonable jurists would determine that Mr. McGhee was denied a fair and impartial trial; and that his convictions are in violation to the United States Constitution.

WHEREFORE, for the arguments in Mr. McGhee's original State pleadings and the arguments above, Mr. McGhee requests that this Honorable Court Grant him the necessary relief.

LAW AND ARGUMENT

1. Reasonable jurists would determine that Mr. McGhee was denied his right to Due Process of Law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution where the State failed to meet its burden of proof beyond a reasonable doubt that Mr. McGhee was guilty of two Counts of First Degree Murder. Jackson v. Virginia; In re: Winship; Fifth, Sixth and Fourteenth Amendments to the United States Constitution.;
2. Reasonable jurists would determine that Mr. McGhee was denied his right to Due Process of Law under the Sixth and Fourteenth Amendments to the United States Constitution where he was denied effective assistance of trial counsel.

V. Argument(s).

ISSUE NO. 1

Reasonable jurists would determine that the State failed to meet its burden of proof beyond a reasonable doubt that Mr. McGhee was guilty of two Counts of First Degree Murder. Jackson v. Virginia; In re: Winship; Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The State failed to meet its burden of proof beyond a reasonable doubt of the essential elements of First Degree Murder. Both the La. Supreme Court and U.S. Supreme Court have reviewed insufficient evidence claims raised in post conviction petitions. First and foremost, the United States Supreme Court set the standard in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 60 (1979).

In Jackson, the United States Supreme Court reached the legal standard of review, *i.e.*, "... whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt ..." In the court's view, the fact-finder's role as weigher of evidence was preserved by considering all of the evidence in the light most favorable to the prosecution: "... The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." Jackson, 443

U.S. at 319, 99 S.Ct., at 2790, 61 L.Ed.2d at 573-574. This standard is applied with “explicit reference to the substantive elements of the criminal offense as defined by state law.” *id. at 324 n. 16*, 99 S.Ct. at 2791 n. 16. *Dupuy v. Cain*, 210 F.3d 582 (5th Cir. 2000).

The Louisiana Fifth Circuit Court of Appeals has previously stated that “[a] conviction based on insufficient evidence cannot stand, and it violates Due Process.” **Fourteenth Amendment to the United States Constitution; Louisiana Constitution of 1974, Art. I § 2.** Further, the *Jackson* standard of review dictates that this standard of review for insufficiency of the evidence requires the reviewing court to affirm the conviction if a rational trier of fact could conclude that the State had proved the essential elements of the crime *beyond a reasonable doubt* (*emphasis added*). *Jackson v. Virginia*, and, La.C.Cr.P. Art. 821. This standard has been codified in LSA-R.S. 15:438, and further requires that the State's evidence must exclude *every* reasonable hypothesis of innocence.

The evidence or testimony involving two Counts of First Degree Murder was not proven beyond a reasonable doubt. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether jury was properly instructed, but to determine whether record evidence could possibly support a finding of guilt beyond a reasonable doubt; the relevant question is whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. U.S.C.A. Const. Amend. 14. (See: *Jackson v. Virginia*, 99 S.Ct. 2781, 443 U.S. 307 (U.S. 1979)).

The Due Process Clause of the Fourteenth Amendment protects persons accused of a crime against conviction unless the State proves every element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970).²

In order to meet its heavy burden of proof beyond a reasonable doubt, the State must meet the

² This type of error has been recognized as patent error preventing conviction for the offense, La.C.Cr.P. art. 920(2), see indicative listing at *State v. Gnilot*, 200 La. 935, 9 So.2d 235, 239 (1942). Quoting: *State v. Crosby*, 338 So.2d 584, 588 (La.1976).

requirements of LSA-R.S. 14:30, which states in pertinent part:

§30. First Degree Murder.

A. First Degree Murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration of Aggravated Kidnapping, Second Degree Kidnapping, Aggravated Escape, Aggravated Arson, Aggravated or First Degree Rape, Aggravated Burglary, Armed Robbery, Assault by Drive-By Shooting, First Degree Robbery, Second Degree Robbery, Simple Robbery, Terrorism, Cruelty to Juveniles, or Second Degree Cruelty to Juveniles.

It appears from the Record that the State is relying upon Section 3 of LSA-R.S. 14:30 for the determination of Mr. McGhee's conviction, which states as follows:

(3) When the offender has a specific intent to kill or inflict great bodily harm upon more than one person.

As it stands, the State was only able to present speculative testimony from someone who had "heard voices in the other room," without actually seeing who had committed this crime.

First and foremost, the State's presentation was decided on "speculation" and "circumstantial evidence," along with evidence of an alleged unsubstantiated and un-proven "voice recognition" by Tremecia Matthews³ who testified that she was in her own room at the time of the incident. Ms. Matthews further testified that she was frightened and had not attempted to see who the shooter was.

Ms. Matthews testified that she was **positive** that the voice she had heard in her mother's room shouting "Mother F****r," was that of Mr. McGhee. Yet, **during the course of her conversation with her father on one cell phone, and 911 on another cell phone (simultaneously)**, Ms. Matthews **informed both her father and 911 that she was not certain who the voice belonged to**.

As the State relied heavily on Ms. Matthews' "positive" identification through "voice recognition," Mr. McGhee avers that the identification must still be subjected to the *Manson v. Braithwaite*, 432 U.S. 98, 109-14, 97 S.Ct. 2243, 2250-53, 53 L.Ed.2d 140 (1977) standard. According to the Record, Ms. Matthews' "identification" has never been subjected to such (See: ineffective assistance of counsel Claim below). however

³ Tremecia Matthews is the daughter of Ms. Muse, one of the victims.

The Courts have erroneously determined that Mr. McGhee was not entitled to relief concerning the identification process in this case. Yet, there are numerous federal court decisions which agree with Mr. McGhee's stance.

For instance, in Palmer v. Peyton, 359 F.2d 199 (U.S. 4th Cir. 4/6/66), the Court held that, "procedure by which police secured identification of defendant's voice by prosecuting witness, after showing prosecutrix suspect's shirt which was about the same color as that worn by her attacker, without permitting confrontation of defendant by prosecutrix, and without opportunity for prosecutrix to compare defendant's voice with voices of others, violated Due Process." Fourteenth Amendment to the United States Constitution.

Also, in Shrader v. Riddle, 401 F.Supp. 1345 (W.D. Virginia, Roanoke Division, 8/25/75), also stated that, "Although defendant's identification stemmed from a police station show-up at which defendant was told he would be allowed to make a phone call and witness watched and listened as defendant did so, there was an independent ground for the identification apart from the suggestiveness inherent in the show-up where in-court identification was based on factors other than a facial identification, such as demeanor, attitude and voice, and witness had talked to defendant two different times.

In U.S. v. Oriakhi, 57 F.3d 1290 (U.S. 4th Cir. 6/22/95), the Court had allowed the voice identification by the co-conspirator was based on audio tapes which had been presented to him, and the fact that he no one had told him beforehand whose voices he would hear on the tapes and only after he independently identified defendant's voice from the recordings. In this case, *no one* requested that Ms. Matthews identify Mr. McGhee from a recording, or any other process in order to determine whether she was accurate in her identification.

It must also be noted that Ms. Matthews stated that she was able to identify Mr. McGhee's voice due to the fact that he had lived with them for four (4) years. This could not be possible due to the fact

that Ms. Matthews and her mother have relatively resided in the same area. However, according to the State's records, Mr. McGhee's residences are listed as:

6656 Harry Dr. Apt. 210, BR, LA 70806 (3/8/08 – 5/2008)
1616 N. Harco Dr., Apt. A-13, BR LA 70815 (5/2008 – 10/2008).
12647 Warfield Ave. Bldg. 21 A-4, BR LA 70815 (10/2008 – 8/2009).
12156 Viola Ln., Lot 2, Independence, LA 70433 (8/2009 – 7/2010).
53474 Cross-Over Rd., Independence, LA 70433 (7/2010 – 1/2011).
10750 West Brae Pkwy., Apt. 1901, Houston TX 77031
8110 Creek Bend Dr., Apt. 113, Houston, TX 77071

Mr. McGhee was also incarcerated during the following dates:

4/25/2000 – Federal charge.
11/18/2000 – convicted
12/6/2000 – El Reno, Oklahoma FCI
2/2005 – Forrest City, Arkansas
5/2006 – Forrest City County jail
6/2006 – Elayn Hunt Correctional
8/2006 – PCC DeQuincy
4/2007 – Beauregard
4/25/2007 – Port Allen Work Release
10/2007 – PCC DeQuincy
1/2008 – OPP
3/2008 – Released

The subject of Ms. Matthews' "positive" identification through the use of "Voice Recognition" is also argued more extensively in the Claim of ineffective assistance of counsel (See: below).

Accordingly, the Record supports the fact that it was storming on the night of the murder and that Ms. Matthews had admitted that she did not actually witness the murder. This Court must consider that a family member would want justice from such, and that it would be easy to place the blame on Mr. McGhee. But, the fact remains that Ms. Muse (who is married) was having an affair with a married man (Mr. Karum Smith). The Record supports the fact that officers failed to investigate whether this could have been Ms. Muse's husband, or Mr. Smith's wife (or family member).

Even though there are many problems with the investigation; such as the fact that Mr. McGhee

allegedly retrieved his mail from the mailbox (in the rain), the letters in question were completely dry. Furthermore, there was no effort to attempt to determine whether the footprints which were found in the mud, or why there was no water or mud on the floorboard of Mr. McGhee's vehicle when he was pulled over. Surely, had Mr. McGhee been the actual perpetrator of this crime, his mail would have been wet, or at a minimum, there would have been water and/or mud on the floorboard of his vehicle at the time that he was pulled over.

The Magistrate even noted that the mail from the box was strewn about on the wet ground, and that Mr. McGhee possessed a letter that was addressed to him at the Mallard Drive address. However, there was no record as to when the mail was actually picked up from that address.

Although Mr. McGhee has shown the Courts that Ms. Matthews was incorrect in her testimony that Mr. McGhee lived with her and her mother for approximately four (4) years, Mr. McGhee has informed the Court of his addresses, proving that he did not live with them.

The State contends that Mr. McGhee's stepdaughter, Nichole Flippen, testified that Mr. McGhee had told her (through hand motions) that he had committed the murder. Nichole had been incarcerated in order to ensure that she would give a Deposition against Mr. McGhee (Nichole was arrested and held until after her deposition). However, Mr. McGhee had talked to his Nichole shortly after he had received numerous phone calls from family members accusing him of killing the two victims, and he was trying to inform her of the fact that Tamica Muse had been killed (not that he had killed her).

This Court must also note that the parties had stipulated that the crime lab was unable to develop any fingerprints from the scene, and the DNA which was recovered from the crime scene also failed to implicate Mr. McGhee.

It appears as though the State and the Magistrate are "hanging their hats" on Ms. Matthews' "voice identification," there was no way to actually prove that the voice that she heard (during a story) was actually Mr. McGhee's voice.

The Record is replete with evidence that there was a strong storm occurring during these murders, and it would be virtually impossible for Ms. Matthews to positively identify Mr. McGhee's voice over the rain and thunder. Furthermore, defense counsel failed to have the 911 recording reviewed for the amount of background noise during the call.

The Magistrate has also erred in determining that the State has provided evidence sufficient for a reasonable jury to conclude that the identification and each element of the crime had been proven beyond a reasonable doubt.

WHEREFORE, for the reasons above, Mr. McGhee contends that the State has failed to meet its heavy burden of proof beyond a reasonable doubt. Mr. McGhee respectfully requests that this Honorable Court Grant any relief deemed appropriate in this matter.

ISSUE NO. 2

Reasonable jurists would determine that Mr. McGhee was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. Strickland v. Washington.

Mr. McGhee contends that he was denied effective assistance of counsel during the course of these proceedings for the following reasons to wit:

The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. U.S. Const. amend. VI. The purpose of this Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The skill and knowledge counsel is intended to afford a Defendant "ample opportunity to meet the case of the prosecution." Strickland, 466 U.S. at 685 (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942)).

Acknowledging the extreme importance of this right, the United States Supreme Court has held:

That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, 466 U.S. at 685. Thus, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763, 773 (1970).

In State v. Myles, 389 So.2d 12, 28-31 (La. 1980), the Supreme Court of Louisiana found ineffective assistance of counsel on the face of the appellate record under circumstances very similar to this case. Trial counsel rested without additional evidence, failed to object to inadmissible evidence, and failed to object to erroneous instructions. Id. at 28-29. See also: United States v. Otero, 848 F.2d 835, 837, 839 (7th Cir. 1988); Deutscher v. Whitley, 884 F.2d 1152, 1162 (9th Cir. 1989); Duckworth v. Dillon, 751 F.2d 895 (7th Cir. 1984); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982)(ineffective assistance found where counsel failed to: (1) investigate; (2) raise a challenge to the petit jury selection system; (3) raise illegality of the arrest; (4) interview crucial witnesses; and (5) object to an improper Witherspoon excusal); Blake v. Zant, 513 F. Supp. 772 (S.D.Ga. 1981)(ineffective Counsel in capital cases; standards applied with particular care; showing of prejudice not always required); State v. Harvey, 692 S.W.2d 290 (Mo. 1985)(counsel's non-participation at the trial without the client's express consent is ineffective assistance of counsel).

"Counsel's ineffectiveness cries out from a reading of this transcript." Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983)(citing Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982); Yarborough v. State, 529 So.2d 659, 662 (Miss. 1988)(quoting Waldrop v. State, 506 So.2d 273, 275 (Miss. 1987)).

While a defendant must ordinarily show that counsel's ineffective assistance resulted in actual

prejudice, such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.

Frett v. State, 378 S.E.2d 249, 251 (S.C. 1988)(citing House v. Balkcom, 725 F.2d 608 (11th Cir. 1984)).

A defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Fuller, 454 So.2d 119 (La. 1984). The defendant must show that: (1) counsel's performance was deficient; and (2) that the deficiency prejudiced the defendant. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. State v. Sparrow, 612 So.2d 191, 199 (La. App. 4 Cir. 1992).

"At the heart of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982); accord Porter v. Wainwright, 805 F.2d 930, 933 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), *vacated*, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984), *adhered to*, 739 F.2d 531 (1984). As the Court held in Wade v. Armontrout, 798 F.2d 304 (8th Cir. 1986): Investigation is an essential component of the adversary process. "Because [the adversarial] testing process generally will not function properly unless counsel has done some investigation into the prosecution's case and into various defense strategies . . . 'counsel has a duty to make reasonable investigations. . . .'" Id. at 307 (quoting Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986) (quoting Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))).

However, the mere presence of an attorney does not satisfy the constitutional guarantee of counsel. As the Supreme Court has often noted, an accused is entitled to representation by an attorney, whether retained or appointed. "Who plays the role necessary to ensure that the trial is fair." *Morrison*, 477 U.S. At 377, 106 S.Ct. At 2584, quoting *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 274 (1984). "In other words, the right to counsel is the right to effective assistance of counsel, citing *Evitts v. Lucey*, 469 U.S. 387, 395-96, 105 S.Ct. 830, 835-36, 83 L.Ed.2d 821 (1985).

Failure to Request a Voice Recognition test:

Mr. McGhee contends that his attorney was ineffective for failing to subject Tremecia Matthews to a Voice Recognition Analysis. Ms. Matthew's testimony is the ONLY testimony which had placed Mr. McGhee at the scene of the crime, and as the perpetrator of this heinous crime, which the State was allowed to introduce during the course of these proceedings, unrebutted.

From very beginning of these proceedings, Mr. McGhee has maintained his position that he was not guilty of these horrendous crimes. Mr. McGhee is not denying that these murders had taken place; just that he was not the one who had committed them. Mr. McGhee had also informed counsel that it was not his voice that Tremecia Matthews stated that she had heard during the murders.

After Mr. McGhee had informed his counsel that Tremecia Matthews could have been confused as to whose voice she had heard, it was now up to the counsel to request that Ms. Matthews subject herself to voice identification is subject to the same Due Process analysis as other forms of identification. See: *United States v. Alvarez*, 860 F.2d 801, 810 (7th Cir. 1988); and, *U.S. v. Recendiz*, 557 F.3d 511 (CA 7 2009). In determining the admissibility of identification, "reliability is the linchpin." See: *Brathwaite*, 432 U.S., at 114, 97 S.Ct. 2243, and an identification procedure is unduly suggestive if it "give[s] rise to a 'very substantial likelihood of irreparable misidentification.'" *Degaglia*, 913 F.2d at 376 (quoting *United States v. Carrasco*, 877 F.2d 794, 806 (7th Cir. 1989)). To

assess the reliability of a voice identification, we apply the same factors articulated in *Neil v. Biggers*⁴, and we must weigh them against the “corruptive effect of the suggestive identification.” *Alvarez*, 860 F.2d at 810 (quotations omitted). However, this was not done.

A witness's voice identification is subject to the same Due Process analysis as other forms of identification. See: *United States v. Alvarez*, 860 F.2d 801, 810 (7th Cir. 1988). As the Court has previously noted, in determining the admissibility of identification testimony, “reliability is the linchpin.”

To assess the reliability of a voice identification, we apply the same factors articulated in *Biggers*, and we must weigh them against the “corruptive effect of the suggestive identification.” *Alvarez*, 860 F.2d at 810 (quotations omitted); *U.S. v. Recendiz*, 557 F.3d 511, 527-8 (CA 7 (Ill.) 2009).

In *U.S. v. Simpson*, 479 F.3d 492 (CA 7 (Ill.) 2007), the Court stated in its opinion:

“The jurors submitted to the judge several questions about the evidence presented. In particular, the jurors asked why Bradley (the confidential informant) had not testified, whether any fingerprints had been lifted from the bag of cocaine, whether any voice recognition techniques had been conducted on the tape recording . . .” (emphasis added).

As the ONLY identification of Mr. McGhee being the perpetrator was through Ms. Matthews' determination that she was certain that the voice that she heard prior to the shooting was that of Mr. McGhee, it was essential to discredit her identification. It is also noted that Ms. Matthews testified to the fact that she had only heard a “portion” of a statement made during the commission of this crime.

Had counsel moved the Court to subject Ms. Matthews to a Voice Recognition Analysis, there is high probability that she would have made the determination that Mr. McGhee was not the person that she heard during the confrontation prior to the shots being fired in her mother's bedroom.

Furthermore, due to the severity of the storm, there is some discrepancy as to Ms. Matthews' testimony as to recognizing Mr. McGhee solely by his voice. It must be noted that Ms. Matthews testified that she did not see the actual perpetrator due to the fact that she was in fear for her life.

⁴ 409 U.S. 188, 198, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972).

Failure to have the 911 recording analyzed for background noise:

Mr. McGhee further contends that he was denied effective assistance of counsel due to the fact that trial counsel had failed to have the 911 recorded analyzed for background noise. According to the testimony presented during the course of the trial, Ms. Matthews was discussing the incident on two different cell phones at the same time.

According to the testimony of her father, Patrick Matthews, at the time of her call, it was "pouring down to the point" that he thought that he would be off for the day. Mr. Matthews worked for the Coastal Bridge Company which lays asphalt on the highways. Mr. Matthews testified to the fact that he was on the interstate, going to the "job site" in order to be given credit for "show-up" time.

Failure to Investigate:

Mr. McGhee also informed counsel that ALL of the persons allegedly involved in this case were married, but not to each other. In other words, Mr. McGhee had a wife, who was not Ms. Muse, Mr. Karum Smith was married, but not to Ms. Muse, and Ms. Muse was married, but not to either of the aforementioned men.

Furthermore, Ms. Matthews had testified to the fact that Mr. McGhee had lived with her and her mother for four years. But, according to the State, Mr. McGhee's residences are listed as:

6656 Harry Dr. Apt. 210, BR, LA 70806 (3/8/08 – 5/2008)
1616 N. Harco Dr., Apt. A-13, BR LA 70815 (5/2008 – 10/2008).
12647 Warfield Ave. Bldg. 21 A-4, BR LA 70815 (10/2008 – 8/2009).
12156 Viola Ln., Lot 2, Independence, LA 70433 (8/2009 – 7/2010).
53474 Cross-Over Rd., Independence, LA 70433 (7/2010 – 1/2011).
10750 West Brae Pkwy., Apt. 1901, Houston TX 77031

8110 Creek Bend Dr., Apt. 113, Houston, TX 77071

Also, Mr. McGhee had been detained, or locked up as stated below:

4/25/2000 – Federal charge.

11/18/2000 – convicted

12/6/2000 – El Reno, Oklahoma FCI

2/2005 – Forrest City, Arkansas

5/2006 – Forrest City County jail

6/2006 – Elayn Hunt Correctional
8/2006 – PCC DeQuincy
4/2007 – Beauregard
4/25/2007 – Port Allen Work Release
10/2007 – PCC DeQuincy
1/2008 – OPP
3/2008 – Released

Therefore, Ms. Matthews's testimony that Mr. McGhee resided with her and her mother for four (4) years would have been determined to be untrue and suspicious at best due to the fact that the evidence proves that Mr. McGhee **could not have** resided with Ms. Matthews and her mother for that length of time. The State was able to convince the jury of the “positive” identification by Ms. Matthews through the use of this misinformation.

This Court must note that the district court failed to grant an evidentiary hearing where Mr. McGhee was given the opportunity to have his trial counsel questioned concerning his ineffectiveness, or to testify as to why he determined that the only alleged witness to this incident was not subjected to a “voice analysis” to determine whether or not she had “actually” heard Mr. McGhee's voice at the time of the murders. As Ms. Matthews was the only witness to the murders (who testified that she did not actually see the perpetrator), the State was able to submit her testimony as an eyewitness which had some uncertainty as to her reliability.

The Magistrate is correct in her statement that the Supreme Court has clarified that, under Strickland, the question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practice or most common custom.

However, in this case, counsel failed to investigate the actual chain of events as they had occurred, especially when he was informed that the murders had occurred during the course of a severe storm. A counsel has, at a minimum, to conduct an investigation into the State's case against his client, which in this case, would include requesting that Ms. Matthews be subjected to some type of voice analysis test

to ensure whether or not she could positively identify Mr. McGhee as she had stated.

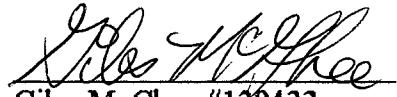
Furthermore, as defense counsel had been informed that there was a violent storm occurring at the time of the murders, had he actually reviewed the 911 tapes, he would have been able to note that it would have been impossible for Ms. Matthews to actually discern who the actual speaker was.

Mr. McGhee had also informed defense counsel that Ms. Matthews had been mistaken when she informed the authorities that Mr. McGhee had lived with them for approximately 4 years. Mr. McGhee attempted to have his attorney review documents which proved his residences.

CONCLUSION

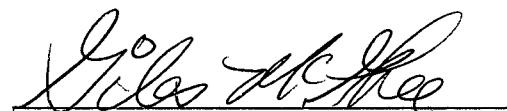
As Mr. McGhee was denied the right to a fair and impartial trial, this Court should grant the petition for Writ of Certiorari.

Respectfully submitted this 19th day of October, 2022.


Giles McGhee #129433

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 19th day of October, 2022 upon counsel of record for Respondent, pursuant to Rule 29 at the following address: District Attorney's Office, P.O. Box 639, Amite, LA 70422-0639.


Giles McGhee