NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY WAYNE ROSS (PETITIONER)
VERSUS
WARDEN E. DUSTIN BICKHAM, Et. Al. (RESPONDENTS)

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS- FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jeffrey Wayne Ross
JEFFREY WAYNE ROSS # 159220
DIXON CORRECTIONAL INSTITUTE
P. O. BOX 788 U-2/D-5
JACKSON, LOUISIANA 70748-0788

QUESTIONS PRESENTED

1. Whether or not the trial court and Fifth Circuit Court of Appeals erred when they made a decision that Petitioner didn't receive ineffective assistance of counsel due to counsel failing to call crucial witnesses that could have testified in his defense?
2. Whether or not the trial counsel violated Petitioner's Sixth Amendment right of the United States Constitution to effective counsel by not performing in a sufficiently diligent manner in his representation to insure Petitioner's right to a fair sentencing hearing?
3. Whether or not Petitioner's Due Process of the United States Constitution was violated when he didn't receive a fair trial in a fair tribunal, before a judge with no bias or interest in the outcome of the proceedings?
4. Whether or not Petitioner's Dues Process of the United States Constitution was violated when the trial judge refused to look at the First and Fourth Circuit views on self defense in a non-homicide case?

LIST OF PARTIES

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 subject of this petition as follows:

1. Honorable, Warren Daniel Willett
   35th Judicial District Court
   Parish of Grant
2. James P. Lemoine
   District Attorney, 35th Judicial District
   200 Main Street-Room 203
   Colfax, Louisiana 71417
3. Warden, E. Dustin Bickham
   Dixon Correctional Institute

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OPINION BELOW

The opinion/denial of the United States Court of Appeals-Fifth Circuit appears at Appendix A to this petition and is available on the Westlaw citation @ 2024 WL 2111035. This opinion is not reported in the Federal Reporter.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals-Fifth Circuit decided the case was the 22nd day of April 2024. No Petition for rehearing was filed in the case, nor was an extension of time filed for a Writ of Certiorari. Therefore, this Writ of Certiorari timely follows and Jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

THE HONORABLE SUPREME COURT OF THE UNITED STATES

The petition of Jeffrey W. Ross, Appellant herein, filing an Application for Writ of Certiorari, and Review in matter No. 2024 WL 2111035, on the docket of the Fifth Circuit

Court of Appeal and Docket No. 17-802, of the 35th Judicial District Court, for the Parish of Grant.

STATEMENT OF THE CASE

On October 13, 2017, the petitioner was charged by bill of information with one count of attempted second degree murder, a violation of La. R.S. 14:27 and 14:30.1, and one count of aggravated battery, a violation of La. R.S. 14:34(A).

STATEMENT OF THE PROCEEDINGS

After a three-day trial that concluded on February 22, 2018, a unanimous jury found the petitioner guilty as charged on both counts. After sentencing, petitioner timely appealed.

On March 13, 2019 the La. Third Circuit Court of Appeal ruled the petitioner's conviction and sentence for attempted second degree murder was affirmed and that the petitioner's conviction and sentence for aggravated battery was vacated. The order of restitution was vacated as well.

Petitioner was unable to timely file Certiorari with the La. Supreme Court due to being transferred multiple times within the Department of Corrections during this time period.

On or about August 28, 2019, petitioner timely filed an application for post-conviction relief with the 35th Judicial District Court. On September 4, 2019, the District Court ordered an evidentiary hearing to take place on November 7, 2019, or in the alternative, for the State to file objections. The Petition was denied on February 26, 2020. Petitioner filed notice of intent to seek Supervisory Writ of Review, which was denied on July 29, 2021. Petitioner filed for re-hearing and was denied on September 1, 2021. ~~Petitioner now seeks Supervisory and/or Remedial Writ of Review with this Honorable Court~~. Petitioner filed on June 29, 2022 a Petition for Writ of Habeas Corpus and was denied on November 9, 2023. Petitioner filed a Certificate of appealability on December 8, 2023, and was denied on April 22, 2024 Therefore seeks review of this decision from this Honorable Supreme Court of the United States.

WRIT GRANTING CONSIDERATION

The decision of the Fifth Circuit Court of Appeal in this case should be subject to this Honorable Supreme Court's Supervisory Authority, in accordance with Rule X of the Court's Rule, specifically: **X (1.) (a).4. ERRONEOUS INTERPRETATION OR APPLICATION OF CONSTITUTION OR LAWS.** The Fifth Circuit Court of Appeal has erroneously interpreted or applied the Constitution or a Law of this State or the United States and the decision will cause material injustice or significantly affect the Public Interest.

The standard utilized conflicts with the decisions of the Supreme Court of Louisiana and the Supreme Court of the United States regarding the minimally required standard of review to be used in such proceedings. The erroneous application of this standard by the appellate court has caused material injustice to the petitioner and significantly affects the public interest.

The Fifth Circuit Court of Appeal issued an erroneous ruling, denying appellant's C. O. A.

The erroneous application of this standard by the appellate court has caused a material injustice to the appellant and significantly affects the public interest.

The decision of the The Fifth Circuit Court of Appeal has so far departed from proper Judicial Proceedings and Sanctions such a departure as to call for an exercise of the Supreme Court's Authority.

However, The Fifth Circuit Court of Appeal have a duty not to only review for, but to recognize and correct, constitutional level of errors on the record. The failure of The Fifth Circuit Court of Appeal to do so should not be impugned to the relator. If three learned Justices of a Supreme Court do not recognize a constitutional level errors and patent errors on the face of

the record, why should the appellant be penalized with an unlawful conviction for failure to recognize the errors.

Rule X, Section 1(a)(5), Gross Departure From Proper Judicial Proceedings:

The Fifth Circuit Court of Appeal has sanctioned the gross departure from proper judicial proceedings and abuse of powers by the 35th Judicial District Court. This Court should exercise its authority in the matter.

If this Court lets the decision of the The Fifth Circuit Court of Appeal stand, it will go against principles established by this Court to protect its citizens from unlawful incarcerations.

Conclusion:

Appellant respectfully prays that this Honorable Court exercise its authority as reflected by the jurisprudence.

The records in this case, clearly provide evidence that The Fifth Circuit Court of Appeal has failed to properly review the Errors raised on the C. O. A. which has offended the Appellant's Due Process Rights.

The standard utilized conflicts with the decisions rendered under Due Process and Equal Protection of the Law. The Fifth Circuit Court of Appeal Judges have used an Abuse of Discretion in rendering their decision to deny the appellant's C. O. A..

The erroneous application of this standard by the appellate court has caused a material injustice to the defendant and significantly affects the public interest.

The appellate court judges have erroneously applied the Laws of Louisiana and the United States, by denying the appellant's Direct Appeal. The appellate court's decision has caused a material injustice to the relator.

QUESTION PRESENTED

Petitioner received ineffective assistance of trial counsel due to counsel failing to call crucial witnesses that could have testified in his defense.

SUMMARY OF THE ARGUMENT

Petitioner received ineffective assistance of trial counsel due to counsel failing to call crucial witnesses that could have testified in his defense. Trial counsel violated petitioner's Sixth Amendment right to effective counsel by not performing in a sufficiently diligent manner in his representation to insure petitioner's right to a fair sentencing hearing. The Due Process Clause of the United States Constitution requires a fair trial in a fair tribunal, before a judge with no bias or interest in the outcome. Petitioner's Due Process Rights of the United States Constitution were violated when the trial judge refused to look at the First and Fourth Circuit's views on self-defense in a non-homicide case.

LAW AND ARGUMENT

Petitioner is aware that in order to prevail on an ineffective assistance of counsel claim, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," and that the defendant was prejudiced as a result of such conduct. Strickland v. Washington, 466 U.S. 668, 688, 692, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); see also Kieser v. New York, 56 F.3d 16, 18 (2d Cir. 1995). As to the conduct of counsel, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotation marks omitted). As to prejudice, "the 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." *Id.* at 694.

The conduct of petitioner's counsel "fell below an objective standard of reasonableness." While counsel's tactical decision commands a high degree of deference, counsel's failure to file a motion to quash indictment was totally preposterous under the circumstances and cannot "be considered sound strategy. In particular, counsel's decision cannot be justified by considerations related to evidence presented by the State, simply because there wasn't any. Petitioner's counsel was therefore ineffective under *Strickland*, and petitioner's Sixth Amendment right to counsel was thereby impaired.

A defendant need only show that his attorney, appointed to satisfy the State's Sixth Amendment obligation, rendered performance that fell below an objective standard of reasonableness. See, e.g., Kimmelman, 477 U.S. at 379. Also see State Ex Rel Colley D. McClendon v. State, 587 So. 2d 685 (La. Lexis 2810) (10-18-91) and State Ex Rel Marice S. Nalls v. State, 152 So. 3d 164 (La. Lexis 2580) (11-7-14).

1.) Petitioner received ineffective assistance of trial counsel due to counsel failing to call crucial witnesses that could have testified in his defense.

Witness Detective Kyle Martin and Shelia Green

Detective Martin worked for Grant Parish Sheriff's Office (GPSO) for several years as both Deputy and a Detective. It is very clear from his job in itself that he would have been available for this trial.

Detective Martin spoke to petitioner about Shelia Green, a witness who videoed the entire incident. He said he was going to contact her and get this video. Petitioner asked defense counsel, Mr. Joe Beck, numerous times prior to trial if Detective Martin received this video yet. Petitioner's defense counsel told him not to worry because Detective Martin was a man of his word. Defense counsel then went on to say how Detective Martin would have to testify how he obtained the video and that it would be played to the jury at trial.

During trial petitioner asked defense counsel why Detective Martin hadn't testified yet and he told petitioner "we wouldn't need him or the video and that we should have enough proof to get you off."

Shelia Green was prompted to video the incident because she thought she was about to see a car wreck. She is the very woman mentioned during trial that said "there goes the windshield." Petitioner realizes that a major factor of his offense came down to whether or not Billy Gillette had his gun out of its holster pointing it at petitioner before he was struck by petitioner's vehicle. There were witnesses who testified to both that he did and that he did not. This video by Shelia Green would have eliminated all doubt. The jury would have been able to see for themselves.

Petitioner is requesting an evidentiary hearing so that Shelia Green and Detective Kyle Martin can be subpoenaed and submit her video. She is willing to testify that she was in fact available for trial as she only lives a short distance from the courthouse. Petitioner feels like the court should order an evidentiary hearing to resolve the issues as to why defense counsel did not subpoena Detective Martin and Shelia Green, both crucial to petitioner's defense. If defense counsel, Mr. Joe Beck, would have subpoenaed this video, Shelia Green, and Detective Martin, petitioner would have been found not guilty.

Witness Joey Dubea

Joey Dubea was another witness mentioned during trial, but yet again, he was not subpoenaed by defense counsel. Mr. Dubea is the witness who took the gun from Billy Gillette. This witness was physically there and saw Billy Gillette with his gun drawn shooting at the petitioner. Mr. Dubea was available for trial as he also lives a short distance from the courthouse. He said, "it would not be a problem to testify." He was expecting to be called to do so but

defense counsel told him "we probably would not need him" again saying "we should have enough to gain an acquittal."

Mr. Dubea was willing to testify that Billy Gillette got out of his vehicle banishing his gun. He was another crucial witness to petitioner's defense.

Witness Willis White

Willis White was another witness mentioned during trial, but yet again, he was not subpoenaed by defense counsel. Mr. White was in the vehicle with Tamatha Desadier (mother/driver) and Courtney Perrine (daughter). One would have to ask why Tamatha Desadier and Courtney Perrine where called to testify but not Mr. White since he is the mentioned boyfriend riding with Tamatha Desadier and Courtney Perrine on the day of the incident.

The reason the State wanted nothing to do with Mr. White's testimony is because what he witnessed was different from what Tamatha Desadier and Courtney Perrine claim to have seen. Mr. White says he seen Billy Gillette with something in his hand prior to petitioner hitting him with his vehicle just as witness Benjamin Nettles had testified to. Mr. White spoke to defense counsel a few times but was never subpoenaed by him or the State. Petitioner made numerous requests to defense counsel for Mr. White to testify but it all fell on deaf ears.

Looking at these crucial witnesses that petitioner's defense counsel did not have subpoenaed, it would make one look a little closer at the ones defense counsel did have subpoenaed. In the right setting, with true experienced defense counsel, this would be logical reasoning, however, defense counsel, Mr. Joe Beck, did not subpoena one witness for petitioner's entire defense.

Thereafter, when petitioner was found guilty by a unanimous jury and his sentencing date came along, one would think it could not get worse. This proved not to be true as defense counsel seems to have out done himself at this stage as will be seen in the following claim.

Again, petitioner is requesting at least an evidentiary hearing to explore defense counsel's reasons as to why he was so profoundly delinquent in not obtaining any available witnesses. Had defense counsel subpoenaed these crucial witnesses there's no doubt petitioner's trial would have ended with a different result.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. Missouri v. Frye, 566 U.S. 134, 138, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). See also State v. Thomas, 12-1410, p.5 (La. 9/4/13), 124 So.3d 1049, 1053. The United States Supreme Court has long recognized that the right to counsel is the right to the "effective assistance of counsel." *Frye*, 566 U.S. at 138. Claims of ineffective assistance of counsel are generally governed by the standard set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), adopted by the La. Supreme Court in State v. Washington, 491 So.2d 1337 (La. 1986).

Smith v. Dretke, 417 F.3d 438 (5th Cir. 2005) (counsel was ineffective in failing to present testimony by witnesses who could have supported self-defense theory).

Soffar v. Dretke, 368 F.3d 441 (5th Cir. 2004) (defense counsel have offered no acceptable justification for their failure to take the most elementary step of attempting to interview the single known eyewitness to the crime, a strategic decision as to whether such information would have helped Soffars defense). Anderson v. Johnson, 338 F.3d 382 (5th Cir. 2003) (counsel was ineffective in failing to interview eyewitness and instead rel[ying] exclusively on the investigative work of the State and assumptions divined from a review of the States files: there is no evidence that counsels decision to forego investigation was *reasoned* at all, and it is, in our opinion, far from *reasonable*).

2.) Trial counsel violated petitioner's Sixth Amendment right to effective counsel by not performing in a sufficiently diligent manner in his representation to insure petitioner's right to a fair sentencing hearing.

It should be clear to all professionals reviewing this case that petitioner was prejudiced by the incompetence of his unconstitutionally ineffective trial counsel. What counsel preformed was not trial strategy. There was no type of strategy at all, much less to try and call it trial strategy. As well, it should also be clear to all professionals reviewing this case that petitioner's result at his sentencing phase would have been different had his counsel been effective.

This court should agree that counsel's actions fell below an objective standard of reasonableness and was constitutionally inadequate. See Anderson v. Johnson, 338 F.3d 382, 391 (5th Cir. 2003) ("Guided by *Strickland*, we have held that counsel's failure to interview eyewitnesses to a charged crime constitutes constitutionally deficient representation." (quotation omitted)); *see also* ABA Criminal Justice Standard 4-4.1(a) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

In representing a criminal defendant, counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's cause, a duty to consult with the defendant on important decisions, a duty to keep defendant informed of important developments in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

The conduct of petitioner's counsel "fell below an objective standard of reasonableness." While counsel's tactical decision commands a high degree of deference, counsel's failure to object to the State being allowed to present testimony that was hearsay within hearsay was totally preposterous under the circumstances and cannot "be considered sound trial strategy."

The underlying incident happened on September 19, 2017. The trial, however, was held on February 20, 2018, only six months later, and the sentencing hearing was conducted on March 29, 2018, just 35 days after the trial. Even if the petitioner's medical condition and mental health issues may not have been sufficient to excuse his crime, those medical records and expert medical testimony were not made available for sentencing purposes. Defense counsel did move to continue the sentencing as, apparently, he had not obtained any doctor's reports or mental health records by the day of sentencing. After the trial judge denied the Motion to Continue, the attorney was not in a position to proffer the evidence or give a meaningful explanation of how those records may have been relevant.

When the petitioner's son and sister testified at the sentencing, each gave information about their non-medical knowledge of the petitioner's long-standing mental health issues. The prosecutor then cross examined each of them, but not about his mental health issues, instead eliciting harmful hearsay testimony about their father's temper and anger problems, with no medical testimony, medical records or other expert testimony to explain or mitigate his past behavior. No objection was lodged.

Further, during cross examination of the petitioner's son and sister, the prosecutor elicited extremely prejudicial other crimes evidence about alleged threats by the petitioner against individuals whom he allegedly said he would "get even with" or words to that effect. Again, no objections were lodged.

It is significant that the trial judge used these very hearsay statements in his reasons for sentencing as one of the main factors for his sentence on the attempted second degree murder charge. The trial judge specifically noted that petitioner showed "no remorse" and had threatened others with bodily harm.

Issues of this kind are more properly presented in "post conviction proceedings" where a full record can be made as to the defense counsel's strategy, and evidence and expert testimony can be introduced. See La.C.Cr.P. art. 930; State v. Durall, 15-794 (La.App. 5 Cir. 5/12/16), 192 So.3d 285; State in the Interest of A.B., 09-870 (La.App. 3 Cir. 12/9/09), 25 So.3d 1012.

The appellate record in this case, however, sufficiently demonstrates an error of law during sentencing. See La. C.Cr.P. art. 920. Specifically, the petitioner was never given an opportunity by the trial judge to speak before sentencing. While the petitioner was properly admonished by the trial judge not to speak while other witnesses were testifying, the petitioner was never afforded an opportunity to speak after those witnesses testified. While it may be true that his attorney didn't call the petitioner as a witness at the sentencing hearing, the petitioner was not given an opportunity to speak by the trial court, as happens in almost every case before sentencing. The words "Do you have anything to say before sentencing?" were never pronounced. To the contrary, when the petitioner tried to speak, the trial judge stopped him as follows:

BY MR. ROSS: Your Honor.

BY THE COURT: Mr. Ross, the hearing is over, sir. It's my turn.

BY MR. ROSS: (Indistinct).

BY THE COURT: Mr. Ross, Mr. Ross, you-you had your opportunity to speak, everyone's had their opportunity to speak, now I get - - now it's my turn.

BY MR. ROSS: I was told to be quiet.

BY THE COURT: Then do it....

While some trial errors by counsel can usually only be corrected in post conviction proceedings, this court should find that this otherwise conscientious and diligent trial judge did not afford petitioner an opportunity to speak and perhaps rebut some of the extremely prejudicial

and damaging information admitted during his sentencing hearing. Louisiana Constitutional Article 1, 2 provides "No person shall be deprived of life, liberty, or property, except by due process of law." The Louisiana Supreme Court in State v. Myles, 94-0217 (La. 6/3/94), 638 So.2d 218, 219 (per curiam), addressed a defendant's right of due process at sentencing hearings:

The sources of information relied upon by the sentencing court are varied and may include evidence usually excluded from the courtroom at the trial of guilt or innocence, e.g., hearsay and arrest as well as conviction records. Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949); State v. Washington, 414 So.2d 313 (La.1982); State v. Brown, 410 So.2d 1043 (La.1982). Because the scope of information available to the court for sentencing purposes is so broad, the defendant has a due process right to rebut prejudicially false or misleading information which may affect the sentencing determination. State v. Lockwood, 439 So.2d 394 (La.1983); State v. Parish, 429 So.2d 442 (La.1983); State v. Underwood, 353 So.2d 1013 (La.1978).

At the sentencing hearing defense counsel first called as a witness Ms. Beason, a long-time church friend of the petitioner. In her testimony, Ms. Beason spoke of her knowledge of the petitioner's kindness, specifically noting an instance where he helped a fellow church member monetarily during a hard time. She summed up her opinion of him by stating, "He's a good person." The State then questioned Ms. Beason on her knowledge of the petitioner's demeanor and narcotic use, to which she replied that she had never experienced the petitioner being violent, and her only knowledge of narcotic use was of medication that had been prescribed to him. The State further questioned Ms. Beason on the petitioner's mental health issues, to which she explained that she knew of his diagnosis of schizophrenia. Defense counsel offered no rebuttal.

Defense counsel then called Nila Painter, the petitioner's sister, who testified that she believed her brother to be a good person and attested to his "generous character." Ms. Painter

also gave testimony as to the extent of her knowledge of the petitioner's mental diagnosis and his back problems. On cross examination, the State questioned Ms. Painter on her knowledge of any statements or lists allegedly made by the petitioner threatening others, and whether he expressed disappointment for not killing the victim. Ms. Painter testified, "yes, uh, I - - he may have, I don't.. . I can't - - I can't say for sure." The State further questioned Ms. Painter, "But you're aware that he's forming an idea while he's incarcerated to harm people when he gets out, is that correct?" To which Ms. Painter replied, "I think he has made that statement, yes." Again, defense counsel offered no objection and no rebuttal.

Lastly, Roy Ross, the petitioner's son, testified to his knowledge of the petitioner's mental diagnosis, back injury, and the medications prescribed in relation to both his mental disorders and his back pain. Further, Roy testified as to the petitioner's previous counseling for temper related issues.

The State cross-examined Roy about his knowledge of any alleged threats or lists made by the petitioner. Roy testified, "I didn't know there was a list, but he has made comments, but everybody makes comments when they're mad." Immediately following Roy's testimony, the trial court asked if there was anything else, to which defense counsel stated, "I don't have anything else."

However, at no point prior to sentencing did the trial court give the petitioner the opportunity to speak or rebut any prejudicial information elicited by the State at the sentencing hearing. The only statements that were made by the petitioner during the sentencing hearing were those directed to his son following Roy's testimony, and those made during the trial court's questioning of witnesses, when he was told he could not speak by the trial judge as noted earlier.

The La. Third Circuit Court of Appeal addressed this exact issue in State v. J.P.F., 09-904 (La.App. 3 Cir. 3/3/10), 32 So.3d 1016, finding that the petitioner's due process rights were

violated when the petitioner was not made aware of or given the opportunity to rebut prejudicial information used against him at sentencing. A panel of that court stated as follows:

> The due process rights of a defendant do not stop at mere awareness of the information that will be used against the defendant in sentencing. Although a pre-sentence hearing is not required, the due process guarantee "requires that a defendant be given an opportunity to rebut false or invalid data of a substantial nature, to which the sentencing judge is exposed, where there is a reasonable probability that it may have contributed to the harshness of the sentence." Telsee, 388 So.2d at 750 (citing Richardson, 377 So.2d 1029; Bosworth, 360 So.2d 173; Underwood, 353 So.2d 1013)).
>
> It is true that "[i]n the absence of allegations of mistake or falsehood, evidence of uncharged offenses is admissible and is a valid factor for consideration in sentencing." State v. Rankin, 563 So.2d 420, 424 (La.App. 1 Cir.1990). Yet, the issue in this case is not whether the letter containing allegations of similar conduct is admissible or could be relied upon by the sentencing judge. It is whether J.P.F. had an opportunity to deny the allegations. Thus, J.P.F., because he had no notice of these allegations, was not given a chance to even assert mistake or falsehood.
>
> J.P.F. did not offer any specific refutation of the allegations. Yet, it may have been not because they were true but because J.P.F. had no notice of those allegations, no knowledge of the details of those allegations, and, thus, no opportunity to deny, explain, rebut, or show that they were false. Based on this, not only did J.P.F. not have an opportunity to deny, explain, or rebut these allegations, he also did not have an opportunity to object to their admissibility based on mistake or falsehood. Therefore, the trial court's failure to allow J.P.F. an opportunity to deny, explain, or rebut the allegations of prior similar conduct also constitutes a violation of J.P.F.'s due process rights.[Pg 7] *Id.* at 1019-20. See also State v. Telsee, 388 So.2d 747 (La.1980); State v. Bosworth, 360 So.2d 173 (La.1978).

In light of the arguably improper hearsay evidence that was admitted during sentencing, albeit without his attorney's objection, and especially in light of the fact that the trial judge used that evidence as the major justification for his sentence and specifically prevented the petitioner from speaking or otherwise contradicting that evidence, this court should find that there was a constitutional violation of the petitioner's due process right to a fair sentencing hearing.

3.) The Due Process Clause of the United States Constitution requires a fair trial in a fair tribunal, before a judge with no bias or interest in the outcome.

Prejudicial Remarks

Petitioner complains his due process rights were violated because of prejudicial remarks made by the trial judge.

During sentencing the trial judge blurted out that the petitioner had made threats of violence towards witnesses. The petitioner asserts there was no evidence that the petitioner committed any act in furtherance of the threat nor was there any evidence the incident occurred. (See Exhibits)

It is significant that the trial judge used these very beliefs in his reasons for sentencing as one of the main factors for his sentence on the attempted second degree murder charge. The trial judge specifically noted that petitioner showed "no remorse" and had threatened others with bodily harm.

Issues of this kind are more properly presented in "post conviction proceedings" where a full record can be made and expert testimony can be introduced. See La. C.Cr. P. art. 930; State v. Durall, 15-794 (La.App. 5 Cir. 5/12/16), 192 So.3d 285; State in the Interest of A.B., 09-870 (La.App. 3 Cir. 12/9/09), 25 So.3d 1012.

A remark like this coming from the trial judge clearly shows there was no fair trial in a fair tribunal, before a judge with no bias, but it does show the trial judge had plenty of interest in the outcome.

State law rises to the level of constitutional violations when they so infuse the trial with unfairness as to deny the defendant due process of law. *Derden v. McNeel,* 978 F.2d 1453, 1458 (5th Cir. 1992) (en banc), *cert. denied,* 508 U.S. 960, 113 S. Ct. 2928, 124 L. Ed. 2d 679 (1993).

4.) Petitioner's Due Process Rights of the United States Constitution were violated when the trial judge refused to look at the First and Fourth Circuit's views on self-defense in a non-homicide case.

Petitioner has argued that he acted in self-defense. Trial counsel noted his objection because there was a split in the circuits. The trial court issued the following ruling:

> BY THE COURT: Counsel, the issue of uh, self defense was recently addressed in a case called State versus Barron, 51[,]491, 243 So.3d 1178 it was a Second Circuit Court of Appeal case, August 9th, of 2017. In that case, the court spent some time talking about the um, burden of proof in a non-homicide case. That, the Second Circuit noted that there is a split but, indicated that the Second Circuit, Third and Fifth have consistently held that the defend [sic] has the burden of proving by the preponderance of the evidence, the defense uh, self defense or justification, the Court intends to follow that line of reason. So the objection to the jury charge is overruled. In brief, the state cites a case by this court, State v. Jasper, 11-488 (La. App. 3 Cir. 11/2/11), 75 So.3d 984, where this court affirmed the placing of such burden on the defendant in a non-homicide case. The state asserts the defendant is attempting to convince this court to overturn years of well-reasoned prior court decisions. The state notes there has been no supreme court ruling or statutory mandate compelling [Pg 34] such a change. Finally, the state asserts that even if this court decides to change the law, a harmless-error analysis should be applied since there was no credible evidence of self-defense presented.

Self-defense in a *homicide* case is governed by La. R.S. 14:20. Self-defense in a *non-homicide* case, such as the present matter, is governed by a separate statute, La. R.S. 14:19 set forth above. In Louisiana, the burden of proving self-defense in a non-homicide case has been the matter of some discussion. In State v. Freeman, 427 So.2d 1161 (La. 1983), the Louisiana Supreme Court noted that different statutory standards exist to justify the use of force or violence under La. R.S. 14:19 and 20, depending on whether a homicide results. In a non-homicide case, a claim of self-defense requires a dual inquiry: first, an objective inquiry into whether the force used was reasonable under the circumstances; and, second, a subjective inquiry into whether the force used was apparently necessary. The court in *Freeman* observed that the burden of persuasion in proving self-defense in a non-homicide situation, which entails a subjective as well as an objective inquiry, could arguably be on the defendant since a subjective inquiry is involved.

However, in disposing of the issues before it, the court in *Freeman* found it unnecessary to decide definitively whether the state or the defendant had the burden of proof in a non-homicide case.

In State v. Cheatwood, 458 So.2d 907 (La. 1984), the Louisiana Supreme Court recognized that our statutory criminal law does not directly address the burden of proof for "defenses." The court found there was a logical distinction between defenses which actually defeat an essential element of the offense, such as intoxication or mistake of fact, which preclude the presence of the mental element of the offense, and those defenses which present exculpatory circumstances that defeat culpability despite the state's proof beyond a reasonable doubt of all of the essential elements. In *Cheatwood*, the court observed that defenses such as justification are truly "affirmative" defenses because they do not negate any element of the offense, and it is logical to conclude that the legislature intended the defendant to prove by a preponderance of the evidence the exculpatory circumstances constituting the affirmative defense.

Until the Louisiana Supreme Court addresses and resolves the split in the decisions of the appellate courts on this issue, the petitioner and a wealth of others will be convicted and sentenced to years behind bars for justifiable acts.

CONCLUSION AND PRAYER

THEREFORE, considering the grave errors committed by the Fifth Circuit failure to review the constitutional violations of the appellant's rights, and the failure to the Fifth Circuit court to order this case remanded back before the trial court for an evidentiary hearing. In the alternative, granting any other relief to which he may be entitled.

Respectfully submitted;

Jeffrey Wayne Ross

Jeffrey W. Ross #159220
Dixon Correctional Institute
P.O. Box 788 / U-II: D-6
Jackson, LA 70748-0788

CERTIFICATE OF SERVICE

I, Jeffrey W. Ross, hereby certify that, a copy of the above and foregoing on the Office for the Clerk of Court, for the United States Supreme Court, by placing the same in the United States Mail, Postage Prepaid, and Properly Addressed on this 15 day of ~~September,~~ July 2024. Jackson, Louisiana.

Jeffrey Wayne Ross
Jeffrey W. Ross