No.: 24-6856

ORIGINAL

In The
Supreme Court of the United States
_____ Term, _____

CURTIS HAWTHORNE V. TIM HOOPER, Warden

On Petition for a Writ of Certiorari to

U.S FIFTH CIRCUIT COURT OF APPEALS

Curtis Hawthorne #632158
MPEY/Cyp-3
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

March 13, 2025

QUESTION PRESENTED

1. **As there are conflicting decisions amongst state courts of last resort concerning a constitutional issue, in accordance with Rule X, this matter is now ripe for review from this Honorable Court.**

RELATED PROCEEDINGS

This is a criminal case resulting from a conviction.

Curtis W. Hawthorne was charged by Bill of Indictment with one Count of Aggravated Rape, in violation of LSA-R.S. 14:42; one Count of Aggravated Kidnapping, a violation of LSA-R.S. 14:44; and one Count of Armed Robbery, a violation LSA-R.S. 14:64. Mr. Hawthorne entered pleas of not guilty to all charges. On January 23, 2014, a Motion to Suppress the Evidence was denied, and on December 1, 2014, trial by jury commenced. On December 2, 2014, the jury returned a guilty verdict. On January 5, 2015, the trial court imposed life sentences for Aggravated Rape and Aggravated Kidnapping, and a sentence of fifty (50) years for Armed Robbery, all without the benefit of Probation, Parole, or Suspension of Sentence, to run concurrently to each other. A Motion for Appeal was granted that same day.

Direct Appeal was filed by appointed counsel from the Louisiana Appellate Project on December 11, 2015. Mr. Hawthorne then filed a Motion to Borrow the Record and Supplement on December 18, 2015. On February 15, 2016, Mr. Hawthorne filed his Pro-Se Supplemental Brief on Appeal.

The Louisiana Fourth Circuit Court of Appeal affirmed Mr. Hawthorne's conviction and sentence on August 10, 2016. Mr. Hawthorne filed his Application for Writs of Certiorari to the Louisiana Supreme Court on August 23, 2016, which was denied by the Louisiana Supreme Court on May 26, 2017.

On July 12, 2018, Mr. Hawthorne timely filed his Application for Post-Conviction Relief w/ Memorandum in Support to the district court. Thereafter, he timely filed his Supervisory Writs to the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court; which was denied on December 10, 2019. Mr. Hawthorne timely filed his Petition for Federal Habeas Corpus pursuant to 28 U.S.C. §2254 to this Honorable Court, which was denied with prejudice on November 27, 2023. Mr.

Hawthorne then timely filed his Notice of Appeal on December 6, 2023.

Mr. Hawthorne filed for Certificate of Appealability on May 21, 2024, which was denied on September 24, 2024 in Docket No.: 23-30863. Mr. Hawthorne now timely files to this Honorable Court, requesting that after a thorough review, this Court Grant him relief in this matter.

INTERESTED PARTIES

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TABLE OF CONTENTS:

Page

APPENDIX:

"A"	Appeal Ruling:	Louisiana Fourth Circuit Court of Appeals (8/10/16);
"B"	Appeal Ruling:	Louisiana Supreme Court (5/26/17);
"C"	PCR Ruling:	Criminal District Court;
"D"	PCR Ruling:	Louisiana Fourth Circuit Court of Appeals (3/3/20);
"E"	PCR Ruling:	Louisiana Supreme Court (9/29/20);
"F"	Magistrate R&R	Eastern District of Louisiana (10/19/23);
"G"	Ruling	Eastern District of Louisiana (11/27/23);
"H"	Ruling	U.S. Fifth Circuit Court of Appeals (11/24/24)

INDEX OF AUTHORITIES: Page

U.S. CONSTITUTION:

FEDERAL CASES:

STATUTORY PROVISIONS:

STATE CASES:

MISCELLANEOUS:

In The
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_____ Term, _____

No.: _____

CURTIS HAWTHORNE v. TIM HOOPER, Warden

Petition for Writ of Certiorari to the Louisiana Supreme Court

Pro Se Petitioner, Curtis Hawthorne respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Fifth Circuit Court of Appeal on September 24, 2024 (received November 4, 2024).

NOTICE OF PRO-SE FILING

Mr. Hawthorne 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. Hawthorne 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 United States Fifth Circuit Court of Appeal was denied on September 24, 2024 (received November 4, 2024).

JURISDICTION

The United States Fifth Circuit Court of Appeal denied review of Mr. Hawthorne's Certificate of Appealability on September 24, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Curtis W. Hawthorne was charged by Bill of Indictment with one Count of Aggravated Rape, in violation of LSA-R.S. 14:42; one Count of Aggravated Kidnapping, a violation of LSA-R.S. 14:44; and one Count of Armed Robbery, a violation LSA-R.S. 14:64. Mr. Hawthorne entered pleas of not guilty to all charges. On January 23, 2014, a Motion to Suppress the Evidence was denied, and on December 1, 2014, trial by jury commenced. On December 2, 2014, the jury returned a guilty verdict. On January 5, 2015, the trial court imposed life sentences for Aggravated Rape and Aggravated Kidnapping, and a sentence of fifty (50) years for Armed Robbery, all without the benefit of Probation, Parole, or Suspension of Sentence, to run concurrently to each other. A Motion for Appeal was granted that same day.

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On May 21, 2024, Mr. Hawthorne timely filed for Certificate of Appealability to the U.S. Fifth Circuit Court of Appeals, which was denied on September 24, 2024.

Mr. Hawthorne originally filed his Writ to this Honorable Court on December 3, 2024, but it was returned for numerous reasons. Mr. Hawthorne was informed that he had 60 days in which to correct his pleadings.

Mr. Hawthorne now files for Writ of Certiorari, requesting that this Court, after a thorough review, Grant him relief for the following reasons to wit:

STATEMENT OF THE FACTS

Curtis Hawthorne was convicted of Aggravated Rape, Aggravated Kidnapping, and Armed Robbery, and sentenced to two life sentences and a fifty-year sentence, based upon the uncorroborated and conflicting statements of the alleged victim, KR, and an erroneous ruling of the trial court.

KR reported to security guards at the Guste High Rise that she had just been the victim of an Armed Robbery (Tr.t.p. 141). She called 911 from the complex and reported the same, that she had been robbed by a man in a silver car posing as a cab driver, and that when he dropped her off he robbed her at gunpoint (911 tape; incident recall; Tr.t.p. 142).

Police arrived to take her statement. She spoke to Officer Viviana Ferriera and Sergeant Richard Welch. KR mentioned then for the first time that she had been vaginally raped by a man she flagged down for a ride, believing him to be a cab driver. She also told them the when she tried to get her shoes and purse from the car, the driver drove off and she was thrown from the vehicle (Tr.t.pp. 69, 70, 73; Day 1). The officers received her consent to bring her to the hospital for a rape exam (Tr.t.p. 71; Day 1).

At University Hospital, KR gave a statement to the sexual assault nurse (SANE). This time, she added that she had been orally raped as well as vaginally raped. She stated that when the perpetrator

was finished, he dropped her off, and as she tried to take her shoes and purse from the car, he drove away, causing her to fall and scrape her hands and hip. She did not mention anything to the effect that she was robbed at gunpoint when the assailant dropped her off (Tr.t.pp. 111, 129).

At trial, KR testified that she had been drinking since noon with a group of friends in town for Mardi Gras for approximately fourteen hours when she began to feel drunk and wanted to go back to her motel. She lost track of her friends at the same time and decided to catch a cab back (Tr.t.pp. 134-5).

After trying to flag down cabs for a while, a silver car finally pulled over. The car had no markings, but she thought it was a private car service like Uber or Lyft, which they have in Dallas where she grew up (Tr.t.p. 137).

She asked the driver to bring her to the Holiday Inn Superdome. Instead, the driver drove around and eventually parked in a residential neighborhood and asked her for sex. She told him no and begged him to let her go (Tr.t.p. 138).

According to KR, he showed her a gun and told her things could get worse. He then told her to get in the back seat and take her clothes off. She complied, removing her underwear, pants, and shoes. He then orally and vaginally raped her (Tr.t.p. 139). When he was finished, he drove to a parking lot and told her to get out. When she did, she tried to reach back into the car for her purse and shoes, and the driver drove off before she could get them, causing her to fall and scrape her hands and hip (Tr.t.p. 141).

The State and defense stipulated that during the sexual assault exam, two vaginal swabs, two cervical swabs, two external genital swabs, and two rectal swabs were taken and Mr. Hawthorne's DNA was found on all four swabs. In addition, Mr. Hawthorne's seminal fluid was a match for the seminal fluid found inside KR (Tr.t.p. 86; Day 1).

Mr. Hawthorne was arrested pursuant to an arrest warrant. Sharon Jupiter, his girlfriend and mother of his child, notified Detective Watts, the detective assigned to locate Mr. Hawthorne and execute the arrest warrant, that she had been in touch with Mr. Hawthorne. In fact, Mr. Hawthorne was on his way to Jupiter's house to pick up his child when he saw a police car parked nearby. He then called Jupiter and asked if she called the police. She denied that she had, and arranged to meet him in the park. She then called the detective and advised him that Mr. Hawthorne noticed his police car and advised him that she was meeting Mr. Hawthorne at the park down the street from her house (Tr.t.pp. 176, 184).

Four members of the NOPD Special Operations Division Violent Offender's Warrant Squad arrived at the park to execute the warrant. Upon seeing them, Mr. Hawthorne allegedly told Jupiter that he was a wanted man and ran. The officers pursued him, with Jupiter warning them Mr. Hawthorne had a gun (Tr.t.pp. 179-80).

Detective Devin Joseph, the pursuing officer, believed Mr. Hawthorne was holding a bulge in his right waistband, his other arm swinging normally as he ran. Joseph lost sight of Mr. Hawthorne for three seconds as he turned a corner. According to Joseph, when he saw Mr. Hawthorne again, he was no longer holding his waistband. Mr. Hawthorne tripped and was apprehended. Joseph cuffed him and went back to the spot where he had lost sight of Mr. Hawthorne. There, he located a silver gun (Tr.t.pp. 180-82).

REASONS FOR GRANTING THE WRIT

In accordance with this Court's *Rule X*, Mr. Hawthorne 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 (Louisiana Supreme Court) 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.

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Specific Issue(s).

1. **Reasonable jurists would determine that the State failed to meet its stringent burden of proof in obtaining the conviction;**
2. **Reasonable jurists would determine that the trial court erred in allowing Mr. Hawthorne's statement to be presented to the jury;**
3. **Reasonable jurists would debate that the trial court erred with the presentation of a handgun allegedly discarded during these proceedings;**
4. **Reasonable jurists would determine that Mr. Hawthorne was denied his right to a fair and impartial trial when the trial court allowed the alleged victim remained in the courtroom during trial; and, trial counsel was ineffective for failing to object;**
5. **Reasonable jurists would determine that the State committed prosecutorial misconduct;**

VI. Argument(s).

1. Reasonable jurists would determine that the State failed to meet its stringent burden of proof in obtaining the conviction.

Curtis Hawthorne was convicted of Aggravated Rape, Aggravated Kidnapping, and Armed Robbery, based upon the uncorroborated and conflicting testimony of the alleged victim, KR. The State failed to prove lack of consent or present any evidence of an Armed Robbery. Thus, no reasonable juror could have found Mr. Hawthorne guilty of these crimes and the convictions must be set aside.

To determine whether evidence was constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 588 So.2d 757 (La. App.

4th Cir. 1991). The reviewing court must consider the record as a whole, and if a rational trier of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution was adopted. ***State v. Mussall***, 523 So.2d 1305 (La. 1988); ***Green***, supra.

When circumstantial evidence forms the basis of the conviction, the evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. ***State v. Shapiro***, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. This is not a separate methodology, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. ***State v. Wright***, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must be sufficient to support the conclusion that the defendant is guilty beyond a reasonable doubt. ***State v. Porretto***, 468 So.2d 1142 (La. 1985), *dissenting opinion*, 475 So.2d 314 (La 1985).

Where there is conflicting testimony as to factual matters, credibility of witnesses is within the discretion of the trier of fact. ***State v. Richardson***, 459 So.2d 31, 38 (La. App. 1st Cir. 4/11/94), 635 So.2d 168, 171.

The trier of fact, within the bounds of rationality, accept or reject the testimony of any witness. The fact finder's discretion may be impinged upon only to the extent necessary to guarantee the fundamental protection of Due Process of Law. ***State v. Mussall***, 523 So.2d 1305 (La. 1988).

In order to uphold the conviction for Aggravated Rape, the State was required to present evidence beyond a reasonable doubt that Mr. Hawthorne engaged in sexual intercourse with KR without her consent, and in this case, either she was presented from resisting the acts by threats of great and immediate bodily harm with the apparent power of execution, or that Mr. Hawthorne was armed with a dangerous weapon. LSA-R.S. 14:42.

To prove that and Aggravated Kidnapping occurred, the State was required to present proof beyond a reasonable doubt that Mr. Hawthorne forcibly seized and carried KR from one place to another, enticed or persuaded her to go from one place to another, or imprisoned her, in order to force her, in this case, to have sex with him. LSA-R.S. 14:44.

Finally, to prove that an Armed Robbery occurred, the State was required to present proof beyond a reasonable doubt that Mr. Hawthorne took something of value from KR, from her person or that was within her control, that he used force or intimidation, and that he was armed with a dangerous weapon at the time. LSA-R.S. 14:64.

The defense does not dispute that sexual intercourse occurred between Mr. Hawthorne and KR, or that the location of sexual activity was Mr. Hawthorne's car. The defense disputes that the act was not consensual. Additionally, the State failed to present any evidence that Mr. Hawthorne used force or intimidation, or was armed with a dangerous weapon when he dropped KR off in the parking lot to prove an Armed Robbery occurred.

First, KR initially reported that she had been armed robbed. She reported to the two security officers, who did not testify at trial, and then to the 911 operator. KR advised 911 that a man posing as a cab driver robbed her at gun point when he dropped her off (911 tape).

In her second version, KR told the responding officers that after she flagged down a car she mistakenly thought was a cap, the driver vaginally raped her. Afterward, he drove around for a while and then stopped in a parking lot where he ordered her out of the car. As she attempted to retrieve her shoes and purse, he drove off, throwing her out of the car (Tr.t.pp. 69, 70, 73; Day 1).

At University Hospital, KR claimed now to have been both orally and vaginally raped inside a car after being shown a gun by her attacker, who sen believed to be a cab driver. She also stated that when the perpetrator drove away, she fell on her hands and knees. She did not mention getting thrown out of

the car, nor did she say she had earlier that she was robbed at gunpoint as he dropped her off (Tr.t.pp. 111, 129).

At trial, KR testified that she had been drinking for approximately fourteen hours and was just beginning to feel drunk at 2:00 am when she decided to go back to her hotel. After trying to flag down a cab for an undetermined amount of time, a sliver car pulled over. She believe the car may have been a private car service such as Uber or Lyft, but had not called one because her cell phone had been damaged the night before. The driver agreed to take her back to her hotel, but instead drove until he finally stopped in a residential neighborhood where he orally and vaginally raped her after showing her a gun. When he was finished, he dropped her off at a parking lot, but drove off as she tried to gather her shoes and clothes. She did not see the gun after the initial time when he first showed it to her.

KR's version changed each time she spoke to someone. Initially she reported an Armed Robbery. This changed to vaginal rape and kidnapping, and then to an oral rape, vaginal rape, and kidnapping.

Initially she said she mistook the driver's silver car for a cab. At trial she claimed she mistook it for an Uber or a Lyft, although she had not called for a car.

While her first version she claimed she had been armed robbed while getting out of the car, in her trial testimony there was no mention of a robbery, only a theft when Mr. Hawthorne drove off without allowing KR to retrieve her belongings. There was no testimony of the use of force or violence, or that he was armed with the weapon at that moment. In fact, Mr. Hawthorne was sitting in the driver's seat of his car and KR was already outside the car when he drove off.

KR told several different versions of this story, including a complete lie that she was robbed at gunpoint.

It is impossible for all of KR's conflicting stories to be true. While she testified that she failed to tell the full story the first few times because she was embarrassed, this does not explain why she would

claim to have been arm robbed when she, in effect, left her purse and shoes inside the car and was prevented from retrieving them as opposed to them being forcibly seized by someone with a weapon. No rational trier of fact could have found KR's conflicting stories to be credible to prove an Aggravated Rape occurred.

Additionally, KR voluntarily got into the car with Mr. Hawthorne. He was minding his own business when she flagged him down for a ride. The State's theory is that at the point she no longer wanted to be inside the car, when she asked Mr. Hawthorne to take her home, she was kidnapped. However, the same argument applies that KR told so many different versions of the events, including the Armed Robbery version, that no rational trier of fact should have found Mr. Hawthorne guilty based upon KR's testimony.

There was no corroborating evidence. While testimony was presented that KR had no vaginal tearing and the absence of tearing could be indicative of non-consensual sex, it is also just as indicative of consensual sex. Additionally, the DNA retrieved only proves that sex occurred and is not relevant to the issue of consent.

Finally, there was a complete lack of evidence of an Armed Robbery. At most, even if the facts were to establish that Mr. Hawthorne drove away before allowing KR to retrieve her belongings, the most he would have committed is a theft. There was no indication of force or violence, as mentioned above, or that he was armed with a weapon at the time KR testified she was attempting to take her shoes and purse from the car.

KR was intoxicated at the time in question.[1] While most of the officers and the SANE nurse attempted to minimize the level of her intoxication, the case detective determined that she seemed to be intoxicated and she herself admitted she decided to go back to her hotel (Tr.t.p. 205). While an alleged

[1]It must be noted that Mr. Hawthorne was not the person who was with KR when she started drinking.

victim's level of intoxication is obviously not a defense to a rape, intoxication may affect an individual's memory of events that occurred, including issues such as consent.

Finally, Mr. Hawthorne testified on his own behalf at trial and provided an alternate version of events than the one provided by KR, stating that KR flagged him down and asked for help finding her hotel and that it eventually led to consensual sex. He then dropped her off near the Greyhound station so she could catch a cab (Tr.t.p. 229).

Mr. Hawthorne's story was consistent, despite the aggressive attempt of the prosecutor to attempt to impeach him, unlike KR, whose story changed each time she told it. While KR regretted what occurred what happened, it is inconceivable that a rational juror could have believed that the evidence presented by the State proved beyond a reasonable doubt that KR did not consent to sexual intercourse with Mr. Hawthorne. Additionally, the State's evidence did not set out sufficient evidence of a robbery, much less an Armed Robbery. Consequently, the convictions and sentences should be set aside.

Mr. Hawthorne contends that the State failed to present sufficient evidence in the conviction of the charges, in violation of the Sixth and Fourteenth Amendments and ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); ***In re Winship***, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970).

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]

The alleged victim in this case testified that she had been drinking for approximately 14 hours, had lost her friends, and waived Mr. Hawthorne in order to obtain a ride from him. However, there is no

[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. Guillot***, 200 La. 935, 9 So.2d 235, 239 (1942). Quoting: ***State v. Crosby***, 338 So.2d 584, 588 (La.1976).

evidence or testimony that Mr. Hawthorne had forced the alleged victim to stay with him, forced her to remain in the vehicle with him, or forced her to go from one place to another.

In fact, KR stated that she had requested that Mr. Hawthorne let her out at one point during the night, which he did. KR's testimony proves that in her intoxicated state, she had stumbled from the vehicle and fell to the ground upon exiting the vehicle.

KR testified that she had failed to retrieve her purse and shoes from the back seat of the vehicle. Not once did she state that Mr. Hawthorne had forcibly taken her property from her with the use of force or intimidation. KR's own testimony was that she had failed to take her property with her. KR further testified that she did not see the alleged gun at the time that she had left her belongings in the car.

The State failed to meet its burden of proof of guilt beyond a reasonable doubt with the evidence and testimony presented during these proceedings even taken as a whole for any of these convictions.

It is truly amazing that a person can actually testify that they had been consuming alcohol for approximately 14 hours during Mardi Gras before they "**started**" feeling intoxicated. KR testified to just this. KR stated that she had lost her friends and then decided to flag down a taxi in order to return to the hotel.

The common factor in these convictions is the handgun allegedly possessed by Mr. Hawthorne during the course of this night. Although the State presented the jury with a gun Mr. Hawthorne allegedly disposed of during an apprehension by the Special Operations Division: Violent Offender Warrant Squad.

Specifically, Mr. Hawthorne notes the testimony of Officer Devin Joseph (Rec. Vol. 4 of 5, p. 177), where Officer Joseph testifies that Mr. Hawthorne had disposed of a handgun during his apprehension from the park. Officer Joseph specifically informed the jury that he had lost sight of Mr. Hawthorne for

a few seconds and then made visual contact with Mr. Hawthorne again.

The State relied on the testimony of Officer Joseph informing the jury that Mr. Hawthorne was "holding his right side" during the course of the chase, then stated that as Mr. Hawthorne was running, he had tripped. Officer Joseph contends that the "holding of the right side" was Mr. Hawthorne's attempt to hide and hold onto a firearm during the apprehension. However, the Court must note that none of the officers had actually viewed, or witnessed, Mr. Hawthorne with any type of weapon.

When reviewing the evidence of the handgun, one **must not forget** that according to the Record and the testimony, there was **no** attempt to obtain fingerprints or DNA from the weapon. If the officers or the State were that certain that this handgun was in the possession of Mr. Hawthorne, some type of testing would have proven beyond a reasonable doubt so.

Mr. Hawthorne also contends that the State had to introduce some type of weapon in order to obtain a conviction for the Aggravated Rape, Armed Robbery, and Aggravated Kidnapping. Without the gun which Mr. Hawthorne allegedly discarded during his apprehension, there was no weapon.

In light of the overwhelming amount of inconsistent testimony, and after viewing evidence in light most favorable to prosecution, any rational trier of fact could not have found Mr. Johnson guilty of every 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); *Winship*, supra.).

The appellate court does not assess the credibility of witnesses or reweigh evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So.2d 442. A reviewing court accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. *State v. Gilliam*, 36,118 (La. App. 2nd Cir. 8/30/02), 827 So.2d 508, *writ denied*, 02-3090 (La. 11/14/03), 858 So.2d 422. However, in this matter before the bar, justice demands that this reviewing Court interject it's Supervisory Powers to weigh the evidence presented to the jury and determine whether or not the State had presented

substantial evidence of proof beyond a reasonable doubt of Mr. Johnson's guilt of every essential element of Aggravated Rape of CF.

On January 23, 1995, the United States Supreme Court in ***Schlup v. Delo***, 115 S.Ct. 851 (1995) held that the appropriate standard for showing that a fundamental miscarriage of justice would result from a failure to address the claim is that of ***Murray v. Carrier***, 106 S.Ct. 2639 (1986). Under ***Murray v. Carrier***, the petitioner:

> "must show that the constitutional error probably resulted in the conviction of one who is actually innocent."

The Court pointed out, only truly extraordinary cases will meet this standard. Prior to ***Schlup v. Delo***, the federal circuit courts have been divided on what standard is required in showing a fundamental miscarriage of justice. That is, the standards of ***Kuhlmann v. Wilson***, 106 S.Ct. 2616 (1986), ***Murray v. Carrier***, 106 S.Ct. 2639 (1986); or ***Sawyer v. Whitley***, 112 S.Ct. 2514 (1992).

Mr. Hawthorne is not requesting that this Honorable Court reweigh the evidence, or even act as the thirteenth juror in this matter. As the evidence presented during the course of these proceedings was not sufficient to sustain a conviction, Mr. Hawthorne is requesting that this Court uphold the ***Jackson*** standard when reviewing the Record.

WHEREFORE, for the reasons stated above, Mr. Hawthorne respectfully requests that this Honorable Court, after a full review of the Record and pleadings, Grant him the relief desired. Or in the alternative, order this matter back to the district court for a new trial.

Issue no. 2: Trial court erred in allowing Mr. Hawthorne's statement to be presented:

On the morning of trial, the State filed "State's Notice Pursuant to La.C.Cr.P. Arts. 716, 721-722, & 768," a standard, fill-in-the-blank form, indicating that it intended to introduce statements made by Mr. Hawthorne on October 7, 2014, at 12:30 pm, located at Franklin and Dreux, to Sharon Jupiter, who was Mr. Hawthorne's girlfriend and the mother of his child. The notice also states that the contents of the

statement were in the discovery provided to the defense (Rec.p. 102).

The State acknowledged that the date on the form is incorrect, as Mr. Hawthorne was incarcerated in Orleans Parish Prison on October 7, 2014, and the year on the form should have been 2013 (Tr.t.pp. 96, 99). Additionally, the State had not provided the substance of the statements, nor any indication that there was such a statement, in response to discovery. The State's contention was that even under La.C.Cr.P. Art. 716 (B), the statement was not discoverable (Tr.t.p. 101).

While the defense concedes that while the contents or substance of the statement may not be subject to disclosure, the fact that a statement was made by a defendant that is going to be introduced at trial in order to inculpate him is subject to disclosure under La.C.Cr.P. Art. 716 (B) (Tr.t.p. 101).

La.C.Cr.P. Art. 716 (B) requires the State to provide, upon request by the defendant, the existence of a statement of any nature made by the defendant and the date, time, place, and to whom the statement was made. Because the defense filed discovery in the case and requested that information, the State was under an obligation to provide this to Mr. Hawthorne in the discovery responses.

The State asserted that it was enough that it filed the notice the morning of trial, prior to trial beginning, failing to recognize that Article 716 is a discovery article that requires the response to be provided as a part of discovery, and not willy nilly whenever the State feels like it. The discovery request had been filed over a year prior to the commencement of trial, Yet, the State insisted the law only required that the State turn over the information anytime prior to trial, apparently even just moments before the jury walked through the door for Voir Dire (Tr.t.p. 104).

The statement itself was allegedly that Mr. Hawthorne knew he was a wanted man when he ran from the police. While the State indicated it assumed the jury would think that Mr. Hawthorne knew he was wanted on the current charge, the prosecutor's assumption of the jury's thought process cannot be allowed to dictate what constitutes error.

The defense asserts that it was not harmless error to withhold the information. The statement had not been mentioned in any of the police reports, nor had it been referenced by the officers in the motion hearing specifically pertaining to the date and time of the statement, which was immediately before Mr. Hawthorne's arrest (Mo.Hg.Tr. Jan. 213, 2014). The defense would not have known to question the police officers at the motion hearing regarding the statement because they were aware of its existence, and there could be no cross-examination pertaining to it because there was no direct examination pertaining to the statement.

Trial counsel specifically noted that had she been made aware of the existence of the statement, the defense would have investigated it. Trial counsel could have perhaps looked for witnesses to the statement, or looked for witnesses who may have testified the statement was not, in fact made, to discredit the witness. The defense was at a disadvantage because the only statement it was made aware of was the one Jupiter made to police regarding a gun, and not a statement by Mr. Hawthorne admitting he knew he was a wanted man.

The statement can easily be construed as evidence of another crime. The fact that the State assumed the jurors assumed Mr. Hawthorne was referring to the warrant issued in the current case is of no moment.

Because the State had an obligation under La.C.Cr.P. Art. 716 (B) to disclose the information, which may have allowed the defense an opportunity to investigate the alleged statement, and the State flagrantly violated the discovery rules – and still remains they did nothing wrong, which was an ongoing theme in this highly contentious prosecution – and the defense was prejudiced by not having the statement, it cannot be said that the verdict is surely not attributable to the error as such, the convictions and sentences should not be set aside.

Issue No. 3: Improper presentation of a handgun allegedly discarded by Mr. Hawthorne.

Mr. Hawthorne contends that he was prejudiced when the State was allowed to present testimony of a gun that was allegedly found after being subdued by the Special Operations Division: Violent Offenders Warrant Squad. Mr. Hawthorne was further prejudiced by the presence of the gun on the "Evidence Table" during the course of this trial.

Testimony presented by the State infers that Mr. Hawthorne had allegedly disposed of this gun in a vacant lot while being apprehended by Officer Devin Joseph from the park where Mr. Hawthorne had met with his girlfriend, Sharon Jupiter.

As ridiculous as it sounds, the testimony from Officer Joseph shows that Mr. Hawthorne was running from the park "while holding his right side;" then, later Mr. Hawthorne had "tripped" and was able to be apprehended by the officers. Officer Joseph alleges that the reason that Mr. Hawthorne was "holding his right side" was to conceal a weapon on his right side.

Officer Joseph admitted that he had "lost sight" of Mr. Hawthorne for approximately three or more seconds during the chase. Then, Officer Joseph "**finds**" a weapon in the vicinity of the chase in a vacant lot.

One important factor in all of this is the fact that none of the officers had seen Mr. Hawthorne with a weapon, throw a weapon; nor was Sharon Jupiter ever able to identify this weapon as being in the possession of Mr. Hawthorne at the time that he was apprehended by the officers in the park incident.

Mr. Hawthorne contends that the State allowed the jury to view this gun in order to ensure a conviction in this matter.

Mr. Hawthorne contends that the presentation of the gun was not harmless, nor was the fact that the State failed to inform defense counsel of the fact that this gun was to be presented to the jury harmless. Although this has been a long-standing practice for the State to keep the defendant misinformed of the proceedings and witnesses to be presented during trial, defense counsel is now subjected to a "trial by

ambush," or to lull the defense counsel into an false sense of security into the lack of the State's case.

Certain kinds of evidence "are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instruction the trial judge might give." ***Bruton v. U.S.***, 391 U.S. 123, 138, 88 S.Ct. 1620, 1629, 20 L.Ed.2d 476 (1968)(Stewart, J., concurring). The State was aware that Mr. Hawthorne would be "shown in a bad light" to the jury if they were informed of a prior incident concerning a shooting, or even firearms being used by Mr. Hawthorne.

The prejudicial effect of this evidence greatly outweighed any probative value, and the introduction of such has denied Mr. Hawthorne the right to a fair trial. Sixth and Fourteenth Amendments to the United States Constitution.

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), held newly discovered evidence material to the outcome of the trial is a violation of ***Brady v. Maryland***, 373 U.S. 87, 83 S.Ct. 1197, which held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution."

A failure on the part of the government to disclose ***Brady*** material requires a new trial, or a new sentencing hearing, if disclosure of the evidence creates a reasonable probability of a different result. As the Court explained in ***Kyles***, "the adjective is important," and "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." ***Kyles***, 115 S.Ct. At 1566.

In ***Barbee v. Warden***, 331 F.2d 842 (4th Cir. 1964). In A.W.I.K. and unauthorized use of automobile case, wherein defendant's gun was offered for ID purposes only and several witnesses made partial ID of gun as being used in shooting, reports of ballistics and fingerprint tests made by police, which

tended to show that different gun was used and to exculpate defendant, were relevant and prosecution should have disclosed their existence.

Once again, Mr. Hawthorne contends that there was NO type of testing on the gun in order to show that it was ever in his possession. It should also be noted that the alleged victim in this case was unable to make a "positive" identification of this weapon to the jury.

United States ex rel. Thompson v. Dye, 221 F.2d 763 (3rd Cir.), *cert. denied*, 350 U.S. 815 (1955). Conviction reversed where state failed to inform defense counsel that arresting officer smelled alcohol on defendant at the time of arrest. Absent state's deceit, jury may have believed defendant's physical and mental state evidence.

Mr. Hawthorne contends that defense counsel was not aware of the State's intention to introduce this gun during the course of the trial even though during discovery, defense counsel had requested for all exculpatory and inculpatory evidence that the State intended to use during these proceedings.

United States ex. rel. Raymond v. Illinois, 455 F.2d 62 (7th Cir. 1972), *cert. denied*, 409 U.S. 885 (1972). Defendant entitled to new trial even though exculpatory evidence had been revealed to defendant himself, but not to defense counsel.

In this case, the State may submit that Mr. Hawthorne was aware of the fact that the officers informed him that they "found" a gun after the "chase" in the park. If so, the State was still responsible, through discovery, to inform the defense counsel of such.

United States v. Beasley, 576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Conviction reversed due to failure of government to timely produce statement of key prosecution witness where not only was the witness critical to the conviction, but defense and prosecution argued his credibility at length, and the statement at issue differed from witness' trial testimony in many significant ways.

Mr. Hawthorne contends that the State also used a "blurted out" statement by Sharon Jupiter at the time that the officers were approaching them. The purpose of the use of this so-called statement was not disclosed prior to the commencement of trial, also a violation of ***Brady***.

United States v. Agurs, 427 U.S. 97 (1976). Three situations where ***Brady*** applies: 1. State's case included perjured testimony of which prosecutor knew or should have known; 2. Defense requested but was denied specific evidence material to guilt; 3. Defense made general request but prosecution suppressed evidence of sufficient probative value to create reasonable doubt as to guilt.

In this case, defense counsel's Motion for Discovery included any and all inculpatory and exculpatory material in the possession of the State. This **would have** included the fact that the State was in possession of a gun allegedly discarded by the defendant.

WHEREFORE, for the reasons stated above, Mr. Hawthorne respectfully requests that this Honorable Court, after a full review of the Record and pleadings, make the determination that the State's use of the gun during the course of the trial was a violation of Mr. Hawthorne's constitutional rights, and Grant him the relief desired. Or in the alternative, order this matter back to the district court for a new trial.

Issue No. 4: Mr. Hawthorne was denied his right to a fair and impartial trial when the alleged victim was allowed to remain in the courtroom; and, defense counsel was ineffective for failing to object.

Mr. Hawthorne was denied his right to a fair and impartial trial with the Court allowing the alleged victim in this case to remain in the courtroom during the course of the trial, prior to her testimony. In order for Mr. Hawthorne to obtain a fair and impartial, trial, the alleged victim, KR, was allowed to remain the audience during the State's case-in-chief.

Mr. Hawthorne notes that the State had called Michelle Johnson, NOPD Communications Division, Officer Viviana Ferreiera, and ex-officer for the NOPD, Sgt. Richard Welch, a 17 year veteran for the

NOPD, and Jean Holland, a SANE nurse with the University Hospital to testify prior calling KR to the stand. KR was present during the testimony of these State witnesses. In this case, "prejudice" ***must be presumed.*** Sixth and Fourteenth Amendments to the United States Constitution.

La.C.Cr.P. Art. 615 allows for the exclusion of witnesses from the courtroom. The purpose of the sequestration article is to prevent witnesses from being influenced by the testimony of earlier witnesses. ***State v. Chester***, 724 So.2d 1276, 1282, *cert. denied*, 528 U.S. 826, 120 S.Ct. 75, 145 L.Ed.2d 64 (1999).

The exceptions are outlined in La.C.Cr.P. Art. 615 (B). In the instant matter, counsel failed to object to the manner in which the court allowed this statute to be applied. This inappropriate application of the Law denied Mr. Hawthorne his constitutional right to a fair trial.

In the case at hand, Mr. Hawthorne was accused of Aggravated Rape, Aggravated Kidnapping, and Armed Robbery. KR[3] was the alleged victim in this case, and the State's primary witness.

In La.C.Cr.P. Art. 615 (B)(4), when discussing the applicable subsection, (B)(4), states in pertinent part:

> (4) The victim of the offense, upon motion of the prosecution, however, if a victim is to be exempted from the exclusion order, the court ***shall*** require that the victim give his testimony ***before*** the exception is effective and the court ***shall*** at that time prohibit the prosecution from recalling the victim as a witness in the State's prosecution in chief and in rebuttal ... (***emphasis added***).

In the instant matter, the alleged victim, KR, was allowed to sit in the courtroom and was able to hear the testimony of the State's witnesses prior to her testimony. According to the Record, KR was able to hear the testimony of: Michelle Johnson (NOPD Communications Division); ex-officer Viviana Ferreira; and, Sgt. Richard Welch (NOPD).

This type of situation is addressed by the Official Comments of La.C.Cr.P. Art. 615, where in

[3]In accordance with LSA-R.S. 46:1844(W), Mr. Hawthorne is using the victim's intials.

Section (d), which states in pertinent part:

> ... the exemption of representatives, if mechanically applied, resulted in manifest unfairness such as by undermining the right to meaningful cross-examination. Nothing in this Article is intended to deprive the trial court of the power to sequester witnesses in such case in the interest of justice. See: La.C.Cr.P. Art. 17. Such a potential prejudicial situation is presented, of course, in criminal cases when a law enforcement officer who is designated to be the State's representative is expected to also testify as a fact witness. In such a situation the court should take appropriate measures to minimize the possibility of prejudice, such as permitting the case agent to be designated the State's representative only if he testifies *prior* to all other fact witnesses. (***emphasis added***).

For the alleged victim to be excluded from the sequestration order, she must have already testified. The court's application of this statute was a ***blatant*** violation of the Legislative intent of La.C.Cr.P. Art. 615. The Law was not intended to be used as it was in this case. The court clearly abused its discretion and counsel's failure to object was a violation of Mr. Hawthorne's Sixth Amendment right to effective assistance of counsel.

Mr. Hawthorne was denied a fair and impartial trial due to counsel's failure to object to this misapplication of the Law. Mr. Hawthorne was prejudiced to the point of causing a manifest injustice to have occurred. This alleged victim was allowed to confirm what her testimony would be prior to being called to testify.

Simply put, the alleged victim was allowed to hear all of the testimony that she would have to corroborate during her testimony. In this case, she did not have to rely upon her own memory during the course of her testimony. Had the State followed the correct procedures, KR would have testified prior to the rest of the State's witnesses.

In this case, Mr. Hawthorne was denied his Equal Protection and Due Process of Law which is guaranteed him through the Sixth and Fourteenth Amendments to the United States Constitution. This is a prime example of a court's abuse of discretion which makes a mockery of our justice system and has resulted in the denial of Mr. Hawthorne's right to a fair and impartial trial. The trial court's abuse of

discretion mandates that Mr. Hawthorne be granted a new trial.

Ineffective Assistance of Counsel:

Defense counsel was ineffective for failing to object to the Court allowing the alleged victim, KR, to remain the courtroom during the State's case-in-chief. Although the victim is allowed to forgo the sequestration rule, the court shall require that the victim give his testimony before the exception is effective and the court shall at that time prohibit the prosecution from recalling the victim as a witness in the State's prosecution in chief and in rebuttal. See: La.C.Cr.P. Art. 615; Sixth and Fourteenth Amendments to the United States Constitution.

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).

"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. 4th 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).

Simply put, defense counsel allowed the State to forgo the rule of sequestration concerning KR, and failed to object to her presence during the testimony of other State witnesses. Had counsel properly objected to such, KR would have had to rely on her own memory during her testimony.

WHEREFORE, this Court must determine that Mr. Hawthorne was denied a fair and impartial trial and remand such for a new trial.

Issue No. 5: Prosecutorial misconduct.

Mr. Hawthorne is relying solely on his lay memory in this Claim as he has not obtained the Records from these proceedings. After a review of the record, if Mr. Hawthorne is in error, he will Supplement in order to avert any misunderstandings in these pleadings.

Prosecutor Misconduct:

The prosecutor's improper remarks, to the best of Mr. Hawthorne's memory that, the jury "needed to protect society from "Predators" such as Mr. Hawthorne." Also, the prosecutor's improper remarks

that, "Mr. Hawthorne had 'stalked' an innocent tourist in order to satisfy his needs." The prosecutor then told the jury that the "This man has destroyed this young woman's life," and, "What kind of man preys on innocent tourists? We *have* to protect the visitors to this great city and state." His persistence in making impermissible remarks and defense counsel's failure to address the misconduct clearly contributed to the verdict.

Mr. Hawthorne contends that if those are not the "exact statements" made by the prosecutor, the comments were relatively close to such. Mr. Hawthorne is certain that his remarks concerned something to the effect of the terror that Mr. Hawthorne has caused for tourists.

The prosecutor's remarks clearly went beyond the proper scope of opening and closing argument which should be confined to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The argument before the Court is clearly that the objectionable statement was an appeal to prejudice in violation of La.C.Cr.P. Art. 774. The prosecutor in Louisiana is prohibited from making such statements partly based on the statutory prohibition of La.C.Cr.P. Art. 774, above, but also for reasons of fairness. See ***State v. Kaufman***, 304 So.2d 300 (La.1974), and authorities cited therein.

The National District Attorneys Association has defined the role of a public prosecutor in our system of justice:

> Each decision [the prosecutor] makes has tremendous impact on the lives of individuals involved, if not on the entire community.
>
> Prosecutors must strive diligently to raise the ethical, technical, and professional standards of all prosecutors throughout the nation. A single unprofessional, corrupt, or unscrupulous prosecutor can undo the fine work being done by the many thousands of dedicated prosecutors throughout the country. The modern prosecutor cannot simply be the defender of the status quo. He cannot be content to simply perpetuate himself in office by withdrawing from the front line battle and practicing old routines. He must be a respected voice in the community with unquestioned integrity. From that operating base he must become a respected voice in the legislative body of his jurisdiction. The prosecutor must truly represent "the people" and conduct himself in a way to make that obvious when he rises to state his views in legislative halls.

Healy & Manak, eds., THE PROSECUTOR'S DESKBOOK, 3-4 (N.D.A.A.).

As a result of this role, public prosecutors owe a higher duty to the justice system. The duties of the prosecuting attorney were well-stated in the classic opinion of Justice Sutherland many years ago. The interest of the prosecutor, he wrote:

> "... is not that he shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He 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, 79 L.Ed. 1314 (1935). Likewise, the ABA *Standards on the Prosecution Function* state that "the duty of the prosecutor is to seek justice, not merely to convict." Standard 3-1.1(a).

That particular petard is one upon which the State must now be hoist. "There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice. . . ." *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972); see also: *Edwards v. State*, 465 So.2d 1085, 1086 (Miss. 1985) ("when the state fails to exercise good faith" the process becomes "unjust and we surrender the very mandate which empowers us to pass judgment").

Mr. Hawthorne contends that the State's prosecutor intentionally and willfully violated his right to a fair trial and Due Process by placing jurors in a "life-like" scenario. In opening statements, the State's prosecutor told the jurors to "think how you would feel if this happened to you while you were on vacation."

Surely, the courts **cannot** allow a representative of the State, or even the defense, to subjugate a trial the way that Mr. Hawthorne's trial was. The Sixth and Fourteenth Amendments to the United States Constitution guarantees individuals a right to a fair and impartial trial.

Ineffective assistance of counsel:

Standard of Review:

The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. 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).

> 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.Ed2d 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. 4th 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).

Defense counsel failed to impeach the State's witnesses due to the lack of investigating the allegations, during the course of these proceedings. The State had presented testimony which would have been impeached had counsel properly investigated and interviewed the witnesses prior to the commencement of trial.

Deficient Performance:

Mr. Hawthorne contends that he was denied effective assistance of counsel from counsel due to the following to wit:

Failure to Object to Remarks Which Would Constitute Prosecutor Misconduct:

Mr. Hawthorne contends that his trial counsel was ineffective for failing to object to the State's

blatant prosecutor misconduct during the course of their Opening Statement and Closing Argument (See: Claim above: *Prosecutorial Misconduct*).

Mr. Hawthorne is in need of the transcripts to fully argue this Issue in order to meet the burden of proof in accordance with La.C.Cr.P. Art. 930.3; and also to specify the "remarks" made by the State which would constitute "prosecutor misconduct" during the course of the trial.

The prosecutor's improper remarks, to the best of Mr. Hawthorne's memory that, the jury needed to protect society from people such as Mr. Hawthorne. Also, the prosecutor's improper remarks, "This man has gotten away with breaking the law long enough. It's time for you to tell him he can't do that any more." The prosecutor then told the jury that the "This man has destroyed enough lives." His persistence in making impermissible remarks and defense counsel's failure to address the misconduct clearly contributed to the verdict.

Mr. Hawthorne contends that if those are not the "exact statements" made by the prosecutor, the comments were relatively close to such. Mr. Hawthorne is certain that his remarks concerned something to the effect of the remaining residents on that particular street.

The prosecutor's remarks clearly went beyond the proper scope of opening and closing argument which should be confined to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The argument before the Court is clearly that the objectionable statement was an appeal to prejudice in violation of La.C.Cr.P. Art. 774. The prosecutor in Louisiana is prohibited from making such statements partly based on the statutory prohibition of La.C.Cr.P. Art. 774, above, but also for reasons of fairness. See *State v. Kaufman*, 304 So.2d 300 (La.1974), and authorities cited therein.

At this point, counsel failed to object to the statements as argumentative and requested an off the record discussion was held at the bench. These inflammatory remarks caused prejudice so severe that it

infects the Due Process rights of Mr. Hawthorne with an incurable disease. Turning jurors' minds from the bias that they must represent and putting their emotion that always has a high percentage factor in finding even an innocent man guilty. This is a distortion of facts and evidence to be used by State. A magic trick to deceive jurors from any possibility of innocence.

In *State v. Bradley*, 516 So.2d 1337 (La. App. 4th Cir. 1987), the Court held that it is prejudicial to have jurors think of themselves as crime victim.

In the case sub judice, the intent of the State's prosecutor was more than obvious. He knew that there are laws in place which do not allow for the Prosecutor to place a juror in the a "life-like" situation. Yet, this Prosecutor had a reckless disregard for the Court Rules or the Professional Rules of Conduct, much less case law set forth by the United States Supreme Court.

As counsel failed to object to this line of argument from the prosecutor, the Court had now failed to instruct the jurors to disregard these statements.

"To establish that a prosecutor's remarks are so inflammatory as to prejudice the substantial rights of a defendant, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred." *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*, ____U.S.____, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987). Mr. Hawthorne has met his burden of proof with this Claim.

"The law is clear that if the remarks were prejudicial or improper, a reversal will be warranted only if this court is 'thoroughly convinced' that the remarks influenced the jury." *State v. Keller*, 526 So.2d 378 (La. App. 4th Cir. 1988); *State v. Jarman*, 445 So.2d 1184 (La. 1984); *State v. Robinson*, 490 So.2d 501 (La. App. 4th Cir. 1986).

Mr. Hawthorne notes that argument which attempts to have jurors think of themselves as crime victim is prejudicial because such prosecutors' argument tends to serve no purpose but to prejudice

defendant by appealing to jurors' emotions, particularly their fear and apprehension for their personal safety is in direct violation of the Petitioner's right to a fair trial.

Obviously this State's prosecutor statement was made **boldly** in order to have the jurors place some form of sympathetic issues within their minds by playing upon the emotions. But this was a violation, plain and simple, of the Petitioner's rights. The intent was well-noticed and the State's prosecutor should be held accountable for his willful intent.

The fact prosecutor's comments asking jurors to put themselves in victim's place could be prejudicial, such comments were so extremely prejudicial as to have influenced jury and contributed to verdict.

WHEREFORE, for the reasons stated above, Mr. Hawthorne requests that this Honorable Court, after a full review of this Claim, determine that Mr. Hawthorne was denied his constitutional right to a fair and impartial trial; and Grant Mr. Hawthorne a new trial. In the alternative, Mr. Hawthorne requests that this Honorable Court order the Clerk of Court's Office forward him a verbatim copy of the Opening Statements and Closing Arguments which were presented to the jury.

SUMMARY

Insufficient Evidence:

This Assignment of Error was argued as both counseled and Pro-Se. As this Error concerned the fact that victim had stated and testified that she had been consuming alcoholic beverages for approximately fourteen (14) hours, a reasonable jurist would tend to believe that there could be reasonable doubt that these allegations were supported by the evidence.

Furthermore, the State failed to meet its burden of proof beyond a reasonable doubt that the victim was actually robbed of her purse and its contents. She specifically testified that when she had

exited the vehicle, she had stumbled from the car, and that Mr. Hawthorne had driven away with her purse and personal items still in the automobile. There was NO evidence presented to the jury that Mr. Hawthorne had actually "taken" anything from the victim.

Furthermore, as held in *In re: Winship*, the State must prove "every element of the crime beyond a reasonable doubt." As it stands, the State has failed to meet its burden in this case for any of the allegations.

Even with the *Jackson* standard, the reviewing court must consider the record as a whole, and if a rational trier of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution was adopted. *State v. Mussall*.

Error in Allowing Mr. Hawthorne's Statement to be Presented to the Jury:

As defense counsel had properly filed, in his motion for discovery, requesting if the State intended to use Mr. Hawthorne's statement during the course of the proceedings, the State was obligated to inform defense prior to the commencement of trial of their intent to use such.

Defense counsel was proper in requesting that a mistrial be granted, yet was denied such by the district court. In *State v. Allen*, 663 So.2d 686 (La. 11/13/95), the Louisiana Supreme Court held that, "Louisiana's criminal discovery rules are intended to eliminate unwarranted prejudice arising from surprise testimony and evidence, to permit the defense to meet the state's case, and to allow a proper assessment of its evidence in preparing a defense."

Furthermore, the State's failure to inform defense of its intent to use the statement has subjected Mr. Hawthorne to a "trial by ambush" with the late disclosure, or non-disclosure of their intent. Mr. Hawthorne was lulled lulled into a false sense of weakness in the State's case with the failure to inform of its intent, which Mr. Hawthorne has shown to be prejudicial. *State v. Mitchell*, 412 So.2d 1042 (La. 1982).

Presentation of the Firearm to the Jury:

Mr. Hawthorne has properly argued this Assignment of Error to the Courts due to the fact that there was no testing of the gun in order to prove if Mr. Hawthorne, in fact, actually ever had possession of this firearm. Testimony adduced during the course of the trial proved that Det. Watts had "lost sight" of Mr. Hawthorne for several seconds, and did not see Mr. Hawthorne dispose of the firearm during the "foot chase."

Furthermore, the most amazing testimony introduced during the course of the trial was when Det. Watts informed the jury that Mr. Hawthorne had a "bulge" in his waistband, and that he was holding up the right side of his pants during the chase. The **impossibility** of Det. Watts actually seeing any type of "bulge" during the chase should be considered as Det. Watts was behind Mr. Hawthorne the entire time. Not once was Det. Watts afforded a frontal view of Mr. Hawthorne during his apprehension.

For the reasons above, Mr. Hawthorne requests that this Honorable Court invoke its Supervisory Authority of Jurisdiction over the lower courts of the State of Louisiana, and grant Mr. Hawthorne relief.

Mr. Hawthorne contends that the courts have abused their discretion in denying him relief during the course of Appeal and collateral review.

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

CONCLUSION

For the foregoing reasons, this Court should grant the petition for Writ of Certiorari.

Respectfully submitted this 13th day of March, 2025.

Curtis Hawthorne

Curtis Hawthorne #632158

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 13th day of March, 2025 upon counsel of record for Respondent, pursuant to Rule 29 at the following address: 619 S. White St., Baton Rouge, LA 70802.

Curtis Hawthorne

Curtis Hawthorne