

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

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TROY BATISTE – PETITIONER, PRO SE

VS.

BURL CAIN, WARDEN
STATE OF LOUISIANA, – RESPONDENT

=====

ON PETITION FOR WRIT OF CERTIORARI TO:
U.S. FIFTH CIRCUIT COURT OF APPEAL

=====

PETITION FOR WRIT OF CERTIORARI

=====

Respectfully submitted,

Troy Batiste
DOC# 116464, Camp J
Louisiana State Penitentiary
Angola, La. 70712

QUESTIONS PRESENTED

Appealable Issue No. 1: Was Petitioner Denied His Sixth And Fourteenth Amendment Rights To Subpoena Defense Witnesses And To Confrontation.

Appealable Issue No. 2: Whether Sentence Enhancement Instituted By Bill Of Information Rather Than Grand Jury Indictment, Violate The Sixth And Fourteenth Amendments Of The U.S. Constitution.

Appealable Issue No. 3: Whether Sentence Enhancement Decided By A Judge As Opposed To A Jury Contrary To *Blakely V. Washington*, And A Violation Of Due Process And The Fourteenth Amendment.

Appealable Issue No. 4: Whether The Lower Courts Misapplied The *Jackson V. Virginia* Standard, And Its Progeny In Reviewing The Sufficiency Of The Evidence Claim In Violation Of The Sixth And Fourteenth Amendment.

Appealable Issue No. 5: Did The Lower Court Misapply The *Strickland* Standard Where Counsel Was Ineffective Failing To Investigate And Procure Defense Witnesses In Violation Of The Sixth And Fourteenth Amendment.

LIST OF PARTIES

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

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

Hon. Walter Reed, District Attorney
22nd Judicial District Court
Justice Center, 701 N. Columbia St.
Covington, LA 70433

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


Troy Batiste

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from federal courts:

The opinion(s) of the United States Fifth Circuit Court of Appeal appear at **Appendix A** to the petition and is unpublished.

The Judgment of the United States District Court, Eastern District of Louisiana, denying habeas relief appear at **Appendix B** and is unpublished.

The Order & Reasons of the U.S. District Court, Eastern District of Louisiana, appear at **Appendix C** and is unpublished.

The Magistrates Report and recommendation in the U.S. Eastern District Court, appear at **Appendix D** of the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeal decided my case was September 11, 2017, a copy of that decision appears at Appendix A.

On appeal the Louisiana Appellate Project argued two claims: (1) ineffective assistance of counsel and (2) insufficient evidence. The Court of Appeal court affirmed petitioner's convictions and sentences, State v. Troy Batiste, No. 2010 KA 2237 (La. App. 1ST Circuit) (June 10, 2011). The Louisiana Supreme Court denied certiorari, No. 2011-KO-1527 on January 13, 2012.

Batiste filed an application for post conviction relief in the 22ND Judicial District Court March 26, 2012. On May 8, 2012, the district court summarily denied relief without requiring the state to answer the claims or ordering evidentiary hearing. On May 18, 2012, petitioner filed for writs in the Louisiana 1ST Circuit Court of Appeal, No. 2012-KW-0906. On October 29, 2012 the Court of Appeal denied writs without reasons. On April 19, 2013, the Supreme Court denied the writ application with one dissent. No. 2012-KH-2525.

An application for habeas corpus relief § 2254 was filed in the U.S. Eastern District Court, relief was denied September 26, 2016. COA was requested in the U.S. Fifth Circuit Court of Appeal. The date on which the United States Court of Appeal decided my case was September 11, 2017, a copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under U.S.C.A. Const. Art. 3 § 2, cl. 2; 28 U.S.C. § 1257(a); Supreme Court Rule 9, 17.1(b), and 22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, **AMENDMENT V** provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be take for public use, without just compensation.

The United States Constitution, **Amendment VI** provides in pertinent part:

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

The United States Constitution, **Amendment XIV, § I** provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(I). STATEMENT OF THE CASE

On July 6, 2001, petitioner was arrested in St. Tammany Parish for one count of second degree battery, La R.S. 14:30.1, and one count of criminal damage to property, La. R.S. 14:55, both charges stemming from a single incident. On October 3, 2001, petitioner was charged by bill of information. The same day, petitioner entered pleas of not guilty to both counts. After posting bond and refusing to accept plea bargaining the court required Mr. Batiste to appear for each setting, after fifty-six (56) continuances and seven (7) years later, petitioner was tried and convicted as charged by a

six member jury. On November 3, 2008, concurrent sentences of five years imprisonment were imposed for each charge.

On August 8, 2008, petitioner was charged by bill of information as a habitual offender. La. R.S. 15:529.1. More than nine years after the offense, on September 24, 2010, a habitual offender hearing was held, petitioner was adjudicated a third felony offender; the court vacated the previous five year sentence imposed for the second degree battery and re-sentenced him to life imprisonment.

On appeal the Louisiana Appellate Project argued two claims: (1) ineffective assistance of counsel and (2) insufficient evidence. State v. Troy Batiste, No. 2010 KA 2237 (La. App. 1ST Circuit) (June 10, 2011). On June 10, 2011, the Court of Appeal court affirmed petitioner's convictions and sentences. The Louisiana Supreme Court denied certiorari, No. 2011-KO-1527 on January 13, 2012.

March 26, 2012, petitioner filed an application for post conviction relief in the 22ND Judicial District Court. On May 8, 2012, the district court summarily denied relief without requiring the state to answer the claims or ordering evidentiary hearing. On May 14, 2012, petitioner filed Notice of Intent to seek writs. And on May 18, 2012, petitioner filed writs to the Louisiana 1ST Circuit Court of Appeal, No. 2012-KW-0906.

On August 13, 2012, the Court of Appeal dismissed petitioner's writ on grounds that petitioner did not provide trial transcripts to support his claims for relief. In dismissing the petition, the Court gave petitioner until October 9, 2012 to re-file the petition with the court and to provide trial transcripts and other documents to support his

claims. On September 13, 2012, petitioner re-filed the original petition along with trial transcripts, exhibits and other related documents. State v. Batiste, 2012-KW-1512. On October 29, 2012 the Court of Appeal denied writs without reasons. On April 19, 2013, the Supreme Court denied the writ application with one descent. No. 2012-KH-2525.

Timely Petition for Habeas Corpus relief was filed in the U.S. Eastern District Court. On October 20, 2014, United States Magistrate Judge Sally Shushan, entered an order recommending Troy Batiste's federal habeas corpus application be denied and dismissed with prejudice. (App. A) Mr. Batiste filed an objection. (App. I). On September 26, 2016 the district court filed its Order and Reasons. (App. B & C). Notice of intent to appeal and request for COA was filed, and October 19, 2016 the District court denied COA and denied his motion to proceed in forma pauperis. (App. E & D). The Court of Appeal mailed forty day notice October 21, 2016. (App. G).

STATEMENT OF THE FACTS

Scott Sewell, the victim in this case, was less than a "model citizen." In fact, he had a lengthy, violent criminal history. His prior criminal charges include simple battery, disturbing the peace by fighting, criminal damage to property and domestic abuse. He also had prior felonies charges which include aggravated battery, battery on a police officer, aggravated assault with a dangerous weapon and second degree battery on a police officer, just to mention a few. See: T.tr. pages 168-171.

Sewell testified at trial that on July 6, 2001, at 8:00 p.m., he was at the Chevron gas station on Highway 190 in LaComb, Louisiana. He said that he first noticed Mr.

Batiste when he (Batiste) nearly sideswiped his vehicle while he was pumping gas. He testified that petitioner said something about "cutting him off in traffic." When asked if he said anything to Mr. Batiste, Sewell said: "I guess I did." Sewell claimed that Mr. Batiste argued with him at the gas pumps.

After paying for his gas, Sewell testified that when he exited the building, Mr. Batiste was standing outside waiting for him. Sewell said that petitioner began arguing with him about "cutting him off." Sewell said he got into his car and "revved up the engine" and "peeled out." He denied intentionally striking petitioner but on cross examination he admitted that he may have ran over Mr. Batiste's feet. Sewell admitted "shooting the bird" at Mr. Batiste two times (Exhibit B), but denied calling him a "nigger."

Sewell said that petitioner ran up to the car and struck the passenger side window with his fist, breaking it. He said Batiste attempted to climb inside the car with him. Sewell said he put the vehicle in park and ran around to the back of the car. Sewell said he saw petitioner coming at him and Batiste's hand or arm was gushing blood. Sewell said he blocked some of the punches as Mr. Batiste came toward him, swinging. Sewell denied trying to strike Batiste. Sewell said he slipped and fell down and petitioner jumped on him and pounded him with his fists until a gas station clerk came outside and broke up the fight. Sewell said petitioner departed from the gas station but he stayed because he could barely see.

According to expert testimony, Sewell had a hairline jaw fracture that did not

require corrective surgery. He also had a small laceration to his face that required five stitches. Mr. Batiste had abrasions on both feet and a deep puncture wound to his arm. Both Sewell and Batiste were eventually transported to the hospital by ambulance.

STANDARD OF REVIEW

Because Mr. Batiste filed his federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, federal habeas review is governed by AEDPA. Questions of law and mixed questions of fact are reviewed under §2254(d)(1), and questions of fact are reviewed under §2254(d)(2). Hill v. Johnson, 210 F.3d 481, 485 (5th Cir. 2000), cert. denied, 532 U.S. 1039, 121 S.Ct. 2001, 149 L.Ed.2d 1004 (2001).

Before an appeal may be considered, petitioner must obtain a certificate of appealability by making a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c)(2). If the district court denied the claim on the merits, petitioner may make this showing by demonstrating that “reasonable jurist would find the district court’s assessment of [his] constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

A state court decision is contrary to federal law within the meaning of §2254(d)(1) if the state court applies a rule that contradicts the governing law set forth in the Supreme Court’s cases, or the state court “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.” Williams v. Taylor, 529 U.S. 362, 405-

06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under §2254(d)(2), a state court's factual findings constitute "an unreasonable application of clearly established" Supreme Court precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. The inquiry into unreasonableness is objective. *Id.* at 410-12.

The state court's factual findings are presumed to be correct. 28 U.S.C. §2254(e)(1). In order to obtain habeas relief on the §2254(d)(2) ground that the state court's decision was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding," the petitioner must rebut by clear and convincing evidence the §2254(e)(1) presumption that the state court's factual findings are correct. See Dowthitt v. Johnson, 230 F.3d 733, 741 (5th Cir. 2000).

"[U]nder the deferential standard of AEDPA, [federal courts] review only the state court's decision, not its reasoning or written opinion, to determine whether it is contrary to or a misapplication of clearly established federal law." Catalan v. Cockrell, 315 F.3d 491, 493 (5th Cir. 2002). We review the "district court's evidentiary rulings for abuse of discretion." United States v. Griffin, 324 F.3d 330, 347 (5th Cir. 2003) (citing) United States v. Miranda, 248 F.3d 434, 440 (5th Cir. 2001). "A district court by definition abuses its discretion when it makes an error of law." United States v. Delgado-Nunez, 295 F.3d 494, 496 (5th Cir.2002)(Brackets omitted) (quoting Koon v. United States, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)).

In response to petitioners objection to the magistrate report and recommendation, the district court wrote a thesis on the limitations AEDPA places on federal courts in granting relief. The court failed however to identify and apply the standard for granting

relief.

Mr. Batiste objected to the standard of review applied by the Magistrate report which overlooks the “contrary to” clause, where Mr. Batiste albeit pro se, clearly relied and cited U.S. Supreme Court decision in support of relief.

Batiste objected in that the habeas court erred giving differential treatment to the state trial court’s May 8, 2012, summary denied of relief without requiring the state to answer the claims or ordering evidentiary hearing. The Mag. Report does not even mention that Mr. Batiste briefed this clear misapplication of the law in his § 2254 application. The habeas court should make a completely de novo review.

Petitioner objected because the court failed to review this claim under firmly held United States Supreme Court precedent as set forth in the Memorandum in support of his § 2254 application. The district court wrote a thesis on Supreme Court law related to AEDPA and failed to address a single finding of fact or application of law to fact in its entire long recitation of negative law. From this view point the district court comes to the erroneous conclusion that federal courts cannot grant Batiste relief. The AEDPA limitation upon the federal courts jurisdiction does not equate to an absolute bar to review or to grant relief upon otherwise timely and properly exhausted constitutional claims.

REASONS FOR GRANTING THE PETITION

The lower courts erred in denying pro se petitioner COA finding that he failed to state a constitutional claim. The standard of review is cited as follows:

In Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1027, 154 L.Ed.2d 931 (2003), the issue of Certificate of Appealability (COA) was addressed. When a habeas applicant

seeks a COA, the court should limit its examination to a threshold inquiry into the underlying merits of the claim; *e.g.*, Slack v. McDaniel, 529 U.S. 473 at 481, 146 L.Ed.2d, 120 S.Ct. 1595 (2000). This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with the Court's precedent and the statutory test, the prisoner need only demonstrate a "substantial showing of the denial of a constitutional right." U.S.C. 28 § 2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case, or that the issues presented were adequate to deserve encouragement to proceed further. He need not convince a judge, or, for that matter, a panel of three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong; Miller-El v. Cockrell, No. 01-7662, 537 U.S. at 326. 123 S.Ct. 1029 (02/25/2003) Accordingly, a court should not decline the application for COA merely because it believes the appellant will not demonstrate an entitlement to relief.

Appealable Issue No. 1: Was Petitioner Denied His Sixth and Fourteenth Amendment Rights to Subpoena Defense Witnesses and to Confrontation.

Petitioner contends that his constitutional right to **Subpoena Defense Witnesses** and confrontation was violated when he requested Deputy Michael O'Neal be subpoenaed for trial. The court erroneously stated Mr. O'Neal was not subject to subpoena. The federal court's opined that Batiste did not request a subpoena. The state

did not notify defendant until the day of trial that the officer who investigated the complaint and arrested Batiste was not going to be called to testify. Deputy O'Neal's testimony was crucial in that he was the arresting officer who brought felony charges against petitioner. He also conducted the investigation and interviewed all the witnesses to this incident as well as prepared the initial police report. Exhibit A-1. The truthfulness and accuracy of the state's witnesses went untested due to Deputy O'Neal's absence at trial.¹

Additionally, Scott Sewell's mother, Linda Sewell, wrote Scott's police statement because she said he was medically unable to write. Exhibit B. She was not tested under oath as to the truthfulness of the alleged victim's statement. See: Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009).

It was established on the record that the witnesses were petitioners fact witnesses. And the court was aware of how petitioner's compulsory process was being hindered / blocked and base its denial on the same. Petitioner was denied a fair trial, being tried without having meaningful opportunity to obtain or contact witnesses in his favor.

"For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence." 8 Wigmore, Evidence § 2192 (McNaughton Rev. 1961). Indeed, it used to be that "[e]very person in the kingdom, except the sovereign, may be called upon and is bound to give evidence" Ex parte Fernandez, 10 C.B. (n.s.) 3, 29 (1861). Since there is now no sovereign, "[t]he duty rests

1. La. C.Cr.P. Article 741 and the Sixth Amendment are very clear, the court has authority to subpoena out-of-state witnesses.

upon every citizen to disclose, when called upon, facts within his knowledge essential to the administration of justice. . . ." White Mountain Freezer Co. v. Murphy, 101 A. 357 (N.H. 1917).

In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the Supreme Court elaborated upon the accused's right to compulsory process. A state statute denied the defendant the right to have co-defendants testify in his defense. The Court reversed, finding that this violated his constitutional right to "compulsory process for obtaining witnesses in his favor." *U.S.C. Amend. VI*. The Court held that "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant to the defense. The Framers of the Constitution did not intend to commit the futile act of giving a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23; see also State v. Hill, 534 So.2d 1296 (La.App. 4 Cir. 1989) (reversing for violation of Sixth Amendment and of state constitution).

Relevant to the Washington v. Texas decision was the fact that the same witnesses who were beyond reach for the defendant could "be called by the prosecution to testify against the defendant." *Id.* at 22. This, the Court held, demonstrated "[t]he absurdity of the rule. . . ." *Id.* The same can be said of the "rule" being applied against Mr. Batiste, since the prosecution has had no problem securing witnesses. See also Flores v. Estelle, 492 F.2d 711 (5th Cir. 1974) (failure to enforce subpoena *duces tecum* for evidence that

eyewitness may have been intoxicated violated right to compulsory process).

Indeed, where the prosecution has access to a witness, the prosecution should secure that witness' attendance, regardless of cost. Mr. Batiste's rights would be violated by "[t]he refusal of the government to return a prosecution witness whose whereabouts are known and who is subject to its subpoena power on the ground of excessive expense. . . ." United States v. Edwards, 469 F.2d 1362, 1369 (9th Cir. 1972).

Petitioner contends that his constitutional rights under the **Sixth and Fourteenth Amendment** were violated when critical defense witnesses were not subpoenaed by the court for trial. Petitioner also contends that his right to confrontation was abridged when he was not afforded opportunity to test the truthfulness or accuracy of the state's key witness when Deputy Michael O'Neal was not present for trial. Petitioner prays for evidentiary hearing so that testimony can be heard concerning this constitutional issue and thereafter, in due course, his convictions and sentences will be set aside and a new trial ordered.

Appealable Issue No. 2: Whether Sentence Enhancement Instituted by Bill of Information Rather than Grand Jury Indictment, violate the Sixth and Fourteenth Amendments of the U.S. Constitution.

After a six person jury trial, on August 5, 2008, petitioner was charged by bill of information with being a third felony offender pursuant to La. R.S. 15:529.1. Mr. Batiste entered a plea of not guilty to the multi-bill. Two years later, September 16, 2010, trial on the multi bill was held. The Court determined that petitioner was a third violent felony offender and set aside the previously imposed five year sentence for second degree

battery, and re-sentenced him to life imprisonment, without benefits.

Petitioner contends that pursuant to the due process clause of the **Fourteenth Amendment**, and **Article 382** and the **Louisiana Constitution**, he should have originally been indicted by grand jury for the charge of second degree battery. Alternatively, he should have been indicted by grand jury for habitual offender proceedings.

Louisiana Courts usually hold that habitual offender proceedings are not a *charge* but rather a *sentence enhancement* proceeding. This may hold true in some cases but not here. The state knew from the outset that if petitioner was found guilty, they intended to multi-bill him and give him a sentence of life imprisonment. See t.t. page 77. (During the trial, the D.A. informed petitioner that if he did not accept a plea bargain offer, he was going to get a life sentence.) In essence, for this petitioner, the second degree battery conviction carried with it a mandatory life sentence and as such, institution of prosecution should have been by indictment. Moreover, if the habitual offender proceedings was not a *charge*, why then would the D.A. be required to file a bill of information and the court be required to apprise petitioner of his rights? The answer is simple. Habitual Offender proceedings are a "charge" that petitioner is a habitual offender, and require special constitutional protections for the accused.

It was obvious from the beginning that the state intended to multi-bill petitioner. During trial the prosecutor stated the following:

BY MR. BARTHOLOMEW: Your Honor, the matter we have to put on the record: I have the authority to offer the defendant a plea that would result in something **other than a life sentence**, It would be a lesser bill, because

that's what he's looking at right now if he's convicted. And as I understand it, if we amended it to a third, he could still be looking at it, if I could find a way to amend it to a third and do away with the life sentence. In other words, a third's not a crime of violence. And I would offer that as a plea and he would not spend the rest of his life in jail.

t.t. page 77

Most States require that habitual offender proceedings be initially raised in the same indictment as the original charge. This State circumvented **Article 382** when they failed to institute prosecution by grand jury indictment. Thus, the district court erred when it failed to quash the bill of information.

Appealable Issue No. 3: Whether Sentence Enhancement Decided by a Judge as Opposed to a Jury Contrary to *Blakely v. Washington*, and a Violation of Due Process and the Fourteenth Amendment.

The U.S. Supreme Court made a landmark decision concerning "enhanced sentences" in the case of Blakely v. Washington, 124 S.Ct. 2531 (2004). Blakely pled guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge sentenced him to 90 months after finding that Blakely had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed, rejecting Blakely's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

The Supreme Court said that this case required the Court to apply the rule of Apprendi v. New Jersey, 120 S.Ct. 2348. Any fact that increases the penalty of a crime

beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant.

Blakely, does make an exception for prior criminal convictions. Petitioner, however, is of the opinion that he should get the benefit of Blakely. **Second Degree Battery**, upon conviction, carried a maximum five year sentence. However, for this Petitioner, a conviction for the same charge carried a mandatory life sentence pursuant to **La. R.S. 15:529.1** due to petitioner having two prior crimes of violence. Petitioner informed the court and the state that he was not interested in taking a misdemeanor plea bargain offer. The state made clear that if petitioner was found guilty, he was facing a life sentence, in essence punishing petitioner for refusing to admit to a crime that he did not commit. T.t. pg 77. This gave advance notice of the state's intent to file a multi bill after a third felony conviction. The habitual offender adjudication assured that the sentencing judge was required by law to depart from the mandatory five year sentence of **14:34.1**. As such, a felony conviction, for this petitioner, meant that *any* third felony conviction would require the judge to depart from the mandatory sentence of that conviction and impose an enhanced sentence pursuant to **La. R.S. 15:529.1**. Due to the mandatory departure, and the state's advance notice of intent to multi bill him, petitioner contends that additional facts concerning petitioner's prior criminal history should have been brought before a jury.

In U.S. v. Booker\ Fanfan, 543 U.S. 220, 125 S.Ct. 738, 2005 WL 50108 (U.S. 1\12\2005), the Supreme Court re-affirmed their earlier decision in Blakely. The Booker Court went further and said that the federal sentencing guidelines was unconstitutional. The court said that federal sentencing guidelines are subject to jury trial requirements of the **Sixth Amendment**.

It is true that the Louisiana Legislature has not provided for habitual offender proceedings to be brought before a jury. These cases, Blakely and Booker, supra, should give the court some indication of which direction the High Court is leaning.

Petitioner contends therefore that La. R.S. 15:529.1 (A) (1) (ii) and (D) (1)(a) are unconstitutional, as applied. La. R.S. 15:529.1 (A) (1) (ii) prescribes the punishment for third felony offenders. If previously convicted of two prior crimes of violence, upon a third felony conviction, the defendant must be sentenced to life imprisonment, without regard as to how minor the third felony conviction may have been. The statute provides no sentencing discretion and provides for no mitigating circumstances to be considered. In this case a jump from five years to life in prison for a minor fist fight is incomprehensible.

La. R.S. 15:529.1 (D) (1)(a) provides that the district attorney shall charge the defendant as a habitual offender by bill of information. It further provides that the matter shall be heard before a judge as opposed to a jury.

Petitioner contends that in his case, upon conviction, he was facing a mandatory life sentence. Thus, the crime of second degree battery should have been brought by way

of grand jury indictment and the district attorney's authority to charge him by bill of information had no effect since La. R.S. 15:529.1 is unconstitutional, as applied. Petitioner further contends that his guilt relevant to habitual offender status should have been decided by a twelve person jury since the state, prior to trial, was well aware of their intent to multi bill him. As such, Mr. Batiste should get the benefit of Blakely and Booker\Fanfan, supra.

Appealable Issue No. 4: Whether the lower Courts misapplied the *Jackson v. Virginia* standard, and its progeny in reviewing the Sufficiency of the Evidence claim in violation of the Sixth and Fourteenth Amendment.

The district court's order and reasons (App. C, Pg. 5) says the magistrate report "determined that the elements of the offense were established through the victim's testimony, as well as other evidence." This counterintuitive finding is contrary to the record, where the investigating officer O'Neal did not testify, nor did the treating physician testify concerning the scope of the injury required for guilt.

Under the guidelines of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the Courts below erred in failing to examine whether the circumstantial evidence in the case excluded every reasonable hypothesis of innocence. In evaluating whether evidence is constitutionally sufficient to support a conviction, a reviewing court must apply the *Jackson* test to determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that every element of the crime was proved beyond a reasonable doubt. *Jackson*, supra; The reviewing court is not permitted to consider just the evidence most favorable to the

prosecution but must also consider the record as a whole, since that is what a rational trier of fact would do.

Therefore in light of the requirement that “all of the evidence,” and not just artfully selected portions, are to be reviewed, *Jackson, Id.*, at 99 S.Ct. 2789, the evidence of the dangerous character of the victim is relevant (1) to show the defendant’s reasonable apprehension of danger which would justify his conduct; and (2) to help determine who was the aggressor in the conflict.² Before such evidence is admissible, however, the accused must produce “appreciable evidence” of an overt hostile act by the victim (running the defendant off the road prior to the argument and running over the defendant in the parking lot) just prior to being [] injured.³ Sewell testified the defendant approached him concerning cutting him (Batiste) off on the road. Thereafter, Sewell said he got into his car and “revved up the engine” and “peeled out.” He denied intentionally striking petitioner but on cross examination he admitted that he may have ran over Mr. Batiste’s feet. It must also be considered that the state is obliged to establish beyond a reasonable doubt that the assault was not in self-defense. Sewell testified the conflict began when Batiste confronted him about cutting him off on the road, no evidence contest Sewell then got in his car revved the engine and peeled out running over Batiste, at which point Batiste took defensive actions. Here, the state did not satisfy its burden.

Second Degree Battery:

In order to uphold a conviction for second degree battery, the state was required to

2 State v. Edwards, 420 So.2d 663 (La. 1982).

3 La. Code of Evid. Art. 404(A)(2)(a); State v. Lee, 331 So.2d 455 (La. 1975).

prove "beyond a reasonable doubt" that petitioner intentionally used force or violence upon Scott Sewell, without Sewell's consent, that petitioner had the specific intent to inflict serious bodily injury, and that Sewell suffered serious bodily injury. La. R.S. 14:31.1.

Petitioner would be justified using force or violence upon Sewell to prevent him from committing an offense against him, albeit as long as the force used is reasonable and necessary. An aggressor cannot claim self defense unless he withdraws in good faith and in such manner that the adversary should know he is withdrawing.

Petitioner does not dispute that he used force upon Sewell, but he does dispute that Sewell suffered serious bodily injury. Petitioner also dispute's that he had the specific intent to *cause* serious bodily injury, when in fact he reacted to Sewell getting out of the car to fight him in self defense.

The standard of proof when a defendant claims self defense in a non homicide case is by preponderance of evidence. State v. Freeman, 427 So.2d 1161 (La. 1983).

In the instant case, no physical contact had been made until Sewell assaulted petitioner by running over him with his car. The sole issue of whether or not petitioner was justified in the use of force hinges upon whether Sewell broke the window by running his vehicle into petitioner, and then jumped out to fight petitioner, or if petitioner punched the window as Sewell claimed, causing Sewell to jump out to fight and the defendant defended himself. The fact that Sewell got beat up in the fight does not prove a crime on Batiste part.

Sewell's contentions are implausible. First, Sewell was already inside a moving vehicle at the time of the incident. Petitioner was standing outside. If Sewell did not want a confrontation with petitioner, he could have simply drove away, even if petitioner had punched his window. The fact of the matter is, Sewell attempted to run over petitioner with the car and did in fact run over his feet. (See Exhibit A-1 (Police Report)). If a defendant attempts to run over a police officer with his vehicle, he would be charged with attempted murder. Not in this case; petitioner was charged despite this assault upon his person. Perhaps more important, Sewell stopped the vehicle, got out and charged petitioner swinging his fists. If Sewell truly did not want a confrontation with petitioner, as he claimed at trial, why did he stop the car to begin with? Petitioner simply defended himself. See T.T. Pgs. 348-350.

Additionally, Sewell was a convicted felon. He was convicted in another case for hitting someone else with his car. He also had several convictions for batteries, disturbing the peace and criminal damage. T.T. pp. 371-372. In fact, there was no definitive proof offered at trial that petitioner was the aggressor in this altercation other than Sewell's discredited testimony and that was self serving.

The force used was necessary. Sewell jumped out of his moving vehicle swinging at petitioner. Had petitioner not used the force that he did, he could have been seriously injured or killed.

Moreover, petitioner disputes that Sewell was seriously injured within the definition of La. R.S. 14:31.1. Sewell had a small laceration above his eye that required

two or three stitches and a hairline jaw fracture that required no treatment. In the instant case, the injury sustained cannot be defined as "serious bodily injury." Let's face it, this petitioner is currently serving a life sentence for a simple fight and this sentence is truly a miscarriage of justice.

Even considering the evidence in the light most favorable to the prosecution, *Jackson, supra*, no rational trier of fact could have found sufficient evidence "beyond a reasonable doubt" that petitioner had the specific intent to inflict serious bodily injury within the meaning of La. R.S. 14:31.1.

Aggravated criminal damage to property:

The state was required to prove *beyond a reasonable doubt* that petitioner intentionally cause damage to Sewell's car, that it was foreseeable a human life could be endangered, and that the damage was caused by petitioner punching Sewell's car.

Petitioner contends that the damage caused to Sewell's car was not caused intentionally but was caused when Sewell attempt to run over him. Moreover, it was not foreseeable that a human life was endangered as required by statute. Even in serious car accidents where windows are shattered, very few serious injuries occur due to the safety-type glass used in the window's construction.

Under the authority of *Jackson v. Virginia, supra*, even considering the evidence in the light most favorable to the prosecution, no rational trier of fact could have found sufficient evidence, beyond a reasonable doubt, that the broken window caused human life to be endangered.

For these reasons, the evidence is insufficient to support the verdict and petitioner's conviction and sentence must now be vacated. When a conviction is reversed for insufficient evidence, the double jeopardy provision of U.S. Const., Amends. V and XIV prohibit a retrial of the defendant. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). Consequently, Defendant should be ordered discharged from his illegal custody.

Appealable Issue No. 5: Did the lower court misapply the *Strickland* standard where counsel was ineffective failing to investigate and procure defense witnesses in violation of the Sixth and Fourteenth Amendment.

Counsel was ineffective for failing to call key defense witnesses. The district court confused this claim with the failure of the court to call witnesses. In summarizing the magistrate findings the district court says "The magistrate Judge first noted that petitioner never asked the state trial court to secure the presence of Sharon Laurent, Dr. Tassin, and Lester Casnea, and so petitioner had "no grounds to complain that the trial court erred in denying his request to issue subpoenas [those witnesses] in that no request for such subpoenas was ever made, much less denied. That is precisely why counsel was ineffective. Counsel did not request Deputy Michael O'Neal and Reginald Dickerson either, the defendant himself requested those two witnesses and the court, contrary to law, stated the court did not have subpoena power to procure the witnesses. Moreover, the court noted "the magistrate judge concluded the petitioner failed to show how the absent witnesses' testimony would have been relevant and material to petitioner's defense." This is clearly wrong as demonstrated below.

To start with, the law with respect to the right to subpoena defense witnesses, confrontation, and ineffective assistance of counsel, has been clearly established by the Supreme Court. The magistrate judge and district court simply failed to apply it.

The United States Supreme Court has firmly held it to be prejudicial error, applying Strickland v. Washington, when an attorney's inexcusable mistake of law caused counsel to fail to procure critical witnesses for trial.

Hinton v. Alabama, 571 U.S. ___, No. 13-6440 (2014); In a per curiam opinion the United States Supreme Court vacated the lower court's judgment and remanded the case for reconsideration of whether the attorney's deficient performance was prejudicial. Hinton's attorney was granted \$1,000 by the court to hire an expert. Counsel did not understand Alabama law allowed him to get additional funding, that misunderstanding of the law caused counsel to employ an expert that *he himself* deemed inadequate.

Analogous to Mr. Batiste case [T]he only inadequate assistance of counsel here was the inexcusable mistake of law - the unreasonable failure to understand the resources that state law made available to him - that caused counsel to fail to subpoena critical defense witnesses.

Mr. Batiste's attorney and apparently the court believed the witnesses could not be subjected to subpoena power of the court.⁴

"The first prong - constitutional deficiency - is necessarily linked to the practice and expectation of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Padilla v.

4. La. C.Cr.P. art. 741 provides "Method of obtaining a witness from another state."

Kentucky, 559 U.S. 356, 366 (2010) (quoting Strickland, *supra*, at 688) “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Strickland, *supra*, at 688. Under that standard, it was unreasonable for Hinton’s lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at \$1,000.

“Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence. Harrington v. Richter, 562 U.S. ___, ___ (2011)(slip op., at 16). This was such a case. As Hinton’s trial attorney recognized, the core of the prosecution’s case was the state experts’ conclusion that the six bullets had been fired from the Hinton revolver, and effectively rebutting that case required a competent expert on the defense side.

An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland. See, e.g., Williams v. Taylor, 529 U.S. 362, 395 (2000) (finding deficient performance where counsel “failed to conduct an investigation that would have uncovered extensive records [that could be used for death penalty mitigation purposes], not because of any strategic calculation but because they incorrectly thought that state law barred access to such records”); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986)(finding deficient performance where counsel failed to conduct pretrial discovery and that failure “was not based on ‘strategy,’ but on

counsel's mistaken belie[f] that the state was obligated to take the initiative and turn over all of its inculpatory evidence to the defense").

Petitioner diligently informed his Counsel, Mr. McGuckin, on several occasions, to subpoena Deputy Michael O'Neal and other defense witnesses for trial. (See Initial Police Report, Exhibit A, attached PCR). Also, the recorded trial transcript supports this contention. t.t. pgs. 3-5. Further, a secretary or paralegal from the Public Defender's Office, Ms. Sheila Jeter, telephoned petitioner on July 12, 2008 asking for a witness list. Petitioner gave her the names of below witnesses that he requested subpoenaed for trial:

1. Deputy Michael O'Neal;
2. Reginald Dickson;
3. Sharon Laurent;
4. Dr. Tassin, (the attending physician who administered medical attention to petitioner after the incident);
5. Felisha Jarvis; and
6. Lester Casnea.

July 19, 2008, petitioner was visited at his residence by Ms. Desirea Wright from Public Defenders Office and she again asked Mr. Batiste for a witness list. He gave her the same list previously given to Ms. Jeter. These requests apparently went on deaf ears.⁵ The only witness present for trial was petitioner's girlfriend, Felisha Jarvis, and even she was not subpoenaed by the court.

In open court, petitioner made the judge aware of his request to have Deputy Michael O'Neal present for trial. Proven by the trial transcript excerpt mentioned above, the court was under the misguided opinion that it lacked judicial authority to subpoena

5. Petitioner contends that if the court finds that appointed counsel failed to request subpoena's for these witnesses, he was denied the effective assistance of counsel.

witnesses from out-of-state. Contrarily, the *State* subpoenaed an out-of-state witness, Amber Larkin Tabiner, who resided in the State of Texas. The D.A.'s Office even paid for her transportation and other expenses. t.t.pg. 96.

The probative value of Deputy Michael O'Neal's testimony, as the first officer on the scene and the investigating officer, was substantial. Deputy O'Neal prepared and wrote the initial police report and ultimately placed petitioner under arrest. (Exhibit A-1) of attached PCR. He investigated the case from the outset and had "still" photographs taken of the "incident sight" at the gas station and interviewed potential witnesses. (Exhibit A-3 of attached PCR.) Had O'Neal testified, his testimony could have discredited state witness, Amber Larkin Tabiner, who testified that she saw everything from inside the gas station. Deputy O'Neal was the best evidence⁶ to testify whether Ms. Larkin could have observed "everything" from her physical location inside the gas station. The state's entire case hinged upon Deputy O'Neal's investigation.

After petitioner's arrest, Deputy O'Neal visited petitioner's family members and indicated to them that he made a mistake in arresting petitioner and that he was going to "straighten this thing out." Coincidentally, this information was never mentioned to the jury because of the "hearsay rule" and Deputy O'Neal not being present to testify.

Dr. Tassin, Counsel's Ineffectiveness:

Dr. Tassin was not present for trial and appointed counsel was ineffective for not securing her presence.

6. United States v. Yamin, 868 F.2d 130, 135 (5th Cir. 1989).

Prejudice:

Dr. Tassin administered medical treatment to petitioner immediately after he was attacked by convicted felon Scott Sewell. Mr. Batiste was transported to the hospital by ambulance, which was never mentioned during trial. He was treated for a deep puncture wound to his arm and missing toenails from his feet where Sewell ran over him with his car. Again, this information was not testified to during trial. Dr. Tassin could have also testified about the treatment she administered and whether the wounds were consistent with offensive or defensive wounds. She could have also testified regarding any injuries petitioner may have sustained when he allegedly struck Sewell's vehicle with his fist. If injuries to his fist were not present, the weight of petitioner's testimony would have been greater. The prejudice this missing witness caused is unmistakable.

Reginald Wright, Counsel's Ineffectiveness:

Reginald Wright was not present for trial. Counsel did not secure his presence and therefore he was ineffective.

Prejudice:

Reginald Wright was present during the altercation with Sewell. He could have testified that Sewell was armed with a screwdriver, that he charged petitioner while armed with a dangerous weapon, that Sewell tried to run over petitioner with his car, and that Sewell called petitioner a "nigger" and shot him the finger. It is true that since this incident, Mr. Wright has had some legal problems of his own and his credibility may have been somewhat damaged. However, the question of credibility is for the fact finder

to decide.⁷ Moreover, despite Wright's credibility problem, any defense put on by counsel would have been better than no defense.

Seven year delay in trial:

This case was continued at least fifty-two times during the seven years this case was pending in the district court. T.t. pp. 1-54. No valid argument can be made as to why any attorney would allow a criminal case to languish for seven years.

Counsel requested no less than forty-five of these fifty-two continuances over seven years, between the date petitioner pled not guilty, October 3, 2001, to the day the case was finally tried, July 30, 2008. The possibility exists that the number may be higher, but two dates, April 28, 2008 and July 28, 2008, have no minute entries so it is impossible to determine which party requested the continuances.

There are no mention of the reasons for these continuances and it is difficult to comprehend any scenarios where it would be good trial strategy or in the client's best interest to reset a criminal case for almost seven years.

Under Louisiana law, La. C.Cr.P. article 578, petitioner would have been entitled to have the charges quashed after the first two years of delay if the court or the state had been responsible for the continuances. However, because defense counsel filed motions in July, 2001, and those motions were continuously reset for an unprecedented seven years, the time limits of Article 578 were suspended pursuant to Article 580, also depriving petitioner of the right to complain about not receiving a speedy trial.

7. State in Interest of R.E.B., 643 So.2d 287 (La.App. 2 Cir. (1994).

Due to petitioner not having witnesses to support his defense, petitioner was forced to waive his Fifth Amendment rights against self incrimination and testify, against his better judgment and the advice of his counsel.

The following transpired during trial:

BY MR. MCGUCKIN: One more matter your Honor, and I'll address it now, I guess. Mr. Batiste has made it clear to me that he desires to testify in this case. Is that correct?

BY THE WITNESS: Correct, that's correct.

BY MR. MCGUCKIN: This is against my advise as he has prior convictions, and I don't think it's to his advantage to do so.

BY THE WITNESS: I have no witnesses; I'm going to have to testify.

t.t. pp. 5-6.

Additionally, the accuracy or validity of the state's witnesses was not tested since Deputy Michael O'Neal was not present for trial. Deputy O'Neal's testimony would not have been cumulative since no other witness testified concerning the investigation and subsequent arrest of petitioner.

The attending physician and medical technicians initially treating petitioner after the altercation could have testified concerning the medical treatment they administered as a result of the fight with Sewell and secondly, whether the wounds were consistent with defensive wounds, as petitioner contended, or offensive wounds as the state contended. Petitioner argued from the beginning that he was stabbed by Sewell with a screwdriver (Exhibit A-1 of attached PCR) and testimony from the attending medical personnel would

have supported petitioner's contention. Perhaps more importantly, the attending physician could have testified as to whether petitioner's knuckles were cut or bruised from allegedly striking Sewell's car window. Had he struck the window with his closed fist, as Sewell claimed, then certainly the violent impact would have injured Batiste's hand in some way. If he suffered no injury to his hands, this would have supported petitioner's position that Sewell ran over him and his arm struck the window as a result of Sewell's aggression. Finally, these attending doctor's testimony could have supported that petitioner's feet were ran over by a car and his toenails suffered damage as a result.

Petitioner reminds the court that his injury (puncture wound) was in the middle of his arm (elbow area) and not his hands. None of Batiste's attending medical personnel testified at trial concerning *his* injuries. The testimony cannot be cumulative since no one brought petitioner's injuries, or the medical treatment he received as result of those injuries, to the attention of the jury.

The other witnesses, i.e. Reginald Dickson; Sharon Laurent; and Lester Casnea were all present when this altercation occurred and could have supported petitioner's position that he was not the aggressor and that **Sewell was armed with a screwdriver.**

The lower court's "determination" of facts from the evidence before it was objectively "unreasonable" because; 1). The court ignored record evidence supporting the petitioner's contentions; 2). The court reached conclusions based on inferences not supported by the record evidence; 3). The court's erroneous "decision" denying relief on petitioner's constitutional claims "resulted" from an objectively "unreasonable

determination of the facts . . .”.

Mr. Batiste was denied effective assistance of counsel, due process and a fair trial.

A petitioner on federal habeas corpus is entitled to an evidentiary hearing where the petitioner established a “colorable” claim for relief, and where the petitioner has never been accorded a state or federal hearing on his claim. Earp v. Oronski, 431 F.3d 1158, 1167 (9th Cir. 2005), citing Townsend v. Sain, 372 U.S. 293 (1963) and Keeney v. Tamayo-Reyes, 504 U.S. 1, 5 (1992). In stating a “colorable” claim, a Petitioner must allege specific facts, which if true, would entitle him to relief. No AEDPA deference is due where the state has made an unreasonable determination of the facts, and, where a state court makes evidentiary findings without holding a hearing or giving a petitioner an opportunity to present evidence, since such state court findings clearly result in an unreasonable determination of the facts. See also Flanagan v. Johnson, 154 F.3d 196, 199 (5th Cir.1998); (Michael) Williams v. Taylor, 120 S.Ct. 1479, 1490 (2000).

The state court insulated itself from habeas review by refusing to allow discovery or public records request, and a hearing to further develop the factual basis, then the Federal Magistrate relies on the deficiency of fact finding to deny habeas. Batiste should be allowed an evidentiary hearing to place this evidence on the record. While the state has had the luxury of litigating upon the available records, Petitioner has been repeatedly denied review of those records upon request.

CONCLUSION

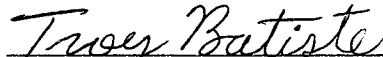
Conclusively, Mr. Batiste acting pro se reasonably articulated the factual basis of his claims, and the lower courts read him the law – without reasonably applying it to the facts of his case. Sewell who had a history of assault including vehicular assault ran over

Batiste, got out of his car to fight Batiste and Sewell lost the fight. For this Batiste was given a life sentence because after seven years of preparation counsel had not prepared a defense. The conviction and sentence in this case is unjust and wrong.

The constitutional claims were not fully and fairly adjudicated and reasonable jurists would find the Court of Appeal's assessment of the constitutional claims debatable or wrong. Petitioner suggests he has presented questions of constitutional substance that adequately deserve encouragement to proceed further. 28 U.S.C.A. §2253(c)(2).

WHEREFORE the lower courts erred denying COA, this Honorable court may grant certiorari or remand to the U.S. Fifth Circuit for further proceedings.

Respectfully submitted on this 13 day of November, 2017.



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