UNDER 28 U.S.C. SECTION 2254

Prisoner's Name:	**Robert Tassin**
Prison Number:	**# 117747**
Place of Confinement:	**Louisiana State Penitentiary, Angola, Louisiana**

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

ROBERT TASSIN
Petitioner

NO. 18-2011

v. **SECT. MAG.**

DARREL VANNOY, Warden,
Louisiana State Penitentiary,
Angola, Louisiana,
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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ENTITLEMENT TO AN EVIDENTIARY HEARING

When assessing an application for a writ of habeas corpus, a federal court must, pursuant to 28 U.S.C. § 2243, "hear and determine the facts, and dispose of the matter as law and justice require." The Supreme Court has long recognized that there "is no higher duty of a court . . . than the careful processing and adjudication of petitions for writs of habeas corpus." *Harris v. Nelson*, 394 U.S. 286, 292 (1969). The standards governing habeas corpus proceedings under 28 U.S.C. § 2254 require the district court to hold an evidentiary hearing if three conditions are met: (1) the petition's factual allegations, if true, would entitle the petitioner to relief; (2) the factual allegations are not "palpably incredible" or "patently frivolous or false"; and (3) for reasons beyond the control of the petitioner, the factual claims were not previously the subject of a full and fair hearing in the state courts.[1] *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963).[2]

A petitioner must also meet the diligence requirements of §2254(e)(2). In every instance where Petitioner seeks a hearing in this case, that condition was met by Petitioner's efforts to be

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[1] A habeas petitioner who "failed to develop the factual basis of a claim in State court," in contrast, is not entitled to an evidentiary hearing unless the petitioner can show "cause and prejudice." 28 U.S.C. § 2254(e)(2)(A)(ii); *see also Michael Williams v. Taylor*, 529 U.S. 420, 432 (2000) ("Under ... § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.").

[2] In *Townsend*, the Court held that the federal court must grant an evidentiary hearing and must not give a presumption of correctness to the state court's fact-finding, if

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313. While some of the *Townsend* factors have been changed by subsequent caselaw, section 2254(d)(2) of AEDPA generally codifies the holding in *Townsend* that state courts with faulty fact-finding processes do not deserve a presumption of correction when it provides that federal courts do not defer to state court decisions that are "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

obtain evidentiary hearings in state court. *See Michael Williams v. Taylor*, 529 U.S. 420, 432 (2000).

For claims that were adjudicated on the merits in state court, the petitioner must also overcome the limitation of § 2254(d)(1) or (d)(2) on the record that was before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). However, where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, "the fact-finding process itself is deficient" and not entitled to deference. *Hurles v. Ryan*, 752 F.3d 768, 790 (9th Cir. 2014). *Pinholster* should not be read to restrict federal courts from hearing evidence when a petitioner diligently presented a claim in state court but the state's faulty fact-finding procedures obstructed the full and fair development of that claim. *See Sanders v. United States*, 373 U.S. 1, 16-17 (1963) ("[T]he applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair.").

Where a claim was not adjudicated on the merits in state court, § 2254(d) does not apply. For these claims, as long as the claim is not barred under § 2254(e)(2), the petitioner is entitled to a hearing if the facts alleged would entitle him to relief, and one of the *Townsend* factors is satisfied. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). If the petitioner failed to develop the factual basis of his claims, the court may still grant an evidentiary hearing if the petitioner can show cause and prejudice for failing to present the factual basis to the state courts.

In the instant case, Petitioner was not allowed to factually develop his claims in state court through no fault of his own. His post-conviction counsel moved for an evidentiary hearing at every juncture. But those requests were denied despite that fact that he met the state law requirement under La. C.Cr.P. art 930 for an evidentiary hearing, given the existence of sharply

contested material facts that could not be fairly resolved without a full evidentiary hearing. *See Tassin v. Whitley,* 602 So.2d 721, 722-23 (La. 1992).

Pinholster does not limit the grant of an evidentiary hearing on any of Petitioner's claims that were adjudicated on the merits, because he demonstrated the unreasonableness of the state court's determination based upon the state court record. §2254(d)-(e), and because the denial of the hearing rendered the state's court's fact-finding procedures unreasonable.

In every instance where a hearing is requested, (1) the petition's factual allegations, if true, would entitle the petitioner to relief; (2) the factual allegations are not "palpably incredible" or "patently frivolous or false"; and (3) for reasons beyond the control of the petitioner, the factual claims were not previously the subject of a full and fair hearing in the state courts.[3] *Townsend v. Sain*, 372 U.S. 293, 312–13 (1963).

INTRODUCTION

In 2008, Robert Tassin's 1987 first-degree murder conviction and death sentence were reversed by this Court because of prosecutorial misconduct: the State's knowing presentation of misleading testimony of its key witness, Georgina Tassin (Santiago) denying the existence of a favorable sentencing deal which gave her a motive to lie.[4] In 2010, Mr. Tassin was retried by the State for second-degree murder and convicted. He now appears before this Court seeking relief from his conviction which again was obtained by prosecutorial misconduct, in a case which

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[3] A habeas petitioner who "failed to develop the factual basis of a claim in State court," in contrast, is not entitled to an evidentiary hearing unless the petitioner can show "cause and prejudice." 28 U.S.C. § 2254(e)(2)(A)(ii); *see also Michael Williams v. Taylor*, 529 U.S. 420, 432 (2000) ("Under ... § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.").

[4] *Tassin v. Cain,* 482 F.Supp.2d 764 (E.D.La. 2007) (reversing conviction due to State violations of Due Process under *Brady v. Maryland,* 373 U.S. 83 (1953), *Napue v. Illinois,* 360 U.S. 264 (1959), and *Giglio v. United States,* 405 U.S. 150 (1972)); *aff'd, Tassin v. Cain,* 517 F.3d 770 (5th Cir. 2008).

involves an extraordinary disregard of the United States Constitution and authority of the federal courts, by both the State and the state courts.

The state violated this Court's clear habeas mandate that he be retried within 180 days, illegally confining him for many hundreds of additional days before it finally did so. At trial, the prosecution then boldly repeated the same misconduct that resulted in the 2008 reversal. Having denied the defenses pretrial requests to disclose the deal in writing or stipulate to its contents, to deprive the defense of effective impeachment at trial it, again deliberately elicited Santiago's testimony denying the deal. It stood silently by while defense counsel attempted in vain to elicit the truth on cross-examination, then reinforced the deception by eliciting further false testimony on redirect examination, and exploiting it in closing argument.

At the retrial, its *Napue* and *Brady* violations did not stop there. It did similarly with another of its key witness, Darryl Macaluso, eliciting false testimony, and suppressing evidence that would have revealed the witness's motivation and propensity to lie to curry favor with the State. After Mr. Tassin presented his self-defense case which rested significantly on its forensic evidence supporting Mr. Tassin's account of a wild shooting during a struggle for a gun, it presented false testimony of its own forensic expert, to undermine the credibility of that evidence, and the defense expert who presented it.

To make matters worse, the defense presentation of that evidence was woefully inadequate, as the junior attorney handling that aspect of the case, appearing at his first trial, fumbled its presentation due to his lack of preparation, lack of understanding of basic hearsay rules, and a serious of other errors.

The credibility of the defense as a whole, was undermined by further state misconduct. Throughout trial the lead prosecutor, George Wallace, engaged in repeated flagrant misconduct,

denigrating and casting aspersions on the defense. The behavior of this prosecutor, who had already been reprimanded by an appeals court for some of the same misconduct, created such a spectacle that the District Attorney's chief of trials took the unusual step of meeting with the judge part-way through trial to discuss the issue. Although the trial court repeatedly threatened the prosecutor with contempt, it failed to follow through those threats, and the inflammatory atmosphere of hostility towards Tassin's defense overwhelmed the proceedings. Not only did this undermine the credibility of Mr. Tassin's defense before the jury, but because of it, Mr. Tassin forewent his basic right to testify on his own behalf at trial. The trial court then erroneously denied the defense request for a self–defense instruction on the basis that there was insufficient evidence presented to put it to the jury.

Mr. Tassin should not in fact have been retried at all. His right to a meaningful defense and Due Process was undermined by the passage of twenty four years since the crime, during which key witnesses died or became unavailable, and the State destroyed critical evidence This included the crime-scene itself—Eddie Martin's car—which the state destroyed after the first trial knowing that the pattern of bullets inside it and other evidence had formed a central part of the defense's case.

As a result of these and other substantial errors outlined in this petition, Mr. Tassin was denied a fair trial in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Because of the exceptional circumstances present in this case, including the State's repeated and deliberate efforts to flout this court's order, and deny Mr. Tassin Due Process, he seeks unconditional discharge from his confinement, with prejudice.

PETITION FOR WRIT OF HABEAS CORPUS UNDER § 2254

Petitioner, ROBERT TASSIN, through undersigned counsel, respectfully petitions this court to issue a writ of habeas corpus. Mr. Tassin's case involves a number of substantial constitutional violations which require the issuance of the writ, as set forth below. Petitioner requests discovery, an evidentiary hearing, and all appropriate relief from his unconstitutional conviction including unconditional discharge from his confinement.

STATEMENT OF INCORPORATION

All facts pled herein go to all claims, and all claims, facts, legal arguments, and authority of law previously pled in this action, whether to this Court or any other, are hereby incorporated by reference. For all the reasons pled, Petitioner requires a new trial in the interests of justice.

PROCEDURAL HISTORY AND REQUIRED INFORMATION[5]

Robert Tassin is in state custody at the Louisiana State Penitentiary, Angola, Louisiana, 70712. His Department of Corrections Number is 117747 and his date of birth is May 12, 1957.

The offense arises out of the homicide of Eddie Martin in Jefferson Parish, Louisiana, on the night of November 7-8, 1986.

Mr. Tassin, was initially indicted for first-degree murder in 1986, and tried, convicted and sentenced to death in 1987. At that time, he was prosecuted along with two co-defendants, his then-wife, Georgina Tassin and 19-year-old Sheila Mills. Both were indicted for capital murder. Georgina Tassin pled guilty to armed robbery and received a 10 year sentence in return for testifying against her husband at his 1987 trial. Although the transcript of her plea indicates

[5] This information is provided to this Court pursuant to the Local Rules and the Model Form for use in applications for Habeas Corpus pursuant to 28 U.S.C. § 2254, prescribed by the Rules Governing § 2254 Cases in the United States District Courts.

she did not admit to participation in an armed robbery, Sheila Mills also pled guilty to armed robbery. She refused to testify against Mr. Tassin, and was sentenced to 30 years in prison.

Mr. Tassin's 1987 conviction was reversed by this Court in 2008 due to violations of Due Process under *Brady v. Maryland,* 373 U.S. 83 (1953)*, Napue v. Illinois,* 360 U.S. 264 (1959), and *Giglio v. United States,* 405 U.S. 150 (1972 *Tassin v. Cain,* 482 F.Supp.2d 764 (E.D.La. 2007). That decision was unanimously upheld by a panel of the Federal Fifth Circuit Court of Appeals. *Tassin v. Cain,* 517 F.3d 770 (5th Cir. 2008).

The State re-indicted him for second-degree murder on February 5, 2009, R. 33. He entered a plea of not guilty to second-degree murder on February 9, 2009, and the state dismissed the first degree murder indictment on March 25, 2009. R. 37.

Mr. Tassin was tried by jury. Unlike at his first trial, he did not testify on his own behalf. He is indigent and was represented at trial and sentencing by Denise LeBoeuf, Paul Fleming and Paul Killebrew.

The 24th Judicial District Court, Hon. Donald Rowan presiding, imposed the conviction and sentence challenged in this proceeding. The docket number is 86-3579.

Voir dire commenced on November 30, 2010 and concluded the next day. R. 71-74. The presentation of evidence began on December 2, 2010, R. 75-76. Mr. Tassin was convicted on December 10, 2010. R. 86. The trial court denied his motion for new trial and sentenced him to life imprisonment on January 18, 2011. R. 2034-35. The trial court denied Tassin's motion for reconsideration of his sentence on January 25, 2011, R. 2037.

Mr. Tassin appealed his conviction and sentence to the Louisiana Fifth Circuit Court of Appeal, case number 11-1144. He was represented on appeal by Abigail Gaunt and Caroline Tillman. Mr. Tassin also filed a pro-se appeal brief raising additional claims which were

considered by the court. On December 19, 2013, the Fifth Circuit Court of Appeals affirmed Mr. Tassin's conviction and sentence in *State v. Tassin,* 11-1144 (La.App. 5 Cir. 12/19/13); 129 So.3d 1235. The Supreme Court of Louisiana denied writs on September 19, 2014. *State v. Tassin,* 2014-0284 (La. 09/19/14); 148 So.3d 950. On direct appeal, the following primary claims were raised:

I. THE TRIAL COURT IMPROPERLY DENIED A DEFENSE CAUSE CHALLENGE TO A JUROR WHO DISPLAYED A "COMPLETE DISREGARD" FOR THE COURT PROCESS AND ADMITTED BIAS AGAINST THE DEFENSE; AND IMPROPERLY RESTRICTED DEFENSE QUESTIONING WHEN IT DISCREDITED THE JUROR'S EXPRESS STATEMENT OF BIAS

II. THE COURT'S REFUSAL TO GIVE AN INSTRUCTION ON SELF-DEFENSE VIOLATED MR. TASSIN'S RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE

III. MR. TASSIN'S RIGHTS TO COUNSEL, DUE PROCESS, AND A FAIR TRIAL WERE VIOLATED BY THE STATE'S REPEATED DENIGRATION OF HIS DEFENSE

IV. MR. TASSIN'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE TRIAL COURT AND STATE FAILED TO CORRECT THE FALSE TESTIMONY OF THE STATE'S STAR WITNESS GEORGINA SANTIAGO

V. MR. TASSIN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT PREVENTED HIM FROM CROSS-EXAMINING SANTIAGO ABOUT HER HABIT OF ALLOWING HIM TO TAKE THE FALL FOR THEIR JOINT ACTS

VI. THE TRIAL COURT VIOLATED LA. C.E. ART. 704 AND MR. TASSIN'S DUE PROCESS RIGHTS WHEN IT DENIED DEFENSE'S OBJECTION AND REQUEST TO STRIKE THE STATE'S EXPERT'S TESTIMONY EXPRESSING AN OPINION ON MR. TASSIN'S GUILT

VII. THE DELAY IN PROSECUTION CAUSED BY THE STATE'S MISCONDUCT LIMITED TASSIN'S ABILITY TO PUT ON A DEFENSE AND DEPRIVED HIM OF DUE PROCESS

VIII. THE TRIAL COURT ERRONEOUSLY DENIED MR. TASSIN'S MOTIONS TO DISMISS AND FOR MISTRIAL BASED ON THE CUMULATIVE EFFECT OF THE STATE'S MISCONDUCT

IX. MR. TASSIN'S RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL TRIBUNAL WAS VIOLATED WHEN THE TRIAL COURT DENIED MR. TASSIN'S RECUSAL MOTION

X. MR. TASSIN'S MANDATORY LIFE SENTENCE IS EXCESSIVE AND VIOLATES THE EIGHTH AMENDMENT.

XI. THE TRIAL COURT ERRED IN DENYING MR. TASSIN'S MOTIONS TO DISMISS THE CASE WITH PREJUDICE WHEN THE STATE FAILED TO RETRY HIM WITHIN 180 DAYS OF THE FEDERAL HABEAS GRANT AND AFTER THE STATE REPEATED ITS *NAPUE* VIOLATIONS AT THE RETRIAL BREACHING THE FEDERAL HABEAS MANDATE.

XII. THE TRIAL COURT ERRED WHEN IT EXCLUDED EVIDENCE THAT MR. STAGNER'S HOSPITAL RECORDS INDICATED THAT HE HAD BEEN INJURED IN AN ALTERCATION WHICH SUPPORTED MR. TASSIN';S THEORY OF DEFENSE.

XIII. THE VERDICT FROM DOES NOT ESTABLISH THE VALIDITY OF THE SECOND-DEGREE MURDER CONVICTION BECAUSE JURORS MAY HAVE DISAGREED ABOUT WHETHER THIS WAS A FELONY MURDER OR SPECIFIC INTENT MURDER.

XIV. THE TRIAL COURT'S REASONABLE DOUBT INSTRUCTION DIMINISHED THE STATE'S BURDEN OF PROOF RENDERING MR. TASSIN'S TRIAL FUNDAMENTALLY UNFAIR.

XV. THE STATE VIOLATED MR. TASSIN'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT APPLIED ITS POWER TO GRANT IMMUNITY IN A MANNER THAT GROSSLY DISTORTED THE COURT'S FACT-FINDING PROCESS.

Mr. Tassin did not file an application for certiorari to the United States Supreme Court. The statute of limitations for filing a petition for federal habeas relief therefore began to run on December 18, 2014, when the time for filing a petition for certiorari expired.

Petitioner filed a Petition for Post-Conviction Relief, Memorandum in Support and Motion for Evidentiary Hearing in the state court on September 8, 2015,[6] which was supplemented on May 6, 2016. The following claims were raised:

I. THE STATE FAILED TO REVEAL THAT DARRYL MACALUSO, A KEY PROSECUTION WITNESS, WAS A LONG-TIME POLICE INFORMANT WITH A REPUTATION FOR LYING AND AN INCENTIVE TO LIE, IN VIOLATION OF ITS DUTIES UNDER *BRADY*, *GIGLIO* AND *KYLES*

II. THE STATE VIOLATED *NAPUE* BY KNOWINGLY SOLICITING MISLEADING TESTIMONY FROM DARRYL MACALUSO, AND CAPITALIZED UPON THAT TESTIMONY IN CLOSING ARGUMENTS

III. MR. TASSIN'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND THE LOUISIANA CONSTITUTION TO TESTIFY IN HIS OWN BEHALF AND PRESENT HIS DEFENSE WERE VIOLATED BY STATE MISCONDUCT

IV. THE STATE KNOWINGLY ELICITED FALSE TESTIMONY ABOUT THE PHYSICAL EVIDENCE WHICH SUPPORTED MR. TASSIN'S DEFENSE, IN VIOLATION OF MR. TASSIN'S RIGHTS TO DUE PROCESS UNDER *NAPUE V. ILLINOIS*

V. MR. TASSIN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO PRESENT A DEFENSE BY FAILING TO FULLY PRESENT THE FORENSIC EVIDENCE THAT SUPPORTED THEIR CASE, AND FOR FAILING TO PROPERLY IMPEACH THE STATE'S EXPERT AND REVEAL HIS OBVIOUS BIAS

VI. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S MISCONDUCT, WHICH UNDERMINED MR. TASSIN'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TESTIFY ON HIS OWN BEHALF

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[6] The district court initially improperly dismissed this petition on September 28, 2015 on the basis that Petitioner did not attach a Uniform Application for Post-Conviction Relief to his petition. However, the Louisiana Supreme Court has made clear that the form is designed for pro-se applicants and is therefore not required for post-conviction applicants represented by counsel who file formal pleadings which contains all the required information. *See Jacobs v. Cain,* 2008-0301 (La. 2/13/09), 999 So.2d 1138. Petitioner filed a motion to vacate the denial, which was unopposed by the state. Out of an abundance of caution, petitioner also supplemented his petition with the Uniform Application form. The district court vacated its denial, and ordered a response from the State to Mr. Tassin's petition. .

VII. THE CUMULATIVE PREJUDICE OF CONSTITUTIONAL VIOLATIONS IN THIS CASE REQUIRES REVERSAL

Mr. Tassin requested an evidentiary hearing on claims I-VI above. However, the state district court denied relief on all claims without holding the requested evidentiary hearings in rulings on March 8, 2016, March 23, 2016, and July 28, 2016. Mr. Tassin's timely writs to the Louisiana Court of Appeal for the Fifth Circuit seeking review of the state court rulings were denied on April 26, 2016 and September 29, 2016. His timely writs to the Louisiana Supreme Court were denied on November 17, 2017.

All grounds for relief asserted herein have been presented to the state district court, the Louisiana Court of Appeals for the Fifth Circuit and the Louisiana Supreme Court during appellate and/or post-conviction proceedings.

On October 13, 2015, counsel filed a 28 U.S.C. 2254 habeas corpus application with this Court, based on Petitioner's mistaken concern regarding the statue of limitations. When counsel realized the error, she filed an unopposed motion to dismiss without prejudice, which was granted by the Court. *See* proceedings in Case No. 15-5083.

Mr. Tassin is not serving any concurrent or consecutive sentence.

This petition is timely.

Mr. Tassin incorporates all facts pled in his appeal and post-conviction proceedings.

Mr. Tassin incorporates all facts of each claim pled herein in every claim pled herein.

Mr. Tassin requests a reasonable amount of time to amend and supplement this Petition and to file a Memorandum in Support of this Petition.

STATEMENT OF THE CASE

A. The Disputed and Undisputed Facts Regarding the Homicide

In the early hours of November 6, 1986, Eddie Martin (the victim), Wayne Stagner, Sheila Mills, Robert Tassin, and Georgina Santiago, each significantly intoxicated on alcohol, Dilaudid, cocaine, valium, or a combination thereof, went on an ill-fated ride in Martin's car.

The following facts are undisputed. After many hours of drinking, Stagner and Martin met Mills, a nineteen-year-old cocaine addict, at the Shady Lady Lounge. R. Vol. 21A 69; R. 5141. Hoping to have sex with her, Martin invited Mills back to the tugboat where he and Stagner worked, and Mills accepted. R. Vol.21A 115. Mills asked him to buy cocaine for them both first, so Martin gave her money. R. Vol.21A 116, 134-35. After efforts to find drugs elsewhere failed, Mills directed them to the home of her neighbors, the Tassins who were enjoying a quiet evening at home. R. 5153. Leaving the men in the car, she knocked on the window and was let in, and asked if the Tassins had any drugs. Mr. Tassin left to get some Dilaudid, a powerful opiate, using additional money Mills obtained from Martin for that purpose. R. 5156, 5286-88, 5366-67. Tassin, Santiago and Mills injected the Dilaudid, then joined Martin and Stagner in the car. R. 5160, 5291-93, 5367. Martin drove them to the Tres Vidas Apartments, where Tassin, Santiago and Mills briefly visited Mary Ann Valverde, a friend of the Tassins. R. Vol.21A 81-82, 146; R. 5298, 5368, 6200; D. Ex. 61. They then began to drive back to the Tassins' home. R. Vol.21A 83. Martin drove, with Stagner in the front passenger seat and Mills between them. Tassin sat behind Martin. Santiago sat behind Stagner. R. 5374. En route, Mills indicated she was about to vomit from the effects of the drugs. Martin pulled off the road underneath the Lapalco Bridge to let her out. R. 5167-68.

It is also undisputed that soon thereafter Martin was fatally shot three times, R. Vol.21A 87; Stagner was shot twice but survived, R. Vol.21A 89; and Tassin fired the gun. R. 4821. But the circumstances leading up to the shooting—most significantly, whether the Tassins and Mills had planned to rob Stagner and Martin or whether Tassin acted in self-defense when Stagner pulled a gun on him—are significantly contested. The State's theory of Tassin's guilt of second degree murder, whether based on a felony-murder or a specific intent shooting, hinged on this key dispute.

Robert Tassin has consistently maintained that there never was any armed robbery plan and that he shot the victims purely in self-defense. The defense theory was that after Mills came knocking on the door, they drove to Valverde's simply to get clean needles to inject more drugs; that Mills genuinely was sick and asked Martin to pull over the car because she thought she was going to vomit; that tired of being given the run around by the Tassins, Stagner pulled out a gun; that trapped with his wife in the back of the tug-boatmen's two door car and fearing for their lives, Tassin lunged across the car from where he sat behind the driver, to grab at the gun; that as he did so, the fleshy part of Tassin's hand between thumb and forefinger got caught between the gun's firing pin and hammer, stopping it from firing and cutting his hand; and that Tassin wrestled the gun from Stagner, shooting at the two men in self-defense.

The State's theory was that, after Mills unexpected arrival at the Tassins, she, Tassin and Santiago formed a plan to rob Martin and Stagner using a gun, which they then procured from the home of Valverde and Darryl Macaluso, at the Tres Vidas Apartments. It argued that Mills faked sick, as a signal to Tassin begin the robbery, and that after they pulled over under the bridge, Tassin pulled out the gun and shot Martin "execution style" in the back of the neck and shoulder, and shot Wayne Stagner as he ran away.

1. The Defense Case

For reasons explained further below, unlike at the first trial, Mr. Tassin did not testify in his own defense. Nonetheless, he presented significant evidence undermining the State's theory and supporting his self-defense case. This included the testimony of the other witnesses whom the State contended were involved in the alleged robbery plan. Sheila Mills testified there was no plan to rob or harm Martin and Stagner, as she consistently has said from the time of her initial arrest, to this day. R. 5160, 5214, 5220, 5226, 5244, 5305.[7] In fact, Mills testified that she had only met Tassin and Santiago one time, for a few minutes, before the night in question. R. 5142-3. Mills was insistent that she did not see Tassin with a gun at any point that evening, and never participated in, or heard Tassin speak to anyone else about, a plan to rob the two men. R. 5305.

Santiago's initial statements to police corroborate that no plan existed—and also that they went to Valverde's just "to take a ride," and that they had to pull over *several* times because Mills was so sick from the dilaudid. R. 5427, 5449, 5455, D. Ex 16. Mary Ann Valverde's testimony corroborated Mills' genuine sickness, R. Supp. 169, as did expert psychiatric testimony that Mills' symptoms—nausea, blackouts, loss of bodily control, and confusion—are classic symptoms of opiate overdose. R. 6229-31. Likewise, Valverde has consistently denied that Tassin obtained a gun from her apartment. R. Supp. 174-175; Ex. 61. Her post-conviction

[7] Ms. Mills did not testify at Tassin's first trial because she was facing first-degree murder charges at the time. However, in Mills' 1986 statement to police, Mills repeatedly stated that she never saw Tassin with a gun, and never knew of any plan to rob Martin and Stagner. R. 5305. When Mills took her plea deal for armed robbery, she initially denied knowing anything about a plan to rob the two men, only acquiescing to the idea that she knew of a plan when her attorney told her that her plea would be refused if she did not make an admission. R. 5213-50.

testimony that there was no gun at her apartment, and that Tassin visited her to obtain needles for his drugs, was read into the record. R. Supp. 168-69.[8]

In addition, Mr. Tassin presented physical and expert testimony supporting his self-defense case. First, Joseph Warren, the State's serologist testified that Tassin's blood type—A—was found on Stagner's shirt, and could have come from Tassin, R. 4911-15, 4918, 4938. This supported Tassin's account that he injured himself and made contact with Stagner during a struggle. The presence of Tassin's blood on Stagner's shirt was inconsistent with the State's execution theory of the case, in which no direct contact between Tassin and Stagner occurred. R. Supp. 250.[9] Second, Louise Walzer, the State's ballistics expert, confirmed it was possible to stop a gun from firing by putting one's hand in between the firing pin and the hammer of a gun and that injury to the web of the hand could be sustained this way. R. 5064, 5069, 5073. Third, Tassin displayed the scar on the web of his hand, which was caused by the firing pin. R. 6330.

Fourth, Ronald Singer, the defense's crime scene reconstruction expert, testified that, based on the available physical evidence, including the location and condition of the bullet holes in the roof and side of the car, it was his opinion that the shots to Martin were fired from closer to the middle of the car than directly behind the driver's seat. This supported the defense theory that the shooting occurred during a struggle with Stagner who was seated on the passenger side. R. 6031, 6039. Singer confirmed that the shots to Stagner could have been fired from a similar position, based on the location of a bullet hole in the glove box (likely linked to a bullet fired at

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[8] The court allowed the defense to read her testimony after declaring Valverde unavailable. R. 6017. The State indicated its willingness to prosecute her as an accessory to murder, and her attorney indicated she would assert her right not to testify under the Fifth Amendment if called to the stand. R. 6013.

[9] In 1986, at the time of crime, only serological testing was available, and DNA testing could not be done. R. 4902. However, on retrial in 2010, defense counsel moved to have DNA testing done to further prove the origin of the blood on Stagner's shirt. R.1894. However, the serological testing has consumed the blood samples, and there were no remaining samples for a pathologist to test. R. 4924-5.

Stagner), and the position of Stagner's leg wounds when hypothetically positioned seated in the passenger seat, and swiveling around to face the back seat as he pulled a gun on Tassin. R. 6042-44. Fifth, the defense presented evidence that bullet holes were shot at varying angles, consistent with wild shooting during a struggle. *See* S. Ex. 34; R. Supp. 252-53. The State had destroyed the car in the intervening years between the crime and this second trial, but the vehicle would have provided critical evidence of what occurred, corroborating the pictures of bullet holes shot wildly around the car from an apparent struggle. R. 6074. Additional evidence supporting a self-defense theory—including Singer's testimony regarding the basis for his critical self-defense opinion—was excluded by the trial court. R. 5964-82.

Ultimately, the trial court refused to instruct the jury on self-defense, undercutting the theory the defense had advanced throughout the entire trial R. 6474-79. The defense had earned the right to have that instruction given to the jury by providing significant evidence that would have shown that it was Stagner, not Tassin, who was the initial aggressor, and that Tassin was acting in self-defense out of necessity. Despite the substantial evidence presented by multiple forensic and lay witnesses that the shooting occurred in self-defense, the trial court abdicated the jury's role when it decided there was not enough evidence of self-defense. Therefore, the jury went to deliberations without the option of finding that Tassin acted in self-defense.

2. The State's Case

Against this evidence, the State's armed robbery theory rested on its star witness, Georgina Santiago. Despite her acknowledged significant drug-induced gaps in her memory of that evening,[10] the State's case hinged on Santiago's testimony. She testified: that she, Tassin

[10] Santiago told police in her initial statement that she was "loaded." D. Ex. 16. In letters to Mr. Tassin in jail, she wrote that she did not remember several aspects of that night, including who dragged the body out the car and who

and Mills had concocted a robbery plan at the Tassin's home, R. 5367-78; that they went to Valverde's apartment to collect a gun to use in the robbery, R. 5368; that Mills faked sickness as a signal to begin the robbery, R. 5375; and that Tassin initiated the shooting, R. 5327-28.

The jury did not learn, however, of critical evidence undermining Santiago's credibility: This included the 10-year sentencing deal that motivated her to waive her marital privilege and testify about the armed robbery plan at the first trial, that she had lied about that deal under oath, and that she would expose herself to perjury charges if she changed her story at the retrial..

Although Tassin's first conviction was reversed because of the State's failure to correct her false testimony denying the existence of any deal, and failure to disclose the deal to the jury, the State did exactly the same again. At every turn—this time aided by the trial court—it thwarted Mr. Tassin's efforts to make sure that Santiago's dubious credibility, motivations, and history of lying under oath were known the jury, at every turn. Before trial, the State refused defense requests to put the deal in writing or stipulate to it. R. 1612, 1701, 1710-11, 3702-24, 3820-43.[11] At a hearing on defense counsel's related motions, the prosecutor claimed ignorance of the deal, R. 3722 questioning even its existence.[12] The State repeatedly claimed that the deal

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was shot first, or that Macaluso had not been present. "There are many moments it's like I totally blacked out." D. Exs. 72, 74; R. 5482, 5474-92. She signed a statement in 1992 stating she "barely knew" what happened because of drugs, and that "there were a lot of moments when I totally blacked out and don't remember nothing." D. Ex. 66; R. 5528, 5535. At the 1992 post-conviction evidentiary hearing challenging Tassin's original conviction, Santiago described having memory black outs of up to several days when taking valium and acknowledged taking valium and other drugs in the ten days before the shooting. D. Ex. 57A, R. 5433-34, 5437-40. At the 1987 trial she confirmed taking heroin, percodan, Dilaudid, and soma in the same period. R. 5546. Mary Ann Valverde's 1992 testimony, read to the jury, confirmed Santiago was the most loaded she'd ever seen her "where you can't walk no good, or talk no good." R. Supp. 169-170.

[11] The State acknowledged this left the defense without effective impeachment: "Defense Counsel has a gigantic problem in terms of impeachment. All she can do under the rules of impeachment… is to show… a prior inconsistent statement. If she cannot establish that, then we don't get to step three…" R. 3825.

[12] In oral argument pretrial, the State insisted "there was no concealment of – as to why that woman was testifying", R. 3715, and "as much as Ms. LeBoeuf might like to believe or want to believe that Georgina Tassin's testimony in the first trial was untruthful, that is something in her universe." R. 3826. Ignoring the clear findings and mandate of

had no relevance at the retrial and accused the *defense* of "taint[ing] this new trial" by trying to present "evidence of a possible sentencing deal… in 1987… to prejudice and confuse the jury." R. 1710-11 (emphasis added).

Defense counsel argued the obvious relevance of the deal: "[H]aving once lied on the witness stand when [the State] did have a great deal of control over her, she's now sticking with that lie for the rest of her life." R. 5659. Indeed, testimony to the contrary would expose her to perjury charges—a fact the trial court acknowledged. *See* R. 5658 ("the only thing that this witness potentially could be charged with, if anything, is perjury"). However, the trial court denied the defense motions, agreeing that the sentencing deal was irrelevant to the jury's assessment of Santiago's credibility at the retrial: "[a]ny leverage the state may have had over this witness has passed." R. 5657; *see also* R. 3870.

On direct examination at trial, the State then deliberately elicited Santiago's false testimony denying any deal pertaining to her testimony at *either* trial. *See, e.g.,* R. 5405 (Q: "[w]as any promise or inducement made to obtain your testimony, by anyone in the District Attorney's office, in his first trial or now? A: SANTIAGO: No, I never had any promises."). Defense counsel attempted in vain to cross-examine her about the 10-year deal, but she denied it. She insisted she "was never promised anything, "I was told ten years, I was told thirty, I was told fifty, I was told ninety-nine," and that "I really didn't know anything for sure. I mean, I was given several different numbers, but nobody said anything for sure." R. 5638. She likewise denied that the 10-year sentence she had received was contingent on how well she testified for the state. "I did not know that my sentence hinged on testimony on this case." R. 5646. On re-

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the federal courts, it suggested that because the prosecutor in question had not been sanctioned by the Louisiana Supreme Court, the misconduct was still somehow in doubt. R. 3827.

direct examination the State consolidated its deception by eliciting her testimony that she didn't know what sentenced she would receive, because she wasn't sentenced yet. R. 5677-78. It closing argument the State vouched for Santiago's credibility, stating that she was cross-examined "on every possible inconsistent statement she's ever made . . . or anything else for that matter was brought to light to show what a liar she is". R. Supp. Vol, 2. 316, but still came out as truthful. The trial court denied defense counsel's request to remedy Santiago's testimony with and instruction.

Other evidence of Georgina Tassin's bias was also withheld from the jury, included evidence excluded by the trial court, R. 5601, that Santiago had a proven history of allowing her husband to take the blame for their joint actions so that she could avoid criminal liability.. R. 5691-94.

In support of its armed robbery theory, the State also presented the testimony of Darryl Macaluso, who was not even at the Valverde-Macaluso home at the time of the offense.[13] R. 5107. Recently released from prison, R. 5115, and armed with prosecutorial immunity, R. 5101, Macaluso testified that he saw his gun at Tassin's home the day after the homicide. R. 5109. This contradicted his initial police statement that he did not own a gun at the time. R. 5107, 5122. Although, as Petitioner discovered for the first time during post-conviction, Mr. Macaluso is a long time informant and was engaged in drugs and other criminal activities at the time he testified, the State presented his misleading testimony suggesting that he had cleaned up his life and was testifying truthfully for purely altruistic reasons. R. 5730.

[13] While Macaluso was originally arrested as an accessory (because of Santiago's false claim to police that he was at Tres Vidas apartments the night of the homicide), the State dismissed all charges. R. 5116.

Additionally, the State called Wayne Stagner to the stand. But the credibility of his testimony that Mr. Tassin attacked him, was undermined with evidence that he had repeatedly lied to the police and medics in the early stages of the investigation telling them that he had been shot by unknown hitch-hikers, who he could not locate or identify. It was only when police confronted him with his lies, having learned that he and Martin had left the bar with Sheila Mills, and that he realized that the Tassin's would be located, that he changed his story., R. Vol.21A 181-182, 203; R. 5769. Only then did he "help" direct the police to the Tassin's home, and provide police with the story he testified to at trial.

Throughout trial, lead prosecutor, George Wallace, impugned Tassin's right to a defense by engaging in increasingly erratic, hostile, and inflammatory behavior. He attacked the character of defense lead counsel, Denise LeBoeuf, during cross-examination of Santiago, repeatedly suggesting that she had coerced Santiago's post-conviction statement, in which Santiago confirmed her drug addled state at the time of the crime. R. 5394-95, 5397-98, 5401.[14] On direct examination, Wallace asked Santiago "Who, if anyone, has ever attempted to get you to say something differently, or specifically, about what happened that night under that bridge…the Defendant's attorney, Denise LeBoeuf, isn't that true?" R. 5394. After objection, Wallace goes even further, asking "And as between the two sides of the courtroom, who was trying to help your memory for you…who has ever suggested what you should say about the

[14] At trial, Santiago denied that she had taken valium (or other drugs) on the day of the crime, and maintained her last valium was taken a week and a half before the homicide, by which time the effects were long gone. R. 5447. This was directly contradicted by her post-conviction affidavit in which she described taking Valium, Dilaudid and Soma the day of the crime, and that she was "was out of it." Her use of Valium was particularly significant to the credibility of her testimony, because as she admitted, Valium significantly affected her memory, inducing black-outs lasting up to days at a time, during which she would walk and talk, but remember nothing. R. 5433, 5437-38. Its credibility eviscerated by the State's comments, ultimately defense counsel did not use this affidavit for impeachment, and relied on Santiago's less helpful post-conviction testimony about her drug use, instead. R. 5434-48.

events that night?" R. 5401. These improper questions signaled to the jury that the defense pressured Santiago to change her story, which was untrue and vilified defense counsel unnecessarily.

During objections throughout trial, he frequently suggested counsel's incompetence and unprofessionalism, speaking loudly so that the jury could hear his unfounded attacks. *See, e.g.,* R. 5433, 5440, 5392, 5389. Outside the earshot of the jury, the court repeatedly chastised Wallace for outbursts which were directed at both defense counsel and the court. R. 5928 ("Mr. Wallace, do you have issues controlling your emotions? . . . [W]hy do you make comments to counsel, with the Jury in the box? . . . Didn't we have this discussion a day or two ago?"). It twice threatened him with contempt, R. 5499, 5461, but did not follow through on the threat, even as his misconduct escalated. Wallace's behavior reached such a fever pitch that the District Attorney's Chief of Trials had to come to the courtroom to observe, and offered to intervene. Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf.

In face of Mr. Wallace's increasingly aggressive behaviors, and the court's failure to reign him in, defense counsel advised their client not to testify, fearing that he would not be able to withstand the inappropriate behaviors. *See* Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf; Post-Conviction Ex. 2, Affidavit of Paul Killebrew. Robert Tassin consequently reluctantly waived his basic right to testify on his own behalf in this self-defense case in which his testimony was most-critical.

Then in closing rebuttal, Wallace adopted as the *theme* of his argument a systematic denigration of the defense function generally, and Tassin's counsel's specifically. He began by telling jurors that "[t]here are those who will follow a blind man in search of themselves." R. Supp. 308. He suggested defense lawyers were "misguided" in their "purpose", *id.*, implying that

they would say anything to get jurors to drink "the Kool-Aid" R. Supp. 308, and get their undeserving client off, R. Supp. 314 ("I'll let their side of the room defend a cold-blooded killer").

Wallace attacked LeBoeuf, personally, telling jurors "you get a snapshot of the . . . character of the people that are involved", R. Supp. 311-12, referring to her "humiliating" cross-examination of Stagner, and implying it would have been understandable if Stagner "chok[ed]" her, afterwards. R. 314.

After suggesting further improprieties by counsel, R. Supp. 323, 324, he argued that the defense case rested on what "Denise LeBoeuf told you". R. Supp. 310. *Id.,* ("Denise LeBoeuf told you there was a struggle. Take my word for it. The check is in the mail"), ("I wonder if Denny LeBoeuf tested that swatch of shirt for DNA"); R. Supp. 329 ("if anything that Denny LeBoeuf said has a grain of truth to it"). The trial court overruled defense counsel's repeated objections, and motion for mistrial. R. 6485.

Thus, the last thing the jury heard from either party before deciding the merits of the case, was a tirade on the duplicitous nature of the defense profession and the unethical character of LeBoeuf.

The defense's case was withdrawn from the jury's consideration, after the state successfully moved for the trial court to delete the self-defense charge from the juror's instructions. The court found that there was no evidentiary support for a charge of self-defense. This ruling ignored evidence the defense had presented from beginning to end of the trial. An expert testified that it was possible that Tassin could have injured his hand in a struggle for the weapon, R. 5053-55, the jurors saw evidence of this exact injury, R. 6330, and Tassin's blood type, unique amongst the three men, was found on Stagner's shirt because of this injury. R.

4911-15, 4918, 4938. Additionally, witness testimony supported a self-defense theory; Sheila Mills testified that there was never a plan to rob the two men, and she never saw Tassin with a gun that night. R. 5160, 5214, 5220. Valverde's statement, which was read into the record, confirmed that there was no gun at her apartment, so Tassin could not have picked one up from there. R. Supp. 168-69. Finally, Stagner's repeated lies to the police about what happened that evening could have lead the jury to discredit his story and believe that it was in fact Stagner who was the initial aggressor. R. Vol. 21A 181-182, 203. Especially since Tassin did not have a burden to prove that he *did* act in self-defense, and it was the prosecution's burden to show that he *did not* act in self-defense, all of this evidence together entitled Tassin to a self-defense instruction before the jury.

Throughout trial, jurors were instructed that they are to get the law from the court., so going into deliberations without a self-defense instruction foreclosed the jury from being able to make a finding of self-defense. Despite having framed their entire case in terms of self-defense, the defense forewent arguing its judicially discredited defense from the jury, and argued an 11th hour defense of manslaughter to the jury instead, which the jury rejected. The jury found Mr. Tassin guilty of second-degree murder.

ARGUMENT

I. THE STATE COURTS VIOLATED THIS COURT'S EXISTING FEDERAL HABEAS MANDATE WHEN IT FAILED TO RETRY HIM WITHIN 180 DAYS OF THE FEDERAL HABEAS GRANT AND FAILED TO CORRECT THE CONSITUTIONAL INFIRMITIES IN THE PROCEEDINGS WHICH RESULTED IN REVERSAL, AND EXCEPTIONAL CIRCUMSTANCES NOW WARRANT MR. TASSIN'S UNCONDITIONAL RELEASE

This Court reversed Mr. Tassin's 1987 conviction because the State failed to disclose its 10-year sentencing deal with Georgina Santiago or correct her misleading testimony about it at Mr. Tassin's trial: "the State was constitutionally required to reveal its deal with the witness to

the jury to prevent the jury from operating under a misconception." *Tassin,* 482 F.Supp.2d at 771.

As is typically the case when a federal court grants relief in habeas proceedings, the habeas mandate was conditional, not absolute, and provided the State with a time-limited opportunity to correct the constitutional violation, and retry Mr. Tassin. *See Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.") The federal court ordered the State to release Tassin, "*unless* the State of Louisiana initiates retrial of the petitioner within 180 days after the entry of this order." *Id.* at 775. (emphasis added). However, the State failed to comply with that mandate. Over 1000 days passed before trial began on November 30, 2010. Mr. Tassin's defense counsel filed a *Motion to Dismiss Prosecution With Prejudice on the Grounds of State Misconduct, Violation of Speedy Trial and Requirements of Due Process*, raising the fact that the State had passed the 180-day deadline. R. 1999. The motion was denied. R. 4151. When the State did finally retry Mr. Tassin, it again violated the mandate when it failed to correct the constitutional error found by the federal court, and instead allowed the continuation of the misconduct that had caused the federal habeas courts to grant relief. (See Claim II) At the end of the trial, Mr. Tassin's defense counsel asked for a mistrial and to dismiss the case with prejudice, because of this repeated misconduct, and other misconduct which compounded the prejudice to his case. But the court again denied his motion. R. 6477-78. Mr. Tassin raised these issues on direct appeal, but again was denied relief by both the Louisiana Court of Appeal and by the Louisiana Supreme Court. He gave the State every opportunity to provide a remedy but received none.

He now seeks remedy from this Court. These violations of the federal mandate, as well as the multiple Constitutional violations pled further below, requires reversal of Mr. Tassin's conviction and release. As the Sixth Circuit has held, "[s]tate executive and judicial authorities, in the course of enforcing their criminal codes, must give full and due regard to federal court orders which remedy practices violative of the constitutional rights of the accused." *Fisher v. Rose*, 757 F.2d 789, 791 f.1 (6th Cir. 1985). "Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release." *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Justice Scalia, concurring). "A state's failure to timely cure the error identified by a federal district court in its conditional habeas order justifies the release of the petitioner." *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006) (citations omitted).

B. The State Failed to Try Mr. Tassin Within 180 days

There is no question that the State violated the federal court order, by failing to try Mr. Tassin within the 180-day deadline set by the federal district court. The federal district court ruled on March 23, 2007, ordering the State to try or release Mr. Tassin within 180 days. Twenty-eight days later, on April 20th, 2007, the court stayed execution of judgment pending the state's appeal to the Fifth Circuit. The Fifth Circuit affirmed relief on February 14, 2008, and the mandate continued to run. The State requested and was granted a trial date for trial on May 30, 2008, over 90 days later. The transcript of that hearing in open court makes it very clear that the State knew that it must try Mr. Tassin within the 180 days, or forego prosecution. R. 3466-67. However, the trial was repeatedly delayed.[15] The federal court's deadline for trial came and went

[15] The trial was continued for various reasons - to allow the defense to prepare for trial, to accommodate the needs of the State (whose prosecuting attorney was ill), and to allow defense counsel to test physical evidence which despite

on July 16th, 2008. Trial was finally set for November 30, 2010, **868 days** after the federal court mandate expired. The State did not seek any extension of the deadline from the federal court, as it should have if it wanted to pursue its prosecution after the time limit expired. *See, e.g., Gilmore v. Bertrand*, 301 F.3d 581, 582 (7th Cir. 2002) (district courts have discretion to extend time period for State to remedy the constitutional violation). Having failed to fulfil the condition specified by the federal court for retrying Mr. Tassin, the State was obligated to comply with the federal mandate and release him. *See Wolfe v. Clarke*, 718 F.3d 277, 287-88 (4th Cir. 2013) (upholding order for immediate release where State failed to retry petitioner within 120 days, and State failed to seek an extension from the federal court of the time to try him).

C. The State Violated the Federal Court Mandate by Continuing The Misconduct Condemned by the Federal Court

Not only did the State fail to try Tassin within the given time, but when it eventually did go to trial, it violated the purpose of the mandate and continued the very misconduct condemned by the federal courts.

Georgina Santiago remained a key witness for the State at the 2010 trial, and the deal which motivated her 1987 testimony remained critical to the jury's understanding of her credibility. However, at every turn, the State thwarted Mr. Tassin's efforts to make sure that the jury knew the truth about Santiago's dubious credibility, motivations, and history of lying under oath. Before trial, the State denied defense requests to put the deal in writing or to give a stipulation about it, even though without that evidence it knew that the defense would not be able to effectively impeach Santiago if she again denied the deal. R. 1612, 1701, 1710-11, 3702-24,

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repeated defense requests was never produced by the State and which the defense finally located themselves in July 2010. Motion to Dismiss. R. 1999.

3820-43.[16] At a motions hearing, the State claimed ignorance of the terms of the deal, R. 3722, and at times even questioned its existence.[17] It repeatedly claimed that the deal had no relevance at the retrial and accused the *defense* of trying to taint the new trial with evidence of it. R. 1710-11 (emphasis added).

Having ensured that the defense could not prove the deal at trial, it then deliberately elicited the same misleading testimony denying the deal condemned by the federal court, sat silently while defense counsel failed in vain to elicit the truth on cross-examination, and then exploited the misleading testimony in argument to the jury. As argued more fully elsewhere, the State's misconduct, and the trial court's failure to take remedial action, violated Tassin's Due Process rights under *Napue v. Illinois. See* Claim II.

To justify continuing the unconstitutional action condemned by the federal courts, both the State and the trial court argued that the "retrial" was the entire habeas remedy for the prior *Napue* violations. *See, e.g.,* R. 3828, 3833, 3866. The State argued, and the trial court found, that the prior misconduct was irrelevant to the proceedings. Not only was that finding factually incorrect (it was highly relevant to the juror's determination of the credibility of this material witness), but it ignores the essential function of the conditional habeas writ. As the Supreme Court has held, federal habeas courts may "delay the release of a successful habeas petitioner *in order to provide the State an opportunity to correct the constitutional violation found by the court*." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (emphasis added). *See Phifer v. Warden,*

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[16] The State acknowledged this left the defense without effective impeachment: "Defense Counsel has a gigantic problem in terms of impeachment. All she can do under the rules of impeachment… is to show… a prior inconsistent statement. If she cannot establish that, then we don't get to step three…" R. 3825.

[17] In oral argument the State insisted "there was no concealment of – as to why that woman was testifying", R. 3715, and "as much as Ms. LeBoeuf might like to believe or want to believe that Georgina Tassin's testimony in the first trial was untruthful, that is something in her universe." R. 3826. It suggested that because the prosecutor in question had not been sanctioned by the Louisiana Supreme Court, the misconduct was still somehow in doubt. R. 3827.

United States Penitentiary, 53 F.3d 859, 865 (7th Cir. 1995) ("The conditional nature of the order provides the state with a window of time within which it might cure the constitutional error. Failure to cure that error, however, justifies the district court's release of the petitioner"); *Smith v. Lucas*, 9 F.3d 359, 367 (5th Cir. 1993) ("the real thrust" of a conditional order "is to alert the state court to the constitutional problem and notify it that the infirmity must be remedied.")

When Mr. Tassin raised the State's violation of the mandate on direct review, the state court of appeals erroneously found that the *Napue* violation found by the federal court "was corrected on retrial." *Tassin,* 129 So.3d at 1267. It conceded as it must however, that the "[c]learly, defendant was not brought to trial within 180 days of the order granting him habeas relief." *Id.* at 1266, but nonetheless refused to order his release. *Citing Jones v. Cain*, 600 F.3d 527 (5th Cir. 2010) and other cases, it refused him any remedy finding that he had not demonstrated the existence of "exceptional circumstances" in additional to the breach of the mandate's condition. As discussed further below, "exceptional circumstances" are required to obtain the special remedy of unconditional release *barring retrial*. While Mr. Tassin did seek that remedy and meet that burden, even absent that finding, Mr. Tassin was entitled to the lesser remedy of reversal and release without prejudice for the violation of the mandate which the court of appeals rightly found. *Gentry v. Deuth*, 456 F.3d 687, 692 (6th Cir. 2006).

D. The Exceptional Circumstances in This Case Render a Further Retrial Fundamentally Unfair, Requiring Mr. Tassin's Unconditional Release.

"The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). Federal courts have broad discretion under 28 U.S.C. § 2243, "to dispose of habeas corpus matters as law and justice require." Ordinarily the remedy for a state's failure to fulfil the

conditions of a habeas mandate is release *without prejudice* to the State's right to re-arrest, and prosecute the defendant. Likewise, the typical habeas relief granted for constitutional violations at trial is the issuance of a conditional writ allowing the State the opportunity to retry him. *See Woodfox v Cain,* 805 F.3d 639, 645 (5th Cir. 2015).

However, the Fifth Circuit and others have recognized that where justice requires, this broad power includes the authority to "end a state criminal proceeding" by issuing an unconditional writ and barring reprosecution in "special circumstances" such as where the constitutional violation "cannot be remedied by another trial" or "other exceptional circumstances exist such that the holding of a new trial would be unjust." *Woodfox v Cain,* 805 F.3d 639, 645 (5th Cir. 2015); *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010); *see also Satterlee v. Wolfenbarger, 453 F.3d 362, 370 (6th Cir. 2006)*; *Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993); *Capps v. Sullivan*, 13 F.3d 350, 352-53 (10th Cir. 1993).

This is one such case. The fifth circuit has indicated that courts should consider the "totality of circumstances" in determining whether "exceptional circumstances" exist, *see Woodfox, at* 649. The totality of circumstances here, compel that conclusion.

Most concerning is the State of Louisiana's brazen refusal to respect the findings and mandate of the federal court, deliberately repeating the misconduct at the retrial, eliciting and capitalizing upon the same false testimony, refusing to put the deal in writing or stipulate to it, even denying its existence at all. Along the way it has made every objection imaginable to defense efforts to enforce his rights, and expressed outrage about those efforts. Mr. Tassin gave the State courts every opportunity to remedy the violations, both pretrial and during trial (seeking corrective instructions, an order for the deal to be put in writing, and the exclusion of Santiago's testimony), and again on direct appeal and post-conviction proceedings, but the state courts

failed to do so, finding the new trial to be the "complete remedy." Not only was the misconduct from the first trial repeated, the state compounded it with misconduct of other kinds: denigrating defense counsel as she attempted to cross-examine Santiago, and continuing its improper assault on the defense until summation to the jury. To bolster the credibility of the only witness who corroborated an aspect of the armed robbery plan, it also selectively immunized only Darryl Macaluso, a many time convicted felon. Despite no evidence that prosecutors had any real genuine intent to prosecute Mary Ann Valverde, who would have contradicted Macaluso's testimony, prosecutor, George Wallace threatened to prosecute her and induced her to plead the Fifth Amendment to prevent her from testifying and contradicting Macaluso's testimony. *See* § XI. It then suppressed critical material impeachment evidence relating to Macaluso, and elicited his misleading testimony to improperly bolster his credibility. *See* § III. Again, these problems were raised before the State courts, without redress.

This troubling conduct, and the state court's failure to safeguard Mr. Tassin's rights, undermines confidence in the State's ability to provide him a fair trial, if one were to be ordered. This concern has weighed heavily in the decisions of many courts, who have ordered release barring retrial. *See Schuster v. Vincent,* 524 F.2d 153 (2d Cir. 1975) (barring retrial in case despite strong evidence of guilt, where state engaged in deliberate efforts to thwart or delay the remedy for constitutional violations found by the federal habeas court); *See, e.g., D'Ambrosio v Bagley, 688 F.Supp 2d 709, 729-30 (N.D. Ohio 2010)* (citing the state's "inequitable conduct" during the proceedings as one factor weighing in favor of barring reprosecution); *Morales v. Portuondo*, 165 F. Supp. 2d 601, 612 (S.D.N.Y. 2001) (finding that a trial :would not serve the interest of justice, in case where the State's ongoing pattern of dubious conduct indicated it "was more intent on protecting a conviction than in seeing that justice was done."); *Cf Woodfox,* at 648

(district court abused its discretion in barring retrial where state court had not been given the opportunity to provide a remedy, and there was no reason to doubt the ability of the state courts to redress violations by the State); *Wolfe v. Clarke*, 718 F.3d 277, 278 (4th Cir. 2013) (same).

Further factors demonstrating the "exceptional circumstances" which renders re-prosecution of Mr. Tassin to be fundamentally unfair, include: the fact that Mr. Tassin already spent twenty years in the oppressive conditions of death row suffering under an unconstitutional death sentence;[18] and the fact that there is significant prejudice to his ability to present his defense given the passage of 24 years since the alleged crime, much of which passed while Tassin tried to vindicate his rights in face of the State's misconduct. See Claim XIII. Since the retrial he has spent a further seven years serving a life sentence at Angola, seeking redress from the state courts for the ongoing violations of the rights perpetrated by the State. *See Gilliam v. Foster*, 75 F.3d 881, 903 (4th Cir. 1996) (en banc) (re-prosecution barred where witnesses unavailable because of the state's delay, and "the prosecution was more intent on protecting a conviction than in seeing that justice was done"); *Morales v. Portuondo*, 165 F. Supp.2d 601, 609 (Southern District of New York, 2001) (re-prosecution barred where defendants had "served extended and potentially unjustified periods of incarceration"; "their ability to defend against the charges in any new trial [was]… hampered, at least in some respects"; and the court found "certain aspects of the District Attorney's Office's handling of this matter are troubling").

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[18] *Johnson v. Bredesen*, 130 S.Ct. 541, (2010) (Stevens, J., dissenting from denial of certiorari) (recognizing the "especially severe, dehumanizing conditions of confinement" on death row); *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."). *See Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015)* (Kennedy, J., concurring) (describing the "terrible price" paid by those suffering "[y]ears on end of near-total isolation").

This court should exercise its broad discretion under 28 U.S.C. § 2243, to make its original writ absolute ordering his immediate release with prejudice to the state's ability to re-arrest and retry him, and/or issue a second mandate remedying the additional constitutional violations on the same absolute terms, barring any further prosecution. In the alternative, Tassin requests an evidentiary hearing, where he can further show the inherent unfairness of retrial, now 32 (thirty-two) years after the night in question.

II. MR. TASSIN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS UNDER *NAPUE V. ILLINOIS* AND *BRADY V. MARYLAND* WAS VIOLATED WHEN THE STATE KNOWINGLY ELICITED AND FAILED TO CORRECT THE FALSE TESTIMONY OF THE STATE'S STAR WITNESS, GEORGINA SANTIAGO TO BOLSTER HER CREDIBILITY TO THE JURY

In 2008, Robert Tassin's 1987 first-degree murder conviction and death sentence were reversed because of prosecutorial misconduct.[19] In compete disregard of the federal court's mandate and rulings, the State, now aided by the trial court, repeated the same misconduct at the retrial, violating Mr. Tassin's Fourteenth Amendment rights to Due Process. His conviction once again must be reversed, this time with prejudice.

E. Background

The federal court reversed Mr. Tassin's original conviction and death sentence because of the State's misconduct and deliberate deception of the jury regarding the credibility of the State's key witness, Georgina Santiago. At the 1987 trial, Georgina Santiago waived her marital privilege and testified on behalf of the State against Mr. Tassin. She provided the only testimony that the shooting occurred during the execution of a pre-planned robbery, rather than in self-defense as Tassin claimed. This testimony contradicted her statements to police that there was no

[19] *Tassin v. Cain,* 482 F.Supp.2d 764 (E.D.La. 2007) (reversing conviction due to State violations of Due Process under *Brady v. Maryland,* 373 U.S. 83 (1953), *Napue v. Illinois,* 360 U.S. 264 (1959), and *Giglio v. United States,* 405 U.S. 150 (1972); *aff'd, Tassin v. Cain,* 517 F.3d 770 (5th Cir. 2008).

armed robbery plan. On cross-examination at the 1987 trial, Santiago testified the only deal she received was the reduction of charges from first-degree murder to armed robbery, but that had already occurred by the time of trial. She testified that she had no reason to lie to the jury, that she faced up to the maximum sentence of 99 years for armed robbery, and that her sentence had nothing to do with what testimony she gave.

However, as the federal courts found, Santiago had a clear understanding based on the representations of the 1987 trial court, that she would receive just 10 years in prison for her role in the homicide in return for her testimony, and that her receipt of such sentence was contingent on her testimony being consistent with the version of events—including an armed robbery plan—which she gave prosecutors when negotiating for her deal. *See Tassin*, 517 F.3d at 777 ("there was an understanding . . . that Georgina had expected to gain beneficial treatment in sentencing, provided she testified at trial consistently with her prior statements inculpating Robert"). The State, which was well aware of the deal, failed to disclose it, and failed to correct the false impression created by her testimony, and instead capitalized upon it in closing argument. *Id.* at 775, fn.4. This misconduct led the federal court to grant habeas relief. *See Tassin*, *Id.* at 777. As the federal district court found:

> The jury found Tassin guilty of first-degree murder "committed in the course of an armed robbery"; Georgina's testimony was crucial to this finding. . . . [I]f the jury had known of Georgina's sentencing deal, there is a reasonable likelihood that they may have chosen to believe Robert's [self-defense] story over his wife's. There is also a reasonable likelihood that the State's remaining theories of the case, based on the other aggravating factors, would have been too weak to stand independently.

Tassin, 482 F. Supp. 2d at 780-81; *affirmed at Tassin,* 517 F.3d 770.[20] In reaching this conclusion, the court was unpersuaded that the testimony of Wayne Stagner, the surviving victim—whom Tassin claimed attacked him—would have carried the day. Stagner had repeatedly lied to police during their initial investigation, claiming that unknown hitch-hikers shot him. It was only when police confronted him about those lies that Stagner produced the story relied on at trial. *Tassin,* 517 F.3d at 781; R. Vol.21A 181-82, 203; R. 5769.

Georgina Santiago remained a key witness for the State at the 2010 retrial. The State's theory that Mr. Tassin shot Eddie Martin during the course of a pre-planned armed robbery, rather than self-defense, remained critical to its second degree murder case, whether based on a specific intent or armed robbery theory. The deal which motivated Santigo's 1987 testimony remained critical to the jury's understanding of her credibility, when she repeated the same testimony that had been motivated by the deal. It would also reveal that she had previously lied under oath to see Mr. Tassin convicted, critical impeachment evidence in and of itself.

Yet, at every juncture, the State thwarted Mr. Tassin's efforts to make sure that the jury knew the truth about Santiago's dubious credibility, motivations, and history of lying under oath. In blatant disregard for the findings of the federal court, the State repeated the *Napue* error at the retrial, when Santiago again denied that her story was motivated by a sentencing deal, or that she had lied about the deal under oath. It denied defense requests to stipulate to the deal or reduce its terms to writing. And the trial court refused to order the state to do so, or provide a corrective

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[20] Notably, in post-conviction proceedings, Guy DeLaup, who prosecuted the first trial confirmed that the deal was for Santiago to testify consistently *with the account she gave during her conversations with him, when she was negotiating her deal.* R. 3179. It was not a deal to testify "truthfully," or consistently with her initial police statement, R. 3167, as often such deals require. Indeed, in her initial statement to police, Santiago denied a robbery plan. D. Ex. 61. Nineteen-year-old Sheila Mills, the third co-defendant, pled guilty to the same offense as Santiago but refused to testify that there was a robbery plan. R. 5320. In contrast to Santiago's lenient ten-year sentence, Mills was sentenced to thirty years. R. 5221.

instruction when Santiago lied. Consequently, Tassin had no effective means to present the evidence that most powerfully would have impeached this key witness, and her misleading testimony went uncorrected.

"The deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972). As the Supreme Court has held, the government:

> "is the representative not of any ordinary party of a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done.

Strickler v. Greene, 527 U.S. 263, 281 (1999) (citing *Berger v. United States,* 295 U.S. 78, 88 (1985). It is from this special status that a prosecutor's broad duty of disclosure derives; a prosecutor must "assist the defense in making its case" where necessary to promote the truth-seeking function of trial. *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

Where the State procures a conviction through the knowingly use of false or misleading material evidence, Due Process Clause requires its reversal. *Napue v. Illinois,* 360 U.S. 264 (1959). The principle applies to testimony going to the credibility of a witness, just as it does to evidence relating to guilt. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue,* 360 U.S. at 266.

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . .

Id, at 266-70 (quotation omitted). Due process is similarly violated where the State knowingly makes false or misleading statements to the jury during argument. *United States v. Williams*, 343

F.3d 423, 439 (5th Cir. 2003) (recognizing potential *Napue/Giglio* violation where a prosecutor makes false statements during closing argument about a witness's plea deal, but finding on the facts that the prosecutor's statements were not false). Technical "perjury" falls within the broad definition of false testimony, but evidence that yields a "false impression," or which is "highly misleading" is forbidden as well. *Alcorta v. Texas*, 335 U.S. 28, 31, 78 S.Ct. 103, 105, (1957).

Relief is required in every case where the false testimony is material, that is, where there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs,* 427 U.S. at 103. As the Fifth Circuit Court of Appeals has held:

> [T]his "reasonable likelihood" standard of materiality is a "low threshold" standard. It is a brother, if not a twin, of the standard ("harmless beyond a reasonable doubt") for determining whether constitutional error can be held harmless. A strict standard is appropriate because, as the Supreme Court has explained, false testimony cases involve not only "prosecutorial misconduct," but also "a corruption of the truth-seeking function of the trial process."

United States v. Barham, 595 F.2d 231, 242 (5th Cir. 1979) (internal citations omitted).

F. The State Knowingly Failed to Correct the False Impression Created By Georgina Tassin's Testimony, and Did Everything It Could To Ensure the Jury Was Deceived About Her Motivation and Propensity To Lie

In most *Napue* cases, the State's failure occurs during trial as the witness testifies. In this case the State failure at trial was part of a deliberate and blatant campaign of deception that began early in pretrial proceedings and continued through closing argument at trial. In a wholesale abdication of its responsibility to "assist the defense" *Bagley,* 473 U.S. at 675 n.6, to guarantee the truth-finding function of trial, and ensure the jury would accurately assess the credibility of its key witness, the State did everything it could to prevent the jury from knowing the truth about its key witness.

1. The State's deliberate pretrial efforts to ensure Santiago could not be effectively impeached if she lied

To ensure Tassin could effectively impeach Santiago if she again denied the deal, the defense asked the State pretrial to reduce the terms of the deal to writing, or to stipulate to its contents. R. 1612,[21] R. 1701,[22] R. 3702-24, R. 3820-43. Although the State candidly admitted it anticipated Santiago would testify the same as before, R. 2831, it vigorously opposed the defense requests. R. 1710-11, R. 3820-43.[23] At hearings on defense counsel's related motions, the State claimed ignorance of the terms of the deal, R. 3722, at times denying its existence: "there was no concealment of – as to why that woman was testifying." R. 3715 "[A]s much as Ms. LeBoeuf might like to believe or want to believe that Georgina Tassin's testimony in the first trial was untruthful, that is something in her universe." R. 3826.[24]

The State argued that the entire remedy for prior violations found by the federal courts was the new trial, and claimed that any prior deal had no relevance at the retrial, R. 1710, R. 3821, 3840. It accused the *defense* of "taint[ing] this new trial" by trying to present "evidence of a possible sentencing deal… in 1987… to prejudice and confuse the jury." R. 1710-11 (emphasis added).

Defense counsel argued that a witness's prior perjury is impeachment, and that "the jury at this trial is entitled to know that Mrs. Tassin, at the time, was testifying untruthfully," R. 3822. Defense argued that the jury was likewise entitled to know of "any potential interest, bias or

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[21] *Motion to Reveal the Deal.* R. 1612.
[22] *Memorandum of Law: Motion to Reveal the Deal In a Retrial.* R. 1701.
[23] The State acknowledged this left the defense without effective impeachment: "Defense Counsel has a gigantic problem in terms of impeachment. All she can do under the rules of impeachment… is to show… a prior inconsistent statement. If she cannot establish that, then we don't get to step three…" R. 3825.
[24] It suggested that because the prosecutor in question had not been sanctioned by the Louisiana Supreme Court, the misconduct was still somehow in doubt, claiming "it's a little outrageous to go as far as Counsel wants to go with this allegation of misconduct." R. 3827.

expectation of benefit" she may have had when giving her testimony at the first trial, since the jury would be hearing it at the retrial. R. 1706. And as defense counsel explained, "we cannot impeach . . . unless we have a clear statement from the State of Louisiana as to what they're prepared to acknowledge." R. 3716. The defense urged that they sought only what defendants usually get: written evidence of deals to allow effective impeachment. *See* R. 1706. Defense warned the trial court that they needed a remedy to avoid a further *Napue* violation. *See* R. 1703-1708.

However, the trial court denied Tassin's requests. R. 3870, 5405-07. The court told defense: "you are going to be able to question the witness as to aspects. And if the witness disagrees with you or has a different interpretation, then you can impeach her." R. 3853; *see also,* R. 3713 ("you're not prejudiced in any way because she'll be here on cross-examination ad nauseam for you to go after exactly what you want.") Despite the fact that defense sought the necessary tool to impeach Santiago if she testified *consistently* with her prior statements denying the deal, the trial court insisted that "the course of avenue is. . . she is going to have to be inconsistent with her testimony for you to be able to impeach her." R. 3870.

Defense counsel alternatively requested the court to instruct the jury as to the settled facts about the deal found by the federal court if Santiago lied, *See* R. 1708, 3820-35. But the Court denied that request for the same reasons, noting "the Court is not going to interject itself into the fact finding of a jury." R. 3835; R. 3870.

Thus Mr. Tassin entered his new trial without any means to impeach the State's critical witness about the deal which had motivated her story in favor or the State or her history of lying under oath. That the defense *knew* of Santiago's deal was of no moment, when it had no means to prove it. *See United States v. Barham,* 595 F.2d 231, 243 n. 17 (5th Cir.1979) ("[E]ven when

the defense is aware of the falsity of the testimony, a deprivation of due process may result when . . . the defense is unable to utilize the information"); *United States v. Sanfilippo,* 564 F.2d 176, 178 (5th Cir.1977).

1. The State—abetted by the trial court—knowingly failed to correct Santiago's misleading testimony

Having worked hard pretrial to ensure that defense counsel had no effective means to impeach Santiago if she lied about the deal, the State deliberately elicited her misleading testimony regarding motivations to lie. Thus having elicited Santiago's testimony supporting its armed robbery-murder case, it elicited the following false testimony:

State: [w]as any promise or inducement made to obtain your testimony, by anyone in the District Attorney's office, *in his first trial* or now?

Santiago: No, I never had any promises.

R. 5405 (emphasis added). After defense counsel objected, the trial court required the State to clarify with the witness that her charges had been reduced, but it denied the defense request to reveal the all-important favorable sentencing deal. R. 5405-07, 5412, 5677-78.

When the defense began attempting its cross-examination of Santiago about the 10 year deal, the State vigorously objected claiming "I don't know what this witness' testimony in a prior trial has to do with her credibility before this jury." R. 5637. The prosecutor continued: "The remedy that was ordered, was a new trial, start over. . . For this lawyer to attempt to discredit this witness by something that took place in a prior trial, twenty-three years ago, is not relevant for what this trier of fact to decide." R. 5639-40. "Whether she lied to a jury in the past, is not relevant." R. 5640. "To raise the inference to this Jury that she lied about anything about that, that draws a conclusion that is not proper in this trial. That is going way beyond the pail." R. 5641.

The court overruled the objection. Having failed to prevent the topic from coming up at all, the State sat silently, failing to correct Georgina's Santiago's misleading testimony, as the defense tried in vain to have her admit the truth about the sentencing deal during its cross-examination. Santiago adamantly denied having had any kind of sentencing deal or expectation of receiving 10 years, and adamantly denied that her testimony had any impact on her sentence.

Defense counsel: You testified at Mr. Tassin's first trial with a deal from the State, correct?

Santiago: Yes.

Defense counsel: And you knew that deal was going to give you a ten-year sentence, correct?

Santiago: Incorrect.

. . .

Defense counsel: What did you know when you testified, about the sentence, you were going to get?

Santiago: I really didn't know anything for sure… I mean, I was given several different numbers, but nobody said anything for sure.

R. 5637-38.

Defense Counsel: You knew that you were going to get a sentence around ten years, did you not?

Santiago: I was given a few different numbers. I was told ten years, I was told thirty, I was told fifty, I was told ninty-nine. But my hopes, of course, I'm only human, my hopes went with the ten; But I was never promised anything.

Defense Counsel: . . . Okay. And your testimony today is that- well—you told the jury, when they asked you what sentence you were looking at in 1987, you said, I could get up to ninety-nine years, right?

Santiago: Right.

Defense counsel: But that was very misleading, wasn't it . . .?

Santiago: That was just some of the numbers they gave me.

R. 5648-49.

Defense counsel: But you knew you weren't going to get ninety-nine years, didn't you?

Santiago: *I really didn't know*.

R. 5649-50 (emphasis added).

Santiago continued to deny any deal even when confronted with the fact she received a ten year sentence after her testimony:

Defense counsel: When you testified, isn't it a fact that you knew, you were going to get that ten-year sentence?

Santiago: I was hoping, but, no, I was never promised anything. I did not know.

R. 5646. And even when asked about her reference in a letter she wrote pretrial mentioning the possibility of getting ten years and again in a letter to Robert Tassin after trial. *See* R. 5650. She explained:

Santiago: My hopes ran with ten years.

Defense counsel: Okay. Its only hopes. You didn't have a deal, from the State, for ten years?

Santiago: No I did not.

R. 5650.

Defense counsel: So when you testified at trial, and you told that jury that you were looking at ninety nine years, that wasn't true, was it?

Santiago: It was a possibility. I was never promised any amount of time. Not even the ten years was a promise to me.

Defense counsel: And you just guess lucky? Ten years, you told somebody before trial; ten years is what you got, right?

Santiago: Right.

Defense counsel: Okay. That's your testimony?

Santiago: Yes.

R. 5661-2.

Likewise, Santiago denied that the 10 years she actually received had been contingent on how well she testified for the State. R. 5646

Defense counsel: So the sentence was related to your testimony? You'd get a lower sentence, depending on your testimony, and you knew that?

Santiago: No, that's not what they said. They said they would drop the [murder] charges, if I testified.

R. 5646.

Defense counsel: When you testified at Robert Tassin's trial, the first trial, 1987, you knew, did you not, that your sentence hinged on your testimony in that case?

Santiago: No, I did not.

R. 5649.

Yet, as the federal courts found, she had a clear understanding with the State that she would receive just 10 years. *Tassin v. Cain,* 482 F. Supp 2d at 770, 773 (E.D. La. 2007), and she knew full well that her sentence hinged on her testifying in a manner consistent with the account of the crime she provided the State when negotiating her plea deal with the State – an account which, contrary to her statements to police, included the armed robbery plan which was so critical to the State's case.[25] Santiago's testimony either misstated the true nature of her

[25] Notably, Ms. Tassin's sentencing agreement did not hinge on her providing truthful testimony. Rather, it hinged on her testimony that was consistent with the account of the crime she had provided to prosecutors in which a plan to commit armed robbery existed.

sentencing deal or, even if "technically accurate[e]," *see Tassin,* 482 F. Supp 2d at 773, left the jury with the false impression that she had faced the real possibility of receiving up to 99 years, and that sentence was not contingent on her testimony.

As it became clear that Santiago would not admit the deal on cross-examination, the defense asked for the remedy it had requested pretrial: for the court to instruct the jury on the terms of the deal as found by the federal courts: "It would be a *Napue* violation to let her testify uncorrected that she didn't have a beneficial sentencing agreement hinged directly on her testimony, and that she mislead the jury. Its law of the case." R. 5653. The state vehemently objected to defense counsel's "thorough corruption of the law," claiming that "there was no such specific finding," and that the full remedy was the new trial. R. 5652. The court denied the request because "any leverage the State may have had over this witness, has passed." After summarizing Santiago's testimony that she was told a lot of different numbers, and after noting that neither the court nor counsel was there in '87 to know what was discussed with her, it told the defense it could "have a field day with the numbers" on cross-examination. R. 5658. Santiago's misleading testimony remained undisturbed.

In denying this claim on direct appeal, the Louisiana Fifth Circuit unreasonably found that "the jury were not misled by Ms. Tassin's testimony and were made aware of all facts that might motivate a witness in giving testimony." *State v. Tassin*, 129 So.3d at 1235. It relied on the jury's knowledge of three facts: that the jury was informed that her charge was reduced (from first degree murder to armed robbery), that she knew ten years was a possible sentence, and that she actually received a ten year sentence. Of course the jury at Robert Tassin's first trial knew of the first fact, but that did not prevent this Court from recognizing the misleading nature of her

false testimony when she denied the existence of any deal. The reduction of her charge had limited impeaching value given that it had already occurred at the time she testified.

Although she acknowledged knowing 10 years was a "possibility," she also said that ninety-nine years was "a possibility. R. 5661-2, and that ten "was just some of the numbers they gave me." R. 5648-49, and that she "really didn't know" she wouldn't get ninety-nine. R. 5649-50.

The fact she received 10 years after she testified did little to inform the jury that she expected to get it when she testified. Courts invariably reject claims that the mere fact of a lenient sentence, proves a deal or any connection with the testimony. *Dowthitt v. Johnson*, 230 F.3d 733, 756 n. 33 (5th Cir.2000) (finding that evidence of the witness's lenient sentence was not sufficient, by itself, to demonstrate that a deal existed between the witness and the State). In this case, any hint this might have given the jury about a deal, was neutralized by her ongoing false testimony, as she repeatedly denied the implication.

On redirect examination, the State then went on to deliberately elicit her further false testimony precisely for the purpose of undermining any impeachment made by the defense on cross. So it elicited Santiago's testimony that when she wrote the letter mentioning a possible 10 years, she "didn't know what her sentence would be because she hadn't yet been sentenced." R. 5677-78.[26]

Finally, the State capitalized on its deception in closing argument, arguing that the defense failed to show that Santiago lied. It vouched for her credibility by representing that she was cross-examined "on every possible inconsistent statement she's ever made . . . or anything

[26] Although a defense objection to the question was sustained, the harm was done by the asking.

else for that matter was brought to light to show what a liar she is". R.Supp_ Vol, 2. 316, yet still came out as truthful.

Through these concerted efforts, the State telegraphed to the jury that it denied the existence of a deal, a deal which jurors would rightly assume the prosecutor would know about if it existed, and whom they trusted not to lie. *See United States. v. Berger,* 295 U.S. 78, 77 (1935) (recognizing jurors belief that prosecutors will "faithfully observe" their obligations and the tendency of jurors to give undue weight to improper suggestions, insinuations, and assertions of personal knowledge against the accused).

Without means to prove the basis for its impeachment of Santiago, the defense's ability to impeach her rested on the defense winning a battle of credibility before the jury, a battle which it was predisposed to lose. *Id.* In this case the State also took additional steps to ensure the juror believed the prosecutors over defense. Beginning in Santiago's testimony itself, and extending through closing arguments, the State engaged in repeated misconduct, with inappropriate comments before the jury personally denigrating defense counsel, including insinuations that the defense made up evidence, or pressured witnesses--including Sangtiago—to lie. This misconduct is raised separately below. But it also forms part of the State's *Napue* violation—further efforts by the state to distort the jury's understanding of the deal, by undermining the credibility of defense on which that impeachment depended. The *Napue* violation in turn undermined the defense's credibility, for its apparently disingenuous efforts to sully the character of the prosecution's witness.

2. Santiago's misleading testimony was material

The trial court refused to correct Santiago's false testimony based in part upon its finding that the sentencing deal from the first trial was irrelevant to the jury's assessment of Santiago's

credibility at the retrial: "[a]ny leverage the state may have had over this witness has passed." R. 5657. As defense counsel argued to the trial court, Santiago's testimony at the retrial did not occur in a vacuum. "Having once lied on the witness stand when [the State] did have a great deal of control over her, she's now sticking with that lie for the rest of her life." R. 5659.

Sentencing deals are powerfully impeaching precisely because they reveal a witness's motivation to lie – which in turn allows a jury to conclude the testimony was fabricated to curry favor with the state. *See Napue,* 360 U.S. at 270; *Giglio*, 405 U.S. 150. The inference that such testimony was fabricated does not disappear when it is repeated at a subsequent trial simply because the consideration for the fabrication had passed. Moreover, having testified to one version of events at the first trial, Santiago was forced to stick with that version at the retrial, regardless of its truth, else open herself up to perjury charges—a fact that the trial court acknowledged. See R. 5658 ("the only thing that this witness potentially could be charged with, if anything, is perjury").27 An equivalent situation existed for a witness in *United States v. Sanfilippo*, who would have faced prosecution for a crime if he refused to testify for the State. The Fifth Circuit found that the prosecution's failure to reveal the facts to the jury required reversal: "[I]f he did not testify, presumably he would have been prosecuted in that case. If he did testify, he would not be prosecuted. One can hardly imagine a more compelling fact that the jury should have in order to properly evaluate whether a witness of doubtful credibility was in fact being credible in his trial testimony." *Sanfilippo*, 564 F.2d at 179.

Furthermore, without proof of the deal, the jury never knew that Santiago's prior testimony about it was untruthful, which as the defense had argued to the court, was itself

[27] There likely were other more personal reasons she might have been reluctant to acknowledge her prior perjury, including that she would have been forced to admit to her daughter, Jessica, among others, that she lied to put her husband on death row. Jessica Tassin was at the trial during her testimony. R. 5564.

important impeachment evidence. "Nothing could be more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath." *United States v. Whitmore,* 359 F.3d 609, 619 (D.C. Cir. 2004). This is particularly true where the prior false testimony is in similar or related proceedings. *See United States v. Cuffie*, 80 F.3d 514 (D.C. Cir. 1996) (finding failure to disclose evidence that key prosecution witness previously lied under oath in a court proceeding related to same conspiracy was "material" for *Brady* purposes despite the defense's impeachment of the witness on other grounds). *See Mesarosh v. United States*, 352 U.S. 1, 13-14, (1956) (finding that a witness's perjury regarding a similar subjected matter in separate cases, undermined credibility of testimony at defendant's trial).

Georgina Santiago's credibility was critical because, as the federal courts found, her testimony was key to the State's case. *Tassin*, 517 F.3d at 780 (Santiago's testimony "was crucial" to armed robbery finding). As at the first trial, the State's theory was that Tassin planned to rob Martin and Stagner and that, during the execution of that robbery, he killed Martin with specific intent.[28] Santiago's testimony was the only direct proof of the alleged robbery plan; Tassin and Mills denied it. While the defense was able to cross-examine Santiago on her prior inconsistent statements indicating that no armed robbery plan existed, R. 5426, 5449, 5455, 5522, the State preempted the impeachment value of those statements by eliciting Santiago's testimony that she had always told the truth about the armed robbery plan when questioned

[28] Although the State was only required to prove specific intent *or* felony-murder at the second trial, to obtain a conviction for second-degree murder, the State's case for both bases of liability was based on a theory of the crime, like its first-degree case at the first trial, which was framed by the armed robbery plan. Lacking the criminal mal-intent of an armed robbery plan, Tassin's self-defense story emerged far more credible. That was particularly so given that it was now corroborated by Mills, who testified there was no such plan. Notably, the Fifth Circuit rejected the notion that Stagner's testimony undermined the materiality of Georgina's testimony at the first trial observing that the "[t]he jury had reason to disbelieve Stagner; he originally told the police that hitchhikers had shot Stagner and Martin," and was unpersuaded by the State's other evidence of first-degree aggravation, including Tassin's intent to kill more than one person, obviously relevant to the question of specific intent. *Tassin*, 517 F.3d at 781.

under oath. R. 5388. The revelation that Santiago *lied under oath* to Tassin's first jury about her motivates to incriminate Tassin would have eviscerated that contention.

The State's other evidence had significant problems. Wayne Stagner's testified that Robert Tassin initiated the shooting, but as the federal court previously found, his testimony was impeached by his repeated lies to police after the offense about what happened. Darryl Macaluso, provided some corroboration from the plan—that he got his gun back from Tassin the day after the shooting. However, that testimony was directly contradicted by that of Mary Ann Valverde. He was also long-time felon, and provided his testimony only after being granted immunity from prosecution, and in direct contradiction of his statements to police.

"[I]f the jury had known of Georgina's sentencing deal, there is a reasonable likelihood that they may have chosen to believe Robert's story over his wife's", and the result of the proceeding would have been different. *Tassin,* 517 F.3d at 780-81.

The state's court decision denying his claim was based on an unreasonable determination of the facts as well as being contrary too and an unreasonable application of federal law. Tassin's conviction must be reversed upon *de novo* review of this claim.

As argued further below, the prejudice from this violation must also be cumulated with that of the state's other Brady and Napue violations, which allowed the State to improperly bolster the credibility of Darryl Macaluso (Claim V), and improperly undermine the credibility of the defense's forensic case for self-defense. (Claim IV). It likewise must be cumulated with prejudice resulting from defense counsel's failures which exacerbated these harms. (Claims IX and VI). Whether considered individually, or cumulatively with these other violations, the State's repetition of its *Napue* violation concerning Georgina Santiago's sentencing deal requires reversal, again, this time *with prejudice*.

III. MR. TASSIN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT PREVENTED HIM FROM CROSS-EXAMINING SANTIAGO ABOUT HER HABIT OF ALLOWING HIM TO TAKE THE FALL FOR THEIR JOINT ACTS

The trial court further undermined Tassin's Due Process rights to present his defense and impeach Santiago when it excluded evidence that she had allowed Tassin to take the fall for their joint criminal conduct, to save herself, at least twice before. Though Santiago had been permitted to testify at the first trial about her prior arrests with Tassin, the trial court excluded this testimony in this case. This ruling is contrary to clearly established federal law; the Confrontation Clause mandates that the defense is given an opportunity to fully cross-examine each witness against them, including questioning about any bias the witness may have. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (finding it unconstitutional for a court to curtail questioning of a witness that would reveal bias against the defendant).

In a proffer made after the trial court's ruling, Santiago testified that, in the early 1980s, she and Tassin planned together to steal drugs from a department store pharmacy. Tassin stayed in the store after closing and Santiago was the getaway driver. R. 5691-93. Both Santiago and Tassin were arrested when the motion detectors went off in the store, but only Tassin was convicted. R. 5691-93. Santiago was arrested, but did not receive a conviction of any kind, despite acknowledging that they planned the robbery together; Santiago acknowledged that Tassin took the full rap and served several months to protect her. R. 5691-93. Notably, Tassin was convicted of fourth degree weapon possession; however, he did not use a weapon during the crime, and the only weapon was a shotgun that was found in the car where Santiago waited. R. 5693.

Santiago also testified about an arrest for forging prescriptions. R. 5693-4. Again, only Tassin was convicted even though Santiago was implicated. Santiago acknowledged that in

Tassin's first trial, she was allowed to testify that Tassin helped her again by taking the fall for this offense, while she escaped prosecution. R. 5693-94.

The trial court violated Mr. Tassin's rights to confrontation and Due Process by refusing to admit this testimony. R. 5601, 5609. Defense counsel strenuously argued that Santiago was not being questioned about these arrests to impeach her own credibility, but to show a bias and motive for her testimony against Tassin; a pattern that Santiago allowed Tassin to take the fall in order to secure a favorable deal for herself. R. 5588-5593. The State never responded to this argument, instead repeatedly arguing, in an overtly disrespectful manner (*see* Claim IV), that it was improper impeachment for defense counsel to ask about a prior arrest. R. 5588-5600. Defense counsel urged again that the evidence was not being used to attack Santiago, but to provide evidence to the jury that she had a history of allowing Tassin to take the fall for her. R. 5588-5600.

Ultimately, the court found that evidence that Santiago had repeatedly escaped convictions at Tassin's expense had no impeachment value, and that the defense already had "enough evidence" to "go after" Santiago "with all of the things that she's been given by the State." R. 5601, determining that the evidence "doesn't show to this Court any bias, at all." R. 5601. This ruling missed the mark of the defense's intention for the evidence, was in plain violation of Louisiana's code of evidence (La. C.E. art. 613 allowing evidence of a witness's "bias, interest, or corruption," La. C.E. art. 613, and his rights under the Sixth and Fourteenth Amendments to a fair trial, to confrontation and to present a defense.

This evidence would have revealed the power dynamic of a relationship in which Santiago consistently connived to save herself at the expense of her husband, regardless of the truth. This was particularly critical given that at trial Santiago implied that *Tassin* had the power

in their relationship - that she lied to the police to protect him, *see* R. 5418-19 (Santiago explaining why she failed to mention the alleged armed robbery when first arrested), and that he tried to pressure Santiago to lie to save himself. R. 5673. The excluded evidence would have corrected this misconception.

In considering the exclusion of this evidence on direct appeal, the Louisiana court of appeals did not address the federal constitutional questions, but only the Louisiana evidentiary law violations. *Tassin*, 129 So.2d at 1259. *Id.* As such, Mr. Tassin is entitled to *de novo* review. The trial court's exclusion of this evidence in violation of the federal constitution, both by itself, and in combination with the other errors undermining Tassin's ability to impeach this key witness, requires reversal.

IV. MR. TASSIN'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, TO PRESENT A DEFENSE AND TESTIFY ON HIS OWN BEHALF UNDER THE FIFTH SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE STATE'S REPEATED DENIGRATION OF HIS DEFENSE

A. Introduction to Claim

The State violated a plethora of Mr. Tassin's constitutional rights as a result of the prosecutor's misconduct and inappropriate behaviors which included a concerted effort to attack defense counsel's integrity and denigrate Tassin's defense throughout his trial. Despite defense counsel's best efforts, repeated objections and motions for mistrial, the trial court failed to keep the prosecutor from creating a circus-like atmosphere in the courtroom, designed to create hostility towards and distrust of the defense. It overruled objections, refused to give a remedial instruction, and denied counsel's requests for a mistrial when the prejudicial effect of the misconduct became too great. George Wallace, the lead prosecutor, was so aggressive, even openly to the court, that he was threatened with contempt multiple times. R. 5461, 5606, 5934.

At one point, word of his behaviors reached the head of trials of the District Attorney's Office, who came down to observe and even offered to intervene, although nothing was done. Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, at 5. On direct appeal, the Fifth Circuit Court of Appeals noted with concern that it had sanctioned Wallace in a previous case for some of the same misconduct, yet he continued in his practices. *State v. Tassin*, 129 So.3d at 1253 (citing Wallace's inappropriate and unprofessional conduct in *State v. Simmons*, 738 So.2d 1131, 1140 (1999)).

The prosecutor's actions undermined the integrity of Tassin's defense counsel and entire defense in the jury's eyes, and rendered his trial fundamentally unfair, in violation of Due Process. "The misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger v. United States*, 295 U.S. 78, 89 (1935).

3. Pronounced and persistent prosecutorial misconduct pervaded Mr. Tassin's trial

The lead prosecutor, George Wallace, engaged in increasingly erratic, hostile, and inflammatory behaviors that impugned Mr. Tassin's defense and prejudiced the jury against him. Prosecutor George Wallace directed particular animosity at lead defense counsel Denise LeBoeuf. He made repeated inflammatory comments attacking her personal and professional integrity, as well as the integrity and credibility of Tassin's defense case as a whole.

These inflammatory tactics first emerged during the State's examination of its key witness, Georgina Santiago. In 1992, Santiago had given a statement and signed an affidavit for the defense during Tassin's post-conviction case acknowledging how impaired by memory-

effecting drugs she was at the time of the homicide.[29] Knowing that the State's case hinged significantly upon Santiago's credibility, George Wallace, pre-emptively undermined defense efforts to impeach her with that statement, with inflammatory comments attacking the integrity of the defense. Suggesting to the jury that Tassin's lead counsel had improperly pressured Santiago to change her story, he asked:

> Who, if anyone, has ever attempted to get you to say something differently, or specifically, about what happened that night under that bridge…the Defendant's attorney, Denise LeBoeuf, isn't that true?

R. 5394. The trial court sustained defense counsel's attack on counsel's credibility. Moments later Wallace continued:

> "Did Robert Tassin's lawyer ever attempt to get you to sign an affidavit about certain facts of the case…what was it they wanted you to say, that you hadn't said before, that they found displeasure with?

R. 5394-5. The court again sustained the defense objection, recognizing that counsel was "just do[ing] her job." R. 5395-98. In flagrant disregard of these rulings, Wallace continued to denigrate Tassin's legitimate defense efforts despite the defense's further ongoing sustained objections to the "direct reference[s] to Mr. Tassin's Sixth Amendment Right to Counsel." R. 5401. *See* 5401 ("since Eddie Martin was shot in the back of his head, who has been trying to help your memory? . . . who has ever suggested what you should say about the events that night?"), R. 5403 ("if you wanted to write an affidavit to help Robert, you could have done so yourself, couldn't you?"); R. 5671. The credibility of this critical impeachment having been

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[29] In that statement Santiago acknowledged her drug addled state at the time of the crime. At trial, Santiago denied that she had taken valium (or other drugs) on the day of the crime, and maintained her last valium was taken a week and a half before the homicide, by which time the effects were long gone. R. 5447. This was directly contradicted by her post-conviction affidavit in which she described taking Valium, Dilaudid and Soma the day of the crime, and that she was "was out of it." Her use of Valium was particularly significant to the credibility of her testimony, because as she admitted, Valium significantly affected her memory, inducing black-outs lasting up to days at a time, during which she would walk and talk, but remember nothing. R. 5433, 5437-38.

undermined, defense counsel forewent using it at all, and relied on Santiago's less helpful post-conviction testimony about her drug use instead. R. 5434-48.

The State continued in a similar vein as defense pursed other lines of impeachment during Santiago's cross-examination *See* R. 5553 (referring to a statement the defense relied on as "bogus"), R. 5459 (suggesting counsel would make up impeachment: "oh, did you make it up?").

Counsel continuously objected to Wallace's deliberate "attack on counsel," R. 5396, the "inferences and references to Counsel's integrity and honor" R. 5459, that "directly impacts [Mr. Tassin's] Sixth Amendment right." R. 5466. The defense properly argued that Wallace's comments:

> imply that there is something improper, underhanded, sneaky, and dishonorable about the performance of Mr. Tassin's counsel; and that is a direct reflection and a diminution of his right to counsel under the Sixth Amendment. The jury cannot be allowed to have the impression the counsel for Mr. Tassin have done something wrong.

R. 5466.

Despite recognizing the improper attacks on the defense function, and, at one point, threatening contempt if the inappropriate comments continued, R. 5461, the court failed to stem the misconduct or remedy the resulting prejudice. It denied Tassin's objection to the question: "[A]s between the two sides of this courtroom, who was trying to help your memory for you?" allowing Santiago to answer: "The Defense of Robert Tassin." R. 5401. It failed to give a remedial instruction requested by the defense. R. 5672. Most critically, it denied defense counsel's motion for mistrial, which it made after the *seventh* improper comment. R. 5470-71. The court said it simply did not "believe" the state's action "in any way" would "deprive Mr.

Tassin of his rights of counsel. "I believe that he can have a fair trial, and he will have a fair trial as long as I'm the Judge." R 5471.

However, Wallace's improper efforts to undermine Tassin's defense did not stop there. Wallace used objections throughout trial to suggest defense counsel's incompetence and unprofessionalism, speaking loudly so that the jury—and Robert Tassin—could hear his unfounded attacks. *See, e.g.,* R. 5433, 5440, 5392, 5389. He often argued his objections sarcastically before the jury instead of privately at the bench, suggesting to jurors that defense counsel was unprofessional and inept, R. Vol.21(A) 124; R. 5532, 5911, 5433 ("Counsel may not like the answer, but she's got to live with it."), 5440 ("This is a switcheroo, judge")—prompting a reprimand from the court. R. Vol. 21(A) 126.[30] He interrupted defense questioning with patronizing comments, R. 5538 (saying "I'm not either" when a witness said she didn't understand defense counsel), R. 5551 (characterizing defense counsel's question as "flip"), R. 6393, (interrupting defense questioning with "oop, there you go"); R. 5926 (commenting that the defense was "playing gotcha").

Wallace explicitly accused defense counsel of incompetence and impropriety at the bench too. R. 5392 ("Are you begging him to change his mind, because that's typical of what you do?"), 5437 ("As long as you know how to do it right."); R. 5498 ("another example of her unprofessionalism, no doubt."); R. 5605 (referring to defense counsel's "inability" to lay a foundation for impeachment, "after five hours, she still doesn't know how to do it.") R. 5467-8? (characterizing defense counsel's legitimate efforts to impeach Santiago with a prior inconsistent statement as "an improper attempt to create "an utterly false impression, that the witness has lied

[30] R. Vol. 21(A) P.126. ("All we do is make an objection, we approach the bench, we don't conversate with each other. It never goes well when we do that, Mr. Wallace.").

. . . that's playing dirty pool. . . the Jury deserves a little bit more respect from the Officers in the Court"); Vol. 21(A) R. 186 (when making a hearsay objection, commenting "maybe we need to send the jury out because this is bush league."); R. 5527 (complaining about how long the re-direct of the State's key witness was taking, implying that was because of counsel's poor questioning).

Wallace's angry, demeaning tone exacerbated the prejudicial effect of his words, indicating to jurors that the defense deserved the State's ire. Wallace himself acknowledged: "my bad temper is world famous." R. 6291. Defense counsel had to continually object to Wallace's "offensive" tone, R. 5605, that conveyed "scorn and contempt." R. 5606.[31] So did the court. R. 5604 ("I'm talking about the tone… it's the tenor in which the objections are made."); R. 5603-04 ("can we make objections without being angry . . . because the tone is what we're talking about."). He was asked to lower his voice countless times. R. 5204 (objecting to the "volume being spoken at the bench" "in the presence of the jury); R. Vol. 21(A) 136 ("Come on, let's talk a little lower, huh"), R. 5494 ("a little lower, Mr. Wallace."), 5389, 5887 ("keep it down"); R. 5923 ("keep your voice down"); Supp. Vol 2. R. 280 ("keep the comments down at counsel table"); R. Vol. 21(A), 186 ("judge, can we tone the volume down?"), R. 5390 ("I just ask we keep our voices down, that's all"). Thus the jury may well have heard his outburst that occurred at the bench, as well as the numerous comments made directly before the jury.[32]

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[31] *See further* R. 5469 (counsel complaining about Wallace's "tone of voice," as she was "being hectored and bullied for the practice of law"). R. 5472 (defense complaint about "counsel's tone"); R. 5443 ("if counsel is going to use language that makes it sound like I am doing something improper. I would ask that either he keep his voice down, or the Jury be sent out.").

[32] Early on in trial, defense counsel brought to the court's attention the fact that jurors appeared to be attempting to listen in on the bench conferences. R. 5243.

The court took several breaks so Wallace could calm down. R. 5607 (taking 10 minute recess); R. 5931 (ending court for the day), R. 5934 (granting ADA Freese's request for recess, so Wallace could calm down). Wallace was so provocative, even the judge needed to take a breather. R. 5933. ("I want to get off the bench to cool down, myself.").[33]

The court repeatedly reprimanded Wallace for his inappropriate comments, R. 5602-03,[34] which were also aimed at the court, ultimately threatening him with sanctions on more than one occasion. R. 5499. During defense cross examination of Santiago, the court warned:

> There isn't going to be anymore exchanges with Counsel. Okay, Mr. Wallace? We're not going to ask if somebody made something up in front of the Jury. . . we don't need to have sarcastic remarks in response to questions. . . . we're not going to go and play some sitcom before a jury . . . I am not a doormat that you can wipe your feet off of. Okay? I wear a robe for a reason. Okay, so that's where we are now. . . [I]f we entertain on this path, that (sic) at the conclusion of this trial, we will have a little hearing.

R. 5462-63. As his behaviors continued, the court repeated the threat:

> You know, Mr. Wallace, we had this conversation, didn't we? Didn't we?
>
> . . .
>
> You know what, Mr. Wallace, let me tell you something. I don't know how you come in Court and practice . . . I don't appreciate the comments anymore . . . I'm going to warn you one more time. Okay? . . . The next time you do it, they'll have your mug shot. Okay, I've never done this in my life, I would never do it to anybody. But if you can't control the comments, to yourself, and breathe in before you say anything . . . there isn't going to be any warning from me. It's just going to be done. Do we understand each other?");

R. 5499.

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[33] The hostile atmosphere created by Wallace's domineering presence and inappropriate actions may have spilled over to his co-counsel too, who engaged in similar theatrics at times. For example, as defense counsel explained to the court: "Mr. Freese's tone of voice in his examination of [Sheila Mills] was extremely loud, extremely angry. He spent half of his examinations roaring at the jury and waiving his arms at the jury, as if an open (inaudible words)." R. 5296.

[34] At a bench conference during Santiago's testimony, the court told him to behave "politely" and to "make objections without being angry." R. 5603-04.

Word of Wallace's excesses reached the Chief of Trials, Tim McElroy, who "came to the courtroom to observe," and met with the judge in chambers. *See* Post-Conviction Ex. 1, at. 5.

During Wallace's redirect examination of the lead detective, Mark Helton, the court cleared the courtroom again to reprimand him:

> Mr. Wallace, do you have issues controlling your emotions? . . . Is it just a hair-trigger that you have?. . . [W]hy do you make comments to counsel, with the Jury in the box? . . . Didn't we have this discussion a day or two ago? . . .You can't control your temper.

R. 5928.

> I don't understand the comments, Mr. Wallace. . . . it is what it is, and if you don't like the ruling, its not their fault. . . . I don't want the comments . . . you don't need to bring it to a level that we're in a barroom at two o'clock in the morning. . .
>
> . . .
>
> If you don't get your way, you pout like a little child. . . . You're supposed to be the State of Louisiana. You're supposed to be above comments.

R. 5929.

At that time, the court also reprimanded Wallace for an inappropriate "explosion" the day before, which the judge apparently did not address at the time it occurred because he did not want to antagonize Wallace any further. R. 5931. The court described the explosion:

> Rahhh, like this . … the same way you handle yourself in every proceeding. You can't control your temper. You can't control your temper.

Id. Instead of respecting the court's reprimand, Wallace grew even more belligerent, prompting a further threat of contempt: "One more word out of your mouth, Mr. Wallace, and you won't be in this courtroom." R. 5934. However, the court never followed through with that threat. As lead counsel, LeBoeuf, described:

> The proceedings developed a pattern. Mr. Wallace would be increasingly rude, angry, disrespectful to counsel, and make insinuations either directly or "surreptitiously" (but always audibly) to the jury. The tenor of these remarks was that counsel had been dishonest, underhanded, sneaky and dishonorable in our

> defense of Mr Tassin. We objected; many objections were sustained although not enough, and eventually the judge would get mad as well. He and Mr. Wallace had a number of exchanges where Mr. Wallace argued back as if they were equals. The judge ordered him to stop talking and leave one night, and told him that his tone of voice was offensive; he criticized Mr. Wallace for not being able to control his temper and not acting like a lawyer. But the judge never did regain control of the courtroom, and Mr. Wallace would always return to his unprofessional ways.

Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, at 4-5.

The State's misconduct culminated in a closing rebuttal argument, the very *theme* of which was the questionable motive and ethics of the defense profession. Wallace began his argument by telling the jury that defense lawyers "will follow a blind man in search of themselves and are "misguided in their vocations . . .". He asked: "[w]hen we speak of these are the least of my brothers, aren't we referring to the man who lives in a cardboard box under a bridge. . . or the man who robs and kills under a bridge?", R. Supp. 308, undermining the presumption of innocence and Tassin's right to a defense. *See also,* R. Supp. 314. ("I'll let their side of the room defend a cold-blooded killer.").

Wallace implied that defense lawyers would lie for their clients, motivated by a perceived "greater purpose of the oppressive state of the rights of the accused," warning that "no purpose . . . is ever served by a lie." R. Supp. 308. Comparing Tassin's defense with a dangerous cult, he warned jurors: "They drank the Kool-Aid and now they are offering it to you." R. Supp. 308.[35] He returned to this metaphor as he addressed the defense's arguments, R. Supp. 309 ("a Kool-

[35] This metaphor alludes to the Rev. Jim Jones massacre, in which members of a cult were convinced to commit suicide by drinking a flavored drink, laced with cyanide.

Aid moment"), 314, 321, describing reasonable doubt as "Kool Aid," R. 317, exhorting jurors to "take a sip." R. Supp. 309.[36]

Continuing, Wallace attacked defense counsel's integrity, suggesting that she misled the jury with photographs that were properly entered as evidence, R. Supp. 323, and suggesting impropriety in her use of transcripts for unavailable witnesses, R. Supp. 324. He attacked lead counsel personally, describing her as "that lawyer with scorn and disdain written all over her face just dripping from her mouth as she asked questions," R. Supp. 312; called her "the best witness the defense ever had" R. Supp. 310; repeatedly implied she was lying, R. Supp. 310, 324 ("their best witness, Denny LeBoeuf told you Bobby Tassin had a scar. I don't know. Did you see it? I looked. Denny says it's a scar. I guess it must be a scar,") R. Supp. 328-9 ("If anything that Denny LeBoeuf said has a grain of truth to it, that could not have happened that way."). He suggested that it would be understandable if Wayne Stagner had "chok[ed] her, after a cross-examination, which Wallace described as "completely humiliat[ing]." R. Supp. 313-14.

Defense counsel objected repeatedly to Wallace's arguments, R. Supp. 312, 315, 316, 323, 326; R. 6485. Despite acknowledging that the State was "attack[ing] lawyers", R. Supp. 313, the court denied defense objections, because "this is just closing argument. What the attorneys say I'm going to instruct them is not evidence," giving the State carte-blanche to continue its misconduct and denigrate Tassin's defense. At the conclusion of the State's argument, defense counsel moved for a mistrial, R. 6485, but the court denied that as well. R. 6487. La. C.Cr.P. arts. 701, 704, 705.

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[36] Wallace also referred to the defense theory as a "fairy tale," R. Supp. 318, 320; a "cock and bull story," "make believe marvel comic foolishness," "nowhere close to reasonable," "laughably ridiculous," R. Supp. 320, and "offensive," R. Supp. 332.

On direct appeal, the State acknowledged that Wallace's behaviors were "injudicious", *State v. Tassin,* 11-1144 (La.App. 5 Cir. 12/19/13); 129 So.3d 1235, 1249. The appellate court agreed that his "inappropriate and unprofessional behaviors" "went beyond the bounds of "earnestness and vigor," and constituted misconduct. They noted with concern that Wallace had been chastised for very similar misconduct in an earlier case. *Id.* (citing *State v. Simmons*, 98-841 (La. App. 5 Cir. 6/1/99), 738 So.2d 1131, 1140). The court "considered very seriously the allegations of prosecutorial misconduct which was displayed by Mr. Wallace throughout the course of the trial," but ultimately concluded, on the record before it, that they did not sufficient undermine the fairness of the trial to warrant reversal. *Id.,* at 1253. This was an unreasonable determination of the facts, and was contrary to and an unreasonable application of clearly established federal law and Due Process.

4. The cumulative effect of the State's misconduct rendered the trial fundamentally unfair and violated Due Process

The flagrant, repeated, and deliberate prosecutorial misconduct in this case violated Tassin's rights to Due Process under clearly established federal law. While an isolated utterance by a prosecutor may not be grounds for reversal, the "consistent and repeated misrepresentation" of facts or evidence "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868 (1974).[37] The touchstone of the prosecutorial misconduct analysis is on the overall fairness of the trial, or the effect of the misconduct on the trial as a whole. *Smith v. Phillips*, 455 U.S. 209, 219-20 (1982). In Tassin's case, the misconduct of the State was so "pronounced and persistent" that there is a

[37] *See also Miller v. Pate,* 386 U.S. 1 (1967). In *Miller*, the Supreme Court reversed where a prosecutor misrepresented to the jury that a pair of underwear were stained with blood, when in actuality they were stained with paint. Similarly here, the State misrepresented to the jury that it was improper for the defense counsel to have obtained Santiago's affidavit, when in actuality it was proper and common defense advocacy.

showing that there was "a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Berger v. United States*, 295 U.S. 78, 89 (1935).

This is not a case where a prosecutor made one or tow improvisational remark during an argument, or asked one question on re-direct that was out of line; George Wallace's misconduct so permeated the trial that it halted proceedings on several occasions and prompted intervention by the chief of his office. Wallace's remarks denigrating counsel were punctuated throughout trial by aggressive outbursts, directed at the defense, all in front of the jury. Wallace's behavior, acknowledged by the Louisiana Supreme Court as "obviously...inappropriate[] and unprofessional[]" grew increasingly erratic as the trial progressed, so by the time the jury took the case back to deliberate, Wallace's week-long belligerence had reached a fever pitch. This is exactly the type of persistent and protracted prosecutorial misconduct that the United States Supreme Court deemed as a violation of due process.

In analyzing Due Process prosecutorial misconduct claims, the Fifth Circuit and other federal courts recognize, that of all types of prosecutorial misconduct, attacks on defense counsel are particularly prejudicial because they "damage . . . counsel's credibility before the jury, prompting the jury to summarily reject defense counsel's arguments on the facts and the law." *United States v. Murrah*, 888 F.2d 24, 25 (5th Cir. 1989). *See United States v. Ollivierre*, 378 F.3d 412, 420 (4th Cir. 2004) ((recognizing attacks on defense counsel undermine a defendant's rights to counsel, due process and a fair trial). In particular, a prosecutor "may not challenge the integrity and ethical standards of defense counsel unless [he] has certain proof of an offense and the matter is relevant to the case." *Murrah*, 888 F.2d at 27; *see also United States v. Young,* 470 U.S. 1, 9 (1985) (holding that counsel "must not be permitted to make unfounded and inflammatory attacks on the opposing advocate"). A prosecutor denigrating defense counsel is

particularly damaging because the prosecutor's commentary "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985).

Misconduct during closing rebuttal argument is especially problematic because the defense cannot "rebut the allegations" and the remarks are made "immediately before deliberations." *United States v. Holmes*, 413 F. 3d 770, 777 (8th Cir. 2005). The defense's only recourse is to make objections, which in Tassin's case were repeatedly overruled.

The State deliberately undermined the credibility of defense counsel to prejudice the jury against Tassin's case, and its misconduct undermined defense efforts to impeach Santiago, its key witness. It surely affected the jury's assessment of Tassin's defense. Reversal is required. *See Berger*, 295 U.S. 78.

Importantly, the actions of the prosecutor must be assessed cumulatively, to see if in the entirety, the State's actions had a prejudicial effect on the jury. *See Berger* at 89 (prosecutorial misconduct violates Due Process if it had "a probable cumulative effect upon the jury which cannot be disregarded as inconsequential").[38] Thus, the focus of such an inquiry is not on the impact of individual instances of misconduct, but the degree to which the misconduct at issue pervaded the trial. The appellate court did not do so, instead considering Mr. Wallace's misconduct in isolated categories, (see cite listing and considering three categories in isolation) "Prosecutor's remarks regarding defense counsel's impeachment of Ms. Tassin," *Tassin*, 129 So.3d 1235 at 1249, "Prosecutor's conduct during bench conferences and throughout trial," *Id.*,

[38] *See also Griffin v. California*, 380 U.S. 609 (1965) ("The proper inquiry for the assessment of prosecutorial misconduct-based due process claims is whether the misconduct at issue "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

at 1251, and "Prosecutorial misconduct during the State's closing rebuttal argument." It thus reached the unreasonable conclusion that Mr. Tassin's rights were not violated.

It also unreasonably dismissed the pronounced and persistent misconduct, assuming that jurors would disregard it based on one isolated instruction that "arguments aren't evidence." This flies in the face of clearly established federal law, as the Court has made clear that as representatives of the State, prosecutors hold unique authority in the eyes of a jury, and their "improper suggestions. . . are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is thus imperative that the trial court keep prosecutorial argument within appropriate bounds. A prosecutor denigrating defense counsel is particularly damaging because the prosecutor's commentary "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985).

The misconduct in Tassin's case was not a fleeting isolated comment, and it was not limited to argument alone: the State's misconduct "so infected the trial with unfairness" that it "made the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). The state court's decision denying relief was an unreasonable determination of the facts and contrary to and an unreasonable application of federal law. The court should consider the claim *de novo*.

5. Mr. Tassin's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments to present a defense testify in his own behalf and present his defense were violated by state misconduct

The flagrant misconduct of the State throughout trial also deprived Mr. Tassin of his constitutional right to testify on his own behalf. Mr. Tassin had testified at the first trial, and consistently expressed his intention to do so again. However, in light of the increasingly

aggressive and hostile behaviors of the prosecutor, and lacking faith in the court's ability to keep him in check, counsel concluded there was too great a risk that Mr. Tassin would not be able to withstand improper attacks and cross-examination, undermining the credibility of his defense. Mr. Tassin therefore reluctantly followed counsel's advice, to waive his right to testify on his own behalf, in a self-defense case where his testimony could not have been more critical.

A defendant's right to testify is one of the most fundamental rights afforded to a criminal defendant. It is guaranteed under the Fifth Amendment's privilege against self-incrimination, the Sixth Amendment's Compulsory Process Clause, and the Due Process Clause of the Fourteenth Amendment. *See Rock v. Arkansas,* 483 U.S. 44, 51 (1987) ("it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense"); *Harris v. New York*, 401 U.S. 222, 225 (1971). Mr. Tassin was deprived of his constitutional right to testify due to the flagrant misconduct of the lead prosecutor at his trial.

B. Mr. Tassin Waived His Right To Testify Because of the State's Misconduct

The defense team all recognized how important Mr. Tassin's testimony would be at his trial. As defense counsel Paul Killebrew states:

> To my knowledge, Robert has always said that he killed Mr. Martin in self-defense...No other witness at the scene provided [Robert's] account of the shooting, and the other witnesses to the shooting, Mr. Stagner and Ms. Tassin, both had strong incentives to lie. Robert's testimony was therefore very important to his self-defense case. He testified at his first trial in 1987, and he made it clear that he wanted to testify again.

Pet. Ex. 2, Affidavit of Paul Killebrew, at 1. Similarly, lead counsel Denise LeBoeuf confirmed:

> Mr. Tassin has always said that he shot the victims in self-defense. I and the rest of his team realized that we had to get his version of the events in front of the jury, while producing the physical evidence that supported his consistent story.

Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, at 1.

Mr. Tassin repeatedly asserted his desire to testify both before and during trial. He did so even when he thought his testimony from the 1987 might be read to the jury by the State, which would have significantly reduced the need for his live testimony. Although counsel they knew that Robert wanted to testify, they considered to relying on the 1987 testimony instead of Robert taking the stand. As Mr. Killebrew explains:

> [H]is 1987 testimony was sufficient, and it seemed unwise to unnecessarily give the state another opportunity to cross examine him. Like all the witnesses in the case, a long time had passed since the shooting, and his memory of events in 1987 was likely to be clearer. In addition, Robert has some mental health issues. He suffers from an anxiety disorder and panic attacks. We had already begun to see how explosive and abusive George Wallace could be in the courtroom, at pretrial hearings, and had some concerns about how he would stand up to aggressive cross-examination.

Pet. Ex. 2, Affidavit of Paul Killebrew, at 2. However, when counsel raised this possibility with Robert, he made it clear that he still wanted to take the stand himself, despite a potentially bruising live cross examination from Wallace. Counsel acknowledged that Robert urged his desire to testify during nearly every legal visit. Pet. Ex. 2, Affidavit of Paul Killebrew, at 2. See also, Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, at 2. ("Robert still wanted to testify. He has worked for over two decades to get the chance at a fair trial, and he really wanted to tell his story.")

Robert did so even more insistently when it became clear at the trial that the State were not going to admit his prior testimony. Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, at 7. Pet. Ex. 2, Affidavit of Paul Killebrew, at 4. ("After we realized that the State would not be introducing Robert's testimony from the first trial, Robert was especially insistent on testifying.").

However, in light of George Wallace's inappropriate, overly aggressive behaviors, and extreme hostility towards the defense, defense counsel concluded that their client should not take

the stand. Mr. Tassin was very shaken by Wallace's behaviors, becoming increasingly agitated and overwhelmed as he saw how Wallace was conducting himself, and his lawyers believed that Mr. Tassin would not survive cross-examination by this out of control prosecutor. Paul Killebrew recalls:

> [A]t trial, we realized by the close of the State's case in chief that the State was not presenting Robert's 1987 testimony. The question then became whether Robert would testify. It was clear to us that he could not do so effectively. We decided that Robert could not testify and that we would instead ask the jury to infer that Robert acted in self-defense from the physical evidence and how the State's witnesses responded to our questions on cross-examination.
>
> Weighing heavily against Robert's testifying was George Wallace's improper conduct throughout the trial, which frankly scared me. I remember having a discussion with Denny in the hallway outside of court about whether she should ask Mr. Wallace to remain seated during her voir dire—he had been walking in and out of the courtroom in a way that seemed calculated to distract potential jurors, or at least to convey that Denny's questions were not important. I knew even asking the question would set Mr. Wallace off, and I asked Denny to make her request in open court, in front of the judge, because at least there was security in the courtroom.
>
> Throughout the trial Mr. Wallace had uncontrolled outbursts in the courtroom; got in screaming matches with the judge that interrupted and caused delays in the proceedings; made vituperative comments about defense counsel, his own co-counsel, and the judge both in and out of court, sometimes in the presence of Mr. Martin's family; and inappropriately attacked and cast aspersion on the defense team—the embodiment of Robert's Sixth Amendment right to counsel—to the jury. . .
>
> George Wallace's tone and body language, his demeanor, the volume of his voice, his physical gestures—he used everything at his disposal to convey his contempt for Robert and for Denny, Robert's longtime advocate. . .
>
> Robert was extremely upset and disturbed by Mr. Wallace's conduct. It made the trial extremely stressful for all of us, but it affected Robert especially. He got very agitated and I remember having to hold his arm and ask him in a whisper over and over again not to stand up and not to speak. Others times he seemed to shut down, and struggled to keep up with the proceedings. A number of times during the trial he leaned over and told me that he couldn't keep up with what was going on, or was confused about what was happening.
>
> . . . Robert suffered from anxiety and panic attacks. We believed that if we called Robert to testify, Mr. Wallace would intimidate and overwhelm Robert with

> inappropriate questioning and his unprofessional conduct. It was hard enough for us to maintain composure and concentrate in face of Mr. Wallace's behavior, let alone our anxious and overwhelmed client, whose freedom depended on the outcome of the trial.

Pet. Ex. 2, Affidavit of Paul Killebrew, at 2-4. Denise LeBoeuf similarly recalls how much George Wallace's behaviors affected Robert, and her conclusion that he should not take the stand.

> Robert felt very keenly what he perceived as attacks on me. Before trial or during breaks, I tried to reassure him that none of the remarks bothered me in the way that concerned Robert. I thought then that Mr. Wallace was a disturbed individual, and do not take these things personally. However, the atmosphere was so heavy and poisonous, as we waited for the next outburst, the constant bullying did have an effect on me as well as Robert.

Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, at 5.

> The lead prosecutor in the case, George Wallace, had behaved so inappropriately and erratically, and had displayed such hostility to the defense and particularly me, that I felt we could not risk putting him on the stand to face this prosecutor. The atmosphere the state had created was so tense, and Mr. Tassin seemed so overwhelmed by it all that frankly I did not think he could cope with testifying at all at that point, regardless of who cross-examined him.
>
> Robert has suffered from an anxiety disorder for many years, and Mr. Wallace's behaviors were clearly getting to him. Robert grew increasingly anxious, reacting to the insinuations and accusations Mr. Wallace was making as the trial progressed. He would get agitated after one of Mr. Wallace's explosions or one of his sarcastic comments. If we returned from the bench conference, Robert would be fixated on a very minor detail, and obsessively ask about an unimportant matter again and again. Even more concerning to me in retrospect, there were periods when he became quiet, essentially shut down, and stopped engaging in his case very much. This was very uncharacteristic of him.
>
> I have known Mr. Tassin since 1990, including throughout most of his twenty years he spent on death row. He has suffered from some kind of anxiety disorder ever since I have known him. Over the years at evidentiary hearings or when things were happening in his case, I have seen his anxiety increase, but never anything like the degree to which it did at his trial.

Id. at 3-4. Despite counsel's repeated objections and the judge's reprimands, Wallace had continued his unruly behavior. The defense team had no confidence that the court would restrain him during cross-examination of their client.

> It is difficult to convey the atmosphere of hostility to the defense that his actions created. Through his objections, questioning of witnesses, the tone of his voice and his body language he displayed contempt for us, and conveyed that we were dishonorable and incompetent. A couple of times, the judge threatened to hold Mr. Wallace in contempt because of his behavior, but never actually did that. Mr. Wallace's anger was so explosive that there were times I believed he might physically harm someone or something. We made many objections, and the court reprimanded him several times, but to no avail. It was clear to the defense team and Robert that the judge was unable to keep Mr. Wallace under control, and we had no faith at all that he would do so if Robert took the stand either.

Id., at 4.

Because of counsels' concerns about Wallace's out of control, erratic behavior and angry outbursts, they advised their client not to take the stand. Based upon that advice, despite his clear desire to testify, he reluctantly waived his right to do so. Pet. Ex. 2, Affidavit of Paul Killebrew, at 4; Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, at 6.

As the evidence shows, Mr. Tassin was prevented from testifying after unequivocally expressing his desire to do so, because of state misconduct.

Mr. Tassin's testimony was critical to his defense. The deprivation of that testimony by state misconduct violated his federal constitutional right to testify guaranteed under the Fifth, Sixth and Fourteenth Amendments, *see Rock* 483 U.S. at 51, and his conviction must be reversed. The violation had "a substantial and injurious effect or influence" on the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). As the United States Supreme Court has recognized, "the most important witness for the defense in many criminal cases is the defendant himself." *Rock*, 483 U.S. at 52. "Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself

must be considered of prime importance." *States v. Walker*, 772 F.2d 1172, 1179 (5th Cir. 1985). This was undoubtedly true in Petitioner's case. He alone could offer direct testimony rebutting Stagner and Santiago's account of an unprovoked shooting. As defense counsel explained,

> Robert has always said that he killed Mr. Martin in self-defense. He said that he never planned to rob Mr. Stagner or Mr. Martin and did not collect a gun from Mary Ann Valverde's apartment. Wayne Stagner pulled a gun on Robert and his then-wife, Georgina Tassin, as they were trapped in the back of a two-door car, and that he wrestled the gun from Mr. Stagner, cutting himself on the firing pin as he did so, and shot desperately at Mr. Stagner and Mr. Martin in self-defense. No other witness at the scene provided this account of the shooting, and the other witnesses to the shooting, Mr. Stagner and Ms. Tassin, both had strong incentives to lie. Robert's testimony was therefore very important to his self-defense case.

Pet. Ex. 2 at 1-2. He testified to this at his 1987 trial, *see* 1987 Trial Record, at 1687-1788, and would have testified to it again. His conviction should be reversed. *See Thompson*, 825 So. 2d 552 (reversing conviction where defendant "was denied his right to testify in his own behalf based upon the improper actions of the State").

As representatives of the State, prosecutors hold unique authority in the eyes of a jury, and their "improper suggestions. . . are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States,* 295 U.S. 78, 88 (1935). It is thus imperative that the trial court keep prosecutorial argument within appropriate bounds. *Berger,* 295 U.S. 78. The lambasting of the defense was the last thing the jury heard before it retired to deliberated, and it deprived Mr. Tassin of his own critical testimony, which would have shown that the shooting was committed in self-defense, and would likely have assured that the jury received a self-defense instruction (*see* Claim VII). In this case, the repeated and persistent misconduct by the lead prosecutor, from voir dire through the State's closing rebuttal, created an atmosphere of hostility and pressure such that Wallace's behavior surely affected the jury's assessment of Tassin's defense. The detrimental effects on Tassin's fundamental right to testify,

should also be considered as part of the cumulative harm in assessing his related Due Process claim outlined above and further confirms additional violation.

The state courts never reach the merits of the claim so Mr. Tassin is entitled to *de novo* review. Reversal is required.[39] *See Berger*, 295 U.S. 78; *State v. Smith*, 554 So.2d 676 (La. 1989). In the alternative, the Court should grant an evidentiary hearing on the claim, which Tassin requested in state court but was denied.

V. THE STATE FAILED TO REVEAL THAT DARRYL MACALUSO, A KEY PROSECUTION WITNESS, WAS A LONG-TIME POLICE INFORMANT WITH A REPUTATION FOR LYING AND AN INCENTIVE TO LIE, IN VIOLATION OF ITS DUTIES UNDER BRADY, GIGLIO AND KYLES AND KNOWINGLY PRESENTED MISLEADING TESTIMONY IN VIOLATION OF NAPUE

The State violated Mr. Tassin's rights to Due Process by suppressing material impeachment evidence concerning another of its witnesses, Darryl Macaluso, who it knowingly elicited misleading testimony from to improperly bolster his credibility.

To prevail on a *Brady* claim, a petitioner must show state suppression of evidence favorable to defense, that is material. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 515 U.S. 419, 432-34 (1995). To prevail under *Napue*, a petitioner must show the state's knowingly present false or misleading testimony that was material. *Napue v. Illinois*, 360 U.S. 264, (1959). Petitioner met both of these burdens in the court below.

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[39] *See Holmes,* 413 F.3d 770 (reversing conviction where prosecutor made comments accusing counsel of dishonesty); *United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996) (prosecutor's impermissible attacks on defense counsel and his role was reversible error); *United States v. Friedman*, 909 F.2d 705, 708 (2d Cir. 1990) (prosecutor's statement that defense "will make any argument he can to get that guy off" constituted reversible error); *Murrah,* 888 F.2d 24 (State's suggestion that counsel caused unavailability of witness, was reversible error); *United States v. McLain*, 823 F.2d 1457, 1462-63 (11th Cir. 1987) (reversing conviction in part because prosecutor stated that defense counsel "misled the jurors . . . and . . .[lied] in court"), overruled on other grounds by *United States v. Lane,* 474 U.S. 438 (1986); *see also Gomez v. State*, 704 S.W.2d 770 (Tex. Crim. App. 1985) (holding that prosecutor's accusation that defense counsel attempted "to manufacture evidence" was improper); *Bell v. State*, 614 S.W.2d 122 (Tex. Crim. App. 1981) (holding that prosecutor's argument that "[h]is [the defense attorney's] duty is to see that his client gets off even if it means putting on witnesses who are lying" was improper).

A. Darryl Macaluso's Trial Testimony Supported the State's Case and Created the Impression that He was A Credible Witness, Who Had Turned His Life Around and Had No Reason to Lie

Darryl Macaluso testified for the state at trial. He provided key evidence corroborating the State's theory of a pre-planned armed robbery, and undermining Tassin's assertion of self-defense. Macaluso lived with his girlfriend, Mary Ann Valverde at the apartment where the defense claimed they had stopped simply to obtain needles but where the State claimed he obtained a gun to implement the alleged armed robbery plan. Valverde testified and confirmed the defense account that Tassin came over for clean needles and denied they even owned a gun. But Macaluso cast it in doubt. He was not there when the Tassins came by that night, but he provided the damning testimony that he did keep a gun at the apartment, that he saw it there the morning of the crime, and that he collected it from Robert Tassin's house a day later. R. 5705, 5709. This testimony contradicted the taped statement he gave police after his December 12, 1986 arrest for accessory to Martin's murder, where he denied having a gun at the apartment. Ex. 2 at 3. The State dropped charges against Macaluso after Tassin's 1987 trial doubting that Macaluso was linked to the gun used.

Prior to trial, the state provided defense counsel with Macaluso's prior inconsistent statement, rap sheet and immunity agreement and defense counsel did their best to impeach him with all three at trial. *See* R. 4711, 5115, 5117, 5123. However, the efficacy of that important evidence was undermined by the State which neutralized the evidence and presented false testimony to bolster Macaluso's credibility. They portrayed him as a man with a troubled past who had now turned his life around and was testifying to do the right thing. It elicited his testimony that his felony convictions were "his past." R. 5702. Macaluso testified, "I've changed my life. I'm trying to go on the right path, and—so here I am." R. 5730. He testified that he now

studied at Delgado University, was gainfully employed as a carpenter, and supervised other contractors. R. 5702. The state had Macaluso explain away his prior inconsistent statement as the words of man who was "neck deep in a murder investigation" facing accessory charges, R. 5723, 5728, but that he was now a changed man seeking to do the right thing. R. 5730. In closing, the state used Macaluso's criminal history to its own advantage, suggesting that his willingness to admit his past convictions and previous lies to police demonstrated his trustworthiness at trial. "Darryl Macaluso is what he is and, boy, they had a lot of fun talking about what a creep he was. He was honest about it." Supp. R. 321. "What motive did they establish that Darryl Macaluso would come in and tell us such an outrageous lie to railroad poor Bobby?" Supp. R. 321.

B. Post-Conviction Evidence Revealing That Darryl Macaluso was a Known Informant With a Long History of Providing Information to the Police To Maintain A Beneficial Relationship with Law Enforcement and Gain Leniency for Ongoing Criminal Activities, A Relationship Which Continued Through the Time of Mr. Tassin's 2010 Trial

Unbeknown to the defense (or the jury), there was ample evidence available that could have been used to impeach Macaluso and undermine the State's knowingly false portrayal of him as a reformed and credible man with no reason or inclination to lie.

Records and witness statements obtained only in post-conviction, indicate that Macaluso is a known informant and has a long pattern of providing information to the police, in order to maintain a beneficial relationship with law enforcement and gain leniency for his ongoing criminal activities, and which endured through the time of Mr. Tassin's trial. The records and witness statements also reveal a long history of lying to law enforcement to escape save himself.

C. Darryl Macaluso was a Known Informant With a Long History of Providing Information to the Police To Maintain A Beneficial Relationship with Law Enforcement and Gain Leniency for Ongoing Criminal Activities

In state-post conviction proceedings, Mr. Tassin presented statements from people close to Macaluso, who knew him to be a drug addict, thief and long-time snitch or informant.

Gavin Galjour grew up around the corner from Valverde and Macaluso and spent substantial time at their home. Galjour lived around the corner from Valverde and Macaluso's shared apartment when he was young, and spent substantial amounts of time there. Post-Conviction Ex. 19, Declaration of Gavin Galjour. He remembers Macaluso as a drug addict who did burglaries to sustain his habit, that he was disliked and had a reputation in the community as a snitch and a liar, who wouldn't hesitate to get others into trouble to save himself. Macaluso expressly told Giljour he was a snitch and even gave Giljour advice on how to do the same himself. Ex. 2 P19. Thus, Galjour states that "Darryl was a drug addict and a thief" who "got money to buy heroin and other drugs from doing burglaries." *Id.* Macaluso also "dealt drugs, heroin, weed, prescription pills." *Id.* He stated that Macaluso was "out for himself" and "would not hesitate to get other people into trouble to save himself." *Id.* Galjour further stated: Macaluso was "a known snitch." *Id.* People "who knew [Macaluso] would talk about him being an informant for the police, they would call him a rat or a snitch, a snake in the grass, a liar." *Id.* Macaluso "got arrested a lot but rarely stayed in jail long, he would rat and be out again." Galjour remembers Macaluso "being arrested when [he] was at their house and coming back home the same night," more than once. *Id.* "He had a reputation for giving police information, whether it was true or not, to get or stay out of trouble." *Id.* Galjour remembers that when he and Mary Ann Valverde's son Dusty, were teenagers, Macaluso told them "he was an informant and did whatever he needed to stay out of trouble," and taught them that "[they]

should do the same." *Id.* Macaluso told him: "when you do favors for the cops, you get things in return, either to get out of trouble now, or further down the line." *Id.* He stated that Macaluso had the attitude that he could "pull off whatever he wanted because he knew he'd be able to get out of trouble because he was an informant, had helped them before and would help them again." *Id.* In addition, Galjour remembers Macaluso threatening someone he was angry at by saying "he would have him arrested because he worked for the police." *Id.*

Robert Guccione knew Macaluso for years between 1983 and 1991 and similarly remembers him as a thief who snitched on others, often bragged about his relationship with police, and he often saw hanging with police officers. Thus, Guccione stated that Macaluso was a drug addict who "got money for drugs any way he could," including home burglaries and robberies. Post-Conviction Ex. 20, Declaration of Robert Guccione 8/31/15. *Id.* He stated that Macaluso was arrested a number of times while they knew each other, and "would get out of jail on the same day, and usually wouldn't go back to court on it." *Id.* He bragged about how easily he could get out of trouble. *Id.* Guccione stated that Macaluso got out of trouble quickly because he was an informant who had inside relationships with police officers. According to Guccione, Macaluso sold stolen guns and jewelry to a Gretna police officer named Dennis Dunn, and then would use the money to buy drugs. *Id.* Guccione also saw Macaluso frequently hang out with a second police officer named Tim Miller, who used to pay people "to snitch on drug dealers" because he "wanted information to do drug busts." *Id.* He described how Macaluso and Miller would meet up with one another and "huddle" at a bar where Miller worked a detail, and Guccione believed Miller paid Macaluso for information. *Id.* When Macaluso and Guccione were arrested together in Algiers in the early 1990s, Macaluso told Guccione that "he'd messed up in the wrong parish," because "he didn't have connections there [in Orleans Parish] who

could keep him out of trouble like he did in Jefferson Parish." *Id.* Law enforcement records obtained for the first time in post-conviction, read in conjunction with available court records, corroborate these accounts. They reveal a man with an extensive criminal history with over 50 arrests, yet who largely avoided lengthy prison sentences or multi-bills in a state with the harshest sentencing in the country.

Police records indicate that Macaluso gave information to the police following many of his arrests, including in 1982[40], 1987[41], 1988[42] and 2011[43].

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[40] On April 13, 1982 Macaluso was arrested by JPSO for extortion and possession of stolen things, after he was involved in burglarizing his friend's parent's house. Post-Conviction Ex. 4, JPSO Record, Item No. D-2689-82. Following the burglary he extorted the victims for $200 to for their stolen jewelry to be returned. *Id.* Upon his arrest with a co-defendant named Michael Ramey, Macaluso admitted knowledge of the burglary but immediately laid blame on a third person named Johnny Laborie. *Id.* He also provided a version of events that totally exonerated himself, but which contradicted witness statements. *Id.* The district attorney refused the extortion charge two weeks later, and agreed to plead Macaluso down to attempt to receive stolen things, which reduced a potential 15 year sentence to one year in parish prison. *Id.*; Post-Conviction Ex. 5, 2009 Rap Sheet; Post-Conviction Ex. 25.

On December 14, 1982, Macaluso was arrested for felony theft and attempted theft in connection with attempts to cash checks that were stolen in a home burglary. Post-Conviction Ex. 6, JPSO Record, Item Nos. K-191005-82, K-19106-82. An informant tipped the police off to Macaluso's involvement and he was arrested. *Id.* Macaluso immediately fingered another person, named Glenn Borchers, claiming that Borchers had committed the home burglary. *Id.* Borchers was eventually sentenced to 18 months probation. *Id.* Macaluso was sentenced to 18 months parish prison, to run concurrent with a separate three-year sentence for burglary, even though he could have received ten years on the burglary alone. *Id.* Post-Conviction Ex. 7, 24th JDC Case File, No. 83-226; Post-Conviction Ex. 8, 24th JDC Case File, No. 83-243.

[41] On October 12, 1987, Macaluso was arrested as a suspect in a home burglary with co-defendant Frankie Morrison. Post-Conviction Ex. 9, JPSO Record, Item No. J-8612-87. He immediately agreed to give police a voluntary statement (which he did under a false name). *Id.* Macaluso claimed that he was duped by Morrison into believing he wasn't involved in a burglary, and then told police he knew Morrison had done other burglaries. *Id.* (He also lied and claimed he had never been involved in a burglary himself, though he was convicted of burglary 1983.) *Id.* Macaluso plead guilty to burglary on January 29, 1989 and received a six-year sentence run concurrent with sentences for four other convictions. *Id.;* Post-Conviction Ex. 10, 24th JDC Case File, No. 87-3462. Macaluso could have received an aggregate 114 years on the convictions but instead the state waived the multi-bill and he was sentenced to six years.

[42] On May 2, 1988, Mary Ann Valverde's juvenile foster child Creighton Wuneberger was arrested with another man, Emanuel Randolph, attempting to cash stolen checks in Algiers. Post-Conviction Ex. 17, NODA File, Item No. D-34079-88. Wuneberger agreed to a consent search of the house in Gretna where he lived with Valverde and Macaluso. *Id.* At the house, the officers found Macaluso surrounded by thousands of dollars' worth of stolen goods, stolen IDs, and stolen checks. *Id.* Macaluso immediately offered to help the officers. He provided a voluntary statement to Gretna police officers implicating Mary Ann Valverde, Creighton, Randolph, and two other individuals named Tony Crooks and Keith, and informed the officers about additional burglaries that Crooks and Keith had

These records also corroborate that Macaluso received lenient plea deals in return for his assistance, as charges were frequently dropped and multi-bills waived despite the extent of his criminal history.

For example, on May 3, 1988, Macaluso was arrested for burglary and immediately provided officers with incriminating information about at least five other individuals. See Post-Conviction Ex. 17, NODA Case File, Item No. D-34079-88. On January 27, 1989, Macaluso plead guilty to two counts of simple burglary, five counts of forgery, and fourteen counts of receiving stolen things, all resulting from the investigation that followed the initial arrest. He could have been sentenced to an aggregate 114 years on the 21 felony counts. *Id.* Instead, the state waived the multi-bill and consented to a plea of 6 years hard labor, run concurrent on all counts, with credit for time served. Post-Conviction Ex. 12, 24th JDC Case File, No. 88-2216; Post-Conviction Ex. 18, 24th JDC Case File, No. 88-2217; Post-Conviction Ex. 13, 24th JDC Case File, No. 88-2218; Post-Conviction Ex. 10, 24th JDC Case File, No. 87-3462.

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committed. *Id.* Macaluso again lied to the police and said he had never previously committed a burglary in Jefferson Parish. *Id.* On January 27, 1989 Macaluso plead guilty to one count of R.S. 14:62.2 simple burglary and fourteen counts of R.S. 14:69 receiving stolen things. Post-Conviction Ex. 12, 24th JDC Case File, No. 88-2216; Post-Conviction Ex. 13, 24th JDC Case File, No. 88-2218. He could have received an aggregate 114 years on the convictions but instead the state agreed not to multi-bill him and he was sentenced to six years.

[43] On April 13, 2011, Macaluso was arrested by the JPSO for possession with intent to distribute heroin, possession of oxycodone and hydrocodone, and a number of misdemeanor charges, after receiving a tip from a confidential informant that he would be transporting heroin. Post-Conviction Ex. 14, JPDA Case File, No. 11-2250. Macaluso immediately gave the officers "detailed information" about a location where they could find a large quantity of cocaine. *Id.* Later on the same night JPSO agents conducted a drug bust at the address Macaluso specified. Post-Conviction Ex. 15, JPSO Record, Item No. D-12625-11. The arrest report narrative notes that, after agents arrived at the location and began surveillance, "the confidential source identified vehicles belonging to 'Tito' and 'Will'" parked in front of the apartment. *Id.* The bust resulted in the arrests of seven people and six convictions. Willis Stevenson, Corey Ramsey, Torrian Veal, Dominique Griffin, Kerwin Williams, Jordan Jones, and Gregory Lewis. *Id.* Macaluso was convicted of intent to distribute heroin, possession with intent to distribute oxycodone, and six related misdemeanors. Post-Conviction Ex. 14, 24th JDC Case File, No. 11-2250. He could have been sentenced to an aggregate 80 years hard labor on the felony convictions, but instead the state agreed to waive the multi-bill and sentenced him to 7 years hard labor for the heroin and 3 years for the oxycodone, with five years without benefits on the longer sentence.

D. Evidence Showing Macaluso's History of Lying to Law Enforcement.

The same records and witnesses also reveal that Macaluso is known as a liar with a history of lying to law enforcement when it is in his own self-interest, which was not disclosed by the state or apparent from his rap sheet.

Police records show, in October 1988, after being arrested for burglary, Darryl Macaluso identified himself as his younger brother David Macaluso and gave officers a false birthdate. Post-Conviction Ex. 9, JPSO Item No. J-8612-87. He went on to sign a voluntary statement in which he identified himself by the false name, and lied by stating that he had never been involved in a burglary before in spite of a 1983 burglary conviction. *Id.* He was convicted of injuring public records on August 29, 1988, and was convicted for the underlying burglary on January 29, 1989. Post-Conviction Ex. 10, 24th JDC Case File, No. 87-3462.

Macaluso was charged a second time with injuring public records for providing officers with his younger brother David's name in January of 1988. Post-Conviction Ex. 24, JPSO Record, Item No. A-17945. In May of 1988, following another arrest for burglary and forgery, Macaluso lied to officers from the New Orleans Police Department when he responded to the question "Have you committed any burglaries in Gretna or Jefferson Parish?" by answering, "No, I don't fool around in Gretna." Post-Conviction Ex. 17.

Gavin Galjour and Robert Guccione memories of Macaluso's confirm this history, as they described his well established reputation for dishonesty among those who knew him. Mr. Galjour stated that Macaluso was "controlling" and a "notorious liar" who was "out for himself." Post-Conviction Ex. 19. People who knew him talked about him as a liar and a "snake in the grass." *Id.* People "didn't like Darryl because he was a snitch, manipulator, and a liar." *Id.*

Likewise, Guccione stated that Macaluso was "manipulative," and "[p]eople knew they couldn't trust anything he said, because he would lie, steal, and cheat to get what he wanted." *Id.*

E. Evidence That Macaluso's Life of Crime, and Habit of Currying Favor With Law Enforcement Was Long-Standing and Continued Through the Time of Mr. Tassin's 2010 Trial

Although Macaluso was incarcerated through much of the 2000s, he soon resumed these habits after his release.

Post-conviction evidence—statements from members of the drug world he inhabited—confirm that Macaluso was back on drugs and engaged in drug related activities, *at the time of Petitioner's trial*. Ex. 2, P22-P23. Willis Stevenson, who associated with Macaluso from December 2009 onward, stated that throughout the time he knew him Macaluso was "a drug addict" who did drugs across the street from his house "almost every day." Post-Conviction Ex. 22, Declaration of Willis Stevenson 8/27/15. Stevenson attests that Macaluso "got the money to buy drugs from stealing generators, air conditioner units, and power tools." *Id.* Torrian Veal, who saw Macaluso frequently around this time, stated that as early as the summer of 2010 he saw Darryl coming in and out "almost every day, twice a day" from a house on 5th Street in Bridge City where people bought drugs, across the street from his friend Willis Stevenson's house. Post-Conviction Ex. 23, Declaration of Torrian Veal 8/28/15. He described Macaluso as "a drug addict." Mr. Veal also stated that he "often saw Darryl coming in and out of 1305 Wiegand, an apartment where people bought drugs." *Id.*

Law enforcement records confirm his resumption of criminal activities, and also the continuation of his efforts to curry favor with law enforcement to escape liability. In April 2011, just four months after Petitioner's December 2010 trial, Darryl Macaluso was arrested on drugs charge during an ongoing drugs investigation. Post-Conviction Ex. 14, JPDA Case File, No. 11-

2250; Post-Conviction Ex. 21. He immediately gave officers "detailed information" leading to a successful drug raid at the Wiegland Street address mentioned by Veal, and the arrest and conviction of six drug dealers. Significantly, the search warrant for the raid referred to information provided by "an informant that has proven credible."

Macaluso was convicted of intent to distribute heroin, possession with intent to distribute oxycodone, and six related misdemeanors. He could have been multi-billed and sentenced to an aggregate 80 years hard labor on the felony convictions, but the state waived the multi-bill and he received concurrent seven and three year sentences for heroin and oxycodone possession, with five years without benefits on the longer sentence. He served four years. Ex. 2, P14.

Importantly, the files of the case show that this operation was part of an "ongoing case" that was "being investigated by multiple agents of the Jefferson Parish Sheriff's Narcotics Division as well as federal agents." Post-Conviction Ex. 14. As those files indicate, that investigation also resulted in arrests of subjects at the other location on 5th Street in Bridge City, that Macaluso was known to frequent. While the April 2011 arrest of Macaluso occurred after trial, law enforcement surely knew of Macaluso's criminal activities previously. They certainly would have known that he was an informant.

F. The State Violated Due Process and Brady v. Maryland when it Suppressed The Material Impeachment Evidence

To prevail on a *Brady* claim, a petitioner must show state suppression of evidence favorable to defense, that is material. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 515 U.S. 419, 432-34 (1995).

1. The State suppressed the evidence

There is no dispute that the State failed to provide any of this critical information to the defense prior to trial. Mr. Tassin's defense counsel has confirmed that the defense were "never

provided with" evidence that "Macaluso was some kind of police informant, and had a long history of assisting law enforcement in anticipation of obtaining leniency . . . [T]he only discovery we received from the State relative to Mr. Macaluso was his rap sheet." Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, 9/4/15 at 7. This was not for want of trying; the defense filed extensive motions seeking impeachment evidence on state's witnesses. These included express requests for arrest and conviction records, records of any law enforcement authority, "any and all other information respecting any prosecution witness which is favorable to the defendant on the issues of guilt", information regarding "[w]itness falsehoods or lies even though unconnected to the case" and "anything that would tend to impeach a prosecution witness' testimony." See R. 1316, 1612.[44] The defense also requested detailed information about any informant who provided information in relation to the case, including records of all arrests, charges and disposition, arrests and dispositions of others obtained as the result of information provided by the witness, and information about law enforcement credibility determinations regarding the witness. R. 1568-69. Yet the state failed to disclose any of the information laid out above.

In rejecting this *Brady* claim in state-post conviction proceedings, the district court found that Petitioner failed to prove the suppression prong of *Brady,* noting for example, that the court and police records were available and accessible to defense. Ex. 11 at 2. However, the United

[44] In its *Motion for a Bill of Particulars, Discovery, and Inspection Necessary to a Fair Trial in Capital Case*, counsel requested disclosure of *Brady* and *Giglio* evidence, including "unfavorable and/or favorable evidence of any sort concerning prosecution witnesses, including (i) all juvenile, detention, jail, prison, parole, probation and presentence investigation records; (ii) all arrest, conviction, and adult and juvenile criminal offense record; (iii) all records of any law enforcement authority […] (c) Any and all other information respecting any prosecution witness which is favorable to the defendant on the issue of guilt […] [and] (e) Witness falsehoods or lies even though unconnected to the case; (f) anything that would tend to impeach a prosecution witness' testimony." R. 1316 (internal citations omitted). In addition, in its *Motion to Reveal the Deals*, counsel specifically requested an order requiring the prosecution to produce, in writing, "any information about any aspects of favorable treatment any state witnesses may expect." R. 1612.

States Supreme Court has long rejected the notion that the State's *Brady* obligations depend upon requests by the defense. *See United States v. Bagley*, 473 U.S. 667, 668 (1985); *Kyles*, 514 U.S. at 432-34. *See also Banks*, 540 U.S. at 696 (rejecting the notion that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence" so long as the "potential existence" of the suppressed evidence might have been detected) (finding cause for alleged default of *Brady* claim where defense relied upon State's assurances that it had disclosed all *Brady* material). Here, the defense filed detailed pretrial motions which should have prompted the State to disclose this important impeaching information. The defense was entitled to rely on the State's compliance with its constitutional duties, and cannot be faulted for the State's failure to provide the requested information upon these clear and explicit requests. The state court also ignored that critical information—particularly official records relating to Macaluso's informant status and activities, were not available—and still have not been made available—to the defense.

For the purposes of *Brady*, "[t]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437-38. The prosecution's actual knowledge is irrelevant, as is its good or bad faith in discharging its duty. *Id.* The prosecutor's duty extends not only to his own files, but also to any evidence held by agents of the state. *Fields v. Wharrie*, 672 F.3d 505 (7th Cir. 2012).

2. The suppressed evidence was favorable and material

Evidence is material when its suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381; *see also Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566. In assessing materiality, the Court considers how *effective counsel could have used* the suppressed information at trial and through pre-trial investigation and development of other

evidence. *Kyles,* 414 U.S. at 441 (finding prejudice where "disclosure of the suppressed evidence *to competent counsel* would have made a different result reasonably probable") (emphasis added); *id. at* 441-49 (reviewing ways in which competent counsel could have used and developed withheld information to impeach prosecution witnesses and undercut police investigation); *Bagley,* 473 U.S. at 675 (materiality analysis considers whether suppressed information, "if disclosed and used effectively" by defense, may have made a difference).

Macaluso's testimony was needed by the prosecution to save its theory that there was a plan to rob Martin and Stagner using a gun, which they procured from the home of Macaluso and Valverde. The other witnesses whose testimony supported the state's theory had significant credibility issues. Santiago's credibility was undermined by the fact that she had received a plea deal in exchange for her testimony, in addition to evidence that her memory was severely impaired by drugs. Likewise, Stagner's testimony that Tassin attacked him was discredited with evidence that he had repeatedly lied to the police. Macaluso provided the only testimony corroborating that Tassin obtained a gun at the Valverde apartment before the shooting. Santiago wrote Tassin letters in jail stating that she could not remember that Macaluso was not present at the apartment when Tassin allegedly retrieved the gun. D. Exs. 72, 74; R. 5482, 5474-92. Valverde has also consistently denied that Tassin obtained a gun from her apartment, R. Supp. 174-175; Ex. 61. His testimony provided the state with damning corroboration of the state's armed robbery shooting plan. The State relied on it as such in arguing its case to the jury:

> It turns out it wasn't Wayne [Stagner]'s gun after all, was it? It was Darryl's gun. It was Bobby Tassin's friend's gun and Darryl went to Bobby Tassin's house the next day to get his gun. "Did you see that gun before?" "Yeah, that was my gun." "Where was that gun before?" "Oh it was at my house on the fifth of November." ". . . That was the gun they got from his apartment the night before and the plan always was to rip off those tugboat guys."

R. Supp. 321.

While counsel did attempt to impeach Macaluso on the basis of his past convictions, R. 4711, his immunity agreement, R. 5115, and his prior inconsistent statement, R. 5117, 5123, the new evidence discovered in post-conviction—of Macaluso's specific motivation to lie at Tassin's trial given is ongoing criminal activities, his status as an informant, and of his history of lying and cooperating with law enforcement—was different in kind, and of a type far more powerful than the generic type of impeachment evidence the jury heard. Moreover, the State was able to neutralize the impeachment evidence the jury did hear, through his testimony.

The state neutralized the impeachment value of Macaluso's rap sheet by soliciting testimony that his felony convictions were "his past." R. 5102. Macaluso testified, "I've changed my life. I'm trying to go on the right path, and—so here I am." R. 5730. And he testified that now he studied at Delgado University, was gainfully employed as a carpenter, other people worked under him doing contract work, bolstering the impression that he was a reformed man. R. 5702.

Macaluso explained away his initial statements to police denying ownership of the gun, R. 4711, 5115, 5117, 5123, as the words of a man afraid of accessory charges, "neck deep in a murder investigation," R. 5723, R. 5728, and portrayed the change in his story as the admission of an honorable man seeking to admit his mistakes and make good his past. R. 5730.

In closing, the state again turned the defense impeachment to its advantage touting his willingness to admit to past convictions and previous lies to police, as evidence of his honest and reformed character. "Darryl Macaluso is what he is and, boy, they had a lot of fun talking about what a creep he was. He was honest about it." Supp. R. 321. "What motive did they establish that Darryl Macaluso would come in and tell us such an outrageous lie to railroad poor Bobby?" Supp. R. 321.

Evidence of Macaluso's ongoing criminal activities would contradicted all of this testimony and shown Macaluso to be a liar to the jury—both about his new reformed life, and his motives for testifying. It would have allowed the defense to show that Macaluso *did* have a reason to lie against Mr. Tassin and curry favor with the State, providing the defense with an alternate explanation for the change in his story far more impeaching than the State's. *See Banks v. Dretke,* 540 U.S. 668, 700 (2004) (finding material evidence that witness who was engaged in ongoing drug activity assumed he would be arrested if he did not cooperate).

Mr. Macaluso's long history of lying to law enforcement would also have been powerful impeachment evidence, undermining the impression he gave that his inconsistent statement about the gun, was a one off, borne of the pressure of accessory murder charges. *United States v. Sipe*, 388 F.3d 471, 486 (5th Cir. 2004) (relief granted where government suppressed witness's acquittal on charges of submitting a false police report); *Mathis v. Berguis*, 90 Fed.Appx. 101, 2004 WL 187552 (6th Cir 2004) (unpublished) (grant of habeas relief affirmed in rape case where state failed to disclose that complainant had twice made false reports to the police).

Evidence of Macaluso's reputation as an informant and his long history of providing assistance to law enforcement would likewise have cast his credibility in a whole new light. Courts have repeatedly recognized the unique impeachment value of evidence that a witness has a history of cooperation with law enforcement especially where, it involves a pattern of lying, precisely because it raises "serious questions about credibility." *Banks*, 540 U.S. at 700. Over sixty years ago, the United States Supreme Court noted that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *Lee v. United States*, 343 U.S. 747, 757 (1952) (emphasis supplied); *See Robinson v. Mills,* 592 F.3d 730 (6th Cir. 2010) ("Jurors suspect their motives

from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable....").

Thus numerous courts have found the suppression of such evidence to be material, notwithstanding the existence of impeachment evidence presented at trial, particularly where the trial impeachment evidence was undermined. *See e.g.*, *Banks,* 540 U.S. 668 (rejecting State's argument that suppressed evidence of witnesses informant status was cumulative given juror's inherent distrust of informants and fact that prosecution turned impeaching evidence of witness's drug use to its advantage, when it argued that his admission to drug use demonstrated his honesty); *Mills,* 592. F.3d 730 (finding that evidence of a witness's history of police cooperation was material, even though the witness had been impeached with her drug use and prior inconsistent testimony, because the evidence would have offered insight into why her testimony had changed, and indicated a pro-prosecution bias); *Benn v. Lambert,* 282 F.3d 1040 (9th Cir. 2002) (finding that evidence of witness's history as an informant and history of misconduct and lying to police was material, rejecting state's argument that evidence was cumulative of other impeachment where the State exploited its misconduct to sanitize that impeachment).

The state's evidentiary suppression undermined confidence in the outcome of the trial. Mr. Tassin is entitled to a new trial. *Brady,* 373 U.S. 83; *Giglio*, 405 U.S. 150; *Kyles,* 514 U.S. 419; *Bagley*, 473 U.S. 667; *Banks*, 540 U.S. 668; *Cf. Robinson v. Mills*, 529 F.3d 730 (6th Cir. 2010) (reversing conviction where state suppressed material impeachment evidence that witness had a "pro-prosecution bias" because he was a confidential informant); *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir 1997) (granting habeas relief as to conviction were prosecution withheld prison records demonstrating witness's long history of burglaries, lying to police, and blaming others to cover up his own guilt); *Cardoso v. U.S.*, 642 F.Supp.2d 251 (S.D.N.Y. 2009)

(granting sentencing relief where state withheld evidence that witness was participating in drug trafficking and actively lied to law enforcement material); *U.S. v. Hector*, 2009 WL 2025069 (C.D. Cal. May 8, 2008) (granting new trial where state failed to investigate or disclose informant's history of informing over 20 years, manipulativeness and willingness to lie to help himself).

G. The State Violated Napue By Knowingly Soliciting Misleading Testimony from Darryl Macaluso, and Capitalized upon that Testimony in Closing Arguments

The state knowingly solicited false or misleading material testimony from Darryl Macaluso regarding his interest in testifying, in violation of Mr. Tassin's rights to Due Process. *United States v. Agurs*, 427 U.S. 97, 103, (1976); *Napue v. Illinois,* 360 U.S. 264 (1959); *Alcorta v. Texas*, 335 U.S. 28, 31, (1957); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Petitioner meets the three prong test to prevail on a *Napue* claim. He can clearly demonstrate that: (1) the state presented false testimony; (2) the State knew or should have known it was false; and (3) the evidence was material. *United States v. Blackburn,* 9 F.3d 353, 357 (5th Cir. 1993).

1. There was false testimony

The prosecution solicited false testimony from Macaluso about his incentive to take the stand. Before it even began to examine Macaluso on facts related to the crime, the state went straight into a line of questioning designed to show the jury that he had "changed his life" and was a new, truthful man in spite of his past. It established that Macaluso was working as a carpenter as he had done "basically all [his] life," that he was in school at Delgado Community College, and that he supervised others doing contract work. R. 5702. The state then pivoted to Macaluso's criminal history, one of the two sources of impeachment the defense had at its disposal. It quickly dismissed the significance of Macaluso's criminal history by asking about

Macaluso's felony convictions, to which Macaluso responded, "that's my past." R. 5703. The picture this testimony painted was that, while Macaluso may have been a liar and a criminal when he made his prior inconsistent statement to police back in 1986, he was now an upstanding citizen who should be trusted.

At the end of Macaluso's testimony, the state again attempted to bolster his credibility by soliciting testimony that distanced his criminal history. Specifically, the state asked Macaluso, "How would you characterize your willingness to come here to Court to testify about your gun and all of this, in front of this Jury today?" Macaluso responded, "[…] I've changed my life. I'm trying to go on the right path, and – so here I am." R. 5730.

As the evidence laid out in the *Brady* portion of the claim shows, Macaluso was not "trying to go on the right path" in December 2010. Nor were felonies in "[his] past," as evidenced by Macaluso's arrest not four months later for dealing large quantities of heroin and oxycodone. Post-Conviction Ex. 14. To the contrary, he was stealing, selling stolen goods for drugs, and using drugs on a daily basis around the time the state solicited this testimony. Post-Conviction Ex. 22; Post-Conviction Ex. 23. This testimony that he was trying to get his life together was patently false; he was arrested on drug charges merely four months after his testimony, and in fact, Macaluso pled guilty to possession with intent to distribute heroin and was sentenced to 15 years at hard labor in June of 2016.

Both the prosecutor's line of questioning and Macaluso's misleading testimony created a false impression in jurors' minds that Macaluso had cleaned up and become a more trustworthy person, that he was a man with a rough past whom the jury "should believe." Supp. R. 217. Considering the material impeachment evidence that the state suppressed – that Macaluso had been a police informant for over thirty years, had a history of repeatedly lying to law

enforcement, a history of assisting law enforcement in return for leniency, and was involved in ongoing criminal activity giving him need to curry favor – this portrayal of Macaluso's credibility was deeply misleading.

In addition, the state capitalized on the misleading testimony in closing argument by harping on the point that the defense had not established a "motive" for Darryl Macaluso to lie:

> **What motive did they establish that Darryl Macaluso would come in and tell us such an outrageous lie to railroad poor Bobby?** Because that's a loper. I mean think about it. If the Kool-Aid story has a grain of truth to it, a grain of truth to it, then Darryl Macaluso is the most diabolical human being there ever was, or – or he's telling the truth.

Supp. R. 321. In fact, the defense could not establish Macaluso's motivation to lie because *the state suppressed the material evidence which would have allowed it to do so*.

The state's active participation in misleading the jury on this point during closing argument, and its capitalization on the false testimony, clearly runs afoul of *Napue*. *Tassin v. Cain,* 517 F.3d 770 (5th Cir. 2008) (upholding district court's reversal of capital murder conviction for *Giglio, Napue* and *Brady* violation based on the prosecution's failure to correct a witness's false testimony coupled with the prosecutor's capitalizing on it in his closing argument); *United States v. Sanfilippo,* 564 F.2d 176, 179 (5th Cir. 1977) (same); *and see United States v. O'Keefe*, 128 F.3d 885, 894-895 (5th Cir. 1997) (even when the defense is aware of the falsity of the testimony, a deprivation of due process may result when the information has been provided to the defense but the government reinforces the falsehood by capitalizing on it in its closing argument).

2. The prosecutor knew the testimony was false

The state had knowledge, either actual or constructive, of the fact that Darryl Macaluso was an informant. In *Kyles,* 514 U.S. 419, the United States Supreme Court held that a

prosecutor has constructive knowledge of information in the possession of others acting on his or her behalf. *Kyles,* 514 U.S. at 437-438; *accord Strickler v. Greene,* 572 U.S. 263, n.12 (1999) (an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case).

By definition, police informants are known by the police. The overwhelming majority of Darryl Macaluso's arrests and convictions occurred in Jefferson Parish, and the records demonstrating his history as an informant and pattern of lying to law enforcement were held by the Jefferson Parish Sheriff's Office, which was actively involved in the investigation of the homicide. On information and belief, the prosecution had actual knowledge about the history of their witness as well. Moreover, the district attorney's office had used his cooperation before to secure convictions and had provided him with leniency to do so.

3. The evidence was material

The "materiality" standard in false testimony cases is lower than in *Brady* suppression cases because the prosecution's actions amount to "a corruption of the truth-seeking function of the trial process." *United States v. Agurs,* 427 U.S. 97, 104 (1976). A conviction obtained by the knowing use of false evidence "is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs,* 427 U.S. at 103 (1976); *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993); *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997); *Beltran v. Cockrell*, 294 F.3d 730, 735 (5th Cir. 2002).

Had competent counsel been in possession of the evidence, there is a reasonable likelihood that the jury would have come to a different conclusion. Macaluso's testimony went to the heart of the state's theory that an armed robbery plan existed, which itself was the core

issue at trial. It was the most persuasive evidence the state had, in light of Georgina Santiago's weakness as a witness and the absence of any other credible witnesses to corroborate the existence of a plan. In closing, the State told the jury that the gun could not have been Stagner's, because Tassin took the gun from Macaluso's apartment and Macaluso retrieved it from his house the next day. R. Supp. 321. The state purposefully used the misleading testimony to bolster the credibility of this witness. Had the state complied with its constitutional obligations and revealed that Macaluso had a motivation to lie to help the state, counsel could have effectively undermined Macaluso's damning testimony, and in turn undone the state's evidence of intent and felony murder. Because there is a reasonable likelihood that the State's misconduct in misleading the jury could have affected the judgment of the jury, Petitioner is entitled to a new trial. *Napue,* 360 U.S. 264; *Agurs*, 427 U.S. 97.

As the State withheld material evidence regarding Macaluso's involvement with law enforcement, and compounded that error by eliciting false assurances to the jury that he was telling the truth, Mr. Tassin is entitled to a new trial. As the state court's ruling denying relief was contrary to and an unreasonable application of federal law, and an unreasonable determination of the facts, Mr. Tassin is entitled to *de novo* review of these claims, and reversal of his conviction.

H. Petitioner is Entitled To An Evidentiary Hearing

The state court denied Petitioners *Brady* and *Napue* claims finding many of the allegations—particularly the allegation he was an informant—to be unsupported and "speculative." Yet it did so unreasonably, after denying him the evidentiary hearing and discovery he was entitled to under state law, which would have allowed him to prove his claim. He is entitled to an evidentiary hearing in this court.

VI. TRIAL COUNSEL WAS INEFFECTIVE FAILING TO INVESTIGATE MACALUSO'S HISTORY AS AN INFORMANT AND CRIMINAL ACTIVITIES AT THE SAME OF TRIAL UNDERMINING THEIR ABILITY TO IMPEACH HIM

To the extent it was unreasonable for counsel to rely upon State disclosures to uncover the extensive impeachment evidence against Macaluso [see claims above], counsel's failure to investigate Macaluso's background and uncover it themselves violated Mr. Tassin's right to counsel guaranteed under the Sixth and Fourteenth Amendments. *Strickland v. Washington,* 466 U.S. 688 (1984). To prevail on a claim that counsel was constitutionally ineffective a Petitioner must meet two prongs: first a showing of deficient performance: that counsel's performance fell below an objective standard of reasonably effective presentation. *Id*. at 687-88. Secondly, it must be shown that prejudice resulted, that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 683.

A. Deficient Performance

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-691. In post-conviction, Mr. Tassin confessed that they did no investigation into Mr. Macaluso's background, and that they relied upon the limited discovery provided by the state and on his prior inconsistent statement for impeachment. See Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, 9/4/15 at 7-8 ("I assumed that the State would comply with their discovery obligations and provide me with that evidence."). In denying Petitioner's *Brady* claim, the state court acknowledged counsel's ineffectiveness here, stating "the State's constitutional obligation to disclose exculpatory evidence does not relieve the defense of its obligation to conduct its own investigation and prepare a defense for trial." *State v. Tassin,* No. 86-3579 (July 28, 2016), at 2.

To the extent that trial counsel's reliance upon the State's compliance with constitutional duties of disclosure and response to discovery motions was unreasonable, counsel should have investigated Macaluso's background and uncovered this information themselves.

Counsel's efforts fell below the standard of minimally competent counsel which the Sixth Amendment to the United States Constitution requires. "Reasonable investigations" certainly include investigating potential impeachment evidence against a key State witness. *Anzaldo v. Reynolds*, 2015 U.S. Dist. LEXIS 113045 (D.S.C. July 10, 2015) (counsel ordinarily has an obligation to investigate possible methods for impeaching the prosecution's witnesses); *Alexander v. Shannon*, 163 Fed. Appx. 167, 173 (3d Cir. Pa. 2006) (same); *Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir. 2003) (same); *Hoots v. Allsbrook*, 785 F.2d 1214, 1221 (4th Cir. 1986) (same).

Neither was the failure a product of reasonable strategy. Lead counsel admitted suspecting Macaluso was an informant. Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, 9/4/15 at 8. Counsel further admitted that had they known Macaluso was an informant with a long history of assisting law enforcement in anticipation of leniency, they would have investigated further, including into his involvement in criminal activities at the time of trial, and that they "certainly would have used his informant history and whatever other impeachment evidence there was to attack his credibility." Post-Conviction Ex. 1, Affidavit of Denise LeBoeuf, 9/4/15 at 7-8. Counsel also recognized the "damning" impact of Macaluso's evidence at trial. *Id.* at 6.

B. Prejudice

Prejudice under *Strickland* is demonstrated where there is a reasonable probability that the outcome of trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 690, 694.

The defense's failure to investigate Macaluso's background and uncover his history of cooperation with law enforcement, his reputation for dishonesty, his pattern of lying to avoid criminal responsibility, and his ongoing criminal activities at the time of trial which gave him a motive to lie to curry favor with the state eviscerated their ability to effectively cross-examine him.

As Macaluso was virtually the only witness testifying that Tassin had a gun on the night in question, showing the jury just how easily and often he was willing to gather favor with the State by lying was crucial. The defense's failure to give an accurate picture of Macaluso to the jury prejudiced Tassin as it gave the jury the ability to credit the only testimony about the origin of the weapon that killed Martin.

The prejudice resulting from counsel's failures in relation to impeachment of Macaluso must also be considered cumulatively with the impact of counsel's deficient presentation of their forensic evidence. [*See* xx] Whether considered individually or cumulatively, counsel's deficient representation undermined confidence in the outcome of petitioner's trial. *Strickland*, 466 U.S. at 690, 694. Because the State court's ruling on this claim was contrary to and an unreasonable application of the law and an unreasonable determination of the facts, this Court must consider Petitioner's claim *de novo* and reverse. In the alternative, Petitioner is entitled to an evidentiary hearing to prove his claim, having been unreasonably denied a hearing in state court.

1. The Cumulative Impact of The Brady, Napue And Strickland Violations Require Reversal

It may be that the Court concludes that the blame for the inadequate impeachment of Darryl Macaluso is shared by both the State and the defense. Whether ineffective assistance of counsel, prosecutorial misconduct is implicated the fundamental question is whether the trial was fair; and whether errors committed during the course of the trial, considered together, rendered the trial unfair. The United States Supreme Court noted in *Strickland* that as with *Brady* claims "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. It is no accident that the standards of *Strickland* prejudice and *Brady* materiality which are both designed to protect the fundamental fairness of the proceeding, are identical. Thus, whichever party is to blame, the cumulative impact of the constitutional *Brady*, *Napue* and *Strickland* errors must be considered together in determining whether petitioner received a fair trial. *Williams v. Quarterman*, 551 F.3d 352 (5th Cir. 2008) (remanding to district court for de novo consideration of Strickland claim and of the cumulative prejudice of Brady and Strickland violations). *See Gonzales v. McKune*, 247 F.3d 1066, 1078 (10th Cir. 2001) (the outcome of the trial "would likely have changed in light of a combination of Strickland and Brady errors, even though neither test would individually support a petitioner's claim for habeas relief"); *Gentry v. Sinclair*, 576 F. Supp.2d 1130, 1171 (W.D. Wash. 2008) ("the Court must also consider the prejudice from the Brady/Napue and IAC claims cumulatively"). The violations of Mr. Tassin's constitutional rights to Due Process, to the effective assistance of counsel, and fair trial require reversal.

VII. THE COURT'S REFUSAL TO GIVE AN INSTRUCTION ON SELF-DEFENSE VIOLATED TASSIN'S RIGHTS TO DUE PROCESS, TO PRESENT A DEFENSE, AND TO A TRIAL BY JURY

Mr. Tassin's Sixth and Fourteenth Amendment rights to Due Process, to present a defense, and to a trial by jury were violated when the trial court refused to instruct the jury on self-defense, despite sufficient evidence for a jury to have found reasonable doubt that the State proved intent. As the United States Supreme Court has made clear "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63, (1988) (citing *Stevenson* v. *United States*, 162 U. S. 313 (1896)).

In Louisiana, the trial judge has a "basic obligation to charge the jury as to the law applicable to the case, under which he is required to cover every phase of the case supported by the evidence." *State v. Marse*, 365 So.2d 1319, 1323 (La.1978) (citing *State v. Miller,* 338 So.2d 678 (La.1976); *State v. Robichaux*, 165 La. 497, 115 So. 728 (1928)). That obligation exists "whether or not [the evidence is] accepted by him as true," *id,* because the ultimate determination of facts is for the jury alone. Louisiana law makes clear that a charge must be given, upon request, as to "any theory of defense which a jury could reasonably infer from the evidence." *State v. Harris*, 26-411 (La. App. 2 Cir. 10/26/94); 645 So.2d 224, 227 (citing *Marse,* 365 So.2d at 1323). *See Mathews v. United States*, 485 U.S. 58, 63, (1988).

Further, "the defendant who asserts self-defense in a homicide case does not assume any burden of proof on that issue;" the State bears the burden of proving beyond reasonable doubt that a killing was not committed in self-defense. *See State v. Harris,* 26411 (La. App. 2 Cir 10/26/94), 645 So. 2d 224, 226 (once a defendant raises the defense, "[t]he state has the affirmative duty of proving beyond a reasonable doubt that the homicide was not perpetrated in

self-defense.") Thus, the showing Mr. Tassin was required to make to earn the right to a self-defense instruction was extremely low, requiring only that he present evidence sufficient to allow a rational juror to have reasonable doubt that the killing was *not* committed in self-defense. And this he clearly did.

The trial court's refusal to provide the instruction violated Tassin's Sixth Amendment right to meaningfully present his defense, his Sixth Amendment right to trial by jury, and rendered his trial fundamentally unfair, in violation of Due Process. While violations of state law do not always rise to the level of federal constitutional violations, they do where, as here, they implicate a defendant's due process protections, undermining a defendant's fundamental rights to a fair trial, to trial by jury, and to a meaningful opportunity to present a defense. *See Crane v. Kentucky*, 476 U.S. 683, 690, (1986) (*quoting California v. Trombetta*, 467 U.S. 479, 485, (1984) ("The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."')); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (describing the rights guaranteed under the due process clause, including, inter alia, the right to present a defense and the right "to present the defendant's version of the facts as well as the prosecution's so the jury so it may decide where the truth lies"); *Holmes v. South Carolina,* 547 U.S. 319 (2006).

In addition to violating his rights to present a defense, the denial of the instruction violated his Due Process and Sixth Amendment rights not to be convicted absent a finding by the jury, beyond a reasonable doubt as to every element of the offense charged. *Henderson v. Kibbe*, 431 U.S. 145, 97 S. Ct. 1730 (1977) (analyzing whether a particular omitted jury instruction violated Due Process). As noted above under Louisiana law, in a self-defense case, the State bears the entire burden of showing, beyond reasonable doubt that the killing was not done in self-defense. *State v. Harris,* 645 So. 2d at 226. Put another way, absence of self-defense

becomes an essential element that must be proven. And a defendant may not be convicted, absent a finding that the state has met its burden of disproving self-defense beyond a reasonable doubt. In Tassin's case, by refusing to instruct the jury on self-defense, the jury were not required to put the state to its essential burden.

A. Mr. Tassin Presented Sufficient Evidence of Self-Defense, Such that there Was Possibility of Reasonable Doubt in the Mind of a Rational Juror that the State Failed to Meet its Burden of Proving Him Guilty of Murder

From the start of trial, the defense case rested on its theory of self-defense: that Mr. Tassin shot at Eddie Martin and Wayne Stagner, not during the course of a pre-meditated armed robbery, but after Wayne Stagner pulled a gun on him and he managed to wrestle the gun away and fire it, defending himself and his wife as they sat trapped in the back of Eddie Martin's two door car without means of escape. Thus the defense alleged, that fearing for his and his wife's lives, Tassin grabbed at Stagner's gun, injuring his hand as the fleshy web between his finger and thumb got caught under the firing pin, stopping it from firing, managed to wrestle it away from Stagner, and then shot wildly at both seaman, killing Martin and injuring Stagner. The defense presented significant evidence to support this self-defense case.

First, Joseph Warren, an expert in serology, testified that Tassin's blood type was found on Stagner's bloody shirt. R. 4911-15, 4918, 4938. Both Martin and Stagner had Type O blood, and Type O was found on Stagner's shirt, from his own injury. R. 4911. However, Type A blood was also found on the same shirt. R. 4912. Of the three men, only Tassin had Type A blood. R. 4911. The presence of both blood types on Stagner's shirt was only explained by the defense's theory – that Tassin struggled for the gun when it was thrust in his face in Martin's car, which resulted in a cut on his hand, which bled on Stagner's shirt. It was not explained by the State's case of an execution style shooting from behind with no contact between the shooter and victims.

The jury was presented with evidence of Tassin's hand injury that bled on Stagner's shirt. The jury was shown a picture of the scar on the web of Tassin's hand that came from the firing pin striking his hand during the struggle. R. 6330. Louise Walzer, an expert in toolmark analysis and firearms identification, testified that the gun involved in this case had a unique hammer and firing pin that made it possible for someone to injure the webbing of their hand if they were grabbing at the gun to stop it from firing. R. 5053-55, 5064, 5073. Taken together, the expert testimony that Tassin's actual injury could have been caused by a struggle for a gun, the picture of that injury, and the blood from that injury which was found on Stagner's shirt, presented the jury with a plausible theory of self-defense.

The forensic evidence of the crime scene also provided the jury with support for a self-defense case. Bullet holes were found wide spread throughout the vehicle, including a bullet hole on the roof of the car. This was incompatible with a straight front to back execution-style shooting alleged by the state, but more consistent with a struggle for the weapon which resulted in wild shooting. S. Ex. 24; *see* R. Supp. 252-53. An expert reconstructed the crime scene and testified that shots were fired from nearer the passenger side of the car than from directly behind the driver, consistent with Tassin lunging from his location behind the driver, to struggle with Stagner, who was positioned in the passenger seat. R. 6031, 6039, 6042-44. From all this evidence, a jury could reasonably infer that Stagner had pulled a gun, and the shooting occurred in self-defense as Tassin struggled and fired the weapon after prizing it from Stagner's hand.

Providing further support for Tassin's self-defense case was defense evidence undermining the state's assertion that he went to the scene armed with a gun collected from Valverde's home. R. Supp. 168-69 In his initial statement to police, Macaluso denied even owning a gun, D. Ex. 2 at 3, and Valverde also claimed there was no gun in their home. R. Supp.

168-69. This supported the defense's explanation; that it was Stagner's gun that was involved in the shooting, and Tassin never had one before the struggle in the car.

Sheila Mills, who was present from the time that Tassin met Martin and Stagner through the time of the struggle testified repeatedly that there was no armed robbery plan. *See, e.g.,* R. 5160, 5214, 5220. Mills was supposed to be Tassin's accomplice; according to the State's theory, Mills and the Tassins all plotted together to rob the two seamen. However, Mills was insistent at trial that there was never a plan to rob the men, and that she genuinely felt sick from the drugs she had taken when she asked to be let out of the vehicle with the shooting occurred. R. 5293, 5306. That Mills, an alleged accomplice, testified instead that there was no robbery plot, which was central to the State's case, lent further support to Tassin's claim that Stagner pulled a gun on him and he had to fight for his life.

Finally, the defense elicited Stagner's acknowledgement that he repeatedly lied to the police, stating that he and Martin had picked up hitchhikers instead of telling the truth about Mills and the Tassins, R. Vol. 21A 181-182, 203; R. 5769. All of this testimony cut into the credibility of Stagner, which could reasonably lead a jury to infer that he also lied about who was the initial aggressor during the crime. R. Vol 21A 181-82, 198, 203; *see Tassin,* 517 F.3d at 781 ("The jury had reason to disbelieve Stagner; he originally told the police that hitchhikers had shot Stagner and Martin."). Stagner testified that he was getting progressively more nervous as the night went on, and that it would have been nice to get everyone out of the car and go back to the boat. R. Vol. 21A 202. When Stagner claimed he lied about what happened that night because he was scared and that he had never been convicted of anything and he did not want to get into trouble – the defense questioned Stagner extensively about what he had done that night that he thought he could have been convicted of, suggesting to the jury that Stagner was the one

who pulled the gun on Tassin, and Tassin had to defend himself. R. Vol. 21A 202-207. Though he denied having a gun, Stagner admitted that he did not know whether or not Martin owned a gun or had one in the car. R. Vol. 21A 201. Stagner's repeatedly lies to police on the night of the shooting was enough for the jury to have doubted his story that Tassin shot Martin without warning, and allowed the jury to find it possible that Stagner instead was the initial aggressor and Tassin acted in self- defense.

Altogether, this was plenty enough evidence to justify a self-defense instruction, particularly considering that Tassin had no burden of proof on the issue. Tassin was required only to present enough evidence to raise reasonable doubt that the state had proven he had *not* killed Mr. Martin in self-defense. *Mathews* 485 U.S. at 63. Having raised the defense, "[t]he state has the affirmative duty of proving beyond a reasonable doubt that the homicide was not perpetrated in self-defense." *Harris,* 654 So.2d at 226. Yet despite all of this significant evidence, the State moved to strike the self-defense instruction from the pattern jury instructions, claiming that "there has been no evidence adduced testimonially or physical evidence or scientific evidence which would indicate that self-defense was in any way involved with this offense...we think the record is barren of such evidence." R. 6466-7. In response, defense counsel argued that the court was required to charge the jury with the law applicable to any theory of defense which the jurors could reasonably infer from the evidence, and outlined all of the evidence that had been presented to the jury which could reasonably show that Tassin acted in self-defense. R. 6467; 6471-4. Indeed, under state law the defense was entitled to a charge, upon request, as to "any theory of defense which a jury could reasonable infer from the evidence," *Harris*, 645 So.2d at 227; *Marse,* 365 So.2d at 1323, as well generally to all charges

on the law applicable to the case, and special charges requested under La. C.Cr.P. art. 807.[45] Counsel rightly explained because Tassin had raised a theory of self-defense, the burden was on the State to prove, beyond any reasonable doubt, that Tassin did *not* act in self-defense, and by failing to instruct the jury on the self-defense law, the court would send a message to the jury that it was not relevant or something they could consider. R. 6468-9. The trial court however, granted the State's request to remove the standard self-defense instruction from the jury charges, finding that the evidence was insufficient to support it. R. 6474-79.

B. The State Court's Refusal to Instruct the Jury on Self Defense Undermined Mr. Tassin's Sixth Amendment Rights To Present A Defense And To Trial By Jury, And Rendered His Trial Fundamentally Unfair In Violation Of The Due Process Of The Fourteenth Amendment.

The trial court's ruling violated not only Tassin's rights under La C.Cr.P art. 807 to a special charge, and under La. C.Cr.P. art. 802 to charges on "the law applicable to the case," but also of Mr. Tassin's Fourteenth Amendment right to Due Process, and his Sixth Amendment rights to present a defense and to have his guilt determined by a jury of his peers.

This ruling deprived Mr. Tassin of his Due Process right to a meaningful opportunity to present a complete defense. *See e.g. Barker v. Yukins*, 199 F.3d 867, 875-76 (6th Cir. 1999) (granting habeas relief under AEDPA because the erroneous self-defense instruction deprived the defendant's of a "meaningful opportunity to present a complete defense") (relying on *Trombetta*, 467 U.S. at 485). As the federal courts have recognized, the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." *Tyson v. Trigg*, 50 F.3d 436, 448 (7th Cir. 1997). *See Bradley v. Duncan*,

[45] La C.Cr.P. art. 807 provides: "The state and the defendant shall have the right before argument to submit to the court special written charges for the jury. . . . [The] charge *shall be given* by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent." *Id.*

315 F.3d 1091, 1099 (9th Cir. 2002) (reversing conviction for denial of instruction on entrapment which deprived Bradley of his only defense and, as a result, of due process.) And it violated his Sixth Amendment right to jury, requiring proof beyond reasonable doubt of every element of the offense- which in this case included that he had *not* killed in self-defense. *Henderson v. Kibbe*, 431 U.S. 145 (1977).

The impact of the ruling in depriving Mr. Tassin of the right to meaningfully present his defense is plain from the record. The judge instructed the jury that the court would provide them with "the law applicable to the case" and that they were obliged "to accept and apply the law as given by the Court." R. Supp. 28. This glaring omission of any mention of self-defense in the court's ultimate instructions undermined Tassin's defense by telegraphing to the jury that not only did the court not believe it, but it was not even an option for their consideration. This problem was described by defense counsel when objecting to the State's request to exclude the charge, R. 3468-69 ("through opening - voir dire and the Court's initial instructions to the jury and then as will come again during the jury charges, this Court has said time and time again that the law comes from the Court, and so by failing to give this instruction, it would effectively be saying to the jury that this law isn't applicable to this case"), and again when objecting to the court's ruling, R. 6477-78 ("there may be a real problem with arguing something that is then not supported by the law as we've said many, many times in voir dire that the law comes from the Court.").Indeed, the State explicitly argued that the trial court did not "give . . . an instruction as to self-defense . . . because self-defense is not applicable to this case." R. Supp. 210. Because of the significant credibility issues created by the Court's ruling if they continued to assert self-defense, Tassin forewent even arguing it to the jury in closing, *see* R. 6477, and was left only

with an eleventh hour defense of manslaughter, R. Supp. 301-02,[46] which the jury rejected, R. 2028.

The ruling also violated Mr. Tassin's Sixth Amendment rights to trial by jury, and impermissibly shifted the burden of proof to the defense, in violation of Due Process. It had the effect of requiring Tassin to choose between his right to present a defense and his Fifth Amendment right not to testify, as he would have testified in strong support of his self-defense claim. The court left Tassin in a position where the only way to satisfy the improperly high burden imposed by the court would have been to testify in his own defense, violating his Fifth and Sixth Amendment rights. Moreover, as pled elsewhere, state misconduct deprived him of that testimony. See Claim IV(B).

Given the significant evidence presented by Tassin in support of his defense, and the weakness of the State's case, the trial court's erroneous ruling caused him clear prejudice entitling him to habeas relief. Among other constitutional violations, it deprived him of a meaningful opportunity to present his *only* defense, and had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. 619, 635.

As the United States Supreme Court has long held, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 887 (1988) (citing *Stevenson* v. *United States*, 162 U. S. 313 (1896). Deprivation of such a right may deprive the defendant of the reasonable opportunity to present a defense, for such right is meaningless if, at the culmination of the case, the court does not instruct the jury on the very

[46] Defense counsel argued manslaughter due to provocation, and manslaughter as a killing committed in the course of an unenumerated crime ("distribution or attempted distribution and possession of drugs"). R. Supp. 301-02.

theory of defense that was presented at trial. In certain circumstances it may also undermine a defendant's right to have a jury determine guilt of every element of the alleged crime beyond a reasonable doubt. *See Henderson v. Kibbe*, 431 U.S. 145 (1977) (citing *In re Winship,* 397 U.S. 358, 364 (1970). And that occurred here. Taken together, the evidence that was presented to the jury – that Tassin's blood type was on Stagner's shirt, that Tassin had an injury consistent with a struggle for a gun and there were bullets shot wildly throughout the car, and that an alleged co-defendant, Sheila Mills, was insistent that there was never a plan to rob the two seamen, was more than enough to instruct the jury on self-defense, especially given the low standard. In raising the self-defense theory, no burden shifted to Tassin; the jury did not need to find that Tassin definitely acted in self-defense. To acquit, all the jury had to find was that the self-defense evidence created a *reasonable doubt* that the State had not met their burden that Tassin acted with intent to kill or commit armed robbery. By depriving Tassin of the self-defense instruction, Mr. Tassin was denied his Due Process rights, and his conviction must be overturned.

VIII. THE STATE KNOWINGLY ELICITED FALSE TESTIMONY ABOUT THE PHYSICAL EVIDENCE WHICH SUPPORTED MR. TASSIN'S DEFENSE AND ABOUT THE QUALIFICATIONS OF THE DEFENSE EXPERT, IN VIOLATION OF MR. TASSIN'S RIGHTS TO DUE PROCESS UNDER NAPUE V. ILLINOIS AND BRADY V. MARYLAND.

The State violated Mr. Tassin's rights to due process under *Napue v. Illinois*, 360 U.S. 264 (1959) by knowingly eliciting false testimony from their crime scene reconstruction expert, Timothy Scanlan, to undermine what would have been powerful forensic evidence supporting the defense case.

A key part of the forensic evidence supporting self-defense was the existence of bullet holes in the roof of the car to the left of where Eddie Martin was seated. As defense counsel argued to the jury:

> [A] planned execution style killing does not result in a bullet hole in the roof. That's not where you shoot. If you are calmly, coolly, planning to kill somewhere and seated behind them in a car . . . why would a bullet hole end up in the roof?

R. 252-53. In addition, the location of the bullet holes indicated a trajectory of fire from towards the right hand side of the car that was more consistent with Robert Tassin's account shooting of shooting in self-defense after wrestling a gun from Stagner, who was seated in the front passenger seat. The defense thus presented the testimony of Ronald Singer, a ballistics and crime scene reconstruction expert, who opined that there was in fact a bullet hole in the roof the car, and that based on the likely trajectory of a bullet that hit Martin and exited at that location, the shot could not have come from directly behind the driver, but further towards the middle or right hand side of the car. R. 6031, 6039.

Due to defense counsel's misunderstanding of evidentiary rules (the subject of an ineffective assistance of counsel claim below), the defense failed to present the key evidence supporting the existence of the bullet holes and the foundation for Singer's opinion. Mr. Singer was unable to examine the car because it had been destroyed after the first trial. R. 5960, 6386. With only the old photographs to rely upon, he necessarily relied on the prior testimony of the firearms expert from the first trial, Alex Vega, who had examined the car and identified two bullet holes in the roof. Vega had described the physical characteristics that lead him to conclude they were bullets. This included the distinctive way the metal had been pushed out by the force of the bullet, "and the greyish metallic substance" that was adhered to the inside of the pushed out metal that "you can remove by scraping it and it appears to be lead." 1987 Trial Record, R.1777-80. Vega specifically distinguished the holes from the other damage to the automobile. *Id.* at 1780 ("So it's-- there is damage on the automobile which is not related to that particular

type of damage.") He also testified to the precise location of the holes, which was critical to Singer's opinion on the trajectory. *Id* at R.1777, 1780-81.

Defense counsel attempted to elicit Vega's testimony from Mr. Singer as the basis for his opinion, but the state raised a hearsay objection and the evidence was excluded. See R. 5987-6005. This exploitation of the defense's mistake was legitimate, but its further efforts were not. Knowing full well that a qualified firearms expert had examined the car and found bullet holes in the roof, the State elicited the false and misleading testimony from its rebuttal expert, Timothy Scanlan, that there was no basis for Singer's opinion that there were bullets holes in the roof.[47] Scanlan condemned Ronald Singer for reaching unfounded opinions based on insufficient evidence. He testified that Singer's claim that there was a bullet hole in the roof was "inaccurate" because "first you have to have proof that you can reasonably state it's a bullet hole." R. 6346 "[T]he deformation of the hole, and the structure around the hole, should all be examined to determine if you can or cannot determine something is a bullet hole." *Id.* Referring only to the old photographs, Scanlan asserted that Singer "has no way of distinguishing that hole from the other holes in the vehicle," caused by the damage to the car. R. 6347. Scanlan asserted that "[t]he damage to the roof, ripping and tearing, are going to give you false bullet holes, or other holes that may resemble bullet holes" and spent a long time pointing out in the photos how the alleged bullet holes looked like all the other holes and fit the pattern of the ripping and tearing he described. R. 6346-47, 6355-59.

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[47] *Napue* is concerned with evidence the *State* knows to be false, rather than the witness, but it is reasonable to assume that Scanlan read that testimony while preparing his own evidence. He was also in the courtroom for Ronald Singer's testimony where the defense argued about the content and relevance of Mr. Vega's testimony. R. 6344; R. 6346; R. 6361-62 (Scanlan testifying he listened to Singer's testimony); R. 6023 (defense counsel's reference to Timonthy Scanlan's presence in the courtroom during Singer's testimony).

While the State had every right to rely on evidentiary rules to exclude defense evidence, it was wholly inappropriate for the State to affirmatively mislead the jury that Singer's opinion, which was legitimately based on the findings of another qualified expert, was unfounded. Not only did this undermine the credibility of Singer's testimony based on the bullet hole, but it undermined the credibility of Mr. Singer as a whole, as it allowed the state to suggest Singer was either incompetent or worse for giving unsubstantiated opinions. Although the defense objected to this ruling, the court erroneously overruled the objection, and this false evidence went to the jury unimpeached.

Compounding the prejudice, the State knowingly elicited further false or misleading testimony from Mr. Scanlan to destroy Singer's credibility. In front of the jury, the State vigorously objected to Mr. Singer's ability to testify about stippling, asserting that he lacked the qualifications to do so because "you would have to be a pathologist" to have the expertize. R. 5965. Although defense counsel ultimately withdrew their efforts to have Mr. Singer qualified in this area, and had him rely on Dr. Hunt's testimony instead, the impeaching effect of the State's aggressive traversal on his qualifications was done, *see* R. 5968-74, and he again emerged as an expert who was willing to overstretch his opinions.

Bolstering this unfounded assault on Singer's integrity, the State elicited testimony from their own crime scene reconstruction expert, that crime scene reconstruction experts are not qualified to discuss stippling, because only a pathologist can do that. R. 6370-71 (Scanlan testifying that as a crime scene reconstruction expert, he is not qualified as an expert in stippling because "that's a pathologist"); R. 6392; (stating that he does not look at the distribution of stippling, but "[t]he pathologist would"); R. 6392 ("I am not a pathologist, we don't do that. . . that's their job). However, unbeknown to the defense at trial, Scanlan himself had previously

testified about stippling, as an expert, in Jefferson Parish on behalf of the State. *See State v. Logan*, 07-739 (La.App. 5 Cir. 05/27/08), 986 So.2d 772, 778 (Scanlan testifying to the existence and significance of stippling found on the body of a deceased victim and arm of a co-defendant). Although this would have been powerful impeachment evidence against *Scanlan*, the State never disclosed it, in violation of *Brady,* 373 U.S. 83, and *Napue,* 360 U.S. 264. Individually and cumulatively these *Brady*/*Napue* violations undermined the credibility of the defense's forensic expert in a case where the defense rested in large part on the physical evidence, and the credibility of their expert. But for these violations, there is a "reasonable likelihood," as well as a "reasonable probability," that the result would have been different. The cumulative material effect on the outcome of Mr. Tassin's trial resulting from these *Brady* and *Napue* violations and those relative to Macaluso and Santiago, *See Kyles*, 514 U.S at 421, additionally warrant reversal.

The state courts never addressed the merits of this claim. Mr. Tassin is entitled to *de novo* review, and reversal. Alternatively, Mr. Tassin requests an evidentiary hearing.

IX. MR. TASSIN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO PRESENT A DEFENSE BY FAILING TO FULLY PRESENT THE FORENSIC EVIDENCE THAT SUPPORTED THEIR CASE, AND FOR FAILING TO PROPERLY IMPEACH THE STATE'S EXPERT AND REVEAL HIS OBVIOUS BIAS.

The law governing claims of ineffective assistance of counsel is well known. The two-prong analysis of *Strickland v. Washington,* 466 U.S. 688 (1984) requires a showing that counsel's performance fell below an objective standard of reasonably effective representation. *Id*. at 687-88. Secondly, it must be shown that prejudice resulted from the deficient performance. To prove prejudice, the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at

683. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id.* That standard requires "less than a preponderance of the evidence." *United States v. Cross*, 308 F.3d 308, 315 (3rd Cir. 2002). In Mr. Tassin's case, his constitutional right to the effective assistance of counsel was violated by counsels several failures in preparing for and presenting the forensic evidence which formed the central part of the defense case.

The forensic evidence was handled by the third chair counsel, Paul Killebrew, who was assisting at his first ever criminal trial. He had a full time job as a Staff attorney at the Innocence Project of New Orleans, and volunteered to assist with Tassin's case to get some trial experience. Only a couple of years out of law school, he had "never examined a witness, introduced an exhibit, or done any kind of presentation before a jury. [He] had not even taken a trial advocacy class in law school." Post-Conviction Pet. Ex. 2, at 1.

Although the defense retained a well-respected and eminently qualified crime scene reconstruction expert, Ronald Singer, counsel's inexperience and lack of preparation undermined the presentation of what should have been a strong forensic case. Due to misunderstanding of basic rules of evidence, counsel failed to get admitted key evidence that was essential to his opinion. Counsel tried to rely on hearsay evidence instead of locating and utilizing readily available live witnesses who would have provided the necessary foundation for the defense's case. Counsel failed to elicit all the evidence his expert could have provided, including evidence contained within the expert's own affidavit. Counsel then failed to effectively cross-examine the State's rebuttal expert despite several problems with his testimony that could easily have been impeached.

The transcript of trial reveals a struggling young lawyer, intimidated by the excesses of the prosecution, whose obvious inexperience was relentlessly exploited by the State. Mr.

Killebrew recalls how nervous he was, particularly in light of George Wallace's success, which "jarred my focus from eliciting Mr. Singer's testimony, to responding to objections I had not prepared for, and preserving my own objections the record." Post-Conviction Pet. Ex. 2, at 6-7. Mr. Killebrew's floundering was "obvious to everyone in the courtroom", including the judge, who "called him up to the bench after it was all over to tell [him] essentially that all young lawyers have to go through days like that." *Id.* at 7. Ms. LeBoeuf and Mr. Fleming jumped in repeatedly to try and assist him as he struggled to deal with the State's complaints and get through the evidence. *See* e.g., R. 5976; R. 5977; R. 5985; R. 5988; R. 6005; R. 6394; R. 6400; R. 6411-15. But the defense presentation could not be saved. The jury never heard the full force of what should have been persuasive and credible physical evidence that the shooting occurred during a struggle, as Mr. Tassin had always said.

A. Counsel Failed to Present Evidence of the Bullet Holes in the Roof of the Car Which Formed the Basis of Their Expert's Opinion

As described in Claim VII above, a key part of the forensic evidence supporting the defense case was the existence of bullet holes in the roof of the car. The location in the roof suggested a wild shooting of Martin, not an unprovoked execution shooting from front to back. R. Supp. 252-53. And the likely trajectory of such a bullet placed the shooter, Tassin, towards the middle or right of the car, not directly behind Martin. R. 6031, 6039. They presented this important evidence through the opinion of their crime scene reconstruction expert, Ronald Singer.

The state understood the importance of this evidence, and did their best to refute it, by challenging the existence of the bullet hole, and by testimony and argument that the shots to Martin exited through the front windshield, which was now missing in the car. *See* Testimony of Timothy Scanlan, R. 6346 ("there's clear evidence in this case that the driver of the vehicle was

shot from behind. And if the windshield was intact, we could trace that shot through the windshield."). State's closing argument. R. Supp. 228. ("if the defendant hadn't gotten rid of the car and if the windshield is intact you see a bullet hole right through there.")

However, due to a basic misunderstanding of evidentiary rules, the defense failed to present the key evidence supporting the existence of the bullet holes and the foundation for Singer's opinion, the 1987 testimony of Alex Vega who had examined the car. *See further,* Claim IV.

Defense counsel attempted to elicit Vega's testimony from Mr. Singer as the basis for his opinion, but the state objected. See R. 5987-6005. As defense counsel should have known the rules only allow experts to discuss hearsay evidence relied upon, during cross-examination, and not direct testimony. La. C.E. 705(B). The trial court excluded that testimony as hearsay under La. C.E. 705(B).[48] R. 5987-6005. *Id.*

Paul Killebrew concedes that had he understood the evidentiary rules, he would have tried to locate Mr. Vega and present his live testimony at trial. Post-Conviction Pet. Ex. 2 at 5-6. Post-conviction counsel located Mr. Vega, who still remembers this unusual case with a car bulled out the bayou, and confirmed he would have been available to testify at the trial. Post-Conviction Pet. Ex. 30, Affidavit of Alex Vega, 8/26/15. There is simply no excuse for this misunderstanding of basic evidentiary law, or failing to research the evidentiary rules relevant to important evidence aspects of the case. As the United States Supreme Court recently held: "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to

[48] Under La. C.E. art. 703, experts may rely on facts or data that is otherwise inadmissible if it is of the type reasonably relied upon by experts in his field. *Id.* La. C.E. art. 705(B) provides that a witness must state the facts upon which his opinion is based, provided, however, that with respect to evidence which would otherwise be inadmissible such basis shall only be elicited on cross-examination.

perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (citing *Williams v. Taylor*, 529 U.S. 362, 395, (2000) (finding deficient performance where counsel "failed to conduct an investigation that would have uncovered" important mitigation records, 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 due to a mistaken belief the State was obliged to unilaterally produce it)).

The State exploited this error to its fullest—and beyond—deliberately misleading the jury that there was no basis for Singer's opinion that there were bullet holes in the roof. See Claim VII. Counsel then compounded the prejudicial effects of this evidentiary error, by failing to cross-examine Scanlon with Vega's testimony. See generally R. 6346-61. 6384-6426. The defense objected to the testimony but overruled it on the basis that "you can cross him all you want.") R. 6354. *See* R. 6354 ("prosecution stating "if they think there's something to corss examine on here, they're free to do so.") However, inexplicably defense counsel did not utilize that right, though the state had clearly opened the door. Tassin's important evidence supporting a struggle, and Singer's credibility, remained thoroughly impeached.

B. Defense Counsel Failed To Present Evidence Of Stippling Found On Wayne Stagner, Which Would Have Supported Tassin's Defense

Counsel made the same evidentiary error in relation to evidence of stippling observed on Stagner's chest that the defense wanted to elicit through Ronald Singer, and have him rely on. As defense counsel has explained, that the "smaller diameter" of stippling which indicates a close range shot, "supports the . . . Defense theory, that Mr. Tassin was closer to Mr. Stagner in the passenger seat, than he was to Mr. Martin in the driver's seat." R. 6412-13. However, all Mr.

Singer had was a police report documenting observations reported by the EMTs. See Post-Conviction Pet. Ex. 28 at 7.[49] The state raised a hearsay objection under La. C.E. art. 705(b), and the court excluded the evidence, just as it did Mr. Vega's testimony, under La. C.E. art.705(b). R. 5979-82. Again, through counsel's ignorance of the law, Tassin was deprived of the opportunity to present significant evidence supporting his defense. As with Vega, defense counsel should have contacted the EMTs and subpoenaed them to testify to their observations. Post-conviction counsel located one of the EMT's Gerald Carter, who confirmed he would have been available to testify at the trial. Post-Conviction Pet. Ex.29, Declaration of Gerald Carter, 8/26/2015, at 4.[50] EMT Carter would also have been able to testify to his experience of treating literally hundreds of gunshot wounds, through which he had become familiar with the appearance of stippling. *Id.* at 2-3. At the time he observed Stagner's wounds he had been an EMT for 10 years. *Id.* at 1. This would have added validity to his observations of the stippling, enhancing the value of Singer's testimony.

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[49] Sgt Rice's supplemental police report states: "Wound #1 was covered prior to Sergeant Rice's observing the wound however, in speaking with transporting West EJfferson General Hospital Emergency Medical Technicians G. Carter and M. Rabalia, advised when the wound was cleaned and tended to for transporting ther appeared to be stippling marks in approximately a three inch diameter pattern surrounding the entrance wound." Post-Conviction Pet. Ex. 28 at 7.

[50] It is clear from the record that the trial court would have excluded Mr. Singer's testimony on this stippling because, it found, only pathologists can testify about stippling observed on human skin. R. 5998. However, that opinion was erroneous. Ronald Singer was clearly qualified to testify in this area, based on his extensive training, and years of experience working for the Tarrant County Medical Examiner's office, observing autopsies, and being consulted by pathologists on this very matter. R. 5966-68. As noted above, Scanlan has testified regarding stippling too. *State v. Logan*, 07-739 (La.App. 5 Cir. 05/27/08), 986 So.2d 772 In violation of Mr. Tassin's Sixth and Fourteenth Amendment rights, appellate counsel was ineffective for failing to raise this clear error on appeal which would otherwise have been recognized by the appellate court. This court should cumulate the prejudice of these errors, and adjudicate the ineffective assistance of counsel trial claim on the basis that the trial court would have allowed the testimony.

C. Defense Counsel Failed To Elicit Other Evidence From Their Forensic Expert That Supported The Defense Case

In violation of Petitioner's rights to the effective assistance of counsel, defense counsel failed to present readily available forensic evidence supporting their case, which was indicated in their own counsel's affidavit.

1. Defense counsel failed to present critical evidence that a second shot was fired through the roof/doorframe to the left of the victim

As noted above, the defense presented evidence of a bullet hole in the roof of the car to support their forensic case. In fact there was not just one, but two, bullet holes in the roof of the car. Mr. Vega had testified to this in 1987, and Mr. Singer had relied on both of the bullet holes in his 2003 affidavit on the case. Counsel failed to present this evidence to the jury. The second bullet would only have strengthened the defense's physical evidence, based on the bullet hole, that shots were fired wildly and from towards the right hand side of the car. Even more importantly, it would have allowed the defense to refute the state's suggestion that the bullets exited through the front windshield of the car instead of the roof. With confirmation of a second bullet exiting the roof of the car, all three shots to Martin would have been accounted for; two shots fired out of the roof, and the third found by the coroner inside of Mr. Martin's body. R. 5013; S. Ex 14.

2. Defense counsel failed to present credible testimony corroborating Tassin's account of injuring his hand on the firing pin

Another important part of Tassin's forensic case was the serology evidence that Tassin's blood type was found on the front of Stagner's shirt. R. 4911-15, 4918, 4938. This supported Tassin's case that he injured himself on the firing pin and made contact with Stagner during a struggle, and undermined the State's execution theory of the case, in which no direct contact between Tassin and Stagner occurred. R. Supp. 250. In addition to the serology evidence, the

defense had Tassin display the scar on the web of hand to the jury. R. 6330. However, they failed to present credible evidence corroborating Tassin's account of injuring his hand on the firing pin, which was the foundation to the relevance of all this evidence.

In his 2003 affidavit, Singer had had first-hand knowledge of "persons handling .38 caliber revolvers to injure themselves in the manner the defendant described, by being struck by the firing pin on the when of the hand, between the thumb and the first finger." Post-Conviction Pet. Ex. 31. And on information and belief, he had had suffered a similar injury himself.

The State had gone to significant lengths to attack the notion of this injury through the testimony of its own firearms expert, Louise Walzer. On direct examination Walzer testified that this type of injury was "theoretically possible," but she had no knowledge of that ever happening before." R. 5054, The State also had Walzer describe the multiple things that would have to happen for such an injury to occur, and do a physical reenactment in the courtroom, to suggest how unlikely it was. R. 5053-59. On cross-examination, the best the defense got from her was a concession that the web of a hand could fit in the gap between the pin and hammer. But on redirect, the state attacked the theory again. Walzer testified that the whole idea "sounds strange", R. 5069, and that "it's possible, but its not probable." R. 5074. The state also staged another theatrical reenactment, to see "how many times" it would take to make that injury happen, to emphasize how unlikely it was all over again. R. 5020.

Defense counsel could easily have restored credibility to Tassin's account by having Singer recount his experiences, but counsel failed to do so. The jury was left with the unimpeached testimony of the state's firearms expert, that the defense theory appeared "strange" and "[im]probable."

D. Defense Counsel Failed To Impeach The State's Expert

Defense counsel's efforts at impeaching the State's expert, were equally deficient. The inexcusable failure of counsel to impeach Scanlan's false testimony about the lack of evidence of bullet holes, was discussed above. There were many other aspects of Scanlan's testimony that the defense could have impeached, either through a more thorough cross-examination, or through the testimony of Ronald Singer as a sur-rebuttal witness. Counsel failed to do so, because they failed to keep Ronald Singer in attendance at the trial to advise them after his testimony, and had inadequately prepared.

First, Scanlan opened his testimony by attacking Ronald Singer's definition of crime scene reconstruction. He testified that Singer's definition was "inaccurate": "we don't make assumptions, we don't speculate . . . we have to base our findings in proof and in fact." He took issue with Singer's description of drawing "inferences", and determining what "may be possible" which he found was "inappropriate." R. 6244-45. However, the scientific method itself entails the formation and testing of hypotheses, to determine the most likely theory based on the available evidence. To require absolute certainly misunderstands the limits of the scientific field itself. The Association for Crime Scene Reconstruction definition of the field itself includes reference to both deductive and inductive reasoning:

> To gain explicit knowledge of the series of events that surround the commission of a crime using deductive and inductive reasoning, physical evidence, scientific methods, and their relationships.[51]

[51] *Available at* http://www.acsr.org/.

Scanlan's critique of Ronald Singer could easily have been impeached and could in fact have been used to expose Scanlan's own lack of understanding of the field. But counsel did not take the opportunity.

Secondly, Mr. Scanlan gave testimony suggesting that stippling could be rubbed off by dragging a body. R. 6371. The defense relied on the absence of stippling to two of Martin's three entry wounds to refute that Tassin shot him execution style in cold blood, because it suggested the shots were fired at least two feet away. See, e.g., R. ("If you don't see any stippling, then generally speaking, you're talking about more than two feet away"). Scanlan's testimony was clearly geared to refute the defense claim. The state's own pathologist testified, "powder stippling is very difficult to wipe off" and commonly, leaves burns the skin with reddish brown stipple spot[s] on the skin, which cannot be washed off." R. 4958. While it would be nice to think that the jury credited Hunt rather and Scanlan, Scanlan's misleading, inaccurate testimony should have been impeached, if nothing else to demonstrate his lack of expertize and credibility to the jury.

Third, having failed to thoroughly research the background of their expert, defense counsel failed to uncover prior cases that Scanlan had purported to testify as an expert on stippling, to impeach his testimony that only pathologists could do that. Defense counsel could not lose, whatever he might have said. Either he was lying now, or he overextended himself then. It would have been powerful evidence demonstrating a willingness to tailor his testimony and expert opinion depending on the needs of the State.

Third, Scanlan attacked Ronald Singer's testimony about the keyhole bullet hole in the dashboard of the car. Singer had testified that the entry hole was a classic keyhole shape of an unstable or tumbling bullet, which meant it was impossible to determine which direction it had

come from. R. 6034-36. This undermined any assertion by the State that it originated from behind the driver's seat of the car. Scanlan, however, opined that the bullet hole was consistent with an angled bullet, shot from behind the driver's seat, and he attacked Singer's conclusion by again claiming Singer had relied on inadequate photos – not taken at the ideal angle of 90 degrees, and that angled bullets can create very similar shaped holes as unstable bullets. R. 6374-77. On information and belief, had Ronald Singer been there to advise counsel, he could have challenged Scanlan's testimony in three ways. First, that although an unstable bullet can make a slit shaped hole like an angled bullet, the opposite is not similarly true. Angled bullets do not usually make a keyhole entry such as the one depicted in the photo of the glove box. Second, the there is no evidence of the deposition of lead or soot you typically see on the edge of an angled bullet hole caused by the bullet scraping the surface before entering. Third, the type of distortion caused by slightly angled photographs, is extremely unlikely to cause an angled bullet with a slit shape entry to have the appearance of a keyhole entry; the profiles are characteristically different shapes.

E. Defense Counsel Failed To Timely Object To The Improper Ultimate Opinion Evidence Of The State's Forensic Expert That There Was No Evidence Of Self Defense

Trial counsel was ineffective for failing to timely object to expert Timothy Scanlan's testimony on the ultimate issue of guilt or innocence. Scanlan impermissibly testified that there was no physical evidence that supported self-defense. R. 6383, 6386. Although experts may offer opinions that embrace an ultimate issue to be decided by the jury, "in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused." La. C. E. art. 704; *see also United States v. Izydore*, 167 F.3d 213, 218 (5th Cir. 1999) ("determinations of guilt or innocence are solely within the province of the trier of fact"). A statement that a

defendant acted or did not act in self-defense is, in essence, an opinion regarding whether that defendant is innocent or guilty. *See Phillips v. Wainwright*, 624 F.2d 585, 589 (5th Cir. 1980) (finding no error where district court "rejected . . . defense counsel's proposal that the experts be permitted to state their conclusion that [the defendant] had 'acted . . . in self-defense'"); *Riley v. United States*, 225 F.2d 558, 560 n.1 (D.C. Cir. 1955) (in rejecting challenge to expert testimony, noting that defendant had not testified to ultimate issue of self-defense); *State v. Butler*, 563 So.2d 976, 984 (La. Ct. App. 1990) *writ denied*, 567 So.2d 609 (La. 1990) (testimony "that the "accused could not understand the significance of his actions 'in a legal sense' essentially would have presented [expert's] opinion to the jury that defendant was not guilty by reason of insanity"; trial court erred in allowing State to ask if "defendant met the legal definition of sanity with regard to his ability to determine right from wrong").

However, instead of objecting to the state's improper question before Scanlan had time to give his improper testimony, trial counsel waited through several bench conferences and until part way through his own cross examination, to object. By that time, counsel had compounded the problem by eliciting a repeat of Scanlan's damaging testimony while desperately trying to impeach him on it, before realizing it should have been objected to and excluded completely. *See Tassin*, 129 So.3d at 1261. When defense counsel finally did object, the trial court overruled the untimely objection. R. 6414-16. Counsel's delay in objecting to the testimony was objectively unreasonable. *Strickland*, 466 U.S. at 687-88. Mr. Tassin was prejudiced by its admission, as this testimony on "the hub of the issue" was "tantamount to an opinion that the defendant was guilty." *State v. Wheeler*, 416 So.2d 78, 82 (La. 1982) ("As the subject matter of the opinion approaches the hub of the issue, the risk of prejudice and hence of reversible error increases."); *Strickland*, 466 U.S. at 683. The state relied upon it in closing argument, R. Supp.

229, and alluded to it when successfully arguing to the court that it should withdraw the issue of self-defense from the jury completely. R. 6466.

The state court unreasonably denied this claim in post-conviction on the sweeping basis that trial counsel decisions regarding presentation of evidence are a matter of trial strategy, *see* Order 7/28/16, at 3-4, despite clear and convincing evidence showing that counsel's errors here stemmed from counsel's inadequate preparation and ignorance of the law.

Counsel's multiple deficiencies in presenting the defense's forensic case was prejudicial. Instead of the compelling forensic case they should have heard, the jury heard only a portion of that evidence, presented by an expert who apparently rendered opinions without any basis and could not even define his field. There is a reasonable probability that but for counsel's errors, in this respect, cumulated with all other deficiencies of counsel found (See Claim V), the outcome of Mr. Tassin's trial would have been different.

That harm must also be cumulated with the prejudice resulting from the State's misconduct during Scanlan's testimony, which further undermined the presentation of the defense case. *See Claim VII.* Indeed, part of that misconduct involved the improper exploitation of defense counsel's errors to undermine the credibility of his defense. *Id. See e.g. Williams*, 551 F.3d 352 (remanding to district court for de novo consideration of Strickland claim and of the cumulative prejudice of Brady and Strickland violations).

Because the State court's ruling on this claim was contrary to and an unreasonable application of the law and based upon an unreasonable determination of the facts, this Court must consider Petitioner's claim *de novo* and reverse. In the alternative, Petitioner is entitled to an evidentiary hearing on this claim, having requested but been denied one by the state post-conviction courts.

X. THE STATE VIOLATED MR. TASSIN'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT WHEN IT APPLIED ITS POWER TO GRANT IMMUNITY IN A MANNER THAT GROSSLY DISTORTED THE COURT'S FACT-FINDING PROCESS.

The State violated Mr. Tassin's rights to due process and a fair trial when it selectively exercised its power to grant immunity, depriving the defense of essential exculpatory testimony and distorting the evidence presented at trial. This distortion affected such an important and disputed issue at trial that it infected the entire trial with unfairness. This court must grant Mr. Tassin a new trial.

The testimony in question went directly to the key issue at trial: whether Mr. Tassin shot Martin in execution of a pre-planned armed robbery, or whether he did so in self-defense after wrestling a gun from Wayne Stagner. The State argued that Mr. Tassin obtained the gun on the evening of the shooting from the apartment of Mary Anne Valverde and Darryl Macaluso, pursuant to a plan to rob Martin and Stagner developed with Ms. Mills, and Ms. Santiago earlier. Of the alleged co-conspirators, only Santiago's testimony supported the State's case, as both Mills and Mr. Tassin denied it. At Mr. Tassin's first trial, Santiago was the sole witness providing evidence of that plan. Two other witnesses who could have provided evidence supporting or contradicting the theory were Darryl Macaluso and Mary Ann Valverde, from whose home the State claimed Tassin had obtained the gun. Neither testified at the first trial, however, rendered unavailable by the State's charges of accessory to the murder, and the exercise of their Fifth Amendment rights.

After Santiago's favorable sentencing deal was uncovered, and post-conviction defense counsel evidence established her drug addled state at the the time of the offense, the State recognized the need for further evidence at trial. Darryl Macaluso was their answer. The State granted him immunity, R. 5115, and in return, he testified favorably: he said that he and Ms.

Valverde kept a gun in their apartment, R. 5105, that the day after the shooting, he and Ms. Valverde visited Mr. Tassin, R. 5108 -5109, that he retrieved their gun from Mr. Tassin during that visit, R. 5109, and that he subsequently sold that gun. R. 5109-10.

Rebutting the State's claim thus became critical to Mr. Tassin's defense. Mary Ann Valverde, was the only other person with relevant knowledge and she would have provided that rebuttal.[52] Ms. Valverde had, for two decades, consistently stated there was no gun, Supp. R. 175. She was at home during the time Mr. Macaluso claimed Mr. Tassin obtained the gun, Supp. R. 168., and she was present at the Tassin's home during the time Mr. Macaluso claimed he retrieved the gun. R. 510809. Ms. Valverde would undoubtedly have testified favorably for the defense.[53] Given her consistent denial of knowledge of the gun and her presence at Mr. Tassin's home the day after the shooting, for instance, she would have specifically contradicted Mr. Macaluso's claim that he retrieved the gun from Mr. Tassin the day after the shooting, a damning claim that likely painted a powerful picture in the minds of the jurors, especially unrebutted.

The State actively obstructed the defense's ability to prevent that evidence, however: not only did it not offer her immunization, R. 6009-601, but it also explicitly threatened to prosecute her if her testimony presented the opportunity. Although in pre-trial proceedings, the State assured the court that "[i]t's the State's position that any illegal acts that [Mr. Macaluso and Ms. Valverde] would have engaged in, have long since proscribed," R. 4749, at a bench conference immediately preceding Ms. Valverde's testimony, the State warned that Ms. Valverde was "very

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[52]Only Ms. Valverde, Ms. Santiago, Ms. Mills, and Mr. Tassin were present at the time when the State claimed that Mr. Tassin obtained the gun, Supp. R. 168-169, and Ms. Mills testified that she did not remember what happened that evening, R. 5166; only Ms. Valverde, Mr. Macaluso, Ms. Santiago, and Mr. Tassin, and Mr. Tassin's grandmother were present at the time when the State claimed that Mr. Macaluso retrieved the gun R. 5108-5109.

[53] Counsel for Mr. Tassin described Ms. Valverde as "a witness who supports a theory of the Defense, and a rebuttal of the State's position" R. 6098.

much in jeopardy of prosecution," R. 6013. The court warned that "when you say that, you make her unavailable, because she's going to take the Fifth," R. 6014, but the State persisted.

Counsel for Mr. Tassin objected to the State's selective use of immunity, R. 5026, arguing that the state's attempt to distort the testimony presented at trial violated Mr. Tassin's right to due process and a fair trial. R. 5027-28. ("The State is attempting, by their grant of immunity to Mr. Macaluso, to make their witness – they like what Mr. Macaluso says, the Defense likes what Ms. Valverde says. The point of a trial is to get those different testimonies in front of the jury. We are objecting on fundamental due process and fairness grounds. . .to the state's ability to pick and choose which version this Jury gets to hear.") Nevertheless, the court granted the state's request to grant immunity to Mr. Macaluso, alone.

Without immunity, Ms. Valverde, she exercised her Fifth Amendment right not to testify, and the court declared her unavailable. R. 6017. Defense counsel was forced to enter, in lieu of her testimony, a transcript of testimony she gave in 1992 during Mr. Tassin's post-conviction proceedings. R. 6199; R. Supp. 167 – 176.[54] In the statement, Valverde testified only generally that she did not own a gun in November of 1986, and that she did not keep a gun in her home at that time. R. Supp. 174. Though this did contradict what Macaluso testified to at trial, a cold reading of the statement would not have nearly the effect of Valverde's live testimony, which impacted the credibility and persuasive value of her emotionless statement being read into the record. The State capitalized on this in their closing argument, implying that witnesses whose testimony was read were less important because "they're not even here live." R. Supp. 325.

[54] Because Mr. Macaluso never testified at Mr. Tassin's first trial, the transcript, which documented testimony from a post-conviction hearing, did not offer Mr. Tassin the opportunity to rebut Mr. Macaluso's testimony.

Additionally, Valverde could have clarified what were ultimately contradictory stories, such as whether Macaluso was at home that night, whether she gave a gun to Tassin, and whether she could tell that Mills was genuinely sick from the drugs she had taken. Without her live testimony, the defense was unable to use her testimony to bolster or impeach multiple other witness, including Mills, Santiago, and Macaluso.

The State abused its discretion when, without legitimate reason for distinguishing between the two witnesses, it simultaneously sought immunity for Mr. Macaluso and threatened to prosecute Ms. Valverde. The Fifth Circuit has recognized that, in certain circumstances, a defendant's due process rights might demand defense witness immunity; chief among those circumstances is prosecutorial misconduct. *United States v. Thevis,* 665 F.2d 616 (5th Cir. 1982); *United States v. Cohen,* 631 F.2d 1223,1226 (5th Cir. 1980).[55] The state's inequitable assignment of immunity amounted to just such misconduct: the government cannot so abuse its discretion as to render the trial unfair, *United States v. Thevis,* 665 F.2d 640-641, *citing Brady v. Maryland,* 373 U.S. 83 (1963), and a prosecutor has abused his discretion when he intends to use his authority to distort the judicial fact-finding process. *Government of the Virgin Islands v. Smith,* 615 F.2d 964 (3d Cir. 1980); *United States v. Hooks,* 848 F.2d 785, 799 (7th Cir. 1988) (The prosecutor has abused his discretion when he intends to use his authority to distort the judicial fact-finding process"); *State v. Lombard,* 471 So. 2d 782, 788 (Ct. App. 5, 1985), *rev'd in part on other grounds, State v. Lombard,* 486 So. 2d 106, 1986 La. LEXIS 6024 (La. 1986) (finding no prosecutorial misconduct in failure to grant immunity to defense witness because, *inter alia*¸

[55] The Louisiana Supreme Court has discussed the possibility of prosecutorial misconduct creating a due process right to defense witness immunity, but it has not decided the issue. *See* State v. Lombard, 486 So. 2d 106 (La. 1986); State v. Mattheson, 407 So. 2d 1150 (La. 1981).

"if the prosecution was attempting to **distort** the court's fact-finding process, the record does not so indicate.").

In Mr. Tassin's case, the State's decision to immunize Mr. Macaluso but not Ms. Valverde exemplifies this fact-distorting behavior. In *United States v. De Palma,* a case the Fifth Circuit has at least twice cited as an example of prosecutorial misconduct justifying defense witness immunity, *see United States v. Thevis,* 665 F.2d 616 (5th Cir. 1982); *United States v. Cohen,* ,631 F.2d 1223 (5th Cir. 1980), the court held that the defendant was deprived of the due process of law based on very similar facts: the State granted broad immunity to government witness, while it denied even limited use immunity to defense witnesses. *De Palma,* 476 F. Supp at 777. "While the government need not in every circumstance grant immunity to potential defense witnesses," the *De Palma* court explained, "here, where the foundation of the government's case against [the defendant] was built by means of a far-reaching immunity grant, and where the evidence sought by the defense is affected by the government's continuing investigation of the potential defense witnesses, the denial of limited use immunity resulted in an unfair trial." *Id.*

Further evidence suggests that this inequitable distribution of immunity was a deliberate attempt to distort of evidence presented at trial and deprive the defense of critical testimony, rather than a genuine effort to pursue justice and prosecute Valverde.[56] In fact, the original charges alleged against Ms. Valverde for accessory after the fact, were dismissed for lack of probable cause. Supp.R. 174-175. There is no evidence that, in those intervening years, the state made any effort to investigate or prosecute Ms. Valverde; indeed, even during pre-trial

[56] Although, in the course of initial investigations, Ms. Valverde was arrested as an accessory after the fact, this charge was dismissed for lack of probable cause. Supp.R. 174-175, and there is no evidence that the issue arose again.

proceedings, the state took the position that they had no intention of prosecuting her because all possible charges had since prescribed.[57] It was only at a bench conference immediately preceding her testimony that the state announced its interest in prosecution. Additionally, the State's immunity decisions took place in the broader context of a trial rampant with other forms of misconduct. See Claims II, III, IV, V. The State "had no legitimate purpose for refusing to bestow immunity upon Ms. Valverde, and it did so to deprive the defense of essential exculpatory testimony." *Clark v. Johnson,* 2001 U.S. Dist. LEXIS 13305 (N.D. Tx., 2001). The State's selective use of immunity grossly distorted the testimony presented at trial and thus rendered Mr. Tassin's trial irreparably unfair.

In denying the claim on direct appeal, the state court relied upon its finding that Valverde genuinely was "a potential target of prosecution," *Tassin*, 1271-72, which was an unreasonable determination of the facts, given the state's express acknowledgment that all prescriptive periods had prescribed. Mr. Tassin is entitled to *de novo* review of this claim, and reversal under the clear precedents of the Fifth Circuit.

The State's decision to protect the witness that would testify to their liking but threaten the witness that could impeach him also runs afoul of the heart of *Brady*. By refusing to immunize Ms. Valverde, forcing her to plead the Fifth in order to protect herself, the State deprived the defense of critical impeachment testimony. *Brady* commands that a prosecutor act as "an architect" of a proceeding that comports with the standards of justice. *Brady v. Maryland*, 373 U.S. 83, 88 (1963). The Supreme Court has gone even further, explicitly stating that the prosecution has a duty to assist the defense, as the ultimate goal of the administration of justice is

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[57] This assumption is in fact borne out by Louisiana's statute of limitations provisions. See La. C.Cr.P. art 572 (providing a four-year prescriptive period for the felony group which includes accessory after the fact).

fairness. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *United States v. Bagley*, 473 U.S. 667, n.6 (1985) ("By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model"); *see also Banks v. Dretke,* 540 U.S. 668 (2004) (noting that the prosecutor has a "special role" in trials, as they are bound to seek the truth, and a prosecutor's dishonest conduct "should attract no judicial approbation"). Here, the State actively prevented the defense from putting strong impeachment evidence to the jury by wielding its power selectively, to the State's benefit and the defense's detriment.

In light of this violation when considered individually, and in combination with all the State's other misconduct, this court must grant Mr. Tassin a new trial.

XI. MR. TASSIN'S RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL TRIBUNAL WAS VIOLATED WHEN THE TRIAL COURT DENIED TASSIN'S RECUSAL MOTION

Before trial, the defense filed a motion to recuse Judge Rowan under La. C.Cr.P. art. 671(A)(3)[58] based on the fact that he was a prosecutor in the Jefferson Parish District Attorney's office while it defended the charges of misconduct it perpetrated against Tassin. *See* R. 1226–37, 3436-41. At the recusal hearing, Judge Rowan confirmed his employment in the District Attorney's office from March 1997 until November 2007, R. 3427, a time-span covering much of Tassin's post-conviction and habeas litigation. However, the court denied the recusal motion

[58] La. C.Cr.P. art. 671(A) (3) requires recusal of a judge who "has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause".

based on Judge Rowan's testimony that he had no involvement in the litigation of Tassin's case. R. 3453-54.

The court's ruling was an abuse of discretion under La. C.Cr.P. art. 671(3), and violated Tassin's due process rights to a fair trial by an impartial tribunal, free from the appearance of partiality. U.S. CONST. amends. V, XIV. Clearly established federal law mandates that any judge with an *appearance* of bias must recuse him or herself from a case. The Court recently re-emphasized that the Due Process Clause sometimes requires recusal even when the judge has no actual bias, but when "the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905 (2017) (*citing Withrow v. Larkin,* 421 U. S. 35, 47 (1975)); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883-4 (2009); *see also Republican Party v. White*, 536 U.S. 765, 730 (2002) (*J. Ginsberg, dissenting on other grounds*) ("due process does not require a showing that the judge is actually biased as a result of his self-interest."); *Taylor v. Hayes*, 418 U.S. 488, 502 (1974) ("Such a stringent rule . . .may sometimes bar trial by judges who have no actual bias."); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

In the unique circumstances of this case, where the judge worked for *the office that committed misconduct against Tassin—at a time when that office was defending itself from those charges, and for which the retrial before it was granted*—the "appearance of impartiality" is *not* preserved. At the recusal hearing, Terry Boudreaux, lead counsel for the State throughout much of the post-conviction and habeas proceedings, confirmed that these contentious proceedings were a matter of some interest at his office, and that a number of assistant district attorneys came in and out of the courtroom to watch the proceedings, which were the subject of media attention as well. R. 3436-41.

Given that the State's misconduct remained a significant issue in the case before the court, the court's employment at the District Attorney's office at the time Tassin was litigating his first trial with that office gives a particular risk of actual bias, and certainly rises to the level of apparent bias.[59] The trial court's participation in the perpetuation of the *Napue* violation, its refusal to stem the State's repeated denigration of Mr. Tassin's defense, as well as its other improper rulings, only confirms it. See Claim VII. Denial of the right to an impartial tribunal is structural error, and reversal is required. *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825 (1986) ("The due process clause may sometimes bar trial by judges who have no actual bias") (reversing judgment to preserve the "appearance of justice"). In this case, the state courts overlooked a clear case of at least apparent bias in allowing the trial judge to remain on the case. The state court ruling was based upon an unreasonable determination of the facts and was contrary to and an unreasonable application of clearly established law. Applying *de novo* review, this Court must reverse Mr. Tassin's conviction.

XII. MR. TASSIN'S RIGHTS TO DUE PROCESS AND PRESENT A DEFENSE WERE VIOLATED WHEN THE TRIAL COURT EXCLUDED EVIDENCE THAT WAYNE STAGNER'S TOLD HOSPITAL PERSONNEL WITHIN HOURS OF THE SHOOTING THAT HE HAD BEEN INJURED IN AN "ALTERCATION", WHICH SUPPORTED TASSIN'S THEORY OF SELF-DEFENSE.

Tassin's ability to present evidence that would have undermined the State's theory of events was limited by the trial court's refusal to allow Tassin to admit evidence that Stagner reported he had been injured in an "altercation," either through the admission of his hospital records or through cross-examination based on these records. This would have supported

[59] To the extent prejudice must be shown, it is demonstrated by the trial court's erroneous rulings, including, particularly, its refusal to stem the State's repeated denigration of Tassin's defense and its refusal to act to prevent the State from repeating its *Napue* violation relating to Santiago's deal.

Tassin's defense that he shot Martin in a struggle (i.e. altercation), and contradicted the State's theory that Stagner and Martin were shot in an unprovoked attack, involving no "altercation" between Mr. Tassin and the tug-boatmen at all. It would have been particularly pertinent given that Stagner lied to the police about what happened; jurors might well have found his initial statements to medical personnel persuasive.

The defense sought to admit Stagner's hospital records, which were certified as authentic, containing the statement that Stagner sustained his injuries in an "altercation." R. Vol 21(A) 182-3. The trial court concluded that such statements were hearsay, relying on the state case *State v. Juniors*, 2003-2425 La. 6/29/05, 915 So.2d 291, 326; R. Vol 21(A) 214-5. This decision was contradictory to established rules on hearsay and its exceptions, and resulted in the violation of Mr. Tassin's constitutional rights under the Sixth and Fourteenth Amendments to Due Process and to present a defense.

First, this ruling runs afoul of clearly established federal law, which holds that constitutional rights trump hearsay rules, and rules of evidence must be applied to comport with justice. *See Chambers v. Mississippi,* 410 U.S. 284 (1973) ("where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"); *see also Green v. Georgia,* 442 U.S. 95, 97 (1979) (finding that when evidence is highly relevant to a critical issue in the case, its exclusion violated Due Process, even if it would otherwise be hearsay)

Second, the statement in question was admissible for relevant purposes other than its truth and was not hearsay for those purposes. La.C.E. art. 801(C). Louisiana Code of Evidence Art. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter

asserted." An out-of-court statement presented for some relevant purpose other than to prove its truth is, by definition, not hearsay and is consequently not excludable on hearsay grounds. *See, e.g., State v. Vigee*, 518 So. 2d 501, 504-05 (La. 1988); *see also State v. Brown*, 338 So. 2d 686, 689 (La. 1976).

Evidence that Wayne Stagner's hospital records stated that he was shot during an "altercation," *i.e.*, during an argument rather than a surprise "bushwhack" attack as the State contended, was relevant to demonstrate both the inconsistencies in Stagner's versions of events and the inadequacies of the investigation in this matter and to suggest that the incident may have occurred in a manner other than that proposed by the State. These purposes did not depend on showing that Stagner had actually been shot during an "altercation". Thus, unlike *Juniors*, where the defendant sought to admit the contested hospital records to prove the truth of their contents, *State v. Juniors*, 2003-2425 La. 6/29/05, 915 So. 2d 291, 323-24, the hospital records here were admissible for purposes other than to prove the truth of their content and thus fell outside the definition of hearsay. Accordingly, at the very least, the statement should have been admitted for purposes of demonstrating that Stagner provided multiple reports of events and the police had failed to conduct an adequate investigation in this case, casting doubt on the State's version of events.

Second, even assuming the hospital records fell within the definition of hearsay, the hospital records also fit within statutorily defined exceptions to the hearsay rule pursuant to La.R.S. 13:3714 and La.C.E. art. 804(4) and the trial court erred in excluding this evidence on hearsay grounds. The Louisiana Legislature has chosen to exempt certified hospital records from the hearsay rule, La.R.S. 13:3714, because of the inherent trustworthiness of such documents. Stagner's medical records, including his statement that his injuries were sustained during an

altercation, were accordingly admissible in their entirety and the trial court erred in excluding the hospital records. The record, moreover, was admissible under La.C.E. art. 803(4), which provides that statements made for purposes of medical treatment or medical diagnosis in connection with treatment are not excluded by the hearsay rule.

The court nevertheless excluded the evidence, relying on *Juniors* to conclude that the statement was inadmissible hearsay falling outside the exceptions set forth above. In *Juniors*, the Court held that the statement that the victim had been shot by a disgruntled employee was not reasonably pertinent to his treatment or diagnosis. Here, by contrast, the statement that Stagner had been injured in an altercation was reasonably pertinent to his medical treatment or diagnosis. Unlike in *Juniors*, where the identity of the shooter had no bearing on the injuries the victim had received, Stagner's statement that he was injured in an altercation could have impacted his treatment. For example, such a statement may have caused treating physicians to examine whether he had any additional wounds that he may have sustained from his role as an aggressor. As a matter of Louisiana evidence law alone, the trial court erred in ruling inadmissible the medical reports. And, as discussed, the trial court's ruling had far greater ramifications, as its exclusion of this evidence violated Tassin's constitutional right to defend himself against the State's charges, and in term it likely also influenced the trial court's decision to refuse to provide a self-defense charge.

Even assuming the statement was hearsay and did not fit within any of the statutory exceptions, the statement that the victim had been shot during an "altercation" should have been admitted because it was essential to Tassin's defense and, unlike the statement sought to be admitted in *Juniors*, was made under circumstances that provided considerable assurances of its

reliability.[60] The trial court's exclusion of this evidence denied Tassin his rights to present a defense, to due process, and to a fair trial secured by the state and federal constitutions and requires reversal. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284 (1973). This evidence that Wayne Stagner reported being involved in an "altercation"—which necessarily involves two active participants, went to the heart of the dispute between the defense and state at trial—whether Mr. Tassin shot the victims execution style, or did so after an altercation initiated by Stagner. The exclusion of this evidence, individually and together with all other errors depriving him of his right to meaningfully present his defense, "had a substantial and injurious effect or influence" on the jury's verdict." *Brecht* 507 U.S. at 623.

The state court's ruling denying this claim was contrary to or an unreasonable application of federal law and an unreasonable determination of the facts. The Court should therefore consider this claim *de novo* and reverse Mr. Tassin's unconstitutional conviction.

XIII. THE DELAY IN PROSECUTION CAUSED BY THE STATE'S MISCONDUCT LIMITED TASSIN'S ABILITY TO PUT ON A DEFENSE AND DEPRIVED HIM OF DUE PROCESS.

As argued by defense counsel in both a pretrial motion, R. 1988-2001, and oral motion made towards the end of trial, R. 6282-83, the twenty-four-year gap between the incident and Mr. Tassin's trial—a delay almost entirely attributable to State misconduct and the lengthy post-

[60] There are several reasons to conclude that the statement that Stagner was shot during an altercation had sufficient indicia of reliability to require its presentation at trial. As discussed above, the Louisiana Supreme Court has concluded that "hospital records [are] inherently reliable" given the importance of reporting information accurately. *Judd*, 663 So.2d at 694. In this case, moreover, the information about the shooting was provided soon after the offense while Stagner was receiving medical treatment. It is unlikely that the information could have come from someone other than Stagner or from the emergency medical technicians attending him who, in turn, would almost certainly have received the information from Stagner. Presumably, Stagner provided this information as part of his medical treatment, or the EMTs reported this information, with no particular agenda other than to provide information as accurately as possible in this emergency setting. Unlike in *Juniors*, Stagner testified that he was conscious for periods after the shooting R. Vol. 21(A) 92-95; *Compare Juniors*, 915 So. 2d at 326 ("[T]he medical report itself shows Robinson was unconscious during his examination.").

conviction proceedings required to remedy it—prejudiced Mr. Tassin's ability to present a meaningful defense and deprived him of Due process under the Fifth And Fourteenth Amendments to the United States Constitution. *See United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Marion*, 404 U.S. 307, 325 (1971).[61]

The Supreme Court has made clear that Due Process may be violated by prejudicial delay attributable to State action. In *United States v. Lovasco,* 431, U.S. 783, 790 (1977) the court held that a due process claim involves consideration of both (a) prejudice to defense and (b) reasons for the delay and "whether the action complained of . . . violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney v. Holohan,* 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency," *Rochin v. California,* 42 U.S. 165, 173 (1952). See also *Ham v. South Carolina,* 409 U.S. 524 526 (1973). *See United States v. Marion,* 404 U.S. 307, 324 (1971).

In Mr. Tassin's case, both the cause of the delay—almost entirely attributable to State misconduct—and prejudice to defense resulted in a trial which violated of Due Process. During the twenty two years it took Mr. Tassin to obtain relief from the State's *Napue* violation, the State destroyed key evidence, other evidence became degraded, witnesses died or became unavailable, and the memories of others became too corrupted or attenuated to serve as reliable evidence.

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[61] *See Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 865 (5th Cir. 1958) ("Laches is . . . time plus prejudicial harm . . . [where] that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense.").

A. Destruction And Degradation Of Physical Evidence

1. Destruction of Eddie Martin's car

First, between Mr. Tassin's first trial and the retrial, the State of Louisiana destroyed the most critical piece of physical evidence in the case, Eddie Martin's car--which was in fact the crime scene.[62] It did so despite knowing that that evidence within it was a key part of the self-defense case at the 1987 trial. At that trial, the defense had presented evidence of Alex Vega, a firearms identification expert, who examined the car and testified to the locations of bullet holes he found, and how the positions and angles of the shots supported Tassin's versions of events. Although the State undermined his credibility because he lacked the qualifications to give ballistics testimony, they were clearly on notice as to the significance of the evidence.

At the retrial, Mr. Tassin presented testimony from a qualified crime scene reconstruction expert, Ronald Singer, with the same objective. But the State exploited Singer's failure to examine the car and bullet holes himself, to undermine the credibility of his opinion. R. 1288, 1291, 1628, 3727. Without the car, defense expert, Ronald Singer, was forced to rely upon the recollections of Alex Vega who had examined the car over 24 years previously, and the few photos he and a detective had taken. The State then successfully objected to Ronald Singer discussing Vega's prior testimony on hearsay grounds. R. 5986-6005. The trial court compounded the prejudice by denying the defense's request that it instruct the jury that if it found that the State had destroyed evidence, it could infer that the car would have supported the defense. R. 1288, 1291. The State's destruction of what it knew to be such critical evidence, and exploitation of its absence at trial, in and of itself requires reversal. *Arizona v. Youngblood*, 488

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[62] See R. 1994; Appendix A, *in globo* to *Motion to Dismiss Prosecution with Prejudice on the Grounds of State Misconduct, Violation of Speedy Trial, and Requirements of Due Process.* R. 1988.

U.S. 51, 61 (1988) (Stevens, J., concurring). *See United States, v. Bohl,* 25 F.3d 904 (10th Cir. 1994) (finding destruction of the evidence of the crime (allegedly faulty radio towers for the FAA) prohibited trial in a case where the significance of the destroyed evidence was "apparent before" it was destroyed. *See also United States v Cooper,* 983 F.2d 928 (9th Cir. 1993) (given potential exculpatory nature of evidence and bad faith on the part of some agents of the government, only appropriate remedy was dismissal of the indictment). It certainly weighs heavily in demonstrating the prejudicial impact of the twenty four year delay.

2. The scar on Robert Tassin's hand

The scar on Tassin's hand was another aspect of his self-defense case, proof of the injury caused as he struggled for the gun. But over the years it had become less visible. R. 6282-83. So much so in fact that the State suggested during closing argument, that defense counsel had made it up. See R. Supp. 324.[63] His ability to bolster his proof by testimony from his prior trial counsel who would have seen it soon after the offense, was undermined by the passage of time. The defense had hoped to call his prior attorney Carolyn Kiff to the stand to corroborate it; as a sitting magistrate at that courthouse she was readily available and highly credible. But she simply could not remember it. R. 6282-83.

3. The swatches from Wayne Stagner's shirt

Another important part of the forensic case for self-defense was the evidence that Tassin's blood was transferred onto Stagner's shirt, consistent with contact during a struggle. In 1987 serology evidence showed Tassin's blood type on the shirt, but for the 2010 trial he sought to prove it more definitively through DNA testing. Counsel sought access to the swatches cut from Wayne Stagner's shirt. For two years the state failed to produce the evidence, prompting

[63] "Denny LeBoeuf told you Bobby Tassin has a scar, I don't know. Did you see it.? I looked." R. Supp. 324.

Once found and examined, it was discovered that serology testing had destroyed the blood spots. The degradation of the evidence for twenty four years makes identification of a further viable DNA source, an impossible endeavor.

4. Reports of the State's forensic testing

Also lost during the intervening years are reports by the state of its own testing of evidence. See *Motion for Appropriate Sanctions for State's Destruction or Loss of Critical Physical Evidence and Scientific Reports.* R. 1288-89. These include reports on the results of fingerprint testing of Martin's beeper and wallet, both recovered at the scene and reportedly tested for fingerprints, and report of comparison of the cast of footprints taken at the crime scene with any of the numerous pairs of Robert Tassin's shoes seized from his home. In particular, evidence that Mr. Tassin's prints were not found on Martin's wallet, or that Santiago's were, would have been helpful to Tassin's defense, both in undermine allegations of robbery, and impeaching Santiago who testified seeing her husband going through the pockets of Martin after he was deceased. R. 5581. The trial court compounded the prejudice by denying the defense's requested jury instruction entitling the defense to the benefit of an adverse inference. R. 1289, 1291.

B. Witnesses Died Or Became Unavailable, And Memories Faded

Robert Tassin's grandmother, with whom he lived at the time of the incident and who could have contradicted Macaluso's testimony, died in the intervening years. R. 6282. Ms. Plaisance could have clarified the truth about Macaluso's changing stories from when he was

arrested to his testimony at trial – her testimony would have shown that Tassin ended up with Stagner's gun, *not* Macaluso's, which supported Tassin's claim of self defense.[64]

Moreover, defense counsel attempted to locate Sue Born, Mary Jo Cronkite, and Linda Torrey Price, but they were unable to do so, requiring the defense to present their evidence through old transcripts. R. 6145, 6147, 6148. The State attacked the defense for doing so in closing argument. R. Supp. 325. Linda Torrey Price, the attorney who notarized Santiago's post-conviction affidavit, was particularly important because she contradicted Santiago's claim that she never read the affidavit she signed in 1992, R. 2288 (testifying Santiago took so long to read it, she was worried she'd be late for class), and this was the same affidavit which the prosecutor improperly suggested the defense unethically procured. As the defense had predicted in its pretrial motion to dismiss, they were "forced to rely on transcripts and documents that are at least eighteen years old," in making their case. R. 1993.

In support of that motion, defense counsel had also argued:

> "Counsellor, I just don't remember" is going to be heard time and time again. No one remembers the details of something that happened twenty-four years ago very clearly, not even something as traumatic as a fatal shooting. Core events may be recalled, but the critical details that can lead to impeachment or bolstering of a witness are lost.

R. 1993. Defense proved correct again. Virtually all key witnesses who testified, had difficulty remembering details of the events, and repeatedly needed to have their recollections refreshed to provide their testimony. *See E.g.*, Wayne Stagner at R. Vol. 21A 44, 67, 110, 120-22, 135, 139,

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[64] In his initial statement to police, Macaluso stated that a couple of days after the homicide, Robert Tassin's grandmother had taken a gun from Robert and asked Macaluso to hide it under the shrimp nets, concerned that Robert was taking a lot of drugs and acting erratically. Macaluso told police this was *not* his gun. Testimony along these lines from Plaisance at trial would have helped discredit Macaluso's testimony that he found Robert Tassin in possession of his gun after the offense, and would have been entirely consistent with Mr. Tassin's defense in which he had ended up with *Stagner's*—not Macaluso's—gun.

148, 153, 155, 156-58, 181, 196-98, 203; Darryl Macaluso at R. 5116-17, Sheila Mills at R. 5162, 5209-10, 5226, 5167, 5266, 5299; Georgina Santiago at 5371, 5373, 5387, 5418, 5424-26, 5434-39, 5447-50, 5455-57, 4578-81; 5528, 5544-48, 5629-34, 5693; Detective Helton R. 5751, 5756, 5791-92, 5837, 5843-44, 5860-68, 5976, 5886-88, 5937.

The inherent difficulty of investigating a twenty four year old case, also undermined the ability of the defense to present evidence indicated from Stagner's medical records, that Stagner told medical personnel he was in an altercation (i.e. fight, rather than unprovoked and undefended attack). Any reference to this at trial was excluded under the hearsay rules, when defense counsel failed to identify and call the medical worker at the hospital, twenty four years later. *See* R. Vol 21A 182-94; R. 5793-5812.

Mr. Tassin was prejudiced by the delay in his prosecution, which was attributable to the State's misconduct. *Lovasco,* 431 U.S. at 790. His conviction should be reversed, and his release ordered forthwith.

XIV. MR. TASSIN'S RIGHTS TO DUE PROCESS, TRIAL BY JURY AND A FAIR TRIAL WERE VIOLATED WHEN THE VERDICT FORM FAILED TO ENSURE THAT JURORS AGREED THAT EACH ELEMENT OF THE CRIME HAD BEEN PROVED BEYOND A REASONABLE DOUBT

The State prosecuted Tassin for second-degree murder based on two possible and separate theories of liability provided in the statute. La. R.S. § 14:30.1 provides, in part, that:

> Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
>
> (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated or first degree rape, forcible or second degree rape, aggravated arson, aggravated burglary, aggravated kidnapping, second degree kidnapping, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, second degree robbery, simple robbery, cruelty to juveniles, second degree cruelty to juveniles, or

> terrorism, even though he has no intent to kill or to inflict great bodily harm.

La. R.S. § 14:30.1. In this case, the State was prosecuting Tassin under both theories; that Tassin had specific intent to kill Martin, or in the alternative that Tassin killed Martin in the course of an attempted armed robbery. Defense counsel objected when the State amended the indictment to second-degree murder, asking the State to specify which theory (felony murder or specific intent murder) and which felonies it would pursue. R. 1773. But the State refused to state which theories it would proceed on. R. 4057, and the court denied defense counsel's request for the State to specify. R. 4058. At trial the state proceeded on both theories, but neither the indictment or the verdict form reflected the separate 14.30.1(A)(1) and (A)(2) theories.

The jury returned a verdict that read "We, the jury, find the Defendant: Robert Tassin guilty of second degree murder." R. 2028. This form does not indicate whether the jury unanimously found Mr. Tassin guilty of second-degree murder based on a finding that he committed a felony murder by planning to perpetrate an armed robbery or that he committed a specific intent murder. More importantly, although in Louisiana, the votes of 10 jurors were required for a conviction, La. C.Cr.P. Art. 782, there was no indication of whether sufficient number of jurors agreed on which theory they found. Absent such assurance, Mr. Tassin's conviction violates constitutional rights to trial by jury, and conviction only upon proof beyond reasonable doubt of every element of the offense. *Richardson v. United States*, 526 U.S. 813, 817 (1999).

It has long been the law in the United States that "proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In re Winship*, 397 U.S. 358, 362 (1970). To satisfy the constitutional requirement, every element of the crime must be proven beyond a reasonable doubt. See *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) ("all elements of the

crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt)"). In the second-degree murder statute, the underlying felonies represent elements of the offense. La. R.S. 14.30.1(A)(2). Under the felony-murder theory of second degree murder under La. R.S. 14:30.1(A)(2), the felony—in this case armed robbery—is an essential element of the offense. Under the specific intent murder theory of second-degree murder under La. R.S. 14.30.1(A)(1), specific intent is an essential element. "The consequence that matters for this case is that a jury…cannot convict unless it [] finds that the [state] has proved each element." *Richardson v. United States*, 526 U.S. 813, 817 (1999).[65]

In *Richardson*, the Supreme Court held that where the alternatives offered constitute elements of the offense, there must be unanimity not only that elements were present, but which specific ones apply. *Id.* at 824. Richardson had been charged with conducting a 'continuing criminal enterprise.' The indictment named several predicate violations. The jury was charged that it must find that he committed at least three of them, but was not charged that it must agree as to precisely which three. *Id.* at 816. The Supreme Court found that because each violation constituted an element of the offense, there had to be agreement upon the findings for each. *Id.* at 824.

Likewise, under Louisiana's first-degree murder state, there has to be unanimous agreement upon the findings for each element, including the element of specific intent, *and* the

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[65] *Schad v. Arizona*, 501 U.S. 624 (1991), is distinguishable because it did not discuss *factual elements* of the offense. Instead, it dealt with differing theories of *mens rea*. Appellant's case looks like *Richardson*, 526 U.S. 813. In *Richardson*, the six-Justice majority held that where the alternatives offered constitute elements of the offense, there must be unanimity not only that elements were present, but which specific ones apply. *Id.* at 824. Richardson had not been charged with conducting a 'continuing criminal enterprise.' The indictment named several predicate violations. The jury was charged that it must find that he committed at least three of them, but was not charged that it must agree as to precisely which three. *Id.* at 816. The Supreme Court found that because each violation constituted an element of the offense, there had to be agreement upon the findings for each. *Id.* at 824 . The Louisiana second-degree murder statute, La. R.S. 14:30.1(A), is analogous to the continuing criminal enterprise statute, 21 U.S.C. 848, and not the Arizona murder statute at issue in *Schad*.

aggravating element, such as attempted armed robbery. La. R.S. 14:30. In Tassin's case, however, it is plausible that six jurors decided that a plan to commit an armed robbery had been proved beyond a reasonable doubt, and six jurors decided that the state proved specific intent murder beyond a reasonable doubt.

The Courts' instructions failed to remedy the problem. When instructing the jury on the definition of second degree murder and the jury's duty to determine whether the defendant was guilty of second degree murder beyond a reasonable doubt, the court at no point instructed the jury that ten of them must agree upon the specific intent sub-section or on the particular underlying felony. See R. Supp.2 11-13.

Before trial, defense filed a motion challenging the State's failure to give notice which theory of second degree murder the State intended to prosecute at trial, R. 1814, but the court denied the defense request for the State to specify its theory in advance. R. 4058. Following this, the defense filed a further motion, raising the violation of Tassin's rights to Due Process which would be violated as a result by the specter of a conviction based on the finding by only five or six jurors of twelve jurors that the State's case had been proven. R. 1938. The defense therefore fought an order that the State specify just one theory to pursue. However, the trial court denied the motion. R. 1940. Despite defense counsel's objections, the trial court then allowed Tassin to be tried using a verdict form and jury instructions which failed to ensure that there was sufficient agreement by the jury on proof of the elements of a felony second degree murder or a specific intent second degree murder – precisely the scenario which defense counsel sought to avoid.

Here, it is unclear which facts or elements Tassin's jury found unanimously – it could be that half found specific intent, and half found for felony murder, under which this would not be a constitutionally sound verdict. This Court must reverse under clearly established federal

law.Particularly in light of the significant weaknesses in the state's case under both theories of second degree murder, this Court must therefore reverse the verdict. See *Richardson*, 526 U.S. at 824.

XV. MR. TASSIN'S RIGHTS TO A FAIR TRIAL AND IMPARTIAL JURY WERE VIOLATED BY RESTRICTION ON DEFENSE VOIR DIRE

There are few rights more fundamental in a criminal trial than a defendant's right to an impartial jury. Courts are bound to safeguard this right through rigorous scrutiny of juror responses during voir dire and must exclude from the jury any person who is biased against the defense or who is unable to faithfully follow the juror's oath. A necessary corollary of that right is the right of a defendant to make proper enquiry of jurors during voir dire to expose any disqualifying bias. *See Turner v. Murray,* 476 U.S. 28 (1986); *Morgan v. Illinois,* 504 U.S. 719 (1992). As the United States Supreme Court has found:

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges.

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (internal citations omitted). In this case, Mr. Tassin was deprived of that right when the trial court improperly restricted his voir dire of a juror whose answers suggested bias towards the defense.

During questioning by defense counsel, prospective juror Victor Marsiglia disclosed his partiality, asserting that counsel would have "trouble with me." R. 4251. On further questioning, he confirmed that he was "trouble" for the *defense*. R. 4251-52. He then expressed doubt that he could be a juror because he had practiced law for twenty years and had "seen enough" to have an "extremely low" opinion of the justice system. R. 4252-54. He also confirmed that it would be

hard for him to listen to and respect other jurors. R. 4282. The trial court itself found that Marsiglia had "a complete disregard for the process as a whole." R. 4294. Marsiglia never indicated that he could be fair and impartial to Tassin.

Defense counsel challenged the juror for cause, which was ultimately denied, R. 4296, and the defense was forced to use a peremptory challenge to prevent him from being seated on the jury. In discussing the issue, the court found that Marsiglia was impartial and rehabilitated based on a single answer, which he never actually gave. The court mistakenly found that the defense asked Marsiglia "if he could be fair and consider all the evidence," and that he answered 'Yes.'" R. 4289-90. In fact, he was asked the far narrower question of whether he could wait until all evidence was presented before determining Tassin's guilt or innocence. R. 4286. Thus, the court was making its ruling based on is incorrect memory of the juror's statements.

The court also speculated that Marsiglia's statements of apparent bias were merely an effort to avoid jury duty,[66] or that, contrary to his express statement that the "defense" had a problem with him, Marsiglia was biased against the criminal process generally, not the defense. However, the defense pointed out several instances where Marsiglia was hostile exclusively towards the defense, including an accusation that the defense was "insulting his intelligence" by asking a question. R. 4290-92. The court speculated that had the State questioned Marsiglia, he would have seemed biased towards them too. R. 4290.[67] Faced with this improper effort by the court to discredit Marsiglia's express statement of bias, R. 4290-93, defense counsel sought to

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[66] "THE COURT: He vehemently would want you to cut him for cause. He has a complete disregard for the process as a whole, not as to the Defendant, but as to the entire system as a whole. That's what he's acting out against." R. 4294.

[67] "THE COURT: And that's because ya'll asked him direct questions. He would have been the same way to the State if he had -- if Mr. Wallace had broached him, because he definitely doesn't want to be here. And he's doing everything he can to get off." R. 4290.

question him further about his ability to be impartial. R. 4293. But the trial court refused to allow defense counsel to question him further in order to clarify his bias for the court. R. 4296-97.

The merit of Tassin's cause challenge rested significantly on the trial court's interpretation of Marsiglia's comments that the defense had "trouble" with him. The court's refusal to permit the defense to explore the issue further deprived Tassin of a reasonable opportunity to probe to determine a basis for challenges for cause. This violated his constitutional right to a full voir dire, a vital safeguard of his right to an impartial jury, and requires reversal of his conviction.

XVI. CUMULATIVE ERROR RENDERED PETITIONER'S TRIAL FUNDAMENTALLY UNFAIR

The combined effect of multiple constitutional errors requires habeas relief if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992); (when trial court errors "so infect[] the entire trial that the resulting conviction violates due process" reversal is warranted) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). The ultimate question here is whether in fact Robert Tassin's conviction and sentence were obtained in accord with the Constitutional guarantees of a fair trial, due process, and fair sentencing. Cumulative error warrants habeas relief where the errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Such "infection" occurs where the combined effect of the errors had a "substantial and injurious effect or influence on the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

It matters not whether Mr. Tassin received a flawed trial due to the State's misconduct, counsel's ineffectiveness or for any other reason that this Court determines. The result is the same. Mr. Tassin has not received a fair trial, i.e. a verdict in which we can have confidence. The

jury did not see the full picture at trial, and if they had there is a reasonable probability of a different verdict. This Court should review the aggregate effect of the constitutional errors. Even if one were not sufficient to mandate reversal, the aggregation of the error surely would be.

Petitioner raised the cumulative impact of errors during trial, on direct appeal and post-conviction, but was denied at every turn.

Before, during, and after trial, defense counsel filed motions to dismiss with prejudice and for mistrial based on the cumulative effect of the State's misconduct and the trial court's erroneous holdings. R. 1988, 6283-84, 6478. Before trial, defense counsel argued that dismissal with prejudice was warranted because Tassin's rights were violated by the delay in his prosecution—which extended well beyond the 180-day mandate provided the habeas court and which was attributable to the State's misconduct—and the State's destruction of evidence. R. 1988. During and after trial, defense counsel re-urged its argument regarding the prejudice caused by the delay and added as grounds for dismissal the long list of errors that occurred at the trial, including the State's violation of *Napue*, the State's denigration of trial counsel, the State's blatant misconduct, and the trial court's denial of Tassin's requested jury instructions. R. 6283-84, 6478, but the trial court denied these requests.

On direct appeal, Petitioner challenged these rulings, and in addition argued reversal for the cumulative prejudice of all the other errors raised on direct appeal as well. And he raised the claim in post-conviction in light of the additional errors identified in those proceedings. However the state courts unreasonably denied his claims both times, in the face of multiple constitutional errors, and without undertaking any inquiry into whether the trial was fundamentally unfair. In fact, the state court essentially refused to consider the claim at all, finding that it had no basis in law.

On direct appeal, the Louisiana Court of Appeals rejected the claim, citing to Louisiana Supreme Court decisions which stated that "the "cumulative error" doctrine has lost favor in the Louisiana courts." *Tassin,* 129 So.3d 1235, at 1264 (citing *State v. Manning,* 885 So.2d 1044, 1110 (La. 2005). It also cited to its own prior decisions, holding that "the combined effect of assignments of error, none of which warrant reversal on its own, does not deprive a defendant of his right to a constitutionally fair trial. *Id.* 3/8/2016 Order, at 3-4.

Citing these finding by the court of appeal, the post-conviction court rejected the claim on procedural grounds, finding that the claim "is not cognizable for review in post-conviction review."

However, as the Fifth Circuit has explained: "It is important to keep in mind that in a cumulative error analysis no single error is ground enough to grant the writ. There must be a cumulation of errors which results in a deprivation of due process." *Derden v. McNeel*, 938 F.3d 605, 610 (5th Cir. 1991). The state court's rejection of these claims was an unreasonable application of federal law.

Moreover, the United States Supreme Court noted in *Strickland* that as with *Brady* claims "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland,* 466 U.S. at 696. Given the identical standards of *Strickland* prejudice and *Brady* materiality which are both designed to protect the fundamental fairness of the proceeding, the cumulative impact of the above-mentioned constitutional *Brady*, *Napue* and *Strickland* errors should be considered together in determining whether petitioner received a fair trial. *Gonzales v. McKune,* 247 F.3d 1066, 1078 (10th Cir. 2001) (the outcome of the trial "would likely have changed in light of a combination of *Strickland* and *Brady* errors, even though neither test would individually support a petitioner's claim for habeas relief";

Williams v. Quarterman, 551 F.3d 352 (5th Cir. 2008) (remanding to district court for *de novo* consideration of *Strickland* claim and of the cumulative prejudice of *Brady* and *Strickland* violations); *Gentry v. Sinclair*, 576 F. Supp. 2d 1130, 1171 (W.D. Wash. 2008) ("the Court must also consider the prejudice from the *Brady/Napue* and IAC claims cumulatively"). *See also*, ***Mak*** *v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) ("We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that, considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death"); (affirming grant of habeas relief based on cumulative impact of ineffective assistance of counsel, exclusion of evidence, and inadequate jury instructions).

In Mr. Tassin's case, ineffective assistance and prosecutorial misconduct impacted virtually every facet of his case. Through the state's suppression of evidence and presentation of misleading testimony, as well as ineffective assistance of counsel, the jury was deceived about the credibility of two of its most important witnesses, Georgina Santiago and Darryl Macaluso. Together those witnesses provided the state with its only evidence of the armed robbery plan which was crucial to the state's theory of second degree murder based on felony murder and specific intent. The state represented that both came to court motivated only by their desire to do the right thing. By failing to correct Santiago's misleading testimony about her deal, the jury never knew that her story about the armed robbery had been generated motivated by a favorable 10 year deal, or that she previously lied under oath about it at the previous trial, to see her husband convicted. Likewise, the state failed to disclose evidence, and the defense failed to discover, that Darryl Macaluso was a long time police informant, with a known history and reputation for lying, who had motivation to lie at Tassin's trial to get leniency for his criminal activities, just has he had assisted police many times in the past.

At the same time, prosecutorial misconduct prevented Mr. Tassin from testifying, and he was deprived of the testimony of the only person who could refute the state's account of an unprovoked execution, and explain how he shot in self-defense. Without Robert's testimony, the physical evidence was the strongest part of the defense case. However, that too was undermined by prosecutorial misconduct and ineffective legal representation. Tassin's right to present his defense was then further undermined by the improper repeated denigration of defense by the prosecutor, and the refusal of the court to instruct the jury on Mr. Tassin's defense, and 24-year delay in bringing him to trial occasioned by the state's misconduct. This combined with all the other errors raised herein, rendered Mr. Tassin's trial fundamentally unfair. *See Guerra v. Collins*, 916 F. Supp. 620, 637 (S.D. Tex. 1995), *aff'd*, 90 F.3d 1075 (5th Cir. 1996) (applying *Derden*, the Court held that the "number of instances of [prosecutorial] misconduct [including intimidation of witnesses, suggestive identification procedures, a Brady violation, and the use of false evidence at trial,] as well as the type and degree [of that misconduct,] compel the conclusion that the cumulative effect . . . rendered the trial fundamentally unfair"); *see also Moore v. Johnson*, 194 F.3d 586, 619-22 (5th Cir. 1999) (considering the "cumulative errors" of counsel and finding them to be prejudicial); *United States v. Johnston*, 127 F.3d 380, 398 (5th Cir. 1997), *cert. denied*, 522 U.S. 1152 (1998) (considering, in narcotics case, the cumulative effect of prosecutorial misconduct and finding prejudice sufficient to cast doubt upon the correctness of the jury's verdict). Reversal is required.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, petitioner Robert Tassin prays that this Court:

(a) Issue an order to have him brought before it, to the end that he may be unconditionally discharged, with prejudice, from the unconstitutional confinement and restraint and an order barring any further prosecution;

(b) Conduct an evidentiary hearing at an appropriately scheduled time where proof may be offered and argument advanced concerning the allegations set forth in this petition;

(c) Permit him, because of his indigence, to proceed without payment of costs; and

(d) Grant such other relief as may be necessary and appropriate.

Dated: February 26th, 2018.

Respectfully submitted,

/s Caroline Tillman
Caroline Tillman, La. Bar No. 31411
636 Baronne Street
New Orleans, LA 70113
(504) 529-5955

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Petition has been served via electronic notification from the clerk of court for delivery upon Respondent Darryl Vannoy, this 26th day of February, 2018

/s Caroline Tillman
Caroline Tillman

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Robert Tassin

(b) County of Residence of First Listed Plaintiff West Feliciana
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Caroline Wallace Tillman, Promise of Justice Initiative, 636 Baronne St, New Orleans LA, 70113. (504) 529-5955

DEFENDANTS

Darryl Vannoy

County of Residence of First Listed Defendant West Feliciana
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

Terry Boudreaux, 24th JDC District Attorney's Office, 200 Debigny St, Gretna, LA 70053. (504) 368-1020

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☒ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 U.S.C. 2254

Brief description of cause:
Habeas Corpus

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Judge Carl Barbier DOCKET NUMBER 05-0143 (prior reversal)

DATE
02/26/2018

SIGNATURE OF ATTORNEY OF RECORD
/s/ Caroline Tillman

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE