No. 11-7669

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY
Petitioner,

versus

BURL CAIN, Warden, Louisiana State Penitentiary,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

OPPOSITION TO WRIT OF CERTIORARI

CAPITAL CASE

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STATEMENT OF THE FACTS

The facts of the case as found by the Louisiana Supreme Court on direct appeal are as follows:

> The record shows that, after the murder was first discovered, authorities undertook an investigation to discover the perpetrator or perpetrators of the crime. As the investigation continued, authorities were unable to discover who was responsible. Not until two years later did a break come in the case. The following information was presented by the state at trial.
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> At approximately 9:30 p.m. on April 4, 1998, the body of a teenaged boy was discovered lying face down alongside Crisp Road in Tangipahoa Parish, Louisiana. The gravel road where the body was found was dark and there was no vehicle in the area. The body was covered in blood. Another large puddle of blood was observed at a short distance from the body where there was the imprint as of a body in the gravel. Nearby, police found a receipt for a pizza delivery to a person named Mary Ann Davis.
>
> The autopsy of the 5'11", 190 lb. body revealed considerable injury to most of the body surfaces, but the main injury was to the victim's head and face. There were multiple lacerations on the victim's scalp and face extending down to the skull, including a palpable skull fracture. In addition, there were brush burns on the victim's face, cheeks and the point of his chin. There were lacerations on the inside of the victim's lips. Extensive lacerations and abrasions were scattered throughout the whole of the victim's body, including the victim's arms and shoulders.
>
> As noted by the expert pathologist who conducted the autopsy, the body initially resembled an individual who had sustained a motor vehicle accident where the person was ejected from the car onto asphalt, concrete or gravel. This impression was dispelled, however, upon examination of all of the head wounds. These head wounds led the expert to believe that a homicide had occurred. There were no broken bones except for the victim's skull. The victim died at the scene due to a combination of the injuries to his head.[1] [Fn. 1 The cause of death was officially noted as multiple sharp and blunt trauma to the body and especially the head, with subdural subarachnoid hemorrhages of the brain and skull fracture.]
>
> In the early morning hours of April 5, 1998, Cherie Walber identified the body as that of her son, Eric Walber.[2] [Fn. 2 Cheri Walber could not identify her son by his facial features. Not until she looked at his tennis shoes and the rest of his body was Ms. Walber able to recognize her son.] Walber, a 16-year old student at Albany High School, worked part-time as a delivery boy at Pizza Express in Albany, Louisiana, and used his red Ford Escort to make deliveries. Walber had been working the night of April 4, 1998, and his last known delivery was to Mary Ann Davis on Blahut Road, in Albany. Walber arrived at Davis' residence sometime around 8:15 p.m. and stayed for approximately five or six minutes.
>
> Cheri Walber gave police a description of her son's car and its contents. She stated that Walber did not wear a uniform while working and that his car had

no decal or other identifying feature that would have indicated he was delivering pizza. Walber had been intending to leave on a ski trip the next day with friends, and his mother informed police that he would have been carrying approximately $200 in cash for the trip in his tri-fold wallet. In his car, Walber kept a policeman's nightstick for protection. Because his luggage had been sent ahead, Walber had a backpack and smaller "fanny" pack in his car packed for the trip. In his backpack, Walber had a pair of Girbaud jeans and a Tommy Hilfiger shirt. In addition, Cheri Walber told police that her son had taken a Scrabble board game, a deck of cards, a handheld electronic game and some Tommy Hilfiger cologne for the trip. She knew that Walber had borrowed a portable CD radio from a friend to take on the trip. Walber's car also contained a new set of speakers still in their packing box. Ms. Walber informed police that her son carried a wallet and wore an Albany High School ring and watch.

Initial Investigation

The initial investigation by the Tangipahoa Parish Sheriff's Office of the location where the body was found revealed long skid marks in the gravel of Crisp Road. Blood was found at the termination of the skid marks and was scattered about in different areas. One eyewitness described the road as looking like someone had spun the tires of a vehicle or was going very fast and then skidded.

The victim's car was discovered on April 8, 1998 behind an abandoned school in nearby Livingston Parish, Louisiana, and was sent to the crime lab for processing. A large blood-stained area was found in the hatchback of the vehicle and more blood was found throughout the car. All of the blood was consistent with the victim; no DNA foreign to the victim was recovered. Although several partial fingerprints or smears were found, none was suitable for identification.

The Tangipahoa Parish Sheriff's Department, and the nearby Livingston Parish Sheriff's Department which was assisting, received leads and information from several persons. Michael Weary was questioned as a possible suspect, but claimed he had been at a wedding the night of April 4, 1998. Many people were questioned in connection with this matter, but the case remained dormant for years.

Sam Scott Comes Forward

Two years later, Sam Scott, an inmate at Hunt Correctional Center, asked to speak to Livingston Parish authorities in April 2000. At that time, Scott was incarcerated on an unrelated conviction for distribution of cocaine with a five year sentence. His sentence qualified him for the boot camp program at Hunt. After completion of the boot camp program, he could have been released on intensive parole in 180 days. However, Scott's conscience was bothering him and he could neither eat nor sleep; consequently, he asked the boot camp program administrator to contact Livingston Parish authorities.

Prior to his coming forward, the name of Sam Scott had never come up in the investigation of Walber's murder by officials in either Tangipahoa Parish or Livingston Parish. When Scott met with the Livingston Parish detectives, he gave several differing accounts of Walber's murder and of his involvement, as well as the involvement of neighborhood friends whom he had known for years.

Ultimately, Scott gave four recorded statements to police[3] [Fn. 3 The dates these statements were recorded are: (1) April 18, 2000 at 10:07 a.m.; Vol. 1, p. 127-132; (2) April 28, 2000 at 10:36 a.m.; Vol. 2, p. 339, 337, 334, 341-345; (3) April 25, 2000 at 11:21 a.m.; Vol. 1, p. 133-147; and (4) May 1, 2000 at 2:50 p.m.; Vol. 1, p. 148-161] and one unrecorded statement,[4] [Fn. 4 Police interviewed Scott and obtained an unrecorded statement from him on April 24, 2000. Vol. 2, p. 338, 340.] each differing in certain respects. However, in each of his statements, Scott implicated the defendant, Randy Hutchinson, James Skinner, Shadrick Reed and Darrell Hampton.

Scott testified at the defendant's trial that on the evening of April 4, 1998, after dark, the defendant, Scott, Hampton, Reed, Hutchinson and others were standing in front of the home of an individual known as "Popeye" who lived near Hutchinson. The defendant was wearing a pinkish dress shirt and slacks. Since this was not his normal type of clothing, Scott believed the defendant had come from some event or special occasion earlier in the evening. The men were passing the time gambling by shooting dice.

When the defendant lost all of his money, Scott heard him say that he needed to obtain more money and that he was going to rob someone. At that time, a red car which was unfamiliar to Scott, came from the direction of Highway 43 onto McCarroll Street where the men were. Scott said they could not see who was in the car but the defendant said that if the car passed by again, he would rob whoever was in the car.

Approximately 15-20 minutes later, as Walber driving the red car was returning from his pizza delivery, he drove back by the group of men. Hutchinson flagged Walber down by standing in front of the car on the street. The defendant ran up to the driver's side and hit Walber three times in the face through the open driver's side window. The defendant and Hutchinson opened the driver's door and pulled Walber out of the car and started beating Walber in the face outside of the car. The defendant took a black wallet and ring from the victim. Scott described the victim as wearing blue jean shorts.

The defendant told Scott, Reed, and Hampton to take a ride with him to get some marijuana. Hutchinson pushed Walber through the passenger door and into the hatchback of the car. With the defendant driving, Scott in the front passenger seat and Hampton, Hutchinson and Reed in the back seat, the men drove approximately 2-3 minutes and parked the car on a gravel road off of nearby Presbyterian Road in Springfield, Louisiana, near a church and a graveyard. According to Scott, there was no discussion where they would go as the defendant, who was driving, simply stopped at this location.

The men exited the vehicle and Hutchinson pulled the victim from the hatchback onto the little gravel road. Hutchinson began to beat Walber with a black, shiny stick that Scott had not seen before the men got into the car. The defendant hit the victim in the face with his hands while Scott, Hampton and Reed stood by. The beating continued for 15-20 minutes, with the victim ultimately on his knees in front of the car's headlights, until the defendant stated that it was time to go.

The men re-entered the vehicle with the defendant driving, Scott in the passenger seat and Hampton, Hutchinson and Reed in the backseat. Once again

Hutchinson had pushed the victim into the hatchback. Scott stated that the victim was making moaning sounds but that he could not understand what he was trying to say. Once again, there was no discussion as to their destination. The defendant drove on Highway 43 going back toward McCarroll Street.

About 2-3 minutes later, the defendant stopped the car in an area of an abandoned house off of Highway 43. The victim was again removed from the car by Hutchinson through the passenger side and beaten with the stick. The victim, who was bleeding and lying on the ground, attempted to crawl away but was unable to do so because Hutchinson prevented his escape. None of the other men attempted to help the victim but Hampton stated that he was going to leave. The defendant told Hampton that no one was going to leave.

After 15-20 minutes, the defendant announced they were leaving and the men returned to the car. With the defendant driving, the men traveled farther down Highway 43 toward Albany. The defendant saw a car he recognized and flashed his lights. The defendant then pulled the red car into the parking lot of a convenience store called The Potluck.

Eric Charles Brown was driving the other vehicle with James Skinner as his passenger. Brown turned around and joined the defendant at The Potluck after the defendant flashed his lights at him. The defendant left the car and walked up to the driver's side of the other vehicle to speak to Brown. Skinner got out of Brown's car and approached the red car to ask Scott and Hampton if they had any marijuana. When they told him they did not, Skinner walked back to Brown's car and spoke to the defendant. Scott did not hear the defendant's conversation with either Brown or Skinner. While the car was parked, Hampton leaned his head out and asked Brown for a ride home; Brown refused.

After their conversation was completed, the defendant and Skinner walked back to the red car. With Skinner driving, the defendant moved to the front passenger seat with Scott sitting on the console between them. Hampton was seated in the backseat behind the driver and Reed was in the backseat behind the front passenger. Hutchinson was in the hatchback with the victim. According to Scott, they were "like sardines in a can."

Skinner drove the car to the gymnasium of the abandoned Springfield Junior High School. Brown followed in his own car. At that location, everyone got out of the vehicles. Hutchinson removed the victim through the passenger door.

Because Brown had refused to give Hampton a ride home, Brown and Hampton got into a fight. Brown punched Hampton in the face between the eyes above his nose three times.[5] [Fn. 5 The state presented evidence that on April 21, 1998, the Livingston Parish Sheriff's Department arrested Hampton on an unrelated charge and took a picture of him. That picture shows a little healed-over area of skin between his eyes, just above his nose.] Meanwhile, Hutchinson continued to beat Walber on the ground in front of Walber's car. The defendant and Skinner talked while Reed and Scott stood there.

After Brown and Hampton's fistfight, the men all returned to their vehicles and sat in the same positions as before and drove off again. Instead of trying to push the victim into the car through the passenger door, however, Hutchinson put the victim into the hatchback through the hatchback door.

Skinner drove the red car to Crisp Road in Tangipahoa Parish. According to Scott, all of the prior activity had occurred at locations in Livingston Parish. The badly beaten Walber was taken out of the hatchback by Hutchinson. All of the men exited their vehicles. Brown stayed at that location for a few minutes but left in his own car after telling Skinner he would see him later. According to Scott, the victim could not say anything that anyone could understand.

After Brown left, Hutchinson and Weary took the victim to the middle of the gravel road, each holding up one of the victim's sides. Skinner got back in the car and drove the car a little way up the road and revved the engine. Accelerating, Skinner drove the car toward the men in the street. The defendant and Hutchinson let go of the victim and Skinner hit the victim with the car. Skinner turned the car around and ran over the victim again, who was now lying on the ground. Skinner then backed up over the victim's body. According to Scott, the victim did not move after being hit by the car. The defendant and Skinner moved the victim's body to the side of the road, leaving the victim lying face down.

The men returned to Springfield to Melvin Tillman's house. There, Scott saw Tillman and Ricky Color from a distance. Scott, Reed and Hampton got out of the car and Scott walked home. Scott admitted he had smoked marijuana that night.

While in the car, Scott saw a Scrabble board game, a hand-held electronic poker game, a deck of cards and a portable CD player. Scott saw new car speakers, a school backpack and a smaller travel bag. In the backpack were Girbaud blue jeans and a Tommy Hilfiger shirt. According to Scott, Hutchinson took the shirt and the defendant had the victim's school ring. In addition, the defendant took the money from the victim's tri-fold black wallet. Scott maintained that he did not receive anything from the victim's car or person.

Scott claims he saw the red car the next day driven by the defendant with Hampton as passenger, but claims he did not talk to them. A day or so after that, Scott and his passenger Robert Brewer saw the red car again being driven by the defendant. At that time, Scott stopped his car and Brewer talked with the defendant.

Scott admitted he did not tell the authorities the whole story the first time, nor on the subsequent times that he spoke with them. In fact, in his first statement, he did not even admit to being present but told authorities that someone had told him the facts. At the time of the defendant's trial, Scott was serving his five year sentence, as he had not been able to participate in the boot camp program due to the need for his presence in Livingston Parish during the investigation of this case. In exchange for his testimony, Scott was offered a deal to plead to manslaughter for his role in the Walber murder and to receive a sentence of 10 years, to be served concurrently with the sentence he was presently serving.

Eric Charles Brown's Testimony

Eric Charles Brown testified that he and James Skinner were hanging out, selling drugs and drinking on the evening of April 4, 1998. After receiving a call to deliver some drugs, Brown and Skinner drove in Brown's car, which was well-known in the neighborhood. Brown, the driver, saw someone blinking his lights at him as he drove down Highway 43 and pulled into the parking lot of The Potluck

convenience store. The defendant, who had blinked his lights at Brown, got out of the small red car he was driving and came over to talk to Brown. Brown could see other people in the red car but had never seen the car before. The defendant asked Brown if Brown had a gun. When Brown replied that he did not, the defendant asked Skinner the same question. Skinner replied that he had a gun on him. Skinner and the defendant then walked to the back of Brown's vehicle to talk.

According to Brown, and contrary to Scott's assertion, Skinner got back in Brown's car and told Brown to follow the defendant after the defendant and Skinner finished their conversation. Driving his car, Brown followed the defendant driving the little red car to Presbyterian Road. When they exited the red car, Brown observed Hampton, Hutchinson, Reed, Scott, and the defendant, all of whom were well known to him. In addition, Brown saw "a little white guy" with them.

Hampton asked Brown for a ride home but the defendant told Brown to refuse. Brown knew the defendant better, so he told Hampton he would not give him a ride. Brown got into a fight with Hampton during which he punched Hampton in the face two or three times. Brown was not paying attention to anything else that was occurring. He was at this location only 5-6 minutes, because the defendant told Brown the defendant was trying to take care of some business and that they should all leave.

Brown did not know what the defendant meant by this statement, but got back in his car with Skinner and followed the defendant again. According to Brown, the defendant was in charge of what was occurring. Brown told Skinner that he did not want to be involved with whatever was going on. Skinner told Brown he wanted to get in the car with the defendant because the defendant had borrowed his gun. Brown then flicked his lights at the defendant, who was preceding him, and the defendant turned onto Crisp Road.

As Skinner exited Brown's vehicle, Brown asked Skinner if he was going to stay with the defendant and the others. Skinner said that he was. Brown saw the men getting out of the red car, including the victim being removed from the hatchback. Brown had eye contact with the victim and turned his head, not saying anything.

Brown left the area and drove to Springfield to complete his drug transaction. He saw the red car again at a stop sign as he was returning, but did not stop. He later heard on television that a young man was killed and realized that the victim was the young man he had seen with his friends and that the murder must have occurred after he left. However, he did not say anything to authorities at that time.

A few days after the murder, the defendant asked Brown for $300 because he had "to blaze for a minute." Brown understood this to mean that the defendant was going to leave town.

Brown was in jail at the time he testified at the defendant's trial. He had a 1991 prior drug conviction and a 1999 conviction for attempted distribution of cocaine, for which he was serving a 15 year sentence. He admitted he did not talk to police about what he knew until he was arrested on his current charges. Brown admitted that his testimony at trial was not the same story that he initially told police. He claimed that he received no deal in exchange for his testimony,

although he acknowledged that his sentencing exposure was much greater for the two counts he had been facing, that the sentences could have been set to run consecutively, and that he could have been billed as an habitual offender and was not. Additionally, Brown admitted he was arrested for aggravated kidnapping, car-jacking and armed robbery in connection with Walber's murder, but that he was not charged with any of these offenses. He also acknowledged that he was caught with a handcuff key while in prison but was not prosecuted for that offense.

Melvin Tillman's Testimony

Melvin Tillman was one of the persons who gave authorities information during their initial investigation. Tillman contacted Livingston Parish authorities when it became known that they were looking for information on the victim's red car. Tillman told Detective Kearney Foster of the Livingston Parish Sheriff's Department that on the evening of April 4, 1998, he and Ricky Color were together smoking crack cocaine. He claimed that he was no longer under the effect of that drug when he saw the defendant, known to him as Mike-Mike, in a small reddish car. Tillman saw the defendant on McCarroll Road approximately 50 yards from Hutchinson's house. He described that Hampton was driving the car with someone named Terrell, now deceased, and Reed was sitting in the passenger side. Tillman claimed that the defendant was sitting in the back seat with Larry Norman, Dartania Tillman and another individual he did not know.

Tillman noticed the car was covered with blood and that the passenger side light was hanging out. When Tillman commented on the condition of the car, the occupants told him they had hit a dog and had to run over it a few times in order to kill it. Subsequently, the defendant left the car and asked Tillman for a ride to Albany. The defendant also asked Tillman if he wanted to buy an Albany High School class ring, which Tillman declined.

Either the next night or a few nights later, Tillman again saw the red car at his house. This time, Reed and Hampton were in the car. Tillman told them they needed to do something about all of the blood in the car because the car was starting to smell. Tillman has prior convictions for both possession and distribution of drugs, as well as misdemeanor theft.

Robert Brewer's Testimony

Robert Brewer knew all of the individuals named by Scott and Brown for many years. Brewer claimed he saw the little red car on April 4, 1998 at approximately 7-7:30 p.m.[6] [Fn. 6 Brewer named this date a Friday, not a Saturday as was established by all the other witnesses, but later stated he was not sure about dates.] He saw the car later when he was out riding with Scott. When he saw the defendant driving the red car, he asked Scott what the defendant was doing with the car and Scott said he did not know. Subsequently, the defendant asked Brewer if he wanted to buy some brand new speakers. Brewer saw the defendant with the red car again a few days later.

Brewer had a prior 1989 conviction for theft and a 1994 conviction for distribution of cocaine. Brewer indicated that he and Scott used to "hang together" and both sold drugs, as did Melvin Tillman.

Jeffrey Ashton's Testimony

On April 4, 1998, Jeffrey Ashton was 10 years old and lived close to McCarroll Road. At approximately 11:20 p.m., he was walking home from a music program at the church across the street from his family's trailer when he heard footsteps. He ran and hid under his family's trailer. From that vantage point, he saw the defendant, Hutchinson and Hampton, whom he knew from the neighborhood. Ashton watched as the defendant threw something silver into a ditch. He then saw the three men get back into a red car. The next day, Ashton rode his bike to the ditch and found a Tommy Hilfiger cologne bottle. Ashton saw the car frequently the next day being driven by Hutchinson, Reed, the defendant, and someone else whom Ashton did not know. Ashton never saw Scott in the red car. Later that afternoon, he saw someone throw a black triangle or square from the car. Although he searched for that object, he did not find it.[7] [Fn. 7 The man who cut grass for the church found a dark black, tri-fold wallet which contained the driver's license of a 16 or 17 year old white boy in the grass of the church across from the Ashton's property. The wallet did not contain any money.]

Ashton told a teacher about what he had seen but claimed that someone else had told him the information. He initially talked to police but did not tell them what he knew. Not until Ashton was under house arrest for a juvenile offense of simple battery did he tell the police what he had seen. Ashton admitted that he plays with Scott's brother in the neighborhood where they all live.

Defendant's Alibi Testimony

The defendant claimed that he had no involvement with Walber's murder, asserting that he was out of town in Baton Rouge at a wedding at the time that the murder occurred. At his trial, the defendant presented the testimony of his girlfriend, Renarda Dominick, her aunt, Darlene Johnson, and her sister, Kimberly Dominick Armstrong, to state that the defendant was attending a wedding reception until 9 or 9:30 p.m. in Baton Rouge. According to these witnesses, the defendant did not return to Springfield until well after 10 or 10:30 p.m., after Walber's body had been discovered.

However, the state presented evidence that the warden of the Tangipahoa Parish jail and two other deputies overheard the defendant as he was speaking to his father after he had been arrested and charged. Weary was overheard to say that he did not understand why he was in jail for the murder, as he was just an innocent bystander. Thus, Weary placed himself at the scene of the crime.

State's Rebuttal Testimony

To rebut the defendant's evidence of alibi, the state presented the testimony of Rene' Helm, the bride at whose wedding the defendant was in attendance on April 4, 1998. According to Ms. Helm, her wedding began at 4 p.m. that afternoon and her reception began at 6 p.m. Although she and her husband rented the reception hall from 6 to 9 p.m., they did not use the hall for the entire time. She and her husband were the last to leave the reception between 8:30 p.m. and 8:45 p.m. While she had seen the defendant at her reception, she did not see him or his girlfriend when she left, so assumed he had left earlier.

After considering all of the evidence presented, the jury unanimously found the defendant guilty of first degree murder. *State v. Weary*, 2003-3067 (La. 4/24/06), 931 So.2d 297, 302-09.

REASONS FOR DENYING THE WRIT

As will be seen, exercise of this Honorable Court's discretionary jurisdiction is unnecessary on the facts of this case. Petitioner has mischaracterized this case by ignoring or overlooking critical trial evidence, mischaracterizing the evidence presented at the trial by assuming the state witnesses were lying, mischaracterizing the evidence presented at the post conviction relief hearing by assuming the petitioner's witnesses were truthful, and ignoring the fact that the jury and trial court judge must determine witness credibility when making their decisions.

I. The recitation of the facts by the Louisiana Supreme Court above, while thorough, fails to include several important facts which will be detailed here as they bear on petitioner's ability to carry his burden of proving violation of his Constitutional rights.

A. Sam Scott

For instance, when Sam Scott testified at the several trials in this and the companion cases, he specified that on the night of the murder Weary was dressed nicely in a reddish pink dress shirt and black slacks, which clothing were not something Weary would normally wear. Also, while Scott was initially participating in the "Impact Program" at Hunt's Correctional Center, his speaking with police and implicating himself in this crime disqualified him from that program and he was not released pursuant to the program guidelines of 180 days of intensive incarceration and then early parole. Ironically Scott's name had never been mentioned in connection with the Walber murder.

Prior to Scott testifying at Weary's trial, Scott's lawyer negotiated a deal in which Scott would plead to manslaughter and receive a ten year sentence. This fact was made known to the jury. Scott and Brown also testified in all of the other defendants' trials.

B. Shadrick Reed

After being arrested, Shadrick Reed confessed to law enforcement, implicating himself in Walber's murder along with petitioner, James Skinner, Randy Hutchinson, Daryl Hampton, Sam

Scott and Eric Charles Brown. Petitioner, Skinner, and Hutchinson were indicted by a Livingston Parish grand jury for first degree murder. Reed and Hampton were indicted for second degree murder. The grand jury declined to indict Brown.

C. Eric Tillman

According to Tillman, when he asked Reed and Hampton about the blood on the outside of the little red car, they laughingly said they had run over a dog, "a big dog like a St. Bernard." Tillman said he encountered the group again a short time later. This time Weary asked Tillman if Tillman wanted to buy an Albany class ring. Tillman declined. Weary did not graduate from Albany High School.

D. Petitioner's admission to his father

The conversation with his father in which petitioner told his father he did not understand why he was in jail as he was just a bystander occurred immediately after bond was set and he was allowed to make a phone call.

II. Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's Brady v. Maryland.

Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's *Brady v. Maryland.* The information cannot be considered material under this Honorable Court's definition of materiality and petitioner did not show that, in conjunction with the trial evidence that has been ignored or overlooked by petitioner, the information would have changed the outcome of this trial.

The holding in *Brady*, requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." *Brady*, 373 U.S. at 87, see also *Moore v. Illinois,* 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). This Court further explained that

requiring materiality shows concern that the suppressed evidence might affect the outcome of the trial. *U. S. v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).This Court has stated that materiality requires showing a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481.

A. Randy Hutchinson's medical records.

Regarding these allegations, the trial court stated in its written reasons "even in the event that the fact of non-disclosure itself may be classified as a violation, none of the evidence, identified, in the event that it had been effectively utilized by the defense counsel at trial, produces a reasonable probability that the defendant would have been aquitted." (Appendix B-6) The trial court went on to say, "...Randy Hutchinson's medical records do not show that he could not have participated in the crime by virtue of his physical condition. To the contrary, Hutchinson's medical records indicate that he was not compliant with the limitations on physical activity prescribed by his treating physician." (Appendix B-6)

At the post conviction relief hearing, petitioner called an orthopedic surgeon, Dr. Paul Dworak. His main purpose was to use Randy Hutchinson's medical records to counter Sam Scott's testimony of Hutchinson's involvement in the murder in an attempt to undermine Scott's credibility. Dr. Dworak claimed that Hutchinson could not have acted as Scott testified because the murder occurred eight days after Hutchinson had knee surgery. According to Dr. Dworak, it "usually" takes 6 weeks to heal and that if two days after surgery one bent the knee at a 90 degree flexation (as if sitting in a chair) he would have a "high probability of pulling the whole thing apart." Dr. Dworak concluded that Hutchinson's repair would have failed if he acted as Sam Scott testified.

However, Dr. Dworak admitted on cross examination that according to the medical records on April 3, 1998 (the day before the murder) Hutchinson was non-compliant with his treatment and Hutchinson was not wearing his splint or crutches, but that the repair was not disrupted. The medical records show that Hutchinson's Doctor noted a month after the murder on May 5, 1998 that Hutchinson had "good flexation (100%)[,]" the tendon was "healing nicely[,]" and that the internal wire was broken but the sutures were not. Dr. Dworak admitted on cross examination that Hutchinson would be able to walk if the wire was broken.

The State's orthopedic surgeon, Dr. Kinnet, testified on August 20, 2012 and his testimony appears in the transcript from that date on pages 73-109. Dr. Kinnet also noted that the April 3, 1998 medical records indicate that Hutchinson was not wearing his splint or crutches. He opined that t was significant because if the corresponding pain was acceptable to Hutchinson then Hutchinson could walk and move. Dr. Kinnet indicated that often patients, especially young patients, are often not compliant and that biological factors affect a patient's rate of healing.

In contrast to Dr. Dworak, Dr. Kinnet opined that Hutchinson could act as Sam Scott testified. He based this opinion on the April 3, 1998 medical records and the type of repair made. The post surgery repaired knee would be "far stronger than before." In fact, this was the function of the repair. Dr. Kinnet did admit that the actions of Hutchinson as testified to by Sam Scott put his repair at risk. However, Dr. Kinnet stated that if Hutchinson tore the wire but not the sutures, or the sutures but not the wire, then he could stand.

More specifically, Dr. Kinnet stated that the wire would rupture because of being fatigued, which he described as being repeatedly bent, like a wire hanger. Because of this, a rupture of the wire shows fatigue of that wire but necessarily also shows motion of the knee which indicates that healing is taking place. One must recall that the medical records show that Hutchinson had torn the wire but not the sutures.

As said above, the medical records show that Hutchinson was non-compliant with his treatment. In other words, Hutchinson was not using crutches and the knee brace as directed. The records show that Hutchinson was ambulatory at his initial checkup following surgery and that he missed a follow up appointment within a week of this murder. Petitioner's expert, Dr. Dworak, based his opinions on what generally occurs with patients after this surgery. As he admitted on cross-examination, each patient is different and heals in varying degrees.

Although Weary's expert, Dr. Dworak, states that Hutchinson could not have acted as Sam Scott testified, that ultimate opinion is not credible given the admissions he made on cross examination. His testimony regarding the evidence shown in the medical records, and the effect non-compliance with treatment has on a repair such as Hutchinson's. Given the admissions, the jury would not possibly have accepted Dr. Dworak's ultimate opinion and found Sam Scott's testimony to be fantastic.

Furthermore, how the testimony of an expert would have impacted the jury must be viewed in light of the other trial testimony. For instance, at the trial Sam Scott and Eric Charles Brown both testified that Randy Hutchinson was injured and limping. Jeffrey Ashton also testified he saw petitioner driving Eric Walber's car the day after the murder, and that he saw petitioner, Hutchinson, and Darrell Hampton get into the red car after petitioner threw the cologne bottle into the ditch. Deputies testified that immediately after bond was set, petitioner called his father in California and said that he was just a bystander.

In order to believe Dr. Dworak's ultimate opinion that Hutchinson couldn't walk or bend his knee, the jury would have had to disregard all the other evidence presented at the trial. Such a conclusion is absurd and therefore, this evidence cannot be said to undermine confidence in the jury's verdict.

B. Eric Charles Brown's testimony.

The information presented by petitioner at the post conviction relief hearing merely shows that at some point Brown sought a deal with the State in exchange for his testimony. The fact that Brown may have sought consideration is irrelevant under the law. While the courts have never limited a *Brady* violation to cases where the facts demonstrate that the state and the witness have reached a bona fide, enforceable deal that remained undisclosed and "evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility[]",*Giglio v. United States,* 405 U.S. 150, 155 (1972), the main question is "the extent to which the testimony misled the jury, not whether the promise was indeed a promise ...." *LaCaze v. Warden LCIW*, 645 F.3d 728, 735 (5th Cir. 2011). "In *Napue v. Illinois*, 360 U.S. 264 (1959), [this Court] explained that the key question is...whether the witness "might have believed that [the state] was in a position to implement ... any promise of consideration." *Id.* (emphasis added), citing *Giglio*; and citing *Tassin v. Cain,* 517 F.3d 770, 778 (5th Cir. 2008).

In other words, the question is whether the witness believed he had been promised or was likely to receive some consideration for his testimony. Here, Eric Charles Brown unequivocably testified at Weary's trial that he had received no "deal" in exchange for his testimony. His answer to this line of inquiry clearly shows his perception as to whether he had any inducements to testify. The fact that he or his attorney initially asked for consideration is therefore irrelevant and under the above case law can hardly be considered *Brady* evidence.

Furthermore, the documents admitted at the post conviction relief hearing in which Brown or his attorney asked for consideration on other charges does not force the conclusion that Brown's motives for testifying were other than what he told the jury. Without being given consideration, Brown testified anyway because he felt the family deserved to know what happened because Walber was nice to his little sister.

C. Sam Scott

It should first be noted that the argument made by petitioner regarding the statement by Reggie Jackson to this Honorable Court is not the same as that made to the trial court, who issued the last reasoned decision on this application for post conviction relief. There, petitioner pointed to the statements given by a Reggie Jackson and a Kedrick Johnson in an attempt to show that the State withheld evidence showing that Sam Scott *manipulated the system* thereby attempting to case doubt on his credibility. These statements appear as petitioner's post conviction relief exhibits 27 and 28.

Jackson's statement was specifically argued on post conviction relief in an attempt to show that Scott was untruthful when he testified to the jury about an affidavit Scott had signed while in prison and that was used by defense counsel trying to impeach his testimony. Reggie Jackson's statement was taken on March 5, 2002. This was the day before the jury recommended the death penalty for petitioner. In other words, this statement was taken when the trial was nearly completed, after Scott had testified at petitioner's trial, was cross-examined, and was made to read the affidavit while on the witness stand. This statement was probably was never seen by anyone involved with the actual trial until after it was over, it at all.

The State argued to the trial court on post conviction relief that even if Jackson's statement is true, which was not shown at the post conviction relief hearing, it did not necessarily contradict Scott's trial testimony. This is because Scott did not actually testify at trial that he did not know what the affidavit said. Scott merely asserted that he did not read the affidavit before he signed it. While this may seem like a small and insignificant difference, when one takes into account that the entirety of Scott's cross-examination it is apparent that he was repeatedly asked the same detailed questions about his previous lies and that Scott obviously did not wish to

answer those questions. It is not surprising that Scott gave minimal information in reference to the affidavit.

The statement petitioner purportedly by Kedrick Johnson appears in petitioner's post conviction relief exhibit 27. This is actually a supplemental report dated May 17, 2000 in which Detective Murphy Martin documents that Johnson claimed to have lied to police the day before and claimed that Sam Scott told him what to say because it would help him get out of jail. Since the report states that Chief Foster contacted Murphy Martin to say that Johnson wished to speak with him, one can see that this conversation took place at the Livingston Parish Jail. Testimony at this trial, and common experience of those who work in the criminal justice field, shows that an inmate who provides information to police is not well received in the prison system. According to the trial testimony, by the time Johnson made this statement, it was known within the prison system that Sam Scott was informing the police on the Eric Walber murder.

Regardless, like with Eric Charles Brown, under the law it does not matter if Sam Scott believed that informing could get him out of jail when he first began his endeavors. What matters is whether Scott received consideration from the prosecution (or believed he would) in exchange for his testimony and if so, whether that consideration was disclosed to the defense. In this case, Scott did receive consideration and it was disclosed. Scott's trial testimony makes it clear that he was being allowed the opportunity to plead guilty to lesser charges and a ten year sentence in exchange for his testimony. It was also made abundantly clear on both direct and cross examinations that Scott had lied to police numerous times.

Like with Eric Charles Brown, under the law it is irrelevant that Scott may have tried to get a better "deal" or whether he told with other inmates that information on this murder may help them too. The legal burden on a claim that a *Brady* violation occurred requires that petitioner show that this information is material to issue of guilt or innocence or that jury would

likely have chosen a different verdict if presented with the information. Petitioner failed to meet that burden at the post conviction relief hearing and ought not now be allowed to change his argument regarding the alleged importance of these statements.

D. Rene Helm statement

Petitioner claimed on post conviction relief and claims here that the statement to police by Rene Helm is inconsistent with her trial testimony, could have been used for impeachment, and ought to have been disclosed.

First, petitioner was aware that Rene Helm was a potential alibi witness and his trial counsel actually had asked his investigator to speak with her in preparation for trial. Because of this, petitioner can hardly claim that he was prejudiced by the State's failure to disclose a potential alibi witness of whom he was already aware and interviewed. The same is true for the statements given to police by Renarda Dominick, Kim Armstrong, and Darlene Johnson as well as the existence of the groom, Ed Helm.

Additionally, post conviction counsel entered into evidence at the hearing a statement given to police by Rene Helm. When counsel questioned the prosecutor, Charlotte Herbert, post conviction counsel stated that Helm's trial testimony was that she and her new husband were the last to leave the reception. Herbert agreed that the statement to police was different from what counsel had stated in that the statement to police stated other persons were there when Helm left the reception. Counsel had a similar conversation with Corbit Ourso.

The fact is counsel completely mischaracterized Helm's trial testimony when questioning the prosecutor and defense trial counsel at the post conviction relief hearing. When one reviews the actual trial transcripts, it is apparent that Helm did not maintain at the trial that she was the last to leave the reception and stated others were there. (Weary Trial Trans. pp. 2289-90)

Second, Rene Helm's statement to police was not actually inconsistent with her trial testimony. In the police statement, Helm stated she had rented the hall from 6:00 to 9:00 pm but left before their time was completed, that she and her husband left between 8:30 and 9:00 pm, that other people were still present and cleaning up when she left, the disc jockey was no longer playing, and that she saw Weary at the reception but did not know for sure if he was there when he left. (Weary PCR exhibit 40) At trial, Helm testified that the reception began at 6:00 pm, they did not use all the time that the hall was rented, she left between 8:30 and 8:45 pm, that other people were still present and cleaning up when she left, she saw Weary at the reception, she did not see Weary when she left and assumed he was gone, she had no idea what time Weary left the reception. (Weary Trial Trans. pp. 2288-90) The only information from her trial testimony that is not contained in her statement is that she assumed Weary had left before her since she did not see him, but Helm qualified this by saying that she had no idea what time Weary left.

On this issue, the trial court stated in its Reasons for Judgment on the post conviction relief that:

> ...Ms. Helm's statement regarding the possible time of the applicant's departure from the wedding reception differs very little from her testimony at trial. In both her statement to police and her trial testimony, she indicated that she was not certain of the applicant's time of departure. In both accounts, Ms. Helm approximated that she left the reception between 8:30 and 9:00 p.m. In her statement, Ms. Helm indicated that she was not sure whether the applicant was still present at the reception when she left; at trail, Ms. Helm testified that she had not seen the applicant at the time that she left and had assumed that he was gone.
>
> Ms. Helm's uncertainty as to the time of the defendant's departure was consistent with the accounts of other witnesses called by defense counsel at trial. Additionally, because Ms. Helm's statement would not have been appreciably inconsistent with her trial testimony, it would not have been an effective method of impeaching her testimony. As such, her statement cannot be properly classified as "material" in a Brady analysis, nor can it be said to produce a reasonably probability of acquittal. (Appendix B-7)

Since Rene Helm's statement to police is not different than her trial testimony, it is likewise not exculpatory or usable for impeachment and the prosecution is under no duty to

disclose that information. Since there was no duty to disclose, no *Brady* violation can have occurred. In fact, Rene Helm's trial testimony was such that Weary's appellate counsel argued that it was exculpatory and should have been disclosed. Trial counsel likely thought so as well. Regardless, petitioner cannot and did not show that use of this information would have led to a different outcome in his trial.

III. Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's Strickland v. Washington allegations. Petitioner failed to prove that his counsel's performance was so deficient that, considering the trial evidence that has been ignored or overlooked by petitioner, that confidence in outcome of this trial is necessarily undermined or the outcome of the trial would have been different.

Exercise of this Honorable Court's discretionary jurisdiction is unnecessary since the Louisiana courts did not err in denying post conviction relief on the basis of petitioner's Strickland v. Washington allegations. Petitioner failed to prove that his counsel's performance was so deficient that, considering the trial evidence that has been ignored or overlooked by petitioner, that confidence in outcome of this trial is necessarily undermined or the outcome of the trial would have been different.

The standard for judging trial counsel's performance was established by this Honorable Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, this Court established a two-part test in which the petitioner must prove deficient performance and prejudice therefrom. See *Strickland*, 466 U.S. at 697. To prevail on the deficiency prong, Skinner must demonstrate that his counsel's conduct failed to meet the constitutional minimum guaranteed by the Sixth Amendment. "The [petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Any analysis of trial counsel's performance must also take into account the reasonableness of counsel's actions in light of all of

the circumstances. See *Strickland*, 466 U.S. at 689. "[I]t is necessary to 'judge . . . counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Lockhart v. Fretwell*, 506 U.S. 364, 371 (1993) (quoting *Strickland*, 466 U.S. at 690).

In order to prove prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Furthermore, "[t]o meet the prejudice prong, the [petitioner] must affirmatively prove, and not merely allege, prejudice." *DeVille v. Whitley*, 21 F.3d 654, 659 (USCA5 1994); *Theriot v. Whitley*, 18 F.3d 311, 314-15 (USCA5 1994). In this context, a reasonable probability of prejudice is "a probability sufficient to undermine confidence in the outcome." *Id.* In making a determination as to whether prejudice occurred, federal courts review the record to determine the relative role that the alleged trial errors played in the total context of the trial.

"...[I]t is not enough, under Strickland, 'that the errors had some conceivable effect on the outcome of the proceeding.'" *Motleyv. Collins*, 18 F.3d 1223, 1226 (USCA5 1994) (quoting *Strickland*, 466 U.S. at 693). Thus conclusory allegations of ineffective assistance of counsel, with no showing of effect on the proceedings, do not raise a constitutional issue sufficient to support federal habeas relief. *Miller v. Johnson*, 200 F.3d 274, 282 (USCA5 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (USCA5 1983)), cert. denied, 531 U.S. 849 (2000).

... On this issue the trial court made very specific findings which will be discussed below.

A. Sam Scott

At the post conviction relief hearing, post conviction counsel called Lakendrick Scott (Sam Scott's brother) and Doris Dantzler-Scott (Lakendrick's wife) who testified that Sam Scott was at the Ponchatoula Strawberry Festival the night and time that Eric Walber was murdered. The argument is that Sam Scott could not have witnessed or participated in the murder.

Doris testified that she saw Lakendrick at about 7:00 pm at the Strawberry Festival and was with him for 45 minutes to an hour before she left. She later picked Lakendrick up between 10:00 and 11:00 pm. Doris never came forward even though Lakendrick is Sam Scott's brother. (See generally, Trans. 8-12-2012 pp. 38-45) Lakendrick testified that he and Sam Scott went to the Strawberry Festival on 4-4-1998, the night Eric Walber was murdered. Lakendrick claims that he and Sam met with Doris and her friend while talking to Shadrick Reed, Darryl Hutchinson, and 2 others about 10 to 15 minutes after arriving. Lakendrick testified that he and Sam were there until Sam's girlfriend got off work "around 10 or 11" and that they were together the entire time. Lakendrick testified that Sam dropped him off in Springfield "around midnight"; contrary to Doris who testified she picked Lakendrick up between 10 and 11 pm. (Trans. 8-13-2012 pp. 26, 41)

On cross examination, Lakendrick admitted that he did speak with someone about the Strawberry Festival after Sam was arrested but before the trials. He thought this person was an investigator, not law enforcement, did not remember the exact time, but he recalled that they spoke at his mother's home. Lakendrick did not reach out to the District Attorney's Office or law enforcement. Despite stating he told an investigator that Sam was at the Strawberry Festival and not with Weary, on cross examination Lakendrick claimed that he did not talk before trial because he was protecting his mother and Sam. Lakendrick also stated that he joined the army in 2001 because he felt he had to leave since his mother and Sam were receiving death threats. (See generally, Trans. 8-13-2012 pp. 17-38)

Yet again, in order to believe the testimony of Doris and Lakendrick Scott, the jury would have had to disregard not just Sam Scott's testimony, but that of the other witnesses including (1) Eric Charles Brown (whose testimony was consistent with Sam Scott's), (2) Jeffrey Ashton who saw petitioner driving Walber's car and throw a bottle of the cologne that was taken

from Walber, (3) Ronnie Pinion and Charles Burise who testified they heard Michael Weary on the telephone from jail tell his father that he was a bystander and did not kill Walber, (4) Melvin Tillman who testified he saw petitioner driving a bloody red car and to whom petitioner tried to sell an Albany class ring, and (4) Robert Brewer who testified he saw petitioner in a red car and to whom petitioner attempted to sell car stereo speakers like those taken from Walber.

No rational jury would disregard all of that evidence in favor or Lakendrick and Doris' inconsistent testimony and therefore, the post conviction hearing evidence cannot be said to undermine confidence in the jury's verdict. Because of this, it cannot be said that the Louisiana courts erred in denying post conviction relief.

B. Randy Hutchinson

Regarding the medical records of Randy Hutchinson, Petitioner argues that his trial counsel was ineffective for failing to uncover the information. The lack of importance of these records is discussed above and for the sake of efficiency respondent hereby incorporates that argument here.

C. Forensic experts

In addition, petitioner claims that his trial counsel should have employed forensic experts to show the jury that Scott's account of how Walber was murdered was not true and points to the testimony by Leroy Riddick at the post conviction relief hearing. In his affidavit and at the post conviction relief hearing, Dr. Riddick opined that the trial evidence does not show evidence that Eric Walber was run over by his vehicle three times.

Post conviction counsel further allege that Corbit Ourso was ineffective because he did not hire or consult with a forensic pathologist or orthopedic surgeon. As became clear in the post conviction relief hearing, the forensic pathologist secured by post conviction counsel could not

have swayed this jury. Dr. Riddick testified on August 16, 2013 and his testimony appears in the transcript from that date on pages 485 through 508. Though he tried his best to discredit Sam Scott and the State's forensic pathologist, Dr. Mackenzie (who conducted the autopsy and testified at trial), Dr. Riddick ultimately concurred with the cause and manner of death and made admissions made at the hearing that show Scott's account is entirely plausible.

Essentially, the injuries on Walber's body indicate he was hit by a car. Dr. Riddick did not contest this. The blood evidence admitted at trial shows that Walber was hit with both the front and rear bumpers of his vehicle. This could not occur if Riddick's opinion that Walber was not hit multiple times is correct.

Dr. Riddick also concurred with much of the autopsy report and Dr. Mackenzie's trial testimony. For example, Dr. Riddick admitted that Eric Walber suffered "road rash" from his body being moved across a surface and that this is consistent with a pedestrian being hit by a car and that blood existed on both the front and rear bumper of the car, that the blood on the front bumper was consistent with hitting Walber's head, and that at some point Walber was under the car.

Also, since his affidavit stated Walber suffered injuries from the undercarriage of the car, Dr. Riddick reluctantly admitted on cross examination that some portion of the car must have gone over Walber's body. Dr. Riddick further admitted on cross examination that although his affidavit stated the car was not "revved up" that he really had no way to know from the evidence whether the car was "revved up" when it hit Walber. Dr. Riddick stated very clearly on direct and cross examination that his opinion was that Walber was not run over by the wheels of a vehicle three times and that the car was not "burning rubber." If a car were burning rubber, he opined, then the tires will peel the skin and transfer rubber to the body; since that injury did not occur Walber cannot have been run over by tires that were burning rubber. He also stated that

Walber was hit in a "low impact collision" and did not make contact with the wheel of the vehicle. Significantly, Sam Scott never testified that the actual wheel of the vehicle impacted Walber's body or whether the impact was low or high impact.

However, on cross examination, Dr. Riddick admitted that the internal injuries inflicted on the body would depend upon which portion of the car passed over Walber's body. Dr. Riddick could not say what portion of the car hit Walber. In other words, the lack of injuries that Dr. Riddick claimed supported his opinion that Walber was not run over by the wheels of a car three times turned out to be irrelevant because Dr. Riddick could not say what portion of the car actually passed over Walber and, therefore, what injuries he could expect to see. When this testimony is viewed in conjunction with the State's trial evidence on these issues and the entirety of the testimony, one cannot say that the jury would have been persuaded to choose a different verdict or that this Court should not have confidence in the verdict rendered.

D. Police investigation

In this portion of his argument, petitioner alleges that the police made admissions in their post conviction relief depositions that they simply did not make. To bolster his claim that Corbit Ourso was ineffective for failing to properly cross examine the police, post conviction counsel called Thomas Streed as an expert if criminal investigations and police interrogations. Mr. Streed opined that the police did not meet the standards of care in their handling of this investigation. However, Mr. Streed's entire testimony is undermined because he based his opinion only on information provided by post conviction counsel; he did not review the entirety of the trial evidence, or the police files.

Significantly, Mr. Streed did not know who Melvin Tillman or Jeffery Ashton were or if they had testified at the trial. Mr. Streed also did not know whether Eric Charles Brown, Melvin

Tillmna, Robert Brewer corroborated Sam Scott's testimony. This is significant because their testimony did corroborate Scott. Mr. Streed also did not know who Ronnie Pinion and Charles Burise were or that they testified that Weary telephoned his father and stated he was a bystander and did not kill anyone. This is a significant failing by Mr. Streed and undermines his testimony and credibility.

Mr. Streed also admitted at the post conviction relief hearing that it was significant that Shadrick Reed named the same participants in the murder as Sam Scott. Mr. Street then inexplicably claimed this did not necessarily corroborate Scott. Mr. Streed also found it "bizarre' that according to Sam Scott, seven people were in Walber's car but no physical evidence was found. He admitted that this finding assumed the car was clean on the inside. The trial evidence shows that the car was not clean on the inside. Post conviction counsel claimed in a post hearing memorandum that Mr. Streed determined that the police had tunnel vision but failed to recall that Mr. Streed stated on cross examination that the police developed tunnel vision after the last interview with Sam Scott and then changed his testimony to state that he did not know when it developed. (See generally, Trans. 8-20-2012 pp. 22-72) In short, Mr. Streed's testimony was unconvincing and because he only looked at what the defense provided, his credibility is slight. Notably, Mr. Streed's testimony at the post conviction relief hearing has now been relegated to footnotes in petitioners' argument to this Court.

While Mr. Ourso may not have handled this case in the way that post conviction counsel would have handled it, that does not mean that petitioner meets his two pronged burden under *Strickland*. He must prove both that Ourso was ineffective and that this deprived him of a trial with a reliable result. Quite simply, the testimony and evidence on post conviction relief was not sufficient to cause any rational trier of fact to discredit the trial testimony of Jeffery Ashton, Eric Charles Brown, Melvin Tillman, Robert Brewer, Ronnie Pinion and Charles Burise.

In other words, this Court cannot say that the evidence presented on post conviction relief is sufficient to undermine confidence in this jury verdict. It cannot be said that this trial does not have a reliable result.

E. Alibi

Petitioner also wants this Court to believe that trial counsel was Constitutionally ineffective because he failed to investigate the so-called alibi. On this issue, the trial court stated in his Reasons for Judgment:

> In the instant application, defendant contends that, after a thorough investigation by his post-conviction relief team, numerous witnesses were discovered that could have offered testimony favorable to him at the trial. Defendant asserts that the failure to call those witnesses constituted ineffective assistance of counsel, and that, under the second prong of the *Strickland* analysis, this resulted in the defendant's having been deprived of a trial with reliable results.
>
> After thoroughly considering the testimony of the dozen or so witnesses called by the defendant on August 13-14, 2012, it is apparent that all witnesses, including those called, seem to agree that Mr. Weary did in fact attend the wedding reception; but their accounts are markedly inconsistent as to when Mr. Weary may have departed the reception. As such, based upon the additional testimony, a reasonable trier of fact could have concluded that Mr. Weary did, in fact, attend the reception. However, because the pivotal issue in establishment of a viable alibi defense was the time of Mr. Weary's departure, the additional testimony could not have produced a more favorable result to Mr. Weary than that effected by the three witnesses actually called at trial. Consequently, insofar as failing to call these witnesses has been alleged as a basis for the defendant's claim of ineffective assistance of counsel, such failure ultimately created no prejudice to Mr. Weary. (Appendix B-4)

Additionally, trial counsel's affidavit and post conviction relief testimony states that he and his investigator spoke with six potential alibi witnesses, four of whom testified at the trial although one testified on behalf of the State. Darlene Johnson, Kimberly Dominick Armstrong, and Renarda Dominick all testified that they were with Weary at the wedding reception and that Weary left around 9:00 or 9:30 pm. (Weary Trial Trans. pp. 2270, 2282, 2285) Johnson further testified that she did not like Weary and Armstrong testified that she and Weary did not get

along. (Weary Trial Trans. pp. 2275 and 2281) The new witnesses uncovered by post conviction counsel would have actually contradicted the testimony of the witnesses who both arrived and left the wedding reception with Weary. Such witnesses would only have undermined Weary's alibi, not strengthened it. Given this, the Louisiana courts' denial of post conviction relief cannot be said to be error.

CONCLUSION

The Rules of this Honorable Court do not support intervention in this case. United States Supreme Court Rule 10 informs on the exercise of this Honorable Court's discretionary jurisdiction in Petitions for Writ of Certiorari involving state court convictions. That Rule states that

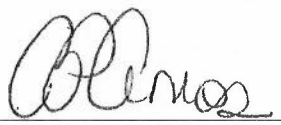
> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: ...
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. *U.S. S.Ct. R. 10.*

Most importantly, however, that rule also states "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a

properly stated rule of law." *Id.* In the case before this Honorable Court today, there is no compelling reason for this Court to grant the petition for a writ of certiorari.

Wherefore, the Respondent prays that this Honorable Court deny the petitioner for writ of certiorari.

Respectfully submitted,



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No. 11-7669

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY
Petitioner,

versus

BURL CAIN, Warden, Louisiana State Penitentiary,
Respondent,

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this the 24th day of August, 2015, pursuant to the United States Supreme Court Rule 29, the accompanying Opposition to Petition for Writ of Certiorari on behalf of the Respondent was served on each party to the proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing a copy of this document in the Unites States mail properly addressed and overnight postage prepaid.

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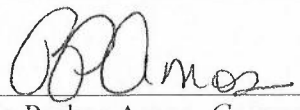

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