STATE OF LOUISIANA

PARISH OF AVOYELLES

TWELFTH JUDICIAL DISTRICT COURT

VINCENT SIMMONS
Petitioner

VERSUS

BURL CAIN, Warden
Louisiana State Penitentiary

FILED: ______________________________ ______________________________
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF

NOW INTO COURT, through undersigned counsel, comes Petitioner Vincent Simmons, DOC #85188, respectfully submitting this Memorandum in Support of Application for Post-Conviction Relief.

Procedural History

As discussed below, in 1977, Petitioner was arrested, charged and convicted of two counts of Attempted Aggravated Rape solely on the basis of the victim's in-court identification. Petitioner, a black male, was accused of raping two fourteen-year-old white female twins in rural Marksville, Louisiana. One of the alleged victims baldly claimed to law enforcement that, "All blacks looked alike to her." No physical evidence connected Petitioner to this crime, and Petitioner was subjected to an unconstitutional, highly suggestive lineup procedure.

Nevertheless, Petitioner was arrested on May 23, 1977. According to law enforcement, during the course of Petitioner's arrest, a struggle ensued and a deputy shot Petitioner in the chest. Despite his precarious health status, Petitioner was indicted on June 10, 1977 for violation of La. R.S. 14:42, Aggravated Rape, which at the time of indictment, carried a death sentence. The prosecutor filed a Motion to Amend the Indictment to two counts of Attempted Aggravated Rape in violation of La. R.S. (27) 14:42 on July 14, 1977 after the United States Supreme Court found death to be an unconstitutional penalty for La. R.S. 14:42. Petitioner was never arraigned on these amended charges.

Petitioner was arraigned on June 16, 1977, and entered a plea of not guilty to the original charge of Aggravated Rape. Petitioner was represented by a public defender, and no pretrial motions were filed on Petitioner's behalf.[1] No pre-trial motion in limine hearings were conducted in this matter, and trial began *less than two month*s after Petitioner's arrest. Moreover, Petitioner was still recovering from a gunshot wound to the

[1] Defense counsel was Harold J. Brouillette, now a retired judge.

chest. The jury trial was held on July 19 and 20, 1977, after which the jury returned a verdict of guilty as charged. On July 28, 1977, Petitioner was sentenced to 50 years on each count, to run consecutive. Through appointed counsel, Petitioner appealed directly to the Louisiana Supreme Court, as the high court had original jurisdiction over his case at this point in time.

On direct appeal to the Louisiana Supreme Court, appellate counsel of behalf of Petitioner only asserted two arguments: that attempted forcible rape was a responsive verdict to the charge of aggravated rape and that the sentence imposed was invalid and unconstitutional. On April 10, 1978, the Louisiana Supreme Court affirmed Petitioner's conviction and sentence, with opinion. State of Louisiana v. Vincent Simmons, 357 So.2d 517 (La. 1978). No writ was taken to the United States Supreme Court. Since his direct appeal, Petitioner has never been represented by counsel and has always proceeded in proper person.

Petitioner has been a duplicitous pro se filer, including several petitions for post-conviction relief. Despite his continued appeals for relief, he has never been provided an opportunity for an evidentiary hearing on his claims raised.

Although this present post-conviction application is not his first filing and it is filed outside of the prescriptive period established by law for filing of an application for post-conviction relief, it is asserted that this application is timely nonetheless as it falls within one of the statutory exceptions to the time limit imposed on post-conviction filings. This application meets a timely filed exception, as brought under La. C.Cr.P. article 930.8 A (1) as it alleges newly discovered information. This newly discovered, exculpatory information was uncovered as a result of a thorough investigation following citizen outcry and assistance offered to Petitioner. This outcry resulted in an onslaught of media attention devoted to Petitioner's case, resulting from the filming of two documentaries, which showcased the numerous constitutional violations committed in this case. The closed district attorney file pertaining to his conviction was obtained, and after reviewing the contents of that file in conjunction with the court record, it was discovered that vital, exculpatory evidence was contained therein, including the two victims statements, withheld medical reports, and numerous incidents of prosecutorial misconduct and due process violations. Thus, considering the new claims raised herein after review of the public record of the District Attorney prosecution file, Petitioner asserts that this application is timely and Petitioner beseeches this Court's consideration of this filing.

Moreover, this Honorable Court has the authority to consider this filing. La. C.Cr.P. art. 930.4 provides in pertinent part:

> A. Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered.

Petitioner urges this Court to acknowledge the gravity of the constitutional violations committed herein and to

consider this filing in the interests of justice. Petitioner labors under two (2) consecutive fifty year sentences and has served over twenty-seven years without meaningful review of any claims raised, and now respectfully requests long-overdue relief.

FACTS

As previously discussed, Petitioner is a black man in 1977 Louisiana who was arrested, charged and convicted of attempted aggravated rape of two white fourteen-year-old alleged virgins. From his arrest to his conviction and sentence of 100 years at hard labor, no more than two months elapsed.

According to the testimony of state's witnesses at trial, at about 9 p.m. on May 9, 1977, 18-year-old Keith Laborde and his 14-year-old twin cousins Sharon and Karen Sanders stopped for gas at a 7-11 in Marksville, Louisiana. Keith testified that, as he pulled his car into the station's parking lot, he noticed a strange black man staring at him. Keith testified that he got out of the car, and asked the stranger how he was doing. According to Keith, the man told Keith, in an aggressive manner, that Keith had almost run him over as he was parking his car. Keith denied trying to run over the man, and asked the stranger if he wanted to fight, to which the stranger allegedly replied, "I don't fight, I shoot."

At trial, Keith testified that despite the potential altercation, Keith and the man shook hands and Keith agreed to give the stranger a ride. At trial, Keith testified that the black man allegedly identified himself by the name of "Simmons." Keith, Sharon and Karen all testified that Karen and Sharon climbed into the passenger seat beside Keith and the stranger got into the back seat of Keith's car.

Keith testified that the stranger proceeded to direct Keith to a remote location. At trial, Sharon testified that Keith and the girls began to get nervous when the stranger told Keith to turn down the remote Little California road. He ordered Keith to park and turn off the ignition. At trial, Keith alleged that the stranger flashed a handgun as he was ordering them about.

According to Keith's trial testimony, Keith eventually stopped the car, and the stranger was brandishing a gun, then proceeded to take the keys and locked Keith in the trunk. Sharon testified that the stranger told the girls to undress. Karen testified that she tried to run away and she, too, was locked in the trunk with her cousin. According the Sharon's trial testimony, the stranger proceeded to vaginally rape Sharon Sanders. She was then placed in the trunk with her sister and cousin while the stranger drove them to a second location. According the Karen's trial testimony, at this point, he got Karen out of the trunk and raped her anally and vaginally. Karen testified that the stranger then proceeded to a third location with Karen in the passenger seat. Karen further testified that, at the third stop, he anally raped Karen again and forced her to perform oral sex on him. Then, the stranger allegedly popped one of the tires on the car with a tool from the trunk. According to Karen's testimony, he made Karen write their names down on a piece of paper, threatening that he would come after them if they told anyone of the events of that evening. Finally, they dropped him off at a pay phone and drove home to their

grandparents house, where the three spent the night.

The girls did not tell anyone about the incident until almost two (2) weeks later on May 22, 1977 when Karen Sanders told her first cousin. The incident was reported to police on May 22, 1977, long after all valuable physical and DNA evidence had been lost. Vincent Simmons was arrested on May 23, 1977. No information was ever given at trial as to why Petitioner was immediately suspected and arrested. On May 23, 1977, after his arrest, Keith, Karen and Sharon identified Petitioner from a physical lineup, in which Petitioner was the sole participant to appear in handcuffs, on May 23, 1977. (Exhibit 1). Despite the girls' description of the perpetrator as a black man, the lineup also included at least one clearly Caucasian participant.

At his arraignment on June 16, 1977, Petitioner entered a plea of not guilty. The jury trial was held on July 19 and 20, 1977, after which the jury returned a verdict of guilty as charged to two counts of La. R.S. 14:(27)42, relative to attempted aggravated rape. On July 28, 1977, Petitioner was sentenced to 50 years for each count, to run consecutive.

Petitioner herein urges this Honorable Court's consideration of the application based on the interests of justice and the newly discovered evidence in the form of the victim's medical reports, and statements to police withheld by the prosecution. This evidence was withheld from the defense at trial, and was only discovered after the undersigned recently requested Petitioner's district attorney file. Petitioner further alleges numerous instances of ineffective assistance of counsel. Thus, based on the following examples of egregious violations of Petitioner's constitutional rights, Petitioner respectfully requests consideration of this application and relief.

CLAIMS MERITING RELIEF

Petitioner avers that his conviction and sentence of 50 years for each of the two counts of attempted aggravated rape were obtained in violation of the Constitution of the United States and the Constitution of the State of Louisiana. Constitutional violations of a magnitude sufficient to warrant post-conviction relief occurred during the trial and on appeal, and include, but are not limited to:

ASSIGNMENT OF ERROR NO. I

Petitioner was denied his right to a fair trial and his right to due process of law, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Art. 1, Sec. 2 and 16 of the Louisiana Constitution of 1974, when the prosecution withheld *extensive* exculpatory material from the defense, including 1) the victim's statements to police immediately following the reporting of the alleged crime, 2) the results of the victim's state-ordered medical examination, and 3) the Avoyelles Parish Sheriff's Office Supplemental Report.

LAW AND ARGUMENT

Petitioner never received copies of the various police reports, medical reports and statements by the victims until more recently when he obtained the public record of the closed district attorney prosecution file.

The failure to produce these documents is not only a discovery violation which greatly prejudiced Petitioner's defense, the withholding of these documents is such an extreme example of prosecutorial misconduct as to warrant reversal of Petitioner's conviction. The documents are considerably damning to the victims's version of events because they are filled with inconsistencies, especially when compared to each victim's testimony at trial, and further contains exculpatory Brady material.

The United States Supreme Court has consistently held in no uncertain terms that the withholding of exculpatory evidence by the State results in a violation of a defendant's fundamental right to due process of law. The landmark case is, of course, Brady v. Maryland, in which the Court laid down the foundational policy and a roadmap for a Brady claim. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, 373 U.S. 83, 87 (1963).

Petitioner asserts that the state intentionally suppressed the statements of its main witnesses, the only witnesses to identify Petitioner in a case in which no physical evidence exists. Petitioner further asserts that the contents of the victims statements, especially when coupled with the numerous other violations in this case, destroy all confidence in the guilty verdict. *See* Kyles v. Whitney, 514 U.S. 419, 434 (1995). "When the State's case hinges on the testimony of one eyewitness, the Brady violation looms larger." State v. Bright, 2004 WL 1157411 (La. 2004).

In Agurs, 427 U.S. at 113, n.21, the United States Supreme Court quoted with approval an example from Comment, *Brady v. Maryland and The Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 125 n.10 (1972).

> If ... one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glimpse, the result might well be different.

In Petitioner's matter, the identification of Petitioner rested solely on the reliability of cross-race identifications made by two impressionable fourteen-year-old girls, one of whom told police "All blacks look alike to me," and their seventeen-year-old cousin. The identifications were made over two weeks after the crime, when the crime was finally reported to police, and, as discussed below, under highly suggestive conditions. Any impeachment evidence contained in the district attorney's file should have been turned over to the defense. *See* State v. Knapper, 579 So.2d 956, 959 (La. 1991)

In order to prevail on a Brady claim, a defendant must show that 1) the prosecution withheld evidence; 2) that evidence was favorable to the defendant, and 3) that evidence was material to either guilt or punishment. *Id.* Subsequent cases have clarified the Brady standards. The defendant does not have to show that the inclusion of

the withheld evidence would have resulted in a different outcome (i.e. acquittal); rather, the defendant must show that the use of the excluded, exculpatory at trial gives a reasonable probability that a different result would have been reached. *See* United States v. Bagley, 473 U.S. 667 (1985). Such a reasonable probability has been held to exist when the "government's evidentiary suppression undermines confidence in the outcome of the trial." Kyles v. Whitney, 514 U.S. 419, 434 (1995).

Furthermore, the prosecutor has more that just a duty to release information at the request of the defense. The prosecutor has an affirmative duty to voluntarily disclose exculpatory evidence. *See* Kyles v. Whitney, 514 U.S. 419 (1995). This duty extends to any exculpatory evidence, even information in the hands of law enforcement and even if it cannot be shown that the prosecutor had any personal knowledge of the existence of the favorable information. *Id.* Finally, the ultimate effect of the withholding of exculpatory evidence is viewed cumulatively and not by individual analysis of each piece of evidence. *Id*.

As discussed below, Petitioner has clearly met the Brady standard. The prosecution withheld the vital evidence listed below, and the evidence was indisputably favorable to Petitioner because it contained both exculpatory and impeachment evidence, and the evidence was clearly material to guilt or punishment.

1. The prosecution withheld statements made to Avoyelles Parish Sheriff's Officers made by the two victims and one witness, dated May 23, 1977.

Petitioner has always vehemently maintained his innocence as to this crime of rape of two young white girls, Karen and Sharon Sanders. Karen, Sharon and their cousin Keith's identification of Petitioner at trial by name was a vital link in the evidence against him; indeed, it was one of the only pieces of circumstantial evidence linking Petitioner to the crime. However, in their statements to police, which were never turned over to Petitioner or his counsel before or during trial, *neither* of the girls mention hearing the perpetrator identify himself as "Simmons" and neither remember precisely what name their cousin Keith addressed the stranger by. In fact, in their May 23, 1977 statements to police, both girls refer to "the black man" and never refer to the perpetrator by name or mention even knowing the name of the perpetrator. Keith's statement to police is the only witness statement that says that the stranger gave his name as "Simmons." Both girls do remember hearing Keith call the stranger something, to which the stranger replied that that was not his name. Curiously, at trial, both girls testified to the contrary, stating unequivocally and repeatedly that they both heard the perpetrator call himself by the name of "Simmons."

This is but one example of the many inconsistencies between the newly discovered victim statements and their subsequent testimony at trial. The following summary reveals the glaring inconsistencies and exculpatory material contained in the victims statements to authorities and the Avoyelles Parish Sheriff's Office incident and supplemental report.

· **Statement of Karen Sanders, dated May 23, 1977. (Exhibit 1).**

Karen Sanders clearly states in her voluntary statement to police that she left her panties at the scene of the crime. The crime allegedly occurred on an abandoned road where there is no traffic or neighboring homes, yet no panties were found at the scene. Police never recovered any such vital evidence in the course of their investigation. Indeed, the record and police reports do not even reflect that a search of the scene was ever conducted by police. Clearly, this lack of inspection of the scene, even the alleged scene was specifically pinpointed by the victims, indicates that this matter was rushed to trial without investigation. Karen also testified at trial that after the crime, she and her sister were too frightened to go back to school for the next two weeks, or, until the crime was reported. Yet, the police statements reveal that the police picked the girls up at school in order to escort them to the station to participate in the physical lineup on May 23, 1977.

In her statement, Karen also mentions that she, Sharon and Keith stole the gas from the gas station where they picked up the stranger, another fact never revealed at trial. All of these details could have been investigated and used by the defense as impeachment evidence. A comparison of the girl's statements and respective testimony reveals numerous questionable inconsistencies which could have at the very least been utilized as impeachment evidence. Many of the contradictions are glaring enough to cast serious doubt on the validity of Petitioner's conviction.

· **Statement of Sharon Sanders, dated May 23, 1977. (Exhibit 2).**

Sharon Sanders states in her police report that she never saw a gun or weapon of any kind and that the "stranger' never overtly threatened any of them. These facts would have been of extreme importance at trial, as the absence of these factors makes the crime no longer aggravated. *See* La. R.S. 14:42. At trial, both of the girls testified that the perpetrator threatened them and their cousin with great bodily harm, waved a gun around *and* flashed a knife. These details do not appear anywhere in any of the statements made to police.

Sharon's statement to police contains myriad details that were never revealed at trial. Sharon states that the stranger and Keith chatted for about half an hour before Keith agreed to give the stranger a ride. This version of events seriously conflicts with the one offered at trial by these same witnesses for the state, in which Keith and the stranger almost get into a physical altercation, and then Keith is intimidated into providing the stranger a ride home. Also in the police reports and statements, Karen and Keith both admit to having marijuana and considering smoking it with the stranger, while Sharon denies that any of them used any drugs that night.

However, perhaps the most damning statement in the report is made by Sharon: "All blacks look alike to me." This statement most certainly would have had an impact at trial, and, if nothing else, could have been effectively utilized for impeachment purposes. She also repeatedly refers to the perpetrator as "Nigger." This was a case in which the major evidence linking Petitioner to the crime was the identification made by two fourteen-year-old girls who apparently thought all people of African descent looked alike and referred to the perpetrator with a racial slur. Such a discriminatory statement places Sharon's identification seriously in question,

and in turn places the validity of Petitioner's conviction in question. As stated above, the crime was not reported until almost two weeks after Karen and Sharon Sanders and Keith Laborde claimed it happened. Thus, there existed no concrete, physical evidence linking Petitioner to the crime. As discussed, the major evidence linking Petitioner to the crime was the identification made by the two young girls.

· **Statement made by Keith LaBorde, dated May 23, 2004. (Exhibit 3).**

At trial, Keith LaBorde stated that the stranger was waving a gun around in a threatening manner when he first ordered Keith to get out of the car. In Keith's own statement to police, he states that he never actually saw a gun; rather, he only saw what appeared to be one. Keith LaBorde also admits to Karen's possession of marijuana that night, stating, "She had 2 small roaches. I took the tobacco out of a cigarette paper and put the pot in it." There was no testimony at trial to indicate that the victims either possessed drugs on the night of the crime or that any one of the three could have been under the influence of marijuana. These inconsistencies were vital impeachment evidence. Moreover, any statements indicating that there was not a dangerous weapon involved in this crime is exculpatory in nature, as this fact eliminates the aggravating factor that elevated this crime to aggravated rape.

The United States Supreme Court has recently reaffirmed the importance of a defendant's right to confrontation as imposed by the Sixth Amendment. Crawford specifically reaffirms that confrontation right extends to out of court statements, and reinforced the importance of testimonial statements:

> Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, Dutton v. Evans, 400 U.S. 74, 94, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring in result). . . . The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused--in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." Ibid. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Crawford v. Washington, 124 S.Ct. 1354 at 1364 (2004).

Thus, by withholding the three victims's statements from Petitioner, the prosecution not only committed a grave Brady and due process violation, it also directly violated Petitioner's Sixth Amendment right to confront witnesses against him with exculpatory inconsistencies in their own statements. For these reasons, Petitioner respectfully requests relief.

2. The prosecution withheld the medical reports and examination results of both Karen and Sharon Sanders. (Exhibit 4).

At the state's request, both of the girls were examined by a physician prior to trial. The resulting reports were not turned over to the defense, perhaps because of the exculpatory material contained therein. After reviewing these medical reports, it is clear why the state also chose not to present medical testimony at trial:

because of the exculpatory nature of the results of the medical examinations of both girls.

A medical assessment of Sharon Sanders reveals that the examining physician was unable to complete the exam because her hymen was fully intact. Sharon testified at trial that she was raped vaginally and that the perpetrator climaxed inside of her, a statement which the medical report directly contradicts. The medical history provided to the examining physician reveals that Sharon claimed to have vaginal bleeding, which is most unlikely when her hymen was found to be intact. The report further shows no trauma associated with Sharon's sexual organs. The medical report of Karen Sanders showed that she "first had intercourse 9 months ago," while the prosecution painted both girls as virgins at trial.

The defense had no knowledge of this exculpatory evidence at trial. Knowledge of this fact would have enabled scientific analysis of the clothing she was wearing the night of the incident, but it was unknown to Petitioner at trial. Furthermore, there was no bruising on either girl's body, which, even two weeks later, seems to cast doubt on the violent version of events.

Finally, the medical report shows that Sharon told the doctor she was raped by a man named Vincent Simmons, when she had very recently told police that she neither knew the name of the perpetrator nor heard her cousin call him by any name. This evidence would have been helpful in revealing whether Sharon knew the name of the perpetrator or was influenced by police, or, at the very least, would have been helpful impeachment evidence.

Clearly, the report of the medical examination of Sharon Sanders was viable, exculpatory evidence that could have been effectively utilized by the Petitioner at trial. Thus, the prosecution committed another grave Brady violation that served only to deny Petitioner his fundamental right to due process of law. Brady v. Maryland, 373 U.S. 83, 87 (1963). Kyles v. Whitney, 514 U.S. 419, 434 (1995). United States v. Bagley, 473 U.S. 667 (1985). Such blatant Brady violations serve to undermine the adversarial process by giving the prosecution unfair, unconstitutional and unwarranted advantages over the defendant. For the forgoing reason, Petitioner respectfully requests relief.

3. The prosecution withheld the Avoyelles Sheriff's Office Supplemental Report, dated May 25, 1977. (Exhibit 4).

The Avoyelles Sheriff's Office Supplemental Report contained evidence which could have been used to impeach the victims at trial. On Page 1 of the Report, the deputy (name illegible) writes, "Keith could see Simmons reach his hands in his back pants like he had a gun." The report continues to state, contrary to Keith, Sharon and Karen's May 23, 2004 statement, that the perpetrator laid a firearm on the roof of the car while it was parked on Little California Road. This inconsistency is evidence that neither Keith nor Sharon nor Karen could get their stories straight, and none of them originally told police that they actually saw a firearm.

Petitioner was unconstitutionally denied access to this vital information and respectfully requests relief on

these grounds. Petitioner's trial counsel did not see these documents until 1998. (Exhibit 6).The inconsistencies and exculpatory statements listed herein indisputably reveal that the prosecution improperly withheld vital material that it was legally and ethically bound to turn over to the defense. By withholding this information, the prosecution ensured that Petitioner was unconstitutionally convicted. "Reversals should only occur when there can be no confidence in the verdict. This conviction, based on the facts of this case which include a failure to disclose what the State now admits is significant impeachment evidence, is not worthy of confidence and thus must be reversed." Bright, 2004 WL 1157411 (La. 2004). Petitioner asserts that the victims's statements withheld in this matter contained not only impeachment evidence, but were also of an exculpatory nature. As such, Petitioner urges that his conviction is "not worthy of confidence" and should therefore be reversed.

ASSIGNMENT OF ERROR NO. II

Petitioner was denied his Fifth, Sixth and Fourteenth Amendment rights to a fair trial and due process of law when he was subjected to an unduly suggestive lineup procedure.

LAW AND ARGUMENT

Petitioner was pinpointed and brought to trial as a direct result of the positive lineup identification of him by Keith Laborde and Karen and Sharon Sanders**.** (Exhibit 7). However, there was a crucial unconstitutional defect in the lineup procedure itself. Petitioner was the only lineup participant wearing handcuffs, which made him look both culpable and undignified. The lineup itself even included a white man who did not even remotely fit the description that Karen and Sharon Sanders had given to the authorities. The Supplemental Report even references the composition of the lineup: "In the lineup, we had eight male subjects. Seven were black and one white." The lineup is further memorialized in a photograph of the lineup participants discovered in the public record. According to Karen and Sharon Sanders, there were nine police officers present during the lineup identification, which sets an intimidating scene.

While the photographic lineup was not specifically used against Petitioner at trial, Petitioner was nonetheless singled out and arrested after the identification was made. These egregious, prejudicial errors coupled with the fact that the lineup was being shown to impressionable adolescents two weeks after the crime make any positive identification very questionable indeed.

The United States Supreme Court has held that an out-of-court identification that is so unduly suggestive as to lead to mistaken identification may very well rise to the level of a violation of due process of law. *See* Manson v. Braithwaite, 432 U.S. 98 (1981); Neil v. Biggers, 409 U.S. 188 (1972); State v. Guillot, 353 So.2d 1005 (La. 1977); State v. Duncan, 635 So. 2d 653, *writ denied* 644 So.2d 649 (La. 1994). The reliability of the identification procedure itself is tested by applying the five factors set out in Neil:

> "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of

the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the
witness at the confrontation, and the length of time between the crime and
the confrontation."

Neil v. Biggers, 409 U.S. at 199-200. These factors are closely evaluated case by case under a "totality of the circumstances" test. *Id*. The Louisiana Supreme Court has articulated the test for the harm inflicted by the suggestive out-of-court identification by balancing the factors set out above by the United States Supreme Court against the "corrupting influence of the suggestive identification itself." State v. Friddle, 396 So.2d 1242 (La. 1981);. *See also* State v. Stewart, 389 So.2d 1321 (La. 1980); State v. Davis, 385 So.2d 193 (La. 1980); State v. Doucet, 380 So.2d 605 (La. 1979); State v. Williams, 375 So.2d 364 (La. 1979); and State v. Guillot, 353 So.2d 1005 (La. 1977).

To show that a lineup identification procedure was suggestive, a defendant must show that the "persons or pictures used in the line-up display defendant so singularly that the witness' attention is unduly focused on the defendant." State v. Rosette, 653 So. 2d 80, 81 (La. App. 3 Cir. 1995). (citing State V. Duncan, 635 So. 2d at 655). This description would seem to perfectly fit Petitioner's case. He was the only suspect in the line-up with his hands and wrists handcuffed in front of his body, which indisputably singled him out from the group, especially to the susceptible eyes of two 14-year-old girls. Further, one member of the lineup was not of the same race as the suspect.

Several of the Neil factors work in Petitioner's favor and suggest a grave misidentification. First, it had been two weeks since the crime, and the girls had not given any kind of description of the perpetrator to anyone during this time. Second, their pre-lineup descriptions of the perpetrator had been very general indeed, and even included the dubious statement that, "All blacks look alike to me." Finally, the alleged crime occurred on a dark, deserted road, and the girls and their cousin may not have had the chance to scrutinize the perpetrator and certainly suggests a possibility of misidentification, especially from the mouths of those predisposed to lumping all African-Americans in one category.

It cannot be denied that Petitioner was singled out in an unconstitutional lineup procedure that had a substantial likelihood of resulting in a misidentification of Petitioner as the perpetrator. Without the positive identification of Petitioner by the victims, the prosecution's case was virtually nonexistent. It rested entirely on circumstantial evidence. Thus, the lineup was a key piece of evidence that brought Petitioner's case to trial. Petitioner was identified by the three as a result of suggestive and unlawful lineup procedures which forged the witnesses identification throughout this case. At trial, Keith, Sharon and Karen then identified Petitioner from the witness stand-but only after the bad physical lineup, which was never brought to the jury's attention by the defense. It is asserted herein that the defense attorney was not even aware of the existence of the physical lineup. Even though the positive lineup identification by the victims was never used at trial, it is clear that Petitioner may

have never been brought to trial without this crucial link for the state. This lineup procedure was indisputably violative of Petitioner's constitutional rights. For the reasons stated above, the suggestiveness and resulting harmfulness of the lineup identification procedure entitles Petitioner to relief.

ASSIGNMENT OF ERROR NO. III

Petitioner was denied his right to effective assistance of counsel as provided by Article 1, sections 2, 3, 13, 16 and 20 of the Louisiana Constitution of 1974 and Amendments V, VI, VIII, and XIV of the United States Constitution in that the numerous incidents of ineffectiveness led to a manifest absence of counsel.

LAW AND ARGUMENT

Petitioner herein asserts that the instances described below reveal that his trial counsel was so ineffective as to deny Petitioner any meaningful representation at all. Among other examples, trial counsel failed to file any pre-trial motions on Petitioner's behalf, failed to conduct any sort on investigation, failed to obtain any discovery prior to trial and failed to raise meritorious issues on appeal.

"The right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970). The right to effective counsel can be violated by either the prosecution or the defense. The government can infringe on this right by interfering "in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Geders v. United States, 425 U.S. 80 (1976). *See also* Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance." Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

Ineffective assistance of counsel claims may be brought in a collateral proceeding under § 2255. *See* Massaro v. United States, 538 U.S. 500 (2003). *See also* Strickland v. Washington, 466 U.S. 668 (1984). ("An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings").

When a petitioner claims that he was denied effective assistance of counsel, he must demonstrate that: (1) his counsel's performance was deficient; and (2) his counsel's deficient performance prejudiced his defense. *See* Strickland, 466 U.S. at 687. Thus, a convicted defendant seeking relief must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced his or her defense. *Id.* at 697. When evaluating a claim of ineffective assistance of counsel, however, a court need not address the two Strickland prongs in order, or even address both of them. If a court finds that petitioner has made an insufficient showing as to either of these two prongs of inquiry, i.e., deficient performance or actual prejudice, it may dispose of the claim without addressing the other prong. *Id.* To establish deficient

performance, as required to support a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's representation fell below the objective standard of reasonableness based on prevailing professional norms. Wiggins v. Smith, 539 U.S. 510 (2003).

In order to prove prejudice under the Strickland standard, a 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; United States v. Chavez, 193 F.3d 375, 377 (5th Cir. 1999) ("a reasonable probability exists that counsel's deficient performance affected the outcome and denied [petitioner] a fair trial."). In Strickland, the Supreme Court defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* at 669. In making a determination as to whether prejudice occurred, courts must review the record to determine the "relative role that the alleged trial errors played in the total context of [the] trial." Crockett v. McCotter, 796 F.2d 787 at 793 (5th Cir. 1986). Indeed, the court must evaluate any claims of ineffectiveness in a specific context peculiar to the case and the counsel:

> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.

Strickland, 466 U.S. at 690. Petitioner therefore submits specific instances of trial counsel's prejudicial and inexcusable conduct.

Petitioner's defense counsel at trial failed to provide effective assistance in numerous instances. Many of the following assignments of error standing alone demonstrate the fact that Petitioner was deprived of effective assistance at trial. There are also less egregious, yet still highly prejudicial errors, in the record. When added together and assessed under the cumulative prejudice test, there is no doubt that Petitioner's trial counsel was ineffective. The seminal case of Strickland v. Washington's focus on the overall fairness of the proceedings seems to dictate that a cumulative prejudice analysis is required: "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." Strickland v. Washington, 466 U.S. 668, 675 (1984).

1. Trial Counsel was ineffective for failing to move to quash the indictment on Equal Protection grounds.

Petitioner was charged by grand jury indictment on July 23, 1996 with attempted aggravated rape. Petitioner's trial counsel was ineffective in his failure to file a motion to quash Petitioner's indictment on Equal Protection grounds. As stated below in Claim Four, Louisiana grand jury selection systems have long been plagued by discriminatory practices. The only method of preserving this type of claim is by raising the issue in a motion to quash. Petitioner's trial counsel failed to safeguard this potential claim on Petitioner's behalf and, as a result, caused Petitioner great prejudice.

2. Counsel failed to file *any* pre-trial motions on Petitioner's behalf.

Petitioner was arrested some two weeks after the alleged crime occurred and was immediately subjected to a highly prejudicial lineup procedure. The victims made positive identifications at the lineup. Petitioner's

counsel at trial did not file one single motion on Petitioner's behalf. Defense counsel did not file any motions for discovery, any motions in limine or even a request for a bill of particulars.

From arrest to trial, less than two months elapsed. Defense counsel clearly mounted no investigation or requested discovery for Petitioner's benefit. In fact, under the law as it stood at the time of his arrest, Petitioner was facing a possible death sentence if convicted of aggravated rape, and those charges were only amended on July 14, 1977, just four days before trial and still nothing was done by the defense counsel. As shown above, the prosecution had in its possession the victims's statements to police and the coroner's report, extremely important, exculpatory documents, and the defense did not even request them via a standard motion for discovery.

On July 18, 1977, the district attorney filed a "Notice of Intention to Introduce a Confession and/or Confessions, and/or Exculpatory and/or Inculpatory Statement and/or Statements in Evidence" stating that "as of the date of this trial, July 18, 1977, the State is not informed of any of the above-type statements made by the defendant in this case." Further, the motion says, if the state became aware of a statement by Petitioner during the course of the trial, they unequivocally intended to use it at trial and said motion serves as notice. This is an unprecedented motion, especially in light of the prosecutor's opening statements, in which the jury was informed of statements made by Mr. Simmons to the alleged victims and Keith Laborde at the time of the crime. It is important to note that in 1977, at the time of trial, a prosecutor was forbidden from making it known to jurors in an opening statement if a defendant had made any statement. This comment by the prosecutor was not objected to by trial counsel. Perhaps even more bizarre is the fact that these statements were introduced to the jury without pre-trial determinations by the court of their admissibility and no objection was entered by the defense. Defense counsel should have demanded clarification of the State's motion, filed motions in limine concerning any statements by Petitioner, and objected to the introduction of any of Petitioner's statements at trial and the prosecutions improper comments in opening statements.

Perhaps most troubling is was counsel's failure to file a Motion to Suppress the Identification on behalf of Petitioner. As discussed, Petitioner was identified by the two girls as a result of a lineup procedure that was highly suggestive and prejudicial. Judging from photos contained in the record, Petitioner is the only lineup subject to appear with handcuffs on. Furthermore, there are members of the lineup who do not even remotely resemble the description the two girls allegedly gave police. Finally, Sharon Sanders told police that, "All blacks look alike to me." The identification of Petitioner should have subjected to rigorous questioning. For the failure to raise this issue pre-trial, trial counsel was ineffective.

Clearly, such an egregious failure to act is not the effective counsel contemplated by the Sixth Amendment. Petitioner was facing a severe sentence and the prosecution's case was entirely circumstantial, yet defense counsel failed to file any protective pre-trial motions on Petitioner's behalf. For this lamentable representation, Petitioner respectfully requests relief.

3. Counsel failed to conduct an investigation on Petitioner's behalf.

When Karen and Sharon Sanders finally came forward to police with their story, Petitioner was arrested the very next day. The record is devoid of any clues as to why the police went straight to Petitioner. In Karen and Sharon Sanders's initial statements to police, no name of a perpetrator is given. Keith Laborde was equally uncertain of the perpetrators identity. Given the racially discriminatory overtones surrounding Petitioner's arrest, trial and conviction, trial counsel should have conducted some pre-trial investigation on Petitioner's behalf. Why did the police go straight to Petitioner? What were the circumstances of the arrest? Was Petitioner read his Miranda rights? The answers to these questions would have enabled a more thorough and coherent defense, but counsel failed to conduct any sort of investigation on Petitioner's behalf, although the client insisted he was innocent and it was a case of mistaken identity. The circumstances surrounding the short investigation which led straight to Petitioner and Petitioner's subsequent arrest are even more suspicious upon closer examination. Petitioner, who was handcuffed after his arrest, has reported that police officers Laborde and Villemarette proceeded to beat him, unprovoked. Petitioner attempted to defend himself and while struggling with Officer Villemarette, was shot in his left shoulder by Officer Laborde with a .38mm caliber handgun. This incident allegedly occurred right after the photographic lineup, a photo of which clearly shows Petitioner was handcuffed. The officers alleged that Petitioner took a .9mm semi-automatic handgun from Villemarette. The deputies claimed that Mr. Simmons was shot while attempting to escape. Notably, Petitioner was handcuffed, never filed a shot or left the room.[2]

Clearly, the circumstances surrounding Petitioner's speedy arrest, trial and conviction called for careful scrutiny. Petitioner's counsel at trial failed to investigate any of the matters described above on Petitioner's behalf. For this failure to prepare, trial counsel was ineffective.

4. Counsel failed to effectively cross-examine the alleged victims.

The testimonies of Karen and Sharon Sanders and Keith Laborde were full of inconsistencies and details that defense counsel was hearing for the first time, and yet, he failed to put the girls through any kind of rigorous questioning during cross-examination. The girls's testimonies were internally inconsistent and Petitioner's trial

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[2] Petitioner filed a civil lawsuit against Sheriff Didier, Robert Laborde, and Melvin Villemarette as a result of his shooting, for the injuries he suffered. The action against Sheriff Didier was dismissed because he was not involved in the incident following Petitioner's arrest, and the complaint against officers Laborde and Villemarette was dismissed because it had prescribed by the time the lawsuit was filed. At the time of trial of this matter, Petitioner was further charged with crimes associated with his shooting, those charges were dismissed after he was convicted in this matter.

counsel failed to impeach either of them on the stand. As explained, there was no physical evidence proffered against Petitioner, and the identification and the testimony of the alleged victims was the essence of the prosecution's case in chief, and for his failure to effectively cross-examine these crucial witnesses, Petitioner's counsel was ineffective.

5. Counsel failed to effectively impeach state's rebuttal witnesses.

The state called two convicted felons, both of whom were still incarcerated at the time of their testimony as rebuttal witnesses. The crux of these witnesses testimony was that they all had seen Petitioner wearing clothes similar to those described by the victims as he was released from jail at the beginning of May, 1977, just over a week before the alleged incident occurred. Petitioner's trial counsel failed to impeach these two witnesses with their respective criminal records.

La.C.Ev. art. 609.1A provides in pertinent part: "In every criminal case, every witness by testifying subjects himself to examination relative to his criminal convictions. . . ." As the prosecution, not the defense, pointed out, one witness was serving time for manslaughter and the other for theft. Petitioner's counsel failed to explore or even question the veracity of these two witnesses, and further failed to question whether they had received any favorable treatment in exchange for their testimony. Such questions are nothing less than routine when someone with a criminal record especially as significant as these takes the stand against your client, and for his failure to effectively impeach these witnesses, Petitioner's trial counsel was ineffective.

6. Counsel failed to object to the introduction of prejudicial 404(b) evidence.

The exclusionary rule generally determines that evidence of other crimes is inadmissible. The Louisiana Code of Evidence, Article 404 (B)(1) provides the statutory exception to the exclusionary rule in Louisiana:

> evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

The jurisprudential requirements for the introduction of other crimes evidence were established in the case of State v. Prieur, 227 So.2d 126 (La. 1973). The court established a five prong procedure for the admission and use of other crimes evidence. The requirements are:

> (1) The State shall within a reasonable time before trial furnish in writing to the defendant a statement of the acts or offenses it intends to offer, describing the same with the general particularity required of an indictment or information. No such notice is required as to evidence of offenses which are part of the res gestae, or convictions used to impeach defendant's testimony.
>
> (2) In the written statement, the State shall specify the exception to the general exclusionary rule upon which it relies for the admissibility of the evidence of other bad acts or offenses.
>
> (3) Prerequisite to the admissibility of the evidence is a showing by the State that the evidence of other crimes is not merely repetitive and cumulative, it is not a subterfuge for depicting the

> defendant's bad character or his propensity for bad behavior, and that it serves the actual purpose for which it is offered.
>
> (4) When evidence is admitted before the jury, the court, if requested by defense counsel, shall charge the jury as to the limited purpose for which the evidence is received and is to be considered.(5) Moreover, the final charge to the jury shall contain a charge of the limited purposes for which the evidence was received, and the court shall at this time advise the jury that the defendant cannot be convicted for any charge other than the one named in the indictment or one responsive thereto."

State v. Prieur, 227 So.2d at 130.

Simply put, the rule articulated in Article 404(B)(1) prohibits the state from introducing evidence of other crimes, wrongs, or acts to show a probability that the accused committed the charged crime because he is a "bad" person who has a propensity for this type of offense. This court has long recognized that evidence of previous criminal activity does affect, reasonably or not, the opinions of the jurors sitting in judgment. State v. Kennedy, 00-1554(La. 4/3/01), 2001 WL 316170 p. 3. See also State v. Prieur, 277 So.2d 126, 129 (La. 1973) ("The natural and inevitable tendency of the tribunal ... is to give excessive weight to the vicious record of crime and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge"). Thus, other crimes evidence is not generally admissible because it infringes upon an accused's presumption of innocence by creating the risk that an accused will be convicted because of his bad character, or other bad acts, regardless of his guilt of the particular crime for which he is charged. State v. Hamilton, 478 So.2d 123, 129 (La. 1985), *citing* State v. Hatcher, 372 So.2d 1024 (La. 1979). The prohibition against the introduction of other crimes exists because there is a "natural and inevitable" tendency on the part of jurors to view proof of other crimes "as justifying a condemnation irrespective of guilt of the present charge." 1 Wigmore, Evidence Sec. 194 (2nd Ed. 1940).

In the instant case, the State purposefully called two convicted felons as witnesses whose only connection to Petitioner was simultaneous incarceration which pre-dated this criminal event. It was impossible for either of the two witnesses to testify against Petitioner and not mention the fact that Petitioner was incarcerated with them. The fact that Petitioner had served jail time previously is obviously an inadmissible prior bad act under 404(b). The testimony was highly inflammatory, as it needlessly exposed the jury to Petitioner's criminal past. Whatever questionable value the testimony may have had to the State's theory of the case was far outweighed by its prejudicial nature, and it should have been excluded under the La.C.Ev. art. 403 balancing test.

Petitioner's trial counsel failed to lodge any objection to the introduction of this inadmissible evidence. Such a failure to act further demonstrates a basic lack of legal and procedural knowledge. For these reasons, Petitioner's trial counsel was ineffective.

7. Counsel failed to brief all issues raised on direct appeal, thereby waiving the issues not briefed.

Petitioner's trial counsel raised four issues on direct appeal on Petitioner's behalf. They were:

(1)The trial court erred when it allowed photographs depicting a re-enactment of the victim's shown in

the trunk of the car;

(2) The trial court erred in allowing, over defense objections, impeachment of all defense witnesses, by the use of traffic offenses and other misdemeanors;

(3) The trial court refused to give the responsive verdict of forcible rape in its jury charge;

(4) The trial erred in sentencing defendant to an illegal sentence of 50 years.

Inexplicably, counsel only briefed two of the issues, thereby waiving the other two. An appellate court may only review what is presented to them. Thus, the claims were briefly raised only in the

briefest sense. Pursuant to La.C.Cr.P. art. 920:

> The following matters and no others shall be considered on appeal:
> (1) an error designated in the assignment of errors; *and*
> (2) an error that is discoverable by a mere inspection of the pleadings and without inspection of the evidence. (Emphasis added).

By failing to brief all of the potential errors that occurred during Petitioner's trial, trial counsel severely prejudiced Petitioner's rights by waiving those issues that were briefed. Because of this ineffective assistance at the appellate level, Petitioner lost viable issues that may have changed the outcome of his appeal. For these reasons, Petitioner's trial counsel was ineffective.

8. Counsel failed to object to the amendment of the indictment against Petitioner and the absence of re-arraignment.

A grand jury indicted Petitioner on two counts of aggravated rape on June 10, 1977. On June 16, 1977, Petitioner entered a plea of Not Guilty to the two counts of aggravated rape through his appointed indigent defender attorney. The prosecutor thereafter filed a motion amending the charge to Attempted Aggravated Rape on July 14, 1977. The minute entries do not reflect that he was ever arraigned or entered a plea on the lesser charge of attempted aggravated rape.

Specifically, before trial, the clerk of court reads to the jury selected the wording from the charging instrument. In his trial at Record Page 57, Madame Clerk read to the jury an *indictment*, not a bill of information. She used the date of filing by the grand jury as June 10, 1977, and states to the jury that the grand jury charged him at that time with Attempted Aggravated Rape. This information is incorrect as he was not indicted by the grand jury for *Attempted* Aggravated Rape and was not arraigned on charge of 14: (27)42. Therefore, the record supports the argument that Petitioner was never arraigned or entered a plea on the charges for which he was convicted. Thus, Petitioner convicted on a charge he was never arraigned on, and asserts this as grounds for reversal of his conviction.

La.C.Cr.P. art. 555 provides in pertinent part:

> Any irregularity in the arraignment, including a failure to read the indictment, is waived if the defendant pleads to the indictment without objecting thereto. A failure to arraign the defendant or the fact that he did not plead, is waived if the defendant enters upon the trial without objecting thereto, and it shall be considered as if he had pleaded not guilty.

Since Petitioner's trial counsel did not raise any objection to the above procedural defects, and any

later objection or claim based upon this trial mistake, the issue was forever waived. Because of his failure to have this basic knowledge of procedure and relevant law, coupled with his failure preserve this claim on Petitioner's behalf, trial counsel was grossly ineffective.

9. Counsel failed to file a Motion to Quash the Indictment based on the prosecution's unwarranted amendment of the bill.

Petitioner's case occurred after the landmark decision of State v. Craig, 340 So.2d 191 (La. 1976). Craig held that because the death penalty had been declared unconstitutional by the United States Supreme Court, the penalty for aggravated rape was to be the maximum penalty associated with the next lesser included offense. *See* Furman v. Georgia, 408 U.S. 238 (1972). *See also* Selman v. Louisiana, 428 U.S. 906 (1976). In particular, the Craig court held:

> Louisiana's mandatory death penalty for aggravated rape suffers the same constitutional infirmities. The jury is given no opportunity to consider mitigating or aggravating circumstances. Therefore, the death penalty for aggravated rape is unconstitutional under Roberts v. Louisiana, supra. The defendant has thus been convicted of a crime whose penalty has been declared unconstitutional.

Thus, any defendant convicted of aggravated rape in Louisiana during this time period was convicted of a crime whose only penalty was death. Because the death penalty was declared unconstitutional, every defendant in Louisiana on Death Row for aggravated rape was re-sentenced to a sentence of twenty (20) years, the maximum for the next lesser included offense. Thus, if the prosecution had continued to trial on the original charge of aggravated rape against Petitioner, Petitioner would have served a sentence of twenty (20) years if convicted.

Instead, the prosecution amended the indictment to a charge of attempted aggravated rape, a charge that does not even fit the facts of the crime as alleged by the state. The state alleged both vaginal and anal penetration, and in no way presented evidence of attempted rape. In addition to penetration, the state alleged that the perpetrator was armed with a dangerous weapon. These facts in no way resemble the amended crime of *attempted* aggravated rape. In 1977, La. R.S. 14:(27)(D)(2) imposed a sentence of fifty (50) years for the crime of attempted aggravated rape. Petitioner asserts herein that his bill of indictment was amended just four (4) days prior to trial so that the prosecution could in fact seek a harsher sentence against Petitioner, and his trial counsel was ineffective for failing to file a Motion to Quash based on the prosecution's amendment of the bill to a charge that did not fit the facts of the crime alleged. By this amendment, the prosecution ensured that it could seek a greater sentence against Petitioner if convicted. By this amendment, the prosecution ensured that it could seek a sentence greater than that which could lawfully be imposed on a more heinous offense. For the failure to object or quash this amendment, Petitioner's counsel was clearly ineffective.

10. Counsel failed to prepare Petitioner to testify, to devastating results.

Petitioner testified in his own defense. Due to trial counsel's failure to review Petitioner's rap sheet and

previous convictions, Petitioner was successfully impeached by the state. Petitioner clearly was not prepared by his counsel for the routine impeachment questions asked of any defendant taking the stand. Trial counsel clearly did not review Petitioner's rap sheet with Petitioner, or even warn Petitioner that he would most likely be questioned regarding previous convictions. On the stand, Petitioner denied having been convicted of charges to which he had previously plead guilty. Clearly, he did not fully understand the questions and was completely unprepared for cross-examination. For this failure to prepare Petitioner and attempt to minimize damages on impeachment, trial counsel was ineffective.

ASSIGNMENT OF ERROR NO. IV

Petitioner was indicted by an unconstitutionally appointed Grand Jury in Lafayette Parish, in violation of Article 1, Sections 2, 3, 15, 16, and 20 of the Louisiana Constitution of 1974 and Amendments VI, VIII, and XIV to the United States Constitution.

LAW AND ARGUMENT

For well over a century, the United States Supreme Court has held that discrimination in the selection of grand jurors violates a defendant's constitutional rights. *See* Rose v. Mitchell, 443 U.S. 545, 556 (1979); Alexander v. Louisiana, 405 U.S. 625, 628 (1972); Bush v. Kentucky, 107 U.S. 110, 119 (1883); Neal v. Delaware, 103 U.S. 370, 394 (1881); *see also* Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272 (1977). Because discrimination in the grand jury selection process "strikes at the fundamental values of our judicial system and our society as a whole," it is well-established that a criminal defendant has suffered an equal protection violation when he is indicted by a grand jury that is the product of such a discriminatory process. Rose v. Mitchell,443 U.S. 545 at 556, 565, 99 S.Ct. 2993, 3005 (1979) (*citing* Neal, 103 U.S. at 394; Reece, 350 U.S. at 87).[3] The importance of a grand jury's ultimate decision is clear. The grand jury "controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime." Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 623-624, 88 L.Ed.2d 598 (1986). An unconstitutionally empanelled grand jury casts doubt over the entire process under which Petitioner was convicted.

"Since the beginning," the United States Supreme Court has "reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage." *Id*. 443 U.S. at 556-57 (citing Neal, 103 U.S. at 394; Bush, 107 U.S. at 119; Virginia v. Rives, 100 U.S. 313, 322 (1880)). Recently the Supreme Court reaffirmed this principle in holding that, "[r]egardless of his or her skin color, the accused suffers a significant injury in fact when the

[3] Gender and race-based discrimination in the selection of grand jury forepersons violates not only equal protection principles, but due process and the fair cross section requirement as well. *See* U.S. Const. Amend. VI, XIV; *see also* Campbell, 523 U.S. at 398.

composition of the grand jury is tainted by racial discrimination. 'Discrimination on the basis of race in the selection of members of a grand jury ... strikes at the fundamental values of our judicial system' because the grand jury is a central component of the criminal justice process." Campbell, 523 U.S. 392, 118 S.Ct. 1419, 140 L.Ed.2d

551 (*quoting* Rose, 443 U.S. at 556). Campbell further holds that any defendant, regardless of his race, has standing to raise an equal protection challenge to discriminatory grand jury selection processes. *Id*.

The test for establishing systemic discrimination in the selection of grand jury members was set forth in Castaneda, 430 U.S. 482 (1976). *See also* Rose, 443 U.S. 545 (adopting the Castaneda test for claims alleging discrimination in the selection of the grand jury foreperson). A claimant need only establish a prima facie case of discrimination for equal protection purposes. That is, a claimant must prove that the group is a distinct class,[4] that the group has been under-represented, and that the selection procedure was susceptible of abuse or was not race-neutral.[5] See Castaneda, 430 U.S. at 494. The burden then shifts to the state to rebut this prima facie case. See Black v. Curb, 422 F.2d 656, 659 (5th Cir. 1970) (citing Whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643 (1967)) ("If a prima facie case of discrimination is made out, the state must explain the disparity or establish that the excluded persons are not qualified."). If the State fails to rebut the claimant's prima facie case, then the claimant prevails. Petitioner herein asserts that African-Americans and females were grossly underrepresented in the grand jury selection procedures utilized in Avoyelles Parish at the time of his indictment.

A claim based on discriminatory grand jury selection practices is waived if it is not raised pre-trial. Petitioner herein respectfully requests this Honorable Court's consideration of this claim despite the absence of a pre-trial motion objecting to the grand jury selection practices. Petitioner asserts that the claim raised herein is viable when coupled with the claims of ineffective assistance of counsel raised below.

Petitioner herein asserts that Louisiana has a long history of discriminatory grand jury selection practices, and, if granted a hearing, will present statistical evidence to this effect. Petitioner further submits that this issue has not been raised specifically in Avoyelles Parish before, but is ripe for review. On the basis of this substantive due process claim, Petitioner respectfully requests relief.

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[4] The law is well settled that both African Americans and women are distinct classes. As the Fifth Circuit has recognized, "Blacks comprise a distinct class capable of being singled out for different treatment under the laws." Johnson v. Puckett, 929 F.2d 1067, 1072 (5th Cir.), cert. denied, 112 S.Ct. 274 (1991).

CONCLUSION

Petitioner has set forth and established claims under La.C.Cr.P. art. 930.3 which would entitle him to post-conviction relief. All claims as set forth are violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1,§§ 2, 3, 13, 15, 16, 17, 19, 21, 22, 23, 24, and 25 of the Louisiana Constitution. If this court intends to dismiss the petition because Petitioner has raised claims that should have been known by his counsel that counsel inexcusably failed to raise during the proceedings leading to Petitioner's conviction, Petitioner must first be given an opportunity to state his reasons for failure to raise these claims. State v. Turner, 544 So.2d 387 (La. 1989), State ex rel. Brown v. Braniff, 475 So.2d 348 (La. 1985). La.C.Cr.Proc. art. 930.4 A-F, State v. Turner, 544 So.2d 387 (La. 1989), State ex rel. Brown v. Braniff, 475 So.2d 348 (La. 1985).

WHEREFORE, as the cumulative effect of these violations of Petitioner's Due Process rights is a per se

violation of his constitutional rights, Petitioner prays that this Court grant him an evidentiary hearing, wherein evidence, documents and witnesses will be presented to support the claims raised herein. Petitioner further prays that this Court grant relief on the claims by ordering the District Attorney's office to answer this petition and by granting him an evidentiary hearing as provided by La.C.Cr.P. art. 924 et seq.

Respectfully submitted,

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COUNSELS FOR PETITIONER,
VINCENT SIMMONS

CERTIFICATE OF SERVICE

I, Laurie A. White, do hereby certify that a copy of the foregoing has been delivered via U.S. Mail, postage pre-paid and properly pre-addressed to Avoyelles Parish District Attorney this _____day of _________, 2004.