FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

James Lee Colvin

v.

Case No. _____

Louisiana

MEMORANDUM OF LAW IN SUPPORT OF PETITION

I. Introduction

I was convicted of armed robbery and imprisoned for Eighty (80) years at hard labor without parole in violation of "principles of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental." Patterson v. New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). That fundamental principle, over which the Caddo Parish District Attorney's office ran roughshod in the prosecution of myself, is that a person may be convicted only for what he has done, not for his bad character. No rule is more deeply rooted, or indeed essential, to the preservation of freedom and democracy in a nation of diverse peoples which tolerates, and indeed celebrates, differences in religion, race and ethnicity, as well as class, wealth, personality and even morals. Thus, no federal or state jurisdiction permits a defendant to be convicted or excessively sentenced because he is of "bad character." These reasons may have most eloquently stated 179 years ago in People v. White, 24 Wend. 520, 574, 1840 WL 3642 (N.Y. 1840):

> The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of law is due alike to the righteous and the unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proven guilty. The admission of a contrary rule, even in any degree, would open the door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, professions, manners, upon the minds of honest and well intentioned jurors.

In the present case, the sole issue should have been whether I was legally insane (whether I knew what I was doing was "wrong") when I robbed a store close to my home, with no apparent provocation, in broad daylight with no disguise, for $136 dollars, in front of no less than six witnesses. But a fair trial of this straightforward issue was not to be. Instead, the trial court instructed the jury, in accordance with Louisiana's standard jury instructions (but without regard to the irrelevant and inflammatory opinions of expert witnesses), that my fate turned on whether they believed I was "sick rather than bad" (which would compel a verdict of not guilty by reason of insanity), or just "bad" (which would compel a verdict of guilty). Since the state put on irrelevant hearsay evidence that I was not sick, all that was left to the jury to determine was whether I was "bad."

The Caddo Parish District Attorney and my own lawyer knew in advance, of course, that, under Louisiana's statutory scheme, in order to succeed on the insanity defense, the burden rested on me (and a trial counsel who was then under disbarment proceedings for incompetence in twenty-eight other cases of crime) to prove by a preponderance of the evidence that I was not a "bad" man. It also knew that a prior juvenile record (which the state and my own counsel turned into a "criminal" record and used in violation of state and federal law) and bizarre behavior made me a particularly unsympathetic defendant who would be an easy target for evidence and innuendo designed to inflame the prejudices and passions of the jury. Whatever the motive, the intact record in this case reveals a deliberate and systematic assault by the prosecution and my own lawyer on my character through the introduction, without objection, of inadmissible hearsay evidence and evidence of prior "bad acts" for which I was never even charged; rumors and false evidence of a violent criminal record which did not exist.

These "bad acts" were temporally remote from the robbery by decades, and were completely irrelevant to the critical issue in the case: did I rob the store for $136 in a delusional state, or because I was an institutionalized criminal, as contended by the prosecution? The prosecution and my own attorney further gilded the lily by repeated pejorative references to my "institutionalization" and "extremely dangerous and criminal nature," notwithstanding the Supreme Court's admonition that "appeals to class prejudice are highly improper and cannot be condoned..." U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 239, 60 S. Ct. 811, 84 L. Ed. 1129

(1940). By the end of the trial, I had been thoroughly vilified and caricatured as a lowlife, dangerous, violent, criminal, and a very "bad" man whose affirmative defense of insanity constituted nothing more than an attempt to avoid responsibility for his action, and whose thoughts became suicidal after conviction because I was so demonized at I did not think myself worthy of life, although this was my first violent crime, a crime in which no one was harmed.

The trial court submitted the case to the jury without the required "specific intent" instruction. But the trial court did, however, instruct the jury that it could consider hearsay evidence and the irrelevant, prejudicial, and highly inflammatory testimony of Dr. Ware put into evidence in violation of the Confrontation Clause: "[t]he experts are merely witnesses and you have the right to either accept or reject their testimony and opinions in the same way and for the same reasons for which you may accept or reject the testimony of other witnesses in the case." (Vol. 6, Tr. p. 1058) (Jury Instruction, Exhibit-A).

We will demonstrate below how the court's impermissible allowance of "bad character" evidence, hearsay evidence coupled with a faulty jury instruction by the court and the unique and disturbingly incoherent Louisiana statutory definitions of insanity and intoxication, was an egregious injustice which unconstitutionally stripped me of the presumption of innocence, and deprived me of a fair trial.

There is also a number of other serious errors of constitutional dimension which, considered individually or collectively, directly implicate the integrity of the trial process and the guilty verdict. These errors include: (1) prosecutorial misconduct and ineffective assistance of counsel in presenting false and unreliable evidence of prior criminal convictions, in depicting me as a drug addict, a criminal, a violent person (2) the hearsay testimony of a psychiatrist expert witness in violation of the Confrontation Clause (3) ineffective assistance of counsel at trial in failing to present available evidence in support of an insanity/intoxication defense, in failing to preclude jury consideration of prejudicial evidence, in failing to voice contemporaneous objection to omission of "Specific Intent" element of crime in jury instruction (4) failure of counsel to object to failure court to allow 24-hour delay to prepare a mitigation case at sentencing (5) unconstitutional sentence (6) Ineffective assistance of counsel at sentencing and denial of due process.

The state courts unreasonably rejected all of the constitutional claims and procedurally defaulted others. The state courts further erred in denying me a hearing on the claims that required factual determinations. Moreover, while each of these errors caused substantial harm to me, the cumulative prejudicial and reenforcing impact of the errors was overwhelming. The state courts improperly ignored the cumulative effect of these errors.

I was deprived of a fair determination of my insanity defense: I was convicted not because I knew the wrongfulness of my acts, but instead because I was found to be a "bad" person. It is respectfully submitted that a conviction so flagrantly violative of the core constitutional principles of due process, the presumption of innocence, and the right to a fair trial simply cannot be allowed to stand.

All claims raised herein were raised on direct appeal and in the initial 1985 Application for Post-Conviction Relief. I have raised only these claims because the Second Circuit State Court of Appeal in 2015 and 2017 vacated the 1985 order denying the initial PCR Application in light of Martinez/Trevino, which only allowed for the claims raised in the initial 1985 Application for PCR to be reviewed.

II.

(A) STATEMENT OF THE CASE AND JURISDICTION

On April 28, 1983, I was convicted of armed robbery and sentenced to 80 years at Hard Labor without parole, probation, or suspension of sentence.

On October 17, 1984, the Louisiana Second Circuit Court of Appeal affirmed the conviction and ordered that my direct appeal claims of Ineffective Assistance of Counsel (IAC) be deferred a to post-conviction proceeding where an evidentiary hearing could be held. State v. Colvin, 452 So. 2d at 1221-1222 (LA. 1984).

On March 27, 1985, I filed an Application for Post Conviction Relief, raising eight claims, including numerous claims of ineffective assistance of counsel (IAC) at trial, several of them structural. My Application was procedurally defaulted on the grounds that I failed to "state" a claim that trial counsel's representation was below the standards set forth in Strickland v. Washington, 104 S. Ct. 2052 (1984) (see Exhibit-B). I had no counsel on this initial 1985 Post-

Conviction Application. The deferment of direct appeal claims of IAC to Post-Conviction where a defendant does not have counsel and where these claims are procedurally defaulted, has been held unconstitutional by the Supreme Court of the United States in what is now known as the Martinez Exception to the Coleman Rule. See Martinez v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S Ct. 1911 (2013). Therefore, because this federal habeas court must make an exception to the procedural defaults in the initial review post-conviction proceeding, this court has jurisdiction. The "Pertinent Judgement" in the 1985 initial post-conviction application was handed down by the Louisiana Supreme Court on Fedurary 11, 2019 (see 2244 (d)(2). (See also Exhibit-C.)

On January 12, 2004, light of the U.S. Supreme Court's Holding in Glover v. U.S., 531 U.S. 198, 148 L. Ed. 2d. 604, 121, S. Ct. 696, I filed a Second post-conviction Application in state district court, raising claims of IAC at sentencing and new evidence of nonexistence of prior convictions used to enhance my sentence under the habitual offender statute. This "Second" petition was prematurely denied as untimely in the state district court's October 20, 2004, opinion which stated incorrectly that my initial state post-conviction proceeding in this case became final in 1985.

In 2014, in light of the U.S Supreme Court's ruling in Martinez v. Ryan, 132 S. Ct. 1309 and Trevino v. Thaler, 133 S Ct. 1911, I filed a 28 U.S.C. 2254 habeas petition in the U.S. District Court for the Western District of Louisiana. This petition was also prematurely denied as untimely because the court incorrectly assumed that initial state post-conviction application was final in 1985.

On August 25, 2015, in light of a Notice of Appeal misfiled in 1985 and found by another District Court clerk, a Ms. Robin Reynolds, in 2015, I filed a Request for Supervisory Review to the Second Circuit Court of Appeal and asked the Court to vacate the conviction or the1985 order denying my initial review PCR application under the Martinez Exception to the Coleman Rule. The Second Circuit granted writs in part and denied in part. In short, it denied my request to vacate the conviction, but granted my request to vacate the order denying my initial 1985 application for PCR in light of the Martinez/Trevino Equitable Exception to the Coleman Rule and the State impediment of the misfiled Notice of Appeal..

NOTE: "Teague does not 'limit a state court's authority to grant relief for violations of new rules [or Martinez's Equitable Exception to the Coleman Rule] of constitutional law when reviewing its own state's convictions,' and thus Teague does not prohibit state courts from applying a new constitutional rule to cases that are finalized before that rule was announced," Danforth v. Minn., 552 U.S. 264, 278-82 (2008).

My raising of the Martinez Equitable Exception to the Coleman Rule in my 2015 pro se Writ for Supervisory Review, and the Second Circuit's granting of the Relief requested by the Martinez Exception, is proof that the Second Circuit's Remand of the 1985 order denying "Initial Review Post-Conviction Proceeding was based, in part, on its application of Martinez Exception in this case. See Martinez v. Ryan, 132 S. Ct. 1309, 182 L. Ed. 2d, at 282-288 (2012).

On November 16, 2015, I filed a Motion for Appointment of Counsel and for an Evidentiary Hearing on the claims of IAC raised in the 1985 Initial Review PCR proceeding. On May 10, 2016, the court granted the Motion for Appointment of Counsel. On April 25, 2017, the state District Court denied my motion for an Evidentiary Hearing.

On June 8, 2017 and June 20, 2017, I filed a pro se Motion and Memorandum raising the same claims raised herein, again particularizing (or properly stating) and arguing those claims raised in the 1985 Application. I requested that the district court hear these claims on the merits on the intact record alone. The district court ignored the timely and properly filed Motion and Memorandum because, I assume, she had appointed counsel. "The Sixth Amendment contemplates a norm in which the accused, and not the lawyer, is master of his own defense") and ("The choice is not all or nothing: to gain assistance, a defendant need not surrender control entirely to counsel.") See Headnotes, McCoy v. Louisiana, 2018 U.S. S. Ct. LEXIS 2802, No. 16-8255 (Decided May 14, 2018).

On July 18, 2017, the district court dismissed my initial 1985 PCR Application based on doctrine of laches because of the state's assertion that it was materially prejudiced under LA. C.Cr.P. art. 930.8 (B), asserting the disbarred Nader is dead and cannot testify as to why he signed conflicting affidavits and why he was incompetent during the trial of this matter (Exhibit-D). This notion of material prejudice is a conclusion of law and *cannot be afforded the presumption of correctness in this post conviction petition*. "For example, although the

presumption of correctness does apply to state court 'finding of fact' underlying an ineffective assistance of counsel claim, it does not apply to ultimate 'conclusions of law' regarding ineffective assistance. Other examples, [as in the District Court's 2017opinion here], of mixed questions of law and fact not entitled to the presumption of correctness include a district court's dismissal of a habeas petition based on a doctrine of laches." 44 Geo. L.J. Ann. Rev. Crim. Proc. p. 1050 (2015). See, e.g., Carson v. Burke, 178 F. 3d 434, 435 (6th Cir. 1999).

Furthermore, the trial record is intact and no amount of testimony from a disbarred lawyer (or anyone else) will make disappear the numerous structural errors on the face of that record caused by trial counsel's ineffective assistance. As to "why" he signed conflicting affidavits is irrelevant because: "...when the transcript and record contain the portions necessary to address the issues actually raised on appeal, including those portions where objections were made [or not made] by counsel, the record is constitutionally sufficient for a meaningful appeal." Schwander v. Blackburn, 750 F. 2d 494 (5 Cir. 1985)," citing Chenevert v. N. Burl Cain, Warden, 2012 U.S. Dist. LEXIS 150099 (E.D. LA. Aug.22, 2012, Civil Action No.12-966, Section "F" (2). Therefore, this post conviction court can review all claims raised herein on the intact record alone, including the defaulted claims of IAC under the authority of the Martinez/Trevino Equitable Exception to the Coleman Rule.

The district court ruling of July 18, 2017, dismissed my petition, "For the reasons outlined in the October 1985 denial of Petitioner's Application, Petitioner's FIRST APPLICATION FOR POST CONVICTION RELIEF, filed March 27, 1985, is DENIED" (Exhibit-D).

My attorney, James C. McMichael, filed Supervisory Writs and on October 5, 2017, the Second Circuit vacated the district court's April 25 and July 18, 2017 Orders in a ruling "Made Preemptory." The Second Circuit stated: "We vacate those rulings and remand for an evidentiary hearing, under LA. Code Cr. P. art. 930, on the issue of ineffective assistance of counsel RAISED IN THE 1985 APPLICATION (my emphasis) for post-conviction relief." (Exhibit-E). Therefore, the Supreme Court's ruling that my initial Application is a third successive under LA. C.Cr.P. art. 930.8 or successive and repetitive under LA. C.Cr.P. art. 930.4 (D) (E), because of newly raised claims, is factually incorrect. No new claims were raised in McMichael's Writ for Supervisory

review and none were remanded by the Second Circuit in its Preemptory Order of Remand. Therefore, the Supreme Court's ruling resulted from a decision that was based on an unreasonable conclusion of law in light of the evidence.

On February 11, 2019, the LA. Supreme Court granted Writs and held that the state was materially prejudiced under under LA.C.Cr.P. art. 930.8(B). The Louisiana Supreme Court also held that "respondent has *now* fully litigated his [initial 1985] application for post conviction relief in state court....Respondent's claims have *now* been fully litigated in accord with La. C. CR. P.ART. 930.6, and this denial is final." (See Exhibit-C).

III

GOVERNING HABEAS CORPUS PRINCIPLES

(A). **Exhaustion and Timeliness**

I present numerous claims of ineffective assistance of counsel and denial of due process. These claims were either procedurally defaulted on post-conviction and/or heard on the merits by the court of appeal. The "pertinent judgment" in this 1985 Initial Application for PCR was not made final until February 11, 2019, by PER CURIAM order of the Louisiana Supreme Court, which dismissed my Initial 1985Application under LA. C.Cr.P. art. 930.8 (B). Therefore, this instant habeas petition is timely and not successive according to 28 USC 2244 (d)(1)(A) and (2), see Rodriguez v. Thaler, 664 F.3d 952, 954 (5th Cir. 2011) (limitation tolled during pendency of state habeas petition). See also, e.g., Mark v. Thaler, 646 F.3d 191, 191 (5th Cir. 2011) (year runs when period in which petitioner could have sought further direct review in state court expires).

The granting of the 2015 and 2017 Writs for Supervisory Review were not out of time petitions for discretionary review, but arose out of the "Direct Appeal" process of "Initial Review Post-Conviction Proceeding" of the state judicial system, and therefore tolled of the AEDPA's limitations period under 28 USC 2244 (d)(1) and (2) and 2244(d)(1)(B).

Even if this court does not agree that the appellate clock is reset in this case, the one-year AEDPA limitation was tolled on the date I filed the Initial Review Post-Conviction proceeding, March 27, 1985. From the date of October 5, 1984, when the Louisiana Supreme Court denied

Writs, to the date of March 27, 1985, when I filed my Initial Review Post-Conviction Application, is 173 days. Considering the time lapse since the date this case became Final on February 11, 2019, until the filing date of this habeas petition is ___ days under the Prison Mailbox Rule.

(B). Pro se Litigation

This petition is pro se litigation. I beg this Court to liberally construe these pleadings because I have made great efforts not to make legal conclusions couched as factual allegation. "Courts construe pleading filed by pro se litigants under a less stringent standard of review." Harris v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (per curiam). Under this standard, "[a] document filed pro se is "to be liberally construed," [Estelle v. Gamble, 429 U.S. 79, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)], and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007).

(C). Review Standards for Claims of Ineffective Assistance of Counsel

The standards for determining claims of ineffective assistance of counsel are well established. A petitioner must show that counsel's performance was deficient and that the deficiencies in performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d. 674 (1984). Prejudice is established where "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. See also, Woodford v. Visciotti, 537 U.S. 19, 22, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (noting that Strickland had "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered") Williams, 529 U.S. at 406 (rejecting state court's to engraft additional burden on habeas petitioner, rather than simply applying "reasonable probability" standard) Jacobs v. Horn, 395 F. 3d 105, n.8 (3d Cir. 2005), cert. denied, 126 S. Ct. 479 163 L. Ed. 2d 366 (U.S. 2005) (habeas petitioner need not prove "conclusively" that deficiency of counsel would have led to different result) U.S. v. Smack, 347 F. 3d. 533, 540 (3d Cir. 2003) Jermyn, 266 F. 3d at 282 (noting that reasonable probability standard is not "a

stringent one") cf. Dugas v. Coplan, 428 F. 3d. 317, 328 (1st. Cir. 2005) (fact that trial counsel was experienced and "generally competent" is not relevant).

There is an additional fundamental legal principle regarding ineffective assistance of counsel claims: after a reviewing court analyzes each claim of deficient performance to determine whether prejudice was established, if no single claim amounts to prejudice, the court must then assess the cumulative prejudicial impact of all deficient performance claims. See, e.g., Wiggins v. Smith, 539 U.S. 510, 54-36, 123 S. Ct. 2527, 156 L. Ed. 2d. 471 (2003) (totality of errors must be considered to properly determine prejudice) Williams, 529 U.S. at 396-98 ("acts or omissions" must be considered in the aggregate) Daniels v. Woodford, 428 F. 3d. 1181, 1214 (9th Cir. 2005) (improper to conduct a "balkanized, issue-by-issue harmless error review") Silva v. Woodford, 279 F. 3d. 825, 834 (9th Cir. 2002), as amended, (Feb. 22, 2002) Humphreys v. Gibson, 261 F. 3d. 1016, 1021 (10th Cir. 2001) Washington v. Smith, 219 F. 3d. 620, 634-35 (7th Cir. 2000) (court must assess the "totality of the omitted evidence...rather than the individual errors") Skaggs v. Parker, 235 F. 3d 261, 267, 2000 FED App. 0415A (6th Cir. 2000) (errors in penalty phase undermined confidence in the verdict). Because the state court rulings were factually incomplete, this Court must undertake the analysis on a de novo basis. See Jermvn, 266 F. 3d at 299-300 Everett, 290 F. 3d. at 507-508.

IV.

ARGUMENT

A. Ineffective Assistance of Counsel. Denial of Right to Fair Trial (Raised as Claim II & III of the initial application for PCR.)

As applied in this case, Louisiana's statutory scheme, which provides that a criminal defendant with an affirmative defense of legal insanity and offers the jury the alternative of finding the defendant not guilty and not guilty by reason of insanity, but no plea of Intoxication, is constitutionally infirm because:

1) Louisiana's statutory scheme utilizes the same definition for legal insanity and intoxication, thus depriving the jury of any meaningful guidance on the governing standards and undermining the presumption of innocence.

2) Louisiana's statutory scheme instructs a jury to decide whether a defendant who has asserted an insanity defense is "sick rather than bad" (i.e., legally insane) or "bad" (i.e., guilty and somewhat intoxicated). In other words, a defendant asserting an insanity defense must shoulder the burden of proving that he is not a "bad" man, insane and intoxicated to the degree of blackout or delusion.

3) The jury was allowed to consider a vast array of prejudicial and highly inflammatory "bad acts" and "bad character" evidence, none of which was germane to the sole disputed issue of whether the robbery was committed with specific criminal intent (as asserted by the prosecution) or under a delusional and illusional state caused by injecting meth and and drinking alcohol shortly before the robbery in question as trial counsel failed to assert due to incompetence and an understanding that the defense of intoxication and insanity.

1. **The Statutory Framework and the Arbitrary Standards for Determining Insanity**

Louisiana's intoxication statute provides:

> "Intoxication." The fact of an intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial, except as follows: (2) Where the circumstances indicate that an intoxicated or drugged conduction has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime." LA. R.S. 14: 15 (emphasis added).

The first prong of this test is essentially duplicative of the M'Naghten test, which is used to define legal insanity in Louisiana:

> "Insanity" If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility. LA. R.S. 14:14 (emphasis added).

Louisiana's not guilty and not guilty by reason of insanity statute is unique. The Louisiana legislator used the American Law Institute's test for legal insanity NOT as as a test for insanity in Louisiana, but instead as the definition of "Intoxication" in the Insanity statute. Thus, Louisiana's statutory scheme uses insanity definitions for the purpose of two mutually exclusive verdicts: not guilty by reason of insanity, and intoxication. Someone who is legally insane under M'Naghten is necessarily "intoxicated" under Louisiana's intoxication statute. Yet someone who is intoxicated under the first prong of Louisiana's intoxication standard ("circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent

or of special knowledge required in a particular crime, this fact constitutes a defense to a prosecution for that crime") is not deemed to satisfy the M'Naghten test.

There is a meaningful difference between the intoxication requirement that the defendant "lacks specific criminal intent or of special knowledge" required for in a particular crime" and the legal insanity test that the defendant "was incapable of distinguishing between right and wrong." But Louisiana appellate decisions use the insanity terms "right and wrong" and "specific criminal intent" interchangeably in discussing legal insanity and intoxication. In State v. James, 241 LA. 233, 128 So. 2d 21 (1961), where no plea of insanity at the time of the crime had been filed, psychiatric testimony as to the defendant's amnesia at the time of the crime for the purpose of showing that he could not entertain the specific intent to kill was held inadmissible, with the court citing the Gunter case. Thus, in the absence of a special plea of insanity, evidence of [intoxication] is not admissible, either as a complete defense or for purpose of negating a specific intent and reducing the degree of the crime." See also, e.g., Knox v. Butler, 884 F. 2d 849, n. 3, LEXIS 15021 (5th Cir. 1989): "In 1979, when Knox was tried, specific intent was an element of armed robbery under LA. Rev. Stat. Ann. 14:64 (West 1981). See State v. Johnson, 368 So. 2d. 719 (LA. 1979). Subsequently, the 1983 Amendments to 14:64 removed the specific intent element from the statutory definition of armed robbery. See State v. Gorden, 504 So. 2d 1135, 1142 n. 4 (LA. App. 5th Cir. 1987)." But not before the date of the offense and trial in this case. Therefore, specific intent is an element of armed robbery in this instant case, and the specific criminal intent requirement in LA. R.S. art 14:15 is relevant here. [1]

A substantive law problem, which is outside the scope of the criminal review procedure revision, is whether a mental defect or intoxication short of insanity under the M'Naghten right

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[1] In the original appellate brief of this case (Exhibit-F), Assignment of Error No. 5., appellate counsel, Paul A. Strickland, stated: "Following the presentation of evidence, trial court instructed the jury as to the statutory definitions of armed robbery, simple robbery, attempt, criminal intent, intoxication and insanity (Vol. 6, Tr. pp. 1053-1068). The trial court never instructed the jury that the crime of armed robbery required specific intent. State v. Johnson, 368 So. 2d 719 (La. 1979). In Johnson, supra, the trial judge, as in the case here, instructed the jury as to the statutory definitions of armed robbery, simple robbery, attempt and criminal intent. The jury returned, requesting further instructions as to the definitions of armed robbery, simple robbery, attempt and criminal intent essential to these crimes. Thereupon, the trial judge instructed the jury that these crimes only required general intent, and, thereafter, the jury returned a guilty verdict to the charge of armed robbery. The Louisiana Supreme Court reversed the defendant's conviction on the grounds that this erroneous instruction was prejudicial. In that case, as well as here, whether or not defendant had specific intent was a decisive issue."

from wrong test codified in LA. R. S. Art 14 of the 1942 Louisiana Criminal Code, can be shown to reduce the degree of the crime, particularly navigating specific intent. The James case is the first Louisiana decision on this problem, and the courts in other jurisdictions are far from uniform in their approach. A clear statement of the rule of diminished responsibility is found in State v. Padilla, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959): (Partial Responsibility) mean the allowing of proof of mental derangement short of insanity as evidence of lack deliberate or premeditated design, i. e., specific intent. In other words, it contemplates full responsibility, not partial. See also, dissenting opinion by Mr. Justice Murphy in Fisher v. United States, 328 U.S. 463, 66 S. Ct. 1318, 90. L. Ed. (1946); Perkins, Criminal Law 767-771 (1957); Clear and Marshal, Crimes 374-377 (6th ed. 1952); Weihofen and Overholster, Mental Disorder Affecting the Degree of a Crime, 56 Yale L.J. 959 (1947). The American Law Institute's Model Penal Code has adopted the diminished responsibility rule. A.L.I. Model Penal Code, Proposed Official Draft (1962).4.02.

However, Louisiana his rejected the concept of partial insanity in favor of the all or nothing approach of Art. 14:14 of the criminal code. And thereby leaving the intoxication defense of Art 14:15 constitutionally infirm. Therefore, if the appellate courts use the terms "specific criminal intent or of special knowledge required for in a particular crime" and the legal insanity test that the defendant "was incapable of distinguishing between right and wrong," interchangeably in discussing intoxication and insanity, how is a lay jury supposed to draw any distinction, particularly where, as here, the trial court fails to provide any meaningful guidance and even fails to include the "specific intent" instruction required by the armed robbery statute at the time of this case?

A jury which is choosing between the two alternatives is guided only by the instruction that one who is "sick rather than bad" is legally insane, but that one who is "both intoxicated and bad" is not insane, but guilty since Louisiana, despite the intoxication statute, LA. R.S. 14:15, which states that guilt requires specific criminal intent, but does not allow "a mental defect or disorder short of insanity . . . to negate specific intent." Fisher v. United States, 328 U.S. 463, 66 S. Ct. 1318, 90 L. Ed. 1382. Citing State v. Lecompte, 371 So. 2d (LA. 1979).

It is this vague and confusingly applied all or nothing statutory schemes, authorized by C.Cr. P. art. 552 and LA. R.S. 14:14 in combination with LA. R.S. 14:15, and the extended evidence of bad acts and bad character evidence and a faulty jury instruction, that stripped me of presumption of innocence and deprived me of a fair trial. In this case, the ever-so-close balance between the insanity and intoxication statutes was inexorably tipped in favor of finding guilt by the introduction of prejudicial and highly inflammatory "bad acts" and "bad character" evidence, none of which were relevant to the critical issue of whether I, in an intoxicated state, had specific intent to rob a store, and an instruction that required the jury to decide my affirmative defense of insanity on the basis of whether I proved that I was not a "drug addict," a "criminal," and a violent "bad" man with an "extremely dangerous nature, " as I was portrayed by my own lawyer and by the State without objection.

SIGNIFICANCE OF IRRELEVANT AND PREJUDICIAL "BAD ACTS" AND "BAD CHARACTER EVIDENCE

The significance of the bad acts and bad character evidence becomes apparent in the context of the legal principles that govern the insanity defense in Louisiana. In this case, the district court charged the jury that, in deciding between the verdicts of not guilty by reason of insanity and Intoxication, the jury's task was was to determine whether I was "sick rather than bad" or "both intoxicated and bad":

The "sick rather than bad" versus "both intoxicated and bad" encouraged the jury to bypass the difficult task of assessing the nature of my "intoxication and organic brain damage" in relationship to my conduct. Instead, the instruction focuses on the question of whether I, a defendant who by definition has committed a very bad act, was "bad or "not bad."

The state supported it's "bad man" portrayal of me by introducing evidence of highly prejudicial and inflammatory "bad acts" and "bad character" evidence that had no relevance whatsoever to the only issue in the case whether I had "specific intent or "specific criminal

intent" to rob the store within a mile of my home for $136 out of a meth and alcohol induced state of delusion or illusion:[2]

The first witness called by trial counsel on behalf of the defense was Mary Kay Colvin-Tallant, my sister (Vol. 4. Tr. pp. 675-686). The substance of her testimony, on direct examination, was that in April 1982, she had seen me at the home of my mother melt down a pill to be injected by me (Vol. 4, Tr. p. 676). The date of the subject offense took place on July 12, 1982. On cross examination of this witness, the state solicited testimony from this witness that I put a screwdriver through her elbow when she was about 13 or 15 (Vol. 4, Tr. p. 681), which made me 8 or 10. The state solicited further testimony that I knocked out the windows of her car in a violent rage (Vol. 4, Tr. p. 681). All of this testimony concerning acts of violence committed by me was allowed into evidence without objection by trial counsel.

The second witness called by trial counsel on my behalf was Debra Colvin, my sister (Vol. 4, Tr. pp. 686-699). She testified on direct examination in response to the questioning of trial counsel that defendant had threatened her and her eight-month old son with a knife (Vol. 4, Tr. p. 687) and that she had seen defendant inject drugs on numerous occasions in the summer of 1982 (Vol. 4, Tr. pp. 689-692). Furthermore, trial counsel made several references to my incarceration in federal prison (but which was actually El Reno federal reformatory) and at Caddo Dentition Center (Vol. 4, Tr. pp. 687, 691, 692, 693). It was even brought out in the presence of the jury that I had been incarcerated most of my life (Vol. 4, Tr. p. 694).

The next two witnesses called by trial counsel on my behalf was Sherry Owens and Darla Hopkins. They gave the same testimony as the two previous witnesses regarding my use of drugs and violent disposition (Vol. 4, Tr. pp. 700-718). In fact, for the remainder of the trial, I was depicted by my own counsel and by the state as an extremely violent person and a criminal when, in fact, I had never been charged or convicted as an adult or adjudicated as a juvenile of any crime of violence except for the instant offense, not even so much as a misdemeanor verbal assault.

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[2] As raised in Assignment of Error No. 6 of the original appellate brief and Claim II on the Initial 1985 Application for PCR, I contend that I was denied effective assistance on the grounds that trial counsel depicted me as a drug addict, a violent person and as a criminal and allowed the state to do the same without objection. This conduct admitted my guilt in the presence of the jury and was held a STRUCTURAL ERROR by the Supreme Court of the United States in McCoy v. Louisiana, 2018 U.S. S. Ct. LEXIS 2802, No. 16-8255 (Decided May 14, 2018) and requires automatic reversal of this conviction.

Dr. Paul D. Ware, a physician and professional witness, appointed to the Sanity Commission in this case, and after reviewing my medical records at LSU Shreveport Medical School, filed a supplemental report concluding that I was mentally capable of assisting my counsel and that I was capable of distinguishing right and wrong at the time of the offense. (Vol. 1, Tr. p. 47). Dr. Ware, as well as the trial court, based his decision principally upon tests which were conducted in September of 1980, by the Louisiana State Medical Center in Shreveport. Dr. Ware, based his opinion primarily on these1980 reports of a Dr. Allen, changing his original diagnosis of "either an antisocial personality or paranoid schizophrenia" (Vol. 1, Tr. p. 46) to an "antisocial and a malinger." (See Exhibit F, Assignment of Error No. 4 of the original appellate brief.) Dr. Ware then gave the following testimony regarding the treatment of anti- socials in response to the questioning of the state:

> Q. Are you saying that the best thing for his mental welfare and survival is not to be rescued from the consequences?
>
> A. That is the best things in terms of trying to make recommendations for his therapy, nothing to do with the law. He needs to be dealt with with facts and figures, and suffer the consequences of his actions. As long as he continues to manipulate the system, he will continue to hold onto the belief that, 'I can do that, I'm different and I'm special and I should be considered different.' There is no way for him to change with that happening.
>
> Q. Does that include the possibility of conviction and/or incarceration?
>
> A. Definitely, conviction and incarceration, all of the leaders in the treatment of anti-socials. They say must go to jail. They must serve their time. We will treat them while they are in there in the closed system, but they must go and serve their time. They must pay the consequences for their behavior. They never had." (Vol. 5, Tr. p. 917)

The Second Circuit ruled that the defense of insanity opened the door for the state to put on evidence of bad acts and bad character evidence on the ground that such evidence was ostensibly relevant to my mental state at the time of the offense and the general strategy of trial counsel. Also, the Second Circuit procedurally defaulted trial counsel's failure to object to Dr. Ware's irrelevant, prejudicial, and highly inflammatory testimony.[3]

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[3] However, the Louisiana Supreme Court has created an exception to the contemporaneous objection rule when there is an allocation of ineffective assistance of counsel. State v. Ratcliff, 416 So. 2d 528 (LA. 1982). I raised ineffective assistance on motion for a new trial (see Assignment of Error No. 6 in the original appellate brief), on Direct Appeal, and in initial application for post-conviction relief. Therefore, Louisiana courts do not consistently or regularly follow the contemporaneous objection rule.

First, on the issue of whether I knew the wrongfulness of my acts, it is difficult to understand how the bad act and bad character evidence, was in any way relevant. This evidence lacked probative value on either of the M'Naghten prongs: whether I suffered from a mental disease and whether I knew my acts were wrong had specific intent. Indeed, the trial court did not even attempt to instruct the jury to ignore this prejudicial testimony put into evidence in violation of the Confrontation Clause, nor did the court instruct the jury on how this prejudicial evidence was affirmatively relevant in any respect. Not only was it irrelevant, its prejudicial impact was overwhelming: it could be used by the jury to determine that I was a "bad" person, and therefore not insane under Louisiana law. We will review below in detail the prosecution's violation of the *confrontation clause* in regard to Dr. Ware's testimony.

Second, the Second Circuit ruled that the evidence of drug use and violent criminal acts, on which the prosecution offered extensive (albeit in part false and circumstantial) testimony, was irrelevant on the issue of my mental condition at the time of the offense. But it is clear from the record that this evidence was introduced with the primary purpose of presenting prejudicial bad act and bad character evidence. As discussed above, the prosecution and trial counsel failed to tie the adolescent bad acts, juvenile adjudications, and general drug use in the summer of 1982 to the only relevant issue in the case, i.e., my state of mind at the time of the commission of the offense. The state presented a closing argument that focused entirely on the issue of that whether I knew the wrongfulness of my acts and had robbed the store because I was a violent criminal that had been locked up all of my life and not a meth-addled delusional with organic brain damage.

By allowing the admission of extensive "bad acts" and "bad character" evidence in violation of La. C.E. Art 404 (A)(1) and (B), and then failing to instruct the jury to disregard this testimony, the trial court insured that the jury would consider the bad acts and bad character evidence in making that all important determination. The Supreme Court of the United States has long held that the Constitution's guarantee of due process does not allow a defendant to be convicted of a crime based on evidence of his "bad character." See Old Chief v. U.S., 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574, 45 FED. R. Evid. Serv. 835 (1997) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the

prosecution to any kind of evidence of a defendant's evil character to establish his guilt.") Michelson v. U.S., 335 U.S. 469, 475, 69 S. Ct. 213, 93 L. Ed. 168 (1948) (the right to a fair trial "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt") Boyd v. U.S., 142 U.S. 450, 12 S. Ct. 292 35 L. Ed. 1077 (1892) (admission of evidence of defendants other crimes prejudiced the defendant and required reversal of convictions). In this case, my own counsel and the state, without objection, put into evidence federal adjudications that are confidential under the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031-5032. See former LA. Code Juvenile Procedure 122A and 123A. See also State v. Brown, Sup. 2004, 879 So. 2d 1276, 2003-2788 (LA. 7/6/04) rehearing denied, cert. denied 125 S. Ct. 1310, 543 U.S. 1177, 161 L. Ed. 2d 161. In Louisiana courts it is well settled that evidence of prior criminal acts is inadmissible for the purpose of proving the defendant has a criminal disposition. See La. C.E. Art. 404 (A)(1) and (B). Furthermore, proof of present guilt may not properly be made by evidence of general bad character or of other criminal activity independent of the present offense. State v. Prieur, 277 So. 2d 126 (LA. 1973). These rules are directed against the state to protect the rights of the accused. See also United States v. Bosch, 584 F 2d 1113 (1st. Cir. 1978).

In this case, trial counsel incompetently, on my behalf, initially put into evidence prior bad acts committed by me and of my so-called violent disposition. Bell v. Cone, 535 U.S. 685 (2002) (This line of testimony was irrelevant and extremely prejudicial to my right to a fair trial and to have "the state put to a meaningful adversarial testing). Under United States v. Cronic, 466 U.S. 648 (U.S. 1984) (Trial counsel's conduct "constituted a complete breakdown of the adversarial process that is presumed prejudicial"). Under Louisiana law, the state cannot put on evidence of bad character unless the defense has put on evidence of my good character. LA. R.S. 15:841. My trial counsel put on no good character evidence at all.

Similarly, the courts of appeal have uniformly condemned the use of "bad character" evidence. See, e.g., *McKinney v. Rees*, 993 F. 2d 1378, 1380, 36 Fed. R. Serv. 1310 (9th Cir. 1993), as amended, (June 10, 1993) (discussing English and early American cases) U.S. v. Waechter, 771 F. 2d 974, 980 (6th Cir. 1985) (reversing conviction for giving false statement,

Court stated, "We cannot allow the government to convict Waechter of being a bad person [or] engaging in sharp practices.") Lovely v. U.S. 169 F. 2d 386, 389 (C.C.A. 4th Cir. 1948) ("The rule which thus forbids the introduction of evidence of other offenses...is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence").

The Supreme Court of the United States not only found such testimony relevant (unlike the Second Circuit in its opinion which found this line of testimony irrelevant and procedurally defaulted this claim because of counsel's failure to contemporaneously object, Colvin, 452 at 1220), but stated that the prejudicial impact of such "bad character" evidence was overwhelming. The Supreme Court explained:

> The inquiry is not rejected because character is irrelevant on the contrary, it is said to weigh too much on the minds of the jury and to over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend himself against a particular charge. The overriding policy of excluding such evidence despite its probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and prejudice. Michelson, 335 U.S. at 475, 476.

Similarly, the Advisory Committee Note to Fed. R. Evid. 404(b) states:

> (C]haracter evidence...tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what evidence in the case shows actually what happened.

The longstanding prohibition of the introduction of "bad acts" evidence is grounded in the presumption of innocence and the Constitutional guarantee of due process. Palko v. State of Connecticut, 302 U.S. 319, 58 S. Ct. 149 L. Ed. 2d 288 (1937) (overruled on other grounds by Benton v. Maryland, 395 U.S. 784 , 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969) (due process protects fundamental interests that are "implicit in the concept of ordered liberty") See Tumey v. State of Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio L. Abs. 159, 5 Ohio L. Abs. 185, 50 A.L.R. 1243 (1927). While not all rules of evidence are constitutionally mandated, those essential 'to a fair trial are: Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in federal-law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men and

women from dubious and unjust convictions, with resulting forfeitures of life, liberty and property. Brinegar v. U..S., 338 U.S. 160, 174, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

While evidence of a defendant's bad acts may sometimes be relevant to a matter in issue, because such evidence carries the significant risk of misuse by the jury and prejudice to the defendant, due process rights are implicated. See Lesko v. Owens, 881 F. 2d 44, 51-52, 28 Fed. R. Evid. Serv. 77 (3rd Cir. 1989) (admission of evidence that is relevant but excessively inflammatory might rise to the level of constitutional violation).

In Government of Virgin Islands v. Toto, 529 F.2d 278, 1 Fed. R. Evid. Serv. 200 (3rd Cir. 1976), the Third Circuit reversed a conviction for distributing marijuana because prosecutor had elicited on cross-examination of the defendant the fact that he previously pleaded guilty to the misdemeanor of petit larceny. The court found that the trial court's curative instruction could not overcome the substantial prejudice to the defendant. Judge Aldisert's opinion for the court stated:

> Clarke [United States v. Clarke, 343 F. 2d 90 (3rd Cir. 1965)] reaffirms this court's tradition of protecting the presumption of innocence that accompanies a defendant throughout the trial. The accused is not only presumed to be innocent of the crime with which he his charged, but our legal tradition protects him from the possibility of guilt by reputation...When such evidence [of prior bad acts] inadvertently reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a class of milk. 529 F. 2d at 283 (emphasis added).

See also Robinson v. State of Calif., 370 U.S. 660, 66-67, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) (presumption of innocence undermined by law that permits conviction based on "status" of addiction) U.S v. Himelwright, 42 F. 3d 777, 787, 41 Fed. R. Evid. Serv. 677 (3d Cir. 1994) (reversing conviction where introduction of prior bad acts "enabled, if not invited, the jury to draw impermissible inferences which might well have deprived Himelwright of a fair trial") U.S. v Sampson, 980 F. 2d 883, 887, 37 Fed. R. Evid. Serv. 440 (3d Cir. 1992) (reversing conviction based on the admission of prior bad act evidence and noting that "where the evidence only goes to show character, or that the defendant had a propensity to commit the crime, it must be excluded").

In McKinney v. Rees, 993 F. 2d 1378, 36 Fed. R. Evid. Serv. 1310 (9th Cir. 1993), as amended, (June 10, 1993), the Court of Appeals affirmed the grant of a writ of habeas corpus where it found that petitioner's murder conviction was the result of the introduction of "other acts evidence probative only of character and thus, irrelevant." 993 F. 2d at 1384. The evidence

relating to petitioner's "fascination with knives" was "emotionally charged" and "served only to pray on the emotions of the jury." 993 F. 2d at 1382, 1385. The Court stressed that "[t]he use of 'other acts' evidence as character evidence...is contrary to firmly established principles of Ango-American jurisprudence." 993 F. 2d at 1380. It concluded that the erroneous admission of the character evidence "rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause." 993 F. 2d at 1385. The Court declared:

> Because of the lack of a "weighty" case against McKinney, and the pervasiveness of the erroneously admitted evidence throughout the trial, we think it "highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict.". Kotteakos, 328 U.S. at 776, 66 S. Ct. at 1253. His was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not for whom they are. Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the district awarded him. McKinney, 993 F. 2d at 1368 (emphasis added).

Here too, the trial proceedings violated the fundamental principle that "people are convicted because of what they have done, not who they are." 993 F. 2d at 1386. Just as in McKinney, the extensive "bad acts" evidence introduced by my own disbarred counsel, and by the sate without objection, "served only to pray on the emotions of the jury" and was "just the sort of evidence likely to have a strong impact on the minds of the jurors." 993 F. 2d at 1385, 1386. The "bad acts" evidence introduced against me was utterly irrelevant to the question of whether I had specific criminal intent or even specific intent to rob the store or a meth/alcohol induced delusion or illusion of something else taking place besides a robbery, considering the medical community's recent findings that "delusion and illusion" are symptomatic of meth use.

The "Addiction Center" (addictioncenter.com) says that "[m]eth addicts are often unable to quit on their own because meth impairs decision-making and reprograms the brain's reward system. Specifically, meth causes the release of dopamine, which in turn activate's the reward center in the brain...Certain behavioral and physical changes are common among meth users. Signs of meth abuse include: ...Impulsive behaviors, Memory loss, Bizarre and Erratic Behavior. Sleep deprivation, resulting in hallucinations, delusions, extreme paranoia, or violence..."

The "bad acts" evidence was so extensive that, in and of itself, it deprived me of many chance for a fair trial. Its effect was greatly exacerbated by my own trial counsel and by prosecution's repeated improper appeals to class prejudice.

Because the incidents of my being referred to as a drug addict, and a violent, institutionalized criminal are too numerous to cite here, I will quote Appellate Counsel, Paul A. Strickland's Original Brief, Assignment of Error No. 6, p. 16, para. 2: "In fact, for the remainder of the trial, the defendant was depicted by his own counsel and by the State as an extremely violent person and as a criminal." Further, the State, in its opening statement, expressed its intention to depict me as a criminal and did so repeatedly. (Exhibit-C). U.S. v. DeGeratto, 876 F. 2d 586 (7th Cir. 1989) (plain error because government used "inflammatory" characterization of defendant as "Loan Shark" in closing argument).

The State's poisoning the well with repeated references to my being an institutionalized violent criminal was plain error and manifestly inappropriate. See, e.g. U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 239, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) ("appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them") Sizemore v. Fletcher, 921 F. 2d 667, 670, 671-72 (6th Cir. 1990) (affirming grant of writ of habeas corpus, court declared that "The defendant was charged with armed robbery, and not with being wealthy [in my case of being of a violent criminal class], and no reference should have been made to his station in life" and "we fault both the prosecutors' to wealth and class biases") U.S., v. Stahl, 616 F. 2d 30, 32-33, 80-1 U.S. Tax Cas. (CCH) P 9165, 45 A.F.T.R. 2d 80-710 (2d Cir. 1980) (reversing defendant's conviction and holding that the appeals to class prejudice "are improper and have no place in the court room").

The trial court did not ameliorate the substantial prejudice caused by the State's extensive and inflammatory "bad acts" evidence. And sense the jury was not instructed on the "specific intent" required for guilt beyond a reasonable doubt, it simply could not ignore the bad acts evidence in making that critical determination. In the words of Estelle v. McGuire, 504 U.S. 62, 74-75, 112.S. Ct. 475, 116 L. Ed 2d 385, 33 Fed. R. Evid. Serv. 305 (1991), there is more than "a 'reasonable likelihood' that the jury would have concluded that this instruction [or lack of

instruction], read in the context of other instructions, authorized the use of propensity evidence pure and simple." See also Burton v. U.S., 391 U.S. 123, 135, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) ("there are some context in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored") Toto, 529 F. 2d at 283-84.

As reflected by the 13 minutes of jury deliberation, the case was extremely unfair and hung on the ephemeral difference, if any, between the ALI definition of insanity and the M'Naghten Rule. The "bad acts" evidence so permeated the trial that the jury could not possibly have rendered a fair and objective verdict. In fact, the prejudicial, irrelevant, and inflammatory "bad acts" and "bad character" evidence was so pertinent in the trial that it even infected the trial court when imposing sentence. The Court:

> "The medical evidence presented at trial clearly shows that the defendant presents an antisocial personality and is a person who is extremely dangerous. His dangerous nature is confirmed by the testimony of his family members and the fear they have of him...Although not prosecuted these events have relevancy to the defendant's character and attitudes and propensity to commit criminal offenses. The review of his criminal history [only nonviolent juvenile adjudications] and the testimony of the psychiatrists as well as the testimony of his family members all showing his propensity for violence demonstrates that his character and attitudes are such that he will continue to commit other crimes unless incarcerated for a lengthy period of time...as we have previously made clear, his dangerous nature is such that he must be removed from society...all the evidence clearly reveals that he has been and is institutionalized...the defendant is now sentenced to serve a term of eighty years at hard labor without benefit of parole, probation, or suspension of sentence..." (Sentencing transcript, pp. 7, 9, Exhibit-H)

Another consequence the vague and inherently confusing statutory definitions of insanity and intoxication, as well as the trial court's failure to properly instruct the jury, is that the jury was deprived of the ability to make an informed decision as to whether I acted with specific

intent required to sustain a conviction for armed robbery, which was then a specific intent crime and therefore required a finding of "specific criminal intent" because of my defense of intoxication under LA. R.S. 14:15.

Moreover, the introduction of the extensive and highly prejudicial "bad character" evidence deprived me of a fair opportunity to rebut the State's evidence on the "specific intent" element of armed robbery (and specific intent was an element of armed robbery at the time of my trial under LA. R.S. Ann 14:64 (West 1981) See State v. Johnson, 368 So 2d. 719 (LA. 1979). The "bad character" evidence focused the jury's attention on whether I was a "bad" man, NOT whether I robbed the store with specific intent AND the specific criminal intent required by R.S. 14:15.

In Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35. L. Ed. 2d 297 (1973), the Supreme Court held that "the right of the accused in a criminal trial to Due Process is, in essence, the right to a fair opportunity to defend against the State's accusations." The Court elaborated on this principle in Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636, 20 Fed. R. Evid. Serv. 801 (1986), stating: "...an essential component of procedural fairness is an opportunity to be heard," which would be effectively denied if "the State were permitted to exclude competent, reliable evidence...when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this type of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of a meaningful adversarial testing." See also, e.g., United States v. Cronic, 466. U.S. 648, 659-662 (1984).

In the present case, specific intent beyond a reasonable doubt was essential to the prosecution's charges of armed robbery. Black's Law Dictionary defines "Specific Intent" as "The intent to accomplish the precise criminal act that one is later charged with." But the jury in this case was NOT so charged. Thus, it is a clear violation of due process to exclude competent, reliable evidence rebutting specific intent and specific criminal intent by tending to show that, because of intoxication, that there was a reasonable doubt that I was capable of harboring the mental state comprising specific criminal intent. Yet that is what precisely what occurred here.

Louisiana law precluded me from offering evidence of intoxication except in the context of an insanity defense. LA. C.Cr.P. art 651: "When a defendant is tried upon a plea of not guilty, evidence of insanity or mental defect [intoxication] at the time of the offense shall not be admissible. See also, e.g., State v. Dowdy, 217 LA. 773, 47 So. 2d 496 (1950). Thus, the only way I could utilize expert psychiatric testimony regarding intoxication and the mental defect of organic brain damage was under the rubric of the insanity defense. However, because the defense of insanity had been reduced by the court's allowance of "bad act" evidence, the jury was not allowed to consider fairly on any issue, including the issue of "specific intent," and the very considerable and largely uncontested evidence of mental illness and meth use. In short, the combined force of Article 651 and the faulty jury instruction, as well as the "bad man" evidence deprived me of my right to have the jury consider the impact of my undisputed meth use on the issue of whether the prosecution had met its burden of proving the essential element of the *mens rea*.

The Supreme Court's opinion in Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987), includes language dispositive of the issue here. In Martin, the Court upheld a state law which placed the burden of proving self defense on the defendant. However, the Court stated: "It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case..." 480 U.S. at 233. In effect, that is what happened here. By framing the issue in terms of whether I was "bad," the state courts precluded the jury from considering the effect of my intoxication and mental illness in determining whether there was a reasonable doubt as to the prosecution's proof of specific criminal intent or even specific intent. By excluding from consideration this "competent, reliable evidence challenging the essential element of he crime, the state courts deprived me of my liberty without Due Process of Law.

It is shockingly incompetent that my own attorney would put into evidence testimony regarding my prior criminal record, adolescent violence, and general drug abuse. Apparently, trial counsel introduced this type of evidence as a strategy to support an insanity plea for which there was no supportive evidence. His request for further testing to carry burden of proof at trial was denied, so counsel knew that there was no possibility to put the state to a meaningful

adversarial testing. Logically, this "bad acts" evidence could only serve to depict me as guilty. Turner v. Epps, 412 Fed. Appx. 696 (5th. Cir. 2011) ("Courts are not required to condone unreasonable decisions parading under the umbrella of strategy or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all. If counsel did not make an informed decision, the court must reject an assertion of strategy"). Especially when trial counsel's "so-claimed strategy was so ill chosen that it permeated the entire trial with obvious unfairness." Garland v. Maggio, 717 F. 2d 199, 206 (5th Cir. 1983). I contend that the forgoing alone is sufficient to support a claim of ineffective assistance of counsel. Nero v. Blackburn, 597 F. 2d 991, 994 (5 Cir. 1979) ("Sometimes a single error is so substantial that it alone causes the attorney's assistance fall below the Sixth Amendment Standard").

The errors above were raised on direct appeal under Assignment of Error No. 4 and No. 6 as proper claims of ineffective assistance, but deferred to post-conviction. These errors were also raised in the initial 1985 application for post-conviction relief in Claim II, Denial of Effective Assistance of Counsel and Claim III, Denial of Due Process and Effective Assistance of Counsel but also procedurally defaulted. These two claims are combined here due to their connection at trial and raised in this federal habeas petition under the Martinez Exception to the Coleman Rule.

B. **My Rights to Due Process of Law and Confrontation of Witnesses were Violated by the Use of Hearsay Evidence.**

The prosecution's expert witness, Dr. Paul D. Ware, a psychiatrist appointed to the Sanity Commission, testified to statements made by third persons (who did not testify at trial), in support of the experts' opinions that I knew the wrongfulness of my acts at the time of the robbery. In his initial report, Dr. Ware stated that I had either an antisocial personality or suffered from paranoid schizophrenia (Vol. 1, Tr. p. 46). After reviewing my medical records at LSU Medical Center, Dr. Ware filed a supplemental report concluding that I was mentally capable of assisting counsel and that I was capable of distinguishing between right and wrong at the time of the offense (Vol. 1, Tr. p. 47).

Dr. Ware, as well as the trial court, based his decision principally upon inconclusive tests which were conducted in September 1980 (almost two years before the trial in this matter) by Dr. R. M. Allen at LSU Medical Center in Shreveport. These tests were conducted in regard to an examination by another sanity commission on an unrelated charge that was dropped for lack of evidence and the confession of the perpetrator of the crime. Dr. Allen's initial impression of my condition was "antisocial personality with explosive personality characteristics... possible temporal lobe epilepsy." An electroencephalogram (EEG) was conducted, which proved negative. Despite this, Dr. Allen states in his progress report on September 11, 1980, that even though the EEG was negative, "it certainly does not rule out the possibility of even deeper than temporal lobe type seizure activity. The main proof of the podding is going to be his response to Tegretol." Tegretol is administered to individuals suffering from temporal lobe epilepsy (Vol 1, Tr. p. 133). On September 17 and 18, 1980, Dr. Allen states in his progress report that I continued to be amazingly better on the Tegretol. The final discharge diagnosis of me by LSU Medical Center was "antisocial personality with possible temporal lobe dysfunction." These test were inconclusive as to whether I suffer from temporal lobe epilepsy.

As shown by the record, the sanity commission appointed by the trial court in this case made no examination or conducted any tests to determine whether I was suffering from temporal lobe epilepsy or any other mental illness. Therefore, the hearsay statements made by Dr. Ware during the trial of this matter were relevant only if offered for their truth to undermine the insanity defense by demonstrating that I was acting normally at the time of the robbery, that I was not delusional, that I understood what I did was wrong. Dr Ware relied strongly on the findings of Dr. Allen, and, in closing argument, the prosecutor made these points in specific reference to the hearsay statements of Dr. Ware. Thus, the jury was improperly permitted to consider these hearsay statements for their truth in assessing my insanity.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), establishes that the Confrontation Clause prohibits the use of "testimonial" hearsay against a defendant in a criminal case, even if the hearsay is reliable. Crawford explained that the Confrontation Clause "applies to 'witnesses' against the accused--in other words, those who 'bear testimony.' " 541 U.S. at 51 (internal citations omitted). The Court

added: " 'Testimony' in turn is typically '[a] solemn declaration affirmation made for the purpose of establishing or proving some fact.' " 541 U.S. at 51 (internal citations omitted). Crawford did not adopt a definition of testimonial hearsay, but if offered some alternative definitions: {indent the following quote}

Various formulations of this core class of 'testimonial' statements exist: 'ex parte in court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorialy '... 'extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions '... statements that were made under circumstances which would lead to an objective witness reasonably to believe that the statement would be available for use at a later trial'... These formalizations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. 541 U.S. at 51 (internal citations omitted).

Under these formalizations, the hearsay statements of Dr. Allen (and the other non-testifying witnesses), were admitted in violation of the Crawford Rule. They were testimonial in that they were given in circumstances under which the witness would reasonably believe that the statements in a trial where I had been charged with a crime. The fact that they were introduced through an expert witness is immaterial, since their relevance depended on their truth. Federal courts apply the Brecht standard of harmless error in habeas proceedings. Under this standard, habeas relief for constitutionally significant "trial errors" is granted only when the error "had substantial and injurious effect or influence in determining the jury's verdict" (as in this case where the Crawford Rule was violated) or when a "deliberate and especially egregious error" warrants habeas relief absent substantial influence. See, e.g., Brecht v. Abrahamson, 507 U.S. 623, 638 n.9 (quoting Kottekos v. U.S., 328 U.S. 750, 756 (1946)), overruled as stated in Hayes v. Brown, 399 F. 3d 972 (9th Cir. 2005).

This error was not contemporaneously objected to at trial or properly raised on direct appeal. It was raised, however, in the initial pro se application for post-conviction relief Claim I: "Denial of Right to Due Process" in connection with "Denial of Right to a Fair Trial." Although not argued legally as it is here, it was simply stated in the "Supporting Facts" and those facts do

not differ here in time or type from those the initial petition set forth. Mayor v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 162 L. Ed. 2d 582, 18 Fla. L Weekly Fed S 464 (U.S. 2005). See also Initial Application for PCR, pp. 7 and 9 (Exhibit-I).

Further, in Coleman v. Thompson, 501 U.S. 722, 750 (1991), the Court established that the cause and prejudice standard will be applied "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule." 501 U.S. at 750. The "cause" is counsel's ineffective assistance at trial due, in part, to the external issue of his disbarment proceedings for incompetence in other cases of crime at the time of my trial and "prejudice" is that the jury was improperly permitted to consider these hearsay statements for their truth in assessing my insanity. Bobadilla v. Carlson, 575 F. 3d 785, 793 (8th Cir. 2009) (improper admission of statements in violation of the Confrontation Clause had substantial and injurious effect).

Finally, it should be noted here that the passage of the AEDPA did not replace the Brecht standard of "substantial and injurious effect" Brecht remains the correct standard of review in assessing the prejudicial impact of federal constitutional error in a criminal trial in state court. See Fry v. Pliler, 551 U.S. 112, 119-20 (2007).

C. Ineffective Assistance of Counsel. Denial of the Right to Fair Trial. THIS IS A STRUCTURAL ERROR ON FACE OF RECORD

Following the presentation of the evidence, the district court instructed the jury as to the statutory definitions of armed robbery, simple robbery, attempt, criminal intent, intoxication and insanity (Vol. 6, Tr. pp. 1053-1068). The trial court never instructed the jury that the crime of armed robbery required specific intent. Knox v. Butler, 884 F. 2d 849, n. 3, LEXIS 15021 (5th Cir. 1989): "In 1979, when Knox was tried, specific intent was an element of armed robbery under LA. Rev. Stat. Ann. 14:64 (West 1981). See State v. Johnson, 368 So. 2d. 719 (LA. 1979). Subsequently, the 1983 Amendments to 14:64 removed the specific intent element from the statutory definition of armed robbery. See State v. Gorden, 504 So. 2d 1135, 1142 n. 4 (LA. App. 5th Cir. 1987)." But not before the commission of the robbery and the trial in this matter. Therefore, this omission in the jury instruction of this fundamental structural element of the offense requires this federal habeas court to automatically reverse conviction.

Trial counsel failed to contemporaneously object to this omission in the jury instructions. For this reason the court of appeal refused to review this error, and the initial post-conviction court procedurally defaulted this claim for the same reason it had been procedurally faulted by the court of appeal.

In State v. Johnson, supra, the trial judge, as in the case here, instructed the jury as to the statutory definitions of armed robbery, simple robbery, attempt, criminal intent. The jury returned, requesting further instructions as to the definition of simple robbery and armed robbery and the criminal intent essential to these crimes. Thereupon, the trial judge instructed the jury that these crimes only required general intent and, thereafter, the jury returned a guilty verdict to the charge of armed robbery. The Louisiana Supreme Court reversed the defendant's conviction on the grounds that this erroneous instruction was prejudicial. In this case whether I had the specific intent was a decisive issue.

In another case, State v. Williamson, 389 So. 2d 1328 (LA. 1980), the fundamental erroneous statements of the essential elements of the charged offense were found to require reversal. In that case, the jury was instructed erroneously that first degree murder was the specific intent killing of a human being and that second degree murder was the unintended killing of another during the perpetration of various felonies. In fact, the first and second degree murder statutes in effect at the time of the offendant's offense defined first degree murder as a murder committed under certain renumbered aggravated circumstances and defined second degree murder to include all other specific intent killings. To reverse the defendant's conviction, the Louisiana Supreme Court recognized the principle that a conviction can be reversed if the unobjected to[4] jury instruction was fundamentally erroneous in the description of the elements of the the offense. The failure of trial counsel to contemporaneously object to this omission in the jury instruction prejudiced my substantial right to put the state to its proof of an essential element of the crime charged. This failure effected the fairness of the trial and the accuracy of the fact

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[4]In State v. Williamson, 389, the Louisiana Supreme Court created an exception the contemporaneous objection rule since there was a fundamental error in the very definition of the crime. See 42 LA. L. Rev. 700 (1982), for an excellent discussion of State V. Williamson. With this case, the Louisiana Supreme Court moved toward a plain error (or structural er se prejudicial error) review of jury instructions as applied by the federal courts. Furthermore, I contend that this federal habeas Court must consider this structural error because I have raised ineffective assistance of counsel. State v. Ratcliff, supra.

finding process and satisfies both prongs of the Strickland standard: (1) counsel's performance was so deficient that (2) counsel's errors actually prejudiced the defense. 466 U.S. at 687, 104 S. Ct. at 2054.

In Coleman, supra, the Court established that the cause and prejudice standard will be applied "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule." 501 U.S. at 750. The "cause" is counsel's ineffective assistance at trial due, in part, to his external disbarment proceedings for incompetence in cases of crime at the time of my trial and the "prejudice" attributable thereto is that my conviction was not proven beyond a reasonable doubt. Nevertheless, because a defective jury instruction is structural error, in violation of the Sixth and Fourteenth Amendments, it falls within the First Category of Cronic, supra, at 748, and "a showing of prejudice is not required--it is presumed."

In Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), the Supreme Court distinguished between structural defects in a criminal trial and all other errors committed during the course of the proceedings. The Court thereby sought to clarify when harmless-error analysis is appropriately conducted by an appellate court (for trial error) and when it is not a (structural defect). As to the latter class of error,

> structural defects in the constitution of the trial mechanism... defy analysis by 'harmless error standards...[Because they] affect the framework within which the trial proceeds, rather than simply [interject] an error in the trial process itself.' " Fulminante, 499 U.S. at 310, 111 S. Ct. at 1265 see also Brecht v. Abrahamson, 507 U.S. 619, 629-30, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) ("The existence of such [structural] defects...requires automatic reversal of the conviction because they infect the entire trial process.' See also Johnson v. United States, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 1549-50, 137 L. Ed. 2d 718 (1997) Neder v. United States, 127 U.S. 1, 7-8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) United States v. Stevens, 223 F. 3d 239, 244 (3d Cir. 2000) State v. Ruiz, 2006-1755 p. 6 (LA 4/11/07) 955 So. 2d 81, 2007 LA Lexis 891.

The failure of trial counsel to contemporaneously object to the court's omission in its instruction to the jury that armed robbery required specific intent prejudiced my substantial right to put the state to its proof of an essential element of the crime charged (LA. C.Cr.P. art. 921) and "violated the Constitution because it inaccurately defined 'reasonable doubt,' thereby permitting a jury to convict 'based on a degree of proof below that required by the Due Process Clause.' " United States v. Gaudin, 515 U.S. at 520.

In Nader, 527 U.S. at 10, the Supreme Court "Reaffirmed the continuing vitality of Sullivan's holding that 'a defective reasonable doubt instruction in violation of the defendant's Fourteenth and Sixth Amendment rights to have the charged offense proved beyond a reasonable doubt... [i]s not subject to Harmless Error analysis' (see I'd. at 10-11). The Court explained that a defective reasonable doubt instruction of the sort given in Sullivan 'vitiates all the jury's findings...' and produces 'consequences that are necessarily unquantifiable and indeterminate.' " (quoting Sullivan v. Louisiana, 508 U.S. at 281-82 (1993).

The defective reasonable doubt instruction here--specific intent--contaminated all the jury's findings and is a structural, per se prejudicial error and a showing of prejudice is not required. The Supreme Court of the United States noted in:

> United States v. Gunzales-Lopez, 548 U.S. at 148-49 ("class of constitutional error we call 'structural defects,'...[which] 'defy analysis by "harmless-error" {bold face} standards,"...include[s]...the denial of the right to trial by jury by giving of a defective reasonable-doubt instruction"). Neder v. United States, 527 U.S. at 8 ("defective reasonable-doubt instruction" is "structural [error].' and thus [is] subject to automatic reversal") Johnson v. United States, 520 U.S. at 469 ("erroneous definition of 'reasonable doubt' [is never harmless because it] vitiate[s] all of the jury's findings [and] one could only speculate what a properly charged jury might have done"). See also, Gage v. Louisiana, 498 U.S. S. Ct. 39 (1990) (per curiam) and Fulminante, 499 U.S. at 310, 111 S. Ct. at 1265.

This Sixth and Fourteenth Amendment claims of ineffective assistance and denial of Due Process Right to a Fair Trial were presented in state courts as independent claims and thus may

be used here to establish cause for the procedural default of counsel's failure to contemporaneously object to a defective jury instruction and the prejudice attributable thereto (although not required in this claim) is that I was convicted on a standard below a reasonable doubt. Murray v. Carrier, 477 U.S. 479, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986) See also Coleman v. Thompson, 501 U.S. 722, 750 (1991). Further, as already stated, this claim is before this federal habeas court under the Martinez Exception to the Coleman Rule. See Martinez v. Ryan, 132 S. Ct. 1309 (2012) and Trevino v. Thaler, 133 S Ct. 1911 (2013). See also, Coleman v. Goodwin, 833 F.3d 537 (5th Cir. 2016) (Martinez/Trevino applies to cases in Louisiana).

Therefore, I beg this Honorable Court to review both the claim of ineffective assistance of counsel at trial and the structural defect of the jury instruction in this case and accordingly vacate this conviction.

C. Ineffective Assistance of Counsel

Where counsel fails to investigate and interview promising witnesses, and, therefore, has no reason to believe they would not be valuable in securing defendant's release, "counsel's inaction constitutes negligence, not a trial strategy." Workman v. Tate, 957 F. 2d at 1345. In the case at bar, trial counsel was afforded evidence that I was intoxicated through the consumption of both meth and alcohol but only put on evidence of general drug use testimony. It is clear from the record that this evidence was introduced with the primary purpose of presenting prejudicial bad character and bad act evidence: it was not tied to my conduct before, during, or after the time of the offense. As a result of this failure to investigate, defense counsel did not put on the testimony of my aunt and uncle, Martha Vassallo and John A. Bishop, who had seen me in a bar, intoxicated and injecting myself with meth shortly prior to the time of the offense. This was established on Motion for New Trial (Vol. 6 Tr. p. 1079). It was also established that Martha Vassallo and John A. Bishop were outside the court room during the trial of this matter but never questioned by trial counsel. This fact was confirmed by the trial court who stated that Martha Vassallo was available as a witness at trial (Vol. 6, TR. pp. 1087-1088).

Intoxication is an affirmative defense. The burden of proof by a preponderance of evidence rests upon the defendant. See La. Rev. Stat. Ann § 14:15. To be exempted from criminal responsibility, a defendant must show that he or she suffered a mental disease or mental defect

that prevented him from distinguishing between right and wrong with reference to the conduct in question. See La. Rev. Stat. Ann Section 14:14. So there is no prohibition which would prohibit the admission of expert testimony as to the effect of meth or alcohol on an individual with temporal lobe epilepsy or organic brain damage as the result of being hit by a dump truck at the age of seven. Such an understanding results from a plain interpretation of La. Rev. Stat. sections 14:14 and 14:15 and obviously permitted by the trial court. Defense counsel was able to do this with Dr. Allen whose training qualified him to render such an opinion (Vol. 1, Tr. p. 133), but failed to do so, despite his decision to present an intoxication defense. Pursuing such a course was clearly dictated by two other Sanity Commission Doctors: 1) Dr. Greve stated that "I cannot determine the exact diagnosis at this time other than that he is psychotic and probably schizophrenic, although organic psychosis cannot be ruled out." (Vol. 1 Tr. pp. 41-44); 2) Dr. Wilkinson, Jr., diagnosed me as "having temporal lobe epilepsy which causes his anti-social behavior." (Vol. 4, TR pp. 217-227, Vol 5, TR. pp. 2-24). However, trial counsel did not question these expert witnesses as to whether I could have committed the robbery in question during a temporal lobe seizure, or what effects drugs or alcohol might have on a person suffering from this condition. Further, trial counsel did not question Dr. Wilkinson as to whether this condition affected my mental ability to distinguish between right and wrong at the time of the offense.

Whether defense counsel pursues some exploration, but fails to take obvious and readily available investigatory steps which would make a defense viable, especially when there is no other defense, such inaction constitutes ineffective assistance of counsel. Proffit v. Waldron, 831 F. 2d at 1345; Weidner v. Wainwright, 708 F. 2d at 616. Clearly this *not* a case "where it is unlikely that further investigation would bear fruit, so that counsel's failure to investigate could be excused, "thus, counsel's inaction constitutes ineffective assistance of counsel." Workman v. Tate, 957 F. 2d at 1345; Harris v. Reed, 894 F. 2d 871, 878-79 (7th Cir. 1990). Counsel made no relevant-to-crime exploration into an insanity defense, and he failed to take an "obvious" and readily available investigatory step which would have made the defense viable; failed to pursue any meaningful investigation into an intoxication defense; and failed to raise any other plausible defense. Thus, trial counsel's conduct cannot be deemed anything but ineffective. Proffit v. Waldron, 831 F. 2d at 1248; Walk v. Mitchell, 587 F. Supp. 1432, 1443 (E.D. Va. 1984).

The only indications the jury received that the defense was claiming intoxication was on direct examination in response to the questioning of trial counsel that I had threatened my younger , Debra Colvin, sister and her baby with a knife[5] (Vol. 4, Tr. p. 687), and that she had seen me inject drugs on numerous occasions in the summer of 1982 (Vol. 4, TR. pp. 689-692). The substance of Mary Kay Tallant's (my older sister) testimony was that in April of 1982 she had seen me at my mother's home melt down a pill to be injected by me (Vol.4, Tr. p. 676). The date of the offense charged took place on July 12, 1982. On cross-examination of this witness, the State solicited testimony from this witness that I had put a screwdriver through her elbow when she was about thirteen or fifteen years of age (Vol. 4, Tr. p. 681), which would have made me seven or nine years of age. [6] The State solicited further testimony that I had knocked out the windows of her car in a violent rage (Vol. 4, Tr. p. 681), when I was about twelve years of age. All this testimony concerning acts of violence committed by me as an adolescent was allowed into evidence without objection by trial counsel on my behalf.

Moreover, trial counsel made several references to my incarceration in federal prison (which was actually federal reformatory) and at Caddo Detention Center (Vol. 4, Tr. pp. 687, 691-693). It was even brought out in the presence of the jury that I had been incarcerated for most of my life (Vol. 4, TR. p. 694).

The next two witnesses called by trial counsel on my behalf were Sherry Owens and Darla Hopkins. They gave the same testimony as the previous two witnesses regarding my occasional use of drugs and my so-called violent disposition (Vol. 4, Tr. pp. 700-718). For the remainder of the trial, despite the fact that no one knew of or had ever seen me commit an act of violence as a teenager or an adult, I was depicted by my own counsel and by the State as an extremely violent person and as a criminal, when in reality, I had never been charged or convicted of any kind of violence except the offense charged, where no one was harmed or could

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[5] This testimony like all other lay testimony was put into evidence out of context so that it sounded worse than it was. This "threat" took place in my mother's kitchen when I was cutting a grapefruit. My sister, with her baby on her hip, yelled at me repeatedly to clean up my mess. I pointed my finger at her and told her to leave me alone, not realizing that at the time she felt threatened because I had a knife in my hand.

[6] Debra Colvin, my younger sister, told me that Mary Kay remembered later that it was my older brother John who had poked her in the elbow with a screwdriver when he was working on his bicycle. I don't remember the incident at all and I would have to be an extremely strong seven-year-old to put a screw driver "through" someone's elbow.

have been harmed because the pistol identified by the robbery victim was a non-firing Civil War pistol with a partially plugged barrel.

The jury was not afforded any evidence of meth or alcohol use, the effects that meth and alcohol consumption would have had on my medical condition, or the amount of the drug consumed, nor was there even confirmation of the fact that I had consumed drugs on the day of the crime charged. The above passing statements of general drug use by lay witnesses formed the entire underpinning of trial counsel's partial defense of intoxication. Instead of putting on testimony to substantiate an intoxication defense, counsel opted for "bad character" evidence, prior juvenile adjudications, which were called "prior criminal convictions," months, years and even 20 years removed from the issue at hand: did I know right from wrong at the time of the offense? This is the same bad character evidence put before the jury by the state without objection for the purpose of deciding guilt of the crime charged (and without a limiting instruction by the court). In State v. Arvie, 505 So 2d 44; La. Lexis 8989, the Louisiana Supreme Court held:

> In State v. Green, 493 So. 2d 588 (LA 1986), this court again considered an error to which no contemporaneous objection had been made at trial. During Green's trial on the charge of third offense theft, the trial judge failed to instruct the jurors that they were to consider Green's prior theft convictions only for the purpose of sentence enhancement and not for the purpose of determining his guilt or innocence. Although defense counsel failed to request such an instruction or to object to its omission, this court considered the error and reversed the conviction. This court's unanimous opinion noted that the Court in {505 So. 2d48} Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648, 17 L Ed 2d 606 (1987) had approved the constitutionality of a procedure which allowed evidence both of the current offense and of prior convictions of similar crimes at the guilt determination trial *only* because of the procedural requirement in the statutory scheme that the jury must be instructed to consider the prior crimes only for the purpose of sentence enhancement and not for the purpose of deciding guilt or innocence of the charged crime. Because Louisiana's statute arguably was facially unconstitutional

> without the requirement of a limiting instruction, this court held that the failure to give such an instruction required reversal, even without a contemporaneous objection. See also People v. White, 24 Wend. 520, 574, 1840 WL 3642 (N.Y. 1840), quoted on page one of this brief.

Furthermore, failure of trial counsel to put on a meaningful intoxication defense cannot be deemed an informed tactical decision in light of knowledge in advance of trial that there was evidence indicating I had consumed a large quantity of meth and alcohol just hours before the offense charged. This inaction was simply inadequate trial preparation, not trial strategy, thus resulting in ineffective assistance of counsel. Kenley, 937 F. 2d 1298, 1313 (8th Cir. 1991) cert. denied, 112 S. CT. 431.

Trial counsel's *deficient performance* and the prejudice caused by that deficiency cannot be condoned as a strategy because:

> "Courts are not required to condone unreasonable decisions parading under the umbrella of strategy or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all. If counsel did not make an informed decision, the court must reject an assertion of strategy." Turner v. Epps, 412 Fed appx. 696 (5th Cir. 2011)

As shown herein, trial counsel's use of the prosecution's strategy of depicting me as a drug addict and an extremely violent criminal was so ill chosen that it permeated the entire trial with an obvious unfairness, (Garland v. Maggio, 717 F. 2d 199, 206 (5th Cir. 1983) and is the basis for a proper claim of ineffective assistance of counsel under the standard set forth in Strickland, 466 U.S. at 668-89, 694.

PREJUDICE

In order to assert a successful ineffective assistance of counsel claim, I understand that I must prove that I suffered prejudice. Strickland v. Washington, 466 U.S. at 668-89. Prejudice has been defined as a reasonable probability that the outcome of the trial would have been different "but for" counsel's unprofessional errors. Workman v. Tate, 957 F. 2d at 1345; Kenley v. Armontrout, 937 F. 2d at 1383, quoting Strickland, 466 U.S. at 694. A reasonable probability is a

probability that is sufficient to undermine confidence in the outcome of the proceeding. Workman v. Tate, 957 F. 2d at 1345. Blackburn v. Foltz, 828 F. 2d 1177, 1186 (6th Cir. 1967), cert denied, 485 U.S. 970 (1968). See also United States v. Mirrow, 977 F. 2d 222 (6th Cir. 1992) (en banc), cert. denied, 113 S. CT. 2969 (1993) ("counsel's performance was so manifestly ineffective that defeat was snatched from the hands of probable victory").

Defense counsel had two viable defenses, yet trial counsel ignored one and barely employed the other. Not one witness or other item of evidence presented supported an intoxication defense. McAleese, 1 F 3d 159, cert. denied 114 S. Ct. 645. Clearly, "but for" counsel's *deficient performance* and "erratic behavior" at the time of my trial, his failure to investigate and question expert and lay witnesses, I would have been afforded a meaningful insanity or intoxication defense. In light of the significant amount of lay and expert evidence, such as Dr. Greve's testimony (vol. 1, Tr. pp. 42-44) Dr. Allen's LSU Medical Center reports from 1980 (Vol. 1, Tr. p. 133), Dr. Wilkinson's testimony (Vol. 4 Tr. pp. 217-227, Vol 5, Tr. pp. 2-24), it is clear that "but for" counsel's *deficient performance*, I would have been afforded a viable defense and would have been found not guilty by reason of insanity. See Genius v. Pepe, 50 F. 3d. 60 (1st cir. 1995). Such prejudice is particularly evident in light of the opening statement of trial counsel concerning the juror's expectations that they anticipated a psychiatric explanation for my conduct. The relevance of such an explanation to jurors should have been obvious to trial counsel.

After counsel failed to employ an insanity defense, he was left with the sole option of an intoxication defense. Although defense counsel could have presented lay testimony to prove my intoxicated state just hours before the offense, he instead opted for doing no more than proffering a vague and insubstantial remark by Dr. Leatherman who stated that drug abusers "can know right from wrong, and most of the time they do. Drugs will not make you change your values of what's right and wrong...." But intravenous injection "can cause confusion and disorientation." (See Exhibit-B) By not effectively presenting evidence supporting either viable defense, the jury was left without a choice or explanation as to my behavior and thus had no other option but to convict. See Deluca v. Lord, 858 F. Supp. at 1346 ("finding ineffective

assistance of counsel where counsel was aware of two viable defenses yet offered the jury no theory other than the State's to consider pertaining to the charges against the defendant"). See also United States v. Cronic 466 U.S. 648, 659-662 (1984) ("Prejudice presumed if counsel entirely fails to subject the prosecution's case to a meaningful testing") as counsel entirely failed to do throughout this case.

"But for" counsel's *deficient performance*, Dr. Allen could have been called to testify concerning the effects of meth and alcohol on a sufferer of temporal lobe epilepsy or organic brain damage. "But for" counsel's *deficient performance*, either expert or lay testimony, or both, would have been offered to support my intoxication defense. Such testimony cannot be deemed cumulative as no other testimony was offered except bad character testimony--all of which was prejudicial, inflammatory, and "it is said to weigh too much with the jury and to over-persuade them as to prejudice with bad general record and deny him a fair opportunity to defend against a particular charge." Michelson, 335 U.S. at 475, 476 (1948). It is not hindsight that compels a finding of ineffective assistance in this particular case. The conclusion is mandated by virtue of competence employed by trial counsel. Deluca v. Lord, 858 F. Supp at 1349. Thus, "but for" counsel's *deficient performance*, I would have been afforded the possibility of two viable defenses Workman v. Tate, 957 F. 2d at 1346. At minimum, had I been given the opportunity to present either viable defenses, a reasonable probability exists that there would have been a different result in the jury's findings. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. See also Woodford v. Visciotti, 537 U.S. 19, 22 123 S. CT. 357 L. Ed. 2d 279 (2002) (noting that Strickland had "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered"); Williams, 529 U.S. at 406 (rejecting state court's attempt to engraft additional burden on habeas petitioner, rather than simply applying "Reasonable probability" standard; Jacobs v. Horn, 395 F. 3d 92, 105 n.8 (3rd Cir. 2005) cert. denied, 126 S. CT 479, 163 L. Ed. 2d 366 (U.S. 2005) (habeas petitioner need not prove "conclusively" that deficiency of counsel would have lead to a different result); U.S. v. Smack, 347 F.3d 533, 540 (3rd Cir. 2003); Jermvn, 266 F. 3d at 282 (noting that reasonable probability standard is not "a stringent one"); cf. Dugas v. Coplan, 428 F. 3d 317, 328 (1st. Cir 2005) (fact that trial counsel

was experienced and "generally competent" is not relevant), especially in this instant case where counsel was under disbarment proceedings during my trial and was disbarred for the same negligent and incompetent conduct exhibited in this case.

There is an additional fundamental legal principle regarding ineffective assistance of counsel claims: after a reviewing court analyzes each claim of deficient performance to determine whether prejudice was established, if no single claim amounts to prejudice, the court must then assess the cumulative prejudicial impact of all deficient performance claims. See, e.g., Wiggins v. Smith, 539 U.S. 510, 534-36, 123 S. CT. 2527, 156 L. ED. 2d 471 (2003) (totality of errors must be considered to properly determine prejudice); Williams, 529 U.S. at 396-98 ("acts or omissions" must be considered in the aggregate).

In State v. Taylor, 669 So 2d 364 (LA.), cert denied, 519 U.S. 860, 117 S. Ct. 162, 166 l. ed 2d 106 (1996), the District Court noted that the failure to make contemporaneous objections "may be raised as ineffective assistance of counsel on post conviction relief." Original opinion at 14. In Taylor "failures to object are numerous and rise to the level of a Strickland violation." The same holds true in this instant case where failures to object are numerous.

D. Denial of Due Process of Law and Denial of Effective Assistance of Counsel.

On June 2, 1983, trial counsel Nader filed a Supplemental Motion for a New Trial (Vol. 1, Tr. p. 87). This motion was denied on the same day after hearing (Vol. 6, Tr. pp. 1090-1101). At the same hearing in which the Supplemental Motion for New Trial was denied, I was sentenced without my waiver of the twenty-four hour delay period required for sentencing under the Louisiana Code. No contemporaneous objection was made by trial counsel for the failure of the Court to observe the twenty-four delay period before sentencing under LA C.Cr.P art. 873. The Louisiana Supreme Court has held that such an improperly imposed sentence must be vacated. State v. Hopkins, 351 So. 2d 474 (LA. 1977) State v. Hutto, 349 So. 2d 318 (LA. 1977). On appeal this error was assigned as error No. 10. The Second Circuit Court of Appeal held that I failed to show any prejudice to my rights resulting from this violation.

However, the record shows that my counsel and I had been at odds during the entire trial and at the time of the June, 2, 1983, hearing (because I knew he was incompetent and under disbarment proceedings during my trial) and because my oral motion of April 11, 1983, to have

him dismissed from my case was denied by the court (see court minutes, Exhibit-C). And my oral motion to have him dismissed during the hearing on my Pro Se Motion For New Trial, where I raised ineffective assistance of counsel, was also denied. (Vol. 1, Tr. p. 78). On June 2, 1983, the same day as the sentencing, trial counsel filed an Answer to my allegations of ineffective assistance (Vol. 1, Tr. p. 85), which can be reviewed by this court against the facts in the record. This error was raised as Claim VI in the initial review Post-Conviction Application and procedurally defaulted under the now forbidden "IAC/PCR Deferment Trick" well known by inmates until it was stopped by the Supreme Court's Martinez Exception.

I submit that it was prejudicial for me to be sentenced without my waiver of the twenty-four hour delay period because I had no effective assistance to protect my rights at sentencing I had no opportunity to file for a mitigation hearing or a chance to review the pre-sentence report and counter the false and misleading statements contained therein. See Detrich v. Ryan, 667 F. 3d 958 2012, after remand ("a halfhearted mitigation case demonstrates that the failure to put on a stronger case is not a strategic choice" but ineffective assistance of counsel). My counsel put on no mitigation case at all.

The presumption of correctness is overcome because I have presented clear and convincing evidence that the denial of a chance to put on a mitigation case prejudiced me by the "excessive" and "cruel and unusual" sentence handed down. See State v. Walker, 414, supra, and Taylor v. Maddox, 366 F. 3d 992, 1008 (9th Cir. 2004) (presumption of correctness overcome by clear and convincing evidence of defects in fact finding process). The sentence handed down in this case is a violation of both the Louisiana Constitution and the Eighth Amendment of the United States Constitution.

The Second Circuit State Court of Appeal heard this claim on the merits and held that the district court did not abuse its discretion by sentencing me without my waiver of the twenty-four hour delay period to eighty years at Hard Labor for a first violent crime in which no one was harmed. The initial post-conviction court dismissed this claim under LA. C.Cr.P. art 930.4 (A) Exhibit-F). Therefore this claim is properly before this court under 2244 (d)(1)(A) and (2) 2254 (b)(1)(A) and 2254 (d)(1) and (2). See Hodges v. Epps, 648 F. 3d 283, 287 (5th Cir. 2011)

(federal habeas review not precluded by procedural bar on due process claim because state court last addressed the claim on the merits without mentioning procedural bar).

E. Unconstitutional Sentence

I was sentenced by the state district court to eighty (80) years at Hard Labor without benefit of parole, probation or suspension of sentence. On direct appeal, Assignment of Error No. 11, and in the initial 1985 Post-Conviction Application, Claim VII, I allege that this sentence is excessive and disproportionate to the facts of the crime, and, therefore, unconstitutional under the Louisiana and United States Constitutions. Article 1, Section 20 of the Louisiana Constitution of 1974 provides in part: "[n]o law shall subject any person... to cruel, excessive, or unusual punishment" (emphasis added). The inclusion by the Redactors of the Constitution of the term "excessive" broadened the duty of Louisiana courts and federal habeas courts in reviewing Louisiana state sentences.

In contrast to the Louisiana Constitution, the Eighth Amendment of the United States Constitution reads: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Although there is no mention of a prohibition against "excessive" punishment, decisions of the United States Supreme Court hold that there is a prohibition against sentences which are disproportionate to the crime committed. Solem v. Helm, 103 S. Ct. 3001 (1983) Weems v. United States, 217 U.S. 349, 30, S. Ct. 544, 54 L. Ed. 793 (1910).

In Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Supreme Court of the United States stated that a sentence is unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hense is nothing more than the purposeless and needless imposition of pain and suffering or (2) is grossly out of proportion to the severity of the crime.

In State v. Williams, 397 So. 1287 (LA. 1981), the Louisiana Supreme Court adopted the same test for "excessive" punishment as applied by the Supreme Court of the United States in the Gregg case. Thus in determining what is an excessive punishment under both constitutions, the harshness of the penalty must be compared with the severity of the offense. State v. Goode, 380 So. 2d 1361 (LA. 1980).

LA. C.Cr.P. art 894.1 (c) provides that the trial court shall state for the record the considerations taken into account and the factual basis for imposing the sentence. In sentencing me to eighty years at hard labor without parole, probation or suspension of sentence, the trial court relied on the following factors indicating that a sentence close to the statutory maximum was appropriate: (1) its view that I terrorized the victims during the robbery (2) its view that I showed no remorse or regret for having committed the crime (3) its view that I contemplated my conduct would cause great harm (4) its view that there were no grounds to justify my conduct (5) its view that I am an antisocial, violent, and have an extremely dangerous nature (6) its belief that my criminal record and character demonstrates my propensity to commit future crimes (Vol. 6, Tr. pp 1094-1099) (Exhibit-D). In view of all the reasons given for sentencing by the trial court, it is evident that the judge imposed a sentence calculated to imprison me for Life.

First, I submit that the sentence is "excessive" and amounts to "cruel and unusual punishment" because it is grossly out of proportion to the severity of the crime. I admit that armed robbery is a serious crime, but the length of the sentence is for this particular crime is grossly out of proportion to the actual harm caused by the commission of the crime. As shown by the record, no victims of this robbery were physically harmed. Therefore, it is extremely cruel and unusual to sentence a person to a sentence which is essentially a life sentence when no individuals were injured by the act itself. Generally, a Life sentence is given only in those instances where the victim is caused great physical harm or death. Therefore, this sentence is a needless imposition of pain and suffering and unconstitutional under both the Louisiana and United States Constitutions.

Second, the sentence imposed by the trial court is "excessive" and "cruel and unusual" because the trial court failed to consider any mitigating factors. It prejudiced me here by sentencing me without my waiver of the twenty-four hour delay period because I had no effective assistance to protect my rights at sentencing, and because I had no opportunity to file for a mitigation hearing. As shown by the record, the trial court found no mitigating factors. However, a review if the record reveals that I suffer from a mental disorder, which is probably organic. In State v. Price, 403 So. 2d 660 (LA. 1981), the Louisiana Supreme Court vacated a

sentence on the grounds the trial court failed to consider the defendant's mental state in sentencing the defendant. It is settled that when a trial judge imposes a severe sentence and fails to weight any mitigating factors, the sentence must be vacated and remanded. State v. Walker, 414 So. 2d 1245 (LA. 1982).

Third, as already discussed, the prejudicial, irrelevant, and inflammatory "bad acts" and "bad character" evidence was so pertinent at trial that it even infected the trial court when imposing sentence. The Court: {indent below quote}

"The medical evidence presented at trial clearly shows that the defendant presents an antisocial personality and is a person who is extremely dangerous. His dangerous nature is confirmed by the testimony of his family members and the fear they have of him...Although not prosecuted these events have relevancy to the defendant's character and attitudes and propensity to commit criminal offenses. The review of his criminal history [only nonviolent juvenile adjudications as proven below] and the testimony of the psychiatrists as well as the testimony of his family members all showing his propensity for violence demonstrates that his character and attitudes are such that he will continue to commit other crimes unless incarcerated for a lengthy period of time...as we have previously made clear, his dangerous nature is such that he must be removed from society...all the evidence clearly reveals that he has been and is institutionalized...the defendant is now sentenced to serve a term of eighty years at hard labor without benefit of parole, probation, or suspension of sentence..." (See sentencing transcript, pp. 7, 9, Exhibit-D)

As so stated, the sentence handed down by the trial court is "excessive" and "cruel and unusual" because the record is devoid if any substantial factual basis for a sentence of eighty years at hard labor without parole. Instead, the court's reasons for such a harsh sentence is based, in part, on irrelevant, inflammatory, psychiatric hearsay teatimony put into evidence in violation of the Confrontation Clause, as argued above. The fact remains, however, that no one was harmed during this crime. And it was established at trial that the gun used in the crime was possibility a non-firing Civil War replica.

Furthermore, I suffer from from a mental disorder which mitigates against the severity of the offense. In addition thereto, a review of my criminal record illistrates that I had never been

charged or convicted of any violent crime except the instant offense (see below Part Two examination of my prior "criminal" record). In view of the mitigating circumstances and the sentencing disparity between the penalty imposed for this offense and the more serious offenses such as murder, I submit that this sentence of eighty years without parole is unconstitutionally "excessive" and "cruel and unusual punishment" under the Eighth Amendment and must be vacated, especially in light of the fact that I have served thirty-seven (37) years at hard labor on this sentence to the date of the filing of this federal habeas petition. I've earned an Associate's Degree and all of a B.A. in English literature except the second language requirement at the University of Minnesota. I am also an accomplished oil painter.

The Second Circuit State Court of Appeal heard this claim on the merits and held that the district court did not abuse its discretion in sentencing me to eighty years at Hard Labor for a first violent crime in which no one was harmed. The 1985 initial post-conviction court dismissed this claim under LA. C.Cr.P. art 930.4 (A)' (Exhibit-F). Therefore, this claim is properly before this court under 2244 (d)(1)(A) and (2) 2254 (b)(1)(A) and 2254 (d)(1) and (2). See Hodges v. Epps, 648 F. 3d 283, 287 (5th Cir. 2011) (federal habeas review not precluded by procedural bar on due process claim because state court last addressed the claim on the merits without mentioning procedural bar).

Finally, presumption of correctness is overcome because I have presented clear and convincing evidence that that the sentence is "excessive" and "cruel and unusual" because state court did not consider any mitigation factors in its reasons for the sentence. See State v. Walker, 414, supra, and Taylor v. Maddox, 366 F. 3d 992, 1008 (9th Cir. 2004) (presumption of correctness overcome by clear and convincing evidence of defects in fact finding process). The sentence handed down in this case is a violation of both the Louisiana Constitution and the Eighth Amendment of the United States Constitution.

Part Two of Claim E, Unconstitutional Sentence: Mitigating Factors and Prejudice

The sentence given to me, eighty (80) years at hard labor without benefit of parole, probation or suspension of sentence for a first violent crime in which no one was harmed or could have been harmed because the gun used in the robbery and identified by the victims of the

robbery was a non-firing Civil War replica with a partially plugged barrel, I submit that this sentence is unusually harsh and based on inaccurate pre-sentence report, which tracks an FBI fingerprint record (Exhibit-G) erroneously labeled an "FBI Rap Sheet."

In the hearing for sentencing, the trial court gave the following highly inaccurate summation of my FBI fingerprint record, to-wit:

> "...the defendant's criminal history is lengthy. He began as a juvenile in the Caddo Parish Juvenile Court when he was very young. He was constantly involved with the juvenile authorities for unlawful entry, violation of parole, trouble at school, unable to be controlled generally, was sent to LTI.
>
> "He escaped from LTI, violated his parole, stole a vehicle, finally ended up in federal custody when he was still a juvenile and was to remain in federal reform school until he was twenty-one years old. In connection with that and in 1974 he was convicted of violating the Dyer Act and was sentenced by the federal authorities. In 1974 in Gulfport, Mississippi, he was arrested for having possessed a stolen vehicle. And in that same year he was arrested for interstate weapons offense and transportation of stolen firearms and was again turned over to federal authorities. In 1975 again he was arrested for breaking and entering in Petersburg, Virginia.
>
> "Again, he was returned to federal custody. In 1976 he was arrested for the Dyer Act violation, violation of the Dyer Act, and arson and escape. He received a sentence from the federal authorities at that time. In 1976 was again arrested for escape and theft of government property. He again received a sentence from federal authorities. In 1976 he was arrested in Los Angeles, California, with the Dyer Act and was again returned to federal custody. In 1978 he was arrested for interstate transportation of a firearm, aggravated arson, and escape. He received a sentence in the state of Kentucky for that offense, sentence being four years, four months and fourteen days.
>
> "In 1980 he was arrested in Shreveport for aggravated burglary although that charge was dismissed in 1982. Of course he was arrested for the instant crime, but while in custody of local authorities he has attempted to escape and has been charged with that offense as well as criminal damage to property.
>
> "Limited pre-sentence investigation report and defendant's [sic] FBI [fingerprint] record show that in addition to the conviction that was just mentioned it is clear that on several occasions when the defendant was arrested by state authorities prosecution was deferred in favor of federal authorities. Therefore, several offenses for which he might have been prosecuted were not prosecuted." (Vol. 6 Tr. pp. 1097-1098).

Large portions of the foregoing summary of my juvenile and adult criminal record are materially false and a misinterpretation of my FBI fingerprint record. The Court cited six (6) non-existing adult convictions and seven(7) juvenile adjudications (6 of which do not exist) and numerous non-existing arrests to enhance my sentence in direct violation of both the Louisiana and U.S. Constitutions and federal statute law, as shown below.

In May of 1974 I ran away from LTI and stole a car and drove it to Arkansas and then back into Louisiana. On June 6, 1974, in Shreveport, I was arrested by federal authorities for this one count of the Dyer Act (NMVTA--or interstate transportation of a stolen motor vehicle). On June 18, 1974, I was sentenced on this charge under the Federal Juvenile Delinquency Act to the custody of the U.S.Attorney General for the reminder of my minority, or for the term of two (2) years, eleven (11) months and nineteen (19) days.

The court erroneously cited this one count of the Dyer Act three (3) times as three (3) different juvenile adjudications in the first one and a half paragraphs of its summation.

On June 19, 1974, I was received at the federal reformatory at El Reno, Oklahoma for this one and only Dyer Act adjudication. While at this reformatory I was charged with one count of simple arson of a waste basket in an office (recreation shack) on the reformatory yard. I was later adjudicate of this charge and sentence to two and one half (2-1/2) years.

On May 14, 1975, I was transferred to the federal reformatory at Tallahassee, Florida, from the federal reformatory at El Reno, Oklahoma. While at the reformatory at Tallahassee, on June 16, 1975, I escaped and was arrested in Gulfport, Mississippi, the next day. In connection with this escape, I was charged by federal authorities with escape, violation of the Dyer Act, and interstate transportation of a firearm (there was an old shotgun in the trunk of the stolen car.) I was sentenced in the Northern District of Florida to one (1) year for the Tallahassee escape.

Therefore, when I was transferred to the federal reformatory in Petersburg, Virginia, on November 12, 1975, I was only serving time for the one and only juvenile adjudication of the Dyer Act out of Shreveport, simple arson, and the Tallahassee escape. On December 24, 1975, while at the federal reformatory in Petersburg, VA, I escaped a second time. I plead guilty to the Petersburg escape offense and sentenced in the Eastern District of Virginia to nine (9) months on 05/03/1975. The FBI fingerprint record (Exhibit G) shows I was arrested by Petersburg police for breaking and entering a church. The owners of the church declined to press charges because the church left its doors open to all on that Christmas night, including runaway and freezing juveniles. Nothing was broken and nothing was stolen from the church.

As the Federal Bureau of Prisons Movement Summary (Exhibit H) shows, I was transferred from the reformatory at Petersburg, Virginia, on August 26, 1976, and was received at

the reformatory in Lompoc, California, on September 23, 1976. During this transfer the U.S. Marshals housed me overnight in the Los Angeles County Jail on September 15, 1976. As the FBOP Movement Summary shows and the Los Angeles County records (Exhibit K) prove, I was never arrested or convicted of the Dyer Act in Los Angeles in 1976 or any other time. Furthermore, the trial court inaccurately stated that I was arrested for escape and theft of government property in 1976. (Exhibit G) records no such arrests or convictions. The court is referring to a "return from writ" fingerprinting on February 26, 1976, from U.S. Marshalls, Richmond, Virginia, to the Petersburg reformatory when I was sentenced for the Petersburg escape; cross-reference dates with FBI fingerprint record (Exhibit-G) with FBOP Movement Summary data sheet (Exhibit-H). The Los Angeles "Dyer Act, escape, and theft of government property convictions cited by the court to enhance my sentence do not exist. (See Exhibit K)

While at the federal reformatory at Lompoc, California, I was placed on "writ" to the U.S. District Court in Macon, Georgia, where I plead guilty to the second Dyer Act (Gulfport) and the first and only interstate firearms violation stemming from the Tallahassee escape on June 16, 1975. On November 18, 1976, I was sentenced to two (2) years for both the Dyer Act and the firearms violation. Clearly U.S. District Judge Elliot saw these two offenses for what they were: a juvenile runaway stealing a car who didn't know there was an old shotgun in the trunk and *not* a dangerous criminal transporting firearms across state lines as the District Court erred in believing in enhancing my sentence to 80 years without parole.

After I reached my twenty-first birthday on June 6, 1977, federal authorities aggregated my sentences which totaled four (4) years, four (4) months, and fourteen (14) days, and transferred me to an adult prison. I was received at the Federal Correctional Institution (FCI) Ashland, Kentucky, on July 26, 1978 (See Exhibits G, H) from the federal reformatory in Texarkana, Texas, to serve time for the the simple arson stemming from my stay at the federal reformatory in El Reno, Oklahoma, the second Gulfport Dyer Act, the Petersburg and Tallahassee escapes, and the one and only interstate transportation of a firearm.

However, the pre-sentence investigator wrongly interpreted this transfer (and others) as a new arrest and conviction and the *aggregated* sentence of four (4) years, four (4) months, and fourteen (14) days as a new sentence. A review of Exhibit G) FBI fingerprint record, Entry 18,

records the following: "Contributor of fingerprints: Fed. Corr. Inst. Ashland, KY...received 7/26/68 TR/F. FCI Texarkana...Charge: NMVTA, interstate transportation of firearm, arson of federal ref. office, escape...Disposition: Sent. 4 years, 4 mos. 14 days, aggrd." As proven in the state of Kentucky and U.S. District Court records for the Eastern District of Kentucky (Exhibits-M, L), I have never been arrested or convicted in the state of Kentucky by either state or federal authorities. These three (3) convictions cited by the court to enhance my sentence do not exist. They are merely a repeated incorrect entry from a fingerprinting when I was received on transfer to FCI Ashland, KY (See court records, Exhibits - L, M). And to throw gas on the fire, the writer of the pre-sentence report misinterpreted "aggrd"--aggregation--to be "aggravated" and attached it to the simple arson conviction from El Reno Reformatory.

In summary of the foregoing, I was only adjudicated and sentenced once for simple arson of a waste basket in an office of a federal reformatory, once for the Dyer Act while escaping from a federal reformatory, and two escapes from a federal reformatory--all very minor crimes committed while serving a juvenile sentence for the first federal juvenile Dyer Act violation. The trial court erroneously cited six (6) non-existent adult convictions and seven (7) juvenile adjudications (six (6) of which do no exist) to enhance my sentence to eighty (80) years at hard labor, without parole. This was due, in part, to trial counsel's failure to review or counter false and unfavorable information contained in the PSI(Court of Appeal, Slip Op. assignment error No. 12, paragraph 2), and it was due in part to the fact that the trial court took the foregoing sentence summary from an erroneous interpretation of an FBI fingerprint record by the pre-sentence investigator.

It should be noted here that the FBI no longer uses the fingerprint record form because, as in this case, it has been erroneously interpreted by sentencing courts all over the United States and played a key role in the U.S. Supreme Court's holding in Booker v. Fan-Fan, which requires all prior convictions used to enhance a sentence to be proven to be prior convictions.

"But for" counsel's *deficient performanc*e, a background investigation would have been conducted; but for counsel's unprofessional errors, he would have reviewed or at least asked for a copy of the PSI and challenged the false and misleading information contained in the PSI and informed the court of my actual very minor prior records there is a reasonable probability that the

court would *not* have concluded that "...because of your extensive criminal record I don't believe the gun brought into this court [and identified by the robbery victims as the gun used in the robbery] was the gun you used. I believe you had a real gun." But for counsel's *deficient performance*, witnesses would have been called to testify that the only gun around in those months leading up to the robbery was the same non-firing Civil war replica pistol that hung in a plaque on my father-in-law's living room. "But for" counsel's *deficient performance*, he would have reminded the Court that no one was physically harmed or could have been harmed in the robbery because the gun used in the robbery was a non-firing Civil War replica, and that one of the robbery victims testified "We weren't harmed, but it scared us." (See testimony of Else McCain.) There is a reasonable probability that the sentence would have been different. Strickland, 466. U.S. 668, 104 S. Ct. 2052, 80 L. ed 2d 674 (1984); State v. Bouie, 598 So 2d 610 (La. 1992).

As stated above, in denying me the opportunity to counter the false and misleading information contained in the pre-sentence report, the Trial Court and the Court of Appeal violated my Right to Judicial Review as guaranteed by Art 1 § 19 of the 1974 Louisiana Constitution, violated La. Code Crim. P. 930.3. In State v. Coleman, 574 So. 2d 477, (La. App. 2n Cir. (1991)) the Court held that "It is reversible error for the trial court not to allow defendant access to the report and an opportunity to rebut any adverse material or prejudicial information in the pre-sentence investigation report." See also State v. Taylor, 514 So 2d 755 (2 cir. app. 1987); State v. Phillips, 391 So 2d 1155 (La 1980): State v. Bosworth, 360 So. 2d 173 (La. 1978); State v. Underwood, 353 So. 2d 1013 (La. 1977). See also LSA-R.S.15:1132.

As stated above, the Court of Appeal evaded this issue by concerning itself not with giving me an opportunity to rebut any false and misleading information contained in the pre-sentence report or by hearing the merits of my claim of ineffective assistance of counsel at sentencing, but by merely stating that "there is no error in the Court's failure to give a copy of the report." (Silp Op. Assign. of Error No 12, paragraph 3.)

I do not care who is at fault. I care only that my Right to Due Process of Law and Judicial Review, as an American citizen, be upheld by the courts as required by the Constitutions

of both Louisiana and the United States for fair sentencing procedures, particularly the right to be sentenced on the basis of accurate information.

First, the U.S. District Court in Shreveport, LA, in United States v. Ruiz-Lrias, U.S. Dist. Lexis 58562 (5th Cir., June 11, 2010) held that "The law is clear that sentences based upon erroneous and immaterial information or assumptions violate Due Process. "Townsend v. Burke, 334 U.S. 736 (AT 741) 68 S. CT. 1252, 92 L. Ed. 1960 (1948)("sentence based upon 'assumptions concerning [the defendant's] criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law . . . '"); United States v. Tucker, 404 U.S. 443, 447-48, 92 S. CT. 589, 30 L. Ed. 592 (1972) ("affirming circuit court's remand for re-sentencing because original was predicated on inaccurate information."). See also State v. Terriault, 369 So. 2d. 125 (LA 1979) and State v. Phillips, 391 So. 2d. 1155 (La. 1980).

Second, I have made showing of the two elements required to support a due process violation claim: "(1) that the challenged evidence is materially false and unreliable, and (2) that it actually served as a basis for the sentence." United States v. Reme, 738 F 2d. 1156, 1167 (5th and 11th Cir. 1984).

Third, the Appeal Court stated in its Slip Op. Assignment of Error NO. 12, paragraph 2, that: "Trial counsel objected at trial to Colvin's sentence, but made no request to review or counter any unfavorable information contained in the pre-sentence investigation." Clearly the Court of Appeal agreed that counsel performance was deficient at sentencing, but evaded the claim.

Therefore, there is no question that counsel's *deficient performance* meets both prongs of the Strickland standard for a proper claim of ineffective assistance of counsel. Further, counsel's *deficient performance* at sentencing to put the state to its test by challenging the false information in the PSI (or even requesting a copy of the PSI), constituted a complete breakdown in the adversarial process that is presumed prejudicial under United States v. Cronic, 466 U.S. 648 (U.S. 1984), as the Connecticut Supreme Court held in an opinion released Nov. 17, 2015 (Davis v. Comm'r of Corr., Conn., No. SCI9286, 11/17/15) quoting BNA Criminal Law Reporter, 11/18/15 (Vol. 98, No. 7), page 167. (See Exhibit-G).The Court:

> "Justice Richard A. Robinson said that by agreeing with the prosecutor's recommendation of the maximum sentence, defense counsel, in the words of the Cronic Court, "entirely fail[ed] to subject the prosecution's case to a meaningful adversarial testing."

Clearly, trial counsel agreed with the prosecutor's request for a maximum sentence in this case by his failure to request a copy of the PSI or counter the false and misleading material contained therein. This was due to the fact that counsel never visited me in jail or questioned me about my prior record.

Fourth, not only are juvenile adjudications cited by the court to enhance sentence considered confidential under the Federal Juvenile Delinquency Act (FJDA), 18 USCS §§ 5031-5032, but the ten Federal Juvenile Adjudications cited by the court (six (6) of which do not exist) are "Pardoned or expunged conviction as 'Prior Offense' under state statute or regulation enhancing Punishment for Subsequent Conviction. 97 ALR5th 293." quoting Annotations of 18 USCS §§ 5031-5032. And "Federal Juvenile Delinquency is a status rather than a crime," UNITED STATES v. D.H., (1998, DC VI) 39 VI 263, 12 F. Supp. 2d. 472. See also Louisiana Code Juv. Procedure 122A and 123A and STATE V. BROWN, Sup 2004, 879 So. ed 1276, 2003 2788 (LA 7/6/04) rehearing denied, cert. denied 125 S. CT 1310, 543 U.S. 1177, 161 L. Ed 2d 161.

As noted above, in the trial court's sentencing reasons, the court relied heavily on non-existing prior convictions, state and federal juvenile adjudications and juvenile arrests. There can be no question that I was sentenced in violation of state and federal law, as well as both the Louisiana and United States Constitutions. R.S. 15: 529.1 states:

> **VALIDITY--Juvenile Adjudications as Prior Convictions--**
>
> The Louisiana Supreme Court has held this statute unconstitutional, as violating a defendant's due process rights, when applied "for the purpose of allowing juvenile adjudications to be counted as predicate offenses, where these adjudications were obtained without the right to a jury trial," so that "juvenile adjudications cannot be used to enhance adult felony convictions pursuant to LA. REV. STAT. 15:529.1." STATE V. BROWN, Sup. 2004, 879 So. 2d 1276, 2003-2788 (La. 7/6/04) rehearing denied, certiorari denied 125 S. Ct. 1310, 543 U.S. 1177, 161 L.Ed 2d 161, application for writ of Habeas Corpus held in abeyance 2008 WL 4678689.

V. CONCLUSION

I pray that this honorable court will not depart from the decisions of the Louisiana and United States Supreme Courts that require convictions based on structural, per se prejudicial errors and substantial claims of ineffective assistance of counsel to be set aside.

As my conviction stands, it is a breach in the wall erected by the Sixth and the Fourteenth Amendments to the Constitution and the decisions of the United States and Louisiana Supreme Courts that were designed to protect a citizen from being convicted by a State through the use of a crooked and incompetent attorney (as confirmed by the Louisiana Supreme Court in Nader, 472 So 2d 11 (1985)), who failed to render effective assistance at my trial and sentencing as set out in Strickland and who failed to put the State case to a meaningful adversarial testing under Cronic and Bell v. Cone, 535 U.S. 685 (2002). The Commissioner of the Louisiana Bar Association stated, and the Louisiana Supreme Court agreed, that trial counsel's conduct in cases of crime "goes beyond being prejudicial to the administration of justice and that it is 'a large black mark against the entire judicial system,' of a serious magnitude."[7]

In reviewing trial the structural errors that require automatic reversal of conviction and counsel's performance in the totality as required by the U.S. Supreme Court decisions cited above, it is clear that counsel's performance fell below an objective standard of reasonableness, and that "but for" counsel's *deficient performance*, the likely outcome of the trial and sentence would have been different.(Strickland, 466)

Therefore, I beg this honorable court to reverse this conviction or remand for re-sentencing after review of this case on the intact record alone or with an Expression of The Record under Rule 7, noting that "....when the transcript and record contain the portions necessary to address the issues actually raised on appeal, including those portions where objections were made [or not made] by counsel, the record is constitutionally sufficient for a meaningful appeal. Schwander v. Blackburn, 750 F. 2d 494 (5th Cir. 1985)," citing Chenevert v. Burl Cain, action no. 12-966, Section "F"(2).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____

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[7] Louisiana State Bar Association v. Nesib Nader, 472 SO. 2d 11 (1985). Id. A.T 12.

Respectfully submitted,

James Colvin Date:_____