NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO: 05-75-8614 DIVISION "H" SECTION 1

KENNETH WAYNE WHITMORE

VERSUS

N. BURL CAIN, Warden

FILED:_____ _____
DEPUTY CLERK

APPLICATION FOR POST-CONVICTION RELIEF

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APPLICATION FOR POST-CONVICTION RELIEF

Petitioner, Kenneth Whitmore, through counsel, moves this Court pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article 1, Sections 2, 3, 5, 13, 14, 16, 17, 19, 20, 22, and 24 of the Louisiana Constitution of 1974, and Articles 926, 930.3, 930.8 (A)(1) of the Louisiana Code of Criminal Procedure, to grant his application for post-conviction relief.[1]

I. INTRODUCTION

Kenneth Whitmore has spent nearly 40 years of his life incarcerated at the Louisiana State Penitentiary for the murder of Marshall Bond – a murder Mr. Whitmore did not commit.[2] As the instant petition demonstrates, Mr. Whitmore was convicted as a result of a prejudiced investigation, prosecutorial misconduct, withheld exculpatory evidence, and perjured testimony. The state's case rested almost exclusively on a false confession unconstitutionally coerced from Mr. Whitmore after he suffered a head injury, had been deprived of food, water, and sleep for almost two days, and then interrogated for 34-36 hours. To compensate for its weak case, the prosecution continued engaging in gross misconduct by 1) presenting perjured testimony, 2) suppressing exculpatory evidence, and 3) participating in racially biased extrajudicial activities in violation of the due process and equal protection clauses of the Fourteenth Amendment.

In addition, a member of Mr. Whitmore's defense failed to disclose an important conflict of interest: that he had been intimidated by members of the community for his representation of Mr. Whitmore. Mr. Whitmore's defense also failed to adequately investigate the circumstances surrounding his confession. These failures rendered Mr. Whitmore's representation constitutionally ineffective. Today, Mr. Whitmore has uncovered new evidence that highlights his innocence and shows that his conviction is predicated on myriad Constitutional violations so egregious that this court should grant his post-conviction relief application.

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[1] This application tracks the Uniform Application for Post-Conviction Relief, which is attached to the back of this pleading, before the certificate of service. Counsel for Mr. Whitmore reserve the right to supplement this petition with additional legal arguments and facts in support, including facts developed through further discovery.

[2] Since Kenneth Whitmore's arrest in February of 1975, he has spent over 35 years in solitary confinement, including the last 28 consecutive years. *See* First Amended Complaint, *Whitmore v. Cain*, No. 14-0004 (M.D. La. 2014)

Arrested in Zachary on February 20, 1975 for an incident unrelated to the Bond homicide, Mr. Whitmore arrived in the East Baton Rouge Parish prison eighteen months after Mr. Bond's death. While a pre-trial detainee at the prison, Mr. Whitmore made two involuntary and coerced statements to Assistant District Attorney Warren Hebert, Detective Louis Russell, and Detective Carson Bueto. New evidence, in the form of new witnesses, reveals that Mr. Whitmore made these statements while suffering from a head injury and almost two days of very little food, water, or sleep. Two days prior to Mr. Whitmore's false confession, prison officials placed him in the dungeon after an inmate fight, during which he was kicked in the head numerous times and knocked to the ground. The dungeon's air quality was so poor that the 6-8 inmates in the 9'x6' cell took turns breathing through the small space between the door and the floor. All of the men had been stripped of their clothes. By the time District Attorney Ossie Brown came to interrogate Mr. Whitmore, a day and a half or two after his placement in the dungeon, Mr. Whitmore had not slept, eaten, or received any medical attention. In light of his physical condition and the circumstances of his 34-hour-long interrogation, Mr. Whitmore's confession was taken in violation of his constitutionally protected rights under the Fifth Amendment.

At his trial, Mr. Whitmore testified that he was told what to say during his confession, however, in light of the lack of physical evidence and the District Attorney's testimony to the contrary, the jury gave little to credit Mr. Whitmore's version of the events. The Assistant District Attorney who took Mr. Whitmore's taped statements has made a sworn statement now crediting Mr. Whitmore's version of events: that Ossie Brown was the first person to get an inculpatory statement from him. This statement not only supports Mr. Whitmore's original trial testimony, it demonstrates that the State allowed two witnesses to perjure themselves in an effort to secure Mr. Whitmore's conviction.

Moreover, new evidence, in the form of previously withheld East Baton Rouge Sheriff's reports and Louisiana State Police crime laboratory reports, identifies exculpatory evidence wrongfully withheld from Mr. Whitmore's defense team. These reports show that the Sheriff's office had in its possession potential murder weapons, leads on viable suspects with legitimate

motives, crime scene photographs and physical evidence that contradicted Mr. Whitmore's coerced confessions, and information that would have assisted the defense in attacking the credibility of the State's witnesses and bolstering its theory of events. By denying access to these reports and evidence, the state hindered Mr. Whitmore's attorneys in developing a robust and effective defense, and in turn violated constitutional mandates required under *Brady v. Maryland*, 373 U.S. 83 (1963).

Compounding the above constitutional violations, the State repeatedly told the jury that "almost no, what could be considered evidence was found" at the crime scene. Tr. p. 42 (Mr. Whitmore's trial transcript is attached as Exhibit G, but is referred to as Tr. throughout). Not only was that statement false, but it ignored the fact that an investigator for the District Attorney's office had removed all of the physical evidence from the crime lab on November 4, 1976, a mere two months after Mr. Whitmore was appointed counsel, and never checked back in. None of this evidence collected at the scene or gathered during the initial investigation was presented at trial or disclosed to the defense. The current District Attorney's office has been unable to produce any documentation showing what happened to this evidence. As more fully set forth below, proof that the District Attorney was in possession of this evidence not only violates *Brady*, but also confirms that the state presented perjured testimony to Mr. Whitmore's jury.

Further, Mr. Whitmore has obtained documents from the Federal Bureau of Investigation showing that Ossie Brown was closely affiliated with the region's chapter of the Ku Klux Klan—a white supremacist organization well-known for extra-judicial violence—and had been a robed speaker at meetings. Mr. Brown actively participated in Mr. Whitmore's prosecution by interrogating and coercing him prior to his confessions and also took the stand at trial to tell the jury Mr. Whitmore had "told the truth" during his subsequent taped statements. Mr. Brown's association with the Klan while serving as a public official and his failure to disclose such an affiliation was not only a *Brady* violation, but also created an environment of prosecutorial misconduct that violated Mr. Whitmore's constitutional rights to due process and equal protection before the law.

Individually and cumulatively, these constitutional violations produced a verdict unworthy of confidence. Each of Mr. Whitmore's post-conviction claims standing alone justifies vacating his conviction. Taken collectively, however, the state's prejudiced and tainted proceeding against Mr. Whitmore violated his fundamental rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments and the resulting verdict, a 10-2 decision, is so unreliable and unconstitutional that this court should vacate his conviction.

II. STATEMENT OF FACTS

A. Marshall Bond's Murder

Marshall Bond was well-known in the town of Zachary. He had lived there most of his life and was involved in town politics, having been both the mayor and a city council member. He ran a successful pharmacy in town and was known to loan money to anyone, black or white, who had a need.

In the days leading up to his murder, Mr. Bond was not his usually affable self. Ex. A, pp. 18, 40, 49, 51, 70. He was described as "upset from Monday through the Wednesday he was killed." Ex. A, p. 49. His altered state of mind was "noticeable by everyone who he had contact with." Ex. A, p. 49. Town members told deputies about Mr. Bond's business deal to start a metal fabrication shop in town. When this fell through, Bond lost $65,000 and told people he intended a show down with his former business partner. Ex. A, p. 49. The two "were considered bitter enemies as a result of this business venture failure." Ex. A, p. 49. Deputies interviewed this bitter enemy and noted he was completely evasive during the interview. Ex. A, p. 49. Because of this, deputies asked him to take a polygraph examination; he never showed up for the exam. Ex. A, p. 49-50.

At the town council meeting the day before Mr. Bond was killed, the Mayor, Jack Breaux, noted Bond was upset and antagonistic. Ex. A, p. 51. Another attendee described Bond as having been "very upset" and in a state of mind he had never been seen in before. Ex. A, p. 51. "[W]hen Bond gave the invocation he asked forgiveness of sins and nearly cried at this point, but recovered and became antagonistic to every item on the agenda." Ex. A, p. 51.

On Monday and the day he was killed, an anonymous caller phoned a woman who could see the pasture where he was found beaten. Both days the caller asked her if it was raining. On

the Tuesday before the murder, the caller held the phone a few seconds and then hung up. Ex. A, p. 42.

On the morning he was killed, Mr. Bond's maid overheard him tell a caller, "I'll be there in five minutes, and you had better be there." Ex. A, p. 70. Mr. Henry Sessums spoke with Bond at his drugstore between 9:30 and 10:20 that morning. Mr. Sessums described Bond as "not his normal self that day, very upset over town politics, town work and general business in the town of Zachary. In all his years of knowing Mr. Bond, Mr. Sessums had never seen him "in the state of mind he was in that day." Ex. A, p. 40.

Bond spent between 11:30 and 2:00 p.m. on the day he was killed with the Vice President of the Bank of Zachary, Jessie Donze. Ex. A, p. 8. Mr. Donze told deputies that Bond was "unusually upset about something, even to the point he cut off short the President of the Bank on the phone, while in conversation and later called him back and apologized." Ex. A, p. 18. Mr. Donze reported he went with Bond to collect a debt, which was unsuccessful, further upsetting Mr. Bond. Ex. A, p. 18. One of Mr. Bond's drugstore employees estimated that at the time he was killed he was owed over $140,000 in uncollected loans. Ex. A, p. 18.

In the afternoon, around 4:00 Mr. Bond travelled to the home of a woman with whom he had been having a long term affair. He had called her that morning, "acted very upset, talked about having to do some banking business," and assured her he would see her later that day. Ex. A, p. 44. When he arrived at her house, he "sat on the porch and poured his heart out to her." Ex. A, p. 44. He talked about failed business dealings and how he was involved with someone who had a bad reputation and cost him a lot of money. Ex. A, p. 44. He told her someone had been tampering with his farm vehicle and his truck and had put tacks in the road at his farm. Ex. A, p. 44. He spoke of his belief that his wife's family would profit most from his death. Ex. A, p. 44. When she told him to be careful, he said no one would bother him at his store in town, but that he might get killed in his pasture. He then assured her he carried a pistol for protection against this. Ex. A, p. 44.

He left her porch that afternoon and she never saw him again. Mr. Bond was killed in his pasture near the barn later that evening.

Before sundown, Mr. Bond was found bleeding from the head, but alive and breathing hard near his barn. He died before reaching the hospital from trauma to the brain caused by multiple skull fractures. Tr. 122-123. He suffered ten to twelve blows to the head, one to the lip, and his eyes were blackened. Tr. 121. The blows to the head left lacerations of various lengths caused by what the coroner estimated to be a "blunt instrument." *Id.* He suffered ten superficial puncture wounds to the left chest and left side of his chest, two to his left forearm, and had six small lacerations on the back of his right hand. Tr. 121-122. The coroner described the puncture wounds as "peculiar looking" and "caused by a laceration or like maybe a Phillips screwdriver." Tr. 121. The coroner also stated that the lacerations to his right hand would not "have been caused by the same instrument that caused those puncture type wounds." Tr. 122. The coroner estimated that when he saw Mr. Bond's body between 8 and 8:30 that night, the wounds "had not been over a couple of hours old." Tr. 123.

B. <u>The Investigation into Marshall Bond's Murder</u>

Since the beginning of the investigation, East Baton Rouge Parish Sheriff's officers knew that Mr. Bond was a man with enemies and problems in town. Only five days after his death, deputies spoke with Mr. Donze, the Vice President of the Bank of Zachary, who had been with Bond the day he was killed. Ex. A, p. 18. Donze described a man who was out of character and "unusually upset." *Id.* Within two weeks of investigation, deputies had learned "from most everyone who saw him" that on the day he was killed and the days leading up to it, he was upset and in an unusual state of mind. Ex. A, p. 40-41. Deputies spoke with Mr. Bond's mistress, probably the last person to see him alive other than his killer, on September 6, 1973. She told them about his erratic behavior, his premonition he would be killed in his pasture, the man with a bad reputation with whom he had become involved, and that Bond carried a pistol for protection. Ex. A, p. 44-45. Deputies taped an interview with the business partner with whom Bond intended a show down. Ex. A, p. 49. The business partner who caused Bond to lose $65,000, but never showed up for his polygraph examination. Ex. A, p. 49-50. In spite of this man's motive, there is no mention of him again in the police reports, no indication of how or if he was eliminated as a suspect. *See* Ex. A.

By September 27, 1973, almost 6 weeks after Bond was killed, Deputies felt that "there are particularly two things that … if it could be found out, it would lead to solving the Marshall Bond Case." Ex. A, p. 70. The first was who Mr. Bond spoke with the morning he was killed. He told the person, "I'll be there in five minutes, and you had better be there." He then left the house. Ex. A, p. 70. The second was who phoned Bond at his drugstore that afternoon and caused him to leave and go to the pasture immediately. This belief was based on the state Bond left the drugstore in. It was not his habit to leave the place with money lying around and the safe unlocked. Ex. A, p. 71.

In spite of this theory of the case, that Marshall Bond had been killed by someone who knew him and knew he was in danger, deputies polygraphed a number of suspects, predominantly black men, who had no association with Mr. Bond. *See* Ex. A, pp. 12, 14, 74, 77, 79, 98. New evidence will show that two of these men, Michael Ghoram and David Rogers, were asked to confess a man named Ralph Ball had paid them to kill Mr. Bond, or were asked if Mr. Ball had paid them to kill Mr. Bond. Ex. I, ¶¶4-5; Ex. J, ¶5. Neither Mr. Rogers nor Mr. Ghoram knew anyone named Ralph Bond.

In spite of the viable lead on a suspect who was evasive during interview, had motive to kill Marshall Bond, and who Marshall Bond swore he would have a show down with, the deputies did not track the man who failed to show up for his polygraph examination. Instead, almost 18 months after these valuable leads were left unfollowed, deputies charged Mr. Whitmore and Mr. Donahue with murdering Marshall Bond.

In addition to unfollowed leads, deputies left numerous items of physical evidence untested, yet when it came time to try Mr. Whitmore, the evidence was nowhere to be found. The day of the murder, deputies recovered the victim's pants and apparently found a splatter that tested positive for human blood, whose human blood was never determined. *See* Ex. B, pp. 2, 27. Deputies recovered the following items from the scene: Mr. Bond's hat with hair samples, hair samples from the bloodied tin bench, the hood of Mr. Bond's car, and a three-and-a-half foot long 1 x 4 with a nail sticking out of the end. Ex. B, p. 3. The car, the bench, and the board all had hair samples on them. These items were submitted to the crime lab for hair comparison and

serology, but no results are in the files. Deputies also found a bloody coke bottle and finger prints on the outside of the car and the bloody tin bench. Ex. B, pp. 8-26. It appears these prints were run against a couple of suspects, Ex. B, pp. 1-2. One test shows negative results, the other test does not indicate the results. *Id.* Nothing in the crime lab documents shows that deputies printed Mr. Bond's former business partner and sworn enemy. Nothing in the crime lab documents shows Mr. Whitmore's prints were ever run against the ones collected from the scene of the crime.

As the investigation unfolded in the days following Mr. Bond's death, deputies recovered more physical evidence and possible murder weapons in addition to the 1 x 4 board. A rusty automobile bumper jack was found on the ground about 18" from the fence at the southwest corner of Mr. Bond's pasture. Ex. B, p. 5. The jack "had evidently been there only a short time as the grass under the jack was not dead or discolored." Ex. B, p. 4. This jack was sent to the crime lab for analysis. Ex. B, p. 5. A galvanized anchor bolt was found only one foot Northwest of the pecan tree where Mr. Bond's body was found. Ex. A, p. 22. This anchor bolt was sent to the crime lab for analysis. Ex. B, p. 5; Ex. B, p. 7 [LSP crime lab docs].

On February 4, 1975, deputies collected evidence from Mr. Carl Bond, Marshall's brother. This evidence came from Mr. and Mrs. Cole. The Coles lived a few miles from where Mr. Bond had been killed and three days after his death, they saw a car drive down their road at a high rate of speed and saw a man throw something out the window into a ditch. Ex. A, p. 101. This turned out to be a small steak knife. Ex. p. 101. At the time, the Coles did not put this incident together with Marshall Bond's death. In January 1975, the grass in the ditch was moved and the Coles recovered a pocket knife and a nut driver. Carl Bond later went to the ditch with a metal detector and further recovered a ½" reinforcement rod and a yellow-handled flat head screwdriver. Ex. A, p. 101. The items were turned over to deputies and sent to the crime lab for blood, hair, and fiber analysis. Ex. B, p. 9. No results are in the crime lab files. Exs. B-C.

When the deputies began investigating the alleged confessions by Mr. Whitmore and Mr. Donahue, they searched Mr. Donahue's car. Ex. B, p. 10. The items recovered included a torque wrench, a jack handle, and lug wrench. Ex. B, p. 10. These items were sent to the crime lab for

serology analysis. Ex. B, p. 10. The last pieces of evidence collected during the entire course of the investigation included the only item presented at trial, a rusty metal bucket.

The bucket was allegedly one that came from Mr. Bond's barn and had been missing since the day of his death. The crime lab document showing the bucket turned over by Zachary Police Officer John Womack, actually lists two different buckets that had been found and submitted for analysis. Ex. B, p. 11 (items 1 and 2, both 5 gallon pails, black in color). The Sheriff's report describing the retrieval of the items from Ligon park in Port Hudson does not mention two buckets, it reports that the items turned over by Officer Womack included "a paint bucket, jack insert (upright), a 10 oz. coke bottle, and some linens." Ex. M, p. 11. As will be shown below in further detail, one bucket, although it is unclear which, was the only piece of physical evidence admitted at Mr. Whitmore's trial. In fact, in its opening statement the prosecution lamented the lack of physical evidence and complete absence of fingerprints at the scene. Tr. 59.

III. WHAT THE JURY HEARD: THE STATE'S CASE

The State's case against Kenneth Whitmore relied almost exclusively on two taped statements taken from him after almost 34 hours of questioning. *See* Tr. 50 ("I have never tried a criminal case where I had a confession that was my only evidence to prove the defendant's guilt."). These two statements conflicted with one another and they conflicted with the evidence withheld from the defense. The only other evidence the State presented was one of the two rusty buckets found in a park in Port Hudson 18 months after Mr. Bond was killed.

A. The State Affirms No Physical Evidence or Prints were Found at the Scene

The State tried to paint Mr. Whitmore as a violent killer who went to Marshall Bond's pasture on August 15, 1973 with the intent to rob him and who ended up stabbing him with a screwdriver and hitting him with a tire iron. The State averred, time and again, that almost no evidence was found at the scene of the crime and that no fingerprints were located. Tr. 58-59 ("the scene as I stated, had no fingerprints. All rough surfaces. Nothing left there…. Only one piece of evidence which was later found which would connect this defendant, physical evidence which would connect this defendant to the crime."). To secure a conviction, the prosecutor had to convince the jury that Mr. Whitmore's confessions were voluntarily given and true.

The State told a short story of Mr. Bond's death. Mr. James Robinson testified he found came in from the pasture before the sun began to set and found Mr. Bond laying in a pool of blood and breathing hard. Mr. Robinson had been out cutting limbs with a chainsaw and had come in to the barn because he ran out of gasoline. Tr. 71-72. Robinson left the scene and got in his truck to get Mr. Carl Bond from his drugstore in town (both of the Bond brothers ran his own drugstore in town). Tr. 74. Robinson followed Carl Bond back to the barn and the rescue unit came behind them. Tr. 75. Mr. Bond was dead by the time the rescue unit arrived at the hospital around 7-7:30.

The State called Mr. Bond's wife and a store employee, Mrs. Doris Hanna, to establish that Mr. Bond carried large amounts of cash and likely had between $1,000 and $1,100 on him the day he was killed. Tr. 64, 104. Mr. Bond's brother testified Marshall had no "folding money" left on his person, only change and keys. Tr. 112-113.

The coroner testified next, stating Mr. Bond died from trauma to the brain from multiple skull fractures. Tr. 122-123. He suffered ten to twelve blows to the head, one to the lip, and his eyes were blackened from blows. Tr. 121. The blows to the head caused lacerations of various lengths from what the corner estimated to be a "blunt instrument." *Id.* He suffered ten superficial, "half inch deep," puncture wounds to the left chest and left side of his chest, two to his left forearm, and had six small lacerations on the back of his right hand. Tr. 121-122. The coroner described the puncture wounds as "peculiar looking" and "caused by a laceration or like maybe a Phillips screwdriver." Tr. 121. The coroner also stated that the lacerations to his right hand would not "have been caused by the same instrument that caused those puncture type wounds." Tr. 122. Mr. Whitmore's counsel did not cross-examine the coroner.

Lieutenant Bueto took the stand next and described the scene of the crime briefly, noting that the deputies found a bloody coke bottle, a spot of blood near the base of a tree close to the barn, the victim's hat, and a tin bench covered with blood. Tr. 127-128. When Bueto testified that Sergeant Baxter with the State Police came to the scene that night to assist, the prosecuting district attorney, Lennie Perez, asked Bueto if Baxter was a "fingerprint expert," which he was, Bueto responded that he "did not have knowledge of that." Tr. 130. Bueto testified that the

investigation initially lasted "three to four months steady at the outset," and then "just off and on as information or something came up on it." Tr. 137.

The rest of the State's case was spent attempting to convince the jury that Mr. Whitmore's confessions were given voluntarily. Little time was spent showing that the confessions matched with the limited evidence presented.

B. Mr. Whitmore's First Taped Statement

Deputy Bueto was the first witness to testify regarding Mr. Whitmore's taped statements. Bueto testified that Mr. Whitmore gave his first statement at 2:45 a.m. on the morning of February 25, 1975. Bueto denied Whitmore had been mistreated, threatened, or offered any deals in exchange for his statement. Tr. 157. Bueto indicated he was "in and out" during the first statement and conceded he did not know whether Ossie Brown spoke with Mr. Whitmore before Mr. Whitmore gave his first taped statement. Tr. 159, 161.

The first taped statement was admitted through ADA Warren Hebert. Hebert testified he spoke with Whitmore for about 15 minutes prior to recording his statement along with Russell and Bueto. During this time "we questioned him about the Marshall Bond case and advised him about some information we had." Tr. 166. When asked if anyone made promises of lenient or harsh treatment to Mr. Whitmore in exchange for his statement, Hebert stated "No. To my knowledge, this was – we were the first ones to talk to him with regard to this particular matter." Tr. 166. He further testified that Ossie Brown was not at the parish prison when "Kenneth Whitmore was taken out of his cell and brought to the interview room." Tr. 169. And that he did not recall Ossie Brown speaking to Mr. Whitmore in his (Hebert's) presence at all. Tr. 169. In weighing his decision to let the first taped statement play for the jury, Judge Gonzalez noted that "there's no evidence in this courtroom of duress, threats, or intimidation." Tr. 188.[3]

Before the tape was played, Judge Gonzalez requested a transcript of the taped statement be given to the court reporter. However, as ADA Perez explained, "the quality of some portions

3 Petitioner has requested transcriptions of the hearing from his motion to suppress the taped statements and will supplement this petition with those transcripts and related arguments once he receives them. On information and belief, Mr. Whitmore avers that testimony regarding the voluntariness of his taped statements was presented at the suppression hearing in similar fashion to what was presented at his trial. He reserves the right to make the same arguments contained herein against the admission of his statements in the suppression hearing.

of the tape were so poor that their person who does the transcribing did not want to – felt she might be too much in error by guessing at words." Tr. 192. The first taped statement was played in its entirety to the jury and lasted about 30 minutes. Tr. 186, 196.

In his first statement, Mr. Whitmore stated that he and Mr. Donahue went to Mr. Bond's property that day so that Mr. Donahue could ask Mr. Bond for a job. Tr. 201. Mr. Whitmore stated that he stayed in the car the entire time they were at Mr. Bond's property and that Donahue "must have grabbed the man, stabbed him, and got back in the car." Tr. 197. When Bueto asked Whitmore what Donahue had in his hands when he got back to the car, Whitmore stated "[i]t looked to be a knife. I'm not sure. I'm not really sure." Tr. 205. Mr. Whitmore further stated Donahue returned to the car with a wallet that was "rust-colored looking" and was really thick. Tr. 205. Whitmore stated he did not see any blood on Donahue when he returned to the car and that he did not receive any money. Tr. 206. Throughout the first statement, Mr. Whitmore denies seeing any part of Mr. Donahue interacting with Mr. Bond. Tr. 213-214.

The first taped statement is inaudible in portions and after the initial short narrative, involves questions from both Hebert and Bueto. At one point, Mr. Whitmore is asked about the kind of soles he had on his shoes at the time he went to the Bond farm and any particular design they might have had. He told them a zigzag. Tr. 209-10.

After the jury heard the first taped statement, counsel for Whitmore cross-examined ADA Hebert who again stated that the first taped statement was taken before Mr. Brown arrived at the prison. Tr. 219.

C. Mr. Whitmore's Second Taped Statement

Lt. Bueto was called back to the stand to lay the foundation for the second taped statement. Tr. 223. This statement was taken at 10:40 a.m., February 26, 1975, approximately 32 hours after Mr. Whitmore's first statement,. Tr. 224. Bueto admitted the he and Lt. Russell were with Mr. Whitmore for "approximately fifteen or twenty minutes" before the statement was recorded. Tr. 225. He again denied making any "threats or inducements" in exchange for the statement. Tr. 225. Bueto acknowledged Mr. Whitmore was questioned by Sgt. Zuelke, the

department polygraphist, the night before this second taped statement. Tr. 228. An interrogation that was taped, but which had been taped over soon after it was conducted. Tr. 229.

Hebert took the stand again to deny threats or inducements related to the second statement. Trp. 237-239. Sgt. Russell took the stand for the first time and testified that he became involved in the investigation on the 24th or 25th of February 1975 because he "received some information on the case." Tr. 243-244. Russell admitted he had been at the parish prison when Mr. Whitmore's first statement was taken and testified that Ossie Brown had been to the prison "and left … when I got there." Tr. 247-248. He also stated that after the 2:45 a.m. interview concluded, around 3:16 a.m., Mr. Brown again spoke with Mr. Whitmore to Russell's knowledge with "no one else present." Tr. 251.

Mr. Whitmore's second taped statement was played for jury and lasted 11 minutes. *See* Tr. 254, 258 (showing tape started at 10:40 and concluded at 10:51). In this second statement, Mr. Whitmore states he got out of the car with Donahue at Mr. Bond's pasture. He says Donahue grabbed Mr. Bond, and he "took the screwdriver out of Donahue pocket, and I hit him with it a few times." Tr. 256. He then states that Donahue "told me to go get the jack handle. So he gave me his keys, and I went got the jack handle. Came back. Told me to hit him. So I – gave him some blows over the head. And then lays the jack handle down." Tr. 257. Mr. Whitmore's statement then describes how Donahue "went into his pocket, got the money. So we – I went back to the car. Donahue came back to the car, too. We put the stuff in the trunk, put the money and stuff in the car, and we drove off … We went to a recreation center at Port Hudson." Tr. 257-258.

After Mr. Whitmore's short statement, Lt. Bueto, ADA Hebert, and Sgt. Russell each questioned him. When asked to describe the screwdriver Mr. Whitmore stated "a plain screwdriver with a yellow handle." Tr. 260. Russell attempts to clarify, "You say, plain. You mean a standard or a Phillips screwdriver? A: Standard. Q: It was not a Phillips screwdriver … A: No, it wasn't. Q: Is that what you're saying? What color was the handle? A: Yellow." Tr. 260.

Hebert asks if Mr. Whitmore knew whether the jack handle or screwdriver had ever been taken out of the trunk. Mr. Whitmore affirms they were never taken out of the trunk after their

supposed use in Mr. Bond's beating. Tr. 260. Whitmore does posit, however, that because Mr. Donahue got another car that he might have moved them out of that car and put "his tools and jack and everything out of that car and put into his other car." Tr. 260. When Lt. Bueto next tries to get Mr. Whitmore to admit that this new taped statement is "more involved," Mr. Whitmore responds "I didn't understand you." Tr. 261. After the tape was played, Hebert denied that anyone told Mr. Whitmore what to say in that second taped statement, but admits he saw Ossie Brown outside of the room after the first statement concluded, at 3:!6 a.m. Tr. 263.

Hebert conceded on cross-examination that the District Attorney's office was recused from trying Mr. Donahue's case because Ossie Brown had taken Donahue's confession and was a witness in Donahue's case. Tr. 266.

In an effort to convince the jury that they could credit Mr. Whitmore's alleged "confessions," the State called District Attorney Ossie Brown. Mr. Brown swore under oath he had not spoken with Mr. Whitmore before Mr. Whitmore gave his first taped statement to Assistant District Attorney Hebert, Lt. Russell, and Lt. Bueto. Tr. 270 ("A taped statement had been taken when I got there. Q: Did you speak to Mr. Whitmore prior to his going into the room with these other three people …? A: Oh, no sir. I wasn't there. They called me at home to come back out there."). Brown tells a story of talking to Mr. Whitmore "after they had finished taking his statement." Tr. 272. "I merely asked Mr. Whitmore, did you tell them the truth. He said, yes. I said, well, fine, that's all that they want is the truth; and then he said, can I use the telephone. I said, you surely can. He didn't have any money, and I gave him three or four nickels to use the telephone …." Tr. 272. Brown concluded, "that's the only conversation I ever had with Mr. Whitmore…. and that was all the subject was, a matter of such seconds." Tr. 273.

On cross-examination Mr. Brown stated he did not tell Mr. Whitmore that he would get him off if Mr. Whitmore would implicate Mr. Donahue: "No, sir. I didn't even know Mr. Donahue was involved in the thing until a couple of days later when Mister Donahue tells me and said he and Whitmore had done it." Tr. 275. He further testified that his presence at the parish prison in the pre-dawn hours of the morning "was in response to a request from Mr.

Hebert that I come because Mr. Whitmore had given a statement and relative to the Bond murder, and I had been involved in that case." Tr. 277.

When confronted with Sgt. Russell's testimony that he had been alone in an interview room with Mr. Whitmore after the first taped statement, Mr. Brown stated "Not going to say [Russell's testimony] would be erroneous because I don't know." Tr. 278. Mr. Brown again affirmed he only "asked [Mr. Whitmore] that one question." Tr. 279.

The state's last few witnesses included the East Baton Rouge Parish Sheriff's office polygraphist, Mr. Don Zuelke. He testified that Mr. Whitmore sat for two tests, the first of which lasted "roughly two hours and thirty minutes." Tr. 288. That two and a half hour examination was tape recorded, but the exam was recorded over because the tape was re-used. Tr. 290-291. Zuelke admitted that Mr. Whitmore was not told he was being tape recorded. Tr. 295. He also stated Mr. Whitmore was given a second polygraph the next morning, around 11:20 on the 26th and that his questions during that second test were "based upon the information that had been given to me by the investigating officers." Tr. 291, 292.

D. <u>The Feed Bucket</u>

After the jury heard the two taped statements, the State put on testimony regarding the only piece of physical evidence it offered at Mr. Whitmore's trial, a metal bucket. Zachary Police Department Chief of Police P.V. Browning laid the foundation for the alleged missing bucket by confirming that horse feed was found on the ground the night of Mr. Bond's death. Browning stated it was a large amount of feed and that they "couldn't figure out how it got out" of the barn because "we never did find the bucket or anything how the feed got out there." Tr. 301. He also testified that there were a couple of buckets found inside the barn that night. Tr. 301.

After a defense objection to the bucket and a sidebar in which the prosecutor conceded that Mr. Whitmore "in no way mentioned the bucket" in his statements. Tr. 326, the court allowed the State to present more testimony regarding the bucket because it was found at the

recreation area at Port Hudson and Mr. Whitmore's second taped statement stated he and Mr. Donahue went to Port Hudson after Mr. Bond's.[4] Tr. 331-332.

Zachary Police Department Assistant Chief of Police, John Womack testified that he went with maintenance employees for the City of Zachary to the recreation area in Port Hudson on Ligon Road on February 27, 1975. Tr. 336-337. He further testified that a photograph was taken "at the time that this pail was found. The pail was essentially leaning out, as you can see here, held with a rake." Tr. 337. Mr. Womack had been involved in the investigation of Mr. Bond's murder since the day he was killed. Tr. 333.

The State then called Leon Wales to testify in front of the jury. He testified that he went to the farm the day after Mr. Bond was killed to feed the horses that were out there and he noticed that bucket was missing. Tr. 341. Mr. Wales stated there were two buckets left at the barn, and that the "particular bucket that was missing" had been in use at the barn for five or six months. Tr. 342. He identified the bucket collected by Officer Womack as the missing bucket based on the dents in the bucket. Tr. 342-343. On cross-examination, Mr. Wales stated it was "just an ordinary paint bucket" and that all he knew was that the bucket in the courtroom looked like the bucket that was on the farm. Tr. 344-345.

The Court next heard arguments regarding a possible stipulation on the bucket. In this colloquy, ADA Perez stated that the bucket had been sent to the Louisiana State Police for testing and that "the results of that analysis were inconclusive and that the crime lab could not determine with any degree of positiveness one way or the other whether this bucket ever in fact [had] been on the Bond property because of – apparently because of the condition of the bucket and its exposure to the elements over a long period of time." Tr. 346. The bucket as admitted and when the jury returned the next day, the State rested its case.

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[4] The colloquy with the between counsel regarding the bucket at transcript pages 327-331 shows that counsel for Mr. Whitmore did not have possession of the actual taped statements, but instead were working from transcripts. Tr. 327-328. The Court listened to this untranscripted portion of the tape off the record, then returned to the record and stated "If an item was found at the Port Hudson recreation center and an item which other witnesses can describe as having been at the crime scene, it would be of value to the jury in determining whether or not that taped statement was accurate and truthful or not." Tr. 331-331.

IV. WHAT THE JURY HEARD: THE DEFENSE CASE

Kenneth Whitmore took the stand in his own defense. He admitted that he had been at Mr. Bond's farm that day with Mr. Donahue, who had gone to look for work. Tr. 358. He told the jury how he had been employed at Floyd Electric at the time, making one hundred to one hundred and twenty dollars a week and how he had saved up around four or five hundred dollars from that work. Tr. 360. He told the jury he stayed in the car the entire time at the farm, but that Mr. Donahue came back to the car and told Mr. Whitmore that he had robbed and beaten Mr. Bond. Tr. 362.

Mr. Whitmore explained to the jury the first person to talk with him about the Bond murder was Mr. Ossie Brown. Tr. 364. That Ossie Brown came to get him from his cell, Tr. 364, and offered him five years in exchange for his testimony against Mr. Donahue. Tr. 365. And that Ossie Brown told him that Angola was a dangerous place where people get killed and no one sees anything. Tr. 365.

Mr. Whitmore explained that the second taped statement was untrue and that he only said the things he did in that statement because of the promises he was made and because he did not want to go to Angola. Tr. 368. He further explained that when Ossie Brown first asked him what he knew about Mr. Bond's murder, "I told him I didn't know what happened." Tr. 369.

On cross-examination, the State questioned how Mr. Whitmore could have sat in the car and not heard or seen anything if Mr. Donahue had been beating and robbing Mr. Bond. Tr. 370-371. Mr. Whitmore explained simply that he did not see or hear anything while he stayed in the car. Tr. 370-371. When ADA Perez asked about the first time he saw Mr. Brown at the jail, Mr. Whitmore answered, "[w]hen him and another deputy got me out of isolation." Tr. 373. He went on to testify that Ossie Brown told him "he was the only one could help me on that" and that Mr. Brown suggested he turn state's evidence in exchange for leniency. Tr. 375.

Mr. Whitmore explained to the jury that in between the 2:30 a.m. taped statement and the evening's polygraph, he was taken to the Bond farm and asked how things had happened the evening Bond was killed. Tr. 375.

When confronted with whether he "heard Mr. Hebert state on the stand that he called Mr. Brown up after – he was out there. He called Mr. Brown up and had him come in?" Mr.

Whitmore replied, "yeah, I heard what they said, you know… No, it's not that way. I know it's not that way. Q: Mr. Hebert is lying then? A: Yeah, he's lying." Tr. 377. Mr Whitmore continued to rebut the prosecution's attempts to get him to affirm his second taped statement. Tr. 379-380.

Mr. Whitmore denied that Mr. Donahue got out of the car with a tire tool and screwdriver in his hand. Tr. 381. He explained that in his second taped statement he told deputies he received about five hundred dollars from Donahue because "I told them the money I had saved up to get married with. Told them what I had to them." Tr. 381. He again denied he stole anything from Mr. Bond. Tr. 381. He explained, "[t]hey told me not to say what Ossie Brown [said] and they had told me because they say the tape would be no good." Tr. 382. ADA Perez pushed Mr. Whitmore to concede that Mr. Bond's wounds could not have been caused by one person: "You heard the doctor's testimony about the type of wounds Mr. Bond had, that his skull was crushed in with a blunt instrument… A: Yeah. Q: And that he was stabbed with a sharp instrument? A: Yeah. Q: Does that sound like one person was doing that, wielding one of them with each hand? One hand, a tire tool? The other hand, a screwdriver? A: One man can do a lot." Tr. 381.

After Mr. Whitmore's testimony, the State re-called Mr. Womack to the stand. Womack testified about the layout of the barn and the surrounding area and what an individual could purportedly see from different vantage points around the barn. Tr. 390-399. He detailed the amount of physical struggle that appeared to have taken place, describing the marks on the corrugated tin bench near where the horse feed had been spilled as "apparently bloody hands struggled here on this bench that's in this photograph." Tr. 405.

The Court asked Mr. Womack about certain dark spots on the ground in photographs of the scene, Womack denied those spots were blood. Tr. 411. With that the State rested its rebuttal. Tr. 411.

V. THE STATE'S CLOSING ARGUMENT

Perez concluded the State's case by focusing the jury on Mr. Bond's injuries, describing his skull as "smashed" "time after time after time with a tire tool or a jack." Tr. 414. He argued Mr. Bond suffered "defensive wounds on his hand." Tr. 415. He told the jury "[w]e don't have the weapon, despite this intensive investigation of this case, but offered up that they could know

what killed Mr. Bond based on "what Mr. Whitmore told you on that tape what these weapons were. A tire tool or something of the nature of a tire tool. How was it used? It was used to bash in Mr. Bond's skull. A screwdriver, Phillips or standard. How was it used? It was used to stab him, stab him in the arms and the chest and the back countless number of times." Tr. 417.

Perez argued it was unbelievable that Mr. Whitmore would have sat in the car while "this brutal murder" took place "within ten feet from the outside of that door a murder which was not a quick stabbing of a person and the person collapses in quire … Not one weapon but two or three weapons used…. Do you think Mr. Bond was passively quiet, that no one was saying anything, that they were being quiet so that Kenny Whitmore wouldn't hear them, sitting in the car…?" Tr. 421. He went on to tell the jury "[f]ingerprints of Mr. Whitmore found at the scene would have been very comforting to you in making your decision to have these things. We tried. The police tried. According to Carson Bueto, they interviewed a hundred and twenty-five -- at least hundred and twenty-five people in the area to try to find anyone who had seen anyone go back into the farm and commit this robbery." Tr. 422.

The ADA continued to lament the lack of physical evidence discovered at the scene "[n]ow, you can look at the photographs that were introduced and look at the testimony, and you can see the old corrugated, pretty rusty, oxidized tin around in places, old wood that hadn't had a coat of paint in probably thirty or forty years. And what else? Ground. Nothing on which you could leave fingerprints that would be legible. The crime lab went out. They could not come here with anything to help in this case today. A massive investigation, an unsolved crime for eighteen months until this man confessed." Tr. 422.

The ADA concludes by impugning Mr. Whitmore's assertions that he was coerced into confessing: "Kenny Whitmore's testimony up here was untrue. He – if he was telling the truth, then everyone else is a liar. All the officers who investigated this case, Mr. Hebert from our office, Mr. Brown from our office, all are lying." Tr. 423. Perez concluded shortly after that, asking the jury to convict on both counts, second degree murder and armed robbery. Tr. 424.

VI. THE DEFENSE'S CLOSING ARGUMENT

"The situation of Mr. Whitmore being at Marshall Bond's property on the evening of August 15, 1973, we don't dispute at all. We never have disputed it. We've never tried to hide it." Tr. 424. Mr. Whitmore's defense attorney opened his closing argument with that statement and goes on argue to the jury that Mr. Whitmore's testimony recanting his confession could be credited. He highlights the fact that Ossie Brown has been recused from Mr. Donahue's case because of misconduct and he goes on to take on Mr. Brown's version of events. Tr. 425.

"Now, if anybody believes the District Attorney of East Baton Rouge Parish is going to get out of bed at three o'clock in the morning to ask a man in the parish prison, which is out at Ryan Airport, he's telling the truth-- it's just so unbelievable, it just shocks my conscious." Tr. 426. "Sergeant Russell directly contradicted Mr. Brown. Kenny acknowledges that -- did Mr. Brown ask him if I was telling the truth. Yes, sir, I told him that. Well, the truth wasn't convenient enough." Tr. 427.

"So here we've got a young man with a tenth grade education. Now, he's going to come up with knowledge about Angola. He's going to come up with knowledge about state's evidence. He's going to come up with knowledge about publicity. He's going to come up with a statement like, don't tell anybody about this deal I want to make with you to testify against Mister Donahue because then the confession won't be any good. There is no way in the world that that man would know those four facts. It's absolutely impossible. No senior in law school is going to know those four things, much less a man with a tenth-grade education. It's absolutely impossible. So what do they do? They conduct an interview until at least 3:16 in the morning. We know that for a fact. How long Mr. Brown was with him, we don't know. The next day they take him down to a small isolation room with another officer. Now, Mr. Hebert of the District Attorney's office is not there. We've got Lieutenant Bueto. We've got Sergeant Russell, and we've got Lieutenant Zuelke, who's a polygraph expert; and they put Mr. Whitmore in one room. Lieutenant Bueto and Sergeant Russell in the other room, and Zuelke in the same room, and finally after beating it out of him, Zuelke admitted that Mr. Whitmore didn't know he was being taped. Now, that's the tape that was conveniently erased, and that's another hole in the prosecution's case. I do not believe that in any way, shape, or form, how hard it is to get a

confession or a statement from somebody, if that statement was against his interest, that it would have been erased. That makes no sense. You've got two officers standing in another room, looking through a two-way mirror, watching a man be interrogated about a case, and they're going to erase a statement that would convict him. Think about that. Does that make any sense whatsoever? No. And then what happens? There's a phone call from Mr. Brown, and we get some more statements. Very convenient. Now, one thing that's really important, and think about this -- I'll be the first one to acknowledge this is a heck of a crime, it's a horribly gruesome crime. The problem is this man didn't do it." Tr. 427-428.

Mr. Brantley goes on to argue that the jury could credit Mr. Whitmore's testimony because of his composure and demeanor while being cross-examined. "If anything, if any question, if that man had something to hide in getting on this witness stand, would have been thought out, would have been reserved. He would have been regarded as -- guarded as Mr. Hebert was when Mr. Hebert was on the witness stand." Tr. 429. Mr. Brantley reminds the jury "If you look at all of the facts, it just does not add up." Tr. 430.

In finishing the defense counsel's argument, Mr. Abadie makes the following charge to the jury "you are basically going to try to decide whether or not you believe Mr. Brown and whether or not you believe Mr. Whitmore." Tr. 432. "There is just no other evidence in this case as Mr. Perez has clearly admitted. There is no weapon. There is nothing that was taken. There are not tire tracks. There are no fingerprints. There is nothing. You had to get somebody to come forward in some fashion and say, I did it." Tr. 432-433.

In rebuttal Mr. Perez tells the jury there just no way Ossie Brown is lying, it would simply require too much of a conspiracy between all parties involved, it would require the witnesses to have committed perjury. Tr. 437. "Now, conspiring in such a fashion to violate the civil rights of a person like Kenny Whitmore is not only a crime against the laws of Louisiana but this is also a crime against ·the laws of the United States, something which could be investigated by the FBI, something, which I'm sure if two citizens like these two citizens knew about, would have been reported to the FBI as violation to the Civil Rights Act, would have been totally investigated by an agency like the FBI. It's a serious crime, a Federal crime, a crime over

which Ossie Brown and Warren Hebert and these little deputies have no control. I haven't seen one FBI agent or agent that came forward and said, yeah, we were -- this was reported to us so we could investigate this to see if all of these people had conspired to violate the civil rights of this man." Tr. 437.

Perez continued on, arguing that it was simply implausible that Ossie Brown and Warren Hebert were lying, and that the jury could credit their testimony over Mr. Whitmore's because Mr. Whitmore had been convicted of robbery. Tr. 443-446.

The jury convicted Mr. Whitmore by a vote of 10-2; he was sentenced to life in prison without the possibility of parole. Ex. L.

VII. WHAT THE JURY DID NOT HEAR

The State's withholding of physical evidence, alternative murder weapons, alternative suspects, crime lab reports and analyses, and information about the victim combined with its failure to follow-up on viable leads, test significant evidence, and run collected fingerprints, resulted in a jury that heard very few of the facts surrounding Mr. Bond's death.

A. Mr. Bond's Troubled Last Few Days and His Fear for His Life

The jury did not hear about Mr. Bond's troubled three days before he was killed. They heard no mention of his failed business dealing with a man who became his sworn enemy and caused him to lose $65,000. They did not hear that he intended a show down with this man, one way or another. Ex. A, p. 49. They were not informed that this man failed to show up for a polygraph test after giving the deputies a completely evasive interview. Ex. A, p. 49-50.

They did not know Mr. Bond had almost cried at the Town Council meeting the night before his death as he gave the invocation. They heard nothing about the strange phone calls Monday, Tuesday, and the day of the murder asking a woman who could see the pasture whether it was raining outside.

The jury did not hear about Mr. Bond's late afternoon visit to his mistress, during which he poured out his heart and talked about his frustrations, his failed business deals, the man who had cost him so much money, his fear for his life and that it would end in his pasture, his carrying of a pistol for protection from such an event.

B. The Physical Evidence: Murder Weapons and Fingerprints

The jury also did not hear that the Sheriff's department had collected over twenty pieces of physical evidence before Mr. Whitmore ever became a suspect. Ex. B, p. 9. They did not know that a 3 ½ foot 1 x 4 with a rusty nail at the end was found with hair samples on it at the scene of the crime. They were unable to question whether that board was capable of causing all of the injuries Mr. Bond suffered, the head and puncture injuries that ADA Perez claimed had to have come from two assailants wielding two different weapons. But, a board with a nail sticking out at the end is capable of causing superficial, half-inch wounds and when turned on its side, it is also capable of causing deep lacerations and fractures to the skull. Mr. Whitmore was never able to present this alternative murder weapon to the jury. He was prevented from contrasting the possibility that this weapon killed Mr. Bond with his coerced statement that Mr. Bond was killed with a tire iron or jack handle that was never recovered.

The jury was also unaware that deputies had collected a rusty automobile bumper jack just on the outskirts of Mr. Bond's farm. They knew nothing of the submission of a bloody coke bottle to the crime lab for analysis (Ex. B, p. 5) or the discovery of an anchor bolt only one foot Northwest of the pecan tree where Mr. Bond's body was found. Ex. B, p. 22.

The jury did not hear that the police had collected a regular yellow-handled screwdriver as evidence. Ex. B, p. 9. A yellow-handled screwdriver recovered by Mr. Carl Bond on February 4, 1975. The jury did not get to wonder whether Mr. Whitmore was fed information by the police in that second statement, that second statement in which he described Donahue stabbing Mr. Bond with "a yellow handled screwdriver approximately eight to nine inches long having a standard blade." Ex. M, p 14.

The jury did not hear that deputies collected eleven pieces of physical evidence from Mr. Donahue's car, all of which were sent to the lab for serology analysis. Ex. B, p. 10. [crime lab reports]. The jury did hear part of Mr. Whitmore's coerced second statement where he allegedly admitted giving Mr. Bond "some blows" with a jack handle. The jury was not allowed to assess the fact that the crime lab collected a jack handle from Mr. Donahue's car, but that the State failed to present it at trial. The state failed to ask Mr. Whitmore if that was indeed the jack handle he allegedly confessed to using. The State failed to discuss the results, if any existed, of

the requested serology analysis on the jack handle. Ex. B, p. 10. Instead, the jury heard over and over again that the State "do[es] not have – and we cannot show you exactly what these weapons were." Tr. 417.

The jury did not hear that Mr. Womack actually collected two buckets at Port Hudson park. Ex. B, p. 11. Two buckets described in almost identical fashion on the crime lab sheet requesting scientific analysis. Ex. B, p. 11. The jury heard Mr. Womack testify that he located one bucket. Tr. 337. The *one* bucket that Mr. Wales testified was missing from Mr. Bond's property and the *one* bucket Mr. Wales confirmed was most likely the one shown to him at trial. Tr. 342. The jury did not hear that the one piece of physical evidence the State offered at Mr. Whitmore's trial was actually one of the *two* buckets collected by Officer Womack and submitted to the crime lab for analysis.

The reason that the jury did not hear about any of these items is because they were never turned over, never even mentioned, to Mr. Whitmore's defense counsel.[5]

And the reason the evidence was not turned over to Mr. Whitmore's defense counsel is that a District Attorney's office investigator, Mr. Leonard Spears, removed the evidence from the State Police crime lab on November 4, 1976, only two months after Mr. Whitmore was appointed counsel. The evidence was never checked back in. Undersigned counsel's requests and search for this evidence turned up only the few fingerprints and photographs remaining in state police custody. *See* Ex. C.

Even these fingerprints however, were not mentioned to the jury. In fact, the State denied the existence of any fingerprint at the scene, telling them opening argument that "[t]here were rough boards around, trees, nothing on which you could expect to find fingerprints, not nice smooth surfaces like you might find in a courtroom…." Tr. 42. But the fingerprints that remain in the state police files did indeed come from smooth surfaces. At least 10 latent prints were

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[5] Counsel for Mr. Whitmore has been in contact with Mr. Joseph P. Brantley, one of Mr. Whitmore's appointed defense counsel. Mr. Brantley did not recall receiving the evidence mentioned in this brief. Counsel for Mr. Whitmore reserves the right and will supplement this application with an affidavit from Mr. Brantley. Mr. Whitmore also submits that it is evident from the trial transcript that the State affirmatively represented certain evidence within its possession did not exist. He also submits that it is clear from the trial that his counsel did not have any of the physical evidence or Sheriff's reports attached to this pleading as Exhibits A-C.

found from examination of the scene and Mr. Bond's car. Ex. C, p. 6. They were pulled from the hood of the car, the fender, the outside of the driver's door glass, and from bottles found inside the car. Ex. C, pp. 8-23. These prints were checked against at least three individuals, one test was negative and it is unclear from the records recovered what the results of the other test were. Ex. C, pp. 1-2, 7.

Last, the jury did not know that on the evening of the investigation the deputies found more than just "some footprints in some dust," as Deputy Bueto testified, they actually found "prints of two different type shoes" in the "soft ground beneath the shed." Ex. A, p. 3. If the jury had known that deputies found only two types of shoes at the scene, they might have discredited the State's theory that both Mr. Whitmore and Mr. Donahue attacked Mr. Bond. Moreover, they might have wondered, if deputies knew that Mr. Whitmore's shoes left a zigzag print (Tr. 209-210), why the State did not present evidence that the zigzag matched at least one of the two kinds of shoe prints found at the scene.

The jury was completely misled regarding the physical evidence that was recovered during the investigation of Mr. Bond's murder. This caused them to render a verdict in a virtual vacuum, a vacuum created by the District Attorney's office when it allowed an investigator to remove the evidence from state police files and when it further failed to disclose this evidence ever existed.

C. Mr. Whitmore Was Home When the Ambulance Went By

In Mr. Whitmore's second taped statement, the jury heard that he and Mr. Donahue went to Port Hudson after they left Mr. Bond's. Tr. 257-258. Mr. Whitmore recanted this statement and testified at trial he went home immediately after they left Mr. Bond's house. Tr. 362-363. The jury did not get to hear that there was a woman who saw Mr. Whitmore standing in his driveway only seconds after the ambulance drove by on its way to Mr. Bond's farm. Affidavit of Aldreaner Hawkins, attached hereto as Exhibit H. Ms. Hawkins was young at the time, but remembers clearly the ambulance going by and "seeing Kenny standing in his driveway." Exhibit H.

This undermines Mr. Whitmore's assertion in his second taped statement that he and Mr. Donahue went to Port Hudson after leaving Mr. Bond's. This corroborates Mr. Whitmore's trial testimony that his second taped statement was coerced and false. The jury did not get to hear Ms. Hawkins's testimony. The evidence is new and could have caused one more juror to credit Mr. Whitmore's testimony.

D. Mr. Whitmore's Head Injury and Time in the Dungeon

In his own defense and in an attempt to explain his statements, Mr. Whitmore took the stand and described how he was coerced into confessing and was fed information by the deputies. What the jury did not hear at the time, in part because Mr. Whitmore had no one to corroborate his story, is that 1-2 days after his arrest an inmate at the parish prison started a fight with him over a blanket. Affidavit of Kenneth Whitmore, attached hereto as Exhibit K, ¶4. During this fight, Mr. Whitmore was kicked in the head 6-7 times, a scar on his face split open and he was bleeding. His head injury resulted in a headache that lasted at least 24 hours and dizziness. Exhibit K, ¶5.

Immediately after this fight, the prison guards escorted him to a place referred to as the dungeon. Exhibit K, ¶6. He was not given medical treatment. Exhibit K, ¶6. The dungeon is a small room, barely larger than 9 feet by 6 feet. Exhibit K, ¶7. Mr. Whitmore was placed there with at least 6 other men. Exhibit K, ¶7. His clothes were taken from him, just as they had been from the other inmates in the dungeon. Exhibit K, ¶7. He was forced to use a hole in the floor as a bathroom. Exhibit K, ¶8. Because there were not proper bathroom facilities, Mr. Whitmore did not eat. Exhibit K, ¶8. There was no light in the dungeon. Exhibit K, ¶7. Mr. Whitmore remained in the dungeon in these deplorable conditions for one and half to two days. Exhibit K, ¶9. He only slept 45 minutes to one hour the whole time he was there. Exhibit K, ¶8.

In the middle of the night, after he had been in the dungeon for one and a half to two days, Ossie Brown and the jail captain came and got Mr. Whitmore from the dungeon. Exhibit K, ¶9. They gave him his clothes and took him down the hall to an interrogation room next to the drunk tank. Exhibit K, ¶9

Ossie Brown spoke with Mr. Whitmore for almost an hour after he was removed from the dungeon. Exhibit K, ¶10. During this time, Mr. Brown told Mr. Whitmore that he needed Mr. Whitmore's help. He said he was the only one who could help Mr. Whitmore with his charges. Exhibit K, ¶11. He asked Mr. Whitmore if he knew Marshall Bond had been killed. Mr. Whitmore replied he thought Mr. Bond had been shot. Exhibit K, ¶11. Mr. Brown again told Mr. Whitmore he was the only one who could help him. Mr. Brown had a piece of paper with him during the conversation. Mr. Whitmore believes it had information Mr. Brown wanted him to say. Exhibit K, ¶11. Brown tried to get Mr. Whitmore to sign the paper. He did not sign. Exhibit K, ¶11.

Mr. Brown asked Mr. Whitmore if he knew what had happened in Zachary that Monday. He gave Mr. Whitmore a nickel and told him to call home and ask his mother. Mr. Whitmore called his mother and she told him Mr. Donahue had been arrested. Exhibit K, ¶15. Mr. Brown also told Mr. Whitmore that Donahue had divulged that he and Whitmore were at Bond's farm the day he was killed. Mr. Whitmore told Mr. Brown he did not know anything about the murder. Exhibit K, ¶12. Mr. Whitmore asked for an attorney numerous times, Mr. Brown told him he didn't need one. Exhibit K, ¶12.

Mr. Brown continued to compel Mr. Whitmore to provide him with helpful information. At one point Mr. Brown told Mr. Whitmore "anything I say you did, you did" and that "my world is three times yours." Exhibit K, ¶13.

Mr. Brown concluded the talk by telling Mr. Whitmore he wanted him to talk to a district attorney and two detectives. Exhibit K, ¶14.

The jury only heard part of Mr. Whitmore's experience at the parish prison. Had they heard about the conditions leading up to Mr. Whitmore's alleged confessions, they might have been more inclined to credit his testimony at trial that the statements were coerced. Moreover, if the jury had known that another parish prisoner, Mr. Ronald Thomas recalled Mr. Whitmore being in the dungeon with him, recalled Mr. Whitmore's head injury, and also experienced the horrible conditions of the dungeon, they might have called into question the State's version of

the voluntariness of Mr. Whitmore's statement. Affidavit of Ronald Thomas, attached hereto as Exhibit D, ¶¶3-13.

The jury did not get the benefit of hearing Mr. Thomas corroborate Mr. Whitmore's claim that he was removed from the dungeon by Ossie Brown for questioning. *See* Ex D ¶14.

E. The District Attorney's Perjured Testimony

The jury clearly heard, time and again, that Mr. Ossie Brown did not talk to Mr. Whitmore before Mr. Whitmore gave his first taped statement. Mr. Brown took the stand and denied it. Tr. 272-273. Mr. Hebert took the stand and affirmed Mr. Brown's statement. Tr. 166.

New evidence, from Mr. Hebert himself, reveals that Ossie Brown did in fact speak with Mr. Whitmore before Mr. Hebert took his first taped statement. Affidavit of Warren Hebert, attached hereto as Exhibit E, ¶4. To Hebert's knowledge, Ossie Brown was the first person to get an incriminating statement from Mr. Whitmore. Ex. E, ¶5.

This new evidence shoes that both Mr. Ossie Brown and Mr. Hebert gave false testimony at Mr. Whitmore's trial. This false testimony lead the jury to believe the State's version of events over Mr. Whitmore's version. This false testimony allowed the jury to believe the one piece of evidence the State had against Mr. Whitmore, his coerced confessions. The impact of this false testimony cannot be overstated. Mr. Whitmore was convicted by a verdict of 10-2. If only one more juror had believed Mr. Whitmore's testimony regarding his first meeting with Mr. Brown, he would not have been convicted.

F. The District Attorney's Affiliation with the Ku Klux Klan

In addition to the new evidence Mr. Whitmore has uncovered and explained above, there remains new evidence addressing the issue of Mr. Ossie Brown's bias and credibility during his prosecution of Mr. Whitmore. Attached to this application as Exhibit F are documents obtained from the National Archives and Records Administration in response to a Freedom of Information Act request for FBI documents related to the Milton Leon Scott murder in Baton Rouge, Louisiana. LSU Manship School of Mass Communications professor James Shelledy obtained these documents in January 2013. Mr. Whitmore's counsel became aware of these documents on May 17, 2014.

The documents state as follows:

> "Files of the New Orleans office [of the FBI] contain the following succinct summary concerning District Attorney Ossie Bluege Brown: Confidential sources have reported he was closely associated with the Ku Klux Klan (KKK) in Baton Rouge area and attended some Klan meetings. He served as attorney for many Klan members and as attorney handling legal matters for the Klan. Brown was reportedly robed speaker at Sixth District Anti-Communist Christian Association (General Knights of the Ku Klux Klan) meeting on February twentythree, sixtyeight attended by forty to forty-five robed KKK members wherein he, Brown, praised the KKK, stated they should not be afraid of the FBI, should not cooperate with the FBI and that they would have no trouble with FBI unless they committed acts of violence."

Affidavit of James E. Shelledy, attached hereto as Exhibit F.

This new evidence shows that Mr. Brown's testimony against and prosecution of Mr. Kenneth Whitmore was motivated by racial animus and a product of a biased investigation.

G. <u>The Racist Environment of East Baton Rouge Parish and Zachary Louisiana</u>

The failures of the State to produce evidence, indeed the State's affirmative removal of evidence from police files, its failure to protect the integrity of its prosecutions and the justice system and its failure to ensure its citizens were not selectively prosecuted based on their race, should be viewed in conjunction with Mr. Brown's association with the Klan and subsequent prosecution of Mr. Whitmore.

Mr. Whitmore attended Zachary High School until the tenth grade. His high-school class was one of the first to integrate in Zachary's public schools. Zachary's schools did not desegregate until fall of 1970, as part of a greater desegregation plan overseen by the federal courts. *See* Bill McMahon, *New School Year Starts in EBR Without Trouble, Morning Advocate*, Baton Rouge, September 1, 1970, at 1 and 6. While the intense violence seen in other communities related to school desegregation did not plague the Zachary schools, integration nonetheless fostered an environment of disagreements, fights, and a general sense of heightened tensions between white and black students.

In the years leading up to the 1973 Marshall Bond homicide, a series of violent events underscored the ongoing racial discord within East Baton Rouge Parish and Zachary, a region that was still struggling to dismantle institutionalized racial segregation and inequality. These racial tensions grew out of two decades of complex and intense civil rights struggles in the Parish. Dating back to 1953 when African-Americans organized the first successful bus boycott

in the United States, social change advocates in the Parish employed multiple tactics over the next twenty years to unravel the systemic racial discrimination pervasive in the region. From lawsuits to sit-ins, the East Baton Rouge African-American community consistently challenged the Parish's public institutions that had legalized Jim Crow segregation. *See e.g.*, The Baton Rouge Bus Boycott, http://www.lib.lsu.edu/special/exhibits/e-exhibits/boycott/.

Parish law enforcement agencies responded to these civil rights demonstrations with violence. In January 1972, a demonstration in Baton Rouge ended in a shoot-out leaving dead two white officers with the East Baton Rouge Sheriff's Office and two black demonstrators. Tom Jory and G. Michael Harmon, *4 Killed in Baton Rouge Riot; Mayor Blames Black Muslims*, THE NASHUA TELEGRAPH, Jan. 11. 1972, at 1.

Newly-elected District Attorney Ossie Brown oversaw the prosecution of 13 of these protestors in an array of litigation that became colloquially known as the "Black Muslim cases" in Baton Rouge. *See e.g. State v. Beavers*, 394 So.2d 1218, 1221 (1981); *See State v. Bell*, 315 So.2d 307 (La.1975), 346 So.2d 1090 (La.1977); *State v. Williams*, 354 So.2d 562 (La.1978); *State v. Eames*, 365 So.2d 1361 (La.1978).

Later that year, EBRSO deputies then violently broke up a peaceful protest at Southern University that left two students—Denver Smith and Leonard Brown—dead. Associated Press, *2 Blacks Slain in Protest at Baton Rouge University*, THE MIAMI NEWS, Nov. 16, 1972, at 1. After an investigation was ordered by then Governor Edwin Edwards, the shooter(s) in the Sheriff's Office were never identified. *Id.*

In Zachary in 1969, Wilford Dunaway – a Zachary police officer – killed George Payne, a young African-American. George Payne was Mr. Whitmore's first cousin. The community raised questions as to whether Dunaway acted with excessive force, but the Parish's grand jury did not indict him. The next year a black bus driver's house was bombed in Zachary. Authorities never arrested or prosecuted the perpetrators, leaving many in Zachary to believe that the Klan had carried out the attack.

Then in 1973, FBI agents killed 21-year-old Baton Rouge black resident, Milton Leon Scott, in an incident where they mistakenly believed he was wanted for deserting the army.

Again questions of excessive force surfaced. A grand jury investigation overseen by District Attorney Ossie Brown was conducted, but the investigation did not produce indictments of the officers.

In the backdrop of this intensifying relationship between the Parish's Black community and law enforcement was a general sense of fear and vulnerability to the ongoing violence and threats of violence from the area's active Klan chapter.

VIII. MR. WHITMORE'S CLAIMS SHOULD BE HEARD ON THE MERITS

No court has reviewed the new evidence in Mr. Whitmore's case or considered the affect this evidence has on the credibility of his conviction. This application is predicated on facts that were previously unknown to him, meaning he is now entitled to consideration on the merits of his constitutional claims. La. C. Cr. P. art 930.8(A)(1).

A. Mr. Whitmore's PCR is Based on Previously Unknown Facts and Cannot Be Procedurally Barred

As detailed above Mr. Whitmore has new evidence in support of his legal claims. Since neither Mr. Whitmore nor his attorneys had previous knowledge of these facts, the statutory time bar for PCR applications does not apply in this case. The Louisiana Criminal Code explains that:

> No application for post-conviction relief . . . shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, *unless* . . . [t]he application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not known to the petitioner or his attorney.

La. C. Cr. P. art. 930.8(A)(1)(emphasis added). It does not matter when an applicant could have discovered the new facts. *See State ex rel. Walker v. State*, 2004-0714 (la. 1/27/06); 920 So. 2d 213 ("Relator's discovery of arguably suppressed evidence allows his untimely filing without regard to his diligence *vel non* in seeking the suppressed material"). As noted above, Mr. Whitmore's new facts were discovered between the period of December 13, 2013 and the filing of this PCR application on July 31, 2014, which is his first filing since the discovery of these facts.

Further, the Louisiana Supreme Court has explicitly stated that a claim based on facts previously unknown to the petitioner or his attorney "remains subject only to the laches-like provisions of La. C. Cr. P. art. 930.8(B)." *Carlin v. Cain*, 97-2390, p. 2 (La. 3/13/98); 706 So. 2d

968, 968. Therefore, in the absence of a showing by the state that its ability to respond has been prejudiced by events beyond its control, Mr. Whitmore's claims qualify as excepted from the two-year time bar in La. C. Cr. P. art. 930.8(B). In this case, the state suffers no prejudice as much of the new evidence in Mr. Whitmore's case has been in the state's possession, and presents no barrier to the state in developing a response to Mr. Whitmore's claims.

In addition to the statutory exception to procedural bars for petitioners whose applications are predicated on new facts, it would also, for reasons outlined by the United States Supreme Court, be improper to procedurally bar a prisoner with a meritorious claim of actual innocence like Mr. Whitmore. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Dretke v. Haley*, 541 U.S. 386 (2004). Mr. Whitmore's application cannot be dismissed for procedural defects, and this court should consider the merits of his claims.

B. <u>The New Evidence</u>

1. East Baton Rouge Sheriff's Office investigation reports describing the crime scene, collected physical evidence, interviews with individuals close to the victim, interviews with individuals familiar with the victim's last few days, and unfollowed investigation leads into viable suspects and information. Ex. A.

2. Louisiana State Police Crime lab reports showing physical evidence collected during the investigation Ex. B.

3. Louisiana State Police Crime lab photographs of the scene of the crime and fingerprints taken from the scene. Ex. C.

4. Ronald G. Thomas' affidavit corroborating the conditions experienced by Mr. Whitmore prior to his confession. Ex. D

5. Warren Hebert's affidavit now affirming Mr. Ossie Brown spoke with Mr. Whitmore before Mr. Hebert took his taped statement and that Mr. Brown was the first person the obtain an incriminating statement from Mr. Whitmore. Ex. E.

6. FBI records showing Ossie Brown's strong affiliation with the Baton Rouge area chapter of the Ku Klux Klan. Ex. F.

7. Ms. Aldreaner Hawkins' affidavit that she saw Mr. Whitmore immediately after the ambulance drove by, heading to the scene of the crime. Ex. G.

8. Mr. Ghoram's affidavit that he was asked to confess that a man named Ralph Ball paid him to kill Mr. Bond. Ex. H.

9. Mr. Roger's affidavit that he was asked if a man named Ralph Ball asked him to kill Mr. Bond. Ex. I.

IX. CLAIMS FOR RELIEF

A. Mr. Whitmore was Convicted in Violation of *Brady v. Maryland*

The State withheld numerous items of evidence from Mr. Whitmore that could have been used to impeach the State's witnesses, corroborate Mr. Whitmore's defense and assertions that his confessions were coerced, to show an alternative theory of Mr. Bond's murder, and to show the crime was committed with different weapons, by a different number of people, and in a different manner than that posited by the State.

"To establish that the state's failure to disclose evidence violates *Brady*, a petitioner must demonstrate that: (1) the prosecution withheld evidence; (2) the evidence is favorable to the accused; and (3) the evidence is material to guilt or punishment." *Crawford v. Cain*, Civ. 04-748, 2006 WL 1968872 (E.D. La. July 11, 2006) (Vance, J.), *aff'd*, 248 F. App'x 500 (5th Cir. 2007) (citing *United States v. Bagley*, 473 U.S. 667, 674 (1985)); *Brady v. Maryland*, 373 U.S. 83 (1963). There is no need for the State to have acted in "bad faith." *Id.*, 373 U.S. at 87. However, where proof that the prosecution acted in bad faith exists, a claimant need only show that the evidence is potentially exculpatory. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) ("requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.").

Evidence is considered to be in the possession of the State if any member of the prosecuting team, including individual law enforcement personnel and investigators, is aware of the evidence; it is legally irrelevant if the attorneys prosecuting the case are themselves unaware

of the favorable evidence. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Evidence is considered favorable to the defense if it exculpates the defendant or impeaches the State's case or witnesses. *Id.* 514 U.S. at 433; *Giglio v. United States*, 405 U.S. 150, 152-53 (1972);. *Brady* 373 U.S. at 87-88.

"'A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, and *Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor. Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, although a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. The reversal of a conviction is required upon a showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Schwertz v. Cain*, Civ.A. 12-1897, 2012 WL 5956308 (E.D. La. Nov. 13, 2012) *report and recommendation adopted*, Civ.A. 12-1897, 2012 WL 5949516 (E.D. La. Nov. 28, 2012) (quoting *Youngblood v. West Virginia*, 547 U.S. 867, 869–70, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (per curiam)).

1. The withheld physical evidence presented alterative murder weapons

The State's withholding of the physical evidence collected in the case, including possible alternative murder weapons like the 1 x 4 board with a nail sticking out and hair samples on it, and the jack handles collected from near the Bond property and Donahue's car, violated *Brady*.

Mr. Whitmore's recanted confession stated he and Mr. Donahue used a jack handle (or similar part of a car jack) and a screwdriver to beat and stab Mr. Bond. The 1 x 4 board with a nail in the end, recovered from the scene of the crime the night Mr. Bond was murdered and sent to the crime lab for analysis was capable of causing the wounds Mr. Bond suffered.

Mr. Whitmore's rights under *Brady* were violated when the prosecution withheld this evidence, in bad faith, and prevented him from presenting an alternative theory of Mr. Bond's

murder and undermining his alleged confession by showing the factual inconsistencies between the confession and the actual events of the crime.

2. The withheld physical evidence prevented Mr. Whitmore from testing the alleged murder weapon

Deputies collected a jack handle from Mr. Donahue's car. Ex. B, p. 10. The jack handle was sent to the crime lab for serology analysis, but no results appear in the file and it is unclear if this item was ever tested. Ex. B, p. 10. Moreover, the prosecution failed to introduce at trial the weapon it claimed Mr. Whitmore used to kill Mr. Bond and in fact withheld its existence from Mr. Whitmore's defense counsel.

3. The withheld physical evidence prevented Mr. Whitmore from testing the fingerprints found at the scene

The State averred time and again that no prints were even capable of being found at the scene. The evidence that remains in state police custody today shows that at least 10 latent prints were developed from the outside of Mr. Bond's car. A car the prosecution claimed was within close proximity to the attack on Mr. Bond. Tr. 395-400.

4. The withheld physical evidence prevented Mr. Whitmore from impeaching Messrs. Wales, Womack, and Browning testimony regarding the bucket

The only piece of physical evidence introduced by the State was a bucket alleged to have been the bucket used to carry feed at Mr. Bond's farm that was taken by Mr. Whitmore and Mr. Donahue when they fled the scene. Tr. 59, 257. Mr. Womack testified the bucket was found in a park in Port Hudson. But crime lab documents show that Mr. Womack actually recovered two buckets. Ex zb, p. 11. It is clear from the transcript and testimony of Messrs. Womack and Wales that the State hid the existence of the second bucket from Mr. Whitmore's defense team.

If Mr. Whitmore had been aware of this second bucket, he could have used it to impeach the testimony of Messrs. Womack and Wales and further to undermine his second taped statement.

B. The withheld physical evidence and police reports prevented Mr. Whitmore from attacking the State's theory of the case

The State attempted to show that Mr. Whitmore and Mr. Donahue robbed Mr. Bond, a man known only to them in passing, and killed him in order to prevent him identifying them as the perpetrators of the robbery. Tr. 419-420.

Mr. Whitmore acknowledges there is "no per se rule under *Brady* requiring the government to disclose all evidence concerning alternative suspects," and that courts look for a "plausible nexus" between the alternative suspect or theory and the crime. *Crawford*, 2006 WL 1968872, at *18. In distinguishing the case in front of her with other cases, Judge Vance noted in *Crawford* that it was "material" when the prosecution had "evidence available to link the alternative suspect to the crime." *Id.*(collecting cases). Here, there is a "plausible nexus" between the evidence of the alternative theory and suspect and the murder of Mr. Bond.

Mr. Bond's final days show a man who knew that something was wrong, a man who was agitated, a man who worried about people profiting from his death to the point he carried a pistol with him. The State had exclusive control over this information. By the time Mr. Whitmore was arrested, it would have been virtually impossible for him and his counsel to piece together the story surrounding Mr. Bond's last days. The evidence suggested that Mr. Bond's sworn enemy and partner in a business that lost $65,000 had motive to kill him. Moreover, the evidence showed this man evaded law enforcements questions and then simply failed to show for a polygraph examination. Evidence that "supports a viable alternative theory of the crime" and "cast[s] doubt on the prosecution's theory of the case" is material exculpatory evidence under *Brady*. *City of Detroit*, 529 F. Appx. 661, 665-66 (6th Cir. 2013); *see also Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) ("[N]ew evidence suggesting an alternate perpetrator is classic *Brady* material.") (citation omitted).

C. The withheld evidence prevented Mr. Whitmore from attacking the thoroughness of the State's investigation

The State's continued misconduct and withholding of evidence from Mr. Whitmore's defense team also denied him the opportunity to attack the thoroughness and good faith of the department's investigation. Evidence that provides "opportunities to attack . . . the thoroughness and even the good faith of the investigation" has been squarely recognized as evidence owed to the defense under *Brady*." *Kyles*, 514 U.S. at 445.

The State left viable leads unfollowed. It let physical evidence taken from the scene of the crime remain untested, it left fingerprints unchecked against viable suspects and unchecked

against Mr. Whitmore. The State's investigation simply was not conducted in good faith. As Mr. Whitmore's counsel argued in closing, "the truth wasn't convenient enough." Tr. 427.

D. The withheld evidence prevented Mr. Whitmore from impeaching Messrs. Brown and Hebert

As the new evidence shows, Mr. Hebert and Mr. Brown gave false testimony that Mr. Brown had not met with Mr. Whitmore prior to Mr. Whitmore giving his taped statements. Had the defense known about this meeting, they could have used the information to impeach Mr. Hebert and Mr. Brown's testimony and undermine their credibility.

New evidence also shows that Mr. Brown was closely associated with the Ku Klux Klan, an organization known to incite racial violence and advocate for the oppression of Blacks. Mr. Brown's bias towards blacks, and specifically his bias towards a black man accused of killing a white man, should have been disclosed to defense counsel because it could have been used to show Mr. Brown's bias and interest in seeing a black man like Mr. Whitmore convicted of Mr. Bond's murder. *United States v. Bagley*, 473 U.S. 667, 676, (1985) (failure to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest violates *Brady*).

Mr. Whitmore's 10-2 conviction rested on the credibility of the State's witness. Tr. 476 ("The Judge is going to tell you that the determination of the credibility of the witnesses, whether or not to believe these witnesses, is solely in your hands; and you can believe them or not believe them. And you are basically going to try to decide whether or not you believe Mr. Brown and whether or not you believe Mr. Whitmore.").

Mr. Whitmore had recanted his confession and claimed he was coerced by the District Attorney into making such a confession. If the jury had found Mr. Brown or Mr. Hebert's testimony to be incredible, the outcome of Mr. Whitmore's trial would have been changed significantly.

E. Mr. Whitmore's Confession was admitted at trial in violation of his Fourteenth Amendment due process rights

Mr. Whitmore's trial judge did not have a complete picture of the coercive and abusive environment in which the petitioner confessed to killing Marshall Bond, calling into question the constitutionality of Mr. Whitmore's interrogation. The due process clause of the Fourteenth

Amendment to the United States Constitution, as well as Article 1 § 2 of the Louisiana Constitution of 1974 both bar the use of involuntary confessions in trial against a criminal defendant. *See Jackson v. Denno*, 378 U.S. 368, 385-386; *In re State in Interest of Garland*, 160 So. 2d 340, 342 (La. App. 4 Cir. 1964).

A voluntary confession is the "product of a rational intellect and a free will." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). Courts assess the voluntariness of a confession by determining whether the "totality of the circumstances that preceded the confession" deprived the defendant of free will. *See Fikes v. Alabama*, 352 U.S. 191, 197-198 (1957). Best summarized in *Withrow v. Williams*, 507 U.S. 680, 693 (1993), the totality of the circumstances test includes the following factors:

- the crucial element of police coercion. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986);
- the length of the interrogation. *Ashcraft v. Tennessee*, 322 U.S. 143, 153–154 (1944));
- the location of the interrogation. *See Reck v. Pate*, 367 U.S. 433, 441 (1961))
- the continuity of the confession. *Leyra v. Denno*, 347 U.S. 556, 561 (1954);
- the defendant's maturity. *Haley v. Ohio*, 332 U.S. 596, 599–601 (1948);
- the defendant's education. *Clewis v. Texas*, 386 U.S. 707, 712 (1967);
- the defendant's physical condition. *Greenwald v. Wisconsin*, 390 U.S. 519, 520–521 (1968)(per curiam)); and
- the defendant's mental health. *Fikes* at 196.

In addition to the factors articulated in *Winthrow*, confessions are involuntary if the state has deprived the defendant of food, water, and clothing prior to interrogation. *See Brooks v. Florida*, 389 U.S. 413 (1967). In *Brooks*, the United States Supreme Court determined that the petitioner's confession was involuntary and inadmissible because of the shocking prison conditions endured by the defendant just prior to his confession. *Id*. In that case, correctional officers forced Mr. Brooks to strip naked before placing him in a 7 'x 6.5' cell with two other inmates for two weeks. *Id*. at 414. The cell had no bed or toilet with the exception of a hole in one corner. *Id*. To eat, Mr. Brooks was given a restricted daily diet of only 12 ounces of soup and 8 ounces of water. *Id*. The Supreme Court called these conditions "a shocking display of

barbarism," and in turned suppressed Mr. Brooks' confession from his criminal proceeding. *Id*. at 415.

The court should grant Mr. Whitmore's application on the grounds that he did not voluntarily confess to killing Mr. Bond. Until this application, the circumstances under which this court assessed the admissibility of Mr. Whitmore's confession have been confined to the moment that he began speaking with ADA Warren Hebert, Detective Louis Russell, and Lt. Carson Bueto until their interrogation ended. Neither the State nor the defense presented any evidence concerning Mr. Whitmore's existing physical and mental condition when questioning began by District Attorney Ossie Brown.

Mr. Whitmore submits new evidence through a sworn statement from Ronald Thomas that documents the prison conditions experienced by both Mr. Whitmore and Mr. Thomas in the East Baton Rouge Parish prison. Exhibit D.[6] As in *Brooks*, Mr. Whitmore was housed in an exceptionally small room colloquially known as the dungeon. It was approximately 6' x 9' – comparable to the room where Mr. Brooks was held, except that Mr. Whitmore's room housed between six and eight men, while the room in *Brooks*' housed only three. No different than in *Brooks*, the guards forced Mr. Whitmore and Mr. Thomas – as well as all the other inmates housed in the dungeon – to remove their clothes.

Mr. Thomas remembers that there were so many naked men in this small room it was impossible to sit down. Ex. D, ¶7 . The air quality was so poor in this lightless room that inmates took turns standing by the door to access fresh air passing through gaps in the door frame. Ex. D, ¶10 . The room had no beds or toilet facilities, just a hole in the middle of the floor. Ex. D, ¶6 . In turn, while food was served to inmates in the dungeon, both Mr. Thomas and Mr. Whitmore recall that few inmates in the dungeon would eat because eating would eventually make them have to use the bathroom.

Mr. Whitmore's experiences in the dungeon so closely parallel those found to be unconstitutional in *Brooks* that if his case were in front of the United States Supreme Court at the same time, the Court would have found Mr. Whitmore's confessions to be inadmissible.

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6 Mr. Whitmore also submits his own sworn statement regarding the conditions he experienced prior to being questioned alone by Mr. Brown. Exhibit __.

Further, Mr. Thomas's affidavit is new evidence that prison officials placed Mr. Whitmore directly into the dungeon after a fight that caused a serious head injury. Ex. D, ¶3 . As detailed above, Mr. Whitmore never received medical treatment and recalls that the severity of the beating caused dizziness and headache for at least a day following the incident. Ex. K, ¶6.

By the time Ossie Brown began interrogating Mr. Whitmore about the Bond homicide, Mr. Whitmore had spent roughly two days completely naked in the dungeon, having not eaten or slept. As in *Brooks*, the severity of these conditions created an environment that greatly contributed to Mr. Whitmore providing law enforcement with a false and involuntary confession. 389 U.S. at 414.

New evidence corroborates Mr. Whitmore's description of the conditions in the dungeon and indicates that the interrogation began earlier, with Mr. Ossie Brown, than originally thought. The trial judge, however, knew nothing about the intensity of the deprivations and trauma suffered by Mr. Whitmore in the days leading up his interrogation. The new evidence shows that Mr. Whitmore was vulnerable to providing a false and involuntary confession. His susceptibility, coupled with the length of his interrogation and promises of leniency from the District Attorney, should lead this court to find that Mr. Whitmore's confession was admitted at trial in violation of his Fourteenth Amendment due process rights. Consequently, Mr. Whitmore's PCR application should be granted.

F. The State Engaged in Prosecutorial Misconduct when it Presented Perjured Testimony

New evidence shows that Assistant District Attorney Warren Hebert and the District Attorney Ossie Brown gave false and misleading testimony during Mr. Whitmore's trial. Such misconduct requires his conviction be overturned

A criminal defendant is guaranteed due process protections throughout the entirety of his criminal proceedings by both the United States and Louisiana Constitutions. *See* U.S. Const. amend. XIV, § 1; La. Const. art. 1 § 2. The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972). Any conviction obtained through the use of false evidence, known to be such by the state, violates a criminal defendant's Fourteenth

Amendment right to due process. *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959). Louisiana adopted the principles articulated in *Napue* when the state Supreme Court expressed that:

> [t]o prove a *Napue* claim, the accused must show that the prosecutor acted in collusion with the witness to facilitate false testimony. When a prosecutor allows a state witness to give false testimony without correction, *a conviction gained as a result of that perjured testimony must be reversed*, if the witness's testimony reasonably could have affected the jury's verdict, even though the testimony may be relevant only to the credibility of the witness.

State v. Broadway, 96-2659, p. 17 (La. 10/19/99); 753 So.2d 801, 814 (emphasis added).

In light of these constitutional requirements, Mr. Whitmore's 1977 conviction must be reversed. The prosecution presented a series of witnesses that told the jury Mr. Whitmore confessed to the killing of Marshall Bond without coercion, threat, or promises of leniency. Tr. 157, 163, 166. Warren Hebert and Ossie Brown also both testified that Ossie Brown was not the first person to interrogate Mr. Whitmore. Ossie Brown additionally testified that he spent only a few minutes with Mr. Whitmore and had little to do with his interrogation. TT. 272-273.

Mr. Whitmore's defense rested on discrediting the State's version of what happened to him from the early morning hours of February 25, 1975 until the evening of February 26, 1975. Through cross-examination of the state's witnesses – namely Warren Hebert and Ossie Brown – Mr. Whitmore's attorneys attempted to explain that it was actually Ossie Brown who first spoke with Mr. Whitmore. They tried to paint a story where the District Attorney spent a significant amount of time interrogating Mr. Whitmore alone, and elicited testimony on cross-examination from state witnesses that discredited Mr. Brown's story. Detective Russell admitted on cross that Ossie Brown was the first person to interrogate Mr. Whitmore. Tr 247-248.

In fact, during closing argument, Mr. Whitmore's attorneys indicated to the jury that this case would turn on whether they believed Mr. Brown or Mr. Whitmore. Tr. 432. The jury returned a 10-2 verdict in favor of the state. Ex. L. As such, Warren Hebert and Ossie Brown's sworn statements during Mr. Whitmore's trial were not simple discrepancies when compared with Mr. Whitmore's version of the events. The state legitimized Mr. Whitmore's false confessions to the jury through the credibility wrongfully given to Warren Hebert and Ossie

Brown because of their status with the District Attorney's office. As such, their testimony was material to Mr. Whitmore's conviction.

Warren Hebert's affidavit shows that both he and Ossie Brown perjured themselves when they provided false testimony in Mr. Whitmore's trial. As employees of the District Attorney's office, both attorneys had every opportunity to correct their statements, making their inaction and misconduct that much more egregious. Due to the importance of their testimony, and the likelihood that the jury would find them credible as attorneys for the District Attorney's office, it is reasonable to conclude that the perjured testimony affected the jury's verdict.

Warren Hebert's affidavit provides sufficient new evidence to show that the state knowingly presented perjured testimony to Mr. Whitmore's jury, which violated his due process rights guaranteed in Fourteenth Amendment of the U.S. Constitution and art. 1 § 2 of the Louisiana Constitution. Thus, under *Napue* and the Louisiana Supreme Court's own jurisprudence, Mr. Whitmore's conviction "must be reversed."

X. THE STATE'S SELECTIVE PROESCUTION OF MR. WHITMORE VIOLATED THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND LOUISIANA CONSTITUTIONS

The District Attorney's close association with the East Baton Rouge Parish Ku Klux Klan, combined with the newly discovered sheriff's office reports showing that Mr. Bond's white business partner was not investigated or charged, demonstrates that Mr. Whitmore was selectively prosecuted because of his race. Pursuant to both the United States and Louisiana Constitutions, no person shall be denied equal protection before the law. *See* U.S. CONST. AMEND. XIV, § 1; La. Const. art. 1 § 3.

A prosecutor's discretion is subject to constitutional restraints, and the "decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classication." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). A selective-prosecution claim under the equal protection clause provides a legal mechanism for criminal defendants to challenge race-based prosecutorial decisions. *Id.* at 465. To prevail on a selective-prosecution claim, the defendant must demonstrate that the "prosecutorial policy had both a discriminatory effect a discriminatory intent." *U.S. v. Jones*, 159 F.3d 969, 976. Proving

discriminatory effect in a race case requires that the claimant show that similarly situated individuals of a different race were not prosecuted. *Armstrong*, 517 U.S. 464.

With new evidence that the District Attorney was affiliated with the Ku Klux Klan, as well as Mr. Whitmore's experiences with Ossie Brown, petitioner contends that the District Attorney's office selectively prosecuted him because he is black. Near the time of Mr. Bond's death, the Klan publicly conceded in a judicial pleading that they furthered their objectives by "assaulting, threatening, and harassing Negroes who seek to exercise any of their civil rights, and assaulting, threatening and harassing persons who urge that negroes should exercie or be accrorded those rights." *U.S. by Katzenback v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 337 (E.D. La. 1965). FBI Documents show that Ossie Brown "was closely associated with the Ku Klux Klan (kkk) in the Baton Rouge area and attended some meetings." *See* Exhibit F. Prior to be elected as the East Baton Rouge District Attorney, Mr. Brown "served as attorney for many Klan members and as attorney handling legal matters for the Klan." *Id.* Considering the Klan's racial animus and the deficient investigation, Mr. Whitmore submits that Mr. Brown's decision to prosecute him for the killing of a prominent white man was racially motivated.

Further, Mr. Whitmore can show that under the direction of Ossie Brown's leadership, the District Attorney's office consistently chose to prosecute similarly situated high-profile black individuals accused of killing white men but did not pursue prosecutions of high-profile white individuals accused of killing black men. For example, in January 1972, a demonstration in Baton Rouge ended in a shoot-out leaving dead two white officers with the East Baton Rouge Sheriff's Office (hereinafter "EBRSO") and three black demonstrators. *See State v. Beavers*, 394 So. 2d 1218, 1221 (La. 1981). Newly elected District Attorney Ossie Brown oversaw the prosecution of 13 black protestors in an array of high-profile litigation which became colloquially known as the "Black Muslim cases" in Baton Rouge. *See State v. Beavers*, 394 So.2d 1218, 1221 (1981); *State v. Bell*, 315 So.2d 307 (La.1975), 346 So.2d 1090 (La.1977); *State v. Williams*, 354 So.2d 562 (La.1978); *State v. Eames*, 365 So.2d 1361 (La.1978). Mr. Brown did not pursue indictments of officers who killed black demonstrators.

Later that year, EBRSO deputies then broke up a peaceful protest at Southern University and left black two students—Denver Smith and Leonard Brown—dead. *See* Alison Shay, Remembering Denver Smith and Leonard Brown, Nov. 16 2012, *available at* https://lcrm.lib.unc.edu/blog/index.php/2012/11/16/remembering-denver-smith-and-leonard-brown. Even after Governor Edwin Edwards ordered an investigation, the shooter(s) in the Sheriff's Office were never identified. *Id.* It is believed that Ossie Brown did not call for or paritipate with an investigation looking into who killed Denver Smith and Leonard Brown.

Then in 1973, white Federal Bureau of Investigation agents killed 21-year-old Baton Rouge black resident, Milton Leon Scott, in an incident where they mistakenly believed he was wanted for deserting the army. *See Muslim is Slain, Morning Advocate, Baton Rouge*, July 19, 1973, at 1 and 10. A grand jury investigation overseen by District Attorney Ossie Brown was conducted, the investigation did not produce indictments of the officers.

The evidence showing Mr. Brown's close affiliation with the East Baton Rouge Klan chapter supports Mr. Whitmore's claim that he was selectively-prosecuted for the murder of Marshall Bond because he was black and because Mr. Brown acted with discriminatory intent in his prosecutorial decisions. This court should reverse Mr. Whitmore's conviction because the State obtained it in violation of his constitutional right to equal protection before the law.

XI. MR. WHITMORE IS FACTUALLY INNOCENT AND HIS CONVICTION VIOLATES DUE PROCESS AND IS A CRUEL AND UNUSUAL PUNISHMENT

As detailed throughout this application, Mr. Whitmore is innocent of murdering an robbing Mr. Bond. The continuing punishment of a prisoner who has proved his innocence is *per se* cruel and unusual and incompatible with the principles of due process. As such, it violates the Eighth and Fourteenth Amendments of the U.S. Constitution. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (punishing those who can make a truly persuasive showing of innocence is unconstitutional); *In re Troy Davis*, 130 S. Ct. 1 (2009); *Schlup v. Delo*, 513 U.S. 298 (1995)

Evidence of Mr. Whitmore's innocence that should have been presented to the jury 39 years ago is raised in this application for post-conviction relief. Mr. Whitmore requests that this Court consider his claims for relief and grant him a trial at which the jury will hear all of the evidence.

Mr. Whitmore has spent nearly 40 years wrongfully imprisoned because the state withheld favorable evidence from him and conducted prosecutorial misconduct. The evidence now makes it clear that Mr. Whitmore would not have been convicted if he had received a fair trial. Furthermore, Mr. Whitmore's sentence is also constitutionally excessive, and had the trial judge had an accurate picture of Mr. Whitmore's past would have likely given a lighter sentence. This is a case where a member of society has never before had his case adequately investigated, and as a result, has suffered a wrongful and unconstitutional conviction. This is exactly the kind of case Louisiana state courts should review on the merits and exactly the kind of case in which they should grant relief.

WHEREFORE, for these reasons, Mr. Whitmore requests:

1. That the State be ordered to file a response to the claims contained in this pleading pursuant to La. C. Cr. P. Art. 927(A);

2. That he be granted orders for discovery of exculpatory information in the State's possession;

3. That if the State has any procedural objections that create questions of fact, an evidentiary hearing be held on those objections pursuant to La. C. Cr. P. Art. 930;

4. That if the State responds on the merits and such response creates questions of fact, an evidentiary hearing be held pursuant to La. C. Cr. P. Art. 930;

5. That he be granted leave to amend and supplement his claims for relief as necessary;

6. That he be granted relief from his conviction and sentence pursuant to La. C. Cr. P. Art. 930.3(1); and

7. That he be granted such other relief as equity and justice require.

Respectfully submitted,

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Angola, LA 70712

VERIFICATION AND CERTIFICATION

I, Emily H. Posner, hereby verify that the facts set forth in this petition are true and accurate to the best of my information and belief, and certify that a copy of the foregoing document has been served by mail on the Assistant District Attorney for Section "H" and the Chief of Appeals, East Baton Rouge Parish District Attorney's Office, Baton Rouge, LA, on the 31st day of July, 2014.

_____

Sworn and subscribed to before me:

this _____ day of July, 2014.

_____

NOTARY: _____

No. _____

My commission expires: _____