

told her he was one of the perpetrators (Exhibit "A").

9.a. Facts to Support Grounds.

The trial of this cause took place in September of 1998. During trial Angela Truitt, the complaining witness, testified that on January 23, 1998, she was with her boyfriend at his house in Gary, Lake County, Indiana. They had been drinking alcohol and playing cards most of the night. They had an argument which caused her to leave the house between 3:00 A.M. and 5:00 A.M. She intended to make a phone call from a pay phone outside the apartment to get a ride home (R. p. 159). On her way to the pay phone she was approached by three men who took her to a nearby house where she was allegedly raped. One of the men wore his hair in an afro, one in braids, and the third wore a ski mask. During the trial she identified the Petitioner Vernon Bateman as the one with the braids (R.p. 180). She testified she had never seen Vernon Bateman before (R.p. 162 & 199). She testified all three had intercourse with her, and one ejaculated in her. The results of a sexual assault kit were not introduced by the State. Although she testified the Defendant had held a gun on her, a gun found at the scene did not contain the fingerprints of Petitioner (R.p. 243).

After Angela Truitt reported the alleged rape she went to Methodist Northlake Hospital in Gary, Indiana. A physician performed a pelvic examination during which samples were taken for evidence of sperm, hair, etc. (R.p. 126). The samples were placed in a sexual assault kit which was given to the police (R.p. 130). The Chief Investigating Officer, Det. Mary Banks, received the sexual assault kit from the hospital (R.p. 143). The results of the sexual assault kit were never introduced into evidence by the State and the whereabouts of the kit and the results were unknown (R.p. 244).

On April 8, 2004, Angela Truitt gave a sworn statement stating that she was not sure if Petitioner Vernon Bateman was involved in the rape and that she picked him because she was told by Det. Mary Banks that he was involved:

"Q. Was in fact Vernon Bateman at the rape, or was Vernon Bateman in that rape?

A. I am not sure. I told you that they told me that's who that was. I didn't know who none of them guys were. The police told me that he was the suspect.

Q. Okay. So after the rape, did you ever see the man with the braids?

A. You say after?

Q. Yeah. After the rape, did you ever see the man with the braids?

A. No.

Q. Do you know who the man with the braids was?

A. No.

Q. Now, who told you that the man with the braids was Vernon Bateman?

A. Mary Banks.

Q. And she was a detective in Gary, Indiana?

A. Yes.

Q. And again, why did you identify him in court?

A. Once again, because for one, they said that's who it was, and the braids.

Q. But in fact, you could not identify him at the man with the braids?

A. What.

Q. Okay. Are you telling us today that when you identified him in court, you couldn't tell if that was actually the man with the braids that raped you?

A. No, I just went on what they told me.

Q. If Vernon Bateman walked in the room today, could you recognize him?

A. I'm not sure.

Q. And why are you giving us a statement today?

A. Because I have reasonable doubt that he's innocent.

Q. And you want to help him be released?

A. Yes."

The recantation of her testimony that Vernon Bateman was involved in the rape was supported by the record. Angela Truitt had been drinking alcohol all night with her boyfriend until about 3:00 A.M. to 5:00 A.M. when she left the house. She was probably intoxicated. There were numerous inconsistencies in her testimony as to which perpetrator did what during the alleged rape. There were no fingerprints found on the weapon supposedly held on her by the Petitioner and the results of a sexual assault kit were not introduced by the State. The test result was probably favorable and did not link the Petitioner with the crime. It was Det. Mary Banks who received the kit from the hospital, and it was Det. Mary Banks who testified concerning an out of court inadmissible "testimonial" statement from a co-defendant Saron Foley that Vernon Bateman was involved (see 8.b. and 9.b.), and it was Det. Mary Banks according to Angela Truitt who told her that Vernon Bateman in a photographic line-up and "was the man with the braids" who had raped her.

One purpose of a Post Conviction Relief is to raise issues unknown or unavailable to

Petitioner at the time of the actual trial or appeal, (Grundy v. State, 695 N.E.2d 167 (Ind. App. 1998; Wilkerson v. State, 728 N.E.2d 239 (Ind. App. 2000)). To receive a new trial based upon newly discovered evidence, a post-conviction relief petitioner must demonstrate nine things: (1) the evidence was not available at trial, (2) it is material and relevant, (3) it is not cumulative, (4) it is not merely impeaching, (5) it is not privileged or incompetent, (6) due diligence was used to discover it in time for trial, (7) the evidence is worthy of credit, (8) it can be produced upon a retrial of the case, and (9) it will probable produce a different result. The party requesting a new trial based upon newly-discovered evidence has the burden of demonstrating the existence of all nine factors (Allen v. State, 791 N.E.2d 748 (Ind. App. 2003)). The recantation of Angela Truitt meets all nine factors.

The April 8, 2004 statement of Angela Truitt recanting her in-court identification of Vernon Bateman was unknown and unavailable to Petitioner at the time of the trial in January, 1998 and at the time of his appeal. This is the type of issue that can be raised in a Petition for Post Conviction Relief. The record supports the recantation of the identification, and the conviction and sentence of the Petitioner should be vacated and set aside.

8.b. Right to Confrontation and Cross Examination of Saron Foley.

Bateman was denied a fair trial and the right to confront and cross-examine the witnesses against him in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article One, Sections Twelve and Thirteen of the Constitution of Indiana.

During the trial of this cause the Deputy Prosecutor elicited testimony from the State's head investigator regarding a "testimonial" statement she obtained from a co-defendant, Saron

Foley, which placed the Petitioner, Vernon Bateman, at the scene of the alleged rape of Angela Truitt. The State did not bring Saron Foley as a witness, and therefore Vernon Bateman was denied his right to confront and cross-examine him regarding the statement.

9.b. Facts to Support Grounds.

During the trial of this cause the Deputy Prosecutor in redirect examination of the lead investigating officer, Detective Mary Banks, elicited the following testimony:

Q. When you showed the photo array, I believe Mr. Schneider had asked you if you told Angela Truitt that, I think prior to her identifying photo five, the name of Vernon Bateman, did you ever tell her that name at all?

A. No Sir, I didn't.

Q. In fact, where did you get that name from?

A. **That name was developed from the other suspect that was in custody, that information was gotten from him.**
(R. p. 145, emphasis added).

"The other suspect" referred to by Mary Banks, who was in police custody was Saron Foley. Prior to this testimony, Mary Banks testified that Foley was picked out by the victim Angela Truitt, in a physical line-up the day of the alleged rape, and that the identification from the line-up was immediate (R. p. 134). Detective Banks next testified that on February 17, 1998, she conducted a photo line-up for Angela Truitt at her home. The composite photo line-up was then admitted into evidence as State's Exhibit "B" (R. p. 137). Detective Banks testified that Angela Truitt immediately picked out No. 5, the photo of the Defendant Vernon Bateman (R. p. 140).

The State's next witness, Det. Corporal Michael Jackson testified on direct examination that he found Saron Foley asleep inside the residence where the rape allegedly occurred (R. p.

208), and that on the bed Foley was sleeping he retrieved a gun and ski mask used in the rape (R. p. 206 and 207). Both the gun and ski mask were admitted into evidence as State's Exhibit 4 and 5, (R. p. 210). Det. Corporal Jackson next testified Saron Foley was brought out of the house to see if the victim, outside in a squad car, could identify Foley as one of the suspects. The detective testified, "she in fact I.D. him" (R. p. 213).

The State's final witness was Angela Truitt who identified the photograph of Saron Foley (State's Exhibit 3) as one of the rapists (R. p. 175).

At the close of its case, the State had firmly established that Saron Foley was one of the perpetrators. The sole purpose in doing so was to establish Foley's credibility as a "State's witness" when Mary Banks stated:

"The name [Vernon Bateman] was developed from the **other suspect [Saron Foley] that was in custody, that identification was gotten from him.**" (R.p. 145) (emphasis added)

In closing argument, the State tied in the "testimony" of Saron Foley, as witness against Vernon Bateman. The Deputy Prosecutor argued:

"Remember when Detective Banks took the witness stand and I asked her what she did with regard to this investigation, how she had taken statements, she put that photographic array together, remember when I asked her how she got Vernon bateman? What did she tell you? **Through the defendant Saron Foley. That's how this all ties together. Because of that, that obviously puts together the defendant Saron Foley who was caught with the hat and the gun as well as now the photograph of Vernon bateman and she was absolutely positive, there was no hesitation whatsoever from Angela Truitt. When Angela Truitt saw that particular photographic display, she didn't know Vernon Bateman's name. She didn't even know Saron Foley's name when she picked him out originally. She didn't know Vernon Bateman's name. She didn't know that person that she was told, that person may or may not be in there. That person [Vernon Bateman] was in there because of what the defendant Saron Foley told Mary Banks and, boom, immediately, Angela Truitt picked out Vernon Bateman from**

that particular lineup. **It's very very important when you try to tie, not only the identification of Vernon Bateman from Angela Truitt, but as to why Vernon Bateman's picture was even in there in the first place.** (R. p. 250-251, emphasis added).

The Deputy Prosecutor continued in rebuttal to tie in the "testimony" of Saron Foley through the statement he gave to Detective Banks:

". . . Corporal Michael Jackson said that **Saron Foley** was the person they found in there, that Angela Truitt made a positive identification, **which actually may not mean a lot in Vernon Bateman's case except for the fact that Detective Mary Banks got Vernon Bateman's name from a conversation she had with the defendant Saron Foley.** Angela Truitt didn't know Vernon bateman, she didn't even know Saron Foley. Once again, she saw a photo on February 17th, boom, that's the guy that did it, that's the guy that ran the show.

The identification that she had, it's also from the another suspect guy [Saron Foley] that was caught with the hat and gun." (R. p. 256, emphasis added).

Vernon Bateman's Sixth Amendment confrontation and cross-examination rights were violated when State's witness, Mary Banks, testified she received Bateman's name from Saron Foley, the suspect she had taken into custody. The Defendant was denied his fundamental right to cross-examine Foley as to the information he gave to Detective Banks regarding the Defendant's involvement and identification. Where or how Detective Banks got Bateman's name which lead to the photographic line-up is not an issue, and should not have been admitted. However, this testimony was crucial to the State's case and used heavily in closing argument to link Bateman to the crime. The State succeeded in using Saron Foley as a "State's Witness" without allowing cross-examination of Foley by Vernon Bateman.

The Sixth Amendment to the U.S. Constitution as interpreted by the U.S. Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004) prohibits

the introduction in a criminal trial of testimonial statement where the Defendant had no opportunity to cross-examine the person who made the statement. The confrontation clause of the Sixth Amendment provides that in all criminal prosecution the accused shall enjoy the right to be confronted with the witnesses against him. Confrontation is the key to Sixth Amendment rights, which apply in State Courts through the Fourteenth Amendment, Douglas v. Alabama, 380 U.S. 415, 418; 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965).

In Crawford, supra, the prosecution in trial played the tape recorded statement of the Defendant's wife given to the police in which she described how the defendant stabbed the victim. She did not testify at trial. The Supreme Court of the United States held that the wife's statement during the interrogation to police was "testimonial" in nature, rather than non-testimonial hearsay which would be properly subject to evidentiary rules concerning reliability. Further, the defendant's right to confront the wife clearly included the right to cross examine her regarding the statement. The right to confront was not a substantive guarantee that evidence be reliable, but rather a procedural guarantee that the reliability of the wife's statement be tested by cross examination. The Supreme Court reversed the Defendant's conviction and the case was remanded for further proceeding.

The first question here is whether the statement by Saron Foley to Detective Banks as to Bateman's involvement and identification was "testimonial" in which case he is subject to cross-examination. The second question is whether Vernon Bateman was given the opportunity to cross examine Saron Foley. Preserving the account of a potential witness is testimonial. Testimonial statements are those where a principal motive of either the person making the statement or the person or organization receiving it is to preserve it for future use in legal

proceedings, Hammon v. State, 829 N.E.2d 444 (Ind. 2005).

Types of testimonial responses include prior testimony at a preliminary hearing, a grand jury, or at formal trial, and **police interrogations**, Hammon, supra, p. 452. To be considered testimonial the inquiry must center around whether the officer involved was acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution, Hammond, supra, p. 455. After considering the view of the Court of Appeals and courts of other jurisdiction the Indiana Supreme Court in Hammond, supra, p. 456 held:

" . . . we conclude that a "testimonial" statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to **preserve the statement it is sufficient to render the statement "testimonial"**. (emphasis added)

The Court continued (P. 456):

"We understand "**police interrogation**" in this context certainly to include documented structured questioning recorded in written, audio, or video devices or any other means permitting the questions and **statements to be preserved and presented to a court.**" (emphasis added)

In Hammon, supra, an affidavit of the complaining witness was admitted against the Defendant. The complaining witness did not testify and the Defendant Hershel Hammon did not have the opportunity to cross examine her. Our Supreme Court held:

"Therefore, the admission of the affidavit [of the complaining witness] was in violation of Hershel's constitutional rights under the Confrontation Clause."

In Anderson v. State, 833 N.E.2d 119 (Ind. App. 2005), our Court of Appeals found that out of Court statements of a victim made to a police detective and an employee of the County

Office of Family and Children were "testimonial", and as such admissibility of the statements were governed by the confrontation clause. In Anderson, supra, both statements were taken from the victim for future use in legal proceedings. The Defendant was not afforded the opportunity to effectively cross examine the victim as required by the confrontation clause. Since the statements were admitted in his trial, the case was reversed and remanded.

At no time during the trial did Counsel for the Petitioner Vernon Bateman, object to or move to strike the testimony of the State's witnesses regarding the "testimonial" statement of Saron Foley. He failed to move for a mistrial, ask for an admonishment, or limiting instruction. Because trial counsel failed to object to the evidence and argument regarding Saron Foley's statement the Court must now consider whether the trial court committed fundamental error when it permitted the deputy prosecutor to elicit the statement of Saron Foley from Det. Banks, and continue to refer to it throughout the trial, especially during the State's closing argument.

Fundamental error is a substantive, blatant violation of basic principles and if not corrected would deny the Defendant fundamental due process, Wright v. State, 730 N.E.2d 713 (Ind. App. 2000); Majors v. State, 735 N.E.2d 334 (Ind. App. 2000). Here the trial court committed fundamental error which is not cured by a claim of waiver by trial counsel (failure to object) or by appellate counsel, (failed to include in direct appeal). The admission of the evidence and the deputy prosecutor's constant reference to it in closing argument is a clear violation of the Petitioner's Constitution rights under the Confrontation Clause, see Crawford, supra; Hammond, supra; and Anderson, supra.

In the case at bar, the State, through the testimony of Detective Banks, made Saron Foley a State's witness, who named Vernon Bateman as one of the perpetrators of the alleged rape.

Vernon Bateman was never given the opportunity to confront and cross examine Saron Foley. The erroneous admission of Saron Foley's "testimonial" statements through Detective Banks and the prosecution's heavy reliance on Foley's statement in closing arguments denied Bateman of his confrontation rights in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article One, Sections Twelve and Thirteen of the Constitution of Indiana. The Court committed fundamental error when it permitted the Deputy Prosecutor to elicit the "testimonial" statements of Saron Foley, and when it allowed the Deputy Prosecutor to rely heavily on the "testimonial" statement of Saron Foley in his closing argument. As such, the convictions and sentences entered in this cause must be vacated and set aside.

8.c. Prosecutorial Misconduct/Sexual Assault Kit/"Brady" Violation.

The State failed to turn over to Petitioner's trial counsel the results of a sexual assault kit that was taken from the complaining witness, Angela Truitt, after the alleged rape.

After the alleged rape, the complaining witness, Angela Truitt, went to the hospital where a sexual assault kit was prepared. Samples of hair, saliva and blood were taken to determine if the Petitioner could be linked to the alleged rape (R.p. 129). The sexual assault kit was turned over to Det. Mary Banks for testing (R.p. 143). In cross examination Mary Banks was asked by Petitioner's trial counsel "were there ever any results that came back". Det. Banks responded "I don't know if Mr. Tavitias [deputy prosecutor] has those results or not" (R.p. 143, L. 17). The failure to turn over the results of the kit to Petitioner's trial counsel amounted to prosecutorial misconduct.

9.c. Facts to Support Grounds.

The State of Indiana has an affirmative duty to disclose favorable evidence to the defendant, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). The Seventh Circuit has held that the Brady duty to disclose material evidence is applicable **regardless of whether there has been a request by the accused for exculpatory materials**, U.S. v. Stoh, 245 F.3d 890 (7th Cir. 2001). A true "Brady" violation consists of (1) evidence favorable to the Defendant, (2) that is suppressed by the prosecutor, (3) resulting in material prejudice, Newell v. Hanks, 335 F.3d 629 (7th Cir. 2003).

The complaining witness, Angela Truitt, testified in trial that all three men had sexual intercourse with her, one had ejaculated "inside" her, and one ejaculated on her buttocks (R.p. 169). The results of the sexual assault kit were relevant and material as to whether sexual intercourse occurred, and specifically, if the Petitioner was involved. The results of the sexual assault kit were probably favorable, since the deputy prosecutor did not introduce them. The failure to disclose the results to the Petitioner was prejudicial and resulted in prosecutorial misconduct.

8.d. Ineffective Assistance of Trial Counsel.

Petitioner was denied his right to effective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendment to the U.S. Constitution and Article I, Sec. 12 and 13 of the Constitution of the State of Indiana.

The specific acts or omissions of trial counsel in this case include but are not limited to the following:

A. Saron Foley's "testimonial" statement and evidence of guilt/failure to object.

1. During the trial of this cause the Deputy Prosecutor elicited the testimony from

Mary Banks, the State's head investigator regarding a statement she obtained from co-defendant Saron Foley, which placed the Petitioner Vernon Bateman at the scene of the alleged rape of Angela Truitt (R.p. 145). The statement of Saron Foley was testimonial in nature and therefore Saron Foley was subject to cross examination by the Petitioner (see 8.b. and 9.b., Facts and Grounds). Trial counsel failed to object to the statement, failed to move to strike the testimony of Det. Banks regarding the statement, failed to ask for an admonishment and failed to move for a mistrial. This failure to act amounted to ineffective assistance of Counsel.

2. During the trial of this cause the Deputy Prosecutor elicited the testimony from Cpl. Michael Jackson regarding the arrest of the co-defendant, Saron Foley (R.p. 206-208). The State's witness, Det. Banks, had already testified about Saron Foley's "testimonial" out of court statement tying Vernon Bateman to the allegedly rape (R.p. 145). The arrest of Saron Foley was not an issue in this case and was used solely by the State to bolster the guilt of Saron Foley and thus increase the credibility of his inadmissible "testimonial" statement that Vernon Bateman was involved. Trial counsel failed to object to the testimony, failed to move to strike, move for an admonishment, or move for a mistrial. The failure to act amounted to ineffective assistance of counsel.

3. During the closing argument, the Deputy Prosecutor used the inadmissible statement of Saron Foley, given through the testimony of Det. Banks, to tie the Petitioner to the alleged rape (R.p. 250-256) (see 8.b. and 9.b., Facts and Grounds). Trial Counsel failed to object to the argument, failed to ask for an admonishment to the jury or a limiting instruction, and failed to ask for a mistrial. This failure to act amounted to ineffective assistance of counsel.

B. Sexual Assault Kit/Failure to Obtain Results.