NO. 17-6446

IN THE SUPREME COURT OF THE UNITED STATES

TODD WESSINGER,
Petitioner
vs.
DARREL VANNOY, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FILED ON BEHALF OF DARREL VANNOY, WARDEN

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner Todd Wessinger was charged with two counts of First Degree Murder in the deaths of Stephanie Guzzardo and David Breakwell, in violation of Louisiana Revised Statute 14:30. Jury selection commenced on June 17, 1997, and was completed on June 20, 1997. Trial commenced on June 23, 1997, and concluded on June 24, 1997. On June 24, 1997, the jury returned two unanimous verdicts of guilty as charged of first degree murder. On June 25, 1997, the penalty phase of trial was conducted with the jury unanimously determining that petitioner be sentenced to death on both counts of first degree murder, based upon its finding that petitioner committed the instant crimes when the following aggravating circumstances were present: (1) petitioner was engaged in the perpetration, or attempted perpetration, of aggravated burglary or armed robbery, (2) petitioner knowingly created a risk of death or great bodily harm to more than one person, and (3) petitioner committed his crime in an especially heinous, atrocious, and cruel manner. On September 17, 1997, the trial court, in accordance with the jury's recommendation, sentenced petitioner to death by lethal injection on both counts.

Petitioner appealed his convictions and sentences, advancing eighteen arguments of error. The Louisiana Supreme Court reviewed the record in this capital case and found that none of petitioner's assigned errors warranted reversal of his convictions or sentences. ***State v. Wessinger***, 98-1234 (La. 5/28/99); 736 So.2d 162, *reh'g denied* (7/2/99).

Petitioner filed for writ of certiorari in the Supreme Court of the United States. His sole allegation of error was that it was reversible constitutional error for the trial court to fail to instruct the jury that unanimity was not required when evaluating the effect of mitigating circumstances. The United States Supreme Court denied petitioner's writ application for certiorari on direct review on December 6, 1999. ***Wessinger v. Louisiana***, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999). Petitioner's application for rehearing was denied on January 24, 2000. ***Wessinger v. Louisiana***, 528 U.S. 1145, 120 S.Ct. 1001, 145 L.Ed.2d 947 (2000).

On June 11, 2001, petitioner filed an application for state post-conviction relief, advancing eleven claims of error. The State responded and requested that the court review each and every claim, conduct any evidentiary hearings that may be necessary for resolution of the claims, and deny all relief requested by petitioner. The State raised several procedural objections and asked for summary dismissal of other claims.

The state judge referred the matter to a Judicial Commissioner for advice on post conviction relief procedures, who issued a fifty-three-page report entitled Commissioner's Preliminary Report On Procedural Bars, finding petitioner failed to establish a basis for post conviction relief. Noting that the First Supplemental Application was one hundred and thirty-six pages, the Commissioner nonetheless recommended dismissal of the petition without a hearing.[1]

[1] ROA.1907.

Following this report, petitioner filed a Second Amended Petition for Post Conviction Relief, totaling an additional one hundred pages and including numerous exhibits. This amended application re-urged and re-argued the claims raised in the First Amended Petition.

At a September 4, 2003, status conference the state district court judge noted that he had received and reviewed the application and amended applications filed by petitioner as well as the exhibits. He also noted that he had reviewed the Commissioner's Preliminary Report and likewise noted that both he and the Commissioner had reviewed petitioner's Second Amended Application. Thereafter, he ruled that all of the claims raised in the First Amended Application and the "bare-bones" petition were procedurally barred.[2] Thereafter, he reviewed and addressed various claims from the Second Amended Petition, denying them without the necessity of an evidentiary hearing. Petitioner sought review with the Louisiana Supreme Court which denied relief on January 14, 2005. ***State ex rel. Wessinger v. Cain***, 03-3097 (La. 9/3/04), 882 So.2d 605.

On or about September 7, 2004, petitioner filed an application for writ of habeas corpus in the United States Middle District Court for Louisiana.[3] The claims asserted in petitioner's federal applications were summarily dismissed by the state courts. Prior to ordering the State to Answer the petition, the district court judge issued a Notice to Counsel, directing the parties to address the issue of

[2] ROA.1920-1922.

[3] ROA.28.

timeliness and equitable tolling.[4] Following briefing on the issue, the district court judge found[5] that petitioner was entitled to equitable tolling and that he had 48 days remaining when he filed his petition on September 7, 2004.[6]

Before the State filed its answer, petitioner filed a First Amended Petition on or about July 22, 2005.[7] The State noted in its Response to Petitioner's "Incomplete First Amended Petition for Habeas Corpus" that any "new claim" raised in this Amended Petition should be considered time barred, should be considered a second or successive claim, and in violation of Rule 15 as it applies to amendments of federal habeas corpus petitions.[8] The district court never ruled on this issue, nor on the timeliness of the Second Amended Petition.

The State responded to the initial application and first amended petition on October 6, 2005.[9] The State contended that petitioner's claims do not merit relief for the reasons cited therein and argued that no evidentiary hearing was required or allowed pursuant to 28 U.S.C. § 2254(e)(2).

Following various proceedings and status conferences, petitioner filed a second Amended Petition on November 1, 2010, without obtaining prior approval by

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[4] ROA.130-131.

[5] ROA.291.

[6] 48 days from September 7, 2004, was October 25, 2004. Thus, any application or amended application filed by petitioner after this date would be untimely based on the district court's ruling.

[7] ROA.344.

[8] ROA.1047-1449.

[9] ROA.1050.

the district court.[10] The State responded to the Amended Petition by filing a response and memorandum in opposition on May 6, 2011.[11] The State argued that the district court should limit review pursuant to ***Cullen v. Pinholster,*** 563 U.S. 170, 131 S.Ct. 1388, 1398 and 1411 footnote 20[12], 179 L.Ed.2d 557 (2011), to the state record without the possibility of expansion.

In a very comprehensive and well-reasoned ruling, the district court ruled on March 13, 2012, that petitioner should be denied habeas relief and that a Certificate of Appealability (COA) should be denied.[13]

Petitioner filed a Motion to Alter Judgment arguing that his own claims were procedurally barred, but that he should be able to assert a claim under ***Martinez v. Ryan,*** —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), that his post conviction counsel was ineffective in failing to raise these claims and that he should be able to assert them in federal court. The State filed an opposition. After oral arguments, the district court granted the motion as to the claim of ineffective assistance of counsel (IAC) at the penalty phase as asserted in petitioner's Amended

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[10] ROA.1453.

[11] ROA.1447-2611.

[12] Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a decision "contrary to" or "involv[ing] an unreasonable application" of federal law, a writ of habeas corpus "shall not be granted" and our analysis is at an end. 28 U.S.C. § 2254(d). **We are barred from considering the evidence Pinholster submitted in the District Court that he contends additionally supports his claim**. For that reason, we need not decide whether § 2254(e)(2) prohibited the District Court from holding the evidentiary hearing or whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied. ***Cullen v. Pinholster***, 563 U.S. 170, 203, 131 S. Ct. 1388, 1411, 179 L. Ed. 2d 557 (2011). [Emphasis added].

[13] ROA.2651-2729.

Petition filed in 2010, not as originally asserted in his initial petition. Specifically, the district court ruled that since this particular claim went beyond what was presented in state court, it was unexhausted and procedurally barred.[14] The question of timeliness was not raised or discussed by the district court's ruling on the motion. The district court characterized the material sought to be addressed in federal court, but that had not been presented in state court, as follows:

> Wessinger presented the following **additional evidentiary support** of his ineffective assistance at the penalty phase claim: psychiatric evaluation, neuropsychological testing, evidence of low intellectual functioning, and evidence of isolation and abuse. None of this was presented to the state habeas court.[15]

The district court conducted hearings nearly three years later over the course of several weeks. On August 3, 2015, the district court ruled that it was granting the Motion to Alter Judgment and Habeas Corpus, vacating the death sentences imposed by the State of Louisiana.[16] The State filed a Notice of Appeal on August 20, 2015. Following review, the Fifth Circuit reversed the federal district court's grant of habeas relief. Rehearing and rehearing en banc were denied. ***Wessinger v. Vannoy***, 864 F.3d 387 (5th Cir. 2017). A separate application for certiorari was filed in relation to this ruling.[17]

Petitioner also filed a notice of appeal from the judgment of the federal district court that dismissed his initial claims and that denied a COA. The Fifth

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[14] ROA.3226-3227.

[15] ROA.3226 [Emphasis added].

[16] ROA.3720.

[17] *See* ***Wessinger v. Vannoy,*** 17-6844.

Circuit affirmed this decision on July 21, 2017. ***Wessinger v. Vannoy***, 12-70008 (5th Cir. 2017) {2017 WL 3121975}. It is this ruling which forms the basis for the application for certiorari in the instant matter.

B. STATEMENT OF THE FACTS

On Sunday, November 19, 1995, at approximately 9:40 a.m., Todd Wessinger, armed with a Larsen .380 caliber semi-automatic pistol, entered Calendar's Restaurant & Bar, located at 7520 Perkins Road in Baton Rouge, Louisiana. He was a former employee of the restaurant who had been terminated for absence from work due to an arrest for possession of cocaine. He entered through a rear door at a time when employees were preparing the kitchen for the opening of the restaurant and attempted to shoot Alvin Ricks, but his gun jammed. He then shot and severely wounded Eric Armentor, shot and killed Stephanie Guzzardo while she was on the telephone with the 911 operator, stole approximately $7,000-$8,000 of the restaurant's money which was being prepared for bank deposit by Ms. Guzzardo, and shot and killed David Breakwell. Of the six Calendar's employees present at the time, two were murdered, another was shot and severely wounded, one would have been shot had petitioner's gun not jammed, and two others managed to escape. Two of the survivors, Eric Armentor and Alvin Ricks, saw and identified petitioner. Willie Grigsby, another Calendar's employee, was told by Alvin Ricks to run for his life. Willie Grigsby testified that as he was running across the street, Alvin Ricks

said, "I saw him, that was Todd." The final survivor, Eric Mercer, never saw petitioner.

Petitioner was observed outside the restaurant by an employee, Eric Armentor, just prior to the robbery/murders. He saw petitioner sitting on a bicycle and said hello. As he entered the back door of the restaurant and approached the time clock, petitioner shot him in the back. Mr. Armentor stated that he looked over his shoulder, saw petitioner approach the office area, heard Ms. Guzzardo pleading for her life, heard petitioner shoot her, and saw Ms. Guzzardo fall to the floor. The 911 tape[18] was played for the jury, wherein Ms. Guzzardo is heard begging for her life:

> [911 OPERATOR]: 911 What's your emergency? Hello.
>
> [MS. GUZZARDO]: Please don't. Please I won't tell anything. Please.
>
> [PETITIONER]: You'll tell them.
>
> [MS. GUZZARDO]: No, I promise, I promise, I promise I promise, I promise I swear, I'm peeing on myself right now, please, please.
>
> [PETITIONER]: Shut up. (gunshot)
>
> [MS. GUZZARDO]: Oh shit. Help, help, help, oh shit. 911.
>
> [911 OPERATOR]: Yes.
>
> [MS. GUZZARDO]: Help.
>
> [911 OPERATOR]: What happened mam? [sic]
>
> [TELEPHONE DROPS]

[18] State exhibit 141.

Mr. Armentor can be heard on the same 911 tape after Ms. Guzzardo is killed. Although he did not know petitioner before this crime, he easily identified petitioner from a photographic lineup as the perpetrator of these crimes. Mr. Armentor spent twelve or thirteen days in the hospital suffering from injuries to his back, stomach, liver, and lungs. After a week, he was again hospitalized for additional surgery and another twelve-day stay.

Alvin Ricks, who had been washing dishes, heard gunshots, turned, and saw someone approach him with a gun. The gun was aimed at his head, and the perpetrator pulled the trigger. The gun jammed, and petitioner asked, "where [is] Stephanie [Guzzardo]." Petitioner attempted to clear the weapon, pointed it at Mr. Ricks' leg, and pulled the trigger again. Mr. Ricks fled across the road to a supermarket where a second 911 call was placed. Mr. Ricks knew petitioner before this incident and identified him in a photographic lineup within hours of the crime.

Eric Mercer, a cook at Calendar's, was in a cooler and unaware of what was occurring until he observed David Breakwell on the other side of the cooler begging for his life saying, "please, don't shoot me." Mr. Mercer exited the other side of the cooler and hid until police arrived. Although Mr. Mercer knew petitioner, he openly stated that he did not see the perpetrator of these crimes.

At trial, witnesses testified that petitioner had told friends before these crimes that he had been planning a "lick" at Calendar's. He had even asked Clarence Brown to help him commit the crimes. Another of petitioner's friends, Barney Wilson, had given petitioner the weapon he used in these crimes about three

weeks prior to the murders. On the night before the Calendar's crimes, while Wilson and petitioner were riding around, Wessinger test-fired the weapon out the window of the vehicle. After three shots, the gun jammed (just as it did when petitioner attempted to kill Alvin Ricks).

Perhaps most compelling was the testimony of two of petitioner's victims, Alvin Ricks and Eric Armentor. Mr. Ricks, who would have been shot in the head and leg had petitioner's gun not jammed, recognized petitioner on the date of the shooting, identified him during a second 911 call from across the street from the Calendar's restaurant, identified him from a photographic lineup on the date of the murders, and identified him in court. Mr. Armentor saw petitioner outside the restaurant as he reported for work. As he was entering the restaurant, he was shot in the back. Thereafter, he saw petitioner with a gun in his hand.

The State also presented the testimony of several witnesses who had been told by petitioner that he had robbed the Calendar's restaurant and shot and killed two people. The morning after the robbery/murders Wessinger told his friend, Clarence Brown, that he "had a lick" indicating that he was "set for the rest of his life." Petitioner showed Clarence Brown a bundle of money in a plastic bag. Petitioner told Clarence Brown that "if the gun wouldn't have jammed, he would have killed all them, all the mother-fuckers." Thereafter, petitioner gave Clarence Brown some money for himself and for him to give to someone else.

Barney Wilson also saw Wessinger after the murders. He described petitioner's appearance as "kind of nervous, shook up." Petitioner also showed the

stolen money to Wilson and told him that he "did the lick at Calendar's, some people were shot, maybe hurt, maybe dead." Petitioner also told Wilson where he had hidden the murder weapon in an abandoned house near petitioner's mother's home. Wilson was asked to remove the weapon "[w]hen things cooled down." Wilson also accepted some money given to him by petitioner.

Several friends and family members testified that petitioner had been seen with large sums of money after the robbery/murders. The State also presented the testimony of the medical examiner who stated that Ms. Guzzardo was shot at very close range through the heart and bled to death within twenty to thirty seconds. The examiner stated that Mr. Breakwell was also shot once in the chest. Mr. Breakwell lived for several hours but eventually died as a result of his wounds.

After the robbery/murders, petitioner fled the scene on a bicycle. At around 2:30 p.m. the day after the robbery/murders, he left Baton Rouge. A relative, who had been in West Baton Rouge Parish for a funeral, allowed petitioner to ride with him to the vicinity of Dallas, Texas. After this relative discovered petitioner was wanted by the police, he notified the local authorities.

While Texas, petitioner told a friend, Tilton Brown, that he "had robbed his place of work, and that, you know, he had shot and killed two people." Petitioner told Brown that he had stolen around $8,000, that he rode his bike to Calendar's, that he shot one person as he entered, that he proceeded to the office where "the woman was and shot her and took a zipper bag of money." Petitioner also told Brown where the weapon, bag, and gloves were located. Ultimately, Tilton Brown

was contacted by Garland police, and he related these facts to police. On November 28, 1995, petitioner was arrested by officers of the Garland Police Department.

Based on this information, Baton Rouge police searched an abandoned house across the street from petitioner's mother's home. There they found the murder weapon, the money bag, the clothes worn by petitioner, and approximately $7,000 in cash. Thus, petitioner's own admissions were corroborated by the discovery and seizure of a Larsen .380 caliber pistol which ballistic tests confirmed was, in fact, the murder weapon.

Petitioner presented no evidence to rebut the substance of the State's case. The jury deliberated for thirty-four minutes before finding petitioner guilty of two counts of first degree murder.

Later, petitioner effectively mooted all of the efforts of his trial attorneys during the guilt phase by admitting the crime to a defense psychiatrist. Dr. Cenac recounted petitioner's version of events, which substantially agreed with the evidence as presented by the State. Petitioner told the psychiatrist that he had shot at least three people, and that after he heard that he was a suspect, he fled to the Dallas area.

SUMMARY OF THE ARGUMENT

The federal district court properly applied AEDPA standards of review in this case and found that the state courts' decisions were not unreasonable or otherwise in violation of federal law. Likewise, the federal district court determined that a

Certificate of Appealability should not issue. The Fifth Circuit reviewed the federal district court's decision and affirmed. The Fifth Circuit noted, "[b]ecause Wessinger has failed to make the requisite showing under ***Miller-El v. Cockrell***, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), we DENY Wessinger's motion for COAs as to all of these claims." ***Wessinger***, {2017 WL 3121975, at 1}. Similarly, in the instant application seeking certiorari from this Court, petitioner has again failed to show that his claims are debatable among jurists of reason. Petitioner's claims do not raise any significant issues for this Court to decide. The relevant inquiry in deciding whether a COA should issue in this case is already established by precedent issued by this court. Petitioner's complaints are mere garden-variety disagreements with the rulings of the lower federal courts who are bound to defer to the rulings of the state courts; thus, they present no issue worthy of debate or further review.

ARGUMENT

A. STANDARD OF REVIEW FOR GRANTING CERTIFICATE OF APPEALABILITY

A certificate of appealability is a jurisdictional prerequisite to an appeal denying a habeas corpus claim. Under AEDPA, 28 U.S.C. § 2253(c)(2), a convict seeking a COA must make "a substantial showing of the denial of a constitutional right." ***Miller–El v. Cockrell,*** 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). In ***Miller-El***, this Court clarified: "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues

presented are adequate to deserve encouragement to proceed further." *Id.* at 327, 123 S.Ct. at 1034 (citing ***Slack v. McDaniel,*** 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)). Under § 2254(d), when reviewing a claim adjudicated by a state court on the merits, courts defer to the state court's decision regarding that claim, unless the decision "[is] contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or ... [is] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* (quoting 28 U.S.C. § 2254(d)(1) & (2)). Thus, to succeed on the question of the propriety of the district court and the Fifth Circuit's denial of a Certificate of Appealability, the petitioner bears a heavy burden. In this case, it is burden which petitioner has failed to overcome.

B. PETITIONER HAS FAILED TO RAISE CLAIMS ABOUT WHICH REASONABLE JURISTS COULD DISAGREE WHEN THE APPROPRIATE STANDARD OF REVIEW IS APPLIED.

1. Trial Counsel were not ineffective under the Sixth Amendment during any phase of the trial.

a) The federal standard for reviewing a habeas corpus claim of ineffective assistance of trial counsel requires a "doubly deferential" review of the state courts' decisions and trial counsel's actions.

Petitioner alleges he received ineffective assistance of counsel during the various phases of the proceedings. Many of the numerous allegations of ineffectiveness are based on issues where the underlying claim has already been

affirmed on direct appeal, thus proving there was no attorney error. The State maintains that petitioner did in fact receive constitutionally effective counsel throughout these proceedings and that petitioner has failed to show how any error by his attorneys has prejudiced petitioner so as to deprive him of a fair and impartial trial as guaranteed by the Constitution.

The elements for ineffective assistance of counsel were set out by the United States Supreme Court in ***Strickland v. Washington,*** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In that case, the court articulated a two-pronged test for determining the adequacy of counsel's performance:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable.
>
> ***Strickland***, 466 U.S. at 687, 104 S.Ct. at 2064.

Thus, on review of the claim of ineffectiveness of counsel, the reviewing court must determine (1) whether counsel's performance was constitutionally deficient and (2) whether the performance prejudiced the defendant.

In determining whether counsel's performance was deficient under the first prong of the ***Strickland*** test, the relevant inquiry is "whether counsel's representation fell below an objective standard of reasonableness as informed by prevailing professional standards." ***Strickland*****,** 466 U.S. at 687, 104 S.Ct. at 2065.

In conducting this evaluation, the reviewing court must examine counsel's conduct in light of "all the circumstances" of the case and from the point of view of "counsel's perspective at the time" so as to "eliminate the distorting effects of hindsight." ***Strickland,*** 466 U.S. at 689, 104 S.Ct. at 2065. As this Court noted in ***Strickland,*** "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690-91, 104 S.Ct. at 2066.

Mere error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error has no effect on the judgment. ***Strickland,*** 466 U.S. at 691, 104 S.Ct. at 2066. To make this affirmative showing of prejudice the defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. 2068.

However, in reviewing claims of ineffective assistance of counsel arising in federal habeas claims, the burden on a petitioner is greatly increased by the standard of review that applies to state court decisions and the deference that is given to trial counsel's decision. In ***Burt v. Titlow***, --- U.S. ---, 134 S. Ct. 10, 13, 187 L. Ed. 2d 348 (2013), the Supreme Court noted, "When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a " 'doubly deferential'

" standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Citing* ***Cullen v. Pinholster****,* 563 U.S. 170, 190, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011).

The ***Cullen*** Court noted the Ninth's Circuit's misapplication of federal law, as follows:

> As with deficiency, the Court of Appeals found this case to be "materially indistinguishable" from ***Terry Williams*** and ***Rompilla v. Beard****,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). 590 F.3d, at 684. But this Court did not apply AEDPA deference to the question of prejudice in those cases; each of them lack the important "doubly deferential" standard of *Strickland* and AEDPA. See ***Terry Williams****,* 529 U.S., at 395–397, 120 S.Ct. 1495 (reviewing a state-court decision that did not apply the correct legal standard); ***Rompilla****, supra,* at 390, 125 S.Ct. 2456 (reviewing ***Strickland*** prejudice *de novo* because the state-court decision did not reach the question). Those cases therefore offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking. We have said time and again that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter, supra,* at ——, 131 S.CT., at 785 (internal quotation marks omitted). Even if the Court of Appeals might have reached a different conclusion as an initial matter, it was not an unreasonable application of our precedent for the California Supreme Court to conclude that Pinholster did not establish prejudice.
>
> ***Cullen,*** 131 S.Ct. at 1410-1411.

b) Applying the cited standard of review, it is not debatable among jurists that trial counsel was ineffective during voir dire.

Appellant's first claim of ineffective assistance of counsel relates to the voir dire of one specific prospective juror, Michele Waguespack. Petitioner's claim regarding jury selection was initially decided on direct appeal. In this case, forty-eight prospective jurors were questioned during the selection of the twelve jurors. Of

the excluded jurors, twelve were challenged by the State based on their views of the death penalty; petitioner only objected to three of these. Seven were challenged based on their knowledge of the case, six challenges were raised by petitioner, and one challenge was raised by the State. Three were excluded based on their relationship with petitioner or his family. One was excused for a hardship. Another was hard of hearing. The State used only three peremptory challenges, and petitioner used nine.

Furthermore, petitioner had the benefit of an expert in clinical psychology and who had a Ph.D. in statistical research to aid in jury selection.[19] In addition, petitioner accepted the twelve-member jury while holding four peremptory challenges. Likewise, the alternates were accepted with the use of one peremptory challenge by petitioner. Thus, one would assume that both the defense jury selection expert and the trial attorneys, not to mention petitioner himself, were satisfied with the jurors who were ultimately accepted and sworn in this case. Where, as here, petitioner's attorneys were fully active in the selection process, had the assistance of experts, properly challenged certain jurors for cause, and accepted the jury that was seated while holding four peremptory challenges, it is clear that no claim of ineffectiveness can prevail.

The Louisiana Supreme Court reviewed petitioner's claims that the trial judge erred by denying specific challenges for cause raised by defense counsel. It considered the claim and determined that it was not required to reach the merits of the issue, because petitioner had unused peremptory challenges remaining and

[19] R. Vol. VIII, p. 1801.

could not prove prejudice. ***State v. Wessinger***, 98-1234 (La. 5/28/99), 736 So. 2d 162, 178. Thus, in the instant case, the Louisiana Supreme Court has declined to review the underlying basis for the denial of cause challenge on the merits.[20]

During the post conviction relief phase of this case, Judge Anderson, who was the presiding judge at trial, and the state court commissioner reviewed and rejected any claim of ineffectiveness at voir dire. In the state court commissioner's recommendation to Judge Anderson regarding procedural matters, Commissioner Morgan noted that she saw no factual basis for this claim.[21] Further, she noted the following in regard to the Second Amended Petition for post conviction relief: "Juror Waguespack Responded affirmatively when asked if she could consider mitigating factors."[22]

The State noted for the edification of Judge Anderson, and by extension this Court, that jury selection in this case was comprehensive and included a "very extensive questionnaire" that provided a lot of information that the Court might not allow counsel to ask in court. Judge Anderson agreed, noting that the questionnaire was eight pages and did, in fact, include questions that he would not have allowed to be asked in court.[23]

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[20] Federal District Court Judge Brady noted this procedural rule in this denial of this claim. ROA.2708.

[21] ROA.1911-1912.

[22] ROA.1917.

[23] ROA.1931-1933.

On federal habeas review, the federal district court judge cited the colloquy between trial counsel and the prospective juror and found "this does not fall below an objective standard of reasonableness."[24]

Both the state courts and the federal district court were reluctant to second-guess trial counsel, especially in a case like this, where counsel failed to use their peremptory challenges to excuse this potential juror and where counsel had expert assistance during jury selection. Obviously, such a choice must be considered a strategic one that cannot be challenged under the ***Strickland*** jurisprudence.

The Fifth Circuit referenced the colloquy cited by the federal district court judge and found, "In light of this colloquy, a reasonable attorney could easily believe that, after clearing up her misunderstanding of the law regarding parole, this juror would actually be reluctant to impose the death penalty. In view of the highly deferential standard of review, reasonable jurists would not find the district court's dismissal of this claim debatable." ***Wessinger v. Vannoy***, 12-70008 (5th Cir. 2017) {2017 WL 3121975 at p. 3}

When this Court applies deference to both the decisions of the state courts and the actions of trial counsel, as well as counsels' strategic choices, this claim of ineffectiveness is surely not debatable.

Petitioner does not cite any federal law the state courts and federal district court failed to follow. The one case cited by him as a basis for reversal is ***Morgan v. Illinois***, 504 U.S. 719, 729, 112 S. Ct. 2222, 2229-30, 119 L. Ed. 2d 492 (1992).

[24] ROA.2012-2013.

However, the question in ***Morgan*** was different than the question presented in the instant case, i.e., a juror who would automatically vote for the death penalty in every case. However, both state and federal courts reached the factual conclusion as demonstrated in the record that Juror Waguespack indicated her willingness to return a not guilty verdict, as well as her willingness to consider mitigating evidence before rendering a death verdict. Although appellant is not happy with this result, both the state and federal courts applied the law as established by the Supreme Court. Thus, these rulings are not unreasonable, nor are they debatable.

c) Applying the cited standard of review, trial counsel was not ineffective during the guilt phase.

In the present case, petitioner initially claimed his trial attorneys were ineffective at the guilt phase based on sixteen specified alleged errors, but only briefs claims related to failure to investigate eyewitnesses, failure to highlight the lack of forensic testimony, failure to file/prevail on pretrial motions, and failure to ensure proper jury instructions. Thus, the remainder must be considered abandoned. The State maintains that none of the alleged errors remotely or arguably meets the standard set forth in ***Strickland*** to constitute deficient conduct on behalf of the attorneys, nor can petitioner establish any constitutional prejudice arising from these alleged errors. In addition, any strategic decisions by trial counsel are virtually unchallengeable. Thus, these claims were properly dismissed without the necessity of a hearing, the district court properly denied a COA, and the Fifth Circuit was correct in declining to grant a COA as well. Further, petitioner's

claims are based almost entirely on rank speculation with little no factual or legal support. Thus, the conclusion of the federal district court and the court of appeal that this claim is not arguable or debatable should be affirmed.

The Eyewitnesses.

First, petitioner complains that trial counsel should have attacked the credibility and alleged inconsistencies from the two surviving eyewitnesses to the armed robbery and murders that occurred in this case. Most of his arguments concern the credibility of the witnesses and seek to re-weigh the evidence presented at trial. Petitioner, in essence, requests this Court to reevaluate the evidence and substitute its judgment for that of the jury. The State maintains that this Court does not have jurisdiction to review the factual findings as determined by the jury. Instead, this Court is called upon to determine whether petitioner's claims are arguable or debatable among jurists in order to qualify for a COA. When considering that question, the Court must likewise consider whether trial counsel's actions were constitutionally deficient, and the state courts and federal district court rulings were unreasonable. The challenge petitioner levels against trial counsel is that they could have done more to attack the credibility of Eric Armentor and Alvin Ricks. However, despite any attacks that may be made against their testimony in hindsight, there is still overwhelming proof that petitioner was the robber/murderer in this case. The Commissioner summarized the nature of this overwhelming proof presented at trial.[25] In addition, statements made by petitioner

[25] ROA.1863.

after the murders to a friend resulted in the recovery of the murder weapon. Likewise, petitioner told various people that he "had a lick" indicating that he was "set for the rest of his life." Petitioner showed a friend a bundle of money in a plastic bag and indicated that "if the gun wouldn't have jammed, he would have killed all them, all the mother-fuckers."[26] Thereafter, petitioner gave this friend some money for himself and for him to give to someone else.[27] Finally and perhaps most telling, petitioner's own expert informed the jury that petitioner had essentially admitted that he had committed the crimes.

The federal district court judge largely agreed with the State's argument and even adopted it as his own:

> Guilt Phase
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> > Wessinger next claims counsel was ineffective during the guilt phase of his trial. (Doc. 120 at 196-216). He lists sixteen (16) specific complaints, many of which are also discussed as alternative grounds of relief in other claims above. The State contends none of these complaints amount to defective performance and further that Wessinger can show no prejudice even if they were. (Doc. 129 at 140-150). The Court **agrees with and adopts and incorporates the State's argument, finding that the overwhelming evidence against Wessinger argues against a finding of unreasonableness by the state courts, especially under this "doubly deferential" review**. *Pinholster*, 131 S.Ct. at 1403. The Court agrees with the state that the record either clearly belies Wessinger's claims or indicates a "virtually unchallengeable" strategic decision by trial counsel. *Strickland*, 466 U.S. at 690-91. Relief is denied on this claim.[28]

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[26] R. Vol. VIII, p. 1947.

[2727] R. Vol. VIII, p. 1948.

[28] ROA.271402715 [Emphasis added].

Against the backdrop of record evidence, petitioner cannot now rationally argue that his trial was tainted because his attorneys did not do enough to attack the credibility of two separate witnesses. All of the alleged inconsistencies argued by petitioner are vague, unsubstantiated, based on rampant speculation, and based on the false premise that petitioner's trial counsel did not have access to the State's evidence before trial.

In addition, petitioner would still be precluded from arguing ineffectiveness regarding these witnesses, because the decision to use or not use certain impeachment evidence rests with the trial attorneys as it is a strategic question. As the Supreme Court noted in ***Strickland,*** "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690-91, 104 S.Ct. at 2066. *See also* ***Austin v. McCotter,*** 764 F.2d 1142, 1144-45 (5th Cir. 1985) ("Strategic choices made on a reasoned basis, after adequate investigation, are not grist for an ineffectiveness claim").

Next, petitioner complains that his attorneys were ineffective for failing to conduct "the most rudimentary investigation," although the court record reflects that petitioner's trial attorneys had an investigator to assist them. In a Motion to Continue filed by his trial attorneys, they certified to the trial court that they had hired an investigator by the name of Clyde Brandon to assist in preparation for this case. In addition, they obtained the services of two mental health experts as part of

their trial preparation, Dr. Louis Cenac and Dr. Cary Rostow.[29] Despite the fact that two attorneys represented this petitioner at trial, and he had the assistance of experts and investigators, petitioner blatantly argues to this Court that no investigation was done. This is blatantly inaccurate and contradicted by the state court record.

In addition, in his post conviction relief applications, petitioner never sought to provide the court with any affidavits from Mr. Hecker, Mr. Rome, Mr. Brandon, Dr. Cenac, or Dr. Rostow to determine the extent of their investigation. Without such proof, petitioner cannot be heard to make such blatantly false assumptions and to have those assumptions serve as the basis for overturning the state court decisions. Here, the record evidence overwhelmingly shows that petitioner's attorneys were not ineffective for failing to investigate. Where, as here, the record clearly indicates that petitioner's assertions are inaccurate, there is no need to consider this ineffectiveness claim absent objective proof to the contrary. Petitioner made many allegations and speculations, but there was no objective proof offered to contradict the state trial court record.

The main problem suffered by petitioner's attorneys in the guilt phase of this trial was the overwhelming evidence against petitioner. It is quite impossible to argue absurd claims in good faith when confronted with the eyewitness testimony that was provided in this case, the recovery of the murder weapon, various witnesses who indicated that petitioner test-fired the murder weapon, the boasting

[29] *See* R. p. 213.

done by petitioner both before and after the murders that he was going to/did a "lick" at Calendar's, and the fact that the money was recovered from petitioner. Petitioner's attorneys in this case had the unenviable task of defending a guilty murderer who left a trail of guilt behind him that even a blind man could follow. The problem in this case is guilt, not lack of a consistent theme.

After reviewing the findings of the federal district court judge and the applicable law, the Fifth Circuit concluded:

> Wessinger does not specifically allege how counsel's errors would have undercut this evidence and changed the outcome of the proceeding. Similarly, Wessinger does not explain what evidence effective cross-examination of the State's witnesses would have produced. Although he states that Ricks was involved in the murder, this assertion is wholly conjectural. The same is true for his contention that Armentor was either unreliable or deceptive. Importantly, Wessinger does not contend that Armentor actually saw Wessinger's photos in the newspapers prior to identifying Wessinger. As for counsel's failure to highlight the lack of physical evidence, Wessinger does not explain how this failure could have affected the judgment in light of the overwhelming evidence against him. On this background, reasonable jurists would not debate the district court's conclusion that the state court's denial of this claim was reasonable. *See Richter*, 562 U.S. at 105, 131 S.Ct. 770.
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> ***Wessinger v. Vannoy***, 12-70008 (5th Cir. 2017) {2017 WL 3121975 at p. 4}

In conclusion, petitioner has failed to put forward any arguable claim which should lead this Court to believe that his attorneys were ineffective during the guilt phase of this trial. All of the claims failed to provide objective proof of attorney error, failed to show prejudice to the petitioner, or failed to show that counsels' strategic decisions were so ill-conceived as to render counsel's overall representation constitutionally defective. Since petitioner has failed to make a prima facie showing

and since the issues are legal ones that can be resolved without the necessity of a hearing, the decisions of the commissioner and state district judge were properly affirmed by the Louisiana Supreme Court. Likewise, the federal district court judge and court of appeal applied the proper reasoning in reaching his decision and should be affirmed by this court as well.

Forensic Witnesses.

Next, petitioner argues that defense counsel failed to "highlight to the jury the lack of physical evidence linking Wessinger to the crime."[30] Basically, petitioner is arguing that, despite the fact that the murder weapon was found where Wessinger said it was, he was convicted because trial counsel failed to argue that his finger prints were not on the weapon, the fact of which the jury was keenly aware. Petitioner also complains that trial counsel failed to challenge the reliability of the State's ballistics expert or medical expert. However, he fails to argue how this alleged failure was deficient attorney performance or prejudiced the defendant. Both experts had been qualified as experts on many occasions. Even now, counsel fails to provide any basis in fact for challenging them. Further, petitioner does not refute the notion that these were strategic decisions by trial counsel which are not subject to second guessing. Here the expert testimony paled in comparison to the overwhelming factual evidence of guilt and lack of remorse. The testimony of the State's experts had little to do with the factual conclusion that the jury reached. Petitioner has failed to establish either deficient performance by trial counsel or

[30] Petitioner's brief at. p.16.

prejudice to Wessinger, especially in light of the "doubly deferential" standard of review.

Pretrial Motions Practice.

Petitioner continues to second-guess the actions of trial counsel by arguing that trial counsel only prevailed on one of thirty pretrial motions. Further, he complains that trial counsel did not file a motion to challenge the selection of the grand jury foreperson in this case. He fails to mention in brief that Judge Brady agreed with the State's assertion that this claim was procedurally barred and that Fifth Circuit precedents were contrary to petitioner's legal arguments. Specifically, Judge Brady noted this Court's decision in ***Pickney v. Cain***, 337 F.3d 542 (5th Cir. 2003) foreclosed a finding of prejudice where trial counsel did not file a motion to quash. Thus, appellant cannot prevail on this issue.[31] Further, as noted in briefs below and in the ***Pickney*** case, even if trial counsel had prevailed on the grand jury foreperson motion, the State had every right and surely would have re-indicted petitioner for the armed robbery and murders he committed.

Jury Instructions.

Petitioner dedicates one-paragraph to the assertion that trial counsel was ineffective in failing to ensure that the appropriate jury instructions were given. He lists five assertions, but fails to brief them in any meaningful manner. The State maintains that he has failed to show that the state courts' or federal district court's ruling on this matter were unreasonable.

[31] ROA.2665-2669.

2. Appellant failed to establish that the State suppressed material, favorable evidence where the State provided "open file" discovery to him.

Petitioner makes a blanket allegation without any substantive showing herein that the State improperly failed to disclose material evidence in violation of ***Brady v. Maryland,*** 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny and that the suppression prejudiced the defense. The State maintains petitioner's claims are not arguable or worthy of further consideration.

Brady established that "the suppression by the prosecution of evidence favorable to the accused *upon request* violates due process where the evidence is material either to guilt or to punishment." *Id.*, 373 U.S. at 87, 83 S.Ct. at 1197 (emphasis added). The question of whether ***Brady*** also required the disclosure of impeachment evidence was resolved by the Supreme Court in ***United States v. Bagley,*** 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 48 (1985). Also, in ***Kyles v. Whitley***, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Court discussed the prosecutor's burden and further explained that excluded evidence is material if its inclusion would, to a "reasonable probability," have resulted in a different verdict and, thus, its exclusion "undermines confidence in the outcome of the trial." ***Kyles***, 115 S.Ct. at 1566.

In the instant case, several relevant motions were filed by the defense. Further, petitioner's trial attorneys filed the following discovery motions: Demand for ***Bernard*** Notice & Motion for Discovery of Information Relating to the Less

Auspicious Aspects of the Reputation of the Deceased[s] in this Case,[32] Motion to Compel Disclosure of Aggravating Circumstances and Information Relating to Mitigating Circumstances,[33] Demand for Notice of Aggravating Circumstances,[34] ***Jackson*** Demand for Notice of Any Bad Acts that the State may Wish to Use at Either Phase,[35] Motion to Produce, Inspect, Examine, and Test Physical Evidence,[36] Motion for Discovery and Inspection,[37] Motion to Compel Production of Initial Offense Report,[38] and a Motion to Compel Disclosure of Information Relating to Mitigating Circumstances.[39] Discovery motions were assigned to various court dates, including March 20, 1996, when First Assistant District Attorney John Sinquefield indicated that he turned over a packet of discovery materials[40] and again on March 26, 1997.[41] Further, the State cooperated with defense counsel and provided open file discovery throughout these proceedings. On September 27, 1996, Mr. Sinquefield noted that he had engaged in "extensive discovery proceedings outside of court"[42] with prior counsel. On March 26, 1997, after Mr. Rome and Mr.

[32] R. pp. 105-108.

[33] R. pp. 117-119.

[34] R. pp. 120-121.

[35] R. pp. 122-124.

[36] R. pp. 143-144.

[37] R. pp. 145-150.

[38] R. pp. 151-152.

[39] R. pp. 190-192.

[40] R. p. 839.

[41] R. pp. 903-980.

[42] R. pp. 881-882.

Hecker enrolled, Mr. Sinquefield informed the trial court that "we've already had extensive discovery proceedings. I basically granted them their requests, made the evidence pictures, statements, almost all physical evidence I have no objection to."[43] The record itself evidences the extensive nature of discovery motions filed by petitioner's trial attorneys.

Petitioner's contentions that the State failed to disclose ***Brady*** evidence in the form of statements given by various witnesses prior to trial must be viewed in light of the above. His claim that this constitutes ***Brady*** evidence is flawed in several other key respects.

First and foremost, the record of the state court trial proceedings indicates that the State cooperated fully with defense counsel and permitted open file discovery. During state post conviction and federal habeas proceedings, petitioner failed to rebut or refute that his trial attorneys had access to the prosecutor's files prior to trial. Thus, there is no factual basis for a ***Brady*** claim.

When viewed against the extensive nature of the discovery admittedly provided in this case, petitioner's assertion on post conviction that these materials were not provided to trial counsel are specious at best. They certainly do nothing to disprove the ample record proof that the State provided sweeping and broad discovery in this case. Petitioner failed to include any affidavit from his attorneys that would justify a belief in the proposition that the attorneys were unaware of or did not receive the statements which petitioner now alleges are ***Brady*** in nature.

[43] R. p. 935.

This is particularly troubling here where the state record reflects that the State provided discovery to the defense attorneys and where the defense attorneys have indicated on the record that they are satisfied with the State's responses and responsiveness. The trial court and post conviction relief judge recalled that the State had provided open file discovery. Thus, as a threshold matter, petitioner has failed to indicate that a factual basis exists for the instant ***Brady*** claim.

Second, none of the statements that were allegedly withheld would arguably constitute exculpatory evidence, nor were they material. To be considered material, the allegedly withheld evidence would have to be evaluated in light of the eyewitnesses who testified at trial.

The Commissioner's Preliminary Report contained such an evaluation and noted that each and every ***Brady*** claim alleged in the First Amended Petition for Post Conviction Relief was factually vague and conclusory. Following this Recommendation and prior to the trial judge setting the matter for argument or a status conference, counsel for petitioner filed the Second Amended Petition for Post Conviction Relief which included a bit more factual support for petitioner's ***Brady*** claim. However, the Commissioner issued the following Amended Recommendation:

> My review of the additional facts still results in my opinion **that the inconsistencies in statements is not "material", but is simply PCR counsel's interpretation of omissions in some of the witnesses' statements**. **It is not even apparent from the added facts which ones were known or made known during**

> **trial and which were not known by trial counsel at all. This claim is somewhat jumbled.** [Emphasis added][44]

The state trial court judge considered the trial record, the allegations made by petitioner, the State's Answer, the Commissioner's Preliminary Recommendation, and the Commissioner's notes as to the Second Amended Petition. Judge Anderson noted the "open file" discovery, the paucity of factual allegations, and the petitioner's burden of proof. In addition, he quoted trial testimony where appropriate. Regarding each of the allegations that were presented in state court, Judge Anderson determined that petitioner failed to establish an arguable ***Brady*** claim.

The overwhelming amount of evidence against petitioner assures that the confidence in the outcome of petitioner's trial was not undermined by the alleged ***Brady*** evidence. Taking all of the facts introduced at trial into consideration, it cannot be said that any alleged nondisclosure error undermined the confidence in the outcome of petitioner's trial or caused a different result to be reasonably probable. Petitioner received a fair trial, and the result was reliable.

Additionally, both the Commissioner's Preliminary Report and the district judge's ruling on this issue reject the notion that any of petitioner's claimed ***Brady*** violations are material. Judge Anderson, who was the trial judge in this case, specifically noted that this case included "almost open file" discovery. He discussed the alleged discrepancies between the witnesses' trial testimony and their previous statements. He noted that there is always some variance, but that the alleged

[44] ROA.1912. [Emphasis added].

discrepancies in this case did not "seem to be material."[45] In regard to the remaining allegations, he determined that they were discussed at trial, either on direct or cross examination. Thus, the state trial court's decision on the alleged ***Brady*** violations was wholly justified. The finding was affirmed by the state's highest court. These ruling are entitled to deference and should be re-affirmed in this habeas proceeding.

The federal district court judge found that the state courts' determinations were not unreasonable.[46] Although he appeared to assume that the evidence was not turned over to the defense, no court, state or federal, has factually found that the State did not turn over the purported ***Brady*** evidence. The federal district court merely found that the defense team did not appear to have or use it at trial, a wholly different conclusion than that the State failed to meet its ***Brady*** obligations. Here, the state court noted the open-file nature of this case and then also decided materiality. However, the federal district court judge took the expedient of assuming non-disclosure without ruling on the issue and then determined that they purported material was not material. The federal judge's assumption in this case is not a finding that the state courts' rulings on the disclosure question were in error. Thus, the State maintains that there has been no finding of non-disclosure, and, even if there had been, the allegedly suppressed evidence is not material. This is hardly a case that presents a debatable ***Brady*** violation for granting a COA. The federal district court judge determined as much and ruled that no COA should issue

[45] ROA.1913.

[46] ROA.2683.

on this issue. Thus, under the AEDPA, appellant has failed to meet his burden of proof as to his ***Brady*** claims.

The Fifth Circuit ruled, as follows:

> The district court accepted that "it is clear that certain information did not make it into the hands of the defense team for use at trial," and that this evidence was favorable. But the court concluded that, given the "quantity and quality of the evidence of guilt that was part of the record before the state court," the evidence was not material under Brady. We agree.
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> *********
>
> Wessinger's brief on the issue of materiality is entirely conclusory and devoid of any meaningful argument. We therefore find that the state court reasonably concluded that Wessinger failed to satisfy Brady's requirements, see *Richter*, 562 U.S. at 105, 131 S.Ct. 770, and thus that reasonable jurists would not debate the district court's conclusion.

Wessinger v. Vannoy, 12-70008 (5th Cir. 2017) {2017 WL 3121975 at p. 5}.

The State submits that the Fifth Circuit's per curiam conclusion that this claim is conclusory and devoid of meaningful argument and the conclusion that reasonable jurists would not debate the federal district court's conclusions are correct and should be affirmed by this court.

CONCLUSION

Based on the foregoing, the State requests this Court to affirm the decision of the Middle District Court of Louisiana. Likewise, the findings and conclusions of the Fifth Circuit Court of Appeal, when reviewing the application for COA, are correct and should be affirmed by this court.

RESPECTFULLY SUBMITTED,

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