***** CAPITAL CASE *****

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TODD WESSINGER,

Petitioner,

VERSUS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

No attorney appointed to represent petitioner Todd Wessinger in the Louisiana state courts, either at his capital jury trial or in state post-conviction review, conducted a mitigation investigation into his background as required by settled professional norms. That investigation was finally conducted by federal habeas counsel, and it yielded powerful proof of petitioner's own mental illness and brain damage, as well as a profound history of mental illness, alcohol abuse, and violence among his family members. Because that information was developed only after the state court proceedings ended, it was presented for the first time to the federal habeas court as the basis for a procedurally defaulted ineffective assistance of trial counsel claim. The federal district court granted relief after finding that the inadequacy of state post-conviction counsel constituted "cause" to overcome the procedural default of the claim under *Martinez v.* Ryan, 566 U.S. 1 (2012). A divided panel of the Fifth Circuit reversed, concluding that state post-conviction counsel's failure to conduct a mitigation investigation was attributable, not to counsel's inexperience or errors, but to the state post-conviction court's denial of a motion for funds for a mitigation investigator.

The questions presented are:

1. Where a state post-conviction court refuses a request for funds to conduct a mitigation investigation in a death penalty case, does counsel nevertheless have a duty himself or herself to investigate mitigation evidence?

2. Does a state court's denial of capital post-conviction counsel's request for funds to conduct a mitigation investigation constitute "cause" to overcome procedural default where that denial operated as an objective factor external to the defense which impeded development and presentation of an ineffective assistance of trial counsel claim during the state court proceeding?

3. Does a state court's denial of capital post-conviction counsel's request for funds to conduct a mitigation investigation render the available state corrective process ineffective to protect the rights of the applicant under 28 U.S.C. § 2254(b)(1)(B)(ii), such that state-court exhaustion of a claim of ineffective assistance of trial counsel based on the results of such an investigation is not required?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 864 F.3d 387 (5th Cir. 2017), and is set forth at App. 1.

JURISDICTION

On July 21, 2017, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming the district court's Order. App. 1. On August 21, 2017, the Fifth Circuit denied rehearing and rehearing en banc. App. 12. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The Petition for writ of certiorari is due on November 20, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amend VI to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2254(b)(1)(B)(ii):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> > circumstances exist that render such process ineffective to protect the rights of the applicant.

STATEMENT OF THE CASE

A. Introduction

Petitioner Todd Wessinger was represented at his first-degree murder trial in Baton Rouge, Louisiana by two attorneys who were appointed less than six months before trial began. During this period, trial counsel did not conduct a mitigation investigation or prepare a social history of petitioner and, instead, primarily attended to counsel's personal and family issues. This failure resulted in a State case for guilt and death that was not tested by the defense and an all-white jury that found petitioner, an African-American, guilty of killing two white people and then sentenced him to death after a defense penalty phase, including cross-examination, that lasted less than four hours.

In state post-conviction, petitioner was represented by *pro bono* counsel, a first-year associate at a New Orleans law firm. As with trial counsel, post-conviction counsel failed to conduct a mitigation investigation or prepare a social history of petitioner despite counsel's assessment, based on the state trial record, that trial counsel's penalty phase performance was "awful" and a "rank failure." Post-conviction counsel requested, without success, funding for investigative assistance from various state entities and filed a motion for funds for a mitigation investigator in the state trial court. The state trial court denied the motion for lack of a sufficient showing of need "at this time." Counsel did not litigate the issue beyond the state trial court nor did he conduct a mitigation investigation himself. The result was a state post-conviction petition that asserted a claim of ineffective assistance of trial counsel at the penalty phase based solely on the state trial court record.

In federal habeas corpus proceedings, petitioner was appointed new counsel who conducted a thorough mitigation investigation and social history. This investigation revealed powerful mitigation that was never presented in the state courts either in the penalty phase trial or in state post-conviction. The results of this mitigation investigation formed the basis for a new, albeit procedurally defaulted, claim of ineffective assistance of trial counsel at the penalty phase raised in federal habeas. Petitioner sought to excuse this default under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), due to initial review counsel's ineffectiveness in state post-conviction proceedings.

Following an evidentiary hearing over the course of five days, the federal district court granted federal habeas relief and ordered a new penalty phase trial, concluding that both trial counsel and post-conviction counsel were prejudicially ineffective in failing to conduct a mitigation investigation. A panel of the Fifth Circuit reversed, with one judge dissenting, concluding that post-conviction counsel's admitted failure to conduct a mitigation investigation and raise the penalty phase ineffectiveness claim raised in federal habeas was "because the state post-conviction court did not grant his motion for funds, not because of any deficiency on [counsel's] part." App. 8.

Petitioner seeks certiorari review of the divided panel opinion for all the reasons set forth more fully herein.

B. State Capital Trial Proceedings

Petitioner was charged in state court in Baton Rouge, Louisiana, with two counts of first degree murder for the November 19, 1995 shooting deaths of Stephanie Guzzardo and David Breakwell. At the time of his first-degree murder trial on these charges, which began on June 16, 1997, petitioner was represented by Greg Rome and Joseph William "Billy" Hecker, who is now deceased, both of whom were appointed as counsel for petitioner on January 7, 1997, barely six

months prior to trial. State Appellate Court Record ("SAR") 7, 11 (minutes of court) (made a part of the federal court record as Doc. No. 39). Jury selection began on June 16, 1997, and eight days later, on June 24, 1997, petitioner was convicted on both counts. SAR 12-25 (minutes of court).

The next day, June 25th, the same jury returned death sentences on both counts following a defense penalty phase presentation that lasted less than four hours, including cross-examination. SAR 25-28 (minutes of court). Hecker, who was responsible for the penalty phase of the trial, admittedly did not conduct a mitigation investigation, nor did he employ someone to do so.

The Louisiana Supreme Court affirmed the convictions and sentences on direct appeal. *State v. Wessinger*, 98-1234 (La. 5/28/99), 736 So.2d 162.

C. State Post-Conviction Proceedings

In January of 2001, the Louisiana Supreme Court appointed Soren Gisleson, a first-year associate at a New Orleans, Louisiana law firm, to represent petitioner in state post-conviction proceedings following Gisleson's firm's agreement to accept *pro bono* representation of a death row inmate. ROA.1848; ROA.3822-3823; ROA.3832. Prior to his formal appointment, in late December 2000, Gisleson filed a two-page "shell" petition. ROA.1850; ROA.3827; Pet. Ex. 2 (exhibit numbers reference petitioner's federal evidentiary hearing exhibits). At a status conference in February of 2001, the state trial court gave Gisleson 60 days, until April 10, 2001, to file an amended petition. ROA.3830.

Gisleson, who had no capital training or experience, or any other experience as a practicing lawyer, and no assistance from any lawyers in his firm, informally reached out to the state and local public defender boards for both funding and assistance, and neither were able to help. ROA.3834-3835. Gisleson contacted attorneys at the Louisiana Crisis Assistance Center (LCAC), who declined

to get involved since, at that time, Gisleson had just 30 days left to file the amended petition. *Id.* Gisleson also contacted the director of the newly-formed Capital Post-Conviction Project of Louisiana (CPCPL), which had state funding for its own cases but not for the cases of *pro bono* counsel like Gisleson, but was willing to provide general affidavits detailing the need for mitigation investigation and funding for a mitigation investigator in capital state post-conviction. ROA.3837.

On March 12, 2001, Gisleson filed a motion, with the CPCPL affidavits, requesting funding for investigative assistance to establish the factual basis for claims of ineffective assistance of counsel at the guilt and penalty phases. Pet. Ex. 4, p. 4. The motion included general allegations that trial counsel's preparation of the penalty phase was "woefully inadequate" and that "there is every reason to believe that such investigation would produce information that should have bene [sic] presented to Mr. Wessinger's jury." Pet. Ex. 3, p. 5.

On April 5, 2001, Gisleson filed a motion to continue the filing deadline for the amended petition, alleging that he was unable to render effective assistance because of inadequate time to conduct an investigation, to resolve funding issues regarding an investigation, and to research and brief the legal issues. Pet. Ex. 4. The director of CPCPL once again provided an affidavit in support, this time detailing the crisis in Louisiana's state post-conviction system that led to a state statutory right to post-conviction counsel in capital cases and the creation of CPCPL to effectuate that right. Pet. Ex. 4, Affidvavit of LeBoeuf, pp. 2-3. The affidavit also detailed the state bar association's efforts to recruit *pro bono* representation from major law firms, such as Gisleson's, in an attempt to fill the need for post-conviction counsel arising after the dissolution of the state death penalty resource center in 1999 and before CPCPL began operation in March of 2001. *Id.*, pp. 4-6.

On April 10, 2001, the filing deadline, Gisleson, having gotten no relief from the state trial court on either motion, appeared before the court "with hat in hand," stating that he could not meet the deadline, at which time the state trial court gave him an additional 60 days, until June 11, 2001, to file an amended petition. ROA.3844; State Court Post Conviction Record (SPCR) Vol. X, Transcript of Motion to Continue April 10, 2011 Deadline for Filing Amended Petition for Post-Conviction Relief and Ex Parte Motion on the Need for Investigative Funding in Order to File an Amended Petition for Post-Conviction Relief, p. 29. At the April 10th hearing, the state trial court also ordered Gisleson to petition the Louisiana Indigent Defender and Assistance Board (LIDAB), who the court found to be responsible for funding the post-conviction investigation, to determine if the board would actually fund the investigation and report back to the court. *Id*., pp. 25, 29. Further, the state trial court set an April 24, 2001 hearing date if there were "any problems with getting funding," at which time the court told Gisleson, "if you have any evidence to present, you better have it that day because it won't be continued to another day. That issue will be resolved that day." *Id.*, pp. 29-30. On April 16, 2001, Gisleson notified the state trial court that LIDAB, CPCPL and the Baton Rouge Indigent Defender Board took the position that they were not responsible for providing funding in post-conviction for petitioner. Notice to Court of Funding Issues, SPCR, Vol. II.

On April 23, 2001, Gisleson filed a motion to continue the April 24th hearing for three weeks because petitioner "has been patently unable to secure the testimony of necessary experts or provide experts with the time to review 'bare-boned' facts and evidence of the case" to determine what expert services are needed. ROA.3843; Pet. Ex. 5, p. 1. At the April 24, 2001 hearing, Gisleson did not appear because he was sick, and two other attorneys from his firm appeared in his place. SPCR, Vol. X, Transcript of Status Conference, Motion to Continue April 24, 2001 Hearing and Motion

for Reconsideration of the Denial of Proceeding Ex Parte, p. 2. Counsel for petitioner did not present any evidence at this hearing and, based on its finding of an inadequate showing of need, the state court denied the request for funding for experts "at this time." SPCR, Vol. XI, Transcript of Status Conference, Motion to Continue April 24, 2001 Hearing and Motion for Reconsideration of the Denial of Proceeding Ex Parte, pp. 13-14.

Gisleson did not take writs to the Louisiana Supreme Court from this ruling, nor did he file another request for expert funding with any additional showing of need as required by the state court. Instead, a week before the June 11th deadline, on June 5, 2001, Gisleson filed a motion to withdraw with the Louisiana Supreme Court, seeking to be relieved of the representation based on his admitted ineffectiveness. Pet. Ex. 7, p. 2. Gisleson also drafted an amended petition and filed it by the June deadline. ROA.3857; Pet. Ex. 6. This 136-page pleading was the product of a template of a master petition that included every conceivable issue that could be raised in state post-conviction that Gisleson had been given by LCAC attorneys and that was based primarily on Gisleson's reading of the state court record. ROA.3845; ROA.3858-3859.

While Gisleson concluded, based on his review of the penalty phase trial transcript, that trial counsel's performance was "awful" and a "rank failure" and a penalty phase ineffective assistance of counsel (IAC) claim should be raised, he did not do any mitigation investigation – either himself or with the help of a mitigation investigator -- in support of that claim and never made any strategic decision not to pursue such an investigation prior to filing the amended petition. ROA.3852; ROA.3907. As a result, besides references to the trial transcript, the penalty phase IAC claim in the amended petition included only "a couple of discrete facts" -- that petitioner suffered from convulsions and head trauma as a child -- that Gisleson may have found in the file or from a general

phone conversation with petitioner's mother, "but otherwise this was just sort of canned law statements." ROA.3859; Pet. Ex. 6, p. 96.

After Gisleson's June 2001 filings in the state courts, he heard nothing from either the state trial or supreme court and assumed, without making any effort to check court records, that he was "out of the case, that they are just looking for some other lawyer to replace me." ROA.3861. For the next *twenty months*, he did absolutely nothing on the case. ROA.3861-3864.

When, in February of 2003, Gisleson was served with the State's opposition to his amended petition, he literally ran to the Louisiana Supreme Court building in New Orleans, where he found in the court record a letter dated June 20, 2001, which had been mailed to his old home address, denying his motion to withdraw. *Id.*; Pet. Ex. 7. Upon learning that at that point the state trial court had not issued a ruling on the amended petition and had referred the case to a commissioner for review, Gisleson felt that he had "an opportunity to try to do something" and decided to file a second amended petition. ROA.3865. He convinced his firm to pay $5000 to attorney Danalynn Recer, who had been referred to him by CPCPL, to consult with him in that effort. ROA.3865-3867.

Six months later, on August 1, 2003, Gisleson filed a second amended petition. ROA.3869-3870; Pet. Ex. 8. Significantly, neither Gisleson nor anyone working on his behalf, nor Recer or anyone working on her behalf, did any mitigation investigation during the six-month period prior to that filing. ROA.3871-3873. Nor did Gisleson re-raise the issue of investigative funding with the state trial or Louisiana Supreme Court. As a result, the penalty phase IAC claim in the second amended petition continued to be based only on trial counsel's penalty phase failures as reflected in the trial transcript, with a passing reference to a Wessinger family history of high blood pressure and "cardio" problems and Wessinger's history of childhood seizures. Ex. 8, pp. 37, 44.

At a September 3, 2003 status conference, the state trial court denied relief, dismissing all claims in the first amended petition as procedurally barred due to lack of factual support, and denying relief on the merits on the IAC claims in the second amended petition. ROA.1919; ROA.3875; Pet. Ex. 9; App. 91. The Louisiana Supreme Court affirmed. *State ex rel. Wessinger*, 2003-3097 (La. 9/3/04), 882 So.2d 605.

D. Federal Habeas Proceedings

Gisleson filed a habeas petition in federal district court raising the same claim for ineffective assistance of penalty phase counsel that he raised in the state courts. ROA.28. This claim, as in the state post-conviction courts, was based on trial counsel's penalty phase failures as reflected in the transcript of the penalty phase of the trial. ROA.72 through ROA.74.

1. The Procedurally Defaulted Penalty Phase Ineffective Assistance Claim

After additional counsel enrolled, petitioner filed an Amended Petition for Writ of Habeas Corpus, which included a claim (Claim IX-C) that trial counsel was ineffective at the penalty phase of his first- degree murder trial. ROA.1684. The claim alleged that trial counsel failed to secure the services of a mitigation specialist and did not conduct a social history investigation of petitioner, and instead called witnesses counsel met for the first time in the hallway outside the courtroom and presented damaging testimony through counsel's own unprepared expert witnesses. ROA.1684.

Petitioner also alleged what trial counsel would have discovered had he conducted a proper investigation, including powerful mitigation regarding petitioner's family history of mental illness, alcohol abuse and violence and petitioner's own mental illness, none of which had been presented to the state post-conviction court. ROA.1684-1708. This mitigation included that petitioner's

maternal and paternal families have a significant history of seizure disorders, mental retardation, cerebral palsy and other neurologic and cognitive impairments and alcohol abuse; that petitioner struggled with neurologic and psychiatric symptoms that adversely affected his ability to function over the course of his life; that petitioner experienced repeated and severe seizures as a child and was medicated with Phenobarbital; that petitioner, who faced great difficulty in school and fell behind his peers academically, suffered ridicule, humiliation and physical abuse by his father who singled him out for cruel treatment; that neuropsychological testing of petitioner shows signs of significant psychomotor impairment, right hemisphere abnormality, deficits associated with fetal alcohol spectrum disorder and other signs of cerebral dysfunction and moderate brain impairment; that petitioner was raised by parents whose world view, handed down to their children, was shaped by the circumstance that they grew up on Louisiana plantations that remained little changed since slavery, and who constantly struggled to make ends meet in raising their children in poverty in segregated Baton Rouge; that petitioner was raised by a father, an alcoholic, who was a violent man who hit, pushed, and threatened his wife when he was drunk.

In its Memorandum in Opposition to Petition for Writ of Habeas Corpus, ROA.2447, respondent alleged that in this penalty phase ineffective assistance of counsel claim "petitioner goes way beyond what he presented to the state courts for consideration of this claim below. As such, he should not be permitted to alter the habeas record by including items and discussions that he did not present to the state courts." ROA.2597.

2. The District Court's Rulings Pre- and Post- *Martinez v. Ryan*

The district court initially denied habeas relief on all claims. ROA.2561; App. 12. Following this Court's decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), petitioner filed a motion pursuant to

Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment denying the petition. ROA.2732; ROA.2746. While acknowledging that the penalty phase IAC Claim IX-C was not fairly presented to the Louisiana state courts and thus was procedurally defaulted, petitioner argued that this was no barrier to review by the federal courts because state post-conviction counsel had failed to provide effective representation in state post-conviction and because the state post-conviction court refused to provide requested funding for mitigation and other expert assistance and, therefore, any procedural default should be excused. ROA.2761-2769.

In granting the Rule 59(e) motion, the district court concluded that the evidence alleged in support of the penalty phase ineffectiveness claim was materially and significantly different and stronger than what was presented to the state court. ROA.3226; App. 123.[1] As a result, the district court concluded that Claim XI-C had not been fairly presented to the state courts and was therefore procedurally barred. ROA.3226-3227; App. 123-124. Nevertheless, the court concluded that petitioner's procedural default would not bar merits review if petitioner could show cause and prejudice as contemplated in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). ROA.3227-3228; App. 124-125; *see also* ROA.3228-3229; App. 125-126. The district court also concluded that it would handle both inquiries – initial-review counsel's ineffectiveness and trial counsel's penalty phase ineffectiveness – at one hearing. ROA.3229; App. 126. That hearing was held on January 12-13, 2015, ROA.3546, ROA.3547, and March 18-19, and 23, 2015. ROA.3568, ROA.3569, ROA.3570.

[1] Petitioner appealed the denial of relief and a certificate of appealability on the remaining claims, which was affirmed on appeal and from which petitioner has filed a petition for writ of certiorari in *Wessinger v. Vannoy*, No. 17-6446.

3. The Federal Evidentiary Hearing

At the federal evidentiary hearing, petitioner presented the testimony, along with supporting documentation, of initial-review counsel Soren Gisleson; Louisiana state post-conviction expert Gary Clements; Wessinger family members and friends Joseph Kelly, Troy Wessinger, Leroy Helire, Jr., John Williams, Demetric Alexander, and Sharon Alexander; neuropsychatrist Dr. George Woods; mitigation expert Russell Stetler; and capital defense expert Michele Fournet. *See id.* Respondent did not present any witnesses.

a. Initial Review Counsel's Ineffective Assistance

Gisleson testified that he did no investigation of his own and did not hire an investigator, mitigation specialist or mental health expert to assist him in investigating and preparing his first amended petition alleging penalty phase counsel's ineffectiveness. ROA.3847. Nor did he obtain any medical records, school records, employment records or family history records of petitioner. ROA.3848. He did not interview any witnesses, friends, teachers, coaches, or family members of petitioner, and only had one or two conversations over the phone with petitioner's mother and brother about guilt-related issues and a few conversations with his client. ROA.3849; ROA.3860.

Gisleson denied that his deficiencies in investigating penalty phase ineffectiveness were the result of a strategic decision. ROA.3852. Gisleson admitted that, without investigative assistance and without being adequately familiar with post-conviction law and procedure, he could not and did not effectively assist petitioner in state post-conviction. ROA.3856. As Gisleson testified, the amended petition he filed in June of 2001 was "inadequately investigated, rushly put together based on a civil lawyer's understanding of what to do, a first-year civil lawyer's understanding of what to do." ROA.3864-3865.

Gisleson admitted that during the twenty-month period after June 11, 2001, until February of 2003, he did nothing on petitioner's case as he assumed that he was out of the case even though he never received an order removing him as counsel. ROA.3854, 3862-3863. As a result, in February of 2003, after being served with the State's response to his amended petition and learning he was still counsel for petitioner, Gisleson found himself in the same posture as he was in June of 2001, with insufficient time, funding or experience to represent petitioner effectively. ROA.3866. Once again, he did not hire a mitigation specialist to do a social history or mitigation investigation, nor did he conduct any mitigation investigation himself, and he never made a strategic decision to do no more than he did on the penalty phase IAC claim. ROA.3871-3872, 3876.

b. Penalty Phase Trial Counsel's Ineffective Assistance

At the time of petitioner's first degree murder trial in June of 1997, he was represented in the penalty phase by Joseph William "Billy" Hecker, who was appointed as counsel for petitioner less than six months prior to trial, in January of 1997. ROA.853; Pet. Ex. 62, p. 1. Hecker inherited the case from petitioner's former attorney, Orscini Beard, who had not done any investigation on the case or sought any funds for experts and had been removed because of his own arrest. *Id.* Additionally, during the six months prior to trial, Hecker suffered a serious personal loss as a result of his father's month-long serious illness that ended in his father's death on April 7, 1997. *Id.* During this traumatic time, Hecker "effectively was not a lawyer," just "a son." ROA.854; Pet. Ex. 62, p. 2. Just two weeks after his father died and just seven weeks before petitioner's trial, Hecker, already overwhelmed, was forced to take custody of his 14-year-old daughter and set up a home with her. ROA.854-855; Pet. Ex. 62, pp. 2-3.

Hecker did not deliberately choose to abandon any area of investigation, but "simply lacked adequate time, funding and focus." Pet. Ex. 63, p. 1. He had no mitigation specialist investigating the case in mitigation and, as a result, could only put on character witnesses to say that petitioner was a good person who suffered from alcoholism at the time of the murders. *Id.*, pp. 1-2. Hecker never learned of the Wessinger family history of seizure disorders, mental retardation and other major health problems, and did not know that petitioner had neurological issues and suffered from seizures as a child. *Id.*, p. 2. Furthermore, due to time constraints and issues in his personal life, Hecker was unable to work with the mental health experts he had hired, Drs. Carey Rostow and Philip Louis Cenac, and put them on the stand in the penalty phase without first discussing with them their testimony. *Id.* Hecker denied that it was his strategy to put on the stand such important witnesses without knowing the full content of their testimony so that he could decide whether to call them. *Id.* He did not expect that, in their testimony, "they would call [his] client a liar, dangerous, and testify that he had confessed," and he would not have called them as witnesses had he known of this testimony and was shocked and not prepared for how to handle it. *Id.*[2]

Troy Wessinger, petitioner's older brother, served as the family liaison with both attorneys Beard and Hecker. He confirmed that Beard did nothing on the case, and never conducted any investigation, during the time he represented petitioner. ROA.4095-4101. Troy also testified that he and six other family members had only one meeting for about an hour with Hecker during the six-month period prior to trial. ROA.4102-4104; ROA.4165. Hecker asked for some "good character"

[2]At the penalty phase trial, Dr. Rostow, a psychologist, testified that petitioner's way of conducting his life is "deviant and somewhat self-serving," he sees the world as a place to meet his needs, and he tends to be "somewhat exploitive." State Court Appellate Record (SAR) at 2151. According to Dr. Rostow, petitioner committed the killings "as something of a lifestyle and something of a business decision in a perverse sense." SAR at 2154. Dr. Cenac, a psychiatrist, testified that petitioner, who had "drunk himself sober" on the day of the crime, initially denied he committed the crime, and then admitted to it the Sunday before trial. SAR at 2177-79.

witnesses for petitioner, and Troy gave him the names of a few ladies whose yards the family mowed growing up, two of whom Hecker called at the penalty phase trial. *Id.* Additionally, the family members and family friends who ended up testifying at the penalty phase came from Troy asking them to come to court to talk to the attorney about being character witnesses. ROA.4108. At most, Hecker talked to these witnesses rounded up by Troy – the bulk of the penalty phase witnesses – in the hallway of the courthouse during the trial and then put them on the witness stand without any preparation. *Id.*

Mitigation expert Russell Stetler testified that, in his expert opinion, Hecker did not perform the thorough mitigation investigation required of him under prevailing professional norms at the time. ROA.4348-4349. As Stetler explained, Hecker had the ultimate responsibility for directing and supervising the mitigation investigation and assuring that it is done in a timely fashion as well as retaining experts and spending time with those experts in order to see what they were learning and to prepare them to testify. *Id.* This obligation was not satisfied by counsel's one-hour group meeting of family members all together, as described by Troy Wessinger. ROA.4352; ROA.4358. Hecker also had the responsibility to provide the experts with independently corroborated objective information about petitioner's development and functioning, which he did not do. ROA.4349.

Likewise, capital defense expert and Baton Rouge-based criminal defense lawyer Michele Fournet testified that, in her expert opinion, Hecker's performance in the penalty phase of petitioner's trial was deficient in that he failed to comply with prevailing professional norms at the time the case was tried as reflected in American Bar Association Guidelines in effect at the time as well as the guidelines manual provided by LIDAB and the training that was available at the time regarding the best way to litigate capital cases. ROA.4396. As Fournet explained: "[t]he mitigation

investigation is the absolute centerpiece of defending a capital case" at the penalty phase trial. ROA.4403. In her review of the records, the trial transcript and all of the testimony presented at the evidentiary hearing in March of 2015, Fournet saw absolutely no evidence that Hecker conducted any sort of thorough mitigation investigation under prevailing professional norms in Baton Rouge, Louisiana in 1997. ROA.4414-4415.

Fournet also testified that the record and evidence reflected penalty phase counsel's failures in connection with the testimony of Dr. Cenac and Dr. Rostow, neither of whom were provided any social history of petitioner and his family beyond what petitioner told them, including that counsel did not even talk to them before they testified, which Fournet considered "almost inconceivable." ROA.4420, ROA.393. ROA.4427, ROA.4430. As a result, their testimony was not only not helpful, but quite harmful, to the point that the prosecutor was able to exploit it to the state's advantage at the penalty phase hearing. ROA.4419. For example, the prosecutor reminded the jury in the penalty phase closing that petitioner lied to his own mental health experts about his commission of the crime, citing to Dr. Cenac's testimony, and argued "[w]here's any remorse in that?" SAR at 2239. Citing to Dr. Rostow's testimony, the prosecutor argued to the jury multiple times – in fact, it became a theme of his closing – that petitioner "made a lifestyle and business decision" in taking money and executing two people. SAR at 2237, 2240 and 2244-45.

Regarding the number (17) of witnesses Hecker called at the one-day penalty phase, Fournet explained that it is not the number of witnesses, but the quality of the testimony they provide, informed by a proper mitigation investigation, that matters and that was missing in petitioner's penalty phase trial. ROA.4432-4433. Fournet described Hecker's penalty phase presentation as a "slapdash, scattershot, check-this-off-the-list presentation" that was not effective. ROA.4450.

Further, given that it superficially and inaccurately presented petitioner as someone with all the privileges of a good home and family who threw it all away out of selfishness, the penalty phase presentation did not give the jury any understanding of why petitioner did what he did. ROA.4433-4434.

c. The Prejudice Resulting from Counsel's Ineffective Assistance

Dr. George Woods, a physician specializing in neuropsychiatry, testified that, in his expert opinion, petitioner suffers from a major neurocognitive disorder. ROA.4277. In reaching this expert opinion, Dr. Woods looked at petitioner's family history and genetics as reflected in the mitigation investigation conducted by federal habeas counsel and found a significant maternal and paternal history of cardiac disease and cerebrovascular disease of the blood vessels of the heart, as well as learning disabilities and mental retardation, all of which was relevant to his diagnosis. ROA.4278-4380, ROA.4286, Pet. Ex. 60.

Dr. Woods also looked at petitioner's environmental history and medical and psychological information, gathered as a result of federal habeas counsel's mitigation investigation, and concluded that at some point in his young life, petitioner had a pediatric stroke in the left ventricular part of his brain, the left frontal lobe. ROA.4287. Additionally, the brain imaging, including the highly reliable MRI which was first developed in 1973, showed a hole in petitioner's brain that occurred because of a cerebrovascular illness. ROA.4291-4292, Pet. Ex. 61. Dr. Woods emphasized that the science regarding pediatric strokes as well as the brain imaging and neuropsychological testing would have been available in 1997, when Hecker represented petitioner. ROA.4295.

Dr. Woods explained the significance of his findings as making sense of why petitioner was so different from others in his family. ROA.4299. The part of petitioner's brain where the stroke

occurred and that was damaged was the frontal temporal lobe, which damage can impair one's ability effectively to weigh, deliberate and sequence one's behavior, to make good decisions and to change gears in response to changed circumstances. ROA.4299-4300, ROA.4311-4312.

In addition, as lay witnesses testified without dispute, petitioner faced a number of difficulties growing up in a poverty-stricken family struggling to make a better life than the near-slavery plantation existence in which petitioner's parents were raised before migrating to the poor, segregated neighborhoods of Baton Rouge. As older brother Troy Wessinger testified, while his now-deceased father, Horace, worked very hard his entire life, beginning as a boy working the fields on a plantation, his main release was drinking alcohol after work. ROA.4121, ROA.4138. That drinking, which was seven days a week with Horace getting drunk most every day, led to domestic violence in the home as much as three days out of the seven. ROA.4141, ROA.4139-4143.

Expert Russell Stetler testified that the Capital Jury Project has interviewed large numbers of capital jurors since 1991, and found over multiple jurisdictions that evidence of brain damage and impairments and developmental difficulties, including violence in the home, domestic violence, child maltreatment and poverty is very powerful mitigation that resonates with capital jurors. ROA.4331. Likewise, expert Michele Fournet, who has tried numerous cases before Baton Rouge juries, testified that, in her expert opinion, there is a reasonable probability that, but for Hecker's unprofessional errors, the result of petitioner's penalty phase trial would have been different. ROA.4440. As Fournet pointed out, under Louisiana law, "all you need is one juror to hold out on the issue of penalty and you get a life sentence," and the presentation of the information that was uncovered by current counsel "would have almost certainly done more than that and certainly would have done at least that." ROA.4440-4441.

4. The District Court's Ruling Granting Habeas Relief

Following the evidentiary hearing, the district court granted petitioner federal habeas relief on Claim XI-C based on ineffective assistance of trial counsel at the penalty phase in violation of the Sixth Amendment, finding both Gisleson and Hecker prejudicially ineffective., ROA.3719, App. 128.

The district court found that Gisleson was "without direction and without training on how to proceed with post-conviction or habeas corpus work." ROA.3708; App. 129. The district court further found that counsel "did no investigation and did not hire an investigator, mitigation specialist or mental health expert to assist him in investigating and preparing his [state post-conviction] amended petition alleging penalty phase counsel's ineffectiveness." *Id.* Furthermore, the district court found that counsel "did not obtain any medical records, school records, employment records or family history records of [petitioner]," and that he "did not conduct interviews of any witnesses, friends, teachers, coaches, or family members of [petitioner]." *Id.* The district court found that counsel's failures were not the result of a strategic decision on his part, but "because he could not do what was necessary without investigative assistance and without being adequately familiar with post-conviction law and procedure." *Id.* The district court found that petitioner's "state initial-review counsel's performance fell below an 'objective standard of reasonableness' by failing to conduct any mitigation investigation, particularly when the underlying claim is one of ineffective assistance of trial counsel at the penalty phase." ROA.3711; App. 134

The district court found the underlying claim of trial counsel's penalty phase ineffectiveness was a "substantial claim" such that petitioner had shown "cause" to overcome procedural default. ROA.3712-3713; App. 135-136. The district court further concluded "it is clear that Mr. Gisleson's

ineffectiveness in failing to conduct any mitigation investigation caused actual prejudice to [petitioner's] habeas claim of ineffective assistance of trial counsel at the penalty phase." ROA.3713; App. 136.

In its review of the underlying habeas claim of ineffective assistance of counsel at the penalty phase, the district court found that penalty phase counsel Hecker "did not conduct a mitigation investigation. He did not provide anything more than a large number of unprepared witnesses at the penalty phase of trial. None of this was done as part of any strategy according to Mr. Hecker. Mr. Hecker's representation of [petitioner] at the penalty phase was deficient and fell below the objectively reasonable norms of capital counsel at a penalty phase." ROA.3715; App 138. The district court also found that, after considering the mitigation evidence presented by petitioner at the federal evidentiary hearing, which was not presented to the sentencing jury, "there is a reasonable probability that the evidence of [petitioner's] brain damage and other impairments, as well as his personal and family history would have swayed at least one juror to choose a life sentence." ROA.3719; App. 142.

5. The Fifth Circuit's Reversal by a Divided Panel

On appeal by the respondent, a divided panel of the Fifth Circuit reversed the district court's grant of habeas corpus relief. *Wessinger v. Vannoy*, 864 F.3d 387 (5th Cir. 2017); App. 1. Rehearing and rehearing en banc were denied. App. 11a.

The majority concluded that initial-review counsel's performance in raising and developing petitioner's claim for ineffective assistance of trial counsel at the penalty phase was not deficient because his failure to present evidentiary support of the penalty phase IAC claim to the state post-conviction court was not attributable to his inexperience or any particular error, but "because the

state post-conviction court did not grant his motion for funds." App. 8-9. The majority also concluded that Wessinger failed to satisfy the prejudice inquiry because he could not show that initial-review counsel's "particular unreasonable errors, rather than decisions by the state post-conviction court," had an adverse effect on the defense. App. 9.

The dissent argued that "the evidence presented to the district court paints an entirely different picture" from that in the majority opinion, which failed to acknowledge that for eighteen months initial-review counsel inexplicably assumed that his duties had ended the moment he filed a motion to withdraw with the Louisiana Supreme Court, at which point he "walked away from Wessinger's case and did not look back." App.10. The dissent concluded that initial-review counsel's failure during this period to do the work he could have done himself, "including interviewing known witnesses and family members and reviewing medical and school records," rendered his performance constitutionally deficient. App.10-11.

REASONS FOR GRANTING THE WRIT

The panel opinion, by relieving capital defense counsel of any responsibility for conducting an investigation into mitigating evidence in the absence of funding for a mitigation investigator, raises an important issue of national significance requiring guidance from this Court: to what extent does counsel's well-established duty to conduct a thorough mitigation investigation obligate counsel personally to conduct that investigation in the absence of expert mitigation investigator assistance? According to the panel majority, a state court's denial of a motion for funds effectively insulates from reasonableness review counsel's decision not to conduct his or her own mitigation investigation or even to investigate mitigation to support a renewed and strengthened motion for funds. Furthermore, when the denial of expert investigative funds comes in state post-conviction

proceedings, trial counsel's penalty phase ineffectiveness is likewise insulated from reasonableness review in both the state and federal courts.

If, as the panel majority concludes, state post-conviction counsel's failure to conduct a mitigation investigation for purposes of a claim of ineffective assistance of trial counsel was not because of any failures of counsel but because the state post-conviction court did not grant his motion for funds, then the denial of funds operates as an objective factor external to the defense which impeded development and presentation of an ineffective assistance claim. Accordingly, petitioner's failure to present his defaulted ineffectiveness claim to the state courts must be excused for "cause." Furthermore, pursuant to 28 U.S.C. § 2254(b)(1)(B)(ii), exhaustion of the claim in the state court is not required because the denial of funding renders the available state corrective process ineffective to protect the rights of petitioner.

I. Capital Defense Counsel's Duty To Conduct A Thorough Mitigation Investigation Continues Despite The State Trial Court's Denial Of A Motion For Funds For An Expert Mitigation Investigator

As the federal district court found, and as the record fully supports, during the thirty-two months that Gisleson represented petitioner in state post-conviction proceedings in the trial court, neither he, nor anyone acting on his behalf, conducted a mitigation investigation in support of a claim of penalty phase ineffective assistance of trial counsel. Moreover, other than filing a generic motion for funds for a mitigation investigator, which was denied by the state court "at this time" for lack of a sufficient showing of need, Gisleson did not make any effort himself to investigate for mitigation evidence that could be used to support a renewed, stronger and more case-specific request for funds for mitigation investigative assistance or that could support a claim of ineffective

assistance of trial counsel at the penalty phase.[3] The panel majority's conclusion that Gisleson's failure to investigate was not deficient performance because the state trial court failed to grant Gisleson's preliminary, non-case-specific motion for funding for a mitigation investigator is contrary to *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny and prevailing professional standards among capital defense counsel.

Counsel's duty to conduct a thorough investigation of possible mitigation evidence is well established by this Court's jurisprudence. *See Wiggins v. Smith*, 539 U.S. 510, 522-524 (2003). *See also Porter v. McCollum*, 130 S.Ct. 447, 452-53 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), and ABA Standards for Criminal Justice (2nd ed. 1982). A decision by counsel not to investigate "must be directly assessed for reasonableness in all the circumstances." *Wiggins*, 539 U.S. at 533.

Thus far, this Court has not definitively held that capital defense attorneys need expert help to conduct a thorough mitigation investigation that comports with the Sixth Amendment and has left it to the states, and capital defense attorneys working within the states, to decide how best to accomplish a thorough mitigation investigation. This Court's jurisprudence has acknowledged the importance of expert mitigation assistance in counsel's conduct of a thorough mitigation investigation. *See, e.g., Wiggins*, 539 U.S. at 521 (observing that the ABA Guidelines for the Appointment of Defense Counsel in Capital Cases have established "well-defined norms" in capital

[3]This Court heard oral argument last month in *Ayestas v. Davis*, No. 16-6795, which presents the issue of what burden of proof must be satisfied by capital defense counsel, under 18 U.S.C. Section 3599(f), in support of a motion for reasonably necessary investigative, expert and other services in a federal habeas proceeding. Given that the resolution of this issue could impact the proper resolution of the issues presented by petitioner's case, petitioner requests that this Court at least defer a decision on his petition until an opinion issues in *Ayestas.*

cases); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 952 (2003) (detailing the necessity of hiring a capital mitigation specialist). Likewise, the federal district court record below supports the importance of a mitigation specialist as an integral part of a capital defense team.[4] While petitioner does not suggest that defense counsel, through his or her own leg work, is an adequate substitute for an expert mitigation investigator, or for expert testimony in mitigation of death, the question remains whether counsel is obligated to conduct mitigation leg work himself or herself in the absence of funding and in order for counsel to make a more informed and stronger renewed motion for funds.

In the present case, Gisleson testified that he did not have sufficient time or expertise within the first six months of his representation of petitioner to investigate both the guilt and penalty phase IAC claims prior to the June 11, 2001 filing of the first amended petition and, thus, did not conduct a mitigation investigation during that period. However, after filing that factually insufficient petition, Gisleson did nothing more on the case for the next twenty months – not because the state trial court had failed to provide funding for a mitigation investigator – but because of his mistaken belief that he no longer represented petitioner, even though he had received no order allowing his withdrawal and did not check with the Louisiana Supreme Court to confirm this belief. Gisleson's failure under these circumstances to continue to work on petitioner's case, litigate funding issues and personally investigate mitigation in support of a penalty phase IAC claim after the June 2001 filing fell far short of the professional standards that prevailed in Louisiana in state post-conviction in 2001-2003, and

[4]Louisiana post-conviction expert Gary Clements testified that a state post-conviction capital defense core team includes two attorneys, with one generally more experienced in capital post-conviction work, a mitigation specialist and a paralegal. ROA.3956-3957; ROA.3975. Clements explained that the mitigation specialist often has training in social work and knowledge regarding mental health issues and a set of investigation skills that involves the collection of documents and interviews with individuals about issues relative to mitigating factors. ROA.3958-3959.

cannot be justified as reasonable because of the state trial court's failure to grant a generic funding motion prior to the June 2001 filing.

Whether counsel's performance is deficient "is necessarily linked to the practice and expectations of the legal community." *Hinton v. Alabama*, 134 S.Ct. 1081, 1088 (2014). *See also Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). It goes without saying that court-appointed counsel cannot assume he no longer owes any duty to a client when there is no court order relieving him of the representation. *See Maples v. Thomas*, 565 U.S. 266, 284-85 (2010) (cited by the dissent). *See also Hinton,* 134 S.Ct. at 1089 ("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.*").

Significantly, while both Louisiana state post-conviction expert Gary Clements and mitigation expert Russell Stetler emphasized the importance of a mitigation specialist to assist capital defense counsel in conducting a thorough mitigation investigation, both testified that under prevailing professional norms, counsel's obligation to conduct a mitigation investigation does not end with the state court's denial of a motion for funds for a mitigation investigator or denial of sufficient time to conduct an investigation. Clements testified that, under prevailing professional norms in the legal community during the period 2001-2003, the duty to investigate continues even after state post-conviction counsel is forced to file a petition with insufficient time or resources. Under those circumstances, a second supplemental petition would be filed, which Clements has done on numerous occasions, so as to "take advantage of the time beyond what the original filing encompassed," ROA.4007, which would be based on continuing work on the case after filing the

first petition, including "an intense amount of extended, additional investigation and expert assistance and other pleading and research." ROA.4008; ROA.4014. As Clements testified: "[i]t is at that point that we have even more factual foundation to support our legal claims." ROA.4015. Stetler was clear regarding capital defense counsel's duty: "[i]t was Mr. Gisleson's responsibility to hire somebody or conduct the investigation himself." ROA.4360.

Additionally, Gisleson's failure to litigate the funding and timing issues beyond his initial filings with the state trial court fell short of the professional standards that prevailed in Louisiana in state post-conviction in 2001-2003. In this regard, Clements's undisputed testimony was that, under prevailing professional norms in the legal community in Louisiana during the period 2001-2003, "it is absolutely the petitioner's attorney's role" to get sufficient time for filing a petition and, if the state trial court denies a motion for sufficient time to prepare a petition, "then a writ would be taken to the Louisiana Supreme Court" to ask them to order the trial court to provide more time. ROA.3984. Significantly, Clements testified that during the period from 2001 to 2003, *he was not aware of any such writ that was denied*, directly disputing the panel majority's conclusion that petitioner "has not demonstrated that a more experienced attorney would have obtained funding, assistance, or additional time from the state post-conviction court." As Clements explained, "what practically happened in many cases is that once the Louisiana Supreme Court ordered more time on the case," then there would be a status conference to set a scheduling order with the opportunity to request good faith extensions "on a step-by-step basis to extend that time as needed." ROA.3984. The same obligation applies with respect to funding: it is counsel's obligation to get adequate funding, ROA.3985, including an obligation "to vigorously litigate the funding deficiency." ROA.4009.

The panel majority's conclusion that petitioner's failure to present evidentiary support of his penalty phase IAC claim to the state post-conviction court "is not attributable to Gisleson's inexperience or any particular error, but rather to the state post-conviction decisions" ignores what dissenting Judge Dennis recognized in his dissent: "counsel's failure to pursue a thorough mitigation investigation was traceable to his unexplainable failure to check on the status of his motion to withdraw or otherwise engage in any way with the case after he filed the first amended petition, in violation of all professional standards." App. 10. As Judge Dennis explained:

> Had counsel acted with minimal diligence and learned that he had not been permitted to withdraw, there is much he could, and should, have done to advance his client's cause. Crucially, as the district court noted, he should have conducted his own mitigation research. Counsel testified that he knew that further mitigation investigation was necessary, but he failed to do the work that he could have done himself, such as interviewing known witnesses and family members and reviewing medical and school records. Beyond the intrinsic value of what this evidence would have revealed, his research would have placed his requests for funding and mitigation assistance on substantially stronger ground.

Id.

The panel majority ignored counsel's failure to perform any work on petitioner's case for twenty months and, instead, set a dangerous precedent for allowing capital defense counsel to satisfy his or her duty to investigate with nothing more than the filing of a preliminary motion for funding for a mitigation investigator. Certiorari is warranted to clarify and correct this cabined view of capital defense counsel's duty to conduct a thorough mitigation investigation.

II. The State's Failure To Provide Funds For An Expert Mitigation Investigator In State Post-Conviction Proceedings Constitutes Cause To Excuse The Procedural Default of Petitioner's Claim of Penalty Phase Ineffective Assistance Of Counsel

The Fifth Circuit opinion is clear: "[t]hat [petitioner] did not present evidentiary support of his claim [of penalty phase trial counsel's ineffective assistance] to the state post-conviction court *is not attributable to Gisleson's inexperience or any particular error*, but to the state post-conviction court's decisions to deny a hearing, discovery and funds." App. 8-9 (emphasis added). If, as the panel majority concluded, the state court denied funding for a mitigation investigator through no fault of counsel, and this denial, over which counsel had no control, is the only cause of the failure to present the defaulted ineffectiveness claim to the state courts, then the state court's denial of funds must necessarily provide "cause" for the procedural default.

This Court has long recognized that "cause" for a procedural default exists if "the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) ("'cause' under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him") (emphasis in original). *See also (Michael) Williams v. Taylor*, 529 U.S. 420, 432, 442-43 (2000) (the provisions of 28 U.S.C. § 2254(e)(2) prohibit an evidentiary hearing in federal district court on a claim that was not developed in state court only where there is "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel," which is not the case where counsel has filed a motion for expert services to investigate the claim that contains "vague allegations" in support through no fault of petitioner, and the motion is denied by the state court).

The procedural default rule is designed to discourage petitioners and their attorneys from "sandbagging," *i.e.*, making a tactical decision to forego a procedural opportunity to raise a claim in the state courts in order to raise the claim later, for the first time, in federal court. *See, e.g., Murray v. Carrier*, 477 U.S. at 490 ("possibility of 'sandbagging'" is principal reason for procedural default doctrine). The doctrine is also designed to assure that state officials and the state courts actually give the petitioner a fair "procedural opportunity" to present the claim. *Reed v. Ross*, 468 U.S. 1, 14 (1984). *See, e.g., Banks v. Dretke*, 540 U.S. 668, 691-98 (2004) (a petitioner shows cause when the reason for his failure to develop facts in state-court proceedings was the state's suppression of the relevant evidence). Moreover, this Court's jurisprudence supports that, in the habeas context, the "objective/external factors" capable of excusing a default should include all extraordinary circumstances suggesting that the party, including counsel, is faultless in causing the default or that the party was prevented from complying by forces beyond his control.

This Court should grant certiorari in order to make clear for the lower courts the proposition that where post-conviction counsel's failure to obtain funds for a mitigation investigator is through no fault of his own but because of the state court's failure to grant a motion for funds the failure to develop a claim of ineffective assistance of trial counsel at the penalty phase is excused for "cause."

III. The State's Failure To Provide Funds For An Expert Mitigation Investigator In State Post-Conviction Proceedings Renders the State's Corrective Process Ineffective

28 U.S.C. § 2254(b)(1)(B)(ii) states that exhaustion is not required if "circumstances exist that render [the available state corrective] process ineffective to protect the rights of the applicant." In addition to instances in which the state court process is illusory or futile, the exception to the

exhaustion doctrine codified in this section should apply as well when the state court process is inadequate. *See Rose v. Lundy*, 455 U.S. 509, 516 n. 7 (1982) ("the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to 'afford a full and fair adjudication of the federal contentions raised.'").

In this case, Gisleson, a first year associate, was appointed by the Louisiana Supreme Court to represent a death row inmate *pro bono* and, despite counsel's efforts in reaching out to various state entities and filing a motion with the state trial court, he did not receive funding from any source to hire an expert mitigation investigator to conduct the mitigation investigation required of initial review counsel under prevailing professional norms. As Louisiana state post-conviction expert Clements explained, Gisleson was appointed during the time between June 30, 1999, when the Loyola Death Penalty Resource Center was closed, and the opening of CPCPL on March 1, 2001, what he referred to as the "doughnut period," when a number of cases, including petitioner's, entered into post-conviction proceedings. ROA.3986-3987. The Louisiana State Bar Association formed a committee to recruit civil law firms, like Gisleson's, to represent these death row inmates. ROA.3987. Unfortunately, CPCPL's state-funded budget at the time did not include money for cases where counsel was *pro bono* and not CPCPL staff. ROA.3836-3838. *See also State ex rel. Williams*, 888 So.2d 792 (2004). As a result, petitioner lost the opportunity in state post-conviction to have a meritorious claim of penalty phase ineffectiveness of trial counsel heard simply because counsel did not have the funding for the needed expert mitigation assistance.

The unique circumstances in place during this "doughnut period" constitute an objective factor external to the defense that impeded counsel's efforts -- which clearly counter any allegation of "sandbagging" -- to investigate and raise the defaulted claim of ineffective assistance of counsel

in the penalty phase and provide cause for the procedural default. Moreover, under these circumstances, the Louisiana state procedures were inadequate to afford petitioner a full and fair adjudication of his Sixth Amendment claim. Thus, the state post-conviction process was ineffective to protect petitioner's rights, and the failure to exhaust the penalty phase ineffectiveness claim raised in federal habeas corpus is not required under Section 2254(b)(1)(B)(ii).

CONCLUSION

For all the foregoing reasons, petitioner respectfully prays that this Court grant his writ of certiorari and permit briefing and argument on the issues presented.

RESPECTFULLY SUBMITTED,

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