APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-70027

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
Clerk

TODD WESSINGER,

Petitioner - Appellee Cross-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellant Cross-Appellee

Appeals from the United States District Court
for the Middle District of Louisiana

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

The district court granted Todd Kelvin Wessinger's second amended petition for habeas corpus as to his claim for ineffective assistance of trial counsel at the penalty phase, vacating his death sentences and remanding the matter to state court for a new penalty phase trial. We REVERSE the district court's grant of habeas relief.

I

On November 19, 1995, Wessinger shot and killed Stephanie Guzzardo and David Breakwell while robbing Calendar's Restaurant in Baton Rouge, Louisiana. He also shot David Armentor twice in the back and attempted to shoot Alvin Ricks. Armentor survived his wounds, and Ricks was able to escape

after Wessinger's gun would not fire. Wessinger stole approximately $7,000 and then fled the scene.

A jury convicted Wessinger of two counts of capital murder. The State presented the testimony of Armentor and Ricks, as well as that of four after-the-fact witnesses. Witnesses testified that Wessinger asked a friend to commit the robbery with him, that he confessed to committing the crime, and that he had large amounts of money after the robbery. The State also presented evidence that the murder weapon and a pair of gloves worn during the crime were discovered at an abandoned house across the street from Wessinger's residence. A witness testified that Wessinger asked him to take the murder weapon from the abandoned house.

During the penalty phase of the trial, Wessinger's counsel presented multiple character witnesses and two experts. The jury sentenced Wessinger to death. Wessinger appealed his conviction and sentence, but the Louisiana Supreme Court affirmed both on direct appeal. The United States Supreme Court denied certiorari, *Wessinger v. Louisiana*, 528 U.S. 1050 (1999), as well as Wessinger's application for rehearing. *Wessinger v. Louisiana*, 528 U.S. 1145 (2000).

After Wessinger's first pro bono post-conviction counsel withdrew, the Louisiana Supreme Court appointed Soren Gisleson as pro bono post-conviction counsel. Before his formal appointment, Gisleson filed a three-page "shell" petition for post-conviction relief to toll the one-year statute of limitations. The state post-conviction court gave Gisleson a 60-day extension to file an amended petition.

Gisleson moved for "funding for any and all types of investigation." While the motion for funds was pending, he asked the Louisiana Indigent Defense Assistance Board ("LIDAB"), the Louisiana Crisis Assistance Center ("LCAC"), the East Baton Rouge Indigent Defense Board, and the Capital Post-

Conviction Project of Louisiana ("CPCPL") for funding or assistance, but the organizations all denied his requests. CPCPL referred him to mitigation specialist Deanne Sandel. Sandel provided Gisleson with an affidavit regarding the time, ethical obligations, investigation, and assistance needed to represent Wessinger in the state post-conviction proceedings.

The state post-conviction court denied his motion for funds. Gisleson moved to continue the deadline to file the amended petition. Although the state post-conviction court initially denied the motion, it eventually gave him a brief continuance. Gisleson obtained the files of Wessinger's previous counsel, the district attorney, and the police. He spoke with Wessinger's mother and brother "a couple times on the phone." Gisleson also visited and spoke with Wessinger. He determined from the files and from his conversations with Wessinger and his family that Wessinger potentially had a claim for ineffective assistance of trial counsel at the penalty phase.

Gisleson then moved in the Louisiana Supreme Court to withdraw from representing Wessinger. Because the Louisiana Supreme Court did not respond to Gisleson's motion before the filing deadline set by the state post-conviction court, Gisleson drafted and filed Wessinger's first amended petition for post-conviction relief. The first amended petition was 136 pages, not including any attachments. Gisleson modelled the first amended petition on a form template he received from LCAC, and he included "a couple of discrete facts" from "the file or from general conversations with [Wessinger's] mother" as well as from the state court trial record. Gisleson included in Wessinger's first amended petition a claim for ineffective assistance of trial counsel at the penalty phase, among other claims.

The State opposed Wessinger's petition, and Gisleson realized that the Louisiana Supreme Court denied his motion to withdraw. The state post-conviction court referred the matter to a commissioner. While the matter was

pending, Gisleson again reached out to various organizations for funding and assistance. He was eventually referred to Danalynn Recer of the Gulf Regional Advocacy Center ("GRAC"), who "offered to provide general assistance for" $5,000.[1] Gisleson secured payment of Recer's fee from his law firm.

The commissioner's report recommended that the state post-conviction court deny Wessinger's first amended petition. With Recer's assistance, Gisleson then filed a second amended petition for post-conviction relief, which was 100 pages long and reflected "[a]ny and all assistance [he] would have received from GRAC, [and] any perceived factual development they would have created and would have assisted and sent to [him]." Among other things, the second amended petition "added some discrete allegations concerning mitigation and [ineffective assistance of counsel] in the [penalty] phase." For example, the second amended petition alleged that Wessinger's trial counsel did not "conduct professional/effective investigation in mitigation" because he failed to "adequately explore [Wessinger's] medical history" or introduce evidence of Wessinger's substance abuse, among other things.

The state post-conviction court dismissed Wessinger's first amended petition as procedurally barred and his second amended petition on the merits. The Louisiana Supreme Court affirmed without reasons the state post-conviction court's denial of relief. Gisleson then filed an application for a writ of habeas corpus in federal district court on behalf of Wessinger, asserting a claim for ineffective assistance of trial counsel at the penalty phase of trial, among other claims.

The district court appointed Gisleson and Recer as federal habeas counsel for Wessinger. Gisleson filed motions for expert funds and for funds for a mitigation specialist, which the district court granted. Wessinger twice

[1] Both Recer and Gisleson are listed as counsel in Wessinger's brief before this court.

amended his petition, filing his second amended petition over six years after filing his initial federal habeas petition.

The district court initially denied all claims. Wessinger then moved to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court granted Wessinger's motion as to Wessinger's claim for ineffective assistance of trial counsel at the penalty phase[2] and subsequently granted habeas relief, holding that penalty phase counsel was ineffective and that Gisleson was ineffective on initial review. The State appealed. Among other things, the State argues that the district court erred in determining that Gisleson's initial-review representation of Wessinger was ineffective.

II

"In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law de novo . . . ." *Lewis v. Thaler*, 701 F.3d 783, 787 (5th Cir. 2012) (quoting *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004)). Whether counsel was ineffective "is a mixed question of law and fact." *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

III

The State raises several arguments on appeal. Because we conclude that the district court erroneously determined that Gisleson's initial-review representation of Wessinger was deficient, we address only that argument.

To determine whether initial-review counsel was ineffective, we apply the familiar *Strickland* test. *See Newbury v. Stephens*, 756 F.3d 850, 871–72 (5th Cir. 2014) (per curiam) (citing *Strickland*, 466 U.S. at 687). A petitioner

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[2] The district court denied Wessinger's Rule 59(e) motion as to his claims of ineffective assistance of trial counsel during voir dire, ineffective assistance of trial counsel at the guilt phase, and suppression of material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). On a separate docket, Wessinger seeks certificates of appealability to appeal the district court's denial of those claims.

seeking to establish ineffective assistance of state habeas counsel must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.*

"[T]he performance inquiry [is] whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

As to the prejudice inquiry, the petitioner must show that the "particular errors of counsel [that] were unreasonable . . . actually had an adverse effect on the defense." *Id.* at 693. To demonstrate that state habeas counsel was ineffective, a petitioner must demonstrate that "there is a reasonable probability that he would have been granted state habeas relief" if not for counsel's deficiency. *Newbury*, 756 F.3d at 871–72. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The district court found that Gisleson'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." The district court determined that Gisleson was deficient because he did not "hire a mitigation specialist to do a social history or mitigation investigation," "conduct [his] own mitigation investigation," or "consult any mental health experts or any other experts." The district court relied on the testimony of two experts, who testified that Gisleson "did not perform the thorough mitigation investigation required under

professional norms" and that a death penalty team should "include[] two attorneys, . . . a mitigation specialist, and a paralegal."

We hold that the district court erred. "[C]onsidering all the circumstances" and "evaluat[ing] the conduct from [Gisleson's] perspective at the time," as we must, we conclude that Gisleson's performance in raising and developing Wessinger's claim for ineffective assistance of trial counsel at the penalty phase was not deficient. *Strickland*, 466 U.S. at 688–89.

Wessinger argues that his initial-review counsel was deficient because he "fail[ed] to *raise* the claim of ineffective assistance of trial counsel at the penalty phase . . . [that was] raised by Wessinger in federal habeas." But it is clear that Gisleson raised Wessinger's claim for ineffective assistance of trial counsel at the penalty phase during the state post-conviction proceedings. The district court acknowledged that Gisleson "preserved the claim." Gisleson filed two separate amended petitions for post-conviction relief. The second amended petition, on which the state post-conviction court ultimately ruled on the merits, asserted Wessinger's claim for ineffective assistance of trial counsel at the penalty phase and made specific factual allegations, including that trial counsel did not obtain Wessinger's medical records. The second amended petition also alleged, among other things, that: Wessinger had a history of head trauma and childhood seizures; he lost two children; he suffered psychologically when he lost three friends to murder as a teenager or young adult; and his sister had seizures and cerebral palsy.

The district court's decision instead focused on Gisleson's "failure to conduct mitigation investigation [which] prevented him from providing any support" for Wessinger's claim for ineffective assistance of counsel at the penalty phase. We disagree. The state post-conviction court denied Gisleson's motion for funds "for any and all types of investigation." Gisleson also repeatedly reached out to various organizations for funding or assistance, and

he was repeatedly denied. Gisleson did not hire a mitigation specialist or consult experts because the state post-conviction court did not grant his motion for funds, not because of any deficiency on Gisleson's part. He was thorough in his attempt to secure funds or other assistance, and ultimately he managed to secure $5,000 from his firm, which he paid to Recer for her help investigating and filing the second amended petition.

Wessinger previously acknowledged to the district court that he did not develop evidentiary support for his claim during state post-conviction proceedings because of decisions *by the state post-conviction court*, not because Gisleson was deficient. He argued in his initial federal habeas petition that "Wessinger did not fail to develop the factual basis" of his claim in state court but rather that "the state court failed to grant . . . Wessinger a forum to develop the factual record in post-conviction proceedings." Wessinger asserted that he—represented by Gisleson—"diligently requested a hearing on every single claim." According to Wessinger, "[h]e not only requested a hearing, but he also submitted extensive medical records and affidavits that supported the necessity of a hearing in state court to factually develop his claims." Wessinger reasserted this argument in his first amended federal habeas petition, arguing that he "was not allowed to factually develop his claims in state court through no fault of his own." Gisleson "requested a hearing, discovery and funds, all of which were denied."

Even after the evidentiary hearing, Wessinger argued that Gisleson did not develop the claim in state court "because of lack of money, lack of expertise, lack of help, lack of experience and lack of time." Wessinger has not demonstrated that a more experienced attorney would have obtained funding, assistance, or additional time from the state post-conviction court. That Wessinger did not present evidentiary support of his 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 court's decisions to deny a hearing, discovery, and funds—decisions which are entitled to deference and which Wessinger does not challenge before this court.

Gisleson's performance in raising and developing Wessinger's claim for ineffective assistance of trial counsel at the penalty phase was not deficient. Furthermore, Wessinger failed to satisfy the prejudice inquiry, as he cannot show Gisleson's particular unreasonable errors, rather than decisions by the state post-conviction court, "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. The district court therefore erred in concluding that Wessinger's initial-review counsel was ineffective.

IV

We REVERSE the district court's grant of habeas relief.

JAMES L. DENNIS, Circuit Judge, dissenting:

If Todd Wessinger's state habeas counsel had performed in the way that the majority opinion describes, I would join in reversing the judgment of the district court. But the evidence presented to the district court paints an entirely different picture. As the majority opinion notes, counsel filed a motion to withdraw as counsel shortly before he submitted the first amended petition. What the majority opinion fails to acknowledge is that *eighteen months* elapsed before counsel was informed that his motion had been denied and that during those eighteen months counsel never bothered to determine the status of his motion: inexplicably assuming that his duties had ended the moment he filed his motion with the Louisiana Supreme Court, counsel walked away from Wessinger's case and did not look back.

I agree with the majority opinion that some of counsel's omissions were the result of the state post-conviction court's decisions to deny a hearing, discovery, and funds. But these omissions were necessarily exacerbated by his total abandonment of the case for eighteen months. 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.

Wessinger's state habeas counsel did not make a strategic choice not to conduct his own mitigation investigation; nor was his course of conduct

mandated by state court decisions, as the majority opinion wrongly asserts. Instead, 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. *See Maples v. Thomas*, 565 U.S. 266, 284–85 (2010); La. Rules of Prof'l Conduct R. 1.16 (1987) (repealed 2004). The majority opinion's omission of any reference to what was counsel's most critical failure renders its conclusions meaningless. I believe that counsel's abandonment of his client's case for eighteen months rendered his performance constitutionally deficient.

Because the majority opinion does not address the state's remaining challenges to the district court's grant of relief, I will not discuss the merits of those challenges here. However, I believe that the district court's judgment is sound, and I would affirm its grant of relief. I therefore respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
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No. 15-70027

TODD WESSINGER,

Petitioner - Appellee Cross-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent - Appellant Cross-Appellee

Appeal from the United States District Court for the
Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 7/20/17, 5 Cir., _____, _____ F.3d _____)

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not

having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

TODD KELVIN WESSINGER

VERSUS

BURL CAIN, WARDEN

CIVIL ACTION

NO. 04-637-JJB-SCR

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Before the Court is Petitioner's Amended Petition for Writ of Habeas Corpus. (Doc. 120). Respondent filed an opposition. (Doc. 129). Petitioner filed a reply. (Doc. 132). The Court did not refer this matter to the Magistrate Judge. For the following reasons, the petition is denied.

BACKGROUND AND PROCEDURAL HISTORY

Kelvin Todd Wessinger was charged by grand jury indictment with two counts of first degree murder for the November 19, 1995 deaths of Stephanie Guzzardo and David Breakwell, a violation of La. R.S. 14:30. He pled not guilty to both counts. After a two-day jury trial, Wessinger was convicted on both counts on June 24, 1997. The penalty phase of the trial took place the next day, at which time the jury unanimously returned death sentences for both counts. The trial court formally sentenced Wessinger to death by lethal injection on September 17, 1997. Wessinger appealed his conviction and sentence to the Louisiana Supreme Court, which affirmed both. *State v. Wessinger*, 98-1234 (La. 5/28/99), 539 So. 2d 162. Wessinger appealed to the United States

Supreme Court, which denied cert. *Wessinger v. Louisiana*, 528 U.S. 510 (1999). The Court also denied his application for rehearing on January 24, 2000. *Wessinger v. Louisiana*, 528 U.S. 1145 (2000). It was on that day Wessinger's conviction became final under Louisiana law.

On June 11, 2001,[1] Wessinger filed an application for post-conviction relief in state court ["Amended State Petition"].[2] The trial court referred the matter to the judicial commissioner for a report and recommendation. The commissioner recommended dismissal of the Amended State Petition in its entirety without prejudice because the claims were procedurally barred. (Doc. 121-1 ex. M at 2-3).[3] Wessinger then filed a second amended application ["Second Amended State Petition"] as a supplement to the first. This application re-urged and re-argued the claims raised in the first amended application and added an additional

[1] Much happened between January 24, 2000 and June 11, 2001. Within a week of his conviction becoming final, an execution date was set for April 5 of that year, despite the fact that Wessinger had not been appointed post-conviction counsel. On March 30, the court granted a motion to stay the execution in order to allow the Louisiana Indigent Defender Assistance Board ("LIDAB") to file an application for post-conviction relief by April 17. This was pushed back one week at the request of the LIDAB. At an April 24 hearing, the court denied a request for more time to find post-conviction counsel and set the execution date for June 7, despite the fact that the one-year statute of limitations for Wessinger to file for post-conviction relief would not run out until January 23, 2001. On June 2, the court appointed Winston Rice as *pro bono* counsel. Mr. Rice was unable to perform the work due to personal difficulties. Ultimately, present counsel was substituted on January 3, 2001.

[2] This was his first amended petition. The original petition was a "shell" petition used stop the statute of limitations clock. The Amended State Petition made the following claims for relief: (1) cumulative error at trial necessitates reversal of the conviction and sentence; (2) petitioner received ineffective assistance of counsel at the guilt phase of trial; (3) petitioner received ineffective assistance of counsel at the penalty phase of trial; (4) petitioner received ineffective assistance from his experts; (5) petitioner received ineffective assistance of counsel at the motion for new trial; (6) petitioner received ineffective assistance of counsel on appeal; (7) petitioner received ineffective assistance of counsel during his post-conviction relief proceedings; (8) petitioner received ineffective assistance of counsel based on a conflict of interest; (9) a conflict of interest existed at trial where trial counsel developed a friendship with the victim's family; (10) the prosecutor suppressed from petitioner exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (11) juror misconduct necessitates reversal of petitioner's conviction and sentence.

[3] The commissioner pointed to a Louisiana criminal code article that requires post conviction petitions allege specific facts or risk possible dismissal. La C.Cr.P. art. 926.

100 pages of argument.[4] Apparently this Second Amended State Petition was referred to the commissioner shortly before a status conference that was held on September 4, 2003. While a supplemental report was issued (doc. 121-1 ex. N) it appears that neither the judge nor the parties had received it by that time.

It was at this status conference where the trial judge ultimately denied relief on both petitions. The trial court ruled the claims from the Amended State Petition to be procedurally barred and denied the claims from the Second Amended Petition without the necessity for an evidentiary hearing. The court did not issue written findings of fact or conclusions of law. The Louisiana Supreme Court denied writs on September 3, 2004.

Wessinger filed his original petition for writ of habeas corpus with this Court on September 7, 2004. This was a skeletal writ filed to toll the limitation period provided under 28 U.S.C. § 2254, the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"). The Court ruled that Wessinger's claims were not time-barred due to the doctrine of equitable tolling (Doc. 19). On June 22, 2005, Wessinger filed his first amended petition. He filed the instant Amended Petition and Request for Evidentiary Hearing on October 31, 2010. (Doc. 120). Wessinger presents 12 claims to the Court's attention: (1) His indictment failed to

[4] Specifically, the second amended complaint made the following claims: (1) cumulative error; (2) petitioner received ineffective assistance of counsel at the guilt phase of trial; (3) petitioner received ineffective assistance of counsel at the penalty phase of trial; (4) petitioner received ineffective assistance of counsel during voir dire; (5) inconsistent testimony and favorable evidence violated *Brady*; (6) the selection of the grand jury foreperson violated due process; (7) the state's use of peremptory challenges violated the equal protection clause (*Batson*); and (8) the state proceedings violated *Apprendi* and *Ring*.

include any guilt or penalty phase aggravating circumstances and the verdict lacked a unanimous finding by the jury as to the existence of aggravating circumstances in the guilt or penalty phase; (2) the selection of the grand and petit juries tainted the entire process; (3) media coverage of the murders so prejudiced the community that Wessinger could not receive a fair trial in East Baton Rouge Parish; (4) admission of hearsay evidence violated the Sixth Amendment right to confrontation; (5) the state withheld exculpatory evidence in violation of *Brady v. Maryland*; (6) the death sentences must be overturned because of improper evidence and arguments made during the penalty phase; (7) he was denied his Fourteenth Amendment right to be present during all proceedings in the case against him; (8) the jury was not provided with a burden of proof on mitigation in violation of the Eighth Amendment; (9) the aggravating circumstances were presented to the jury in violation of the Eighth and Fourteenth Amendments; (10) Louisiana's lethal injection protocol violates his Eighth and Fourteenth Amendment rights; (11) he received ineffective assistance of counsel because (a) his counsel failed during the voir dire process to take steps to prevent discrimination during the selection process, (b) his counsel was ineffective during the guilt phase, (c) his counsel was ineffective during the penalty phase, (d) counsel failed to object when the trial court improperly stated the law during the guilt phase, and (e) trial counsel failed to obtain a complete transcript of the proceedings; and (12) cumulative error renders the convictions unconstitutionally unreliable.

As to these claims, Wessinger contends they were not adjudicated by the state court as required by the AEDPA and that he is entitled to an evidentiary hearing to develop his claims. The state responded, contending Wessinger's claims have no merit, should be considered procedurally barred, and that no evidentiary hearing is required or allowed under 28 U.S.C. § 2254(e)(2). Further, the state argues Wessinger has not met his burden under the AEDPA for obtaining a Certificate of Appealability and that such certificate should be denied. (Doc. 129).

STANDARD OF REVIEW

Federal court review of habeas corpus petitions filed by state prisoners is governed by 28 U.S.C. § 2254. Paragraphs (d) and (e) of the statute are the relevant provisions before the Court in this petition. They provide:

> **(d)** 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> **(e)(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden

> of rebutting the presumption of correctness by clear and convincing evidence.
>
> **(2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> **(A)** the claim relies on--
>
> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> **(B)** the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §§ 2254(d)-(e).

Paragraph (d) sets forth a barrier to habeas writs, dictating that they not be granted for any claim that was adjudicated on the merits unless that adjudication was deficient for either of the reasons provided in subparagraphs (1) or (2).

Paragraph (e)(1) establishes a presumption of truth given to determinations of factual issues made by the state court and sets forth a clear and convincing burden on a petitioner seeking to rebut this presumption. Paragraph (e)(2) then provides that a federal court shall not hold an evidentiary hearing on an undeveloped factual basis for a claim unless the claim relies on new Supreme Court law or a factual predicate that was not known of through due

diligence. Even then, the facts underlying the claim would have to be enough to establish by clear and convincing evidence that, basically, his conviction was not reasonable.

A recent Supreme Court case, *Cullen v. Pinholster*, has clarified the relationship between these two paragraphs. 131 S.Ct. 1388 (2011). In *Pinholster*, the Court faced a similar factual situation; the petitioner had been convicted of murder and was claiming ineffective assistance of counsel in the penalty phase of his trial. The federal court held an evidentiary hearing and then found counsel's performance ineffective. In affirming this decision, the Ninth Circuit, sitting *en banc*, determined the evidence from the evidentiary hearing in the federal district court could be used in addition to the state court record to determine whether the state court's decision violated § 2254(d)(1). *Id.* at 1398. In reversing, the Supreme Court held "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 1398. The same is true for review under § 2254(d)(2); the plain words of this provision make that beyond dispute. And while the dissent and Justice Alito's concurring opinion in *Pinholster* found that this interpretation of the statute renders § 2254(e)(2), the evidentiary hearing provision, to be too narrow, it is now the law of the Supreme Court that an evidentiary hearing may not be held unless and until a petitioner has prevailed on a claim under § 2254(d), thus showing either that a claim was not adjudicated at the state court level or that the

decision of the state court was unreasonable legally or factually. The Court found that this restriction on evidentiary hearings fits with the purpose of the AEDPA to "strongly discourage" new evidence being presented in federal court proceedings. *Id.* at 1401. This is because "federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue instate proceedings." *Id.* (citing *Harrington v. Richter,* 131 S.Ct. 770, 787 (2011).

In the cases it has considered since Pinholster, the Fifth Circuit has acknowledged and applied this narrow availability of an evidentiary hearing. *See McCamey v. Epps*, ___F.3d ___, 2011 WL 4445998 (5th Cir. 2011) (finding that district court improperly held evidentiary hearing where petitioner's claims were adjudicated on the merits at the state court); *Higgins v. Cain*, 2011 WL 3209843 (5th Cir. 2011) (district court did not err in refusing to hold evidentiary hearing); *Pape v. Thaler*, 645 F.3d 281 (5th Cir. 2011) (district court erred in holding evidentiary hearing on claim of ineffective assistance of counsel and using the evidence to conclude state court had unreasonably applied *Strickland.*).

Therefore, in assessing each of Wessinger's claims the Court will consider first whether the claim was adjudicated at the state court level. If it was, the Court will next determine whether the determination made by the state court was unreasonable legally under § 2254(d)(1) or factually under § 2254(d)(2). In order to show unreasonableness under § 2254(d)(1), Wessinger must show there was

no reasonable basis for the state habeas court's decision. *Pinholster*, 131 S.Ct. 1388, 1402 (2011). In making this determination, the Court "must determine what arguments or theories . . . could have supported the state court's decision; and then it must ask whether it is possible fair-minded jurists could disagree that these . . . are inconsistent with the holding in a prior decision" of the Supreme Court. *Id.* To prevail under § 2254(d)(2), Wessinger must show a particular factual determination made by the state court was unreasonable. To meet this, he must show the decision "rests upon a determination of fact that lies against the clear weight of the evidence" such that it is "arbitrary and therefore objectively unreasonable." *Ward v. Sterns*, 334 F.3d 696 (7th Cir. 2003). However, he does not have to make this showing by clear and convincing evidence. *Miller-El. V. Cockrell*, 537 U.S. 322, 342 (2003).

If the claim clears this hurdle, the Court will next determine whether Wessinger is entitled to an evidentiary hearing on that claim, using the framework of § 2254(e). Claims that were not adjudicated at the state court level do not have to clear the § 2254(d) bar and proceed directly to § 2254(e), so long as they are not procedurally barred.

As for claims that were dismissed by the state court as procedurally barred, they will be reviewed de novo if Wessinger can overcome the procedural bar. When a state court decision rests on a state law ground that is independent of a federal question and adequate to support the judgment, federal courts lack

jurisdiction to review the merits of the case. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Moore v. Roberts*, 83 F.3d 699, 702, *reh. denied*, 95 F.3d 56 (5th Cir. 1996). For the independent and adequate state ground doctrine to apply, the state courts adjudicating a habeas petitioner's claim must explicitly rely on a state procedural rule in dismissing the claim. *Moore*, 83 F.3d at 702. The procedural default doctrine presumes that the "state court's [express] reliance on a procedural bar functions as an independent and adequate ground in support of the judgment." *Id.*

A petitioner can overcome this presumption by showing the procedural rule is not "strictly or regularly followed." *Id.* If he cannot or does not make this showing, he can still overcome the bar by showing either (1) cause for the procedural bar and actual prejudice as a result of the violation of federal law or (2) that failure to consider this claim will result in a fundamental miscarriage of justice. *Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000). Cause is shown through objective external factors that prevented the petitioner from raising the claim before. *U.S. v. Flores*, 981 F.2d 231, 235-36 (5th Cir. 1993). Further, this must be something that cannot be fairly attributed to the petitioner. *McCowin v. Scott*, 67 F.3d 100, 102 (5th Cir. 1995). As for prejudice, the petitioner must show that, but for the error, he might not have been convicted. *U.S. v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996). This standard is "a significantly higher hurdle" than the plain error standard that applies on direct appeal. *U.S. v. Shaid*, 937

F.2d 228, 232 (5th Cir. 1991). The miscarriage of justice exception requires a petitioner to show he is actually innocent of the charges against him. *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001).

LAW AND ANALYSIS

Were the Claims Adjudicated on the Merits at the State Court Level?

In his Amended Federal Petition, Wessinger makes the argument that none of his claims were adjudicated on the merits by the state court. (Doc. 120 at 31). Much of this argument is based on the quality and timing of the hearing at which they were "adjudicated." After he filed his Amended Federal Petition, but before the State filed its opposition, the law on what constitutes a "claim adjudicated on the merits" was clarified by the Supreme Court.

In *Harrington v. Richter*, the Supreme Court "held and reconfirmed that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'" 131 S.Ct. 770, 785 (2011). Further, there is no prohibition against an adjudication being made in a summary fashion. *Id.* at 784. Indeed, there is a presumption that the state court decision was adjudicated on the merits "in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 785-86. "The presumption may be

overcome when there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 786. This reason must be more than "pure speculation." *Id.* This case does not disturb existing Fifth Circuit precedent that holds when a claim is denied at the state court level on procedural grounds, that decision is not an adjudication on the merits that is subject to deference under the AEDPA. *Graves v. Dretke*, 442 F.3d 334, 339 (5th Cir. 2006); *see also Powell v. Quarterman*, 536 F.3d 325, 343 (5th Cir. 2008). Assuming the claim was not procedurally barred, the review of the claim is *de novo*. *See Wright v. Quarterman,* 470 F.3d 581 (5th Cir. 2006) citing *Solis v. Cockrell,* 342 F.3d 391, 394 (5th Cir. 2003).

In the September 4, 2003 status conference in which the state court dismissed Wessinger's claims, the court ruled that all claims from the first amended state petition be dismissed as procedurally barred. The state court then denied relief on all the claims contained in the Second Amended State Petition, which contained all of the claims from the Amended State Petition as well. With two exceptions, the state court stated it was denying relief on the merits. The exceptions were the ineffective assistance of counsel claim that alleged racial and gender discrimination in the selection of the grand jury foreperson (Claim II-1) and the claim that admission of hearsay evidence violated his Sixth Amendment right of confrontation (Claim IV). The state court ruled these were procedurally barred. PCR Vol. III, 9/4/03 Status Conference Tr. at

25-27.[5] For the reasons discussed above, these two claims, as they were not adjudicated on the merits, are not entitled to deference under the AEDPA and, if they clear the procedural bar, will be reviewed de novo. The remainder of the claims, under *Richter*, were adjudicated despite their summary nature. Therefore, Wessinger bears the burden of showing each claim satisfies one of the two exceptions in § 2254(d) in order to proceed.

CLAIM I- FAILURE TO INCLUDE AGGRAVATING CIRCUMSTANCES IN INDICTMENT AND FAILURE OF JURY TO UNANIMOUSLY FIND EACH AGGRAVATING FACTOR

Wessinger's first claim is that the failure of the grand jury indictment to include the aggravating factors relied upon to obtain his conviction and death sentence was a violation of both the notice requirement of the Sixth Amendment and the due process clause of the Fourteenth Amendment. This claim also asserts that the failure of the jury to unanimously find these aggravating factors was a violation of the jury requirement of Sixth Amendment (Doc. 120 at 35). The trial court denied this claim on the merits at the status conference. PCR R. Vol. III, 9/4/03 Status Conference Tr. at 27.

The first portion of Wessinger's claim, which alleges that the grand jury indictment was flawed, asserts that Wessinger was not fully informed of the

[5] The record in this matter is in two sections. The first is ten volumes and includes everything occurring before and through Wessinger's trial. Tr. R. Vol. I-X at #. The second, the cited above, is eleven volumes and contains everything relating to the post-conviction litigation. Because this portion is not bates-stamped, the Court will refer to it by volume and title of the document, as in this case the transcript of the September 4, 2003 status conference.

charges the state intended to bring against him because the aggravating circumstances the state intended to rely upon were not included in the grand jury indictment. (Doc. 120 at 37). The second portion of this claim argues that the Sixth Amendment requires that a jury must unanimously find that each aggravating factor relied upon to justify a sentence of death exists. Wessinger argues that the jury instructions and verdict form used at trial court were ambiguous as to whether the jury must unanimously find that each aggravating factor relied upon existed. As a result, Wessinger argues, it is unknown if the jury unanimously agreed upon the existence of each aggravating factor used to justify Wessinger's conviction and sentence. (Doc. 120 at 41).

Both portions of this claim rely on the applicability to this matter of several Supreme Court decisions which were decided after Wessinger's trial and direct appeals were final, primarily *Ring v. Arizona*. *Ring* held that aggravating factors that justify an increase in the maximum punishment for first degree murder from life imprisonment to death become elements of a greater offense and a jury must find they exist beyond a reasonable doubt.[6] 536 U.S. 584, 609 (2002). The first portion of this claim relies upon the applicability of *Ring* because if these aggravating factors are not considered elements of the offense with which Wessinger was charged he need not have been informed of them in the

[6] Another case, *Apprendi v. New Jersey*, held that "[o] ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. *466,* 489 (2000). The Supreme Court has specifically stated that *Apprendi* does not apply retroactively, however. *Harris v. U.S.*, 536 U.S. 545, 581 (2002).

indictment. The second portion of this claim relies upon the applicability of *Ring* because the Sixth Amendment only requires that a jury unanimously find that every essential element of an offense exists. *In Re Winship*, 397 U.S. 358 (1970). If *Ring* is inapplicable in this case the aggravating factors will not be considered elements of the offense with which Wessinger was charged. As Ring was decided after Wessinger's trial, it only benefits him if it may be applied retroactively.

In *Schriro v. Summerlin*, the Supreme Court clearly stated that *Ring* is not to be applied retroactively. 542 U.S. 348, 353 (2004). *Schriro* held that "*Ring's* holding is properly classified as procedural" and that it therefore should not be applied retroactively. *Id.* Additionally, *Schriro* addressed whether the *Ring* holding falls within the retroactivity exception for watershed rules of criminal procedure which implicate the fundamental fairness and accuracy of the criminal proceeding and determined that it did not. *Id.* at 353-358. As the entirety of Wessinger's first claim hinges on the applicability of the *Ring* holding, which does not apply to his case, it was not unreasonable that this claim was denied.

CLAIM II: IMPROPER SELECTION OF THE GRAND AND PETIT JURIES

In this claim, Wessinger asserts two things: (1) that the selection of the foreperson of the grand jury that indicted him was done in a discriminatory way that violates his Sixth and Fourteenth Amendment rights (doc. 120 at 43); and (2)

that he was denied an impartial petit jury from a fair cross-section of the community (doc. 120 at 53). The Court will address each in turn.

1. Grand Jury Foreperson Discrimination

Wessinger did not raise this claim until his post-conviction filing. The state court ruled it procedurally barred. PCR Vol. III 9/4/03 Status Conference at 25-27. The State maintains this acts as an independent and adequate state law bar to this claim in habeas corpus. (Doc. 129 at 45). While acknowledging this bar, Wessinger asserts he meets the standard for overcoming it or, in the alternative, that it was ineffective assistance of his trial counsel for failing to preserve this claim. (Doc. 120 at 51). If Wessinger overcomes the bar, the Court will review the claim *de novo*. The Fifth Circuit has addressed this very issue and found in the State's favor. Therefore, this Court is bound to follow that precedent.

In *Pickney v. Cain*, the petitioner was convicted of rape and sentenced to life in prison. 337 F.3d 542 (5th Cir. 2003). In his state post-conviction filing, he raised grand jury foreperson discrimination for the first time. In the alternative, he argued it was ineffective assistance of counsel not to file a motion to quash the indictment. *Id.* at 544. The court acknowledged a petitioner can show cause by proving ineffective assistance of counsel. *Id.* at 545, citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The court did not address whether he had made this showing because it found Pickney had not shown actual prejudice. *Id.* In making this determination, the court determined that had Pickney been successful in

having his indictment quashed, the state would simply have sought and obtained a second indictment. After analyzing the evidence the State used to obtain the original indictment, it concluded that "[g]iven the strength of the State's case, a successful grand jury challenge would have served no purpose other than to delay the trial." *Id.* The Court followed the Eleventh Circuit in holding that the presumption of prejudice expressed by the Supreme Court in *Rose v. Mitchell* only applies in cases where the claim was preserved by a motion to quash. *Id.* at 545-546 (*accord Francois v. Wainwright*, 741 F.2d 1275, 1283 (11th Cir. 1984). Key to this finding was language from *Rose* that, "there is no contention in this case that the respondents sought to press their challenge to the grand jury without complying with state procedural rules." *Id.* at 546 (quoting *Rose v. Mitchell*, 443 U.S. 545, 559 n. 8 (1979)). Therefore, the Fifth Circuit held, "where a defendant has failed to show actual prejudice, we will not consider the merits of a procedurally defaulted claim of racial discrimination in the selection of a grand jury foreperson." *Id.* at 546.

The Court understands the significant difference in presuming prejudice in the indictment arena: without the presumption it will be very difficult to show the facts underlying the defective indictment would not have supported an indictment from a non-discriminatorily created grand jury. And while this is as it should be, the Court notes how radically the playing field can be tilted depending on whether counsel filed a motion to quash—a motion that almost surely would have been

denied at the trial court level. And while it may not agree with *Pickney*, it is controlling on this Court.

Turning to the facts before this Court, the Court finds that, had Wessinger's counsel timely filed a motion to quash and succeeded on the motion, the State would have sought and obtained a second indictment. Among the evidence was the eyewitness testimony of two people present at the restaurant on the day of the shooting. One, Armentor, testified he saw Wessinger ride up on his bicycle and greeted him before going into the restaurant. He testified Wessinger shot him twice in the back as soon as he walked through the door. Armentor identified Wessinger from a photo lineup. A second eyewitness, Ricks, testified Wessinger pointed his gun at his head and pulled the trigger but the gun jammed, allowing Ricks to flee. Ricks told the 911 operator Wessinger was the shooter. The murder weapon and a pair of gloves worn during the shooting were found in an abandoned house across the street from Wessinger's house. Based on the strength of the evidence the grand jury challenge would have resulted only in delay of the trial. Therefore, following *Pickney*, the Court finds Wessinger has failed to show actual prejudice.

As for his claim of ineffective assistance of counsel for failing to file a motion to quash, the *Pickney* court found that petitioner had not satisfied the prejudice prong of *Strickland v. Washington* for the same reason. *Id*. Therefore,

the Court also finds Wessinger's ineffective assistance claim does not pass *Strickland*.

The Court recognizes that the end result of this is a situation where his trial attorneys' possibly ineffective assistance would now preclude Wessinger from gaining relief for that very ineffective assistance. While understanding Wessinger's frustration, and agreeing largely with Justice Johnson's concurring opinion in *State v. Langley*,[7] this Court cannot overlook the controlling precedent of this circuit. Relief on this claim is denied.

Petit Jury Discrimination

There are four separate issues that make up this claim. All were adjudicated on the merits and are entitled to deference under the AEDPA. Each one will be taken in turn.

a. Denial of an Impartial Jury From a Fair Cross-Section of the Community

In this claim, Wessinger asserts his Sixth and Fourteenth Amendment rights were violated by the unconstitutional composition of his petit jury. (Doc. 120 at 53). He claims the process by which the jury venire was selected purposely excluded African-Americans from the jury venire. This claim was

[7] Justice Johnson noted the "cruel irony" that a white co-defendant could gain relief under this discrimination claim though his African-American co-defendant could not due only to the fact that his attorney filed a motion to quash his indictment. She then mentions the many prisoners who were indicted by such illegally constituted grand juries, noting, "[t]hey will not have the benefit of *Cambell* and *Langley* because of the ineffective assistance of their counsel in failing to file timely a pretrial motion to quash their indictments." 95-1489 (La. 4/3/02), 813 So.2d 356, 375-76. While this Court does not necessarily endorse Justice Johnson's ultimate solution, it is nonetheless in agreement with her assessment of the problem.

denied at the state court level on the merits. Therefore, that decision is owed deference by this Court, and will be evaluated under § 2254(d). The parties disagree as to whether the test from § 2254(d)(1) or (2) should apply, with the State applying the former and Wessinger the latter. As the Court finds the state court decision passes both tests, the question is moot.

To succeed on a claim of violation of the fair cross-section requirement, Wessinger must show: (1) the group alleged to be excluded is a 'distinctive' group in the community; (2) the representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v. Missouri,* 439 U.S. 357, 364 (1979). The test under the Equal Protection Clause is similar.[8] He contends the state court made an unreasonable factual determination when it found there was not enough evidence to support his claim.

The record includes testimony from the jury coordinator of East Baton Rouge Parish and a jury clerk. They testified the venire was chosen randomly by computer. All members of the venire then reported to the clerk's office. A clerk then walked through the room giving out panel sheets. They testified that the sheets were not given out on a "first-come-first-served" basis, as alleged by

[8] The three showings a petition must make are: (1) the group is recognizable, distinct class, singled out for different treatment; (2) underrepresentation of that group over a significant period of time; and (3) a selection process "susceptible to abuse or is not racially neutral." *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

Wessinger. The Louisiana Supreme Court, on direct appeal, dismissed this ground because Wessinger did not show how this method, if it were indeed the method used to choose panels, discriminates against any certain segment of the community. *Wessinger*, 736 So. 2d 162, 170-72 (La. 1999).

Wessinger asserted that only 13 of the 64 members of his venire were black, which is less than the ratio of blacks living in East Baton Rouge Parish at the time, which he asserts was one-third. In his Amended Petition to this Court, Wessinger points out that of the 240 jurors who have sat on the 24 capital cases since 1991, less than 10 percent were black. Further, he argues the first-come-first-served method discriminates against those who are tardy, which he posits is usually a result of taking public transportation, a group he claims is largely black. However, as the Louisiana Supreme Court noted, he does not provide empirical evidence to back these allegations.

During the September 4, 2003 status conference, the state court briefly addressed this claim, noting it had been "litigated on appeal."[9] R. Vol. III 9/4/03 Status Conference Tr. at 27. The Court finds that based on the record before the state court, this was neither an unreasonable application of the law nor was it an unreasonable factual determination. Therefore, relief on this claim is denied.

b. State's Use of Peremptory Challenges Violated Equal Protection

[9] The court went on to say it found there no evidence in the record to support this. For reasons discussed in the next section (b), the Court assumes the trial court was conflating the two issues.

In this claim Wessinger asserts that the State's use of its peremptory strikes violated his Equal Protection rights. (Doc. 120 at 58). Specifically, the State used only three of its 12 allotted peremptory strikes, with two of those struck being black. Wessinger did not object to these strikes at trial; the State claims he thereby waived the objection and was procedurally barred from bringing it during post-conviction proceedings. (Doc. 129 at 63, citing La. Code Crim. P. art. 930.4(B) ("If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court may deny relief.")).

At the status conference, the trial court seems to have combined discussion of the previous issue with this, stating, "That was handled on appeal. I don't believe there was any spontaneous or contemporaneous objections [sic] to that. And in addition, the petition doesn't allege any specific facts that would indicate that." PCR Vol. III 9/4/03 Status Conference Tr. at 27. As there is no evidence the Court can find that this issue was addressed on direct appeal, the Court is of the opinion the state court was determining the use of peremptory challenges to have been procedurally barred while the fair cross-section issue, which was addressed by the Louisiana Supreme Court on appeal, was denied on the merits. As for the state court's final assertion that the petition did not allege any specific facts, the court seemed to be referring to both issues, in essence

saying there was no evidence to support either claim of racial discrimination relating to the petit jury.

Wessinger did not address the procedural bar to this claim in his petition or in his reply. Thus, he did not argue the cause and prejudice exception to the bar. Therefore, the Court finds he has not met his burden and the claim is denied.

c. Jurors Excluded for Cause Without Proper Showing

Wessinger challenges the dismissal of three prospective jurors, Cuadra, Bossom, and Shropshire for cause. (Doc. 120 at 64). The thrust of the argument is that these three were improperly struck for cause because they expressed reservations about imposing the death penalty.

As the Louisiana Supreme Court noted on direct appeal, a prospective juror may be challenged for cause when his or her beliefs about capital punishment would "prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath." La. C.Cr.P. art. 798(2)(b). However, a juror may not be excused for cause simply because she has expressed "conscientious or religious scruples" against it. *Wessinger*, 736 So.2d at 173-74, citing *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968). It is only those who are "irrevocably committed . . . to vote against the death penalty" who are properly excused for cause. *Id.* at 173 (citations omitted). The trial judge has great discretion in deciding challenges for cause, and these

determinations are entitled to great deference, so long as they are supported by the record. *Id.* at 174. Further, a juror may be struck for cause when he is "not impartial, whatever the cause of his partiality." La. C.Cr. P. art. 797(2).

First, with regard to Cuadra, Wessinger claims the State had no objections to him until they read his answer on the jury questionnaire, where he answered the question, "How do you feel about the death penalty?" in the following way: "I believe in the death penalty only in extreme cases when the convicted individual's existence poses a threat to society while incarcerated." Tr. R. Vol. II at 355. He contends Cuadra was never directly questioned about this response but was struck nonetheless.

The transcript of the colloquy shows that Cuadra and another juror, Felps, each were familiar with the facts surrounding the case. Tr. R. Vol. VI at 1283. The defense moved to strike Felps for cause due to media exposure and the State challenged Cuadra for the same reason. The colloquy reveals that Felps expressed he had no problem imposing the death penalty while Cuadra expressed the above qualification. The State pointed out that both Felps and Cuadra had extensive knowledge of the facts of the case but that the defense had moved to strike only Felps.

And while Cuadra's feelings about the death penalty alone would not have been enough to merit a strike for cause, the record provides evidence that Cuadra might have been rendered impartial by his familiarity with the case. The

record indicates Cuadra lived two miles from the restaurant at the time of the crime. He was very familiar with the details from news reports; he remembered one of the victims begging for her life, that another was shot in the head, and that the defense reportedly planned to use the "rap music" defense at trial. Based on the record that was before the state court, it was not contrary to or an unreasonable application of clearly established federal law for the state court judge to deny relief relating to Cuadra.

Likewise with juror Bossom, who stated during voir dire that she was uncomfortable with the idea of sentencing someone to the death penalty. And while that and her other statements would make her a close call on this issue alone, the record indicates there was another reason she was struck for cause. That reason is that she said she would have a problem with a defendant not testifying on his own behalf and that it would prejudice her against him. As this is a violation of Louisiana Code of Criminal Procedure article 797(2), the Court finds the state court's decision to deny relief on this claim was not contrary to or an unreasonable application of clearly established federal law.

Juror Shropshire clearly indicated in his voir dire questioning that he "does not believe in the death penalty." Tr. R. Vol. VII at 1544. Upon repeated questioning by the defense, he agreed that he might be able to vote for the death penalty. Although he stated he would have voted for the death penalty in the Timothy McVeigh case, he stated that, in the current case, he could sentence

Wessinger to "life in prison or something like that," at most. *Id.* at 1542. As there is evidence in the state court record that juror Shropshire was biased against the death penalty, the Court finds the state court's decision to deny relief on this claim was not contrary to or an unreasonable application of clearly established federal law.

d. Misapplication of Hardship Challenge

Wessinger's final claim is that one of the jurors, Hotard, should have been excused for hardship because he was involved in a community theater production that was rehearsing most evenings. He acknowledged he could serve but might be distracted by thoughts of the play. The state court's decision not to excuse him was not contrary to or an unreasonable application of clearly established federal law. Relief on this claim is denied.

CLAIM III: WESSINGER DID NOT RECEIVE A FAIR TRIAL DUE TO PRE-TRIAL MEDIA COVERAGE

Wessinger's third claim is that he did not receive a fair trial as required by the due process clause of the Fourteenth Amendment due to pretrial publicity (Doc. 120 at 75). This claim was first asserted in trial court as a motion to quash and was subsequently raised on direct appeal in appellate court and at the Louisiana Supreme Court. The Louisiana Supreme Court denied this claim on the merits (Doc. 120 at 78).

Wessinger's claim is that East Baton Rouge Parish was an improper venue because the crime in this case took place at a well known restaurant in Baton Rouge and resulted in two murders. Wessinger claims that this crime received significant media coverage and that this coverage resurfaced several times because Wessinger's original defense attorney was suspended from practice and later disbarred (*Id.* at 75). An expert witness for the defense testified that thirty-one percent of potential jurors were prejudiced by pretrial media coverage (Doc. 120 at 76). Wessinger also asserts that this case was highly publicized because his original defense attorney planned to use a "rap music" defense, which the media incorrectly reported would consist of an argument that the violence advocated in rap music prompted Wessinger's actions (*Id.* at 76).

Extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial unconstitutionally unfair. *State v. Connelly*, 96-1680 (La. 7/1/97), 700 So.2d 810, 815, *quoting Dobbert v. Florida*, 432 U.S. 282, 303 (1977). Rather, a defendant seeking a change of venue must show that the extent of the prejudice in the minds of the community renders a fair trial impossible. *State v. Wilson*, 476 So.2d 503 (La. 1985). Generally, the defendant bears the burden of proving prejudice due to pretrial media coverage. *State v. Williams,* 708 So.2d 703, 728 (La. 1983). Prejudice can be presumed, however, when media coverage pervades the proceedings. *Murphy v. Florida,* 421 U.S. 794, 799 (1975); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). Wessinger claims that prejudice should be presumed in this case due to the

sensational nature of the "rap music" defense and the coverage the media afforded this defense (Doc. 120 at 78). The Louisiana Supreme Court considered this issue on direct appeal. 736 So.2d at 172-73. In finding the trial court's denial of the motion was not manifestly erroneous, the court considered the voir dire process. It noted that of the 65 prospective jurors examined during voir dire, most knew the crime Wessinger was accused of committing. The court noted that only five were excused for cause due to having a set opinion about his guilt and that most had only a vague recollection of the facts underlying the crime or the defendant's name. The court concluded the facts were similar to cases in which denial of a change of venue had been held proper and denied relief. Based on the record before it, the Court finds the state court did not unreasonably apply *Williams*, *Murphy*, or *Dobbert*."

CLAIM IV- THE ADMISSION OF HEARSAY EVIDENCE VIOLATED THE SIXTH AMENDMENT RIGHT TO CONFRONTATION

Wessinger's eighth claim is that the admission of hearsay evidence violated his Sixth Amendment right to confrontation. (Doc. 120 at 78). Wessinger also asserts, in the alternative, that the failure of trial counsel to object to hearsay evidence constitutes ineffective assistance of counsel. (Doc. 120 at 81). The Court will address each of these claims in turn.

Wessinger first raised the claim that the trial court erred by admitting hearsay on direct appeal. (Doc. 120 at 80). He did not, however, assert a

confrontation claim at that time. (Doc. 129 at 71). The Louisiana Supreme Court ruled the hearsay claim was procedurally barred by the contemporaneous objection rule. *Wessinger*, 736 So.2d at 178.

In this claim Wessinger asserts that the trial court improperly admitted hearsay on several occasions during the guilt phase of the trial. Specifically, Wessinger complains of the admission of his arrest warrant, along with all other warrants, through Detective Keith Bates. Wessinger also claims that the testimony of two other police officers constitutes hearsay, as these officers each testified that a key witness positively identified Wessinger. Lastly, Wessinger asserts that Detective Bates testified about Wessinger's flight from Baton Rouge by describing his phone conversations on this matter with a witness. (Doc. 120 at 80).

As in Wessinger's second claim, the State maintains that this claim is barred by the independent and adequate state ground doctrine (doc. 129 at 71) while Wessinger asserts that he can overcome this bar by showing cause and prejudice (doc. 120 at 81). The law regarding the state procedural bar and the exception to it provided by the cause and prejudice test is laid out in the Court's discussion of Wessinger's second claim. The contemporaneous-objection rule is not only "firmly established and regularly followed", additionally, as the state argues, it is well settled that it is "an independent and adequate state procedural ground". *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977). Wessinger asserts that the cause and prejudice requirements for overcoming this bar are met by the

ineffective assistance of counsel rendered in relation to this claim. (Doc. 120 at 80). **He does not discuss case law or in any way explain to the Court why he passes this test. Similarly, the State provides no reasons why Wessinger does not meet his burden, it simply says the claim is barred. (Doc. 129 at 71-72.)** The Court will not rule on whether the cause requirement has been met as it finds that Wessinger cannot meet the prejudice requirement.

To show prejudice, Wessinger must show that, but for the error of admitting the hearsay evidence, he might not have been convicted. *U.S. v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996). Wessinger concedes that all of the declarants in the hearsay statements complained of were available at trial. (Doc. 120 at 80). The Court finds that, but for the admission of the hearsay testimony, Wessinger has not shown he might not have been convicted. It is highly probable that the State would have called the declarants to testify as to their statements. Thus, the evidence would likely have come in regardless. Even had it not come in, the weight of the other evidence is such that the Court cannot say its absence might have led to a not guilty verdict.

The finding of no prejudice also eliminates Wessinger's alternate ineffective assistance of counsel claim for not making contemporaneous objections to the hearsay statements: as the Court has found no prejudice, Wessinger cannot meet the second prong of *Strickland*. See *Pickney*, 337 F.3d at 546. As Wessinger has not cleared the state procedural bar, relief on his claim on the admission of hearsay is denied.

CLAIM V: WITHHOLDING *BRADY* MATERIAL

In this claim, Wessinger contends certain evidence was withheld from him by prosecutors in violation of *Brady v. Maryland*. (Doc. 120 at 82-104). While the State claims it provided open file discovery throughout the prosecution, Wessinger claims this was not the case. Either way, it is clear that certain information did not make it into the hands of the defense team for use at trial.

The prosecution's suppression of material evidence favorable to the accused violates due process regardless of whether or not the prosecution acted in good faith or bad faith in failing to make a timely disclosure of the evidence. *Brady,* 373 U.S. 83 (1963). To be entitled to federal habeas corpus relief on a *Brady* claim, the petitioner must show: (1) the prosecution suppressed evidence, (2) the suppressed evidence was "favorable to the accused," and (3) the evidence was "material" either to guilt or punishment. *Brogdon v. Blackburn*, 790 F.2d 1164, 1167 (5th Cir. 1986). Evidence that is "favorable to the accused" includes evidence that tends directly to exculpate the accused as well as evidence that impeaches the testimony of a witness where the reliability or credibility of that witness may be determinative of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154, (1972). The touchstone of materiality is a "reasonable probability" of a different result. *Kyles v. Whitley*, 514 U.S. 419, 115 (1995). "The question is not whether the defendant would more likely than not

have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

Wessinger claims the state withheld the following exculpatory evidence: (1) Eric Armentor's November 19, 1995 statement to police at the scene; (2) Armentor's taped statement to police from November 22, 1995; (3) Alvin Rick's November 19, 1995; (4) Ricks's 911 call; (5) Eric Mercer's November 19, 1995 statement to police; (6) Willie Grigsby's November 19, 1995 statement; (7) Tilton Brown's November 29, 1995 statement to police; (8) Brown's criminal records; (9) a report showing Brown had been arrested prior to giving his interview to police; (10) Randolph Harden's cooperation plea agreement; (11) a report showing Wessinger's fingerprints were not on the murder weapon, on other physical evidence, or at the crime scene; (12) a letter from Capital One Credit stating that $2,500 had been withdrawn from Ms. Guzzardo's credit card account in California three days after her death; and (13) supplemental police reports concerning the investigation of Wessinger in Texas, including contact with Randolph Harden. (Doc. 120 at 82-83).

The state notes that two of these claims, numbers (12) and (13), were not brought up until the instant proceeding and should be procedurally barred. (Doc. 129 at 84-85). Wessinger did not address this in his reply brief. After examining the state court record, the Court agrees that the two issues were not litigated at

the state court level and may not be heard by this Court. As the Court finds the state court's determination on the materiality of the remaining claims was not unreasonable, the Court pretermits deciding the first two elements of the *Brady* claim.

In finding the state court was not unreasonable, the Court notes the quantity and quality of the evidence of guilt that was part of the record before the state court, as listed by the State in its brief. (Doc. 129 at 82-83). This evidence included, inter alia, two eyewitness identifications by survivors (Armentor and Ricks), testimony that Wessinger borrowed the gun from a friend, testimony he asked Brown, a friend, to help him, testimony he had told others he planned the robbery, and testimony Wessinger told people afterwards that he had robbed the restaurant and killed several people. Additionally, there was a recording of a 911 call containing one of the victim's pleas for mercy before being killed. While the alleged *Brady* material potentially would call into question the credibility or reliability of some of the witnesses, it was not unreasonable, based on the record before it, for the state court to find the evidence in question was not material under *Brady*.

The fact that Eric Armentor's statements contained slightly different versions of the events does not cast doubt on the essence of his testimony: that he saw Wessinger as Armentor walked into the restaurant; that Armentor was

shortly thereafter shot in the back; and that Wessinger then walked into the office and shot Guzzardo.

The same is true for Alvin Ricks: the fact that his trial testimony was different in some ways from his statement to police and his 911 call does not undermine confidence in the verdict.

Wessinger walked into the restaurant, pointed a gun at him and pulled the trigger—whether he pointed it at his head or his leg first is not as important If the *Brady* material were of a sort as to raise questions about whether Ricks was there at all, the conclusion might be different. However, disagreements over details during a crime such as this are not enough to cause doubt as to the confidence of the verdict. Likewise the absence of the inconsistent statements of Grigsby and the potential suspect vehicle identified by Mercer, do not call into question the jury verdict.

As for the testimony of Tilton Brown, the fact that his criminal record was not turned over would likely have undermined his credibility, but its absence does not call into the question the verdict. Had Brown been the star witness, this might be different. The Court is disturbed that the plea agreement between Harden was not disclosed to the defense—even if it would not have been admissible. However, its absence does not undermine confidence in the verdict. The investigative report showing Wessinger's fingerprints were not on the gun or at the scene of the crime would no doubt have helped the defense's case.

However, in light of the powerful evidence presented by the State, this absence does not undermine confidence in the verdict.

Wessinger contends the state court unreasonably applied federal law as expressed by *Kyles v. Whitley*, 514 U.S. 419 (1972), by failing to consider the Brady evidence collectively, not item by item. The Court finds that the state court made no express declaration of how it was considering the evidence. And as *Richter* allows for summary determinations, the Court finds that only an express declaration that the state court was not considering the evidence collectively would be contrary to federal law. Otherwise, if an express collective analysis were required on the record, every summary disposition of Brady claims would be violative of *Kyles*.

As Wessinger cannot meet the materiality prong of *Brady*, he also fails on the prejudice prong of his alternate ineffective assistance claim.

The Court is concerned that so much evidence apparently did not make it to the hands of the defense team for trial. It should have. However, under this deferential review, the question is the reasonableness, not the correctness, of the state court's decision. As it was not unreasonable, relief is denied.

CLAIM VI: IMPROPER EVIDENCE AND ARGUMENT DURING PENALTY PHASE

In his sixth claim Wessinger alleges that multiple instances of prosecutorial misconduct during the penalty phase of his trial warrant reversal of the death sentence. (Doc. 120 at 106-144). The Court will address each in turn.

A) Non-family members were improperly allowed to give victim impact statements

In this sub-claim, Wessinger alleges the admission of victim impact statements by individuals who are not family members of the victims violated the Eight and Fourteenth Amendment principles that victim impact evidence must be limited. (Doc. 120 at 106). This claim was first raised on direct appeal. The Louisiana Supreme Court acknowledged this claim as error but dismissed it as harmless error. *Wessinger*, 736 So.2d at 181.

Wessinger complains that non-family members supplied four of the six victim impact statements offered by the state. Louisiana Code of Criminal Procedure article 905.2(A) governs the use of victim impact evidence in capital cases. Although it has since been amended to also allow testimony from "friends, and associates" of the victim, at the time of Wessinger's trial article 905.2(A) only allowed testimony from family members of the victim. Wessinger asserts that victim impact evidence is only admissible under *Payne v. Tennessee*, the Supreme Court case that established the admissibility of victim impact statements in capital cases if permitted by state law. 501 U.S. 808 (1991); (Doc. 120 at 107). Wessinger then alleges that the Louisiana Supreme Court's dismissal of this claim as harmless error was an unreasonable

application of Supreme Court law in that it widens the exception for impact evidence created by *Payne*. (Doc. 120 at 111).

In *Payne*, the Supreme Court held in part that:

> . . . if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.

501 U.S. 808, 827.

Wessinger misapplies *Payne*. The Supreme Court simply said if states want to allow victim impact testimony, the Eighth Amendment does not necessarily stand in the way.[10] Louisiana allowed victim impact evidence at the time of Wessinger's trial, thus there is no Eighth Amendment violation per se. The fact that the trial court allowed the testimony of non-family members in direct violation of the article does not make it a misapplication of *Payne*, for Payne does not say non-family victim testimony is violative of the Eighth Amendment.

And however persuasive the Court may find the reasoning of the Illinois Supreme Court, which found "improper admission of this irrelevant victim impact evidence deprived defendant of a fair capital sentencing hearing," that is not clearly established federal law as interpreted by the United States Supreme Court. (Doc. 120 at 110, citing *People v. Hope*, 702 N.E.2d 1282, 1289 (Ill.

[10] The Court notes that, many states, including Louisiana, have since begun to allow non-family members to give victim impact evidence. At present, a majority of states do not limit victim impact evidence to family members. (Doc. 129 at 95); See Blume, Ten Years of *Payne*: Victim Impact Evidence in Capital Cases, 88 Cornell L.Rev. 257, 271-272 (2003).

1998)). As there seems to be no such case law, the Court finds it was not an unreasonable application of Supreme Court law for the Louisiana Supreme Court to find that the admission of victim impact evidence by non-family members was harmless error.[11]

2) Family members' victim impact statements were so highly emotional they were prejudicial

In this sub-claim Wessinger asserts his Fourteenth Amendment right to a fair trial was violated because: (1) the victim impact evidence provided by family members of one of the victims was so highly emotional and prejudicial; and (2) an outburst by one of the victim's parents during closing arguments. (Doc. 120 at 111). Wessinger raised these issues on direct appeal. The Louisiana Supreme Court denied it on the merits. (Doc. 120 at 114); *Wessinger*, 736 So.2d at 183.

The victim impact evidence Wessinger objects to consists of testimony from the parents of one of the victims to the effect they felt no sympathy for Wessinger. The outburst came during closing arguments of the penalty phase after the State played an audio tape of the 911 call to the jury, after which someone in the gallery said "son of a bitch" in obvious reference to Wessinger. Tr. R. at 2232. After this outburst, the courtroom was cleared and the trial judge

[11] In making this determination, the Louisiana Supreme Court found that it was error to allow the testimony but that because the testimony in question "would have been proper testimony from family witnesses," it was harmless error. *Wessinger*, 736 So.2d 162, 181 (citing *State v. Frost*, 97-1771 (La. 12/1/98), 727 So.2d 417). Though the Court notes that this seems to be an exception that swallows the rule, it is not this Court's role to review the correctness of the decision, only whether it was an unreasonable application of federal law. This, it was not.

denied a defense motion for a mistrial. *Id.* at 2233. The trial judge also denied a request to postpone the rest of closing arguments—it was early evening at the time—until the next morning. Instead, the arguments continued and the jury reached a verdict that night. Wessinger asserts that the denial of this claim was contrary to clearly established Supreme Court law.

Two United Stated Supreme Court cases set out the standards in this situation. Generally, *Gardner v. Florida* establishes that a jury's decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion." 430 U.S. 349, 358 (1977) (opinion of Stevens, J.). Additionally, in the arena of victim impact testimony, only if the testimony is "so unduly prejudicial that it renders the trial fundamentally unfair" will the Due Process Clause of the Fourteenth Amendment provide relief. The Louisiana Supreme Court determined that the "no sympathy" testimony was not prejudicial to Wessinger, due to the credit that is due jurors, these events would be seen as "normal human reactions to the death of a loved one". *State v. Wessinger,* 736 So.2d at 183. After reviewing the transcript, the Court finds it was not unreasonable for the court to make such a finding.

The trial court's refusal to delay closing arguments after the outburst concerns the Court, but the record before the state habeas court shows this was not an unreasonable application of *Gardner*. It surely came as no surprise to the jury that the victim's parents felt very strongly about Mr. Wessinger; further, juries often deliberate into the night without their decision being based on emotion

rather than reason. Without more specific case law from the Supreme Court regarding this particular conduct, it was not an unreasonable application of *Gardner* for the state habeas court to determine the jury's decision was not based on emotion rather than reason. Relief on this claim is denied.

3) The state improperly interjected irrelevant arguments on the issue of commutation to encourage a death sentence

Wessinger alleges that the state violated his Eighth and Fourteenth Amendment rights to due process and a non-arbitrarily imposed sentence by interjecting irrelevant arguments on commutation which were intended to encourage the jury to impose a death sentence based upon improper grounds. (Doc. 120 at 115). Wessinger first raised this issue on direct appeal and the Louisiana Supreme Court denied it on the merits. (Doc. 120 at 119). Wessinger asserts that the denial of this claim was contrary to federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1).

This claim arises from the State's cross-examination of an expert witness the defense called to testify on how frequently commutation had been granted to prisoners convicted of first degree murder. The State attempted to elicit from the witness information about two unrelated cases and how many times the victim's families had attended pardon board hearings in those cases. (Doc. 120 at 118). The State also questioned the witness about how attending pardon board hearings was very hard on the families of victims. (Doc. 120 at 119). Wessinger

argues that the decision of the victims' family and friends on whether to attend pardon board hearings and his decision on whether to exercise his right to seek a pardon were irrelevant to the jury's decision in the penalty phase. Wessinger alleges that the state interjected an arbitrary factor into the penalty phase by turning the cross-examination of this witness into an argument that the imposition of a life sentence would require the victims' friends and family to attend pardon board hearings for the remainder of Wessinger's life. (Doc. 120 at 117).

Wessinger also alleges that multiple other instances of prosecutorial misconduct occurred during testimony on the commutation issue. First, Wessinger contends that the State improperly invited the expert witness to speculate about how pardons could be more common under a future governor. Second, Wessinger argues the prosecutor misled the jury by asking questions about a past case involving a man whose murder sentence was commuted but who committed another homicide once released. (Doc. 120 at 121). Wessinger argues that this case was irrelevant to the instant matter, as the man whose sentence was commuted had not been convicted of first degree murder, and that the State was insinuating that if the death penalty were not imposed under a future governor Wessinger could have his sentence commuted and kill again once released. (Doc. 120 at 122). Lastly, Wessinger alleges that when a second expert witness was called to testify on the commutation issue the State attempted to turn this issue into a proportionality survey by asking how many

individuals who had been convicted of double homicides were given the death sentence. (Doc. 120 at 122-24).

Wessinger cites a Fifth Circuit case, *Byrne v. Butler*, for the principle that the possibility of future release is an arbitrary factor which should not be interjected into capital sentence proceedings. (Doc. 120 at 117, citing 845 F.2d 501, 508 (5th Cir. 1988)). The *Byrne* court only mentioned this principle in passing, however, and found that the prosecutor's remarks on this subject did not warrant reversal because when the prosecutor referred to the possibility of future relief he was merely attempting to correct what he perceived as an improper statement from defense counsel on the meaning of life imprisonment. *Id.* Likewise, in Wessinger's case the Louisiana Supreme Court found that the testimony on commutation Wessinger complains of was part of a proper cross-examination, as the prosecutor was attempting to make the witness "retreat from his position of virtually guaranteeing the jury that the defendant would never be commuted out of a life sentence." *Wessinger*, 736 So.2d at 185. Additionally, the Louisiana Supreme Court noted both that the credit which is due jurors indicates that a jury would not impose a death sentence merely to prevent the victims' families from attending commutation hearings and that in his closing argument the prosecutor impressed upon the jury that they were not to use the pardon board hearings as a reason to impose the death penalty. *Id.* at 186.

Wessinger also argues that the Supreme Court has stated that Due Process rights are denied by the creation of a "false choice between sentencing

petitioner to death and sentencing him to a limited period of incarceration" and that the state did so by its questions on the commutation issue. (Doc. 120 at 122, citing *Simmons v. South Carolina,* 512 U.S. 154, 161-62 (1994)). The Court agrees with the Louisiana Supreme Court that such a "false choice" was not created in this case. Additionally, as the Louisiana Supreme Court noted, due to the volume of evidence the state put forth in the penalty phase it is unlikely that the jury imposed the death penalty due to the disputed testimony on commutation. *Wessinger,* 736 So.2d at 186-87. Therefore, the Louisiana Supreme Court's denial of this claim was not contrary to, or an unreasonable application of, federal law as determined by the Supreme Court in *Simmons*.

4) The State violated the 'golden rule' in its closing argument of the penalty phase

Wessinger next claims the State improperly asked jurors to put themselves in the victims' shoes when deciding whether Wessinger should be put to death, thereby invoking the forbidden "Golden Rule" argument. (Doc. 120 at 124-29). Specifically, Wessinger objects to the following from the State's penalty phase closing argument, in which the assistant district attorney described the circumstances surrounding the death of one of the victims:

> It wasn't 18 seconds for Stephanie Guzzardo. It was a lot longer than 18 seconds that she realized that she was probably going to die or at least realized that she was in extreme danger. Put yourself in her position. Pretty day, a happy, beautiful person, fine parents, a job. There is no reason to believe that it's going to be any different from any other day working in a restaurant. And then all of a sudden you hear a noise and you hear people running and you hear people

> probably saying things that don't sound right and then all of a sudden you hear a gunshot. And you're sitting there with that safe open and that money and the fear hits you and hits your heart that somebody is in here, somebody has got a gun, somebody has shot the gun, and your fear is that they'll come for you, and you have to think about that. And that room, which is about as big about as this jury box, has one door and the shot came from the direction you have to go out of and you look around and you're trapped. You're trapped and then within a short period of time, here's your worst fear. Here's Todd Wessinger with this pointed at you and it hits you what he's there for and you glance at that safe and you know what he's there for and you look down the barrel of this. I will hold it to the ceiling, but you look down the barrel of this and you know it was just shot out there. Can you imagine how you would feel? Can you imagine what would go through your mind? And you know the issue because you know him and you know the issue right away is that he's probably going to kill you because he doesn't want you to recognize him and you start begging for your life. Can you imagine being trapped in that room and looking at a full grown healthy, physically fit male that an unarmed female sitting there, looking at that gun and begging for her life. Can you imagine what she felt? You heard it. And then that pain when that bullet tears into her. Dr. Suarez says last 17 or 18 seconds. When that clock comes up on three up there -- see that second hand? Watch it tick off 18 seconds. Longer than you thought, isn't it? Longer than you thought. Is that a heinous and atrocious way to die? I say it is. And when you're the person that inflicts that on someone, I say you deserve the death penalty.

(Doc. 120 at 125). The Louisiana Supreme Court denied relief on direct appeal, finding that, even if this argument was improper, "an intelligent jury could not reasonably have believed that the prosecutor was urging them to disregard the law as given to it in the instructions of the trial judge." *State v. Wessinger*, 736 So.2d at 187.

Wessinger asserts this denial was based on an unreasonable determination of the facts in light of the evidence under § 2254(d)(2). However,

he does not point out what facts he feels were unreasonably determined by the Louisiana Supreme Court. Rather, this is a situation where Wessinger disagrees with how the court applied the facts to the law and is evaluated under §2254(d)(1). The State correctly points out that there is no clearly established federal law as announced by the United States Supreme Court that use of a golden rule argument in a capital case is impermissible. Therefore, the unreasonable application provision of § 2254(d)(1) is not available. And while the Court notes the case law from the Fifth Circuit and other courts that disapproves of this argument, there is no case law from the United States Supreme Court. Therefore, the express language of §2254(d)(1) forbids the Court from considering this claim. 28 U.S.C. § 2254(d)(1) (relief may be granted where the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*;). This statute refers to "holdings, as opposed to dicta, of Supreme Court decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). As there is no holding from a United States Supreme Court case that the Louisiana Supreme Court unreasonably applied, relief on this claim is denied.

5) Prison life at Angola

In the fifth part of this claim, Wessinger alleges that the prosecutor violated his right to a fair trial and his right to reliable sentencing by asking questions and making comments regarding life in Angola Prison during cross-examination of Dean Foster, a university professor called by the defense to testify on the commutation procedure and statistics. (Doc. 120 at 130). The Louisiana Supreme Court has mandated that "[i]mproper or allegedly prejudicial argument requires reversal when it is probable that the jury's verdict was influenced by the remarks." *State v. Deboue*, 552 So. 2d 355, 364 (La. 1989). Most courts that have reviewed a prosecutor's arguments in this context have found that, while some statements made by a prosecutor are improper, they don't amount to reversible error. The State notes, and the Court agrees, that Wessinger has pointed to no Supreme Court case that the state courts' determination violates. (Doc. 129 at 104). Wessinger cites generally to *Zant v. Stephens*, 462 U.S. 862 (1983) but does not explain how its holding is violated. After reviewing the case, the Court finds as it is not violated.[12] Therefore, for the same reasons discussed in the "golden rule" claim, Wessinger has not met his burden under § 2254(d)(1), and relief is denied.

6) Verdict as a Recommendation

[12] Zant dealt with aggravating factors and whether the later invalidation of one factor called the death sentence into question. The Court held that, where jury found existence of multiple aggravating factors, the later invalidation of one of them by the state supreme court did not require vacation of the death sentence. This case is inapposite.

Next, Wessinger alleges that the prosecutor improperly referred the jury's sentence as a "recommendation" instead of a "verdict." (Doc. 120 at 135). In *Caldwell v. Mississippi*, the U.S. Supreme Court addressed the question of whether a capital sentence is valid where the prosecutors specifically told jurors that their decision would be reviewed by the appellate court in an attempt to convince them that they shouldn't consider themselves the final say on the defendant's life or death. 472 U.S. 320, 325.[13] That Court held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentence who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Subsequent cases have clarified this position by stating that *Caldwell* is only relevant to comments that mislead the jury as to its role in the sentencing process in order to make the jury feel less responsible for imposing a death sentence. *Romano v. Okla.*, 512 U.S. 1, 9 (1994). Specifically, "to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Id.* (citing *Darden v. Wainwright*, 477 U.S. 168, 184, n.15 (1986)).

Wessinger argues that the prosecutor referred to the jury's sentencing decision as a "recommendation" several times throughout the trial and that this

[13] In that case, the District Attorney, following the defense's plea for life imprisonment rather than a death sentence, stated, "they [defense attorneys] would have you believe that you're going to kill this man and they know – they know your decision is not the final decision. My god, how unfair can you be? Your job is reviewable. They know it. . . the decision you render is automatically reviewable by the Supreme Court." *Id.*

improperly influenced the jury's decision by telling them that their decision wouldn't be final. (Doc. 120 at 136). However, one of the cases cited by the petitioner himself directly contradicts this argument. In *Kyles v. Whitley*, the Fifth Circuit held that even though the prosecutor referred to the jury's decision as a recommendation, because the jury was told in the instructions the judge gave them that if they chose to sentence the defendant to death, that a death sentence would indeed be imposed. 5 F.3d 806, 857-58 (5th Cir. 1993). Similarly, in this case, during voir dire, prior to opening statements in the penalty phase, and during the instructions given to the jury, the trial judge in this case made clear that "it will be [the jury's] duty whether the sentence in this matter should be life in prison without benefit of probation, parole, or suspension of sentence or death." *Wessinger*, 736 So. 2d at 189. The prosecutor should not have used such language, however. The Court finds it was not an unreasonable application of *Caldwell* for the state courts to find the instructions cured any misunderstanding the prosecutor may have created. Relief on this claim is denied.

7) Cumulative Error During Penalty Phase

In this claim, Wessinger argues that the errors during the penalty phase of the trial, when cumulated, cannot be viewed as harmless error. The law relating to cumulative error claims in the Fifth Circuit is discussed fully below in Claim XII. *Infra* at 71. In short, the errors relating to the allowance of non-family victim-impact evidence are errors of state law. Therefore, they do not meet the *Derden*

test, as discussed below. *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992).

CLAIM VII- DENIAL OF RIGHT TO BE PRESENT AT ALL STAGES OF PROCEEDINGS

Wessinger's seventh claim is that he was denied the right to be present at all stages of proceedings in violation of the Due Process Clause of the Fourteenth Amendment (Doc. 120 at 144).

At the heart of this claim are the events surrounding the aforementioned outburst made by the father of one of the victims during the prosecutor's closing statement of the penalty phase. Tr. R. Vol. IX at 2232. Immediately following the outburst, the trial judge removed Wessinger and the jury from the courtroom. The judge then convened a bench conference to discuss the outburst, at which defense counsel requested a mistrial due to the outburst (Doc. 120 at 112). The mistrial was denied and following a bench conference Wessinger and the jury were returned to the courtroom. Tr. R. Vol. IX at 2232-35. Wessinger asserts that his right to be present at all stages of proceedings was violated because he was not present when this bench conference took place.

Supreme Court jurisprudence interpreting the right to be present at all stages of proceedings shows that Wessinger's removal from court during the bench conference was not a violation of this right. The Supreme Court has held that the presence of the defendant is a condition of due process only to the

extent that a fair and just hearing would be thwarted by his absence. Therefore, the presence of the defendant is only essential at proceedings which have a reasonably substantial relation to the fullness of the opportunity of the defendant to defend against the charge. *Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97, 109 (1934). As a result of this principle a general rule has emerged that no claim of error, or at least no claim of prejudicial error, can be based upon the exclusion or absence of a defendant, pending his trial on a criminal charge, from the courtroom, or from a conference between court and attorneys, during argument on or discussion of a question of law. *State v. Kahey,* 436 So.2d 475, 483 (La. 1983) (citing *Snyder*). The bench conference Wessinger complains of related to a motion for a mistrial, an argument or discussion of a question of law. Therefore, it was not an unreasonable application of *Snyder* for the state court to find Wessinger's Fourteenth Amendment rights were not violated by his exclusion from it.[14] Relief on this claim is denied.

CLAIM VIII- THE FAILURE TO PROVIDE JURORS WITH A BURDEN OF PROOF ON MITIGATION VIOLATED THE EIGHTH AMENDMENT

[14] The Court notes that Louisiana law provides criminal defendants with more right to be present than the Supreme Court jurisprudence cited above. Yet Wessinger's absence from the courtroom during the bench conference also did not violate Louisiana law. La. Code Crim. P. art 831 provides times during which a felony defendant must be present. As noted in the state's Opposition to Writ for Habeas Corpus, however, Wessinger's absence during the bench conference does not fall within any of the times set out in article 831 (Doc. 129 at 116). Additionally, La. Code Crim. P. art 834 specifically states the presence of the defendant is not necessary in a criminal prosecution during ". . . (2) The making, hearing of, or ruling on a motion or application addressed to the court during the trial when the jury is not present . . ." As a result, Wessinger's presence during the bench conference was not necessary under article 834 because the jury was not present at that time.

Wessinger's eighth claim is that the failure to provide jurors with a burden of proof as to mitigation violated the Eighth Amendment principle that a capital jury's sentencing discretion must be guided (Doc. 120 at 146). This claim was first raised on direct appeal in appellate court and at the Louisiana Supreme Court, which denied it on the merits (Doc. 120 at 147).

Wessinger does not assert that either Louisiana or federal law has actually established a burden of proof for mitigation for capital cases but instead claims that federal law requires that some burden of proof for mitigation must be provided and that the jury must be told about that burden (Doc. 120 at 146). Only one case is cited for this notion that a burden of proof must be provided for mitigation and that jury must be told about it, *Proffitt v. Florida*, 428 U.S. 242 (1976). The portion of *Proffitt* that the petitioner cites for this statement of law, however, does not in any way require that a burden of proof for mitigating factors be provided. Instead, it only addresses what sentencing factors satisfy the *Furman v. Georgia* requirement that the question of whether the punishment for a crime should be death or a lesser punishment cannot be left entirely to the discretion of the judge or jury.[15] The State argues, and the Court agrees, that no federal law or Supreme Court decision can be cited for the requirement that in capital cases a burden of proof for mitigation must be provided and supplied to

[15] This portion of *Proffitt* states: "the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition". *Proffitt* at 258 ; *Furman v. Georgia,* 408 U.S. 238 (1972).

the jury (Doc. 129 at 118). As a result, the Court finds that *Furman* and the cases interpreting it should control, as they provide the more general requirement that a capital jury's sentencing discretion must be guided. *Furman v. Georgia,* 408 U.S. 238 (1972). The Supreme Court has interpreted this to mean "[a] capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980).

The record from the state court proceedings provides ample evidence that the sentencing factors used in this matter satisfied this requirement. A Louisiana Code of Criminal Procedure provides specific factors that are to be used by juries in capital cases to determine sentencing. La.C.Cr.P. art. 905.2(A). The Louisiana Supreme Court found that the trial judge's jury instructions at the penalty phase essentially recited the requirements of this article and also noted that the trial judge instructed the jury to consider any other relevant mitigating factors. Therefore, it was not unreasonable for the Louisiana Supreme Court to rule that the jury's instructions for mitigation were adequate.

CLAIM IX- THE AGGRAVATING CIRCUMSTANCES SUBMITTED TO THE JURY WERE UNCONSTITUTIONAL

Wessinger's ninth claim is that the aggravating circumstances submitted to the jury were unconstitutional due to vagueness and duplicity. (Doc. 120 at 147). This claim was first raised on direct appeal in appellate court and at the

Louisiana Supreme Court. The Louisiana Supreme Court denied this claim on the merits. *Wessinger*, 736 So.2d at 192. Alternatively, Wessinger asserts the failure of his trial counsel to object to the use of these aggravating circumstances constitutes ineffective assistance of counsel. (Doc. 120 at 150).

Wessinger argues that the State's reliance upon the aggravating circumstance that "the offense was committed in an especially heinous, atrocious or cruel manner" violated the Eighth Amendment as an unconstitutionally vague jury instruction in a capital case. (Doc. 120 at 147). As Wessinger argues, a jury instruction of "especially heinous" is unconstitutionally vague if not accompanied by a limiting instruction. *U.S. v. Jones,* 132 F.3d 232 (5th Cir. 1998), (citing *Maynard v. Cartwright,* 486 U.S. 356, 364 (1988)). The Fifth Circuit has held that the vagueness of such an instruction is cured by a limiting instruction that the offense must involve "torture or serious physical abuse". *Id.* at 249, citing *Walton v. Arizona*, 497 U.S. 639, 654-55 (1990). Wessinger maintains that the limiting instruction used at his trial, that there must be evidence of "torture or the pitiless infliction of unnecessary pain of the victims", did not cure the vagueness of the "especially heinous" instruction. (Doc. 120 at 148). Additionally, Wessinger argues that the felony aggravating circumstance was duplicitous because it allowed the jury to find that the murders were committed during a burglary or robbery. (Doc. 120 at 149).

As the State argues, Wessinger only cited state law when he raised the vagueness and duplicity claims on direct appeal and therefore did not put a

federal issue before the state courts. (Doc. 129 at 120). This Court cannot hear this claim unless a state court's adjudication of it was based upon federal law. 28 U.S.C. § 2254 (d)(1). The Louisiana Supreme Court's ruling on this claim only considered and addressed state law. *Wessinger,* 736 So.2d at 192. Thus, it is procedurally barred. Additionally, Wessinger does not attempt to argue that he can overcome this procedural bar by showing cause and prejudice.

Even if this claim were not procedurally barred, the limiting instruction used in this case provided an arguably higher bar for jurors to find the existence of the "especially heinous" aggravating circumstance than did the *Jones* instruction. While both include torture, the trial court's instruction requiring "pitiless infliction of unnecessary pain of the victim" seems to go well beyond the standard of "serious physical abuse." It was not an unreasonable application of *Jones* to find this instruction sufficient.

Wessinger's alternative claim that the failure of his trial counsel to object to the vague or duplicitous instructions constituted ineffective assistance of counsel is without merit as this claim cannot pass either prong of *Strickland.* As the Court finds the limiting instruction given provides at least as much protection as the *Jones* instruction, there was neither defective performance for not objecting nor any prejudice caused. Relief is denied on this claim.

CLAIM X: LETHAL INJECTION PROTOCOL VIOLATES EIGHTH AND FOURTEENTH AMENDMENTS

Wessinger claims the method of lethal injection employed by the state of Louisiana violates the Eighth and Fourteenth Amendments because there is substantial risk of serious, unnecessary pain. (Doc. 120 at 150-55). The State contends this claim is procedurally barred and precluded from review. (Doc. 129 at 122-25). Wessinger admits in a footnote he is raising this claim for the first time in this Court. (Doc. 120 at 155 n. 26). Wessinger does not respond to this argument in his reply. The Court finds Wessinger has not exhausted his state court remedies regarding this claim. As the state court would find this claim barred, it is procedurally defaulted in this Court. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991). The Court finds Wessinger does not meet one of the exceptions to this procedural default rule. Therefore, relief is denied on this claim.

As an alternative request for relief, he contends it was ineffective assistance for his trial and appellate counsel to not raise this claim earlier. Even if it were defective, Wessinger cannot meet the second prong of Strickland: objecting to the protocol would not have affected either phase of his trial, it simply would have delayed his execution until the protocol was constitutional. Relief on this claim is denied.

CLAIM XI: INEFFECTIVE ASSISTANCE OF COUNSEL

Wessinger claims he received ineffective assistance of counsel in the following areas: (1) during voir dire; (2) during the guilt and (3) penalty phases of

the trial; (4) for failing to object to incorrect jury instructions; and (5) for failing to obtain a complete transcript of the proceedings. (Doc. 120 at 155-306). To the extent that some of these claims overlap with claims previously discussed, the Court will refer to the prior discussion. The Court notes that all of these claims were adjudicated at the state court level and are therefore subject to review under § 2254(d).

The clearly established law in this claim is *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court established a strong presumption that counsel had acted adequately. To overcome this presumption, the petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Id.* at 687. To prove deficient performance the petitioner must demonstrate that counsel's actions "fell below an objective standard of reasonableness." *Id.* at 688. To prove prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1983). In the habeas corpus context, the Supreme Court has stated this review is "doubly deferential" as it takes a "highly deferential look at counsel's performance through the deferential lens of § 2254(d)." *Pinholster*, 131 S.Ct. at 1403 (citations omitted). Therefore, Wessinger must show that it was

necessarily unreasonable for the state courts to conclude both that he had not overcome the strong presumption of competence on the part of his trial attorneys and that he had failed to undermine confidence in the jury's verdicts of guilt and/or death. *Id.* With this in mind, the Court will examine each of Wessinger's claims

A. Voir Dire

Wessinger claims his trial counsel was ineffective for failing to: (1) question and challenge jurors who demonstrated bias; (2) challenge prospective jurors who obviously could not follow the law; (3) question jurors about whether they knew anyone who was a victim of crime; and (4) challenge jurors who were antagonistic to the case in mitigation. (Doc. 120 at 180-196). The State contends that all claims related to jury selection are procedurally barred as they were either decided on direct appeal, were known by Wessinger but not brought up on appeal, or were raised in the trial court but then not brought up on appeal. (Doc. 129 at 132). Thus, the State maintains these claims are barred from consideration on post-conviction appeal by Louisiana Code of Criminal Procedure art. 930.4(A)-(C). Wessinger does not address this matter in his reply brief. However, the state court did not treat the issue as procedurally barred—indeed there is no mention of a bar at the state court level—and this Court will not recognize a bar that none of the courts below addressed. Therefore, the

Court will address the merits of the claim, which is broken down into specific jurors and general allegations of ineffectiveness.

Trial counsel is ineffective during voir dire if he allows a biased jury to be seated such that it leaves "the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Wainwright*, 391 U.S. 510, 520 (1968). Also, criminal defendants are entitled to a jury of "impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717 (1961).

Wessinger was not allowed to appeal any of the trial court's denial of challenges for cause due to a procedural rule in Louisiana that states where a party does not use all of his peremptory challenges, he may not object to denial of challenges for cause. *State v. Koon*, 704 So.2d 756, 768 (La. 1997). Therefore, he was not allowed to appeal the denial of challenges for jurors Bagur, McDonner, Harville, Lee, Dewitt, Mercier, and Yarborough. The defense used peremptory strikes on the last five; Bagur and McDonner were on the jury. Another, Nesom, was an alternate and will not be discussed here as no prejudice can be shown.

As Wessinger used peremptory strikes on Harville, Lee, Dewitt, Mercier, and Yarborough and had strikes left over, he was not prejudiced by any deficiency on the part of his trial attorneys relating to these jurors. The same is true for Nesom, who did not ultimately deliberate in either phase of the trial.

As for Bagur and McDonner, who were on the jury, Wessinger points to no authority for the position that failing to use the full allotment of peremptory strikes—thereby preserving the right to challenge denial of strikes for cause—can be ineffective assistance of counsel. Further, while these two jurors could have been questioned more thoroughly, nothing in their stated answers indicates they were not impartial and indifferent during the trial. Juror Bagur stated she thought she could put aside her preconceptions and follow the law. Tr. Vol. V at 1100. This is not indicative of someone who is not partial.[16] Regardless, none of the Supreme Court case law Wessinger cites holds that such a response is per se bias. As to her testimony about alcoholism, Bagur stated she felt it was less a disease and more of a personal choice. *Id.* at 1159-60. She also said she thought alcoholism did not affect a person's judgment when they were sober. As the defense strategy in the penalty phase was to claim Wessinger was intoxicated and therefore unaware of what he was doing, this attitude would not necessarily be a bad one for a juror. It was not unreasonable for the state court to find it was not ineffective assistance not to strike Bagur.

Juror McDonner is closer, but Wessinger has not met his burden. McDonner was a chef at a local restaurant who knew many of the employees and the owners of the restaurant where the killings took place. Tr. R. Vol. V at 1067. McDonner stated that as a result of this crime, he changed certain

[16] Like many, Bagur had been exposed to pretrial publicity and testified she remembered thinking at the time that Wessinger was probably guilty.

procedures where he worked and also acknowledged he had been threatened by a disgruntled employee before. Tr. R. Vol. VI at 1299-1300. He also stated that he did not think his associations would prevent him from being fair and that he would not give favor to the State's evidence. Tr. R. Vol. V at 1068. McDonner's longest answer came in response to the question about whether he had formed an opinion about Wessinger's guilt or innocence through the pretrial media coverage: "No sir, not really, just basically you go to work the next day and you start taking, you know, you just think this could happen here, you know. So you start locking things and making sure everybody is happy." *Id.* at 1300. While it might have been advisable to find out more about McDonner, the record does not indicate that he was actually impartial, it was not unreasonable for the state court to find no violation of *Wainwright* and *Dowd*.

Wessinger also points to the voir dire of Juror Daniel as problematic. When asked her opinion of a defendant who chooses not to testify, she responded, "I think in all honesty I would wonder why, you know, I don't know that much about the courts and how they operate, but I would wonder why that person would not, if there was something to be hidden, not to be questioned about." Tr. R. Vol. VI at 1483. After the court instructed her on the law, she said she would not hold his silence against him. (*Id.* at 1488). Defense Counsel Rome tried to ask her how it would make her feel if the defendant chose not to take the stand. The trial court sustained the State's objection to this. During a

bench conference on this objection, the prosecutor said the question was not allowed "because there's a case that says you can't do it." *Id.* at 1487-88. Wessinger faults Rome for not pressing this point further. (Doc. 120 at 186-187). However, after reviewing the full transcript, the Court finds Rome rigorously pursued this line of questioning, abandoning it only after the trial court twice sustained the State's objections—the second coming immediately after the "because there's a case" argument. His performance was not deficient.

Likewise, for three of the remaining jurors, the Court finds trial counsels' performance was not defective during voir dire. Although juror Hotard was a witness in another case in the same judicial district and had a "good friend" who worked for the district attorney's office, allowing him to sit on the jury does not rise to the level of defective performance. *Brooks v. Dretke* is inapposite as in that case, the juror had criminal charges pending at the time: in no way could it be said Hotard's fate was in the district attorney's hands, as the Fifth Circuit held was the case in *Dretke*. 418 F.3d 430, 435 (5th Cir. 2005). The failure to challenge Hemba, who said when she initially heard the news of Wessinger's arrest recalled thinking he must be guilty, is not defective. She stated she recalled thinking he must be guilty at the time of his arrest. She also stated that, "that was a long time ago."[17] Tr. R. Vol. VI at 1404-1405. As for Motichek, the fact that she was a waitress at a nearby restaurant does not, in and of itself,

[17] In his brief, Wessinger left out this part of Ms. Hemba's answer. The Court advises counsel to provide the entire answer when block–quoting questions and answers in the future.

disqualify her from service. Based on the entirety of her voir dire colloquy, it was not unreasonable for the state court to find counsels' performance effective regarding her selection.

The voir dire of juror Waguespack is the only one the approaches ineffective assistance. Under questioning from the State, Waguespack said she thought she could return a verdict of death. Tr. R. Vol. VII at 1694. When pressed, she said, "Well, I think it's hard to be the one to say to put this person, you know, to die." *Id.*

> But then again, if all the evidence proves that he's definitely guilty I just feel like the system today so many people are sent for a life sentence and they eventually get off on parole or come up for parole and then they get out or something. And I just feel like if they're there and its been proven that they're guilty and that they did do the crime then they should be put to death.

Id. at 1694-96. While Waguespack's first answer seems to indicate a hesitance to vote for the death penalty, Wessinger claims her second answer indicates a predisposition to imposing it. (Doc. 120 at 188-89). She then replied in the affirmative twice when asked if she could in fact return a verdict of death. Tr. R. Vol. VII at 1695. On questioning by the defense, Waguespack was asked if she could return a not guilty verdict if the State did not prove its case. "Well, if it was proven that he's not guilty," was her reply. (*Id.* at 1697). After it was explained to her that the burden was on the State to prove Wessinger guilty—not the other way around—Waguespack said she understood. Then, she was asked to answer the question again:

A: Would I have any problem with a not guilty if [the State] didn't prove it is what you're asking me?

Q: Yes, that's right.

A: I guess, no.

Q: You guess?

A: No.

Tr. R. at 1696-97. The defense attorney moved on to the other prospective juror being questioned with Waguespack. Later, defense counsel returned to Waguespack and clarified that a sentence of life in prison would not carry the possibility of parole. She said she understood that. (*Id.* at 1704).

While the Court is certain that more questions could have been asked Waguespack on this topic, this is not a forum to second guess trial counsel's performance during jury selection. The Court finds this does not fall below an objective standard of reasonableness. The attorneys addressed the concerns that were raised by Waguespack, a registered nurse, and were apparently satisfied with her responses. It is possible that they thought that, after clearing up her misunderstanding of the law regarding parole, her initial hesitance to impose the death penalty would prevail. It did not, but this does not fall below the objective standard for reasonableness.

Wessinger also claims trial counsel was ineffective for failing to litigate the manner in which the State used its peremptory strikes. (Doc. 120 at 193).

Specifically, he asserts the State used them to discriminate against black jurors. There were three black prospective jurors. The record shows that the state used three of its 12 allotted strikes. Two of those three were used on black jurors. The defense struck the third black juror. The defense did not make a Batson challenge to any of the State's strikes. Wessinger presents some statistics to back his assertion that it is virtually impossible to have an all-white jury in a parish with a population that is one-third black. (Doc. 120 at 193-94). He provides no source for these statistics. He then string cites cases showing it is ineffective not to challenge where one group is almost absent from the jury. Wessinger seems to ask the Court to declare counsel ineffective simply because there were no black jurors. He contends that the state court's decision, as it did not provide reasons, is not entitled to deference and should be reviewed de novo. *Richter* clearly negates this argument. Thereafter, Wessinger cites no Supreme Court case who's holding is directly violated by the state court's ruling that failing to challenge excusal of the majority of a small number of minority jurors is ineffective assistance where the defense itself struck members of that same minority. Therefore, this claim fails under § 2254(d)(1).

Based on the state court record, the Court finds the state court did not unreasonably apply the federal law or make unreasonable factual determinations relating to Wessinger's voir dire claims.

B. Guilt Phase

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.

C. Penalty Phase

Wessinger also alleges trial counsel was ineffective during the penalty phase of his trial. (Doc. 120 at 232). The main thrust of this argument is that trial counsel did not adequately investigate or present mitigating evidence to the jury. As the state court record shows otherwise, relief on this claim is denied.

At the penalty phase, defense counsel put on seventeen witnesses in mitigation. They included Wessinger's former employers, the mothers of his children, his brother, a preacher, his sister, his aunt, a cousin, a psychologist, a psychiatrist, a commutation expert, and a friend. The testimony of these

witnesses painted a picture of Wessinger as a caring and present father, a brother who cared for his handicapped sister growing up, and a hard worker from a stable family. Testimony also revealed Wessinger had a drinking problem and that he was "a totally different person" when drinking. Tr. R. Vol. IX at 2132. None of the friends or family members could believe he had committed the crime. The expert testimony revealed Wessinger had an I.Q. of 90, placing him in the 25th percentile. Both mental experts testified that in a controlled environment such as prison Wessinger was not a danger to others; Dr. Cenac testified Wessinger would be a "model prisoner" in Angola. (*Id.* at 2180).

Wessinger faults trial counsel for not investigating further into his childhood and upbringing, which he claims would have led to evidence of a physically and mentally abusive childhood, possible mental defects, and an alienation from society that led him to feel he did not belong. (Doc. 120 at 232-256). This is little more than a narrative of Wessinger's life. Further, it is contradicted by the witnesses called by the defense, who testified as discussed above. Wessinger points to no documentary evidence his attorneys overlooked that would have led a reasonable attorney to investigate further. Further, the cases Wessinger cites to bolster his claim are inapposite.[18] In short, it is not the quality or thoroughness

[18] *Rompilla v. Beard* dealt with failure to investigate records of prior convictions that counsel knew would be used as aggravating factors. 125 S.Ct. 2456 (2005). No such prior convictions were used here, nor are there any records at all the counsel should have but did not investigate. In *Wiggins v. Smith*, the Supreme Court found it unreasonable for trial counsel not to further investigate their client's background where a prior pre-sentence report indicated misery in his youth and foster care placements. 539 U.S. 510 (2003). Here, no such prior knowledge is alleged or evidenced. Finally, in *Williams v. Taylor*, the Court found counsel's failure to uncover

of the investigation Wessinger is attacking, he essentially does not like the way his story was spun for the jury. This is not ineffective assistance.

Wessinger also faults his attorneys for failing to prepare his mental health expert witnesses. As noted by the state, he does not say what this additional preparation would have yielded. Additionally, the Court finds the record indicates this was a strategy on the part of the defense team. Mr. Hecker asked both Dr. Rostow and Dr. Cenac if they had had any prior conversations about the questions they were to be asked on the stand. Tr. R. at 2147, 2174. Rather than failure to prepare, the Court finds the record shows the defense was using this to show the jury they had not scripted the testimony in an attempt to make it seem a totally impartial opinion. This seems to have backfired, and while Wessinger is correct that some of the most damaging testimony came from Dr. Cenac, who testified that Wessinger had confessed to the killings to him and also classified contradictory stories told by Wessinger as lies, that is one peril of that strategy.

Overall, defense counsel seems to have bet heavily on a strategy of painting Wessinger as a good person who suffered from alcoholism and was not his normal self when he committed the murders and that a life sentence would not endanger the lives of other inmates. Defense put on multiple witnesses to that effect and painted a compelling picture. The fact that the jury rejected this

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voluminous mitigating evidence ineffective. 529 U.S. 362 (2000). Here, mitigating evidence was uncovered. Wessinger now contends it was not interpreted correctly by counsel.

theory does not make counsel ineffective. Thus, the state courts' application of *Strickland* was not unreasonable.

D. Incorrect Jury Instructions During the Guilt Phase

Wessinger claims that his defense counsel was ineffective in failing to object to erroneous jury instructions. Specifically, he claims that trial counsel failed to object to (1) an instruction that witnesses are presumed to tell the truth; (2) the disjunctive wording of the instructions; (3) the instruction on the "reasonable doubt" standard; (4) an instruction that the jury had a duty to convict; and (5) the instruction on flight evidence. (Doc. 120 at 223). The State did not brief this issue. It is unclear from the briefs if the claim was adjudicated at the state court level. The Court will assume it was adjudicated. As the Court finds the instructions given were not erroneous, it does not need to evaluate counsel's performance using *Strickland*.

In a federal habeas corpus review context, the standard for reviewing jury instructions is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (citation omitted). In other words, the primary question for the Court is whether the instruction itself "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72; *see also Donnelly v. DeChrisoforo*, 416 U.S. 637, 643 ("It must be established not merely that the instruction is undesirable, erroneous, or even 'universally

condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.").

The first instruction Wessinger finds fault with concerns the presumption of truth given to every witness. (Doc. 120 at 223). The trial court gave the following instruction:

> Although under the law, it is presumed that every witness has told the truth, that presumption is rebuttable and if you believe that any witness has deliberately testified falsely to you, or attempted to mislead you on a material fact at issue in this, you have the right to disregard what that witness has told you, to disbelieve it, and to reject any part of or the entire testimony of that witness, as untrustworthy of belief and as proving nothing. You can accept as true or reject as false, any part of or all of the testimony of a witness, depending on whether or not you believed it to be true or not.

Tr. R. Vol. IX at 2066.

The Fifth Circuit has stated instead that while it disapproves of such an instruction, it does not amount to reversible error. *Knapp v. United States*, 316 F.2d 794, 795 (5th Cir. 1963). While this Court also disapproves of this instruction, it finds the last sentence especially negates any harmful affect: the judge specifically instructed the jury that they could reject any or all of any witnesses testimony if they did not believe it. Therefore it is unlikely that the instruction, on its own, so infected the entire trail such that the conviction violates due process.

The next instruction error Wessinger alleges is that trial counsel was ineffective in failing to object to instructions delivered in the disjunctive. (Doc. 120 at 226). In this regard, the instructions delivered to the jury stated that in order to find the defendant guilty, the jury must find that the defendant had the specific intent to kill or inflict great bodily harm in the process of perpetrating or attempting to perpetrate an aggravated burglary ***or*** armed robbery. Tr. R. Vol. IX at 2070. He complains that because there is evidence his entry into the restaurant was authorized, the evidence did not support one of the disjunctive theories and therefore the instruction was improper.

The Supreme Court has held that where a conviction was obtained by a general verdict where one possible basis for a finding of guilt was legally or constitutionally invalid, the conviction cannot stand. See *Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957). However, the Court has specifically refused to extend this general rule to cases in which a general verdict is rendered but one of the possible theories of conviction is "merely" unsupported by sufficient evidence. *Griffin v. United States*, 502 U.S. 46, 56 (1991). Even if Wessinger's contention that he did not enter the premises without authorization is valid, it is specifically foreclosed by Griffin. Relief on this claim is denied.

The next jury instruction error Wessinger alleges is that the trial court lessened the state's burden of proof by giving a dubious instruction on

reasonable doubt. (Doc. 120 at 228). Wessinger claims that the following instruction was erroneous:

> Reasonable doubt is a doubt based on reason and common sense, and is present, when, after you have carefully considered all of the evidence, you cannot say that you are convinced of the truth of the charge. A reasonable doubt is not a mere slight misgiving or a possible doubt. You may say it is self-defining; it's a doubt that a reasonable person could entertain; it's a sensible doubt.

Tr. R. Vol. IX at 2064. Without explaining how, Wessinger claims the instruction was flawed and the failure to object by trial counsel weakened the burden of proof the jury employed.

The Supreme Court has held that certain reasonable doubt instructions are unconstitutional. *Cage v. Louisiana*, 498 U.S. 39, 40 (1990), *overruled on other grounds.* Specifically, both the Supreme Court and the Louisiana Supreme Court have found the following instruction unconstitutionally limiting a defendant's right to due process:

> This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required s not an absolute or mathematical certainty but a *moral certainty.*

Id. (emphasis in original); see also *State v. Smith*, 600 So. 2d 1319, 1325 (La. 1992). Although there is some overlap between the two instructions, specifically that a reasonable doubt is not a possible doubt, it is the "grave uncertainty" and "actual substantial doubt" and "moral certainty" that the Supreme Court found offensive. None of that offensive language is present in the disputed instruction and the Court finds the phrase, "it's a doubt that a reasonable person could entertain; it's a sensible doubt" does not create a higher burden of proof. Relief is denied on this claim.

The next jury instruction error Wessinger alleges is that the jury was erroneously told that it had a duty to convict Wessinger. (Doc. 120 at 228). Wessinger charges that the following instruction violated his constitutional right to due process and a trial by jury: "If after you have deliberated you are convinced that the state has proven beyond a reasonable doubt that the defendant is guilty of first degree murder, your verdict should be guilty." (Trial Tr. at 2074). While this Court has found case law indicating it is improper for a *prosecutor* to suggest that a jury has a civic duty to convict, it can find no case law establishing that jury instructions directing the jury to convict if it is convinced that the state has proven the defendant is guilty beyond a reasonable doubt are erroneous. Further, the petitioner himself has not cited any Supreme Court law in support of this proposition. Therefore, the this claim does not meet the requirements of § 2254(d)(1) and is denied.

Finally, Wessinger objects to the flight instruction given by the trial court. (Doc. 120 at 229). The instruction at issue states:

> "If you find that the defendant fled immediately after a crime was committed or after he was accused of a crime, the flight alone is not sufficient to prove that the defendant is guilty. However, flight may be considered along with other evidence. You must decide whether such flight was due to consciousness of the guilt or to other reasons unrelated to guilt."

(Tr. R. Vol. IX at 2067-68).

Specifically, Wessinger argues that flight instructions are, in general, "frowned upon" and that the flight instruction in this case unconstitutionally shifted the burden from the prosecutor to Wessinger to explain why he fled. (Doc. 120 at 229). The Fifth Circuit has held that the inherent unreliability of evidence of flight makes flight instruction improper unless the evidence supports it. *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977). That is, a flight instruction is proper where evidence supports the reasonable inference that the defendant fled. *Id.*; see also *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). In this case, the defendant hasn't argued that the evidence didn't support the fact that he fled (in fact, a review of the evidence supports a finding that he did leave the state immediately after the crime occurred), but rather that the flight instruction was improper. The Court can find no case law, however, to support the proposition that a flight instruction is per se improper. The Court finds this claim to be without merit.

E. Obtaining a Complete Transcript

Wessinger claims that trial counsel was ineffective for failing to obtain a complete transcript of the proceedings. (Doc. 120 at 305-307). He argues that trial counsel's motion to withdraw was dealt with in Chambers. The transcript discloses that the motion was decided and that trial counsel asked if he should put anything on the record, in which the court replied, "no." Tr. R. Vol. IV at 827-28. Additionally, there are references to other conferences held in chambers in the record, but no discussion of what was said in the transcript. *Id.* at 897, 988, 991. There are off the record discussions throughout the trial and there is no record of what was said during these discussions or any reference to what these discussions were about. *Id.* at 926, 934, 973. In addition, when new counsel was appointed for Wessinger, all parties agreed that the trial date would have to be continued and a status conference was set, however, nothing was transcribed.

The State does not address this particular claim. Assuming the issue was litigated at the state court level, the claim will be analyzed under § 2254(d)(1) for unreasonable application of federal law.

The law as interpreted by the Supreme Court states that a defendant "has a right to a record on appeal which includes a complete transcript of the proceedings at trial." *Hardy v. United States*, 375 U.S. 277 (1964). Meetings and conferences in chambers are not proceedings at trial. Likewise, off the record conversations are not proceedings at trial. Therefore, Wessinger has no

complaint that they were not transcribed, much less that it was his counsel's fault.

CLAIM XII: CUMULATIVE ERROR

In his final claim, Wessinger contends the errors that occurred at trial, when considered together, necessitate a new trial or sentencing phase.

Federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and, (3) the errors so infected the entire trial that the resulting conviction violates due process. *Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995). The cumulative error doctrine provides relief only when the constitutional errors committed in the state trial court so fatally infected the trial that they violated the trial's fundamental fairness. *Spence v. Johnson*, 80 F.3d 989, 1000 (5th Cir. 1996). In order to satisfy the cumulative error rule in the Fifth Circuit, a federal habeas petitioner must show that (1) the state trial court actually committed errors, (2) the errors are not procedurally barred, (3) the errors rise to the level of constitutional deprivations, and (4) the record as a whole reveals that an unfair trial resulted from the errors. *Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992).

For the reasons explained in claims one through eleven, the Court finds that any errors that occurred at trial do not meet the *Derden* test. Relief on this claim is denied.

CONCLUSION

For the reasons discussed above, Wessinger's petition for writ of habeas corpus (Doc. 120) is DENIED.

Signed in Baton Rouge, Louisiana, on February 22, 2012.

JUDGE JAMES J. BRADY
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

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NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

SECTION II

STATE OF LOUISIANA

VERSUS

TODD WESSINGER

NUMBER: 12-95-657

STATUS CONFERENCE ON POSTCONVICTION

THURSDAY, SEPTEMBER 4, 2003

THE HONORABLE RICHARD D. ANDERSON, JUDGE PRESIDING

APPEARANCES:

MR. JOHN SINQUEFIELD FOR THE STATE OF LOUISIANA

MR. DALE LEE FOR THE STATE OF LOUISIANA

MR. SOREN E. GISLESON FOR THE DEFENDANT

REPORTED BY: TESSIE KELLEY, CCR

THURSDAY, SEPTEMBER 4, 2003

REPORTER'S NOTE: TODD WESSINGER, DEFENDANT, WAS PRESENT IN COURT WITH COUNSEL, MR. SOREN E. GISLESON. MR. JOHN SINQUEFIELD AND MR. DALE LEE, ASSISTANT DISTRICT ATTORNEYS, WERE PRESENT ON BEHALF OF THE STATE OF LOUISIANA.

THE COURT: ALL RIGHT. FIRST OF ALL I GUESS WE NEED TO HAVE EVERYBODY MAKE THEIR APPEARANCES.

MR. SINQUEFIELD: JOHN SINQUEFIELD AND DALE LEE FOR THE STATE OF LOUISIANA, YOUR HONOR.

MR. GISLESON: SOREN GISLESON ON BEHALF OF PETITIONER, TODD WESSINGER.

THE COURT: ALL RIGHT. TODAY WE'RE ACTUALLY SET FOR A STATUS CONFERENCE ON A POSTCONVICTION. THIS MORNING I RECEIVED A FAX I THINK FROM YOUR OFFICE OF AN AFFIDAVIT.

MR. GISLESON: THAT'S CORRECT, YOUR HONOR.

THE COURT: MR. HECKER.

MR. GISLESON: YES, SIR.

THE COURT: I DON'T KNOW IF THE DISTRICT ATTORNEY HAS RECEIVED A COPY OF THIS OR NOT.

MR. GISLESON: I BROUGHT IT WITH ME THIS AFTERNOON. THIS WAS EXHIBIT Z THAT WAS MISTAKENLY NOT ATTACHED TO THE SECOND AMENDED PETITION FOR POSTCONVICTION RELIEF.

THE COURT: RIGHT. JUST SO THE RECORD IS CLEAR, IT IS AN AFFIDAVIT OF MR. HECKER THAT WAS SIGNED JUNE 2ND, 2002 OR THE 10TH DAY OF JUNE, 2002 AND RELATES TO THE JIMMY --

MR. GISLESON: -- JIMMY RAY WILLIAMS, YOUR HONOR.

THE COURT: -- JIMMY RAY WILLIAMS CASE. IT

REFERS TO BOTH HIM AND MR. ROME. ALL RIGHT. THE DEFENDANT HAS FILED NOW HIS SECOND AMENDED PETITION FOR POSTCONVICTION RELIEF. I ASKED THE COMMISSIONER TO REVIEW THE FIRST AMENDED PETITION AND SHE DID AND MADE SOME RECOMMENDATIONS. AND I BELIEVE Y'ALL HAVE BOTH RECEIVED A COPY OF THOSE. IS THAT RIGHT?

MR. GISLESON: YES, YOUR HONOR.

MR. LEE: YES, SIR.

THE COURT: ALL RIGHT. AFTER THAT TIME THERE WAS -- THE SECOND AMENDED PETITION WAS FILED, AND SHE HAS NOT FILED ANY KIND OF FORMAL RECOMMENDATIONS ON THAT, ALTHOUGH SHE HAS REVIEWED IT AND I HAVE TOO. BOTH OF THEM, AS A MATTER OF FACT, GONE OVER THEM A GREAT DEAL TO DETERMINE WHAT I BELIEVE WE WILL NEED A HEARING FOR, IF ANY. AND I GUESS WE NEED TO CLEAR UP, WHEN YOU FILED YOUR SECOND AMENDED PETITION, DID YOU WANT THAT TO REPLACE THE FIRST AMENDED PETITION OR IN -- AS A SUPPLEMENT TO IT?

MR. GISLESON: YOUR HONOR, IT WAS A SUPPLEMENT TO THE FIRST AMENDED PETITION.

THE COURT: ALL RIGHT. WELL, LET'S LOOK AT THE FIRST AMENDED PETITION, AND WE'LL DISCUSS THOSE ISSUES FIRST BECAUSE THEY ARE KIND OF OUT OF ORDER AND SOME OF THE NUMBERING GOT MIXED UP AND IT'S REAL DIFFICULT TO FOLLOW JUST IN A -- IT'S NOT A REAL OUTLINE FORM. BUT I'VE REVIEWED THAT AND ACTUALLY THE STATE HAS FILED A RESPONSE TO THAT. I DON'T KNOW IF I ACTUALLY ORDERED THE STATE TO RESPOND TO ANYTHING YET. I DON'T THINK I HAVE. AND AFTER REVIEWING THE FIRST ONE, I'VE

DETERMINED THAT THERE'S NOTHING IN THERE THAT I BELIEVE NEEDS TO BE. EVERYTHING IN THERE IS PROCEDURALLY BARRED. AND THEREFORE NO HEARING ON THE FIRST AMENDED PETITION.

MR. GISLESON: NOTE MY --

THE COURT: OR, FOR THAT MATTER, THE FIRST PETITION, WHICH REALLY WAS A BARE-BONES PETITION I BELIEVE FILED BY MR. RICE, IF I HAVE HIS NAME RIGHT. IS IT MR. RICE?

MR. GISLESON: MR. RICE. YES, YOUR HONOR.

THE COURT: ALL RIGHT. SO ON THAT ONE THERE IS NOT GOING TO BE ANY RESPONSE NECESSARY. ON THE SECOND AMENDED PETITION --

MR. GISLESON: IF I COULD NOTE MY OBJECTION FOR THE RECORD, YOUR HONOR.

THE COURT: WHAT IS THAT?

MR. GISLESON: NOTE MY OBJECTION FOR THE RECORD.

THE COURT: ALL RIGHT. IT REALLY GOES INTO SOME OF THE SAME THINGS, JUST MAYBE A LITTLE MORE DETAIL, AND I WANT TO SAY FACTS, BUT I CAN'T REALLY SAY THAT IT REFERS TO FACTS. BUT IT DOES BREAK IT DOWN INTO SEVERAL DIFFERENT ISSUES. FIRST OF ALL IN ROMAN NUMERAL II IT REFERS TO INEFFECTIVE ASSISTANCE OF COUNSEL BY THE DEFENSE ATTORNEY NOT OBJECTING TO DR. SUAREZ'S TESTIMONY ON THE PAIN AND SUFFERING OF THE VICTIM. AND I HAVE READ THE TESTIMONY OR REREAD THE TESTIMONY OF DR. SUAREZ FROM THE TRANSCRIPT.

MR. GISLESON: I'M SORRY, YOUR HONOR. WHERE ARE YOU EXACTLY IN THE SECOND PETITION?

THE COURT: I BELIEVE IT'S ROMAN NUMERAL II.

MR. GISLESON: ON PAGE 6? MR. WESSINGER'S TRIAL COUNSEL WERE INEFFECTIVE IN THE CULPABILITY PHASE? ARE YOU ON THE SECOND PETITION OR THE FIRST?

THE COURT: YEAH. WE'RE ON THE SECOND AMENDED PETITION.

MR. GISLESON: OKAY.

THE COURT: AS I SAID, THIS NUMBERING SYSTEM HAS THROWN EVERYBODY OFF. WE'LL GET TO IT EVENTUALLY. ACTUALLY, ROMAN NUMERAL II, SECTION K: FAILURE TO OBJECT TO INADMISSIBLE EXPERT EVIDENCE. AND, AS I SAID, THIS REFERS TO DR. SUAREZ'S TESTIMONY ABOUT THE VICTIM SUFFERING AFTER BEING SHOT, WITH THE ENTRANCE WOUND AND EXIT WOUND AND HAVING APPROXIMATELY EIGHTEEN SECONDS BEFORE AT LEAST LOST CONSCIOUSNESS AND THE FACT THAT HE IS A PATHOLOGIST AND WAS AN EXPERT IN THE FIELD OF PATHOLOGY, THEREFORE NOT QUALIFIED TO MAKE OR TESTIFY REGARDING PAIN AND SUFFERING. AND SINCE -- OF COURSE THE DEFENDANT NOW CLAIMS THAT SINCE HIS ATTORNEY DID NOT OBJECT TO THAT BEING OUT OF THE REALM OF HIS EXPERTISE, THAT IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL. OF COURSE, I'M NOT SURE IF IT TAKES AN EXPERT -- I DON'T KNOW IF THERE IS SUCH A THING AS AN EXPERT TO TESTIFY ABOUT WHAT A GUNSHOT WOUND -- WHAT THE PAIN IS. I THINK IT'S PRETTY EASY FOR ANYONE TO FIGURE OUT, ESPECIALLY A MEDICAL DOCTOR, WHICH DR. SUAREZ IS, THAT BEING SHOT IN THE HEART WILL CAUSE PAIN. AND KNOWING THE FACT THAT YOU'RE GOING TO DIE AFTER BEING SHOT IN THE CHEST AND HAVING TO LIVE WITH THAT FOR THE REST OF YOUR LIFE, WHICH IN THIS CASE

WAS TWENTY TO THIRTY SECONDS, IS WHAT HE SAID, IS PAINFUL AND DOES LEAD TO AGONY.

MR. GISLESON: YES, YOUR HONOR. OUR POSITION IS THAT ONCE THE STATE DID NOTIFY THE DEFENDANTS THAT IN FACT THEY WERE GOING TO SEEK THE -- YOU KNOW, THE FACT THAT THERE WAS SUBSTANTIAL PAIN AND SUFFERING INVOLVED, THAT THEY WOULD HAVE OBTAINED THEIR OWN EXPERT. AND SINCE THAT -- AND SHOULD HAVE MADE IT MORE OF A FACT ISSUE AND PUT IN MORE CONTENTION. AND THEIR FAILURE TO OBTAIN THAT EXPERT WAS INEFFECTIVE.

THE COURT: YOU THINK THEY SHOULD HAVE GOT A -- TRIAL COUNSEL SHOULD HAVE OBTAINED AN EXPERT TO SAY BEING SHOT IN THE CHEST THROUGH THE HEART IS NOT PAINFUL?

MR. GISLESON: WELL, THEY COULD HAVE PHRASED IT I GUESS IN A NUMBER OF DIFFERENT WAYS, ONE OF WHICH COULD HAVE BEEN, YOU KNOW, IT'S IMPOSSIBLE TO TELL EXACTLY, YOU KNOW, WHAT THE NEURONS AND THE SYNAPSES WERE FIRING, HOW THAT PARTICULAR PERSON AT THAT PARTICULAR MOMENT EXPERIENCED AND THAT IT'S PURE CONJECTURE AND THAT FOR AN EXPERT TO COME UP AND SORT OF PUT HIS STAMP OF APPROVAL ON SOMETHING LIKE THAT IS INAPPROPRIATE, AT THE LEAST SHOULD HAVE BEEN, YOU KNOW, WATERED DOWN OR CONTRADICTED OR CHALLENGED BY ANOTHER EXPERT BY THE DEFENSE.

THE COURT: SOMETIMES WE HAVE EXPERTS THAT TESTIFY AND THEY TESTIFY IN THEIR FIELD OF EXPERTISE BUT THEY ALSO TESTIFY TO SOME OTHER THINGS THAT ARE GENERALLY COMMON KNOWLEDGE. AND I REALLY DON'T THINK IT TAKES AN EXPERT IN ANY FIELD

TO TESTIFY THAT SOMETHING LIKE THIS WOULD BE PAINFUL. AND I CAN'T IMAGINE FINDING ANY EXPERT THAT WOULD TESTIFY THAT A PERSON WHO IS CONSCIOUS, WHO IS IN THE PROCESS OF ASKING NOT TO BE MURDERED, IS SHOT IN THE CHEST THROUGH THE HEART, IS IN THE PROCESS OF BLEEDING TO DEATH, DID NOT SUFFER.

MR. SINQUEFIELD: MAY I ADD SOMETHING, YOUR HONOR?

THE COURT: YES.

MR. SINQUEFIELD: WHAT HIS PETITION DOESN'T SAY IS THAT THERE WAS A LIVE TAPE PLAYED IN THIS COURTROOM IN WHICH THE VICTIM SCREAMS WHEN SHE IS SHOT, IS MY RECOLLECTION OF IT. SO IN THIS CASE THE EXPERT HAD SOME EVIDENCE THAT WASN'T AVAILABLE NORMALLY THAT SHOWS THAT THE PERSON EXHIBITED THE PAIN HERSELF. AND THAT'S NOT WHAT'S IN THE PETITION, AS I UNDERSTAND IT.

THE COURT: BUT NOT ONLY THAT, I THINK ON EXAMINATION YOU ASKED DR. SUAREZ IF YOU HAD -- IF HE DID IN FACT LISTEN TO THE 911 TAPE. AND HE TESTIFIED THAT HE HAD LISTENED TO IT. AND I THINK FROM THAT HE MADE SOME TIMING FROM THE GUNSHOT --

MR. SINQUEFIELD: YEAH.

THE COURT: -- TO THE TIME THE PHONE RECEIVER HIT THE FLOOR AND --

MR. SINQUEFIELD: I HONESTLY DON'T RECALL, YOUR HONOR. THE RECORD WOULD SPEAK --

THE COURT: WELL, THAT'S WHAT THE RECORD SAYS. I RECALL.

MR. SINQUEFIELD: SURE.

THE COURT: AND THAT WAS HIS TESTIMONY. I

BELIEVE IT WAS EIGHTEEN SECONDS OR THEREABOUT FROM THE TIME OF THE SHOT TO THE TIME THE RECEIVER WAS DROPPED AND YOU COULD HEAR THE CLUNK. AND DR. SUAREZ SAYS THAT IT WAS HIS OPINION THAT'S WHEN SHE LOST CONSCIOUSNESS AND DROPPED THE PHONE. AND THAT BASICALLY -- HE HAD EARLIER TESTIFIED THAT BASED ON THE SHOT THROUGH THE HEART IT WOULD BE TWENTY TO THIRTY SECONDS BEFORE SHE BLED TO DEATH. AND THE EIGHTEEN SECONDS WOULD JUST BE WHEN SHE LOST CONSCIOUSNESS, BASED ON WHAT I GATHERED FROM HIS TESTIMONY. SO I DON'T SEE HOW NOT HAVING AN EXPERT TO SAY BEING SHOT IN THE CHEST THROUGH THE HEART WOULD IN FACT BE PAINFUL, ESPECIALLY KNOWING YOU'RE GOING TO DIE -- AND THAT -- THAT'S NOT EVEN CONSIDERING THE FACT THAT PRIOR TO BEING SHOT SHE WAS BEGGING FOR HER LIFE. BEING PUT IN THAT POSITION ALONE I THINK A JURY COULD FIGURE OR DECIDE THAT THAT'S AGONY RIGHT THERE, JUST HAVING A GUN POINTED AT YOU AFTER HEARING GUNSHOTS IN OTHER PARTS OF THE OFFICE AND THINKING YOU'RE GOING TO BE NEXT.

MR. GISLESON: AND THEN THE -- BUT IS THAT -- YOU KNOW, IS THAT THE REALM WITHIN WHICH A PATHOLOGIST SHOULD TESTIFY, OR IS THAT SOMETHING MORE FOR A PSYCHIATRIST, IN WHICH CASE IT WOULD BE OUTSIDE OF HIS REALM OF EXPERTISE AND THEN IT SHOULD HAVE BEEN INCUMBENT UPON DEFENSE COUNSEL TO HAVE OBJECTED AND KEPT IT OUT OF THE JURY'S PURVIEW.

THE COURT: AS I SAID, I DON'T THINK IT TAKES AN EXPERT FOR ANYBODY TO FIGURE OUT BEING SHOT LIKE THAT -- A CONSCIOUS PERSON BEING SHOT WOULD

EXPERIENCE PAIN.

MR. GISLESON: WE'LL SUBMIT IT AS WRITTEN, YOUR HONOR.

MR. SINQUEFIELD: WELL, JUDGE, I DON'T REMEMBER EXACTLY WHERE -- I'M WORKING FROM MEMORY HERE, BUT IF THAT WAS IN THE GUILT PHASE OF THE TRIAL, I THINK THEIR POSITION WAS THAT MR. WESSINGER AT THAT TIME APPARENTLY -- THEY APPARENTLY WERE ATTACKING THE CREDIBILITY OF THE IDENTIFICATION WITNESS. AND I DON'T KNOW PARTICULARLY IF THAT OBJECTION OR THAT THEORY WOULD HAVE FIT AT THAT PART OF THE TRIAL. I RECALL LATER IN THE PENALTY PHASE THERE WAS A PSYCHIATRIST THAT SAID BASICALLY THAT MR. WESSINGER CONFESSED TO HIM THE NIGHT BEFORE THE HEARING. BUT I BELIEVE THAT WAS IN THE PENALTY PHASE. I'M NOT CERTAIN. THE RECORD WILL CORRECT ME ON THAT.

THE COURT: THE PSYCHIATRIST TESTIFIED IN THE PENALTY -- I MEAN -- YEAH, THE PENALTY PHASE. DR. SUAREZ, OF COURSE, IN THE GUILT PHASE.

MR. SINQUEFIELD: YEAH. THE IMPRESSION IN THE GUILT PHASE WAS THAT THEY WERE ATTACKING THE CREDIBILITY OF THE EYEWITNESS, AS I RECALL. SO I'M NOT SURE THAT THAT OBJECTION WOULD HAVE FIT THE STRATEGY THAT THEY APPARENTLY SEEMED TO BE EXERCISING AT THAT POINT IN THE TRIAL.

MR. GISLESON: AGAIN, I WOULD SUBMIT IT AS WRITTEN, YOUR HONOR.

THE COURT: ALL RIGHT. WELL, I DON'T THINK A HEARING -- FURTHER HEARING IS REQUIRED ON THAT ISSUE. THE RECORD SPEAKS FOR ITSELF. ALL RIGHT.

ANOTHER ISSUE THAT WAS RAISED WAS DR. CENAC AND DR. ROSTOW, THEIR TESTIMONY. AND IN FACT, ACCORDING TO THE PETITION, CALLING MR. WESSINGER A LIAR AND A DANGEROUS PERSON AND THAT TRIAL COUNSEL HADN'T PREPARED THEM ENOUGH OR SPENT ENOUGH TIME WITH THEM TO KNOW WHAT THEY WOULD TESTIFY TO. , THIS IS IN ROMAN NUMERAL II C, SUBSECTIONS 1 AND 2.

MR. GISLESON: YES, YOUR HONOR. THAT -- YOU KNOW, THESE TWO ARE ALSO ISSUES THAT GO TO THE DEFENSE COUNSEL'S OVERALL PREPARATION FOR THE TRIAL AND GO INTO SORT OF THE CUMULATIVE ERROR ANALYSIS AS WELL. IN OTHER WORDS, THESE ARE JUST PIECES OF THE PUZZLE THAT WHEN THROWN IN WITH EVERYTHING ELSE REFLECTS THE SIXTH AMENDMENT VIOLATION OF EFFECTIVE COUNSEL. AND PERHAPS WHILE NOT STANDING ALONE DO THEY MERIT REVERSAL OF THE SENTENCE OR A NEW TRIAL, THEY ARE CERTAIN PIECES OF THE PUZZLE AND REFLECT THE TYPE OF PRESENTATION AND EFFORT THAT WENT INTO DEFENDING MR. WESSINGER IN THIS TRIAL.

THE COURT: WELL, I BELIEVE THE DOCTOR TESTIFIED THAT HE HAD BEEN ASKED TO REVIEW ALL THE MEDICAL RECORDS. HE ASKED TO INTERVIEW THE DEFENDANT AND, IN FACT, HE IS THE ONE WHO INSISTED THAT THEY -- THE ATTORNEYS NOT BE PRESENT WHEN HE INTERVIEWED HIM JUST BECAUSE THAT'S THE WAY HE DOES IT AND IT LEADS TO MORE ACCURATE INFORMATION I BELIEVE. I'M PARAPHRASING HIS TESTIMONY, BUT -- AND AS FAR AS PREPARING THE DOCTOR, I'M NOT SURE HOW YOU PREPARE A DOCTOR. BUT HE DID SAY THAT MR. HECKER TOLD HIM THAT HE NEEDED TO TELL THE

TRUTH, WHICH GOES WITHOUT SAYING SINCE WE SWEAR THEM IN, EVEN EXPERTS. AND I'M NOT SURE WHERE THE INCOMPETENCE WOULD COME IN HERE OR INEFFECTIVENESS WOULD COME IN IF THE DOCTOR IS GOING TO TESTIFY TRUTHFULLY, WHICH HE'S REQUIRED TO DO BY LAW, AND HE IS CROSS-EXAMINED AND UNDER CROSS-EXAMINATION FINDS OUT THAT THE DEFENDANT DID NOT TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH TO THE DOCTOR THE FIRST TIME AND THEN LATER CHANGED IT. SO IT WAS OBVIOUS THAT THERE WAS DISCREPANCIES IN WHAT HE WAS SAYING TO THE DOCTOR, THAT THE DOCTOR HAD ANY CHOICE BUT TO TESTIFY THIS WAY. I'M NOT SURE WHAT MR. HECKER OR MR. ROME OR ANYBODY ELSE COULD TELL THE DOCTOR OTHER THAN TO LIE THAT WOULD NOT HAVE RESULTED IN THIS TESTIMONY.

MR. GISLESON: WELL, THERE ARE WAYS OF PREPARING A WITNESS FOR TRIAL IN WHICH -- AND EXPERTS IN PARTICULAR IN WHICH YOU DON'T TELL THEM TO LIE BUT YOU -- YOU ENGAGE IN A DISCOURSE AND YOU FIGURE OUT WHAT THE STRONGEST AREAS ARE, YOU PICK OUT A THEME AND YOU PRESENT THE THEME, YOU TRY TO MAKE THE TESTIMONY AS CLEAR AND FOCUSSED AS YOU POSSIBLY CAN. AND, AGAIN, I WOULD SAY THAT THIS IS SOMETHING THAT GOES TOWARD THE CUMULATIVE ERROR OF THE I.A.C. CLAIM IN THE GUILT PHASE.

MR. SINQUEFIELD: THE PROBLEM WITH THAT IS I GET TO CROSS-EXAMINE HIM AS TO THE WHOLE CASE, JUDGE, AND I'M GOING TO DO THAT. SO, I MEAN, IT'S A SITUATION WHERE ANY LAWYER THAT HAS A PSYCHOLOGIST OR A PSYCHIATRIST ON THE STAND THAT'S GOING TO TESTIFY, THEN SOME OF IT MAY BE VERY

HELPFUL TO YOU. THERE MAY BE SOME OF IT THAT DOESN'T HELP YOUR CASE. AND YOU MAKE A DECISION AS TO WHETHER TO PUT THEM ON. BUT SUBJECT TO CROSS-EXAMINATION YOU CAN INTERVIEW THEM AND GO THROUGH EVERYTHING IN YOUR CASE AND NOT KNOW EXACTLY WHAT A PSYCHOLOGIST OR PSYCHIATRIST IS GOING TO SAY IN RESPONSE TO QUESTIONS ON CROSS-EXAMINATION BECAUSE YOU DON'T KNOW WHAT THE QUESTIONS ARE GOING TO BE. YOU CAN TRY TO PRACTICE IT, BUT UNLESS YOU START TRYING TO COACH THEM TO SAY CERTAIN THINGS UNDER CERTAIN CIRCUMSTANCES, WHICH SHOULD AND IS PROHIBITED, OR -- I'M NOT SAYING THAT ANYBODY WOULD TRY TO GET SOMEBODY TO LIE UNDER OATH. BUT IF YOU DON'T DO THOSE THINGS, THEN YOUR WITNESS IS SUBJECT TO CROSS-EXAMINATION AND THEN THE WORLD OF PSYCHIATRY AND PSYCHOLOGY, THERE'S -- YOU CAN DO VERY CAREFUL PREPARATION, EVEN A PROSECUTOR SUCH AS MYSELF. AND I'VE HAD PSYCHOLOGISTS TESTIFY AND PSYCHIATRISTS TESTIFY. AND YOU CAN PREPARE AT LENGTH AND NOT KNOW EXACTLY WHAT THE ANSWERS ARE GOING TO BE TO QUESTIONS ON CROSS-EXAMINATION.

THE COURT: THAT'S WHAT I SAID. OTHER THAN THE ATTORNEY MEETING WITH THE EXPERT OR THE DOCTOR HERE AND SAYING NOT TO TELL THE TRUTH, WHICH I'M SURE DID NOT HAPPEN, I DON'T KNOW HOW HE COULD PREPARE THAT BETTER. AND I DEFINITELY CANNOT SEE HOW THAT WOULD BE INEFFECTIVE ASSISTANCE OF COUNSEL. EVEN THOUGH IT'S A DEATH PENALTY CASE, ATTORNEYS ARE STILL BOUND BY THE ETHICAL RULES AND ALSO BY THE LAW. AND WE DO HAVE THE LAW AGAINST PERJURY. AND THE DIFFICULTY COMES IN HERE BECAUSE

HE IS SWORN TO TELL THE TRUTH AND THE DEFENDANT TOLD HIM TWO DIFFERENT STORIES. THERE'S NO WAY AROUND THAT. AND THAT'S NOT INEFFECTIVE ASSISTANCE OF COUNSEL. AND BASED ON WHAT YOU'VE SAID IN THE PETITION, I DON'T THINK ANY FURTHER HEARING IS NECESSARY ON THAT, AND THAT WILL BE DISMISSED. THERE'S ALSO A CLAIM IN THE SECOND AMENDED PETITION, ROMAN NUMERAL II, SECTION I WHICH REFERS TO THE FACT THAT MR. HECKER'S FATHER WAS ILL DURING THE PREPARATION PERIOD FOR THE TRIAL AND THAT HE WAS INEFFECTIVE BECAUSE OF THAT. IN FACT, I BELIEVE WE CONTINUED THE TRIAL FROM AN APRIL OR MAY DATE -- I CAN'T REMEMBER THE EXACT DATE -- AT THE REQUEST OF MR. HECKER ONE TIME. AND I THINK THERE MAY HAVE BEEN ANOTHER -- MAYBE THERE WAS ANOTHER MOTION TO CONTINUE, BUT I DON'T REMEMBER IT BEING BASED ON THE FACT THAT HE WAS HAVING DIFFICULTY WITH HIS FATHER.

MR. GISLESON: NO. THE SECOND MOTION TO CONTINUE YOU'RE REFERRING TO I BELIEVE WAS RULED THE MORNING OF TRIAL AND HAD TO DEAL WITH DELAYING THE TRIAL, YOU KNOW, TO PROVIDE DEFENSE COUNSEL THE OPPORTUNITY TO TAKE WRITS ON A JURY SELECTION ISSUE. BUT, AGAIN, THIS IS ANOTHER INCIDENT WHEN TAKEN TOGETHER IN THE WHOLE DEMONSTRATES THE INEFFECTIVENESS AND THE INABILITY TO ADEQUATELY PREPARE FOR MR. WESSINGER'S CASE.

THE COURT: ALL RIGHT. I DON'T AGREE, AND I DON'T THINK ANY HEARING IS REQUIRED FOR THAT. THE NEXT ONE IS GENERAL INEFFECTIVE ASSISTANCE OF COUNSEL ON VOIR DIRE. AND I'M NOT SURE I UNDERSTAND EXACTLY WHAT YOU'RE ARGUING ON THAT.

IT'S NOT VERY SPECIFIC.

MR. GISLESON: IT WAS -- I GUESS THE THRUST OF THE ARGUMENT GOES TOWARD THE -- THEIR INABILITY -- WELL, IT GETS GENERAL AND SPECIFIC, BUT THEIR INABILITY TO FIRST, YOU KNOW, ASK THE RIGHT QUESTIONS, ASK ENOUGH DETAILED QUESTIONS. I DO UNDERSTAND THAT THEY HAD THE JURY QUESTIONNAIRES BEFORE THEM. BUT THERE WERE STILL A NUMBER OF WITNESSES' EXAMPLES PROVIDED IN THE PETITION IN WHICH THEY JUST DIDN'T ASK THE RIGHT QUESTIONS OR WHEN THEY SOMETIMES DID ASK THE RIGHT QUESTION, STILL DIDN'T STRIKE THEM PEREMPTORILY. AND WITH THAT I'LL JUST SUBMIT IT ON THE BRIEF.

MR. SINQUEFIELD: YOUR HONOR, I WOULD JUST POINT OUT -- AND, AGAIN, I'M WORKING FROM MEMORY AND THIS HAS BEEN A LONG TIME. BUT THE QUESTIONNAIRE WE NORMALLY USE IS A VERY EXTENSIVE QUESTIONNAIRE. IT PROVIDES A LOT OF INFORMATION, SOME OF WHICH EVEN THE JUDGE MIGHT NOT ALLOW YOU TO ASK IF YOU ASK THEM, BUT IT'S ON THE QUESTIONNAIRE. I DON'T REMEMBER THE NUMBER OF LEGAL PAGES. IT'S IN THE RECORD. BUT IT'S A VERY EXTENSIVE QUESTIONNAIRE. AND I JUST -- THESE TWO ATTORNEYS, I DON'T KNOW HOW MANY CAPITAL CASES THEY'VE BEEN INVOLVED IN BY THIS TIME. I KNOW THEY HAVE BEEN INVOLVED IN AT LEAST ONE BEFORE THIS. TO ME I -- I'M OPERATING FROM MEMORY, BUT I SEEM TO REMEMBER VERY THOROUGH QUESTIONING OF JURORS THAT WERE IN ISSUE. IN ANY CAPITAL JURY SELECTION THERE'S SOME THAT I DON'T QUESTION TO ANY EXTENT BECAUSE I KNOW THEY'RE GONE. AND THERE MAY BE SOME THE DEFENSE DON'T QUESTION. BUT ON

THE JURORS THAT WERE AT ISSUE, I -- THE RECORD WILL SPEAK FOR ITSELF. AND, AGAIN, I THINK THEY WERE LITIGATED ON APPEAL.

THE COURT: ALL RIGHT. WELL, IT'S EASY TO SECOND-GUESS JURY SELECTION. AND IT'S KIND OF A COMPLEX THING. YOU'RE WORKING WITH A LIMITED NUMBER OF PEREMPTORY CHALLENGES. YOU TRY NOT TO OFFEND PEOPLE THAT MAY WELL BE ON THE JURY. YOU'RE TRYING TO FIND THOSE THAT CAN BE FAIR. AND SOMETIMES MONDAY MORNING QUARTERBACKING IS A VERY EASY THING TO DO. AND I REMEMBER THE JURY SELECTION PROCESS. WE DO HAVE THE QUESTIONNAIRES, AND THEY'RE ABOUT EIGHT PAGES. AND THEY DO GO INTO SOME INFORMATION THAT I WOULDN'T EVEN ALLOW TO BE ASKED IN OPEN COURT PROBABLY, BUT THEY ARE ON THE QUESTIONNAIRE. AND I DON'T THINK THIS COMES ANYWHERE NEAR INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON THE TRANSCRIPT. SO THAT WILL BE DISMISSED TOO. WE HAVE ANOTHER GENERAL CLAIM, A BRADY CLAIM, THAT WAS IN THE SECOND AMENDED PETITION. AND THIS REFERS TO SEVERAL DIFFERENT WITNESSES THAT TESTIFIED. IF I REMEMBER RIGHT, I THINK THIS WAS ALMOST JUST OPEN FILE DISCOVERY IN THIS CASE. AND I'M NOT SURE WHAT WAS IN THERE THAT WAS OVERLOOKED. THERE EVIDENTLY WAS SOME -- OR THE DEFENDANT IS NOW CLAIMING THERE WAS SOME DISCREPANCIES BETWEEN THE WITNESSES' STATEMENTS AND THEIR TRIAL TESTIMONY. AND FROM CHECKING THOSE, NONE OF THOSE SEEM TO BE MATERIAL. AND TESTIMONY ALWAYS VARIES A LITTLE BIT, OR IT'S NOT UNCOMMON, I SHOULD SAY, FOR TESTIMONY TO VARY A LITTLE ABOUT SOME LITTLE MINOR DETAILS THAT ARE

NOT MATERIAL. THERE WAS ALSO A QUESTION ABOUT MR. BROWN'S RAP SHEET NOT BEING PROVIDED.

MR. GISLESON: WHICH MR. BROWN ARE WE SPEAKING OF, YOUR HONOR?

THE COURT: IN MY NOTES HERE I DIDN'T WRITE A FIRST NAME.

MR. SINQUEFIELD: TILTON MAYBE?

THE COURT: IT IS TILTON. IN ANY EVENT, AFTER LOOKING AT HIS RAP SHEET, HE ONLY HAS ONE CONVICTION FOR TWO MISDEMEANORS THAT HE GOT NINETY DAYS FOR. HE DID HAVE SEVERAL ARRESTS. THOSE WOULD NOT BE ADMISSIBLE TO IMPEACH A WITNESS ANYWAY. I DON'T BELIEVE THAT NOT DISCLOSING MR. BROWN'S RAP SHEET WAS MATERIAL. ALSO MR. HEARN'S TESTIMONY IS QUESTIONED.

MR. GISLESON: I'M SORRY, YOUR HONOR. MR. WHO?

THE COURT: HEARN.

MR. GISLESON: HEARN OR HARDEN?

THE COURT: I BELIEVE IT'S HEARN, H-E-A-R-N.

MR. GISLESON: I THINK RALPH HARDEN MAYBE. RANDOLPH HARDEN. I'M SORRY.

THE COURT: WELL, I WROTE IT DOWN WRONG. BUT IT'S ON PAGE 64 OF THIS. YEAH, IT IS A TYPO. HERE IT IS, HARDEN. ALL RIGHT. AND IN YOUR PETITION YOU'VE ALLEGED THAT HE HAD SOME SORT OF PLEA AGREEMENT ON SOME PENDING CHARGES IN THIS STATE?

MR. GISLESON: YES, YOUR HONOR. I'M A LITTLE BIT -- I CAN'T PULL IT UP FROM MEMORY RIGHT NOW. I WAS SORT UNDER THE ASSUMPTION THAT TODAY WAS JUST GOING TO BE A STATUS CONFERENCE DISCUSSING

DATES AND HOW TO PROCEED FURTHER. I DIDN'T KNOW WE WERE GOING TO GET INTO THE MERITS OF IT. AS FAR AS -- I DON'T REMEMBER EXACTLY WHICH PLEA AGREEMENT RANDOLPH HARDEN WAS, WHETHER HE WAS THE ONE WHO WAS IN FEDERAL PRISON IN TEXAS AT THE TIME AND WAS BROUGHT OVER IN WHICH THE PLEA AGREEMENT SAID THAT HE WOULD HAVE TO PROVIDE OR HE WOULD HAVE TO GIVE ALL SORT OF ASSISTANCE OR ANY TYPE OF ASSISTANCE HE POSSIBLY COULD TO THE PROSECUTION IN AN EFFORT TO REDUCE HIS SENTENCE. AND WE WOULD SAY THAT THAT, ALTHOUGH NOT PERFECTED BY THE STATE OF LOUISIANA AND PRESUMABLY DONE BY THE FEDERAL GOVERNMENT, STILL CARRIES OVER AND WAS -- AND IT WAS THE STATE'S BURDEN TO PROVIDE THE DEFENSE WITH THAT DOCUMENT.

MR. SINQUEFIELD: JUDGE, IS HE TALKING ABOUT A PLEA AGREEMENT SOMEBODY ELSE MADE WITH THE DEFENDANT AS TO CHARGES -- BECAUSE, AGAIN, I'M WORKING FROM MEMORY, BUT I KNOW I WENT OUT OF MY WAY AND OVERBOARD TO MAKE CERTAIN THAT THESE DEFENSE ATTORNEYS AND EVERYBODY KNEW WHATEVER -- IF I HAD A PLEA AGREEMENT WITH ANY WITNESSES, I ALWAYS GO OVERBOARD TO MAKE SURE THEY KNOW TO THE EXTENT OF IT AND EVEN I GO TO GREAT LENGTHS, AND I JUST DON'T RECALL MAKING A PLEA AGREEMENT WITH -- I'M TRYING TO GET IT. IS THIS LIKE RALPH HARDEN WAS CHARGED IN FEDERAL COURT AND THE FEDERAL PEOPLE CUT HIM A PLEA AGREEMENT ON HIS OWN CASE?

MR. GISLESON: THERE WAS A PLEA AGREEMENT RANDOLPH HARDEN UNDERTOOK JUST IMMEDIATELY BEFORE THE TRIAL IN WHICH HE STATED HE WOULD HELP OUT THE PROSECUTION -- HE WOULD HELP OUT IN ANY PARTICULAR

SENSE HE COULD WITH THE PROSECUTION. AND IT WAS VAGUE ENOUGH TO APPLY TO ANY KIND OF SITUATION. THE DEFENDANT SHOULD HAVE HAD AN OPPORTUNITY TO CROSS HIM ON IT ON THE STAND IN ORDER TO DETERMINE THE FULL EFFECT OF IT, IN ORDER TO UNDERMINE HIS CREDIBILITY. IT'S A MATTER OF NOT HAVING THE OPPORTUNITY.

MR. SINQUEFIELD: WELL --

MR. GISLESON: AND WITH EACH ONE OF THESE, IT'S STILL -- I DON'T KNOW IF IT WAS TURNED OVER.

MR. SINQUEFIELD: IF I MADE ANY AGREEMENT WITH ANY WITNESS TO TESTIFY AGAINST DERRICK TODD LEE [SIC], THEN IT WAS DISCLOSED TO THEM. SO I'M NOT SURE WHAT HE'S TALKING ABOUT OR IF HE KNOWS WHAT HE'S TALKING ABOUT.

MR. GISLESON: WELL --

MR. SINQUEFIELD: AGAIN, I'M WORKING FROM MEMORY, BUT I KNOW IN THAT CASE THAT I WORKED VERY HARD TO MAKE EVERYBODY AWARE OF ANY PLEA AGREEMENT THAT I HAD. AND I DON'T KNOW IF HE'S CLAIMING THAT THIS -- IF THIS GUY CUT A PLEA AGREEMENT TO WORK FOR FEDERAL PROSECUTORS IN SOME WAY IN CASES SOMEWHERE ELSE, THEN HE WASN'T MADE ANY PROMISES BY ME OR ANYBODY ASSOCIATED WITH THIS CASE FOR TESTIMONY HERE. I DON'T KNOW EXACTLY WHAT HE'S TALKING ABOUT.

MR. GISLESON: PERHAPS THIS IS ANOTHER INSTANCE WHERE WE COULD SET A DATE IN THE FUTURE, DISCUSS IT AND THEN BE ABLE TO BRING THE DOCUMENTS INTO COURT AND GO OVER EXACTLY WHAT THAT PLEA AGREEMENT STATED, AS WELL AS WHETHER OR NOT IT WAS PROVIDED TO DEFENSE COUNSEL. AND TO BACK UP A

MINUTE --

MR. SINQUEFIELD: WELL, IF HE FILED SOMETHING SAYING THAT I HAD A PLEA AGREEMENT WITH A WITNESS THAT I DIDN'T DISCLOSE TO HIM, HE SHOULD BE ABLE TO DISCUSS IT AND GIVE DETAILS OF IT HERE TODAY. I DIDN'T MAKE THE ALLEGATION. HE MADE THEM.

THE COURT: WELL, THE PROBLEM IS THE DEFENDANT DOES HAVE AN OBLIGATION TO MAKE SPECIFIC ALLEGATIONS. AND I THINK YOUR ALLEGATION IS VERY VAGUE. IT DOESN'T EVEN REALLY ALLEGE THERE WAS A PLEA AGREEMENT. AND THE THING I REMEMBER ABOUT A PLEA AGREEMENT WAS TESTIFIED TO IN COURT, THAT I BELIEVE THE STATE HAD OFFERED IMMUNITY FOR ACCESSORY AFTER THE FACT OR ANYTHING LIKE THAT, WHICH WAS BROUGHT OUT ON -- ACTUALLY BROUGHT OUT ON DIRECT EXAMINATION.

MR. SINQUEFIELD: BUT I -- YOU KNOW, I CAN SAY THIS. IF I DIDN'T MAKE IT TO HIM, HE DIDN'T HAVE ONE AND HE KNOWS HE DIDN'T HAVE ONE, SO.

MR. GISLESON: WELL, WE ALSO NEED TO BACK UP FOR A MINUTE AND DISCUSS WHETHER OR NOT IT WAS AN OPEN FILE DISCOVERY. THERE IS JUST PASSING REFERENCE ON THE RECORD OF MR. SINQUEFIELD SAYING THAT HE WAS GOING TO MAKE CERTAIN DOCUMENTS AVAILABLE. BUT IT WAS NEVER CLEAR ON THE RECORD OR ANYWHERE ELSE WHETHER OR NOT ALL THE PRIOR STATEMENTS OF THE WITNESSES WERE DISCLOSED TO THE DEFENSE. AND I CAN STATE FAIRLY CERTAINLY THAT IT NEVER APPEARED IN MR. HECKER'S FILE, ALTHOUGH HE WAS RESPONSIBLE FOR THE SENTENCING PHASE. I HAVE NOT BEEN ABLE TO OBTAIN OR LOOK AT MR. ROME'S FILE. BUT IT WASN'T ANYWHERE IN MR. HECKER'S

FILE. I OBTAINED ALL THESE OBVIOUSLY FROM WHEN I COPIED THE STATE'S FILE IN TOTO WHEN I FIRST GOT ON THIS CASE TWO AND A HALF YEARS AGO. THERE WERE EXTENSIVE PRIOR STATEMENTS THAT, YOU KNOW, TOOK UP TWO BOXES. MR. HECKER'S FILE WAS A SINGLE REDWELL. I WOULD BE SURPRISED IF MR. ROME'S WAS MUCH BIGGER. AND I JUST -- I DON'T SEE ANY EVIDENCE WHATSOEVER THIS WAS OPEN FILE. THEY SAID THAT THEY WERE GOING TO TRY TO WORK THINGS OUT EX PARTE, BUT, YOU KNOW, I WOULD LIKE TO GET MR. ROME ON THE STAND AND QUESTION HIM EXACTLY WHAT HE HAD IN HIS POSSESSION, WHAT WAS GIVEN TO HIM BEFORE TRIAL. SHORT OF THAT I WOULD LIKE THE OPPORTUNITY TO GET AN AFFIDAVIT TO SUBSTANTIATE THESE CLAIMS. I THINK THAT THE WAY THEY'RE WRITTEN NOW PROVIDES THE OPPORTUNITY FOR SUCH A -- FOR THE NEXT STEP, FOR THE EVIDENTIARY HEARING. THERE WERE ENOUGH MATERIAL CONTRADICTIONS IN THE STATEMENTS BEFORE THE CASE, IN THE STATEMENTS MADE AT TRIAL, STATEMENTS MADE HOURS AFTER THE INCIDENT AND THE STATEMENTS MADE AT TRIAL WHICH ARE DIFFERENT ENOUGH SUCH THAT THE DEFENSE SHOULD HAVE HAD AN OPPORTUNITY TO CROSS HIM ON IT ON THE STAND. WHETHER OR NOT THEY RECEIVED IT IS GOING TO OBVIOUSLY BE THE FIRST STEP IN A BRADY ANALYSIS. AND THAT'S SOMETHING I'M ENTITLED TO FURTHER INVESTIGATE, WHETHER THAT'S BY GETTING MR. HECKER ON THE STAND -- OR MR. ROME, I'M SORRY, AND THEN GOING FROM THERE.

MR. SINQUEFIELD: JUDGE, MY RECOLLECTION, THAT I FILED A VERY COMPREHENSIVE AND EXTENSIVE -- I BELIEVE IT WAS 768 NOTICE IN THIS CASE THAT TOLD

THE WITNESSES WHAT -- AS FAR AS I KNEW WHAT I EXPECTED THEM TO SAY. AND I THINK THAT IGNORES THAT DOCUMENT. I HAVEN'T SEEN IT IN YEARS BUT I BELIEVE IT WAS QUITE LENGTHY, A NUMBER OF PAGES AND A NUMBER OF PARAGRAPHS WITH VERY DETAILED INFORMATION AS TO WHAT WITNESSES HAD SAID AND I EXPECTED THEM TO TESTIFY TO. WHILE THAT WASN'T PART OF THE DISCOVERY PROCESS, IT WAS FILED IN THIS RECORD AND GIVEN TO THE DEFENSE ATTORNEYS.

MR. GISLESON: I MEAN, YOU KNOW, IT HAS BEEN A LONG TIME, AND MR. SINQUEFIELD'S MEMORY DOESN'T SOUND LIKE A STEEL TRAP, AND THAT -- I DON'T KNOW HOW MUCH WEIGHT THAT CARRIES. AND THEN IF YOU ADD TO IT THE FACT THAT THE STATE ONLY HAS THIRTY DAYS WITH WHICH TO ANSWER MY PETITION AND HASN'T ANSWERED IT. SO, IN EFFECT, THEY'RE EITHER WAIVED OR BARRED FROM ARGUING ONE WAY OR THE OTHER.

MR. SINQUEFIELD: JUDGE, MY MIND IS NOT A STEEL TRAP, BUT I HAVE A VERY GOOD MEMORY THAT I THINK I FILED A 768 NOTICE WITH VERY COMPREHENSIVE INFORMATION ABOUT THE WITNESSES THAT WERE GOING TO TESTIFY AS TO STATEMENTS MADE TO THEM BY MR. WESSINGER. AND I THINK THE RECORD -- WHILE MY MEMORY MAY NOT BE A STEEL TRAP, THAT RECORD SHOULD BE. AND I THINK HE'S GOING TO FIND THAT DOCUMENT IF HE LOOKS.

MR. GISLESON: THIS IS SOMETHING I BELIEVE SHOULD BE DEFERRED FURTHER UNTIL WE DETERMINE WHETHER THIS INFORMATION WAS TURNED OVER AT ALL TO MR. ROME.

MR. SINQUEFIELD: WELL, JUDGE, HE SHOULDN'T GET A HEARING JUST TO GO FISHING. HE IS SUPPOSED

TO MAKE SPECIFICS ALLEGATIONS --

MR. GISLESON: I --

MR. SINQUEFIELD: -- AND KNOW THESE THINGS WHEN HE FILES THIS PETITION. THEN HE'S NOT ENTITLED TO A HEARING.

MR. GISLESON: YOUR HONOR, I MADE THE SPECIFIC ALLEGATIONS. AND THE ALLEGATIONS WERE IT'S A BRADY CLAIM. THE OBVIOUS IMPLICATION IS IT WAS NOT TURNED OVER. THE STATE HAS COME FORWARD TODAY SAYING THEY'VE GOT SOME VAGUE RECOLLECTION THAT THEY PROVIDED SOME SORT OF GENERAL SUMMARIES, PERHAPS A SENTENCE, A COUPLE OF WORDS, TWO SENTENCES AND THAT THAT SHOULD BE ENOUGH TO DEFEAT MY SPECIFIC ALLEGATIONS THAT THEY WEREN'T TURNED OVER. I SAID THE STATEMENTS WEREN'T TURNED OVER. THEY JUST CONCEDED THAT THE STATEMENTS WEREN'T TURNED OVER; SOME SORT OF SUMMARY WAS TURNED OVER. AND THERE IS A BIG DIFFERENCE BETWEEN A SUMMARY AND THE ACTUAL STATEMENTS.

MR. SINQUEFIELD: JUDGE, I WANT TO CORRECT HIM. I DIDN'T CONCEDE ANYTHING TO HIM. THAT'S NOT WHAT I SAID. SO I WOULD APPRECIATE IT IF HE WOULD CONFINE HIMSELF TO WHAT -- HIS ARGUMENTS HE WANTS TO MAKE AND NOT SAYING THAT I SAID THINGS THAT I DIDN'T SAY, BECAUSE I HAVE CONCEDED NOTHING TO HIM. AND I DON'T CONCEDE ANYTHING TO HIM. HE WASN'T HERE DURING THE DISCOVERY PROCESS OR THIS TRIAL. AND APPARENTLY HE HASN'T READ THIS RECORD VERY WELL OR PREPARED VERY WELL FOR THE ALLEGATIONS THAT HE'S PUT IN THIS PETITION. SO HE CAN'T BOOTSTRAP HIMSELF BY MAKING PERSONAL ALLEGATIONS AGAINST ME. AND I WOULD OBJECT TO

THAT.

THE COURT: ALL RIGHT. I'M LOOKING AT THE TRANSCRIPT AT THIS TIME. AND THE TRANSCRIPT IS CLEAR THAT MR. ROME ON CROSS-EXAMINATION ASKED MR. HARDEN IF HE HAD BEEN GIVEN IMMUNITY IN LOUISIANA. AND HE HAS. AND HE WAS ALREADY SERVING TIME, I BELIEVE 46 MONTHS, IN TEXAS AND THAT THIS WOULDN'T HAVE ANY EFFECT ON WHEN HE GOT OUT. HE DOES GO INTO THERE ARE SOME PROGRAMS IN FEDERAL -- OR OVER THERE THAT CAN ALLOW THEM TO REDUCE THEIR TIME, BUT DOESN'T MENTION ANYTHING AT ALL ABOUT THIS HAVING ANY EFFECT ON THE DATE HE MAY GET OUT OF JAIL OR NOT. IT REFERS TO THE DAP PROGRAM AND THAT WAS IT. AND IT IS BROUGHT OUT TO THE JURY THAT HE WAS INCARCERATED. MR. ROME ASKED HIM IF HE WAS A CRACK DEALER. HE WAS. IF ANYBODY KNOWS THAT HE GOT A DEAL, I'M SURE IT WOULD BE MR. HARDEN. AND BESIDES THIS -- I HAVEN'T READ ALL THE TRANSCRIPT, BUT MY MEMORY IS THAT HE WAS GIVEN IMMUNITY FOR ANYTHING THAT MIGHT INDICATE HE WAS AN ACCESSORY AFTER THE FACT TO THE MURDER THAT TOOK PLACE HERE WHEN HE WAS OVER THERE. BUT THAT WAS IT, AND THAT WAS BROUGHT OUT ON CROSS-EXAMINATION. SO I DON'T -- AND I DO AGREE WITH MR. SINQUEFIELD, THIS IS NOT A FISHING EXPEDITION. AS I SAID, YOU'RE THE ONE WHO HAS THE RESPONSIBILITY TO ALLEGE SPECIFIC FACTS THAT WOULD LEAD TO IT, NOT THERE MAY BE SOME DEALS THAT WE DON'T KNOW ABOUT, WE WOULD LIKE TO INVESTIGATE IT. OTHERWISE IT COULD GO ON FOREVER. SO I DON'T BELIEVE WE NEED A HEARING ON THAT.

MR. GISLESON: SIR, YOUR HONOR, WAS THAT JUST

THE BRADY CLAIM AS TO RANDOLPH HARDEN OR AS TO ALL BRADY CLAIMS?

THE COURT: ALL THREE OF THEM.

MR. GISLESON: I'M SORRY, YOUR HONOR?

THE COURT: ALL THREE OF THEM.

MR. GISLESON: ALL --

THE COURT: ALL OF THEM. I HAVEN'T REALLY DISCUSSED CLARENCE BROWN YET.

MR. GISLESON: OH.

THE COURT: WE DISCUSSED TILTON BROWN, MR. HARDEN.

MR. GISLESON: OKAY.

THE COURT: AND MR. CLARENCE BROWN WAS THE SAME THING. AS A MATTER OF FACT, THAT'S PROBABLY THE ONE WHO TESTIFIED THAT HE WAS GIVEN IMMUNITY FOR ACCESSORY AFTER THE FACT. HE WAS -- I DON'T BELIEVE WAS IN JAIL AT THAT TIME. AND THAT WAS BROUGHT OUT. AGAIN, IT'S -- THERE ARE NO SPECIFIC PLEA AGREEMENTS OR THE FACT THAT HE HAD ANYTHING THAT WAS ALLEGED IN THIS PETITION. THEREFORE, WE DON'T NEED A HEARING ON THAT.

MR. GISLESON: SIR, WAS THAT CLARENCE BROWN OR TILTON BROWN?

THE COURT: I COULDN'T HEAR YOU. I'M SORRY.

MR. GISLESON: DID YOU SAY CLARENCE BROWN OR TILTON BROWN?

THE COURT: WELL, BOTH OF THEM. IN YOUR PETITION YOU ASSERTED THAT CLARENCE BROWN -- TILTON BROWN IS THE ONE WITH THE RAP SHEET ISSUE. CLARENCE BROWN IS THE ONE WITH THE MAYBE AN AGREEMENT TO TESTIFY AND WHAT -- A DEAL TO EITHER NOT PROSECUTE HIM ON SOMETHING OR GIVE HIM A DEAL

ON SOMETHING HE WAS BEING PROSECUTED FOR. BUT IT DOESN'T ALLEGE ANYTHING THAT HE WAS BEING PROSECUTED FOR. THE TRIAL DID BRING OUT THAT HE WAS GIVEN IMMUNITY FOR ACCESSORY AFTER THE FACT TO MURDER RELATING TO THIS. ALL RIGHT. THERE'S ANOTHER AREA THAT THE PETITION HAS GONE INTO, AND THAT'S THE SELECTION OF THE GRAND JURY FOREPERSON AND RACIAL AND GENDER DISCRIMINATION AND SELECTION OF THAT. I DO BELIEVE THE STATE OF THE LAW IS AT THIS TIME THAT THERE MUST HAVE BEEN A MOTION TO QUASH THAT WOULD HAVE BEEN FILED TO PRESERVE THAT RIGHT, AND THERE WAS NONE.

MR. GISLESON: AND, YOUR HONOR, WE ALLEGE THAT COUNSEL WAS INEFFECTIVE FOR THAT VERY REASON, GIVEN THE STRENGTH OF THE NUMBERS.

THE COURT: ALL RIGHT.

MR. LEE: AND, YOUR HONOR, THE STATE WOULD RESPOND BY SAYING THAT THERE ARE CASES THAT YOU COULD FIND THAT BASICALLY SAY THAT THE FAILURE TO FILE A MOTION TO QUASH DOES NOT CONSTITUTE INEFFECTIVE COUNSEL IN AND OF ITSELF, ESPECIALLY IN A CASE LIKE THIS WHERE THE STATE COULD JUST REINDICT. I COULD CITE YOUR HONOR THE CASES ON THAT, TO THAT POINT IF YOU CAN'T FIND THEM ON YOUR OWN, BUT I'M SURE YOU CAN. THEY'RE OUT THERE.

THE COURT: I'VE GOT A LIST OF THEM RIGHT HERE.

MR. GISLESON: THE MOST NOTABLE CASE OF LATE IS THE STATE V. RICKY LANGLEY, IN WHICH THE LOUISIANA SUPREME COURT DID FIND THAT THE FOREPERSON DISCRIMINATION ISSUE ON BOTH RACE AND GENDER MERITED QUASHING THE INDICTMENT.

MR. LEE: YES, YOUR HONOR, AND THAT WAS ONE WHERE THERE WAS --

THE COURT: WASN'T THERE A MOTION TO QUASH FILED IN THAT CASE THOUGH?

MR. GISLESON: I'M SORRY, YOUR HONOR?

THE COURT: THERE WAS A MOTION TO QUASH THAT WAS FILED IN THE LANGLEY CASE.

MR. GISLESON: I'M TRYING TO REMEMBER IF THE MOTION TO QUASH WAS FILED BY POSTCONVICTION COUNSEL OR WHETHER IT WAS FILED BY TRIAL COUNSEL.

MR. LEE: IT WAS FILED PRETRIAL, YOUR HONOR. IF YOU WOULD LIKE TO LOOK AT THE CASE, I'M SURE YOU'LL FIND THAT. THAT'S THE ONLY REASON THEY LOOKED AT IT IN LANGLEY OR ELSE THEY WOULD HAVE DISMISSED IT AS BEING PROCEDURALLY BARRED.

MR. GISLESON: AND THEN OUR FINAL RESPONSE TO THAT IS IT'S A STRUCTURAL DEFECT SUCH THAT CAN'T BE WAIVED. IT GOES TO THE HEART OF THE JUDICIAL SYSTEM. IT -- IT'S THE BASIS AND THE FOUNDATION FOR ALL PROCEEDINGS AFTERWARDS. IT'S -- YOU KNOW, IT'S THE DISCRIMINATION OF -- OF THE TYPE THAT YOU JUST CAN'T DISMISS BECAUSE IT'S WAIVABLE. IT'S A STRUCTURAL ERROR.

MR. LEE: AND HE HAS NO AUTHORITY FOR THAT PROPOSITION, YOUR HONOR, WHILE WE HAVE A STATE STATUTE THAT SAYS IF YOU DON'T FILE A MOTION TO QUASH, YOU DON'T GET TO REVIEW IT.

MR. GISLESON: WELL, IF IT'S A STRUCTURAL ERROR THEN THAT PROVISION IS UNCONSTITUTIONAL.

THE COURT: WELL, AS I SAID AT THE BEGINNING, THE STATE OF THE LAW IS THAT TO PRESERVE THAT THERE MUST BE A MOTION TO QUASH. THERE WAS NOT

ONE FILED HERE, AND IT IS PROCEDURALLY BARRED. IN YOUR PETITION YOU ALSO ALLEGE THAT THAT WAS A SYSTEMATIC EXCLUSION OF BLACK JURORS.

MR. GISLESON: YES, YOUR HONOR. THAT IS ISSUE NUMBER 7.

MR. SINQUEFIELD: YOUR HONOR, I BELIEVE THAT WAS LITIGATED ON APPEAL, WASN'T IT?

THE COURT: THAT WAS HANDLED ON APPEAL. I DON'T BELIEVE THERE WAS ANY SPONTANEOUS OR CONTEMPORANEOUS OBJECTIONS TO THAT. AND, IN ADDITION, THE PETITION DOESN'T ALLEGE ANY SPECIFIC FACTS THAT WOULD INDICATE THAT. SO THAT WILL ALSO BE DISMISSED. THAT BRINGS US TO THE LAST AREA THAT'S INCLUDED, WHICH WOULD BE ROMAN NUMERAL VIII. AND THIS DEALS WITH RING V. ARIZONA IN THAT THE INDICTMENT WAS CONSTITUTIONALLY DEFICIENT BASED ON THAT DECISION AND ARGUES THAT THE RING DECISION -- I'M NOT SURE WHAT THE DATE WAS, BUT IT WAS AFTER THIS CASE -- SHOULD BE APPLIED RETROACTIVELY TO THIS CASE.

MR. GISLESON: THAT'S CORRECT, YOUR HONOR.

THE COURT: AND I DON'T THINK SO. AND THERE IS NO AUTHORITY FOR THAT. I KNOW YOU DO CITE THE CASE THAT SAYS THE SUPREME COURT IS CONSIDERING ANOTHER CASE. I'M SORRY I CAN'T REMEMBER WHICH STATE IT IS OUT OF, BUT THIS VERY ISSUE. BUT AS FAR AS -- I THINK IT MIGHT BE STATE V. HUNT. BUT AS FAR AS I CAN TELL IT IS NOT RETROACTIVE AND THEREFORE THAT ALSO -- THERE WILL BE NO NEED FOR A HEARING AND THAT WILL ALSO BE DISMISSED. SO I GUESS IN SUMMARY, EVERYTHING THAT WE'VE GONE OVER HERE -- AND SOME OF IT IS JUST TO DISCUSS IN A

LITTLE DETAIL -- I DON'T THINK WE NEED A HEARING. I THINK EVERYTHING -- THE RECORD SPEAKS FOR ITSELF. THE THINGS THAT YOU'VE ALLEGED ARE INEFFECTIVE ASSISTANCE OF COUNSEL. I HAVE LOOKED AT AND CONSIDERED THE RECORD, AND I REALLY DON'T SEE ANY NEED FOR ANY HEARING, ANY EVIDENTIARY HEARING ON ANY OF THOSE, BASED ON THE REASONS I JUST GAVE YOU TODAY.

MR. GISLESON: THEN SO THE ENTIRE SECOND PETITION FOR POSTCONVICTION RELIEF IS DENIED, YOUR HONOR?

THE COURT: RIGHT.

MR. GISLESON: OKAY. JUST NOTE MY OBJECTION FOR THE RECORD. I'M OBVIOUSLY GOING TO APPEAL BUT -- IF IT'S OVER. I'VE GOT MY THIRTY DAYS.

THE COURT: ALL RIGHT.

MR. SINQUEFIELD: ALL -- IN OTHER WORDS, AS I UNDERSTAND IT ALL HIS PETITIONS HAVE BEEN DENIED, YOUR HONOR?

THE COURT: ALL OF THEM AND -- AS I STARTED OUT SAYING, WE GOT A FIRST PETITION, A FIRST AMENDED PETITION AND A SECOND AMENDED PETITION. AND IN GOING OVER THEM I TOOK SOME OUT OF ORDER BECAUSE -- AND I KNOW IT WAS A LONG DOCUMENT. IT WAS OVER 135 PAGES, THE FIRST ONE, AND 90 THE SECOND ONE. SO THE NUMBERING SYSTEM KIND OF GOT SKEWED A LITTLE BIT AND THEY WERE NOT ALWAYS IN ORDER. AND I'VE BROKEN THEM DOWN INTO THE ISSUES AND ADDRESSED THEM IN THAT ORDER. I TRIED TO POINT YOU TO WHERE IN THE PETITION THEY WERE COMING FROM. BUT THERE'S NOTHING LEFT IN THERE. I BELIEVE I'VE HIT ALL OF THEM, ALL OF THE GROUNDS

ALLEGED IN YOUR PET -- ALL OF YOUR PETITIONS. AND, AS I SAID, I THINK REALLY THE SECOND SUPPLEMENTAL PETITION REALLY JUST EXPANDED ON THE ONES THAT WERE IN THE SECOND -- OR FIRST AMENDED PETITION.

MR. SINQUEFIELD: I JUST WANT TO MAKE SURE IT'S CLEAR THAT ALL PETITIONS ARE DENIED.

THE COURT: ALL OF THEM.

MR. SINQUEFIELD: THANK YOU, YOUR HONOR.

MR. GISLESON: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT.

END OF TRANSCRIPT

C E R T I F I C A T E

I, TESSIE KELLEY, CCR, OFFICIAL COURT REPORTER, NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DO HEREBY CERTIFY THAT THE FOREGOING PAGES CONSTITUTE A TRUE AND ACCURATE TRANSCRIPT OF THE AFORESAID MATTER AS TAKEN BY ME ON THE STENOTYPE MACHINE, TO THE BEST OF MY KNOWLEDGE AND ABILITY.

BATON ROUGE, LOUISIANA, THIS 5TH DAY OF SEPTEMBER, 2003.

Tessie Kelley

TESSIE KELLEY
OFFICIAL COURT REPORTER
19TH JUDICIAL DISTRICT COURT
CCR #91169

App. 120

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

TODD KELVIN WESSINGER

VERSUS

BURL CAIN, WARDEN

CIVIL ACTION

NO. 04-637-JJB-SCR

RULING AND ORDER

This matter is before the Court on a Motion to Alter or Amend Judgment (doc. 139) brought by the Plaintiff, Todd Wessinger ("Wessinger"). The Motion, brought under Rule 59(e) of the Federal Rules of Civil Procedure, asks the Court to alter or amend its Judgment on Petition for Writ of Habeas Corpus (doc. 137), which denied all Wessinger's claims for relief. The Defendant opposed the Motion (doc. 150) and the Plaintiff filed a reply (doc. 151). The Court heard oral arguments on April 25, 2012. After considering the briefs and oral argument, the Court will amend its prior Ruling as specified below.

Rule 59(e) provides that "a motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." The Court's Ruling dismissing the Petition was entered on March 13, 2012. The Motion to Alter was filed on April 10, 2012, thus it is timely. "A Rule 59(e) motion calls into question the correctness of a judgment." *Molina v. Equistar Chemicals LP*, 261 Fed. Appx. 729, 733 (5th Cir. 2008) (internal citation omitted). It is not to be used to merely rehash old arguments or to present new arguments that were available

and should have been raised prior to judgment. *Id.* Rather, its purpose is to allow a party to "correct manifest errors of law or fact or to present newly discovered evidence." *Id.* Therefore, the motion must clearly establish either a manifest error of law or some newly discovered evidence that was not available before the judgment. *Id.*

Wessinger presents five factual or legal errors: (1) The Court answered the wrong question in its 18 U.S.C. §2254(d) determination; (2) the Court mistreated his claim of ineffective assistance of counsel at the penalty phase of the trial; (3) the Court made legal and factual errors in denying his claim of ineffective assistance of counsel during voir dire; (4) the Court erred in denying relief on his exhausted *Brady* claim items (Claim V); and (5) the Court erred in finding certain items from the *Brady* claim unexhausted and therefore procedurally barred. The Court finds issues (1),[1] (3), and (4) wholly without merit and will not alter its Ruling as regards to them. Issue (5) is closer but ultimately without merit. It is issue (2) the Court finds deserving of further proceedings.

Wessinger's ineffective assistance at the penalty phase claim was brought in his Amended Petition for Writ of Habeas Corpus (doc. 120 at 232-302). The

[1] Wessinger makes the argument that the state habeas court denied his claims on the pleadings under article 928 of the Louisiana Code of Criminal Procedure rather than article 929, which provides for summary disposition. Therefore, instead of analyzing the reasonableness of each substantive decision by the trial court, the Court should have been analyzing the reasonableness of the decision to dismiss each claim for failure to state a claim. While an interesting argument, Wessinger presents no case law from any jurisdiction that has made such a distinction and the Court agrees with the State that, even if the trial court had intended to dismiss the claims under article 928—which the Court is not at all convinced is the case—the effect of such a distinction would not lead to the type of analysis Wessinger suggests.

State, in its opposition to the Petition, contended that the claim went "way beyond what [Wessinger] presented to the state courts for consideration of this claim below." (Doc. 129 at 151). In its Ruling, the Court should have agreed that the claim was a new claim as it went beyond what was presented to the state court; and therefore should have found it to be unexhausted and subject to a procedural bar. When a habeas petitioner presents "material additional evidentiary support" to the federal court that was not presented to the state court, he has not exhausted his state remedies. *Graham v. Johnson*, 94 F.3d 958, 968 (5th Cir. 1996). When a claim is "significantly different and stronger" than presented to the state court, it is deemed not exhausted. *Brown v. Estelle*, 701 F.2d 494 (5th Cir. 1983); see also *Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003) (addition of psychological report and mother's affidavit detailing family history of mental illness along with concrete instances of abuse of petition presents "significant evidentiary support" such that claim was not exhausted).

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. The Court finds that the additional evidence Wessinger has presented to this Court is material and significantly different and stronger than what he presented to the state court. Therefore the claim was not exhausted and is procedurally

barred. The Court's ruling was manifestly erroneous in this respect and the Judgment will be vacated as to claim XI-C.

As claim XI-C is procedurally barred, Wessinger is not allowed to bring it unless he can show cause and prejudice for his failure to exhaust it at the state court level. To show cause, Wessinger points to a recent Supreme Court case, *Martinez v. Ryan*, released on March 20, 2012. 132 S.Ct. 1309 (2012). In *Martinez*, the Supreme Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320. In so holding, the Supreme Court expressly provided a narrow exception to the general rule expressed in *Coleman v. Thompson*, 501 U.S. 722, 754-55 (1991) that the negligence of an attorney in a post-conviction proceeding cannot serve as cause for his failure to exhaust. As a preliminary matter, the Court notes there is a jurisprudential rule in Louisiana that ineffective assistance claims are generally best suited for post-conviction proceedings. *State v. Hamilton*, 699 So.2d 29, 31 (La. 1997). The Louisiana Supreme Court applid this rule to Wessinger's ineffective assistance at trial claim. *State v. Wessinger*, 736 So.2d 162, 195 (La. 1999).

The State claims *Martinez* does not apply to this situation because *Martinez* involved a case in which the ineffective assistance at trial was not brought at all in the initial-review proceeding, unlike the case at bar, which involves an allegedly ineffective prosecution of the claim. The Court disagrees. Nothing in either the opinion or the holding indicates such a distinction matters.

As for how he will prove cause, Wessinger claims his initial-review counsel, Mr. Gisleson, was ineffective during this proceeding because he failed to properly present the ineffective assistance at trial claim in the state court. Gisleson agrees that his performance was deficient, but only because he repeatedly was denied funds and time to properly investigate these claims. There is case law supporting this ineffectiveness through denial of funds theory. See *Gary v. Hall*, 558 F.3d 1229, 1251-1253 (11th Cir. 2009); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985). The Court finds there are questions of law and fact as to whether this theory applies in this case.

If Wessinger is able to show his initial-review counsel was ineffective in prosecuting his ineffective assistance at penalty phase claim, then he must show prejudice. This prejudice prong is satisfied only by a showing that, but for the error, he might not have been convicted. *U.S. v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996). In the context of the penalty phase, this means he might not have received the death penalty. If he can make this showing, then the Court will consider the underlying ineffective assistance at the penalty phase claim *de novo*

under the *Strickland v. Washington* standard. The Court will handle both inquiries together at a hearing.

As for his unexhausted *Brady* claim, the Court disagrees with Wessinger that *Martinez* allows him to get around the procedural bar. *Martinez* only applies to claims of ineffective assistance of counsel at trial that are procedurally barred because of ineffective assistance of counsel at the initial-review proceeding. 132 S.Ct. at 1320. This provides for equitable relief in situations where a petitioner would otherwise not have the substance of a claim heard. *Brady* claims are allowed to be heard on direct appeal. Most of Wessinger's *Brady* claims were heard on direct review. *Martinez* does not allow Wessinger to get around *Coleman*'s prohibition against using ineffective assistance during post-conviction proceedings as cause to excuse a procedural bar for the claims that were not brought before the state court. This claim is without merit.

CONCLUSION AND ORDER

For these reasons, Petitioner's Motion to Alter or Amend Judgment (doc. 139) is GRANTED and the case is reopened as to Petitioner's Claim XI-C (doc. 135 at 65) as provided herein. A hearing will be held on December 13, 2012. The parties will brief both issues beforehand. Wessinger will file his brief within sixty (60) days of the date of this Order and the Defendant will file an opposition within thirty (30) days thereafter. Both sides will be limited to twenty (20) pages. The parties are encouraged to refer to previous briefs (by docket and page

number) in order to avoid merely repeating prior factual, procedural, and evidentiary recitations.

Signed in Baton Rouge, Louisiana, on May 15, 2012.

JUDGE JAMES J. BRADY
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

TODD KELVIN WESSINGER

VERSUS

BURL CAIN, WARDEN

CIVIL ACTION

NO. 04-637-JJB-SCR

RULING

In 2012 this Court issued a Ruling and Order granting Petitioner's Motion to Alter or Amend Judgment ordering an evidentiary hearing as to the sole remaining habeas claim (doc. 156). The evidentiary hearing, held in January and March of 2015, was set to consider two issues. First, the Court considers whether this federal habeas court is barred from considering the unexhausted claim for habeas corpus relief. Second, should this Court find that the claim is subject to this Court's review, the underlying claim is to be considered *de novo* by this Court. The underlying habeas claim is that of ineffective assistance of counsel ("IAC") at the penalty phase of trial in violation of Petitioner's Sixth Amendment right. Before reaching the underlying claim, the Court must first consider Petitioner's initial review proceedings in state court, as well as the performance of initial review counsel ("IRC"), Mr. Gisleson.

I. CONSIDERATION OF *COLEMAN* AND *MARTINEZ*

This Court's previous ruling determined Petitioner's remaining habeas claim is procedurally defaulted (doc. 156, at 4). The Court reached this determination based on the *Coleman v. Thompson* rule: "[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred." 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991). In *Coleman*, the Court went on to limit the rule barring federal habeas review of such defaulted

claims when the prisoner can demonstrate (1) cause for the default and (2) actual prejudice as a result of the failure to exhaust the claims in state court. *Id.*

Prior to the Supreme Court's ruling in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the negligence of an attorney in post-conviction proceedings did not suffice as "cause" under *Coleman*. However, *Martinez* served as a significant exception when it held the following:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id. at 1320. This Court has already noted the jurisprudential rule in Louisiana that ineffective assistance claims are generally best suited for post-conviction proceedings (doc. 156, at 4, citing *State v. Hamilton*, 699 So.2d 29, 31 (La. 1997)).[1] *Martinez* sets forth two more conditions that must be satisfied in order for the procedurally defaulted claim to be heard by this federal habeas court: (1) IRC was ineffective in the initial-review proceeding and (2) the underlying habeas claim of IAC at penalty phase must be a substantial claim.

EFFECTIVENESS OF IRC IN THE INITIAL REVIEW PROCEEDING

Petitioner claims his IRC, Mr. Gisleson, was prejudicially ineffective during state initial review proceedings in pursuing Petitioner's habeas claim that trial counsel, Mr. Billy Hecker, was ineffective during the penalty phase of Petitioner's trial (doc. 211, at 2). Petitioner is correct

[1] The State urges that *Martinez* holding is satisfied here because the Petitioner was afforded the right to bring and did assert several IAC claims (doc. 212, at 5). As this Court has already stated, *Martinez* makes no distinction between whether IRC's ineffectiveness is measured by failure to present a claim of ineffective assistance of trial counsel or in connection with the ineffective prosecution of such a claim, the latter being what Petitioner argues herein (doc. 156, at 5). The Fifth Circuit's ruling in *Escamilla v. Stephens* "that *Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court," does not change our Court's finding that *Martinez* applies to the instant case. 749 F.3d 380, 394-95 (5th Cir. 2014). In our previous ruling, this Court found that the claim of ineffective assistance at the penalty phase presented to this Court was a new claim, and therefore not adjudicated on the merits in state court, in light of the additional evidentiary support that was not presented to the state habeas court, including psychiatric evaluation, neuropsychological testing, evidence of low intellectual functioning, and evidence of isolation and abuse (doc. 156, at 3).

that the effective assistance of counsel at trial is a fundamental principle of our justice system. *Id.* Furthering this point, the Supreme Court in *Martinez* emphasized a prisoner's ability to pursue a substantial claim of ineffective assistance of counsel with the aid of effective counsel at the initial review proceeding. *Martinez*, 132 at 1317. The Court also made clear that when the prisoner is claiming IRC was ineffective, prisoner has the burden under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Martinez*, 132 at 1318-1319. In trying to satisfy "cause" by claiming ineffective IRC under *Martinez*, AEDPA does not apply because the alleged error of IRC is not a "claim." *Id.* at 1320.

Petitioner points to *Canales v. Stephens*, 765 F.3d 551, 569 (5th Cir. 2014), a case applying *Martinez*, where the Fifth Circuit found that defendant established that his state habeas counsel's performance fell below an "objective standard of reasonableness" when state habeas counsel did not conduct a mitigation investigation due to a mistaken belief that his funding was capped and did not make a strategic choice to forego a mitigation investigation. *See also Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052 (1984); (doc. 211, at 4).

The evidentiary hearing held before this Court in January and March of 2015 considered, in part, Petitioner's argument for why his IRC was ineffective in prosecuting the claim of ineffective assistance of trial counsel at the penalty phase of trial. Mr. Gisleson, with limited legal experience of his own, was appointed as Petitioner's state post-conviction counsel in January 2001 (doc. 211, at 9). In December of 2000, Mr. Gisleson received a file from Petitioner's previous *pro bono* counsel who apparently suffered a mental breakdown and had done no work on the case. *Id.* at 9. To avoid an impending one-year deadline for filing a petition, Mr. Gisleson filed a three-page shell petition in December of 2000. *Id.* He was then granted sixty days to file an amended petition, during which time he sought funding and assistance from

entities with experience in habeas legal work, filed motions for funding and to continue the amended petition deadline, all to no avail. Mr. Gisleson testified that his efforts to seek funding and assistance were not part of a strategy. Instead, they were out of frustration for his own lack of experience. *Id.* After sixty days passed and Mr. Gisleson appeared before the court without an amended petition, the judge continued the filing deadline to June 11, 2001. *Id.* at 10.

While Mr. Gisleson was granted more time, he was still without direction and without training on how to proceed with post-conviction or habeas corpus work. To satisfy the continued deadline, Mr. Gisleson used a master petition template for post-conviction relief that comprised every conceivable issue that could be raised and some limited factual information from the previous *pro bono* counsel's file. This first amended petition did include a claim of ineffective assistance of trial counsel at the penalty phase. *Id.* Mr. Gisleson did no investigation and did not hire an investigator, mitigation specialist or mental health expert to assist him in investigating and preparing his amended petition alleging penalty phase counsel's ineffectiveness. *Id.* at 11. Mr. Gisleson did not obtain any medical records, school records, employment records or family history records of Petitioner. *Id.* He did not conduct interviews of any witnesses, friends, teachers, coaches, or family members of Petitioner. *Id.* He had only one or two conversations with Petitioner's mother and brother about guilt-related issues and a few conversations with Petitioner himself. *Id.*

It was Mr. Gisleson's impression that trial counsel's "lack of due diligence" was "astounding" and reflected in the trial records and transcript. Mr. Gisleson thought there was more to be discovered with regard to this claim, but he could not do what was necessary without investigative assistance and without being adequately familiar with post-conviction law and procedure. Mr. Gisleson stated that it was not a strategic decision to not put in time or energy or

effort to pursue the claim of ineffectiveness of penalty trial counsel. In light of his realized limitations, Mr. Gisleson, shortly before the first amended petition was due in June 2001, filed a motion with the Louisiana Supreme Court to withdraw based on his inability to provide competent representation to Petitioner and that it would be a breach of his ethical and professional duty, resulting in ineffective assistance, to continue as counsel in the case. *Id.*

After filing his motion to withdraw with the Louisiana Supreme Court, Mr. Gisleson heard nothing for the next year and a half. He testified that he "couldn't imagine being kept on the case after filing" to withdraw and took that silence as his removal from the case. In February of 2003, Mr. Gisleson received the state's opposition to the first amended petition that was filed in June of 2001. Mr. Gisleson went to the Louisiana Supreme Court only to discover that his motion to withdraw had been denied in June 2001 but was sent to an old address. From the time he filed the motion to withdraw and until he received the state's opposition, Mr. Gisleson did no work on Petitioner's case. *Id.* at 12.

Mr. Gisleson believed he had the opportunity now to submit a second amended petition. He again reached out to many of the same groups and was then put in contact with Danalynn Recer of Gulf Regional Advocacy Center for consultation, provided Mr. Gisleson's firm paid Ms. Recer $5,000. *Id.* at 13. The managing partners agreed to pay this amount. Mr. Gisleson did work on a second amended petition from March 2003 until he filed it in August of 2003. The second amended petition, in relevant part, restructured the guilt phase portion and added some discrete allegations regarding penalty phase ineffectiveness based on the trial court record. Ms. Recer reviewed the final draft of the second amended petition and provided the assistance of two unpaid, college-student interns, who did question some people who had testified at the guilt phase, but not at the penalty phase.

Mr. Gisleson did not view his second amended petition as a cure to his inadequacies. After all, despite drafting a second amended petition, Mr. Gisleson still did not hire a mitigation specialist to do a social history or mitigation investigation, nor did he or Ms. Recer conduct their own mitigation investigation. Mr. Gisleson did not direct anyone to conduct interviews of family, friends, coaches, teachers and the like or conduct a comprehensive records collection. Mr. Gisleson did not consult any mental health experts or any other experts. *Id.* at 13.

During the evidentiary hearing before this Court, post-conviction expert, Gary Clements, testified to his expert opinion of what the standard of performance of state post-conviction death penalty work was in Louisiana from 2001 to 2003. *Id.* at 14. It was Clements' opinion that it was standard to have a core team working on the case that included two attorneys, with one typically more experienced with capital post-conviction work, a mitigation specialist, and a paralegal. A mitigation specialist often had training in social work, knowledge as to mental health issues, and a set of investigative skills that would aid in the collection of documents and interviews on subjects relative to mitigating factors. Clements' understanding of ABA guidelines led him to conclude that investigation in every post-conviction case involved massive data and records collection, including medical, criminal, and family history going back at least two generations. *Id.* Interviews, in Clements opinion, conducted in a death penalty post-conviction case were extremely sensitive and difficult to be done over the phone, making the process lengthy in time. *Id.* at 15. Additionally, Russell Stetler, an expert in the investigation and presentation of mitigation evidence in death penalty cases, testified that Mr. Gisleson did not perform the thorough mitigation investigation required under professional norms. Mr. Gisleson echoed a similar opinion since his attempt at investigation of the claim of ineffective assistance of trial counsel at the penalty phase did not go beyond the trial court record. *Id.*

Both experts, Mr. Stetler and Mr. Clements, emphasized the importance of conducting a mitigation investigation, either with the aid of a mitigation specialist or by counsel conducting an investigation beyond the trial court record. It is undisputed that Mr. Gisleson conducted no investigation into mitigation evidence and did not hire a mitigation specialist during his time as counsel for Petitioner's post-conviction proceedings. Mr. Gisleson may have preserved the claim of ineffective assistance of trial counsel at the penalty phase simply by asserting it in his various amended petitions, but his failure to conduct mitigation investigation prevented him from providing any support for these claims. This lack of a mitigation investigation to even determine the merit of Petitioner's claim of ineffective assistance of trial counsel at the penalty phase is below the standard for capital post-conviction proceedings. Under the guidance of the Fifth Circuit in *Canales v. Stephens*, 765 F.3d 551, 569 (5th Cir. 2014), this Court finds 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.

WHETHER CLAIM INEFFECTIVE PURSUED BY IRC WAS "SUBSTANTIAL"

Upon finding that IRC was ineffective, *Martinez* directs this Court to next consider if the underlying claim is a "substantial claim of ineffective assistance at trial[.]" *Martinez*, 132 S. Ct. at 1320. In *Canales*, after finding that the defendant's state habeas counsel was deficient, the Fifth Circuit considered whether there was some merit to the underlying habeas claim that the defendant's trial counsel was ineffective at sentencing. 765 F.3d at 569. The defendant's own trial counsel admitted that he failed to conduct any mitigation investigation, hire a mitigation specialist, interview family members or others who would have known the defendant growing up, or collect records on the defendant's life. Further, during sentencing, trial counsel's only

mitigation evidence was that defendant was a "gifted artist" and a "peacemaker in prison." *Id.* The Fifth Circuit noted that had the trial attorneys conducted a mitigation investigation, they would have discovered a history of physical and verbal abuse from the defendant's family, financial struggles for the family, and a history of substance abuse. *Id.* Based on the information that could have been discovered if a mitigation investigation had taken place, the Fifth Circuit found that the defendant's underlying claim of ineffective trial counsel during the sentencing phase did have merit. *Id.*

Six months prior to Petitioner's trial, Mr. Hecker was appointed as counsel for Petitioner at the penalty phase (doc. 211, at 16). Prior to Mr. Hecker's appointment, Petitioner was represented by 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. The six months of Mr. Hecker's appointment leading up to trial were personally trying on Mr. Hecker. His father has been suffering from a serious illness that ended with his father's death in April of 1997. *Id.* at 17. Only two weeks after his father's death, Mr. Hecker was forced to take custody of his fourteen year old daughter. It is unsurprising and also undisputed that Mr. Hecker's ability to properly prepare for the penalty phase of the Petitioner's trial was limited. *Id.*

Mr. Hecker did not hire a mitigation specialist to investigate and, as a result, only presented character witnesses to speak of Petitioner as a good person, who struggled with alcoholism. Mr. Hecker did not work closely with the two experts he hired, yet put them on the stand in the penalty phase without discussing their testimony. Their testimony was shocking to him, and he was unprepared with how to handle it. While Mr. Hecker is now deceased, he asserted to as much in an affidavit filed by Petitioner. He further denied that it was part of any strategy to deliberately abandon any area of investigation or to put important witnesses on the

stand without knowledge of the content of that testimony. *Id.* Based on what Mr. Hecker's acknowledged shortcomings in preparing for the penalty phase of Petitioner's trial, this Court finds that the underlying ineffective assistance of counsel at the penalty phase claim has merit and satisfies the "substantial" element of *Martinez*.

This Court has determined that IRC was ineffective in pursuing a substantial claim. Therefore, *Martinez* provides the equitable remedy of having the "cause" element under *Coleman* satisfied. The Court next asks whether Petitioner can demonstrate "actual prejudice" as a result of IRC's failure to exhaust the substantial underlying claim. *Coleman*, 111 S. Ct. at 2565. With regard to the initial review proceeding, 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.

II. FEDERAL HABEAS COURT'S REVIEW OF UNDERLYING HABEAS CLAIM

The equitable holding of *Martinez* does not decide Petitioner's underlying claim for habeas relief.[2] Instead, in the interest of equity, it allows this federal habeas court to consider a federal habeas claim that would have otherwise been procedurally defaulted. As this Court stated in its 2012 ruling, the underlying habeas claim of ineffective assistance of counsel at penalty phase claim was a new claim in that it went "way beyond what Petitioner presented to the state courts for consideration of this claim below" (doc. 156, at 3). It was the following additional evidentiary support for Petitioner's ineffective assistance at the penalty phase claim that led this Court to find the claim presented to federal court was significantly different and stronger than what was before the state court and therefore an unexhausted, new claim: psychiatric evaluation, neuropsychological testing, evidence of low intellectual functioning, and evidence of isolation

[2] *Martinez*, 132 S. Ct. at 1320 ("'Cause,' however, is not synonymous with 'a ground for relief.' A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted.").

and abuse. As a new claim, this Court will review the habeas claim of ineffective assistance of trial counsel at the penalty phase *de novo*.[3]

The evidentiary hearing held before this Court in January and March of 2015 considered, in part, Petitioner's underlying claim of IAC at the penalty phase of trial. This underlying IAC claim considers the assistance of counsel, Mr. Hecker. Some of the facts with regard to Mr. Hecker's assistance are addressed above in our *Martinez* analysis and determination that the underlying claim is a substantial one.

First, the Court asks whether Mr. Hecker's performance in the penalty phase of trial was deficient as compared to an "objective standard of reasonableness" and "under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687; *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In a capital trial, the Supreme Court has considered the norms for a penalty phase by stating it as "defense counsel's job [] to counter the State's evidence of aggravated culpability with evidence of mitigation." *Rompilla v. Beard*, 125 S. Ct. 2456, 2462 (2005). At the time of Petitioner's trial in 1996, the American Bar Association Standard for Criminal Justice understood that the standard mitigation investigation duty of capital defense

[3] State argues that this Court is barred from considering new evidence to support the underlying IAC at penalty phase claim that was raised in state post-conviction proceedings (doc. 212, at 12-13, quoting *Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014)(considering *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011))). The Fifth Circuit determined that "once a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an exception to *Pinholster*'s rule that bars a federal habeas court from considering evidence not presented to the state habeas court." *Id.* at 395. In *Escamilla*, the Fifth Circuit found that the defendant's underlying IAC of trial counsel claim due to "his attorneys' failure to investigate and present mitigating evidence was considered and denied by the state habeas court." *Id.* In *Escamilla*, defendant's IRC did procure a mitigation investigator who conducted an investigation into that defendant's records and social history. Notably, in the instant case, Petitioner's IRC, Mr. Gisleson, did not make these same efforts. Further, the Fifth Circuit found that "the new evidence presented to the district court did not 'fundamentally alter' his claim…but merely provided additional evidentiary support for his claim that was already presented and adjudicated in the state court proceeding." *Id.* at 395, quoting *Dickens v. Ryan*, 740 F.3d 1302, 1320. This Court's previous ruling addressed this very issue in finding that the additional evidentiary support presented before this federal habeas court made the IAC at penalty phase claim a new claim (doc. 156, at 3). The additional evidence presented to this Court "is material and significantly different and stronger than what [Petitioner] presented to the state court." *Id.*; relying on *Dickens*, 740 F.3d at 1317. In the words of the Ninth Circuit's *Dickens* case, as relied on by the Fifth Circuit in *Escamilla*, the additional evidentiary support presented to this Court "fundamentally alters" the claim that was presented to the state court such that this Court considers the claim anew.

counsel could not "effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant[.]" Standard 4-4.1 (3rd ed. 1993). The Supreme Court has made clear that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91.

Already this Court has considered some facts surrounding Mr. Hecker's representation of Petitioner at the penalty phase: Mr. Hecker was appointed six months before the trial following previous counsel who had done no mitigation investigation, during the six months Mr. Hecker was dealing with his own personal struggles, Mr. Hecker did not hire a mitigation specialist to conduct a mitigation investigation during the six months, Mr. Hecker did not conduct his own mitigation investigation, Mr. Hecker presented only character witnesses who spoke of Petitioner as a "good person," and Mr. Hecker did not closely work with the experts who he then blindly allowed to testify. Finally, Mr. Hecker filed affidavits acknowledging his own shortcomings in preparing for the penalty phase of the trial and asserted that it was not part of a strategy to abandon any part of the investigation. These facts are not disputed.

Petitioner's brother, Troy, testified at the evidentiary hearing about what he observed leading up to Petitioner's trial. Troy testified to having one, hour-long meeting with Mr. Hecker during the six months leading up to the trial where Troy and six other family members attended (doc. 211, at 18). At this meeting, Mr. Hecker sought character witnesses for Petitioner, who were called as such at the penalty phase. *Id.* Several other character witnesses testified after Troy asked them to come to court to talk to the attorney about being a character witness. *Id.* At most,

Troy understood Mr. Hecker's preparation with these additional witnesses as a conversation in the courthouse hallway and then calling them to testify as character witnesses. *Id.* Ultimately, there were seventeen witnesses called by Mr. Hecker at the penalty phase, but there is no evidence to suggest that these were quality witnesses for the purposes of mitigation.

Mr. Stetler, an expert in the investigation and presentation of mitigation evidence in death penalty cases, testified that Mr. Hecker's duty as penalty phase counsel was not satisfied by the family meeting described by Troy. *Id.* In Mr. Stetler's opinion, Mr. Hecker was responsible for providing the experts with independent and objective information regarding Petitioner's development and function; yet, there is no evidence suggesting this was provided. Michele Fournet, capital defense expert, testified that the record does not suggest that Mr. Hecker's two experts were provided with any social history of Petitioner or his family, nor did he explain the purpose of their testimony or the idea of mitigation evidence. *Id.* at 19.

Mr. Hecker's 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.

Second, the Court asks if Mr. Hecker's deficient performance at the penalty phase of trial prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 692. In the context of penalty phase of a capital case, that requires the Court ask if the defendant might not have been sentenced to death. In determining if there was prejudice, the Supreme Court has required re-weighing of "evidence in aggravation against the totality of

available mitigating evidence," both from trial and habeas proceedings. *Wiggins*, 539 U.S. at 594.

As the State points out, there was no hearing on the IAC at penalty phase claim in the state post-conviction proceedings (doc. 212, at 26). At the penalty phase of trial, Mr. Hecker presented character witnesses and two experts. The evidentiary hearing before this federal habeas Court explored areas that would have been available to present at the penalty phase had a mitigation investigation been conducted by Mr. Hecker. Dr. George Woods, a physician with a specialty in neuropsychiatry, testified at the evidentiary hearing after having examined Petitioner three times, reviewed testing of Dr. Dale Watson, reviewed brain imaging of Petitioner, interviewed Petitioner's mother and two cousins, reviewed reports of the two experts Mr. Hecker did call, reviewed transcripts from previous proceedings, heard lay testimony at the evidentiary hearing, and reviewed a number of other records regarding Petitioner and his family, as well as relevant scientific articles (doc. 211, at 21). In Mr. Woods' expert opinion, Petitioner suffers from a major neurocognitive disorder. *Id.* at 22. In reaching this opinion, Dr. Woods considered family history and genetics, environmental history, and medical and psychological information gathered by Petitioner's federal habeas counsel's mitigation investigation. Dr. Woods concluded that at some point in his young life, Petitioner suffered from a pediatric stroke, which presented a significant problem with how Petitioner's left and right sides of his brain were able to communicate. *Id.* Additionally, Dr. Woods considered the brain images that showed a hole in Petitioner's brain that occurred due to some cerebrovascular illness. *Id.* at 23. Dr. Woods explained that the motor skills affected by a childhood stroke go away to a degree, the part of the brain handling a significant amount of decision-making remains impaired. *Id.* The brain imaging

and neuropsychological testing relied on by Dr. Woods, as well as the relevant social history of Petitioner and his family, were available in 1997 when Mr. Hecker represented Petitioner. *Id.*

A number of lay witnesses testified at the evidentiary hearing about the family history of poverty, alcoholism, violence, and struggle. *Id.* The drinking habits of Petitioner's father nearly seven days a week often lead to domestic violence as often as three times a week, according to Petitioner's brother, Troy. *Id.* Family-friends and cousins testimony confirmed Petitioner's father's habits of drinking and verbal abuse, particularly directed at Petitioner. *Id.* Petitioner's father's drinking led to his own improprieties, including getting his sons drunk and giving beer and marijuana to kids in the house. *Id.* at 24-25. Petitioner's personal struggles continued into his teenage and young adult life when he struggled in school and was often exposed to other's opinion of his own self-worth; including his father's demeaning comments, described as slow by his counterparts, easily manipulated to do things not in his best interest. *Id.* at 26.

Not one of the witnesses presented at the evidentiary hearing, other than Petitioner's brother, who still had limited interaction with Mr. Hecker, were previously contacted or interviewed regarding Petitioner for purposes of mitigation. *Id.* Mr. Stetler's testimony discussed a large empirical study that found "evidence of brain damage and impairments and developmental difficulties including violence in the home, domestic violence, child maltreatment and poverty is very powerful evidence that resonates with capital jurors." *Id.* at 27. As Ms. Fournet noted at the hearing, under Louisiana law, "all you need is one juror to hold out on the issue of penalty and you get a life sentence." *Id.* at 28.

The question remains, had these witnesses been contacted and had a mitigation investigation been done to reveal these lay and expert opinions, is there a reasonable probability that the result of the sentencing proceeding would have been different? The Court does not

consider the question before it lightly. After considering the mitigation evidence presented at the evidentiary hearing before us, which was not presented to the sentencing jury, this Court finds 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.

CONCLUSION

For the foregoing reasons, the Court grants Petitioner's claim for habeas relief based on ineffective assistance of trial counsel at the penalty phase in violation of the Sixth Amendment.

Counsel for Petitioner is to submit an order in conformity with this ruling within five (5) days of this ruling.

Signed in Baton Rouge, Louisiana, on July 23, 2015.

JUDGE JAMES J. BRADY
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

TODD KELVIN WESSINGER **CIVIL ACTION**

VERSUS **No. 04CV637-JJB-SCR**

BURL CAIN, WARDEN

JUDGMENT

For reasons assigned in the record,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition for writ of habeas corpus is hereby GRANTED as to Claim XI-C (Penalty Phase Ineffective Assistance of Counsel) of the Amended Petition for Writ of Habeas Corpus (doc. 120), the death sentences are vacated and this matter is remanded to the 19th Judicial District Court for a new penalty phase trial not inconsistent with this Court's ruling. All other claims are denied.

Baton Rouge, Louisiana, August 3rd, 2015.

JAMES J. BRADY
United States District Judge