No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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OSCAR MADRID -- PETITIONER, PRO SE

VS.

DARRELL VANNOY, WARDEN
STATE OF LOUISIANA, -- RESPONDENT

==========

ON PETITION FOR WRIT OF CERTIORARI TO:
U.S. FIFTH CIRCUIT COURT OF APPEAL

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PETITION FOR WRIT OF CERTIORARI

==========

Respectfully submitted,

Oscar Madrid
DOC# 523435, Spruce 4
Louisiana State Penitentiary
Angola, La. 70712

QUESTIONS PRESENTED

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Paul Connick, Jr.. District Attorney
5th Floor Courthouse Annex
200 Derbigny Street
Gretna, LA 70053

Darrell Vannoy, Warden
Louisiana State Penitentiary
Angola, Louisiana 70172

and,

Oscar Madrid
D.O.C. No. 523435, Spruce 4
Louisiana State Penitentiary
Angola, Louisiana 70712

There are no other parties to this action within the scope of Supreme Court Rule 29.1.

Madrid Oscar
Oscar Madrid 523435

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

1. For cases from **federal courts:**

The opinion(s) of the United States Fifth Circuit Court of Appeal appear at **Appendix A** to the petition and is unpublished.

The opinion(s) [judgment & Order] of the United States District Court, Eastern District of Louisiana, denying COA, appear at **Appendix B** and are unpublished.

The Magistrates Report and recommendation in the U.S. Eastern District Court, appear at **Appendix C** of the petition and is unpublished.

The U.S. Fifth Circuit Court of Appeal denial of the timely filed petition for Panel Rehearing, appear at **Appendix D** and is unpublished.

2. **State Court Opinions:**

The opinion of the highest state court to review the merits appears at **Appendix E** to the petition and is unpublished. State v. Madrid,13-KH-741(La. App. 5 Cir. 9/19/13).

The opinion of the Twenty Fourth Judicial District Court appears at **Appendix F** to the petition and is unpublished. No. 10-2889

The opinion of the Louisiana Supreme Court Appears at **Appendix G** and is reported at State ex rel. Oscar Madrid v. State, 140 So.3d 735, 2013-KH-2356 (La. 5/30/14).

3. **State Court Direct Appeal Opinions:**

The opinion of the Louisiana Court of Appeal affirming the conviction and sentence appear at **Appendix H** to the petition and is reported at State v. Oscar A. Madrid, 104 So.3d 777, 12-410 (La.App. 5th Cir. 12/11/12).

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 5, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on May 10, 2018, and a copy of the order denying rehearing appears at **Appendix D**.

The jurisdiction of this Court is invoked under **U.S.C.A. Const. Art. 3 § 2, cl. 2; 28 U.S.C. § 1257(a); Supreme Court Rule 9, 17.1(b),** and **22**.

For cases from **state courts**:

The date on which the highest state court decided my case was September 19, 2013. A copy of that decision appears at **Appendix E**.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, **AMENDMENT V** provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be take for public use, without just compensation.

The United States Constitution, **Amendment VI** provides in pertinent part:

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

The United States Constitution, **Amendment XIV, § I** provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Oscar Madrid was charged August 5, 2010 with second degree murder and cruelty to a juvenile, La. R.S. 14:30.1 and 14:95. Trial was held February 27-28, 2012 and the jury returning a non-unanimous verdict, a ten-two vote, of guilty as charged. March 7, 2012, Madrid was sentenced to life imprisonment and 10 years.

Madrid on Appeal, through counsel Margaret Sollars assigning 3 errors. (1) The court erred by not suppressing Madrid's statement; (2) The court erred by not declaring a mistrial when unproven allegations of other crimes were presented to the jury; (3) the evidence supported a conviction for manslaughter rather than second degree murder. The Court of Appeal affirmed the conviction and sentence. *State v. Madrid*, 12-KA-0410 (La.App. 5 Cir. 12/11/12). Madrid received the denial and because he could not read or write English he was unable to read or comprehend the decision. Madrid assisted by another prisoner, filed a motion for extension of time (which was treated as a motion for rehearing and denied January 18, 2013). His friend also wrote a letter to Legal Programs, informing them of Madrid's situation, and legal programs assigned a Spanish speaking offender counsel substitute to speak with and assist Madrid in litigating his case after the time for filing certiorari had expired.

With the assistance of Offender Counsel Substitute, an Application for Post Conviction Relief was filed April 22, 2013 in the Twenty-Fourth Judicial District Court, No.10-2889, and denied August 5, 2013. The court of appeal denied writs. *State v. Madrid*, 13-KH-741 (La. App. 5 Cir. 9/19/13). The Louisiana Supreme Court denied review without comment. *State v. Madrid*, 2013-KH-2326 (La. 5/30/14).

A timely §2254 application was filed. Magistrate Judge Michael B. North issued a Report and Recommendation, June 6, 2016, and an objection was filed. The District Court, Honorable Susie Morgan, denied application for Writ of Habeas Corpus

September 26, 2016. Notice of appeal and motion to proceed in forma pauperis was timely filed. Application for COA was filed and the United States Court of Appeals denied COA, April 5, 2018 (App. A). A timely petition for rehearing was denied May 10, 2018 (App. D).

STATEMENT OF THE FACTS

The Louisiana Court of Appeal set forth the disputed facts as follows. Oscar Madrid and Baleria Lopez had lived together for four years and they had two young children. According to the State's theory of the case, Baleria wanted to leave Madrid because she was dating someone else. Madrid had seen a picture of Baleria with this man and waited for Baleria to return home after she stayed out all night. They began to argue and Madrid went to the kitchen, got a knife and after she told him that she did not want him or their children – that she wanted to be a party girl – he stabbed Baleria three times. He also unknowingly stabbed his young son who had walked in.

Jose Lopez, Baleria's father, heard noises and intervened. Madrid was trying to administer CPR to Baleria and told Lopez to call 911. Lopez did not speak English so he called another daughter who notified the police.

Officer Damond Barlett arrived and found two Hispanic men covered in blood. As he entered the house, he saw Baleria sprawled on the floor and Madrid trying to give her CPR. Bartlett called for paramedics and tried to find a pulse. (R. P. 200, 202, 204-205). Previously Bartlett had gone to the house for another domestic disturbance. At that time Madrid agreed to leave and no charges were filed. The second time he thought Madrid appeared frantic, but Madrid did not run from the police and only asked for his help. (R. Pp. 213, 216).

Reina Rodriguez and Hilda Lopez Martinez testified at the *Prieur* hearing that previous

instances of physical abuse had occurred. They repeated this testimony at trial. Rodriguez had seen Madrid and Baleria arguing. She asserted that Madrid was choking Baleria and she demanded that he stop. She had also seen bruising on Baleria. (R. Pp. 180-181).

The day before Baleria's death Rodriguez picked up Madrid because he was having car trouble. He asked to look at her phone to see if Baleria had really taken their baby to the hospital, [as she had claimed] because he thought she was with someone else. Rodriguez knew Baleria was with her boyfriend. That night Madrid came to her house and said he knew Baleria was lying. Madrid saw the text on Rodriguez phone from Baleria asking Rodriguez to lie about where she was. Madrid appeared calm and she took him home.

Martinez was Baleria's sister and she claimed to have seen bruises on her sister many times. Madrid had gotten mad one time because he had seen a picture of Baleria with a male friend. The next day Baleria was hurt, but Baleria refused to call the police. Even though she was concerned, Martinez never called the police. (R. Pp. 217, 221-223, 230).

Jose Lopez lived with Baleria, Madrid, and their children. The day before Baleria died, Lopez had gone to play soccer. When he returned about three in the morning, Madrid was cooking. They had a drink together and Madrid announced that he was leaving the next day. Madrid seemed calm. Lopez woke up about nine o'clock when he heard screaming and he saw his daughter lying next to the front door. Madrid asked him to help him resuscitate her. Then he saw the child covered in blood.(R.Pp. 234-239).

Lopez initially testified, "Madrid said he was not going to let anyone take him alive and he was going to kill himself." They began to fight and Lopez called 911. The police arrived soon afterward and handcuffed both of them. Lopez didn't remember if he told the police he had to disarm Madrid because he was trying to kill himself. (R. P. 238-241). When confronted with the statement he gave the police, Lopez agreed that he previously said Madrid wanted to kill

himself, and that he prevented him from killing himself by taking a knife away from him. He also agreed that never in that statement did he say that Madrid said he would not be taken alive, but he disputed the fact that he had not told this to the police. (R. P. 260).

Detective David Canas aided Detective Russ by acting as translator. When Det. Canas arrived at the crime scene, he was directed to go to the detective bureau. There he met Madrid who was very upset and saying he couldn't believe he did this. Madrid said he didn't want to hurt Baleria and he wanted to die. Because these statement were inculpatory Canas attempted to explain Miranda warnings. Several hours later, when Det. Russ arrived, Madrid signed the form upon Det. Canas urging, without further explaining the rights. (R. Pp. 342-345, 353, 356-357).

After Dr. Karen Ross, the forensic pathologist who performed the autopsy, testified that Baleria died from knife wounds to the neck, the State rested. (R. Pp. 362-363, 366, 372, 386-391, 418).

The only defense witness was Madrid. He had been convicted of two drug charges and worked for 16 years in a body shop "painting and straightening cars." He and Baleria had a relationship for four years and they had two young children. They lived together as a couple, but Baleria wanted to break up their family. He loved her a lot. Every weekend they would go to the park. When they argued, it was mostly about cleaning the house and [Baleria not] taking care of the children. (R. Pp. 419-422).

Madrid denied ever striking Baleria, but he had grabbed her "strongly" in the arm. He had never lived with Baleria's sister so she was lying. The night before Baleria died, their daughter appeared sick and Baleria said she was taking her to the hospital. When he spoke to Reina Rodriguez, he learned Baleria had lied and was with another man, not at the hospital. Baleria returned to their home about nine the next morning and said she had been at the hospital. He confronted her about what Reina had said and Baleria admitted that she wanted to "have

another man" and that "their family was unimportant to her." (R. Pp. 423-425).

He never wanted to hurt Baleria, but he wanted to scare her so he went into the kitchen and got a knife. When Baleria said she wanted to be a "street woman," he got scared[1] and he cut her. When she fell to the floor, he called for Mr. Lopez and said to call 911 while he started CPR. When he saw that she was bleeding a lot, he went to the kitchen, grabbed another knife and tried to stab himself. Then Lopez held him so that he couldn't cut himself any more. He did not want to lose his family and he had no idea how his son got hurt.(R. Pp. 426-430).

He was not told if Baleria survived. He didn't want to talk to the police, but they insisted. He didn't understand anything of what they were saying. All he wanted was to be left alone. (R. Pp. 430, 437). After the police were called the first time, Baleria picked him up and took him home. She wanted him there. He never hit Baleria or choked her. He got the knife to scare her, and he didn't remember cutting his son. (R. Pp. 431-432, 435). He was at the bureau for six hours with his hands cuffed behind his back before he told the police what they wanted to hear. He didn't understand what they were talking about. (R. Pp. 438, 440).

REASONS FOR GRANTING THE PETITION

The lower courts erred in denying pro se petitioner COA finding that he failed to state a constitutional claim. The standard of review is cited as follows:

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1027, 154 L.Ed.2d 931 (2003), the issue of Certificate of Appealability (COA) was addressed. When a habeas applicant seeks a COA, the court should limit its examination to a threshold inquiry into the underlying merits of the claim; *e.g.*, *Slack v. McDaniel*, 529 U.S. 473 at 481, 146 L.Ed.2d, 120 S.Ct. 1595 (2000). This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with the Court's precedent and

1 Madrid actually said he got 'enojado' meaning mad/angry.

the statutory test, the prisoner need only demonstrate a "substantial showing of the denial of a constitutional right." U.S.C. 28 § 2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case, or that the issues presented were adequate to deserve encouragement to proceed further. He need not convince a judge, or, for that matter, a panel of three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong; *Miller-El v. Cockrell*, No. 01-7662, 537 U.S. at 326. 123 S.Ct. 1029 (02/25/2003). Accordingly, a court should not decline the application for COA merely because it believes the appellant will not demonstrate an entitlement to relief.

Question 1: Whether The Court Erred Finding Claim One – Three where not Exhausted To The State's Highest Court In Violation Of The Fourteenth Amendment.

In denying COA the Court of Appeal found the Magistrate's untruthful suggestion that claim 1-3 where not exhausted as being "moot" as the magistrate alternatively reviewed the merits. The overall scheme employed by the magistrate, however, first falsely suggesting the claims are barred for failure to exhaust, carried into the merits review such a defeated conclusion that the court failed to properly apply the already difficult AEDPA standards in reviewing the claims.

The court erred denying relief of claims (1) through (3) pursuant to 28 U.S.C. § 2254(b)(2) for failure to exhaust based on failure to present those claims to the Louisiana Supreme Court. Madrid raised ineffective assistance of appeal counsel in his APCR reurging the three claims brought on appeal and exhausted those claims to the states highest court. Therefore, the claims were exhausted and fairly presented to the state courts.

Further Cause For Failure To Exhaust Remedies In The La. Supreme Court.

Mrs. Terry Cannon, Attorney for the Department of Corrections addressed a letter to the district court dated March 13, 2015 stating reasons Madrid did not file for certiorari on direct appeal to the Louisiana Supreme Court. (§2254, Ex. P-1).[2] Also, Madrid raised the issue on direct appeal as ineffective assistance of appeal counsel - requesting an out-of-time appeal, or that the court allow him to exhaust his appeal claims to the Supreme Court. He also filed an administrative remedy procedure (ARP) complaining he was denied assistance filing to the Supreme Court. A hearing was held before the Commissioner for the 19 Judicial District Court, State of Louisiana, see transcript (§2254, Ex. P-2).

Madrid also raised the issue that appeal counsel failed to serve him notice in Spanish, and / or he was denied access to the law library and therefore can show cause for his failure to timely seek review in the Supreme Court. He requested Spanish speaking legal assistance even before he was denied on direct appeal, and during the critical time for exhausting his claims. See 2254 exhibits.

At the time of his arrest and trial, Madrid requested a Spanish translator due to his very limited ability to understand English. His motion for appeal was filed March 9, 2012. Madrid wrote the Department of Corrections for legal assistance citing his inability to read and write English, after receiving the May 23, 2012 Pro se briefing notice from Appeal Counsel Margaret Sollars. The briefing notice advised him of the right to file a supplemental brief within 30 days. (Madrid does not have a copy of the first letter, however the second and third letter makes reference to it)(Ex. C & D).

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2. In *Egerton*, the Fifth Circuit held: "We conclude that an inadequate prison law library may constitute a state created impediment that would toll the AEDPA's one-year limitations period pursuant to Section 2244(d)(1)(B)." Id. at 439. In order to invoke this particular equitable exception under the AEDPA the prisoner-petitioner must show that: 1) he was prevented from filing a petition, 2) by State action, and 3) in violation of the Constitution or federal law. See, *Egerton v. Cockrell*, 334 F.3d 433.

On October 8, 2012, Madrid sent a letter to the Legal Programs Director. Advising that he speaks very little English and requested assistance of a Spanish speaking counsel or other person to assist with legal work. This was the second letter requesting assistance. Again on October 16, 2012, Madrid sent a letter, advising he wrote to Legal Programs on two separate occasions requesting Spanish speaking legal assistance.

October 29, 2012 Madrid filed his ARP to the Warden's Office. (Letter / ARP form letter) (3 pages) No. LSP-2012-3361. Grounds: 1) I wrote legal programs requesting a Spanish speakin[g] inmate counsel and was not answered; 2) I wrote Trish Foster directly requesting a Spanish speak[ing] inmate counsel because I speak very poor English [and] I was not answered. The requested relief: a Spanish speakin[g] inmate counsel or Spanish speakin[g] counsel. And on November 29, 2012, the Department issued the ARP acceptance form No. LSP-2012-3361.

On December 14, 2012 Margaret Sollars, sent a letter advising Madrid that his appeal was denied December 11, 2012. *State v. Madrid*, 12-KA-0410 (La. 12/11/12). Mrs. Sollars further advised; 1) he can file for Certiorari to La. Supreme Court within 30 days; 2) he can file for Post Conviction Relief within 2 years (w/notice of federal one year time period).

On December 19, 2012, Madrid sent a letter to Mrs. Foster advising he just received a letter from appeal [lawyer]. He does not understand it. He has two deadlines within 30 days with no interpreter to help him with his legal work. He needs interpreter that knows the law.

On December 20, 2012 another offender (George Rodriguez housed on Eagle unit) helped Madrid file a "Motion Requesting Extension of Time to File Application for Rehearing." The Court of Appeal construed the motion as a motion for rehearing and denied same January 18, 2013.

Another undated letter was sent to Legal Programs, requesting Spanish speaking assistance. With no help forthcoming, February 14, 2013, he wrote a letter to the Secretary

Department of Corrections. Expressing grievance in that he has not received help from [the law library counsel's] because none of them speak Spanish. Stating he is being denied access to the courts, and advising he filed ARP "I need help as soon as possible." In another undated letter to Legal Programs, stating he is still waiting on a reply, it has been over 90 days since he filed ARP. And on April 24, 2013 he sent a "Motion for Default" of his ARP LSP no. 2012-3361 to legal programs stating it has been over (5) five months since he filed his ARP and still has not received an answer.

On May 13, 2013 the Department issued the "First Step Response." Stating: "This is in response to ARP # LSP 2012-3361 regarding your complaint that you wrote Legal Programs requesting a Spanish speaking offender counsel and you were not answered. According to the Legal Programs Director, you requested to see the Spanish interpreter to help with your legal work. Mrs. Foster, on two occasions [giving no dates] sent Jamie Maduro #459556 and James Matthews #323455, both Offender Counsels to see you. Jamie Maduro is a Spanish interpreter. My office verified with Assistant Warden Poret that he has also sent appropriate Offender Counsels to assist you." Thereby denying relief.

Madrid made his initial request for "Spanish speaking" legal assistance while housed at TU U/D Cell 5. On November 11, 2012 he made the board and was sent to Camp D, Raven unit (cellblock). He made the board at Raven March, 2013 and went to Camp D - Falcon (dormitory).

The critical time for Madrid to file in the Supreme Court began December 11, 2012, the date Mrs. Sollars advised him he was denied on direct appeal and he had 30 days (or until January 10, 2013) to file to the La. Supreme Court to exhaust his claims. [While he was housed at Raven]. Assuming his motion for rehearing tolled the time until it was denied January 18, 2013, Madrid had until February 17, 2013 to file his certiorari in La. Supreme Court.

Jamie Maduro stated he first spoke to Madrid on Falcon unit in 2013 and cannot

remember the exact date. Both Maduro and Matthews determined the time to file Certiorari (February 17, 2013) to La. Supreme Court had expired, and that all they could do at that time is assist him filing his APCR. The offender counsel working Falcon Unit (Troy Shelvin) assisted in preparing and filing the APCR April 2, 2013. Claim 3 of the APCR argued Madrid was not able to exhaust his direct appeal claims to the La. Supreme Court, i.e. he was denied access to the court because he was not provided Spanish speaking legal assistance in a timely manner, or properly notified in Spanish by counsel.

It stands to reason had Maduro and Matthews spoke to Madrid during the critical time to file in the La. Supreme Court (before February 17, 2013) while at Raven, and actually provided assistance in filing, there would not have been any need to continue writing letters requesting assistance - in Spanish or English - as he would have properly exhausted his remedies on direct appeal. This is a fundamental area of legal assistance that every counsel at Angola has been trained to do. The only answer is they could not speak Spanish and Madrid was not able to effectively communicate his legal problem until Maduro spoke to him in March 2013. Legal Programs, did not provide Madrid adequate assistance during the critical time, and he was unable to exhaust his remedies on direct appeal.

Madrid raised the issue as a due process violation in his APCR, claim three.[3] And

3. Trial court denied Claim 3 Post-conviction relief: Claim #3: Petitioner argues that he was denied effective assistance of counsel because his appellate counsel failed to properly inform him of the Fifth Circuit Court of Appeal's ruling on appeal, which resulted in petitioner not being able to seek review at the Louisiana Supreme Court. Petitioner argues that appellate counsel's letter informing him of the appellate opinion was in English, and that petitioner did not understand it because it was in Spanish.

The court finds no merit to this claim. As the state points out in its response, petitioner clearly knew of the appellate opinion, as he sent a letter to the Fifth Circuit seeking a rehearing.

That letter was in English, and was written within the 30 days time period to file writs with the Louisiana Supreme Court.

Furthermore, although petitioner does have a constitutional right to judicial review, he has no constitutional right to further review by way of rehearing or writs to the Louisiana Supreme Court. (citation omitted).

attached to that application the appeal brief with the three claims. The state courts had full and fair notice of the three claims he was presenting. As the magistrate noted he included the claims on appeal to the Court of Appeal, and in his writ application to the Louisiana Supreme Court on denial of PCR.

Madrid also timely filed an Administrative Remedy Procedure (ARP), complaining that he was being denied access to the court, and law library assistance filing his claims. Thereafter, he filed for judicial review which is still pending. Those documents were attached to his 2254 application.

Madrid knew he had some kind of decision, and sought assistance, because he did not know the rules for seeking review to the Louisiana Supreme Court. He wrote Legal Programs asking for assistance, and another English speaking inmate, not trained in the law and obviously not knowing the rules, wrote a letter to the court of appeals asking for an extension of time, which was construed as a motion for rehearing. The state court's finding he did not have a right to file in the Louisiana Supreme Court – which the magistrate also based its opinion – does not end the exhaustion question in federal court. Madrid objected to the magistrate finding he had no constitutional rights beyond the English language letter advising him his appeal was denied. He still had a right to access the court to exhaust his claim, he had a right to an adequate law library or be informed of the procedure for filing same.

The State Created The Impediment That Resulted In His Failure To Exhaust His Direct Appeal Claims To The State's Highest Court.

The magistrate failed to recognize Madrid asserted claims based on a violation of due process rights "in which the petitioner demonstrates that his failure to raise the claims during his

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Upon a complete review of the entire record and pleading, the court concludes that post-conviction relief is unwarranted. For these reasons, petitioner's application for post-conviction relief will be denied by this court.

direct appeal review was "the result of interference by government officials with the presentation of the claim." Where the state had a continuing duty to provide [adequate] assess to the law library. Legal programs failure to provide an interpreter during the critical time, the thirty days to file in the Louisiana Supreme Court, was a state created impediment. The court has previously found "[t]hat an inadequate prison law library may constitute a state created impediment that would toll the AEDPA's one-year limitation period pursuant to 2244(d)(1)(B)." *Egerton v. Cockrell*, 334 F.3d 433, 437-9 (C.A.5 (Tex.) 2003).

Petitioner is entitled to assess to the law library. *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1976). The *Bounds* decision held only that the states must protect a prisoner's constitutional right of adequate, effective and meaningful access to the courts by providing the prisoner either with a law library or with **adequate assistance from persons trained in the law**. (Emphasis added). In *Bounds*, the prisoner was accorded the right of access to law books because he already exhausted his appeal of right and was no longer entitled to the services of appointed counsel. *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

Access to the law library is provided in the form of inmate counsel who are assigned to each unit. The Louisiana court have held: "[Our 'counsel substitute system' is comprised of assigned inmates, who demonstrate a certain inclination toward the law, and have sufficient training and knowledge to do adequate legal research and writing on other inmates legal problems." *Martin v. Phelps*, 380 So.2d 164 (La. App. 1 Cir. 1979).[4]

Indeed, the court has not recognized a constitutional guaranteed right to post-conviction counsel. But the courts have also said "a state created impediment" is a statutory exception. A

4 See *Knop v. Johnson*, 977 F.2d 966 (6th Cir. 1992). See also, See *State v. Lavelle Meyers*, 839 So.2d 1183 (La.App. 3 Cir. 11/10/2003), 02-1296 (access to the law library was through inmate counsel assigned to assist him).

review of whether a state created impediment existed and tolled the time is different from a purely "equitable tolling claim". However, "equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is **prevented in some extraordinary way** from asserting his rights." *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999)(quotation marks omitted). "a petitioner's failure to satisfy the statute of limitations must result from external factors beyond his control; delays of the petitioner's own making do not qualify." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006). As recently noted by the Supreme Court, "To be entitled to equitable tolling, [the petitioner] must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way' and prevented timely filing." *Lawrence v. Florida*, 529 U.S. 327, 336, 127S.Ct. 1079 (2007).

Madrid submits that the state created the impediment to filing by the facts set forth above. That he sought [English speaking] assistance outside the law library under the circumstances should not be counted against him. Madrid diligently pursued his rights and is entitled to review of his claims.

Madrid submits he is "entitled to equitable tolling" if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way" and prevented timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669. Courts must often "exercise [their] equity powers... on a case-by-case basis," *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 12 L.Ed.2d 377, demonstrating "flexibility" and avoiding "mechanical rules," *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S.Ct. 582, 90 L.Ed. 743, in order to "relieve hardships... aris[ing] from a hard and fast adherence" to more absolute legal rules, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250. The Court's cases recognize that equity courts can and do draw upon decisions made in other similar cases for guidance, exercising judgment in light of precedent, but

with awareness of the fact that specific circumstances, often hard to predict, could warrant special treatment in an appropriate case. *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640, Distinguished. Quoting *Holland v. Florida*, 130 S.Ct. at. 2552-2554 (U.S. 2010); see also, *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (2012).

The court failed to recognize and apply the state created impediment exception.

Question 2: Did The Court Abused Its Discretion To Consider And Recommend Denying The Claims Under 28 U.S.C. § 2254(b)(2), Which Was Based On An Erroneous Presumption That The Three Claims Not Exhausted Had No Merit.

The court erred by alternatively ruling on the merits based on the erroneous view that his claims had no merit. Then proceeding to support this view with an improper application of the applicable law. Because the AEDPA limits a federal courts ability to grant relief, the court's inquiry should begin from a prospective view that ask can the court grant relief given the limitations, not given the limitation can the court deny relief.

The magistrate report misapplies Supreme Court precedent in denying the six claims as follows. (1) Denial of the Motion to Suppress Statement. (Mag. R & R, p. 10); (2) Denial of Motion for Mistrial. (Mag. R & R, p. 20); (3) Sufficiency of Evidence. (Mag. R & R, p. 22); (4) Ineffective assistance of Trial Counsel. (Mag. R & R, p. 28); (5) Trial Court's Failure to Eliminate Conflict of Interest. (Mag. R & R, p. 34); (6) Ineffective assistance of Appellate counsel. (Mag. R & R, p. 37).

Question 3. Did The Lower Court Err Finding No Merit In The Denial Of The Motion To Suppress Statement In Violation Of The Fourteenth Amendment.

The court erred finding no merit to the claim based on suppressing Madrid's statements

which could not have been freely and voluntarily given his emotional state and where Madrid has a very limited understanding of the English language, and invoked his right when he told the detective that he didn't want anything except to be "let alone," and there is no evidence he re-initiated the questioning. (R.Pp. 106-107, 109). The magistrate finding are contrary to well established Supreme Court precedent.

The Fifth Amendment to the United States Constitution states that no defendant in a criminal trial shall be forced to be a "witness against himself." As a result, an oral or written admission of guilt cannot be admitted into evidence at trial unless it is clearly shown that the defendant's statement was voluntarily made. Therefore the adequacy of the warnings are at issue and whether the defendant knowing and intelligently waived his rights. Madrid contends that the warnings were not explained in language or terms that he understood, and at a time that he was so emotionally helpless that he could not make a knowing and intelligent waiver.

It is clear that when the suspect invokes his right to remain silent under the Fifth or Sixth Amendments, there may be no police-initiated interrogation.[5] This became all the more clear with respect to statements. Since the officers re-initiated interrogation by their own admission that is the end of the issue. See *Cervi v. Kemp*, 855 F.2d 702 (11th Cir. 1988); (Cites ommitted). As Chief Justice Rehnquist explained, "any waiver of the Sixth Amendment rights given in a discussion initiated by police is presumed invalid. . . ." *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S.Ct. 476, 108 L.Ed.2d 293, 301 (1990).

Madrid's purported confession was not admissible even if law enforcement officials apprised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d

5 If the accused indicates in any manner at any time prior to or during questioning that he wishes to **remain silent** or to have access to counsel, the officers must cease interrogation. Where the accused asks for counsel, the officers may not resume interrogation. . . . *Edwards v. Arizona*, 451 U.S. 47, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

694 (1966), absent proof that he thereafter affirmatively waived his right against self-incrimination and his right to counsel. "The mere giving of the *Miranda* warnings, no matter how meticulous, no matter how often repeated, does not render admissible any inculpatory statement thereafter given by the accused. The giving of the warnings is only the first step. ***To render the statement admissible the State must take the second step and prove that the rights of which the accused has been* Miranda*-warned were thereafter waived–intelligently, knowingly and voluntarily.***" *Jones v. State*, 461 So.2d 686, 696 (Miss. 1984)(emphasis added).[6] Even where "warnings and advice" regarding the accused's *Miranda* rights have been "fully and fairly given, the State shoulders a heavy burden to show a knowing and intelligent waiver. That burden is proof beyond a reasonable doubt." Id. at 697. *Accord, Moran v. Burbine*, 475 U.S. 412, 89 L.Ed.2d 410 (1986). The state made no such showing.

Here, Madrid never effectively waived his Fifth and Sixth Amendment rights. The [detective] interpreter saying "just sign" does not provide a ***intelligently, knowingly*** basis for a waiver. The law is clear that a court may not infer a waiver of Miranda rights by a custodial suspect merely on the basis that he went ahead and answered questions put to him by law enforcement. Many of the same standards informing an inquiry into the voluntariness of a confession inform the inquiry into the voluntariness of a consent to search. Thus, age, intelligence and education of the defendant are of critical importance. *United States v. Chemaly*, supra; *United States v. Rodriquez*, 525 F.2d 1313 (1st Cir. 1975) (inability to understand English); *United States v. Lama*, 614 F.Supp. 434 (S.D.N.Y. 1986), aff'd 788 F.2d 4 (2d Cir. 1986) (difficulty in understanding language militates against voluntariness); *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (consent involuntary when given by defendant with limited lingual and educational background); *United States v. $64,000 in U.S. Currency*, 722 F.2d 239 (5th Cir.

6 It should be noted that this is a subjective, not an objective, inquiry.

1983).

It is also axiomatic that an interpreter should be a neutral and detached individual whose abilities are first screened by the Court and who is sworn to make a true, literal and complete bilateral translation. In this case the interpreter was a **detective** and his purpose was to attain a statement. See, *State v. Tamez*, 506 So.2d 531 (La. App. 1st Cir. 1987)**(interpreter who has an interest in the case can render a waiver of rights questionable). Emphasis added.**

Madrid had average to low average intelligence, short in stature, slight build (i.e., easily intimidated) ill adapted to prison life and required psychiatric care before trial due to being suicidal. This Court has recognized educational & mental shortcomings as relevant factors in the voluntariness analysis.[7]

Det. Canas testified that at first Madrid was very upset, he was banging his head on a wooden wall and kept saying he couldn't believe what he did. Because Canas thought these statements were inculpatory he advised him of his rights. The detectives self serving statement that Madrid understood them is not dispositive. Madrid stated unequivocally that he didn't want to talk and wanted to be **left alone**, thus asserting his right to remain silent. (R. Pp. 107). Then, when Detective Russ arrived after five or six hours, Detective Canas told Madrid to sign the form and the second questioning began. This was despite the fact that Madrid repeatedly said he did not want to talk and he wanted to be left alone. By then Madrid had been in custody roughly six hours without water and the handcuffs on his hands were hurting. Thus, his will was overborne and he did as they told him just to get the ordeal over with.

Madrid testified, stating that the police arrived about 9:40 that morning and five minutes

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7 See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 2d 854 (1973); *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed. 2d 423 (1967); *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966); *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246 (1957).

later he was put in a police car. He was kept there for a long time because no one spoke Spanish. He was sick and mad because he didn't want anything to happen to Baleria. He was insane and wanted to hurt himself. Also, he didn't understand his rights. The detective spoke Spanish, but it was a different Spanish. He was constantly saying he didn't understand, but the detective kept on saying "Yes, yes, okay." The detective read a paper to him and said all he had to do was to sign it. He told the detective that he didn't want anything except to be let alone. (R. Pp. 106-107, 109).

Nobody disputes that Detective Canas acting as translator and Detective Russ initiated the questioning. Madrid was very agitated and upset prior to the taking of the statement. Before the tape was turned on, Madrid told Canas that the handcuffs were hurting him, and Det. Canas told him "if you talk to me I will help you." [His hands were photographed and showed welts and cuts caused by the handcuffs.] Madrid's limited education and emotional condition lessened his ability to understand Canas dialect. Madrid felt he didn't have a choice and he signed it. Also, prior to the statement he was not given any food, but finally they gave him some water. (R. Pp. 106-108, 110).

Although Canas says he translated the waiver of rights form,[8] the video tape of signing the *Miranda* warning only shows Madrid saying he don't understand. Det. Canas does not explain any of the rights on the form he only says (si, si esta bien solo firma) meaning '**just sign it**.' (Emphasis added). What was being said was not interpreted for the jury as the tape played. The defendant told the interpreter Heidi Ochoa that the jury cannot understand. She responded that she is not the lawyer. She said tell Raul Guerra, but he was on the other end of the defense

8. This testimony changed somewhat during the trial, but clearly Det. Canas stated that he did not give a second *Miranda* warning after his first warning. Det. Canas only asked Madrid if he understood his rights, then told him to sign the form which was written in English. (R. Pp. 113-114). Thus, Madrid did as he was told without any understanding of the consequences.

table. Madrid was held in a room over five hours, handcuffed behind his back, in a state of extreme emotional distress and remorse, before this statement was taken. (R. Pp. 86-88, 90-92, 94).

The record supports Madrid had a great deal of difficulty understanding his rights. It was undisputed that with his background of being from Honduras, he had problems understanding English, he was ill prepared to come to America and face the immense cultural changes without anyone to advise him, other than the police, when he faced criminal charges. Also apparent he was extremely upset such that extra precautions were necessary because of his emotional state and his desire to kill himself, to insure that Madrid fully understood his rights before he gave a statements.

The magistrate erred finding this claim has no merit, when in fact these are the issues *Miranda* cases are built on. The court erred failing to suppress Madrid's statements which could not have been freely and voluntarily given.

In *Miranda v. Arizona*, 384 U.S. at 473-474, the Supreme Court specifically stated that if the individual "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." When a defendant exercises his privilege against self-incrimination, the validity of any subsequent waiver depends upon whether police have scrupulously honored his right to remain silent. *Michigan v. Mosley*, 423 U.S. 96, 102, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Whether police have met the standard is determined on a case-by-case basis under the totality of the circumstances. Id. Factors going into this assessment include who initiates further questioning, although, significantly, police are not barred from reinitiating contact. Mosley, 423 U.S. at 103-104. Other factors include whether there has been a substantial time delay between the original request and subsequent interrogation; whether *Miranda* warnings are given before subsequent questioning; whether signed *Miranda* waivers are obtained; and,

[not relevant to this case] whether the later interrogation is directed at a crime that had not been the subject of the earlier questioning. Id. 423 U.S. at 105.

There should be no question that Oscar Madrid made an unequivocal assertion of his right to remain silent to Detective Canas when he said he did not want to talk and he asked to be left alone, yet both detectives reinitiated the questioning. Also, Canas testified specifically that he did not re-advise Madrid of his rights but simply asked if he understood them before telling him to sign the form. (R.p. 113-114). This, in combination with the language difficulties, proves that Madrid's *Miranda* rights were not "scrupulously honored."

The evidence supports Madrid gave the statement without fully understanding the consequences of waiving his rights. Therefore, the court erroneously applied firmly established Supreme Court precedent in failing to suppress Madrid's statement when the State failed to show affirmatively that the confession was freely given.

Question 4. Did The Lower Court Err Finding No Merit In The Denial Of Motion For Mistrial, In Violation Of The Fourteenth Amendment.

The court erred finding no merit in the claim (Mag. R & R, p. 20) that "Evidence of other crimes or acts of misconduct of the accused may not be introduced where the relevancy of such evidence serves solely to show the defendant's bad character or criminal propensities." *Michelson v. United States*, 335 U.S. 469, 475-476, 69 S.Ct. 213, 93 L.Ed 168 (1948); *United States v. Lawrence*, 480 F.2d 688, 690 (5th Cir. 1973). This general rule is subject to certain recognized exceptions where the evidence of the other acts tends to prove some element of the crime presently charged and therefore is not offered to show the defendant's bad character. *United States v. Pittman*, 439 F.2d 906, 908 (5th Cir. 1971). Thus, evidence of other acts of misconduct or crimes is regarded as admissible for the purpose of showing knowledge, intent, motive, design, scheme, or the like, where such is an essential element of the commission of the

offense. *United States v. Goldsmith*, 483 F.2d 441, 443 (5th Cir. 1973); *Ehrich v. United States*, 238 F.2d 481, 483 (5th Cir. 1956). Quoting *United States v. Crockett*, 514 F.2d 64 (5th Cir. 1975).

Prieur hearings were held March 21 & 31, 2011. The State presented two witnesses who attested to several episodes of domestic abuse between Madrid and Baleria. Ms. Rodriguez was a friend who had witnesses one instance when she saw Madrid hit Baleria on her side. Madrid tried to grab Baleria, but Rodriguez's boyfriend stopped them. Madrid had grabbed her throat. The prosecutor stated he "choked" her. Rodriguez's had observed some bruising on different occasions, and Baleria said Madrid hit her. She claimed that Baleria called the police one time. (R.p. 126-128, 131). The record only supports that Madrid called the police once.

Martinez, the second witness, was Baleria's sister and she had seen Madrid and Baleria arguing at various times. One time she saw a bandage on Baleria's foot. Baleria said Madrid threw a glass and when it broke, Baleria cut her foot. Another time Baleria arrived with a black eye and said Madrid hit her after he saw a picture of Baleria hugging another man. (R.p. 142-144). When the police were called, Madrid called them. She never reported anything to the police, and she had seen them fight about five times when she intervened. (R.p. 147, 150, 153).

The court ruled that this evidence was admissible and an objection was made. Then during her trial testimony, Rodriguez said she had seen bruising on her sister over **fifty times.** (R.p. 220). After some more testimony, counsel called for a mistrial, stating that Martinez was pulling things "out of the air" and Martinez was testifying about things that had not come out in the *Prieur* hearing. The court asked if a transcript of that hearing was available and said that a ruling would be made outside the presence of the jury. (R.p. 226). When it was learned that a transcript was not available, the court relied on the State's motion to use other crimes evidence and said the exaggeration was not overly broad. Therefore, the motion was denied. (R.p. 253-254).

There should be no question that this exaggeration was introduced to portray Madrid as a person of bad character. A mistrial should have been declared because the probative value of the exaggerated abuse occurred "over fifty times" was certainly outweighed by its prejudicial impact. The only reason this "other crimes evidence" was offered by this witness who had previously declared that she had only witnesses five fights was for its prejudicial effect. (R.p. 153). She wanted to establish to the jury that it was normal for Madrid to beat Baleria so he would be punished for second degree murder, rather than manslaughter.

Moreover, this exaggeration was not relevant to any real and genuine contested issue in this trial. Martinez stated this exaggeration solely for the purpose of portraying Madrid as a bad man capable of planning and stabbing Baleria without any remorse and not in a fit of rage and anger. The probative value of these comments was greatly outweighed by its prejudicial effect.

Thus, it was predictable for the jury to misuse this information. Justice requires that the defendant be given a fair trial, with only proper evidence given to the jury. It is highly likely that this exaggeration swayed the jury to convict Madrid for second degree murder rather than manslaughter. Madrid was unconstitutionally denied a fair trial and the lower courts erred denying relief.

Question 5. Did The Lower Court Err Finding No Merit In Sufficiency Of Evidence To Support Manslaughter Rather Than Second Degree Murder In Violation Of The Fourteenth Amendment.

The district court erred (Mag. R & R, p. 22) finding no merit in the court's erroneous "decision" denying relief on petitioner's constitutional claim "resulted" from an objectively "unreasonable determination of the facts . . ." applicable to his claim.

First, the magistrate erred primarily focusing on acts leading up to the arguments, which legally have limited consideration to the question of whether **the defendants acts amount to Manslaughter**. The magistrates statement that Madrid "talked to the victim" ignores completely

the provocative nature of the statements made by the victim. I just want to be a party girl, I don't want to stay home and take care of the children, I want to do drugs, ect. The facts that the victim was seeing another man, lying about her activities, and staying out all night while Madrid took care of the children were factors that built upon the heat of the moment when Madrid overreacted in anger. The magistrate erred omitting the exacting evidence that makes this case one of manslaughter rather than second degree murder.

In presenting a manslaughter defense, the defendant bears the burden of proving by only a **preponderance** of the evidence that the offense was committed in "sudden passion" or "heat of blood" immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. [S]udden passion or heat of blood are not elements of the offense of manslaughter; rather, they are mitigating factors in the nature of a defense which exhibits a degree of culpability less than that present when the homicide is committed without them. Id., at 110. Since they are mitigating factors, a defendant who establishes by a preponderance of the evidence that he acted in a "sudden passion" or "heat of blood" is entitled to a manslaughter verdict. Id., at 111.

Since "sudden passion" and "heat of blood" are not elements of the crime, the state does not bear the burden of proving them. Neither is there a requirement that these factors be affirmatively established by the defendant. Instead, the jury is free to infer these mitigatory factors from the evidence. Thus, a manslaughter verdict is responsive to a second degree murder indictment even though the record contain no evidence of "sudden passion" or "heat of blood." Id., at 111 n. 9.

In reviewing defendant's claim, the court failed to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigatory factors were not established by a preponderance of the evidence. Id., at 111.

Madrid should have been convicted of manslaughter rather than second degree murder because this was a crime of rage. When the state asked the jury to make the assumption that Madrid specifically intended to kill Baleria without provocation, the state clearly asked them to disregard mitigating and contradictory evidence that Madrid was provoked and acted in a jealous rage. All that the State proved was that Madrid stabbed Baleria, something that was never disputed. The State offered no substantive evidence to rebut Madrid's testimony and the physical evidence that Madrid just "snapped" when threatened with the breakup of his family and proof of Baleria's unfaithfulness.

What is most important to this case is what Madrid was thinking and feeling immediately before and after he stabbed Baleria. He stated that when they were fighting, he grabbed a knife in the kitchen in order to scare her. Then she said she would finally tell him the truth, that she had lied and was with another man throughout the night. She also stated that she no longer cared about her children and wanted to leave. (R.p. 423-425, 429). When confronted with the knowledge that the woman he loved no longer cared about him or the children, Madrid lost his ability to reason sensibly. The physical evidence pointed to this being a crime of rage. (R.p. 447). Madrid lost his self control to such a degree his young son was sum-how cut and he didn't even remember it. (R.p. 429).

When he realized what he had done, Madrid tried to administer CPR in order to keep Baleria alive. He called for help and told Lopez to call the police. If he had planned to kill Baleria as the State wanted the jury to believe, he would have had the knife with him on the sofa before Baleria arrived, but instead he went to the kitchen and got it when she admitted she was with another man. When he realized that Baleria was beyond help, he went to the kitchen and stabbed himself before Baleria's father stopped him. (R.p. 426). Everyone who first arrived at the crime scene described Madrid as very upset so must so that he intended to harm himself. Even at

the detective bureau he kept banging his head on the cell wall, unbelieving what he had done.

This was a classic case of why manslaughter is a lesser crime than second degree murder. Thus, in order for the jury to reach its verdict, it had to make the assumption that Madrid initiated the attack without any provocation. Secondly, the jury had to discount the evidence that this was a crime of rage and that Madrid harmed himself. Also, the jury had to discount the evidence that Madrid wanted Baleria to live, otherwise he would not have administered CPR and seek help from the police. At that time Madrid lost his ability to think rationally and his pent up rage erupted when he was told that his family and children were unimportant. What Madrid did was not planned. The evidence points to Madrid losing his self-control and falls more appropriately as a case of manslaughter.[9]

Madrid denied having intent to kill Baleria. He admitted stabbing her, but her injuries were consistent with someone who lost his self-control. Moreover, even though specific intent to kill or inflict great bodily harm may be inferred from the circumstances of the transaction and actions of the defendant [see, *State v. Cousan*, 94-2503 (La. 11/25/96) 684 So.2d 382], the circumstances of this case more correctly suggest that Madrid lost his self-control after he was provoked and taunted by Baleria.

Sudden passion or heat of blood distinguishes manslaughter from homicide. They are not, however, elements of the offense but mitigating factors exhibiting a degree of culpability less than is present when the homicide is committed without them .... a defendant who shows by a

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9. LA. R.S. 14:30.1(1) provides that second degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:31 defines, in pertinent part, manslaughter as follows: A. Manslaughter is: (1) a homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed.

preponderance of the evidence that these mitigatory factors are present is entitled to the verdict of manslaughter .... However, the defendant is not obligated to establish the factors affirmatively; instead, the jury may infer them from the overall evidence presented .... The reviewing court's function is to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found that the mitigatory factors were not established by a preponderance of the evidence.

Thus, this was not a calculated homicide warranting a finding of second degree murder. This Court established the standard of review for this issue in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires the reviewing court to determine not whether there is any evidence to support the conviction, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the court to determine whether the evidence is minimally sufficient. Furthermore, using an inference to prove an essential element of the crime triggers the use of the circumstantial evidence rule, La. R.S. 15:438. *State v. Jacobs*, 504 So.2d 817 (La. 1987).

The state court failed to apply the appropriate standards, had the state court used these standards and properly reviewed the evidence that was presented at trial, it is apparent that the state failed to prove beyond a reasonable doubt that Madrid was guilty of second degree murder. It is also clear that the jury did not apply the correct law in this situation. The error requires that habeas relief be granted.

Question 6. The court erred finding no merit in the claim that Counsel Was Ineffective in Failing to Insure Madrid Was Represented by Conflict Free Counsel In Violation Of The Sixth And Fourteenth Amendments.

Attorney Raul Guerra had represented state witness Reina Pavia on pending drug charges,

and in another matter. (See Reina Pavia Trial Testimony). The state court reasoned that because Attorney Guerra was the assistant to trial counsel, the conflict did not exist. This court has never held this to be the law. When either defense counsel has a conflict, the conflict exist, especially here where the defendant is only able to communicate through the conflicted counsel.

In a situation where the defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection, the defendant is entitled to automatic reversal and a new trial. The Court has given great consideration to the relationship between conflicting interest and effective assistance of counsel. *Holloway v. Arkansas*, 435 U.S. 475, 488-90, 98 S.Ct.1173, 55 L.Ed.2d 426 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The court has established two avenues for identifying and resolving Sixth Amendment violations due to a conflict of interest, depending upon when the issue is raised.

Where the defendant raises the issue of ineffective assistance of counsel due to conflict of interest prior to trial, the trial judge must "either . . . . appoint separate counsel or take adequate steps to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel." *Holloway*, supra. If a defense attorney owes duties to a party whose interest are adverse to those of the defendant, then an actual conflict exists. The interest of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. *Zuck v. Alabama*, 588 F.2d 436 (5th Cir.1979), *cert. denied*, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979).

Madrid, charged with second degree murder, could not understand the proceedings without a Spanish interpreter, proceeded to trial with a counsel who had previously represented one of the state's witnesses. What emphasizes this conflict is the fact that Madrid does not speak English and the attorney who was burdened by the conflict was the only attorney Madrid had that

spoke Spanish; (Raul Guerra) and was there to inform and instruct concerning his actual rights, as well to inform the lead attorney (Calvin Fleming) of Madrid's request regarding questioning witnesses.

The accused has the right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Herein, the first prong of the *Strickland* test is met where counsel's conflict rise to the level of being deficient in his performance. Madrid asserts that his counsels performance was deficient when counsel brought the conflict to the court's attention but failed to inform Madrid that he had a right to conflict free counsel and Madrid was never informed of the consequences to his defense from continuing with a conflict-laden counsel; and that he had a right to another counsel, one free of conflict. (SEE: EX. - 1, pg 1 of 4, court minutes).

It is through the deficient performance of counsel that Madrid was compelled to proceed through trial with an attorney burdened with conflict of interest; not knowing the consequences of proceeding with such an attorney, or that he had a right to request conflict free counsel. Additionally, Madrid did not knowingly and intelligently waive his right to conflicted counsel when, (1) he was never informed of the actual nature or depth of the conflict; (2) that the conflict of interest existed; (3) he was not informed of the consequences to his defense from continuing with conflict-laden counsel; an (4) that he had a right to obtain other counsel. See State v. Tensley, *supra*. Thus, counsel performance in failing in his duty to inform Madrid of his right to effective assistance of a conflict free counsel is clearly deficient.

In meeting the second prong of the *Strickland* test, prejudice occurred when he requested several times that specific questions be asked and his attorney either ignored his request, or simply informed Madrid that it was an inappropriate question. Upon insisting that the attorney ask one witness a question regarding her reason for testifying, Madrid was informed that this

question "would not set well with the judge of jury." The question was never asked. Madrid asserts that it is due to the conflict-laden counsel's loyalties to his previous client that he was denied even the basic right to question a state's witness. Counsel's loyalties to a previous client prohibited him from asking or relaying specific request that Madrid may have had for witnesses. Clearly this prejudice Madrid in confronting witnesses with questions relevant to their reason for giving testimony, etc.

Coupled with the fact that counsel for Madrid was the only counsel capable of interpreting what Madrid wanted to say or ask, Madrid was impaired from effectively questioning witnesses and submitting possible evidence through their testimony that witnesses were biased. Further, on several occasions, Madrid informed the court that he wanted another counselor and that he had refused to visit with his counsel because it was apparent that his counsel was not following his instructions or even speaking to material witnesses he requested he speak with.

Madrid, a Spanish speaking man with an appointed counsel who did not speak any Spanish and a substitute counsel who spoke Spanish who was conflict-laden, was convicted in violation of the United States constitution and the Constitution of Louisiana and now respectfully ask the Court to review this question and relieve him of his unconstitutional incarceration, vacate said conviction and sentence.

Question 7. The court erred finding the Trial Court's Failure to Eliminate the Conflict of Interest had no merit In Violation Of The Fourteenth Amendment.

The court erred (Mag. R & R, p. 34) finding no merit contrary to Supreme Court precedent, appointing another counsel, Mr. Calvin Fleming, did not cure the conflict with Mr. Raul Guerre, because the only attorney-client communication was between conflicted counsel and Madrid. Due to the language difference Madrid was unable to communicate anything to Mr.

Fleming concerning the extremely damaging, and patently false testimony of Reina Pavia, except through conflicted counsel, whom had previously represented her and knew about her propensity to stretch the truth, did not contribute anything to her impeachment. Madrid objected in that he was also denied due process when the trial court failed to eliminate the conflict that was brought to the courts attention, or insure that Madrid knowingly waived such conflict.

To show adverse effect from counsel's active representation of adverse interests, and thus a violation of the Sixth Amendment, defendant need only show that some effect on counsel's handling of particular aspects of the trial was likely; defendant need not show prejudice to prevail on his ineffectiveness claim. *U.S. v. Christakis*, 238 F.3d 1164.

To show a lapse in representation, for purposes of ineffective assistance claim based on conflict of interest, defendant need not demonstrate prejudice, i.e., that the outcome of his trial would have been different but for the conflict, but only that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. U.S.C.A. Const. Amend. 6; *Amiel v. U.S.*, 209 F.3d 195 (2nd Cir. 2000).

The trial court has duty to ensue that an accused defendant has a fair trial in compliance with Constitutional mandates. The record will prove that the trial court never eliminated, or addressed the issue after being informed of the conflict. Counsel for Madrid brought to the court's attention the conflict of interest, wherein, he had represented one of the state' witnesses and the trial court without ensuring that the conflict was eliminated, or no longer existed, proceeded with the trial, failing to even ascertain whether Madrid was knowingly and intelligently waiving his Sixth Amendment right.

Finally, the state court insulated itself from habeas review by refusing to allow

discovery or public records request, and a hearing to further develop the factual basis, then the Federal Magistrate relies on the deficiency of fact finding to deny habeas. Madrid should have been allowed an evidentiary hearing to place this evidence on the record. While the state has had the luxury of litigating upon the available records, Petitioner has been repeatedly denied review of those records upon request.

Question 8. The Court Erred Finding The Ineffective Assistance Of Appellate Counsel Claim Had No Merit In Violation Of The Fourteenth Amendment.

The court erred (Mag. R & R, p. 37) finding Madrid **had no right to notice in Spanish that he could understand**. And he objected as argued above to any suggestion he had no right to be advised of the procedure necessary to exhaust his claim. Reasonable jurist would certainly disagree with this illogical finding.

Madrid was denied his Constitutional right to Due Process and Equal Protection when his appellate counsel's performance was deficient by failing to inform him of his denial of appeal, via Spanish interpretation, etc., and Madrid was prejudiced by not being able to fully exhaust his claim by further review to the Louisiana Supreme Court. The facts supporting this claim have been set forth above and adopted in support herein.

The magistrate erred disposed of this claim finding the defendant did not have a right to counsel after the court of appeal denied his appeal. He had a right to be advised in a manner that he could understand that he was denied, and as to the necessity of exhausting his remedies. The magistrate overlooks the due process aspect of this claim where pro se defendant claims he had a right to access to the court and assistance that advised him of the procedure for filing such writ. And that he had a right to that advise before the filing deadline in the Louisiana Supreme Court expired.

Madrid shows herein that his counsel's failure to communicate to him in Spanish,

or have a Spanish letter written informing him of the status of his appeal was deficient performance on counsel's part; and this deficiency, caused Madrid to be denied having his claims reviewed in the Louisiana Supreme Court. Madrid wrote numerous letters to Legal Programs Department, to the Department of Corrections and filed an Administrative Remedy Procedure (ARP) seeking assistance interpreting the letter and trying to get assistance in exhausting his claim. Madrid did not waive his rights at any time and would have proceeded to the Louisiana Supreme Court in response to the denial of the state circuit court had he had fair notice or assess to the law library to learn the rules himself. Clearly the standard set out in *Strickland v. Washington*, supra., has been met and the lower court erred finding otherwise.

CONCLUSION

The constitutional claims were not fully and fairly adjudicated and reasonable jurists would find the Court of Appeal's assessment of the constitutional claims debatable or wrong. Petitioner suggests he has presented questions of constitutional substance that adequately deserve encouragement to proceed further. 28 U.S.C.A.§2253(c)(2).

WHEREFORE the lower courts erred denying COA, this Honorable court may grant certiorari or remand to the U.S. Fifth Circuit for further proceedings.

Respectfully submitted on this 31 day of July, 2018.

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