STATE OF LOUISIANA	:	14TH JUDICIAL DISTRICT COURT
VS. NO. 20179-01, Div. G	:	PARISH OF CALCASIEU
JASON REEVES	:	STATE OF LOUISIANA
FILED:_____	:	_____ DEPUTY CLERK OF COURT

STATE'S RESPONSE TO DEFENDANT'S POST HEARING BRIEF MEMORANDUM IN SUPPORT OF CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE GUILTY & PENALTY PHASES

NOW INTO COURT comes John F. DeRosier, the District Attorney of Calcasieu Parish, represented herein by the undersigned Assistant District Attorneys, who respectfully submit the following response to Defendant's Post Hearing Brief Memorandum In Support of Claims of Ineffective Assistance of Trial Counsel in the Guilty and Penalty Phases:

FACTUAL & PROCEDURAL HISTORY

On December 13, 2001, the petitioner was indicted for first degree murder, a violation of LSA-R.S. 14:30. On January 7, 2002, the petitioner, through counsel, waived a reading of the bill of indictment and tendered a plea of not guilty. The petitioner elected for a jury trial. On this day, the State filed its Notice of Intent to Seek the Death Penalty.

The petitioner's case was first called for trial on October 27, 2003. On November 9, 2003, the trial court judge declared a mistrial. The jury at the petitioner's first trial was unable to meet a unanimous decision as to a verdict.

The petitioner's second trial began on October 12, 2004. The jury found the petitioner guilty of first degree murder on November 5, 2004. On November 8, 2004, the same jury unanimously recommended that the petitioner be sentenced to death. The trial court judge, the Honorable G. Michael Canaday, sentenced the petitioner to death by lethal injection on December 10, 2004.

The petitioner appealed his conviction to the Louisiana Supreme Court. His conviction and death sentence were affirmed by that court. *State v. Reeves,* 2006-2419 (La. 05/05/09), 11 So.3d 1031. The United States Supreme Court denied his certiorari petition on November 16, 2009. *Reeves v. Louisiana,* 130 S.Ct. 637 (2009).

On December 23, 2009, the defendant filed what was entitled a "*Pro Se* Petition for Post-Conviction Relief and Request for Counsel." It was not truly filed *pro se,* since it was filed by G. Ben Cohen of the Capital Appeals Project, although it was signed by Jason Reeves. Some twelve generic claims were listed; none were briefed.

Most alleged ineffective assistance of counsel. None involved intellectual disability as a claim. No further substantive filing was made by this defendant until years later.

On March 19, 2010, Mr. Gary P. Clements of the Capital Post Conviction Project of Louisiana forwarded to the trial court a "Motion and Order to Enroll as Counsel of Record," which he filed on behalf of the defendant. This motion was signed by the trial court on March 24, 2010, and the State received a conformed copy of it on March 31, 2010.

No fully articulated post conviction relief application was subsequently filed by the defense for years. On May 31, 2012, over two years after Mr. Clements was appointed as post conviction relief counsel, the State filed for a death warrant for the defendant's execution. Only then did the defendant act, filing a "Motion to Recall the Warrant and Stay the Execution." That warrant was recalled.

On March 4, 2013, the State received a defense pleading entitled "Initial Amended Petition for Post-Conviction Relief." The defense also filed a motion to enroll Mr. Alan Freedman as co-counsel in this matter. The State timely filed its procedural objections to the defendant's application for post conviction.

On December 12, 2013, a hearing was held to address the defendant's intellectual disability competency claims. The defendant asserted that he had made a *prima facie* showing that he was intellectually disabled, and thus he was entitled to an expert panel appointed by the trial court. The State maintained it was not provided with the necessary materials that its experts would need in determining the defendant's claims regarding competency and intellectual disability. The trial court ordered the defendant to provide all the materials to the State and ordered a further evidentiary hearing.

A hearing on the issue of the defendant's intellectual disability (formerly called mental retardation) was held March 2, 2015 through March 6, 2015. The trial court determined that the defendant was not intellectually disabled, and the defendant took a supervisory writ application to the Louisiana Supreme Court that was ultimately denied. *State v. Reeves,* 2015-1668 (La. 04/04/16); 188 So.3d 257. The defendant later sought to amend his post conviction relief application to state that his attorneys were ineffective for failing to raise this claim, and the State objected to this late addition. The trial court ruled in the State's favor, and the defendant took a writ application to the Louisiana Supreme Court, which that court ultimately denied in January of 2017. *State v. Reeves,* 2016-KP-2199.

On April 18, 2017, a final evidentiary hearing was held on the defendant's remaining post conviction relief claims regarding ineffective assistance of counsel. At that hearing, the defendant called former defense attorneys Kerry Cuccia and Judge Ronald F. Ware as witnesses, and the State called the two prosecutors who tried the defendant, Assistant District Attorney Ronald R. "Rick" Bryant and First Assistant District Attorney Cynthia S. Killingsworth. Post hearing briefs were ordered by the trial court, and the State herein submits its brief in response to the defendant's post hearing brief to this Honorable Court. Where appropriate, references to the record and to the defendant's original post conviction relief claims are made.

STATEMENT OF FACTS[1]

When Dr. Terry Welke, who has served as the coroner of Calcasieu Parish since 1996, arrived at LeBleu Settlement Cemetery in Calcasieu Parish, Louisiana, in November of 2001, he found the body of the four-year-old MJT[2] lying on her back. The little girl was wearing a purple top which was pulled up to her chest. She was nude below the waist. (R. Vol. XXXXI, R. p. 10215). The child's body was taken by Dr. Welke to the Coroner's Office for examination. (R. Vol. XXXXI, R. p. 10201).

Dr. Welke's initial examination of the body took place on the evening of November 14, 2001. (R. Vol. XXXXI, R. p. 10215). Before MJT's body was cleaned, fly eggs were discovered in her mouth and eyes. (R. Vol. XXXXI, R. p. 10216). Q-tips were swabbed in the young girl's mouth, vagina, and rectum for the collection of possible sexual assault evidence. Those samples were dried and given to the Calcasieu Parish Sheriff's Office so that further testing could be conducted. (R. Vol. XXXXI, R. p. 10202).

On the morning of November 15, 2001, Dr. Welke performed the autopsy on MJT. (R. Vol. XXXXI, R. pp. 10215, 10205). He discovered that the cause of her death was multiple stab wounds to the neck and trunk. (R. Vol. XXXXI, R. p. 10220). The child's neck was approximately nine-and-a-half inches around, while the cut around it totaled about six-and-a-fourth inches in length. As Dr. Welke later testified at trial, the cut "essentially went two-thirds around her neck." (R. Vol. XXXXI, R. p. 10205).

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[1]These references are taken from the appellate record volumes and page numbers from when this case was lodged at the Louisiana Supreme Court on the defendant's direct appeal.
[2]Initials are used in this brief in accordance with LSA-R.S. 46:1844(W).

MJT's small body was brutalized by a total of 14 stab wounds on its frontal region. Her heart area featured six stab wounds, while the heart itself was stabbed five times. (R. Vol. XXXXI, R. p. 10217). Four of the injuries were to the front of the heart, and one was to the left upper portion of the organ. (R. Vol. XXXXI, R. p. 10224). When Dr. Welke was asked if the wounds to MJT's heart would have killed her quickly, he testified that because the heart is such a thick muscle, it was quite possible that she suffered for a significant period of time before she finally died. (R. Vol. XXXXI, R. p. 10224).

MJT also had two stab wounds to her left lung and two stab wounds to the right lung. The coroner determined that these grave injuries occurred before MJT died. (R. Vol. XXXXI, R. p. 10217). She also had two stab wounds on her right hand consistent with defensive wounds; these wounds suggested that she held her hand out for protection against the defendant's fatal attack. (R. Vol. XXXXI, R. p. 10219).

The defendant anally sexually assaulted MJT. Her rectum was dilated, meaning that it was widened about three-fourths of an inch. There was also blood and some scrapes on her rectum. Dr. Welke determined that the anal rape occurred while MJT was still alive. (R. Vol. XXXXI, R. pp. 10219, 10221).

MJT's right buttocks had abrasions on them, while there were linear scrapes along her thigh and buttock, and some on the lower leg. On MJT's left outer thigh, scrapes ran the length of it. These wounds suggested that MJT had been dragged or carried somewhere, and she was scraped in the process. (R. Vol. XXXXI, R. p. 10218).

Dr. Welke testified that the wounds to MJT's heart and back occurred while she was alive. (R. Vol. XXXXI, R. pp. 10219-10220, 10223). The stab wound to her liver occurred post mortem. (R. Vol. XXXXI, R. pp. 10217-18). Dr. Welke estimated that MJT's time of death was approximately 4:30 p.m. on November 12, 2001. (R. Vol. XXXXI, R. p. 10222).

On November 12, 2001, MJT's mother, CT, and her family were living in McFatter Trailer Park off of Highway 171 in Moss Bluff, an outlying region of Lake Charles, Louisiana. (R. Vol. XXXVII, R. p. 9247; R. Vol. XXXVIII, R. p. 9282). CT lived with her husband and five children. At the time of MJT's death, CT's mother and sister were also staying at their home.(R. Vol. XXXVII, R. p. 9247). CT worked at the Sonic Drive-In in Moss Bluff, but she was off of work that day. Due to a holiday, the children were not in school. (R. Vol. XXXVII, R. pp. 9248-9249).

On the afternoon of her death, MJT was playing outside. She normally played in the front yard with her sister, or the two of them would go down and visit a friend in the trailer park. CT recalled that MJT was playing with her sister, AT, around 3:30 that afternoon. (R. Vol. XXXVII, R. p. 9249). MJT had come into the house by herself for a drink and a snack. She then asked to go back outside to play.

After CT finished hanging clothes out to dry, she walked up the back side of the trailer to make sure that the water hose was off. At that point, she saw an older-model, faded blue car coming toward her. (R. Vol. XXXVIII, R. p. 9255). She didn't get a good look at the person driving; she knew only that it was a young man who was clean-cut in appearance with short hair. (R. Vol. XXXVIII, R. pp. 9256, 9258). After checking the water hose, CT went inside. She went into the front bedroom overlooking the street, and she saw the same car coming down the street toward her trailer again. (R. Vol. XXXVIII, R. p. 9256).

CT saw AT in the front yard with her friend. She could see them while standing in her open front door. (R. Vol. XXXVII, R. p. 9250). She also saw a few other children outside. As she got some clothes out of the washing machine and hung them outside to dry, she saw MJT playing with a little boy and another little girl. After that moment, CT never saw her daughter again. (R. Vol. XXXVIII, R. p. 9251).

JT, CT's husband and MJT's father, got home around 4:30 p.m. and inquired where the children were. JT went to call them all in for the evening. He took two of the younger children to walk around the trailer park and gather the other children. They found JT, Jr., continued around the trailer park circle, and found the oldest daughter, AT. They could not find MJT. (R. Vol. XXXVIII, R. p. 9252).

CT asked JT, Jr. and AT when they last saw MJT. They said they had seen her not long before, and she was playing in the driveway of a specific house in the neighborhood not far from their trailer. CT went to that house to find her daughter, but MJT was not there. Other adults started to come outside to help look for the lost child. After CT walked around the trailer park once, she told her husband that she could not find MJT, and that she was going to walk around some more. (R. Vol. XXXVIII, R. p. 9253).

The second time CT walked around the park, she knocked on every door. Once she got back from the second walk around, she was understandably "very worried." She told her husband,

"I cannot find her... I can't find [MJT] anywhere." At that point, JT told her to immediately go inside the house and call the police. After CT spoke to the police, she went back outside to look for MJT. (R. Vol. XXXVIII, R. p. 9254).

Richard McGuire, the Assistant Director for the Calcasieu Parish Communication District, testified that CT's 911 call came into the call center at 5:02 and 25 seconds p.m. The date of the call was November 12, 2001. The call was then routed to the Calcasieu Parish Sheriff's Office at 5:02 and 55 seconds p.m. (R. Vol. XXXVII, R. pp. 9210-11).

Around 5:11 p.m., Deputy Allen Cormier of the Calcasieu Parish Sheriff's Office was dispatched to McFatter Trailer Park on Highway 171. (R. Vol. XXXVIII, R. pp. 9281-82). CT was questioned about any suspicious vehicles in the area that day. (R. Vol. XXXVIII, R. pp. 9254-9255). She told them that she had seen one car that might be out of the ordinary.

Early on November 12, 2001, the same car was also seen at Saint Theodore's Holy Family Catholic School, located in Moss Bluff, Louisiana. (R. Vol. XXXVIII, R. p. 9303). Emily LaFleur and Olivia St. Cyr attended the school and were walking toward their extended daycare program around 3:00 p.m. on the afternoon of November 12, 2001. Ms. LaFleur was walking with her cousin, Ms. St. Cyr, when a "dark blue, older-model vehicle" pulled up alongside of them. (R. Vol. XXXVIII, R. pp. 9302-9303, 9307-9308). The male driver of the vehicle spoke to the girls through the car's passenger window. LaFleur didn't hear him at first. She walked over and said, "What was that?" He said, "Do you know a girl by the name of Brandi, or Stacy, or somebody, Richard." She said, "No sir, I don't recall that name." (R. Vol. XXXVIII, R. pp. 9303-9304, 9308-9309). At trial, St. Cyr identified the defendant in open court as being the same person who was driving the car that day. (R. Vol. XXXVIII, R. p. 3110).

Michelle Rogers was a school employee and is also the aunt of the two girls. She saw the girls walking and was startled when Ms. LaFleur began talking to the driver of a blue four-door older model vehicle. She yelled at Ms. LaFleur to stop talking to whoever it was and stated that if that person needed to talk to someone, they needed to talk to her. (R. Vol. XXXVIII, R. pp. 9318-9320). The car pulled up to where she was. (R. Vol. XXXVIII, p. 9322). Ms. Rogers recalled that the driver wore a burgundy-colored T-shirt. She also remembered thinking that it was strange that his shirt was pulled over his knees. (R. Vol. XXXVIII, R. p. 9323).

The driver asked for Stacy Richard or her mother, Amanda Richard. Ms. Rogers did not know the individuals he referred to, so she instructed him to go to the office. (R. Vol. XXXVIII, R. pp. 9321-9322). However, the driver did not go to the office. Instead, he just left the scene. Because Ms. Rogers felt that the car's presence was unusual, she wrote down the license plate number, JWJ 941, and she also notified the school's principal for it to be called in to law enforcement. (R. Vol. XXXVIII, R. pp. 9322-9324). Ms. Rogers was eventually shown a photographic line-up wherein she identified the defendant as being the man lurking in the parking lot that day. Later, she also identified the defendant in open court. (R. Vol. XXXVIII, R. pp. 9324-9325).

In November of 2001, Erin Schrepfer was also an employee of Holy Family Catholic School. (R. Vol. XXXVIII, R. p. 9311). Ms. Schrepfer testified that she also witnessed a suspicious vehicle in the school parking lot on the afternoon of November 12, 2001. Part of her job duties included knowing which vehicles belonged to which students during pick-up time. She recalled noticing a car and a driver that she did not recognize that afternoon. (R. Vol. XXXVIII, R. p. 9312). Ms. Schrepfer also identified the defendant in a photographic line-up as the same man in the parking lot on that tragic afternoon. (R. Vol. XXXVIII, R. p. 9315).

Janice Duraso was employed with the Calcasieu Parish Sheriff's Office and worked at the Moss Bluff substation during the same period. (R. Vol. XXXVIII, R. p. 9327). Ms. Duraso testified that she received a call from the principal at Holy Family Catholic School regarding a suspicious person and vehicle on the school property. She gave the information to Deputy Allen Cormier and asked him to go check it out. (R. Vol. XXXVIII, R. p. 9328). When Duraso called the radio room with the information, she was notified that the vehicle was registered to Jason Reeves. (R. Vol. XXXVIII, R. p. 9328). By the time Deputy Cormier reached the school property, the vehicle driven by the defendant was gone. (R. Vol. XXXVIII, R. p. 9286).

Back at CT's residence, the search continued for MJT. Anthony Lane, a Moss Bluff resident, helped out with the search. (R. Vol. XXXVIII, R. p. 9408). On the evening in question, he was with his son, Brandon, off of Charles Breaux Road. They ran across a pair of children's tennis shoes. (R. Vol. XXXVIII, R. p. 9411). Law enforcement officers were notified of the find and were sent to the area to recover the shoes. (R. Vol. XXXVIII, R. pp. 9412-9413). Deputy Jerry Bell assisted in the recovery of the shoes. Once the shoes were recovered, they were brought

back to the trailer park for MJT's parents to identify. When Bell showed the shoes to CT, she became hysterical and began screaming, as she identified the shoes as belonging to MJT. (R. Vol. XXXVIII, R. pp. 9416-9417).

By the following day, November 13, 2001, MJT still had not been found. After hearing about the missing child on the news, FBI Special Agent Leonard Jones responded to help search. (R. Vol. XXXVIII, R. p. 9420). He went to the area where the shoes were found. Around noon on November 13, 2001, Jones found a pair of purple sweatpants submerged in the creek underneath Charles Breaux Road. (R. Vol. XXXVIII, R. pp. 9421-9422). Mr. Jones notified authorities immediately. (R. Vol. XXXVIII, R. p. 9422).

On November 14, 2001, Michael Conner of the Calcasieu Parish Sheriff's Office was out searching in the area of LeBleu Settlement Road when he spotted the small body of MJT. (R. Vol. XXXIX, R. pp. 9641-9643). She was found about 20 or 30 yards down the trail that runs on the south side of the cemetery in a secluded, wooded area. MJT was discovered lying on her back. She was wearing a purple sweatshirt which was pulled half way up her abdomen, and her tiny lower body was unclothed. (R. Vol. XXXIX, R. pp. 9643-9644).

Ray Laviolet was a lieutenant for Lake Charles City Police Department during this time period. (R. Vol. XXXXI, R. p. 10162). On November 12, 2001, Laviolet had to meet with a confidential informant ("C.I.") to retrieve some information. He instructed the C.I. to meet him at the LeBleu Settlement Cemetery. (R. Vol. XXXXI, R. p. 10163). Laviolet arrived at the cemetery around 4:15 p.m. When he got there, there was a medium-sized, bluish-colored four-door vehicle in the parking lot. Lt. Laviolet scanned the area but did not notice anyone in his view, so he continued to wait for his C.I. to show up. (R. Vol. XXXXI, R. p. 10164).

Once the C.I. arrived and got into Laviolet's vehicle, Laviolet noticed an individual in the cemetery. Laviolet watched the individual exit the cemetery, get into the vehicle that he saw parked in the parking lot, and leave. It was approximately 4:45 p.m. at this point. (R. Vol. XXXXI, R. pp. 10166-10168). Laviolet contacted Sergeant Jason Gertz at the Sheriff's Office on November 15, 2001, to relay what he had witnessed the day MJT went missing. (R. Vol. XXXXI, R. pp. 10181-10182). Lieutenant Laviolet identified the defendant in a photographic line-up conducted on November 16, 2001, and he also identified the defendant in open court. (R. Vol. XXXXI, R. pp. 10174-10175).

On the day that MJT went missing, Detective Michael Carpenter of the Calcasieu Parish Sheriff's Office was called out to McFatter Trailer Park around 5:45 p.m. (R. Vol. XXXVIII, R. pp. 9340-9341). Detective Vic Salvador was also at the trailer park and was involved in the search for the child. (R. Vol. XXXVIII, R. p. 9369). Deputy Mary Pierrotti was involved in the search for MJT too. (R. Vol. XXXVIII, R. p. 9396). Pierrotti's sergeant had been notified of a suspicious vehicle earlier that day, so all of the officers were asked to check into that occurrence. (R. Vol. XXXVIII, R. p. 9397). Around 8:40 p.m., Carpenter, Salvador, and Pierrotti, along with Detective Mike Byrne and Corporal Casey Williamson, went to an address on Briarmarsh Road to speak to the defendant. (R. Vol. XXXVIII, R. pp. 9343, 9370, 9397).

When the group of law enforcement officers arrived at the defendant's home, a number of dogs were outside and began barking. The defendant then came out of the residence. (R. Vol. XXXVIII, R. pp. 9345, 9371, 9400). Detective Salvador introduced himself and told the defendant that they were there about a missing person. (R. Vol. XXXVIII, R. pp. 9345, 9372). The defendant gave the officers permission to search the property. (R. Vol. XXXVIII, R. pp. 9348, 9372, 9401). Judy Dugas, the defendant's mother, was also at the residence. She told Detective Carpenter that the defendant arrived home from work that day around 5:00 or 5:30 p.m. Ms. Dugas also told them that he was wearing blue jeans and a maroon T-shirt that day. (R. Vol. XXXVIII, R. pp. 9347-9348).

After the search was complete, Salvador advised the defendant of his *Miranda* rights. (R. Vol. XXXVIII, R. pp. 9374, 9402). The defendant indicated that he understood them. (R. Vol. XXXVIII, R. p. 9374). Detective Salvador asked the defendant what he had been doing that day, and the defendant informed him he had finished work around 3:00 p.m. He said that he arrived home around 4:00 p.m. (R. Vol. XXXVIII, R. p. 9375). When Detective Salvador spoke with Carpenter he realized that there was a one-hour time difference from when the defendant said that he arrived home and the time that his mother recalled. Detective Salvador asked the defendant if he would agree to go to the Sheriff's Office for more questioning. (R. Vol. XXXVIII, R. p. 9376). The defendant agreed. He drove his own vehicle to the Sheriff's Office. (R. Vol. XXXVIII, R. pp. 9351, 9376, 9403).

Several people interviewed the defendant upon his arrival at the Calcasieu Parish Sheriff's Office. The defendant initially lied about going to Holy Family Catholic School that day. (R. Vol.

XXXVIII, R. p. 9434). The defendant admitted to going to McFatter Trailer Park that day, but said that he was not there when MJT went missing. When Skip Chisholm of the Calcasieu Parish Sheriff's Office inquired how the defendant knew what time the girl went missing, the defendant simply said that he did not know. (R. Vol. XXXVIII, R. p. 9436). At some point, the defendant recalled being in the parking lot of Holy Family Catholic School. He claimed that he only turned around in the parking lot of the school. (R. Vol. XXXVIII, R. p. 9481).

The time that the defendant stated that he got home from work that day varied throughout the interviews conducted. (R. Vol. XXXVIII, R. pp. 9436, 9483; R. Vol. XXXIX, R. p. 9507). During an interview with Detective Leslie Blanchard of the Calcasieu Parish Sheriff's Office, the detective said to the defendant: "There are only two people that really knew what happened out there." The defendant replied, "Yeah, me and the good Lord." To which Blanchard replied, "Okay, so there are actually three people that really know what happened out there." (R. Vol. XXXIX, R. p. 9549).

On November 14, 2001, Elizabeth Zaunbrecher, a detective with the Sheriff's Office, assisted in interviewing the defendant. (R. Vol. XXXIX, R. pp. 9724-9730). The defendant was informed that MJT's body was found. FBI agent Don Dixon[3] showed the defendant photos of her body. (R. Vol. XXXIX, R. p. 9716). After the interviews, the defendant spoke with his mother. Detective Zaunbrecher was present during the conversation. The defendant told his mother, "I did this thing. I don't know why, but I did it." The defendant told his mother that he was going to go to jail for a long time. (R. Vol. XXXIX, R. p. 9728).

Detective Mark Holmes, a canine handler with the Port Arthur City Police Department of Port Arthur, Texas, was called to Calcasieu Parish to assist in the search for evidence regarding this crime. (R. Vol. XXXXI, R. pp. 10026-10034). Detective Holmes used a full-blooded bloodhound named Marks "Bo" Diddley to assist him in his search. (R. Vol. XXXXI, R. p. 10052). Detective Holmes' first assignment was to locate a vehicle that MJT may have perhaps been inside. Detective Holmes did not know which vehicle was "of interest" to the Sheriff's Office. (R. Vol. XXXXI, R. p. 10052). Bo smelled everyone that was present at the search in order to eliminate them from his scent path. Bo was then given a scent article of the victim and started in the downwind corner of the Sheriff's Office parking lot.

[3]He currently serves as the Lake Charles Chief of Police.

After a short while, Bo targeted a 1986 dark blue Cutlass Sierra with a LA license plate JWJ 941. The dog went straight to the driver's side door, sat down, and scratched at the door. (R. Vol. XXXXI, R. pp. 10053-10054). Detective Holmes opened the driver's door to the vehicle, and Bo immediately jumped inside and started scratching at the seat, predominantly the middle to the passenger's side of the seat. The dog sat down, looked at Holmes, and continued to scratch at the seat. (R. Vol. XXXXI, R. p. 10055). At that point, Detective Holmes said, "I don't know whose vehicle this is, but I can say without a doubt that the victim has been in this vehicle." (R. Vol. XXXXI, R. p. 10056).

On October 7, 2002, CT was shown a vehicular photo line-up by Cinnamon Salvador, a Calcasieu Parish District Attorney's Office Investigator. (R. Vol. XXXVIII, R. pp. 9261-62). She was able to identify the defendant's car because of the red sticker in the back window. She saw it in the trailer park the day MJT went missing, and she saw it again on November 14, 2001, the day that she and AT walked past it at the Sheriff's Office. (R. Vol. XXXVIII, R. pp. 9258, 9278).

On November 15, 2001, Detective Holmes took Bo to LeBleu Settlement Cemetery. (R. Vol. XXXXI, R. p. 10061). Bo was given the victim's scent again. Detective Holmes was not told where the body of MJT was found. However, Bo clearly followed a trail through the cemetery straight to the location where the child's body was located. Once Bo reached the spot where the body was found, he would not go any further, even after being coaxed to continue. Detective Holmes told law enforcement that the trail ended at that spot. (R. Vol. XXXXI, R. pp. 10061-10066). When Bo was given the scent of the defendant, he followed a trail similar to the one that he followed for the victim. However, when the dog reached the area where the child's body was found, the trail did not stop, as the defendant's scent continued. (R. Vol. XXXXI, R. pp. 10070-10071).

Perhaps the most damning piece of evidence against the defendant was handled by Michelle Collins of the North Louisiana Criminalistics Laboratory in Shreveport, Louisiana. (R. Vol. XXXXI, R. p. 10107). Ms. Collins was asked to analyze certain information sent to her in November of 2001. She analyzed bloodstained cards of the defendant and of the victim, along with rectal swabs from the victim. (R. Vol. XXXXI, R. p. 10114). In her analysis of the rectal swabs, sperm was found. (R. Vol. XXXXI, R. pp. 10120-10121). Through DNA analysis, the

sperm in MJT's rectum was found to be a match to the DNA from the bloodstained card of the defendant. (R. Vol. XXXXI, R. p. 10127).

LAW & ARGUMENT

I. INTRODUCTION

A. TESTIMONY OF ATTY. KERRY CUCCIA

Defense attorney Kerry Cuccia was the defendant's attorney at his first trial. The saga of his replacement with new counsel at the second trial is well-known to this Court, and was ratified by the Louisiana Supreme Court on direct appeal. *State v. Reeves,* 2006-2419 (La. 05/05/09), 11 So.3d 1031.

Mr. Cuccia testified at the post conviction relief hearing about his strategy to try to get a "not guilty" verdict for the defendant by attacking the State's evidence. (PCR hearing, Tr. p. 5). It should be noted that the first trial ended in a mistrial rather than a "not guilty" verdict.

Mr. Cuccia stated that his grounds of attack were the DNA analysis, testimony that the defendant had been seen in the trailer park where MJT lived at the time that she disappeared, and the defendant's inculpatory statement to law enforcement. (PCR hearing, Tr. pp. 5-6).

Mr. Cuccia testified that he used Dr. Mark Zimmerman to try to convince the jurors of the defendant's lower than average intellectual functioning, which he felt would "make him susceptible to suggestion to maybe confess and admit to doing something that he really had not done." (PCR hearing, Tr. p. 6, lines 27-29).

He also testified that he used Dr. Shields as an expert, and that Dr. Zimmerman's testimony gave the jury a doctor's opinion as to the defendant's lower than average mental function, which he again stated "would lend him and make him susceptible to suggestion, perhaps susceptible to giving in when the truth was not what he said." (PCR hearing, Tr. p. 7, lines 29-30). With regard to the use of Dr. Shields, Mr. Cuccia explained that he helped to attack the DNA evidence and show that "there was a glaring problem with this evidence." (PCR hearing, Tr. p. 8, lines 11-12). According to Mr. Cuccia, the problem with this sample was that it was too "pristine," showing "virtually no level of degradation whatsoever," as it was taken from MJT's anal cavity. (PCR hearing, Tr. p. 9, lines 11, 13-14). Mr. Cuccia also testified that he had hired a fingerprint expert, Ms. Guidry, to testify about unidentified fingerprints on MJT's body. (PCR hearing, Tr. pp. 9-10). He also discussed the traffic expert, Mr. Tekell, from Lafayette who testified to attack the State's

timeline of events. (PCR hearing, Tr. pp. 11-14). Because the testimony Mr. Cuccia referred to was not part of the Louisiana Supreme Court record of this case, and since it had never been provided to the State as part of the post conviction relief process (despite voluminous other exhibits being filed), the first trial testimony was proffered---not admitted---by the defendant as Proffer 1 and Proffer 2.[4]

On cross examination, the State pointed out that there was no possible way to accurately reproduce road conditions on the day of the murder, refuting Mr. Terrell's purported value as an expert witness. (PCR hearing, Tr. p. 23). Mr. Cuccia also admitted that the defendant's inculpatory statements were admitted into evidence, and that admissibility was upheld via the appellate process. (PCR hearing, Tr. p. 24). He also acknowledged that Dr. Zimmerman did testify for the defendant at his second trial. (PCR hearing, Tr. p. 30). Mr. Cuccia stated with regard to the DNA evidence and its "pristine" status, a reasonable inference could be drawn that it was planted or faked, or that "a mistake was made in the testing lab, the samples got confused." (PCR hearing, Tr. p. 32, lines 28-29). On cross examination, the State pointed out that its DNA expert testified that there was a 1 in 256 trillion chance that somebody other than the defendant was the source of the DNA in MJT's anal cavity. (PCR hearing, Tr. p. 34, lines 9-15).

B. TESTIMONY OF JUDGE WARE

Judge Ronald F. Ware testified that he was the Executive Director of the Calcasieu Parish Public Defender's Office at the time of the defendant's second trial. (PCR hearing, Tr. p. 47). He had been a practicing attorney since July of 1981 and in 1986 joined the Calcasieu Parish Public Defender's Office after serving as an Assistant District Attorney in Calcasieu Parish from 1981 to 1986. Judge Ware testified that he had tried about a hundred felony jury trials. (PCR hearing, Tr. p. 48). Judge Ware noted that he had previously served as counsel in three capital cases that went to trial. (PCR hearing, Tr. pp. 48-49).

In March of 2004, he was appointed to represent the defendant as lead counsel. Judge Ware testified that he had originally recruited Mr. Cuccia to take on the representation of the defendant. (PCR hearing, Tr. p. 50). He indicated that for the second trial, he had twelve boxes of material from Mr. Cuccia's office from the first trial, and he tried to read and organize all of it. He

[4]These proffers were not even certified transcripts, and thus are not even clearly admissible into evidence. (PCR hearing, Tr. p. 21).

stated that he read a lot of the documents in the files and the transcripts and talked and visited with the defendant, and attempted to brainstorm with the other lawyers. (PCR hearing, Tr. p. 53).

Judge Ware testified that he was certain that he reviewed the witnesses' testimony and the transcript from the first trial. (PCR hearing, Tr. p. 54). He did not recall why he did not put on the testimony of Dr. Shields at the second trial, or Ms. Guidry, but he did recall that one witness was unavailable and could not be located. (PCR hearing, Tr. pp. 54-55). Likewise, he did not recall why the traffic engineer Mr. Tekell was not called at the second trial. (PCR hearing, Tr. p. 55).

Judge Ware was questioned about the timeline of the State's case, and he testified that he cross-examined Detective Michael Carpenter at trial about his interview of three people who purported to see MJT at the former Eckert's drugstore in Moss Bluff on the day of the murder. Those individuals were Faith Watson, Michelle Mathis, and one's mother. Judge Ware did not recall if he had their statements with him during that cross examination or not. (PCR hearing, Tr. pp. 56-58). He did not recall seeing Faith Watson's statement until after the trial, but stated that "[t]o the extent that I could, may have interviewed her and possibly called her as a witness...." (PCR hearing, Tr. p. 58, lines 21-23).

On cross examination, Judge Ware admitted that an attorney does have an advantage in retrying a case, as he did with this one. (PCR hearing, Tr. p. 91). With regard to the idea that he should have further attacked the State's timeline of the case, he admitted that establishing a victim's time of death is not an exact science. (PCR hearing, Tr. p. 93). He also agreed that in a trailer park like the one where MJT lived (which he had visited when he got this case), it would not be unusual but rather would be plausible if some people had seen things on the day MJT was kidnapped while others did not. (PCR hearing, Tr. pp. 93-94). Judge Ware also agreed that Michelle Mathis and Faith Watson incorrectly identified the brunette MJT as blonde. (PCR hearing, Tr. pp. 93-94).

Judge Ware also testified that he had the assistance of Richard White and Charles St. Dizier at the trial, with Mr. White, an experienced criminal lawyer, focusing on the expert cross examination, and Mr. St. Dizier, another highly experienced criminal lawyer, concentrating on the penalty phase. (PCR hearing, Tr. pp. 97-98). He noted in a case like this a defense attorney would always want more time to prepare. (PCR hearing, Tr. p. 99). Judge Ware also went through the copious number of pretrial motions he filed, all of which were admitted into evidence by the State.

(PCR hearing, Tr. pp. 99-105). On cross examination, Judge Ware admitted to the strongest parts of the State's case. (PCR hearing, Tr. pp. 106-109).

II. INEFFECTIVENESS CLAIMS

In *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 562 (2004), the United States Supreme Court stated that "[a]ttorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear." That was certainly the case here, where DNA, other physical evidence, eyewitness testimony, and the defendant's own damning statement conclusively established his guilt of the kidnapping, rape, and murder of a four-year-old girl, little MJT. The defendant, a previously convicted sex offender with a criminal record dating back to childhood, showed no remorse for his heinous crimes, and even warned that he would kill again if released. Despite evidence of the defendant's admittedly tragic childhood being entered into evidence in a valiant effort by defense counsel to save his life, the jury considered all of this and still returned a capital verdict. That result was not due to ineffective assistance of counsel: it was justice.

Throughout the post conviction relief process, the defendant unsuccessfully tried to compare his first trial and second trial. Trials are different, and jurors are different at each one; to do such a comparison is to try to equate the proverbial apples to oranges. It should be noted that: 1) the overwhelming strength of the State's case could not be overcome; 2) the defendant was essentially the "poster child" for the death penalty, with a life full of criminal conduct; 3) his heinous actions in kidnapping, raping, and murdering a four-year-old little girl are virtually the reason why we have the death penalty in this state, as they constitute every parent's worst nightmare; 4) he was remarkably unrepentant for his horrific crimes; and 5) a guilty verdict and death penalty were virtually assured given all of these facts.

The proper standard of review of an ineffective assistance of counsel claim is well-established law. A criminal defendant has a constitutional right to effective assistance of counsel. *State v. James*, 95-962 (La.App. 3 Cir. 02/14/96), 670 So.2d 461, 465, citing U.S. Const. amend. VI; *State v. Kirkpatrick*, 443 So.2d 546, 552 (La. 1984), citing U.S. Const. amend. VI & La. Const. of 1974 Art. I. § 13. This defendant is indigent. While his right to counsel is protected by the requirement that he be appointed counsel, he does not have the right to the appointment of a particular attorney to defend him. *Kirkpatrick*, 443 So.2d at 552.

Ineffective assistance of counsel claims are typically addressed in a post conviction context. They may be considered on direct appeal if the record contains sufficient evidence with which to do so. *State v. Collins,* 04-1441 (La.App. 3 Cir. 03/02/05), 896 So.2d 1265, 1270. Such consideration furthers the interest of judicial economy. *State v. Myers*, 1999-677 (La.App. 3 Cir. 12/8/99), 753 So.2d 898, 905. In this case, the defendant's ineffective assistance of counsel claims are being addressed on post conviction.

Ineffective assistance of counsel claims are gauged by the guidelines set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Thomas*, 2012-1410 (La. 9/4/13), 124 So.3d 1049, 1053. To establish ineffectiveness of counsel a defendant must demonstrate that: 1) his defense counsel's performance was deficient (which requires a showing that counsel's errors were so serious that he failed to function as "counsel" guaranteed by the Sixth Amendment); and 2) such deficiency prejudiced the defense so as to deprive the defendant of a fair trial, or a trial with a dependable result. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The proper standard for attorney performance is not perfect assistance; rather, it is reasonably effective assistance of counsel. *Id.*

In explaining Strickland's standard of review of ineffective assistance of counsel claims, in *Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S.Ct. 1388, 1403 (2011), the United States Supreme Court stated:

> There is no dispute that the clearly established federal law here is *Strickland* v. *Washington.* In *Strickland,* this Court made clear that 'the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial.'466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Thus, '[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct *so undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' *Id.*, at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (emphasis added). The Court acknowledged that '[t]here are countless ways to provide effective assistance in any given case,' and that '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'*Id.*, at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674.
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> Recognizing the 'tempt[ation] for a defendant to second-guess counsel's assistance after conviction or adverse sentence,'*ibid.*, the Court established that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,'*id.*, at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674. To overcome that presumption, a defendant must show that counsel failed to act 'reasonabl[y] considering all the circumstances.'*Id.*, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. The Court cautioned that '[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.'*Id.*, at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674.

The *Pinholster* Court elaborated on the requirement that the defendant seeking to establish ineffective assistance of counsel prove not just deficient performance, but prejudice as well:

> The Court also required that defendants prove prejudice. *Id.*, at 691-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674. 'The defendant 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, 104 S. Ct. 2052, 80 L. Ed. 2d 674. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Ibid.* That requires a 'substantial,' not just 'conceivable,' likelihood of a different result. *Richter, supra*, at 112, 131 S. Ct. 770, 178 L. Ed. 2d 624, 647.
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> *Pinholster*, 563 U.S. at 189, 131 S.Ct. at 1403.

A defendant who complains that defense counsel's assistance was ineffective must show that counsel's representation fell beneath an objective standard of reasonableness. *Strickland*, 466 U.S. 687-688, 104 S.Ct. 2064. He must show that his defense lawyer did not meet the competency level normally required of criminal attorneys. *James*, 670 So.2d at 465. An accused cannot prove ineffective assistance of counsel by merely making allegations of incompetence. Instead, he must combine his claims with a definite showing of prejudice. *James*, 670 So.2d at 465. If the defendant fails to meet one of the criteria of the two-pronged test, then the reviewing court is not required to address the other one. *James*, 670 So.2d at 465.

In *Buck v. Davis*, 137 S.Ct. 759 (2017), a capital habeas case, the United States Supreme Court emphasized that under the *Strickland* standard of review:

> *Strickland*'s first prong sets a high bar. A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case. The lawyer has discharged his constitutional responsibility so long as his decisions fall within the "wide range of professionally competent assistance." *Id.*, at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674. It is only when the lawyer's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" that *Strickland*'s first prong is satisfied. *Id.*, at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674.
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> To satisfy *Strickland*, a litigant must also demonstrate prejudice—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694, 104 S. Ct. 2052. 80 L. Ed. 2d 674.
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> *Buck*, 137 S.Ct. at 775-776.

See also Hinton v. Alabama, 134 S.Ct. 1081, 1087-1088 (2014). The *Hinton* Court emphasized that the assessment of the attorney's performance is "'whether counsel's assistance was reasonable considering all the circumstances.'" *Hinton*, 134 S.Ct. at 1088, quoting from *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). The "reasonableness" is measured under

"prevailing professional norms." *Hinton*, 134 S.Ct. at 1088, quoting *Strickland, supra*, at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674.

With regard to a claim of ineffective assistance of counsel at the guilt phase of a capital trial, the Louisiana Supreme Court has stated:

> Under the standard for ineffective assistance of counsel set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Lockhart v. Fretwell,* 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), which standard was adopted by this Court in *State v. Washington,* 491 So.2d 1337, 1339 (La.1986), a reviewing court must reverse a conviction if the defendant establishes (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect, or whether counsel's constitutionally ineffective performance affects the outcome of the plea process.
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> *State v. Hoffman*, 1998-3118 (La. 4/11/00), 768 So.2d 542, 575-576, *supplemented*, 2000-1609 (La. 6/14/00), 768 So.2d 592. (footnote omitted).

The standard for determining the effectiveness of counsel during capital penalty phase proceedings is outlined in *State v. Sparks*, 1988-0017 (La. 05/11/11), 68 So.3d 435:

> A defendant at the penalty phase of a capital trial is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life. *State v. Hamilton,* 92–2639, p. 6 (La.7/1/97), 699 So.2d 29, 32, *cert. denied,* 522 U.S. 1124, 118 S.Ct. 1070, 140 L.Ed.2d 129 (1998); *State v. Sanders,* 93–0001, p. 25 (La.11/30/94), 648 So.2d 1272, 1291, *cert. denied,* 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996). A capital sentencing proceeding 'is sufficiently like a trial in its adversarial format and in the existence of standards for decision' such that counsel's role in both is 'to ensure that the adversarial testing process works to produce a just result under the standards governing decision.' *Strickland v. Washington,* 466 U.S. 668, 686–687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Accord Sanders,* 93–0001, at p. 25, 648 So.2d at 1291.
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> When a defendant challenges the effectiveness of his counsel at the penalty phase, the court must determine whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded the balance of aggravating and mitigating factors did not warrant death. *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069; *Hamilton,* 92–2639 at p. 6, 699 So.2d at 32; *Sanders,* 93–0001, at p. 25, 648 So.2d at 1291. Unless defendant shows both a deficient performance and prejudice, the court cannot find his death sentence resulted from a breakdown of the adversarial process which rendered the result unreliable. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Sanders,* 93–0001 at pp. 25–26, 648 So.2d at 1291.
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> *Sparks*, 68 So.3d at 481-482.

In *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 788 (2011), the United States Supreme Court noted the extremely respectful nature of the *Strickland* standard of review, after cautioning about the temptation to sit in judgment on an attorney's performance after the client sentence or conviction. *Harrington*, 562 U.S. at 105-106. The "prevailing professional norms" are

the benchmark, rather than viewing a lawyer's actions to gauge if they differed from "best practices or most common custom." *Id.*

In some cases, the sole available and rational defense strategy will require an expert witness to be consulted or expert evidence to be introduced. *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 788 (2011). The *Richter* Court cautioned that "[e]even the best criminal defense attorneys would not defend a particular client in the same way," and that it would be the exceptional case in which the broad tactical discretion attorneys are afforded would be restricted to one method or manner. *Richter*, 562 U.S. at 789, quoting from *Strickland*, 466 U.S. at 689. The *Richter* Court also stated that there is no need for a lawyer to go after an investigation that would not be productive, let alone one which might prove harmful to the defense. *Richter*, 562 U.S. at 789-790.

The *Richter* Court noted that where there were a number of available experts of various types Richter's defense counsel could have hired, a lawyer is entitled to prioritize his work on the case, and was entitled to "formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Ritchter*, 526 U.S. at 789. Moreover, the hiring of an expert does not mean that courts should engage in deciding whether a qualified expert was not sufficiently qualified. As the United States Supreme Court emphasized in *Hinton v. Alabama*:

> The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.' *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired.
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> *Hinton*, 134 S.Ct. at 1089.

The defendant alleges that his defense counsel was ineffective for failing to present testimony from expert witnesses who, individually and cumulatively, allegedly could have undermined the State's case by creating reasonable doubt in the minds of the jury. The State's case against this defendant was a collectively strong one, as this Court no doubt still recalls from presiding over the trial. No efforts of any defense counsel could have defeated such a strong evidential case, and the defendant's current claims engage in the exact "Monday-morning quarterbacking" which *Strickland* and its progeny prohibit.

The defendant criticizes his trial counsel for not challenging the DNA evidence in the same manner as the first trial counsel – by calling a defense expert witness. Even he admits that this

evidence was assailed by his attorneys via cross examination of Dr. Wojtkiewicz. (Defendant's original PCR brief, page 13). While the defendant claims that this method was "effective" at his first trial, the vote of the jurors at that trial was *not* to acquit him – there was simply a dispute over the degree of murder for which he was guilty. With regard to this evidence, the Louisiana Supreme Court stated: "Expert forensic analysis matched the semen obtained from a rectal swab of the victim to Reeves' DNA profile, with a statistical probability of 1 in 256,000,000,000 (trillion). In addition, fibers consistent with the victim's clothing were found in the defendant's car." *State v. Reeves*, 2006-2419 (La. 5/5/09), 11 So.3d 1031, 1085. Physical evidence like this is not as easy to attack as this defendant presumes, and he cannot establish that trial counsel's methodology of doing so constituted ineffective assistance of counsel.

The defendant's similar attack over latent print testimony regarding Sybil Guidry's first trial testimony not being presented at the second trial also fails, as does his claim regarding the attack of the timeline of the State's case. As noted earlier, the defendant's semen was found in the victim's rectum, multiple eyewitnesses saw him at critical locations, and he confessed – there was not a witness on Earth who could have established his innocence in this case since he was not in fact innocent. Moreover, the defendant's attorneys at his second trial were not required to present the exact same case from his first trial.

With regard to the defendant's claim that his attorneys failed to attack the cadaver dog evidence, the defendant concedes that defense attorneys cross examined witnesses on this topic, but he argues that an expert should have been retained to assist in this endeavor. (Defendant's original PCR brief, pages 18-27). The cadaver dog evidence was minimal in comparison to the wealth of physical evidence, the testimony of witnesses who saw the defendant in critical places linked with his crimes,[5] *and* his own confession. While no defense counsel mistake in this regard is conceded by the State, even if the defense counsel's assault of this evidence were not as aggressive as the defendant would have had it, no prejudice occurred.

The United States Supreme Court has rejected the sort of second-guessing in which the defendant now engages. In *Harrington v. Richter*, 131 S. Ct. 770 (2011), the United States Supreme Court soundly rejected a defendant's claim that he had received ineffective assistance of counsel when his attorney did not retain an expert witness:

[5]The State refers here to the testimony of Lake Charles Police Lieutenant Ray Laviolet, Erin Schrepfer, and Michelle Rogers, among others.

> Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, 'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.' *Id.*[6], at 689, 104 S.Ct. 2052. Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach. *Ibid.*
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> From the perspective of Richter's defense counsel when he was preparing Richter's defense, there were any number of hypothetical experts—specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines—whose insight might possibly have been useful. An attorney can avoid activities that appear 'distractive from more important duties.' *Bobby v. Van Hook,* 558 U.S. ——, ——, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009) *(per curiam).* Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See *Knowles, supra,* at 787 – 788, 129 S.Ct. at 1421–22; *Rompilla v. Beard,* 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith,* 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Strickland,* 466 U.S., at 699, 104 S.Ct. 2052.
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> Even if it had been apparent that expert blood testimony could support Richter's defense, it would be reasonable to conclude that a competent attorney might elect not to use it.
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> This theory overlooks the fact that concentrating on the blood pool carried its own serious risks. If serological analysis or other forensic evidence demonstrated that the blood came from Johnson alone, Richter's story would be exposed as an invention. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense. *Strickland, supra,* at 691, 104 S.Ct. 2052.
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> In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict.
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> *Richter*, 131 S. Ct. at 787-792.

These excerpts illustrate that the decision to retain an expert witness is fraught with dangerous potential and that a strong presumption of effective assistance is afforded to trial counsel faced with such decisions. As the *Richter* Court noted: "Surmounting *Strickland's* high bar is never an easy task." *Richter*, 131 S.Ct. at 788, quoting*Padilla v. Kentucky,* 559 U.S. ——, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010)." The defendant has not done so in this case.

[6] *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

With regard to mitigation evidence, the defendant's trial attorneys developed a powerful case using varied sources. According to the defendant, it still was not enough. However, the United States Supreme Court rejected a similar complaint in *Bobby v. Van Hook*, 558 U.S. 4, 12, 130 S.Ct. 13, 19 (2009), stating:

> This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, cf. *Wiggins*, 539 U.S., at 525, 123 S. Ct. 2527, 156 L. Ed. 2d 471, or would have been apparent from documents any reasonable attorney would have obtained, cf. *Rompilla v. Beard*, 545 U.S. 374, 389-393, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005). It is instead a case, like *Strickland* itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.'466 U.S., at 699, 104 S. Ct. 2052, 80 L. Ed. 2d 674.3

In *State v. Stewart*, 2000-2960 (La. 3/15/02), 815 So.2d 14, 15, the Louisiana Supreme Court repeated admonitions from *Strickland*:

> ....'[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding....' Instead, '[i]n every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.' *Strickland*, 466 U.S. at 696-97, 104 S.Ct. at 2067-69.

The *Stewart* Court continued: "*Strickland* imposes on a defendant the difficult burden of overcoming a strong presumption that the challenged action of his trial counsel reflected sound trial strategy because '"[e]ven the best criminal defense attorneys would not defend a particular client in the same way."'*Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065." The *Stewart* Court concluded by stating that the purpose of an ineffective assistance of counsel claim is not to "grade" defense counsel's "performance;" instead, *Strickland* requires "a showing that the adversary process in the present case went so far wrong that no court may have confidence that it produced a reliable and just result." *Stewart*, 815 So.2d at 19. In no way can the defendant meet this burden of proof.

With regard to particular filings, defense counsel is not required to file frivolous, unnecessary motions. *State v. Pettibone*, 626 So.2d 66, 69 (La.App. 3 Cir. 1993); *State v. Pendleton*, 96-367 (La.App. 5 Cir. 5/28/97), 696 So.2d 144, 156. Moreover, the decision to file or not to file pretrial motions is within the realm of trial strategy. *State v. Dammeron*, 98-378 (La.App. 5 Cir. 9/29/98), 719 So.2d 1151, 1154. Since defense counsel is not required to file

pretrial motions, a defendant must demonstrate specific prejudice when he asserts that the failure to file a motion was ineffective assistance of counsel. *State v. Seiss*, 428 So.2d 444, 447 (La. 1983); *State v. Green*, 1998-0912 (La.App. 4 Cir. 9/9/98), 731 So.2d 286, 293.

With regard to failure to investigate claims, in *State v. Castaneda*, 94-1118 (La.App. 1 Cir. 6/23/95), 658 So.2d 297, the First Circuit Court of Appeal stated that a defendant who asserts that his defense counsel was ineffective for failing to investigate must specifically assert what the investigation would have revealed as well as how the trial's outcome would be altered; conclusory, vague allegations are insufficient for relief. *Castaneda*, 658 So.2d at 306. In *State v. Johnson*, 31, 448 (La.App. 2 Cir. 3/31/99), 747 So.2d 61, 68, the Second Circuit Court of Appeal found that where a defendant alleged that his counsel was ineffective for failing to request a continuance so that he could investigate further and obtain witnesses, when sufficient evidence existed for a conviction, as it did in this case, the defendant could not demonstrate prejudice from the defense attorney's failure to request a continuance and to obtain witnesses.

Regarding a particular line of questioning of witnesses, in *State v. Brooks*, 505 So.2d 714, 724 (La. 1987), the Louisiana Supreme Court noted that the decision not to cross examine could very well be trial strategy to "rob the state of the force of its evidence." The *Brooks* Court stated: "While opinions may differ on the advisability of such a tactic, hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful." In *State v. Mitchell*, 44,008 (La.App. 2 Cir. 2/25/09), 4 So.3d 320, the Second Circuit Court of Appeal stated that the decision to decline to ask cross examination questions "can be a reasonable trial strategy that will not render trial counsel's assistance ineffective." *Mitchell*, 4 So.3d at 326-327, citing *State v. Brooks*, 505 So.2d 714, 724 (La. 1987). In *State v. Folse*, 623 So.2d 59, 71 (La.App. 1 Cir. 1993), the First Circuit Court of Appeal stated: "The election to call or not call a particular witness is a matter of trial strategy and not, per se, evidence of ineffective assistance of counsel."

In summary, the complaints that this defendant raises, as detailed above and again below, fall squarely within the scope of trial strategy. The decisions made by trial counsel during trial and before trial are nothing if not trial strategy. In *State v. Felde*, 422 So.2d 370 (La. 1982), the Louisiana Supreme Court stated:

> Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during the trial rests with the accused and his attorney. *Estelle v. Williams*, 425 U.S. 501 at 512, 96 S.Ct. 1691 at 1697, 48 L.Ed.2d 126 at 135 (1976). The fact that a particular strategy is unsuccessful does not establish ineffective assistance. *Gray v. Lucas*, 677 F.2d 1086 (5 Cir. 1982).
>
> *Felde*, 422 So.2d at 393.

In *State v. Hoffman*, 1998-3118 (La. 4/11/00), 768 So.2d 542, the Louisiana Supreme Court noted that it did not "'sit to second-guess strategic and tactical choices made by trial counsel.'" *Hoffman*, 768 So.2d at 579, quoting from *State v. Myles*, 389 So.2d 12, 31 (La. 1979). In *State v. Collins*, 2004-1441 (La.App. 3 Cir. 3/2/05), 896 So.2d 1265, the Third Circuit Court of Appeal stated that it has recognized that an alleged error which is within the scope of "'trial strategy'" does not "'establish ineffective assistance of counsel.'" *Collins*, 896 So.2d at 1270, quoting from *State v. Bienemy*, 483 So.2d 1105 (La.App. 4 Cir. 1986). See also *State v. Duplichan*, 2006-852 (La.App. 3 Cir. 12/6/06), 945 So.2d 170, 182 (an alleged mistake that falls inside the trial strategy realm does not constitute ineffective assistance of counsel).

In *State ex rel. Blank v. Cain*, 2016-0213 (La. 05/13/16); 192 So.3d 93, 100, the Louisiana Supreme Court stated the following with regard to trial strategy decisions made by a capital defense attorney:

> Counsel's tactics were not unreasonable. See Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003) ('In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.'); Sanders v. State, 738 S.W.2d 856, 858 (Mo. 1987)('The selection of witnesses and the introduction of evidence are questions of trial strategy and the mere choice of trial strategy is not a foundation for finding ineffective assistance of counsel.'); State v. Felde, 422 So.2d 370, 393 (La. 1982) (the fact that a particular strategy fails does not establish ineffective assistance). The district court correctly rejected this claim.

Not only do all of this defendant's complaints about his lawyers fall squarely within the purview of trial strategy, none of them demonstrate error, let alone prejudice, in a case in which a conviction and death sentence were both a virtual certainty.

A. JUDGE WARE WAS INEFFECTIVE FOR FAILING TO INTRODUCE COMPELLING, READILY AVAILIBLE EVIDENCE IN SUPPORT OF PETITIONER'S CLAIM THAT THE STATE UTILIZED PEREMPTORY CHALLENGES TO PURPOSEFULLY DISCRIMINATE AGAINST AFRICAN-AMERICANS IN JURY SELECTION, IN VIOLATION OF *BATSON V. KENTUCKY.*

B. STATISTICAL EVIDENCE

C. SPECIFIC, INDIVIDUALIZED EVIDENCE

This claim is insulting and specious; moreover, it was neither properly preserved nor presented. None of this evidence was properly preserved for argument at the trial court level. As Judge Ware testified, he never compared the seven black jurors struck by the State with the white ones struck. (PCR hearing, Tr. p. 66). There was also no evidence ever offered as to the race of the jurors when the *Batson* comments were made. As the State details below, this Court correctly ruled that a *prima facie* case was never established.

Even worse, on post conviction this defendant never introduced any reliable evidence in support of his *Batson* claim because none exists. His new Appendix Exhibit I, which are purportedly voter registration records, are not even clearly linked to the final or proposed jurors and are not authentic or certified documents. They should be deemed wholly inadmissible.

Furthermore, as the State noted at the post conviction relief hearing, the defendant offered no definitive proof of the race of any of the jurors he argues about, and there are no notations to their race anywhere in the record. (PCR hearing, Tr. pp. 68-77). Simply put, the defendant has absolutely no evidence to support this salacious claim.

In this case, at the late date of the defendant's *Batson* comments, this Court properly noted that the defendant's *Batson* challenge failed at the outset. Based on the numbers and the percentages of jurors selected, the defendant could not establish a *prima facie* case. (Direct Appeal R. Vol. XXXVII, R. pp. 9033-9045). In addition, the defense could have been accused of exercising *its* peremptory challenges in a discriminatory manner since it struck eleven white jurors and only one black juror in its exercise of twelve peremptory challenges. (Direct Appeal R. Vol. XXXVII, R. pp. 9031-9032). The defendant's challenge was not even timely made in accordance with LSA-C.Cr.P. Art. 841, as the trial judge noted. (Direct Appeal R. Vol. XXXVII, R. pp. 9028-9029). Moreover, the final racial composition of the jury featured a higher percentage of African-Americans than were in the jury venire itself. (Direct Appeal R. Vol. XXXVII, R. pp. 9034, 9041; Trial Court Record Vols. 50 & 51, Tr. pp. 343-351). The record offers no support for this defendant's belated *Batson* challenge, and this Court did not err in finding that the defendant failed to establish the requisite *prima facie* case. For these reasons, defense counsel cannot be gauged ineffective for failing to prevail on a meritless *Batson* claim.

In *State v. Tyler,* 1997-0338 (La. 9/9/98), 723 So.2d 939, the Louisiana Supreme Court discussed the United States Supreme Court decision in *Batson v. Kentucky,* 476 U.S.

79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In *Batson,* the federal high court held that it was an Equal Protection violation for a prosecutor to exercise a peremptory challenge to exclude a black prospective juror on the basis of his or her race. *Tyler,* 723 So.2d at 942. The *Batson* decision has subsequently been expanded to prohibit either the State or the defense from exercising racially based peremptory challenges.[7] *Id.* The ultimate burden of proof on establishing the impermissible peremptory challenge rests on the party objecting to it, who must establish purposeful discrimination. *Id.*

In *Rice v. Collins*, 546 U.S. 333, 338, 126 S. Ct. 969, 973–74, 163 L. Ed. 2d 824 (2006), the United States Supreme Court discussed *Batson* challenges:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. 476 U.S., at 96-97, 106 S.Ct. 1712. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. *Id.,* at 97-98, 106 S.Ct. 1712. Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices. *Purkett v. Elem,* 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) *(per curiam).* Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson,supra,* at 98, 106 S.Ct. 1712. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.' *Purkett,supra,* at 768, 115 S.Ct. 1769.

As stated *supra*, the challenger (in this case, the defendant) always bears the ultimate burden of persuasion in proving purposeful discrimination. *Batson,* 476 U.S. at 93, 106 S.Ct. at 1721. In *State v. Duncan,* 1999-2615 (La. 10/16/01), 802 So.2d 533, the Louisiana Supreme Court noted that if a defendant cannot present evidence showing the required inference of deliberate discrimination, then he fails to establish a *prima facie* case and "his *Batson* challenge expires at the threshold.'" *Duncan,* 802 So.2d at 544, quoting from *State v. Green,* 94-0887 (La. 5/22/95), 655 So.2d 272, 290, fn. 24.

As the State previously noted, this defendant never properly raised *Batson* challenges at trial, and like other claimed errors, *Batson* is subject to LSA-C.Cr.P. Art. 841's contemporaneous objection requirement. In *State v. Snyder*, 98-1078 (La. 4/14/99), 750 So. 2d

[7]It has been codified in LSA-C.Cr.P. Art. 795.

832, 839–40, the Louisiana Supreme Court discussed a defendant's failure to timely raise *Batson* challenges:

> Under *Batson* jurisprudence, a defendant must first establish a prima facie case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on the basis of race. If such a showing is made, the burden of production then shifts to the State to articulate a race-neutral explanation for the challenges. Finally, the trial court must determine whether the defendant carried his burden of proving purposeful discrimination. *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (Per Curiam); *see State v. Collier,* 553 So.2d 815 (La.1989). The second step does not require an explanation that is persuasive, or even plausible, and unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral. *Purkett,* 514 U.S. at 767, 115 S.Ct. at 1771. The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. *See State v. Green,* 94-0887, p. 28 (La.5/22/95), 655 So.2d 272, 290, and cases cited therein. A trial judge's determination pertaining to purposeful discrimination rests largely on credibility evaluations; therefore the trial judge's findings are entitled to great deference by the reviewing court. *Batson,* 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.
>
> As an initial matter, the defense failed to lodge an objection to the State's use of its peremptory challenges against jurors Greg Scott and Thomas Hawkins, Jr., although counsel did note for the record that both jurors were African-American.[7] According to defense counsel, when Scott and Hawkins were struck by the State, counsel felt that no "pattern" of exclusion had emerged because the State had accepted an African-American juror, Jeffery Brooks (who was later backstricken by the State).
>
> Nevertheless, while defense counsel's choice not to object on *Batson* grounds until they felt a pattern of discrimination had emerged may have been a valid reason for delaying a request for a race-neutral explanation, it does not negate the fact that the State was never requested to provide a race-neutral explanation for its use of peremptory challenges on potential jurors Greg Scott and Thomas Hawkins, Jr. Even after lodging a *Batson* objection and requesting a race-neutral explanation for the State's challenge of other African-Americans, defense counsel never demanded such an explanation for these two jurors.
>
> This court has traditionally applied La.C.Cr.P. art. 841 to errors occurring during voir dire.[9] It has consistently held that a defendant waives review of irregularities in the selection of the jury when an objection is not timely raised. *See State v. Potter,* 591 So.2d 1166, 1168 (La.1991) (failure to make *Batson* objection waived issue on appeal); *State v. Spencer,* 446 So.2d 1197, 1200 (La.1984) (review of improper exclusion of blacks from jury not preserved for appeal); *State v. Whitt,* 404 So.2d 254 (La.1981) (objection to failure to sequester jury at an earlier time waived); *State v. Bazile,* 386 So.2d 349 (La.1980) (improper procedure for selecting venire not reviewable where objection was made after jury was sworn); *State v. Qualls,* 377 So.2d 293, 298 (La.1979) (objection to State's use of peremptory challenges raised for first time on appeal came too late); *State v. Landry,* 262 La. 32, 262 So.2d 360 (1972) (issue waived where objection to three jurors improperly excluded for opposition to death penalty not timely made). With respect to prospective jurors Greg Scott and Thomas Hawkins, Jr., the defense failed to initiate the three-step *Batson* procedure properly and therefore the State did not offer race-neutral reasons for its challenges. Consequently, the trial court did not have the opportunity to rule on them. **Defendant therefore waived any claim based upon the prosecutor's allegedly intentional discrimination against Greg Scott and Thomas Hawkins, Jr. and the issue is not properly before this court.** *Potter,* 591 So.2d at 1168.
>
> (emphasis added)

The *Snyder* Court also addressed a situation where a defendant argued, like this one, that his attorneys were ineffective for failing to raise a *Batson* claim. The *Snyder* Court stated:

> Defendant also argues that his attorneys were ineffective for failing to object to the prosecution's improper use of its peremptory challenges to exclude African Americans from the jury. Specifically, defendant points to counsel's failure to raise a *Batson* objection to the State's use of peremptory challenges on veniremen Greg Scott and Thomas Hawkins, Jr. Defendant maintains that his trial counsel erroneously believed that the presence of one African American juror, Jeffrey Brooks (who was later backstricken by the State) defeated any *Batson* claim. Defendant contends that this error prejudiced him because it allowed the prosecutor to exercise peremptory challenges to remove members of the defendant's race from the jury venire for a discriminatory purpose without having to provide a race-neutral reason.
>
> Even assuming defense counsel erred in failing to make a *Batson* objection to the State's challenges of Greg Scott and Thomas Hawkins, Jr., this failure does not prejudice the defendant to the extent that the trial was rendered unfair and the verdict suspect. In *Allen v. Hardy,* 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), the United States Supreme Court held that *Batson* would not be applied retroactively on collateral review. The Court noted that retroactive effect is 'appropriate where a new constitutional principle is designed to enhance theaccuracy of criminal trials.'*Allen,* 478 U.S. at 259, 106 S.Ct. at 2880. The Court found, however, that although 'the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial[,] ... the decision serves other values as well ... only the first of which may have some impact on truthfinding.'*Id.* Because protections afforded by *Batson* did not go 'to the heart of the truthfinding function,'*Id.,* the Court held that *Batson* would not apply retroactively.
>
> While the instant case does not deal with the question of retroactivity, the Court's comments on the import of *Batson* are pertinent to the considerations present in the prejudice prong of the *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), two-part test used in ineffective assistance of counsel claims. **Where a rule does not have 'such a fundamental impact on the integrity of factfinding,' *Allen,* 478 U.S. at 259, 106 S.Ct. at 2881, it cannot be said that the violation of such rule renders the trial unfair and the verdict suspect.[11] Thus, counsel's failure to make a *Batson* objection did not prejudice defendant. Accordingly, this argument lacks merit.**
>
> *Snyder*, 750 So.2d at 842–43. (emphasis added)

Where this objection was never properly preserved or presented at the trial court level, and where the evidence introduced on post conviction relief was not even indicative of the racial composition of the challenged jurors, this claim has never even been correctly argued, let alone established. It fails.

D. JUDGE WARE DID NOT HAVE A REASONABLE STRATEGY REASON NOT TO USE THE EXPERT WITNESSESS ATTY. CUCCIA USED IN THE FIRST TRIAL, THEREFORE HE SHOULD BE FOUND TO HAVE PROVIDED PETITIONER CONSTITUTIONALLY INEFFECTIVE REPRESENTATION.

This issue was already discussed at length by the State *supra*. In *Harrington v. Richter*, 131 S. Ct. 770 (2011), the United States Supreme Court specifically rejected this same argument. No two defense attorneys have to try a case the same way to have been considered to have rendered effective assistance of counsel.

E. JUDGE WARE DID NOT HAVE A REASONABLE STRATEGY REASON FOR HIS FLAWED CROSS-EXAMINATION OF DET. MARK HOLMES AT TRIAL, THEREFORE HE SHOULD BE FOUND TO HAVE PROVIDED PETITIONER CONSTITUTIONALLY INEFFECTIVE REPRESENTATION.

With regard to the defendant's claim that his attorneys failed to attack the cadaver dog evidence, the defendant concedes that defense attorneys cross examined witnesses on this topic, but he argues that an expert should have been retained to assist in this endeavor. (Defendant's original PCR brief, pages 18-27). The cadaver dog evidence was minimal in comparison to the wealth of physical evidence, the testimony of witnesses who saw the defendant in critical places linked with his crimes,[8] and his own confession. While no defense counsel mistake in this regard is conceded by the State, even if the defense counsel's assault of this evidence were not as aggressive as the defendant would have had it, no prejudice occurred.

Moreover, after first stating that no cadaver dog training evidence was admitted upon defense questioning, upon State cross-examination Judge Ware read from exhibits the State introduced that indicated that not only had records of the dog's certification and training been introduced by the State,[9] but also he conducted cross examination on this very issue. (PCR hearing, Tr. pp. 83-84; 88-91). The defendant made a false allegation about what was actually presented by the defense at trial, and for this reason and due to controlling jurisprudence cited *supra* this argument also fails.

F. JUDGE WARE DID NOT HAVE A REASONABLE STRATEGY REASON NOT TO USE THE WITNESS STATEMENTS OF FAITH WATSON AND MICHELLE MATHIS AT TRIAL, THEREFORE HE SHOULD BE FOUND TO HAVE PROVIDED PETITIONER CONSTITUTIONALLY INEFFECTIVE REPRESENTATION.

Witness statements of those who do not testify and which are testimonial in nature are classically inadmissible hearsay evidence. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354,

[8]The State again refers here to the testimony of Lake Charles Police Lieutenant Ray Laviolet, Erin Schrepfer, and Michelle Rogers, among others.
[9]The State introduced these exhibits at the post conviction relief hearing as S-82 through S-84.

158 L.Ed2d 177 (2004). Judge Ware recognized as much when the defense questioned him about not using Michelle Mathis' statement to cross-examine Detective Carpenter, noting that "a lot of this would have been hearsay." (PCR hearing, Tr. p. 59, lines 28-29). He also noted with regard to not calling them as witnesses, "hindsight is 20/20, I guess." (PCR hearing, Tr. p. 60, lines 12-13). He refused to fully concede that these witnesses could have created reasonable doubt, correctly stating "You never know what effect." (PCR hearing, Tr. p. 60, lines 21). The statements were offered and admitted into evidence as Defendant's Exhibits 1 and 2 without objection. (PCR hearing, Tr. p. 61).

Judge Ware also noted that the so-called failed line-up evidence that the defendant asserted he should have used to cross-examine Detective Shannon Daughenbaugh was not impeachment evidence. (PCR hearing, Tr. p. 65, lines 19-23). Evidence to support this line of questioning was introduced without objection as defendant's Exhibit 3. (PCR hearing, Tr. p. 66).

The defendant's claim in this regard is almost farcical. The defendant, who confessed to his crimes, was linked to them by numerous eyewitnesses, and whose semen was found in the victim's anus, now contends that his counsel was ineffective for failing to present the equivocal testimony of two alleged eyewitnesses who at best possibly could have called into slight question the State's timeline of events. (Defendant's original PCR brief, pages 27-31; PCR hearing, Tr. pp. 64-65). The defendant alleges that statements of two women who believe they saw a little girl that **may** have been the victim, combined with the fact that other individuals **did not** pick him out of an array of photos, was such exculpatory evidence that had it been presented to the jury it would have resulted in a different verdict.

The evidence detailed by the defendant that would have allegedly proven his innocence is sketchy at best. One of the two women he chiefly refers to never even saw a photo of little MJT but only heard a description of her. Both women that he details identified the little girl that they saw as a blonde, while MJT was a brunette. Moreover, the failure of the residents of MJT's trailer park to identify the defendant does not negate the fact that he was seen by eyewitnesses in areas critical to his offenses, his DNA was found inside the victim, fibers from her clothing were found in his car, and he confessed to the crime. Only in a realm outside all reality does this so-called "evidence" exonerate this defendant. By no means does counsel's failure to present it constitute ineffective assistance of counsel.

The defendant's assertion in post conviction relief hearing and in his original post conviction relief brief that his counsel was ineffective because of an alleged lack of sufficient

preparation time is also without merit. The defendant's trial counsel Judge Ronald F. Ware and Mr. Charles St. Dizier, along with Mr. Richard White, were all experienced, highly competent counsel who did a valiant job defending him. While the defendant claims that six and a half months of preparation time until his retrial was insufficient, courts have not set forth a specific amount of time for trial preparation, as this issue is assessed on a case by case basis.

Reviewing courts have looked to the seriousness of the charge, the case's complexity, and the witness availability, in addition to preparation time and counsel's experience, as criteria to assist in determining whether or not an attorney was ineffective. These factors are not determinative of the issue, either singly or together. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984). As the *Cronic* Court stated, they "are relevant to an evaluation of a lawyer's effectiveness in a particular case, but neither separately nor in combination do they provide a basis for concluding that competent counsel was not able to provide this respondent with the guiding hand that the Constitution guarantees." *Cronic*, 466 U.S. 648, 663, 104 S. Ct. 2039, 2049. The *Cronic* Court refused to hold that a young inexperienced counsel with 25 days to prepare a complex case was ineffective. Similarly, in *State v. Martin*, 93-0285 (La. 10/17/94), 645 So.2d 190, the Louisiana Supreme Court upheld the denial of continuance motions filed by defense counsel who had three weeks to prepare for a capital case, where, as in this case, there was no evidence of specific prejudice in the record.

In *Reeves*, the Louisiana Supreme Court rejected this defendant's direct appeal claim that his defense attorneys' continuance motion was improperly denied, noting that defense counsel had almost seven months to prepare for his trial and also had at their disposal the evidence, information, transcripts, and materials prepared by counsel at his first trial. The *Reeves* Court stated that the decision to grant or deny a continuance motion rests with the trial court's broad discretion, and that ruling will not be upset unless there is an abuse of discretion, which the Court specifically declined to find. Going one step further, the *Reeves* Court also held that its record review revealed no evidence of specific prejudice suffered as a result of the trial court's continuance ruling. *Reeves*, 11 So.3d at 1077-1079.

G. JUDGE WARE DID NOT HAVE A REASONABLE STRATEGY REASON FOR FAILING TO REVIEW THE VIDEO RECORDING OF PETITIONER'S STATEMENT TO THE POLICE PRIOR TO IT BEING PLAYED IN COURT FOR THE JURY AT TRIAL, THEREFORE HE SHOULD BE FOUND TO HAVE PROVIDED PETITIONER CONSTITUTIONALLY INEFFECTIVE REPRESENTATION.

This claim was conclusively disproved at the post conviction relief hearing conducted in this case. It is based on the inadvertent introduction into evidence of some statements in the

defendant's confession referring to his "urges" toward young children. (Defendant's original PCR brief, pages 32-37). That information should have been redacted from the videotaped confession pursuant to trial court ruling. Moreover, Judge Ware thought that it was redacted, as did the State. The State's inadvertent error does not constitute ineffective assistance of defense counsel.

The defendant attempts to compare his trial counsel's failure to catch something that should have been redacted in a video to a failure to conduct a reasonable investigation. In his original post conviction relief brief, he referenced *Sanders v. Rattelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) where "counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." (Defendant's original PCR brief, page 35). By contrast, this is not a case of insufficient preparation and investigation, as the record reveals. Rather, the objectionable references themselves were so minimal in the context of the defendant's entire chilling confession about kidnapping, raping, and murdering a four-year-old girl that they drew no special attention. It is also critical that they were fleeting and quickly caught by the State.

It strains credulity to suggest that minimal, fleeting comments from this defendant were more prejudicial than his admitted kidnapping, rape, and stabbing to death a four-year-old little girl. This information was certainly not prejudicial or impactful in the jurors' minds when compared to the defendant's own words describing his brutal acts in this case. Moreover, it is not clear from the record, nor has the defendant established, how much of this information the jurors heard, as First Assistant District Attorney Cynthia Killingsworth quickly called this issue to the Court's attention. (Trial Court Record Vol. 54 of 60, 11/2/04 Tr., p. 121).

As for the defendant's claim about his attorney's ineffectiveness in this incident, defense counsel Judge Ware admitted at the trial that he viewed the videotape and an accompanying transcript that was of the properly redacted confession and that he did not view the videotape in an uninterrupted fashion. (Trial Court Record Vol. 54 of 60, 11/2/04 Tr., pp. 4-5). At the post conviction relief hearing, he stated the same thing. (PCR hearing, Tr. pp. 79-80). Essentially, he did due diligence and trusted that the properly redacted tape that followed the correctly redacted transcript that he had was going to be played for the jury. The fact that it was not the one played was a mistake of the State, not a failing of the defense.

That is not ineffective assistance of counsel. Moreover, for the defendant's attorney to have publicly and loudly objected to passing references in a lengthy confession that were essentially minimal would have drawn undue attention to them. That was clearly a reasonable trial strategy decision not to object to this material. Furthermore, as this Court thoroughly detailed in addressing the videotape issue and the subsequent defense mistrial motion, the references at issue were not

inadmissible other crimes evidence; thus, they were not even grounds for a mistrial. (Trial Court Record Vol. 54 of 60, 11/2/04 Tr., pp. 18-28).[10]

Finally, at the post conviction relief hearing held in this case First Assistant District Attorney Cynthia S. Killingsworth testified that the fact that the wrong confession tape was played for the jurors was a mistake that Judge Ware could not have possibly anticipated. After all, she did not do so. When she realized that the wrong tape—the unredacted version—was being played, she immediately alerted the trial court to the issue. (PCR hearing, Tr. p. 131).

H. DEPOSITION OF ATTY. CHARLES ST. DIZIER

1. **ATTY. CHARLES ST. DIZIER DID NOT HAVE A REASONABLE STRATEGY REASON FOR FAILING TO DISCOVER AND PRESENT EXPERT WITNESSES IN THE PENALTY PHASE OF THE TRIAL TO EXPLAIN THE EFFECTS OF SEXUAL ABUSE THAT PETITIONER SUFFERED AS A CHILD, OR TO PROVIDE MULTIPLE REPORTS DETAILING PETITIONER'S CHILDHOOD TO THE EXPERT THAT WAS PRESENTED TO THE JURY BY THE DEFENSE AT THE PENALTY PHASE OF THE TRIAL.**

The defendant wholly mischaracterizes the deposition testimony of Mr. Charles Dizier. He testified to the incredible amount of work he put into the penalty phase of this case. Moreover, his testimony indicated that the areas the defendant now thinks that he should have covered *were* presented in some form or fashion to the jury---just not to the extent or in the precise manner that the defendant now desires.

With regard to the defendant's specific complaints about Mr. St. Dizier, who handled the penalty phase for the defense, the defendant claims that trial counsel was ineffective for failing to investigate and put forth more testimony of his experiences as a sex abuse victim as mitigation evidence. The defendant also contends that his trial counsel should have conducted further investigation into the background of his adolescence and family, along with presenting additional testimony from the outcome of that investigation. (Defendant's original PCR brief, pages 51-61). The defendant goes into great detail describing his traumatic childhood, including his alleged witness of abuse of his sister Renee. In reality, the jury was informed of the defendant's sister's death and its impact on him. The jury also knew that the defendant had witnessed Renee being physically abused and that she was molested by Dennis Mott, the defendant's stepfather. (Trial Court Record Vol. 58 of 60, 11/8/04 Tr., pp. 43-47, 66-67, 170-178). The defendant cannot

[10]In particular, see *State v. Odom*, 33, 340 (La.App. 2 Cir. 5/10/00), 760 So.2d 576, 585, which correctly states that thoughts of a defendant are not other crimes evidence as contemplated by LSA-C.E. Art. 404(B).

establish that his trial counsel's failure to present even more evidence on this topic constituted ineffective assistance of counsel.

Many people are sexually abused as children, and they do not go about raping and killing little girls. Had the defendant's trial counsel overplayed the "victim" card with this jury, then they would have risked alienating the jury further and driving them toward a death penalty. After all, it could be argued that a sex offense victim like this defendant should have been wary of inflicting the same pain on someone else rather than be willing, as he was, to inflict it on multiple victims.[11]

During the penalty phase, defense counsel presented testimony from Jody Doucet, the defendant's mother, Ronald Reeves, the defendant's brother, and Drs. Maureen Santina and Marc Zimmerman. Testimony was presented by these witnesses to show that the defendant had post-traumatic stress disorder stemming from a less than idyllic childhood. The jurors had all of the information they needed to reach that conclusion. In fact, with regard to the claim that the defendant now makes that insufficient mitigation evidence was presented by his counsel, as part of the proportionality review on his direct appeal the Louisiana Supreme Court notably stated: "At trial, the defense presented extensive evidence of Reeves' character and behavioral disorders, both to challenge the validity of the confession and in the penalty phase as mitigation." *State v. Reeves*, 2006-2419 (La. 5/5/09), 11 So. 3d 1031, 1088.

In *Wiggins v. Smith,* 539 U.S. 510, 533, 123 S.Ct. 2527, 2541 (2003), the United States Supreme Court notably stated:

> ....*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case.

While counsel in *Wiggins* was ultimately declared to have been ineffective for failing to conduct an investigation into that defendant's troubled childhood, the same cannot be said in this case. Defense counsel here walked a fine line between showing the jury that the defendant suffered as a child and in angering them by trying to justify actions *which can never be justified*, despite one's childhood trauma. In *Bobby v. Van Hook*, 558 U.S. 4, 130 S.Ct. 13 (2009), the United States Supreme Court rejected a "more is better" argument such as that made by this defendant. The United States Supreme Court held that defense counsel's decision not to search for additional mitigating evidence from the defendant's background was a rational professional judgment, and that even if it was not the defendant had failed to establish prejudice. *Van Hook*, 558 U.S. at 11-12, 130 S.Ct. at 2051. A similar conclusion should be reached by this Court.

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[11]The defendant had a previous sex offense conviction.

In *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383 (2009), the United States Supreme Court rejected a defendant's claim that more mitigation evidence should have been presented of his terrible childhood, despite the fact that his defense counsel had introduced such evidence at the penalty phase of his trial. The *Belmontes* Court noted that more evidence of that nature would have been simply cumulative of that presented. The *Belmontes* Court also reiterated the standard of review for attorney performance:

> Belmontes argues that his counsel was constitutionally ineffective for failing to investigate and present sufficient mitigating evidence during the penalty phase of his trial. To prevail on this claim, Belmontes must meet both the deficient performance and prejudice prongs of *Strickland,* 466 U.S., at 687, 104 S.Ct. 2052. To show deficient performance, Belmontes must establish that 'counsel's representation fell below an objective standard of reasonableness.' *Id.*, at 688, 104 S.Ct. 2052. In light of 'the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant,' the performance inquiry necessarily turns on 'whether counsel's assistance was reasonable considering all the circumstances.' *Id.*, at 688–689, 104 S.Ct. 2052. At all points, '[j]udicial scrutiny of counsel's performance must be highly deferential.' *Id.*, at 689, 104 S.Ct. 2052.
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> **********
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> To establish prejudice, Belmontes must show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland,* 466 U.S., at 694, 104 S.Ct. 2052. That showing requires Belmontes to establish 'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,' and 'that had the jury been confronted with this ... mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.' *Wiggins v. Smith,* 539 U.S. 510, 535, 536, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).
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> *Belmontes*, 558 U.S. at 16-20, 130 S. Ct. at 384-386.

The defendant cannot demonstrate counsel's ineffectiveness under these standards. The fact that the defendant's attorneys presented the penalty phase evidence that they did is proof that they conducted a thorough investigation into available mitigation evidence. The decision as to the volume of such evidence to present portraying the defendant as the "victim" in his own childhood was a carefully calculated, strategic one. It should not be assailed now. Moreover, even a Dickensian childhood does not excuse the decision of an adult male to kidnap, rape, and murder a four-year-old girl.

The defendant also incredibly claims that his trial counsel was ineffective for not presenting evidence regarding certain alleged problems and conditions at various juvenile detention facilities he was housed at over his lengthy juvenile offender career. (Defendant's original PCR brief, pages 68-73). It should be noted that the defendant never presents compelling evidence or argument that

he was personally a victim of these purportedly deplorable juvenile detention facilities. Instead, he makes reference to investigations and cases with which he had no involvement. That is hardly compelling evidence in his case.

The State notes that the jury was aware of the defendant's incarceration in juvenile facilities. It was unlikely to regard any of these places as "country club" environments. Moreover, it seems like a wise trial strategy to avoid pleas for sympathy based on incarceration for one's previous criminal record as a juvenile when one is facing the death penalty. Undue emphasis by a defense attorney as to a defendant's lengthy criminal history is not only unlikely to sway sympathy in jurors, but it is further a probable way to ensure that the defendant is depicted as a career criminal who cannot be rehabilitated. The failure of the defendant's trial counsel to portray him as a "victim" of the system when he was incarcerated at juvenile facilities because he was, quite simply, a troubled young criminal, was a wise trial strategy decision.

The Louisiana Supreme Court previously discussed trial counsel's failure to introduce certain evidence at a penalty phase:

> In evaluating a claim of ineffective assistance of counsel during the penalty phase of a capital case, we must first determine whether a reasonable investigation would have uncovered mitigating evidence. If such evidence could have been found, we must consider whether counsel had a tactical reason for failing to put the evidence before the jury. If the failure to present mitigating evidence was not a tactical decision but reflects failure by counsel to adequately advocate his client's cause, defendant must still have suffered **actual prejudice** due to the ineffectiveness of his counsel before relief will be granted. *State ex rel. Busby v. Butler,* 538 So.2d 164, 169 (La. 1988).
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> *State v. Brooks*, 94-2438 (La. 10/16/95), 661 So.2d 1333, 1337-38 (emphasis added).

There is no way that this defendant can show that presentation of this evidence would have caused the jury to spare his life. It likely would have enraged many jurors to hear a ploy for sympathy from a man who relied on his own troubled youth for mercy, yet showed none to the defenseless four-year-old girl he raped and murdered.

Consider what defense counsel in this case did do. It is apparent from the six defense witnesses called during the penalty phase that the defendant's trial counsel more than adequately investigated mitigating evidence, and then presented that evidence effectively to the jury during the penalty phase of the defendant's trial. (Trial Record Vol. 58 of 60, 11/8/04 Tr., pp. 12-190). Trial counsel elicited testimony from a professor of criminal justice, Burt Foster, regarding the rarity of escapes from Louisiana State Penitentiary at Angola, and the unlikelihood an offender serving a life sentence being pardoned or having his sentence commuted. (Trial Record Vol. 58 of 60, 11/8/04

Tr., pp. 12-18). Drs. Marc L. Zimmerman and Maureen Santina testified as to the defendant's troubled mental state. (Trial Record Vol. 58 of 60, 11/8/04 Tr., pp. 110-189). Dr. Zimmerman testified that the defendant had dysfunction in the portions of his brain controlling information processing and impulse control. (Trial Record Vol. 58 of 60, 11/8/04 Tr., pp. 112-113). Dr. Zimmerman also told jurors that personality tests showed that the defendant suffered from post-traumatic stress disorder (PTSD). *Id.* Dr. Zimmerman stated that upon finding indications of PTSD, he recommended someone more specialized in that area, Dr. Maureen Santina, examine the defendant. (Trial Record Vol. 58 of 60, 11/8/04 Tr., p. 114).

Dr. Santina, a clinical and forensic psychologist, stated that after a variety of psychological tests and clinical interviews she determined that circumstances from the defendant's childhood could be indicative of PTSD. (Trial Record Vol. 58 of 60, 11/8/04 Tr., pp. 127-132). This assessment was coupled with previous testimony from the defendant's brother, Ronald Reeves, his mother, Judy Doucet, and his middle school assistant principal, Charles Nichols. (Trial Record Vol. 58 of 60, 11/8/04 Tr., pp. 42-110). These three witnesses testified to various aspects of the defendant's troubled childhood, including sexual abuse, distant parents, and problematic family life. *Id.*

It is apparent from the defense witnesses called during the penalty phase that the defendant's trial counsel more than adequately investigated this case for mitigating evidence. This investigation clearly resulted in the introduction of a variety of mitigation evidence, which was detailed above. Thus, the defendant cannot show that failure to investigate and/or present the conditions of his juvenile incarceration is enough to overcome the strong deference afforded trial counsel.

The *Strickland* case effectively outlines the standard for determining whether a defendant facing the death penalty was actually prejudiced by trial counsel's ineffectiveness:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. **Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.** Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland v. Washington, 466 U.S. at 695-96, 104 S. Ct. at 2069 (emphasis added).

Taking this standard of review into account, the question is whether or not the defendant has shown that the outcome of the penalty phase would have been different in light of this evidence. Adding evidence of the conditions of the defendant's juvenile incarceration would not have appreciably changed the way the jury weighed the aggravating and mitigating factors in determining the proper sentence. The jury unanimously found three aggravating factors: (1) that the defendant was engaged in perpetrating an aggravated rape during the murder, (2) that the four-year-old victim was under the age of 12, and (3) that the offense was committed in an especially heinous, atrocious, or cruel manner. (Trial Record Vol. 58 of 60, 11/8/04 Tr., pp. 272-275). It is difficult to imagine that this same jury would have found that evidence of the conditions of the defendant's juvenile detention somehow mitigated these heinous actions such that it would warrant life in prison rather than death.

III. CUMULATIVE ERRORS OF THE TRIAL COUNSEL

Cumulative error also affords no relief to the defendant. In *State v. Manning*, 2003-1982 (La. 10/19/04), 885 So.2d 1044, the Louisiana Supreme Court addressed a defendant's claim of cumulative error. The *Manning* Court noted numerous previous decisions which held that harmless errors, no matter how plentiful, do not combine in such a fashion that they constitute reversible error. *Manning*, 885 So.2d at 1110. The same decision is appropriate in this case, except that no errors actually occurred, even those which can be deemed harmless.

The Louisiana Supreme Court has previously rejected the "cumulative error" doctrine. *State v. Draughn*, 2005-1825 (La. 01/17/07); 950 So.2d 583, 629. In *State ex rel. Blank v. Cain*, 2016-0213 (La. 05/13/16); 192 So.3d 93, 102-103, the Louisiana Supreme Court noted that despite its previous analysis of cumulative error claims, it has never supported them. In that case, the Louisiana Supreme Court stated that where the defendant could not establish prejudice from the asserted mistakes, he could not demonstrate "that their combined effect entitles him to relief." *Blank*, 192 So.2d at 103, citing *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) ("twenty times zero equals zero").

IV. THE STATE'S EVIDENCE

A. THE TESTIMONY OFFERED BY THE STATE AT THE APRIL 18, 2017 HEARING WAS ENTIRELY IRRELEVANT TO THE QUESTION OF

WHETHER PETITIONER RECEIVED CONSTITUTIONALLY INEFFECTIVE REPRESENTATION AT TRIAL.

While the defendant would clearly like it to be otherwise, the testimony of the two prosecutors who tried this case, former Calcasieu Parish District Attorney and current Assistant District Attorney Robert R. "Rick" Bryant and First Assistant District Attorney Cynthia S. Killlingsworth, was highly relevant and compelling. Both are prosecutors of considerable experience, including in capital cases. They both testified about the incredible strength of the State's case, and the valiant defense that the defendant received.

Mr. Bryant discussed his capital trial experience, and the fact that he is the lead capital prosecutor in Calcasieu Parish. (PCR hearing, Tr. pp. 114-115). He noted that while in this case the defense attorneys had six months and a retrial to work from in preparation, in another case he tried, the Leslie Dale Martin case, the defendant was executed and his defense attorney, who was not experienced, had a month or less to prepare for trial. (PCR hearing, Tr. pp. 117-118). He noted that the fact that these defense attorneys had all the information from the first trial was a great advantage to them. (PCR hearing, Tr. p. 118). Mr. Bryant, who has tried 75 to 100 murder trials in his career, characterized the evidence in this case as "overwhelming." (PCR hearing, Tr. p. 120). As he detailed the evidence, that fact was made clear. (PCR hearing, Tr. pp. 120-122). Mr. Bryant also testified about the considerable work the defense put into the penalty phase of this case. (PCR hearing, Tr. pp. 124-125).

First Assistant District Attorney Cynthia S. Killingsworth testified about the number of pretrial motions that Judge Ware filed for the defense before the second trial. (PCR hearing, Tr. pp. 129-129). She also testified that with regard to the second trial, the defense absolutely had an advantage with the retrial. (PCR hearing, Tr. p. 131). Mrs. Killingsworth also testified that the fact that the wrong confession tape was played for the jurors was a mistake that Judge Ware could not have possibly anticipated because she did not do so. When she realized that the wrong tape---the unredacted version---was being played, she immediately alerted the trial court to the issue. (PCR hearing, Tr. p. 131). With regard to the strength of the State's case, Mrs. Killingsworth noted that in her 30 years as a prosecutor, she believed that no matter who tried this case, the only issue would be the penalty. (PCR hearing, Tr. p. 132).

CONCLUSION

The defendant has utterly failed to establish ineffective assistance of counsel at the guilt or penalty phases of his capital murder trial. His guilt was beyond all reasonable doubt, and his death sentence was amply warranted. It was proof of justice, not defense attorney incompetence. His defense attorneys did a commendable job representing him at a trial where his guilt was certain and his life and actions warranted the ultimate punishment. Therefore, the State respectfully requests that this Honorable Court deny the defendant's post conviction relief application claims regarding ineffective assistance of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been sent by email and hand delivery to the Honorable Judge G. Michael Canaday, 14th Judicial District Court, 1001 Lakeshore Drive, 3rd Floor, Lake Charles, Louisiana, 70601, and has been sent by email and certified mail to defense counsel Mr. Gary P. Clements, Capital Post-Conviction of Louisiana, 1340 Poydras Street, Ste. 1700, New Orleans, LA 70112, on this 21st day of June, 2017.

CARLA S. SIGLER