No. 18-7693

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN DRESSNER,

Petitioner,

v.

DARRYL VANNOY, WARDEN,

Respondent,

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW
(restated)

Did the Louisiana Supreme Court err in upholding the post-conviction court's judgment that, after considering the large amount of psychiatric, psychological, and psycho-social evidence presented at trial and comparing it to the proposed psychological evidence not offered at trial, Petitioner's trial counsel was not ineffective?

Did the Louisiana Supreme Court err when, in a per curium opinion considering eleven ineffective assistance of counsel claims where it found no ineffective assistance of counsel, it held that Petitioner had not shown "that the result would have been different" as to one claim but stated the as test whether "there was a reasonable probability that he would have prevailed on the claim" for another claim and stated that Petitioner had "failed to make a showing of prejudice" on yet another claim?

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CONSTITUTIONAL PROVISION

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The state district court's *Order* denying post conviction relief on January 12, 2018 is attached as Petitioner's Appendix B. The Louisiana Supreme Court denied Dressner's application for supervisory writs to review that judgment in a *per curiam* decision on October 29, 2018. *State v. Dressner*, 18-0828 (La. 10/29/18) 255 So.3d 537, attached as Petitioner's Appendix A. This was the final judgment at the state court level.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

At 10:30 p.m. on the night of June 6, 2002, Petitioner and an accomplice forced their way into the residence of Paul and Shannon Fasullo, who were at home with their two-year-old daughter, Samantha.[1] *State v. Dressner*, 45 So.3d 127, 131 (La. 7/6/10), *reh. denied*, (La. 9/03/10). Paul Fasullo struggled with Dressner and ultimately sustained multiple stab wounds, lacerations, and abrasions to his chest, upper neck, and head areas; one of the chest wounds proved fatal. *Id.* at 131, 134-135. After being attacked in the doorway to the residence, Shannon Fasullo fled into a bedroom, dialed 911, and screamed her address to the operator before Petitioner and his accomplice renewed their attack on her, at which point she tossed the cordless phone under a bed

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[1] At the door of the residence, Petitioner had initially asked for their nephew, saying that he wanted to purchase drugs. (R. 3155). However, planning ahead, Petitioner had grabbed two knives from a friend's girlfriend's house earlier that evening and armed himself and Parker.

while the 911 call was still engaged. *Id.* at 131. Petitioner then straddled her and sliced her throat, cutting her three to four times in that area. *Id.* at 132. They struggled further, and Petitioner slit Shannon's face open from her forehead down to her cheek and her left eye down to her lip, which was gashed in two. *Id.* at 132. Eventually, she fled into the bathroom, using her feet pressed to the sink to keep the door closed; however, Petitioner and his accomplice kicked the door until the frame broke. *Id.* Shannon was stabbed twice more in the arm before Petitioner and his accomplice fled in fear that the police would arrive. *Id.* Shannon suffered over twenty stab wounds to her back, scalp, face, neck, upper body, arms, and legs and was discovered lying on the bathroom floor in a pool of blood and vomit by a deputy responding to the 911 call. *Id.* at 132-133. The Fasullo's two-year-old daughter, her clothes and face bloodstained, was sitting on the sofa looking toward the body of her dead father when the police entered the residence. R. 3649.

Shannon was able to identify Petitioner because he was someone she knew. *State v. Dressner*, 45 So.3d at131, 133. An arrest and search warrant were issued. *Id.* at 133. Petitioner was found attempting to clean blood from his car and clothing. *Id.* at 133-134. DNA testing revealed that Shannon Fasullo could not be excluded as the donor of this blood. *Id.* at 134. Eventually, Petitioner provided a detailed recorded statement in which he admitted inflicting the fatal stab wound to Paul Fasullo's chest. *Id.* Another individual, who was waiting outside in the Petitioner's car, also testified against Petitioner. *Id.* at 130-131, 134.

Petitioner was indicted with one count of first degree murder, a capital offense, in violation of La. R.S. 14:30, and a jury trial was held May 17-23, 2004. *Id.* at 129. Petitioner Dressner was unanimously found guilty as charged of the first degree murder of Paul Fasullo. *Id.* Following the penalty phase of the trial, the jury unanimously returned a verdict of death, and Petitioner was subsequently sentenced to death in accordance with the jury's verdict. *Id.*

Summary of Penalty Phase Evidence

In its penalty phase case, the State introduced the record of the proceedings and certified copies of Dressner's juvenile delinquency adjudication for a simple robbery. *Id.* at 151. It also offered certified copies of a prior conviction for the simple robbery of Lawson Knight, along with brief testimony from Mr. Knight and the officer who found Petitioner rifling through the unconscious man's pockets.[2] Petitioner's trial counsel called eight witnesses to testify during the penalty phase, including family members, and mental health experts.

Expert Testimony - Dr. Wiley

Justin Wiley, Ph.D., testified as an expert in the field of clinical psychology. R.3718. In connection with his testimony, Dr. Wiley interviewed Petitioner's family

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[2] Knight was struck in the back of the head, and fell to the ground. *State v. Dressner*, 45 So.3d at 152, fn. 43. Sergeant Gray detained the defendant and another man after observing them going through Mr. Knight's pockets as he lay on the ground, apparently unconscious. *Id.* Dressner was found to be in possession of a screwdriver and Mr. Knight's wallet. *Id.*

members and reviewed Dressner's educational records, juvenile correctional records, and records from treatment facilities. R. 3728. Dr. Wiley conducted a clinical interview of the Petitioner over two, forty-five minute sessions, and performed a mental status examination. R. 3727. Dr. Wiley testified that he also consulted with Dr. Larry Carver, a neuropsychiatrist, and Dr. Daphne Glindmeyer, a forensic psychiatrist and adolescent psychiatrist. R. 3730. In light of all of the information, including past diagnoses, Dr. Wiley diagnosed Petitioner with Bipolar Affective Disorder II, polysubstance dependence, and ADHD by history. R.3730-3731.

Dr. Wiley testified that there is a history of mental illness in the defendant's family, and explained that he believed that the disorders have a genetic component. R.3741, 3747. He noted that the defendant's father, Allan Dressner, Sr., is taking anxiety medication and his brother, Eric Dressner, suffers from depression and suicidal ideation. R. 3741, 3743. He also testified that in the last four years, the defendant's mother had developed a panic disorder, which is a type of anxiety disorder. R. 3745. Dr. Wiley also testified that the defendant's paternal grandmother was diagnosed as suffering from paranoid schizophrenia, attempted suicide on more than one occasion, underwent electroconvulsive therapy, and was hospitalized for lengthy periods of time. R. 3742.

According to Dr. Wiley, Dressner was anoxic (oxygen deprived) at birth.[3] R. 3749. He explained to the jury that anoxia affects the brain's cortex which, if

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[3] Petitioner's father testified that the Petitioner was a "blue baby." (R. 3886).

compromised, has a fairly significant impact on how someone behaves in terms of logical thinking, good judgment and the super-ego. R. 3749. Dr. Wiley also related that the defendant suffered an episode of hemiparalysis after falling out of a tree at approximately six or seven years of age. R. 3750-3751. Dr. Wiley testified that it was impossible to determine whether the defendant actually suffered head trauma in that fall because to his knowledge no scan of the defendant's brain was performed. R. 3751-3752.

Concerning the diagnosis of ADHD, Dr. Wiley testified that ADHD results in progressive academic and social deficits. R. 3754. It is also associated with aggression and impulsiveness. R. 3756. Moreover, poly-substance abuse can increase the impulsivity associated with ADHD. R. 3759. Dr. Wiley testified that Petitioner began his substance abuse around age eleven, when he began drinking Nyquil. R. 3760. Then, Petitioner used marijuana with quick progression, from age eleven to approximately eighteen, to harder drugs such as cocaine and Ecstasy. R. 760.

With regard to the diagnosis of bipolar disorder, Dr. Wiley testified that bipolar disorder is a mood disorder in which a person's mood varies between depression and mania. R. 3761. Manic people have inflated self-esteem and are grandiose. *Id.* They can also become very irritable and angry. R., 3761. Dr. Wiley testified that the defendant was hospitalized several times. R. 3763. Petitioner also received intensive outpatient treatment, and numerous treatments for substance abuse. R., 3763.

With regard to his final diagnosis of borderline intellectual functioning, Dr. Wiley was questioned concerning the daily effects of this condition, coupled with drug

and alcohol use and a failure to take prescribed medications. He said that borderline intellectual functioning affects things like the ability to hold a job, being responsible for taking your medicine, relationships with other people, and ability to continue with your education. R. 3768-3769.

Dr. Wiley testified that Petitioner spoke with him about the night Paul Fasullo "was killed" and expressed great remorse, stating he wished he had never done it, and going through scenarios like "If only I hadn't done this, or if only I hadn't done that." R. 3770

On cross-examination, Dr. Wiley testified that he could offer no opinion regarding whether the defendant's stated mental defects made him a danger to people; however, Dr. Wiley conceded that one of Petitioner's previous commitments to a lock-down unit stemmed from his assaultive behavior to his mother. R. 3791. Dr. Wiley testified that Dressner is mentally ill and, in response to the prosecutor's questioning, Dr. Wiley testified that Petitioner has some responsibility for his actions, stating "He's responsible, but his illness makes it difficult for him to be responsible at times." R. 3796-3796.

On redirect, Dr. Wiley testified to the significance of the records he reviewed, some of which were from in-patient facilities where staff were able to watch the defendant "24 hours a day, seven days a week, for a month, month and a half." R. 3806. Dr. Wiley testified that his observations of Petitioner, interviews with Petitioner, and Petitioner's family history were not inconsistent with what was contained in the records he reviewed. R. 3807.

Expert Testimony - Dr. Vyas

Dr. Sankat Vyas a licensed physician, board certified in forensic and general psychiatry, testified as an expert in the field of psychiatry. R. 3818, 3821. Although he only met with Petitioner on one occasion, he testified that that was often the usual practice and the standard of care. R. 3822. After interviewing Petitioner, conducting a mental status examination, and reviewing educational, psychiatric, and medical records, Dr. Vyas concluded that Dressner has Bipolar Disorder, Type II; Attention Deficit Disorder by history; and polysubstance dependence without physiological dependence. Furthermore, based upon his conversation with Petitioner and prior records, he concluded that his IQ was in the low average range. R. 3823-3825.

Dr. Vyas,[4] who testified that he did a fellowship in child and adolescent psychiatry and treats children/adolescents with ADHD, explained that ADHD is a genetic and neurochemical disorder. R. 3827. People who have it are easily distracted, very impulsive, and can be hyperactive as well. R. 3825. He testified that he believes Petitioner's ADHD is a "mixed disorder," incorporating inattention and hyperactivity. R. 3827.

Dr. Vyas further testified that Bipolar Disorder is what is commonly known as manic-depression. R. 3828. Symptoms of Bipolar Disorder, Type II, are three of the

[4] When asked if he had experience dealing with children with ADHD, Dr. Vyas replied: "Yes. I've done a fellowship in child and adolescent psychiatry, as well as, currently treat children [adolescents] with this disorder." R. 3827. Dr. Vyas described ADHD as a genetic and neurochemical disorder. R. 3827.

following within a four-day period: inflated self-esteem of grandiosity; decreased need for sleep at nighttime; pressured speech;[5] flight of ideas;[6] and distractibility. R. 3829. Dr. Vyas testified that it is also associated with an increase in goal-directed activity.[7] R. 3830. Dr. Vyas testified that mania in Bipolar Disorder Type II is really hypomania instead of mania. R. 3831.[8] Dr. Vyas related these problems to a neurochemical disorder in the brain. R. 3833.[9]

According to Dr. Vyas, these illnesses often begin in childhood and in Petitioner's case began with Attention Deficit Disorder. R. 3837. Dr. Wiley testified that problems

[5] "Pressured speech" refers to talking quickly, without being able to think about what one is saying. R.,Vol. 16, p. 3829.

[6] Dr. Vyas described "flight of ideas" as going from one thought to the next without any connecting bridge or common sense. R., Vol. 16, p. 3829.

[7] Dr. Vyas explained that increased goal-directed activity meant that once a person begins some task, they are not thinking about the next step, they just don't stop. (R. 3830). He stated that this can include engaging in risk taking impulsive behaviors without really thinking about how it will affect their lives or the lives of those around them. R. 3830.

[8] Dr. Vyas distinguished Bipolar Disorder, Type II, from the more serious Bipolar Disorder, Type I. R. 3831. To be diagnosed with Type I, one also must exhibit three of the described symptoms, but must exhibit them for a period of a week. R. 3831. Dr. Vyas also described symptoms of depression, but later stated that he believed the defendant was in a hypomanic rather than a depressed state at the time of the instant offense. R. 3832-3833; 3854.

[9] Dr. Vyas offered several description of the manner in which the neurochemical disorder manifests itself, which generally tended to suggest that the brain chemicals do not work to put the "brakes" on an adrenaline/fight or flight response in the same manner as they do in persons not suffering from Bipolar Disorder. R. 3834-3835,.

caused by Attention Deficit Disorder increase with each year of school until around fourth or fifth grade, where the child eventually finds himself an entire year behind his peers. R. 3839. At that point, the child is labeled as a bad kid, performs poorly in school, and associates with bad peers, creating problems between the child and his parents. R. 3829.

With respect to the substance abuse, Dr. Vyas testified that one aspect of bipolar disorder and attention deficit disorder is the tendency to "self-medicate" with drugs and alcohol to feel better R. 3841. Also, riskier behavior is associated with bipolar disorder. R. 3842.

After reviewing the police report and talking with Petitioner, Dr. Vyas testified that it is his opinion that Petitioner was suffering from a major mood disorder at the time of the offense that could have affected his actions on that night. R.3845. He testified that he was not saying that Petitioner did not know right from wrong, but that this disorder caused him to have one poor judgment which led to another, without really thinking about the long-term consequences of his actions or what the next action in the series of steps was going to be. R. 3847. He also said that he believed the Petitioner's capacity to conform his conduct to the requirements of the law would have been impaired due to his untreated bipolar disorder and prior history of ADHD. R. 3847. Dr. Vyas related that Petitioner expressed remorse in a manner which appeared to indicate genuine remorse. R. 3849.

Dr. Vyas believed Petitioner was having a hypomanic episode at the time of the crime. R.3854. On cross-examination, Dr. Vyas acknowledged that even someone with

what he described as Petitioner's "low average intelligence" could appreciate the fact that if he stabbed someone in the heart that he would die, however, Dr. Vyas indicated that he did not believe Petitioner was thinking about long-term consequences such as whether he could go to jail, or bad things might happen to him. R. 3855, 3856. The prosecutor pointed out that Petitioner had to make numerous decisions in the instant case, such as the decision to take the knives from one house, the decision to enlist and arm another person, the decision to drive to the Fasullos, and the decision to speak casually to Shannon Fasullo at the door until she turned around. R. 3857. The prosecutor asked Dr. Vyas whether Petitioner's "impulsivity is going to block out even the scheming part of his crime?" *Id.* Dr. Vyas explained that from what Petitioner told him, he "did not think [Petitioner] understood that this could have resulted in the [victim's] death and all the things that followed after that. It [is] just - - one poor judgment led to one bad decision followed by another." R. 3858.

In response to the prosecutor's question, Dr. Vyas admitted that he reviewed the 911 tape, with its statements about "stab her in the neck" and "hurry up help me kill this bitch" and "let's get out of here, the police are coming." R. 3859-3860. He testified that "I'm not saying he didn't realize what he was doing was bad, but the poor decisions based on the impulsivity is what, kind of – was the fuel that, kind of, led him down this path - - that helped lead him along this path. R.3860.

Dr. Vyas said, "Once bad things started happening, he got revved up and bad decisions kept following after that, is more of the way that I saw it." R. 3866. Asked about whether once Petitioner got on a roll he just couldn't help himself, Dr. Vyas said,

"No. He could help himself, but this just led to bad decisions being pushed along further." R. 3866. He said, "My only point in this is that, given all these bad things that he knew he was about to do or was doing at the time, the action between hitting Paul Fasullo's wife over the head with the bottle and the actions that happened after that, were all on a very high, kind of - - very high arousal; there was a lot of excitement going on. And when you've got a lot of excitement and you've got one of these disorders, you, again, act first and think about how horrible, or bad, it is later." R.3868.

Family Testimony

Allan Dresser. Petitioner's older brother, Allan Dressner, He noticed a change in Petitioner when he began to socialize with the worst people in school. *Id.* at 150 Petitioner had a bad temper and, if he did not get his way, sometimes he would have a temper trantrum. *Id.* at 150. Allan recalled Dustin as becoming increasingly more disobedient to their parents and rebellious. *Id.* Allan testified that Petitioner had told him that he was very sorry for what happened to the Fasullos, and for his own family. R. 3699-3700. On cross-examination, Allan conceded that Petitioner had admitted what he had done and that he knew it was wrong. R. 3706-3707.

Allan Dresser, Sr. Petitioner's father, Allen Dressner, Sr., testified that the defendant was placed in the neonatal ICU for three days after his birth because he suffered a lack of oxygen. *State v. Dressner*, 45 So.3d at 150, fn. 38. Mr. Dressner testified that Petitioner was a sensitive child. *Id.* at 150. Petitioner was bullied by other students in elementary school because of his small size. *Id.* He and his wife

sought help for Petitioner within the school system and also through family counseling. R. 3891-3892. When it was recommended that Petitioner, who was drinking Nyquil, obtain "further help," his parents saw to it that he was hospitalized at DePaul Behavioral Health Clinic, where he remained until their insurance benefits were exhausted six to eight weeks later. R. 3892-3893. The same thing happened at Methodist Psychiatric Pavillion. R. 3894. Petitioner's father testified that a doctor at DePaul Behavioral Clinic told him that Petitioner was bipolar. R. 3893. When the defendant was on his medications, everything was under control. R. 3895. However, a lot of the medications had side effects and the doctors had to prescribe different medications to try to find the right ones. R. 3895.

Post Conviction

In 2014, subsequent to the appointment of counsel, Petitioner filed his *Second Supplemental and Amended Petition for Post-Conviction Relief* (*Second Supp. PCR*) raising the claim that he received ineffective assistance of counsel in the penalty phase of his capital trial relative to the alleged failure to request neuropsychological testing, among other claims.[10] In support of this allegation, Petitioner included the following documents as attachments to his *Second Supp. PCR*: Summary of Neuropsychological Consultation (Report of Dr. Tony Strickland, Ph.D. Clinical Psychology); Neuropsychological Evaluation (Report of Robert D. Shaffer, Ph.D. Clinical

[10] Together, Petitioner's counseled *First* and *Second Supplemental Petition(s) for Post Conviction Relief* presented some sixteen claims for relief, including eleven ineffective assistance of counsel claims.

Psychology); Comprehensive Psychiatric Services of Atlanta (Report of Dr. Agharkar, M.D., Psychiatrist). *Second Supp. PCR*, Exs. 44, 47, 55.

According to Dr. Shaffer's report, he diagnosed Petitioner with "Neurocognitive Disorder due to perinatal brain trauma, Bipolar Disroder, Attention Deficit Hyperactivity Disorder, Impulsive type and Substance Use Disorder, marijuana and alcohol." *Second Supp. PCR,* Ex. 47, p. 6. According to Dr. Shaffer, Petitioner's behavior during the offense could "be understood in light of his Neurocognitive Disorder" in that individuals with "dysregulation from anoxia at birth, have difficulty halting an ongoing sequence of behavior, considering new information, and choosing behavior based on inevitable consequences." *Id.* at p. 7. Otherwise, "Mr. Dressner could have interrupted the sequence of behaviors and considered a safer course of action." *Id.*

Dr. Strickland's report reflected a "diagnostic impression of "cognitive disorder not otherwise specified." *Second Supp. PCR,* Ex. 44, p. 34. He concluded that Petitioner's "ability to employ alternative conflict resolution strategies at the time of the instant offense" was impacted, and that Petitioner "was compromised in his ability to plan, employ adequate self-regulation, social/interpersonal skills, use of self-direction, and perform functional academics and work." *Id.*

Dr. Agharkar's report indicates that he found evidence that Petitioner has been suffering from symptoms consistent with the following: "Bipolar II Disorder, Minor Neurocognitive Disorder, and Alcohol, Marijuana, and Cocaine Use Disorders," and his "poor performance on various cognitive screening questions indicate soft signs of

neurological or organic brain damage which impair his ability to think in a rational and organized manner." *Second Supp. PCR,* Ex. 55, p. 5. Due to his age (19) at the time of the offense, Dr. Anghakar wrote that the area of Petitioner's brain responsible for "decision-making, effective weighing and deliberating, impulse inhibition and foreseeing the future consequences of [his] behavior," would not yet have been fully developed, and Brain damage would have had a "synergistic effect" on such deficits. *Id.* Further, Petitioner's attempts "to self medicate and treat his condition" with alcohol, marijuana, and later cocaine" "would serve the role of 'gas on a fire.'" *Id.* at 7.

After considering the totality of the circumstances, the post-conviction trial court determined that Petitioner's experts had relied solely on the psychological testing that was performed after petitioner had been incarcerated for nearly ten years on death row. Pet'r. App. B. 5. This concerned him. *Id.* at n. 23. Furthermore, Petitioner had failed to provide any actual medical records that verified that he had ever had any brain injuries, and diagnostic imaging of petitioner's brain had ever been performed. *Id.* at 5. Thus, the evidence presented of organic/traumatic brain damage was insufficient, unreliable, and speculative. *Id.* The court also considered "petitioner's actions in committing the offenses for which he was convicted and his calculated actions immediately following the crimes." *Id.* He found these actions to be "counteractive to the allegations and assumptions presented in [Petitioner's] claim." *Id.* Furthermore, he determined that Petitioner's two trial experts had thoroughly covered petitioner's bipolar and ADHD history. *Id.* He noted that the jury had learned of petitioner's low intelligence, of his experience as a baby with anoxia and the effects

thereof, of his family history of mental illness and the genetic component of that, and of the hospitalizations and treatments he had received throughout his life. *Id.* He concluded that trial counsel had presented thorough mitigating evidence as to petitioner's mental health and was, thus, not deficient during the penalty phase. *Id.* Thus, Petitioner was not prejudiced by his trial counsel's representation.

In a *per curiam* decision denying Petitioner's subsequent application for supervisory writs, the Louisiana Supreme Court set forth the standard applicable to ineffective assistance of counsel claims as follows:

> 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), a reviewing court must reverse a conviction if the petitioner establishes (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. When the substantive issue that an attorney has not raised has no merit, then the claim that the attorney was ineffective for failing to raise the issue also has no merit.

Pet'r. App. A, 6-7.

With regard to the penalty phase of a capital trial, the Louisiana Supreme Court recognized that "[a] defendant at the capital penalty phase is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life." *Id.* at 11. It noted that a finding of ineffective assistance of counsel at the penalty phase requires a showing that counsel failed to undertake "a reasonable investigation [which] would have uncovered mitigating evidence," and that failing to put on the available mitigating evidence "was not a tactical decision but reflects a failure by

counsel to advocate for his client's cause," which resulted in "actual prejudice." Pet'r. App. A, at 12.

After reviewing Petitioner's claims and the record, the Louisiana Supreme Court noted that "[w]hile the reports state that Dressner might have issues with impulse control and his ability to exercise proper judgment, he fail[ed] to attach actual medical records or demonstrate why this subsequent testing [was] more reliable or accurate than that conducted by his trial experts." *Id.* at 12-13.

Moreover, the court noted that the post-conviction experts' conclusions were cumulative of the almost identical evidence the two trial experts had presented to the jury. The "jury heard evidence concerning Dressner's educational, mental, social, and criminal history. ... [T]he experts indicated that Dressner had a history of Bipolar Affective Disorder, polysubstance abuse and dependency, and a history of Attention Deficit Hyperactivity Disorder. He suffered a head trauma at the age of six or seven and had previously received inpatient psychiatric treatment and intensive outpatient treatment for substance abuse." *Id.* at 12. And, of course, the post-conviction court had noted that the experts had testified regarding the Petitioner suffering from anoxia as a baby and the effects thereof.

As to the claim by Petitioner that trial counsel should have undertaken a more extensive investigation of his mental health, the supreme court found that there was nothing that raised any red flags that might have caused trial counsel to engage in further testing. *Id.* at 13. There was no showing that counsel failed to undertake a reasonable investigation that would have uncovered mitigating evidence. *Id.*

Furthermore, the fact that both of the independent experts found the exact same mental health problems undermined any claim that the experts did not have adequate time to prepare for trial. *Id.*

As the court concluded, "while Dressner now identifies different evidence that he would have had trial counsel present to the jury, he fails to carry his burden of demonstrating why trial counsel were ineffective in choosing to present to the jury what they did. He has not shown that trial counsel performed deficiently in their penalty phase representation or that the result would have been different had they presented the evidence upon which he currently relies. Trial counsel properly presented to the jury evidence of Dressner's medical history, family and social history, mental illness and cognitive impairments, and substance abuse. The district court correctly rejected this claim." Pet'r. App. A, p. 14.

REASONS FOR DENYING CERTIORARI

I. NO CONFLICTS OR UNSETTLED QUESTIONS.

There is no compelling reason for this Court to grant this petition. Petitioner has made no claim that the Louisiana Supreme Court has decided an important federal question in a way that conflicts with a decision by another state court of last resort or of a federal court of appeal. Nor has Petitioner claimed that the Louisiana Supreme Court decided an important federal question of federal law that has not been settled by this Court. Nor could he.

II. THERE IS NOTHING ABOUT THIS CASE THAT WOULD LEAD TO AN OPINION THAT WOULD HAVE ANY PRECEDENTIAL VALUE.

At most, Petitioner is asking for error correction based upon the application of the *Strickland* prejudice standard to the facts of the instant case. Moreover, as is discussed below, Petitioner's failure to establish the deficient performance prong of the *Strickland* test is otherwise fatal to his claim.

III. THIS CASE IS NOT A GOOD VEHICLE TO DECIDE THE ISSUE OF THE CORRECT PREJUDICE STANDARD

A. The Issue is Not Clearly or Cleanly Presented Because the Factual and Legal Premises Are Built on Mischaracterization and Omission.

Petitioner mischaracterizes the record in this case. For example, in his Reasons for Granting Certiorari, he says that trial counsel failed to retain a neuropsychologist to evaluate Petitioner (Pet. 4), but fails to mention that Dr. Wiley, the clinical psychologist retained by trial counsel, testified during the penalty phase that he had also consulted with a neuropsychiatrist and a forensic psychiatrist in the course of his evaluation of Petitioner. (R. 3730). Petitioner claims his history was "replete with multiple head trauma" (Pet. 4) but fails to show any evidence of head trauma other than possibly the incident of falling out of a tree at age six, which the trial expert testified about. R. 3750-3752. Petitioner claims a history of traumatic experiences of the type expected to lead to significant impairments (Pet. 4) but can cite no such "traumatic experience." He states that Petitioner's psychologist did not review all of the records (Pet. 5), but his testimony was that he reviewed them in an "expedited fashion." R. 3780. He also doesn't mention that one of the experts testified that this

length of preparation was the "standard of care" and not unusual. R. 3822. Petitioner argues that presenting testimony on organic brain disorder would have kept the prosecutor from arguing that the crime was about Petitioner's choices (Pet. 6) yet he doesn't point out anywhere in their testimony where they said organic brain disorder kept a person from being able to make choices. Petitioner claims the court "conflate[d] mental illness with brain damage" when it held that the new evidence what cumulative. Pet. 9. But the Court did no such thing, although Petitioner appears to. See further argument below. Petitioner states that "neither trial mental health expert conducted any testing of Petitioner," (Pet. 9) which is simply not true. Dr. Vyas conducted a "mental status examination," (R. 3823-3825) as did Dr. Wiley. R. 3730. Petitioner claims that the court "wholly disregard[ed] current medical standards regarding neuropsychological testing, but he does not explain to the Court what those medical standards might be.

Petitioner argues that the Louisiana Supreme Court used the wrong prejudice standard when said that Petitioner had not shown that "the result would be different" rather than saying there was a "reasonable probability" that the result would be different. Pet. 7-8. But Petitioner fails to tell the Court that, in fact, the Louisiana Supreme Court said those exact words a few pages later when considering ineffectiveness of appellate counsel. Pet'r. App. A, p. 16.

Furthermore, the record was not fully developed in post-conviction. Pursuant to LSA-C.Cr.P. art. 929, relief was denied based upon the application and answer, and supporting documents, including transcripts and other documents submitted by the

parties and available to the court. No evidentiary hearing was held. The reports of Dr. Shaffer, Dr. Strickland, and Dr. Agharkar list the records reviewed by them and do not reflect that any of them reviewed medical records of Petitioner's birth to confirm the claim that he was "axonic." Finally, Petitioner did not submit affidavits from counsel regarding their preparation, decision-making, or trial strategy.

B. Even if the Court Were to Determine that the Louisiana Supreme Court Used the Wrong Prejudice Standard, It Would Not Change the Outcome

Respondent does not believe that the Louisiana Supreme Court actually used the wrong standard of prejudice. However, even if this Court found that it did, it would not change the result in this case for two reasons: (1) that step of the *Strickland* analysis is not reached until it has been determined that counsel was ineffective and (2) had the court applied the "reasonable probability that the result would be different" standard, it would have found that there was no such probability.

First, trial counsel was not ineffective. They hired and consulted with a credentialed psychologist and psychiatrist, who consulted with a neuropsychiatrist and a forensic and adolescent psychiatrist. They spent time interviewing Petitioner and his family members and reviewing large amounts of lifelong mental health and other records. As previously discussed, trial counsel presented extensive and compelling evidence regarding Petitioner's mental health. They explained to the jury that Petitioner had an extensive history of mental illness, both personally and in his immediate family history, with numerous lengthy hospitalizations and having even been placed in lock down. They not only diagnosed him with borderline intelligence,

Bipolar Affective Disorder II, ADHD, and polysubstance dependence, they went into great detail explaining the diseases and the effects they had on Petitioner. Both experts knew that Petitioner had fallen out of a tree and possible suffered a brain injury. As far as the record reflects, neither of them, however, in their expert medical opinion, felt that a neuropsychologist needed to be added to the team to evaluate Petitioner nor recommended that to trial counsel. It is not unreasonable or deficient for trial counsel not to seek another expert when he's consulted with four and none of them made such a recommendation. Trial counsel were not ineffective so there was no need to determine if Petitioner was prejudiced or not, which was what the court found. It's determination that Petitioner was not prejudiced was a superfluous finding.

Second, there was not a reasonable probability that not hiring a neuropsychologist or presenting evidence of organic brain disease would have made a difference in the verdict. Petitioner argues that such experts or evidence would have told the jury that Petitioner had "deficits in his ability to plan, and challenges in his ability to exercise adequate judgment and impulse control" and that these impairments "adversely impacted his ability to employ alternative conflict resolution strategies." Pet. 5. He argues that through the new experts, the jury would have also learned that the anoxia at birth could cause someone to "have difficulty halting an ongoing sequence of behavior, consider new information, and choose behavior based on inevitable consequences." Pet. 5-6. But this is exactly what Petitioner's trial experts told the jury.

The trial experts discussed the fact that Petitioner possibly had brain damage from anoxia that he suffered at birth which could affect Petitioner's logical thinking,

good judgment, and super-ego. R. 3748-3750. They told them about Petitioner's fall from a tree at age 6 in which he could have suffered brain injury. R. 3750-3751. They discussed how ADHD causes social deficits and is associated with aggression and impulsiveness and that polysubstance abuse can increase the impulsivity. R. 3756. Dr. Vyas' testimony was particularly compelling. He testified that ADHD is a biological condition, a neurochemical disorder. R. 3827. It causes people to be easily distracted and very impulsive. R. 3825. He testified that Bipolar Disorder, a neurochemical disorder in the brain (i.e. brain damage), is associated with an increase in goal-directed activity, which meant that once a person begins some task, they are not thinking about the next step, they just don't stop. R. 3830, 3833. He stated that this can include risk-taking impulsive behaviors. *Id.*

Dr. Vyas tied Petitioner's mental health problems directly to the commission of the crime at issue. He testified that Petitioner was having a hypomanic episode at the time of the crime which kept him from thinking about long-term consequences such as whether he could go to jail, or bad things might happen to him. R. 3845-3847). He said he did not think Petitioner understood that his actions could have resulted in the victim's death and all the things that followed after that. R. 3858.

No jury, considering the viciousness of the attack on the Fasullo's, with their two-year old daughter watching, was going to decide Petitioner's fate differently just because his behavior - the same behavior - was attributed to organic brain disease rather than Bipolar Disorder, low-intellectual functioning, possible effects of axonia, and/or ADHD as was presented at trial.

IV. THE COURT BELOW WAS RIGHT: PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Ineffective assistance of counsel claims are analyzed under the two prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In order to successfully urge an ineffective assistance of counsel claim, Petitioner must demonstrate both that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697, 104 S.Ct. 2052 (1984).

The proper standard for judging counsel's performance is that of reasonably effective assistance, considering all the circumstances. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Appellate scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. *Id.* at 689, 104 S.Ct. at 2065. The defendant has the burden of rebutting the strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgement." *Id.* at 690, 104 S.Ct. 2052. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," and not whether it deviated from best practices or most common custom. *Id.* at 690, 104 S.Ct. 2052. The burden to rebut that strong presumption rests with the defendant. *Id.* at 687, 104 S.Ct. 2052.

With regard to investigations, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. However, it is "rare" that constitutionally competent representation will require "any one technique or approach." *Harrington v. Richter*, 562 U.S. 86, 106 131 S.Ct. 770 (2011). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Strickland*, 466 U.S. at 691.

If a defendant shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052 A "reasonable probability" is probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052. It is not enough "'to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052. Moreover, when challenging a death sentence, the petitioner must show that "'there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.'"

In the instant case, Petitioner contends that his Sixth Amendment right to the affective assistance of counsel in the penalty phase of his capital trial was violated when defense trial counsel did not retain a neurologist to perform testing or evaluation for possible organic brain damage based upon so-called "red flags" presented by a

reported history of anoxia, head trauma, and self-medication. However, the Louisiana Supreme Court did not err in determining that Petitioner failed to establish either prong of the *Strickland* test with respect to this claim.

In support of his contention that defense trial counsel performed deficiently with regard to the penalty phase investigation, Petitioner argues that defense trial counsel ignored "red flags" allegedly pointing to a need to perform further testing. However, Dr. Wiley, whose purpose was to diagnose and to make recommendations relative to Dustin Dressner, testified that he did not believe further psychological testing was needed in this case after examining the petitioner, interviewing family members, and reviewing the aforementioned educational, mental health, substance abuse treatment, and corrections records, and. consulting with Dr. Larry Carver (a neuropsychiatrist) and Dr. Daphne Glindmeyer (a forensic psychiatrist and adolescent psychiatrist), R. 3729-3730, 3813.

Considering Petitioner's allegations, all of the circumstances, and taking care to eliminate the distorting effects of hindsight while affording deference to counsel's judgments, defense trial counsel did not perform deficiently with regard to the issue of further testing in the penalty phase. Petitioner's failure to establish the first prong of the *Strickland test* was fatal to his claim that he received ineffective assistance of counsel in the penalty phase of the trial, and the Louisiana Supreme Court was not required to address the prejudice prong of the test.

Even assuming *arguendo*, that Petitioner established that defense trial counsel performed deficiently with regard to the issue of further testing, the record does not

demonstrate that the Louisiana Supreme Court applied an incorrect prejudice standard to the claim. While Petitioner's cites the court's statement that Petitioner had not shown "the result would be different" (Pet. 7-8) rather than saying there was a "reasonable probability" that the result would be different, the court said those exact words a few pages later when considering ineffectiveness of appellate counsel. Pet'r. App. A, p. 16.

To the extent that Petitioner attempts to demonstrate prejudice by highlighting conclusions from the reports obtained during post-conviction proceedings to argue what "the jury would have been told" had defense trial counsel retained these professionals prior to the trial in this matter, the State submits that, as has been discussed in Section III(2), what it was told is substantially similar to what Petitioner contends it should have been told with regard to the effects of alleged "organic brain damage."

Petitioner also contends that "[w]ithout the presentation of Petitioner's neuropsychological deficits, the State had an unfettered ability to argue to the jury in its penalty phase closing that this case was about Petitioner's "choices." Pet. 6. However, it must be understood that Petitioner made numerous decisions in the context of the instant offense - to take knives from one location to another, to enlist and arm another person, to drive to the Fasullo's, to speak to Ms. Fasullo casually until she turned away from the door, to enter and attack the Fasullos with the 911 tape reflecting statements like "stab her in the neck," "hurry up help me kill this bitch," and "let's get out of the here the police are coming," to flee from the scene and then extricate his vehicle from a ditch when it ran off of the road, and to clean his clothes

and car on the following day - all of which speak to his planning, memory, and decision-making abilities. State v. Dressner, 45 So.3d 127, 149. Considering the State's evidence and the fact that substantially similar testimony was presented respecting Petitioner's inability to conform his conduct, control his impulses, and consider potential consequences of his actions as a result of anoxia, Bipolar Disorder, polysubstance abuse and ADHD, there is no reasonable probability that the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death if the experts consulted by the defense post-conviction had testified to the conclusions in their reports.

Based on the foregoing, the State respectfully submits that there is no merit to Petitioner's claim that he received ineffective assistance of counsel in the penalty phase of his capital trial in violation of the Sixth Amendment, and certiorari should be denied.

CONCLUSION

The petitioner has failed to show that any of the issues raised herein necessitate the granting of certiorari. The State of Louisiana requests that, for the foregoing reasons, the petition for writ of certiorari be denied.

Respectfully Submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

DUSTIN DRESSNER,

Petitioner,

v.

DARRYL VANNOY, WARDEN,

Respondent,

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court

CERTIFICATE OF SERVICE

I hereby certify that the Respondent's Brief in Opposition to the Petition for Writ of Certiorari was served upon opposing counsel Mathilde J. Carbia and Charlotte Faciane, Capital Post-Conviction Project of Louisiana, 1340 Poydras St. Suite 1700, New Orleans, Louisiana 70112 by United States Priority Mail, this the 3rd day of May, 2019.

Respectfully submitted,

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