No. 19-5807

In the Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner

vs.

DARREL VANNOY, WARDEN

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S APPENDIX A TO BRIEF IN OPPOSITION
STATE POST CONVICTION COMMISSIONER'S RECOMMENDATION

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THEDRICK EDWARDS	* NUMBER: 07-06-0032 SECTION: VI
	* 19TH JUDICIAL DISTRICT COURT
VS.	* PARISH OF EAST BATON ROUGE
N. BURL CAIN, WARDEN	* STATE OF LOUISIANA

COMMISSIONER'S RECOMMENDATION

The Petitioner, Thedrick Edwards, was charged by grand jury indictment with armed robbery (five counts), aggravated rape, aggravated kidnapping (two counts), and attempted armed robbery.[1] He entered a plea of not guilty. The Petitioner's motion to suppress confession was denied.[2] A jury subsequently found the Petitioner guilty as charged on all counts, except the attempted armed robbery charge, for which he was acquitted.[3] On February 7, 2008, the Petitioner was sentenced to thirty years without benefit consecutive on each armed robbery count[4]; life imprisonment without benefit for aggravated rape and each count of aggravated kidnapping, all consecutive to each other and to the other sentences.[5] On June 12, 2009, the First Circuit Court of Appeal affirmed the Petitioner's convictions and sentences[6] and writs were denied on December 17, 2010.[7]

On or about December 15, 2011, the Petitioner, through Counsel, filed the instant application for post-conviction relief alleging the following constitutional errors: **1) Confrontation Rights Were Violated (by expert witness's reliance on another individual's findings in Rape Kit); 2) Improper Comments by Prosecutor During Closing Arguments; 3) Louisiana Jurisprudence Allowing Conviction Without Unanimous Jury Verdict is Unlawful; 4) Louisiana Jurisprudence Prohibiting Use of Identification Experts Violates Due Process Rights; 5) Failure of Prosecutor to Inform of an Informal Plea Deal With Testifying Witness; 6) Trial Court Error For Allowing Confession That Was a Product of Coercion; 7) Intentional Exclusion of African Americans From the Jury; and 8) IAC For Failing to Address the Violations in Claims 1-7.**

The State filed procedural objections and a partial answer seeking to dismiss the Petitioner's application. The Petitioner filed a response to the State's procedural objections.

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[1] R. pp. 24-31, Indictment No. 07-06-0032.
[2] R. pp. 442-487, Transcript of Motion to Suppress heard July 18, 2007.
[3] *Id.*
[4] R. pp. 16-17, Minutes of Court dated February 7, 2008.
[5] *Id.*
[6] *State v. Edwards*, 2008 KA 2011 (La. App. 1 Cir. 6/12/2009).
[7] *State v. Edwards*, 51 So.3d 27 (La. 12/17/2010).

For the following reasons, it is the recommendation of this Commissioner that the instant application should be dismissed in its entirety without the necessity of further proceedings and without a hearing.

Statement of Facts

The facts as taken from the appellate decision are as follows:

> On May 13, 2006, at approximately 11:30 p.m., Ryan Eaton, who was a student at Louisiana State University, went to the Circle K on State Street and Highland Road and then drove to the apartment of his girlfriend, G.W., on East Boyd Drive near Nicholson Drive. Eaton turned his vehicle off, opened a beer, and opened the driver's door. As Eaton began to step out of his vehicle, a male subject wearing black clothing and a black bandana across his face (from the nose down) pointed a .45 caliber, black, semiautomatic pistol at Eaton's head and told Eaton to get back into his vehicle and unlock the doors. Another male subject, also armed with a gun, entered the back of Eaton's vehicle after Eaton unlocked the back door. The armed subject who entered the front of Eaton's vehicle drove away from the complex. The assailants were later identified as the defendant and Joshua Johnson.
>
> The assailants demanded money and ultimately took the victim to an ATM so that he could retrieve cash. Eaton's accounts were depleted, so he was unable to retrieve any cash from the ATM. According to Eaton, the assailants were angry because he did not have any money. Eaton suggested that the assailants take him to his apartment on Bluebonnet Road and take some of his belongings; the assailants agreed.
>
> After they entered the apartment, the assailants blindfolded Eaton, tied his hands together, began rummaging through his apartment, and took several items. The assailants also took Eaton's cellular telephone, turning on the telephone speaker when G.W. called. The assailants instructed Eaton to speak to G.W. calmly and make arrangements for a meeting. G.W. told Eaton that she was at Chelsea's Bar and asked him to meet her there. The assailants led Eaton, at gunpoint, back to his vehicle, put him in the front passenger seat, and drove away from his apartment. According to Eaton, the defendant was driving at this point, and Johnson was in the back seat sitting behind Eaton. They drove to Chelsea's Bar, and when the vehicle stopped, Eaton was able to get a good look at the defendant. The assailants responded to text messages sent by G.W. to Eaton, encouraging her to go back to her apartment.
>
> Eaton and his assailants ultimately drove back to G.W.'s apartment where Eaton was instructed, at gunpoint, to knock on the door. By that time, G.W., her roommate R.M., and her friend L.R. were at the apartment. When G.W. answered the door, the defendant and Johnson rushed in behind Eaton. They rummaged through the apartment, finding items to steal. L.R. was vaginally and anally raped at gunpoint and forced to perform oral sex. L.R. was unable to identify her attacker as his face was obscured, but Eaton believed it to be the defendant. R.M. was dragged upstairs and raped. R.M. also was unsure of her attacker's identity. The assailants gathered several items and told Eaton that they would abandon his vehicle nearby. After the assailants left, Eaton walked out of the apartment and used a passerby's telephone to call for emergency assistance.
>
> Two days later, during the early morning hours of May 15, 2006, two assailants began following Marc Verret as he drove through his apartment complex near State Street. After Verret parked, the assailants forced entry into his vehicle. They brandished guns and had bandanas over their faces. One of the assailants entered the front of Verret's vehicle as Verret slid to the passenger's side, and the other entered the back of the car. Verret was taken to an ATM, where he withdrew funds and gave them to the assailants. The assailants exited the vehicle after taking the money and other items. Verret was able to identify Johnson as one of the armed assailants.[8]

ANALYSIS

[8] *State v. Edwards*, 2008 KA 2011, 3-5 (La. App. 1 Cir., 2009).

The State argues that the claims raised in the instant application are either procedurally barred or without merit. As to several of the claims, the State suggests the Petitioner's claims are procedurally barred for his inexcusable failure to raise them previously, while the Petitioner suggests that any such failure was a result of counsel's performance. I have reviewed the Petitioner's claims, and for reasons stated, recommend that the instant application should be dismissed in its entirety without the necessity of further proceedings and without a hearing.

Claims 5 & 6

The State argues Claim 6 is procedurally barred pursuant to Art. 930.4(A) as it was fully litigated on appeal. The State argues Claim 5 is without merit. For reasons more fully explained herein, and those asserted by the State, Claims 5 & 6 should be dismissed.

Claim 6 Fully Litigated

In Claim 6, the Petitioner argues the trial Court erred in admitting Petitioner's confession. He contends the confession was the product of coercion and made without the presence of counsel. The State argues the claim is procedurally barred pursuant to Art. 930.4 as it was fully litigated on appeal.

La. C.Cr.P. art. 930.4 (A) states:

> A. Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered.

On appeal, the Petitioner claimed that the trial court erred in denying the motion to suppress his confession.[9] The First Circuit Court of Appeal determined the assignment of error to be without merit.

> Although the defendant subsequently presented trial testimony regarding an assertion of his right to counsel, this testimony was in direct conflict with testimony presented by all three officers at the motion to suppress hearing. Moreover, although the defendant claims otherwise, his trial testimony regarding his request for an attorney was rebutted during the trial. During the trial, on cross-examination, the defense attorney asked Detective Fairbanks if the defendant ever asked for an attorney, and he responded, "No, ma'am."
>
> During the videotaped confession, the defendant expressed hesitancy only to the extent that he was concerned about the number of years of incarceration he would receive. There was no indication that the defendant asked for an attorney. The confession contained ample, unprompted, highly detailed facts that were consistent with statements given by the victims herein, including timelines and locations. Further, there was no indication that the confession was being made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises.
>
> While the issue raised on appeal was not preserved, we further conclude that the record supports the trial court's denial of the defendant's motion to suppress the confession. The sole assignment of error lacks merit.[10] (footnote omitted)

[9] *State v. Edwards*, 2008 KA 2011, 5-11 (La. App. 1 Cir., 2009).
[10] *State v. Edwards*, 2008 KA 2011, 10-11 (La. App. 1 Cir., 2009).

As asserted by the State, the instant Claim 6 is repetitive of his challenge to the trial Court's denial of his motion to suppress his confession on appeal. The interests of justice do not require further litigation of this issue. Therefore, Claim 6 should be dismissed as procedurally barred pursuant to La. C.Cr.P. art. 930.4.

Claim 5 is factually insufficient to warrant relief and/or without merit

In Claim 5, the Petitioner suggests the State failed to disclose an informal plea deal with an unidentified witness, presumably Jacquin James. He claims the witness testified at Petitioner's trial, as well as a related trial, and subsequently pled guilty to a felony which, according to Petitioner's allegations, he will seek to have expunged. Petitioner questions how the jury may have viewed the testimony if they knew the witness "was auditioning for an expungement when he testified".[11]

As indicated by the State, Jacquin James testified at the trial in this matter.[12] James stated that he had been arrested and charged in connection with this matter.[13] He indicated that he was facing criminal charges, but the State had not made promises to him to get him to testify.[14] He testified that he was there to tell the truth, and also that he hoped for leniency in exchange for his testimony.[15] James acknowledged the pending charges and his hope for leniency when examined by defense counsel.[16] Additionally, defense counsel emphasized the obvious incentives for James to testify against the Petitioner.

Q: WHEN THE POLICE FIRST QUESTIONED YOU, WHAT DID YOU TELL THEM?

A: I DON'T REMEMBER EXACTLY WHAT I TOLD THEM.

Q: BUT YOU PRETTY MUCH TOLD THEM THAT YOU WERE INNOCENT.

A: YES, MA'AM.

Q: YOU WERE TRYING TO SAVE YOURSELF THEN, WEREN'T YOU.

A: YES, MA'AM.

Q: IS THAT LIKE YOU'RE TRYING TO SAVE YOURSELF HERE TODAY?

A: NO, MA'AM.

Q: WHAT'S THE DIFFERENCE?

A: I'M TELLING MY INVOLVEMENT IN THE SITUATION.[17]

Even assuming James, subsequent to his testimony at Petitioner's trial, pled guilty to a felony and that he intends to seek an expungement at some point, there is nothing to indicate that the guilty plea was a part of a deal or that he was otherwise promised anything for his

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[11] *See* PCR, Claim 5.
[12] R. pp. 817-843, Testimony of Jacquin James.
[13] *Id.* p. 818.
[14] *Id.*
[15] *Id.* pp. 818-819.
[16] *Id.* p. 836.
[17] *Id.* p. 841.

testimony at trial. It does not even appear that Petitioner is suggesting that there was an actual deal. Rather, Petitioner merely suggests that James entered a plea to a felony and speculates that he may seek an expungement. In sum, the Petitioner fails to show that there was any undisclosed deal between the State and any witness in which a witness received consideration for his testimony at the trial in this matter.

For the reasons stated, Claim 5 should be dismissed without the necessity of further proceedings as it is not only factually insufficient to warrant relief, but also contradicted by the record.

Claims 1-4, 7 & 8

The State argues Claims 1-4 & 7 are procedurally barred, pursuant to Art. 930.4(B), for the Petitioner's failure to raise the issues previously. The State argues Claim 8, the Petitioner's IAC claim(s), should be dismissed in accord with Art. 926 for failure to set forth a factual basis for relief with sufficient particularity.

I note that Art. 930.4(B) provides a discretionary bar for claims that were not raised in the proceedings leading to conviction, upon the Court's determination that such failure was inexcusable.[18] Also, it is well settled that the issue of ineffective assistance of counsel is more properly raised in an application for post conviction relief.[19]

In connection with Claims 1-4 & 7, the Petitioner alleges that any failure to raise the claims previously is due to counsel's ineffectiveness. In Claim 8, the Petitioner claims he was denied effective assistance of counsel for failure to raise the issues presented in his application. In connection with the State's procedural objections, and also in connection with his IAC Claim(s), I have reviewed the Petitioner's Claims 1-4, 7 & 8. For the following reasons I find that these claims are factually insufficient to warrant relief and/or insufficient to support a finding that counsel was ineffective. Thus, I recommend that Claims 1-4, 7 & 8 should be dismissed without the necessity of further proceedings.

As this Court is aware, the *Strickland* standard (for IAC claims) requires *a showing of both deficient conduct and prejudice in the outcome/verdict*. Claims of ineffective assistance of counsel are evaluated by the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*[20]. Under *Strickland*, a defendant claiming ineffective assistance of counsel must show both that counsel's performance was deficient and that the deficiency prejudiced the defense.[21] One claiming ineffective assistance of counsel must identify specific

[18] See La. C.Cr.P. art. 930.4(F).
[19] *See State v. Williams*, 632 So.2d 351, 361 (La. App. 1 Cir. 1993).
[20] 466 U. S. 668, 104 S. Ct. 2052, 80 L.Ed.2d. 674 (1984).
[21] *Celestine v. Blackburn*, 750 F. 2d 353 (5th Cir. 1984).

acts or omissions and general statements and conclusionary charges will not suffice.[22] There is a strong presumption that the conduct of counsel falls within a wide range of responsible, professional assistance.[23] Hindsight is not the proper perspective for judging the competence of counsel's trial decisions, and an attorney's level of representation may not be determined by whether a particular strategy is successful.[24] In evaluating whether counsel's alleged error has prejudiced the defense, it is not enough for the defendant to show that an error had some conceivable effect on the outcome of the proceeding; rather, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different.[25] Claims of ineffective assistance of counsel may be disposed of for either reasonable performance of counsel or lack of prejudice and, if one is found dispositive, it is not necessary that the court address the other.[26] A claim that an attorney was deficient for failing to raise an issue is without merit, when the substantive issue the attorney failed to raise is without merit.[27]

I note that once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel.[28]

Claim 1

In Claim 1, the Petitioner alleges his right to confrontation was violated when Wanda Pezant testified regarding reports/examination conducted by another nurse. He concludes that this violation mandates a new trial. He claims, in part, as follows:

> "One of the witnesses, Wanda Pezant, testified regarding the "Rape Kit." Her testimony included commenting on the victim's demeanor and experiences with such victims. However, Pezant did not perform the actual examination of the victim and her testimony regarding the victim's demeanor and forensic findings of the examination violated Edwards' confrontation rights."[29]

The record reveals that Pezant was qualified to testify as an expert in sexual assault examination.[30] She testified that she was the supervisor of Christy Bronould (the nurse who examined the victim) and she, Pezant, was responsible for keeping the records.[31] At trial the State introduced the medical records of the victim (LR) without objection.[32] Pezant stated that

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[22] *Knighton v. Maggio*, 740 F. 2d 1344 (5th Cir. 1984).
[23] *State v. Myers*, 583 So. 2d 67 (La. App. 2nd Cir. 1991).
[24] *State v. Brooks*, 505 So. 2d 714 (La. 1987).
[25] *Sawyer v. Butler*, 848 F. 2d 582 (5th Cir. 1988).
[26] *Murray v. Maggio*, 736 F. 2d 279 (5th Cir. 1984).
[27] *State ex rel. Roper v. Cain*, 763 So.2d 1, 5, 99-2173, p. 6 (La. App. 1 Cir. 10/26/99), writ denied, 773 So.2d 733, 2005-0975 (La. 11/17/00).
[28] *State v. Folse*, 623 So.2d 59, 71 (La. App. 1st Cir.1993).
[29] PCR, p. 11.
[30] R. p. 703.
[31] R. p .704.
[32] R. p. 707.

the records reflected an interview with the victim that was taken for purposes of guiding the exam and helping with medical needs.[33] Defense counsel objected to Pezant testifying as if she had independent knowledge of what the victim did/said. The Court instructed the State to re-phrase the question so as to clarify Pezant was not there when the examination was done and that she was only testifying as to what was contained in the report.[34] Pezant testified that the nurse documented crying and poor eye contact.[35]

Even assuming the report or any of Pezant's testimony violated his right to confrontation, confrontation errors are subject to harmless error analysis.[36]

From my review of the record, the victim did testify at trial, and the fact that she was raped was established by the testimony of other witnesses, and, more importantly, by the Petitioner's confession. The guilty verdict in this matter is surely unattributable to any error in admitting the reports or the examining nurse's statements. Even assuming counsel was deficient, there is nothing to indicate the Petitioner was prejudiced as a result of counsel's alleged failure to challenge Pezant's testimony.

Claim 1, and also Claim 8 to the extent it alleges IAC for failing to raise the issue in Claim 1, should be dismissed as Petitioner's allegations are not only factually insufficient to warrant relief but also factually insufficient to establish deficient performance and prejudice.

Claim 2

In Claim 2, the Petitioner complains regarding alleged Improper Closing Arguments/Improper Vouching. He asserts that the prosecutor improperly referenced Detective Fairbanks' status as a pastor, and commented that the jury represented people who were "out for justice".

The scope of closing arguments is limited to evidence or the lack of evidence admitted, to conclusions of fact that the state or defendant may draw there from, and to the law applicable to the case.[37] Louisiana jurisprudence allows prosecutors wide latitude in closing arguments, and the trial judge has broad discretion in controlling the scope of closing arguments.[38] Even if the prosecutor exceeds the bounds of proper argument, the court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict.[39] It is well settled that much credit should be accorded to the good sense and fair-

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[33] R. pp. 708-709.
[34] R. p. 710.
[35] R. p. 710.
[36] *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986) (Confrontation errors, are subject to a harmless-error analysis).
[37] La. C.Cr.P. art. 774; *State v. Casey*, 99-0023 (La. 1/26/00), 775 So.2d 1022, 1036, *cert. denied*, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).
[38] *Id.*
[39] *State v. Taylor*, 669 So.2d 364, 384 (La.,1996).

mindedness of jurors who will see the evidence, hear the argument, and be instructed repeatedly by the trial judge that arguments of counsel are not evidence.[40]

As to the allegations of improper comments "that the jury represented the people who were out for justice" OR "detective was out for justice like the rest of us"[41], I note that the prosecutor, in closing stated:

> "When we started this trial, in opening statement, counsel for **the defense said this was a journey for justice.** I don't usual agree with defense counsel, but in that statement, I do, **this is a journey for justice.**"[42] (emphasis added)

As indicated by the prosecutor in closing, defense counsel stated the following during opening statements:

> "We're getting ready to embark this week, ladies and gentlemen, on what I'm going to call "a journey for justice." Justice for everybody who's concerned or has anything to do with this case."[43]

Even assuming the prosecutor's statements agreeing with defense counsel's characterization of the proceeding as a "journey for justice" somehow exceeded the scope of closing arguments, the Petitioner fails to show how he may have been prejudiced. The transcript of the jury instructions reveals that the jury was specifically instructed that opening and closing arguments are not evidence.[44] Further, there is nothing to indicate that any improper argument influenced the jury and contributed to the verdict. Similarly, insofar as Petitioner alleges counsel was deficient with respect to the prosecutor's statements, his allegations are insufficient to establish both deficient performance and prejudice.

The Petitioner also suggests that counsel was ineffective with respect to an alleged incident of improper vouching. The Petitioner alleges that the prosecutor vouched for a detective when she referenced his status as a pastor.

I note that in closing arguments, the prosecutor stated the following:

> "Does Detective Fairbanks have any reason at all to convict an innocent man? Absolutely not. He's a chaplain. He's been a Detective for a long time. He's got a good career. He's not going to get up there - - He's out for justice like the rest of us."[45]

As to the issue of vouching, the Louisiana Supreme Court has stated it is only reversible error if the State bolsters the credibility of a witness by appearing to rely on evidence outside of the record or testimony:

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[40] *See State v. Dilosa*, 01-0024, p. 22 (La.App. 1 Cir. 5/9/03), 849 So.2d 657, 674, *writ denied*, 03-1601 (La.12/12/03), 860 So.2d 1153.
[41] PCR, p. 13.
[42] R. p. 1050.
[43] R. pp. 583.
[44] R. pp. 1072-1073.
[45] R. p. 1065.

> [I]t has consistently been held to be reversible error for the prosecutor to express his belief in the guilt of the accused, or the credibility of a key witness, *where doing so implies that he has additional knowledge or information about the case which has not been disclosed to the jury.*[46]

In this case, the Petitioner suggests that the prosecutor improperly vouched for the detective. However, the information that Fairbanks was a chaplain was brought out during the questioning of Fairbanks.[47] Thus, it can not be said that this is a situation where the prosecutor's reference in closing could be considered as implying knowledge not disclosed to the jury. Therefore, the improper vouching claim is without merit. Likewise, any claim that counsel was ineffective for failing to raise the issue is without merit.

For the reasons stated, Claim 2, and Claim 8 insofar as it alleges IAC with respect to the issue(s) raised in Claim 2, should be dismissed.

Claims 3 & 4

In claims 3 & 4, the Petitioner challenges the constitutionality of Art. 782 C.Cr.P., which allows non-unanimous verdicts, and this State's prohibition on the Defendant's use of identification experts to challenge eye witness reliability.

As to the first challenge, the Petitioner acknowledges in his written argument that "Louisiana's Supreme Court has repeatedly upheld [art. 782]". By analogy, the U.S. Supreme Court has upheld a state's use of non-unanimous verdicts in *Apodeca v. Oregon.*[48]

The Petitioner also challenges Louisiana's refusal to allow experts to testify on the unreliability of eye-witness identification. I note that there is no allegation that the Defense attempted to call such a witness at his trial, but even if he had wanted to, the Petitioner once again acknowledges in his argument that "Louisiana's courts [have] *repeatedly rejected defense attempts to have identification experts testify...*".[49]

The Petitioner's allegations are, thus, factually insufficient to support that either Art. 782 C.Cr.P., which allows non-unanimous verdicts, and/or this State's prohibition on the Defendant's use of identification experts to challenge eye witness reliability violates any constitutional or statutory right.

Therefore, Claims 3 & 4 should be dismissed for failure to state sufficient legal or factual support for the claim that Art. 782 C.Cr.P. and/or this State's prohibition on the Defendant's use of identification experts to challenge eye witness reliability are unconstitutional.[50]

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[46] *State v. Smith*, 554 So.2d 676 (La. 1989) (Emphasis added).
[47] *See* R. pp. 983-984 (wherein Fairbanks stated that he was also a chaplain of the police department and explained his duties as chaplain).
[48] 92 S.Ct. 1628 (1972), as cited by the Petitioner on pp. 20-21 of application.
[49] PCR, p. 16.
[50] *State v. Interiano*, 868 So.2d 9, 13, 03-1760, p. 4 (La. 2/13/04) (A statute is presumed constitutional and the burden of proving a claim of unconstitutionality rests upon the party attacking the statute).

In a related portion of Claim 8 he alleges ineffectiveness based on his lawyer's failure to challenge the constitutionality of Art. 782 C.Cr.P., and also challenges counsel's failure to contest this State's prohibition on a Defendant's use of identification experts to challenge eye witness reliability.[51]

However, as to *this* ineffectiveness claim, it is important to remember that in 2007, when the trial occurred, the jurisprudence from the highest court in this State, and the land, clearly upheld the constitutionality of the non-unanimous verdict. Consequently, based on the facts and the law applicable, counsel could not have been incompetent for failing to challenge a statutory procedure that was then accepted by this State and the United States Supreme Court. Simply put, deficient conduct on this issue cannot be proven on the facts alleged and the applicable law. This is especially true considering the Petitioner's admission that the statutory law and applicable authoritative jurisprudence was adverse to his current argument.

Similarly, Petitioner acknowledges Louisiana's courts have repeatedly rejected defense attempts to have identification experts testify. Petitioner's admission of such and the state of the admitted jurisprudence makes it impossible to conclude counsel could have been incompetent for failing to challenge well known jurisprudence prohibiting such experts to testify. In other words, based on the then current state of the law, one could not find counsel's representation to be constitutionally deficient simply for failing to urge a challenge that admittedly has been historically and "repeatedly rejected" by the courts throughout this State.

Based on Petitioner's own admissions that the law in Louisiana in 2007 was (and still is) adverse to the challenges, these two claims of ineffectiveness can not be proven pursuant to the Supreme Court's standard of proof set out in *Strickland v. Washington*.

For the reasons stated, Claims 3 & 4, and Claim 8 insofar as it alleges IAC with respect to the issues raised in Claims 3 & 4, should be dismissed.

Claim 7 Batson Violation

In Claim 7, the Petitioner claims intentional exclusion of African Americans through the use of ***cause and peremptory*** challenges, in violation of *Batson*.[52] In a related portion of Claim 8 he alleges counsel was ineffective for failing to raise the issue.

In *Batson*, the United States Supreme Court held that the use of peremptory challenges to exclude persons from a jury based on their race violates the Equal Protection Clause.[53] The holding in *Batson* was subsequently adopted by the Louisiana Supreme Court, and has been codified in Louisiana Code of Criminal Procedure article 795(C) and (D).[54]

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[51] P. 16 of application.
[52] PCR, pp. 14, 18, & 33. *See* R. pp. 338-342 (jury selection sheets and peremptory challenge sheets).
[53] *Batson*, 476 U.S. at 96–98, 106 S.Ct. 1712.
[54] *See State v. Nelson*, 85 So.3d 21, 28 (La. 3/13/12) (citing *State v. Collier*, 553 So.2d 815 (La.1989)).

> The Court in *Batson* outlined a three-step test for determining whether a peremptory challenge was based on race. Under *Batson* and its progeny, the opponent of a peremptory strike must first establish a prima facie case of purposeful discrimination. Second, if a prima facie showing is made, the burden shifts to the proponent of the strike to articulate a race-neutral explanation for the challenge. Third, the trial court then must determine if the opponent of the strike has carried the ultimate burden of proving purposeful discrimination. *Batson*, 476 U.S. at 94–98, 106 S.Ct. 1712. *See also, Johnson v. California*, 545 U.S. 162, 168, 125 S.Ct. 2410, 2416, 162 L.Ed.2d 129 (2005); *State v. Sparks*, 1988–0017 (La.5/11/11), 68 So.3d 435, 468; *State v. Givens*, 99–3518 (La.1/17/01), 776 So.2d 443, 448.[55]

In his instant claim, the Petitioner complains regarding the State's use of cause and peremptory challenges, arguing that the State used its challenges improperly in violation of *Batson*. His allegations are insufficient to warrant relief under the *Batson* analysis.[56]

Initially, I note that time is of the essence when raising *Batson* issues because the nature of the challenge depends largely on contemporaneous analyses and deductions by the presiding judge[57]:

> Subsequent to *Batson*, "both the federal and state courts have consistently held that failure to make a timely objection effectively waives any arguments based on improprieties in jury selection which the defendant might urge pursuant to *Batson*." Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J.Crim. L. and Criminology 1, 19 (1988); *See, e.g., United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir.1992); *United States v. Masat*, 948 F.2d 923, 927 (5th Cir.1991); *State v. English*, 795 S.W.2d 610, 612 (Mo.App.1990); *People v. Lockhart*, 201 Ill.App.3d 700, 146 Ill.Dec. 1011, 558 N.E.2d 1345, 1350 (1990).[58]

The Petitioner's instant claim is not only speculative, but is also undermined by the fact that Petitioner's attorney, who was present during voir dire and able to observe and assess the potential jurors' responses and non-verbal communications, did not make a *Batson* challenge.

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[55] *State v. Nelson*, 85 So.3d 21, 28-29 (La. 3/13/12).

[56] *See State v. Tilley*, 767 So.2d 6, 12, 99–0569 (La.7/6/00)(observing that, under *Batson*, a defendant must first establish a prima facie case of discrimination by showing facts and relevant circumstances which raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on account of their race).

[57] *State v. Parker*, App. 2 Cir.1995, 27,417 (La.App. 2 Cir. 9/27/95), 661 So.2d 603, writ denied 95-2576 (La. 2/16/96), 667 So.2d 1049; *State v. Matthews*, App. 2 Cir.1994, 26,550 (La.App. 2 Cir. 12/21/94), 649 So.2d 1022, rehearing denied, writ denied 95-0435 (La. 6/16/95), 655 So.2d 341; *State v. Mamon*, App. 2 Cir.1994, 26,337 (La. App. 2 Cir. 12/16/94), 648 So.2d 1347, writ denied 95-0220 (La. 6/2/95), 654 So.2d 1104. *See also U.S. v. Masat*, 948 F.2d 923, 927 FN 6 (C.A.5 (Tex.),1991) (*United States v. Romero-Reyna*, 867 F.2d 834, 836-837 (5th Cir.), *appeal after remand*, 889 F.2d 559 (5th Cir.1989), *cert. denied*, 494 U.S. 1084, 110 S.Ct. 1818, 108 L.Ed.2d 948 (1990) (*Batson* objection timely because made immediately after completion of jury selection, before the jury venire was dismissed, and prior to the commencement of the trial); *Sawyer v. Butler*, 881 F.2d 1273, 1286 (5th Cir.1989), *cert. granted*, 493 U.S. 1042, 110 S.Ct. 835, 107 L.Ed.2d 830 (1990), *motion granted*, --- U.S. ----, 110 S.Ct. 1468, 108 L.Ed.2d 606 (1990), *aff'd*, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), *later proceeding*, 567 So.2d 597 (La.1990), *habeas corpus proceeding*, 772 F.Supp. 297 (E.D.La.1991), *aff'd, stay vacated*, 945 F.2d 812 (5th Cir.1991) (citation omitted) (a timely objection is an essential element of a claim of racial discrimination in the exercise of peremptory challenges under *Batson*); *United States v. Erwin*, 793 F.2d 656, 667 (5th Cir.), *cert. denied*, 479 U.S. 991, 107 S.Ct. 589, 93 L.Ed.2d 590 (1986) (*Batson* motion must be timely to be entertained; motion not timely because appellants waited a full week before moving to strike panel, trial was about to begin and unselected venire persons had been released)).

[58] *Strong v. State*, 263 S.W.3d 636, FN 6 (Mo., 2008).

Great deference is to be accorded to counsel's judgment, tactical decisions, and trial strategy and should not be second guessed if within the range of professional reasonableness.[59] Examination of potential jurors is dependent upon a variety of factors including counsel's observations of potential jurors and questions asked by the attorneys as well as the responses thereto. Moreover, the trial court plays a unique role in the dynamics of a voir dire, for it is the court that observes firsthand the demeanor of the attorneys and venire persons, the questions presented, the composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from the transcript.[60] The Petitioner does not even identify a particular panelist who was likely struck based on his/her being a member of a cognizable group or indicate that otherwise similar panelists were allowed to serve.[61] Also, he does not identify any evidence of disparate questioning of any perspective jurors.[62] In sum, he fails to particularly identify any violation that may have required corrective action.[63] Also, by Petitioner's own allegations, the allegedly targeted group was not actually excluded from the jury.

Moreover, the Petitioner's allegations are not only insufficient in showing that the State's exercise of its challenges was improper, but also insufficient in establishing that counsel's deficient performance resulted in prejudice. In sum, the Petitioner's allegations are factually insufficient to support a finding that he was denied effective assistance of counsel. Claim 7 should be dismissed pursuant to Arts. 926 & 928-929 C.Cr.P.

Therefore, Claim 7, and Claim 8 to the extent it alleges IAC with respect to the *Batson* issue, should be dismissed.

Claim 8

As previously indicated and discussed herein, the Petitioner, in Claim 8, argues that counsel was ineffective for failing to address the alleged violations in Claims 1-7. However, based on a review of the record and the Petitioner's application, the Petitioner fails to establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that he was prejudiced as a result of any alleged deficiency. Therefore, and for the reasons stated hereinabove, Claim 8 should be dismissed.

For the reasons stated herein, it is the recommendation of this Commissioner that the instant application for post-conviction relief should be dismissed in its entirety without the

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[59] *See State v. Morgan*, 472 So.2d 934, (La. App. 1st Cir. 1985).
[60] *State v. Myers*, 761 So.2d 498, 502 (La. 4/11/00).
[61] *See State v. Sparks*, 68 So.3d 435, 468-9 (La. 5/11/11), citing *Batson v. Kentucky*, 476 U.S. at 96, 106 S.Ct. at 1723 (noting that to establish a prima facie case, the defendant must show: (1) the prosecutor's challenge was directed at a member of a cognizable group; (2) the challenge was peremptory rather than for cause; and (3) relevant circumstances sufficient to raise an inference that the prosecutor struck the venire person on account of his being a member of that cognizable group).
[62] *See State v. Draughn*, 950 So.2d 583, 605, 2005-1825 (La.,2007) citing *Miller-El v. Dretke*, 545 U.S. 231, 249 (2005).
[63] *See generally State v. Nelson*, 85 So.3d 21, 35-36 (La. 3/13/12) (noting that La. C.Cr.P. art. 795 gives broad discretion to the trial court to formulate "corrective action" to remedy a *Batson* violation.).

necessity of further response from the State and without a hearing. Should this Court agree, my formal recommendation follows.

COMMISSIONER'S RECOMMENDATION

I have considered the Petitioner's application for post-conviction relief, the State's response thereto, any traversals filed, the record and the law applicable, and for the reasons stated hereinabove, I recommend that Claim 6 should be dismissed as procedurally barred pursuant to La. C.Cr.P. art. 930.4 as it was fully litigated on appeal. As to Claims 1-5, 7 & 8, I recommend dismissal pursuant to La. C.Cr.P. arts. 926 & 927-929 as Petitioner's allegations in connection therewith are factually insufficient to warrant relief, or without merit.

Respectfully recommended, this 11th day of March, 2013 in Baton Rouge, Louisiana.

NICOLE ROBINSON
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS/JUDGMENT/ORDER/ COMMISSIONER'S RECOMMENDATION WAS MAILED BY ME WITH SUFFICIENT POSTAGE AFFIXED TO: ALL PARTIES.
DONE AND SIGNED THIS 11th DAY OF March 2013
Deputy Clerk Of Court

FILED
MAR 11 2013
DEPUTY CLERK OF COURT

No. 19-5807

In the Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner

vs.

DARREL VANNOY, WARDEN

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S APPENDIX B TO BRIEF IN OPPOSITION STATE POST CONVICTION COURT ORDER

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THEDRICK EDWARDS

VERSUS

N. BURL CAIN, WARDEN

NUMBER: 07-06-0032, SECTION: VI

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

ORDER

CONSIDERING the Petitioner's application for post-conviction relief, the Commissioner's Recommendation dated March 11, 2013, the Petitioner's traversal thereto, and

FOR the reasons stated in the Commissioner's Recommendation, which the Court hereby adopts as its own;

IT IS ORDERED that the Petitioner's **Claim 6** is **DISMISSED** as procedurally barred pursuant to La. C.Cr.P. art. 930.4 as it was fully litigated on appeal.

IT IS FURTHER ORDERED that **Claims 1-5, 7 & 8, are DISMISSED** pursuant to La. C.Cr.P. arts. 926 & 927-929, as they are factually insufficient to warrant relief or without merit.

IT IS FURTHER ORDERED that the Petitioner's application is hereby **DISMISSED** in its entirety without the necessity of a hearing.

SO ORDERED, this 26 day of April, 2013 in Baton Rouge, Louisiana.

JUDGE, RICHARD "CHIP" MOORE, III
19TH JUDICIAL DISTRICT COURT

CERTIFIED TRUE COPY
12-12-2013

19TH JUDICIAL DISTRICT
EAST BATON ROUGE PARISH

A copy of Order to: Mr. Thedrick Edwards
Louisiana State Penitentiary
Angola, Louisiana 70712

EBR1763301