No 20-6708

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ORIGINAL

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TONY DECLOUES -- PETITIONER, PRO SE

VS.

BURL CAIN, WARDEN
STATE OF LOUISIANA, -- RESPONDENT

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

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PETITION FOR WRIT OF CERTIORARI

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Respectfully submitted,

Tony DeCloues

Tony Decloues
DOC# 193085, Walnut 4
Louisiana State Penitentiary
Angola, La. 70712

QUESTIONS PRESENTED

Question No. 1: Whether The Court Of Appeal Should Have Granted Coa Where The District Court Employed A Constitutionally Impermissible Standard In Evaluating The Voluntariness Of The Confession In Direct Contradiction To This Courts Ruling In *Rogers V. Richmond*, In That The Magistrate And State Courts Consider The Truth Or Falsity Of A Confession In Ruling On Its Voluntariness Due To Drug Impairment/Intoxication And Sleep Deprivation, In Violation Of the Fifth, Sixth, And Fourteenth Amendment?

Question No. 2: Whether The Lower Court Misapplied The *Strickland* Standard To The Facts Of This Case, In Violation Of Fifth, Sixth And Fourteenth Amendment To The Constitution?

LIST OF PARTIES

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

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

Mr. Leon Cannizzaro, Orleans Parish District Attorney
1340 Poydras Street, Suite 700
New Orleans, Louisiana, 70112

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

Tony Decloues

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **federal courts:**

The opinion(s) of the United States Fifth Circuit Court of Appeal appear at **Appendix A** to the petition and is unpublished.

The opinion(s) of the United States District Court, Eastern District of Louisiana, appear at **Appendix B** and is unpublished.

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Report and recommendation in the U.S. Eastern District Court, appear at **Appendix C** of the petition and is unpublished.

For cases from **state courts:**

The opinion of the highest state court to review the merits on Post Conviction appears at **Appendix G** to the petition and is published. La. Court of Appeal denied writ, *State v. Decloues*, 131 So.3d 857 (Mem), 2013-1694 (La.2/7/14).

The opinion of the highest state court to review the merits on appeal appears at **Appendix H** to the petition and is published at *State v. Decloues*, 62 So.3d 778, 2010-1247 (La. App. 4 Cir. 3/23/11).

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeal decided my case was July 10, 2020, a copy of that decision appears at Appendix A.

[X] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under **U.S.C.A. Const. Art. 3 § 2, cl. 2**; **28 U.S.C. § 1254(1)**; **Supreme Court Rule 9, 17.1(b)**, and 22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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

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

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

(I). STATEMENT OF THE CASE

On April 9, 2009, Tony Decloues was indicted by an Orleans Parish Grand Jury for the second degree murder of Louis Decloues, a violation of La. R.S. 14:30.1. (R. 1).

On April 15, 2009, Petitioner was appointed counsel and entered a plea of not guilty. (R. 4).

On June 16, 2009, a hearing was held to determine whether the Petitioner was competent to stand trial. At the conclusion of the hearing, the trial court ruled that he was able to understand the charges against him and participate in his defense. (R. 20, p. 7).

Defense counsel filed a motion to suppress a statement given to police. On July 17, 2009, a hearing was held on the motion to suppress. (R. 21). After testimony, the trial judge took the matter under advisement. (R. 21, pp. 4-5).

On July 21, 2009, another hearing was held to determine Petitioner's competence. After hearing additional testimony on the matter, the trial court again ruled that Petitioner was able to understand the charges against him and participate in his defense. (R. 22, p. 10). On this same date, the trial judge issued a ruling denying defense counsel's motion to suppress the statement. The court further denied the motion to suppress the evidence. (R. 23, p. 11).

On April 20, 2010, a jury trial was held. (R. 29-31). The twelve-member jury found Petitioner guilty as charged. (R. 31, p. 120).

On April 26, 2010, the trial court sentenced Petitioner to life at hard labor, without the benefit of probation, parole, or suspension of sentence. (R. 33). Defense counsel made an oral motion to reconsider sentence, requesting "special consideration of the facts." (R. 33, p. 3). The trial judge denied the motion to reconsider and defense counsel noted his objection. (R. 33, p. 4). On the same date, defense counsel filed a written motion to reconsider sentence and a written motion for appeal. (R. 40, 43). The trial court denied the motion for reconsideration (R. 41), but granted the motion for appeal and appointed the Louisiana Appellate Project to represent Petitioner on appeal. (R. 44). Attorney Mary Constance Hanes, of the Louisiana Appellate Project, perfected Petitioner's appeal. It was submitted to the Fourth Circuit Court of Appeal on October 14, 2010.

The state filed an answer to the appeal. Additionally, on February 1, 2011, Petitioner filed a notice of intent to file a pro-se brief. On February 3, 2011, the appeal

court granted the motion and ordered him to submit his pro-se brief within 30 days. No pro-se brief was filed.

On March 23, 2011, the Fourth Circuit Court of Appeal affirmed the Petitioner's conviction and sentence. (Docket No. 2010-KA-1247).

Decloues timely filed a writ of certiorari into the Louisiana Supreme Court. Said writ was denied on February 3, 2012.

After his direct appeal was exhausted, Petitioner properly and timely filed a post conviction relief application into the Orleans Criminal District Court.

On May 14, 2013, Decloues signed for legal mail showing that his PCR application had been denied by Judge Frank Marullo on May 3, 2013.

He filed a Notice of Intent to Seek Writs and Motioned the Court to set a Specific Return Date into the state district court. However, when he had not heard from the court in a reasonable amount of time, out of abundance of caution and because he had all the necessary documentation, he filed a supervisory writ to ensure that his federal filing times were tolled.

On June 12, 2013, the Fourth Circuit Court of Appeal denied relief. DeCloues filed a writ of certiorari into the Louisiana Supreme Court asking it to invoke supervisory jurisdiction to remand to the district court with instructions to appoint counsel for full development of his ineffective assistance of trial counsel claims. However, the Louisiana Supreme Court denied relief with a one-word opinion.

After exhausting all of his state court remedies, he timely filed a Writ of Habeas Corpus seeking relief into the Federal District Court, Eastern District of Louisiana. On April 22, 2016, after considering the magistrate judge's report and recommendation and the petitioner's objection, Judge Vance denied relief. (App. D). He filed a notice of intent to appeal. On May 26, 2016, Decloues received notice that he had 40 days from

that date to perfect his appeal.

On May 19, 2017 the U.S. Fifth Circuit Court of Appeal granted in part and denied in part COA, Tony Decloues, 5th Cir. No: 16-30579, U.S.D.C. 2:14-CV-1158. (App. E).

On August 17, 2018 The U.S. Fifth Circuit Court of Appeal issued a Per Curiam opinion and granted in part and Vacating denial of habeas petition and remanding so that the district court can obtain and review the video of the confession. Tony Decloues, 5th Cir. No: 16-30579, U.S.D.C. 2:14-CV-1158. (App. F).

On March 8, 2019 the district court issued its Magistrate Report and recommendation. (App.C).

On May 30, 2019 the U. S. District Court, Eastern District of Louisiana, entered Judgment and order adopting the Magistrate's recommendation and denying federal habeas relief. USDC No. 2:14-CV-1158. (App. B1 & 2).

On July 10, 2020 The U.S. Fifth Circuit Court of Appeal denied COA, Tony Decloues, 5th Cir. No: 19-30501, U.S.D.C. 2:14-CV-1158. (App. A).

STATEMENT OF THE FACTS

Around noon on January 10, 2009, the body of 74-year-old Louise Decloues was found by June Jones, a family friend. Ms. Jones was checking on Ms. Decloues at the behest of Ms. Decloues' sister, who had not been able to get in touch with her.

Ms. Jones knocked and noted that the front door was locked, so she proceeded to the rear of the house and entered the home through the back door. Upon entering Ms. Decloues' bedroom, Jones discovered Louise's body with a plastic bag wrapped around her head. Ms. Jones called 911. There were visible wounds to the victim's body, blood on

the bed and the closet and dresser drawers appeared to have been rifled.

Upon the arrival of authorities, the home was sealed off until the Homicide Division arrived. The victim was Petitioner's mother and he lived with her in the home. Detective Randy Gant, of the New Orleans Police Department, arrived on the scene and found Petitioner in the backyard. Gant said the Petitioner appeared agitated and tried to leave, claiming that he did not know what happened to his mother and that he had been at the house of a friend, Pershing Matthews, since 2:00 p.m. on the previous day, when he had came to the house to get a saw from the shed in the backyard. Based upon this information, Petitioner was transported to the NOPD Homicide Division for questioning.

Upon the arrival of the crime scene technicians, photographs were taken, blood samples obtained and dusting for fingerprints. Officers collected a pair of gloves that were hanging from a clothesline.

Detective Grant later went to the home of Pershing Matthews and interviewed him. Matthews denied that Petitioner had been at his house during the time frame which Petitioner claimed.

At the station, Detective Anthony Pardo interviewed Petitioner. At approximately 5:46 p.m., Petitioner was allegedly read his rights and signed a Rights of Arrestee or Suspect Form. He then confronted Petitioner with the fact that his alibi did not match with the statement given by Mr. Matthews. At this time, Petitioner allegedly confessed that he had killed his mother.

At approximately 7:15 p.m., Petitioner gave a videotaped statement in which he confessed to murdering his mother. After giving the statement, Petitioner showed the detectives where he had disposed of the knife and the clothing he was wearing at the time

of the murder. The detective maintained visual sight of a red dumpster where the items were alleged to have been discarded. A search warrant was obtained and when it was executed, a black gym bag similar to what Petitioner had described was discovered.

The crime lab went to the dumpster and collected the evidence: a black gym bag, a knife with a wooden handle, a blue lock-box, a sweatshirt, sweatpants/scrub-type pants, a white bag containing gloves, and a white bag containing newspaper. DNA testing was requested, but never performed after Petitioner confessed.

Petitioner was transported to University Hospital for execution of a search of his person. While at the hospital, which was around 11:00 p.m., some 11 hours after the victim's body was discovered, Detective Aucoin noticed that Petitioner's speech was slurred.

Petitioner testified at trial that he was 55 years old and was living with his mother at the time of her death. He explained that he walked with a limp because he had two pins in his ankle from a 2003 injury and a hip replacement surgery in 2008. He noted that he had been prescribed Percosets for pain, but had run out of them in January 2009.

Petitioner described his mother as loving, but that she had shown him "tough love" due to his drug addictions. He admitted to five misdemeanor convictions for possession of drug paraphernalia. During the month of January 2009, he was working on and off for cash money. He noted that on January 7, 2009, he worked at odd jobs and used the money to buy crack cocaine. He then went to his mother's house because his leg was hurting. He took Tylenol, which his mother gave him. He then fell asleep and awoke at 1:30 a.m. due to a nightmare.

He described his nightmare as follows: He came home from work to a house

which was not his mother's house and went into the bedroom, where he discovered a woman, who he assumed was his wife or girlfriend, in bed with a man. The scenes of the dream were like "changing channels." He began to hit the woman and pulled her from the bed because she did not deserve to be in his bed. He noticed that the woman had blood on her face, which he did not want to look at, so he went into a utility room. The next thing he knew, he was putting some clothing in a black bag. The scene switched again and he was at the red dumpster. At this point, Petitioner awoke from the nightmare.

He admitted to working for cash and smoking crack over the next few days, even stealing a saw from his mother's shed to fund another crack cocaine binge. He said that he had not slept at all since waking from his dream at 2:00 a.m. several days earlier until he began talking to police officers at around 6:00 p.m. on Saturday.

STANDARD OF REVIEW

Because Mr. Decloues filed his federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, federal habeas review is governed by AEDPA. Questions of law and mixed questions of fact are reviewed under §2254(d)(1), and questions of fact are reviewed under §2254(d)(2). *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), cert. denied, 532 U.S. 1039, 121 S.Ct. 2001, 149 L.Ed.2d 1004 (2001).

Before an appeal may be considered, petitioner must obtain a certificate of appealability by making a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253 (c)(2). If the district court denied the claim on the merits, petitioner may make this showing by demonstrating that "reasonable jurist would find the district court's assessment of [his] constitutional claims debatable or wrong." *Slack v. McDaniel*, 529

U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

A state court decision is contrary to federal law within the meaning of §2254(d)(1) if the state court applies a rule that contradicts the governing law set forth in the Supreme Court's cases, or the state court "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under §2254(d)(2), a state court's factual findings constitute "an unreasonable application of clearly established" Supreme Court precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. The inquiry into unreasonableness is objective. *Id.* at 410-12.

The state court's factual findings are presumed to be correct. 28 U.S.C. §2254(e)(1). In order to obtain habeas relief on the §2254(d)(2) ground that the state court's decision was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding," the petitioner must rebut by clear and convincing evidence the §2254(e)(1) presumption that the state court's factual findings are correct. See *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000).

"[U]nder the deferential standard of AEDPA, [federal courts] review only the state court's decision, not its reasoning or written opinion, to determine whether it is contrary to or a misapplication of clearly established federal law." *Catalan v. Cockrell*, 315 F.3d 491, 493 (5th Cir. 2002). We review the "district court's evidentiary rulings for abuse of discretion." *United States v. Griffin*, 324 F.3d 330, 347 (5th Cir. 2003) (citing) United

States v. Miranda, 248 F.3d 434, 440 (5th Cir. 2001). "A district court by definition abuses its discretion when it makes an error of law." *United States v. Delgado-Nunez*, 295 F.3d 494, 496 (5th Cir.2002)(Brackets omitted) (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)).

In response to petitioners objection to the magistrate report and recommendation, the district court failed however to identify and apply the standard for granting relief.

The Mag. Report does not even mention that Mr. Decloues briefed this clear misapplication of the law in his § 2254 application. The habeas court failed to review the claim de novo. The AEDPA limitation upon the federal courts jurisdiction does not equate to an absolute bar to review or to grant relief upon otherwise timely and properly exhausted constitutional claims.

REASONS FOR GRANTING THE WRIT

Question No. 1

Should The Court Of Appeal Have Granted Coa Where The District Court Employed A Constitutionally Impermissible Standard In Evaluating The Voluntariness Of The Confession In Direct Contradiction To This Courts Ruling In *Rogers V. Richmond*, In That The Magistrate And State Courts Consider The Truth Or Falsity Of A Confession In Ruling On Its Voluntariness.

The district court employed a constitutionally impermissible standard in evaluating the voluntariness of the confession. In *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), the Supreme Court held that it is impermissible to consider the truth or falsity of a confession in ruling on its voluntariness. This decision has been adhered to consistently and implemented in decision of the Supreme Court. *Lego v. Twoney*, 404 U.S. 477, 484 n.12, 92 S.Ct. 619, 624 n. 12, 30 L.Ed.2d 618 (1972); *Johnson v. New*

Jersey, 384 U.S. 719, 729 n. 9, 86 S.Ct. 1772M 1778 n. 9, 16 L.Ed.2d 882 (1966); *Jackson v. Denno*, 378 U.S. 368, 383-386, 84 S.Ct. 1774, 1784, 12 L.Ed.2d 908 (1964); *Hill v. Beto*, 412 F.2d 832 (5th Cir. 1969). In the report and recommendation, the magistrate repeatedly recounts and relies on the state court opinions reciting Decloues statement and trial testimony and ultimately basing there legal analysis on the truth or falsity of the confession in ruling.

In context, it is apparent that the magistrate and state courts evaluated the truthfulness of the details. The magistrate report makes clear that the truthfulness of the confession was an - if not the deciding factor in his finding of voluntariness. Clearly the district court violated the dictates of *Rogers v. Richmond* and the Court of Appeal erred denying COA to review the district courts erroneous opinion.

The lower court dismissed this claim based upon their belief that the last state court finding was not "contrary to" or an "unreasonable application" of Supreme Court precedent (See p. 10 of R&R). Further, the judge seemed to base her opinion entirely on the state court record, which included the state appellate court's mention regarding how Decloues was acting at his "competency hearing" and the fact that he never alleged police coercion (See p. 9 of R&R). (*United States v. O'Keefe*, 128 F.3d 885 (5 Cir. 1997)). Decloues alleged police coercion in putting him in handcuffs and taking him to the police station (taking him into custody) for questioning despite his having told them he had not slept in days and ultimately telling them he had been using drugs throughout this time.

First, to afford the state court decision any deference based upon a competency

hearing held days after his statement was taken when he was arrested was ludicrous. What bearing does his behavior at a competency hearing held days after he was arrested have on the claim presented? Decloues alleged in his petition that he was so intoxicated on the day he gave the statement that it negated his consent. (*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). His demeanor at the competency hearing days later should have had no bearing on the merits of this claim.

Decloues argued that intoxication can render a statement inadmissible when the intoxication is of such a degree as to negate the defendant's comprehension and render him unconscious of the consequences of what he is saying. (*State v. Simmons*, 443 So.2d 512 (La. 1983); and *State v. Robinson*, 384 So.2d 332 (La. 1980)). He acquiesced that that "whether intoxication exist and is of a degree sufficient to vitiate the voluntariness of the confession are questions of fact and a reviewing court will not overturn a trial judge's ruling on the credibility and weight of the testimony relating to the voluntariness of a confession unless they are not supported by the evidence (*State v. Rankin*, 357 So.2d 803 (La. 1978))." Decloues has specifically alleged that the trial court's ruling to not suppress the statement is not supported by the evidence if reasonable jurist would have watched what transpired on the videotaped confession.

As a matter of fact, if one were to consider his behavior at the competency hearing it would entail the fact that he had been in jail—in a controlled environment where drugs were not available—for days before the he was examined, yet he was still "fidgety" even lends more support to his claim of intoxication invalidation.

The videotaped confession of Petitioner shows that he was impaired to such a degree that he did not fully understand what he was saying or the potential consequences

thereof.[1] If he was confused during the video, surely it is only logical to believe that he was in worse, or at least the same, condition, when he earlier confessed to killing his mother and telling officers where the incriminating evidence was hidden.

Petitioner testified that prior to giving his statement to police he had smoked crack practically nonstop for three days and had not slept at all during the 72 two hour period. The psychologist who was asked to review his videotaped confession confirmed that Petitioner was heavily drugged at the time of the confession. The trial judge, after reviewing the tape during the suppression hearing, said, ***"It is very marginal to me, very marginal. I mean what I saw in that tape is somebody that is not really with us."***[2] (See 7/17/09 hearing transcripts, p 23). It was after seeing this tape that the judge then ordered another competency hearing (See 7/21/09 hearing transcripts, p 11).

Was the videotape of the confession made a part of the federal record? Did the lower court review the tape before affording deference to the state court ruling and denying relief? There is nothing to suggest they did, as there was no mention of whether or not Decloues, in Judge Vance's opinion, was "not really with us!"

The police officers were well aware that Petitioner was under the influence of

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1 Many times, Petitioner lost his train of thought; the detectives constantly had to remind him to speak up, not because he was speaking softly, but because he had become incoherent. In the last four minutes of the 25 minute tape, Petitioner went off of the topics and rambled on until the detective had to interrupt him and announce that the interview was over.

2 In the videotape, Petitioner can be seen moving and gesturing wildly throughout the entire event. At the beginning, when the detective was advising him of his rights, Petitioner was rolling his head around in a circular movement like a "drunk." He repeated this movement at other points in the tape. More obvious is the Petitioner's violent rocking movement throughout most of the interview; he would lean back and then abruptly lurch forward toward the table in front of him. During much of this time, Petitioner would wave his arms wildly, often times rocking from side to side. Multiple times he banged the table for no apparent reason. Petitioner's speech was slurred throughout the taped statement. Many times Petitioner lost his train of thought; the detectives constantly had to remind him to speak up, not because he was speaking softly, but because he had become incoherent. In the last four minutes of the 25 minute tape, Petitioner went off topic and rambled on until the detective had to interrupt him and announce that the interview was over.

narcotics and actually used that fact to obtain a confession despite the intoxication. When a defendant is too intoxicated to vitiate consent, it reeks of coercion of the worst kind.

Based upon all of the foregoing, Petitioner's confession should have been suppressed, along with the evidence obtained as a result of those confessions. Since the confession was illegally obtained, the evidence seized should have been excluded as "fruit of the poisonous tree."[3]

If one considers the actions of Decloues on the videotape, it is plausible that jurists of reason would find that the state courts' findings were contrary to, and involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, i.e. *Miranda v. Arizona*, supra.

Under the "contrary to" clause, a [reviewing] court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-413 (2000)

Wherefore, the Fifth Circuit Court of Appeal erred denying that there are enough material questions surrounding the validity of the confession to warrant issuing a certificate of appealability, and the State Court's determination was unreasonable in light of the federal constitution and the U.S. Supreme Court's precedent. As such, Certiorarir should issue and the lower courts ruling

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3 The lower courts' errors in denying the motion to suppress was not a harmless error, since there was no other physical evidence to link Petitioner to the crime. As previously stated, while evidence was obtained due to the illegal statement, none of the evidence was tested for DNA comparison. No latent fingerprints were found on the knife. Moreover, the police were not able to locate any witnesses in the neighborhood who had observed Petitioner enter or leave his house on the night of January 9, 2009, or during the day of January 10, 2009.

overturned and the matter be remanded for further review.

Question No. 2

Whether The Lower Court Misapplied The *Strickland* Standard To The Facts Of This Case, In Violation Of Fifth, Sixth And Fourteenth Amendment To The Constitution.

Decloues maintains that the lower court cited the correct case regarding the standard of review for ineffective assistance of counsel claims; ie, *Strickland v. Washington*. And he agrees that federal review of an ineffective assistance of counsel claim is "doubly deferential." However, Decloues avers that the standard was misapplied when one considers the facts of this case.

2A. Failed to Investigate/Call Corroborating Witnesses

The lower court again deferred to the state district court ruling where it held that because Decloues testified at trial and brought up his drug usage and his relationship with his mother, any further testimony "would be cumulative" (See p. 14 of R&R). As this court is well aware, it is a given that prosecutors are constantly advising juries not to give much credence to a defendant's testimony, as it is self-serving. And when a defendant is the sole defense witness to make an allegation—and he has no corroborating witnesses—a jury member will more likely than not look upon that testimony with skepticism. This is a case where a man killed his mother to get money for drugs! There was no other defense other than intoxication/mental state. Wouldn't a competent defense attorney in this posture at least try to interview witnesses that would corroborate his client's claim of

intoxication/mental state?[4]

Why do state prosecutors present numerous witnesses to corroborate a fact? To bolster their point and make the allegation more believable to the jury members. Shouldn't a defendant have the same ability to present corroborating evidence if it exists?

DECLOUES' TRIAL COUNSEL FAILED TO DO ANY PRETRIAL INVESTIGATION! He did not interview any of the potential witnesses that were given to him by Decloues himself. Decloues was under the impression, right up until the time that Defense Counsel suddenly rested, that these witnesses were going to be called.

Decloues named the witnesses who should have been called: Fire Chief Gordon Cagnaletta, employer William Brown, and numerous neighbors of his mother. The federal district court completely failed to address why a trial counsel in a murder case, wherein his defenses are limited, **would not even attempt to interview potential witnesses** who could corroborate his client's claim of intoxication/mental state! Surely the lower court should have found that failure to conduct interviews was deficient performance and moved to the prejudice prong of the standard!

Fire Chief Gordon Cagnaletta had known the petitioner and his mother since childhood, was a family friend and since he was a public official, his testimony would have been deemed credible. Why didn't defense counsel interview him? What possible reasoning could defense counsel have for not even interviewing him? What of the fact that Cagnaletta had told several of the family's friends and neighbors that, "I don't believe that he [Tony] did it. If he did, he had to have been under the influence of drugs?"

Cagnaletta was a witness who would have given a first-hand account of the

4*Cf. Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799

substance abuse addictions the petitioner had fought since the early 1980s, the numerous rehabilitation facilities that DeCloues had voluntarily been admitted to and the fact that one time the court ordered DeCloues to attend rehab. Surely this would have bolstered Decloues' testimony of being under the influence of drugs when he committed this crime? Why did the lower court completely disregard the validity of these arguments?

The magistrate stated that because Decloues failed to include affidavits from the purported witnesses, he is not entitled to relief (See p. 14 of R&R). This is an erroneous determination when one considers that Decloues specifically requested an evidentiary hearing at the state court level to allow him to develop the record. Neither the state court, nor the federal district court, commented on Decloues' request for an evidentiary hearing and his request for appointment of counsel under the auspice of *Martinez v. Ryan*, WL 912950 (3/20/12) and the expanded dicta announced in *Trevino v. Thaler*, No. 11-10189 (5/28/13).

Is the federal court going to deny Decloues' ineffective assistance of counsel claim based upon him not obtaining affidavits when he requested assistance at the state and federal level? Is that due process?

Decloues has been incarcerated since his initial arrest. He has been indigent the entire time and as such, does not have the ability or resources to attempt to find the addresses of the uncalled witnesses. Angola Inmate Counsel Substitutes, who have completed ALL of Decloues' filings, have no Internet access and lack the resources to search for witnesses' addresses. As a matter of fact, people on the outside, many times with good reason, are hesitant to provide prisoners with addresses of persons who could have been called as witnesses in their trials. This is a case where even minimal

investigation by defense counsel would have uncovered a wealth of information material to Decloues' defense. (Cf. *Cuyler v. Sullivan*, 446 U.S. 335, 343-4, 100 S.Ct. 1708, 1715-6, 64 L.Ed.2d 333 (1980)).

Since Decloues filed his PCR application AFTER *Martinez* was decided and he requested an evidentiary hearing and appointment of counsel, he was entitled by Supreme Court precedent to have counsel appointed to represent his ineffective assistance of trial counsel because it was his "initial-collateral review" of this claim.[5]

There needed to be some supporting evidence pointing to the extent that Decloues' had struggled with his drug addiction for decades! The testimony of these witnessed would have corroborated Decloues' claim that it had peaked. The uncalled witnesses would have testified about the closeness his mother and he had possessed in the past despite his crippling addiction. This was crucial when this was the only defense. Again, the court must ask itself, "What did defense counsel have to lose by at least interviewing these witnesses.? NOTHING! The fact is defense counsel was either too lazy or too busy to engage in professional conduct that would have benefited his client.

2B. Failed to Raise Intoxication as a Defense

The lower court gave this claim minimal consideration. The state trial court did not even consider this claim, finding that because the attorney did not file a pre-trial motion asserting intoxication as a defense, the "issue is moot." This was surely an erroneous ruling when one considers the gist of this sub-claim: ineffective assistance of counsel BECAUSE HIS ATTORNEY DID NOT FILE A PRE-TRIAL MOTION

5 "Without adequate representation in an initial-review collateral proceeding, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-at-trial claim. The same would be true if the State did not appoint an attorney for the initial-review collateral proceeding. A prisoner's inability to present an ineffective-assistance claim is of particular concern because the right to effective trial counsel is a bedrock principle in this Nation's justice system" (quoting *Martinez*, supra).

ASSERTING INTOXICATION AS A DEFENSE!

The magistrate failed to acknowledge the fact that the intoxicated or drugged condition of the offender at the time of the commission of the crime is immaterial, **except** when where the circumstances indicate that an intoxicated or drugged condition has precluded the presence of a specific criminal intent or of special knowledge required in a particular crime and can constitutes a defense to a prosecution for that crime. R.S. 14:15(2). Since one of the elements of Second Degree Murder is "specific intent," intoxication in this case was a valid defense.

Decloues pointed the state and federal courts to numerous cases which say that when a defendant raises a defense which actually defeat an essential element of an offense—intoxication negated specific intent—the State must overcome the defense by evidence which proves beyond a reasonable doubt that the mental element was present despite the alleged intoxication. Magistrate Judge Shushan and Judge Vance completely failed to address this jurisprudence.

The lower court judge claimed that defense counsel's failure to raise intoxication as a defense "relates to trial strategy and was not unreasonable" (See p. 15 of R&R). Decloues adamantly disagrees with this assessment. **HOW CAN IT BE CONSIDERED REASONABLE TRIAL STRATEGY TO NOT OBTAIN EVEN ONE PAGE OF DECLOUES' EXTENSIVE MENTAL HEALTH/SUBSTANCE ABUSE TREATMENT RECORDS?**[6]

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6 The following records were obtainable with only minimal investigation: a court ordered stay at the Veteran's Hospital in New Orleans in 1980; stays in The Bridge House in New Orleans and The Salvation Army in Jefferson Parish for his addictions.; involuntary commitment to the psych ward of Charity Hospital after an unsuccessful suicide attempt; placement in Blue Walters in Jackson, Louisiana; admitted to the Salvation Army's Harbor Light facility in Houston in 1990; a 1993 stay at Shoulders, a rehab facility; a 1995 stint at Star of Hope Men's Rehabilitation Program; a 1997 admittance to Victory House, another rehabilitation

Decloues presented the fact that in *Martin v. Maggio,* 711 F.2d 1273 (5th Cir. 1983), the Federal Court found that Martin's counsel failed to conduct a reasonably substantial investigation into the intoxication defense because they had chosen to rely on another defense at trial. Decloues agreed that although Martin's counsel was deficient in this sense, the court ruled that he was not ineffective in Martin's case because Martin did not prove that this deficient performance "worked to his actual and substantial disadvantage", ie, no prejudice because he had another defense. *Strickland,* supra Id. At 1258. The Maggio court said, "If a review of the record convinced us that counsel had relied on unreasonable assumptions or strategies in deciding not to pursue the defense, a finding of ineffective assistance would be warranted." *Maggio;* quoting *Strickland* at 1256.

That is exactly what Decloues is alleging. HE HAD NO OTHER DEFENSE! Although the defendant is not required to produce evidence to which he is unlikely to have access, if there is evidence that could have been uncovered in his favor through adequate representation, he can prevail on a claim of ineffective assistance of counsel. *Strickland* at 1262. Again, Decloues was not afforded an evidentiary hearing by any state or federal court.

The bottom line is that Decloues was a known crack addict. DeCloues had been on a crack cocaine and heroin binge—shooting heroin intravenously, smoking hundreds of dollars worth of crack cocaine, while also drinking and taking the painkiller Percocet—in the days leading up to the death of his mother with no sleep. It is no wonder that DeClues

program aimed at helping addicts overcome their addictions; a 2007 stay at the Jefferson Parish's Salvation Army rehabilitation program under the guidance of Ms. Willie Fay Lane. These records would have supported a defense of intoxication by showing Decloues' suffered with chemical addictions and dependency for decades.

described his psychotic episodes as being in a dream-like state with the cocktail of drugs being mixed in his system!

Trial Counsel failed to obtain DeCloues' extensive mental health records and the records from the many rehabilitation facilities where he was treated. This was not a first-time drug user, but a man who had been plagued with these addictions for decades.

When one considers the extensive medical records that could have been subpoenaed, it was neither plausible or reasonable for the federal district court to conclude it was "trial strategy." Intoxication was a viable defense, and, if defense counsel would have presented defendant's past drug abuse/mental health history, the claim could have been supported by the records. This would have allowed the jury to consider the option of finding that the Petitioner did not possess specific intent which is necessary to convict the Petitioner of Second Degree Murder and there was a distinct possibility that they would have returned a manslaughter verdict, which would have prevented a life sentence. The judge would have determined a sentence of between 0 and 40 years for the crime, which is a substantial difference than the mandatory life sentence without parole meted out to DeCloues after being convicted of second degree murder.

It is obvious that the failure of trial counsel to raise intoxication, or at least bolster the intoxication defense by subpoenaing the records,[7] was deficient performance. The prejudice is evident when one considers the language found in *Maggio*; the facts of this

7 Judge Shushan implies that because Decloues' testimony "was entirely centered around his intoxication as a defense," defense counsel was raising intoxication as a valid defense (See p. 15 of R&R). But Magistrate Shushan failed to take into consideration the last reasoned state court ruling wherein they found the issue was moot because defense counsel failed to file a pre-trial motion notifying the court that they were going to utilize intoxication as a defense! Thus, the state court did not even consider this claim and the ruling is not entitled to any deference.

case and the *Maggio* case differ because Decloues had no other defense.

Finally, did Judge Vance consider the fact that the question of ineffective assistance of counsel is a cumulative one? It is not proper to divide each issue up in an effort to "conquer" it; rather, **this court must review the totality of the circumstances and the cumulative effect of counsel's lapses**. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). When one considers the things that Decloues' defense counsel failed to do—which could have been accomplished with minimal effort—there can be no doubt that the assistance of counsel was deficient and prejudicial; ie, the cumulative effects of counsel's lapses are so egregious that his performance has to be considered deficient and prejudicial, as counsel failed to protect his client's Sixth and Fourteenth Amendments.

The lower court's "determination" of facts from the evidence before it was objectively "unreasonable" because; 1). The court ignored record evidence supporting the petitioner's contentions; 2). The court reached conclusions based on inferences not supported by the record evidence; 3). The court's erroneous "decision" denying relief on petitioner's constitutional claims "resulted" from an objectively "unreasonable determination of the facts . . .".

Conclusively Mr. Decloues was denied effective assistance of counsel, due process and a fair trial.

CONCLUSION

Mr. Decloues acting pro se reasonably articulated the factual basis of his claims, and the lower courts read him the law – without reasonably applying it to the facts of his case. The conviction and sentence in this case is unjust and wrong.

Under the umbrella of *Miranda*, supra, Decloues had a constitutional guarantee to waive his right against self-incrimination "knowingly" and "voluntarily." The supporting record, including the video tape of the inculpatory statements, prove beyond a doubt that Decloues was unable to make a "knowing waiver" when the court considers all of the surrounding circumstances, ie; defendant's characteristics, conduct of the law enforcement officials, and the defendant's mental state [See *Connelly*, supra].

The facts of *Taylor's*, supra, and Decloues' cases are identical. The remedy should be the same: Decloues' conviction and sentence should be overturned and remanded back to the state district court with instructions to proceed in a manner consistent with this court's findings.

In *Chambers v. Mississippi*, 410 U.S. 287, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Supreme Court held the right of an accused in a criminal trial to due process is, in essence, the right to a fair a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf having long been recognized as essential to due process. To secure these rights, this court applying firmly held United States Supreme Court precedent, require reviewing courts to

evaluate the evidence that *was* presented supporting a claim counsel was ineffective.

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

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

Respectfully submitted on this 2 day of DECEMBER, 2020.

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