IN THE

SUPREME COURT OF THE UNITED STATES

MARECELLUS ADAMS — PETITIONER

vs.

TIM HOOPER, WARDEN — RESPONDENT(S)

APPENDICES

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 2, 2022
Lyle W. Cayce
Clerk

No. 21-30503

MARECELLUS ADAMS,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Western District of Louisiana
USDC No. 5:18-CV-634

ORDER:

Marecellus Adams, Louisiana prisoner # 425582, seeks a certificate of appealability (COA) from the dismissal of his 28 U.S.C. § 2254 application and the denial of a motion to amend the application to assert a claim under *McCoy v. Louisiana*, 138 S. Ct 1500 (2018). Adams is serving a life sentence imposed after a jury convicted him of second degree murder. The district court dismissed some of Adams's claims on the merits. But it denied his motion to amend the application, finding the proposed claim was procedurally defaulted. In his COA motion and brief, Adams argues that the *McCoy* claim should not be procedurally defaulted because it was a structural error. He also argues that counsel was ineffective for failing to investigate

Appendix A

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and prepare, failing to raise the intoxication defense, failing to properly cross-examine witnesses, failing to adequately prepare Adams for trial, and failing to subject the prosecution's case to meaningful adversarial testing. He does not brief claims raised in the district court challenging the sufficiency of the evidence, the excessiveness of his sentence, the use of peremptory challenges, and trial counsel's failure to object to the use of peremptory challenges; those issues are abandoned. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999).

Adams fails to show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the motion for a COA is DENIED because Adams does not make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Adams's motion to stay proceedings pending exhaustion of claims in state court is also DENIED.

KURT D. ENGELHARDT
United States Circuit Judge

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 16, 2021
Lyle W. Cayce
Clerk

No. 19-31066

MARECELLUS ADAMS,

Petitioner—Appellant,

versus

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent—Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:18-CV-634

ORDER:

Marcellus Adams moves for a certificate of appealability ("COA") to appeal the district court's denial of his motion to stay habeas proceedings to allow him to exhaust his claim pursuant to *McCoy v. Louisiana*[1] in state court.

"[S]tay and abeyance [of a petition raising both exhausted and unexhausted claims] should be available only in limited circumstances."[2] A stay is appropriate where there was good cause for the failure to exhaust the claim first in state court, the claim is potentially meritorious, and there is no

[1] 138 S.Ct. 1500, 1508-09 (2018).
[2] *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

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indication that the failure to exhaust was for purposes of delay.[3] Claims that are procedurally barred from being raised in state court are "plainly meritless" claims, which do not warrant a stay.[4]

Adams's *McCoy* claim is procedurally barred by Louisiana Code of Criminal Procedure Article 930.8, which requires applications for post-conviction relief to be filed within two years after a conviction becomes final.[5] Adams's conviction became final in 2015, but he filed his application for relief raising the *McCoy* claim in 2019. Article 930.8 includes certain exceptions, such as where the claim is based on a subsequent interpretation of constitutional law that is retroactively applicable, but Adams makes no argument that *McCoy* applies retroactively or that any other exception applies. Because Adams's claim is plainly meritless,[6] he fails to make "a substantial showing of the denial of a constitutional right" as is required to obtain a COA.[7]

IT IS ORDERED that Adams's motion for a certificate of appealability is DENIED.

Patrick E. Higginbotham

PATRICK E. HIGGINBOTHAM
United States Circuit Judge

[3] *Id.* at 278.
[4] *Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005).
[5] LA. CODE CRIM. PROC. art. 930.8(A).
[6] *See Dretke*, 423 F.3d at 480.
[7] 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

MARECELLUS ADAMS #425582	CIVIL ACTION NO. 18-cv-634 SEC P
VERSUS	JUDGE FOOTE
DARREL VANNOY	MAGISTRATE JUDGE HORNSBY

JUDGMENT

For the reasons assigned in the Report and Recommendation of the Magistrate Judge previously filed herein, and having thoroughly reviewed the record, including the written objections filed, and concurring with the findings of the Magistrate Judge under the applicable law;

It is ordered that Petitioner's petition for writ of habeas corpus is denied. It is further recommended that Petitioner's Motion to Amend and Supplement Petition (Doc. 26) is denied.

Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. The court, after considering the record in this case and the standard set forth in 28 U.S.C. Section 2253, denies a certificate of appealability because the applicant has not made a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 6th day of August, 2021.

ELIZABETH E. FOOTE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

MARECELLUS ADAMS #425582	CIVIL ACTION NO. 18-cv-634 SEC P
VERSUS	JUDGE FOOTE
DARREL VANNOY	MAGISTRATE JUDGE HORNSBY

REPORT AND RECOMMENDATION

Introduction

A Caddo Parish jury returned a unanimous verdict that Marecellus Adams ("Petitioner") was guilty of the second-degree murder of Michael Blackshire, and a mandatory life sentence was imposed. Petitioner's conviction and sentence were affirmed on direct appeal. State v. Adams, 139 So.3d 1106 (La. App. 2d Cir. 2014), writ denied, 159 S.3d 460 (La. 2015). His post-conviction application was denied.

Petitioner now seeks federal habeas corpus relief on the grounds of insufficient evidence, excessive sentence, ineffective assistance of counsel, and discriminatory peremptory challenges. He has also filed a motion to amend and supplement his petition to present a McCoy claim that counsel conceded his guilt over his express objection. For the reasons that follow, it is recommended that the petition and motion for leave to amend be denied.

Sufficiency of the Evidence

A. Relevant Facts

The evidence showed that Petitioner and the victim, Michael Blackshire, were among a group of people who often gathered in an open lot behind a house on Miles Street in Shreveport. People would hang out there to drink, play dominoes, barbecue, and the like. The victim placed a 911 call at 9:03 p.m. on July 7, 2012. The 911 records show that Michael Blackshire called and reported that he was being threatened by a black male, named Marecellus, who was wearing a white t-shirt and blue pants. A recording of the call was played for the jury. Patrick Crutchfield, the victim's nephew, identified his uncle in a photograph and testified that the voice on the 911 call was that of his uncle. Tr. 529-30. The record also shows that the first police unit arrived at 9:17 p.m. Tr. 357-63.

Police found Mr. Blackshire unconscious, having been hit numerous times with a blunt instrument, likely a long 2x4 board. His skull was caved in, several teeth were knocked out, and he was gasping for breath. Blackshire was taken to the LSU Medical Center, and he died the next day. Witnesses told police that Petitioner was responsible for the attack, and he had left the scene.

Dr. James Traylor, the forensic pathologist who performed the autopsy, testified that the cause of death was hemorrhagic shock and blunt force injuries, meaning that Blackshire was beaten to death. Dr. Traylor identified a total of eighteen blows, with five to the head. Twelve of the victim's teeth had been traumatically knocked out of socket. One of the blows to the body caused tears to the liver. There were no injuries to the victim's hands or knuckles that would reflect he had hit or punched someone. Tr. 394-412.

Corporal Brian Lauzon was alerted to the location of Petitioner on the day after the incident. Petitioner, who wore blue jeans and a white t-shirt, was shaking and told the officer that he knew police were looking for him. Officer Lauzon read Petitioner his Miranda rights, which Petitioner said he understood. Petitioner said he believed police were looking for him because of an altercation the night before, where he sent a man to the hospital. Officer Lauzon asked Petitioner what happened, and Petitioner "said he basically got the best of the guy." He first said that the man came toward him with a knife, so he picked up a board and struck him in the head with it. Petitioner then revised the story to say the victim went toward Petitioner's wife, which caused Petitioner to pick up the board and use it to strike the victim. Then Petitioner said the victim both had a knife and was going toward his wife, which caused Petitioner to use the board. Tr. 495-99. A DNA analyst with the crime lab testified that she tested the blue jeans and white t-shirt taken from Petitioner when he was arrested; she found Petitioner's own blood on his pants but no blood on his shirt. Tr. 430-35.

Detective Shonda Holmes interviewed Petitioner, and a recording of the interview was played for the jury. Tr. 504-16. The record filed with this court does not include the recording, and the court reporter did not transcribe it. But the state appellate court apparently had the benefit of the recording and summarized the interview as Petitioner stating that Blackshire was arguing with Petitioner's wife, Petitioner tried to defend his wife, Blackshire came toward him with a knife or boxcutter, and Petitioner grabbed a 2x4 and struck Blackshire once on his head and once on the side of his face. Petitioner said that Blackshire was not on his cell phone when he struck him.

The other people present at the time of the crime were Sarah Davis, Robert Rattler, and Donald Ashley. Leroy Scott, the owner of the lot, lived in a nearby residence, and he testified that Petitioner and the victim often visited the area and frequently bickered about a woman. Scott said that the two men were talking loudly and trading insults that evening. Blackshire wanted to call 911, but Scott steered him away from Petitioner and told him to stay on Scott's porch and let things cool down. Scott went inside and was watching television when he heard a scream. He ran outside to find Blackshire on the ground. Tr. 364-74.

Sarah Davis, age 45, testified that she often visited the lot to lounge around. On the evening of the incident, she had drunk a half-pint of whiskey, which was less than her usual amount. She was the only woman present that evening. She said she did not hear anything or see how it started, but when she returned from a trip to the water cooler, she saw Petitioner and the victim on the ground. She said that before then it was loud, as always, but there was nothing that caught her attention. She saw Petitioner "hitting him a couple of times more, and he didn't move or nothing." She said the weapon was a "long stick," and "as tall as he is, he was hitting pretty hard." Tr. 450-62.

Robert Rattler testified that he used to hang around the lot, drink a few beers, and play dominoes. He had drunk only two beers at the time of the incident. Rattler testified that he saw Petitioner and the victim talking nearby. Blackshire then started walking in Rattler's direction, while talking on a cell phone. Rattler heard a woman on the phone say 911, "and that's when he got hit." Rattler said that Petitioner hit Blackshire "in the back of the head," and the victim fell to the ground. The victim did not have a visible weapon.

Rattler said that Petitioner hit the victim twice with a "long big old white thing." Rattler told Petitioner to stop before he killed the victim, and Petitioner took off. Tr. 462-77.

B. State Court Decision

Petitioner challenged the sufficiency of the evidence on direct appeal and presented the same arguments he presents in support of his federal petition. In evaluating the sufficiency of evidence to support a conviction "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 99 S.Ct. 2781, 2789 (1979). The Jackson inquiry "does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." Herrera v. Collins, 113 S.Ct. 853, 861 (1993).

The state appellate court noted that second-degree murder includes the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. La. R.S. 14:30.1. The court noted that the evidence did not show that Petitioner was in danger from the victim, nor was he protecting his wife, who was not present and did not arrive until after the incident. The witnesses on the scene testified that Sarah Davis was the only female present.

The court acknowledged that Ms. Davis said she saw Petitioner strike the victim "two more times" and Robert Rattler said there were only two blows, with one to the back of the head. The medical evidence, however, indicated many more blows were struck, but none to the back of the head. Rattler also said that he never heard the victim say anything

to the 911 dispatcher, which was inconsistent with the recording of a lengthy conversation with the 911 operator.

The appellate court acknowledged these inconsistencies, but it noted that the testimony of the witnesses at the scene was generally consistent that Petitioner was the aggressor and violently attacked the victim. Dr. Traylor's testimony showed that the number and severity of the blows were greater than described by the witnesses but consistent with the use of an object such as they described. The appellate court applied the Jackson standard and determined that the jury found that Petitioner was the aggressor with specific intent to kill or cause great bodily harm to the victim, and a rational trier of fact could have found those facts from the evidence presented. State v. Adams, 139 So.3d at 1110-12.

C. Habeas Review

Habeas corpus relief is available with respect to a claim that was adjudicated on the merits in the state court only if the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). Thus a state-court decision rejecting a sufficiency challenge is reviewed under a doubly deferential standard. It may not be overturned on federal habeas unless the decision was an objectively unreasonable application of the deferential Jackson standard. Parker v. Matthews, 132 S.Ct. 2148, 2152 (2012); Harrell v. Cain, 595 Fed. Appx. 439 (5th Cir. 2015).

Petitioner admitted in his statements to police that he attacked the victim with a board. He gave inconsistent statements about an alleged justification, but none of the testimony offered by the other witnesses supported his claim that the victim was an aggressor. The victim's 911 call also undermined that argument. There were some inconsistencies in the description of events offered by the witnesses, and between their descriptions and what was reflected in the autopsy report. But "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." Cavazos v. Smith, 132 S.Ct. 2, 4 (2011). And "under Jackson, the assessment of the credibility of the witnesses is generally beyond the scope of review." Schlup v. Delo, 115 S.Ct. 851, 868 (1995). The state court's decision with respect to the sufficiency of the evidence was an entirely reasonable application of Jackson to the relevant facts, so there is no basis for habeas relief with respect to this claim.

Excessive Sentence

Louisiana law mandated a natural life sentence for the conviction of second-degree murder. The trial judge noted the mandatory nature of the sentence and imposed it without assigning reasons. Tr. 610. Petitioner argued on direct appeal that the trial court erred when it did not grant a downward departure (none was requested) and did not discuss relevant sentencing factors under La.C.Cr.P. Art. 894.1. Petitioner's argument was based primarily on state law, but he cited a state court decision that applied federal jurisprudence regarding sentencing, so the State concedes that Petitioner has exhausted his state court remedies with respect to a federal sentencing claim.

The state appellate court noted that there is no need for a trial court to justify a sentence under Article 894.1 if the court is legally required to impose the sentence. The court also rejected the claim that the sentencing judge should have departed from the statutorily mandated sentence, because Petitioner did not demonstrate that he is the exceptional defendant for which downward departure is required. The court noted that Petitioner mercilessly bludgeoned Mr. Blackshire to death by striking him 18 times with a 2x4 and continued to attack him as he lay motionless and unconscious on the ground. The beating broke numerous bones in the victim's face, knocked out 12 of his teeth, tore his liver, and left him unrecognizable. Petitioner did not turn himself in and did not show any remorse for his actions. State v. Adams, 139 So.3d at 1112-13.

Petitioner continues to argue in his habeas petition that the sentencing judge did not discuss relevant factors under Article 894.1. As the state court noted, compliance with the Article is not required when the sentence is mandatory. Furthermore, habeas challenges based on failure to comply with this state sentencing rule have been rejected. Haynes v. Butler, 825 F.2d 921, 924 (5th Cir. 1987); Butler v. Cain, 327 Fed. Appx. 455 (5th Cir. 2009). Habeas relief must be based on violations of federal law.

Petitioner also argues that his sentence was disproportionate in violation of the Eighth Amendment. In Solem v. Helm, 103 S.Ct. 3001 (1983), the Court struck down a sentence of life without parole for a man who was convicted of writing a "no account" check for $100 and who had three prior convictions for non-violent offenses. The majority found the sentence was significantly disproportionate to the crime. "In other cases,

however, it has been difficult for the challenger to establish a lack of proportionality." Graham v. Florida, 130 S.Ct. 2011 (2010).

In Harmelin v. Michigan, 111 S.Ct. 2680 (1991) the offender was sentenced to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. Another closely divided Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California's three-strikes statute. Ewing v. California, 123 S.Ct. 1179 (2003).

The Court in Lockyer v. Andrade, 123 S.Ct. 1166 (2003) reviewed its decisions and rejected a habeas attack on two consecutive terms of 25 years to life for a third-strike conviction. The petitioner had a string of burglary, drug, and property-crime convictions, capped by felony petty-theft after he stole approximately $150 worth of videotapes. The sentence did not permit habeas relief because it was not contrary to or an unreasonable application of clearly established gross disproportionality principle set forth in Supreme Court holdings. The Court admitted that its precedents in the area are not clear, which makes it difficult to obtain habeas relief under the deferential Section 2254(d) standard.

Petitioner does not point to any Supreme Court decision that has held that a mandatory life sentence for an adult convicted of intentional murder is grossly disproportionate to the crime. The killing in this case was particularly heinous, and there is simply no federal law that suggests habeas relief from the sentence is available in these circumstances. The state court's rejection of this claim was not an unreasonable application of any clearly established Supreme Court precedent, so habeas relief is not available.

Post-Conviction Decisions in State Court

Petitioner next asserts claims for ineffective assistance of counsel and improper use of peremptory challenges. These claims were first presented in the post-conviction process. Petitioner presented several ineffective assistance of counsel claims, some of which are also asserted here, in his post-conviction application. The district court reviewed the claims and summarily denied them based on a finding that Petitioner failed to show any performance by counsel that was objectively below a professional standard of practice, and Petitioner failed to provide specific facts to show how any such performance could have possibly prejudiced his case. Tr. 809-813.[1]

With respect to the claim of racially discriminatory jury selection, the district court found that it was without merit because it was based on a general accusation unsupported by facts. Tr. 812. The appellate court denied writs in a brief opinion that cited Strickland and the Louisiana rules regarding the burden of proof on a post-conviction application. It held, "On the showing made, this writ is hereby denied." Tr. 909. The Supreme Court of Louisiana also denied a writ application, with an observation that Petitioner "fails to show he received ineffective assistance of counsel under the standard of Strickland" and failed to satisfy his post-conviction burden of proof as to his remaining claims. Tr. 984-85.

[1] The ruling also appears as an exhibit to the petition, Doc. 1-5, which is noted because one page of the ruling is missing from the state court record.

Ineffective Assistance of Counsel

A. Introduction

Petitioner argues that his attorney rendered ineffective assistance of counsel ("IAC") in several ways. To prevail on such a claim, Petitioner must establish both that his counsel's performance fell below an objective standard of reasonableness and that, had counsel performed reasonably, there is a reasonable probability that the result in his case would have been different. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984).

B. Habeas Burden

Petitioner's IAC claims were adjudicated and denied on the merits by the state court, so 28 U.S.C. § 2254(d) directs that the question is not whether a federal court believes the state court's determination under the Strickland standard was incorrect but whether the determination was unreasonable, which is a substantially higher threshold. Schriro v. Landrigan, 127 S.Ct. 1933, 1939 (2007). The Strickland standard is a general standard, so a state court has even more latitude to reasonably determine that a defendant has not satisfied it. The federal court's review is thus "doubly deferential." Knowles v. Mirzayance, 129 S.Ct. 1411, 1420 (2009). For the federal court to grant relief, "[t]he state court decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016) (per curiam) (quotation marks removed).

"If this standard is difficult to meet, that is because it was meant to be." Harrington v. Richter, 131 S.Ct. 770, 786 (2011). Section 2254(d) "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings" and reaches

only "extreme malfunctions" in the state criminal justice system. Id. Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Id.

C. Exhaustion; Procedural Bar

The State argues that Petitioner did not exhaust his state court remedies with respect to the particular Strickland claims he asserts in his federal petition because, although he presented some Strickland claims in his post-conviction application, he did not articulate these particular claims before the state trial court. Petitioner did present them in his writ applications to the state appellate court and Supreme Court of Louisiana. The State argues that the claims are unexhausted and now procedurally defaulted.

Petitioner was not represented by counsel on his post-conviction application, so his error might be forgiven under Martinez v. Ryan, 132 S.Ct. 1309 (2012). The court need not decide the procedural bar issue if it instead chooses to deny the claim on the merits. King v. Davis, 883 F.3d 577, 585 (5th Cir. 2018) (electing to ignore the procedural bar and cut to the "core of the case," the merits of the underlying claims); Glover v. Hargett, 56 F.3d 682, 684 n.1 (5th Cir. 1995). That is the course that will be followed here, and the court will apply the deference due under Section 2254(d) because the claims did receive state court decisions on the merits in the state appellate and supreme court.

D. Failure to Prepare

Petitioner argues that his attorney failed to adequately investigate the facts and circumstances of the case, including that Petitioner and Blackshire had participated in fights before. Petitioner argues that counsel could have used that information to present to the jury that Petitioner did not have any specific intent to cause serious harm or death to

the victim. Leroy Scott testified that he sometimes had to break up a scuffle between the people who hung out in his yard, and he said that Petitioner had been messing with Blackshire, "arguing, like they usually do." He also said that Petitioner was "messing with him again, arguing with him, wanting to fight." On cross examination by defense counsel, Scott said that he "just thought they were doing boxing and hit him like he usually do, fighting." Tr. 365-66, 373, & 384.

Thus, the jury heard testimony that there had been prior fights and disagreements between the two men, but they obviously were not persuaded that the history somehow meant that Petitioner lacked specific intent to inflict great bodily harm when he repeatedly bludgeoned the victim with a 2x4. There is no reasonable likelihood that the verdict would have been different had defense counsel put more effort into establishing a history of fighting between the men. Accordingly, the state court's rejection of this Strickland claim was not objectively unreasonable.

Petitioner also makes a one-sentence argument that defense counsel said he would present an intoxication defense but failed to do so. Counsel did file notice of intent to offer an intoxication defense. Tr. 74. He argued in closing that Petitioner's intoxication was part of a "toxic stew" that would allow the jury to find that he lacked specific intent and was guilty of no more than manslaughter. Tr. 568-69. But counsel was hampered in presenting an intoxication defense because, after consultation with counsel, Petitioner elected not to testify.

There was evidence that people in the lot often drank, but Mr. Scott said that he did not get close enough to Petitioner that day to tell whether he had been drinking. Defense

counsel did get Scott to say that there were two pints of Thunderbird under a tree. Tr. 384-85. Petitioner has not articulated any other evidence of intoxication that counsel could have discovered and presented at trial if he had engaged in additional preparation. Given this lack of factual support, the state court's denial of this claim was not an unreasonable application of Strickland.

E. Failure to Cross-Examine Witnesses

Petitioner argues that defense counsel "failed to cross-examine certain witnesses and also failed to properly cross-examine other witnesses." He does not identify the witnesses, suggest what questions should have been asked, state what answers could have been generated to help the defense, or articulate any facts in support of this argument.

"[C]onclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding." Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000). When a petitioner does not provide the facts necessary to support a claim, the "mere allegation of inadequate performance during cross-examination is thus conclusory and does not permit the Court to examine whether counsel's failure prejudiced her." Day v. Quarterman, 566 F.3d 527, 540 (5th Cir. 2009). Accordingly, this claim lacks merit.

F. Denial of Right to Testify

Petitioner argues that counsel constructively denied him the right to testify by failing to prepare him for trial. Petitioner says the lack of preparation is why he told the trial judge that he did not wish to testify. The record does not support this claim.

After the State rested its case, defense counsel requested a bench conference. The judge then announced that it was about 7:15 p.m., and court would recess for the evening. Counsel asked that Petitioner be held at the courthouse before he returned to the jail because counsel wanted to see him that evening. The court granted the request and added that counsel could have some additional time in the morning if needed. Tr. 531-32.

The next morning, defense counsel told the court that he spoke with Petitioner the night before, and again in the morning, about the prospect of testifying. "He did not want to last night, and he does not want to this morning." The court asked Petitioner if those statements were correct, and he answered, "Yes, ma'am." Petitioner was asked if that was what he wished, and he repeated, "Yes, ma'am." Tr. 540. Petitioner did not make any complaint that he wished to testify but felt unprepared, not did he voice any other objections.

The state courts denied this claim summarily, and the lack of supporting evidence demonstrates that the decision was not an objectively unreasonable application of Strickland. Petitioner has not explained what additional preparation might have persuaded him to testify, nor has he hinted at what testimony he might have offered that might have produced a different verdict. Given the complete lack of supporting evidence, this claim is meritless. And it is too late for Petitioner to present such facts to this court. Review of a Strickland claim under Section 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 131 S.Ct. 1388, 1398 (2011).

Discriminatory Peremptory Challenges

Petitioner argues that his trial was fundamentally unfair because the voir dire process was not transcribed for appeal, leaving him unable to make a challenge pursuant to Batson v. Kentucky, 106 S.Ct. 1712 (1986) that the prosecution excluded black persons from the jury.

The court minutes show that the State used five peremptory challenges, and the defense used seven. No additional detail is given. Tr. 3. On direct appeal, Petitioner did not raise a Batson challenge or make any other argument regarding the jury selection process. Thus, in accordance with standard procedure, the voir dire was not transcribed. Petitioner first raised his Batson challenge in the post-conviction process. He did not base it on any particular facts from his case, but rather from the "Blackstrikes" report issued by a public interest group regarding the use of peremptory challenges in Caddo Parish. The study addressed trials conducted between 2003 and 2012 (Tr. 799); Petitioner's trial began in August 2013. There is no indication that Petitioner made a Batson challenge at trial, and Petitioner has yet to articulate any specific facts that might support such an argument.

Petitioner argued in his post-conviction proceedings that he had provided enough information to warrant receiving a free copy of the voir dire transcript. Tr. 795. He complains on federal habeas that the state courts did not grant that request, but the federal habeas court does not sit to correct procedural errors alleged to have happened in the postconviction process. "[I]nfirmities in State habeas proceedings do not constitute grounds for relief in federal court." Rudd v. Johnson, 256 F.3d 317, 319 (5th Cir. 2001). As for the Batson claim itself, Petitioner has presented no supporting facts or evidence

about his case, to the state or federal court, so the state court's rejection of this claim was not an objectively unreasonable application of Batson.

McCoy Claim; Motion to Amend

Four months after briefing was completed, Petitioner filed a Motion to Stay (Doc. 16) and asked this court to stay this proceeding to allow him to exhaust his state court remedies with respect to a second post-conviction application based on McCoy v. Louisiana, 138 S.Ct. 1500 (2018), which held that trial counsel cannot concede guilt over a client's express objection. Petitioner asked that this court stay the federal proceeding to allow him time to exhaust remedies in state court, after which he would seek to amend his federal petition and add the exhausted McCoy claim.

Petitioner's motion for stay did not offer any facts to support his asserted McCoy claim. A review of the record showed that defense counsel waived an opening statement. In closing argument, defense counsel argued that it was a case of manslaughter rather than second-degree murder. He argued in favor of an intoxication defense and challenged the state's ability to prove specific intent to kill or inflict great bodily harm. He did concede that the defense could not establish self-defense as Petitioner had claimed in his statements to police. Petitioner did not point to any record evidence that reflects that he objected to this defense strategy.

The undersigned denied the motion to stay, noting the lack of factual foundation for a claim or explanation of how Petitioner would overcome the procedural hurdles of the two-year limitations period in Louisiana Code of Criminal Procedure art. 930.8. Doc. 17. Judge Foote affirmed the decision. Doc. 20. Petitioner pursued an appeal of that decision.

While the appeal was pending, in November 2020, the Supreme Court of Louisiana denied Petitioner's writ application on the post-conviction application that presented the McCoy claim. The summary denial stated that Petitioner "has previously exhausted his right to state collateral review and fails to show that any exception permits his successive filing." State v. Adams, 303 So.3d 1048 (2020).[2] Then, in April 2021, the Fifth Circuit denied a COA to appeal this court's denial of Petitioner's motion to stay to allow exhaustion of the McCoy claim. The Fifth Circuit noted that claims procedurally barred in state court are "plainly meritless" claims that do not warrant a stay, and Petitioner's McCoy claim was procedurally barred under state law. Doc. 28.

While the federal appeal was pending, Petitioner filed with this court a Motion to Amend and Supplement Petition (Doc. 26) in which he represented that he had recently exhausted his McCoy claim, citing the Supreme Court of Louisiana's writ denial, and should be allowed to amend his habeas petition to assert it. Petitioner may have exhausted his state court remedies, but it remains that the claim is procedurally barred based on the state court's denial of it on the grounds that it was a successive filing that did not meet any exception to the Louisiana law's bar against such filings.

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[2] The Supreme Court had warned Petitioner against successive claims when it denied his first post-conviction application: "Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, relator has exhausted his right to state collateral review." Tr. 985.

The state court relied upon a firmly established procedural bar against successive applications to decline review of the McCoy claim. A procedural default may be excused only upon a showing of "cause" and "prejudice" or that application of the doctrine will result in a "fundamental miscarriage of justice." Coleman v. Thompson, 111 S.Ct. at 2564 (1986). The "cause" standard requires the petitioner to show that some objective factor external to the defense impeded his efforts to raise the claim in state court. Murray v. Carrier, 106 S.Ct. 2639 (1986). As for prejudice, it "can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." Id. at 2648. Finally, the fundamental miscarriage of justice exception applies only when a petitioner shows, as a factual matter, that he is actually innocent: that he did not commit the crime of conviction. Ward v. Cain, 53 F.3d 106, 108 (5th Cir. 1995). Petitioner has not articulated any cause or prejudice that would overcome the procedural bar.

The claim also lacks merit. McCoy is based on a concession of guilt against the will of the defendant. The best that Petitioner can do is point to a portion of the closing argument where trial counsel stated that this was not a case of self-defense and that Petitioner "lied when he said he acted in self-defense in those two statements." Counsel may have said that, but he did not concede guilt. His next statement was that this fact did not make him guilty of murder, and the jury should look at the evidence carefully to determine whether that was the case. Counsel went on to present an argument that manslaughter, based on heat of passion, was a more appropriate verdict. Tr. 557.

Defense counsel submitted an affidavit in the state court proceedings. Doc. 26-2, Ex. F. He explained that Petitioner claimed from the beginning that he acted in self-

defense, but counsel presented him with the information learned in discovery and through interviews with witnesses conducted by a defense investigator. Counsel believed that arguing self-defense would be detrimental and, through face-to-face meetings and by letter, he provided Petitioner with the evidence and information that supported that view. Petitioner at one time authorized counsel to offer a manslaughter plea with an agreed seven to ten-year sentence range, but the prosecutor refused to consider anything short of a maximum 40-year sentence, which Petitioner rejected. Counsel testified that, during a meeting at the jail in August 2013, Petitioner asked him about trial strategy. Counsel stated that his objective was to get a manslaughter verdict, and Petitioner did not object to that course of action. He also did not object to the manslaughter argument at trial. Counsel attached his handwritten notes from the jail visit, and they indicate that he told Petitioner that the objective was to get a manslaughter verdict.

Petitioner has not pointed to any evidence in the record that indicates he voiced any objection to pursuing the manslaughter strategy or dropping the self-defense argument. Thus, in addition to being procedurally barred, the McCoy claim lacks merit. Petitioner's request to amend his habeas petition to present a McCoy claim should be denied.

Accordingly,

It is recommended that Petitioner's petition for writ of habeas corpus be denied. It is further recommended that Petitioner's Motion to Amend and Supplement Petition (Doc. 26) be denied.

Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Civ. P. 6(b). A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 14 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

An appeal may not be taken to the court of appeals from a final order in a proceeding under 28 U.S.C. § 2254 unless a circuit justice, circuit judge, or district judge issues a certificate of appealability. 28 U.S.C. § 2253(c); F.R.A.P. 22(b). Rule 11 of the Rules Governing Section 2254 Proceedings for the U.S. District Courts requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate may issue only if the applicant has made a substantial showing of the denial of a constitutional right. Section 2253(c)(2). A party may, within fourteen (14) days from the date of this Report and Recommendation, file a memorandum that sets forth arguments on whether a certificate of appealability should issue.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 27th day of May, 2021.

Mark L. Hornsby
U.S. Magistrate Judge

Case No. 19-31066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
USDC NO. 5:18-cv-634

REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM THE DENIAL OF HABEAS CORPUS RELIEF

Respectfully submitted

Marecellus Adams
425582, Oak—4
Louisiana State Penitentiary
Angola, LA 70712

5

REQUEST FOR CERTIFICATE OF APPEALABILITY

ADAMS V. VANNOY—Case No. 19-31066

NOW INTO COURT, in proper person, comes Marecellus Adams to respectfully ask the Court to issue a certificate of appealability on the ground that he has shown that jurists of reason would find it debatable whether he is entitled to a stay and abeyance of his federal habeas petition until after he exhausts his remedies in the state courts concerning his counsel's arbitrary decision to concede guilt which violated his right to choose his defense contrary to *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). In fact, the violation of client autonomy claim is currently pending in the Louisiana Supreme Court.

Respectfully submitted this 15th day of March, 2020.

Marecellus Adams
425582, Oak—4
Louisiana State Penitentiary
Angola, LA 70712

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AFFIDAVIT/CERTIFICATE OF SERVICE

I do hereby swear and affirm that the foregoing is true and correct to the best of my knowledge and belief. I further certify that a copy of the foregoing has been served upon:

Opposing Counsel:

Caddo Parish District Attorney's Office
Attention: ADA Rebecca Edwards
501 Texas Street Fifth Floor
Shreveport, LA 71101-5408

By placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Withdrawal Form made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for legal mail.

Done this 15th day of March, 2020.

_____
Marecellus Adams, Petitioner-Appellant

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Case No. 19-31066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
USDC NO. 5:18-cv-634

BRIEF IN SUPPORT OF REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM THE DENIAL OF HABEAS CORPUS RELIEF

Respectfully submitted

Marecellus Adams
425582, Oak—4
Louisiana State Penitentiary
Angola, LA 7071

8

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations, as described in the fourth sentence of 5th Cir. Local Rule 28.2.1, other than those listed below which have an interest in the outcome of this particular case:

Marecellus Adams, Petitioner-Appellant

Darrel Vannoy, Respondent-Appellee

Jeff Landry, Attorney General, Attorney for Respondent-Appellant

James E. Stewart, Sr., District Attorney, Attorney for Respondent-Appellant

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MEMORANDUM

NOW COMES pro se habeas petitioner Marecellus Adams respectfully asking the Court to grant him a certificate of appealability ("COA").

STATEMENT OF JURISDICTION

The Court has jurisdiction to entertain the instant memorandum in support of Adams's request for a COA under 28 *U.S.C.* § 2253.

STATEMENT OF THE CASE

Adams was charged, tried, convicted, and sentenced to life imprisonment by a twelve-member jury for second degree murder. He was unsuccessful in his direct appeal and the initial collateral attack of his conviction and sentence in the state courts.

On May 13, 2019, Adams filed a SAPCR with Memorandum, Exhibits, and Attachments in Support alleging that his trial counsel conceded guilt over his express objection in violation of *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). Adams also filed a motion to stay in the federal district court the same day. The district court denied the motion to stay December 20, 2019.

Adams's SAPCR is currently awaiting disposition in the state supreme court. He was denied relief in the trial court September 12, 2019; and the appellate court on December 5, 2019. Had the district court held Adams's

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habeas petition in abeyance until he exhausted all remedies in state court, then his habeas petition would not be a mixed-petition. For the following reasons, Adams respectfully asks the Court to stay his federal proceedings and hold his writ of habeas corpus in abeyance until he has exhausted his violation of client autonomy claim.

STANDARD OF REVIEW

In a habeas corpus proceeding brought under 28 *U.S.C.* § 2254, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a COA under 28 *U.S.C.* § 2253(c). "[A] COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Slack v. McDaniel*, 529 U.S. 473, 483, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542 (2000) (quoting 28 *U.S.C.* § 2253(c)). In order to secure a COA when his application for habeas relief is denied on the merits, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* 529 U.S. at 484, 120 S.Ct. at 1604. This Court has held that to make a substantial showing "requires the applicant to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to

proceed further." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000) (quoting *Slack v. McDaniel*, 529 U.S. 473 (2000)); *Hill v. Johnson*, 210 F.3d 481, 484 (5th Cir. 2000) (quotes and citations omitted). For a substantive claim, this determination is made from an overview of the claim rather than after full consideration of the claims' merit. See *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003).

In *McCoy v. Louisiana*, the United States Supreme Court said the Sixth Amendment guarantees a defendant the right to choose the objective of his or her defense and to insist that counsel refrain from admitting guilt over counsel's experienced-based opinion because some decisions, like whether or not to plead guilty, are for the client to make. *McCoy v. Louisiana*, 138 S.Ct. at 1507, 1508-12. In *State v. Horn*, 2016-0559 (La. 9/7/18); 251 So.3d 1069, the Louisiana Supreme Court echoed the sentiments of the *McCoy* Court and went on to say the holding in *McCoy* was "broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *State v. Horn*, 251 So.3d at 1075. This new interpretation of the Sixth Amendment's right to the assistance of counsel presented an unprecedented area of law in need of judicial guidance. Cf. *State v. Cannon*, 2018-1846 (11/20/18); 257 So.3d 182.

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Since Adams filed his motion to stay, the state district and appellate courts have applied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to his claim. Applying the *Strickland* standard is wrong because the United States Supreme Court unambiguously said: "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) or *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) to [a] McCoy[] claim." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1510-11 (2018); see also *State v. Horn*, 251 So.3d at 1077.

Adams told authorities he struck Michael Blackshire in defense of self and/or others after a heated exchange with Blackshire. Adams's trial counsel, however, conceded guilt to manslaughter over Adams's express objection and defense. Accordingly, the trial court was constrained to follow the new rule governing the violation of a client's autonomy instead of applying *Strickland's* two-pronged standard of review to Adams's claim; and, because Adams's SAPCR followed the Supreme Court's *McCoy* decision in a timely manner, it was not procedurally barred from reviewed in the state courts.

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A COA should be granted in this case because Adams has shown: (1) the denial of a substantial constitutional right; (2) reasonable jurists would find the issue debatable; (3) this Court could resolve the issue in a different manner; and (4) the question is adequate to require further proceedings.

ISSUE AND QUESTION PRESENTED FOR REVIEW

1. Adams's trial counsel asked him if he could present a manslaughter defense instead of arguing justifiable homicide. Adams told counsel he did not agree with a manslaughter defense because he believed his actions were justified. Even so, counsel conceded guilt in his closing argument without Adams's consent. Is Adams entitled to stay his federal proceedings while he exhausts his substantive claim in the state courts?

REASONS WHY COA SHOULD BE GRANTED

1. Whether jurists of reason could debate if Adams is entitled to stay his federal habeas proceeding while he exhaust his violation of client autonomy claim in the state courts.

According to the state courts, Adams's SAPCR presents a claim of ineffective-assistance-of-counsel and is afflicted with several procedural faults. Specifically, the trial court said Adams failed to articulate a factual basis for the requested relief and he offered a conclusory allegation without any proof his counsel conceded guilt. The appellate court agreed and denied Adams's writ. The state courts overlooked the transcript of Adams's trial counsel's closing argument where he told the jury Adams was a liar: "I want

to make one thing very clear. This is also not a case of self-defense. Marecellus lied when he said he acted in self-defense in those two statements." As for the alleged procedural errors under *La. C. Cr. P. art.* 927, the state courts did not identify them.

The state courts erroneously converted Adams's claim into an ineffective-assistance-of-counsel claim. According to the Supreme Court's holding in *McCoy v. Louisiana*, and under *La. C. Cr. P. art.* 930.2, Mr. Goins's affidavit is proof he conceded guilt over Adams's express objection.

In *State v. Cannon*, 257 So.3d 182, the state supreme court denied the defendant's writ application concerning an issue stemming from the Supreme Court's decision in *McCoy v. Louisiana*. However, Justice Crichton disagreed with the majority and, in part, said the Court was "missing a valuable opportunity to provide guidance on the best practice for trial courts across the State in conducting hearings in this unprecedented area of the law." Adams's claim of violation of his autonomy right is currently pending in the state supreme court. If the state supreme court renders an adverse ruling, Adams would be able to present the exhausted claim to the federal district court without the affliction of a mixed petition.

CONCLUSION

WHEREFORE, after considering the foregoing, Adams respectfully asks the Court to grant the requested COA and motion to stay and to hold his federal proceeding in abeyance until he has exhausted all remedies in the state courts concerning his violation of client autonomy claim.

Respectfully submitted this 15th day of March, 2020.

Marecellus Adams, pro se
425582, Oak—4
Louisiana State Penitentiary
Angola, LA 70712

AFFIDAVIT/CERTIFICATE OF SERVICE

I do hereby swear and affirm that the foregoing is true and correct to the best of my knowledge and belief. I further certify that the foregoing has been served upon:

Opposing Counsel:

Caddo Parish District Attorney's Office
Attention: ADA Rebecca Edwards
501 Texas Street, Fifth Floor
Shreveport, LA 71101-5408

By placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Withdrawal made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for the sending of legal mail.

Done this 15th day of March, 2020.

_____

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2, 115 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using *LibreOffice* in 14 point Times New Roman type face.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7) may result in the court's striking the brief and imposing sanctions against the person signing the brief.

_____

Marecellus Adams Petitioner-Appellant

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Case No. 19-31066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

DECLARATION OF INMATE FILING

I am an inmate confined in a state institution. Today, March 13, 2020, I am depositing a Motion for Certificate of Appealability, the Brief in Support for the Motion for Certificate of Appealability in this case in the institution's internal mail system. First-class postage is being prepaid by me or by the institution on my behalf.

I declare under penalty that the foregoing is true and correct.

_____

Marecellus Adams Petitioner-Appellant

Signed on March 15, 2020.

Case No. 21-30503

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
USDC NO. 5:18-cv-634

REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM THE DENIAL OF HABEAS CORPUS RELIEF

Respectfully submitted

Marecellus Adams
425582, Spruce—4
Louisiana State Penitentiary
Angola, LA 70712

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REQUEST FOR CERTIFICATE OF APPEALABILITY

ADAMS V. VANNOY—Case No. 21-30503

NOW INTO COURT, in proper person, comes Marecellus Adams to respectfully ask the Court to issue a certificate of appealability on the ground that he has shown that jurists of reason would find it debatable that: (1) his counsel's arbitrary decision to concede guilt violated his right to choose the objective of his defense; and (2) he carried his burden and proved his trial counsel rendered ineffective assistance.

Respectfully submitted this 20th day of September, 2021.

Marecellus Adams
425582, Spruce—4
Louisiana State Penitentiary
Angola, LA 70712

23

AFFIDAVIT/CERTIFICATE OF SERVICE

I do hereby swear and affirm that the foregoing is true and correct to the best of my knowledge and belief. I further certify that a copy of the foregoing has been served upon:

Opposing Counsel:

Caddo Parish District Attorney's Office
Attention: ADA Rebecca Edwards
501 Texas Street Fifth Floor
Shreveport, LA 71101-5408

By placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Withdrawal Form made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for legal mail.

Done this 20th day of September, 2021.

_____
Marecellus Adams, Petitioner-Appellant

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Case No. 21-30503

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
USDC NO. 5:18-cv-634

BRIEF IN SUPPORT OF REQUEST FOR A CERTIFICATE OF APPEALABILITY FROM THE DENIAL OF HABEAS CORPUS RELIEF

Respectfully submitted

Marecellus Adams
425582, Spruce—4
Louisiana State Penitentiary
Angola, LA 7071

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CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that he knows of no other person, associations of persons, firms, partnerships, or corporations, as described in the fourth sentence of 5th Cir. Local Rule 28.2.1, other than those listed below which have an interest in the outcome of this particular case:

Marecellus Adams, Petitioner-Appellant

Darrel Vannoy, Respondent-Appellee

Jeff Landry, Attorney General, Attorney for Respondent-Appellant

James E. Stewart, Sr., District Attorney, Attorney for Respondent-Appellant

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Other Authorities

MEMORANDUM

NOW COMES pro se habeas petitioner Marecellus Adams respectfully asking the Court to grant him a certificate of appealability ("COA").

STATEMENT OF JURISDICTION

The Court has jurisdiction to entertain the instant memorandum in support of Adams's request for a COA under 28 *U.S.C.* § 2253.

STATEMENT OF THE CASE

Adams was charged, tried, convicted and sentenced to life imprisonment by a twelve-member jury for second degree murder. He was unsuccessful in his direct appeal and the initial collateral attack of his conviction and sentence in the state courts.

On May 13, 2019, Adams filed a supplemental application for post-conviction relief ("SAPCR") with Memorandum, Exhibits and Attachments in Support alleging that his trial counsel conceded guilt over his express objection in violation of *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). Adams also filed a motion to stay in the federal district court the same day. The district court denied the motion to stay December 20, 2019. On April 16, 2021, Judge Higginbotham denied Adams's request for a COA and, in turn,

Adams filed a motion and brief in support for a panel rehearing. The motion is still pending before the Court.

On August 6, 2021, the Western District Court of Louisiana adopted the Magistrate's Report and Recommendation and denied Adams's habeas petition and further declined to issue a certificate of appealability. Adams now seeks a COA from this Court.

STANDARD OF REVIEW

In a habeas corpus proceeding brought under 28 *U.S.C.* § 2254, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a COA under 28 *U.S.C.* § 2253(c). "[A] COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Slack v. McDaniel*, 529 U.S. 473,483, 120 S.Ct. 1595, 1603, 146 L.Ed.2d 542 (2000) (quoting 28 *U.S.C.* § 2253(c)). In order to secure a COA when his application for habeas relief is denied on the merits, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* 529 U.S. at 484, 120 S.Ct. at 1604. This Court has held that a substantial showing "requires the applicant to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner;

or that the questions are adequate to deserve encouragement to proceed further." *Barrientes v. Johnson*, 221 F.3d 741,772 (5th Cir. 2000) (quoting *Slack v. McDaniel*, 529 U.S. 473 (2000)); *Hill v. Johnson*, 210 F.3d 481,484 (5th Cir. 2000) (quotes and citations omitted). For a substantive claim, this determination is made from an overview of the claim and not a full merit consideration. See *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003).

In *McCoy v. Louisiana*, the United States Supreme Court said the Sixth Amendment guarantees a defendant the right to choose the objective of his or her defense and to insist that counsel refrain from admitting guilt over counsel's experienced-based opinion because some decisions, like whether or not to plead guilty, are for the client to make. *McCoy v. Louisiana*, 138 S.Ct. at 1507,1508-12. In *State v. Horn*, 2016-0559 (La. 9/7/18); 251 So.3d 1069, the Louisiana Supreme Court echoed the sentiments of the *McCoy* Court and went on to say the holding in *McCoy* was "broadly written and focuses on a defendant's autonomy to choose the objective of his defense." *State v. Horn*, 251 So.3d at 1075. This new interpretation of the Sixth Amendment right to counsel presented an unprecedented area of law in need of judicial guidance. Cf. *State v. Cannon*, 2018-1846 (11/20/18); 251 So.3d 182,183 (Crichton, J., would grant and docket).

In denying Adams's SAPCR, the state courts applied the *Strickland* standard of review. *Strickland* was the wrong standard because the United States Supreme Court unambiguously said: "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) or *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) to [a] McCoy[] claim." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1510-11 (2018); see also *State v. Horn*, 251 So.3d at 1077.

Adams told authorities he struck Michael Blackshire in defense of self and/or others after a heated exchange with Blackshire. Adams's trial counsel, however, conceded guilt to manslaughter over Adams's express objection and defense. The state courts had a duty to follow the new rule governing the violation of a client's autonomy instead of applying *Strickland's* two-pronged standard of review to Adams's claim; and, because Adams's SAPCR followed the Supreme Court's *McCoy* decision in a timely manner, it was not procedurally barred from reviewed in the state courts.

A COA should be granted in this case because Adams has shown: (1) the denial of a substantial constitutional right; (2) reasonable jurists would

find the issue debatable; (3) this Court could resolve the issue in a different manner; and (4) the question is adequate to require further proceedings.

ISSUE AND QUESTION PRESENTED FOR REVIEW

1. Adams's trial counsel asked him if he could present a manslaughter defense instead of arguing justifiable homicide. Adams told counsel he did not agree with a manslaughter defense because he believed his actions were justified. Even so, counsel conceded guilt in his closing argument without Adams's consent. Did trial counsel violate Adams's right to choose the objective of his defense when he conceded guilt over his express objection?

REASONS WHY A COA SHOULD BE GRANTED

1. Whether jurists of reason could debate if Adams was denied his Sixth Amendment right to counsel when his trial counsel conceded guilt over his express objection.

The state courts claimed Adams presented a supplemental ineffective-assistance-of-counsel claim afflicted with several procedural faults under *La. C. Cr. P. art.* 927. Specifically, the trial court said Adams failed to articulate a factual basis for the requested relief and offered conclusory allegations without any proof that his counsel conceded guilt. The state appellate court said that after a review of the claims under *McCoy v. Louisiana*, Adams's writ is denied. In denying Adams's writ application, the state supreme court said that Adams had previously exhausted his right to state collateral review and failed to show that any exception allowed him to

file a successive APCR. However, the state courts overlooked the transcript of Adams's trial counsel's closing argument where he conceded guilt, without Adams's consent, and also told the jury Adams was a liar: "I want to make one thing very clear. This is also not a case of self-defense. Marecellus **lied** when he said he acted in self-defense in those two statements." As for the alleged procedural errors under *La. C. Cr. P. art.* 927, the state courts failed to identify them. *La. C. Cr. P. art.* 927, in pertinent parts, provides:

> A. If an application alleges a claim which, if established, would entitle the petitioner to relief, the court shall order the custodian, through the district attorney in the parish in which the defendant was convicted, to file any procedural objections he may have, or an answer on the merits if there are no procedural objections, within a specified period not in excess of thirty days. If procedural objections are timely filed, no answer on the merits of the claim may be ordered until such objections have been considered and rulings thereon have become final.
>
> B. In any order of the court requiring a response by the district attorney pursuant to this Article, the court shall render specific rulings dismissing any claim which, if established as alleged, would not entitle the petitioner to relief, and shall order a response only as to such claim or claims which, if established as alleged, would entitle the petitioner to relief.

The trial court directed the State to respond to Adams's claim that his trial counsel violated his Sixth Amendment right to choose the objective of his defense and conceded guilt over his express objection. The trial court then converted Adams's claim into an ineffective-assistance-of-counsel

claim and said it was procedurally defaulted. The trial court's summary dismissal of Adams's SAPCR ran afoul of *La. C. Cr. P. art.* 927(B) because the court failed to specifically address Adams's violation of client autonomy claim—even before it changed the claim into an ineffective-assistance-of-counsel claim.

The trial court said Adams's claim was that his trial counsel rendered ineffective assistance of counsel when he chose to concede guilt to manslaughter. The trial court said Adams is not entitled to relief because he failed to prove that Mr. Goins's strategic decision and advice fell below the standard for a criminal defense attorney who exercises reasonable professional judgment and failed to provide any factual basis to support his claim. When Adams said his trial counsel conceded guilt in his closing argument over his express objection and provided a copy of counsel's closing argument as an exhibit, he provided the factual basis to support his claim. In an obvious reference to an affidavit Mr. Goins submitted on the State's behalf, the trial court claimed Adams presented conclusory statements and did not offer any proof in the form of statements, affidavits, or depositions under *La. C. Cr. P. arts.* 928 and 930.2. This is contrary for more than one reason. First of all, *La. C. Cr. P. art.* 928 is not applicable

here: the trial court directed the State to respond because Adams alleged a claim which, if established, would entitle him to relief. And secondly, in light of *La. C. Cr. P. art.* 930.2, the trial court had a duty to extend the provisions of *La. C. Cr. P. art.* 930, especially after Adams presented a copy of Mr. Goins's closing argument where he conceded guilt without Adams's permission. Cf *Cope v. Vannoy*, 2019 WL 8918835 *16 (W. D. La. 12/16/2019). And, as submitted in his affidavit, Mr. Goins admitted to conceding guilt over Adams's objection:

> In my experience of handling a number of Murder cases, a claim of self-defense does not always equate to a valid claim of self-defense. Mr. Adams's case, in my opinion was not a case in which a valid claim of self-defense could be sustained, hence given the facts, evidence, and law herein, I pursued a Manslaughter argument. Unfortunately for Mr. Adams, the evidence was too much to overcome.

Mr. Goins Affidavit.

Under the clear language found in *McCoy v. Louisiana* and under *La. C. Cr. P. art.* 930.2, Mr. Goins's affidavit is proof he conceded guilt without Adams's permission and over his express objection. In other words, the essential elements of the State's accusation against Adams were not found by a rational trier of fact but were conceded by his trial counsel.

A. Reasonable Jurists could debate whether the Court has authority to address Adams's claim on its merits under ineffective-assistance-of-counsel jurisprudence.

The Sixth Amendment right to counsel is a structural error and was recognized as such in *McCoy*. Cf. *Elmore v. Shoop*, 2019 WL 7139860, at *9 (S.D. Ohio 2019). The Southern District Court of Ohio, at Cincinnati, discussed the effects of *McCoy* in habeas petitioner Elmore's case and concluded that *McCoy* did not apply retroactively to his matter. *Id.*, at ** 9-10. However, the court said the petitioner was "entitled to relief as a matter of law, because this constitutional violation was a structural error, which entitles him to a new trial[.]" *Id.* That court also acknowledged that when a defendant is denied his constitutional right to choose the objective of his or her defense, the error is structural and prejudice is presumed under the Sixth Amendment because the defendant is prejudiced by counsel's actions in a number of ways.

A structural error is understood to be an error that affects the framework within which a trial proceeds and not "simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279,309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Without basic constitutional protections, such as the Sixth Amendment right to the effective assistance of counsel for

one's defense, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Id.*, quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101,3106, 92 L.Ed.2d (1986). This is especially true when counsel believes his client is guilty and informs the jury of that belief. Adams's right to have the assistance of counsel for his defense is guaranteed by the Sixth and Fourteenth Amendments and "is indispensable to the fair administration of our adversarial system of criminal justice." *Maine v. Moulton*, 474 U.S. 159,168, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).

The standard of review for a claim of ineffective assistance of counsel requires a reviewing court to reverse a conviction if the defendant establishes that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. at 694. This reasonable probability standard does not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome in the case. *Strickland v. Washington*, 466 U.S. at 693, 104 S.Ct. at 2068. While a reviewing court must examine the "totality of

circumstances and the entire record" to assess counsel's performance, "[s]ometimes a single error is so substantial that it alone causes the attorney's performance to fall below the Sixth Amendment standard." *Nero v. Blackburn*, 597 F.2d 991,994 (5th Cir. 1979).

In *United States v. Cronic*, the Supreme Court created limited exceptions to the application of Strickland's two-part test for situations that "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Included among these situations are instances when a defendant is denied counsel at a critical stage of the proceedings and when counsel fails to subject the prosecution's case to meaningful adversarial testing. *Cronic*, 466 U.S., at 659-662. A detailed examination of the specific facts and circumstances of each case is necessary to determine whether a presumption of prejudice applies and any inquiry into the counsel's effectiveness must be individualized and fact-driven. See *Cronic*, supra; *Strickland*, supra. The presumption of prejudice applies to Adams's case because Mr. Goins's performance defied the Sixth Amendment's effective-assistance guarantee and he failed to subject the state's case to **any** adversarial testing.

"[A]n attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty.'" *Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir.1981). Even if Mr. Goins believed it was "tactically wise to stipulate to a particular element of a charge or to issues of proof," he could "not stipulate to facts [that] amount to the 'functional equivalent' of a guilty plea." *Id.* When Adams pled not guilty, he retained the "constitutional rights fundamental to a fair trial" and Mr. Goins was obligated to "structure the trial of the case around" his plea. *Id.* at 650. When Mr. Goins conceded guilt, he deprived Adams of his "constitutional right to have his guilt or innocence decided by the jury" and his concessions "nullified the adversarial quality of this fundamental issue." *Id.*, see also *Ramirez v. U.S.* 17 F.Supp.2d 63, 68 (D.R.I. 1998). Mr. Goins asked the jury to accept his concession of guilt as a confession that Adams was guilty. He acted on the "belief that [Adams] should be convicted" and failed "to function in any meaningful sense as the [prosecution's] adversary." *Fisher v. Gibson*, 282 F.3d 1283, 1291 (6th Cir.2002). Mr. Goins's concession deprived Adams of his right to a trial by jury and qualifies as a structural error. See *Sullivan v. Louisiana*, 508 U.S. 275, 281-282, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) ("The right to trial by jury reflects, we have said, 'a profound judgment

about the way in which law should be enforced and justice administered.' *Duncan v. Louisiana*, 391 U.S., at 155, 88 S.Ct., at 1451. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'").

B. Reasonable jurists could debate whether Adams's trial was rendered fundamentally unfair because his trial counsel rendered ineffective assistance in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Adams briefed the state courts of how his trial counsel, Mr. Goins, rendered ineffective assistance within the meaning of *Strickland v. Washington*. Because Mr. Goins was not prepared for trial, and because he further failed to prepare Adams for trial, Adams suffered prejudice in this case because the jury only heard the State's representation of what allegedly happened on the day of this tragic incident. Trial counsel's failure in this regard did affect the outcome of trial. In other words, Mr. Goins's failure to adequately investigate the facts and circumstances of Adams's case in order to present them to the jury in an orderly fashion is evidence of his deficient performance. For instance, there is evidence that establishes Adams and Blackshire have had fights before—fights that were described as violent as the one that resulted in Blackshire's death. According to Scott, Adams and Blackshire argued and fought regularly. In fact, Scott testified that

Blackshire "was just laying on the ground like he usually do, fighting." R. pp. 372-374. Had Mr. Goins investigated this fact he could have represented to the jury that Adams did not have any specific intent to cause serious harm or death to Blackshire. Mr. Goins had a duty to present to the jury that Adams did **not** possess "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." See *State v. Harris*, 00-3459 (La. 2/26/02); 812 So.2d 612,618 (quoting *La. R.S.* 14:10(1)). Mr. Goins told Adams he would present his intoxication defense but failed to do so. In fact, Mr. Goins, in addition to his other failures, did not even offer an opening statement. *U.S. v. Hammonds*, 425 F.2d 597 (1970). Adams was intoxicated and could not form the requisite specific intent. This was yet another drunken brawl that turned out badly for the 2 willing participants. Mr. Goins could have told this to the jury in opening.

Mr. Goins also failed to cross-examine certain witnesses and failed to properly cross-examine other witnesses. Mr. Goins constructively denied Adams the right to testify in his own defense by failing to prepare him for trial. It is for this reason that Adams told the trial court he did not want to testify. He was afraid to speak on his own behalf because he could not

anticipate what Mr. Goins would ask him. Mr. Goins was also ineffective for not preparing him for what could possibly happen on cross-examination. Mr. Goins failed to present Adams with any anticipatory questions that may have been asked by the prosecution. As was pointed out in his original APCR, Mr. Goins's performance was so grossly deficient that there was a break down of the adversarial process because he failed to subject the State's case to any meaningful adversarial testing. According to the lowers courts, Adams's claim that Mr. Goins rendered ineffective assistance does not have any merit; however, each court failed to list or address any one of the so-called "general allegations and assumptions" supposedly contained in Adams's APCR.

Adams's right to the effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and is also "indispensable to the fair administration of our adversarial system of criminal justice." *Maine v. Moulton*, 474 U.S. 159,168, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). In *U.S. v. Hammonds*, supra, the United States Court of Appeals for the District of Columbia discussed what it means for a criminal defendant to have the assistance of counsel for his defense. *U.S. v. Hammonds*, supra 425 F.2d at 600-601. The *Hammond* court said the constitutional guarantee of the Sixth Amendment is not just a procedural

formality. The court said that although "the word 'effective' does not appear in the Constitution itself, it was held in *Powell v. Alabama*, 287 U.S. 45,71, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932) that the failure of the trial court to make an 'effective' appointment of counsel was a denial of due process, and that the duty to assign counsel is not discharged by an assignment 'under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.'" *Id.*, at 601. Quoting its decision in *Mitchell v. United States*, 104 U.S. App. D. C. 57, 259 F.2d 787,793 (1958) *cert. denied*, 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958) the *Hammonds* court reiterated that:

> We think the term "effective assistance"—the courts' construction of the constitutional requirement for the assistance of counsel—does not relate to the quality of the service rendered by a trial lawyer or to the decisions he makes in the normal course of a criminal case; except that, if his conduct is so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and farce is one descriptive expression,—the accused must have another trial, or rather, more accurately, is still entitled to a trial.

U.S. v. Hammonds, 425 F.2d at 601.

The standard of review for a claim of ineffective assistance of counsel requires a reviewing court to reverse a conviction if the defendant establishes: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) but for counsel's

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deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, supra. This reasonable probability standard does not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome in the case. *Strickland v. Washington*, 466 U.S., at 693, 104 S.Ct., at 2068. While a reviewing court must examine the "totality of circumstances and the entire record" to assess counsel's performance, "[s]ometimes a single error is so substantial that it alone causes the attorney's performance to fall below the Sixth Amendment standard." *Nero v. Blackburn*, 597 F.2d 991,994 (5th Cir. 1979).

CONCLUSION

WHEREFORE, after considering the foregoing, Adams respectfully asks the Court to grant the requested COA and motion to stay and to hold his federal proceeding in abeyance until he has exhausted all remedies in the state courts concerning his violation of client autonomy claim.

Respectfully submitted this 20th day of September, 2021.

Marecellus Adams, pro se
425582, Spruce—4
Louisiana State Penitentiary
Angola, LA 70712

AFFIDAVIT/CERTIFICATE OF SERVICE

I do hereby swear and affirm that the foregoing is true and correct to the best of my knowledge and belief. I further certify that the foregoing has been served upon:

Opposing Counsel:

Caddo Parish District Attorney's Office
Attention: ADA Rebecca Edwards
501 Texas Street, Fifth Floor
Shreveport, LA 71101-5408

By placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Withdrawal made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for the sending of legal mail.

Done this 20th day of September, 2021.

_____

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,766 words and does not exceed 30 pages, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using *LibreOffice* in 14 point Times New Roman type face.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7) may result in the court's striking the brief and imposing sanctions against the person signing the brief.

_____

Marecellus Adams Petitioner-Appellant

Case No. 21-30503

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

DECLARATION OF INMATE FILING

I am an inmate confined in a state institution. Today, September 20, 2021, I am depositing a Motion for Certificate of Appealability, the Brief in Support for the Motion for Certificate of Appealability in this case in the institution's internal mail system. First-class postage is being prepaid by me or by the institution on my behalf.

I declare under penalty that the foregoing is true and correct.

_____

Marecellus Adams Petitioner-Appellant

Signed on September 20, 2021.

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Case No. 19-31066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

MOTION AND BRIEF IN SUPPORT FOR PANEL REHEARING
UNDER F.R.A.P. RULE 40

RESPECTFULLY SUBMITTED

MARECELLUS ADAMS
425582,SPRUCE—4
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 7071

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MOTION AND BRIEF IN SUPPORT FOR
PANEL REHEARING UNDER RULE 40

NOW INTO COURT comes Marecellus Adams ("Adams") pro se Appellant who respectfully submits that he has been adversely affected by Judge Patrick E. Higginbotham's April 16, 2021, Order denying his request for a Certificate of Appealability ("COA"). According to Judge Higginbotham, "Adams's *McCoy* claim is procedurally barred" under *La. C. Cr. P. art.* 930.8. Document 00515824481, pp. 1. This assertion is not true based on errors of fact or law in the opinion. F.R.A.P. 40.2

JURISDICTIONAL STATEMENT

The Court has jurisdiction under 28 U.S.C. § 1291, 28 U.S.C. § 2253 and Rule 40 of the Federal Rules of Appellate Procedure.

REASONS FOR GRANTING REHEARING

Before a prisoner seeking post-conviction relief under §2254 may appeal a district court's denial or dismissal of the petition, he must first seek and obtain a COA from a circuit justice or judge under § 2253. When a habeas applicant seeks a COA, the Court of Appeals should limit its examination to a threshold inquiry into the underlying merits of his claim. See *Slack v. McDaniel*, 529 U.S. 473, 481, 120 S.Ct. 1595. This inquiry does not require full consideration of the factual or legal basis supporting the claim.

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Consistent with this Court's precedent and the statutory text, a prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." § 2253(c)(2). Adams has satisfied this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*,529 U.S., at 484. He need not convince a judge or, for that matter, three judges that he will prevail but must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claim debatable or wrong. *Id.*, quoting *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029,1032 (2003).

REASONS FOR DENYING CERTIFICATE OF APPEALABILITY

Judge Patrick E. Higginbotham intimates that: (1) Adams did not have good cause for his failure to exhaust his claim that his trial counsel violated his autonomous right to choose the objective of his defense; (2) the claim has no merit; (3) Adams failed, inexcusably, to exhaust his claim in state court; (4) Adams's claim is procedurally barred; (5) Adams's claim is "plainly meritless"; and (6) the claim does "not warrant a stay." Document 00515824481, pp. 1-2.

Judge Higginbotham concluded, in error, that *La. C. Cr. P. art.* 930.8 precludes Adams from post-conviction or habeas relief because he did not

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file his *McCoy* claim within 2 years of the finality of his conviction and sentence. Judge Higginbotham correctly noted that Adams filed his *McCoy* claim in 2019, but overlooks that under *La. C. Cr. P. art.* 930.8A(2); Adams's *McCoy* claim falls under an exception to the procedural bar:

> No application for post-conviction relief ... shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final ... **unless** any of the following apply:
>
> > (2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is **filed within one year** of the finality of such ruling.

On May 14, 2018, the United States Supreme Court decided *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). Adams filed a successive application for post-conviction May 13, 2019—within 1 year of the Supreme Court's decision. Adams asked the district court stay his habeas petition when he filed his successive post-conviction application. He also served the district court with a copy of the application along with his memorandum in support. At this time, Adams's *McCoy* claim has been completely exhausted in the state courts. The trial court denied relief September 12, 2019. The appellate court denied relief December 5, 2019; and the Louisiana Supreme Court

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denied relief November 10, 2020. On November 20, 2020, Adams filed a Motion to Amend his petition for a writ of habeas corpus in the federal district court. Because Adams has exhausted his claim in the state courts and has filed an amended habeas petition with the federal district court, he humbly asks the Court to review his matter and take the necessary steps to ensure his constitutional claim be heard on its merit.

CONCLUSION

Wherefore, Adams prays the Court grant a COA and remand his matter to the district court with instructions.

Respectfully submitted this 26th day of April, 2021.

_____

Mr. Marecellus Adams

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AFFIDAVIT/CERTIFICATE OF SERVICE

I do hereby swear and affirm that the foregoing is true and correct to the best of my knowledge and belief. I further certify that the foregoing has been served upon:

Opposing Counsel:

Caddo Parish District Attorney's Office
Attention: ADA Rebecca Edwards
501 Texas Street, Fifth Floor
Shreveport, LA 71101-5408

By placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Withdrawal made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for the sending of legal mail.

Done this 26th day of April, 2021.

_____

56

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,197 words, including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using *LibreOffice* in 14 point Times New Roman type face.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7) may result in the court's striking the brief and imposing sanctions against the person signing the brief.

Marecellus Adams Petitioner-Appellant

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Case No. 19-31066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARECELLUS ADAMS

Petitioner-Appellant

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee

DECLARATION OF INMATE FILING

I am an inmate confined in a state institution. Today, April 26, 2021, I am depositing a Motion and Brief in Support for a Panel Rehearing under F.R.A.P. Rule 40 into the institution's internal mail system. First-class postage is being prepaid by me or by the institution on my behalf.

I declare under penalty that the foregoing is true and correct.

_____

Marecellus Adams Petitioner-Appellant

Signed on April 26, 2021.

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The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No.2020-KH-00053

VS.

MARECELLUS ADAMS

IN RE: Marecellus Adams - Applicant Defendant; Applying For Supervisory Writ, Parish of Caddo, 1st Judicial District Court Number(s) 307,643, Court of Appeal, Second Circuit, Number(s) 53,338-KH;

November 10, 2020

Writ application denied - Applicant has previously exhausted his right to state collateral review and fails to show that any exception permits his successive filing. See State ex rel. Adams v. State, 17 0229 (La. 4/20/18), 240 So.3d 917.

BJJ

JLW

JDH

SJC

JTG

WJC

JHB

Supreme Court of Louisiana
November 10, 2020

Katie Marjanovic

Chief Deputy Clerk of Court
For the Court

Appendix B

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STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

No. 53,338-KH

STATE OF LOUISIANA

VERSUS

MARECELLUS ADAMS

FILED: 10/02/19
RECEIVED: PM 09/26/19

On application of Marecellus Adams for POST CONVICTION RELIEF in No. 307,643 on the docket of the First Judicial District, Parish of CADDO, Judge Ramona L. Emanuel.

Pro se	Counsel for: Marecellus Adams
James Edward Stewart, Sr.	Counsel for: State of Louisiana

Before PITMAN, GARRETT, and STONE, JJ.

WRIT DENIED.

Applicant Marecellus Adams seeks review of the September 12, 2019 ruling of the trial court denying his "Second or Subsequent Application for Post-Conviction Relief." After review of the claims under *McCoy v. Louisiana*, 584 U.S. ——, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018), this writ is denied.

Shreveport, Louisiana, this 5th day of December, 2019.

SDS TGB JJG

FILED: December 5, 2019

Karen Lee McGee
Chf. Dep. CLERK

SECOND CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA
Endorsed Filed December 5, 2019
Lillian Evans Richie
LILLIAN EVANS RICHIE, CLERK OF COURT
A TRUE COPY - Attest

Appendix C

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STATE OF LOUISIANA	*	**NUMBER: 307,643**	**SECTION 4**
VERSUS	*	**FIRST JUDICIAL DISTRICT COURT**	
MARECELLUS ADAMS	*	**CADDO PARISH, LOUISIANA**	

RULING

On September 4, 2013, the jury found the Petitioner, **MARECELLUS ADAMS**, present with counsel, guilty as charged of Second Degree Murder. The Court sentenced the Petitioner to pay court costs through inmate banking and to life imprisonment at hard labor. In doing so, the Court committed the Petitioner to the Louisiana Department of Corrections, subject to the conditions provided by law, without benefit of probation, parole, or suspension of sentence. The Court ordered the Petitioner be given credit for time served. The Court informed the Petitioner of his right to an appeal of his right to post-conviction relief proceedings.

On appeal, the Second Circuit Court of Appeal affirmed the Petitioner's conviction and sentence on January 5, 2017, and the Supreme Court of the State of Louisiana denied the Petitioner's application for supervisory writ on April 20, 2018. *State v. Adams*, 49, 053, 139 So. 3d 1106, *writ denied*; 2014-1225 (La. 2/13/15), 159 So. 3d 460.

The subject of this Ruling is Petitioner's "**Second or Subsequent Application for Post-Conviction Relief with Memorandum and Exhibits in Support**" filed on **May 16, 2019.** In said application, the Petitioner raises one claim in his Uniform Application for Post-Conviction Relief: The Petitioner asserts that he had ineffective counsel.

The Petitioner's Uniform Application for Post-Conviction Relief possesses procedural errors, under *La. Code Crim. Proc. art.* 927. Furthermore, the Petitioner failed to specify, with reasonable particularity, the factual basis for the Petitioner's

Appendix D

requested relief, in accordance with *La. Code Crim. Proc. Art. 926(B)(3)*. The Petitioner only provides conclusory statements and offers no proof of evidence such as statements, affidavits, or depositions, in accordance with *La. Code Crim. Proc. arts. 928* and *930.2*.

To succeed on an ineffective counsel claim, the Petitioner must first satisfy the test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), by showing that his counselor's performance was deficient. This requires a showing that counsel made errors so serious that that he was not functioning as the counsel guaranteed to Petitioner by the Sixth Amendment. In other words, the counsel's representation must fall below the standard of reasonableness and competency as required by prevailing professional standards demanded for attorneys in criminal cases. *Strickland, supra*. The assessment of an attorney's performance requires his conduct to be evaluated from counsel's perspective at the time of the occurrence. A reviewing court must give great deference to trial counsel's judgment, tactical decisions and trial strategy, strongly presuming he has exercised reasonable professional judgment. State v. Grant, 41,475 (La. App. 2 Cir. 4/4/07), 954 So.2d 823. Petitioner must also show that his counsel's deficient performance prejudiced his defense. This element requires a showing that the errors were so serious as to deprive Petitioner of a fair trial. Strickland, supra; State v. Grant, supra. Prior Louisiana jurisprudence has stated that "mere conclusory statements are insufficient to establish a claim of ineffective assistance of counsel." State v. Lewis, 51, 672 (La. App. 2 Cir. 11/15/17), 245 So.3d 233.

In this matter, Petitioner asserts that his trial counsel rendered ineffective assistance of counsel when he chose to concede Petitioner's guilt to the jury in an attempt to obtain a manslaughter verdict. Petitioner alleges that trial counsel had asked him what he thought about a manslaughter defense and Petitioner claims he did not agree with it. Supposedly, the matter was dropped and did not come up again until after trial counsel conceded guilt to the jury without Petitioner's consent. The Petitioner

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failed to prove that his counselor's strategic decisions and advice fell below the standard for criminal defense attorney, exercising reasonable, professional judgment and failed to provide any factual basis to support his contentions. Therefore, the Petitioner's assertions lack merit and do not meet his burden in proving facts to meet *Strickland's* two prong test.

It is also to be noted that Petitioner is raising this claim for the first time after inexcusably omitting this claim from his first application for post-conviction relief in violation of La. C. Cr. P. art. 930.4 (E).

For the foregoing reasons, Petitioner's "**Uniform Application for Post-Conviction Relief, Memorandum in Support of Post-Conviction Relief Application** filed on **May 16, 2019** is **DENIED.**

The Clerk of Court is directed to provide a copy of this Ruling to the Petitioner, his custodian, and the District Attorney:

RENDERED, READ AND SIGNED this 12th day of September, 2019, in Shreveport, Caddo Parish, Louisiana.

Ramona L. Emanuel
RAMONA L. EMANUEL
DISTRICT JUDGE

SERVICE INFORMATION:
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Oak-4
Louisiana State Penitentiary
17544 Tunica Trace
Angola, LA 70712

Darrel Vannoy
Louisiana State Penitentiary
17544 Tunica Trace
Angola, LA 70712

Caddo Parish District Attorney's Office

STATE OF LOUISIANA
VERSUS
MARCELLUS ADAMS

NUMBER 307, 643 SECTION 4
1ST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA

STATE OF LOUISIANA
PARISH OF CADDO

AFFIDAVIT

BEFORE ME, the undersigned NOTARY PUBLIC, came and appeared, KURT J. GOINS, who after being duly sworn, stated the following:

1.

I am an Attorney at Law, employed by the Caddo Parish Public Defender Office. In that capacity, I represented Marcellus Adams in his case in the above Docket Number, from its inception in July, 2012 through his sentencing in September, 2013. Mr. Adams was found guilty as charged of Second Degree Murder at trial and sentenced to life imprisonment without parole, probation, or suspension of sentence, with credit for time served. This affidavit is in response to his allegations of ineffective assistance of counsel.

2.

More particularly, Mr. Adams claimed that he acted in self-defense from the beginning of his case, which included his first meeting with me. After investigating the case, I did not consider Mr. Adams's self-defense claiim to be credible nor viable. I based this assessment upon the information I learned in discovery, interviews with Mr. Robert Rattler and Sarah Davis conducted by Mr. Lucky Raley, one of our office's Investigators at that time, my telephone conversation with Dr. James Traylor, who performed the autopsy, and my visit to the crime scene. After all of this, I thought that arguing self-defense would be detrimental rather than beneficial to Mr. Adams's interests.

3.

Through face to face meetings and by letter, I provided Mr. Adams with copies of the discovery in his case, including but not limited to, the police and autopsy reports. I also provided him with copies of Mr. Raley's interviews with the above witnesses and my memorandum of my conversation with Dr. Traylor. I also brought the media to CCC for Mr. Adams to see the crime scene and autopsy photographs. Mr. Adams also heard his statement to Officer Lauzon and Mr.

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Appendix E

Blackshire's 911 call. All of this was done before trial for Mr. Adams to see the evidence as the case proceeded.

4.

Mr. Adams authorized me to offer a Manslaughter plea to resolve the case. He specifically authorized me to offer a seven (7) to (10) year sentence range. I conveyed this to Mr. Dhu Thompson, the prosecutor in the case. Mr. Thompson told me that he was not authorized to make a plea offer in the case, but that Mr. Adams could submit a plea proposal of Manslaughter with a 40 year sentence. When I told Mr. Adams of Mr. Thompson's response, Mr. Adams rejected the 40 year proposal.

5.

For a time, Mr. Adams told me that Mr. Blackshire died because he was taken off of life support too soon and seemed to suggest he wanted me to argue this. Given the evidence in the case, I dismissed this as frivolous.

6.

As per our CCC meeting of August 18, 2013, Mr. Adams asked me what our trial strategy was. I replied that our objective was to get a Manslaughter verdict. A copy of my CCC visitation slip for that date, with my notes is attached to and made a part of this affidavit. Mr. Adams did not object to this course of action in this meeting. He did not object to my Manslaughter argument at trial. His McCoy v. Louisiana-based objection is an after the fact objection.

7.

In my experience of handling a number of Murder cases, a claim of self-defense does not always equate to a valid claim of self-defense. Mr. Adams's case, in my opinion was not a case in which a valid claim of self-defense could be sustained, hence given the facts, evidence, and law herein, I pursued a Manslaughter argument. Unfortunately for Mr. Adams, the evidence was too much to overcome.

Kurt J. Goins

KURT J. GOINS, Affiant

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SWORN TO AND SUBSCRIBED, before me, this 12th day of July, 2019 at Shreveport, Louisiana.

M. L. Harried

NOTARY PUBLIC

MARY L. HARRIED
STATE OF LOUISIANA
NOTARY PUBLIC ID # 51406
MY COMMISSION IS FOR LIFE

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SHERIFF STEVE PRATOR

CADDO CORRECTIONAL CENTER

ATTORNEY VISITATION RECEIPT

DATE: 8-18-13

TIME IN: 1341

TIME OUT: 1424

ATTORNEY'S NAME: Kurt Goins
(PLEASE PRINT)

INMATE(S) VISITED: Quennel Washington
(PLEASE PRINT)

Marcellus Adams

DEPUTY/RECEPTIONIST: Stone COMM#: 2261

Appendix F

- Discussed jury selec. + ~~Other~~ trial proc. w/ J.
- Δ still wants to know who cut life support off.
- Δ asked about trial strategy. Told Δ our objective is to get manslaughter.

that intent of what he wanted to do, which was inflict great bodily harm on the victim, and he did it. The burden was not met on the intoxication defense.

But the burden has been met beyond a reasonable doubt that Marecellus Adams committed Second Degree Murder on Michael Blackshire when he picked up a large blunt object, and while Mr. Blackshire was on the phone with 911 calling for help. Marecellus Adams struck him several times in the head, in the chest and arms, in the abdomen of his body, causing injuries that he would not recover from and that, ultimately, he died from within a day's time.

Myself, Mr. Thompson ask that you deliberate on these facts and come back with the only correct verdict in this case, and that is guilty of Second Degree Murder. Thank you.

THE COURT: Mr. Goins?

MR. GOINS: Thank you, Your Honor. Good morning, ladies and gentlemen.

THE JURY: Good morning.

MR. GOINS: Ladies and gentlemen, this is not a case of Second Degree Murder. This is a case of Manslaughter. And what I'm going to do in the next few moments is go through the evidence with you and talk about why that's so.

Many of the facts in this case are not in dispute, but wha[illegible]heir

Appendix G

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interpretation. What do they really mean?

There are some categories of evidence that I'm going to talk with you about but before I do that, I want to make one thing very clear. This is also not a case of self-defense. Marcellus lied when he said he acted in self-defense in those two statements. But that fact does not make him automatically guilty of Second Degree Murder. You have to look at the evidence carefully to determine whether or not that's so.

What categories of evidence am I going to talk about, or what things am I going to talk about? Well, you remember in voir dire I asked you if you had heard the expression toxic stew, or toxic soup, and I used the Hurricane Katrina example. Well, that's what you have here. That's what caused this to happen. What is in that soup? Anger, jealousy perhaps, possessiveness, and perhaps intoxication. And when I get to intoxication, I'll talk more about why I use the term, perhaps, intoxication.

Also, as far as Manslaughter's two definitions, the heat of passion and lack of specific intent, or if you will, unintentional homicide, I'll talk about that, too. You will see some overlap, and hear some overlap in what I'm saying and what I'm asking you to consider, because the facts don't fit a neat pattern. In many cases, they seldom do. And, in fact, often facts do not lend themselves to

being fitted in a nice neat little box. They certainly don't here.

But there's also something else we should talk about, and that's a concept related to reasonable doubt. You know that reasonable doubt is the State's standard. It's a high burden. Not an impossible burden, it's not beyond all doubt, but it's a high heavy burden. It means that if you can exclude every reasonable alternative conclusion, but one here, what the State has charged, Second Degree Murder. But you also know that it's the Defendant, Marecellus here, that gets the benefit of every reasonable doubt arising out of the evidence. Not the State, Marecellus. And if there's any evidence, if there's any doubt, any reasonable doubt that comes from either the evidence presented or the lack of evidence, that goes to Marecellus. And what we argue about here is murder versus manslaughter.

Where do we start? There's three witnesses who are at or near the scene when this happens: Mr. Leroy Scott, Ms. Sarah Davis, and Mr. Robert Rattler, who saw some or all of what happened, or even most of what happened. We learned that two of these witnesses are limited in their ability to perceive what happened.

We learned first from Officer Bordelon. You recall he was asked, were any of the witnesses drunk when he was gathering them?

He said, at least one was.

You learned also from Ms. Sarah Davis herself that she drank. You learned from Mr. Scott. He said that, yes, Sarah was out there, Robert was out there. When I asked about drinking, he said they were the main ones. Sarah was the main one, and Robert also. I don't want to misquote it.

And then lastly, Detective Holmes told you when she went to the scene that night, she could not get a detailed interview from Ms. Sarah Davis initially because she was too drunk. She was intoxicated. She had to stop the interview.

Now, ladies and gentlemen, is there anything sinister about that? No. Is there anything like, oh, this is a conspiracy? No. Sometimes that's how the facts fall in a case, and you have to take a situation as you find it. Both parties are bound by that. What did they say, because even with the limitations, what did Ms. Davis say? She didn't see the hit actually, she heard loud talk. She couldn't tell what it was, but she heard loud talking.

Mr. Rattler said he heard talking between Marecellus and Michael. It wasn't loud. He couldn't hear what it was.

Now, Mr. Leroy Scott is the one that did not see it but gave you the background of these folks. He told you about Michael and Marecellus. They were friends, but they got

into it. They argued. And he heard them arguing on this occasion. He said that's like they do all the time. But tragically, this did not evolve, and this did not end like it did all the time. It ended with Michael's death. It ended with Marecellus being here on trial.

What caused that? In looking at evidence, you have to look at what's said, heard, seen, and think about what's perceived by witnesses, what's shown by physical evidence. But sometimes, also, you have to draw what's known as inferences, conclusions, indirectly make a decision and find what the facts are. Look behind and between the lines, so to speak. Read between the lines. Hear what's said behind the words. Those are called inferences.

And here, what the State has not excluded, are reasonable inferences about this being an act in the heat of passion because Marecellus and Michael were arguing. What was the argument about? We haven't had anybody come forward and tell us exactly what it was about, so we have to infer. Is this argument about Niecy? That is a reasonable possibility. I use the word anger because Mr. Scott said Marecellus was mad. He was looking for Niecy, whom he called his wife. Where is my wife? And somehow he got into it with Michael.

In the course of that argument, did

Michael say something that hit Marecellus' last nerve? That is certainly a reasonable possibility. When a person loses it, that can happen. That is not excluded by the evidence in this case.

Now, let me pause a moment and make another point very, very clear. Michael saying something that hit Marecellus' nerve. Last nerve does not mean, and I don't want you to get the impression that I'm saying Michael is responsible for his death, he is not in no way. The responsible person is Marecellus. What you're going to decide is what that level or degree of responsibility is. I want to make that very clear.

He hits the last nerve, and Michael, very well, is the first person to realize that because he goes to Mr. Scott first, you remember. According to Mr. Scott he says, he's upset, he's angry, he's threatening me, call 911. And what does Mr. Scott try to do? Be the peacemaker. His words, no, no, no, don't call the police. Let him cool down. He'll cool down.

What does that tell you? Marecellus is angry. It's not his usual anger. It's not your usual back and forth argument that ended with them blowing off steam and that's the end of it. This one is more serious. That's what triggers the 911 call.

And what does Michael say on the 911 call? He's talking noise. That's my

paraphrase of it. You heard the exact words. He tells the police, he's coming at him. You hear that sound. Why are you running? Is that Marecellus running to get the board? Perhaps. Very likely. And the inference you draw from it is Michael backing up, trying to get away, but sadly he doesn't make it.

At first Michael says -- the 911 call. The dispatcher receives the call and says, does he have a weapon? Michael's answer is, no. And within about five seconds, give or take, that's when Michael says, he's got a board. He's coming at me. And then seconds after that is the first of the blows, the one that stops the call. And sadly, the beginning of the end.

Now, I want to direct your attention to something. Now, if you look at that clock and you see it tick with the second hand, a second is not a long time. It seems like it, but remember something as you look at that. We're in this courtroom now, a controlled environment. And if we were in any other environment just talking, none of you have somebody coming at you under these circumstances who is angry and has a weapon. None of you is backing up in fear saying, he's coming at me, he's talking this, and basically describing the situation is bad and it's going to get worse. It's happening quick. So, do keep that in mind. But you're not under that kind of pressure. I'm not. None of us

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sitting in this room are. Michael was.

Yes, Marecellus does strike Michael in the head, in the stomach, in the arms. You saw the pictures with all of the locations, and you know the result that caused his death. That's not in dispute. And Marecellus is the one that wielded the board and hit him.

The argument there, on the one hand, between us and the State is, is that enough for specific intent because of the location or number of blows? Not necessarily. So, on our part -- no doubt the State will say yes, that proves it, end of discussion. My point, no it's not because what you have to ask yourselves is, when Marecellus struck Michael with that board multiple times, what was his state of mind? Was he acting in passion? Was he acting in a rage that was triggered by something that would anger anybody and cause them to lose their reason? That's not easy to do because you don't have witnesses in the case to give you something directly. It's not their fault. It's the way this happened. And that's the evidence you have to rely on. You've got to reach in and try to find it, and it's illusive. That is why I said the State has not excluded Manslaughter by reason of acting to kill someone in the heat of passion. That's why I said that's the thing to keep in mind.

Let's turn to specific intent. Specific intent, an abbreviated definition -- you're

going to hear the precise legal definition in Her Honor Judge Emanuel's charge. That's what you go with. I'm going to give you an abbreviated one. Did the person want the result of their action to happen? Did they want that consequence to happen?

Here is where we get into the territory of lack of intent. And in deciding the presence or absence of specific intent, which is an essential element of this offense, the State has to prove that beyond a reasonable doubt to succeed in convicting Marecellus of Second Degree Murder. As we discussed in voir dire, if you fail on that element, the case for Second Degree Murder fails overall. It fails.

You have to look at all of the facts and circumstances. And what I've done and what I will try to do with you is give you some facts and circumstances. Not in a particular order, but I think they are all important. One, Marecellus left the scene. He may have left running, as Mr. Scott seemed to suggest, he may have walked away. As he said, he left. That's the bottom line. But, where did he go?

His own statement puts him walking, and it puts him in Airport Park. And as Detective Holmes told you, that's about five or six blocks away from Miles Street. The police canvass the area. Was he hiding? We don't know that. Or, was he just walking around thinking, what have I got myself into?

Because if you take Mr. Scott's testimony, remember, he says Marecellus was in the area looking when the police came and the fire department came, and the fire department was trying to tend to Michael, and the police were beginning their investigation by gathering witnesses and trying to figure out what happened. Well, if he saw that, he had to realize something was wrong, that this had gone too far. How far, how extensive, is not yet clear. It is not yet clear to Marecellus.

What does he do? Walk around. Then the next day, the very next day where is he detained and ultimately arrested by Corporal Lauzon on Mayfield Street, two blocks south of Miles Street and one block over from Broadway, all of these areas in Mooretown, that's some flight, remaining in the same area and walking the streets. Not exactly concealment of self.

What else is important about that? You remember the descriptions from the witnesses? They say Marecellus had on a white shirt and blue jeans that night. And when Corporal Lauzon arrested him, what does he have on? A white sheet -- a white shirt and blue jeans. They were seized into evidence and ultimately examined by the crime lab.

Marecellus didn't dispose of the evidence. It turned out not to be inculpatory towards him. There wasn't any blood spatter from Michael on the pants or on the shirt. Blood. It was his DNA. Do you think

Marecellus knows about DNA? I doubt it. Do you think Marecellus is smart enough to pick a board up and knows anything about blood spatter? No. So, that's evidence not disposed of. Do you think he figured out that wouldn't hurt him? No.

Do you remember in voir dire there was a discussion of circumstantial evidence? It's indirect evidence. You have to look at the circumstances, so to speak, and see if you can prove something, again, by inference. Nobody exactly sees something happen, hears something happen, touches, feels, uses any of your five senses to perceive it, or to know it, but yet you draw it from surrounding facts. He had the same clothes on.

What does Corporal Lauzon find him with? A pocketknife. Is it logical that he had a pocketknife the night before? I would say, yes. Despite Robert Rattler's limited perception, he did not see either of these men try to stab each other, and they both had knives. I think in Michael's case, he was more concerned about trying to avoid the situation and sadly, he didn't make it. He didn't think to do it, and it seemed like it happened so fast he didn't have a chance. That's a regrettable thing for me to tell you, ladies and gentlemen, but it's the truth. Just as is the truth Marecellus did not. He was so angry he didn't even reach for the weapon in his pocket. He got a board. And

what did he do with the board?

Now, you know from what you learned from Dr. Traylor and from all of the pictures you saw of Michael in the hospital, at the crime scene, and at autopsy, Michael didn't get hit two times. He got hit more than two times. He had 18 blows that Dr. Traylor determined. That's a lot of blows.

Now, is there specific intent to kill or inflict great bodily harm for the purposes of murder? Well, there's another reasonable interpretation that's consistent with anger, and it's overdoing it. It's going too far. And what did Marecellus do? Walk away, or run away, and throw away the board? I'm sure the State can talk about disposal of evidence if they like, but is that also consistent with the anger is over, and he walks away and runs away and throws the board away? He does tell the police he threw the board away and they couldn't find it. But even despite that, we know this happens because of blunt force trauma.

And now to another point. While he's with Corporal Lauzon, Marecellus says, I got the better of him. I knocked him out, or, I think I knock him out. I sent him to the hospital. Yeah, because either by seeing it, if it is under circumstances Mr. Scott describes, them taking, them being the fire department putting Michael on a stretcher and taking him away, or if he just hears it

through word of mouth, Marecellus knows this has gone too far. He knows he has hurt Michael.

The question is, does he know, and did he intend? He hurt him enough to cause great bodily harm. Did he want to cause great bodily harm? My answer to that is, no.

And another thing that links in with that. In his statement to Detective Holmes, in the last part of it he says, I hope he's all right. And Detective Holmes says, no, he's not. He's going to die. They are going to take him off the ventilator, or respirator, whatever her exact words were. You don't have any evidence of Marecellus reacting joyfully, or gloating, or even stoically.

Now, you don't have to show a particular emotion, granted, to act and have specific intent to kill either at the time or afterward. Ladies and gentlemen, if he wants that result, then he doesn't care. Why ask him? Killing Michael with a board is what Marecellus did. That's beyond doubt. Whether or not he wanted to hit him with that board and wanted him to die is very much in doubt, and it has not been proven that he murdered him beyond a reasonable doubt.

I want to turn to intoxication because I said, you remember as I began this argument to you I said, perhaps intoxication is part of a toxic stew. Marecellus told you that he drank and used drugs that day. Mr. Scott, when I

asked him, do you remember, did Marecellus appear to have been drinking? He said, no. And the other two witnesses, Mr. Rattler and Ms. Davis, they don't know.

What does that mean? Well, the law says the burden of proof is on the Defense, that means yours truly, to show that Marecellus was intoxicated at the time of the offense. And if you so find that precludes him from having the specific intent to kill or inflict great bodily harm upon Michael, that means it's part of the toxic stew.

If, on the other hand, it's not drinking, any drug use, it certainly doesn't help. Even if that burden is not met, it does not help. It can fuel the situation and make it worse.

And the third thing is intoxication. Marecellus was not intoxicated. You still have anger. You still have possessiveness, jealousy, perhaps jealousy. All of those things don't help.

You heard Mr. Scott talk about it, Marecellus being involved with Niecy, Michael being involved with Niecy, all of them living in the junk house that Mr. Scott maintained out back. And you have to ask yourselves, is that a usual thing, or an unusual thing, and did something happen to trigger Marecellus' anger and set this entire thing off to bring it to this tragic conclusion.

Now, I'm sure you might say, well, this is speculation. Well, ladies and gentlemen,

you have evidence that's speculative in that regard. So, you have to look at it, and you have to ask yourself to try to go through it and see if you can get beyond it, and you come to one conclusion which is the charge of Second Degree Murder. Or if you have Second Degree -- and Manslaughter also is a reasonable possibility. And I keep stressing that, reasonable.

Ladies and gentlemen, beyond any dispute, this is a tragedy. Michael did not deserve death. His loss is a tragedy. It's a tragic loss to his family. They have my deepest sympathy. I'm sorry they are here for this. It's a tragedy, too, for Marecellus. It's self inflicted because he's here on trial, and you will decide what to with him.

It's a tragedy for his relatives, too, that are here. I'm sorry all of this happened, and that they are all here, but those sorry's only go so far. We're at the point now where you all will decide this case.

And as I said before, the parties are limited by the facts of the case, and also not only the evidence that's shown, but the lack of evidence. The State has done a very thorough job of presenting their case, but they have not met their burden. They have not.

One thing I must say about intoxication, and you'll hear this in the law, if you do feel that I have met the burden required of us

to show by preponderance of the evidence, that means more likely than not, that Marecellus was intoxicated, that Marecellus was intoxicated at the time of the offence, and it gets a little tangled and that's why I'm taking my time with it, then the State has to prove that he had the specific intent to kill or inflict great bodily harm beyond a reasonable doubt. And one thing I want to leave with you on that point, even if you find there's no intoxication, doesn't matter here. The State never loses the responsibility or the requirement to prove specific intent to kill or inflict great bodily harm beyond a reasonable doubt. Never. Keep that in mind as you go into the jury room.

Now, I said a moment ago that the parties are limited by the facts in this case. That means both parties. And bottom line is, the State is limited. They haven't proven manslaughter. They haven't proven murder. Take that back with you, but there's always second chances.

And Marecellus is limited because we can't establish beyond a reasonable doubt this was self-defense; and therefore, he should get not guilty. That's not going to happen, either. There's only one verdict in this case, ladies and gentlemen. All the State has proven to you beyond a reasonable doubt is that Marecellus is guilty of Manslaughter. Now, whether it's heat of passion, lack of

intent, or unintentional homicide, if you prefer, take your pick. The evidence in this case does not fit itself in a nice neat little box for us. Frequently, it doesn't, but sometimes it does. I'll leave that to you all to decide.

Now, I'm going to sit down in a moment, ladies and gentlemen. I think I've covered everything I need to cover with you, but if I've forgotten to say something, please do not hold that against Marecellus. The person you blame for that is standing before you. So, ladies and gentlemen, I would urge you, and I ask you to find Marecellus guilty of Manslaughter.

And I want to thank you very much for your patience and attention both this morning and these past few days. Thank you.

Thank you, Your Honor.

THE COURT: The State?

MR. THOMPSON: Good morning, ladies and gentlemen of the jury.

THE JURY: Good morning.

MR. THOMPSON: Ladies and gentlemen, I always want to take this time on behalf of the elected District Attorney, Mr. Charles Rex Scott, and Office of the District Attorney, and Office here in Caddo Parish, to thank you for your service this week, and the attention and courtesies that you've given all of the parties in this case. And when I always come up to this podium as the last person to argue,