

NO. 17-6844

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IN THE SUPREME COURT OF THE UNITED STATES

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**TODD WESSINGER,**  
*Petitioner*  
vs.  
**DARREL VANNOY, WARDEN,**  
**LOUISIANA STATE PENITENTIARY,**  
*Respondent*

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

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**OPPOSITION TO PETITION FOR WRIT OF CERTIORARI  
FILED ON BEHALF OF DARREL VANNOY, WARDEN**

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## QUESTIONS PRESENTED

The State of Louisiana takes issue with petitioner's recitation of the issues presented for review. Thus, the State will attempt to clarify the real issue presented for review to this Court and distinguish those issues that were not presented to the courts below, nor ruled upon by the courts below.

First and foremost, the State acknowledges that this is a capital case, but that does not mean appellate or supervisory review rules may be discarded.

Second, petitioner's premise that "[n]o attorney . . . conducted a mitigation investigation into [petitioner's] background as required by settled professional norms" is belied by the fact that trial counsel presented a substantial mitigation case at trial. As noted by the federal district court judge in his initial habeas decision, "The main thrust of this argument is that trial counsel did not adequately investigate or present mitigating evidence to the jury. As the state court record shows otherwise, relief on this claim is denied. At the penalty phase, defense counsel put on seventeen witnesses in mitigation. They included Wessinger's former employers, the mothers of his children, his brother, a preacher, his sister, his aunt, a cousin, a psychologist, a psychiatrist, a commutation expert, and a friend. *Wessinger v. Cain*, {2012 WL 602160, at \*29} (M.D. La. Feb. 23, 2012).

Since the Fifth Circuit only reviewed the alleged ineffectiveness of post conviction (initial review) counsel, the only issue that is ripe for consideration is:

- 1) Whether the Fifth Circuit properly applied this Court's precedents (primarily *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)) under the mandates of the Antiterrorism and

Effective Death Penalty Act (AEDPA) in concluding that initial review counsel was not ineffective.

The Fifth Circuit did not rule on, nor was it requested to rule on, any issue related to alleged state court refusal to fund mitigation experts. Thus, the remaining questions presented by petitioner are not ripe for review by this Court. Further, there was no claim in petitioner's application for post conviction relief, nor argument provided to the federal district court or the federal appellate court. Therefore, this Court should reject the remaining questions, i.e., 2) whether a state court's denial of capital post-conviction counsel's request for funds to conduct a mitigation investigation constitute "cause" to overcome procedural default, and 3) whether a state court's denial of funds renders the state court corrective process ineffective to protect habeas petitioner's rights.

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Petitioner Todd Wessinger was charged with two counts of First Degree Murder in the deaths of Stephanie Guzzardo and David Breakwell, in violation of Louisiana Revised Statute 14:30. Jury selection commenced on June 17, 1997, and was completed on June 20, 1997. Trial commenced on June 23, 1997, and concluded on June 24, 1997. On June 24, 1997, the jury returned two unanimous verdicts of guilty as charged of first degree murder. On June 25, 1997, the penalty phase of trial was conducted with the jury unanimously determining that petitioner be sentenced to death on both counts of first degree murder, based upon its finding that petitioner committed the instant crimes when the following aggravating circumstances were present: (1) petitioner was engaged in the perpetration, or attempted perpetration, of aggravated burglary or armed robbery, (2) petitioner knowingly created a risk of death or great bodily harm to more than one person, and (3) petitioner committed his crime in an especially heinous, atrocious, and cruel manner. On September 17, 1997, the trial court, in accordance with the jury's recommendation, sentenced petitioner to death by lethal injection on both counts.

Petitioner appealed his convictions and sentences, advancing eighteen arguments of error. The Louisiana Supreme Court reviewed the record in this capital case and found that none of petitioner's assigned errors warranted reversal of his convictions or sentences. *State v. Wessinger*, 98-1234 (La. 5/28/99); 736 So.2d 162, *reh'g denied* (7/2/99).

Petitioner filed for writ of certiorari in the Supreme Court of the United States. His sole allegation of error was that it was reversible constitutional error for the trial court to fail to instruct the jury that unanimity was not required when evaluating the effect of mitigating circumstances. The United States Supreme Court denied petitioner's writ application for certiorari on direct review on December 6, 1999. *Wessinger v. Louisiana*, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999). Petitioner's application for rehearing was denied on January 24, 2000. *Wessinger v. Louisiana*, 528 U.S. 1145, 120 S.Ct. 1001, 145 L.Ed.2d 947 (2000).

On June 11, 2001, petitioner, through post conviction relief counsel (also called initial review counsel), filed an application for state post-conviction relief, advancing eleven claims of error. The State responded and requested that the court review each and every claim, conduct any evidentiary hearings that may be necessary for resolution of the claims, and deny all relief requested by petitioner. The State raised several procedural objections and asked for summary dismissal of other claims.

The state judge referred the matter to a Judicial Commissioner for advice on post conviction relief procedures, who issued a fifty-three-page report entitled Commissioner's Preliminary Report On Procedural Bars, finding petitioner failed to establish a basis for post conviction relief. Noting that the First Supplemental Application was one hundred and thirty-six pages, the Commissioner nonetheless recommended dismissal of the petition without a hearing.<sup>1</sup>

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<sup>1</sup> ROA.1907.

Following this report, post conviction relief counsel filed a Second Amended Petition for Post Conviction Relief, totaling an additional one hundred pages and including numerous exhibits. This amended application re-urged and re-argued the claims raised in the First Amended Petition.

At a September 4, 2003, status conference the state district court judge noted that he had received and reviewed the application and amended applications filed by post conviction counsel as well as the exhibits. He also noted that he had reviewed the Commissioner's Preliminary Report and likewise noted that both he and the Commissioner had reviewed petitioner's Second Amended Application. Thereafter, he ruled that all of the claims raised in the First Amended Application and the "bare-bones" petition were procedurally barred.<sup>2</sup> Thereafter, he reviewed and addressed various claims from the Second Amended Petition, denying them without the necessity of an evidentiary hearing. Post conviction counsel sought review with the Louisiana Supreme Court which denied relief on January 14, 2005. *State ex rel. Wessinger v. Cain*, 03-3097 (La. 9/3/04), 882 So.2d 605.

On or about September 7, 2004, post conviction counsel filed an application for writ of habeas corpus in the United States Middle District Court for Louisiana; thus, making post conviction counsel habeas corpus counsel.<sup>3</sup> The claims asserted in petitioner's federal applications had been summarily dismissed by the state courts. Prior to ordering the State to Answer the petition, the district court judge issued a Notice to Counsel, directing the parties to address the issue of timeliness

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<sup>2</sup> ROA.1920-1922.

<sup>3</sup> ROA.28.



and equitable tolling.<sup>4</sup> Following briefing on the issue, the district court judge found<sup>5</sup> that petitioner was entitled to equitable tolling and that he had 48 days remaining when he filed his petition on September 7, 2004.<sup>6</sup>

Before the State filed its answer, habeas counsel (formerly post conviction counsel) filed a First Amended Petition on or about July 22, 2005.<sup>7</sup> The State noted in its Response to Petitioner's "Incomplete First Amended Petition for Habeas Corpus" that any "new claim" raised in this Amended Petition should be considered time barred, should be considered a second or successive claim, and in violation of Rule 15 as it applies to amendments of federal habeas corpus petitions.<sup>8</sup> The district court never ruled on this issue, nor on the timeliness of the Second Amended Petition.

The State responded to the initial application and first amended petition on October 6, 2005.<sup>9</sup> The State contended that petitioner's claims do not merit relief for the reasons cited therein and argued that no evidentiary hearing was required or allowed pursuant to 28 U.S.C. § 2254(e)(2).

Following various proceedings and status conferences, habeas counsel filed a second Amended Petition on November 1, 2010, without obtaining prior approval by

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<sup>4</sup> ROA.130-131.

<sup>5</sup> ROA.291.

<sup>6</sup> 48 days from September 7, 2004, was October 25, 2004. Thus, any application or amended application filed by petitioner after this date would be untimely based on the district court's ruling.

<sup>7</sup> ROA.344.

<sup>8</sup> ROA.1047-1449.

<sup>9</sup> ROA.1050.

the district court.<sup>10</sup> The State responded to the Amended Petition by filing a response and memorandum in opposition on May 6, 2011.<sup>11</sup> The State argued that the district court should limit review pursuant to *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398 and 1411 footnote 20<sup>12</sup>, 179 L.Ed.2d 557 (2011), to the state record without the possibility of expansion.

In a very comprehensive and well-reasoned ruling, the district court ruled on March 13, 2012, that petitioner should be denied habeas relief and that a Certificate of Appealability (COA) should be denied.<sup>13</sup> *Wessinger v. Cain*, {2012 WL 602160} (M.D. La. Feb. 23, 2012)

Petitioner filed a Motion to Alter Judgment arguing that his own claims were procedurally barred, but that he should be able to assert a claim under *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), that his post conviction counsel, now habeas counsel, was ineffective in failing to raise these claims and that he should be able to assert them in federal court. The State filed an opposition. After oral arguments, the district court granted the motion as to the

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<sup>10</sup> ROA.1453.

<sup>11</sup> ROA.1447-2611.

<sup>12</sup> Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a decision “contrary to” or “involv[ing] an unreasonable application” of federal law, a writ of habeas corpus “shall not be granted” and our analysis is at an end. 28 U.S.C. § 2254(d). **We are barred from considering the evidence Pinholster submitted in the District Court that he contends additionally supports his claim.** For that reason, we need not decide whether § 2254(e)(2) prohibited the District Court from holding the evidentiary hearing or whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied. *Cullen v. Pinholster*, 563 U.S. 170, 203, 131 S. Ct. 1388, 1411, 179 L. Ed. 2d 557 (2011). [Emphasis added].

<sup>13</sup> ROA.2651-2729.

claim of ineffective assistance of counsel (IAC) at the penalty phase as asserted in petitioner's Amended Petition filed in 2010, not as originally asserted in his initial petition. Specifically, the district court ruled that since this particular claim went beyond what was presented in state court, it was unexhausted and procedurally barred.<sup>14</sup> The question of timeliness was not addressed or discussed by the district court's ruling on the motion. The district court characterized the material sought to be addressed in federal court, but that had not been presented in state court, as follows:

Wessinger presented the following **additional evidentiary support** of his ineffective assistance at the penalty phase claim: psychiatric evaluation, neuropsychological testing, evidence of low intellectual functioning, and evidence of isolation and abuse. None of this was presented to the state habeas court.<sup>15</sup>

The district court conducted hearings nearly three years later over the course of several weeks. On August 3, 2015, the district court ruled that it was granting the Motion to Alter Judgment and Habeas Corpus, vacating the death sentences imposed by the State of Louisiana.<sup>16</sup>

The State filed a Notice of Appeal on August 20, 2015. The issues sought to be reviewed by the State included: 1) whether the federal district court improperly allowed petitioner to amend his habeas petition after the expiration of the time limitations; 2) whether the federal district court erred in granting hearings on Wessinger's amended and expanded *Martinez* "claim" in federal court; and, 3)

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<sup>14</sup> ROA.3226-3227.

<sup>15</sup> ROA.3226 [Emphasis added].

<sup>16</sup> ROA.3720.

whether the federal district court reached an incorrect conclusion of fact and law with regard to the merits of the *Martinez* claim in federal court. The Fifth Circuit did not address the first two questions and only reviewed the first portion of the third question, i.e., initial review counsel's alleged ineffectiveness, but not trial counsel's alleged ineffectiveness. However, a ruling that initial review counsel was not ineffective was a dispositive finding which pretermitted the other issues raised by the State. Thus, following review, the Fifth Circuit reversed the federal district court's grant of habeas relief. Rehearing and rehearing en banc were denied. *Wessinger v. Vannoy*, 864 F.3d 387 (5<sup>th</sup> Cir. 2017). It is from this decision that the current application seeking certiorari arises.

Petitioner also filed a notice of appeal from the judgment of the federal district court when it dismissed his initial claims and that denied a COA. The Fifth Circuit affirmed this decision on July 21, 2017. *Wessinger v. Vannoy*, 12-70008 (5<sup>th</sup> Cir. 2017) {2017 WL 3121975}. A separate application for certiorari was filed in relation to this ruling.<sup>17</sup>

## **B. STATEMENT OF THE FACTS**

On Sunday, November 19, 1995, at approximately 9:40 a.m., Todd Wessinger, armed with a Larsen .380 caliber semi-automatic pistol, entered Calendar's Restaurant & Bar, located at 7520 Perkins Road in Baton Rouge, Louisiana. He was a former employee of the restaurant who had been terminated for absence due

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<sup>17</sup> See *Wessinger v. Vannoy*, 17-6446.

to an arrest for possession of cocaine. He entered through a rear door at a time when employees were preparing the kitchen for the opening of the restaurant and attempted to shoot Alvin Ricks, but his gun jammed. He then shot and severely wounded Eric Armentor, shot and killed Stephanie Guzzardo while she was on the telephone with the 911 operator, stole approximately \$7,000-\$8,000 of the restaurant's money which was being prepared for bank deposit by Ms. Guzzardo, and shot and killed David Breakwell. Of the six Calendar's employees present that morning, two were murdered, another was shot and severely wounded, one would have been shot had petitioner's gun not jammed, and two others managed to escape. Two of the survivors, Eric Armentor and Alvin Ricks, saw and identified petitioner. Willie Grigsby, another employee, was told by Alvin Ricks to run for his life. Willie Grigsby testified that as he was running across the street, Alvin Ricks said, "I saw him, that was Todd." The final survivor, Eric Mercer, never saw petitioner.

Petitioner was observed outside the restaurant by an employee, Eric Armentor, just prior to the robbery/murders. He saw petitioner sitting on a bicycle and said hello. As he entered the back door of the restaurant and approached the time clock, petitioner shot him in the back. Mr. Armentor stated that he looked over his shoulder, saw petitioner approach the office area, heard Ms. Guzzardo pleading for her life, heard petitioner shoot her, and saw Ms. Guzzardo fall to the floor. The 911 tape<sup>18</sup> was played for the jury, wherein Ms. Guzzardo is heard begging for her life:

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<sup>18</sup> State exhibit 141.

[911 OPERATOR]: 911 What's your emergency? Hello.

[MS. GUZZARDO]: Please don't. Please I won't tell anything. Please.

[PETITIONER]: You'll tell them.

[MS. GUZZARDO]: No, I promise, I promise, I promise I promise, I promise I swear, I'm peeing on myself right now, please, please.

[PETITIONER]: Shut up. (gunshot)

[MS. GUZZARDO]: Oh shit. Help, help, help, oh shit. 911.

[911 OPERATOR]: Yes.

[MS. GUZZARDO]: Help.

[911 OPERATOR]: What happened mam? [sic]

[TELEPHONE DROPS]

Mr. Armentor can be heard on the same 911 tape after Ms. Guzzardo is killed. Although he did not know petitioner before this crime, he easily identified him from a photographic lineup as the perpetrator. Mr. Armentor spent twelve or thirteen days in the hospital suffering from injuries to his back, stomach, liver, and lungs. After a week, he was again hospitalized for additional surgery and another twelve-day stay.

Alvin Ricks, who had been washing dishes, heard gunshots, turned, and saw someone approach him with a gun. The gun was aimed at his head, and the perpetrator pulled the trigger. The gun jammed, and petitioner asked, "where [is] Stephanie [Guzzardo]." Petitioner attempted to clear the weapon, pointed it at Mr. Ricks' leg, and pulled the trigger again. Mr. Ricks fled across the road to a supermarket where a second 911 call was placed. Mr. Ricks knew petitioner before this incident and identified him in a photographic lineup within hours of the crime.

Eric Mercer, a cook at Calendar's, was in a cooler and unaware of what was occurring until he observed David Breakwell on the other side of the cooler begging for his life saying, "please, don't shoot me." Mr. Mercer exited the other side of the cooler and hid until police arrived. Although Mr. Mercer knew petitioner, he openly stated that he did not see the perpetrator of these crimes.

At trial, witnesses testified that petitioner had told friends before these crimes that he had been planning a "lick" at Calendar's. He had even asked Clarence Brown to help him commit the crimes. Another of petitioner's friends, Barney Wilson, had given petitioner the weapon he used in these crimes about three weeks prior to the murders. On the night before the Calendar's crimes, while Wilson and petitioner were riding around, Wessinger test-fired the weapon out the window of the vehicle. After three shots, the gun jammed (just as it did when petitioner attempted to kill Alvin Ricks).

Perhaps most compelling was the testimony of two of petitioner's victims, Alvin Ricks and Eric Armentor. Mr. Ricks, who would have been shot in the head and leg had petitioner's gun not jammed, recognized petitioner on the date of the shooting, identified him during a second 911 call from across the street from the Calendar's restaurant, identified him from a photographic lineup on the date of the murders, and identified him in court. Mr. Armentor saw petitioner outside the restaurant as he reported for work. As he was entering the restaurant, he was shot in the back. Thereafter, he saw petitioner with a gun in his hand.

The State also presented the testimony of several witnesses who had been told by petitioner that he had robbed the Calendar's restaurant and shot and killed two people. The morning after the robbery/murders Wessinger told his friend, Clarence Brown, that he "had a lick" indicating that he was "set for the rest of his life." Petitioner showed Clarence Brown a bundle of money in a plastic bag. Petitioner told Clarence Brown that "if the gun wouldn't have jammed, he would have killed all them, all the mother-fuckers." Thereafter, petitioner gave Clarence Brown some money for himself and for him to give to someone else.

Barney Wilson also saw Wessinger after the murders. He described petitioner's appearance as "kind of nervous, shook up." Petitioner also showed the stolen money to Wilson and told him that he "did the lick at Calendar's, some people were shot, maybe hurt, maybe dead." Petitioner also told Wilson where he had hidden the murder weapon in an abandoned house near petitioner's mother's home. Wilson was asked to remove the weapon "[w]hen things cooled down." Wilson also accepted some money given to him by petitioner.

Several friends and family members testified that petitioner had been seen with large sums of money after the robbery/murders. The State also presented the testimony of the medical examiner who stated that Ms. Guzzardo was shot at very close range through the heart and bled to death within twenty to thirty seconds. The examiner stated that Mr. Breakwell was also shot once in the chest. Mr. Breakwell lived for several hours but eventually died as a result of his wounds.

After the robbery/murders, petitioner fled the scene on a bicycle. Around 2:30



p.m. the day after the robbery/murders, he left Baton Rouge. A relative, who had been in West Baton Rouge Parish for a funeral, allowed petitioner to ride with him to the vicinity of Dallas, Texas. After this relative discovered petitioner was wanted by the police, he notified the local authorities.

While in Texas, petitioner told a friend, Tilton Brown, that he “had robbed his place of work, and that, you know, he had shot and killed two people.” Petitioner told Brown that he had stolen around \$8,000, that he rode his bike to Calendar’s, that he shot one person as he entered, that he proceeded to the office where “the woman was and shot her and took a zipper bag of money.” Petitioner also told Brown where the weapon, bag, and gloves were located. Ultimately, Brown was contacted by Garland police, and he related these facts to them. On November 28, 1995, petitioner was arrested by Garland Police Department officers.

Based on this information, Baton Rouge police searched an abandoned house across the street from petitioner’s mother’s home. There they found the murder weapon, the money bag, the clothes worn by petitioner, and approximately \$7,000 in cash. Thus, petitioner’s own admissions were corroborated by the discovery and seizure of a Larsen .380 caliber pistol which ballistic tests confirmed was, in fact, the murder weapon.

Petitioner presented no evidence to rebut the substance of the State’s case. The jury deliberated for thirty-four minutes before finding petitioner guilty of two counts of first degree murder.

Later, petitioner effectively mooted all of the efforts of his trial attorneys during the guilt phase by admitting the crime to a defense psychiatrist. Dr. Cenac recounted petitioner's version of events, which substantially agreed with the evidence as presented by the State. Petitioner told the psychiatrist that he had shot at least three people, and that after he heard that he was a suspect, he fled to the Dallas area.

### **SUMMARY OF THE ARGUMENT**

The federal district court improperly applied this Court's precedents and reached a conclusion inconsistent with the AEDPA standards of review in this case. The Fifth Circuit reviewed the federal district court's decision and reversed, finding that post conviction (initial review) counsel was not ineffective, thus obviating review under *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). The Fifth Circuit noted, "The State raises several arguments on appeal. Because we conclude that the district court erroneously determined that Gisleson's initial-review representation of Wessinger was deficient, we address only that argument." *Wessinger*, 864 F.3d at 391. The Fifth Circuit ruled, as follows, "We hold that the district court erred. '[C]onsidering all the circumstances' and 'evaluat[ing] the conduct from [Gisleson's] perspective at the time,' as we must, we conclude that Gisleson's performance in raising and developing Wessinger's claim for ineffective assistance of trial counsel at the penalty phase was not deficient. *Strickland*, 466 U.S. at 688–89, 104 S.Ct. 2052." Further, the Fifth Circuit noted

that petitioner's original habeas argument focused on allegations that the state courts' denial of funding for investigation and mitigation, but later changed the argument to claims that initial review counsel was ineffective for not securing funding, "Wessinger previously acknowledged to the district court that he did not develop evidentiary support for his claim during state post-conviction proceedings because of decisions *by the state post-conviction court*, not because Gisleson was deficient." *Wessinger*, 864 F.3d at 392. Thus, the Fifth Circuit determined that petitioner's real complaint was related to the alleged lack of state funding and not the allegations of ineffectiveness of initial review counsel. Since the *Martinez* equitable exception only applies if initial review counsel is found to be ineffective, the Fifth Circuit's ruling properly resolved the question that was presented below.

Petitioner's claims do not raise any significant issues for this Court to decide. The relevant inquiry is whether the Fifth Circuit decision, finding that petitioner failed to establish that his initial review counsel was ineffective, is proper under this Court's precedents and the AEDPA. The question is essentially a fact bound one that will not result in any new or illuminating decisions by this Court. Simply put, petitioner is alleging no more than disagreement with the ruling below. Both the *Martinez* exception to procedural default and the *Strickland* standard for reviewing claims of ineffective assistance of counsel are well known and well accepted jurisprudence. The decision of the Fifth Circuit was thus in compliance with this Court's precedents. Petitioner's complaints in his application for certiorari are mere garden-variety disagreements with the rulings of the lower federal court

which is bound to defer to the rulings of the state courts; thus, they present no issue worthy of debate or further review.

## ARGUMENT

- I. The Fifth Circuit properly applied this Court’s precedents (primarily *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)) under the mandates of the Antiterrorism and Effective Death Penalty Act in concluding that initial review counsel was not ineffective.**

### STANDARD OF REVIEW

Review is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), codified in relevant part at 28 U.S.C. § 2254(d). which provides, a state prisoner’s

application for a writ of habeas corpus ... shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: (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 proceeding.

Accordingly, § 2254 creates a “highly deferential standard for evaluating state court rulings, which demands that state-court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002). The petitioner bears the burden of showing that “there was no reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 784, 178 L.Ed.2d 624 (2011).

In this case, petitioner presented a claim of ineffective assistance of counsel at the penalty phase claim in his state court post conviction relief application. The state court judge discussed this matter with post conviction counsel prior to ruling and rejected the claim on the merits. This was a merits decision that is entitled to federal deference. Since the state courts ruled on the merits of the underlying claim, there was no procedural default of a claim, and the *Martinez* exception was not applicable.

*Pinholster* noted that it did not matter whether the state court decided the matter on summary disposition or following an evidentiary hearing. In either event, a state court decision on the merits of an issue is entitled to deference under the AEDPA. *Pinholster*, 131 S.Ct. at 1402-03, and *Harrington v. Richter*, --- U.S. ---, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). When a merits adjudication has occurred, a federal court’s review is limited to “the evidence presented in the State court proceeding.” *Pinholster*, 131 S.Ct. at 1398–99 (limiting review under § 2254(d)(1) to the record before the state court that adjudicated the claim on the merits).

In the present matter, petitioner instituted federal habeas proceedings in 2004. Claim three of this petition asserted a claim of IAC at the penalty phase.<sup>19</sup> These claims were the same general and vague claims that were presented to the state courts and ruled on the merits. In the Incomplete First Amended Petition filed more than 10 months after the initial petition, petitioner asserted an IAC at

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<sup>19</sup> ROA.67-76.

the penalty phase claim that was very similar to his initial claims. In the 2010 Amended Petition<sup>20</sup>, petitioner greatly expanded the facts or evidence that he purported supported his IAC at the penalty phase claim.

In the State's original answer, it was noted that the state court record contained ample proof that petitioner's trial attorneys were prepared for the penalty phase of this trial. Petitioner's witnesses in the penalty phase included: the widow of former Louisiana Supreme Court Chief Justice Sanders, who testified about his demeanor; the President of the Babe Ruth Baseball league where petitioner played and for whom petitioner had also done yard work; a former girlfriend and mother of petitioner's son to discuss petitioner's character; the mother of petitioner's two daughters to testify as to his character; a friend who testified that petitioner converted to Christianity since the crime; a Reverend who ministers to inmates; his brother; an expert in clinical psychology; several other family members; a former employer; his mother; a Professor of Criminal Justice; an administrator from the Louisiana Pardon Board; and, a former school teacher. A total of seventeen witnesses and ten exhibits were presented on his behalf at the penalty phase.

On February 22, 2012, the federal district court issued a thorough and well-reasoned Ruling on Petition for Writ of Habeas Corpus, denying petitioner's habeas corpus in its entirety. In ruling on the IAC at the penalty phase, the district court reasoned as follows:

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<sup>20</sup> ROA.1684-1757.

### C. Penalty Phase

Wessinger also alleges trial counsel was ineffective during the penalty phase of his trial. (Doc. 120 at 232). The main thrust of this argument is that trial counsel did not adequately investigate or present mitigating evidence to the jury. As the state court record shows otherwise, relief on this claim is denied.

At the penalty phase, defense counsel put on seventeen witnesses in mitigation. They included Wessinger's former employers, the mothers of his children, his brother, a preacher, his sister, his aunt, a cousin, a psychologist, a psychiatrist, a commutation expert, and a friend. The testimony of these witnesses painted a picture of Wessinger as a caring and present father, a brother who cared for his handicapped sister growing up, and a hard worker from a stable family. Testimony also revealed Wessinger had a drinking problem and that he was "a totally different person" when drinking. Tr. R. Vol. IX at 2132. None of the friends or family members could believe he had committed the crime. The expert testimony revealed Wessinger had an I.Q. of 90, placing him in the 25th percentile. Both mental experts testified that in a controlled environment such as prison Wessinger was not a danger to others; Dr. Cenac testified Wessinger would be a "model prisoner" in Angola. (*Id.* at 2180).

Wessinger faults trial counsel for not investigating further into his childhood and upbringing, which he claims would have led to evidence of a physically and mentally abusive childhood, possible mental defects, and an alienation from society that led him to feel he did not belong. (Doc. 120 at 232-256). This is little more than a narrative of Wessinger's life. Further, it is contradicted by the witnesses called by the defense, who testified as discussed above. Wessinger points to no documentary evidence his attorneys overlooked that would have led a reasonable attorney to investigate further. Further, the cases Wessinger cites to bolster his claim are inapposite.FN18 **In short, it is not the quality or thoroughness of the investigation Wessinger is attacking, he essentially does not like the way his story was spun for the jury. This is not ineffective assistance.**

FN18 *Rompilla v. Beard* dealt with failure to investigate records of prior convictions that counsel knew would be used as aggravating factors. 125 S.Ct. 2456 (2005). No such prior convictions were used here, nor are there any records at all the counsel should have but did not investigate. In *Wiggins v. Smith*, the Supreme Court

found it unreasonable for trial counsel not to further investigate their client's background where a prior presentence report indicated misery in his youth and foster care placements. 539 U.S. 510 (2003). Here, no such prior knowledge is alleged or evidenced. Finally, in *Williams v. Taylor*, the Court found counsel's failure to uncover voluminous mitigating evidence ineffective. 529 U.S. 362 (2000). Here, mitigating evidence was uncovered. Wessinger now contends it was not interpreted correctly by counsel.

Wessinger also faults his attorneys for failing to prepare his mental health expert witnesses. As noted by the state, he does not say what this additional preparation would have yielded. Additionally, the Court finds the record indicates this was a strategy on the part of the defense team. Mr. Hecker asked both Dr. Rostow and Dr. Cenac if they had had any prior conversations about the questions they were to be asked on the stand. Tr. R. at 2147, 2174. Rather than failure to prepare, the Court finds the record shows the defense was using this to show the jury they had not scripted the testimony in an attempt to make it seem a totally impartial opinion. This seems to have backfired, and while Wessinger is correct that some of the most damaging testimony came from Dr. Cenac, who testified that Wessinger had confessed to the killings to him and also classified contradictory stories told by Wessinger as lies, that is one peril of that strategy.

Overall, defense counsel seems to have bet heavily on a strategy of painting Wessinger as a good person who suffered from alcoholism and was not his normal self when he committed the murders and that a life sentence would not endanger the lives of other inmates. Defense put on multiple witnesses to that effect and painted a compelling picture. The fact that the jury rejected this theory does not make counsel ineffective. **Thus, the state courts' application of Strickland was not unreasonable.**<sup>21</sup>

The district court denied petitioner's Certificate of Appealability and issued a Judgment dismissing the case. This ruling by the district court was the correct procedure for addressing claims that were presented in state court and resolved on

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<sup>21</sup> ROA.2715-2718. [Emphasis added].



the merits. The district court judge fell into error when he essentially second-guessed his own ruling.

Petitioner filed a Motion to Alter Judgment and supporting memorandum. After briefing and oral arguments, the district court inexplicably granted the motion as to the claim of IAC at the penalty phase. Specifically, the district court ruled that, since this particular claim went beyond what was presented in state court, it was unexhausted and procedurally barred,<sup>22</sup> even though the state courts denied the claim as presented in state court. The court characterized the material sought to be presented in federal court,<sup>23</sup> but that had not been presented in state court, as follows:

Wessinger presented the following **additional evidentiary support** of his ineffective assistance at the penalty phase claim: psychiatric evaluation, neuropsychological testing, evidence of low intellectual functioning, and evidence of isolation and abuse. None of this was presented to the state habeas court.<sup>24</sup>

Based on this finding, the Court considered the applicability of the recent decision of *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) and decided that the additional evidence Wessinger presented was material and significantly different and stronger than what he presented to the state court. Rather than barring the new evidence under *Pinholster* as advocated by the State, Judge Brady found that the “additional evidentiary support” should be treated as a

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<sup>22</sup> ROA.3226-3227.

<sup>23</sup> This evidence was produced after the federal district court provided ex parte funding to petitioner for various purposes.

<sup>24</sup> ROA.3226 [emphasis added].

separate claim that is both unexhausted and should have been procedurally barred. This finding is where the district court committed its gravest error. Based on this finding, the district court determined that petitioner could assert a *Martinez* claim that his post conviction counsel was ineffective as a potential cause to avoid the alleged state procedural bar to asserting this “new claim”.

The State contended below that *Martinez* should not be used as an exception in order to allow “additional evidentiary support” in federal court that he allegedly failed to present to the state courts during his state post conviction relief proceeding. The decision to hold federal *Martinez* hearings ignored the import of the state courts’ rulings. Judicial efficiency, comity, and the AEDPA require that some sense of finality attach to state court rulings.

Here, the state courts determined that petitioner’s penalty phase IAC claim could be summarily denied as occurred in *Pinholster* and *Harrington*. Although post conviction counsel sought more time and more money to pursue the penalty phase IAC claims that he identified in state court, the state district judge refused. Wessinger complained of this refusal in briefs to the federal district court and in the testimony of post conviction counsel Soren Gisleson, but he did not seek appellate review of it in state court.<sup>25</sup> In fact, most of petitioner’s argument at the *Martinez* hearing was, not that post conviction counsel was ineffective, but that he was not provided with more time and more funds. Judge Brady noted as much in his ruling allowing the *Martinez* hearing, “Gisleson agrees that his performance was

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<sup>25</sup> ROA.3831, 3833-3839, 3843-3844 , 3895-3897, and 3924-3925.

deficient, **but only because he repeatedly was denied funds and time** to properly investigate these claims. There is case law supporting this ineffectiveness through denial of funds theory. See *Gary v. Hall*, 558 F.3d 1229, 1251-1253 (11th Cir. 2009); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985).”<sup>26</sup> However, the State maintains that the judgment of the state court dismissing petitioner’s claims on the merits is entitled to AEDPA deference, which should have resulted in the dismissal of all of petitioner’s federal habeas claims. Further, any denial of funds and time by the state courts should be categorized as state trial court error, not ineffectiveness of counsel. Only IAC claims are allowed under *Martinez*.

Applying *Pinholster*, federal courts should not exercise the simple expedient of allowing additional testimony at a new evidentiary hearing as a basis for reversal: “If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) **on the record** that was before that state court.” *Pinholster*, 131 S.Ct. at 1400 [Emphasis added]. A petitioner cannot substitute “new” evidence for the federal court to consider as part of its habeas corpus review of a state court merits decision. Once a state court has ruled on the merits, the federal district court must decide whether the state court’s determination based on the state court record alone was unreasonable. Admission of new evidence in federal district courts should be limited to those instances where the petitioner’s claim was never reviewed by the state court initially. No federal

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<sup>26</sup> ROA.3228. [Emphasis added].

court evidentiary hearing was appropriate where, as here, the state district court issued a ruling on the claim's merits.

Juxtaposed against these standards of the normal manner in which a federal court should review habeas claims based on claims that are adjudicated on the merits in the state courts is the rare and exceptional situation that occurs when a court grants additional hearings under *Martinez*, which, by its own terms, created a "narrow exception" to the general rule expressed in *Coleman v. Thompson*, 501 U.S. 722, 746–47, 111 S.Ct. 2546, 2562–63, 115 L.Ed.2d 640 (1991). The *Coleman* rule generally provides that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as a cause to excuse a procedural default." *Martinez*, at 1315. The *Coleman* Court further defined the terms of its ruling as follows:

We now make it explicit: In all cases in which a state prisoner has **defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule**, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

*Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640 (1991). [Emphasis added].

The *Martinez* Court specifically explained its exception to *Coleman* rule as follows:

Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. **These rules include the doctrine of**

**procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule.** See, e.g., *Coleman, supra*, at 747–748, 111 S.Ct. 2546; *Sykes, supra*, at 84–85, 97 S.Ct. 2497. A state court’s invocation of a procedural rule to deny a prisoner’s claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. See, e.g., *Walker v. Martin*, 562 U.S. —, —, 131 S.Ct. 1120, 1127–1128, 179 L.Ed.2d 62 (2011); *Beard v. Kindler*, 558 U.S. —, —, 130 S.Ct. 612, 617–618, 175 L.Ed.2d 417 (2009). The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. See *Coleman*, 501 U.S., at 750, 111 S.Ct. 2546. There is no dispute that Arizona’s procedural bar on successive petitions is an independent and adequate state ground. Thus, a federal court can hear Martinez’s ineffective-assistance claim only if he can establish cause to excuse the procedural default.

*Coleman* held that “[n]egligence on the part of a prisoner’s postconviction attorney does not qualify as ‘cause.’” *Maples v. Thomas*, 565 U.S. —, —, 132 S.Ct. 912, 922, 181 L.Ed.2d 807 (2012). *Coleman* reasoned that “because the attorney is the prisoner’s agent ... under ‘well-settled principles of agency law,’ the principal bears the risk of negligent conduct on the part of his agent.” *Maples, supra*, at 922, 132 S.Ct., at 922.

*Coleman*, however, did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. The alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner’s claims had been addressed by the state habeas trial court. See 501 U.S., at 755, 111 S.Ct. 2546.

***Martinez***, 132 S. Ct. at 1316 [Emphasis added]. Thus, ***Martinez*** should only apply when a claim has been precluded from review in state court and that state court bar operates as a bar in federal court, the concepts of how much deference a state court decision should be given should not come into play. In other words, normally, if the

state court did not rule on the merits of a claim, then that claim would otherwise be precluded from review in federal court unless the threshold requirements of *Martinez* are established. Even then, a federal court that has granted a *Martinez* hearing would not be troubled by how much deference to give to the state court decision, because the state court did not rule on the merits.

The *Martinez* majority repeatedly stated throughout the opinion that it had created a specific and limited exception to the so-called “*Coleman* rule”, i.e., that claims which are defaulted under state procedural rules are likewise defaulted under federal habeas procedural rules unless cause for the default and actual prejudice may be shown. Nowhere in *Coleman* or *Martinez* is the concept of defaulted evidence discussed. Thus, the *Martinez* exception to the *Coleman* rule does not allow new evidence where *Coleman* itself barred defaulted claims, not new evidence of a claim that was addressed on the merits. Justice Kennedy, writing for the Court, framed the question, thus:

While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an **ineffective-assistance claim** when **the claim** was not properly presented in state court **due to an attorney’s errors** in an initial-review collateral proceeding.

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Despite initiating this proceeding, **counsel made no claim trial counsel was ineffective** and later filed a statement asserting she could find **no colorable claims** at all.

*Martinez*, 132 S. Ct. at 1313-1314. [Emphasis added].

In the instant case, it is clear that, not only did state district court Judge Anderson rule on the merits of the penalty phase IAC claim, he also ruled that he would not provide additional funding to post conviction counsel, nor provide additional time to post conviction counsel to explore this claim.<sup>27</sup> Likewise, petitioner requested additional funds for investigation of this particular claim in his state court pleadings - First Amended Petition for Post-Conviction Relief, pp. 2-3, and Second Amended Petition for Post-Conviction Relief, p. 100, as well as in his other appearances in state court. Finally, post conviction counsel Soren Gisleson admitted repeatedly in his federal court testimony that he requested additional funding and time in state court and from other state agencies, but was denied. Mr. Gisleson agreed with petitioner's federal habeas counsel that he would "say it also includes issues relative to lack of funding, lack of time, all the things we have talked about, as well as your lack of experience[.]" However, any lack of funds and/time do not relate to ineffectiveness of post conviction counsel. Instead, they are questions related to the soundness of the state court judge's decisions. Such issues are rulings of the state trial court that are not at issue in this federal hearing, since *Martinez* only applies to post conviction counsel's ineffectiveness.

## **CAUSE AND PREJUDICE BASED ON INEFFECTIVENESS OF POST CONVICTION COUNSEL**

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<sup>27</sup> See state court Commissioner's Preliminary Report on Procedural Bars, pp. 4-17 and Judge Anderson's ruling at the Status Conference on Post Conviction held on September 4, 2003.

*Martinez* for the first time held that ineffective assistance of counsel in a state collateral review proceeding can amount to “cause” to excuse a procedurally defaulted claim of trial level ineffective assistance when, “under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding,” and “in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez*, 132 S. Ct. at 1320.

*Martinez* did not address the separate requirement of actual prejudice. On the contrary, the opinion emphasized that it addressed only whether lack of counsel or ineffectiveness of counsel in an initial collateral proceeding constitutes “cause” for some defaults. *Id.* at 1315 (explaining that the “precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding”). The Court explained it was holding only that ineffectiveness of post-conviction counsel “may establish *cause* for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez*, 132 S. Ct. at 1315 (emphasis added). The Court then noted that obtaining habeas review of a defaulted claim requires a prisoner to show both “cause and prejudice.” *Id.* at 1316. The Court concluded by stating that the Ninth Circuit “did not address the question of prejudice. These issues remain open for a decision on remand.” *Id.* At 1321. On remand, the trial court found Martinez did not show “actual prejudice.” *Martinez v. Schriro*, {2012 WL 5936566} (D. Ariz. 2012). In light of this language and history, it is untenable to read *Martinez* as altering the longstanding rule that “cause” is



separate and distinct from “actual prejudice” and that “both” showings are necessary to obtain review of a defaulted claim. *Murray v. Carrier*, 477 U.S. 478, 494, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (“the Court could not have been clearer that *both* cause and prejudice must be shown, at least in a habeas corpus proceeding challenging a state court conviction”); *see also Francis v. Henderson*, 425 U.S. 536, 542 (1976) (referenced in *Murray*). That *Martinez* addressed only “cause” is further confirmed by the Court’s statement that expanding what constitutes “cause” did not affect stare decisis concerns because it did not alter an issue decided by precedent. *Martinez*, 132 S. Ct. at 1319.

In the instant case, it is clear from the testimony elicited at the federal hearing that post conviction counsel was not ineffective. He filed two separate amended applications for post conviction relief, one totaling 137 pages and the other totaling 100 pages. He sought support, training, and funding from multiple sources, including the state district court. He requested additional time and funding numerous times. Perhaps, most strikingly, he was still enrolled as petitioner’s federal habeas counsel when he obtained funding in federal court for the expert witnesses who ultimately testified. Thus, it should be clear that Mr. Gisleson was not ineffective in raising the issues in state or federal court. Any deficiency on his part was attributed to him not receiving the funds to engage the experts. This is a very important distinction, since an IAC claim is dependent on a showing that counsel’s conduct was both deficient and prejudicial. It is not enough to indicate that counsel failed to secure a favorable state court ruling. The deficiency has to lie

with counsel, himself, and not the court's ruling. Here, it is quite clear that Mr. Gisleson raised the claims of mental capacity and IAC at penalty phase in the state courts. All of the additional witnesses could have been called in support of that claim with the possible exception of the expert witnesses who required payment. Thus, all of the lay witnesses who testified in federal court were available for state post conviction. However, the state post conviction judge<sup>28</sup> ruled that there would be no hearing on the IAC at penalty phase claim. Further, the state post conviction judge ruled that the court would not provide additional funds or additional time to supplement the post conviction relief application. The state judge ruled that post conviction counsel was not ineffective. Finally, the state judge ruled that no expert witness testimony was necessary to resolve the IAC at penalty phase claim. Each of these rulings is entitled to deference and show that post conviction counsel was not himself ineffective.

To prove cause under *Martinez*, petitioner must show that he had no counsel or that post conviction counsel was ineffective. In *Newbury v. Stephens*, 756 F.3d 850, 871-72 (5<sup>th</sup> Cir. 2014) *cert. denied* (U.S. 2015), the Fifth Circuit noted that under *Martinez*, a petitioner must show that (1) his state habeas counsel was ineffective in failing to present that evidence to the state habeas court, and (2) his underlying claims of ineffective assistance of trial counsel are "substantial," meaning that he "must demonstrate that the claim[s] ha[ve] some merit."

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<sup>28</sup> This was the same judge who ruled on all of the pretrial matters, conducted the trial proceedings, and ruled on all of the state post conviction relief issues.

*Martinez*, 132 S.Ct. at 1318. To establish ineffective assistance of state habeas counsel, petitioner must show both that habeas counsel’s performance—in failing to present to the state habeas court the evidence that he presented for the first time in federal court—was deficient and that he was prejudiced by the deficient performance—that is, that there is a reasonable probability that he would have been granted state habeas relief had the evidence been presented in the state habeas proceedings. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Martinez*, 132 S.Ct. at 1318 (suggesting that the *Strickland* standard applies in assessing whether state habeas counsel was ineffective).

Even if a petitioner makes both of the showings required under *Martinez*, that “does not entitle [him] to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted.” *Martinez*, 132 S.Ct. at 1320. *Newbury v. Stephens*, 756 F.3d at 872.

To establish that post conviction counsel was a “cause” for the failure to bring the claim in state court, petitioner must show that post conviction counsel was ineffective. Obviously this ineffectiveness must be based on some action or inaction on the part of post conviction counsel himself. To constitute deficient performance under *Strickland*, a reviewing court must likewise consider the actions or inactions of post conviction counsel. The mere fact that counsel may or may not have been as experienced as another attorney is not enough. The mere fact that counsel wanted more time is not enough. There must be some improper action that

he took or a necessary action that he failed to take. In this case, it is clear that post conviction counsel raised the claim of ineffectiveness of trial counsel at the penalty phase. Counsel attempted to alert the state courts to the alleged need for further investigation regarding petitioner's family history, medical history, psychological history, as well as many other areas. However, the state courts refused to accede to his request. Clearly, counsel acted as expected under the constitution and jurisprudence. In fact, even in his post *Martinez* hearing memorandum, petitioner notes that Mr. Gisleson testified that "failed to develop the claim in the two amended petitions he filed because of lack of money, lack of expertise, lack of help, lack of experience and lack of time."<sup>29</sup> None of these purported failures prove deficient performance of his duty as an attorney. Instead, they show that all of the alleged insufficiencies were attributable to the law or the state courts, not to his own actions or inactions.

The Fifth Circuit opinion focused solely on the question of ineffectiveness of post conviction counsel. Finding that post conviction counsel was not ineffective obviated the need to discuss cause and prejudice under *Martinez*. Likewise, a finding that post conviction counsel was not ineffective also precluded any additional federal evidentiary hearings directed at the underlying claim that trial counsel was ineffective.

While reviewing the threshold question of IAC of post conviction relief counsel, the Fifth Circuit noted that none of the alleged failures to conduct

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<sup>29</sup> ROA.3585-3586.

mitigation review at the post conviction relief phase were the fault of post conviction counsel. Specifically, the Fifth Circuit noted the federal district court judge who granted habeas corpus was forced to admit that post conviction counsel preserved the IAC at the penalty phase claim. However, the Court noted:

The district court's decision instead focused on Gisleson's "failure to conduct mitigation investigation [which] prevented him from providing any support" for Wessinger's claim for ineffective assistance of counsel at the penalty phase. We disagree. The state post-conviction court denied Gisleson's motion for funds "for any and all types of investigation." Gisleson also repeatedly reached out to various organizations for funding or assistance, and he was repeatedly denied. Gisleson did not hire a mitigation specialist or consult experts because the state post-conviction court did not grant his motion for funds, not because of any deficiency on Gisleson's part. He was thorough in his attempt to secure funds or other assistance, and ultimately he managed to secure \$5,000 from his firm, which he paid to Recer for her help investigating and filing the second amended petition.

*Wessinger*, 864 F.3d at 392. Thus, the Fifth Circuit determined that petitioner's real complaint is that he could not get the funding for additional mitigation investigation at the post conviction relief stage. Despite the fact that the state court refused his request, initial review counsel continued to seek funding from various outside sources, culminating in the procurement of \$5,000 from his own law firm, which was used to hire another attorney to help in investigating and filing the second amended petition.

For the first time in this Court, petitioner now argues that post conviction counsel should have conducted a mitigation review "despite the state trial court's denial of a motion for funds." No Court has ever extended the duty of counsel to include self-funding of a claim. To the extent that such a requirement could be said

to exist, post conviction counsel obtained \$5,000 independently in this case. However, the fact remains as noted by the Fifth Circuit that failure to secure funding is not the same as ineffective assistance of counsel. This can be equated to any claim that is brought before a court where the movant fails. For instance, if a party moves for summary judgment and the court denies the motion, it does not mean that the attorney was ineffective. He filed a motion and lost. He has a remedy by seeking appellate review, or he must otherwise continue litigation under the ruling of the court. Losing on a contested issue does not constitute ineffectiveness.

In this case, post conviction counsel sought funding for additional mitigation evidence. State district court judge Anderson, knowing the extent of the mitigation evidence that was presented at trial and reviewing the requests made by post conviction counsel ruled that no further mitigation evidence was required. A contrary substantive ruling on the merits of a question raised by an attorney is not ineffectiveness. Here, initial review counsel attempted to obtain and present mitigation evidence in state district, but was overruled by the state district court judge. Such efforts are not diminished where they fail, nor do they render counsel's efforts ineffective. Counsel's actions in this case were admirable, as demonstrated in the federal habeas hearing. He sought multiple avenues for both drafting support and financial support, including convincing the partners in his firm to pay for part of the post conviction relief effort. However, it was likewise clear from the record, that it was not attorney error that prevented him from presenting

mitigation evidence in state court. Whether it had been Mr. Gisleson, or any of the federal attorneys that testified as experts (Mr. Clements and Ms. Fournet), or even the federal habeas attorneys who presented the evidence to the federal court (Ms. Hudsmith and Ms. Gibbens), who had presented the claim to the state court, the claim was still rejected by the state judge and upheld on review. Thus, it was not attorney error that prevented the claim from being heard. That being the case, petitioner has failed to show how Mr. Gisleson's conduct fell below the *Strickland* standard. He raised and litigated the claim. He lost on the merits of that claim. Further, petitioner cannot be said to have been prejudiced by his attorney's deficient performance. Since it was the state courts' rulings that deprived him of the chance to present his expert witness testimony in state court, his attorney's action did not prejudice him. The ruling of the Fifth Circuit is correct and should be upheld.

**II. The State's Failure to provide funds for an expert mitigation investigator in state post conviction proceedings constitutes cause to excuse the procedural default of petitioner's claims of penalty phase ineffective assistance of counsel**

This claim was not raised or addressed by the courts below. Further, the entirety of the issues raised in the appeal by the State was related to the question of the alleged ineffectiveness of post conviction relief counsel under *Martinez*. As noted previously, *Martinez*, by its own terms, is a limited exception based on equity. Nothing in the opinion suggested that a state court ruling denying funds could likewise be used as a basis for circumventing the AEDPA, *Coleman's*

procedural default doctrine, or the comity owed to state court decisions. Further, petitioner did not raise this issue below, either by argument or cross-appeal. Thus, it would be inappropriate for this Court to rule on a question that was not considered below.

**III. The State's failure to provide funds for an expert mitigation investigator in state post conviction proceedings renders the state's corrective process ineffective**

Again, this claim was not raised or addressed by the courts below. Further, the entirety of the issues raised in the appeal by the State was related to the question of the alleged ineffectiveness of post conviction relief counsel under *Martinez*. As noted previously, *Martinez*, by its own terms, is a limited exception based on equity. Further, petitioner did not raise this issue below, either by argument or cross-appeal. Thus, it would be inappropriate for this Court to rule on a question that was not considered below.

Additionally, this claim itself is self-defeating. After raising an entirely new issue, i.e., that the entire state process is ineffective to comply with 28 U.S.C. § 2254(b)(1)(B)(ii) in that it did not provide a proper remedy to allow full and fair adjudication of federal claims, petitioner cites the case of *State ex rel Williams*, 888 So.2d 792 (2004).<sup>30</sup> This is interesting because *Williams* in fact demonstrates that the state system is adequate to address any and all federal constitutional claims when they are properly raised and presented for appellate review. The

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<sup>30</sup> Undersigned counsel represented the State of Louisiana in that case as well.



problem faced by petitioner in the instant case is not that there is some endemic or pervasive problem affecting Louisiana courts that vitiates their effectiveness. Instead, petitioner was displeased with a ruling by a Louisiana district court. He did not seek review of the funding ruling at the time it occurred or afterward. Instead, he sought review of the ineffectiveness claim without separately seeking review of the funding question. Regardless, the reference to the *Williams* case proves that there is no problem with the state system. The state court system and its review process works when invoked, as in *Williams*. In this case, however, there was no challenge to the state court's ruling denying funding. Thus, petitioner cannot now cite a different case where funding was addressed as a basis for arguing that the state funding system is inherently flawed and provides him with a basis for bypassing federal habeas rules where he did not seek appropriate review of the question himself. This claim is not ripe for review.

### CONCLUSION

Based on the foregoing, the State requests this Court to affirm the decision, the findings, and the conclusions of the Fifth Circuit Court of Appeal related to the claim of ineffectiveness of post conviction counsel. Further, the State requests that the remaining questions were not raised or addressed by the lower federal habeas courts. Thus, they are inappropriate for review.

RESPECTFULLY SUBMITTED,

HILLAR C. MOORE, III  
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ASSISTANT ATTORNEY GENERAL

By:   
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DALE R. LEE, #20919\*  
ASSISTANT DISTRICT ATTORNEY

*\*Lead Counsel*

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No. 17-6844

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IN THE SUPREME COURT OF THE UNITED STATES

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**TODD WESSINGER,**  
**PETITIONER**

**V.**

**STATE OF LOUISIANA,**  
**RESPONDENT**

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**CERTIFICATE OF SERVICE**

I hereby certify, pursuant to United States Supreme Court Rule 29, that a copy of the Opposition to Petition for Writ of Certiorari on behalf of Darrel Vannoy, Warden, has been served upon:

Ms. Rebecca L. Hudsmith  
102 Versailles Boulevard, Suite 816  
Lafayette, LA 70501

by placing the same in the United States Mail, first class postage prepaid, on this 21<sup>st</sup> day of December, 2017.

  
\_\_\_\_\_  
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