STATE OF LOUISIANA | CRIMINAL DISTRICT COURT

VERSUS | PARISH OF ORLEANS

PHILLIP ANTHONY | NO. 387-535 SECTION G

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POST-CONVICTION JUDGMENT

This matter comes before the Court on Petitioner's Post Conviction Application for Relief, received by this court on July 17, 2001, and Supplemental Petition for Post-Conviction Relief, received by this court on November 17, 2004. Specifically, in his application and supplemental petition, Mr. Anthony asserts sixteen-claims, contending that he was represented at trial by ineffective counsel and deprived of his constitutional rights of due process and equal protection under the Sixth and Fourteenth amendments. Accordingly, Mr. Anthony requests this court to reverse his conviction and death sentence.

PROCEDURAL HISTORY

On January 30, 1997, a grand jury returned a "true bill," and the State filed a bill of indictment against Mr. Phillip Anthony for three-counts of first-degree murder under R.S. 14:30(A)(1). On February 7, 1997, Mr. Anthony pled not guilty at arraignment. On June 17, 1997, a motions hearing was held where the court denied the Mr. Anthony's motion to suppress identification and motion to suppress confession. On July 30, 1997, the court denied the trial counsel's motion to exclude putrid and mildewed evidence. On August 1, 1997, on trial counsel motion, the court severed Mr. Anthony's case, from the case of his co-defendant, Mr. Malcolm Hill.

September 23, 1997, Mr. Anthony proceeded to trial on the above captioned matter and was found guilty as charged by a unanimous jury verdict to three counts of first-degree murder on September 26, 1997. On September 27, 1997, that same jury sentenced Mr. Anthony to death. On December 12, 1997, the court sentenced the Mr. Anthony to death as to each count. On that same day, trial counsel filed the following written motions: motion to reconsider sentence, motion for a new trial, motion for judgment notwithstanding the verdict, which the court subsequently denied. On June 25, 1997, Mr. Anthony's supervisory and remedial writs were denied. On April 11, 2000, the Louisiana Supreme Court affirmed Mr. Anthony's conviction in *State v. Anthony*, 98-0406 (La. 4/11/00), 766 So.2d 376. Mr. Anthony subsequently filed for certiorari from the United States Supreme Court and was denied relief on October 10, 2000, in *Anthony v. Louisiana*, 531 U.S. 934 (2000).

On July 17, 2001, Mr. Anthony filed initial petition for post-conviction relief. On October 23, 2002, Kathy Kelly and Gary Clements enrolled as counsel for Mr. Anthony for the purpose of amending the initial application for post-conviction relief, with agreement by all parties. On April 7, 2003, trial counsel filed motion for scientific testing of evidence which the court denied, and an order for production of NOPD documents. On June 6, 2003, trial counsel filed motions and order for release of psychiatric, medical, and disciplinary records of Philip Anthony, which the court subsequently denied on June 26, 2003. On November 17, 2004, Defense filed a supplemental application for post-conviction relief with exhibits. That same day, Defense filed a motion and order to recuse Judge Julian Parker, which was denied.

On December 17, 2004, the State filed a response to the Defense's post-conviction application and on February 15, 2008, it filed answer to Defense's motion to recuse Judge Julian Parker. On February 29, 2008, the State filed a supplemental response to the Defense's motion for post-conviction relief. On April 18, 2008, a hearing for motion to recuse Judge Parker was held, to which the Defense filed a reply to State's supplemental response to the petitioner's motion to recuse Judge Parker. On June 18, 2008, the court denied the Defense's motion to recuse Judge Parker to which Defense gave notice of intent to seek writ. On October 15, 2009, the Louisiana Supreme Court denied the Defense's writ.

On September 13, 2010, the State filed a motion to bar the petitioner's claims I through XI and XI through XVI from proceeding to evidentiary hearing under La. C. Cr. P. Art. 928 et. seq. On September 24, 2010, the Defense filed an answer to the State's previous motion. On April 28, 2011, a hearing on the claims was held to which the court rendered the following ruling in relation to the claims brought:

Claim I: The court found that this claim was not procedurally barred and that it would allow submissions of briefs to make a determination on the merits.

Claim II: The court found this claim to be procedurally barred, reasoning it was previously litigated in the Defense's motion to recuse, and Judge Waldron's judgment in the matter was rendered final after the Louisiana Supreme Court denied the Defense's writ.

Claim III: The court found this claim should proceed to evidentiary hearing, only as it relates to the ineffective assistance of counsel claim.

Claim IV: The court found this claim to be procedurally barred, reasoning it was fully adjudicated on appeal or that Mr. Anthony inexcusably failed to raise the issue on appeal.

Claim V: The court found this claim to be a question of law to be determined on the merits based. The court allowed parties to submit briefs on the matter.

Claim VI: The court found this claim merited an evidentiary hearing.

Claim VII: The court denied this claim on the merits, reasoning that it could have been raised on appeal, and the jury had an opportunity to evaluate the credibility of the witness's testimony. However, the court stated with regards to VII(D), if Mr. Anthony could provide a witness who could testify that the prosecutors in this case had knowingly suborned perjured testimony, then this aspect of the claim could proceed to an evidentiary hearing.

Claim VIII: The court ruled this claim was procedurally barred, reasoning that this claim was a matter of record which was previously reviewed by the appellate courts.

Claim IX: The court found this claim is inexplicably tied to claim VI and would be considered along with that claim at an evidentiary hearing.

Claim X: The court found that subsections (A) and (B) of this claim would be submitted to an evidentiary hearing.

Claim XI: The court found this claim required the court to hold legislation unconstitutional and was procedurally barred under Article 930.4 and 926(D).

Claim XII: The court denied this claim due to lacking factual basis and any support from the evidence.

Claim XIII: The court found this claim should be submitted to an evidentiary hearing or addressed in briefs to determine if the pharmaceutical company is no longer manufacturing drugs to carry out a lethal injection.

Claim XIV: The court found this claim to be procedurally barred under Article 930.4 and 926(D); however, the court would take in consideration additional briefings or evidence in the matter.

Claim XV: The court found this claim to be procedurally barred under Article 930.4 and 926(D); however, the court would take in consideration additional briefings or evidence in the matter.

Claim XVI: The court found this claim to be vague and ambiguous.

On April 23, 2015, Defense counsel Jane Eggers, filed motion to substitute counsel of record naming Gary Clemmons as counsel. On October 30, 2015, the Defense filed motion for production of documents of district attorney records accompanied with a memorandum in support.

On December 14, 2015, the court denied Mr. Anthony's motion for production of district attorney records. Specifically, on this day the court noted that claim VII could be raised at an evidentiary hearing, reasoning that it was not ruled upon by Judge Parker. Still on this same day, the court granted the Defense's motion to access evidence as modified by the court.

On November 2, 2021, the State filed motion to calendar hearing on petitioner's remaining post-conviction claims Naila Campbell and Matilde Carbia with Mwalimu Center for Justice (formerly Capital Post Conviction Project of Louisiana (CPCPL)) enrolled as counsel and appeared on behalf of Mr. Anthony. On December 2, 2021, this Court ordered supplemental briefs in the remaining matters be submitted on or before February 8, 2022 and set the matter for an evidentiary hearings on April 12, 14, 21, 28 and May 5. On February 10, 2022, the State filed Supplemental Response to Petitioner's Remaining Post-conviction claims. On this same day, Defense filed the following motions: motion for writ of habeas corpus ad posequendum; petitioner's proposed order regarding the production, under seal or alternatively in chambers viewing of grand jury transcripts; petitioner's supplemental briefing in support of claims for post-conviction relief; and petitioner's motion to authorize opening statements. On April 11, 2022, Defense filed petitioner's motion to set deadlines, motion to appoint special process server, motion to compel dispositions, and notice to authorize Zoom testimony.

On April 12, 2022, day one of Mr. Anthony's post-conviction evidentiary hearings was held. Before hearing testimony, the court ruled on the Defense's motions accordingly: granted Defense's motion to set deadlines; denied Defense's motion to appoint special process server, as written; granted Defense's motion to compel depositions; granted Defendant's notice to authorize Zoom testimony; granted Defense's motion to enroll Charlotte Faciane; and granted Defense's motion to remove box from Defendant's hands. The State and Defense then provided opening statements, after which Defense calling Ronald Singer, a forensic scientist, to testify. The court found Mr. Singer to be an expert in the fields of firearm examination, trace evidence analysis, and laboratory administration, without any objection from the State, and after hearing Mr. Singer's testimony, the court recessed until April 14, 2022.

On April 14, 2022, this court proceeded with day two of Mr. Anthony's evidentiary hearings and found Mr. Anthony indigent for purposes of these hearings. That same day, this court ruled as follows: granted Defense's motion to appoint special process server; and granted Defense's motion to compel un-redacted bench notes. Subsequently, Defense called Professor

Mark Denbeaux to testify, who this court found to be an expert in the field of limitations of forensic document examination. After hearing Mr. Denbeaux's testimony, the court recessed until April 21, 2022. On April 20, 2022, the court granted the Defense's subpoena for un-redacted bench notes.

On April 21, 2022, this court proceeded with day three of Mr. Anthony's evidentiary hearings. Defense first called Carol Kolinchak to testify, followed by Mark Zimmerman who the court found to be an expert witness in the field of forensic psychology and Frederick Sautter, who the court found to be an expert in the fields of trauma and forensic psychology.

On April 28, 2022, this court proceeded with day four of Mr. Anthony's evidentiary hearings. In lieu of live testimony on May 5, 2022, Defense filed a motion to compel deposition for a Clarence Roby, Robert Jenkins, and Roger Jordan. This same day, Defense then called Dr. Silas Lee to testify. This court subsequently found Dr. Lee to be an expert in the field of public opinion research. The Defense then called James Boren Esq to testify, whom the court found to be an expert in the field of capital criminal defense. At the conclusion of the hearing, this court ordered all additional Defense briefs be submitted by May 27, 2022, and State briefs be submitted by June 03, 2022.

On May 12, 2022, the Defense filed three returns on deposition subpoenas and provided this court with electronic versions of Clarence Roby's May 10, 2022, deposition and Robert Jenkin's May 12, 2022, sworn affidavit.

STATEMENT OF FACTS

The facts governing the issue at hand have been duly acknowledged in *State v. Anthony*, 1998-0406 (La. 4/11/00, 3-11); 776 So.2d 376, 380-85 and are as follows: On Dec. 1, 1996, four employees of the Louisiana Pizza Kitchen, Cara LoPiccolo, Santana Meaux, Michael Witkoskie, and Damien Vincent, arrived at approximately 10:00am to begin their opening shift. Subsequently, Mr. Anthony and two friends, Malcolm Hill, and Tracey Marquez, arrived at the restaurant claiming clarification was needed regarding Malcolm Hill's work schedule with Pizza Kitchen.

Damien Vincent was mopping in the back when he overheard Cara LoPiccolo speaking with Malcolm Hill. Damien Vincent then entered the front of the restaurant where Mr. Anthony stated to him "Let me holler at you for a minute." Damien Vincent proceeded to Mr. Anthony, who pulled out from his pocket a gun with a potato stuck on the end of the barrel. Mr. Anthony then ordered Damien Vincent and Michael Witkoskie to the back of the restaurant.

Damien Vincent noticed Cara LoPiccolo already in the walk-in cooler. Moments later, Santana Meaux entered the cooler. Mr. Anthony then instructed all four employees to get on their knees. Damien Vincent in addition to Mr. Anthony, witnessed another individual holding a gun with a potato on the end of barrel. Damien Vincent then lowered his head, heard four to five gunshots discharge, and was ultimately shot in the back of the head before losing consciousness.

Upon regaining consciousness, Damien Vincent observed that the perpetrators had left the scene. Damien Vincent then called 911, informing to the operator the series of events that just transpired. Terrell Collins arrived on the scene while Damien Vincent was relaying the subsequent information and went next door to the Tourist Trap Restaurant to attain assistance. There, Mr. Collins saw a co-worker, Jennifer Pleasants, and informed her of the situation.

NOPD Lt. Chris Pelleteri was the first officer on the scene. Both Michael Witkoskie and Damien Vincent were then transported to Charity Hospital for medical treatment. Michael Witkoskie was pronounced deceased upon arrival, while Damien Vincent received aid in the emergency facility. The other two employees, Cara LoPiccolo and Santana Meaux, were pronounced dead at the scene, each from a single gunshot wound to the head. Det. Waguespack, the lead homicide investigator, arrived on the scene at 11:15am. He and his officers secured the scene, and a single copper casing along with fragmented particles of potato were retrieved from the cooler of Pizza Kitchen.

Outside the cooler, the police observed a grease board bearing a cryptic message, "Trip an get flipped like a pancake[;] thinkin this man a Fake[.] Now they bringin flowers to you wake." During the subsequent investigation, Officer Dupuis, an expert in the field of handwriting analysis, compared the handwriting from the message with a handwriting exemplar taken from Mr. Anthony and found the two to be of common authorship. Det. Harris met with Damien Vincent, shortly after his arrival to the hospital, and learned that three black males were responsible for the crime. Damien Vincent described the suspects physically as "big, medium, and small." Damien Vincent described the clothing worn by the largest suspect as a dark blue ski jacket; the middle suspect was wearing a blue, red, and white Atlanta Braves starter jacket; and the smallest suspect was wearing a black Louisiana Pizza Kitchen hat and a camouflage bandana around his neck. Mr. Anthony was the tallest suspect.

Damien Vincent also told Det. Harris that one of the perpetrators was a current employee of the Pizza Kitchen. Although Damien Vincent did not know the employee's name, he told Det.

Harris that his name began with the letter "M" and that his name should appear on the work schedule located in the restaurant kitchen. The police then contacted Rob Gerhart, operations manager for the Louisiana Pizza Kitchen. He provided employee records, including the work schedule for December 1, 1996. Malcolm Hill's name appeared at the bottom of the work schedule.

The police prepared a six-person photographic lineup containing a photograph of Malcolm Hill. On December 1, 1996, Det. Waguespack went to visit Damien Vincent in the hospital to see if he could make an identification. After viewing the pictures, Damien Vincent turned his head and would not identify anyone at that time.

On December 1, 1996, the police found Malcolm Hill in the company of two other black males, Mr. Anthony and Tracey Marquez. The officers transported the three suspects to the homicide office due to their heights matching the "step ladder" description given by Damien Vincent. The officers stated they were investigating the suspects for first degree murder.

Det. Harris then returned to Damien Vincent to present the photo lineup again. Damien Vincent positively identified Malcolm Hill as the individual who entered Pizza Kitchen that morning, who was the medium built guy, and who was the "M" employee on the work schedule.

The officers presented separately, photographic lineups containing photographs of Mr. Anthony and Tracey Marquez to Damien Vincent. Damien Vincent positively identified Mr. Anthony as the big guy in the blue jacket who had the gun with the potato on the end of it. Damien Vincent was unable to identify anyone in the second photographic lineup containing Tracey Marquez. Subsequently, Mr. Anthony was placed under arrest for first degree murder.

On December 2nd, 1996, the police executed a search warrant at 2408 ½ Florida Avenue, where Mr. Anthony, Hill, and Tracey Marquez were found. There police found two weapons. In the attic of the apartment, the officers found a cooler, which contained clothing that Damien Vincent had earlier described as being worn by Malcolm Hill, an Atlanta Braves jacket and blue wind-suit pants. Beneath the clothing, the officers found a .22 caliber revolver, a fully loaded .357 magnum revolver, and four spent casings. Later, the police identified the .357 magnum revolver as the murder weapon. Additionally, a white substance was found on the end of the .357 magnum revolver. Subsequent analysis by the NOPD Crime Lab revealed that the substance was potato starch.

Crime Lab technician, Theresa Lamb, conducted testing on the clothing seized from Mr. Anthony, Malcolm Hill, and Tracey Marquez at booking and clothing seized from the search of

2408 ½ Florida Avenue. She identified potato particles on both shoes of Mr. Anthony; Malcolm Hill's left shoe and Tracey Marquez's right shoe also revealed evidence of potato particles. Particles retrieved from Cara LoPiccolo's hair, during autopsy, were also tested and identified by Theresa Lamb as potato.

Jennifer Pleasants told police that she was scheduled to work at the Pizza Kitchen at 11:30 a.m. on December 1st and arrived shortly before 10:00 a.m. to have breakfast at the Tourist Trap Restaurant next door. On her way there, she noticed two males standing in the area where Pizza Kitchen employees usually stand to take a cigarette break. She was drawn to the two males by the vast disparity in their heights and was able to see the face of the tall subject as she passed. Approximately twenty minutes later, Terrell Collins came into the Tourist Trap and told her about the shooting. On December 7th, 1996, the police presented to Jennifer Pleasants three photographic lineups, and she positively identified Mr. Anthony as the tall subject she had seen outside the restaurant that morning. She was unable to identify anyone else.

Michael Skinkus told police that he arrived at work at the business adjacent to the Pizza Kitchen on December 1st at 10:00 a.m. He stated that as he was locking his bicycle, he observed the three suspects walking back toward the Pizza Kitchen. Mr. Skinkus gave the police detailed descriptions of the heights and clothing. On December 2nd, he positively identified Mr. Anthony as the tallest subject he had seen walking with the other two males.

Finally, police learned that Angelo Collins picked up the three suspects after the shootings, as he had just dropped off his brother, Terrell Collins, to go to work at the Pizza Kitchen. Angelo Collins informed the police that he had previously worked at the Pizza Kitchen and knew Mr. Anthony from his brief tenure there. As he was driving down Barracks Street, Mr. Anthony called to Angelo Collins and asked him for a ride. Mr. Anthony sat in the front seat and kept his left hand in his pocket. The other two males sat in the back seat, but Angelo Collins could see their faces in the rearview mirror. Angelo Collins's physical and clothing description corroborated the accounts of the prior witnesses. On December 9th, 1996, Angelo Collins positively identified all three passengers he picked up outside the Pizza Kitchen in a photographic lineup presented.

On January 30, 1997, a grand jury returned a "true bill" and the State filed a bill of indictment against Mr. Phillip Anthony, for three-counts of first degree murder under R.S. 14:30(A)(1). On February 7, 1997, Mr. Anthony pled not guilty at arraignment. On September 23, 1997, Mr. Anthony proceeded to trial on the above captioned matter and was found guilty as

charged by a unanimous jury verdict to three counts of first-degree murder on September 26, 1997. On September 27, 1997, that same jury sentenced the Mr. Anthony to death.

RULING

In Mr. Anthony's applications and supplemental petitions for post-conviction relief Defense asserts through sixteen claims that Mr. Anthony was both wrongfully convicted and wrongfully sentenced to the death penalty. After considering the law, facts, and all the evidence presented by the State and the Defense, the court renders the following rulings:

Claim I: DENIED, as without merit.

Claim II: DENIED, as procedurally barred.

Claim III: DENIED.

Claim IV: DENIED, as procedurally barred.

Claim V: DENIED.

Claim VI & IX: DENIED, as without merit.

Claim VII(D): DENIED, as without merit.

Claim VIII: DENIED, as procedurally barred.

Claim X: DENIED, as it pertains to the guilt/innocence phase, GRANTED, as it pertains to the penalty phase.

Claim XI: DENIED, as procedurally barred.

Claim XII: DENIED.

Claim XIII: Judgment DEFERRED.

Claim XIV: DENIED, as procedurally barred.

Claim XV: DENIED, as procedurally barred.

Claim XVI: Judge Parker found this claim to be vague and ambiguous; however, this claim is GRANTED in accords with Claim X(B), specifically as it pertains to trial counsels' deficient and substantially prejudicial performance during the penalty phase.

LAW AND DISCUSSION

On April 28, 2011, Judge Julian Parker held a post-conviction hearing during which he identified several claims that were procedurally barred and denied on the merits. Judge Parker also identified which claims were entitled an evidentiary hearing and/or to be determined on the merits through submission of briefs. Therefore, to best address each claim, the court will first address the claims that were granted an evidentiary hearing by Judge Parker and were heard by this court,

specifically Defense claims based on or linked to Mr. Anthony's claim of ineffective assistance of counsel (Claims I III, V, and X). This court will then address matters Judge Parker determined would be submitted for briefing, specifically Defense claims VI, and VII(D). Finally, the court will address the matters previously denied or determined to be procedurally barred by Judge Parker and which the parties failed to provide additional or supplemental evidence.

INEFFECTIVE ASSISTANCE OF COUNSEL

The purpose of the Sixth Amendment's guarantee of counsel is to ensure that an accused has necessary and sufficient representation by defense counsel as to justifiably rely upon the outcome of the proceeding. Therefore, through the course of representation, an attorney has many duties to their clientele, with the foundational standard being to tender reasonably effective assistance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Any shortcomings or deficiencies of a counsel's performance that prejudice the accused can be grounds for a claim ineffective assistance of counsel and reversal of Mr. Anthony's conviction or sentence. [1]

Such claims are governed by the two-pronged *Strickland* standard, which requires mixed inquiries of both law and fact.[2] Thus, a petitioner's claim that counsel's actions or inaction requires reversal of a conviction or death sentence is comprised of two parts: (1) counsel performance that is in fact deficient, meaning the errors committed were so serious as to not be considered functioning as "counsel" provided by the Sixth amendment; and (2) the deficient performance caused substantial prejudice to the petitioner by depriving them of a fair trial. *Strickland,* 466 U.S. at 687. Under *Strickland,* petitioners must establish that their counsel's performance was deficient or below objectively reasonable professional norms, based on the "rule of contemporary assessment," a fact intensive inquiry of the counsel's challenged conduct from the counsel's perspective at the time. *See State v. Jenkins*, 172 So.3d 27, 35 (La. App. 4 Cir. 2015). However, deficient performance or errors made do not warrant reversal if such errors bear no effect on the judgment issued—meaning they would not have impacted the outcome of the case. *See State v. Curley*, 250 So.3d 236, 241-42 (La. 2018).

Accordingly, a petitioner's burden in proving an ineffective assistance of counsel claims is high. Specifically, "[o]nly if petitioner shows both error and prejudice will his conviction or sentence be found unreliable and set aside. . . [and] it is unnecessary to address the issues of both

[1] *See e.g. State v. Curley*, 250 So.3d 236, 241-42 (La. 2018).
[2] *See Lockhart v. Fretwell*, 506 U.S. 364, 368-69 (1993); *Strickland v. Washington*, 466 U.S. 668, 698-99 (1984).

counsel's performance and prejudice to the defendant if petitioner makes an inadequate showing on one component." *State ex rel. Busby v. Butler*, 538 So.2d 164, 168 (La. 1988) (citing *Strickland*, at 697, 104 S.Ct. at 2069.). Additionally, because trial counsel's performance and decisions must be given great deference, trial counsel is presumed to have rendered reasonable assistance.[3] Nevertheless, any claim of ineffective assistance of counsel is determinate upon—and the central inquiry is—whether the counsel's conduct undermined the adversarial process rendering an unjust outcome. *See Strickland* 466 U.S. at 686. Finally, because Mr. Anthony's matter is capital in nature, the court will analyze trial counsels' performance separately, first at the guilt phase, then at the penalty phase.

I. PETITIONER CLAIM I: PETIONER'S INDICTMENT WAS ISSUED BY AN UNCONSTITUTIONALLY SELECTED GRAND JURY, GRAND JURY FOREPERSON, AND GRAND JURY VENIRE AND TRIAL COUNSELS FOR MR. ANTHONY PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT OR CHALLENGE THE ALLEGED DISCRIMINATORY NATURE OF THE SELECTION PROCESS

This court asked the State and Defense counsels to submit briefs on this claim pursuant to Judge Parker's April 28, 2011, ruling. Evidentiary Hearing Trial Transcript from 04/28/2011 p. 30. Specifically, Judge Parker permitted additional briefing on this claim in response to Mr. Anthony's emphasis on the procedure and the "unconstitutionality of how the grand jury was selected" and the fact *State v. Dilosa* was decided in 2003 and deemed the grand jury selection procedure in Orleans parish as violative of the equal protections clause under the Fourteenth amendment. EH. Tr. 4/28/2011 p. 17.

On February 8, 2022, Mr. Anthony submitted supplemental briefs presenting an additional argument that the constitution forbids race and gender discrimination in the selection of both the grand jury and the foreperson under the equal protection and the trial prosecutor's discriminatory actions during the selection process created a structural defect in the process that which requires reversal of Mr. Anthony's conviction and sentence. *See Petitioner's Supplemental Briefing In Support Of Claims For Post-Conviction Relief* at 2-8. Mr. Anthony further asserts that the Orleans Parish's lack of objective guidelines for selecting grand jurors and forepersons afforded the trial prosecutors the opportunity to discriminate by race and gender, and, due to the grand jury and foreperson having significant function as to voting to indict, perfecting the indictment, delegating duties, and endorsing a true bull, such discrimination violates both state and federal constitutions.

[3] "Judicial scrutiny of counsel's performance must be highly deferential...[as] even the best criminal defense attorneys would not defend a particular client in the same way." *State v. Reeves*, 2018-0270, p. 4 (La. 10/15/18); 254 So.3d 665, 671(citing *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.).

Id. Finally, Mr. Anthony claims that trial counsels' failure to investigate and discover discrimination in the selection of the grand jury and forepersons deprived Mr. Anthony of his right to effective assistance of counsel. *Id.* In response, the State succinctly argues this claim should be dismissed on the merits, as trial counsels failed to raise the issue in a timely filed motion to quash, prior to trial and Mr. Anthony's subsequent conviction. *Supplemental Response to Petitioner's Remaining Post-Conviction Claims* at 7.

First, trial counsels' failure to assert a claim based on racial and gender discrimination in the grand jury and grand jury foreperson selection process in its motion to quash filed March 7, 1997, waived Mr. Anthony's right to seek reversal on such grounds. The United States and Louisiana Supreme Courts have established that individuals are deprived of their constitutional right to equal protection under the law when the grand jury selection process is tainted by racial discrimination. *See Campbell v. Louisiana*, 523 U.S. 392, 397-98 (1998); *State v. Langley*, 813 So.2d 356, 370-71 (La. 2002). Notably, racial discrimination regarding a grand jury foreperson, is given the same legal consequence as when discrimination is found regarding the grand jury itself. *See State v. Fleming*, 846 So.2d 114, 121-22 (La. App. 4 Cir. 2003). However, for a defendant to allege an equal protection claim premised upon discriminatory selection or composition of the grand jury, counsel must file a motion to quash asserting such conflict prior to trial or *any subsequent claim in that regard is waived. See Deloach v. Whitley*, 684 So.2d 349 (La. 1996) (emphasis added).[4] Here, trial counsels filed a motion to quash, which was subsequently denied by the Court. However, in the motion, they failed to raise a claim for racial and gender discrimination, which consequently waived Mr. Anthony's right to raise such claim on appeal or subsequent review.[5] Therefore, this claim is procedurally barred.

Next, even assuming trial counsels' performance was deficient, Mr. Anthony has failed to prove that he was prejudiced from trial counsels' actions. Specifically, Mr. Anthony failed to prove that a significant probability exists that he would not have been re-indicted had trial counsels filed and succeeded in quashing the grand jury and grand jury forepersons on the aforementioned

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[4] *See also State v. Woodberry*, 820 So.2d 638, 642 (La. App. 4 Cir. 2002) (holding that challenging a grand jury indictment premised on racial discrimination in the selection of the foreperson must be raised pretrial in a motion to quash or it is waived); *State v. Washington*, 900 So.2d 1072, 1077-78 (La. App. 4 Cir. 2005) (holding indictment returned by grand jury selected pursuant to unconstitutional law had to be raised by pretrial motion to quash indictment and such failure resulted in waiver of claim on postconviction review).

[5] While this procedural rule has been criticized, *see State v. Langley*, 1995-1489 (La. 4/3/02), 813 So. 2d 356, 374 (Johnson, C.J., dissenting) (noting the inequitable result of this procedural bar) it remains steadfast. *State v. Hoffman*, 98–3118 (La.4/11/00), 768 So.2d 542, 577 (counsel's decisions as to which motions to file form a part of trial strategy); *State v. Hoffman*, 07-1913 (La. 12/12/08), 997 So.2d 554 (denying writ on postconviction claim regarding racial discrimination in selection of grand jury foreperson); *Hoffman v. Cain*, CIV.A. 09-3041, 2012 WL 1088832 (E.D. La. 3/30/12); *Hoffman v. Cain*, 752 F.3d 430 (5th Cir. 2014).

grounds. When trial counsel fails to file a motion to quash, and it is likely that such motion would only lead to re-indictment, then no ineffective assistance of counsel can be found. *See State v. Bradford*, 846 So.2d 880, 888 (La. App. 4 Cir. 2003) (finding defendant was not deprived of effective assistance because of counsel's failure to file a motion to quash because (1) doing so would "[have] likely lead only to re-indictment, and (2) trial counsel's actions can properly be assigned to "trial strategy.").

To be clear, there is no doubt as to Mr. Anthony's participation in the murders,[6] rather doubt only exists pertaining to *the level* of his participation in the murders. Therefore, even if trial counsels' motion to quash was granted, there is a substantial likelihood Mr. Anthony would have been re-indicted by a subsequent grand jury.[7] Moreover, Mr. Anthony has failed to prove that trial counsels' failure to assert a claim based on race and gender discrimination in the previously filed motion to quash was simply poor trial strategy. Therefore, this court finds this claim is without merit.

Accordingly, Mr. Anthony's Claim I is DENIED.

II. PETITIONER'S CLAIMS III & X(A)(4) & (5): TRIAL COUNSELS WERE INEFFECTIVE FOR FAILING TO RETAIN AN EXPERT TO CHALLENGE THE STATE'S TWO EXPERT WITNESSES AT A DAUBERT HEARING AND/OR AT THE GUILT PHASE OF PETITIONER'S TRIAL

Pursuant to Judge Parker's April 28, 2011, ruling, Claim X was set for an evidentiary hearing and Claim III was set for evidentiary hearing specifically "on the *Daubert* issue as it relates to counsel's claims that trial counsel was incompetent. EH. Tr. 04/28/2011 p. 30; 33. Therefore, the court will address these claims in conjunction, as they would require identical consideration.

As the Fourth Circuit has explained, if an alleged error falls "within the ambit of trial strategy" it does not "establish ineffective assistance of counsel." *State v. Bienemy,* 483 So.2d 1105 (La. App. 4 Cir. 1986); *See State v. Reeves*, 2018-0270, p. 4 (La. 10/15/18); 254 So.3d 665, 670. Accordingly, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Harrison v. Quarterman*, 496 F.3d 419, 424 (5th Cir. 2007) (citing *Strickland v. Washington*, at 690-91 (1984)). Whether or not trial counsels'

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[6] In *State's Response to Petitioner's Post-Hearing Memorandum*, it identified and outlined approximately 60 pieces of evidence that established Anthony's guilt—only four of which remain in dispute. *See State's Response to Petitioner's Post-Hearing Memorandum*; p. 26-29

[7] It is unclear what evidence the State presented to the grand jury; however, the information provided in the police reports and evidence at trial indicate that even then, the evidence against Mr. Anthony was overwhelming.

error constitutes trial strategy speaks to the reasonableness of his performance under *Strickland*'s first prong. Nevertheless, the Supreme Court is clear; whether to call a witness, or in this case hire an expert witness, is a choice of strategy. Therefore, "to prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *State v. Reeves*, 2018-0270, p. 6 (La. 10/15/18); 254 So.3d 665, 671–72 (citing *Day v. Quarterman,* 566 F.3d 527, 538 (5th Cir. 2009).

To determine if the potential expert testimony is favorable, this court must analyze both the testimony of the witness who testified and the witness who trial counsels failed to retain. In Louisiana, an expert witness may be qualified, by either "knowledge, skill, experience, training, or education," to testify if (1) the expert's specialized knowledge will help the trier of fact understand or determine evidence or a fact in dispute; (2) the testimony is premised upon sufficient facts and or data; (3) such testimony is founded upon reliable methods and principles; and (4) the expert witness has reliably applied the principles and methods to the facts of the case. La. C.E. Art. 702. To determine whether scientific evidence is reliable and should be rightly considered, courts balance the following factors, the *Daubert* factors: (1) the testability of the scientific theory or technique; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the methods utilized are generally accepted in the scientific community. *Daubert v. Merrel Dow Pharm.*, 509 U.S. 579, 592-95 (1993). The trial judge enjoys broad discretion to determine whether *Daubert's* specific factors are or are not reasonable measures of expert testimony reliability. *See Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 152-53 (1999).

When a challenging party identifies discrepancies or errors in the methodology utilized by the expert, and provides more than general statements and conclusory allegations, then a claim for ineffective assistance of counsel may be sufficiently established.[8] However, Louisiana courts have declined to find ineffective assistance of counsel claims when counsel decides to stipulate to the

[8] *C.f. State ex rel. Byrd v. State*, 223 So.3d 1150, 1151 (La. 2017) (citing *State v. Celestine,* 91 So.3d 573, 577 (La. App. 3 Cir. (2012) (holding defendant failed in aggravated rape prosecution to prove ineffective assistance based on trial counsel's failure to request a *Daubert* hearing on DNA testing that linked defendant to rape, where defendant did not assert any error in the methodology used by either laboratory that tested the DNA evidence.); *See also State v. Critton*, 251 So.3d 1281, 1288 (La App. 2 Cir. 2018) (holding murder defendant's counsel was not ineffective for failing to request a *Daubert* hearing because defendant did not allege any discrepancies or errors in the methods used by the crime lab or expert witness coupled with expert testimony that all protocols were followed, and work was peer-reviewed).

expert witness's qualifications, opposed to motioning for a *Daubert* hearing, because such conduct constitutes trial strategy, not ineffective assistance. *See State v. Johnson*, 764 So.2d 1113, 1121 (La. App. 4 Cir. 2000).

Finally, prejudice is sufficiently present when the defendant has established *a reasonable probability exists* that, had the errors committed not occurred, the outcome of the proceeding would have been different. *Id.; See also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The probability of a different outcome must be substantial. *Curley*, 250 So.3d at 241-42. Specifically, the defendant must prove that, absent the errors committed, the factfinder likely would have reasonable doubt in determining or allocating guilt towards the defendant. *Jenkins*, 172 So.3d at 39. Thus, in determining the matter, the court must consider the totality of the evidence and circumstances surrounding the factfinder. *Id.*

A. Claim III(B) & Claim X(A)(4): Trial Counsel Was Ineffective For Failing To Investigate And Object To Inadmissible Evidence And Requesting A Hearing Pursuant To Daubert Merrell Dow Pharm., 509 U.S. 579 (1993)

Here, Mr. Anthony argues the trial court erred in the admission of Theresa Lamb's alleged unreliable expert testimony regarding potato starch and trial counsels' failure to challenge this testimony and hire a counter-expert constituted ineffective assistance of counsel. The State argues that, given the significant evidence indicating Mr. Anthony's involvement in the murder,[9] it is unlikely that the introduction of such expert testimony deprived Mr. Anthony of a reliable determination of culpability. The State further argues that prior trial counsel, Clarence Roby, admits in his deposition, that the shoe descriptions and the question of the potato matter on the shoe only address whether the Mr. Anthony was inside or outside the freezer when the shootings occurred, and, therefore, did not undermine the evidence that Mr. Anthony was guilty of first-degree murder under the laws of principals. *See* Deposition of Clarence Roby 5/10/2022 at 58-59.

First, although Mr. Anthony presented Ronald Singer as a potential, available expert witness and demonstrated that his testimony would have been favorable, he has failed to provide evidence that prior trial counsels' failure to request a *Daubert* hearing or call a counter-expert witness for trial was not part of strategic trial strategy. Neither the testimony from the four

[9] In State's Response To Petitioner's Post-Hearing Memorandum, it identified and outlined approximately 60 pieces of evidence that established Anthony's guilt—only four of which remain in dispute. *See State's Response To Petitioner's Post-Hearing Memorandum*; p. 26-29. Furthermore, at trial, Jennifer Pleasants provided testimony identifying Mr. Anthony as arriving at Louisiana Pizza Kitchen just prior to the murders. EH. Tr. 4/12/2022 p. 22:26-29, Michael Skinkus, who worked adjacent to the Pizza Kitchen, also identified Mr. Anthony on the day of the crime. *Id.* at 22:30-31, Angelo Collins' testimony established that he picked up Mr. Anthony on the day of the murders and drove him home. *Id.* at 22:31-23:2, and police officers testified they located the murder weapon at Malcolm Hill's home where Mr. Anthony was residing. *Id.* at 23:2-6. There is no doubt in the court's mind Mr. Anthony committed this crime.

evidentiary hearings nor Clarence Roby's deposition evidence a lack of trial strategy or preparation to constitute deficient performance at trial. On the contrary, Mr. Roby admits in his deposition that the shoe descriptions and the question of the potato matter on the shoe only addressed whether Mr. Anthony was inside or outside the freezer when the shootings occurred, and, therefore, did not undermine the evidence that Mr. Anthony was guilty of first-degree murder under the laws of principals. *See* Depo. of Clarence Roby 5/10/2022 at 58-59. Thus, as it relates to the guilt phase, this court finds that Mr. Anthony has failed to prove deficient performance under *Strickland.*

Now, this court agrees with Mr. Anthony that Theresa Lamb's testimony, although relevant, does not meet the reliability standards for admission. Specifically, and as Mr. Singer's testimony demonstrated,[10] the methods Ms. Lamb's utilized to exam the potato starch particles deviated from the generally accepted methods of chemical analysis and best practices by in the scientific community. This court further agrees that had trial counsels hired Mr. Singer or a similar counter-expert witness, a reasonable probability exists that Ms. Lamb's testimony would have been excluded at a *Daubert* hearing or undermined at trial. However, even if we assume that trial counsel's guilt phase performance was deficient, Defense failed to prove such performance sufficiently prejudiced Mr. Anthony under *Strickland.*

The trial prosecutors' theory at trial and their argument at closing implicating Mr. Anthony as the shooter was based heavily on the claim that Mr. Anthony had a higher concentration of white potato starch on his shoes, in comparison to his co-defendants. However, trial prosecutors' evidence and trial counsels' failure speak more to Mr. Anthony's level of participation or triggerman status, rather than his guilt. Therefore, because of the overwhelming evidence of Mr. Anthony's involvement in the murder—specifically the several witnesses who identified Mr. Anthony as one of the men seen at the crime scene and the fact the murder weapon was found where Mr. Anthony was arrested— Mr. Anthony has failed to demonstrate that had trial counsels' successfully challenged Ms. Lamb's testimony the outcome of the trial would have been different.

[10] At the evidentiary hearing held on April 12, 2022, Defense expert Ronald Singer provided that upon review of Ms. Lamb's work, that there was no validity at all to the assertion that the quantity or location of potato particles is any indication of who the shooter in this case was. EH. Tr. 4/12/2022 p. 39. Mr. Singer testified that he could not determine on what basis Ms. Lamb made distinctions between the type of potato (red or white) used by the shooter, as the methods Ms. Lamb utilized (examining the sample under a microscope) only identifies potato starch and not what specific type of potato. EH. Tr. 4/12/2022 p. 44-45; 39. That Ms. Lamb did not proceed in accordance with best practices by failing to take photos, provide measurements on her worksheet, and finally, Mr. Singer testified that Ms. Lamb did not document her process or methods used in her report, again, contrary to best practices. EH. Tr. 4/12/2022 p. 60. Mr. Singer ultimately concluded that the potato explosion examined by Ms. Lamb was a random event and, contrary to Ms. Lamb's testimony, there is no valid way to indicate who the shooter was from the amount of potato starch or on what shoes or clothing the particles were found. EH. Tr. 4/12/2022 p. 70-71.

Accordingly, this court finds that Mr. Anthony has failed to satisfy his burden under *Strickland* and prove Mr. Anthony received ineffective assistance of counsel during the guilt phase.

B. Claims III & X(A)(5): Trial Counsel Were Ineffective For Failing To Retain An Expert To Challenge The State's Handwriting Evidence At A Daubert Hearing And/Or At The Guilt Phase Of Petitioner's Trial

The same laws regarding trial counsels' performance during the guilt phase apply when analyzing a challenge against Officer Dupuis's testimony. However, there is one important, differentiating fact: on March 6, 1997, trial counsels specifically requested and received funding from the court to retain a handwriting expert, Minute Entry in *State v. Anthony* 387535 03/06/1997; yet inexplicably failed to hire a counter expert or request a *Daubert* hearing on the matter.

Consequently, and much to trial counsels' chagrin, the State introduced evidence of handwriting on a grease board and expert testimony that the writing was authored by Mr. Anthony to prove he not only was at the scene of the crime and had the specific intent to kill three people, but also lacked remorse for the killings. Tr. R. 1688-1689; *See also* Tr. R. 1714-1715. Such testimony—and the lack of evidence or expert testimony to refute it—was indeed prejudicial. But the first question is "was it objectively unreasonable?" Neither the April 22, 2022, affidavit executed by trial counsel, Clarence Roby, nor his May 10, 2022, deposition provide the court with a reason or rationale as to why trial counsels failed to hire a handwriting expert. Without such information, the court must assume it was trial strategy.

Much like Ms. Lamb's testimony, this court finds that Officer Dupuis's testimony was unreliable and likely could have been undermined by a counter-expert witness, had trial counsels provided such a witness. The testimony provided by Defense's expert witnesses, Mark Denbeaux and Professor James Boren, at the April 12 and April 28, 2022 evidentiary hearings shed light on the significant bias, the legitimacy, and validity of forensic document examination, as well as the questionable methods employed by Officer Dupuis in analyzing Mr. Anthony's handwriting exemplars.[11] However, given the eyewitness testimony and physical evidence and location of the

[11] At the April 14, 2022, evidentiary hearing, Professor Mark Denbeaux was deemed an expert in the limitations of forensic examination and provided testimony for the Defense on the reliability and limitations of the handwriting analysis in Mr. Anthony's case. Professor Denbeaux explained the limitations of forensic document examiners by explained the biases within the forensic document examination process and how there are no guiding principles or standards to establish the legitimacy of the science. *See* EH. Tr. 4/14/2022 p. 22. Specifically, Professor Denbeaux testified that nothing in an opinion given by a forensic document examiner would be more than what a layperson would and asserted "all they do is look at shapes of letters and say 'this is the same person.'" *Id.* at 26. Professor Denbeaux further testified that State's expert, Officer James Dupuis did not cite empirical studies, proficiency tests or any scientific foundation for his conclusions, *Id.* at 50; note any dissimilarities that could rule out the other two co-defendants as the author, or, at the least, follow FBI protocol which directs handwriting experts to discuss similarities and dissimilarities. *Id.* at 72. Professor Denbeaux ultimately concluded that handwriting analysis is not a legitimate science and Officer Dupuis (1) cherry-picked 27 similar characters and similarities from over 70,000 possible characteristics in Mr. Anthony's compelled handwriting sample, and (2) gave no premise or explanation why 27

murder weapon, the testimony and evidence presented by Mr. Anthony was not sufficient to show that the verdict in Mr. Anthony's matter would have been different had trial counsels successfully challenged Officer Dupuis's findings.[12] In hindsight, trial counsels' actions proved detrimental to Mr. Anthony's case; however, detriment is not the standard—but rather substantial prejudice.

Accordingly, this court finds that Mr. Anthony has failed to satisfy his burden under *Strickland* and prove Mr. Anthony received ineffective assistance of counsel during the guilt phase.

C. Conclusion

For the foregoing reasons, this court finds that Defense failed to prove Mr. Anthony received ineffective assistance of counsel during the guilt phase of his trial by failing to retain an expert to challenge the trial prosecutors' two expert witnesses at a *Daubert* hearing and/or at the guilt phase of Mr. Anthony's trial.

Accordingly, Petitioner's Claims III and X(A)(4) & (5) are DENIED.

III. CLAIM X(A)(1): PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEYS FAILED TO FILE A MOTION FOR CHANGE OF VENUE THAT WOULD SURELY HAVE BEEN GRANTED BY THE TRIAL COURT DUE TO THE EXTREME COMMUNITY-WIDE PREJUDICE

Pursuant to Judge Parker's April 28, 2011 ruling, this court ordered an evidentiary hearing be held as to Claim X. At the April 28, 2022, evidentiary hearing, Defense expert Silas Lee provided testimony regarding the media coverage and the effects of the coverage on Mr. Anthony's Case. Dr. Lee ultimately concluded that constant and continuous media coverage "galvanized communities in terms of demanding a response;" EH. Tr. 4/28/2022 at 2.

In Mr. Anthony's Post-Hearing Briefing In Support of Post-Conviction Relief, Mr. Anthony argues that media's coverage on Mr. Anthony's case prejudiced the community against Mr. Anthony. Mr. Anthony further argued that trial counsels' failure to request a motion to change venue constituted ineffective assistance of counsel. The State contends that much of the media introduced by Mr. Anthony was irrelevant to the venue claim[13] and none of it would have required

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similar matches was a sufficient or adequate number for a match, why those features were correctly chosen, and how they were consistent with the way Mr. Anthony writes generally in other circumstances. On April 28, 2022, Professor James Boren testified for the Defense and was tendered as an expert in capital criminal defense. After, reviewing Professor's report and testimony provided by Officer Dupuis, concluded, had Professor Denbeuax or someone with similar expertise been retained by trial counsels, that expert could have challenged the State's expert "in a serious, believable, credible way."

[12] The Defense cites *United States v. Velasquez*, 64 F.3d 844 (3d Cir. 1995) as support that Mark Denbeaux's testimony may very well have affected the jury's verdict. However, the facts and charges are dissimilar. In *Velasquez*, the handwriting was critical in identifying all person involved in the crime. Here, there was additional testimony and independent evidence of Mr. Anthony's involvement in the crime and Defense made no showing as to how this evidence alone would have resulted in a different outcome.

[13] The media reviewed by Dr. Lee included letters to OffBeat Magazine from January 1999, an article from the year 2000 about poet Lee Meitzen Grue's poem "Potatoes for All those Lost at the Louisiana Pizza Kitchen", an article from the Communita di Sant'Egidio from 2001 that references juries in Orleans Parish' reluctance to impose the

a change of venue. The State also argues that given the denial of a change of venue in other similar cases, it is also unlikely that the trial court would have granted the motion in this case or that its denial of would have resulted in reversable error.[14] This court agrees with the State.

As Defense legal expert, James Boren testified, change of venue "is a strategic decision." EH Tr. 4/28/22 at 11. Although Mr. Boren testified that he could not think of a valid reason as to why trial counsel would not have moved to change venue out of Orleans Parish, Clarence Roby did not provide an explanation in his April 22, 2022 affidavit, nor did Defense elicit this information during Mr. Roby's May, 10, 2022 deposition. Furthermore, Carol Kolinchak, trial attorney for Mr. Anthony's co-defendant, Malcolm Hill, testified that she was also concerned about the media coverage, intended to file a Motion to Change Venue, but was waiting for the appropriate, or in other words, more strategic time.[15] Therefore, because Mr. Anthony has failed to provide evidence sufficient to prove trial counsels' failure to change jurisdictions was not a result of an informed, strategic trial decision or even that such a motion would have succeeded, this court need not analyze whether such action by trial counsel prejudiced him.

Accordingly, this court finds this claim lacks merit.

IV. CLAIM V and CLAIM X(A)(2): TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY PERMITTING DISCRIMINATION IN JURY SELECTION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Pursuant to Judge Parker's April 28, 2011 ruling, this court asked the State and Defense to submit briefs on Claim V and held an evidentiary hearing as to Claim X. On February 8, 2022, Mr. Anthony submitted supplemental briefs on the matter, asserting that trial prosecutors continued their discriminatory practice and pattern of striking qualified prospective African American jurors on the basis of their race in violation of the equal protection clause, under *Batson v. Kentucky*. In response, the State asserts (1) trial counsels made no objection to the

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death penalty, an article from January 2002 noting a drop in executions in Louisiana, a number of articles about other cases that merely reference the 1997 Pizza Kitchen case as the last instance in which a death sentence was imposed, and two articles about Kyan Douglas of Queer Eye for the Straight Guy, who had lived in New Orleans while attending Loyola University and Blue Cliff School of Massage Therapy, who noted that he had worked with and was friends with the three people killed at the Louisiana Pizza Kitchen.

[14] *See State v. Frank*, 1999-0553 (La. 1/17/01), 803 So. 2d 1, 17, as revised (Apr. 16, 2001) (rejecting change of venue claim where "nearly every potential juror had been exposed to some publicity surrounding this case, with approximately 89% of them having been exposed to information on more than one occasion or in multiple sources..."); *See also State v. Lee*, 2005-2098 (La. 1/16/08), 976 So. 2d 109, 133 ("In support of defendant's motion for change of venue, he filed into evidence over 5,000 pages of printed media reports and newscast transcripts published between July 2002 and January 2004 that related to the South Louisiana Serial Killer. The record also reveals that 123 of 125 potential jurors stated they were at least vaguely familiar with this case through media accounts or informal private conversations. ... After examining these statistics and surveying prior jurisprudence, we find these numbers consistent with other similarly situated cases in which venue was not changed.")

[15] Ms. Kolinchak ultimately decided not to file the motion as her client entered a plea deal following Mr. Anthony's trial. EH. Tr. 4/21/22 at 41-42.

pattern of strikes at the time of trial, (2) Mr. Anthony failed to establish racial bias in the exercise of peremptory strikes, and (3) even assuming deficient performance, Mr. Anthony failed to present evidence to demonstrate the trial prosecutors' strikes in this case were based solely upon race. *Supplemental Response to Petitioner's Remaining Post-Conviction Claims* at 9.

First, the contemporaneous objection rule requires trial counsel to timely object to State peremptory challenges in violation of *Batson* or suffer the risk of waiving future *Batson* claims on appeal and review.[16] Therefore, this court finds that Mr. Anthony's claims predicated on the trial prosecutor's violation of *Batson* were waived by trial counsels' failure to object at the time of trial. However, The Louisiana Supreme Court has established that a defendant may challenge trial counsel's failure in a timely filed application for post-conviction relief, alleging ineffective assistance of counsel.[17]

Given the District Attorney's historical practice and pattern of using peremptory strikes to remove qualified African American jurors from juries in Orleans parish—and the severity of Mr. Anthony's case—trial counsels' failure to raise a *Batson* challenge during the *voir dire* process is bizarre and inexplicable. However, even assuming trial counsels' performance was deficient, Defense has failed to prove substantial prejudice—particularly considering the overwhelming evidence presented against Mr. Anthony.

The Fourth Circuit has opined that when there is overwhelming evidence against a defendant to which the composition of the jury would not taint the outcome of the proceeding, then an ineffective assistance claims for failing to raise a *Batson* objection have no merit. *See State v. Anderson*, 728 So.2d 14, 19 (La. App. 4 Cir. 1998).[18] Although Defense expert witness James Boren testified that trial counsels failed to exercise reasonable, professional judgment when they did not raise a *Batson* objection; EH. Tr. 4/28/22 p. 113, Defense expert witness Carol Kolinchak—and Mr. Anthony's trial counsel, Clarence Roby—admitted that the evidence against Mr. Anthony

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[16] *See State v. Potter*, 591 So.2d 1166, 1169 (La. 1991) ("A timely objection would have satisfied the fundamental purposes of the contemporaneous objection rule by placing the trial judge on notice that a problem existed and by giving the court a chance to correct the alleged error before it infected the entire proceeding . . . By failing to make the timely objection required by La.Code Crim.Proc. art. 841(A), Potter waived the alleged violations.").

[17] *See State v. Martin*, 427 So.2d 1182, 1186 (La. 1983) ("A defendant, who failed to object to that possible deficiency at a time when the problem could have been easily resolved, has an adequate remedy by post-conviction application to show any possible violation of his Sixth Amendment rights"); *See also State v. Lewis*, 2019-0448, p. 5 (La. App. 4 Cir. 2/12/20); 292 So.3d 945, 950, writ denied, 2020-00389 (La. 6/22/20); 297 So.3d 760 ("Defendant can raise counsel's purportedly deficient performance during jury selection in post-conviction proceedings during which the district court can conduct a full evidentiary hearing on the matter, if it determines that one is warranted.").

[18] In *State v. Anderson*, defendant alleged his trial counsel tendered ineffective assistance during the voir dire process by failing to raise a *Batson* objection predicated upon the state's systematic exclusion of blacks from the jury. The Fourth Circuit held there was no ineffective assistance tendered, opining that defendant had to prove both state's use of peremptory challenges to discriminate and exclude jurors, in addition to subsequent prejudice. The court concluded that the overwhelming evidence against the defendant resulted in no prejudice because defendant could not show the jury composition affected the outcome of his trial. *State v. Anderson*, 728 So.2d 14, 20 (La. App. 4 Cir. 1998).

was overwhelming.[19] Despite these admissions, Mr. Anthony did not depose the trial prosecutors to ask whether they had race neutral explanations for their strikes or provide evidence to demonstrate that even a single strike was based solely upon race.[20] Instead, the crux of the Mr. Anthony's evidence and support for this claim involved statistics and a historical analysis of the District Attorney's discriminatory practices. However, this is neither sufficient to meet his burden of showing racial discrimination,[21] nor his burden of proving substantial prejudice[22] to grant Mr. Anthony a new trial.

Therefore, this court finds that Mr. Anthony has failed (1) to meet his burden under *Batson* to prove use of racial discrimination during the *voir dire* process and (2) to prove substantial prejudice, as required by *Strickland*, to satisfy its claim of ineffective assistance of counsel.

Accordingly, Petitioner's Claim III and Claim X(A)(2) are DENIED.

V. CLAIM X(A) (3): TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE THE BURLINGTON RECIEPT AND INTERVIEW EYEWITNESSES IS ALTERNATIVELY INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Anthony also alleges that trial counsel was ineffective for failing to interview Damien Vincent, Angelo Collins, and Valerie Booker and failing to investigate the Burlington Coat Factory receipt. Here, Mr. Anthony provided no evidence demonstrating that trial counsels did not interview Damien Vincent, Angelo Collins, and Valerie Booker. Additionally, several witnesses described Mr. Anthony as wearing a blue jacket. Finally, Mr. Anthony's mother provided NOPD with the Burlington Coat Factory Receipt that she indicated to them matched the description of the blue jacket that witnesses alleged Mr. Anthony wore during the shooting. Therefore, this court cannot conclude that trial counsels' failure to interview the aforementioned witnesses or investigate the receipt constituted deficient performance at trial.

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[19] Specifically, the record contains such evidence: First, Jennifer Pleasants provided testimony identifying Mr. Anthony arriving at the Pizza Kitchen just prior to the murders. Tr. 4/12/2022 p. 22:26-29. Second, Michael Skinkus, who worked adjacent to the Pizza Kitchen, also identified Mr. Anthony on the day of the crime. *Id.* at p. 22:30-31. Third, Angelo Collins' testimony established that he picked up Mr. Anthony on the day of the murders and drove him home. *Id.* at p. 22:31-23:2. Finally, police officers testified they located the murder weapon at Malcolm Hill's home where Mr. Anthony was and had stayed. *Id.* at p. 23:2-6. With such evidence present and against Mr. Anthony, there is no doubt as to his participation in the murders; *See also* EH. Tr. 4/21/2022 at 31 (Testimony of Carol Kolinchak); Depo. of Clarence Roby, 5/10/2022 at 56 ("I think, given what was disclosed to me and Mr. Jenkins regarding the charges, I believe that it appeared to be extremely overwhelming"); *Id.* at ("I will agree with you're a characterization that it was a rather overwhelming case").

[20] *See also Foster v. Chatman*, 578 U.S. 488, 499 (2016) ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose." (citations omitted)).

[21] *See State v. Boys*, 2019-0675 (La. App. 4 Cir. 5/26/21), 321 So. 3d 1087, 1102, writ denied, 2021-00909 (La. 11/10/21), 326 So. 3d 1245, and cert. denied, 142 S. Ct. 1672 (2022) ("The mere fact that the State used the majority of its strikes against black jurors does not establish a prima facie case of discrimination.")

[22] Evidence that trial prosecutors struck Black jurors because of their race would have been helpful, although not dispositive, in demonstrating that a challenge by trial counsels could have reasonably resulted in a different outcome in Mr. Anthony's case. Admittingly, given the amount of time that has passed since trial, trial prosecutors, much like Mr. Roby, likely would not, after all of these years, have independent recollection of their reasoning for striking specific jurors.

Accordingly, the Mr. Anthony has failed to satisfy the first prong under Strickland and this court finds that the Petitioner's claim X(A)(3) is without merit.

VI. CLAIM X(A)(6): STRICKLAND AND BRADY ERRORS ARE TO BE CONSIDERED COLLECTIVELY OR CUMULATIVELY AND THE ULTIMATE QUESTION IS WHETHER THE TRIAL WAS RENDERED UNFAIR BY THE CUMULATION OF ERROR

As discussed in detail above, neither trial counsels' errors nor the State's failure to disclose favorable evidence, discussed in more detail below, can reasonably shake the court's confidence in the outcome of the guilt/innocence phase or Mr. Anthony's participation the murders. In the trial prosecutors' first closing argument, they identified approximately 60 pieces of evidence that established Anthony's guilt—only four of which remain in dispute before this court.[23] Moreover, Defense expert witness Carol Kolinchak—and Mr. Anthony's trial counsel, Clarence Roby—admitted that the evidence against Mr. Anthony was overwhelming. Therefore, even assuming trial counsels' errors constituted deficient performance, this court cannot conclude, and Mr. Anthony has failed to prove that, had those errors not occurred, the outcome of the guilt/innocence phase would have been different.

Accordingly, this court finds Petitioner's claim X(A)(6) is without merit; Petitioner Claim X(A) is DENIED.

VII. CLAIM X(B): TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

There is an obvious and substantial difference between the capital cases and all other criminal cases: the Defendant's risk of being sentenced to death. The United States Supreme Court has consistently emphasized the severity of such cases and recognized the "need for reliability in the determination that death is the appropriate punishment in [each] case." *Strickland v. Washington*, 466 U.S. 668, 705; 104 S.Ct. 2052, 2074 (1984) (BRENNAN, J. concurring in part) (citing *Barefoot v. Estelle*, 463 U.S. 880, 913–914, 103 S.Ct. 3383, 3405, 77 L.Ed.2d 1090 (1983) (dissenting opinion). As such, the Supreme Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring). Louisiana courts have also recognized this duty by establishing a claim for ineffective assistance of counsel when trial counsels' performance during the penalty phase "so undermined the proper functioning of the adversarial process that the trial [or sentencing] cannot be relied on

[23] *See State's Response to Petitioner's Post-Hearing Memorandum* at 26-29.

as having produced a just result." *State ex rel. Busby v. Butler*, 538 So.2d 164, 167 (La. 1988) (citing *Strickland,* 466 U.S. at 686, 104 S.Ct. at 2063). Therefore, like the guilty phase, a Defendant is entitled to "the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life" during the penalty phase. *See e.g. State v. Fuller*, 454 So.2d 119, 124 (La. 1984); *State v. Berry*, 430 So.2d 1005, 1007 (La. 1983); *State v. Myles*, 389 So.2d 12, 28 (La. 1980) (on reh'g).

A court cannot impose the death penalty unless the jury, by a unanimous decision, finds two things: (1) the State proved beyond a reasonable doubt that at least one statutory aggravating circumstance exists and (2) the death penalty is the appropriate punishment, after consideration of the available mitigating circumstances. La. C.Cr. P.Art. 905.3. Therefore, trial counsels' primary tasks at sentencing are to present the jury with any and all mitigating evidence and testimony—acquired through reasonable investigation—to not only undermine evidence presented by the State, but also bolster Mr. Anthony's character, cast doubt on his propensity to commit similar crimes, and compel the jury to spare the Mr. Anthony's life.

Testimony and evidence presented to the jury must "focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates." La. C.Cr. P. art 905.2 (A). During sentencing deliberations, however, the jury may also consider any evidence offered at the trial on the issue of guilt, even if it was not reintroduced during sentencing. *Id.* Should trial counsel fail to conduct sufficient mitigation investigation or render deficient performance at sentencing—or trial—an aggrieved Petitioner may have valid grounds for a claim for ineffective assistance of counsel on post-conviction relief.

To prove ineffective assistance of counsel at the penalty phase, Defense must show (1) trial counsel failed to undertake "a reasonable investigation [which] would have uncovered mitigating evidence," (2) triall counsel's failure to put on the available mitigating evidence "was not a tactical decision but [instead] reflects a failure by counsel to advocate for his client's cause," and (3) trial counsel's failure resulted in "actual prejudice" to the defendant. *See State ex rel. Busby v. Butler*, 538 So.2d 164, 169 (La.1988) (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)).[24]

[24] *See also State v. Hamilton*, 699 So.2d 29, 32 (La. 7/1/97) (citing *State v. Brooks*, 94-2438 (La. 10/16/95), 661 So.2d 1333; *State v. Sanders*, 93-0001 (La. 11/30/94), 648 So.2d 1272.

Now, in Petitioner's Initial Supplemental Memorandum for Post-Conviction Relief, Mr. Anthony identifies several errors committed by trial counsels during the penalty phase. Each sub-claim is discussed, in turn, below:

1. Petitioner was Denied His Right to Effective Assistance of Counsel as a Result of Counsel's Failure to Adequately Prepare and Present Available Mitigating Evidence to the Defense Expert in Order to Ensure a Complete and Thorough Evaluation, an Accurate Diagnosis

Mr. Anthony contends trial counsels failed to adequately prepare and furnish mitigating evidence, which deprived him of his constitutional right to effective assistance of counsel. This court agrees.

The record is spewing with testimony from multiple individuals that illustrates trial counsels' lack of preparation, ambiguous defense theory, and insufficient mitigation: (1) Dr. Zimmerman—the only expert trial counsel hired in preparation of the penalty phase—testified he was not provided enough information regarding Mr. Anthony's suicide attempt to be able to distinguish between a rational decision or an irrational decision indicative of a mental health issue, EH Tr. 4/21/22 p. 75-76; (2) James Boren testified trial counsel did not provide Dr. Zimmerman with adequate information which limited Dr. Zimmerman to conduct basic standardized tests and barring any potential serious conclusion, EH. Tr. 4/28/22 p. 85; (3) James Boren also testified that trial counsel stated in open court that he has never encountered Burk Foster, a witness trial counsel themselves called, which was indicative of trial counsels' lack of preparation done by trial counsel to ascertain the substance of Burk Foster's testimony. EH Tr. 4/28/22 p. 88; (4) Dr. Sautter testified that the penalty phase did not include detailed information about Mr. Anthony's life and family, EH Tr. 4/21/22 p. 158; (5) Carol Kolinchak, testified that she felt during the penalty phase Mr. Anthony's family members had "...a lot more to say... and the information they presented was very, very general," EH Tr. 4/21/22 at 13; and finally, (6) James Boren further testified that the "perfect and happy life" narrative trial counsel portrayed in the penalty phase, was grossly inconsistent with reality in which Mr. Anthony actually had, ". . .[A] very, very difficult life..." EH. Tr. 4/28/22 p. 90. However, trial counsels' lack of preparation could have been avoided.

Trial counsels requested—and the trial court granted—their funding request for both a mitigation investigator and a psychologist, R. 1487-94; R. 256-57. However, trial counsels inexplicably failed to hire a mitigation investigator and only retained psychologist, Marc Zimmerman, to testify during the penalty phase. EH. Tr. 4/21/22 p. 56-57. Yet, and even more bizarrely, trial counsels did not call Mr. Zimmerman to testify. Given the severity of Mr. Anthony's

conviction, the higher degree of care imposed in capital proceedings, and trial counsels' failure to utilize the requested funding to ensure more robust investigation, trial counsels' performance was, in fact, deficient. *See State ex rel. Busby v. Butler,* 538 So.2d 164 (La. 1988).

2. Counsel Failed to Investigate and Present Mitigating Evidence Concerning the Emotional Disturbances and Mental Illness Suffered by the Client

Mr. Anthony argues trial counsel's failure to present mitigating evidence regarding his mental and emotional state resulted in sufficient prejudice requiring the need for a new sentencing hearing.[25] This court agrees.

At the April 21, 2022 evidentiary hearing, Dr. Zimmermann testified that suicide attempts are, "... [A]n irrational decision and indicates a mental health issue." EH Tr. 4/21/22 p. 75-76. Dr. Sautter also testified and stated, upon reviewing Mr. Anthony's full medical file, Mr. Anthony suffered from major depression and psychotic features in addition to PTSD. EH Tr. 4/21/22 p. 92-93; *See also* Petitioner's Exhibit 12, tab 2 at 5. Because an individual's social history, including family history of mental health issues, are important mitigating factors the jury considers during the penalty phase,[26] trial counsel knew or should have known of Mr. Anthony's suicide attempts, and Dr. Zimmerman's testimony would have significant mitigation value that needed to be heard by the jury. Therefore, this court finds trial counsel's failure to present this evidence is foundationally incompatible with trial strategy and demonstrates instead a failure to advocate for Mr. Anthony's life.

3. In Addition To Counsel's Ineffectiveness For Failing To Provide The Jury With Expert Analysis Of Phillip Anthony's Multiple Mental Illnesses, Trial Counsel Further Failed By Not Presenting Evidence Of Phillip's Father's Mental Illnesses, Alcoholism And Drug Usage, and Phillip Anthony's mother also suffered from depression while Phillip was growing up

Mr. Anthony claims trial counsel failed to provide mitigating evidence surrounding his father's mental illness and battle with substance abuse.[27] Again, an individual's social history, including family history of mental health issues, are important mitigating factors for the jury to consider.[28] Yet, although such evidence was available, the record bears no indication that trial counsels introduced, or even attempted to introduce such mitigating evidence concerning Anthony

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[25] *See Porter v. McCollum*, 558 U.S. 30, 42-43 (2009) (holding counsel provided deficient representation in penalty phase of capital murder proceeding by failing to uncover and present any mitigating evidence regarding defendant's mental health, family background, or military service.)
[26] La.C.Cr.P. Art. 905.5(h); *See Locket v. Ohio*, 438 U.S. 586 (1978).
[27] *Compare Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003).
[28] Dr. Sautter testified as to the significance of social history and family history of mental health issues, stating that the likelihood an individual has or will develop a mental health disorder is directly affected by such individual's life experiences and genetics. EH. Tr. 4/21/22 p. 101-02.

Sr.'s battle with drug abuse and suicidal thoughts. Specifically, the records introduced at the April 21, 2022, hearing detail Philip Anthony Sr.'s serious, 20-year addiction to cocaine and PTSD after having shot enemy-combatants, as a soldier in the Vietnam war.[29] Such evidence gives great insight into Mr. Anthony's troubled childhood and family history that contributed to his own mental health issues and trauma.

Likewise, the record is void of any evidence introduced by trial counsel evidencing the battle Mr. Anthony's mother endured with depression and its effect on his childhood. However, at the April 21, 2022 hearing, Dr. Zimmermann provided testimony on Mr. Anthony's mother's own mental health challenges:

> She's beaten down emotionally. She's depressed. She's getting smaller in the family. Her husband's becoming bigger. ... So the depression is increasing and he's not -- so Philip is not receiving things from his mother he would normally be receiving, like love. He's being cut off from positive emotion, and then on the other hand the male father figure is the one who's like destroying that and, you know, that's his dad.

EH. Tr. 4/21/2022, p. 141-142. Again, such evidence and testimony could have been utilized by trial counsel to give the jury greater insight into the dysfunction in Mr. Anthony's life that contributed to his own mental health issues and trauma. Therefore, this court finds trial counsel's failure to present or even investigate this evidence does not constitute trial strategy, but rather a failure to advocate for Mr. Anthony's life.

4. Trial Counsel was Ineffective For Failing to Present Evidence Of Mr. Anthony's good character, lack of previous criminal history and lack of violence in his background

Mr. Anthony argues trial counsel failed to investigate mitigating evidence regarding his good character, criminal history, and violent background. This court agrees, in part.

Mr. Anthony's good character and lack of criminal history are both important mitigating factors for the jury to consider.[30] At the penalty phase of his trial, trial counsel called several of Mr. Anthony's family members and friends merely to beg for Mr. Anthony's life and present "good guy" evidence. Such testimony included statements that Mr. Anthony was well-liked, an altar boy, a good friend, and close with his family. However, aside from a statement made in passing during his second closing argument,[31] trial counsel presented no evidence or testimony sufficient to

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[29]Philip Anthony Sr. reported using $100/week of cocaine for 8 to 10 years. Stated he was introduced to cocaine while in Viet Nam. Reported last use 2/23/1994. Expressed desire to stop. Veteran shared traumatic experience of killing a child while serving in Nam. Briefly shared the experience had/has on him: stated 'I felt as if I lost my mind that day." Progress Note 2/24/1994, at Exhibit 12, Tab 22, p. 37. *See also Id.*, Tab 22, at p. 000025-000026 (noting 20 years of alcohol use, cocaine use, cannabis use); *Id.* at 000029 (noting serious contemplation of suicide).

[30]La.C.Cr.P. Art. 905.5

[31] During his second closing argument, trial counsel stated in a convoluted manner, "Well, do I need to tell them that [Mr. Anthony] had no significant criminal history?" T. Tr. 9/27/1997 76:18-24.

bolster or illustrate Mr. Anthony's lack of criminal history or violent demeanor. Therefore, because Mr. Anthony was found guilty of first-degree murder—rather a misdemeanor or low-level felony that might only call for simple pleas and kind remarks—this court finds trial counsel's failure to adequately present the aforementioned mitigating evidence does not constitute trial strategy, but rather a failure to advocate for Mr. Anthony's life.

5. Trial Counsel was Ineffective For Failing to Present Evidence that Phillip Anthony Was Follower, Not A Leader

Mr. Anthony argues trial counsel was ineffective for failing to put forth evidence illustrative of Mr. Anthony being a follower and not a leader. Given the preceding claim and the testimony trial counsel elicited regarding Mr. Anthony's good character, this court is baffled as to why Defense asserts such a claim. Specifically, Mr. Anthony's brother, along with several defense witnesses, testified at sentencing that Mr. Anthony had leader-like qualities.[32] Moreover, Mr. Anthony has not provided any evidence to corroborate such a claim. Therefore, the court finds this argument is without merit.

6. Counsel were Ineffective for Failing to Present Evidence that the Co-defendants had a History of Violent Criminal Behavior in Contrast to Petitioner's History of Non-violence and Lack of Criminal History

Mr. Anthony contends trial counsel was ineffective for failing to present evidence regarding his co-defendant's history. The record is once again void of such evidence, and even had such evidence been present, it would not be admissible.[33] This argument is without merit.

7. The Brady and Strickland errors in the guilt/innocence phase of the trial prevented the jury from considering strong mitigating circumstances that Mr. Anthony was not the person who shot the victims.

It is well known that "[v]ery few death sentences have been approved against persons who were not proven to be the principal offender." *Stumpf v. Mitchell*, 367 F. 3d 594, 617 (6th Cir. 2004); *See also State v. Green* 738 N.E. 2d 1208, 1224 (Ohio 2000). In fact, the United States Supreme Court has emphasized a defendant's level of participation in a crime, or in other words his non-triggerman status, as important mitigation and potentially relevant to both the defendant's

[32]T. Tr. 9/27/97 at 6:4-6 (Brother Louis Tomasso testified Mr. Anthony was a mentor and teacher to younger kids); T. Tr. 9/27/97 at 11:25-33 (Dianne Bieniemy testified Mr. Anthony took care and looked after his younger brother); T. Tr. 9/27/97 at 50:14-15 (Damien Anthony testified "[Mr. Anthony] taught me how to laugh, how to be myself, self-true feelings.")

[33] *State v. Brogdon*, 457 So.2d 616, 626 (La. 1984). ("Defendant argues that he was entitled to have the jury consider that his co-defendant received a life sentence as a mitigating circumstance or as a meaningful basis for determining whether his case falls within the capital or non-capital punishment category. There can be little doubt that a comparison of defendant's case to similar first degree murder cases would provide a meaningful basis for determining whether the case is one of the relatively few in which the death penalty is to be imposed or one of the many in which it is not. Such a comparison also could reveal to the sentencer other relevant mitigating circumstances not listed in the statute. We conclude, however, that the district court did not err in deciding that the evidence was inadmissible.").

criminal record and his character. *See Sumner v. Shuman,* 483 U.S. 66 (1987).[34] The court further opined "the character and record of the individual offender and the circumstances of the particular offense a[re] a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 74 (quoting *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976)).

The Louisiana Supreme Court has also confronted the non-triggerman status issue in the death penalty context by overturning a jury's determination to impose the death penalty in cases where there was doubt as to the Defendant's non-triggerman status and his specific intent to kill.[35] Today, the importance of a Defendant's non-triggerman status is enumerated as one of the mitigating factors for the jury to consider when deciding the death penalty, specifically whether "[t]he offender was a principal whose participation was relatively minor." La. C.Cr. Art. 905.5(g). However, for a jury to consider that factors, trial counsel must conduct investigation, acquire evidence sufficient to satisfy such factors, and present them at sentencing. Trial counsels failed on all accounts.

Despite the overwhelming evidence of guilt and their duty to advocate to save Mr. Anthony's life, trial counsels made little to no attempt during the penalty phase to counter the trial prosecutors' depiction of Mr. Anthony as the primary shooter. Admittedly, given their errors during the guilt/innocence phase, there was not much evidence to offer. Therefore, although this court finds the Defense failed to meet its burden of proof regarding the *Strickland* and *Brady* claims as they relate to Mr. Anthony's guilt, it is clear that such errors had a detrimental and prejudicial effect on the outcome of the penalty phase.

First, although trial counsels specifically requested and received funding from the court to retain a handwriting expert; T. R. 496, for reasons neither known to the court nor probed by Mr. Anthony during Clarence Roby's deposition, trial counsels failed to hire a counter expert or request a *Daubert* hearing on the matter. Consequently, the trial prosecutors used the handwriting on a grease board to prove Mr. Anthony was not only at the scene of the crime, but also had specific intent to kill three people and lacked remorse for doing so. R. 1764. Specifically, the prosecutor stated in his closing during the guilt phase:

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[34]"Even if the offense was first-degree murder, whether the defendant was the primary force in that incident, or a non-triggerman like Shuman, may be relevant to both his criminal record and his character." *Id.* at 81.

[35]*See State v. Elmo Patrick Sonnier,* 402 So.2d 650 (La. 1981) (affirming the death sentence of one of two brothers convicted of a brutal kidnapping-rape-murder of a young couple, because that brother was the primary shooter); *But see State v. Eddie James Sonnier,* 380 So.2d 1 (La. 1979) (reversing a death sentence and remanded for imposition of a life sentence Eddie Sonnier's matter, in part, but primarily because, although he was a principal in the killing of these young people for aiding and abetting his brother, it was Elmo Patrick Sonnier who acted as their executioner).

> And then to rub everybody's faces in it he left that message so he would know that he could brag to his cohorts about how powerful and how proud he was of what he did. He wanted more, He wanted everyone to know. And not only did he want them to know. He wanted them to know that he was proud, that he enjoyed it. It made him feel good.

R. 1746. These statements painted Mr. Anthony as a monster—someone who enjoyed murdering three people—not as someone with a significant but lesser role in the murders. As for the jury, they had no clear evidence from trial counsels to undermine such prejudicial statements, neither during the guilt phase nor the penalty phase.

Had trial counsels utilized the funds granted by the court, retained Professor Denbeaux[36] or someone with similar expertise, and offered testimony at a *Daubert* hearing, a reasonably possibility exists that Denbeaux's testimony would have challenged the legitimacy of the science and Officer Dupuis's methods and conclusions. Additionally, had trial counsel presented Professor Denbeaux as an expert witness at trial, there is a reasonable probability counsel would have been successful in attacking Officer Dupuis's conclusions and methods, using that testimony to bolster mitigation during sentencing, refuting the State's demonizing characterization of Mr. Anthony, and persuading at least one juror to save Mr. Anthony's life.[37]

Next, given Mr. Anthony's lack of violent criminal history and Mr. Singer's findings regarding the unreliability of Ms. Lamb's testimony, a reasonable possibility exists that had trial counsels hired a counter-expert to challenge Ms. Lamb's conclusions, such testimony would have also cast doubt as to whether Mr. Anthony was in fact the primary shooter. But they did not.

Instead, Mr. Anthony's penalty phase defense seemed to be nothing more than a mere afterthought; a defense haphazardly pieced together in no more than a day after a verdict of guilty as charged. Such failures cannot not reasonably be characterized as tactical or strategy, but instead reflects trial counsels' failure to advocate for Mr. Anthony's cause. *See State v. Hamilton*, 699 So.2d 29, 32 (La. 1997) (citing *State v. Brooks*, 94-2438 (La. 10/16/95), 661 So.2d 1333). A defendant's triggerman status is known to be one of the most important factors in a jury's determination whether to impose the death penalty. Therefore, it was unreasonable for trial counsel to not provide such key testimony—or any evidence—sufficient to directly challenge the State's damning and flawed testimony[38] at sentencing.

CONCLUSION

[36] Prof. Denbeaux was available and working as an expert in the field at the time of Mr. Anthony's trial.
[37] *See* Evidentiary Hearing Testimony from April 28, 2022 by Professor James Boren; p. 118-119.
[38] *See* Court findings under Claim III, regarding ineffective assistance of counsel during guilt phase.

Again, trial counsels' primary role during sentencing is to "ensure that the adversarial testing process works to produce a just result." However, given trial counsels' severely lacking performance, this court cannot say with confidence that Mr. Anthony's sentence to death was just or reliable. Although trial counsels' several and cumulative errors during the guilt/innocence phase were insufficient to cast doubt on the reliability of Mr. Anthony's guilty verdict, when considered in conjunction with trial counsels' lack of investigation and poor performance during the penalty phase, trial counsels' efforts during the penalty phase fell far below the minimum constitutional standard applicable in a capital case.

For the foregoing reasons, this court finds the Mr. Anthony has met its burden of proving that Mr. Anthony's trial counsels provided ineffective assistance of counsel during the penalty phase. Accordingly, Petitioner Claim X(B) is GRANTED.

VIII. CLAIM VI, VII: STATE VIOLATED VARIOUS DISCOVERY OBLIGATIONS MANDATED BY BRADY V. MARYLAND, 373 U.S. 83 (19630; KYLES V. WHITLEY 115 S. CT. 1555 (1955); NAPUE V. ILLINOIS, 360 U.S. 264 (1959) AND GIGLIO V. UNITED STATES, 405 U.S. 150 (1972) DEPRIVING PETITIONER OF DUE PROCESS AS GUARANTEED BY THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION

Mr. Anthony argues various discovery violations committed by the State depriving the Defendant of due process as provided by the Fourteenth Amendment of the United States Constitution. Specifically, Mr. Anthony alleges the State violated the mandates of *Brady v. Maryland*, *Kyles v. Whitley*, *Napue v. Illinois*, and *Giglio v. United States*, by failing to disclose eyewitness statements from Angelo Collins and Valerie Booker, in addition to providing false testimony from Det. Waguespack concerning Mr. Anthony's clothing, while being in possession of a Burlington Coat Factory receipt that provided contrary information. *See Petitioner's Supplemental Briefing in Support of Claims for Post-conviction relief* at 12-14. The State asserts Angelo Collins did not remember the type of shoes Mr. Anthony wore on the day of the murder and contends that the Burlington receipt is immaterial, as the color of Mr. Anthony's jacket would not affect the outcome of the case. *See State's Response To Application For Post-Conviction Relief* at 23-25.

This court ordered an evidentiary hearing on the matter pursuant to Judge Parker's April 28, 2011. EH. Tr. 04/28/2011; p. 31. By the conclusion of the hearing, the only evidence that the defense alleged was suppressed was:

a. December 9, 1996, statement of Angelo Collins: In relevant part, Mr. Collins stated to detectives that he recalled Philip Anthony was wearing tennis shoes when he approached Mr. Collins's car to ask for a ride on the morning of December 1, 1996.

b. December 2, 1996, statement of Valerie Booker: In relevant part, Ms. Booker, who was co-defendant Tracey Marquez's aunt and co-defendant Malcolm Hill's girlfriend, told detectives that she saw Philip Anthony wearing white tennis shoes when she saw him on the December 1, 1996.

c. Burlington Coat Factory Receipt Information.

The State now argues that because Mr. Anthony's trial counsels did not conduct a discovery inventory and post-conviction counsel did not introduce such file as an exhibit or call the prosecutors to testify whether such materials were handed over, this court cannot ascertain whether these statements were withheld or turned over. *State's Response To Petitioner's Post-Hearing Memorandum* at 12-13. The State further contends that, even assuming the Defense's assertions that the State failed to turn over favorable evidence were true, Valerie Booker's statement was immaterial and had little to no impeachment value and Angelo Collin's statement was very inculpatory. *Id* at 14. This court agrees.

A. The Shoes

When prosecution fails to disclose favorable material evidence, such as a police report bearing a witness's original description which is contrary to the witness's trial testimony, they have committed a *Brady* violation. *See State v. Knapper*, 579 So.2d 956 (La. 1991).[39] However, the *Brady* rule encompasses evidence that impeaches witness testimony only when the reliability or credibility of that witness may determine guilt or innocence.[40] *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *See also State v. Kemp*, 828 So.2d 540, 545 (2002). Although the State contends that because Defense counsel did not introduce the file as an exhibit to the record or call the trial prosecutors to testify whether the materials were turned over, this Court cannot ascertain whether the statements were actually withheld or turned over, we do not agree. In Clarence Roby's April 22, 2022 affidavit, he specifically states that neither Angelo Collins and Valerie Booker's statements nor the District Attorney's handwritten notes regarding Valerie Booker and the

[39] In *State v. Knapper*, a witness described the defendant as wearing a *white* shirt, but later at trial testified that the gunman was wearing a *black* shirt, corroborating other eyewitness testimony. *State v. Knapper*, 579 So.3d 956, 957-58 (La. 1991). The Louisiana Supreme Court reversed the Criminal District Court of Orleans' denial, reasoning that if defense had been tendered the police report the witness may have conceded during cross-examination that his description of the gunman's shirt immediately after the incident was more accurate than his trial testimony. *State v. Knapper*, 579 So.3d 956, 960-61 (La. 1991). The Court concluded that the withheld evidence could've had significant value in creating a reasonable doubt that otherwise was not present. *State v. Knapper*, 579 So.3d 956, 960 (La. 1991); *See also State v. Calloway*, 718 So.2d 559, 563-64 (La. App. 5 Cir. 1998) (holding prosecution's failure to disclose two-eyewitness statements that contradicted evidence at trial deprived defense of opportunity for cross-examination of inconsistencies and was material directly to guilt/innocence and credibility/impeachment of the witnesses, such failure seriously undermines the confidence in the verdict).

[40] *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *State v. Knapper*, 579 So.2d 956, 959 (La. 1991); *State v. Wells*, 191 So.3d 1127, 1137-38 (La. App. 4 Cir. 2016).

Burlington Coat Factory were disclosed.[41] However, none of this evidence would have cast sufficient doubt on Mr. Anthony's involvement in the murder.

Mr. Anthony contends that the aforementioned statements were favorable because it held significant impeachment value and competent counsel would have used the evidence to properly impeach the witnesses' statements at trial. This court disagrees. Irrespective of the physical description he gave of Mr. Anthony, and even assuming his statement was not tendered to trial counsels, Angelo Collins's statement is deeply inculpatory to Mr. Anthony, as it places him leaving the Pizza Kitchen after the murder with his co-defendants, Malcolm Hill and Tracey Marquez. Furthermore, Mr. Collins did not testify at trial about the shoes that Anthony was wearing and introducing such description would have only bolstered the State's case by confirming Mr. Anthony's presence at the scene of the crime. Therefore, such statement would have had no impeachment value. As to Valerie Booker's statement, Ms. Booker observed Mr. Anthony almost eight hours after the murder; what kind of shoes Mr. Anthony was wearing at that time would have not been material at trial. Given the numerous eyewitnesses who identified Mr. Anthony at the place of murder, neither statement likely would have undermined the confidence on the verdict. However, they would have had meaningful value in the penalty phase, as it related to Mr. Anthony's triggerman status.

Had the State tendered Angelo Collins and Valerie Booker's statements to trial counsel,[42] Mr. Collins may have conceded or indicated that his description of Mr. Anthony's attire on the day of the incident was likely more complete than at trial,[43] and Ms. Booker could have been called to testify about her observations, casting some doubt on the State's theory at sentencing that Mr. Anthony was the shooter.[44] But, this court finds these statements and evidence would likely not

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[41] Specifically, Mr. Roby stated: "I met with two of Mr. Anthony's current post-conviction team earlier this year and was shown several items that were not included in my case file and that I had never seen and did not receive during my representation of Philip Anthony."

[42] Angelo Collins initially reported that Mr. Anthony was wearing a *blue* jacket, and *tennis* shoes. Petitioner's Deposition Ex. 3 (Petition Ex. 10) at 11 (emphasis added). Angelo Collins further explained he did not observe any material on or left behind by Mr. Anthony. Petitioner's Deposition Ex. 3 (Petition Ex. 10) at 12. Valerie Booker, provided a statement to Det. Brink explaining that Mr. Anthony was wearing "a cream-colored shirt... brown or khaki jeans... and some type of white shoes, like tennis shoes." Petitioner's Deposition Ex. 4 (Petitioner Ex. 9).

[43] In Mr. Roby's April 22, 2022 affidavit, he stated the following: "Mr. Anthony's clothing and shoes were key pieces of evidence for the State . . . Angelo's undisclosed pre-trial statement undermines the State's theory that Mr. Anthony was the shooter because he had more potato particles on his boots than that of his co-defendants' shoes. . . I could have used it to establish that Mr. Anthony was wearing tennis shoes - not brown boots - on the day of the offense as well as to undermine the State's theory that Mr. Anthony was the shooter because he had the most potato particles on the brown boots that NOPD confiscated and tested."

[44] In Mr. Roby's April 22, 2022 affidavit, he stated the following: "However, had the State disclosed this statement, I could have called Ms. Booker to testify and used her undisclosed statement to establish that Mr. Anthony was wearing white tennis shoes on the date of the offense and to impeach the State's theory that Mr. Anthony was the shooter because he had the most potato particles on the brown boots that NOPD confiscated and tested. The corollary handwritten note, by my reading, is referencing Ms. Booker's contradictory description of Mr. Anthony's shoes related to the brown boots the State are presented to the jury were the shoes Philip Anthony was wearing at the

have changed the outcome of Mr. Anthony's culpability verdict and therefore did not prejudice Mr. Anthony, under *Strickland.*

b. The Burlington coat

Next, Mr. Anthony asserts that trial prosecutors presented false or misleading testimony from Det. Joseph Waguespack regarding Mr. Anthony's clothing on the date of the offense. *See Petitioner's Supplemental Briefing in Support of Claims for Post-Conviction Relief* at 13-14. In his April 28, 2011 ruling, Judge Parker found this claim to be procedurally barred, unless Mr. Anthony could provide a witness to testify that prosecution knowingly suborned perjured testimony or provide a document with proper foundation to support this claim. EH. Tr. 04/28/2011 p. 31-32. No such witness testified; however, the Mr. Anthony provided additional documentation in support of this claim.

On February 8, 2022, Defense submitted supplemental briefs on this matter, alleging that the trial prosecutors withheld material, exculpatory and impeachment evidence, including a handwritten note providing the type and color of jacket that Mr. Anthony owned; a "black" jacket, not a "blue" one as testified to by Det. Waguespack. *See Petitioner's Supplemental Briefing in Support of Claims for Post-Conviction Relief* at 13; *Ex.* 1; R. 1354-55. Defense further claims the information contained in the Burlington Coat Factory receipt is additional *Brady* evidence to which the trial counsel was entitled to receive. Defense contends that the note, coupled with alleged false/misleading testimony Det. Waguespack describing Mr. Anthony's attire, provides a reasonable probability that the outcome of the trial would have been different had the receipt been disclosed. *See Petitioner's Supplemental Briefing in Support of Claims for Post-Conviction Relief* at 13, 21-23. The State argues (1) testimony provided repeatedly confirms or describes Mr. Anthony as present at the crime scene, with co-defendants, all on the morning of the murders to which does not undermine the confidence of the jury's culpability phase determination; and (2) even if there been proof the trial prosecutors presented knowing and false evidence concerning the origins of the Burlington Coat Factory Receipt or the blue jacket, the issue is deeply concerning with regard to a penalty phase determination. This court agrees.

The United States Supreme Court is clear in that it is impermissible for prosecution to knowingly use false testimony to obtain a conviction. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

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time of the offense. This undisclosed handwritten note underscores the materiality of Ms. Booker's December 2, 1996 pre-trial statement to NOPD detectives."

However, for an individual to prevail in a claim that prosecution utilized false testimony, the challenger must establish (1) the state knowingly used or failed to correct false evidence, and (2) such false evidence was material. *See Giglio v. U.S.*, 405 U.S. 150, 153-54 (1972). At some point the State learned that the Burlington receipt was for a black jacket, but what remains unclear is when the State discovered this discrepancy and whether it could have been tendered as *Brady* to the trial counsels before trial.[45] At no point in the hearing or in its briefs did Petitioner present evidence on the authorship of the note, the time note was written, or even who "Paulette" was. Although the State has provided the court some speculation on who "Paulette" might be, this is not sufficient to meet the Defense's burden of proof for proving prosecutorial misconduct.[46] Furthermore, Mr. Anthony initially indicated his intent to depose the Ms. Holahan and other trial prosecutors yet chose not to do so. Therefore, the Mr. Anthony has failed to prove that the state committed prosecutorial misconduct.

Accordingly, this Petitioners claims VI and VII(D) are without merit and DENIED.

IX. CLAIM XIII: LETHAL INJECTION VIOLATES THE RIGHT TO HUMANE TREATMENT AND RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

Mr. Anthony alleges that the foreseeable nature of unnecessary pain and lingering death upon Mr. Anthony constitutes a violation of his right to be free of cruel and unusual punishment pursuant to the Eighth Amendment of the United States Constitution. Pursuant to Judge Parker's April 28, 2011, ruling this claim will be set for an evidentiary hearing and briefs submitted on the matter. EH. Tr. 04/28/2011; p. 33-34. Specifically, Mr. Anthony claims the regulations governing Louisiana's injection executions fail materially to answer questions critical to the determination of whether such procedures will minimize the risk if unnecessary pain, torture, and lingering death. *See Supplemental Petition for Post-Conviction Relief* at 240.

The State requests that this issue be deferred until after the court adjudicates all the other claims at hand. *Supplemental Response to Petitioner's Remaining Post-Conviction Claims* at 13.

Accordingly, the court defers its ruling on this claim.

CLAIMS PROCEDURALLY BARRED OR DENIED BY THE COURT IN THE COURT'S APRIL 28, 2011 RULING

[45] On February 2, 2022, the State provided Defense counsel with a photocopy of a single piece of paper of paper that had the name Paulette written on the upper right hand corner and the notes "turbo sports wear black, down thinsalate parka black bubble, "36". It is unknown to the State whether this piece of paper was written in response to pre-trial investigation or whether it was written in response to the post-conviction petition filed in 2004. However, the record indicates that Mr. Anthony's mother provided the NOPD with a Burlington Coat Factory Receipt that she indicated to them matched the description of the jacket that Mr. Anthony wore during the shooting.

[46] The State suggested to petitioner that "Paulette" may refer to Paulette Holahan, a former prosecutor at the District Attorney's Office.

I. Petitioner's Claim II:

In Defense's Supplemental Petition for Post-Conviction relief, Defense contends that "Mr. Anthony's right to an impartial tribunal under the due process clause and under C. Cr. P. 671 was violated when Judge Parker, who engaged in citywide protests concerning this particular crime, presided over Mr. Anthony's case." Pursuant to Judge Parker's Ruling on April 28, 2011, the court found this claim to be procedurally barred. Trial Transcript from 04/28/2011 p. 30:20-31. Specifically, because Judge Waldron ruled on this matter in consideration of trial counsels' motion to recuse, and the matter was reviewed by the Fourth Circuit, by the Supreme Court, and by Judge Parker himself, the trial court found this claim to be duplicitous and repetitive rendering it procedurally barred. *Id.* at 30:27-31. Pursuant to La. C. Cr. Pr. Art. 930.4 (A) and (D), this court claim is procedurally barred.

II. Petitioner's Claim IV:

In Defense's Supplemental Petition for Post-Conviction relief, Defense contends that "[Prosecutors] error in admitting Sidney Anthony's confession." Pursuant to Judge Parker's Ruling on April 28, 2011, the trial court found this claim to be procedurally barred due to the trial counsel having knowledge of the information and inexcusably failed to raise a claim in the proceedings subsequent to conviction or on appeal. T. Tr. 04/28/2011 p. 31:3-7. This matter is procedurally barred pursuant to La. C. Cr. Pr. Art. 930.4(B) and (D).

III. Petitioner's Claim VIII:

In Defense's Supplemental Petition for Post-Conviction relief, Defense contends that "prosecutorial misconduct in closing arguments at both the guilty/innocence and penalty phase of the trial" entitle Mr. Anthony to relief. Pursuant to Judge Parker's Ruling on April 28, 2011, the trial court found this claim to be procedurally barred. T. Tr. 04/28/2011 p. 32-33:24-8. Specifically, Judge Parker found that the trial counsel had knowledge of trial prosecutor's conduct and inexcusably failed to raise a claim on appeal *Id.* at 33:5-8. This matter is procedurally barred pursuant to La. C. Cr. Pr. Art. 930.4(B) and (D).

IV. Petitioner's Claim XI:

In Defense's Supplemental Petition for Post-Conviction relief, Defense contends that "[t]he unanimity requirement for responsive verdicts to first degree murder violates equal protection, due process, and the right to humane and proportionate punishment." Pursuant to Judge Parker's Ruling on April 28, 2011, the trial court found this claim to be procedurally barred. T. Tr. 04/28/2011 p. 33:21-25. In support of its ruling, the trial court cited La. C. Cr. P. Art. 930.4 et

seq. and Art. 926(D), opining that this claim would require a ruling rendering legislation unconstitutional. *Id.* This matter is procedurally barred pursuant to La. C. Cr. Pr. Art. 930.4(B) and (D).

V. Petitioner's Claim XII:

In Defense's Supplemental Petition for Post-Conviction relief, Defense contends that "Petitioner is incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986)." Pursuant to Judge Parker's Ruling on April 28, 2011, the trial court found this claim to be procedurally barred. T. Tr. 04/28/2011 p. 33:26-27. Specifically, the trial court denied this claim as not being supported by evidence and lacking factual basis. *See Supplemental Response to Petitioner's Remaining Post-Conviction Claims* at 13. This matter is procedurally barred pursuant to La. C. Cr. Pr. Art. 930.4(B) and (D).

VI. Petitioner's Claim XIV:

In Defense's Supplemental Petition for Post-Conviction relief, Defense contends that "Petitioner's rights under international law constitutionally guaranteed to him under the supremacy clause were also violated in multiple ways requiring reversal of his conviction and death sentence." Pursuant to Judge Parker's Ruling on April 28, 2011, the trial court found this claim to be procedurally barred. T. Tr. 04/28/2011 p. 34:26-32. This matter is procedurally barred pursuant La. C. Cr. P. Art. 930.4 and 926.

VII. Petitioner's Claim XVI:

In Defense's Supplemental Petition for Post-Conviction relief, Defense contends that "[c]umulative error renders the verdict untrustworthy." Pursuant to Judge Parker's Ruling on April 28, 2011, the trial court found this claim to be procedurally barred. T. Tr. 04/28/2011 p. 35:1-34. Specifically, Judge Parker found this claim to be vague and ambiguous. *Id.* However, the court found that trial counsels rendered ineffective assistance of counsel during the penalty phase. Therefore, this matter is granted, in part and accords with claim X(B).

CONCLUSION

Because Mr. Anthony's trial counsels provided ineffective assistance of counsel during the penalty phase, this court vacates Mr. Anthony's September 27, 1997, sentence to death and order the matter be set for a new sentencing hearing, under La. C.Cr. P. Art. 905.1.

Accordingly, Defense's Application for Post-Conviction Relief is **GRANTED, in part and DENIED, in part.**

New Orleans, La., this 29 th day of JUNE, 2022.

HONORABLE, JUDGE NANDI F. CAMPBELL