No.

IN THE

Supreme Court of the United States

ROGERS LACAZE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Questions Presented One And Two

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), this Court announced a new test for obtaining a new trial in cases where a juror has failed to disclose a material fact at voir dire: "[A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. The district court found that Petitioner had been denied his right to an impartial jury under this test. The Supreme Court of Louisiana disagreed, joining the narrow end of a deep split on how to interpret *McDonough*.

The first question presented is:

> Under *McDonough* does "a valid basis for a challenge for cause" require a showing that a correct response would have subjected the juror to mandatory or *per se* disqualification, or does it require a showing that a hypothetical reasonable judge would have granted a motion to dismiss the juror for cause?

The second question presented is:

> Does the *McDonough* test apply only in cases of deliberate dishonesty or does it apply also in cases of misleading omissions?

Question Presented Three

This Court has repeatedly recognized that to "establish an enforceable and workable framework" governing judicial recusal, the Court "asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (internal quotation marks and citation omitted). Here, the judge who presided over Petitioner's first-degree murder trial was questioned, before and during Petitioner's trial, in police investigation pertaining to the release of the potential murder weapon to Petitioner's co-defendant through a court order signed by the judge. The judge denied ordering the release of the weapon and indicated that his signature had been forged. At Petitioner's trial, the judge did not disclose his participation in the investigation or the dispute related to the potential murder weapon.

The third question presented is:

> Does a trial judge's involvement as a witness in a police investigation before and during trial, and his failure to even disclose it, create an "unconstitutional potential for bias"? *Williams*, 136 S. Ct. at 1905.

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PETITION FOR A WRIT OF CERTIORARI

Rogers Lacaze respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Louisiana in this case.

OPINION AND ORDER BELOW

The corrected opinion of the Supreme Court of Louisiana (Pet.App. 1a-24a) is published at 208 So.3d 856. The opinion of the Court of Appeal for the Fourth Circuit (Pet.App. 25a-26a) is unpublished. The opinion of the Criminal District Court for Orleans Parish (Pet.App. 27a-183a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on December 16, 2016. A timely request for reconsideration was denied on December 20, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional provisions are reprinted at Pet.App. 259a.

INTRODUCTION

The Sixth and Fourteenth Amendments guarantee an accused the right to an impartial jury and the right to an impartial judge—each among the most "basic fair trial rights." *Gomez v. United States*, 490 U.S. 858, 876 (1989). Petitioner was deprived of both. The denial of each presents independent issues that satisfy this Court's criteria for certiorari.

First, this case presents a perfect opportunity to resolve a deep split over the correct interpretation of the majority and controlling plurality concurrence in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), which announced the standard for obtaining a new trial where a juror was dishonest at voir dire.

Petitioner was convicted and sentenced to death for the murder of a New Orleans Police Department ("NOPD") officer and two civilian siblings. He was implicated in the crime by one of the shooters, who was also an NOPD officer. On the jury that voted to convict Petitioner was a twenty-year state law enforcement officer, who—based on the facts as found below—did not disclose his current or prior employment as a law enforcement officer at voir dire, even though he was asked multiple times and watched as other prospective jurors made such disclosures. On the jury was also a woman employed as a 911 dispatcher for the NOPD, whose husband was also an NOPD officer and who—based on the facts found below—failed to disclose at voir dire that she was present in the dispatch room during the 911 call reporting the murder (and may even have

assisted in certain respects). She personally attended the victim's funeral and failed to disclose that, too. Finally, on the jury was a woman whose own two siblings had been beaten to death and shot in the head. Based on the facts found below, she failed to disclose this at voir dire despite being asked three times.

The district court held that Petitioner's right to an impartial jury had been violated under *McDonough*. In disagreeing with that holding, the Louisiana Supreme Court joined the narrow end of a two-dimensional split regarding (1) what it means to show that a juror's accurate response would have provided "a valid basis for a challenge for cause," and (2) the significance of deliberate dishonesty versus a misleading omission to *McDonough*. In the thirty-three years since *McDonough*, courts have adopted conflicting interpretations of the majority and controlling plurality opinions—some of which, like the decision below, render *McDonough* superfluous. The split implicates a fundamental Constitutional right and, because *McDonough* governs all civil and criminal cases—capital and non-capital—it recurs frequently. The stark facts of this case present an ideal record to restore uniformity.

Second, this case presents a fundamental question regarding the right to an impartial tribunal. It is undisputed that the judge who presided over Petitioner's trial had been questioned, before and during Petitioner's trial, as part of the NOPD investigation into the release of a 9mm weapon to Petitioner's co-defendant. Petitioner's co-defendant

had obtained the gun from police evidence through a court order purportedly signed by the trial judge. During the post-homicide investigation the judge denied authorizing the release of the weapon and indicated that a potential accomplice of Petitioner's codefendant had forged his signature. The judge not only failed to recuse himself, but failed to disclose any of these facts at the start of trial, upon defense counsel's separate motion to recuse the judge, or upon learning the defense's theory that the codefendant had committed the murder with her brother and said she would be getting her brother a weapon from police evidence.

The court below rejected the argument that these facts gave rise to an appearance of bias in an egregious decision applying the wrong legal standard. That decision presents a critical issue: whether the Constitutional right to a trial free from the appearance of bias imposes upon judges a duty to disclose facts that give rise to an appearance of bias, even where the judge believes himself to be impartial.

The Court should grant certiorari to resolve these fundamental issues.

STATEMENT OF THE CASE

I. Background.

On March 4, 1995, NOPD officer Ronald Williams and siblings Ha Vu and Cuong Vu were shot and killed during an armed robbery of a restaurant in New Orleans. Another NOPD officer, Antoinette

Frank, was shortly identified as one of the shooters. Upon arrest, Officer Frank implicated Petitioner, who was eighteen years old at the time. All three victims were killed with a 9mm gun that was never recovered.

On April 28, 1995, both Frank and Petitioner were indicted for first degree murder. Petitioner's case was assigned to Orleans Parish Judge Frank Marullo. Judge Marullo set a deadline for motions of approximately three weeks and scheduled Petitioner's capital trial to begin less than three months later.

Petitioner's defense was that, although Rogers Lacaze was a friend of Officer Frank and had been present with her restaurant earlier that night, Officer Frank returned to commit the murder with her brother, Adam Frank.

On July 20, 1995, a jury convicted Petitioner of first-degree murder and, the next day, it sentenced him to death.

II. The Jurors Who Convicted Petitioner.

Petitioner's guilt and sentence—in a case involving the murder of a New Orleans police officer and two siblings—was determined by a jury that had on it two law enforcement employees and a woman whose own two siblings were murdered. In particular, the jury included the following three people:[1]

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[1] The facts recited herein are as found by the courts below on post-conviction, or undisputed.

David Settle. Juror Settle "had a long history of employment in the field of law enforcement." Pet.App. 44a. He spent five years in the Southern Railway Police Department as a special agent with the power to arrest, at which point he became a Sergeant of Police. *Id.* He worked in that capacity for an additional 11 years, until being discharged for misappropriating property. *Id.* At the time of Petitioner's trial, Juror Settle was employed by the Louisiana State Police, New Orleans division, as a public safety officer. Pet.App. 45a.

Victoria Mushatt. At the time of trial, Juror Mushatt was employed by NOPD as a police dispatcher and had been for nearly twenty years. Pet.App. 35a. She was on duty and present in the dispatch room during the 911 call for the murder in this case. *Id.* Based on her testimony, she "may have overheard radio transmissions between various officers and the dispatchers handling the case" and "may even have helped other dispatchers search records to identify" the shooting NOPD officer. Pet.App. 43a. Juror Mushatt "testified that she may have had some professional contact with [the victim NOPD officer] prior to the night of his murder, as a result of which she felt like she knew him." Pet.App. 35a.

Juror Mushatt also attended the victim's funeral. *Id.* Attendance of the funeral—"understandably a very emotional event"—was reflective of the bond of the law enforcement community, such that it was "common practice for police department employees to attend the funeral of a fallen officer." *Id.*

Juror Mushatt was also the wife of an NOPD officer. *Id.* Her husband had worked details, as the victim was doing at the time of his murder. *Id.* As a result of her and her husband's employment by NOPD, Juror Mushatt was familiar with several of the state witnesses by name, one of whom was a dispatcher like herself. *Id.* at 36a.

Lillian Garrett. Both of Juror Garrett's brothers—like the Vu siblings—were murdered. One of her brothers was beaten to death in New Orleans. Pet.App. 49a. The other brother, just like the victims in this case, died from a gunshot wound to the head. *Id.*

III. The Jurors' Failures To Disclose At Voir Dire.

The trial court and counsel asked jurors about their connections to law enforcement and relation to victims of crime.

Juror Settle was assigned to the second panel of jurors and was seated in the audience during questioning of the first panel of jurors. When questioning the first panel of jurors, defense counsel asked if anyone was related to someone in law enforcement. Pet.App. 44a. One potential juror disclosed her nephew was a police officer; another disclosed his brother-in-law was a customs officer. When the Juror Settle's panel was called, "[t]he very first thing that happened" was a "question from the court as to whether anyone had something to volunteer based upon what they had heard with the first panel." Pet.App. *Id.* Juror Settle "did not

respond, although he should have heard defense counsel's question." *Id.*

The court then directly asked the first row of the second panel—where Juror Settle was sitting—"if anyone was related to anybody in law enforcement." *Id.* Another prospective juror (apparently seated next to Juror Settle) disclosed that his wife was a forensic pathologist. *Id.* Again, Juror Settle said nothing about his present employment and long career in law enforcement. *Id.* at 45a.

The court then asked the second row of Mr. Settle's panel if anyone was "involved or know anybody in law enforcement? – any close personal friends or anything like that?" A prospective juror asked if the court was referring specifically to New Orleans. The judge responded, "No, paint it with a wide brush. Anywhere in the world?" The juror disclosed that her son was on the Atlanta police force. Once again, Juror Settle sat silently.

Juror Settle was seated as a juror and ultimately voted to convict Petitioner of first-degree murder.

At the very beginning of voir dire, when the prosecutor was addressing the entire venire, an unnamed juror (presumably Juror Mushatt) disclosed from the audience that she was a 911 dispatcher. Pet.App. 37a-38a. The court instructed her to raise this fact in the event she was subsequently called for individual questioning on a panel. Pet.App. 38a. When Juror Mushatt was called for individual questioning, she never raised her employment as an NOPD dispatcher. *Id.* Moreover, Juror Mushatt never raised at any point

that she was present in the dispatch room at the time of (and may have assisted in certain ways with) the 911 call for the murder at issue. Juror Mushatt also never raised that she attended the funeral of the victim.

Juror Mushatt was seated as a juror and ultimately voted to convict Petitioner of first-degree murder.

Juror Garrett's panel was asked on three occasions whether anyone had been the victim of a violent crime or had someone close to them who had been the victim of a violent crime. Pet.App. 48a-49a. When the court asked the first time, other prospective jurors spoke up. Pet.App. 49a. Even though both of her brothers had been murdered, Juror Garrett said nothing. *Id.* The Court again, asked, if anyone else "had been the victim of a violent crime or a relative who has been the victim of a crime?" and defense counsel then asked for the same information. *Id.* Other jurors disclosed and, each time, Judge Garrett said nothing. *Id.*

Juror Garrett was seated as a juror and ultimately voted to convict Petitioner of first-degree murder.

IV. Post-conviction Discovery Of Judge Marullo's Participation In NOPD Investigation Into Potential Murder Weapon And His Failure To Disclose It.

Petitioner discovered on post-conviction that his trial judge, Judge Marullo, had failed to disclose that before and during trial, he had had participated in

an NOPD investigation into how Officer Frank obtained the potential murder weapon.

During the investigation of the homicide, NOPD learned that Officer Frank had received two weapons from the NOPD property and evidence room. Pet.App. 60a.[2] The investigating Sergeant contacted Judge Marullo because his signature appeared on an order authorizing the release of a 9mm weapon, which was then given to Officer Antoinette Frank. The investigation focused on whether Officer David Talley, head of the evidence room, had lied about the circumstances surrounding the weapon's release. Pet.App. 60a-61a. During the investigation, Officer Talley admitted that he was friends with Officer Frank and had obtained the weapon for her as a favor. Pet.App. 241a, 247a. He claimed that Judge Marullo had signed the order authorizing release of the 9mm weapon. Pet.App. 61a, 240a.[3]

The investigating Sergeant contacted Judge Marullo on at least three occasions. First, before Petitioner's case had been assigned to Judge Marullo, the Sergeant met personally with him. Judge Marullo claimed that the signature on the order was not his and that he would not have signed such an order. Pet.App. 61a-62a, 238a-39a.

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[2] At the time, NOPD policy allowed weapons in the property and evidence room to be transferred to officers upon *ex parte* court order.

[3] The NOPD investigation report is included at Pet.App. 235a-256a.

Second, in light of Judge Marullo's denial and the implication that Officer Talley had forged the judge's signature, the Sergeant determined he needed a taped statement. When approached, Judge Marullo declined to provide one, stating that he had since been assigned Petitioner's trial and would provide one only when the trial was complete. Pet.App. 62a, 240a.

Following the completion of Petitioner and Officer Frank's trials, the Sergeant returned to Judge Marullo for a statement; however, Judge Marullo said he would not provide one due to appeals, which would last "for a long time." Pet.App. 62a, 242a-43a.

At the time of Petitioner's trial, Petitioner's counsel did not know any of the above details—the investigation, that a 9mm had actually been released from police evidence, Officer Talley's involvement in the release of the 9mm gun to Officer Frank (who had implicated Petitioner in the crime), or the dispute as to whether Judge Marullo signed the order or Officer Talley forged his signature. Judge Marullo never disclosed any of these facts.

On the first day of trial, defense counsel made a motion for recusal, alleging that Judge Marullo had "screamed" at him and made him feel "inadequate and incompetent," jeopardizing his ability to represent Petitioner. Notwithstanding the motion, Judge Marullo made no mention of the above facts.

At trial, Petitioner's defense was that Officer Frank had planned the murders and carried them out with her brother, Adam Frank. Petitioner took the stand and testified that Ms. Frank had told him:

"I got a friend of mine down in the property room, and I should be getting a nine millimeter soon." Despite hearing this testimony (and knowing it to be true), Judge Marullo still did not disclose his involvement as a witness in the investigation.[4]

At Officer Frank's trial (after Petitioner was convicted), the State sought to prove she obtained the 9mm gun from police evidence before committing the murder. Judge Marullo ordered an off-record conference, inviting only the prosecution. He then conducted an on-record conference in chambers, during which Judge Marullo stated that he could not recall signing the order and (contrary to his representations to the investigating Sergeant) that it would have been ordinary for him to sign it: "it would be perfectly logical and correct that I would do something like that." Judge Marullo represented that he had produced handwriting exemplars "to be analyzed by an expert" and "they came back and told me it wasn't my signature." This conflicted with the Sergeant's report, which noted that other witnesses, but not Judge Marullo, had provided handwriting exemplars, which were inconclusive. Pet.App. 248a. Judge Marullo allowed the State to present evidence that Officer Frank had access to a 9mm gun, but precluded it from introducing evidence that the 9mm gun came from the evidence room via court order.

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[4] The murder weapon was not recovered. It is undisputed that, three years after Petitioner's trial, Officer Frank's brother was arrested and had in his possession the 9mm gun that was taken from evidence.

V. Post-Conviction Proceedings.

A. Criminal District Court for Orleans Parish.

On July 23, 2015, the Criminal District Court for Orleans Parish issued a 128-page opinion granting Petitioner relief from his conviction and death sentence. The court held that Petitioner had been denied his right to an impartial jury under *McDonough* and was thus entitled to a new trial. The court also held that Petitioner's trial counsel rendered ineffective assistance at the penalty phase.

The court observed that to obtain a new trial under *McDonough*, Petitioner "must show a juror failed to answer honestly a voir dire question and show that a correct response would have provided a valid basis for a challenge for cause." Pet.App. 37a. The court concluded that Juror Settle met both prongs. First, it found it could not "fathom a legitimate reason" for his failure to disclose his present employment and long history in law enforcement, despite being asked multiple times and watching other jurors disclose more remote connections. There was "simply no excuse" and he "did not honestly answer." Pet.App. 44a-45a, 48a.

Second, Juror Settle's nondisclosure provided "provided a valid basis for a challenge for cause" because, at the time of Petitioner's trial, Louisiana had a *per se* rule that "law enforcement officers were not competent jurors." Pet.App. 45a.

The court concluded that Juror Mushatt's circumstances did not satisfy *McDonough*. It found insufficient evidence to show that Juror Mushatt had "a nefarious purpose or intent" or "'lied,'" which the court defined to mean "a false statement made with a deliberate intent to deceive." Pet.App. 41a & n.7.

Moreover, the court concluded that the facts Juror Mushatt did not disclose—that she was present in the dispatch room and may have assisted with aspects related to the 911 call, and that she attended the victim's funeral—would not have caused Juror Mushatt to be *per se* ineligible for the jury. *See* Pet.App. 37a ("knowledge of the facts of the case is not the determining factor for granting a challenge for cause"). Moreover, the court reasoned, Petitioner had not shown actual or implied bias. Pet.App. 42a-43a.

The court also concluded that Juror Garrett's circumstances did not satisfy *McDonough*. It found that she had failed to disclose that her two brothers were murdered despite being asked twice to do so. Pet.App. 48a-49a. It reasoned, however, that Petitioner could not satisfy the second prong of *McDonough* because "crime victims are not *ipso facto* subject to challenges for cause." Pet.App. 50a. Moreover, the court explained, there was no mandatory dismissal for implied bias because it could not determine that Juror Garret "lied" or

"consciously withheld the information." Pet.App. 50a.[5]

The court denied Petitioner's claim that he had been deprived of his right to an impartial tribunal based on Judge Marullo's participation in the NOPD investigation pertaining to the 9mm gun and his failure to disclose it. The court reasoned that there was no reason to believe Judge Marullo "was suspected of wrongdoing" the investigation or "had done something wrong that he needed to cover up." Pet.App. 61a, 63a. Thus, the court reasoned, it could not conclude that "the investigation engendered some animus in Judge Marullo." Pet.App. 64a.

Moreover, the trial judge stated that it was a "logical leap" for Judge Marullo to disclose that he was a witness in the investigation upon defense counsel's motion to recuse or upon hearing Petitioner's testimony that Officer Frank intended to obtain a 9mm gun from evidence. *Id.* The court reasoned that the motion to recuse was premised on other grounds, rather than the possibility of Judge Marullo being part of an investigation. *Id.* Furthermore, Judge Marullo could not have been "aware . . . what the prosecution or defense strategies would be" at trial and should not have been required "to conduct an impromptu, but exhaustive, examination of conscience." *Id.* The

[5] Unlike Jurors Settle and Mushatt, Juror Garrett did not testify at post-conviction, despite efforts to subpoena her. Pet.App. 48a. Her surviving sibling testified about the murder of one of their brothers, and Ms. Garrett's signed statement was introduced as an exhibit.

court further reasoned that whether Officer Frank had a 9mm gun "did not address any issue that needed to be proved in the case." Pet.App. 66a.

B. Fourth Circuit Court of Appeal.

On appeal, the State argued that the district court erred in concluding that Louisiana law provided a "per se" bar on Settle's placement on the jury.[6]

The Fourth Circuit reversed the district court's finding that Petitioner had been denied his right to an impartial jury in a one-paragraph decision. The entirety of its explanation was: "we find that the trial court erred in finding that the seating of Mr. Settle on the defendant's jury was a structural error entitling him to a new trial." Pet.App. 26a.

C. Supreme Court of Louisiana.

The Supreme Court of Louisiana affirmed. In its initial opinion, the court stated it was reinstating Petitioner's death sentence. It included a separate concurrence, which criticized Petitioner for "attempt[ing] to re-litigate the penalty phase of his trial" and expressed satisfaction that "[i]t is time for justice to be served." Upon Petitioner's explanation that his penalty phase was not at issue and the State had never appealed the district court's penalty phase ruling, the court issued a corrected opinion, removing

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[6] The state did not appeal the district court's holding of ineffective assistance at the penalty phase. Moreover, the State has represented that it does not intend to pursue a capital sentence.

all references to reinstating Petitioner's death sentence and deleting the separate concurrence.[7]

With respect to Petitioner's *McDonough* claim, the court did not dispute the district court's findings regarding the questions asked at voir dire and the jurors' respective failures to disclose information in response. The court concluded, however, that Petitioner had not satisfied *McDonough* as to any of the three jurors.

With respect to Juror Settle, the court reasoned that "it is not clear that his lack of candor can be characterized as outright dishonesty." Pet.App. 12a. It agreed, however, that "because several questions were aimed at whether panelists had any connections with law enforcement, the inquiries were sufficient to have prompted a reasonable person in Mr. Settle's position to disclose his employment experience." *Id.*

According to the court, Juror Settle's nondisclosure did not satisfy the second prong of *McDonough* because he did not have actual bias or a category for which bias "must be presumed." Pet.App. 11a. The court reasoned that Juror Settle was not covered by Louisiana's "per se bar to law enforcement personnel serving as jurors." Pet.App. 8a-9a.

The court addressed Jurors Mushatt and Garrett in a footnote, concluding that Petitioner had failed to show actual bias or a situation in which "bias must

[7] All citations below are to the court's corrected opinion.

be presumed" as to either juror. Pet.App. 13a-14a n.2. The court reasoned that Juror Mushatt had never personally met the victim officer and had attended the funeral "only because it was 'expected' [she] would." Moreover, she did not have "prejudicial details" because she "was not the dispatcher to accept the related 911 calls." *Id.* For Juror Garrett, the court considered dispositive that there was "no evidence [she] consciously withheld the information" about her brothers being murdered, even if she failed to disclose it upon being asked. *Id.*

The court also rejected Petitioner's claim that he had been denied his right to an impartial tribunal based on Judge Marullo's participation as a witness in, and failure to disclose, the investigation into the 9mm weapon. The court reasoned that "[a]s a post-conviction witness, Judge Marullo emphatically denied any bias on his part." Pet.App. 16a. Moreover, adopting the district court's analysis, the court reasoned that evidence from the investigation was "immaterial" because "none of the issues in dispute at trial pertained to the means by which the murder weapon was procured." Pet.App. 16a.

REASONS FOR GRANTING THE PETITION

This case presents three questions which satisfy this Court's criteria for granting certiorari. The first two questions implicate a deep split regarding the correct interpretation of *McDonough*—a frequently recurring issue, which only this Court can resolve. The third question involves an important question of federal law on which the decision below conflicts

with and undermines the principles adopted by this Court. All three questions relate to a fundamental Constitutional right and, in each instance, the court below was wrong. The Court should grant certiorari in this case.

I. The Court Should Grant Certiorari To Resolve The Deep Split On How To Interpret *McDonough*.

In *McDonough*, the plaintiffs brought a civil suit for an accident involving feet caught in a lawnmower. 464 U.S. at 549. After losing, the plaintiffs moved for a new trial because a juror had failed to disclose at voir dire that his son had been injured in an accident involving the explosion of a truck tire. *Id.* at 550-51. Writing for seven judges, Justice Rehnquist articulated the following test: "To obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

Three judges whose votes were necessary to the majority authored a controlling plurality concurrence, to express that the Court's test for cases involving dishonesty does not "foreclose the normal avenue of relief" in other cases alleging juror impartiality—in particular, "whether a juror's answer is honest or dishonest," a party may still obtain a new trial by demonstrating "actual bias or, in exceptional circumstances, that the facts are such

that bias is to be inferred." *Id.* at 556-57 (Blackmun, J., concurring).

For the past 33 years, this splintered decision has governed all civil and criminal cases. As discussed below, a substantial, acknowledged split exists over its interpretation. The record in this case presents the ideal opportunity to resolve it.

A. There Is A Three-Way Split On What It Means To Show "A Valid Basis For A Challenge For Cause."

The second part of the *McDonough* test asks whether correct information at voir dire "would have provided a valid basis for a challenge for cause." 464 U.S. at 556. Federal circuits and state high courts are divided in their interpretations of this language and apply three different tests.

1. In The First And Second Circuits, "Valid Basis For A Challenge For Cause" Means That A Hypothetical Reasonable Judge Would Grant A Motion To Strike For Cause.

First Circuit. The First Circuit interprets the second prong of *McDonough* to ask "whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed)." *Sampson v.*

United States, 724 F.3d 150, 165-66 (1st Cir. 2013). The court considers "[a] number of factors," which "may include (but [are] not limited to) the juror's interpersonal relationships, the juror's ability to separate her emotions from her duties, the similarity between the juror's experiences and important facts presented at trial, the scope and severity of the juror's dishonesty, and the juror's motive for lying." *Id.* at 166 (citations omitted).

Second Circuit. The Second Circuit similarly evaluates the second prong of *McDonough* by asking whether it "would have granted the hypothetical challenge." *United States v. Stewart*, 433 F.3d 273, 304 (2d Cir. 2006) (citation omitted); *see also United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002) (*McDonough* requires "a basis for arguing that the district court is required to sustain his challenge for cause" (citation omitted)).

The Second Circuit has been clear that this test does not require a showing that the juror would have been subject to *per se* or mandatory dismissal. It is satisfied "when there is actual bias, implied bias, or inferable bias." *United States v. Parse*, 789 F.3d 83, 99-100 (2d Cir. 2015). While for actual or implied bias "disqualification of that juror is mandatory," the third category, "inferred bias," covers circumstances "sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias." *Id.* at 100 (citation omitted); *see also United States v. Fell*, No. 2:01-CR-12, 2014 WL 3697810, at *15 (D. Vt. July 24, 2014) (in the Second Circuit, "the

test is not whether the true facts would compel the Court to remove a juror for cause, but rather whether a truthful response 'would have provided a valid basis for a challenge for cause.'" (citation omitted)).

2. In The Third, Sixth, And Eleventh Circuits, "A Valid Basis For A Challenge For Cause" Means *Per Se* Disqualification Based On Actual Bias Or Implied Bias.

In conflict with the legal test applied by the First and Second Circuits, the Third, Sixth, and Eleventh Circuits hold "a valid basis for a challenge for cause," *McDonough*, 464 U.S. at 556, entails proving the juror would have been subject to mandatory dismissal based on actual or implied bias.

Third Circuit. The Third Circuit has repeatedly held that *McDonough*'s second prong requires actual or implied bias, where the latter "is a limited doctrine, one reserved for exceptional circumstances" and a "narrowly-drawn classes of jurors." *United States v. Flanders*, 635 F. App'x 74, 78 (3d Cir. 2015) (quoting *United States v. Mitchell*, 690 F.3d 137, 142-44 (3d Cir. 2012)).

Sixth Circuit. The Sixth Circuit has acknowledged the Second Circuit's "inferred bias" approach, but, similar to the Third Circuit, has interpreted *McDonough* to be limited to instances of actual or implied bias. *Johnson v. Luoma*, 425 F.3d 318, 326-27 (6th Cir. 2005); *Baker v. Craven*, 82 F. App'x 423, 429-30 (6th Cir. 2003).

Eleventh Circuit. The Eleventh Circuit holds that satisfying *McDonough*'s second prong requires a showing of bias that would "disqualify the juror." *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (citation omitted). Similar to the Third and Sixth Circuits, this requires either an "express admission" of bias or a circumstance from which "bias must be presumed." *Id.* at 967; *see also Jackson v. State of Alabama State Tenure Comm'n*, 405 F.3d 1276, 1288 (11th Cir. 2005) (new trial required where juror failed to disclose felony, which would have made him *per se* ineligible).

As described above, the courts below adopted the same limited interpretation of *McDonough*. *See, e.g.*, Pet.App. 8a, 11a, 13a-14a n.2 (asking whether there is actual or implied bias or a basis for per se disqualification under Louisiana law); Pet.App. 45a, 47a, 49a-50a (same).

3. In The Fourth, Eighth, And D.C. Circuits, Even *Per Se* Disqualification Is Not Enough.

Fourth Circuit. The Fourth Circuit has expressly rejected the interpretation of *McDonough* adopted by the First and Second Circuit, that a petitioner need "establish only that the trial court had a valid reason to dismiss the dishonest juror, not that the trial court would have been required to dismiss the juror." *United States v. Blackwell*, 436 F. App'x 192, 196 (4th Cir. 2011) (citing *United States v. Fulks*, 454 F.3d 410, 432 (4th Cir. 2006)). Rather, like the Third, Sixth, and Eleventh Circuits, the

Fourth Circuit requires that "a per se rule of disqualification applies." *Fulks*, 454 F.3d at 432.

In the Fourth Circuit, however, a petitioner must additionally establish a "third prong": that "the juror's 'motives for concealing information' or the 'reasons that affect [the] juror's impartiality can truly be said to affect the fairness of [the] trial." *McNeill v. Polk*, 476 F.3d 206, 224 n.8 (4th Cir. 2007) (King, J., concurring in part and concurring in the judgment) (quoting *Conaway v. Polk*, 453 F.3d 567, 585 (4th Cir. 2006)).

Eighth Circuit. Like the Fourth Circuit, the Eighth Circuit holds that *per se* disqualification is not enough; *McDonough* requires a third prong: "that the juror was motivated by partiality." *United States v. Hawkins*, 796 F.3d 843, 863-64 (8th Cir. 2015); *Manuel v. MDOW Ins. Co.*, 791 F.3d 838, 842 (8th Cir. 2015); *cf. also Bennett v. Lockhart*, 39 F.3d 848, 852-53 (8th Cir. 1994) (proof that a juror would have been statutorily barred from serving insufficient absent showing of actual bias).

D.C. Circuit. The D.C. Circuit has also rejected the First and Second Circuits' interpretation that *McDonough* is satisfied by showing a hypothetical reasonable judge would have granted a motion for cause—rather, "[u]nder *McDonough*, . . . a 'valid basis for a challenge for cause' absent a showing of actual bias, is insufficient." *United States v. North*, 910 F.2d 843, 904 (D.C. Cir.), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990); *cf. also United States v. Boney*, 977 F.2d 624, 633-34 (D.C.

Cir. 1992) (showing of *per se* disqualification insufficient absent actual bias).[8]

B. The Three-Way Split Above Is Compounded By A Split On Whether The *McDonough* Test Applies To All Misleading Nondisclosure Or Requires Deliberate Concealment.

The split described above is compounded by an additional split over whether *McDonough*'s first prong—"that a juror failed to answer honestly a material question on voir dire," 464 U.S. at 548—should be interpreted to limit *McDonough* to deliberate concealment, or whether the *McDonough* test applies to all misleading nondisclosure.

The First, Second, Fourth, Fifth, and Sixth Circuits, and several states, have held that "regardless of whether [a juror's] failure to respond was intentional or unintentional, the first element [of *McDonough*] is satisfied." *Baker*, 82 F. App'x at 429 (citation omitted)); *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992) ("[W]e read [*McDonough*] to require a further determination on the question of juror bias even where a juror is found to have been honest."); *Greer*, 285 F.3d at 170 (*McDonough* applies to "juror nondisclosure or misstatements"); *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002) ("the test applies equally to deliberate

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[8] *See also State v. Myers*, 711 A.2d 704, 706 (Conn. 1998) (not even "bias that is implied" suffices*); Young v. United States*, 694 A.2d 891, 894-95 (D.C. 1997) (same); *State v. Pierce*, 788 P.2d 352, 356 (N.M. 1990) (same).

concealment and to innocent non-disclosure"); *United States v. Scott*, 854 F.2d 697, 698-700 (5th Cir. 1988) (rejecting argument that *McDonough* turns on honesty); *see also, e.g., State v. Dye*, 784 N.E.2d 469, 473 (Ind. 2003) ("the test applies equally to deliberate concealment and to innocent non-disclosure"); *Schwan v. State*, 65 A.3d 582, 591 (Del. 2013) (applies to "inadvertent nondisclosure"); *State v. Thomas*, 830 P.2d 243, 246 (Utah 1992) ("intent or lack of intent is irrelevant").

The Eighth, Eleventh, and D.C. Circuits, and several other states, hold that *McDonough* applies only in the case of deliberate dishonesty. *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1473 (11th Cir. 1992) ("the *McDonough* test requires a determination of . . . whether [the juror] was aware of the fact that his answers were false" (quotation marks omitted)); *Hawkins*, 796 F.3d at 863-64; *United States v. White*, 116 F.3d 903, 930 (D.C. Cir. 1997); *see also, e.g.*, *Sanchez v. State*, 253 P.3d 136, 146 (Wyo. 2011) ("party must show that the juror intentionally gave an incorrect answer"); *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 765 S.W.2d 924, 930 (Ark. 1989) (must have "deliberately concealed").

C. The Court Should Take This Case To Resolve The Conflicting Interpretations Of *McDonough*.

The above difficulty in interpreting *McDonough* is acknowledged. *See, e.g.*, *Sampson*, 724 F.3d at 160 (exercising mandamus, in part, because *McDonough*'s "framework . . . is not well-defined");

Greer, 285 F.3d at 172 (elements of *McDonough* test "unclear"); *Zerka v. Green*, 49 F.3d 1181, 1185 (6th Cir. 1995) (recognizing "confusion surrounding *McDonough*"); *United States v. Tucker*, 243 F.3d 499, 508 (8th Cir. 2001) (difficult "[t]o divine the law" on whether dishonesty required). The Court should resolve it now because this is an important issue and this is the perfect record.

1. This Conflict Concerns A Fundamental Issue.

The right to an impartial jury is a fundamental Constitutional right, protected by the Sixth and Seventh Amendments, and "a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The test announced in *McDonough*, combined with the gloss of the three-judge plurality concurrence, has led to non-uniform standards effectuating that right. As discussed below, had Petitioner been tried by this jury in a different court—even some courts that have adopted narrow interpretations of *McDonough*—his basic right to an impartial jury would have been vindicated.

This question recurs frequently. The *McDonough* standard presently governs all civil and criminal (capital and noncapital) cases. Thirty-three years have produced the above disparity in interpreting the *McDonough* test/plurality, so there is no need for additional percolation. *See also Sampson*, 724 F.3d at 159-160 (clarifying *McDonough* fits "snugly within the[] narrow confines" of mandamus jurisdiction because it has caused "an unsettled question of systemic significance," because "the right at stake . . .

deserves great respect," and because "[t]he specter of juror dishonesty presents a recurring danger in all cases, civil and criminal, capital and non-capital"). Only this Court can resolve the conflict.

2. This Case Is The Perfect Vehicle To Resolve The Conflicting Interpretations Of *McDonough*.

This case offers the perfect record to resolve the conflicting interpretations of *McDonough*. Louisiana courts have made all of the predicate factual findings with regards to (1) the backgrounds of the three jurors that went undisclosed at voir dire and (2) each juror's respective failures to speak up at voir dire. Those facts, as found and analyzed by the courts below, squarely present both the meaning of "valid basis for a challenge for cause, *see supra* Part I.A, and the significance of dishonesty to *McDonough*, *see supra* Part I.B.

As described above, in conflict with the First and Second Circuits, the Louisiana Supreme Court interpreted the second prong of *McDonough* to require Petitioner to categories for mandatory dismissal, *i.e.* actual bias, implied bias, or a *per se* rule of ineligibility under state law. *See* Pet.App. 8a, 11a, 13a-14a n.2.

Moreover, similar to the Eighth, Eleventh, and D.C. Circuits, the courts below appeared to assume a requirement of deliberate dishonesty. *Compare* Pet.App. 48a (Juror Settle's failure to respond despite multiple questions about his connections to law enforcement showed he "did not honestly answer

the question") *with* Pet.App. 12a ("it is not clear that [Juror Settle's] lack of candor can fairly be characterized as outright dishonesty"); *see also* Pet.App. 41a & n.7 (Juror Mushatt's failure to disclose employment as a 911 operator upon being selected for a panel (despite being told to), that she was present in dispatch room during 911 call, and that she attended the victim's funeral insufficient to show that she "lied," *i.e.* made "a false statement made with a deliberate intent to deceive"); Pet.App. 13a n.2, 50a (not clear Juror Garrett "lied" or "consciously withheld the information"). The case thus also begs the question of the significance of "outright dishonesty" or "lying" to *McDonough*.

The present posture allows the court to squarely address these questions, unlike if they were to arise following a federal habeas petition. *See* 28 U.S.C. § 2254(d).

D. The Louisiana Supreme Court's Interpretation Of *McDonough* Was Wrong.

This Court has long recognized that the right to an impartial jury guarantees a jury free of bias, and that "[t]he bias of a prospective juror may be actual or implied." *United States v. Wood*, 299 U.S. 123, 133 (1936). Indeed, that guarantee derives from Blackstone and Chief Justice Marshall's opinion in the trial of Aaron Burr. *United States v. Torres*, 128 F.3d 38, 46 (2d Cir. 1997) (Calabrese, J.).

Actual bias is "bias in fact," while implied bias is bias "conclusively presumed as a matter of law."

Wood, 299 U.S. at 133. The latter exists in "extreme situations," such as "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction," *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring). Where a juror is actually or impliedly bias, disqualification is mandatory. *Id.* at 223; *Torres*, 128 F.3d at 5.

In *McDonough*, the majority opinion written by Justice Rehnquist, announced a new test where a juror has given inaccurate responses at voir dire: "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." 464 U.S at 556. Three Justices concurred separately in a controlling opinion to clarify that "the Court's holding [does not] foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury." *Id.* at 556 (Blackmun, J., concurring)). "[R]egardless of whether a juror's answer is honest or dishonest," the plurality stated, it remained an alternative avenue to show "actual bias or . . . that the facts are such that bias is to be inferred." *Id.* at 556-57.

With this backdrop, the Louisiana Supreme Court's decision in this case was obviously wrong. If, as it and multiple circuits have concluded, *McDonough* requires actual or implied bias in

addition to proof of a juror's failure to disclose, it would render Justice Rehnquist's test a nullity. Under longstanding precedent preserved by the plurality, any party that proved actual or implied bias would be entitled to a new trial without regard to whether he also proved nondisclosure. Thus, the only way to give Justice Rehnquist's opinion meaning is to—like the First and Second Circuits—interpret it to require something different from actual or implied bias, upon a showing of nondisclosure. "Valid basis for a challenge for cause" should mean what it says: whether the fact of a juror's nondisclosure and the truthful answer provides basis upon which a judge would have struck the juror for cause.

The extreme facts of each juror in this case—(1) a juror who spent twenty years as a law enforcement officer and failed to disclose it with no "legitimate reason," in a case involving the murder of a law enforcement officer (in which Petitioner was implicated by another law enforcement officer), (2) a juror who was in the NOPD dispatch room at the time of the 911 call and attended the victim's funeral, and (3) a juror who did not disclose that her two siblings were murdered in a case involving the murder of two siblings—would plainly satisfy that standard. *See, e.g.*, *Sampson*, 724 F.3d at 167 (reasonable judge standard satisfied where juror failed to disclose she had been victim of domestic violence, indicating "she would rather lie to the court than discuss these painful life experiences" and given "the similarity between her distress-inducing life experiences and the evidence presented"); *United*

States v. Colombo, 869 F.2d 149, 150 (2d Cir. 1989) (same where a juror failed to disclose that her brother-in-law was a government attorney).

Indeed, at least some circuits would hold that the circumstances of this case amounted to implied bias. *See, e.g.*, *Scott*, 854 F.2d at 698-99 (implied bias where juror's brother was deputy sheriff of police agency involved in investigation); *Porter v. Zook*, 803 F.3d 694, 698 (4th Cir. 2015) ("relationship with a family member in law enforcement" can give rise to implied bias); *Dyer v. Calderon*, 151 F.3d 970, 981-82 (9th Cir. 1998) (en banc) (implied bias where juror failed to disclose her brother had been shot and killed in case involving a shooting); *Burton v. Johnson*, 948 F.2d 1150, 1158-59 (10th Cir. 1991) (collecting cases, and finding implied bias where juror was victim of domestic violence in case related to domestic violence).

The Court should grant certiorari to resolve the split on *McDonough* and correct the court below.

II. This Court Should Grant Certiorari To Resolve The Fundamental Issue Of When Due Process Requires Disclosure Of Facts That Give Rise To An Appearance Of Bias.

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *Murchison*, 349 U.S. at 136). Because bias is "difficult to discern in oneself," the Court "asks not whether a judge harbors an actual, subjective bias,

but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."'" *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (quoting *Caperton*, 556 U.S. at 881).

As discussed below, the Louisiana Supreme Court's decision—which sanctioned a Judge's decision not to disclose facts giving rise to an appearance of bias based on his evaluation that he remained impartial and that the undisclosed evidence was not material—undermines these core principles and presents a necessary follow up to *Williams* and *Caperton* that warrants plenary review.

However, the Louisiana Supreme Court's decision so blatantly conflicts with this Court's appearance of bias standard that, in the alternative to plenary review of the questions presented, the Court should summarily reverse.

A. In Prior Cases Involving Blatant Application Of The Wrong Legal Standard To Extraordinary Circumstances, This Court Has Summarily Reversed.

In each of the courts below, Petitioner argued that Judge Marullo's participation as a witness in the NOPD investigation followed by his failure to disclose it gave rise to an obvious appearance of bias, in violation of his right to an impartial tribunal. The facts giving rise to the objectively impermissible risk of bias are undisputed and extraordinary:

(i) Judge Marullo participated as a witness in the police investigation pertaining to the release of a 9mm gun to Officer Frank (the codefendant who had implicated Petitioner in the murder);

(ii) The investigation involved a dispute as to whether Officer Talley, a potential accomplice of Petitioner's codefendant, forged an order to release the weapon or Judge Marullo signed it himself;

(iii) Defense counsel had no knowledge of the investigation, release of the weapon, Officer Talley, or Judge Marullo's involvement; and

(iv) Judge Marullo did not disclose any of these facts at any point during trial—even upon learning of the defense theory that Officer Frank's brother was the second shooter, and hearing Petitioner's (otherwise unsupported) trial testimony that Officer Frank had planned to get a 9mm gun from police evidence.

The courts below disposed of Petitioner's claim on two bases, each of which conflicts with this Court's judicial recusal standard. First, the courts focused on the fact that Judge Marullo "emphatically denied any bias on his part" and that the investigation had not shown that Judge Marullo himself had engaged in "wrongdoing" or "something illegal, subjecting him to a police investigation." Pet.App. 16a, 61a, 63a.

Second, the courts applied a *Brady*-like "prejudice" standard, concluding that "means by which the murder weapon was procured" was "immaterial" because it "did not address any issue that needed to be proved in the case." Pet.App. 16a, 66a. This reasoning flatly contradicts this Court's legal standard.

To begin with, the appearance of bias here arises independent of any wrongdoing on the part of Judge Marullo, and independent of whether Judge Marullo signed the order or not. Before and while presiding over Petitioner's first-degree murder trial, Judge Marullo was involved in the NOPD investigation, in which he had accused another person of forging his signature to release the potential murder weapon to Petitioner's codefendant. That other person, Officer Talley, was thus a potential accomplice of Petitioner's codefendant. The integrity of the judicial system was further degraded when Judge Marullo failed to disclose any of this, even upon defense counsel's motion to recuse, or upon hearing the defense theory that Officer Frank planned and carried out the murders with her brother, and told Petitioner she planned to get a 9mm gun from the police evidence room. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 856 (1988) ("To determine whether [a judge's impartiality] 'might reasonably be questioned,' it is appropriate to consider the state of his knowledge immediately before the lawsuit was filed, what happened while the case was pending before him, and what he did when he learned of [the conflict] in the litigation."). The implications for the appearance of justice are

just as bad if Judge Marullo did not sign the order, in which case he knowingly chose to deprive the defense of knowledge of a potential accomplice of his codefendant and facts consistent with the defense's theory.

Furthermore, the court below's analysis of whether the "means by which the murder weapon was procured" was material at trial is a blatant misapplication of the appearance of bias test. Where an appearance of bias exists, it is structural error—no consideration is given to whether the impermissible risk was prejudicial. *Williams*, 136 S. Ct. at 1909.

This Court "has not shied away from summarily deciding" cases arising from a state court judgment when the "lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases). The Court should grant plenary review of the fundamental issues presented in this case; however, in the alternative it should summarily reverse or, at the least, GVR, the egregious misapplication of law in the decision below. *Rippo v. Baker*, No. 16-6316, 2017 WL 855913, at *1 (U.S. Mar. 6, 2017) (GVR where court below appeared to apply the wrong legal standard in evaluating judicial recusal argument).

B. This Case Presents A Fundamental Issue Regarding The Duty To Disclose Facts That Give Rise To An Appearance Of Bias.

The courts below rejected Petitioner's argument that he had been denied an impartial tribunal based on the conclusion that Judge Marullo had no obligation to disclose his involvement in the police investigation. As described above, the courts reasoned that he "emphatically denied any bias on his part" and should not have been required "to conduct an impromptu, but exhaustive, examination of conscience." Pet.App. 16a, 64a. This reasoning directly undermines this Court's objective appearance of bias standard and presents a fundamental issue regarding the Constitutional dimensions of judicial disclosure.

If the right to a trial free from the appearance of bias is to be of any consequence, it must be the case that a judge has a duty to disclose facts that potentially give rise to an appearance of bias, *independent of whether the judge himself believes he can remain impartial*. *See Caperton*, 556 U.S. at 886 (A judge's "search for actual bias . . . is just one step in the judicial process."); *see also* ABA Model Code of Judicial Conduct, Canon 2.11, Comment 5 ("A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification").

In cases that have set forth the Due Process requirements for judicial recusal, the appearance of bias has generally arisen from facts known to defense counsel without reliance upon judicial disclosure. In *Caperton*, for instance, the campaign expenditures that gave rise to the appearance of bias were discovered pursuant to state campaign disclosure law. *See* JA 184a-88a, *Caperton*, 556 U.S. 868, 2008 WL 5784213. In the more common instance, however, this will not be the case—only the judge will be aware of the facts giving rise to an appearance of bias. This case, thus, presents a necessary next step to effectuate the right recognized in *Caperton* and *Williams*.

In cases interpreting federal disqualification statutes, this Court has recognized the critical nature of judicial disclosure—and that failure to disclose can itself create an appearance of bias. *See Liljeberg*, 486 U.S. at 866, 869 ("remarkable" and "inexcusable" that, upon learning of a potential conflict, judge did not provide "[a] full disclosure" to the parties, which would have quelled a "basis for questioning the judge's impartiality"); *see also Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149-50 (1968) (arbitrator must disclose facts that "might create an impression of possible bias" and nondisclosure of such facts creates evident partiality, even when no actual bias is present). Moreover, the Court has recognized that a clear message regarding disclosure is critical to avoid "injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864-69 (finding vacatur

"eminently sound and wise" for this reason, even absent any express statutory remedy).

The very nature of nondisclosure cases means that it will be the rare instance in which a record allows this Court to address the issue. Here, however, the relevant facts regarding Judge Marullo's participation in the investigation and his nondisclosure are undisputed. The Court has recognized it is "extreme cases" like this that "cross constitutional limits and require this Court's intervention and formulation of objective standards" and "[t]his is particularly true when due process is violated." *Caperton*, at 556 U.S. at 887.

Moreover, as cases like *Murchison*, *Caperton* and *Williams* reflect, due to the federal disqualification statutes mentioned above, the "constitutional dimensions" of judicial nondisclosure are unlikely to reach the Court in any posture other than this—direct review from a state high court. *Liljeberg*, 486 U.S. at 865 n.12.

The Court should grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

CHIEF JUSTICE

BERNETTE J. JOHNSON	Seventh District

JUSTICES

GREG G. GUIDRY	First District
SCOTT J. CRICHTON	Second District
JEANNETTE THERIOT KNOLL	Third District
MARCUS R. CLARK	Fourth District
JEFFERSON D. HUGHES III	Fifth District
JOHN L. WEIMER	Sixth District

JOHN TARLTON OLIVIER
CLERK OF COURT

400 Royal St, Suite 4200
NEW ORLEANS, LA 70130-8102

TELEPHONE (504) 310-2300
HOME PAGE http://www.lasc.org

December 20, 2016

In Re: State of Louisiana vs Rogers Lacaze
No: 2016-KP-0234

Dear Counsel:

Attached please find corrected Action and Per Curiam of the court dated December 16, 2016, in the above entitled matter.

Please substitute these with the Action and Per Curiam recently received. With kindest regards I remain,

Very truly yours,

John Tarlton Olivier
Clerk of Court

/s/ Carmen B. Young
Carmen B. Young
Deputy Clerk of Court

CBY

ccs: All counsel of Record

CORRECTED ACTION

THE SUPREME COURT OF THE
STATE OF LOUISIANA

No. 2016-KP-0234

STATE OF LOUISIANA

vs.

ROGERS LACAZE

IN RE: Rogers Lacaze; - Defendant; Applying For Applying for Reconsideration of this Court's action dated December 16, 2016, Parish of Orleans, Criminal District Court Div. D, No. 375-992; to the Court of Appeal, Fourth Circuit, No. 2015-K-0891;

December 16, 2016

Denied. See per curiam.

JLW
BJJ
JTK
GGG
MRC
JDH
SJC

Supreme Court of Louisiana
December 16, 2016

/s/ [Illegible]
Deputy
Clerk of Court
For the Court

CORRECTED PER CURIAM

SUPREME COURT OF LOUISIANA

[Filed: Dec. 16, 2016]

No. 16-KP-0234

STATE OF LOUISIANA

v.

ROGERS LACAZE

On Supervisory Writ from the Criminal District Court, Parish of Orleans

PER CURIAM:

Writ denied. The Fourth Circuit correctly reversed the district court's order for a new trial.

In 1995, an Orleans Parish jury found Rogers LaCaze, and separately, co-defendant Antoinette Frank, guilty of three counts of first degree murder for the March 4, 1995 armed robbery and triple homicide of siblings Cuong Vu and Ha Vu, employees of the family-owned Kim Anh Vietnamese restaurant in New Orleans East, and New Orleans Police Officer Ronnie Williams, who was at the time working a paid security detail at the restaurant. Antoinette Frank ("Frank"), herself a New Orleans Police Officer, was Ofc. Williams's former partner and sometimes also worked security at the restaurant.

After finding LaCaze guilty as charged on all three counts, jurors unanimously voted to impose the death sentence. This Court affirmed his convictions and sentence. *State v. LaCaze*, 99-0584 (La. 1/25/02), 824

So.2d 1063, *cert. denied*, *LaCaze v. Louisiana*, 537 U.S. 865, 123 S.Ct. 263, 154 L.Ed.2d 110 (2002).

The state's case was premised on the survivors' identifications of both LaCaze and Frank, in addition to other evidence which showed, *inter alia*, that after Frank met LaCaze in November 1994, the pair established a routine of acting in concert while Frank was on duty, with LaCaze accompanying her as she responded to calls. Just hours before the murders, the two were seen together at a Wal-Mart store, Frank in full uniform, shopping for the same caliber ammunition that was used to kill all three victims. The state also presented LaCaze's custodial statements in which he placed himself inside the restaurant during the massacre, albeit while denying he killed anyone.

LaCaze took the stand to repudiate his custodial statements, instead claiming he was at the time with his brother Michael, playing pool at Mr. C's Pool Hall, an alibi Michael repeated when called to testify. The defense timeline offered at trial, however, was internally inconsistent: LaCaze conceded he was still in Frank's company when she ordered food from the restaurant, which phone records established occurred at 12:51 a.m., roughly 20 minutes after LaCaze and Michael claimed they were en route to the pool hall. Further, the pool hall's manager testified unequivocally that Michael had played pool that night *without his brother.*

Ultimately, the jury rejected LaCaze's defense in which he insisted his inculpatory statements were the result of coercion, and instead accepted the state's theory that, although it appeared the same gun was used to kill all three victims, it was immaterial whether Frank or LaCaze had pulled the trigger because the evidence showed that both were present

and specifically intended to kill, and therefore equally guilty as principals.

In 2002 or 2003, LaCaze filed a pro-se shell application for post-conviction relief, followed by a counseled supplement. After protracted delays, the district court conducted a multi-day evidentiary hearing in 2013, at which the parties called over 20 witnesses in total. Nearly two years later, the district court issued a 128-page ruling addressing LaCaze's claims in detail and ultimately vacating his convictions and death sentence based on its determination that juror David Settle was seated after he failed to disclose his law enforcement experience during voir dire, an error it found constituted a structural defect warranting a new trial.

The Fourth Circuit granted the state's writ and reversed the order for a new trial, *State v. LaCaze*, 15-0891 (La. App. 4 Cir. 1/6/16) (unpub'd), having found the district court "erred in finding that the seating of Mr. Settle on [the] jury was a structural error entitling him to a new trial," and that the district court had not erred in dismissing the remaining claims.

As a result of LaCaze's failure to file a writ application in the Fourth Circuit, the parties now dispute the scope of the issues before us. As the state sees it, his failure to seek writs in the court below caused the district court's ruling as to all remaining claims to become final and no longer subject to review. However, this Court has recognized that a "party who does not seek modification, revision, or reversal of a judgment" may "in an appellate court, including the supreme court," assert in support of that judgment any argument for which the record contains support "although he has not appealed, answered the appeal, *or applied for supervisory writs." State v. Butler*, 12-2359, pp. 4-5

(La. 5/17/13), 117 So.3d 87, 89 (emphasis added) (citing La.C.C.P. art. 2133(B)). Although LaCaze did not file a cross-application below, he did file an opposition in which he re-urged claims the district court dismissed as alternate grounds for upholding the order for a new trial, and thereby preserved those claims, as contemplated in *Butler.* In any event, considering the need for heightened scrutiny in capital penalty proceedings, *see Gilmore v. Taylor*, 508 U.S. 333, 342, 113 S.Ct. 2112, 2117, 124 L.Ed.2d 306 (1993), we have considered whether exercise of our supervisory jurisdiction is warranted in light of any claim now raised and upon which the district court passed judgment.

The district court vacated LaCaze's convictions and death sentence based exclusively on the seating of juror David Settle. LaCaze urges the district court correctly ordered a new trial as a result of Mr. Settle's presence on the jury because Mr. Settle failed to respond during voir dire when asked whether any panelists were related to anyone in law enforcement, although he had a history of law enforcement experience and other venire members disclosed their connections to law enforcement personnel. Specifically, LaCaze asserts he has discovered post-conviction that Mr. Settle's employment history includes past service as a police officer for railroad companies in other states and that, at the time of LaCaze's trial, he was "a Field Officer for the Louisiana State Police."

The district court credited the argument, finding "simply no excuse" for Mr. Settle's failure to respond when his panel of prospective jurors was asked if anyone was related to someone in law enforcement, especially after fellow panelists volunteered their more tenuous connections. The district court deter-

mined that Mr. Settle was a "badge-wearing law enforcement officer" who, but for his failure to respond, would have been subject to a meritorious challenge for cause, citing *State v. Simmons*, 390 So.2d 1317 (La. 1980), and therefore found his inclusion on the jury a structural error which prevented the verdicts from being rendered by an impartial jury.

As the Fourth Circuit determined, the district court erred in this regard. Louisiana law is settled that there is no per se bar to law enforcement personnel serving as jurors. Although at the time of trial, our jurisprudence provided that the guarantee of a fair trial "is offended by the presence on a jury of a badge-wearing law enforcement officer," *Simmons*, 390 So.2d at 1318, courts interpreting *Simmons* construed it narrowly and carved out exceptions for law enforcement personnel not actively engaged in making arrests. *See, e.g., State v. Valentine*, 464 So.2d 1091, 1095 (La. App. 1 Cir. 1985), *writ denied*, 468 So.2d 572 (La. 1985) (DOC correctional officer not incompetent to serve although she also had four first cousins who worked for the sheriff); *State v. Henderson*, 566 So.2d 1098, 1103-04 (La. App. 2 Cir. 1990) (field sergeant at Wade Correctional Institute competent to serve). Further, as even the district court acknowledged, while LaCaze's appeal was pending, this Court overturned *Simmons*, reasoning that because law enforcement officers are sworn to uphold the law, including the guarantee of a fair trial, a district judge has discretion to determine whether an officer is speaking the truth when he states under oath that he can remain fair and impartial. *State v. Ballard*, 98-2198 (La. 10/19/99), 747 So.2d 1077, 1079. Thus, the *Simmons* ban does not apply, given that it was overruled it while LaCaze's appeal was pending. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708,

716, 93 L.Ed.2d 649 (1987) (". . . [A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

Even assuming *arguendo* that *Simmons* did apply, Mr. Settle would not have been subject to a meritorious challenge for cause. LaCaze maintains Mr. Settle was an "active duty officer," but has put forth no evidence that he was at the time of trial the sort of badge-wearing officer *Simmons* deemed unfit for jury service. Instead, LaCaze has shown that although Mr. Settle was previously a police officer in other states with patrols limited to railroad property, when he was selected as a juror in this case he was working for the Bureau of Motor Vehicles *without arrest powers*—in an apparent desk position. Mr. Settle testified at the post-conviction hearing that "he was 'not a field officer' at the time of LaCaze's trial, that he '[did not] have arrest powers,' and that his job was to 'clear up driver's license for people under suspicion." Such circumstances hardly give rise to the sort of bias that disqualified the juror in *Simmons. See Simmons*, 390 So.2d at 1318 (juror with graduate degree in law enforcement who was employed by sheriffs office and working closely with the district attorney's office, must have been affected by her employment to an extent that would influence her verdict).

Even having acknowledged that *Simmons* was overturned before LaCaze's convictions and sentences were affirmed, the district court found Mr. Settle's presence on the jury a reversible error because his non-disclosures precluded the parties from exploring whether his employment experience would affect his

deliberations.[1] For the following reasons, this view is untenable.

The United States Supreme Court has found that a petitioner who collaterally attacks his conviction based on alleged juror dishonesty during voir dire must demonstrate (1) that the juror failed to honestly answer a material question and (2) that a correct response would have provided a meritorious basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984). Under La.C.Cr.P. art. 797, the grounds for challenging a prospective juror for cause include, *inter alia*, that the "juror is not impartial, whatever the cause of his partiality," or that he has a "relationship, whether by blood, marriage, employment, friendship, or enmity" with persons involved in the case "such that it is reasonable to conclude that it would influence the juror in arriving at a verdict." Applying *McDonough*, the 10th Circuit has explained the standard as requiring that:

> A party who seeks a new trial because of non-disclosure by a juror during voir dire must

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[1] The district court contrasted the instant case with *State v. Deruise*, 98-0541, p. 12 (La. 4/3/01), 802 So.2d 1224, 1235, which was also pending on appeal when *Simmons* was overturned, and in which the Court rejected the defendant's claim that an NOPD officer was erroneously seated on the jury, because in *Deruise* the juror at issue disclosed his law enforcement experience and thereby enabled the parties to question him about possible bias. In *Deruise*, this Court found the lack of clarity in the record as to whether the defense issued a challenge for cause to that juror was immaterial given that, "[e]ven assuming the defense unsuccessfully challenged [the officer] for cause, the trial court's denial of that challenge would not have constituted reversible error," because the courts no longer presume police officers are incompetent to serve as jurors. *Id.*, 980541, p. 12, 802 So.2d at 1235.

> show actual bias, either by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.

Burton v. Johnson, 948 F.2d 1150, 1156 (10th Cir. 1991) (citations and quotations omitted).

Thus, in addition to showing that Mr. Settle failed to honestly answer a material question, LaCaze must also show that he harbored actual bias, or at least point to specific facts from which bias must be presumed. For example, in *Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), another post-conviction capital case, the Supreme Court remanded for an evidentiary hearing based on allegations that a juror concealed relationships with a prosecution witness and the prosecutor—and that prosecutor was so aware but stood mute. On remand, the district court found the juror intentionally misled the court and granted relief. *Williams v. Netherland*, 181 F.Supp.2d 604 (E.D. Va.), *aff'd*, 2002 WL 1357162 (4th Cir. 2002) (unpub'd). In *Burton*, *supra*, the defendant obtained relief because issues of domestic abuse were central to the case and a juror failed to disclose her own experiences as a victim of similar abuse, yet later discussed it with other jurors. Similarly, in *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988), the Fifth Circuit reversed the defendant's convictions because a juror failed to disclose that his brother was a deputy sheriff in an office involved in the case.

Here, Mr. Settle testified as a post-conviction witness and, as LaCaze urges, his testimony detailing his own law enforcement experience indicates he had good reason to respond when his voir dire panel was

asked whether they had any such connections. However, as the state urges, it is not clear that his lack of candor can be fairly characterized as outright dishonesty: the only indication he may have been questioned about his *own* experience is a truncated query in which the trial judge asked those in the second row if any were *"involved* or know anybody in law enforcement?—any close personal friends or anything like that?", and it appears Mr. Settle was not seated in the second row. Nevertheless, because several questions were aimed at whether panelists had any connections with law enforcement, the inquiries were sufficient to have prompted a reasonable person in Mr. Settle's position to disclose his employment experience.

However, even assuming Mr. Settle failed to honestly answer a material question, thereby satisfying *McDonough's* first prong, LaCaze has not shown that he would have been subject to a meritorious challenge for cause. *See Dryer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1988) ("[E]ven an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality."). The avenue to resolve allegations of concealed juror bias is to conduct a hearing at which a defendant has the opportunity to prove bias. *Burton*, 948 F.2d at 1156. LaCaze has been afforded precisely such an opportunity, yet, despite having called Mr. Settle as a post-conviction witness, he has offered neither an express admission of bias from Mr. Settle nor pointed to any specific facts from which Mr. Settle's bias or partiality must be inferred. Unlike in *Williams*, 529 U.S. 420, 120 S.Ct. 1479 and *Scott*, 854 F.2d 697, where jurors concealed relationships with a state witness, a prosecutor, and a sheriffs deputy, and distinguishable from *Burton*, where a juror failed to disclose her experience as a victim of abuse similar to the abuse at issue, LaCaze

neither alleges nor shows that Mr. Settle had any relationships or experience which affected or must be presumed to have affected his view of the evidence in this case. Accordingly, the Fourth Circuit correctly reversed the order for a new trial on this ground.[2]

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[2] LaCaze also fails to make the required showings as to the seating of jurors Victoria Mushatt and Lillian Garrett. He asserts Ms. Mushatt failed to disclose that she "felt like [she] knew" victim Ofc. Williams through her employment as a 911 dispatcher; that she was "present in the dispatch room" when 911 calls came through reporting the murders; and that she attended Ofc. Williams's funeral. However, as the district court found, LaCaze's assertion that Ms. Mushatt "knew" Ofc. Williams and was thereby biased is unfounded: rather than implying that she had any sort of relationship with the slain officer, Ms. Mushatt testified that she had never met Ofc. Williams but was familiar with his name, as she was with other officers' names, from repeatedly hearing it over the dispatch. She explained that she attended his funeral along with the entire department only because it was "expected" they would. As for LaCaze's assertion that Ms. Mushatt became privy to sensitive details because she was working when the shooting was reported, he altogether fails to show that she—who was not the dispatcher to accept the related 911 calls—was aware of any prejudicial information, let alone specify those prejudicial details.

LaCaze also shows no ground for relief based on Lillian Garrett's presence on the jury. He claims Ms. Garrett deceived the court during voir dire when, after being asked whether any close relations had been a victim of a crime, she failed to respond, although two of her brothers were murdered. Even if Ms. Garrett failed to honestly answer the question, LaCaze has not shown she would have been subject to a meritorious challenge for cause if she had. As the district court found, LaCaze offers no evidence that Ms. Garrett consciously withheld the information about her brothers to get onto the jury (for the purpose of avenging her brothers' murders, or otherwise). *See Dryer v. Calderon*, *supra* (even intentionally dishonest answers are not fatal, as long as the falsity does not bespeak a lack of impartiality). As with the other two jurors he complains of, LaCaze offers no evidence that Ms.

LaCaze's related claim that trial counsel rendered ineffective assistance during voir dire is also meritless. A petitioner claiming counsel rendered ineffective assistance must show that (1) counsel erred and (2) the error rendered the proceedings unfair and the conviction suspect. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's decisions during voir dire lie at the core of trial strategy, *see generally Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997) ("An attorney's actions during voir dire are considered to be matters of trial strategy.") (citing *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995)), and even assuming counsel's voir dire questions should have been more searching, because LaCaze has not shown that any seated juror would have been subject to a meritorious challenge for cause, he has not shown that counsel's performance rendered the proceedings fundamentally unfair or his convictions suspect. The district court correctly rejected this claim.

LaCaze next asserts he is entitled to relief because Judge Marullo presided over trial despite an appearance of impropriety. LaCaze asserts recusal was necessary in light of information adduced at co-defendant Frank's subsequent trial; specifically, that months before the murders, Frank, then a New Orleans Police Officer, obtained—pursuant to a release purportedly signed by Judge Marullo—a 9 mm Beretta semi-automatic handgun from the NOPD Evidence and Property Room. That weapon, which Frank reported stolen

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Garrett harbored any bias and points to no specific facts from which bias must be presumed. Her post-conviction affidavit was apparently devoid of any admissions to this effect, and LaCaze's bare assertions in lieu thereof are insufficient. La.C.Cr.P. art. 930.2. The district court correctly rejected these claims.

before the murders, was of the same caliber and perhaps the same gun used to kill the victims. As LaCaze sees it, Judge Marullo's failure to disclose that he was questioned in an internal police investigation as to how Frank obtained the weapon obstructed his ability to make an informed decision about moving for recusal.[3]

It is well-settled that a judge is presumed impartial. *State v. Edwards*, 420 So.2d 663, 673 (La. 1982). La.C.Cr.P. art. 671(A) lists the grounds for recusal in a criminal case, providing in part that a judge shall be recused if he is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial or "would be unable for any other reason, to conduct a fair and impartial trial." The latter catch-all includes circumstances which clearly indicate the judge cannot remain impartial, although no specified ground for recusal exists. La.C.Cr.P.art. 671, Cmt. The code article thus underscores a judge's duty to avoid even the appearance of impropriety. *See State v. LeBlanc*, 367 So.2d 335, 341 (La. 1979) ("[E]ven the appearance of impartiality, as well as impartiality itself, outweighs the inconvenience caused by recusal of the trial judge.") (citing *State v. Lemelle*, 353 So.2d 1312 (La. 1977)).

A review of the parties' competing views shows that even if Judge Marullo had disclosed his possible

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[3] The district court's minute entry indicates defense counsel orally moved for Judge Marullo's recusal during the trial, although it is unclear on what basis. Judge James McKay denied the motion after a hearing. *See* Minute Entry for 7/17/95. Subsequently, post-conviction, Judge Marullo recused himself in advance of being called to testify in connection with this claim at LaCaze's evidentiary hearing. *See* Minute Entry for 6/18/10.

connection with the weapon's release to Frank—and thereby led LaCaze to move for his recusal on that basis—LaCaze has pointed to no evidence that the judge harbored any bias, prejudice, or personal interest in the case, let alone to such an extent that it rendered him unable to conduct a fair trial. As a post-conviction witness, Judge Marullo emphatically denied any bias on his part. Further, LaCaze fails to show "any other reason" why Judge Marullo was unable to conduct a fair trial. La.C.Cr.P. art. 671(A)(6). The suggestion that he became entangled in the facts at issue, purely because he was possibly involved in an administrative release of a weapon that may have been later used to commit the crimes, is baseless and hardly sufficient to rebut the presumption of impartiality.

There has been considerable inquiry, to no avail, as to whether the signature is genuine. Even assuming it is, meaning Judge Marullo in fact authorized the weapon's release to Frank—a practice which for all that appears was routine, subject to established NOPD procedures—none of the issues in dispute at trial pertained to the means by which the murder weapon was procured. Whether months earlier Judge Marullo approved the release has no bearing on the evidence indicating LaCaze killed Ofc. Williams while Frank gathered the others in the kitchen and that both co-defendants were equally guilty under the law of principals. *LaCaze*, 99-0584, p. 10, 824 So.2d at 1071-72. As the district court put it, whether Frank obtained the murder weapon "pursuant to a bogus court order" is "immaterial and irrelevant since it did not address any issue that needed to be proved in the case nor did it have a tendency to make the existence of any fact of consequence [] more or less probable."

LaCaze next claims his convictions were secured by the suppression of evidence and the presentation of misleading testimony. Specifically, he claims the state had a duty to disclose that Frank obtained a 9 mm Beretta from NOPD evidence, as discussed above; that her brother, Adam Frank ("Adam"), possessed motive because he often spent time at the restaurant until he was banned for making unwanted advances toward an employee; that Adam was at one point a person of interest; and that survivor Chau Vu did not, contrary to her trial testimony, see LaCaze during the shooting.

According to the rule in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963) and its progeny, the state's failure to disclose evidence violates due process only if the withheld evidence is exculpatory or fit for impeachment use and is material to guilt or punishment. As discussed in connection with the claim that Judge Marullo was subject to recusal, any evidence pertaining to the release of the likely murder weapon in no way exculpates LaCaze. He makes the dubious contention that any evidence indicating it was Frank who obtained the murder weapon would have contradicted the state's theory that he was the dominant party. However, evidence that his accomplice obtained the same type of gun that was used to kill the victims, in a case in which the state presented evidence that he and Frank had been acting in concert under the guise of her authority and together premeditated[4] the murders and were equally

[4] For example, the day of the murders, "a uniformed Frank and a young African-American male with gold teeth were in Wal-Mart inquiring about 9 mm cartridges. They left without making a purchase." *LaCaze*, 99-0584, p. 8, 824 So.2d at 1070.

culpable, would have only supported the state's theory and was therefore not subject to disclosure.[5]

Evidence that Adam harbored ill will toward the restaurant employees and Ofc. Williams—because he had been banned from the premises—and that Adam was at some point a person of interest is insufficient to undermine the verdict in a case in which the state presented substantial evidence of LaCaze's guilt, including, notably, his own custodial statement acknowledging his presence inside the restaurant during the murders and relating details only a perpetrator could have known that early in the investigation. LaCaze has not pointed to any evidence indicating Adam was involved which the state possessed but failed to disclose. Accordingly, he fails to show that, without the information about Adam, he received an unfair trial or a verdict not worthy of confidence. *See Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995) ("The question is . . . whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

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[5] LaCaze also urges—by way of a bullet-point list accompanied by scant argument—that other items were suppressed. His terse presentation is insufficient to show that any of the alleged suppressions warrant this Court's intervention. For example, he claims the state was required to disclose that two surviving victims reported seeing him carrying a cell phone earlier on the evening of the crimes, evidence he claims was material because it supports his theory that, if he possessed his cell phone some hours before the crime, he was not with Frank when she committed the murders because his phone records show he called her at that time. This claim fails the *Brady* materiality standard because LaCaze has not shown that without the statements, he received an unfair trial resulting in a verdict not worthy of confidence, and more closely resembles an attempt to re-litigate the sufficiency of the evidence. The district court's detailed assessment finding these claims meritless was well-founded.

LaCaze also fails to show the state suppressed anything of impeachment value by withholding Chau Vu's initial statement. As LaCaze tells it, immediately after the shootings Chau told police, contrary to her trial testimony, that she did not see LaCaze during the shooting. LaCaze claims he should have been able to impeach Chau with this prior inconsistent statement, which he presumably would have urged was more likely accurate than her testimony positively identifying him, given its temporal proximity to the crimes. As the district court found, however, contrary to LaCaze's characterization, Chau did not tell officers that she did not see LaCaze during the crimes. Rather, her initial statement was consistent with her trial testimony: in her statement she described the male perpetrator as a short African-American whom she met earlier that evening—introduced to her and other employees as Frank's "nephew." The state had no duty to disclose this initial statement because nothing therein contradicts her trial testimony in which she positively identified LaCaze as Frank's accomplice.

LaCaze's claim that the state suborned perjury is similarly without merit. He asserts prosecutors possessed a duty to correct Ofc. Stanley Morlier's misleading testimony when the defense called him as a witness in an effort to depict Adam as a likely alternate suspect. LaCaze claims Ofc. Morlier misled jurors when, in response to a line of questioning aimed at showing Adam and Frank harbored ill will after Adam was banned from the restaurant (a directive which was apparently carried out with Ofc. Williams's enforcement), Ofc. Morlier testified that he never witnessed Frank threaten to kill Ofc. Williams *within Ofc. Williams*'s *presence.*

As the district court found, although the state possesses a duty to correct false or misleading testimony, *see Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972),[6] a petitioner is only entitled to relief on that basis if the testimony "could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Giglio*, 405 U.S. at 154, 92 S.Ct. at 766 (quoting *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959)). Even assuming Ofc. Morlier's testimony created a false impression that Frank never threatened Ofc. Williams—when in fact there was evidence she had, outside his presence—LaCaze fails show the testimony was reasonably likely to affect the jury's judgment in a case in which there was no dispute as to Frank's involvement (the party who either threatened Ofc. Williams or not) and there existed no evidence to connect Adam to the murders. *Cf. United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968) ("We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .'); *see also State v. Schilling*, 92-3312 (La. 4/13/94), 637 So.2d 459 (denying relief to inmate who showed important state witness lied about agreement to dismiss pending charges in return for testimony

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[6] This claim was also subject to dismissal for the reason that the witness who allegedly gave misleading testimony was, at the time of the testimony complained of, a *defense* witness. The jurisprudence condemning presentation of false and misleading testimony generally pertains to the state, given that such testimony contravenes a defendant's due process rights, rights he presumably cannot himself violate. *See Napue*, 360 U.S. at 269, 79 S.Ct. at 1177 ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.").

because "given other evidence against him, there is no reasonable likelihood that the alleged false testimony could have affected the outcome of the trial."). The district court correctly dismissed this claim.

LaCaze next claims trial counsel, Mr. Willie Turk, rendered ineffective assistance.[7] He asserts counsel was woefully unprepared, it being his first capital trial, and that his deficient performance "pervaded the proceedings." He claims the Fourth Circuit erred when it refused to leave intact the district court's order for a new trial in light of counsel's errors, so numerous were they, he asserts, that post-conviction counsel has opted herein to present them by way of a numbered list, rather than with supporting discussion. Instead of advancing specific arguments as to why each alleged error rendered the proceedings unfair, *see Strickland*, *supra*, post-conviction counsel offers a general proposition that the jury was deprived of a "wealth of evidence" as a result of trial counsel's omissions.

Among the listed errors is that counsel failed to call Peter Williams and Angela Walker, whom LaCaze asserts would have supported his alibi by testifying—as his brother Michael did—that he was with them at a pool hall during the shootings. However, LaCaze has failed to address the district court's finding that a decision not to call these witnesses was reasonable, given that Peter's account "was incongruent with [LaCaze's] version of the alibi timeline" and Angela's was imprecise as to the timing of events.

LaCaze also re-urges that counsel erred by failing to file a motion to suppress the survivors' identifications, which he claims were obtained by highly suggestive

---

[7] Because Mr. Turk is deceased, he did not testify at the hearing below.

procedures; especially Chau's identification at the preliminary hearing. Just after the crimes, Chau gave a statement in which she described the male perpetrator (a description consistent with LaCaze's appearance) and later positively identified LaCaze. This Court can find no logic in the assertion that Chau's identification should have been excluded as the product of an impermissibly suggestive "show up" merely because she verified her earlier statement at the preliminary hearing while LaCaze was present. As the district court found, "the law does not require attorneys to engage in vain and useless acts" and counsel's failure to file a motion to suppress on this ground "does not meet the threshold for ineffective assistance of counsel."

By merely repeating allegations of counsel error, which the district court provided thorough reasons for rejecting, and absent any convincing argument as to why the district court's conclusions were flawed, LaCaze fails to show the district court erroneously dismissed these claims. La.C.Cr.P. art. 930.2.

Finally, LaCaze claims he is actually innocent and asserts he has made the required showing, as contemplated in *State v. Conway*, 01-2808 (La. 4/12/02), 816 So.2d 290, 291, with "new material, noncumulative and conclusive evidence which meets an extraordinarily high standard, and [undermines] the prosecution's entire case." Specifically, he revisits the theory that Adam was the male perpetrator, based on post-conviction testimony from Ofc. Perry Fleming, who testified that "a known, reliable confidential informant told him that Keith Jackson (an alias of Adam's) had boasted about killing a policeman in New Orleans;" evidence that Adam was apprehended in 1998 with a weapon matching the description of the Beretta used in this case; and testimony from a former fellow

inmate of Adam's, Darren Reppond, who asserted Adam confessed to having shot an NOPD officer in the head at a restaurant because the officer was "shaking him and his sister down for money." Adam testified below and, not surprisingly, denied having made such a confession.

The district court weighed this evidence and rejected LaCaze's theory, specifically noting the weaknesses in his new evidence, including that Reppond's retelling of Adam's alleged confession was incomplete as to the offense circumstances; that Reppond did not inform LaCaze's attorneys of Adam's confession when they initially contacted him, an omission the district court found indicative of fabrication; and that Reppond—who attributed his ability to recall the confession to it having been "so definite about the details"—"suffered a memory failure" when asked for those details at the post-conviction hearing.

As set out above this Court has opined that a non-DNA actual innocence claim, if cognizable, requires new material, noncumulative and conclusive evidence which meets an extraordinarily high standard and undermines the state's entire case. *Conway*, 01-2808, 816 So.2d at 291. More recently, in *State v. Pierre*, 13-0873 (La. 10/15/13), 125 So.3d 403, the Court further articulated that the new facts must be so compelling that no reasonable juror could have voted to convict with knowledge thereof. *Id.*, 13-0873, pp. 9-10, 125 So.3d at 409 (adopting the standard for federal habeas relief set out in *McQuiggen v. Perkins*, 569 U.S. ___, ___, 133 S.Ct. 1924, 1933, 185 L.Ed.2d 1019 (2013)).

The district court was within its discretion to find LaCaze's evidence fell short. *See State v. Mussall*, 523 So.2d 1305, 1310 (La. 1988) (fact finder makes credibility determinations and may, within the bounds of

rationality, accept or reject the testimony of any witness; reviewing courts may impinge on the "fact finder's discretion only to the extent necessary to guarantee the fundamental due process of law."). The evidence that Adam boasted about the murders appears entirely insufficient to prove that "no reasonable juror could have voted to convict" LaCaze, had it been presented at trial, in a case in which the state presented evidence that LaCaze accompanied Frank to Walmart to shop for 9 mm ammunition within hours of the murders; that survivors (who saw LaCaze with Frank twice earlier that same evening) positively identified LaCaze as the male perpetrator who rummaged through their property after the gunfire ceased; that LaCaze's initial statements contained details only the perpetrators could have known; that LaCaze's trial testimony admitted his presence in the restaurant earlier that night, contradicting his alibi in which he claimed he was at the pool hall; and that LaCaze was observed within an hour of the murders using Ofc. Williams's stolen credit card to purchase gas at a Chevron station near his brother's apartment. The district court's conclusion is further bolstered by evidence that LaCaze and Adam had such different physical appearances that for the surviving victims to have confused Adam—whom they had known for some time—with LaCaze would have been nearly impossible, even under the traumatic conditions: The survivors identified Frank's accomplice as a black male with gold teeth across the top, less than 20 years of age, and just over five feet tall. LaCaze was 18 years old, 5'3" in height, and had gold teeth. Adam was 24 years of age and 6'5" in height. *LaCaze*, 99-0584, p. 3 n.4, 824 So.2d at 1066 n.4.

For the foregoing reasons, the Fourth Circuit correctly reversed the order for a new trial.

APPENDIX B

[SEAL]
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Susan B. Hammer
Chief Deputy Clerk of Court

No. 2015-K-0891

STATE OF LOUISIANA

versus

ROGERS LACAZE

IN RE: STATE OF LOUISIANA

APPLYING FOR: SUPERVISORY WRIT

DIRECTED TO: HONORABLE MICHAEL KIRBY JR. CRIMINAL DISTRICT COURT ORLEANS PARISH SECTION "D", 375-992

WRIT GRANTED IN PART; DENIED IN PART

After review of the State's writ application in light of the applicable law and arguments of the parties, we find that the trial court erred in finding that the seating of Mr. Settle on the defendant's jury was a structural error entitling him to a new trial; we do not find that the trial court erred in denying the remaining claims. Accordingly, the writ is granted in part (reversing the grant of a new trial on the juror basis), denied in part (as to the denial of the remaining claims), and remanded to the trial court for consideration of the defendant's remaining post-conviction claims.

New Orleans, Louisiana this 6th day of January, 2016.

/s/ Edwin A. Lombard
JUDGE EDWIN A. LOMBARD

/s/ Paul A. Bonin
JUDGE PAUL A. BONIN

/s/ Madeleine M. Landrieu
JUDGE MADELEINE M. LANDRIEU

APPENDIX C

IN THE CRIMINAL DISTRICT COURT FOR
ORLEANS PARISH
STATE OF LOUISIANA

No. 375-992

STATE OF LOUISIANA, *ex rel* ROGERS LACAZE

vs.

BURL CAIN, Warden, Louisiana State Penitentiary

SECTION "D"

JUDGMENT WITH REASONS ON APPLICATION FOR POST-CONVICTION RELIEF

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Rogers LaCaze was indicted April 28, 1995 for the March 4, 1995 first degree murders of New Orleans Police Ofc. Ronnie Williams, Ha Vu and Cuong Vu at the Kim Anh Restaurant in New Orleans East. His trial commenced July 17, 1995; the jury returned verdicts of guilty as charged on each count July 20, 1995 and the following day sentenced him to death after the penalty hearing. Throughout the initial proceedings Mr. LaCaze was represented by attorney William “Willie” Turk who had been retained by his family. Mr. Turk is now deceased.

Different counsel represented him for the appeal. His conviction and sentence were affirmed. *State v. LaCaze*, 99-0584, (La. 1/25/2002), 824 So.2d 1063.

Mr. LaCaze seeks a new trial. He raises a plethora of claims that he asserts resulted in an unfair trial proceeding and a denial of basic due process of law. I will consider his claims in the order in which he raised them in his Post Hearing Memo. Mr. LaCaze bears the burden of proving that relief should be granted. La. C. Cr. P. art. 930.2. The Louisiana Supreme Court has said that his burden is to show that there is a reasonable probability that but for his counsel’s errors the result of the proceedings against him would have been different. *State v. Thomas* 12-1410 (La. 9/4/13) at 13, 124 So.3d 1049 at 1057.

Although I find the evidence of Mr. LaCaze’s actual guilt compelling, he is entitled to a new trial because his trial was afflicted with a structural defect, *i.e.* the violation of a constitutional right so basic to a fair trial it cannot be treated as a harmless error. Consequently, he has proven a ground for granting

post-conviction relief. La. C. Cr. P. art. 930.3 (1).[1] For the reasons expressed *infra*, I decline to reach the issue of whether he is mentally retarded.

I. DENIAL OF AN IMPARTIAL JURY.

The Sixth and Fourteenth Amendments to the U. S. Constitution guarantee a criminal defendant a speedy, public trial by an impartial jury and due process of law; Article I, §16 of the Louisiana Constitution entitles him to a speedy, public and impartial trial. The selection of a fair and impartial jury is accomplished through the voir dire process and the exercise of both challenges for cause and peremptory challenges. *U. S. v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); *U. S v. Mitchell*, 690 F.3d 137 (3rd Cir. 2012.) For this reason the Louisiana Constitution grants a defendant a right to full voir dire examination and the right to challenge jurors peremptorily. La. Const. Article I §17 (A). Both the state and the defendant have a statutory right to challenge a prospective juror for cause. To this end, La. C. Cr. P. art. 797 provides:

> Art. 797. Challenge for cause
>
> The state or the defendant may challenge a juror for cause on the ground that:
>
> ***
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render

[1] The conviction was obtained in violation of the Constitution of the United States or the state of Louisiana.

> an impartial verdict according to the law and the evidence;
>
> (3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;

As exemplified above, courts distinguish between two types of cause challenges: those based on actual bias and those based on implied bias. Actual bias is a state of mind leading to an inference that the juror would not be entirely impartial. Conversely, implied bias is bias that is conclusively presumed as a matter of law, regardless of the juror's actual partiality. It is based upon the recognition that certain narrowly-drawn classes of people are highly unlikely to be impartial jurors, despite their contrary assurances. *U. S. v. Mitchell, supra*, at 142 and the cases cited therein. The test centers on whether an average person in the juror's situation would be prejudiced. The facts underlying the alleged bias determine whether there is an inherent risk of substantial emotional involvement.

If a defendant is denied an impartial judge or juror to determine his guilt or innocence, that is a structural defect in the proceedings mandating a new trial. *Solis v. Cockrell*, 342 F.3d 392 (5th Cir., 2003),[2] *U. S. v.*

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[2] Although the Fifth Circuit denied relief to the petitioner, it noted in footnote 44: "The remedy for a valid implied bias claim is a new trial. *See Dyer v. Calderon,* 151 F.3d 970, 973 n. 2 (9th Cir.1998) ("The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. Like a judge who is biased, the presence of a biased juror

Mitchell, supra, at 148. The United States Supreme Court has held that the remedy for cases alleging juror partiality is a hearing at which the accused is given a chance to prove the juror's actual bias. *Smith v. Phillips*, 102 S.Ct. 940 (1982), and cases cited therein. The Louisiana Supreme Court has observed, "[C]ourts are required to take evidence upon well pleaded allegations of prejudicial juror misconduct violating an accused's right to due process . . . or to a trial by a fair and impartial jury. . . ." It elaborated that courts are to set aside the verdict and order a new trial if it is demonstrated that a constitutional violation has occurred and that there is a reasonable possibility prejudice exists. *State v. Graham*, 422 So.2d 123, 131 (La. 1982).

Mr. LaCaze bases his denial of an impartial jury claim on the assertion that three jurors who sat in judgment of him either worked in law enforcement or had relatives who had been the victim of homicide. He asserts these jurors "failed to disclose crucial information about their backgrounds and lied in response to direct questioning." (Petitioner's Post Hearing Memo, p. 3.) He avers that had they truthfully answered voir dire questioning they would have been disqualified as jurors.

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introduces a structural defect not subject to harmless error analysis." (Citations omitted)); *Johnson v. Armontrout,* 961 F.2d 748, 756 (8th Cir.1992) ("The presence of a biased jury is no less a fundamental structural defect than the presence of a biased judge. We find this claim outside the gamut of harmless error analysis." (citation omitted)). *But see Fitzgerald v. Greene,* 150 F.3d 357, 365 (4th Cir.1998) (subjecting juror bias claims to harmless error analysis). As Justice O'Connor suggested in *Smith,* such an extreme remedy should be reserved only for "extreme situations" not amenable to actual bias analysis."

A. Jurors' Failure to Disclose Information.

1. VICTORIA MUSHATT.

One of the victims Mr. LaCaze was charged with murdering was a young New Orleans police officer who was working a detail at the restaurant when the crime was committed. One of the jurors who convicted him was an employee of the New Orleans Police Department, a dispatcher. Victoria Mushatt was on duty when the crime was called into the dispatch center, although she was not the person who received it. The record is unclear as to the extent she was involved in handling the call. Ms. Mushatt testified that she may have had some professional contact with Ofc. Williams prior to the night of his murder, as a result of which she felt like she knew him. Ex. D – 2.[3] Although she did not know him personally, Ms. Mushatt attended Ofc. Williams' funeral, understandably a very emotional event, because it was common practice for police department employees to attend the funeral of a fallen officer.

Ms. Mushatt's husband, Raymond, was a police officer at the time of Mr. LaCaze's trial. As Ofc. Williams was doing when he was murdered, her husband had worked details early in his career. One of the prosecutors, Glenn Woods, knew Mr. Mushatt, although Ms. Mushatt did not know Mr. Woods. However, Ms. Mushatt noted on Ex. D – 2 that her

[3] Two sets of exhibits will be referenced herein. Those received in evidence at the hearing will be identified as "Ex. D – ___." The other set consists of various attachments to Mr. LaCaze's Supplemental Petition for Post-conviction Relief. Although they were introduced into evidence at the hearing *in globo* as exhibit D – 1, they will be referred to herein by the exhibit number assigned to them when attached to the petition, *e.g*. "Exhibit ___ to the Supplemental Petition."

name prompted Mr. Woods to make the connection between her and her husband during voir dire. Supp. II (B), 208:1—8.[4] As a result of her employment and that of her husband Ms. Mushatt was familiar with several of the state witnesses by name, one of whom was a dispatcher like herself, but she did not know them personally. Others she did not recognize at all.

Ms. Mushatt testified at the post-conviction hearing that she did not believe her employment by the NOPD influenced her verdict and that she based it upon the evidence presented at trial.

Mr. LaCaze's complaint that Ms. Mushatt failed to disclose information appears to be based upon her alleged failure to respond when the prosecutor asked the entire venire if they had heard anything about the case in the media, Supp. II (A), 29:21, *et seq*.,[5] and that she remained silent when defense counsel asked if anyone had heard about the case from sources other than the media. Supp. II (A), 111:8—10. While the parties dispute the amount of information she

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[4] References to the trial transcript are to the record I received from the Louisiana Supreme Court. It consists of Volumes 1 through 9 and seven supplements. The supplements will be identified as follows: Supp. I, filed August 5 1999; Supp. II (A) and (B), filed July 13, 1999; Supp. III, filed March 23, 2000; Supp. 4, filed July 14, 2000; Supp. V, filed July 25, 2000; Supp. VI filed, August 16, 2001.

[5] But, see Supp. II (B) 213:7—16 where prosecutor Woods asked the panel from which Ms. Mushatt was selected if anyone had *not* heard anything about the case. There were likewise no responses from any panelists, thus implying Ms. Mushatt acknowledged media exposure. Then, at 214:13—14 the prosecutor asked if the panelists could put aside what they heard and just listen to what comes from the witness stand. He addressed each separately and at 216: 19-20, Ms. Mushatt responds, "Yes."

obtained at work on the night of the murder, it is likely that she learned something. Likewise, it seems inconceivable that she was not exposed to extrajudicial information about the case at the funeral.

The U. S. Supreme Court has refused to invalidate a trial simply because of a juror's mistaken, albeit honest, response to a voir dire question. The Court explained that since jurors are called from all walks of life they may not fully grasp the connotations of the argot legal professionals regularly use. *Donough Power Equipment, Inc. v. Greenwood*, 104 S.Ct. 845 (1984). It held that to obtain a new trial, a party must show a juror failed to answer honestly a voir dire question and show that a correct response would have provided a valid basis for a challenge for cause.

Under La. C. Cr. P. art. 797(2) mere knowledge of the facts of the case is not the determining factor for granting a challenge for cause. Before a challenge for cause may be sustained, such knowledge must affect the juror's ability to render a fair and impartial verdict according to the law and the evidence. See, for instance, *State v. Chapman*, 410 So.2d 689, 695 (La. 1981). A prospective juror revealed that as a result of having read newspaper accounts of the case he had formed an opinion as to the defendant's guilt or innocence. He indicated that he would have difficulty serving as an impartial juror. The venireman was deemed rehabilitated when he related that he would be able to decide the case only on the evidence presented in the courtroom. Upon examination by the defense attorney he "firmly stated" that at the conclusion of the case he would vote to acquit if he was not certain of the defendant's guilt.

At the LaCaze trial, when the prosecutor addressed the entire venire identifying potential witnesses, an

unnamed person responded that she knew, or possibly knew, some of the witnesses because she was a dispatcher with the NOPD. The judge instructed her to indicate that if she was called up subsequently for individual questioning on a panel. Supp. II (A) 149:22—150:17. No one has suggested that this person was not Ms. Mushatt. (Certainly, if there had been another police dispatcher on the venire it would have been brought to the court's attention before now.)

Regardless, in view of the trial court's instruction in this instance, it is improbable that he would have given a different instruction had Ms. Mushatt responded to the earlier inquiries regarding sources of information about the case. Thus, I find the perceived nondisclosure of her sources of extra-judicial information not overly significant in light of her ultimate disclosure, recounted in footnote 5, and her revelation that she was currently employed by NOPD as a dispatcher and that she was acquainted with the names of some of the witnesses. Surely, that information should have excited interest of all parties.

To complete the jury, Ms. Mushatt was selected as one of the second panel of twenty people to be questioned. Supp. II (B) 172:32. The judge began examining the panel by asking them to volunteer any pertinent information since they all had heard the questions asked of the previous panel. Supp. II (B) 173:7, *et seq*. Despite the previous instruction from the judge to bring to his attention her NOPD employment and that she knew of several of the listed witnesses, Ms. Mushatt did not volunteer anything. Indeed, no one else did, either. The court began questioning individual veniremen regarding their prior jury service.

When the court asked if any panelist was related to anyone in law enforcement, several people responded. The transcript identifies responses from Mr. Massart, Ms. Sanchez and Ms. Rosen. Supp. II (B) 182:1—185:21. This is followed by a series of responders identified only as "BY A JUROR." A juror reveals, at Supp. II (B), 187:2—22, that she is married to a police officer and knows several police officers, prompting the trial judge to add, "And you know some of the people that we mentioned before?"[6] The juror then acknowledged that she knew some of the people mentioned earlier "just by associating them with names I've come across" but that she really did not know any of them although her husband might. She stated that the fact she might know these people would not affect her judgment, which distinguishes her situation from that of the juror in *State v. Hallal*, 557 So.2d 1388 (La., 1990), who indicated she would give more weight to the testimony of witnesses she knew.

At a point the court asked whether anyone, or a close family member, had been the victim of a crime. When the question was put to those on the third row "A JUROR" responded that she had a brother awaiting trial on a murder charge. Supp. II (B) 188:13—189:16. This is unquestionably Ms. Mushatt since at Supp. II (B), 217:21, *et seq.* prosecutor Woods states, ". . . And I believe that Ms. Mushatt, that you had someone, but who was either indicted for murder or any felony offense. . . ." Apparently no other panelist had a similar situation because on the next page Mr. Woods says, "So there is just you, Ms. Mushatt." In the follow-up discussion Ms. Mushatt relates that her brother

[6] The judge's reference to knowing previously mentioned people is an obvious reference to her announcement from the audience that she was a police dispatcher.

was scheduled to go to trial the following month. *Id.*, 218:21. The attorneys did no follow-up questioning on this revelation and neither the voir dire record nor the record of the post-conviction hearing reveals where that trial was to take place. If one assumes for the sake of argument that it was to occur in Orleans Parish, even that would not have sustained a challenge for cause because Ms. Mushatt told the trial court that her brother's impending trial would not influence her consideration of this case. Supp. II (B), 189:17 – 24. See also *State v. Cyriak*, 96-661 (La. App. 3 Cir. 11/6/96); 684 So.2d 42 and *State v. Gray*, 533 So.2d 1242 (La. App. 4 Cir. 1988).

Admittedly Ms. Mushatt was never searchingly interrogated as to whether her knowledge of the facts of the case or her brother's impending trial would affect her verdict. She did tell the court at one point that the fact that she might know some of the witnesses would not preclude her from judging whether they were correct or not in their testimony. Supp. II (B) 187: 17 – 22. She testified at the post-conviction hearing that her verdict was based upon the trial evidence, not her employment. On this record I find it most unlikely that a challenge for cause under La. C. Cr. P. art. 797(2) would have been successful. In all probability she would have been deemed successfully rehabilitated by her statement that she could make a decision based on the evidence.

I am unable to conclude that Mr. LaCaze has sustained his burden of showing that Ms. Mushatt's alleged lack of response to the questions pertaining to extra-judicial knowledge of case facts demonstrates she was not impartial within the meaning of La. C. Cr. P. art. 797(2). I have not found, nor have I been directed to any portion of Ms. Mushatt's testimony

that evidences that she "lied[7] in response to direct questioning." Ms. Mushatt substantially discharged her duty to disclose information. It was up to counsel to explore the issues associated with her employment and contact with witnesses. Had that been done, it could have led them to the fact that she was on duty the night of the crime and that she had gone to the funeral. I am not persuaded that the alleged failure to volunteer information suggests a nefarious purpose or intent on her part to garner a seat on the jury. There is nothing on the face of the record that overtly indicates she was not impartial.

See *State v. Jones* 474 So.2d 919 (La. 1985) for a capital case sustaining the denial of a challenge for cause for a prospective juror who had previously worked in law enforcement, had also worked for a state witness and who had visited the funeral home "out of curiosity" to see if the deceased was the missing child from her neighborhood. The prospective juror there was ultimately challenged peremptorily, but the Supreme Court held that the "impersonal interest" in the victim was insufficient to sustain a challenge for cause where the prospective juror said it would not affect her fairness. Although Ms. Mushatt was not voir dired on the point, she testified before this court that her verdict was based upon the evidence presented, not extraneous factors. Mr. LaCaze has failed to show this is not the case.

Actually, the first time Ms. Mushatt is identified by name in the voir dire transcript is at Supp. II (B) 208:1, after the prosecutor asked if she could consider imposing the death sentence. It is apparently on this

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[7] I use the word "lie" to mean a false statement made with a deliberate intent to deceive. www.dictionary.com, "lie".

point that Mr. Woods draws the connection between the prospective juror and her husband because he asks forthrightly, "are you married to Raymond Mushatt" to which she responds "Ah, Ah" apparently signifying an affirmative response. Supp. II (B) 208: 1 – 13.) This disclosure was not followed-up on by defense counsel.

Mr. LaCaze also relies upon the legal theory of "implied bias" to support his claims that he was denied his right to a trial before an impartial jury. The parties have skirmished on the current viability of that theory as a result of the U.S. Supreme Court's decision in *Smith v. Phillips, supra*. However, the principles of the "implied bias" rule seem to be embodied in the Louisiana statute, La. C. Cr. P. art. 797(3), supra and the U. S. Fifth Circuit Court of Appeals has held that nothing in the opinion rejects the doctrine of implied bias. *Brooks v. Dretke*, 444 F.3d 328, 330 (5th Cir., 2006).

Evaluating her jury service under La. C. Cr. P. art. 797, *supra*, I find there has been no showing that Ms. Mushatt had a blood, marital, employment, friendship or inimical relationship with either defense counsel. The same is true regarding the prosecutor. While she may have heard of him through her husband, she herself did not have the sort of relationship contemplated by the statute to warrant a challenge for cause on presumed bias. Neither the record before this court, nor the trial court, reveals that Ms. Mushatt had any blood, marriage, employment, friendship or hostile relationship with Mr. LaCaze, personally. The question thus becomes whether her employment by NOPD is sufficient to impute bias warranting her disqualification from the LaCaze jury.

It is not. *U. S. v. Mitchell, supra*, is strikingly similar to the facts of this case. There, a juror was employed

by the police department in a support capacity. As such, she worked with two of the officers who were witnesses at trial. Under the rule of *Dennis v. United States* 70 S.Ct. 519 (1950) employment by the police agency, by itself, does not warrant an implication of bias. In response to defendant's argument that the juror's employment at the police department and her interaction with the police witnesses were enough to impute bias, the court pointed out the absence of any controlling precedent presuming prejudice in such circumstances. It relied on the long-standing common-law rule that the relationship between a juror and witness did not result in a legal conclusion of partiality, and declined to equate employees of the investigating agency with employees of the prosecuting agency. Likewise, in Mr. LaCaze's case Ms. Mushatt's employment by the NOPD does not impute bias to her.

I find that it requires quite a stretch of the imagination to conclude that Ms. Mushatt was a witness, or somehow involved in the criminal transaction, simply because she was on duty when the crime was reported. She may have overheard radio transmissions between various officers and the dispatchers handling the case and may even have helped other dispatchers search records to identify an officer named "Antoinette." However the record in no way justifies the melodramatic, hyperbolic scenario depicted in Mr. LaCaze's Post Hearing Memo at pp. 7-9. He has failed to show that Ms. Mushatt's peripheral involvement with the report of the event created the type of substantial emotional involvement necessary to impute disqualifying bias to her.

2. DAVID SETTLE.

David Settle was another juror at Mr. LaCaze's trial. He had a long history of employment in the field of law enforcement. From 1978-1982 he was employed by Southern Railway Police Department as a railroad special agent with the power to arrest. Then, in 1982 he was employed by Norfolk Southern Railroad Police as a Sergeant of Police, again with arrest power. He worked in similar capacities for Norfolk Southern until his discharge in 1993 for misappropriation of four tires. Ex. D – 4, pp. 20-24.

When he was questioning the first panel, defense counsel asked if anyone was related to someone in law enforcement. Supp. II (A), 106:31—32. However, Mr. Settle was not in that group. As with Ms. Mushatt, he was not called for individual voir dire until the second panel. Supp II (A), 172:16.

The very first thing that happened with the second panel was the question from the court as to whether anyone had something to volunteer based upon what they had heard with the first panel. Supp. II (A), 173:7. Mr. Settle did not respond, although he should have heard defense counsel's question concerning law enforcement employment since he had answered the rollcall at the beginning of jury selection. Supp II (A), 5:29.

Even if there is a plausible explanation for his silence here, I cannot fathom a legitimate reason for him not speaking up when the trial court directly asked the first row of his panel if anyone was related to anybody in law enforcement. Supp. II (B), 182: 1. Mr. Massart immediately responded that his wife was a forensic pathologist and a series of follow-up questions ensued. That is significant because Mr. Settle probably was sitting next to Mr. Massart since Mr.

Massart was the first person called for the second panel and Mr. Settle was the second. Supp. II (B), 172:13-16. Mr. Massart's response should have prompted Mr. Settle to speak. Yet, Mr. Settle, obviously hearing Mr. Massart's exposition, sat there mute. There is simply no excuse for him not mentioning his employment status.

At the time of trial he was actually employed by the Louisiana State Police as a public safety officer. He testified at the post-conviction hearing that his work related to drivers' license issues. The parties, though, do not dispute he was a commissioned law enforcement officer. That is significant because at the time of his jury service law enforcement officers were not competent jurors. In 1980 the Louisiana Supreme Court decided *State v. Simmons* 390 So.2d 1317 (La. 1980):

> The guarantee of an impartial trial in Article 1, Section 16 of the Louisiana Constitution of 1974 is offended by the presence on a jury of a badge-wearing law enforcement officer. [Citations omitted.] *Id.*, at 1318

Admittedly this bright line rule was overruled in *State v. Ballard*, 98-2198 (La. 10/19/99); 747 So.2d 1077. The state argues that Mr. Settle's law enforcement status while on the jury is of no moment because the ban was overruled while Mr. LaCaze's case was on appeal and not yet final. The Louisiana Supreme Court used a similar rationale in *State v. Deruise*, 802 So.2d 1224 (La. 2001).

As in this case, Mr. Deruise was tried while *Simmons, supra*, governed juror qualifications but his appeal was not completed until after *Ballard, supra*, was decided. On his appeal Deruise complained that a

juror should have been stricken for cause because he was a lieutenant with the NOPD at the time of trial (1996). Since a challenge for cause was not granted Deruise had to use one of his peremptory challenges to remove him. The Supreme Court *assumed* (due to a deficiency in transcribing the voir dire) that the defendant had, in fact, challenged the juror for cause, but it found the denial of a challenge for cause was not reversible error in *Deruise* since *Ballard* had overruled *Simmons*.

The Court specifically noted that a trial court's refusal to grant a challenge for cause for a law enforcement officer is not an abuse of discretion if the juror demonstrates his willingness to decide the case impartially under the applicable law. It quoted extensively from the voir dire by both the state and the defense to the effect that the juror's police employment would not interfere with his impartial consideration of the case. The Court found it significant, too, that another prospective juror was excused for cause based on his police officer status. It inferred the trial court was properly exercising its discretion and excluded police officers when appropriate to impanel a fair jury.

I find the *Deruise* rationale inapplicable to this case. The police-officer-prospective-juror there had unmistakably disclosed the fact of his NOPD employment, and he was extensively voir dired on it to determine his ability to be fair to the parties. The attorneys were thus able to intelligently make both cause and peremptory challenges. None of that happened in this case. The transcript of his voir dire does not reveal Mr. Settle's law enforcement status so, obviously, there was no discussion with him regarding whether his employment would have a bearing on his decision-making process in the jury room. Thus, Mr.

Settle's employment could not have been a factor in Mr. LaCaze's trial counsel's strategy regarding the exercise of challenges.

I find that at the time Mr. LaCaze was tried for three counts of first degree murder there was present on the jury "a badge-wearing law-enforcement officer" whose presence thereon offended the impartial trial guarantee of Article I, Section 16 of the Louisiana Constitution under the controlling jurisprudence at the time of the trial, *State v. Simmons, supra*. Thus, under the teaching of *State v. Graham, supra*, the guilty verdicts must be set aside and a new trial ordered.

Actually, Mr. Settle's service on the LaCaze jury was rather akin to the situation in *U.S. v. Scott*, 854 F.2d 697 (5th Cir. 1988). There, a prospective juror did not disclose, when asked, that his brother was a law enforcement officer with an agency that had done some investigation in the case. After the trial the convicted defendant learned of the juror's connection to law enforcement. At a post-trial hearing the juror explained his failure to answer by stating that he thought he only had to disclose his brother's employment if he thought it would affect his decision. The court found that the juror's conduct established specific facts revealing his close connection to the circumstances at hand such that bias had to be presumed. *U. S. v. Nell, supra*. The court cited the voir dire for its strong suggestion that the juror sought to be a member of the jury and that he knew he would be excused if he disclosed his brother's law enforcement employment. The court said that the juror consciously censored information so that he, not the court or the attorneys, determined his own appropriateness for jury duty. It granted the defendant a new trial.

Negative inferences are always difficult and I am reluctant to find that Mr. Settle, like the juror in *U.S. v. Scott*, supra, was actively seeking to be a part of the jury by his silence. Such a finding, however, is not necessary. The record before this court abundantly establishes that, for whatever reason, Mr. Settle did not honestly answer the question and that if he had honestly answered it he would have been found to have been a legally incompetent juror under *State v. Simmons, supra*. Thus I conclude Mr. LaCaze has met his burden, under *Donough*, of showing that a juror failed to honestly answer a voir dire question and that an honest answer would have provided a valid basis for a challenge for cause.

3. LILLIAN GARRETT.

Ms. Garrett did not testify at the postconviction hearing, although efforts were made to subpoena her through a special process server, Byrne N. Sherwood, III. Mr. Sherwood's affidavit is in evidence as a part of Ex. D – 6 and relates, in two separate instances, that Ms. Garrett was elderly and in ill health.

Mr. LaCaze asserts Ms. Garrett was an improper juror in his case due to implied bias because she had two brothers who had been killed in the early 1980s and she did not respond when asked about it on voir dire. Her declaration, dated July 19, 2003 is in evidence as Ex. D – 5 and asserts that these homicides were "not discussed when I sat as a juror in this case. No one ever asked me about it."

However, the voir dire transcript reveals that on two occasions her panel was asked for that information. Supp. II (B) 187:26 – 29 and at 231:22. On neither occasion did Ms. Garrett speak up. In the first instance the question was propounded by the trial court and "A

JUROR" responded that he or she had been attacked, beaten and robbed about a year previously. After telling the judge that the event would not influence his/her verdict, the court again asked if anyone else "had been the victim of a violent crime or a relative who has been the victim of a crime? Armed robbery, murder, rape, etc." there were no responses. Supp. II (B), 188:1 – 23.

Mr. Caulfield asked for the same information. Again, "A JUROR" spoke up saying she had been robbed about five years earlier, but it would not affect her decision. Supp. II (B), 231:22—232:19.

Neither of these responders reported victimizations similar to those experienced by Ms. Garrett, whose two brothers had been murdered, one beaten to death and one shot in the head. The responses, therefore, cannot be attributed to her.

Mr. LaCaze cites *Dyer v. Calderon* 151 F.3d 970 (9th Cir. 1998) as authority for Ms. Garrett's conduct establishing her implied bias, disqualifying her as a juror in his case. I disagree. This case is factually distinguishable from *Dyer, supra*. In *Dyer*, also a capital case, the Court of Appeal was able to discern that the juror there had lied (as defined in footnote 3) to the court twice. The first time was on voir dire when she denied that she or a family member or close friend had been the victim of a crime and that neither she nor a family member or close friend had been accused of a crime. The second time was after the guilt phase but before the start of the penalty phase. The defense had learned that the juror's brother had been killed which prompted the trial court to examine her again. In the brief *in camera* interview the juror told the judge that she thought her brother's death had been ruled accidental, so she responded as she did. However,

before the *in camera* interview, the prosecution had given the judge its file on the brother's murder case. If the judge had referred to it, he would have known that there was no way for that death to have been accidental. There was also available evidence, not presented to the trial court, that the juror harbored resentment about her brother's death that would have belied her assertion that she believed his death was accidental. As a result of that juror's repeated lies, the *Dyer* case is much more akin to the facts in *Scott*, *supra*. The *Dyer* juror was just too eager to get a seat on the jury in order to grind an ax.

On this record however, all that can be said is that Ms. Garrett did not respond when asked if she or a close family member had been the victim of a crime. In the absence of demeanor evidence it is not possible for me to intelligently judge whether or not she consciously withheld the information to get on the jury to avenge her brothers' deaths. Perhaps she did not perceive herself to be a victim since it was her brothers who were killed, although that does not account for her not responding to the "close relative" aspect of the question. This court does not have information concerning Ms. Garrett's educational background, age or health status at the time of trial. Did she understand the question? Could she hear the question? The record is simply insufficient for this court to find Ms. Garrett lied and thus was impliedly biased. As noted above, *State v. Cyriak, supra*, and *State v. Gray, supra*, crime victims are not *ipso facto* subject to challenge for cause. Their victim experience must be such that they cannot be fair and impartial in deciding the case before them.

B. INEFFECTIVE ASSISTANCE OF COUNSEL AT VOIR DIRE.

A claim of ineffective assistance of counsel is evaluated under the test prescribed in *Strickland v. Washington*, 104 S. Ct. 2052 (1984). There are two parts of that test. First, the claimant must prove that his counsel's performance was deficient, and secondly, that that deficient performance prejudiced his defense. The standard by which counsel's performance is judged is that of reasonably effective assistance under all the circumstances. A reviewing court evaluates counsel's performance under a highly deferential standard that strives to avoid the distorting effects of hindsight. There is a strong presumption in the law that an attorney's conduct falls within the wide range of reasonable professional assistance. Thus, Mr. LaCaze bears the burden to show that under the circumstances of his case his attorneys' action was not some trial strategy.

To prove counsel's deficient performance prejudiced him Mr. LaCaze must prove that there is a reasonable probability that if his attorney had not made the complained of unprofessional errors the result of the trial would have been different.

Mr. LaCaze's overarching complaint is that Mr. Turk delegated jury selection to Mr. Caulfield, who would be there for jury selection only. His expert, Mr. Reed, condemned this practice because he thought it important for the defense attorneys to establish and maintain a relationship with the jury. That relationship, he contends, was destroyed by Mr. Caulfield's fleeting participation in, and abrupt departure from, the case. Mr. Jenkins, attorney for Mr. LaCaze's codefendant, testified that Mr. Turk did not know how to select a capital jury. If that were in fact the case,

then engaging someone else to cover this aspect of the trial would have been the better avenue to pursue.

The U. S. Fifth Circuit Court of Appeals has held that an attorney's voir dire actions are part of his trial strategy. Thus, under *Strickland, supra*, they cannot form the basis of an ineffective assistance of counsel claim unless they are shown to be so ill-chosen that they permeate the whole trial with obvious unfairness. *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995); *Hoffman v. Cain* (09-3041 Eastern District of Louisiana, 2012 available on the internet at https://scholar.google.com/scholar_case?case=8760026746460087829&q=Hoffman+v.+Cain&hl=en&as_sdt=8000003). While I may agree that delegation of jury selection may not have been a best practice, it cannot say that it amounted to deficient performance under the *Strickland, supra*, standard, nor has Mr. LaCaze shown that the engagement of Mr. Caulfield, by itself, permeated the entire proceeding with obvious unfairness. It will be necessary to consider each action complained of.

Mr. LaCaze's complaint that Mr. Turk did not know the procedure for death qualification of a jury is of no moment since Mr. Turk did not conduct the voir dire, but he makes the same complaint against Mr. Caulfield. His primary complaints are that Mr. Caulfield only asked whether veniremen could return a death sentence and that he told them they could not have sympathy for the defendant or the victims.

I am not convinced that Mr. LaCaze portrays Mr. Caulfield's inquiry in the proper context. It must be remembered that the first order of business when the prosecutor began his voir dire was to individually question each panelist as to his or her ability to seriously consider capital punishment. Supp. II (A), 15:14 – 27:22 and 193:27 – 213:8. When Mr. Caulfield

asked the first panel the complained of question, each panelist had already answered it for the state. *Id.* 116:31 – 117:20 (Only one, Mr. Batiste, told Assistant District Attorney Woods he could not seriously consider the death penalty, but he did not respond to Mr. Caulfield.) Mr. Caulfield's question strikes me more as an effort to get someone to speak up so he could ask follow up, possibly rehabilitative questions, rather than as an overt attempt to death qualify the jury to his client's disadvantage. When no one wavered from his or her previous answer to the prosecutor, he moved on. Simply put, I find the record too ambiguous to accept Mr. LaCaze's hypothesis.

I find it noteworthy that Mr. Caulfield did question prospective juror Sincere regarding her ability to impose capital punishment. The prosecutor had laid a substantial foundation to challenge her on the basis of the *Witherspoon* jurisprudence. Supp. II (B), 202:31–207:31. However, Mr. Caulfield successfully rehabilitated her such that when the state attempted to challenge her for cause the trial court denied it and thereby forced the prosecution to use one of its peremptory challenges. Supp. II (B), 233:1–31; 243:9 – 26 and 247:13 – 19.

I am equally unimpressed with the contention that defense counsel eliminated the possibility for mercy by telling prospective jurors they could not sympathize with either the defendant or the victims Supp. II (B), 114:8 – 9). It seems more likely he was building upon both the prosecution's, and his own, previous admonition concerning racial fairness. Supp. II (A), 61:5, et seq., and 113:2, *et seq*. He had just emphasized to the panelists that the victims were of a different racial background than that of the defendant and he wanted

to point out that the panel could not favor them at the expense of his client.

It is just as probable that the comment was an attempt to balance the effect of the prosecution's introduction to the panelists of the victims' survivors in the courtroom during its voir dire, Supp. II (A), 43:29 – 44:8, as well as the multiple references to the youth of the victims. See, *e.g.*, Supp. II (A), 29:23 – 28 and 61: 10 – 13.

These questions and comments are within counsel's trial strategy and I do not believe they permeated the whole trial with obvious unfairness. *Teague v. Scott, supra.*

The next complaint is that defense counsel asked very few individual questions of jurors, preferring to address the panels as a whole; that he never inquired into juror opinions on issues critical to the defendant's case, nor did he ask what jurors knew and how it would affect them.

In *State v. Carmouche*, 872 So.2d 1020 (La. 2002) the defendant was sentenced to death for the murders of three people. On direct appeal his counsel asserted, in assignment of error 11, that direct examination of prospective jurors was "far superior and preferable to 'sermonizing' them." This assignment was dealt with in an unpublished appendix (comprising a part of the official court record and available at WL______) because it did not constitute reversible error and was resolved by well-settled legal principles. (*Id.*, at 1027.) In response, Justice Kimball writing for the court, acknowledged that defendant "might be correct" on this point, but that still did not relieve him of his obligation to prove reversible error. She noted that the Louisiana Code of Criminal Procedure does not

mandate any particular way for attorneys to conduct their voir dire. The goal is to get answers to questions and to instruct potential jurors on issues important in a capital trial. She noted that in Carmouche's case the court and both parties used a variety of techniques to question and educate the veniremen. Thus, it may be inferred that it is not as important *who* delivers the information as it is that the information is ultimately obtained.

A careful review of the record herein reveals that each panel examined was informed, by one participant or the other, of the key issues involved in a capital murder case. Everyone knew they were going to have to first decide if Mr. LaCaze was guilty of the charged offense or a lesser one. After that, they would have to consider the issue of his punishment if they convicted him of first degree murder. They were also informed that at the penalty hearing, if they got that far, they would have to consider the circumstances of the offense, the character and propensities of the defendant and the impacts the deaths had on surviving family members. Supp. II (A), 43:24 – 28 and Supp. II (B) 219:27 – 220:9. Finally, Mr. Caulfield informed them that they would have to follow the law, whether or not they agreed with it. Supp. II (A), 104:28 – 105:4, and Supp. II (B), 237:15 – 28.

In a case similar to this one, *Garza v. Stephens*, 738 F. 3d 669 (5th Cir. 2013), writ den. 134 S.Ct. 2876 (2014) the defendant had been convicted of murdering a police officer and sentenced to death. He unsuccessfully sought post-conviction relief in the state courts and then filed for federal habeas corpus relief, alleging his counsel was ineffective for failing to propound appropriate death penalty questions during voir dire. As a part of its rationale for denying relief the

unanimous panel of the court said, "Moreover, Garza cites no authority, and we have found none, that would require a defense attorney to ask specific questions on voir dire." (*Id*., at 676.)

Regarding Mr. LaCaze's argument that Mr. Caulfield's representation was deficient because he failed to follow up when jurors said they knew something about the case, I find *Mu'Min v. Virginia*, 111 S.Ct. 1899 (1991) instructive. Mu'Min was tried and convicted of capital murder and complained to the U. S. Supreme Court that his Sixth Amendment right to an impartial jury was violated because the trial judge refused to voir dire prospective jurors on the contents of news reports to which they had been exposed. As in the case *sub judice*, his had generated substantial pretrial publicity--to the extent that eight of the twelve jurors had heard or read something about it. As in this case, none of those had formed an opinion based on what they had read or heard, nor would it have affected their ability to render a verdict solely on the evidence presented at the trial.

Mu'Min claimed that the questions he wanted propounded to the panelists would have materially assisted in seating a jury less likely to be tainted by pretrial publicity. However, the Court found them not constitutionally required. The constitutional test is not one of helpfulness, but whether the failure to ask them renders the trial fundamentally unfair. Mu'Min also impressed upon the court the ABA Standards for Criminal Justice which would have required that each juror be interrogated individually about what he had read or heard about the case. The Court declined to adopt them because they subjected a juror to challenge for cause simply because he had been exposed to significant information, regardless of the juror's state

of mind. The relevant issue under the constitutional standard is whether the jurors had such fixed opinions that they could not fairly judge the defendant's guilt or innocence. The Supreme Court further noted that just because a particular rule might be thought to be the "better" view, does not mean it is incorporated into the Fourteenth Amendment's Due Process requirement.

In light of the above authorities, I find Mr. LaCaze's foregoing assertions to be without merit.

I am somewhat perplexed by Mr. LaCaze's assertion on page 20 of his Post Hearing Memo to the effect that counsel "did raise a *cause* challenge against a [C]atholic seminarian who opposed the death penalty." (Emphasis added.) I have scoured the voir dire transcript and have been unable to find support for this statement. The juror at issue was John Arnone. When asked, "Could you seriously consider the imposition of capital punishment, sir?" he responded, "Yes." Supp. II (B), 213:2 – 6. This statement in the memorandum seems to emanate from a garbled reading of a passage in the original opinion on appeal, *State v. LaCaze*, *supra*: "One of his [Caulfield's] *peremptory* strikes was unusual." (Emphasis added.) Footnote 41 was attached to that sentence: "[41] Caulfield struck a Catholic seminarian who opposed capital punishment but said he could consider it and who had been the subject of a *state* challenge for *cause*." (Emphasis added.) When the parties approached the bench for the challenge conference, Prosecutor Woods wanted to question Mr. Arnone further, but the trial court refused permission saying, "So, he answered the question that he could consider it, and that is all that is necessary." The transcript is devoid of any reference to the State actually offering a cause challenge that

was denied. Supp. II (B), 241:1 – 22.) Still, there is confusion because there is no evidence that Mr. Arnone said he opposed capital punishment. If there was a juror questionnaire containing that statement, it is not in the record *sub judice*.

As I noted when the defense expert, Mr. Reed, was testifying at the post-conviction hearing, there was widespread publicity that one of the murdered victims, Cuong Vu, planned to become a priest. Following the hearing I refreshed my memory. See: www.nytimes .com/1995/05/13/us/killings-that-broke-the-spirit-of-a-murder-besieged city.html?page wanted=all, attached as Appendix I. I find it quite appropriate for defense counsel in the trial of one accused of murdering, *inter alia*, an aspiring seminarian to strike from the jury a current seminarian who could "seriously consider the imposition of capital punishment." Supp. II (B), 213:1 – 6.

One aspect of defense counsel's voir dire performance that has given me pause is the examination, or more accurately lack of examination, of Ms. Mushatt. While she may not have been a candidate for a valid challenge for cause, there was available enough information to enable the defense to exercise a peremptory challenge. First she disclosed from the audience during the prosecution's voir dire of the first panel that she was an NOPD dispatcher. Secondly, she knew several of the witnesses. Third, she disclosed to the court that she was married to an NOPD policeman and she could seriously consider imposing capital punishment. It is ironic that upon her answer to that precise question Mr. Caulfield interjected that he could not hear the response, prompting the trial judge to repeat her answer. Supp. II (B), 208:11 – 20. Finally she

informed everyone on voir dire that she had a brother awaiting trial for murder.

It would seem reasonable that a competent defense attorney would want to know more about such a potential juror. Yet neither defense attorney asked any follow-up questions of her. Had they done even the meagerest of follow-up it might have been revealed that Ms. Mushatt was working as a dispatcher the night of the murder, that from past experience with him she felt like she knew Ofc. Williams and that she attended his funeral. Also, defense counsel could have probed the extent of her knowledge of, or relationships with, the anticipated NOPD witnesses. Keeping in mind the *Teague* court's admonition that voir dire decisions are a part of a lawyer's trial strategy, and *Strickland's* requirements that reviewing courts apply a highly deferential standard to strive to avoid the distorting effects of hindsight and the strong presumption that an attorney's conduct falls within the wide range of reasonable professional assistance, I am not able to conclude that keeping Ms. Mushatt on the jury was unsound strategy. Counsel could reasonably have believed that she could be sympathetic to Mr. LaCaze because she had a brother awaiting trial on a murder charge despite her connections to the NOPD and certain of the witnesses.

II. TRIAL BEFORE BIASED TRIBUNAL.

A. Judge Marullo Investigated as Source of Weapon.

Mr. LaCaze argues that he is entitled to a new trial because he was tried before a biased tribunal. Specifically, he claims that the presiding judge, Frank Marullo, should have been recused because the judge was both the judge "and witness (or worse, suspect)"

in the investigation surrounding the transfer to Antoinette Frank of a 9 mm Beretta pistol from the NOPD property and evidence room. Petitioner's Post Hearing Memo, p. 20. The 9 mm Beretta is significant because all of the victims were killed with a 9 mm gun, but it was not recovered and so was not available for the trial.[8]

During the homicide investigation, the NOPD learned that Ms. Frank had received at least two weapons from the property room. Sgt. Robert Harrison of the Public Integrity Bureau began an investigation into the circumstances surrounding the release of the weapons. His report, dated August 19, 1996, is in evidence as defendant Ex. D – 9. It is clear from the very first page of that twelve-page report that the focus, indeed target, of that investigation was the

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[8] There are two 9 mm weapons at issue here. The first is one obtained for Ms. Frank by Ofc. Talley through a disputed court order. The other is Ofc. Williams' 9 mm weapon which was not located at the crime scene. Mr. LaCaze suggests this fact somehow exculpates him. That pistol did not reappear until it was recovered by the Jefferson Parish Sheriff's Office on March 26, 1997 after it was used in an attempted robbery on the West Bank of Jefferson Parish. Ex. 31 to the Supplemental Petition. Frankly, I find it more than coincidental that the weapon was recovered and Jefferson Parish, the same parish where Michael LaCaze was residing at the time of this crime. I am also impressed by the fact that the route from New Orleans East to his apartment off Terry Parkway, across the Greater New Orleans Bridge, would have taken him near the Fisher Housing Project. At the time that housing development was known as a hotbed of criminal activity, so it would seem to have been an attractive site to dispose of a "hot" weapon. Likewise I find it more than coincidental that although the alleged perpetrator was never apprehended, the victim of the incident in Ex. 31 to the Supplemental Petition lived a short distance from Michael LaCaze's apartment in Terrytown.

former head of the property and evidence room, Ofc. David Talley: "Officer Talley maybe [sic] in violation of departmental rules Two paragraph 3 relative to Truthfulness, Rule 4, paragraph 4 relative to Neglect of Duty,. " [Sic] The report concludes the charges against Ofc. Talley appear supported by sufficient evidence.[9] There is no suggestion in the report that Judge Marullo was suspected of wrongdoing.

The salient facts, taken from Exs. D – 9, 10, 11 and 14 are that, as a police recruit, Ms. Frank worked in the property and evidence room under Ofc. Talley's supervision. When she told Ofc. Talley she could not afford a firearm she needed for training, he secured an order authorizing the transfer to her of a Smith and Wesson Model 15 that had been in the police property and evidence room for nearly fourteen years. Ex.—17, p. 2 to the Supplemental Petition. After Ms. Frank had been assigned to the Seventh District, he helped her get a 9 mm Beretta, also in his custody. Ex. D – 9, p. 4, and p. 1 of Ex. 17 to the Supplemental Petition. Regarding the latter transfer, Ofc. Talley testified he went to Judge Marullo's office, presented the papers to a staff person, later identified as Mr. Genovese, who brought the order into the judge's chambers and returned it to him, signed. Subsequently, Mr. Genovese died and was not available to testify in any proceedings.

Sgt. Harrison's report relates that he contacted Judge Marullo on three occasions. The first time was before the case had been allotted. About three and a

[9] Following a departmental hearing Officer Talley was terminated from employment, but the Civil Service Commission reversed that decision and was affirmed by a unanimous panel of the Louisiana Fourth Circuit Court of Appeal in an unpublished opinion. Ex. D—10.

half weeks after the murders, Sgt. Harrison met with Judge Marullo and showed him the court order purportedly bearing his signature. The judge said he did not believe the signature was his and, since the order did not describe the weapon, he would not have signed it. Ex. D – 9, p. 3. At the post-conviction hearing Judge Marullo testified that another reason he believed he did not sign the order is that he would have personally presented the weapon to the recipient named in the order.

The case was allotted to Judge Marullo on May 1, 1995 and Harrison next contacted him on May 16 for a taped statement. According to the report, *Id,* pp. 3 – 4, the judge related to him that he had been assigned the case so he would not make a statement until it was finally disposed of. Following the completion of Ms. Frank's trial, Harrison telephoned the judge again for a statement, but the judge indicated that due to the anticipated length of the appeals process the "case would be with him for a long time" and thus he was unable to give a statement.

Mr. LaCaze contends that evidence that Ms. Frank had access to a 9 mm weapon was critical evidence favoring his case and had he known of it, he could have blunted, or even overcome, the state's argument that he was the heartless killer the state portrayed him as. It would have corroborated his trial testimony that Ms. Frank told him she had a friend in the property room and that she should be getting a weapon soon.

B. Judge Marullo Failed to Disclose He was Being Investigated .

As I read it, the sinister tenor of the assertion in Mr. LaCaze's post hearing memorandum emanates from

Judge Marullo's failure to give Sgt. Harrison statements. The intimation is that the judge had done something wrong that he needed to cover up, or something illegal, subjecting him to a police investigation.

I find no evidence that warrants such a conclusion. This is a classic example of circumstances and appearances creating an inference unsupported by facts. A primary reason I am unpersuaded by Mr. LaCaze's assertion is the absence of a reason for Judge Marullo to believe he had done something wrong. He denied signing the order, no one has ever proved that he did sign it, and there has been ample opportunity for multiple interested parties to try. Indeed Ofc. Talley, the individual who prepared and obtained the order, did not contradict the judge's denial. There has been no showing of any relationship whatsoever between Ms. Frank, or Mr. LaCaze, and Judge Marullo. Thus, there is no basis upon which one might extrapolate a reason for him to favor her, or them, with a weapon. Finally, I believe that if there was any "fire" associated with the "smoke" Mr. LaCaze has conjured up, it would have been discovered by the Public Integrity Bureau investigation, even without formal statements from Judge Marullo. Simply put, it is highly improbable that Judge Marullo's reluctance to become involved in an internal NOPD investigation constituted an awareness of some illegality or wrongdoing that he had to cover up.

It is likewise improbable that Judge Marullo would have associated Mr. LaCaze with the release of the Beretta. On the first two occasions he was contacted about it, the focus was on the release of the weapon to *Ms. Frank*. Even if the release of the Beretta to Ms. Frank was pursuant to an order signed by him, it does

not follow that the investigation engendered some animus in Judge Marullo toward Mr. LaCaze.

Similarly, it requires another great logical leap to find that Judge Marullo suppressed that the PID interviewed him about the transfer of the Beretta when Mr. Turk moved to recuse him on the first day of trial. By Mr. LaCaze's own admission, that motion was premised on the judge having screamed at Mr. Turk and making him feel incompetent and inadequate. Mr. LaCaze suggests that that spontaneous recusal motion somehow morphed into an omnibus one. If that were so, it would impose an arduous, if not impossible, burden on every respondent judge in the throes of an intricate trial, murder or otherwise. He or she would have to conduct an impromptu, but exhaustive, examination of conscience to self-confess matters he or she might not associate with the pending issue. I find that absurd, especially since there is no evidence Judge Marullo was aware when Sgt. Harrison interviewed him what the prosecution or defense strategies would be in the LaCaze trial.

The statutory grounds for judicial recusation are specified in La. C. Cr. P. Art. 671.[10] For the reasons

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[10] Art. 671. Grounds for recusation of judge

A. In a criminal case a judge of any court, trial or appellate, shall be recused when he:

(1) Is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial;

(2) Is the spouse of the accused, of the party injured, of an attorney employed in the cause, or of the district attorney; or is related to the accused or the party injured, or to the spouse of the accused or party injured, within the fourth degree; or is related to an attorney

just expressed I find Subsection A (1) inapplicable to this case. No "other reason" for recusal has been advanced that would bring the case within the ambit of Subsection A (6). That leaves the question of whether Judge Marullo was a witness in the cause within the meaning of Subsection A (4) because of the assertion he signed the order transferring the Beretta to Ms. Frank.

Mr. LaCaze complains that Judge Marullo remained silent when Mr. LaCaze testified that Ms. Frank expected to get a 9 mm weapon from a friend in the property room. The reason Judge Marullo should have spoken up escapes me. First, he denied signing the order that gave it to her. Also, the state had already introduced the testimony of the two associates at Wal-Mart that, although Mr. LaCaze was with her, *Antoinette Frank* was the person seeking to purchase 9 mm bullets. See, *e.g*. Vol. 5, 122:28 – 124:32 and 128:15 – 129:12.

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employed in the cause or to the district attorney, or to the spouse of either, within the second degree;

(3) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause;

(4) Is a witness in the cause;

(5) Has performed a judicial act in the case in another court; or

(6) Would be unable, for any other reason, to conduct a fair and impartial trial.

B. In any cause in which the state, or a political subdivision thereof, or a religious body is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision, or pays taxes thereto, or is a member of the religious body is not of itself a ground for recusation.

Prior to Mr. LaCaze's testimony, the state had presented the testimony of Det. Demma, that upon execution of a search warrant at the apartment where Mr. LaCaze was living, he found a box of UMC .380 ammunition. Vol. 6, 256:16 – 26 and 267:16 – 23. Mr. Turk made the point with Det. Demma that none of the victims were shot with .380 ammunition.

The strong inference before the jury from the testimony of these witnesses was that Ms. Frank had a 9 mm weapon. Thus, Mr. LaCaze's subsequent testimony was already corroborated. All Judge Marullo could have added was that she may have gotten it pursuant to a bogus court order. Such testimony would have been immaterial and irrelevant since it did not address any issue that needed to be proved in the case nor did it have a tendency to make the existence of any fact of consequence in the case more or less probable. Furthermore, there is no indication that Judge Marullo even knew if Mr. Turk was aware of the means by which Ms. Frank acquired the weapon.

Mr. LaCaze has cited *Caperton v. A. T. Massey Coal Co.*, 129 S.Ct. 2252 (2009) for the proposition that Judge Marullo's having been interviewed by the PID presented an "extraordinary situation where the constitution requires recusal." I find no such "extraordinary situation." Regarding the Due Process Clause's guarantee of a fair and impartial tribunal, the U. S. Fifth Circuit stated in *Richardson v. Quarterman*, 537 F.3d 466, 474-475 (5th Cir. 2008):

> Under the Due Process Clause, a criminal defendant is guaranteed the right to a fair and impartial tribunal. Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793 1797, 138 L.Ed.2d 97 (1997). The Due Process Clause

"establishes a constitutional floor, not a uniform standard." Id. This floor requires a fair trial, "before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Id. (citation omitted).

However, "bias by an adjudicator is not lightly established." Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047, 1052 (5th Cir.1997). Courts ordinarily "presume that public officials have properly discharged their official duties." Bracy v. Gramley, 117 S.Ct. at 1799 (internal quotation marks and citations omitted). General allegations of bias or prejudice are insufficient to establish a constitutional violation. See Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580 1585, 89 L.Ed.2d 823 (1986) . . . . The Supreme Court has stated that "most matters relating to judicial disqualification [do] not rise to a constitutional level." Id. at 1584 (quoting FTC v. Cement Inst., 333 U.S. 683, 68 S.Ct. 793, 804, 92 L.Ed. 1010 (1948)). So even if a judge is disqualified under state or federal law, the disqualification is not always required by the Due Process Clause. See id. at 1585.

In general, the Supreme Court has recognized "presumptive bias" as the one type of judicial bias other than actual bias that requires recusal under the Due Process Clause. Buntion, 524 F.3d at 672. Presumptive bias occurs when a judge may not actually be biased, but has the appearance of bias such that "the probability of actual bias . . . is too high to be constitutionally tolerable." Id.

> (quoting Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 1464, 43 L.Ed.2d 712 (1975)). The Supreme Court has only found that a judge's failure to recuse constitutes presumptive bias in three situations: (1) when the judge "has a direct personal, substantial, and pecuniary interest in the outcome of the case," (2) when he "has been the target of personal abuse or criticism from the party before him," and (3) when he "has the dual role of investigating and adjudicating disputes and complaints." Buntion, 524 F.3d at 672 (quoting Bigby v. Dretke, 402 F.3d 551, 559 (5th Cir.2005)); see also Crater v. Galaza, 491 F.3d 1119, 1131 (9th Cir.2007) (coming to the same conclusion).

The U. S. Supreme Court handed down the *Caperton* decision about eleven months after the Fifth Circuit adjudicated *Richardson, supra*. *Caperton* is but an application of the rule that a judge must recuse himself when he has a direct personal, substantial or pecuniary interest in the outcome of a case.[11] There has been no showing that Judge Marullo had any pecuniary interest in the outcome of the case, nor that

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[11] A jury found the coal company liable and awarded Caperton $50 million in damages. Knowing the State Supreme Court of Appeals would consider the appeal, the coal company's chairman and principal officer supported a challenger rather than the incumbent justice seeking reelection. The chairman's $3 million in contributions exceeded the total amount spent by all of the challenger's supporters, including his own committee. The challenger won. Before the coal company filed its appeal, Caperton moved to disqualify the newly elected justice under, inter alia, the Due Process Clause because of the company chairman's financial involvement in the campaign. The motion was denied and the court reversed the $50 million verdict.

Mr. LaCaze had abused or criticized him. The record is quite clear that Judge Marullo did nothing that would place him in the dual role of investigator and adjudicator. It must be remembered that the target of the PID complaint was Ofc. Talley and his role in obtaining weapons for Ms. Frank. There is nothing to implicate Mr. LaCaze in that investigation. Once the case was assigned to him Judge Marullo exhibited appropriate judicial conduct by assiduously avoiding becoming entangled in the gun transfer investigation.

III. STATE SUPPRESSED FAVORABLE MATERIAL EVIDENCE.

A. Suppression of Favorable Evidence.

1. Chau Vu's Statement that She Did Not See Antoinette Frank's Accomplice .

Mr. LaCaze contends the state withheld exculpatory material, *i.e.* the statement Chau Vu gave to police the morning of the offense. He claims the statement contradicted her trial testimony and in-court identification of him as a perpetrator, and thus could have been used to impeach her trial testimony.

The gist of Ms. Vu's trial testimony was to the effect that when she, her brother and Vui Vu were in the cooler she saw Antoinette Frank and her "nephew" (Rogers LaCaze). However, in the statement she gave to Det. Louis Berard shortly after 6:30 AM March 4, 1995, Ex. D – 12, p. 5 of 13, Ms. Vu only mentioned seeing Ms. Frank while she was hiding in the cooler. The state contends that Ms. Vu refers to Mr. LaCaze several times through her use of the pronoun "they." State's Response to Petitioner's Application for Post-conviction Relief (Claims I – III), filed October 31, 2012, p. 20.

For example, on pp. 4-5 of Ex. D-12 Ms. Vu says:

> So . . . that's why . . . when uh, when I walk out . . . the uh . . . to, to come to see Ronnie, like to walk out . . . to the door, and I saw . . . Antoinette was pushing me. She say, Chau, I want to talk to you . . . come . . . she, she like push . . ., pushing me . . . go to the kitchen. Um . . . she . . . at that moment, I heard boom, boom, boom. I say . . . I think there's something wrong, so I say . . . hey . . . I told my . . . my . . . my um . . . the helper . . . and, and my . . . my older brother. They say . . . let . . . let's go, let's go, hurry up. And . . . at that moment, Antoinette went back in the front. And I heard continuous boom, boom, boom. And I, I went into the . . . hiding in the cooler. And . . . I saw . . . I, I looked out . . . because they have a glass . . . door cooler, a walk-in cooler, and I . . . I saw Antoinette go . . . jus' go back and forth, back and forth in the . . . my, my restaurant . . . she . . . she was kinda (inaudible) . . . she, she. . .
>
> Q: She was . . . doin' what?
>
> A: . . . (Inaudible) . . . she was, she was (inaudible) . . . that's why she . . . she came to the, the phone that we had put on the bar. We have phone right there. She did something (inaudible) I think she took the phone, because when I found out the phone gone . . . and, and . . . and I have uh, a hand phone. I . . . I would put it at . . . behind the counter in the bar. And I saw she was in there to. I saw because when . . . after . . . after that . . . and . . . I wait for a little while . . . and they still . . . boom, boom . . . I heard there was a

> lot of shooting out there. And . . . Antoinette, Antoinette was . . . yeah . . . and I, I . . . I stand up in the cooler to see if Antoinette's car is still outside. They stayed out there for a . . . a . . . about fifteen or twenty minutes . . . .
> (Emphasis added.)

I am not persuaded the state's reading of Ms. Vu's statement is entirely accurate. Admittedly, several factors must be considered. When she gave the statement she was surely still experiencing the physical and emotional trauma associated with the murder of two of her siblings and Ofc. Williams. No doubt, too, she was acutely aware that she had nearly suffered the identical fate. Also, although Ms. Vu could read and write English, and was attending SUNO part-time, she had graduated from high school in Vietnam and had only been in this country five years. Near the end of her statement, Ex. D – 12, there are several instances where Ofc. Tuoc Tran needed to translate Det. Berard's questions for her.

I have no doubt that Ms. Vu's use of the first and fourth "they" in the above quotation is as the nominative plural of the pronouns he or she. It is clear that in the first instance she is referring to her brother, Quoc, and Ms. Vui Vu; in the fourth she is referring to the perpetrators.

However, the second time she uses "they" it is obvious that she uses it incorrectly. In this context "they" can only refer to the inanimate single door of the cooler. It is her irregular use of "they" here that leads me to question the state's reliance on "I wait for a little while . . . and they still . . . boom . . . boom . . ." as authority for its contention she is referring to Ms. Frank and Mr. LaCaze shooting people. I think she has again misused the word, especially since just a

few lines earlier[12] she recounted the first gunshots with, "I heard boom, boom, boom." Then, after Ms. Frank exited the kitchen, Ms. Vu heard "continuous boom, boom, boom."[13] Considering she said "they *still*" in connection with the booms, I find it more likely she is referring to hearing more gunfire as opposed to who the shooters were. In context, I think the correct interpretation of her broken English for the third time she used "they" is "*there was* still . . . boom, boom, . . ."

Unquestionably someone besides Ms. Frank was involved in the commission of these homicides because Ms. Vu heard the first shots as Ms. Frank was accosting her in the kitchen. Later in the statement Ms. Vu did tell Det. Berard the "nephew" returned with Ms. Frank immediately prior to the shooting and that they were both in the restaurant during the shooting. Ex. D – 12, p. 8. Mr. LaCaze denigrates this passage contending that she had contradicted herself earlier and had to be coached with leading questions to give that answer. Ex. D – 12, p. 7. I am not impressed with this argument. A fair reading of pages 7-8 reveals she and the detective were talking about different occasions. When she said on page 7 that she saw the black male leave, she was referring to the *first* time he entered the establishment. I base this finding on the preceding half-page or so of her statement dealing with her description of Mr. LaCaze's clothing and his height, which she observed when she spoke with him upon being introduced. As she was telling Det. Berard that she turned the outside light off when they left on this occasion, he interrupted her by asking

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[12] At the bottom of page 4.

[13] On the top of page 5.

if she saw him leave. The matter is finally clarified on the first two lines of page 8.

Mr. LaCaze asserts on page 35 of his Post Hearing Memo that the detective suggested two more times that the black male returned with Ms. Frank before Ms. Vu "tentatively acquiesced." I do not read it that way. Admittedly the detective asked, near the top of p. 8 of Ex. D –12, "but he was in the restaurant at the time the shooting started, wasn't he?" The transcriptionist inserted an ellipse for Chau's response. Mr. LaCaze construes this as silence. but I think the detective did not give her enough time to answer and interrupted her by asking his next questions. Those questions pertained to whether Ms. Frank identified her companion by name. After Ms. Vu responded that Ms. Frank did not name him, Det. Berard returned to whether Mr. LaCaze was present during the shootings. I find Ms. Vu's responses were unequivocal. Both Ms. Frank and Mr. LaCaze were there.

Finally, Mr. LaCaze cites other language on page 8 where Ms. Vu is quoted as saying, "So . . . so that I can't . . . see him . . ." for the proposition that Ms. Vu did not see Mr. LaCaze at the restaurant when the shooting took place. That is not a fair reading of what she said. That statement was made in answer to a question that spans several lines because of interruptions by Ms. Vu. It is clear to me that the words "So . . . so that I can't . . . see him . . ." is Ms. Vu's explanation for why Ms. Frank forced her into the kitchen. They are not a declaration that she did not, or was unable to, see him.

Recently the United States Supreme Court addressed a Brady issue in *Smith v. Cain*, 132 S.Ct. 627, 630 (2012). The Court summarized the current state of the law as follows:

> Under Brady, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment. [Citation omitted.] . . . We have explained that "evidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." [Citation omitted.] A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," only that the likelihood of a different result is great enough to "undermine[] confidence in the outcome of the trial." [Citation omitted.]
>
> We have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. [Citation omitted.] . . .
>
> *Id*., 630.

Applying these principles to the facts surrounding Ms. Vu's statement in Ex. D – 12, I conclude the statement did not contradict her trial testimony. Admittedly Ms. Vu did not make the specific statement in Ex. D – 12 that she made at trial regarding seeing Mr. LaCaze walking back and forth while she was in the cooler, but she clearly places him in the restaurant at the time the murders occurred. I do not find this to be exculpatory, especially in light of the identifications made by Quoc Vu and John Ross.

2. Vui Vu Failed to Identify Mr. LaCaze in a Photo Lineup and that "from Her Vantage Point with Chau Vu" Neither Could See the Second Perpetrator.

Mr. LaCaze also contends the state withheld evidence favorable to him in the nature of information it had from Vui Vu, the kitchen helper at the restaurant. Vui Vu testified at the post-conviction hearing. Mr. LaCaze relies on her June 18, 2013 testimony at pages 77 – 78 of the transcript to the effect that all three survivors sat together in the cooler and from their location she could not see the face of the male perpetrator, only "shadows" (silhouettes?) of a male and female. She was able to identify the female as the police officer who worked details at the restaurant but, as emphasized on page 37 of Mr. LaCaze's post hearing memorandum, she "could not describe the male at all." She was unable to identify anyone in a photo lineup at police headquarters the morning of the murders. Mr. LaCaze claims this information would have been critical to rebut the state's contention that the only reason Chau Vu could not make a photo line-up ID was because of her hysteria immediately following the murders and to discredit Chau and Quoc's testimony that they could see Mr. LaCaze from inside the cooler.

The record contains the transcribed statements Chau and Quoc Vu gave police immediately following the murders. See Exs. D-12 and D-32, respectively. It does not contain a transcript of the one that Vui gave at about the same time, although Sgt. Edward Rantz's supplemental report, Ex. D – 34, states on page 13 that she gave a recorded statement. Upon learning at the crime scene that one of the witnesses spoke no English at all (Vui Vu), Sgt. Rantz requested the presence of Ofc. Tuac Tran as a translator. Ex. D – 34, p. 17. All

three Vus were brought to the homicide office for in-depth interviews.

I recognize that the 2013 hearing was the first time Vui Vu testified about her experiences in this matter. For reasons that should be obvious, I give more weight to the statements and evidence generated closer to the time of the event. In that context, I do not find the state's nondisclosure of the information it had from Vui to be material exculpatory evidence.

Det. LeBlanc interviewed Vui Vu with Ofc. Tran translating. Since I do not have a verbatim transcript of her statement, I reproduce Sgt. Rantz's summary from page 24 of Ex. D – 34:

> Vui Vu stated she was in the back kitchen area when she heard several gunshots. Chau Vu came running into the kitchen and threw Vui Vu into the glass-fronted, walk-in cooler, which is located in the kitchen. Vui Vu was crawling out of her hiding place when she spotted a man from the back. She then crawled back into the cooler. The [*sic*] stayed there for a few minutes then crawled back again and saw Antoinette Frank standing by a body. Vui Vu told Chau Vu that the policewoman was out there but Chau Vu told her not to go out yet because Frank might be involved. Vui Vu then stayed in the cooler until she heard the arrival of police officers in the restaurant.
>
> Vui Vu described the man she saw as a small-built, black man, not very tall. Vui Vu could not add anything further because she was in the kitchen the entire time and then she hid in the cooler.

As related on page 24 of Ex. D – 34, Vui Vu confirms practically all of the information Chau Vu gave in her statement to Det. Berard, Ex. D – 12. There is, however, a major discrepancy between what she told the police the morning of the murders and her 2013 hearing testimony. At the hearing she testified she could not describe the man at all, but in Ex. D-34 she gave the police a rudimentary description. I attribute this inconsistency to the dulling effect the passage of nearly two decades has on one's memory.

I cannot reconcile Vui Vu's assertion that she could recognize the silhouette of Ms. Frank from her vantage with her opinion that Chau and Quoc could not see or recognize Mr. LaCaze, if in fact they were situated in the same place. For reasons that will become clear momentarily, however, I do not think Chau and Quoc were sitting statically adjacent to Vui during their ordeal in the cooler. It important to note that Vui Vu's observations were made as she 'crawling out of her hiding place." *Id*. I have taken into account that Vui had seen Ms. Frank on several prior occasions and that she had never seen Mr. LaCaze on his earlier visits that evening due to her kitchen duties. However, nowhere in their statements or testimony do the Vu siblings state their observations were made while attempting to exit the cooler. Rather they both relate seeing the perpetrators as they (Chau and Quoc) were moving back and forth within the cooler, bobbing up and down to get glimpses of them. Vol. 6, 380:13—20; 383:24 – 384:4; *Id.* 22—29; 398:7—12; *Id*., 21—24; 412:27; 414:12—16; *Id*., 23—25; 423:4—7; 428:31—32. The point is that the evidence suggests Vui Vu stayed in one place while she was in the cooler, except for when she tried to crawl out. On the other hand Chau and Quoc did not remain static but changed their vantage points during the ordeal.

Also of note is that Chau and Quoc had seen Mr. LaCaze earlier that evening when he entered the restaurant with Ms. Frank to eat. Additionally, it must be noted that Vui only saw the silhouetted man from the back; Chau and Quoc saw his face. I find it significant, too, that Vui's description, skimpy as it was, comported rather well with Chau and Quoc's description[14]. Additionally, since she had not seen his face I find it ludicrous to expect her to be able to identify him. This situation is quite different from one in which the witness sees the perpetrator's face during the *res gestae* but subsequently cannot pick out his photo in a lineup. Under these circumstances I do not consider her failure to make an ID an impeachment of Chau and Quoc Vu's identification.

Mr. LaCaze makes much over the state's arguments to the jury justifying Chau Vu's inability to pick out his photo in a photo array. Of course, the arguments of the attorneys are not evidence to be considered by the jury. In her testimony, which is evidence that can be considered by the panel, Chau Vu explained that after giving her statement she was shown some photographs but she was too upset to look at them. She did not look carefully because she could not believe someone "could do that" to her siblings and Ofc. Williams. Vol. 6, 390: 12-19.

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[14] In Ex. D – 12, pp. 6 – 7, Chau Vu described the "nephew" as a black male, less than twenty, about her height (5' 2" or 5' 3"). She did see his face and noted gold teeth. In his statement, Ex. D – 32, pp. 2 and 6, Quoc Vu identified the person with Ms. Frank as a black male in his teens. Ex. D—30 and Ex. 45 to the Supplemental Petition are photo lineups containing a picture of Rogers LaCaze. The accompanying information thereon shows his birth date as August 13, 1976, making him 18 years old on March 4, 1995; that he was 5' 3" tall and weighed 135 pounds.

3. Quoc Vu's Statement that He Saw Antoinette Frank, Not Rogers LaCaze Shooting in the Kitchen.

Mr. LaCaze's next allegation is that the state suppressed a favorable statement that Quoc Vu made in his police interview, Ex. D – 32. He relies on two lines on page five thereof:

> Q. Did you see the persons who was doing the shootin'?
>
> A. Yes, uh . . . . I saw the partial side of her

He asserts this statement conflicts with Mr. Vu's trial testimony during which he never said anything about seeing Ms. Frank with a gun. Short shrift can be made of this contention.

I do not find this statement, taken out of context, constituted material exculpatory evidence. Earlier in his statement, page two, Quoc Vu was asked if he saw the person or persons doing the shooting. He responded: "Yes. It was . . . uh . . . black male . . . and . . . Miss Antoinette was there with him." Again, on page five, he was asked if he had seen Ms. Frank after she had run to the front of the restaurant, to which he responded that he did see her leaving. This was followed up with the same inquiry as to the male perpetrator:

> Q. The uh, black male who had done the shooting, did you see him anymore after that?
>
> A. Um . . . No.
>
> Q. At that time?
>
> A. No. He jus' ran real quick . . . out after he shot her.

Finally, as I noted earlier, someone besides Ms. Frank was obviously involved in these killings since the first shots rang out while Ms. Frank was with Chau and Quoc Vu in the kitchen area. They clearly and unmistakably identify that person as Mr. LaCaze. I find it beyond coincidental that a portion of Chau and Quoc Vu's account was confirmed by Antoinette Frank. After she had been told she was a suspect, transported to headquarters and advised of her Miranda rights multiple times, Ms. Frank related to Sgt. Rantz, Det. Demma and Lt. Marino that while she was speaking with Chau Vu in the kitchen she heard six or seven gunshots in the bar area. When she turned to face the bar she saw Ofc. Williams fall to the floor. As she went to the bar she passed Mr. LaCaze as he entered the kitchen. Ex. D – 34, pp. 28 – 29. In a supplemental statement, volunteered later that morning, Ms. Frank changed her story but still placed Mr. LaCaze in the kitchen area when, she claimed, he forced her to shoot two of the victims. *Id.*, p. 32. See also Ex. 43 to the Supplemental Petition, pp. 11 – 12 and 25 – 26. I find Ms. Frank's corroboration of Chau and Quoc Vu's placement of Mr. LaCaze in the kitchen especially compelling since the record is devoid of any evidence that Ms. Frank was aware of the contents of the statements the Vus gave police.

4. Unduly Suggestive Interview and Photo Lineup with John Ross.

John Ross was the attendant on duty in the early morning of March 4, 1995 at a Chevron gas station on Terry Parkway in Jefferson Parish. This establishment is near Michael LaCaze's apartment, where police first located Rogers LaCaze following the murders. About three weeks following Ofc. Williams' homicide, his widow reported his Chevron credit card

had been used to purchase gasoline on Terry Parkway. A follow-up investigation led Det. Demma to conduct a photo lineup on March 28, 1995 and a recorded interview on March 30, 1995 with Mr. Ross.

Mr. LaCaze's first complaint is that Mr. Ross' identification is tainted because he had seen pictures of the suspects in media coverage. This claim seems to be based upon a misreading of Mr. Ross' statement. On page 6 of Ex. D--13 he acknowledges that he saw part of the officer's funeral on television. He categorically states he did not see the male suspect who had been arrested with Ms. Frank. He only saw her photograph in the newspaper, although he was aware she had an accomplice. On the following page, 7 of Ex. D--13, he admits to a conversation with his brother-in-law near the time of the murders in which his brother-in-law suggested that the male perpetrator looked like someone he had seen while at the gas station during his lunch break from the Crescent City Connection. At no point in his statement did Mr. Ross indicate he had seen a photo of Mr. LaCaze prior to being shown the lineup. It is not possible to discern from Ex. D--13 how detailed or specific Mr. Ross' conversation with his brother-in-law focused on Mr. LaCaze specifically, or simply a customer he had seen at the station.

I do not find the state guilty of misconduct for failing to provide the statement to the defense as I find nothing exculpatory in it.

However, even if Mr. Ross did see Mr. LaCaze's photo in media coverage, it affords him no benefit. He cannot show that that pretrial event was tainted by an unconstitutionally suggestive procedure because any media coverage he saw was not arranged by the police. See: *Perry v. New Hampshire*, 132 S.Ct. 716 (2012); *State v. Gilmore*, 2011 – 1606 (La. App. 4 Cir.

2/8/13);156 So.3d 46, *Writ Den*. 119 So.3d 600 and *State v. Henry*, 2013 – 0059 (La. App. 4 Cir. 8/6/14); 147 So.3d 1143.

More troublesome is Mr. LaCaze's next contention, that the photo lineup shown to Mr. Ross was unduly suggestive because each photograph bore the person's name and other identifying information.

The law in this area was succinctly recapped in *State v. Henry, supra*:

> The Fifth and Fourteenth Amendments to the United States Constitution protect defendants from unreliable evidence in criminal proceedings through the provision of rights and resources that function to persuade juries that such evidence is untrustworthy. The defendant bears the burden of proof in his motion to suppress an outof-court identification. La. Code Crim. Proc. art. 703; *State v. Thibodeaux,* 98-1673, p. 20 (La. 9/8/99), 750 So.2d 916, 932. To prevail on such a motion, a defendant must show that the identification procedure in question was suggestive, *Manson v. Brathwaite,* 432 U.S. 98, 106 (1977), and that the procedure created a substantial likelihood of misidentification such that defendant was denied due process of law. *Neil v. Biggers,* 409 U.S. 188, 196 (1972); *State v. Prudholm,* 446 So.2d 729, 738 (La. 1984). To prove suggestiveness, a defendant must show that the police conduct in organizing and administering the identification was improper. *Perry v. New Hampshire,* ___ U.S. ___, 132 S. Ct. 716, 724 (2012). An identification is suggestive if the witness'

> attention is "unduly focused" on the defendant. *State v. Brown,* 09-0884, p. 5 (La. App. 4 Cir. 3/31/10), 36 So.3d 974, 979.
>
> We review a trial court's determination on the admissibility of an out-of-court identification and its subsequent denial of a motion to suppress for abuse of discretion. *Brown,* 09-0884 at p. 3, 36 So.3d at 978. This review is not limited in scope to the evidence introduced at the hearing on the motion to suppress; rather, consideration extends to all pertinent evidence adduced at trial. *State v. Chopin,* 372 So.2d 1222, 1224 n.2 (La. 1979).

A review of Ex. D—30[15], the photo array shown Mr. Ross, reveals all photographs had the same information on them, in the same form and appearance. There was nothing to draw Mr. Ross' attention specifically to Mr. LaCaze's identifying information. Also, it must be remembered that the photo ID procedure occurred two days before the police took Mr. Ross' statement. Yet, on page 3 of Ex. D--13, Mr. Ross related that although he had previously viewed photographs and that he had made an identification, *he did not know that person's name*. He based his identification of Mr. LaCaze on the fact that he was a regular customer at the station, usually on weekends.

I am unable to conclude that the procedure used here created a substantial likelihood of misidentification in view of the fact that Mr. Ross was well

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[15] This exhibit contains color photocopies of photographs on letter sized (8.5" x 11") paper. The record does not clearly reveal if the photos shown Mr. Ross were this size, or smaller. In my courtroom experience as a trial judge I never saw a photo array with photographs this large.

acquainted with the appearance of his frequent patron. He was aware of and able to describe Michael LaCaze's automobile that Rogers used. I find it very significant, too, that the information Michael LaCaze gave to police on March 25, 1995 (Ex. 55 to the Supplemental Petition) was confirmed by Mr. Ross in his statement, several days after Michael LaCaze made his statement.[16] Finally, and I think most importantly, is the fact that when the credit card was used Mr. Ross spoke with the user whom he recognized as his regular customer. He noticed a remarkable departure from the routine, payment by credit card instead of cash. It was such a noteworthy matter that Mr. Ross attempted to engage Mr. LaCaze in conversation about it over the intercom system.

Considering all of these factors, I do not find the lineup unduly suggestive.

5. Chau and Quoc Vu Said that Rogers LaCaze Was Carrying a Cell Phone at the Restaurant Earlier That Night.

Mr. LaCaze claims the state wrongfully withheld the statements of Chau and Quoc Vu in which they each said they saw Mr. LaCaze with a cell phone. Exs. D--12, p. 11 and D--32, p. 7. He claims this information would have buttressed his theory at trial that he could not have been at the restaurant because phone company records show he made four phone calls from his phone to Ms. Frank's phone between 1:26 AM and 1:49 AM on March 4, 1995 when, he contends,

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[16] I recognize Michael LaCaze subsequently repudiated his statement, claiming he was coerced into parroting what the police told him to say. His repudiation rings hollow, though, considering the confirmation of many of the details of that statement by the independent witness Mr. Ross.

the murders were being committed. In his view this evidence would have controverted the state's theory that Michael LaCaze, defendant's brother, was in possession of the defendant's telephone and made the subject calls.[17]

This contention fails for several reasons:

First, Chau Vu testified before the jury that the "nephew" had a cell phone with him the night of the crimes. Vol. 6, 375:1 – 2. Ms. Braddy, Mr. LaCaze's girlfriend with whom he was living on March 3 – 4, 1995 confirmed that Ms. Frank had purchased a cell phone and beeper for Mr. LaCaze. Vol. 7, 475:3 – 8; 562:10-12. She also testified that Rogers called her about 2:00 AM March 4, 1995. 471:23 – 24. The Bell South Mobility phone records, Ex. 12 to the Supplemental Petition, reveal that at 2:02 AM on that date the phone Ms. Frank had provided Mr. LaCaze called Ms. Braddy's apartment.[18] Mr. LaCaze himself

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[17] The reader may find it helpful to refer to Appendix II, a timeline of the telephone calls, taken from Ex. D – 22 and Ex. 12 to the Supplemental Petition, as well as other significant events related in the trial testimony and other evidence in this proceeding.

[18] On page 27 of its Opposition to the Supplemental Petition for Post-Conviction Relief, which it incorporated by reference into its Post Hearing Memorandum, page 30, the state asserts that its witness, Bridget Drake, a representative of the cell phone service provider "identified a call from Rogers LaCaze's cell phone to his brother's pager at 2:02 AM on March 4." This is a gross overstatement of her testimony. Ms. Drake only testified that Mr. LaCaze's cell phone was employed to call telephone number 504 243 1956. Vol.5, 200:31 – 32 and Ex. 55, p. 2 to the Supplemental Petition. Ms. Drake never identified *whose* number was called. In fact, on cross-examination, she admitted she did not have access to South Central Bell customers' telephone numbers. Vol. 5, 203:29 –204:3. Also, it ignores Michael LaCaze's testimony that his pager number was 504 844 4465. Vol. 7, 509:29 – 32. In fact,

testified that Ms. Frank bought him a phone and beeper, Vol. 7, 562:22 – 25, and that he had a portable phone in the early morning hours of March 4, 1995 that he used. *Id.*, 583:31 – 584:3. Furthermore, his mother, Ms. Chaney, testified that upon the appearance of the police at her home in the early morning hours of March 4, 1995 she beeped Rogers and he called her back. Vol. 7, 484:18 – 24. The telephone company records reveal that Mr. LaCaze called his mother twice from the subject cell phone at 3:40 AM and 3:47 AM. Ex. 12 to the Supplemental Petition.

I find the jury had before it sufficient evidence, which if believed, would have permitted it to find that Rogers LaCaze was in possession of a cellular telephone from which he could have called Ms. Frank's telephone and thereby have provided himself with an exculpating alibi. Mr. LaCaze has failed to carry his burden of proof on his claim that the alleged withholding of the statements deprived him of Brady material.

The second reason I believe this claim fails is evidentiary in nature. Since Ms. Vu offered the evidence that Mr. LaCaze possessed a cell phone, I see no way that the defense could have used her police

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though, the record reveals that the telephone number 504 243 1956 was the number at the apartment of Renee Braddy, 6801 Cindy Pl., Apt. 211 from which Ms. Frank picked up Mr. LaCaze to go to the Kim Anh Restaurant. Ex. D – 34, p. 14; Tr. Vol. 7, 509:10 – 11; *Id*, 471:21 – 24. Likewise, the jurors heard the state's cross examination of Michael LaCaze which went through the statement he gave police March 25, 1995. Ex. 55 to the Supplemental Petition and Vol. 7, 506:15 – 507:6. In the statement he told officers that Rogers *beeped* him about 2:00 AM March 4, 2014 from Ms. Braddy's apartment, not necessarily from the cell phone.

statement. It did not contradict her trial testimony, so it was not impeachment material as a prior inconsistent statement. In order for it to have been used as a prior consistent statement, under C. E. art. 801 (D)(1)(b), the defendant would have had to show the statement was being offered to rebut an express or implied charge against the witness of recent fabrication, or of improper influence or motive. There is no evidence to suggest that such a claim could have legitimately been made at trial. Finally, in light of the abundance of evidence that Mr. LaCaze possessed a phone, it is likely that an attempt to offer Quoc Vu's statement regarding the LaCaze cell phone would have been objected to as cumulative.

Another reason I discount Mr. LaCaze's claim that the Vu statements would have buttressed his alibi is because, even though the Vus told authorities Mr. LaCaze had a cell phone the night of the murders, it is by no means certain that it was the one Ms. Frank provided for him.[19] Mr. LaCaze has based this argument on the assumption that he had only the cell phone provided him by Ms. Frank. Nothing in the record converts that assumption into a fact.

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[19] However, I do not accept the state's contention that the phone they saw Mr. LaCaze with was Chau Vu's. State's Memorandum in Opposition to Supplemental Petition for Post-Conviction Relief, p. 27, incorporated by reference into its Post Hearing Memorandum, p. 30. Chau Vu's police statement, Ex. D – 12, p. 5 of 13 relates that *Ms. Frank*, not Mr. LaCaze, may have taken the phone from the bar in the restaurant during the perpetration of the homicides. As explained above Ms. Vu observed the telephone – exactly like hers – when Mr. LaCaze and Ms. Frank were leaving the restaurant on the *second* visit. She did not see them leave after the last visit when the shootings occurred. Ex. D—12, p. 8 of 13. See also Vol. 6, 375:1 – 4, Ex. D – 32, p. 7.

There is evidence that prior to the night of the murders Michael LaCaze used the cell phone Ms. Frank provided for his brother. Ms. Gracia Duplessis testified that not only did she see Michael LaCaze with a cell phone sometime in 1994, but she had spoken with him on February 28, 1995 at 6:13 PM when he called her from one. Vol. 5, 209:26—30; 213:8 – 11; 213:16 – 18. That call was placed from the telephone Ms. Frank had given his brother, Rogers. 191:26 – 32 and Vol. 7, 585:31 – 586:1; Ex. 12 to the Supplemental Petition. (This call is italicized on Appendix II.)

The state also presented Ms. Perry, Michael's across the street neighbor at the apartment complex in Terrytown. She and Michael were just friends who talked on the telephone. On occasion Michael would come to her apartment to use the telephone.[20] Vol 7, 610:17 – 18. She was acquainted with Rogers through Michael but testified he had never called her on the telephone. *Id.*, 609:26—610:16 and 612:26—27. She identified her telephone number and pointed to instances on Rogers' phone log where it appeared.

The first call Ms. Perry referred to was placed from Rogers' cell phone at half-past midnight of March 4th. Ex. 12 to the Supplemental Petition. Someone must have been home to take the call, or the caller left a lengthy message on an answering machine, if there was one, because this call lasted three minutes.[21] The

[20] Michael LaCaze's telephone in his Terrytown apartment was not connected until March 3, 1995, the eve of the murders. Vol. 7, 540:23 – 25; 614:19 – 30

[21] Of the sixty-three calls itemized on the aforesaid Ex. 12 to the Supplemental Petition, only five lasted longer than three minutes. One of those was the call Mr. LaCaze made to his mother upon her page to tell him the police wanted to speak with him. Another was placed mid-afternoon on March 4th, long after

second call to the Perry residence was a one minute call made only twelve minutes after the first one. These calls were placed twenty-one and nine minutes, respectively, before the seminal 12:51 AM call to the restaurant for food. (Mr. LaCaze's phone was quite active in this period. Before calling Ms. Perry's phone, it placed calls at 12:18 AM and 12:26 AM to unidentified numbers.)

Another intriguing call from Mr. LaCaze's cell phone occurred in the interim between the calls to the Perry residence. It was registered five minutes after the first Perry call, at 12:35 AM March 4, 1995 and was to Ms. Frank's cell phone. (This call is italicized on Appendix II.) The record is uncontroverted that Ms. Frank retrieved Mr. LaCaze from his apartment about 11:20 p.m. March 3rd. It is devoid of any hint that they were apart between then and when they returned to eat at the restaurant, following the 12:51 AM call to ask Chau to prepare food for them. This gives rise to the most pregnant of questions: Why would Mr. LaCaze use a cell phone to speak with the person sitting next to him as she drove the car in which he was a passenger? The most reasonable explanation is that he was not in possession of the cell phone Ms. Frank had provided him with. Either the person who did have it was trying to return the calls of 12:17 AM and 12:21 AM, or he knew Rogers was with Ms. Frank and wanted to speak with him so he called her number.

Interestingly, no inquiry was made by either the state or the defense about two occasions Ms. Perry's

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Rogers was jailed. Mr. LaCaze's and Ms. Frank's phones were engaged with each other at 12:49 a.m. March 3rd. The record does not identify to whom the other calls were made.

telephone number appeared on *Ms. Frank's* telephone log, Ex. D—22. These calls (italicized on Attachment II) were made earlier than the ones from Mr. LaCaze's phone, March 2nd at 8:04 PM. (three minutes) and four hours later, at 12:04 AM March 3rd (one minute), about twenty-four hours before the homicides *sub judice*. There is no evidence that Michael LaCaze ever had access to Ms. Frank's phone, nor is there any evidence whatsoever to connect Ms. Frank with Ms. Perry.

These calls could constitute additional circumstantial evidence Rogers was without his cell phone the night of the murders. The prosecution could have made a fair and reasonable argument from the existence of these calls that Rogers was with Ms. Frank and placed them from her phone looking for his brother. The state could have downplayed the possibility that Ms. Frank placed them looking for Rogers, since they had been together earlier that day during her shift looking for a job for Rogers. The record does not inform at what time the pair separated.[22]

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[22] Mr. LaCaze confirmed this, but in an apparent memory lapse said the date was March 3rd. The testimony of officers Crier and Watson establish the date as March 2, 1995. Vol. 5, 106:9 – 20; 110:29 – 111:22, respectively. Also, Mr. LaCaze testified that when he and Ms. Frank went to the accident scene at Chef Highway and Downman Road they were coming from the Days Inn on Read Boulevard where they had been "checking on a job". Vol. 7, 564:28 – 565:1. Mr. Morgani, likewise testified that on March 2nd Ms. Frank brought Mr. LaCaze to his body shop in search of a job for him. Vol. 5, 116:27 – 117:4 and Ex. D – 34, p. 36. In Sgt. Rantz's supplemental report, Ex. D—34, p. 37, Mr. Morgani said Ms. Frank and Mr. LaCaze visited him about 5:00 p.m. on March 2nd.

Ms. Frank's phone called Mr. LaCaze's phone at 12:16 AM,[23] on the morning of the murders. (That was just thirty-five minutes before Ms. Frank called the restaurant for food.) Perhaps there was no answer, because just five minutes later the call was placed again, at 12:21 AM. Ex. D – 22. Again, one must ask why she would use the telephone to speak with the person next to her in her car.

I find these phone calls to be quite compelling evidence that Rogers LaCaze did not have his cell phone with him and that he was using Ms. Frank's phone to call Michael who did have Rogers' telephone.

Ms. Duplessis also testified that she paid for the telephone at her mother's residence. That number was 504 – 943 – 6571. Her daughter Daphne, Michael LaCaze's girlfriend and mother of his child, lived there. The telephone records, Ex. 12 to the Supplemental Petition show a one minute call placed from Rogers' cell phone to that number at 12:43 a.m. March 4th.

A likely explanation is that Michael possessed the phone and that he was contacting Daphne to arrange a rendezvous. Such a finding would have been consistent with Michael's police statement, Ex. 55 to the Supplemental Petition, pp. 2 and 5 of 8; Vol. 7, 508:31 – 509:12, in which he stated he left his Terrytown apartment at 3:00 AM March 4, 1995 to pick up his girlfriend from her grandmother's house. He and his girlfriend were in the Terrytown apartment about 4:00 AM when the homicide detectives took Rogers to headquarters. *Id*.

[23] The records for Mr. LaCaze's phone show this call was received at 12:17 a.m.

In summary, I find it highly unlikely Mr. LaCaze was calling Ms. Frank during the commission of these horrific crimes. By reference to Appendix II, it is clear that there is no telephone activity between these codefendants between the seminal 12:51 AM call and Mr. LaCaze's call to Ms. Frank at 1:26 AM. It is reasonable to conclude that that is when these ghastly crimes occur. I am reinforced in this finding by the fact that after the 12:51 AM call Ms. Frank and Mr. LaCaze had to return to the restaurant, eat a bit, use the restroom, pack up, converse the front door among themselves, then with Chau, leave and then return for the final, deadly, visit. The first 911 report of the crime, at 1:48 AM, occurred before Mr. LaCaze could make his final call at 1:49 AM. That happened after the survivors waited for a while to be sure the perpetrators were gone and then they surveyed scene. After that, Chau had to struggle to get a call out on her cell phone because the battery had been tampered with. Quoc's 911 call at 1:50 AM followed his exit from the restaurant through the rear door and then a short run to his friend's house on Pressburg Street.

Considering the first responders arrived at 1:53 AM and Ms. Frank, unquestionably a perpetrator, was already back on the scene after dropping her accomplice off somewhere, going to the Seventh District police station, changing vehicles and returning to the restaurant, there was plenty of time for Mr. LaCaze to be reunited with his brother and begin calling Ms. Frank for status updates.

Suffice it to say I do not find anything exculpatory regarding the state's failure to disclose to Mr. Turk that Chau and Quoc Vu saw Mr. LaCaze with a cell phone on the night of the murders

6. Adam Frank Was the Likely Perpetrator.

Mr. LaCaze contends the state failed to disclose that Ms. Frank's brother, Adam, was a suspect in the homicides at the Kim Anh Restaurant. He contends that in the months preceding the murders, Ofcs. Williams and Morlier had several run-ins with Antoinette and Adam Frank, as a result of which Ms. Frank threatened Ofc. Williams' life. Mr. LaCaze asserts that the investigators knew Adam Frank was wanted elsewhere on homicide-related charges; that he had hidden out at his sister's residence in New Orleans; that he was armed with a gun and possessed a police radio; and, that he accompanied her while she was on duty. To this he attempts to link that just ten days before the murders Ms. Frank reported the theft of the 9 mm Beretta she had obtained from Ofc. Talley. He finds significant, too, evidence that about a day and a half prior to the homicides Ms. Frank telephoned Rayville, Louisiana where Mr. Frank was later found living under an alias. Finally, he contends that "NOPD officers suspected Adam Frank was involved in the Kim Anh Restaurant murders and continued to investigate, long after Rogers LaCaze's arrest." Petitioner's Post-evidentiary Hearing Memo, p. 44.

I find these contentions to be woven from whole cloth.

The glaring flaw with this entire argument is that the police could not have had an honest, good faith belief that the male perpetrator was Adam Frank. At least one of the witnesses, Chau Vu, was familiar with Adam Frank because he had often frequented the Kim Anh. Ex. D – 12, page 10 of 13; Vol. 6, 393:24 – 394:23 399:21 – 400:14; 404:6 – 23; 413:1 – 23; Ex. 43 to the Supplemental Petition, 37: 32 – 38:20. She knew him to be Ms. Frank's brother, but she was introduced to Mr. LaCaze as Ms. Frank's nephew. She identified

the male shooter as Ms. Frank's nephew, whom she had met earlier that evening. Ofc. Morlier testified at the hearing that the reason the Vu family wanted Adam banned from the restaurant was because he was making advances toward Chau. Quoc Vu, too, had never seen the perpetrator before the night of the murders. Ex. D – 32, p. 6 of 8; Ex. 43 to the Supplemental Petition, 56:28 – 57:6; 57:12 – 58:5; Vol. 6, 418:6 – 13; 421:22 – 23; 427:9 – 15; 432:17 – 21; 435:12 – 20.

Chau Vu described the male perpetrator to the police as a black male with gold teeth across the top of his mouth, less than twenty years old and about her height (estimated by Det. Berard to be about 5'2" or 5'3"). Ex. D – 12 pp. 6 and 7 of 13. Quoc Vu told his police interviewers the male was in his teens. Ex. D—32, page 6 of 8.

From the information in Ex. 60 to the Supplemental Petition, Mr. LaCaze was slightly over 18 1/2 years old in March 1995. By reference to Exs. 47 and 48 to the Supplemental Petition, Adam Frank was born March 21, 1970 making him almost 25 years old at the time of the murders. The photo in Ex. D – 30 reveals Mr. LaCaze was 5'3" tall. According to Ex. 48 to the Supplemental Petition, in September 1992 Adam Frank was 6'5" tall. This striking difference between the respective heights of Mr. LaCaze and Mr. Frank was dramatically demonstrated at the hearing, when Mr. LaCaze and Mr. Frank stood next to each other in the courtroom. Considering all of these factors, and even aware that she was under an unimaginable degree of emotional trauma, grief and stress, I find there is simply no way Ms. Vu could have mistaken Mr. LaCaze for Mr. Frank.

Turning now to the specific arguments raised in Mr. LaCaze's post-evidentiary hearing memorandum:

a. The State Suppressed Evidence Adam Frank Had a Gun and Police Radio and Was Riding with His Sister While On Duty.

I find it hard to comprehend the significance of this contention. There has been no showing that Adam Frank was in New Orleans when the murders were committed. Indeed, he testified at the post-conviction relief hearing that he left the city in January 1995 and never returned. That he had a gun, police radio and rode with his sister while she was on duty when he was present in the City has no bearing on this case. To conclude otherwise requires me to *assume* that Mr. Frank was in the area at the time. Such an assumption would be nothing more than a hope, belief or wish, the very antithesis of fact and evidence. Even if one considers he was wanted on attempted homicide charges and that the NOPD interrogated Antoinette Frank about his whereabouts, that does not connect him to the murders at the Kim Anh restaurant.

b. Officers Morlier and Williams Fought with Adam and Antoinette Frank at the Kim Anh Restaurant and Antoinette Frank Threatened to Kill Officer Williams.

This claim is based upon the testimony of Ofc. Stanley Morlier, an NOPD officer, now retired, who once worked off—duty details at the restaurant, as did Ofc. Williams and Ms. Frank. Mr. Frank was deemed to be an unsavory character who should not be hanging around the restaurant.

It is clear from Ofc. Morlier's testimony at Ms. Frank's trial that he and Ofc. Williams were aware Adam Frank was wanted on outstanding charges. Ex. D – 31, 165:25 – 28. On instructions from the bench he omitted any reference to pending charges against Adam Frank. *Id*., 164:17 – 23. In response to the prosecutor's question as to "whether either you or Officer Williams" informed Adam Frank he was no longer welcome at the restaurant he replied, "yes, sir." *Id*. 163:28 – 164:4. By way of explanation he related that "we" told Mr. Frank he was a risk at the restaurant and for insurance reasons and the protection of the Vus he should not be there. *Id*. 164: 32 – 165:3.

The record is unclear as to whether these two policemen personally delivered the message to Mr. Frank. However, Ofcs. Morlier and Williams did inform Ms. Frank that her brother was banned from the restaurant, whereupon she reacted "angrily," stormed out of the room and went directly to the Kim Anh. Ofcs. Morlier and Williams, together, followed and observed Ms. Frank retrieve her brother saying, "If they don't want you here you don't need to be here." *Id*. 168: 16 – 169:10. Since he was at the restaurant when his sister was informed of his ouster, I conclude the two officers did not deal directly with Mr. Frank but rather worked through their colleague, Antoinette Frank.

Regarding Ms. Frank's relationship with Ofc. Williams as a result of this incident, Ofc. Morlier related that three or four months later, after she had apparently "cooled down," Ms. Frank told him she was over the incident, but he was to tell Ofc. Williams "when he messes with my brother he's messing with me, and I'll take him out." *Id* 169:19 – 170:18. This

conversation occurred about two months before Ofc. Williams was murdered. *Id*. 171: 25 – 172:2.

The assertion that either Ofc. Morlier or Ofc. Williams "fought" (in the usual sense of that word) with Adam Frank is utterly unsupported by the record. The record is devoid of any description by anyone that Adam Frank reacted hostilely to his banishment. In fact, Ofc. Morlier testified on June 19, 2013 during the hearing on this matter that Mr. Frank never "went ballistic" nor did he ever threaten Ofc. Williams over the incident. It is replete, though, with evidence of Antoinette Frank's animus towards Ofc. Williams because of it.

I conclude the prosecution's failure to disclose to Mr. LaCaze that Ofcs. Morlier and Williams were instrumental in having Adam Frank banished from the restaurant was not exculpatory, nor material to the issue of his guilt or innocence. It was of no impeachment value in the case against Mr. LaCaze.

c. Ofc. Morlier Believed Adam Frank Was Involved in the Kim Anh Murders and Subsequently Investigated Him.

This assertion stems from Mr. LaCaze's understanding, or perhaps misunderstanding, of what Ofc. Morlier's testimony at the hearing would be following some pre-hearing interviews with him. On the witness stand Ofc. Morlier did not confirm certain elements of Mr. LaCaze's theory of his case.

The dispute Mr. LaCaze has with Ofc. Morlier's testimony is reflected in Ex. D—27, a proposed affidavit prepared by one of his investigators to memorialize this interview. When the investigator presented it to Ofc. Morlier he declined to sign it

because he felt it was not entirely accurate. The controversy centers on paragraphs 5, 7 and 8 of the affidavit. The gist of the disagreement is that Mr. LaCaze contends Ofc. Morlier said he "knew" Adam Frank must have been involved; that he immediately instituted a search for Adam Frank, thinking he might return to kill the surviving witnesses; and that he used a long-time informant to track down Mr. Frank who was located in north Louisiana. Finally, the instrument avers that he was questioned by Lt. Richard Marino at the police station the day of the murders and that he told Lt. Marino what he thought about the case, but Marino never followed up with him.

Ofc. Morlier worked with both Ofc. Williams and Ms. Frank in NOPD's Seventh District and at the Kim Anh Restaurant, but he never had any role in the official investigation of the murders. Hearing transcript, 6/19/13 Vol. 2, p. 4 and 6/26/13, p. 13—14. It certainly strains credulity, though, to think he was not interested in the case. He was familiar with all of the principals involved in the murders: the Franks, the Vus and Ofc. Williams.

It would be interesting to know how many other co-employees of Ofc. Williams had theories and suspicions as to who the proper suspects were, or should have been. Just because Ofc. Morlier was more intimately acquainted with the people involved, does not convert his suspicions or theories into authentic evidence, nor does any follow-up he may have individually undertaken on his hunches constitute part of the police investigation in this case.

In fact, Sgt. Rantz and Det. Demma, the leaders of the investigation, knew of the expulsion of Adam Frank from the Kim Anh and that he was wanted on

serious charges, but they could not connect him to these murders. The detectives could not even put him in New Orleans at the time. The actual threat on Ofc. Williams' life came from Antoinette Frank, not Adam. On the other hand they had the descriptions and identifications of Mr. LaCaze from two witnesses who placed him with Ms. Frank attempting to buy ammunition at Wal-Mart the afternoon preceding the homicides, a witness who placed Mr. LaCaze with Ms. Frank on a domestic dispute police call between 5:30 PM and 6:30 PM the day prior thereto, Chau Vu's description and a witness who testified that Mr. LaCaze used Ofc. Williams' credit card shortly after the murders. For these reasons they never considered Adam Frank a viable suspect.

The value, if any, of this proposed affidavit is to impeach Ofc. Morlier's testimony at the hearing by showing he made a prior inconsistent statement. Absent another provision of law, a prior inconsistent statement is not substantive evidence of the information recited therein. See C. E. Art. 607 (D)(2); *State v. Duncan* 91 So.3d 504 (La. App. 4 Cir. 2012), and *State v. Johnson* 774 So.2d 79 (La. 2000) 1999 – 3462 11/3/2000.

Thus, if I deem Ofc. Morlier has been successfully impeached I can discard his testimony because that would make him a liar. However, that does not prove the facts Mr. LaCaze had hoped to establish through him, i.e. the facts alleged in paragraphs 5, 7 and 8 of Ex. D – 27.

I do not find that he lied under oath. The facts that he related leading up to the homicide agree with the other well established evidence in the case. He had no evidence Mr. Frank was at the Kim Anh Restaurant on March 4, 1995. He did explain at the hearing that

he thought there was a possibility Adam Frank was the root cause of the crimes but that if he was involved in the killings, it was in a lesser way, perhaps as a lookout. He denied conducting an investigation but did acknowledge making some inquiries to try to satisfy his personal curiosity and even discussed the situation with a "regular informant" who also knew Ofc. Williams. He denied commissioning him to locate Adam Frank so he could be arrested. He had heard just rumors that Mr. Frank was in north Louisiana, which were only confirmed about two years later upon his arrest there under an alias.

I find it quite normal that Ofc. Morlier would harbor some question about Adam Frank's possible involvement in this case considering his knowledge of the earlier events, his awareness of Ms. Frank's threat against Ofc. Williams and her hostility toward him for not getting more detail work. His actions, unsanctioned by and unknown to anyone connected with the investigation were simply those of a victim's friend on a freelance mission to try to satisfy his own inquiring mind.

Finally, I find that whatever he told Lt. Marino was in connection with the parallel Public Integrity Bureau investigation. Lt. Marino was assigned to the Public Integrity Bureau. His involvement was more in the nature of a personnel evaluation than it was a criminal investigation. The reports of the PIB investigations are confidential and not available to other investigative units. Nonetheless, as noted above, Sgt. Rantz and Det. Demma were familiar with the information about Adam Frank being expelled from the restaurant but they were unable to tie him to the events of March 4, 1995. Besides, Ofc. Morlier could not have told Lt. Marino of any investigation he was

conducting or about employing a confidential informant to locate Mr. Frank because the interview occurred about six hours after he learned of the murders. Finally, it is clear that Mr. Turk was aware of a possibility that Adam Frank was involved because he attempted, unsuccessfully, to make something of it at Mr. LaCaze's trial.

I have purposely avoided a discussion of Adam Frank's arrest in north Louisiana with a 9 mm Beretta automatic pistol. Mr. LaCaze claims this is exculpatory Brady material that should have been disclosed to him. However, that claim ignores the fact that Mr. Frank was not arrested in Richland Parish until two years following the conclusion of this trial. It was therefore impossible for the state to withhold that information from him because it did not itself know of it.

There is no substance to this claim.

c. NOPD Investigators Probed Ofc. Talley about Adam Frank, Whether Ms. Frank Gave Him Her 9 mm Beretta and Whether He Ever Fought With Ronald Williams.

For reasons discussed in the previous section I find this claim to be without merit.

Ofc. Talley was re-interviewed about three weeks following the killings. All he knew was that Ms. Frank had told him Adam was wanted "somewhere" (Ex. D--16, p. 2); that he knew her gun had been stolen, but he denied any knowledge that she gave it to her brother (*Id*. at 10); that he knew little of what went on at the Kim Anh; and, that Adam Frank did not get any guns from the property room nor did either Adam or

Antoinette try to get guns from him for Adam. (*Id*. at 21).

Even if one considers this interview part of the murder investigation and not part of the PIB/civil-service case against Ofc. Talley, it does nothing to connect Adam Frank to the crime and in fact, exculpates him. This was a blind alley for the police and it would have been a blind alley for the defense. *State v. Roussell, Jr*. 2012 KA 1792 (La. App. 1st Cir. 7/25/13) at 16–17 [Unpub.]:

> We find that the questioning of LeBoeuf and Trahan and their elimination as suspects by a victim constitutes neither Brady nor Kyles material. The fact that the officers questioned two people who they thereafter . . . excluded as being the perpetrators is neither exculpatory nor favorable to the defendant.

d. The State Suppressed Evidence that Ms. Frank Got a 9 mm Beretta from the NOPD Evidence Room and "Dubiously" Reported It Stolen Ten Days Before the Murders.

Admittedly the prosecution did not reveal to Mr. LaCaze that Ms. Frank had obtained a 9 mm weapon from Ofc. Talley, nor that she had reported it stolen a few days before the murders. He is aggrieved because at his trial the state contended he was the gunman with the 9 mm weapon that took the life of at least Ofc. Williams and possibly all three victims. However at her later trial it claimed she was the gunman because Ofc. Talley had provided her with a 9 mm weapon. The suppressed information, in his view, would have bolstered his own testimony that Ms. Frank had a

friend at police headquarters who not only could, but did, get her guns.

I do not think this information could have established a reasonable doubt of his guilt in the mind of a juror.

First, in his very first police interview Mr. LaCaze told them Ms. Frank had a friend in the property and evidence room who got guns for her. He was the one who told them she reported the gun stolen a few days before these murders. Ex. D—61, p. 11 of 15; Ex. D—14 p. 3 and Ex. D—15. He had some obligation to inform his counsel of this evidence.

On top of that, the police report of the theft indicated the weapon was inoperable. Even if he had been provided the documents, he would have had to establish the falsity of the alleged theft and overcome the assertion that the gun did not work in order for these documents to support his contention that Ms. Frank used the 9 mm pistol acquired from Ofc. Talley. It is most improbable that he could have carried this burden because the weapon had not yet been located.[24] Further, that Ms. Frank sought a replacement gun from Ofc. Talley would have lent credence to the allegation that the gun had been lost, stolen or was inoperable. Ex. D—16 pp. 1–3 and 23 of 26.

In all of his statements to the PIB, Ofc. Talley denied getting her another gun, but Mr. LaCaze's difficulty would not have ended there. The very materials he thinks would be so helpful also suggest Ms. Frank may have pilfered a weapon from the gun safe

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[24] Adam Frank testified at the hearing that he was arrested in north Louisiana in 1998 with this weapon which he had taken when he left New Orleans in early January 1995. He confirmed it had a broken firing pin.

when Ofc. Talley briefly left her alone in it while he tended to other business. Ex. D—9 pp. 7—8; Ex. D—14, pp. 2 and 3—5; Ex. D—16 pp. 1, 4, 17—19 and 25 of 26 and D—17, p. 2. I am impressed with the following passage from Sgt. Harrison's August 19, 1996 report of his investigation of Ofc. Talley and Ms. Frank's acquisition of the 9 mm Beretta at issue here:

> The statements of Lts. Italiano and Marino along with Officer Talley's signed statement show Talley allowed Antoinette Frank in the gun vault which is a sensitive evidence area of the C.E.+P. Lts. Marino and Italiano stated in their statements that Talley told them he left Officer Frank alone in the gun vault. . . . See PID # 95- 641(R) for information on the investigation of a missing 380 cal. pistol, and the individuals who had access to the gun vault. [Emphasis added.] Ex. D—9, p. 8

This is significant because upon the execution of a search warrant for the Cindy Place apartment Mr. LaCaze shared with Ms. Braddy at the time of his arrest, the police recovered a box of .380 caliber ammunition. Ex. D—34, p. 8 and Vol. 6, 256: 16-26 and 267:17-23. There was no evidence that a .380 caliber weapon was fired at the crime scene, but disclosure of this information could not have been helpful to Mr. LaCaze since it could lead to an inference he got weapons from that source, too, notwithstanding Ofc. Talley's denial.

Also worth noting is Mr. Woods' argument that the 9 mm weapon he accused Mr. LaCaze of firing could not have been based upon the suggestion Ms. Frank gave Mr. LaCaze the one she acquired through Ofc. Talley. There was no evidence in this trial that Ofc. Talley had provided Ms. Frank with a gun. The

complained of excerpt from his closing argument, "you know that Rogers LaCaze was the one with the 9 mm weapon . . . ," quoted on p. 52 of Mr. LaCaze's Post Hearing Memo was based on the uncontroverted testimony from the surviving eyewitnesses that Ofc. Williams was slain with a 9 mm weapon while Ms. Frank was present in the kitchen with Chau and Quoc Vu. If the jury believed them, then Ms. Frank could not have shot Ofc. Williams. The rest of Mr. Woods' argument clearly was based upon the unambiguous identification of Mr. LaCaze by the Vu siblings.

For this reason I reject Mr. LaCaze's claim that the state violated his due process rights by presenting inconsistent theories at his trial and that of Ms. Frank. In Ms. Frank's trial the state showed she obtained a 9 mm gun from Ofc. Talley, all the victims were killed with 9 mm bullets and that Ms. Frank and Mr. LaCaze had tried to buy 9 mm ammunition the afternoon preceding the crime. Based upon this evidence Mr. Woods implied such a weapon was available for her to use at the Kim Anh thus suggesting she was an active participant in the crime. However, since the witnesses testified Ofc. Williams was shot with 9 mm ammunition and that Ms. Frank was with them in the kitchen when it happened, the source of his gun was immaterial. Thus, as in *State v. Ortiz*, 11 – 2799 (La. 1/29/13); 110 So.3d 1029. I find these arguments not diametrically opposed, but rather they emphasized different aspects of the same evidentiary matrix. See also *State v. Holmes*, 06 – 2988 (La. 12/2/08); 5 So.3d 42.

In the final analysis, it does not matter if Mr. LaCaze fired a 9 mm gun. He gave the police a statement shortly after his arrest. (Ex. D – 61.) In it he admitted Ms. Frank gave him her .38 caliber

service revolver when they were en route to the restaurant the final time. *Id*., p. 4. He recounted that she told him to come in if he heard shots fired inside but not to shoot the gun "unless he had to" because it was traceable to her. *Id*. p. 4—6 and 13. He admitted obeying her instructions. *Id*., pp. 5—7 and 13. His armed entry into the restaurant following shots, prepared to shoot "if he had to" knowing she planned to kill someone (*Id*. p. 13) evidences a specific intent to kill or inflict great bodily harm. That makes him a principal to the multiple homicides regardless of who actually pulled the trigger. The jury clearly rejected his and his brother's trial testimony regarding his Mr. C's Pool Hall alibi, a deviation from what he had told the police.[25]

B. Materiality.

While the allegedly suppressed information may have been material, I do not find that it would have been helpful to Mr. LaCaze's case. In light of my findings, detailed above, I have every confidence that the jury's verdict would have been the same had they been aware of the nuances in the witnesses' testimony and statements recounted, *supra*.

[25] It is interesting to note that an important aspect of his statement, although repudiated at trial Vol. 7, 587:4—583 :3, was verified by the physical evidence. Ms. Frank's service revolver, a .38 caliber Smith and Wesson with a four inch barrel (Ex. D—14, pp. 1 and 4; Ex. D—16, p. 5 of 26) was recovered at her apartment during execution of a search warrant. Mr. LaCaze had told the police he had returned it there after his brother had picked him up and while they were in route to go shoot pool. Ex. D – 34, p. 23; Ex. D – 61, pp. 9 – 10. The .38 caliber she had on her person when arrested was Ofc. Talley's personal property that he had loaned her. Ex. D—14, p. 4; Ex. D—16, p. 13 of 26.

IV. THE STATE FAILED TO CORRECT THE FALSE TESTIMONY OF POLICE WITNESSES AT TRIAL.

This claim is essentially "The state suppressed evidence that Adam Frank was the likely perpetrator," redux. The focus is Mr. LaCaze's claim that the state knowingly permitted two police officers to lie at Mr. LaCaze's trial. Post Hearing Memo, p. 58. He devotes the entirety of his argument around the testimony of Ofc. Morlier and does not specifically identify the other prevaricator. Presumably, he is referring to the testimony of either (or both) Sgt. Rantz or Det. Demma since he cites their testimony in footnote 20 on page 59 of his Post Hearing Memo.

With regard to Ofc. Morlier, the claim is that he lied under oath when he told Mr. Turk that he did not hear Ms. Frank threaten Ofc. Williams' life. However, Mr. LaCaze has mischaracterized Ofc. Morlier's trial testimony. Mr. Turk asked him if, while in the presence of Ofc. Williams, Ofc. Morlier heard Ms. Frank threaten Ofc. Williams' life. He responded negatively, and that was a factual, true answer. Vol. 7, 555:29 – 556:1. This record is more than abundantly clear that Ofc. Morlier heard her make such a threat, but it was not while Ofc. Williams was present. Witnesses in a trial answer the questions asked of them, not ones they, or subsequent counsel, think should have been asked. In fact the Louisiana State Bar Association publishes a pamphlet entitled *Preparing to be a Witness*. In the section captioned, "Your Duty as a Witness" it advises prospective witnesses to listen carefully, make sure the answer is responsive to the question and that the witness should not try to anticipate where the question is going. http://files.lsba.org/documents/PublicResources/LSBAWitnessBr

ochure.pdf. Other agencies are more specific: "Answer only the question asked and *do not volunteer information* you believe is important or helpful." (Emphasis added.) http://www.douglascoungywa.net/departments/prosecutingatty/Witnessinfo.asp.

See also the Ohio State Bar Association's "Tips for Witnesses" at https://www/ohiobar/ForPublic/Resources/LawFactsPamphlets/Pages/LawFactsPamphlet-20.aspx: "If you can answer [the question] with a 'yes' or 'no,' do so. *Never volunteer information.*" (Emphasis added.)

As noted above, there is no evidence in this record that there was ever a confrontation or argument between Adam Frank and Ofc. Williams. All the evidence suggests Adam Frank agreeably complied with the order to stay away. Vol. 6, 404:17 – 23. Conversely, the record is replete with evidence that his removal from the restaurant fueled bitterness on Ms. Frank's part and that it was she who harbored a grudge due to this incident. This is the factual scenario with which Sgt. Rantz and Det. Demma had to work. While Adam Frank was the person banned from the restaurant, these investigators had no evidence at all that he had any conflict, altercation or disagreement with Ofc. Williams over it. Even if one were to assume that Adam possessed an un-evidenced enmity for Ofc. Williams sufficient to give him a motive for murder, the investigators had absolutely no evidence to connect him to the events at the Kim Anh Restaurant on the night of the murders.

The allegation that the state condoned lies on the witness stand concerning an altercation between Adam Frank and Ofc. Williams is utterly unproven.

V. DEFENSE COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE OF TRIAL.

A. Willie Turk's Representation Fell Far Below Reasonable Standards of Representation.

1. Counsel Failed to Litigate a Motion for Indigence or to Request Funds for Expert or Investigative Services.

Mr. LaCaze asserts Mr. Turk did not hire an investigator nor did he do any meaningful investigation on his own. He refers to the testimony of several witnesses at the post-conviction hearing that no one contacted them before the merits trial to ascertain if they had any information that would help Mr. LaCaze's case. He specifically cites the testimony of Mr. Robert Jenkins, attorney for Ms. Frank, to the effect that Mr. Turk was not prepared for trial. He contends the cause of these performance deficits was a lack of funds. The state responds that the issue is precluded from this court's consideration because it was argued to, and considered by, the Louisiana Supreme Court on direct appeal.

Indeed, C. Cr. P. art. 930.4(A) provides, "Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered." The majority opinion of the Louisiana Supreme Court addressed this issue under the heading "Assignment of Error Regarding too Few Pretrial Motions." *State v. LaCaze, supra*, at 1079. The court concluded by stating it found "no error or dereliction" on Mr. Turk's part. *Id.* Although not mentioned specifically, it is clear the court intended its ruling to encompass the pretrial determination of Mr. LaCaze's indigence, for that was one of the reasons

Justice Johnson dissented from the affirmation of the death sentence.[26] *Id*., at 1088.

Against this backdrop I have concluded that the law does not permit me to revisit the issue. C. Cr. Pr. Art. 930.4(A), *supra*. Although much evidence has been introduced in an effort to support Mr. LaCaze's assertion, I have been directed to nothing that indicates there is anything new here that was not presented to or considered by the Supreme Court on direct appeal. Therefore, I am not able to find the interest of justice requires me to revisit an issue already resolved by the highest court of this state.

2. Counsel Failed to Call Known Alibi Witnesses.

Mr. Turk offered an alibi defense through Mr. LaCaze and his brother, Michael. He is faulted because Rogers did not perform well and was ineffective in presenting a convincing alibi. The difficulty with Michael's testimony was that at the time of trial he was jailed and testified in prison garb. Mr. LaCaze argues that Michael's credibility was thereby diminished. He suggests these exigencies could have been overcome, or at least lessened, if Mr. Turk had called Mr. Peter Williams and Ms. Angela Walker as alibi witnesses. He avers they would have testified they were with Rogers and Michael LaCaze at Mr. C's Pool Hall the night of the murders. Presumably these independent witnesses would have enhanced the alibi's credibility.

[26] I find the fact that Justice Johnson dissented only from the affirmance of the sentence somewhat puzzling. It would seem that if Mr. LaCaze should have been declared indigent for the penalty phase of the prosecution, that error would have permeated the guilt issue as well.

Certainly Mr. Turk knew of Mr. Williams because he called him as a witness at the preliminary hearing on March 17, 1995. Ex. 43 pp. 59—60 to the Supplemental Petition.[27] There, he testified that at 1:00 a.m. March 4, 1995 he was at Mr. C's shooting pool with Rogers. The only other people in the establishment were "his [Rogers'] brother and another girl," presumably a reference to Michael LaCaze and Angela Walker. When Mr. Williams left, about 1:20 AM, the others were still there and Michael and Rogers began shooting pool.

Mr. Williams testified at the post-conviction hearing, confirming the facts he related at the preliminary examination. He stated that he learned from television when he awoke March 4, 1995 that Mr. LaCaze had been arrested, but he "knew" it could not have been him because they were together between 1:00 a.m. and 1:30 a.m. March 4, 1995. He added that he spoke to Mr. Turk the day of the preliminary hearing before testifying but he was not contacted again. If asked, he

[27] Mr. LaCaze's defense expert, John Reed, criticized Mr. Turk for having done this. In Louisiana it is rare for the defense to put on evidence at preliminary examinations as prior to indictment their scope is limited a determination of whether there is probable cause to charge the defendant with the offense for which he has been arrested, or with a lesser and included one. C. Cr. P. art. 296. If the court finds no probable cause the defendant is released from custody or bail, but the prosecution may continue. Most Louisiana defense lawyers use it as a discovery tool to learn as much as possible about the state's case before exposing their evidence during discovery. As will appear infra, Mr. Turk learned valuable information from Mr. Williams regarding his client's proffered alibi and that could have led him not to call Mr. Williams at trial. However, he could have acquired the same details privately in an out-of-court interview which would not have informed the state of, and committed the witness to, a time line incompatible with his client's.

would have testified at the trial in accordance with his preliminary hearing testimony. Again, he found out about the trial from television.

I fail to see how Mr. Williams' testimony would have improved the credibility of Mr. LaCaze's alibi. On page 68 of his Post Hearing Memo he admits the state had "a concrete, immutable fact" in the form of phone records demonstrating Ms. Frank telephoned the Kim Anh at 12:51 a.m. ordering food. Absent some sort of time warp, Mr. Williams could not have been with Mr. LaCaze between 1:00 a.m. and 1:20 a.m.,[28] considering that after the "concrete, immutable fact" of the 12:51 a.m. call Mr. LaCaze and Ms. Frank: 1.) had to make their way back to the restaurant; 2.) introduce Rogers to the Vus and Ofc. Williams (Vol. 7, 569:21—25); 3.) eat a little (*Id.* 569:7—29 and 570:8 – 16); 4.) Allow Mr. LaCaze to use the restroom (Vol. 6, 374:24); 5.) collect their leftovers and prepare to leave (374:27); 6.) pause briefly outside the door and talk (376:9—11); 7.) have Chau go outside through the connected grocery's door to bid Ms. Frank goodnight (376:12—16); 8.) have Ms. Frank chat with Chau about possibly working the detail the next day (376:16—17); 9.) have Chau return inside to confer with Ofc. Williams then return to advise Ms. Frank that Ofc. Williams was going to work that detail (376:17—21);[29] 10.) take Mr. Lacaze to

[28] Mr. LaCaze himself testified he, Michael and Angela did not get to Mr. C's until about 1:15 a.m. Then he had to retrieve and reassemble his brother's wheelchair, get help to roll Michael up the ramp and spend a few minutes talking with Angela outside. Volume 7, 572:19 – 573:3.

[29] In his police statement Quoc Vu estimated that Ms. Frank and Mr. LaCaze were in the restaurant 15 minutes upon their return to eat. (Ex. D—32, p. 2). Even discounting the driving time

Cindy Place (Vol. 7, 570:22— 26); 11.) have Rogers go inside to contact Michael; and 12.) get picked up, drive to Angela's and then to Mr. C's.[30]

I find it quite possible, if not probable, that after hearing it Mr. Turk realized Mr. Williams' testimony was incongruent with his client's version of the alibi timeline and decided against presenting him. Doing so would have only compounded the damage done by the LaCaze brothers' testimony.

The other alleged alibi witness was Angela Walker. Mr. Turk did not present her at trial, although he had listed her on his slate of alibi witnesses. She was presented at the post-conviction relief hearing. Ms. Walker testified that in 1995 she was 16 or 17 years old and had known Rogers LaCaze since she was 13 or 14 as a playmate from her neighborhood and school. She was a frequent patron of Mr. C's Pool Hall and testified they never checked IDs for admission, a useful tidbit that might have been used to impeach

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from wherever the call was made to the restaurant, the earliest the pair could have departed the restaurant was 1:06 a.m.

[30] The record does not reveal how long it takes to drive from the Kim Anh restaurant to 6801 Cindy Place. Rogers LaCaze testified that when he beeped his brother, Michael said he was on a pay phone just leaving Burger King, "around five minutes away." Volume 7, 571:16 – 17. Michael LaCaze testified it took three to four minutes to drive from Rogers' Cindy Place apartment to Angela's residence on Harbourview and about 2 to 3 minutes to drive from there to Mr. C's. *Id.* 495:20—29. Thus, adding a total of 10—12 minutes to the time in the preceding footnote yields an arrival time at Mr. C's of between 1:16 a.m. and 1:18 a.m.—not including any time to get from the restaurant to Cindy Place. There would have been precious little time for Rogers LaCaze and Peter Williams to have played a 15 minute game of pool (*Id*. 496:20—22) that would have permitted Mr. Williams to have left by 1:20—1:30 a.m.

Mr. C's manager, Patrick Mazant, (whom she denied knowing despite her frequent visits to the pool hall) to the effect that he did.[31]

Ms. Walker acknowledged accompanying Rogers and some others to Mr. C's on March 4, 1995. However, she was unable to be precise regarding a time frame. All she could say was that it was after Burger King closed, which would have been "around 11 or 12." They left when the pool hall closed, but she did not know what time that was. She denied drinking alcohol or doing drugs at Mr. C's the night of the murders.

The witness was surprised to learn of Mr. LaCaze's arrest from her mother the day following the killings. The surprise was because she had been with him the previous evening. Ms. Walker did not speak to the police, the District Attorney's office nor with Mr. Turk or with anyone else on Mr. LaCaze's behalf. That could have been because her family moved her to Alexandria Virginia for her safety shortly after the homicides. I think it likely Mr. Turk did not pursue her testimony because he thought she would testify akin to the time line Mr. Williams presented which, as demonstrated above, does not validate the desired alibi. I was most stricken by Ms. Walker's pointed refusal to state

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[31] I think that whatever impeachment value her contradiction of Mr. Mazant's testimony regarding checking IDs was minimal. Both Michael and Rogers LaCaze acknowledged in their testimony that he did do some checking, but because they were such regular customers he did not check them. Vol. 7, 496:2—12. ; *Id*. 573:20—28. Also, there was a slight contradiction between her testimony and that of Mr. Williams. He said that only he, the LaCaze brothers and a "chick" Rogers was seeing were in the place. She indicated those present were herself, the LaCaze brothers, "another guy," presumably Mr. Williams, another female and she did not remember the other people.

categorically that she was with Mr. LaCaze during the times the murders occurred. She was quite emphatic that all she was prepared to attest to "was that she was with him at a certain time."

In light of Ms. Walker's testimony I cannot conclude that had Mr. Turk spoken with her or that if she had testified in the trial as she did at this hearing, there would have been a reasonable probability of a different verdict. The best she could do was to confirm that at some nonspecific time the night of the murders she had been at the pool hall with Rogers and Michael LaCaze. I think the value of testimony would have been overcome by the stunning revelation that she would not state she was with Mr. LaCaze during the time the crimes were being committed.

3. Counsel Failed to Investigate a Known Alternate Suspect or the Murder Weapon.

Again, Mr. LaCaze attempts to point the finger at Adam Frank as the male perpetrator. He blames Mr. Turk for calling Ofc. Morlier as a defense witness without having previously interviewed him. He asserts that that failure permitted Ofc. Morlier to lie to the court unimpeached. As demonstrated above, the lying under oath charge against Ofc. Morlier simply does not hold water.

His second argument under this heading claims that Mr. Turk neglected to investigate the murder weapon. Had he done so, Mr. LaCaze contends he could have connected a 9 mm semiautomatic pistol to Ms. Frank. I find this another avenue to nowhere.

Had Mr. Turk investigated and discovered the link between Ms. Frank and the gun, what difference

would it have made? Absolutely none. The two eyewitnesses' testimony was, and remains, uncontradicted that they were in the kitchen with Ms. Frank when the first shots were fired in the dining room where Ofc. Williams was killed. Only 9 mm shell casings were found on the scene. The record is likewise uncontroverted that besides Ofc. Williams, the Vus and Ms. Frank, the only other person on the scene was a male perpetrator, positively identified to have been Mr. LaCaze. *Ergo*, he must have fired at least those first shots with a 9 mm weapon. It matters not whether these shots killed Ofc. Williams or the subsequent ones the Vu's heard while seeking refuge in the cooler after Ms. Frank left them, regardless of who fired them. The fact that Mr. LaCaze fired a dangerous weapon during the event that led to the three victims' deaths leads to the inescapable conclusion that he was a "person[ ] concerned in the commission of a crime" and as such a principal to it. R. S. 14:24. Also, the act of shooting the weapon "indicate[s] he actively desired the prescribed criminal consequences[32] to follow his act," thus demonstrating his specific intent to kill or inflict great bodily harm. R. S. 14:10(1). The source of the male perpetrator's weapon is immaterial. In the absence of the actual murder weapon the state could easily have argued the two perpetrators shared a single 9 mm pistol (as Ms. Frank confessed to Sgt. Rantz in Ex. D – 34, p. 32).

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[32] R. S. 14:9 defines "criminal consequences" as "any set of circumstances prescribed in the various articles of this Code . . ." The circumstances prescribed for first-degree murder are set out in R. S. 14:30: "[T]he killing of a human being . . ." followed by a list of special circumstances, all of which are prefaced with the phrase "when the offender has a specific intent to kill or to inflict great bodily harm and . . ."

I think if Mr. Turk had gotten into the source of the missing 9 mm Beretta, it would have hurt Mr. LaCaze's cause far more than help it. Quite simply that information would have enhanced the credibility of his police statement and belied his complaint of having been beaten into repeating what the police told him to say. Mr. LaCaze began his police statement at approximately 8:51 a.m. March 4 and concluded it at 9:14 a.m., a mere seven hours following Quoc's 911 call. Ex. D – 61, pp. 1 and 15. On page 11 Det. Demma asked if he knew where Ms. Frank had gotten the 9 mm she had the previous night. His response was, "Yeah. She got it from . . . downstairs in the um, Recovery Room." Then just three questions later, in an unresponsive answer, he volunteered that she had reported it stolen "around a week ago" because he was present when the officer came to take the theft report.

As far as I have been able to discern, these are the earliest references to Ms. Frank's acquisition of the Beretta from the NOPD's property and evidence room and the report of its recent theft. Certainly in the seven hours following the 911 call the police were too preoccupied with questioning the survivors, first responders, and Ms. Frank as well as analyzing the crime scene and then locating and questioning Mr. LaCaze to have been able to independently obtain this data so they could beat him into incorporating it into his confession.

Since Mr. Turk is deceased it is impossible to know whether he failed to explore this topic by accident or design. Nevertheless, I find that had he pursued this issue at trial it was fraught with much more danger to his client than any benefit it could have had for him. Thus, I am impelled to the conclusion that had Mr.

Turk investigated this issue he would have gained nothing helpful to Mr. LaCaze's defense.

4. Counsel Failed to Interview a Third Eyewitness or Move to Suppress "Inherently Suggestive" Identifications.

In this alleged dereliction Mr. LaCaze contends the "third eyewitness" is Ms. Vui Vu. This issue has been adequately addressed under the heading "Vui Vu failed to identify Mr. LaCaze in a photo lineup and that 'from her vantage point with Chau Vu' neither could see the second perpetrator.

I find it meritless.

Mr. LaCaze faults Mr. Turk for failing to pursue a motion to suppress Chau and Quoc Vu's identifications as well as that of John Ross. The state objects to consideration of the identification issue because, it contends, the matter has already been disposed of by the Supreme Court. In *State v. LaCaze, supra*, at 1081 Justice Traylor wrote:

> No basis for suppressing the pretrial identifications of Quoc Vu and John Ross appears. Counsel may have concluded as much and made a tactical decision not to expend effort on a losing cause. The matter cannot be resolved on this record. Therefore, this part of the assignment lacks merit.

I find the quoted passage internally inconsistent. It starts out saying that there appears to be no basis to suppress the pretrial identifications of Quoc Vu and Mr. Ross, yet concludes by finding that matter cannot be resolved on the record. The finding that the assignment of error had no merit appears to be a *non sequitur*. Ordinarily, when an appellate court cannot

resolve an issue on the record before it, the court reserves the issue for post-conviction proceedings. *State v. Watson,* 00 – 1580 (La. 5/14/02); 817 So.2d 81at 84. I am unable to resolve the obviously contradictory language so I have elected to consider these issues.

Regarding Chau Vu, the Supreme Court noted her in-court identification of Mr. LaCaze and her earlier non-identification when presented a photo array containing his photograph. Conversely, the issue presented to me is somewhat different, if not quite novel. It attacks her in-court identification at trial on the basis that she was exposed to an unconstitutionally suggestive and unreliable one-man show-up procedure – the preliminary examination. Mr. LaCaze contends this fatally infected her subsequent identification of him before the jury. I am unimpressed with this argument.

To be clear, there was no out-of-court, one-man show-up procedure conducted between Chau and Mr. LaCaze, so her identification cannot be tainted by that. Also, it is undisputed that not only did she fail to select his photograph in a photo array the night of the murders, she did not identify anyone else. As far as the record reveals, the only time she saw Mr. LaCaze out-of-court was on the night of March 3-4, 1995 at the restaurant. Mr. LaCaze complains that the taint of the in-court identification at the preliminary hearing emanates from the fact that he was the only male defendant at counsel table and that he was near the alleged co-perpetrator, with whom the witness was well acquainted. Thus, it is alleged, her attention was unduly focused on him thereby corrupting her identification. I find this contention flawed. If Ms. Vu did not recognize Mr. LaCaze as the co-perpetrator, all she had to do was say so. Obviously she had no compunction against doing just that when shown the

photo array at police headquarters. She could have just as easily done the same in court. Moreover, if his contention were valid, it would be virtually impossible for any eyewitness to make an in-court identification of a defendant because the accused would always be seated at counsel table with his lawyer, thereby narrowing the selection options.

Identification procedures are intensely fact dependent. For that reason the law has established standards to regulate their admissibility. The governing principles were laid down in the U.S. Supreme Court cases of *Stovall v. Denno*, 87 S.Ct. 1967 (1967), *Neil v. Biggers*, 93 S.Ct. 375 (1972) and *Manson v. Braithwaite*, 97 S. Ct. 2243 (1977).

In *Stovall* the Court addressed the widely condemned practice of one-man show-ups as violations of the Due Process Clause. It held that whether a due process violation occurs depends upon the "totality of the circumstances" of the particular situation. In *Biggers*, it found the admission of show-up evidence by itself did not violate due process principles. It emphasized that the core issue is whether the identification is reliable under the totality of the circumstances, albeit suggestive. The primary evil to be avoided is a substantial likelihood of misidentification. Recapitulating prior jurisprudence, it established five factors that must be considered in evaluating whether there has been a likelihood of misidentification. Those factors are: 1) the witness' opportunity to view the perpetrator at the time of the crime; 2) his/her degree of attention; 3) the accuracy of his/her prior description; 4) The level of certainty; and, 5) the length of time between the crime and the confrontation. *Manson* chiefly resolved a technical question of whether

the *Biggers* factors apply to identifications occurring after the *Stovall* decision. They do.

Mr. LaCaze relies on *State v. Davis*, 409 So.2d 268 (1982) to support suppression of his identification. There the Louisiana Supreme Court reversed the district court's refusal to suppress a jailhouse show-up to two teenagers, one the victim the other a witness, forty-eight days following the crime. Initially, the court noted the procedure was both suggestive because of the one-on-one nature of the event and unnecessary due to the lack of exigent circumstances. Applying the *Manson* factors, the court noted the victim and witness viewed the show-up together, without precautions to prevent them from collaborating. They both made identifications of the defendant. In evaluating the victim's testimony the court observed that of the three times she had seen her assailant, she had only gotten a good look at him after she was shot. At the time the assailant was in a moving vehicle, driving away from her. The witness only saw a man seated in a passing car. The court found the degree of their attention was not high and they did not have a good look at his physical characteristics. Their descriptions were not very detailed. The victim's description of the perpetrator as heavyset was based upon the way he sat in the car. She noted he had a beard and mustache, but the witness was not sure of the beard. It placed some emphasis on the girls' youth and the fact that they had little experience in making identifications. Finally, the court emphasized the show-up occurred forty-eight days following the girls' observations.

Davis is readily distinguishable on its facts: prior to the preliminary hearing at which the complained-of show up occurred, the only time Chau Vu saw Mr. LaCaze was at the restaurant shortly before, and then

during, the crime. The show-up in *Davis* occurred forty-eight days following the crime; here (if an in-court identification truly constitutes a "show-up") it was only twelve days. Ms. Vu may only have gotten an indistinct view of the person in the car as Ms. Frank pointed him out when she was in the restaurant getting drinks. Ex. D – 12, p. 3. However, on the return trip he entered with Ms. Frank, sat at a table and ate "a little bit." Chau noticed he went to the restroom before the pair left, but paused to talk outside, near the front door. *Id*. pp. 3 – 4. When she saw them outside, realizing she had not told Ms. Frank goodbye Chau exited through the door of the adjoining grocery to bid her farewell. A conversation ensued about whether Ms. Frank was needed for the detail the following evening. Ms. Vu consulted with Ofc. Williams and returned with the negative reply. *Id*. p. 4. This discussion outside the front door occurred under a light which Ms. Vu extinguished upon their departure. She also noted Mr. LaCaze had a cell phone "exactly" like hers and that he was wearing a black jacket. *Id*. p. 7. When Det. Berard confirmed with her that the nephew was a black male, Ms. Vu volunteered that he had gold teeth.[33] She further stated he was less than 20 and about her height, just a little taller. Furthermore, in this, her very first interview regarding the events that night, Chau Vu made it clear that this was the first time Ms. Frank had brought her "nephew" to the restaurant. "[B]efore she had brought her brother. The one who attempt [*sic*] murder." *Id*. p. 10.

It should be remembered Ms. Vu was called as a witness at the preliminary examination by Ms. Frank. She was only asked if she saw the "nephew" in court.

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[33] Adam Frank testified at the post-conviction hearing that he did not, nor did he ever, have any gold teeth.

Ex. D – 33, 38:6 – 16. When Mr. Turk examined her, his questions pertained to whether the "nephew" was the same person she saw get out of the car later, to which Ms. Vu responded affirmatively. *Id.* 48:32–49:4. The transcript is somewhat confusing because the ensuing colloquy indicates Mr. Turk was referring to the third time Ms. Frank's car came to the restaurant but Ms. Vu was referring to the second time when the pair came in to eat. The upshot of this, however, is that Ms. Vu was never asked whether the nephew was the man who accompanied Ms. Frank on the final, murderous, visit. That she did not answer an unasked question is of no moment. Less than five hours following the report of the killings, she told the officers in that first interview that the nephew was with Ms. Frank on the deadly third visit. Ex. D – 12, p. 8.

Ms. Vu made no specific reference to the lighting conditions inside the restaurant while Ms. Frank and Mr. LaCaze were inside. It is clear, though, that while it was near closing time, the restaurant was fully functional since they were able to prepare the food Ms. Frank requested for Mr. LaCaze and herself. Upon their arrival they sat at a table for a short time to eat. There is no indication that the lights were ever turned off.

I do not find Chau's identification of Mr. LaCaze at the preliminary examination to have been suggestive. In light of the totality of the circumstances I have concluded the identification was reliable and a motion to suppress it would have been unsuccessful. Since the law does not require attorneys to engage in vain and useless acts, Mr. Turk's failure to engage in them does not meet the threshold for ineffective assistance of counsel. *Murray v. Maggio*, 736 F.2d 279 (C.A. 5, 1984)

It is clear that Ms. Vu, who was twenty-two at the time of the crime, had adequate opportunities to view Mr. LaCaze on the second visit after he came into the restaurant to eat, and then when she saw him with Ms. Frank as they talked under the light outside the front door. Even if she only had fleeting views of him during the actual perpetration on the third visit, she had ample reference points. She obviously paid close attention since she accurately noted his gold teeth, height, age, the fact that he had a phone "exactly" like hers and that he wore a black jacket that night.

There is no indication in the cold transcript of the preliminary hearing that she was uncertain or equivocated in any way about her identification of Mr. LaCaze. Finally, I do not think a lapse of two weeks between the horrific experience of the murders of her two siblings along with a coworker and the identification at the preliminary hearing was so inordinate that it affected her recognition of him, especially when compared to her police statement given just a few hours post event. I am unmoved by the suggestion that her inability to select Mr. LaCaze in a photo lineup around the same time as her statement detracts from her ability to relate to the officers what she saw. I think the mental and emotional shock she experienced from the murders of her sister, brother and Ofc. Williams accounts for her inability to select his photograph. Certainly, she did not select anyone else.

As to Quoc's identification of him Mr. LaCaze asserts the photographic lineup he was shown shortly after the murders was highly suggestive and thus fatally contaminated his in-court identification. As noted above, suggestiveness does not nullify the identification. It must be so suggestive that it creates a *substantial* likelihood of misidentification. *State v.*

Higgins, 03 – 1980 (La. 4/1/05)*;* 898 So.2d 1219, 1232 – 1233. Photo lineups are tested by the *Manson* factors, supra.

To support this claim Mr. LaCaze relies on the testimony of his expert, Dr. Jennifer Dysart. She testified at the hearing that the NOPD did not properly confect the photo array because it did not match the witnesses' descriptions of the perpetrator. He contends the individuals selected differed significantly in age, size and skin tone. Tr. 6/19/13 at p. 54

When Quoc Vu spoke to the police dispatcher at 1:50 AM March 4 the only descriptions he gave her were alternately, Ms. Frank's accomplice was "a black guy," and "a guy." Ex. 11 to the Supplemental Application, p. 2.

Chronologically, the next description of the male perpetrator is from Vui Vu, on p. 24 of Ex. D – 34, Sgt. Rantz's supplemental report. The report does not reveal the time she rendered her description but it was obviously in the immediate aftermath of the murders. She told Det. LeBlanc, through Ofc. Tuac Tran translating, that "she saw a small-built black man, not very tall."

Quoc Vu selected Mr. LaCaze's photograph at 5:59 AM March 4. Exhibit D –29. Since the interview during which he selected the photograph began at 6:20 a.m., and Chau's at 6:35 a.m., wherein it was revealed she did not make an identification, I infer the officers had compiled the lineup from descriptions obtained in pre-interview briefings.

Mr. Vu repeated to the detectives what he had told the dispatcher, the male was black; that he could not

recall how he was attired, but for the officers he estimated his age to be “about in his teens.” Exhibit D – 32, pp. 2 and 6. Finally, Chau’s description appears at p. 3 of Ex. D – 12, “he’s black . . . guy; p. 6, “he have uh . . .uh gold teeth [across the top of his mouth];” “he less than 20 I think;” “He’s . . . he’s about my tall . . . a little bit higher than me;” p. 7, “I think he had jacket on . . . it’s black;” “He has . . . had a, a hand phone like I have . . . exactly . . . .” In nothing I reviewed did I find a witness’ reference to the perpetrator’s hairstyle or skin tone that could guide the police in selecting photographs for inclusion in the array.

I have carefully reviewed exhibit D – 29, the photo lineup shown Quoc Vu. The photographs used in it comport very well with the descriptions available to the officers at the time. All of the photographs are of relatively young African-American men. They appear to be relatively close in age. I see nothing age-wise to suggest any is much older or younger than the others. The pictures are head shots, *i.e.* from the upper shoulder and above. None of the subjects appears to be dressed in prison or jail garb. The little bit of the clothing depicted in each photograph appears to show street clothes – casual sports shirts. Three have slightly, but noticeably, darker complexions than the other three. All have neat, close—cut hairstyles and none has a mustache or facial hair. No image displays the subject’s teeth. The background in each photo is plain white with no markings to indicate height.

The only difference I discern does occur with Mr. LaCaze’s photograph. There appears to be a pronounced reflection of the camera’s flash on his forehead. All of the other photos have a similar reflection, but of a more muted nature. That artifact may account for the overall lighter tone of his entire photograph. In

any event, I do not find this artifact unduly focuses attention on Mr. LaCaze. I find there was sufficient physical similarity among the photo subjects to reasonably test Mr. Vu's identification. *State v. Bright,* 98 – 0398 (La. 4/11/00); 776 So.2d 1134, 1145.

As with Chau's identification, I find Quoc's earlier opportunities to view Mr. LaCaze legitimately informed his identification of Mr. LaCaze as the male perpetrator. Specifically I refer to his testimony at Vol. 6, 435:12—20 to the effect that he was present in the dining room the whole time Mr. LaCaze and Ms. Frank were there on the second visit. Although he was sweeping, he noticed that Mr. LaCaze kept staring at him. Also, he escorted them to the door upon their departure to lock it. As the Supreme Court did in *Bright, supra*, I find under the totality of the circumstances the photo array presented to Quoc Vu did not present a substantial likelihood of irreparable misidentification under the *Manson, supra*, factors.

As with Chau, Mr. LaCaze urges that Quoc merely identified the person who ate with Ms. Frank earlier that evening, rather than her actual cohort in the shootings. To try to make his point he cites Quoc's testimony at the preliminary hearing where Mr. Vu responded negatively when asked if he saw who fired the gunshots and whether he saw the person who entered with Ms. Frank. Ex. D – 33, 56:13 – 22 .[34] At that point Judge Giarusso, apparently sensing the witness did not grasp the question, intervened to ask if Quoc understood the question or whether he needed it translated. When the question was repeated, Mr. Vu changed his response. He still said he did not see

[34] On page 88 of his Post Evidentiary Hearing Memorandum Mr. LaCaze erroneously cites the page number as page 55.

who fired the first shots, but this time he said he did see the person who came into the restaurant with Ms. Frank, whereupon he pointed to Mr. LaCaze. Ex. D – 33*,* 56:28 – 57:6. Mr. LaCaze construes Mr. Vu's about face to mean he only saw Mr. LaCaze earlier, when the pair was eating and faults Mr. Turk for not capitalizing on it. The fallacy of this argument is that immediately following the foregoing colloquy and identification, Mr. Turk again asked Mr. Vu if he saw Mr. LaCaze with a gun. He responded, "No, I saw him running." *Id*., 57:8 – 9. Mr. Turk then asked whether Quoc saw who accompanied Ms. Frank on the *third* visit, to which he replied, "It was him." *Id*. p. 57:12–58:5. Although Mr. Turk was not privy to it, this statement was consistent with what the witness told Det. LeBlanc in his police statement a few hours following the killings. Ex. D – 32, p. 5.

Regardless of why Mr. Turk did not pursue this issue at the trial, it would not have helped his case if he had. The prosecution would have been able to easily rehabilitate Quoc with his earlier statement to Det. LeBlanc and with the complete transcript of his testimony at the preliminary hearing. The latter would have been more devastating to the credibility of his case since it would have appeared to the jury he had desperately taken Mr. Vu's testimony out of context to create a false impression.

In his final attack on the Vus' identification of him Mr. LaCaze claims the circumstances of the crimes created a risk of misidentification. He cites such factors as limited exposure time, cross racial identification, stress and fear, post event consultation among the Vus and change blindness to invalidate their identifications of him. He premises this attack on his contention that had Mr. Turk tried to suppress the identifications

the trial court would have had to deal with the factors that created a likelihood of misidentification.

This argument is defective for several reasons. First, the jurisprudential standard established by the Supreme Court of the United States is “a *very* substantial likelihood of misidentification,” not simply a risk of misidentification. *Biggers* and *Manson*, supra. [Emphasis added.] Secondly, of the factors by which Mr. LaCaze wants the lineup judged, only one has been sanctioned by the United States Supreme Court. (I correlate his “limited exposure time” with the Supreme Court’s “opportunity to view.) Perhaps his “stress and fear” criterion has some resemblance to the high court’s “degree of attention.”

He relies upon the testimony of his expert, Dr. Dysart, to validate his criteria, but expert testimony on the accuracy of eyewitness testimony was not admissible in Louisiana at the time of his trial. *State v. Stucke* 419 So.2d 939 (La. 1982). Admittedly *Stucke* is a pre-Louisiana Code of Evidence occurrence, and this case was tried after its effective date. However, after the Code became effective, at least one appellate court found *Stucke* to be consistent with La. C. E. art. 702. It affirmed a trial court’s exclusion of expert testimony as to the fallibility of eyewitness identification. *State v. Ford* 608 So.2d 1058 (La. App. 1 Cir. 1992). In *State v. Lee,* 94 – 2584 (La. App. 4 Cir. 1996); 668 So. 2d 420 the trial court did allow a defense expert to testify and explain to the jury twenty-one factors that allegedly caused identifications to be unreliable. He must not have been very convincing. The defendant appealed his conviction, citing as error the trial court’s denial of his motion to suppress the identification. Without even mentioning or discussing the expert, his twenty-one factors or the admissibility *vel non* of his

testimony, the court adjudicated the matter solely under the *Manson* guidelines. As recently as 2010 the Louisiana Supreme Court has affirmed the *Stucke* principle. *State v. Young,* 09 – 1177 (La. 4/5/10); 35 So.3d 1042.

For the reasons previously stated I find Mr. Turk had no valid basis upon which to successfully challenge the lineup. Moreover, in light of the controlling jurisprudence, any attempt to present expert testimony to the jury regarding the unreliability of eyewitness identifications would have been futile.

The next assault upon Mr. Turk's representation of Mr. LaCaze concerns the identification John Ross made of Mr. LaCaze as he purportedly pumped gasoline into Michael's gray car at 2:29 a.m. March 4, 1995. The claims are that the police presented Mr. Ross with an unconstitutionally suggestive photo lineup and that he did not identify the person who actually used Ofc. Williams' credit card.

The crux of the suggestiveness argument is that each photo in the array was labeled with the person's name and other identifying information. He is correct that such information appeared on the images. The state relies on *State v. Nathan*, 444 So.2d 231 (La. App. 1 Cir. 1983) for its position that such information on the photographs does not *ipso facto* render the lineup unduly suggestive.

In *Nathan* the victim, at her request, observed multiple arrays. After the first one on the night of the crime she identified the defendant and signed the back of the photograph. She wanted to be sure however, and requested a "show-up." The detective could not arrange one but assembled a second photo lineup, this time using color photographs instead of black and

whites. The defendant's was the only common photograph in the lineups. There is no question she knew the defendant's name since she saw it when she signed the reverse of the first photo she selected. There was some controversy as to whether the names of the people were visible when she previewed the second array a few days later. The witness said they were not visible, but it really did not matter because she did not remember or recognize his name. Again, she identified the defendant. The Court of Appeal found the names were not visible. Further, it held that even though the victim knew the defendant's name and the fact that his was the only photograph in both lineups, there was nothing on the photographs to emphasize the defendant.

Another applicable case is *State v. Lucky* 453 So.2d 1234 (La. App.1 Cir. 1984). There, the crime victim was given a high school yearbook containing the defendant's picture and asked if she could identify the perpetrator. No suggestion was made regarding which one she should select and the victim did not know accused's name before she identified him. The court of appeal did not find the procedure unduly suggestive. *Id*. at 1238.

I find the same result obtains here. Admittedly, a cursory scan of exhibit D – 30, the photo array of March 28, 1995 exhibited to Mr. Ross contains certain identifying information about each subject in a data box to the right of the page. Significantly, though, the same information appears on each photo, in the same place on the page, in the same format (including relatively small print) so that none stands out over the other. Also worth noting is that the names are not on the first line where one would ordinarily expect to see them. The first line is a series of file numbers which I

found discouraged my inclination to look for a name. Since I needed to thoroughly evaluate the array, though, I pressed on and finally located the names printed in small dark rectangles on the second line.

I observed nothing in the array that would focus attention on Mr. LaCaze. The background in each photograph is solid white, although in two, including Mr. LaCaze's, there are dark halos made by the shadows of the subjects' head. There are no lines in the background to indicate the subject's height, but that information is available in the data box on the right of the photograph, if one were to search for it.

In none of the photographs do the subjects reveal their teeth. Thus, it was not possible for the observer to be influenced by the presence or absence of gold teeth, probably Mr. LaCaze's most conspicuous identifier.

Mr. LaCaze's photograph in this array does not appear to be the same one used in the lineup shown the Vus since he sports a longer hairstyle, as do all the others, save one. All subjects appear to be in street clothes. In only one image, the last one of Ex. D – 30, does the subject seem to have a darker complexion than the others. In no image does the subject have a mustache or other distinguishing facial hair. Two subjects, identified as Preston and Julian, may have a scar or some similar facial feature on their left cheeks. However, I did not find it to draw my attention to the photographs as I did not discover them until I had examined the exhibits several times. Actually, the features could be a photo processing or printing artifact.

Finally, as in *Lucky, supra*, Mr. Ross did not know Mr. LaCaze's name until after he viewed the lineup and selected his picture. Vol. 6, 312:2 – 7.

As stated above, I do not find the subject array to be suggestive. I do recognize, though, that the appearance of the identifying information on the photographs could be deemed by some to constitute suggestiveness. For that reason I have subjected it to an evaluation under the *Manson, supra*, factors:

Regarding Mr. Ross' opportunity to view Mr. LaCaze while he was buying gasoline it must be remembered that Mr. Ross was quite familiar with both LaCaze brothers before the night of March 3 – 4, 1995. *Id*., 306:30 – 307:3; 311:20 – 312:12. One night he saw Mr. LaCaze use a credit card, which Ross deemed an unusual event since previously Mr. LaCaze always had paid in cash. 308:4 – 8, and 308:18 – 27; 309:8 – 9. He was also familiar with Michael's gray car because he had once pumped gasoline for him. 313:6 – 32. He felt so familiar with Rogers he would sometimes allow him into the station. 314:1 – 7; 321:29 – 322:1. Mr. LaCaze's car was the only one getting gasoline at the time in question. 316:13 – 18. Mr. Turk attempted to get Mr. Ross to say there was a column or other impediment to his view between his location and Mr. LaCaze's, but Mr. Ross would not concede the point. 319:7 – 22. He even unsuccessfully questioned Mr. Ross' eyesight. 320:29 – 30. I find Mr. Ross had an excellent opportunity to view Mr. LaCaze despite the brevity of his refueling operation. He had a wealth of past experiences with him upon which to draw.

As far as Mr. Ross' degree of attention is concerned, it is obvious that he was focused on Mr. LaCaze, his only customer at the time. On top of that he actually spoke with him through an intercom about the unusual circumstance of the use of the credit card. As previously noted, he was so well acquainted with Mr. LaCaze he had let him into the store on occasion.

Also, he knew that Rogers had only frequented his establishment on weekends while Michael had patronized it on all manner of occasions. I have found nothing in the record that I can construe as a distraction to Mr. Ross at the time he said he saw Mr. LaCaze use a credit card at his station.

It is clear that Mr. Ross did not provide the police with a description before he selected the photograph from the array. The first time the police went to see him was his day off. Their second visit was his very first encounter with them; it was then that he observed the lineup and helped the police find the receipt for the purchase made with Ofc. Williams' credit card. Apparently the police came to him with the lineup already prepared. His police statement was not taken until two days later, March 30, 1995. *Id.* 312:2 – 7 and Exs. D – 13 and D – 30. However, at the trial he was able to correctly tell the jury Mr. LaCaze had gold teeth, which were then demonstrated to the jury. Furthermore he correctly estimated Mr. LaCaze's height to be between 5'3" and 5'5" tall. *Id.* 308:28—30 and 320:5 – 12.

Mr. Ross was "positive" Mr. LaCaze was the man pumping the gas. *Id.* 309:8 – 10 and 315:21 – 29.

Finally, considering his familiarity with Mr. LaCaze I do not think an interval of about three weeks between the use of the credit card and the lineup was sufficient to interfere with the quality or validity of Mr. Ross' identification of Mr. LaCaze in the lineup.

Another component of Mr. LaCaze's attack upon Mr. Ross' identification of him is that it was made after Mr. Ross had been exposed to weeks of intense media coverage that followed this notorious crime. That possibly corrupting influence never came up in Mr. Ross'

trial testimony, but it did arise in the course of his statement to the police on March 30, 1995. Ex. D – 13. If Mr. Turk had tried to make an issue of this, I think it would have failed. Mr. Ross' trial testimony was consistent with his police statement so it is likely he would have responded to Mr. Turk the same as he did to the officers.

He covered his media awareness of the crime somewhat extensively with Det. Demma in Ex. D – 13. He seemed to have learned more about Ms. Frank than Mr. LaCaze from such publicity. Beginning on page six of Ex. D – 13 Mr. Ross acknowledges awareness of the "incident" in which a policeman and two others were murdered in a New Orleans East restaurant; that a police officer had been arrested; he saw part of "the" funeral[35] on television; that he did not see the male arrested with Ms. Frank; that he knew she had an accomplice, but he did not know "if it was one person or two or three others that was involved with her." Det. Demma presented Mr. Ross with an unidentified photograph, presumably of Mr. LaCaze, but Mr. Ross denied having seen it previously. Despite all this information from the news media, nothing caused him to connect Mr. LaCaze with the "incident" until he had seen the photo two nights earlier. *Id.* p. 7. This is consistent with what he told Mr. Turk at trial. Vol. 6, 312:8 – 10.

Mr. Ross volunteered to Det. Demma that shortly after the crime his brother-in-law told him "it" (obviously a reference to the male perpetrator) looked like someone he had met at Mr. Ross' Chevron station. Significantly, Mr. Ross responded to him, "I don't

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[35] It is unclear if he was referring to Ofc. Williams' funeral or that of the murdered Vu siblings.

think so . . ." Ex. D – 13, p. 7. In light of these details about Mr. Ross' exposure to media coverage, Mr. LaCaze's claim that such exposure nullifies Mr. Ross' identification of him rings hollow. *State v. Lee, supra; State v. Smith*, 95 – 826 (La. App. 1 Cir. 9/27/96); 681 So.2d 980 at 985 – 986.

The final element of Mr. LaCaze's complaint against Mr. Turk's handling of Mr. Ross' testimony is his claim that Mr. Turk failed to argue that Mr. Ross never actually saw the person who used Ofc. Williams' credit card. He rests this complaint on a single question and answer appearing in the trial transcript at Vol. 6, page 308. Mr. Woods asked Mr. Ross if he saw Mr. LaCaze about 2:29 or 2:30 in the morning of March 4, 1995 at the Chevron station. Mr. Ross' response was that he did not know the exact date, but he did see him one night when he used a credit card. He never did say specifically that it was Ofc. Williams' card. 308:4 – 27. From this testimony Mr. LaCaze fashions a gossamer argument that Mr. Turk could have credibly argued that Mr. Ross saw Mr. LaCaze on an altogether different night. This, he contends, would have caused the trial court to question the reliability of Mr. Ross' identification. It would also have permitted Mr. Turk to advance an alternate theory that Rogers was framed by whoever had really killed Ofc. Williams, stolen his wallet and then used his credit card at the station near his brother's apartment, in full view of an employee who knew him.

At first blush these are alluring expostulations. On closer examination, however, they are fraught with evidentiary pitfalls that could easily have led Mr. Turk to an informed decision not to pursue them if he was aware of Mr. Ross' police statement. Regardless of the reason he did not try to make these points at trial, I

find his failure to do so did not contribute to the guilty verdict. I find a high probability that a claim Mr. LaCaze was seen using a credit card some other night, or that he was set up would have been as ineffectual as the alibi defense. I base this on the following:

- Mr. Ross first became acquainted with Rogers in November or December of 1994, or possibly as late as January or February 1995. Vol. 6, 313:19 – 32.

- Rogers had always paid for his purchases in cash. Ex. D – 13, p. 4. That is the unmistakable import of Mr. Ross' trial testimony relating how he joked with Mr. LaCaze about his getting a credit card. 308:11 – 27.

- Mr. Ross knew Mr. LaCaze used the credit card on a Friday night because he worked Fridays through Tuesdays and he was not at work the night before he saw him with the card. 314:20 – 32.

- The witness had "no doubt" it was Mr. LaCaze he saw pumping gasoline with a credit card, but he was surprised to learn that that event would connect him to this case. 315:21 – 29.

- On March 30, 1995 he told Det. Demma that the single occasion on which Mr. LaCaze had used a credit card was "a few weeks ago." Ex. D – 13, p. 4. March 30, 1995 was 26 days – not even four weeks – from the night on which Ofc. Williams' credit card was used at Mr. Ross' gas station.

- Quite striking was Mr. Ross' revelation to Det. Demma that he had not seen Mr. LaCaze

since he had used a credit card to purchase gasoline at his station.

• If Mr. LaCaze had truly used a credit card at the Chevron store on some other night, that would have been an objective, verifiable, "immutable fact" so obviously exculpatory that it should have been the first thing he told Mr. Turk upon learning the state was making an issue of his use of a credit card. His deafening silence betrays the veracity of this contention.

• Even if he had stolen the card he would have used on that "other night," admitting to it bore significantly lighter consequences than three first degree murder convictions. Yet, despite all the expense, time and effort exerted by a multitude of lawyers, investigators and experts to prepare this post-conviction proceeding, he has proffered nothing to connect himself to any credit card on any night. Nevertheless, when taken as a whole Mr. Ross' testimony leaves virtually no doubt Mr. LaCaze used a credit card at the Chevron station on March 4th.

Certainly these facts are only circumstantial evidence that Mr. LaCaze used Ofc. Williams' card, but they are quite impressive ones. When they are considered in conjunction with Mr. LaCaze's admission that he was with Ms. Frank eating at the restaurant just before the slayings; that he confessed to being with Ms. Frank when she killed the victims, then reneged on it with the botched attempt at an unsupportable alibi; that Chau and Quoc Vu, well acquainted with Adam Frank, positively identified Mr. LaCaze, whom they did not know previously, as being

in the kitchen with Ms. Frank as shots were fired; and that Mr. LaCaze was arrested just a few blocks from where Ofc. Williams' credit card had been used shortly after his murder, not much room is left for a hypothesis of innocence. For Mr. Turk to try to argue that Mr. Ross did not actually see Mr. LaCaze use Ofc. Williams' credit card on March 4, 1995 would have been ludicrous.

Also, under these circumstances, for Mr. Turk to advance a theory that Mr. LaCaze was set up by Adam Frank was certain folly. As has been noted numerous times the Vus knew Adam Frank very well through his sister. They emphatically identified Mr. LaCaze on numerous occasions, and Mr. Frank by his own testimony, albeit nearly 20 years later, stated he had left the area fully two months before the crime. No one else has been suggested. For Mr. Turk to have suggested someone to the jury he would have had to invent someone, *e.g.,* create the proverbial phantom with no evidentiary base to back him up. His client could reap no profit from such an effort. Like the alibi, it would have been easily exposed as a desperate, uncorroborated attempt to shift blame.

Surely, Mr. Turk could have tried other tactics and handled these matters differently. However, he was burdened with the facts, facts he was powerless to change. For these reasons I find the outcome would have been no different had Mr. Turk attempted to suppress or challenge the eyewitness identifications as asserted above.

5. Counsel Was Ineffective for Failing to Present Evidence Mr. LaCaze Was Calling Ms. Frank During the Murders

Mr. LaCaze's next grievance alleges Mr. Turk was ineffective for not adducing evidence his client was phoning Ms. Frank at the time of the murders. He cites the testimony of witnesses whose phone numbers appeared on Rogers' call log the night of the crime and he categorizes as "weak" the state's evidence that Michael had Rogers' phone that night. This argument borders on the frivolous.

As for Mr. LaCaze's allegation that Mr. Turk neglected to present evidence he was calling Ms. Frank as she murdered the Vus and Ofc. Williams he is simply incorrect.

The state introduced the telephone records (state trial exhibits 13, 14, 15 and 16) for both Mr. LaCaze's and Ms. Frank's cell phones through a representative of Bell South Mobility. Vol. 5, 194:2 – 195:3; Ex. D – 22 and Ex. 12 to the Supplemental Petition. On cross-examination Mr. Turk focused the witness' attention on the calls that were made from Mr. LaCaze's phone to Ms. Frank's at the relevant time. 202:18 – 203:12; 204:22 – 205:2. He also stressed with the witness calls made on Mr. LaCaze's phone to the apartment he shared with Ms. Braddy and to his mother's home. 203:17 – 28; 204:5 – 7; 205:3 – 5. Then he summed up with the witness, getting her to confirm that as of 2:02 a.m. March 4th Mr. LaCaze's phone was still placing calls. 205:21—32.

Later, Ms. Braddy identified the telephone number at the apartment she shared with Rogers. Mr. LaCaze himself established the cell phone number 504 – 858 – 6986 for the phone Ms. Frank purchased for him. She confirmed that Mr. LaCaze had called her apartment about 2:00 a.m. on March 4th and Mr. LaCaze testified he placed the calls to Ms. Frank at 1:26 a.m., 1:28 a.m., 1:44 a.m. and 1:49 AM on March 4th. Even the

prosecution vouched for Mr. LaCaze's claim when it read Michael LaCaze's police statement during its cross-examination of him. Vol. 7, 514:13 – 22. The only other person with actual knowledge of the facts was Antoinette Frank and there was no chance she, as the next person to be tried for the same offenses, would take the stand subject to cross examination by the state.

Although he tries to minimize it, the reality is that in its case in chief the state elicited from Chau Vu the fact that Ms. Frank's accomplice had a cell phone. She included it as a part of her description of him. Vol. 6, 374:31 – 375:2. Instead of "quickly changing the subject" as he alleges on page 74 of his Post Evidentiary Hearing Memo, Ms. Teel, the prosecutor, actually dramatized the point by repeating the last part of Chau's response, "He had a cellular phone with him?" thereby eliciting an affirmative response. 375:3 – 4. The jury became aware during the state's case that Mr. LaCaze had a cell phone with him the night he accompanied Ms. Frank to the Kim Anh Restaurant. That was an appropriate foundation for the subsequent testimony concerning his calls later that night to his apartment and to Ms. Frank.

In connection with Mr. LaCaze's claim that the state withheld Brady material, *i.e.*, the statements of Chau and Quoc Vu, I did a detailed exposition of the chronology of events using cell phone records as the most accurate benchmark of when things occurred. That analysis causes me, and should have caused Mr. Turk, to doubt Rogers' possession of the cell phone from which the calls were made at those times.

In addition to the two calls from Ms. Frank's phone to Rogers' phone when they were next to each other in her car, there is another call that reinforces this

conclusion. Just three minutes before Ms. Frank picked him up at 11:20 PM she placed a two-minute call to the land line at his apartment, 504 – 243 – 1956, instead of to his cell phone. This could have seemed as odd to Mr. Turk, as it did to me. Ms. Frank had to know Mr. LaCaze and Ms. Braddy had an infant. A ringing house phone at that time of night would have been very disturbing for the infant, as well as the parents. Common sense would dictate it was something that should have been avoided, but a reasonable explanation is that she knew he had loaned his phone to Michael.

Also, there was no logical reason for Rogers to have been calling the Perry residence, where he was merely an acquaintance, especially at such an early hour. Rogers may have been better known at Daphne's grandmother's residence, but still one is driven to contemplate why he would call the landline there in the wee hours of the morning. Conversely, a logical explanation for such a call can be found in Michael's statement to the police on March 25th: He told the officers that after Rogers returned to the apartment upon refueling his car, he (Michael) left his apartment about 3:00 a.m. to pick up his girlfriend. It would make sense for him to have called beforehand to make or confirm arrangements for that encounter.

The final factor that makes unbelievable his claim that before he met Michael he was calling Ms. Frank during the murders from his phone is that there is no testimony from any witness confirming that they actually spoke with him during any of the calls I referred to. Certainly Daphne or her grandmother could have been subpoenaed to identify who called their residence. The only person who did verify such a

call was his mother, Ms. Chaney, but that call unquestionably occurred after Rogers and Michael reunited. Significantly, though, when Rogers paged Michael to pick him up (whether it was 12:30 AM or 2:00 AM) from Cindy Place he did not call from his cell phone.

Under all the circumstances, either through profundity or sheer luck, Mr. Turk did the best he could with the available evidence. The jury was well exposed to the fact that Mr. LaCaze's cell phone was in service during the time he claimed to have been calling Ms. Frank. Had he gotten into more detail about the phone calls after midnight, he risked accentuating the abundant evidence supporting the state's contention that someone else had the phone.

6. Counsel Was Ineffective in Presenting Michael LaCaze as a Witness.

Mr. LaCaze lambastes Mr. Turk for calling his brother, Michael, as a witness for the defense. His testimony had two purposes. The first, was to confirm that witnesses had been coerced, and secondly to verify Rogers' alibi. Unfortunately, from Rogers' point of view, the state effectively cross examined and impeached Michael using his statement to the police, Ex. 55 to the Supplemental Petition.

But, unless Michael told him, Mr. Turk could not have known the strength of the state's impeachment evidence. Who else could have supported the police coercion and alibi defenses? No one. (I have previously found that the testimony of Peter Williams and Angela Walker does not suffice.) Without Michael's testimony there would have been no predicate for the defense of police brutality or coercion, nor would there have been anyone to validate his version of the alibi.

This claim of deficient representation is nothing more than an attempt second-guess counsel's unsuccessful trial strategy. It has no merit.

7. Counsel Was Ineffective For Not Hiring a Crime Scene Expert and Not Challenging the State's "implausible" Theory of the Case.

Admittedly, this is a seductive argument, made more so by Justice Traylor's "implausibility" comment regarding the state's version of the shooting.[36] That theory was advanced during the state's cross examination of Ms. Sherry Gutierrez, a defense witness qualified as an expert in the field of crime scene reconstruction and blood stain pattern analysis and revisited in the state's closing argument. Vol. 7, 444:4 – 6; 458:29 – 459:7; Supp. Vol. IV, 48:3 – 13 and 49:4 – 8. A review of Ms. Gutierrez's report, Ex.

[36] Footnote 10: "The defense did not stress the implausibility of the 5'2" 135 lb. never-before-convicted 18-year-old defendant sneaking up on the fully armed 6'1/2" 225-pound policeman in the manner suggested by the state. In the state's version, the defendant would have had to have entered the restaurant, crossed to the bar, leaned up and over the bar as well as some looseleaf binders piled atop the bar and, still unnoticed, brought the gun within 18 inches of the officer's neck and, holding it parallel to the floor, shot him under the right ear. The victim's immediate collapse also would have made it difficult for the shooter in the state's version to have produced the other two wounds sustained by the officer." State v. LaCaze, 99—0584 (La. 1/25/02), *12 824 So.2d 1063, 1089. One difficulty I find with the "implausibility" characterization is that it presumes both men were standing erect, but there is no evidence regarding their relative positions. In fact the opinion notes that Ofc. Williams had begun to move in Chau and Quoc's direction when the gunfire erupted. 824 So.2d at 1067. If he was running toward them or leaning as he, perhaps, reached out to try to grab Ms. Frank as she accosted the Vus, he would not be at his full 6'1/2" stature.

D – 53, and her testimony suggests Mr. Turk expected to adduce exculpatory evidence that all of the victims were shot at a close enough range to have produced back spatter on the shooter. Then, he could credibly contend that since no back spatter was found on Mr. LaCaze, he was not the shooter. Vol. 7, 445:9 – 448:16. Her conclusions were based upon the information contained in the respective autopsy reports for each victim. 445:4 – 7.

On cross examination the state pointed out that she had never been to the crime scene and that it would have been helpful for her to have gone there. 452:8 – 31. It likewise got her to admit she had not seen photographs of the location nor of the victims' bodies. 453:1 – 11. She admitted not examining the defendant's clothing for blood spatter. 453:13 – 17. Probably the most damaging part of her cross examination was her admission that if there was an object between the victim and the shooter, spatter would be deposited on the object rather than the shooter. 458:29 – 459:21.

Mr. LaCaze blames Mr. Turk for a perception that the state's cross examination demolished the witness' credibility. He suggests that had Mr. Turk better prepared Ms. Gutierrez by getting her access to the crime scene, to Mr. LaCaze's clothing, to pictures of the scene and victims as well as information about the weapon involved, she would not have been so vulnerable to the state's cross examination. He does not explain how viewing the scene or photos or the clothes or having information about the weapon would have changed her testimony. For *any* location at which she pinpointed either person, the state could simply have asked her to assume a location where an obstruction, like the bar, existed to intercept spatter.

Actually, a fair reading of her testimony reveals she held up well under cross-examination. For instance, when the prosecutor informed her that the pathologist no longer thought there was stippling on Cuong Vu's face, Ms. Gutierrez would not retract her opinion. All that she would concede was that it would not be as likely to find back spatter on the shooter. Moreover, she remonstrated that as long as Mr. Vu was kneeling below the perpetrator there was still a possibility of back spatter reaching the shooter. 454:16 – 455:30.

On another occasion she was confronted with Dr. McGarry's testimony that the wound in Ofc. Williams' neck was to a bony area without a lot of vascularity. Ms. Gutierrez would not say that would decrease back spatter and cause it to travel a shorter distance. 457:9 – 15. She went on to explain the volume of blood is only one factor determining the distance spatter travels. It is also affected by the velocity of the projectile and whether the wound is covered with clothing. Furthermore, she implied Ofc. Williams was shot with a high velocity projectile because anything above 100 ft./s is considered high velocity and the slowest ammunition manufactured is 740 ft./s, thus obviating a need for more information about the weapon. 457:21 – 458:4.

On redirect Mr. Turk rehabilitated his witness by getting her to repeat that absent some obstruction between the perpetrator and the victim she would anticipate "a great deal of back spatter" to have reached the shooter since the coroner found stippling on the officer. 460:21 – 30. Further, he got her to establish that neither photographs nor visits to the scene were essential to a back spatter analysis. That is because back spatter always accompanies handgun injuries, regardless of the weapon's caliber or its

distance from the victim, although other factors, such as the victim's clothing can retain the spatter. 461:3 – 24. Also, he established with her that it was only necessary to examine the alleged shooter's clothes to confirm the presence of the back spatter because normally if he is within four feet of the victim he will receive back spatter. 462:20 – 26. Finally, in closing arguments, he emphasized that Ms. Gutierrez had used the state's own evidence, the autopsy reports, to show that if he was a shooter in this crime, there should have been back spatter on Mr. LaCaze's clothes. Supp. IV, 63:6 – 15 and 75:15 – 29.

The allure of Mr. LaCaze's present argument is that it relies so heavily upon Justice Traylor's comment, *supra*. However, that comment is clearly a *post hoc* assessment of the facts, precisely what *Strickland*, *supra*, instructs us to avoid:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citations omitted.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

> professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation omitted.]

Strickland the Washington, 466 U.S. at 689; 104 S.Ct. at 689

I find Mr. LaCaze's reliance on *Hinton v. Alabama*, 134 S.Ct. 1081 (2014) is misplaced. He asserts that in *Hinton* the defense attorney was found to have provided constitutionally ineffective representation because he failed to seek funds for expert services. However, that was not the case. In fact the attorney had sought and received an award of funds. The trial court was unaware of a recent change in the statute that would have permitted him to award a larger sum but, nonetheless, advised counsel that if he needed more money to return to the court. The funding provided was insufficient to retain the proper expert the defense needed. Counsel, also unaware of the recent statutory change, did not raise the issue with the court as he had been advised to do and went to trial with an expert he knew was unsuitable for the issues in his case. The expert's testimony was badly discredited and Hinton was convicted. Counsel's constitutional deficiencies were in not knowing of the change in the statute regarding funding for experts and his failure to request additional funds to replace the expert he knew to be inadequate. In post-conviction proceedings Hinton was able to produce three experts who testified that bullets found at the crime scene could not be connected to Hinton's gun. Thus, he was able to show both ineffective assistance and prejudice. Here, Mr. LaCaze has not shown that Mr. Turk was dissatisfied

with Ms. Gutierrez's qualifications or that he did not know he could seek court funding for experts.

Mr. Turk developed the absence of back spatter defense through Ms. Gutierrez in consultation with Mr. Jenkins. Ex. 53 to the Supplemental Petition.[37] Such evidence could have led one or more jurors to entertain a reasonable doubt about Mr. LaCaze's guilt. That the strategy did not succeed does not mean it was unsound. Mr. LaCaze's argument on this aspect of his claim is just what the Supreme Court emphasized in *Hinton, supra*: "We do not today launch [ ] courts into examination of the relative qualifications of experts hired and experts that might have been hired."

At the post-conviction hearing Mr. LaCaze presented the testimony of Rex Sparks, an expert in crime scene processing, blood stain pattern analysis and crime scene reconstruction. Mr. Sparks struck me as a learned, competent professional in the fields in which he is expert. However, his testimony does not advance Mr. LaCaze's cause the way the three ballistics experts helped Hinton's claims.

The thrust of his testimony was that the NOPD did an extremely poor job of processing the murder scene. He thought it required more than the three technicians assigned to it and he criticized their efforts at crime scene preservation. Particularly he noted that no videography was done and although photographs were taken, he found them lacking in quantity and quality. He noted a lack of effort documenting the scene near the victims and suggested more than four areas could have been checked for fingerprints. He

[37] "This information was made available to Mr. Robert Jenkins and Mr. Willie Turk in a meeting on May 29, 1995 . . . ."

seemed particularly dismayed by a "total disregard" of footwear impression evidence.

His cross examination reveals possible logical explanations for these alleged deficiencies. Of particular relevance to the location of the shooter relative to Ofc. Williams was his acknowledgment that the reason there are no photos of blood spatter could be that no spatter existed. His suggestion that photos should have been taken anyway, to document its non-existence, did not strike me as realistic. The same is true regarding his contention that many other areas should have been checked for fingerprints, even though those areas, like the main entrance door, the microwave or the work tables, were likely to have overlapping prints unsuitable for identification.

Theoretically, it would have been ideal to have better documentation of the footwear impressions near the victims' bodies. Yet there is no doubt that the crime scene technicians, who arrived at the restaurant after Ofc. Williams had been rushed to the hospital, knew the scene had been already contaminated by police or emergency medical personnel when they dragged him from the pool of blood behind the bar to begin lifesaving efforts. It was highly likely the bloodied footwear impressions were theirs. Mr. Sparks suggested locating all such personnel and getting impressions of the shoes they wore on the scene that night to compare with the bloody impressions to determine whether a perpetrator's footprint was present. Such an endeavor strikes me as a waste of precious resources since that print would have been of questionable utility in court. Its reliability could be easily discredited due to the aforesaid scene contamination.

I do not intend for the foregoing to be either an endorsement or a condemnation of the crime scene processing techniques employed at the Kim Anh Restaurant in the early morning of March 4, 1995 and following days. I mention these highlights from Mr. Sparks' testimony only to point out what Mr. Turk and his expert had to work with. Certainly by the time he became counsel for Mr. LaCaze the scene had been cleaned. Neither he nor any expert he hired could have photographed the shoe impressions, possible blood spatter sites nor dusted additional areas for fingerprints with a reasonable expectation of finding usable evidence.

Finally, in connection with the testimony of Ms. Gutierrez, Mr. Sparks did not refute her testimony and agreed that even if Ofc. Williams was shot from across the bar spatter could have been propelled onto the shooter. He seemed reluctant to criticize her when asked if she could have determined whether spatter would have been produced from Ofc. Williams' wounds. At first, all he would say was that he would have wanted more information than she was provided with to make that analysis. He had to be pressed before finally stating that she could not have answered the production of back spatter question with the photos and autopsy reports she had been given.

I find Mr. Sparks' testimony something of a conundrum. He did exactly what Ms. Gutierrez did. Although he testified he would have expected back spatter from Ofc. Williams' wounds, he had not gone to the crime scene nor did he interview anyone who had been at the scene and, generally, based his opinions on reports and photographs prepared by others – the sufficiency and quality of which he heartily disapproved. Yet, upon being pressed he testified Ms. Gutierrez did not have

enough information to answer the question with which she was presented.

I find it significant that Mr. LaCaze does not proffer what he would expect a different crime scene expert to testify to. Had he sought court funding Mr. Turk would have had to demonstrate to the court (possibly in an *ex parte* hearing) that it was more likely than not that expert assistance was needed to answer a serious issue or question raised either by the prosecution's or his own theory of the case. *State v. Touchet*, 93 – 2839 (La. 9/6/94) p. 14 – 15, 642 So.2d, 1213 at 1221.

Considering he had already engaged[38] an expert to advance a reasonable exculpatory theory, it is unlikely Mr. Turk could have met the *Touchet, supra*, threshold for obtaining public funds for a roving expert to conjure up possible defense theories.

In *State v. Crawford* 02—2048 (La. App. 4 Cir. 2/12/03), 848 So.2d 615, the petitioner contended counsel was ineffective for failing to hire experts to show that certain physical evidence impeached the testimony of a prosecution witness. The court rejected that claim because it found his trial counsel could not have known until the witness testified what the testimony would be. In this case the record does not reflect if Mr. Turk was aware before the trial of the state's theory regarding the shooter's location relative to Ofc. Williams. The statements of Chau and Quoc Vu, and Det. Rantz's report Exs. D—12, 32 and 34,

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[38] On pages 76 and 79 of his Post Hearing Memorandum Mr. LaCaze asserts that Mr. Turk merely borrowed the expert employed by Ms. Frank's lawyers. However that is directly contradicted by Ms. Gutierrez at the very beginning of her cross examination where she testified Turk was paying her for her services. Volume 7, 451:22 – 29.

respectively, do not indicate on which side of the bar the shooter was located. In its opening statement the state only revealed a part of its theory: "Whoever shot him, more likely than not snuck up on him." Vol. 5, 52:12 – 13. Notably, though, Mr. Woods did not suggest where the shooter was vis-à-vis the bar. In fact it is not until Ms. Teel cross-examined Ms. Gutierrez that the possibility of the bar impeding back spatter is even suggested.

Mr. LaCaze has failed to carry his burden of showing Mr. Turk's employment of Ms. Gutierrez constituted ineffective assistance or that there is a reasonable probability the outcome of the trial would have been different had he employed some other crime scene expert.

8. Counsel Was Ineffective for Not Attempting to Suppress Mr. LaCaze's Statement and for Not Introducing Evidence It was False and Unreliable.

There are two components to Mr. LaCaze's argument on this issue. The first is that Mr. Turk did not file a motion to suppress his statement to the police, Ex. D – 61. Instead, he "piggy-backed" the one Ms. Frank's attorneys filed. The second is that after the court denied the motion to suppress Mr. Turk did not avail himself of the opportunity provided by La. C. Cr. P. art. 703 to present the jury with evidence of the circumstances under which the statement was given so the panel could determine the proper weight, if any, to give the statement.

I am unimpressed with the first contention because I find no evidence Mr. LaCaze was prejudiced by joining Ms. Frank's motion. In fact, at the hearing on May 25, 1995 Mr. Turk cross-examined Det. Demma.

Supp. III, pp. 52 – 61. In addition he called as his own witnesses Sgt. Rantz, Det. Young and Mr. LaCaze's mother, Ms. Alice Chaney. *Id.* pp. 61 – 84.

His efforts at the hearing appear to have been directed toward two ends. First, he tried to show the police lied to Mr. LaCaze and his mother to induce him to voluntarily come to headquarters so they could then arrest and question him. Secondly, he sought to show the officers coerced a confession out of their accused cop killer. Although he was unsuccessful in suppressing the statement, he did get to preview the testimony that would be used against him at trial.

As a part of the second component of his argument Mr. LaCaze contends Mr. Turk neglected to present evidence at the trial that his confession was false. This is incorrect. In fact, he suggested through his trial cross examination of Det. Young and the direct testimony of his client that Mr. LaCaze was punched, kicked in the butt, beaten with a telephone book and threatened with a gun prior to giving the statement. Vol. 7, 579:5 – 21 and 581:7 – 16; Vol. 8, 630:28 – 631:15; 631:24 – 632:24. Regardless, Mr. Turk would have been confronted with two options: police brutality or mental deficiency arguments. He had already been apprised of Mr. LaCaze's proposed alibi and the transcript of the motion to suppress hearing reveals he received a copy of Mr. LaCaze's taped statement. Supp. Vol. III, 51:30 – 32. Although I have not heard the tape recorded statement, I have read its transcript as well as his trial testimony. I found that he came across as lucid and coherent. Nothing in the statement or Mr. LaCaze's testimony suggested to me subnormal intelligence, the presence of a mental disease or a defect that would undermine the voluntariness of his statement. Mr. Turk probably made a similar

assessment of his client's mental state. The record contains Ex. D – 55 to the Supplemental Petition, (also appearing at Supp. VI, p. 1) a report from Kenneth Ritter, M.D. detailing the results of his examination of Mr. LaCaze just over five weeks after his conviction. The doctor found, "no signs or symptoms of a mental disorder or defect." Also a part of Ex. 55 to the Supplemental Petition is the testimony of Dr. Rafael Salcedo, a forensic psychologist. Supp. VI, pp. 3 – 7. He found Mr. LaCaze's IQ to be in the borderline range, about two points above the mild mental retardation range. However, he reported Mr. LaCaze's performance IQ was deflated because he had been tested in tight handcuffs impeding his ability to use his hands appropriately on the Revised Wechsler Adult Intelligence Scale test.

Which direction should Mr. Turk have taken? His death prior to these post-conviction proceedings complicates the evaluation of the reasonableness of his actions. There is a dearth of information to illuminate the reasons he employed these strategies and tactics. No doubt there was a constellation of factors that influenced his decisions. Among them had to have been his awareness that the state would play the recording of Mr. LaCaze's statement for the jury. Aware the jury was going to hear his client lucidly and coherently relate the events of March 3 and 4, 1995 he may have deemed it more advisable to explain, as Michael LaCaze did, that police coercion, rather than intellectual disability was responsible for what the jury heard on the tape. Also, he knew that Mr. LaCaze had an alibi defense. He reasonably could have believed that if he was successful in destroying the credibility of the statement on the intellectual disability basis, he would simultaneously destroy his client's credibility on the alibi – which he wanted the jury to believe.

After all, who would believe the alibi of a simpleton who falsely confessed to three grisly murders.

Certainly he did not make the decision in a vacuum. No doubt he had input from his client, his client's mother and his client's brother, Michael. But, most importantly, as a local attorney practicing in the New Orleans court system undoubtedly he had an awareness of local current events. I previously noticed Appendix I, the *New York Times* article regarding Cuong Vu's aspiration to become a Catholic priest. That same article reminded me that as this case was proceeding to trial the New Orleans Police Department had a reputation for being one of the most corrupt police agencies in the nation. That article led me to one of December 6, 1994 in *The Times Picayune* reporting the arrest of NOPD Ofc. Len Davis for ordering a murder. See Appendix III. It relates that several other police officers were expected to be arrested in connection with Ofc. Davis' crimes. (http://www.nola.com/crime/index.ssf/1994/12/officer_len_davis_two_others_c.html.

Considering this case involved the high profile murder of a policeman with two others and implicated another officer as an alleged perpetrator, and followed so closely on the heels of the Davis case, I do not think it was unreasonable for Mr. Turk to have chosen the police brutality tactic to attempt to discredit Mr. LaCaze's statement. In light of the previous publicity regarding alleged widespread police misconduct, Mr. Turk could reasonably have thought it easier to persuade a juror (and he only had to convince *one*) that the police coerced the confession than it would have been to persuade one that Mr. LaCaze was so intellectually deficient that the police could get him to falsely admit he participated in killing three people.

Adhering to *Strickland's, supra*, injunctions to scrutinize an attorney's performance deferentially, to avoid the distorting effects of hindsight and to reconstruct and evaluate Mr. Turk's performance from his perspective at the time, I am unable to conclude Mr. LaCaze has overcome the strong presumption that Mr. Turk's conduct fell within the wide range of reasonable professional assistance.

B. Counsel's Deficiencies Undermine Confidence in the Outcome of the Trial.

Since I have found that none of Mr. LaCaze's claims relating to the ineffective assistance of counsel have merit, it goes without saying that those claims do not undermine confidence in the ultimate outcome of the trial. As noted, I find the evidence of his guilt overwhelming so if there was an error in connection with that finding, I do not think it could have prejudiced him.

ACTUAL INNOCENCE

Mr. LaCaze asserts his actual innocence in a separate memo on that subject filed April 4, 2014. It should be obvious from my findings above, I disagree with him. I will not repeat the reasons for that disagreement and will address here only the claims he raised in that memo that I have not previously addressed.

Once again, he brings up Adam Frank. This time he emphasizes two situations in which Mr. Frank allegedly "confessed" to killing an NOPD officer. One of those occasions emanates from Richland Parish where Mr. Frank was ultimately located and arrested on a variety of charges. Officer Perry Fleming testified on June 18, 2013 that a known, reliable confidential informant had told him that Keith Jackson (an alias

for Mr. Frank) had boasted to him (the CI) about killing a policeman in New Orleans. See also Ex. 20 to the Supplemental Petition.

This unchallenged hearsay statement from an unidentified source might be sufficient to establish “reasonably trustworthy information” as part of the probable cause determination in connection with an affiant’s application for a search or arrest warrant. It might even help establish an officer’s “reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion” in connection with a warrantless search. However it in no way suffices to prove beyond a reasonable doubt a confession of murder.

The other reference to “confession” allegedly was made in 2003 to Darren Reppond. Mr. Reppond was an inmate with Mr. Frank at the South Louisiana Correctional Facility in Basile, La. The gist of the alleged confession is that Mr. Frank shot an officer in the head at a restaurant because the officer was shaking him and his sister down for money. Mr. Frank denied making this statement to Mr. Reppond.

I am inclined to believe Mr. Frank on this point. While the statement has an element of fact, it is incomplete. The crime did involve a New Orleans police officer and he was shot in the head – twice – and once in the back. However, there is no mention of the other two victims. I do not think this statement can be considered a confession to the crimes at the Kim Anh Restaurant. Even Mr. Reppond acknowledged that inmates often boast about things they have not done in order to seem tough to their fellows. If Mr. Frank was making a boast to impress his jail mates, then it would seem he would have taken the macabre credit for all of the killings.

Mr. Frank denied involvement in the Kim Anh murders in his June 23, 2013 testimony.

Some other factors that cause me to question Mr. Reppond's credibility include the fact that he did not inform Mr. LaCaze's attorneys of this statement when they initially contacted him. I think that would have been the first thing he would have told them if the "confession" was true. On top of that, he got a trip from his Florida prison, where he is confined for second degree murder, to Orleans Parish to testify at the November 22, 2013 hearing. That could serve as a motive to invent a jailhouse confession. Finally, Mr. Reppond said he believed the so-called confession because Mr. Frank was so definite concerning the details. However when he was asked about those details Mr. Reppond suffered memory failure.

Quite simply I find the evidence of Mr. LaCaze's guilt overwhelming: He was seen in the company of Ms. Frank at Wal—Mart less than twelve hours before this execrable massacre attempting to purchase cheap ammunition. Two of the survivors positively identified him rummaging through the kitchen after the gunfire. They had each seen him twice earlier that evening and were well acquainted with Adam Frank so as not to mistake Mr. LaCaze for him. He disavows the statement he gave police on March 4, 1995 as "a complete falsification." Vol. 7, 588:25 – 29. Yet, in it he related facts they could not have known so early in the investigation to be able to coerce him into incorporating them into the statement. Then, in his trial testimony, when unquestionably he was not being threatened or beaten, Mr. LaCaze conclusively placed himself with Ms. Frank as she called the restaurant for food. Vol. 7, 569:6 – 16; 591:26 – 592:12; 596:2 – 4; 601:26 – 602:12. That admission eviscerated his

cynical, contrived alibi with his brother because it was physically impossible for Rogers to be with Ms. Frank during that call *and* be with his brother and Angela en route to Mr. C's. The telephone records for both his and Ms. Frank's cell phone strongly indicate Rogers LaCaze was not in possession of his cell phone until after Michael picked him up from Cindy Place in the early morning hours of March 4, 1995. Lastly, he was seen using Ofc. Williams' credit card at the service station near his brother's apartment within an hour or so of the officer's murder. For these reasons I conclude there are legally sufficient grounds upon which to re-prosecute him. La. C. Cr. P. art 930.5.

VI. MR. TURK DID NOT INVESTIGATE OR PRESENT AVAILABLE MITIGATING EVIDENCE AT THE PENALTY PHASE

Since I have found a structural error in the guilt phase of Mr. LaCaze's trial that requires a new trial, I consider this issue moot. Recognizing, however, that another court could come to a different conclusion, I should briefly state that I find Mr. LaCaze's point well taken. Mr. Turk's austere presentation at the penalty phase did not come close to the competent, effective representation Mr. LaCaze was entitled to.

As noted previously, Mr. Turk's death clouds consideration of many issues in this case. This is one of them. Without his testimony, or some other evidence explaining why he chose certain courses of action, the courts are left to assess his professional conduct in a vacuum, albeit deferentially pursuant to *Strickland, supra*.

It is clear to me that Mr. Turk focused all his efforts on the guilt phase. That he telephoned Mr. Trenticosta for advice on handling the penalty phase only after

rendition of the guilty verdict, and literally on the eve of the sentencing hearing, accentuates his lack of preparation for the eventuality his client might be convicted. Then, that he had to ask the court for "five or ten minutes" to confer with his penalty phase witnesses at the commencement of the penalty hearing further underscores his lack of preparation. There is no evidence that he sought the services of or consulted with professionals – psychiatrists, psychologists, social workers, etc. who could offer some objective reason for sparing the client's life. Once he had the benefit of professional mitigation witnesses then he could present the testimony of family and friends to attempt to humanize Mr. LaCaze before the jury.

This situation strikes me as quite similar to the one the Louisiana Supreme Court faced in *State v. Sullivan*, 596 So.2d 177 (La., 1992), rev'd on other grounds *sub nom. Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). There the defendant's trial counsel admitted he had not prepared for the penalty phase because he felt the jury would return a verdict of second degree murder, a feeling the court deemed unreasonable under the facts of the case. The supreme court noted its agreement with the lower court that whenever a defendant faces capital punishment his attorney must prepare for the possibility that he could be convicted as charged.

I have seen nothing in this record that evidences that Mr. Turk investigated defenses to place before the jury. If he did, he did not use it at trial. I can divine no legitimate tactical reason for not investigating or presenting evidence from professionals to the penalty jury. As in *Sullivan, supra,* had he investigated he would have found evidence that Mr. LaCaze had

been a slow learner in school which should have caused him to consult professionals. Such consultation would have led him to the information Dr. Salcedo developed post—trial and current counsel have built upon regarding his alleged mental retardation. That evidence in conjunction with humanizing testimony from teachers, family, neighbors and friends could have persuaded at least one juror to hold out for a sentence of life imprisonment.

MENTAL RETARDATION ISSUES

Mr. LaCaze presented an abundance of testimony that he was mentally retarded, primarily from Dr. Woods. He also offered testimony from lay people that he was a slow learner, a follower, not a leader, and easily influenced by others.

The state offered countervailing evidence, primarily from Dr. Pinkston. I do not think it necessary to recapitulate the scientific and technical testimony from the experts or from the lay witnesses. Suffice it to say that after hearing all of the testimony, reviewing the original trial record multiple times and observing Mr. LaCaze in the courtroom I do not think he is mentally retarded. Immediately following his trial Dr. Salcedo found Mr. LaCaze to be on the borderline of mental retardation, but only because he was handcuffed and unable to take the test normally. Likewise, Dr. Ritter diagnosed him with antisocial personality disorder, but not mental retardation. He attributed Mr. LaCaze's low IQ to his school truancy and educational deficits.

The subsequent testing that Mr. LaCaze was subjected to was specifically tailored for these post–conviction proceedings. I believe his poor performance on them was but a manifestation of his anti-social

personality disorder. I think he made a conscious effort to perform poorly on those tests because they afforded him, at the least, a ticket off death row and at best release from Angola. For all of his lack of education, I think Mr. LaCaze is a manipulative, cunning, street-smart malefactor capable of pulling the wool over the eyes of family, friends and teachers who cannot bear to appreciate him as the antisocial lawbreaker he is. I think that some of the professionals who have evaluated him have done so with a predilection – perhaps charitable or unrecognized – that the severity of the sentence he has incurred affects the lenity of their findings.

Since I have found Mr. LaCaze is entitled to a new trial, he may raise this issue at the time he is retried. La. C. Cr. P art. 905.5 .1.

CONCLUSION

Since juror David Settle sat on Mr. LaCaze's jury when commissioned law enforcement officers were legally barred from jury service, there was a structural error in his trial. That structural error constitutes a violation of the Constitution of the United States and of the State of Louisiana, a valid basis for granting post-conviction relief under La. C. Cr. P. art. 930.3 (1). He is thus entitled to a new trial before a properly constituted jury. In view of the new trial, he may invoke the procedures of La. C. Cr. P. art. 905.5.1 to address whether or not he is mentally retarded.

Since I have found sufficient grounds for a retrial, Mr. LaCaze shall remain in custody until he is retried. Although La. C. Cr. P. art. 930.5 provides that a petitioner to whom relief is granted is entitled to bail "as though he has not been convicted of the offense," I decline to authorize bail. The charges are for three

counts of first-degree murder, capital offenses, subject to the bail provisions of La. C. Cr. P. art. 331. That statute provides that persons charged with capital offenses shall not be admitted to bail if the proof is evident and the presumption great that they are guilty of the capital offenses. As noted, *supra,* I do find the evidence of Mr. LaCaze's guilt overwhelming. That meets the "proof is evident and presumption great" standard of the statute.

THEREFORE:

IT IS ORDERED ADJUDGED AND DECREED that there be judgment herein in favor of applicant, Rogers Joseph LaCaze and against the State of Louisiana, vacating the verdicts of "guilty of first-degree murder" rendered herein July 20, 1995 as to count one, Ronald Williams, count two, Cuong Vu and count three, Ha Vu; and

IT IS FURTHER ORDERED ADJUDGED AND DECREED that there be judgment herein vacating each sentence of death rendered July 21, 1995 upon the aforesaid verdicts and imposed by the court September 15, 1995; and

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Mr. LaCaze be afforded a new trial within the delays prescribed by law; and

IT IS FURTHER ORDERED ADJUDGED AND DECREED that pending a retrial Mr. LaCaze shall remain in custody. Bail is denied.

New Orleans, Louisiana this ___ day of July 2015.

____

MICHAEL E. KIRBY
JUDGE *AD HOC*

PLEASE SERVE:

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District Attorney, Parish of Orleans
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APPENDIX I

Killings That Broke the Spirit Of a Murder-Besieged City

By RICK BRAGG

Published: May 13, 1995

NEW ORLEANS—Every killing added its own specific grief to the city, like water dripping in a bucket already too heavy to carry. In all, 21 people died violently in New Orleans from Feb. 25 to March 4, the bloodiest week in recent memory in a city with a record-setting murder rate.

New Orleans, where they play jazz at funerals and the procession can break into a dance, usually heals quickly. But three of the murders that week, in a modest Vietnamese restaurant in the New Orleans East neighborhood, still haunt this city more than two months later.

A brother and sister, one planning to be a priest, the other hoping to be a nun, died on their knees in prayer in the family-owned Kim Anh restaurant at 1:50 A.M. on March 5. A few feet away, a young New Orleans police officer working as an off-duty security guard was also shot dead. He had a 1-week-old son.

Later that day, the New Orleans police released a picture of the accused killer. The photograph was cropped so that it showed the suspect only from the neck up. No one could see her badge.

Prosecutors have charged Antoinette Frank, a 23-year-old New Orleans police officer, with the murders of the brother, Cuong Vu, 17, his 24-year-old sister, Ha Vu, and the officer, 25-year-old Ronald Williams. They were killed, the police said, during a robbery by Officer Frank and an 18 year-old accomplice.

New Orleans is accustomed to killing. It is also accustomed to the breakdown of morality in its police department: four New Orleans officers have been charged with murder in the last year.

"But this carried us just a little too far," said the Rev. Thomas G. Glasgow, the pastor of St. Brigid's Roman Catholic Church. Cuong Vu was his altar boy.

The hurt, laced with anger, is especially deep in the corner of New Orleans East known as Little Saigon, where the Vu family lived and ran their restaurant. Here, almost every family has an elder who can remember the brutality and corruption of war-torn Vietnam, where uniforms were often to be feared.

"They had hoped they had left that behind," said Tommy Tran, a 32-year-old program analyst who works in New Orleans East and knows the Vu family. "And here it is again."

Officer Frank, who also worked as an off-duty security guard at the restaurant, had once been Officer Williams's partner. The Vus considered her a trusted friend, and Ha Vu had prepared dinner for her less than an hour before the slow, deliberate gunshots sounded along Bullard Avenue.

Another sister, Chau Vu, 23, ducked inside a walk-in freezer when the shooting started, and later told the police what happened.

"She did this to my family," Ms. Vu said of Officer Frank. "God teaches us to forgive, but I do not know if I can."

The hurt also lingers in the Catholic neighborhood where the officer people knew as Ronnie Williams grew up.

"I think the police motto is, 'To protect and serve,'" said Brother Ronald Hingle, Mr. Williams's high school algebra teacher. "I just felt, 'How much faith can we place in that?'"

The horror and sense of betrayal caused by the killings have crossed all lines of race and class. There has been talk by some residents that the deaths might be a catalyst for change. Others dismissed that hope as civic cheerleading.

In the darkened Kim Anh, Nguyet Nguyen, the mother of Ha and Cuong Vu, sat recently with tears ruining her makeup, explaining in Vietnamese what the killers had done. She talked a long time.

A friend, struggling to make Nguyet Nguyen's feelings clear in his limited English, tried to interpret. "They broke everything," he finally said.

What he meant was, her life is in pieces. Callings 2 Siblings Share Spiritual Dreams

The statue of the Madonna outside St. Brigid's Church has almond-shaped eyes.

The eyes, Asian eyes, "are by design," said Father Glasgow, whose congregation is largely Vietnamese. Assimilation has its boundaries in a place like New Orleans East, a lowland where fishermen in conical straw hats search for crabs in the bayous beside three-bedroom homes with blue aluminum siding.

Nguyet Nguyen and her children came to the United States from Vietnam four years ago, reuniting with a husband and father they had not seen for 10 years. They worked together to make the restaurant a small success, but Ha and Cuong had another career – a calling, really – in mind.

It is common, after death, to trim the rough edges from a person's character. But the people who remember Ha and Cuong Vu said there was no need to smooth over their lives.

Ha Vu, a soft-spoken young woman who was the restaurant's cook, wanted to become a nun as soon as the family's business was firmly established. She had attended a local college but dropped out because it was too expensive.

Over and over, people referred to her as "delicate," "innocent" and deeply spiritual. She never had a boyfriend.

"You can feel it in the air," Msgr. Dominic Luong, an advocate for the Vietnamese community who knew the young woman, said of the community's sadness.

Cuong Vu would have made a good priest, Father Glasgow said. Even before the boy could speak English, Cuong was following the pastor around, helping at the church.

"His countenance did not know anger," Father Glasgow said. "He was sublime. I will miss him. I will miss him very much."

To the Vietnamese people here, the killings brought back memories of a world they had fled. (Page 2 of 2)

The Vietnamese communities in New Orleans, in the eastern part of the city and across the Mississippi River on the West Bank, have been slow to extend their trust. Instead of trusting banks, they often used "collective financing" – several businesses chipping in to help start a new one, or to help it expand.

Rumors that the Vu family had hidden such pooled financing at their restaurant may have led to the robbery.

And instead of relying on governments to protect them, the immigrants hired their own guards.

"In Vietnam the police are corrupt," said Monsignor Luong, the pastor at Mary Queen of Vietnam Church in New Orleans East.

When the police in New Orleans were slow to respond to calls at their businesses, the Vietnamese, like many other business owners here, bought their loyalty by offering them off-duty security jobs.

That is how the Vu family came to know Officers Williams and Frank, both of whom had worked for them off and on over the last year.

"I hired them to take care of my family," Nguyet Nguyen said. "She killed them." Dress Blues Same Uniforms, Different Sides

The killing of Officer Williams, the first case in which one New Orleans police officer has been charged in the murder of another, leaves the department in alien territory. In the past, when officers were charged with crimes, the department often just closed ranks. But there is no "blue wall of silence" now, no apparent cover-ups.

"His funeral procession just went on and on, forever and ever," Lieut. Sam Fradella said of the service for Officer Williams. Hundreds of officers, from police departments all over the country, marched behind the coffin. As the procession passed, cars pulled over to the curb and people got out to pay their respects.

At the time of his death, Officer Williams seemed to be building a solid career. He had saved a child from drowning, but even police heroes in New Orleans have to work overtime to pay their bills.

The new baby, whom he and his wife, Mary, named Patrick Austin, would need things: food, clothes, toys. The couple already had a 5-year-old son, Christopher. Moonlighting at the Kim Anh restaurant seemed like easy duty, safe duty.

Brother Hingle, Officer Williams's high school teacher, attended his wake. He sat with the slain officer's mother and told stories about Ronnie Williams in life. Sometimes they even laughed a little. But it is his death that will register on the history of New Orleans.

"Probably the whole city has been changed because of this," Brother Hingle said. "He is a symbol for the community. He has been made so."

Officer Frank, according to her service record and in the views of officers who served with her, should probably never have been in uniform in the first place, even in a department considered among the most corrupt in the nation.

She failed a psychological exam that is a prerequisite for the police academy, but the academy accepted a second opinion, from her own doctor. It is a regular practice in a department that in recent years has often had to lower its standards to match its pay, veteran officers said.

Ms. Frank joined the force in August 1993, but just a few months later superiors recommended that she be returned to the academy for retraining. Her incident reports were sometimes incomprehensible, and fellow officers complained about irrational behavior.

The police now believe that she may have used her badge to steal from drug dealers with the help of Roger Lacaze, the 18-year-old laborer who has been charged

as her accomplice in the Kim Anh killings. Mr. Lacaze, a fried of Officer Frank, had been booked on weapons and battery charges, but the cases were never pursued by the district attorney's office.

"This tells us we have to do a better job of screening our applicants," Lieutenant Fradella said.

Officer Frank's lawyer, Robert Jenkins, maintained his client's innocence, saying she had nothing to do with the killings or robbery. Other officers have tried to paint her as a bad cop to distance her from the department and make it easier to prosecute her, he said.

Mr. Jenkins paints a picture of a woman who grew up poor in a small town outside Baton Rouge, who always dreamed of being a police officer. She lived in a tiny house on Michigan Street and was not involved in anything illegal, he said.

He described her as a solid officer whose application had been endorsed by judges and other respected people in New Orleans. Her application form to the department was even signed by then-Mayor Sidney Barthelemy, he said, instead of the usual city official.

Mr. Barthelemy has since said his name was faked on the form.

Mr. Jenkins said his client went to the Kim Anh that night to pick up the meal she had ordered. "She didn't shoot anyone," he said. The Killings Officers Respond; One Is Accused

The crime, as described by the police, was brutally simple but inexplicable in its meanness: Officer Frank and Mr. Lacaze came to the restaurant to rob it, and shoot the witnesses.

Police said the robbers shot Officer Williams near the bar. Then they shot the two siblings.

Prosecutors and investigators are not talking about who shot whom, except to say that both Officer Frank and Mr. Lacaze fired their guns.

Mr. Jenkins said that Officer Frank knew there were others in the restaurant, and he argued that it would have made no sense for her to shoot some witnesses and leave others alive to testify against her.

Chau Vu and her brother, Quoc Vu, hid in the restaurant when the shooting started. Later, when Officer Frank came back to the restaurant with other officers, as though she were responding to the call, Chau Vu pointed at her and told other officers that Ms. Frank had killed her brother and sister and Officer Williams.

Later that day, the police said that Officer Frank had confessed to the killings and that she and Mr. Lacaze had implicated each other. But Mr. Jenkins now says that the police confused her statement with a confession and that she never said she killed anyone.

Officer Frank and Mr. Lacaze were indicted on April 27 on three counts of first-degree murder.

The intensity of grief, more than two months after the slayings, still touches Father Glasgow. It is as if his city is locked in a box with its pain.

"This is not the true New Orleans," the pastor said. "The true New Orleans is a place that celebrates life."

Photos: Antoinette Frank, charged in killings that haunt New Orleans. (Associated Press); Nguyet Nguyen, who came to the United States with her children from Vietnam four years ago, says her life is in pieces since the killing of her son and daughter, Cuong and Ha Vu,

on March 5. In her home in New Orleans last month, she placed incense in front of pictures of her slain children. (Matt Anderson for The New York Times)(pg. 6)

APPENDIX II

DATE	TIME	CALL DESCRIPTION
26-Feb	6:23 PM	Rogers' phone calls Ms. Chaney
27-Feb	6:09 PM	Rogers' phone calls Ms. Braddy's apt.
28-Feb	*6:13 PM*	*Rogers' phone calls Ms. Duplessis*
1-Mar	4:07 PM	Rogers' phone calls Ms. Frank
1-Mar	4:07 PM	Ms. Frank's phone receives a call
1-Mar	10:38 PM	Ms. Frank's phone calls Kim Anh Restaurant
1-Mar	11:17 PM	Rogers' phone calls Michael's beeper
1-Mar	11:24 PM	Rogers' phone receives a call
1-Mar	11:25 PM	Rogers' phone receives a call
1-Mar	11:46 PM	Rogers' phone calls Kim Anh restaurant
1-Mar	11:51 PM	Ms. Frank's phone calls Ms. Braddy's apt.
2-Mar	12:10 PM	Ms. Frank's phone calls Ms. Braddy's apt.
2-Mar	1:52 PM	Ms. Frank's phone calls Ms. Braddy's apt.
2-Mar	1:53 PM	Ms. Frank's phone calls unknown number
2-Mar	1:55 PM	Ms. Frank's phone receives a call
2-Mar	1:56 PM	Ms. Frank's phone receives a call
2-Mar	2:00 PM	Rogers' phone receives a call
2-Mar	2:30 PM	Rogers' phone calls Ms. Braddy's apt.
2-Mar	2:32 PM	Rogers' phone calls unknown number

2-Mar	2:36 PM	Rogers' phone receives a call
2-Mar	2:42 PM	Rogers' phone receives a call
2-Mar	2:58 PM	Rogers' phone calls unknown number
2-Mar	3:05 PM	Rogers' phone calls Ms. Frank's phone
2-Mar	3:05 PM	Ms. Frank's phone receives a call
2-Mar	3:07 PM	Ms. Frank's phone calls the NOPD Seventh District
2-Mar	3:26 PM	Ms. Frank's phone calls Rayville Louisiana
2-Mar	4:10 PM	Ms. Frank's phone calls Van Village
2-Mar	4:48 PM	Ms. Frank's phone calls unknown number
2-Mar	4:52 PM	ditto
2-Mar	5:00 PM	A. FRANK & R. LACAZE AT JAY & MIKE'S BODY
2-Mar	5:42 PM	ditto
2-Mar	7:56 PM	Ms. Frank's phone receives a call
2-Mar	*8:04 PM*	*Ms. Frank's phone calls the Perry apartment*
2-Mar	9:25 PM	Ms. Frank's phone calls Ms. Braddy's apt.
2-Mar	9:45 PM	Ms. Frank's phone calls unknown number
2-Mar	9:56 PM	Ms. Frank's phone calls Ms. Braddy's apt.
2-Mar	10:30 PM	Frank's phone calls unknown number
2-Mar	10:32 PM	ditto

2-Mar	11:14 PM	Ms. Frank's phone calls unknown number
2-Mar	11:45 PM	Rogers' phone receives a call
3-Mar	*12:04 AM*	*Ms. Frank's phone calls the Perry apartment*
3-Mar	12:42 AM	Rogers' phone calls unknown number
3-Mar	12:43 AM	Rogers' phone receives a call
3-Mar	12:49 AM	Ms. Frank's phone calls Rogers' phone
3-Mar	12:49 AM	Rogers' phone receives a call
3-Mar	9:34 AM	Rogers' phone receives a call
3-Mar	2:55 PM	Ms. Frank's phone calls an unknown number
3-Mar	3:00 PM	EARLIEST THEY WERE AT WAL-MART (AMMO)
3-Mar	3:08 PM	Ms. Frank's phone receives a call
3-Mar	4:48 PM	Ms. Frank's phone calls an unknown number
3-Mar	5:00 PM	LATEST THEY WERE AT WAL-MART (AMMO)
3-Mar	5:30 PM	EARLIEST THEY WERE AT SMITH RESIDENCE
3-Mar	6:30 PM	LATEST THEY WERE AT SMITH RESIDENCE
3-Mar	7:55 PM	Ms. Frank's phone calls an unknown number
3-Mar	8:25 PM	Ms. Frank's phone calls an unknown number
3-Mar	9:59 PM	Ms. Frank's phone calls Ms. Braddy's apt.

3-Mar	11:17 PM	Ms. Frank's phone calls Ms. Braddy's apt.
4-Mar	11:20 PM	FRANK PICKS UP LACAZE FROM BRADDY APT.
4-Mar	12:16 AM	Ms. Frank's phone calls Rogers' phone
4-Mar	12:17 AM	Rogers' phone receives a call
4-Mar	12:18 AM	Rogers' phone calls an unknown number
4-Mar	*12:21 AM*	*Ms. Frank's phone calls Rogers' phone*
4-Mar	*12:21 AM*	*Rogers' phone receives a call*
4-Mar	12:26 AM	Rogers' phone calls an unknown number
4-Mar	12:30 AM	Rogers' phone calls the Perry apartment
4-Mar	*12:35 AM*	*Rogers' phone calls Ms. Frank's phone*
4-Mar	*12:35 AM*	*Ms. Frank's phone receives a call*
4-Mar	12:42 AM	Rogers' phone calls the Perry apartment
4-Mar	12:43 AM	Rogers' phone calls Daphne's grandmother's
4-Mar	12:51 AM	Ms. Frank calls the Kim Anh restaurant
4-Mar	1:26 AM	Rogers' phone calls Ms. Frank's phone
4-Mar	1:26 AM	Ms. Frank's phone receives a call
4-Mar	1:28 AM	Rogers' phone calls Ms. Frank's phone
4-Mar	1:28 AM	Ms. Frank's phone receives a call

4-Mar	1:44 AM	Rogers' phone calls Ms. Frank's phone
4-Mar	1:44 AM	Ms. Frank's phone receives a call
4-Mar	1:48 AM	911 CALL–MAN SHOT AT KIM ANH REST.
4-Mar	1:49 AM	Rogers' phone calls Ms. Frank's phone
4-Mar	1:49 AM	Ms. Frank's phone receives a call
4-Mar	1:50 AM	QUOC VU CALLS 911
4-Mar	1:53 AM	FIRST POLICE CAR ARRIVES AT REST.
4-Mar	2:02 AM	Rogers' phone calls Ms. Braddy's apt.
4-Mar	2:38 AM	Rogers' phone calls Ms. Braddy's apt.
4-Mar	2:40 AM	Rogers' phone calls an unknown number
4-Mar	3:40 AM	Rogers' phone calls Ms. Chaney
4-Mar	3:47 AM	Rogers' phone calls Ms. Chaney

APPENDIX III

Officer Len Davis, two others, charged in death of Kim Groves on December 06, 1994 at 3:20 PM

A New Orleans police officer and two other men were arrested Monday in connection with the Oct. 13 slaying of a woman, a killing federal authorities say was plotted and celebrated over phone lines tapped by the FBI.

In what comes as the latest disgrace to the already scandal-ridden Police Department, officer Len Davis, 30, is accused of conspiring with Paul "Cool" Hardy, 27, and Damon Causey, 24, in the murder of Kim Groves, 32, in the 1300 block of Alabo Street.

The arrests stem from a 10-month federal probe of police corruption that is expected to result in charges against as many as 11 other officers who allegedly were involved in large-scale drug trafficking, sources said.

Davis was among the officers involved in narcotics dealings, a federal complaint alleges. One of his contacts was Hardy, a man who was arrested but cleared in two previous New Orleans killings and is described in the complaint as the leader of a violent drug gang.

The complaint alleges that Davis ordered the murder of Groves; Hardy carried it out; and Causey hid the murder weapon. FBI ballistics tests matched a 9 mm pistol found in Causey's bedroom to a bullet casing found at the scene of Groves' murder.

Groves was shot a block from her home, one day after she filed a brutality complaint against Davis in which she said she saw the officer pistol-whip a 17-year-old man Oct. 11.

The federal documents include detailed transcripts of telephone conversations between Davis, Hardy and Causey, including conversations just minutes before and after the killing. This is the account described in the documents:

Shortly after Davis found out about the brutality complaint against him, he is quoted as muttering to himself as he dialed Hardy's beeper, "I can get P to come and do that whore now and then we can handle the 30." In police code, 30 is the signal for a homicide.

On the night of Groves' murder, Davis spoke with Hardy several times. In two conversations, Davis, using a cellular phone in his car, directed Hardy to Groves by giving detailed descriptions of what she was wearing. The description matched what Groves had on at the time of her murder.

In a conversation at 10:43 p.m., Davis is quoted as saying to Hardy: "I got the phone on and the radio. After it's done, go straight Uptown and call me." A few minutes later, Groves died after being shot once in the head.

Davis and his police partner Sammie Williams are quoted talking to Hardy at 11:22 p.m., moments after police officially logged Groves' death as a murder:

Davis: Yes!

Williams: It's the whore!

Davis: Yes!

Williams: Hello.

Hardy: Yeah, what's happening?

Williams: (Laughing) It's confirmed, daddy.

Williams has not been charged, but he is expected to be arrested this week, sources said. Davis, Hardy and Causey are charged with conspiring to violate the civil rights of Groves by killing her, a crime punishable by death.

Others who may be arrested include several officers from the 5th Police District, two from the 6th District, two from the 2nd District, one assigned to public housing and one from the juvenile division. One of the officers, a 5th District sergeant, is a commander.

Most of the targeted officers were hired in the late 1980s, two sources said.

As part of the probe, Police Superintendent Richard Pennington Monday called more than 50 police officers, including commanders, to the Municipal Training Academy. Each was given a subpoena to a federal grand jury that will begin hearing testimony today and Wednesday, sources said.

Sources said prosecutors want to eliminate the possibility that accused officers will concoct an alibi that they were participating in legitimate undercover drug operations. To do that, prosecutors will ask commanders whether they instructed their officers to be involved in such duties.

Law-enforcement sources said the officers are suspected of conspiring to distribute large amounts of cocaine.

The undercover investigation was so secret that even former police Superintendent Joe Orticke was not told, sources said. Pennington, appointed in October, was briefed about the probe in November, the sources said.

The investigation ended prematurely after Justice Department officials were shown evidence that Davis ordered Groves' murder. At that point, a decision was made not to let Davis and the other two suspects remain on the street.

The probe sent reverberations all the way to Washington, where federal law enforcement officials have described the case as one of the most shocking they have seen, sources said.

The investigation hits the Police Department at a time when the agency is reeling from several years of corruption, with more than 30 officers arrested in connection with a variety of crimes. Convictions have been obtained against officers for bank robbery, bribery, theft and sexual offenses. Several officers still await trial, including two facing murder charges.

Davis has been suspended by the Police Department.

Michael Perlstein and Walt Philbin wrote this report

http://www.nola.com/crime/index.ssf/1994/12/officer_len_davis_two_others_c.html

APPENDIX D

824 So.2d 1063

SUPREME COURT OF LOUISIANA

No. 99-KA-0584

STATE OF LOUISIANA

v.

ROGER LACAZE.

Jan. 25, 2002

Defendant was convicted in the Criminal District Court, Parish of Orleans, Frank A. Marullo, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Traylor, J., held that: (1) trial judge's response to jury's request for explanation of mitigating factors was permissible; (2) missing transcripts did not warrant relief; (3) attorney did not render ineffective assistance during voir dire; and (4) the death sentence was permissible.

Affirmed.

Attorneys and Law Firms

G. Benjamin Cohen, Clive A. Smith, New Orleans, Lane R. Trippe, New Orleans, Counsel for Applicant.

Richard P. Ieyoub, Attorney General, Harry F. Connick, District Attorney, John J. Glas, New Orleans, Valentin M. Solino, Counsel for Defendant.

Opinion

TRAYLOR, Judge.[*]

On April 27, 1995, an Orleans Parish Grand Jury indicted the defendant, Roger LaCaze, for three counts of first degree murder in violation of La.Rev.Stat. 14:30. After a trial by jury, the Defendant was found guilty as charged on all three counts. At the conclusion of the penalty phase the jury, having found multiple aggravating factors, unanimously sentenced defendant to death. The trial judge sentenced defendant to death in accordance with the jury determination.

This matter is now before this court on direct appeal. La. Const. art. V, § 5(D).[1] On appeal, Defendant alleges twenty-seven assignments of error for the reversal of his conviction and sentence.[2] Finding no merit to Defendant's assignments of error, we affirm his sentence and conviction.

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[*] Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore,* participating in the decision.

[1] La. Const. Art. V, § 5(D) provides that a case is appealable to the Louisiana Supreme Court if a defendant has been convicted of a capital offense and a penalty of death has been imposed.

[2] Several assignments of error were not discussed in this opinion because they do not represent reversible error and are governed by clearly established principles of law. They will be reviewed in an appendix which will not be published but will comprise part of the record in this case.

Factual Background and Procedural History

On April 27, 1995, an Orleans Parish grand jury indicted the defendant Roger[3] LaCaze and co-defendant Antoinette Frank for three counts of first degree murder. La.Rev.Stat. 14:30. The cases were severed. Following a five-day bifurcated trial in July of 1995, the defendant was found guilty as charged. Jurors thereafter unanimously recommended imposition of the death penalty on each of three counts. The defendant now appeals.

Co-defendant Antoinette Frank, then a 24-year-old New Orleans Police Officer, and 18-year-old defendant Roger LaCaze were charged with murdering two members of the Vu family and a New Orleans Police Officer. The Vus owned and operated the Kim Anh Vietnamese Restaurant, located at 4952 Bullard Road in Eastern New Orleans. Officer Ronald Williams was working a security detail at the restaurant the night of the murders.

Evidence at trial established that Antoinette Frank had worked security at the Kim Anh and knew the Vu family. Around 9 p.m. on Friday, March 3, 1995, she called to inquire if she would be needed for the detail that night. Frank spoke with Chau Vu, the 23 year old daughter of the owner. Chau advised Frank that she was not needed, as Officer Ronald Williams would work from 11 p.m. until closing time, normally around 1 a.m. Frank completed her shift at the 7th District Police Station at 11 p.m. After changing clothes at

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[3] Pleadings and transcripts contain different versions of the defendant's name. He was indicted as "Roger LaCaze." Some volumes of the trial record reflect the defendant's name as "Rogers LaCaze." The defendant himself signed a rights-of-arrestee card as "Rogers LaCaze."

home, she picked up the defendant and drove directly to the Kim Anh. She entered alone, asking for cold drinks for herself and a "nephew," who remained in the car. Frank spoke with Officer Williams, whom she knew, and with Mrs. Vu. Frank told Chau that she and her nephew were going to a midnight movie, and left with the drinks. Business was slow that evening, and the family decided to close early. Mrs. Vu went home, leaving her children to clean up. Frank telephoned a pick-up food order about fifteen minutes later to order some food, indicating that she had missed the movie. At this point there were six people in the restaurant: Chau, her 24-year-old sister Ha Vu, her 18-year-old brother Quoc Vu, and her 17-year-old brother Cuong Vu, a waitress named Tu, and 25-year-old Officer Williams.

Frank and a man she introduced as her nephew arrived at the restaurant minutes later and were the only customers. Their order was brought out in styrofoam containers, but Frank and her dinner companion decided to eat in the restaurant. Chau took close notice of Frank's dinner partner, later describing him to police as a short African-American with several gold front teeth, carrying a cellular phone.[4] Quoc, who was sweeping up around the tables, also made note of Frank's companion because he "kept staring" at Quoc. Frank and the man left without finishing their meal, exited the restaurant, but remained outside, talking. Chau went to attached grocery side of the building, unlocked the doors, and bid them good night. Frank asked if she would be needed Saturday night for the security detail. After checking with Officer Williams,

[4] On the first day of trial the defendant was asked to stand and display his (gold) teeth for jurors. Later, Antoinette Frank was shown to the jury.

Chau said no, that Williams would handle it. The two got in Frank's car and drove off.

Shortly thereafter, Frank and the man returned for a third time. Chau Vu and Quoc Vu were certain that the man accompanying Frank on her third trip to the restaurant was the man she introduced as her nephew, the same person who had eaten with her. Chau was frightened when she saw Frank approaching for the third time. Shouting to Officer Williams and Quoc not to open the doors, Chau gathered the money and ran to the kitchen where her sister Ha and brother Cuong were cleaning. As Chau hid the money in a microwave, she heard Quoc calling for her to come quickly to the front.

Quoc had interrupted his sweeping to watch Frank pull into the parking lot, maneuver her car, then exit and walk up to the glass door and begin shaking it. He called to Chau and moved toward the kitchen. Chau was leaving the kitchen area and coming towards him when, suddenly, Quoc saw Antoinette Frank there inside the restaurant. Frank began pushing Chau backward, forcefully and rapidly, toward the kitchen, saying that they needed to talk. Frank tried but failed to grab Quoc. Officer Williams was behind the bar. He had started moving in Chau's and Quoc's direction when Quoc heard "lots of gunshots" from that area.

Frank spun around and ran towards the bar and the front of the restaurant. Chau and Quoc ran in the opposite direction, going deeper into the building. They raced through the kitchen and into a large, room-sized cooler, situated between the kitchen and a small grocery the family also operated. As they ran they called to Ha and Cuong, who were by the stoves, to come along. But Ha and Cuong did not follow.

Chau testified similarly, that suddenly Antoinette Frank was inside the restaurant pushing her roughly toward the kitchen. It was at a point when she, Quoc, and Frank were together that Chau heard gunfire from the bar area where Officer Williams was located. When Frank left them, Chau, Quoc, and a helper hid in the cooler. Quoc turned off the cooler's lights as they entered and crouched down. From the darkened interior he and Chau were able to see into parts of the kitchen and bar through a small window. Chau saw Frank and her companion running back and forth, all over the kitchen. She saw Frank do something to the phone at the bar. Chau heard more gunfire but was unable to see who was shooting. Quoc observed Frank and her companion running around, rummaging, "digging in this little area where we always hide our money." Then she heard gunfire from the area where he had last seen his siblings, Ha and Cuong. Quoc was positive that the defendant was the man who was with Frank during the shooting.

Then Frank and the defendant were gone. From her vantage point inside the cooler, Chau looked through the windows of the grocery to the parking lot and watched Frank's car pull out and drive away. Yet she and Quoc hesitated to leave the relative safety of the cooler, uncertain what they would find and unsure whether Frank and the defendant had left or would return. Chau left the cooler on the grocery side to try to reach the telephone or her cellular phone at the bar. The telephone normally kept on the bar was gone. Going to retrieve her cellular phone, Chau spotted Officer Williams's body and lost all "confidence . . . because the person that protects us is lying right there." She returned to the cooler with her cellular phone and attempted unsuccessfully to call 911. She finally reached a friend and asked him to relay news

of the shooting and that an officer was hurt. The friend's call was received by 911 operators at 1:48 a.m.

While Chau was calling, Quoc left the cooler on the kitchen side to look for his brother and sister. He returned with news that both were lying in pools of blood. Quoc decided to try to reach a friend's house and call police from there. He left through the kitchen and back door. Quoc's call from his friend's home was received by 911 operators at 1:50 a.m.

The first police unit arrived on the scene at 1:52 a.m. Officers Wayne Farve and Reginald Jacques pulled into an empty parking lot. Jacques went around to the back, while Farve approached the front. A young female Vietnamese darted out of the building and ran toward him. Officer Farve also observed "a black female running a short distance behind [the Vietnamese female]," whom he recognized as another police officer, Antoinette Frank, who told him that the injured officer and perpetrators were "in the back." Farve entered the restaurant, with the semi-hysterical Vietnamese female right behind him. After quickly checking on the three victims, Farve made the appropriate notifications by radio then withdrew to the front of the restaurant. Arriving close behind him in another unit was Officer Yvonne Farve, who pulled in as her husband, Wayne, entered the restaurant. She attempted to follow him but was stopped by Chau who bolted from the building, crying and shouting. Yvonne Farve later testified that she "just grabbed on to me. So, I held her."

Chau had waited "so long" in the cooler for help to arrive. She saw one patrol car pull up but hesitated, not "want[ing] to go outside because I know Antoinette is police too . . . ." When she heard more sirens approaching she felt safe enough to leave the building. Exiting

on the grocery side, Chau began running toward the policeman. But from "somewhere[] Antoinette" appeared. Frank kept asking where she and her brother had hidden and what happen to her sister and other brother. Chau answered, "You was there. You know everything. Why you ask me that . . . ." Frank reached out to grab her but Chau "saw the lady with the uniform [and] ran to her, and she hug me[.]" Later, after the Yvonne Farve calmed her down, Chau was able to relate that Antoinette and a short black man with gold in his teeth had come in and "were just shooting everybody."

Chau was unable make an identification from a photo line-up that morning. At trial she positively identified the defendant as Antoinette Frank accomplice. Quoc picked out the defendant's picture from a photo array in the hours following the shootings. At trial he, too, positively identified the defendant as the man who was with Antoinette Frank at dinner and at the time of the shooting.

Antoinette Frank was questioned on the scene and taken into custody. She gave several statements implicating the defendant. By 3:30 a.m. Saturday morning police were at the home of the defendant's mother. From there they proceeded to Michael LaCaze's West Bank apartment, where they took the defendant into custody. By approximately 5:00 a.m. he was in the homicide office where he gave verbal and taped statements placing himself inside the restaurant during

the shooting, even while insisting that he had neither fired a weapon nor killed anyone.[5]

The bodies of Ha Vu and Cuong Vu were found next to the stoves, each shot multiple times. Ha Vu had been shot at least twice: once to the top of the head, which killed her instantly; and, once to the back of the head. There were minor wounds to the left knee and right arm which may have been caused by bullet fragments. Cuong Vu suffered four wounds, each of which would have been fatal. Two bullets were fired close together into the back of his head, exiting in the forehead. Their parallel trajectories suggested a rapid-fire type weapon. A third bullet struck a shoulder blade and exited in the chest area. A fourth bullet entered the victim's front chest, striking the liver and exiting the back. Two other wounds were superficial.

Officer Williams was shot three times. Forensic pathologist Paul McGary testified that the likely first shot was fired at close range to the right side of the victim's neck, under and beneath his ear, which severed the spinal column and exited just below his

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[5] The defendant told detectives that after the shootings Frank dropped him off at his girl friend's apartment on Cindy Place in Eastern New Orleans, a short distance from the Kim Anh restaurant. Frank told him not to worry, that she would return and take care of things She would go to the 7th District and report that several black masked men broke through the back door of the restaurant and started shooting. She would be able to do this because "the[re] ain't no way . . . [that anyone] would ever believe she had anything to do with it." Frank did return to the 7th District Station House but only to swap her personal automobile for a patrol unit, which she used to return to the scene, after taking the precaution of parking in an adjacent parking lot. Frank either hid near the front of the restaurant or perhaps was inside when Chau Vu broke cover and ran for the safety represented by Officers Farve.

left ear. The bullet's trajectory was almost horizontal, slightly forward and upward. The victim would have been standing upright when this shot was fired. Death would have been instantaneous. The second wound was high on the neck at the base of the skull, with the bullet traveling into the head on an upward trajectory and exiting above the left ear. This would have been inflicted while the victim was down or falling down. Similarly the third bullet, which entered the right lower back and exited in the left chest area below the collar bone after passing through the right kidney, diaphragm, liver and right lung, was fired when Williams was down or falling down. The microwave oven where Chau Vu tossed the uncounted currency was empty. The murder weapon was never found.[6]

Three weeks after the murders detectives were contacted by the widow of Officer Williams, advising that someone had used her husband's gasoline credit card on March 4, the date of his death. Investigators had recovered the slain officer's identification folder, which most members of the force use in lieu of wallets. With the new information they realized that Williams also carried a wallet and that it and its credit cards had been taken after he was killed. Further investigation led detectives to the night manager of a Chevron Gas Station located a short distance from the home of the defendant's brother, Michael LaCaze, who told

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[6] It is unclear how many guns were used. Police recovered 9mm casings, 9mm bullets and 9mm bullet jacket fragments from the scene and autopsies. While New Orleans Police Firearms Examiner John Treadaway matched jacket fragments, a bullet from the scene and a bullet from the autopsy as being fired from one 9mm semi-automatic weapon, and while he found that all casings were fired from one 9mm semi-automatic, he could not could not conclude that all casings, bullets and fragments were fired from the same weapon.

them that the defendant had made a credit card purchase around 2:30 a.m. in early March. Matching transaction records kept at the service station of "swipe card" purchases not requiring a signature with credit card billing information established that a credit card issued to Officer Ronald Williams was used to purchase $15.29 of gasoline at 2:29 a.m., Saturday, March 4. The manager positively identified the defendant as the person making that credit card purchase.

The prosecution's theory of the case was that Antoinette Frank became involved with the defendant in November of 1994 when she responded to a report of a disturbance and encountered a gunshot LaCaze. She followed his medical progress, then called and visited after his discharge from the hospital. Frank began giving him money, buying him gifts and clothes, and tried to get him a job. According to the defendant, Frank saw to it that he got a G.E.D. She also warned him that Eastern New Orleans was unsafe, as the person for whom he sold cocaine actually worked for 7th District police officers. Asked the nature of their relationship, defendant testified that he and Antoinette were friends.

By February of 1995, she purchased two cellular telephones, one for him and one for herself.[7] By this point the two were acting in concert while Frank was on duty. On March 2, for example, Frank responded to a report of an auto accident at Chef and Downman Streets. An African-American male rode in the front

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[7] Telephone company records show that Frank bought two cellular telephones, 858-6986 and 858-6987. Billing records show a series of calls from 858-6986 (LaCaze) to 858-6987 (Frank) at 1:26 a.m., 1:28 a.m., 1:44 a.m. and 1:49 a.m. on March 4, or the approximate time that Frank and LaCaze were terrorizing the occupants of the Kim Anh and making their get-away.

seat with her in the patrol unit. At Frank's direction the man got behind the wheel and repositioned the unit; at another point, he directed traffic. Other officers on the scene took him for an off-duty or plainclothes police officer. Also on March 2, while still on duty and in uniform, Frank drove the defendant in her patrol unit to apply for a job. The following day, a uniformed Frank and a young African-American male with gold teeth were in Wal-Mart inquiring about 9mm cartridges. They left without making a purchase. That evening Frank and a young man she introduced as a "trainee" responded to a residential call in the 7th District.

In addition to their play-acting, prosecutors theorized that Frank was becoming increasingly angry over being cut out of what she considered an equitable share of the paid details at the Kim Anh Restaurant. The defendant told detectives that Frank resented the fact that her former partner, "Ronnie [Williams, was] always [] fuckin' over her . . . . He be messin' over her . . . . [and the Vus] do anything he say."

The defendant took the stand in his own behalf at trial. At the guilt phase he repudiated his statements to detectives. Instead, he explained to jurors, he and Antoinette Frank went to the restaurant twice, the last time to eat. Afterwards, Frank dropped him at his girlfriend's apartment around 12:20 a.m. Saturday morning. That was the last time he saw her. Minutes later his brother called, inviting him to play pool. His brother picked him up about 12:30 a.m. They picked up Angela, a friend of his brother's, then went to Mr. C's Pool Hall in Eastern New Orleans. They stayed until about 2:00 a.m. They left, dropped off Angela, then drove to his brother's West Bank apartment, arriving about 2:30 a.m. There the defendant

remained until police arrived between 4:00 and 4:30 a.m. The defendant denied returning to the Kim Anh for a third time, denied any part in the killings, and insisted that his oral and taped statements to the contrary were products of police threats and coercion. He would confess again, he testified, because he "kn[ew] for a fact that New Orleans police get away with anything . . . ."

The defense supported the alibi through testimony from the defendant's brother, Michael LaCaze. It did not produce Angela, however, and the manager of Mr. C's Pool hall testified unequivocally that Michael played pool late that Friday night without his brother. Further, the defendant contradicted the time line of his alibi when he testified that he was with Frank when she called the restaurant to order the food. Telephone company records established that the order was placed by cellular phone at 12:51 a.m. Saturday. This was some twenty minutes after he testified that Michael picked him up.

In addition to its alibi evidence, the defense raised for juror consideration the possibility that Antoinette Frank's brother, Adam Frank, was the accomplice. Cross-examination of Chau Vu established that Frank brought her brother to the restaurant when she worked a detail there. Later she began to drop Adam off at the restaurant, "just to hang around," while she performed her regular shift at the 7th District. Chau had a benign view of Adam Frank, however. He would come in, watch people having fun and enjoy the karioke. When Antoinette Frank got off work, she pick up Adam. The defense established that at relevant times Adam Frank had outstanding warrants for two counts of attempted manslaughter.

The defense also attempted to show that the wounds suffered by Cuong Vu and Officer Williams would have caused "back spatter" of blood on the shooter. The importance of this was the lack of blood spatter on the clothes of the defendant, which were seized at his arrest. However, the prosecution established through cross-examination of the defense blood pattern expert that defense counsel had neither provided any data on the murder weapon nor asked her to visit the scene, review photographs of the scene or the victims, or asked her to examine the defendant's clothes.[8]

The state conceded in closing that no one saw the shootings. On the other hand, it maintained that it had proved that Antoinette Frank did not kill Officer Williams. The evidence identified his killer as the defendant, Roger LaCaze. While

Frank made a commotion by gathering people together, LaCaze sneaked in and shot Williams from behind.[9] The defendant then rummaged with Frank

[8] The expert also retreated from her conclusions with respect to Cuong Vu's wounds, after learning that the pathologist determined that these were not close wounds and thus would not likely produce back-spatter. Told that the pathologist felt that little back-spatter would have been produced by the neck wound to the officer, the defense expert held to her view that a shooter within four feet of a gunshot wound would receive an amount of back-spattered blood. She conceded that a definitive assessment would depend on an examination of the scene or photographs of the area, neither of which was requested by defense counsel.

[9] The defense did not stress the implausibility of the 5#2# 135 lb. never-before-convicted 18-year-old defendant sneaking up on the fully armed 6# 1/2# 225-pound policeman in the manner suggested by the state. In the state's version, the defendant would have had to have entered the restaurant, crossed to the bar, leaned up and over the bar as well as some looseleaf binders piled atop the bar and, still unnoticed, brought the gun within 18 inches of the officer's neck and, holding it parallel to the floor,

for money. The prosecutor also conceded that "we will never know [precisely] what happened" to Ha and Cuong Vu in the kitchen. Neither survivor, Chau or Quoc Vu, saw who shot their siblings. It appeared that only one gun was used and, the state argued, while reasonable to suppose that LaCaze kept and used the gun again, it made no difference who pulled the trigger on the Vus. That was "because whether that gun was in Antoinette Frank's hands or in [the defendant's] hand, [LaCaze] was there, he was helping, and he was intending to kill everybody, and he is guilty under the law of [p]rincipals." Jurors were urged to find LaCaze personally killed Officer Williams then participated as a principal in an armed robbery and the killings of the Vus.

Jurors deliberated seventy-nine minutes before unanimously finding the defendant guilty as charged on each of three counts of first degree murder.

At the penalty phase the state presented aggravating evidence of two unadjudicated crimes involving guns and violence to the person. It also presented victim impact testimony from Mrs. Vu, and the wife and mother of Officer Williams. Defense witnesses included the defendant's parents, the two mothers of his three children, and the pastor of a church he attended. All urged jurors to spare his life. The defendant took the stand and frankly begged for his life, telling jurors that while he was "guilty from being with Antoinette Frank," he "did not pull the trigger

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shot him under the right ear. The victim's immediate collapse also would have made it difficult for the shooter in the state's version to have produced the other two wounds sustained by the officer.

. . . [and] . . . did not kill them people." He begged for a chance to see his children, even from a jail cell.

In closing the state argued that the death penalty was appropriate, that the "mind of a person who could do that is unfathomable" and that jurors should consider the defendant's lack of remorse and denial of responsibility. Jurors were asked to show the same mercy as shown to the victims.

Defense counsel pleaded for his client's life. He argued that life imprisonment for an 18-year-old is a death sentence. He begged the panel not to make the defendant pay for what Antoinette Frank did. Counsel cautioned that "there may come a time in the very near future that other evidence might [show] that [LaCaze] may not have committed this crime," but a verdict of death would render that moot. In mitigation counsel primarily urged the defendant's youth, the lack of prior convictions, that he was under the influence and dominion of Antoinette Frank, and that he was a principal whose participation was minor.

Jurors interrupted deliberations to request further instructions on the statutory mitigating factors of the youth of the offender, and when the offender is under the influence or dominion of another. La.Code Crim. Proc. art. 905.5(c) and (f). The trial court hesitated to say anything which could be construed as a comment on the evidence, but told jurors that when legislators defined the mitigatory factors enumerated in La.Code Crim. Proc. art. 905.5, it did so "in a fashion for the jury to read into that what they believe that says." Further, "the weight that you are to give to the mitigating and aggravating circumstances is strictly the prerogative of the jury." Asked also to comment on the appellate process, the court responded that, "in this type of case the defendant will get an appeal," but

that was an area "not [for jurors to be] considering . . . ." Panel members resumed their deliberations and, thereafter, unanimously recommended the death penalty on each of three counts, finding the following statutory aggravating circumstances:

> *As to count one* (Ronald Williams), jurors found that (1) the victim was a peace officer engaged in his lawful duties; (2) the offense was committed during the commission of an armed robbery; and that the (3) offender knowingly created a risk of death or great bodily harm to more than one person.
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> *As to count two* (Cuong Vu), jurors found that (1) the offense was committed during the commission of an armed robbery; and (2) the offender knowingly created the risk of death or great bodily harm to more than one person.
>
> *As to count three* (Ha Vu), jurors found that (1) the offense was committed during an armed robbery; and (2) that the offender knowingly created a risk of death or great bodily harm to more than one person.

Defendant was then sentenced to death in accordance with the jury determination.

DISCUSSION

The principal issues of this appeal involve: (1) whether the evidence was sufficient to support defendant's conviction; (2) whether defendant adopted and litigated the motion to be declared indigent filed by Antoinette Frank; (3) whether defendant's borderline IQ and its effect on his ability to resist the influence and dominion of an older authority figure should have been considered by the jury during the penalty phase of the

trial; and (4) whether the trial court gave adequate responses to the jury's questions on mitigating circumstances. After a thorough review of the record, we answer each of these in the affirmative and, finding no reversible error, affirm defendant's conviction and sentence. We now turn to the assignments of error raised by the defendant.

Assignments of Error XVII, XIX and XX

In related claims, the defense complains that the trial court diminished jurors' sense of responsibility by commenting on the appellate process and denigrating their verdict as a "recommendation;" that the court erred further when it instructed a deadlocked jury to resume deliberations until a verdict was reached, thus denying the defendant's right to a fair trial and reliable sentencing determination; and that the trial court erred in giving an inadequate response to jurors' request for further instructions on mitigating circumstances, the defense complains.[10]

The jury broke off penalty phase deliberations with two inquires. One was whether the court could "comment" on the appeal process. The trial court replied that it was "another layer of the system," about which jurors should not concern themselves.[11] While a

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[10] As an initial matter, there was no defense objection to any of these alleged errors during the trial. However, as this case was tried before the decision in *State v. Wessinger*, 98-1234, p. 20 (La.5/28/99), 736 So.2d 162, 181 (on a prospective basis, the court will no longer consider alleged errors in the penalty phase of a capital trial absent a contemporaneous objection), the failure of counsel to object does not preclude review.

[11] Continuing, the trial court stated,

> Now, I will tell you that the defendant is entitled to an appeal. As a matter of fact I will even go further than that and I'll say in this type of case the defendant will get an

defendant's right to a reliable sentencing hearing is compromised by references to appeal rights by the trial judge or prosecutor which convey the message that jurors' awesome responsibility is lessened by the fact at that their sentencing decision is not final,[12] brief reference to appeal rights in response to a juror's direct inquiry, as here, which emphasizes that such concerns are not for the panel, does not deprive a defendant of a fair sentencing decision.[13] This portion of the argument lacks merit.

There is no support for claims of a deadlocked jury. During the recharge, a juror asked, "How long are we allowed to deliberate tonight? If we come to a deadlock or we can't make a decision, how long do we have?" The judge replied, "[t]hat is a call that I have to make." Thereafter he asked jurors to "go upstairs and make an earnest effort to reach a verdict . . . [to] go . . . and deliberate, and at some point I will check on you."

While a trial court has broad discretion in deciding whether the jury is deadlocked, and its decisions will

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> appeal. But, I think that is as far as I can go, and that really is not your prerogative to be considering the appeal and the appellate process. Just like you shouldn't be the prosecutor, or the defense attorney, or make the evidentiary calls. Your job is to focus on the sentencing hearing, the aggravating and mitigating circumstances that are involved in this case and weigh that and make your decisions solely on that and what has been introduced in this case.

[12] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

[13] *State v. Deboue*, 552 So.2d 355, 365 (La.1989)(judge's "succinct and legally accurate response, acknowledging the commonly known fact that defendant had a right to an appeal . . . [did not lead] the jury to believe that its responsibility for sentencing was in any way diminished.").

not be overturned absent a palpable abuse of discretion,[14] in this case, there was no deadlock. This portion of the argument lacks merit.

The defendant's complaint, that the judge described the verdict as a "recommendation" which diminished jurors' sense of responsibility, is equally without merit. As a general principle, the failure to impress upon a jury the seriousness and finality of its decision denies due process.[15] Yet review of the voir dire argument of counsel[16] and the trial court's instructions in this

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[14] La.Code Crim. Proc. art. 905.8; *State v. Lowenfield*, 495 So.2d 1245, 1259 (La.1985); *State v. Monroe*, 397 So.2d 1258, 1271-1272 (La.1981).

[15] *State v. Williams*, 96-1023 (La.1/21/98), 708 So.2d 703, 722-723.

[16] With a 120-person venire in the courtroom, and having called the first panel of twenty venirepersons to the jury box for examination, the district court advised the assembled prospective jurors:

> [B]ut, in a first degree murder [case] because of the possible penalty here, [it] is the jury . . . if they come back with guilty as charged, that is the only time in Louisiana law that the jury recommends a sentence. And, they can recommend a sentence of death or life imprisonment without benefit of probation, parole or suspension of sentence. And, that will only occur if there is a guilty verdict in the first phase.
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> So, in other words, it is a bifurcated trial. We will try the question of guilt . . . first, and if the defendant is found guilty of first degree murder, as charged, then twelve people who are sitting on the jury will make the selection of whether the person receives a sentence of death or life imprisonment.
>
> Jurors were queried frankly by the state on an ability to vote for the death penalty. The state plainly informed jurors, "If this jury comes back with a verdict of guilty as charged, I am going to ask you to put him to death."

case[17] offer no support for claims the jury did not understand the gravity of its duty or the finality of its decision, as this responsibility was impressed upon jurors repeatedly.[18] This portion of the argument lacks merit.

Next, defendant complains that the court did not properly reply to jurors' request for further explanation on statutory mitigating circumstances relating to "the youth of the offender at the time of the crime" and "the influence or . . . domination of another person" under La.Code Crim. Proc. art. 905.5(c) and (f). To this inquiry, the judge replied in pertinent part:

> . . . [T]he legislature, when it defined these activities here-these mitigating activities, they defined them in a fashion for the jury to read into that what they believe that says.

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[17] In opening remarks to jurors at the penalty phase the state told jurors:

> As you recall, I explained to you that if . . . the jury decided that the defendant was guilty of first degree murder that I would come back . . . that we would come back . . . and ask you to unanimously recommend that [defendant] be put to death. We are at that time now. As the Judge has explained to you . . . each one of you individually must now consider what the appropriate penalty is for what he has done.
>
> The district court's penalty phase charge left no doubt about jurors' sentencing responsibility:
>
> Ladies and gentlemen, having found the defendant guilty of first degree murder, you must now determine whether [he] should be sentenced to death or to life imprisonment without benefit of probation, parole, or suspension of sentence . . . .

[18] *State v. Wessinger*, 736 So.2d at 188; *Williams,* 708 So.2d at 722-723.

> Now, I will make one comment. Okay. [Subpart (c)] you say, "The offense was committed while the offender was under the influence or under the domination of another person." That is one of the mitigating circumstances that you consider in making your decision. And, the weight that you are to give to the mitigating and aggravating circumstances is strictly the prerogative of the jury. The other one that you point out is [Subpart (f)], "The youth of the offender at the time of the offense[,"] and that again is the prerogative of the jury, and I cannot in my explanation start talking about something that will fade into the evidence in this case because that is not my prerogative.

The judge advised that he could not intrude into the evidence but did offer that the jury could read into the definition as they saw fit, determine what weight to accord mitigating and aggravating circumstances, and concluded by repeating that he could not comment on the evidence.

The Eighth Amendment does not require, even in response to a defendant's request, particularized and detailed jury instructions addressing the concept of mitigation generally, or the specific statutory circumstances urged by the defendant. It suffices that the instructions given by the trial judge allow jurors to consider and give effect to any and all mitigating evidence.[19] The test is whether a reasonable likelihood

[19] *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998).

exists that jurors understood the trial court's instruction to preclude consideration of mitigating circumstances.[20]

Additionally, in the case of *State v. Flowers*,[21] this court held that in the context of a general instruction which emphasized the jury's authority to consider not only statutory mitigating circumstances but also any other relevant circumstances, any "further attempt to define or expand upon statutory mitigating circumstances may only lead to juror confusion and further efforts to define the definitions." Furthermore, a trial court has no independent affirmative duty to provide jurors any more of an explanation of mitigating circumstances than provided by La.Code Crim. Proc. art. 905.5. Moreover, even when specifically asked by a jury whether it must return a sentence of death if it finds one or more aggravating circumstances beyond a reasonable doubt, a trial court may respond by rereading a general charge which correctly informs jurors that they must consider all of the evidence in the case, including mitigating circumstances, before returning a sentencing verdict.[22]

In this case, jurors clearly were not confused about their duty to consider mitigating circumstances. The district court did not err in giving an incorrect statement of the law, but merely did not fully answer the jury's query. We cannot say that it is reasonable to believe that the jury was hindered in considering

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[20] *Buchanan*, 522 U.S. at 277-79, 118 S.Ct. 757; *see State v. Howard*, 98-0064, p. 31 (La.4/23/99), 751 So.2d 783, 816 (adopting *Buchanan*). *Buchanan* made no change in Louisiana law.

[21] 441 So.2d 707, 716 (La.1983).

[22] *Weeks v. Angelone*, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000).

mitigating circumstances due to the court's response to its questions. The complained-of failure of the trial court to define or further address the mitigating circumstances of youth and influence or domination of another person does not rise to a level of reversible error in this case.[23] There are no legal definitions interpreting the language employed by the legislature in La.Code Crim. Proc. art. 905.5 and the trial court correctly informed the jurors that whether the defendant was a youthful offender and whether he acted under the domination of another person, as well as the larger question of whether these circumstances reduced the moral culpability of his acts, were theirs to determine according to their own experience and understanding. Any further definition or discussion may have led to jury confusion. For the above reasons, this portion of the argument lacks merit.

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[23] We distinguish the instant case from *State v. Martin*, 550 So.2d 568, 574 (La.1989), where this court ordered a new sentencing hearing due to the trial court's failure to answer jury's questions which could have led a reasonable juror astray with respect to the necessity of first finding a mitigating factor before recommending life verdict. The jury's request for further instruction from the court essentially asked how they could give effect to the statutory mitigating circumstances they were contemplating during deliberations. The district court in the instant case did not err as previous courts have. For instance: The jurors in the instant case did not ask whether the existence of mitigating factors were necessary for a life verdict. Furthermore, the trial court in this case did not explain to the jury that there need be no "findings" or unanimity with respect to mitigating factors. *Wessinger* at 40, 736 So.2d at 193. Jurors were not told that there were no presumptions or burdens of proof with respect to mitigating factors. *State v. Jones*, 474 So.2d 919 (La.1985), *cert. denied.* 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 992 (1986). Nor was it made clear that the jury need not find a mitigating factor in order to recommend a life sentence. *Martin*, 550 So.2d at 574.

Assignment of Error IX

The defense complains that the proceedings were not adequately transcribed, thereby preventing judicial review based on a complete record of the case. Transcripts of various proceedings are missing, along with the objections, arguments and rulings contained therein. The defense maintains that reversal is mandated on these grounds.

A defendant convicted of a capital crime in which a penalty of death has been imposed has a right to appeal to this Court. La. Const. art. V § 5(D)(2). La. Const. art. I § 19 guarantees defendants a right of appeal "based upon a complete record of all the evidence upon which the judgment is based." While this court has reversed when material portions of the trial record were incomplete or not available,[24] a "slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal does not require reversal of a conviction."[25] Specific complaints about the record by the defense follow.

Pre-Trial Assignment of Error

The defense complains that transcripts of proceedings June 13, July 6, July 13 and July 14 are missing and necessary for his appeal. Yet minute entries show relatively minor events, favorably resolved to the

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[24] *State v. Landry*, 97-0499 (La.6/29/99), 751 So.2d 214, 215-216; *State v. Ford*, 338 So.2d 107, 110 (La.1976); *State v. Jones*, 351 So.2d 1194 (La.1977); *State v. Parker*, 361 So.2d 226 (La.1978).

[25] *State v. Brumfield*, 96-2667 (La.10/20/98), 737 So.2d 660, 669.

defense.[26] Such inconsequential omissions merit no relief.

The defense also complains about gaps in the record preventing a full review. Only partial records exist for May 3, May 15 and June 19, it complains. The claims lack substance. Review of the minutes and available transcripts does not support contentions that these portions of the record are material or necessary to a full appeal.[27]

Voir Dire Assignment of Error

The defense claims the record of voir dire is incomplete, in that "[a]t least twenty-two different unidentified prospective jurors made comments that-

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[26] On June 13 the trial court granted a defense request and issued an instanter subpoena to WWL-TV for an unspecified video tape. On July 6, a minute entry reflects that a pre-trial conference "is complete." On July 13, the trial court granted a defense request for subpoenae duces tecum. There was a status hearing on July 14; some subpoenae duces tecum were quashed because previously satisfied and others were issued at defense counsel's request.

[27] A minute entry reflects that the defendant was arraigned May 3. No transcript of that exists but there are (duplicate) transcripts of a short hearing on a joint motion to subpoena the restaurant's business records and another transcript on Antoinette Frank's counsel's subpoena requests in connection with a motion to quash, neither of which is mentioned in the minutes. The minute entry of May 15 reflects that motions were filed by the state and Frank's counsel, which defense counsel Turk adopted, as well as the imposition of a gag order. Only the gag order proceeding is available. There is nothing to suggest that the missing transcript is anything but a *de minimus* omission from the record. Similarly, the minute of 6/19 reflects that the defense was entitled to some NOPD personnel records, and confirmed the trial dates of defendants. Not mentioned by the minute is proceeding dealing with Frank's attorney's effort to revisit the scene and the court's refusal.

to varying degrees-would have supported a challenge for cause." Given the nature of the case, it was critical to test jurors' links and relationships with police officers. The defense contends that review of this critical portion of trial is impossible on the present record.

The complaint lacks merit. Because voir dire was intended to cover the entire 120-person venire, responses often were recorded from "unidentified" jurors not among the twenty identified panelists in the jury box. At such times the trial court listened to the exchanges until some threshold was reached, indicating a possible cause challenge. At that point, the trial court made note of the juror's name. Later, if the juror were called for one of the panels and challenged, the judge would refer to his own notes when making a ruling. The venire was not an anonymous sea of faces as many had been in a previous venire examined by ADA Woods in an earlier case. A through reading of the voir dire supports a conclusion that any juror exhibiting a basis for disqualification was removed for cause. Jurors were questioned about links to law enforcement, and hints that active duty officers or their spouses or relatives may have served does not state a basis for reversal, as the standard is whether the person can impartially carry out the duties and obligations of a juror in the particular case.[28] On the showing made, no relief is due.

Penalty Phase Assignment of Error

The defense argues confusion of witnesses and transcripts requires reversal, that some transcripts

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[28] *See State v. Ballard*, 98-2198, pp. 3-4 (La.10/19/99), 747 So.2d 1077, 1079-1080 (overturning prior rule which had held active duty peace officers incompetent to serve as jurors).

purport to be duplicates, but do not match, and that the condition of the record raises grave doubts about any court's ability to review this capital proceeding.

The claims lack merit. This court will go as far as agreeing the transcripts are out of chronological order, are duplicated, and are very difficult to read. However, the defendant does not show that any of the testimony is missing, either at the hearing to decide admissibility of the unadjudicated crimes evidence or the penalty phase itself. This part of the argument lacks merit.

Post-Trial Assignment of Error

Defendant complains that the transcript of a hearing on a new trial motion is missing, along with "[all] of the other post-trial hearings." The hearing on a new trial motion, held August 14, 1995, is before this court, raised under Assignment of Error XXVII and found to lack merit. As for the "other" post-verdict hearings, the defense does not identify which it is interested in or even allege that transcripts are "material" to proper appellate review. This portion of the assignment lacks merit.

This condition of the record in this case falls between that in *Landry*,[29] in which the record rendered voir dire unreviewable and contained different versions of the defendant's criminal history and victim impact statements being presented at the penalty phase, and *Brumfield*,[30] in which it was found that unrecorded bench conferences absent a showing of prejudice were immaterial to a proper determination of the appeal. Regarding all defense complaints made about the record in this case, we agree that condition

[29] *Landry*, 751 So.2d at 215-216.

[30] *Brumfield*, 737 So.2d at 669.

of the record is abysmal. Nevertheless, it contains all significant portions of the proceedings complained of by counsel and it thus provides a basis for the full judicial review guaranteed in Louisiana. No relief is due.

Assignments of Error X and XIV

The defense claims that retained counsel Willie Turk was ineffective. Current counsel argues that trial counsel was unprepared, did not lodge appropriate objections, and his performance was so lackluster that this court should reverse on the present record and not waste judicial resources on a remand for an evidentiary hearing. Specific claims are that Turk filed only three pre-trial motions; failed to adequately litigate identification; abdicated his obligations at voir dire; and, did not guard against hearsay or prosecutorial misconduct.

A criminal defendant is guaranteed the effective assistance of counsel. U.S. Sixth Amendment; La. Const. art. I § 13. To prevail on a claim of ineffective assistance, a defendant must demonstrate (1) that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's errors or omissions resulted in prejudice so great as to undermine confidence in the outcome.[31] The Sixth Amendment does not guarantee "errorless counsel [or] counsel judged ineffective by hindsight," but counsel reasonably likely to render effective assistance.[32] Judicial scrutiny must

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[31] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State ex rel. Busby v. Butler*, 538 So.2d 164, 167-168 (La.1988); *State v. Washington*, 491 So.2d 1337, 1339 (La.1986).

[32] *State v. Ratcliff*, 416 So.2d 528, 531 (La.1982).

be "highly deferential" and claims of ineffective assistance are to be assessed on the facts of the particular case as seen from "counsel's perspective at the time," hence, courts must indulge "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[33]

Claims of ineffective assistance are generally relegated to post-conviction, unless the record permits definitive resolution on appeal.[34] The same approach is followed in capital cases. When the record permits, this court will reach the merits of claims about counsel's performance and grant relief when appropriate.[35] However, when the record does not permit a reasoned determination based on a full evaluation of arguably meritorious claims in a capital case, this court has

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[33] *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. 2052; *see State v. Brooks*, 505 So.2d 714, 724 (La.1987)(an attorney's competence is not judged by the success of a particular strategy hence "no-question defense" was not a deviation below professional norms but a deliberate tactical choice designed to rob the state of the force of its evidence; hindsight is not the test of Sixth Amendment ineffectiveness claims).

[34] *State v. Wille*, 559 So.2d 1321, 1339 (La.1990); *State v. Prudholm*, 446 So.2d 729 (La.1984); *State v. Seiss*, 428 So.2d 444 (La.1983).

[35] *State v. Hamilton*, 92-2639 (La.7/1/97), 699 So.2d 29, 32-35 (counsel's penalty phase errors, including no opening statement, failure to investigate and present available mental health evidence and a twelve-sentence closing argument, require new penalty hearing); *State v. Sanders*, 648 So.2d 1272, 1291-1293 (La.1994)(counsel's tepid penalty phase opening admitting unreadiness coupled with failure to present mitigating evidence, prepare witnesses, object to inadmissible unadjudicated other crimes evidence and make a closing argument requires new penalty hearing).

conditionally affirmed and remanded for an evidentiary hearing on allegations of ineffective assistance.[36] We now will evaluate whether the record permits a full evaluation of these claims.

Assignment of Error Regarding Few Pre-trial Motions

Claims that Turk was derelict because he filed only one single-line motion to sever, and two motions for *subpoena deuces tecum* lacks factual support. Counsel for co-defendant Antoinette Frank filed numerous motions on May 15, 1995, and the trial court granted Turk's request to adopt them.[37] While Turk did not press for individual voir dire, no "special circumstances" were present as would support this mode of voir dire.[38] As claimed, he did not challenge the admissibility of victim impact evidence, but had full notice and the state's presentation of such was modest. To his support, Turk did contest, unsuccessfully, admission of the unadjudicated crimes evidence at the

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[36] *State v. Strickland*, 94-0025 (La.11/1/96), 683 So.2d 218, 238-239 (remand for a hearing on whether it was strategy or dereliction for counsel to omit opening and closing statements, fail to investigate and present mitigating evidence, and prepare witnesses); *State v. Sullivan*, 559 So.2d 1356 (La.1990) (remanding for a hearing to determine if *Brady* material was suppressed and if counsel was ineffective at the penalty phase of trial); *Wille*, 559 So.2d at 1339 (claims of incompetent counsel spanning both phases of trial which cannot be resolved on the record require remand and evidentiary hearing).

[37] Objections of one co-defendant is presumed to have been made on behalf of all unless the contrary appears. La.Code Crim Proc. art. 842. By analogy, that applies to written motions as well. *State v. Bergeron*, 371 So.2d 1309, 1313 (La.1979)(on rehearing).

[38] La.Code Crim. Proc. art. 784, Cmt. (c); *State v. Bourque*, 622 So.2d 198, 224-225 (La.1993); *State v. Copeland*, 530 So.2d 526, 535 (La.1988).

penalty phase. No error or dereliction by counsel is discerned. This part of the assignment lacks merit.

Voir Dire Assignment of Error

The defense complains of a total collapse by defense counsel, arguing that Turk abdicated his duty by turning voir dire over to "an attorney who is now suspended from practice[.]" At a bench conference during the state's examination of the first panel, Turk advised the court and prosecutors that Ernest Caulfield would be assisting in jury selection. Caulfield thereafter conducted the defense voir dire, although Turk joined bench discussions for cause challenges and strikes. The defense describes voir dire as an "unmitigated disaster," (emphasis omitted) and argues that jurors were not queried regarding mitigating circumstances, their attitudes toward law enforcement, eye witness identification, or an accused's right to silence. Furthermore, the defense argues that Caulfield "repeatedly failed to procure responses from any of the jurors" and that his peremptory strikes were haphazard.[39]

The defense overstates these claims. The entire venire was assembled in the courtroom, where the trial court announced that "we are going to pick a jury in here today" and to "pay close attention," so that "we

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[39] Caulfield participated in a chambers conference then conducted the defense voir dire of the first panel through cause challenges and strikes. He did the same with the second and third panels. Caulfield appeared only for voir dire. However, he was not the only attorney assisting Turk.

Walter Critinin (silently) assisted on the second and third days of trial (7/17 and 7/18/95). The transcript of the next day's proceedings begins with this advisement, "As the trial proceeds this date, Mr. Walter Critinin is not present." It is unknown if Critinin returned for the last two days of trial. The minutes mention neither Caulfield nor Critinin.

can cut down on . . . redundant . . . questions[.]" In fact, a jury was empaneled by 2:00 p.m. on the first day of voir dire. The defense offers nothing to support its claim about Caulfield's status but, as contended, the attorney did not discuss mitigating circumstances and sprinkled liberally throughout his examination were open-ended rhetorical queries eliciting little response. One of his peremptory strikes was unusual.[40] A lack of questions on eye-witnesses raises no alarms, however, and not examining jurors on an accused's right to silence means little in a case in which the defendant testified at both phases of trial.

The venire was extensively questioned by the state, aided by juror questionnaires and the fact that many jurors had been examined in an earlier capital case by the same prosecutor, circumstances which compensates for defense shortcomings.[41] Neither side discussed mitigating factors or, for that matter, aggravating circumstances. While silence is a problematic tactic for the defense at voir dire of a capital case, still, counsel may have made a strategic decision not to discuss aspects relating to the penalty phase to instill

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[40] Caulfield struck a Catholic seminarian who opposed capital punishment but said he could consider it and who had been the subject of a state cause challenge.

[41] It is unclear if the defense had access to the questionnaires. At any rate, the state questioned jurors about capital punishment, ties to law enforcement, their exposure to pre-trial publicity about the case, any links to victims of crimes, their understanding of the presumption of innocence and applicable law, including the law of principals, specific intent, and whether they appreciated that the burden of proof was beyond a reasonable doubt and was entirely the state's. Jurors were aware that this was a bifurcated proceeding at which, if the accused were found guilty as charged, the state would ask for the death penalty.

confidence in the defense alibi evidence. The state's reason for avoiding the topic was laid out by Assistant District Attorney Woods, who explained that "we are only concerned with the guilt or innocence [at this stage,]" and if a guilty verdict is returned, "then we move on to discuss other aspects of this that we have to present."

More generally, when a juror signaled a question or problem, questioning would continue until the matter was resolved and/or the judge would note the juror's name for later reference when challenges were issued. Bench conferences at which challenges were raised and ruled on were recorded and are before this court.[42] The attorneys also were permitted to back-strike. While Caulfield's performance may have been less-than-stellar and the speed of voir dire may give pause, on balance and particularly on this record, it cannot be concluded that jurors were misinformed about any single issue with respect to the guilt phase of trial. Even if counsel's conduct of voir dire amounted to professional dereliction, the lack of apparent prejudice dooms claims of ineffectiveness rooted in this part of trial. Therefore, this part of the assignment lacks merit.

Assignment of Error Regarding Identifications

As claimed, counsel did not move to suppress the identifications of Chau Vu, Quoc Vu, and John Ross. A state answer to a bill for particulars and discovery, filed May 15, 1995, advised that LaCaze had been

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[42] *Cf., State v. Landry*, 97-0499 (La.6/29/99, 751 So.2d 214) (reversing, in part, over a record so deficient that the court could not review the more than forty cause challenges which had been granted).

identified by "Quol Va and Chan Vu." At motion hearings on May 26, attorney Turk "waived all motions as to the identification[.]" An amended state answer, date-stamped by the Orleans Criminal District Court's clerk's office June 1, 1995, advised that the defendant had been identified by "Quol Vu and Mr. John Ross by photo." There are no transcripts from May 26 (assuming the date is correct). The record offers no insight into Turk's decision to waive "all motions as to identification," and the defense does not explain how the attorney should have set about suppressing a pre-trial identification Chau Vu never made.[43]

No basis for suppressing the pre-trial identifications of Quoc Vu and John Ross appears. Counsel may have concluded as much, and made a tactical decision not to expend effort on a losing cause. The matter cannot be resolved on this record. Therefore, this part of the assignment lacks merit.

Objections to Hearsay and Prosecutorial Misconduct

The defense complains Turk did not object to prejudicial hearsay and state misconduct.[44] The cited examples either are not hearsay, show little likelihood of prejudice or appear to be a matter of strategy and, thus, do not reflect ineffective assistance. Complained-of portions of Detective Demma's testimony concerns statements made by John Ross and Quoc Vu at photo

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[43] Chau Vu could make no identification in the hours after the murders, unlike her brother, Quoc Vu, who picked the defendant's picture from a photo line-up. Both made in-court identifications. John Ross picked out the defendant's picture and, at trial, identified him as the man who bought gasoline with Officer Williams's credit card shortly after the murder.

[44] The misconduct is discussed in Assignments VI, VII and XV and was found to lack merit.

arrays. Chau Vu's statements were cumulative of her own testimony and present no prejudice. Ross's statements were non-hearsay.[45] As for admission of 911 tapes and dispatchers' testimony, having state evidence and witnesses establish a time line against which to later present an alibi defense is arguably a strategic decision, not subject to second-guessing.[46] The cited testimony by Chau Vu, relating a talk she had with Officer Ronald Williams about Adam Frank, was hearsay but arguably beneficial to the defense, as it provided an evidentiary basis to suggest that another male, perhaps Adam, had been with Antoinette during the rampage through the restaurant. No error is apparent. This part of the assignment lacks merit.

Given the deferential review required, none of the claimed errors or omissions by counsel necessitates a remand for an evidentiary hearing. Even if counsel's conduct was professionally deficient in the guilt phase, no prejudice is demonstrated. Without that, the defense cannot make the dual showing necessary to prevail on an ineffectiveness claim. This part of the assignment lacks merit.

For the above reasons, the assignment lacks merit.

Assignment of Error No. XXV

The defense argues that it would violate the state and federal guarantees against cruel, excessive, and unusual punishment found in La. Const. art I, § 20

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[45] *See* La.Code Evid. art. 801(D)(1)(c)(prior statements of identification by declarant who testifies and is subject to cross-examination is non-hearsay).

[46] *See State v. Myles*, 389 So.2d 12, 31 (La.1980) ("This Court does not sit to second-guess strategic and tactical choices made by trial counsel.").

and the United States Eight Amendment to execute LaCaze, a "17-year-old" "mentally retarded" "child" with an IQ of 71. Appellate counsel concedes that execution of the mentally retarded is not per se unconstitutional.[47] But when the death penalty has been upheld, he argues, the defendant has been able to place his mental status before jurors at the penalty phase. He argues that in this case, jurors did not consider LaCaze's mental retardation. Given the lack of money for mitigation experts and the trial court's inadequate response to the jury's requests for a further explanation of mitigating factors, the defense contends that executing LaCaze would be a travesty of justice.

The arguments are flawed in several respects. First, the defendant was born August 13, 1976. Thus, he was 18 years and 3 months old when he met Antoinette

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[47] *See State v. Comeaux*, 93-2729, p. 21 (La.7/1/97), 699 So.2d 16, 27 (defendant, 17-years-old at commission of the crimes and mildly retarded with an IQ of 68, "made no showing that the degree of his mental impairment, when combined with his youth, rendered him incapable of acting at the level of culpability required for the imposition of the death penalty."), *cert. denied,* 522 U.S. 1150, 118 S.Ct. 1169, 140 L.Ed.2d 179 (1998); *State v. Mitchell*, 94-2078 (La.5/21/96), 674 So.2d 250 (1996)(22 year old mildly retarded defendant with an IQ of between 61 and 71 had full opportunity to present this evidence but that neither federal nor state constitution precluded execution), *cert. denied*, 519 U.S. 1043, 117 S.Ct. 614, 136 L.Ed.2d 538 (1996); *State v. Prejean*, 379 So.2d 240 (La.1979)(18-year-old, classified as borderline mentally retarded with an IQ of 76 and a mental age of 13 1/2 years; his capital verdict was upheld by this Court), *cert. denied*, 449 U.S. 891, 101 S.Ct. 253, 66 L.Ed.2d 119 (1980); *State v. Brooks*, 92-3331 (La.1/17/95) 648 So.2d 366 (unnecessary to consider whether the execution of 20 year old defendant with a tested IQ range of 44 to 67 would be unconstitutional as death sentence reversed on other grounds).

Frank, and 18 years and 7 months old when he participated with her in the triple killings in the Kim Anh Restaurant in March of 1995. As for "mental retardation," while appellate counsel speaks as though it were fact, the available record evidence reflects that LaCaze has an overall IQ score of 71, which forensic psychologist Raphael Salcedo testified was in the borderline range, with mild retardation beginning at an IQ score of 69. Psychiatrist Kenneth Ritter's examination found no mental disease or disorder and attributed LaCaze's IQ score of 71 to poor school performance. The defense is correct as far as it contends that mental retardation will not per se invalidate a death sentence. Nor will LaCaze win sympathy by erroneously claiming to have been a "child," either at the time of the murders or now. Such contentions lack merit.

On the other hand, LaCaze was absolutely entitled to have jurors consider his low IQ, as well how that may have affected an ability to resist the influence and domination of an older woman. A capital defendant may introduce virtually any evidence in mitigation at the penalty phase of a capital trial.[48] Trial attorney Turk's decision not to have his client evaluated, thus foregoing discovery of LaCaze's low IQ before trial, is reasonable precisely to the "extent that reasonable professional judgments support the limitations on investigation."[49] This, like other questions about the performance of trial counsel, cannot be resolved on the

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[48] *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(that includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.").

[49] *State ex rel. Busby v. Butler*, 538 So.2d 164, 171 (La.1988), *citing Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987).

present record and would be best reviewed upon post conviction relief.

Capital Sentencing Review

Pursuant to La.Code Crim. Proc. art. 905.9 and Louisiana Supreme Court Rule XXVIII, this Court reviews every sentence of death to determine if it is constitutionally excessive. In making this determination the Court considers whether the sentence was imposed under the influence of passion, prejudice or arbitrary factors; whether the evidence supports the jury's findings of statutory aggravating circumstances; and, whether the sentence is disproportionate, considering the offense and offender.

Defendant Roger Joseph LaCaze is an African-American male, and was 18 years old at the time of the offense. He and an older brother, Michael, were raised by a single mother until each attained the age of 17, because she disapproved of their lifestyles. The presentence investigation report in the record is unclear, but it appears that the defendant had no juvenile record and only two arrests as an adult prior to this offense.[50] The state presented evidence at the penalty phase of unadjudicated criminal conduct in November of 1994 involving an armed robbery and attempted murder of Derrick Jefferson, and an aggravated battery of Anthony Wallace in February of 1995. The defendant did not complete high school. He has never married but is the father of three children by two mothers. In his testimony, the defendant admitted to using and selling cocaine.

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[50] LaCaze was arrested 10/10/93 for criminal damage to property valued under $500 and illegal use of a weapon; and, 1/9/95 for aggravated battery. Charges in each were refused.

The victims in this case were Vietnamese siblings, Ha and Cuong Vu, and, a white police officer. However, race does not appear to have played a part in the killings. Rather, it appears that the defendant joined with co-defendant Antoinette Frank, herself a police officer, who was disgruntled over not getting enough paid details at the Kim Anh Restaurant where the armed robbery and murders occurred.

At the penalty phase, defendant presented testimony from his mother, father, a family friend, the mothers of his children, and a pastor. He took the stand on his own behalf. All asked the jury to spare the defendant his life. Mitigating factors urged were his youth; lack of significant prior criminal history; that the offense was committed while he was under extreme mental or emotional disturbance, as well as the under the influence and dominion of another; that he did not appreciate the criminality of his conduct; and, that he was a principal whose participation was minor under La.Code Crim. Proc. arts. 905.5(a), (b), (c), (e), (f), (g).

Passion, Prejudice or Other Arbitrary Factors

In his Capital Sentence Review Memorandum, Defendant claims that his death sentence is excessive and was improperly imposed. Doubts about counsel's performance at the guilt and penalty phases of trial give pause but must await post-conviction. However, all of these issues were addressed in depth above in the individual assignments of error and found to be without merit.

Aggravating Circumstances

The jury returned separate verdicts finding that as to all three victims that the offense was committed during the commission of an armed robbery and that

the offender knowingly created the risk of death to more than one person. As to Ronald Williams, jurors additionally found that the victim was a peace officer engaged in his lawful duties. La.Code Crim. Proc. art. 905.4(A)(1), (2), (4).

Proof of each of the aggravating circumstance was established beyond a reasonable doubt. The evidence, including the defendant's own confessions and penalty phase testimony, demonstrates that he and co-defendant Antoinette Frank armed themselves and entered the restaurant, where they shot and killed three people, and stole money, a telephone, a wallet, and credit cards. The taking of something of value from the person of another or his immediate control while armed with a dangerous weapon defines an armed robbery. La.Rev.Stat. 14:64. Given the result it cannot be debated that the defendant and Frank, in a single consecutive criminal episode spanning about fifteen minutes, created a risk of multiple deaths or great bodily injury by repeatedly firing semi-automatic weapons inside a family-owned business establishment occupied by six people. La.C.Cr.P. art. 905.4(A)(4).[51]

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[51] It is worth noting that meeting the evidentiary requirements of La.Code Crim. Proc. art. 905.4(A)(4) does not include proof of specific intent to kill more than one person; and, this aggravating circumstance "encompasses a broader range of conduct that the first degree murder definition . . . in the [parallel] La.Rev.Stat. 14:30(A)(3)." *State v. Robertson*, 97-0177, pp. 44-45 (La.3/4/98), 712 So.2d 8, 42, quoting *State v. Johnson*, 541 So.2d 818, 826 (La.1989). Specific intent to kill or inflict great bodily harm upon more than one person, La.Rev.Stat. 14:30(A)(4), is shown by proof that the offender contemplated and actually caused the death of one person and the risk of death or great bodily harm to at least one other person by a series of acts during a single criminal episode or transaction. *State v. Roy*, 95-0638, p. 19 (La.10/4/96), 681 So.2d 1230, 1242; *State v. Williams*, 480 So.2d 721, 726-727 (La.1985). A finding of specific intent to kill or inflict great harm

Lastly, Officer Williams was in uniform and was working a paid detail when he was killed and thus "was engaged in the performance of his lawful duties." *State v. Berry*, 391 So.2d 406, 412 (La.1980)(peace officer working paid details protects citizenry and prevents or deters violent crime is performing his lawful duty for purposes of La.Rev.Stat. 14:30(A)(2)), hence, satisfies the aggravating circumstance defined in Art. 905.4(A)(2). *State v. Broadway*, 96-2659, p. 27 (La.10/19/99), 753 So.2d 801, 819; *Brumfield*, 737 So.2d at 671, n. 6. Consequently, Defendant's sentence of death is firmly grounded on the finding of these aggravating circumstances.

Proportionality

The federal constitution no longer requires proportionality review. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Nevertheless, comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Miller,* 99-0192, p. 30 (La.9/6/00), 776 So.2d 396, 414. Pursuant to La. S.Ct. Rule 28, § 4(b), the Orleans Parish District Attorney's Office filed with this Court a list of each first degree murder case tried after January 1, 1976, in the parish. The only two comparable cases in Orleans Parish are those of the defendant's co-defendant, Antoinette Frank, and Phillip Anthony. As to Frank, this Court recently affirmed conviction but remanded for a determination of indigency and entitlement to state-funded expert assistance for the sentencing portion of trial.

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on more than one person, La.Rev.Stat. 14:30(A)(3), always supports a finding that the offender knowingly created a risk of bodily harm to more than one person. Art. 905.4(A)(4). *See State v. Baldwin*, 96-1660, p. 11 (La.12/12/97), 705 So.2d 1076, 1080-1081.

State v. Frank, 99-0553, p. 22, 803 So.2d 1, 20-21. As to Anthony, this Court affirmed the defendant's conviction and sentence of death for the notorious triple homicides committed in the Pizza Kitchen restaurant in the French Quarter. *State v. Anthony,* 98-0406 (La.4/11/00), 776 So.2d 376.

On a state-wide basis this Court has affirmed capital sentences in a variety of settings involving multiple deaths or when a defendant creates the risk of death or great harm to more than one person. *State v. Broaden*, 99-2124, pp. 27-28 (La.2/21/01), 780 So.2d 349, 366 (victims were shot on the street in the same neighborhoods minutes apart, an accomplice using small-arms fire, the defendant using a sawed-off shotgun placed directly against the victims' skulls); *State v. Wessinger*, 98-1234 (La.5/28/99), 736 So.2d 162 (ex-employee returns to restaurant, shoots three and kills two people); *State v. Robertson*, 97-0177 (La.3/4/98), 712 So.2d 8 (mixed-race coupled stabbed to death in their home during an aggravated burglary); *State v. Tyler*, 97-0338 (La.9/9/98) 723 So.2d 939 (defendant entered a Pizza Hut armed with a .22 caliber revolver, ordered the three employees to lie face down on the floor in the cooler after robbing them and shot each one in the back of the head); *State v. Baldwin*, 96-1660 (La.12/12/97), 705 So.2d 1076 (defendant shot and killed his estranged wife and three men who were present at the time with a sawed-off shotgun); *State v. Ortiz*, 96-1609 (La.10/21/97), 701 So.2d 922 (murder-for-hire scheme resulting in death of defendant's wife and a visiting friend); *State v. Tart*, 93-0772 (La.2/9/96), 672 So.2d 116 (defendant murdered his wife and severely wounded her mother); *State v. Taylor*, 93-2201 (La.2/28/96), 669 So.2d 364 (ex-employee returns to restaurant, kills one employee and attempts to kill others).

Considering the foregoing, the death sentence imposed in this case does not appear disproportionate. Evidence at trial established the cold-blooded and callous disregard for human life exhibited in these killings. Nothing contained in the post trial documents filed pursuant to La. S.Ct.R. 28 warrants reversal of Defendant's death sentence.

DECREE

For the reasons assigned herein, Defendant's conviction and sentence are affirmed. In the event this judgment becomes final on direct review when either: (1) the Defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the Defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules for rehearing of denial of certiorari, or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this Court under La.Code Crim. Proc. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La.Rev.Stat. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the Defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under La.Rev.Stat. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

JOHNSON, J., dissents and assigns reasons.

CALOGERO, J., concurs and assigns reasons.

CALOGERO, Chief Justice, concurs and assigns reasons.

I concur in affirming the conviction and sentence. Although the trial court's response to jurors' request for further explanation regarding mitigating circumstances at the defendant's penalty phase did not transgress minimal constitutional requirements, *see Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998); *State v. Howard*, 98-0064 (La.4/23/99), 751 So.2d 783, I write separately to point out that it is preferable to educate capital jurors on the full range of their sentencing options. The trial court should, therefore, answer comprehensively any questions posed, as well as answer to the extent possible the unstated premises of questions raised, rather than require lay panel members to articulate precisely the difficulty that prompts them to interrupt deliberations to seek direction from the trial judge.

As the majority recognizes, jurors in this case "essentially asked how they could give effect to the statutory mitigating circumstances they were contemplating . . . ." *Ante,* p. 1075, n. 22. Although the trial judge did not give an incorrect answer to the jurors' inquiry, the better response would have included an explanation that, in order to return a verdict of life imprisonment, a mitigating circumstance need not be found by any number of jurors, jurors need not agree on the same mitigating circumstance, and no presumptions or burdens of proof with respect to mitigating circumstances exist. *See State v. Wessinger*, 98-1234 (La.5/28/99), 736 So.2d 162; *State v. Jones*, 474 So.2d 919 (La.1985). In addition, jurors should have been made aware that a life sentence remained a viable option even in the absence of any mitigating evidence and that no juror is ever required to return

the death penalty under any circumstances. *State v. Martin*, 550 So.2d 568 (La.1989); *see also State v. Watson*, 449 So.2d 1321 (La.1984).

JOHNSON, J., dissenting

I agree with the majority's decision to affirm defendant's conviction. However, for the reasons that follow, I would vacate defendant's sentence and remand this matter to the trial court for a new penalty phase hearing, a clarification regarding a ruling of competency, and a determination of whether defendant adopted an indigency motion filed by his former co-defendant.

First, defendant was absolutely entitled to have jurors consider his borderline IQ, as well as how that may have affected his ability to resist the influence and domination of an authority figure who was considerably older than he. The evidence suggests that defendant was acting under Antoinette Frank's dominion and control on the night of the murders. In *State v. Sonnier*, 380 So.2d 1 (La.1979), the court reversed the defendant's death sentence, finding that the defendant was acting under his brother's influence when he participated in the murders of two young lovers. The court pointed out that defendant's brother was the one who initiated the excursion that night. The brother also suggested harassing the couple and approached the victims' car, impersonating a police officer. It was also the brother who decided to kill the young couple to avoid going to prison. The court stated:

> Whatever resistance [the defendant], whom the prosecution characterized as a mental and physical weakling, might have offered against his armed brother at this point would surely have been ineffective.

In this case, the evidence indicates that Frank masterminded the entire plan to rob the Kim Ahn restaurant. It was Frank who worked security details at the restaurant and had intimate knowledge of the restaurant's routine. She was familiar with the layout of the restaurants and with its owners. It was Frank who stole the key, which allowed her and defendant to enter the building that night, and it was Frank who knew the routine of the restaurant and where the money was kept. It was also Frank who became angry and held a grudge against Officer Williams, her former partner, because of her belief that he was cutting her out of paid security details at the restaurant. Finally, it was Frank who provided defendant with a gun on the night of the murders.

Next, defendant is entitled to another penalty phase hearing because of the trial judges inadequate response to jurors' request for a further explanation regarding mitigating factors. During the penalty phase, the jury sought an explanation from the trial court on those statutory mitigating circumstances relating to "the youth of the offender at the time of the crime" and whether the "offense was committed while the offender was under the influence or . . . domination of another person." LSA-C.Cr.P. art. 905.5(c), (f). The judge advised that he could not intrude into "something that starts to get into the area called 'evidence,' "but could say that the legislature defined these circumstances "in a fashion for the jury to read into that what they believe that says." He also told jurors they were to determine what weight to accord mitigating and aggravating circumstances, and concluded by repeating that they could not "start talking about something that will fade into the evidence . . . ."

In *State v. Martin*, 550 So.2d 568, 574 (La.1989), this court held that a new sentencing hearing was required, as the court's failure to answer the jury's questions could have led a reasonable juror astray with respect to the necessity of first finding a mitigating factor before recommending a life sentence. In this case, the trial court "did not give an incorrect statement of the law;" however, it did not fully answer the jury's query. The trial court failed to explain to the jury that there need be no "findings" or unanimity with respect to mitigating factors. *Wessinger*, 736 So.2d at 193. Jurors were not told that there are no presumptions or burdens of proof with respect to mitigating factors. *Wessinger*, *citing State v. Jones*, 474 So.2d 919, 932 (La.1985), *cert. denied.* 476 U.S. 1178, 106 S.Ct. 2906, 90 L.Ed.2d 992 (1986). Nor was it made clear that the jury need not find a mitigating factor in order to recommend a life sentence. *Martin*, *supra*, 550 So.2d at 574.

In my mind, the jurors' request for further instruction from the court essentially asked how they could give effect to the statutory mitigating circumstances they were contemplating during deliberations. The trial court's rambling response is reminiscent of the circumlocutions of trial courts faced with jury requests for instructions on the possibility of commutation, pardon, and parole of life sentences at a time when mere mention of the subject in a capital case invited reversible error. *See*, *e.g*., *State v. Messiah*, 538 So.2d 175, 182-83 (La.1988). Furthermore, the jury's request went to the heart of the capital sentencing scheme in Louisiana. There are no legal definitions interpreting the language employed by the legislature in LSA-C.Cr.P. art. 905.5, and the trial court started off in the right direction by informing jurors, that whether defendant was a youthful offender and whether he

acted under the domination of another person, as well as the larger question of whether these circumstances reduced the moral culpability of his acts, were theirs to determine according to their own experience and understanding. However, the trial court should have gone farther and made clear that jurors need not "find" those mitigating circumstances proved by any quantum of evidence to return a life sentence and, in fact, remained free to return that non-capital sentence even if they found no "evidence" of mitigation.

These distinctive and essential aspects of Louisiana's capital sentencing scheme afford jurors not simply the opportunity to consider mitigating evidence but also the greatest means of giving effect to their views (or at least to the view of one juror) that the offender's moral culpability for the offense does not warrant imposing the most severe sanction under the law. "'Accurate sentencing information is an indispensable prerequisite to a reasoned determination,'" *Martin*, *supra* at 574, (quoting *Gregg v. Georgia,* 428 U.S. 153, 190, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859 (1976)). Thus, in my view, jurors in this case were inadequately informed with respect to mitigating factors, and the failure to fully explain this component of their decision-making injected arbitrariness into the proceeding and prevented a reliable sentencing determination.

Moreover, I believe that a remand is necessary to clarify whether a ruling of competency has been issued. The trial judge ordered a post-verdict competency evaluation to allow a "lunacy commission [to] examine the defendant for his compet[e]nce and so that his IQ might be determined." The transcript of the hearing held on September 5, 1995 reflects that "Dr. Raphael Salcedo" appeared and was questioned exclusively by the trial judge. Defense counsel was not

present, nor is there an indication that defendant was present. The trial judge acknowledged defense counsel's absence on the record but apparently discerned no impediment to proceeding, as he remarked to the doctor that the hearing "is really not adversarial."

Any unresolved question about a defendant's capacity to proceed precludes imposition of punishment. It is possible that the required ruling of competency has been issued. However, the record does not so reflect. Clarification can only come by remanding this case, to allow the district court to sort matters out.

Finally, this case should be remanded to allow the trial court to determine whether defendant adopted the indigency motion filed by Antoinette Frank. In *State v. Frank*, 99-0553 (La.4/16/01), 803 So.2d 1, this court remanded the case because the trial court failed to allow Frank "the opportunity to make a showing [of indigency] under [*State v.*] *Touchet* [93-2839 (La.9/6/94), 642 So.2d 1213, 1216] as to her need for state-funded assistance for the purpose of presenting . . . mitigating evidence." *Frank* at 11.

Defendant contends that he adopted all motions filed by Frank prior to the severance of the cases. However, the record is unclear regarding the date Frank's motion for a determination of indigency was filed. LSA-C.Cr.P. art. 842 provides:

> If an objection has been made when more than one defendant is on trial, it shall be presumed, *unless the contrary appears,* that the objection has been made by all the defendants. (Emphasis added).

I believe that defendant should have an opportunity to show that he adopted Frank's motion for a deter-

mination of indigency. Therefore, the proper disposition would be to remand this matter to the trial court to determine when Frank's motion to be declared indigent was filed and whether that motion was adopted by defendant herein. If the trial court determines that defendant adopted the motion, defendant must be allowed the same opportunity to show whether he is entitled to state-funded expert assistance for the sentencing phase. Additionally, if the court determines that defendant met his burden of proving that he is so entitled, defendant will have the benefit of that expert assistance at a new sentencing phase.

APPENDIX E

EXHIBIT D-9

DEPARTMENT OF POLICE

INTEROFFICE CORRESPONDENCE

TO: Richard J. Pennington
Superintendent of Police
Sgt Robert Harrison

FROM: Public Integrity Division

SUBJECT: PID # 95-263 R

DATE: August 19, 1996

INTRODUCTION

Sgt. Robert Harrison assigned to the Public Integrity Division respectfully reports of being assigned the following investigation on Friday March 17, 1995. The case was assigned by Lt, Robert Snell of the Public Integrity Division's Criminal Section. The complainant in this case was Deputy Superintendent Duane Johnson of the Technical Services Bureau.

CHARGES

The complainant requested an investigation into the release of weapons from the New Orleans Police Dept's Central Evidence and Property Division. It was learned after the arrest of Officer Antoinette Frank for the murder of Officer Ronald Williams and two civilians, Officer Frank had obtained weapons from the Property room through Police Officer David Talley. Officer Talley was assigned to C.E.+P. as the gun vault officer. Information and documents were given to Sgt. Harrison that showed two weapons had been released to Officer Frank by Officer Talley. The gun vault is considered sensitive evidence ie. . . . confiscated drugs. Officer Talley maybe in violation of departmental

Rules 2 paragraph 3 relative to Truthfulness, Rule 4 paragraph 4 relative to Neglect of Duty,.

INVESTIGATION

Sgt. Harrison began the investigation by contacting the new commander of Central Evidence and Property Lt. Sonny Mounicou. On 3/23/95 at 1:00pm Sgt. Harrison spoke with Lt. Mounicou via telephone and asked him for any documentation he may have involving the release of the two pistols to Officer Antoinette Frank. Lt. Mounicou related he could not find a property card or any information on one of the weapons, a model #15 Smith and Wesson revolver. Lt. Mounicou agreed to give Sgt. Harrison what information he had on the weapons. On 3/24/95 Sgt. Paul Moretti also of P.I.D. retrieved the documents from Lt Mounicou for Sgt. Harrison. Sgt. Harrison inventoried the documents and observed the following. Two copies of court orders showing two guns , a Smith and Wesson model #15 serial # 19k3767 and a Beretta model 92 serial # Ber 1372572 were released to Antoinette Frank See attachments # 6 and 7.

There were two copies of police reports item numbers F-25688-93 and B-38846-95. A Central Evidence and Property chain of custody, evidence and property card were also included. A check of the NOPD computer revealed there was no record for that item number. Sgt. Harrison later checked the N.O.P.D. Record room for a report under the above item number. It was learned there was no report filed under that item number.

Police report under item # F-25688-93 is a signal 21 miscellaneous incident report on 6/16/93 at 2024 N. Prieur St. In this report a narcotics search warrant was executed at the above address. The officers were

not able to locate any drugs, but did confiscate a loaded Beretta model 929 9mm semi automatic serial # Ber 137257Z along with some other items. The weapon and other items were placed in the police Dept's property room under control # C 034479. This control number is the same control number which appears on the court order. This is the weapon which was released to Officer Frank under the court order. The second report under item # B-38846-95 is a 62C auto burglary report on 2/22/95 from 615 City Park Ave. In the report officer Frank reports to the investigating officer her car was broken into and a Beretta 9mm gun Serial number Ber.137257Z was taken from the glove box. The Beretta 9mm gun has the same serial number as the gun confiscated under Item # F-25688-93. The same gun was placed in the Police property room under C 034479, which is the same control number on the court order which released the gun to Officer Frank. See attachments # 3 and 5

The evidence card and chain of custody card under control # C 034479 list the Beretta 9mm Ber.137257Z as one of the items placed in the property room. The chain of custody card shows Officer David Talley releasing the Beretta to Officer Frank on August 30, 1994 at 1:00pm. See attachments # 4. There was no property card or chain of evidence card on the Smith and Wesson revolver. When Sgt. Harrison initially spoke to Lt. Mounicou, he related there was no information on the revolver. Since there was no information on the revolver, Sgt. Harrison would attempt to see if the revolver could be traced through the Pawnshop unit of the N.O.P.D.

On 3/27/95 at 10:30am Sgt. Harrison proceeded to the Criminal Court Building to meet Judge Morris Reed. Sgt. Harrison presented Judge Reed with the

copy of the order which bore his signature for the release of the Smith And Wesson revolver. Judge Reed informed Sgt. Harrison the signature on the order was not his. He pointed out to Sgt. Harrison the name "Reid" on the warrant was not the way he spells Reed in his name. Judge Reed gave Sgt. Harrison three (3) samples of his handwritten signature.

Later that same date at 11:10am, Sgt. Harrison proceeded to the Pawnshop unit located in Police Headquarters. Sgt. Harrison met with Det. Teddy Aufdemorte of the Pawnshop unit. Det Aufdemorte checked the files on both weapons. According to Det. Aufdemorte, neither weapon had any history in the pawnshop files prior to P/O Antoinette Frank having possession of them. Det. Aufdemorte explained there was no history or record of the weapons being sold or registered in parish of Orleans. He also stated the weapons could have been registered or sold in another parish or state (See attachment # 17 for copy of pawnshop files) There was still no history on the Smith and Wesson revolver. The Beretta was confiscated on the warrant, but there was no explanation of how the Smith and Wesson revolver came to be in possession of the New Orleans Police Dept's property room. Any property seized by police is placed in the property room with a control number and police report item number. The report details what, who, how and why the property was seized. The only documentation from Central Evidence and property is the court order describing the weapon in question which is a Smith and Wesson Model# 15 revolver.

On 3/28/95 at 11:00am Sgt. Harrison proceeded back to the Criminal Court building to meet this time with Judge Frank Marullo. Sgt. Harrison presented a copy of the court order with his signature. Judge Marullo

viewed the document, and compared it to several other documents with his signature. Judge Marullo related he did not believe the court order in question was his signature. He stated since the court order did not have a description of the weapon to be released, he would not have signed the order.

Based on the conversations with the two Judges, it appears the two orders allegedly signed by those Judges were forgeries of their signatures. An investigation would have to focus on a party who would have interest in the weapons. Suspended Officer Antoinette Frank was the recipient of the two weapons. She was presently confined to Orleans Parish Prison for three counts of murder. The likelihood of Officer Frank giving a statement to assist in the investigation was improbable. The only other remaining person who would know what weapons are housed in the New Orleans Police Dept's Property room is Police Officer David Talley. Sgt. Harrison also learned the original copy of both orders could not be located. The originals were not on file in the Property room. (See item # G-8640-95 for criminal investigative report concerning the possibility the documents were forged.)

On 4/12/95 Sgt. Harrison learned from Lt. Richard Marino, also of the Public Integrity Division, he had taken a statement from P/O David Talley. Lt. Marino related he was doing the P.I.D. administrative investigation on Officer Antoinette Frank, and as a result of that investigation, questions as to where she obtained the guns had to be answered. Officer Talley was a witness in the investigation. Initially, Officer Talley gave a statement to Lt. Robert Italiano then of the Homicide Division regarding the murder case. In that statement, Officer Talley related the guns were obtained by court orders. Lt. Marino and Lt. Italiano

took a second statement According to Lt. Marino, Officer Talley in that statement related he obtained both court orders from the respective Judges to get the guns released to Officer Antoinette Frank. In fact, Lt. Marino related Officer Talley stated he observed Judge Morris Reed signed the order in his Judge chambers. Officer Talley also stated the other court order was brought to Judge Marullo's clerk who brought it to Judge Marullo while he waited outside the Judge's chamber. The clerk returned the order signed by the judges. There also was another problem concerning the tape statement of Officer Talley. Lt Marino informed Sgt. Harrison that during the transposing of the taped statement, the secretary inadvertently erased the beginning portion of the statement.

Continuing with the investigation, on 5/16/95 at 10:40am Sgt. Harrison left telephone messages with both Judge Marullo's and Judge Reed's clerks to ascertain if both Judges were willing to give Sgt. Harrison a taped statement. Finally on 5/18/95, Sgt. Harrison spoke to Judge Marullo via telephone. Judge Marullo informed Sgt. Harrison the Antionette Frank/Roger Lagaze case had been allotted to his court section for adjudication. According to Judge Marullo, he would not make a statement in the matter until the case has reached its final disposition. Sgt. Harrison left more messages with Judge Reed's clerk to set an appointment with the Judge for a statement.

On 5/28/95 Lt. Robert Italiano was transferred to the Public Integrity Division. On 6/19/95, Sgt.Harrison consulted with Lt. Italiano regarding the case. He informed Sgt. Harrison he did in fact assist in the statement of Officer Talley with Lt. Marullo. Lt. Italiano explained he was assigned to the Homicide division as the commander and assisted in the murder

investigation of Officer Ronald Williams. He related he took a statement from Officer Talley as a witness in the case on 3/7/95. According to Lt. Italiano, Officer Talley stated he obtained both of the court orders that released the weapons to Officer Frank. Lt. Italiano further stated he and Lt. Marino took a second statement from Officer Talley on 3/22/95. According to Lt. Italiano, Officer Talley did in fact state he brought a court order to Judge Marullo. Judge Marullo's clerk took the order and brought it to the Judge's chambers. The clerk returned with the order signed by Judge Marullo. Lt. Italiano further stated Officer Talley related he brought the other court order to Judge Reed, and observed Judge Reed sign the order. Lt. Italiano also stated the portion of the statement was mistakenly erased during transposition of the audio tape by the secretary.

On 6/20/95 Sgt. Harrison obtained copies of Officer Talley's statement, and learned Officer Tally met Officer Frank while she was assigned to Central Evidence and Property as a police recruit. This established a link between those two and the weapons. Also in the statement, Officer Talley states he helped Officer Frank obtain the weapons through a court order, because she needed a gun for use in the police academy. In particular, the Smith and Wesson #15 revolver was the first weapon he obtained for her. He later got the Beretta 9mm for her while she was assigned to the Seventh District. He also explains the Smith Wesson revolver had been in the property room for nearly fourteen years, and he could not find the original property card for the gun. This explains why there was no information in the property room on the gun, and no history in the Pawnshop unit. In Officer Talley's signed statement dated 3/7/95, Officer Talley stated he spoke with Officer Antionette Frank 3 or 4

days prior to her arrest for murder. Talley stated he talked to Officer Frank in the gun room of Central Evidence and Property. Talley stated it was possible for Officer Frank to have removed a weapon from the gun vault without his knowledge. For complete text of both statements see attachements # 2 and 16

On 6/21/95, Sgt. Harrison proceeded to Criminal Court and spoke to Judge Reed. Judge Reed informed Sgt. Harrison he would give a statement on 6/30/95 at 2:00pm. On 6/30/95 at 11:00am Sgt. Harrison telephoned Judge Reed and learned from his clerk, that Judge Reed would sign a deposition instead of at taped Statement. Sgt. Harrison agreed to have a statement typed and presented to Judge Reed on 7/5/95. On 7/5/95 at 3:00pm, Sgt. Harrison presented Judge Reed with a statement. The Statement described the weapon one Smith and Wesson revolver model #15 serial # 19K3767 which was released to Officer Antionette Frank. It read as follows: On 3/27/95, Sgt. Robert Harrison of the New Orleans Police Dept's Public Integrity Division presented me a copy of a signed court order releasing the above weapon to Police Officer Antionette Frank. This court order had my name (Morris Reed signed at the bottom. My last name was misspelled (Reid) on this document , and I Morris Reed did not sign this court order releasing the above weapon. The Judge also hand wrote this notation: note that authorization was not given to anyone to sign my name. Judge Reed signed his signature and Douglas Carey was a witness. See attachment # 8

Since Judge Marullo would not comment on the case until the trial of Antionette Frank and Rogers Lagaze were over. The trial of both suspects were over in September. On 10/4/95 Sgt. Harrison spoke to Judge

Frank Marullo via telephone. Sgt. Harrison asked Judge Marullo if he remembered the conversation he had with Sgt. Harrison on 5/18/95 concerning the investigation. Judge Marullo related he did remember telling Sgt. Harrison he would give a statement after the case was completed. Judge Marullo stated the Antionette Frank case would be with him for a long time because of appeals. It was this reason he would not be able to give Sgt. Harrison a statement. Judge Marullo did relate that a witness in the case, an NOPD officer (he did not remember the name) testified during the trial. His testimony was dealing with how Antionette Frank obtained the weapons. According to Judge Marullo, during the trial he had the officer testify in his chambers. The officer was assigned to the evidence room of the NOPD. He testified that court officer Phillip Genovese got the court order signed for him. Judge Marullo related it just so happened that Phillip Genovese had died the same day. Judge Marullo thought it was very convenient for this officer to say that Phillip Genovese had obtained the order, now that Phillip Genovese was dead. Judge Marullo stated the officer's testimony was a part of the court record. Although Judge Marullo did not remember the officers name, the officer in question was P/O David Talley who was a witness in the Antionette Frank murder trial.

Continuing with the investigation, on 11/21/95, Sgt. Harrison was able to obtain a copy of the court transcript of the Antoinette Frank trial where P/O David Talley had testified. The testimony he had given concerned how Antoinette Frank had obtained weapons. The weapon in particular was the one Judge Marullo had signed through a court ordered release. During officer Talley's testimony, the question arose whether or not the court order allegedly signed by Judge

Marullo could be used in the trial. The defense questioned the authenticity of the document because it could have been a forgery. In his testimony, Officer Talley informed the court in Judge Marullo's closed chamber, he had given the order to the late Court Liaison officer Phillip Genovese. It was also his testimony that Phillip Genovese returned the court order signed by Judge Marullo. Judge Marullo still did not believe the signature was his. It is also important to mention that in Officer Talley testimony, he was asked a question by defense council Mr. Larre. The question was "You never saw the judges sign either of those documents is that correct" The judges, Mr. Larre is referring to are Judges Marullo and Reed. Officer Tally's response is "No sir". As was mentioned earlier in the report, Officer Talley gave a statement to Lts. Marino and Italiano where he stated he observed Judge Reed sign the court order. Officer Talley's testimony conflicted with his earlier statement to Lts. Marino and Italiano. The trial continued in the regular courtroom. (see attachment # 9 page for copy of court transcript.)

On 1/9/96 at 12;30pm Sgt. Harrison took a statement from Lt. Robert Italiano also of the Public Integrity Division. The statement was taken in the PID office. As mentioned earlier in the report. Lt Italiano and Lt. Richard Marino took statements from Officer Talley. One of those statements taken on 3/22/95 was accidentally erased during transposition by a secretary. The statement obviously could not be used in this investigation. Thus was the reason Sgt. Harrison needed to take statements from Lts. Italiano and Marino. The following is a summary of the statement taken from Lt Italiano. Lt. Robert Italiano related he Lt. Richard Marino had taken the statement from Officer Talley in connection with the murder of Officer

Ronald Williams and two other civilians. Officer Antoinette Frank was arrested for the those murders. Some weapons had been recovered from Officer Frank. These weapons were obtained from the Police Department's Central Evidence and Property room. The object of the statement was to learn how Officer Frank came in possession of the weapons.

Lt Italiano stated Officer Talley told them one of the weapons was a snubnose 38 caliber revolver which belonged to Tally, Another was a four inch 38 caliber revolver which was obtained through a court order. A third weapon was a nine millimeter also obtained through a court order. Tally informed Lts. Italiano and Marino he had obtained both court orders and had released them to Officer Frank. Officer Tally also told them the orders were signed by Judges Frank Marullo and Morris Reed of Criminal District Court. Tally further told them he (Tally) observed Judge Reed sign one order and the other was given to Judge Marullo's Minute Clerk who returned the order signed to Tally by Judge Marullo. Lt. Italiano explained Tally told them of his involvement with Officer Frank. Tally stated he had met her while she was a recruit assigned to the Central Evidence and Property Room. Upon her entering the academy, she told Tally she did not have enough money to purchase a weapon. Tally told her he would get a weapon for her. According to Lt Italiano. Tally denied selling any weapon to Frank, and any romantic involvement with her.

Lt. Italiano stated the nine millimeter was reported stolen and that Tally stated Officer Frank had come to him asking his assistance in obtaining another weapon. Tally told them he did not give her another weapon, but she did come visit him in the gun vault a week before the murders. According to Lt Italiano,

Tally stated he had left Officer Frank in the gun vault alone for a period of time, and it is possible she had taken a gun from the vault. (See attachement # 2)

On 1/10/96 at 10:00pm Sgt. Harrison took a statement from Lt. Richard Marino in the PID office. Lt. Marino is currently assigned to the New Orleans Third District. Lt. Marino related he and Lt Italiano took a statement from Officer Dave Talley on 3/22/95 in connection with the arrest of Officer Antoinette Frank for murder. Upon her arrest, she was in possession of a 2 inch revolver which belonged officer Dave Talley. Officer Frank also had a 4 inch revolver and a nine millimeter automatic which she had reported stolen. The purpose of the statement was to see how Officer Frank came into possession of the three weapons. There was a fear one of the weapons may have been used the triple murder. It was determined the weapons came from the Property room of the New Orleans Police Dept, where Officer Talley was assign.

According to Lt. Marino, officer Talley informed them two of the weapons were obtained through court orders signed by Criminal Court judges. Tally in turn gave the guns to Antoinette Frank. One of the orders was signed by Judge Reed and the other by Judge Marullo. Tally further told them he personally stood next to Judge Reed while he signed the order. The other order was given to Marullo's clerk. The clerk gave the order to the judge and was returned by the clerk to Talley signed by Judge Marullo. Lt. Marino stated Talley did not identify the clerk. Lt. Marino related he did not know of any department procedure regarding the use of Court orders to release weapons. Talley told them he was going to locate paperwork on one of the weapons, then use it to complete the court order. He could never find the paperwork, but

gave it to Officer Frank anyway. Lt. Marino stated the weapon recovered from Officer Frank at her arrest belonged to Officer Talley. Talley stated the gun belonged to a friend of his that had been lost or stolen. Talley was going to look out for the weapon. Talley told them the weapon did eventually come into the Property room, and he notified his friend. The friend told Talley he no longer wanted the weapon which was a 38 caliber revolver. Talley bought the gun, and later loaned it to Antionette Frank. When The nine millimeter was reported stolen by Frank, Talley did not ask for the 38 caliber revolver back.

Lt. Marino related Talley stated he obtained the court orders himself, and went and got the orders signed. Talley explained that he and Frank had become friends when she was a recruit. He denied any sexual relationship with her, but admitted taking her to a private shooting range to teach her how to shoot an automatic pistol. He further stated he had gotten her work on his detail at Dillard's department store in Lake Forest Plaza. Lt. Marino stated Talley told them he saw Officer Frank a week before the murders in the property room at police Headquarters. Talky stated he did not give her anymore guns. He did leave her alone in the gun vault, while he went to attend to something else. Talley stated he did not have any knowledge of her taking any weapons from the room. Lt. Marino did not know if it were procedure for the gun vault to be left unattended, but he did not think it was. Lt. Marino believed it was possible for Antionette Frank to have removed weapons from the gun vault when she visited Officer Talley. Lt. Marino based this on the statement from Talley. (See attached copy of statement) (It should be noted that a weapon was discovered missing from the property room and was investigated under

PID 95 -641R) See attachment # 13 for copy of Lt. Marino's statement.

The statements of Lts. Italiano and Marino along with Officer Talley's signed statement show Talley allowed Antoinette Frank in the gun vault which is a sensitive evidence area of the C.E.+P. Lts. Marino and Italiano stated in their statements that Talley told them he left Officer Frank alone in the gun vault. Again this is a sensitive evidence section of C.E.+P and only those individuals assigned to those duties and the supervisors in C.E.+P have access to the gun vault. See PID # 95- 641(R) for information on the investigation of a missing 380 cal. pistol, and the individuals who had access to the gun vault. Officer Antionette Frank was not assigned to C.E.+P at the time Talley stated she was in the gun vault. In Talley's statement to Lts. Marino and Italiano, he stated he did not locate the paperwork on the Smith and Wesson revolver, but gave it to Antionette Frank anyway. Officer Talley also told Lts. Marino and Italiano he had observed Judge Reed sign one of the court orders. In Officer Talley's testimony in the Frank trail, he testified he had never seen the judges sign any of the orders.

This investigation was presented to the District Attorney's office for consultation. Handwriting exemplars were ordered by the grand jury in the investigation. Those exemplars were compared to the samples on the court orders. These examinations were conducted by P/O James Depuis of the Crime Lab. The examination was inconclusive. The alleged criminal violations were two counts R.S. 14-71 relative to Forgery and R. S. 14-67 relative to theft. On 7/1/96, Correspondence was received from The District Attorney's office stating there was insufficient evidence to proceed with criminal charges against Officer Talley.

With this information received, the criminal investigation against Officer Talley was terminated and a departmental administrative investigation would ensue.

Through the course of the investigation It was determined there were some possible administrative violations. In Officer Talley's statement to Lt. Italiano on March 7, 1995 he stated he allowed former Police officer Antionette Frank in the gun vault of Central Evidence and property to talk with him about a detail they worked at Dillards Dept. Store. See attachement # 2. As mention earlier, officer Talley gave a second statement to Both Lts. Italiano and Marino where he stated he left Antionette Frank alone in the Gun Vault. This may be a violation of NOPD Rule 4 paragraph 4 regarding neglect of duty.. Also in that same statement Officer Talley stated he released the 38 caliber Smith and Wesson to Antionette Frank without having the necessary paperwork. To release the weapon there is a chain of custody card that shows who releases property and who receives the property. See attachment # 13. This violation may also constitute neglect of duty. Officer Talley also stated in the same statement The court order bearing Judge Marullo's signature was given to a clerk to have Marullo sign the order. The order bearing Judge Reed's signature was signed by Judge Reed in the presence of Talley. In Officer Talley's sworn testimony in the Frank Trial, he stated he never saw any of the Judges sign the orders. This may constitute a violation of NOPD Rule 2 paragraph 3 Truthfulness.

On 7/ 18/96 Sgt. Harrison spoke to Wiley Beavers the attorney representing Officer Talley via telephone. Sgt. Harrison informed Mr. Beavers a statement was needed from his client concerning the administrative investigation. Sgt. Harrison further informed Mr.

Beavers that the Criminal investigation against his client was closed. Mr. Beavers agreed to have his client come to the PID office on Tuesday July 30 to give an administrative statement. It should be noted this would be the second time Officer Talley would give a statement. An initial statement was taken from Officer Talley on 10/10/95 as part of the criminal investigation. Because of the Police Officer Bill of Rights, which were read on tape to officer Talley in the presence of his attorney, he refused to give a statement at that time.

On Tueday July 30, 1996 at 9:30am Officer David Talley and his attorney Wiley Beavers arrived at the PID office. An audio taped statement was taken from Officer Talley with his attorney present. As per provisions of the Police Officers Bill of Rights, and the constitutions of the United States and the State of Louisiana which were read on tape to Officer Talley and Wiley Beavers, Officer Talley refused to make a statement in a criminal investigation. Sgt. Harrison further read on tape State Law Statue 33 Art 2426 which requires all civil service employees to answer questions in official inquires and refusal to answer those questions results in job forfeiture as well as a two year ineligibility period as to the appointment to any state or civil service job. Sgt. Harrison further explained any statement made by Officer Talley in this internal administrative investigation since required by state law can not be used in any criminal proceedings against him. After hearing the above explanations, Officer Talley agreed to give a statement in this administrative investigation.

The following is a summary of the taped statement taken from Officer Talley Police Officer David Talley W/M ██████ SSN ████████ presently assigned to

the Sixth district related he did know Former NOPD officer Antionette Frank. Officer Talley stated he did provide Officer Frank with two weapons, an automatic and a revolver. The weapons were released to Frank through a court orders which Talley stated he obtained. He related he got the orders signed by two Court Judges at criminal Court. The Judges were Marullo and Reed. Talley stated he had access to the gun vault as the gun vault officer. He related beside himself there were supervisors and other police officers who had access to the gun vault He explained access meant there was a key and alarm to gain access to the vault. Officer Talley stated Officer Frank did not have access to the gun vault. He also stated he left her alone in the gun vault one time. According to Talley, it was not procedure to leave anyone alone in the gun vault , but the one time he did so was because he was called to the front counter in another location of Central Evidence and Property. The gun vault is considered a sensitive area along with the narcotics and valuable property vaults. And only those officers named previously would have access.

Officer Talley further stated he did release a Smith and Wesson 38 caliber revolver to Antionette Frank through a court order. There was a chain of custody card on the gun when he released the weapon at that time but he did not know what happen to it (custody card) According to Officer Talley, you are not to release the weapon without the chain of custody card. Sgt. Harrison asked Officer Talley to explain why the card could not be located now He stated the card could have been missed filed, but he did not know where it was since he had not worked there in almost two years. Talley further related he did not see Judge Marullo sign the order but, gave it to Phillip Genovese and it was returned to him signed. Talley stated he gave the

other order to Judge Reed to sign and it was signed by Judge Reed. Officer Talley further stated although Judge Reed is saying he did not sign the order, Talley believed it was Reed who signed it. Talley explained he had never seen Judge Reed before he signed it, and it was possible it was someone else. Talley ended the statement by saying the this statement was true and correct to the best of his knowledge. See attachment # 15 for copy of Talley's statement.

CONCLUSION

Officer Talley in his statement to Sgt. Harrison on 7/30/96 stated he did in fact allow Former NOPD officer Antionette Frank to be left alone in the gun vault This is a sensitive area of C.E.+P and only the gun vault officer or those supervisors and certain police officers assigned in C.E.+P have a access to the gun vault. Officer Talley In his statement to Sgt. Harrison stated Officer Frank did not have access to the gun vault, and normally would not be left alone.. It should be noted there was a PID investigation into a missing automatic pistol from the gun vault in C.E.+P. after this investigation was initiated (see PID) # 95-641(R) Officer Talley also in the same statement to Sgt Harrison stated be released the Smith and Wesson 38 caliber revolver to Frank by court order, and he stated he had a chain of custody card on the weapon. See attachment # 15 No chain of custody card nor any documentation on how that gun came into C. E.+P was ever found on that particular gun. This was noted earlier in the report when Sgt Harrison first spoke to Lt. Mounicou, then commander of C.E.+P, and in the initial investigation. In a statement taken from Lt. Marino regarding the statement taken from Officer Talley, Lt. Marino stated that Talley said he released the gun without any documentation on the

weapon. See attachment # 13 Also in Officer Talley's statement to Sgt. Harrison , he stated he did see Judge Reed sign the order or maybe someone else whom he believed to be Judge Reed. In Officer Talley's sworn testimony in the Frank Trial he stated he never saw any of the Judges sign the orders in question See attachments # 9 page 111

Therefore, as a result of this administrative investigation, allegations of misconduct against Officer David Talley appear to be supported by sufficient evidence and Officer Talley maybe in violation of the following Department Rules and/or Regulations.

Rule 2 MORAL CONDUCT

3 TRUTHFULNESS .... SUSTAINED

Upon the order of the Superintendent of Police, the Superintendent's designee, or a superior officer, employees shall truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the department which may be asked of them.

Officer Talley may have violated this rule when he stated in his statement to Sgt. Harrison he observed either Judge Reed or someone he believed to be Judge Reed sign the order, but yet he testified under oath in Criminal court that he did not see any of the judges sign the orders.

RULE 3 PROFESSIONAL CONDUCT

2 ABUSE OF POSITION .... SUSTAINED

Employees shall not use their position, official identification cards or badges for personal or financial gain, for obtaining privileges or for avoiding consequences of illegal acts. Employees shall not lend to another persontheir identification cards or badges or

permit them to be photographed or reproduced without the approval of the Superintendent of Police.

Officer Talley may have violated this rule when acting in his capacity as a police officer he obtained two handguns through court orders for Antionette Frank who was not a police officer, but a recruit. Officer Talley was assigned to the C.E.+P as the gun vault officer and released the guns to Antionette Frank.

Rule 4 PERFORMANCE OF DUTY

4 NEGLECT OF DUTY .... SUSTAINED

Each member, because of his grade and assignment, is required to perform certain duties and assume certain responsibilities, A member's failure to properly function in either or both of these areas constitutes neglect of duty.

Officer Talley may have violated this rule when as assigned as the gun vault officer in a sensitive area of the Central Evidence and Property section he allowed former Officer Antionette Frank to be left alone in the gun vault.

Officer Talley again may have violated this rule when assigned as the gun vault officer to Central Evidence and Property he released a 38 caliber Smith and Wesson revolver through a court order to former officer Antionette Frank without any documentation on the weapon and a chain of custody card.

RULE 6 OFFICIAL INFORMATION

2 fALSE OR INACCURATE REPORTS... SUSTAINED

A member shall not make, or cause to allow to be made a false or inaccurate oral or written record or report of

an official nature, or intentionally withold material matter from such report or statement.

Officer Talley may have violated this rule by using a forged signature (Reed's signature) on a official document of official nature (court order) to release the Smith and Wesson Handgun to Antionette Frank. Officer Talley account of bow this document was obtained changed three times in his two statements and in sworn testimony in the Frank trial.

Respectfully Submitted

/s/ Sgt. Robert Harrison
Sgt. Robert Harrison
Public Integrity Division

CONCUR/~~DO NOT CONCUR~~

/s/ Lt. Robert Italiano
Lt. Robert Italiano,
Criminal Section, Public
Integrity Division

CONCUR/~~DO NOT CONCUR~~ 9-5-96

/s/ Capt. Chester Cooke
Capt. Chester Cooke
Deputy Commander, Public
Integrity Division

CONCUR/DO NOT CONCUR

____
Major Felix Loicano
Commander, Public
Integrity Division

LIST OF ATTACHMENTS

1) DM-1 95-263(R)

2) Statement of Officer Talley dated 3/7/95

3) Report # F-25688-93

4) NOPD C.E. + P evidence and poperty and Chain of custody card #C034479

5) Report # B-38846-95

6) Court Order item # F-25688-93

7) Court Order #2 no item number for S +W 38 caliber revolver

8) Statement of Judge Morris Reed PID # 95-263

9) Court transcript of David Talley's testimony in Frank Trial

10) Handwriting exemplar G-8640-95

11) C.E.+P, Evidence card # D37391

12) Crime Lab Report under item # G-8640-95

13) Statement of Lt Richard Marino

14) Statement of Lt. Robert Italiano

15) Statement of David Talley dated 7/30/96

16) Incomplete statement of David Tally dated 3/22/95

17) Copy of Pawnshop files

APPENDIX F

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

Case No. 375-992

STATE OF LOUISIANA

versus

ROGERS LACAZE

JUDGEMENT

This matter appears before the Court on a motion to recuse Judge Frank Marullo from presiding over the hearing on Rogers Lacze's post conviction relief application. In it's motion, the defense alleges several grounds for recusal of Judge Marullo. This court finds merit in only one. The defense alleges that Judge Marullo is an essential witness on the issue of whether the State and the Court withheld information regarding the release of a 9mm handgun to Officer Antoinette Frank by Judge Marullo, prior to the shooting deaths at the Kim Anh Restaurant on March 3, 1995. The record is relatively clear that a document purporting to bear Judge Marullo's signature was presented to secure the release of a 9mm handgun from the NOPD Property and Evidence Room to then Officer Antoinette Frank, the co-defendant in this case. It is also undisputed that the weapon used in the shooting was an unknown 9mm handgun that was never recovered. Judge Marullo has consistently urged that the signature on the document was a forgery, which led to an investigation by NOPD's Public Integrity Bureau.

However, the record is not clear on how much of this information, if any, was provided to defense counsel in preparation for the capital murder trial against Rogers Lacaze.

In order to resolve this issue, Judge Marullo's testimony may be necessary during the hearing on this matter, which requires the recusal of Judge Marullo pursuant to La.C.Cr.P. Article 671(A)(4).

For the forgoing reasons, this Court grants the motion to recuse Judge Frank Marullo.

/s/ Lynda Van Davis
Judge Lynda Van Davis
Criminal District Court
Section B

This the 18th day of October 2010.

APPENDIX G

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The Due Process Clause of the Fourteenth Amendment provides, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."