IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

ALBERT WOODFOX, Petitioner,	CIVIL ACTION NO: 06-CV-789
vs.	JUDGE JAMES J. BRADY
CHARLES C. FOTI, Jr., Warden, et al. Respondents.	MAGISTRATE JUDGE BOURGEOIS

PETITIONER'S MOTION FOR RULE 23(c) RELEASE

NOW INTO COURT comes Petitioner, by and through undersigned counsel, to move this Court for release pursuant to Federal Rule of Appellate Procedure 23(c). Based on the law and facts detailed in the supporting memorandum, Petitioner respectfully prays that the Court grant the relief he requests, release on his own recognizance, with or without surety. A proposed Order is attached.

Dated this 6th day of February, 2015

Respectfully submitted,

By: _/s/ Carine M. Williams__________

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and accompanying documents were filed electronically with the Clerk of Court using the CM/EMF system this 6th day of February, 2015. Notice of this filing will be sent to opposing counsel by operation of the Court's electronic filing system.

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CHARLES C. FOTI, Jr., Warden, et al.	MAGISTRATE JUDGE BOURGEOIS
Respondent.	

ORDER

Petitioner's Motion for Rule 23(c) Release is hereby GRANTED.

So Ordered.

Baton Rouge, Louisiana, on February ___, 2015.

Judge James J. Brady
United States District Court for the
Middle District of Louisiana

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CHARLES C. FOTI, Jr., Warden, et al. Respondents.	MAGISTRATE JUDGE BOURGEOIS
	Expedient Hearing Requested

PETITIONER WOODFOX'S MEMORANDUM IN SUPPORT OF MOTION FOR RULE 23(c) RELEASE

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Mr. Woodfox's habeas petition challenges his life-sentence custody. He has thus far served over 40 years of his sentence. However, his time-served is based solely on a now-void conviction for the 1972 murder of a Louisiana State Penitentiary (LSP) corrections officer. Because the Federal Rules establish a presumption in favor of enlargement after habeas relief has been granted, Mr. Woodfox hereby moves to be released from this custody. *See* Fed. R. App. P. 23(c).

Mr. Woodfox's petition was fully submitted over seven years ago, as of July 30, 2007. *See* Doc. No. 24. Subsequent full submission, this Court variously considered additional, voluminous briefing, arguments and hearings. After careful consideration, this Court concluded the conviction against Mr. Woodfox was acquired in violation of the Constitution. *See, e.g.*, Doc. No. 48 (adopting the Magistrate Judge's Report and Recommendation, Doc. No. 33); *and see* Doc. No. 274. This Court's first finding of constitutional infirmity—as to ineffective assistance of counsel—was reversed by a sharply divided panel of the Fifth Circuit. *Woodfox v. Cain*, 609 F.3d 774 (2010). Thereafter, a unanimous panel of the Fifth Circuit agreed with this Court's second determination of constitutional trespass; that racial discrimination infected the constitution of the grand jury which indicted Woodfox. *See Woodfox v. Cain*, No. 13-30266 (5th Cir. Nov. 20, 2014) (Higginbotham, J.) (attached hereto as Exhibit A). Quoting *Rideau v. Whitley*, 237 F.3d 472, 484 (5th Cir. 2000), the panel concluded that the conviction against Mr. Woodfox, "cannot stand under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 3 (internal quotations omitted).

The State pursued en banc review of this panel decision. The Fifth Circuit has denied reconsideration. *Woodfox v. Cain*, No. 13-30266 (5th Cir. Feb. 3, 2015). Although the State may yet seek certiorari review, unless a court order provides to the contrary, Rule 23(c) requires that Mr. Woodfox be allowed out of custody, with or without surety, "while a decision ordering his release is under review." Fed. R. App. P. 23(c).

Given how long his claims have pended, Mr. Woodfox hereby respectfully urges this Court to consider his motion for Rule 23(c) relief on an expedited schedule, and to order his enlargement in the interests of justice. To that end, **Mr. Woodfox requests an expedient hearing date of Monday, February 23, 2015.**

I. RELEVANT FACTUAL BACKGROUND

A. *The Challenged Custody*

As this Court is well aware, the custody which Mr. Woodfox challenges by habeas petition is particularly pernicious:

> [A] reasonable fact finder could conclude that by keeping the plaintiffs in lockdown for such an inordinate length of time in spite of the obvious health risks, physical and psychological, the defendants acted with deliberate indifference to the substantial risk of harm from doing so. Furthermore, and most importantly, as there is no legitimate penological interest in continuing the plaintiffs' confinement in lockdown, it follows that a fact finder could also determine "*a fortiori* that the Defendants have the requisite mental state to establish an Eighth Amendment violation."

See Wilkerson v. Stalder, No. 00-304 (M.D. La. Aug. 13, 2007) (Doc. No. 33) (quoting Plaintiffs' opposition to Summary Judgment on Eighth Amendment claims, Doc. No. 165 at 49). Since 1972, Louisiana has insisted on holding Mr. Woodfox in the most harshly

restrictive custody possible—solitary confinement. Louisiana has held Mr. Woodfox in solitary confinement even throughout the lengthy course of the instant habeas litigation, notwithstanding that Mr. Woodfox's habeas pleading indisputably set forth more than colorable claims of wrongful conviction. Louisiana persists with this confinement today, even when that conviction stands invalid. Accordingly, for more than four decades Mr. Woodfox has been housed in a small, single cell, in 23-hour–a-day lockdown, subject to myriad deprivations (as to which this Court is already familiar), almost without exception.

The facts relating these exceptions are critical to this Court's consideration of release pursuant to Rule 23(c): in those periods wherein Mr. Woodfox has been allowed to live among others, he has demonstrated beyond doubt his capacity to live peacefully and constructively. First, for nearly three years, Woodfox lived—without any significant disciplinary incident—in the general population of a parish facility pending his 1998 retrial. Then, in 2008, for nine months, Woodfox again lived peacefully in a segregated dormitory.

Indeed, Mr. Woodfox's institutional files are sufficiently compelling that, on November 25, 2008, after granting relief on ineffective assistance of counsel, this Court gave due consideration to release pending appeal. *See* Doc. No. 75. Louisiana launched a no-holds-barred attack to resist this Order. Apart from various incendiary—and false—accusations that Woodfox was a serial sex offender, the Warden of LSP changed his prior testimony that, "Woodfox had an excellent record during the [prior] five years." *See Woodfox v. Cain*, 305 Fed. App'x. 179, 181 (5th Cir. 2008) (characterizing the warden's prior

deposition testimony); *see also* Cain Dep. 11/30/2006 at 106:3-6 (admitting Woodfox could "almost be described as a model prisoner") and at 108:3-8 (admitting that if his murder charge were taken away, Woodfox did not belong in closed cell confinement) (attached hereto as Exhibit B).

Instead, on October 22, 2008, in connection with the Rule 23(c) proceedings, the Warden testified that Woodfox is held in solitary confinement "in the cell," in other words, "so that he won't have the opportunity to cause problems, or to hurt someone or himself or hurt the correctional officers or other inmates." Cain Dep. 10/22/2008 at 65:19-22 (attached hereto as Exhibit C). Problems with the Warden's new testimony were readily apparent. First, the testimony was sharply controverted by Woodfox's institutional files as well as the Warden's own prior testimony: no one had even accused Woodfox of attempting to cause problems or of trying to hurt anyone in decades. Second—and importantly—Woodfox was not in "the cell," at the time the Warden reversed course on his prior testimony. Mr. Woodfox was living peaceably in the dormitory discussed *supra*, among other prisoners and prison staff. While housed in this dorm, Mr. Woodfox had been able to share meals with his dorm mates; go outside regularly for hours at a time; interact with guards daily; and engage with the general public during regular visitation, all without incident.

Nevertheless, just after the Warden's new testimony, Mr. Woodfox was pulled out of the dorm and placed back into solitary confinement. The basis for this change in housing quarters was, Woodfox has alleged, a purely pretextual disciplinary for three-way

phone call violations, for giving an "interview" to a friend who is also a journalist, and for purportedly lying about her friendship with him so that she would be approved on his phone list. *See* December 17, 2008 Disciplinary Report (attached hereto as Exhibit D); *see also Wilkerson v. Stalder*, No. 00-304 (M.D. La. Aug. 13, 2007) (Fourth Amended Complaint, Doc. No. 489 ¶¶ 38-42) (alleging that the extreme sentence of a "quarters change" back into the cell was handed down so as to falsely portray him as a security risk, and so as to retaliate against him for speaking in his own defense and for accessing the courts). Prison officials disciplined Woodfox for these supposed infractions after the Attorney General requested they target him for punitive action. Working with staff of the Attorney General's office, prison officials looked through a year's worth of recorded calls to find, "'sufficient justification for stiff disciplinary action.'" *See* Doc. No. 374 (Magistrate Judge Dalby quoting e-mail between Attorney General's Office staff and a prison investigator) (attached hereto as Exhibit E).

None of this information was known, however, at the time of 2008 bail considerations. Wrongfully, prison officials resisted disclosing their e-mails with staff in the Attorney General's office, and that evidence was not produced until after protracted litigation over a motion to compel. Instead, when the Fifth Circuit reversed this Court's grant of Rule 23(c) release, it did so based on the fact that the State had shown a substantial case on the merits, and in misplaced reliance on the Warden's testimony as to his purported justifications for keeping Mr. Woodfox in a cell.

Although Mr. Woodfox has not picked up a single additional disciplinary since this 2008 write-up—not one, in the over six years subsequent—his "quarters change" to solitary confinement continues today. In connection with the 2008 bail application, this Court was apprised of the serious health ailments which plague Mr. Woodfox. *See, e.g.*, Doc. No. 53 at 7, 10-13; *and see id.* Exh. C (Declaration and Expert Report of Dr. Brie Williams). *See also Wilkerson v. Stalder*, No. 00-304 (M.D. La. Aug. 11, 2007) Doc. No. 233 at 22 (noting the "obvious health risks" which attend Woodfox's continued confinement); and *id.* Doc. No. 553 at 16, n.9 (recapitulating record evidence as to mental and physical health risks). Mr. Woodfox, currently 67 years old, has grown older and remains infirm. Yet, the duration of his lockdown confinement has now stretched beyond three decades to four.

Remarkably, the deprivations to which Mr. Woodfox is subject have grown only more abject. In March 2013, the State also began unlawfully subjecting him to routine daily visual body cavity searches, forcing him to strip naked and spread his buttocks for cavity inspection, as often as six times a day. *See id.* Doc. No. 505. The Court preliminarily enjoined this egregiously unlawful conduct, *see id.* Doc. No. 567, but that ruling was reversed on jurisdictional grounds. *Wilkerson v. Stalder*, No. 14-30142 (5th Cir. Dec. 18, 2014). Mr. Woodfox subsequently filed for relief in state court, and that case pends. *Woodfox v. Phelps*, No. 209-535 (19th JDC, Div. H. Jan.14, 2015). Even in the absence of this

particular indignity, the custody challenged by Mr. Woodfox remains, as one media outlet has described it, "barbaric beyond measure."[1]

B. *Nature of the Case*

This Court is familiar with the weakness of the State's case against Mr. Woodfox. *See, e.g.*, Doc. No. 33 at 61 ("[T]he Court fails to see the 'overwhelming evidence' to which [the State] refers."). Because, as discussed further *infra*, the flaws in the State's case are relevant to Rule 23(c) analysis, they are briefly reviewed here.

First, no physical evidence has ever linked Mr. Woodfox to the crime for which he was unfairly tried and convicted. In fact, the only physical evidence presented by the State—a crime scene fingerprint—exculpates Mr. Woodfox. *See* Doc. No. 15 at 32-34. Instead, the State's evidence against Mr. Woodfox came in primarily by way of the unreliable and inconsistent testimonies of interested inmate witnesses, Hezekiah Brown, Joseph Richey and Paul Fobb. *See id.* at 25-37.

By all admissions, Brown, a former death row inmate, was the key witness against Mr. Woodfox. The 1998 jury learned, through documentary evidence and other witnesses, that Brown had testified for the State only after being promised considerable favors. Those favors included—among other rewards—weekly deliveries of high value prison currency, a carton of cigarettes; as well as the promise of a pardon. The pardon eventually materialized and led to Brown's freedom. The jury, however, was denied an opportunity

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[1] *Four Decades of Solitary in Louisiana*, N.Y. Times, Nov. 21, 2014, available at http://www.nytimes.com/2014/11/22/opinion/four-decades-of-solitary-in-louisiana.html?_r=0.

to see Brown confronted on the stand as to the pardon, much less as to his prior lie—under oath—that he had never been promised anything for his testimony. Although Brown died before Woodfox's 1998 retrial, his unconfronted 1973 trial testimony was nevertheless read into the record. *Id.* at 26, 39-45. In addition, the jury was wrongly permitted to hear testimony of the prosecutor of the 1973 trial, John Sinquefield, who vouched for Brown's credibility, *see id.* at 45-49. *See also Woodfox v. Cain*, 609 F.3d 774, 805 (5th Cir. 2010) (noting "we too are troubled by that aspect of Sinquefield's testimony wherein he exclaimed how 'proud' he was of Hezekiah Brown and that Brown's testimony 'took courage,'" but finding that AEDPA deference precluded relief).

Moreover, since Woodfox could not call Brown to the stand, the 1998 jury had no opportunity to hear Brown questioned about an admission he made in Woodfox's co-defendant's case. Specifically, Woodfox could not confront Brown as to his admissions that he had identified the purported assailants only after prison officials put selected prison files in front of him. Jurors also did not learn that Brown had admitted that he fingered Woodfox and Woodfox's co-defendants out of fear of being thrown into much-dreaded solitary confinement. *See, e.g.*, Transcript of Trial of Herman Wallace and Gilbert Montegut at 34 (attached hereto as Exhibit F) ("I knowed if I said no, I didn't know nothing about it, then… I'm going to get punished behind it, I'm going to get throwed in one of them cells, and I done stayed in one of them cells too long on death row… I couldn't stand that no more.").

Additional problems with the State's case included that Joseph Richey's trial testimony was likewise not credible. At the 1998 trial, Woodfox's counsel failed to make use of significant deviations from Richey's prior written statement. As the Warden who investigated the crime confirmed, "I don't think [Richey] knew anything about the case to begin with." *See* Doc. No. 15 at 16. Fobb's testimony was inconsistent with testimony offered by Brown and testimony offered by Richey. *See id.* at 28. Further, because trial counsel failed to use medical records which disproved Fobb's testimony that he had sight in his left eye, the jury never heard that he could not possibly have seen what he claimed to have seen. *Id.* at 57-59.

The slew of infirmities in the State's case shows that the State's 1998 case against Mr. Woodfox was slight. *See Woodfox v. Cain*, 609 F.3d 774, 782 (2010) (describing the 1998 trial as full of "the problems that arise when a defendant is re-tried decades after an initial conviction"). When considered in conjunction with Woodfox's evidence of actual innocence, the weakness of the State's case sixteen years ago makes it difficult to imagine how the State could reconvict Mr. Woodfox in a trial today that satisfies constitutional norms.

II. APPLICABLE LAW: *The Presumption in Favor of Release*

This Court is well-versed in the applicable legal standards for release of a habeas petitioner pending further review, having already visited the issue in this case in 2008. *See* Doc. No. 75. For ease of reference, however, Mr. Woodfox recapitulates here the case law which establishes the presumption in favor of his release.

"[T]here is abundant authority that federal district judges in habeas corpus and section 2255 proceedings have inherent power to admit applicants to bail pending the decision of their cases." *Cherek v. U.S.*, 767 F.2d 335, 337 (7th Cir. 1985); *see also In re Wainright*, 518 F.2d 173 (1975) (likewise noting the "inherent power" of the district court to enlarge state prisoners pending disposition of habeas relief). Indeed, as discussed, Fed. R. App. P. 23(c) requires release from custody, with or without surety, when the government appeals a grant of habeas relief, unless a federal court orders otherwise.[2] Rule 23(c) thereby establishes a presumption in favor of release.

The district court's authority to enlarge a petitioner pursuant to Rule 23(c) continues even after an appeal has been taken. *See Jimenez v. Aristiguieta,* 314 F.2d 649 (5th Cir. 1963) (recognizing the district court's authority to modify enlargement order, even after appeal was taken); *and see Jago v. U.S. District Court, Northern District of Ohio*, 570 F.2d 618, 622 (1978) (noting that, "the district court has of necessity a retained power to act even though a judgment in the case may be the subject of a pending appeal.").

Exercising this authority, as the Supreme Court has observed, "contemplate[s] individualized judgments," such that the consideration of any enlargement application pending appellate review of habeas relief, "cannot be reduced to a rigid set of rules." *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987).

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[2] Specifically, Rule 23(c) provides: "while a decision ordering the release of a prisoner is under review, the prisoner **must**—unless the court or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety." Fed. R. App. P. 23(c) (emphasis added).

That said, the Supreme Court has explained that, once habeas relief has been ordered, if the State seeks to rebut the presumption in favor of enlargement pending appeals, the State's opposition in effect amounts to a demand for a stay. *Hilton*, 481 U.S. at 776. Accordingly, general standards governing stay requests can also guide courts in evaluating opposition to Rule 23(c) release. *Id.* Those factors include: (a) whether the State has made "a strong showing" that it is likely to succeed on the merits of the pending appeal; (b) whether the State would be harmed irreparably absent a stay; (c) whether the stay will "substantially injure" other interested parties; and (4) where the public interest lies. *Id.* at 776-777 (string citation omitted).

As to these factors, the Supreme Court provides some additional, more nuanced guidance. First, *Hilton* instructs that, in the context of an enlargement application, the first stay factor is usually more heavily weighted than the other factors: "The balance may depend to a large extent upon determination of the State's prospects of success in its appeal." *Id.* at 778. Where the State's showing on the merits falls below "a strong likelihood of success on appeal," or at minimum "a substantial case on the merits" *with* the second and fourth factors also militating against release, then "the preference for release should control." *Id.* Moreover, as to the third factor, the Supreme Court maintains that the interests of the habeas petitioner in release are, as a general matter, "always substantial." *Id.* at 777-78.

Analysis of the stay factors may require evidentiary record development. *See, e.g.*, *Workman v. Tate*, 958 F.2d 164, 165 (6th Cir. 1992) (remanding a Rule 23 motion for release

from custody because the Sixth Circuit could not undertake a proper evaluation of the matter on the record then existing). For example, if it is not reasonably likely that the State will prevail on appellate review, then the State may be required to establish (pertinent to the second and fourth factors), an "especial flight risk or danger to the public," in order to prevail. *O'Brien v. O'Laughlin*, 557 U.S. 1301, 1301 (2009) (Breyer, J., in chambers). Under such circumstances, the district court should proceed expediently in taking the record evidence, and in rendering judgment as to whether to release a petitioner on bail and ruling upon appropriate conditions. *Richards v. Quarterman*, 578 F. Supp. 2d 849, 874, n.1 (N.D. Tex. 2008) (clarifying a prior order which instructed the state to "promptly take steps to cause [the Petitioner] to be released from custody on appropriate conditions of release that will not impose a financial burden on him," *id.* at 873, by setting a date for a hearing on bail within one week from the order). *See also Rado v. Manson*, 435 F. Supp. 349, 351 (D. Conn. 1977) (granting enlargement in a case where expedited treatment was warranted).

III. ENLARGEMENT IS WARRANTED IN THIS CASE

As set forth below, the State cannot satisfy its burden and overcome the presumption in favor of release because all of the *Hilton* factors favor Mr. Woodfox. To the extent public interests in security and risk of flight can be deemed to exist in this particular case, appropriate conditions can be imposed to more than adequately address those interests. Consequently, Mr. Woodfox is entitled to release pursuant to Rule 23(c).

A. *Likelihood of Success*

As to the first *Hilton* factor, the State cannot demonstrate *any* likelihood of success on further review, much less "a strong likelihood" of success. Nor can the State establish even a "substantial case" on the merits, with the second and fourth factors also militating against release.

As discussed, *Hilton* instructs that, of the stay factors, likelihood of success is the most important. 481 U.S. at 778. With respect to this critical factor, the State has no colorable claim as to likelihood of success, much less a persuasive showing. In this case, the State's appellate arguments are demonstrably unavailing: the Fifth Circuit has rejected them, by unanimous panel. In so doing, the panel made plain that there is not even a close question as to the merits of the State's case. The authorities which required reversal of Mr. Woodfox's conviction have been settled, "'[f]or well over a century....'" Exh. A at 3.

On appeal, the State articulated two principal arguments. First, that this Court had erred in refusing to accord Louisiana state courts with AEDPA deference. Second, that even if AEDPA deference was not warranted, this Court also erred in failing to find that the State had successfully rebutted Woodfox's prima facie showing of discrimination.

It would be unreasonable to speculate that these arguments will present any more compellingly on cert petition. In fact, as to the State's AEDPA arguments, the Fifth Circuit relied on not one but *two* independent grounds for finding that the last

reasoned State court decision relevant to Woodfox's grand jury discrimination claim was the post-conviction court's ruling. *Id.* at 14-15 ("[E]ven if we reject the use of the law-of-the-case doctrine, we would still hold that the state post-conviction court adjudicated the claim on the merits."). It is crystal clear that the post-conviction court unreasonably applied Supreme Court law when it rejected Mr. Woodfox's prima facie case, since the absolute disparities demonstrated had been, "well within the range considered significant by the Supreme Court." *Id.* at 23. Plainly, no credible argument supports AEDPA deference, whether in this Court, in the Fifth Circuit, or in the Supreme Court.

The Fifth Circuit also soundly rejected the State's appellate argument that your Honor erred in finding insufficient the State's rebuttal evidence. Over and over again, the panel agreed with the District Court that, in rebuttal of Mr. Woodfox's prima facie case, the State's evidence is inadequate, *see id.* at 35, "fails to persuade," *id.* at 36, and "fails to convince," *id.* at 37. The panel proceeded further, agreeing that Woodfox presented compelling evidence that the State's case was pretextual. The Fifth Circuit took special note of the facts that: the judge presiding over Mr. Woodfox's prosecution never asked venire members about their qualifications, *id.* at 36; the same judge selected only one of the five African American forepersons selected in the relevant time period, *id.*; and that, in making these selections, this judge consistently passed over African Americans in the venire who had comparable qualifications, *id.* at 37. All of this evidence, the panel observed, "bolsters our conclusion" that the State's rebuttal case was unavailing. *Id.*

Given the powerful case against the State's appellate arguments, it unreasonable to posit that the Supreme Court might take any different view, even assuming a cert grant. The rigorous standards for certiorari lessen even further the State's chances of success. Because the State cannot demonstrate a likelihood of success on appeal—or even a substantial case on the merits, with the second and fourth factors also in their favor—"the preference for release should control." *Hilton*, 481 U.S. at 778.

B. *Irreparable Injury*

As a threshold matter, enlarging Mr. Woodfox has no effect on the State's ability to seek further review of this Court's grant of habeas relief, or on the State's ability to retry Mr. Woodfox in the event that further appeals are unsuccessful. The State can claim no injury there. The State likewise cannot show that it will be irreparably injured in any other way by Rule 23(c) release.

Indeed, at this stage, even in the highly unlikely event that the State were to prevail on a grant of Supreme Court certiorari, all that *might* be irretrievably lost by the State as a result of Rule 23(c) enlargement would be time on the clock of Mr. Woodfox's sentence. And assuming, as is most likely, that the State does *not* prevail on appeal, the possibility of the State exacting a shorter life sentence from Mr. Woodfox because of Rule 23(c) release remains extraordinarily speculative. That is because, not only is there a low likelihood of success on appeal, but the State is unlikely to succeed at fairly reconvicting Mr. Woodfox.

Whether the State can establish that it is likely to succeed at convicting Mr. Woodfox in a constitutionally fair trial is relevant to the irreparable harm prong. *See*

Harris v. Thompson, No. 12-1088, 2013 U.S. App. LEXIS 16715, at *6 (7th Cir. Feb. 20, 2013) (granting Rule 23(c) release because, *inter alia*, the Court disagreed with the State that it would likely reconvict the defendant in a new trial).

The State cannot make any such showing here. This is evident, first, because the State has now had not just one but two chances to convict Mr. Woodfox at a trial that passes constitutional muster, and failed. Moreover, in post-hearing briefing before this Court, the State urged the Court not to grant habeas relief on the grounds that, "the implications of such a ruling would be sweeping… it would mean re-trying him for a crime that occurred more than 40 years ago." Doc. No. 258 at 38-39. As the State explained, relying on *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982), "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Doc. No. 258 at 39 (internal quotation marks omitted). Again, in the Fifth Circuit, the State represented that habeas relief would "set free" Mr. Woodfox. *See* Appellant Brief at 10 (attached hereto as Exhibit G.).

That being the State's position then, the State cannot now claim that conditional release pursuant to Rule 23(c) would cause any irreparable harm whatsoever. *See Woods v. Clusen*, 637 F. Supp. 1195, 1197-1198 (E.D. Wis. 1986) (Granting enlargement because, *inter alia* the petitioner "is not likely to be retried and reconvicted in an error free trial….").

Finally, by any reasonable estimate, a request for certiorari review and a retrial by State would implicate a stretch of several months, perhaps a year, or even, most liberally, a few years. Even assuming the very unlikely event that the State succeeds to convince the

Supreme Court to review this case, or the unlikely event that it succeeds in a fairly-conducted retrial; given the context of 42-years already served and any measure of a normal, predictable natural lifespan, the time that the State could speculatively lose on Woodfox's continued custody would be nominal. *See also LaFrance v. Bohlinger*, 487 F.2d 506, 507 (1st Cir. 1973) (approving release pending appeal because, *inter alia*, the petitioner "had served much, probably most, of his state sentence."). By contrast, as discussed further below, to Woodfox the irreparable harm of continued incarceration is both certain and acute.

Because it is unlikely that the State will succeed in further appellate review and it is unlikely that the State will succeed in an error-free retrial, the State cannot claim irreparable harm. The State simply "does not have a defensible interest in the continued incarceration of an individual whose conviction was obtained in violation of the U.S. Constitution." *House v. Bell*, 2008 WL 972709 at *3 (E.D. Tenn. Apr. 7, 2008); *see also Smith v. Jones*, 2007 WL 3408552 at *1 (E.D. Mich. Nov. 15, 2007).

C. *Substantial Injury to Woodfox*

Hilton recognizes that the third stay factor invariably favors Rule 23(c) release. *See* 481 U.S. at 778. That is because, as one federal district court has put it, the loss of liberty is an especially "severe form of irreparable injury." *Ferrara v. United States*, 370 F. Supp. 2d 351, 360 (D. Mass. 2005). *See also Harrison v. Ryan*, 1990 WL 45740 at *2 (E.D. Pa. Apr. 12, 1990) ("[T]he liberty interest of an improperly convicted prisoner is stronger than any injury that may be caused to the [State] in releasing petitioner from

custody pending retrial."). Indeed, a prisoner, "suffers irreparable harm each day that he is imprisoned in violation of the United States Constitution." *Burdine v. Johnson*, 87 F. Supp. 2d 711, 717 (S.D. Tex. 2000). While this factor invariably favors petitioners, it may be weighted more heavily where circumstances warrant. *See, e.g.*, *Harris*, 2013 U.S. App. LEXIS 16715 at *5 (comparing the harm of increasing the length of time spent in prison on an unconstitutional conviction where there is evidence of actual innocence and observing: "[a]ny harm to the State pales in comparison.")[3]

In this case, the substantial injury to Mr. Woodfox should be weighed more heavily than the remaining stay factors. The injury of continued custody is particularly egregious to Woodfox for three reasons.

To begin with, Mr. Woodfox has already served an extraordinary duration of time on his life sentence, all of it pursuant to unconstitutional conviction, notwithstanding that there exists strong evidence of actual innocence in his case. The injury of continued incarceration is greater here than in the ordinary case because, in the absence of any constitutional conviction, Mr. Woodfox has served over four decades of a life sentence which began running when he was 25 years old. Now that Woodfox is aged 67, this duration of time indisputably constitutes a

[3] Notably, in 2008, the Fifth Circuit failed to analyze the *weight* of Woodfox's specific interests in release. *Woodfox v. Cain*, 305 Fed. App'x. 179, 181-2 (5th Cir. 2008). Instead, the panel "accepted" *Hilton's* general instruction that a prisoner's interest in release is "always substantial" and "move[d] on." *Id.*

majority of Woodfox's life sentence (if not the vast majority), and there exists ample record evidence of Mr. Woodfox's actual innocence here.[4]

Second, Mr. Woodfox has endured (and endures) the entirety of this sentence under atypical and significant hardship—again, in violation of the Constitution. *See Wilkerson v. Stalder*, No. 00-304 (M.D. La). The injury of continued custody is further heightened where Mr. Woodfox has credibly alleged that his confinement is cruel and unusual, in violation of his due process rights, First Amendment Rights and the Equal Protection Clause. *Id.*

Finally, continuing custody in light of Mr. Woodfox's advanced age and poor health compromises his access to good healthcare, and deprives him of the type of low stress, supportive community that would allow him to make the best of whatever years he has left. While Rule 23(c) release cannot change the past four decades of confinement, it would mitigate the harms which flow from the State's unlawful lockdown. In particular, Rule 23(c) release would allow Mr. Woodfox to begin addressing

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[4] Inexplicably, in 2008, although Mr. Woodfox was then 61 years old and had already served 36 years of his life sentence the Fifth Circuit panel found that there was a "long period left on [Mr. Woodfox's] sentence." *Woodfox v. Cain*, 305 Fed. App'x. 179, 182 (5th Cir. 2008). The Fifth Circuit did not at all consider the evidence of actual innocence which is part of the record in this case. The evidence of innocence in this case includes: (1) a statement from State's key witness Leonard Turner, admitting Mr. Woodfox was *not* involved in Miller's murder; (2) statements from two women with whom Chester Jackson (who pleaded manslaughter for the same crime) spoke about Woodfox's actual innocence upon his release; (3) a reliable scientific review of the bloody print at the scene, exculpating Woodfox; (4) evidence that severely undermines the credibility of State's three prisoner witnesses; and (5) a polygraph examination indicating that Woodfox truthfully denied involvement in the crime. *See* Docs. No. 15, 47. *See also House v. Bell*, 547 U.S. 518, 537-38 (2006).

his serious health conditions with better quality medical care. As this Court is aware, Mr. Woodfox's serious medical problems include: stage 2 hypertension, diabetes, cardiovascular disease, and chronic renal insufficiency. Doc. No. 53 at 7, 10-13; *and see id.* Exh. C.

The duration, deprivation and medical concerns unique to this case make it plain that if Mr. Woodfox is not released pursuant to Rule 23(c), he faces a risk of injury far greater than the "always substantial" risk attendant ordinary cases. *Hilton*, 481 U.S. 778. Accordingly, this factor should be even more heavily weighted than the remaining stay factors, in Mr. Woodfox's favor.

D. *The Public Interest*

The public interest is served by mechanisms—such as Rule 23(c) release—which safeguard against incarceration in violation of the Constitution. *See, e.g.*, *House v. Bell*, 2008 WL 972709 at *2 (E.D. Tenn. Apr. 7, 2008), *vacated as moot by House v. Bell*, 2008 WL 2235235 (E.D. Tenn. May 29, 2008). That is because, "Citizens will not have confidence in the criminal justice system unless they are convinced that the system is compliant with constitutional norms." *Id.* Indisputably, the public's interest in the enforcement of fairly rendered criminal judgments is heightened where such enforcement would keep the citizenry safer. *See, e.g.*, *Hilton*, 481 U.S. at 777 (recognizing the possibility of flight and the risk that the prisoner will pose a danger to the public when released as relevant to deliberation over Rule 23(c) release).

In this case, while the State may seek further appeals, it remains an order of this Court and of the Fifth Circuit that there is no fairly rendered criminal judgment to enforce. This must militate in favor of finding that the public interest supports release. But, even if there remains a possibility that the State will ultimately prevail on further appellate review, the public's interest in security would not be compromised by the enlargement of Mr. Woodfox.

Four significant indicators belie the State's past position that Mr. Woodfox presents a flight and security risk. *See* Doc. No. 71.

First, Mr. Woodfox has twice proven he is able to live peacefully among others, first during his time in the Amite Parish jail general population, and again while housed in the dorm at LSP. Second, the State's own documentation corroborates that Mr. Woodfox is non-violent when living among others, just as he has been while living in solitary confinement. In addition, throughout his years of incarceration, Mr. Woodfox has cultivated strong community ties by nurturing relationships with family and friends through vigilant letter writing, and by exercising the limited call and visitation privileges accorded to prisoners in CCR. These ties further support a finding that he can adjust well upon release and will not pose any threat of danger or flight. Finally, Rule 23(c) release need not be unconditional release—conditions set on the terms of Woodfox's release (including bail) can address any weight otherwise given to the State's unsupported claim that he presents a risk of harm and flight.

The State's past position that Mr. Woodfox presented a danger to the public and risk of flight was based on, "numerous misrepresentations, mischaracterizations, and tenuous, unsubstantiated accusations that are based on patently incredible hearsay." *See* Doc. No. 73 at 1. In fact, the State's 2008 allegations as to security relied on out-and-out inaccuracies.

For example, notwithstanding that the State was well aware that Mr. Woodfox had never been convicted of any sort of sex offense, in 2008 the State repeatedly urged this Court to find that Mr. Woodfox presented a danger to the public on the grounds that his criminal history included serial rape cases, and that Mr. Woodfox was a convicted sex offender. *Id.* at 2-4. "Given how long ago these arrests occurred as well as the fact that Mr. Woodfox was never convicted of these crimes," this Court rightly concluded that those allegations were irrelevant to Woodfox's petition for release. Doc. No. 75 at 11. They remain as irrelevant today.

In addition, with respect to his conduct while incarcerated, it was undisputed in 2008 (as it is today) that all of Mr. Woodfox's serious disciplinary history had been several decades old. Since 1972, Mr. Woodfox has been charged just once with an incident of violent conduct, an inmate fight for which he received a suspended sentence. Accordingly, in 2008 the State attempted to portray Woodfox as a danger to the community by relying on the contemporaneous disciplinary which charged him with three-way phone call violations and an "illegal and unauthorized media interview." Doc. No. 71 at 6. Yet, this is the same write-up that we now know (based on, *inter alia*, the

e-mail correspondence produced years subsequent) resulted from extensive efforts by Woodfox's custodians to reverse-engineer a security threat. As discussed, those efforts involved an exhaustive review of a year's worth of recorded phone calls, for the purpose of finding some pretext for punitive action. *See* Exh. D. In 2008, without the benefit of the e-mail disclosures, this Court considered the prison warden's years of experience and gave the State's evidence "some weight." Doc. No. 75 at 11. Nevertheless, the Court also found that, overall, Mr. Woodfox "does seem to exhibit a good conduct record," and concluded that, in total, the *Hilton* stay factors did not operate to outweigh the presumption in factor of release. *Id.* at 12.

In a per curiam decision, the Fifth Circuit reversed this Court's Rule 23(c) Order, viewing three of the stay factors differently. Most importantly, as to the countervailing first factor, the Fifth Circuit concluded that the State had demonstrated "a substantial case" on the merits of the underlying ineffective assistance of counsel appeal. *Woodfox v. Cain*, No. 08-30958, 2008 U.S. App. LEXIS 25225, at *5 (5th Cir. Dec. 12, 2008) (attached hereto as Exhibit H). It would be unreasonable to posit that the Fifth Circuit would say the same today, after a unanimous panel has rejected the State's appellate arguments, and after the entire bench has declined to grant *en banc* reconsideration.

In addition, in 2008, the Fifth Circuit wrongly gave the warden's testimony undue weight. Noting that, "the only testimony on whether Woodfox poses a threat of danger was the deposition of Warden Cain," the Fifth Circuit credited the

warden's "impressions of Woodfox's character and disciplinary record," and deemed the risk of danger to the public to weigh in the State's favor. *Id.* at *4-*5. Just as the first, critically important *Hilton* factor as to likelihood of success must come out very differently today, after the disclosure of the e-mails it is plain now that the warden's testimony should not have been credited.

In the event that this Court concludes that Mr. Woodfox's application for Rule 23(c) release requires further record development, ample additional evidence exists to support the conclusion that any evaluation of the public interest must weigh differently today, and yield in Mr. Woodfox's favor. Apart from the fact that the public has no interest in seeing a person imprisoned in violation of the Constitution, the security or escape risks urged by the State are in fact de minimis. Woodfox's advancing age, serious illness, and strong network of family and community support further combine to drive even a theoretical risk of flight, or danger to the community, down to purely fanciful.

First, Mr. Woodfox can establish that he has demonstrated his capacity to live peacefully with others. Mr. Woodfox maintained an excellent conduct record while he was in the general population of the Amite city jail awaiting trial from 1996 to 1999. He also did well while living in a dorm from March of 2008 until November of 2008. Mr. Woodfox can also show that the prison's own records document that he has maintained good conduct even while under the strain of lockdown confinement. In addition, he can establish that he has maintained strong family and community ties throughout his incarceration. Mr. Woodfox has used letter writing and his visitation

privileges to maintain close relationships with family, including his brother Michael Mable, as well as his nieces and nephews. Multiple close friends are prepared to work on Mr. Woodfox's behalf to house him; tend to his medical and social service needs; and to help him readjust upon enlargement. Mr. Woodfox's community of loved ones are fully prepared to aid him in complying with any conditions this Court is inclined to impose.

IV. CONCLUSION

By all applicable standards, Mr. Woodfox is an exceptionally strong candidate for bail. The critical first stay factor—likelihood of success on the merits—weighs decidedly *against* the State, and the State will not be significantly prejudiced if Mr. Woodfox is released on his own recognizance or under surety. Yet the harms to Mr. Woodfox are myriad and profound, and the public's interest in ensuring that people are incarcerated only by valid conviction also weighs the scales in favor of release. In conjunction with all these aforementioned factors, given the robust actual innocence issue in this case, it is beyond cavil that Mr. Woodfox's application for release is "exceptional," and "deserving of special treatment in the interests of justice." *Aronson v. May*, 85 S. Ct. 3, 5 (1964).

For the foregoing reasons, Mr. Woodfox respectfully requests that this Court set an expedited briefing schedule and hearing date, and grant the presumption in favor of Rule 23(c) relief.

Dated this 6th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was filed electronically with the Clerk of the Court using the CM/ECF system this 6th day of February, 2015. Notice of this filing will be sent to opposing counsel by operation of the Court's electronic filing system.

By: /s/Carine Williams

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EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-30266

United States Court of Appeals
Fifth Circuit
FILED
November 20, 2014
Lyle W. Cayce
Clerk

ALBERT WOODFOX,

Petitioner - Appellee

v.

BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY; JAMES CALDWELL,

Respondents - Appellants

Appeal from the United States District Court
for the Middle District of Louisiana

Before JOLLY, HIGGINBOTHAM, and SOUTHWICK, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Petitioner-Appellee Albert Woodfox is once again before this Court in connection with his federal habeas petition. The district court had originally granted Woodfox federal habeas relief on the basis of ineffective assistance of counsel, but we held that the district court erred in light of the deferential review afforded to state courts under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and therefore vacated the district court's decision.[1] We then remanded the case to the district court to consider the only remaining claim, which related to allegations of discrimination in the selection

[1] *See Woodfox v. Cain (Woodfox I)*, 609 F.3d 774, 817–18 (5th Cir. 2010).

of the grand jury foreperson.[2] On remand, the district court held that the state court was not entitled to AEDPA deference; that Woodfox had successfully made out a *prima facie* case of discrimination in the selection of the grand jury foreperson; and that the State of Louisiana, acting through Respondent-Appellant Warden Burl Cain, had failed to rebut the *prima facie* case.[3] The district court once again granted federal habeas relief.[4]

The State now appeals that grant of habeas relief. Because we find that AEDPA deference should not be granted, that Woodfox successfully made his *prima facie* case at the district court level, and that the State failed in its rebuttal, we AFFIRM.

I

A

This case has a long and complicated factual and procedural history. Because of our detailed recitation of this history in our earlier opinion, we explain here only those facts relevant to the claim at issue: discrimination in the selection of the grand jury foreperson.

We begin with an important observation. Woodfox's claim is not just about the selection of the grand jury *foreperson*. Rather, it is also about the selection of the grand jury itself. The grand jury system used for Woodfox's re-indictment was the same as the one challenged in *Campbell v. Louisiana*.[5] As the Supreme Court explained, the Louisiana system of grand jury foreperson selection, at the time, was unlike most other systems. Under most systems, "the title 'foreperson' is bestowed on one of the existing grand jurors without any change in the grand jury's composition."[6] But under the Louisiana system

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[2] *Id.*
[3] *See generally Woodfox v. Cain*, 926 F. Supp. 2d 841 (M.D. La. 2013).
[4] *Id.*
[5] 523 U.S. 392 (1998).
[6] *Id.* at 396.

at issue, "the judge select[ed] the foreperson from the grand jury venire before the remaining [eleven] members of the grand jury [were] chosen by lot."[7] The foreperson had the same voting power as all the other grand jurors. Thus, in effect, the judge chose one grand juror. This case then is one that alleges discrimination in the selection of the grand jurors, an important constitutional challenge. "For well over a century, the Supreme Court has held that a criminal conviction of an African-American cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which African-Americans were excluded on the basis of race."[8]

B

In 1972, Albert Woodfox was an inmate at the Louisiana State Penitentiary serving a fifty-year sentence for armed robbery. On April 17, 1972, the body of Brent Miller, a prison guard at the penitentiary, was found in a pool of blood, having been stabbed 32 times. Woodfox, along with three other prisoners, was identified as one of the assailants. Woodfox was tried twice for the murder. Initially, he was indicted in 1972 and convicted in 1973. That conviction was overturned in state court post-conviction proceedings. As a result, he was re-indicted in 1993 by a grand jury in West Feliciana Parish. The late Judge Wilson Ramshur of the 20th Judicial District appointed the grand jury's foreperson.[9] Woodfox was convicted of second-degree murder in 1998. Woodfox was sentenced to life imprisonment, without the benefit of parole, probation, or suspension of sentence in February 1999.

After his re-indictment, Woodfox moved to quash the new indictment based upon allegations of discrimination in the selection of the grand jury

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[7] *Id.*

[8] *Rideau v. Whitley*, 237 F.3d 472, 484 (5th Cir. 2000); *see, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 308-10 (1879).

[9] The 20th Judicial District is comprised of both West and East Feliciana Parish.

foreperson. The state trial court denied this motion. After his second conviction, on direct appeal, Woodfox raised several issues, including the trial court's denial of the motion to quash the indictment. On June 23, 2000, the Louisiana Court of Appeal, First Circuit affirmed the conviction and sentence,[10] and in doing so, held that the trial court made no error in denying the motion to quash. The Louisiana First Circuit found that the claim about discrimination in the selection of the grand jury foreperson failed because Woodfox did not successfully establish a *prima facie* case. According to the Louisiana First Circuit, Woodfox had not shown "substantial underrepresentation of his race." Woodfox is African-American. The evidence available to the Louisiana First Circuit demonstrated that between March 1980 and March 1995, African-Americans constituted 44% of all registered voters in the Parish, while constituting only 27% of all grand jury forepersons. First, the Louisiana First Circuit did not think this disparity was large enough. Second, the court held that the percentage of African-American registered voters did "not indicate how many were qualified to serve as grand jurors."[11] The court reasoned that the difference could have been reduced, if not eliminated, if eligible population statistics instead of gross population statistics had been used. Woodfox filed a writ application with the Louisiana Supreme Court, which was denied on June 15, 2001, and then filed a writ of certiorari with the United States Supreme Court, which was denied on November 13, 2001.[12]

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[10] The Louisiana First Circuit also remanded the matter with instructions to the state trial court to notify Woodfox of the appropriate time period for filing an application for post-conviction relief.

[11] In Louisiana, to be qualified to serve on a grand jury, a person must: 1) be a citizen of the United States who has resided within the parish for a year, 2) be at least 18 years old, 3) be literate in English, 4) not be incompetent because of mental or physical infirmity, and 5) not be under indictment for or convicted of a felony. La. Code Crim. Proc. Ann. art. 401.

[12] *Woodfox v. Louisiana*, 534 U.S. 1027, 1027 (2001).

C

After failing to gain relief on direct appeal, Woodfox next filed his application for state post-conviction relief. He raised several claims, including the claim regarding discrimination in the selection of the grand jury foreperson. In support of that claim, Woodfox produced new evidence. First, Woodfox presented the disparity over a longer period of time. Between 1970 and 1990, African-Americans represented between 40%–56% of the non-incarcerated population of the Parish. But, between 1964 and 1993, African-Americans represented only 12% of all grand jury forepersons. Second, in response to the earlier decision on direct appeal, Woodfox presented the disparity using eligible population statistics, instead of general population statistics. For the eligible population statistics, Woodfox chose to rely on the race percentages found within the grand jurors drawn by lot, i.e., the racial makeup of non-foreperson grand jurors.[13] Woodfox compiled the race data with information he gathered with assistance from the registrar of voters in the Parish, and he presented the data to the extent he could determine the race of all the non-foreperson grand jurors. Between 1964 and 1993, African-Americans constituted an average of 36% of the non-foreperson grand jurors. During the same period, as mentioned above, African-Americans represented only 12% of all grand jury forepersons.[14]

The State filed a response to this application for state post-conviction relief.[15] In its answer, the State urged the rejection of the grand jury foreperson

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[13] Woodfox relied on such data because a Louisiana Supreme Court case had allowed the use of such data as eligible population statistics. *See State v. Langley*, 1995-1489 (La. 4/3/02); 813 So. 2d 356.

[14] Woodfox also broke down the data by two different year periods. Between 1964 and 1972, African-Americans constituted 13% of non-foreperson grand jurors. Between 1973 and 1993, African-Americans constituted 45% of non-foreperson grand jurors.

[15] The state trial court handling the application for post-conviction relief initially denied relief without requiring a response from the State. But Woodfox filed a writ to the

discrimination claim. The State argued that the new evidence was essentially the same as the evidence presented on direct appeal, except that the time period had been changed from 1980–1995 to 1964–1993. The State also argued that the new evidence, which presented the race of the non-foreperson grand jurors was publicly available information that the defense could have presented during direct appeal but did not. As a result, the State argued that the claim was "meritless," that the matter had already been ruled upon, and that the state post-conviction court need not revisit the issue.

On October 25, 2004, the 21st Judicial District Court sitting as the state post-conviction court denied the application for post-conviction relief. The state post-conviction court's decision was comprised of two separate documents: a "Judgment" and a statement of "Written Reasons."

In the "Judgment," the state post-conviction court denied Woodfox's application in entirety, stating that the application was "fully addressed" by the State's answer and that "[a] review of the record of these proceedings, as well as the answer, indicates that there is no need to hold an evidentiary hearing in these proceedings. For written reasons this day adopted and assigned, the Court finds that the allegations are without merits and the Application may be denied without the necessity of further proceedings."

In the "Written Reasons," the state post-conviction court noted that Woodfox had to bear the burden of proving that he was entitled to habeas relief. It then cited to the Louisiana Code of Criminal Procedure article 930.2, and then stated: "In light of such burden of proof, the Court has fully considered the application, the answer, and all relevant documents and has determined that Petitioner has failed to carry his burden of proof. In determining that

Louisiana First Circuit. That state appellate court granted the writ on May 16, 2003 because Woodfox had "raised claims in the application for postconviction relief that, if established, would entitle him to relief" and remanded with instruction to order an answer from the State.

Petitioner's application should be denied, the Court, moreover, adopts the State's [answer] as the written reasons for the Court's decision."

After failing to get relief from the state post-conviction court, Woodfox filed a writ application with the Louisiana First Circuit, which was denied on August 8, 2005. He then filed a writ application with the Louisiana Supreme Court, which was denied on September 29, 2006.

D

Woodfox timely filed his petition for federal habeas relief pursuant to 28 U.S.C. § 2254 on October 11, 2006 and amended it on February 14, 2007. Woodfox made several claims for habeas relief, including claims of ineffective assistance of counsel, claims of suppression of exculpatory evidence, and the claim of discrimination in the selection of the grand jury foreperson.

The case was referred to a magistrate judge. As to the ineffective assistance of counsel claims, the magistrate judge found that Woodfox's 1998 trial counsel had performed deficiently in some respects and thus prejudiced Woodfox, and therefore recommended that the conviction be vacated and the case remanded to state court.[16] As to the grand jury foreperson discrimination claim, the magistrate judge ruled in the alternative. The magistrate judge found that Woodfox had presented evidence sufficient to support a *prima facie* case of discrimination, but that an evidentiary hearing would be necessary to allow the State an opportunity to rebut the *prima facie* case. But the magistrate judge did not conduct the hearing because Woodfox's ineffective assistance claims were sufficient to overturn his conviction. Instead, the magistrate judge recommended that if the district judge disagreed with the

[16] As to the suppression of exculpatory evidence claims, the magistrate judge dealt with these claims in a footnote and denied an evidentiary hearing because Woodfox's ineffective assistance of counsel claims were sufficient to overturn his conviction.

resolution of the ineffective assistance claims, then the matter be referred back for the evidentiary hearing.

On July 8, 2008, the district court adopted the magistrate judge's report and granted the writ of habeas corpus. The State filed a motion to supplement the record and a motion to reconsider. On September 11, 2008, the district court reaffirmed its July 8th ruling granting the writ of habeas corpus. The State appealed the grant of habeas corpus. As discussed above, we vacated the district court's judgment based upon the highly deferential review mandated by AEDPA.[17] But the claim of discrimination in the selection of the grand jury foreperson was not before us,[18] and we remanded for the resolution of this remaining claim.[19]

E

Upon remand, the district court first held that the state court's decision—specifically the Louisiana First Circuit's June 23rd ruling—was an unreasonable application of clearly established law as determined by the Supreme Court and therefore should not be afforded AEDPA deference. It then held an evidentiary hearing on May 29–31, 2012.[20]

The district court ruled that the relevant time period for grand jury foreperson selection in West Feliciana Parish was 1980 through March 1993.[21] To establish his *prima facie* claim, Woodfox used both general and eligible population statistics. First, the general population statistics showed that in 1990, the percentage of African-Americans in the Parish, excluding prisoners, was 44%.[22] The percentage of African-Americans among registered voters

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[17] *Woodfox I*, 609 F.3d at 817–18.
[18] *Id.* at 788 n.1.
[19] *Id.* at 818.
[20] *Woodfox*, 926 F. Supp. 2d at 843.
[21] *Id.* at 844.
[22] *Id.*

between 1980 and 1993 was 43.5%.[23] Second, the eligible population statistics showed that between 1980 and March 1993, there were 297 non-foreperson grand jurors; Woodfox was able to establish the race of 277 of these grand jurors.[24] Only 113 out of 277 non-foreperson grand jurors were African-American, or 40.8%.[25] Third, during this time, only 5 out of 27 grand jury forepersons were African-American, or 18.5%.[26] Based on this and other factors, the district court found that Woodfox had successfully made out a *prima facie* case.[27] The district court then rejected the State's rebuttal case, which included statistical evidence that aimed to discredit the *prima facie* case as well as evidence attempting to demonstrate that West Feliciana Parish judges relied on racially neutral criteria in selecting the grand jury foreperson.[28] The district court granted habeas relief.[29] The State now appeals.

II

"In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo*, applying the same standards to the state court's decision as did the district court."[30] Under 28 U.S.C. § 2254(d), we cannot grant a writ of habeas corpus with respect to any claim adjudicated on the merits in state court unless such adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 844–58.
[29] *Id.* at 858.
[30] *Lewis v. Thaler*, 701 F.3d 783, 787 (5th Cir. 2012) (internal quotation marks omitted); *see also Higgins v. Cain*, 720 F.3d 255, 260 (5th Cir. 2013).

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[31]

For a challenge to a state court decision under § 2254(d)(1), the Supreme Court has clarified that the "contrary to" inquiry is different from the "unreasonable application" inquiry.[32] A state court's decision is "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts."[33] A state court's decision involves an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case."[34] In reviewing a state court's decision under the "unreasonable application" prong, we focus on "the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence."[35] The Supreme Court has clarified that when a claim is adjudicated on the merits, for the purposes of review under § 2254(d)(1), the record is limited to the one before the state court, even if the state court issued a summary affirmance.[36]

A challenge to a state court decision under § 2254(d)(2) challenges the determination of facts by the state court.[37] Under 28 U.S.C. § 2254(e)(1), "a

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[31] 28 U.S.C. § 2254(d).
[32] *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).
[33] *Id.* at 413.
[34] *Id.*
[35] *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam).
[36] *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398, 1402 (2011).
[37] 28 U.S.C. § 2254(d)(2).

determination of a factual issue made by a State court shall be presumed to be correct" and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."[38] Section 2254(e)(1) is the "arguably more deferential standard."[39] The Supreme Court has recognized a division among the circuits on the interplay between these two statutory provisions,[40] but has yet to resolve this question.[41] Regardless, a state court's factual determination is "not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."[42] For claims that are not adjudicated on the merits in the state court, we apply a *de novo* standard of review.[43]

Finally, "whether the grand jury was selected in a systematically unrepresentative or racially discriminatory manner, has long been recognized to be a question of law or a mixed question of fact and law."[44]

III

The first issue in this appeal is which state court decision ought to be examined for AEDPA deference. The State argues that it is the Louisiana First Circuit's June 23rd ruling on direct appeal which should be examined. Indeed, the district court examined this ruling for AEDPA deference. Woodfox argues

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[38] *Id.* § 2254(e)(1).

[39] *Wood v. Allen*, 558 U.S. 290, 301 (2010).

[40] *Id.* at 299 ("[W]e granted review of a question that has divided the Courts of Appeals: whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,' or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence.").

[41] *Id.* at 300 ("Although we granted certiorari to resolve the question of how §§ 2254(d)(2) and (e)(1) fit together, we find once more that we need not reach this question . . . .").

[42] *Id.* at 301.

[43] *Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006).

[44] *Rideau*, 237 F.3d at 486.

that the state post-conviction court's October 25th ruling should be examined.[45]

Under AEDPA, "we review the last reasoned state court decision."[46] Using the "look through" doctrine, we "ignore—and hence, look through—an unexplained state court denial and evaluate the last reasoned state court decision."[47] In *Ylst v. Nunnemaker*,[48] on direct appeal, the state appeals court had applied a procedural bar to a claim.[49] The petitioner subsequently filed a petition for habeas corpus with the state supreme court, "invoking the original jurisdiction" of that court.[50] That petition was denied without opinion.[51] In holding that the procedural bar was still valid, the Supreme Court applied a presumption that "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."[52] *Ylst* also made clear that if the later state court decides the question differently than the original state court, then the later judgment has controlling effect.[53]

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[45] The State argues in the alternative that deference should be given to both decisions. *See Collins v. Secretary of Pennsylvania Dept. of Corrections*, 742 F.3d 528, 544-46 (3rd Cir. 2014); *Loggins v. Thomas*, 654 F.3d 1204, 1217 (11th Cir. 2011); *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009). We find this argument unpersuasive. In the cases cited by the State, successive state court decisions decided separate issues, such as the separate prongs of a *Strickland* inquiry. None of the cases cited suggest that deference should be given to both of two successive state court decisions on the same issue. In this case, the later state court ruling decided the same issue as the earlier one: whether or not Woodfox had made out a *prima facie* case of discrimination.

[46] *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012) (quoting *Wood v. Quarterman*, 491 F.3d 196, 202 (5th Cir. 2007)) (internal quotation marks omitted).

[47] *Bledsue v. Johnson*, 188 F.3d 250, 256 (5th Cir. 1999).

[48] 501 U.S. 797 (1991).

[49] *Id.* at 799.

[50] *Id.* at 800.

[51] *Id.*

[52] *Id.* at 803.

[53] *Cf. id.* at 801 ("State procedural bars are not immortal, however; they may expire because of later actions by state courts. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available.").

Here, working backwards through the state adjudicatory process, it is clear that during state post-conviction proceedings, neither the Louisiana First Circuit nor the Louisiana Supreme Court issued a reasoned opinion. At the very least, then, we have to examine the state post-conviction court's October 25th ruling. But the State contends that as to the grand jury foreperson discrimination claim, the October 25th ruling by the state post-conviction court was not on an adjudication on the merits. The State contends that the state post-conviction court applied a special type of bar: Louisiana Code of Criminal Procedure article 930.4(A), which states that "[u]nless 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."[54] As we have recognized before, "[t]he bar imposed by article 930.4(A) is not a procedural bar in the traditional sense, nor is it a decision on the merits."[55] The State argues that the state post-conviction decision cannot be examined for AEDPA deference because it neither adjudicated the claim on the merits nor applied a procedural bar in the traditional sense. The State wishes us to look even further back to the opinions on direct appeal. Specifically, the State argues that the Louisiana First Circuit's June 23rd decision on direct appeal is the only one that adjudicated this claim on the merits; that opinion should be examined for AEDPA deference. The upshot of this argument is clear. The Louisiana First Circuit rejected Woodfox's claim because he had failed to present eligible population statistics. Thus, the § 2254(d) inquiry would ask whether the state court's opinion was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court in requiring eligible population statistics. By contrast,

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[54] La. Code. Crim. Proc. Ann. art. 930.4(A).
[55] *Bennett v. Whitley*, 41 F.3d 1581, 1583 (5th Cir. 1994).

Woodfox did present eligible population statistics to the state post-conviction court. Thus, the § 2254(d) inquiry would ask whether the state court's opinion was contrary to or an unreasonable application of clearly established federal law in rejecting the disparity demonstrated.

To our eyes, the state-post conviction opinion was an adjudication on the merits and should be examined for AEDPA deference. This conclusion is the product of two different reasons. First, the law-of-the-case doctrine suggests that this was a merits adjudication. "The law-of-the-case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case."[56] "[A]n issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal."[57] During his first appeal to our Court, we specifically noted that the grand jury foreperson discrimination claim was not at issue. Yet when deciding the nature of the state-post conviction opinion we also held that "it is clear that the state [post-conviction] court decided all of Woodfox's claims on the merits."[58] This holding binds us, and compels the conclusion that the state post-conviction court adjudicated the present claim on the merits.

Second, even if we reject the use of the law-of-the-case doctrine, we would still hold that the state post-conviction court adjudicated the claim on the merits. The Supreme Court clarified in *Harrington v. Richter*,[59] that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the

[56] *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (citations omitted) (internal quotation marks omitted).

[57] *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004) (citations omitted) (internal quotation marks omitted).

[58] *Woodfox I*, 609 F.3d at 798.

[59] 131 S. Ct. 770 (2011).

merits in the absence of any indication or state-law procedural principles to the contrary."[60] The *Richter* presumption applies even where the habeas petitioner raises a federal claim and the "state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question."[61] But the "presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely."[62] The presumption could be rebutted "either by the habeas petitioner (for the purpose of showing that the claim should be considered by the federal court *de novo*) or by the State (for the purpose of showing that the federal claim should be regarded as procedurally defaulted)."[63] For example, "a federal claim [that] is rejected as a result of sheer inadvertence," would not be afforded the *Richter* presumption.[64] Thus, we *must* presume that the state post-conviction opinion was an adjudication on the merits as to the grand jury foreperson discrimination claim. And it is the State's burden to demonstrate that a bar—such as Article 930.4(A)—was applied. The State simply cannot carry this burden.

We have adopted a three-part test when it is unclear whether a state court's opinions adjudicates a claim on the merits. We consider:

> (1) what the state courts have done in similar cases;
> (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and
> (3) whether the state courts' opinions suggest reliance upon procedural grounds rather than a determination on the merits.[65]

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[60] *Id.* at 784–85.
[61] *Johnson v. Williams*, 133 S. Ct. 1088, 1091 (2013).
[62] *Richter*, 131 S. Ct. at 785.
[63] *Williams*, 133 S. Ct. at 1091.
[64] *Id.* at 1097.
[65] *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999) (citation omitted) (internal quotation marks omitted).

As to the first prong, as we noted in Woodfox's first appeal, the state post-conviction court held that Woodfox's claims had no merit and that it would adopt the State's answer. The court cited Louisiana Code of Criminal Procedure article 930.2, which provides that "[t]he petitioner in an application for post conviction relief shall have the burden of proving that relief should be granted."[66] The Louisiana Supreme Court cites Article 930.2 both in cases where the petitioner has failed to carry his burden on the merits and where the petitioner has failed to meet his burden on some procedural point.[67] Moreover, the Louisiana Courts of Appeals have repeatedly cited Article 930.4(A) when relying upon it, while in this case no such citation was made.[68] Thus, consideration of what the state courts have done in similar cases does not support overcoming the presumption that the state court here issued a decision on the merits.

As to the second prong, the history of the case suggests that the state court was aware of a possible ground for not adjudicating the case on the merits. The State primarily relies on the answer that it submitted to the state post-conviction court. The State argued that the new evidence presented was both untimely and substantially similar to evidence already considered on appeal, and thus did not justify revisiting the already-litigated issue. This reasoning could support a merits decision: it urges that the logic behind the merits decision on appeal retained its force because nothing of consequence had been added in the post-conviction case. Indeed, the answer explicitly

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[66] La. Code Crim. Proc. Ann. Art. 930.2.

[67] *Compare State v. LeBlanc*, 2006-0169 (La. 9/16/06); 937 So. 2d 844, 844 (per curiam), *with State v. Russell*, 2004-1622 (La. 11/15/04); 887 So. 2d 462, 462.

[68] *See, e.g.*, *State v. Mourra*, 06-695 (La. App. 5 Cir. 1/30/07), 951 So. 2d 1216, 1218; *State v. Hunter*, 2002-2742 (La. App. 4 Cir. 2/19/03), 841 So. 2d 42, 43; *State v. Biagas*, 1999-2652 (La. App. 4 Cir. 2/16/00), 754 So. 2d 1111, 1118.

asserted that the claim was "meritless." On the other hand, though it never cited Article 930.4(A), the State's argument could also provide grounds supporting a non-merits decision based on that Article. It is worth noting that a distinction may be drawn between the state court being "aware of any ground for" a non-merits decision and the court being aware simply of the argument that such a ground exists. Putting aside that distinction, however, it does appear that the court was aware of a ground that might have supported a non-merits decision under Article 930.4(A).

As to the third prong, we find ourselves constrained to follow the logic adopted in Woodfox's earlier appeal. We inquire whether the state post-conviction court's opinion suggests reliance upon procedural grounds rather than a determination of the merits. In its "Judgment," the court stated that the record along with the State's answer indicated that "the allegations are without merit." In its "Written Reasons," the court stated that it had considered "the application, the answer, and all relevant documents" before concluding that Woodfox failed to meet his burden. The court then stated that "moreover" it was adopting the State's answer. As we noted in Woodfox's earlier appeal and note again now, "moreover" means "[i]n addition thereto, also, furthermore, likewise, beyond this, beside this,"[69] or "in addition to what has been said."[70] Resultantly, the state post-conviction court reviewed the record in its entirety and found no merit as to any of Woodfox's claims. In addition to this conclusion, the court also adopted the State's answer which, as discussed above, could support either a merits or non-merits decision.

We cannot simply assume that there was an implicit application of the Article 930.4(A) bar. To do so would fly directly in the face of the presumption

[69] Black's Law Dictionary 1009 (6th ed. 1990).
[70] Merriam-Webster's Collegiate Dictionary 755 (10th ed. 2002).

of merits adjudication the Supreme Court has clearly announced. In this case, the factors on balance point to the conclusion that the state post-conviction court adjudicated the grand jury foreperson discrimination claim on the merits. Therefore, the district court erred in examining afresh the Louisiana First Circuit ruling. We now turn to examine the state post-conviction decision, according the deference required by AEDPA.

IV

If the state post-conviction opinion withstands the scrutiny of § 2254(d), thereby affording AEDPA deference, habeas relief may not be granted.

A

In *Castaneda v. Partida*,[71] the Supreme Court held that to show that an equal protection violation has occurred in a grand jury context, the "defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs."[72] To make a *prima facie* case, the petitioner must do three things:

> The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.[73]

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[71] 430 U.S. 482 (1977).
[72] *Id.* at 494.
[73] *Id.* (citations omitted).

Upon showing of this *prima facie* case, "the burden then shifts to the State to rebut that case."[74]

There can be no dispute that the first and third elements of the *prima facie* case have been met. African-Americans are a distinct, cognizable class that have been singled out for discrimination.[75] Next, both federal and state courts have recognized that the system of selecting the grand jury foreperson then in place was susceptible to abuse.[76] Indeed, as the Louisiana Supreme Court held before Woodfox's state post-conviction proceedings, the system "was unquestionably subject to abuse according to subjective criteria that may include race and gender."[77] If the state post-conviction court had rejected the *prima facie* case on either of these prongs, its determination would have clearly been contrary to or an unreasonable application of clearly established federal law. Therefore, the state post-conviction court could only have rejected this claim based on the second element: that the degree of underrepresentation had not been proven over a significant period of time.

B

In making our § 2254(d) inquiry, we begin first by clarifying a question we are not answering. We need not decide the question of whether a state court errs when it requires eligible population statistics rather than general population statistics from a petitioner in making out a *prima facie* case. That issue is quite complicated. To begin, *Castaneda* allowed the use of general population statistics in proving the degree of underrepresentation. Even though Chief Justice Burger argued in dissent that "eligible population

[74] *Id.* at 495.
[75] *Rose v. Mitchell*, 443 U.S. 545, 555–56 (1979).
[76] *Campbell*, 523 U.S. at 396–97; *Guice v. Fortenberry* (*Guice I*), 661 F.2d 496, 503 (5th Cir. 1981); *Langley*, 813 So. 2d at 371.
[77] *Langley*, 813 So. 2d at 371.

statistics, not gross population figures, provide the relevant starting point,"[78] the majority rejected this position. The majority found that the petitioner had made a *prima facie* case, thus shifting the burden of rebuttal to the State.[79] Next, the *Castaneda* Court faulted the Texas state court under review for speculating on its own motion that general population statistics were not reliable, and requiring the use of eligible population statistics.[80] Instead, *Castaneda* made it the State's burden to show that the statistical disparities are unreliable through the use of eligible population statistics.[81] Thus, *Castaneda* stands for the proposition that petitioners can always prevail on the *prima facie* case using general population statistics, and it is the State's burden to produce eligible population statistics.

But *Castaneda*'s holding is also limited by its context. First, *Castaneda* compares the general population statistics to a group of persons not at issue in this case: people *called to serve* as grand jurors, not those who *actually served* as grand jurors. As the Supreme Court explained at the time, the Texas method of selecting grand jurors was unique. A Texas state district judge would appoint jury commissioners; those jury commissioners would in turn select a list of 15 to 20 people from which the grand jury would eventually be drawn.[82] When at least 12 of those people appeared appear in court, the district judge would proceed to test their qualifications.[83] Thus, "qualifications [were] not tested until the persons on the list appear[ed] in the court."[84] *Castaneda* compares the general population statistics to those called by the jury

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[78] *Castaneda*, 430 U.S. at 504 (Burger, C.J. dissenting).
[79] *Id.* at 495 (majority opinion).
[80] *Id.* at 498.
[81] *Id.* at 499–500.
[82] *Id.* at 484.
[83] *Id.* at 484–85.
[84] *Id.* at 488 n.8.

commissioners. In other words, it compares population statistics to a group that had not yet been qualified. By contrast, Woodfox attempted to compare his population statistics to persons who actually served as grand jury forepersons, i.e., a group of qualified persons. Second, the Supreme Court also explained that it preferred not to use eligible population statistics because the idea that eligible population statistics ought to be used was not brought up until oral argument: "[T]here are so many implicit assumptions in this analysis, and we consider it inappropriate for us, as an appellate tribunal, to undertake this kind of inquiry without a record below in which those assumptions were tested."[85]

Further complicating the question is our decision in *United States ex rel. Barksdale v. Blackburn*.[86] In that case, the "issue [was] whether general population statistics or more meaningful eligible population statistics should be used where . . . those statistics are in the record."[87] We acknowledged that *Castaneda* used general population statistics, but held that *Castaneda* "should not be read to require using those figures."[88] We decided that "statistics describing the presumptively eligible black juror population, rather than the general black population, provide the proper starting point for an inquiry into racial disparities in the Parish."[89] This was because such "appropriate statistics had been developed in the record."[90]

Since Woodfox presented both general and eligible population statistics to the state post-conviction court, however, our § 2254(d) inquiry is much simpler. We simply have to ask whether the state post-conviction court's

[85] *Id.*
[86] 639 F.2d 1115 (1981) (en banc).
[87] *Id.* at 1123.
[88] *Id.*
[89] *Id.* at 1124.
[90] *Id.* at 1123.

rejection of the statistics presented was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court.

C

Recall that Woodfox presented the following information to the state post-conviction court. First, that between 1970 and 1990, African-Americans represented between 40%–56% of the non-incarcerated population of the Parish. Second, that between 1964 and 1993, African-Americans constituted an average of 36% of the non-foreperson grand jurors.[91] This constituted his proof of general and eligible population statistics. Third, that between 1964 and 1993, African-Americans represented only 12% of all grand jury forepersons. Therefore, using the low end of general population statistics, the absolute disparity would have been 28%, and using the eligible population statistics it would have been 24%.

State courts are not restricted to using only absolute disparity evidence to evaluate a *prima facie* case.[92] However, absolute disparity evidence was the only kind of evidence put before the state post-conviction court in this case. The Supreme Court has provided useful indicators as to the amount of absolute disparity that is sufficient to satisfy the second element of the *prima facie* case. To begin, the Court has held that underrepresentation by as much as 10% does not show purposeful discrimination based on race.[93] Next, in *Castaneda*, the petitioner successfully made his *prima facie* case by showing that Mexican-

[91] Woodfox also broke down the data by two different year periods. Between 1964 and 1972, African-Americans constituted 13% of non-foreperson grand jurors. Between 1973 and 1993, African-Americans constituted 45% of non-foreperson grand jurors.

[92] *Berghuis v. Smith*, 559 U.S. 314, 329 (2010) ("[No] decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools.").

[93] *Swain v. Alabama*, 380 U.S. 202, 208–09 (1965), *overruled on other ground by Batson v. Kentucky*, 476 U.S. 79 (1986).

Americans constituted 79.1% of the county, yet constituted only 39% of those summoned for grand jury service: an absolute disparity of 40%.[94] Not only that, but *Castaneda* also highlighted the other absolute disparities that were acceptable to establish a *prima facie* case. For example, the Supreme Court has specifically allowed the following disparities to make out a *prima facie* case of grand jury discrimination: 14.7%[95]; 18%[96]; 19.7%[97]; 23%.[98]

Based on these figures, it is apparent that the absolute disparities before the state post-conviction court—either 24% or 28%—could not have been rejected without being an unreasonable application of federal law as determined by the Supreme Court. These disparities are well within the range considered significant by the Supreme Court. As a result, the state post-conviction opinion cannot be afforded AEDPA deference under the § 2254(d) standard.

V

Having held that AEDPA deference is not warranted, we now turn to the proceedings held before the district court at the federal evidentiary hearing. We begin with the *prima facie* case made before the district court.

As a reminder, under *Castaneda*, there are three elements to the *prima facie* case: 1) the group has to be a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied, 2) the degree of

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[94] *Castaneda*, 430 U.S. at 495–96.

[95] *Jones v. Georgia*, 389 U.S. 24, 24 (1967) (per curiam) (holding that disparity was enough where African-Americans were 19.7% of taxpayers but only 5% of jury list).

[96] *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (holding that disparity was enough where African-Americans were 27.1% on the tax digest but only 9.1% of grand jury venire).

[97] *Sims v. Georgia*, 389 U.S. 404, 407 (1967) (per curiam) (holding that disparity was enough where African-Americans were 24.4% of the individual taxpayers in the county but only 4.7% of the names on the grand jury list).

[98] *Turner v. Fouche*, 396 U.S. 346, 359 (1970) (holding that disporting was enough where African-Americans were 60% of the general population in the county but only 37% on the list from which grand jury was drawn).

underrepresentation must be proved over a significant period of time, and 3) the selection procedure must be susceptible of abuse or must not be racially neutral.[99] Again, there can be no doubt that Woodfox met the first and third elements. Woodfox is African-American and African-Americans constitute a distinct, cognizable class.[100] Next, the Louisiana procedure for selecting grand jury forepersons prior to 1999 was "unquestionably subject to abuse according to subjective criteria that may include race and gender."[101]

As to the second element, the district court held that the relevant time period was between 1980 and March 1993. Recall that, to establish his *prima facie* claim, Woodfox used both general and eligible population statistics. First, the general population statistics showed that in 1990, the percentage of African-Americans in the Parish, excluding prisoners, was 44%.[102] The percentage of African-Americans among registered voters between 1980 and 1993 was 43.5%.[103] Second, the eligible population statistics showed that between 1980 and March 1993, there were 297 non-foreperson grand jurors; Woodfox was able to establish the race of 277 of these grand jurors.[104] Only 113 out of 277 non-foreperson grand jurors were African-American, or 40.8%.[105] Third, during this time, only 5 out of 27 grand jury forepersons were African-American, or 18.5%.[106] Based on these statistics, the district court found that a *prima facie* case had been established. We agree. The absolute disparity using general population statistics is at least 25%. This in itself would be enough to establish the *prima facie* case. First, our Court has previously

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[99] *Castaneda*, 430 U.S. at 494.
[100] *Mitchell*, 443 U.S. at 565.
[101] *Langley*, 813 So. 2d at 371.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

allowed the use of general population statistics for this purpose.[107] Second, this disparity is exactly in the range the Supreme Court has found sufficient for a *prima facie* case.[108] Fifth Circuit precedent confirms that these numbers are enough.[109] Moreover, the absolute disparity using eligible statistics is 22.3%.[110] The district court did not err in finding that Woodfox had made out his *prima facie* case.

VI

The *prima facie* case made by Woodfox "therefore shifted the burden of proof to the State to dispel the inference of intentional discrimination."[111] Before proceeding to the rebuttal case, however, we deal with the evidentiary stages the district court set up for the proceedings.

The district court split its hearing into three stages. Stage One was to be the *prima facie* case. The *prima facie* case, as discussed above, was for between 1980 and March 1993. And it covered grand jury foreperson selections for all of West Feliciana Parish, i.e., it covered grand jury foreperson selections by both Judge Ramshur (the appointing judge in Woodfox's re-indictment) and Judge William Kline. Stage Two was to be the State's rebuttal, both as to statistics and race-neutral criteria used in the selection of grand jury forepersons. Stage Three was to be Woodfox's reply because once the rebuttal was successful, the presumption of discrimination would disappear and Woodfox would again have the burden of showing discriminatory intent on the

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[107] *See Rideau*, 237 F.3d at 486 (using general population statistics).

[108] *See Castaneda*, 430 U.S. at 495–96; *Fouche*, 396 U.S. at 359; *Jones*, 389 U.S. at 24; *Whitus*, 385 U.S. at 552; *Sims*, 389 U.S. at 407.

[109] *See Rideau*, 237 F.3d at 486 (holding that disparity was enough where African-Americans were 18.5% of the parish's male population over 21 and 16-2/3% of registered voters, but only 5% of the grand jury venire).

[110] The State takes issue with the use of Woodfox's eligible population statistics for the *prima facie* case because they were not developed until Stage Three. Even accepting this contention, however, we find the general population statistics from Stage One were enough.

[111] *Castaneda*, 430 U.S. at 497–98.

part of Judge Ramshur. This framework parallels the Supreme Court's *Batson*[112] framework, which "(1) requir[es] defendants to establish a *prima facie* case of discrimination, (2) ask[s] prosecutors then to offer a race-neutral explanation for their use of the peremptory, and then (3) require[es] defendants to prove that the neutral reason offered is pretextual."[113]

The State argues that this three-stage process is not allowed under *Castaneda*; that although the district court pronounced that it did not need to reach Stage Three, it implicitly did so because it used Woodfox's eligible population statistics as the proper baseline, which were developed in Stage Three. While we agree, we do not find any reversible error. First, the *Batson* framework is not an exact analogy to the *Castaneda* framework. While in *Batson* a simple articulation of any race-neutral reason moves the process to the next stage, we have found the rebuttal stage of *Castaneda* to encompass more: it is an examination into whether there was intentional discrimination.[114] Thus, in *Castaneda* challenges, Stages Two and Three are really one and the same. Second, it is evident that the district court had to reach the evidence in Stage Three. As we discuss below, the State provided a statistical rebuttal and Woodfox a statistical reply. For the district court to rely on Woodfox's statistical reply, it necessarily reached what it termed Stage Three. This presents no reversible error. Even considering all the Stage Two and Three evidence together, the State fails in its rebuttal case.

VII

In rebuttal of the *prima facie* case, the State renews its arguments that the eligible population statistics used by Woodfox were not appropriate and that, in any case, the statistical disparity was not enough.

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[112] *Batson v. Kentucky*, 476 U.S. 79 (1986).
[113] *Miller-El v. Dretke*, 545 U.S. 231, 267 (2005) (Breyer, J., concurring).
[114] *Guillory v. Cain*, 303 F.3d 647, 650 (5th Cir. 2002).

A

As *Castaneda* suggests, the State in rebuttal tried to introduce its own eligible population statistics. The State introduced an expert according to whom the eligible population statistics for the Parish showed that African-Americans were only 36.62% of the population eligible for grand jury foreperson service. The district court rejected the use of this figure, concluding that the appropriate baseline for comparison was 40.8% from Woodfox's eligible population statistics. We agree.

To understand the problematic nature of the State's 36.62% baseline, it is important to understand how it was derived. The State's expert started with the voter rolls for West Feliciana Parish. He then proceeded to screen out those people on the voter rolls who would be ineligible to serve as grand jurors, and did so by using illiteracy as his screening factor. But public records only contained the illiteracy data for 1980–1985 and 1988–1993. Moreover, only the data from 1980–1985 were broken down by race, and they indicated that 97.8% to 98% of illiterate voters were African-American. The expert used the smaller of these numbers (97.8%) and applied it to the 1988–1993 data to derive the percentage of illiterate voters who were African-American. Then, for the missing time period of 1986–1987, he used a regression analysis to determine the number of illiterate voters in the two year period. Finally, he then combined this illiteracy data with the voter rolls to conclude that African-Americans were only 36.62% of the eligible population. In sum, this analysis relies on limited information about literacy rates from 1980–1985 and *no* evidence of literacy rates, broken down by race, from 1985–1993. Given this incomplete picture, we cannot find reversible error in the district court's refusal to rely upon it. In *Barksdale*, for example, we similarly rejected the

opinion of a state's expert footed on his statistical analysis where he was "overzealous in his adjustment of the eligible population."[115]

The type of eligible population statistics provided by Woodfox have already been accepted by the Louisiana Supreme Court. First, the Louisiana Supreme Court has held that for the purposes of a grand jury foreperson discrimination claim, a petitioner can use the percentage of a racial group from the non-foreperson grand jurors as representative of eligible population statistics.[116] As to the State's argument that Woodfox's eligible population statistics are merely a sample and not the whole population, "common sense tells us that the group of grand jurors who actually served is . . . a randomly-selected sample or subset of" the eligible population.[117] More importantly, the district court concluded that the State's statistics "relied on more incomplete data" than the statistics relied on by Woodfox.[118] It further found that "the State has altered the numbers to reduce the baseline of eligible African-Americans."[119] Given the fact-intensive nature of the competing statistical inquiries and the district court's through review of these questions, we hold the district court did not clearly err in finding that the appropriate baseline for eligible population statistics was 40.8%.

B

The State also argues that Woodfox failed to show statistical significance in the disparity. As both parties acknowledge, there are other statistical methods besides absolute disparity, such as disparity in standard deviations as well as hypothesis testing (including one-tailed and two-tailed testing).

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[115] *Barksdale*, 639 F.2d at 1125–26.
[116] *Langley*, 813 So. 2d at 371–72.
[117] *Id.* at 369–70.
[118] *Woodfox*, 926 F. Supp. 2d at 848.
[119] *Id.* at 850.

We begin with a necessary observation. While it is true that *Castaneda* discussed disparity in standard deviations, the Supreme Court conducted its analysis in absolute disparity terms by holding that a 40% disparity was enough to establish a *prima facie* case.[120] Indeed, we have "referred to statistical methods other than absolute disparity, but have never found a constitutional violation based on the data produced by such methods."[121] In this case, the absolute disparities shown are within the range traditionally accepted by the Supreme Court to establish a *prima facie* case of discrimination.

However, the gravamen of the State's argument is that the absolute disparities shown are meaningless because they are statistically insignificant. The State argues that under the 40.8% baseline of eligible population statistics, the disparity is *only* 2.37 standard deviations.[122] Woodfox argues that standard deviations are not the appropriate method of measuring statistical significance. He argues next that under the more accurate one-tailed and two-tailed testing, he has shown statistical significance for both baselines.

We begin first with the disparity in standard deviations. The source of the difficulty is the Supreme Court's general language in *Castaneda*, offering a description of standard deviation, but not an explanation of its context or use with regard to binomial distributions. As the Court explained:

> If the jurors were drawn randomly from the general population, then the number of Mexican-Americans in the sample could be modeled by a binomial

[120] *Compare Castaneda*, 430 U.S. at 496, *with id.* at 496 n.17 (discussing disparity in terms of standard deviations).

[121] *United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980) (citing *Berry v. Cooper*, 577 F.2d 322, 326 n.11 (5th Cir. 1978) and *United States v. Goff*, 509 F.2d 825, 826–27 & n.3 (5th Cir. 1975), *cert. denied*, 423 U.S. 857 (1975)).

[122] The State also argues that under the 36.62% baseline, the disparity is 1.95 standard deviations. We need not concern ourselves with this argument, however, because we have already rejected the State's eligible population statistics.

> distribution. Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican- American (0.791) times the probability of selecting a non-Mexican-American (0.209). Thus, in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist. The 11-year data here reflect a difference between the expected and observed number of Mexican-Americans of approximately 29 standard deviations.[123]

Despite its generality, two important lessons are fairly drawn from this discussion. First, in *Castaneda*, the difference between the expected and observed number was 29 standard deviations, very different from the 2.37 standard deviations present in this case. Second, and importantly, the Supreme Court did not define the number of standard deviations necessary to offer a statistically significant result. Instead, it observed only that a difference greater than 2 or 3 standard deviations would cause a social scientist to doubt that the difference had occurred by chance. This is important because the State

[123] *Castaneda*, 430 U.S. at 496 n.17.

primarily argues that a standard deviation between 2 and 3 is a "gray zone," not necessarily implicating statistically significance. Since the disparity is *only* 2.37 standard deviations, the State argues that Woodfox has not shown statistical significance.

We need not linger further here because the district court found the one-tailed and two-tailed tests more appropriate and addressed the statistical significance issue in those terms. Woodfox's expert explained that standard deviation is a crude tool to analyze symmetric, bell-shaped, normally-distributed data, but does not work where, as here, the data is not symmetrically distributed. Again, given the fact-intensive nature of the statistical inquiry, we can find no clear error in the district court's opting to use the one-tailed and two-tailed tests.

The basics of hypothesis testing (including one-tailed and two-tailed tests) are explained through two simple examples. First, suppose that 50% of the population eligible to serve as jurors in a county are women.[124] A jury is drawn from a panel of 350 persons selected by the clerk of the court, but the panel includes only 102 women, i.e., less than 50%.[125] Hypothesis testing answers the question of whether the shortfall in women can be explained by the mere play of random chance.[126] A statistician would formulate and test a null hypothesis, which in this case would see the panel of 350 as 350 persons drawn at random from the larger eligible population.[127] The expected number of women would be 50% of 350, which is 175.[128] The observed number is

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[124] David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Reference Manual on Scientific Evidence 211, 249 (3d ed. 2011).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

obviously less: 102.[129] The shortfall is the difference between 175 and 102: 73.[130] Hypothesis testing answers the question of how likely it is to find this disparity between the numbers—the probability is called the *p*-value.[131] "Large *p*-values indicate that a disparity can easily be explained by the play of chance."[132] "[I]f *p* is very small, something other than chance must be involved."[133] "In practice, statistical analysts typically use levels of 5% and 1%" for statistical significance.[134]

Second, to demonstrate the difference between one-tailed and two-tailed testing, suppose a coin is tossed 1000 times and the result is 532 heads.[135] "The null hypothesis to be tested asserts that the coin is fair."[136] If correct, the chance of getting 532 or more heads is 2.3%; in other words, the *p*-value is 2.3%.[137] This is called one-tailed testing.[138] Alternatively, a statistician can compute the chance of getting 532 or more heads *or* 468 heads or fewer.[139] The *p*-value for this example would be 4.6%.[140] This is called two-tailed testing.[141]

We discuss these basics of statistical analysis to accent the fact that at the district court level, the parties divided over which test was more appropriate: one-tailed or two-tailed. While agreeing that a *p*-value of 5% or smaller showed statistical significance for two-tailed testing, they disagreed about the significance level for one-tailed testing. The State argued that a *p*-

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129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.* at 250.
133 *Id.*
134 *Id.* at 251.
135 *Id.* at 255.
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.*
141 *Id.*

value of 2.5% or smaller showed statistical significance for one-tailed testing, while Woodfox argued that 5% or smaller would do.

The district court found it unnecessary to solve these problems. Under the 40.8% eligible population baseline, the *p*-value for one-tailed testing was 1.26% and for two-tailed testing was 1.85%. Both *p*-values were below the threshold required to show statistical significance. We do not find any clear error in the district court finding.

Therefore, the State's attempt to rebut the *prima facie* cases using statistics does not persuade. The district court did not err in finding as such.

VIII

The State also renews its arguments that it rebutted the *prima facie* case by demonstrating the use of race-neutral criteria in the selection of grand jury forepersons. Such a rebuttal case operates by "showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."[142] "[A]ffirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion."[143] But the "presumption of discriminatory conduct may be successfully rebutted by testimony of responsible public officials if that testimony establishes the use of racially neutral selection procedures."[144]

During the time relevant time period, the two judges of the 21st Judicial District appointed grand jury forepersons in West Feliciana Parish: the late Judge Ramshur and Judge Kline.

Judge Kline testified at the federal evidentiary hearing. According to Judge Kline, he would think of someone who would be a good foreperson and would attempt to contact them during the morning of the venire. If he did not

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[142] *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).
[143] *Id.*
[144] *Guice v. Fortenberry* (*Guice II*), 722 F.2d 276,281 (5th Cir. 1984).

know someone on the venire, he sought facts about the person, not opinions, about whether he or she would be good foreperson. Judge Kline explained that various criteria mattered, including character, communication skills, patience, independence, reputation and education. But while education and employment were important, they were not determinative. Instead, Judge Kline sought "basic education" and looked for employment because it "reflected some dependability." But Judge Kline also stated that he did not want to choose only people with advanced degrees because that would eliminate "a whole body of good folks with good common sense." Judge Kline also stated that he actively tried to be inclusive, and appointed women and African-American forepersons without as much education as others in the pool but who were "representative of the community." Finally, Judge Kline clarified that he could only speak to his own selection procedures.

Because Judge Ramshur passed away in 2006, the State presented other officials familiar with his selection process. The State presented Judge George H. Ware, Jr., who was the District Attorney of West Feliciana Parish from 1985 through 1996. Ware testified that he would meet with the judges as they were selecting the foreperson and discuss potential selections. He testified that the question the judges asked him suggested they were seeking information about "community leadership role, responsibility in the community, background, whether or not this person was a gossip." Occasionally, the judges would ask him questions about the potential foreperson's job and family. The State also presented Jesse Means, the Assistant District Attorney for the 20th Judicial District from 1985 through 2006. Means testified that while Judge Ramshur never asked him for advice, on one occasion, he advised the Judge not to select a person. But this testimony was given only under proffer as it was hearsay testimony. In totality, Means testified that he did not give Judge Ramshur "specific advice about specific people" because the Judge did not need it.

Finally, the State also presented other witnesses to attest to the race-neutral selection by Judge Ramshur. Much of this testimony is irrelevant or was offered under proffer. As an example, the former clerk of the court in East Feliciana Parish testified as to what she thought Judge Ramshur's practices were in East Feliciana.[145]

This rebuttal evidence is more that affirmations of good faith that discrimination did not occur, but it is not the sort of evidence that rebuts a *prima facie* case.[146] The State contends that subjective criteria like "character" and "leadership" are acceptable. We need not disagree, although our past pronouncements have created some confusion on this point.[147] But the difficulty is that while Judge Kline was able to articulate race-neutral criteria, there is almost no evidence that Judge Ramshur employed race-neutral criteria, either objective or subjective. What makes matters worse is that the only information the judges received about the people on the grand jury venire were the names, addresses, and in later years, the telephone numbers. As we have noted before, "[t]he presence of identified objective criteria known in advance to the appointing judge would have mitigated the difficulties of the selection system then in place."[148] As far as we are able to discern, Judge

[145] *See Guice II*, 722 F.2d at 278 (focusing attention on statistics from and the selection procedure in the parish where the indictment issued despite testimony concerning other parishes); *Crandell v. Cain*, 421 F. Supp. 2d 928, 938 (W.D. La. 2004) (noting that there is no legal basis for examining statistics from a sister parish).

[146] *See Guice II*, 722 F.2d at 281 (holding that rebuttal was unsuccessful because testimony did not reveal objective criteria and showed judge selected someone he knew always); *United States v. Perez-Hernandez*, 672 F.2d 1380, 1387 (11th Cir. 1982) (holding that the rebuttal was successful when eight district judges testified to similar guidelines used to make foreperson selections).

[147] *Compare Johnson v. Puckett*, 929 F.2d 1067, 1073 (5th Cir. 1991) ("This court has required that testimony rebutting a prima facie case of discrimination establish the use of objective, racially neutral selection procedures."), *with Guillory*, 303 F.3d at 650–51 (accepting such subjective race-neutral criteria as "who would be fair," "independent," and "not necessarily go along").

[148] *Guillory*, 303 F.3d at 651.

Ramshur mostly selected people known to him without any systematic attempt to obtain information about qualifications. Indeed, Judge Ramshur's grand jury venire transcripts shows a lack of questions as to qualifications. We also take special note of the fact that of the five African-American grand jury forepersons during the relevant time period, Judge Kline selected four. Thus, Judge Ramshur selected only one. Indeed, as Woodfox points out, Judge Ramshur selected a grand jury foreperson nineteen times during this same period.

The State does suggest a plethora of race-neutral criteria that can account for the disparity, such as employment, education, character, and independence. In support, the State provided a lot of data. First, it compiled a list of grand jury forepersons between 1980 and March 1993 to show that they all shared similar education and employment characteristics. Second, it produced U.S. census data showing educational attainment by race for 1980 and 1990. These data corroborate that African-Americans were less educated than the general population. Third, it produced U.S. census data showing unemployment and lack of participation in the labor force by race for 1980 and 1990. These data also corroborate that African-American were less employed and participated less in the labor force that the general population. Yet the problem with this evidence is that it fails to persuade when considered in light of the fact that there is no evidence Judge Ramshur actually knew about the characteristics when picking the foreperson.[149]

The State's argument that West Feliciana Parish is small and the judges knew all its members is no more than a good faith assertion. Moreover, the

[149] *Guice II*, 722 F.2d at 281 ("Judge Adams' testimony regarding the qualifications of the particular individual he chose as foreman of the grand jury does not undermine our reasoning when considered in the light of the fact that he testified that he made no inquiries regarding the qualifications of any of the other venire members.").

State's assertion that the judges made proactive attempts to include women and minorities fails to convince. Only Judge Kline made such an assertion, and we have no reason to believe that Judge Ramshur made similar attempts. Furthermore, the records reveals that Judge Ramshur in particular passed over equally qualified African-American candidates to appoint white forepersons. Woodfox identified specific African-American venire members and their employment and education, and compared those qualifications to the white forepersons actually selected. For almost every year, Woodfox can point to African-Americans in the grand jury venire that had comparable educational and employment experience to the selected foreperson. This bolsters our conclusion.

We hold then that the State has not demonstrated reversible error in the district court's holding that it failed to rebut the *prima facie* case.

IX

For these reasons, we AFFIRM the district court's grant of habeas relief.

EXHIBIT B

1 reflecting in his suspended sentence, that was
2 good.
3 Q He could almost be, in the last five
4 years he could almost be described as a model
5 prisoner?
6 A Yes.
7 MR. HICKS:
8 And to clarify, that's based upon
9 the description that you just read.
10 MR. HANLON:
11 That's exactly right.
12 A Here's the thing, the review board
13 reviews him and they never have brought to me a
14 recommendation that he go out, so I'm pretty
15 oblivious to that because the board have their
16 hearings and I don't have to deal with that
17 because they haven't ever said we need to let
18 him go. So really, the board, like I told you
19 before, I don't ever overrule them hardly.
20 Q But you've got the authority to
21 overrule them?
22 A I do have the authority but it's just
23 never gotten that far.
24 Q If they were doing something that you
25 thought constituted cruel and unusual

1 Your objection is well taken.
2 BY MR. HANLON:
3 Q Based upon his conduct as set forth,
4 that I just set forth I want you to assume, and
5 taking away out of any consideration the
6 original charge that he's in for, he doesn't
7 belong in CCR?
8 A No, probably not.
9 Q Now we'll go to Wallace.
10 "Mr. Wallace's most recent disciplinary report
11 for institutional violence occurred some 22
12 years ago. He was a principal in the May 1999
13 hunger strike. From May '99 through March
14 2002, Mr. Wallace maintained a clear conduct
15 record. On March 11, 2002, Mr. Wallace was
16 charged with possession of contraband; metal
17 pen clip characterized by security personnel as
18 a quote 'homemade handcuff shim.' His most
19 recent disciplinary report was December 2005,
20 when he was found in the possession of excess
21 number of postage stamps, for which he received
22 thirty days cell confinement. See LSP
23 Disciplinary Report, Herman Wallace, 12-2805.
24 Between March 2002 and December 2005,
25 Mr. Wallace received disciplinary reports for

EXHIBIT C

1 based upon the rap sheet that you reviewed, as
2 well as his disciplinary history at Angola, do you
3 feel that he should be released to the general
4 public?
5 A. No. I do not feel that he should be
6 released to the general public. I think it is a
7 gamble, and I told you, in our business, we don't
8 gamble, because he will hurt and harm people again
9 or resort to violence when he feels the need to do
10 it to get his way.
11 Q. Okay. Is there a difference in a
12 prisoner's ability to cause trouble when they are
13 in CCR as compared to when they are in the general
14 population?
15 A. Yes, because he is in the confinement of
16 the cell. And, therefore, he has no one to commit
17 violence upon other than himself, or to reach
18 through at the correctional officers or someone.
19 So that's why he's in the cell so that he won't
20 have an opportunity to cause problems or to hurt
21 someone or himself or hurt the correctional
22 officers or other inmates.
23 Q. Okay. So he has less opportunity?
24 A. He has less opportunity.
25 Q. What are the restrictions for his

EXHIBIT D

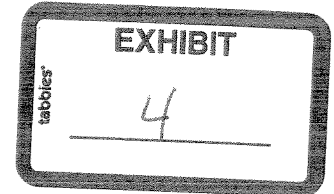
BOBBY JINDAL
Governor

JAMES M. Le BLANC
Secretary

State of Louisiana
Department of Public Safety and Corrections
Louisiana State Penitentiary

TO: DISCIPLINARY OFFICE

FROM: COL. BOBBY ACHORD
INVESTIGATIVE SERVICES



DATE: DECEMBER 17, 2008

RE: INMATE: ALBERT WOODFOX # 72148
DISCIPLINARY REPORT 11-13-08 RULE: 30-w
DISCIPLINARY BOARD REQUEST FOR INVESTIGATION

On November 13, 2008 Major Michael Vaughn prepared a Disciplinary Report for Inmate Albert Woodfox # 72148 and placed him in Administrative Segregation at the request of Lt. Col. Gary McDonald for possible violation of Rule 30-w, pending investigation. At the conclusion of the investigation it was substantiated that Inmate Woodfox violated Inmate Rule 30-c GENERAL PROHIBITED BEHAVIORS- 3 Counts, Rule 22 THEFT- 1 count, and Rule 29 DISTURBANCE- 1 count. Col. Achord requests that the Disciplinary Chairman amend Inmate Woodfox's original Disciplinary Report of Rule 30-w to reflect the substantiated violations as noted. The following is a summary of the investigation regarding Inmate Woodfox.

The Louisiana State Attorney General Office requested copies of all recorded phone calls of Inmate Herman Wallace # 76759 and Inmate Albert Woodfox # 72148 as a part of an investigation they were involved with. On November 13, 2008 representatives of the Attorney General's office advised Warden Cain of conversations overheard on November 3, 2008 in which Inmate Woodfox gave an interview to a Radio Station using the Inmate Phone system. On that same date, November 13, 2008, Warden Burl Cain and Lt. Col. McDonald of Investigative Services listened to recorded telephone calls placed by Inmate Albert Woodfox # 72148 on November 3rd, 2008 to 415-648-4505. Inmate Woodfox showed that phone number on his approved telephone list as Noel Hanarthan, "friend." It was later determined that the phone number is to Prison Radio in California and Noelle Hanrahan is a journalist and Director of Prison Radio. In the three telephone calls Inmate Woodfox read to Ms. Hanrahan from a prepared written text and the conversation was obviously being recorded by Ms. Hanrahan. Inmate Woodfox made comments in the statement/media release that he **continues** to live by the principal embarred and stored in them by the philosophy of the Black Panther Party for Self Defense. He apparently knew that the comments would go out all over the country and internationally. He alleged a smear campaign was being conducted against him by the Attorney General's office using Countel Pro techniques and tactics of lies, deceptions, missing information and character assassination. He made derogatory comments about the New Orleans Police Department and District Attorney's office alleging that they connected him to other crimes doing what was common practice against African men in those times and is still going on now. Those comments appear to be designed to provoke racial unrest between black offenders and correctional

officers who are associated with authority. The comments also appear to be designed to deliberately provoke unfavorable public opinion toward the Attorney General's office and the Louisiana State Penitentiary, which could ultimately affect the safety of staff and inmate population, and stability/security of the institution. Many offenders at the Louisiana State Penitentiary are from New Orleans as are inmates Woodfox and Wallace.

Inmate Woodfox additionally made a comment in the statement "As a member of the Black Panther Party for Self Defense, I, along with Herman Wallace, thought that we had an obligation to speak out and organize against brutality, racism and inhumane conditions and the rape of young men that was being used by security to run and control this prison. As a result of our actions, **we earned the hatred of both prisoners and security**. All three phone calls were transcribed and are attached as **Exhibit # 1, 2, and 3**.

The inflammatory statements made by Inmate Woodfox in an obvious news release to a radio station disguised as a "friend" call caused immediate concern for the stability and security of the Penitentiary. This was the first knowledge by institutional staff that Woodfox and perhaps Wallace were conducting interviews and providing news releases. Warden Cain immediately ordered the cessation of all phone call privileges, with the exception of Legal Calls, by Inmate Woodfox and Wallace until further investigation could reveal exactly when and what had been released by both inmates and to what extent the inmates had abused their inmate telephone privileges. Both inmate phone lists were modified to allow only Legal Calls. The acknowledgement of hatred toward himself and Inmate Wallace by other inmates as stated in the call created concern for their safety and well-being and both inmates were placed in Administrative Segregation until the Investigation could be completed. Major Michael Vaughn prepared a Disciplinary Report for Inmate Albert Woodfox # 72148 and Inmate Herman Wallace # 76759 and placed them in Administrative Segregation at the request of Lt. Col. Gary McDonald for possible violation of Rule 30-w , pending investigation.

Investigative Services determined that the Inmate Phone system had saved 379 phone calls placed by Inmate Herman Wallace and 303 placed by Inmate Albert Woodfox, approximately 170 hours of conversation. Investigative personnel, assisted by personnel from the State Attorney General's office immediately began monitoring the recorded phone calls. While monitoring these calls it became readily apparent that Woodfox and Wallace exhibit and express obvious contempt and disregard for following inmate rules and/or Institutional policies thereby jeopardizing the stability, safety, and security of the institution . Most of the calls were monitored with many violations uncovered that were committed by both inmates. The attached **Exhibit # 4** is a summation of the Inmate Rule violations by Inmate Albert Woodfox.

____

Col. Bobby Achord
Investigative Services

C: File

Exhibit # 1

11/03/2008 at 4:24 P.M., Inmate Albert Woodfox #72148 placed a phone call to Noel Hanthan at 415-648-4505.

Woodfox: Hello
Prison Radio: So glad I got you.
Woodfox: Hey
Prison Radio: I'm nearly here doing the day. Let me turn you to the board. Hold on.
Woodfox: Okay
Prison Radio: Alright
Woodfox: Yea
Prison Radio: How can I help you Albert?
Woodfox: Well I asked somebody from A3 and Mirana to get in touch with you and let you know the latest smear campaign by the Attorney General's Office.
Prison Radio: Yea, I'm ready to rock and roll and do what you need me to do in turns of getting down your statement and working with Mirana to do what you want with it.
Woodfox: Well, basically, I prepared a statement, I want to read it off. I think it is important that I respond, me not the members of A3, not the Attorneys, but me, since I am the one being slandered and after I read the statement any question or interviews, we can go into that you know?
Prison Radio: You go it. I'm ready.
Woodfox: Okay, when I woke up, you ready.
Prison Radio: Oh, yea, 1, 2, 3 mark.
Woodfox: When I woke up this morning. It was like any other morning, nothing unusual. However later this morning Herman Wallace told m he had been informed that there was an article about me in the advocate newspaper, the Saturday edition. Since the Saturday and Sunday paper are not delivered at Camp D on the weekend. I decided to call a friend to ask then did they know anything about this article. I soon find out that because of a motion pending before the Honorable Judge James Brady, Middle District Court requesting their, State of Louisiana through Attorney General's Office has decided to use a smear campaign reminiscent of the Federal Govt. Countel intelligence program to oppose my constitution rights to be released on bail. For those of you who may not know or have forgotten, Countel Intelligence program was a Federal Government Intelligence Act aimed members of the American people and carried out by the Intelligence Agency of the United State government. The purpose of the Countel Pro was an act that was destroyed or neutralized any political party organization or group of individuals that the United State government felt had challenge the foreign, challenge their policies, both domestic and foreign. The techniques and tactics used by Countel Pro were lies, deceptions, missing information and character of assassination. These technique and tactics were used cause chaos and disunity among members of any political party, organization or group of individual. If the United State government decided any political party, organization, or group of individual were a threat to its agenda and they became targets of Countel Pro. The Black Panther party for self defense became a primary target of Countel Pro attacks. Although Countel Pro was exposed to the American peoples in the 70's, it is my opinion that technique and tactics used by

them are still being used against American citizens, American citizens to this date. It has become increasely clear to me that the State of Louisiana, through the Attorney General's Office has decided to use these tactics and techniques to oppose bail being granted. On 10/14/2008, my Attorney's argued a motion for bail before Honorable Judge James Brady of the Middle District Court. That motion is pending. Shortly after that hearing, a smear campaign was started. During the hearing my niece testified in court that she and her family after a long discussion decided to allow me to live with her and her family, supervising any condition the court would impose if bail was granted. Someone contacted the home owner association that my niece and family belongs to and told its members that my niece had decided to bring into their community a murderer and a dangerous man. They all made sure that the news media knew of the discord that was pitting neighbors against neighbors. I have been held in Louisiana State Penitentiary for almost 40 years. Since being here, I have always fought against inhumane and cruel condition. As a member of the Black Panter Party for self defense, I along with Herman Wallace thought that we had an obligation to speak out and organize against brutality, racism and inhumane conditions and the rape of young men that was being used by security to run and control this prison. **As a result of our actions, we earned the hatred of both prisoner and security**.

Global Tel telephone recording: *This call originate from a Louisiana Correctional Facility and may be recorded or monitored.*

Woodfox: But our belief, in the right of every human being to be treated humanely No matter their color or ethic background would not allow us to stop our acts no matter what. Our reward was to be framed for the murder of a prisoner guard that took place in 1972 and locked in a cell for 23 hours a day for 33 and 36 years respectably and almost 40 years in this prison and inspite of the inhumane and brutal conditions, I, we, have continued to live by the principal inbarred and stored in us by the philosophy of the Black Panther Party for Self Defense. We met any criteria that exit that make us model prisoner. Yet we are continuously referred to as militant and dangerous. The latest Countel Pro smear campaign against me by the State Attorney General's Office is to have placed in the local newspaper the threat of prosecution me for robberies and rapes that occurred in the 1960 around the time I was arrested for the armed robbery charge that I have served 25 plus years. I deny now as I did then when questioned about these crimes my involvement. The Orleans Parish Police Department despite of no evidence connected me to these crimes decided to do what was common practice against African American men in those times. Use my arrest for a similar crime to clear the books by charging me with every robbery and rape that took place during that time. Other than the filing of the charges against me there have never been any legal actions taken by the District Attorney's Office of Orleans Parish. I have never been prosecuted at any level or in any form of these charges simply because I am innocent. The District

Exhibit # 1
Page 3 of 4

Attorney's Office of Orleans' Parish has known of my where about for the last 38 years and has not made any attempts to prosecute me. This is the second time that Herman Wallace and I have been victims of the Countel Pro attacks. In the 1970's our first support group was by penetrated by government agency whose responsibility was to disrupt raising funds by party members so that we could not afford legal and competent counsel. In closing, this is the second time that I have been a victim of Countel Pro, instead of choosing to fight the case in the Court of Law, the State of Louisiana through the Attorney General's Office has decided to fight this case using the smear campaign used by Countel Pro by using lies, deception, miss information and the character assassination. The Attorney General's Office hopes to avoid trying this case in the court of Law, but rather in the Media and court of public opinion. I will leave my lawyers to handle this latest persecution by the State of Louisiana in a court of Law. This murder conviction has been reversed twice already because the State of Louisiana has shown total disregard for the United State Constitution and the Laws of the State. By using Countel Pro attacks the State of Louisiana Attorney General's Office has put into jeopardy lives of my niece and her family as their careers. Let's let the evidence speaks for it self or not, all the Power to the people, Albert "Shakka" Woodfox, Angola 3, and that's my statement.

Prison Radio: Hey, so Albert Woodfox, tell me were you charged with, were you convicted of any of crimes that were similar. Let me phrase it again. Albert Woodfox, what was your original conviction for?

Woodfox: My original conviction was for Armed Robbery of a Bar & Lounge name, Tony's Greenrow.

Prison Radio: Now you're serving 25 plus years for that crime?

Woodfox: I completed that sentence in April 1996.

Prison Radio: Now they are using other charges that they, they using other charges, other types of charges to smear you? Have you ever been associated with being charged with rape?

Woodfox: Yes, at one time but that matter again it was resolved it was determined by the District Attorney's Office that it was no rape involved and the case was dismissed.

Prison Radio: So the local authority never took you to trial, they just charge you with all the open cases.

Woodfox: No, I have never; as I stated in my statement been persecuted and prosecuted rather at any level for any of these charges, that I was questioned about by the Orleans Parish Police Department. As a matter of fact, when I first found out about these charges, I asked State appointed Attorney, what the hell is going on here. He told me, he did not know he would go and talk with somebody.

Global Tel telephone recording: *This call originates from a Louisiana Correctional Facility and may be recorded or monitored.*

Woodfox: he told me he would go and check on the charges and he would come back and let me know. About ½ hour later this Attorney came back to me

Exhibit # 1

and said there are no more charges and the State had determined there is no evidence or any witnesses connecting you to those crimes so therefore you would not be prosecuted for them and that is the last time I ever heard of these charges until the Attorney General's Office in their attempts to smear me an my reputation and use these, the threat of these charges and whether not Judge Brady would grant bail.

Prison Radio: So, I totally get that. What about Statute of Limitation?

Woodfox: I talked to my Attorney, Scott Fleming who's been confident with other attorneys involved with A3 and they have versely said there is at least 20 different legal statues that prevent any, any prosecution by the Attorney General's Office and I think he knows this and this why he only making these allegations. There is no evidence and I never was involved with these crimes and I defy him if he had evidence then bring it forth.

Prison Radio: You're saying that, this is being used to inflame the community, trying to intimidate the Judge and using extra legal method in order to prevent your your justifiable release on bail.

Woodfox: True, to in rage my niece's neighbors who her and her family had excellence relationship with and so this is, all this is purely smear campaign.

Prison Radio: You know, I'm so sorry, now they are jamming you like this.

Woodfox: Okay, look I probably have to call you back if it possible. They are getting ready to cut us off.

Prison Radio: Yes.

Woodfox: Let me hang up and I'll call back.

Prison Radio: Alright.

End of Call

Transcribed by Lt. Col. Cassandra Temple and Col. Bobby Achord, Investigative Services 12-5-08 and 12-07-08

Exhibit # 2

11/03/2008 at 4:40 P. M., Inmate Albert Woodfox #72148 placed a phone call to Noel Hanthan at 415-648-4505.

Prison Radio: Hey, How you doing Albert?
Woodfox: OK
Prison Radio: So I listen to your call. I just got finish talking to Mirana on the other line. You one line and she's on the other
Woodfox: OK
Prison Radio: So, just your call. I mean, I think those things should be challenged
Woodfox: Are you talking to me?
Prison Radio: Yes!
Woodfox: I agree 100%, I told Torrey, I told Scott. You know I think we should challenge these allegations. We just can't leave this stuff out there unresponsive
Prison Radio: Held on a second .... you just, you want Robert to read it, or you want to use your voice
Woodfox: I prefer, my voice you know. I mean from that point on you can give copies to Miriana or the A3 can use utilize it anyway they choose.
Prison Radio: yea, what about them question I ask you; you know
Woodfox: excuse me!
Prison Radio: Yea! What about getting, you know retaliation for it.
Woodfox: That's my, that is the least worry, Look for 30 some years
Prison Radio: For 30 some years, (stop talking to albert) PR told Mirana you want me to call you back or you got a minute. Told Miriana she will call her back
Prison Radio: Begin talking to Albert. Basic on she really loves you everything is going to be fine.
Woodfox: OK, you know, to answer your question, retaliation is the least of my worries. I, we, spent almost 40 yrs in this prison, 33 for myself and 36 for Herman.
Prison Radio: No, I think she was just worried.
Woodfox: OK, you know I'm not worried about that. Matter fact the attitude of nobody the men I live in the dorm with, as well as the men who work in this camp have not changed one bit. Being victims of persecution, they understand what going on
Prison Radio: Yea, Albert, I am going to ask you straight up again so you can answer, so that I will have it clear and clean. In terms of these new invented charges being promulgating and being put out there by the State to try and prevent you from getting bail and actually getting out. Tell me how specious they are, where are they coming from?
Woodfox: Well, they are very su-suspect, I am not sure exactly who in the Attorney Generals Office is doing this it obviously its coming from there. Who else has an interest in preventing me from being released on bail on bail being granted for a practical. Our lawyers are trying to uh find out exactly who is behind this smear campaign and once we find out then and we can make the accurate response to these allegations.
Prison Radio: Alright .... And in turns of the types of allegation they are using, why do they have no basic in fact.
Woodfox: Because, I simply, I did not do it an not a part of it, I was never prosecuted for this is not a case where they charge me with some thing and arrange

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me and then decided contrary to the Attorney General's statment that I was going to be locked up for the rest of my life because that was that was not true. At that time a 50 year sentence was basically 25 years and so there very real possibility that I would live and be released from Angola. So That is just some statement he made to try to justify not being able. The District Attorney of Orleans Parish never prosecuted in this case, never took any action toward the police filing the report against me. And that was a common practice, maybe still going on back in the 60's. It was just common. If there was a series of burglary's going on in the neighborhood and you got arrested for burglary and they would give you ten to fifteen burglary's, their concern was clearing the books. This way it would look good. They could go to the public and say, well we solved these 15 burglaries and once they turn it over to the District Attorney's Office they wasn't concern whether they was prosecuted or not. Now the District Attorney's Office in most cases, they would use all these burglaries to pressure and if that you was charge, who know that he is innocence of these burglaries, in most cases the District Attorney's Office knew they were innocence of these burglaries. In most cases the District Attorney's Office knew they were innocence but they would use all these charges to pressure that person to plead guilty to the burglary he was originally arrested for. I mean that's just how the system works and I am more than sure that it's still going on now.

Prison Radio: Let me ask you, The reason the specter of these decade old charges. Because they don't want people talking about what really is going on with your conviction overturned. Tell me about that.

Woodfox: As I said (This call originated from a Louisiana Correctional Facility) The Attorney General Has made the statement that two juries has spoken and I been convicted twice on this charge. What he failed to say is that, had the State of La followed the US Constitution of United States and the Laws of the State of Louisiana. This case would have not have been overturned twice. So of course they were able to convict me because they used unconstitutional tactics. They made sure that I had lawyers incompetent and would not present a strong defense.

Prison Radio: We are not talking about technically overturning. We are talking about perjuried testimony as a constitutional right.

Woodfox: Yes, we are talking about payment being paid to principal witness in this case. Fellow named Hessikah Brown who is the only who has ever said that he saw us involved in the death of Brent Miller. And we found out, and the court has recognized and the court has spoken on this. That it was paid testimony and his testimony, my attorney at my second trial should have objected to these testimony being used at my second trail because of the fact that it was tainted testimony and they were held.

Prison Radio: There is a lot of other evidence that goes to your innocence of this crime. So you are purporting that one innocence of the crime the courts have overturned your conviction on the murder of the officer Brent Miller. You have spent now nearly 40 yrs in prison, 33 of those years in Solitary Confinement and the District Attorney is saying that you would be dangerous to the society

Exhibit # 2
Page 3 of 4

Woodfox: Yes, the thing about it, we have been in 40yrs I may have between 10 and 15 disciplinary reports, most of those report with the exception of one was a fist fight that was when they opened the door of a enemy I had on the tier. They opened his door and my door, this was their doing. I had no other choice but to protect myself. All the other disciplinary reports I had was usually resisting inhumane and brutal conditions by individual correctional officers or by the policies of the prison itself.

Prison Radio: So you saying 40 yrs and 40 yrs when they were serving your food cold and throwing it on the floor. You protested

Woodfox: Right and the overwhelming majority of pissed prison people, we have document from the Deputy Secretary of DOC at that time that attested to the fact, we were model prisoners and the Warden at this penitentiary Burl Cain said in a deposition of our civil suit, not verbatim but this is what he said I was a model prisoner and had I not been locked up for the death of Brent Miller, I would not be in the cellblock.

Prison Radio: Now you are so pointing out that the District Attorney is getting desperate because there seems to be a huge international and national push for justice in this case and for bail to be granted in your case. So the public relations avenue is the only thing they have to prevent that so is this was going on

Woodfox: yea, Look if you want to smear an African American man reputation, all you got to do is say the word rape. How do you un-ring this bell. Now these people has the same and trying to assassinate my character. All of the people, all over this country all over this planet, who have rallied to the cause to free Angola 3, what can I say to these people that going to change what the Attorney General of Louisiana has said without absolutely no proof, no evidence of any kind. How do I un-ring this bell. This is why I felt that it was so important. Anyone who support the cause for the freedom of Herman Wallace and myself hear me say I did not do this, I have no knowledge of it and I welcome even though the statue of limitations may prevent them from taking me to trial, put it out there. You got evidence put it out there. The same way you got it, you gave this shorten bullion to the Advocate News Paper. Tell the public what you got. He say I'm a serial rapist, Okay, put it out there show them what you got. Get him some proof at least the public would be safe of me. He got DNA let's have it, He's not going to get it though.

Prison Radio: It seems, It seems unjust and unfair given that one of the main reason that you both was targeted. (This call originated from a Louisiana Correctional Facility and may be recorded or monitored) One of the reason you were targeted is because you were trying to stop the internal dealings of in prostitution of men inside Angola. Like you're interest in personal dignity and the potley integrity of people inside prison was one of the things got you targeted in the first place.

Woodfox: You know, honestly we was targeted because we was members of the Black Panther Party and we all know how far the government of the United States went to detain the Black Panther Party for self defense and the good work they was doing. Had Herman and I not been successful in organizing and bringing down the barriers between white and black

Exhibit # 2
Page 4 of 4

inmates in this prison at the time, forming rape, and antirape for stopping young men who would normally be forced into a life of sexual slavery. Had we not been successful, had we not challenged to the very core the controlling mechanism of this prison, I don't think we would have been singled out.

Prison Radio: Just a reminder, there was some innocent people at Angola. What was the economy at Angola when you was fighting to make sure that

Woodfox: Angola was a Agriculture Plantation, It's primarily source of production and income was agriculture

Prison Radio: I don't mean so much Agriculture, Remember, you was saying that the market days when people would come in off the bus and there was an internal culture of actual slavery

Woodfox: Let me, Hang up and call back

Prison Radio: Go ahead

END OF CALL

Transcribed by Major Michael Vaughn and Col. Bobby Achord, Investigative Services 12-05-08 and 12-07-08

Exhibit # 3

11/03/2008 at 4:55 P.M., Inmate Albert Woodfox #72148 placed a phone call to Noel Hanathan at 415-648-4505.

Woodfox: Hello.
Prison Radio: Hey Albert, are you still there?
Woodfox: Yea.
Prison Radio: Sorry to keep you on the line so long.
Woodfox: Okay.
Prison Radio: Hold on --------- Are you there, hold on, Chuck, Chuck are you there? (Possibly had Chuck on the line)
Woodfox: Yes, I am.
Prison Radio: What else would you like to say?
Woodfox: Oh ---------you know, my main concern now is the safety of my niece and her family, you know. I'm very distressed that the idea that the relationship that she had with neighbors in her community may be destroyed because of this smear campaign by the Attorney General's Office. It's more to me that it not be allowed to happen, then just about anything.
Prison Radio: Got it. I am going to get this to Mirana and call her back right now. I am going to type it up and get it down on audio.
Woodfox: Okay.
Prison Radio: One of the strongest parts was when you, it was couple parts of the written Statement, I'll include two parts in there, that's to the point of it.
Woodfox: Okay.
Prison Radio: I'm usually here 9 to 5 and if you get me a message. I can be here mostly any time.
Woodfox: Right.
Prison Radio: I'm just not here at 6 A.M. I love you guys.
Woodfox: You know we been going through some internal trials and tribulation here you know. I guess you were aware of the situation with Herman, you know. We kind of like trying to let these, both the criminal and civil case run their course. But not give this Administration any reason to take any kind of action against us.
Prison Radio: Right, well it's going to happen.
Woodfox: I hope so, you know, you know.
Prison Radio: It's going to happen (both laugh), you going to come home just a matter of time.
Woodfox: Well, I hope so. I wish I could be more enthusiastic or as confident as everyone is. You know, I been kicked around by the Judicial system so long and had my heart broke so many times.
Prison Radio: Right.
Woodfox: It's kind of hard for me to be optimistic.
Prison Radio: Right.
Woodfox: My posture is when it happens. I would unlease the little man inside of me, and let it jump up and down. (both laugh)
Prison Radio: You know that is so right. It's funny, you know. you go to such extreme, you probably have Alberto Gonzales, threat to the government if he was still around.

Exhibit # 3
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Woodfox: And the thing about it, that these people in positions of power and authority, they violate the constitution, they break the laws and they have the immunity from prosecution, you know. They walk away continues to live their lives and all people whose lives are destroyed by them, by their illegal action are left to fend for themselves, you know.
Prison Radio: There is no accountability for breaking the Constitution.
Woodfox: None what so ever.
Prison Radio: Alright give me a call back when you can.
Woodfox: Okay and thanks you so much for allowing me to reach out and have my voice attached to this.
Prison Radio: Any time.
Woodfox: Say hello to that son of yours for me.
Prison Radio: I will. Take good care.
Woodfox: Bye, Bye.

End of Call
Transcribed by Lt. Col. Cassandra Temple and Col. Bobby Achord, Investigative Services 12-05-08 and 12-7-08

Exhibit # 4

INMATE RULE VIOLATIONS
ALBERT WOODFOX # 72148

1. **Asking for/allowing called parties to place three-way or conference calls** Inmate Woodfox participated in 10 three way phone calls between the time frame of 11-16-07 to 9-15-08. (1) 11-16-07 to 510-595-8264 8:09 A.M. (2) 12-04-08 to 281-821-9334 8:24 P.M. (3) 1-07-08 to 281-821-9334 7:20 P.M. (4) 2-16-08 to 281-821-9334 11:14 A.M. (5) 2-18-08 to 504-864-0700 10:08 A.M. to LA Times Reporter (6) 2-18-08 to 504-864-0700 10:42 A.M. to LA Times Reporter (7) 6-10-08 to 510-595-8264 11:32 A.M. (8) 6-10-08 to 510-595-8264 11:49 A.M. (9) 6-10-08 to 510-595-8264 3:52 P.M. (10) 9-15-08 to 281-821-9334 8:39 P.M.

(**Violation** of I/m Disciplinary Rule 30.c. GENERAL PROHIBITED BEHAVIORS. *Threatening, planning, conspiring or attempting to commit a violation of the rules of behavior for adult offenders or state and federal laws; aiding or abetting another offender involved in committing a violation of the rules or state and federal laws;*) Inmate Posted Policy G-31-IIIA.3.*states* Third party, three-way, or conference telephone calls are prohibited without prior approval of the Warden.)

2. **Deliberate misrepresenting of information on telephone calling list by showing media/documentary personnel [Noel Hanarthan] as "friend" .** Inmates are expected to be truthful when listing names and relationship of people to be added to their approved phone list. It is in the interest of security and stability of the facility that the administration knows with whom inmates are communicating. Inmate Woodfox's deliberate misrepresentation in showing Noelle Hanrahan, a Journalist and Director of Prison Radio, as a "friend" was designed to conceal the fact that he would be giving periodic releases of information he knew would be distributed to public media sources. This action concealed from prison authorities, information that could affect the internal/external security, racial harmony and good order of the institution.

(**Violation** of Inmate Disciplinary Rule 22 THEFT….. *Fraud, which is also a form of theft, is the deliberate misrepresentation of fact to secure material return and/or special favors or considerations. An offender who knowingly submits obviously false information to any employee within the Department of Public Safety and Corrections is guilty of this violation.*)

(**Violation** of I/m Disciplinary Rule 30.c. GENERAL PROHIBITED BEHAVIORS. *Threatening, planning, conspiring or attempting to commit a violation of the rules of behavior for adult offenders or state and federal laws; aiding or abetting another offender involved in committing a violation of the rules or state and federal laws;*) Inmate Posted Policy G-31-IIIE.CALLING LIST 2.states *Each inmate will provide the Investigative Services Department a master list of up to 20 frequently called telephone numbers inclusive of all family, personal and legal calls.* It is expected that inmates will be truthful when listing people and relationships)

3. **Making an unauthorized press release on 11-3-08 in three phone calls to Noelle Hanrahan, Director of Prison Radio, at 415-648-4505 where he alleges smear campaign against him by the Louisiana State Attorney General's office using Countel Pro techniques and tactics of lies, deceptions, missing information and character assassination. He repeats this accusation later in the release.** Telephone

records reveal that Inmate Woodfox, in collaboration with Inmate Herman Wallace, developed a statement that they wanted to release to the public via Prison Radio. Inmate Woodfox's statements in a written statement/press release to Prison Radio on 11-3-08 appear to be designed to deliberately provoke unfavorable public opinion of the Attorney General's office and the Louisiana State Penitentiary ultimately affecting the safety of staff and inmate population and stability/security of the institution. Department Regulation and Penitentiary Directive prohibit unauthorized media releases by Inmates.

(**Violation** of I/m Disciplinary Rule 30.c. GENERAL PROHIBITED BEHAVIORS. *Threatening, planning, conspiring or attempting to commit a violation of the rules of behavior for adult offenders or state and federal laws; aiding or abetting another offender involved in committing a violation of the rules or state and federal laws;*)

(**Violation** of Department Regulation C-01-013 Public Information Program and Media Access 7. MEDIA PROCEDURES: E. states "*Only those persons authorized by the Secretary or Unit Head shall release information to the media regarding official matters. Authorized spokespersons shall be knowledgeable of issues and Departmental policy and shall ensure the accuracy of information before releasing it*")

Louisiana State Penitentiary Directive 01.014 B. MEDIA RELATIONS 10. states "*Access to inmates will also be restricted or disallowed to prevent them from profiting from their crimes, either materially or through enhanced status as a result of media coverage*". C. MEDIA ACCESS 2. states "*All interviews must be approved by the Warden*... E. COMMERCIAL PRODUCTIONS 1. states "*All commercial productions are required to make a written request to the Warden for access*".

4. **<u>Making inflammatory statements in a media release on 11-3-08 in three phone calls to Noelle Hanrahan, Director of Prison Radio, at 415-648-4505 designed to incite other persons/inmates to create or participate in a disturbance</u>**. Telephone records reveal that Inmate Woodfox, in collaboration with Inmate Herman Wallace, developed a statement that they wanted to release to the public via Prison Radio. Inmate Woodfox makes comments in the media release that "I, we, **continue** to live by the principal embarred and stored in them by the philosophy of the Black Panther Party for Self Defense." He knew that the comments would go out all over the country and internationally. He makes derogatory comments about the New Orleans Police Department and District Attorney' office alleging that they connected him to other crimes doing what was common practice against African American men in those times and is still going on now. Those comments appear to be designed to provoke racial unrest between black offenders and correctional officers who are associated with authority. Many offenders at the Louisiana State Penitentiary are from New Orleans. Inmate Woodfox participated in 22 interviews/releases during the time frame of 2-18-08 to 11-03-08.

(**Violation** of Inmate Disciplinary Rule 29 DISTURBANCE No offender shall create or participate in a disturbance. No offender shall incite any other person to create or participate in a disturbance. A disturbance is considered as two or more offenders involving acts of force or violence toward persons or property or acts of resistance to the lawful authority of Correctional Officers and/or other law enforcement officers under circumstances which present a threat of injury to persons, to property, or to the security and good order of the institution.

Add'l documents produce

EXHIBIT E

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ROBERT KING WILKERSON, ET AL **CIVIL ACTION**

VERSUS **NUMBER 00-304-RET-DLD**

RICHARD STALDER, ET AL

ORDER

This matter comes before the court in order to resolve an issue concerning certain documents withheld as privileged by defendants. These documents were the subject of a prior motion to compel filed by plaintiffs, which was granted in part and denied in part, leaving only the issue of privilege to be resolved after further briefing.[1] That briefing has occurred, and the withheld documents have been submitted to the court for an *in camera* review.[2] A separate motion for protective order has been filed by attorneys from the Louisiana Department of Justice (LDOJ) based on their assertion of the law enforcement privilege with regard to the withheld documents.[3]

Plaintiffs have challenged documents listed by defendants in a privilege log covering a period of time between November 14, 2008, and December 12, 2008, and exchanged between Sha Carter, a paralegal in the LDOJ's office, and several individuals[4] at the

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[1] Rec. docs. 337 and 348.

[2] The defendants initially redacted portions of the documents even from the court, but produced unredacted copies after being ordered to do so. (rec. doc. 366) Defendants subsequently produced additional documents after inquiries from the court. Defendants explained in correspondence that the documents were inadvertently omitted.

[3] Rec. doc. 360. Additional counsel enrolled from the LDOJ's office on behalf of defendants in order to file the motion. (rec. docs. 356 and 358.)

[4] The privilege log submitted in connection with the motion shows LSP personnel Bobby Achord, Gary McDonald, Darryl Vannoy, and Kenny Norris as either sending, receiving, or being copied with emails to or from Sha Carter of the LDOJ's office.

counsel of record

Louisiana State Penitentiary (LSP). This privilege log was produced only after the court ordered its production, and that was only after depositions revealed the documents' existence, a series of correspondence was exchanged between the parties, motions and memoranda were filed, and ultimately a telephone conference was held where the parties argued their positions. The original requests[5] asked for materials relating to the investigations of plaintiffs Wallace and Woodfox in the fall of 2008, including the production of "mail watch" materials, which culminated in a general disciplinary charge against plaintiffs and their immediate movement from a restricted dormitory setting to administrative segregation.[6] Plaintiffs' requests to defendants became more and more explicit as discovery progressed and depositions were taken. They specifically sought any correspondence about those investigations between the LDOJ's office and LSP officials.[7]

Further evidence of relevant correspondence and/or emails being withheld came from deposition testimony of LSP investigators Michael Vaughn and Bobby Achord. Apparently, at some point, perhaps early October of 2008, the LDOJ's office asked for and was sent recordings of "every phone call," including legal calls, for plaintiffs Wallace and

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[5]October 26, 2009, document request nos. 12 and 13.

[6]Plaintiffs Woodfox and Wallace have been in extended lockdown since 1972 (except for a 3-year period in a parish prison for Woodfox) until mid-March of 2008, when LSP moved the two plaintiffs to a new, highly restrictive dormitory (Camp D). Since plaintiffs' suit challenges the constitutionality of their 36+ years in lockdown under the First, Fourteenth, and Eighth Amendments, defendants attempted to dismiss the injunctive claims as moot when plaintiffs were moved into the new dormitory, but the court rejected defendants' arguments, finding that "if defendants were able to moot claims for injunctive relief simply by voluntarily ceasing the prohibited conduct without providing any assurances that the conduct would not be repeated, they would rarely ever be subject to injunction, regardless of the illegality of their conduct." (rec. doc. 262, October 15, 2008). In mid-November 2008, plaintiffs were placed in administrative segregation, and in mid-December 2008, were returned to extended lockdown where they have remained.

[7]December 12, 2008, document request nos. 12 and 13.

Woodfox .[8] On November 13, 2008, a conference occurred at LSP in which some of the recorded phone calls were played. Although memories of who was there vary, it appears that Attorney General Buddy Caldwell and Sha Carter (paralegal at the LDOJ) were there from the LDOJ, and Warden Burl Cain, Deputy Warden Norris, Deputy Warden Vannoy, Lieutenant Colonel Temple, and Lieutenant Colonel Gary McDonald, head of investigations,[9] were present from LSP. Burl Cain testified that the purpose of the meeting "was [for the LDOJ] to show me he [plaintiff] was doing the press thing."[10] McDonald testified that when he was called into the room, the participants (he was not sure about Norris and Vannoy) were listening to a tape-recorded conversation between Woodfox and a lady in California. He said Warden Cain did not cite any particular rule violation but complained about plaintiff(s) "talking to the media."[11] McDonald asked Cain whether he wanted the plaintiffs locked up, and Cain replied in the affirmative. According to plaintiffs,

> Lieutenant Colonel McDonald left that conference and immediately instructed his subordinates [Bobby Vaughn] to place Plaintiffs Wallace and Woodfox in administrative segregation and charge them with disciplinary violations. (*See* Exh. B; *and see* McDonald Dep. Transcript, relevant portions attached herein as Exh. C.[12]

The plaintiffs were immediately placed in administrative segregation under a general charge (30W), and an investigation ensued to look for specific violations. The very next

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[8] See rec. doc. 367, p.47, Vaughn depo. Plaintiffs suggest that this request "was more likely connected to the September 25, 2008 federal court decision granting Plaintiff Woodfox habeas relief, *Woodfox v. Cain"* (M.D. La) C.A. No. 06-789, rec. doc. 50, "and/or the October 14,2008 hearing wherein a federal court indicated that it was seriously considering granting Mr. Woodfox bail." Rec . doc. 365, p.9

[9] See rec. doc. 365-32, McDonald depo.

[10] See rec. doc. 365-29, McDonald depo.

[11] See rec. doc. 365-33, McDonald depo.

[12] See rec. doc. 347, pg 4.

day and for three days after that, Sha Carter sent Deputy Warden Vannoy and Lieutenant Colonel McDonald various emails, attached a list of "Woodfox's 3-way and media calls," a subsequent correction of the list, lists of Wallace's calls, and comments about them.[13] McDonald forwarded Sha Carter's email of November 16, 2008, to Investigator Achord,[14] and from that point forward, the withheld documents show that for the next month Sha Carter and Investigator Achord emailed one another about the disciplinary investigation of plaintiffs Woodfox and Wallace which culminated in a number of disciplinary charges being filed in mid-December, 2008.[15]

Bobby Achord, an LSP investigator, testified that this was the only case he could recall where the LDOJ's office passed LSP information about violations occurring at LSP.[16] Warden Vannoy said there were no other such instances.[17] Gary McDonald, who supervised investigations, likewise could recall no other instance where the LDOJ's office was involved in an internal investigation.[18] Michael Vaughn, another LSP investigator, testified that as far as he was aware, "the Attorney General's office [had] nothing to do with

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[13] The defendants inadvertently failed to provide the attachments discussed in the emails, but subsequently supplemented their *in camera* responses.

[14] The records are somewhat confusing, because Achord obviously at some point was forwarded Sha Carter's November 14, 2008, email to Warden Vannoy also. It appears not all strings of emails were submitted to the court. DPSC 019949 "Subject: Your e-mail of 11-14-08 to Warden Vannoy." State defendants explained that if the emails were between two LSP officials, they were not part of the privileged documents and therefore had been produced to plaintiffs.

[15] The privilege log shows the senders and recipients along with the subjects. While most of the emails after November 16, 2008, were between Carter and Achord, both McDonald and Warren Norris were copied on occasion.

[16] See rec. doc. 365, p. 37, Achord depo.

[17] See rec. doc. 365-43, Vannoy depo.

[18] See rec. doc. 365, p.31, McDonald depo.

our investigation at all."[19] Deputy Warden Vannoy denied any direct communication with the LDOJ's office about the investigation and could not recall whether he received any emails from Bobby Achord concerning the investigation.[20]

According to Bobby Achord, the investigation leading to the disciplinary charges ultimately filed against plaintiffs in December 2008 consisted of listening to phone calls, placing the plaintiffs on "mail watch," (reading their mail), and researching posted policies, regulations and directives from the prison for possible rule violations. He also did some research on the internet because he was not "familiar with the people involved or Prison Radio or any of those type people.[21]" He said there were no interviews or other witnesses involved in the violations.[22]

The plaintiffs devoted several paragraphs of their third amended complaint to this investigation and resulting disciplinary charges. In part, they are as follows:

> 25. In an October 2008 sworn deposition – taken in connection with bail proceedings for plaintiff Albert Woodfox after Mr. Woodfox's underlying conviction was overturned by different judges of this Court – Warden Cain made a number of statements demonstrating that he is penalizing plaintiffs because of their perceived political affiliation and political beliefs, as well as their race. Among other things, when asked to assume that Mr. Woodfox was not guilty of his underlying conviction, Warden Cain stated " I would still keep him in CCR. . . . I still know that he is trying to practice Black Pantherism, and I still

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[19] See rec. doc. 365, p.46, Vaughn depo.

[20] See rec. doc. 365-43, Vannoy depo.

[21] See rec. doc. 365-38, Achord depo.

[22] *Id.* The court was not provided with a full transcript of Achord's deposition; thus the court is unaware of any direct testimony from Achord about Sha Carter's involvement in the investigation. Everyone agreed that the LDOJ's office asked for and received recordings of all telephone calls and that they brought those calls to the attention of Burl Cain and others in the November 13, 2008, meeting at LSP. What is missing from the submissions is any testimony about the investigation over the next month with the assistance of Sha Carter, other than what is quoted above.

would not want him walking around my prison because he would organize the young new inmates. . . . Warden Cain added that Mr. Woodfox "has to stay in a cell while he's in Angola."

26. Mr. Wallace and Mr. Woodfox have been the victims of targeted, and ongoing mistreatment by LSP officials. . . . [i]n mid-December 2008, Mr. Wallace and Mr. Woodfox were given excessive disciplinary sanctions for minor alleged rule violations. According to disciplinary reports concerning these alleged rule violations, plaintiffs were placed in administrative segregation and then returned to further extended lockdown for, inter alia, self-identifying as members of the Black Panther Party, and for making statements that "provoke unfavorable public opinion" about LSP and the Attorney General's office, as well as statements that are "derogatory" to the New Orleans Police Department and District Attorney's Office.

27. Upon information and belief, prison officials' actions are not common practice at LSP, nor are they justified by legitimate penological interests. In addition, upon information and belief, LSP allows inmates to give media statements that, in their view, create "good" publicity. Rather, these incidents reflect targeted, and ongoing mistreatment based on plaintiffs' race, perceived political ideology and association, perceived viewpoints and particular opinions, and/or perceived success in this lawsuit and in separate proceedings challenging their convictions. Upon information and belief, defendants, including Warden Cain, have either directed or facilitated this targeted, ongoing mistreatment of plaintiffs, or are aware of this targeted, ongoing mistreatment but have taken no steps to rectify it.[23]

Issues

The withheld documents are clearly relevant, and defendants' general protests of the requests being overly broad are without merit. The only issues are whether the withheld documents are privileged under any or all three doctrines of work product, attorney-client privilege, or law enforcement privilege. The plaintiffs also contend that defendants waived any privilege they might have had by not properly raising and supporting their objections to production.

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[23]See rec. doc. 289, pp. 6-7.

Work product privilege:

It is well established that documents prepared in anticipation of litigation are protected by the work product doctrine. F.R.C.P. Rule 26(b)(3), *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L.Ed. 451 (1947). This doctrine is broader and distinct from the attorney-client privilege. *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L. Ed.2d 141 (1975) (citing *Hickman*, 329 U.S. at 508, 67 S.Ct. 385). The party asserting protection under the work product doctrine has the burden of proving that the documents were prepared in anticipation of litigation. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000); *Lasalle Bank N.A. v. Mobile Hotel Props., LLC*, 2004 WL 1238024, at *2 (E.D. LA June 3, 2004). Moreover, the anticipated litigation must be identified and it must be proven that the communication in question was in preparation of that litigation. *In Re Vioxx Products Liability Litigation*, 501 F.Supp.2d 789 (E.D. La 2007). In the Fifth Circuit, while litigation need not necessarily be imminent, the primary motivating purpose behind the creation of the document must be to aid in possible future litigation. *United States v. Davis*, 636 F. 2d 1028, 1040 (5th Cir. 1981).

When determining the applicability of the work product doctrine, the court must consider the nature of the document, and the facts surrounding its creation and distribution. *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir.1993). Based upon these factors, the court then determines whether "the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *In re Grand Jury Proceedings (FMC Corp.)*, 604 F. 2d 798, 803 (3d Cir.1979).

Even if materials are found to be prepared in anticipation of litigation, a party still may be able to obtain the materials. Under Rule 26(b)(3), the party seeking to discover

materials prepared in anticipation of litigation must first show that the party has substantial need of the materials in the preparation of the party's case and second, that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

There is nothing whatsoever in these documents that even resembles documents prepared in anticipation of litigation. The defendants claim that the anticipated litigation is the ongoing case and "any actions taken [by them] would play a major role."[24] Most of the content consists of summaries of telephone calls made by the plaintiffs, and the purpose, as evidenced in the communications themselves and in the subject line of the emails, is to find something that could support disciplinary violation charges against plaintiffs. Paragraphs 25 - 27 of the Third Amended Complaint specifically allege that the defendants targeted the plaintiffs and filed these very charges without any legitimate penological justification in violation of their constitutional rights, especially those under the First Amendment. These emails with attachments constitute evidence which is directly responsive to those allegations. As such, plaintiffs have shown substantial need of the materials, and there is no other way to obtain the materials by other means. Plaintiffs would be entitled to the documents under the qualified privilege of work product even if the privilege were valid.

The work product privilege, however, simply does not apply to these documents. Although Sha Carter testified in her affidavit[25] filed on January 15, 2010, that she is

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[24] Rec. doc. 361, p.8.

[25] Rec. doc. 360-3, pg. 1.

assigned to the civil and criminal cases involving plaintiffs, there is no testimony from LSP personnel – whether named defendants or employees – that the LDOJ was in any way actively involved with the prosecution of this case in 2008. Outside counsel has been handling the case for years on behalf of the LSP defendants. Even when discussing the internal investigation leading to disciplinary charges, the deponents did not discuss either the disciplinary investigation or the LDOJ's involvement as related to, arising from, or in furtherance of the ongoing civil litigation. The comments from LSP deponents were instead that it was highly unusual for anyone from the LDOJ to be involved in *internal LSP investigations of disciplinary violations.*

That Sha Carter's involvement in going through telephone communications in order to find disciplinary violations was unusual does not convert that action into work product in furtherance of the ongoing litigation. Her actions in the context of the events is all that matters. This disciplinary investigation, with the assistance of Sha Carter, an investigator/paralegal from the LDOJ, was conducted by LSP investigators under the direction of Lieutenant Colonel McDonald, all of whom routinely handled investigations at LSP. It was not the prospect of litigation that led to this investigation, but rather a prospect separate and distinct from the ongoing litigation. It was the search for disciplinary charges that could be lodged against the plaintiffs that would be "sufficient justification for stiff disciplinary action."[26] As explained in *Wright & Miller,*

[26] DPSC 019936, Achord to Carter.

> . . . even though litigation is already in prospect, there is no work product protection for documents prepared in the regular course of business rather than for purposes of the litigation.[27]

Using defendants' logic, any claim later lodged as a result of defendants' actions would be protected by the work product doctrine, because they could always argue that they anticipated that an inmate would file a claim against them. This is not a situation where the incident giving rise to the lawsuit has already occurred and defendants are gathering information in defense of the anticipated or already filed lawsuit. These are the very actions giving rise to the claim itself. Investigatory files leading to disciplinary charges are routinely provided in discovery, subject to confidentiality orders to protect the identity, for example, of confidential informants in the prison setting.

The overwhelming evidence from both the testimony by LSP personnel and from the content of the withheld documents themselves shows nothing other than state employees – one from the LDOJ and several from LSP – joining forces in an investigation to find disciplinary violations of LSP rules and regulations. The work product doctrine does not apply to the withheld documents.

Attorney-Client Privilege:

Where, as here, a federal question provides the basis for subject matter jurisdiction, federal common law governs the resolution of the privilege issue. *United States v. Zolin, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989)*. The attorney-client privilege under federal common law consists of the following elements: (1) a confidential communication; (2) made to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion, legal services, or assistance in a legal proceeding. *United*

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[27] 8 *Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* ¶ 2024 at 198-99(1970).

States v. Robinson, 121 F3d. 971, 974 (5th Cir. 1997), cert denied, 522 U.S. 1065, 118 S.Ct. 731, 139 L.Ed.2d 669 (1998). The privilege does not protect documents and other communications just because they arise from an attorney-client relationship. *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 477(N.D.Tex.2004). It protects "only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976) The attorney-client privilege does not protect against the disclosure of underlying facts. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96, 101 S.Ct. 677, 685, 66 L.Ed.2d 584 (1981).

As stated previously, most of the content contained in these withheld documents constitute phone lists and summaries/transcriptions of calls made by plaintiffs. Nothing in that information constitutes a confidential communication between client and lawyer. The remainder of the content concerns comments made by the sender and recipient of the emails.

The defendants argue that Sha Carter, a paralegal at the LDOJ's office, should be considered an attorney or his substitute for purposes of the privilege, and thus her communications with LSP employees should be confidential. Without even reaching the question of whether every attorney and staff member at the Attorney General's office could be considered to be in an attorney-client relationship with defendants in the confines of this case where defendants have been represented by outside counsel for years, and whether every employee at LSP can be considered a client in the case, even though not named as a defendant, the content of the communications simply does not fall within the definition of attorney-client privileged communication. To fall into the definition, it is necessary to have (1) a confidential communication; (2) made to a lawyer or his subordinate; (3) for the

primary purpose of securing either a legal opinion, legal services, or assistance in a legal proceeding. *United States v. Robinson*, 121 F3d. 971, 974 (5th Cir. 1997), cert denied, 522 U.S. 1065, 118 S.Ct. 731, 139 L.Ed.2d 669 (1998).

First, as discussed earlier, there is nothing in any of the emails to suggest that anyone from LSP was seeking legal advice about this case. The primary purpose of these communications was to secure the summaries of telephone conversations, lists of who the plaintiffs called, and any ideas for converting that information into disciplinary charges against the plaintiffs. The one instance where any lawyer advice is mentioned consists of Sha Carter indicating that *she* would ask one of the lawyers (in what case?) a question about one of the contemplated disciplinary charges.[28] She makes this comment only after asking Achord whether or not he could charge them [Woodfox and Wallace] with participating in gang activities.[29] There is no subsequent email clarifying whether she asked any lawyer anything or not, and there is no email from LSP asking for any lawyer's advice or opinion.

But even if she did ask a lawyer a question about the disciplinary investigation, that one action would not turn what is an administrative function of investigating rule violations into an attorney-client relationship. Her role, as evidenced by the emails, consisted of synthesizing and putting together information gathered from listening to the plaintiffs' phone calls and then brainstorming with Bobby Achord, an LSP investigator, to come up with

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[28] DPSC 019933. There is one other instance of a lawyer's name being mentioned, but the defendants have not suggested that he is an attorney for the defendants. See ftnt. 30.

[29] DPSC 019931, Carter to Achord.

disciplinary charges.[30] This is not the role of an attorney, but rather that of a state official's activities in the context of an alleged constitutional violation that now has been asserted in a valid complaint. There is nothing in any of the emails to indicate that LSP employees were seeking legal advice from attorneys through communicating with Sha Carter or that Sha Carter was assisting "an attorney to formulate and render legal advice to a client."[31] The documents submitted for *in camera* review are not protected by the attorney-client privilege.

The Law Enforcement Privilege:

"Federal common law recognizes a qualified privilege protecting investigative files in an ongoing criminal investigation. . . ." *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir.1991). The latest Fifth Circuit case to discuss the privilege is *In re: United States Department of Homeland Security*, 459 F.3d 565 (5th Cir. 2006). In this case, the issue was whether such a privilege exists in the Fifth Circuit; thus the analysis was in terms of the parameters of the privilege and not in the context of specific application to a particular set of documents. The court found that the privilege existed, and instructed the district court to conduct an *in camera* inspection of the disputed documents and to apply the *Frankenhauser* test (*Frankenhauser v. Rizzo*, 59 F.R.D. 339,344 (E.D. Pa. Mar. 13, 1973)), in deciding the applicability of the privilege. That test consists of the following elements:

1. the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;

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[30] See, *Hpd Labs., Inc. v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J. 2001) (Where paralegal gave advice, court stated, "The disputed documents do not enjoy attorney-client protection because the statements contained in those documents were not made either for the purpose of obtaining legal advice from an attorney or to assist an attorney to formulate and render legal advice to a client.")

[31] *Id.*

2. the impact upon persons who have given information of having their identities disclosed;

3. the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure;

4. whether the information sought is factual data or evaluative summary;

5. whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;

6. whether the police investigation has been completed;

7. whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation;

8. whether the plaintiff's suit is non-frivolous and brought in good faith;

9. whether the information sought is available through other discovery or from other sources;

10. the importance of the information sought to the plaintiff's case. [32]

The court further noted that the privilege was not so broad as the defendants in this case would have it to be. The district court must examine the privilege within the constraints of time and relevancy, and the court cautioned that certain types of information would not be protected. For example, the privilege probably would not apply to (1) people who were investigated in the past but who are no longer under investigation; (2) people who are merely suspected of a violation without being part of an ongoing criminal investigation, and (3) people who may have violated only civil provisions. *Id, at* 571. The court concluded that the privilege "lapses after a reasonable period of time – either at the close of an investigation or at a reasonable time thereafter based on a particularized assessment of

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[32] *See, In re: U.S.Dep't of Homeland Security*, 459 F.3d at 570.

the document."[33] Furthermore, while all privileges are narrowly construed, those in civil rights cases are subject to even more scrutiny than in other cases:

> Special caution should be exercised in recognizing a privilege in a civil rights case because "application of the federal law of privilege, rather than state law, in civil rights actions is designed to ensure that state and county officials may not exempt themselves from the very laws which guard against their unconstitutional conduct by claiming that state law requires all evidence of their alleged wrongdoing to remain confidential." *Torres,* 936 F.Supp. at 1213; *accord Hinsdale*, 961 F.Supp at 1495. To invoke a privilege against disclosure of law enforcement records, the Sheriff [law enforcement] must make a "substantial threshold showing" that specific harms are likely to result from disclosure." *Morrissey v. City of N.Y.*, 171 F.R.D.85,92 (S.D.N.Y.1997).[34]

The defendants, acting through the newly enrolled LDOJ's office, submitted two exhibits in support of their claim of law enforcement privilege. The first is the affidavit[35] of Sha Carter, "an investigator and/or paralegal" with the LDOJ.[36] According to Sha Carter:

> 2.
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> . . . [S]he has obtained credible evidence of witness tampering, corrupt influencing and perjury, inter alia by individuals sympathetic to the plaintiffs and attorneys representing the plaintiffs jointly in their criminal case, and that these possible offenses involve at least one eyewitness to the murder committed by the plaintiffs on April 17, 1972;
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> 4.
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> That the documents at issue in the attached motion are part of an open investigation by the Louisiana Department of Justice regarding possible witness tampering, corrupt influencing and perjury, inter alia by the plaintiffs,

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[33] *Id.*

[34] *Darensburg v. Lee*, 2004 WL 1158039 (E.D.La.)

[35] See rec. doc. 360-3, p.1.

[36] The LDOJ's office filed a motion to enroll as counsel for defendants in order to file a motion for protective order and to assert the law enforcement privilege. Rec. doc. 356. Counsel who have represented defendants for years raised the law enforcement privilege in their memoranda but did not address the privilege except in passing, and did not file the supporting affidavit or join in the filing of the protective order. See rec. doc. 360.

their attorneys and their supporters, and the illegal use of the prison telephone system to facilitate these offenses;

5.

That this investigation is ongoing and disclosure of these documents would compromise the methods of the investigation, as well as the State's legitimate efforts in (a) discovering the extent of and the parties to a possible conspiracy to tamper with and/or corruptly influence an eyewitness to the murder committed by the plaintiffs, and (b) eliminating illegal prison communications by plaintiffs and their sympathizers in order to halt further offenses involving witnesses.

The LDOJ's office also attached a letter dated November 17, 2008, from Samuel D'Aquilla, the District Attorney in West Feliciana Parish, requesting to assist and advise in the "investigation and/or prosecution (or other action you deem appropriate)" including State v. Albert Woodfox, Herman Wallace, et al, "their associated cases and activities, not limited to but including appeals, post-conviction relief, and trials before and during their confinement at Angola State Penitentiary and afterwards as indicated.[37]"

Other than these bare allegations by a paralegal employed by the LDOJ and a vague, open-ended letter offering to investigate and/or prosecute anything and everything having to do with plaintiffs Woodfox and Wallace, and which is dated *after* the plaintiffs were first charged with a violation (30W) on November 13, 2008, and taken to administrative segregation, there is nothing to support the claim of law enforcement privilege. Pretermitting whether or not a paralegal/investigator even has the capacity to assert the claim in the first place, there simply is nothing in the withheld documents themselves to support the claim. *Exxon Corporation v. Department of Energy*, 91 F.R.D. 26, 43 (N.D. Tx May 1981) (only the agency head may assert the privilege after that

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[37] See rec. doc. 360-2, p. 1

officer's personal consideration of the matter); *see also United States v. O'Neill*, 619 F.2d 222, 226(3rd Cir. 1980) *quoting, United States v. Reynolds*, 345 U.S. 1, 73 S. Ct. 528, *8 (1953).

Applying the *Frankenhauser* test, as the court must, and balancing the government's interest in confidentiality against the plaintiffs' need for the documents, the court finds no factor which weighs in favor of withholding the documents. Perhaps the LDOJ's office is conducting some other investigation in connection with the pending habeas actions or anticipated criminal actions should plaintiffs succeed in having their convictions overturned, but this investigation clearly is not the one described in the affidavit. According to the plain reading of the documents, this investigation evidences an intense search for rule violations committed by the plaintiffs at LSP, which is not an "ongoing criminal investigation by law enforcement" just because a paralegal at the LDOJ's office assisted in LSP's civil investigation. Furthermore, as McDonald testified, there are no witnesses, no interviews – only recordings of plaintiffs' phone calls and some internet research involved in this investigation. The withheld documents are merely evidence of the LSP investigation of Wallace and Woodfox to determine what LSP disciplinary violations could be found in their recorded telephone conversations. The purpose of the "investigation" is reiterated again and again in emails exchanged between Sha Carter and various individuals at LSP involved in the investigation:[38]

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[38] In *Everitt v. Brezzel*, 750 F.Supp. 1063 (D. Col. Nov. 1990), as part of the procedure for determining whether certain documents were subject to the law enforcement privilege, the court allowed both sides to view the documents under an order of confidentiality pending a final ruling so that the parties were able to argue their respective positions in context of the documents. It is difficult for either side (and for the court) to apply the law in a vacuum. This order will be filed under seal and under order of strict confidentiality pending any appeal of the order, since it contains excerpts from the withheld documents.

- A lot of these media and 3 ways you can cross charge them as violations– All of the media calls to Prison Radio, Noelle Hanrahan, you can charge him with the interview violation, but also as lying to you as they put her on their list as a "friend.'"[39]

- . . . Angad is asking him about the chance of getting into trouble with the interviews and Wallace says, ... "I am going to speak out irrespective of consequences." . . . So you can prove he knows it is wrong to do it and talks freely about doing it in defiance of the rules.[40]"

- These media calls are a threat to security – also Alan Usry suggestred[sic] that all those attorneys especially making the 3 ways should lose all phone privileges in the prison, totally – all clients. . . .[41]

- I'm having trouble finding a specific Department of Corrections Regulation or Penitentiary Directive or Inmate Posted Policy that says that media interviews by inmates have to be approved by the Warden ahead of time, . . . but maybe I'll have to address this under our catch all of 30.w. . . . " , , , ... I'm going to develop a list of inmate rule violations that I feel can be used against Wallace and Woodfox. I'd like to e-mail these to you for your comments before I do the final investigative report.[42]"

- I have roughed out my disciplinary investigations on Woodfox and Wallace. . . . . Let me know if you don't get all 7 documents. . . I am also sending a copy to Lt. Col. McDonald at home for his ideas. With your suggestions I'll run with them.[43]

- I noticed in some of your prohibited activities that participating in gang activities is prohibited – can you charge them with that [?][44]

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[39] DPSC 019953, Carter to Vannoy and McDonald, 11/14/08

[40] DPSC 019950. Carter's email of 11/16/08 to Vannoy and McDonald, who forwards to Achord on 11/17/08.

[41] DPSC 019947 Carter to Achord, 11/21/08. No one has identified Alan Usry as an attorney representing Achord.

[42] DPSC 019947 Achord to Carter 11/21/08.

[43] DPSC 019943 Achord to Carter, 12/07/08.

[44] DPSC 019940, Carter to Achord 12/07/08.

- I might could. Can I say that the Black Panthers is a gang? . . . I did some research on the internet to see if the FBI classified them as a gang but did not find anything. . . .[45]

- I think you would be totally accurate in describing the BPP as an inmate group and/or gang, chapter – . . . these interview they are doing with Prison Radio are broadcast widely in the prison population; they are both using BPP slogans and beliefs; . . .[46]

- In your rules violations on Woodfox, it might be interesting to note in there that 6 of those 10 3 ways were made by two of his attorneys, Nick Trenticosta (2) and Scott Fleming (4); . .. In your rules violations on Wallace, it might be interesting to note that three of these 8 3-ways were made by his attorney Scott Fleming. . .[47]

Even if these documents evidenced an ongoing criminal investigation by law enforcement (presumably the LDOJ), which they do not, there is nothing about the investigation itself that militates in favor of defendants under the *Frankenhauser* test. There is nothing about the review of plaintiffs' recorded phone calls which would discourage citizens from giving the government information. This is not an investigation arising from witnesses providing information.[48] There likewise is no information in any of the documents from confidential informants. In fact, McDonald testified to the limited scope of the disciplinary rules violation investigation: the plaintiffs' phone calls, letters, and some internet research along with reviewing regulations and rules for possible violations. Every phone call contains a warning that it might be monitored, and plaintiffs certainly were aware that their mail could be read and their calls recorded, so this situation is not like one where

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[45] DPSC 019933 Achord to Carter 12/07/2008.

[46] DPSC 019931, Carter to Achord, 12/08/08.

[47] DPSC 019923, Carter to Achord, 12/08/08.

[48] The defendants sought to redact the identity of "witnesses," but these were not witnesses, but rather comments about plaintiffs' friends and associates. Musings over whether they could be charged with violations does not constitute an "ongoing criminal investigation."

wiretaps are in progress unbeknownst to the individual being recorded. This matter does not involve an internal investigation of law enforcement personnel. There is no criminal proceeding pending or likely to follow from the plaintiffs' disciplinary rules violation investigation.[49] The investigation into the rules violation was long ago finished and the charges long ago filed in December 2008.[50] The plaintiffs have brought a non-frivolous suit in good faith. This information is not available through other discovery – the plaintiffs have tried for some time to obtain this information, and the information is important to the plaintiffs' case. All *Frankenhauser* factors favor the plaintiffs.

These documents are directly responsive to the plaintiffs' allegations in the Third Amended Complaint that they were targeted for rule violations in violation of their constitutional rights. These documents are not, on their face, evidence of an "ongoing criminal investigation by law enforcement," but rather are evidence of an investigation by state officials of possible prison rule violations. These investigations are routinely provided in discovery. Having a paralegal from the LDOJ's office assisting LSP personnel in the investigation, however unusual, does not alter its characterization. The documents are not protected by the law enforcement privilege, the work product privilege, or the attorney-client privilege and should be produced in their unredacted form to the plaintiffs.

Accordingly, **IT IS ORDERED** that plaintiffs' motion to compel documents withheld on the basis of privilege is **GRANTED**, and defendants' motion for protective order is **GRANTED IN PART AND DENIED IN PART** as follows:

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[49] That the LDOJ's office may decide to prosecute plaintiffs in the event they succeed in having their prior convictions overturned is not the same as showing that criminal charges either are or are likely to follow from this investigation into LSP disciplinary violations.

[50] Plaintiffs' appeals of these charges were final in March 2009.

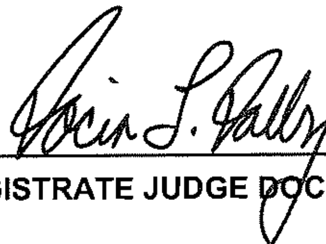
1. All withheld documents shall be filed in the record under seal as though held *in camera* in order to have the documents available to the court for purposes of appeal. These documents shall **not** be sent to counsel nor are they available for viewing by anyone other than the court unless otherwise ordered by the court.

2. This order shall be filed under seal, forwarded to counsel by mail, and shall remain confidential and for "attorney's eyes only" unless this order is affirmed on appeal by the district court or the expiration of time to appeal to the district court has elapsed. The contents of the order may not be used for any purpose other than appeal of this order unless the order is affirmed by the district court or the expiration of the time to appeal to the district court has elapsed and no appeal has been taken.

3. Any pleadings and/or memoranda filed in connection with an appeal of this order shall be filed under seal.

4. Defendants shall produce to the plaintiffs all withheld documents provided to the court within 5 days of the decision by the district court on appeal should this order be affirmed, or within 5 days of the expiration of the time to appeal to the district court if no appeal has been taken.

Signed in Baton Rouge, Louisiana, on February 10, 2010.



MAGISTRATE JUDGE DOCIA L. DALBY

EXHIBIT F

clothes on and go on, on up there. Well, I gets up and puts my clothes on and I goes up there and when I walks in that door, I knowed it was some stuff. I felt it, in here, you know, you can feel when something done gone wrong, you know, and you know something about it, you know, you can feel it all in your bones, so when I walked in there, they was all setting around, all around the table, all the Wardens and all the whole administration, and they could tell me -- they went to telling me everything that I did that morning. They told me about what the connection which me and Mr. Miller had and how he would drink coffee from me, and they told me about everything. Well, I knowed somebody had to tell them people, 'cause they wasn't there where I was, you know. Somebody had to tell them people about that.

Q They had some good information?

A They had some too good a information for me. I didn't like that, you know. Now, look, now, I knows that I could get messed around behind this, and I just wasn't going to take no more rap. I set there -- I had the whole world on me. Man, look, I don't want to -- this is the first time in my life ever being on the stand, 'specially against my own race of people. I knowed what the consequences was. I knowed what was going to happen. I knowed if I said no, I didn't know nothing about it then, it was going to be something -- I'm going to get punished behind it, I'm going to get throwed in one of them cells, and I dont stayed in one of them cells too long on death row, and I'm going to be misused, treated in a cool way, you know -- I know that -- but I couldn't stand that no more, so I set there a long time before I answered them people's questions, when they was asking me about who they was. See, I didn't want to tell it. I knowed if I tell it, my life was in jeopardy ...

EXHIBIT G

the finding that it established statistical significance are legal issues; and the decision to consider or refuse to consider evidence in a three stage framework is a legal determination.

SUMMARY OF ARGUMENT

The District Court's ruling would set free an inmate who has been convicted twice for the brutal murder of a prison security officer in 1972. Woodfox has unsuccessfully pursued an array of habeas claims. This appeal does not involve a claim of innocence. There is no claim that Woodfox was somehow prejudiced by the alleged discrimination.[20] The District Court nevertheless has reversed Woodfox's conviction and granted Woodfox's last conceivable challenge to his longstanding murder conviction on the thinnest imaginable allegations of discrimination – driven entirely by statistics that were based on highly questionable data from the 1980s and early 1990s. The District Court found statistical support for discrimination in the selection of – *not the randomly selected members of any grand or petit jury, but* – the foreperson of the second grand jury that indicted Woodfox. Judge Ramshur, the state court judge who appointed the white woman foreperson of that grand jury, died before this habeas was filed and cannot defend his selection.

[20] *Guice v. Fortenberry,* 661 F.2d 496, 499 (5th Cir. 1981) (recognizing that a defendant who has been convicted suffered no prejudice because the grand jury assays only probable cause).

EXHIBIT H

ALBERT WOODFOX, Petitioner - Appellee v. BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY, Respondent - Appellant

No. 08-30958

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

305 Fed. Appx. 179*; *2008 U.S. App. LEXIS 25225

December 12, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the Middle District of Louisiana. No. 06-789-JJB.
Woodfox v. Cain, 2008 U.S. Dist. LEXIS 96146 (M.D. La., Nov. 25, 2008)

COUNSEL: For ALBERT WOODFOX, Petitioner - Appellee: Nicholas Joseph Trenticosta, Center for Equal Justice, New Orleans, LA; Christopher Albert Aberle, Mandeville, LA.

For BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY, Respondent - Appellant: James David Caldwell, Mary Ellen Hunley, Dana J Cummings, Office of the Attorney General for the State of Louisiana, Baton Rouge, LA.

JUDGES: Before KING, DENNIS, and OWEN, Circuit Judges.

OPINION

[*180] PER CURIAM: [*]

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

Before the court is the Emergency Motion for Stay of Release Order filed by respondent-appellant Warden Burl Cain (the Warden or the State), which seeks to have petitioner-appellee Albert Woodfox remain in custody pending review of the district court's final judgment granting Woodfox habeas corpus relief. For the reasons stated below, we grant the motion.

This court reviews a district court's order regarding custody pending appeal of a successful habeas corpus petition pursuant to *Rule 23(d) of the Federal Rules of Appellate Procedure*. **[**2]** The district court's order continues in effect unless the movant can show "special reasons." *FED. R. APP. P. 23(d)*. [1]

1 The Court in *Hilton v. Braunskill* held that "*Rule 23(d)* creates a presumption of correctness for the order of a district court entered pursuant to *Rule 23(c)*, whether that order enlarges the petitioner or refuses to enlarge him, but this presumption may be overcome in the appellate court 'for special reasons shown.'" *481 U.S. 770, 775, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)*. At the time *Hilton* was decided, *Rule 23(d)* stated that the district court order "shall govern review" in this court. After an amendment in 1998, *Rule*

> *23(d)* now states that the district court order "continues in effect pending review." We assume without deciding that this alteration does not change the presumption of correctness which this court must afford the district court's custody determination. However, as described herein, we find that this presumption has been overcome.

[*181] *Rule 23(c) of the Federal Rules of Appellate Procedure* creates a rebuttable presumption that a prisoner who has received habeas relief will be released pending appeal. In *Hilton v. Braunskill,* the Supreme Court set forth the factors that a court should consider **[**3]** in determining whether to enlarge the prisoner or continue custody. *481 U.S. 770, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)*. The Court drew upon the traditional factors for a stay pending appeal: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id. at 776*. These factors are not exclusive:

> [I]f the State establishes that there is a risk that the prisoner will pose a danger to the public if released, the court may take that factor into consideration in determining whether or not to enlarge him. The State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal is also a factor to be considered; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.

Id. at 778.

As the Court recognized in *Hilton,* an appellate court asked to modify (here, to stay) an initial custody determination pursuant to *Rule 23(d)* also looks **[**4]** to the traditional stay factors. We proceed to the most important, whether the applicant (the State) has shown a likelihood of success on the merits. The Court in *Hilton* also recognized that the applicant need not always show a likelihood of success on the merits. The prisoner should remain in custody if the State can "demonstrate a substantial case on the merits" and the other factors militate against release. *Id.* (citing *O'Bryan v. Estelle, 691 F.2d 706, 708 (5th Cir. 1982)*; *Ruiz v. Estelle, 650 F.2d 555, 565-66 (5th Cir. 1981))*. While we are not now convinced that the State has established a likelihood of success on the merits, it has at least shown that it presents a substantial case. Accordingly, we consider the other factors in *Hilton.*

The Court acknowledged that the interest of a successful habeas petitioner in being released pending appeal is "always substantial." *Hilton, 481 U.S. at 777*. Accepting that, we move on to analyze the strength of the other factors, particularly the risk of danger to the public. The *only* testimony on whether Woodfox poses a threat of danger was the deposition of Warden Cain, who testified about his impressions of Woodfox's character and Woodfox's **[**5]** disciplinary record while in prison. The Warden stated his belief that Woodfox has not been rehabilitated and still poses a threat of violence to others. The district court found Woodfox's recent prison record more persuasive than the violent incidents in his past. Although the Warden agreed in a previous deposition that Woodfox had an excellent record during the last five years, he unequivocally stated, in the deposition submitted to the **[*182]** district court in connection with Woodfox's motion for release pending appeal, that he believed, based upon Woodfox's entire history and the particular circumstances surrounding the case, that Woodfox is still too dangerous to be allowed into the general population at the prison or into the public at large. Accordingly, this factor weighs in favor of continuing custody. Additionally, *Hilton* recognizes that the State has a strong interest in continuing custody where there is a long period left on the prisoner's sentence. Woodfox is serving a life sentence and, therefore, the State's interest in continuing custody should be given substantial weight.

Because the State has shown a substantial case on the merits and the remaining factors weigh against release, **[**6]** we GRANT the Emergency Motion for Stay of Release Order. The district court's order entered on November 25, 2008 granting Woodfox's motion for release pending the State's appeal of the grant of habeas relief is STAYED. We order that the State's appeal be expedited and that the case be placed on the March oral argument calendar.

STAYED. APPEAL EXPEDITED.

DENNIS, Circuit Judge, concurs but notes that if the

district court's grant of habeas corpus relief is ultimately affirmed, the State should be prepared to retry the petitioner with the greatest expedition possible thereafter.