UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ALBERT WOODFOX **CIVIL ACTION**
(DOC# 72148)

VERSUS

BURL CAIN, ET AL **NO. 06-789-D-M2**

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have 10 days from the date of service of this Notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. The failure of a party to file written objections to the proposed findings, conclusions, and recommendation contained in a Magistrate Judge's Report and Recommendation within 10 days after being served with a copy of the Report shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge that have been accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in chambers in Baton Rouge, Louisiana, June 10, 2008.

MAGISTRATE JUDGE CHRISTINE NOLAND

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ALBERT WOODFOX (DOC# 72148) **CIVIL ACTION**

VERSUS

BURL CAIN, ET AL **NO. 06-789-D-M2**

MAGISTRATE JUDGE'S REPORT

This matter is before the Court on the original and amended petitions for writ of habeas corpus (R. Doc. 1 and 12) filed by petitioner, Albert Woodfox ("Woodfox"). The State has filed an answer and a memorandum in support of answer (R. Docs. 21 and 22), to which Woodfox has filed a reply memorandum and a supplemental reply memorandum. (R. Docs. 24 and 31).

PROCEDURAL BACKGROUND

In 1972, Woodfox was charged by grand jury indictment with second degree murder in violation of La. R.S. 14:30. The crime, which involved the murder of Brent Miller ("Miller"), a prison guard at the Louisiana State Penitentiary, Angola, Louisiana ("Angola"), occurred on April 17, 1972.[1] Woodfox was tried regarding the murder of Miller in Iberville Parish in 1973 ("the 1973 trial") and found guilty as charged. He received a sentence of life imprisonment at hard labor. He appealed his conviction through the state courts, and in 1974, the Louisiana Supreme Court affirmed his conviction.

In 1992, Woodfox filed a post-conviction relief application, which was granted on the ground that he received ineffective assistance of counsel, and his 1973 conviction and

[1] At the time of the crime, Woodfox was serving a fifty (50) year sentence at Angola based upon an armed robbery conviction and had served approximately one (1) year of that sentence.

sentence were overturned. In March 1993, Woodfox was re-indicted for the first-degree murder of Miller, a charge the State subsequently amended to second-degree murder in December 1996. He was re-tried in December 1998 ("the 1998 trial"), at which time he was again found guilty as charged. He was sentenced to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence on February 23, 1999. Woodfox appealed his 1998 conviction to the Louisiana First Circuit Court of Appeals on August 25, 1999. The First Circuit affirmed his conviction and sentence on June 23, 2000, but remanded the matter with instructions to the trial court to notify the defendant of the time period for filing an application for post-conviction relief. On July 24, 2000, Woodfox filed a writ application with the Louisiana Supreme Court relative to his 1998 conviction and sentence, which was denied on June 15, 2001. Woodfox then filed a petition for writ of certiorari with the United States Supreme Court, which was denied on November 13, 2001.

On October 30, 2002, Woodfox timely filed an application for post-conviction relief with the trial court. The trial court initially denied Woodfox's post-conviction relief application without requiring a response by the State. Woodfox then applied for a writ to the First Circuit Court of Appeals, and on May 16, 2003, the First Circuit granted that writ, finding that Woodfox had "raised claims in the application for postconviction relief that, if established, would entitle him to relief" and remanding the matter to the trial court with instructions to order an answer from the prosecution. The State filed a response in September 2003, and on October 24, 2004, the trial court again denied the post-conviction relief application, adopting the State's response brief as its opinion. Woodfox applied for writs to the First Circuit and to the Louisiana Supreme Court, which were denied without written reasons on August 8, 2005 and September 29, 2006 respectively.

Woodfox then filed his present habeas petition with this Court on October 11, 2006, challenging his 1998 conviction and sentence. He filed an amended habeas petition on February 14, 2007. In his original and amended petitions, he makes the following claims for relief, which the State concedes are timely and have been fully exhausted through the state court system:[2]

> (1) Ineffective assistance of counsel:
>
> > (A) With the State's key witness dead and the physical evidence lost, counsel should have sought to dismiss the prosecution on the ground that retrial two decades after the commission of the crime was unfair and violated his right to confront his accusers;
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> > (B) Defense counsel erred in allowing the prosecutor from Woodfox's original trial to testify about his opinion of Hezekiah Brown's credibility and demeanor when Brown testified in 1973;
> >
> > (C) Had counsel challenged the bloodstain evidence, the trial court would have been obligated to

[2] The Court agrees that Woodfox's claims are timely and exhausted. His direct appeal was final on November 13, 2001, when the United States Supreme Court denied his application for a writ of certiorari. Woodfox's post-conviction relief application was then stamped as filed with the state trial court on October 30, 2002. At that point, he had fourteen (14) days left in the one (1) year time period provided by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which would begin to run again once all proceedings relative to his post-conviction relief application became final. Woodfox's post-conviction relief proceedings became final on September 29, 2006, when the Louisiana Supreme Court denied his request for discretionary review. Accordingly, the deadline for filing his habeas petition with this Court was October 13, 2006. Since he filed his habeas petition on October 11, 2006, such petition was timely under AEDPA.

Furthermore, Woodfox's claims asserted herein were properly exhausted because he raised his grand jury claim prior to trial and then challenged the district court's ruling on that claim through the state appeals process, and he asserted his remaining claims in his post-conviction relief application and requested writs of review from the First Circuit and the Louisiana Supreme Court.

prevent its admission, and if admitted nonetheless, such a challenge would have negated its exculpatory value;

(D) Counsel erred in failing to challenge the State's last-minute claim that an exculpatory finger print may actually be a palm print;

(E) Counsel erred in failing to challenge Paul Fobb's eyewitness testimony;

(F) Counsel erred in allowing the State to argue that the purported statement of Turner was substantive evidence of guilt, which was admitted only for impeachment purposes; and

(G) Counsel was ineffective for failing to defend Woodfox against the State's repeated introduction of accusatory, testimonial hearsay in the form of contents of the prior statement of Chester Jackson ("Jackson").

(2) Suppression of exculpatory evidence: The State suppressed interrogation notes of Paul Fobb and Joseph Richey that contained exculpatory impeachment information, which Woodfox could have used to show that both witnesses had given prior inconsistent statements and that Richey had lied at trial.

(3) Discrimination in the selection of the grand jury foreman: Having alleged a prima facie case of underrepresentation of blacks as grand jury foremen, Woodfox is entitled to a hearing to prove that the process used for selecting grand jury foremen discriminates against blacks.

See, Woodfox's original and amended habeas petitions, R. Docs. 2 and 12.

Although Woodfox has requested an evidentiary hearing with respect to his claims that evidence which was either excluded or unavailable at trial would, when considered in conjunction with the trial evidence, prove his "actual innocence" and regarding his claim

that there was discrimination in the selection of the grand jury foreman,[3] the Court finds that an evidentiary hearing is unnecessary on those issues at this time since other claims raised by Woodfox, which do not require an evidentiary hearing, are dispositive of his petition.[4]

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[3] Woodfox contends that he has met his burden of establishing a *prima facie* claim of discrimination in the selection of the grand jury foreman, and he is therefore entitled to prove his claim at a hearing in which the State may come forward with evidence to rebut the presumption of discrimination. *See*, p.77 of Woodfox's Memorandum in Support of his Amended Petition, R. Doc. 15.

[4] A court may grant an evidentiary hearing under 28 U.S.C. §2254(e) within its discretion. Such a hearing is appropriate where an "'applicant has failed to develop the factual basis of a claim in State court proceedings, . . . [only if] the applicant' can show that 'the claim relies on [either] a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or a factual predicate that could not have been previously discovered through the exercise of due diligence; and the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." §2254(e)(2)(A); *Riddle v. Cockrell*, 288 F.3d 713, 719 (5th Cir. 2002).

A hearing is not warranted in this case on the question of whether Woodfox's trial counsel was ineffective, as the evidence presented herein on that matter (*i.e.*, various declarations prepared by experts retained prior to the filing of Woodfox's post-conviction relief application) was also presented to the state courts during his post-conviction proceedings, and since the Court's consideration of such evidence does not involve credibility determinations, the Court finds that it can appropriately consider the evidence in written form, without the necessity of an evidentiary hearing. *See, Peacock v. State*, 876 F.Supp. 865 (E.D. Tex. 1995)(No federal evidentiary hearing was required where the record was complete, and the evidence presented at trial and in the state habeas proceedings was sufficient to provide full review of the petitioner's claims. Unless a habeas petitioner alleges with specificity a claim upon which relief can be granted and demonstrates that his state hearing was not a full, fair, or adequate hearing, the decision of whether to hold an evidentiary hearing is discretionary with the district court).

The undersigned notes that this Court's prior decision in *Koon v. Cain, et al*, No. 01-327-D, where the petitioner was allowed an evidentiary hearing on the issue of ineffectiveness of counsel, is distinguishable from this matter because, in that case, the petitioner was "prepared to present substantial evidence on th[e] matter during the state post-conviction proceedings, but the state court limited that evidence severely." This Court, in *Koon*, found that the fault for the petitioner's failure to establish the facts he sought to prove during state post-conviction proceedings rested with the trial court, not

FACTUAL BACKGROUND & WOODFOX'S 1998 TRIAL

Sometime between 7:30 and 8:00 a.m. on April 17, 1972, Miller was stabbed to death inside Pine 1 Dormitory ("Pine 1") at Angola where he had purportedly gone to get some coffee. Fingerprints, another bloody print, and a homemade knife were recovered at or near the scene of the crime. Several prison employees and law enforcement officers, including Sheriff Bill Daniel ("Sheriff Daniel") and Deputy Thomas Guerin ("Deputy Guerin"), interviewed inmates at the prison who had been near the scene of the crime on the morning of the murder. The inmates who were interviewed were also searched for suspicious stains on their clothing. Like the other inmates interviewed, Woodfox denied having anything to do with the murder or knowing anything about it. He indicated that he worked in the prison kitchen and that, at the time the murder was alleged to have occurred, he was eating breakfast. However, at the time of his interview, Sheriff Daniel seized the clothing that Woodfox was wearing due to suspicious stains on the clothing.

A break in the case occurred two days after the murder when Sheriff Daniel was advised that an inmate, Hezekiah Brown ("Brown"), wanted to speak with the investigators. At that point, Sheriff Daniel, Deputy Guerin, and Deputy Warden Hayden Dees ("Warden

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with the petitioner, and that the allegations regarding the errors in lawyering, if proven, were serious enough to warrant the attention at a hearing in federal court." By contrast, in the present case, petitioner was permitted to submit the various expert declarations related to his ineffective assistance of counsel claim in state court; however, the state court nevertheless found that such claims lacked merit. Accordingly, an evidentiary hearing is not needed in this Court to bring out evidence that Woodfox was precluded from having considered in state court on the issue of ineffectiveness of counsel. *See*, *Koon v. Cain, et al*, No. 01-327-D, p. 1-2.

Dees"), took a statement from Brown, wherein he claimed that he had witnessed the murder as it was being committed by Woodfox and his fellow inmates, Herman Wallace ("Wallace"), Chester Jackson ("Jackson"), and Gilbert Montague ("Montague").[5] Based upon Brown's statement, Sheriff Daniel filed charges against the inmates named in that statement.

At the time of the murder, Brown lived in Pine 1, and his bed was closest to the lobby door and only a few feet away from where Miller's body was found. Brown served as the State's primary witness against Woodfox during Woodfox's 1973 trial, and because Brown was deceased at the time of Woodfox's 1998 trial, his 1973 testimony was read aloud to the jury, without defense objection. In his 1973 testimony, Brown claimed that he initially told Sheriff Daniel on the day of the murder that he was not in Pine 1 at the time of the murder because he was at the blood plasma unit. He later changed his story and claimed that he had actually hurried to the blood plasma unit after he witnessed the crime in order to fabricate an alibi for himself. Brown explained that, four or five days after the murder, prison officials came to him and told him "everything" that had happened, and at that point, he decided to tell "the truth" about his knowledge of the crime. According to Brown's 1973 testimony, the true story was that, on the morning of the murder, Miller came to him for coffee, as he frequently did, and while Miller was sitting on Brown's bed waiting for the coffee to heat up, Woodfox, Montague, Wallace, and Jackson entered the dorm.

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[5] Wallace, Jackson, and Montague were tried after Woodfox's 1973 trial. Jackson pled guilty to manslaughter in exchange for his testimony as a State witness in the trial against Wallace and Montague. Wallace was convicted of murder, and Montague was acquitted. Throughout the briefs and court documents filed in connection with this matter, Gilbert Montague is also referred to as "Gilbert Montegut" on some occasions.

Brown testified that Woodfox grabbed Miller around the neck and stabbed him in the back, and the others then began stabbing him, pulling Miller off of Brown's bed and into the dorm lobby, where they continued to stab him. Brown also testified twice on direct examination in 1973 that no one had promised him anything in exchange for his testimony, other than to move him to another location in the prison for safety reasons.[6]

To corroborate Brown's transcribed testimony at the 1998 trial, the State also presented the transcribed testimony of another deceased inmate, Paul Joseph Fobb ("Fobb"), who claimed during his 1973 trial testimony that, on the morning of the murder, he was on his way to the plasma unit, when he saw Woodfox come up the side of Pine 1 and then enter that dorm at approximately 8:05 a.m.[7] Fobb did not suggest that there was anything unusual about the sight of Woodfox walking into the dormitory. However, he claimed that seeing Woodfox "stunned" him, and he stood near Pine 1 for five to ten minutes until he saw Woodfox exit Pine 1. According to Fobb's testimony, after Woodfox exited Pine 1, he walked across the walkway to Pine 4 dorm and threw a rag inside that dorm. While Brown testified that all four assailants ran out of Pine 1 together, with him

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[6] As is discussed in more detail below, at Woodfox's 1998 trial, the defense presented testimony, through Warden C. Murray Henderson ("Warden Henderson"), that, prior to providing a statement to Sheriff Daniel, Brown had already been moved out of the main prison to the "dog pen," a minimum security area reserved for trustees who looked after the prison's hunting dogs. Additionally, Warden Henderson conceded that, prior to Brown's testimony at Woodfox's 1973 trial, he personally offered to assist Brown in obtaining a pardon in exchange for Brown's agreement to testify against Woodfox, which pardon Brown ultimately received.

[7] Prison officials were sure, however, that they had already discovered Miller's body in Pine 1 between 7:30 and 8:00 a.m.

following behind them, Fobb testified that he saw only Woodfox exiting Pine 1.[8] Fobb conceded that he had vision problems at the time of the crime; however, he testified that he could see out of his left eye. Because Fobb was also deceased at the time of Woodfox's 1998 trial, his testimony was read aloud to the jury, without defense objection.

The State also presented, at the 1998 trial, the testimony of two living witnesses, who had been Angola inmates at the time of the crime, Leonard Turner ("Turner") (who was released on parole the day after Miller was killed but was later convicted and sentenced to prison for armed robbery) and Joseph Richey ("Richey"). Turner testified that, although he did see Miller near Brown's coffee pot on the morning of the murder, he had left the area where the crime occurred before anything happened. He indicated that he did not know anything about the murder and that he had never previously implicated Woodfox. During the 1998 trial, however, the State impeached Turner with an unsigned, handwritten statement taken on the day of the murder by someone claiming to have witnessed the murder being committed by Woodfox and others. Turner testified that he did not recognize the statement and that it was not his. In an effort at proving that the statement was, in fact, Turner's, the State called former prison officer, C. Ray Dixon ("Captain Dixon"), who examined the statement and recognized it as being in his own handwriting. Captain Dixon further testified that, although he had no independent recollection of the contents of the statement, he recalled having taken it from Turner at the request of Warden Dees. Warden Dees also testified that he told Captain Dixon that Warden Henderson had requested that

[8] Additionally, although Fobb testified that Woodfox was wearing a hat on the morning of the murder, Brown indicated that he was wearing a blue handkerchief on his face at the time of the murder.

a statement be taken from Turner. Warden Henderson, however, testified that he had no knowledge of any statement that Captain Dixon took from Turner.

Richey provided live testimony at the 1998 trial, indicating that, on the morning of the murder, he was brushing his teeth in Pine 4, and he saw Miller enter Pine 1 close to 8:00 a.m. He said that, hoping to pursue an earlier discussion about Vietnam that he had had with Miller, he walked out of Pine 4 toward Pine 1, and as he was approaching Pine 1, he saw Turner coming out at a fast pace, followed by Woodfox, Montague, Jackson, Wallace, and then Brown, in that order. He testified that each of the men, except Brown, was headed toward the prison snitcher gate, while Brown, who had come out in his pajamas, turned around and went back into Pine 1.[9] Richey then saw Brown come out of Pine 1 fully dressed and heading in the same direction as the other inmates. During his testimony, Richey did not mention seeing Woodfox walk over to Pine 4 and throw a rag into it, as Fobb had testified. He also did not mention seeing Fobb or any other inmates or guards anywhere in the area. Finally, Richey testified that he went inside Pine 1 and saw Miller's body, causing him to think that the inmates he had seen exiting the building were going to seek medical assistance.[10]

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[9] Richey further indicated that none of the men were wearing gloves or bandanas, that none of them had any blood on them, and that Woodfox was not wearing his glasses. He also testified that, as Woodfox was leaving Pine 1, he bumped into a trash cart being pushed by an inmate, who went by the name of "Fess." The 1973 testimony of Fess was presented by the defense later in the trial however, and Fess indicated that he did not see Woodfox on the morning of the murder.

[10] Richey had previously given a signed statement to Warden Dees and Captain Dixon on May 16, 1972, wherein, unlike his trial testimony, he stated that, as he approached Pine 1 on the morning of the murder, Turner and Brown threw the door open, allowing him to see Miller trying to stand up and falling back to the floor. In contrast to his trial testimony, the signed statement also indicated that Richey then

During the 1998 trial, the State also introduced the 1973 trial testimony of Carl Cobb, Jr. ("Cobb"), the supervisor of the Louisiana Police Crime Lab at the time of the murder. As is discussed in detail below, Cobb testified regarding the test results on small stains found on clothing purportedly seized from Woodfox shortly after the murder.[11] According

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entered Pine 1, at which point Woodfox, Wallace, Montague, and Jackson passed him and exited the dorm going in different directions. Richey's statement further stated that "[i]t looked like they expected me to walk into something." At the 1998 trial, Richey testified that the information contained in the May 16, 1972 statement was incorrect because of errors by the typist, and although he signed the statement, he claimed that he never reviewed it. He further indicated that he had been allowed to "revise" that statement in a meeting with the attorney general's office prior to Woodfox's prosecution; however, the "revised" statement was not the one about which defense counsel questioned him at trial.

Finally, although Richey indicated that he and Woodfox initially disagreed with each other regarding Woodfox's commitment to ending the practice of homosexual rape and slavery at Angola, he contended that they resolved their issues prior to the murder. Richey also testified that, several years after he provided his May 16, 1972 statement, he was transferred from Angola to the State Police Barracks, where he was given trustee status, assigned to work at the Governor's mansion, and weekend furloughs. Subsequently, when he was convicted for three bank robberies committed while on furlough, that status was revoked, and he was returned to Angola until 1991, when he was released.

[11] The Court uses the term "purportedly" in describing the blood-stained clothing about which Cobb testified because, as Woodfox explains in his memorandum in support of his habeas petition, there is no evidence in the record of this matter reflecting that the blood-stained clothing about which Cobb testified was the same clothing that was seized from Woodfox on the day of his interview with Sheriff Daniel and that the clothing seized was the same clothing that was submitted to the crime lab for analysis. The only document in the record is Sheriff Daniel's "Request for Scientific Analysis," which indicates that the clothing evidence that was seized by Sheriff Daniel on the day of the murder was not submitted to the crime lab until a week after the murder. *See*, p. 96 of Woodfox's supporting memorandum, R. Doc. 2-2, discussing Sheriff Daniel's "Request for Scientific Analysis," State's Exh. 16, Exhibit LL. Moreover, it indicates that, although Sheriff Daniel seized clothing from four inmates on the day of the murder, there are no records indicating that he recorded which clothes he seized from which prisoner and that he kept the clothing separate. Sheriff Daniel simply testified that, when it became necessary to seize clothing from an inmate, he would take the clothing, put it in a bag, and label it for evidence.

to Cobb, the testing revealed a small spot of animal or human blood on the shoe and pants seized from Woodfox, while a small stain on the jacket was human blood. Woodfox, however, testified that the jacket and shoes purportedly seized from him were not his and that, on the day of the murder, he was wearing a grey sweatshirt and rubber boots and was not wearing a jacket.

In an effort at proving Woodfox's "motive" to kill Miller, the State also presented testimony by John Sinquefield ("Sinquefield"), the District Attorney who had prosecuted Woodfox in 1973, that Woodfox, while shackled for a proceeding in the Orleans Parish courthouse in 1971, told the audience, "I want all of you to see what these racist, fascist pigs have done to me." When questioned about that incident during the 1998 trial, Woodfox indicated that he made such statement because he had just been beaten and maced before being brought into the courtroom. During the 1998 trial, the State also presented a letter Woodfox wrote to an acquaintance after he had been accused of the murder of Miller and placed in lockdown, in which he spelled the word "America" with three Ks.[12]

Finally, the State alleged that another letter written by Woodfox existed that had been written after he was placed in lockdown and in which he expressed the opinion that "all correctional officers were pigs and that all white races should be killed." However, the State never produced the actual letter and instead had Jim Stevens, the director of prison classification in 1972, testify to the contents of the alleged letter. The State also introduced a prison memo instructing that the alleged recipient of the letter, Shirley Duncan, be

[12] Evidence was also presented that, at the time of his incarceration at Angola, Woodfox was a self-admitted member of the Black Panther Party.

removed from Woodfox's prison visitor's list.

Woodfox testified on his own behalf at his 1998 trial. He denied killing Miller and indicated that he never had any unpleasant encounters with Miller. He testified that he was eating breakfast in the dining hall at the time of the murder, and two other inmates testified that they recalled being with or seeing Woodfox around the time of the murder. Another inmate, Fess Williams ("Fess"), testified that he was on the walkway outside Pine 1 all morning during breakfast and never saw Woodfox on the walkway, although he did see Brown returning from the dining hall after breakfast. None of the prison guards, including the one stationed at the security gate on the walkway within one to two hundred feet from the Pine Unit dorms, reported seeing Woodfox or any of the other defendants running out of Pine 1 on the morning of the murder. In his defense, Woodfox relied upon the fact that the State had failed to match a bloody print on the wall above Miller's head to him or any of the other perpetrators identified by Brown. He also theorized that the reason he was charged with the murder of Miller was because he was a member of the Black Panther Party and an activist for prison reform. He asserted that, although he was an activist, violence and murder were not part of his plan since his activism arose from a desire to stop the known violence in the prison system.[13] He contended that prison officials "framed" him

[13] Testimony was presented at the 1998 trial about the violent situation at Angola prison in 1972. Warden Henderson testified that the prison, in 1972, was a "sad situation" that "couldn't go anywhere but up," and Sheriff Daniel agreed that the prison, in 1998, was "about a thousand percent better than in '72." According to the testimony of Richey, at the time of Miller's murder, stabbings occurred on a daily basis at Angola, and killings on a weekly basis. Moreover, it was recognized that there was a widespread problem with molestation and homosexual rape, through which certain inmates were known as "gal boys" and were sold and traded like slaves. Richey even testified that prison officials condoned such behavior as a way of keeping the prison population under control. According to Woodfox's defense theory, he and others were

by coercing inmates to lie about what they had seen on the day of the murder in exchange for favorable treatment and early release from prison.

LAW & ANALYSIS

I. Legal standards concerning habeas relief:

In order for this Court to grant an application for a writ of habeas corpus as to any claim which has been previously adjudicated on the merits in state court, the Court must find that adjudication of such claim: (1) resulted in a decision that is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1) and (d)(2). A 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 different than [the] Court has on a set of materially indistinguishable facts'." *Gardner v. Johnson*, 247 F.3d 551, 557 (5th Cir. 2001), quoting *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A decision is an "unreasonable application of federal law"

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working to restore some measure of dignity at the prison by stopping the sexual rape and molestation of inmates. He contended that he informed predatory inmates, purportedly including Brown and Richey, that he would protect new inmates arriving at the prison from such abuse. However, defense counsel did not present any witnesses to substantiate Woodfox's assertion that Brown and Richey were predatory inmates.

Finally, Woodfox contended that Warden Dees, who was the acting warden until Warden Henderson arrived, did not want reform and refused to follow federal court orders regarding the treatment of inmates. Woodfox asserted that such recalcitrance on Warden Dees' part affected the investigation of Miller's murder, in that Warden Dees seemed to have made up his mind about who committed the murder before sufficient evidence had been obtained, resulting in Warden Henderson admonishing him.

if the state court "identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Factual findings of the state court are presumed to be correct and are deferred to "unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding'." *Id.*, quoting *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000)(quoting 28 U.S.C. §2254(d)(2)).

II. Woodfox's ineffective assistance of counsel claims:

A habeas petitioner seeking to prove ineffective assistance of counsel must meet the two-pronged burden of proof set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner must affirmatively demonstrate:

> (1) that his counsel's performance was "deficient", *i.e.*, that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; *and*
>
> (2) that the deficient performance "prejudiced" his defense, *i.e.*, that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial where the result is reliable.

Strickland, 104 S.Ct. at 2064.

(A) Was defense counsel's conduct deficient?

To satisfy the deficiency prong of the *Strickland* standard, the petitioner must demonstrate that his counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir. 1986), *cert. denied*, 479 U.S. 1057, 107 S.Ct. 935, 93 L.Ed.2d 985 (1987). The reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence and that, under the circumstances, the challenged action might be considered sound trial strategy. See *Bridge*

v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). The court, therefore, must make every effort to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time of trial. *Martin*, 796 F.2d at 817. When it is apparent that the alleged incompetent acts of the attorney were in fact conscious strategic or tactical trial decisions, review of the acts must be "highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2587 91 L.Ed.2d 305 (1986).

(1) Counsel's failure to quash the 1998 indictment when the State's key witness was dead and the physical evidence lost:

In this claim, Woodfox contends that his counsel was deficient in failing to quash his 1998 indictment because re-trial two decades after the commission of the crime was unfair and violated his right to confront his accusers.[14] He argues that the delay adversely affected his defense because the eyewitnesses who testified against him during the 1973 trial, Brown and Fobb, died prior to his 1998 trial and therefore could not be cross-examined, and the physical evidence which was used against him during his 1973 trial could not be located and was therefore unavailable for scientific testing by defense counsel prior to the 1998 trial. He also notes that several defense witnesses died or could not be found as a result of the passage of time, and crucial State witnesses, such as Cobb, the witness who oversaw the State Crime Lab where the bloodstained clothing used against

[14] After Woodfox was convicted in 1973, the indictments of others implicated in the crime, including those of Wallace, Montague, and Jackson, were quashed because the grand jury was defective in that it discriminated against African-Americans and women. Due to the ineffectiveness of Woodfox's 1973 trial counsel, the defectiveness of his 1972 grand jury indictment was not discovered and remedied until 1992, at which time his 1973 conviction was overturned.

Woodfox was analyzed, had also died.[15]

Of most significance to Woodfox's arguments relative to this claim is the death of the State's primary eyewitness, Brown, whose testimony both the State and the state trial court admitted was "so critical to [the prosecution's] case that without it there would probably be no case." As discussed above, during the 1973 trial, Brown testified that he witnessed the murder in question as it was being committed by Woodfox and his fellow inmates, Wallace, Jackson, and Montague. Brown also testified that no one had promised him anything in exchange for his testimony, other than protection from possible retaliation. Woodfox contends herein that Brown's 1973 testimony, which was read aloud to the jury during the 1998 trial by an investigator with the Louisiana Department of Justice, Larry Moore, without objection by defense counsel, runs afoul of the requirements of the Confrontation Clause because the jury was not able to assess Brown's demeanor firsthand,[16] and because

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[15] While Woodfox asserted this claim (that his indictment should have been challenged on Due Process and Confrontation Clause grounds) in his application for post-conviction relief, he also asserted therein that his counsel should have challenged his indictment on speedy trial grounds. The state trial court, through its adoption of the State's opposition to Woodfox's post-conviction relief application as its reasons for denying that application, only addressed Woodfox's speedy trial arguments and did not address his Due Process and Confrontation Clause contentions. Thus, although Woodfox "fairly presented" his Due Process and Confrontation Clause contentions for purposes of exhaustion under AEDPA, since the state court completely failed to address those arguments, this Court will review those contentions *de novo*, rather than under the deferential standard of review typically used where a state court has adjudicated a claim on its merits. *Lambert v. Beard*, 2007 WL 2173390 (If the state court has adjudicated a claim on its merits, the claim is to be considered under AEDPA's deferential standard of review. On the other hand, if petitioner "fairly presented" a claim to the state court (*i.e.*, exhausted it), but the state court completely failed to address it, or refused to consider it because of an inadequate procedural bar, the federal district court reviews it *de novo*).

[16] Woodfox's amended petition explains:

Woodfox's counsel was unable to impeach and otherwise cross-examine Brown concerning, among other things, the promise of a pardon made to him by the head warden in exchange for his 1973 testimony.[17]

> With Brown's absence from the courtroom, the jury did not get to see, hear, or otherwise evaluate the demeanor of this serial rapist, who had once sat on death row. Instead, the jury experienced Brown's 1973 testimony as a play acted out in the courtroom, with the prosecutor playing the role of the original prosecutor and an investigator with the Louisiana Department of Justice, in a suit and tie, playing the role of Hezekiah Brown, as he read Brown's 25-year-old answers aloud to the jury. The confrontation clause cannot permit such recasting of a character whose credibility is of such vital importance.

See, R. Doc. 15, p. 48-49.

[17] According to evidence presented at the 1998 trial, Brown was pardoned by the governor and released from his life (formerly death) sentence and prison in 1986, after years of effort by Warden Henderson and other DOC officials. *See,* Trial transcript, 1949-62. Beginning a month after Brown testified against Wallace, Warden Henderson wrote several letters to Elayn Hunt, the Secretary of Corrections, and Frank Shea, Brown's sentencing judge, in which he pleaded for a pardon for Brown, citing in support of his pleas Brown's testimony against Woodfox and his co-defendants. Warden Henderson also signed a letter authorizing Angola's business manager to pay for Brown's clemency advertisement out of the Louisiana State Penitentiary budget. *Id.*, at p. 1958. He further acknowledged authorizing his staff to prepare a November 4, 1975 letter from Brown to the Board of Pardons, in which Brown informed the Board that an unprecedented number of high-ranking prison and prosecution officials intended to appear before the Board on Brown's behalf, and Warden Henderson testified that his successors, including Secretary of Corrections C. Paul Phelps, continued pressing for Brown's release "on the basis of agreements . . . previously made with Hezekiah Brown." *Id*., p. 1961.

In addition to receiving the pardon, the evidence presented at trial also revealed that Brown received incentives at the prison in exchange for his testimony, including a carton of cigarettes per week and transfer to a minimum-security protection area of Angola's prison, the dog pen, where he initially lived with 10 to 12 trustees in a three to four bedroom house with a kitchen and dining room and was later given his own private room with a television in a separate building. *See*, Trial transcript, p. 1977; Exhibit 9 to Woodfox's post-conviction relief application, a 1978 letter between Angola Warden

Specifically, Woodfox argues herein that his 1973 counsel did not have an opportunity to cross-examine Brown regarding the prospect of a pardon and incentives because his counsel had no information in that regard at the time of the 1973 trial since the State had suppressed that information and since Brown twice denied receiving anything in exchange for his testimony. The State's withholding of such information has, in fact, been recognized as a *Brady* violation by the 19th Judicial District Court in relation to the conviction of one of Woodfox's co-defendants, Wallace. On November 22, 2006, a Commissioner with the 19th Judicial District Court, Parish of East Baton Rouge, recommended that Wallace's 1974 conviction for the murder of Miller be reversed based upon such *Brady* violation. Brown had also testified at Wallace's trial, and based upon Warden Henderson's testimony in Woodfox's 1998 trial regarding the incentives and pardons that Brown received in exchange for his 1973 testimony, the Commissioner found that "such favors, together with the promise to help obtain a pardon, in light of the inconsistencies of Chester Jackson's testimony, should have been disclosed to the Defense before trial, as they weighed on the credibility of Hezekiah Brown," and that, after cumulative evaluation of all of the evidence that was omitted, that failure to inform the defense of such evidence was sufficient to undermine confidence in the proceedings that resulted in Wallace's guilty verdict.

Considering that Woodfox's 1973 counsel was unable to question Brown regarding the promises made to him in exchange for his testimony because such information was still

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Frank C. Blackburn and Secretary of Corrections C. Paul Phelps, in which Blackburn requests authorization to have issued to Brown one carton of cigarettes per week to "partially fulfill commitments made to him in the past with respect to his testimony in the State's behalf in the Brent Miller murder case;" Trial Transcript, p. 1286-87.

being suppressed by the State at the time of the 1973 trial, this Court agrees with Woodfox that his rights under the Confrontation Clause were violated when his 1998 counsel failed to at least object to the admission of Brown's transcribed testimony at the 1998 trial. The Confrontation Clause requires that, where prior testimony is admitted in a later proceeding, the party against whom the testimony is admitted must have had an opportunity to cross-examine the witness at the earlier proceeding "sufficient to endow the testimony as a whole with some 'indicia of reliability'," and the trier of fact must have a "satisfactory basis for evaluating the truth of the prior statement." *Mancusi v. Stubbs*, 408 U.S. 204, 216, 92 S.Ct. 2308, 2315, 33 L.Ed.2d 293 (1972); *U.S. v. Ciak*, 102 F.3d 38 (2 Cir. 1996). When the testimony from a prior proceeding focuses on a different issue such that the witness has not been cross-examined on the now-relevant issue at the earlier hearing, the prior testimony should be excluded on grounds of the Confrontation Clause. *See, Ecker v. Scott*, 69 F.3d 69 (5th Cir. 1995)("[T]rial courts should examine the extent of and motive for the cross-examination of the witness at the prior hearing or trial . . . [T]rial courts should be wary of admitting testimony when defense counsel did not have sufficient motive or opportunity to cross-examine the relevant witness").[18]

Furthermore, it is "axiomatic that defense counsel should be permitted to expose to the jury facts relative to a witness's possible motivation to testify favorably for the prosecution or his potential bias for or against any party to the criminal proceeding," as

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[18] *See also, United States v. Peterson*, 344 F.2d 419 (5th Cir. 1965)[Emphasis added.] ("If it appears that the reception, at a succeeding trial, of evidence taken at a former trial would amount to a denial to the opposing party of the opportunity for *full and complete* cross-examination with respect to every issue in the case to which the testimony of the witness might properly relate, then such evidence is inadmissible at the succeeding trial and should be excluded by the court").

such information is "always relevant as discrediting the witness and affecting the weight of his testimony." *Wilkerson v. Cain*, 233 F.3d 886 (5th Cir. 2000). Finally, the imperative of protecting a defendant's right to effective cross-examination is even more critical where the witness in question is crucial to the prosecution's case, as all parties have conceded Brown was.[19]

In addition to the fact that Woodfox was unable to effectively cross-examine the chief witness against him at his 1998 trial on the issue of bias/motivation for testifying, the primary physical evidence against Woodfox, certain bloodstained clothing, also could not be located for evaluation and testing by defense experts at that time. The First Circuit Court of Appeal's opinion on appeal indicates the significance of such physical evidence in its decision to affirm Woodfox's conviction. Specifically, the First Circuit explained that, "[w]hile some of the physical evidence (such as the fingerprints, the bloody print, and the knife) did not link the defendant or anyone else to the murder, other physical evidence did. During the investigation, clothing recovered from the defendant was found to contain small bloodstains." *See*, Opinion of First Circuit Court of Appeal, p. 24. Despite the importance of such physical evidence to the prosecution's case against Woodfox, Woodfox's counsel failed to object to the fact that the evidence could not be located for testing prior to the 1998 trial and that he would not be able to cross-examine the supervisor of the Crime Lab that

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[19] The Fifth Circuit has recognized that testimony, which only provides cumulative evidence or addresses a portion of the prosecution's case that the defense has not disputed or does not intend to dispute, may be admitted "more readily than testimony not sharing those characteristics." *Ecker*, at 72. Since Brown was the only eyewitness to the murder presented by the State, his 1973 testimony was not cumulative of any other evidence, and it was the most disputed aspect of the prosecution's case. As such, his testimony should not have been "readily admitted" at the 1998 trial without any objection based upon the Confrontation Clause.

performed the testing on the clothing because he had died since the 1973 trial.

Considering the above issues relating to the prosecution's two strongest items of evidence implicating Woodfox in the crime (*i.e.*, the only eyewitness who testified he saw the crime being committed by Woodfox and the only physical evidence linking Woodfox to the crime) in addition to the fact that other witnesses such as Fobb (an inmate who testified he saw Woodfox leaving Pine 1 around the time of the murder) were unavailable and could not be cross-examined,[20] the Court finds that Woodfox's counsel was deficient in failing to challenge the indictment on Confrontation Clause and Due Process grounds.[21]

(2) Did defense counsel act deficiently in allowing the prosecutor from Woodfox's original trial to testify about his opinion of Brown's credibility and demeanor when Brown testified in 1973?

After Investigator Moore read Brown's 1973 testimony aloud to the jury during the 1998 trial, Sinquefield, the prosecutor who had conducted the examination of Brown in

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[20] The Fifth Circuit has explained that the Confrontation Clause expresses a preference for live testimony so that the jury is able to observe the witness's demeanor, and opposing counsel can cross examine the witness. *Ecker v. Scott*, 69 f.3d 69, 71 (5th Cir. 1995). The right of confrontation and cross-examination is "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* The Fifth Circuit has further held that the preference for live testimony increases with the "importance of the testimony" and the degree to which that testimony is conflicting and that, in a "close case," trial courts should take care that "the omission of live cross-examination . . . before the jury not tip the balance . . . against [a] defendant." *Ecker*, at 72. Considering the importance of the testimony of Brown, Fobb, and Cobb to the State's case, the inability to cross-examine them live in front of the jury tipped the balance against Woodfox, and his counsel should have at least objected to Woodfox's prosecution without those live witnesses, through the filing of a motion to quash the indictment.

[21] It should be noted that the grounds provided in La. C.Cr.P. arts. 532-34 are not the exclusive grounds for filing a motion to quash, and Woodfox's counsel therefore could have challenged his indictment on the grounds discussed above. *State v. Foster*, 2002-1259 (La. App. 1 Cir. 2/14/03), 845 So.2d 393.

1973, took the witness stand and testified regarding his account of Brown's delivery of his 1973 testimony. Sinquefield stated the following:

> Hezekiah Brown testified in a good, strong voice, he was very open, he was very spontaneous, he answered questions quickly, and he was very fact specific. He didn't have to hesitate and think about his answers but if you got something wrong he would stop you, even to the extent that in one part of his testimony, I think he – he stopped and corrected me that he said, now, you know, wait, this wasn't Woodfox just by hisself [sic], there were others involved. He would even stop you if you tried to put more on Mr. Woodfox than he thought Mr. Woodfox did. He was very open, very quick. He testified, he didn't hesitate, he testified very clearly and I was proud of the way he testified. I thought it took a lot of courage.

See, Trial transcript, p. 1836-37. Sinquefield also testified that he had discussed the case with Brown prior to the 1973 trial and that his story never changed. *Id.*, at p. 1837. He further indicated that he personally never offered Brown anything for his testimony and that Brown had confirmed with him that no one else had offered him anything in exchange for his testimony, other than to transfer him to a different part of the prison for security reasons. *Id.*, at p. 1830-31. Woodfox's counsel did not object to the above testimony by Sinquefield at the 1998 trial. However, Woodfox raised the issue on appeal, asserting that the trial court erred in allowing the State to introduce such inadmissible opinion evidence. In considering that argument on appeal, the First Circuit noted that it was "troubled by that portion of Sinquefield's testimony wherein he indicated that he was 'proud' of Brown and concluded that Brown's testimony 'took a lot of courage'." The court of appeal explained that, "while not directly mentioning Brown's veracity," such comments by Sinquefield were "personal comments in the nature of his opinions about Brown." While it "strongly disapprove[d]" of that aspect of Sinquefield's testimony, the First Circuit found no reversible

error since that portion of Sinquefield's testimony was "unresponsive to the prosecutor's line of questioning," and the defendant "*did not enter a specific objection* to that portion of Sinquefield's testimony *either complaining that it was his opinion or pointing out the lack of any foundation* regarding Brown's character for truthfulness, reputation, etc." under La. C.Cr.P. art. 841 and La. C.E. art. 103A(1)(Emphasis added).

The Court finds that, even if the trial court's admission of such opinion testimony might not alone constitute reversible error for the reasons articulated by the First Circuit, Woodfox's counsel nevertheless acted deficiently under *Strickland* in failing to object to that testimony. The United States Supreme Court has explained that a prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused can pose two dangers: (1) Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the "imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *U.S. v. Young*, 470 U.S. 1, 105 S.Ct. 1038 (1985).[22] The Supreme Court has therefore held that a prosecutor's statements

[22] *See also, Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005)(It is "patently improper for a prosecutor either to comment on the credibility of a witness or to express a personal belief that a particular witness is lying"); *Bates v. Bell*, 402 F.3d 635, 646 (6th Cir. 2005)("To be certain, prosecutors can argue the record, highlight the inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence. But, they cannot put forth their opinions as to credibility of a witness, guilt of a defendant, or appropriateness of capital punishment"); *United States v. Carroll*, 26 F.3d 1380, 1389 (6th Cir. 1994)("We cannot overstate the extent to which we disapprove of this sort of improper vouching by prosecutors"); *State v. Smith*, 14 Ohio St. 3d 13, 470 N.E.2d 883, 885 (1984)("It is improper for an attorney to express

suggesting that he has personal knowledge of a witness's credibility is "one example of egregious prosecutorial misconduct." *Berger*, at 88-89.[23] In fact, courts have recognized that such misconduct can warrant habeas relief either as a Due Process violation or through a claim of ineffective assistance of counsel where defense counsel fails to object to the prosecutor's commentary. *See, Bates*, at 646 (Prosecutors' misconduct at death penalty sentencing hearing in inciting passions and prejudices of jury, injecting their personal beliefs and opinions into the record, and criticizing defense counsel for objecting to their improper arguments, was so flagrant as to warrant habeas relief in the form of reversal of the death penalty); *Hodge*, at 386 (Child rape defendant was prejudiced by his counsel's failure to object to prosecutor's misconduct, including counsel's suggestions that defendant, expert, and defense counsel were lying, resulting in a finding of ineffective assistance of counsel).

Although the above cases relate to situations where the prosecutor who made the improper comments regarding witness credibility is the prosecutor who is actually trying the case, the Court nevertheless finds that the same concerns apply in the present case relative to Sinquefield's opinion testimony. In fact, the Court agrees with Woodfox's assertion that his counsel's failure to object to Sinquefield's prosecutorial commentary is even more egregious than if he had simply failed to object to comments by the prosecutor actually trying the 1998 case because Sinquefield made the comments under oath as a

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his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused").

[23] The Louisiana Supreme Court has also recognized that even expert testimony concerning a witness' credibility is forbidden as "an encroachment upon the province of the jury." *State v. Foret*, 628 So.2d 1116, 1127-29 (La. 1993).

witness testifying on the stand (not just as an attorney prosecuting the case as an advocate) and because the witness about whom Sinquefield testified was deceased and therefore could not appear before the jury to testify, such that the jury did not have its own opportunity to evaluate the witness's credibility. Under the circumstances, the Court cannot find any reason that Woodfox's counsel's failure to object to Sinquefield's commentary would be considered sound trial strategy. Accordingly, such conduct was objectively unreasonable and deficient under *Strickland.*

(3) Woodfox's counsel's failure to investigate and consult with expert witnesses:

As noted above, Woodfox asserts that his counsel was ineffective in failing to investigate and consult with expert witness(es) regarding: (1) the alleged bloodstain evidence; (2) the bloody print evidence; and (3) Fobb's eyewitness testimony. Before examining each of those claims in detail, the Court will briefly address the legal standards underlying a claim regarding an attorney's failure to investigate. The Fifth Circuit Court of Appeals has held that "[i]t is beyond cavil that 'an attorney must engage in a reasonable amount of pretrial investigation and[,] at a minimum, interview potential witnesses and make an independent investigation of the facts and circumstances of the case." *Harrison v. Quarterman*, 496 F.3d 419 (5th Cir. 2007), quoting *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994)(internal quotation marks and alterations omitted). Failure to conduct such an investigation has been held to constitute deficient performance under *Strickland*. *See, Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007)((quoting *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006)(quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999))("A lawyer who fails adequately to investigate, and to introduce into evidence,

information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance"); *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction").

Furthermore, this Court, like the United States Supreme Court, has recognized that the ABA Standards of Criminal Justice are "persuasive guides in determining what is effective assistance of counsel." *Koon v. Cain*, No. 01-327-D, R. Doc. 111-2; *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)(citing *Strickland*, 466 U.S. at 688-689). The ABA standards in circulation at the time of Woodfox's 1998 trial described defense counsel's duty to investigate as follows:

> (A) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

ABA Criminal Justice Standards, 4-4.1.

The Commentary to Standard 4-4.1 provides that "considerable ingenuity" may be required to locate persons who observed a criminal act or who have information concerning it, and after they are located, their cooperation must be secured. *See*, *ABA Criminal Justice Standards*, Commentary to Standard 4-4.1, p. 182. For example, the resources of

scientific laboratories may be required to evaluate certain kinds of evidence, including analysis of fingerprints or handwriting, clothing, hair, or blood samples, or ballistics tests may be necessary, and neglect of any of those steps may preclude the presentation of an effective defense. *Id.* The Commentary to Standard 4-4.1 further provides that the prosecutor and law enforcement agencies are important sources of information that are often needed by the defense lawyer:

> Apart from any formal processes of discovery that are available, prosecutors and law enforcement officers may have in their possession facts that defense counsel must know. Prosecutors will often reveal facts freely in the hope of inducing a guilty plea. If defense counsel can secure the information known to the prosecutor, it will obviously facilitate investigation. Defense counsel should urge the prosecutor to disclose facts even though defense counsel must then proceed to verify them.

Id. Finally, the Commentary to Standard 4-4.1 recognizes that effective investigation by a lawyer has "an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial . . ." *Id.*, at p. 183.

> The lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment. If there were eyewitnesses, the lawyer needs to know conditions at the scene that may have affected their opportunity as well as their capacity for observation. The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel.

Id., citing *Strickland*, at 691.

(a) Failure to investigate bloodstain evidence:

As mentioned above, at Woodfox's 1973 trial, the State relied upon certain bloodstained evidence, which included a shoe, pants, and a jacket purportedly seized from Woodfox shortly after the murder, to link him to the crime. Specifically, the State introduced the testimony of Cobb, the Supervisor of the Louisiana State Police Crime Lab, concerning certain testing that was performed on the bloodstained evidence prior to the 1973 trial. Cobb testified that the crime lab was able to detect small stains of blood on the three items of clothing purportedly belonging to Woodfox. While he was able to identify the bloodstain on the jacket as human blood through a precipitin test, he indicated that there was not enough of a sample on the other two clothing items to determine what type of blood, human or animal, was on those items. *See*, 1998 Trial Transcript, pp. 1162-63.[24]

Woodfox's counsel at his 1973 trial stipulated to Cobb's qualification as an expert and cross-examined him for only two (2) pages of the trial transcript. Essentially, the only information he obtained from Cobb was further testimony that the bloodstains were very small and, with the exception of the stains on the jacket, could not be tested for blood type. *Id.*, pp. 1165-67. His counsel did not cross-examine Cobb regarding the validity of any of the tests performed on the clothing by the Crime Lab, the error rates of those tests, or the significance of the test results. Furthermore, there was no questioning of Cobb regarding the conditions under which the testing was performed, the types of equipment used, or the

[24] As mentioned above, because Cobb was deceased at the time of the 1998 trial, his transcribed testimony was offered by the State to raise the inference that there was a physical link between Miller's murder and Woodfox; however, the physical clothing items themselves were not offered into evidence at the 1998 trial because they had been lost between the 1973 and 1998 trials.

qualifications, experience, and competency of the Crime Lab and of the technician who actually performed the tests, Freddie R. Cox. Finally, although Woodfox testified that the jacket and shoes in evidence were not his and that, on the day of the crime, he wore a grey sweatshirt and rubber boots and was not wearing a jacket,[25] his 1973 counsel did not cross-examine Cobb concerning the chain of custody for the clothing in question and how it was determined that the clothing items belonged to Woodfox. The Court agrees with Woodfox that Cobb's transcribed testimony on direct- and cross-examination, standing alone, gave the jury the uncontroverted impression that the Louisiana Crime Lab's test results proved that at least one item of clothing, which belonged to Woodfox and was retrieved from him after the murder, was stained with human blood.

Despite the obvious problems with the cross-examination of Cobb conducted by Woodfox's 1973 counsel, his 1998 counsel neither objected to the introduction of that transcribed testimony nor offered any expert evidence to counter it at the 1998 trial. In fact, his 1998 counsel conducted little, if any, investigation relative to the alleged bloodstain evidence prior to trial. While the trial court ordered the State to search for the bloodstained clothes, it is unclear what, if any, efforts were made to locate them, and Woodfox's counsel does not appear to have taken any independent steps to locate the bloodstained evidence, through subpoenas or otherwise, so that experts could subject the evidence to modern forensic testing. Such modern forensic (DNA) testing could have resolved the question of whether the alleged bloodstains on the clothing attributed to Woodfox, in fact, contained

[25] *See*, Trial transcript, p. 2381-82. Woodfox further testified that the clothes taken from him were simply tossed into a pile of clothes taken from other inmates. *Id.*, at p. 2348.

Miller's blood[26] and whether the clothing in question actually belonged to Woodfox.[27]

Because Woodfox's 1998 counsel did not retain a single expert witness to test the physical evidence, review the tests performed by the State's experts, and/or testify at trial, even though the trial judge appeared willing to grant funds for expert(s) some eighteen (18) months prior to trial,[28] he was unable to challenge the reliability of the Crime Lab's

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[26] DNA from reference samples of the victim's blood could have been compared to DNA extracted from the clothing items allegedly belonging to Woodfox to determine whether it was actually the victim's blood on the clothing.

[27] Since his 1998 trial (during his post-conviction relief proceedings), Woodfox retained an expert, Dr. Randall T. Libby ("Dr. Libby"), who attested to the fact that modern DNA testing was being performed prior to Woodfox's 1998 trial and that it could have been performed upon "sloughed off skin cells" on areas of the clothing in question, such as the collar and cuffs, pant legs, and inside a pair of shoes, to determine whether Woodfox was the actual, habitual wearer of such clothing. If it was genetically determined that Woodfox was not the habitual wearer of the clothing, scientific corroboration would exist supporting Woodfox's claim that Sheriff Daniel falsely attributed the clothes to him.

[28] In June 1997, defense counsel filed a "Motion for Funds for Expert Assistance," in which he sought funds to hire a "blood spatter expert." At the hearing on the motion, the trial court noted that there were "several possible funding sources," but that defense counsel needed to make a showing of why expert assistance was needed and how much the assistance would cost. The State also acknowledged at that time that the defense had a right to the funds. However, Woodfox's counsel never made the required showing to obtain the funds for the "blood spatter expert" and never asked for funds to hire any other experts, such as a DNA expert, a fingerprint expert, or an ophthalmologist – all of which could have assisted in Woodfox's defense.

Since his 1998 trial (during post-conviction proceedings), Woodfox retained the services of Stuart James, a crime scene and forensic bloodstain analyst; Dr. Libby, an expert in the fields of DNA testing and molecular genetics; and James Werring, a fingerprint analyst, all of whom have rendered opinions that Woodfox's counsel's failure to press forward with the Motion for Funds for Expert Assistance prejudiced Woodfox. In fact, James indicates that he reviewed "various police reports, evidence photos, autopsy reports, fingerprint reports, and evidence lists" and offers an expert opinion as to how the State's scientific experts could have been challenged at trial and regarding the suitability of the evidence for modern forensic testing.

testing of the bloodstain evidence under Louisiana's Code of Evidence art. 702 (and the Louisiana and U.S. Supreme Court's decisions in *State v. Foret*, 628 So.2d 1116 (1993)

For example, James explains in his declaration how Cobb misstated the meaning of the forensic test results on the clothing items allegedly belonging to Woodfox. *See*, Exhibit QQ to Woodfox's Memorandum in Support of Habeas Petition, R. Doc. 2-2, pp. 31-33. Specifically, he notes that reports of the Crime Lab officials who performed the testing contain no documentation regarding the conditions under which the tests were performed, the procedures used, or the qualifications of the individual(s) performing the testing. He also notes the lack of controls or blanks having been used in the bench notes from the "Louisiana State Police Laboratory Analytical Procedures" report and the lack of any discussion of the concentrations at which the questioned samples were tested and indicates that such "crucial details" would be included in "any properly prepared lab report." James further concludes that, because the Crime Lab failed to properly document their testing procedures, it "cannot reasonably be presumed that the alleged human blood stains present on the knife and jacket attributed to Albert Woodfox are in fact blood or, if they are blood, that they are of human origin." According to James, confirmatory testing, coupled with DNA testing of the samples, would be needed to resolve the issue, and the Crime Lab's assertion that the benzidine test results proved the presence of blood on the shoe and pants was scientifically invalid. *Id.*, at 33; Exhibit 20 to Memorandum in Support of Amended Petition (where James indicates that a positive benzidine test cannot confirm blood since it is merely a preliminary or presumptive test indicating only that blood may be present. According to James, the test does not confirm that blood is present, whether or not the possible blood is of human origin, or the blood type. Instead, such a test is useful to 1) establish the absence of blood through a negative test result; or 2) identify items that may contain blood and should be set aside for more exact *confirmatory* testing).

Libby expresses a similar opinion in his declaration that the conventional serological tests used to test the clothing items in question were "neither sensitive enough nor robust enough to provide reliable information and data related to the origin or identity of the individuals from whom the sample was derived." R. Doc. 2-2, p. 33. Libby opines that Cobb's testimony regarding the import of the benzidine test result was "scientifically incorrect" because it misstated the significance of that test result. As to the precipitin testing performed by the Crime Lab, he notes that no antigen test results were reported on the jacket ("Specimen 12"); therefore, the assumption of the presence of human blood on Specimen 12 was not confirmed. He also discusses the unreliability of precipitin tests when they are not properly performed and the fact that, if the State failed to perform the test properly, a false-positive result could have been generated based upon Woodfox's contact with food products with which he had contact while working in the prison kitchen, such as beef and other animal meats. *Id.*, p. 33-34; Exhibit 21 to Memorandum in Support of Amended Petition.

and *Daubert v. Merrelll Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) and to attempt to exclude the evidence, or to discredit it even if it was admitted.[29] Considering that the bloodstained clothing was the only physical evidence used by the State to link Woodfox to the crime, and the significance attributed to it by the First Circuit in affirming Woodfox's conviction, the Court finds that Woodfox's counsel's failure to investigate, consult experts, and challenge such evidence constitutes deficient conduct under the jurisprudential and ABA standards discussed above.[30]

(b) Failure to investigate a bloody print found at the scene of the murder:

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[29] Woodfox also notes that, in addition to the bloodstained clothing, there were other items of physical evidence which, if found, should have been subjected to modern forensic testing. For example, he refers to fingernail scrapings from the victim that contained human blood, hair, and possibly cellular material, and the victim's clothing, which could have contained the assailant's blood. There is no indication that Woodfox's trial counsel made any efforts whatsoever to locate or test any of that additional physical evidence.

[30] The state trial court, in ruling upon Woodfox's application for post-conviction relief on this claim, simply adopted the arguments asserted in the State's response to that application. Relative to Woodfox's counsel's failure to investigate and challenge the Crime Lab's findings regarding the bloodstains (and his counsel's related failure to challenge the 1973 testimony of Cobb), the State failed to assert any argument that such conduct was not deficient; instead, the State simply argued that Woodfox's general allegations as to how his counsel's conduct in that regard prejudiced him were insufficient to warrant post-conviction relief. The State argued that Woodfox failed to allege any "actual prejudice" and merely alleged that his counsel's conduct had a "possible effect on the outcome." In the State's present brief in opposition to Woodfox's habeas application, the State again fails to assert any argument that defense counsel's failure to investigate and challenge the bloodstained evidence was not deficient. Instead, the State argues that Woodfox's arguments concerning prejudice are "too speculative" and contends that exclusion of the serology testimony would not have likely affected the outcome of the verdict, given the "overwhelming evidence of Woodfox's guilt." Accordingly, the issue of whether Woodfox's counsel's conduct was deficient appears to be undisputed. The Court will address the State's arguments regarding prejudice below.

The Court also finds that Woodfox's counsel's failure to investigate and consult expert(s) concerning a bloody print found at the murder scene was deficient. This deficiency was expressly brought out by the trial judge at the 1998 trial, when the State's fingerprint expert, Carol Richard ("Richard"), testified that the bloody print (which had been previously identified during the 1973 trial testimony of State expert, Steve Ledell, as a "fingerprint" that did not match any of the persons Brown implicated in the crime, including Woodfox, or those who handled the body after it was discovered) might actually be a partial palmprint, instead of a fingerprint.[31] The identification by Richard of the bloody print as a palmprint was significant because, if it was considered a fingerprint, it had been previously tested and determined not to match Woodfox; whereas, if it was a palmprint, it had not been tested (*i.e.*, compared to anybody's palmprints) and therefore would lack any exculpatory value for Woodfox. When Woodfox's counsel objected to the introduction of Richard's opinion that the bloody print may be a palmprint, the trial judge specifically recognized the deficiency in defense counsel's conduct in simply relying on the testimony of a prior State witness from the 1973 trial and in failing to consult his own experts to evaluate the physical evidence:

> THE COURT: The second question: Have the defense retained any experts in this case?

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[31] Although the State contends in its opposition to Woodfox's habeas petition that this claim "mischaracterizes petitioner's argument and this claim, as stated, was not raised previously in state court," suggesting that Woodfox failed to exhaust his state court remedies relative to this claim, the Court disagrees. Woodfox expressly discussed, in his post-conviction relief application, his counsel's failure to consult a fingerprint expert prior to trial and the fact that his defense was therefore "blindsided" at trial when the State's fingerprint expert, Richard, "unexpectedly announced her opinion that the bloody fingerprint that didn't belong to any of the defendants may actually be a less-useful palmprint." *See*, p. 80-81 of Post-Conviction Relief application.

MR. GARRAWAY: No, Your Honor.

THE COURT: All right, you are aware that the defense, from day one, has had the ability to move the Court to appoint experts at taxpayer expense, because we're dealing with an indigent defendant?

My question to the defense is: In essence, What you have done is relied upon the state's expert and the state's expert's opinion, solely, in preparation of your defense. I simply remind you that from the get-go, the defense could retain its own fingerprint analyst, who might contest the opinion of the state's expert, or who might have concurred with the state's opinion, and you would have known about this issue had that been done. That's the first point. The mere fact that the state is calling an expert in no way entitles the defense to rely on that expert for its case-in-chief.

Point two: Experts, like wives, reserve the right to change their mind. And many times, an expert will render a report and then, in open court, give an opinion which is diametrically opposed or at least inconsistent with the previous opinions rendered by the expert. It happens all the time, in both civil and criminal cases, which is why, sometimes, you may wish to retain your own expert.

So, the mere fact that this expert may change a former opinion is not considered by me to be a surprise to anyone. These things always can happen, and that's why we retain our own experts.

* * *

THE COURT: I understand it creates a problem for you, Mr. Garraway, and I understand the theory of the

> defense is that . . . what you thought was a thumb print matched no one who is alleged to have been in that dorm that day. And I understand your position that that could create a reasonable doubt in this case. I understand that, one hundred percent.
>
> The question is, why are you entitled to rely on some state witness's opinion that's what it is, without doing your own separate and independent investigation in that regard.

See, Trial Transcript, p. 1642-49.

This Court agrees with the position enunciated by the trial judge, particularly in light of the expert declarations Woodfox has now submitted with his habeas petition (and which he submitted with his post-conviction relief application), indicating that trial counsel's failure to consult with experts from various disciplines precluded Woodfox from sufficiently challenging the State's evidence/experts and from seeking testing which might still be available to help exonerate him. Specifically, relative to the bloody print evidence, if Woodfox's counsel had consulted his own expert rather than simply relying upon the testimony of Ledell, he would have known prior to trial whether the bloody print was, in fact, a fingerprint or a palmprint and could have prepared to refute the testimony of Richard.

As mentioned above, since the 1998 trial, Woodfox has retained a fingerprint expert, Werring, who examined the fingerprint evidence in connection with Woodfox's post-conviction proceedings and indicated that he disagreed with Richard's conclusion that the bloody print was a palmprint. Werring further indicated that, based upon his years of experience, the print "could possibly be a finger," but he believes it is the print of a thumb. *See*, Exhibit 22 to Woodfox's amended complaint, p. 3. Werring also attested that, even if it is accepted, for the sake of argument, that the bloody print was made by a palm, it

would be possible to eliminate the defendants by comparing it to palmprints submitted by them. Werring compared all of the prints recovered from the murder scene to Woodfox's prints, including his palmprints, and excluded him as the donor of the bloody print at the crime scene. *Id.*, at p. 4.

The Court finds no merit to the State's argument that defense counsel made a competent argument in opposition to the testimony of Richard at the 1998 trial and that, apparently, defense counsel, "in his professional estimation, did not accord the bloody print evidence with the same weight as Woodfox now submits." The Court's review of the trial transcript indicates that defense counsel attributed great weight to the bloody print evidence, recognizing its exculpatory significance to Woodfox's case, yet he nevertheless failed to consult experts to evaluate that evidence. Woodfox's counsel expressly stated at trial that the introduction of evidence that the bloody print was likely a partial palmprint, rather than a fingerprint or thumbprint, would "knock an immense hole in [Woodfox's] case. *See*, Trial transcript, p. 1636;[32] 1645 (stating that the presentation of such evidence would

[32] Specifically, defense counsel stated, in his objections to Richard's testimony:

> [The defense was], needless to say, surprised by this development in the middle of a trial, and in reliance on the representations made by the State for the – all this time, [the defense] crafted [its] opening statement and relied heavily upon the – the failure of the bloody fingerprint found on the wall, to match not only Mr. Woodfox, but also the co-defendants in this case, as well as the body handlers . . . anyone vaguely connected with the crime scene . . . now, at this late stage in the game, [the defense] is advised that hey, maybe this is not a fingerprint at all . . . it's more probably than not, a partial palmprint, and [the defense] claim[s] surprise and we don't think that the State should be allowed to put that on. It will knock an immense hole in our case if they are allowed to do so, Judge.

"shoot[ ] a large, large hole in our entire theory of the case"). Woodfox's counsel further explained that the defense "crafted [its] opening statement and relied heavily upon the . . . failure of the bloody fingerprint found on the wall, to match not only Mr. Woodfox, but also the co-defendants in this case, as well as the body handlers," and that, if Richard testified the print was a palmprint, the defense was in "a world of trouble." *See*, Trial transcript, p. 1636, 1648. Woodfox's counsel specifically articulated the significance of the bloody print (and its lack of connection to the defendant) to the defense's case during opening statements:

> Because this crime was particularly bloody, you . . . should expect to be presented with a bloody fingerprint, or other identifiable fingerprints, something traceable to the killer or killers. A signature of a bloody participant in this incident. And lo and behold, you will learn that there was a bloody print, that it was left at the crime scene . . . [Y]ou will hear uncontradicted evidence that this bloody print found at the crime scene is certainly not the fingerprint of Albert Woodfox . . . or anyone previously identified, or charged with having any contact with the crime scene, including the body handlers. This is a mystery print, that has not been identified to anyone. And whose print is this? This is a very serious question for the State to answer.

See, Trial Transcript, p. 1085-86. Considering the recognition by both defense counsel and the trial court of the significance of the print evidence to Woodfox's case, the failure of defense counsel to at least retain an expert to evaluate that evidence and to verify or refute the conclusions of the State's experts prior to trial was unreasonable and constitutes

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Id., at p. 1636.

deficient conduct under *Strickland*.[33]

A recent decision out of the Sixth Circuit Court of Appeal, *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007), supports the conclusion that defense counsel's conduct in failing to retain experts to discredit and/or refute the testimony of the State's experts regarding the bloodstain evidence and the bloody print was deficient under *Strickland*. In *Richey*, the Sixth Circuit held that the defendant's counsel rendered ineffective assistance of counsel in an arson trial in which scientific evidence of arson was fundamental to the State's case. In that case, defense counsel did more than counsel in Woodfox's 1998 case, in that he at least retained an expert; however, the court found that counsel did "next to nothing to determine if the state's arson conclusion was impervious to attack." *Id.*, at 362 ("True, [defense] counsel retained [an expert] to review the State's arson evidence, so this case does not exemplify that most egregious type, wherein lawyers altogether fail to hire an expert. But the mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable"), citing *Strickland*, at 691 (stating that defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

The *Richey* court held that, "[a]t bottom, the record shows that [defense] counsel did not conduct the investigation that a reasonably competent lawyer would have conducted

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[33] Again, rather than arguing that Woodfox's counsel's failure to retain a fingerprint expert was not deficient, the State argued in the post-conviction relief phase and argues herein that Woodfox's claim in this regard should fail because it is "speculative," and he has not sufficiently established that he was "prejudiced" by such conduct under *Strickland*. Thus, the deficiency prong of the *Strickland* analysis appears undisputed, and the Court will address the State's prejudice argument below.

into an available defense . . . before deciding not to mount that defense." The court also noted that it was "inconceivable that a reasonably competent attorney would have failed to know what his expert was doing to test the State's arson conclusion . . ., would have failed to work with the expert to understand the basics of the science involved, at least for purposes of cross-examining the State's experts." *Id.*, at 362-63. The court determined that defense counsel did not have a duty to shop around for another expert when the expert he retained agreed with the opinions of the State's experts; however, he did have a "duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion."

Similar reasoning applies herein, where Woodfox's counsel failed to retain any experts to evaluate the bloodstain and print evidence – the "most egregious type" of deficient performance, as the *Richey* court noted. As discussed above, had Woodfox's counsel retained expert(s) and sufficiently investigated the evidence in question, a number of attacks could have been made upon the conclusions drawn by the State's witnesses concerning the bloodstain evidence. Furthermore, the bloody print, if determined to actually be a fingerprint or thumbprint, could have retained some level of exculpatory value before the jury. However, because Woodfox's counsel failed to retain any experts, he did not even have enough information to "make a reasoned determination" about what defenses to assert on behalf of Woodfox.[34] As Woodfox aptly put it, in his application for post-conviction

[34] For other cases where defense counsel's failure to sufficiently investigate and/or retain experts has been held "deficient" under *Strickland*: *See, Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995)(holding that, even where defense counsel elicited a concession from the State's expert that whether a particular blood type was on a knife was entirely speculative, he was nevertheless deficient for having failed to take measures "to understand the laboratory tests performed and the inferences that one

relief, his counsel "failed to conduct the investigation necessary to justify not presenting expert testimony at trial." *See*, Post-conviction relief application, p. 82.

(c) Failure to investigate evidence that would have permitted counsel to discredit the prior testimony of Paul Fobb:

In this claim, Woodfox contends that his counsel failed to investigate "readily available evidence" that would have permitted counsel to discredit the prior testimony of

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could logically draw from the results"); *Dugas v. Coplan*, 428 F.3d 317, 328 (1st Cir. 2005)(holding that, where defense counsel visually inspected the fire scene himself, talked with the State's experts, did some limited reading, and talked with other defense attorneys, he nonetheless failed to adequately investigate an available "no arson" defense); *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)(stating that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision and holding that counsel's conduct was deficient where, although he hired a psychology expert to examine his capital client for the penalty phase and obtained social services records regarding the client's childhood, he did not conduct an adequate investigation into the client's childhood); *Rompilla*, at 374 (holding that trial counsel performed deficiently when they failed to investigate a court file containing mitigating evidence even though they pursued other avenues of unearthing mitigating information, including interviewing the defendant and his family members and consulting mental health professionals); *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007)(Counsel's failure to investigate and present mitigating evidence on defendant's mental state in penalty phase of capital murder trial was deficient performance; later diagnoses supported theories not advanced at trial that the defendant was suffering from extreme emotional disturbance and was unable to appreciate the wrongfulness of his conduct at the time of murder); *Koon*, No. 01-327-D-M1 (finding defense counsel's conduct "egregious" for failing to employ an expert witness on the issue of the defendant's mental state at the time of the killings until one day before trial. In so holding, this Court noted that the uncontroverted evidence revealed that, because of his late retention, the defense expert only had enough time to examine the defendant for about an hour prior to trial, and his testimony was, "naturally," "torn apart by the State's rebuttal expert." Defense counsel had secured funds to hire an expert witness nearly one year before trial, yet he failed to do so. The Court also found defense counsel's failure to prepare the expert witness for trial, failure to use the services of a second attorney, and failure to adequately prepare the defendant's trial testimony to be additional evidence of defense counsel's "overall lack of preparation and investigation" into the case).

deceased inmate, Fobb, by showing that, at the time of the murder in question, Fobb was too blind to have seen Woodfox exiting Pine One and throwing a rag into Pine Four, as Fobb testified to have seen. Woodfox further contends that his counsel failed to investigate the whereabouts of Clarence Franklin ("Franklin"), an inmate who worked with Fobb and testified at Woodfox's first trial, and the State therefore successfully moved to exclude from the 1998 trial Franklin's former testimony concerning Fobb's "extremely poor vision."

Finally, Woodfox argues that, although defense counsel had access to Fobb's medical records documenting Fobb's ophthalmological treatment, including numerous hospitalizations and surgeries for glaucoma, he did not present those records at trial or contact a medical professional/expert who could have evaluated those records and rendered an opinion that it was impossible for Fobb to identify Woodfox given his deteriorated eyesight. He contends that this failure to conduct a basic investigation regarding Fobb's eyesight, when counsel was aware of the fact that Fobb was "substantially blind in both eyes by the time of the 1973 trial and . . . similarly blind months earlier when Officer Miller was murdered, constitute[s] deficient performance within the meaning of *Strickland*."

During his post-conviction proceedings, Woodfox retained the services of a board-certified ophthalmologist, Dr. Daniel Pope ("Dr. Pope"), who reviewed Fobb's medical records, which were available to Woodfox's 1998 trial counsel. Dr. Pope opined that Fobb's medical records "very probably" indicate that Fobb's vision was "too severely impaired" for him to have seen what he claimed to have seen on the day of the murder. According to Dr. Pope, Fobb's medical history indicates that he was diagnosed with juvenile glaucoma at least as early as May 1968; that he was hospitalized for that eye condition at

least five times and underwent two eye surgeries prior to 1972; that he was hospitalized at Angola twenty-four (24) times prior to 1972; and that his attending physician noted that his vision in both eyes in 1974 was 20/400. Dr. Pope attested to the fact that "if, as Fobb indicated, he was blind in his right eye and was limited to 20/400 vision in his left eye it would be difficult to give an accurate visual description of someone 30 to 40 feet away," as Woodfox purportedly was on the day of the murder. Dr. Pope further opined that Fobb's vision would have to have been better than 20/70 to identify anyone at 30 to 40 feet away. He concluded that, "[i]n view of Mr. Fobb's history of injury to his right eye and multiple surgeries for glaucoma in both eyes, it is reasonable to question the visual capabilities of Mr. Fobb . . . Mr. Fobb in all likelihood was significantly visually impaired on April 17, 1972." *See*, Exhibit 29 to Woodfox's Amended Petition. Additionally, Woodfox obtained a declaration by optometrist, Lesli Handmacher, O.D., who reviewed Fobb's medical records and concluded that "it would have been *impossible*" for Fobb to identify a person from a distance of 30 to 40 feet coming out of Pine 1 on the day of the murder. *See*, Exhibit 30 to Woodfox's Amended Petition (Emphasis added).

Considering the above expert opinions, and the fact that defense counsel was in possession of Fobb's medical records and aware of Fobb's visual impairments prior to trial in 1998, the Court finds that it was professionally unreasonable for Woodfox's counsel to fail to at least present Fobb's medical records at trial and/or consult an expert to evaluate those records in an effort at discrediting Fobb's testimony at trial. This failure is made even more egregious by the fact that defense counsel apparently made little effort to locate Franklin, whose transcribed testimony, if admitted, would have indicated that Fobb was virtually blind at the time of the murder and therefore lying when he said he saw Woodfox

leaving the murder scene. Although defense counsel indicated at the 1998 trial that he had "requested some way to get a line" on Franklin from the prosecution, and the prosecution had been "perfectly honest" that she did not know where he was, defense counsel did not describe or present any evidence to the trial court of other attempts he had made to locate Franklin, such as contacting the Department of Corrections ("DOC") to see if it had any information regarding Franklin's whereabouts or contacting an investigator to search for Franklin.

Moreover, defense counsel did not bring the matter of his inability to locate Franklin to the trial court's attention prior to trial, despite several years of pre-trial proceedings. Instead, he simply stated at trial that he and the prosecutor were "both in the dark" relative to Franklin's whereabouts and that he was "surely unavailable, just because of the passage of time." The prosecutor would not stipulate to Franklin's unavailability, and the trial court specifically noted, in sustaining the State's objection to admission of Franklin's testimony, that proving Franklin's unavailability would "take more than mere assertions by counsel." *See*, Trial Transrcipt, pp. 2219-2221. This Court agrees and finds that it was unreasonable for defense counsel not to make further efforts and investigation into the whereabouts of Franklin prior to trial, considering that his testimony could have discredited the capacity and credibility of one of the only eyewitnesses to the events surrounding the murder.

(4) Woodfox's counsel's failure to object to the State's argument that the purported statement of Leonard Turner was substantive evidence of guilt:

At some point between Woodfox's 1973 and 1998 trials, the State came into possession of an unsigned, handwritten statement that implicated Woodfox in Miller's murder. At trial, the State called Turner to the stand and asked him if he had ever given

such statement to Captain Dixon. Turner responded that he had not, and the trial court allowed the State to use the unsigned, handwritten statement to impeach him with the contents of the statement. In order to impeach Turner with the statement, the State called Captain Dixon to the stand. Captain Dixon testified that he recognized the handwriting on the statement as his own and that the statement was related to a conversation he had with Turner concerning the murder of Miller. Captain Dixon further testified that he had received a call from Warden Dees advising him that Warden Henderson wanted him to go up and talk to Turner about Miller's murder before Turner was transferred from the facility. Captain Dixon indicated that Turner did not sign the statement because he did not want to be identified and did not want to testify at trial.

While Captain Dixon recalled having taken the statement from Turner, he did not have any independent recollection of the substance of the statement nor did the contents of the statement refresh his recollection. Over defense counsel's objection, the trial court then allowed the prosecution to direct Captain Dixon to read specific lines from the statement aloud to the jury. *See*, Trial transcript, p. 1574-77. The trial court, however, instructed the jury that the prior inconsistent statement attributed to Turner was admitted only to support the State's "attempt to discredit the witness, not to show that the contradictory statements [were] true."[35] *Id.*, p. 1589-90.

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[35] The basis for the trial judge's instruction to the jury was La. Code Evid. Art. 607(D)(2), which provides that extrinsic evidence, including prior inconsistent statements and evidence contradicting a witness's testimony, is admissible only when offered to attack the credibility of a witness unless the court determines that the probative value of the evidence on the issue of credibility is "substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice," which the trial judge did not find in Woodfox's case. La. Code. Evid. Art. 607(D)(2); *See also, State v. Cousin*, 96-2973 (La. 4/14/98), 710 So.2d 1067 (When a witness, other

In this claim, Woodfox contends that, despite the trial court's instruction, the prosecution, during closing arguments, nevertheless "repeatedly urged" that the statement it attributed to Turner was evidence of Woodfox's guilt and was "definitely critical" for the jury's review, and defense counsel failed to object on the ground that impeachment evidence cannot be used as substantive evidence of guilt. Specifically, Woodfox refers to the following excerpts from the State's closing arguments:

> But, there were other people who saw some – some events that became critical in this case also. And definitely critical for your review.
>
> Leonard Turner, in his statement to C. Ray Dixon the night the murder happened, Mr. Dixon said it was sometime around midnight, the night before Leonard Turner left the prison.
>
> He also has Albert Woodfox there, with a scarf and he leaves – leaves the Leonard Turner, himself, Specs, leaves Pine 1. Sometime shortly after that, Albert Woodfox leaves Pine 1, then some of the perpetrators of this crime, and then Hezekiah.
>
> * * *
>
> What Hezekiah didn't know was that Leonard Turner was going to tell exactly what he saw.
>
> So while Hezekiah is off rushing to the plasma unit to try to develop an alibi for himself, other people already know what's happening.
>
> * * *
>
> . . . What Hezekiah didn't count on was that Leonard Turner was going to make a statement.
>
> Now, Murray Henderson testified that he talked to Turner,

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than the defendant, is impeached by the admission of a prior inconsistent statement incriminating the defendant, the statement is admissible only on the issue credibility and not as substantive evidence of the defendant's guilt); Trial transcript, p. 1598-99.

because he knew Turner's parole hearing had already been scheduled and he knew Turner was getting ready to leave the prison. You know, it's a now or nothing kind of situation. He knew Turner didn't go to breakfast.

Did Turner want to get involved? No. Did he want to say anything? No. So he tells Murray Henderson, well, I wasn't in a position to see anything, but Hezekiah was there. Feed them a little bit of information.

But, what happened during that same April 17th day, is the prison officials knew that Leonard Turner knew Ray Dixon. Ray Dixon had a relationship with Leonard Turner, Turner had given him information in the past, and had never asked for anything in return.

So, Dixon was asked to talk to him, and he takes a statement, and he says - Mr. Dixon says Turner did not want to get involved, he didn't want to sign anything, he didn't want to testify. But, he gave him information, and then, was gone. Gone to Atlanta, gone to Federal custody. Did he get a deal? I don't see a deal. Leonard Turner gave this information, he went for his parole - for his parole, which had been granted before Brent Miller ever got to work that day, on April 17th. And he left. He didn't get any deals at all . . .

But, after he talks about Hezekiah and gives some information about Hezekiah, and then, gives information about Albert Woodfox, then, they start talking to Hezekiah.

* * *

Now, the prison officials have information that Hezekiah's alibi about being at the plasma unit just won't fly because they've got eyewitnesses, they've got Joseph Richey, . . . and they've got Leonard Turner. So, now, they've got two individuals.

* * *

Now, so far, we've talked about Leonard Turner's testimony. He didn't get anything. He got to go to Angola – excuse me– he got to go to Atlanta; his parole wasn't revoked, but he didn't get anything that he wasn't already scheduled to get.

* * *

> The investigation continues, it continued, technically, I guess it's continued to this day. Because the officers were asked and various people were asked has there anything -- has there been any information, credible information that has come to your attention, that gives you the slightest idea that Albert Woodfox did not do exactly what Herman Wallace said, excuse me – exactly what Hezekiah Brown said, and exactly what Leonard Turner said and that he was not in the same place where Paul Fobb and Joseph Richey saw him. Not one credible bit of evidence has been presented in twenty-seven years.

Trial transcript, p. 2471-73, 2479-81, 2482, 2485-86.

In reviewing Woodfox's claim on appeal that the trial court erred in allowing the State to introduce and rely upon the prior inconsistent statement attributed to Turner, the First Circuit explained that, given the defense theory of the case at trial (*i.e.*, that the defendant was an "immediate suspect in the murder due to his race and political activism and was ultimately framed by lying inmates"), it was important for the prosecution to "show how, when, and why the investigation led to the defendant." The First Circuit found that, in order to show how the authorities discovered the key witness to the murder, *i.e.*, Brown, the State had to first establish that Turner's statement led them to Brown. Since Turner testified at trial that he did not witness the murder and did not make a statement to Captain Dixon about witnessing the murder, the First Circuit found that the State was properly allowed to impeach Turner's trial testimony with his prior inconsistent statement to Captain Dixon. The First Circuit further noted that, even if the initial admissibility issue was a "close one," the prosecutor "did not strongly emphasize" Turner's prior inconsistent statement during closing arguments, and the court could not say that the prosecutor was "deliberately trying" to have the jury consider Turner's prior inconsistent statement as substantive evidence of

Woodfox's guilt. According to the First Circuit's opinion, it viewed the references to Turner in the prosecution's closing arguments as "attempts to explain the sequence of the investigation" and to "elaborate on why Turner and Brown initially denied knowledge of the murder until they were told by investigators that others had named them as witnesses." The court of appeal noted that, while Turner was mentioned in the State's closing, the prosecutor "focused primarily upon the testimony of Joseph Richey, Carl Joseph Fobb, and the key State witness, Brown," and it therefore concluded that the trial court did not err in denying the defendant's objections to the admission of Turner's statement for purposes of impeachment and in denying defendant's motion for mistrial relative to the prosecution's references to Turner's statement during closing arguments.

This Court agrees with the First Circuit's reasoning relative to the references to Turner's statement in closing arguments. Although it is a "close call," the Court finds that the prosecution's references to Turner were primarily for the purpose of demonstrating how the investigation ultimately reached the State's key witness, Brown. The prosecutor never explicitly stated, during closing, the substance of the statement attributed to Turner[36] and instead relied upon the substance of the testimony of other witnesses, Brown, Richey, and Fobb, as the primary evidence of Woodfox's guilt. Moreover, even if the State's references to Turner's statement during closing improperly encouraged the jury to consider the statement as substantive evidence of Woodfox's guilt, the Court nevertheless finds that Woodfox's counsel's decision not to object to such references during the course of the

[36] In fact, much of the prosecutor's remarks relative to Turner are somewhat disjointed, suggesting that, while the prosecutor wanted to refer to Turner's statement for purposes of establishing the sequence of the investigation, she was trying to avoid discussion of the substance of that statement.

prosecution's closing arguments was a strategic or tactical one that was within the wide range of reasonable professional competence, and review of which is "highly deferential." Often, trial counsel will withhold objections during otherwise improper arguments - especially during closing arguments - for strategic purposes and to avoid appearing argumentative. *Middleton v. Roper*, 455 F.3d 838 (8th Cir. 2006); *Strong v. Guirbino*, 2006 WL 475462 (9th Cir. 2006); *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991)(no ineffective assistance even though prosecutor's closing remarks "c[a]me close to impermissible prosecutorial comment" because there were tactical reasons why trial counsel might "refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel").

Since it was a "close call" as to whether the prosecutor's statements in Woodfox's case could even be considered improper, such statements were not the type of "egregious misstatements by opposing counsel" to which Woodfox's counsel necessarily would have had to object. Accordingly, the Court does not find that his counsel's failure to object to the prosecution's remarks constitutes deficient performance under *Strickland*.

(5) Woodfox's counsel's failure to defend Woodfox against the State's repeated introduction of accusatory, testimonial hearsay in the form of the contents of the prior statement of Chester Jackson:

Prior to Woodfox's 1998 trial, the State sought to use the former testimony of Jackson, who had testified at the 1974 trial of Wallace and Montague (but not at Woodfox's 1973 trial) and who had died prior to Woodfox's 1998 trial. When the State obtained permission to present Jackson's testimony at Woodfox's 1998 trial, Woodfox sought a writ from the First Circuit Court of Appeal, and the First Circuit ruled that Jackson's testimony

was inadmissible hearsay because Woodfox was never afforded the opportunity to cross-examine Jackson.

In this claim, Woodfox contends that the prosecutor disregarded the First Circuit's ruling when it elicited testimony during the 1998 trial from three prison officials who "revealed directly and indirectly that Jackson had, in fact, stated that he witnessed Mr. Woodfox kill Brent Miller." Woodfox asserts that the first instance occurred when the prosecution presented a document to Sheriff Daniel and proceeded to establish that such document was the written, witnessed statement of Jackson. After establishing that Jackson had signed the statement, the prosecutor asked Sheriff Daniel:

> Q. Whether you had issued a warrant before talking – for Albert Woodfox, before talking to Chester Jackson, or after, did you acquire any information from Chester Jackson that changed your mind about issuing an arrest warrant for murder against Albert Woodfox?
>
> A. No ma'am.

See, Trial transcript, p. 1290-91. Woodfox's counsel did not object to such questioning by the prosecution until the next day, at which time he complained to the trial judge, "Yesterday, [the prosecution was] allowed to get into whether or not Sheriff Daniel's conclusion about whether or not had Albert Woodfox, right or wrong, were changed by talking to Chester Jackson, which the First Circuit Court of Appeals has completely said was inadmissible." *Id.*, p.1595-96. In response to that complaint, the trial judge and the prosecutor noted that Woodfox's counsel had failed to object to such questioning at the time it occurred (the trial judge even indicated he "had [his] gavel raised, and . . . was ready to rule"), and Woodfox's counsel conceded that it "may [have] be[en] ineffective assistance on [his] part" not to object to such questioning contemporaneously. *Id.*, at p. 1596.

Woodfox further contends that, undeterred by the recognition by the trial judge and counsel that the prosecution's questioning regarding the Jackson statement was improper, the prosecution nevertheless also asked Warden Henderson about the substance of Jackson's statement to him, as follows:

> Q. Without going into anything that Chester Jackson said to you, did you get any information from Chester Jackson, that contradicted what Hezekiah Brown had told you about Albert Woodfox's involvement in this case?
>
> A. No.

Id., at p. 1984. Although defense counsel had previously objected when Warden Henderson started to testify about the substance of his interview with Jackson, he did not object to the above-quoted question by the prosecution, which Woodfox argues indirectly sought information regarding the substance of Jackson's statement to Warden Henderson concerning Woodfox's involvement in the murder. *Id.*

Finally, Woodfox asserts that the prosecution took one other opportunity to get a prison official to testify that Jackson accused Woodfox of the murder by "exploiting an unsolicited comment that Deputy Hoyle made after defense counsel asked him whether he knew if Mr. Woodfox was already a suspect on April 17 before Hezekiah Brown had given his statement on April 19." *Id.*, p. 2043-44. Deputy Hoyle indicated that the "only time" he heard Woodfox's name mentioned as a suspect in the murder was on April 19th. *Id.* Upon cross-examination, the State then asked Deputy Hoyle, without objection by defense counsel:

> Q. . . . was the nineteenth, that statement that you're talking about, was that the statement – was that Chester Jackson?

A. That was a prelude to the statement of Chester Jackson.

Q. And was that the only statement that you were present for, during the first couple of days?

A. I didn't even stay for the statement, basically. I stayed for the minute that a certain convict walked into that interrogation room and admitted his role in the thing, and named Woodfox, and Wallace as the perpetrators of that stabbing, I couldn't stand even to be in the room with that pair. I left.

Id., p. 2044-45.

The Court agrees with Woodfox that, although the above questioning of Sheriff Daniel and Warden Henderson did not *directly* ask for the substance of Jackson's statements to them, the questioning nevertheless *indirectly* sought and/or elicited such information, by asking whether the substance of such statement contradicted other information which had been provided to them that implicated Woodfox in the crime. Furthermore, Deputy Hoyle testified *directly* that Jackson admitted his role in the murder and named Woodfox as a perpetrator in the stabbing, and defense counsel did not seek to strike such testimony from the jury's consideration, despite the clearly inadmissible nature of such testimony based upon the First Circuit's ruling. The failure of Woodfox's counsel to object to the introduction of such inadmissible evidence constitutes deficient performance under *Strickland*. *See, Anderson v. Cain*, 2001 WL 1751413 (5th Cir. 2001)(where the Fifth Circuit upheld the Louisiana Fourth Circuit's post-conviction opinion that trial counsel's failure to object to an out-of-court hearsay statement, that was a critical piece of evidence in the case, was deficient under the first prong of the *Strickland* test, citing *State v. Sanders*, 648 So.2d 1272, 1292 (La. 1994), and noting that Louisiana courts

have held that the failure to object to the introduction of damaging hearsay evidence "presents a textbook unprofessional error").

(B) Did defense counsel's deficient conduct prejudice Woodfox?

Although the Court has not found that Woodfox's counsel was deficient in all respects claimed by Woodfox, it has determined that his counsel was deficient: (A) in failing to file a motion to quash the 1998 indictment when the State's key witness was dead and the physical evidence lost (or in failing to at least object to the introduction of Brown's transcribed testimony on Confrontation Clause grounds); (B) in allowing the prosecutor from Woodfox's original trial to testify about his opinion of Brown's credibility and demeanor when Brown testified in 1973; (C) in failing to investigate and consult with expert witness(es) regarding: (1) the alleged bloodstain evidence; (2) the bloody print evidence; and (3) Fobb's eyewitness testimony; and (D) in failing to defend Woodfox against the State's introduction of hearsay in the form of the contents of the prior statement of Jackson. However, in order to obtain the habeas relief he seeks, Woodfox must not only demonstrate that his trial counsel's performance was deficient, he must also establish that such deficient instances of conduct, whether considered individually or cumulatively, prejudiced him.

To prove prejudice, the petitioner must show that "there is a reasonable probability that, absent the errors [of counsel], the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, at 695.[37] A "reasonable probability" is a probability sufficient

[37] Put another way, to establish prejudice, Woodfox must show that it is "reasonably likely that one juror would have voted against [convicting him] absent [his counsel's] unprofessional errors." *Koon*, No. 01-27, R. Doc. 111, p. 40, citing *Cain*, 125 F.3d at 279; *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996).

to undermine confidence in the outcome of the proceeding. *Id.*[38] [39] Woodfox must present "evidence of sufficient quality and force to raise a reasonable probability that," had it been presented to the jury, the outcome would have been different," not that there is a mere possibility that the outcome would have been different. *U.S. v. Drones*, 218 F.3d 496 (5th Cir. 2000). Finally, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. *Strickland*, at 695-96; *Dugas v. Coplan*, 428 F.3d 317 (1st Cir. 2005)("This case lay on a knife's edge, and it would not have taken much to sway at least some jurors towards acquittal. Accordingly, the threshold for prejudice is comparatively low because less would

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[38] In making the prejudice determination, a court must consider the "totality of the evidence" before the judge or jury:

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect . . . Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id.

[39] Since an ineffective assistance claim asserts the absence of one of the "crucial assurances" that the result of a proceeding is reliable, "finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Id.*, at 694. Thus, the result of a proceeding can be rendered unreliable, and the proceeding itself unfair and prejudicial, "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id; Koon*, R. Doc. 111, p. 40 ("A 'reasonable probability' need not be proof by a preponderance that the result would have been different, but it must be 'sufficient to undermine confidence in the outcome' of the verdict").

be needed to unsettle a rational jury").

In considering the totality of the evidence before the jury as required by *Strickland*, the Court finds that such a reasonable probability exists in this case. *Strickland*, at 695-96. As mentioned above, both the prosecution and the state trial court recognized on several occasions that the "key item of evidence" against Woodfox was the testimony of Brown and that it was "so critical to [the prosecution's] case that without it there would *probably* be no case." *See*, State's response to Woodfox's post-conviction relief application, pp. 9-10. If Woodfox's counsel had not acted deficiently and would have challenged Woodfox's prosecution on the ground that Brown's transcribed testimony violated his rights under the Confrontation and Due Process Clauses, Woodfox's 1998 trial might never have occurred, or at the least, such testimony would have been excluded, resulting in the State losing its only direct, eyewitness testimony. While other witnesses, Richey and Fobb, purportedly saw Woodfox fleeing Pine 1 around the time of the murder, their testimony was merely corrobative of that of Brown, and without Brown's testimony, the prosecution had essentially no evidence directly linking Woodfox to the crime. Moreover, had Woodfox's counsel conducted an adequate pre-trial investigation relative to Fobb, he could have presented evidence discrediting Fobb's corroborative account based upon expert testimony that it would have been "impossible" for Fobb to see Woodfox running out of Pine 1 at the distance from that building at which Fobb was standing, given his deteriorated eyesight.

Even if Woodfox's case was not dismissed or Brown's testimony excluded on Confrontation/Due Process Clause grounds, if Woodfox's counsel had appropriately objected to Prosecutor Sinquefield's opinion testimony concerning Brown's demeanor and credibility as a witness, Brown's transcribed testimony likely would not have appeared as

credible to jurors, considering other evidence presented at trial, demonstrating that: Brown was a multiple offender serving life imprisonment without parole for aggravated rape; that he received a pardon and incentives in exchange for his 1973 testimony and that his testimony and statements could have been motivated by a fear of punishment;[40] that he had provided inconsistent statements over time regarding his knowledge about the murder and who was involved in the crime;[41] that he had once been described by Warden Bulter as "one you could put words in his mouth;"[42] and that he twice denied on direct examination during the 1973 trial that he had been promised anything in exchange for his testimony, other than a transfer within the prison for safety reasons.[43] Even the First Circuit explained,

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[40] At Woodfox's 1973 trial, Brown testified that, several days after the murder, prison officials came to him and told him what had happened. *See*, Trial transcript, p. 1788. According to Woodfox's memorandum in support of his amended habeas petition, Brown also testified at Wallace and Montague's trial that the officials placed the institutional files of the defendants in front of him and asked him to select who committed the crime. He testified, "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." Although Woodfox inadvertently failed to submit that excerpt of Brown's testimony at the Wallace/Montague trial (pp. 33-35) with Exhibit 10 to his habeas petition, he has represented to the Court that the above quote was made by Brown during the course of his testimony at that trial.

[41] Although Brown testified that Montague was involved in the crime, Montague was acquitted in 1974 after evidence was presented that he was in the prison hospital between 7:30 and 8:00 a.m. on the morning Miller was murdered. *See*, Transcript of Wallace/Montague trial, Exhibit 10 to Woodfox's petition, pp. 312-313. At Woodfox's 1998 trial, an inmate also testified that Montague was not involved in the crime, and Warden Butler testified that he "did not think [Montague] was present at the time of the murder." *See,* Trial transcript, p. 1885-90; 2012-13.

[42] *See*, Trial transcript, p. 2015-2016.

[43] The failure or inability to question an eyewitness regarding his or her financial interests in testifying has been recognized as a deficiency sufficient to undermine confidence in a jury's guilty verdict. *Reynoso*, at 1117("Had defense counsel

in affirming Woodfox's conviction, that, where there is "conflicting testimony about factual matters" as in Woodfox's case, the "resolution" of those matters "depends upon a determination of the credibility of [ ] witnesses." *See*, p. 24 of First Circuit's opinion, Exhibit 1 to Woodfox's habeas petition. While the Court cannot say definitively that elimination of the bolstering of the prosecution's key witness's credibility, through Sinquefield's opinion testimony, alone would have caused one juror to have a reasonable doubt as to Woodfox's guilt, the Court finds that, when that error is combined with all of the other deficient conduct on the part of Woodfox's counsel, a reasonable probability exists that such an outcome would have occurred. *See, Tassin v. Cain*, 2008 WL 384578 (5th Cir. 2008)(where the Fifth Circuit very recently held that, if a key witness has received consideration or potential favors in exchange for testimony and lies about those favors at trial, the trial is not fair).[44]

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investigated and questioned [the two eyewitnesses] about their expectation of reward money in return for their testimony inculpating [the defendant], she would have been able to provide the jury an explanation of the eyewitnesses' incentive to identify him, regardless of their lack of knowledge, and would have effectively demonstrated witness bias. She would have answered directly the open question that the prosecution's closing argument posed for the jury - what was the witnesses' motive to lie? In the absence of the missing cross-examination, the defendant was unable to provide an answer to this critical question. [The court therefore] conclude[d] that, but for counsel's deficient performance, there [was] a reasonable probability that the outcome of t[he defendant]'s trial would have been different"), citing *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005)("Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case); *Horton v. Mayle*, 408 F.3d 570, 580 (9th Cir. 2005)(holding that, "where a witness is central to the prosecution's case, the defendant's conviction demonstrates that the impeachment evidence presented at trial likely did not suffice to convince the jury that the witness lacked credibility," and that, therefore, any impeachment evidence not introduced at trial takes on greater significance).

[44] In *Tassin*, the Fifth Circuit held that an understanding or an agreement between a witness and the state (a "firm promise" is not needed), under which the witness expected to gain beneficial treatment in sentencing for related crimes provided that she testified at a first degree murder trial consistently with her prior statements

For example, had Woodfox's counsel performed an adequate pre-trial investigation and consulted with expert witnesses, other evidence linking Woodfox to the crime either would have been excluded as unreliable under *Daubert/Foret* or discredited. It is evident that defense counsel's failure to exclude or discredit the State's assertions regarding the clothing attributed to Woodfox was prejudicial because the First Circuit, in affirming Woodfox's conviction, determined that the only physical evidence "linking Woodfox to the murder" was the bloodstains on the clothing attributed to him. In other words, if Woodfox's counsel had presented expert testimony discrediting the State's theory that the stains on the clothes were, in fact, blood and/or that the clothes belonged to Woodfox, there would not have been any physical evidence linking Woodfox to the murder. Considering that, in combination with the credibility issues relating to the State's sole eyewitness, at least one juror probably would have had a reasonable doubt as to Woodfox's guilt.[45]

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inculpating the defendant, was material to the defendant's guilt, and thus, the state's failure to disclose that agreement constituted a *Brady* violation. The jury was not informed of the beneficial sentencing agreement that hinged directly on the witness's testimony, and the witness's testimony was central to the State's case. The Court found that there was a Fourteenth Amendment violation under the clear precedent of *Giglio*, *Napue*, and *Brady* because the State not only failed to correct the witness's misleading testimony with respect to the agreement but actually capitalized on that witness's testimony, arguing to the jury that the witness had no reason to lie. *Id.* at *6-*7.

[45] *See, Richey v. Bradshaw*, at 364 (where prejudice was found to exist in a case where defense counsel failed to adequately investigate and consult experts, and to introduce into evidence, information that demonstrated his client's factual innocence, or that raised sufficient doubts as to that question. The court held that, "[c]onfronted with evidence debunking the State's scientific conclusions, the trial court might have had a reasonable doubt about [the defendant's] guilt, especially where the prosecution's case depended on a cast of witnesses whose lives revolved around drinking and partying and some of whom might have had their own motives for implicating [the defendant"). Similarly, in the present case, if the jury had been presented with scientific evidence discrediting the State's scientific conclusions, at least one juror might have had a reasonable doubt about Woodfox's guilt, considering that the prosecution's case

Additionally, had Woodfox's counsel investigated and consulted experts concerning the bloody print evidence, an element which he knew to be crucial to Woodfox's defense, he could have provided support for the argument that the print was, in fact, a fingerprint or thumbprint, rather than a palmprint, and that such print was not Woodfox's or that of anyone else alleged to have been involved in the crime by Brown, thereby again discrediting the testimony of the State's key witness as to who was involved in the crime. *See,* Declaration of Werring. The fact that defense counsel's failure to consult a fingerprint expert was prejudicial to Woodfox under the *Strickland* standard was essentially conceded by the trial judge and the prosecution during the 1998 trial, when the trial judge stated that he understood "one hundred percent" the defendant's position that such expert evidence "could create a reasonable doubt in this case," and the prosecution acknowledged that "maybe [the prosecution] would have a problem" if the print was a fingerprint rather than a palmprint. *See*, Trial transcript, p. 1648-49; 2512.[46]

Finally, while defense counsel's failure to object to the prosecution's introduction of

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otherwise depended on witnesses of questionable credibility and some of whom may have had their own motives for inculpating Woodfox. While the First Circuit was correct in its conclusion that positive identification by a single eyewitness *may* be sufficient to support a defendant's conviction, where that single eyewitness' testimony would either have been excluded, discredited, or would have been introduced unbolstered by Prosecutor's Singuefield's commentary if Woodfox's counsel had not acted deficiently, confidence in the jury's guilty verdict is certainly undermined.

[46] The Court agrees with Woodfox that the exculpatory value of the print evidence was significantly diminished by the palmprint theory, since that theory provided the jury with a plausible and unchallenged explanation for the presence of the bloody print that did not conflict with Brown's testimony, while classification of the print as a finger- or thumb-print, which did not match Woodfox or any of the other suspects identified by Brown (or any of the individuals who handled the body after the crime), conflicted with the State's theory of guilt and could have created a reasonable doubt in the mind of one or more jurors.

hearsay in the form of the contents of the prior statement of Jackson, may not have prejudiced Woodfox's defense on its own, the Court again finds that, when that error is combined with the other deficient conduct committed by Woodfox's counsel, there is a reasonable probability that at least one juror would have had a reasonable doubt respecting Woodfox's guilt, such that confidence in the outcome of his 1998 trial is undermined. As noted above, a verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Although the prosecution and the state post-conviction court rejected Woodfox's claim of ineffective assistance of counsel on the ground that defense counsel's deficient performance did not "affect[] the outcome of the verdict, given the *overwhelming evidence* of [Mr.] Woodfox's guilt," the Court fails to see the "overwhelming evidence" to which they refer. At most, the Court sees a case supported largely by one eyewitness of questionable credibility for the reasons discussed above; two corroborating witnesses, Richey and Fobb, both of whom, according to other evidence submitted with Woodfox's petition, provided trial testimony which was materially different from their written statements given just after the murder,[47][48] and one of

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[47] In another section of his habeas application, Woodfox contends that his conviction should be overturned because the State suppressed the interrogation notes regarding Fobb and Richey, which contained exculpatory impeachment information that Woodfox could have used to show that both witnesses had given prior inconsistent statements and that Richey had lied at trial. Specifically, Richey testified at the 1998 trial that he discovered Miller's body after witnessing Turner, Woodfox, Montague, Jackson, Wallace, and Brown running out of Pine 1. He also testified on cross-examination that his prior statements were always "exactly" the same as his trial testimony, including a statement he gave to Sheriff Daniel during his interview immediately after the murder. *See*, Tr. Transcript, pp. 1477-78.

In preparing his post-conviction application, Woodfox obtained access to Sheriff Daniel's interrogation notes which were taken during the investigation of the murder, and according to those notes, Richey never mentioned Woodfox or anything that he

testified to at the 1998 trial in his initial statement to Sheriff Daniel and instead said that, on the morning of the murder, he "went to chow," gave another inmate some cigarettes at "Hic-4" dorm, and then went back to his dorm. *See*, Exhibit 2 to Amended Habeas Petition, p. 58. Woodfox now contends that, if the State had disclosed Sheriff Daniel's notes, defense counsel would have been able to establish, through the examination of Sheriff Daniel, that Richey had, in fact, been interviewed and had given the sheriff statements that were materially inconsistent with his trial testimony. The State responds herein that Richey's 1998 trial testimony and his initial statement are not materially inconsistent and that the differences in his statements instead indicate an "initial lack of specificity," in that Richey's initial statement was "generic" and that his later testimony was a "clarification" of his prior statements and therefore not exculpatory evidence which the State was required to produce under *Brady.*

Although the Court will not examine Woodfox's *Brady* claim in any great detail because his ineffective assistance of counsel claim has merit and, on its own, is grounds for overturning his conviction, the Court finds Richey's 1998 trial testimony (that his prior statement to Sheriff Daniel was "exactly" the same as his trial testimony) placed upon the State a duty to produce Richey's prior statement to Woodfox. The statement and trial testimony are not "exactly" the same, nor was the trial testimony a mere clarification of a generic initial statement, as the State suggests. Instead, the initial statement placed Richey in a different place and doing different tasks than he alleged in his trial testimony. Furthermore, the Court agrees with Woodfox that it is absurd to think that, in describing his knowledge of what occurred to Sheriff Daniel just after the murder, Richey would have omitted (or Sheriff Daniel, in writing down Richey's statement, would have omitted or forgotten) the key fact that Richey witnessed Woodfox and the other suspects fleeing Pine 1 just before Richey discovered Miller's body. Such an omission also cannot be blamed upon the typist; even if the typist was somehow incompetent, the Court hardly thinks he or she would have omitted the key details in Richey's statement. Accordingly, the Court finds that, if the State had properly turned over Richey's prior statement, Woodfox's counsel could have used that statement to impeach or discredit the corroborating testimony given by Richey.

Similarly, although Fobb's testimony could have been discredited on other grounds had Woodfox's counsel not acted deficiently, the Court also finds that the State failed to turn over exculpatory evidence, in the form of Sheriff Daniel's interrogation notes from his initial interview with Fobb, that could have also been used to impeach Fobb's testimony. Specifically, as discussed above, Fobb testified at the 1973 trial that, on the morning of the murder, he was on his way from the breakfast hall to the plasma unit when he saw Woodfox walk into and out of Pine 1. *See*, Tr. Transcript, p. 1612-13. By contrast, in his initial statement to Sheriff Daniel, he indicated that, on the morning of the murder, he had not gone to breakfast, that he had never left his dorm room, and that the "dorm man" could verify his statement. *See*, Exhibit 2 to Amended Habeas Petition, p. 61. Again, a comparison of the initial statement and the trial testimony of Fobb

whom's testimony (Fobb's) could have been discredited by expert evidence; and no physical evidence definitively linking Woodfox to the crime. *See, Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003)*(*The Fifth Circuit found a "relatively 'weak' case" existed for purposes of *Strickland*, where the amount of evidence was similar to or even stronger than that presented by the State in Woodfox's case. In *Anderson*, the State's case rested primarily upon the testimony of *two* eyewitnesses, and there was no physical evidence linking the defendant to the crime).

Because, in the Court's view, the State's case did not have "overwhelming" record support, confidence in the outcome is more susceptible to and is undermined by defense counsel's errors. The Court finds that the state post-conviction court, in reaching a contrary conclusion, applied the prejudice standard of *Strickland* in an objectively unreasonable manner,[49] and as a result, Woodfox is entitled to the habeas relief he seeks -- that his

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indicates that one is not a mere clarification of the other; instead, Fobb's statements actually contradict one another as to where he was and what he was doing on the morning of the murder. Accordingly, the initial statement is exculpatory and material to Woodfox's guilt, such that it should have been produced by the State for use in Woodfox's defense. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995)(Evidence is material if, considered cumulatively, the suppression "undermines confidence in the outcome of the trial").

[48] The U.S. Supreme Court has held that the "effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others." *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (La. 1995). Thus, the fact that a single eyewitness, such as Richey, could be impeached with the statement he made to Sheriff Daniel just after the murder, which was not "exactly" the same as his 1998 trial testimony as he contended, could be grounds for a new trial, even if the defense was unable to attack the credibility of Brown and Fobb because they are deceased.

[49] The Court finds that, although the State (and the state trial court, through its adoption of the State's arguments) articulated the correct *Strickland* prejudice standard, they actually misinterpreted and misapplied that standard, by requiring a higher burden

conviction and life sentence for the second-degree murder of Miller be reversed and vacated.

III. Alternatively, an evidentiary hearing is warranted on the claim of discrimination in the selection of the grand jury foreperson:

In the event the district judge disagrees with the undersigned's above conclusions, the undersigned recommends that this matter be referred back for an evidentiary hearing relative to Woodfox's claim of discrimination in the selection of his grand jury foreperson because Woodfox has presented evidence sufficient to support a *prima facie* case of discrimination. To establish a *prima facie* case of grand jury foreperson discrimination, a defendant must show: (1) that the population group to which he belongs is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied; (2) the degree of under-representation, by comparing the population of the group in the total population to the population called to serve as grand jurors over a significant period

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of proof of Woodfox than that called for by *Strickland*. Specifically, the state trial court found that, even if Woodfox's post-conviction expert evidence "very probably" undermined the State's evidence, such a level of proof was "merely speculative" and insufficient to warrant relief under *Strickland*. *See*, State's Repose to Application for Post-Conviction Relief, p. 21. However, this Court finds that expert evidence which "very probably" would have undermined the State's evidence in one or more of the juror's minds is sufficient to meet the "reasonable probability" standard under *Strickland*, which, as noted above, is lower than the preponderance of the evidence standard. It also appears that the State has confused the sufficiency of the evidence standard under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), with the prejudice standard under *Strickland*, in that, on several occasions, it argues that Woodfox was not prejudiced by his counsel's deficient performance because the First Circuit held on appeal that there was sufficient evidence to convict him, even when counsel's errors are considered. However, courts have distinguished between the sufficiency of the evidence standard and the prejudice standard, holding that a lesser showing is needed to establish prejudice under *Strickland*. *See*, *Richey*, at *19 ("Although circumstantial evidence alone might have led to a conviction, the question before us [*i.e.*, the question of prejudice under *Strickland*] is not one of the sufficiency of the evidence, but of undermining our confidence in the reliability of the result").

of time; and (3) a selection procedure that is susceptible of abuse or is not racially neutral. *Castenada v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).

It is undisputed that Woodfox has established elements one and three of his *prima facie* case. He is a member of the African American population group, which has been recognized as a group "singled out for different treatment under the laws." *See, Rose v. Mitchell*, 443 U.S. 545, 565, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). He has also demonstrated that the procedure used to select his grand jury foreperson, set forth in the pre-1999 version of La. C.Cr.P. art. 413, is one susceptible of abuse. That procedure granted the judge the authority to select one full-voting member of the grand jury as the foreperson, outside of the usual random selection procedures. *Campbell v. Louisiana*, 523 U.S. 392, 396-97 (1998); *State v. Langley*, 1995-1489 (La. 4/3/02), 813 So.2d 356, 372.

While the second element of Woodfox's *prima facie* case is disputed, the Court finds that he has produced sufficient evidence that African Americans were "substantially under-represented" as grand jury forepersons over a significant period of time in West Feliciana Parish so as to warrant an evidentiary hearing on the issue. *Castenada*, at 494. Specifically, while Woodfox has not set forth the percentage of the population in West Feliciana Parish "eligible" for grand jury service which was African American over a period of time, as the State contends he is required to do in order to establish a *prima facie* case, he has met the level of statistical proof required in the Louisiana Supreme Court's decision in *State v. Langley*, 1995-1489 (La. 4/3/02), 813 So.2d 356. In particular, he has presented evidence, from over a period of nearly thirty years (1964-1993), as to: (1) the percentage of African Americans in the general population in West Feliciana Parish; (2) the percentage of African Americans registered to vote in that parish; and (3) the percentage of African

Americans who actually served on grand juries (a figure that Woodfox did not present to the trial court initially but later obtained in connection with his post-conviction relief application). As in *Langley*, those percentages (which averaged (1) 48%; (2) 45.5%; and (3) 45% respectively) are not "significantly statistically different." Accordingly, in a statistical sense, the base group used by Woodfox (*i.e.*, the percentage of actual grand jurors randomly selected from the grand jury venire over the thirty year time period who were African American) to show under-representation in the target group of grand jury forepersons is essentially equivalent to the base group advocated by the State (*i.e.*, the percentage of the population "eligible" for grand jury service that was African American during that same time period) to show under-representation in the target group of grand jury forepersons. Consequently, because the State has not attacked the accuracy of Woodfox's statistical data, Woodfox has demonstrated substantial under-representation of African Americans as grand jury forepersons since only 26.7% of grand jury forepersons during that approximate thirty-year period have been African Americans, while 45% of the individuals actually selected for grand jury service were African American.

The statistical comparison in this case results in an "absolute disparity" calculation (*i.e.*, the difference between the percentage of African Americans comprising the pool of grand jurors randomly selected from the venire, 45%, minus the percentage of African American grand jury forepersons actually selected by the judge, 26.7%) of at least 18%, which is well within the range of under-representation that has been deemed sufficient to support a *prima facie* case of discrimination in other cases. *See, Mosley v. Dretke*, 370 F.3d 467, 479 (When the group in question makes up a sufficiently large proportion of the overall population, *i.e.*, more than 10% of the population, an "absolute disparity" percentage

is the only proper method for assessing under-representation. The Fifth Circuit has recognized that absolute disparities of 19.7%, 14.7%, and 13.5% are sufficient to satisfy the second prong of the *Rose* test and that absolute disparities of 10% or less are insufficient to establish statistical discrepancies worthy of relief); *Langley*, at 371 (Absolute disparity range of 15.5% to 15.9% sufficient); *Turner v. Fouche*, 395 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 532 (1970)(absolute disparity of 23% sufficient); *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967)(absolute disparity of 18% adequate); *Jones v. Georgia*, 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967)(absolute disparity of 14.7% sufficient).

Because Woodfox has demonstrated under-representation sufficient to make out a *prima facie* case of discrimination, the burden of proof shifts to the State to rebut his case. Thus, if the district judge disagrees with the undersigned's present findings and recommendations relative to Woodfox's other claims, the matter should be referred back for an evidentiary hearing at which time the State will be allowed the opportunity to present evidence refuting the presumption of discrimination created by Woodfox. *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)(The State would bear the burden of showing that the pattern of under-representation demonstrated by Woodfox was the result of a racially-neutral selection procedure).

RECOMMENDATION

For the above reasons, it is recommended that the Petition for Writ of Habeas Corpus (R. Doc. 1) filed by Albert Woodfox be **GRANTED** and that his conviction and life sentence for the second-degree murder of Brent Miller be **REVERSED AND VACATED**. It is further recommended that the case be remanded to the 21st Judicial District Court,

Parish of Tangipahoa, for additional proceedings, not inconsistent with this recommendation. Alternatively, in the event the above recommendation is not adopted, this matter should be referred back to the undersigned for an evidentiary hearing on the issue of discrimination in the selection of Woodfox's grand jury foreperson.

Signed in chambers in Baton Rouge, Louisiana, June 10, 2008.

MAGISTRATE JUDGE CHRISTINE NOLAND