NATHANIEL ROBERT CODE, JR.	DOCKET NO. 138,860-A
VERSUS	FIRST JUDICIAL DISTRICT
BURL CAIN, WARDEN	CADDO PARISH, LOUISIANA

POST-CONVICTION MEMORANDUM BY THE STATE OF LOUISIANA

Petitioner was convicted of four counts of first degree murder and received four sentences of death after a three week jury trial in October of 1990. On appeal his convictions and sentences were affirmed, and the United States Supreme Court denied certiorari and rehearing. *State v. Code,* 627 So.2d 1373 (La. 1993), *cert. denied* 511 U.S. 1100, *reh. denied* 512 U.S. 1248.

Petitioner's original application for post-conviction relief was filed July 10, 1995, raising some 17 claims for relief. The Louisiana Supreme Court ordered evidence to be taken on five of the seventeen claims in a ruling issued September 3, 1999. *State ex rel. Code v. Cain*, 98-2581 (La. 9/3/99), 747 So.2d 527. New claims raised at the beginning of the evidentiary hearing were denied as untimely, and the Supreme Court denied petitioner's writs as to their dismissal. *Code v. Cain*, 2003-3524 (La. 10/01/04), 883 So.2d 1011.

The evidentiary hearing and John Doe depositions have been held over the last three and a half years while petitioner attempted to address these remaining issues. The State presented four witnesses in rebuttal.

Petitioner's post-hearing memorandum has now distilled the remaining complaints into three general areas: Ineffective assistance of counsel, the claim that execution by lethal injection is cruel and unusual punishment and the claim that the State failed to reveal *Brady* material.

ARGUMENT

A. INEFFECTIVE ASSISTANCE OF EXPERT/COUNSEL

Petitioner argues a claim that is largely a malpractice by expert witness claim. Petitioner has not cited any cases which apply the standard of ineffective assistance of counsel to an expert witness. In fact, the cases are to the contrary. Counsel who engages the services of an expert witness is entitled to rely on that witness's expertise. Petitioner has intertwined the claims of ineffectiveness of trial counsel with that of his claim of ineffective experts. The State will address each aspect of these various attacks.

Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which requires access to psychiatric assistance where an indigent is preparing a defense based on his mental condition, does not contemplate competence review of psychiatric experts. "To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require." *Poyner v. Murray,* 964 F.2d 1404, 1419 (4th Cir. 1992), cert. denied 506 U.S. 958, 113 S.Ct. 419, 121 L.Ed.2d 342.

"Although *Ake* refers to an 'appropriate' evaluation, we doubt that the Due Process Clause prescribes a malpractice standard for a court-appointed psychiatrist's performance." *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998) *cert. denied sub. nom. Wilson v. Taylor,* 525 U.S. 1012, 119 S.Ct. 536, 142 L.Ed.2d 441. See also *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990), *cert. denied* 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106, *reh. den.* 499 U.S. 984,

111 S.C.t 1642, 113 L.Ed. 2d 737; *Harris v. Vasquez*, 949 F.2d 1497, 1518, (9th Cir. 1990), *cert. denied* 503 U.S. 910, 112 S.Ct. 1275, 117 L.Ed.2d 501.

Even on the "merits'" of the malpractice portion of this claim, however, petitioner has failed to show either error or prejudice. In *Harris v. Vasquez, supra*, the Ninth Circuit noted that "It is certainly within the 'wide range of professionally competent assistance' for an attorney to rely on properly selected experts." *Ibid*, 949 F.2d at 1525.

In the instant case trial counsel engaged not one, not two, not three, but *four* psychiatric experts in his efforts to discover some organic or psychological evidence which might be used in his defense or in mitigation. Besides the more conventional psychiatric tests, trial counsel also had petitioner tested for organic brain damage through the use of MRIs, EEGs, and CAT scans. (T. 12/06/05, p. 46; Vol. 23, pp. 5595-5595, 5603)

As in *Harris*, petitioner has failed in his effort to show that the defense psychiatrists were incompetent, or that their credentials were deficient in any way. In fact, his attack is limited to only one of the four experts employed. Unlike the defense counsel in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), trial counsel supplied petitioner's medical records, prison activities record and prison medical records to the psychiatric experts, who each spent from three to six hours interviewing petitioner, in addition to the testing that was done. There was no significant factor in petitioner's history which was not known to or discovered by these four experts.

THE IQ TESTS

Petitioner was subjected to IQ tests, all of which showed that he had an average or above average IQ. Dr. Semone, petitioner's expert witness on the Haalstad-Reitan battery of IQ testing, complained that the tests were not properly administered. The results of an earlier test were remarkably similar, however. Dr. Vigen's tests showed petitioner to have a full scale IQ of 97. The IQ tests administered upon petitioner's admission to Confederate Memorial in 1975 produced a full scale IQ of 95. Dr. Semone's IQ testing in 2003 revealed a much higher full scale IQ of 117. (Vol. 23, pp. 5514-5515, State's Exhibit 31, circled page # 29, T. 10/07/04, p. 185)

Petitioner's complaints about Dr. Vigen's methods of IQ testing are more in the nature of an academic argument about what the test should have been called. In the setting of a capital case, such nitpicking is an unwarranted waste of time and resources. Even if one applies a *Strickland* standard to expert witness testimony, which is totally unsupported by the law, there is no prejudice because any variance in the results would not have made a difference in the result of the outcome of the trial.

Certainly since the advent of *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), obtaining evidence of a capital defendant's IQ is a vital part of any capital defense case. As petitioner's IQ is well above the 70 score cut-off for mental retardation, the difference between Dr. Vigen's test results in 1990 and Dr. Semone's test results in 2003 is irrelevant to the outcome of the trial.

Petitioner also attempts to enact a domino effect by claiming that, since Dr. Vigen's testing was flawed, then the conclusions of the other experts were suspect because they were based on Vigen's tests. On the contrary, the evidence shows

that, although the experts were aware of and considered each other's conclusions, each expert conducted his own interview of petitioner and each spent several hours with him. The extensive written notes of Dr. Rappaport in particular are valuable and quite detailed, as the State will address below. (See Defense Exhibit 193)

Petitioner has failed to show that his expert witnesses were ineffective under the standard of *Strickland*, and he has certainly failed to show that *Strickland* even applies to expert witnesses.

THE JESSIE WILSON RELATIONSHIP

Dr. Vigen testified at the penalty phase of the trial that as an adolescent petitioner had been involved in a homosexual "relationship of convenience" with an older man, one Jessie Wilson. In this relationship, petitioner performed anal sex on Wilson, and permitted Wilson to perform oral sex on him. In exchange, Wilson gave petitioner money and alcohol. Petitioner was fourteen years old when this relationship began, and it continued for a couple of years, until Wilson's murder.

Petitioner has expressed shock and outrage regarding Dr. Vigen's testimony that petitioner's relationship with Jessie Wilson was a relationship of convenience, instead characterizing it as rape, and asserting that the relationship therefore must have been highly damaging to petitioner's psyche. While the State certainly condemns such a relationship, it is clear that the relationship, while illegal, immoral and just bad in general, did not have the emotional impact that the usual type of rape or molestation case would have.

Dr. George Seiden, the only Board Certified Forensic Psychiatrist to testify at the evidentiary hearing, testified that because Wilson was not in a parental or guardian relationship with petitioner, there was no breach of trust due to their

sexual activity. It is the breach of trust that produces the devastating effects of child molestation. (T. 12/05/05, pp. 37-38, 72-75, 103-104, 115, 119)

Petitioner willingly went to Wilson to exchange sex for money or alcohol. He was not abducted, enticed or trapped into submitting and in fact acted a dominant role in their sexual encounters, performing anal sex on Wilson and allowing Wilson to perform oral sex on him. Seiden and Vigen's conclusions were supported by petitioner's own characterization of his relationship with Wilson, which he related to Dr. Vigen and to Dr. Rappaport as well. (Vol. 23, p. 5535, Petitioner's Exhibit 193, p. 20)

Dr. Seiden testified, based on the records of Vigen and Rappaport, that petitioner, who had already been sexually active with an older woman, approached Jessie Wilson voluntarily and used him to his own advantage, exchanging sexual favors for money and alcohol. Petitioner was not subject to the control or supervision of Wilson, who was neither a family or household member, nor a teacher, minister or guardian of any kind. In short, Wilson exercised no power over petitioner. Petitioner freely chose to participate in the relationship. Dr. Seiden testified that such a phenomenon was not unknown, and that the betrayal of trust isn't present in a situation in which "a person is, essentially, exploiting the situation himself." (T. 12/05/05, p. 72)

In fact, Jessie Wilson was murdered within two years of his association with petitioner, and petitioner himself was a suspect in that murder. Any reluctance by trial counsel to delve further into petitioner's relationship with Wilson, whatever its nature, was certainly an understandable tactical decision. As trial counsel testified, he was walking through a minefield of unadjudicated offenses, and he did

not want to expose the jury to yet another murder petitioner was suspected of committing:

> "I wouldn't want to bring up anything at all about Jessie Wilson in the penalty phase... There was an allegation that Mr. Code killed him... I wouldn't want to touch that at all... To me that would be a ridiculous thing to do... of scant value to gain if you have to deal with the fact that he may have been involved in another murder. I don't think any responsible lawyer would ever do that." (T. 12/06/05, pp. 131-133)

No rational defense counsel would want to risk exposing a capital jury to the information that his client had already committed a murder at the age of sixteen. Insofar as this aspect of petitioner's claim depends on allegations of ineffective expert witnesses, there is no Sixth Amendment basis for relief, as the State has addressed above. Insofar as this aspect of petitioner's claim relates to the allegation of ineffectiveness of counsel, trial counsel's decision not to emphasis petitioner's relationship with Jessie Wilson was a sound tactical decision.

MENTAL DISEASE OR DEFECT

Petitioner also claims that trial counsel was ineffective because the four experts he consulted failed to diagnose petitioner with schizophreniform disorder, therefore depriving him of an insanity defense. As noted above, there is no Sixth Amendment right to effective assistance of expert witnesses. The State will nonetheless address the "merits" of this malpractice claim in the interest of judicial economy, without waiving its objection to the applicability of the claim itself.

In support of his claim, petitioner presented the testimony of Dr. George Woods, who opined that petitioner was suffering from schizophreniform disorder. Dr. Woods based this opinion on petitioner's 1975 diagnosis of paranoid schizophrenia and the reports of petitioner's supposed delusions and hallucinations at that time, a diagnosis that was shown to be in error. This erroneous diagnosis therefore formed an unstable basis for Dr. Woods' own diagnosis. Dr. Woods' diagnosis, moreover, is not supported by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised, (DSM-IV-TR), the so-called "Bible" of psychiatric diagnosis.

The DSM-IV-TR, and its ancestors, comprises diagnostic criteria for various mental diseases, defects and personality disorders, and is widely used by virtually every psychiatric expert, and numerous non-experts, in the United States. In order to make a diagnosis of a mental disease, defect or personality disorder, certain symptoms must be either found or excluded.

The DSM-IV-TR begins with a Cautionary Statement: "The purpose of DSM-IV is to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders. It is to be understood that inclusion here, for clinical and research purposes... does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency." (DSM-IV-TR, p. xxxvii)

In short, just because a person is found to have a particular mental condition defined in the DSM-IV-TR does not mean that person is legally insane.

Dr. Woods opined that petitioner was suffering from schizophreniform disorder, a type of disorder which resembles schizophrenia, but which is of shorter duration. There is every indication, however, that this is an inaccurate diagnosis. Although petitioner had received a diagnosis of schizophrenia in 1975, it has been clearly demonstrated that this early diagnosis was in error. Petitioner had presented himself to Confederate Memorial Hospital (now LSU Health Science Center) shortly after he raped Gloria Campbell, stating that he had raped someone. (State Exhibit # 31, circled page # 26) Petitioner subsequently pled guilty to attempted aggravated rape in this offense and was sentenced to fifteen years at hard labor. Those who evaluated petitioner at the time of his admission to treatment, however, felt that petitioner was delusional in his admission to rape, and therefore recorded a "diagnostic impression of paranoid schizophrenia." (State Exhibit # 31, circled pages ## 26, 29)

Not only did Dr. Seiden find this diagnosis to be in error, petitioner's own experts retained for trial also disagreed with this diagnosis. (T. 12/06/05, p. 85 T. 12/05/05, p. 85; Vol. 23, pp. 5529-5530, 5536, 5596-5599, 5617) The basis for the error is simple: the 1975 diagnosis of schizophrenia was based on a belief that petitioner was delusional. As he did in fact rape someone, however, he was *not* delusional, and the diagnosis therefore must fail. Dr. Woods' diagnosis, built upon this same erroneous diagnosis, must fail also.

Dr Seiden also noted that petitioner's report to Lockridge of hearing someone call his name a few years earlier, and of seeing gnats flying from the side of his eye do not qualify as the sort of sustained hallucinations that qualify one for

a diagnosis of schizophrenia. The nature and severity of these phenomena was also not of a level to qualify as true hallucinations (T. 12/05/05, pp 93, 126) The DSM-IV-TR notes that hallucinations must be present for "a significant portion of time during a 1-month period." (DSM-IV-TR, page 312) Petitioner's complaint to Lockridge did not indicate any prolonged or severe hallucinations, but a few isolated incidents common to nearly everyone.

Dr. Woods' diagnosis was flawed in other respects. Although schizophreniform disorder is a "temporary" form of schizophrenia, it does not turn on and off like a switch. In order to be diagnosed as suffering from schizophreniform disorder, the episodes must last for at least one month, but less than six months. (DSM-IV-TR, p. 319, section 295.40) There is no indication, nor did Dr. Woods cite any, that any "episode" lasted longer than it took for petitioner to commit the murders on each occasion. In two-thirds of the cases, the condition of a person with schizophreniform disorder progresses to full-blown schizophrenia. In the remaining one third, there is no recurrence. (DSM-IV-TR, p. 318, T. 12/05/05, pp. 35, 96-98)

Dr. Woods did not explain how petitioner could suffer three distinct episodes of schizophreniform disorder, though he never achieved schizophrenia. Indeed, petitioner has never suffered from any schizophrenic episode since his arrest almost twenty years ago, as reflected in the complete prison medical records from Angola. (State's Exhibit 28, T. 12/05/05, p. 47) Nor did petitioner suffer any schizophrenic episodes during his previous incarceration at Angola. Professional personnel at the DOC were in possession of the previous records from Confederate Memorial, but found "no evidence of psychosis" or schizophrenia (State exhibit 29, pp. 13, 42, 109-112)

Petitioner's experts did testify at the penalty phase that, if petitioner had committed the murders in question, he was probably in a temporary psychotic state at the time. (Vol. 23, pp.5579, 5612, 5617-5618, 5620, 5650-5654) As trial counsel testified at the evidentiary hearing, the experts told him that it was possible that petitioner could have had a brief psychotic episode each time caused by stress, but that testing could not show this: "we didn't have anything to point directly to, to say that because of this test, Mr. Code is exempt from responsibility." (T. 12/06/05, p. 49) The DSM-IV-TR notes that Brief Psychotic Disorder is characterized by sudden onset of at least one positive psychotic symptom, such as hallucinations, delusion, disorganized speech or grossly disorganized or catatonic behavior lasting at least 1 day but less than one month (T. 12/06/05, p. 329).

Moreover, as trial counsel observed, petitioner told him that he clearly recalled the night of each offense, claiming to have walked by Debra Ford's house on the night of her murder and to have paid to have sex with fifteen year old Carlitha Culbert in the bathtub earlier on the day of the murder of the Chaney family. Petitioner had also told police that he had been at his grandfather's house on the day of the murder, and proceeded to explain how he had touched every item in the house where the police might have found fingerprints relating to those murders. (T. 12/06/05, p. 45) Trial counsel testified that these recollections indicated that petitioner was not in any kind of stress-induced psychosis, nor did petitioner offer any information to indicate he was under any particular stress at the time of any of the murders. (T. 12/06/05, pp. 82-83)

A possible cause of any psychotic episode would seem to be intoxication, as there was evidence of petitioner's use of cocaine. (Vol. 19, pp. 4650-4654, Vol. 23, pp. 5550, 5553, 5612) Voluntary intoxication is not a basis for an insanity defense

unless a defendant is so intoxicated that he is unable to form the requisite intent. La.R.S. 14:15.There is no indication that petitioner ever informed trial counsel or any of the four psychiatric experts that he was intoxicated or high on cocaine at the time of the Chaney murders.

Faced with a tenuous basis for an insanity defense, trial counsel determined that this was best saved for the penalty phase, especially in light of the high failure rate of the insanity defense. (T. 12/06/05, pp. 46-47) A defendant is not entitled to a defense based on what trial counsel knows to be a lie: a claim of schizophrenia or schizophreniform disorder would have been based on a lie, as petitioner would not be able to have a clear recollection of the events which he related to trial counsel if he had been in a psychotic state at the time.

Petitioner also complains that trial counsel was ineffective based on a portion of counsel's affidavit, filed with the State's original response as State's Exhibit 1. The affidavit states that counsel "is aware that temporary insanity is not a defense in Louisiana." As counsel testified, however, this resulted from a mere omission, and the sentence should have read that counsel "is aware that temporary insanity is not a *good* defense in Louisiana."

Trial counsel was certainly aware that temporary insanity is available as part of a plea of not guilty and not guilty by reason of insanity. Mr. Lawrence testified that his Master's Thesis in Criminal Justice was on the insanity defense, and counsel had employed temporary insanity as part of an insanity defense in at least two murder cases, both before and after the instant offense. [T. 12/06/05, pp. 35, 42, 60; *State v. Hahn*, 526 So.2d 260, 261-262, (La.App.2d Cir. 1988)].

Certainly counsel thoroughly investigated the possibility of an insanity defense, even going so far as to have his client tested for organic brain damage as

well as the usual battery of psychiatric tests, and employing four expert witnesses for the purpose. In addition, counsel and his investigator had begun to delve into the nature of serial killers even before an arrest was made, and continued to devote a massive amount of time and effort in preparing for trial and the penalty phase. (T. 12/06/05, pp. 8-16, 41-42, 62)

Counsel testified as to the difficulty of using an insanity defense, even though the defense provides for alternative theories of lack of factual guilt as well as, or together with, lack of *mens rea*. In a complex case such as this where a client insists on his factual innocence, attempting to use an insanity defense is not the best choice, especially where there was no obvious mental disease or defect:

"He said he didn't do it. He had an explanation for his actions of being somewhere else and a very clear recollection. That was not the way that a person who had been under a psychotic state could remember those things. And in my opinion, as his attorney, after talking to the doctors, the insanity defense didn't fit. It was better to use it as a mitigator." (T. 12/06/05, pp. 46, 73-74)

Trial counsel's decision not to pursue an insanity defense was a reasonable one, based on the advice of four expert witnesses, his own extensive experience and his client's protestations of innocence. That decision was not ineffective. Counsel has failed to satisfy either prong of the *Strickland* standard.

ALLEGED FAILURE TO INVESTIGATE SOCIAL AND FAMILY HISTORY

Petitioner complains that his trial counsel did not do a thorough enough social history of petitioner in preparation for the penalty phase of trial, and that the half-sisters who testified at the penalty phase were not raised with petitioner and

had little knowledge of his childhood. Trial counsel and his investigator testified to the contacts with family and the medical, psychiatric and previous prison records which they had obtained relating to petitioner. In addition, the psychiatric experts interviewed petitioner, his wife, sisters, and other friends and family, as noted below.

Counsel had asked the expert witnesses if they had all the records they needed, and was assured that they did. They "were all on the same page" and of the opinion that there was "nothing remarkable" about petitioner or his family that they thought was important to his mental status. (T. 12/06/05, p. 113)

Petitioner particularly complains about trial counsel's supposed failure to obtain petitioner's birth records (which in fact *were* included in trial counsel's materials, State Exhibit 31, circled pp. #82-86) and various issues relating to the health of petitioner's mother. Petitioner complains that trial counsel did not have his mother's medical records which showed that she had suffered from toxemia during one pregnancy (not petitioner), had practiced poor pre-natal care, was an alcoholic and suffered from late stage syphilis several years after petitioner's birth.

As Dr. Seiden noted, petitioner himself tested negative for syphilis upon admission to the hospital and therefore had not developed "late neuro syphilis." (T. 12/05/05, pp. 41-42, 63, 65) There is no indication that petitioner suffered from fetal alcohol syndrome. Trial counsel retained experts who conducted numerous tests for organic brain damage, such as might result from fetal alcohol syndrome, toxemia or poor pre-natal care. No such damage was shown to petitioner's intellect or brain function, so any "failure" to obtain these records did not result in the loss of any mitigating evidence.

Petitioner also incidentally questioned trial counsel on cross-examination to raise a claim that evidence of poverty and racism should have been presented as mitigation. No direct causal effect has been shown that would make such evidence relevant and admissible in mitigation. Petitioner has made absolutely no effort of any kind to show that petitioner was peculiarly or especially impacted by racism or poverty, and this claim is a mere make-weight effort to blame society for petitioner's ills. As trial counsel testified, "there are a lot of people who are raised poor, and don't commit crimes... That's more of an excuse than it is a reason." (T. 12/06/05, pp. 121-122)

Although petitioner complains that Dr. Vigen's testimony told the jury that petitioner had a "nice" childhood, that is a gross mischaracterization of Vigen's testimony, which actually provided a good bit of mitigating evidence regarding petitioner's family and upbringing.

Dr. Vigen testified: "(H)e was not raised by his mother and father, who were very violent and were unwilling or unable to support him in some way...

"And it just seemed to me, you know, he comes out (of) a very confused, disorganized family in which there is not a lot of support, stability or consistency.

"The violence in his family was precipitated around alcohol abuse, I believe, on his father's part. There were several incidences that he described in which his father beat his mother. And so my understanding was that his father – Nathaniel never labeled him as an alcoholic, but his behavior toward the mother certainly would indicate that he was, particularly with the loss of temper and violent behavior toward the mother, at one time knocking out her teeth, for example...

"Clearly, a broken family, yes." (Vol. 23 of appellate record, pp. 5505-5507.

And later, Dr. Vigen compares petitioner's claims of a happy family life and childhood with the reality: "I am contrasting that with what I think is a very dysfunctional, chaotic family background in which ultimately no one is really raising him properly; no close relationships; emotional distances prominent in his family. I think he comes out (of) a chaotic background and says things are nice." (Vol. 23, p. 5539).

Petitioner relies on a number of cases evaluating the ineffectiveness of counsel in capital cases based on a failure to investigate. Those cases are not relevant to the instant case, because the testimony of counsel and his investigator and their files on petitioner's case show that there was in fact a high degree of investigation which encompassed petitioner's prior prison record, his medical history and his social history. Moreover, none of those cases sets a standard which requires defense counsel to procure the records of a defendant's parents and grandparents, as petitioner seems to think.

Jim McClure, investigator for the Caddo Parish Indigent Defender's Office, testified on December 6, 2005, that he conducted interviews or tried to locate witnesses for petitioner's family history and background, including employers, several members of the Davis family, Walter Hudson, Daryl Leg, a prison guard at Angola from petitioner's previous incarceration, Mark Jefferson, and others, totaling eleven people he tried to locate or actually interviewed on background. McClure testified that he had attempted to contact petitioner's brothers and sisters to get information about where he was raised. McClure also sought records regarding petitioner's adoption by his grandmother (actually his father's adoption) and obtained substantial records of petitioner's medical history, his prison activities records and prison medical records from his previous incarceration, all

admitted as State's Exhibits 29, 30 and 31.[1] McClure's file, admitted as State's Exhibit 32 A and B, was contained in two file boxes, and included a large stack of subpoenas for witnesses. (Transcript of 12/06/05, pp. 9-27)

Trial counsel, John M. Lawrence, also testified he had been in contact with petitioner's half-sister, Gloria Butler, since the day of petitioner's arrest, before counsel was even appointed. His handwritten notes on petitioner's "life & social history," admitted as part of State's Exhibit 34, was characterized by him as a "partial, early one," with the experts expanding on it. It includes notations that petitioner's parents separated when he was six months old, that he was sent to Kentucky to live as a young child and was raised by relatives there and by William T. Code and Josephine Sanders Code, whom he considered as his mother.

The notes reflect that petitioner told trial counsel that William T. Code had adopted petitioner's father, and also listed seven siblings, all "halfs." The notations also include "Dr." Lockridge's diagnosis of petitioner as paranoid schizophrenic, that his father was an excessive drinker, "probably borderline alcoholic," and that his mother had died while petitioner was in prison. Petitioner's various employers were also listed, as well as a notation that, although petitioner had generally good conduct in prison, the "state may introduce evid. re rape accusation made against NC while in prison."

The notes include references to testing and evaluations by six different doctors, a brief outline of the aggravated rape case for which petitioner went to prison, as well as other notes regarding an aggravated assault. The notes also

[1] Petitioner complains that the District Attorney's Office actually obtained these records and supplied them to trial counsel, rather than trial counsel obtaining them on his own. Petitioner has cited no basis for finding the co-operation between the State and defense regarding these important records as some form of ineffectiveness. It is instead likely that the State received quicker responses from the agencies involved and was professional enough to supply them to trial counsel. What matters is that trial counsel had all these records well in advance of trial.

include discussions with the expert witnesses, references to a priest opposed to capital punishment as a possible witness during the penalty phase and extensive notes for closing argument which address lingering doubt and possible mitigating circumstances, and notes on the testimony at trial, as well as various newspaper reports and other notes on the case.

A set of notes titled "significant aspects re D's medical history" include references to petitioner being shot in the chest in 1971, and his visit to Confederate Memorial in 1975 where he admitted to rape and to having sexual feelings for children. Petitioner, it was noted, was living with his grandmother at the time, and not his mother. There is also a note that petitioner had ingested insect spray at 15 months old, all taken from petitioner's medical history. (State's Exhibit 31)

Dr. Rappaport's notes, letters and reports, admitted as Petitioner's Exhibit 193, begins on the third page with a note regarding the Jessie Williams (sic) murder in 1970, and that Code was "let go – 14 yrs old." Dr. Rappaport's notes of his interviews with petitioner begin at Caddo Detention Center with biographical information regarding his parent's separation and divorce and their "drunken fights," his siblings and his short time living with his mother, then his father before being sent to live with his grandparents in Kentucky and later back in Shreveport. The notes also reflect that petitioner visited with his father and stepmother during the summer from about age 14 and that he continued to live with his grandparents until his arrest for aggravated rape at age 19. The notes reflect that petitioner's mother would visit him on weekends for several hours and that petitioner's father had been adopted by his grandfather. (Petitioner's Exhibit 193, pp. 1-2 of handwritten notes)

The notes reflect "Shifting around occurred when he was too young to know what was going on. Spent most of the time w/ grandmother -- & the grandfather came back... when on leave from the army... Felt like he was always with grandmother & grandfather." Petitioner told Rappaport that he "Remembers happy times," "happy because of activity surrounding it... playing with cousins on his mother's side." (Petitioner's Exhibit 193, p. 3)

At less than 5 years old he was "not aware of parents problems," and had "no awareness of mother & father living together" He reported his only corporal punishment was in school if he talked in class, and that he got in fights at school. (Petitioner's Exhibit 193, pp. 5-7) Petitioner told Rappaport that he was not bothered or disturbed by his family history, that he "just accepted the way it was." (Petitioner's Exhibit 193, p. 8)

Much of the turmoil in his parents' relationship occurred when petitioner was not even around, or when he was so young he could not have formed any memory of it. (T. 12/06/05, pp. 122-124, T. 12/05/05, pp. 32-33, 67-69, 117, Vol. 23, p. 5540)

Rappaport's notes also reflect that petitioner was suspended several times for fighting and got into a crowd of "poor, uneducated kids." (Petitioner's Exhibit 193, p. 10) Petitioner was sent to "Detention Hall" at twelve or thirteen for stealing a bike and being picked up by police. His grandparents punished him, and he "realized he had done something wrong," but it "just seemed like fun at that age." (Petitioner's Exhibit 193, p. 11)

Petitioner told Rappaport that he began to drink at twelve or thirteen, although he denied being a compulsive drinker. (Petitioner's Exhibit 193, pp. 12-13) He began to smoke marijuana at age 12 or thirteen as well, tried cocaine and

had sniffed glue. (Petitioner's Exhibit 193, p. 13) By high school he got suspended for fighting at the end of ninth grade, but claimed he stopped going to school the next year as he "felt he was too grown up," and began to work at various places (Petitioner's Exhibit 193, pp. 14-15) Petitioner detailed his work history, his incarceration in 1975 and his eventual marriage. (Petitioner's Exhibit 193, pp. 16-17)

Petitioner told Rappaport about his sexual history, including his first experience of sex with an older woman (23 or 24) at the age of 12, with no sexual dysfunction, and admitted homosexual experiences at age 14 or 16 where Jesse Wilson paid petitioner for allowing oral sex and to be sodomized. Petitioner claimed "it was OK with him – didn't bother him." (Petitioner's Exhibit 193, p. 20) Petitioner also related his medical history, including being shot in the chest at 14 years of age during a drunken argument, and that he saw a school board psychologist as required when he was suspended at 12 years old. (Petitioner's Exhibit 193, pp. 20-21)

Petitioner told Rappaport his parents were both dead and that his father had a drinking problem that interfered with both his marriages, which ended in divorce. (Petitioner's Exhibit 193, p. 22) His father when drinking was argumentative and violent to his wives, but never hurt petitioner physically, mentally or sexually. His mother died of congestive heart failure, and had been sick for years with bronchitis. She was "real nice, got along real well with people" and with petitioner, but was "very strict morally," and wouldn't let her sons smoke in front of her. She never used profanity around him. He thought it was "good (that his) mother was this way." (Petitioner's Exhibit 193, p. 23) He was "proud to be raised in environment such as that – i.e. no profanity."

He related that his grandmother raised him because his mother was working, but he saw both parents and got affection from them. (Petitioner's Exhibit 193, p. 23-24) Petitioner related other details regarding his grandparents and his siblings. (Petitioner's Exhibit 193, pp. 25-26) Petitioner then begins to detail various criminal activities he participated in or was accused of including fighting, an attempted homosexual rape at age 12 (Petitioner's Exhibit 193, pp. 29-30), to which petitioner only admitted hitting the 10 year old victim, and burglarizing cars with his cousin. (Petitioner's Exhibit 193, p. 31) Petitioner had shoplifted from the Piggly Wiggly with his cousin.

Petitioner again refers to his relationship with Jesse Wilson, where he was paid for sex, and tells Rappaport that Wilson was beaten to death with an iron skillet, which petitioner denied doing. He "felt hurt when Jesse (was) killed – he was one of the nicest guys he met." He told Rappaport that the family knew they were friends, and had to be naïve not to realize what was going on. (Petitioner's Exhibit 193, p. 35) Petitioner claimed he was not arrested for Wilson's murder, as he was babysitting in another part of town for his father and stepmother, too far to get to Jesse's house quickly. He also faked a burglary to his father's house to cover a friend's theft of his father's pistol. He didn't get away with it, and his father whipped him. (Petitioner's Exhibit 193, p. 36) Petitioner also admitted several batteries, and finally his arrest for aggravated rape, although he told Rappaport the victim was a prostitute, and claims he pled guilty expecting to do only 3 ½ years since he was a first offender. (Petitioner's Exhibit 193, pp. 37-38)

Petitioner denied committing a rape in prison of which he was accused. (Petitioner's Exhibit 193, pp. 39-40) Petitioner told Rappaport about being arrested for the Debra Ford and Chaney homicides, but didn't volunteer the information

that he was arrested for his grandfather's murder as well. (Petitioner's Exhibit 193, p. 40) He denied having anything to do with his grandfather's death. (Petitioner's Exhibit 193, p. 41)

Petitioner admitted to knowing the Chaney family for a few months before they were murdered, claiming that Billy Joe Harris was having sex with Carlitha, and that petitioner sometimes gave Carlitha money for beer. (Petitioner's Exhibit 193, p. 42) He claimed he sometimes bathed Carlitha with Johnson's Baby Oil, and had stopped visiting them a week or so before the murders. He told Rappaport there were no witnesses "only a fingerprint." (Petitioner's Exhibit 193, p. 45) Petitioner provided other details he claimed to have heard about Debra Ford, and said that he "had attempted to burglarize her house – of color T.V. – when saw door open (on a diff. day), but didn't go in when he heard voices." He denied guilt of this murder as well, claiming his fingerprint was there from his previous attempt to break in. (Petitioner's Exhibit 193, p. 47) Petitioner also denied murdering his grandfather, and told Rappaport about three other murders he was suspected of in the same time period of 1984-1987. (Petitioner's Exhibit 193, p. 49)

In notes from another interview held on 5/25/89, petitioner denied his guilt, and repeats his claim that he pled to the attempted rape thinking he'd only have to serve 3 ½ years. He again details his family members (Petitioner's Exhibit 193, p. 6), and tells Rappaport that his father was arrested once for shooting his girlfriend. Petitioner told Rappaport that he was accused of a lot of things he didn't do, such as starting a riot in prison by telling other inmates not to go back to their cells. (Petitioner's Exhibit 193, pp. 8-9) Petitioner relates that his brother, Calvin, is in rehab in Texas, that his father was an alcoholic, and that his mother drank heavily as well, repeating his reports that his father physically abused petitioner's mother

and stepmother. (Petitioner's Exhibit 193, p. 9) He also reports that, since his parents split up when he was three, they didn't fight in front of him that he can recall. He reports that his mother stabbed his father after he threw a knife at her. He relates divorces among his parents and grandparents, physical abuse due to alcoholism, and drug abuse. Criminal charges against his father and brother were dropped. (Petitioner's Exhibit 193, p. 10)

Petitioner related no psychiatric hospitalization, despite spending a week at Confederate Memorial Hospital in 1975, and denied that he committed the aggravated rape of Gloria Campbell, claiming that "Lee" was a prostitute he did not pay. He characterized himself as a "sensitive and caring person" who "would go out of (his) way to help others." (Petitioner's Exhibit 193, p.11) Rappaport noted that petitioner told him he "may not be proud of everything I've done (e.g. stealing bikes) – but not ashamed of anything he did – sure(?) won't admit it. (e.g. homosexual exp.)." (Petitioner's Exhibit 193, p. 12)

Rappaport also interviewed petitioner's wife, Vera Code, and Katie Samuels, a close friend of petitioner, Mr. and Mrs. Hart, his neighbors, and Joanne Davis, a relative who told Rappaport that petitioner claimed he "took the rap" for his father "having raped a younger girl." (Petitioner's Exhibit 193, p. 2 of Davis interview notes)

This review of Rappaport's and Lawrence's notes is to show that petitioner has produced little additional relevant information beyond what trial counsel already knew. Trial counsel was aware of petitioner's involvement with Jesse Wilson, and Dr. Vigen testified about this at trial. Trial counsel was also aware that petitioner's parents were reputed to have been alcoholics, that his father was

violent and that he grew up in a chaotic environment. Evidence regarding these mitigating factors was presented at trial, as noted above.

TRIAL STRATEGY BASED ON KNOWLEDGE OF PETITIONER'S BACKGROUND AND PRIOR BAD ACTS

In fact, petitioner's quarrel with trial counsel's representation is actually based on counsel's decisions about how to use this information or whether to use it at all. The State has clearly demonstrated that trial counsel made an extensive investigation and obtained virtually all relevant information about petitioner's background. Petitioner has not presented the court with any pertinent facts which were not already known to trial counsel through his pre-trial investigation of petitioner's family history. Certainly petitioner has not shown anything that would have made a difference in the outcome of the trial, and that is a necessary part of the test for ineffective assistance of counsel.

Most of the "mitigating evidence" petitioner urges should have been discovered, if not actually already known to trial counsel and his experts, related to incidents of family turmoil which occurred when petitioner was not even present, as he was raised by his grandparents, and not with his siblings. (T. 12/06/05, pp. 122-124, T. 12/05/05, pp. 68-69, Vol. 23, p. 5540)

As the Fifth Circuit noted in *Prejean v. Smith*, 889 F.2d 1391, 1398 (5th Cir. 1989), *writ denied* 494 U.S. 1090, 110 S.Ct. 1836, 108 L. Ed.2d 964 (1990), character testimony of family members could give the prosecution the opportunity through cross-examination to present evidence of unadjudicated offenses. In his testimony at the evidentiary hearing, trial counsel revealed this same important tactical reason for not relying on petitioner's closest family members for further

information about his childhood. In addition to the suspicion that petitioner murdered Jessie Wilson, petitioner's childhood and youth presented "bushels and bushels of unadjudicated offenses," including incidents where he had tortured and killed animals, had sexual desires for young children and where he had participated in a homosexual rape. Any effort to address petitioner's history through close family and friends would have provided an opportunity for the State to bring out these further examples of anti-social behavior by petitioner, and trial counsel was unwilling to take that risk. (T. 12/06/05, pp. 50-52)

Even current counsel has not chosen to subject any of petitioner's surviving family members or friends to the rigors of cross-examination regarding their recollections and knowledge of petitioner's "character and propensities." Their untested affidavits cannot support petitioner's claim that their testimony at trial would have provided any real mitigation evidence, fraught as it was with the danger of revelations of other serious offenses committed by petitioner, including murder, rape and the torture of animals.

Instead, trial counsel agreed with the State that he would not seek to introduce evidence of good character and that the State would not provide evidence of these other unadjudicated offenses unless he did. (T. 12/06/05, pp. 50-52) In such an instance, the presence of siblings who were not raised with petitioner and therefore were not aware of these incidents, was viewed by trial counsel as a positive thing, and constituted a deliberate strategic decision. Counsel did not want to bring up any information about any family members committing crimes, either, such as petitioner's brother who was discharged from the army for drug abuse and arrested for rape. (T. 12/06/05, pp. 127-129)

Trial counsel also testified about several instances where he was able to obtain valuable stipulations that aided the defense. FBI Agent John Douglas, who had testified at a pre-trial hearing regarding other crimes evidence, was delayed in arriving to testify at trial. The trial judge was unwilling to allow the State a recess in order for Agent Douglas to arrive. Trial counsel agreed to allow the transcript of Douglas's prior testimony to be read to the jury. He considered this a major victory because of Douglas's personality and expertise, and the severely blunted impact that reading a transcript would have as compared to the actual witness. In exchange for this concession, the State agreed to stipulate to the testimony of Mrs. Hart adduced at a Motion to Perpetuate Testimony, and have it read to the jury in lieu of her testimony. (Vol. 6, pp. 1251, et seq., Vol. 22, p. 5265) Mrs. Hart had been petitioner's neighbor at the time of the Chaney murders and she had provided an alibi and character evidence for petitioner, but then began to make demands of trial counsel, with what he viewed as threats to change her story if he didn't comply. (T. 12/06/05, pp. 58-60) Trial counsel was able to get Mrs. Hart's prior testimony read to the jury as a stipulation without taking the risk that she would change her testimony to hurt his client.

In addition, trial counsel was able to obtain a stipulation regarding the two surviving Chaney children, who were found hiding in a bedroom. One of the children said that four people, two men and two women, committed the murders, put flies on the victim's faces, and wore masks. Counsel had been prevented from interviewing the children, and was afraid to call them as witnesses in case they recoiled in fear from his client or otherwise directly implicated him in the Chaney murders. The stipulation allowed counsel to present the jury with the tale of four perpetrators, which was consistent with his belief that the murders were part of

some drug revenge scheme, and contradicted the State's theory that petitioner was the sole perpetrator, without risking an identification or reaction to his client. (T. 12/06/05, pp. 54-58, 61)

In order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy a two pronged test by first showing his counsel's performance to be so deficient as to deny him the "counsel" guaranteed by the Sixth Amendment and second that those errors are so serious as to deprive him of a fair trial, that is, one with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail under the *Strickland* test, the defendant must demonstrate that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Knighton v. Maggio*, 740 F.2d 1344, 1349, (5th Cir. 1984), *certiorari denied, stay denied, Knighton v. Louisiana,* 469 U.S. 924, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984). *State v. Thompson*, 39,454 (La.App.2dCir. 3/2/05), 894 So.2d 1268, 1281.

A defendant making a claim of ineffective assistance of counsel must identify certain acts or omissions by counsel which led to the claim; general statements and conclusory charges will not suffice. *Strickland, supra; Knighton v. Maggio, supra; State v. O'Neal,* 501 So.2d 920 (La.App.2d Cir. 1987), *writ denied,* 505 So.2d 1139 (La.1987).

In reviewing such a claim, there is a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance. Where mitigating evidence is not presented to the jury because of counsel's tactical choice, petitioner must overcome the strong presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct.

158, 164, 100 L.Ed. 83 (1955); *State ex rel. Busby v. Butler,* 538 So.2d 164, 169 (La. 1988).

A reviewing court must give great deference to trial counsel's judgment, tactical decisions and trial strategy, strongly presuming he has exercised reasonable professional judgment. The failure to present such evidence would not constitute "deficient" performance within the meaning of *Strickland* where trial counsel concluded, for tactical reasons, that attempting to present such evidence would be unwise. *Williams v. Cain,* 125 F.3d 269, 278 (5th Cir. 1997), *certiorari denied* 525 U.S. 859, 119 S.Ct. 144, 142 L.Ed.2d 116 (1998).

There is no ineffective assistance where, as here, trial counsel was "legitimately concerned that any mitigating testimony would have been presented by witnesses whose knowledge would have opened the door to more damaging evidence under cross-examination." *Williams v. Collins*, 16 F.3d 626, 632 (5th Cir. 1994), *certiorari denied*, 512 U.S. 1289, 115 S.Ct. 42, 129 L.Ed.2d 937 (1994), *Prejean, supra.*

"It is all too tempting for a defendant to second-guess counsel's assistance after conviction... and all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland, supra*, 466 U.S. at 689. "Hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy was successful." *State v. Brooks*, 505 So.2d 714, 724 (La. 1987), *cert. denied* 108 S.Ct. 337, 484 U.S. 947, 98 L.Ed.2d 363

The election to call or not to call a particular witness is a matter of trial strategy and is not, per se, evidence of ineffective assistance. *State v. Seay*, 521

So.2d 1206, 1213 (La. App.2dCir. 1988); *State v. Lee*, 39,969 (La.App.2d Cir. 8/17/05) 909 So.2d 672, *writ denied* 2006-0247 (La. 9/1/06), 936 So.2d 195.

WIGGINS AND *WILLIAMS*

Petitioner relies heavily on *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct.2527, 156 L.Ed.2d 471 (2003) and *Williams v. Taylor*, 120 S.Ct. 1495, 529 U.S. 362, 146 L.Ed.2d 389 (2000), for the proposition that failure to investigate and present mitigating evidence is ineffective assistance in a capital case. In each of these cases, the information which defense counsel had failed to discover was of a strong nature, including severe privation and abuse in the first six years of life, foster care and alleged repeated sexual abuse by foster father, gang rape by foster brothers and sexual abuse by a Job Corps supervisor (in *Wiggins*) and a diagnosis of borderline retardation and childhood abuse, neglect and mistreatment (in *Williams*).

In *Wiggins*, the Supreme Court found that trial counsel had unreasonably relied solely on a PSI and DSS records and had not instituted any independent social history report. In *Williams*, trial counsel had not sought relevant juvenile and social services records because he erroneously thought he was not entitled to them, and had failed to return a phone call from a "potentially persuasive character witness."(529 U.S at 373).

Neither of these cases dictates the result in the matter before this court. As detailed above, trial counsel investigated and obtained a substantial social history on petitioner, together with his medical history, his prison records and his prison medical records. Trial counsel's experts tested petitioner and told trial counsel they had all the records that they needed. (p. 113) Trial counsel was aware that petitioner had essentially been raised by his grandmother, and that his parents had

an unstable marriage and abused alcohol. (T. 12/06/05, pp. 62, 115) He was certainly aware of petitioner's involvement with Jesse Wilson. (T. 12/06/05, pp. 50, 131-134)

Trial counsel was also aware, however, of numerous unadjudicated crimes and other bad acts which could be exposed through the presentation of witnesses who had known petitioner or grown up with him at the time these incidents had occurred or been committed. (T. 12/06/05, pp. 50-51) *Prejean, supra; Nixon v. Epps,* 405 F.3d 318, 324 (5th Cir. 2005, *certiorari denied* ___U.S.___, 126 S.Ct. 650, 163 L.Ed.2d 528. Counsel was aware of the results of the psychiatric and medical tests performed by his experts to try to determine if there was any strong indicator of a mental disease or defect such as would support an insanity defense. (T. 12/06/05, pp. 42-44) Counsel had been in contact with members of petitioner's family from the time of his arrest, and his investigator was employed in contacting or attempting to locate people who might provide mitigation information. (T. 12/06/05, pp. 11-27, 39-41)

Faced with a substantial case for guilt and a horrifying case of aggravation for the penalty phase, trial counsel made a reasoned decision to avoid witnesses who could be used to inform the jury of even more horrifying unadjudicated offenses committed by his client. Trial counsel also made an agreement with the prosecution to limit the character evidence in exchange for the prosecution limiting its evidence of unadjudicated offense at the penalty phase. Trial counsel was faced with an unenviable task: a defendant who was almost sure to be convicted of mass murder, with evidence that he was also a serial murderer, and with mitigating evidence which was fairly mundane and unlikely to evoke much sympathy from the jury. As he testified, "the evidence of good character was certainly miniscule

compared to the damage that could have been done by these unadjudicated offenses."(T. 12/06/05, p. 52)

Trial counsel was attempting to maintain credibility with the jury and balance lingering doubt with a tale of a less than ideal childhood and possible psychotic breaks, "hoping to use someone's reluctance to accept whatever had been presented in favor of their own beliefs, and a lingering doubt just might save Mr. Code or could have in this case if that could have been possible." (T. 12/06/05, p. 49)

As counsel observed, "you don't have to be consistent when you just need one vote to save someone's life. You just need one... It was the only strategic move that I thought made any sense is to use what we had for mitigation because it certainly didn't fit the insanity defense for mental disease or defect... Lingering doubt means that there may be something there that they can hold on to say that death is not appropriate, whatever that may be, and then there's a million possibilities. But one of them is a mental status situation where if you can convince somebody that, well, maybe it doesn't fit the McNaughton rule, but there's something wrong. Even though he tested normal, that it's possible that under stress or situation that maybe he reacted in a bad way and maybe there was something that we don't know about... Maybe you can convince somebody that death is not appropriate." (T. 12/06/05, pp. 47-48)

Trial counsel's strategy was based upon a sufficient investigation and was a reasonable one. The second prong of *Strickland*, prejudice, is also lacking: In the context of a complaint of ineffectiveness in the penalty phase of a capital case, the question is whether the "additional" mitigating evidence petitioner argues was not discovered is so compelling that there is a reasonable probability at least one juror

could reasonably have determined that death was not an appropriate sentence. *Neal v. Puckett,* 286 F.3d 230, 241 (5th Cir 2002), *certiorari denied sub nom. Neal v. Epps*, 537 U.S. 1104, 123 S.Ct. 963, 154 L.Ed.2d 772.

The "deficient performance" prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2065. If this first hurdle is cleared, the defendant then has the burden to show that because of counsel's deficient performance "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. A "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *Nixon, supra.*

Certainly petitioner has failed to carry this portion of his burden as well. Although unpleasant and even unhealthy, petitioner's childhood and home life was an unfortunately common one of neglect from a chaotic and alcoholic family, not the extremes of abuse suffered in *Wiggins* and *Williams*, and was unlikely to elicit great sympathy from any juror, especially in light of the horror of the crimes of which he was convicted. The mitigating evidence is far weaker and the evidence in support of the death penalty considerably stronger than in *Williams* and *Wiggins*. See *Hood v. Dretke*, 93 Fed.Appx. 665, 671, 2004 WL 723267, 5 (5th Cir. 2004), *certiorari denied* 543 U.S. 836, 125 S.Ct. 255, 160 L.Ed.2d 58.

As in *Nixon, supra*, juxtaposing petitioner's "scant potential mitigating evidence against the calculated, vicious nature of his crime," petitioner has not demonstrated a reasonable probability that the outcome of the sentencing phase would have been different if not for trial counsel's purported deficient

performance. *Ibid*, at 328. The jury was in fact made aware of the majority of this supposedly "compelling" mitigating evidence, and found it lacking.

The State submits that trial counsel's tactical decisions were valid and reasonable and made with a sufficient factual basis to reach such a determination. It therefore did not constitute ineffective assistance. Under *Strickland* and its progeny, the presumption of effectiveness of trial counsel should be applied. Petitioner has failed to satisfy either of Strickland's two "prongs." Petitioner's claim of ineffective assistance of counsel is without merit.

II. LETHAL INJECTION

Petitioner complains that execution by lethal injection is cruel and unusual punishment, in violation of the state and federal constitutions. His original application complained that the state regulations were not specific enough as to "volume and mixture of the drugs, the pressure in the catheter lines, etc." to ensure a humane execution. Lengthy testimony, including John Doe depositions by Angola personnel directly involved in the lethal injection executions, set forth the procedures employed by the State in administering lethal injections.

ADMINISTRATIVE LAW, "CUT-DOWN" PROCEDURES & STRESS OF THE JOB ISSUES PROCEDURAL OBJECTIONS

Although petitioner devotes much criticism to the methods by which Department of Corrections (DOC) personnel determined the appropriate chemicals and amounts to be used, this issue is outside the limited grounds permitted for post-conviction relief, as it does not relate to a constitutional violation. La.C.Cr.P.

Article 930.3. The State will nonetheless address this issue, without waiving the procedural objection that it is not permitted as a vehicle for post-conviction relief under Art. 930.3.

Former DOC Secretary Bruce Lynn, former Angola Warden John Whitley, former DOC counsel Annette Viator, Deputy Warden Peabody, Angola pharmacy Director Don Courts and a senior EMT/paramedic (John Doe # 1) visited and consulted over the telephone with several other states about what procedures and chemicals they used, as part of their efforts to determine an appropriate method and combination of drugs for a humane and effective execution. In addition, they received information from seventeen states on their lethal injection protocols. (T. 2/11/03, pp. 27-40, 53-56, 63-72, T. 2/13/03, pp. 40-41, T. 3/18/03, pp. 56-61, T. 9/17/06, pp. 62-74, 89-99, JD #1, pp. 21-24, 134-139, Petitioner's sealed Exhibit 119). The same drugs, in the same or similar amounts, are used in the vast majority of the states which use lethal injections as their method of execution, as noted by the Supreme Court of Connecticut in *State of Connecticut v. Webb*, 252 Conn. 128, 145, 750 A.2d 448, 457 (Conn. 2000), *certiorari denied Webb v. Connecticut,* 531 U.S. 835, 121 S.Ct. 93, 148 L.Ed.2d 53 (2000):

> "Of the thirty-eight states permitting capital punishment, at least thirty-four have adopted lethal injection as a manner of execution. They have done so because it is universally recognized as the most humane method of execution, least apt to cause unnecessary pain. In addition, every court that has addressed this issue has concluded similarly that lethal injection is constitutional."

In *Webb*, state officials conferred with the officials of six other states before deciding on how lethal injections would be administered. *Ibid*, A.2d at 451. In Tennessee, that Department of Correction "formed a committee for establishing the protocol and then studied the protocols used throughout the country," and met with

officials in Indiana and Texas regarding the protocol. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 300, 307 (Tenn. 2005), certiorari denied ____U.S.____, 126 S.Ct. 2288, 164 L.Ed.2d 813.

The Ninth Circuit noted in *Beardslee v. Woodford*, 395 F.3d 1064, 1073, *certiorari denied* 543 U. S. 1096, 125 S.Ct. 982, 160 L.Ed.2d 910 (2005) that the procedure used in most lethal injections originated in Oklahoma, based on the recommendations of Dr. Stanley Deutsch, chair of the Anesthesiology Department at Oklahoma University Medical School.

Petitioner complains that there exist more regulations for the euthanasia of laboratory animals than for the execution of human beings. He is comparing apples and oranges. Thousands, if not millions, of laboratory animals are euthanized every year in research laboratories across the United States, without the attendant legal guarantees, formality, ceremony or witnesses attendant on the execution of those persons condemned for committing the most heinous crimes. Indeed, such a concept would be ridiculous.

Petitioner has shown no constitutional basis for his claim that the state is obligated to utilize any specific method of determining how to administer lethal injections and is prohibited from consulting and considering methods successfully used by other states. Stated more succinctly, there is no constitutional mandate to reinvent the wheel. The record reflects that all those involved in determining the lethal injection protocol for Louisiana were dedicated to ensuring a swift and humane death for any condemned inmate, and did extensive research to that end. Besides the prison and medical personnel in seventeen other states, they also consulted two doctors, the pharmacy director and a senior EMT, John Doe # 1, who was also a trained paramedic. These professionals employed by the DOC

served as part of the committee formed for this specific task, and were included for their medical knowledge and expertise. (T. 9/17/03, p. 89) This portion of petitioner's claim is without merit, as well as being outside the limitations for post-conviction relief claims provided by the Louisiana Code of Criminal Procedure.

Petitioner also devotes a lot of argument to use of a "cut-down" procedure, but he has produced not a single witness to testify that any "cut down" procedures have ever been employed in a Louisiana lethal injection. Moreover, petitioner has not presented any evidence, nor even an allegation, that his own veins are in such poor condition that a cut down procedure might be necessary to provide adequate access to his veins.

Dr. Angelo Tarver and John Doe # 4 testified that they had each checked inmates' veins several days before scheduled executions in order to determine any potential problems. (T. 3/18/03, p. 105-106, JD # 4, pp. 67-69, JD # 1, pp. 40, 48-49) Warden Cain also stressed that the EMTs were certified, and would know ahead of time if there were an apparent problem with a prisoner's veins. (T. 2/12/03, pp. 108-109) Addressing the issue of a cut down in this pcr application is therefore premature, and unnecessary to a determination of petitioner's Eighth Amendment claim.

Referring to cases where cut downs were actually required (which did not include that inmate either) the Indiana Supreme Court found that "these two examples demonstrate that problems may occur in unusual circumstances, but that possibility does not rise to a systematic or inherent flaw in the lethal injection process." *Ritchie v. State*, 809 N.E.2d 258, 262 (Ind. 2004), *certiorari denied* ____U.S.___, 126 S.Ct. 42, 163 L.Ed.2d 76 (2005).

Petitioner also devotes an inordinate amount of time to the psychological effect on various Angola personnel. As expected as this may be, it does not relate in any way to the Eighth Amendment, except to illustrate that those persons involved consider their task with the appropriate gravity. It is entirely irrelevant otherwise.

Although John Doe #6 testified that his hands shook as he administered the lethal drugs through the IV port, there was no indication that it had any impact on the inmate who was being executed. (JD #6 pp. 24-26) John Doe # 5 testified that he never saw a syringe pusher unable to perform the task. (JD #5 pp. 23-24)

OVERVIEW OF DEATH PENALTY

The Eighth Amendment prohibits cruel and unusual punishment. This has historically been interpreted to forbid such "punishments of torture" as disembowelment, beheading, quartering, burning at the stake, breaking at the wheel and crucifixion. *Furman v. Georgia,* 408 U.S. 238, 265, 92 S.Ct. 2726, 2739 (1972). Under the Louisiana Constitution, Art. 1, section 20, punishment must not be degrading to the dignity of human beings, arbitrarily inflicted, unacceptable to contemporary society or disproportionate to the crime. *State v. Perry*, 610 So.2d 746, 762 (La. 1992). The evidence adduced during the course of the evidentiary hearing and depositions shows that the death penalty by lethal injection, as administered in Louisiana, is not unconstitutional under either the federal or state constitutions.

The federal and state constitutions do not require that a condemned inmate experience a death that is completely free of pain or anxiety. "Traditional deaths by execution... have always involved the possibility of pain and terror for the

convicted person." *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983), *certiorari denied,* 463 U.S. 1237, 104 S.Ct. 211, 77 L.Ed.2d 1453. In *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995), *certiorari denied,* 516 U.S. 1054, 116 S.Ct. 724, 133 L.Ed.2d 676, the Fourth Circuit upheld execution by poison gas as constitutional, and also noted that no court had yet found execution by lethal injection is unconstitutional. This still holds true eleven years later.

As noted in *Webb*, the United States Supreme Court has not yet decided whether lethal injection violates the Eighth Amendment's prohibition against cruel and unusual punishment. In rebuffing attacks on other methods of capital punishment, however, the Supreme Court

> "articulated a framework for addressing the constitutionality of a method of execution: (1) whether the method of execution comported with the contemporary norms and standards of society; (2) whether it offends the dignity of the prisoner and society; (3) whether it inflicted unnecessary physical pain; and (4) whether it inflicted unnecessary psychological suffering...
>
> '**The cruelty against which the [c]onstitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely**.'" *Webb, supra,* A.2d at 454. (emphasis added).

As noted above, lethal injection is employed by thirty-seven of the thirty-eight states which provide for capital punishment. Testimony at the evidentiary hearing showed that a dignified and respectful atmosphere prevails at executions in Louisiana. Petitioner has failed to show that lethal injection, as administered in Louisiana, inflicts unnecessary physical pain. Former warden Whitley testified that the inmate who was the first to be executed by lethal injection was so calm as he lay on the gurney that Whitley had to speak to him to make sure he was conscious before the procedure began. (T. 2/11/03, pp. 73-77, 80) Warden Cain testified that

the six prisoners whose lethal injection executions he presided over were resigned, even calm, in the face of their fate. None offered any resistance. (T. 2/12/03, p. 68, 121) All four of the criteria for a constitutional method of capital punishment have been satisfied by Louisiana's lethal injection protocol.

OVERVIEW OF THE LOUISIANA PROTOCOL

Testimony was uniform in its revelation that each execution is performed in a solemn, professional and even reverential fashion. Testimony was presented from prison personnel, including the Secretary of the Department of Corrections (DOC), Richard Stalder, Angola Warden Burl Cain, former legal counsel for the DOC, the medical director and former medical director, several Emergency Medical Technicians (EMTs) and other DOC employees who had witnessed and administered lethal injections, and even from Denise LeBouef, a defense counsel then employed by the Capital Post-Conviction Project, who had witnessed the execution of her client. (T. 2/11/03, pp. 24, 79, 124-125, T. 2/12/03, pp. 122, 124-125, T. 3/17/03, p. 63, Stalder deposition, pp. 51-52, JD # 1, pp. 132-134)

Three drugs are used in the lethal injection procedure in Louisiana. Angola's head pharmacist, Don Courts, testified that he personally prepared the syringes of the three drugs for six of the seven lethal injections, and marked the syringes with large numbers to indicate the order in which they were to be used. Two grams of sodium pentothal, or thiopental, an ultra-fast-acting barbiturate, is prepared and placed in the syringe marked "#1." Forty (40) milligrams of pancuronium bromide, or Pavulon, a muscle relaxant, are prepared and placed in the syringe marked "#2," and 120 milliequivalents of potassium chloride, a salt which stops the heart in high doses, are prepared and placed in the syringe marked "#3." The three syringes,

along with additional doses of the drugs to be prepared in case of need, are placed in a fitted case which is then given into the custody of a senior Emergency Medical Technician (EMT) who will participate in inserting the intravenous (IV) lines. (T. 3/17/03, pp. 66-68, JD #1, pp. 10-19, 29-37, 114-116, JD # 2, pp. 26-33, JD # 4, pp. 22-27).

That EMT takes the case with the syringes to a "control room" next to the execution chamber where the IV lines and wiring for the monitors are routed and where the EMTs, executioner and Secretary Stalder later observe or participate in the execution while remaining unseen by those in the observation room. A one-way mirror allows those in the room to observe the inmate and the IV lines, as well as to await Warden Cain's signal to begin the execution. (JD # 1, pp. 42-45, 71-73, 80, JD #2, 6/17/03, pp. 25-31)

Care is taken that the inmate is not strapped down so tightly that the flow of blood in his arms is impaired, so as to ensure that the drugs enter the blood stream quickly. (JD # 1, p. 60). Experienced and senior EMTs insert two IV lines in each arm/hand of the inmate to be executed, and ensure that the lines remain open and are flowing properly. Hanging bags of saline solution, with injection ports, drip into the lines. Pulse oximeter and EKG monitors are attached, and provide information on the condemned man's physical condition. The EMTs, Secretary Stalder and the "syringe pusher" are in a "control room" next to the execution chamber, and monitor the status of the inmate and the progress of the execution. (JD # 1, pp. 4, 28-29, 72-75, 79-86; JD # 2, 6/17/03, pp. 55, 59, 62-65, 85, 93, 110; JD # 4, pp. 35-37, 41-42, 51-57)

The "syringe pusher" was a short-hand label used by counsel at the hearing. At least two men had acted as "syringe pusher" for the seven lethal injection

executions held in Louisiana. Each was a prison employee who actually inserted the three syringes containing the lethal drugs into the IV port and slowly "pushed" the contents of the syringe into the port, and so into the veins of the condemned man. This is obviously a much less skilled procedure than inserting an IV or syringe needle into the skin. John Doe #3, who had acted as a "syringe pusher" had been an EMT some years ago, and knew "how to give a shot." He also had experience in administering injections to farm animals. He also met with a senior EMT for about an hour, and was instructed to "push" the drugs slowly. He found the use of a syringe very simple and he had no need to practice. (JD # 3, 2/11/03, pp. 10-12, 39-40)

Another "syringe-pusher," John Doe #6, also had experience in administering injections to farm animals and had given hormone injections to his own wife, although he had no formal medical training beyond CPR and first aid. Each time an execution was scheduled, he met with a highly trained senior EMT who walked him through a simulation of picking up the syringe and inserting it in the injection port. He was told not to push the drugs too fast, and the EMTs timed him as he took about 30 seconds to empty each syringe into the IV port. (JD # 6, pp. 7, 10-15, 23-27; JD # 1, pp. 86, 91-93)

Warden Cain himself stands by each condemned man as he lies on the gurney, as Warden Whitley had done before him, and prays with any condemned man who requests it, even holding the hand of one of the condemned men. Warden Cain gives a nod to signal those inside the chamber to begin the injection of the drugs. (T. 2/11/03, pp. 76-77, 2/12/03, pp. 34-100; JD # 3, pp. 26-27)

Three drugs are used in the lethal injection protocol in Louisiana. The first drug administered is sodium pentothal, also called thiopental, a powerful and ultra-

fast acting anesthetic which produces unconsciousness within seconds, as the witnesses affirmed. The sodium pentothal, used in amounts of .30 to .50 grams in a clinical setting, is administered in the amount of 2 grams, four to eight times the amount used for medical purposes.

Next is administered 40 milligrams of pancuronium bromide, or Pavulon, a muscle relaxant which prevents all movement including respiration, but does not provide any anesthetic effect, nor does it affect a person's consciousness. In this amount, the dose is sufficient to cause death. Finally, 120 milliequivalents of potassium chloride is administered, which immediately stops the heart and ensures that the condemned man is dead. (T. 2/12/03, pp. 106-107; T. 3/17/03, pp. 43-45, 53-56, 66-68; JD # 2, pp. 14-20)

Petitioner's original complaint alleged that there was no guarantee that the drug to be used would be properly stored, prepared or administered. Testimony showed instead that the Angola pharmacy has a procedure which guarantees drugs are not kept past their expiration date. The EMTs also check that the drugs are current. The pharmacy director himself prepares the syringes to be used and labels them clearly and simply with large numbers indicating the order in which they are to be administered. No deficiencies were ever found regarding expired drugs during inspections of Angola's pharmacy. (T. 3/17/03, pp. 54, 66-68, 80; JD # 2, pp. 25-26; JD # 4, pp. 23- 24, 130)

The EMTs watch the IV lines to make sure there are no leaks and coach the "syringe pusher" not to push the drugs too quickly, in order to prevent a "blow out" of the IV. The lines are briefly flushed with saline between each drug to prevent any interaction between the drugs. The entire procedure, from the first injection of sodium pentothal until the inmate is pronounced dead, takes from *4 ½*

to six minutes. The parish coroner and the medical director, Dr. Tarver, examine the body and pronounce the prisoner's death. (T. 3/17/03, pp. 95-100; JD # 1, pp. 67-70, 73-75; JD # 3, pp. 10, 16, 29, 31-34, 39-43)

Various witnesses testified as to the execution of each of the seven condemned men who have been executed by lethal injection in Louisiana. In each case, there were no untoward incidents observed. Indeed, the real only difficulty occurred in the execution of one inmate, when one of the IVs had to be inserted into the inmate's collarbone area on one side because a suitable vein could not be found in one arm. (T. 2/12/03, pp. 73, 81; JD # 2, p. 64, Stalder pp. 41-42) In an even more minor delay, it took less than fifteen minutes to find a suitable vein in one of Antonio James' arms. (T. 2/12/03, pp. 65-66)

Each witness testified that each condemned man became unconscious in a matter of seconds. (T. 2/12/03, pp. 69, 79, 96) Death occurred in *six minutes or less* from the time the first drug was administered. (T. 2/12/03, pp. 70, 80, 97; JD # 2, p. 110; JD # 1, pp. 41-43) This powerfully illustrates that the drugs are being administered properly.

Petitioner also complains that the EMTs and syringe pusher have only a vague idea of the operation of the drugs employed. In fact, nothing more is needed, but the senior EMTs did in fact have a very good understanding of the effect of the drugs. (JD # 1, pp. 16-18; JD # 2, pp. 14-20) The protocol which is in place operates efficiently and humanely, as it was intended to do. The drugs involved are stored, mixed and placed in the syringes by head pharmacy director Don Courts. The IV lines are placed by EMTs who have many years of training and experience in placing and maintaining secure and freely flowing IV lines. Those who follow the protocol don't have to know how it works to know that it in fact does work:

you don't have to understand how your car operates in order to drive it safely and efficiently.

Although petitioner persists in attempting to apply medical standards to lethal injection executions, this is obviously a false premise. Medical procedures are aimed at treating diseases or medical conditions and at healing those who are in pain or otherwise suffering. These often call for unpleasant, painful and protracted treatment encompassing such procedures as spinal taps, skin graft, colonoscopies, radiation therapy, dialysis, chemotherapy, and many other painful and unpleasant treatments inflicted on patients to diagnose or treat their afflictions. Lethal injection executions are designed to administer a quick and humane death for the condemned man.

INAPPLICABILITY OF VETERINARY REGULATIONS

Petitioner made an offer of proof of the testimony of a veterinary professor from LSU Baton Rouge's School of Veterinary Medicine regarding the prohibition of the use of paralytics drugs as a method of euthanasia by American Veterinary Medicine Association (AVMA). (Petitioner's exhibit #176) If petitioner's offer of proof is probative of anything, however, it supports the State's position and not petitioner's.

When questioned by the State, Dr. Clint G. Pettifer stated that he would consider euthanasia through the use, in rapid succession, of massive doses of sodium pentothal, pancuronium bromide and potassium chloride to be humane. (T. 04/20/05, p. 60). His testimony offered nothing to support petitioner's Eighth Amendment claim.

Death penalty opponents have even managed to distract some members of the United States Supreme Court momentarily with this red herring, as petitioner's

selected excerpts from the recent argument in *Hill v. McDonough* shows. The *Hill* case arose as a request for a last minute stay and a § 1983 action, not an Eighth Amendment challenge. Because it arose just days before Hill's scheduled execution, no evidence was taken, and Hill's claim was apparently based on an article from *The Lancet*. The complaint was ultimately dismissed by the Supreme Court, however, and the requested stay and certiorari have been denied. *Hill v. McDonough*, ___S.Ct.___, 2006 WL 2679987 (09/20/06), *certiorari denied,* ___S.Ct.___, 2006 WL 2934070 (10/16/06).

Since Dr. Pettifer's testimony and other similar attacks on lethal injection, the AVMA has issued a paper decrying the "Misuse of the 2000 Report of the AVMA Panel on Euthanasia." The AVMA notes that the report "should not be extrapolated to humans," that the AVMA report prohibits the use of a paralytic as the *sole agent* of euthanasia, that pentobarbital products are included in several euthanasia products, and that the report never mentions pancuronium bromide or Pavulon. (See attached.)

The trial court properly found Dr. Pettifer's testimony to be irrelevant when petitioner first sought to introduce it, limiting petitioner to an offer of proof. Dr. Pettifer's testimony has not gained relevance since then. Petitioner's use of the AVMA guidelines for euthanasia is misleading and should be disregarded in this court's consideration of the serious issue before it.

EFFECTIVENESS OF SODIUM PENTOTHAL

Petitioner complains that the use of sodium pentothal does not ensure a quick and humane death. Petitioner's theory is based on sodium pentothal's ultra-fast acting properties, which includes not only a rapid onset, but also a short

duration of effect. Petitioner claims that there is therefore an unacceptable risk that an inmate, rendered unconscious by the first injection, and paralyzed by the second injection, might recover consciousness in time to feel the pain caused by the third injection, but be unable to notify prison personnel because of the second injection.

Petitioner presented the testimony of anesthesiologist Dr. Mark Heath and Ms. Carol Weihrer. Ms. Weihrer's testimony related to an incident of "anesthesia awareness" she suffered during surgery to remove her eye. Ms. Weihrer testified that she awoke at some point during surgery, and that the surgeons used a paralytic when there were indications she was waking up, rather than administering more anesthetic. In Ms. Weihrer's case, this resulted in a terrible experience of several hours duration until, as she testified, she passed out during the surgery. Petitioner failed to prove what anesthetic had been used or in what amount, how long Ms. Weihrer had been anesthetized before she awoke, or how often the phenomenon occurs. Ms. Weihrer's testimony was of little real relevance beyond showing that it is possible for a patient to awaken during surgery. Her experience, however, was of several hours duration. Lethal injection in Louisiana is complete within six minutes. (T. 2/13/03, pp. 15-21)

Petitioner also presented Dr. Heath, an anesthesiologist, who testified regarding his understanding of the properties of the three drugs used by Louisiana in its lethal injection protocol. He was unable or unwilling, however, to provide any specifics about how long an injection of two grams of sodium pentothal would provide complete anesthesia. At one point, Dr. Heath testified that it would be for "several minutes." (T. 2/12/03, p. 144-145) Dr. Heath agreed, however, that a dose of 2 grams of sodium pentothal *alone* could be fatal for some individuals. (T. 2/12/03, p.149)

Dr. Heath had never witnessed a lethal injection, and of course as an anesthesiologist his focus is on making sure that his patients are unconscious and/or comfortable during surgery and emerge alive afterward. (T. 2/12/03, pp. 139-140). Dr. Heath apparently had no experience in using the lethal injection drugs in the amount they are employed for that purpose in Louisiana. Research shows that he and Ms. Weihrer have provided similar testimony in lethal injection challenges throughout the country.

In *Reid v. Johnson*, 333 F. Supp.2d 543, 547, (W.D.Va. 09/03/04), the United States District Court for the western District of Virginia found that the probability of an inmate regaining consciousness within the first ten minutes after injection of 2 grams of sodium pentothal (the same amount used in Louisiana) is 3/1000 of one percent, after fifteen minutes it rises to 6/1000 of one percent and after twenty minutes never rises to the level of 1/1000 of one percent. The court also found that "In light of the inordinately high dosage, the weight or other physical attributes peculiar to a particular inmate will have a negligible impact on these probabilities."

The court's findings were based on the testimony of Dr. Mark Dershwitz, a board certified anesthesiologist with a doctorate in pharmacology who had performed extensive research into pharmacokinetics and pharmacodynamics of intravenous anesthesia agents such as those used in the Virginia (and Louisiana) lethal injection protocol. Dr. Heath also testified at the hearing in *Reid*, where he deferred to Dr. Dershwitz' superior expertise.

In Florida's review of its death penalty protocol, in *Sims v. State,* 754 So.2d 657, 666 (Fla. 2000), *certiorari denied* 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1122, the Florida Supreme Court found:

> On the issue of dosage, a defense expert admitted that only one milligram per kilogram of body weight is necessary to induce unconsciousness, and that a barbiturate coma is induced at five milligrams per kilogram of body weight. Thus, two grams of sodium pentothal (i.e., 2000 milligrams) is a lethal dose and certain to cause rapid loss of consciousness (i.e., within 30 seconds of injection).

Although petitioner claims that the State has not rebutted the testimony of Dr. Heath, such a characterization is misleading and inaccurate. The bulk of Dr. Heath's testimony is based on speculation regarding the possibility of what might go wrong with a lethal injection execution. Dr. Heath provided no proof that this scenario was even likely, much less that it had ever actually occurred either in Louisiana or anywhere else. Rebuttal of such non-probative, speculative testimony is unnecessary.

Petitioner complains that the EMTs and the "syringe pusher" do not have sufficient medical expertise to administer the sodium pentothal appropriately. As the *Webb* court noted, "more skill in administering the drug is required in the medical setting because of the delicate balance between unconsciousness and death. The circumstances surrounding an execution do not require such a balance." *Webb, supra,* 750 A.2d at 456.

Even Dr. Heath testified that the administration of 2 grams of sodium pentothal would produce an extremely rapid loss of consciousness which would last for "several minutes." In his testimony in *Abdur'Rahman, supra,* 181 S.W.3d at 308, Dr. Heath testified that a dosage of two grams of sodium pentothal would cause unconsciousness in all but "very rare" cases and that a dosage of five grams would "almost certainly cause death."

As noted above, Dr. Heath conceded the greater expertise of the state's witness in *Reid.* That witness testified that the probability of an inmate regaining consciousness within the first ten minutes after injection of 2 grams of sodium pentothal is 3/1000 of one percent. In Oklahoma, Dr. Heath averred in an affidavit that the use of 2.4 grams of sodium pentothal would render a defendant unconscious "for a considerable period of time," *Malicoat v. State of Oklahoma*, 137 P.3d 1234, 1237 (Okla.Crim.App. 06/19/06), and in the United States District Court for Maryland, Heath acknowledged that three grams of sodium pentothal "will drive any individual into deep unconsciousness." *Evans v. Saar*, 412 F.Supp.2d 519, 524 (D. Md. 02/01/06).

Dr. Heath's testimony in the instant case does not support petitioner's claim that there is a probability that he might be awake during the administration of the remaining lethal drugs, and his subsequent testimony in the other cases cited above demonstrates the weakness of any factual basis for petitioner's current claims. Insofar as Dr. Heath's testimony might be considered to provide some support for petitioner's claims, the State presented in rebuttal Dr. Nicholas Goeders, head of the Pharmacology Department at Louisiana State University Medical School. Dr. Goeders is also a professor at the medical school, teaching pharmacology to medical students, some of whom doubtless go on to become anesthesiologists.

Dr. Goeders' testimony was based in part on his own expertise as a pharmacologist and by his research into scientific studies relating to the lasting effects of sodium pentothal, research which Dr. Heath apparently was not aware of, and including information which Dr. Heath could not have known from his own experience as an anesthesiologist. (State exhibits # 35-39)

Dr. Goeders testified that sodium pentothal has been in use as an anesthetic for over sixty years. The surgical dosage of sodium pentothal is approximately 300 milligrams, which produces unconsciousness for a few minutes, consistent with Dr. Heath's testimony. In doses of one to two grams, however, Dr. Goeders testified that unconsciousness lasts for two to three *hours*. (T. 2/21/06, pp. 17-18) Dr. Goeders testified that this is due to a change in the pharmacokinetics of the drug. With larger doses of sodium pentothal, an equilibrium develops between the brain and the blood so that the amount of the drug in the brain remains constant for a much longer period of time and metabolizes at a rate of 15% per hour.

Dr. Goeders testified that, if a person had been injected with one to two grams of sodium pentothal, he would not be conscious, and would therefore not be able to feel the effects of the subsequent injections of pancuronium bromide and potassium chloride because he would still be "deep under the influence of the pentothal." (T. 2/21/06, p. 18-19)

Dr. Goeders' testimony is certainly consistent with findings of the Supreme Courts of Florida, Texas, Tennessee, Connecticut, Indiana, the United States District Court of Virginia and the Ninth Circuit Court of Appeals in California, the last of which found after evidentiary hearings that an inmate injected with *five* grams of sodium pentothal would remain unconscious for over *thirteen hours*. *Beardslee v. Woodford, supra,* at 1075, 395 F.3d 1064, 1075 (9th Cir. 2005), certiorari denied ___U.S.____, 125 S.Ct. 982, 160 L.Ed.2d 910. See also *Sims, supra, Abdur' Rahman, supra, Webb, supra, Ritchie, supra.*

In the case of a lethal injection, therefore, once injected with 2 grams of sodium pentothal, it is virtually certain that *no* inmate would be awake and aware of what was happening to him, and would not feel the effects of either the

pancuronium bromide or the potassium chloride. He would therefore experience a death that is humane and does not involve an unreasonable risk of pain and suffering. Petitioner's speculative evidence has failed to demonstrate that execution by lethal injection involves the wanton and unnecessary infliction of pain.

Petitioner's argument has been much the same as that advanced by the condemned man in *Webb*. As the Connecticut Supreme Court found in *Webb*, 750 A.2d at 456:

> "The defendant's argument is premised on a series of presumptions: that the personnel will not be trained adequately; that the dosage of thiopental sodium ten times the surgical dosage will not be sufficient to render the inmate unconscious; and that the agents will not be administered in the proper time and sequence. The evidence, however, supports a conclusion that reasonable steps have been taken to eliminate human error. We cannot foreclose the possibility of human error, that always accompanies any human endeavor. We conclude, however, that the agents may be administered correctly and effectively, and that the possibility of a "botched" execution is extremely remote under the protocol. Furthermore, we agree with the court in *Campbell v. Wood, supra*, 18 F.3d [662] at 687 [9th Cir. 1994], when it stated: 'The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.' "

Every court that has addressed this issue has concluded similarly that lethal injection is a constitutional method of execution. See *Woolls v. McCotter*, 798 F.2d 695, 698 (5th Cir.), *cert. denied*, 478 U.S. 1031, 107 S.Ct. 15, 92 L.Ed.2d 769 (1986); *Kelly v. Lynaugh*, 862 F.2d 1126, 1135 (5th Cir.1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 608 (1989); *Hill v. Lockhart, supra,* 791 F. Sup. at 1394; *Felder v. Estelle*, 588 F.Supp. 664, 674 (S.D.Tex.1984); *State v. Hinchey*, 181 Ariz. 307, 315, 890 P.2d 602 (1995); *State v. Deputy*, 644 A.2d 411, 421 (Del.Super.1994); *People v. Stewart*, 123 Ill.2d 368, 386, 123 Ill.Dec. 927, 528 N.E.2d 631 (1988), *cert. denied*, 489 U.S. 1072, 109 S.Ct. 1356, 103 L.Ed.2d 824

(1989); *State v. Moen*, 309 Or. 45, 98-99, 786 P.2d 111 (1990); *Hopkinson v. State*, 798 P.2d 1186, 1187 (Wyo.1990), *Webb, supra, Abdur' Rahman, supra, Beardslee, supra, Reid, supra, Ritchie, supra.*

The State notes that petitioner has cited an earlier version of *Abdur' Rahman* in his post-hearing memorandum. That lower court ruling has been overruled by the Tennessee Supreme Court in the opinion the State cites above, and therefore does not provide a valid legal basis for that portion of petitioner's argument. To the contrary, the Tennessee Supreme Court found "(a)ccordingly, we agree that using Pavulon in the lethal injection protocol does not violate contemporary standards of decency." *Ibid*, 131 S.W. 3d at 307. It seems unlikely that petitioner was unaware that the *Abdur' Rahman* ruling he relies upon has been specifically overruled.

Testimony established that Louisiana's lethal injection protocol is administered with all due dignity and care, and that it operates smoothly, even flawlessly. There is no cruelty inherent in the use of lethal injections to carry out the death penalty in Louisiana. There is no basis for a finding that the protocol is an unconstitutional violation of the prohibition against cruel and unusual punishment. Petitioner's claim is without merit.

III. *BRADY* CLAIMS

A Brady *overview*

Petitioner complains that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), having now distilled his *Brady* claim down

to the question of unidentified hairs found at the scenes, and the testimony of FBI special agent Robert Webb regarding duct tape found at the scenes and at petitioner's home. Despite a clear record that the information petitioner relies on was held in FBI records and was not sent to the prosecution, or did not even exist until years after the trial, petitioner persists in labeling this claim one of "prosecutorial misconduct." A finding of deliberate action by the prosecutor is unnecessary to review of a *Brady* claim, and petitioner's accusation is unwarranted.

Brady evidence is that which tends to exculpate a defendant or reduce his penalty, and the State is required to reveal such information to the defense. This includes evidence where a witness's reliability or credibility may be determinative of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *State v. Ates*, 418 So.2d 1326 (La. 1982).

The evidence in question must be material to guilt or punishment. *United States v. Bagley*, 105 S.Ct. 3375, 473 U.S. 667, 87 L.Ed.2d 481 (1985). Evidence is material only if its disclosure would have created a *reasonable probability* that the result of the proceeding would have been different. *Bagley, supra.*

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), clarified the prosecutor's responsibility to provide possible exculpatory evidence in the possession of law enforcement agencies, even if the prosecutor had no knowledge of the existence of the exculpatory evidence. *Kyles*, however, does not change the fact that, where there is no *reasonable probability* that disclosure of the "suppressed" evidence would have produced a different result at trial, there is no basis for reversal of the conviction.

Since *Kyles* was handed down the United State Supreme Court has reiterated its rule of materiality for alleged *Brady* violations: where there is no *reasonable probability* that disclosure of the evidence would have produced a different result at trial, there is no *Brady* violation. *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995).

Unlike the *Kyles* case, moreover, the evidence against Nathaniel Code is compelling and cannot be undermined by petitioner's claims, no matter how vigorously argued. A determination of *Brady* materiality is highly fact based, and the State will address the specific facts involved below.

A question of* Brady *applicability

The State continues to maintain its position that *Brady* does not apply to crimes for which petitioner was not tried. Petitioner treats the evidence regarding the Debra Ford and William T. Code murders as if they are of equal relevance as the Vivian Chaney murders, despite any statutory or case law authority. While the State presented evidence of the Ford and William Code murders as part of its case under *State v. Prieur*, 277 So.2d 126 (La. 1973) and La. C. E. Articles 404.B(1), 1103 and 1104, petitioner was not on trial for these murders, and the State did not have to prove them beyond a reasonable doubt, but only by "clear and convincing evidence."

The State submits, therefore, that *Brady* does not apply to evidence of murders for which petitioner was not on trial and was not convicted. The State will nonetheless address the merits as if *Brady* did apply, in the interest of judicial economy, without waiving its position that *Brady* is restricted to the offenses for which a defendant is actually being tried.

A. Hair evidence

Petitioner complains that the State violated *Brady* because, he claims, it did not reveal to petitioner that foreign hairs which belonged neither to petitioner nor to his murder victims were found at each of the murder scenes. Petitioner has obtained copies of the FBI laboratory work sheets which reflected analysis of various hairs found at the three murder scenes. These work sheets reflect that no hairs which "matched" petitioner were found at any of the three scenes, and that hairs were found at the scenes which were not able to be matched to the victims or to any known person. An FBI report was furnished pre-trial to the prosecution, which supplied trial counsel with it. That report states that no hairs found at the crime scenes had been matched to petitioner.

Petitioner asserts that the presence of these unidentified hairs was exculpatory evidence which should have been revealed to trial counsel. Petitioner continues to ignore the assertion of trial counsel in his affidavit that he indeed knew there were unidentified hairs found, while not being any more aware of the specific FBI work sheets than the prosecution was. (State's Exhibit 1, p. 5). Trial counsel asserted that he was aware that there were unmatched human hairs at the crime scene, and that he felt this was of little exculpatory value because of the hard evidence of his client's presence at the scene, that is the finger and palm prints.

As trial counsel was aware that there were unidentified hairs, there can be no *Brady* violation: "There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source, because in such cases there is really nothing for the government to disclose." *State*

v. Kenner, 2005-1052 (La. 12/16/05), 917 So.2d 1081; *U.S. v. Miranne*, 688 F.2d 980, 987 (5th Cir. 1982), *certiorari denied,* 459 U.S. 1109, 103 S.Ct. 736, 74 L.Ed.2d 959 (1983).

The State continues to assert its objection that petitioner has not made a showing that *Brady* applies to "other crimes evidence." *Brady* requires that the State inform a defendant of exculpatory evidence. As petitioner was not on trial for the murder of Debra Ford or the William T. Code victims, *Brady* does not apply to those cases. Even if it did, however, the State submits that the evidence was more than sufficient, including as it did petitioner's fingerprint at the Ford crime scene and his statement regarding his presence at William T. Code's house the day of those murders, which included his attempts to explain away any possible fingerprints found on the various items which were used in the murders of William T. Code, Joe Robinson and Eric Williams. (See attached copy of petitioner's statement.)

Moreover, there was no one to compare to these unknown hairs. Although petitioner has been loquacious in posing imaginative scenarios, sixteen years later he has provided not a single person to whom these unknown hairs could be compared. If the FBI crime lab results were so exculpatory, surely petitioner would be able to show the court exactly what advantage trial counsel could have taken of it at trial. He has failed to do so.

Despite trial counsel's assertion in his affidavit, petitioner continues to claim that trial counsel should have been made aware of the unidentified hairs. It appears that petitioner is simply unwilling to accept the proven fact that trial counsel was aware of the unidentified hairs. He has said so in his sworn affidavit. The contents of his file shows that he received police reports to this effect. There is no factual

basis remaining WHATSOEVER that this "evidence" was withheld from trial counsel.

Without an individual to point to, the presence of unknown hairs at the three murder scenes can be of no real use as exculpatory evidence when petitioner's fingerprints and palm prints were found at two of the murder scenes. As petitioner's expert witness, Ms. Patricia Eddings, agreed, hair is easily deposited or transferred and the time of deposit or transfer cannot be determined, as hair does not break down. Ms. Eddings also agreed that the presence or absence of hair does not indicate that the person whose hair it was had been either present or absent from the place where the hair was later found. Ms. Eddings also testified that hair could not be "matched" as fingerprints are matched. One can only determine if a hair is similar to, or has the same characteristics as, a known hair sample. (T. 09/16/03, pp. 149-152)

Petitioner's expert on capital defense, James Boren, specifically did not offer an opinion on the *Brady* issues raised by petitioner, but was of the opinion that the guilt phase case was "difficult" and that trial counsel generally did a competent job, except for the area of a possible temporary insanity plea, as addressed above.

As trial counsel was aware of the unmatched hairs, and as the hairs are of no exculpatory use without persons to whom they can be compared, petitioner's claim is without merit.

B. DUCT TAPE

Petitioner repeats his complaint that FBI expert, Robert Webb, committed perjury when he testified that the duct tape found at the scene of the Chaney murders matched the duct tape found at petitioner's home. Petitioner points to a

probe of the FBI laboratory which began five to seven years AFTER petitioner's trial. Although *Brady* and its progeny impose a heavy burden on the State to provide *Brady* material even where the prosecutor is unaware of its existence, petitioner has provided *no* case law which requires the State to see years into the future and provide notice to a defendant that the FBI laboratory will be investigated five or more years after his trial.

Special Agent Webb was ultimately found by the FBI Crime Lab investigation to have overstated his conclusions, but there was no finding of any indication that Webb had falsified his tests results or testing. Certain laboratory notes or reports that may have been in Webb's personal possession or stored "off-site," were not included in the FBI's response to petitioner's FOIA request. Dr. Frederick Whitehurst testified that, although he believed that Webb's comparison was flawed, "without that data there is nothing for me to review here for me to determined the basis of Mr. Webb's opinion. The data may exist in FBI files but I've not seen it, sir." (T. 04/20/05, p. 25) In short, Whitehurst could not say one way or the other that Agent Webb had falsified test results or perjured himself at petitioner's trial. In his previous day's testimony, Dr. Whitehurst was unable to proceed with testifying about certain pieces of analysis because the FBI Crime Lab numbers did not match, and so he could not be certain that they even related to petitioner's case. (T. 04/19/04, pp. 122-125) Petitioner's efforts in this regard were a complete and utter failure.

Because of reports or complaints by Dr. Whitehurst against the FBI laboratory and even the Director of the FBI at the time, Louis Freeh, an extensive investigation was conducted by the Office of the Inspector General (OIG). The OIG's final report noted that Whitehurst "accused many of his colleagues of

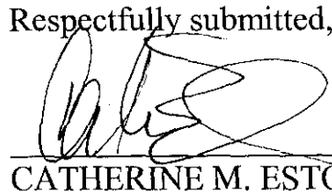
perjury, fabrication of evidence, and conspiracy. Those allegations were not supported by the facts uncovered in the investigation."

While acknowledging that Whitehurst's allegations had brought to light "issues in the laboratory that need to be addressed," the OIG also noted the "considerable harm he had caused to the reputations of innocent persons and the fact that his frequently overstated and incendiary way of criticizing laboratory personnel will make it extremely difficult, if not impossible, for him to work effectively within the laboratory. Our own view is that Whitehurst lacks the judgment and common sense necessary for a forensic examiner, notwithstanding his own stated commitment to objective and valid scientific analysis" (T. 04/19/04, p. 36)

The entire duct tape tempest in a teapot does not amount to material evidence. The duct tape formed a miniscule part of the state's case. Even aside from the question of whether there is a clairvoyance *Brady* obligation, Special Agent Webb's testimony did not render petitioner's trial unfair, as is necessary for a finding of a *Brady* violation. There has not been the first effort by petitioner to try to verify if Webb's conclusions about the duct tape was in error by actually testing the tape. Petitioner has failed to show that there was *Brady* material existing either at the time of his testimony or thereafter. This claim is without merit.

WHEREFORE, the State of Louisiana prays that petitioner's application for post-conviction relief be denied as without merit.

Respectfully submitted,



CATHERINE M. ESTOPINAL
ASSISTANT DISTRICT ATTORNEY

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Post Conviction Memorandum has been mailed, sufficient postage attached to:

Gary Clements &
Carol Kolinchak
1340 Poydras
Suite 2110
New Orleans, Louisiana 70112

this 23rd day of October, 2006.

CATHERINE M. ESTOPINAL

The 2000 Report of the AVMA Panel on Euthanasia has been widely misinterpreted. Please note the following:

1. The guidelines in this report are in no way intended to be used for human lethal injection.
2. The application of a barbiturate, paralyzing agent, and potassium chloride delivered in separate syringes or stages (the common method used for human lethal injection) is not cited in the report.
3. The report never mentions pancuronium bromide or Pavulon, the paralyzing agent used in human lethal injection.

Before referring to the 2000 Report of the AVMA Panel on Euthanasia, please contact the AVMA to ensure the association's position is stated correctly. Please contact Michael San Filippo, media relations assistant at the AVMA, at 847-285-6687 (office), 847-732-6194 (cell) or msanfilippo@avma.org for more information or to set up an interview with a veterinary expert.

Misuse of the *2000 Report of the AVMA Panel on Euthanasia*

The *2000 Report of the AVMA Panel on Euthanasia* has been widely misinterpreted in the media, particularly how it relates to capital punishment.

The panel's objective in developing these guidelines is to give veterinarians guidance in relieving pain and suffering of animals that are to be euthanatized. The recommendations in this report are intended to serve as guidelines for veterinarians who must then use professional judgment in applying them to the various settings where animals are to be euthanatized. The report should not be extrapolated to humans.

Summary of Lethal Injection in Humans
The process of lethal injection in capital punishment involves the administration of the following:

- A barbiturate to render the person unconscious (eg, sodium pentobarbital)
- A paralyzing agent to prevent involuntary muscle movements (eg, pancuronium bromide, or Pavulon)
- Potassium chloride to stop the heart.

The three drugs are administered in order, at separate times and in separate syringes.

Misinterpretation of AVMA Guidelines on Euthanasia
Capital punishment opponents and the media have attempted to use the AVMA report to infer that the AVMA deems this procedure an inhumane method of nonhuman euthanasia. Particularly, the following two segments of the report have been misinterpreted:

> 1. Agents that induce death by direct or indirect hypoxia can act at various sites and can cause loss of consciousness at different rates. For death to be painless and distress-free, loss of consciousness should precede loss of motor activity (muscle movement). Loss of motor activity, however, cannot be equated with loss of consciousness and absence of distress. **Thus, agents that induce muscle paralysis without loss of consciousness are not acceptable as sole agents for euthanasia (eg, depolarizing and nondepolarizing muscle relaxants, strychnine, nicotine, and magnesium salts).** With other techniques that induce hypoxia, some animals may have motor activity following loss of consciousness, but this is reflex activity and is not perceived by the animal. (Page 675) [Emphasis added]
>
> 2. **Pentobarbital combinations**—Several euthanasia products are formulated to include a barbituric acid derivative (usually sodium pentobarbital. Although some of these additives are slowly cardiotoxic, this pharmacologic effect is inconsequential. These combination products are listed by the DEA as Schedule III drugs, making them somewhat simpler to obtain, store, and administer than Schedule II drugs such as sodium pentobarbital. The pharmacologic properties and recommended use of combination products that combine sodium pentobarbital with

lidocaine or phenytoin are interchangeable with those of pure barbituric acid derivatives.

A combination of pentobarbital with a neuromuscular blocking agent is not an acceptable euthanasia agent. (Page 680) [Emphasis added]

The first section of text indicates that neuromuscular blocking agents should not be the sole method of euthanasia, which, in lethal injection of humans, it is not.

The second section refers to a mixture of a barbiturate and neuromuscular blocking agent ***in the same syringe***, since it could not be known which would act first, and an animal might become paralyzed while conscious. Again, as explained above, this does not happen in human lethal injection; the drugs are administered in order, from separate syringes.

Furthermore, the report never mentions pancuronium bromide or Pavulon.

When referring to the *2000 Report of the AVMA Panel on Euthanasia*, reporters are strongly encouraged to contact the AVMA to ensure the association's position is stated correctly. Please contact Michael San Filippo, media relations assistant at the AVMA, at 847-285-6687 (office), 847-732-6194 (cell) or msanfilippo@avma.org for more information or to set up an interview with a veterinary expert.

(MIS)USE OF AVMA EUTHANASIA GUIDELINES

Inhumane Drug Used in Many Executions
The Boulder Daily Camera
By Christopher Brauchli
November 2003

The unfortunate thing, as far as those facing the executioner's needle in Tennessee is concerned, is that humans are excluded from the definition of "nonlivestock animals." Thus, the requirement for a humane execution that is imposed on those killing animals is not imposed on those killing humans. Tennessee is not alone in being more concerned about kind executions of nonlivestock animals than humans. The **American Veterinary Medical Association** has come out against using Pavulon when euthanizing animals when it is used alone or in combination with sodium pentobarbital.

Are lethal injections humane? Effectiveness of drugs debated
Houston Chronicle
December 2003
But an impetus for change, critics say, might come from a 2001 decision by the **American Veterinary Medical Association**. It decided the combination of a sodium thiopental-like barbiturate and pancuronium bromide "is not acceptable" to euthanize pets because it can mask pain and suffering.

That recommendation has led several states to adopt laws against the use of pancuronium bromide for euthanasia, including Texas.

If a method isn't suitable for killing a dog, they say, why should it be used on people?

Analysis: Is Lethal Injection Humane?
United Press International
By Phil Magers
December 11, 2003
... The new arguments are based on a recent trend in Texas and other states to ban the use of the some of the same chemicals in the euthanization of dogs and other animals. They also cite an **American Veterinary Medical Association** recommendation against the use of the drugs to put down an animal.

"If evolving standards of decency, as reflected by legislative action and professional association of **veterinarians**, preclude the use of these particular drugs when killing a dog or a cat, then certainly those same standards of decency would require a more humane, readily available version of the lethal injection for human beings as well," the lawsuit states.

Drug Florida Uses in Executions at the Center of Court Fights
http://www.fadp.org/news/tbo-20031213.htm
Associated Press
By Ron Word
Dec 12, 2003

JACKSONVILLE, Fla. (AP) - One of the drugs Florida uses to execute condemned killers is being challenged by inmates in Texas and Tennessee who have won appellate court reprieves arguing the drug has been banned from being used on animals.

... Opponents of the drug's usage say it can cause prisoners to suffocate before they lose consciousness and is so cruel that some **veterinarians** won't use it to euthanize animals.

Humanity In Death
Kentucky has given one man a lethal injection. Two inmates' lives now rest on the argument that his last breaths were cruelly excruciating.
http://disc.server.com/discussion.cgi?disc=207906;article=4436;title=Against%20Death%20Rows
Herald-Leader (Ky.)
By Beth Musgrave
November 28, 2004
... Many of the lawsuits filed in other states have also targeted the use of the drug, which has been banned by the **American Veterinary Medical Association** for use in animal euthanasia.

Uncomfortably Numb
Lethal injection looks painless and peaceful. On Missouri's death row, appearances can be deceiving.
http://www.riverfronttimes.com/Issues/2004-12-15/news/feature_5.html
Riverfront Times (Mo.)
By Malcolm Gay
December 15, 2004
... The combination of barbiturates and Pavulon has been publicly condemned by the **American Veterinary Medical Association** for euthanizing animals, and Johnston's attorneys argue that its use on humans "violates contemporary standards of decency."

State Supreme Court Upholds Tennessee's Lethal Injection 'Protocol'
http://www.chattanoogan.com/articles/article_74340.asp
The Chattanoogan
October 17, 2005
The combination of drugs and method of administering them to condemned prisoners is constitutional, the Tennessee Supreme Court said in a decision striking down challenges to the state's lethal injection protocol raised by death row inmate Abu-Ali Abdur'Rahman.

FROM RULING:
. ... Dr. Dennis Geiser, Chairman of the Department of Large Animal Clinical Sciences at the University of Tennessee College of **Veterinary** Medicine, also testified on behalf of the petitioner. A doctor of **veterinary** medicine, Dr. Geiser stated that he was familiar with the drugs used in the lethal injection process and the effects of each drug. He testified that Pavulon is a neuromuscular blocking agent which paralyzes an animal's diaphragm and causes breathing to cease. He stated that Pavulon, whether used alone or with other drugs, is not acceptable by the **American Veterinary Medical Association** for animal euthanasia for several reasons:

[T]he use of Pavulon could potentially produce an inhumane situation as it relates to animals if it's used in an euthanasia protocol, and I think one of the reasons for that is that . . . it does cause respiratory arrest without causing central nervous system depression. . . . And if we cause asphyxiation using the Pavulon, but yet you [cannot] perceive that asphyxiation then this causes inhumane distress and pain for that particular animal. . . . It has no pain relief properties whatsoever and it does produce respiratory relief.

Dr. Geiser acknowledged that he was not a physician, that he had never used Pavulon on a person, and that Pavulon had other surgical uses. ...

Tennessee's Use of 3 Drugs for Lethal Injection Upheld
High Court Rejects Death Row Inmate's Claim Of Cruelty
http://www.tennessean.com/apps/pbcs.dll/article?AID=/20051018/NEWS03/510180362/1017/NEWS
The Tennessean
By Sheila Burke
October 18, 2005
... Opponents of the injection protocol had argued that one of the drugs merely paralyzes the individual and masks all signs of pain and suffering. They also argued that Tennessee law forbids animals from being euthanized with the chemical, as does the **American Veterinary Medical Association**.

"If it doesn't meet your community standards for putting animals to sleep, even a wild dog, then it should not meet our community standards for executing a human being," said Bradley MacLean, one of Abdur'Rahman's lawyers.

Condemned Prisoner Claims Lethal Injection 'Cruel And Unusual'
http://www.sacbee.com/content/news/story/14106631p-14936275c.html
Sacramento Bee
By Claire Cooper
January 23, 2006
He fears that pancuronium bromide, the second of three drugs administered in executions by California and 26 other states - yet banned by the **American Veterinary Medical Association** in

euthanizing animals - will leave him conscious of torturous pain but paralyzed and unable to cry out.

Death Row Appeals over Injections Create Legal Mess
http://washdateline.mgnetwork.com/index.cfm?SiteID=wsh&PackageID=46&fuseaction=article.main&ArticleID=7986&GroupID=213
Tampa Tribune
By Kevin Epstein
... A formula of three powerful chemicals administered in eight steps by medically unskilled personnel — and involving one substance banned by **veterinarians** — can cause agonizing or prolonged deaths.