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OF COUNSEL

January 28, 1991

Professor Victor L. Streib
Cleveland State University
Cleveland-Marshall College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115

Re: Dalton Prejean

Dear Professor Streib:

Enclosed, as requested, are selected materials on Dalton Prejean. I hope that these are helpful to you, and if you have any questions or need anything else, please do not hesitate to call me.

Sincerely,

Anne F. Jacobs

Anne F. Jacobs

Enclosure

TRANSCRIPT OF MAY 3, 1990 INTERVIEW

BETWEEN JAMES GILL AND DALTON PREJEAN

Gill: Um, *** before we start is there anything, before I ask you any questions, is there anything you want to say, did you have in mind when you said you wanted to talk to me, is there anything you want to say first off? Do that, okay?

Dalton: Just, just, there's nothing ***

Gill: Well, let me ask you some questions, you have a lot of time to think around here, can you tell me what you think about during the day?

Dalton: Ah, it's most a lot of things, you know, time has healed *** just what they're going through, just as you're going, and mostly you think of the family and mostly my son because I'm wondering how he's growing up and *** goes so fast, you know, and those times I have with him, you know, I cherish, but I wish I was there more to be a father to him like a father should and that takes a lot out of me, you know? *** I give great thoughts to my mistake that I made in life -- something I can't bring back, you know, and I think about Cleveland children's, you know, they don't have a father either -- and that there mistake I have made *** can't turn that around either -- and makes you go back and forth, you know, trying to figure out if something had been done earlier it could have all been avoided, you know -- the state would a did something that should have been years ago, my life wouldn't be hanging in the balance and Mr. Cleveland would be alive and nobody told nobody, my family *** records that had been there for years and they were just there, and

Gill: You mean the records, you're talking about when you were held at LTI?

Dalton: Right.

Gill: So what do you think the state should have done to spare you and Trooper Cleveland?

Dalton: If they would have gotten (me) some help and at least told the family of those records -- or at least informed the probation department down in Lafayette or even in Texas of this problem back then -- then I could have been dealed with then at a younger age ***

Gill: You say you shouldn't, you say you shouldn't have been on the streets at that time, or you should have been under some supervision -- (or some kind of treatment?)

Dalton: Not necessarily have to be on the streets but could have been dealed with either by a hospital or by a clinic -- where if a *** find out about this problem instead of pushing it back in the files and leaving it there without telling anybody that it was there.

Gill: Were you aware of this at the time?

Dalton: No. I haven't been aware of this until now.

Gill: You didn't know what your problem was?

Dalton: No. *** I had saw a doctor but never knew the reports that come about from seeing a doctor -- no one ever told me until now of this problem.

Gill: Let me just continue on then -- what you think about. Do you think about God all the time?

Dalton: Well He plays the biggest part of my life because He's brought me a long way and He's given me more faith and understanding, you know, to understand people more and what has grow is (doomed) to grow and His faith as well and with that I am able to understand you know things that I didn't understand back then that I can understand now. Things might upset me back then, don't upset me now, but yet, I can understand and deal with it in a more human way.

Gill: Were you a Christian when you arrived?

Dalton: I'm sorry . . .

Gill: Were you a Christian when you arrived here?

Dalton: No, I went to church, but I wouldn't say I was a full Christian then. I tried to get baptized years ago, a, but unfortunately my aunt wouldn't let me.

Gill: This is the aunt you abused you?

Dalton: Right. Well, I still went to church and all and I believed in God *** but right now I believe stronger in

Him and more or less in His faith and He's a given me a more better outsight on life itself.

Gill: What about on death, did He help you to prepare for what may be happening to you?

Dalton: Well, we all have to die, and I, I have always thought about death before even I come to prison, but then I knew we all have to die, and I don't, I don't fear death, you know, 'cause I know one thing that if I do die, my troubles are over, my pain is over, you know, but personally what I worry about most is my family and people that love me and what they have went through because of me and I . . .

Gill: Your death will upset them?

Dalton: Huh? [Noise]

Gill: Your death will distress your family?

Dalton: My family and a whole lot of people who have stood by me, you know and who believes in me and not just took one side of the story, but looked at the issues and the person and I don't fear death, 'cause I like I've said, you know, I'll go to a better place than here, you know, my journey is not over with yet.

Gill: *** Apart from your family, are you saying that you would rather die than spend the rest of your life here?

Dalton: No, because if I live, I will live with the mistakes I've made and that's really what it's all about -- I think prison was actually about living with your mistakes and that being in pain with your mistake and that way could you learn ***

Gill: So [you're saying you've learned?]

Dalton: You learn and you educate, because if you stay here [noise] *** your family, but you educate other people that's come along -- just like we make mistakes since you were younger and you can teach them, you know, I'm not saying that everyone is -- will change, but you can make a difference and you can give a thought to what's being taught.

Gill: In what way did you change? -- You were baptized?

Dalton: December 10th '83.

Gill: Sorry, what was that?

Dalton: December the 10th '83

Gill: '83 -- What other changes would you say have come over you in your time here?

Dalton: Well, I've learned to be patient, you know, far as listening, you know, and being aware of what's going on around me. Taking notice in other people's problems and not just my own, you know.

Gill: Other inmates?

Dalton: Other inmates, family, whoever, it could be a stranger, because we all have problems in life and we can't just think of just yourself in life, there's other people around you and other people with problems. You're not the only one who has problems in life so you have to try to *** might be a small hand but at least try give a effort anyway.

Gill: *** The Cleveland family has problems, of course. Have you ever sent any kind of message to them?

Dalton: No, I didn't do it -- the simple fact that I didn't know if I was doing more -- bringing more pain than I would be doing good and I feel that it wouldn't be appropriate for me to do it *** cause I feel it would just bring more pain -- bring back memories of what actually happened, you know. But like I say, I have sympathized concerning different thoughts.

Gill: What about, what if I say what message would you, would you send to Mrs. Cleveland and the son?

Dalton: That would be the same as I spoke to the pardon boards on, please do not hate me for the rest of their life, you know, 'cause that hatred would soon destroy them, 'cause if it stays in them, sooner or later it will come out and the way it come out might not be a way in which themself even like. That's about keeping things inside you -- holding things inside you, but eventually

it will come out and no one knows who's on who or what about.

Gill: Well, as you know, they, they want to see you executed and they say that their problems won't go away until you are. What do you say about that?

Dalton: Well, I don't believe that. 'Cause I mean the problem still lies in their heart, because even though I'm dead their problems and their memories still won't go away even though I'm dead. When you look at the kids, I'm still dead, their husband's still dead. I can't believe Mrs. Cleveland actually means this from her heart, 'cause I don't believe she's that kind of lady.

Gill: Get back to daily life here. How, how often do you have visitors? Who comes to see you?

Dalton: Well, my mother, my son and my sister and them tries to come up here as often as possible, when they can get a ride. They try to come twice a month if they can, you know. And my girlfriend, Jennifer, comes. They all try to come when they're able to come as much as possible, which we writes one another.

Gill: Are you on good terms with your mother?

Dalton: Yes.

Gill: Do you blame your mother for any of your problems?

Dalton: No. That's a -- I couldn't do that because I didn't know it was more or less not understanding. And that's why I say in my time well being here, I have learned to understand and patient has been more understanding to me -- where as God and with that I talk a lot and I got a basic understanding of it all and you can't change what happened so why dwell on it. 'Cause if I hate someone, how can I ask for forgiveness for something I've done?

Gill: What about ***

Dalton: I speaks with them too, and *** as well

Gill: ***

Dalton: ***

Gill: What about your son, you are very close to your son, you are very fond of your son -- do you, do you spend much time thinking about the problems he has as Dalton Prejean, Jr.

Dalton: I give that great thought, but I believe him growing up and him taking life as I do one day at a time and just live for today, you know. I've told him, you know, there will be problems in life, you know, some that we don't agree with, but some we have to live with and if you can well, just adjust and be yourself, you know, and don't let nobody change you, use your own mind -- I feel you will be a better person yourself. Where is if something is wrong and you need to talk to me about it,

please do. Don't feel afraid to come to me to talk to me about anything, because I am here. And he's come along well, you know, so far his problems as being Dalton Prejean, I don't actually believe he has a problem with his name because I've said he should be proud of his name. I don't believe ***

Gill: I'm not saying that, but children can be cruel to each other.

Dalton: Yes, well he has little ways to ***. I guess he has dealt with it. We talk about it *** but I believe he has adjust to that and don't let it bother him like he did when he was a little bit younger.

Gill: What will happen if you die? How will he handle that?

Dalton: I can't give you an answer to that 'cause I don't know.

Gill: When he was born you were already in here.

Dalton: No, I was in the parish

Gill: You were in the parish when he was born? You were in custody when he was conceived? Did you ever think that maybe the best thing for him would be just for his mother to say your daddy's dead and not tell him where you were?

Dalton: No, because that would be the same as -- that would be telling him a lie and that's something that I don't never want to tell him. Why should she tell him

something like that because I am alive, you know, 'cause no one, like I said, no one knows the future. Now, a lot of folks didn't figure we could get this far in life.

Gill: Right.

Dalton: But, I am here. So, we never know what tomorrow holds so we live just for today.

Gill: Okay, you say that spending the rest of the time in prison would require you to live with the consequences of what you did, but what constructive things can you see about spending life -- what makes you prefer life here over the death that you do not fear?

Dalton: Because in time, I'm hoping and praying that the system can put people such as myself with *** younger people before they reach this stage in life with problems such as mines, because kids are sensitive and they wants to be heard, you know, a lot of parents are here and don't hear and don't give them assurance that they are loved until something happens. But I believe the parents should tell their kids they're loved before something happens, tell them that they're loved and be able to talk to them, where as ***. You know, most parents -- well -- kid do something or one that's older tell the parents the kids done something instead of *** the care out, they will always take the *** boy over the kid, and I don't agree with that because I believe a kid has the right to speak out and be heard you know *** as an adult.

Gill: Well you seem to be saying that your own childhood didn't have ***

Dalton: No it didn't.

Gill: Can you tell me, tell me what you remember about growing up from the earliest time you can recall.

Dalton: *** many years ago, I lived with my Auntie at the time and it was always a up and down struggle. It's *** now, but at the time I didn't know that she was my Auntie, I always thought she was my mother. I wasn't aware of my real mother or father at the time. So that's why I had to live with them, you know. Mostly my Auntie was ***, though my Auntie. I don't know if she was trying to bring me up as my grandmother or father brung them up or what but, it was always chaos when she come from work or something it was always, always a bad time for me because she always take her frustration out on me.

Gill: You're talking about beating you up?

Dalton: Yea.

Gill: How often?

Dalton: Very often, any problems she had it was always took out on me, you know. I don't know it was a time I wondered if she took it out 'cause I was around my uncle he brung her up one time, always took it out on me, but it

wouldn't have done any good 'cause everyone around the house knew I didn't do what was happening and saw what happened, couldn't get any help.

Gill: Nobody did anything, nobody tried to help you?

Dalton: No. Only person I actually talked with, you know, was a close friend I have in ***, you know. But, I just have to live with it you know, and after I did find out about my grandmother and them, you know, I would turn and I could tell a lot of times when I did come down *** I could see a change and mood in her, you know, but eventually I stayed.

Gill: *** Your aunt was, she drank or

Dalton: She was an alcoholic -- still is.

Gill: Do you ever see her these days?

Dalton: I haven't saw her since '83.

Gill: Okay, so how did you find out who your mother was.

Dalton: With my real mother, I found out when I come down for a summer and I was at my uncle house and my mother came by there with my two sisters and my grandmother. She told me who she was but it still didn't sink in until my uncle and them told me, but still it was just -- it just didn't kick in. They talked about it.

Gill: How old were you at this time?

Dalton: I'd say about 11 or 12. Might have been maybe younger than that about 10 -- 11 or 12.

Gill: So it didn't sink in. Did you go back to Houston then?

Dalton: No, I was definitely sent to stay with my uncle, but my mother came and got me. And he had told me who she was, you know. So, she took me to her house and I stayed the rest of the summer with her and my grandmother and them.

Gill: And then went back to Houston?

Dalton: I went back when school started again.

Gill: And how was your Aunt *** then?

Dalton: She was like the same person she had always been, you know. See I was, actually I was really caught on between love and despising her at one time because of what she'd done and not understanding it. That's what made me more or less angry because I didn't understand why it was all happening, but yet I was still caught up in . . .

Gill: Why all this abuse was happening, you mean?

Dalton: Yea,

Gill: And you loved your aunt nevertheless?

Dalton: Yea, because when she wasn't drinking, she can be kind but you never know spur of the moment how she'll turn.

Gill: But she was drinking most of the time?

Dalton: Yea, definitely

Gill: What about the other kids in town. Did you have good friends there or what?

Dalton: At school, I had a few at school. It was mostly around the neighborhood that I had my friends -- that was mostly (Lori) and Glenn, (Lori's) brother and (Billy).

Gill: How did you do at school?

Dalton: So, so (laughter)

Gill: Were the other kids *** The other kids in Houston were kind of mean to you is that true?

Dalton: Yea, that was because of my ears.

Gill: Your ears?

Dalton: Yea

Gill: You've got ears some under there somewhere.

Zwicker: A roach.

Gill: Oh, a roach,

Zwicker: Do you want roaches from New York. Our roaches eat your roaches.

Gill: So how much longer did you stay with your Aunt, what was her name? T you said?

Dalton: Mary.

Gill: Yea, oh Mary.

Dalton: I went back and forth actually, 'cause I came back here then I went back to Texas that summer and that's when I *** I find out about my mother and them and actually liked being around my brother really, your know, it was good to know that I did have brothers and sisters and I actually didn't want to stay after I find out that I did have brothers and sisters and a mother somewhere else, you know.

Gill: But how did it affect you to find out that you'd been under a misapp-- being someone else's mother all this time -- did you feel you'd been rejected or deceived?

Dalton: I just couldn't understand it really. I just couldn't put it all together the reason why. Actually I didn't get that fully understanding of this since I been up here that me and my mother actually have sat down and had a talk concerning this. I just at times I did want to talk about it when I was still out there but I never brung it up.

Gill: ***

Dalton: Well, me and my *** friends ***, we used to speak about a lot of things, you know, but this had never came up. I felt this was something I would have to deal with on my own and I guess in my own time and it did come about since I come up here that I was able to talk about it and got a clear understanding of it and believed in what she had told me, you know. She did go through a hard time after she had kids, which I found out that I wasn't the only one she had give for someone to keep until she got well. She had came back from *** in plenty of time -- she said, you know, that *** bad for my Auntie to keep me and she let her. She knew my Auntie drunk, but she wasn't aware how much she drank and how she turned once she started drinking that much.

Gill: Is Aunt Mary your mother's sister?

Dalton: No it's my daddy's sister.

Gill: Your daddy's sister. You became very close to your brother

Dalton: Yes.

Gill: When you were growing up did you know you had a brother?

Dalton: No.

Gill: So you were living there as Aunt Mary's only child?

Dalton: Right.

Gill: Okay, so when did you leave there and when did you quit school?

Dalton: I left *** '72 -- '72 -- because I had skipped myself in the 5th to 7th and my friends went to the high . . .

Gill: You excused yourself, you say?

Dalton: Yea. And I went to the 7th grade and I stayed there a few days actually because someone called Aunt Mary and told her that they saw me at the high school and she called me at home and inquired about that and I just told her yea

Gill: I'm sorry, at the hospital?

Dalton: Uh uh, At home, she called me at home and I just told her yea, you know that I had been to the high school so that afternoon she got off a work, you know and she just took me back to Lafayette that night. She used to always threaten me with that--taking me back to Lafayette--but I never -- I ain't paid it no mind really, you know. So when she took me back I stayed.

Gill: That wasn't a bad thing then, huh?

Dalton: No, but she didn't know that at the time.

Gill: So, you went back to your mother's then?

Dalton: Right.

Gill: But you had already discovered that she really was your mother, before that?

Dalton: Right.

Gill: So what age are you now, when you went back, you went back to Lafayette to live you were how old?

Dalton: 13. About 13 about 12 -- 13 at the most.

Gill: And what about school? Did you go to school in Lafayette?

Dalton: No, I went to school a few days there, I got out out 'cause of fighting 'cause me and the principal could not get along -- see eye to eye and *** I went to reform school for ***

Gill: Well, who were you fighting?

Dalton: Another dude that went to school there.

Gill: And you had to go to reform school for that?

Dalton: Yea, because I didn't go back because the principal was putting more things that happened that didn't happen

Gill: Okay.

Dalton: And I saw it so I just told my mother I wasn't going. So we tried to switch schools but they wouldn't do it - - I just didn't go.

Gill: What school was that?

Dalton: Lafayette Elementary.

Gill: ***

Dalton: Mr. Gray, that was the principal name, Mr. Gray.

Gill: Mr. Gray? Okay. So how long were you in reform school?

Dalton: I think it was six or seven months.

Gill: And then when you got out, you got in trouble again pretty soon?

Dalton: No, I got out the first time, came back, Aunt Mary came and got me again.

Gill: After your abuse?

Dalton: Yes, she came back and got me again, but I didn't stay because I had to be returned because I was still on parole and I came back to Lafayette and I didn't graduate reform school until '74. ***

Gill: Wasn't '74 when you shot the cab driver.

Dalton: '74 right.

Gill: And how long were you out of reform school when that happened.

Dalton: I had got more than 2 or 3 years.

Gill: So what had you been doing, were you working, going to school or what?

Dalton: Well, I tried, tried to find work. I was working different odd jobs, but nothing significant.

Gill: You were only 14 when that happened, right?

Dalton: I think I was 13 -- 13-14

Gill: When you shot the cab driver?

Dalton: Yea.

Gill: Tell me how, tell me about that, how did that happen, or why did that happen?

Dalton: 'Cause more or less, kids getting out -- trying to make a hustle and don't know what they're doing actually -- and doing something for the first time like that and panic, I more or less panicked.

Gill: What made you panic? You were trying to rob the cab driver, right?

Dalton: Right

Gill: And he wouldn't cooperate?

Dalton: It wasn't so much that he wouldn't cooperate, just saying kids being scared . . .

Gill: Sorry, sorry, sorry -- is that okay?

Robinson: ***

Gill: Is that okay?

Dalton: Yea

Robinson: It's always a pleasure when I ***. That's all I get on the phone. And I don't get mail so ***

Dalton: *** Andrea.

Gill: So let's get to that *** The question was why, why did you do it *** two kids you and some other kid trying to hustle some cab driver and, and for some reason you panic.

Dalton: I was already scared, scared from jump street and feeling that he was going for a gun . . .

Gill: So you all were inside the cab at the time?

Dalton: No, we both had got out from each side (actually)

Gill: So, you hired a cab, and rode somewhere and got out and then stuck him up?

Dalton: Yes.

Gill: And he told you, I've got a gun?

Dalton: From under the seat.

Gill: And how did that make you feel?

Dalton: You know, it's a scary feeling, 'cause *** still -- what I had said -- kids doing something they don't kn nothing about. I still leave the scene at the time because I was a (kid) and the same person *** I migh have done something doesn't mean I don't hold no concern behind my actions and I was there, matter o fact I'm the one *** matter of fact, and . . . That night it was a strange feeling 'cause you do someth and sit back and think and realize what you have don you do things out of reaction, come back to sit down and realize what you have done, you understand and y u don't understand what you done. What have it all accomplished.

Gill: Did you get any money?

Dalton: No.

Gill: So what did you do after you shot him, like what did you do *** Did you run?

Dalton: We ran, but I came back

Gill: To see how he was -- to check on him?

Dalton: Yea, 'cause I ran -- I don't know if I ran around the corner, but I came back, you know -- I didn't go in the lot where he was at. I looked from a distance, you know, and I just stood there, you know I *** go into another, another feeling

Gill: Did you think to call an ambulance or anything?

Dalton: Well, the lady on the street had called the police and *** ambulance car, 'cause I was still there when they came, you know. 'Cause I don't know it's just hard to actually describe the feeling that, you know, knowing that you're the one that caused it. Something you have to deal with

Gill: Were you surprised that you had done it?

Dalton: Surprised, more or less at my, my own self -- shocked actually, 'cause something I don't know why *** done before and gotten in deeper trouble, you know, that was ***

Gill: Well had you, before that, had you thought yourself capable of (killing)?

Dalton: No. Never have.

Gill: Never wanted to?

Dalton: Didn't want to.

Gill: So this was something, this was a reaction to his reaching, as you thought, for a gun?

Dalton: ***

Gill: *** take him to the hospital?

Dalton: They took him -- the ambulance -- just laid in the seat of the car for a while. After that I just walked off, you know?

Gill: And you went home?

Dalton: No. I didn't go home that night. I stayed over my auntie house that night.

Gill: In Lafayette?

Dalton: Yes.

Gill: Were you scared?

Dalton: Yes, very. Just kids got one way of doing and they realize what you got yourself caught up in -- it's like being alone all awhile all over again and you really don't have but one alternative.

Gill: What did you think you were going to do?

Dalton: Think about it, you know. Just tried to sit down and put thoughts together, you know, but still come up with the same thing. You made a big mistake.

Gill: What about, what do you remember about the cab driver, did you know what his name was?

Dalton: I know it was Albert E. -- I can't remember . . .

Gill: ***

Dalton: I'm not sure.

Gill: Was he married? Did he have kids?

Dalton: I'm not aware, but I know he was from Church Point I believe, Church Point, Louisiana.

Gill: You don't know anything about him?

Dalton: No.

Gill: Then you -- You were arrested pretty soon after?

Dalton: Arrested next day.

Gill: How come they found you?

Dalton: Oh, they didn't find me, I found them.

Gill: You went, you turned yourself in?

Dalton: Yes.

Gill: And you pleaded guilty in court?

Dalton: Mmm hmm.

Gill: To what, manslaughter ***

Dalton: Actually, I don't, I don't -- like I say, I was a kid, I didn't know anything about the law and . . . ***

Gill: So, anyway they certainly jailed you up, right?

Dalton: Right.

Gill: At that time in your life did you have any *** to think you had a particular problem *** result in your childhood ***?

Dalton: No.

Gill: Did you think you were dangerous to the community?

Dalton: No, not as much a danger to society or anything like that because I was just this kid, you know, and all I felt was reaction to --him going-- thinking he was going for a gun, but you have to look at it -- you don't think of yourself having a problem, see that's the biggest thing you have to do is realizing and facing up that you do have a problem . . .

Gill: But did you think you had one?

Dalton: And kids -- No. See, but you see doctors, at LTI you see doctors. They give -- they had me on medication, but you don't know what the medication's for.

Gill: Right.

Dalton: See, you know something's wrong, but *** is knowing what is wrong, see? 'Cause I had to get myself took off medication while I was at LTI because it kept me drained and I, I couldn't move around -- like I was always sleepy.

Gill: Do you know what medication that was?

Dalton: I found out later that it was thorazine and another kind of, another kind of medication -- liquid medication.

Gill: But the, the affect was to make you drowsy and ***

Dalton: It kept me sleepy all the time.

Gill: Did you, at this time, spend much time thinking about the cab driver?

Dalton: I thought about it, you know, (every) time we went back to the place. When I got out I went back, you know, it seemed like it just was unreal it was like it all happened again, you know, just looking at it. 'Cause as a matter of fact we lived right around the corner,

when I come back I realized we lived right around the corner from that ***

Gill: (Where)?

Dalton: St. Charles Street *** I had to pass the street every day, so it's hard not to think about it, plus you always think about it -- a human life, you know, even if you young or not.

Gill: So it was on your conscience?

Dalton: Yea, because you never know, I didn't know the man and I believe anyone should have to die like that, you know. It was hurting more to realize that he wasn't going for a gun and that made *** more worser.

Gill: He didn't have a gun in his cab?

Dalton: No. To realize he didn't have a gun.

Gill: What did he reach under the seat or something?

Dalton: Mmm hmm.

Gill: ***.

Dalton: Yea.

Gill: So, how long were you in LTI for that?

Dalton: Two years and a half.

Gill: So, what did you do when you got out?

Dalton: I went and stayed in Houston for a while, I *** for a while, you know. And things started taking a downfall 'cause first, actually first my brother and my Auntie had an (argument) *** I watched my brother *** my daddy and -- I guess -- as I explained earlier my Auntie when she get to drinking and you in her home, you know, she wants to put everybody out and it's all crazy everybody, which I wasn't there, I was at my girlfriend house at the time and she called me over there and tell me not to come home and I don't even know the reason why. So I did come home realizing what had happened.

Gill: Your brother was there?

Dalton: No, my brother had gone when they got in the fight.

Gill: So he was . . .

Dalton: He had left. She told me her side of the story and I left and went to a friend of mines and called my brother, you know and talked to him.

Gill: Where was he?

Dalton: Oh, he was staying with his father in law . . .

Gill: In Houston?

Dalton: In Houston. And he was telling me about it, you know *** she had stabbed him, you know and she tried to stab my sister in law, which she was pregnant at the time.

Gill: So, you didn't stay with Aunt Mary very long then, this time?

Dalton: No, I didn't stay that long.

Gill: So, you came back to Lafayette?

Dalton: Yes, came back to Lafayette, but I didn't leave right then at that particular time, I talked to my brother and I say about a week or two weeks later I come home from work and my uncle it just so happened hadn't come home for about three days 'cause actually somebody had pick pocketed him and the reason why he never came home -- but he had promised to buy me a car, which when I walked in I saw it sitting in the driveway, you know, but I didn't know he was in there at the time and I went in the house and I took my bath and I asked her did I have any phone calls so she told me I had and she said something about April had told her something smart or whatever and I just said well you must have told her something for her to tell you something smart. We had changed words and left it like that. So I asked her where daddy was and she didn't say anything so I went out to the car and daddy was in the car, you know. And I told him, you know to come in the house he could sleep in my room, you know and *** between her and him. So he had came in the house after a while -- came in my room and I assume she realized that he was in the

house, you know, 'cause in the room messing around with him, you know. I was actually, she didn't leave him alone, but he wasn't doing nothing, you know just trying to get somewhere for work as well as myself 'cause I had to get up at 5 every morning, you know, to go to work, and she got mad went into the kitchen and got a butcher knife and *** the house. And knowing she had done this, you know I give my clothes -- I don't -- seem like from that moment on *** all the rage *** the years that she had mistreated me -- seem like it all came up then. And *** she come after me with the knife outside when I left and went outside. I picked up a jack, jack hammer and I hit her with it and before my uncle had stopped us from fighting, my friend Glenn *** and I left and I stayed there, you know, and she put all my clothes outside, you know. (My friend would have to go) So I *** go back there anymore. I went to work the next day. I went and stayed with my daddy for a while maybe a week or two weeks before I left, 'cause I was waiting for my next check so I could come back to Lafayette, you know. I never, never did see her anymore until '78 or '79 -- '78 when she came to court, you know.

Gill: She came to court in '78?

Dalton: Yea, she came with my father, my daddy, but she was more like this she do something and come back to you just like it just like it never happened. See you gotta realize *** brother and sister *** used fight in the house -- I mean this was every Friday and Saturday night they was fighting in the house.

Gill: Now, this is when you were at your mother's house in Lafayette?

Dalton: No, this is my Auntie house when I was living there.

Gill: Okay.

Dalton: They both, they all drank, you know. Get full of it and wind up fighting one another. This was every weekend. She, matter of fact, she *** her twin brother one time.

Gill: So, you never lived there again, right?

Dalton: No.

Gill: So you, what'd you do, quit your job and left town?

Dalton: Yea.

Gill: And came back . . .

Dalton: to Lafayette.

Gill: To Lafayette. What'd you do then?

Dalton: Well, first I got a job helping a dude who was fixing concrete like patios. That was an odd job and then I finally got a job off shore. ***

Gill: Make some money, huh?

Dalton: *** But that didn't last either because *** to get a job and not realizing what age I had told the man, you had to be 18 or older. I wasn't but 17.

Gill: But you told him you were 18, huh?

Dalton: No, I told him I was 25.

Gill: Okay!

Dalton: They found out eventually when I came back in . . .

Gill: They found out through your brother?

Dalton: Yea, 'cause he asked me when I came in how old was I, you know, ***, I told him my real age, you know, so he told me he couldn't keep me because of that age, you know, but he said once I'm 18 he will rehire me again, you know.

Gill: But you never made it?

Dalton: No.

Gill: So was there anybody, well how long was this before Trooper Cleveland?

Dalton: Oh, it was a couple months, about two months before because I came to Baton Rouge looking for work too.

Gill: Did you find any?

Dalton: No, I hadn't found any yet, I was trying -- I had put the applications in Baton Rouge, matter of fact a counselor of mines in LTI *** cause he was like a big brother to me when I was at LTI, I stayed with him and his family and he helped me try to find a job, matter of fact, he's the one who *** trying to help me find a job, you know -- down in Baton Rouge.

Gill: Well, were you still living with this counselor looking for work when the Trooper Cleveland . . .

Dalton: I had just come back from Baton Rouge -- matter of fact -- one or two days before, matter of fact I came back, no I came back that Monday and that happened Friday.

Gill: Why don't you tell us a little more about the day. You were with Joe, right?

Dalton: Yea.

Gill: How did it start off, you went out on the town?

Dalton: No, I was, me and my brother, we just, I went to his house that night, see I used to go there most of the time cause if you didn't see one with the other, I wasn't too far behind -- he wasn't too far behind. And that time of the morning I'm real sure we was a home with his wife. So, I had went over there, you know.

Gill: Were you married at this time?

Dalton: No. I wasn't married yet. And, I went to his house and we, like always, clowning *** we always do. We left and started drinking, you know,

Gill: At his house?

Dalton: Yea. We left and just riding around town. Gone back his house, between my mother house and his mother in law house, you know. Just riding around cause in the summer time going down to the park.

Gill: Going around drinking or something?

Dalton: Yea.

Gill: You had a gun?

Dalton: I didn't have a gun on me, no. I didn't have a gun on me, no.

Gill: Did Joe?

Dalton: No. I didn't have a gun on ***. And that, like I say *** clown around this and that. But we came down like night fall and we came, he had dropped me off early at my mother's house so and he came back and got me. *** tell me about something and we had left again and everybody was at his mother in law's house that day 'cause they had a card game going on there and that's where everybody was at so we left to go over there. We stayed there for a little while and just drinking and just clowning with the family and we had left and went

-- I left, I left I had to go see Diane about something.

Gill: Diane's your girlfriend, or ?

Dalton: Yes. And we talked and *** come back, come back and we was standing by the car to drinking, you know that's when Mike and George came along, my cousin, you know, and like I say it was Friday night just having a good time. Then we left and went down the block at the Harlem Club.

Gill: What club?

Dalton: Harlem

Gill: Harlem?

Dalton: It's on Washington.

Gill: ***

Dalton: And we went in there, sitting around there *** Joe mentioned to me about something, about some girl or something. We was at the club drinking because Mike knew, the I think the lady or the dude who was behind the counter, you know. We didn't have to pay for our drinks. We was just sitting there. We stayed 'til -- for a good little while.

Gill: What were, what were you drinking, beer or ?

Dalton: Beer, I had drunk -- I think I had some vodka somewhere in there too, but it was mostly beer and ***

Gill: How many?

Dalton: [shrugged shoulders]

Gill: A lot?

Dalton: Yea, I can't give you an estimate on that there. Plus we had mixed it, you know -- 'cause lot of times we mixed in a cup.

Gill: You were drinking ***

Dalton: Mmm hmm. We mixed . . .

Gill: What drugs did you have?

Dalton: Huh?

Gill: Did you have drugs too?

Dalton: Yea, that was, that's was when we got to ***, you know, we had smoked some weed -- like I say I don't too much like weed but I like angel dust

Gill: Okay.

Dalton: And there was some angel dust there, mostly we had done it, but it was mostly done at *** night club.

Gill: So, what ***

Dalton: Yea, we come back, we come back we stand outside of the Harlem club and it just so happens Michael Brousard was standing outside and I knew . . .

Gill: ***

Dalton: Yea. I know him through his brother, you know, ***. He wanted to go to the Roger's and we could catch a cab. So I asked Joe would he take me, which I knew he would, you know ***. I was very fond of his mama. His brother *** used to always look out for me, you know ***, you know. So, Joe agreed to take me to the Roger's night club. So we left and came back to Joe mother in law house. And we picked Chicken (Joe's wife) up -- we picked my sister up and we all rode, went to Chicken house. And first we dropped Chicken off and we left and went to my mother's house for some reason I went to my mother's house and didn't realize where it was at the time when I was actually into my mother's house, but . . .

Gill: And who's all there, it was you, and Joe, and Michael Brousard . . .

Dalton: Michael George

Gill: *** so there were five of you?

Dalton: It was Michael George, me, my brother, Mike Brousard, my brother's wife and my sister.

Gill: Okay.

Robinson: If you're wondering why he keeps referring to Chicken, that's what they call ***

Gill: ***

Dalton: We left and went to my brother's place and we dropped Chicken off and we dropped my sister off. Then we left and went to ***. First we went to *** house and we came back around to get some gas. Place that had gas they sold liquor in there as well -- that's when we bought some White Bull out of there

Gill: Some what?

Dalton: White Bull -- wine.

Gill: Oh, White Bull wine, okay.

Dalton: And, just drank that ***

Gill: And what time is it now?

Dalton: Might be after midnight. It was after midnight I'd say. Then we went to Roger's night club and we stayed there oh, till about 4 or 5 o'clock.

Gill: When you were there, did you or your brother say anything about planning to go shoot a cop that night.

Dalton: No. We just actually going in there to have a good time, you know. Wasn't about hurting nobody . . .

Gill: It had been suggested that there was *** in the car and though you said ***. So you left there about 4 or 5 o'clock.

Dalton: 4 or 5 o'clock.

Gill: And you got on the road, who was driving?

Dalton: I was driving.

Gill: ***

Dalton: Pulled along the road and I assume we were 100 feet from the club and the cop *** us, you know had me pull over, hollered for us to get out of the car, which me and Joe had to switch places because I didn't have a driver's license . . .

Gill: So, Joe switched with you?

Dalton: Yes. I was driving cause Joe was . . .

Gill: Drunker than you?

Dalton: Yes. Actually, I had threw up already, he hadn't threw his up yet. So, I slid under. So, anyway, we switched places. The police still hollered at us to get out for Joe to get out of the car I was still in the car. And him and Joe started arguing, you know, and *** same time he was telling me to get out of the car, but I still hadn't get out of the car yet.

Gill: Why not?

Dalton: Because I still don't know the reason he would actually want me to get out of the car 'cause I feel that all he had to do was a ticket and let us go or whatever, we drinking, you know, he would just took us to his jail *** license though. I couldn't see no actual reason for me to get out the car. So he kept on hollering for me, you know, but at the same, same token *** he had Joe pushed down on the hood of the car. Joe was trying to raise his head up, you know, before I actually realized that I was I *** and the Trooper looked up at me and I shot him.

Gill: What did you shoot him with?

Dalton: 38.

Gill: *** Where did you pick up the gun?

Dalton: From *** at another girlfriend house of mine.

Gill: Do you pick up the gun on the course of this long day?

Dalton: Time -- Picked it up when we came to this club here, because this particular club is the only club that's open when all the rest of the clubs is closed down and *** that I did have and all the kinds of things that goes down at the club and that's the reason why I did get a pistol.

Gill: *** protection?

Dalton: Right.

Gill: You weren't supposed to have a gun, right? Were you out on, were you released on -- When you were released from LTI were you on parole or what?

Dalton: No. I was discharged.

Gill: But you were still, you weren't legally *** to carry a gun, right? Were you, were you a convicted felon?

Robinson: No, ***

Gill: As a juvenile or something?

Robinson: *** clean release.

Gill: Okay. So this little game, this was a quick reaction, you shot him ***?

Dalton: Yes.

Gill: And he had your brother's head down and you got out the car and he looked at you

Dalton: Yes.

Gill: And you shot him (in the face)?

Dalton: Yes.

Gill: And how, what did you, how did you feel when ***?

Dalton: Honestly, you know, it

Robinson: How you doing? How you doing?

Dalton: Alright.

Robinson: You want a drink or something.

Dalton: ***

Zwicker: Here, we'll split it.

Robinson: Do you need to go to the bathroom or anything?

Dalton: No, I'm alright.

Robinson: Almond Joy break?

Dalton: No, I gotta eat my Almond Joys slow.

Gill: Hmm?

Dalton: Gotta eat my Almond Joy slow.

Robinson: Eat your Almond Joys slow.

Gill: Do you want to rest or carry on?

Dalton: Carry on.

Gill: ***

[Break ?]

Gill: Trooper had your brother on the car. You got out of the car and he looked at you and you shot him twice -- now what, this is something you did with a quick reaction. How did you, did you realize straight away what you had done or were you too drunk?

Dalton: Being, actually, I just stood there because I still today *** see my brother wining and hollering *** noticed he had passed me at the same time, you know, cause everything happened all at once and 'cause Michael Brous-, Michael George had drove off.

Gill: Were they witnesses?

Dalton: Michael George?

Gill: Did they see ***?

Dalton: I assume, I don't even know. I really don't know. They was in the car though.

Gill: Did you know *** Did he know you killed a cop of the state?

Dalton: I think he heard the shots. I don't think he knew if he was dead or not, but he heard . . .

Gill: What about you, did you know what you had done?

Dalton: I *** had the gun in my hand, you know. *** I don't know, my brother was telling me something, you know. I still don't remember actually what he said, you know, to this day, but *** everything, everything I say happened at once. It all didn't fully register to me until moments before we were arrested.

Gill: How long before you were arrested?

Dalton: A couple hours later.

Gill: So you took off?

Dalton: Right.

Gill: And how did they catch you -- where did they catch you?

Dalton: We was at my brother's house.

Gill: How did they find you.

Dalton: I don't know. They went to my mother house first. I think they went to Chicken mother house too. I don't know how they actually found the address.

Gill: So here we're talking somewhere around 6 or 7 in the morning. They took you to jail and put you away?

Dalton: Yea.

Gill: Okay, well tell me about the criminal justice system in Lafayette. How do you feel you were -- you got your -- an attorney was appointed for you, right?

Dalton: Yes.

Gill: That was Mr. Gilbeau?

Dalton: Yep.

Gill: Do you think you got a fair deal?

Dalton: No.

Gill: Tell me why, tell me what -- any particular complaints you have about the way the trial was handled here, the whole, the whole system --

Dalton: Like I say, I don't so much blame Gilbeau in a sense, you know it was his first trial plus I'm unaware of how the system worked at that time so it be hard for me to know just what's going on really cause at the time I would feel that he had done everything possible that

could be done but now when I look back at it I have to wonder, you know after having lawyers that I have now who put in every effort, you know.

Gill: Do you remember the process of selecting a jury?

Dalton: Right.

Gill: And how did that go?

Dalton: I don't know 'cause we had so many people that come in that day and seem like everybody either had got robbed or something had happened on that jury when they came there that day and I listened at so many juries, you know and I was actually found guilty, you know before I went on trial.

Robinson: James, can I just, I don't know if you're aware of something

[Break ?]

Gill: *** were all white. Can you recall black candidates being questioned?

Dalton: Ms. Taylor in particular, Ms. Taylor. *** It was a lot of blacks that come through there but it mostly whites that was actually put in *** of the jury, but I had *** that it was because I had been in Monroe before and it was the same Monroe that I always remember, you know.

Gill: Well at the time, did you or Mr. Gilbeau say to each other that black people were being excluded from the jury because they were black, was that an issue at the time or ***. Mr. Gilbeau did he say to you that blacks were being excluded.

Dalton: He tried to get it stopped in the middle of it but the judge wouldn't allow him to get the evidence of proving it -- a motion that he filed at the time.

Gill: So objections to that were overruled and the trial proceeded with an all white jury and ***. How long did it take the to find you guilty. Were the facts ***

Dalton: The whole process took to be tried and convicted and to be sentenced took a three days.

Gill: That includes the sentence?

Dalton: Yes.

Gill: I'm sorry but how did you plead?

Dalton: I pleaded not guilty.

Zwicker: He had to.

Gill: ***

Zwicker: There's also a Louisiana statute which prevents murder-one people from pleading guilty. He had to plead not guilty

Robinson: What you ought to know is that *** challenged this *** he didn't testify

Dalton: *** I didn't take the stand.

Gill: Okay, what about, so now, after you had been found guilty there is a second trial where they decide what -- the sentence you're going to get, right?

Dalton: Right.

Gill: Now this time you didn't, you weren't aware of what was in the LTI files, right? You didn't know of any problems you might -- anything that might force you

Dalton: No, I wasn't aware of this until I *** the claims being brung up -- I had a chance to look at the files myself

Gill: Your attorney didn't seek his appeal on these files?

Dalton: No. It wasn't any of that. I never.

Gill: It was in the files at LTI?

Dalton: Yea, I never have saw nothing that told me was ever filed. Only time I had ever got anything from a file was the attorneys I have now. Anything they told me was filed I have never saw.

Gill: What is the *** prosecute *** long time?

[Break ?]

Dalton: I assume it was an hour or two hours something I believe if I'm not mistaken.

Gill: What was your reaction when they came back with the death penalty? Were you surprised or scared or both?

Dalton: Pretty of both you know, 'cause you never think of yourself getting sentenced to something like that. I couldn't figure out just how this come about, you know.

Gill: Were you still 17 at this time, by the time you were sentenced or had you turned 18?

Dalton: I was 18 then.

Gill: But, you were 17 at the time of the offense?

Dalton: Yes.

Gill: Then they put you in the parish jail here, initially?

Dalton: Yea, I stayed in Monroe jail for about a month then I was transferred back to Lafayette parish.

Gill: When did you get married in all of this?

Dalton: '79

Gill: While you were in -- where were you then?

Dalton: Lafayette parish jail.

Gill: And that's where young Dalton was conceived?

Dalton: Right.

Gill: ***

Dalton: ***

Gill: Alright. And you came here in 1980?

Dalton: Yea.

Gill: Was Mr. Gilbeau still your *** attorney?

Dalton: Right.

Gill: Okay. Well then, how did you settle in here? When you first came here, how did you cope with it, what was on your mind?

Dalton: Well, mostly things, I tried to cope with it by I used to do a lot of writing.

Gill: Writing?

Dalton: Yea, do a lot of writing.

Gill: What sort of writing?

Dalton: More or less writing home, you know?

Gill: Letters?

Dalton: Yea.

Gill: Okay. And, then you started to go to Bible classes or something?

Dalton: They didn't start the Bible classes up here until, I think either '86 or '85 or '86 -- start Bible class, we just go once a year and we just started that a couple years ago, 'cause other than that, the preacher come on the cell if you want to take communion or something like that, but now every year they have a seminar in September or October for three days and you allowed to be in a room something like this, you know but other preachers *** inmates that's the only time you allowed around *** inmates an individual period, without the handcuffs on and to do as you please, far as walking around and stuff like that.

Gill: So it's a relief quite apart from any spiritual . . .?

Dalton: Yes. You have to more or less learn it on your own and have the will to learn it on your own and you know they have volunteers and stuff that come around too and you can spend time with them.

Gill: What else do you do. Are there other things that the inmates are allowed to participate in?

Dalton: *** about anything. We get to go in the yard three times a week that's if the weather is alright and got T.V. sets in about *** that sits in the hallway. You can write or draw or something like that, make cards or something like that.

Gill: How much do you know about the outside world. I mean do you know what people what they're saying about Prejean?

Dalton: Yes, I think -- I hear some talk against me, but I can understand it and -- or mostly agree with it in a to an extent, but I say they's talk about me in this way like that because they don't know me, they know what they have read on paper,

Gill: About Dalton?

Dalton: And not actually know Dalton Prejean and

Gill: Do you think if people knew you they would be less inclined to want to see you die?

Dalton: I believe they would. Because I believe I have come a long way from changing and understanding and I believe if people could see me as a person not just somebody they read in the newspaper or something or saw on T.V., but see a person, you know, a person can change you know, but you gotta have the will to change and my biggest inspiration is my little son because with him I have put a lot of thought into -- and see myself in him and he have taught me a lot more than he'll realize

because I see him doing things that I used to do or even ask the same questions almost I have asked one time or another, and

Gill: Do you see yourself in him?

Dalton: Yep.

Gill: Does that alarm you in any way? Do you feel concerned about his future?

Dalton: Very, but see, kids going to be kids. And he's not a bad child. I don't consider myself as a bad child, you know. I don't agree with what I have done in my life, but things that happened in my life that I don't want to happen to him, you know. See where the difference come in between me and him is that I'm going to always reassure him that he is loved and cared for and that he can be talked to and can talk to me and don't have to worry about being whipped or worry about being fussed at regardless of what it is . . .

Gill: The things that happened to you?

Dalton: No, just

Gill: You don't have to worry about -- You want him to have the bond as if you didn't have with your ***.

Dalton: Right. And with that, you know, I believe I was a kid over the years *** who *** come to his parents and talk to them without being come down on hard, you know. I'm

not at all saying that I'm going to agree every time with him, you know if he had done something, but I'm going to talk to him and I'm not going to chastise him every time he do something either, you know. With that I mean, you know, I will understand him just like he must understand me. And he understand his schooling better -- he gotta worry about somebody putting pressure on him 'cause I don't want him to do anything that he don't want to do or feel comfortable with. 'Cause if someone don't feel comfortable in doing something, they not going to do it anyway, you see. So, therefore I want him to feel comfortable in doing things in his own little life in coming up. And I feel strong and proud of him and he will be a great person once he grow up. I'm very proud of him

Gill: When'd you last see him?

Dalton: Last Friday.

Gill: So he comes up here whenever he can?

Dalton: Yep, supposed to come up Saturday, I believe.

Gill: Well, what exactly do you think your problem is?

Dalton: My problem?

Gill: Yea, I mean we know about your background *** and you say you didn't think you were a bad kid. *** Dalton, you killed two men which is a serious thing, I mean what is it that made Dalton Prejean do this. What is

your problem? Are we talking about a medical problem? How do you see the impulse that made you commit these crimes?

Dalton: *** Both medical and back then I didn't understand myself and not being able to really cope with life itself, you know. But in the time that I've done, I've grown and with my growing I've learned about patience and *** like I said God's a help and *** deal with a lot of the problems, you know. I believe if I was allowed the chance, I can become better, a better person because with time you can become better and I believe I can become better in life.

Gill: Yea, *** So you find *** this great big change since you came here?

Dalton: Right.

Gill: Well, could you *** on the outside? Or would you be a menace to society?

Dalton: I couldn't actually give you an honest answer on that there because I would have to live here first, you know. I'm in a cell right now I'm around people but I want to be around people here first and adjust to this world first and with that if I'm able to adjust to being around that and see my own self better myself maybe some day I probably could but I believe at this time it would be better for me to stay here and get the education that I need and I think I have to give back something to society, you know to really live in it.

Gill: They don't educate you on death row, right?

Dalton: No.

Gill: What do you expect to happen, I mean you've got another date in a couple of weeks, are you optimistic?

Dalton: I *** just live for today, you know. I can't predict the future, you know, I don't even try, you know.

Gill: Well, as you say, we all die, which is true, very few of us know in advance when and how. *** How do you prepare for a thing like that?

Dalton: So far as myself, I'm at peace. I don't fear death *** cause I don't believe it's going to solve anything. They said capital punishment forces people to be deter, but I don't see no kind of deterrent in crime.

Gill: Didn't deter you did it?

Dalton: No, and it didn't deter a lot of people, see a lot of people, they spend more time, they spend more money trying to kill them than trying to find the problems behind my actions. And I always wonder do I have to take the blame by myself when they knew the problems *** years ago but yet they never done anything about it. The same system that trying to kill me today . . .

Gill: You're mad at the system right?

Dalton: The system work for some people. It don't work for all people. It depends on who you are and who your victim are. Because I'm a always feel that if it had been me or my brother had been killed it would have been a shut case and we wouldn't a heard any more about it. But it's not, it's me -- I'm poor, you know, don't have the finance to find people when you needed them and you caught up in it and don't know what you doing and don't know anything about the system at the time and you put all your trust in the system, and the system fail you like it done before, but you don't realize that as a youngster, you know. It took me a lot of thought, a lot of time to look into this and see it. It took the lawyers I have right now they had to come clean out of state, you know. You have to wonder, you know people right here in this state won't give you help, you know or turn their heads on you and always looking for a dollar bill, you know. You don't have a dollar bill or know the right people, you stuck out, you know. I don't know makes you feel like a person can't change, you know he'll always be the person that he is just because a person made a mistake in their life, you know, a person can change, you know. And I'm proud of myself if ain't nobody else proud of myself that I have and I have come a long way, you know and I'm a always believe that regardless of what happens to me.

Gill: If you had been a white kid with a lot of money, where would you be today?

Dalton: I wouldn't be in prison

Gill: *** that's right.

Dalton: At least if I did have to come to prison, I wouldn't see death row period.

Gill: When you shot the trooper, did you have any thought in your head as to what might happen to you? I mean obviously *** capital punishment. Do people who commit homicides have time or inclination to think about the electric chair when they do it?

Dalton: No.

Gill: Do you think capital punishment would deter anybody from a homicide?

Dalton: No.

Gill: Do you think it does any good at all?

Dalton: No. Capital punishment is not going to solve anything to no one in society. It's not capital punishment that going to solve it, it's people that get caught up in *** that don't have *** get out there and trying to get it and find themselves in deeper trouble and don't have the money to put a defense up and you find you got juries and judges don't get a personal interest in -- no matter what you do you going always fall flat. Capital punishment is for who? Who do we see on death row is nothing but the poor. Not just black, white -- you find poor you don't find no rich, you know. That's how its always been and going always be. And I can't

see how that actually happened and carry these things out, you know and well even the executioner himself makes some pennies off how to kill a human being in this way and feel proud about himself by doing it. They say in their own law how to kill is capital punishment, but they pay him $400 to kill us.

Gill: $450 I think it is actually. Well the people in favor of it, they're outside don't say it does any good, they just say society has a right to punish its worse criminals and if somebody were to get off, its too bad, but the *** do you think society has the right to punish people who have taken other lives?

Dalton: No, cause it's still not going to solve, it's not going to bring the victim back and I don't see where one kind is worse than another, as far as murder is concerned a life is a life and that's another thing I don't understand that they have put more value on a police life is like he's more than a human being but he's just like me and you, you know, but to put more value on his life that makes me think that's prison in itself, you know and *** make it out to be. I'm not saying they're all like that but there are some like that. Who cares nobody ever challenged them, they always challenge ***. They try to challenge them but still find themselves beat out.

Gill: Let me ask you this, there are 34 people here on death row. Since you've been here a few of them have been executed, how much contact do you all have a *** like you're in the same boat? Do you feel ***

Dalton: You feel a very bad feeling when you spend time with *** on death row you spend years with them and some like your whole family You talk about your family his family you know like you friends, you talk to them about it, you know and consult with them and you love them just like a family.

Gill: Do you get a chance to talk at all and how often?

Dalton: The cells are right next to each other

Gill: But isn't it a straight row, I mean you can't talk to the guy who's 10 cells down?

Dalton: You come out of the cell for an hour a day.

Gill: *** Which execution affected you the most?

Dalton: It was Robert Wayne Williams.

Gill: Why?

Dalton: Because, me and him was real close and he favored my uncle in Houston matter of fact we just

Gill: He what your uncle?

Dalton: He favored my uncle.

Gill: Oh, he favored your uncle, he looked like your uncle?

Dalton: And he was a real fun person, you know, and Alvin Moore, you know Southstein being buried and all they've all took their toll on my life, you know you can see just how the system is more or less.

Gill: Sorry, . . .

Robinson: Joe, it's a two hour tape

Zwicker: It says one hour and 37 minutes

Robinson: I'll keep my mouth, you know how Joe gets when I give him advice

Gill: Can you start that last part again about Robert Wayne Williams. How its affected you, you were talking about the people you know.

Dalton: Just how funny life is really. Here today - gone tomorrow. You know and people spend their lives around You get to know them you get to know them better than the system actually know them. You know they've been given a bad deal and its actually hard to understand how can it be.

Gill: Did you see all these man prepare themselves for death. How does each of them handle it?

Dalton: Some handle it in different ways, you know some have to read, some do more writing to just try to pass the time. It's more or less want to be by their self or

someone closer to them will go talk to them, they looking for an answer how this has happened, you know.

Gill: They claim to hope to the end.

Dalton: I believe that everyone should. I don't believe you should put yourself in the grave before it's time.

Gill: Are you aware that people gather outside demonstrating execution night?

Dalton: Sister Helen and them?

Gill: Well, yea, Sister Helen on one side

Dalton: I was always aware of Sister Helen, I'm sure other people was too, you know, and I can't say anything about the other side cause I don't that there is something they are doing out of revenge so far as to *** I forgot the name I know they're parents of the victim of Robert uh,

Gill: Hathaway.

Dalton: It's more of a revenge thing that *** I wish the Clevelands wouldn't hate me for the rest of their life, it brings such a toll, hate, but I give great respect to Sister Helen and them and all they have supported me because they have saw me a person and not just look on one side of the issue, but on both sides of the issue and give me a chance you know it's not going to solve anything by killing me, you know I don't understand it

and I probably never will, they say there's a deterrent, but I don't see no deterrent. They'll hear one side of the story *** hear one side of the story but close their eyes to the other as if it don't exist but it very much exist, but this is just for some people, you don't do it to all people sometimes you *** it's good for others but not good for me. It's always puzzled me how can it be. Cause a life is a life, a human being is a human being, and how can you cut short those claims when a man's life is at stake? It's a whenever come to see or understand that point in life but our system I'm glad there are good people who can analyze these facts and realize just what's happening. We need more people to stand up and make a statement and say something about what they feel and not be afraid to speak their own mind and what they feel, you know. I believe there would be no capital punishment. Cause we got so many people who are afraid to speak out just don't want to speak out because of their colleagues or someone is going to say, you know. Why do you have to go by what someone else say, be your own person and speak what you want to speak, you know, cause don't wait 'til you find your family member or somebody close to you in a predicament before you decide to speak out, you know. You're not doing them no good, you know. *** Capital punishment can never be good because to kill an innocent person, you could never bring him back and you can't file anything else on that.

Gill: What kind of man do you hope your son will become and how can he and other kids avoid the sort of trouble you got into? That's two questions really.

Dalton: First thing is that be patient and understanding and finish their schooling and if they can finish their schooling they're moving up in life and getting an education field and whatever they pick in the field keep with it not let someone distract them you know and if something's wrong don't be afraid to ask someone That's something that I as a kid was afraid to do, to reach out and ask, but I found out there's nothing wrong with asking for help and if something you don't understand, ask. Cause if you don't ask, you'll never understand it and you'll never go forward you'll always be at a stand still. So I believe he stay in school and just be him and not let his direction in life you know in what he want not me or his mother but what he wants, not what we want, you know. You school your kids so far up and down the road, but he's going to have to live his life, not us.

Gill: So it's up to him, right?

Dalton: Right.

Gill: Give me a chance for a second

Robinson: (What does your brother mean to you?)

Dalton: My brother, you know, he means a great deal to me.

Gill: How old is Joe, now?

Dalton: He's 31 -- 31 now. *** He schooled me in a lot of things, you know, taught me in a lot of things make me understand. At the time we was kids you know I might do something, he'd jump in my case about it, but and I'd get mad, but as I've grown you know I've understood just why his reasons behind it. Because as *** as he had got in trouble he didn't want me to fall in the same path, you know and I love him for doing that you know, because I love him you know, very much.

Gill: Does he still write to you.

Dalton: Mmm hmmm.

Dalton: He come Friday . . . (tears run down his face).

Robinson: You're doing great kiddo.

Dalton: I'm alright.

Robinson: You okay?

Zwicker: You okay?

Dalton: Mmm hmm.

Robinson: Have a chance to talk to Nancy?

Dalton: I spoke to her Tuesday. I think she's supposed to come tomorrow not tomorrow, Saturday, she's supposed to bring D.J. up here.

Robinson: What does she mean to you?

Dalton: She's a sweet lady, she's my godmother, you know she always come through, stuck by me ever since we met you know. And ever come along way herself. She always got *** so she's always there to listen, you know. Give a helping hand. She always does what she can, you know. I will respect and love her for that, you know.

Zwicker: What about Jennifer?

Dalton: She's a person who I am grateful for. You don't find many sister *** I'm glad to have her in my life and her happiness means more to me than a lot of things in life because she's deserving of that, you know and I wish I had many years to go, you know *** think about someone in life you dream of someone in life but you never realize that one day you could actually meet this person that you always wanted. Be your friend *** and companion and she have been that, you know and like I said I love her a great deal because she's her and she tries to better me and push me to be better, you know and she's crazy about D.J. too and he's crazy about her and I just want her to be strong and hold up because she's held me up a great deal, more than she know.

Robinson: Dalton, what do you want your family to remember about you?

Dalton: I guess just remember me as me, you know as the person that I am, the person that they know is the real me not just someone who assumes they know me but actually know me with that I mean, you know, love me for being me and I'm going to always be there regardless of what happens, I'm going to be there, you know either in my spirit or the things we have done together, I'm going to be there you know. I'm going to be the person they always have good thoughts, you know that's why for my son to always *** just as far as he know, not what someone else have told him, but him knowing me and being a memory just like that. I'm sure he'll survive any test come before him, you know, and I'll be there. He can always call on me through his own actions and things he might do in life so.

Gill: Do you have anything ***

Dalton: No, I had to put that *** behind me because being angry is not going to solve my problem it's not going to make things any better for me you can *** this and that but it's not going to make things any better or solve anything, but I believe the ones that know and saw my case and who actually know my case know what they have done and they going to have to live with it because I believe that anyone who have actually read my case and know the facts of it, they'll realize I've been given a bad deal, you know. *** find someone who would actually listen and read it and see for themselves, like I said the wrong person is hard to make a human being at times, you know, but ***.

Gill: Is there anything else you want to say ***

Zwicker: Dalton, do you want to say anything to Governor?

Dalton: I would just like to more or less meet him and talk to him person to person, you know and put politics aside and just be a person you know, and talk to me you know, *** they say he was a Christian man and *** just what I'm coming from, you know and I have tried to better myself you know. The board have heard and give a recommendation, you know. All I want is, I'm not asking to get out of prison, I was just asking to live with the mistake, you know and I was hoping that he would be man enough to do that to give me the chance to spend my whole *** since I been born and being able to live has always been *** and able to live and understand and *** someone else holds your life and he got the power to give you life or death if it was his kid *** I don't believe they would be here *** but who am I to tell *** his judgment, you know. I can't do anything but ask him to give me a chance at life. That's the only thing I can do.

Gill: Good luck to you.

Dalton: I appreciate that.

TIMES-PICAYUNE, New Orleans, Louisiana, May 19, 1990.

Roemer called Prejean, said death served society

By JONATHAN EIG
Staff writer

ANGOLA, La. — Gov. Roemer phoned Dalton Prejean less than two hours before Friday morning's execution and told the convicted killer he must die to "serve society," Prejean's attorney said Friday.

"The governor said he thought his execution was the only thing that would serve society and give the proper message back to people who were thinking about killing police officers," attorney John Hall said.

Prejean, convicted of killing State Trooper Donald Cleveland in 1977, told Roemer more crime could be deterred if he were alive to tell his story to troubled young people.

"Dalton spoke of his remorse and the sorrow and pain he had caused others and said he thought he could reach people, that people could learn from him," Hall said.

The phone call took place about 10:30 p.m. — an hour and a half before Prejean was put to death — and lasted about 10 minutes. Roemer called Prejean at the condemned man's request.

Roemer's spokesman, Rusty Jabour, confirmed that the conversation took place, but would not discuss details.

Despite his disappointment, Prejean seemed determined to die with dignity, Hall said.

"The governor told Dalton he should serve as a model, and I think that's how Dalton accepted it," he said.

In his final statement, Prejean expressed frustration that his execution would be in vain, and sent a message encouraging his 9-year-old son to be strong.

Prejean, shackled around the hands, feet and waist, stood at a microphone in front of the electric chair. He stared through a window at the execution's witnesses and spoke softly.

"Nothing is going to be accomplished," he said. "I have peace with myself. I'd like to thank all of those who supported me all these years.

"I'd also like to thank my loved ones for being strong. . . . My son will be a better person for not letting something like this bring down his life. . . . Keep strong, keep pushing, keep praying."

He also spoke to the Cleveland family: "They said it wasn't for the revenge, but it's hard for me to see, to understand. I hope they're happy.

"So I forfeit my life. I give my love to all. God bless."

With that, Prejean turned and walked to the chair. The executioner administered four jolts of electricity. Five minutes later, at 12:17 a.m., the prison's doctor declared Prejean dead. He was 30.

Prejean spent the past 10 years on death row and had 10 stays of execution. Despite his youth, he became known as "the old man of death row," because he was on it the longest.

Prejean killed Cleveland on July 2, 1977, during a routine traffic stop, after a night of drinking and drug use. Prejean was 17. When he was 14, he killed a Lafayette cab driver in a holdup attempt.

The Supreme Court cleared the way for the execution Friday by rejecting a request for an 11th stay.

Prejean spent most of the day with his family, including his son, Dalton Jr., conceived during a conjugal visit in the Lafayette Parish jail, and with his attorney and spiritual adviser. The only time Prejean lost control of his emotions was when he said goodbye to his son, Hall said.

His last meal was a seafood platter with French fries, salad, chocolate cake and two orange soft drinks.

THE DAILY ADVERTISER, Lafayette, Louisiana, May 19, 1990.

Prejean calm, collected

Two-time murderer Dalton Prejean's electrocution at 12:17 a.m. Friday ended years of court litigation and waiting, but for Tommy Guilbeau, Prejean's attorney since July 1977, it also meant the loss of a personal friend.

Guilbeau, who was a witness to the execution, said Prejean was calm and composed during his last moments.

"He showed compassion for his family and the Cleveland family (family of the officer he killed in 1977), he talked about his son, he talked of a woman who was very close to him — who had visited him on Death Row and studied the Bible with him, he thanked all those who had fought so hard for his life," Guilbeau said. "There was no bitterness or hatred. He was a gentle person. It was a hallmark of what he had always stood for."

Prejean had spent the last 12 years of his life on Death Row for the murder of Trooper Donald Cleveland of Lafayette in 1977. During that time, his execution had been stayed 10 times.

Three months prior to the Cooper slaying, Prejean had been released from the Louisiana Training Institute where he had been incarcerated for killing a Lafayette cab driver on June 3, 1974 during the course of an armed robbery.

At the time, he was only 14.

"I have mixed feelings (about the execution)," said Margaret Keiser whose first husband was that cab driver. "When the murder happened, I felt more pity and sadness for Prejean than hatred because he was so young. Even to this day, I hold nothing really against him. I didn't really want him to be executed, but... It's hard to put into words. I just feel sad about the whole situation."

District Attorney Nathan Stansbury, who prosecuted Prejean in the Cleveland case, however, said earlier this week that a jury had decided Prejean's fate, and it was time that the case be ended. He could not be reached for comment Friday night.

At the time of Friday's execution, about a dozen death penalty supporters stood outside the prison, voicing support for the action. Earlier, a number of death penalty opponents protested at the state capital.

Guilbeau said he hopes this controversy will one day end with the elimination of the death penalty.

He is currently actively involved in the defense of three people who could face the death penalty in Louisiana — Troy Shelvin in Lafayette, Joseph "Floyd" Carmouche in Opelousas and Joan Benoit in Cameron.

"I absolutely could have no more resolution than I have now about overturning the death penalty after what I saw (Friday morning)," Guilbeau said. "I plan to stand before the legislature on this eventually."

Guilbeau said the first step to eliminating the death penalty is to change the law so that a life sentence actually means life with no chance for parole.

"I do not believe for a second that the majority of the American people are for the death penalty, but I do believe that the majority of Americans do want to feel safe in their homes," Guilbeau said. "That is why it's crucial that we change the law."

When asked how the defense in death penalty cases has changed since he first took on Prejean's cause in 1977, Guilbeau said that things have greatly evolved.

"In 1978, when we first tried the Prejean case, it was like a man flying an airplane at Kittyhawk," he said. "Today when we try a death penalty case, we have the equivalent of space age technology. With the Prejean case, we were pioneers in the real sense of the word. We introduced forms of mitigation that hadn't been used before in this state — we showed his youth, his mental capacity, his intoxication."

In his official statement to the press Friday, Guilbeau said:

"Last night, the state, after 13 years, executed Dalton Prejean, a person who was brain damaged, mentally retarded and was 17-years-old at the time of the execution of the crime.

"The execution was wrong and an injustice as it only fostered habitual fear and prejudice among us as a people. The true Christian, the true Christian-like example in this terrible affair of Friday morning was Dalton Prejean, who showed love and compassion for all concerned including his family and the Donald Cleveland family. The dignity and courage shown by Dalton in his last hours was an inspiration to all of us priviliged to witness it."

JOURNAL, Shreveport, Louisiana, May 25, 1990.

Shreveport Journal

Ritual murder

It's wrong to execute retarded juvenile offender.

316

LET IT NEVER be said that Louisianians are not trailblazers — even if the path wends its way through medieval immorality. Upon the execution of Dalton Prejean at midnight Friday, the state will have entered into a new era in judicial barbarity.

The Supreme Court, having unconscionably declared the execution of mentally retarded persons legal, cleared the way last summer for the execution of Prejean, who has an I.Q. of 76 and the mental age of 13. Similarly, the Court ruled that juvenile offenders — Prejean was 17 when he killed trooper Donald Cleveland — could be put to death.

This ruling places the United States in league with only six other countries known to have sentenced to death a juvenile offender in the last decade: Bangladesh, Barbados, Pakistan, Iraq and Iran — hardly the keepers of humanity.

Governor Roemer is the only person who can save Louisiana and Prejean from this tragic fate. Unfortunately, it is unlikely that Roemer will save much of anything before Prejean's execution — not the retarded man's life, not time (yet another reprieve is likely), not money and certainly not Louisiana's image in the rest of the nation.

State officials recently paid The Wall Street Journal for three advertisements promoting the "Roemer revolution" in an attempt to boost the state's national reputation. Every one of the $250,000 paid for that ad was rendered useless Sunday night when the CBS news program, "60 Minutes," ran a 20-minute story on the trials and tribulations of Dalton Prejean.

Needless to say, the state took a beating. But Mike Wallace isn't the only journalist to have delivered a near lethal blow to the state's image abroad. An editorial in the Minneapolis Star Tribune: "When Louisiana takes Prejean's life, it will be committing a crime every bit as heinous as the killing of a state trooper. By an act of his creator, Prejean hadn't adequate mental capacity to appreciate the wrong he was doing or to control his impulses. The citizens and officials of Louisiana have no excuse. May they receive greater mercy than they have shown Prejean."

Add to that Richard Cohen of The Washington Post: "Dalton Prejean is no victim of a frame-up. He's a killer — doubly so. He himself thinks he ought to spend the rest of his life in jail, and he is right about that . . . He is a duly adjudicated killer but also a crippled mess of a person. Retarded and brain-damaged — abused by a relative, neglected by both his parents and the state — he will die unless the governor intervenes."

The Prejean case grows in importance every time a reprieve is granted. If the state carries through with the execution, this case will explode into mythical proportions — an allegory for our times. Rather than entrenching the image of Louisianians-as-barbarians further in the nation's mind, Governor Roemer should do the right thing, and commute the death sentence of Dalton Prejean.

Sue Neal
Bob - Mitch
Vernell Pile
Joyce Swicher

Andrea Faverson

We have seen his star
in the east,
and are come to worship him.
MATTHEW 2:2

And to all the Kind people in & round the office, pray that all have a Nice & Safe Christmas Holiday, Grateful to each one of you who's made it possible I got to see Christmas at all. you are the Greatest people on who I can call friends in this world

Kiss & Hand Shake for all
Merry Christmas

God rest you merry, gentlemen;
Let nothing you dismay,
Remember Christ, our Saviour,
Was born on Christmas Day,
To save us all from Satan's pow'r
When we were gone astray.

O tidings of comfort and joy!

Loving Kindest Always
Walton Pinear Sr.

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

* *

CIVIL ACTION
NO. 81-0632

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
AUG 5 1983
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

DALTON PREJEAN

versus

FRANK C. BLACKBURN, ET AL

* *

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Judge Scott's Decision of 8/5/83 Lifting STAY

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NAUMAN S. SCOTT
CHIEF UNITED STATES DISTRICT JUDGE

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OPINION

1. BACKGROUND

Dalton Prejean, a 17 year old black male, was convicted by a jury in the Fourth Judicial District Court, Ouachita Parish, Louisiana, of first degree murder for the shooting death of Louisiana State Police Officer Donald Cleveland. At the sentencing phase of the trial, the jury found one statutory aggravating circumstance,[1] and after considering the mitigating circumstances, unanimously recommended the death penalty--a verdict binding upon the trial judge. See La.C.Cr.Pr.art.905 et.seq.

Prejean's conviction and sentence were appealed to and affirmed by the Louisiana Supreme Court. *State v. Prejean,* 379 So.2d 240 (La. 1979), *rehearing denied* January 28, 1980. Petitioner then sought relief from the United States Supreme Court by writ of certiorari which was denied. *Prejean v. Louisiana,* 449 U.S. 891, 101 S. Ct. 253, 66 L.Ed.2d 119, *rehearing denied* 449 U. S. 1027, 101 S. Ct. 598, 66 L.Ed. 2d 489 (1980).

Petitioner next sought post-conviction relief by filing an application for a writ of habeas corpus in the Fourth Judicial District Court, Ouachita Parish. After hearing on April 9, 1981, said application was denied. Thereafter petitioner filed an application for a stay of

execution and for review of an application for post-conviction relief which were denied by the Louisiana Supreme Court. *State of Louisiana, ex rel. Prejean v. Blackburn*, 397 So.2d 517 (La. 1981).

Petitioner immediately sought a stay of execution and filed an application for writ of habeas corpus before this court. 28 U.S.C. §§2251, 2254. Considering the time constraints and the facial substantiality of the claims presented, we stayed the execution pending our determination of the merits. 28 U.S.C. §2251. See *Rosenburg v. United States*, 346 U.S. 273, 73 S.Ct. 1152, 97 L.Ed. 1607 (1953) *(per curium)*. See also *Evans v. Bennett*, 440 U.S. 1301, 99 S. Ct. 1481, 59 L.Ed. 2d 756 (1979); *Shaw v. Martin*, 613 F.2d 487 (4th Cir. 1980).

Subsequently, petitioner filed a motion seeking abatement of our consideration of his Section 2254 motion, pending disposition by the United States Supreme Court of *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct 869, 71 L.Ed. 2d 1 (1982), alleging that the *Eddings* case presented a question of constitutional law, the answer to which would undoubtably pertain to the instant case. Due to the prerequisite of exhaustion of remedies found in 28 U.S.C. §2254(b) and (c), we dismissed Prejean's application for writ of habeas corpus without prejudice and ordered a temporary stay of execution, to expire on October 15, 1981, to afford Prejean an opportunity to present his unexhausted claim which was

based on *Eddings* to the Louisiana Supreme Court. On October 13, 1981, we extended our temporary stay of execution until November 6, 1981.

Petitioner reapplied to the Louisiana Supreme Court for supervisory writs. The application was denied on November 27, 1981, and that court granted a stay order to permit Prejean to apply to Federal Court for further relief. *State ex rel Prejean v. Blackburn*, 407 So.2d 1189 (La. 1981).

Again considering the time constraints and the facial substantiality of petitioner's claims, we stayed the execution pending our determination on the merits. Petitioner's application for habeas corpus relief under Section 2254 is now before this court.

II. STANDARD OF REVIEW

In *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), the United States Supreme Court elucidated the review guidelines of the federal habeas court, under 28 U.S.C. §2254(d). There is a presumption of correctness in a State court's factual findings unless one of the seven conditions specifically set forth in § 2254(d) is found to exist by the federal habeas court. See *Williams v. Blackburn*, 649 F.2d 1019 (5th Cir. 1981); *Germany v. Estelle*, 639 F.2d 1301 (5th Cir. 1981); *Thomas v. Estelle*, 582 F.2d 939 (5th Cir. 1978). So long as there are "written findings, written

opinion, or other reliable and adequately written indicia," the court's findings are sufficient. *Sumner v. Mata*, supra at 546-47, 101 S.Ct. at 769, 66 L.Ed.2d at 730-31.

Petitioner has exhausted his State remedies regarding the many claims presented to us. In our review of the State court record, we have found that many of petitioner's claims have been factually determined, as evidenced by an opinion of the trial judge, written findings by the Louisiana Supreme Court, and findings by the State court in its review application for post-conviction relief.[2/] The petitioner's burden of proof is not as great where no written findings support a State court's habeas decision. For both categories of claims we have endeavored to thoroughly investigate the record of the case. However, our disposition of the latter group of issues necessarily entails a more independent degree of findings under *Sumner* and the language of § 2254(d). We then are guided by the dictates of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). Based upon the record and the nature of petitioner's claims, no evidentiary hearing at which testimony is introduced is necessary.[3/]

III. CLAIMS

Petitioner has raised eleven separate claims for us to consider: (1) the admission of gory photos, (2) the systematic exclusion by the prosecutor of prospective black

jurors, (3) the exclusion from the jury venire of a certain socio-economic class, (4) the death qualification of the jury, (5) the exclusion of a prospective juror in violation of *Witherspoon*, (6) the illegality of the sentencing instructions, (7) the prospective rebuttal of mitigating circumstances, (8) the intentional racial discrimination in the imposition of the death sentence, (9) the limiting of mitigating circumstances, (10) the denial of due process in the affirmance of the death sentence, and, (11) the excessiveness and disproportionality of the death sentence. Due to either their factual or legal similarity, we have combined several of these claims in our discussion below.

Prejean contends that his rights to a fair trial under the Sixth Amendment, as applied to the states through the Fourteenth Amendment, and his rights to due process under the Fourteenth Amendment were violated by the introduction into evidence of two photos of the victim, alleged to be gruesome and inflammatory to the jury. The standard to be utilized by the Federal Court in a habeas corpus case in reviewing the state trial court's actions in admitting evidence was recently discussed by the Fifth Circuit in *Nettles v. Wainwright*, 677 F.2d 410 (5th Cir. 1982):

> As a general rule, a federal court in a habeas corpus case will not review the trial court's actions in the admission of evidence. *Lisenba v. California*, 314 U.S. 219 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941); *Gebhart v. Beto*, 441 F.2d 319, 321 (5th Cir. 1971). While it is true that an evidentiary ruling which deprives a state court defendant of fundamental fairness is cognizable

on habeas corpus, see *Barnard v. Henderson*, 514 F2d 744 (5th Cir. 1975), the federal court will make inquiry "only to determine whether the error was of such magniture as to deny fundamental fairness to the criminal trial." *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir. 1976). The admission of prejudicial evidence justifies habeas corpus relief only if the evidence "is material in the sense of a crucial, critical, highly significant factor." *Hills*, 529 F.2d at 401 (quoting *Corpus v. Beto*, 469 F.2d 953, 956 (5th Cir. 1972), *cert. denied* 414 U.S. 932, 94 S.Ct. 236, 38 L.Ed. 2d 162 (1973)). *Id.*at 414-415.

The prosecution introduced the photographs for the purpose of showing the exact location of the body after the shooting and the identity of the decedent.[4/] The manner of the shooting and the decedent's identification as a police officer are relevent to the crime of first degree murder with a sentence of death[5/] and although these facts may have been able to be established by other means, we find that upon reviewing the photographs we can not conclude that the admission of the photographs constituted an abuse of discretion of the magnitude needed to deprive petitioner of a fair trial or due process.[6/]

The next group of claims, numbers two through five in the above list, deal with alleged violations of petitioner's Sixth and Fourteenth Amendment rights allegedly occurring due to the jury's composition and/or the manner in which the jury was selected.

Prejean alleges that at his trial the prosecutor, in a parish with alleged historical racial prejudice, used peremptory challenges to exclude all prospective black jurors

resulting in petitioner's trial before an all white jury. This contention without more, is not sufficient to support a constitutional claim for habeas corpus relief. See generally *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981). However, under *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), followed by the Fifth Circuit in *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977), if there is a showing that over a period of time the prosecutor used peremptory challenges for the systematic exclusion of blacks from jury service, then an equal protection claim is raised under the 14th Amendment.[7/] The petitioner has had ample opportunity in the past to introduce the evidence needed to substantiate this claim, and has failed to do so. At trial, Prejean objected to the jury panel but offered no evidence in support of his claim of systematic exclusion. Again on motion for new trial and at the hearing on post-conviction relief, Prejean had an opportunity to substantiate his claim and failed to do so. In petitioner's memorandum before this court no evidence is offered that would support an inference of any constitutional violation. Conclusory allegations such as those in petitioner's memorandum do not state a basis for relief. See *Sumner v. Mata*, 449 U.S. 539, 101 S. Ct. 764, 66 L.Ed. 2d 722 (1981); *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). We agree with the state courts that this contention is without merit.

Prejean's second basis for relief in this group of claims is that his Sixth Amendment right to a fair and impartial jury drawn from a cross-section of the community was violated when the commissioners in charge of jury selection intentionally excluded all doctors and lawyers from the general venire. Under Louisiana Code of Criminal Procedure Article 532(9) a Motion to Quash is the proper method for challenging the composition of the jury venire. *State v. Ramos*, 390 So.2d 1263 (La. 1980), *rehearing denied*, Dec. 15, 1980; *State v. Durr*, 343 So.2d 1004 (La. 1977). No Motion to Quash was filed on behalf of petitioner at trial. Due to principals of federalism and comity, a defendant's failure to follow this state procedure acts as a waiver of his right to raise a constitutional claim at a later federal proceeding[8/] unless the petitioner shows there was cause for failing to utilize the proper state procedures and there was resulting prejudice affecting the outcome. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 249, 53 L.Ed. 2d 594 (1977); *Bass v. Estelle*, 696 F.2d 1154 (5th Cir. 1983); *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981).[9/]

Petitioner's contention that "cause" in this case derives from his counsel's ineffectiveness in failing to investigate and raise the issue pretrial is without merit. The Fifth Circuit standard for constitutionally affective assistance of counsel is "not errorless counsel, not counsel judged ineffective by hindsight, but counsel reasonably

likely to render and rendering reasonably effective assistance." *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974). Having examined the performance of counsel and considering the totality of the circumstances and the entire record, we conclude that petitioner's representation was more than adequate to pass constitutional standards. In fact, counsel had previously filed a Motion to Quash the venire, alleging the same constitutional violation alleged here, but with different facts as to who had been allegedly unconstitutionally excluded from the general venire.[10/] There was a change of venue, however, from Lafayette, Louisiana to Monroe, Louisiana, and subsequently a new jury venire. Counsel's previous challenge to the composition of the jury venire indicated his awareness as to the proper procedure for objecting to the jury panel. This court will not scrutinize counsel's decisions in choosing to pursue a particular course of action. Nor will we judge such experienced counsel by hindsight.[11/] *Lovett v. Florida*, 627 F.2d 706 (5th Cir. 1980). We thus find there is no adequate cause for failing to object as require by state law.

Even if adequate cause for failing to object had been established, the second requirement for waiver would not have been established in that sufficient prejudice has not been shown. Under Louisiana Supreme Court Rule 25, the Supreme Court of Louisiana has found as a matter of law that it is in the public interest to exempt from jury duty

such occupational classes as doctors and lawyers. There is an inadequate foundation to hold that these court mandated exemptions deprived this defendant of a fair trial. The record indicates an extensive voir dire by defense counsel, insuring the existence of a fair and impartial jury. The mere fact that two particular occupations were not represented on petitioner's jury did not deprive him of a fair trial.

There being no adequate cause for counsel's failure to object, and also no resulting prejudice, we find that petitioner's failure to object to the composition of the jury in accord with the proper state procedures, acted as a waiver of his right to assert the claim for federal habeas relief.

Next, petitioner alleges that the death qualification of his jury--that is, the process of excluding those jurors who could not under any circumstances vote for a death penalty because of religious or conscientous scruples--violates his right to a fair and impartial jury drawn from a cross-section of the community, as required by the Sixth and Fourteenth Amendments. The Fifth Circuit has held that "unalterable opposition to the death penalty is a legitimate disqualification and that the exclusion of such disqualified jurors does not violate the fair cross-section principle of the sixth amendment." *Smith v. Balkcom*, 660 F.2d 573, 583 (5th Cir. 1981), modified 671 F.2d 858 (5th Cir. 1982), 677 F.2d 20 (5th Cir. 1982). To raise the same issue here is frivolous, and without merit.

Finally, the last claim alleging violations of petitioner's Sixth and Fourteenth Amendment rights with respect to jury makeup, is that a prospective juror was excused for cause because of her general opposition to the death penalty in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed. 2d 776 (1968). *Witherspoon* and its progeny establish that a member of the venire may not be excused for cause if he expresses only a general objection to the death penalty. However, a prospective juror may be excused for cause if he states that he would automatically vote against the imposition of capital punishment; that is, that he would be unable to follow the law in assessing punishment. The trial transcript reveals that the prospective juror challenged, Ertha Taylor, voiced more than a general objection to the death penalty. Initially, the question addressed to the jury panel was:

> "With regard to the question of this being a capital offense, are there any of you that have scruples against capital punishment to the point where you would, under no circumstances, be able to find the defendant and impose that penalty, even if it were justified by the facts?

Transcript, page 368.

When Eretha Taylor was called for the next panel she was asked about her beliefs concerning capital punishment with respect to the initial question posed to

prospective jurors.

Q: O.K. Not at all?

A: I don't believe I could do it.

Q: Not at all.

A: No sir.

Transcript, page 398.

Taken into conjunction with the prosecutor's first question, in which the entire jury venire was present, the follow-up questions to Miss Taylor elicited responses that indicated her unequivocal opposition to the death penalty. See *Williams v. Maggio*, 679 F.2d 381 (5th Cir. 1982). We, thus, find no violation of the *Witherspoon* rules and petitioner's claim is without merit.[12/]

Petitioner's remaining six claims, claim numbers 6 through 11 outlined above, deal with the imposition of the death sentence.

Petitioner alleges violations of his Eighth and Fourteenth Amendment rights with respect to the court's instructions to the jury. Specifically, Prejean contends a constitutional flaw resulted from the trial judge's failure to clearly communicate in his sentencing instructions the role of mitigating factors, and the requirement to return a life sentence if there was not a unanimous finding for the death sentence.

The trial judge must clearly instruct the jury about mitigating circumstances as well as the option to

recommend against death. *Spivey v. Bant*, 661 F.2d 464, 470 (5th Cir. 1981); *Chenault v. Stynchcombe*, 581 F.2d 444, 448 (5th Cir. 1978). In order to determine whether a defendant has been accorded his constitutional rights, the trial court's instructions are accorded reasonable interpretation. *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed. 2d 39 (1979); *Washington v. Watkins*, 655 F.2d 1346, 1369 (5th Cir. 1981). This interpretation must not be accomplished in piecemeal fashion, but rather by examining the entire charge to determine its adequacy. *Davis v. McAllister*, 631 F.2d 1256 (5th Cir. 1980). Furthermore, a deficiency, if found, must have violated some right guaranteed by the constitution, and it must so infect the entire trial that a resulting conviction or sentence violates due process. *Kupp v. Naughten*, 414 U.S. 141, 94 S. Ct. 396, 38 L.Ed. 2d 368 (1973).

The trial judge clearly instructed the jury pursuant to Louisiana Code of Criminal Procedure Art. 905 that if aggravating circumstances were found, all mitigating factors must be considered before recommending the sentence of death:

> "Even if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide a sentence of death should be imposed. The law specifically lists certain mitigating circumstances.

Trial transcript, page 858.

The trial judge then proceeded to outline the mitigating circumstances which are provided for by statute.[13/]

Petitioner's allegation that the trial judge failed to inform the jury that if they should fail to agree on a death sentence then life imprisonment without probability of parole would be imposed is not true. The trial judge instructed the jury:

> "B. Before you decide that a sentence of death should be imposed you must unanimously find, beyond a reasonable doubt, that at least one statutory aggravating circumstance exists.
>
> C. If you find, beyond a reasonable doubt that any of the statutory aggravating circumstances existed you are authorized to consider imposing a sentence of death. If you do not unanimously find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, then life imprisonment without benefit of probation, parole, or suspension of sentence is the only sentence that may be imposed.

Transcript, page 857. Later in the instructions the trial judge explained the verdict forms:

> "The first forms reads - - the first form of the verdict reads:
>
> 'Having found the below listed statutory aggravating circumstances or circumstances beyond a reasonable doubt and, after consideration of the mitigating circumstances offered, the jury recommends the the defendant be sentenced to death.'
>
> In the event that you unanimously decide the death penalty should be imposed, a space is provided to write out the statutory aggravating circumstance or circumstances you unanimously find to exist. The Foreperson must sign the form.
>
> The second form of the verdict reads:

> 'The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.'
>
> If the jury decides that a life sentence without benefit of probation, parole or suspension of sentence should be imposed, the Foreperson need only sign that form of verdict. No listing of aggravating or mitigating circumstances is required.

Transcript, pages 859-60.

Taken in their entirety, the instructions and verdict forms, as explained by the trial judge, informed the jurors that failure to reach a unanimous decision for the death penalty would result in a life sentence, without benefit of Probation, parole or suspension of sentence. See *Baldwin v. Blackburn*, 653 F.2d 942, (5th Cir. 1981), *cert. denied* 456, U. S. 950, 102 S.Ct. 2021, 72 L.Ed.2d 475, *rehearing denied* U.S. , 102 S.Ct. 2918, 73 L.Ed 2d 1323 (1982).

Petitioner's allegation that the jury charges, during the sentencing phase of the capital case, must contain a charge that the aggravating circumstances must outweigh the mitigating circumstances, beyond a reasonable doubt, is ill-founded, *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982):

> "While the existence of an aggravating or mitigating circumstance is a fact susceptible of proof under the reasonable doubt or preponderance standard, . . . the relative <u>weight</u> is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party."

Id. at 442 (emphasis in original). See also *Zant v. Stephens*, 51 U.S.L.W. 4891 (1983); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982).

Petitioner also calls into question the constitutionality of the statute because it fails to provide the guidelines requested above, and because the Louisiana Supreme Court has not instituted procedures to cure the defects. We find this contention to be without merit. *Zant, supra; Blackburn, supra;* and *Gray, supra.*

Petitioner next alleges error by the trial court in allowing the prosecution, during the penalty phase of the trial, to put on evidence prospectively rebutting mitigating factors, because this was not the correct order of procedure. Louisiana Code of Criminal Procedure Art. 905.2 provides, in pertinent part, that "Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character in issue" and that "The jury may consider any evidence offered at the trial on the issue of guilt." The statute clearly indicates the relevancy of aggravating and mitigating circumstances, in addition to the ability of the jury to consider evidence introduced at the guilt determination stage. Consequently, it was permissable for the prosecutor, at the penalty phase, to offer evidence to rebut the intoxication defense, which had been raised at the trial stage. The order in which evidence is admitted is within the discretion of the trial court. This discretion will not be disturbed unless there is a showing of extraordinary circumstances. *United States v. Leaman,* 546 F.2d 148 (5th Cir. 1977). Considering the record as a whole and the Louisiana Code of Criminal Procedure

Article 905.2, we cannot find any extraordinary circumstances which would justify our intervention into the matter, and, thus, this claim is without merit.

Petitioner alleges intentional racial discrimination in the imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

Nothing in petitioner's brief suggests that he is going beyond conclusory allegations of racial discrimination in the imposition of the death penalty. The statistics offered to show discriminatory application of the death penalty would purport to demonstrate that defendants who murdered whites have received the death penalty when other defendants who have murdered blacks have received a life sentence. The Fifth Circuit has made it clear that we need must venture on a case by case comparison to ascertain the truth or falsity of petitioner's claim. "We need not repeat the myriad of difficult problems, legal or otherwise, generated by such federal court intrusion into the substantive decision making of the sentencing process which is reserved to the . . . state courts. . . ."*Spinkellink v. Wainwright, supra.* Consequently, "if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness - and therefore the racial discrimination-condemned in *Furman* have been conclusively removed." Id. at 613-14. 14/

Louisiana Code of Criminal Procedure Articles 905 et seq., require the jury to find at least one aggravating factor before it may impose a death sentence. As mentioned above, it must also consider factors in mitigation. This channeling of discretion prevents any freakish imposition of the death penalty. In addition, the automatic Louisiana Supreme Court review of each sentence, to determine if it is is excessive, in relation to similar crimes, is a further safeguard against an arbitrary imposition of a death sentence based on nothing more than race. Just a resulting disproportionate impact on blacks, therefore, does not raise an equal protection claim. Id. See also generally *Washington v. Davis*, 426 U.S. 229, 99 S.Ct.2040, 48 L.Ed 2d 597 (1976).

The statistical data that petitioner intends to rely on, to show discriminatory intent, are similar to those proffered in *Smith v. Balcom, supra*. Nothing in petitioner's brief suggests that the evidence he would introduce would be more probative than that in *Smith*. The *Smith* court's conclusion that Smith did not consider "countless racially neutral variables" which led to its finding of unsupported assumptions, applies equally to the case at bar. The mere conclusory allegations in petitioner's brief is not the type of evidence of racially disproportional <u>impact</u> which would compel us to infer racially discriminatory intent.

For all of these reasons we find that petitioner was not the subject of racial discrimination in the imposition of the death penalty violative of the Eight and Fourteenth Amendments.

Petitioner next alleges that the Louisiana Supreme Court considered only that mitigating evidence which would excuse criminal behavior as a matter of law in violation of the Eighth and Fourteenth Amendments as defined by the courts in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed. 2d 1 (1982), and *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed. 2d 973 (1978). In *Eddings*, the United States Supreme Court held that the sentencing authority could not restrict its consideration of mitigating circumstances to only those that create a legal excuse.

In the case at bar, the jury, which was the sentencing authority, was instructed to consider specific mitigating circumstances as enumerated in Louisiana Code of Criminal Procedure Article 905.5 as well as "any other relevant mitigating circumstance." Transcript, page 859. Furthermore, the jury was given a written list of the mitigating circumstances, as listed in Louisiana Code of Criminal Procedure Art. 905.5. Subpart (h) of this article reads "Any other relevant mitigating circumstance." Consequently, this is not a case where the sentencer was restricted only to certain delineated mitigating circumstances upon which to impose a death sentence. See *Lockett, supra*. Also, this

is not a situation, as in *Eddings*, where the sentencing authority did not consider mitigating evidence which would not excuse criminal behavior as a matter of law. The jury was instructed to consider all possible mitigating circumstances in the penalty phase of the trial. Even though the defense was unable to pursuade the jury on the intoxication defense, the jury was in no way precluded from considering the intoxication evidence in mitigation of Prejean's actions.

The Louisiana Supreme Court was not the sentencer but only a reviewer of the sentence to determine if it was imposed according to the statutory procedures and was not imposed in an arbitrary or capricious manner or as the result of passion or prejudice. Louisiana Code of Criminal Procedure Article 905.9.1 requires that the Louisiana Supreme Court review every death sentence to determine if it is excessive. The reviewing court ascertains whether or not the sentence resulted from prejudice or passion, whether the evidence supported a finding of an aggravating circumstance, and also compares similar cases, including cases with similar mitigating circumstances. Because the function of the Supreme Court is that of review, and not imposition of sentence, it need not make an independent determination of the mitigating circumstances. It must only decide if the sentencing authority adhered to the statutory guidelines in imposing sentence and whether or not it is excessive. See Louisiana Code of Criminal Procedure Art. 905.9.1; *Ford, supra;* and *Spinkellink, supra*. The Louisiana Supreme Court

does not impose the sentence. The *Lockett/Eddings* rule applies to sentencing authorities. As a result, petitioner's argument must fail.

Petitioner next alleges that in its review of the propriety of the death sentence, the Louisiana Supreme Court considered evidence outside the record, in violation of the Eighth and Fourteenth Amendments.[15/] The trial judge had deemed inadmissable evidence of a prior offense committed by the petitioner while a juvenile, which had not resulted in a conviction but in an adjudication of delinquency. Since the Louisiana statute properly confines evidence of prior criminal activity to actual conviction the judge precluded any mention of the prior offense at trial. The offense was part of the secret pre-sentence report which was provided to the trial judge and which was submitted under seal to the Louisiana Supreme Court in its review of the matter. The Louisiana Supreme Court's opinion contains a detailed discussion of petitioner's past history. As part of his history, the Louisiana Supreme Court mentions the offense and discusses the pyschiatric evaluations of petitioner which resulted from the court procedures for the offense. *State v. Prejean, supra.*

The imposition of sentence and subsequent review are two distinct phases of a capital trial. Petitioner's allegation relates to the review phase. Material outside the record can have no effect in the imposition of sentence.

Brown v. Wainwright, 392 So.2d 1327 (La. 1981); *Ford v. Strickland, supra.*[16/] The Louisiana Supreme Court followed the review guidelines set out in Louisiana Code of Criminal Procedure Article 905.9.1 in reviewing and affirming the death sentence. Petitioner does not substantiate his claim that the sentence was affirmed through the use of outside evidence. Mere mention by the Louisiana Supreme Court of this aspect of petitioner's history does not indicate that the Supreme Court relied upon this fact to affirm the death sentence which was imposed by a jury which had no evidence as to the commission of the offense. The overwhelming evidence is that the death sentence was imposed and affirmed to the cold blooded manner in which Prejean killed a peace officer engaged in his lawful duties. Petitioner's claim is without merit.[17/]

Finally, petitioner presents an Eighth Amendment claim, alleging that the imposition of his death sentence was excessive and disproportionate.

Petitioner first contends that death is an excessive and inappropriate punishment per se when imposed on a person under the age of 18. Although the Supreme Court granted certiori in *Eddings* to consider the issue of whether imposing the death penalty on a person under 18 years of age was unconstitutional, this matter was not addressed in the final opinion. *Eddings v. Oklahoma, supra.* Petitioner appears to rely on Civil Statutes which make him a "major" at 18 years of age.

We first note the differences in the *Eddings* case and in Prejean's situation. The petitioner in *Eddings* was 16 years of age and was considered a juvenile when he committed the murder; he was subsequently certified to stand trial as a adult. See Oklahoma Statutes Annotated, Title 10, §1112. Under Louisiana law, however, Prejean did not have to be certified as an adult. He was 17 years of age and an adult for purposes of criminal court jurisdiction. Art. 4, §19, La. Constitution of 1974; LSA-R.S.13:1570; *State ex rel Coco*, 363 So.2d 207 (La. 1978). Louisiana Revised Statute 14:30 constitutes a legislative classification that the crime of murder, in certain instances, is a capital offense. *State v. Whatley*, 320 So.2d 123 (La. 1975), *rehearing denied*, 1975. This classification, along with the policy of adult treatment of juveniles over a certain age convicted of that crime, indicates a legislative intent to punish persons such as petitioner, to the full extent permitted by the Constitution. *Smith v. Johnson*, 458 F.Supp. 289, 296 (E.D.La. 1977). "Therefore in assessing a punishment selected by a democratically elected legislature against the Constitutional measure, we presume its validity." *Greg v. Georgia, supra.* at 174, 96 S.Ct. at , 49 L.Ed. 2d at 876. See also *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed. 2d 982 (1977). We must also consider the importance of the prohibition on federal courts from imposing their own subjective preferences upon the judgment of the state and

the community, as enunciated in *Greg, supra,* and *Coker, supra.* To compare the severity of a punishment with the evidence proferred by the petitioner with regard to age we would be succumbing to reliance on our own subjective opinion as to the propriety of the punishment for the petitioner in question. *Martin v. Blackburn,* 521 F.Supp. 685 (E.D.La. 1981). Traditionally, the primary purpose of the Eighth Amendment's cruel and unusual punishment provision has been directed towards the kind of punishment or on the severity of the punishment in relation to the type of the crime. See *Solem v. Helm,* U.S. , 51 USLW 5019, 5021; *Powell v. Texas,* 392 U.S. 514, 20 L.Ed. 2d 1254, 88 S. Ct. 2145 (1968).[18/] It generally is not directed to the propriety of the punishment on a particular person, as long as it is not imposed as the result of bias or passion. Through proper sentencing and review procedures any bias and prejudice has been remoed here. This petitioner's Eighth Amendment claim that the death penalty is unconstitutional per se as applied to individuals under 18 years of age is without merit.[19/]

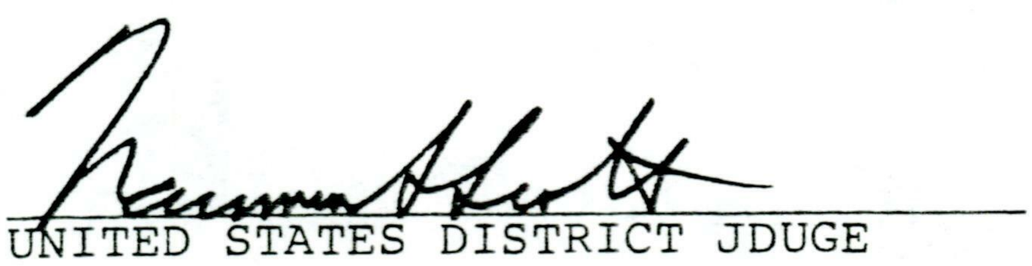
Petitioner further argues that whether or not death is per se excessive and disproportionate when inflicted on a defendant who was under the age of 18 at the time of the offense, it is excessive and disportionate in this case due to improper review of petitioner's case by the Louisiana Supreme Court. The purpose of review by the supreme court is to make sure that death sentences are being imposed fairly,

rationally, and without discrimination throughout the state. *Proffitt v. Florida*, 428 U.S. 242, 260 (1976).

Louisiana Code of Criminal Procedure Article 905.9.1 requires the Louisiana Supreme Court to review all first degree murder cases within the same district being reviewed. The Louisiana Supreme Court considered the relevant first degree murder convictions in the district where the offense occurred, and where the trial was held. We cannot conclude that this review violated any Constitutional prohibition. *Williams v. Maggio*, 679 F.2d 381, 394-95 (5th Cir. 1982) (*en banc*).

For the foregoing reasons, petitioner's application for habeas corpus relief, pursuant to 28 USC 2254, is hereby denied, and it is hereby ordered that the stay of execution previously rendered by this Court expires on Sept. 1st, 1983 at 10:00AM o'clock.

Thus done and signed in Alexandria, Louisiana, on this the 5th day of August, 1983



UNITED STATES DISTRICT JDUGE

FOOTNOTES

1/
The victim of the crime was a peace officer engaged in his lawful duties. La.C.Cr.P. art. 905.4(b).

2/
Findings are included in the Transcript of the hearing which as part of the record may be used by the District Court to determine if there was a full hearing. *Thomas v. Beto*, 452 F.2d 1072 (5th Cir. 1971).

3/
Also, see *Spinkelink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), in which claims similar to some of those presented by the petitioner herein were presented. The court found them to be of a legal nature only, and subsequently, there was no need for an evidentiary hearing on those claims.

4/
The prosecutor showed Trooper Legendre the pictures in order for him to testify as to where the victim was found. Trial Transcript, p. 565.

5/
La.R.S. 14:30(2) defines first degree murder as the killing of a human being where the offender has the specific intent to kill or to inflict great bodily harm upon a Fireman or Police Officer engaged in the performance of his lawful duties. As noted previously, one of the aggravated circumstances which can be found in order to consider imposition of the death sentence is that the victim was a Peace Officer engaged in his lawful duties. See n. 1, *supra*. The photos showed that it was evident Cleveland was a Police Officer and that he was dressed in full uniform.

6/
A review of the record indicates that the overwhelming evidence presented by the prosecutor was the basis of the guilty verdict and the imposition of the death sentence rather than any inflammatory effect the photographs may have had on the jury.

7/
Prejean argues that while systematic exclusion of blacks through the use of preemptory challenges is one way to meet the *Swain* burden, the use of discriminatory practices generally thoughout the parish is also sufficient. This contention is without merit.

8/

This failure to object does not act as a waiver if the State does not raise the waiver issue, and addresses the issue directly on the merits. In this case, the State did raise the issue of waiver.

9/

Petitioner's argument that the ordinary waiver rules of *Wainwright v. Sykes, supra,* do not apply in a capital case is without merit. In spite of petitioner's arguments, there is only one system of justice in this country and it does not change if an individual is charged with a capital crime. The difference is that there are added safeguards to be applied in the sentencing phase to insure that the sentence is imposed in accordance with constitutional requirements.

10/

In the motion to quash the jury venire petitioner alleged that he was deprived of a fair and impartial jury because there were more men than women on the panel. See Trial Transcript, p. 109.

11/

The record indicates defense counsel's trial experience, specifically ten years of general legal practice. Trial Transcript p. 187.

12/

Petitioner's reliance on *Granviel v. Estelle,* 655 F.2d 673, (5th Cir. 1981) is misplaced. There the questions asked by the prosecutor were not the type to elicit unequivocal responses:

> Q: The defendant in this case is charged with capital murder. There are only two punishments for the offense of capital murder and that is either death or life in the penitentiary. Now do you have any conscientious scruples against the infliction of the death penalty as a punishment for crime?

13/

The judge instructed the jury, in accordance with Louisiana statutory law, that the following were mitigating circumstances:

(a) the offender has no significant prior history of criminal activity;

(b) the offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) the offense was committed while the offender was under the influence or under the domination of another person;

(d) the offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) the youth of the offender at the time of the offense;

(g) the offender was a principal whose participation was relatively minor;

(h) any other relevant mitigating circumstance.

See Trial Transcript, p. 858; Louisiana Code of Criminal Procedure, art. 905.

In *Spivey, supra,* the instructions failed to mention factors to be considered as mitigating. Hence, it is inapposite.

14/

See *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 346 (1972). See also *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 929 (1976); *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 47 L.Ed.2d 859 (1976); *Proffit v. Florida,* 428 U.S. 242, 96 S.Ct. 2690, 49 L.Ed. 2d 913 (1976); *Roberts v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

15/

The Supreme Court mentioned petitioner's juvenile record.

16/

In *Ford v. Strickland, supra,* the Fifth Circuit stated:

"We reject the contention both generally and specifically as made for Ford. The function of the Supreme Court of Florida in these cases is to review sentences for procedural regularity and proportionality. The court does not 'impose' sentence, and for that reason there cannot exist a due process violation under *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1980). As the Florida Supreme Court aptly stated:

> The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our

analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases. Illustrative of the Court's exercise of the review function is *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

* *

It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review'. That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence 'review' process of appellate courts from the sentence 'imposition' function of trial judges in *Proffit* and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)."

Id. at 444. In Louisiana, as in Florida, the Supreme Court only reviews sentences; it does not impose the sentence.

17/

It would have been incredible for the probation officer to omit known past criminal behavior of petitioner, including his arrest for the killing of Doucet. This occurrence accounts for his incarceration in the Louisiana Training Institute and his subsequent psychiatric examinations. This information had been available to the trial court, and was necessary for the Louisiana Supreme Court's review of petitioner's sentence. That reviewing authority was certainly aware of the fact that this information was not in evidence, was not considered by the jury in its deliberations on the sentence, and therefore, could not be considered by that authority in reviewing the sentence.

18/

In *Solem*, the Supreme Court enumerated three objective criteria to aid a court in its reivew of a sentence under the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem, supra* at , 51 USLW at 5023. None of these factors lend support to petitioner's contention that the death penalty is *per se* unconstitutional when imposed against a person who was under the age of eighteen years at the time of the offense.

19/ Youth is specifically mentioned by the trial judge as a mitigating factor under Louisiana Code of Criminal Procedure, art. 905.5(f).

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
AUG 5 1983
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

DALTON PREJEAN :

-vs- : CIVIL ACTION NO. 81-0632

FRANK C. BLACKBURN, ET AL. :

J U D G M E N T

For written reasons assigned this date, it is

ORDERED, ADJUDGED AND DECREED that petitioner's application for habeas corpus relief be and it is hereby DENIED; it is further

ORDERED, ADJUDGED AND DECREED, that the Stay of Execution previously rendered by this Court expires on September 1, 1983 at 10:00 A. M. o'clock.

Thus done and signed on this the 5th day of August, 1983, in Alexandria, Louisiana.

UNITED STATES DISTRICT JUDGE

APPENDIX I

ANALYSIS OF EVIDENCE WITH RESPECT TO REASONS FOR STRIKING BLACK POTENTIAL JURORS

A. Potential Juror Cole

The District Attorney offered three allegedly racially neutral reasons for excluding black potential juror Glendell Cole: his large number of traffic violations, his drinking habits, and the fact that he had a six-year-old child. (App'x E, Hearing Tr. at 265) The first two factors cannot be considered legitimate given that white jurors exhibited the same characteristics and were nonetheless acceptable to Mr. Stansbury. The third factor cited by the District Attorney must be pretextual inasmuch as the victim's children were approximately the same age as Mr. Cole's child. (Affidavit of Glendell Cole ("Cole Aff.") ¶ 6).

Mr. Stansbury testified that in picking the jury he was looking for people with respect for the law. (App'x E at 34) Concerned that a person with a history of traffic violations would not be sympathetic to the shooting of a state trooper, Mr. Stansbury obtained police records for members of the venire. (App'x E at 36) The records he utilized in picking this jury are no longer in his files and thus have not been examined by Petitioner's counsel. Mr. Stansbury's files do contain other police

records of the venire members, but Mr. Stansbury testified that he did not review these records. (App'x E at 172) According to these police records, potential black juror Cole was cited for speeding on three occasions. (App'x E at 194) Mr. Stansbury never questioned Mr. Cole about his traffic record. (Cole Aff. ¶ 5).

Mr. Stansbury posed no questions as to the police records of white jurors, despite the fact that police records obtained from the prosecutor's files show that white juror Howell had been cited for speeding and for driving without a license (App'x E at 201); that white juror Austin had been cited for driving with an expired license (App'x F at Ex. B); and that white juror Linder had been cited for speeding (App'x F at Ex. B). White venirepersons Reininger, Wright and Young also had histories of traffic violations including drunk driving and speeding. (App'x E at 199-200; Trial Tr. 221). Mr. Stansbury found the police records of each of these six white people acceptable, yet he struck black potential juror Cole because of his virtually identical traffic violation record. Explanations of this type do not deserve to be credited. See State v. Butler, 731 S.W.2d 265, 269 (Mo. App'x 1987); Gamble v. State, 357 S.E.2d 792, 795 (Ga. 1987).

In response to a question by Mr. Guilbeau, Mr. Cole testified that he drank alcoholic beverages. (Trial Tr. 261; Cole Aff. ¶ 4) Mr. Stansbury did not question Mr. Cole regarding the extent of his drinking. (Cole Aff. ¶ 4) At least nine white venirepersons also told Mr. Guilbeau that they drank: jurors Linder (Trial Tr. 161); Richardson (Trial Tr. 176); Belton (Trial Tr. 425); Austin (Trial Tr. 408); Johns (Trial Tr. 408) and Bell (Trial Tr. 275) and potential jurors Duke (Trial Tr. 381); Gorn (Trial Tr. 385); and Young (Trial Tr. 358). Mr. Stansbury posed no questions to these whites concerning their drinking habits, although Mr. Duke admitted "I do drink quite a bit of beer myself" (Trial Tr. 383), and Mr. Young had been arrested for drunk driving. (App'x E at 200) None of these white drinkers troubled Mr. Stansbury: he passed on them all. His contention that Mr. Cole's drinking was objectionable to him is thus not a sufficiently racially neutral explanation under Batson. See Gamble, 357 S.E.2d at 795.

Finally, the prosecutor expressed some displeasure that Mr. Cole had a six-year-old child. (App'x E at 46, 165) Mr. Stansbury testified that he was looking for married people with children to serve on the jury. (App'x E at 34) He was seeking people who would

sympathize with the victim, who was survived by a wife and two young children. Given this goal, it is incredible that the prosecutor found Mr. Cole objectionable on this point. Mr. Cole was married with a six-year-old child. (Trial Tr. 259-61; Cole Aff. ¶ 6) Objectively, he was exactly what Mr. Stansbury testified he wanted. Mr. Stansbury asked no questions of Mr. Cole concerning his family life to suggest otherwise. The fact that Mr. Stansbury struck a black juror with the characteristics he testified he was searching for certainly destroys any racially neutral explanation for excluding this juror.

B. Potential Juror Watson

Mr. Stansbury offered four allegedly neutral reasons for striking black potential juror John Watson: Mr. Watson was divorced; he belonged to a religion that was unfamiliar to the prosecutor; he looked at defense counsel while Mr. Stansbury questioned him; and he struck Mr. Stansbury as not very bright. (App'x E at 265-66) Because Mr. Stansbury did not strike white jurors exhibiting the same characteristics and failed to establish clear and specific reasons supported by the record, his explanation is not sufficient to meet the requirements of Batson.

Mr. Watson testified that he was divorced with two children, aged eleven and nine. (Trial Tr 395; 400) No questions were posed as to whether his marital status would have any bearing on his ability to be an impartial juror. According to Mr. Stansbury, however, Mr. Watson did not meet his objective to place family-oriented people on the jury. (App'x E at 54) Mr. Stansbury's explanation is undercut, though, by the fact that he did allow white juror Cain to be seated. Mr. Cain was no family man: he had been arrested for criminal neglect of family and his wife had filed suit for separation. (App'x E at 171)

Mr. Stansbury testified that he had never heard of Mr. Watson's religious denomination and that he was therefore reluctant to put him on the jury. (App'x E at 54) Mr. Watson testified that he was a member of the Church of God. (Trial Tr. 400) Mr. Stansbury's reluctance did not extend to white members of the Church of God: he passed on white venirepersons Duke and Wright, although they too testified that they were members of the Church of God. (Trial Tr. 219, 381) These facts expose the illegitimacy of Mr. Stansbury's explanation. Gamble, 357 S.E.2d at 795.

Mr. Stansbury testified that Mr. Watson was inattentive during voir dire, looking at the ceiling

during the proceedings. (App'x E at 52) He further testified that Mr. Watson looked at defense counsel while he questioned Mr. Watson. (Id.) Mr. Stansbury's testimony is contradicted by Mr. Guilbeau, who testified that Mr. Watson did pay attention during the voir dire and looked at Mr. Stansbury when questioned by Mr. Stansbury. (App'x E at 228) Mr. Stansbury's explanation is further called into question by papers he filed during the appeal of Petitioner's conviction, in which he claimed that black juror Cole, not black juror Watson, had looked at defense counsel while questioned by the prosecutor. (App'x E at 168-169; App'x H)[1] He admitted that he could not recall whether either Cole or Watson had looked at defense counsel during voir dire: "I'm not sure whether they did or not, no . . . I don't recall that either way." (App'x E at 169-70) The premise that a juror who looks at the ceiling is unfit has been held inappropriate. Butler, 731 S.W.2d at 272. Furthermore, Mr. Stansbury's explanation is undermined by the fact that he conducted only a cursory examination of Mr. Watson, asking him only three questions. (Trial Tr. 395, 399) Engaging black jurors in

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1. Mr. Cole has provided an affidavit in which he testifies that he paid attention during voir dire and looked at the prosecutor while being questioned. (Cole Aff. ¶ 3)

only minimal questioning has rightly been held to render a prosecutor's reasons suspect. People v. Turner, 726 P.2d 102, 111 (Cal. 1986); Butler, 731 S.W.2d at 272.

Finally, Mr. Stansbury stated that he formed the impression that Mr. Watson was not very bright. (App E. at 52) Mr. Watson was a custodian; his educational history is not in the record. (App'x E at 154; Trial Tr. 395) Given the lack of any foundation in the record, Mr. Stansbury's impression cannot be considered a clear and specific explanation of the type required by Batson. Evidence of low intelligence must be clear in the record to support its use as a factor supporting a peremptory challenge under Batson. Gamble, 357 S.E.2d at 796. Mr. Stansbury asked just three simple questions of Mr. Watson; his answers were direct and responsive. (Trial Tr. 395, 399). Nothing in Mr. Guilbeau's interrogation of Mr. Watson indicates that Mr. Watson was of less than average intelligence. (Trial Tr. 400-403)

This is in contrast to white juror Correro, who testified that she felt she could not sit on the jury because she didn't understand the questions being asked. (Trial Tr. 291-92) Mrs. Correro was a housewife with a tenth grade education. (Trial Tr. 242, 281) Mr. Stansbury himself wrote in his notes during voir dire,

introduced as State Exhibit No. 1, that Correro "doesn't understand question." (App'x E at 160; App'x G) Similarly, Mr. Stansbury found white veniremen Reininger, Young and Duke acceptable as jurors. Mr. Reininger was a sewer worker with a ninth grade education (Trial Tr. 138-39); Mr. Young was a retired furnace operator (Trial Tr. 375); and Mr. Duke worked for the highway department (Trial Tr. 379). Although Mr. Stansbury wrote in his notes during voir dire, introduced as State Exhibit No. 1, that Young was "not too smart," he did not challenge this white venireman. (App'x E at 164; App'x G)

On this record Mr. Stansbury's explanation cannot be considered the clear and specific explanation required by Batson. The district attorney did not develop any evidence of Mr. Watson's facilities during voir dire. His unsubstantiated, subjective impressions (even if truthfully reported) cannot meet the Batson standard given the evidence regarding other jurors and the totality of the circumstances of the jury selection here. See People v. Turner, 726 P.2d 102, 110 (Cal. 1986) (prosecutor's explanations were insufficient to establish neutral grounds for exclusion of black juror when black juror answered all questions directly and appropriately and the

prosecutor seated a white juror who had been confused by the questions).

C. Potential Juror Gipson

The District Attorney offered three neutral factors for his decision to exclude black potential juror Gipson. (App'x E at 266) Mr. Stansbury testified that he found Mrs. Gipson objectionable because she drank, she gave more weight to the youth of Petitioner than to the fact that the victim was a peace officer, and she was hostile to him. As discussed above, many white members of the venire drank and they were acceptable to Mr. Stansbury. In such circumstances Mr. Stansbury's first proffered explanation cannot be considered legitimate. Gamble v. State, 357 S.E.2d 792 (Ga. 1987); State v. Butler, 731 S.W.2d 265 (Mo. App. 1987).

Mr. Stansbury's second contention is not borne out by the record. Mrs. Gipson initially told Mr. Stansbury that the petitioner's youth would have an effect on her opinion of capital punishment. (Trial Tr. 455) When asked whether the fact that the victim was a police officer would make any difference, she replied that his being "a human being" was what mattered most. (Id.) When the District Attorney told Mrs. Gipson that the judge would instruct her that the killing of a peace officer is

an aggravating circumstance, she testified she would consider it as such. (Id. at 456) The substance of her testimony is not different from that of several white venirepersons who testified that the fact that the victim was a police officer carried no extra weight with them. White venireperson Vines, for example, testified that "the fact that a life's been taken would mean more than him being a police officer." (Trial Tr. 441) She further testified she would be willing to accept youth as a mitigating circumstance. Seated white juror Howell also testified that the fact that the victim was a police officer would not affect him. (Trial Tr. 431) White jurors Cain (Trial Tr. 362), Koontz (Trial Tr. 449), Linder (Trial Tr. 167) and Thompson (Trial Tr. 298) as well as white venirepersons Holloway (Trial Tr. 195) and Wright (Trial Tr. 224), all testified that they would not give extra emphasis to the fact that the victim was a police officer. Because Mr. Stansbury struck Mrs. Gipson while passing on at least eight similarly situated white members of the venire, his explanation cannot be considered a racially neutral.

Finally, Mr. Stansbury testified that he felt that Mrs. Gipson didn't like him. (App'x E at 56) His testimony is contradicted by that of Mr. Guilbeau, who

stated that nothing in Mrs. Gipson's tone of voice or mannerisms indicated that she was hostile to the district attorney. (App'x E at 230) The alternate juror seated in the case also felt that Mrs. Gipson was not mean or hostile to the prosecutor. (Affidavit of John Turner, Jr. ¶ 3) Mr. Stansbury questioned Mrs. Gipson but briefly (Trial Tr. 454-56); it is difficult to believe he could have sensed any hostility from her in a period of seconds. Given this record, Mr. Stansbury's explanation cannot be considered the legitimate clear and specific explanation required by Batson.

D. Potential Juror Burks

The District Attorney stated four "neutral" factors supporting his decision to exclude black potential juror Earl Burks from the jury; Mr. Burks was single; he was "wishy-washy" on the issue of capital punishment; his nephew had been murdered and he had waived an exemption from jury service. (App'x E at 264) Because similarly situated white jurors were approved by Mr. Stansbury with regard to the first three factors, and because the fourth factor is not supported in the record, the proffered explanation for the challenge was not sufficient. (Affidavit of Earl Kay Burks ("Burks Aff.")

Mr. Burks testified that he was single. (Trial Tr. 373; Burks Aff. ¶ 3) He further testified that he was 29 years old, was a repairman for South Central Bell, and held a commission as a second lieutenant in the National Guard. (Tr. 373; 376) Mr. Stansbury excluded Mr. Burks without questioning him about his family life or respect for the law. (Burks Aff. ¶ 3) White venireman Howell also testified that he was single. (Trial Tr. 431) He further testified that he was 22 years old and worked as a meat cutter. (Trial Tr. 412) Mr. Stansbury allowed Mr. Howell to be seated on the jury. The District Attorney's failure to strike similarly situated white jurors calls his explanation into question.

Mr. Stansbury also failed to strike white venirepersons who had similar views regarding the death penalty. When asked his feelings on the death penalty, Mr. Burks testified "I'm not for nor against it." (Trial Tr. 377; Burks Aff. ¶ 5). His testimony was not substantially different from that of white juror Koontz (Trial Tr. 448) or white venireperson Wright (Trial Tr. 224), who both stated they had no strong feelings about the death penalty. The prosecutor's failure to strike these whites undermines the legitimacy of his explanation. (App'x E at 177)

Mr. Burks expressed "some apprehension" toward the criminal justice system because his nephew had been murdered and the murderer had received a suspended sentence. (Trial Tr. 375) He added that it would not affect his conduct as a juror: "I could separate the two." (Id.; Burks Aff. ¶ 4) Mr. Stansbury testified that he struck Mr. Burks for this reason even though he didn't know whether it would cut in favor of the prosecution or against. (App'x E at 206) This is hardly the clear and specific reason required by Batson. Furthermore, Mr. Stansbury did not strike a white juror whose house had been broken into by a black man the weekend before. (Trial Tr. 144) This man, who had stolen the venireman's money and threatened his family, was still at large. (Trial Tr. 144) The District Attorney did not even question the venireman as to whether this incident left him with any apprehensions about the criminal justice system. (App'x E at 207) In this situation, the failure to treat similarly situated jurors alike negates the proffered explanation.

Finally, the District Attorney contends that he was unhappy with Mr. Burks because he had waived an available jury exemption. (App'x E at 38) At the beginning of voir dire, Judge Brunson asked the all

venirepersons who had been called for jury duty within the past two years to identify themselves so that they could be excused (Trial Tr. 15). Mr. Burks was eligible to be excused and so informed the court. (Trial Tr. 17) Judge Brunson was about to excuse Mr. Burks (Trial Tr. 17) when Mr. Stansbury intervened, asking Mr. Burks whether he desired to be excused. (Trial Tr. 18) Mr. Stansbury asked him if he would agree to serve on the jury if picked, to which Mr. Burks answered yes. (Trial Tr. 18) Mr. Stansbury noted that he wished he had asked the same question of the two veniremen who were excused (Trial Tr. 18) Had Mr. Stansbury not initiated this episode it is clear that Mr. Burks would have been excused. Because Mr. Stansbury intervened to prevent Mr. Burks from being excused and expressed his wish to ask other veniremen to waive their exemptions, his testimony that he was put off by Mr. Burks' desire to waive his exemption rings hollow, to say the least.