UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WALTER J. KOON

VERSUS

BURL CAIN

CIVIL ACTION

NO.: 01-327

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The matter before the court is a petition by Walter J. Koon ("Koon"), a Louisiana state prisoner sentenced to death, seeking a writ of habeas corpus (doc. 1), pursuant to 28 U.S.C. §2254. He claims three separate grounds for relief. Under his first two claims, Koon argues that his trial counsel provided ineffective assistance, as that term is construed under U.S. Const. Amends. VI, XIV. Koon claims that his trial counsel was ineffective in representing him during both the guilt phase and the penalty phase of his jury trial. His third claim is that a new trial is warranted on the basis of an erroneously admitted confession.

The respondent is the warden of the prison where Koon is presently incarcerated, the Louisiana State Penitentiary in Angola, Louisiana. He is represented by the State of Louisiana ("State").

Koon was convicted of first-degree murder and sentenced to death. On direct appeal, the Louisiana Supreme Court affirmed the judgment and sentence. *State v. Koon*, 704 So. 2d 756 (La. 1997), *cert. denied*, *Koon v. Louisiana*, 522 U.S. 1001 (1997). Koon's motion for post-conviction relief was denied by the state post-conviction court on March 21, 2000. His petition for habeas relief in the Louisiana

Supreme Court was also denied, without any written reasons. *State ex rel. Koon v. State*, 781 So. 2d 1258 (La. 2001). After exhausting his state remedies, Koon's petition is now ripe for review. 28 U.S.C. §2254. A federal evidentiary hearing was held by the court on February 14-16 and March 6, 2006.

Factual Background

At approximately noon on March 5, 1993, Koon and a passenger, Sarah Robinson,[1] drove to the Baton Rouge home of his in-laws where his wife, Michelle Guidry Koon, was staying. Armed with a semi-automatic pistol, Koon parked his truck in the driveway, walked to the backyard, pulled the gun from his waistband and shot his wife two times, killing her. Robinson then jumped out of the truck and ran into the Guidry home, yelling that Koon had shot Michelle. As Mrs. Guidry attempted to dial 911, Koon entered the Guidry residence and shot her at close range. She died a few moments thereafter. Koon then shot Mr. Guidry twice in the chest and then after he had fallen, moved closer to Mr. Guidry and shot him twice more at close range, killing him.

Koon left the Guidry home and drove directly to his residence in Livingston Parish, Louisiana. From there he contacted the Livingston Parish Sheriff's Office and told Detective Kearney Foster that he had just killed three people in Baton

[1]Sarah Robinson's name has since changed to Sarah Garcia. For purposes of ease of discussion, and reference to the state record, her name will be maintained as Sarah Robinson throughout this ruling. The court intends no disrespect to Ms. Garcia.

Rouge. The Livingston Parish police officers arrested him at his home without incident.

Koon was indicted by an East Baton Rouge Parish grand jury on three counts of first-degree murder for killing his estranged wife, Michelle Guidry Koon, and her parents, Felicie and Richard Guidry, in violation of La. R.S. 14:30. Following trial by jury, Koon was found guilty on three counts of first-degree murder and sentenced to death on each count. After exhausting all state remedies, Koon now submits an application for a writ of habeas corpus.

State Habeas Hearing

Koon's state post-conviction hearing was held on March 21, 2000. Prior to the hearing, Koon's post-conviction counsel requested that the clerk of the court for the 19th Judicial District issue subpoenas directing the attendance of 33 witnesses at the hearing. On March 9, 2000, counsel for Koon received a call from the state court informing him that the judge was not allowing the issuance of the requested subpoenas–except for two, namely Koon's trial counsels, Kevin Monahan and Denise Vinet. On March 20, 2000, Koon, through his post-conviction counsel, filed with the Louisiana Supreme Court an application for writs seeking review of the state trial court's denial of the issuance of subpoenas. The Louisiana Supreme Court denied the writ to stay the March 21, 2000 evidentiary hearing. *State ex rel. Koon v. Cain*, 760 So. 2d 308 (La. 2000).

At the state post-conviction hearing, the court refused to allow Koon to call

any of the witnesses except for his trial counsels. At the outset of the hearing, the state court ruled,

> Well, my thought process was that, basically, today we would limit it to the ineffective assistance of counsel claim and have Mr. Monahan and Mrs. – uh – Vinet. If at some point, I after hearing that evidence, decide that perhaps there was ineffective assistance of counsel or not, then I'm going to determine whether or not we're going to proceed to the next step, which would be calling all of those witnesses that they've talked about. I don't want to have to do all of that yet. Let's see where we stand after today's hearing.

In accordance with the state court's ruling, Koon was only able to call two witnesses, namely Monahan and Vinet.[2]

Following the testimony of Monahan and Vinet, the state court rejected Koon's ineffective assistance of counsel claim, as well as all other claims, concluding that Monahan was prepared for trial and "did a good job with what he had to work with." With regard to the claim of Monahan's failure to investigate the penalty phase, the court acknowledged that "that is probably the biggest question that I have in this." The court went on to say, "[m]aybe had there been another lawyer more testimony might have been presented, maybe, not." The court noted

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[2]As will be discussed *infra*, Ms. Vinet was appointed as co-counsel to assist Mr. Monahan in the defense of Koon's case. The court notes, however, that Ms. Vinet did absolutely nothing to assist in the preparation of Koon's case because Mr. Monahan did not ask her to do anything. She simply did not work on Koon's case. State Record at Appdx. to Vol. 1, §28 at 7. Therefore Ms. Vinet had no first-hand knowledge as to what Mr. Monahan did or did not do to prepare Koon's defense. Accordingly, the court can only conclude that Koon was in effect limited to presenting only one witness, Mr. Monahan, on the issue of ineffective assistance of counsel at the state habeas hearing. The transcript to that hearing is evidence of this, as none of Ms. Vinet's testimony was directed to the issue of ineffective assistance of counsel by Mr. Monahan–because, of course, she had no first-hand knowledge as to that issue. State Record at Appdx. to Vol. 1, §28 at 7-14.

the existence of affidavits conflicting with Monahan's testimony that Koon's brothers and an uncle refused to testify at the penalty phase. However, the court supported its order denying Koon the right to call additional witnesses by stating, "I don't know if at trial they [Koon's witnesses] would have [testified in Koon's favor] ...."

Scope of Federal Habeas Review

As a result of the state court's actions, this court granted Koon an opportunity to present the evidence that the state court refused to hear (doc. 20). Review of the federal evidentiary hearing transcripts shows that neither the parties, nor the court, limited the testimony to penalty phase issues. Testimony was also had relative to whether Koon received ineffective assistance of counsel during the guilt phase of his trial (*see* doc. 24). At a status conference on January 17, 2007, both parties were instructed that the court would consider Koon's claim of ineffective assistance as it relates to both the guilt phase and the penalty phase of his trial. Neither party objected to the court's assertion that it had review power over both guilt phase and penalty phase claims of ineffective assistance of counsel (doc. 110).

Standard of Review

The court proceeds by addressing the standard of review applicable to cases seeking habeas relief. The Antiterrorism and Effective Death Penalty Act ("AEDPA") is applicable to this proceeding as Koon's habeas corpus petition was filed after the effective date of the AEDPA. *See* *Lindh v. Murphy*, 521 U.S. 320

(1997); *Nobles v. Johnson*, 127 F.3d 409, 412-13 (5th Cir. 1997). As amended in 1996 by the AEDPA, 28 U.S.C. §2254(d) provides,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court has held that a state court decision that correctly identifies the governing legal rule but unreasonably applies it to the facts of a particular prisoner's case is enough for a federal habeas court to grant the writ. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Bell v. Cone*, 535 U.S. 685, 694 (2002). However, "[i]n order for a federal court to find a state court's application of [Supreme Court] precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. *Wiggins*, 539 U.S. at 520; *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). The state court's application of federal law must have been "objectively unreasonable." *Wiliams v. Taylor*, 529 U.S. 362, 409 (2000).

Moreover, the state court's findings of facts are presumed to be correct, and the court only reviews the facts for clear and convincing error. 28 U.S.C. §2254(e)(1). Nevertheless, the Supreme Court stated in *Miller-El v. Cockrell*, 537

U.S. 322, 340 (2003),

> [e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by [the] AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

537 U.S. at 340. The Fifth Circuit has stated that "[a]n evidentiary hearing [in federal court] is not an exercise in futility just because §§2254(d) and (e)(1) require deference." *Valdez v. Cockrell*, 274 F.3d 941, 952. Thus, while "[t]he standard [of review of state court decisions] is demanding[,] [it is] not insatiable." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2325 (2005).

Merits

I. Ineffective Assistance During the Guilt Phase

At trial, Koon was represented by a court-appointed attorney, Kevin Monahan ("Monahan"). As Koon's application for habeas relief claims ineffective assistance of counsel by Monahan with respect to both the guilt phase and the penalty phase of his trial, the court will address both in turn.

A. Findings of Facts as to Ineffective Assistance–Guilt Phase

On April 28, 1993, the state trial court appointed Monahan as counsel of record for Koon along with the Office of the Public Defender as co-counsel. By October 1993, a private attorney, Denise Vinet ("Vinet") was substituted for the public defender as co-counsel for Koon. Prior to the appointment of Monahan, the

public defender had requested the appointment of a sanity commission to examine Koon. When granting the motion, the trial court appointed one Dr. F.A. Silva to the sanity commission. In May of 1993, Dr. Silva concluded that Koon was competent to stand trial. The trial court found Koon likewise competent on the basis of the sanity commission's reports and recommendations. Thereafter, Monahan withdrew Koon's former not guilty plea and entered the dual plea of not guilty and not guilty by reason of insanity.

In February of 1994, nearly a year before Koon's trial, Monahan motioned the court for authority to retain a psychiatrist for mental examination of his client, for appointment of an investigator, and for money to hire an expert to assist in the preparation of the case. On September 30, 1994, the trial court granted Monahan's request for funds to hire one Dr. Cenac. However, Monahan never hired Dr. Cenac as an expert witness. By March 1995, Monahan had yet to hire the expert services of a psychologist or psychiatrist, even though his theory of defense focused on Koon's mental state at the time of the killings. Monahan finally retained Dr. Marc Zimmerman, on March 5, 1995–one day before Koon's murder trial was set to begin–as an expert witness.

1. Withdrawal of Monahan's Co-Counsel

On Monday March 6, 1995, the trial court called the case and motions were heard. On March 7, the case was again called for trial, and at that time, Monahan informed the court that his co-counsel, Vinet, no longer wished to participate in the

case, and that she sought to withdraw. Monahan informed the court that he did not need Vinet's assistance, and he was prepared to try the case alone. On March 8, Vinet appeared in court and told the trial court that she did not think her withdrawal would be a problem as she "had never been asked to do a thing on this case." The trial court sustained Vinet's motion to withdraw, but only after Koon voluntarily waived any objections. Monahan was of the view that only one attorney was necessary to defend a capital case, and that he felt confident in his ability to handle the case on his own.

At the federal evidentiary hearing, Koon's expert witness Ms. Phyllis Mann informed that at the time of Koon's trial, the American Bar Association ("ABA") and Louisiana Supreme Court Rule 31 required that a *minimum* of two attorneys should be appointed on a capital case. According to Ms. Mann, two attorneys should work together in investigating and preparing the case and developing strategies about what defenses can be presented at both phases of the capital trial, even though one is typically responsible for the guilt phase and the other is responsible for the penalty phase. Ms. Mann stated that in the beginning, "you want to explore every possibility so that, at the end, you can present what is truthful, what is within the law, and what is effective." She further stated that these methods of providing a defense in a capital case have been longstanding and were in effect by the time of Koon's trial. The court finds Ms. Mann very credible and her reasoning compelling, especially in light of the paucity of investigation undertaken by Monahan as set forth

more fully *infra* .

2. Monahan's Use of the Mental Health Expert

On the first day of jury selection, March 7, Monahan for the first time filed a notice of intent to introduce testimony relating to mental disease or defect or other condition bearing on whether Koon had the mental state required for the offense charged. During voir dire, Monahan stressed to the venire panel the elements of an insanity defense and read to the panel the statutory mitigating factors under Louisiana law. The jury was selected on March 11, and on the first day of testimony, March 13, the court issued an order that Dr. Zimmerman "release unto th[e] court the results and corresponding written reports of all psychiatric examinations conducted by him on the defendant," including MMPI and academic testing.

Monahan stressed his mental disease or defect theory of defense to the jury during his opening statement. He stated that

> [t]he evidence is going to show that [Koon] had not had anything to drink th[e] morning [of the killings] and he had not had any prescription drugs that morning. But that it's that withdrawal process. ... The experts will tell you that that withdrawal process caused the heightened anxiety. That withdrawal process is also a drug condition that can be used to negate specific intent. So the drug condition is the withdrawal process you're going to hear about. It goes with the insanity defense. To exempt criminal responsibility, if they prove specific intent and the act, but the drug condition can also be used to negate specific intent.

Monahan admitted that he came up with this theory of defense solely from talking to Koon about the facts of the case. As Monahan testified, his theory of

defense was basically that Koon "just had one bad week, beginning with the Friday afternoon, which was the week before the actual murder," during which he ingested Xanax and other drugs with Sarah Robinson–the lone eyewitness to the murders. At the end of the week, Koon had not only lost his wife, was sick, and had a tax lien, but Robinson also told him that his wife was having an affair with one Joey LeBlanc and that "he snapped." Monahan's plan was to pitch to the jury that the murders "w[ere] a heat-of-passion-type of thing, plus fueled by the fact that [Koon] was in some sort of withdrawal from all chemicals that he had been ingesting." Due to the withdrawal of drugs Koon was going through, Monahan asserted his defense as being that Koon did not know right from wrong at the time of the killings. According to Monahan, he was going to pursue this defense regardless of whether his primary expert witness, Dr. Zimmerman, would say that Koon was competent enough to distinguish right from wrong.

Dr. Zimmerman was Koon's chief expert witness. While Dr. Zimmerman administered several tests on Koon, he did not consult with any family members or other collateral sources in making his diagnosis. This was because Monahan, although intending to pursue a defense of mental disease or defect, did not hire his chief expert until one day before Koon's trial. Therefore, Dr. Zimmerman had extremely limited time to adequately examine Koon. In fact, Dr. Zimmerman spent just over an hour interviewing Koon on the day before the trial. With such limited information, he concluded that Koon had an addictive personality and had some

mild forms of brain dysfunction. He further testified that alcohol and drug abuse constitutes a disease, and that on the day before the killings, Koon had his usual amount of ten to fourteen Xanax and a half case of beer, and finally took some Xanax and a couple of beers at 2:00 a.m. on the day of the killings.[3] According to Dr. Zimmerman, Koon displayed symptoms at the time of the killings which were typical of depersonalization, one of the major symptoms of detoxification. With regard to the impact of detoxification on Koon's ability to distinguish right from wrong, Dr. Zimmerman stated, "[t]hat part of the brain that we use for that [was] less functional" in Koon's case. In terms of psychological probability, Dr. Zimmerman testified that it was more probable than not that the detoxifying effect going on in Koon's brain affected his ability to determine right from wrong.

At the federal evidentiary hearing, Koon's mental health experts testified, without contradiction, that because Monahan failed to employ the services of a mental health expert until the day before his murder trial, the result was that Dr. Zimmerman (1) had insufficient time to develop a complete psychological history of Koon; (2) had insufficient information, lacking information from sources collateral to Koon, upon which to base an opinion as to Koon's mental state at the time of the crime; (3) was in error in many significant respects, including his diagnosis of a non-

[3]While Koon denied taking any alcohol or Xanax on the day of the killings, he did admit to taking about four Xanax and two beers at approximately 2:00 a.m. in the early morning hours of that day. State Record at Vol. IX, at 2056, 2058, 2060.

existent psychological disorder; and (4) failed to elaborate adequately on the effect of substance abuse on Koon's behavior. According to expert witness Dr. Seiden,

> [i]f your defense is a mental-health defense, you're using mental-status defense as your primary area of defense, your primary expert should be a mental status or mental-health expert. And that person needs to be hired more than a day ahead of time to work with you as an attorney.

The court believes Koon's uncontroverted evidence on this issue, as the mental health experts testifying at the federal habeas hearing were very credible.

As would be expected, the State at trial called one Dr. Donald Hoppe to rebut Dr. Zimmerman's testimony. Because of Monahan's lack of preparation for the trial of a mental health defense and his last minute hiring of Dr. Zimmerman, what little mental health testimony was presented in support of Koon's defense was attacked to a devastating level. Dr. Hoppe criticized Dr. Zimmerman for not interviewing Koon for longer than an hour and for not getting corroborating data from collateral sources. Monahan was completely unprepared to address Dr. Hoppe's testimony. After Dr. Hoppe testified, Monahan made a phone call to Dr. Zimmerman for some guidance. However, Monahan never thought it necessary to request a surrebuttal or to call Dr. Zimmerman during the penalty phase to rebut the damaging testimony.

Ms. Mann testified at the federal hearing that Dr. Hoppe's testimony should not have remained unchallenged. She explained that "[t]here was no reason why Mr. Monahan's expert wasn't sitting in the room during Dr. Hoppe's testimony. There was no reason why he wasn't prepared to refute that." As Ms. Mann

explained regarding Monahan's ineffective use of experts,

> [defense attorneys] don't know everything. We hire experts to teach us about this so that we can decide what the defense is. We don't just pick one, show up at court, and then, in the middle of trial, start hiring experts til we find out that they will say the thing we picked. That's not constitutionally effective.

3. Monahan's Failure to Investigate the Sole Eye-Witness

Even more shocking than hiring his chief expert witness one day before trial was Monahan's complete failure to investigate the one and only eyewitness to the incident, Sarah Robinson. Despite Robinson's critical status as the eyewitness, Monahan never even attempted to interview her because it was his practice never to interview a state's witness. As Monahan testified, "I just felt that [Robinson] wasn't going to give me anything that would help." Monahan hoped that Robinson would hear his opening statement and "if she heard those facts that I was saying, she would help [Koon]."

Monahan's defense rested in part on facts showing that Robinson had informed Koon that his wife was having an affair with LeBlanc. According to Monahan, given the drug withdrawals that Koon was suffering, finding out that his wife was having an affair with LeBlanc was the added push causing him to commit the murders in a heat-of-passion. Thus Robinson's testimony on this issue was critical. However, Robinson testified in complete contrast to that of Koon and Monahan's theory of defense.

At trial, Robinson testified that she was with Koon the night before the

murders. She stated that she was not sure whether Koon ingested drugs or alcohol the night before the killings, and denied that he took anything the morning of the incident. Robinson denied telling Koon that his wife was having an affair with LeBlanc. Robinson's testimony as to the actual murders was one that presented Koon as a "cold-blooded" killer, which was drastically different than Monahan's theory of a heat-of-passion type of killings. She has since recanted this testimony.

At the federal hearing, Robinson testified that she would have cooperated with Monahan had he approached her and assured her that the State would not hold her criminally responsible for the killings as a result of her cooperation with the defense. The court viewed Robinson's demeanor carefully. While the State stresses that Robinson has repeatedly lied in regards to the actual facts of the incident, the court finds Robinson's testimony at the federal hearing to be very credible, and accepts it as true. As Robinson did not testify at the state post-conviction hearing, the court does not find any contradicting evidence on the issue of her willingness to cooperate with Monahan had Monahan attempted to speak with her *ante* trial. Had Monahan attempted to interview Robinson, she would have told him about the drugs Koon was doing in the early morning hours before the killings, which included cocaine, Xanax, Valium and beer. Moreover, Robinson testified that she would have informed Monahan that she told Koon about his wife's affair with LeBlanc on the way to the Guidry house the morning of the killings.

Expert witness Ms. Mann testified that because criminal defense attorneys

do not have the subpoena power to get witnesses to talk to them, and since witnesses do not have to talk to criminal defense lawyers and are often reluctant to do so, "[w]e go knock on their door, we sit down and talk with them, we answer their questions." Ms. Mann explained that "Sarah Robinson could have been provided with counsel, independent counsel, to advise her so that she would know precisely what risks were and were not realistic." Ms. Mann testified that the ABA standards then in place required defense attorneys to at least attempt to interview opposing witnesses. As Ms. Mann stated, "if [Robinson] was going to tell ten different stories, [Monahan] would have learned that. If she was going to say something entirely different, he would have learned that. And he would have been prepared with that knowledge."

4. Monahan's Failure to Prepare Koon's Testimony

Monahan also put his client on the witness stand during the guilt phase. Koon testified that he took Xanax and beer at approximately 2:00 a.m. the morning of the killings. Contrary to Robinson's testimony, at trial Koon testified that Robinson told him that his wife was having an affair with LeBlanc. It was at this time that Koon arrived at the Guidry house and felt like he was in a "dream-state." He testified that all his vision went down to nothing, and he did not have any control over his actions and could not hear anything.

Monahan put little effort into preparing Koon for testimony. As Monahan stated, he likes to "have a conversation with a client," and "then put them on the

stand and then have that same conversation." Ms. Mann testified, on the other hand, that "[i]f one believes that there is a possibility that the client will testify, one must reach that conclusion long before trial because you cannot prepare during the trial." She stated that preparation with the client includes going over questions and answers, talking about possible cross-examination, and actually having another lawyer question the defendant as the prosecutor. Ultimately, as Ms. Mann testified, the client cannot make an informed decision about whether or not to testify, and whether or not he or she can handle the pressures of testifying, unless he knows what it means to testify.

As a result of the lack of preparation, Koon came across as showing no remorse for his actions and as very unsympathetic. On cross-examination, Koon referred to one of the victims as a bully. Even Monahan admitted that Koon made an awful witness, and in retrospect he would not have put Koon on the witness stand and would have fought with him over not testifying.

B. Conclusions of Law as to Ineffective Assistance–Guilt Phase

The court finds that Koon was denied an effective assistance of counsel, as that term is construed under U.S. Const. Amends. VI, XIV, during the guilt phase of his murder trial. The Supreme Court established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). Ineffective assistance of counsel under *Strickland* is deficient performance by counsel resulting in prejudice. 466 U.S. at 687. Trial counsel's

performance is to be measured against an "objective standard of reasonableness," under "prevailing professional norms." *Id.* at 688. In determining ineffective assistance, the Supreme Court refers to the ABA Standards of Criminal Justice as "'guides to determining what is reasonable.'" *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins*, 539 U.S. at 524; *Strickland*, 466 U.S. at 688.

The State urges the court to disregard the ABA standards on effective trial representation. The State asserts, through testimony of its capital defense expert, Hugo Holland, that the ABA criminal defense standards are primarily promulgated by criminal defense attorneys and that prosecutors have very little input. The court disagrees, and in fact finds Holland to not be a credible witness. Instead, the court finds the declaration of one Robert M.A. Johnson to be credible and true. Johnson's declaration explains the long and careful process involved in promulgating the ABA's Criminal Justice Standards. In finding Johnson's affidavit more credible than the State's affidavits and testimony on the subject, the court finds that prosecuting attorneys play an equal and meaningful role in creating the standards. Thus, like the Supreme Court, this court considers the ABA Standards of Criminal Justice to be persuasive guides in determining what is effective assistance of counsel.

1. Constitutionally Deficient Performance

The ABA standards in circulation at the time of Koon's trial in 1995 described defense counsel's general duty to investigate as follows:

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

ABA Criminal Justice Standards, 4-4.1. Guided by *Strickland*, the Fifth Circuit has held that counsel's failure to interview eyewitnesses to a charged crime constitutes constitutionally deficient representation. *See Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004). In *Soffar*, the court found that "defense counsel ... offered no acceptable justification for the[] failure *to take the most elementary step of attempting to interview the single known eyewitness to the crime* with which their client was charged." *Id.* at 473-74. The court finds the *Soffar* court's analysis persuasive, and binding, and thus quotes the following:

The scope of a defense counsel's pretrial investigation necessarily follows from the decision as to what the theory of defense will be. At the state habeas proceeding, both Cannon's and Stover's testimony made it clear that their defense theory was that Soffar's self-incriminating statements were false and should not be believed. Nevertheless, in spite of this theory of defense, Soffar's defense counsel never attempted to interview Garner, the only known eyewitness, to (1) obtain his description of the perpetrator[s] and his version of the crime events; to (2) determine whether he could testify at trial, the substance of his potential testimony, and whether it would be consistent with his taped and transcribed statements and any other information he gave to the police; and (3) whether he could identify the perpetrator[s], had already done so, or attempted to do so. Defense counsel testified that they did not seek to interview Garner because an unspecified person told them Garner was a "vegetable."

"Guided by *Strickland*, we have held that counsel's failure to interview eyewitnesses to a charged crime constitutes 'constitutionally deficient representation.'" *Anderson v. Johnson*, 338 F.3d 382, 391 (5th Cir. 2003) (quoting *Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir. 1994)). In *Bryant*, the defense counsel

did not interview two eyewitnesses and limited his pretrial investigation to examination of the prosecutor's file, discussions with the accused, and a review of the indictment. 28 F.3d at 1418. We observed that "information relevant to [the] defense might have been obtained through better pretrial investigation of the eyewitnesses, and a reasonable lawyer would have made some effort to investigate the eyewitnesses' testimony." *Id.* (alteration in original) (citation and quotations omitted). In *Anderson*, we held that a trial counsel's failure to interview an eyewitness rose to the level of constitutionally deficient performance, given the gravity of the burglary charge, and the fact that there were only two adult eyewitnesses to the crime; and that counsel relied exclusively on the investigative work of the State, basing his own pretrial "investigation" on "assumptions divined from a review of the State's files." *Id.*

We conclude that Soffar's defense counsel have offered no acceptable justification for their failure to take the most elementary step of attempting to interview the single known eyewitness to the crime with which their client was charged. We conclude that this failure is sufficiently deficient to satisfy the first prong [deficient performance] of *Strickland*.

Id.

In the case at bar, Monahan failed to investigate the *only known eyewitness* to the crime. His decision to not even attempt to contact Robinson because he rarely found the State's witnesses willing to cooperate cannot be discounted as trial strategy. Indeed, it baffles the court as to how failing to take the most elementary step of interviewing Robinson constituted any sort of trial strategy. It is clear from the state habeas proceeding and the federal evidentiary hearing that Monahan's theory of defense was that Koon was going through a drug withdrawal process and his mental state was altered because of Robinson informing him that his wife was having an affair with LeBlanc. Such a theory necessitated interviewing the only known eyewitness to determine if she would have corroborated Koon's appearance and state of mind at the time of the killings. Indeed, Robinson was the *only* person,

except for Koon himself, that had any knowledge as to how Koon was acting in the moments before the killings. It was essential that Monahan find out before trial what Robinson planned to say on the witness stand. That there existed questions as to Robinson's credibility was not a sufficient reason to refrain from investigating her story. In *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003), the Fifth Circuit stated that while,

> a lack of credibility might support a strategic decision not to call a witness to *testify* at trial, ... a witness's character flaws cannot support a failure to *investigate*. Without so much as contacting a witness, much less speaking with him, counsel is "ill-equipped to assess his credibility or persuasiveness as a witness," ... *Strickland* simply does not "require ... defer[ence] to decisions that are uninformed by an adequate investigation into the controlling facts and law."

"The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense," but is also dictated by the ABA Standards of Criminal Justice. *Rompilla*, 545 U.S. at 387. The court finds that Monahan failed to take even the elementary step of finding out what the State knew about Robinson's involvement with Koon at the time of, and before, the incident. Speaking to Koon alone was insufficient, and failing to *attempt* to contact Robinson was unreasonable. In light of these circumstances, the court holds that Monahan's failure to investigate Robinson *ante* trial was constitutionally deficient performance.

However, the court need not only rely on Monahan's failure to interview Robinson in finding his performance deficient. The court also finds Monahan's

conduct even more egregious due to his failure to employ an expert witness on the issue of Koon's mental state at the time of the killings until *one day* before trial. Koon was in effect denied effective representation because Monahan failed to properly present a defense of mental disease or defect. The uncontroverted evidence is that Dr. Zimmerman only had enough time to examine Koon for about an hour. Naturally, his testimony was torn apart by the State's rebuttal expert, Dr. Hoppe. Monahan had secured funds to hire an expert witness nearly one year before trial, yet he failed to do so. The court also finds that Monahan's failure to prepare Dr. Zimmerman for trial, failure to use the services of a second attorney, and failure to adequately prepare Koon's trial testimony as additional evidence showing Monahan's overall lack of preparation and investigation into this case. As to Vinet's last minute withdrawal as co-counsel, the court acknowledges Koon's waiver of her presence during trial. However, there is nothing in the record showing that Koon ever waived his right to have her *work on and investigate* his case. As Ms. Mann explained, the ABA standards then in place required a minimum of two attorneys representing a capital-defendant. *ABA Criminal Justice Standards*, 5-6.1; Louisiana Supreme Court Rule 31. Nonetheless, Monahan refused to allow Vinet to assist on the case.

That the state court did not sustain habeas relief on the basis of Monahan's refusal to be assisted by Vinet does not preclude this court from considering this

factor.[4] It cannot be disputed that had Monahan used Vinet, or any other qualified attorney for that matter, as co-counsel, a much more thorough investigation would have taken place. While perhaps Monahan's failure to use co-counsel's services, standing alone, *may* not be sufficient to sustain habeas relief–which was the inquiry that the state court examined, State v. Koon, 704 So.2d at 769–it is appropriate for this court to consider this factor, *along* with his lack of investigation of Robinson's story and preparation of a mental health defense, in determining if Monahan was ineffective. *See* Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980) (holding that ineffective assistance of counsel claims are not to be examined by looking at errors in a piecemeal fashion, but rather totality of circumstances must be analyzed); Carbo v. United States, 581 F.2d 91, 92 (5th Cir. 1978). The court finds that Monahan's refusal to allow Vinet to assist on the case ran counter to the spirit of the ABA standards and the Louisiana Supreme Court rules, and when combined with Monahan's overall lack of investigation and preparation, the result was clear–constitutionally deficient representation.

2. Prejudice

The court must next determine whether Monahan's constitutionally deficient

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[4]State Record at Appdx. to Vol. 1, §28 at 68-69. Louisiana courts have long adhered to the view that the better practice is to appoint two attorneys to defend a capital case. *See e.g.*, State v. Williams, 480 So.2d 721, 728 n.14 (La. 1985). However, the Louisiana Supreme Court has held that Louisiana Supreme Court Rule 31 "does not give rise to an affirmative right to multiple attorneys in capital trials." State v. Koon, 704 So.2d at 769. Nonetheless, although an "affirmative right" to two attorneys may not exist in Louisiana, Monahan's refusal to be assisted by competent co-counsel can factor into the ineffective assistance analysis.

performance was prejudicial to Koon. Strickland, 466 U.S. at 687; Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (holding that a habeas petitioner must establish that the trial error resulted in "actual prejudice."). To be prejudicial, the constitutional error must have permeated the entire trial with obvious unfairness. United States v. Jones, 287 F.3d 325, 331 (5th Cir. 2002); Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). Under Brecht, the constitutional trial error is only harmful if there is "more than a reasonable possibility that it contributed to the verdict." Mayabb v. Johnson, 168 F.3d 863, 868 (5th Cir. 1999). The Fifth Circuit has stated that, "[i]f our minds are 'in virtual equipoise as to the harmlessness,' under the *Brecht* standard, of the error, then we must conclude that it was harmful." Woods v. Johnson, 75 F.3d 1017, 1026 (5th Cir. 1996) (*quoting* O'Neal v. McAninch, 513 U.S. 432 (1995)). In the Fifth Circuit, the *Brecht* standard has survived the AEDPA and is still applicable for harmless error analysis. Robertson v. Cain, 324 F.3d 297, 306-07 (5th Cir. 2003).[5]

In the case at bar, Monahan's constitutionally deficient performance resulted in actual prejudice to Koon. Had Monahan attempted to interview Robinson before trial, she would have talked to him and told him about the drugs Koon was doing in the early morning hours of the day of the killings. These were the types of drugs

[5]Because the state court found Monahan's representation adequate, it never reached the issue of prejudice. Accordingly, this court reviews the prejudice prong of the Strickland claim *de novo*.

that Koon also testified to taking at 2:00 a.m. in the morning of the day of the killings. She would have told Monahan that Koon was in a drunken and drug induced state at the time of the killings. She would have further told Monahan that she had informed Koon of his wife's affair with LeBlanc only moments before Koon shot and killed the Guidry family. Most importantly, she would have cooperated with Monahan had he simply reassured her that the State would not file charges against her if she helped Koon.

Both parties make much over Robinson's previous record of lying, sometimes even under oath. However, Robinson did not testify at the state habeas hearing. Thus, the court has nothing to give deference to on the issue of Robinson's credibility. Accordingly, 28 U.S.C. §2254(e) is not even triggered. This court is therefore permitted to make a credibility determination as to Robinson's testimony during the federal evidentiary hearing–the only habeas hearing at which she has testified. *See* *Herrera v. Collins*, 506 U.S. 390, 445 (1993) (Blackmun, J., dissenting). The court finds Robinson was very credible at the federal hearing. Accordingly, had Monahan investigated the case, there would have been more than a reasonable probability that the outcome would have been different. The State's case against Koon was primarily centered on Robinson's testimony. Had she not controverted Koon's theory of defense, it is likely that the jury would have given more consideration to Monahan's "heat-of-passion" defense.

In addition, Koon's failure to provide Dr. Zimmerman with additional time,

rather than *one hour, one day before trial*, was prejudicial. Koon's mental disease or defect defense rested on the credibility of Dr. Zimmerman. He was the chief expert on the subject. Dr. Hoppe's rebuttal was of devastating effect because it highlighted the limited time and limited information Dr. Zimmerman used in arriving at his conclusion. The court has reviewed the state record and notes that Dr. Hoppe did not conduct an examination of Koon. His rebuttal was mostly based on the fact that Dr. Zimmerman's examination was poorly conducted. Had Monahan investigated Koon's mental disease defense by hiring Dr. Zimmerman at a much earlier date, there is a strong probability that Dr. Hoppe's rebuttal would have had less of an impact in hurting Koon's defense.

The court is disturbed by Monahan's performance. A review of the record shows that Koon's actions could have been construed as something less than first-degree murder–be it second degree murder under La. Rev. Stat. 14:30.1(A), or manslaughter under La. Rev. Stat. 14:31(A)(1). Had Monahan investigated the case, outside of simply relying on what Koon told him, there is a reasonable probability that Koon would not have been found guilty of first-degree murder. Thus it follows that confidence in the outcome of the trial has been undermined.

3. State Habeas Court's Unreasonable Application of Law

Before Koon is entitled to a new trial as a result of Monahan's constitutionally deficient performance, the court must determine whether the state court's resolution of Koon's claim of ineffective assistance of counsel "resulted in a decision that was

contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Rompilla*, 545 U.S. at 380 (*quoting* 18 U.S.C. §2254(d)(1)). An "unreasonable application" occurs when a state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the petitioner's case. *Wiggins*, 539 U.S. at 520; *Williams*, 529 U.S. at 413. That is, the state court's decision must have been not only incorrect, but it must have also been unreasonable. *Wiggins*, 539 U.S. at 520-21.

Koon concedes that the state court correctly identified the governing legal rule to be applied. His argument, however, is that the state court was unreasonable in applying the rule to the particular facts of his case. The state court addressed Koon's contention that Monahan was not prepared to try the guilt phase of the trial. The state court found that Monahan was prepared in that he "did a good job with what he had to work with." The court finds such an application of federal law to be unreasonable. The state court's reasoning fails to acknowledge that Monahan's performance was to be measured by an objective standard of reasonableness under prevailing professional norms, not by his own limited investigation. The ABA guidelines and Supreme Court and Fifth Circuit precedent, as discussed above, required Monahan to promptly investigate the case and to at least interview the lone eyewitness. This Monahan failed to do. Thus what Monahan "had to work with" was limited by his own constitutionally deficient performance.

Moreover, the state court denied Koon's claim for relief on the basis of Monahan's failure to employ the assistance of a second attorney by noting that Koon failed to object when Vinet filed her motion to withdraw. Once again, the state court unreasonably applied federal law. First, Vinet withdrew from the case on the second day of voir dire. Secondly, Koon only waived any objection to Vinet's representation during trial, not to her assistance during the pre-trial investigation.

The Supreme Court has stressed that the ABA standards are to be applied in determining whether trial counsel's performance was deficient. *Rompilla*, 545 U.S. at 387. It is undisputed that the criminal justice standards then in place at the time of Koon's trial required a minimum of two qualified attorneys *working* on a capital case. *ABA Criminal Justice Standards*, 5-6.1; Louisiana Supreme Court Rule 31. The court notes that the record only shows that Koon waived his right to have Vinet represent him at trial. Nowhere does the record indicate that he waived his right to have Vinet, being his court-appointed co-counsel, assist Monahan during the *preparation* of his defense. However, by his own admission, Monahan did not rely upon Vinet or the services of an investigator to assist him in preparing Koon's defense. Monahan stated that he "had really not delegated anything to Ms. Vinet, so it wasn't like her withdrawing had yanked the rug out from under me." Thus to hold Koon responsible for his counsel's refusal to be assisted in the preparation of the case is unfair. The court finds there is a reasonable probability that had Monahan fulfilled his professional duty and used the assistance of co-

counsel, the outcome of the trial would have been different. If Monahan was unwilling to investigate the sole eyewitness, Robinson, perhaps Vinet would have. She was, however, never given the opportunity to do so. Accordingly, the trial court's denial of relief on this basis was unreasonable.

II. Ineffective Assistance During the Penalty Phase

Although the court finds Koon's claim of ineffective assistance of counsel during the guilt phase of his trial to have merit, it will nonetheless also address his claim of ineffective assistance during the penalty phase.

A. Findings of Facts as to Ineffective Assistance–Penalty Phase

Monahan's entire penalty phase case rested on the testimony of Koon's mother; such testimony taking up only two pages in the transcript. In preparing for Koon's defense during the penalty phase, Monahan, by his own admission (1) did not secure a mitigation expert to help prepare a social history; (2) did not himself prepare a social history of Koon; (3) did not gather basic documents regarding Koon's life history; (4) did not interview anyone, concerning Koon's background, other than Koon, Koon's two brothers, uncle and mother; and (5) despite presenting a mental health defense that he hoped would spill over into the penalty phase, did not even attempt to hire any sort of mental health expert until one day before the trial. The state post-conviction court found that Monahan's strategy was to put most of his mitigation evidence on during the guilt phase because that strategy had

worked for him in previous cases.

Although there was significant evidence that Koon's mental state was "impaired" at the time of the killings, Monahan failed to introduce any such evidence in mitigation of a death sentence. *See* Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000) (holding that trial counsel's failure to conduct adequate investigation into mental health relevant to mitigation constituted ineffective assistance). Dr. George Seiden examined Koon in prison for in excess of three hours in 2003. The purpose of his examination was to prepare an accurate diagnosis of Koon's mental state at the time Koon committed the killings. Dr. Seiden diagnosed Koon as suffering from alcohol dependence, continuous in full, sustained remission in a controlled environment. He also diagnosed Koon as suffering from cocaine dependance, continuous in full, sustained remission in a controlled environment. The third diagnosis was that Koon was suffering from dependence on anti-anxiety drugs like Valium and Xanax. Fourth, Dr. Seiden testified at the federal hearing that Koon was suffering from substance-induced mood disorder. The final diagnosis was that Koon was suffering from adjustment disorder with a depressed mood.

Although Dr. Seiden did not testify at the penalty phase of Koon's trial, he testified at the federal hearing that Koon's mental status at the time of the killings was "clearly impaired,"–a result caused by substance abuse. Dr. Seiden testified that in the week preceding the killings, Koon was dealing with a divorce, he found out that he owed money to the IRS, he became physically ill, he was sleep-

deprived, and he was abusing large amounts of a variety of substances, including cocaine, alcohol, Xanax and Valium. This was all in addition to the fact that Robinson had told him, immediately prior to the killings, that his wife was having an affair with LeBlanc.

Dr. Seiden further testified to the literature supporting a finding that drugs such as Valium and Xanax increase incidents of impulsive and aggressive behavior. Dr. Seiden addressed the fact that cocaine is widely known to increase irritability, paranoid thinking and violent behavior. Alcohol significantly raises cocaine blood levels, which in turn increases irritability and has potential behavioral effects. According to Dr. Seiden, the drugs and alcohol that Koon was taking the weeks leading up to the killings resulted in a "soup of substances that increase[d] the likelihood of impulsive aggression and decrease[d] [Koon's] mental sharpness." This "soup of substances," in Dr. Seiden's opinion, impaired Koon's ability to conform his behavior to the requirements of the law. It dis-inhibited Koon and made him less likely to make good judgments. Dr. Seiden, if called to testify at the penalty phase, would have opined that at the time of the killings, Koon was under the influence of extreme mental and emotional disturbance. The State argues that Dr. Seiden's testimony on Koon's intoxication is irrelevant because by Koon's own admission, he did not take any drugs the day of the killings. However, the evidence is that Koon did take some Xanax around 2:00 a.m. on the morning of the killings. Moreover, Dr. Seiden's testimony is relevant because it addresses Koon's

dependence on alcohol and drugs, and his emotional disturbance, all matters relevant in presenting a mitigation defense.

Ms. Mann testified on the issue of whether Monahan should have put on evidence of Koon's mental health in the penalty phase. Ms. Mann explained that presenting expert testimony in the guilt phase in hopes that it would carry over into the penalty phase did not excuse Monahan from presenting a penalty phase. Not only did Monahan fail to put on any evidence of Koon's mental state, coupled with drug and alcohol addiction, during the penalty phase, he conducted very little investigation into Koon's background. Monahan admitted that he did nothing to investigate for mitigating evidence other than to interview his client and speak briefly on one or two occasions with Koon's mother and two brothers. The family members Monahan intended to call were Koon's mother and two brothers and an uncle who was a preacher. Monahan claimed to have met with each of these potential witnesses and discussed Koon and his background. From these interviews, Monahan concluded that "there was nothing significant about [Koon's] childhood except that he left [home] when he was 16." Consequently, Monahan's plan was that he would put on a penalty phase in the guilt phase and attempt to "create[] at least some sort of whimsical residual doubt." For the penalty phase, Monahan described his strategy as having "the family get up in the penalty phase" and try "to convince the jury that they wanted him to live."

Monahan, however, only called Koon's mother during the penalty phase. He

claimed that the reason he did not call any other family members was because after Koon testified, both of Koon's brothers told him that they could not say anything good about Koon. Also, according to Monahan, Reverend Bernard, Koon's uncle and a preacher, told him that he could not get up there "right now."

Reverend Bernard and Koon's brothers, Charles and Lee, testified at the federal hearing. Directly contrary to Monahan's testimony, the three all testified that they were willing to testify at the penalty phase of Koon's trial. All three stated that they were willing to say positive things about Koon in mitigation of the death penalty, but they were all unsure what they could say because Monahan had spent little time with them discussing their potential roles in attempting to save Koon's life. This court was able to view these witnesses as they testified, and the court found all three of Koon's family members to be very sincere and credible in this regard.

As previously mentioned, the only family member to testify on behalf of Koon in mitigation of death was Koon's mother. Her testimony takes up a lonely two pages in the record. Koon's mother testified that Monahan never discussed with her the extent or purpose of her testimony. She stated that she had no idea what Monahan was going to ask when she took the stand. A review of the penalty phase transcript shows that only about half of her testimony–consisting of one page in the transcript–was directed toward Koon. After the sparse questioning that took place, Monahan rested his penalty phase case.

Moreover, Monahan never employed the services of an investigator or

mitigation specialist to prepare any sort of social history of Koon. The court finds Ms. Mann's testimony on this issue credible. Ms. Mann explained that the ABA standards for the performance of counsel in the defense of capital cases at the time of Koon's trial recommended the creation of a social history. *ABA Criminal Justice Standards*, 11-4.1. She testified that creating a social history involves obtaining nearly every relevant document relating to the client's life, interviewing every living family member that can be found, interviewing doctors, teachers, pastors, next-door neighbors, friends, and generally everyone that has relevant information in support of mitigation of death. Once having reviewed the documents and listened to the words of all those people, then, according to Ms. Mann, "you do anything else that is indicated from that."

Ms. Mann explained that the preparation by a mitigation specialist of social history reports is standard practice in the defense of capital cases. A mitigation expert is usually required to create a social history because such experts are trained to ask questions in a way that will allow people to tell them unpleasant, uncomfortable things in difficult situations. Ms. Mann stated that this is crucial in capital cases because "[f]amilies are protective of themselves, keep their secrets, and it is not – it is unnatural, it is sort of anti our culture, to air your dirty laundry; and people don't do that naturally." Accordingly, the ABA standards require that an attorney investigate for mitigation regardless of what the client tells him. *ABA Criminal Justice Standards*, 11-4.1. Thus Monahan's limited investigation, which

constituted very brief interviews with a few family members, should not have ended his inquiry into Koon's life history.

The court finds that beyond the few family members Monahan very briefly spoke to, he did not investigate, prepare, or in essence even present a case in mitigation of death. The federal hearing displayed the great deal of mitigation evidence available to present to the jury. Monahan, by his own admission, testified that he was "not a big fan" of mitigation evidence, which he considered to be limited to evidence of childhood abuse. He testified that he did not plan to "go in there with the abuse excuse." As a result of Monahan's failure to put on an effective mitigation defense, the jury never heard Dr. Seiden's testimony that Koon was suffering from dependence on alcohol, cocaine, Xanax, and Valium. The jury never heard of the medical evidence that Koon was then suffering from substance-induced mood disorder and adjustment disorder with a depressed mood. The jury never heard family members speak of Koon's work ethic, family loyalties, and their continued love for him despite what transpired at the Guidry house.

The jury also never heard, during the penalty phase, that Koon had no significant prior history of criminal conduct. Ms. Mann testified this circumstance was significant because to many lay jurors, it meant that for the most part, Koon was like them. Koon's whole life was rather uneventful as far as crime was concerned. Ms. Mann stressed,

it has been my experience – if a person was abused, of course, you should

tell the jury about that; if they're mentally ill, of course you should tell the jury about that, because that is something that makes up the whole human being. But if they are not abused and they are not mentally ill, you still tell the jury what makes up this whole human being. And those cases are successful.

The court finds that Monahan failed to tell Koon's story to the jury, and thus the jury failed to hear who Koon, the whole human being, truly was.

B. Conclusions of Law as to Ineffective Assistance–Penalty Phase

A petitioner claiming ineffective assistance of counsel during the penalty phase must show both counsel's performance was deficient and that the deficient performance prejudiced the petitioner's defense. *Williams v. Cain*, 125 F.3d 269, 276 (5th Cir. 1997).

1. Constitutionally Deficient Performance

Koon was denied the effective assistance of counsel during the penalty phase of his murder trial. Monahan's failure to investigate and put on an adequate penalty phase was constitutionally deficient when tested against the "objective standard of reasonableness" under what was then the "prevailing professional norms." *Strickland*, 466 U.S. at 687-88; *Wiggins*, 539 U.S. at 521. Monahan was certainly deficient by his failure to comply with the "norms of adequate investigation in preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence of mitigation." *Rompilla*, 545 U.S. at 380-81.

The ABA Criminal Justice Standards state,

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

ABA Criminal Justice Standards, 4-4.1, Commentary (3d ed. 1993). Monahan failed to meet the ABA standards through his lack of investigation and presentation of relevant mitigation evidence.

The duty to investigate is critically important in capital penalty phase proceedings. In a capital case, a criminal defendant has a constitutionally protected right to provide the jury with mitigating evidence. *Williams*, 529 U.S. at 393. "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'" *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (*quoting Williams*, 529 U.S. at 399).

Although the court agrees with the State that it must usually defer to a lawyer's strategic trial choices, *Guy v. Cockrell*, 343 F.3d 348, 352 (5th Cir. 2003); *Knox v. Johnson*, 224 F.3d 470, 479 (5th Cir. 2000), those choices must have been made after counsel conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. During penalty phase proceedings, counsel has a duty to make a "diligent

investigation into his client's troubling background and unique personal circumstances." *Williams*, 529 U.S. 415. As the Supreme Court has stated, there is a "belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990) (quotation and emphasis omitted). To that end, investigations into mitigating evidence should unearth all relevant information for consideration at the capital sentencing phase.

Although the Fifth Circuit abides by the rule that "[t]he failure to present a case in mitigation during the sentencing phase of a capital trial is not, *per se*, ineffective assistance of counsel," *Stringer v. Jackson*, 862 F.2d 1108, 1116 (5th Cir. 1988), *vacated and remanded on other grounds*, 503 U.S. 222; *West v. Johnson*, 92 F.3d 1385, 1408 (5th Cir. 1996); *Cain*, 125 F.3d at 277, trial counsel does at least have to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.[6]

Monahan failed to make a *reasonable* investigation into Koon's background.

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[6]The Ninth Circuit, on the other hand, takes a markedly different approach. That circuit has held that the "[f]ailure to present mitigating evidence at the *penalty phase* of a capital case constitutes ineffective assistance of counsel." *Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) (emphasis added).; *Smith v. Stewart*, 140 F.3d 1263, 1268 (9th Cir. 1998); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir. 1998); *Clabourne v. Lewis*, 64 F.3d 1373, 1384 (9th Cir. 1995).

By his own admission, he is "not a big fan" of mitigating evidence. Although Monahan's plan was to put on his mitigation case during the guilt phase, the court refuses to discount what he did as trial strategy because doing so ignores the true problem. It was Monahan's lack of investigation into mitigating evidence that is at the heart of the issue. Monahan's presentation of mitigating evidence, during the guilt phase, was limited by his lack of investigation. He cannot be said to have used trial strategy when that strategy was premised on a lack of investigation, preparation, or consideration of mitigating evidence.

It is undisputed that Monahan failed to hire an investigator or a mitigation specialist. Moreover, the state habeas court never had the opportunity to listen to Koon's family's testimony because the state court did not allow them to testify. Thus this court need not show any deference on this issue because the state court never made any relevant factual findings. *Cf.* 28 U.S.C. 2254(e)(1). This court, however, did hear the evidence, and found Koon's two brothers and uncle to be very credible. They testified, contrary to Monahan's assertions, that they were ready, willing, and able to testify on behalf of Koon–they just did not know what to say. This is because Monahan failed to prepare any witnesses properly. Even Koon's mother, the only witness Monahan presented, did not know what she was to do when she got up on the stand. She testified that Monahan never discussed with her the purpose of her testimony. After considering the severity of the punishment that hung in the balance, and the amount of mitigating evidence

available for use during the penalty phase, the court holds that Monahan's performance with respect to the penalty phase of Koon's trial was constitutionally deficient.

2. Prejudice

To establish prejudice, Koon must show that it was reasonably likely that one juror would have voted against death absent Monahan's unprofessional errors. *Cain*, 125 F.3d at 279; *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). A "reasonable probability" need not be proof by a preponderance that the result would have been different, but it must be "sufficient to undermine confidence in the outcome" of the verdict. *Strickland*, 466 U.S. at 694. Because the state court never reached the issue of prejudice, this court reviews the evidence *de novo*. 545 U.S. at 388.

The State's assertion that "there is no significant difference in the testimony presented at the federal evidentiary hearing and the state court trial" is wrong. Dr. Seiden testified extensively, at the federal hearing, as to Koon's history of drug addiction and mental disorders. Dr. Seiden, unlike the doctors that testified at trial, examined Koon for a number of hours. Moreover, none of Koon's family, except for his mother, testified at trial because Monahan refused to put any of them on the stand. Ms. Mann provided expert opinion on the subject of preparing witnesses for a penalty phase. She testified,

I would rather have too many witnesses waiting in the hall than too few. You

just prepare .... [i]t's not as if you're trying to say please don't look behind the curtain and don't see the real human being there; you're doing just the opposite. That is what [you want] the jury to see, is a real, live, flesh-and-blood human being. There are almost no dangerous witnesses in a mitigation case.

According to Ms. Mann, "there were many, many people who were available, who have been identified readily by people who've just gone out and done a social history," and, importantly, could have corroborated much of what Koon testified to about himself. Due to Monahan's lack of investigation, none of these potential witnesses were interviewed and none were presented to the jury. Ms. Mann's expert opinion was that there was a reasonable probability that, but for Monahan's constitutionally deficient performance in putting together a case in mitigation of death, the result of the proceeding would have been different.

Even the State's capital attorney expert stated that telling a positive life story about a person "might be one of the more effective things" he has heard about in the defense of a capital case. All that was required was one juror to vote against the death penalty and Koon's life would have been spared. After considering the totality of the evidence available for mitigation that Monahan did not use or look into, the court concludes that there was a reasonable probability that the outcome would have been different had Monahan's performance not been constitutionally deficient. Accordingly, confidence in the fairness of Koon's death penalty has been undermined.

3. State Habeas Court's Unreasonable Application of Law

As noted *supra*, the state court refused to allow Koon the opportunity to call any witnesses except for Monahan and Vinet, thereby prohibiting him from fully developing the facts in support of his claims for habeas relief. On the issue of whether Monahan failed to investigate and present mitigating evidence at the penalty phase, the state court ruled,

> that is probably the biggest question that I have in this. And, maybe, had there been another lawyer more testimony might have been presented, maybe, not. Maybe the witnesses still would have had the same reaction – I don't want to testify. I don't know anything good I can say about Joey Koon – the ones that Mr. Monahan had lined up. I don't know who else you can call other than your brothers and your mother – your brothers and your preacher refuse to testify because they don't have anything good to say about you. I don't know that, even though now there are people out there who are saying, according to your affidavits, they weren't contacted and were willing to come in and testify, I don't know at the trial if they would have and I don't know if they would have. If your own brothers don't have anything good to say about you, what these other people could have said that would change the jury's mind, which is one of the factors, whether or not he got a fair trial because Mr. Monahan didn't call everybody and his brother, so to speak, to testify about Mr. Koon .... But the issue is whether or not he got a fair trial because of that and whether or not Mr. Monahan was ineffective in his representation in the defense of Mr. Koon, and I don't think that he was ....

In so reasoning, this court holds that the state court failed to evaluate the totality of the available mitigating evidence in determining whether that potential evidence might have influenced the jury's appraisal of Koon's moral culpability. The trial court applied the wrong legal standard in this case. It determined whether the potential mitigating evidence not presented by Monahan would have changed the jury's mind. The standard to be applied, however, is whether there is a reasonable

probability that one juror would have voted against the death penalty, thus undermining confidence in the outcome of the death sentence. *See* Nix v. Whiteside, 475 U.S. 157, 176 (1986). The state court considered whether Monahan's performance more likely than not altered the outcome of the penalty phase. This is too high of a burden. *See id.* ("Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*, a defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"). Given the amount of mitigating evidence that Monahan could have used during the penalty phase, this court finds that but for Monahan's unprofessional errors, there was a reasonable probability that one juror would have voted against the death penalty. Thus confidence in the outcome of the penalty phase has been undermined.

The state court unreasonably applied federal law to the issue of ineffective assistance of counsel during the penalty phase of Koon's trial. Accordingly, Koon's sentence of death must be vacated.

III. Erroneous Admission of Koon's Confession

In his third, and final, claim for relief, Koon challenges the Louisiana Supreme Court's opinion holding that although his confession was erroneously admitted into evidence, it was harmless error. The confession at issue stems from a police interrogation conducted on Koon following the killings. Koon clearly expressed his

desire to refrain from talking with the police. State v. Koon, 704 So. 2d 756, 761-62 (La. 1997). However, the Baton Rouge detective continued his interrogation of Koon. Id. at 763. As a result, Koon confessed that "he killed his wife because she wanted-uh-his business-part of the divorce settlement and that was unacceptable[,]" and that "he killed Mrs. Guidry because she was putting Michele [sic] up to trying to take his business away from him[,]" and that he killed Mr. Guidry "because he knew he was going for a weapon." Id. at 762.

The Louisiana Supreme Court concluded that under Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny, the confession was obtained illegally, in violation of Koon's Fifth Amendment right to refrain from self-incrimination, and should have been suppressed. Koon, 704 So. 2d at 763. Nevertheless, the court held the error harmless under the analysis of Arizona v. Fulminante, 499 U.S. 279, 311 (1991) (holding that when reviewing the erroneous admission of an involuntary confession, the appellate court reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.). Koon, 704 So. 2d at 763, 765-66.

Because disposition of Koon's claims of ineffective assistance of counsel warrant a new trial, his third claim is rendered moot. At the new trial, the state trial court shall deny admission of the challenged confession, as the Louisiana Supreme

Court has already ruled it inadmissible. *Id.* at 763.[7]

Conclusion

Koon was deprived of his constitutional right to effective assistance of counsel during both the guilt phase and the penalty phase of his first-degree murder trial. U.S. Const. Amends. VI, XIV. Accordingly, it is ordered that Koon's three convictions of first-degree murder and the sentences of death are hereby REVERSED AND VACATED. The case is remanded to the 19th Judicial District Court for the Parish of East Baton Rouge for a new trial, not inconsistent with this ruling.

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[7]Koon has raised a number of other grounds for relief in his petition for habeas corpus. He claims that habeas relief is also warranted because (1) he was forced to file his habeas petition in state court in an unreasonably short period of time; (2) he was denied the right to a fair and impartial trial; (3) he was convicted and sentenced to death on the basis of inadmissible testimony by Dr. Donald Hoppe; (4) the jury was incorrectly instructed by the trial court; (5) the state failed to reveal to him that Robinson never fulfilled the conditions of her probation; (6) his death sentence was in violation of the federal and Louisiana constitutions; and (7) the cumulation of errors infecting his conviction and death sentence violated the federal and Louisiana constitutions.

As to Koon's claim that he was forced to file his habeas petition in state court in an unreasonably short period of time, he requests that the court grant him an evidentiary hearing to more fully develop his case. The court did so on February 14-16 and March 6, 2006, and therefore this claim is now moot. As to his six remaining claims for relief, he presents no argument in support of them, except to say that he incorporates his arguments made to the state post-conviction court. Before granting relief on these claims, Koon must prove that either the state court's ruling resulted in (1) a decision contrary to, or an unreasonable application of, clearly established federal law; or (2) a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d). He has failed to do so as to these additional claims. Koon's briefs only address his claims of ineffective assistance of counsel during the guilt and penalty phases of his trial, and the erroneously admitted confession. It has been nearly six years since Koon filed his petition for habeas relief (doc. 1). Accordingly, the court finds that all other grounds for relief, not addressed in the body of this ruling's text, are waived. *Lockett v. Anderson*, 230 F.3d 695, 711 n.27 (5th Cir. 2000). In any case, disposition of Koon's claims of ineffective assistance of counsel moots all other claims for relief.

Baton Rouge, Louisiana, February 1ST, 2007.

JAMES J. BRADY, DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA