UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

ALBERT WOODFOX Petitioner, v. BURL CAIN, WARDEN OF THE LOUISIANA STATE PENITENTIARY, ET AL., Respondents.	CIVIL ACTION NUMBER 3:06-00789-JJB-CN JUDGE BRADY MAGISTRATE JUDGE NOLAND

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENTS' SUPPLEMENTAL RESPONSE TO THE MAGISTRATE'S RECOMMENDATION ON GRAND JURY DISCRIMINATION

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I. INTRODUCTION

Petitioner Albert Woodfox, by and through undersigned counsel, respectfully submits this brief in opposition to Respondents' December 14, 2010 brief to the Court.

Respondents assert that this Court cannot grant relief on Petitioner's meritorious grand jury foreperson discrimination claim. They argue first that the Court cannot order an evidentiary hearing because it has not yet adopted the Magistrate Judge's Report and Recommendation ("Report") as to that claim. (Doc. No. 98 at 6-9.) Respondents go on to raise new and greatly expanded objections not previously asserted in Respondents' June 24, 2008 objections—which were appropriately filed within 14 days after the Report was issued—to the grand jury foreperson related recommendations. (*Compare* Doc. No. 98 at 2-4, 9-18 *with* Doc. No. 34 at 52-55.) Respondents detail for the first time arguments as to why the Magistrate Judge erred; purportedly because she did not defer to the relevant state court decision on the grand jury foreperson issue under the Antiterrorism and Effective Death Penalty Act (AEDPA). (*See* Doc. No. 98 at 2-4, 9-18.)

Respondents are mistaken. In order to demonstrate that Respondents are wrong, Petitioner first reviews herein the procedural posture of his grand jury foreperson discrimination claim, and then discusses briefly the legal standards under AEDPA. Petitioner next addresses Respondents' argument that this Court has not yet adopted the Magistrate's recommendation that an evidentiary hearing should be held. Subsequently, Petitioner explains that the new and expanded objections raised in Respondents' December 14, 2010 briefing are not only untimely, but entirely without merit.

II. PROCEDURAL POSTURE OF PETITIONER'S GRAND JURY FOREPERSON DISCRIMINATION CLAIM

In 1973, based on an indictment alleging he and three other inmates killed Corrections Officer Brent Miller, Mr. Woodfox was convicted of murder. In 1992, this conviction was overturned. In 1993, Mr. Woodfox was re-indicted; in 1998, he was convicted of murder in the second degree.

Prior to the 1998 trial, Mr. Woodfox timely moved to quash the indictment, and argued that African Americans were substantially underrepresented among parish grand jury forepersons, in the period from 1980 to 1994. The prosecution and the defense stipulated to evidence submitted in support of this claim, which showed that only 27% of the forepersons were black, while 1990 census figures and voter registration rolls indicated that blacks comprised 44% of the population. (*See* Exh. A, Jan. 4, 1995 Transcript of Hearing on Motion to Quash at 6.) Neither the State nor the trial court suggested that census figures and voter registration rolls were inappropriate comparators for calculating the disparity in the first instance. (*Id.* at 7-10.) Instead, the trial judge limited his review to only the four grand juries empanelled between 1993 and 1994, and determined that—because there was one black female foreperson in that time period and because the judge saw "a significant number of black males" (presumably among the grand jurors who were not forepersons)—the *Rose v. Mitchell*, 443 U.S. 545 (1979), standard for grand jury foreperson discrimination claims had not been met. (*Id.*)

On direct appeal, the Louisiana First Circuit affirmed the trial judge on different grounds. Relying exclusively on a prior First Circuit case, *State v. Young,* 569 So. 2d 570, 573-76 (1990) (La. App. 1st Cir. 1990), the court decided that Mr. Woodfox could not use census and voter registration figures to establish a prima facie case of discrimination. *State v. Woodfox*, 99-KA-2102 (La. App. 1st Cir. June 23, 2000) (attached hereto as Exhibit B). The court reasoned

that those numbers failed to account for the proportion of African Americans who were qualified to serve as grand jurors. "It is entirely possible," the First Circuit speculated, "that this difference between those blacks who served as grand jury foremen (27%) and the total of black registered voters (44%) might be reduced, if not eliminated, when considering how many of the registered voters were actually qualified to serve." (*Id.* at 21.)

Mr. Woodfox continued to press his grand jury foreperson discrimination claim in state postconviction proceedings. At this stage, he supplemented the evidence that had been presented to the trial court with additional evidence showing that this disparity persisted when comparing the percentage of African American forepersons and the pool of African American grand jurors who served during the same time period, an unquestionably "qualified" subset of the total population. *See*, *e.g.*, *State v, Langley*, 813, So. 2d 356, 370 (La. 2001). Mr. Woodfox also added evidence contemplating a wider date range, from 1964 to 1993, which confirmed substantial underrepresentation of black forepersons in the parish.

Contrary to what it claims today, the State's position in postconviction proceedings was *not* that Mr. Woodfox's claim was procedurally barred because the trial court had been denied an opportunity to pass on this additional evidence. The State argued instead that the quality of the additional evidence was superfluous to the merits inquiry. (*Compare* Doc. No. 98 at 11 *with* State's Sept. 30, 2004 Resp. Brief, at § C, p. 29 (attached hereto as Exhibit C).) The State urged that, "[t]he problem is that the evidence now offered . . . is *identical* to that offered in the original January 4, 1994, hearing on the motion to quash, except that this new evidence is for the time period of 1964-1993 rather than the original period of 1980-1995." (Exh. C at § C, p. 29.) (emphasis added). The State continued, "[t]his [grand jury foreperson discrimination claim] was determined to be meritless by the First Circuit. Simply expanding the time period for *the exact*

same information does not justify revisiting this issue. This claim is *meritless*." (*Id.* at p. 30) (emphases added). The 21st Judicial District Court adopted in full the State's brief as its own opinion, thus squarely rejecting Mr. Woodfox's grand jury foreperson discrimination claim on the merits. *See Woodfox v. Cain*, No. 68933-B, at 1 (21st Dist. Ct. Oct. 25, 2004) (further finding no need for an evidentiary hearing because Mr. Woodfox's "allegations are without merit") (attached hereto as Exhibit D).

In August, 2005, the First Circuit denied supervisory review, without reasons. *State v. Woodfox*, 2005-0551 (La. App. 1st Cir. Aug. 8, 2005). In September, 2006, the Louisiana Supreme Court denied review, also without reasons. *State v. Woodfox*, 2005-0551 (La. Sept. 29, 2006).

Mr. Woodfox filed the instant petition on October 11, 2006. (Doc. No. 1.) The subsequently amended petition alleged, *inter alia,* ineffective assistance of counsel claims, and the grand jury foreperson discrimination claim now at issue. (Doc. No. 15.) The amended petition also alleged ample evidence of actual innocence in accordance with *Schlup v. Delo*, 513 U.S. 298 (1995) and *House v. Bell*, 547 U.S. 518 (2006). (*Id.*) The State's Answer did not assert that AEDPA deference bars relief on the foreperson discrimination claim. (Docs. No. 21, and 22 at 25-26.)

On June 10, 2008, in addition to recommending habeas relief on ineffective assistance of counsel and other grounds, Magistrate Judge Noland recommended that the Court find that Mr. Woodfox demonstrated a prima facie case of foreperson discrimination. (Doc. No. 33.) Magistrate Judge Noland further recommended an evidentiary hearing be held on that claim in the event habeas relief was not granted on other grounds. (*Id.* at 67.) This Court "carefully considered the petition, the record, the law applicable to this action, and the [Report]" and

expressly adopted the Magistrate Judge's recommendations, with supplementation, on July 8, 2008. (Doc. No. 35.) The habeas relief thereby granted was subsequently vacated by the Fifth Circuit, which noted that "the ruling" on the grand jury foreperson discrimination claim had not been appealed, and remanded "for resolution of the only remaining issue relating to the selection of the grand jury foreperson." *Woodfox v. Cain*, 609 F.3d 774, 788, n. 1 (5th Cir. 2010) (excerpt attached hereto as Exhibit E).

III. RELEVANT LEGAL STANDARD OF REVIEW UNDER AEDPA

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when a state court has denied a claim on the merits, federal habeas relief is warranted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

"A state-court decision will certainly be contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams v. Taylor*, 529 U.S. 362, 395, 403 (2000). Under the "contrary to" clause, a federal habeas court may also grant habeas relief if the state court decided a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Id.*

A state court decision constitutes an "unreasonable application of clearly established Federal law" if "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 412-13; *see also Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007). The "unreasonable application" inquiry turns on whether the state court's application of clearly established federal law was objectively unreasonable. *Williams*, 529 U.S. at 409-10. Thus, a state court need not have applied federal law "in a manner that reasonable jurists would all agree is

unreasonable" to have unreasonably applied clearly established federal law under an AEDPA analysis. *Id.* at 409. As the Supreme Court instructs, "[t]he federal habeas court should not transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner as the state court did in the habeas petitioner's case." *Id.* at 409-10; *see also Gardner v. Johnson*, 247 F.3d 551, 559 (5th Cir. 2001) (discussing *Williams*, 529 U.S. at 409-10).

IV. ARGUMENT

A. This Court's July 8, 2008 Ruling Adopted the Magistrate Judge's Report and Recommendation as the Court's Opinion

The State insists that, although this Court's July 8, 2008 Order explicitly adopts Magistrate Judge Noland's Report, it would make "nonsense" of this Court's ruling to conclude that the Court adopted her recommendations pertaining to Mr. Woodfox's grand jury foreperson discrimination claim. (Doc. No. 98 at 7.) The State suggests that the Magistrate Judge conditioned both her finding that a prima facie case has been made by Mr. Woodfox, as well as her recommendation that an evidentiary hearing be held on his foreperson discrimination claim, on the District Court's "disagreement" with her other recommendations for relief. (*Id.*) The State reasons that, since the other recommendations for relief were adopted by the Court, "it did not reach the grand jury recommendations in Section III." (*Id.*) Respondents' reading of the July 8, 2008 Order is not supported by the text of the Order, and is not persuasive.

"A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). After noting that the Court had "carefully considered the petition, the record, the law applicable to this action, and the [Magistrate's] Report and Recommendation," this Court's July 8, 2008 Order plainly states:

"The Court hereby approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein." (Doc. No. 35 at 1.) The Court's July 8, 2008 Order expressly supplements the Report, but does not otherwise qualify this adoption, or otherwise indicate that any portion of the Report was rejected or modified by the Court, in whole or in part.

Respondents acknowledge that the Report recommended remand for an evidentiary hearing on the grand jury foreperson discrimination claim, "[i]n the event the district judge disagrees with the undersigned's above conclusions [recommending relief based on ineffective assistance of counsel and other grounds]." (*See* Doc. No. 98 at 7 (citing Doc. No. 33 at 64 and 67).) The Fifth Circuit's vacatur of the habeas relief that had been granted by this Court triggered precisely such an event. Although this Court initially agreed with the ineffective assistance findings in Section II of the Magistrate Judge's Report, this Court can no longer enter judgment for Mr. Woodfox in accord with those Section II recommendations. (*See id.* at 8 (observing that this Court agreed with Section II findings).). After vacatur, the Court is now constrained to "disagree" with the Magistrate's conclusions as to those claims.

There is nothing nonsensical about understanding this Court's adoption of the recommendation relating to an evidentiary hearing as an alternative holding for relief. The effect of this adoption was to hold that, in the event habeas relief granted on other grounds was reversed on appeal, an evidentiary hearing would be warranted on Mr. Woodfox's remaining grand jury foreperson claim. Thus, the July 8, 2008 Order adopts: (1) the Magistrate Judge's recommendations that habeas relief be granted on ineffective assistance of counsel and other grounds; (2) the Magistrate Judge's recommendation that this Court find a prima facie case for

grand jury foreperson discrimination, and; (3) in light of that finding, the recommendation that an evidentiary hearing be held if Mr. Woodfox is not granted habeas relief on other grounds.[1]

Moreover, this Court clearly adopted the Magistrate's conclusion that Mr. Woodfox established a prima facie case of racial discrimination in the selection of grand jury foreperson. (Doc. No. 33 at 64-67.) Contrary to the State's contention, the Magistrate Judge's conclusion that Mr. Woodfox has established a prima facie case, and the analysis supporting it, was never proposed as a contingent, alternative finding. (*Compare id. with* Doc. No. 98 at 7.) Accordingly, even if this Court could not simultaneously adopt both a recommendation for habeas relief and an alternative recommendation for an evidentiary hearing—which it could—it still adopted the Magistrate's finding that Mr. Woodfox established a prima facie case of grand jury foreperson discrimination. There is no basis for reopening this issue. *See Christianson v. Colt Industries Operating Co.*, 486 U.S. 800, 815-16 (1988) (observing that, under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," and further noting that "the doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions") (citations omitted).

Finally, far from "confirming" the State's position that this Court has not adopted recommendations relating to Mr. Woodfox's grand jury claim, the Fifth Circuit opinion vacating habeas relief actually undermines it. The panel explained, "The *ruling* on discrimination in the grand jury foreperson selection has not been appealed and is not before us." *Woodfox v. Cain*,

[1] Indeed, this seems to be precisely how Respondents once interpreted the July 8, 2008 Order; in submitting their original objections to the Magistrate's Report, the State had objected "to the Court's determination that, *at whatever juncture*, a hearing is needed on this issue." (Doc. No. 34 at 53) (emphasis added.)

609 F.3d 774, 788, n. 1 (5th Cir. 2010) (emphasis added). Fifth Circuit judges are surely cognizant that district courts issue "rulings" on applications for postconviction relief, but magistrate judges cannot. *See* 28 U.S.C. § 636(b)(1)(B). Additionally, if, as the State now contends, there had been no ruling on Mr. Woodfox's grand jury foreperson discrimination claim, it would have been highly unlikely for the Fifth Circuit to observe that the issue had not been appealed.

B. Respondents' New and Expanded Objections to the Magistrate Judge's Report and Recommendation

Respondents' original objections to the grand jury foreperson related recommendations in the Report offered only a bare-bone and conclusory objection based on § 2254(d) and AEDPA deference.[2] (Doc. No. 34 at 53-54.) Midway on page 53 of those Objections the State first, "submits that the state appellate court's determination, based on the evidence submitted by the defendant, that he had failed to establish discrimination in the selection process of his grand jury foreman, was not 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.'" (*Id.*) (quoting 28 U.S.C. § 2254(d)(1)). Thereafter, the State provides a "brief review" of the Louisiana First Circuit decision. (*Id.* 53-54.) The State's entire analysis of the State court decision, and application of relevant law, follows the brief review:

> The State suggests that the Louisiana First Circuit court of Appeal applied the federal jurisprudence, and in particular the decision of *Rose v. Mitchell*, in a reasonable fashion as determined by the United States Supreme Court in interpreting and analyzing the evidence which was introduced by defendant.

[2] Petitioner notes again that the State never mentions § 2254(d) in its Answer to Mr. Woodfox's petition. (*See* Docs. No. 21, and 22 at 25.)

(*Id.* at 54.) The sum of this objection comprises one paragraph, just over a page long. (*Id.* at 53-54.)

Petitioner's first response to Respondents' December 14, 2010 brief is that the State has improperly used the additional briefing authorized by the Court to take a second, much larger bite at the objections apple, in which they raise over 13 pages of new and much more detailed objections based on AEDPA. At the November 8, 2010 status conference, Respondents specifically asked permission to brief the issue of whether or not this Court had adopted the entirety of the Magistrate's Report; Respondents never requested or moved for permission to reopen the window for filing objections. Even assuming *arguendo* Respondents' contention that this Court has not yet ruled on the Magistrate's Report as to the foreperson discrimination issue, Respondents identify absolutely no reason why these new arguments were not raised as the Federal Rules of Civil Procedure require, 14 days after the Report was issued. *See* Fed. R. Civ. P. 72.[3] Petitioner respectfully submits that Respondents' new and expanded objections, raised years after the window closed for objecting to the Magistrate Judge's Report, are untimely.

Second, and far more important, the new, more detailed objections remain entirely without merit. Requiring, as the Louisiana First Circuit Court did here, that a defendant at the prima facie stage present statistics beyond general population data—or even voter registration data—to establish a baseline "qualified" population comparator flatly contradicts the clearly established law set forth by the Supreme Court in *Castaneda v. Partida*, 430 U.S. 482 (1977). Such a requirement also constitutes an "unreasonable application" of *Castaneda*. Although a state

[3] Respondents indicate that these new objections "focus on" § 2254(d) deference and "intervening precedent." (Doc. No. 98 at 2.) However, the sole authority cited in their 19-page brief published after the deadline for filing objections is discussed in just over a page and, as an unpublished district court decision, carries no precedential weight. There is simply no justification for failing to raise any and all objections relating to § 2254(d) deference when they were due.

court decision need only be one or the other to warrant relief under 28 U.S.C. § 2254(d)(1), the Louisiana First Circuit decision is both "contrary to" and an "unreasonable application of" clearly established federal law.

Finally, Petitioner notes that, in this case, the last reasoned state court decision was actually rendered in postconviction proceedings, not direct appeal. That decision was likewise both "contrary to" and an "unreasonable application" of clearly established federal law within the meaning of § 2254(d)(1).

i. "Contrary To"

Finding Mr. Woodfox's failure to provide more detailed statistics about the percentage of African American voters qualified to serve as grand jurors fatal to his claim, the Louisiana First Circuit denied Mr. Woodfox's prima facie case for foreperson discrimination, even though he presented compelling statistics showing a substantial disparity between the percentage of black forepersons and *both* the total black population, and the percentage of black registered voters in the Parish. *State v. Woodfox,* 99-KA-2102, at 21 (La. App. 1st Cir. June 23, 2000) (attached hereto as Exh. B). In so doing, the state court applied a rule that "contradicts the governing law set forth" by the Supreme Court, and therefore was "contrary to" clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1). *Williams*, 529 U.S. at 405.

As Respondents acknowledge, *Castaneda v. Partida*, 430 U.S. 482 (1977) sets forth the clearly established federal law for the resolution of this case. (*See* Doc. No. 98 at 4.) In *Castaneda*, the Supreme Court held that racial discrimination in grand jury selection violates the Equal Protection Clause of the Fourteenth Amendment, and set forth specific standards for evaluating grand jury discrimination claims. *Castaneda,* 430 U.S. at 493-94 (relying on the burden-shifting framework established in *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972) and

Washington v. Davis, 426 U.S. 229, 239-41 (1976)). Because, under the Louisiana law in effect at the time of Mr. Woodfox's indictment, "when the Louisiana judge selected the foreperson, he also selected one member of the grand jury outside of the drawing system used to compose the balance of that body," Mr. Woodfox's claim concerning racial discrimination in the selection of grand juror forepersons must be tested under *Castaneda* and "treat[ed] as one alleging discriminatory selection of grand jurors." *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998); *see also Rose v. Mitchell*, 443 U.S 545, 571 (1979) (applying the *Castaneda* analysis to a claim of discrimination in the selection of grand jury foreperson).

Under *Castaneda*, the petitioner first bears the burden of making out a prima facie case of racial discrimination. 430 U.S. at 493-94. If that showing is made, the burden then shifts to the State to rebut the inference of unconstitutional action. *Id.* *Castaneda* explains clearly how to make a prima facie showing of discrimination. First, the defendant must establish that the group considered is a recognizable, delineated class, singled out for different treatment under law, as written or as applied. *Id.* Next, the defendant must show the degree of underrepresentation of this group. *Id.* The Court is quite specific about how this showing is made: "by comparing the proportion of the group *in the total population* to the proportion called to serve as grand jurors, over a significant period of time." *Id.* (emphasis added). Finally, the defendant has to show that the selection procedures at issue are either susceptible to abuse, or not racially neutral. *Id.* If a defendant makes out his prima facie case, it becomes the State's responsibility to "introduce controverting evidence," or to "fill in the evidentiary gap," by providing a race-neutral accounting for the underrepresentation. *Id.* at 492, 499. If the State fails to meet its rebuttal burden, the defendant is entitled to prevail. *Id.* at 501.

The Supreme Court relied on the precedent set in *Castaneda* to decide *Rose v. Mitchell*, a case that specifically considered a claim for grand jury foreperson discrimination. 443 U.S. at 556 (citing *Castaneda*, 430 U.S. at 494). In *Rose*, the Court again expressly instructed that a prima facie case requires proof of the degree of underrepresentation as demonstrated by a comparison of the proportion of the group "*in the total population*" with the proportion of the group called to serve over a significant period of time. *Id.* (citing *Castaneda*, 430 U.S. at 494) (emphasis added). The Fifth Circuit has also repeatedly followed *Castaneda* and *Rose*, consistently evaluating grand jury foreperson discrimination claims by comparing the percentage of minorities who were selected to be grand jury forepersons with the percentage of minorities in the total population. *See Guice v. Fortenberry*, 661 F.2d 496, 499, 505 n.2, 506 (5th Cir. 1981) (en banc); *Johnson v. Puckett*, 929 F.2d 1067, 1069, 1072-73 (5th Cir. 1991); *Mosley v. Dretke*, 370 F.3d 467, 478 (5th Cir. 2004).

In this case, in moving to quash the indictment, Mr. Woodfox presented stipulated evidence establishing a substantial disparity over a significant time period between the percentage of blacks who served as grand jury foreperson and *both* the total population of blacks in the parish, and the population of blacks registered to vote in the parish. (Exh. A.) Nonetheless, the Louisiana First Circuit court held that Mr. Woodfox had not made out a prima facie case, based solely on its finding that Mr. Woodfox was required to present more detailed statistics about the percentage of blacks qualified to serve on the grand jury. (Exh. B.)[4] In so doing, the state court applied a rule that clearly contradicts the rule set forth in *Castaneda,* which plainly instructs litigants to establish baseline data for proving substantial underrepresentation by relying on the proportion of the minority group *"in the total population." Castaneda*, 430 U.S. at

[4] As the Magistrate Judge recognized, and the State has not contested, Mr. Woodfox clearly satisfies the remaining elements of the *Castaneda* test. (Doc. No. 33 at 65.)

494 (emphasis added); *see also* Doc. No. 98 at 4 (wherein the State concedes that *Castaneda* so holds). By applying a rule that directly contradicts the governing law set forth in *Castaneda*, the Louisiana First Circuit's decision is "certainly . . . contrary to clearly established federal law" within the meaning of 28 U.S.C. § 2254(d)(1). *Williams v. Taylor*, 529 U.S. at 403.

Moreover, the Supreme Court in *Castaneda* addressed and specifically rejected the very grounds the state court relied on in this case to deny relief: that total minority population statistics were not a reliable measure of who was qualified to serve on the jury sufficient to establish a prima facie case of discrimination. In *Castaneda*, the state court had denied relief because the record did not reflect how many individuals in the minority group at issue (Mexican Americans) were eligible to serve as grand jurors. *Castaneda*, 430 U.S. at 498 (quoting state court opinion). The state court had decided that the total population statistics were not reliable because they did not establish what portion of the total minority population were ineligible for service because they were, *inter alia*, illiterate, not of sound mind, not of good moral character, or had been convicted of a felony. The Supreme Court unequivocally rejected the state court's analysis. The Court ruled that challenges contending total population data are not sufficiently probative of the percentage of qualified minority jurors must be made through what the Court described as "rebuttal evidence." *Id.* at 498. In other words, at the second stage of the discrimination inquiry, after the petitioner has established a prima facie case, the State must actually present *evidence* that the total population data is unreliable; absent such evidence, the State has failed to rebut the prima facie case and relief is warranted. *See id.* at 498-99 (holding that the State failed to present rebuttal evidence proving that the disparity established by total population comparisons would be accounted for based on the qualifications of potential minority jurors and therefore habeas relief was warranted). *Id.* Put simply, under *Castaneda*,

challenges to the reliability of total population data based on juror qualifications are irrelevant to the prima facie case, and must be made through the presentation of specific evidence by the State at the rebuttal stage of the inquiry. *See id.* at 497-99. In this case, the Louisiana First Circuit disregarded *Castaneda*'s instruction.

In sum, the Supreme Court set forth clearly established law in *Castaneda* that: (1) the qualifications of the total population group is an issue which goes to whether the State can rebut a prima facie case, not whether the defendant can build one; and (2) even at the rebuttal stage, the State must present evidence—not speculation—that minority jurors are disproportionately unqualified for service. Yet, in this case, the state court repeated the very error that the state court made in *Castaneda*. The Louisiana First Circuit held that the petitioner was *required* as part of the prima facie case, to present detailed evidence, beyond total population data, and even beyond voter registration data, in order to establish the percentage of black jurors qualified to serve. This is a paradigmatic example of a state court decision that is "contrary to" clearly established law within the meaning of 28 U.S.C. § 2254(d)(1), because the "state court applie[d] a rule that contradicts the governing law set forth in [Supreme Court precedent]." *Williams*, 529 U.S. at 405 (and further providing a hypothetical example where, as here, the state court applied a rule imposing a more onerous burden on the habeas petitioner than the burden set forth under the relevant Supreme Court precedent). By rejecting a total population comparison as the relevant baseline, the Louisiana First Circuit applied a rule that is facially and substantively inconsistent with the clearly established law set forth in *Castaneda* for establishing underrepresentation.

ii. "Unreasonable Application"

Tellingly, Respondents only conclusorily assert that the Louisiana First Circuit decision was not "contrary to" *Castaneda*, and never expressly argue or reason the point. (*See* Doc. No. 34 at 53) *and* Doc. No. 98 (which fails even to assert the state court decision was not contrary to *Castaneda*).) Instead, in their new, untimely objections, Respondents devote their analysis in support of AEDPA deference entirely to the "unreasonable application" clause of § 2254(d)(1).

As a threshold matter, because the state court decision is "contrary to" clearly established law, this Court need not analyze whether the state court decision is also an "unreasonable application" of clearly established law within the meaning of § 2254(d)(1). The Supreme Court made clear in *Williams v. Taylor* that "a federal court may grant a writ of habeas corpus if the relevant state-court decision was *either* (1) '*contrary to*… clearly established Federal law, as determined by the Supreme Court of the United States,' *or* (2) '*involved an unreasonable application of*… clearly established Federal law, as determined by the Supreme Court of the United States.'" 529 U.S. at 404-05 (emphases to "either" and "or" added); *see also id.* at 404 (explaining that independent meaning must be given to both clauses).

In any event, the state court decision in this case also constitutes an "unreasonable application" of *Castaneda*. *See generally Williams*, 529 U.S. at 413-16 (holding a state-court decision both contrary to and involving an unreasonable application of the standards set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984)); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) (finding a state court decision both contrary to and involving an unreasonable application of the standards set forth in *Penry v. Lynaugh*, 492 U.S. 302 (1989)). The Louisiana First Circuit decision unreasonably applies clearly established federal law because its basis for changing the burden-shifting standards set forth in *Castaneda* relies on an immaterial factual distinction between the

grand jury selection process in Texas and Louisiana. Respondents rely on no authority which in any way supports a conclusion to the contrary.

a. **The State's Unreasonable Application of *Castaneda's* Burden-Shifting Standards**

Even if the state court had identified the correct legal rule in adjudicating Mr. Woodfox's claim—which it did not—the state court's application of the rule to the facts of this case is "so patently incorrect as to be [objectively] 'unreasonable'" under § 2254(d)(1). *Gardner*, 247 F.3d at 559. As discussed, the data Mr. Woodfox presented in moving to quash the indictment proved a substantial racial disparity, over a significant period of time, between the percentage of black jury forepersons and the total black population in the Parish. Indeed, Mr. Woodfox also showed that this disparity held against the percentage of black registered voters. Mr. Woodfox needed only to make the former showing to satisfy the relevant part of the *Castaneda* prima facie test, and no reasonable application of *Castaneda* could hold otherwise. As the State concedes, the Louisiana First Circuit applied the *Castaneda* rule differently. (Doc. No. 98 at 15.) The state court did so in reliance on a prior First Circuit decision, which explicitly departed from *Castaneda* on the ground that the grand jury selection system of Louisiana is different than the Texas grand jury selection system considered by the Supreme Court in *Castaneda*. (Doc. No. 98 at 15.) However, *Castaneda* and its progeny leave no doubt that that this purported distinction is wholly irrelevant to the grand jury discrimination inquiry under the Equal Protection Clause. Because the state court's decision "cannot be reconciled with any reasonable application of the controlling [Supreme Court] standard," it constitutes an unreasonable application of clearly established federal law. *Panetti*, 551 U.S. at 954.

As the sole support for its conclusion that Mr. Woodfox was required in his prima facie case to submit data as to the percentage of blacks qualified to serve as grand jurors, the

Louisiana First Circuit cited its previous decision in *State v. Young*, 569 So. 2d 570, 573-76 (La. App. 1st Cir. 1990).[5] In *Young*, the court declined to follow the instructions of *Castaneda* and *Rose,* because under the Louisiana grand jury selection system, qualifications were tested before the general venire was composed, whereas, in Texas, the district judge tested the qualifications of potential grand jurors. *Id.* at 575.

However, as discussed, the Court in *Castaneda* set forth a clear, three-part test for defendants to prove a prima facie case of grand jury discrimination in violation of the Equal Protection Clause. *See Castaneda*, 430 U.S. at 494. Like any other federal constitutional rule, that test must be followed in all cases involving such Equal Protection claims, notwithstanding variations in the way that different states administer their criminal justice systems. *See*, *e.g.*, *Williams*, 529 U.S. at 391 (recognizing that the *Strickland* test for analyzing ineffective assistance of counsel at capital sentencing proceedings—which are undeniably structured differently in different states—is clearly established law that must be followed nationwide).

Moreover, the purported factual distinction relied on by the court in *Young* is wholly immaterial to the grand jury discrimination inquiry under *Castaneda.* The Texas grand jury

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[5] Respondents are wrong to suggest that the holding in *Young* has been endorsed by the Louisiana Supreme Court in *State v. Langley*, 813 So. 2d 356 (La. 2002). (*See* Doc. No. 98 at 10 (stating that *Langley* "confirmed" *Young*).) *Langley* does not "note with approval" *Young* and other state intermediate appellate decisions requiring qualified population statistics, (*id.*), it merely observes that those cases have so held. *Langley*, 813 So. 2d at 368-369 (further explaining that the concept of the "eligible population" was acknowledged by the Supreme Court in *Alexander v. Louisiana*, 405 U.S. 625 (1972), but that, there, the Court spoke of the "eligible population" in the "broadest sense"); *see also Alexander*, 405 U.S. at 627 n.4 (indicating that census figures for parish residents 21 years of age and older reflected those "presumptively eligible" for grand jury service, even though additional statutory qualifications besides age existed in Louisiana). Acknowledging only that it is "arguable" that eligible population statistics "might be" more precise than total population statistics, *Langley* proceeds to sidestep the question of whether requiring such data is in accord with federal law because, there, the defendant had provided total population statistics, voter registration data, and statistics regarding grand jurors who actually served. 813 So. 2d at 369-70. The court found this evidence to be tantamount to the evidence the State sought to require. *Id.*

selection system considered in *Castaneda* did indeed qualify prospective grand jurors—and in fact relied on many of the same criteria as Louisiana, including requirements as to citizenship, residency, literacy and lack of a criminal background—it simply did so at a later stage of the selection process. *Compare Castaneda*, 430 U.S. at 490 (discussing the statutory qualifications of citizenship, literacy, sound mind, moral character, and lack of criminal record or accusation in Texas) *with Young*, 569 So. 2d at 574, n.6 (discussing the statutory qualifications of citizenship and residency, literacy, lack of infirmity, and lack of criminal record or accusation in Louisiana). The probativeness of total population statistics simply does not correlate with *when* qualifications are tested. If potential grand jurors are not qualified for service, in both Texas and Louisiana, they will at some point be disqualified for service. This means that, in either state, total population figures may well include a segment of people unqualified for grand jury service. But *Castaneda* squarely holds that total population data is nevertheless sufficiently probative to be used by a defendant seeking to establish a prima facie case of discrimination. *See* 430 U.S. at 494. Thus, following the *Castaneda* test in Louisiana does not, as *Young* reasoned, "ignore the fact that a substantial percentage of the general population does not meet the five qualifications which must be met in order to serve on a grand jury." *Young*, 569 So. 2d at 575. Instead, just as is true in Texas, if total population statistics are for some reason an unreliable measure of the percentage of qualified minority jurors, the State has an opportunity to prove that point with specific evidence in its rebuttal case. *See Castaneda*, 430 U.S. at 497-99.

However, *Castaneda* rejects speculation, without any evidentiary foundation, that a disparity between the segment of people unqualified for grand jury service and the total population will correlate with race. In other words, *Castaneda* declines to do what *Young* does implicitly, and what the Louisiana First Circuit did in this case; to presume without any evidence

that minority jurors are less likely than whites to be qualified for service. The Louisiana First Circuit's conjecture that, "[i]t is entirely possible that [the racial disparity Mr. Woodfox had demonstrated between the proportions of blacks in the total population/among registered voters and blacks serving as forepeople] might be reduced, if not eliminated, when considering how many of the registered voters were actually qualified to serve," reflects the very sort of speculation that the Supreme Court in *Castaneda* squarely rejected. *See Castaneda*, 430 U.S. at 498-499 (rejecting state court conclusion that the total population statistics relied on by the defendant were of "little force or effect," *Partida v. State*, 506 S.W.2d 209, 211 (Tex. Crim. App. 1979), because they did not account for grand jury service qualifications, including literacy, good moral character, and lack of a felony conviction). The Court in *Castaneda* instead held that, because the State had not presented any rebuttal evidence, "it is impossible to draw any inference about literacy, sound mind, and moral character, and criminal record," and therefore the disparity between the percentage of Mexican-American grand jurors and the Mexican-American percentage of the county's total population (combined with the defendant's satisfying the other elements of the prima facie case) warranted habeas relief. *Castaneda*, 430 U.S. at 498-99.[6]

Finally, it is apparent that the purported factual distinction between the grand jury selection systems of Texas and Louisiana is immaterial because other Supreme Court and Fifth Circuit decisions have considered jurisdictions wherein general venires are "pre-qualified" and consistently applied the inquiry into grand jury discrimination as it was applied in *Castaneda*. In

[6] Even as Respondents advance their unpersuasive argument that the Louisiana First Circuit decision is a reasonable application of the law, Mr. Woodfox has already shown that blacks in West Feliciana were as qualified as whites for grand jury service; the data he submitted in postconviction proceedings relying on blacks who actually served on grand juries confirmed the disparity already demonstrated using total population and registered voter information.

Rose v. Mitchell, the Supreme Court case squarely concerned with foreperson selection, the Tennessee jury selection system was one wherein the jury commissioners "pre-qualified" the grand jury; commissioners compiled a list of qualified potential jurors to fill the general venire, and from this venire grand jurors were selected at random. *See Rose*, 443 U.S. at 548 n.2. The foreperson in the Tennessee system, as in the instant case, was hand selected by the judge from the eligible population. *Id.* Several Fifth Circuit decisions have likewise applied the *Castaneda* burden-shifting test without modification when addressing grand jury selection systems wherein foremen were drawn from pre-qualified pools, including Louisiana's. *See, e.g.*, *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981) (en banc) (considering the Louisiana grand jury foreperson selection system); *Johnson v. Puckett*, 929 F.2d 1067, 1069 (5th Cir. 1991) (considering a Mississippi jury selection system where the judge selected a foreperson from an empanelled grand jury). Indeed *Mosley v. Dretke*, 370 F.3d 467, 478 (5th Cir. 2004), considered the foreperson selection system of a Texas county (the same jurisdiction considered in *Castaneda*), where, just as in this case, the judge appointed a foreperson from a pre-qualified pool of eligible grand jurors.

What makes the Louisiana First Circuit's application of the relevant law to the facts of this case "so patently incorrect as to be 'unreasonable,'" *Gardner*, 247 F.3d at 560, is that, unsupported by a single material factual distinction, it turns the general burden-shifting standards set out in *Castaneda* on their head. The state court below unreasonably requires the petitioner to present qualification evidence when, under *Castaneda*, such evidence is *not* required in the prima facie case, and rather may be presented by the State at the rebuttal stage of the inquiry, at the State's election. The rule applied by the state court below, requiring Mr. Woodfox to prove the percentage of blacks qualified to serve as grand jurors at the prima facie stage,

simply does not square with the Equal Protection burden-shifting standards relied on and endorsed by *Castaneda* and its progeny. Thus, it does not, as Respondents now urge, "make the State's argument stronger" that the Louisiana grand jury selection system involved a "pre-qualified" venire pool (Doc. No. 98 at 15); instead, the fact that the state court changed the burden-shifting standards set forth in *Castaneda* based on an entirely immaterial distinction only illustrates that court's unreasonable application of clearly established federal law.

b. **Respondents' Authorities are Wholly Inapposite**

Respondents urge that *Barksdale v. Blackburn*, 639 F.2d 1115 (5th Cir. 1981), should be read as permitting courts to *require* petitioners to present evidence beyond total population data (or even voter registration statistics) in order to meet the prima facie case. (Doc. No. 98 at 14-15.) This argument, which the State also made in its Answer, (*see* Doc. No. 22 at 26-30), is untenable, and has already been properly rejected by the Magistrate Judge and this Court.

According to Respondents, *Barksdale* "closed the question" of whether a court can require a defendant to use eligible population statistics to prove substantial underrepresentation. (Doc. No. 98 at 14 (contending that this "is not an open question" in the Fifth Circuit).) However, the Supreme Court itself closed this question in *Castaneda*—but in the opposite direction from what the State submits. As discussed, in *Castaneda*, the Court expressly rejected a state court decision which reasoned that relief should be denied because total population statistics were inadequate to satisfy the petitioner's burden. *Barksdale* does not even suggest that the question should reopened. While *Barksdale* states that *Castaneda* "should not be read to require using [total population] figures," Respondents conflate not requiring that data with permission to preclude it. *Barksdale* provides no such authority. *Barksdale* explains that statistics other than total population statistics may be used as the baseline comparison data *if*, *but only if*,

those statistics are in the record, introduced by the defendants and stipulated to by the parties. *See* 639 F.2d at 1123 (qualifying that statistics other than total population should only be used, "where, as here, those statistics are in the record"); *id.* at 1124. *Barksdale* simply provides no support for the proposition that a court may reject a petitioner's claim for failure to make a prima facie case when more detailed statistics are not in the record and the petitioner has not consented to their use (much less where, as here, had they been in the record, they would have only strengthened the claim, *see also* Part III, *infra*). Indeed, the only other federal case Petitioner has found which squarely considers the interpretation of *Barkdale* herein advanced by the State ruled accordingly. *See United States v. Breland*, 522 F.Supp.468, 479, n.14 (N.D. Ga. 1981). [7]

Apart from *Barksdale*, the State cites to *Schexnaydre v. Cain,* Civ. No. 08-294-FJP-DLD, 2009 WL 3242552 (M.D. La. Oct. 8, 2010) as support for its contention that the Louisiana First Circuit below reasonably applied clearly established federal law. (Doc. No. 98 at 13-14.) *Schexnaydre* is unavailing. In *Schexnaydre*, the court reviewed a pro se petition asserting a claim for grand jury foreperson discrimination against African Americans. The court had no access to the state court ruling on the issue, or the transcript of the hearing where the claim was argued. *Id.* at *5. Nevertheless, the court, in a decision by Judge Polozola adopting the Report and Recommendation of Magistrate Judge Dalby, was able to determine from a handwritten note in

[7] As that court explained:

> The government urges that defendants' population data is insufficient to prove a prima facie case since it does not account for literacy and other juror requirements. This argument is without merit. The prima facie case requirements of *Rose* clearly provide that the degree of underrepresentation is to be compared with the "**proportion of the group in the total population**." While we would be inclined to use 'more meaningful eligible population statistics (if) those statistics (were) in the record," *United States ex. rel. Barksdale v. Blackburn*, 639 F. 2d 1115, 1123 (5 Cir. 1981), the government failed to introduce population figures which took into account factors beyond the data submitted by defendants.

Id. (emphasis in original).

the record that petitioner's claims were procedurally barred because he never filed a motion to quash the grand jury indictment in the trial court. *Id.*

Schexnaydre proceeded to decide in the alternative that the evidence petitioner submitted in support of his prima facie case was deficient. *Id.* at *7. At the outset, the court found the evidence deficient because the data that the petitioner had apparently submitted to the state court concerned percentage of blacks in the local population of registered voters in the year 2000, and the number of minority grand jury forepersons selected between 1978 and 1992. *Id.* The court found that neither set of figures carried the petitioner's burden because he had been indicted in 1995. *Id.* Then, citing only *state* cases, the court in *Schexnaydre* concluded that proof of the percentage of registered black voters is not sufficient to show substantial underrepresentation without evidence of the percentage of those registered voters who were "qualified" to serve, or evidence of the percentage of those who actually served. *Id.* (string citing Louisiana cases) and *State v. Langley*, 813 So. 2d 356 (La. 2002)). *Schexnaydre* never addressed whether those state court decisions reasonably applied Supreme Court precedent by requiring data beyond general population data. *Id.* at *6-7. Indeed, *Schexnaydre* provides no suggestion that the pro se petitioner even argued the issue. *Schexnaydre* plainly did not attempt to abrogate the controlling Supreme Court precedents in *Castaneda* and its progeny. Even if it had, the decision—which is not binding on this court—would be unpersuasive. *In re Fema Trailer Formaldehyde Prods. Liab. Litig.*, 719 F. Supp. 2d 677, 687 (E.D. La. 2010) (noting that a district court is not bound by another district court decision). The two remaining authorities cited—and not explained—by Respondents are likewise inapposite.[8]

[8] Respondents assert that *United States v. Brummitt*, 665 F.2d 521, 529-30, n.14 (5th Cir. 1981), "held that, to prove a prima facie case, 'the disparity between the proportion of members of an identifiable class

C. The Last Reasoned Decision Was Rendered By the Postconviction Court

The foregoing analysis clearly shows that, even assuming, as the State does, that the relevant state court decision for this Court's review is the decision by the Louisiana First Circuit on direct appeal, the First Circuit's decision was both contrary to, and an unreasonable application of, clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1). However, federal courts look to the last reasoned state court decision when reviewing a habeas claim. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Wood v. Quarterman*, 491 F.3d 196, 202 (5th Cir. 2007). In this case, the postconviction court's decision is the last reasoned decision, and is thus the decision this Court is bound to review. As the State concedes, Petitioner introduced the data—even under the state court's clear misapplication of Supreme Court precedent—sufficient to establish a prima facie grand jury claim in those proceedings. (*See* Doc. No. 98 at 17.) Indeed, that data only strengthened Mr. Woodfox's claim.

The State claims that the state postconviction court rejected Mr. Woodfox's claim as procedurally barred on the ground that Mr. Woodfox was required to present the additional statistics at trial and on direct appeal. Notably, however, the State does not quote any of the state court's ruling. As discussed, the state postconviction court, adopting the State's

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on a jury list must be based not on total population but, instead, on those of the identifiable class who are eligible to serve as jurors.'" (Doc. No. 98 at 14.) Respondents neglect to inform the Court that the cited portion of *Brummitt* explicitly contemplates, not an Equal Protection claim, but rather, how "to establish the prima facie case of a denial of a fair cross-section claim," under a federal statute. *Id.* Moreover, in *Brummitt*, like *Barksdale*, there *were* additional, undisputed statistics beyond total population data in the record, namely voter registration data, which directly undermined petitioner's claim. 665 F.2d at 529. In this case, Mr. Woodfox presented both total population and voter registration data in his motion to quash; unlike *Brummitt*, however, the disparity was identical using both sources of information. (*see* Exh. A at 6.) Respondents also cite *Chin v. Runnels*, 343 F.Supp.2d 891, 901 (N.D. Cal. 2004), where, as in *Barksdale*, the defendant consented to the use of statistics beyond total population data, which were in the record, and as here further confirmed substantial disparity. *See also People v. Brown*, 75 Cal. App. 4th 916, 925 (Cal. App. 1st Dist. 1999) (describing the evidence heard by the trial court in a hearing on Chin and his co-defendants' joint motion to quash the indictment, all of which confirmed substantial underrepresentation).

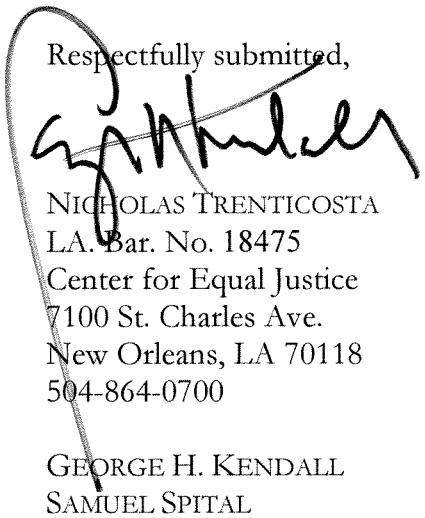
postconviction brief, rejected Mr. Woodfox's grand jury foreperson claim squarely on the merits, reasoning that the new evidence did not change the direct appeal analysis and that the claim was therefore "meritless." *See* page 3, *supra*. Whether the state postconviction court *could* have rejected the claim, and the additional postconviction data supporting that claim, on procedural grounds, it did not do so. (*See* Doc. No. 98 at 15 (citing provisions of the Louisiana Code of Criminal Procedure provision never mentioned in the state postconviction brief, nor relied on by the state postconviction court).) Federal courts on habeas do not enforce procedural bars not enforced by the state court in the Petitioner's case. *See, e.g., Harris v. Reed*, 489 U.S. 255, 261-262 (1989).

Even if the State were correct that it is a reasonable application of *Castaneda* and *Rose* to *require* defendants to present data beyond total population and voter registration as a baseline for establishing under representation—which it is not—that data *were* submitted and passed upon in postconviction review. Accordingly, even under the State's untenable analysis of the relevant Supreme Court precedent, the final state court that reviewed the merits of Mr. Woodfox's grand jury foreperson discrimination claim reached a decision that was "contrary to," and "an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1).

V. Conclusion

Petitioner respectfully submits that there is no basis for re-litigating the question of whether Mr. Woodfox has made a prima facie showing of grand jury foreperson discrimination. Petitioner further respectfully submits, for the foregoing reasons, that the state court's decisions were contrary to, and an unreasonable application of, *Castaneda*; and that an evidentiary hearing is warranted on Mr. Woodfox's grand jury foreperson discrimination claim.

Respectfully submitted,



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