03/24/2016 "See News Release 017 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 15-KH-1000

STATE EX REL. TROY ARNAUD

v.

STATE OF LOUISIANA

ON SUPERVISORY WRITS TO THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON

PER CURIAM:

Denied. Relator fails to show he received ineffective assistance of trial and appellate counsel under the standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to the remaining claims, relator shows no error in the thorough analysis performed by the District Court. We attach hereto and make a part hereof the District Court's written reasons denying relator's application.

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, see 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive

Guidry, J. recused

application applies, relator has exhausted his right to state collateral review. The District Court is ordered to record a minute entry consistent with this per curiam.

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 11-721 DIVISION "E"

STATE OF LOUISIANA

VERSUS

TROY ARNAUD

FILED: 2-10-15

DEPUTY CLERK

ORDER

This matter comes before the court on petitioner's **APPLICATION FOR POST-CONVICTION RELIEF, STAMPED AS FILED JULY 10, 2014, STATE'S RESPONSE, STAMPED AS FILED DECEMBER 2, 2014, AND PETITIONER'S TRAVERSE TO THE STATE'S OPPOSITION, STAMPED AS FILED DECEMBER 29, 2014.**

On April 17, 2012, petitioner was convicted of count #1, LSA-R.S. 14:30.1, second degree murder, and count #3, LSA-R.S. 14:130.1, obstruction of justice. On April 30, 2012, the court sentenced him on count #1 to life imprisonment at hard labor, and on count #3 to 30 years, consecutively. His convictions and sentences were affirmed on appeal. *State v. Arnaud,* 12-899 (La. App. 5 Cir. 5/16/13), 113 So.3d 1218; writ denied, *State ex rel Arnaud v. State*, 2013-1985 (La. 3/21/14), 135 So.3d 614.

The petitioner filed an application for post-conviction relief, alleging the following claims:

1. Insufficient evidence.
2. Petitioner was denied right to testify.
3. Ineffective assistance of counsel for
   a. Failing to object to prosecutor's misstatement of law of principals during voir dire.
   b. Failure to make an opening statement.
   c. Failure to object to prejudicial and irrelevant hearsay.
   d. Failure to properly cross-examine Gregory Ford.
   e. Failure to object to prosecutor's repeated attempts to bolster Gregory Ford's credibility through use of expert testimony.
   f. Failure to object to prosecutor's coercive misconduct.
   g. Placed petitioner on scene in closing argument.
4. Ineffective assistance of appellate counsel.
5. Violation of right to equal protection -- Louisiana's non-unanimous verdict system was enacted for racially discriminatory purposes.

Claim #1

The court finds this claim procedurally denied under LSA-C.Cr.P. art 930.4(C), which states if the application alleges a claim that was raised at trial, but was inexcusably not pursued on appeal, the court may deny relief. Petitioner raised this claim in his Motion for New Trial, but failed to pursue it on appeal. The court finds this claim procedurally barred from review.

Claim #2

Petitioner claims that he was denied the right to testify at trial. He argues that his trial counsel informed him that the prosecutor informed him that should he testify on his own behalf, the State would charge his wife with accessory after the fact, and thus he was deprived the right to present his defense.

The petitioner fails to provide the necessary requirements to support this claim as required by the Louisiana Supreme Court in *State v. James,* 05-2512 (La. 9/29/06), 938 So.2d 691, which states, "Though this Court recognizes that an attorney's interference with a defendant's desire to testify may violate the defendant's constitutional rights, we also require that the claimant 'allege specific facts, including an affidavit from counsel' and point to record evidence to support his claim. *State v. Hampton*, 00-0522, p. 14-15 (La.3/22/02), 818 So.2d 720, 729-30.

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APPENDIX – 1
G

Petitioner's claim is merely speculative. Nothing in the record or in petitioner's application supports these allegations. Petitioner has not met his burden of proof, and this claim will be denied.

Furthermore, as the State points out in its response, petitioner stated on the record, when asked by his trial counsel, that he was choosing on his own free will not to testify in this case. The court then conducted a colloquy with petitioner, insuring that petitioner understood that his was his choice to testify, and that he could not be forced to make one choice or the other.

Petitioner, in his traverse, argues that the State failed to address prosecutorial misconduct. However, he court finds no merit to this claim. It is within the District Attorney's power and authority to institute charges, as the District Attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute. LSA-C.Cr.P. art. 61.

Claim #3 -- Ineffective Assistance of Counsel

It is clear that the petitioner has a Sixth Amendment right to effective legal counsel. Under the well-known standard set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Washington,* 491 So.2d 1337 (La.1986), a conviction must be reversed if the defendant proves (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. *State v. Legrand,* 2002-1462 (La.12/3/03), 864 So.2d 89.

To be successful in arguing a claim of ineffective assistance of counsel, a post-conviction petitioner must prove deficient performance to the point that counsel is not functioning as counsel within the meaning of the Sixth Amendment. A petitioner must also prove actual prejudice to the point that the results of the trial cannot be trusted. It is absolutely essential that both prongs of the *Strickland* test must be established before relief will be granted by a reviewing court.

Furthermore, there is a strong presumption that counsel's performance is within the wide range of effective representation. Effective counsel, however, does not mean errorless counsel and the reviewing court does not judge counsel's performance with the distorting benefits of hindsight, but rather determines whether counsel was reasonably likely to render effective assistance. *State v. Soler*, 93-1042 (La.App. 5 Cir. 4/26/94), 636 So.2d 1069, 1075.

Mindful of controlling federal and state jurisprudence, this court now turns to the specific claims of ineffective assistance made in petitioner's application and argued in the memorandum in support, as well as the State's response and petitioner's traversal.

3(a)

Petitioner claims that counsel was ineffective in failing to object to the State's example of principles used in voir dire. The court finds no merit to this claim, as it was merely a hypothetical, and was used to accurately explain how one could be charged as a principle to an offense without possessing any intent to commit the crime. The court finds no error in his explanation, as it relates to the crimes for which petitioner was charged as enumerated in LSA-R.S. 14:30.1(A)(2). Furthermore, the petitioner fails to prove any prejudice. Regardless, the court properly instructed the jury regarding the elements of the charged offenses, principles, and attempt.

3(b)

Petitioner claims that counsel was ineffective in waiving opening statements. Petitioner fails to establish any deficiency in counsel's performance, or any prejudice resulting. This claim is purely speculative and conclusory. On the showing made, it will be denied.

3(c)

Petitioner claims that counsel was ineffective in allowing hearsay during the State's direct examination of Sergeant Spera. The court finds no merit to this claim, as the testimony of Spera does not contain hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. LSA-C.E. 801(C). Petitioner's allegations are misplaced. The court finds no merit to this claim.

3(d)

Petitioner claims that counsel was ineffective for failing to cross-examine Mr. Ford as to prior calls to police and shootings at his mother's house by Hispanic people. The court finds no merit to this claim, as this claim is solely based on speculation. Petitioner fails to prove any prejudice resulting.

3(e)

Petitioner claims the counsel was ineffective for failing to object to prosecutor's repeated attempts to bolster Ford's credibility through use of expert testimony. As the State surmises in its response, under LSA-C.E. 702, the expert witnesses are authorized to testify as to their observations and opinions. Petitioner fails to establish how this line of questioning was improper or illegal. Petitioner fails to prove any deficiency in c0ounsel's performance, or prejudice resulting.

3(f)

Petitioner claims that counsel was ineffective for failing to object to prosecutor's misconduct by threatening to charge petitioner's wife with accessory after the fact in petitioner were to testify on his own behalf. As previously noted (claim #2, above), petitioner's claim is unsupported and purely speculative, as the record reflects that petitioner was not prevented from testifying. The court finds no deficiency in counsel's performance and no prejudice resulting.

3(g)

Petitioner claims that counsel was ineffective for placing defendant on the murder scene in her closing argument, without discussing with him. The court finds that this claim of ineffective assistance of counsel go to trial counsel's strategy. The Supreme Court has emphatically directed that, "in evaluating the performance of counsel, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674.

Furthermore, as the State surmises in its response, other evidence was presented that established that the three men left the bar together, and that defendant assisted Ford in tampering with and/or destroying evidence in attempt to influence the investigation of the murder. Petitioner fails to prove that counsel acted deficiently, and that prejudice resulted.

Claim #4 – Ineffective Assistance of Appellate Counsel

Petitioner claims that appellate counsel was ineffective for failing to assign and brief a claim of insufficient evidence. In reviewing claims of ineffective assistance of counsel on direct appeal, the Supreme Court of the United States has expressly observed that appellate counsel "need not advance every argument, regardless of merit, urged by the defendant. *Evitts v. Lucey,* 469 U.S. 387, 394 (1985). The Court gives great deference to professional appellate strategy and applauds counsel for "winnowing out weaker arguments on appeal and focusing on one central issue if possible, and at most a few key issues. *Jones v. Barnes*, 463 U.S. 745 (1983). This is true even where the weaker arguments have merit. *Id.* at 751-2.

When the claim of ineffective assistance of appellate counsel is based on failure to raise the issue on appeal, the prejudice prong of the *Strickland* test requires the petitioner to establish that the appellate court would have granted relief, had the issue been raised. *United States v. Phillips*, 210 F.3d 345, 350 (5 Cir. 2000).

In his application, petitioner fails to establish that counsel was ineffective, as the facts and evidence presented at trial were constitutionally sufficient for the jury to return a verdict of guilty. The petitioner fails to prove that appellate counsel would have been successful in pursing this issue of appeal.

Claim #5

Petitioner claims that the law permitting a non-unanimous jury verdict violated his right to equal protection. The statute in question is LSA-C.Cr.P. art 782, which reads as follows:

Number of jurors composing jury; number which must concur; waiver

A. Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases.

As the State points out in its response, the court finds this claim procedurally barred. Under LSA-C.Cr.P. art. 930.4, if the application alleges a claim which the petitioner had

knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court may deny relief. Furthermore, the court finds that under *State ex rel. Rice v. State*, 749 So.2d 650 (La. 1999), petitioner's use of the Uniform Application satisfies the requirement of LSA-C.Cr.P. art. 930.4(F). The court finds this claim procedurally barred from review in post-conviction relief.

Furthermore, petitioner fails to follow the proper procedure for at contesting the constitutionality. The Louisiana Supreme Court has outlined the proper procedure for challenging the constitutionally of a statute:

> While there is no single procedure for attacking the constitutionality of a statute, it has long been held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. *State v. Schoening*, 00–0903, p. 3 (La.10/17/00), 770 So.2d 762, 764 (citing *Vallo v. Gayle Oil Co.*, 94–1238, p. 8 (La.11/30/94), 646 So.2d 859, 864–65). This Court has expressed the challenger's burden as a three step analysis. **First,** a party must raise the unconstitutionality in the trial court; **second,** the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized. *Vallo v. Gayle Oil Co., Inc.*, 94–1238, p. 8 (La.11/30/94), 646 So.2d 859, 864–865. The purpose of these procedural rules is to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute. *State v. Schoening,* 00–0903, p. 3 (La.10/17/00), 770 So.2d 762, 764 (citing *Vallo v. Gayle Oil Co., Inc.*, 94–1238, p. 8 (La.11/30/94), 646 So.2d 859, 865). The opportunity to fully brief and argue the constitutional issues provides the trial court with thoughtful and complete arguments relating to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to consider the constitutionality of the statute. *Id.*
>
> **The final step** of the analysis articulated above requires that the grounds outlining the basis of the unconstitutionality be particularized. This Court has thoroughly considered the standard for particularizing the constitutional grounds. The purpose of particularizing the constitutional grounds is so that the adjudicating court can analyze and interpret the language of the constitutional provision specified by the challenger. *State v. Expunged Record (No.)* 249, 044, 03–1940, p. 4 (La.7/2/04), 881 So.2d 104, 107 (citing *Louisiana Mun. Ass'n v. State,* 00–0374, p. 5 (La.10/6/00), 773 So.2d 663, 667 ("In adjudicating [a] constitutional challenge, the court must analyze and interpret the language of the constitutional provision specified by the challenger.")). This basic principle dictates that the party challenging the constitutionality of a statute must cite to the specific provisions of the constitution which prohibits the action. *State v. Fleury*, 01–0871, p. 5 (La.10/16/01), 799 So.2d 468, 472 (citing *Moore v. Roemer,* 567 So.2d 75, 78 (La.1990)); see also State v. Granger, 07–2285, p. 3 (La.5/21/08), 982 So.2d 779; *State v. Herring*, 211 La. 1083, 31 So.2d 218, 219–220 (1947) (citing City of Shreveport v. Pedro, 170 La. 351, 127 So. 865 (La.1930)); *A. Sulka & Co. v. City of New Orleans,* 208 La. 585, 23 So.2d 224, 229 (1945) ("It is elementary that he who urges the unconstitutionality of a law must especially plead its unconstitutionality and show specifically wherein it is unconstitutional....").
>
> In addition to the three step analysis for challenging the constitutionality of a statute, the specific plea of unconstitutionality and the grounds therefor must be raised in a pleading. See *State v. Schoening*, 00–0903, p. 4 (La.10/17/00), 770 So.2d 762, 765, citing Williams v. State, Dept. of Health and Hospitals, 95–0713, p. 6 (La.1/26/96), 671 So.2d 899, 902 (recognizing that "Louisiana jurisprudence requires that the constitutionality of a statute be specially pleaded in a petition, exception, written motion, or answer and that the grounds be particularized, so that the parties are given sufficient time to brief and prepare arguments regarding their position on a constitutional question."); *State v. Campbell*, 263 La. 1058, 270 So.2d 506 (1972)(wherein this Court refused to consider grounds of unconstitutionality not raised in the defendant's Motion to Quash); *State v. Herring*, 211 La. 1083, 31 So.2d 218, 219–220 (1947) ("This Court has consistently refused to consider an attack on the constitutionality of a law where such issue is not raised by the pleadings. The attack on the constitutionality of a law must be urged by special plea setting forth therein grounds on which it is claimed that the law is unconstitutional.").
>
> Thus, in light of the foregoing jurisprudential rules, in order to properly confect a constitutional challenge, a party must raise the constitutional issue in the trial court by

> raising the unconstitutionality and the grounds outlining the basis of the alleged unconstitutionality in a properly filed pleading in the trial court, ...

State v. Hatton, 2007-2377 (La. 7/1/08), 985 So. 2d 709, 719-20. In this case, petitioner clearly fails to follow the proper procedure in attacking LSA-C.Cr.P. art 782, as he did not file a proper pleading at the appropriate time.

Furthermore, even if petitioner had properly filed such pleading, it would have been without merit and properly denied. The First Circuit Court of Appeal recently addressed this same issue, relying on the Louisiana Supreme Court's decision in *State v. Bertrand*, 2008-2215 (3/17/09) 6 So.3d 738:

> In two related assignments of error, the defendant argues that Louisiana Constitution article I, § 17 A, that allows for non-unanimous jury verdicts, violates the right to a jury trial and the right to equal protection of the laws guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.[3] Specifically, the defendant argues that the enactment of its source provision in the Louisiana Constitution of 1898 was motivated by an express and overt desire to discriminate on the basis of race.
>
> The punishment for second degree murder is life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. See La. R.S. 14:30.1 B. Article I, § 17 A and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than unanimous jury does not violate the right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 1630, 32 L.Ed.2d 184 (1972); *State v. Belgard*, 410 So.2d 720, 726–27 (La.1982); *State v. Shanks*, 97–1885, pp. 15–16 (La.App. 1 Cir. 6/29/98), 715 So.2d 157, 164–165.
>
> This court and the Louisiana Supreme Court have previously rejected the argument raised in defendant's assignments of error. *See State v. Bertrand*, 2008–2215, pp. 6–7 (La.3/17/09), 6 So.3d 738, 742–43; *State v. Smith*, 2006–0820, pp. 23–24 (La.App. 1 Cir. 12/28/06), 952 So.2d 1, 16, writ denied, 2007–0211 (La.9/28/07), 964 So.2d 352. In *Bertrand*, the Louisiana Supreme Court specifically found that a non-unanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. Moreover, the *Bertrand* court rejected the argument that non-unanimous jury verdicts have an insidious racial component and pointed out that a majority of the United States Supreme Court also rejected that argument in *Apodaca*. Although *Apodaca* was a plurality rather than a majority decision, the United States Supreme Court has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to non-unanimous jury verdicts represents well-settled law. *Bertrand*, 2008–2215 at 6–7, 6 So.3d at 742–743. Thus, Louisiana Constitution article I, § 17 A and Louisiana Code of Criminal Procedure article 782(A) are not unconstitutional and, therefore, not in violation of the defendant's federal constitutional rights.

State v. Hammond, 2012-1559 (La. App. 1 Cir. 3/25/13), 115 So. 3d 513, 514-15 (La. Ct. App.) writ denied, 2013-0887 (La. 11/8/13), 125 So. 3d 442 *and cert. denied*, 134 S. Ct. 1939, 188 L. Ed. 2d 965 (2014).

Conclusion

Under LSA- C.Cr.P. art. 930.2, the petitioner in an application for post-conviction relief shall have the burden of proving that relief should be granted. Petitioner fails to prove his burden as to any of his aforementioned claims.

The court notes that petitioner has requested appointment of counsel and an evidentiary hearing. The court finds that petitioner is not entitled to appointed counsel or an evidentiary hearing. Under LSA-C.Cr.P. art. 929, if the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, the court may grant or deny relief without further proceedings.

Accordingly,

IT IS THE ORDER OF THIS COURT that petitioner's *Application for Post-Conviction Relief, Motion for Evidentiary Hearing,* and *Motion for Appointment of Counsel* and the same are hereby **DENIED.**

Gretna, Louisiana this 10th day of February, 2015.

JUDGE

S/JOHN J. MOLAISON, JR.

PLEASE SERVE:

PETITIONER: Troy Arnaud, DOC # 375747, Louisiana State Penitentiary, Angola, LA 70712

Terry Boudreux, Juliet Clark, District Attorney's Office, 200 Derbigny St., Gretna, LA 70053

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