No. 15-8114

IN THE SUPREME COURT OF THE UNITED STATES

JAMES TYLER, III,

Petitioner,

vs.

DARREL VANNOY, Acting Warden, Louisiana State Penitentiary

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

ARGUMENT

This reply brief is filed to correct misrepresentations put forth by the Respondent in its *Opposition to Application for Writ of Certiorari* filed with this Court on August 1, 2016. The Respondent has misrepresented, miscited, and misunderstood the record and petitioner's claims. This reply brief corrects these serious misrepresentations and reemphasizes the serious mistakes that were committed prior to and during trial by the district court and Mr. Tyler's defense counsel.

A. The Evidence of Mr. Tyler's Guilt was Not Overwhelming

Respondent refers to the evidence against Mr. Tyler as "overwhelming." *See Opposition Brief* at 5. Petitioner again asserts that to classify the evidence in this case as "overwhelming" when there is no physical evidence, no oral or written confessions to the police, extremely questionable eyewitness identifications, and based on the testimony of a crack addicted prostitute that Mr. Tyler allegedly confessed to, is vastly ***overstating*** the strength of the State's case. The State disingenuously argues that the letter Mr. Tyler wrote to Elijah Clark confessing to the crimes is part of the "overwhelming evidence" of Mr. Tyler's guilt at the time of the trial which is a serious distortion of the record in this case. *See Opposition Brief* at 5.

First, that letter was not a part of the guilt phase of the trial. The State had no such confession letter and that letter was never introduced into the guilt phase of the trial. The letter from Mr. Tyler to Elijah Clark was introduced by the ***defense*** at the **penalty** phase of the trial, an issue that has been raised in state post–conviction proceedings as another egregious example of trial counsel's ineffectiveness during the penalty phase.

By introducing the letter, once again, against Mr. Tyler's full objections, the defense introduced the following description of the crime that indicates absolutely no remorse:

> What up my nigger. I'm happy to hear from you. Also happy to know you are doing good. Me, I'm all right considering my circumstances. I fucked some shit up this time. I was broke one day; I just couldn't take it no more. So I walked into Pizza Hut, off like, oh, dog, bam. Pop, pop, shoot 'em up. The next thing I knew, I had shoot two people in the head and now I'm here.

Vol. 18 p.3972.

The introduction of the letter conceding guilt against Mr. Tyler's wishes in the penalty phase of the trial is also a violation of *Strickland.*

Immediately after Mr. Clark left the stand and the letter was introduced, the Petitioner objected and the Court gave defense counsel an opportunity to explain.

> Tyler: I object to that letter that defense counsel just placed into evidence. He didn't tell me that he had it or discussed with me he was going to put it in there.
>
> Court: Defense counsel would you like to state for the record why you are doing what you are doing.

R. 3972.

Leaving more questions than answers, counsel stated:

> Mr. Golden: Your Honor, we've discussed with Mr. Tyler our objective: To show the jury his life story. . . . Of course, we do everything we possibly could to help show all sides and that's what we are doing. . . . I don't know if we mentioned specifically this letter, but generally our purpose for doing all this is to help him.

R. 3972-73.

> Tyler: I haven't reviewed anything he was going to place in evidence.

R. 3972-73.

The Court stated it was trial counsel's decision and noted Mr. Tyler's objection. R. 3973.

Just as in the guilt phase once again decisions that belonged to Mr. Tyler were stripped from him by the trial court and his attorneys.

This letter was not part of the evidence introduced at the guilt phase of the trial and should therefore not be considered in evaluating the actual strength of the evidence at the time of Mr. Tyler's trial.

The actual evidence presented by the State at Mr. Tyler's trial was not as the State suggests "overwhelming."

There was absolutely no forensic evidence that connected Mr. Tyler to the crime scene or the crime. Mr. Tyler's fingerprints were not at the scene and there was no other forensic evidence from the scene tested to either include or exclude him as the perpetrator. The police found a .22 caliber bullet in the motel room that Mr. Tyler occupied with Ms. Tedder; however, there was no indication that it had any connection to the crime or even Mr. Tyler. No weapon was recovered, so there could be no bullet or fingerprint comparisons. None of the items recovered from the body shop behind the motel were directly connected to Mr. Tyler.

One of the eyewitnesses, Roberson, could not pick Mr. Tyler out of either a photographic lineup or a later live line-up.

Had defense counsel presented readily available evidence, he could have established that Denise Washington and Rashaan Roberson described the perpetrator as wearing clothing that did not match what Mr. Tyler was wearing. Defense counsel could have established that Denise Washington described the gunmen as being very short and estimated his height as 4'10. Mr. Tyler was 5'9. Defense counsel could have established that Roberson and Washington repeatedly described the assailant as having a fade style haircut and that Mr. Tyler's hair was not cut in a fade style. Defense counsel could also have presented evidence that Mr. Tyler had visible tattoos and scars. Denise Washington and Rashaan Roberson testified they did not notice any scars or tattoos. Defense counsel also could have presented testimony that Roberson

described the gunman as having a slim build and as being light complected, while Mr. Tyler has a stocky build and is dark complected. *See Petitioner's Brief* at 26-31.

Sharlott Tedder's description of Mr. Tyler's clothing completely differed from that given by Ms. Washington and Mr. Roberson, who were direct eyewitnesses to the gunman's appearance at the crime scene. *See Petitioner's Brief* at 27;

B. The Respondent Misinterprets and Misleadingly Cites Lower Court Decisions Addressing Concession of Guilt Claims

The Respondent mischaracterizes the decision by the *Haynes en banc* court as holding that all cases involving any degree of concession of guilt are governed by *Strickland* analysis rather than *Cronic*. The Respondent claims that Mr. Tyler's case is the same as Mr. Hayne's case. *See Opposition Brief* at 8. The Respondent fails to mention the crucial distinction between *Hayne's* and Petitioner's case. In *Haynes v. Cain,* 298 F.3d 375 (5th Cir. 2002) (en banc), the defense attorneys conceded that the defendant was guilty of the underlying felony of rape, but disputed that the defendant had the specific intent to kill that is necessary for a finding of first-degree murder in Louisiana.

In the instant case, the defense attorneys conceded that Petitioner was *completely guilty of all elements of first-degree murder*. That difference is the key distinction that numerous lower courts have used to determine whether the claim is to be analyzed under *Strickland* or *Cronic*. In fact, the Fifth Circuit Court held in *Haynes* that *Strickland* governs any case involving a partial concession of guilt while cases involving ***complete*** concessions of guilt are *Cronic* error. Specifically, the *Haynes* court stated that conceding guilt to a lesser-included offense is a partial concession while it agreed with other courts that conceding all charges in an indictment is a complete concession and is governed by *Cronic:*

> Thus, when analyzing an attorney's decision regarding concession of guilt at trial courts have found a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute. *See United States v. Swanson*, 943 F.2d 1070,1074 (9th Cir. 1991) (holding that "[a] lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing"). In contrast, those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel. As such, they have analyzed them under the two-part Strickland test. (Footnote omitted)

Haynes v. Cain, 298 F.3d at 381.

See also:

> The dissent finds a constitutional violation because Haynes' attorneys conceded a lesser-included offense, but it ignores that basic distinction between conceding the only factual issues in dispute and acknowledging that the evidence establishing a lesser-included offense is overwhelming that is at the core of the *Strickland/ Cronic* distinction in this context.

Id., at 380, n. 6.

Furthermore, all of the cases cited by the Fifth Circuit in *Haynes* base the distinction between a complete or partial concession on whether counsel contested some of the elements of the crime during the guilt/innocent phase or whether counsel fully conceded all elements of the crime, as in the instant case. The former is to be analyzed under *Strickland* the latter as *Cronic* error.

The Seventh Circuit opinion in *Holman* notes that *Cronic* is the correct standard when defense counsel concedes guilt to all charges pled in the indictment. *United States v. Holman,* 314 F.3d 837, 839, n.1 (7th Cir. 2002).

The Respondent's reliance on *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551,160 (2004), to assert the contrary is misplaced. There, this Court considered whether defense counsel's concession of guilt without the defendant's express consent constituted ineffective assistance of

counsel. This Court's holding was very narrow. As illustrated by the holding, the defendant's silence was critical to the Court's conclusion. See id. at 191-92. This Court never suggested that its holding would apply when a client does expressly objects to the concession.

The Respondent has not been able to cite one single case in any other state or federal court that has held that *Strickland* is the appropriate standard to apply when trial counsel fully concedes his client's guilt against the client's express objection after *Florida v. Nixon*. By contrast, the Petitioner has cited numerous opinions granting *Cronic* relief in that situation. Lower courts continue to cites these opinions as good authority after Nixon. *See United States v. Dago*, 441 F.3d 1238, 1250 (10th Cir. 2006) (Continuing to cite *Swanson, Spraggins and Harbison* for authority that complete concessions of guilt over client objection *is Cronic* error); *Poindexter v. Mitchell*, 454 F. 3d 564 (6th Cir. 2006) (citing *Swanson* as good authority).

C. Trial Counsel's Performance During the Guilt/Innocence and Penalty Phases of the Trial Was Not Meaningful Adversarial Testing

The Respondent cites a number of actions on the part of trial counsel that it claims qualify as "meaningful adversarial testing" of the State's case. In fact, at best these efforts could be labeled as ***"meaningless*** adversarial testing." For example, Respondent asserts that trial counsel objected to the State's introduction of evidence relating to Mr. Tyler's drug arrest." *See Opposition Brief* at 10. While this is true, the Respondent fails to mention that it was defense counsel, who introduced much more prejudicial other crimes evidence relating to Mr. Tyler's confession to another armed robbery/attempted murder charge into the guilt phase of the trial:

> State: The State has concern over the statements Tyler made about being wanted for the shooting in St. Louis. The State doesn't mind if the defense asks about it but the State has concern about the statement in the case-in-chief. For that reason the State has cautioned the witnesses not to comment on these statements. I understood the Court would also caution the witnesses but defense counsel indicated they might ask about it. I want the State's concern on the record.

T.R. 3563.

> Defense: If the State does elicit this information the defense has no objection. We also expect to cross-examine on these statements.

T.R. 3563.

> State: We will avoid it. If the defense opens the door its not the State's fault.
>
> Defense: That's fine.

On cross-examination of the arresting police officer the defense elicited the fact that Mr. Tyler confessed to shooting his manager at a Church Chicken Restaurant in Missouri during an armed robbery. The defense also brought out on cross-examination inadmissible evidence of Mr. Tyler's alleged gang membership.

Q. Did Tyler make a post-Miranda statement?

R. " Yes".

Q. What did he say?

R. "Write out a confession I'll sign it." T.R. 3584.

Detective Johnson further testified that Mr. Tyler "I'm wanted in St. Louis." . T.R. 3585:

Tyler kept repeating "write out the confession; I'll sign it. He then said he was working at a Church's Chicken up in Missouri and that he shot the manager he was working for because the manager changed his work schedule. He also said that he was a Crip gang member. He also said he was down with which was gang terminology. T.R. 3586. In other words I hold allegiance to the gang. He also said "kill me I got nothing to live for. He said he had a sexually transmitted disease and found out he was HIV positive. He said he wished he had a gun that he would have gone out with a bang if he had a weapon. In other words he would have fired back at us if we had attempted to arrest him and he was armed.

Q. Did he say he was a member of Shreveport Crips?

R. "No"

Q. He said he was with L.A. Crips?

R. "That's correct".

Q. And L.A. is the birthplace of the Crips?

T.R. 3588.

R. "Yeah, you're right".

T.R. 3588.

Respondent then states that counsel filed some motions in support of its argument that Mr. Tyler's counsel provided "meaningful adversarial testing." *See Opposition Brief* at 9-10. Counsel did file a Notice of Defense based upon Mental Condition to present mental health evidence into the guilt phase. However, it is well settled law in Louisiana that the defense cannot introduce such evidence into the guilt phase. In Louisiana, defense counsel is precluded from introducing mental health evidence to negate the specific intent element of first-degree murder without the assertion of an insanity defense. La. Code Crim. P. Art. 651. The trial court granted the state's *motion in limine* to prohibit the defense from introducing any evidence of mental illness during the guilt phase of the trial. R. 1305. Therefore, the defense was not allowed to introduce any mental health evidence in the guilt/innocence phase of the trial. Filing a motion that has no chance of being granted is not "meaningful adversarial testing." Filing motions to prohibit 404 (b) evidence and to suppress Mr. Tyler's confession to the other crimes evidence was "meaningless when as mentioned above the defense introduced the evidence themselves.

Counsel's decision to concede guilt without investigating the credibility of any of the State's witnesses was unreasonable. *See Strickland v. Washington*, 466 U.S. 668 (1984) (requiring investigation unless and until counsel determines that further investigation would either be fruitless or harm the client). Regardless of whether *Cronic* or *Strickland* is the right prejudice standard the Petitioner's conviction should be reversed.

CONCLUSION

For all of the foregoing reasons this Court should grant the petition and schedule the case for briefing and argument.

Respectfully submitted,

Dated: August 12, 2016

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CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Reply Brief to Respondent's Brief in Opposition to Petition for Writ of Certiorari was served via priority U.S. Mail, on this 12th day of August, 2016 upon James E. Stewart, Sr., Caddo Parish District Attorney, 501 Texas Street, 5th Floor, Shreveport, LA 71101. All persons required to be served have been served.

Respectfully submitted,

Dated: August 12, 2016

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