

IN THE UNITED STATES SUPREME COURT  
NUMBER 12-10251

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CHRISTOPHER SEPULVADO  
Petitioner-Appellant

VERSUS

BURL CAIN  
Louisiana State Penitentiary, Angola, LA  
Respondent-Appellee

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STATE OF LOUISIANA'S  
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI  
(Capital Case)

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State of Louisiana  
Parish of DeSoto

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CHRISTOPHER SEPULVADO

VERSUS

BURL CAIN

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

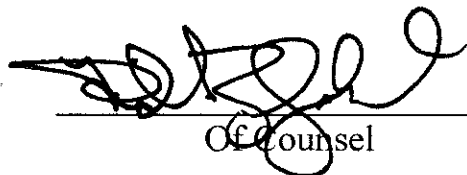
A. PETITIONER:

1. Christopher Sepulvado

B. RESPONDENT:

1. State of Louisiana

C. Petitioner is represented by the Capital Post-Conviction Project of Louisiana, through Gary Clements and Kathleen Kelly and the State of Louisiana is represented by the 42<sup>nd</sup> Judicial District, District Attorney, Richard Z. Johnson, Jr. and Assistant District Attorney, Ron Stamps.

  
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Of Counsel

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### **A. STATEMENT OF ISSUES**

1. Whether Petitioner, Christopher Sepulvado, should be granted a certificate of appealability so that he may file a second and successive writ of habeas corpus in the district court, when the issue that he asserts has been previously adjudicated in his first filed habeas action.

## B. STATEMENT OF THE CASE

Christopher Sepulvado was convicted of first degree murder and sentenced to death after bludgeoning his six-year-old step son in the head with a screw driver and then immersing him in scalding hot water. He was tried before a jury, qualified pursuant to *Batson*, convicted and sentenced to death in April and May of 1993. He appealed his conviction and sentence to the Louisiana Supreme Court, which affirmed both on April 8, 1996. *State v. Sepulvado*, 672 So. 2d 158 (La. 1996), *cert. denied*, 519 U.S. 934 (1996), *rehearing denied*, 519 U.S. 1035 (1996).

Mr. Sepulvado instituted proceedings for post-conviction relief in the then 11<sup>th</sup> Judicial District, now 42<sup>nd</sup> Judicial District, claiming ineffective assistance of counsel. His claims were denied and writs denied by the Louisiana Supreme Court on March 24, 2000. *Sepulvado v. Cain*, 757 So. 2d 652 (La. 2000).

Thereafter, Petitioner's first writ of habeas corpus was filed in the United States District Court, Western District of Louisiana. He admits that a subject of his first habeas proceeding was a challenge to the "longstanding pattern of racial discrimination in the selection of grand jury forepersons in DeSoto Parish." The habeas claim was dismissed after hearing, with the appellate court finding that Petitioner's trial counsel had failed to preserve the issue for review by moving to quash the indictment.

Mr. Sepulvado claims now that he should be given yet another chance to argue the issue concerning grand jury foreperson appointment because his habeas counsel also provided ineffective assistance for failing to discover and raise the issue that his trial counsel labored under a conflict of interest, and that such conflict prevented him from raising the grand jury foreman issue at trial. The reason for the alleged conflict was that the trial counsel had been a judge on the DeSoto court from 1979 through 1984 and, as such, had appointed grand jury foremen. Thus, Mr. Sepulvado argues that his counsel could not raise the issue concerning his own appointments.

U.S. District Court judge, Beth Foote, refused to consider the subject writ of habeas corpus, pursuant to 28 U.S.C. §2244 (b), finding that such constituted a second or successive petition. This matter was transferred to the Fifth Circuit Court of Appeal (see *Sepulvado vs. Cain*, #13-30058) court to determine if a certificate of appealability should be granted the Petitioner. The Fifth Circuit affirmed the transfer and dismissed all other claims. As a result, Mr. Sepulvado now seeks review by this Honorable Court. The Respondent, State of Louisiana, submits that the Petition for Writ of Certiorari should be denied for the reasons set forth below.

### **C. STATEMENT OF THE FACTS**

The relevant facts of this case are that Mr. Sepulvado was tried and convicted of first degree murder and sentenced to death in 1993. He appealed his conviction and sentence and both were affirmed after review by the Louisiana Supreme Court. The United States Supreme Court denied writs in 1996. Mr. Sepulvado sought to have his conviction and sentence overturned through use of post-conviction proceedings in Louisiana state court proceedings. The Louisiana Supreme Court denied writs from those proceedings in 2000. Mr. Sepulvado sought habeas relief in the federal courts and was denied that relief in 2002. For nearly 20 years, Mr. Sepulvado has remained on death row in the Louisiana State Penitentiary.

A death warrant issued for Mr. Sepulvado on December 12, 2012. Petitioner claimed that the execution should be stayed because the Louisiana lethal injection system was flawed and unconstitutional. The Louisiana Supreme Court denied writs from that second attempt at post-conviction relief in January 2013.

In this second habeas proceeding, he claims that the very lawyer who is representing him in his current state post-conviction proceedings, and who represented him in his initial habeas proceeding was ineffective for failing to raise his trial counsel's conflict of interest.

#### **D. SUMMARY OF THE ARGUMENT**

According to 28 U.S.C. § 2244(b)(1), a claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed. By his own admission, Petitioner shows that his first petition for habeas corpus challenged the racial discrimination in the appointment of grand jury foremen in DeSoto Parish and that the claim was dismissed because of his trial counsel's failure to file a motion to quash the indictment. Since the issue concerning the appointment of grand jury foremen was previously raised, Petitioner is not allowed to raise it now in a second petition.

He is not allowed to object to the ineffectiveness of his habeas counsel because 28 U.S.C. § 2254(i) prevents such challenges. Moreover, any failure of his habeas counsel to raise the "conflict of interest" with his trial counsel failing to object, pursuant to *Campbell v. Louisiana*, 523 U.S. 392, 118 S.Ct. 1419 (1998), is not supported by the factual record. *Campbell* did not become law until 1998. By 1998, Petitioner had been tried, convicted, sentenced and his conviction and sentence affirmed on appeal.

Petitioner also seeks remedy pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). However, the *Martinez* holding provides neither an unfettered constitutional right to the effective assistance of post-conviction counsel nor an

avenue for a Louisiana prisoner to obtain a successive review of collateral proceedings.

## **E. ARGUMENT**

- 1. A COA should not be granted when the issue presented for review was raised and disposed by a previous application for writ of habeas corpus:**

On pages 3 and 4 of his brief, Petitioner asserts, as follows:

Petitioner, then timely filed a petition for a writ of habeas corpus in the United States District Court, Western District of Louisiana. Petitioner argued, as he did in state post-conviction proceedings, that under *Campbell v. Louisiana*, 523 U.S. 392 (1998), he was entitled to relief from his conviction and sentence due to a longstanding pattern of racial discrimination in the selection of grand jury forepersons in DeSoto Parish. . . . He also argued that his counsel was ineffective for failing to file a motion to quash the tainted grand jury indictment, and that counsel's error in that regard provided "cause and prejudice" for the resulting procedural default.

The original habeas action was dismissed because Petitioner had not timely moved to quash his indictment and had not shown "cause and prejudice" in the failure to do so.

Now, a decade later, Petitioner is before this Court claiming that he should be granted a certificate of appealability because this writ of habeas corpus should not be treated as a second or successive petition. At its core, his claim is the same, i.e., that he should be relieved from his conviction and sentence because there was racial discrimination in the selection process for grand jury foremen in DeSoto

Parish.

Petitioner's proposed basis for obtaining a successive review is the argument that his habeas counsel was ineffective in failing to discover that his trial counsel had a conflict of interest which prevented his raising the *Campbell* claim. This argument ignores the plain meaning of 28 U.S.C. § 2254(i), which provides that ineffectiveness or incompetence of counsel during federal or state collateral post-conviction proceedings shall not be a ground for relief in habeas proceedings.

This court may entertain an application for writ of habeas corpus from a prisoner held in state custody only on grounds that his custody is in violation of the Constitution, law or treaties of the United States. 28 U.S.C. § 2254(a). Petitioner's claim that he is being held in state custody in violation of the Constitution, law or treaties of the United States has already been found to be invalid. His claim that he was indicted by a racially suspect grand jury was raised and dismissed.

Mr. Sepulvado's claim directs the court to consider that it was a "conflict of interest" with his trial counsel that prevented him from raising the *Campbell* claims through a motion to quash. His argument is that his trial counsel had been a judge in DeSoto Parish, who appointed grand jury foremen during his tenure. Therefore, he was "conflicted" and could not raise a *Campbell* argument against his own

appointments.

A closer scrutiny of the facts should reveal that a “conflict of interest” did not prevent trial counsel from raising the *Campbell* claims because *Campbell* was not decided until *after* Sepulvado was tried, convicted, sentenced, appealed that sentence and had his conviction affirmed. Petitioner was indicted March 17, 1992; he was tried and convicted on April 17, 1993; he was sentenced on May 19, 1993 and the Louisiana Supreme Court affirmed his conviction on April 8, 1996. This Honorable Court decided *Campbell v. Louisiana*, 523 U.S. 392, 118 S.Ct. 1419 (1998), two years later in 1998. The *Campbell* decision stands for the proposition that a white criminal defendant has standing to object to the discrimination against blacks in the selection of grand jurors. This considered, the State contends that it was not any conflict of interest that prevented his trial lawyer from moving to quash the indictment pursuant to *Campbell*, it was the fact that *Campbell* was not decided prior to his conviction. His *Campbell* claim was raised by his habeas counsel and denied based on the fact that a grand jury indictment cannot be challenged post-conviction without there having been a motion to quash. In this case there was none.

Petitioner argues, also, that *Martinez* provides a basis for a successive writ. Petitioner’s habeas claims concerning ineffective assistance of counsel are rooted

in the Sixth Amendment. As the Fifth Circuit noted in its earlier dismissal of Petitioner's request for a COA, Martinez did not disturb the rule that "the Sixth Amendment does not apply to habeas proceedings." *Sepulvado v. Cain*, 707 F. 3d 550, 554 (5th Cir. 2013). The Petitioner is further barred from anchoring any remedy in the Martinez decision because Petitioner is a Louisiana prisoner, and the state of Louisiana allows a prisoner to raise claims of ineffective assistance of counsel claims on direct appeal. *Ibarra v. Thaler*, 687 F. 3d 222, 227 (5th Cir. 2012). *Martinez* applies only in cases where the State barred the defendant from raising the claims on direct appeal. *Martinez*, 132 S. Ct. at 1320. There is no dispute that Petitioner is a Louisiana prisoner and the record reflects no evidence of the State unjustly barring Petitioner's claims on direct appeal. Moreover, Petitioner raised a number of ineffective-assistance-of-trial-counsel claims in the petition seeking state-court relief. The Fifth Circuit addressed those claims on the merits. *See Sepulvado v. Cain*, 2003 WL 261769, at \*3-5. Petitioner did not raise the issue of jury misconduct at that time, but very well could have. Therefore, Petitioner may not now remedy his missed opportunity with a successive habeas petition.

These things considered, Petitioner should not be granted a certificate of appealability. His first habeas action challenged the appointment of grand jury

foremen in DeSoto Parish. It has been adjudicated. He cannot now raise the same argument in a second habeas petition. His “conflict of interest” theory is merely a red herring, because his trial counsel was not conflicted about raising a *Campbell* claim. *Campbell* had not been decided until after his conviction was final. *Martinez* offers the Petitioner no basis for remedy, either. As *Martinez* stands, its holding is inapplicable to this Louisiana prisoner’s habeas claims concerning Sixth Amendment rights.

#### **F. CONCLUSION**

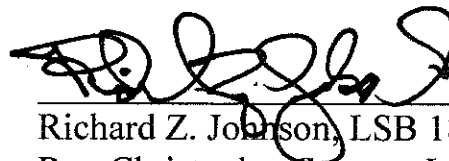
For all of the above stated reasons, the Petitioner’s request for a certificate of appealability should be summarily denied. He raises the same issue in this application as he raised in his previous application, i.e., that there was historical racial discrimination in the appointment of grand jury foremen in DeSoto Parish, a *Campbell* claim. He previously raised the claim in a first habeas action.

The claim that his habeas counsel was ineffective for failing to raise his trial counsel’s conflict of interest as a reason for failing to file a motion to quash is improper. Ineffective assistance from habeas counsel is not a proper basis for a habeas claim. Moreover, the *Campbell* decision was decided two years after the Petitioner’s conviction and sentence were affirmed by the Louisiana Supreme Court.

The district judge correctly found that the subject habeas petition is a second and successive petition because it seeks the same relief as his first one, that is, to overturn his conviction because of racial discrimination in the selection of grand jury foremen. Second habeas claims are not allowed when raising the same issue. Finally, Petitioner is incorrect that *Martinez* is applicable and that it affords a remedy in this matter. *Martinez* leaves unaltered the rule that the Sixth Amendment does not apply to habeas proceedings. Furthermore, *Martinez* does not apply to prisoners in Louisiana, a state that allows prisoners, on direct appeal, to raise claims of ineffective assistance of counsel. The certificate of appealability should not issue from this court.

Respectfully submitted,

RICHARD Z. JOHNSON, JR.  
DISTRICT ATTORNEY  
42<sup>ND</sup> JUDICIAL DISTRICT

A handwritten signature in black ink, appearing to read 'R. Z. Johnson, Jr.', written over a horizontal line.

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IN THE UNITED STATES SUPREME COURT  
NUMBER 12-12051

CHRISTOPHER SEPULVADO


VERSUS

BURL CAIN

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing Brief on Behalf of Respondent has been served on defendant's counsel of record herein, namely Gary Clements and Kathy Kelly, Capital Post-Conviction Project of Louisiana, 1340 Poydras Street, Suite 1700, New Orleans, Louisiana, 70112, or via electronic notification and certified mail and by depositing same in the United States Mail, properly addressed and postage prepaid this 28<sup>th</sup> day of August, 2013.

MANSFIELD, LOUISIANA, this 28<sup>th</sup> day of August, 2013.

  
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Of Counsel