

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

AMY HEBERT,

Petitioner-Appellant,

v.

JAMES ROGERS, WARDEN, LOUISIANA CORRECTIONAL
INSTITUTE FOR WOMEN,

Respondent-Appellee,

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**APPLICATION FOR EXTENSION OF TIME TO
FILE A PETITION FOR WRIT OF CERTIORARI**

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**TO THE HONORABLE SAMUEL A. ALITO, ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT
JUSTICE FOR THE FIFTH CIRCUIT:**

Pursuant to United States Supreme Court Rules 13.5, 22, and 30, Petitioner Amy Hebert respectfully requests a 60-day extension of time to file a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's decision in *Amy Hebert v. James Rogers, Warden, Louisiana Correctional Institute for Women*, 890 F.3d 213 (5th Cir. 2018) (attached as Exhibit A). Rehearing was denied by the Fifth Circuit on June 12, 2018 (attached as Exhibit B), which means that the time to file a petition for writ of certiorari will expire without extension on September 10, 2018. This application is timely because it has been filed more than ten days prior to the date on which the time for filing the petition is to expire. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). As set forth below, the Petitioner submits that good cause exists for granting this extension.

1. This case presents the substantial and important question of whether the courts are adequately addressing gender discrimination within the court system itself. Specifically, the Fifth Circuit in a published opinion in this case concluded that, in the context of a claim of gender discrimination during jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79 (1991), and *J.E.B. v. Alabama*, 511 U.S. 127 (1994), comparative juror analysis, long recognized to be the most effective tool for ferreting out jury discrimination,

can only be conducted when the venire includes a male who is wholly identical to the struck female juror. *See Hebert v. Rogers*, 890 F.3d 213. Despite the fact that the prosecution used 12 of 12, or 100%, of its peremptory strikes against women in Ms. Hebert’s case, the Fifth Circuit panel concluded that none of the struck female jurors shared all of the other characteristics of the accepted male jurors, and, thus, the Court refused to consider whether the gender-neutral reasons proffered by the prosecution for its strikes were equally applicable to accepted jurors. The court’s conclusion was particularly troubling considering that the prosecution had expressly disavowed reliance on the other characteristics (e.g., views on the death penalty) cited by the court. *Cf. Miller-El v. Dretke* (“*Miller-El II*”), 545 U.S. 231, 252 (2005) (“a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives”).

2. Because allowing the Fifth Circuit’s ruling to stand would effectively dispense with comparative juror analysis as the primary tool for uncovering discrimination on juries, *cf. Miller-El II*, 545 U.S. at 247, fn. 6 (“A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.”), multiple organizations have expressed an interest in acting as *amicus curiae* in Ms. Hebert’s case either at the cert stage or, if cert is granted, at the merits stage.

3. Moreover, the Fifth Circuit opinion in *Hebert* followed closely on the heels of the *en banc* ruling in *Chamberlin v. Fisher*, 885 F.3d 832 (5th Cir. 2018), in which a sharply divided court likewise held that comparative juror analysis could be defeated by characteristics that distinguished an accepted white juror from a struck black juror but which were not proffered by the prosecutor. The dissenting judges in *Chamberlin* recognized the impact that the majority’s reasoning would have on the future of comparative analysis: “If this case in which the compared jurors are identical with respect to the reasons stated at trial is not enough (the standard only requires that they be similarly situated), it is difficult to see how comparative analysis will ever support a finding of discrimination.” *Chamberlin*, 885 F.3d 832, 846 (5th Cir. 2018) (Costa joined by Stewart, C.J., and Davis, Dennis, and Prado, Circuit Judges dissenting). This Court will be asked to assess whether the Fifth Circuit in this pair of cases¹ has failed to adhere to the principles set out by this Court. *See id.* (“What is more troubling is that we have been down this road before [in *Miller-El II*]. . . . As will be explored further, this approach used to avoid the clear import of a direct comparison of the reasons stated at trial is the same rejected analysis of our *Miller-El II* opinion and the Supreme Court dissent. It is one thing to make a mistake; it is quite another not to learn from it.”).

¹ Following the grant of a 60-day extension, the cert petition in *Chamberlin* is currently due on October 5, 2018.

4. Undersigned counsel is counsel of record for Ms. Hebert, but she has had commitments in several other cases that have substantially limited her availability to prepare Ms. Hebert's petition by the current September 10 deadline and require her to request 60 additional days. Ms. Di Giulio is counsel of record in *State v. David Brown*, 2016-KA-0998, a capital case for which the direct appeal brief is due in the Louisiana Supreme Court on September 28, 2018. The record in Mr. Brown's case is voluminous at more than 58 volumes, and preparation of Mr. Brown's appeal will consume the majority of counsel's time until the filing date.² In addition, Ms. Di Giulio will be a presenter at a continuing legal education seminar on the subject of state post-conviction proceedings which is being held in New Orleans on September 21, 2018. She is also counsel of record in the life sentence case of *State v. Willard Anthony*, 17-KA-372, in which she was required on July 6, 2018 to respond to the State's overlength opening brief and will be presenting oral argument on October 11, 2018 in the Louisiana state Fifth Circuit. Ms. Di Giulio is also counsel of record in the capital federal habeas case of *Shedran Williams v. Vannoy*, No. 3:15-cv-00868, which is pending in the Middle District of Louisiana. The federal court in *Williams* has ordered counsel to file a reply to the State's 178-page Answer by October 15, 2018.

5. In order to prepare this important case for the Court's consideration, undersigned counsel respectfully requests that Ms. Hebert be

² Mr. Brown's co-defendant Jeffrey Clark's case was recently granted review by this Court and remanded to the Louisiana Supreme Court. *Clark v. Louisiana*, Case No. 16-9541.

given an additional 60 days in which to file her petition for writ of certiorari in this Court, placing the deadline for the petition at December 9, 2018.

Respectfully submitted,

/s/ Letty S. Di Giulio

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Dated: August 22, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been sent electronically and by U.S. Postal Service to counsel for the State of Louisiana: Assistant District Attorney Joseph Soignet, Lafourche Parish District Attorney's Office, 406 W. 3rd Street, Thibodaux, LA 70302, jsoignet@lpda.org, on this 22nd day of August, 2018.

/s/ Letty S. Di Giulio

LETTY S. DIGIULIO