No. _____

In the Supreme Court of the United States

AMY HEBERT,

Petitioner,

v.

JAMES ROGERS, Warden, Louisiana Correctional Institute for Women,

Respondent.

On Petition for Writ of Certioriari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR CERTIORARI

Letty S. Di Giulio
Counsel of Record
K&B Plaza
1055 St. Charles Avenue, Suite 208
New Orleans, LA 70130
504.571.5929
letty@lettydigiulio.com

Counsel for Petitioner Amy Hebert

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30191

AMY HEBERT,

Petitioner - Appellant

v.

JAMES ROGERS, WARDEN, LOUISIANA CORRECTIONAL INSTITUTE FOR WOMEN,

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

Before STEWART, Chief Judge, and CLEMENT and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is Denied,

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 12, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-30191 Amy Hebert v. James Rogers, Warden
USDC No. 2:15-CV-4950

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Connie Brown, Deputy Clerk
504-310-7671

Ms. Letty Spring Di Giulio
Mr. Joseph S. Soignet

Hebert v. Rogers

United States Court of Appeals for the Fifth Circuit

May 10, 2018, Decided

No. 17-30191

Reporter
890 F.3d 213 *; 2018 U.S. App. LEXIS 12286 **; 2018 WL 2165321

AMY HEBERT, Petitioner - Appellant v. JAMES ROGERS, WARDEN, LOUISIANA CORRECTIONAL INSTITUTE FOR WOMEN, Respondent - Appellee

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Louisiana.

Herbert v. Rogers, 2017 U.S. Dist. LEXIS 23755 (E.D. La., Feb. 21, 2017)

Case Summary

Overview
HOLDINGS: [1]-In her habeas petition under 28 U.S.C.S. § 2254, the inmate did not meet her burden to prove that the State used its peremptory strikes with the intent to discriminate against women in violation of J.E.B. v. Alabama ex rel. T.B. Without showing a violation of J.E.B., she failed to show that her attorney's representation was prejudicial when he did not object to the State's use of its peremptory strikes. Yet, even if she could show prejudice, she failed to show that her attorney's representation was incompetent or objectively unreasonable; [2]-The inmate did not rebut the presumption of sanity by proving insanity by a preponderance of the evidence, pursuant to La. Code Crim. Proc. Ann. 652. At the inmate's trial for the stabbing murder of her children, the jury had objective reasons to reject the expert testimony from the four defense experts.

Outcome
Judgment affirmed.

Counsel: For AMY HEBERT, Petitioner - Appellant: Letty Spring Di Giulio, New Orleans, LA.

For JAMES ROGERS, WARDEN, LOUISIANA CORRECTIONAL INSTITUTE FOR WOMEN, Respondent - Appellee: Joseph S. Soignet, District Attorney's Office, Thibodaux, LA.

Judges: Before STEWART, Chief Judge, and CLEMENT and SOUTHWICK, Circuit Judges. CARL E. STEWART, Chief Judge, specially concurring.

Opinion by: EDITH BROWN CLEMENT

Opinion

[*217] EDITH BROWN CLEMENT, Circuit Judge:

This habeas case is about a woman who, awaking in the night to an alleged voice telling her to kill her children, grabbed several kitchen knives and repeatedly stabbed her young children, leaving them to bleed to death. Upon being charged with first degree murder, she pled not guilty by reason of insanity. The jury found her guilty but did not sentence her to death. After exhausting all forms of direct or collateral relief in Louisiana, Amy Hebert filed a petition for habeas relief in federal court. The district court denied relief but granted a certificate of appealability. Hebert raises two issues before us: (1) defense counsel provided ineffective assistance by failing to object to the State's allegedly **[**2]** discriminatory peremptory strikes; and (2) a rational jury could not have found that Hebert was sane at the time of the killings. We affirm.

Facts and Proceedings

Amy Hebert had two children, a nine-year old girl named Camille and a seven-year old boy named Braxton. In 2005, Hebert and her husband, Chad, separated. In 2006, they divorced after she learned about Chad's affair with a woman from work, Kimberly. Over the next year, Chad's relationship with Kimberly became more serious, and they started to plan a wedding, which was set for 2008. The children also had been developing a closer relationship with Kimberly, a fact that Hebert

observed and resented. Chad began building a new home, where both children would have their own room.

In the late summer of 2007, Hebert stabbed both of her children to death at their home in Matthews, Louisiana. Both children suffered dozens of stabs wounds in the chest, back, and scalp, and ultimately bled to death. After killing both children, Hebert placed their bodies in her bed. She then killed the family dog, made a pot of coffee, wrote two notes, and attempted to take her own life. She slashed her wrists until she exposed her tendons; punctured her **[**3]** lungs, collapsing them; and inflicted cuts to her legs, skull, neck, and eyelids. Then, Hebert lay down in her bed to die beside her children.

Hebert's former father-in-law discovered this grisly scene the next morning, and he summoned the police. When the authorities arrived and entered the master bedroom, Hebert lifted a large knife and yelled, "Get the f--- out." The police subdued her with a taser. The authorities' attempts to resuscitate the children were unsuccessful. Hebert was taken to the hospital.

The police discovered the two notes that Hebert had written. The first note was addressed to Chad. It stated:

> Monday 8-20-07
> Chad,
>
> You wanted your own life. You got it. I'll be damned if you get the kids, too. Your **[*218]** ambition & greed for money won out over your love for your family. The hell you put us through & I do mean all of us because you don't know what the kids used to go through because of course you weren't here. This is no kind of life for them to live. I sure hope you two lying alduttering [sic] home wrecking whores can have more kids because you can't have these. Actually I hope you can't because then you'll only produce more lying homewrecking adultering [sic] whores like **[**4]** yourselves. Maybe you can buy some with all of your money you will make from this house & the life insurance benefits you'll get from the kids.

The second note, which was addressed to Hebert's former mother-in-law, stated:

> Monday 8-20-07
> Judy,
> You run from the very thing you support! Monica pairs up with a married man, becomes a kept woman & your response is maybe she is in love with him—so that makes it okay? How stupid! Your sons have affairs bring these whores home & you welcome them all in. I guess its okay for them to hurt the family as long as it is not you. Well when you started delivering my kids to that whore, Kimberly, that was the last straw! To all my friends thanks for all the help & support you tried to give me. I love you all, Sorry Daddy, Celeste & Renee I love you all too.

Upon her arrival at the hospital, Hebert received treatment for her physical wounds along with mental treatment from Dr. Alexandra Phillips, a psychiatrist. Initially, Hebert was unresponsive. A few days after the children's deaths, Hebert informed Dr. Phillips that she had been hearing "the words of Satan for a long time." In response to a question from Dr. Phillips, Hebert said that "Satan was in the **[**5]** room and was laughing at her." Hebert then proceeded to scream, and Dr. Phillips concluded that Hebert was "completely psychotic" and prescribed anti-psychotic medicine for her.

The State of Louisiana charged Hebert with first-degree murder of her children. Hebert pled not guilty by reason of insanity. A trial was held in Lafourche Parish, Louisiana.

The jury venire comprised 200 people, 112 of whom were women. Both parties received 12 peremptory strikes and two alternate juror peremptory strikes. Before the final jury was selected, 23 women and 10 men were randomly selected to sit on the jury. The court struck four men for cause or hardship, and Hebert used four peremptory strikes on men, which left just two men on the panel. The State used 11 peremptory strikes and one alternate peremptory strike against women. Hebert's counsel did not object. The final jury included 10 women and two men, together with three men and one woman as alternate jurors.

The jury heard testimony from six experts during the guilt phase of the trial. The defense called four experts: Dr. Alexandra Phillips, Dr. David Self, Dr. Glenn Ahava, and Dr. Phillip Resnick. Dr. Phillips prescribed anti-psychotic medication **[**6]** for Hebert after concluding that she was "completely psychotic" when she claimed that she saw and heard Satan in the hospital room. Dr. Resnick opined that Hebert was psychotic[1] when she killed her children because she was having auditory hallucinations in which she heard the voice of Satan commanding her to kill the children and then commit suicide to keep the family together. The voice, according

[1] Dr. Resnick defined "psychosis" as being out of touch with reality.

to Hebert, **[*219]** then instructed her to write the notes left at the scene of the crime. Dr. Ahava, an expert in forensic psychology, testified that Hebert was psychotic and likely could not distinguish right from wrong on the day of the offense based on her history of mental health problems and the excessive number of stabs wounds on the children. Dr. Self, an expert in forensic psychiatry, diagnosed Hebert as suffering from major depression with recurrent and severe psychosis. He further concluded that Hebert must have been psychotic because "only the most psychotic people attack their own eyes."

In response, the State called two rebuttal experts: Dr. Rafael Salcedo and Dr. George Seiden. Dr. Salcedo, an expert in clinical and forensic psychology, conceded at trial that Hebert suffered from a psychotic **[**7]** disorder but concluded that Hebert was still able to distinguish right from wrong. In reaching this conclusion, Dr. Salcedo relied on Hebert's notes, which he opined revealed the logical mental process of someone seeking revenge through a retribution killing. Dr. Seiden, an expert in general and forensic psychiatry, opined that Hebert was capable of telling right from wrong because there was no evidence that Hebert exhibited psychosis before killing her children. He also relied on the notes as evidence of Hebert's mental state, and he opined that the line "Sorry Daddy, Celeste & Renee" showed Hebert understood the wrongfulness of her actions.

The jury returned a verdict of guilty. The jury was unable to reach a unanimous verdict on the death penalty, and the court sentenced Hebert to life imprisonment. Hebert filed a direct appeal to the Louisiana First Circuit Court of Appeals, which affirmed her conviction and sentence. Hebert then unsuccessfully pursued habeas relief in state court. In response to a claim that its peremptory strikes discriminated against women, the State provided gender-neutral reasons for using its peremptory strikes. After exhausting all other avenues of relief, **[**8]** Hebert filed a habeas corpus petition in the United States District Court for the Eastern District of Louisiana. The district court denied her petition for relief, but it granted a COA on all issues raised. Hebert timely appealed.

Standard of Review

The Antiterrorism and Effective Death Penalty Act ("AEDPA") prohibits a federal court from granting habeas relief unless the decision of the state court "(1) . . . was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) . . . was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). A state court's decision is contrary to clearly established precedent if the rule it applies "contradicts the governing law set forth in the [Supreme Court's] cases," or if the state court confronts facts that are materially indistinguishable from a decision of the Supreme Court yet reaches a different result. *Wooten v. Thaler*, 598 F.3d 215, 218 (5th Cir. 2010) (quoting *Wallace v. Quarterman*, 516 F.3d 351, 354 (5th Cir. 2008)). A state court commits an unreasonable application of Supreme Court precedent if it identifies the correct legal rule but unreasonably applies that rule to the facts. *Id.* (citing **[**9]** *Williams v. Taylor*, 529 U.S. 362, 407, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2007)).

"Determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). A state court's decision does not **[*220]** even "require awareness of [the Supreme Court's] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002).

In an appeal from the denial of habeas relief, we review legal conclusions de novo and factual findings for clear error. *Perez v. Cain*, 529 F.3d 588, 593 (5th Cir. 2008). We presume the state court's factual findings are correct unless rebutted by the petitioner with clear and convincing evidence. *Wooten*, 598 F.3d at 218.

Discussion

I. Ineffective Assistance of Counsel

Hebert argues that her counsel provided ineffective assistance because he failed to object to the State's use of its peremptory strikes against qualified female venire members in a manner that she alleges was discriminatory. We apply the legal standard articulated in *Strickland v. Washington* when evaluating the effectiveness of Hebert's trial counsel. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, a petitioner must prove both deficient performance and prejudice. 466 U.S. at 697. To prove deficient performance, petitioner must show that her counsel's **[**10]** performance "fell below an objective

standard of reasonableness." *Id.* at 688. For prejudice, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The issue is whether defense counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (quoting *Strickland*, 466 U.S. at 690)).

In the habeas context, attorney performance is scrutinized under a "doubly" deferential standard. *Id.* (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)). There is a strong presumption that defense counsel's strategic and tactical decisions fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* Even if the petitioner proves deficient performance, prejudice is not presumed. *See Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006).

The Equal Protection Clause prohibits a prosecutor from intentionally discriminating against a potential juror based on race or gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (prohibiting discrimination **[**11]** in jury selection based on gender); *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1991) (prohibiting discrimination in jury selection based on race). Hebert contends that her counsel's failure to object amounted to deficient performance that prejudiced her because the State's alleged intentional discrimination undermined the confidence in the proceedings and caused structural error. If Hebert fails to show that a *J.E.B.* violation occurred, however, then she also fails to show that her attorney's performance was deficient or that she was prejudiced thereby.

Hebert raised her allegation of ineffective assistance of counsel for failing to object to gender discrimination on state **[*221]** post-conviction review. The state trial court denied her claim without performing an analysis under *J.E.B. v. Alabama ex rel. T.B.*, instead simply citing the State's proffered gender-neutral explanations for striking the female jury members:

> Of the jurors stricken, there were many sufficiently gender-neutral explanations for the use of peremptory challenges including: religious, moral or ethical considerations, self-employed business owners, jurors with medical or psychiatric problems, jurors with family members that had psychiatric problems, one juror who knew **[**12]** the defendant, and those jurors that had misgivings about imposing the death penalty.

The state court concluded that "[t]he record in this matter reflects that petitioner's counsel used their experience and training in the most skillful manner to properly defend petitioner against the charges." The Louisiana Supreme Court adopted the trial court's reasons when denying Hebert's petition.

Acknowledging that the state court addressed her ineffective assistance of counsel claim on the merits, Hebert contends that it—and the district court—failed to articulate the *J.E.B.* legal framework, failed to consider relevant facts, and unreasonably applied the law and facts. As previously noted, a state court's decision does not need to be thorough or directly address Supreme Court's cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early*, 537 U.S. at 8. Thus, the brevity of a state court's opinion is immaterial.

To determine whether the reasoning and result of the state court's opinion comport with Supreme Court precedent, we undertake the *J.E.B.* analysis as it is relevant to Hebert's ineffective assistance of counsel claim. The *J.E.B.* framework employs the same analysis **[**13]** as a *Batson* claim. *See J.E.B.*, 511 U.S. at 144. The petitioner must present a prima facie case that the state discriminated on the basis of gender during the jury selection. *See Reed v. Quarterman*, 555 F.3d 364, 368 (5th Cir. 2009). This step becomes "moot," however, "[o]nce a prosecutor has offered a [gender]-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination[.]" *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991). If the State articulates a gender-neutral reason for striking the jurors in question, the court must determine if the petitioner has met her burden to prove purposeful discrimination. *See Reed*, 555 F.3d at 368. "[A] finding of pretext as to a single juror requires that a conviction be vacated . . . ." *Murphy v. Dretke*, 416 F.3d 427, 434 (5th Cir. 2005).

Hebert argues that the State violated her constitutional rights when it exclusively used its peremptory strikes to

remove qualified women from the jury. In support of this argument, Hebert observes that the State used 11 of its primary peremptory strikes against women and then used one of its alternate peremptory strikes against another woman. Hebert then concludes that the State acted discriminatorily because 100% of the peremptory strikes used by the State were against qualified women.

Of all the venire members randomly selected before **[**14]** a final jury was chosen, there were only two men left on the jury after four men were dismissed for cause and Hebert struck the other four men with her peremptory strikes. Thus, as the district court noted, the State's strikes against qualified women is hardly surprising or alarming. The State also provided gender-neutral reasons for its strikes, and thus the initial step requiring proof of a prima **[*222]** facie case is moot. *See Hernandez*, 500 U.S. at 359.

When the State offered gender-neutral reasons for its strikes, the primary question became whether the reasons were plausible. *See Miller-El v. Cockrell*, 537 U.S. 322, 338-39, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003); *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) ("*Miller-El II*") ("[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."). At the third step of the *J.E.B./Batson* analysis, courts consider whether the State's "proffered reason for striking a [female] panelist applies just as well to an otherwise-similar [male] who is permitted to serve [because] that is evidence tending to prove purposeful discrimination." *Miller-El II*, 545 U.S. at 241. In *Miller-El II*, the Supreme Court held that the state used its peremptory strikes in a racially discriminatory manner when the state struck black jurors for reasons that applied equally well to white **[**15]** jurors retained on the jury. *See* 545 U.S. at 266. The Court also found it significant that the final jury only included one black juror: "[t]he numbers describing the prosecution's use of peremptories are remarkable. Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution." *Id.* at 240-41.

We have previously drawn three principles from the Supreme Court's analysis in *Miller-El II*. *Reed*, 555 F.3d at 376. First, the struck juror and the comparator-juror do not need to "exhibit *all* of the exact same characteristics."

Id. Second, if the state presents a particular reason for striking a juror without "engag[ing] in meaningful *voir dire* examination on that subject," that is "some evidence" that the asserted reason for the strike was pretext for discrimination. *Id.* Third, we must confine our inquiry to the reasons provided by the state for its strikes. *Id.*

Hebert argues that "the preemptively offered gender-neutral reasons provided by the State were demonstrably implausible." She specifically identifies the following female potential jurors as examples where the State discriminated based on gender: J.L., M.M., H.P., E.U., **[**16]** F.R., A.O., C.L., and T.F. She compares these women to B.J., J.O., and T.G.—three men who sat on the final jury.

During *voir dire*, the State asked each member of the venire to rate their views on the death penalty using a 1-5 scale. The prosecutor described how this 1-5 scale worked: "[1], death is the only appropriate sentence for first degree murder. [2], you favor death but can impose life. [3], you're equally open to either. [4], you favor life but could impose death. And, [5], life is the only appropriate sentence for first degree murder." To help view the relevant individuals' answers to this question side-by-side, here is a chart:

[*223]

	Person	Death Penalty	Reason for Strike
Women	J.L.	4, favored life	bipolar, suffered depression
	M.M.	4, favored life	brother was schizophrenic
	H.P.	4, favored life	believed Hebert mentally ill
	E.U.	4, favored life	sympathetic to mental illness
	F.R.	3, neutral	more friendly with defense
	A.O.	3, neutral	more friendly with defense
	C.L.	4, favored life	strongly opposed death penalty
	T.F.	4, favored life	concerned about mental illness
Men	B.J.	2, favored death	served as an alternate juror
	J.O.	4, favored life	served on the jury
	T.G.	3, neutral	served on the jury

While a comparator-juror is not required to be identical in all regards, the comparator-juror must be similar in the relevant characteristics. Hebert argues that male juror B.J. "had moral objections to imposing the death penalty, and he was never rehabilitated by the State." It is true that, in his questionnaire, B.J. indicated a moral opposition to the death penalty. But the State asked him about this during *voir dire*. In response to the State's questioning, B.J. admitted he had misunderstood the questionnaire because he actually favors the death **[**17]** penalty. ("I guess I understood it the opposite way.") Furthermore, when asked during *voir dire* about his views on the death penalty, B.J. said "correct" to the statement that he "favor[ed] imposing

the death penalty but [he] could consider life." This directly contradicts Hebert's argument that B.J. was not rehabilitated. As someone who favored the death penalty, B.J. was an ideal juror for the State.

More importantly for the issue presented on appeal, B.J. was not a proper comparator for the women struck from the jury because he favored the death penalty, unlike all of the women struck from the jury panel who indicated they were either neutral or against it. Thus, the comparison to B.J. is not valid because he is dissimilar to all the women on perhaps the most important factual point, views on the death penalty.

Hebert's comparison to male juror J.O. is similarly unpersuasive. Hebert argues that J.O. indicated that he could not impose the death penalty on his questionnaire and in his *voir dire* answers. Near the end of the *voir dire* questioning, however, J.O. admitted in response to a question about whether he could impose the death penalty that "[i]n the most extenuating circumstances, **[**18]** I could, if it came down to it, but I do favor life."

More importantly, J.O. is also distinguishable as a comparator in light of another highly relevant fact. Unlike all of the women who were struck from the panel, the State had a personal connection to J.O. because his aunt was an Assistant District Attorney, a fact disclosed and explored during *voir dire*. Thus, the comparison to J.O. is also not appropriate because he is factually distinguishable on a highly relevant characteristic from the women who were struck from the panel.

That leaves T.G. as the only remaining male comparator-juror identified by Hebert. **[*224]** T.G. indicated that he was neutral on the death penalty. From among the women that Hebert identified as victims of gender discrimination, F.R. and A.O. were the only ones who were neutral on the death penalty. All the other women favored life over death. Thus, T.G. is not a valid comparator to those women.

This leaves two remaining potential comparisons: T.G. to F.R. and A.O. The State claims that it struck F.R. and A.O. because they seemed friendlier with defense counsel. Unless pretext for gender or racial discrimination, this is a completely valid basis for exercising a peremptory **[**19]** strike because "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried." *Batson*, 476 U.S. at 89 (quoting *United States v. Robinson*, 421 F. Supp. 467, 473 (D. Conn. 1976)). Hebert does not identify any man on the jury with the characteristic of being friendlier to defense counsel than the State. Accordingly, Hebert does not show that T.G. is an adequate comparator for any of the women the state struck.

We conclude that Hebert has not met her burden to prove that the State used its peremptory strikes with the intent to discriminate against women in violation of *J.E.B.* Without showing a violation of *J.E.B.*, Hebert has failed to show that her attorney's representation was prejudicial when he did not object to the State's use of its peremptory strikes. Yet, even if Hebert could show prejudice, she fails to show that her attorney's representation was incompetent or objectively unreasonable. On appeal, Hebert acknowledges that "the State's delay in using all of its strikes made it more difficult to decipher that the strikes were not supported by legitimate reasons." This acknowledgement supports the conclusion that her counsel provided **[**20]** effective assistance. Although the state court did not mention *J.E.B.* in its analysis of her claim, its rejection of her ineffective assistance of counsel claim was not contrary to Supreme Court precedent and was not objectively unreasonable. The district court was correct to deny habeas relief on this ground.

II. Insanity

Hebert claims that she overcame the presumption that she was sane so convincingly that that no rational jury could have found her guilty. In Louisiana, there is a rebuttable presumption that the defendant is sane at the time the offense is committed. *State v. Roy*, 395 So. 2d 664, 665 (La. 1981); *see also Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008). The defendant may rebut this presumption by proving insanity by a preponderance of the evidence. La. Code Crim. Proc. Ann. art. 652. The test for insanity is whether a mental disease or defect has made the defendant "incapable of distinguishing between right and wrong with reference to the conduct in question." La. Stat. Ann. § 14:14. Although the state is not required to prove sanity in all criminal cases, the state must prove all essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (holding that evidence is insufficient and a habeas applicant is entitled to relief if no rational trier of fact could have found proof of guilt beyond a **[**21]** reasonable doubt); *Roy*, 395 So. 2d at 665.

As we have previously held, "the question under the *Jackson* sufficiency standard is whether . . . any rational trier of fact could have found beyond a reasonable

doubt that [the defendant] did not prove by a preponderance of the evidence that he was insane at the time of the **[*225]** offense." *Perez*, 529 F.3d at 594 (emphasis added). Moreover, under our precedent, "[t]he credibility of the witnesses and the weight of the evidence is the exclusive province of the jury." *United States v. Garcia*, 995 F.2d 556, 561 (5th Cir. 1993). Hebert acknowledges on appeal that "the state court correctly identified the general legal standard,"[2] but she contends that the state court's "application of the preponderance standard to the facts of this case was unreasonable." We disagree.

Hebert argues that no rational juror could have found beyond a reasonable doubt that she failed to prove insanity by a preponderance of the evidence because she presented twice as many experts as the State, and there was more than enough evidence from those experts for the jury to conclude she was insane. She further argues that the factual basis the State's experts relied upon was incomplete. She contends that "[i]f a suicidal and clinically depressed person's **[**22]** belief that two children with promising futures would be *better off* dead does not represent an 'inability to distinguish right from wrong due to mental disease or defect,' then legal insanity under Louisiana law has little meaning at all."

The State responds that the evidence was sufficient for a rational juror to find that Hebert failed to prove by a preponderance of evidence that she was insane. Contending that this court cannot sit as a "thirteenth juror," the State argues this court should not "substitute [its] analysis of the evidence for that of the jury."

The leading case in our circuit on this issue is *Perez v. Cain*. 529 F.3d 588 (5th Cir. 2008). There, all of the experts to testify agreed that the defendant was insane, yet the jury disregarded the expert testimony and found the defendant guilty, a verdict that was affirmed on appeal. *Id.* at 595. We held that the state court's conclusion that a rational jury could have found the defendant was sane despite unanimous expert testimony to the contrary was an "objectively unreasonable application of federal law." *Id.* at 599. In reaching that holding, we analyzed whether there was any objective reason for the jury to reject the expert testimony. *Id.* at 595. The expert testimony could have been rebutted **[**23]** with evidence that the expert's factual assumptions were incorrect, the reasoning was inadequate, the expert had an interest or bias, the opinion was inconsistent or contradictory, or there was contrary expert testimony. *Id.* Yet, the state did not offer anything to rebut the unanimous expert testimony, and thus there was no objective reason for the jury to reject the expert testimony. *Id.* at 597.

Perez stands for the proposition that a rational jury cannot reject unanimous expert testimony if there is no objective reason to reject it. It does not follow from this holding, of course, that—when the jury had objective reasons to reject expert testimony—a federal habeas court may **[*226]** discard the findings of the jury merely because it disagrees with the jury's conclusion. *Weeks v. Scott*, 55 F.3d 1059, 1063 (5th Cir. 1995) ("[D]ifferences in opinion go to the weight of the evidence . . . and such disputes are within the province of the jury to resolve.").

After reviewing the record, we conclude that the jury had objective reasons to reject the expert testimony from the four defense experts. A rational juror could have found the testimony of Dr. Salcedo and Dr. Seiden, the State's expert witnesses, to be more credible. That determination, as we stated in **[**24]** *Garcia*, is the exclusive province of the jury and should not be disturbed on appeal. 995 F.2d at 561.

The jury also could have found that the factual assumptions underlying the defense experts' opinions were inadequate. For example, Dr. Phillips admitted that she reached her opinion without knowing about Hebert's religious beliefs. Furthermore, there is evidence in the record and argument on appeal that Hebert's statement about hearing Satan was fabricated and self-serving. The record indicates that Hebert did not mention hearing a voice tell her to kill her children until several weeks after the killings. Hebert also did not initially "ascribe an identity to th[e] voice" and only concluded retrospectively that it must have been Satan that spoke

---

[2] The district court phrased the inquiry as being whether "any rational trier of fact could have found that Hebert had not proven by a preponderance of the evidence that she was insane at the time of the offense" with all evidence viewed in the light most favorable to the state. This interpretation conflicts with our precedent stating that "the question under the *Jackson* sufficiency standard is whether . . . any rational trier of fact could have found *beyond a reasonable doubt* that [the defendant] did not prove by a preponderance of the evidence that he was insane at the time of the offense." *Perez*, 529 F.3d at 594 (emphasis added). The key point missing from the district court's opinion is that the entire inquiry requires proof that the evidence of sanity was "beyond a reasonable doubt." We owe no deference to the district court's misstatement of the state court's articulation of the legal standard.

to her that night. At trial, the prosecution argued in closing that Hebert lied about hearing Satan when she killed her children. This evidence and argument provided the jury with an objective reason to conclude that Hebert was sane when she killed her children.

Dr. Resnick testified that Hebert was insane, in part, because the number of stab wounds on the children was excessive, but he admitted that there was no evidence that Hebert continued to stab the children **[**25]** after they died. The trial record also indicates that Hebert went into the children's room twice and was unable to stab them, which the jury could have found as evidence that Hebert knew her actions were wrong. The jury could have found that the defense experts improperly dismissed the significance of the notes Hebert wrote and the indications from those notes that Hebert knew her actions were wrong. The jury also could have found it significant that there was no evidence Hebert was psychotic prior to when she killed the children, a fact at least one of the defense experts acknowledged in his testimony. ("Q. But you've not seen anything in any medical records where prior to August, 20, 2007, defendant was diagnosed as being psychotic? A. That's correct.") The jury could have understood Dr. Resnick as testifying that Hebert had only had one auditory hallucination—the night she killed her children—and found that her theory of insanity was implausible given the rest of the record.

Dr. Ahava, another expert for the defense, testified that a "central" factual basis for his opinion was information Hebert provided. The jury could have found that Dr. Ahava relied too much on Hebert's characterization **[**26]** of the facts, which may have been skewed because she had been charged with first degree murder at the time she relayed those facts to him. For example, he relied on Hebert's statement that she had a history of mental issues to conclude that she was psychotic when she killed her children. But he also admitted that there were no records of mental health providers treating Hebert for mental health problems from twenty years prior, as she originally claimed.

Dr. Self, also a defense expert, admitted that it gave him pause when Hebert told him that she had never had any hallucinations before the night she killed her children. Although Dr. Self. followed up on **[*227]** that admission with an explanation, a juror could have found that it seemed implausible for a person who had never previously had a hallucination to suddenly have one on such a tragic night. Dr. Self admitted that a factual basis for his opinion was Hebert's own statements about her history of depression, which could have led a juror to disregard Dr. Self's opinion because it was based on a self-serving factual basis provided by Hebert. Dr. Self also stated that Hebert's weight loss from July to August 2007 indicated a major depression, **[**27]** but her medical records indicated that her weight remained nearly the same throughout that entire period. Although the record does show that the night Hebert killed her children and attempted suicide she weighed about twenty pounds less than her last previous medically-observed weight, a juror could have found that Hebert's weight loss was more likely from a loss of blood than major depression.

In sum, this case is distinguishable from *Perez*, where there was no objective reason to disregard the expert testimony. 529 F.3d at 593-95. Here, there is contradictory expert testimony from the State. Furthermore, the factual basis for the defense experts' testimony is arguably unreliable, and there are arguably inconsistencies in some of the opinions expressed. Any of these could have served a rational juror as an objective reason to disregard the testimony of the defense experts and find beyond a reasonable doubt that Hebert failed to prove she was insane by a preponderance of the evidence. Thus, the state court's decision was not an objectively unreasonable application of the law, and habeas relief is not warranted on this ground.

Conclusion

For the reasons stated above, we AFFIRM the district court.

Concur by: CARL E. **[**28]** STEWART

Concur

CARL E. STEWART, Chief Judge, specially concurring:

The majority opinion accurately identifies the two issues before us on appeal: (1) whether Hebert received ineffective assistance of counsel; and (2) whether the evidence sufficiently supported the jury's finding that Hebert was not insane. I agree with the majority opinion's well-reasoned analysis regarding Hebert's insanity claim. However, I write separately to express my view that the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the record support a different ineffective assistance of counsel analysis.

The majority opinion concluded that Hebert's counsel's performance was not deficient. However, before doing so, it conducted a comparative juror analysis to determine that the State did not discriminate in using all of its peremptory strikes against women. Using the reasons the State proffered five years after voir dire in its response to Hebert's post-conviction *Strickland* claim, the majority opinion holds that Hebert failed to prove intentional discrimination because there were sufficient differing characteristics to render the men who served as jurors as inadequate comparators to the stricken women. These reasons **[**29]** were not a part of the trial record because Hebert did not object to the State's strikes at voir dire. As a result, the State did not have the opportunity to provide a contemporaneous nondiscriminatory explanation. Instead, it offered the reasons five years later when Hebert first raised ineffective assistance of counsel in her application for post-conviction relief, arguing a *Batson* violation as the basis.

Without thoroughly analyzing the substance of her discrimination argument, the state court found that Hebert's ineffective assistance of counsel claim should be denied **[*228]** because her counsel's performance was not unconstitutionally deficient. Instead of evaluating whether this decision was an erroneous application of the law or was based on an erroneous determination of the facts, the majority opinion undertakes a *J.E.B./Batson* analysis because it is "relevant." I, however, would follow the path AEDPA requires of us and evaluate the actions of the state court without conducting a *Batson* analysis because the State's nondiscriminatory explanations were proffered five years after voir dire and because the state court correctly determined the substantive claim: Hebert's counsel was not **[**30]** ineffective.

I.

After her conviction on May 14, 2009, Hebert unsuccessfully filed a direct appeal with the Louisiana First Circuit Court of Appeal. *State v. Hebert*, 57 So. 3d 608, 2011 WL 2119755, *1 (La. App. 1st Cir. 2011). The Louisiana Supreme Court denied her cert petition without opinion. *State v. Hebert*, No. 2011-K-0864, 73 So. 3d 380 (La. 2011). Hebert then filed an application for post-conviction relief on January 16, 2013, claiming for the first time that her trial counsel was ineffective for failing to make an objection to the state's use of its peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The trial court ordered the State to file an answer to Hebert's habeas application. It was in this answer, filed September 12, 2014, that the State—more than five years after voir dire—proffered explanations for only using its strikes against women.

Following a hearing, the state trial court found "there were many sufficiently gender-neutral explanations for the use of peremptory challenges . . . ." Ultimately, the trial court determined Hebert's claim had no merit because the record showed her "counsel used their experience and training in the most skillful manner to properly defend [her] against the charges." Hebert sought writ of review which was denied without written **[**31]** opinion by the Louisiana First Circuit Court of Appeal. *State v. Hebert*, No. 2015-KW-0289, 2015 La. App. LEXIS 783, at *1 (La. App. 1st Cir. April 20, 2015). In the last-reasoned state court opinion, the Louisiana Supreme Court denied Hebert's claim because she "fail[ed] to show she received ineffective assistance of trial counsel." *State v. Hebert*, No. 2015-KP-0965, 182 So. 3d 23, 23 (La. 2015). In a well-reasoned opinion that accorded AEDPA deference to the state court decision, the magistrate judge conducted an analysis under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to find Hebert's ineffective assistance claim was undermined by the record and she failed to make a prima facie showing of intentional discrimination. ***Hebert v. Rogers***, No. 15-cv-4950-LMA, 2016 U.S. Dist. LEXIS 184381, 2016 WL 8291110, at *14-16 (E.D. La. Nov. 10, 2016). The district court adopted the report and recommendations. Hebert appealed.

II.

A federal habeas court cannot disturb a state court's decision denying habeas relief unless the state court's adjudication of the claim

> (1) resulted in 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This court does "not **[**32]** function as a superior state court, reviewing challenges to convictions as if we were part of the state appellate review system." **[*229]** *Woodfox v. Cain*, 609 F.3d 774, 818 (5th Cir. 2010) (Southwick, J., dissenting). Our responsibility at this level is to evaluate "not whether [we] believe[] the state court's determination was

incorrect but whether that determination was unreasonable." *Chamberlin v. Fisher*, 885 F.3d 832, 837 (5th Cir. 2018) (en banc).

In order to prevail on a claim for ineffective assistance of counsel, a party must prove—by a preponderance of the evidence—her counsel performed deficiently and that deficient performance caused her prejudice. *See Strickland*, 466 U.S. at 687; *see also Montoya v. Johnson*, 226 F.3d 399, 408 (5th Cir. 2000). To prevail on deficient performance, petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Our "scrutiny of counsel's performance must be highly deferential." *Id.* at 689. We must indulge and petitioner must rebut "a strong presumption that counsel's conduct falls within the wide range of professional assistance." *See id.* To prevail on prejudice, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The petitioner must prove there is a substantial likelihood of a different **[**33]** result. *See Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Because *Strickland* is a conjunctive test, petitioner must prove both deficient performance and prejudice. *See Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995). Failure to prove either is fatal. *See id.* Thus, a court may dispose of a claim if the petitioner fails to meet either prong. *Id.*

III.

The state court did not conduct a *Batson* analysis. It instead disposed of Hebert's substantive claim employing the *Strickland* framework and determining her counsel's performance was not deficient. This was a reasonable application of *Strickland*. As determined by the state court, Hebert's claim has no merit because her counsel's decision not to object was not marred by incompetence so serious she was effectively denied her Sixth Amendment right to counsel. *See Strickland*, 466 U.S. at 687. Hebert failed to overcome the "presumption that, under the circumstances, the challenged action 'might be considered sound strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). This determination is supported by the record. As the magistrate judge pointed out, many of the women who the State allegedly struck because they were women also could have been seen as undesirable jurors by her counsel. Hebert's side-by-side comparison illustrated that some of the women who were stricken were more supportive of the death penalty **[**34]** than the men who were seated. This illustrates that Hebert's counsel did not necessarily fail to object because they were incompetent, but they could have strategically chosen not to object to avoid the death penalty. The jury voted unanimously to convict but could not agree to sentence Hebert to death. Given the requirement to be "doubly deferential" to both the trial counsel's strategic decisions and the state court's determinations, *Burt v. Titlow*, 571 U.S. 12, 15, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013), the state court did not act unreasonably when it rejected Hebert's ineffective assistance of counsel claim, without determining prejudice.

IV.

In this circuit, a failure to lodge a *Batson* challenge is fatal. *See United States v. Skilling*, 554 F.3d 529, 562 (5th Cir. 2009) **[*230]** (citing *Dawson v. Wal-Mart Stores*, 978 F.2d 205, 208-09 (5th Cir. 1992). If a petitioner's counsel fails to object on *Batson* grounds, that challenge is procedurally defaulted. *See id.* However, "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *See Martinez v. Ryan*, 566 U.S. 1, 10, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). "[W]hen attorney error amounts to constitutionally ineffective assistance of counsel, that error is imputed to the State (for the State has failed to comply with the constitutional requirement to provide effective counsel), rendering the error external to the petitioner." **[**35]** *See id.* at 23 (Scalia, J., dissenting). In determining whether Hebert was prejudiced, the majority opinion analyzed whether a *Batson* violation actually occurred. However, if counsel was not constitutionally ineffective, there was no error to impute to the State. Thus, there was no need to evaluate prejudice.

There is little guidance on whether a trial court must evaluate deficient performance before prejudice. With good reason, that process is left to the discretion of the trial courts. Here, given the facts and circumstances of this case, the road to prejudice seems much more arduous: (1) there were no *Batson* objections lodged at voir dire; (2) the State was not given the opportunity to proffer contemporaneous reasons and instead developed its explanation five years later; and (3) even the State contested the use of the long-delayed reasons as juror comparators. Furthermore, Hebert's *Batson* argument is not her substantive claim. It is evidence of her substantive claim that her counsel provided ineffective assistance by failing to object. Logically, the state and district courts judiciously took the path of

greatest logic and least resistance.

In order to prevail on an ineffective assistance **[**36]** of counsel claim, a petitioner must prove deficient performance and prejudice. *See Strickland*, 466 U.S. at 687; *see also Amos*, 61 F.3d at 348. In this case, in order to prove prejudice, the court must evaluate whether the State committed a *Batson* violation. Under usual circumstances, in order to raise a *Batson* violation, the defendant must object and "make out a prima facie case of purposeful discrimination." *See Batson*, 476 U.S. at 93-94. Then the prosecution must raise contemporaneous[1] nondiscriminatory reasons for its strikes and "stand or fall on the plausibility of the reasons he gives." *See Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). The trial court is then responsible for determining if these reasons are pretextual. *See Chamberlin*, 885 F.3d at 837-38.

But here there were no contemporaneous reasons to test for veracity because there were no *Batson* objections. What the state court had—to no fault of the State—were reasons mulled over and rendered five years after **[**37]** voir dire, "reek[ing] of **[*231]** afterthought." *Cf. Miller-El*, 545 U.S. at 246 (noting the difficulty in crediting later-developed explanations for striking a juror). The state court committed no error in disposing of the case without conducting this analysis.

Notably, Hebert did not make a prima facie showing of discrimination. At the state and district courts, in making her substantive ineffective assistance claim, Hebert contended prejudice was presumed "[w]here trial counsel fails to object to a prima facie case of discrimination" because discrimination in jury selection is a "structural error that requires automatic reversal."[2] Analyzing this argument, the state court found there was no prima facie case of prejudice and "petitioner's counsel used their experience and training in the most skillful manner to properly defend petitioner against the charges." Hebert argued that because the State offered reasons for why it may have struck the women, her requirement to make a prima facie case of discrimination was waived. The majority opinion seems to agree with this point. Also citing *Hernandez*, Hebert argues "once the prosecution has proffered gender-neutral reasons, the question of whether a prima facie case existed **[**38]** becomes moot." This simplification misinterprets and misapplies *Hernandez* because: (1) the Supreme Court decision in *Hernandez* illuminates the discretionary power the trial court holds in *Batson* claims; and (2) *Hernandez* is distinguishable from the facts of this case.

In *Hernandez*, after nine jury members were empaneled, defense counsel objected to the prosecutor's use of its peremptory strikes against Latino venire members. *Id.* at 355-56. Without (1) waiting for the judge to rule on whether the defense established a prima facie showing or (2) arguing that the defense did not make a prima facie showing, the prosecutor volunteered reasons for his strikes. *Id.* at 356. The trial court denied defense counsel's motion. *Id.* at 357. On appeal, after reiterating the three-step process for evaluating a *Batson* claim, the Supreme Court ratified the trial court's actions. *Id.* at 359. It held there was no error in the not evaluating whether the defense made a prima facie case, and under those particular facts and circumstances the "departure from the normal course of proceedings" was of no concern. *Id.*

The facts and circumstances surrounding this case are completely distinguishable, and thus the question whether Hebert presented a **[**39]** prima facie case is not moot. Unlike in *Hernandez*, here, Hebert did not timely object, so the State did not offer a contemporaneous explanation. Furthermore, when Hebert raised this argument in her post-conviction application, the trial court had not yet ruled on intentional discrimination. Thus, she maintained the

---

[1] The timeliness of the reasons are important in analyzing whether the explanation is pretextual. *Cf. Miller-El*, 545 U.S. at 246 (noting that the State's later proffered explanation "reek[ed] of afterthought" and questioning the Fifth Circuit's willingness to accept the reasons, ignoring its "pretextual timing"). In *Chamberlin*, this circuit also recognized the importance of contemporaneous reasons.

> This narrow focus is essential to maintaining the integrity of the *Batson* framework, which requires a focus on the actual, *contemporaneous reasons* articulated for the prosecutor's decision to strike a prospective juror. The *timely expressed* neutral reasons, after all, are what must be tested for *veracity* by the trial court and later reviewing courts.

Chamberlin, 885 F.3d at 841 (emphasis added).

[2] This circuit previously refrained from holding that "a structural error alone is sufficient to warrant a presumption of prejudice in the ineffective assistance of counsel context." *See Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006). However, the error "serves as an important guidepost in our evaluation of whether the state court's denial of [petitioner's] ineffective assistance of counsel claim was 'objectively reasonable' under AEDPA." *Id.*

burden of making a prima facie showing of discrimination. *Cf. Hernandez*, 500 U.S. at 359 ("Once a prosecutor has offered a race neutral explanation for the peremptory challenges *and the trial court has ruled on the ultimate question of intentional discrimination*, the preliminary issue of whether the defendant made a prima facie showing becomes moot." (emphasis added)). The State submitted its explanations five years later in briefs responding to Hebert's *Batson* argument. Before proffering those reasons, the State argued Hebert failed to make a prima facie showing of discrimination. Because of **[*232]** the unusual procedural posture, the State did not have the option of waiting until the trial court ruled on its prima facie argument before proffering a nondiscriminatory explanation. Thus, offering the explanation did not render the question moot and Hebert failed to make a prima facie showing of discrimination. **[**40]** Under these circumstances, the state court prudently avoided determining whether Hebert was prejudiced by a *Batson* violation by instead making a determination on her substantive claim, the effectiveness of Hebert's counsel. This was not an unreasonable application of clearly established law.

V.

As such, I would have accorded deference to this determination and held the trial court did not act unreasonably in not reaching the prejudice prong and evaluating Hebert's *Batson* argument because Hebert failed to prove by the preponderance of the evidence that her counsel performed deficiently. Nevertheless, I specially concur in the judgment denying relief.

End of Document

Herbert v. Rogers

United States District Court for the Eastern District of Louisiana

February 21, 2017, Decided; February 21, 2017, Filed

CIVIL ACTION No. 15-4950 SECTION I

Reporter
2017 U.S. Dist. LEXIS 23755 *; 2017 WL 679528

AMY HERBERT, VERSUS JIM ROGERS, WARDEN ET AL.

Subsequent History: Affirmed by ***Hebert v. Rogers***, 2018 U.S. App. LEXIS 12286 (5th Cir. La., May 10, 2018)

Prior History: ***Hebert v. Rogers***, 2016 U.S. Dist. LEXIS 184381 (E.D. La., Nov. 10, 2016)

Counsel: [*1] For Amy Hebert, Plaintiff: Letty Spring Di Giulio, LEAD ATTORNEY, Law Office of Letty S. Di Giulio, P.L.C., New Orleans, LA.

For Jim Rogers, Warden, Louisiana Correctional Institute for Women, St. Gabriel, Louisiana, Defendant: Joseph Sidney Soignet, District Attorney's Office (Thibodaux), Thibodaux, LA.

Judges: LANCE M. AFRICK, UNITED STATES DISTRICT JUDGE.

Opinion by: LANCE M. AFRICK

Opinion

ORDER

The Court, having considered the petition, the record, the applicable law, the Report and Recommendation of the United States Magistrate Judge, and the objection by plaintiff, Amy Hebert, which is hereby **OVERRULED**, approves the Magistrate Judge's Finding and Recommendation and adopts it as its opinion in this matter. Therefore,

IT IS ORDERED that Ms. Hebert's petition for issuance of a writ of habeas corpus under 28 U.S.C. § 2254 is **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that, after considering the record and requirements of 28 U.S.C. § 2253 and Fed. R. App. P. 22, the Court **GRANTS** a certificate of appealability on all issues raised because the Court concludes that "the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2009).

New Orleans, Louisiana, February 21, 2017.

/s/ Lance M. Africk

LANCE M. AFRICK

UNITED STATES DISTRICT JUDGE

End of Document

Hebert v. Rogers

United States District Court for the Eastern District of Louisiana

November 10, 2016, Decided; November 14, 2016, Filed

CIVIL ACTION NO. 15-4950 SECTION "I" (5)

Reporter
2016 U.S. Dist. LEXIS 184381 *

AMY HEBERT VERSUS JIM ROGERS, WARDEN, C.A.

Subsequent History: Adopted by, Objection overruled by, Writ of habeas corpus denied, Dismissed by, Certificate of appealability granted Herbert v. Rogers, 2017 U.S. Dist. LEXIS 23755 (E.D. La., Feb. 21, 2017)

Prior History: State v. Hebert, 57 So. 3d 608, 2011 La. App. Unpub. LEXIS 33 (La.App. 1 Cir., 2011)

Counsel: **[*1]** For Amy Hebert, Plaintiff: Letty Spring Di Giulio, LEAD ATTORNEY, Law Office of Letty S. Di Giulio, P.L.C., New Orleans, LA.

For Jim Rogers, Warden, Louisiana Correctional Institute for Women, St. Gabriel, Louisiana, Defendant: Joseph Sidney Soignet, District Attorney's Office (Thibodaux), Thibodaux, LA.

Judges: MICHAEL B. NORTH, UNITED STATES MAGISTRATE JUDGE.

Opinion by: MICHAEL B. NORTH

Opinion

REPORT AND RECOMMENDATION

On August 20, 2007, Amy Hebert awoke in the night and killed her two children and the family dog. Thereafter, on September 26, 2007, Hebert was indicted in Lafourche Parish on two counts of first-degree murder, for which the State sought the death penalty.[1] Hebert's jury trial began on April 16, 2009, and lasted until May 14, 2009, when the jury found her guilty as charged on both counts.[2] During the penalty phase of the trial, the jury was unable to reach a unanimous sentencing verdict. Consequently, the trial court sentenced Hebert to two consecutive terms of life in prison.[3] She is currently incarcerated in the Louisiana Correctional Institute for Women.[4]

I. PROCEDURAL HISTORY

Following her conviction, Hebert filed a direct appeal in the Louisiana First Circuit Court of Appeal, in which she raised six **[*2]** claims: (1) the trial court erred when it denied her post-verdict motion for a judgment of acquittal; (2) the trial court erred when it denied her motion for a new trial; (3) there was insufficient evidence to support her conviction; (4) the trial court erred when it limited Dr. Spitz' testimony; (5) the trial court erred when it denied Hebert's motion for a change of venue and (6) the trial court imposed an excessive sentence by making the life sentences consecutive.[5] The First Circuit denied her appeal in an unpublished opinion on February 11, 2011.[6] Hebert filed a writ application to the Louisiana Supreme Court, which was denied without opinion on October 21, 2011.[7] Hebert's conviction became final 90 days later, on Thursday, January 19, 2012, when she did not file a writ application in the United States Supreme Court.[8]

---

[1] State Rec. Vol. 1 of 45.

[2] State Rec. Vol. 20 of 45.

[3] State Rec. Vol. 28 of 45; May 16 transcript Vol. 2, p. 30.

[4] State Rec. Vol. 23-42.

[5] State Rec. Vol. 43 of 45; *State v. Hebert*, No. 2010-KA-0305, 57 So. 3d 608 (La. App. 1st Cir. 2011), (Table), 2011 WL 2119755 .

[6] *Id.*

[7] *State v. Hebert*, 73 So.3d 380 (La. 2011), No. 2011-K-0864.

[8] *See Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003) (*citing* 28 U.S.C. § 2244(d)(1)(A)).

On January 16, 2013, Hebert timely filed an application for post-conviction relief in the state district court. Her petition raised five claims: (1) trial counsel was ineffective for failing to make a *J.E.B./Batson* objection to the State's use of its peremptory challenges; (2) Hebert's rights to confrontation, an impartial jury, and a fair **[*3]** trial were violated when one of the jurors — a nurse — introduced her own, extraneous, medical expertise into jury deliberations; (3) the jury engaged in premature deliberations, violating Hebert's due-process rights; (4) Hebert's trial lawyers were ineffective for disclosing investigative work-product, thereby violating Hebert's privilege against self-incrimination and (5) appellate counsel was ineffective for failing to challenge the warrantless search of Hebert's home. *Id.*[9]

The trial court ordered the State to file an answer to Hebert's application. On February 4, 2013, the State filed a "Motion to Strike Pleadings and Exhibits" for claims 2 and 3 (the jury-misconduct claims).[10] On April 8, 2013, a hearing was held on the State's motion to strike and the trial court granted that motion.[11] Following the trial court's ruling, Hebert sought supervisory writs in the Louisiana First Circuit Court of Appeal and the Louisiana Supreme Court challenging the trial court's ruling striking claims 2 and 3; on July 29, 2013, the First Circuit Court of Appeal denied Hebert's writ and, on May 30, 2014, the Louisiana Supreme Court followed suit.[12]

On June 20, 2014, the trial court ordered the State **[*4]** to answer Hebert's three remaining post-conviction claims by July 21, 2014. In the interim, on June 23, 2014, Hebert filed a "Supplement to Application for Post—Conviction Relief and Motion for Evidentiary Hearing," which the trial court granted.[13] In this supplemental post-conviction application, Hebert raised only one additional issue: "Trial counsel's failure to follow up on information that petitioner had a long-standing but untreated seizure disorder that likely caused her psychotic break constituted ineffective assistance of counsel, as this evidence was essential to a meaningful presentation of petitioner's insanity defense."[14] In response, on July 23, 2014, the State filed procedural objections to Hebert's supplemental application.[15] On August 14, 2014, the court denied the State's objections and again ordered the State to answer Hebert's post-conviction application.[16] The State filed its answer to Hebert's four outstanding claims on September 12, 2014.[17]

On December 29, 2014, the trial court issued a written opinion denying Hebert's four remaining claims.[18] Hebert then sought a writ of review from the Louisiana First Circuit Court of Appeal, which that court denied on April 20, **[*5]** 2015 without written opinion.[19] Finally, on October 2, 2015, in the last reasoned state-court opinion, the Louisiana Supreme Court denied all of Hebert's post-conviction claims.[20] In that opinion, the Louisiana Supreme Court briefly addressed Hebert's claims of ineffective assistance of counsel and "attached[ed] and incorporate[d] the trial court's written opinion denying her post-conviction application."[21]

The record reflects that on October 2, 2015, Hebert filed her petition for federal *habeas corpus*.[22] That petition was referred to this Court to conduct hearings, including an evidentiary hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.[23]

---

[9] The procedural history of Hebert's post-conviction relief application is largely taken from the trial court's written decision denying Hebert's post-conviction application, which the Louisiana Supreme Court attached to its opinion. *State v. Hebert*, 182 So. 3d 23, 24 (La. 2015), Case No. 2015-0965; State Rec. Vol. 43 of 45.

[10] *Id.*

[11] State Rec. Vol. 44 of 45.

[12] *Id.*; *State v. Hebert*, 140 So. 3d 734 (La. 2014), Case No. 2013-KP-2065.

[13] *Hebert*, 182 So. 3d 23 (La. 2015).

[14] *Id.* at 24.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] State Rec. Vol. 45.

[19] Rec. Doc. No. 1, Exh. 17; 2015-KW-0289.

[20] *Hebert*, 182 So. 3d 23 (La. 2015).

[21] *Id.*

[22] Rec. Doc. No. 1. The state court record accompanying her petition consists of 45 volumes.

[23] Upon review of the petition, this Court has determined that a federal evidentiary hearing is unnecessary at this time. See 28 U.S.C. § 2254(e)(2).

In her petition, Hebert alleges six grounds for relief:[24] (1) there was insufficient evidence to rebut her insanity defense; (2) the State unlawfully struck qualified prospective female jurors on the basis of their gender and counsel was ineffective for failing to raise challenges to those improper strikes; (3) trial counsel was ineffective for failing to follow-up on Hebert's seizure disorder; (4) appellate counsel was ineffective for failing to challenge the search of Hebert's home; (5) Hebert was denied **[*6]** her rights of confrontation, jury impartiality and a fair trial because the jury considered extraneous information; and (6) Hebert was denied due process and a fair trial because of premature juror deliberation.[25] On November 5, 2015, the State responded. The State concedes that Hebert's petition was both exhausted and timely filed.[26] The State challenges all of the claims on the merits, but also argues that claims five and six were decided on independent and adequate state grounds and are thus procedurally defaulted.[27]

For the reasons that follow, this Court recommends that Hebert's petition for *habeas corpus* relief be **DENIED** and **DISMISSED WITH PREJUDICE**.

II. THE FACTS OF THE UNDERLYING CASE

There is no dispute that on August 20, 2007, Hebert awoke in the middle of the night, gathered multiple knives, and killed her two children, Braxton and Camille, along with the family dog.[28] The Louisiana First Circuit Court of Appeals described the grisly details of how each child was killed:

> Braxton suffered approximately 20-25 stab wounds to his chest and approximately 50-55 stab wounds to his back. The number of wounds could not be determined exactly due to the presence of perforating wounds, i.e., **[*7]** wounds that went entirely through his body and exited on the other side. He also suffered five defensive wounds on his left arm and one or two defensive wounds on his right arm. Braxton bled to death.
>
> Camille suffered approximately 30-35 stab wounds to her chest and approximately 30-35 stab wounds to her back. She also suffered perforating wounds. She had five defensive wounds on her left arm and nine defensive wounds on her right arm. She was stabbed in the scalp approximately 30 times. Camille also bled to death.

Id. Hebert did not stab only her children — she also stabbed herself repeatedly, slashed her wrists to the point that her tendons were exposed, punctured her lungs until they collapsed, and cut her chest, skull, neck, legs and eyelids. *Id.*

It wasn't until the next morning that the resulting carnage was discovered:

> The children's paternal grandparents, R.J. "Buck" and Judy Hebert ... became concerned for the welfare of the defendant and [their] grandchildren. [Buck Hebert] knocked on the defendant's front door, and when no one answered, he broke into the utility room of the home by climbing through a window. Buck saw blood splattered on the floor of the kitchen/dining area. In **[*8]** the master bedroom, he saw a large quantity of blood and the defendant lying in bed with the [dead] children. Buck tried to exit the house to summon help, but the doors had been dead-bolted from the inside, and he could not find the keys.
>
> Upon arrival, the police broke the kitchen door down and entered the house. When the police entered the master bedroom, the defendant lifted a large knife in her right hand and shouted, "Get the f——— out." The police used a Taser electroshock weapon to force the defendant to drop her knife so that they could attempt a rescue of the children. After removing the children from the bed, the police discovered multiple knives in the bed, as well as a dead dog.

Id.

At the crime scene, the police found two blood-stained notes. The first note was addressed to Hebert's ex-husband, Chad Hebert:

> Chad,
>
> You wanted your own life. You got it. I'll be damned if you get the kids, too.
>
> Your ambition & greed for money won out over your

---

[24] The Court addresses these issues somewhat out of the order in which they were raised by Petitioner for ease of analysis.

[25] *Id.*

[26] Rec. Doc. No. 8, p. 2, 5.

[27] *Id.* at 25.

[28] Rec. Doc. No. 1, p. 7; State Rec. Vol. 43 of 45; *Hebert*, No. 2010-KA-0305 (La. App. 1st Cir. 2011), 57 So. 3d 608, 2011 WL 2119755, at *1-2.

> love for your family.
> The hell you put us through & I do mean all of us because you don't know what the kids used to go through because of course you weren't here.
> This is no kind of life for them to live.
>
> I sure hope you two lying alduttering **[*9]** [sic] home wrecking whores can have more kids because you can't have these.
> Actually I hope you can't because then you'll only produce more lying homewrecking adultering [sic] whores like yourselves.
> Maybe you can buy some with all of your money you will make from this house & the life insurance benefits you'll get from the kids.

Id. at 2. The second note was addressed to Hebert's mother-in-law, Judy Hebert:

> Judy,
> You run from the very thing you support!
> Monica pairs up with a married man, becomes a kept woman & your response is maybe she is in love with him—so that makes it okay? How stupid!
> Your sons have affairs bring these whores home & you welcome them all in. I guess its okay for them to hurt the family as long as it is not you.
> Well when you started delivering my kids to that whore, Kimberly, that was the last straw!
> To all my friends thanks for all the help & support you tried to give me.
> I love you all,
> Sorry Daddy, Celeste & Renee I love you all too.

Id.

III. THE TRIAL

During its case in chief at trial, the defense called four expert witnesses: Dr. Alexandra Phillips, Dr. Phillip Resnick, Dr. Glenn Ahava, and Dr. David Self. The Louisiana First Circuit summarized their testimony as follows:

> Defense **[*10]** witness Dr. Alexandra Phillips testified as both a fact witness and as a court-accepted expert in psychiatry. Dr. Phillips was the attending physician for the acute psychiatric unit when the defendant was brought to the hospital. She attempted to talk with the defendant on August 21, 2007, the day after the offense, but the defendant was unresponsive. Dr. Phillips again met with the defendant on August 23, 2007. The nurses were concerned because the defendant was not eating; the defendant told Dr. Phillips she was not eating because she was afraid of getting sick and vomiting. The defendant advised Dr. Phillips that she had heard the words of Satan for a long time and had pushed them away with the words of Christ and prayer. The defendant said she had not been planning on killing herself, but Satan took over, and she snapped. Dr. Phillips asked the defendant if she was hearing the voice of Satan at that moment, and the defendant stated Satan was in the room laughing at her. Dr. Phillips observed the defendant's eyes tracking the room. Dr. Phillips's attempts to redirect or calm the defendant were unsuccessful, and the defendant began to scream. Dr. Phillips concluded the defendant **[*11]** was completely psychotic and responding to internal stimuli so anti-psychotic medication was prescribed. The court accepted defense witness Dr. Phillip Resnick as an expert in psychiatry. Dr. Resnick examined the defendant on August 6, 2008. The defendant told Dr. Resnick that in the summer of 2007 she was depressed, had lost weight, and did not have a good appetite. She was having trouble sleeping and lost interest in things. She felt fatigued and worthless. The defendant indicated she had trouble concentrating and remembering things and had thoughts of suicide.
>
> Dr. Resnick defined "psychosis" as being out of touch with reality. In his opinion, on the day of the offenses, the defendant suffered an auditory hallucination. The defendant said she heard a forceful male voice telling her that her ex-husband was going to take away her children, that she had to keep the family together, and that the family had to die to stay together. The defendant told Dr. Resnick that the voice instructed her to stab her children and to kill herself, and after she killed the victims, the voice dictated the notes she left at the scene. Dr. Resnick noted the defendant told Dr. Phillips that she heard Satan **[*12]** laughing at her. According to Dr. Resnick, the defendant was having auditory hallucinations when she heard the voice of Satan. Dr. Resnick maintained it was not surprising that the defendant's hallucination at the time of the offenses reflected her concerns that her children were getting close to her ex-husband's fiancée, that he was building a new house, and that she might lose custody of them. The defendant advised Dr. Resnick that when she stabbed Camille, Camille said, "Mommy, I love you. I don't want to die," and the defendant told her, "I love you, but I don't want daddy to take you away."

Dr. Resnick concluded that on the day of the offenses the defendant was suffering from major depression and killed her children because she was psychotic. In his opinion, with reasonable medical certainty, due to severe psychotic depression, distorted mind, delusions, and hallucinations, the defendant could not distinguish whether stabbing her children was right or wrong because she believed it was in their best interests. He conceded, however, that he had seen no evidence the defendant had been diagnosed as psychotic prior to the offenses, including when she saw a neurosurgeon and physical **[*13]** therapists in August 2007. He also conceded that Dr. Phillips's conclusion that the defendant was suffering from psychosis beginning long before Dr. Phillips saw her was unsupported by the evidence.

The defense also presented testimony at trial from Dr. Glenn Wolfner Ahava, who was accepted by the court as an expert in forensic psychology. He became involved in the case in January of 2008 and interviewed the defendant four times between March 28, 2008, and August 11, 2008. Dr. Ahava did not think the defendant was malingering. He diagnosed the defendant as suffering from major depressive disorder that was severe, recurrent, and with psychotic features. In his opinion, on the day of the offenses, it was more likely than not that the defendant could not distinguish right from wrong with respect to her criminal conduct. The defendant, a religious woman, had a delusional belief consistent with depression that God was speaking to her and commanding her. According to the defendant, on the day of the offenses, God spoke to her and told her "he" was going to take the children away, and she had to kill the children and herself to keep the family together so that they could go to heaven. The **[*14]** defendant advised Dr. Ahava that the voice told her to stab the victims in the head. The defendant told Dr. Ahava that as she stabbed the victims, she told them she loved them, but she could not let their father take them. The defendant explained that the voice told her to kill the family dog and, then, to make coffee to stay awake to write the notes. The defendant told Dr. Ahava she hesitated twice before stabbing the victims, but the voice told her to practice on a bed.
Dr. Ahava testified that the defendant, who was forty-one years old when he saw her, reported a history of mental health issues dating back to her early twenties. He conceded, however, there were no medical records to support her claim. The defendant told him she had heard voices prior to the date of the offenses; however, she had not made that claim to any of the other doctors who had interviewed her. According to Dr. Ahava, the number of stab wounds inflicted on the victims indicated the defendant was obviously psychotic.

Dr. David Self testified as an expert in forensic psychiatry. Dr. Self interviewed the defendant on July 16, 2008, and August 14, 2008. He diagnosed her as suffering from major depression that was **[*15]** recurrent and severe with psychosis. He indicated with reasonable psychiatric certainty that due to mental disease the defendant was incapable of distinguishing the wrongfulness of her conduct in killing the victims. The defendant advised Dr. Self that she suffered from symptoms of major depression following the birth of Braxton, and her depression became much worse when her husband announced his intent to separate from her. Dr. Self testified that the likelihood of a person suffering from mental illness increased if other family members suffered from mental illness. The defendant's sister had a psychotic breakdown in her teens; the defendant's uncle had been diagnosed with schizophrenia; and the defendant's maternal grandfather had committed suicide. The defendant told Dr. Self that on the day of the offenses she heard a male voice taunting her, "He's going to take the children. He's going to take them." According to the defendant, the voice told her she had to keep the family together by killing the children and then herself, and to stab the brains of the children. Dr. Self, reflecting on the defendant's self-inflicted wounds, stated that only the most psychotic people attack their **[*16]** own eyes.

Id. at 3-5.

In rebuttal, the State called two expert witnesses, Dr. Rafael Salcedo and Dr. George Seiden, who testified that Hebert was not psychotic when she killed her children, but instead committed the killings as an act of "retribution." The First Circuit summarized Drs. Salcedo and Seiden's testimony:

> The State presented testimony at trial from Dr. Rafael Salcedo, a court accepted expert in clinical and forensic psychology. He interviewed the defendant on April 28, 2008. In Dr. Salcedo's opinion and within a reasonable degree of psychological certainty, at the time of the offenses, although the defendant was suffering from a psychotic disorder (major depression), the disorder

did not rise to the level that it impaired her ability to distinguish right from wrong. Stated differently, the defendant was capable of distinguishing right from wrong when she murdered her children.

Dr. Salcedo delineated numerous sources of stress in the defendant's life from 2006 until the date of the offenses. The defendant's husband, Chad, had moved out and ultimately divorced her. The defendant did not want the divorce. The defendant was a single mom, and Braxton suffered from Asperger's disorder, a mild **[*17]** form of autism. The defendant was very angry with her ex-husband and that anger intensified when she learned that he was involved with Kimberly. Moreover, the children were excited that Chad and Kimberly were building a house. Camille was becoming attached to Kimberly; the defendant had seen Camille at a ball game holding hands with, or sitting next to, Kimberly. Camille was excited about being a flower girl at Chad and Kimberly's wedding. The defendant also was upset by Chad's mother, Judy, encouraging a relationship between Braxton, Camille, and Kimberly.

Dr. Salcedo testified that psychosis builds up over time. A delusion that lasts four hours—beginning suddenly without any evidence of delusional thinking and ending after being shocked by a Taser—would be very unusual. Dr. Salcedo pointed out that the defendant first claimed she was acting at the direction of God and later at the direction of Satan. Moreover, the defendant's note to Chad did not appear to be written by someone who was psychotic. Dr. Salcedo explained:

> "It is logical. The content is consistent with the circumstances that were found to be in evidence later on. It shows no evidence of loosening of associations. See, **[*18]** one of the things that I didn't mention is that psychosis is not just hallucinations and so called delusions. Usually, a psychotic individual also displays disorganized thinking, loosening of associations, you know, they go off on tangents. You ask them one question, they come back with something else. You know, it incorporates what we call cognitive distortions, cognitive disorders. That's a very well-written, well-organized, thought-out letter."

Dr. Salcedo stated the defendant's statement in the note, "You wanted your own life. You got it. I'll be damned if you get the kids, too," presented a plausible motive for the behavior she manifested. When the defendant wrote, "I sure hope you two lying alduttering (sic) home wrecking whores can have more kids because you can't have these," she was telling Chad that she was getting ready to kill, or had already killed, the children, and he was not going to have them. Dr. Salcedo also remarked the note showed no evidence of delusional ideation; specifically, the note did not refer to heaven or being together.

Dr. Salcedo also discussed the defendant's note to her ex-mother-inlaw (sic), Judy. The defendant's statement, "Well when you started **[*19]** delivering my kids to that whore, Kimberly, that was the last straw!" was consistent with Judy supporting Kimberly developing a close relationship with Camille and Braxton. The defendant had a huge amount of anger at her mother-in-law and had not let Camille and Braxton visit Judy's house, which was across the street from her own house, since June of 2007. Dr. Salcedo concluded his analysis of the notes by stating:

> "Well, what you have here is something that I've never had in the numerous not guilty by reason of insanity cases that I've been involved with and, that is, you have an authored description written by the defendant of her mental state at the time. Sometimes you have observers. Sometimes you have a video camera. Sometimes you have witnesses. But rarely are you able to get inside the mind of the defendant in such close proximity to the time of the commission of the alleged offense. It's almost like having a videotape of her thought processes at the time. That's what's remarkable about this case.
>
> And I would add that there's no mention of psychosis or delusions or, you know, nothing psychotic in the notes themselves, as opposed to what she self-reported."

Dr. Salcedo indicated **[*20]** in a retribution killing of children, also known as a spousal revenge killing of children, the woman who kills her children loves them but that love is overridden by her hatred for her spouse. It is typical in such a killing to leave behind a note to inflict cruelty on the other spouse.

Dr. Salcedo testified that people who are depressed often commit suicide. A suicidal mother may be very concerned about what will happen to her children after the parent kills herself and, therefore, may decide to kill the children too. Given the defendant's religious belief that heaven was a

better place—which he noted was not a delusion but, rather, a belief shared by many people from her church—and her anger toward Chad, she decided to kill her children and herself.

In Dr. Salcedo's opinion, Dr. Phillips did not have enough information to render an accurate diagnosis. Dr. Phillips's final diagnosis of the defendant was "psychosis NOS," which means "not otherwise specified," or the diagnosis does not fit in any category of psychosis. Dr. Salcedo opined that Dr. Phillips did not have any background information on the defendant and assumed the defendant was crazy because she talked about Satan and God **[*21]** and seemed to be hyper-religious.

State witness Dr. George Seiden was accepted by the court as an expert in general and forensic psychiatry. He interviewed the defendant on March 24, 2009. Dr. Seiden stated that, although the defendant was suffering from a depressive episode, on the day of the offenses, she was capable of distinguishing right from wrong in connection with the killings of the victims.

Dr. Seiden found no evidence in the defendant's medical records that she had exhibited any psychotic features prior to the day of the offenses. He pointed out that on August 16, 2007, on a "Functional Health Intake Summary" for a physical therapist, the defendant indicated she could fully concentrate.

The defendant told Dr. Seiden that a voice had commanded her to kill her children. She also told him she attempted to stab one of the children, left, and then came back. The defendant explained she hesitated because she "could not hurt her babies." According to Dr. Seiden, the defendant's statement indicated she knew she was going to hurt her children.

Dr. Seiden found nothing in the defendant's note to Chad that indicated she was in a psychotic state when it was written. He found no evidence **[*22]** of the psychotic disorganization of thought that is seen in a true psychosis. To the contrary, Dr. Seiden felt the note indicated the defendant was not psychotic at the time it was written. The defendant's statement in her note, "Sorry Daddy, Celeste & Renee I love you all too," was significant in that it was a statement acknowledging she had done something wrong. Dr. Seiden defined a delusion as a fixed false belief that cannot be changed with any amount of information and that is not consistent with the culture. Herein, there was no delusion but, rather, the defendant's fear of losing her children either through formal legal means or through the loss of their love.

In thirty years of practice, Dr. Seiden had never seen or read about a psychotic disorder that began and ended suddenly. Psychoses gradually develop and gradually ebb. Dr. Seiden concluded that Dr. Phillips was mistaken in her diagnosis of the defendant on August 23, 2007, because Dr. Phillips did not view the defendant's claim of Satan being in the room and laughing at her within the context of the defendant's religious beliefs—that Satan is a real and tangible entity.

Id. at 5-8.

IV. GENERAL STANDARDS OF REVIEW APPLICABLE TO HEBERT'S [*23] *HABEAS* PETITION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") comprehensively overhauled federal *habeas corpus* legislation, including 28 U.S.C. § 2254. Amended subsections 2254(d)(1) and (2) contain revised standards of review for pure questions of fact, pure questions of law, and mixed questions of both. The amendments "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

As to pure questions of fact, factual findings are presumed to be correct and a federal court will give deference to the state court's decision unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

As to pure questions **[*24]** of law, and mixed questions of law and fact, a federal court must defer to the state court's decision on the merits of such a claim unless that 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). Courts have held that the "'contrary to' and 'unreasonable application' clauses [of § 2254(d)(1)] have independent meaning." *Bell*, 535 U.S. at 694.

Regarding the "contrary to" clause, the United States Fifth Circuit Court of Appeals has explained:

> A state court decision is contrary to clearly established precedent if the state court applies a rule that contradicts the governing law set forth in the [United States] Supreme Court's cases. A state-court decision will also be contrary to clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of the [United States] Supreme Court and nevertheless arrives at a result different from [United States] Supreme Court precedent.

Wooten v. Thaler, 598 F.3d 215, 218 (5th Cir. 2010) (internal quotation marks, ellipses, brackets, and footnotes omitted).

Regarding the "unreasonable application" clause, the United States Supreme Court has held: "[A] state-court decision **[*25]** is an unreasonable application of our clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." *White v. Woodall*, 134 S. Ct. 1697, 1706, 188 L. Ed. 2d 698 (2014). However, the Supreme Court cautioned:

> Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; *it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error. Thus, if a habeas court must extend a rationale before it can apply to the facts at hand*, *then by definition the rationale was not clearly established at the time of the state-court decision*. AEDPA's carefully constructed framework would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.

Id. (citations and quotation marks omitted) (emphasis added).

Therefore, when the Supreme Court's "cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (quotation marks and brackets omitted). The Supreme Court has also expressly cautioned that **[*26]** "an unreasonable application is different from an incorrect one." *Bell*, 535 U.S. at 694. Accordingly, a state court's merely incorrect application of Supreme Court precedent does not warrant *habeas* relief. *Puckett v. Epps*, 641 F.3d 657, 663 (5th Cir. 2011) ("Importantly, 'unreasonable' is not the same as 'erroneous' or 'incorrect'; an incorrect application of the law by a state court will nonetheless be affirmed if it is not simultaneously unreasonable.").

While the AEDPA standards of review are strict and narrow, they are purposely so. As the United States Supreme Court has held:

> [E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable.
>
> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that *habeas corpus* is a guard against *extreme malfunctions* in the state criminal justice systems, *not a substitute for ordinary error correction through appeal.* ***[*27]*** *As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement*.

Harrington v. Richter, 562 U.S. 86, 102-03, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citations omitted) (emphasis added); *see also Renico v. Lett*, 559 U.S. 766, 779, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) ("AEDPA prevents defendants — and federal courts — from using federal *habeas corpus* review as a vehicle to second-guess the reasonable decisions of state courts").

The Supreme Court has expressly warned that although "some federal judges find [28 U.S.C. § 2254(d)] too confining," it is nevertheless clear that "all federal judges must obey" the law and apply the strictly deferential standards of review mandated therein. *White*, 134 S. Ct. at 1701.

V. ANALYSIS OF HEBERT'S SPECIFIC CLAIMS

A. Sufficiency of the Evidence

Hebert's first claim is that no rational juror could have found her guilty because she proved by a preponderance of the evidence that she was legally insane at the time she committed the murders.[29] In response, the State argues that its two expert witnesses provided sufficient evidence that Hebert deliberately sought "retribution" against her ex-husband **[*28]** and was not psychotic when she killed her children. On direct appeal, both the Louisiana First Court of Appeal and the Louisiana Supreme Court denied this sufficiency-of-the-evidence claim.[30]

A claim of insufficiency of the evidence is a mixed question of law and fact, requiring this Court to examine whether the state court's denial of relief was contrary to or an unreasonable application of United States Supreme Court precedent. *Penry v. Johnson*, 215 F.3d 504, 507 (5th Cir. 2000); *Maes v. Thomas*, 46 F.3d 979, 988 (10th Cir. 1995). As noted below, the state appellate court invoked the correct standard in Hebert's direct appeal,[31] which means this Court is left to determine whether that court's *application* of that standard was objectively unreasonable. For the reasons set forth below, this Court recommends that Hebert's sufficiency claim be denied.

1. Standard of Review

The Supreme Court established the due-process standard that a reviewing court must employ in analyzing the sufficiency of the evidence in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under *Jackson*, the reviewing court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime, as identified by state substantive law, to have been proven beyond a reasonable **[*29]** doubt. *Id.* at 316-17, 99 S.Ct. at 2787. In this case, Hebert claims that no rational jury could have concluded that she failed to prove she was legally insane at the time she committed the murders.

In Louisiana, a criminal defendant is presumed to be sane and responsible for his or her actions. La.Rev.Stat. § 15:432; *State v. Peters*, 643 So.2d 1222, 1225 (La. 1994). However a defendant may rebut this presumption by a preponderance of evidence. La.Rev.Stat. § 15:652; *see State v. Silman*, 663 So.2d 27, 32 (La. 1995). Notably, the State is not required to offer any proof of the defendant's sanity or to offer evidence to rebut the defendant's evidence. *State v. Thames*, 95-2105 (La. App. 1 Cir. 9/27/96); 681 So.2d 480, 486, *writ denied*, 96-2563 (La.3/21/97); 691 So. 2d 80. "Legal insanity is proved if the circumstances indicate that a mental disease or mental defect rendered the offender incapable of distinguishing between right and wrong with reference to the conduct in question." *Peters*, 643 So.2d at 1225 (citing La.Rev.Stat. § 14:14).

Here there is no question that Hebert actually committed the acts for which she was charged — first-degree murder. Instead of making a typical sufficiency argument, however, *i.e.*, the prosecution failed to meet one of its essential elements, Hebert makes the argument that she overcame the presumption that she was sane so that no rational jury could have found her guilty. In light of Louisiana law on the issue of insanity, the inquiry under *Jackson* is whether viewing **[*30]** the evidence in the light most favorable to the State, any rational trier of fact could have found that Hebert had not proven by a preponderance of the evidence that she was insane at the time of the offense. *See Thames*, 681 So. 2d at 486, *see also Donahue v. Cain*, 231 F.3d 1000, 1004 (5th Cir. 2000).

In a federal *habeas corpus* proceeding, great deference must be given to the factual findings in the state-court proceedings because review of the sufficiency of the evidence does not include review of the *weight* of the evidence or the *credibility* of the witnesses—those determinations are the exclusive province of the jury. *United States v. Young*, 107 F. App'x 442, 443 (5th Cir. 2004) (citing *United States v. Garcia*, 995 F.2d 556, 561 (5th Cir. 1993); *see Jackson*, 443 U.S. at 319 (it is the jury's responsibility "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"). A reviewing federal *habeas* court is not authorized to substitute its interpretation of the evidence or its view of the credibility of witnesses in place of the fact finder. *Weeks v. Scott*, 55 F.3d 1059, 1062 (5th Cir. 1995); *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir.

[29] Rec. Doc. No. 1.

[30] *Hebert*, 57 So.3d 608; *Hebert*, 73 So.3d 380.

[31] *Hebert*, 2010-0305, 57 So. 3d 608 (La. App. 1st Cir. 2/11/11)

1985). Thus, all credibility choices and conflicting inferences must be resolved in favor of the verdict. *Ramirez v. Dretke*, 398 F.3d 691, 695 (5th Cir. 2005). In addition, "[t]he *Jackson* inquiry 'does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a *rational* decision to convict or **[*31]** acquit.'" *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) (quoting *Herrera v. Collins*, 506 U.S. 390, 402, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)) (emphasis added).

2. Analysis

On this issue, the sole question before this Court is whether the First Circuit's decision denying Hebert's sufficiency challenge "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). This Court cannot say, based on its review of the extensive record in this case, that the First Circuit's decision was objectively unreasonable.

Six expert witnesses testified at Hebert's trial: two for the State and four for the defense. The very fact that the jury heard this conflicting testimony from *court-approved* experts ultimately dooms Hebert's sufficiency-of-the-evidence claim. In this analysis, it is of no moment that the defense called twice as many expert witnesses as the State because "conflicting expert testimony invites juries to make a credibility determination, not to tally which side produced more experts." *See Chester v. Thaler*, 666 F.3d 340, 349 (5th Cir. 2011), *cert. denied*, 568 U.S. 978, 133 S. Ct. 525, 184 L. Ed. 2d 338 (2012); *compare Strickland v. Francis*, 738 F.2d 1542, 1551 (11th Cir. 1984) (noting the significance of conflicting testimony for a *Jackson* claim).

This Court is explicitly prohibited from engaging in a credibility analysis; it is the province of the jury "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable **[*32]** inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. As compelling as the defense experts and physical evidence may have been, the State presented evidence — including the testimony of two expert witnesses — that supported its theory that Hebert was not insane at the time of the offense. Looking at this evidence in the light most favorable to the State, as the *Jackson* standard demands, this Court cannot say that a rational juror *must* have found Hebert not guilty by reason of insanity. *See Ramirez*, 398 F.3d at 695 (all credibility choices and conflicting inferences must be resolved in favor of the verdict); *Morris v. Attorney Gen. of State of California*, 36 F. App'x 235, 237-38 (9th Cir. 2002) (on *habeas* review, federal court must "respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict") (citation omitted). Accordingly, Hebert's sufficiency-of-the-evidence claim is without merit.

B. Ineffective Assistance of Trial Counsel

Hebert makes three distinct claims of ineffective assistance of counsel: (1) trial counsel was ineffective for failing to challenge the State's use of its peremptory challenges under **[*33]** *J.E.B./Batson*; (2) trial counsel was ineffective for failing to investigate a seizure disorder that may have "caused [Hebert's] psychotic break" and (3) appellate counsel was ineffective for failing to challenge the warrantless search of Hebert's home.[32] Hebert raised these claims in state post-conviction proceedings and they were denied by the Louisiana Supreme Court in a written opinion.[33] As discussed below, these claims are without merit.

1. Standard of Review on Ineffective Assistance Claims

The standard for judging the performance of counsel was established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the Court established a two-part test for evaluating claims of ineffective assistance of counsel in which the petitioner must prove deficient performance and prejudice therefrom. *See* 466 U.S. at 697. The petitioner has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *See Montoya v. Johnson*, 226 F.3d 399, 408 (5th Cir. 2000); *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992). In deciding ineffective-assistance claims, a court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test. *See Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995).

---

[32] Rec. Doc. No. 1. Although Hebert ordered her claims differently, this Court will address all three *Strickland* challenges together.

[33] Rec. Doc. No. 1; *Hebert*, 182 So. 3d at 27.

To prevail on the deficiency prong of **[*34]** the *Strickland* test, a petitioner must demonstrate that counsel's conduct failed to meet the constitutional minimum guaranteed by the Sixth Amendment. *See Styron v. Johnson*, 262 F. 3d 438, 450 (5th Cir. 2001), *cert. denied*, 534 U.S. 1163, 122 S. Ct. 1175, 152 L. Ed. 2d 118 (2002). "The defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88; *see also Cantu v. Thaler*, 632 F.3d 157, 163 (5th Cir. 2011). The analysis of counsel's performance must take into account the reasonableness of counsel's actions under prevailing professional norms and in light of all of the circumstances. *See Strickland*, 466 U.S. at 689; *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009). The reviewing court must "'judge ... counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (quoting *Strickland*, 466 U.S. at 690). Petitioner must overcome a strong presumption that the conduct of her counsel falls within a wide range of reasonable representation. *See Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 787, 178 L. Ed. 2d 624 (2011) (*citing Strickland*, 466 U.S. at 689).

In order to prove prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Williams v. Thaler*, 602 F.3d 291, 310 (5th Cir. 2010). Furthermore, "[t]he petitioner must 'affirmatively prove,' and not just allege, prejudice." *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009) (quoting *Strickland*, 466 U.S. at 695). In this context, "'a reasonable probability is a probability sufficient **[*35]** to undermine confidence in the outcome." *Cullen*, 131 S.Ct. at 1403 (quoting *Strickland*, 466 U.S. at. 694). This standard requires a "substantial," not just "conceivable," likelihood of a different result. *Harrington*, 131 S.Ct. at 791.

In making a determination as to whether prejudice occurred, courts must review the record to determine "the relative role that the alleged trial errors played in the total context of [the] trial." *Crockett v. McCotter*, 796 F.2d 787, 793 (5th Cir. 1986). Thus, conclusory allegations of ineffective assistance of counsel, with no showing of effect on the proceedings, do not raise a constitutional issue sufficient to support federal *habeas* relief. *See Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)), *cert. denied*, 531 U.S. 849, 121 S. Ct. 122, 148 L. Ed. 2d 77 (2000).

On *habeas* review, the United States Supreme Court has clarified that, in applying *Strickland*, "[t]he question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington*, 131 S.Ct. at 788. The *Harrington* Court went on to recognize the high level of deference owed to a state court's findings under *Strickland* in light of AEDPA standards of review:

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable **[*36]** applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Id. at 788 (citations and quotation marks omitted).

Accordingly, scrutiny of counsel's performance under § 2254(d) is "doubly deferential." *Cullen*, 131 S.Ct. at 1403 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1413, 173 L. Ed. 2d 251 (2009)). The federal courts must take a deferential look at counsel's performance under the *Strickland* standard through the "deferential lens of § 2254(d)." *Id.* (citing *Strickland*, 466 U.S. at 689 and quoting *Knowles*, 129 S.Ct. at 1419 n. 2). Furthermore, the court will "indulge a strong presumption that strategic or tactical decisions made after an adequate investigation fall within the wide range of objectively reasonable professional assistance." *Moore v. Johnson*, 194 F.3d 586, 591 (5th Cir. 1999) (citing *Strickland*, 466 U.S. at 689-90); *see also Mattheson v. King*, 751 F.2d 1432, 1441 (5th Cir. 1985).

The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. *Duhamel v. Collins*. 955 F.2d 962, 967 (5th Cir. 1992) (citing *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991)). In reviewing claims of ineffective assistance of appellate counsel, the Supreme Court has expressly observed that appellate counsel "need not advance every argument, regardless of merit, urged by the [] defendant. **[*37]** *Evitts v. Lucey*, 469 U.S. 387, 394, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). When alleging

ineffective assistance of appellate counsel, the defendant "must show that the neglected claim would have had a reasonable probability of success on appeal." *Duhamel*, 955 F.2d at 967. However, failing to raise every meritorious claim on appeal does not make counsel deficient. *Green v. Johnson*, 116 F.3d 1115, 1125-26 (5th Cir. 1997) (citing *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989)). Similarly, failing to raise a frivolous claim "does not cause counsel's performance to fall below an objective level of reasonableness." *Id.* at 1037. Courts give 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, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). This is true even where the weaker arguments have merit. *Id.* at 751-2. Instead, the applicable test is whether the omitted issue was "clearly stronger" than the issue[s] actually presented on appeal. *See, e.g.*, *Diaz v. Quarterman*, 228 F. App'x 417, 427 (5th Cir. 2007); *see also Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

2. Ineffective Assistance of Counsel for Failing to Make a *J.E.B./Batson* Challenge

In her first ineffective-assistance-of-counsel claim, Hebert contends the State unlawfully struck qualified prospective female jurors on the basis of their gender and counsel was ineffective for failing to raise challenges to those improper strikes.[34] She argues that prejudice is presumed **[*38]** "where trial counsel fails to object where a prima facie case of discrimination exists because discrimination in jury selection is a structural error."

Specifically, Hebert claims that the State discriminated against female jurors when it used all of its peremptory strikes to remove women from the jury.[35] Hebert raised this same claim in her state post-conviction application and, in the last reasoned state-court opinion, the Louisiana Supreme Court denied the claim on its merits.[36] That court wrote: "Relator fails to show that she received ineffective assistance of trial counsel under the standard of *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674."[37] The Louisiana Supreme Court explicitly relied upon the post-conviction findings of the trial court that

> there were many sufficiently gender-neutral explanations for the use of peremptory challenges including: religious, moral or ethical considerations, self-employed business owners, jurors with medical or psychiatric problems, jurors with family members that had psychiatric problems, one juror who knew the defendant, and those jurors that had misgivings about imposing the death penalty.[38]

The trial court also concluded that, even had counsel's performance been insufficient, Hebert had **[*39]** not shown any prejudice arising from that deficiency.[39] The trial court also held that trial counsel were not deficient because they "used their experience and training in the most skillful manner to properly defend petitioner against the charges."[40] Because the state courts rejected the ineffective assistance of counsel claims on the merits and such claims present a mixed question of law and fact, this Court must defer to the state-court decision unless it 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); *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir.).

Because it is undisputed that Hebert's counsel did not lodge any objections to the State's use of peremptory challenges, the Court must apply the two-pronged *Strickland* analysis to that alleged omission by counsel. Turning first to the deficient-performance prong, Hebert "bears the burden of demonstrating [that trial counsel's] performance was outside the wide range of reasonable professional assistance and must overcome a strong presumption of adequacy." *Clark v. Collins*, 19 F.3d 959 (5th Cir. 1994). The AEDPA, however, adds a second layer of deference to trial counsel's perspective on the

---

[34] Rec. Doc. No. 1.

[35] *Id.* In its reply the State notes that it only used 11 of its peremptory challenges before a full jury was seated and only used the remaining of its "additional, yet entirely separate," peremptory challenges for the selection of alternate jurors pursuant to La.C.Cr.P. art. 789. Rec. Doc. No 8, p. 9.

[36] *Hebert*, 182 So. 3d 23.

[37] *Id.*

[38] *Id.* As noted above, the Louisiana Supreme Court incorporated in its opinion the written reasons for ruling issued by the state district court.

[39] *Id.*

[40] *Id.*

jury selection proceedings. **[*40]** *Burt v. Titlow*, __ U.S. __, 134 S.Ct. 10, 13, 187 L.Ed.2d 348 (2013) ("[O]ur cases require that the federal court use a doubly deferential standard of review that gives both the state court and the defense attorney the benefit of the doubt.") (quotation omitted). As the United States Supreme Court has cautioned, this Court's analysis must attempt to "eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Ramirez v. Stephens*, 641 F. App'x 312, 322 (5th Cir. 2016) (a decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be so ill chosen that it permeates the entire trial with obvious unfairness).

While Hebert does point to a fact that might be troubling on its face and in a vacuum, *i.e.*, that the State used all of its peremptory challenges on women,[41] that fact alone does not afford her *habeas* relief in the absence of any challenge to the strikes by trial counsel. The question on her federal *habeas* claim for ineffective assistance of counsel is whether she can demonstrate that counsel was deficient for failing to challenge the State's peremptory strikes at the time of trial. Here, Hebert's claim of deficient performance **[*41]** is undermined by the record facts and, indeed, her own petition.

It is important to recall that to establish a case of intentional discrimination, the petitioner must show that the State exercised peremptory challenges to remove "member[s] of a cognizable group" and that "circumstances [are] sufficient to raise an inference that the prosecutor struck the venire person on account of being a member of that cognizable group." *State v. Givens*, 776 So.2d 443, 449 (La. 10/17/01). The relevant circumstances of the jury selection in this case simply do not allow for the conclusion that a *prima facie* case of discrimination can be made.

The record reflects that the final jury proper consisted of 10 females and two males, along with three males and one female chosen as alternate jurors.[42] After the venire members were randomly drawn, 23 females and 10 males were questioned prior to the final jury selection.[43] Of the 10 males examined, four were stricken for cause or hardship, leaving only six on the venire. The defense used four of its peremptory challenges on those males, leaving only two males on the panel. Given these straightforward numbers, that the State used 11 of its strikes on females is, in the final analysis, neither surprising nor indicative of **[*42]** a discriminatory pattern.[44]

Underlying all this are Hebert's own arguments that, intentionally or not, demonstrate a clear strategic reason why trial counsel would choose not to make a *J.E.B./Batson* challenge: if trial counsel succeeded with that challenge, the defense would risk losing favorable jurors. Hebert writes that "side-by-side comparison of the *voir dire* statements of the struck female jurors reveals that they were as qualified, *or more qualified*, to serve on the jury and return a sentence of death [than the] male jurors who were actually seated on Hebert's jury."[45] Hebert further notes that, "of the twelve female venire members peremptorily struck by the State, five of them conveyed unequivocal support for the death penalty and willingness to impose a death sentence on Hebert."[46] Indeed, one juror, Mary Davidson, went so far as to "indicat[e] that, in her opinion, death would be the appropriate penalty in a factual scenario that was based on the State's version of the instant crime but that she would consider all of the evidence presented."[47] And later, Hebert notes that "none of the female prospective jurors removed by the State was as opposed to the death penalty as some of the **[*43]** males ultimately selected to sit on the jury."[48]

The Court has reviewed the transcript of the *voir dire* and finds Hebert's characterization of these potential jurors' statements to be accurate and, therefore, cannot

---

[41] Rec. Doc. No. 1

[42] State Rec. Vols. 21-23, 29-39. The Court has carefully reviewed the entire *voir dire*, which comprises some 14 volumes in the state-court record.

[43] *Id.*

[44] This conclusion is illustrated to an extent by an observation made by the State in its Response to the Petition, namely that if the District Attorney had truly been motivated to exclude female jurors, one would have expected him to strike the last juror seated, a female, because she would have been replaced with a male.

[45] *Id.* at 31 (emphasis added).

[46] *Id.* at 32.

[47] *Id.* at 33.

[48] *Id.* at 34.

help but conclude that her trial counsel had ample strategic reasons to abstain from making *J.E.B/Batson* challenges regarding any number of the State's strikes. In attempting to establish that the stricken jurors were death-penalty qualified, Hebert necessarily highlights a clear justification for her counsel to want them stricken — that they were death-penalty qualified. While she escaped that sentence ultimately, that Hebert faced the death penalty at the time the jury was selected cannot be gainsaid, and efforts by counsel to exclude potential jurors who were "as qualified, or more qualified"[49] to return a death sentence simply cannot be second-guessed at this level of review. Given the state court's factual findings and the strong deference paid to trial counsel's performance, the state court's rejection of this ineffective assistance claim was not unreasonable. Thus, this Court need not reach the prejudice prong of the *Strickland* inquiry and Hebert's ineffective-assistance **[*44]** claim that counsel failed to make a *J.E.B./Batson* challenge should be denied.[50]

3. Ineffective Assistance of Trial Counsel for Failing to Investigate Hebert's Seizure Disorder

Hebert next claims that her trial counsel was ineffective for failing to investigate a long-standing, untreated, seizure disorder that "likely caused her psychotic break."[51] In response, the State argues that Hebert's trial attorneys were not deficient because they were aware of the seizure disorder and conveyed that information to their expert witnesses who "chose to give it very little weight."[52] The State opines that, even had her trial attorneys (and experts) presented this alternate theory as the cause of Hebert's psychosis, Hebert still fails to prove prejudice because that theory cannot account for the "the angry letters she penned on the date of the killing."[53] In its decision denying Hebert's claim, the Louisiana Supreme Court stated: "Relator fails to show she received ineffective assistance of trial counsel under the standard of *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674," and attached and incorporated the trial court's post-conviction order. That order specifically found that Hebert's trial attorneys did not render deficient performance, noting **[*45]** (as mentioned above), that "petitioner's counsel used their experience and training in the most skillful manner to properly defend petitioner against the charges."[54]

Through the affidavit of Dr. Merikangas, the email from Dr. Ahava, and the diagnosis of temporal lobe seizures, Hebert argues that she suffered prejudice when her trial lawyers deficiently failed to investigate her temporal-lobe seizures, which may have exacerbated (or even potentially caused) her psychosis.[55] In support of this claim, Hebert relies upon an affidavit from Dr. James Merikangas.[56] That affidavit provides evidence that Hebert wrote the two notes, not as a scorned lover, but as someone who was suffering from a labile mood.[57] Dr. Merikangas supports this assertion by pointing to Hebert's statement, made only a week before the killings that she "wanted to move on her with her life."[58]

---

[49] *Id.* at 31.

[50] Hebert presents this claim as an ineffective assistance claim rather than as a *Batson* violation claim. She argues for a presumption of prejudice in the ineffective assistance of counsel context based upon the failure to object to the State's use of peremptory challenges to remove females and resultant structural error. While the Court need not reach the issue of prejudice, it notes that the United States Fifth Circuit has declined to "hold that a structural error alone is sufficient to warrant a presumption of prejudice in the ineffective assistance of counsel context." *Scott v. Hubert*, 610 F. App'x 433 (5th Cir. 2015) (quoting *Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006).

[51] Rec. Doc. No. 1.

[52] Rec. Doc. No. 8, p. 16.

[53] *Id.* at 20.

[54] *Hebert*, 182 So. 3d at 27.

[55] Rec. Doc. No. 1. Supp. Exh. 1, 7, 8. Dr. Merikangas' affidavit does not indicate that he would have, in fact, been available to testify at trial. Notwithstanding this, however, the Court will consider the affidavit because of its substantial compliance with Hebert's burden for claims of failure to investigate. In order to demonstrate prejudice arising from the failure to call witnesses, a petitioner must identify the witnesses, explain the content of their proposed testimony, show that their testimony would have been favorable to the defense, and demonstrate that the witnesses were available and willing to testify at trial. *See Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009); *See also Anthony v. Cain*, Civ. Action No. 07-3223 at 8, 2009 U.S. Dist. LEXIS 100697, 2009 WL 3564827 (E.D.La. Oct. 29, 2009) ("This Court may not speculate as to how such witnesses would have testified; rather, a petitioner must come forward with evidence, such as affidavits from the uncalled witnesses, on that issue.").

[56] Rec. Doc. No. 1-13.

[57] *Id.*

[58] Rec. Doc. No. 1. Supp. Exh. 13-8.

Further, Dr. Merikangas' affidavit rebuts the State's claim that Hebert could not have been in a psychotic state for such a short period of time and he also explains why "it is not surprising that [a] [taser] shock brought her around to awareness."[59]

Hebert has not demonstrated that her counsel's performance was deficient. **[*46]** *See Motley v. Collins*, 18 F.3d 1223, 1226 (5th Cir. 1994), *cert. denied*, 513 U.S. 960, 115 S. Ct. 418, 130 L. Ed. 2d 333 (1994)) (in deciding ineffective assistance of counsel claims, this court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test). To do so, she must establish that counsel "made errors so serious that he was not functioning as the 'counsel' guaranteed to the defendant under the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. On federal *habeas* review, scrutiny of counsel's performance "must be highly deferential," and the court will "indulge a strong presumption that strategic or tactical decisions made after an adequate investigation fall within the wide range of objectively reasonable professional assistance." *Moore v. Johnson*, 194 F.3d 586, 591 (5th Cir. 1999) (citing *Strickland*, 466 U.S. at 689-90). Under this standard, the petitioner bears the burden to show that counsel's performance fell below an objective standard of reasonableness and that the deficiency prejudiced the defense. *See Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052.

Further, every effort must be undertaken "'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *United States v. Harris*, 408 F.3d 186, 189 (5th Cir. 2005) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052).

A "conscious and informed decision on trial tactics **[*47]** and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill-chosen that it permeates the entire trial with obvious unfairness." *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) (citations and internal quotation marks omitted). However, "strategic choices made after less-than-complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 521, 123 S.Ct. 2527 (internal quotation marks and alteration omitted) (quoting *Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052). When assessing the reasonableness of an attorney's investigation, we must "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527, 123 S.Ct. 2527.

The weakness of Hebert's deficiency argument vis-à-vis the seizure investigation is particularly clear when juxtaposed against her prejudice argument. Unlike Hebert's prejudice claim, which is accompanied by direct evidence, in the form of affidavits, documents and emails, Hebert's deficiency claim conspicuously lacks any such supplemental evidence. Here, there is no evidence that there was anything further for counsel to investigate — indeed, the record shows that counsel *actually* ***[*48]*** *had* information about the existence and effects of Hebert's frontal-lobe seizures.[60] Page 11 of Dr. Ahava's report reads:

> At the age of 20 years old, [Hebert] was in an automobile accident in which she was the passenger in the front seat of a pickup truck, sitting in the middle. She suffered a concussion and was hospitalized. She reported experiencing changes in mood following that event. Hebert developed a seizure disorder and was placed on a variety of anti-seizure medications over the ensuing years.
>
> ...
>
> In conclusion, Dr. Gaddis opined that Hebert had "temporal lobe seizures." This is relevant to the extent that this classification of seizures often co-exists with mood disturbances that appear similar to manic depression.

Rec. Doc. No. 1, Exh. 2, p. 11.

Although Hebert offers no evidence about trial counsel's investigative choices, there are viable strategic reasons why counsel might have focused on Hebert's depression instead of her seizures. For instance, counsel may have wanted to direct the jury to Hebert's most recent mental illness and worried that bringing up an old seizure disorder would just confuse the jury. *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 76 (1st Cir. 2009) (noting that trial counsel's decision to disregard one of two different **[*49]** diagnoses for an insanity defense was a strategic decision and therefore not deficient performance because of the potential to confuse the jury).

Hebert, who bears the burden of proof, offers no

[59] *Id.*

[60] See Rec. Doc. No. 1, Exh. 1, p. 2; Exh. 2, p. 11.

evidence that the other medical experts who testified at trial — Drs. Self, Resnick and Phillips — thought the seizure disorder played a significant role in Hebert's psychotic break and thus should have been investigated further and introduced at trial. *Escamilla v. Stephens*, 749 F.3d 380, 392 (5th Cir. 2014) (if a purportedly tactical decision is not preceded by *a reasonable investigation*, then it is not sufficiently informed and not entitled to the deference typically afforded counsel's choices). To be sure, the use of three separate doctors to evaluate Hebert for psychiatric problems amounts to a "reasonable investigation" and her trial counsel's decisions are afforded great deference. This claim is therefore without merit.

C. *Ineffective Assistance of Appellate Counsel for Failing to Challenge the Search of Hebert's Home*

Hebert's final claim of ineffective assistance of counsel is that her appellate counsel failed to challenge the warrantless search of her home.[61] On direct appeal, Hebert's appellate counsel raised six claims: (1) the trial court **[*50]** erred when it denied the post-verdict judgment of acquittal; (2) the trial court erred when it denied Hebert's motion for a new trial; (3) there was insufficient evidence to conclude that Hebert was guilty; (4) the trial court erred when it limited Dr. Spitz' testimony; (5) the trial court erred when it denied Hebert's motion for a change of venue and (6) the trial court imposed an excessive sentence by making the life sentences consecutive.[62] After raising the issue of the warrantless search on post-conviction, the Louisiana Supreme Court denied the claim in the last reasoned state court opinion:

> Relator also fails to show appellate counsel "ignored issues ... clearly stronger than those presented," *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) (citation and internal quotation marks omitted), and that there was a "reasonable probability" she would have prevailed on the omitted claim on appeal. *Mayo v. Henderson*, 13 F.3d 528, 533-34 (2d Cir. 1994).

Hebert, 182 So. 3d at 23. The court attached and incorporated the trial court's written ruling in its opinion. In relevant part, that opinion stated:

> Petitioner, in her *Reply to the State's "Answer to Application to Post Conviction Relief,"* did not claim that the initial entry into her home was unlawful. Petitioner complaints [sic] are of the subsequent "warrantless" **[*51]** search of her home and the seizure of evidence taken during that search.
> Officers did not enter petitioner's home until they heard cried of distress from petitioner's father-in-law, Buck Hebert, who entered petitioner's home out of fear and concern for petitioner and her children. When Mr. Hebert called for help, the officers entered the home.
>
> Upon entering the home and observing large amounts of blood, the officer's [sic] began their search for the cause of the blood and to determine if its residents of were safe. Because it was difficult to determine what had taken place, once the scene in petitioner's bedroom was secured, officers conducted a protective sweep to secure the premises. The evidence seized from petitioner's home and introduced into evidence was observed in "plain view" by the officers while in the home, and the evidence seized were those objects that were lying in plain view and had the obvious presence of blood. See *State v. Brown*, 370 So.2d 525 (La. 1979).
>
> If appellate counsel for the petitioner had asserted this claim on appeal, the appellate court would have been found the claim to be meritless. Thus, counsels' alleged failure to assert the claim has not prejudiced the applicant. This claim has no merit. **[*52]**

Hebert, 182 So. 3d at 26. The State argues, as the Louisiana Supreme Court held, that the officers did not violate the Fourth Amendment in that an exigency justified their initial entry into the home and, once they were inside the house, the blood-splattered notes were clearly evidence and were in plain view.[63]

When a petitioner claims that the failure to raise an issue on appeal constitutes ineffective assistance of appellate counsel, the prejudice prong of *Strickland* requires the petitioner to establish that, had the issue been raised, the appellate court would have granted relief. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). Hebert cannot meet this burden.

---

[61] Rec. Doc. No. 1.

[62] State Rec. Vol. 43 of 45; *State v. Hebert*, 57 So.3d 608 (La. App. 1st Cir. 2011), No. 2010-KA-0305.

[63] Rec. Doc. No. 8, p. 23.

Police may seize evidence under the plain-view doctrine when: (1) their intrusion into the protected area is justified and (2) it is immediately apparent, without close inspection, that the items seized are evidence or contraband. *Horton v. California*, 496 U.S. 128, 135-136, 110 S.Ct. 2301, 2307, 110 L.Ed.2d 112 (1990). The plain-view doctrine is a recognized exception to the rule that a search or seizure conducted without a warrant is presumed to be unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971); *State v. Smith*, 982 So.2d 821 (La. App. 5 Cir. 3/11/08). Because all parties agree that the police's initial entry into the home was lawful, the sole issue on appeal would have been whether it was immediately apparent that the bloody notes were evidence. *Michigan v. Tyler*, 436 U.S. 499, 509-510, 98 S.Ct., 1942, 1950-1951, 56 L. Ed. 2d 486 (1978).[64] This is not Hebert's argument, however **[*53]** — instead, she challenges the officers' "exhaustive" search of her home.[65]

In support of her argument, Hebert relies on *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). In *Mincey*, the Supreme Court held that there is no general "murder scene" exception to the Fourth Amendment's warrant requirement. However, *Mincey* also endorsed the application of the plain-view doctrine in the warrantless investigation of murder scenes:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. *And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities*.

Id. at 391 (citations and quotations omitted) (emphasis added).

Here, the blood-stained notes were clearly incriminating **[*54]** and were thus excepted from the warrant requirement under the plain-view doctrine. Louisiana and federal courts have held that blood-stained items inherently have evidentiary value and therefore fall within the "immediately apparent" prong of the plain-view doctrine.

For instance, in addressing a similar set of facts, the Louisiana Fifth Circuit Court of Appeal determined that a bloody palm print was immediately apparent as evidence and thus fell within the plain-view doctrine:

> When the responding police officers, from their lawful vantage point, saw the unconcealed bloody palm print on the kitchen countertop, *it was immediately apparent that they had important forensic evidence before them. The discovery of such probative evidence warranted its immediate preservation*.
>
> This Court has recently emphasized the application of the plain view doctrine: evidence in open or plain view of a police officer legally on the premises is subject to seizure without a warrant. *State v. Nicholas*, 06-903, p. 6 (La.App. 5 Cir. 4/24/07), 958 So.2d 682, 689.
>
> ...
>
> The case of *State v. Robichaux*, 00-1234 (La.App. 4 Cir. 3/14/01), 788 So. 2d 458, writ denied, 01-1178 (La.3/15/02), 811 So. 2d 897, is illustrative of the application of constitutional principles. In *Robichaux*, the warrantless seizure of a bloody hammer was upheld under the plain view doctrine. Police officers were informed that **[*55]** someone in a nearby home needed assistance. Upon responding to the emergency call, the officers saw blood on the ground and porch of the defendant's home and heard the victim moaning. Upon entering the house, officers saw blood on the floors and walls and learned that the victim had been beaten with a hammer. For officer safety and preservation of evidence, the officers conducted a security sweep of the premises. As they did so, in plain view, the officers found a bloody hammer near the back door. The seizure of this bloody hammer was upheld on appeal.

State v. Simmons, 996 So. 2d 1177, 1186 (La. App. 5 Cir. 10/28/08), *writ denied*, 18 So. 3d 81 (La. 9/25/09); *see also United States v. Chipps*, 410 F.3d 438, 443

---

[64] Hebert does not challenge the police's initial entry of the house or their continued presence therein. *Hebert*, 182 So. 3d at 26.

[65] Rec. Doc. No. 1.

(8th Cir. 2005) (when an agent legally arrived at a place from which he observed a bloody sweatshirt, the incriminating nature of that bloody sweatshirt — at the site of a potential assault — was obvious; therefore the plain-view doctrine justified his seizure of the sweatshirt); *State v. Chapman*, 410 So. 2d 689, 700 (La. 1981) (holding that bloodstains on clothing that matched the description of the crime made it immediately apparent that the items were evidence of the commission of the crime").

In Hebert's case, the officers were securing a crime scene when they noticed the blood-stained notes. Specifically, paramedic Tracy Adam Gambarella noticed the note while he was **[*56]** inside the house to check the children for signs of life.[66] Unlike *Mincey* where detectives returned and proceeded to conduct an exhaustive four-day warrantless search of the apartment, which included the opening of dresser drawers, the ripping up of carpets, and the seizure of 200-300 objects, the note in this case was not only in plain view, it was also immediately apparent as evidence because it was stained in blood. *Mincey* 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290.

Accordingly, as discussed above — and as noted by the Louisiana Supreme Court in the last reasoned state court opinion — this claim fails because it is not "clearly stronger" than the sufficiency claim that appellate counsel brought on direct appeal. *See, e.g.*, *Diaz v. Quarterman*, 228 F. App'x 417, 427 (5th Cir. 2007); *see also Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (explaining that the relevant test is whether the omitted issue is "clearly stronger than the issues actually brought on appeal). Hebert cannot show that, had appellate counsel raised this issue on appeal, the outcome would have been different. For the foregoing reasons, this claim should be denied.

D. *Jury Misconduct*

Hebert's fourth and fifth claims allege juror misconduct in violation of her rights to due process and an impartial jury.[67] First, Hebert contends that her constitutional rights were violated **[*57]** by the jury's consideration of extraneous evidence that was not admitted at trial. Specifically she claims that juror Erin Folse, a nurse, offered impermissible medical opinions about Hebert's self-inflicted wounds during deliberations.[68] Second, Hebert contends that the jurors engaged in premature deliberations.[69]

1. Standard of Review

As to these two jury-misconduct claims, the State argues that the state district court's decision addressed the merits of both claims, thereby triggering application of the strict standards of § 2254(d)(1).[70] In response, Hebert argues that the court's rulings on the extraneous-evidence and premature-deliberation claims were procedural, thus entitling her to *de novo* review.[71]

The transcript of the state district court's April 8, 2013 hearing on Hebert's motion to strike pleadings and exhibits makes it clear that the court's rulings were merits-based.[72] First, the court found no evidence that Nurse Folse ever shared her medical opinion about the ultimate question of whether Hebert could distinguish right from wrong and thus it was unable to determine whether Hebert suffered prejudice, *i.e.*, that she was

[66] State Rec. Vol. 5 of 45; (motions hearing 6/17/2008, p. 122)

[67] Rec. Doc. No. 1, p. 99-122

[68] *Id.* at 103-115

[69] Rec. Doc. No. 1. The Court notes that the State's response submits in the alternative that Hebert's jury misconduct claims were procedurally barred based on independent and adequate state-law grounds (*i.e.* procedurally default). Rec. Doc. 8, pp. 25-28. However, given the complexity of the procedural bar analysis and the fact that the claims plainly fail on the merits in any event, the Court will proceed to the alternative merits review. *Taylor v. Thaler*, 397 F. App'x 104, 107 (5th Cir. 2010) (citing *Busby v. Dretke*, 359 F.3d 708, 720 (5th Cir. 2004)); *see also Hudson v. J*ones, 351 F.3d 212, 216 (6th Cir. 2003) (citing *Lambrix v. Singletary*, 520 U.S. 518, 525, 117 S. Ct. 1517, 137 L. Ed. 2d 771 (1997) ("Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.").

[70] That provision states that

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

denied due process.[73] The trial court also noted that, to the extent Ms. Folse offered her opinions, those opinions were not extraneous to the proceedings. Rather, "she made comments about statements made by other medical witnesses in the trial, which is exactly what the juror shield law is designed to defeat."[74]

The Fifth Circuit addressed a similar issue in *Salazar v. Dretke*, 419 F.3d 384, 398 (5th Cir. 2005). In *Salazar*, the defense sought to present testimony of four jurors about the jury's deliberations. *Id.* The Fifth Circuit held that the trial court made a substantive determination when it "left Salazar with no admissible evidence to support his due process claim...." *Id.* at 389. **[*59]** The Fifth Circuit went on: "The state habeas court's ruling, therefore, was not a procedural ruling in which the court dismissed Salazar's claim as improperly before the court. Rather, the state court's decision was a substantive determination that Salazar's claim was unsupported by any evidence and that Salazar's due process rights had not been violated." *Salazar*, 419 F.3d at 398; *see also Henderson v. Cockrell*, 333 F.3d 592, 598 (5th Cir. 2003) (holding that among the factors relevant to determining whether a claim was dismissed on the merits was whether the state courts' opinions suggested reliance upon a determination on the merits rather than procedural grounds).

Here, as in *Salazar*, the trial court excluded the evidence about Nurse Folse's statements on the merits rather than making a purely procedural ruling that "dismiss[ed] the juror testimony as improperly before the court." *Salazar*, 419 F.3d at 398.[75] Likewise, the trial court extended this analysis in denying the premature deliberation claim on the merits, noting: "there's no specifics about pre-trial or premature deliberations actually leading to some misconduct that could possibly be construed to have affected the verdict in this case."[76]

More recently, the Fifth Circuit reaffirmed the appropriate standard of review **[*60]** when it considered the denial of *habeas* relief based on a state court's ruling that a juror's affidavit supporting a jury misconduct claim was inadmissible under Louisiana Code of Evidence article 606(B). *Allen v. Vannoy*, 659 Fed. Appx. 792, 2016 WL 4254375, at *4-5 (5th Cir. 2016). In *Allen*, the state *habeas* court "held the affidavit inadmissible because it did not demonstrate the exertion of outside influence on the jury or indicate the jury was exposed to any extraneous prejudicial information." 659 Fed. Appx. 792, *Id.* at *5. The Fifth Circuit stated that an evidentiary ruling under 606(B) is a question of law to which § 2254(d)(1) deference applies. Additionally, the Fifth Circuit noted that whether the court's ruling was correct under state law is of no moment, stating "federal courts sitting in habeas do not review state courts' application of state evidence law. Therefore, we assume without deciding that the state court correctly applied state law to exclude the affidavit." *Id.* "A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render a petitioner's trial fundamentally unfair." *Id.* (citations omitted). Similarly, this Court will not review whether the state court correctly applied state law, but rather, considers only the overriding federal constitutional **[*61]** question with respect to that ruling. Furthermore, the state-court ruling will be accorded deferential review under § 2254(d)(1).

2. The Law Concerning Post-Verdict Inquiry Into Jury

---

(1) resulted in 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; or

(2) resulted in a decision that **[*58]** was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[71] Rec. Doc. No. 1, p. 99-122. Hebert argues that she is entitled to *de novo* review of her claim of "extraneous information" because the trial court "repeatedly misstated the applicable legal standard." Rec. Doc. No. 1, p. 112. This argument is not well-taken. "Whether a state court interpreted a (state) evidentiary rule correctly is generally not of concern to a federal court on habeas." *See Panzavecchia v. Wainwright*, 658 F.2d 337, 340 (5th Cir. 1981); *Allen v. Cain*, No. CIV.A. 09-0218, 2014 U.S. Dist. LEXIS 19412, 2014 WL 573181, at *14 (W.D. La. Feb. 13, 2014).

[72] Rec. Doc. No. 1-10.

[73] *Id.* Subsequent to the trial court's ruling, Hebert filed a writ applications that was denied by the Louisiana First Circuit Court of Appeal on April 20, 2015. Rec. Doc. No. 1-17; 2015-KW-0289.

[74] *Id.*

[75] As was noted by the court in *Henderson v. Cockrell*, the state court here clearly relied upon a determination of the merits in its decision, even if it also pointed to the lack of sufficiently specific fact pleading in Hebert's petition in denying her claim. *Henderson*, 333 F.3d at 598.

[76] *Id.* at 32

Deliberations

Courts are generally barred from post-verdict inquiries into matters involving jury deliberations. The reasons are obvious: "Courts properly avoid such explorations into the jury's sovereign space, and for good reason. The jury's deliberations are secret and not subject to outside examination." *Yeager v. United States*, 557 U.S. 110, 129 S.Ct. 2360, 2368, 174 L. Ed. 2d 78 (2009) (citations omitted). This principle was codified in Federal Rule of Evidence 606(b). Later, Louisiana Code of Evidence Article 606(B) codified the same rule, modeling the provision after the federal rule.[77]

Louisiana's jury-shield law expressly prohibits inquiry into the validity of a verdict, with only two exceptions. The article reads:

> B. Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, [1] except that a juror **[*62]** may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, [2] whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

LSA-C.E. art. 606(B). The United States Third Circuit Court of Appeal[78] explained the rationale behind the exceptions:

> [T]here is a clear doctrinal distinction between evidence of improper intra-jury communications and extra-jury influences. It is well-established that the latter pose a far more serious threat to the defendant's right to be tried by an impartial jury. It has long been recognized that when jurors are influenced by the media and other publicity, or when they engage in communications with third parties, these extra-record influences pose a substantial threat to the fairness of the criminal proceeding because the extraneous information completely evades the safeguards of the judicial process.

United States v. Resko, 3 F.3d 684, 690 (3rd Cir. 1993) (citations omitted).

Although this prohibition may at times lead to seemingly unjust results, the United **[*63]** States Tenth Circuit Court of Appeals explained the prohibition's greater purposes:

> The rule against impeachment of a jury verdict by juror testimony as to internal deliberations may be traced back to "Mansfield's Rule," originating in the 1785 case of *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B.1785). Faced with juror testimony that the jury had reached its verdict by drawing lots, Lord Mansfield established a blanket ban on jurors testifying against their own verdict. The rule was adopted by most American jurisdictions and "[b]y the beginning of [the twentieth] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). This common-law principle, together with exceptions also developed by common law, was eventually codified into Federal Rule of Evidence 606(b).
>
> Rule 606(b) is a rule of evidence, but its role in the criminal justice process is substantive: it insulates the deliberations of the jury from subsequent second-guessing by the judiciary. Jury decision-making is designed to be a black box: the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation **[*64]** of the jury are deliberately

---

[77] La.Code Evid. art. 606, Comment (b) ("Paragraph B of this Article follows Federal Rule of Evidence 606(b) with respect to criminal cases."); *State v. Hailey*, 953 So.2d 979, 984 (La. App. 2nd Cir. 2007) ("This article is closely related, at least in criminal cases, to Federal Rule of Evidence 606").

[78] Due to the dearth of relevant jurisprudence interpreting LSA-C.E. art. 606(B), this Court has looked to federal jurisprudence interpreting the similar federal rule, which is appropriate under the circumstances. *See, e.g.*, La. Code Evid. art. 102, Comment (a) ("[T]he adoption of this Code facilitates the movement towards a uniform national law of evidence. Thus, especially where the language of the Louisiana Code is identical or virtually identical with that used by other states or in the federal rules, Louisiana courts now have available a body of persuasive authority which may be instructive in interpreting the Louisiana Code.").

insulated from subsequent review. Judges instruct the jury as to the law, but have no way of knowing whether the jurors follow those instructions. Judges and lawyers speak to the jury about how to evaluate the evidence, but cannot tell how the jurors decide among conflicting testimony or facts. Juries are told to put aside their prejudices and preconceptions, but no one knows whether they do so. Juries provide no reasons, only verdicts.

To treat the jury as a black box may seem to offend the search for perfect justice. The rule makes it difficult and in some cases impossible to ensure that jury verdicts are based on evidence and law rather than bias or caprice. But our legal system is grounded on the conviction, borne out by experience that decisions by ordinary citizens are likely, over time and in the great majority of cases, to approximate justice more closely than more transparently law-bound decisions by professional jurists. Indeed, it might even be that the jury's ability to be irrational, as when it refuses to apply a law against a defendant who has in fact violated it, is one of its strengths. *See* John D. Jackson, *Making Juries Accountable*, 50 Am. J. Comp. L. 477, 515 (2002).

If **[*65]** what went on in the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands. Final authority would be exercised by whomever is empowered to decide whether the jury's decision was reasonable enough, or based on proper considerations. Judicial review of internal jury deliberations would have the result that "every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave." *Carson v. Polley*, 689 F.2d 562, 581 (5th Cir.1982).

Defendants undoubtedly have a powerful interest in ensuring that the jury carefully and impartially considers the evidence. This case presents that interest to the highest degree. But there are compelling interests for prohibiting testimony about what goes on in the jury room after a verdict has been rendered. The rule protects the finality of verdicts. It protects jurors from harassment by counsel seeking to nullify a verdict. It reduces the incentive for jury tampering. It promotes free and frank jury discussions that would be chilled if threatened by the prospect of later being called to the stand. Finally, it preserves the "community's trust in a system that relies on the decisions **[*66]** of laypeople [that] would all be undermined by a barrage of post-verdict scrutiny." *Tanner*, 483 U.S. at 121, 107 S.Ct. 2739; see also *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1548 (10th Cir.1993) ("[T]he rule against jurors impeaching their own verdict is designed to promote the jury's freedom of deliberation, the stability and finality of verdicts, and the protection of jurors against annoyance and embarrassment."); *Gov't of the V.I. v. Gereau*, 523 F.2d 140, 148, 12 V.I. 212 (3d Cir.1975) (listing these five policies behind the rule).

> Like other rules of evidence protecting the confidentiality of certain communications, such as the attorney-client privilege or the priest-penitent privilege, Rule 606(b) denies the court access to what may be relevant information—information that might, for example, justify a motion for a new trial. But like these other privileges, the rule protects the deliberative process in a broader sense. It is essential that jurors express themselves candidly and vigorously as they discuss the evidence presented in court. The prospect that their words could be subjected to judicial critique and public cross examination would surely give jurors pause before they speak. *See Tanner*, 483 U.S. at 120, 107 S.Ct. 2739 ("If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction **[*67]** of all frankness and freedom of discussion and conference.") (*quoting McDonald v. Pless*, 238 U.S. at 267-68, 35 S.Ct. 783). Moreover, part of the urgency that comes from knowing that their decision is the final word may be lost if jurors know that their reasoning is subject to judicial oversight and correction.

United States v. Benally, 546 F.3d 1230, 1233-34 (10th Cir. 2008).

Similarly, the United States Supreme Court has noted:

> There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the

> jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120-21 (citations omitted).

Accordingly, the evidence Hebert proffered about jury deliberations was only admissible if the alleged impropriety involved (1) **[*68]** an outside influence improperly brought to bear upon a juror; or (2) extraneous prejudicial information improperly brought to the jury's attention. Here, Hebert makes no allegation of an improper "outside influence"; therefore, the Court need only consider whether Hebert's claim involves "extraneous prejudicial information."

3. Jury Misconduct through Extraneous Evidence

In support of her claim that improper extraneous information was introduced during jury deliberations, Hebert proffered at the April 8, 2013 post-conviction hearing the statement of juror Alma Crochet. According to that statement, Nurse Folse told the other jurors that, because Hebert cut around her eyes, she did not believe that Hebert really intended to cut out her eyes.[79] Hebert also presented the affidavits of investigators Annie Preziosi and Ashley Cusick. When they interviewed Nurse Folse about jury deliberations, Nurse Folse stated: "I'm a nurse. One ER nurse [who testified] said [Hebert] was catatonic and that they had to sedate her or use a drug to get a chest tube in. A catatonic person wouldn't need that. For medical stuff the jury would turn to me."[80]

According to Hebert, Nurse Folse thereby offered "evidence" **[*69]** contradicting the defense theory "that Hebert was following the command of an auditory hallucination."[81] Hebert similarly argues that Ms. Folse used her medical expertise to instruct the other jurors "that Hebert was lucid enough to protect herself from permanent injury or, perhaps, was even staging the entire injury to match her alleged hallucination."[82]

After review of the evidence and law, this Court concludes that the state district court was correct in finding that Nurse Folse's opinions did not constitute "extraneous prejudicial information."

First, Nurse Folse's opinion did not enter the jury room through an *external* and prohibited contact, communication, or public statement; rather, her statements reflected pre-existing knowledge brought to the jury room by one of the jurors. *See United States v. Brito*, 136 F.3d 397, 414 (5th Cir. 1998) (a jury's verdict may be impeached only by evidence that the verdict was influenced by *outside* sources); *United States v. Gonzales*, No. 92-2118, 1993 U.S. App. LEXIS 40962, 1993 WL 185718, at *7 (5th Cir. 1993) (juror's knowledge of Spanish, which allowed him to interpret for the other jurors part of an audiotape in evidence, stemmed from his personal experience and was therefore not from an extrinsic source); *see also Tanner*, 483 U.S. at 117-18 (discussing the history and application of the "external" versus "internal" distinction). **[*70]**

Second, the information that Nurse Folse brought to the jury was based purely on her own personal experience; it did not reflect any particularized knowledge of this petitioner or her case. *See Benally*, 546 F.3d at 1237 (when determining whether information constitutes improper extraneous information under the federal rule, the relevant inquiry is whether the information concerned specific facts about the defendant or the incident in which she was charged; "generalized statements, ostensibly based on the jurors' personal experience," do not support an actionable claim). The United States Court of Appeal for the Ninth Circuit has explained why a juror's past personal experiences are appropriately deemed part of jury deliberations:

> It is probably impossible for a person who has highly relevant experience to evaluate the credibility of witnesses without that experience bearing on the evaluation. Were we to require the impossible and prohibit jurors from relying on relevant, past personal experience, about all we would accomplish would be to induce jurors to lie about it when questioned afterward, unless we limited jury participation to the most unworldly and ignorant individuals.
>
> The mere fact that the jury foreman **[*71]** brought her outside experience to bear on the case is not sufficient to make her alleged statements violate Grotemeyer's constitutional right to confrontation. Counsel ordinarily learn during voir dire what a veniremember does for a living, and use

[79] Rec. Doc. No. 1-6.

[80] Rec. Doc. No. 1, p. 106.

[81] *Id.*

[82] Rec. Doc. No. 1, p. 105

> peremptory challenges to avoid jurors whose experience would give them excessive influence.

Grotemeyer v. Hickman, 393 F.3d 871, 878, 880 (9th Cir. 2004). *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2nd Cir. 1994) (jurors may bring to the jury room knowledge gained from their ordinary experience, such as knowledge that "Times Square is busy all night or that there are doormen along stretches of Park Avenue"); *United States v. Holck*, 398 F.Supp.2d 338, 364-67 (E.D.Pa. 2005) ("jurors can and should draw upon prior life experiences and use them in the course of deliberations," and "[s]uch conduct does not amount to bringing in extraneous information"), *aff'd*, 500 F.3d 257 (3rd Cir. 2007), *cert. denied*, 552 U.S. 1223, 128 S. Ct. 1329, 170 L. Ed. 2d 138 (2008).

Furthermore, courts have routinely held that, when medical professionals use their professional experience to assist in jury deliberations, the use of that expertise is not an impermissible outside influence. *See Grotemeyer*, 393 F.3d at 879 ("The Sixth Amendment entitles a defendant to an 'impartial' jury, not to an ignorant one. *That a physician is on the jury does not deprive a defendant of his constitutional right to an impartial jury, even though the physician will doubtless have knowledge and* ***[*72]*** *experience bearing on any medical questions that may arise*.") (emphasis added); *see also State v. Weaver*, 05-169 (La. App. 5 Cir. 11/29/05), 917 So. 2d 600, 614, *writ denied*, 2006-0695 (La. 12/15/06), 944 So. 2d 1277 (finding no issue when a juror had a background in psychology); *Corines v. Superintendent, Otisville Corr. Facility*, 621 F. Supp. 2d 26, 40-41 (E.D.N.Y. 2008) (finding no juror misconduct when nurse gave jury her lay opinions regarding introduction of intravenous therapy (IV) line, when question before jury was whether unlicensed anesthesiologist employed by doctor practiced medicine by administering anesthesia and not merely by starting IV).

For all the foregoing reasons, Hebert's claim lacks merit. Although Nurse Folse may have introduced her opinion or opinions based on professional experience into deliberations, that does not equate to the introduction of impermissible extraneous information. *See Grotemeyer*, 393 F.3d at 879; *Oliver v. Quarterman*, 541 F.3d 329, 336 (5th Cir. 2008) ("Under clearly established Supreme Court case law, an influence is not an internal one if it (1) is extraneous prejudicial information; *i.e.*, information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, or (2) is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering with a juror.'") (citations omitted). Accordingly, Hebert cannot show that the trial court's decision was contrary **[*73]** to or involved an unreasonable application of clearly established federal law.

4. Jury Misconduct through Premature Deliberations

Hebert's final claim is that the jury engaged in premature deliberations.[83] To support this claim, during state post-conviction proceedings, Hebert proffered the affidavits of three jurors. First, Hebert provided the affidavit of Hannah Boudreaux. In relevant part Ms. Boudreaux's affidavit stated:

> Overall I thought the lawyers did a good job, especially Cam Morvant. The other lawyer for the defense with all the white hair didn't always make sense. I was kind of lost on some of the stuff he said. We would get back to the hotel and everyone would be like "did he make sense to you?" and we'd try to figure it out.

St. Rec. Vol. 44 of 45, Exh. 16. Next, Hebert offered the declaration of Steven Arceneaux, who said:

> I think some of the jurors took the case more seriously than others. I think some had pre-formed conclusions. Little comments made me think that some of them didn't take the evidence as seriously and may have decided the case off the bat.

Id., Exh. 17. Finally, Hebert submitted the affidavit of Burleigh Johnson, who wrote:

> *We didn't really talk about the case* ***[*74]*** . Some people were very opinionated. They would say things like "she deserves to die" *but mostly we didn't talk about the case*.

Id., Exh. 18 (emphasis added).

In evaluating a claim of juror misconduct, the law presumes that the jury is impartial and the burden rests on the defendant to show otherwise. *United States v. York*, 600 F.3d 347, 356-57 (5th Cir. 2010). However, deliberations prior to the close of evidence threaten a defendant's Sixth Amendment right to trial by an impartial jury. *Id.* Nevertheless, trial judges have broad discretion to deal with possible jury misconduct in this regard. *Id.*; *see United States v. Sotelo*, 97 F.3d 782, 794 (5th Cir. 1996) (noting that "the trial court can better judge the mood and predilections of the jury"); *see*

[83] Rec. Doc. No. 1.

Quintero-Cruz v. Ward, No. CIV.A. 93-2027, 1996 U.S. Dist. LEXIS 23442, 1996 WL 469672, at *43 (W.D. La. Aug. 12, 1996) (upholding state courts' ruling that the judge did not abuse his discretion when two jurors sent notes during the penalty phase that they were coerced into finding the defendant guilty).

The United States Eleventh Circuit Court of Appeals explained the breadth of that discretion in *U.S. v. Dominguez*:

> The most salient aspect of the law in this area is the breadth of discretion given to judges who are called upon to deal with the possibility of juror misconduct. District court judges deal with jurors on a regular basis, and those judges are in the trenches when problems **[*75]** arise. The problems that present themselves are seldom clearly defined and a number of variables have to be considered. There are often no obviously right or wrong answers to the questions that arise. For all of these reasons, *a trial judge is vested with broad discretion in responding to an allegation of jury misconduct, and that discretion is at its broadest when the allegation involves internal misconduct such as premature deliberations, instead of external misconduct such as exposure to media publicity*. In a number of decisions we have held that when a jury problem involves the possibility of internal misconduct, the trial judge's discretion extends even to the initial decision of whether to interrogate the jurors.

226 F.3d 1235, 1246 (11th Cir. 2000) (citations and quotations omitted) (emphasis added); *see also United States v. York*, 600 F.3d 347, 356-57 (5th Cir. 2010)

While pre-deliberation discussions between jurors have been held to violate the judge's instructions, they do not constitute an impermissible outside influence. *State v. Weaver*, 917 So.2d 600, 612, 05-169 (La.App. 5 Cir. 11/29/05), writ denied, 944 So .2d 1277, 2006-0695 (La. 12/15/06); *see also Higgins v. Cain*, No. CIV.A. 09-2330, 2011 U.S. Dist. LEXIS 40196, 2011 WL 1399217, at *14 (E.D. La. Feb. 1, 2011), *report and recommendation adopted in part, rejected in part*, No. CIV.A. 09-2330, 2011 U.S. Dist. LEXIS 40175, 2011 WL 1399241 (E.D. La. Apr. 13, 2011), *aff'd*, 720 F.3d 255 (5th Cir. 2013).

Here, Hebert's claim fails for several reasons. First, as Hebert admits, the trial judge — who had broad discretion to remedy the problem **[*76]** — took corrective action to ensure that there would be no more pre-deliberation communications (to the extent there were any to begin with). When trial counsel made an objection to suspected communication between the jurors before deliberation, the judge took swift action to remedy the problem:

> Well, we can ask them — this just gives us a new question to ask and I can guarantee you this, this isn't going to happen tomorrow. Because I'm going to make sure it doesn't happen tomorrow. I don't know why it happened yesterday. I've been sitting here for 21 years and that has never happened before where jurors hung around in the hall or outside. That's never happened before. I don't know why that happened but I can guarantee you it's not going to happen tomorrow.

St. Rec. Vol. 31 of 45; (*voir dire* transcript, April 17, 2009, p. 35). Given the vast judicial deference afforded a judge who is resolving questions of premature jury deliberations, this Court cannot say that the state courts' decision to exclude the jurors' testimony was an unreasonable application of federal law.

Next, and perhaps most importantly, none of the pre-deliberation communication contained any outside influence or extraneous **[*77]** prejudicial information. *Resko*, 3 F.3d at 690 ("when there are premature deliberations among jurors with no allegations of external influence on the jury, the proper process for jury decisionmaking has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial") (citations omitted). Taking the affidavits of Hannah Boudreaux and Steven Arceneaux at face value, the jurors talked only among themselves about the evidence presented at trial. Other than the allegation about Nurse Folse (discussed above), there was no claim that any outside influence or extraneous prejudicial information reached the jury prior to its deliberations, and thus no reason to believe the jury based its decision on evidence that was not formally presented at trial.

Finally, Hebert's own proffered affidavits are conflicting as to whether there even was pre-deliberation juror communication at all. Juror Burleigh Johnson said twice that the jurors "didn't really talk about the case".[84] Even assuming the comments alleged by jurors Hannah Boudreaux and Steven Arceneaux were made and heard by another juror, nothing in these comments deprived Hebert of a fair trial. Additionally, **[*78]** nothing in the comments addressed the credibility or truthfulness of the witness.

---

[84] State Rec. Vol. 44 of 45, Exh. 18.

Both factually and legally, this claim of jury misconduct falls far short of the petitioner's burden of proof on such a claim. Based on the inadequate showing made in connection with this claim, there is no basis for post-conviction relief and this claim should be denied.

RECOMMENDATION

For the foregoing reasons, **IT IS RECOMMENDED** that Heberts petition for issuance of a writ of *habeas corpus* under 28 U.S.C. § 2254 be **DISMISSED WITH PREJUDICE**.

A partys failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judges report and recommendation within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc) (citing 28 U.S.C. § 636(b)(1)).

New Orleans, Louisiana, this 10th day of November, 2016.

/s/ Michael B. North

MICHAEL B. NORTH

UNITED STATES MAGISTRATE JUDGE

End of Document

10/02/2015 "See News Release 047 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

NO. 2015-KP-0965

STATE OF LOUISIANA

VERSUS

AMY T. HEBERT

ON SUPERVISORY WRITS TO THE SEVENTEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFOURCHE

PER CURIAM

Denied. Relator fails to show she received ineffective assistance of trial counsel under the standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Relator also fails to show appellate counsel "ignored issues . . . clearly stronger than those presented," Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) (citation and internal quotation marks omitted), and that there was a "reasonable probability" she would have prevailed on the omitted claim on appeal. Mayo v. Henderson, 13 F.3d 528, 533–34 (2d Cir. 1994). Finally, relator has previously fully litigated her claims regarding the district court's application of La.C.E. art. 606(B). See La.C.Cr.P. art. 930.4(D). We attach and incorporate herein the District Court's written reasons for ruling.

Relator has now fully litigated her original and supplemental applications for state post-conviction relief. 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 La.C.Cr.P. art. 930.4 to make the

procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in state collateral proceedings in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless relator can show that one of the narrow exceptions authorizing the filing of a successive application applies, relator has exhausted her right to state collateral review.

STATE OF LOUISIANA	*	17TH JUDICIAL DISTRICT COURT
VS NO: 448,360	*	PARISH OF LAFOURCHE
AMY T. HEBERT	*	STATE OF LOUISIANA

REASONS FOR JUDGMENT ON APPLICATION FOR POST-CONVICTION RELIEF

On May 14, 2009, the defendant, Amy T. Hebert, after a trial by jury, was convicted of two counts of first degree murder, and she was sentenced to life imprisonment on February 4, 2010;

The convictions have become final, and the defendant filed an application for post-conviction relief on January 16, 2013. The District Attorney was ordered to file an answer to the application, but, instead of filing an answer, he filed on behalf of the State of Louisiana, a *Motion to Strike Pleadings and Exhibits* which he has labeled as procedural objections to the Application. On April 8, 2013, a hearing was held on the State's *Motion to Strike Pleadings and Exhibits* and the Court granted the Motion to Strike as to paragraphs 2 and 3, to which defendant filed a supervisory writ with the Louisiana First Circuit Court of Appeal. On July 29, 2013, the First Circuit Court of Appeal denied defendant's writ. Defendant then filed a writ with the Louisiana Supreme Court, which writ was denied on May 30, 2014.

On June 20, 2014, the court ordered the District Attorney to file an answer to defendant's application for post-conviction relief by July 21, 2014. However, on June 23, 2014, defendant filed a *Supplement to Application for Post-Conviction Relief and Motion for Evidentiary Hearing*, which the court granted. On July 23, 2014, the District Attorney filed *Procedural Objections* to defendant's supplemental application.

The Court considered defendant's *Supplement to Application for Post-Conviction Relief and Motion for Evidentiary Hearing* and the *Procedural Objections* filed by the District Attorney to defendant's supplement application and denied the State's *Procedural Objections*, and on August 14, 2014, the court ordered the District Attorney to file an answer to defendant's Post Conviction Relief and Supplemental Post Conviction Relief. The District Attorney filed it's answer on September 12, 2014.

Petitioner filed this application for post-conviction relief and makes the following claims:

1) The State unlawfully struck qualified prospective female jurors on the basis of gender in violation of the equal protection clauses of the United States and Louisiana Constitutions and *J.E.B. V. Alabama.*

2) The introduction of extraneous information in the form of purported medical expertise in a case that hinged on closely-contested expert medical testimony violated petitioner's right to confrontation, her right to an impartial jury, and her right to a fair trial.

3) Where the jurors engaged in premature deliberations and prejudgment of the case, petitioner was denied her rights to due process and an impartial jury.

4) Trial counsel's disclosure to the state of its investigative work-product, including its witness interviews and petitioner's own statements, constituted a violation of her right to effective assistance of counsel and her privilege against self-incrimination.

5) Appellate counsel was ineffective in failing to challenge the constitutionality of the exhaustive warrantless search of petitioner's home in violation of the fourth, sixth, and fourteenth amendments.

In her supplemental application for post-conviction relief petitioner makes the following claims:

S-1) Trial counsel's failure to follow up on information that petitioner had a long-standing but untreated seizure disorder that likely caused her psychotic break constituted ineffective assistance of counsel, as this evidence was essential to a meaningful presentation of petitioner's insanity defense.

The court having considered the application and supporting documents, the answer of the custodian through the District Attorney of this parish, and the record in this matter, and finding that the factual and legal issues raised by the claims of the petitioner can be resolved based upon the record:

The petition is dismissed without a hearing for the following reasons:

1) Petitioner claims ineffective assistance of counsel when counsel failed to raise an objection to the State unlawful use of peremptory challenges to strike qualified prospective female

jurors on the basis of gender.

Of the jurors stricken, there were many sufficiently gender-neutral explanations for the use of peremptory challenges including: religious, moral or ethical considerations, self-employed business owners, jurors with medical or psychiatric problems, jurors with family members that had psychiatric problems, one juror who knew the defendant, and those jurors that had misgivings about imposing the death penalty.

Petitioner claims she was denied effective assistance of counsel. In assessing a claim of ineffectiveness, a two-pronged test is employed. The petitioner must show that (1) her attorneys' performance was deficient, and (2) the deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Soler*, 93-1042, p. 9 (La.App. 5 th Cir. 4/26/94), 636 So.2d 1069, 1075, writs denied, 94-0475 (La.4/4/94), 637 So.2d 450; 94-1361 (La.11/4/94), 644 So.2d 1055. To show "prejudice" as required in order to establish ineffective assistance of counsel, the petitioner must demonstrate that, but for counsels' unprofessional conduct, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064; *State v. Soler*, supra. Effective assistance of counsel does not mean errorless counsel, or counsel who may be judged ineffective on mere hindsight, *State ex rel. Graffagnino v. King*, 436 So.2d 559, 564 (La.1983), it only required counsel who, in fact, renders reasonable assistance The record in this matter reflects that petitioner's counsel used their experience and training in the most skillful manner to properly defend petitioner against the charges.

This claim has no merit and post-conviction relief is not warranted.

2) The record reflects that this claim has been dismissed due to a procedural objection filed by the district attorney; therefore, this claim does not require an answer.

3) The record reflects that this claim has been dismissed due to a procedural objection filed by the district attorney; therefore, this claim does not require an answer.

4) Petitioner makes a claim that trial counsels' disclosure and the acceptance of an open-file agreement with the district attorney's office disclosed investigative work-product, including its own witnesses interviews, and petitioner's own statements, violated her right to self-incrimination, and therefore, petitioner's counsel provided ineffective assistance of counsel.

subsequent "warrantless" search of her home and the seizure of evidence taken during that search.

Officers did not enter petitioner's home until they heard cried of distress from petitioner's father-in-law, Buck Hebert, who entered petitioner's home out of fear and concern for petitioner and her children. When Mr. Hebert called for help, the officers entered the home.

Upon entering the home and observing large amounts of blood, the officers began their search for the cause of the blood and to determine if its residents of were safe. Because it was difficult to determine what had taken place, once the scene in petitioner's bedroom was secured, officers conducted a protective sweep to secure the premises. The evidence seized from petitioner's home and introduced into evidence was observed in "plain view" by the officers while in the home, and the evidence seized were those objects that were lying in plain view and had the obvious presence of blood. See *State v. Brown*, 370 So.2d 525 (La. 1979).

If appellate counsel for the petitioner had asserted this claim on appeal, the appellate court would have been found the claim to be meritless. Thus, counsels' alleged failure to assert the claim has not prejudiced the applicant. This claim has no merit.

S-1) Petitioner claims that trial counsel's failure to follow up on information that petitioner had a long-standing but untreated seizure disorder that likely caused her psychotic break constituted ineffective assistance of counsel, as this evidence was essential to a meaningful presentation of petitioner's insanity defense. Petitioner's attorneys were not medical or psychiatric experts; however, her attorneys exercised due diligence and hired medical and psychiatric experts to help with her insanity defense. One of petitioner's own experts, Dr. Glenn W. Ahava, Ph.D., considered her history of frontal lobe epilepsy and her treatment history in his opinion and relayed this to the jury. The record reflects that defense counsel used their experience and training in the most skillful manner to properly defend the petitioner against the charge.

On the appeal in petitioner's case, the First Circuit Court of Appeal stated:

> ...the determination of whether the defendant's evidence successfully rebuts the presumption of sanity is made by the trier of fact viewing all of the evidence, including lay and expert testimony, the conduct of the defendant, and the defendant's actions in committing the particular crime. *Thames*, 681 So.2d at 486. The issue of insanity is a factual question for the jury to decide. *Thames*, 681 So.2d at 486. Lay testimony concerning a defendant's actions, both before and after the crime, may provide the jury with a rational basis for rejecting even a unanimous medical opinion that a defendant was legally insane at the time of the offense.

Thames, 681 So.2d at 486. Louisiana does not recognize the defense of diminished capacity. *State v. Pitre*, 04–0545 (La.App. 1 Cir. 12/17/04); 901 So.2d 428, 444, *writ denied*, 05–0397 (La.5/13/05); 902 So.2d 1018. A mental disease or defect short of insanity cannot serve to negate an element of the crime. *Pitre*, 901 So.2d at 444.

The record reflects that defense counsel used their experience and training in the most skillful manner to properly defend the petitioner against the charge. The right to counsel does not require errorless counsel or counsel judged ineffective by hindsight; it only requires counsel who, in fact, renders reasonable assistance. This claim has no merit.

Thibodaux, Louisiana, this 29th day of December, 2014.

JEROME J. BARBERA III, JUDGE
17th Judicial District Court
Division "B"

FILED
DEC 30 2014
CLERK OF COURT

A TRUE COPY
Clerk of Court's Office
Thibodaux, La. January 9, 2015
Clerk of Court

D1056811

NOTICE

STATE OF LOUISIANA
VS. 2007-C-448360
AMY T. HEBERT

SEVENTEENTH JUDICIAL DISTRICT
PARISH OF LAFOURCHE
STATE OF LOUISIANA

HON. JEROME J. BARBERA, III
DIVISION 'B'
1ST FLOOR OLD COURTHOUSE BLDG
THIBODAUX, LOUISIANA

To: LETTY S. DI GIULIO
1305 DUBLIN ST.
NEW ORLEANS, LA 70118

PLEASE BE NOTIFIED THAT THE COURT HAS ORDERED THAT:

THE APPLICATION FOR POST-CONVICTION RELIEF FILED BY THE PETITION-DEFENDANT, AMY HEBERT, IS **DENIED** AND DISMISSED. ATTACHED ARE CERTIFIED COPIES OF THE JUDGMENT AND REASONS FOR JUDGMENT, THAT WERE SIGNED ON DECEMBER 29, 2014.

IN TESTIMONY WHEREOF, WITNESS MY HAND AND OFFICIAL SEAL OF OFFICE THIS January 09, 2015 AT THIBODAUX, LOUISIANA.

VERNON H. RODRIGUE
CLERK OF COURT

Deputy Clerk of Court

A TRUE COPY
Clerk of Court's Office
Thibodaux, La January 9 2015
Clerk of Court

STATE OF LOUISIANA	*	**17TH JUDICIAL DISTRICT COURT**
VS NO: 448,360	*	**PARISH OF LAFOURCHE**
AMY T. HEBERT	*	**STATE OF LOUISIANA**

JUDGMENT

This Court, having considered the foregoing application for post-conviction relief, and finding that the application is without merit, and that the petitioner is not entitled to a hearing thereon, for reasons assigned this day:

IT IS ORDERED, ADJUDGED, AND DECREED that the application for post conviction relief filed by the petitioner-defendant, Amy Hebert, is denied and dismissed;

RENDERED AND SIGNED in Chambers, in Thibodaux, Louisiana, on this 29th day of December, 2014.

JEROME J. BARBERA III, JUDGE
17th Judicial District Court
Division "B"

PLEASE SERVE:

Petitioner Amy Hebert

Counsel for Petitioner Letty S. Di Giulio

Warden Jim Rogers

District Attorney Camille A. Morvant II

A TRUE COPY
Clerk of Court's Office
Thibodaux, La January 9, 2015
Clerk of Court

FILED
DEC 30 2014
CLERK OF COURT

STATE OF LOUISIANA	*	**17TH JUDICIAL DISTRICT COURT**
VS NO: 448,360	*	**PARISH OF LAFOURCHE**
AMY T. HEBERT	*	**STATE OF LOUISIANA**

REASONS FOR JUDGMENT ON APPLICATION FOR POST-CONVICTION RELIEF

On May 14, 2009, the defendant, Amy T. Hebert, after a trial by jury, was convicted of two counts of first degree murder, and she was sentenced to life imprisonment on February 4, 2010;

The convictions have become final, and the defendant filed an application for post-conviction relief on January 16, 2013. The District Attorney was ordered to file an answer to the application, but, instead of filing an answer, he filed on behalf of the State of Louisiana, a *Motion to Strike Pleadings and Exhibits* which he has labeled as procedural objections to the Application. On April 8, 2013, a hearing was held on the State's *Motion to Strike Pleadings and Exhibits* and the Court granted the Motion to Strike as to paragraphs 2 and 3, to which defendant filed a supervisory writ with the Louisiana First Circuit Court of Appeal. On July 29, 2013, the First Circuit Court of Appeal denied defendant's writ. Defendant then filed a writ with the Louisiana Supreme Court, which writ was denied on May 30, 2014.

On June 20, 2014, the court ordered the District Attorney to file an answer to defendant's application for post-conviction relief by July 21, 2014. However, on June 23, 2014, defendant filed a *Supplement to Application for Post-Conviction Relief and Motion for Evidentiary Hearing*, which the court granted. On July 23, 2014, the District Attorney filed *Procedural Objections* to defendant's supplemental application.

The Court considered defendant's *Supplement to Application for Post-Conviction Relief and Motion for Evidentiary Hearing* and the *Procedural Objections* filed by the District Attorney to defendant's supplement application and denied the State's *Procedural Objections*, and on August 14, 2014, the court ordered the District Attorney to file an answer to defendant's Post Conviction Relief and Supplemental Post Conviction Relief. The District Attorney filed it's answer on September 12, 2014.

Petitioner filed this application for post-conviction relief and makes the following claims:

1) The State unlawfully struck qualified prospective female jurors on the basis of gender in violation of the equal protection clauses of the United States and Louisiana Constitutions and *J.E.B. V. Alabama.*

2) The introduction of extraneous information in the form of purported medical expertise in a case that hinged on closely-contested expert medical testimony violated petitioner's right to confrontation, her right to an impartial jury, and her right to a fair trial.

3) Where the jurors engaged in premature deliberations and prejudgment of the case, petitioner was denied her rights to due process and an impartial jury.

4) Trial counsel's disclosure to the state of its investigative work-product, including its witness interviews and petitioner's own statements, constituted a violation of her right to effective assistance of counsel and her privilege against self-incrimination.

5) Appellate counsel was ineffective in failing to challenge the constitutionality of the exhaustive warrantless search of petitioner's home in violation of the fourth, sixth, and fourteenth amendments.

In her supplemental application for post-conviction relief petitioner makes the following claims:

S-1) Trial counsel's failure to follow up on information that petitioner had a long-standing but untreated seizure disorder that likely caused her psychotic break constituted ineffective assistance of counsel, as this evidence was essential to a meaningful presentation of petitioner's insanity defense.

The court having considered the application and supporting documents, the answer of the custodian through the District Attorney of this parish, and the record in this matter, and finding that the factual and legal issues raised by the claims of the petitioner can be resolved based upon the record:

The petition is dismissed without a hearing for the following reasons:

1) Petitioner claims ineffective assistance of counsel when counsel failed to raise an objection to the State unlawful use of peremptory challenges to strike qualified prospective female

jurors on the basis of gender.

Of the jurors stricken, there were many sufficiently gender-neutral explanations for the use of peremptory challenges including: religious, moral or ethical considerations, self-employed business owners, jurors with medical or psychiatric problems, jurors with family members that had psychiatric problems, one juror who knew the defendant, and those jurors that had misgivings about imposing the death penalty.

Petitioner claims she was denied effective assistance of counsel. In assessing a claim of ineffectiveness, a two-pronged test is employed. The petitioner must show that (1) her attorneys' performance was deficient, and (2) the deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Soler*, 93-1042, p. 9 (La.App. 5 th Cir. 4/26/94), 636 So.2d 1069, 1075, writs denied, 94-0475 (La.4/4/94), 637 So.2d 450; 94-1361 (La.11/4/94), 644 So.2d 1055. To show "prejudice" as required in order to establish ineffective assistance of counsel, the petitioner must demonstrate that, but for counsels' unprofessional conduct, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064; *State v. Soler*, supra. Effective assistance of counsel does not mean errorless counsel, or counsel who may be judged ineffective on mere hindsight, *State ex rel. Graffagnino v. King*, 436 So.2d 559, 564 (La.1983), it only required counsel who, in fact, renders reasonable assistance The record in this matter reflects that petitioner's counsel used their experience and training in the most skillful manner to properly defend petitioner against the charges.

This claim has no merit and post-conviction relief is not warranted.

2) The record reflects that this claim has been dismissed due to a procedural objection filed by the district attorney; therefore, this claim does not require an answer.

3) The record reflects that this claim has been dismissed due to a procedural objection filed by the district attorney; therefore, this claim does not require an answer.

4) Petitioner makes a claim that trial counsels' disclosure and the acceptance of an open-file agreement with the district attorney's office disclosed investigative work-product, including its own witnesses interviews, and petitioner's own statements, violated her right to self-incrimination, and therefore, petitioner's counsel provided ineffective assistance of counsel.

Petitioner's argument is misplaced. The witnesses identified by defense counsel were all know to the members of the victims' family before their identities were disclosed by defense counsel. The State was aware of the nature of the relationship between those witnesses and the defendant through information provided by the victims' family. The State would have eventually learned the identity of all of petitioner's family, friends and acquaintances through their own investigation.

Petitioner complains that her statements should not have been provided to the State as they constitute a violation of her privilege against self-incrimination. La. C.E. articles 501 et seq. and La. C.E. art. 801(D)(2) state that petitioner's statement made to friends and family are neither privileged nor inadmissible. Petitioner herself provided her expert witnesses with information that is the basis of this claim. Petitioner's expert reports were subject to the mandatory disclosure to the State by order of the Court making petitioner's statements to her experts available to the State through a collateral source.

Petitioner also benefitted from the open-file agreement. The State was only required to provide limited physical and documentary evidence as provided for under La. C.Cr.P. Art. 716 et seq., for which the defense would not have been entitled – the investigative report, the many statements obtained from both law enforcement and lay witnesses during the investigation, the photographs taken during the investigation, and the disposition of all of the physical evidence collected.

The record reflects that defense counsel used their experience and training in the most skillful manner to properly defend the petitioner against the charge. The right to counsel does not require errorless counsel or counsel judged ineffective by hindsight; it only requires counsel who, in fact, renders reasonable assistance. This claim has no merit.

5) In this claim, petitioner alleges that her appellate counsel was ineffective in failing to challenge the constitutionality of the exhaustive warrantless search of petitioner's home in violation of the fourth, sixth, and fourteenth amendments.

Petitioner, in her *Reply to the State's "Answer to Application to Post Conviction Relief,"* did not claim that the initial entry into her home was unlawful. Petitioner complaints are of the

subsequent "warrantless" search of her home and the seizure of evidence taken during that search.

Officers did not enter petitioner's home until they heard cried of distress from petitioner's father-in-law, Buck Hebert, who entered petitioner's home out of fear and concern for petitioner and her children. When Mr. Hebert called for help, the officers entered the home.

Upon entering the home and observing large amounts of blood, the officers began their search for the cause of the blood and to determine if its residents of were safe. Because it was difficult to determine what had taken place, once the scene in petitioner's bedroom was secured, officers conducted a protective sweep to secure the premises. The evidence seized from petitioner's home and introduced into evidence was observed in "plain view" by the officers while in the home, and the evidence seized were those objects that were lying in plain view and had the obvious presence of blood. See *State v. Brown*, 370 So.2d 525 (La. 1979).

If appellate counsel for the petitioner had asserted this claim on appeal, the appellate court would have been found the claim to be meritless. Thus, counsels' alleged failure to assert the claim has not prejudiced the applicant. This claim has no merit.

S-1) Petitioner claims that trial counsel's failure to follow up on information that petitioner had a long-standing but untreated seizure disorder that likely caused her psychotic break constituted ineffective assistance of counsel, as this evidence was essential to a meaningful presentation of petitioner's insanity defense. Petitioner's attorneys were not medical or psychiatric experts; however, her attorneys exercised due diligence and hired medical and psychiatric experts to help with her insanity defense. One of petitioner's own experts, Dr. Glenn W. Ahava, Ph.D., considered her history of frontal lobe epilepsy and her treatment history in his opinion and relayed this to the jury. The record reflects that defense counsel used their experience and training in the most skillful manner to properly defend the petitioner against the charge.

On the appeal in petitioner's case, the First Circuit Court of Appeal stated:

> ...the determination of whether the defendant's evidence successfully rebuts the presumption of sanity is made by the trier of fact viewing all of the evidence, including lay and expert testimony, the conduct of the defendant, and the defendant's actions in committing the particular crime. *Thames*, 681 So.2d at 486. The issue of insanity is a factual question for the jury to decide. *Thames*, 681 So.2d at 486. Lay testimony concerning a defendant's actions, both before and after the crime, may provide the jury with a rational basis for rejecting even a unanimous medical opinion that a defendant was legally insane at the time of the offense.

Thames, 681 So.2d at 486. Louisiana does not recognize the defense of diminished capacity. *State v. Pitre*, 04–0545 (La.App. 1 Cir. 12/17/04); 901 So.2d 428, 444, *writ denied*, 05–0397 (La.5/13/05); 902 So.2d 1018. A mental disease or defect short of insanity cannot serve to negate an element of the crime. *Pitre*, 901 So.2d at 444.

The record reflects that defense counsel used their experience and training in the most skillful manner to properly defend the petitioner against the charge. The right to counsel does not require errorless counsel or counsel judged ineffective by hindsight; it only requires counsel who, in fact, renders reasonable assistance. This claim has no merit.

Thibodaux, Louisiana, this 29th day of December, 2014.

JEROME J. BARBERA III, JUDGE
17th Judicial District Court
Division "B"

A TRUE COPY
Clerk of Court's Office
Thibodaux, La. January 9, 2015
Clerk of Court
By

FILED
DEC 30 2014
CLERK OF COURT
By

STATE OF LOUISIANA
EX REL. AMY T. HEBERT

VERSUS NUMBER 448360

JIM RODGERS, WARDEN
LCIW

STATE OF LOUISIANA

PARISH OF LAFOURCHE

17TH JUDICIAL DISTRICT COURT

ANSWER TO APPLICATION FOR POST CONVICTION RELIEF

NOW INTO COURT comes the State of Louisiana through the undersigned Assistant District Attorney in answer to the petitioner's Application for Post-Conviction Relief filed herein. The State answers as follows:

1.

Claim I is denied.

2.

Claim IV is denied.

3.

Claim V is denied.

4.

The petitioner's supplemental claim is denied.

WHEREFORE, the State prays that this answer be deemed good and sufficient and that it be relieved from further answering, and that there be judgment herein in favor of the State of Louisiana.

RESPECTFULLY SUBMITTED

BY: _____

CAMILLE A. MORVANT, II
DISTRICT ATTORNEY
JOSEPH S. SOIGNET
ASSISTANT DISTRICT ATTORNEY
P. O. BOX 431
THIBODAUX, LOUISIANA 70301
TELEPHONE: (985) 447-2003

PLEASE SERVE:

The defendant
Amy T. Hebert
Louisiana Correctional Institute for Women
St. Gabriel, Louisiana

Counsel for the Defendant
Letty S. DiGiulio
1305 Dublin St.
New Orleans, LA 70118

AND

Camille A. Morvant, II
Lafourche Parish District Attorney's Office

DISTRICT ATTORNEY'S OFFICE

STATE OF LOUISIANA
EX REL. AMY T. HEBERT

VERSUS NUMBER 448360

JIM RODGERS, WARDEN
LCIW

STATE OF LOUISIANA

PARISH OF LAFOURCHE

17TH JUDICIAL DISTRICT COURT

MEMORANDUM IN SUPPORT OF ANSWER TO APPLICATION FOR POST CONVICTION RELIEF

MAY IT PLEASE THE COURT:

The State of Louisiana submits this memorandum in support of its answer to the remaining claims for relief presented in the application for post-conviction relief filed by Amy T. Hebert (hereinafter referred to as either "defendant" or "petitioner).

The exclusive grounds for post-conviction relief under Louisiana law are set forth in La.C.Cr.P. article 930.3, which provides as follows:

> If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:
>
> (1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana;
>
> (2) The court exceeded its jurisdiction;
>
> (3) The conviction or sentence subjected him to double jeopardy;
>
> (4) The limitations on the institution of prosecution had expired;
>
> (5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or
>
> (6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.
>
> (7) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted.

Each of the petitioner's claims implicates the performance of her prior counsel, either at the trial court or appellate level. A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. *State v. Serigny*, 610 So.2d 857, 859–60 (La.App. 1st Cir.1992), writ denied, 614 So.2d 1263 (La.1993). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So.2d 1035, 1038–39 (La.App. 1st Cir.), writ denied, 476 So.2d 350 (La.1985).

The State respectfully submits that in no regard was the performance of her trial or appellate counsel deficient. But in any event, nothing alleged in the application for post-conviction relief, even if accepted as true, would have had any effect on the outcome of the trial, and thus the petitioner cannot establish sufficient prejudice. Therefore, the petitioner is not entitled to relief.

CLAIM I

In her first claim, the petitioner alleges that the State "unlawfully" used its peremptory challenges to strike qualified prospective female jurors on the basis of

gender, and further alleges that her trial counsel were ineffective in failing to lodge an objection pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419 (1994).[1]

As a claim for post-conviction relief, the petitioner can only prevail if she establishes that her conviction was obtained in violation of the constitution of the United States or the state of Louisiana, since none of the other grounds listed in La.C.Cr.P. article 930.3 have any possible applicability.

As a matter of law, since the defense did not make a *Batson* objection, there has been no prima facie showing that the State exercised peremptory challenges on the basis of gender, and the burden never shifted to the State to articulate gender-neutral reasons for striking jurors. *State v. Cobb*, --- So.3d ----, 2014 WL 1258543 (La.App. 1st Cir. 2014). Further, courts of review have engaged in structural error analysis only when a trial court improperly denies a *Batson* challenge. *Alex v. Rayne Concrete Service,* 951 So.2d 138 (La. 2007); *Gorman v. Miller*, 136 So.3d 834 (La.App. 1st Cir. 2013).

The Louisiana Supreme Court has noted that the protections afforded under *Batson* do not go "to the heart of the truthfinding function." *State v. Snyder*, 750 So.2d 832 (La. 1999). In applying that principle to an ineffective assistance of counsel claim under *Strickland*, the Court held that:

> Where a rule does not have "such a fundamental impact on the integrity of factfinding," it cannot be said that the violation of such rule renders the trial unfair and the verdict suspect. Thus, counsel's failure to make a *Batson* objection did not prejudice defendant.
>
> *State v. Snyder*, 750 So.2d at 842-843 (citing *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), footnote omitted)

[1] For the sake of simplicity, the gender-based objections asserted in the application for post-conviction relief will hereafter be referred to as "*Batson*" objections.

Without structural error or prejudice, the petitioner cannot establish that the conviction was obtained in violation of the constitution of the United States or the State of Louisiana. Accordingly, there is no merit to the defendant's claim.

Turning nonetheless to the substance of the claim, in *State v. Nelson*, 85 So.3d 21(La. 2012), the Louisiana Supreme Court recited the three-step test for determining whether a peremptory challenge was based on prohibited criteria:

> Under Batson and its progeny, the opponent of a peremptory strike must first establish a prima facie case of purposeful discrimination. Second, if a prima facie showing is made, the burden shifts to the proponent of the strike to articulate a race-neutral explanation for the challenge. Third, the trial court then must determine if the opponent of the strike has carried the ultimate burden of proving purposeful discrimination. Batson, 476 U.S. at 94–98, 106 S.Ct. 1712.
>
> *State v. Nelson*, 85 So.3d at 28-29.

As further noted by the Supreme Court at page 29 of the *Nelson* opinion:

> To establish a prima facie case, the objecting party must show: (1) the striking party's challenge was directed at a member of a cognizable group; (2) the challenge was peremptory rather than for cause; and (3) relevant circumstances sufficient to raise an inference that the peremptory was used to strike the venireperson on account of his being a member of that cognizable group. *Batson*, 476 U.S. at 96, 106 S.Ct. 1712; *Sparks*, 68 So.3d at 468; *Givens*, 776 So.2d at 449. If the trial court determines the opponent failed to establish the threshold requirement of a prima facie case (step one), then the analysis is at an end and the burden never shifts to the proponent of the strike to articulate neutral reasons (step two). *Sparks*, 68 So.3d at 468–89; *State v. Duncan*, 1999–2615 (La.10/16/01), 802 So.2d 533, 544.

At some point, it bears noting that the petitioner is incorrect when she alleges that the State used "all twelve (12) of its peremptory strikes." The minutes and trial transcripts demonstrate that the State only used eleven peremptory strikes before a full jury was seated. The State used one of the additional, yet entirely separate, peremptory challenges granted to both sides during the selection of alternate jurors (as per La.C.Cr.P. article 789, regular peremptory challenges shall not be used against alternate jurors.) Thus, the State only exercised 11 out of 12 peremptory strikes before a jury was seated.

The significance is that if the District Attorney was motivated by gender bias, he could have removed one more female from the ten already chosen for the jury. Had the State exercised that last peremptory challenge on one of the females already accepted, she would have been replaced by the next potential juror, who had already been subject to voir dire and was sitting in the jury box when the State declined to use its last strike. That juror was Bradley Terrebonne, a male.[2]

This important factor alone refutes the allegation that the District Attorney had any discriminatory intent in the exercise of the State's peremptory challenges.

Further, the "relevant circumstances" surrounding the jury selection in this matter rebut the contention that a prima facie showing of discrimination can be made.

As noted above, the State accepted ten female jurors. Due to the simple luck of the draw, a total of twenty-three (23) females were drawn for examination prior to the selection of the full jury[3], as opposed to only ten (10) males.

Of those ten males, four were removed for either cause or hardship. Through the appropriate and permissible use of backstrikes,[4] the State was able to wait until after the defendant had a chance to strike jurors to determine how to use its peremptory challenges. When the defense used four of its peremptory challenges on the remaining males on the jury panel, only two men were left for the State to strike.

Any statistical analysis of the State's peremptory challenges in this case would have shown an inordinate amount of strikes against women, simply because

---

[2] The four prospective jurors chosen after Erin Folse were Julia Matherne (excused for hardship), Matthew Karns (peremptorily struck by the defense), Jimmy Tabor (excused for cause) and Bradley Terrebonne.

[3] These figures are calculated up to and including the draw of Erin Folse as a potential juror, since with her acceptance the selection of the jury proper ended. Because a defendant's rights under *Batson* are rooted in the constitutional right to a jury of one's peers, and the focus of the court's inquiry in response to a Batson objection focus on the prosecutor's intent at the time peremptory challenges are exercised, any statistical information compiled after the selection of a jury cannot have any bearing on the prosecutor's conduct at the time he participated in the selection of that jury.

[4] As authorized by La.C.Cr.P. article 795.

women were predominantly chosen at random for voir dire. Simply looking at the raw numbers in this case does not establish a prima facie case of purposeful discrimination against prospective women jurors.

The State of Louisiana also submits that the failure of the defense to lodge a contemporaneous *Batson* objection has prejudiced the State's ability to respond with gender-neutral reasons for excusing potential jurors. The Louisiana Supreme Court has held that the sole focus of a Batson inquiry is the intent of the prosecutor ***at the time he exercised his peremptory strikes***. *State v. Green*, 655 So.2d 272 (La. 2005); *State v. Juniors*, 915 So.2d 291 (La. 2005), certiorari denied, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006). As the Supreme Court noted in *State v. Myers*, 761 So.2d 498 (La. 2000):

> The trial judge observes first-hand the demeanor of the attorneys and venirepersons, the nuances of questions asked, the racial composition of the venire, and the general atmosphere of the voir dire that simply cannot be replicated from a cold record.
>
> *State v. Myers*, 761 So.2d at 502.

Because of the failure to lodge a contemporaneous objection, the State has been deprived of an opportunity to recite gender-neutral reasons supporting its peremptory challenges which go beyond the "cold record." For one example among many, a potential juror peremptorily stricken by the State began crying in open court when questioned by the District Attorney on her ability to serve as a juror in the case. While the relevant portion of the transcript reflects that something emotional might be occurring, nowhere does the court reporter type that the member of the venire began "crying." Had the State been asked to provide a contemporaneous, gender-neutral reason for its peremptory challenge, it would have been simple enough for the trial court (as well as defense counsel) to note that the juror in fact had been crying. Now, the State is placed in the difficult position of hoping that the trial court accurately remembers one incident among the

hundreds which occurred during jury selection over five years ago, illustrating the prejudice caused by the defendant's failure to make a contemporaneous *Batson* objection.

As recognized by both *Batson* and *J.E. B.*, supra, to rebut a prima facie showing of intentional discrimination, the proponent of a peremptory challenge must offer a race- or gender-neutral explanation in response to a properly-lodged objection.

This explanation does not have to be persuasive, or even plausible, but must be more than a mere affirmation of good faith or an assumption that the challenged juror would be "partial to the defendant because of their shared race" (or, as applied to the instant matter, gender.) *Purkett v. Elem*, 514 U.S. 765, 768 115 S.Ct. 1769 (1995). At the second step of the *Batson* inquiry, the issue is the facial validity of the striking party's explanation. *Id.* Unless a discriminatory intent is inherent in the striking party's explanation, the reason offered will be deemed race- (or gender-) neutral. *Id.*

While the petitioner now places an inordinate amount of emphasis on the views each prospective juror held on the death penalty, she ignores the fact that there was also a guilt phase of the trial. Many of the State's decisions regarding the suitability of jurors focused on whether a particular juror would be more or less likely to accept the petitioner's insanity defense.

For example, the petitioner now suggests that Janet Loupe should have been an ideal juror for the State because of her views on the death penalty. That view completely ignores the fact that Loupe was bipolar, suffered from depression and required medicine to help her sleep at night. She informed the court that she was taking seven prescription drugs at the time of jury selection, including lithium for the last eight years. She also was a patient at the mental health clinic in Raceland.

It is not unreasonable for the State to question whether such personal issues would not make her more sympathetic to the defense which was expected to follow.

In attempting to establish that the State had no valid gender-neutral reason for exercising its peremptory strikes, the petitioner incorrectly assumes that the rehabilitation of a juror precludes the State from citing the reasons which required that rehabilitation from being invoked in response to a *Batson* objection. Even though a rehabilitated juror may survive a challenge for cause, the reasons for the cause challenge may still constitute a valid justification for a prosecutor's subsequent peremptory strike. *State v. Jacobs*, 67 So.3d 535 (La.App. 5th Cir. 2011).

The petitioner's attempts to equate the death-penalty views of Jordan Orgeron with potential female jurors excused by the State fail because of that juror's unique factual situation. No potential female juror was similarly situated to Orgeron, for the simple reason that Orgeron was the nephew of an assistant district attorney.[5] As such, prosecutors had a unique insight into this juror that could not possibly be developed during normal voir dire. While the defendant now contends that his views on the death penalty should have disqualified him in the State's eyes (and the failure to do so thus evidenced discriminatory intent) the State was presented with an opportunity to accept someone as a juror that they knew more intimately than any other prospective juror, regardless of the time that might be spent in voir dire getting to know that person. Since no female juror excused by the State can be considered similarly situated to Orgeron, any attempts to draw such a comparison must fail.

Accordingly, although the State respectfully submits that the petitioner has failed to establish a prima facie *Batson/J.E.B.* violation, it would nonetheless

[5] That fact is of record in this matter and was known by defense counsel when they accepted Orgeron.

proffer the following gender-neutral reasons for exercising each of its peremptory strikes in this matter:

1. Mary McFarland: She informed the court that "My brother was under the care of a psychiatrist. He was schizo (sic)." She also stated during voir dire that it would be important to her to know whether or not the defendant herein was taking or not taking medication at the time of the crime.

2. Faye Reynolds: Throughout voir dire she generally answered the District Attorney's questions with only one word responses, yet was very animated and loquacious in answering questions from defense counsel. This is corroborated by the trial transcripts. Counsel for the State noted at the time that the "defense wants her" and that she "says what we (the attorneys and the judge) want to hear."

3. Catherine Landry: On her written juror questionnaire, she stated that she had religious, moral or ethical considerations that would prevent her from returning a verdict that would result in the execution of another human being. She also stated that she had an acute interest in criminal cases, and reads "a lot of crime novels." She also stated "I do not believe I could sentence someone to death, no matter how heinous a crime a person may have committed." She began crying during voir dire when questioned by the District Attorney over whether she could serve as a juror in this case.

4. Harriet Pennex: The Court noted that she hesitated when asked if she could vote for the death penalty if she thought it was appropriate. She favors life over death, and said there were religious, moral or ethical considerations that would prevent her from voting for the death penalty. She said it took her two days to answer that on her questionnaire. When asked about the insanity defense, she stated "I think there is mental illness, and I believe, you know, that she probably was."

The trial judge actually brought Pennex back into the courtroom to follow up on that last statement, which she admitted making, although she attempted to qualify it by saying that she was putting herself in the defendant's position.

5. Janet Loupe: On her questionnaire, she stated that she was bipolar, noting "I suffer from depression. I take medicine to help me sleep at night. I am bi-polar. I see a psychiatrist at the mental health in Raceland, La." She noted that she had taken amopine for over 22 years, lithium for eight years, and was still on both. She was taking seven prescription drugs at the time of jury selection.

6. Tracy Faucheaux: She noted that she was self-employed and "there is no one to run my business" if she were chosen as a juror. The Court thought it appropriate to question her regarding statements on her juror information form, where she had some serious misgivings about imposing the death penalty. She also stated on the record, in response to questioning, "... but in this case I really, really think that mental illness could be ... a factor – yes, very real."

7. Beth David: Prosecutors were aware prior to trial that David and the defendant had a very close relationship while the defendant was in high school, which was corroborated by discovery propounded to the State by the defense. David refused to acknowledge this, despite being given numerous chances by the District Attorney during both phases of voir dire. She consistently attempted to portray defendant as just another student. Prosecutors noted at the time that she was "too close to Amy and did not reveal this fact. Wants to be on jury."

8. Mary Davidson: Her son had been prosecuted for underage drinking and possession of marijuana. One prosecutor noted during the death qualification portion of voir dire that she seemed to agree with a statement made by another to the effect that it was "awful that people were saying things about Amy."

9. Arlene Orgeron: She informed the court that her daughter saw a psychiatrist. She was much more talkative in her dialog with Richard Goorley than with the District Attorney, and she stressed her independence from the State.

10. Erma Usea: Had been prosecuted and placed on probation for DUI. Noted on questionnaire that "my sister has mental problems, all I can say is when she takes the meds they prescribe it helps her."

11. Patricia Bonnette: On her questionnaire she stated "my first cousin was murdered by her husband." She also stated that she was once married to a psychologist, and that "I was given an antidepressant when I went through menopause at the age of 40." Speaking about mental health professionals, she opined that "many are knowledgeable and helpful, but some are not. In my case, I would have been better off not having sessions with a psychologist." Regarding her experiences with the DA's office, she bluntly told the District Attorney "well, let's put it this way. The last time I went to see you about something, I wasn't pleased with the help I got."

Additionally, the State would note that Randie Hebert, whom the State struck with one of its extra peremptory challenges during the selection of alternate jurors, is the cousin of Gary Hebert. Hebert was tried and convicted of second degree murder by the Lafourche Parish District Attorney's Office, and is now serving a life sentence.

Finally, in light of the outcome-oriented second prong of *Strickland*, the State would note that had the defendant lodged a contemporaneous *Batson* objection, the court could have invalidated every one of the State's gender-neutral reasons and the 10-2 ratio of females to males on the jury would not have changed. As the record demonstrates, Orgeron became the second (and last) male juror with

his selection, and ultimately he was seated as juror number 5. Four jurors[6] selected before Orgeron were ultimately struck by the State. Even if those jurors were returned to their positions ahead of Orgeron, he would have nonetheless remained as the second male on the jury, albeit as juror number 9. Because the seven jurors seated after Orgeron were all women, the court could have invalidated the State's seven subsequent peremptory challenges, returned those women to the jury and the composition of the ultimate jury would have remained ten women and two men.

Thus, even if one concedes that the failure to lodge a *Batson* objection constituted deficient performance by the petitioner's trial counsel, the defendant cannot demonstrate how the result would have been any different.

For the reasons set forth above, this claim for relief is without merit.

CLAIM IV

The defendant in this claim contends that her trial counsel were ineffective in agreeing to an "open file" discovery agreement with the State of Louisiana.

Initially, the State would note that the petitioner offers no legal authority for her assertion that the open file agreement "did not, by its terms, provide the defense with an discovery from the State that it was not already entitled to" under the Code of Criminal Procedure. To the contrary, as a matter of law this is incorrect.

Louisiana Code of Criminal Procedure articles 716 et seq. provide only for the discovery of limited physical or documentary evidence. A defendant has no right to unlimited or full discovery in criminal matters, particularly with regard to discovery which was regulated by the law in effect prior to January 1, 2014. See generally *State v Ates*, 418 So.2d 1326 (La. 1982); *State v. Hooks*, 421 So.2d 880 (La. 1982); *State v. Lynch*, 655 So.2d 470 (La.App. 1st Cir. 1995).

---

[6] In order of selection, those prospective jurors were Harriet Pennex, Arlene Orgeron, Erma Usea and Mary McFarland. All four were drawn for the first panel. Orgeron was the first prospective juror drawn for the second panel.

Specifically, La.C.Cr.P. article 723 provided[7] that

> Except as provided in Articles 716, 718, 721, and 722, this Chapter ***does not authorize the discovery or inspection of reports***, memoranda or other internal state documents ***made by*** the district attorney or by ***agents of the state in connection with the investigation*** or prosecution of the case; ***or of statements made by witnesses or prospective witnesses***, other than the defendant, to the district attorney, or to agents of the state. (Emphasis added.)

Thus, for example, the defendant would not have been entitled to obtain the 121- page investigative report prepared by Sgt. Chad Shelby, dozens of statements (from both law enforcement and lay witnesses), almost 400 accompanying photographs, as well as the disposition of all physical evidence collected in the case.

To accept the petitioner's arguments at face value would be to conclude that her attorneys would have been in a better position to try all pretrial motions and the trial on the merits, while being completely ignorant of the facts developed during the investigation conducted by law enforcement against their client. This assertion beggars belief.

In fact, a review of both the motion to suppress evidence and the motion to suppress the defendant's confession show that defense counsel derived a great deal of factual information in support directly from Sgt. Shelby's report, information which would have been unavailable to the defendant without an open file agreement. Likewise, the petitioner's two preeminent mental health experts, Drs. David Self and Phillip Resnick, both used this report as a basis for their expert testimony.

The petitioner's assertion that the waiver of her right to a preliminary exam deprived her of a possible discovery tool is likewise incorrect, as it fails to take into account her indictment by a grand jury. The scope of a preliminary examination is set forth in La.C.Cr.P. article 296:

---

[7] This was the version of La.C.Cr.P. article 723 in effect at the time of the defendant's indictment.

> If the defendant has not been indicted by a grand jury for the offense charged, the court shall, at the preliminary examination, order his release from custody or bail if, from the evidence adduced, it appears that there is not probable cause to charge him with the offense or with a lesser included offense. If the defendant is ordered held upon a finding of probable cause, the court shall fix his bail if he is entitled to bail.
>
> ***After an indictment has been found by a grand jury, the preliminary examination shall be limited to the perpetuation of testimony and the fixing of bail.*** (Emphasis added.)

Accordingly, even if the defendant had sought a preliminary examination, the defendant would have been precluded from using the hearing as a discovery tool, and the State would have promptly lodged a valid objection to any attempt to improperly broaden the scope of the hearing.

Turning to the information the defense was required to disclose to the State pursuant to the open file agreement, the arguments in support are misplaced, for several reasons. As applied to witness statements, the argument presupposes that the State was either unaware that such witnesses existed, or that the State would not otherwise have had access to those witnesses without the agreement of the petitioner's trial counsel.

The first argument ignores the fact that all of the lay witnesses identified by defense counsel were known to the members of the victims' family before their identity was disclosed by the defense. Through information provided by the victim's family, the State was also aware of the nature of the relationship between those witnesses and the defendant, and was actually in the process of interviewing them as discovery was pending. In fact, the State, from the earliest stages of the investigation, diligently sought out any person who was alleged to have had contact with the defendant in the months and even years preceding the crime, trying to gain insight into the defendant's mental state leading up to the murder of her children.

The second argument assumes that otherwise law abiding citizens would refuse to talk to prosecutors or investigators out of a misguided sense of loyalty to the defendant.[8] It is hard to fathom that anyone would refuse to cooperate with an investigation into the death of two innocent children, but this is exactly what the petitioner's argument presupposes.

The defendant's allegation that her attorneys violated her right against self-incrimination when they disclosed witness statements is likewise misplaced. Her own statements to her friends and acquaintances were by definition neither privileged (see La.C.E. articles 501, et seq.) nor inadmissible against her (see La.C.E. article 801(D)(2).)[9] But in any event, the defendant herself provided her expert witnesses with the same information she now complains about disclosing through voluntary discovery. Their reports in turn were subject to mandatory disclosure to the State by order of the court. Accordingly, when her attorneys complied with the lawful orders of the court in providing those reports to the State, her claims relating to the non-discoverability of the same information in collateral sources was rendered moot.

For example, the petitioner complains at length that the District Attorney, in his opening statement, was able to describe her state of mind during the period of time before the murders because he had access to the statement of her friend, Stacy Stegman. This allegation ignores the fact that the defendant herself disclosed the same material to her expert witnesses, who each included her statements in their mandatory reports. In fact, Dr. Phillip Resnick gave an extremely detailed summary of the information provided to him by the defendant herself in his report

[8] Or worse, it assumes that defense counsel should prevent witnesses from talking to law enforcement.

[9] As the petitioner acknowledges in her memorandum, Stacy Stegman testified at trial as a defense witness. Therefore, the statements made by the petitioner to her were, by definition, not hearsay. Unless Stegman were prepared to perjure herself at trial (the petitioner makes no such allegation) any statements made by the petitioner to her would ultimately have been disclosed to the jury. Accordingly, there was no prejudice to the defendant.

dated August 13, 2008, under the heading captioned "Ms. Hebert's Account of Events Preceding the August 20, 2007 Homicides." That narrative is more extensive than that of Stegman, and covers the same information discussed by the District Attorney in his opening statement. Accordingly, the defendant's complaint in this regard is moot.

In evaluating an ineffective assistance of counsel claim, a reviewing court must give great deference to trial counsel's judgment, tactical decisions and trial strategy. There is a strong presumption that trial counsel has exercised reasonable professional judgment. *State v. Cook*, 127 So.3d (La.App. 2nd Cir. 2013); *State v. Hollins*, 123 So.3d 840 (La.App. 4th Cir. 2013); *State v. St. Romain*, --- So.3d ----, 2013 WL 1810585 (La.App. 3rd Cir. 2013).

As noted by the Fourth Circuit in *State v. Hollins*, supra:

> A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2065. There is no precise definition of reasonably effective assistance of counsel, so any inquiry into the effectiveness of counsel must be specific to the facts of the case and must take into consideration the counsel's perspective at the time. *State v. LaCaze*, 99–0584, p. 20 (La.1/25/02), 824 So.2d 1063, 1078–79. The Sixth Amendment does not guarantee errorless counsel or counsel judged ineffective by hindsight, but counsel reasonably likely to render effective assistance. *Id.*

State v. Hollins, 123 So.3d at 869-870.

In applying those principles to the case at bar, it is clear that the petitioner's trial attorneys made a tactical decision to give up certain information which would have been discovered by the State in any event (either through the mandatory production of expert reports or the simple exercise of due diligence by the State) in exchange for invaluable information which they had no right to receive under formal discovery rules.

The fact that a particular trial strategy is unsuccessful does not establish that trial counsel was ineffective. *State v. Felde*, 422 So.2d 370 (La. 1982). But in this case, the decision by defense attorneys to accept open file discovery benefitted the petitioner in two material ways. First, her trial attorneys were able to use the investigative report to successfully suppress her confession. But more importantly, that information was invaluable to preparing her trial defense, and through the assistance of her competent trial counsel, the petitioner was able to avoid the death penalty.

The defendant had the benefit of multiple death-penalty-qualified attorneys representing her cause throughout these proceedings. The petition and exhibits filed herein fail to establish that they did not discharge their duties to the defendant with the utmost professionalism and skill.

Accordingly, the State of Louisiana submits that there was no deficient performance by the petitioner's trial counsel, and in any event the defendant cannot show that the outcome of the trial would have been different. In other words, there was no prejudice to the defendant. This claim for relief is therefore without merit.

CLAIM V

In the final claim of the petitioner's original PCR application, she contends that her appellate counsel was ineffective in failing to challenge the warrantless search of her residence on the morning of the homicides.

However, the State respectfully submits that if the petitioner can now present a somewhat coherent argument in favor of suppression, it is only because she ignores every meaningful fact on which the actual ruling of the trial court was based.

It is well-settled that an appellate court should afford great weight to a trial court's findings of fact based on the credibility of evidence, but its legal findings are subject to a de novo standard of review. *State v. Thompson*, 93 So.3d 553 (La.

2012). As a general rule, an appellate court may review the testimony at trial in determining the correctness of the trial court's pretrial ruling on a motion to suppress. *State v. Green*, 655 So.2d 272 (La. 1995).

It is that testimony which the petitioner completely ignores as she tries to articulate a basis for her suggested appeal of the trial court's ruling.

Neither in her initial factual summary nor in the particulars of Claim V does the petitioner even allude to the role Buck Hebert played in the discovery of the pertinent evidence eventually presented to the jury. Any good faith appeal would have to take some cognizance of the fact that Hebert, ***in violation of the direct orders of law enforcement personnel at the scene***, broke a window and entered the petitioner's residence of his own accord. In fact, as the testimony at the hearing on the motion to suppress established, Deputy Todd Prevost actually tried to prevent Hebert from entering the residence, to no avail.

Once inside the house, it was Buck Hebert's cries of distress, including "oh God, somebody get in here" that prompted law enforcement to initially enter the residence – another fact ignored now by the petitioner.

The petitioner also makes no reference to the copious amounts of blood that Buck Hebert, Prevost and Deputy Mike Wintzel observed ***before*** the defendant was even secured.

The petitioner's argument makes another telling omission when it states:

> After reporting officers had secured the scene,[10] tazering and handcuffing Ms. Hebert and determining that Camille and Braxton Hebert were deceased, homicide detectives and crime scene technicians began an exhaustive process of collecting and inventorying all potential evidence inside of Ms. Hebert's home without ever once stopping to consider obtaining a warrant. (Application for PCR, pages 48-49.)

[10] Tellingly, this is how the petitioner begins her factual summary of this claim, with no reference to any activity which preceded it.

This summary skips right over the protective sweep that officers testified about in detail[11] at the motion to suppress, which occurred after the defendant was secured but before any attempt was made to collect evidence observed to be in plain view.

It bears repeating that even though the defendant was armed with a knife and uttered a profanity at law enforcement when she observed them in her bedroom doorway, officers at the scene testified that it was not readily apparent what had happened to the petitioner and her children. In fact, law enforcement could not assume that the petitioner's initial belligerence wasn't attributable to her belief that the real perpetrator(s) had returned and she was only trying to protect herself and her children. That uncertainty was not dispelled even though it was necessary to taze the still-armed petitioner into submission.

Thus, the scene was not considered secure until detectives conducted a thorough protective sweep of the premises, as sanctioned by the United States Supreme Court in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990).

It was during this protective sweep that the majority of the remaining evidence was observed in plain view.

In *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), the U.S. Supreme Court, while holding that there was no "death-scene" exception to the warrant requirement, did recognize that there were emergency situations in which a warrant would not be required:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the ***Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.*** Similarly, when the police come upon the scene of a homicide ***they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises***. Cf. *Michigan v. Tyler*, supra, 436 U.S., at 509-510, 98 S.Ct., at 1950-1951. "The need to protect or preserve life or avoid serious injury is justification for what would

[11] Without contradiction, as was all of the factual testimony offered at the hearing.

be otherwise illegal absent an exigency or emergency." *Wayne v. United States*, 115 U.S.App.D.C. 234, 241, 318 F.2d 205, 212 (opinion of Burger, J.). ***And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities***. *Michigan v. Tyler*, supra, 436 U.S., at 509-510, 98 S.Ct., at 1950-1951; *Coolidge v. New Hampshire*, 403 U.S., at 465-466, 91 S.Ct., at 2037-2038.

Mincey v. Arizona, 437 U.S. at 392-393 (emphasis added.)

In all respects, the seizure of evidence from the petitioner's home comports with this clear legal authority. There was no evidence recovered from the home of the petitioner and introduced into evidence at the trial of this matter which was not observed in plain view by law enforcement. There was no "exhaustive" search for evidence which uncovered these items. Law enforcement observed evidence during their "legitimate emergency activities" and collected that evidence, in full accord with *Mincey*, supra.

The petitioner makes a number of dubious assertions in support of her claims, particularly with regard to the discovery of the two notes the petitioner composed to her ex-husband and ex-mother-in-law.

The petitioner states that "(e)ven the alleged original observation of the Bible and letter to Judy Hebert occurred in connection with the search for evidence." This is factually incorrect.

The allegation ignores the direct testimony of Det. Robert Mason, who observed blood on a note pad while simply standing guard over the bodies of the two children murdered by the defendant, as authorities prepared to properly and respectfully remove the children from the crime scene. In no way could Mason's actions at that moment be described as a "search for evidence," notwithstanding the petitioner's attempts to conflate his actions with that of Sgt. Shelby.[12]

[12] The defendant's contention that "at the time the notepad and Bible were collected and inventoried by police, the identity of the suspect had already been determined" is a meaningless truism. Of course, the defendant at that time was a suspect, but until law enforcement concluded its investigation, she could not be considered the only suspect. In any event, the relevant time period with regard to these two items is not when they were collected and inventoried, but when they were discovered.

The false premise repeated throughout this claim for relief is that the collection of evidence already observed lying in plain view by law enforcement was a "search." Because the seizure of evidence under the plain view doctrine is not a search at all,[13] the defendant's premise is inapt.

The petitioner identifies no evidence recovered from her home and subsequently introduced against her at trial which was not inadvertently observed by law enforcement from a vantage point where they legally had a right to be, either during the initial emergency entry, the subsequent protective sweep or while officers prepared to properly remove the children's bodies from the house.

The trial court's ruling correctly noted that the one thing that made all of the items seized from the home readily apparent as evidence (particularly the note pad) was obvious presence of blood. It was unnecessary for law enforcement to examine such items to understand their clear evidentiary significance at a murder scene.

In fact, even as she attempts to argue otherwise, the petitioner actually acknowledges that this evidence was discovered inadvertently when she notes that the "nature" of the note pad was not readily apparent to detectives. The State would agree with that assertion. It was neither the nature of the note pad, nor its contents, that prompted its seizure. Rather, it was the presence of blood which called Mason's attention to its evidentiary importance. The petitioner fails to demonstrate in any way how obvious blood evidence observed in plain view at the scene of a homicide is not readily identifiable as evidence of that crime.

The defendant's contention that the note to Chad could not have been seized in the context of her concession that the plain view doctrine might apply to the note to Judy is curious, since both were attached to the same notepad. It is unclear how

[13] In *State v. Brown*, 370 So.2d 525, 527 (La. 1979), the Louisiana Supreme Court reiterated: "When an officer inadvertently observes evidence of a crime from a vantage point that does not intrude upon a protected area or when that protected area is entered with prior justification, there is no violation of the search warrant rule because there has been no 'search'."

law enforcement could have collected the latter without damaging the same notepad which included the former.

Because the petitioner is required to establish that she was prejudiced by prior counsel's failure to pursue this issue on appeal, she must now articulate a valid assignment of error ***based on the actual record of this case***. The arguments presented in Claim V completely fail to do so.

Simply stated, petitioner's appellate counsel could not have presented this claim to the First Circuit in good faith, because the facts upon which it is based bear no resemblance to the factual record counsel was obliged to account for. Nor was petitioner's appellate attorney obligated to present assignments of error to the court of appeal simply for the sake of doing so. See generally *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

The State of Louisiana respectfully submits that by ignoring the material facts upon which the ruling of the trial court was based, the petitioner tacitly admits that an appeal on the actual merits of this claim would have had no chance at success.

Accordingly, this claim has no merit.

PETITIONER'S SUPPLEMENTAL CLAIM

The State has already filed a memorandum in support of its procedural objections to this claim which touches in detail upon its merits. Accordingly, the State would adopt its previous memorandum as part of this response, as if it were copied herein in its entirety.

However, a few points in that memorandum bear repeating.

This claim should properly be maintained only for consideration of the performance of the petitioner's trial counsel, and whether that performance fell below the standards set forth in *Strickland*. The petitioner has cited no jurisprudence which holds that the failure to present evidence of a defendant's

epilepsy constituted ineffective assistance of counsel in the guilt phase of a capital trial. Rather, all of the numerous cases cited by the petitioner limit such evidence to mitigation in the sentencing phase of a death penalty prosecution. Because the jury did not return a verdict of death in this matter, the issue was rendered moot.

Further, as noted in great detail in the State's supplemental objection, the factual evidence the defendant now faults her trial counsel for failing to present to the jury in a "meaningful way" was in fact submitted to the jury. The actual complaint (if indeed any exists) rests not with the performance of the petitioner's trial attorneys, but rather with the conclusions reached by her previous experts. Drs. Ahava, Self and Resnick were all aware of the defendant's prior diagnosis of epilepsy, yet each chose to give that fact little importance in reaching their respective conclusions. That decision cannot be laid at the feet of the petitioner's trial counsel, unless the Court accepts the unspoken premise that attorneys, in effectively representing their clients, must direct their expert witnesses to alter conclusions which don't fit the theory of the case.

But even if it was the attorneys' call to make, the decision to focus the defense on the most recent manifestation of the defendant's alleged mental problems (i.e., the severe depression over the breakup of her marriage) rather than the more remote (a head injury in 1988) falls within the ambit of acceptable trial strategy.

Objectively, the problem with focusing on the petitioner's head injury as the source of her alleged psychosis is that it was irreconcilable with what would be the actual trial testimony. The jury would have been expected to believe that her head injury and subsequent epilepsy were the cause of her alleged psychosis on the night of the murders, even though approximately nineteen years had transpired between the two incidents with not one intervening psychotic episode.

To summarize the trial testimony of Dr. George Seiden, one does not become psychotic overnight, nor does psychosis suddenly appear and disappear. Nothing in the affidavit submitted by Dr. James Merikangas refutes that testimony.

But more importantly, nothing in that affidavit is capable of overcoming the prejudicial effect that the petitioner's two angry suicide notes had on the jurors who heard the case. Nor does it even attempt to do so.

The affidavit now submitted to the court is fundamentally no different than the expert testimony offered at trial by four defense expert witnesses. Each opined that Hebert was psychotic on the night of the murders, and considered the complete mental health history of the defendant in doing so. The only difference is that Merikangas suggests a different cause for that psychosis (i.e., temporal lobe epilepsy rather than severe major depression with psychotic features.) The insurmountable obstacle that the petitioner now faces in meeting her burden of proof is that the jury rejected the contention that the defendant was psychotic at all on the night of the murders. Therefore, any possible cause was irrelevant.

The State of Louisiana respectfully submits that the jury rejected the defendant's insanity defense not because they could not find a valid cause for her alleged psychosis, but rather because the two angry suicide notes she penned on the night of the murders clearly demonstrated that she knew the difference between right and wrong. Focusing a little more closely on a head injury which happened nineteen years earlier would not have changed that.

Accordingly, the affidavit cannot help the defendant meet her burden of proof under the second prong of Strickland; i.e., but for her attorneys' allegedly deficient performance, the outcome of the trial would have been different. This final assignment of error lacks merit as well.

CONCLUSION

The State of Louisiana respectfully submits that the original and supplemental application for post-conviction relief fail to establish the merits of the claims presented therein.

Regarding the need for a hearing, La.C.Cr.P. article 929(A) provides as follows:

> If the court determines that the factual and legal issues can be resolved based upon the application and answer, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or available to the court, the court may grant or deny relief without further proceedings.

There is no need for testimony on any of the claims now presented for review. Resolution of the remaining claims should not go beyond the trial record compiled in this matter. Even with regard to the new evidence submitted in the supplemental claim, the petitioner's new witness has fully articulated his anticipated testimony in the proffered affidavit.

Accordingly, the State of Louisiana respectfully submits that this Court may grant relief without the necessity of setting this matter for hearing, and would pray for relief accordingly.

RESPECTFULLY SUBMITTED:

_____

CAMILLE A. MORVANT, II
DISTRICT ATTORNEY
JOSEPH S. SOIGNET
ASSISTANT DISTRICT ATTORNEY

4/22/09

(2)

PLEASE PRINT LEGIBLY

1. Full Name: Timmy P Guidry JR
2. Address: 478 Karla Dr, Thibodaux LA 70301-6040
3. Telephone: 1-985-413-0869 home _____ work
4. Marital Status: single: ✓ married: ____ separated ____ divorced: ____ widowed: ____
5. Date of Birth: 5-9-1978
6. Place of Birth: New orleans LA
7. Your employer: Total Instrumentation and electrical service
8. Work address: PO Box 1917, 5363 Highway 311, Houma LA 70360
9. How long at your current job: 1 yr
10. Your title and main duties: Electrican
11. Before your current job, what other jobs have you had?

Maintanee tech, Stock boy

12. How long have you lived in Lafourche Parish? 1 yr
13. Your Spouse's Name and Age: Regina Guidry 27
14. Your Spouse's Employer: Baton Rouge Zoo
15. Your Spouse's Place of Birth: Baytown, Tx
16. Information about your children: [do not include names]

Male/Female	Age	School or Employment
N/A		

H1

Your Name: Timmy D Guidry JR

17. If you are selected as a juror in this case, do you think your concentration might be affected by your concern or worry about your children? Yes____ No ✓ Maybe____

18. What is the highest grade you finished in school? GED, Went to tech college

If you went to high school, did you graduate, where did you go?
Thibodaux High didnt Graduate got GED

If you went to college, did you graduate, where did you go and what did you study?
N/A

If you are in school now, what school, where, what are you studying?
N/A

19. Have you had any legal training or any law enforcement training? Yes____ No ✓
If you have, please explain:

20. Have you, your spouse or a close relative ever been employed by, been a member of or been closely associated with any law enforcement agency of any kind, including a crime commission or the sheriff's auxiliary? Yes___ No ✓; if the answer is yes, please explain:

21. Have you, a member of your family, or a close friend experienced a violent or unexpected death or serious bodily injury or an assault involving a family member or close friend?
Yes ✓ No ____ If yes, please explain: Mother had abusive husbands

22. Do you believe that the criminal laws of Louisiana are too soft? Yes___ No ✓ No opinion___
If you do, please explain:

23. Do you believe that the criminal laws are too harsh? Yes ✓ No___ No opinion
If you do, please explain:
Too many people go to jail for minor crimes

24. Do you have any vision or hearing problems or some other disability that would make serving on a jury difficult for you? Yes____ No ✓
If you do, please explain:

25. Did you or your spouse serve in the military? Yes ✓ No____. If either of you did, please state the branch of service, how long you served, the rank you held and what kind of discharge you received:

Army 3yrs

Your Name Timmy P Guidry JR

26. Have you, a member of your family or close friend ever been involved in a criminal case as a defendant, witness or victim? Yes_____ No_✓_
If the answer is yes, please explain:_____

27. Have you, a member of your family or close friend ever been arrested or charged with an offense above the level of a traffic violation? Yes_✓_ No_____. If the answer is yes, please explain: Possesion of marijuana

28. Are you presently under any charges in a court anywhere for any misdemeanor or felony? Yes_____ No_✓_. If the answer is yes, please explain:_____

29. Have you ever been on any kind of court ordered probation? Yes_✓_ No_____. If the answer is yes, please explain: 6 months unsupervised Probation

30. What is your religious preference? Pagan

31. If you attend church, please give the name and location of the church:
N/A

32. If you have a leadership role in your church or if you are involved in church activities, please explain:
N/A

33. Do you have any religious, moral or ethical considerations that would prevent you from sitting in judgment of another person? Yes_✓_ No_____

34. Do you have any religious, moral or ethical considerations that would prevent you from returning a verdict that would result in the execution of another human being?
Yes_____ No_✓_

35. Do you now have or did you recently have (within the past year) a bumper sticker on your vehicle? If you do or did have one, please explain:_____ N/A

36. Have you served on a jury before in a state or federal court? Yes_____ No_✓_; if the answer is yes, what kind of case? Civil_____Criminal_____Both_____Court Martial_____.
If you served in a criminal case, please complete the following:

What was the charge against the defendant? N/A

How long ago did you serve? N/A

Did the jury reach a verdict? Yes_____ No_____. The verdict: N/A

Did the jury decide the punishment for the defendant? Yes_____ No_____. If the jury did decide punishment, what did it decide? N/A

Were you the foreman of the jury? Yes_____ No_____

Your Name Timmy P Guidry JR

37. Is there anything about your prior jury experience that upset you or agitated you? Yes___ No___.
If the answer is yes, please explain:
N/A

38. Other than your service on a jury, have you ever been interested in the outcome of a criminal case? Yes ____ No ✓. If so, please state the extent of your interest; did you watch television stories about the case or listen to news about the case, read books about it, discuss it with others?

Please explain:

39. Have you or your spouse ever served on a Grand Jury? Yes____ No ✓

40. Have you or your spouse or a close relative ever received any training in psychiatry or psychology? Yes _____ No ✓. If the answer is yes, please explain:

41. How do you feel about psychiatrists and psychologists?
I see psychologists

42. Have you, your spouse, one of your children or another close relative been under the care of a psychiatrist or psychologist or other mental health professional such as a licensed professional counselor? Yes ✓ No____; if the answer is yes, please explain:
Spouse + Myself under the care of psychiatrist + psychologist

43. Have you, your spouse, one of your children or another close relative ever taken prescribed anti-depressant or anti psychotic medication? Yes ✓ No____; if the answer is yes, please explain:
Myself + spouse take antidepressents

Your Name Timmy P Guidry JR

44. If your answer to No. 43 above was yes, and you are the person who was prescribed the medication, please state the name of the medication you took, how long you took it, and whether your are still taking it:
~~Still depressed~~ cymbalata going to start soon

45. Are you taking any prescribed medication other than an anti depressant or anti psychotic drug? Yes ✓ No ___; If the answer is yes, please explain:
Clonazepam, adderal

46. Have you or your spouse ever received counseling regarding mental health issues about parenting or childbirth? Yes___ No ✓; if the answer is yes, please explain:

47. Do you perform any volunteer work in your community? Yes___ No ✓; if the answer is yes, please explain and identify the groups and organizations you work with:

48. Do you belong to any civic, professional, or fraternal organizations or any labor unions? Yes___ No ✓; if yes, please list the organizations you belong to.

49. Have you ever been involved with any organization that either supports or is opposed to the death penalty? Yes___ No ✓; if the answer is yes, please name the group or groups you were involved with:

50. Have you ever belonged to or been involved with the American Civil Liberties Union, or the National Organization of Women, or Amnesty International? Yes___ No ✓; if the answer is yes, please list the group you had contact with and explain your participation:

51. Have you ever appeared before any legislative body such as a City Council, or the Parish Council or the State Legislature? Yes___ No ✓; if the answer is yes, please explain:

52. Have you ever written a letter to the editor, an email or letter to a judge, or other public official? Yes___ No ✓; if the answer is yes, please explain:

Your Name Timmy P Guidry JR

53. What TV shows do you watch on a regular basis?
CSI

54. What magazines and newspapers do you read on a regular basis?
N/A

55. Do you know anyone who works at the District Attorney's Office or in any office in the Courthouse in Thibodaux? Yes___ No✓; if the answer is yes, please identify the person(s) and state your relationship with that person(s):

56. Do you know any lawyers who do criminal defense work? Yes___ No✓; if the answer is yes, please list their name(s):

57. Do you know anyone who has been to prison? Yes✓ No___: if the answer is yes, please explain: Brother went to prison, father went to prison Cousin went to prison

58. Do you believe that mental illness is a real illness or disease like physical illness and disease? Yes✓ No___

59. If there is anything about your health, your job or your family that could affect your service as a juror, please explain: Chronic pain in left side of body makes sitting for long periods painful

60. Please list below anything you believe the Court or the lawyers in this case should know about your ability to serve as a juror in this case.
IDont like judging people

I certify that my answers to the questions above are true and correct.

Timmy Guidry
Your Signature

Timmy P Guidry JR
Print Your Name

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 28, 2018

Ms. Letty Spring Di Giulio
Law Office of Letty S. Di Giulio
1055 St. Charles Avenue
Suite 208
New Orleans, LA 70130

Re: Amy Hebert
v. James Rogers, Warden
Application No. 18A217

Dear Ms. Di Giulio:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Alito, who on August 28, 2018, extended the time to and including October 10, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Clayton Higgins
Case Analyst