No. 18-6306

In the Supreme Court of the United States

AMY HEBERT,

Petitioner,

v.

JAMES ROGERS, WARDEN, LOUISIANA CORRECTIONAL INSTITUTE FOR WOMEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner fails to present her questions in their correct procedural posture as a habeas review of a ruling on ineffective assistance of counsel brought pursuant to the highly deferential standards set forth in 28 U.S.C.A. § 2254 and *Strickland v. Washington*, 466 U.S. 668 (1984). Instead, the questions presented by Petitioner appear to primarily improperly raise claims for direct review of a *J.E.B./Batson* claim.

Accordingly, the questions actually presented are:

1. Whether the Fifth Circuit erred in upholding the state court's rejection of Petitioner's ineffective assistance of counsel claim pursuant to 28 U. S. C. A. §2254(d) and (e) and Strickland v. Washington.
2. Whether it is appropriate for the federal habeas court, when reviewing a claim of ineffective assistance of counsel based on trial counsel's failure to object to the State's alleged discriminatory use of peremptory exceptions, to engage in comparable juror analysis even though no *prima facie* case of prejudice has been shown and even though it was not the basis of the state court judgement, and, if it so engages, must the jurors be identical in all respects.
3. Whether it is appropriate for the federal habeas court to determine that the issue of proving a prima facie case of discrimination is moot because the State, after objecting to the lack of a prima facie case being proven, provided a non-exhaustive list of reasons for its strikes of certain jurors in a non-required

memorandum to the state post-conviction court which was not relied on by the post-conviction court.

4. Whether the Petitioner establishes prejudice under the double deference of 28 U. S. C. A. Sec. 2254 and *Strickland v. Washington* by showing that, had an objection to a peremptory challenge been made, it would have been granted or does *Strickland* require a showing that the result of the case would have been different?

This Court should not grant certiorari; however, if it does, it should add the following question:

5. Whether in a state allowing review of an ineffective assistance of counsel claim on appeal, a Petitioner waives that claim if it is not raised on appeal, particularly when it involves a *J.E.B./Batson* claim.

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STATEMENT OF THE CASE

This case involves the brutal stabbing murder of two young children and the family dog by Petitioner, the mother of the children. Petitioner plead not guilty and not guilty by reason of insanity. Commission of the crime was not at issue; the only issues at trial were whether Petitioner was legally insane at the time she killed the children and, if not, whether she deserved the death penalty for doing so. She was represented by *three*[1] seasoned, extremely qualified and death penalty certified attorneys[2] – most would say the standard-bearers for professional competency – who were assisted during *voir dire* by a jury consultant.[3]

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[1] Louisiana provides for two attorneys to represent Petitioners in capital cases. *See* La. S.Ct. Rule XXXI (J)(a). However, the state-funded defense team also hired Mr. George Parnham, a nationally known defense attorney from Texas who specializes in the insanity defense for mothers who kill their children. R. 1098.

[2] Richard Goorley, the Executive Director of the Capital Assistance Project of Louisiana at the time of trial, served as "lead counsel." *See* https://www.houmatoday.com/news/20071020/mathews-mother-pleads-insanity--in-killings. With thirty-four years of experience at the time of trial, Mr. Goorley had represented over 100 people charged with first-degree murder. *See* https://www.houmatoday.com/news/20090518/attorney-mathews-moms-case-boggles-my-mind. Later elected as president of Amici, the Louisiana Association of Criminal Defense Lawyers, Goorley has received numerous awards as a defense attorney and capital crimes advocate. *See* https://www.lacdl.org/officers and https://www.lacdl.org/lacdlawards.

Also actively involved in jury selection was George Parnham, whose extensive C.V. was filed of record in connection with his motion for pro hoc vice admission. (R. 1098). Parnham is, in his own right, an accomplished capital crimes litigator from Texas with, at the time of trial, forty years of experience and who has successfully defended a number of high profile capital cases. As Parnham's motion for admission noted, he is board certified in criminal law and has special experience in mental health and insanity defenses. (R. 245.) His experience in this area included the case of Andrea Yates, another mother charged with the capital murder of her own children in Texas and for whom Parnham was able to win an insanity plea, and which he would go on to lecture about at seminars throughout the country. (R. 166 et seq.) *See also* http://www.postpartum.net/staff/george-parnham/.

The third attorney actively involved in jury selection, A.M. "Marty" Stroud, had over thirty-four years of experience at the time of trial, was the president of his local bar association, was listed as a "Super Lawyer," and has an AV Pre-imminent rating with Martindale Hubbell. Mr. Stroud became a capital defense litigator after years of serving as a prosecutor in both the federal and state systems. He served as an Assistant U.S. Attorney from 1976-1982, rising to chief of the criminal division. He later served as a 1st Assistant District Attorney in Caddo Parish where he tried death penalty cases. *See* http://www.lawyerdb.org/Lawyer/Stroud-III/. Since 1989 he has worked as a criminal defense attorney and has become nationally known for regretting decisions he made as a

And, yet, requesting habeas review pursuant to 28 U.S.C.A. § 2254, Petitioner presents the unique argument that these extremely qualified attorneys, with the assistance of professionals, were legally deficient for failing to object to the State's elimination of nine female jury members (out of the twenty-four (24) women and nine (9) men remaining after cause and Witherspoon challenges but before further eliminations by the court and Petitioner, and twenty (20) women and *three (3)* men after eliminations by the court and Petitioner) despite the fact that the State *chose ten women* to serve on the jury of twelve and the fact that the jury returned a life sentence rather than the death penalty – one of *Petitioner's* goals in selecting the jurors. (*See* State's App. A). Thus, this expert defense team, as the post-conviction trial court held, "used their experience and training in the most skillful manner" in choosing a jury that suited their purposes. (Petr.'s App. F5).

The Murders[4]

In the middle of the night on August 20, 2007, Petitioner stabbed both of her children, Camille (age 9) and Braxton (age 7), and the family dog dozens of times in the chest, back, and scalp and put their lifeless bodies into her bed at their home in Matthews, Louisiana. They all ultimately bled to death. This fact has never been disputed. After this bloody rampage, she made a pot of coffee, wrote a note to her

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prosecutor in death penalty cases, including decisions made in selection of juries. *See* https://jonathanturley.org/2015/03/24/i-wasnt-interested-in-justice-prosecutor-writes-apology-to-innocent-man-that-he-sent-to-prison-30-years-ago/.

[3] Additionally, the defense was also assisted at trial by a jury consulting firm, which was present throughout both phases of jury selection, although the firm never made a formal appearance of record. (For an indirect reference to this, see R. 1870)

[4] The factual summary is derived from the Louisiana First Circuit Court of Appeal opinion rendered on the direct appeal of this matter, *State v. Hebert*, Not Reported in So.3d., 2011 WL 2119755 (La. App. 1st Cir. 2011) (Petr.'s App. B2).

ex-husband and his fiancé and to her mother-in-law, and, arguably, attempted to take her own life by cutting and stabbing herself. She then lay down in her bed with the children and dog. Her former father-in-law, who lived across the street, discovered this grisly scene and called the police. When they arrived and entered the master bedroom, Petitioner lifted a large knife and yelled, "Get the f--- out!" She was taken to the hospital and, ultimately, arrested for these murders.

In addition to the physical evidence found at the crime scene, investigators found two blood-stained notes admittedly written by the Petitioner. The letters, directed to the Petitioner's ex-husband and ex-mother-in-law stated in part:

> Chad, You wanted your own life. You got it. I'll be damned if you get the kids, too. … 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 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.
>
> Judy, … Your sons have affairs bring these whores home & you welcome them all in. … Well when you started delivering my kids to that whore, Kimberly, that was the last straw! … Sorry Daddy, Celeste & Renee I love you all too.

The letters were ultimately offered by the State at trial to demonstrate the hostility of the Petitioner towards the two and provide a motive for the killings. The State's mental health experts relied on the letters to discuss Petitioner's state of mind and to conclude that she knew the difference between right and wrong. The Petitioner's experts, conversely, attempted to minimize the significance of the letters.

Pre-Trial Proceedings

The Public Defender for the 17th Judicial District was appointed to represent Petitioner two days after the crime (R. 90) and a million-dollar bond was set. She was indicted on September 26, 2007 on two counts of first degree murder (R. 2) and was arraigned on October 19, 2007. She entered the dual plea of not guilty and not guilty by reason of insanity. (R. 3) On January 24, 2008, the State gave the Petitioner notice of its intent to seek the death penalty. (R. 5)

Petitioner was well-represented by counsel throughout the proceedings. At the arraignment, Christopher Boudreaux, Chief Public Defender with the Lafourche Parish Public Defender's Office, represented her and the trial court additionally appointed the attorneys at the Capital Assistance Project of Louisiana (aka CAPOLA). (R. 1069). Death penalty certified attorney, Richard Goorley, Executive Director of the Capital Assistance Project of Louisiana appeared for the first time at arraignment. *Id.*[5] The expert on filicide and insanity, George Parnham of Texas, joined the defense team after being granted *pro hac vice* status by the trial court, and appeared and argued on behalf of Petitioner for the first time, regarding the State's Motion for an Independent Medical Exam and the Petitioner's Motion to Prohibit the State from Evaluating Petitioner, on April 1, 2008. (R. 1096) Ultimately, Mr. Boudreaux was no longer involved in the case and death-penalty certified CAPOLA attorney, Marty Stroud, joined the defense team, first appearing

[5] Four other attorneys with CAPOLA – James Stevens, Elton Richey, Joe Page, and Daniel Olds – in addition to Misters Goorley, Stroud, and Parnham, also made appearances on behalf of Petitioner during pre-trial proceedings.

at the Motion to Suppress hearing on July 17, 2008. (R. 1154)

Prior to trial, defense counsel filed numerous motions relating to discovery (the State agreed to open file discovery), suppression of certain physical evidence and statements by Petitioner, prohibition of the state's expert evaluation of Petitioner, quashing a medical records subpoena duces tecum, changing venue, funding experts, and referring to Parnham as being from out of town or to any case he handled, among others. Petitioner's counsel also applied for supervisory writs from the appellate court on the issues of venue and the State's right to an independent medical exam. (R. 279)

Voir dire Proceedings[6]

Jury selection commenced on April 16, 2009, with the trial court conducting the process in a bifurcated fashion, first interviewing the entire jury pool on the preliminary issues of their jurors' views on the death penalty and pretrial publicity. Challenges for cause, including those pursuant to *Witherspoon v. Illinois,* 88 S.Ct. 1770 (1968) were made at this time. A total of six hundred (600) jurors were summoned; one hundred ninety-three (193) appeared for *voir dire*. Approximately eighty-one (81) were excused for cause by the Court; nineteen (19) for cause by the State; eighteen (18) for cause by Petitioner; and seven (7) for cause by the joint motion of the State and Petitioner. Sixty-eight (68) jurors remained and returned

[6] Petitioner has grossly mischaracterized the selection process and pattern throughout this case, including in her petition for certiorari. In order to accurately and visually represent the process and pattern of selection of jurors, Respondent has prepared a chart summarizing the fifteen volumes of the trial that covers selection of the jury and attached the trial court's panel seating charts thereto. See State's App. A.

for the general *voir dire* on April 28, 2009. (R. 4948.)

The names of the 68 remaining jurors were put on folded cards which were put into a large bowl. (R. 1863 et seq.) The panels of jurors were then selected by lot drawn by the Court's clerk. *Id.* The jurors were randomly assigned to five panels on that first day so everyone knew the order in which each juror would be questioned and selected or eliminated.[7] *Id.* It was only necessary to use three of the panels to select the twelve-person jury. The remainder of Panel 3 and six members of Panel 4 were also questioned to select alternate jurors.

Due to the luck of the draw, a total of twenty-four (24) females were drawn for examination prior to the selection of the full jury, as opposed to only nine (9) males, a ratio of greater than two-to-one. *See* State's App. A. Of those nine males, five were removed by Petitioner with peremptory challenges and two were removed for cause. That left only two men against whom the State could have exercised a peremptory challenge had it wanted to. (*See* State's App. A, R. 49 *et seq.*) Conversely, only two women were excused for cause (one that the State had already accepted) and three were removed by Petitioner with peremptory challenges (all three of whom the State had already accepted). This left nineteen (19) women in the group from which the 12-person jury was selected increasing the ratio of women to men to 19 to 2 in favor of females. *See* State's App. A.

The *pattern* of the strikes, though, is also important. *See* the chart at State's

[7] Unlike the Texas jury selection process which was problematic in *Miller-El v. Dretke, supra*, the State can do nothing to affect the order of the random draw of prospective jurors under Louisiana law. Thus, the disproportionately heavy ratio of female to male prospective jurors in this case was truly "produced by happenstance," a relevant consideration in *Miller-El*.

App. A. On the first day of jury selection, the State *accepted* seven (7) women to be on the jury, only peremptorily challenging one. On the morning of the second day, the State accepted *another* seven (7) women, only peremptorily challenging two. After it had accepted Judy Boudreaux and Alma Crochet, the jury was composed of ten women and two men – the same composition as the final jury. At that point, the State had only used three of its peremptory challenges and it exercised its first backstrike – a commonly accepted yet recently codified process[8] in Louisiana which allows the State, which has to exercise its challenges before the defense,[9] to wait until after the defendant has had a chance to strike jurors to determine how to use its peremptory challenges. It chose to backstrike Ms. Pennex, bringing the number of jurors chosen back to eleven. The Petitioner then used its eighth peremptory challenge to remove the next juror, a man. After that, *the next ten (10) jurors were women* – something both the Petitioner and the State were aware of. The State could not have used its remaining peremptory strikes to "alter the gender composition of the jury," as Petitioner alleges (Pet. 25), because any challenge to a woman would have resulted in the seating of another woman. The State then accepted another woman while using a backstrike to remove an earlier-selected woman. It then peremptorily challenged the next juror, who happened to be a

[8] La. C. Cr. P. art. 799.1 (Acts 2006, No. 71, §1) ("Notwithstanding any other provision of law to the contrary, and specifically notwithstanding the provisions of Article 788, in the jury selection process, the state and the defendant may exercise all peremptory challenges available to each side, respectively, prior to the full complement of jurors being seated and before being sworn in by the court, and the state or the defendant may exercise any remaining peremptory challenge to one or more of the jurors previously accepted. No juror shall be sworn in until both parties agree on the jury composition or have exercised all challenges available to them, unless otherwise agreed to by the parties.")

[9] La. C. Cr. P. art. 788 (After the examination provided by Article 786, a prospective juror may be tendered first to the state, which shall accept or challenge him. If the state accepts the prospective juror, he shall be tendered to the defendant who shall accept or challenge him….")

woman but accepted the next juror, who also happened to be a woman. It then used a backstrike to, again, eliminate an earlier-selected woman but, in her place, accepted the next juror, a woman. It then used another backstrike and a peremptory to challenge two women but accepted the next juror, a woman, in their stead. It then rested, with three peremptory challenges remaining, and the ten (10) woman/ two (2) man jury was final. Note that, at that point, because the next juror in line, a female, had been excused by the Court prior to the beginning of the general *voir dire*, *the next three people in the queue were men*. Had the State wanted to discriminate against women and "alter the gender composition of the jury," all it had to do was backstrike three more women and three men would have been seated in their stead.[10]

Selection of alternates then began with the procedure and the gender count and placement in the queue being similar. *See* chart at State's App. A. The court decided to allow four alternates to be seated rather than the usual two and gave each party an additional two peremptory challenges to use. (R. 5424) The defense struck the first two men and the next man was selected as the first alternate. The next four persons in the queue were women. The state accepted the next woman but the defense struck her. The State challenged the next juror but then accepted the woman after her. This would have been the end of selection of alternates had the court not allowed two extra ones. The State then challenged the next woman and

[10] Both parties agreed to the composition of the jury after the selection of juror Erin Folse, a woman. (R. p. 5422 et seq.) After both sides affirmed to the trial court that they were satisfied with the composition of the jury, the trial court announced: "All right. So, the State has three peremptories remaining, the defense has four, and both sides agree to the composition of the jury," to which both sides agreed. (R. p. 5424.)

day two was over. On day three, both parties accepted the first man up, the State struck the next juror, and then accepted the next four jurors (the defense challenged one and the court excused the other two women).

The Trial, Post-Trial Motions, and Direct Appeal

The guilt phase of the trial was conducted over eleven days, after which the jury unanimously found the Petitioner guilty as charged on two counts of first degree murder and rejected her insanity defense. (R. 78-79) The penalty phase ended with a hung jury. (R. 83). Accordingly, the trial judge sentenced the Petitioner to the mandatory sentence of life without the benefit of probation, parole or suspension of sentence. (R. 85.)

Petitioner filed a Motion for New Trial (R. 1029) and a Motion for Post-Verdict Judgment of Not Guilty by Reason of Insanity (R. 1031). In neither of these post-trial motions did Petitioner complain about gender discrimination in the selection of the jury.

Petitioner filed a notice of appeal (R. 1037) and was assigned *two* very experienced appellate counsel through appointment of the Louisiana Appellate Project that same day (R. 1044 and 1045). In her appeal, however, Petitioner's new attorneys raised no objection or assignment of error regarding the selection of the jury or the use of peremptory exceptions by the State, although they did complain, again, about the removal of juror, Timothy Guidry, for cause after the start of the trial. Nor did they complain about the purported ineffectiveness of her counsel, despite the fact that Louisiana law allows for such arguments to be made at the

appellate level.[11] The Petitioner's conviction and sentence were affirmed by the Louisiana First Circuit Court of Appeal. See *State v. Hebert*, Not Reported in So.3d., 2011 WL 2119755 (La. App. 1st Cir. 2011). The Louisiana Supreme Court thereafter denied the Petitioner's writ application. *See State v. Hebert,* 2011-0864 (La. 10/21/11), 73 So.3d 380. Petitioner did not seek review by this Court.

State Post-Conviction Relief Proceedings

On January 16, 2003, the Petitioner filed a Uniform Application for Post-Conviction Relief with a request for an evidentiary hearing in the 17th Judicial District Court.[12] The matter was allotted to the same trial judge who presided over the Petitioner's capital jury trial, who thus had personal knowledge of the facts of the jury selection process and of counsel's performance during same.

The Petitioner set forth six grounds for relief in her Uniform Application, three of which related to her insanity defense, as well as a claim that the prosecution's use of peremptory strikes violated equal protection pursuant to *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 128 (1994), a claim that had been waived.[13] As a subpart of that claim, though, Petitioner argued that her trial counsel were ineffective for not objecting to the strikes. Despite filing numerous affidavits in

[11] *See State v. Potter*, 612 So.2d 953 (La. App. 4th Cir. 1993) *cert. den.* 619 So.2d 574 (1993).
[12] Petitioner also filed a Supplemental Application, which does not relate to the issue raised in her Petition, and a Reply to Respondent's Answer.
[13] Louisiana, as most states, has a contemporaneous objection rule and requires most errors, including the improper use of jury exceptions, to be raised at trial for the explicit purpose of allowing the trial judge to correct the error if possible. La. C. Cr. P. art. 841. If such error is not objected to at trial, any complaint regard it is waived. *State v. Potter*, 591 So.2d 1166 (La.1991) (defendant waived an equal protection complaint about the state's exercise of its peremptory challenges). Petitioner continues to couch her arguments as substantive gender discrimination claims but that claim has been waived at trial and not raised on appeal.

support of her other claims,[14] and although she carried the burden of proof, Petitioner filed nothing to support her claim of ineffectiveness of counsel. Neither did she attempt to depose any of the three attorneys to determine why they did not object to what she claims was an obvious pattern of discrimination, nor did she offer their affidavits, all as allowed by La. C. Cr. P. art. 929B.

The State filed an answer on the merits pursuant to La. C. Cr. P. article 927. A memorandum in support of the answer, which was not required by article 927 or the court, was also filed by the State. Pursuant to La. C. Cr. P. art. 930, which provides that an evidentiary hearing is only necessary "whenever there are questions of fact which cannot properly be resolved pursuant to Articles 928 and 929" (which allow for affidavits, deposition transcripts, etc. to be filed), the post-conviction court determined that no evidentiary hearing was necessary and rendered judgment denying and dismissing the application for post-conviction relief, finding that "Petitioner's counsel used their experience and training in the most skillful manner to properly defend Petitioner against the charges." *See* Petr.'s App. F2 and F5.

The Petitioner sought writs of review in turn to the First Circuit and Louisiana Supreme Courts which were both denied. The Louisiana Supreme Court, in its *per curiam* opinion, held that the Petitioner "fail(ed) to show she received ineffective assistance of trial counsel under the standard of *Strickland v.*

[14] Including but not limited to a detailed affidavit on the issue of her alleged psychosis at the time of the killings prepared by Dr. James Merikangas, discussed at length in district court's opinion. *Hebert v. Rogers*, Not Reported in Fed. Supp. 2016 WL 8291110 (E. D. La. 2016).

Washington" and explicitly adopted the district court's written reasons for ruling. *State v. Hebert*, 2015-0965 (La. 10/2/15), 182 So.3d 23. Petr.'s App. E.

Federal Habeas Corpus Proceedings

On October 2, 2015, the Petitioner filed a petition for habeas corpus relief in the United States District Court for the Eastern District of Louisiana raising the same claims presented in her state post-conviction application. The State filed an answer on the merits as ordered by the Court.

The case was referred to Magistrate Judge North. Finding no need to hold a hearing but "carefully review[ing] the entire *voir dire,* which comprises some 14 volumes in the state court record," the judge issued his Report and Recommendations. Using the double deference standard required in a habeas ineffective assistance of counsel claim by *Harrington v. Richter*, 131 S.Ct. 770 (2011) (Petr's App. D11), the magistrate judge correctly found that Petitioner's "claim of deficient performance [was] undermined by the record facts and, indeed, her own petition," that "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," that the fact that the State used its peremptory challenges on "females is, in the final analysis, neither surprising nor indicative of a discriminatory pattern," that Petitioner's "trial counsel had ample strategic reasons to abstain from making *J.E.B./Batson* challenges regarding any number of the State's strikes," and, thus, that the "state court's rejection of this ineffective assistance of counsel claim was not unreasonable." Petr's App. D13-14. For those reasons, the magistrate judge

recommended that the petition should be dismissed. Petr's App. D14. The district judge subsequently adopted the Report and Recommendation, dismissed the Petitioner's request for post-conviction relief, and granted the Petitioner a certificate of appealability. Petr's App. C1.

On appeal to the Fifth Circuit, the Petitioner presented only two of the claims she had presented in the district court. Again, correctly using the "double deference" standard, the Fifth Circuit panel affirmed the district court's denial of the petition for habeas corpus relief. After conducting an exhaustive "comparative juror" analysis, two members of the panel determined that Petitioner had "not met her burden to prove that the State used its peremptory strikes with the intent to discriminate against women" and that, therefore, Petitioner "failed to show that her attorney's representation was prejudicial when he did not object to the State's use of peremptory strikes." Petr. App. B4. Additionally, the majority concluded that, even if Petitioner "could show prejudice, she fail[ed] to show that her attorney's representation was incompetent or objectively unreasonable." *Id.* The entire panel agreed that the state court's "rejection of [Petitioner's] ineffective assistance of counsel claim was not contrary to Supreme Court precedent and was not objectively unreasonable." Petr. App. B6, B9. Chief Judge Stewart specially concurred to express his opinion that he would have simply followed "the path AEDPA requires of us and evaluate[d] the actions of the state court without conducting a *Batson* analysis … because the state court correctly determined the substantive claim: Hebert's counsel was not ineffective."

Despite now arguing that this decision is a "new twist" on comparative juror analysis which conflicts with *Miller-El v. Dretke* and with other circuit decisions, Petitioner did not seek an *en banc* review which could have clarified the Fifth Circuit's position on this issue.

REASONS FOR DENYING THE PETITION

I. PETITIONER COMPLETELY IGNORES THAT THIS CASE COMES TO THE COURT ON HABEAS REVIEW OF A STATE COURT JUDGMENT UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, 28 U.S.C.A. § 2254 AND, THUS, MUST BE REVIEWED UNDER THAT STANDARD. SHE, THEREFORE, MAKES NO SHOWING THAT HER CLAIMS FALL WITHIN ITS REQUIREMENTS FOR REVIEW.

Petitioner would like for her claim to be a direct review claim of gender discrimination under *J.E.B. v. Alabama*. It is not. In default, she has tried to raise her *J.E.B.* claim through an ineffective assistance of counsel claim under *Strickland v. Washington*. Although this would be the more appropriate claim, she makes no argument as to how that claim should be considered pursuant to the statutory rules of the AEDPA establishing a heightened standard of review under 28 U.S.C.A. §2254(d).

Under 28 U.S.C.A §2254(d), a writ of habeas corpus should be granted only if a state court arrives at a conclusion that is contrary to federal law clearly established in the holdings of this Court; or that involves an unreasonable application of clearly established Supreme Court precedent; or that was based on an unreasonable determination of the facts in light of the record before the state court. 28 U. S. C. § 2254(d) (1-2). *See also Thaler v. Haynes*, 130 S. Ct. 1171 (2010) (involving a *Batson* claim); *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011)

(involving double deference due under AEDPA and *Strickland*); *Premo v. Moore*, 131 S.Ct. 733 (2011) (ditto); *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) (ditto; cases not applying AEDPA deference to the question at issue offer no guidance on whether a state court has unreasonably determined the issue). Strikingly, Petitioner has not cited one of the previously listed cases in her Petition. Furthermore, federal courts are required to presume that a factual issue made by a State court is correct and petitioner has the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U. S. C. A § 2254(e)(1). *Id.*

The changes to the law made by Congress in enacting AEDPA "modified a federal habeas court's role in reviewing state prison 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*, 122 S. Ct. 1843 (2002). "If the standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 131 S. Ct. at 786. It was meant to prevent defendants "from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010). But that is exactly what Petitioner is asking this Court to do – second guess the reasonable factual and legal determinations made by the state post-conviction court and the state supreme court which have been upheld through a detailed review by the federal district court and the Fifth Circuit Court of Appeals, both of which applied the proper deferential AEDPA (and *Strickland*) standards.

This is an ineffective assistance of counsel claim raised in the habeas context. The clearly established federal law on ineffectiveness of counsel is set forth in *Strickland v. Washington*: Petitioner must prove both deficient performance and prejudice. The AEDPA standard is that "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 fair-minded disagreement." *Harrington v. Richter*, 131 S. Ct. at 786-787. Five courts, three state and two federal, have reviewed this case and all have concluded the same thing: Petitioner's counsel did not render deficient assistance nor was Petitioner prejudiced by their performance.

Petitioner simply has not met the requirements of habeas review under 28 U.S.C.A. §2254(d) & (e) by showing that the state courts arrived at a conclusion that is contrary to federal law as set forth in the holdings of this court and which clearly established on the date of the state court rulings. Nor has she shown that the state court arrived at a conclusion that involved an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of the facts in light of the record before the state court.

II. QUESTION 1 MISSTATES THE ISSUE IN THIS CASE AND, THEREFORE, DOES NOT WARRANT REVIEW

1. The Claim Before the Courts Was Whether Defense Counsel *Rendered Legally Deficient Assistance* by Not Objecting to Peremptory Exceptions Made by The State. It Was Not a Stand Alone *J.E.B./Batson* Claim. Thus, the State Courts' Reliance on *Strickland* rather than *J.E.B./Batson* Was a Reasonable Application of Clearly Established Law.

The issue actually raised in this Petition - whether the Petitioner's trial counsel were ineffective under the *Strickland v. Washington* standards by not raising objections to the State's use of peremptory challenges under *J.E.B. v. Alabama* - was considered by each court below under the *Strickland* standard. None of them found that Petitioner had met her burden of demonstrating deficient performance by trial counsel, a *prima facie* showing of gender discrimination, or prejudice resulting therefrom. In fact, they all found, in one way or another, that, given the makeup of the jury venire, "the State's strikes against qualified women [was] hardly surprising or alarming." *Hebert v. Rogers*, 890 F. 3d 213, 221 (5th Cir. 2018), Petr's App. B5.

After reviewing the record, the state post-conviction judge – who had tried the case and, therefore personally witnessed the *voir dire* - simply held that pursuant to *Strickland's* two-part test, "[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." *State v. Hebert*, Petr's App. F4-5.

Although finding that "a state court's decision does not need to be thorough or directly address Supreme Court cases," two of the three judges on the Fifth Circuit panel unnecessarily supplemented the state court's reasoning by engaging in what could be viewed as "comparative juror analysis" under *Miller-El I and II* in order to determine "whether the reasoning and result of the state court's opinion comport[ed] with Supreme Court precedent." *Hebert v. Rogers*, 890 F.3d at 221,

Petr's App. B4.[15] This discussion, however, was undertaken "as it is relevant to Hebert's ineffective assistance of counsel claim" and, apparently, to determine "whether her attorney's representation was prejudicial when he did not object to the State's use of its peremptory strikes." *Id.* at 221, 224, Petr's App. B4 & 6. These two judges are the only judges who discussed comparative juror analysis and even they did not rely on it as the basis for their judgment upholding the state court's determination that counsel were not ineffective.

As this Court has noted, "surmounting *Strickland's* high bar is never an easy task." *Premo v. Moore*, 131 S. Ct. 733 (2011), *citing Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010). The case at bar presents an example of the very warning the *Premo* decision cautioned against - the ineffective assistance claim is presented as a means to avoid the rules of waiver and forfeiture and raises issues not presented at trial. Accordingly, the *Strickland* standard should be applied with the scrupulous care this Court has historically taken "lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Id.*

When reviewing an ineffective assistance claim under the AEDPA, the question is not whether trial counsel's actions were reasonable, but whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard. *Premo, supra*. All reviewing courts have concluded that the actions of Petitioner's trial counsel were proper as set forth in the first prong of the *Strickland* test.

[15] The third judge was critical of this approach arguing that "the path AEDPA requires" is to "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 ineffective." *Hebert v. Rogers,* 890 F.3d at 228 (Stewart, concurring). Petr's App. B9.

a. Any ruling by this Court on the "comparative juror analysis" issue raised in Question 1 would have no effect on the outcome of this case because it was only, at best, an alternative basis for the Fifth Circuit's ruling and no basis for the state court's judgment.

The panel admits that its "comparative juror analysis" was unnecessary to its holding. Although finding that Petitioner "ha[d] not met her burden to prove that the State used its peremptory strikes with the intent to discriminate against women" and that, thus, she had "failed to show that her attorney's representation was prejudicial," the Fifth Circuit's foundational ruling was that even if Petitioner had shown prejudice, she had "*fail[ed] to show that her attorney's representation was incompetent or objectively unreasonable*." Thus, any ruling by this Court on the "comparative juror analysis" issue raised in Question 1 would have no effect on the outcome of this case because it was only, at best, an alternative basis for the Fifth Circuit's ruling and *no* basis for the state court's judgment.

b. Petitioner failed to create an adequate record below; therefore, this case is an inappropriate vehicle to review Question 1.

Petitioner did not object at trial. Petitioner did not raise her *J.E.B.* claim in her Motion for New Trial. Even with two new attorneys, Petitioner did not raise her *J.E.B.* claim nor an ineffective assistance of counsel claim on appeal, even though, despite the misrepresentation in her petition, she had the ability to do so.[16] Had it been raised on appeal, the appellate courts could have remanded the case for an evidentiary hearing. *See State v. Potter,* 612 So. 2d 953 (La. App. 4th Cir. 1993) *cert. den.* 619 So. 2d 574 (1993); *State v. Strickland*, 683 So. 2d 218, 238–39 (La.

[16] Petitioner has not made any claim that her appellate counsel were ineffective.

1996), *citing State v. Wille*, 559 So. 2d 1321 (La. 1990); *State v. Williams*, 480 So. 2d 721 (La. 1985); *State v. Fuller*, 454 So. 2d 119 (La. 1984).

In her petition for state post-conviction relief, Petitioner offered no evidence regarding why her trial counsel did not object to the juror challenges although she had the ability to attach affidavits or transcripts of depositions she was allowed to take and did so on other issues. La. C. Cr. P. art. 929B. Thus, there is no evidence in the record to determine whether Petitioner's trial counsel had a strategic reason for not objecting to the striking of jurors - leaving the lower courts to have to review the record to make such determination, something Petitioner caused but now complains of.[17] As Chief Judge Stewart pointed out, "Hebert failed to overcome the 'presumption that, under the circumstances, the challenged action 'might be considered sound strategy.'" *Hebert v. Rogers*, 890 F. 3d 213, 229 (5th Cir. 2018) *citing Strickland v. Washington*, 104 S. Ct. 2052, ___ (1984) (quoting *Michel v. Louisiana*, 76 S. Ct. 158 (1955); Petr's App. B. There is a universal maxim: The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Interstate Circuit v. United States*, 59 S. Ct. 467, 474 (1939) *citing Clifton v. United States*, 11 L. Ed. 957 (1846). Silence then becomes evidence of the most convincing character. *Id.*

[17] After noting the "doubly deferential" standard of review recognized by this Court in *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) that gives both the state court and the defense attorney the benefit of the doubt on *Strickland* claims, the magistrate court specifically articulated evidence in the record which demonstrated a specific strategic reason not to lodge any *J.E.B.* objections. The magistrate reviewed the entire transcript of the voir dire proceedings before concluding that Petitioner's trial counsel "had ample strategic reasons to abstain from making *J.E.B/Batson* challenges regarding any number of the State's strikes." *Hebert v. Rogers*, CV 15-4950, 2016 WL 8291110, at *15 (E.D. La. Nov. 14, 2016), report and recommendation adopted *sub nom. Herbert v. Rogers*, CV 15-4950, 2017 WL 679528 (E.D. La. Feb. 21, 2017), *aff'd sub nom. Hebert v. Rogers*, 890 F. 3d 213 (5th Cir. 2018); Petr's App. D13. See also, state post-conviction decision, Petr's App. F5 ("Of the jurors stricken, there were many sufficiently gender-neutral explanations for the use of peremptory challenges….").

Additionally, because Petitioner's claim was not raised until five years after trial, the State had no ability to "contemporaneously" give reasons for its strikes and the trial court had no ability to do an adequate comparative juror analysis. As Chief Judge Stewart noted, "[b]ecause of 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." *Hebert v. Rogers*, 890 F.3d at 231 (Petr's App. B12).

Finally, although Petitioner sought a rehearing from the Fifth Circuit panel, she never sought *en banc* review of the Panel's decision. Thus, the jurisprudential value of the panel's judgment is questionable – it is not evidence of the Fifth Circuit's position on any issue represented by Hebert's petition and, thus, cannot be compared to the final decisions from other Circuits.

2. Cases dealing directly with a jury discrimination claim that was *objected to at trial*, such as *Miller-El*, don't apply to an ineffective assistance of counsel claim based on the failure to object at trial and thus make Question 1, and this Petition in general, a poor vehicle for certiorari review.

As to pure questions of law and mixed questions of law and fact, AEDPA requires that a federal court must defer to the state court's decision on the merits unless that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by this court. 28 U.S.C.A. §2254(d)(1). A state court decision is "contrary to" clearly established precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at result different from

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

However, Petitioner cites no case that is materially indistinguishable from a decision of this Court. In particular, Petitioner cites *no* case decided pursuant to AEDPA. As this court noted in *Cullen v. Pinholster*, 11 S. Ct. 1388, 1410-1411 (2011), cases in which this Court did not apply AEDPA deference to the question at issue "offer no guidance with respect to whether a state court has unreasonably determined" that issue. This is particularly true when the claim arises under an ineffective assistance of counsel claim which is due double deference. *Id.* Additionally, cases cited by Petitioner regarding Batson, in particular the "comparative juror analysis," are not even ineffective assistance of counsel claims. The cases, such as *Miller-El,* involve direct challenges to discriminatory practices objected to at trial so that a full record was contemporaneously developed at trial.

The law regarding ineffective assistance of counsel is focused on trial counsel's behavior and motivation; the law regarding jury discrimination is focused on behavior and motivation of the person striking the juror. Therefore, cases dealing with jury discrimination that do not involve a failure to object at the time of trial are inapposite – but are all that Petitioner asks this Court to rely on. Petitioner cites no post-AEDPA case where this Court has even considered an ineffective assistance of counsel claim where counsel failed to object to a state's peremptory challenge to a woman or where the State offered a non-exhaustive list of reasons for their objections five years later in a memorandum to the post-conviction court after

objecting to their being no showing of a prima facie case of gender discrimination. Petitioner is clearly asking for this Court to extend *Strickland, Batson, J.E.B.* and *Miller-El* far beyond their limits – another reason why this case is an inappropriate vehicle to answer Question 1.

3. *Chamberlin v. Fisher*, 885 F. 3d 832 (5th Cir. 2018) Would Be a Better Vehicle for This Court to Use to Decide the Comparative Juror Analysis Issue.

As even Petitioner seems to recognize, *Chamberlin v. Fisher* would be a better vehicle for this Court to use to decide the issue of comparative juror analysis.[18] Because it does not raise an ineffective assistance of trial counsel claim,[19] it does not require the double deference that this case requires. *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011). Additionally, a full record was developed at the trial level in *Chamberlin* but not in this case, since no objection was made at trial and no further evidence was offered by Petitioner during subsequent proceedings. Thus, the lower courts did not have to infer trial counsel's strategy nor was the State prejudiced by a five-year delay before it had a chance to justify its strikes. Finally, it is an *en banc* decision by the Fifth Circuit, so it is a final full decision on the issue, which this case is not. *Chamberlin* is a much better vehicle within which to discuss comparative juror analysis. at

[18] As indicative of its importance and relevance to this issue, Petitioner cites it frequently. Pet. 7, 8, 9, 10, 11, 12, 19, 29, 30, 39.

[19] *Chamberlin* involves an ineffective counsel claim but it was regarding post-conviction counsel who allegedly did not properly preserve the Petitioner's *Batson* objection in state post-conviction after it was made at trial and argued on appeal. The test for ineffective assistance of counsel at post-conviction is completely different.

4. Although Not Relevant to the State Courts' Determination that Petitioner Had Not Met Her Burden to Prove that Her Attorneys had Been Ineffective, the Fifth Circuit's Application of Comparative Juror Analysis is also Not in Conflict with Decisions of this Court or Other Circuits.

While the Petitioner contends that the Fifth Circuit's application of comparative juror analysis in her case is in conflict with other circuit courts, the cases she relies on involved differences in the application of a jurisprudential rule. This matter involves a *Strickland* claim which was reviewed by the Federal courts under AEDPA. In that light, there is no conflict between the Fifth and other circuits.

The three cases cited by the petitioner, *U.S. v. Atkins*, 843 F. 3d 625 (6th Cir. 2016), *U.S. v. Odeneal*, 517 F. 3d 406 (6th Cir. 2008) and *U.S. v. Gooch*, 665 F. 3d 1318 (D.C. Cir. 2012) are all appellate cases arising out of the United States trial courts, not habeas actions subject to state court deference pursuant to AEDPA. In each case defense counsel also raised a timely *Batson* objection, and thus there was no *Strickland* analysis to be made. Furthermore, even if it would be applicable, *U.S. v. Atkins* was decided after the state court decision in this case and, thus, its ruling was not clearly established at the time the state courts ruled. These cases do not create a split between circuits nor do they indicate that the Fifth Circuit ruling in this case conflicts with rulings in other circuits.

Furthermore, the Fifth Circuit also has not created a new rule that conflicts with clearly established Supreme Court precedent. Rather, it properly applied the authority of this Court to a factual situation which is fundamentally different from those cases cited by the Petitioner.

Snyder v. Louisiana, 128 S. Ct. 1203 (2008) is inapposite because it was neither determined under AEDPA nor did it present an ineffective assistance of counsel claim. Like the other authority cited by petitioner, there was an objection lodged at trial, and thus the claim was not waived, and additionally there was a full record which allowed the Court to reach the question presented.

Foster v. Chatman, 136 S. Ct. 1737 (2016) was not decided until after the Louisiana state courts ruled in this matter, and thus it could not constitute clearly established Supreme Court precedent, even if it were on point. However, it too did not involve an ineffective assistance of counsel claim, and again there was a contemporaneous trial objection. More importantly, the defendant satisfied his burden of proof on the issue of intentional discrimination by documentation submitted through the Georgia habeas proceeding, including documents which designated prospective jurors according to race, as well as a draft affidavit from an investigator comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay." No such documentary evidence exists in the case at bar, as the petitioner has relied solely on an incomplete statistical analysis and selective excerpts from the voir dire which she submits as circumstantial evidence of discriminatory intent, none of which present the entire context of the proceedings.

5. **Although Not Relevant to the Decision in this Case, There is No Clearly Established Supreme Court precedent stating that the Prejudice Prong of *Strickland* Is Satisfied If the Petitioner Can Show That Had an Objection Been Lodged, It Would Have Been Sustained. Furthermore, There is No Split in the Circuits regarding the issue.**

The Petitioner argues that there is a marked split among circuits about how to analyze a jury discrimination claim raised as ineffective assistance of counsel. However, as stated in her own Petition, the Fifth, Sixth, Seventh, Ninth, and Eleventh[20] Circuits have concluded that a petitioner raising a *Batson/JEB* claim via a claim of ineffective assistance of counsel need not show that the trial itself would have resulted in a different outcome but only that the objection if raised would have been successful, although the cases cited by Petitioner are not all on point with this case. The Fourth Circuit has not ruled. Apparently neither has the First, Second, Third, Tenth, or D.C. Circuits – Petitioner makes no argument of what the position of these circuits on the subject is thus, again, not proving a split in the circuits. It appears that the Eighth Circuit may take a contrary position on this issue, holding that to prove prejudice petition must establish the result would have been different, but it is an outlier. *Young v. Bowersox,* 161 F. 3d 1159 (1998). Thus, the Fifth Circuit is in line with the majority. The Court should wait until a case comes up from the out of line Eighth Circuit, which would be a more appropriate vehicle in which to align the circuits on this issue.

Although none of the lower courts' decisions relied on the prejudice prong of *Strickland*, Petitioner also cites no authority demonstrating clearly established Supreme Court precedent on this point – because there isn't any. Thus, Petitioner is unable to show, as required by AEDPA, that the "adjudication of the claim resulted

[20] To create her split, Petitioner cites *Jackson v. Herring*, 42 F. 3d 1350 (11th Cir. 1995) as standing for a rule that to prove prejudice, petitioner must establish the result would have been different. However, this case was reversed by *Davis v. Secretary of the Department of Corrections*, 334 F. 3d 1310 (11th Cir. 2003) which, instead, adopted the rule/analysis from *Eagle v. Linahan*, 279 F. 3d 926 (11th Cir. 2001).

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."

Finally, the *appellate* cases inappropriately cited by Petitioner to sustain her argument are inapposite to the case at bar. *Scott v. Hubert*, 610 Fed. Appx. 433, 583 (5th Cir. 2015), an unpublished per curiam case was decided *after* the state court decision in this case so could not have been considered by the state court. *Drain v. Woods*, 559 Fed. Appx. 558 (6th Cir. 2014) (not published) involved a *Batson* complaint which was raised during trial *sua sponte* by the trial judge. The harm complained of was trial counsel's "failure to suggest the proper remedy" to the trial court after it had already ruled on the issue of intentional discrimination. Furthermore, the post-conviction court had determined there was ineffective assistance of counsel. No lower court in this case has made that determination. Likewise, *Winston v. Boatwright*, 649 F.3d 618 (7th Cir. 2011) has no applicability simply because the matter involved a complaint that the defendant's *own lawyer* used peremptory challenges to eliminate all men from the jury in his trial. *Carrera v. Ayers*, 699 F.3d 1104 (9th Cir. 2012) was a pre-*Batson* case based on an interpretation of California law in which the Ninth Circuit placed the burden on Carrera to show prejudice under *Strickland* and found he had not carried the burden. Finally, *Eagle v. Linahan*, 279 F. 3d 926 (11th Cir. 2001) is a pre-AEDPA case which did not involve a claim of ineffective assistance of *trial* counsel, but rather *appellate* counsel.

III. THE COURT SHOULD NOT GRANT A WRIT IN AN AEDPA CASE IN ORDER TO "GIVE GUIDANCE" TO LOWER COURTS; THUS PETITIONER'S SECOND QUESTION IS UNWORTHY OF REVIEW.

1. If The Supreme Court's Cases Give No Clear Answer to the Question Presented, It Cannot Be Said That the State Court Unreasonably Applied Clearly Established Federal Law. *Wright v. Van Patten*, 128 S. Ct. 743 (2008).

a. AEDPA requires that the Louisiana court decision be contrary to clearly established Federal law as determined by this Court at the time of the state court determination. In 2014/2015, when the state district and appellate courts entered their decisions, this Court had not decided how to determine prejudice from deficient counsel who fail to object to alleged jury discrimination. *Weaver* did not change that.

The Petitioner's repeated contentions that this Court, in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), left open the question of whether prejudice should be presumed when a claim of intentional discrimination is raised via *Strickland*, and that there is an alleged circuit split on that issue as well, practically concede the point that there could be no unreasonable application of clearly established Federal law as determined by this Court. Thus, relief is unauthorized pursuant to 28 U. S. C. A. § 2254(d)(1) and the state courts reviewing the Petitioner's habeas action were correct in denying relief, in accordance with this Court's per curiam opinion in *Wright v. Van Patten*, 128 S. Ct. 743 (2008).

Weaver had not even been decided at the time this case progressed through the Louisiana state courts in the petitioner's post-conviction relief action. Thus, even the Court's musings about structural error in 2017 were not clearly established law in 2015.

Additionally, in *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014), this Court distinguished a habeas court's failure to reasonably *apply* Supreme Court precedents from attempts to *extend* such precedents. The claims made on this point in the Petition fall under the latter category. As the Court concluded in *White*:

> 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." *Yarborough*, 541 U.S., at 666, 124 S. Ct. 2140. AEDPA's carefully constructed framework "would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *White v. Woodhall*, 134 S. Ct. at 1706.

This is the very essence of what the Petition urges. The authority relied on by the Petitioner concerns matters where a criminal Petitioner properly preserved a *Batson/J.E.B.* objection for review. The Petitioner now wishes to extend such precedents to a case where her attorneys waived such objections at trial, and presume prejudice under the second prong of the *Strickland* test when this Court has never expressly done so. Accordingly, the State respectfully submits that the Petitioner's own arguments demonstrate that the courts below did not unreasonably apply the prevailing precedents of this Court to the facts of her case.

b. This Court has never held that a *J.E.B.* error is a structural error; thus, that, too, is not clearly established Federal law. *See Weaver v. Massachusetts*, 137 S. Ct. at 1911.

When it ruled in *Weaver v. Massachusetts*, the Court noted that it had yet to label *Batson/J.E.B.* errors as structural in express terms. 137 S. Ct. at 1911. Specifically, the Court noted that "(t)he errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. And this opinion does not address whether the result should be any different if the errors

were raised instead in an ineffective-assistance claim on collateral review. *Id.,* at 1911-1912, emphasis added.

Because this Court had not decided the issue of structural error in a Batson-related ineffectiveness of counsel context by 2014/2015 when the Louisiana district and appellate courts entered their decisions, AEDPA would bar the federal courts from granting habeas relief.

2. The State Courts Did Not Rely on *J.E.B.* as the Basis of Their Judgment; Nevertheless, the Fifth Circuit and Petitioner Improperly Argue That Proving a *Prima facie* Case Is Moot Because Post-Conviction Counsel Offered Reasons for the Strikes

The State disputes the Petitioner's contention that the gender-neutral reasons for its peremptory challenges rendered the need for a *prima facie* showing moot under *Hernandez v. New York*, 111 S. Ct. 1859 (1991). The concurring opinion of the Fifth Circuit in the case below correctly distinguished the ruling *Hernandez*, noting that, unlike in Hernandez, the Petitioner herein had not make a timely objection at trial and thus the State could not offer a contemporaneous explanation. Additionally, the concurrence pointed out that when Hebert raised this argument in her post-conviction relief application, the trial court had yet to rule on intentional discrimination, and thus she still maintained the burden of making a *prima facie* showing of discrimination. Both of these reasons were sufficient to distinguish this matter from that considered in *Hernandez*. *Hebert v. Rogers*, 890 F. 3d at 231 (Petr's App. B12).

But even if a *prima facie* showing can be rendered moot on a *J.E.B.* claim, it bears repeating that the issue now arises under *Strickland*, and particularly on the

claim of the allegedly deficient performance of the Petitioner's trial counsel. The Petitioner bears the burden of demonstrating that her trial attorneys were deficient for failing to object to the prosecution's peremptory strikes. To do so, the State respectfully submits that she still needs to make out a *prima facie* showing of discrimination. Absent that, there was neither cause nor reason for her counsel to lodge an objection as voir dire progressed, and thus there can be no deficient performance for failing to do so.

a. This Approach Is Not Consistent with Clearly Established Federal law – As Determined by the Supreme Court or by the Fifth Circuit

In arguing mootness, the Petitioner contends that her approach is consistent with a long line of Fifth Circuit cases. However, the cases she cites in support of her contention are inapposite: neither *U.S. v. Williams*, 264 F. 3d 561 (5th Cir. 2001), *U.S. v. Williamson*, 533 F. 3d 269 (5th Cir. 2008) and *U.S. v Williams*, 610 F. 3d 271 (5th Cir. 2010) involved an AEDPA claim, requiring deference to state court determinations, nor an ineffective assistance of counsel claim, while *Ladd v. Cockrell*, 311 F. 3d 349 (5th Cir. 2002), although reviewed under AEDPA, presented no *Strickland* claim. And none of them involved a situation where a *Batson/J.E.B.* objection was raised five years after trial.

More importantly, she cites no Supreme Court cases, and thus cannot demonstrate that her arguments represent clearly established Federal law as determined by this Court. "Accordingly, the State submits that the Petitioner fails to demonstrate that her approach on the issue of mootness is clearly established as a matter of Federal law, as determined by this Court.

IV. PETITIONER'S CLAIMS ARE REPEATEDLY BASED ON MISCHARACTERIZATION OF THE FACTS, THE RECORD, AND THE LAW; THUS, THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE TO ADDRESS THE QUESTIONS PRESENTED.

In addition to arguing conflicts and splits where none exist, in her apparent attempt to draw a comparison to *Batson, J.E.B.,* and *Miller-El*, the Petitioner distorts the statistical facts of *voir dire*. Her incomplete and flawed statistical analysis of the *voir dire* proceedings make this case an exceptionally poor vehicle to address the questions presented. The Petitioner's flawed analysis repeatedly misstates and mischaracterizes the number and order of peremptory challenges used by the State, as well as the number of gender-neutral reasons offered by the prosecution for those strikes.[21] She also strategically omits relevant facts, like the fact that there were only two men left on the jury when State used its backstrikes, in large part because the defense had used six of its eight peremptory exceptions to strike men. The accurate statistical analysis in this case, set forth more completely in the Statement of the Case, *supra,* demonstrates that the State was clearly not using peremptory strikes to exclude people on the basis of gender. As Appendix A manifests, the State accepted more females (thirteen) than it struck (nine) before the jury of ten women and two men was selected and, for each woman it struck, it accepted another woman. Finally, with three remaining peremptory strikes and three men in the queue, had it been motivated by a desire to "alter the gender

[21] The State did not use twelve out of twelve peremptory challenges although Petitioner has attempted to use that number throughout these proceedings. The State used nine of twelve peremptory strikes before seating the jury proper and two of two peremptories on alternate jurors. These are the 11 challenges for which the State gave reasons in the trial court. See Petr.'s Appx. G, p. G11. The Petitioner also misstates the number of peremptory challenges each party had for selection of alternates, which was two, not three. Thus, the Petitioner twice makes the erroneous assertion that the State provided gender-neutral reasons for "his 12 strikes against women." *See e.g.* Pet. 3, 12, & 30.

composition of the jury," it could have easily done so by continuing to use its backstrikes.

Petitioner also frequently "cherry-picked" statements from the jurors' questionnaires and testimony which did not give a complete picture of that juror. For example, she compares Timmy Guidry to Mary McFarland and Janet Loupe. In addition to listing three drugs that Mr. Guidry reported in his juror questionnaire that he was currently taking, all three having uses for other than psychiatric disorders, she quotes him as saying he "definitely believes in mental illness." Pet. 13 citing R. 5111. That statement alone, however, is a half-truth, since the petitioner ignores the balance of Guidry's voir dire colloquy, particularly where he addressed whether mental illness could affect a person's ability to distinguish between right and wrong and he responded, "I believe some people do try and use it…(t)o get off easy." (R. 5136.) Ms. Loupe expressed no such sentiments. But more importantly, that one statement succinctly summed up the State's theory of the case as it related to the Petitioner's insanity defense. Thus, it was an important distinguishing factor between Guidry and those females stricken from the jury panel – and not mentioned by Petitioner. There were numerous situations like that.

The Petitioner also mischaracterizes the Fifth Circuit's analysis when she contends that the Court required the females and males it compared to be identical. In fact, the Court specifically said otherwise, noting "(w)hile a comparator-juror is not required to be identical in all regards, the comparator-juror must be similar in relevant characteristics." *Hebert v. Rogers*, 890 F. 3d at 223.

Petitioner also contended that the trial judge was "suspicious of the tactic" of backstriking, and that his comments during jury selection indicated that he thought the prosecution might be doing something improper with its use of backstrikes. This completely misrepresents the judge's statements by removing them from their proper context. The judge's comments had nothing to do with the State's strategic use of backstrikes, but rather related to how the backstrike procedure worked under La. C. Cr. P. art. 799.1 (this 2009 trial being the court's first capital trial since the backstrike statute was enacted in 2006). Immediately after making the comments quoted at page 27 of the Petition, the trial court asked the parties "(y)ou think that's what the law is?" After both attorneys answered in the affirmative, the judge responded "Well, I was hoping we were going to do it once. But OK. If you agree that that's what the law is, then that's what we'll do." (R. 5300.) Thus, it is clear that the judge was not commenting on any ill motives of the prosecution, but rather seeking clarification from the parties on how backstrikes were to be implemented. But that part is left out of Hebert's Petition.

Related to that, at page 26 of the Petition, Hebert asserts that Louisiana state and federal judges have recognized that backstriking is an indicia of an intent to discriminate against jurors. She cites *Williams v. Cain*, 2009 WL 1269282 (E. D. La. 2009) and the dissent in *State v. Weary*, 931 So. 2d 297 (La. 2006) for that proposition. The federal district court in *Williams* did not *hold* that defense counsel failed to establish an inference of discrimination where the State didn't use backstrikes. The court was repeating the lower state court's statement and was

simply factually comparing the case to other cases. In the dissent in *Weary*, the justice's statement is completely taken out of context. The case did not involve the use of a backstrike; the State had used its first peremptory to exclude the only black person remaining after challenges for cause. The justice's statement could only have been referring to the striking of a juror after a cause strike and suggested that every peremptory strike should have to be explained. Contrary to the Petitioner's assertions, neither quote asserted that the practice of backstriking should be considered indicia of discriminatory intent. In fact, in 2006 this practice, jurisprudentially approved by the courts, was codified with the consent of prosecutors, defense attorneys, and judges alike.[22]

The Petitioner also insinuates prejudice from the inclusion of a question about the National Organization for Women in the pre-trial jury questionnaire mailed by the trial court to all potential jurors. However, she carefully crafts the argument without asserting that the prosecution had anything to do with the questionnaire. That care is no doubt attributable to the knowledge that the State had nothing to do with the question, which was drafted and included in the questionnaire by the trial judge.

The State respectfully submits that the repeated attempts to mischaracterize the record demonstrate the Petitioner's recognition that she cannot prevail if her claims are evaluated based on the actual record, both factual and procedural. More

[22] *See* testimony of Pete Adams, Executive Director of the Louisiana District Attorneys Association, before the Louisiana House Committee on the Administration of Criminal Justice on April 26, 2006 available at http://house.louisiana.gov/H_Video/VideoArchivePlayer.aspx?v=house/2006/apr/0426_06_CJ at 2:02:47.

importantly, it signals a situation where the Court, should it grant a writ, after a tedious and time-consuming review of the record, is likely to determine that the writ was improvidently granted.

V. THE FIFTH CIRCUIT CORRECTLY DECIDED THIS CASE. CERTIORARI SHOULD BE DENIED.

1. The Fifth Circuit Gave Proper Deference to the State Courts' Determination of the Facts and Its Application of Clearly Established Federal Law as Determined by this Court at the Time of the State Court Rulings.

The state courts found that the Petitioner's trial counsel were not deficient in failing to make a *Batson* objection, making a factual finding based on the entire record that "Petitioner's counsel used their experience and training in the most skillful manner to properly defend Petitioner against the charges." *State v. Hebert*, 2015-KP-0965 (La. 10/2/2015). This is not an unreasonable determination of the facts in light of the record nor is it an unreasonable application of clearly established law, particularly not under the AEDPA/*Strickland* doubly deferential standard.

Petitioner's contends that none of the federal courts reviewing her claim applied the same mode of analysis. The State respectfully submits that this is a direct consequence of the poor factual basis on which the claim rests. It is not that the reviewing courts took varied approaches in resolving the issue, but rather that each subsequent decision simply built upon the previous rulings. Importantly, no reviewing court ever rejected the legal conclusions reached in a prior decision, no court found a prima facie case of gender discrimination had been proven, and every

court determined that Petitioner's counsel had not rendered a deficient performance.

The U.S. District Court *elaborated*, after doing a full and detailed review of the entire *voir dire* record, that Petitioner had not made a *prima facie* showing of intentional discrimination and that counsel had a strategic reason for not making any J.E.B. objections. Thereafter, the Fifth Circuit's panel majority opinion *added* that, under *Strickland*, there was no prejudice to the Petitioner, citing the record to specifically rebut the Petitioner's contentions that under *Miller-El*, the State's proffers were pretextual. Finally, the concurring opinion noted that in applying the AEDPA standard of review, the dismissal of the federal habeas claim was appropriate, since the state trial court's ruling which determined that the performance of Hebert's trial counsel was not deficient "was a reasonable application of *Strickland*."

These opinions are all complimentary, each in turn rejecting a necessary element of the Petitioner's claims. Contrary to the Petitioner's assertion, the Fifth Circuit majority and concurring opinions were not "opposing opinions." The judges simply looked at independent grounds for rejecting the habeas action, the majority focusing on *Strickland/Miller-El* and Chief Judge Stewart[23] on the express provisions of AEDPA. While the Chief Judge offered a different ineffective assistance of counsel analysis in his concurrence, nothing therein demonstrated

[23] Note that Chief Judge Stewart, one of the dissenting judges in *Chamberlin*, was able to clearly distinguish between the facts of *Chamberlin* – a direct Batson challenge and non-effective assistance of counsel case – and this case. *Chamberlin v. Fisher*, 885 F. 3d at 845.

either that the majority approach was incorrect, or that the two approaches were mutually exclusive, as he specifically noted:

> 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. ***None of these approaches were inconsistent, nor were they mutually exclusive.*** The failure of the Petitioner to prove any one element of the analysis (i.e., a *prima facie* showing of discriminatory intent, deficient performance by trial counsel or prejudice resulting therefrom) would provide sufficient grounds to deny relief. *Hebert v. Rogers*, 890 F. 3d 213 (5th Cir. 2018), emphasis added.

Under this Court's historical *Strickland* analysis, the failure to prove any element of the two-pronged test is sufficient to defeat a Petitioner's claim of ineffective assistance of counsel. The State of Louisiana respectfully submits that the Petitioner has failed to prove any element of her claim, and thus each Court which has reviewed her case has correctly denied relief.

CONCLUSION

The State of Louisiana respectfully submits that the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that the Respondent's Brief in Opposition to the Petition for Writ of Certiorari was served via regular U.S. Mail first class, postage prepaid, upon Letty S. Di Giulio, counsel of record for the Petitioner, 1055 St. Charles Avenue, Suite 208, New Orleans, LA 70130.

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