ORIGINAL

No. 19-5067

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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JIMMIE DARNELL DIXON -- PETITIONER, PRO SE

VS.

BURL CAIN, WARDEN
STATE OF LOUISIANA, -- RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI TO:
U.S. FIFTH CIRCUIT COURT OF APPEAL

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PETITION FOR WRIT OF CERTIORARI

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Respectfully submitted,

Jimmie Darnell Dixon
DOC# 527454, Mag. 4
Louisiana State Penitentiary
Angola, La. 70712

QUESTIONS PRESENTED

QUESTION 1. Whether The Lower Court Erred Denying COA on The Claim Of Insufficient Evidence Where Petitioner Sufficiently Proved By A Preponderance Of The Evidence That He Was Not Guilty By Reason Of Insanity At The Time Of The Offense, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution

QUESTION 2. The Lower Court Erred Denying COA on Ineffective Assistance Of Counsel, in Violation of the Fifth, Sixth and Fourteenth Amendment to the Constitution

QUESTION 3: The District Court Erred Denying Mr. Dixon A Hearing, in Violation of the Fifth, Sixth and Fourteenth Amendment to the Constitution

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Hillar Moore, D.A., District Attorney
Parish of East Baton Rouge
5th Fl., Governmental Bldg.
222 St. Louis St.
Baton Rouge, LA 70802

There are no other parties to this action within the scope of Supreme Court Rule 29.1.

Jimmie D. Dixon III
Jimmie Darnell Dixon

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion(s) of the United States Fifth Circuit Court of Appeal appear at **Appendix A** to the petition and is unpublished.

The opinion(s) of the United States District Court, Middle District of Louisiana, appear at **Appendix B, C, & D** and is unpublished.

The Magistrates Report and recommendation in the U.S. Middle District Court, appear at **Appendix E** of the petition and is unpublished.

For cases from **state courts:**

The opinion of the highest state court to review the merits appears at **Appendix J** to the petition and is unpublished. La. Supreme Court denied writ, *State v. Dixon*, 2008-KA-1038 (La. App. 1st Cir. 12/23/08)(Unpublished).

The opinion(s) of the Louisiana Supreme Court denying Certiorari on Appeal, appears at **Appendix K** and is published at *State ex Rel. Jimmie Darnell Dixon v. State of Louisiana*, 21 So.3d 275, 2009-0189 (La. 10/30/09).

The opinion(s) of the Louisiana Supreme Court denying review of denial on Post-conviction Application, appears at **Appendix M** and is published at *State ex Rel. Jimmie Darnell Dixon v. State of Louisiana*, 152 So.3d 876, 2014-KH-0536 (La. 11/14/14).

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeal decided my case was December 10, 2018, a copy of that decision appears at **Appendix A**.

[X] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under **U.S.C.A. Const. Art. 3 § 2, cl. 2**; **28 U.S.C. § 1254(1)**; **Supreme Court Rule 9, 17.1(b)**, and **22**.

[X] For cases from state courts:

The date on which the highest state court decided my case was November 14, 2014. A copy of that decision appears at Appendix M.

The jurisdiction of this Court is invoked under **U.S.C.A. Const. Art. 3 § 2, cl. 2**; **28 U.S.C. § 1254(1) & 1257(a)**; **Supreme Court Rule 9, 17.1(b)**, and **22**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, **AMENDMENT V** provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be take for public use, without just compensation.

The United States Constitution, **Amendment VI** provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The United States Constitution, **Amendment XIV, § I** provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(I). STATEMENT OF THE CASE

Jimmie Dixon was charged by Bill of Information with two counts of Attempted First Degree Murder and two counts of Second Degree Kidnapping, relative to violations of La. R.S. 14:30(27), and 14:44.1, respectively. (R. pp. 54-55). Mr. Dixon was arraigned January 3, 2007, and entered a plea of not guilty. (R. pp. 2-3). Prior to trial, the Trial Court permitted a change in plea (R. pp. 4-5) from Not Guilty to Not Guilty by Reason of Insanity. (R.Pp. 170-172). Dixon was sentenced to 110 years imprisonment at hard labor without the benefit of parole,

probation or suspension of sentence. He received a fifty-year (50) term and three, twenty-year (20) terms to run consecutive. (R.pp. 19-20; 1402-1403).

On appeal, the First Circuit affirmed the conviction and sentence. See: *State v. Dixon*, 2008-KA-1038, 2008 WL 6809594, (La.App. 1 Cir. 12/23/08), ___ So.3d ___ (unpublished)(App. J). Among the questions and assigned errors filed with the Louisiana Supreme Court, Dixon asked whether his conviction was constitutional – because overwhelming evidence showed that at the time of the crime, he could not distinguish between right and wrong. Dixon further alleged that the trial court erroneously denied challenges for cause to exclude prospective jurors whose answers on voir dire reflected inability to follow the law with regard to the defense of insanity. The Louisiana Supreme Court affirmed Dixon's conviction and sentence, *State v. Dixon*, 2009-0189 (La. 10/30/09), 21 So.3d 275) (App. K).

On or about September 29, 2010, an Application for Post Conviction Relief (APCR) was filed in the Nineteenth Judicial District Court Parish of East Baton Rouge. After a series of Commissioner's reports and objections, the APCR was denied August 26, 2013. On February 18, 2014, the State Court of Appeal denied writs (App. L) and the Louisiana Supreme Court denied Certiorari November 14, 2014 (App. M).

Mr. Dixon timely filed for a writ of habeas corpus under 28 U.S.C.A. § 2254. On February 13, 2017 the 1st Magistrate Judge Report and Recommendation was filed. (App. I). The District Court Judgment & Ruling was filed March 3, 2017 denying §2254 as untimely. (App. H). Notice of Appeal was filed March 17,

2017. (omitted). And a motion for Relief from Judgment 60b was filed. The District Court issued a Ruling granting the Motion For Relief From Judgment March 27, 2017. (App. G). On May 5, 2017, the U.S. Court of Appeals for the Fifth Circuit No. 17-30203, denied as moot. (App. F). The 2nd Magistrate Judge Report and Recommendation was filed November 20, 2017. (App. E). Petitioner filed an objection. (R.Doc.29). The District Court Denied the § 2254 as untimely January 3, 2018. (App. D). A Motion for Relief From Judgment was filed January 8, 2018. (App. E). The District Court Vacated and Withdrew previous Order January 23, 2018.(App. C). The District Court made its Ruling (13 pg's) denying §2254 on merits January 23, 2018.(App. B). The Notice of Appeal, Motion to proceed in forma pauperis was filed January 30, 2018. (Omitted). The Fifth Circuit Court of Appeal denied COA December 10, 2018 (App. A). Petitioner herein request a writ of certiorari issue to review the denial of Certificate of Appealability (COA).

STATEMENT OF THE FACTS

Jimmie Darnell Dixon and S. Dixon began dating in 1998, when S. Dixon was 17 or 18 years old. Shortly thereafter, Jimmie Dixon joined the army and moved to Georgia; the two continued their relationship by phone, wrote to one another, and visited when Jimmie came home to Louisiana. S. Dixon became pregnant with Jimmie's child and a son, Damarius, was born on August 2, 1999.

In December of 1999, Jimmie and S. Dixon became engaged and they married in August of 2000. The army stationed Jimmie in Junction City, Kansas. S. Dixon left Damarius in her mother's care and moved to Kansas to live with

Jimmie on the army base. She got work at a convenience store and became pregnant with their second child, Jimmie Darnell Dixon, IV. During her pregnancy, she began to feel that Jimmie was treating her unfairly because he was unsympathetic to the cravings she experienced while pregnant and limited the amount of money she could spend to indulge them. She also became dissatisfied with his desire to have her account for her whereabouts and to explain herself when she was late returning home from playing bingo.

Her dissatisfaction grew to the point that S. Dixon began to threaten to leave Jimmie. Then, when their son, Jimmie IV, was almost two years old, S. Dixon left her husband and returned to her family in Louisiana. While she was in Louisiana, she and her husband continued to talk on the phone but, before they could fully reconcile, Jimmie was deployed to Iraq.

While Jimmie was in Iraq, his wife became pregnant by another man. When Jimmie returned from Iraq, S. Dixon told him that she was pregnant with another man's child. When Jimmie heard the news, he cried but he indicated that he still wanted to be with S. Dixon and agreed to care for the child as his own. The two reunited and moved to Fort Riley with their sons. The baby, a girl, J. Dixon, was born while they were there. Jimmie loved J. Dixon and gave her extra special care. He changed her diapers, played with her, bathed her, called her "baby girl," and she slept on his chest. Jimmie and S. Dixon began to participate in family counseling while they were stationed at Fort Riley.

According to S. Dixon, things were good between Jimmie and her at that time but, nevertheless, when her baby girl was less than three months old, she left

Jimmie again and returned to Louisiana. She denied leaving Jimmie because she was unhappy in the marriage, indicating that she left him only because she "didn't know if she really wanted to get back into that or not." (R. P. 986). S. Dixon, admitted that Jimmie did not drink, or do drugs and that he was a good provider. (R. pp. 1039, 1122).

Jimmie was then deployed to Iraq for a second time, and he left in the fall of 2006. When he returned from his second tour of duty, Jimmie discussed with his wife his desire to start a new life in Texas. He told her that he felt that the schools were better in Texas, that there better job opportunities for him there, and that they could have a fresh start with their family life there. (R. pp. 989-990). He wanted to go to school to become a pharmacy tech so he started an application process for an apartment in Dallas, Texas, and registered for school. Jimmie then started school where he made good grades and continued to try to persuade S. Dixon to bring the children and join him. (R. pp. 990-994).

Jimmie came to Baton Rouge to tell S. Dixon that he had an apartment which would be available on May 1st. He told her of his plans for their future together. The two were getting on well and S. Dixon agreed to move, with four-year-old Jimmie and one-year-old J. Dixon, to Dallas with Jimmie. (R. pp. 993-994, 996). However, because her oldest son, Damarius, was in second grade, she left him in her mother's care so that he could finish the school year. (R. p. 995).

When the school year was out, S. Dixon returned to Louisiana to retrieve Damarius. While there, her cousin died and S. Dixon wanted to stay for the funeral. But, given the regularity with which she left him in Louisiana, Jimmie

was feeling anxious about her being gone and urged her to return to Dallas. (R. pp. 995-999).

When she returned to Dallas, the two of them got into a verbal, then physical, fight. After S. Dixon broke Jimmie's laptop computer, Jimmie picked her up by her neck and threw her to the ground. (R.pp. 1000-1003). S. Dixon indicated that she was hurt but Jimmie did not want her to go to the hospital because he was concerned about making their fight public; however, when her pain persisted until the following morning, he took her to the hospital. S. Dixon fabricated a story to explain her injuries. (R.pp. 1003-1005).

Following this fight, their first which had gotten physical, S. Dixon told Jimmie that she wanted to go home to Louisiana to "take a break." Jimmie did not want her to go and told her that the only way he would let her do that was if she promised to return. (R. p. 1005). He also suggested that she leave the kids with him as assurance for her return but she refused to do so. S. Dixon indicated that she stayed with Jimmie for a while and pretended that everything was alright between them so that he would feel comfortable with her leaving. Then she left with the kids and went back to Louisiana. (R. pp. 1005-1007).

Once she was in Louisiana, she obtained a protective order and an order for child support and alimony against her husband. (R.pp. 1008-1011). The judge granted Jimmie supervised visitation with the children. The judge further ordered that Jimmie provide use of one of the cars to S. Dixon. (R. pp. 1015-1016).

After this proceeding, Jimmie contacted S. Dixon and told her that he needed to get back to Dallas to get back to school. He asked her to bring the

children to his mother's house to visit with him before he left. He told her that he would give her the keys to the car when she came. (R. p. 1016.

Once she was at his mother's house, Jimmie asked her to talk to him in the car. She got in the car with the baby, while the two older boys went in the house. Jimmie then sped off with S. Dixon and J. Dixon in the car. They got stuck in traffic on the interstate. Jimmie then began stabbing S. Dixon and J. Dixon with a knife. S. Dixon jumped out of the car and ran for help. Jimmie put the baby out on the side of the highway and stabbed her. He then got back in his car, sped up, and hit S. Dixon with his car. Both S. Dixon and J. Dixon sustained serious, life-threatening injuries but, fortunately, both survived.

REASONS FOR GRANTING THE PETITION

The lower courts erred in denying a COA, finding that Dixon failed to state a constitutional claim.

The standard of review is as follows:

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1027, 154 L.Ed.2d 931 (2003), the issue of a Certificate of Appealability (COA) was addressed. When a habeas applicant seeks a COA, the court should limit its examination to a threshold inquiry into the underlying merits of the claim; *e.g.*, *Slack v. McDaniel*, 529 U.S. 473 at 481, 146 L.Ed.2d, 120 S.Ct. 1595 (2000). This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with the Court's precedent and the statutory test, the prisoner need only demonstrate a "substantial showing of the denial of a constitutional right." U.S.C. 28 § 2253(c)(2). He satisfies this standard by demonstrating that jurists of

reason could disagree with the district court's resolution of his case, or that the issues presented were adequate to deserve encouragement to proceed further. He need not convince a judge, or, for that matter, a panel of three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong; *Miller-El v. Cockrell*, No. 01-7662, 537 U.S. at 326. 123 S.Ct. 1029 (02/25/2003). Accordingly, a court should not decline the application for COA merely because it believes the appellant will not demonstrate an entitlement to relief.

Question 1. Whether The Lower Court Erred Denying The Claim Of Insufficient Evidence Where Petitioner Sufficiently Proved By A Preponderance Of The Evidence That He Was Not Guilty By Reason Of Insanity At The Time Of The Offense, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

This Fifth Circuit Court Of Appeal held under materially indistinguishable Supreme Court law and facts that "sufficient evidence established that petitioner was insane when he committed the crime." See, *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008), cert. denied, --- U.S. ---, 129 S.Ct. 496, 172 L.Ed.2d 358 (2008) (. . . the state courts unreasonably applied established Supreme Court precedent in denying Petitioner relief on his claims relating to the sufficiency of the evidence as to the insanity defense, . . . , and ineffective assistance of counsel).

In light of Louisiana law on the issue of insanity, the question under the *Jackson* sufficiency standard is whether, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt that the petitioner did not prove by a preponderance of the evidence that he was insane at the time of the offense.

A claim of insufficiency of the evidence is a mixed question of law and fact, requiring the court to examine whether the state court's denial of relief was contrary to or an unreasonable application of United States Supreme Court precedent.[1] The Supreme Court established the due process standard a reviewing court must utilize in analyzing the sufficiency of the evidence in *Jackson v. Virginia*.[2] Pursuant to *Jackson*, the inquiry is 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 doubt.[3]

The lower court erred when it failed to find Mr. Dixon had carried his burden "by a preponderance" of the evidence and thereafter holding the state to its burden. Louisiana law presumes the sanity of the defendant, placing the burden on the defendant to overcome this presumption with proof of insanity by a preponderance of the evidence.[4] A defendant is not, however, required to establish insanity beyond a reasonable doubt.[5] To be exempt from criminal responsibility on the basis of insanity, a defendant must persuade the jury that he had a mental disease or defect which rendered him incapable of distinguishing right from wrong at the time of the incident.[6] Applying the *Jackson* Standard to the insanity defense under Louisiana law, the inquiry for a reviewing court is whether any rational trier of fact, viewing the evidence in the light most favorable to the

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1 *Penry v. Johnson*, 215 F.3d 504, 507 (5th Cir. 2000); *Maes v. Thomas*, 46 F.3d 979, 988 (10th Cir. 1995).

2 *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). See also *Guzman v. Lenzing*, 934 F.2d 80, 82 (5th Cir. 1991).

3 *Jackson v. Virginia*, 443 U.S. at 316-17, 99 S.Ct. At 2787-88, 61 L.Ed.2d 560 (1979). *Donahue v. Cain*, 231 F.2d 1000, 1004 (5th Cir. 2000).

4 La.Rev.Stat.Ann 15:432.

5 *State v. Stewart*, 117 So.2d 583 (La. 1960).

6 La. Rev.Stat. 14:14

prosecution, could conclude beyond a reasonable doubt that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the offense.[7] (emphasis added). Under *Jackson*, a review of the sufficiency of the evidence does not include a review of the credibility of the witnesses.[8] Instead, *Jackson* "gives full play to the responsibility of the trier of fact fairly to resolve conflict in testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.[9] A fury's findings on an issue of fact will be upset only where necessary to preserve the "fundamental protection of due process of law."[10]

When an accused offers expert testimony on the issue of sanity and the state does not, such testimony might suffice to render a jury's determination of guilt unreasonable, but due process does not inherently necessitate such a finding. There is "nothing essentially sacred or untouchable in expert testimony" and it is well-established that the state is not required to call expert witnesses to rebut the conclusions of a defendant's expert. "Expert testimony, particularly that of psychiatrists, may be rebutted by the personal opinions of laymen.[11] Nevertheless, "the opinions of experts may not be arbitrarily ignored," and there generally must exist some reason that is objectively present for ignoring expert opinion.[12] Previous case law indicates that expert testimony may, for

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7 See *Donahue v. Cain*, 231 F.3d 1000, 1004 (5th Cir. 2000); *State v. Silman*, 663 So.2d 27, 32 (La. 1995); *State v. Peters*, 643 So.2d 1222, 1225 (La. 1994); *State v. Nealy*, 450 So.2d 634, 637 (La. 1984).

8 *Schlup v. Delo*, 513 U.S. 298, 330 (1995); *United States v. Garcia*, 995 F.2d 556, 561 (5th Cir. 1993).

9 *Jackson*, 443 U.S. at 319 (emphasis added).

10 Id. at 319; *State v. Milton*, 2006 WL 2776247, 1 (La. App. 3 Cir. 2006).

11 *Brock v. United States*, 387 F.2d 254, 257 (5th Cir. 1967).

12 *Brock*, 387 F.2d at 247 (5th Cir. 1967); *United States v. Fortune*, 513 F.3d 883, 890 (5th Cir. 1967), cert. Denied, 423 U.S. 1020, 96 S.Ct. 459, 46 L.Ed.2d 393 (1975); *United States v. McCracken*, 488 F.2d 406, 412 (5th Cir. 1974); *United States v. Harper*, 450 F.2d 1032, 1037 (5th Cir. 1971); *Mims v. United States*, 375 F.2d 135, 140-43 (5th Cir. 1967); *State v. Peters*,

instance, be overcome in the following ways:

> [B]y showing the incorrectness or inadequacy of the factual assumptions on which the opinion is based, 'the reasoning by which he progresses from his material to his conclusion,' the interest or bias of the expert, inconsistencies or contradictions in his testimony as to material matters, material variations between the experts themselves, and defendant's lack of co-operation with the expert. . . in some cases, the cross examination of the expert may be such as to justify the trier of facts in not being convinced by him.[13]

The determination of whether expert testimony sufficiently overcomes contrary lay testimony depends, of course, on the particular facts of the case. A careful review of the record in the instant case, however, reveals no objective reason for the jury to have entirely disregarded the opinion of Petitioner's experts. The state in no way impinged upon the veracity, motives or qualifications of any expert and there was nothing intrinsically unreliable about the experts' findings. All of the experts were qualified beyond dispute. All of the experts were disinterested as they were either appointed by the court or otherwise employed by the state. While the interest and qualifications of experts are not decisive in the context of a sufficiency of evidence claim, they are important factors in determining whether the jury was acting reasonably in disregarding expert testimony.[14]

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643 So.2d 1222 (La. 1994).

13 *Mims v. United States*, 375 F.2d 135, 143-44 (5th Cir. 1967).

14 In *Wright v. United States*, 250 F.2d 4 (D.C.Cir. 1957), and *Bishop v. United States*, 394 F.2d 500 (5th Cir. 1968) the testimony of disinterested experts specifically appointed or employed by the state carried substantial weight against law witness testimony and the state's attempt to undermine the expert's testimony merely throguh cross-examination. Similarly, in *Douglas v. U.S.*, 239 F.2d 52. 59 (D.C. Cir. 1956) the court indicated that a rational jury may not disregard the expert testimony of three disinterested psychiatrists when there is no opposing medical evidence, and the non-expert testimony arguably 'cut both ways, at least as deeply in the direction of insanity as sanity." See also *Fielding*, 251 F.2d 881; *State v. Charles*, 643 So.2d 1222 (La. 1994)(Finding defendant sufficiently established his insanity where both members of the sanity commission supported his claim, he was on medication for a long period of time before being restored to competency, and the state presented no expert

Beyond being highly-qualified and disinterested, Petitioner's experts were largely in agreement about Petitioner's condition and his sanity at the time of the incident.

The MJ overlooked Dixon's military medical records that revealed his commander requested he be evaluated by mental heath experts because the problems he was experiencing, which directly contradict Dr. Hoppe's opinion. Dr. Hoppe who spoke to Dixon one time in the parish prison right before trial, conducted no testing, and gave lip service to the prosecutor's hypothesis to rebut the defense consisting of three doctors or psychologist on the question of insanity.

On May, 30, 2007 the court ordered "one single evaluation" eight (8) months after arrest by Dr. Hoppe. And he spoke to defendant one (1) time July 20, 2007, ten months after arrest. Dixon had been diagnosed by the treating psychiatrist at the parish prison with PTSD and was on medication for PTSD symptoms prior to Dr. Hoppe's single interview. Dr. Hoppe did not indicate he had any experience dealing with or diagnosing persons suffering from mental illness related to PTDS. Further his opinion was based on speculative facts rebutted by the three defense witness. See *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008) (Louisiana law regarding an insanity defense makes sanity a rebuttable presumption by defendant to prove by preponderance of evidence and [the] question on review framed under the *Jackson* sufficiency standard). Petitioner demonstrated that the state court's use of this standard to review his sufficiency of evidence claim was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court, or that the state court's factual determinations were unreasonable in light of the evidence presented at petitioner's trial.

The evidence was insufficient to convict Dixon of attempted first degree

testimony to rebut his claim).

murder and/or second degree kidnapping because the preponderance of the evidence established he was insane at the time of the offense. To sustain conviction in which insanity is an issue, appellate court, viewing evidence in light most favorable to prosecution, must determine that rational trier of fact could conclude that defendant did not prove by preponderance of evidence that he was insane at time of offense.[15] The courts have failed to apply this principle to this case.

In Louisiana, a jury considering a defendant's dual plea of not guilty and not guilty by reason of insanity must first determine whether the state has proved the essential elements of the charged offense beyond a reasonable doubt, the defendant then bears the burden of establishing that he was insane at the time of the offense and, therefore, exempt from criminal responsibility.[16] A legal presumption exists that a defendant is sane and responsible for his actions at the time of an offense.[17] Thus, the state is not required to offer any proof of the defendant's sanity. To rebut the presumption of sanity and avoid criminal responsibility, a defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence.[18]

A review of his evidence shows that no rational trier of fact could have found that he had not proven by a preponderance of the evidence that he was insane at the time of the offense. In support of his burden, the defense offered the testimony of several renowned experts in the field of mental disease and defects,

15 *State v. Armstrong*, 671 So.2d 308.
16 *State v. Williams*, 2001-0944 (La. App. 1 Cir. 12/28/01), 804 So.2d 932, 938-939.
17 See La. R.S. 15:432; *State v. Harris*, 99-0820, pp. 6-7 (LA. App. 1 Cir. 2/18/00), 754 So.2d 304, 308.
18 See La. C.Cr.P. Art. 652.

as well as numerous reports, medical histories, results of examinations, etc. Further, the facts of the offense itself – namely that it was committed in the view of a host of eyewitnesses, in rush hour traffic where there was no real opportunity for escape and within the view of a police vehicle – suggest that Mr. Dixon was not behaving as someone who understood that his conduct was wrong.

Petitioner's Mental Illness

There is no dispute that Petitioner prior to, during, and after the incident suffers from Post Traumatic Stress Disorder, and/or Mood Disorders, i.e., depression or mania.

Post Traumatic Stress Disorder is an illness, mental disease/disorder, in which people who have been traumatized by experiences outside of normal, everyday life experience a predictable collection of symptoms. The symptoms include things like flashbacks to the experience, nightmares, dreams of the experience, feelings of reliving the experience, an inability to get rid of the thinking of the experience.

As of 1980, the American Psychiatric Association began formally to recognize Post Traumatic Stress Disorder (PTSD), which can derive from disturbing war experiences. See American Psychiatric Assn., Diagnostic and Statistic Manual of Mental Disorders 463-468 (rev. 4th Ed. 2000).

Dr. Sarah Deland is a well renowned expert in the field of forensic psychology. Dr. Deland performed an extensive examination of Dixon, which included numerous visits, the battery of tests performed by Dr. Zimmerman,[19] and interview of others. After the extensive evaluation, Dr. Deland's diagnosis was Post Traumatic Stress Disorder

19 Dr. Deland requested the assistance of Dr. Marc Zimmerman, who testified as an expert in the field of forensic psychology. Dr. Zimmerman performed a battery of psychological tests to provide Dr. Deland with objective information as a basis for arriving at a more precise diagnosis. (R. P. 1176).

(PTSD). (R. P. 1106). PTSD is a condition caused by, and is common to people who experience combat conditions such as those experienced by Dixon while in Iraq.[20] Dr. Deland indicated that the symptoms manifested themselves after his return from Iraq, as he was unable to sleep, was very paranoid, was very jumpy, and experienced nightmares.[21] (R. P. 1122).

Part of the diagnosis manifests itself in psychosis, which Dr. Deland explained as follows:

> Psychosis is a condition which means a lack of being based in reality where peoples perceptions become distorted so that they are not able to tell what is real or what is not real. They may have some symptoms like hearing voices that the rest of us can't hear, or seeing things that the rest of us can't see. It may also come in the form of thought disorganization meaning that people can't collect their thoughts together in order to communicate thoughts or think clearly, misperceive things in their environment, or often become very paranoid and misperceive things in their environment as harmful.(R.P. 1107).

Dr. Deland made a point of determining whether Dixon was malingering or not,

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20 That "a current medical diagnosis of PTSD" assures that the in-service stressor occurred to the veteran-- miunderstands the ordinary role of a physician diagnosing PTSD. A physician is not expected to do a detailed invetigation of a veteran's claimed in-service stressors. And a physician's Diagnoses of PTSD does not necessarily identify what stressor caused it. Indeed, PTSD could result from an event not identified by the veteran. That is why the regulation requires the veteran to separately submit credible supporting evidence that the claimed in service stressor occurred. *Kays v. Snyder*, 846 F.3d 1208, 1212 (C.A.Fed.2017).

21 See *Porter v. McCollum*, 130 S.Ct. 447, FN4, 558 U.S. 30 (U.S. 2009); [PTSD] is not uncommon among veterans returning from combat. See Hearing on Fiscal Year 2010 Budget for Veterans' Programs before the Senate Committee on Veterans' Affairs, 111 Cong., 1st Sess., 63 (2009)(uncorrected copy)(testimony of eric K. Shinseki, Secretary of Veterans Affairs (VA), reporting that approximately 23 percent of the Iraq and Afghanistan war veterans seeking treatment at a VA medical facility had been preliminarily diagnosed with PTSD). *Cf.* Cal Penal Code Ann. § 1170.9(a) (West Supp.2009)(providing a special hearing for a person convicted of a crime "who alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military"); Minn.Stat. § 609.115, Subd. 10 (2008)(providing for a special process at sentencing if the defendant is a veteran and has been diagnosed as having a mental illness by a qualified psychiatrist).

and confirmed that he was not. (R. P. 1109). Dr. Zimmerman's test scores supported that Dixon fit the profile of someone suffering from post traumatic stress disorder and from psychotic episodes. (R. pp. 1163, 1174, 1175). Dr. Zimmerman's test scores also supported that Dixon was not malingering. (R. pp. 1109, 1166).

Dr. Deland was asked whether she had a medical opinion concerning Dixon's ability to distinguish right from wrong at the time of the offense and Dr. Deland stated as follows:

> ...After taking everything that I could get my hands on in consideration it was my opinion that he does suffer from a major medical illness, namely post traumatic stress disorder, and that because of the symptoms at the time that he was not able to distinguish right from wrong. (R. P. 1106).

Dr. Deland reiterated her opinion stating:

> ..following my evaluation and taking into consideration all available information it is my opinion with reasonable medical certainty that Mr. Dixon does suffer from a major medical illness, namely post traumatic stress disorder, and as a result of this illness he was unable to distinguish right from wrong at the time of the offense. (R. P. 1128).

Dr. Deland explained that the facts surrounding the incident itself were consistent with her diagnosis—namely, that the crime was committed in the middle of rush hour traffic, with witnesses everywhere, no opportunity for escape, and a police vehicle nearby. (R. P. 1123).

Dr. Robert Blanche testified as an expert in the field of psychology. Dr. Blanche was Dixon's treating physician for his mental illness. (R. P. 1188). Dr. Blanche agreed with Dr. Deland's diagnosis of Post Traumatic Stress Disorder. (R. pp. 1114,1193). Dr. Blanche prescribed Dixon the anti-psychotic Haldol, anti-depressant Prozac, anti-anxiety Ativan, and the anti-depressant Trazedone to aid Dixon in sleeping. (R. pp. 1114,1192).

Dr. Blanche testified that the anti-psychotic Haldol is a potent medication, which he would not have prescribed had he not been **strongly convinced** that Dixon was **psychotic**. (R. P. 1194). Dr. Blanche further testified that Dixon responded well and appropriately to the medications which is yet another indicator that Dixon was not malingering.

Petitioner avers that considering the extensive evaluation performed by Dr. Deland, which is further supported by other experts in the field, his diagnosis should have carried great weight with the jurors.

After arrest, Dixon was determined in separate mental health proceedings to be suffering from *Post Traumatic Stress Disorder* and therefore gravely disabled. As a result of those proceedings, continued treatment was ordered.

Thus, the medical evidence submitted by the defense was consistent and profound, leading to the inexorable conclusion that Dixon was legally insane at the time of the offense. Given this overwhelming medical evidence, which more than satisfied the defense's burden of preponderating to show that he was legally insane, no rational trier of fact could have found otherwise. The lay testimony concerning the other factors relevant to determine insanity at the time of the offense, such as Dixon's behavior before, during and after the crime can, with the exception of the testimony of his wife[22], only be said to support this conclusion.

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22 A review of S. Dixon's testimony reveals that, throughout her marriage to Jimmie, she was very immature and self-involved. Thus, the fact that she was not tuned in to her husband's mental distress should not be deemed probative of the fact that he was not suffering with mental health issues. Indeed, his medical records from Fort Riley, Kansas, indicate that his commander requested that he be evaluated by mental health experts because of problems he was experiencing. (R.P. 1116). Further, she indicated that she was unaware that Jimmie was engaged in combat while he was in Iraq, yet his records reflect that he most certainly was. (R.Pp. 1118-1120).

While State's witness, Dr. Donald Hoppe, indicated that he disagreed with the diagnosis of post-traumatic stress disorder, although it was already determined in a separate proceeding that he did suffer from PTSD, and provided by the other three distinguished medical experts who testified at Mr. Dixon's trial, he did so only on the basis of his subjective determination that the combat experiences of Dixon were not, in his opinion, "scary enough" to justify Dixon's feeling traumatized. (R.Pp. 1239-1245). Dr. Hoppe did no testing and had no special training in diagnoses of PTSD. His opinion over looks that all Units stationed in Iraq were subjected to attacks, suicide car bombing and random gun fire. Dr. Hoppe overlooked or down-played, in his role of prosecution witness, extensive evidence of stressors related to Dixon's family circumstances that existed at the time of the crime in reaching his opinion. Contrary to Dr. Hoppe opinion there has been no evidence to support PTSD is limited to a specific traumatic combat experience, and suicides and other mental health problems experienced prior to deployment have plagued the military. Clearly the military was a contributing factor to Dixon's overall mental condition at the time of the offense. No reasonable jurist could find Dr. Hoppe's testimony alone, was adequate to carry the states burden of proof. Thus, defendant established by a preponderance of the evidence that he was insane at the time of the crime, and the states evidence was legally insufficient to support the verdict.

In addition to the state courts insufficient consideration of the qualifications of the experts, the record also does not substantiate the state court's conclusion that the testimony of Petitioner's experts was reasonably undermined by doubts about the factual

basis upon which the experts based their diagnoses or by the existence of facts or circumstances demonstrating Petitioner's sanity. Several of the experts testified that they bases their opinion on many sources of information and on their personal evaluation of Petitioner's behavior.

Given such testimony, it is evident that the reliability of all of the experts did not hinge on and, therefore, could not be impugned by simply undermining the veracity of Petitioner.[23] This is especially true where, as here, the experts' credentials and interests remained untainted.

As to the notion that the expert opinion in this case was undermined by the state demonstrating a lack of knowledge of Petitioner's behavior on the part of the experts, the record demonstrates that Petitioner's experts had knowledge of Petitioner's overall actions and that they found his behavior entirely consistent with someone suffering from PTSD. Even assuming that some of Petitioner's specific actions were not known by a particular expert, in order for an expert's opinion to be discredited on the basis of unknown facts, the facts in question must be "material".[24] There is no indication in the instant case that any unknown facts were "material" as knowledge of the unknown acts would not apparently have altered any expert's opinion.

Finally, the record does not support the state court's conclusion that Petitioner's actions, known or unknown to the experts, sufficiently demonstrated that he was sane at the time of the incident in light of the overwhelming evidence established otherwise. As mentioned, expert testimony set out that Petitioner's actions, as described by witnesses in

23 *See Bishop v. United States*, 394 F.2d 500 (5th Cir. 1968)(holding that the government failed to rebut Petitioner's evidence of insanity despite the defendant's questionable credibility, where the defendant presented expert testimony that did not depend on the truth of narrative statements made by the defendant and the government offered no contrary medical evidence).

24 *See Id.*

police and hospital records, were consistent with Petitioner suffering from PTSD. In contrast to the testimony offered by Petitioner's experts, the state failed to present any evidence that Petitioner's actions were inconsistent with him being mentally ill or, alternatively, indicative of sanity. The state's witnesses did little more than document Petitioner's actions, which were ambiguous at best as to Petitioner's sanity at the time of the offense.[25] A recitation that a defendant was able to perform certain actions or that he seemed normal has previously been found insufficient in the face of expert testimony establishing otherwise.[26] This is especially so where the witness had only brief contact with the accused and/or limited experience dealing with mental illness.[27] As the Louisiana Supreme Court indicated in *State v. Roy*, for instance, a "defendant's flight from the scene of the killing and his submission to the police when his car stopped ... [were] not

25 Compare *State v. Peters*, 643 So.2d at 1226 (noting that the circumstances of a shooting itself were neutral on the issue of sanity and, therefore, insufficient to rebut expert testimony establishing insanity despite Petitioner shooting only his estranged wife, lighting a cigarette, smiling and riding his bicycle away from the scene).

26 *United States v. Collier*, 453 F.2d 1173 (5th Cir. 1972)(finding testimony of ten lay witnesses insufficient to rebut the testimony of seven psychiatrists who concluded defendant was insane); *Brock* 387 F.2d at 247 (5th Cir. 1967)(noting that "there is less force to a statement that nothing abnormal was observed than to a clinically based assertion of insanity"); *Wright v. United States*, 250 F.2d 4, 10 (D.C. Cir. 1957); *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957); *State v. Armstrong*, 671 So.2d 307 (La. 1996)(finding defendant presented overwhelming proof of insanity despite police officer and clerk of court testimony that defendant seemed normal and coherent); Peters, 643 So.2d at 1226. But see *White v. Estelle*, 669 F.2d 973 (5th Cir. 1982); *United States v. Andrew*, 666 F.2d 915 (5th Cir. 1982); *United States v. Mota*, 598 F.2d 995 (5th Cir. 1979), cert. denied, 444 U.S. 1084, 100 S.Ct. 1042, 62 L.Ed.2d 770 (1979). While helpful reminders that lay witness testimony may adequately rebut expert testimony, White, Andrew, and Mota are readily distinguishable from the present case in that the experts that did testify made substantial concessions during cross-examination, the government offered some expert testimony in two of the cases, and the lay witnesses had more exposure to the defendants.

27 *Wright v. United States*, 250 F.2d 4, 10 (D.C. Cir. 1957)(noting that "a statement that the witness never observed an abnormal act on the part of the accused is of no value if, but only if, the witness had prolonged and intimate contact with the accused")(quoting *Carter v. United States*, 252 F.2d 608 (D.C. Cir.)); see also *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957).

inconsistent with a state of insanity, and could not by any rational fact finder be said to overcome the overwhelming evidence of insanity.[28] Likewise, in United States v. Cooper, the Ninth Circuit found the government's evidence of sanity insufficient to rebut defendant's experts where the government's evidence consisted of testimony of lay witnesses that the defendant could talk intelligently, was relaxed, could run, could perform movements involved in a robbery, appeared alert, and did not appear to be under the influence of drugs.[29]

The entire scenario – a family man with no violent criminal history, suddenly stopping on the interstate highway and stabbing his wife and a child – does not suddenly appear the actions of a sane man merely by assuming he was obsessed with his wife.

In the absence of a valid reason to disregard the testimony of Petitioner's experts, and viewing the evidence in the light most favorable to the prosecution, no reasonable jury could have found that Petitioner failed to prove by a **preponderance** of the evidence that he was insane at the time of the offense. The jury's verdict flies in the face of overwhelming evidence that Petitioner was insane at the time of the incident, and, as the numerous cases cited herein demonstrate, it was an unreasonable application of the due process standard set out in *Jackson* for the state courts to have concluded otherwise.

Question 2: Whether The Court Erred Denying COA on Ineffective Assistance of Counsel Ineffective, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

The MJ's legal and factual findings where in error where the rulings of the state court denying Dixon's ineffective assistance of counsel grounds involved unreasonable

28 *State v. Roy*, 395 So.2d 664, 669 (La. 1981).
29 465 F.2d 451 (9th Cir. 1972).

applications of clearly established federal law, as determined by the Supreme Court. See 28 U.S.C. §2254 (d)(1). "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." [30] And, "[t]he focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable . . . ." Id. While the state court correctly identified principles adopted by the Supreme Court in *Strickland v. Washington*, 466 U.S. 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), it unreasonably applied them to the facts of this particular case. See *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008). See also, *Harrison v. Quarterman*, 496 F.3d 419, 424 (5th Cir. 2007) (Stating that "[a] decision constitutes an 'unreasonable application' of clearly established federal law if it is 'objectively unreasonable.' In this case, the determination of the state court as to Dixon's ineffective assistance of counsel ground were objectively unreasonable under the state court record.

No opinion was proffered as to his competence to assist in his own defense. At the conclusion of the hearing the court asked the parties if a competency hearing was needed and neither said it was necessary. As such, the Court held that this claim was without merit. The district court's judgment is an erroneous application of state and federal law. Also, Dixon maintains that the State Courts' decision is based on an unreasonable determination of the facts as presented in this case.

Here, Dixon relies on the law and arguments made in his application and memorandum in support for habeas corpus relief, § 2254.

30 *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Counsel was aware that Dixon's mental health concerns went as far back at least to the time he served in the military. Dixon's military medical records reveal his commander requested he be evaluated by mental health experts because of the problems he was experiencing.

Dr. Blanche placed Dixon on Haldol, an anti-psychotic, Prozac, an anti-depressant, Ativan, an anti-anxiety medication, and Trazadone, an anti-depressant used as a sleep aid. Dr. Blanche said he would not have prescribed such a potent anti-psychotic had he not been strongly convinced that Dixon was psychotic.

There was no strategic reason for counsel to not request that a sanity commission be convened to determine Dixon's competency to proceed.

The MJ overlooked Dixon was determined in separate mental health proceedings to be suffering from *Post Traumatic Stress Disorder* and therefore gravely disabled. As a result of those proceedings, continued treatment was ordered. The MJ misapplied the test for determining a defendant's mental competency depends on whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual understanding of the proceedings against him. No evaluations were done to make such determinations. Failure to observe procedures adequate to protect a defendant's right not to be tried while incompetent deprives him of Due Process, right to a fair trial, right to present a viable defense, and the right to a finding of guilt beyond a reasonable doubt. This right is protected by clearly established Federal and State jurisprudence, and is built into our statutory law.[31]

31 See *Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836, 841 (1966); *State v. Nomey*, 613 So.2d

Moreover, the fact that Dr. Blanche prescribed Dixon the anti-psychotic: Haldon; anti-depressant: Prozac; anti-anxiety: Ativan; and the anti-depressant: Trezedone, is pertinent to Dixon's competency to proceed and affects his ability to not only assist Defense Counsel, but to meet all of the other criteria enunciated in *Bennett*, supra.[32]

At the outset, "[b]ecause competency to stand trial is an aspect of substantive due process," only the Constitution can mandate the "legal standard" by which to evaluate it.[33] Applying the appropriate standard, a review of the record in the instant case, shows that Dixon, although assumed to be oriented as to time, place, and person, did not possess a rational understanding and was not competent to proceed.

Of course, this was also exacerbated by the large dosage of medication Dixon was taking. None of Dixon's reports from the numerous doctors state that he had a rational understanding. In fact, after a review of the record in this case, any jurist could surmise just the opposite. Dixon avers he did not possess a rational as well as factual understanding of the proceedings against him and was legally incompetent to stand trial under the *Dusky* standard.[34]

Counsel failed to demand adequate procedures guaranteed by the

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157, 161 (La. 1993)(citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975); La.C.Cr.P. Articles 642 – 647.

32 See also *State v. Snyder*, 750 So.2d 832 (La. 4/14/99).

33 *Lafferty v. Cook*, 949 F.2d 1546, 1550 (10th Cir. 1991), cert. denied, 112 S.Ct. 1942 (1992); *Bouchillion v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990).

34 *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788 (1960)(per curiam); *Lafferty v. Cook*, 949 F.2d 1546, 1550 (10th Cir. 1991), cert. denied, 112 S.Ct. 1942 (1992); *Bouchillion v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990); see also, *Dusky v. United States*, 271 F.2d 385, 387-89 (8th Cir. 1959).

Constitution to insure that the court would not try his client while incompetent. Defense Counsel's failure to demand these protective measures deprived Dixon of his constitutional rights protected by the Fifth, Sixth, and Fourteenth Amendments. Overall, Defense Counsel was ineffective for not utilizing the safeguards and protections set forth in our jurisprudence.

Finally, the question presented by Dixon is not to determine whether there was a reasonable probability that he would not have been convicted absent his counsel's errors, but whether there was a reasonable probability that he would have been found incompetent to stand trial if not for the deficient performance of his attorney. For a lawyer to proceed to trial under the described conditions is a constructive denial of counsel, which denied Dixon Procedural and Substantive Due Process.[35]

B. Counsel failed to present a defense.

Dixon submits that counsel was grossly ineffective by waiving the opportunity to have a sanity commission examine him.

Here, Dixon relies on the law and arguments made in his application and memorandum in support for habeas corpus relief, § 2254.

Dixon avers that Counsel's actions and/or inactions, indicate incompetence and/or ignorance of the law. As a result of Defense Counsel's failures, Dixon was denied substantive and procedural Due Process, the right to a fair trial having a just and reliable outcome, the right to present a defense, and the right to effective assistance of counsel.

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35 *Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836, 841 (1966); *State v. Nomey*, 613 So.2d 157, 161 (La. 1993)(citing *Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 903 (1975).

Dixon avers that "any" defense attorney provided such information (substantial history and treatment for severe mental illness, i.e., PTSD and being determined Psychotic) would have demanded thorough evaluation, testing, a full, fair and adequate hearing, and then prepare and present a viable defense. Dixon was denied his viable and sole defense. There is no applicable strategy to be claimed here by Defense counsel.

C. Counsel failed to object to the court's erroneous jury instruction.

The District Court ruled that this claim be dismissed stating that at trial, the court Stated:

> "[I]f you find that the state proved beyond a reasonable doubt that the defendant did commit the offense charged or a responsive verdict and that the defendant established beyond a preponderance of the evidence that he was unable to distinguish right from wrong with respect to the conduct in question at the time of the offense, then your verdict must be guilty by reason of insanity." (R. p. 1331-33).

The court's ruling is objectionably unreasonable. Trial counsel should have objected to the erroneous instruction.

First, to be found "not guilty by reason of insanity" the law does not require that the State first find that a defendant committed the offense charged or a responsive verdict thereof. The verdict of "not guilty by reason of insanity" is a responsive verdict included and allowed when a criminal defendant enters the dual plea of "not guilty and not guilty by reason of insanity." La.C.Cr.P. art. 816.

And second, there is no verdict of "guilty by reason of insanity." La.C.Cr.P. art. 816 only allows the lesser included verdict of "not guilty by reason of insanity" when a criminal defendant enters the dual plea of "not guilty and not

guilty by reason of insanity."

Counsel's failure to object to such an erroneous instruction deprived Dixon of his Due Process right to a fair trial and a reliable verdict.

Any presumption of correctness of determinations made by the state court relevant to Dixon's ineffective assistance of counsel ground has been rebutted by clear and convincing evidence.[36]

Dixon objects to the "Standard of Review on the Merits." The posture of Dixon's ineffective assistance of counsel claims are distinguishable from *Price v. Vincent*, 538 U.S. 634, 641 (2003) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002))(brackets in original); and Bell v. Cone, 535 U.S. 685, 699 (2002). Dixon has not submitted any evidence outside the record to support the magistrate application of *Cullen v. Pinholser*, __U.S. __. 131 S.Ct. 1388, 1398 (2011).

Dixon objected to the magistrate application of the standards set forth in *Knowles v. Mirzayance*, 129 S.Ct. 1411, 556 U.S. 111 (U.S. 2009). In *Knowles*, the court found the Court of Appeals, applied an improper standard of review, "it blamed counsel for abandoning the NGI (insanity) claim because there was nothing to lose by pursuing it. Id. at 1417. The court found the court of appeal applied a legal rule that has not been squarely established by this court. "The court has never established anything akin to the Court of Appeals "nothing to lose" standard for evaluating *Strickland* claims." With no Supreme Court precedent established a "nothing to lose" standard for ineffective assistance of counsel claims, habeas relief cannot be granted pursuant to § 2254(d)(1) based on such a standard. In *Knowles* counsel made a strategic decision, with an understanding of the law and facts, to abandon the insanity defense during the penalty

36 See 28 U.S.C. § 2254 (e)(1).

phase of trial. There is nothing in the record to support that Dixon's counsel made a strategic decision based on a knowledge of the law and facts.

The only state court to rule on the claim was the trial court in denying the claim on Post Conviction Relief. The court improperly applied *Strickland* which requires a court to review counsels error. Instead the State trial court and the magistrate report "defended" counsel, by limited the review to what counsel did do. Rather, than reviewing the claim raised, as *Strickland* requires, reviewing whether there was "error" and "prejudice" upon reviewing the ineffective assistance claim.

Mr. Dixon's federal habeas petition raises serious doubts as to the validity of his convictions. No less than three expert witnesses testified that they did not believe Dixon was capable of distinguishing right from wrong at the time of the offense. Accordingly, jurists of reason would find the denial of Dixon's claims debatable. And, for the reasons outlined above, jurists of reason would find the correctness of the Magistrate Judge's recommendation debatable.

Question 3: Whether The District Court erred denying Mr. Dixon A Hearing, in Violation of the Fourteenth Amendment to the Constitution.

Mr. Dixon was denied due process by the denial of a hearing. He ask for a hearing at every level of litigation, setting forth the required fact pleading and was denied the opportunity to develop further factual support for his claims as it relates to PTSD and ineffective assistance of counsel. The failure to grant a hearing when one is essential to develop the facts fully and fairly is a denial of due process.[37] Due process requires that Mr. Dixon be afforded a fair opportunity to defend against the State's allegation.

37 *Hollingshed v. Wainwright*, 429 F.2d 1059 (5th Cir. 1970); *United States v. Henderson*, 19 F.3d 917 (5th Cir. 1994).

Under Title 28 U.S.C. § 2254(e)(2), an evidentiary hearing may be held at the discretion of the judge when the petitioner shows that a factual basis that could not have been previously discovered by exercise of due diligence and the facts underlying the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have convicted the petitioner.

PRO SE LITIGANT CONSIDERATION

Dixon prays the instant pleading be given the benefit of liberal construction, and that he not be held to the same stringent standards as an attorney.[38] Dixon should not be held to the same standard of review as formal attorneys.[39]

CONCLUSION

For these reasons and any others appearing to this honorable Court, Petitioner was entitled to a Certificate of Appealability.

The constitutional claims were not fully and fairly adjudicated and reasonable jurists would find the Court of Appeal's assessment of the constitutional claims debatable or wrong. Petitioner suggests he has presented questions of constitutional substance that adequately deserve encouragement to proceed further. 28 U.S.C.A.§2253(c)(2).

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38 *Register v. Thaler*, 681 F.3d 623, 628 (5th Cir. 2012).

39 See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam); *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam) (pro se complaints are entitled to liberal construction).

WHEREFORE the lower courts erred denying COA, this Honorable court may grant certiorari or remand to the U.S. Fifth Circuit for further proceedings.

Respectfully submitted on this 4th day of March, 2019.

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