ORIGINAL

No. 19-8547

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH D. BLUEFORD

(Petitioner) PRO'SE

vs.

TIMOTHY HOOPER, Warden, Elayn Hunt Correctional Center,

(Respondent)

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

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,
Joseph D. Blueford #393195
Joseph D. Blueford #393195
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QUESTION PRESENTED

Question 1: Does a petitioner have the right to a fair and impartial trial when a juror does not hear or understanding the evidence being provided?

Petitioner respectfully suggest this question is worthy of this Honorable Court's review.

U.S. Const. Amend Sixth. This clause has been interpreted to mean that a defendant is entitled to " a tribunal both impartial and mentally competent to afford a hearing. *Tanner v. United States*, 483 U.S. 107, 126 (1987) (quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) To satisfy this fundamental standard, jurors must be able to "conscientiously and property carry out their sworn duty to apply the law to the facts of the particular case." *Biagas v. Valentine*, No. 4:06-CV-0668, 2007 WL 1217976, at *7 (S.D. Tex. Apr. 23, 2007), aff'd, 265 F. App'x 166 (5th Cir. 2008) (quoting *Lockhart v. McCree*, 476 U.S. 162, 184 (1986); see *McIlwain v. United States*, 464 U.S. 972, 975 (1983)

Rule 10: Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reason the Court considers:
(a) United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort ; or has so far departed from the accepted and usual course of judicial proceeding , or sanctioned such a departure by a lower court, as to call for exercise of this Court's supervisory power;

U.S. Const. Amend Sixth. has been interpreted to mean that a defendant is entitled to " a tribunal both impartial and mentally competent to afford a hearing. To satisfy this fundamental standard, jurors must be able to "conscientiously and property carry out their sworn duty to apply the law to the facts of the particular case." The Supreme Court cannot say that the juror's inability to hear and understand substantial portion of the testimony was harmless beyond a reasonable doubt. Indeed, the failure of one juror to participate meaningfully cannot be justified on the basis that those jurors who did participate found the testimony to be credible. Hence, the juror's inability to hear denied the defendant the right to a fair trial and that the court abused its discretion in refusing to declare a mistrial or new trial. Moreover, a juror cannot be aware of what she cannot hear. Thus, the juror here could not participate in meaningful discussion during the deliberative stage of the trial nor decide the case intelligently. The effect of the juror's inability to hear the testimony was tantamount to the juror not being in attendance for more than one-third of the trial, thus denying the defendant the right to a jury of twelve.
(b) a state court of last resort has decided an important federal question in a way that conflict with the decision of another state court of last resort or of a United States court of appeals;. The state court along with the United States Fifth Circuit Court of Appeals failed to provide petitioner a fair and impartial trial.

Rule 24. Briefs on the Merits: In General

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with **Rules 33.1** and **34** and shall contain in the order here indicated:

(a) The questions presented for review under **Rule 14.1(a)**. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

The question before this Honorable Court is: Does a petitioner have the right to a fair and impartial trial when a juror does not hear or understand the evidence being provided?

U.S. Constitution Amendment Sixth along with the Fourteenth has been interpreted to mean that a defendant is entitled to "a tribunal both impartial and mentally competent to afford a hearing. To satisfy this fundamental standard, jurors must be able to "conscientiously and property carry out their sworn duty to apply the law to the facts of the particular case. The U.S. Fifth Court of Appeals has ruled in conflict with the interpretation of this Honorable Court. The Appellate Court cannot say that the juror's inability to hear and understand substantial portion of the testimony was harmless

beyond a reasonable doubt. Indeed, the failure of one juror to participate meaningfully cannot be justified on the basis that those jurors who did participate found the testimony to be credible. The juror's inability to hear and understand denied Joseph D. Blueford the right to a fair trial and that the court abused its discretion in refusing to declare a mistrial or new trial.

A juror cannot be aware of what she cannot hear or understand. The juror in the instant case could not participate in meaningful discussion during the deliberative stage of the trial nor decide the case intelligently. The effect of the juror's inability to hear and understand the testimony was tantamount to the juror not being in attendance for more than one-third of the trial, thus denying the Joseph D. Blueford the right to a jury of twelve. The State courts along with the U.S. Fifth Circuit Court of Appeals failed to provide a fair see that petitioner did not obtain a fair and impartial as required by law and by the Louisiana and United States Constitution.

Finally, Joseph D. Blueford would like to point out that the Magistrate Judge Karen L. Hayes of the United States Western District of Louisiana Court along with Judge Terry A. Doughty both agreed to grant and remand the matter back to the 4th Judicial District Court, Parish of Morehouse, for a new trial or for further proceedings not consistent therein. It was stated by Judge Terry A. Doughty in Blueford Certificate of Appealability that Blueford made a substantial showing of denial of a constitutional right. The reason of jurist has shown that Blueford claim is debatable or can even be

wrong. Blueford has shown (1) that reasonable jurist found this court's assessment of the constitutional claim debatable and wrong. (2) that reasonable jurist found claim debatable and that petition stated a valid claim of denial of a constitutional right and debatable whether this United States Fifth Circuit Court of Appeals was correct in its procedural ruling. *Slack v. Mc Daniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

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 subject of this petition is as follows:

Respondent for the State of Louisiana
Jerry L. Jones , District Attorney
400 St. John St. P.O, Box 1652
Monroe Louisiana 71210-1652

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

Joseph Blueford
Joseph Blueford

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Appendix C 10-16-18	U.S. Western District of Louisiana Magistrate Judge Karen L. Hayes under Docket 17-0639 recommended Petition for habeas corpus and granted and remanded to the 4th Judicial District Court, Parish of Morehouse, for a new trial or for further proceedings not inconsistent therein.
Appendix D 4-24-2017	Louisiana Supreme Court denied and his application for post conviction relief was considered untimely pursuant to La. S.Ct. R. X § 5 *State Ex rel Joseph D. Blueford v. State of Louisiana*, 217 So.3d 329; La. Lexis 842 No. 2017-KH-0356 (La. Apr. 24, 2017). \
Appendix E 12-8-2016	The Second Circuit Court of Appeals denied in the petitioner's application for Post conviction relief on December 8, 2016.
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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

OPINION BELOW

FEDERAL COURT RULINGS:

The opinion of the United States Fifth Circuit Court of Appeals appear at **Appendix A** to the petition and is unpublished. where petitioner was denied Certificate of Appealability under Docket No. 18-31169.

The opinion(s) of the United States District Court, Western District of Louisiana, which was granted, appears at **Appendix B** and is *Blueford v. Hopper*, 2018 U.S. Dist. Lexis 18771 (W.D. La. Nov. 1, 2018)
The opinion(s) of the United States District Court Western District of Louisiana U.S. Western District of Louisiana Magistrate Judge Karen L. Hayes which was granted, appears at **Appendix C** under Docket 17-0639 recommended Petition for habeas corpus and granted and remanded to the 4th Judicial District Court, Parish of Morehouse, for a new trial or for further proceedings not inconsistent therein.

STATE COURT RULINGS:

The opinion of the highest state court to review the merits appear at **Appendix D** of petition it appears that petitioner was denied and his application for post conviction relief was considered untimely pursuant to La. S.Ct. R. X § 5 *State Ex rel Joseph D. Blueford v. State of Louisiana*, 217 So.3d 329; La. Lexis 842 No. 2017-KH-0356 (La. Apr. 24, 2017).

The opinion of the state appellate court to review the merits appears at **Appendix E** of the petition and is unpublished. Petitioner was denied in the Second Circuit Court of Appeals on December 8, 2016.

The opinion of the state district court to review the merits appears at **Appendix F** of the petition and is unpublished. Petitioner was denied post conviction relief on August 26, 2016 under Docket No. 12-467F & 11-14F.

JURISDICTION

The Court had jurisdiction under **28 U.S.C. § 1254**. The decision under review from the United States Court of Appeals from the Fifth Circuit is an Order rendered on January 14, 2020 affirming the U.S. District Court's denial of Petitioner's Petition for Habeas Relief. The instant Petition is timely filed. The jurisdiction of this court is invoked under **28 U.S.C.A. § 1651**, and **US.C.A. §1254(1)**.

The U.S. Western District Court granted petitioner's Application for Certificate of Appealability on November 5, 2019 in case No: 3:17-CV-00639. The U.S. Western District Court's order denying Petitioner's Petition for Habeas Corpus was affirmed by the United States Fifth Circuit on January 14, 2020. The United States Fifth Circuit's judgment is reported at **Appendix A** at Doc No: 18-31169 The United States Fifth Circuit's Opinion affirmed Petitioner's conviction and sentence is reported at **Appendix A**.

The jurisdiction of this court is further invoked under **28 U.S.C.A. § 1651, 28 U.S.C.A. §1257(a) U.S.C.A. Const. Art. 3 § 2 cl.2; Supreme Court Rule 10, 17.1(b), 22, 24** and;

(a) The Supreme Court and all courts established by Acts of Congress may issue all Writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative Writ or rule nisi may be issued by a justice or judge of Court which has jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> The Sixth Amendment to the Constitution of the United States provides: 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** provide in pertinent part:
>
> No state shall make or enforce any law which shall abridge the privileges or immunities of citizen 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

By bill of information filed March 1, 2011, in the 4th Judicial District Court, Morehouse Parish, the State of Louisiana charged Joseph Blueford with two counts of attempted second degree murder. On June 14, 2011, a third count, possession of a firearm by a convicted felon, was added to that bill. Trial began March 19, 2013 and concluded on March 22, 2013. The jury found Blueford guilty of (1)

aggravated battery as to count one; (2) not guilty as to count two; and (3) guilty as charged as to count three. The State subsequently filed a habitual offender bill of information, which was heard on March 5, 2013. Following a sentencing hearing March 7, 2013, the trial court, the Honorable C. W. Manning, Judge adjudicated Joseph a fourth felony offender and sentenced him to life imprisonment as to count one and sixty five years as to count three. A motion to reconsider sentence was filed and denied March 14, 2013. A Motion for appeal was timely filed; and, the Louisiana Appellate Project, Mrs. Peggy Sullivan, P. O. Box 2806 Monroe, La. 71207-2806 was appointed to represent Joseph. On October 7, 2014 appeal counsel filed the appeal in this matter under Docket number 2011-14 F. the court granted Mr. Blueford until January 21, 2014 to file his supplement.

Mr. Blueford's timely filed a supplemental appeal, No. 2012-467 F. The Court of Appeals, Second Circuit affirmed the conviction and sentence in *State v. Blueford*, 48,823 (La.App. 2d Cir. 03/05/14), 137 So.3d 54, writ denied, 14-0745 (La. 11/21/14), 160 So.3d 968, cert. denied, U.S., 135 S. Ct. 1900, 191 L. Ed. 2d 770, (April 27, 2015).

Mr. Blueford filed his Application for Post Conviction Relief in the district court on April 8, 2016, the same was denied on October 29, 2016. Petitioner mailed his Rule 4-2 Notice of Intent to file writs and asked the court to set a return date, and for a 20 day extension of time. (See attached Motion). The district court adopted the States Answer which the state did not serve on petitioner. Therefore, petitioner was denied the opportunity to rebut the unfounded conclusory allegation suggested by the ruling. And given the factual disputes raised in the APCR the court erred in not allowing an evidentiary hearing to present evidence and respond to these disputes.

Blueford timely sought writ with The Court of Appeal for the Second Circuit of Louisiana which denied relief on December 8, 2016. Because of the August floods in the State of Louisiana, Mr. Blueford was transferred to the Louisiana State Prison at Angola, he subsequently was transferred back to Hunt Correctional Center. Unfortunately while in the process of being transferred the December 8,

2016 decision was not received by him until January 26, 2017, the date he signed for legal mail with the institution. (See Exhibit #3 copy of envelope and decision of the Second Circuit Court of Appeal). According to the rules of court, it was the fault of the State Prison System for giving Blueford the Court of Appeals decision late. Blueford contends the limitations period should not start until January 26, 2017, the date on which an alleged state-imposed impediment to filing his writ of certiorari was removed. Blueford now seeks writs with this Honorable State Supreme Court of Louisiana to review the lower courts decision and reverse the ruling issued below.

An application for writ of habeas corpus **§ 2254** was filed with copies of writs and mail receipts demonstrating timeliness. Petitioner raised the following claims in his **§ 2254** petition and forward the claims and arguments by reference herein.

> (1) Counsel was ineffective when he failed to object to Ms. Massey remaining on the jury and returning a verdict when she had not heard or understood the evidence, in violation of the **Fifth, Sixth** and **Fourteenth Amendment** and **Article 1 Section 13 of the La. Constitution**; and
>
> (2) Counsel was ineffective in failing to file a motion to quash the Habitual Offender Bill of Information on the grounds that it contains allegations of irrelevant convictions, and failed to object to their inclusion and consideration at the HFC hearing, in violation of the **Fifth, Sixth** and **Fourteenth Amendments** and **Article 1 Section 13** of the La. Constitution.

(ii) STATEMENT OF FACTS

It is New Year's Day, 2011, at the Townhouse Club in Bastrop, Louisiana. Joseph Blueford steps outside as the club closes. Lying in wait for him is Mark Ramey. Mark attacks Joseph. The two tussle. The crowd outside watches. Someone breaks up the fight. Joseph and his friend Bobby Mays break loose as the fracas begins anew. They make it to Joseph's truck. With people coming at them from all directions, shots are fired out the passenger's side window. (Vol. IV. pp. 833-835). two people are shot; Rosahonda Vance, in the upper thigh; and Maurice Pitts, in the hand (Vol. III p. 691).

Roshaonda Vance testifies at trial she saw Joseph Blueford shoot her. (Vol. III p. 736). Shekeva King, who was with Roshonda, also testifies Joseph Blueford was the shooter. (Vol. III p. 705). Both

deny seeing anyone else in the truck with Joseph. (Vol. III pp. 757, 759, 764). Joseph testifies Bobby Mays was with him in the truck and fired out the passenger side window. (Vol. III pp. 835, 847).

Bobby Mays gets out of the truck immediately after firing the shots. (Vol. IV. p. 835). Joseph goes straight to the Bastrop Police Department to report the shooting. He is turned away and told to go to the Morehouse Parish Sheriff's Office (MPSO). (Vol. IV. p. 835-36). He goes to the MPSO, but again is turned away without anyone taking a report. Shortly after leaving the Sheriff's Office, Joseph is stopped by a sheriff's deputy who had seen a BOLO for Joseph's vehicle. When detectives searched his vehicle, they found a spent shell casing. (Vol. IV. p. 767).

iii) REASONS FOR GRANTING THE PETITION

The Supreme Court should grant this petition according to *Witherspoon v. Illiniois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

> The right to an 'impartial' jury is guaranteed by the Louisiana Constitution of 1974 and the Sixth Amendment of the United States Constitution applied to the states through the Due Process Clause of the Fourteenth Amendment. Thus, the minimal standards of constitutional due process guarantees to the criminally accused a fair trial by a panel of impartial and 'indifferent' jurors. A fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623,625, 99 L.Ed 942 (1955).

Also the Supreme Court should grant this petition because in this state of the record, we cannot say that the juror's inability to hear and understand substantial portion of the testimony was harmless beyond a reasonable doubt. Indeed, the failure of one juror to participate meaningfully cannot be justified on the basis that those jurors who did participate found the testimony to be credible. Hence, the juror's inability to hear denied the defendant the right to a fair trial and that the court abused its discretion in refusing to declare a mistrial or new trial. Moreover, a juror cannot be aware of what she cannot hear. Thus, the juror here could not participate in meaningful discussion during the deliberative stage of the trial nor decide the case intelligently. The effect of the juror's inability to hear the testimony

was tantamount to the juror not being in attendance for more than one-third of the trial, thus denying the defendant the right to a jury of twelve.

APPEALABLE QUESTIONS

Question 1: Does a petitioner have the right to a fair and impartial trial when a juror does not hear or understanding the evidence being provided by the Court?

DOES A PETITIONER HAVE THE RIGHT TO A FAIR AND IMPARTIAL TRIAL WHEN A JUROR DOES NOT HEAR OR UNDERSTANDING THE EVIDENCE BEING PROVIDED BY THE COURT?

I. Introduction – Juror Massey's Condition During Trial and Deliberation Versus Her Conduct During *Voir Dire* and the Trial.

The District Court committed clear error in finding that Mr. "Blueford failed to prove that Massey could not hear the proceedings in order to overcome the trial judge's specific factual finding that there was no indication during the trial that Massey had difficultly hearing or understanding the proceedings. "ROA.425. The Louisiana state courts have never determined, on direct appeal or in post conviction proceeding, whether Juror Massey could hear or understand the evidence at Mr. Blueford's trial. Instead, much like the District Court, the State courts erred by focusing on Juror Massey's conduct during *voir dire* and the trial and by ignoring/failing to investigate her condition during the trial and during deliberations.

Mr. Britton ineffectively represented Mr. Blueford, and the State courts erred – in a manner that was contrary to, or involved an unreasonable application of, clearly established Federal law. There was a complete lack of investigation into Juror Massey's condition during the trial and during deliberations – her inability to hear or to understand any of the evidence at trial – by Mr. Britton and the Louisiana courts. Juror Massey's condition during trial and during deliberations was not challenged with investigation or developed with evidence; rather, it was met with cursory and/or uncorroborated observations of her – conduct during *voir dire* and the trial. Therefore, the only evidence regarding

Juror Massey's condiction after Mr. Blueford's trial started is the note from the jury that stated she had not heard or understood anything during the trial.

Moreover, the District Court erred when it rejected the Report and Recommendation of Magistrate Judge Hayes that the State's habeas decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." ROA.425. The District Court found that the state courts reasonably could have concluded that Mr. Britton made a strategic choice. However, the District Court's decision is flawed because Mr. Britton's failure to investigate Juror Massey's condition prevented Mr. Britton from having a factual basis or a foundation of factual knowledge on which to make a reasonable decision based on his legal knowledge and expertise. The Sixth Amendment which applies to the States through the Due Process Clause of the Fourteenth Amendment, provide in 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," **U.S. Const. Amend Sixth**. This clause has been interpreted to mean that a defendant is entitled to "a tribunal both impartial and mentally competent to afford a hearing. *Tanner v. United States*, 483 U.S. 107, 126 (1987) (quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) To satisfy this fundamental standard, jurors must be able to "conscientiously and property carry out their sworn duty to apply the law to the facts of the particular case." *Biagas v. Valentine*, No. 4:06-CV-0668, 2007 WL 1217976, at *7 (S.D. Tex. Apr. 23, 2007), aff'd, 265 F. App'x 166 (5th Cir. 2008) (quoting *Lockhart v. McCree*, 476 U.S. 162, 184 (1986); see *McIlwain v. United States*, 464 U.S. 972, 975 (1983)

The State courts could not have reasonably determined that Mr. Britton made a reasoned decision to keep Juror Massey on Mr. Blueford's jury because Mr. Britton failed to investigate, through any means, including, but not necessarily limited to, an available evidentiary hearing that would have been mandatory if requested by Mr. Britton and would have established whether Juror Massey had heard or understood any of the evidence at Mr. Blueford's trial.

The District Court correctly found that Defense counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallenged. Moreover, the District Court correctly noted that this Court has explained that counsel is afforded particular leeway where a potential strategy carries "double-edged" consequences.

However, while the District Court, the State, and Mr. Britton point out that Mr. Britton made decisions based on the admittedly "doubled-edged" consequences of removing Juror Massey, the District Court, the State and Mr. Britton overlooked or undervalued the fact that virtually unchallengable difference is afforded to Defense counsel's strategic choice *only when* they have been made after thorough investigation of law and facts relevant to plausible options.

In the instant matter, Mr. Britton failed to undertake *a thorough investigation of law and facts relevant to plausible options; rather, he undertook no investigation at* ***all***.

That is, Mr. Britton was ineffective when he failed to request that the State trial court hold a hearing as to Juror Massey, who had not heard or understood anything that went on at trial. Due Process "protect a defendant from jurors who are incapable of rendering an impartial verdict. Such as when a juror is insane or biased against the defendant. *Peters v. Kiff*, 407 U.S. 493, 501-02 (1972) Like wise, a physical infirmity, such as a hearing impairment, can render a juror incompetent to serve on jury. See *Gov't of Virgin Islands v. Nicholas*, 759 F.2d 1073, 1078 (3rd Cir. 1985)(noting a juror could be incapable of rendering satisfactory jury service" if unable to hear the trial proceedings); see. e.g. *United States v. Leahy*, 82 F.3d 624, 629 (5th Cir. 1996) (district court removed a hearing impaired juror after jury deliberations had begun because he "had not heard significant amounts of testimony and could not participate in deliberations") *United States v. Quiroz-Cortez*, 960 F.2d 418, 419 (5th Cir. 1992) (After jury deliberation had begun, district court excused a hard of hearing juror who may not have heard all of the trial testimony); *United States v. L'Hoste*, 609 F.2d 796, 801 n.4 (5th Cir. 1980) Prior to jury deliberations, the district court disqualified a juror as incompetent after concluding "she had a hearing impairment and had not heard portion of the testimony").

Further, state courts have found that juror's inability to hear or comprehend testimony can

infringe upon a defendant's **Sixth Amendment** right. *People v. Trevino*, 826 P.2d 399, 401 (Colo App. 1991)(the effect of one juror's inability to hear testimony during trial denied defendant "the right to a jury of twelve") The presence of a juror with a physical impairment of such magnitude as to interfere with the juror's ability to hear and understand the presented testimony and evidence precludes a verdict by all jurors.

"It is clearly established that the Supreme Court views the denial of the right to an impartial decision-maker to be such an error that taints any resulting conviction with constitutional infirmity." *Virgil v. Dretke*, 446 F.3d 598, 607 (5th Cir. 2006).

The State previously argued, before the State courts and before District Court, that Mr. Britton took a gamble on Juror Massey because of her prior jury service, wherein a defendant was acquitted. However, without inquiring as to Juror Massey's inability to hear or to understand any testimony or evidence, Mr. Britton lacked sufficient knowledge to form an intelligent and reasonable basis to make a strategic decision as to whether Juror Massey's past experience would benefit Mr. Blueford given her then current inability to hear or to understand testimony.

Similarly, the State trial court erred – in a manner that was contrary to, or involve an unreasonable application of, clearly established Federal law – when it failed to undertake any action to investigate or to develop evidence regarding the condition of Juror Massey during the trial and during deliberations and instead focused on her conduct during *voir dire* and the trial.

II. STATE COURT PROCEEDINGS

The District Court Judge correctly set forth the State Court Proceedings. Accordingly, the following is taken verbatim from the District Court's Ruling, ROA.490-13.[1]

"Blueford was charged in the Fourth Judicial District Court, Morehouse Parish, Louisiana, with two counts of attempted second degree murder, a violation of La. R.S. 14:27 and 14:30.1, and

1 Citation to the ROA. Will be made in footnotes added to the quoted lenguage by the District Court. There were no footnotes in the original quoted lenguage.

possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1.[2]

Blueford was tried by a jury in March 2012. Blueford was represented by George W. Britton, III ('Britton'). The prosecutor was Stephen Sylvester ('Sylvester'). At the conclusion of trial, the Judge provided jury instructions, directed the jury to retire, and excused the two alternate jurors. After a recess, the court reconvened, and the following exchange occurred:

Court: Let's return to the record in the State v. Joseph Blueford, 11-14F. The defendant is present with counsel. The state is also present. Madam Bailiff has handed me a note from the jury. It reads: "Your Honor, a juror Ms. Massey has said that she has not heard and has not understood anything that was said in trial and she is wondering what to do. Shouldn't you have an alternative juror?" That is the question.

Mr. Sylvester: Too late for that.

Mr. Britton: We cannot have an alternate juror.

Mr. Sylvester: That's right.

Court: The last question is should Ms. Massey be excused or allowed to go on with deliberations?

Mr. Britton: I mean, I don't know. If they have ten, they have ten verdicts, regardless of what Ms. Massey has to say. So I don't think she should be excused. But if they don't have a verdict, they don't have a verdict, you know, whichever Ms. Massey goes.

Court: So at this time it would be the pleasure of the counsel not to excuse her from any jury deliberations?

Mr. Britton: That's right.

Mr. Sylvester: Yes, sir.

Court: All right.

Mr. Britton: I think if we look at it this way in terms of the jury, we go in that courtroom and talk and talk to a witness, there should be a speaker behind the jury box or something like that.

Court: I would like to explain to them that once the deliberations start, the

2 ROA. 1635

jury – alternates are dismissed.

The jury was brought back into the courtroom

> Court: Members of the jury, before the proceedings, a note was submitted to the bailiff. The note reads: "Your Honor, the juror Ms. Massey said she has not heard and does not understand anything that's been said in the trial. She doesn't know what to do. Should we have an alternative juror?" Let me advise you that under the Code of Criminal Procedure once the jury begins jury deliberations, the two alternatives are excused. I'd also like to remind you that the provisions or charge still say that at least ten of you must agree on the same verdict on each count. It requires ten of the twelve agreeing on each count. So that is my response to you. Don't know how may we addressed everyone here and asked them to repeat, and at no time was there any indication that Ms. Massey was having a problem. So, I'd encourage you to go back and resume your deliberations.

The jury was then retired from the courtroom for further deliberations, with Ms. Massey ('Massey') included. [Doc. No. 16-2 at 1158-60][3]; *Blueford*, 137 So.3d at 66.[4]

The jury acquitted Blueford on one count of attempted murder by a vote of 10-2. On the second count of attempted murder, it convicted him of the responsive verdict of aggravated battery by a vote of 10-2. The jury also convicted Blueford of the possession of a firearm by a convicted felon count by a vote of 11-1. Ms. Massey voted with the majority on all three ballots. Blueford, 137 So.3d at 67.[5]

After the state filed a habeas offender bill, the district court found that Blueford was a fourth-felony offender and sentenced him to serve a life sentence at hard labor for aggravated battery and a concurrent 65-years hard labor term, without parole, for possession of a firearm by a convicted felon.[6]

Blueford's conviction was affirmed on direct appeal by the Louisiana Second Court of Appeal on March 5, 2014. *Blueford*, 137 So.3d 54.[7] The Louisiana Supreme Court denied Blueford's subsequent application for writ of certiorari on November 21, 2014; *State v. Blueford*, 2014-0745, 160 So.3d 968 (La. 11/21/14).[8]

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3 ROA. 1388-90.
4 ROA. 1634-62.
5 ROA. 1635, 1657.
6 ROA. 1635.
7 ROA. 1634-62, esp. 1655-61 (finding the issue with Juror Massey had been waived and noting that the matter could be further developed in post conviction relief).
8 ROA. 1702 (The written review of the application was limited to the word, Denied.")

On April 8, 2016, Blueford filed an application for post-conviction relief in the state district court.[9] He alleged he was denied effective assistance of counsel when his trial counsel, Britton, (1) failed to object to Massey remaining on the jury and returned a verdict when she said she had not heard or understood the evidence; and (2) failed to file a Motion to Quash the Habitual Offender Bill of Information on grounds that it contained allegations of irrelevant convictions, and failed to object to the inclusion and consideration of such convictions at the habitual offender hearing. Blueford also claimed that the trial court erred when it permitted Massey to cast the deciding vote on guilty after admitting she did not hear and did not understand any of the testimony. [Doc. No. 16-5 at 1473-1504].[10]

The state district court denied the application on August 29, 2016.[11] The district court incorporated the State's Objection to Petitioner's Application for Post-Conviction Relief in its Reasons for Judgment and denied Blueford's claim of ineffective assistance of counsel on the basis that (1) "[a]t the outset of voir dire the Court specifically directed the venire that they should inform the Court if they did not hear a question or response so that it could be repeated"; (2) no member of the venire indicated she or he was incapable of serving on the jury because of a mental or physical infirmity; (3) there was no indication during the trial that Massey had difficulty hearing or understanding the proceedings; (4) "Mr. Britton is a seasoned criminal defense attorney who zealously and competently represented [Blueford] at all stages of trial;" (5) Mr. Britton knew from voir dire that Massey had previously served on another criminal jury; and (6) after consulting with Blueford, Mr. Britton "made the strategic decision to allow deliberations to proceed without objection," which was a "reasonable tactical decision. [Doc. No. 16-5 at 1507]"[12]

The Second Circuit Court of Appeal denied Blueford's application on December 8, 2016.[13] On

9 ROA. 1703-34.
10 ROA. 1703-34.
11 ROA. 1735-38.
12 ROA. 1737.
13 ROA. 1773 (The writ was denied "[o]n the showing made," without analysis.)

February 1, 2017, Blueford filed a writ application in the Louisiana Supreme Court, which the court denied as untimely on April 24, 2017."[14]

III. ACTION OF THE TRIAL COURT

The District Court correctly set forth the proceedings of the federal Trial Court. Accordingly, the following is taken verbatim from the District Court's Ruling, ROA. 413-15.[15]

"On May 15, 2017, Blueford filed the instant federal habeas corpus petition raising the same claims as in the state court:

Claim One:	Petitioner was denied effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 13 of the Louisiana Constitution when counsel
(1)	Failed to object to Ms. Massey remaining on the jury and returning a verdict when she said she had not heard or understood the evidence; and
(2)	Failed to file a Motion to Quash the Habitual Offender Bill of Information on grounds that it contained allegations of irrelevant convictions, and failed to object to their inclusion and consideration at the habitual offender hearing.
Claim Two:	The trial court erred when it permitted a juror to cast the deciding vote on guilty after admitting she did not hear and did not understand any of the testimony, in violation of the right to a fair trial and due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Louisiana Constitution.

[Doc. Nos. 1-2, 5].[16]

The State filed its response on March 14, 2018, [Doc. Nos. 15, 16],[17] in which it submitted that Blueford has exhausted his state court remedies and argued the Blueford had no substantive grounds to

14 ROA. 1807-08.
15 Citations to the ROA. Will be made in footnotes to the quoted lenguage by the District Court.
16 ROA. 7-181, 208-24, 237-48.
17 ROA. 260-79, 505-1808.

support his Petition. [Doc. No. 15 at 4].[18] On March 26, 2018, Blueford filed a reply. [Doc. No. 17].[19]

On August 28, 2018, the Magistrate Judge held an evidentiary hearing on the issue of juror competence, with testimony from Blueford, Britton, Sylvester, and a member of the petitioner jury from Petitioner's trial.[20] Britton explained his decision to have Ms. Massey remain on the jury:

> [I]t seemed from my perspective improbable that she didn't hear anything. We had a voir dire process. She was questioned during the voir dire process.
>
> It appeared, from the words of the particular message, to be an effort to get her off the jury from the foreman – from the foreman's perspective. Because, like I said, we had with a little voir dire. I asked questions of each on of the potential jurors. Mr. Sylvester had questioned each one of the prospective juror. And the foreman note suggested to me that that was an effort to get her off the jury.

[Doc. No. 34,p 9-10].[21]

> And she was a juror that was, in terms of my experience with a jury appeared to be good juror.
>
> . . . . .
>
> Based on her answers in voir dire, based upon, you know, gut reaction, gut feelings of any attorney, I thought she was a good juror.

[Doc. No. 34, p. 13].[22]

> My recollection is during the general course of voir dire, there were questions generally asked have you ever served on a jury before?
>
> And my recollection, she had served, and it was not guilty on that.

18 ROA. 263.
19 ROA. 280-89.
20 ROA. 433-502.
21 ROA. 441-42.
22 ROA. 445.

[Doc. No. 34,p.24].[23]

> In terms of if everybody that says that were found not guilty, I'm going to try to put them on the jury, that's not a hard-and-fast rule. It depends on how they respond to other questions and a totality of the situation, ultimately gives me some type of grade as to how strongly should the jury is and how likely that juror is to be receptive to my case.

[Doc. No. 34, p.25].[24]

> [F]rom the wording on the note, it appeared the foreman was trying to get rid of Ms. Massey. And it wasn't like it was done a note that came from Ms. Massey. It was the note came from the foreman saying that she didn't hear anything.

[Doc. No. 34,p.29].[25]

> This is the foreman speaking to Ms. Massey, worded in a way that would suggest to me that he wants an alternative to be sent in to be on a jury.

[Doc. No. 24,p. 34].[26]

> [S]he was one of the higher-rated [] jurors.

[Doc. No. 34, p.34-35].[27]

When asked why he didn't ask for a mistrial, Britton responded:

> I guess, based upon my recollection and particular transcript, I would say that whether we could get a mistrial, would it effect a mistrial, I felt the trial had gone fairly well at that particular point in time. I felt like, you know, we were going to get not guilty verdict in terms – that's just me, you know, projecting in terms of how the trial was going.

[Doc No. 34, p.32].[28]

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23 ROA. 456.
24 ROA. 457.
25 ROA. 461.
26 ROA. 466.
27 ROA. 466-67.
28 ROA. 464.

As indicated above, the jury found Blueford not guilty on one count of attempted second degree murder, and guilty of only a responsive verdict of aggravated battery on the other count of attempted second degree murder.

On October 16, 2018, the Magistrate Judge filed her Report and Recommendation [Doc No. 33].[29] The delay for filing objections has passed, and the matter is ripe." ROA. 413-15.

On November 1, 2018, the District Court, after "conduct[ing] a de novo review of the record in this matter," declined to adopt the report and recommendation "insofar as it recommended that the Petitioner be granted on the two grounds set forth above." ROA. 408-26, esp. 409. However, the District Court, then, adopted "the Report and Recommendation insofar as it recommends that the petitioner be denied as to the asserted grounds pertaining to his counsel's failure to file a Motion to Quash the Habitual Offender Bill of Information." *Id.*

On November 1, 2018, Mr. Blueford filed a notice of appeal. ROA. 428-29.

On November 5, 2018, the District Court granted a certificate of Appealability. ROA. 431.

SUMMARY OF THE ARGUMENT

III. The District Judge committed clear error in finding that Mr. "Blueford failed to prove that Massey could not hear the proceedings in order to overcome the trial judge's specific factual finding that there was no indication during the trial that Massey had difficulty hearing or understanding the proceedings." ROA. 425. The Louisiana proceedings, whether Jury Massey could hear or understand the evidence at Mr. Blueford's trial. Instead, much like the District Court, the State courts erred by focusing on Juror Massey's conduct during voir dire and the trial and by ignoring/failing to investigate her conduct during the trial and during deliberations.

Mr. Britton ineffectively represented Mr. Blueford, and the State trial courts erred-in an manner that was contrary to, or involved an unreasonable application of , clearly established Federal law. There

29 ROA. 386-407.

was a complete lack of investigation into Juror Massey's conduct during the trial and during deliberations-her inability to hear or to understand any of the evidence at trial-by Mr. Britton and the Louisiana courts. Juror Massey's conduct during trial and during deliberations was not challenged with investigation or developed with evidence; rather, it was met with cursory and/or uncorroborated observations of her conduct during voir dire and the trial. Therefore, the only evidence regarding Juror Massey's conduct after Mr. Blueford's trial started is the note from the jury that she had not heard or understood anything during the trial.

Moreover, the District Court erred when it rejected the Report and Recommendation of the Magistrate Judge Hayes that the State's habeas decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." ROA. 425. The District Court found that the state courts reasonably could have have concluded that Mr. Britton made a strategic choice. However, the District Court's decision is flawed because Mr. Britton's failure to investigate Juror Massey's conduct prevented Mr. Britton from having a factual basis or a foundation of factual knowledge on which to make a reasoned decision based on his legal knowledge and expertise.

The State courts could not have reasonably determined that Mr. Britton made a reasoned decision to keep Juror Massey on Mr. Blueford's jury because Mr. Britton failed to investigate, through any means, including, but not necessarily limited to, an available evidentiary hearing that would have been mandatory if requested by Mr. Britton and would have established whether Juror Massey had heard or understood any of the evidence at Mr. Blueford's trial.

The District Court correctly found that Defense counsel's strategic choice made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable. Moreover, the District Court correctly noted that this Court has explained that counsel is afforded particular leeway where a potential strategy carries "double-edged" consequences of removing Juror Massey, the District Court, the State , and Mr. Britton overlooked or undervalued the fact that virtually unchallengable defense is afforded to Defense counsel's strategic choice *only when* they have been made after thorough investigation of law and facts relevant to plausible options.

In the instant matter, Mr. Britton failed to undertake *a thorough investigation of law and facts*

relevant to plausible options; rather, he undertook no investigation at ***all***. This is, Mr. Britton was ineffective when he failed to request that the State trial court hold a hearing as to Juror Massey, who had not heard or understood anything that went on at the trial.

The State previously argued, before the State courts and before the District Court, that Mr. Britton took a gamble on Juror Massey because of her prior jury services, wherein a defendant was acquitted. However, without inquiring as to juror Massey's inability to hear or understand any testimony or evidence, Mr. Britton lacked sufficient knowledge to form an intelligent and reasonable basis to make a strategic decision as to whether Juror Massey's past experiences would benefit Mr. Blueford given her current inability to hear or to understand testimony.

Similarly, the State trial court erred-in a manner that was contrary to, or involved an unreasonable application of, clearly established Federal law-when it failed to undertake any action to investigate or to develop evidence regarding the condition of Juror Massey during the trial and during deliberations and instead focused on her conduct during voir dire and the trial.

ARGUMENT

I. STANDARD OF REVIEW

In *Poree v. Collins*, 866 F.3d 235, 244-45 (5th Cir. 2017), this Court recognized that it "review[s] the district court's findings of fact for clear error and review its conclusion of law de novo, applying that same standard or review to the state court's decision as district court." That is, this Court, "[w]hen examining mixed question of law and fact,. . . adhere[s] to a de novo standard under which we independently apply to the facts found by the district court, as long as the district court's factual findings are not clearly erroneous." 866 F.3d at 245 (internal quotation marks, citations, and footnote omitted). Further, the Poree court stated "[f]ederal habeas proceedings are subject to the rules prescribed by the Antiterrorism and Effective Death Penalty Act (AEDPA)," which "Directs that a writ of habeas corpus shall not be granted unless the state court adjudication of the claim:" "(1) resulted in a

decision that was contrary to, or involved an unreasonable application of , clearly established Federal law, as determined by the Supreme Court of the United States; or" "(2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 866 F.3d at 245 (internal quotation marks, citations, and footnote omitted).

> II. The District Court committed clear error in finding that Mr. "Blueford failed to prove that Massey could not hear the proceedings in order to overcome the trial judge's specific factual finding that there was no indication during the trial that Massey had difficulty hearing or understanding the proceedings," ROA. 425, by focusing on Juror Massey's conduct during voir dire and trial rather than her condition during trial and deliberation.

The District Court committed clear error in finding that Mr. "Blueford failed to prove that Massey could not hear the proceedings in order to overcome the trial judge's specific factual finding that there was no indication during the trial that Massey had difficultly hearing or understanding the proceedings." ROA. 425. The Louisiana state courts have never determined, on direct appeal or in post conviction proceedings, whether Juror Massey could hear or understand the evidence at Mr. Blueford's trial. Instead, much like the District Court, the State courts erred by focusing on Juror Massey's conduct during voir dire and the trial and/or by ignoring/failing to investigate her conduct during the trial and during deliberations.

Mr. Britton ineffectively represented Mr. Blueford when he completely failed to investigate Juror Massey's condition during the trial and during deliberations-her inability to hear or to understand any of the evidence at trial. Juror Massey's condition during trial during deliberations was challenged with investigation or developed with evidence; rather, it was just meet with cursory and/or uncorroborated observations of her conduct during voir dire and the trial. Therefore, the only evidence regarding juror Massey's condition after Mr. Blueford's trial started is the note from the jury that she had not heard or understood anything during the trial. Given the fundamental nature of a defendant's right to a trial by an impartial and competent jury, the result in case is unreliable. "Our criminal justice

system is predicated on the notion that those accused of criminal offenses are innocent until proven guilty and are entitled to a jury pf persons willing and able to consider fairly the evidence presented in order to reach a determination of guilt or innocence." Blueford was denied these basic rights.

As the Magistrate Judge found in her Report and Recommendation, "After receiving the foreman's note indicating that Ms. Massey had not heard or understood anything that was during the trial, the court briefly conferred with the prosecutor and defense counsel. Mr. Sylvester and Mr. Britton agreed it was too late to replace Ms. Massey with an alternate juror, and Mr. Britton, without consulting his client, informed the court he did not want to excuse Ms. Massey. Mr. Britton did not challenge Ms. Massey's remaining on the jury, move for a mistrial request an evidentiary hearing, or consult with his client regarding any of these possible responses to Ms. Massey's revelation. Blue ford was prejudiced by the presence of Ms. Massey, an incompetent juror, in violation of the **Sixth** and **Fourteenth Amendments**, and the state court's decision to the contrary is unreasonable application of clearly established federal law. The trial court brought the jury back into the courtroom, informed them that there was no indication that Ms. Massey had been having any problems during the trial and the jury needed only ten jurors to agree on a verdict, and sent all of the jury members, including Ms. Massey, back to resume deliberations." ROA. 398-99. As Magistrate Judge Hayes found, the State trial court "did not hold, and Mr. Britton did not request, a hearing to determine whether Ms. Massey was actually unable to hear or understand the evidence. Therefore, the trial court made no factual findings to support the implied conclusion that Ms. Massey was competent." ROA 399.

Thus, the District Court committed clear error in finding that Mr. "Blueford failed to prove that Massey could not hear the proceedings in order to overcome the trial judge's specific factual finding that there was no indication during the trial that Massey had difficultly hearing or understanding the proceedings," ROA. 425, by focusing on Juror Massey's conduct during voir dire and the trial rather then her condition during trial and deliberation.

III. The District Court Erred When it Rejected the Report and Recommendation of Magistrate Judge Karen L. Hayes That the State's Habeas Decision "Was Established Federal Law." ROA. 425.

The District Court found that the state courts reasonably could have concluded that Mr. Britton made a strategic choice to keep Juror Massey on the juror. ROA. 425. However, the District Court's decision is flowed because Mr. Britton's failure to investigate Juror Massey's conduct prevented Mr. Britton from having a factual basis or a foundation of factual knowledge on which to make a reasoned decision based on his legal knowledge and expertise.

The State courts could not have reasonably determined that Mr. Britton made a reasonable decision to keep Juror Massey on Mr. Blueford's jury because Mr. Britton failed to investigate, through any means, including, but not necessarily limited to, an available evidentiary hearing that would have been mandatory if requested by Mr. Britton and would have established whether Juror Massey had heard or understood any of the evidence at Mr. Blueford's trial. See *State v. Colbert,* 2007-0947, p. 22 (La.App.4th Cir. 7/23/08), 990 So.2d 76, 90 (citing State v. Fuller, 454 So.2d 119, 123 (La. 1984)).

The District Court correctly found that Defense counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable. See *Rhoades v. Davis*, 852 F.3d 422, 434 (5th Cir. 2017); *Wiggins v. Smith*, 539 U.S. 510,523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Moreover, the District Court correctly noted that this Court has explained that counsel is afforded particular leeway where a potential strategy carries "double-edged" consequences. See *Aubin v. Quarterman*, 470 F.3d 1096, 1103 (5th Cir. 2006); *Rompilla v. Beard,* 545 U.S. 374,162 L.Ed. 2d 360, 125 S. Ct. 2456.

However, while the District Court, the State and Mr. Britton point out that Mr. Britton made decisions based on the admittedly "double-edged" consequences of removing Juror Massey, the District Court, the State, and Mr. Britton overlooked or undervalued the fact that virtually unchallengable deference is afforded to Defense counsel's strategic choice only when they have been made after

investigation of law and facts relevant to plausible options. *Rhoades*, 852 F.3d at 434.

In the instant matter, Mr. Britton failed to undertake *a thorough investigation of law and facts relevant to plausible options; rather, he undertook no investigation at all*. That is, Mr. Britton was ineffective when he failed to request that the State trial court hold a hearing as to Juror Massey, who had not heard or understood anything that went on at the trial.

Indeed, Magistrate Judge Hayes noted that, because Mr. Britton did not have "full knowledge of the facts or the law, defense counsel's decision cannot be considered conscious or strategic. Both the trial transcript and his testimony at the hearing reveal that Mr. Britton believed an incompetent juror could remain on the jury simply because Louisiana does not require a unanimous verdict to convict." As he stated, "If they have ten, they have ten verdicts, regardless of what Ms. Massey had to say." ROA. 399 (citing ROA. 1389). That is, "Mr. Britton demonstrated his ignorance of his client's constitutional right to twelve competent jurors. Further, Mr. Britton admitted that he did not know of the right to an evidentiary hearing regarding Ms. Massey's competency." ROA. 399. Further, as Magistrate Judge Haynes noted, "[t]hough Mr. Britton testified that he did not ask for a mistrial because he thought the case had gone well, he agreed that Ms. Massey would not be a good juror if she could not her or understand anything that was said during the trial." ROA. 399.

Therefore, Magistrate Judge Hayes correctly concluded that "Mr. Britton's decision to keep Ms. Massey on the jury cannot be considered a conscious and informed trial tactic. Both the trial transcripts and his testimony at the hearing reveal that Mr. Britton believed an incompetent juror could remain on the jury simply because Louisiana does not require a unanimous verdict to convict . As he stated, "If they have ten, they have ten verdicts, regardless of what Ms. Massey had to say." [doc #16-2 at 1159]. In doing so, Mr. Britton demonstrated his ignorance of his client's constitutional right to twelve competent jurors. Further, Mr. Britton admitted that he did not know of the right to an evidentiary hearing regarding Ms. Massey competency. Though Mr. Britton testified that he did not ask

for a mistrial because he thought the case had gone well, he agreed that Ms. Massey would not be a good juror if she could not hear or understand anything that was said during the trial. In this case, neither the trial court nor defense counsel conducted even a rudimentary inquiry into Ms. Massey's competence. No effort was made to determine whether she had heard and understood what was said at trial and whether she could competently consider all of the evidence . When faced with a possibly incompetent juror, Mr. Britton essentially did nothing. Given the trial court record and Mr. Britton's hearing testimony, Mr. Britton's decision to keep Ms. Massey on the jury cannot be considered a conscious and informed trial tactic. Mr. Brittion's failure to explore Ms. Massey's alleged incompetence and /or challenge her as a juror constitutes deficient performance under *Strickland.*

Blueford must also establish that counsel's deficient performance prejudiced his defense and that the state court's decision was an unreasonable application of clearly established federal law. *Virgil* 446 F.3d at 611. *Strickland's* prejudice standard is a well-rehearsed phrase in the inferior federal courts: 'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *United States v. King*, 917 F.2d 181, 183 (5th Cir. 1990); *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064-65, 2068, 80 L.Ed.2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quoting *Strickland*, 466 U.S. At 694). Mr. Britton's failure to explore Ms. Massey's alleged incompetence and/o challenge her as a juror constitutes deficient performance under *Strickland.*" ROA 399-400. Expressed in *Strickland* terms, the deficient performance of counsel denied Blueford an impartial and competent jury, leaving him with one that could not constitutionally convict, perforce establishing *Strickland* prejudice with its focus upon reliability Id. at 614.

In sum, counsel's failure to follow up in response to Ms. Massey's note constitutes "objective unreasonable" performance, which denied Blueford a competent jury and thus a fair and reliable trial

under *Strickland.* The state court's rejection of Blueford's ineffective assistance of counsel claim was contrary to the Supreme Court's decision in *Strickland.* See *Virgil,* 466 F.3d at 614. Therefore, Blueford is entitled to federal habeas corpus relief under the AEDPA.

As Magistrate Judge Hayes recognized, due to Mr. Britton's deficient performance, Ms. Massey remained on the jury that convicted Blueford. The law mandates that jurors render a verdict based on the evidence presented in court, but that did not occur here." ROA. 400 (internal quotation marks and citation omitted). As Magistrate Judges Hayes explained "[a] juror who cannot hear or understand any of the evidence presented in court cannot logically render a verdict based on the evidence, and therefore, is not an impartial and competent decision maker." ROA. 400 (internal quotation marks and citations omitted).

Thus, Juror Massey "was incompetent to serve on the jury and could not render a verdict based on a fair consideration of the evidence." ROA. 401 Because of "the fundamental nature of a defendant's right to a trial by an impartial and competent jury," the result of Mr. Blueford's "case is unreliable." ROA. 401

Thus, because "Mr. Britton did not challenge Ms. Massey's remaining on the jury, move for a mistrial, request an evidentiary hearing, or consult with his client regarding any of these possible responses to Ms. Massey's revelation[,] Blueford was prejudiced by the presence of Ms. Massey, an incompetent juror, in violation of the **Sixth** and **Fourteenth Amendments**, and the state court's decision to the contrary is an unreasonable application of clearly established federal law." ROA. 401. Accordingly, as found by Magistrate Judges Hayes, "[t]he state courts rejection of Blueford's ineffective assistance of counsel claim was contrary to the Supreme Court's decision in Strickland. Therefore, Blueford is entitled to federal habeas corpus relief under the AEDPA." ROA 401. (internal citation omitted).

Similarly, the State trial court erred-in a manner that was contrary to, or involved an

unreasonable application of, clearly established Federal law-when it failed to undertake any action to investigate or develop evidence regarding the condition of Juror Massey during the trial and during deliberations and instead focused on her conduct during voir dire and the trial.

As Magistrate Judge Hayes noted, "the trial court did not offer a mistrial, conduct an evidentiary hearing, or even question Ms. Massey about her claim that she had not heard the testimony at trial. Absent some sort of hearing or fact finding, the State's argument that Ms. Massey was clearly competent is unavailing. Without evidence to the contrary, this Court must assume that Ms. Massey was telling the truth when she said did not hear or understand anything said at trial, and therefore was incompetent." ROA. 405. Indeed, either the foreman or Juror Massey were wrong or were lying for nefarious and unknown reasons or Juror Massey was incompetent. These are possibilities that should have been, and had to have been, explored in order to produce a trustworthy and constitutional trial and verdict.

Mr. Blueford was was denied his constitutional right to a competent jury when Juror "Massey was permitted to remain on the jury and render a verdict.

Therefore, the trial court's decision to allow Ms. Massey to remain on the jury had a substantial and injurious effect on the jury's verdict." ROA. 406. As a Magistrate Judge Haynes correctly found this error ny the trial court also entitled Mr. Blueford to habeas corpus relief. Id.

CONCLUSION:

For the above reason the defendant-appellant, Joseph D. Blueford, respectfully submits that (1) this Court should find District Court committed clear error in determining that Mr. "Blueford failed to prove that Massey could not hear the proceedings in order to overcome the trial judge's specific factual finding that there was no indication during the trial that Massey had difficulty hearing or understanding the proceedings." ROA. 425, by focusing on Juror Massey's conduct during voir dire and trial rather her condition during trial and deliberation; and (2) this Court should find the District Court erred when

it rejected the Report and Recommendation of Magistrate Judge Karen L. Hayes that the State's habeas decision "was contrary to, or involved an unreasonable application of, clearly established federal law."

The Honorable Magistrate Judge, Karen L. Hayes granted and remanded the matter back to the 4th Judicial District Court, Parish of Morehouse, for a new trial or for further proceedings not consistent therewith. In addition, the Honorable Judge, Terry A. Doughty in Blueford's Certificate of Appealability stated and ruled that the applicant, Blueford made a substantial showing of denial of a constitutional right, issues this Certificate of Appealability on the following issues:

(1) Whether he received ineffective assistance of counsel at trial when his attorney failed to object to a juror remaining on the jury and returning a verdict when he received notice that she claimed not to have heard or understood the evidence; and

(2) Whether the trial court violated his Sixth Amendment right to a competent jury when he allowed a juror to remain on the jury and to return a verdict after he received notice she claimed not to have heard or understood the evidence.

Therefore a reason of jurist shows that Blueford claim is debatable and wrong. The Fifth Circuit Court of Appeal should have granted Blueford Certificate of Appealability. Blueford has shown (1) that reasonable jurists found this court's assessment of the constitutional claims debatable and wrong. (2) that reasonable jurists found claim debatable and that petition stated a valid claim of denial of a constitutional right and debatable whether this court was correct in it's procedural ruling. *Slack v. Mc Daniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Respectfully submitted on this 5 day of March, 2020.

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