No. 23-7379

ORIGINAL

FILED
MAR 05 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

==========

MICHAEL HEBERT -- PETITIONER, PRO SE

VS.

TIM HOOPER, WARDEN
STATE OF LOUISIANA, -- RESPONDENT

==========

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

==========

# PETITION FOR WRIT OF CERTIORARI

==========

Respectfully submitted,

Michael Hebert

Michael Hebert
DOC# 263630, Ash 1
Louisiana State Penitentiary
Angola, La. 70712

## QUESTIONS PRESENTED

QUESTION 1(A): Whether The Lower Court Erred Denying COA On The Claim Of Prosecutorial Misconduct Where The State Refused To Reveal Evidence And Facts In Their Possession Which Are Material And Favorable To The Defense, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

QUESTION 1(B). Whether The Lower Court Erred Denying COA On The Claim Of Prosecutorial Misconduct In Contaminating Evidence, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

QUESTION 1(C). Whether The Lower Court Erred Denying COA On The Claim Of Contamination Of Evidence, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

QUESTION 2: Whether The Lower Court Erred Denying COA On The Claim Of Ineffective Assistance Of Counsel At Trial As Guaranteed By The Sixth And Fourteenth Amendments Of The U.S. Constitution, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

QUESTION 2(A): Whether The Lower Court Erred Denying COA On The Claim Of Ineffective Counsel For Failing To Motion The Court To Order Further DNA Analysis, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

QUESTION 2(B): Whether The Lower Court Erred Denying COA On The Claim Of Ineffective Counsel For Failure To Investigate, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

QUESTION 2(C): Whether The Lower Court Erred Denying COA On The Claim Of Ineffective Counsel For Failing To present a "stand Your Ground Defense," In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.

Petitioner respectfully suggests these questions are worthy of this Honorable Court's review.

## LIST OF PARTIES

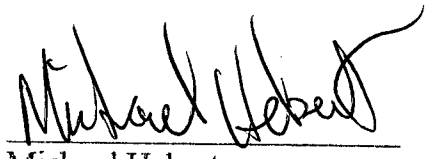
[ ] All parties appear in the caption of the case on the cover page.

[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

Tim Hooper, Warden
Louisiana State Penitentiary
Angola, Louisiana 70172

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



Michael Hebert

## TABLE OF CONTENTS

## INDEX TO APPENDICES

Appendix F: La. Court of Appeal, First Circuit denied Supervidory writ, *State v. Hebert*, 2019-KW-0337 (La. App. 1st Cir.7/11/19) (Unpublished). 2019 WL 3064943.

Appendix G: La. Supreme Court denied supervisory writ, *State v. Hebert*, (Unpublished). 2019 KH 01379 (La. 8/14/20) (Per Curiam attached).

Appendix H: 19th Judicial District Court order denying Application for Post Conviction Relief. *Michael Hebert v. State of Louisiana*, (2/6/19).

## TABLE OF AUTHORITIES

PAGE

**CONSTITUTION**



**CASES**:

**STATUTES AND RULES**

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** and is unpublished.

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

## JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeal decided my case was February 14, 2024, 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 28 U.S.C. § 1254(1); Supreme Court Rule 10. *Hohn v. U. S.*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); United States Supreme Court has jurisdiction to review decisions of courts of appeals denying applications for Certificates Of Appealability (COA) under Antiterrorism and Effective Death Penalty Act.

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix ___.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) & 1257(a).

## 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.

## STATEMENT OF THE CASE

On September 11, 2013, Michael Hebert was indicted for La. R.S. 14:30.1., relative to the second degree murder of Wayne Gaston Hebert, II. This matter proceeded to trial before the Honorable Richard D. Anderson, Judge, Section II in the 19th Judicial District Court. On March 20, 2015, the jury found Petitioner guilty as charged, and the trial court thereafter sentence him to mandatory life in prison without benefit of probation, parole, or suspension of sentence.

On April 7, 2016 the Louisiana First Circuit Court of Appeal affirmed Petitioner's conviction and sentence on direct appeal. *State v. Hebert*, No. 2015 KA 1455 (La. App. 1st Cir. 4/7/16), -- So.3d -- (unpublished in 3d reporter). The Louisiana Supreme Court denied certiorari relief on April 24, 2017. *State v. Hebert*, No. 2016 KO 0834 (La. 4/24/17), 220 So.3d 741 (unpublished decision).

Petitioner timely filed his *Application for Post Conviction Relief* into the trial court on April 19, 2018. The trial court denied relief on February 6, 2019. Petitioner sought writs in the Louisiana First Circuit Court of Appeal on March 7, 2019. The Louisiana First Court of Appeal denied relief on August 5, 2019. Petitioner sought writs in the Louisiana Supreme Court. The State Supreme Court denied relief on August 14, 2020.

Petitioner filed his Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus, on September 10, 2020. On February 13, 2017 the Magistrate Judge Report and Recommendation was filed. (App. C). Petitioner filed an objection. The District Court entered its Ruling denying §2254 on merits.(App. B). The Fifth Circuit Court of Appeal denied COA February 14, 2024 (App. A). Petitioner herein request a writ of certiorari issue to review the denial of COA in the U.S. Fifth Circuit Court of Appeal.

## STATEMENT OF THE FACTS

On September 11, 2013, an East Baton Rouge Grand Jury returned an indictment against the Petitioner for the second degree murder of Wayne Gaston Hebert, II (Gaston) in violation of LSA-R.S. 14:30.1. Petitioner entered a plea of not guilty.

The state gave notice of its intent to use statements made by the Petitioner (which did not constitute a crime) as evidence of other crimes under LSA-C.E. Art. 404(B) to show that he maintained a tense relationship with his parents, thus transferring his intent to harm Gaston. Petitioner was over the age of fifty at the time of trial and had been living with his parents due to limited employment opportunities necessitating that he stay with his parents while he cared for them. At the time of the incident, both parents were over the age of 80.

The trial court permitted the use of Petitioner's statements also showing that he was upset with his parents for attempting to sell their house and move out of state despite his circumstances. Another statement used at trial referred to a comment he made when asking if Gaston was coming to Baton Rouge to take his parents away to Texas.

The state presented its' case alleging that Petitioner shot and killed Gaston because Gaston made plans with their parents to sell their home in Baton Rouge and move to Austin, Texas to live with Gaston and his family. Petitioner was very vocal to his parents about his disapproval of the move and the fact that his opinion did not matter.

After Trial, the jury returned a guilty verdict and the district court accepted the jury's verdict and scheduled the matter for sentencing. At sentencing, the district court permitted the decedent's brother-in-law to give a victim impact statement. The district court then sentenced Petitioner to life imprisonment pursuant to LSA-R.S. 14:30.1.

## REASONS FOR GRANTING THE PETITION

The lower court erred in denying COA finding that he failed to show that jurist of reason could debate the correctness of the district court's ruling denying his application.

The standard of review is cited as follows:

In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1027, 154 L.Ed.2d 931 (2003), the issue of 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*, 537 U.S. at 326. 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(a): The Lower Court Erred Denying COA On The Claim Of Prosecutorial Misconduct Where The State Refused To Reveal Evidence And Facts In Their Possession Which Are Material And Favorable To The Defense, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.**

This is a case of omitted evidence wherein the prosecution still commits constitutional error if the omitted evidence creates a reasonable doubt that did not otherwise exist. In other words, a defendant challenging the prosecutor's failure to disclose evidence is entitled to relief, if the withheld evidence actually creates a reasonable doubt as to guilt in the fact finder's mind.

The greatest concern in these situations is the defendant's right to a fair trial and due process of law afforded by the Fifth and Fourteenth Amendments of the U.S. Constitution which is violated. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the state in its zeal to convict a defendant and not suppress evidence that might exonerate him. See *Moore v. Illinois*, 408 U.S. 786, 810, 92 S.Ct. 2562, 2575, 33 L.Ed.2d 706 (1972).

The prosecutor in this case intentionally omitted evidence, while not in a "newly discovered" *Brady* sense but it was in possession of the state, it was material as far as the Petitioner's degree of culpability and its omission deprived the Petitioner of a fair trial. ADA Kathleen Barrios intentionally violated the defendant's Motion to Disclose and Discover Evidence favorable to the defendant which was ordered by the Honorable Judge Richard Anderson on October 8, 2013. (Trial transcript pp. 40-42). In this case, the Hebert family represented divided loyalties. While the Petitioner's adoptive family seemed normal from the outside, Petitioner was aware of a life style that told a different story. With this knowledge and

the Petitioner's history of being informant for several police agencies including the FBI, DEA and EBRSO he did not spare these facts. The victim also surely knew his adopted brother to be long time informant for EBRSO, as he became party to corruption himself. The Petitioner contends his youngest daughter was murdered in retaliation for Petitioner providing information to the FBI, DEA and EBRSO about the criminal acts of Gaston Hebert, the victim. Petitioner requests Alyssa's death be investigated as a homicide by the DOJ and names Gaston Hebert as a suspect in Alyssa's death. This is the real motive for Gaston Hebert, the victim, coming to Baton Rouge. This is the reason Petitioner feared for his life and well being and also the lives and well being of his oldest daughter Michelle Hebert and his grandson Riley from Gaston Hebert, the victim. But none of this was presented at trial. Exhibit 91 are emails generated by the Petitioner detailing Gaston's role in Alyssa's death, along with exhibit 94 linking Jim Phelps and Gaston in their role in Alyssa's death. These emails were done the week before Gaston came to Baton Rouge. Gaston's wife Nicole testified that during the time period of 4/29/13 until 6/14/14 when the Petitioner sent emails to Attorney General Eric Holder accusing him and his parents of criminal acts, Gaston was clearly distraught. Mrs. Hebert stated that the victim was not making the source of his distress clear. She said that "it was the week leading up to his departure . . . getting more disturbed or distant you know."

A: When the house on Chateau Drive was put on the market . . . Gaston at that point became distressed.

Q: How is behavior changed?

A: And so I noticed from that point he became distant and troubled and brooding, which was so unlike him."
(Rp. 806).

Gaston told Nicole he was stressed about work but knew the e-mails were being sent about him to the Attorney General's office. Defendant's exhibits 1-115 are all emails sent to Attorney General Eric Holder and President Barak Obama on the White House website email program along with Sen. Mary Landrieu (LA.), Tammy Baldwin (Wis.), Charles Schumer (NY.), Elizabeth Warren (MA.) and many others.

These emails began with facts about Wayne Hebert senior himself which caused much tension in the household[1] and snowballed to the fight on the day of the final altercation with the victim. The testimony presented by the prosecution painted the Petitioner as mean, aggressive and abusive towards his family but there was nothing from the defense. On the very day of the shooting, one e-mail addressed to the Attorney General was found in the driveway on the scene by the BRPD and placed in evidence. Assistant District Attorney Kathleen Barrios questioned Officer J. Anders about collecting this evidence. See (Exhibit 126) T.tr.pp. 119, 122, 148; Exhibit 128 p. 744-55).[2]

As the Petitioner made known to his trial attorney, his emails were what fueled the dispute on the day of Gaston's death which began the night before and lasting until the next day when the victim came at him with a baseball bat as he was attempting to leave. A gray Toshiba Laptop Model PSAG8U-04001W sn:49599612Q (Exhibit 137-141, Tr.t. pp. 1225-1230) belonging to the Petitioner was also collected by Corporal A. Kuhn CIBM-P10066. It is a

1 (See exhibit 1).

2 The email states: "I am asking your office to closely monitor the investigation of these criminals as well as the outcome of their cases as I suspect these people are involved in corrupting the legal system. As I have already sent you emails regarding other criminal acts I thought it wise to report the Hebert's other criminal acts as well. My e-mail address is mhebert37@yahoo.com you may email me there. Thank you for reading all my emails." (Exhibit 143).

known fact that this Laptop was used to type and generate emails including the one seized by BRPD in report #13-00051473-014, along with the Petitioner's I-phone. (Exhibit 140, Tr.t. 1237-1241).

Petitioner contends that these emails are information that tend to corroborate not only his statements to both Sergeant Dwayne Stroughter and Novak but his theory of defense which was not presented at trial. These emails show the motive for Gaston's attack on the day of the shooting contrary to the trial testimony of Nicole and Earline Hebert painting the Petitioner as volatile and abusive. Despite their relevance to this case, those emails never made it to trial. The prosecution had this evidence in their possession since the date of the Petitioner's arrest and did not produce the laptop or the information contained therein.

Detective Jeff Anders stated that through the course of his investigation, detectives learned that victim and suspect often communicated through text message and email. See (Tr.t.p. 1232). Anders made affidavit to search the Petitioner's I-phone seized on the day of his arrest with the laptop but never to the Petitioner's knowledge searched the laptop. Moreover, East Baton Rouge Parish District Attorney's Investigator Kelly Walker and his family had direct knowledge about the defendant and the case as a result of Mr. Walker's parents relationship with the Petitioner's family.

Mr. Walker is son of John and Elizabeth Walker who resided on Chateau Drive across street from Hebert's. At trial, Earline Hebert admitted telling Elizabeth and John Walker about the Petitioner.

Q: Had you told anyone else, friends, family members about what was going on in the house with Michael?
A: I told one of my neighbors.

Q: What is that?
A: Mrs. Walker.
Q: And what is her first name?
A: Elizabeth.
Q: Is she married?
A: Yes.
Q: Who is her husband?
A: Well, her husband is just deceased, but his name was Johnny.
Q: So his name was Johnny Walker?
A: Johnny Walker.

Tr.tp.1033.

Petitioner contends that one of the many reasons the emails were withheld was because of the known relationship with DA's investigator, his parents and the Petitioner's family. This Court's holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) regarding the materiality of the evidence also applies to this case. In *Brady* this Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87 S.Ct. 1194. Three essential elements of a Brady prosecutorial misconduct claim were set out in by the United States Supreme Court in *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) those elements are that the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Though the emails were created by the Petitioner himself, he had no way of obtaining this information prior to trial.[3] In response to the defense "Motion to Discover and Disclose

3 Defendant had no way of obtaining emails personally until reaching Angola and through Dolores Epler mother of another offender Feliciano Armijo, through priority mail on 10/19/16 Ex. 115. Emails were sent from 4/29/13-6/11/13 and everyday from 4/29/13 – 6/14/13 the day before the incident.

Evidence Favorable to Defense" there was no reference to the information from the laptop or the laptop itself despite the fact that it corroborated the defendants statements to police. Detective Jeff Anders testified that he sends cell phones to hi tech support division but never submitted defendant's laptop. See (Tr.t.p. 762). Petitioner contends that this evidence was favorable to his defense being exculpatory where the testimony unfairly painted him as the aggressor who shot the victim because the victim wanted to move his parents to Texas and that he only wrote the emails to have them arrested to live in their house, as if the victim had no motive to harm him.[4] The evidence was in the State's sole possession and either willfully or inadvertently; it was not presented at trial. The Petitioner was prejudiced in his right to present a defense.

**QUESTION 1(B): The Lower Court Erred Denying COA On The Claim Of Prosecutorial Misconduct In Contaminating Evidence, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.**

Petitioner contends that a U.S. Constitutional 14th Amendment Due Process violation occurred when the prosecution also committed misconduct by not only failing to have further testing done on the baseball bat Gaston had on the day he was killed but the evidence was contaminated during trial when it was removed from its packaging at trial and handled by ADA Kathleen Barrios without gloves. (Exhibit 127, Tr.t.p. 721).

It is a known fact from the beginning of this case that the Petitioner admitted shooting

---

4 Exhibit 91 email detailing Gaston's role in Alyssa's death, Exhibit 94 email about Jim Phelps and Gaston's role in Alyssa's death. Exhibits 96-102 to AG Saturday 6/8/13 subject "Republican cover up of the investigations I worked on. 1 week before 6/15/13 shooting. Exhibit 102 and 103 #1-7 (repeats exhibit 91). Exhibit 109 email to AG 6/11/13 Re: other federal crimes committed by Heberts' and is original email state's Exhibit 38 on page 1249 of the trial transcript and is confirmation of the exact date and time the email found at the crime scene was first sent to AG. This email was sent four days before defendant shot victim.

the victim because he came at him with a baseball bat. At the scene of the crime, the victim was found and photoed with the baseball bat along side him. (R.p. 704). When this evidence was submitted to the Louisiana State Police Crime Lab, it was requested that only one spot on the bat be tested. Crime Lab Analyst Tammy Rash testified that of the area of the bat she tested there was not much DNA present. (Exhibit 130, R.p. 861-951). She did However, find that there was a mixture of DNA from at least two individuals and Wayne Gaston Hebert Sr. could not be excluded. Ms. Rash also said that the other DNA profile was at a low level and the exact source could not be determined. (R.p. 890-91).

Nevertheless, there was no other part of the bat tested to determine if there was a struggle over it, whether the Petitioner was hit or poked in the heat of the argument and no other tests were requested. Ms. Barrios admitted that the bat had become an important piece of evidence but her interest in it was not to find the truth of the matter. The prosecution had approximately 18 months from June 15, 2013 until January 1, 2015 to request further testing on the bat and refused to do so violating the Petitioner's Due Process Rights to fair trial based on all the evidence submitted during the prosecution of his case. In fact, ADA Barrios intentionally contacted LSP crime lab analyst Tammy Rash to request a scientific analysis of the DNA from the single swab and that analysis was based on Rash's opinion and experience, yet Barrios failed to request additional swabs for DNA be taken on other areas of the bat that would corroborate the defendant's statements to the police. (Exhibit 124, Tr.t.p. 224; Exhibit 123 Tr.t.p. 218, 219).

**Question 1(C): The Lower Court Erred Denying COA On The Claim Of Contamination Of Evidence, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.**

During the testimony of Corporal Congalona Kersh of the Baton Rouge City Police Department, Ms. Barrios had the baseball bat removed from its wrapping and not only put it under her arm but she handled it bare handed knowing there were latex gloves in the courtroom. (Exhibit 127 Tr.t.p. 721).

Ms. Barrios passed the bat to jurors without gloves knowing that this evidence was documented at the crime scene laying a few feet from the victim's outstretched hand. She knew the defendant's statements were in reference to this evidence and she knew that the crime lab analyst only tested a small section of the bat and the defendant could have requested other parts to be tested in the future. The following exchange took place between Ms. Barrios and Ms. Kersh at (Exhibit 127 Tr.t.p. 685):

Q: Are you able to get the bat back in there?
A: I will try.
Q: We may need to get some new paper.
A: Probably so.
Q: Okay. We'll get some new paper to go over it.

Mr. Ambeau noted at the end of the proceedings that day that he wanted the record to reflect that during that time, the bat was removed from its covering and handled without gloves, preventing future testing. R.p. 721. Petitioner contends that this contamination of evidence along with the fact that there was no proper testing done on this evidence in the first place violates his due process rights to a fair trial based on all the evidence.

**QUESTION 2: The Lower Court Erred Denying COA On The Claim Of Ineffective Assistance Of Counsel At Trial As Guaranteed By The Sixth And Fourteenth Amendments Of The U.S. Constitution, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.**

The Sixth Amendment, applicable to the States by the terms of the Fourteenth

Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. *Missouri v. Frye*, 132 S.Ct. 1399, 1404, 182 L.Ed.2d 379 (2012); *State v. Messiah*, 538 So.2d 175 (La. 12/12/88). The United States Supreme Court has long recognized that the right to counsel is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Claims of ineffective assistance of counsel are generally governed by the standard set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984), and adopted by Louisiana courts in *State v. Washington*, 491 So.2d 1337 (La.1986).

In order to prevail on such a claim, a defendant must first show that "counsel's representation fell below an objective standard of reasonableness" 466 U.S. at 687-88, 104 S.Ct. 2052. The Supreme Court further noted that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Additionally, the Court reasoned that "the purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. Therefore, the *Strickland* Court held that the "defendant must [also] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The Court further explained that in making a determination of ineffectiveness of counsel, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the

court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce a just result.

**QUESTION 2(A): The Lower Court Erred Denying COA On The Claim Of Ineffective Counsel For Failing To Motion The Court To Order Further DNA Analysis, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.**

Petitioner contends his trial attorney was aware of the testing done on the bat from the beginning. Mr. Ambeau knew of the findings of the DNA analysts and he was aware of the allegations by his client that the victim came after him with the baseball bat when he was shot, and that he poked him with it. The DNA could only help his client and it was therefore imperative that the proper testing was done on this evidence. Mr. Ambeau's failure to request this testing prejudiced the Petitioner because the evidence was contaminated during the trial proceedings and may not be usable in the future. In fact, Mr. Ambeau did not object when the bat was being handled without gloves during trial. He intentionally allowed the bat to be handled without gloves saying that he did not want the jury to hear his objection.. R.p. 721.

His objection would not have hurt the defense in the eyes of jurors, his failure to object on the other hand has not only excluded favorable evidence from trial which would be definitive proof that the victim did have the bat but it prevented the Petitioner from getting any future testing of that bat.

**QUESTION 2(B): The Lower Court Erred Denying COA On The Claim Of Ineffective Counsel For Failure To Investigate, In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.**

Petitioner contends that his trial attorney was ineffective when he failed to investigate his client's version of the case and obtain copies of his emails. These emails were accessible to

counsel where he only had to access the Petitioner's email account to get these emails. The emails were created by the Petitioner but due to his incarceration and his being ostracized from family and friends because of the crime, he had no way of obtaining this information prior to trial. In conjunction with the defense's "Motion to Discover and Disclose Evidence Favorable to Defense" the information from the laptop or the laptop itself may have been available to the defense and it corroborated the defendants statements to police and showed that the victim did have a motive for attacking the Petitioner.

This evidence could have been used to prove the dates of the emails and their contents showing that they were created before Petitioner's parents decided to move to Austin. This evidence would have contradicted Ms. Barrios false allegations that Petitioner made up this information to get his parents arrested so that he could have their house. The emails clearly show Petitioner requested the United States Department of Justice to investigate Gaston Hebert, the victim for the death of Alyssa Danielle Hebert, on August 23, 2001. (See exhibits 104-105).

Without the emails, the Petitioner could show no motive for the victim's attack, there was no answer to ADA Barrios' allegations to the Petitioner's ulterior motive for sending the emails and defense counsel failed to impeach and did not try to impeach the false testimony of Wayne Hebert Sr. Earline Hebert and Nicole Hebert. Because counsel failed to investigate and obtain the emails there was no other way for the defense to show the type of things that would influence the Petitioner's family to be against him. The defense was also not able to show why Gaston would attack him and counsel's failure to investigate therefore resulted in his inability to present a defense and ultimately, the Petitioner's conviction.

**QUESTION 2(C): The Lower Court Erred Denying COA On The Claim Of Ineffective Counsel For Failing To Raise The "Stand Your Ground Defense," In Violation Of The Fifth, Sixth And Fourteenth Amendment To The Constitution.**

The "stand your ground" law set forth in La. R.S. 14:20 provides:

> C. A person who is not engaged in unlawful activity and who is in a place where he or she has a right to be shall have no duty to retreat before using deadly force as provided for in this Section, and may stand his or her ground and meet force with force.
>
> D. No finder of fact shall be permitted to consider the possibility of retreat as a factor in determining whether or not the person who used deadly force had a reasonable belief that deadly force was reasonable and apparently necessary to prevent a violent or forcible felony involving life or great bodily harm or to prevent unlawful entry.

Stand Your Ground dramatically expanded the right to use deadly force. It removed as a factor any consideration of the possibility of retreat. As long as a person is not engaged in an unlawful activity and is in a place where he had the right to be, he is allowed to stand his ground and meet force with force, including deadly force if he reasonably believes it is necessary to do so to prevent a violent or forcible felony involving life or great bodily harm.

The facts of this case are not well established but it is known that the Petitioner was trying to leave prior to the shooting, he was at his home where this crime occurred and no one has accused him of any other crime during the time of the incident, therefore, justification is the only issue here. Self-defense is justified for a killing only if the person committing the homicide reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm. *State v. Allen*, 200 So.3d 376, (La. App. 2Cir. 8/10/16).

In examining a self-defense claim in a homicide action, it is necessary to consider: (1)

whether the defendant reasonably believed that he was in imminent danger of death or great bodily harm; (2) whether the killing was necessary to prevent that death or great bodily harm; and (3) whether the defendant was the aggressor in the conflict. *State v. Fox*, 184 So.3d 886, (La. App. 3rd Cir. 2/3/16).

Had defense counsel used this defense, there were several factors in favor of the defense to support the stand your ground defense. The question of whether the Petitioner reasonably believed that he was in imminent danger of death or great bodily harm was evident by the fact that the victim possessed the baseball bat. After a confrontation with the victim in the backyard which started to turn physical with the victim grabbing the Petitioner by the head, Petitioner went into the house to get his things to leave including his keys and his gun. Upon returning from the house Gaston was not seen because he had went into the garage and retrieved the bat. As the Petitioner emerged from the back door and turned right to get in his truck the victim came from the left behind him with what appeared out of peripheral vision to be a black gun in his left hand and silver colored gun in his right hand. Gaston poked the Petitioner in the back with the object and the Petitioner turned and fired aiming only for his arms. The victim in fact did not have a gun but it turned out to be what is documented as a black phone and a baseball bat.

It is documented that the Petitioner has had multiple eye surgeries beginning in the last 1970's after a contact lens shattered in the Petitioner's right eye. The surgery was performed at Our Lady of the Lake in Baton Rouge by Dr. Thomas Eades Hebert, Ophthalmologist and owner of Eye Care & Surgery Center and Plastic Surgeon James LaNasa. The Petitioner then had RK and Lasik surgery to attempt to correct poor vision at Eye Care & Surgery Center on

Old Hammond Highway by Dr. Hebert and Petitioner is still presently being treated during his incarceration for poor vision.

Defense counsel was therefore armed with enough information to argue that his client reasonably believed that he was in imminent danger of loosing his life or receiving great bodily harm. Regarding the second factor of the self-defense claim, the pictures of the victim support the Petitioner's argument where the victim had the black object which only turned out to be a phone and the baseball bat which also turned out not be a gun but could cause great bodily harm.

Finally, Petitioner was not the aggressor where he was attempting the leave because this argument had lasted through the night and when it began to turn violent he retreated to his vehicle to leave the area for a while. Petitioner left the confrontation in the yard and retrieved his gun and keys while the victim armed himself with the bat. Had counsel presented these facts along with the stand your ground defense, a jury could have reasonably concluded that the Petitioner was not the aggressor and only trying to defend himself.

Such claims are governed by well established United States Supreme Court precedents as well as the United States Constitution.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. *Missouri v. Frye*, 132 S.Ct. 1399, 1404, 182 L.Ed.2d 379 (2012). This Court has long recognized that the right to counsel is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Claims of ineffective assistance of counsel are generally governed by the standard set forth by the

Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to prevail on such a claim, a defendant must first show that "counsel's representation fell below an objective standard of reasonableness" 466 U.S. at 687-88, 104 S.Ct. 2052. The Supreme Court further noted that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Additionally, the Court reasoned that "the purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceedings. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. Therefore, the *Strickland* Court held that the "defendant must [also] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The Court further explained that in making a determination of ineffectiveness of counsel, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce a just result.

Petitioner undisputedly had a constitutional right to the effective assistance of counsel at trial as outlined by the United States Supreme Court in *Strickland*.

28 U.S.C. § 2253(c)(2), holds that a COA may issue in federal habeas review of state

proceedings "if the applicant has made a substantial showing of the denial of a constitutional right." Further, *Miller-El v. Cockrell*, 573 U.S. 322, 336-38 (2003) held that a court will not decline the application for a COA merely because they believe the applicant will not ultimately demonstrate an entitlement to relief. 537 U.S. at 337. Rather, a COA will issue if jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.

In light of the foregoing, Petitioner avers that he has made the substantial showing of the denial of a constitutional right and a COA should have issued regarding his claims of ineffective assistance of counsel.

The district court has held that Petitioner's first three claims were harmless and insufficient to warrant granting relief in light of the evidence presented. However, the history and purpose of the harmless error review demonstrates why it is inappropriate in this case. The dichotomy between errors of constitutional dimension that may be found to be harmless and those that may not began with *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In *Chapman*, the Supreme Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. Two of the rules the Court pointed to as found in this case were the coerced confessions, and the right to counsel as belonging to the list of constitutional rights so important that their violation requires automatic reversal.

Since the Chapman decision, this Court added to its dichotomy in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), where the court developed a theory for distinguishing between constitutional "trial errors," which can be harmless, and constitutional

"structural defects," which cannot. The Court explained that the trial error "occurs during the presentation of the case to the jury" and is amendable to harmless error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." At the other end of the analysis of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by the 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by [structural defects such as] the absence of counsel for a criminal defendant [and] the presence on the bench of a judge who is not partial."

The existence of a structural defect "affects the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself." at 310, 111 S.Ct. 1246. A structural defect "transcends the criminal process" because "without these basic protections, a criminal trial cannot reliably serve its function . . . and no criminal punishment may be regarded as fundamentally fair" at 310, 111 S.Ct. 1246 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)).

In *Fulminante*, this Court also recognized that since *Chapman* it added to the category of structural constitutional errors not subject to harmless error the following: "unlawful exclusion of members of the defendant's race from a grand jury; the right to self-representation at trial; and the right to public trial. In *Fulminante* itself the Court held that the admission of a coerced confession is a trial error subject to harmless error analysis, reversing its prior classification in Chapman of that kind of error as a structural defect. Ultimately, however, a majority of the *Fulminante* court held that the error was not harmless beyond a reasonable doubt in that particular case and affirmed the Arizona Supreme Court's decision to grant *Fulminante* a new

trial.

This case presents the same defects which all occurred prior to trial and shaped the presentation of the prosecution and defense. Petitioner's right to counsel was infringed upon where counsel sought no defense in a capital case. Petitioner was also forced to proceed to trial in the face of a coerced confession. If the *Fulminante* Court could grant the brief on those grounds, surely this Court could not be in err for granting permission to appeal.

The final claim of insufficient evidence warrants the right to appeal where this conviction is not based on concrete evidence but scant circumstantial evidence. A fact finder's decision will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Jackson v. Virginia*, 443 U.S. 307 at 319, 99 S.Ct. 2781, at 2789, 61 L.Ed.2d 560 (1979). Where rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all evidence most favorable to the prosecution must be adopted on review.

This claim clearly identifies a viable constitutional right and it is adequate to deserve encouragement to proceed further.

## PRO SE LITIGANT CONSIDERATION

Hebert 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.[5] Hebert should not be held to the same standard of review as formal attorneys.[6]

---

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

6 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).

## 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).

**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 29 day of April, 2024.

Michael Hebert

Michael Hebert
D.O.C. # 263630, Ash 1
Louisiana State Penitentiary
Angola, Louisiana 70712