

court also found that the PLA was “reasonably tailored” to protect the public from the “unauthorized practice of psychology.” The Fifth Circuit disagreed on both counts. The circuit court held that the PLA was not “narrowly tailored” because Dr. Serafine was not practicing psychology through her campaign website; rather, she was campaigning for public office. The circuit court opined that the way to protect the state’s interest would be to bring an enforcement action against Dr. Serafine for actually engaging in the practice of psychology, when she is treating clients, and not to suppress her political speech. The circuit court referenced the Supreme Court’s opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), asserting that erroneous statements are unavoidable in political debate and that such statements must be protected for freedom of expression to have the “breathing space” it needs to survive. The circuit court rejected the claim that the Board had an important interest in preventing the mistaken belief that a candidate was licensed to practice psychology by the state. Because the potential mistake would occur because of her campaign’s attestation that she was a “psychologist,” the circuit court held that the Board’s approach was not actually “narrowly tailored.”

Finally, the circuit court held that the Board’s licensing scheme was overbroad because it “affected speech beyond purview of state’s interests or power, such as Alcoholic Anonymous (AA), Weight-Watchers, various self-help groups, life-coaches, and yoga teachers” (*Serafine*, p 367). The circuit court held that the scheme was an overbroad restriction on free speech that could even limit “the ability of individuals to dispense personal advice about mental or emotional problems, based on knowledge gleaned in a graduate class, in practically any context” and that it “chills and prohibits protected speech” (*Serafine*, p 370).

#### Discussion

Psychiatrists reading the fact pattern of *Serafine* might be mystified, or even angered, by a holding that protects a political candidate’s right to assert that she is a “psychologist,” when she, in fact, lacked the degree requirement necessary to be licensed as a psychologist in the state in which she was campaigning. The circuit court noted that Dr. Serafine had taught psychology at prestigious colleges and had even published an article in a respected psychology journal.

The circuit court noted that “although she may not be able to practice as a psychologist under Texas law, that does not bear on whether she is a psychologist by reputation or training” (*Serafine*, p 362). Given her educational and occupational background, the circuit court did not consider her campaign declaration that she was a “psychologist” to be a “bald-faced lie.”

Even so, the circuit court was not going to readily countenance any abridgement of political free speech. Free speech, in particular political speech, is a fundamental right, and limitations on it are strictly scrutinized by federal courts. The circuit court asserted that the Board’s goal of preventing deception can be served by other means, namely “the vigorous public debate and scrutiny that accompany political campaigns” (*Serafine*, p 362). The court noted, paraphrasing Justice Brandeis, “the remedy” for misleading speech is “more speech, not enforced silence” (citing *Whitney v. California*, 274 U.S. 357 (1927), p 377).

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## Denial of Habeas Relief in Filicide Case

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**The Fifth Circuit Court of Appeals Considers Claims of Ineffective Assistance of Counsel in Jury Selection and Whether the Jury Erred in Reaching Their Verdict**

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In *Hebert v. Rogers*, 890 F.3d 213 (5th Cir. 2018), the Fifth Circuit Court of Appeals considered the recommendations of the Eastern District Court of Louisiana in denying a *habeas* relief plea for Amy Hebert. In a series of appeals, Ms. Hebert had contended that she had received ineffective assistance as evidenced by her attorney’s failure to object to the state’s allegedly gender-discriminatory, peremptory jury strikes. The circuit court reviewed the lower court’s finding that there were valid gender-neutral

reasons for striking female potential jurors in comparison to male potential jurors. She had also asserted that a rational jury could not have found her sane at the time of the crimes. The circuit court also reviewed the case as to whether a reasonable jury could have found Ms. Hebert both sane and guilty.

#### Facts of the Case

Ms. Hebert was a mother of two children, a nine-year old girl and a seven-year old boy. In 2006, Ms. Hebert and her husband, Chad Hebert, divorced after she learned of an affair he was having with a female co-worker. Her now ex-husband continued the relationship with his co-worker and they were eventually engaged to be married. Ms. Hebert's children began developing a closer relationship with Mr. Hebert's fiancé, which was quite upsetting to Ms. Hebert.

In the summer of 2007, while the children were at home in Matthews, Louisiana, Ms. Hebert stabbed both children to death. The children suffered numerous stab wounds to the back, chest, and scalp and eventually bled to death. After killing the children, Ms. Hebert placed their bodies in her bed and proceeded to kill the family dog. She made herself a pot of coffee and wrote two notes, one addressed to her ex-husband and one addressed to her ex-mother-in-law. She attempted to kill herself by slashing her wrists until the tendons were exposed, puncturing her lungs leading to their collapse, and inflicting cuts to her eyelids, neck, skull, and legs. She then lay down in her bed beside her children to die.

In Ms. Hebert's note to her husband, she related that he "had wanted" his "own life." She then stated that he now "had it" and that she "would be damned" if he got "the kids, too." She also wrote in pointed terms about his infidelity, calling Mr. Hebert and his fiancé "home-wrecking whores." The second letter strongly criticized Ms. Hebert's ex-mother-in-law for allowing her sons to "bring whores home" and for delivering "my kids to that whore."

During her hospital stay, Ms. Hebert was treated for her injuries and was provided psychiatric treatment by Dr. Alexandra Phillips. Ms. Hebert was initially unresponsive in meetings with Dr. Phillips. A few days later, she reported that she had been hearing "the words of Satan" for a long time. She reported that "Satan was in the room and was laughing at her" (*Hebert*, p 218). Dr. Phillips noted that

Ms. Hebert was "completely psychotic" and placed her on antipsychotic medication.

Ms. Hebert was charged with the first-degree murder of her two children. Ms. Hebert pleaded not guilty by reason of insanity. The defense called three experts in forensic psychiatry: Dr. David Self, Dr. Glenn Ahava, and Dr. Phillip Resnick. Dr. Resnick concluded that Ms. Hebert was psychotic during the killing because she was experiencing auditory hallucinations of Satan commanding her to kill her children and commit suicide so that the family could be together. Dr. Resnick also testified that Ms. Hebert related that the voice told her to write the notes she left. Dr. Ahava testified that Ms. Hebert was psychotic and could not distinguish right from wrong on the day of the offenses. He related that her insanity on the day of the offense was supported by her mental health history and the large number of stab wounds on the children. Dr. Self testified that Ms. Hebert suffered from major depression with recurrent and severe psychosis. He opined that Ms. Hebert must have been psychotic because "only the most psychotic people attack their own eyes" (*Hebert*, p 219).

The state called two experts in rebuttal. Dr. Rafael Salcedo, an expert in forensic psychology, testified that Ms. Hebert suffered from psychosis, but opined that Ms. Hebert had been able to distinguish right from wrong. He testified that the notes she wrote immediately after the murders revealed a logical mental process and were consistent with someone seeking revenge through a retribution killing. Dr. George Seiden testified that he believed Ms. Hebert was aware of the wrongfulness of her actions because there was no evidence that she was psychotic prior to the killing of the children. He also noted that the line "Sorry Daddy, Celeste & Renee" in her second note indicated that Ms. Hebert had an understanding of the wrongfulness of her actions.

The jury found Ms. Hebert guilty of the charges but could not reach a unanimous verdict regarding the death penalty. Ms. Hebert was sentenced to life imprisonment. Ms. Hebert filed a direct appeal to the Louisiana First Circuit Court of Appeals, which affirmed her conviction and sentence. Ms. Hebert pursued *habeas* relief in state court, but these actions were unsuccessful. Ms. Hebert then filed a *habeas* petition to the United States District Court for the Eastern District of Louisiana. This court denied her *habeas* petition but granted a cer-

tificate of appealability on the concerns raised. Her *habeas* petition was then considered by the Fifth Circuit Court Appeals.

Ruling and Reasoning

Ms. Hebert’s appeal asserted that she had received ineffective assistance of counsel as evidenced by her attorney’s failure to object to gender-discriminatory jury strikes by the state. She alleged that the state had struck qualified female jurors due to their gender and that this action constituted a J.E.B. violation (*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)). In *J.E.B.*, the Supreme Court held that the Constitution’s guarantee of equal protection bars the exclusion of potential jurors on the basis of their sex, just as it bars exclusion on the basis of race. Ms. Hebert asserted that the fact that the state had used all of its preemptory strikes against women indicated gender-based discrimination. The Fifth Circuit Court noted that the state had articulated several gender-neutral reasons for striking these jurors. The circuit court then asserted that the remaining questions on this point were whether these proffered reasons were plausible (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)) and whether the reasons for striking a female panelist would also apply to a similar male panelist (*Miller-El v. Dretke*, 545 U.S. 231 (2005)). The circuit court pointed out that Ms. Hebert had compared male jurors who were in favor of the death penalty to female jurors who were opposed. The court stated that being in favor of the death penalty would have been a positive attribute in the eyes of the state, and therefore the male jurors were qualitatively dissimilar to the females raised in Ms. Hebert’s comparison. The circuit court found that the male potential jurors whom Ms. Hebert identified were thus not valid comparators to the females who had been struck, and therefore the state’s reasons for striking these potential female jurors were not discriminatory. The circuit court concluded that Ms. Hebert did not meet her burden to prove a J.E.B. violation.

Ms. Hebert also contended that no rational jury could have found her both sane and guilty. She argued that she had presented twice as many expert witnesses as the state, all of whom provided evidence that she was insane at the time of her acts. Ms. Hebert referenced *Perez v. Cain*, 529 F.3d 588 (5th Cir. 2008), in which the Fifth Circuit Court held that the state court had erred in concluding that a “reasonable jury” could have found the defendant sane. But the circuit court noted

that in *Perez* the state court approved the jury’s finding despite unanimous expert opinion to the contrary (*Perez*, p 599). The Fifth Circuit Court affirmed her conviction and dismissed her *habeas* appeal.

Discussion

The crime of filicide often raises concerns as to the sanity of its perpetrator. In *Hebert*, the defense experts focused on command hallucinations reported by Ms. Hebert after the murders. The prosecution expert opinion relied on the notes written immediately after the crimes. In these notes, there is evidence that revenge was the underlying motive for the crimes. Revenge, as a motive for filicide, has long been recognized (for example, in Euripides’ *Medea*). As Ms. Hebert had no pre-offense history of psychotic symptoms, the defense was essentially arguing for the substitution of Ms. Hebert’s *post hoc* reports of psychosis for motive information recorded in notes, penned by Ms. Hebert herself, immediately after the crime. The Fifth Circuit Court ruled that the decision the jury made as to the contradictory expert testimony in *Hebert* was not unreasonable and that a rational juror could have arrived at such a conclusion.

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## Objection to Therapeutic Visits for Insanity Acquittee

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### **Challenges to Insanity Acquittee’s Therapeutic Visits Are Civil in Nature; State has the Burden of Proof in Objection to Therapeutic Visits for an Insanity Acquittee**

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In *Parsons v. District Court of Pushmataha County*, 408 P.3d 586 (Okla. 2017), the Oklahoma Supreme Court considered a state challenge to therapeutic visits for an insanity acquittee. Per state code, the state is permitted to raise objections to therapeutic visits, but it was a question of first impression as to who has the burden of proof when visits are challenged. The