

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

Oklahoma Supreme Court ruled that challenges to therapeutic visits are civil in nature and that the trial court's order upholding the state's objection to therapeutic visits was incorrect.

#### Facts of the Case

In November 2011, Robert Parsons was charged with one count of first-degree murder. Mr. Parsons confessed to killing his friend by striking him in the head with a hatchet. Mr. Parsons underwent an evaluation for competence to stand trial by a forensic psychologist. The forensic evaluator found that Mr. Parsons was attentive, responded to questions in a relevant manner, and appeared to appreciate his legal situation and possible outcomes. Legal counsel stipulated to his competency, and the criminal proceeding resumed. He plead not guilty.

In February 2012, Mr. Parsons withdrew his not guilty plea and entered a plea of not guilty by reason of insanity (NGRI). Mr. Parsons submitted an evaluation of his mental state at the time of the charged offense. In June 2012, the trial court adjudicated Mr. Parsons as NGRI. As required by state law, the trial judge ordered additional assessment to determine whether Mr. Parsons remained mentally ill and dangerous to the public. A forensic psychologist reviewed Mr. Parsons' history and conducted an examination, finding that his symptoms were consistent with bipolar disorder in remission and, specifically, that he had not had symptoms since his hospital admission and presented a low risk for violence.

The forensic psychologist noted that Mr. Parsons had a history of medication noncompliance and recommended strict, constant supervision if the trial court were to authorize his release from the treatment facility. The trial judge found Mr. Parsons remained a danger to others due to treatment noncompliance and ordered his continued commitment.

An annual clinical status update was provided to the trial court in July 2013, which stated that Mr. Parsons had been compliant with his medication regimen and gained full-grounds privileges without problems. In December 2012, the trial court had issued an order permitting a supervised therapeutic visit for Mr. Parsons to attend a family funeral, and there was no indication of problems during the off-site pass. The report also noted the Oklahoma Forensic Review Board's (FRB) duty to review Mr. Parsons' case. The FRB is vested with authority to recommend therapeutic visits, conditional release, or

patient discharge for NGRI acquittees. At the time of this 2013 annual report, the FRB had made no recommendations with respect to Mr. Parsons.

In October 2014, the FRB recommended Mr. Parsons begin weekly supervised therapeutic visits to a mental health center for approximately two hours. The Pushataha County District Attorney filed a written objection but did not provide a basis for the state's opposition.

A hearing was held in December 2014. Dr. Atwant Tandon, clinical director of the hospital where Mr. Parsons was committed, testified that therapeutic visits are necessary for patients to have exposure to a community setting and that Mr. Parsons would be supervised during passes. The state offered no evidence to contradict Dr. Tandon's testimony or the FRB's review. The trial judge sustained the state's objection. The court found Mr. Parsons to be "presently dangerous" and a "person requiring treatment" (*Parsons*, p 592). Mr. Parsons petitioned for an order compelling the trial judge to approve therapeutic visits. The Oklahoma Court of Criminal Appeals (OCCA) denied the petition.

The FRB filed a report with the district court in December 2015 notifying the parties that Mr. Parsons would soon begin therapeutic visits to the mental health center. The state once again objected in the same manner. A hearing was held in January 2016, and the parties debated over who had the burden of proof. The trial judge did not rule on the question of the burden of proof. The court sustained the state's objection.

In March 2016, Mr. Parsons asked the OCCA to assume original jurisdiction and to direct the district court to vacate its order denying therapeutic visits. The OCCA transferred the case to the Oklahoma Supreme Court for disposition or to determine jurisdiction.

#### Ruling and Reasoning

Stating that the line between civil and criminal subject matter is not always obvious, the Oklahoma Supreme Court first addressed which court had jurisdiction to address the claimant's petition. Mr. Parsons argued that his postacquittal proceedings were civil in nature because they fall under the purview of mental health. The state argued that Mr. Parsons' case retained a criminal status because he was committed on the basis of a "criminal judgment" in accordance with the state's criminal code.

The Oklahoma Supreme Court ruled that mere placement of "postacquittal" proceedings in the

criminal code does not *ipso facto* make the provision a matter of criminal law. The court relied on multiple provisions in the same title of the state's criminal code that are unquestionably matters of civil law. The court held that Mr. Parsons' commitment, although secondary to a finding of NGRI, which is indeed a criminal judgment, is based on his ongoing mental illness; he is not committed because of a criminal judgment. The court stated, "Once Parsons' acquittal became final, no criminal issues remained" (*Parsons*, p 595).

Having determined jurisdiction, the Oklahoma Supreme Court addressed the merits of the appeal. The court determined that the trial court erred in failing to place the burden of proof on the state in its objection to therapeutic visits. The court also ruled that the trial court erred by failing to determine whether therapeutic visits were necessary for treatment and, if necessary, the extent to which the power to initiate therapeutic visits for insanity acquittees is vested in the FRB. The court stated that the state (or the objecting party) has the burden to support its objection by presenting evidence in opposition to the visits. The court based its ruling on plain language of the statute, which requires commencement of therapeutic visits unless a timely objection is filed by the state, and on multiple instances of case law that impose the burden of proof on "the party who asserts an entitlement to the judicial relief sought" (*Parsons*, p 596, citing *In re Initiative Petition No. 397*, 326 P.3d 496 (Okla. 2014), p 512). The language of the statute demonstrates legislative intent to afford broad authority to the FRB when recommending therapeutic visits for insanity acquittees, and that these visits take place automatically unless the state raises timely objection, with the burden of proof on the state as the objecting party. The court ruled that the state must support any objection to therapeutic visits by a preponderance of evidence.

#### Discussion

In its ruling in *Parsons*, the Oklahoma Supreme Court helped to clarify the scope of the criminal code with regard to insanity acquittees. Although such an acquittee's subsequent mental health treatment and commitment may result from criminal court proceedings, questions pertaining to involuntary commitment are a civil rather than criminal matter under Oklahoma law. In its ruling, the Oklahoma Supreme Court placed the burden of proof on the state to oppose treatment

recommendations made by the FRB, rather than on the acquittee to demonstrate necessity and safety of such treatment recommendations. The implication of this is significant because it places the FRB's treatment recommendation as the default course of action. Broadly speaking, the acquittee's treatment becomes the driving factor behind commitment decisions. Treatment recommendations are only superseded when the state can adequately demonstrate that the treatment recommendations are unnecessary or inappropriate.

In assessing insanity acquittees's readiness for conditional release, it is not uncommon to advance them through a level system or gradually permit them increased independence with continued monitoring of how they manage the privilege. One tool for clinicians is the use of therapeutic passes, especially like the one in *Parsons*, where the insanity acquittee is to use passes to participate in mental health services in the community. The *Parsons* case makes clear that this is a clinical decision that can be overridden by the state with sufficient proof.

The Oklahoma Supreme Court's ruling is, of course, in line with the state statute, which dictates that an insanity acquittee shall not be punished for the criminal offense committed while insane. The necessity of the *Parsons* ruling, despite extant language in the state statute that clarified the criminal versus civil aspects of persons found NGRI, demonstrates that ambiguity existed in the criminal code in Oklahoma. It is likely that such ambiguity exists in other state codes, and it is worth examining who has jurisdiction over insanity acquittees at various stages of their case and commitment.

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## Prolonged Solitary Confinement of a Pretrial Detainee

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