

**SUPREME COURT OF LOUISIANA**

**No. 15-KH-2052**

**STATE EX REL. JAMES JOSEPH HEBERT**

**v.**

**STATE OF LOUISIANA**

**ON SUPERVISORY WRITS TO THE THIRTY-SECOND  
JUDICIAL DISTRICT COURT, PARISH OF TERREBONNE**

**PER CURIAM:**

Writ denied. Relator fails to show he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We attach hereto and make a part hereof the District Court's written reasons denying relator's application.

Relator has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the Legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Relator's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, relator has exhausted his right to state collateral review. The District Court is ordered to record a minute entry consistent with this per curiam.

STATE OF LOUISIANA	*	32 <sup>ND</sup> JUDICIAL DISTRICT
VERSUS	*	PARISH OF TERREBONNE
JAMES JOSEPH HEBERT	*	STATE OF LOUISIANA
DOCKET NO. 603328	*	DIVISION "A"

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**JUDGMENT DISMISSING PETITIONER'S MOTION FOR  
POST CONVICTION RELIEF**  
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Upon information and belief, Petitioner, James Joseph Herbert, asserts that he has a meritorious constitutional claim to vacate his conviction and sentence. On October 1, 2012, the Petitioner was found guilty of one count of aggravated rape, a violation of La. R.S. 14:42, by a jury of his peers. (Pet'r Sentencing Minutes). He was given a life sentence at the Department of Corrections at hard labor without benefit of parole, probation, or suspension of sentence. (Pet'r Sentencing Minutes). Petitioner appealed this sentence and on September 17, 2013 a judgment was rendered affirming the 32<sup>nd</sup> Judicial District Court's conviction and sentence. Following this affirmation, the Petitioner applied for writ of certiorari and/or review by the Supreme Court of the State of Louisiana. On March 21, 2014, the Supreme Court of the State of Louisiana denied Petitioner's writ of certiorari. Presently, Petitioner has filed an application for post – conviction relief alleging one claim: his trial counsel denied him of his Sixth Amendment guarantee to representation.

Petitioner alleges that counsel failed to properly exercise the skill, judgment, and diligence of a reasonably competent defense attorney and that this failure prejudiced Petitioner a fair trial. Petitioner claims that counsel was ineffective for failing to obtain and secure funds for an expert witness. He alleges this failure resulted in his defense counsel being unable to adequately question State's two expert witnesses. After review and consideration, the trial court believes that all material questions of fact and law can properly be resolved without an evidentiary hearing based solely upon the record. La. C.Cr.P. 928.

required at every stage of a criminal proceeding where substantial rights of accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134, (1967).

Ineffective assistance claims are determined under *Strickland*'s two-prong test. *Strickland v. Washington*, U.S. 668, 685 (1985). Court defines "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* 686-687 (1984). In summary, the Petitioner must meet the high burden establishing "that counsel's performance was deficient" and that "this deficient performance prejudiced his defense." *State v. Pratt*, 26,862 (La. App. 2 Cir. 1995).

Under *Strickland*'s first prong, deficiency turns on whether counsel was reasonably competent, "not perfect." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). The reasonableness of an attorney is determined by "professional norms" which falls within a "wide range of professional assistance." *Strickland*, U.S. 668, 688 (1984); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). When evaluating the reasonableness standard as applied to ineffective assistance of counsel, the Court will undertake "a detailed examination of the specific facts and circumstances of the case. This is necessary...because effectiveness of counsel cannot be defined in a vacuum, but rather requires an individual, fact-specific inquiry." *State v. Peart*, 621 So. 2d 780, 788 (La. 1993).

*Strickland*'s second prong requires the Petitioner to establish that counsel's objectively unreasonable performance prejudiced the petitioner a fair trial. Prejudice is present when "reasonable probability existed that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." *Kimmelman*, 477 U.S. 365, 380 (1986); see also *Strickland*, U.S. 668, 695 (1984). The Court in *Strickland* defines reasonable as "probability sufficient to undermine confidence in the outcome." *Id.* At 694. This standard requires more than a mere probability that the defendant would more likely than not have received a different verdict. *Id.* at 694; *Jones v. Cain*, 151 So.3d 781,793 (2014). It demands a showing that the prejudice "undermines the confidence of the outcome." *Id.*

*Defense Counsel Was Not Ineffective for Failing to Secure Funds for an Expert*

*A. Petitioner did not meet Touchet standard to secure funds and obtain an expert*

Before determining whether defense counsel's actions were deficient and prejudiced the Petitioner's trial, the Court must examine the standard used to determine whether an indigent defendant would have been able to obtain an expert. If Petitioner preliminarily is unable to demonstrate the need, then there is no evidence that his counsel's performance fell below the *Strickland* standard outlined in the above case law.

Louisiana Courts have stated that for an indigent defendant to obtain an expert he must first meet a "threshold showing as to need for an expert assistance" and second "he must establish that the expert assistance will be necessary to the construction of an effective defense." *State v. Touchet*, 642 So.2d 1213, 1215 (La. S.Ct. 1994). This standard was further defined in *Moore* where the Court held that a reasonable probability must exist both that the expert would be of assistance to the defense and denial of the expert would result in a fundamentally unfair trial. *Moore v. Kemp*, 809 F.2d 702 (11<sup>th</sup> Cir. 1987). Therefore, the burden is on the defendant to (1) establish more than that he merely wants expert but that he needs one because (2) without an expert his trial would be fundamentally unfair.

In *Caldwell v. Mississippi*, the US Supreme Court held that the defendant failed to demonstrate a need for a ballistic expert. The Court stated that the defendant "only offered little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320,325 (US S.Ct. 1985). Therefore, a vague and conclusive statement falls far below the requisite standard articulated by the Courts.

Like in *Caldwell*, the Petitioner vaguely requests for a psychologists or psychiatrists without more description. In his petition, he merely suggests that an "expert witness could have testified...that [the defendant] suffered from a major depressive disorder." (PCR Memo pg 7). The conditional phrase of "could have" is not enough to meet the threshold need for an expert.

confession of continuous rape. A review of the record does not indicate once before or during trial, the defendant's request for such an expert. Therefore, defense counsel's failure to secure funds and obtain an expert did not result in a fundamentally unfair trial.

After examining the applicable standard, Petitioner's argument fails to establish that his counsel was ineffective under *Strickland*. Counsel's actions were not deficient. Even if defense counsel had moved for an independent expert to testify or assist at Petitioner's trial, the above analysis demonstrates that he would have been unable to meet the two prongs necessary to obtain an expert.

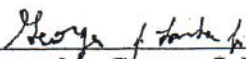
*B. Defense Counsel's decision falls within the ambit of trial strategy under Strickland*

As stated above in the section detailing the *Strickland* standard, an attorney's conduct is only deficient when his actions fall outside the wide range of professional tactics. Here, defense counsel is a seasoned public defender with close to 25 years of experience. Determining whether or not to request an independent expert is well within the ambit of tactical decisions that he must make. Therefore, defense counsel was not deficient. Furthermore, the failure to not obtain and secure an expert did not prejudice the petitioner of a fair trial. Merely obtaining an independent expert would not have altered the verdict when juxtaposition against the overpowering evidence demonstrating Petitioner's guilt of aggravated rape of his eleven year old step-daughter.

This assignment of error is without merit and dismissed and denies any relief.

Petitioner's Post Conviction Application is **Dismissed** and **Denied** Relief.

Signed the 17 day of June, 2015 in Houma, Louisiana.

  
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Honorable George J. Larke, Jr.  
32<sup>nd</sup> Judicial District Court, Div. "A"

Please Serve:  
Mr. James Joseph Hebert  
DOC # 604346  
Camp D, Eagle Unit - 3  
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**FILED**

JUN 17 2015