04/24/2017 "See News Release 023 for any Concurrences and/or Dissents."

SUPREME COURT OF LOUISIANA

No. 2016-KP-0511

STATE OF LOUISIANA

v.

ANTHONY BELL

**ON SUPERVISORY WRIT FROM THE
19TH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE**

PER CURIAM:

Writ denied. In 2008, an East Baton Rouge Parish jury found relator, Anthony Bell, guilty of the first degree murders of his wife Erica Bell, Leonard Howard, Gloria Howard, Doloris McGrew, and Darlene Mills Selvage; and the attempted first-degree murder of his mother-in-law, Claudia Brown. For the following reasons, we find no error in the district court's denial of post-conviction relief and we attach hereto and make a part hereof the district court's written ruling.

At trial, the state's evidence showed that in May of 2006, after arguing with his estranged wife, relator entered the small family church led by Claudia Brown and shot all adults present for church services, except his wife whom he abducted. Four of those victims died as a result of their injuries but Brown survived despite being shot in the back of the head. Relator did not harm any of the five children present and one child was able to locate a cell phone, which Brown used to call 911 as she regained consciousness. Brown reported to the 911 operator that relator was the shooter and described his clothing.

Taking his wife and their three children along with him, relator first drove to a relative's home, where he dropped off the older two children, then to the parking lot of an apartment complex. While in the car with his wife and their infant, relator shot his wife in the back of the head with the same gun that he used in the church, killing her. He then placed the gun in her hand, called 911, and waited at the scene holding their infant, where he was arrested. Relator gave both an unrecorded statement and a recorded statement to police, in which he claimed his wife committed the church shootings and then shot herself because she was distraught over his affairs and the breakup of their marriage.

Relator was initially represented by appointed counsel. On the defense's request, the trial court appointed a sanity commission to determine whether relator was competent to proceed and appointed experts to determine his I.Q. for purposes of the defense's motion to quash the death penalty pursuant to *Atkins v. Virginia.*[1] The court found relator competent to proceed, but declined to resolve the *Atkins* claim before trial because the parties did not agree to leave the determination to the court pursuant to La.C.Cr.P. 905.5.1.

Frustrated that his court-appointed attorneys were not pursuing his defense that his wife shot the victims and then herself in response to relator's disclosure that he was having an affair with her mother, and convinced his attorneys were withholding information from him, relator began filing pro-se motions to dismiss one or both of the attorneys and to represent himself. Eventually, on February 28, 2008, the trial court granted relator's motion to represent himself and his attorneys continued to assist as standby counsel throughout the guilt phase of trial.

The jury found relator guilty as charged on each count. Relator requested that appointed counsel be reinstated for the penalty phase. The court granted his

[1] In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the Supreme Court held that the Eighth Amendment prohibits execution of the intellectually disabled.

request but denied the 60-day extension for preparation that relator requested, which left defense counsel five days to prepare for sentencing. After the sentencing hearing, jurors rejected relator's intellectual disability claim and unanimously agreed to impose a sentence of death in light of the aggravating circumstances that relator killed Erica Bell during the commission of a second degree kidnapping; the victims Leonard Howard, Gloria Howard, and Doloris McGrew were 65 years of age or older; and that relator possessed specific intent to kill multiple persons.

The trial court sentenced relator to death by lethal injection for each of the five counts of first degree murder, and to 50 years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for attempted first degree murder. The convictions and sentences were affirmed. *State v. Bell*, 09-0199 (La. 11/30/10), 53 So.3d 437, *reh'g denied*, (La. 1/14/11), *cert. denied sub nom. Bell v. Louisiana*, 564 U.S. 1025, 131 S.Ct. 3035, 180 L.Ed.2d 856 (2011). In 2013, relator filed an application for post-conviction relief, which the district court denied with written reasons.

Relator first contends that an MRI and neuropsychological evaluation conducted in 2013, seven years after the shootings and five years after his trial, reveals that he suffers from a previously undiscovered brain asymmetry[2] and undiagnosed mental illness in the form of bipolar disorder and grandiosity. He claims these conditions render him incompetent in a manner distinct from the previously litigated questions of his competency to stand trial and his intellectual disability and justify the reopening of several claims. However, the issue of his

[2] Relator characterizes the asymmetry as "severe brain damage." However, his medical reports do not support the use of that phrase as it is conventionally understood, as relator is not alleging that his brain was damaged by any traumatic injury or disease process. Two of the reports on his brain imaging identified his brain as within normal limits. The reports noted, at most, mild asymmetry in some portions of his brain, and none of the reports offer any supposition as to the reasons for the asymmetry.

competence was thoroughly addressed at trial and on direct review.[3] Although he now argues that a previously undiscovered medical basis underlies these previously litigated claims, a competence determination rests on a defendant's capacity to understand the proceedings or assist in his defense. La.C.Cr.P. art. 641. The jury and trial judge had the opportunity to extensively observe relator's lucid and capable behavior as he represented himself during the guilt phase, and those firsthand observations were undoubtedly factored into the jury's determinations at both phases of trial. Relator fails to show that the new evidence about his brain structures and his performance on tests conducted several years later are relevant to the issue of his competency to stand trial or would have affected the verdicts. As evaluating psychologist Dr. Donald Hoppe noted in a letter[4] at the conclusion of relator's trial:

> Mr. Bell has more recently requested, and has been allowed, to serve as his own attorney. I had the opportunity to observe him in the court room during voir dire on April 2, 2008. His behavior at this time was remarkably different from what I had seen earlier. Mr. Bell clearly had no difficulty following what was going on in court. He was

[3] As this Court noted on direct review:

> Before defendant dismissed his appointed counsel, they placed his mental status at issue in separate but interrelated motions. First, on June 22, 2006, the defense asked the district court to appoint a sanity commission to determine whether the defendant was competent to proceed. Second, on July 5, 2006, the defense asked the district court to appoint experts to determine the defendant's I.Q. in light of the Supreme Court's determination in [*Atkins*], wherein the court held the Eighth Amendment prohibits the execution of mentally retarded offenders. Finally, on October 11, 2007, appointed counsel filed a lengthy Motion to Quash the state's notice to seek the death penalty, claiming the defendant is mentally retarded. On February 26, 2007, the district court granted the defense's Motion to Determine Defendant's Competency, and after a hearing on August 30, 2007, the court found he was competent to proceed. The district court also granted the defense's Motion to Determine Defendant's I.Q. but declined to resolve the *Atkins* claim pre-trial, because the parties did not agree to leave this determination up to the court pursuant to La.C.Cr.P. 905.5.1, which states, "The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge."

Bell, 09-0199, p. 2, 53 So.3d at 439–40.

[4] While Dr. Hoppe's contemporaneous assessment of relator's courtroom performance was written in response to relator's *Atkins* claim, rather than his current claims of mental illness and brain abnormality, the doctor's description of relator's courtroom performance remains pertinent.

> observed to be reading and writing with no apparent difficulty. He was articulate, even eloquent in his arguments before the court. Several times he correctly cited Louisiana law and the court ruled in his favor. The questions which he posed to prospective jurors were well-planned and carefully crafted. All of this directly observed behavior strongly weighs against Mr. Bell's true level of intelligence falling in the 50-53 range.
>
> Based on the highly doubtful IQ test results and direct observation of average to above average conceptual, social, and practical adaptive skills, it is my opinion that Anthony Bell is *definitely not mentally retarded*.

(emphasis in original). Relator fails to show that the interests of justice require the Court to revisit his intellectual ability or competence. La.C.Cr.P. art. 930.4.

Moreover, as the district court found in its post-conviction ruling, the 2013 neuropsychological reports do not contain any credible evidence that relator suffers from "severe brain damage" and mental illness as he claims. To the contrary, the initial MRI report identifies several normal brain structures[6] and concludes relator's "Study [was] within normal limits." Likewise, the report from Sundeep Mangla, M.D., who performed an independent evaluation of the same MRI, identifies merely that "there may be mild asymmetry of the medial temporal lobes and hippocampal gyri, . . . [but that n]o abnormality or asymmetry of signal intensity is observed within these temporal lobe regions," and that "[t]he remainder of the Brain MRI appears structurally normal without evidence of tumor, stroke, or significant asymmetry in morphology or signal intensity."

On the other hand, a 2013 neuropsychiatric exam authored by George Woods, M.D., quotes relator's MRI report finding that his brain is "within normal limits," but interprets relator's partly empty sella (previously identified as a pituitary issue) and structural asymmetries as indicative of abnormality. He refers to yet another interpretation of the same images conducted by Erin Bigler, Ph.D.,

[6] The report also notes a "partly empty sella;" the area of the brain in which the pituitary gland is located.

whom Dr. Woods claims described the asymmetry as roughly 20%. Dr. Woods concludes that relator's neuropsychological examination and "poor performance" at trial[5] are direct manifestations of relator's brain asymmetry, and concludes that relator suffers from bipolar disorder, secondary to a general medical condition. In the same vein, a 2013 neuropsychological report authored by Robert Shaffer, Ph.D., indicates testing showed relator's intelligence to be in the low average range. After summarizing the various neuropsychological tests performed, the report concludes that relator's "MRI brain scans and neuropsychological tests demonstrate abnormal structure and impairment of important neuropsychological functions" which show relator "suffers from an organic, brain-based condition causing *grandiosity*," potentially causing relator to overestimate his own abilities and demonstrate judgment poorer than expected for someone with low average intelligence. The report also concludes that because of this, although relator was 25 years old at the time of the offenses, he "would have displayed characteristics of youth in their developmental period younger than 18."

On the whole, relator uses the 2013 neuropsychological testing to draw retrospective, speculative, and unprovable conclusions about his mental functioning at the time of the offenses and at trial, based on tests performed years later. Even if the test results relator now offers had been available at trial, they would have had no reasonable likelihood of affecting the outcome. Although the reports opine that relator suffers from poor judgment and poor impulse control, they are in no way inconsistent with the finding at trial that relator is not intellectually disabled nor do they reveal any new information about relator's "capacity to understand the proceedings against him or to assist in his defense." *See* La.C.Cr.P. art. 641. Rather, it appears the expert opinions that relator suffers

[5] Because there is no indication that Dr. Woods observed relator at trial, it is unclear how he formed his opinion that relator's performance was poor.

from poor impulse control and poor judgment may have even been detrimental to his defense. In sum, because this new evidence is not so compelling that no reasonable juror could have voted to convict him with knowledge thereof, *see State v. Pierre*, 13-0873 (La. 10/15/13), 125 So.3d 403, relator has shown no error in the district court's rejection of it.[6] Moreover, because this new information does nothing to change this Court's analysis of any related claims that were fully litigated on appeal, relator has not shown that the interest of justice requires this Court to reconsider them now. La.C.Cr.P. art. 930.4(A).[9]

Relator next argues that the prosecution committed misconduct by failing to disclose that between November 2007 and March 2008, the jailhouse law librarian wrote several letters to the prosecution in which he offered information about relator's trial preparation and requested leniency in his own pending prosecution. Although relator invokes *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and the cases that followed it, the doctrine addressed therein bars the introduction of a defendant's incriminating statements if the

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[6] Likewise, relator shows no district court error in its dismissal of his argument that appointed counsel's failure to discover and introduce this information before he waived representation constitutes ineffective assistance, or in its rejection of his claim that, although he was 25 years old when he committed the offenses, *Atkins* and/or *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) prohibit his execution, because his mental illnesses and brain damage "functionally impair him to the level of a person under 18 years of age." This Court rejected a similar argument seeking to extend the rationales of *Roper* and *Atkins* to adults who display immature developmental characteristics, in *State v. Tucker*, 13-1631, p. 52 (La. 9/1/15), 181 So.3d 590, and we see no reason to depart from this reasoning in relator's case.

[9] Separately, relator contends these evaluation results should permit him to re-open numerous procedurally-barred claims, including claims related to his decision to waive counsel and decisions made during his self-representation, along with claims that: he was denied access to investigators and experts, the trial court erred by imposing excessive restraints on him during trial without a finding of necessity, he was prevented from seeking assistance from his standby counsel during trial, the trial court erred by denying his motion for a change of venue, and his charging document was defective. These claims were thoroughly addressed on direct review and found meritless.

In addition, claims that the trial court erroneously permitted the state's DNA expert to present unreliable testimony in response to an impermissible hypothetical from the state, and that the state exercised its peremptory strikes in a discriminatory manner in violation of *Batson v. Kentucky*,476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) were not preserved by contemporaneous objections at trial. La.C.Cr.P. art. 841; La.C.Cr.P. art. 930.4(B).

statements were intentionally elicited by a jailhouse informant acting as a government agent and in the absence of counsel. Because relator does not allege that he made any incriminating statements to the law librarian, that case appears inapposite. Further, relator does not show that the law librarian acted as an agent for the state. Relator surmises that the warden intentionally selected that individual, a police officer charged with theft and fraud in the line of duty, to serve as the law librarian because his "predisposition to dishonesty was obvious" given his pending charges, but his theory that the warden predicted the librarian's actions is pure conjecture. Nothing indicates that the warden and prosecutors acted in concert, or that the prosecution solicited the letters, encouraged them, obtained any advantage from them, or even responded to them.[10] Rather, the letters merely reflect an aspiring snitch who offered his services in the hopes of leniency, and do not appear to contain any incriminating information or confidences relayed by relator. Notably, communications with jailhouse law librarians, who are typically not attorneys, are not privileged. *See e.g.*, *State v. Myers*, 02-1296 (La. App. 3 Cir. 3/5/03), 839 So.2d 1183. Accordingly, though the prosecutor failed to disclose the letters, because there is no indication they were in any way used at trial (much less to prejudicial effect), relator fails to show that the district court erred in rejecting this claim. La.C.Cr.P. art. 930.2.

Relator next argues that his conviction should be reversed because the trial court's evidentiary rulings and restriction of relator's case to a single day prevented him from presenting a defense. Specifically, he claims the court

[10] Relator contends the prosecution used information from the letters to his detriment, citing the state's renewal of a motion to perpetuate testimony from the only adult survivor, Claudia Brown. However, given that Brown was the sole adult eyewitness and relator was on trial for an incident in which he shot Brown in the head, even absent the informant's letters, the prosecution was clearly aware that relator might pose a threat to Brown's well-being. As such, the prosecution's decision to perpetuate Brown's testimony is not clearly attributable to the librarian's letters.

"pressured" him to call his witnesses within one day, but does not show that any witnesses or evidence were erroneously excluded as a result.[11] Because these are issues of which he had knowledge and raised in the trial court, yet inexcusably failed to pursue on appeal, the district court did not abuse its discretion in rejecting the claims. La.C.Cr.P. art. 930.4(C).

Relator next argues that his absence from various pretrial proceedings, and appointed counsel's failure to object thereto, denied him due process and violated unspecified Sixth Amendment rights. Relator contends he was absent from 16 of the 41 pretrial conferences and hearings before he assumed his own representation. As an initial matter, relator does not explain how his absence from any of these pretrial proceedings violated his substantial rights. In any event, as indicated by the district court's ruling dismissing this claim, with the exception of an emergency gag order request by the defense, the proceedings from which relator was absent

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[11] In any event, the claims lack merit. Relator asserts the court denied him an opportunity to re-call Claudia Brown the next day, yet the trial transcript shows Brown was available to testify on the day that relator presented his defense, and relator fails to explain why he needed an additional day to re-call an available witness. Relator also argues that "key witness" Joshua Brown would have testified that Erica Bell was "controlling and jealous" and provided information regarding "relator's state of mind," but was unavailable until the following day. Though relator has offered an unsworn statement from Brown, it does not support relator's assertion that Brown was prepared to provide beneficial testimony.

Relator also argues that the trial court's evidentiary rulings constituted improper commentary on the evidence, in violation of La.C.Cr.P. art. 772. Specifically, the court sustained the state's objection to relator's questions about previous conflicts between relator and his wife because the testimony was inadmissible evidence of the victim's character. *See* La.C.E. art. 404 (generally prohibiting admission of character evidence to prove a person acted in conformity with her character on a particular occasion). Relator reasons that the ruling effectively pre-judged the merits of the case by presuming that Bell was, in fact, a victim as the state contended, rather than the perpetrator, in accordance with his defense theory.

Indulging such a view would produce absurd results. To construe evidentiary rulings as judicial commentary on the merits of either party's theory is to disregard the trial court's fundamental role as a neutral arbiter. Necessarily encompassed in that role is the discretion to apply the law to govern the proceedings, including the application of the evidentiary rules. *Cf.* La.C.Cr.P. art. 17 ("[A trial court] has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done."). Here, relator was on trial for Bell's murder; as such, Bell was a victim for purposes of the evidentiary rulings. The court's ruling on the objections was therefore not, as relator claims, an improper comment on the evidence, but rather a necessary ruling on the objections. Moreover, because relator has failed to show that the court abused its discretion in ruling, he cannot carry his post-conviction burden of proof. La.C.Cr.P. art. 930.2.

consisted of housekeeping matters. Because he does not show that he was absent from any constitutionally significant proceedings or proceedings at which his attendance was obligatory, *see* La.C.Cr.P. art. 831, the claim fails.

Relator next alleges he received ineffective assistance pre-trial from court-appointed counsel. He claims counsel erred by failing to investigate his mental health, failing to retain an expert who would have established that he was not competent to represent himself, and failing to prevent his waiver of counsel. He posits that such an expert would have shown that he suffered from mental illness and "brain damage," and as a result the trial court would not have permitted his "disastrous" self-representation. He also claims pre-waiver counsel failed to investigate, and thereby failed to retain experts to examine the DNA evidence, fingerprint evidence, and gunshot evidence "to create reasonable doubt."

Relator urges that the district court erred by citing *Faretta*[12] in finding that he waived any ineffective assistance of counsel claims when he chose to represent himself, because *Faretta* does not specifically address claims that pre-waiver appointed attorneys were ineffective. Though relator does not point to any law supporting his argument that pre-waiver ineffectiveness claims remain viable after a waiver of counsel, even assuming *arguendo* that *Faretta* does not bar such claims, relator's precise claims were in fact waived because they were all within the purview of his self-representation.[7] Moreover, as set out on appeal, relator's court-appointed attorneys zealously attempted to prevent his self-representation:

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[12] *See Faretta v. California*, 422 U.S. 806, 834–35, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975) (accused who chooses to represent himself may not later complain that his self-representation was inadequate); *see also State v. Dupre*, 500 So.2d 873, 875 (La. App. 1 Cir. 1986).

[7] The errors and prejudice that relator attributes to pre-waiver counsel are, at best, conjecture, because it is impossible to determine what counsel would have done, had relator not insisted on representing himself. Notably, pre-waiver counsel investigated the relevant aspects of relator's competence, requested and obtained competence and intelligence evaluations, and obtained statements from relator's mother, teachers, and employers, pertaining to his history.

> Additionally, after defendant had been representing himself for over two weeks, his standby counsel filed a Motion to Reconsider Defendant's Pro Se Motion to Dismiss Counsel, and the motion was heard seven days later. At this hearing, defendant stated, "Your Honor, if I can't—if I can't have my attorneys and be—be co-counsel with them, I will represent myself, and I don't want to entertain their motion." The court attempted to confirm once again that the defendant knew there is no right to be both represented and represent yourself, he had every right to take the stand regardless of his representation, he is not being withheld discovery that representing himself will allow him to obtain, and he has been provided or allowed to inspect every piece of evidence in the case. Defendant confirmed he understood the above, but objected to the statement that he had received all of the evidence, as there was a dispute about a certain statement and a few other items that were absent from a box the state provided to the defendant. After standby counsel and the state were heard on the motion, the court insisted the defendant articulate why he opposed their motion. The defendant stated, "Because I wouldn't be able to—I wouldn't be able to act as co-counsel at my trial. That's the only reason why I'm objecting to their motion." The court then asked what he wanted to have the ability to do as co-counsel. The defendant stated, "Talk just like my lawyer would be able to talk to witnesses, question witnesses." The defendant then reiterated his desire to act as co-counsel if he had that right, but absent that right he stated, "I'm representing myself." It is clear the defendant in this case desired to represent himself, and was well-apprised of the dangers and pitfalls of his venture.

Bell, 09-0199, pp. 21–22, 53 So.3d at 451.

Relator further argues that counsel, who later re-enrolled for the penalty phase at relator's request, made numerous errors. First, he argues that penalty phase counsel erred by failing to present mitigation evidence, including evidence of his life history, brain abnormalities, and mental illness.

A defendant at the capital penalty phase is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life. *State v. Fuller*, 454 So.2d 119, 124 (La. 1984). Thus, counsel's role at capital sentencing resembles his role at the guilt phase in that he must "ensure that the adversarial testing process works to produce a just result." *Burger v. Kemp*, 483 U.S. 776, 788–89, 107 S.Ct. 3114, 3122–26, 97 L.ed.2d 638 (1987). A finding of ineffective assistance of counsel at the penalty phase requires a showing that

counsel failed to undertake "a reasonable investigation [which] would have uncovered mitigating evidence," and that failing to put on the available mitigating evidence "was not a tactical decision but reflects a failure by counsel to advocate for his client's cause," which resulted in "actual prejudice." *State v. Hamilton*, 92-2639, p. 6 (La. 7/1/97), 699 So.2d 29, 32.

Here, though penalty phase counsel presented an *Atkins* defense,[8] relator argues that counsel failed to investigate with sufficient zeal to discover his alleged brain abnormalities, which could have served as mitigation evidence. However, as discussed above, relator fails to demonstrate that at the time of the offense he suffered from any brain abnormalities or mental illness which would have caused impaired capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." *See* La.C.Cr.P. art. 905.5. Moreover, though relator alleges counsel erred by failing to investigate his potential brain abnormalities, separate and apart from the intellectual disability inquiry, and refers to counsel's failure to ensure he received an MRI, prison medical records show that an MRI was ordered for relator before trial, not because of his cognitive functioning, but rather to evaluate his pituitary gland for abnormalities because he was suffering from enlarged breast tissue. Because the facility did not have MRI equipment, it conducted a CT scan, which revealed "no acute or significant intracranial abnormality." Under these circumstances, relator fails to show that there was any reasonable basis to pursue further investigation at that point, or that such investigation would have revealed anything helpful, given that the first two doctors to examine his subsequent 2013 MRI results noted they were "within

[8] In conjunction with the *Atkins* defense, counsel presented evidence of relator's educational struggles and work history, and called three of relator's family members to testify that he struggled in school and with following directions but was a good father and husband, and that he had helped family members financially. Counsel also introduced relator's academic records, which demonstrated his struggles in school, and called Dr. Zimmerman to testify regarding relator's intellectual ability.

normal limits" and showed "no abnormality." Thus, relator has not shown, as required under *Hamilton*, that counsel's penalty phase investigation resulted in the omission of mitigating evidence, and this claim fails. *See Hamilton*, 92-2639 p. 6, 699 So.2d at 32; *see also Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct. 2527, 2538, 156 L.Ed.2d 471 (2003) ("In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.").[9]

Relator also shows no prejudice as a result of counsel's failure to object to the injection of allegedly inapplicable aggravating factors in a case in which the state provided sufficient evidence to support the jury's findings that he killed his wife during a second degree kidnapping; that he killed three victims who were 65 years of age or older; and that he killed all victims in a shooting spree. *See, e.g.*, *State v. Monroe*, 397 So.2d 1258, 1276 (La. 1981) ("Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon."). This claim fails.[16]

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[9] Although relator argues that penalty phase counsel erred by failing to present additional evidence, counsel appears to have reasonably concluded that no other evidence supported the *Atkins* defense. Much of what relator now presents shows, contrary to his claims of intellectual disability and "severe brain damage," that relator earned promotions at work and was generally a capable employee. Thus, he fails to show the omitted evidence would have resulted in a different sentencing outcome, especially in a case in which, because he chose to represent himself during the guilt phase, jurors observed his abilities and demeanor firsthand.

Relator also alleges counsel erred by failing to raise various objections during the penalty phase, regarding underlying issues that were addressed on appeal, including the admission of relator's phone calls from prison, religious references, and victim impact testimony. Relator shows no basis to revisit these issues, La.C.Cr.P. art. 930.4, and he fails to show the district court erred in rejecting those claims.

[16] The district court correctly rejected relator's remaining complaints about penalty phase counsel. Counsel did not err by failing to object to Dr. Hoppe's testimony as an expert witness for the state, on the ground that Dr. Hoppe did not advise relator that the results of his evaluation would not be kept confidential, because Dr. Hoppe evaluated relator pursuant to court order and relator therefore harbored no reasonable expectation of privacy. No provider-patient privilege

Finally, relator fails to show that he received ineffective assistance of appellate counsel because counsel failed to raise the claims discussed above. Relator does not have a right to designate the issues that counsel raises on appeal, *see Jones v. Barnes*, 463 U.S. 745, 751–53, 103 S.Ct. 3038, 3312–13, 77 L.Ed.2d 987 (1983), and would be entitled to relief only if he can show both that (1) counsel erred by "ignor[ing] issues . . . clearly stronger than those presented," *see Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) (citation and internal quotation marks omitted), and (2) a "reasonable probability" that he would have prevailed on the claim on appeal. *Mayo v. Henderson*, 13 F.3d 528, 533–34 (2d Cir. 1994). Because the claims are meritless, appellate counsel did not render ineffective assistance by failing to raise them.

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's 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. 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.

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exists when "the communication was made in the course of an examination ordered by the court in a criminal case to determine the health condition of a patient, provided that a copy of the order was served on the patient prior to the communication." *See State v. Brodgon*, 457 So.2d 616, 627–28 (La. 1984) (doctor-patient privilege not intended to apply to information or opinion genuinely relevant to the narrow issue of the defendant's mental health or condition when tendered as an issue either at trial or at the penalty phase).

STATE OF LOUISIANA	*	DOCKET NO. 06-03-655 SEC. VII
VERSUS	*	NINETEENTH JUDICIAL DISTRICT COURT
	*	PARISH OF EAST BATON ROUGE
ANTHONY BELL	*	STATE OF LOUISIANA

ORDER

HAVING CONSIDERED the petitioner's Application for Post-Conviction Relief, First Supplemental Petition for Post-Conviction Relief, State's response and the Reply to the State's procedural Objections and Answer,

IT IS ORDERED THAT THE petitioner's Application for Post-Conviction Relief is Denied and the instant petition is dismissed.

Claim one is denied. Petitioner claims that numerous aspects of his counsels' pre-trial performance were ineffective. Under ***Faretta v. California***, 422 U.S. 806, (1975) the petitioner waived any challenges regarding the effectiveness of counsels' pre-trial performance.

Claim two is denied. Petitioner claims that his right to counsel was violated by the Court's refusal to permit petitioner to proceed with one attorney. In ***State v. Reeves***, 11 So. 3d 1031 (La. 2009) the Court held that an indigent defendant did not have a right to counsel of choice under either the federal or state constitutions, but only the right to effective representation of counsel and the petitioner's right to counsel was not violated when the Court refused his request with one counsel of record.

Claim three is denied. Petitioner alleges that he should not have been allowed to proceed pro se. He claims that he was not competent to waive counsel, his request was not clear, unequivocal, knowing, intelligent and voluntary and that the Court's decision constitutes reversible error. This claim was fully and extensively litigated on appeal and is barred by La. C.Cr.P. art. 930.4(A). He cites ***Indiana v. Edwards***, 554 U.S. 164 (2008), in support of this contention. However, this argument was rejected on appeal finding that "the present case does not offer the facts on which it should be built" regarding his contention that he suffers from a significant mental defect or illness. The ruling issued by the La. Supreme Court found that there was significant evidence to the contrary regarding a significant mental impairment.

Claim four is denied. Petitioner claims that he was improperly denied access to investigators and experts. This allegation is also barred by La. C.Cr.P. art. 930.4(A) since it was

fully litigated on appeal. The evidence shows that the Court informed him of the availability of the Office of Public Defender resources on March 14, 2008 and was told on March 26, 2008 how to procure those resources. The evidence further shows that he did not follow the proper channels to procure such assistance until at least April 2, 2008. There is no evidence that he was deprived of access to investigators and experts.

Claim five is denied. Petitioner claims his sixth amendment right was denied when counsel failed to object to petitioner's absence at a portion of the pretrial proceeding. This allegation is barred under La.C.Cr.P. article 930.4(B) since this was known prior to conviction and was not objected to at the time. Additionally, this claim was not raised at appeal. The Louisiana Supreme Court in *State v. Brown*, 907 So.2d 1, held that the Louisiana Code of Criminal Procedure does not provide that a capital defendant is entitled to be present at pretrial status hearings. The matters that were handled in Court without petitioner present involved housekeeping matters regarding the exchange of reports and documents. The only other matter handled was an emergency gag order request by his counsel to prevent a local television station from releasing the 911 call involved in the case. Petitioner was brought in to Court the next day and on the record informed of the events of the day before.

The PCR claim that was filed under seal (claim six) and inserted into the supplemental petition at this point in the petition is, after a review by the Court, denied.

Claim seven is denied. Petitioner claims that there was an excessive use of restraints at the trial without any individualized finding of necessity. This claim was addressed on appeal and the Louisiana Supreme Court noted that the shackles were concealed from the jury. Additionally, a deputy was seated close to him but was not in uniform. This claim is also barred by La.C.Cr.P. 930.4(A).

Claim eight is denied. Petitioner claims that he was improperly prohibited from seeking assistance from stand-by counsel. This allegation was also brought up on appeal and therefore also barred by article 930.4(A). The Court also notes that petitioner requested and was permitted to meet with standby counselors (who were present in the courtroom at all times) at least seventeen times while he was defending himself pro se.

Claim nine is denied. Petitioner claims that he was improperly prevented from presenting his defense. The Court notes that petitioner's complaints in this section regarding access to

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defense experts have already been addressed earlier. The additional complaint about the rulings on the admissibility of Erica Bell's character and the time he had to present his case are barred per La. C.Cr.P.930.4(C) since they were not raised on appeal.

Claim ten is denied. Petitioner argues that the Court pre-judged his defense in front of the jury. There is no constitutional complaint made with regard to this allegation. The trial court only made a ruling on the admissibility of evidence in response to the State's objection. In ***State v. Jones***, 593 So.2d 802, (4th Cir. 1992) case the trial judge stated that a defense counsel's question was "out of line." The appellate court did not find reversible error. In this case, the Court made a ruling on the admissibility of evidence and referred to Erica Bell as a victim. There is no merit to petitioner's claim that the Court pre-judged his defense.

Claim eleven is denied. Petitioner argues that the guilt phase was tainted by the admission of extensive improper and highly prejudicial evidence. This claim is barred by La. C.Cr.P. 930.4(B) and (C) because of a failure to object at trial and a failure to raise this issue on appeal. Additionally, petitioner failed to cite a constitutional claim, so it is barred from post-conviction review under La. C.Cr.P. article 930.3. Petitioner argued that DNA analyst Jeffery Dubois' comment about how someone becomes a major versus minor contributor of DNA was inaccurate and based on an improper scientific finding. This was not a challenge to his qualification as an expert but only a challenge to his testimony regarding this particular issue. Rather than object to the testimony petitioner chose to argue that DNA cannot definitively prove who fired the weapon. Dubois also testified that petitioner was also the major contributor on the telephone used to call 911. Dubois concluded that petitioner was the major contributor to the DNA on the gun. This showed no prejudice on the part on the expert. Petitioner also claims that the court erred in allowing the prosecutor to pose a hypothetical to Dubois. This ruling was not challenged at trial or on appeal. It is also without merit and the line of questioning using a hypothetical was proper.

Claim twelve is denied. Petitioner claims that his utterly ineffective performance demonstrated his incompetency to appear pro se. Under the ***Faretta*** case, cited above, petitioner cannot complain that he provided himself ineffective assistance of counsel.

Claim thirteen is denied. Petitioner claims that his severe brain damage and mental illness warrant the reversal of his death sentence. Petitioner does not claim to be mentally retarded

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which could constitutionally protect him from the death penalty under ***Atkins v. Virginia,*** 536 U.S. 304, (2002). He asks the Court to extend ***Atkins*** to include individuals with mental illness. He also did not meet his burden of proving that he had a severe brain dysfunction or mental illness. At trial, two of the three doctors who had interviewed him as part of the pre-trial process were of the opinion that although he exhibited sub-average intelligence, he had no evidence of mental impairment of any kind.

Claim fourteen is denied. There was also no evidence that he functioned at a level of less than an 18 year old at the time of the trial based on his claim of severe brain damage and mental impairments. In ***Roper v. Simmons,*** 543 U.S. 551 (2005), the Court prohibited capital punishment for anyone who commits the crime prior to the age of 18. Two of the three doctors who interviewed petitioner prior to his trial determined that although he was of sub-average intelligence, he had no evidence of a mental impairment of any kind. Dr. Robert Shaffer, a neuropsychologist, opined that petitioner displayed characteristics of someone under 18 due to allegedly deficient brain structures. He went on to explain that young adult brains do not develop fully until their early twenties and that in petitioner's case his brain deficiencies caused his brain development to be even more delayed. Case law does not support this theory. Additionally, Petitioner was twenty-five years old, working, married and with children at the time of the commission of these crimes. He was clearly functioning at an adult level not as someone under the age of 18.

Claim fifteen is denied. Petitioner claims that his counsel failed to investigate and present critical and readily available mitigation evidence to the jury. Petitioner has not shown any new evidence that would warrant a lesser sentence and the investigation was not deficient nor did it cause prejudice to him. Additionally, this case presented a unique set of facts. Petitioner insisted on and had the right to represent himself in the guilt or innocence part of the trial. He was given thorough and repeated warnings from the Court that he would have to be prepared for the penalty phase of the trial if he was found guilty. After he was found guilty by the jury, he asked for counsel to assist him and this request was granted by the Court. His counsel had five days to do final preparations for this part of the trial. ***State v. Hamilton,*** 699 2d 32 (1997). The standard of review used in that case is the same as ***Strickland v. Washington.*** The ***Strickland*** court held that the defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense. In order to show a deficiency, it must be shown that counsel

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made errors so serious that counsel was not functioning as the "counsel" that is guaranteed the defendant by the Sixth Amendment. In *State v. Hamilton*, 699 So.2d 29 (La. 1997) the Court held that in such a challenge, the Court must determine whether there is a reasonable probability that, absent counsel's errors, the sentence would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. There is no showing made that had there been more evidence of his life history and mental health that a reasonable probability would have existed that he would have received a penalty of life imprisonment, rather than death.

Claim sixteen is denied. Petitioner claims that the death sentence should be reversed because his sixth amendment right to effective assistance of counsel was violated by counsels' numerous and egregious errors during the penalty phase. A defendant in a criminal proceeding is entitled to effective assistance of counsel. U.S. Const. Amend VI; La. Const. Art. I, sec. 13 *Strickland v. Washington*, 466 U.S. 668 (1984). Likewise, a defendant at the penalty phase of a capital trial is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life. *State v. Brooks*, 661 So.2d 1333 (La. 1995). When a defendant challenges the effectiveness of his counsel at the penalty phase, the court must determine whether there is a reasonable probability that, absent counsel's errors, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. In evaluating a claim of ineffective assistance of counsel during the penalty phase of a capital case, the court must first determine whether a reasonable investigation would have uncovered mitigating evidence. *Brooks*, 661 So.2d 1338; *Sullivan v. Louisiana*, 508 U.S. 275 (1993). If such evidence existed, then the court must consider whether counsel had a tactical reason for failing to put the evidence before the jury. If the failure to present mitigating evidence was not a tactical decision but reflects a failure by counsel to adequately advocate for his client's cause, the defendant must still have suffered actual prejudice before relief will be granted.

Petitioner makes the following claims regarding ineffective counsel during the penalty phase all of which are denied as noted above.

Petitioner claims that defense counsel erred during the penalty phase by not objecting to the State's use of excerpts of tape recorded telephone calls that he made while incarcerated and awaiting trial. He claims that the State insinuated that he posed a continuing threat to victim Claudia Brown in these calls. In petitioner's appeal, he alleged that the phone calls were inadmissible because they introduced an arbitrary factor into the penalty phase. The court

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deemed this claim waived because he failed to object but explicitly acquiesced in its use. When the State sought a ruling on the admissibility of the phone calls at penalty phase, petitioner, while still representing himself, did not object. Thus based on *Faretta*, 422 U.S. at 834, he cannot now complain that this amounted to ineffective assistance of counsel. Additionally, the State used these conversations to refute petitioner's claim of mental retardation by showing that he was an intelligent manipulator seeking to get his family and friends to act in his best interest.

Petitioner also complains that his counsel failed to object to the State's improper injection of religion into the penalty phase. This was discussed by the appellate court who noted counsel's failure to object but also noted that no relief was warranted considering that Claudia Brown was a minister and that significant religious imagery was interjected by the defense. There is no showing of prejudice for counsel's failure to object.

Petitioner alleges that his counsel was ineffective for failing to object to what he calls the State's improper use of victim impact statements. On appeal, the court noted that the victim impact testimony was not atypical and "did not interject an arbitrary factor into the proceedings." There were five victims and the State limited the victim impact testimony to the individuality of each victim and the impact of the crime on their survivors. There was no prejudice by this testimony.

Petitioner claims that his counsel was ineffective for failing to object to the submission of inapplicable and inappropriate aggravating factors to the jury including that one of the victims was an eyewitness to a crime committed by the defendant and that the offense was committed in an especially heinous, atrocious or cruel manner. He argues that submission of these two factors was improper because they were never alleged by the State. The Louisiana Supreme Court in its ruling on appeal found no error in any of the aggravating factors and noted that "as a general rule 'where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstances found and the sentence of death based thereon.'"

With regard to the mitigating circumstances, petitioner argues that his counsel was ineffective for failing to object to the State's mischaracterization of his lack of a significant prior history or criminal activity. The State referred to the murder of Erica Bell two and one half hours after the murders of the other victims as evidence that he had a history of significant criminal

activity. This was not objected to during the State's closing argument but was addressed by counsel for petitioner in his closing argument when he noted that petitioner did not have a prior criminal record before the day of these crimes. As noted above, all claims of ineffective counsel due to numerous and egregious errors in the penalty phase are denied.

Claim seventeen is denied. Petitioner claims that the death sentence should be reversed because counsel was ineffective in presenting a closing argument that actually undermined any chance to receive a life sentence. The court finds that the closing argument was neither deficient, nor prejudicial. In order to get relief for this complaint, the ***Strickland*** court held that he must prove that the likelihood of a different result is substantial, not just conceivable. The case relied upon by petitioner, ***State v. Myles***, 389 So.2d 12 (La. 1979) was decided before the ***Strickland*** case and is not applicable herein. Petitioner has failed to prove the elements set forth by the ***Strickland*** court.

Claim eighteen is denied. Petitioner claims that counsel inappropriately relied on an Atkins defense because it was done so ineffectively. He claims that their attempt to prove that he was mentally retarded was ineffective, that they failed to object to improper lay testimony on mental retardation and that both the court and counsel failed to instruct the jury on the statutory definition of mental retardation. Additionally, he claims that both the court and counsel erred in requiring the jury to unanimously find that he was mentally retarded. Plaintiff fails to allege that he is mentally retarded. Additionally, his own mental health experts did not find that he tested at that level. There is no prejudice shown because petitioner is not mentally retarded. The claim regarding the court's failure to define mental retardation is barred by La.C.Cr.Proc. article 930.4(A) as it was raised on appeal. The appellate court noted that the "jury had the benefit of an accurate description of the controlling statutory framework in voir dire as well as expert testimony on the diagnosis of mental retardation."

As to the claim of error based on the trial court's requirement of instructing the jury that it had to unanimously find petitioner mentally retarded, this claim is barred due to counsel's failure to object. Additionally in ***State v. Williams***, 22 So.3d 867 (La. 2009) the Court approved a jury instruction that stated that a finding of mental retardation had to be unanimous in order for the death penalty to be barred.

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Claim nineteen is denied. Petitioner claims that the conviction should be overturned because the State exhibited a discriminatory pattern and practice of striking qualified prospective African-American jurors on the basis of race. Petitioner failed to raise a single *Batson v. Kentucky*, 476 U.S. 79 (1986) challenge during voir dire. Therefore this claim is barred under La.C.Cr.Pr. art. 930.4(B). Because of this failure there has been no prima facie showing that the State exercised peremptory challenges on the basis of race, and the burden never shifted to the state to articulate race-neutral reasons for striking any particular juror.

Claim twenty is denied. Petitioner claims that his conviction should be overturned because he was not granted a change of venue. This was one of the elements of the petitioner's appeal and the appellate court properly determined that petitioner "failed to demonstrate the existence of an overriding prejudice in the community that would prevent him from receiving a fair trial." Additionally, petitioner has waived this challenge since he did not object during voir dire to any of the court's procedure. He was self-represented at that time so now cannot claim ineffective assistance of counsel.

Claim twenty-one is denied. Petitioner claims that the short form indictment used by the State was unconstitutional because it did not allege any statutory aggravating factors under La.C.Cr.P. art. 905.4. This claim was previously litigated on appeal so is now barred. There is no showing that the petitioner was improperly informed of the charges against him, nor does he present any specific allegations that the reliability of his proceeding was rendered fundamentally unfair by any alleged error.

Claim twenty-two is denied. Petitioner alleges that the death penalty statute in Louisiana is unconstitutional. This claim is barred under C.Cr.Pr. art. 930.4(B) since it was not raised prior to conviction. It is also without merit. Petitioner has not alleged how Louisiana's death penalty statute is overbroad as applied to him. He was sentenced to death based on four aggravating circumstances and so must establish how all four of the provisions for which he received the death penalty are unconstitutionally overbroad.

Claim twenty-three is denied. Petitioner claims that Louisiana's lethal injection protocol is unconstitutional. This claim was not raised on appeal and also lacks merit. Under *Baze v. Rees*, the court noted that "capital punishment is constitutional" and that "there must be a means

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of carrying it out." Petitioner has not established that the current protocol amounts to cruel and unusual punishment.

Claims twenty-four is denied. Petitioner claims that his rights under international law were violated and require reversal of both his conviction and death sentence. International law claims are not recognized as a ground for post-conviction relief under La.C.Cr.Pr.art. 930.3.

Claim twenty-five is denied. Petitioner claims that his right to a fair clemency process has been violated. This claim is premature. In the event it becomes no longer premature, it will be addressed by the appropriate court.

Claim twenty-six is denied. Petitioner has claimed that his appellate counsel was not effective by failing to raise various issues on appeal. Appellate counsel briefed fifty-four assignments of error and orally argued them before the Louisiana Supreme Court. The omitted claims were either without merit or barred from appellate review. He did not suffer any prejudice due to the actions or inactions of his appellate counsel.

Claim twenty-seven is denied. Petitioner argues that the "cumulative effect" of the dozens of constitutional errors in this case require a new trial. This claim was denied by the appellate court and also lacks merit. This remedy has rarely been used and only applies in the unusual case where repetitive error violated a constitutional right to a fair trial. There is no evidence that this occurred here.

SO ORDERED, this 8th day of December 2015 in Baton Rouge, Louisiana.

JUDGE TODD HERNANDEZ
NINETEENTH JUDICIAL DISTRICT COURT