No. _____

In the
Supreme Court of the United States

STEVE KELLY MOYER,
Petitioner,

v.

STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Kansas Supreme Court Who Affirmed the Remand Court's Analysis and Findings on Moyer's Counsel's Effectiveness under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) and *Edgar v. State,* 294 Kan. 828, 283 P.3d 132 (2012) and Held: "Giving Deference to the Lower Court's Credibility Assessments and Considering the Overwhelming Evidence Against Moyer, We Agree That There Was No Reasonable Probability That the Outcome of the Case Would Have Been Different Had J.T. Testified", Failed to Consider the Prejudicial Constitutional Errors Committed by Trial Counsel and Applied an Incorrect Standard in Violation of the Binding Principals of *Stare Decisis*, Contrary to this Court's Rulings in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967) (Where this Court Admonished Against Giving to Much Emphasis to "Overwhelming Evidence" of Guilt, Stating That Constitutional Errors Affecting the Substantial Rights of the Aggrieved Party Could Not Be Considered to Be Harmless); and *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (Where this Court Held: "A Limited Class of Fundamental Constitutional Errors Is So Intrinsically Harmful as to Require Automatic Reversal Without Regard to Their Effect on a Trial's Outcome. Such Errors Infect the Entire Trial Process and Necessarily Render a Trial Fundamentally Unfair")?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONAL AMENDMENTS AND STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioner Steve Kelley Moyer (herein after Moyer), respectfully requests a *Writ of Certiorari* be issued to review the judgment of the Supreme Court of the State of Kansas affirming the convictions of Moyer and specifically affirming the remand court's findings that the constitutional errors committed by Mason did not cause Moyer to suffer prejudice because of "the overwhelming evidence of guilt". Although the remand court found Moyer's court-appointed trial attorney (herein after Mason) had a conflict of interest in simultaneously representing both Moyer and J.T., a crucial exculpatory witness for Moyer in separate and unrelated cases and Mason waited until the third day of Moyer's jury trial to prepare a subpoena for J.T., and Mason failed to make any arrangements to get the unsigned subpoena properly served on J.T., the Supreme Court of Kansas affirmed the remand court by holding: "that because of the overwhelming evidence against Moyer that there was no reasonable probability that the outcome of the case would have been different had J.T. testified".

I.

OPINIONS BELOW

The 4-3 opinion of the Supreme Court of Kansas issued on October 16, 2015 remanding the case for a *State v. Van* Cleave, 239 Kan. 117, 716 P.2d 580 (1986) hearing in the trial court to determine whether Moyer was denied his Sixth Amendment right to counsel, either because Mason, his trial counsel was not

constitutionally conflict free or was not constitutionally competent is reported as *State v. Moyer*, 302 Kan. 892, 935, 360 P.3d 384 (2015), *as modified* in 306 Kan. 342, 410 P.3d 71 (2017). The 4-3 opinion of the Supreme Court of Kansas issued February 15, 2019 affirming Moyer's convictions and the remand court's decision following the remand hearing by holding: "giving deference to the lower court's credibility assessments and considering the overwhelming evidence against Moyer, we agree that there was no reasonable probability that the outcome of the case would have been different had J.T. testified", is listed in the Appendix as "A". The Kansas Supreme Court's denial of Moyer's Motion for Rehearing or Modification was issued on March 28, 2019 and is listed in the Appendix, as "B".

II.

JURISDICTION

The 4-3 decision of the Supreme Court of Kansas was entered on February 15, 2019. Moyer's Motion for Rehearing or Modification was denied by the Supreme Court of Kansas on March 28, 2019. This petition is timely filed within ninety days of that date. This Court's certiorari jurisdiction is invoked pursuant to Title 28 United States Code Section 1257 (3).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

This Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.

The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Sixth Amendment to the United States Constitution provides that a criminal defendant shall have the right to "the assistance of counsel for his defense". Inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the states through the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution provides in part:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction the equal protection of the laws.

IV.

STATEMENT OF THE CASE

A. Facts Relevant to Arrest and Conviction of Moyer

On April 5, 2009 Moyer's oldest daughter J.M. alleged to her mother that Moyer had been engaging in sex acts with her for several years. Moyer's wife reported this allegation by her daughter to a local police detective. When Moyer went to work the next day, after hearing from J.M., the police arranged to have Moyer arrested when he finished work and was waiting to be picked up by his family. The son of the trial judge who signed the arrest and search warrants and presided over Moyer's jury trial, was a member of the law enforcement team that arrested Moyer. The trial judge's son was also listed as a witness on the amended complaint.

On April 7, 2009 J.M. was interviewed by the executive director of the Western Kansas Child Advocacy Center. Based upon J.M.'s interview, Moyer was charged with five felony counts.

On April 9, 2009 the assigned District Court Judge, court appointed Mason, a local attorney to represent Moyer on two severity level 1 felonies which were filed by the Sherman County Attorney. Despite there being five attorneys on the 15th Judicial District's Panel of Indigent Defense Services List who were qualified to handle the severity level 1 and off-grid felonies, the trial judge appointed Mason, who was listed as qualified only to handle severity levels 5-10 felonies.

On May 8, 2009 the Kansas Attorney General's Office filed an amended complaint charging Moyer with three off-grid felonies and two severity level 3 felonies and the son of the trial judge was listed as a witness.

On July 1, 2009 Moyer filed a *pro se* Motion to Dismiss Mason as Public Defender. No hearing was held on the merits of Moyer's *pro se* motion. On October 29, 2009 a letter was filed by Moyer to his court-appointed attorney titled "I am fireing (sic) You as my "court-appointed –Attorney". Mason then prepared a Motion to Change Attorney, with Moyer's letter as an attachment. On November 2, 2009 a hearing was held on the Motion to Change Attorney and the trial judge denied Mason's request.

On January 7, 2010 Moyer filed a *pro se* Motion entitled: "The Defendant" –Steve K. Moyer" Requests an "Emergency Motion" to "Fire" Mr. Jeffrey A. Mason" As my "Court Appointed Attorney"! and third "Motion to Change Attorney". There was no hearing held by the district court on Moyer's motion.

On January 13, 2010 a Motion to Recuse was filed by Mason asking the assigned judge to recuse himself because the State of Kansas listed the judge's son as a witness and alleged that it would create a conflict of interest and have a prejudicial effect on the defendant. A hearing was held on January 15, 2010 on the motion and the assigned trial judge refused to recluse himself.

On January 20, 2010 Defendant's Third Motion in *Limine* was filed by Mason asking the Court for an Order in *Limine* redacting from any exhibits used by the State and asking that no reference be made to the

judge's son by any of the witnesses during the trial which was granted by the court. At a hearing on January 21, 2010, Mason advised the court that he had followed the statutory requirements under K.S.A. 20-311d(b) to file an affidavit under seal with the Chief Judge after the assigned judge refused to recluse himself. The Chief Judge had no recall of receiving an affidavit from Mason pursuant to K.S.A. 20-311d(b) and the Sherman County District Court file did not contain any such K.S.A. 20-311d(b) affidavit.

During Mason's court-appointed representation of Moyer, the Sherman County District Court also appointed Mason as the *Guardian ad Litem* to "J.T.", a juvenile in a separate child-in-need of care case. Mason learned from J.T. on January 11, 2010 following a court hearing in the child-in-need of care case, that she had been a guest in Moyer's home and was friends with Moyer's two oldest daughters, J.M. and H.M. Mason had a conversation with J.T. in which J.T. told Mason that she had discussed the allegations that J.M. had made against Moyer and that J.M. and H.M., had told J.T. that Moyer had not done the things which were alleged by J.M. which resulted in Moyer's arrest and that those allegations were made up by J.M. J.T. told Mason that she would come to Moyer's jury trial and testify about her conversations with J.M. but Mason failed to get J.T. properly served with a subpoena which he prepared and sent unsigned by facsimile transmission on the third day of the jury trial to St. Catherine's Hospital, the S.R.S. and to St. Francis Academy employees in whose care J.T. was assigned. On the fourth day of the jury trial, Mason informed the trial judge of his conflict of interest in

representing Moyer and J.T. a crucial exculpatory witness in Moyer's defense. The assigned district court judge did not make any meaningful inquiry about the apparent conflict of interest that Mason had in representing both Moyer and J.T. as their court-appointed attorneys in separate cases. When Mason informed the court that Moyer's crucial exculpatory witness was a patient at the psychiatric ward of a hospital in a town fifty miles from Sherman County and that he was having trouble getting J.T. served with the subpoena and transported to Moyer's trial, the assigned Judge gave Mason until the next morning to produce J.T. and warned Mason if J.T. was not present, Moyer's jury trial would proceed without Moyer's exculpatory witness J.T.

During an in-chambers discussion with the assigned judge on the fourth day of the jury trial, Mason and the State's attorney informed the assigned judge that medical personnel at the psychiatric hospital would not allow J.T. to leave the hospital because she needed to be transferred to a residential treatment facility and advised that J.T. was medicated; would not be a credible witness; and was a danger to others. Mason met with Moyer about the unavailability of J.T. and after two conferences Moyer advised Mason that he wanted to proceed with the completion of the jury trial. The assigned judge was advised of Moyer's decision but Moyer was never asked to orally waive his right to have J.T. present as an exculpatory witness, nor did Mason or the court have the Moyer or J.T. sign any written waiver of conflict. According to Mason's testimony at the *Van Cleave* hearing, he made no efforts to preserve J.T.'s testimony prior to the jury

trial by written statement, audio-tape or video tape deposition or any other means. After being advised by J.T. of information that made her a crucial exculpatory witness for Moyer, Mason took no steps to follow-up on that information or to investigate further J.T.'s information until the night of the third day of the jury trial when he called and spoke with her, and later that night when he prepared the unsigned subpoena for her attendance at Moyer's jury trial the next day. Mason did not secure service of the subpoena nor did he arrange for a process server.

The 102 pages of psychiatric medical records of J.T.'s admission, diagnosis, stay, discharge plan and mental status were a part of the exhibits marked and admitted by the *Van Cleave* court and those records clearly showed that the reports by the state's attorney and Mason to the trial judge during the in-chambers meeting following Mason announcement that he had a conflict of interest and was having difficulty getting Moyer's witness to court were not accurate. The S.R.S. and St. Francis Academy e-mail records which were marked as an exhibit and admitted by the *Van Cleave* court also showed that it was not any medical personnel from the hospital who was telling anyone that J.T. could not testify or appear at Moyer's trial, but it was St. Francis workers who were upset that they received a faxed unsigned subpoena on the morning of the fourth day of Moyer's jury trial listing that J.T. needed to be in court, 50 miles away later that day. J.T. was court ordered to be in St. Francis' care and it was their responsibility to transport her to the jury trial if the subpoena was properly served. The psychiatric records for J.T. and the St. Francis

Academy and S.R.S. exchange of e-mails were a part of the appellate record provided by the Sherman County District Court. Mason admitted at the *Van Cleave* hearing that he never spoke with any medical personnel at the psychiatric hospital were J.T. was a patient and that he never saw or was told what J.T's hospital records stated. The transcript of the jury trial shows that the state attorney who alleged during the *Van Cleave* hearing to the assigned judge that she had spoken with medical personnel about J.T., actually only spoke with an attorney for St. Francis Academy whose was trying to prevent his agency from having to transport J.T. to Moyer's jury trial. The *Van Cleave* court ignored a majority of the 102 pages of psychiatric medical records for J.T., and only commented on the final discharge information. The *Van Cleave* court ignored the e-mail exchanges between St. Francis Academy employees and S.R.S. employees concerning efforts to keep from having to transport J.T. to Moyer's jury trial.

J.T. was never served with the unsigned subpoena and did not appear at Moyer's trial as an exculpatory witness. Moyer testified in his own defense and denied all of J.M.'s allegations. Moyer was convicted of one count of aggravated criminal sodomy, one count of aggravated indecent liberties, and three counts of criminal sodomy. Moyer was sentenced on August 6, 2010 to life in prison with a hard 25 years to serve before being eligible for parole, plus an additional 177 months in prison consecutive to the life sentence.

B. Facts Relevant to Moyer's First Appeal

Mason timely filed an appeal on August 10, 2010 citing 35 issues. Moyer filed a *pro se* appeal on August 12, 2010. On August 16, 2010 Moyer filed a second *pro se* appeal.

On April 7, 2014, the Sherman County District Court appointed Moyer's current appellate attorney. Moyer's brief was filed on September 18, 2014. On October 16, 2015, the Kansas Supreme Court issued a 62 page 4-3 decision remanding the case to the Sherman County District Court for a *Van Cleave* hearing "to determine whether Moyer was denied his Sixth Amendment right to counsel, either because trial counsel was not constitutionally competent or was not constitutionally conflict-free. The Kansas Supreme Court could not determine from the initial appellate record, "whether Mason's duty to J.T. as her *Guardian ad Litem* still existed at the time that Mason also owed Moyer a duty to present the best possible defense at trial. The Kansas Supreme Court questioned in their opinion: "if those contradictory loyalties co-existed, was it possible for Mason to objectively advise Moyer on whether to attempt to force J.T.'s testimony. The Kansas Supreme Court suggested in their first opinion: "if J.T.'s apparent unavailability was a consequence of Mason's failure to properly issue and serve a subpoena forcing her appearance … then Moyer's Sixth Amendment right to effective assistance of counsel might well have been denied because of Mason's ineffectiveness, rather than, or in addition to, his conflict of interest". The Kansas Supreme Court stated in their first opinion: "We have no findings as to

Mason's deficiencies in obtaining J.T.'s presence at Moyer's trial or any inquiry into whether Mason should have preserved J.T.'s testimony in some manner".

Finally, in the October 16, 2015 opinion, the Kansas Supreme Court remanded Moyer's case to the Sherman County District Court "to determine whether Moyer was denied his Sixth Amendment right to counsel, reserving the question of cumulative error until that determination is made".

C. Facts Relevant to the *Van Cleave* Remand Hearing and Decision

Moyer's current appellate counsel, after the trial judge again refused to recluse himself, filed a K.S.A. 20-311d(b) Affidavit with the Chief Judge of the 15th Judicial District, who ordered recusal of the trial judge and assigned a judge from the 23rd Judicial District to preside over the *Van Cleave* remand hearing. At a status hearing prior to the *Van Cleave* hearing being held the state and Moyer's attorney stipulated to the introduction of the 102 pages of the St. Catherine's Hospital's psychiatric medical records of J.T. and the e-mail exchanges between employees of St. Francis Academy and the S.R.S. who were trying to keep from having to transport J.T. to Moyer's trial due to the short notice. Those records were marked as exhibits and the court accepted them as a part of the *Van Cleave* court record.

The *Van Cleave* hearing was held on November 22, 2016. At the hearing Mason was called as a witness and Moyer also testified. Moyer testified about the unannounced jail visit by Mason where Mason

informed Moyer that on January 11, 2010 following a child-in-need of care case hearing where Mason represented J.T. as her *Guardian ad Litem* he spoke with J.T. and learned that she had been a guest in the Moyer home and had been told by the alleged victim and her sister that Moyer had not done the things that she had reported to the police and that she made up those allegations that she reported to the police. Mason testified that Moyer was asked if he wanted J.T. to be a defense witness and testify at the jury trial and that Moyer stated he did want J.T. as a witness. Mason admitted he did not secure any statement or voice recording from J.T. and waited until after the third day of the jury trial to prepare a subpoena for J.T. to appear the next day in the Sherman County District Court because he did not want the State to know who his defense witness was so the State could not interview J.T. prior to Moyer's trial.

The assigned *Van Cleave* judge ruled after submission of written arguments by the state and defense counsels that:

> "This Court finds that Mason did have a conflict of interest when the hospital disclosed that it would be detrimental to J.T.;s health to testify. This Court further finds that this conflict did not result in ineffective assistance of counsel nor did it prejudice the defendant. Further the court rules that the strategy employed by Mason and Moyer in not preserving the possible testimony of J.T. and in not issuing a subpoena until after the trial commenced, was reasonable under the circumstances and did not rise to ineffective

> assistance. Finally, the evidence in this case was so overwhelming that J.T.'s participation would not have affected the outcome and therefore no prejudice resulted to the defendant".

A review of the 102 pages of J.T.'s psychiatric hospital records which included J.T.'s admission, stay, diagnosis, treatment, medications and ultimate transfer to a drug treatment facility shows that no medical personnel stated that it would be detrimental to J.T.'s health to testify at Moyer's jury trial.

On October 10, 2017 Moyer's current appellate counsel filed an Amended (Second) Brief of Appellant.

On February 15, 2019 the Kansas Supreme Court issued their 38-page 4-3 decision affirming the Sherman County District Court's remand and *Van Cleave* rulings. See Appendix "A". The Kansas Supreme Court specifically stated:

> "The *Van Cleave* court found that '[t]he evidence of guilt in this case was overwhelming." and "Although there were multiple errors in this case, "the same reasons that led us to find that the individual errors were not reversible lead us to be firmly convinced beyond a reasonable doubt that the result of this trial would have been no different without errors"
>
> "At the beginning of the *Van Cleave* hearing, the *Van Cleave* court took judicial notice of J.T.'s CINC file and the corresponding SRS records. Although those records do not appear in the record on appeal, we presume they supported

> the *Van Cleave* court's finding that Mason's representation of Moyer became materially limited by his responsibilities to J.T. only upon discovering that it may be detrimental to J.T.'s health to testify at Moyer's trial".

The Kansas Supreme Court also specifically stated:

> "But as noted above, the CINC files and S.R.S. records which might give credence to such speculation are not part of the record on appeal. The *Van Cleave* court's finding that Mason did not anticipate an issue with J.T.'s attendance at the trial is supported by substantial competent evidence in the record".

On February 25, 2019 Moyer's current appellate attorney filed a Limited Motion for Rehearing or Modification, pursuant to Kansas Supreme Court Rule 7.06 and pointed out to the Kansas Supreme Court that the S.R.S. records and St. Francis e-mail records were a part of the appellate record provided to the Kansas Supreme Court by the Sherman County District Court.

On March 28, 2019 the Kansas Supreme Court issued their denial of the Appellant's Motion for Rehearing or Modification. See Appendix B.

V. REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. This Court should grant the *Writ of Certiorari* because the Kansas Supreme Court who affirmed the remand court's findings on Mason's effectiveness under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674

> (1984) and *Edgar v. State,* 294 Kan. 828, 283 P.3d 132 (2012), failed to consider the prejudicial constitutional errors committed by Mason and applied an incorrect standard, in violation of the binding principals of *stare decisis,* contrary to *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d (1967)(where this Court admonished against giving too much emphasis to "overwhelming evidence" of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless), where the Kansas Supreme Court held: "Giving deference to the lower court's credibility assessments and considering the overwhelming evidence against Moyer, we agree that there was no reasonable probability that the outcome of the case would have been different had J.T. testified".

The standard used by the *Van Cleave* court and affirmed by the Kansas Supreme Court to judge Mason's effectiveness under the Sixth Amendment and to determine under a constitutional error standard whether Moyer suffered any prejudice was based upon *Strickland v. Washington*, 466 U.S. 668,104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) and the Kansas Supreme Court's decision in *Edgar v. State*, 294 Kan. 828, 283 P.3d 132 (2012). In *Edgar v. State*, the Kansas Supreme Court stated: "See *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1403, 179 L.Ed.2d 557 (2011); See also *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (less onerous non-constitutional error standard applies in determining whether collateral relief must be granted

because of constitutional error rather than the *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705[1967], harmless-beyond-a-reasonable-doubt standard).

The Kansas Supreme Court stated:

> "The *Van Cleave* Court found that '[t]he evidence of guilt in this case was overwhelming." and "Although there were multiple errors in this case, "the same reasons that led us to find that the individual errors were not reversible lead us to be firmly convinced beyond a reasonable doubt that the results of this trial would have been no different without errors".

The Kansas Supreme Court failed to consider the prejudicial constitutional errors committed by Mason and applied an incorrect standard, in violation of the binding principals of *stare decisis,* contrary to this Court's opinion in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967) on the issue of whether a federal constitutional error can be held harmless. This Court held in *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967) that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". Id. at 24, 87 S. Ct., at 828. This Court further said in *Chapman v. California,* Id.: that although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (Id. at 23, 87 S. Ct. at 827), not all TRIAL ERRORS WHICH VIOLATE THE CONSTITUTION automatically call for reversal." Ibid. See e.g.,

Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L.Ed.2d 284 (1969). In *Harrington v. California,* this Court stated: "We admonished in *Chapman*, 386 U.S. at 23, 87 S. Ct., at 827, against giving too much emphasis to 'overwhelming evidence' of guilt, stating that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless" and "We do not depart from *Chapman*, nor do we dilute it by inference. We reaffirm it. We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error". Id.

The *Van Cleave* court ruled: "the strategy employed by Mason and Moyer in not preserving the possible testimony of J.T. and in not issuing a subpoena until after the trial commenced, was reasonable under the circumstances and did not rise to ineffective assistance". Moyer did not know or agree with Mason that J.T. had not been subpoenaed and served to appear as his crucial exculpatory defense witness. "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions', including questions of overarching defense strategy." See *Florida v. Nixon,* 543 U.S. 175, 187, 125 S. Ct. 551, 160 L.Ed.2d 565 (2004) (quoting *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 [1984]). The Sixth Amendment provides criminal defendants "compulsory process for obtaining witnesses in [their] favor". U.S. Constitution, Amendment VI. The right then, affords a defendant subpoena power to secure the appearance of witnesses at trial to offer otherwise admissible testimony. *Taylor v. Illinois,* 484 U.S. 400, 408, 108 S.

Ct. 646, 98 L.Ed.2d 798 (1988). Mason's failure was not a "justified strategic decision" as the *Van Cleave* court had found and the Kansas Supreme Court affirmed. This Court previously noted:

> "…the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas of those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation. *Taylor v. Illinois*, 484 U.S. at 415-416. (citing *Williams v. Florida*, 399 U.S. 78, 85, 90 S. Ct. 1891, 1898, 26 L.Ed.2d 975 (1970).

The conflict of interest that Mason had in representing Moyer and J.T. in separate cases where Mason owed an absolute duty to each of his clients should have caused special limitations on harmless errors rules and were essential to the fundamental fairness guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. The *Van Cleave* court held: "this conflict did not result in ineffective assistance of counsel nor did it prejudice the defendant". Some constitutional errors this Court has recognized as having an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found to be harmless. E.g. *Payne v. Arkansas*, 356 U.S. 560, 78 S. Ct. 844, 2 L.Ed.2d 975 (1958) (confessions); See *Fahy v. State of*

Connecticut, 375 U.S. 85, 84 S. Ct. 2229, 11 L.Ed.2d 171 (1963) (dissenting opinion of Harlan, J.). Mason's failure to timely subpoena and secure proper service on Moyer's exculpatory witness, J.T. violated the Compulsory Process Clause of the Sixth Amendment and was on its face ineffective assistance of counsel in violation of the Sixth Amendment made applicable to the States through the Fourteenth Amendment. This Court noted in *United States v. Ruiz,* 536 U.S. 622, 122 S. Ct 2450, 153 L.Ed.2d 586 (2002) that: "exculpatory evidence is evidence the suppression of which would 'undermine confidence in the verdict'(quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995)) exculpatory evidence includes 'evidence affecting' witness 'credibility' where the witness' 'reliability' is likely 'determinative of guilt or innocence'. (quoting *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972). Mason's dual and concurrent representation of Moyer and J.T., Moyer's exculpatory defense witness and Mason's failure to produce J.T. as an exculpatory witness for Moyer violated the constitutional right of Moyer to representation that is free from conflicts of interest. Finally, Mason entirely failed to subject the prosecution's case to meaningful adversarial testing, and as such, there was a denial of Moyer's Sixth Amendment rights that make the adversary process itself presumptively unreliable in this case.

B. This Court should grant the *Writ of Certiorari* because the Kansas Supreme Court who affirmed the remand court's findings on Mason's effectiveness under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) and *Edgar v. State,* 294 Kan. 828, 283 P.3d 132 (2012) failed to consider the prejudicial constitutional errors committed by Mason and applied an incorrect standard in violation of the binding principals of *stare decisis,* contrary to this Court's decision in *Neder v. United States,* 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) (where this Court held: "A limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal without regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamentally unfair"), where the Kansas Supreme Court held: "Giving Deference to the lower court's credibility assessments and considering the overwhelming evidence against Moyer, we agree that there was no reasonable probability that the outcome of the case would have been different had J.T. testified".

The Kansas Supreme Court failed to consider the prejudicial constitutional errors committed by Mason and applied their incorrect standard, in violation of the binding principals of *stare decisis,* contrary to *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999) where this Court held: "A limited class of fundamental constitutional errors is so intrinsically harmful as to require automatic reversal without

regard to their effect on a trial's outcome. Such errors infect the entire trial process and necessarily render a trial fundamental unfair").

This Court in *Neder v. United States, Supra* discussed:

> "…the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a 'defect affecting the framework within which the trial proceeds itself'. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed. 2d 302 (1991). Such errors 'infect the entire trial process.' *Brecht v. Abrahamson*, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993), and 'necessarily render a trial fundamentally unfair.' *Rose v. Clark*, 478 U.S 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). Put another way, these errors deprive defendants of 'basis protections without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence … and no criminal punishment may be regarded as fundamentally fair.' *Id.* at 577-578, 106 S. Ct. 3101.

This Court has also held that: "the erroneous exclusion of evidence in violation of the right to confront witnesses guaranteed by the Sixth Amendment is subject to harmless-error analysis under our cases". See *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986). ("The Compulsory Process Clause of the Sixth Amendment is not merely a guarantee that the accused shall have the power to subpoena witnesses, but confers on the

accused the fundamental right to present witnesses in his own defense"); See also *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 1000, 94L.Ed.2d 40 (1987) where this Court held: "[O]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt".; See also *Chambers v. Mississippi*, 410 U.S. 284, 302 S. Ct. 1038, 1049, 35 L.Ed. 2d 297 (1973) where this Court held: "Few rights are more fundamental than that of an accused to present witnesses in his own defense".

In *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980) this Court held: "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest" and "Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the states through the Fourteenth Amendment".

In *Cuyler* this Court stated: "The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without legal assistance.

In *Cuyler* this Court discussed *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1942) and stated: "*Glasser* established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice

calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel'. 315 U.S. at 76, 62 S. Ct., at 467. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See *Holloway v. Arkansas*, 435 U.S. 487-91, 98 S. Ct. at 1180-1182 (1978). But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance". See *Glasser, supra*, 315 U.S., at 72-75, 62 S. Ct. at 465-467.

In *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1984) this Court held: "The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing" and "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that make the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974), because the petitioner had been 'denied the right of effective cross-examination' which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Id.* at 318, 94 S. Ct. at 1111 (citing *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct.748, 749, 19 L.Ed.2d 956 (1968), and *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L.Ed.2d 314 (1966).

The failure of Mason to timely subpoena J.T. and to make arrangements to have her served with the subpoena to force her attendance at Moyer's jury trial, was a deprivation of Moyer's right to effective cross-examination which is a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it, notwithstanding the holdings of the *Van Cleave* court which their affirmation by the Kansas Supreme Court was prejudicial error.

In *United States v. Cronic*, *Supra,* this Court discussed the adversary system of criminal justice by stating: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free". *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 2555, 45 L.Ed.2d 593 (1975). It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process'. *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 667, 66 L.Ed.2d 564 (1981). Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.' *Cuyler v. Sullivan*, 446 U.S., at 343, 100 S. Ct., at 1715. Thus, the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' *Anders v. California*, 386 U.S. 738, 743, 87 S. Ct. 1396, 1399, 18 L.Ed.2d 493 (1967).

This Court further stated in *United States v. Cronic*, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the

effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867-869, 102 S. Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982); *United States v. Morrison*, 449 U.S. at 364-365, 101 S. Ct., at 667-668; *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977).

VI.

CONCLUSION

The Kansas Supreme Court applied an incorrect standard when affirming the *Van Cleave* Court's ruling on Mason's effectiveness under *Strickland v. Washington, Supra* and *Edgar v. State, Supra* and failed to acknowledge that Mason's trial errors and conflict of interest were among the limited class of fundamental constitutional errors that this Court has held require automatic reversal without regard to their effect on a trial's outcome. See *Chapman v. California*, *Supra* and *Neder v. United States, Supra.* Moyer requests that a *writ of certiorari* be issued to the Supreme Court of the State of Kansas.

Respectfully submitted,

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