No.: _____

In The
Supreme Court of the United States
_____ Term, _____

HENRY LOWE,
(Petitioner)

versus

DARREL VANNOY, Warden, Louisiana State Penitentiary,
(Respondent)

Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

Henry Lowe #398433
MPWY/Pine-3
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

April 9, 2018

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QUESTIONS PRESENTED

1. Reasonable jurists would determine that defense counsel rendered ineffective assistance of counsel when he failed to: A) object to the introduction of Mr. Lowe's statements and other crimes evidence. The defendant was prejudiced by counsel's deficient performance for failing to request a hearing under LSA-C.E. Art. 403, 404 B; and B) defense counsel rendered ineffective assistance of counsel by failing to obtain an Independent Expert Witness to refute the State Expert Witness's testimony; and C) retained trial counsel failed to investigate the evidence presented.

2. Jurists of reason would debate Mr. Lowe is Actual/Legal Innocent of the convictions of Aggravated Rape, Sexual Battery and Indecent Behavior; and Mr. Lowe's Newly Discovered Evidence of False Accusations has been obtained through Due Diligence.

3. Reasonable jurists would find that Mr. Lowe was prejudiced by the State suppressing or destroying the original taped statement of K.S. from evidence.

4. Reasonable jurists would determine that the evidence is legally insufficient to sustain his convictions for Aggravated Rape under the "Oral Sexual Intercourse" provisions of LSA-R.S. 14:42.

5. Reasonable jurist would determine that the use of Mr. Lowes statement to police against him at trial violated his Fifth and Fourteenth Amendment rights under the United States Constitution.

INTERESTED PARTIES

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Pro Se Petitioner, Henry Lowe respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on February 20, 2018; that the issue presented to the Fifth Circuit was: rather reasonable jurists would find it debatable whether the "new" evidence that he presents is such that no juror, acting reasonably would have voted to find him guilty beyond a reasonable doubt.

OPINIONS BELOW

The opinion of the Fifth Circuit was assigned Docket No.: 17-30437, and the decision of the District Court was assigned Docket No.: 2:16-cv-221.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2018. This Court's Certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth, Fifth and Sixth Amendments to the United States Constitution and 28 U.S.C. § 2254, as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat.

1214 are reproduced in the Appendix. (App. C-F).

STATEMENT OF THE CASE

On November 7, 2003, the Vernon and Beauregard Parish Sheriff's Office arrested the Mr. Lowe. January 7, 2004, a Bill of Information was filed charging Mr. Lowe with three counts of Oral Sexual Battery, LSA-R.S. 14:42.3; One count of Indecent Behavior with a Juvenile, LSA-R.S. 14:81. On January 27, 2004, Mr. Lowe was arraigned and pleaded not guilty on all counts. Mr. Lowe record does not indicate whether or not these charges were dismissed.

The indictment charged Mr. Lowe with three counts of Aggravated Rape, LSA-R.S. 14:42; three counts of sexual battery, LSA-R.S. 14:43.1; and three counts of indecent behavior with a juvenile, LSA-R.S. 14:81. On April 6, 2004, Mr. Lowe was arraigned and plead not guilty on all counts. On May 19, 2005, a jury found Mr. Lowe guilty on two counts of Aggravated Rape, two counts of Sexual Battery and two counts of Indecent Behavior With Juveniles.

On June 24, 2005, Mr. Lowe was sentenced to serve the remainder of his natural life without the benefit of probation, parole, or suspension of sentence on each count of Aggravated Rape. Mr. Lowe was sentenced to one hundred and twenty months at hard labor on each count of Sexual Battery and eighty four months for each count of Indecent Behavior of a Juvenile. All sentences were ordered to run concurrently with one another.

Mr. Lowe's defense counsel, Ervin C. Fontenot, Jr. gave notice of appeal to the trial court on June 24, 2005. Mr. Lowe appellate counsel, Mitchell M. Evans, III, filed a Motion to Dismiss the appeal which was granted September 14, 2005.

Mr. Lowe filed a Motion For An Out of Time Appeal/Application Post-Conviction Relief which the trial court denied July 23, 2007. August 31, 2007, the appellate court denied review, ***State v. Lowe***, No. KH-07-00998, *citing* URAP Rule 4.5. Mr. Lowe refiled his application in the circuit court. Mr. Lowe's application was granted in part and denied in part. To which Mr. Lowe's direct appeal as reinstated. ***State v. Lowe***, No. KH-07-01240 (La. App. 3 Cir. 1/15/08).

On December 10, 2008, the circuit court remanded Mr. Lowe's case with instructions. No. KH-08-

669 (La. App. 3 Cir. 12/10/08). Mr. Lowe's conviction were affirmed and his sentences were amended to reflect that diminution was denied under La. R.S. 15:537 (a).

Mr. Lowe sought Certiorari which was also denied September 29, 2009. No. 2009-K-0054.

Mr. Lowe's collateral review was quite extensive, with the Louisiana Third Circuit Court of Appeals remanding the matter back to the district court. The Louisiana Supreme Court denied Mr. Lowe relief during collateral review on September 29, 2009.

The U.S. Western District Court of Louisiana erroneously determined that Mr. Lowe's Petition was untimely.

On July 11, 2017 Mr. Lowe filed for his Certificate of Appealability, which was erroneously denied partially as being untimely on February 20, 2018. The U.S. Fifth Circuit Court of Appeals abused their discretion in holding that Mr. Lowe's collateral proceedings were untimely under the prevailing cases concerning "Actual Innocence." See: *McQuiggin v. Perkins*, 133 S.Ct. 1924 (U.S. 2013), where the Court held: "(1) plea of actual innocence can overcome habeas statute of limitations, abrogating *Escamilla v. Jungwirth*, 426 F.3d 868, but; (2) timing is factor relevant in evaluating reliability of a Mr. Lowe's proof of innocence.

Mr. Lowe would like this Court to take Judicial Notice that he has **never** been afforded an evidentiary hearing even though he has sworn Affidavits in his case.

This timely Petition for Writs of Certiorari now follows, with Mr. Lowe requesting that this Honorable Court Grant him relief for the following reasons to wit:

SUMMARY OF THE ARGUMENT

The Courts have completed disregarded the fact that Mr. Lowe has submitted numerous sworn Affidavits which would tend to prove him innocent of the charges lodged against him. At a minimum, Mr. Lowe should have been afforded the opportunity to submit testimonial evidence from the individuals who have submitted sworn Affidavits for Mr. Lowe.

The Courts have also completely disregarded the fact that it had been accepted that, "although Mr.

Lowe strongly smelled of alcohol, I don't believe that he was intoxicated at the time of his arrest and statement," and that the Courts have misinterpreted Mr. Lowe's Claim concerning the involuntary statement was the product of his intoxication; not that he was trying to mitigate that he was intoxicated at the time of the alleged incidents.

One issue before this Court is whether trial counsel's failure to expose so gross an act of perjury violation, his failure to impeach the witness as to her admitted fabrication of an entire incident of abuse, and his noncomitant stipulation to the consistency of the accusers' CAC interviews, even before the accuser's ever submitted their testimony, amounted to the effective representation of counsel promised by the Sixth Amendment to the United States Constitution.

LAW AND ARGUMENT

ISSUE NO. 1

1 A. Defense counsel rendered ineffective assistance of counsel when he failed to: A) object to the introduction of Mr. Lowe's statements and other crimes evidence. B) Mr. Lowe was prejudiced by counsel's deficient performance for failing to request a hearing under LSA-C.E. Art. 403, 404 B; and D) retained trial counsel failed to investigate the evidence presented.

Detective Galbreath introduced BL's statements during his testimony which were taken at the Beauregard Parish Sheriff's Office November 8, 2003 (Tr.t.pp. 1358-1363). Detective Faciane also testified regarding Mr. Lowe's statements and testified with regards to other crimes evidence (Tr.t.p. 1410).

Mr. Fontenot noted at the beginning of Mr. Lowe's trial that this was his first experience trying a case dealing with a sex charge. It is apparent that Mr. Fontenot did not properly prepare or review the evidentiary rules and pertinent case law or even the facts of the case. Had counsel performed any investigation, he would have timely lodged an objection and argued for a hearing under LSA-C.E. Art. 403, when the State, through Detectives Galbreath and Faciane elicited other crimes evidence contrary to the provisions of LSA-C.E. Art. 404 B.

Mr. Lowe relies upon the standard of review of ineffective assistance of counsel in the above listed Claim.

In the case *sub judice*, Mr. Lowe asserts that counsel rendered ineffective assistance when he failed to object to the introduction of his statements and the other crimes evidence at the trial; and for failing to obtain a hearing under the provisions of LSA-C.E. Art. 403, 404 and 404 B.

It is well settled that courts may not admit evidence of other crimes to show the defendant is a man of bad character who has acted in conformity with his bad character. LSA-C.E. Art. 404 B(1); ***State v. Williams***, 96-1023 (La. 1/21/98), 708 So.2d 703, 725; ***State v. Prieur***, 277 So.2d 126, 128 (La. 1973). This is so, because it creates the risk that the defendant will be convicted of the present offense simply because the unrelated evidence establishes him or her as a "bad person." ***State v. Jackson***, 625 So.2d 146, 148 (La. 1993). This rule of exclusion stems from the "substantial risk of grave prejudice to the defendant" from the introduction of evidence regarding his or her unrelated criminal acts." ***Prieur***, 277 So.2d at 128. And, even if the evidence is independently relevant, it must be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, prejudice of the issues, misleading the jury, or by considerations of undue delay or waste of time. LSA-C.E. Art. 403. Finally, the requirements set forth in ***Prieur***, supra, must be satisfied. Those include written notice to the defendant and a showing by clear and convincing evidence that the defendant committed the other crimes.

By not only some vague reference to a "supposed" arrest in the year of 2000, where Mr. Lowe shows by clear and convincing evidence that he was not arrested for any crime in that year, as per the FBI/Justice Department records that he has submitted to the Courts; Det. Faciane knew that there was NO arrest, which makes her guilty of perjury (See: attached Exhibits).

Additionally, several other statutory and jurisprudential rules also play a role in determining the admissibility of such evidence. First, one of the factors listed in Article 404 B "must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible." ***Jackson***, 625 So.2d at 149. Second, the State must prove by a preponderance of the evidence that the defendant committed the similar act. ***Huddleston v. United States***, 485 U.S. 681, 685, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). Third, even if independently relevant, the evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice. ***State v.***

Miller, 98-0301 (La. 9/9/98), 718 So.2d 960, 962.

The Louisiana Supreme Court's precedence in *State v. Kennedy*, 00-1554 (La. 4/3/01), 803 So.2d 916, controls in this case. And as stated by the Justices of the Louisiana Supreme Court:

> "This difficult case involving the capital crime of the rape of a child tests this court's resolve in upholding the law as written and as consistently followed by this court for nearly thirty years. The law, governing the admission of other crimes has not changed, and however repugnant the alleged criminal conduct may be, we must apply to this case, just as we do any other, well-settled evidentiary rules that promise a process for determining guilt or innocence fairly."

The *Kennedy* Court affirmed the conviction obtained by the prejudicial use of other crimes evidence.

To be sure, where the victim's testimony failed to reveal any element of penetration, the State failed to meet its burden of proof. The other crimes evidence contained in Mr. Lowe's statements was admitted in the presence of the jury solely for the purpose of inflaming the jury. This was error of the first magnitude.

A defense counsel is charged with knowing the relevant statutory and jurisprudential laws. However, it is strikingly clear, in the case *sub judice*, that Mr. Fontenot was not aware of the Louisiana Supreme Court's *Kennedy* decision and he further failed to apprehend the import of LSA-C.E. Arts. 403 and 404 B as it pertained to the facts of the case. Here, counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and counsel's inadequate performance prejudiced Mr. Lowe to the extent that the trial was rendered unfair and the verdict suspect. Therefore, as mandated by the Louisiana Supreme Court decision in *Kennedy*, supra, in light of *Strickland*, supra, Mr. Lowe's convictions for Aggravated Rape under the oral sexual intercourse provision of LSA-R.S. 14:42 must be reversed.

1 B. Defense counsel rendered ineffective assistance of counsel when he failed to obtain an Independent Expert Witness to refute the State Expert Witness's testimony at trial.

Ineffective assistance of counsel Claims appear regularly in habeas corpus petitions. Those Claims are grounded, of course, in the Sixth Amendment right of criminal defendant's to "the assistance of counsel." A right which has been long recognized to guarantee "the effective assistance of counsel."

McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); see also: *Kimmelman v. Morrison*, 477 U.S. 365, 377-78, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1985); *Pavel v. Hollins*, 261 F.3d 210, 215-16 (2nd Cir. 2001), and may be included in a petition for the Writ of Habeas Corpus because "where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the 'State ... unconstitutionally deprives the defendant of his liberty." 28 U.S.C. § 2254 (a). The purpose of the Sixth Amendment effective assistance of counsel "is not to improve the quality of legal representation, but simply to ensure that criminal defendants receive a fair trial. Effective legal assistance ensures the fairness, and thus the legitimacy of our adversary process, ensuring the defendants have a fair opportunity to contest the charges against them.

In sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel. See: *Eze v. Senkowski*, 321 F3d 110, 127-28 (2nd Cir. 2003); *Pavel v. Hollins*, 261 F3d 210, 224 (2nd Cir. 2001); *Lindstandt*, 239 F.3d at 201. This is particularly so where the prosecution's case, beyond the purported medical evidence of abuse, rests on the credibility of the alleged victim. To be sure, the prosecution of child sexual abuse cases is challenging. With third-party witnesses often unavailable, these cases frequently hinge on judgments about credibility in which jurors must choose between contradictory stories proffered by the defendant and the complainants. Just as the complainants are entitled to effective advocacy, so too are those charged, especially given the consequences of conviction. Thus, the Courts have underscored the importance of effective representation for defendants in child sexual abuse prosecution. See generally, *Pavel*, supra; *Lindsadt v. Keane*, 239 F.3d 191 (2nd Cir. 2001); *Holsomback v. White*, 133 F.3d 1382 (11th Cir. 1998).

It must also be noted that recently, the Louisiana Supreme Court has criticized the use of these "Experts" in *State v. Ayo*, 167 So.3d 608 (La. 6/30/15), where the Louisiana Supreme Court reversed the convictions of Derrick Mais, Brett Ward, Clayton King, and Michael Ayo for the charges of Aggravated Rape and Attempted Aggravated Rape. In that case, the Louisiana Supreme Court held that, "reports of alleged victim's pretrial statements to witnesses that she had not been raped, but had instead

been injured in an accident on a four-wheeler, constituted newly discovered evidence and that warranted new trial."

In the case of *Ayo*, "experts" in the field of forensics had testified that:

> "[D]elayed piecemeal revelations of sexual abuse are common with younger victims, who usually make their first disclosure to peers instead of to a parent or to authorities 'because they are concerned about getting into trouble, family problems, and embarrassment,' and also because they 'often consider trying to forget about such events or pretend like they never happened.' according to Rickles, RP appeared to fit that pattern: she disclosed the rapes for the first time to Devon Radecker on the night they happened; she then made only the partial disclosure of a beating and attempted rape to her mother, the authorities, and forensic interviewers, Rickles and Atzemis, eventually adding the detail of the attempted oral intercourse; and she finally made full disclosure to her mother, the Attorney General's Office, and then to jurors at trial. Dr. Atzemis also opined that the bruises on RP's body could have stemmed from blunt force trauma but were more likely caused by a laying-on of hands during sexual assault.

(**FN6.**) *State v. Ayo*, 2014-1933, 167 So.3d 608 (La. 2015).

In the case of *Ayo*, the alleged victim **lied** about what had happened. These alleged perpetrators of the horrible crimes had their lives destroyed from June of 2008 to June of 2015, when the Louisiana Supreme Court granted relief in their cases. These individuals were convicted and sentence to life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence and were considered "Sex Offenders" during their incarceration. Then, the State has the audacity to continuously consider this type of testimony as **credible**.

The State has been continually using the testimony of these "experts" who have consistently testified on behalf of the victim in order to obtain convictions for innocent persons accused of sexual misconduct. Mainly, the purpose of this testimony is to overcome the State's lack of evidence (physical, DNA, or eyewitness). When it comes to a case of credibility between the alleged victim and defendant, this "Expert" testimony "tips the scale" to ensure the State a conviction, even if it means sentencing an innocent person to incarceration for the remainder of their lives for a crime that they have not committed. **This practice MUST come to an end.**

John E.B. Myers, a Professor of Law at the University of the Pacific, McGeorge School of Law has compiled research concerning "**Expert Testimony in Child Abuse Litigation: Consensus and**

Confusion" His research, combined with research of other psychologists and experts in the field of sexual abuse allegations of juveniles. This research also establishes that the testimony of the State's "Experts" concerning Child Sexual Abuse Accommodation Syndrome (CSAAS) has not been subjected to testing amongst the scientific community, and does not meet the criteria of *Daubert v. Dow Pharmaceuticals*, 509 U.S. 579 (1993).

C. Defense Counsel's Failure To Consult With Or Call A Medical Expert Or Challenge The Medical Evidence Of Penetration:

Here, defense counsel failed to call as a witness, or even to consult in preparation for trial and cross-examination of the prosecution's witness, any medical expert on child sexual abuse. Counsel essentially concluded that the physical evidence was indicative of sexual penetration without conducting any investigation to determine whether this was the case. However, had counsel conducted such an investigation, he would likely have discovered that exceptionally qualified medical experts could be found who would testify that the prosecution's physical evidence was not indicative of oral sexual penetration and provided no corroboration whatsoever to the alleged victim's stories. Counsel could thus have presented a strong affirmative case that the charged crimes did not occur and the alleged victim's stories were incredible in their entirety.

This case is substantially similar to *Lindstadt*, supra. Both cases were essentially credibility contests. In both cases, the only witnesses to the alleged abuse were its victims and the defendant, and there was no substantial circumstantial evidence of abuse. When a sex abuse case boils down to such a credibility contest, physical evidence will often be important. Indeed, may sex abuse cases are close on the evidence. *Swofford v. Dobucki*, 137 F.3d 442, 443 (7th Cir. 1998), and when a case hinges all-but-entirely on whom to believe, and expert's interpretation of relevant physical evidence (or the lack of it) is the sort of neutral disinterested testimony that may well tip the scales and sway the fact-finder. *Williams v. Washington*, 59 F.3d 673 (7th Cir. 1995). Because of the importance of physical evidence in "credibility contest" sex abuse cases, in such cases physical evidence should be a focal point of defense counsel's pre-trial investigation and analysis of the matter. And because of the vagaries of abuse

inidicia, such pre-trial investigation and analysis will generally require some consultation with an expert.

To be sure, there is no indication in the record that Mr. Lowe's defense counsel had the education or experience necessary to assess relevant physical evidence, and to make for himself, a reasonable, informed determination as to whether an expert should be consulted or called to the stand. *Cf.*, ***United States v. Tucker***, 716 F.2d 576, 581 (9th Cir. 1983); also see: ***Knott***, 671 F2d at 1212-13 (noting that counsel may be found to be ineffective for failing to consult with an expert where "there is substantial contradiction in a given area of expertise," or where counsel is not sufficiently versed in a technical subject matter ... to conduct effective cross-examination").

As to this point, the Eleventh Circuit's decision in ***Holsomback***, supra, is instructive. In that case, the habeas petitioner was convicted in state court of crimes related to sex abuse of his children. The Petitioner claimed he received ineffective assistance of counsel because "his trial counsel [] failed to conduct any [pre-trial] investigation into the conceded lack of medical evidence [against the Petitioner], including [trial counsel's] failure to consult with any physicians concerning the significance of the lack of medical evidence in the case." See: *Id.*, at 1386. The Eleventh Circuit agreed, and granted habeas relief.

In ***Williams***, supra, at 679-82, a case of alleged sexual abuse of a child by her foster parent, counsel's failure to investigate was held to constitute ineffective assistance of counsel where an investigation would have disclosed information bolstering his client's credibility and information "indicating that, given the layout of the home ... the alleged assault could not have taken place as claimed."

Moreover, in this case, there exists no evidence that defense counsel contacted an expert, either to testify or at least to educate counsel on the vagaries of abuse indicia. See generally, **Beth A. Townsend, Defending the "Indefensible"**; A Primer to Defending Allegations of Child Abuse, 45 A.F.L. Rev. 261, 270 (1998)("It is difficult to imagine a child abuse case ... where the defense would not be aided by the assistance of an expert"). Such an expert could have brought to light a contemporaneous study,

accepted for publication at the time of Mr. Lowe's trial, that found similar irregularities on the hymens, or irritation and redness of girls who were not abused. See: **John McCann et al., Genital Findings in Prepubertal Girls Selected for Nonabuse**; A Descriptive Study, 86 Pediatrics, No. 3, at 428-439 (Sept. 1990); see also: *Townsend*, 45 A.F.L. Rev. at 269-70; **J. Gardner, Descriptive Study of Urogenital Findings in Children with Straddle Injuries**, 29 Pediatric Surgery, No. 1, at 7-10 (Jan. 1994).

In sum, defense counsel's failure to consult an expert, failure to conduct any relevant research, and failure to even request copies of the underlying studies relied on by Dr. Perkins contributed significantly of his ineffectiveness. See: *Holsomback*, supra (holding that failure to conduct adequate investigation into medical evidence of sexual abuse was ineffective); *Knott v. Mabry*, 671 F.2d 1208 (8th Cir. 1982)(noting that counsel may be found to be ineffective for failing to consult with an expert where "there is substantial contradiction in a given area of expertise," or where counsel is not sufficiently "versed in a technical subject matter ... to conduct effective cross-examination").

D. Mr. Lowe was denied effective assistance of counsel with the retained trial counsel's failure to investigate the evidence presented in these proceedings in violation of the Sixth Amendment to the United States Constitution.

Mr. Lowe contends that he was denied effective assistance of counsel with the trial counsel's failure to **fully investigate** the evidence that was to be presented during these proceedings. The Sixth and Fourteenth Amendments of the United States Constitution guarantees criminal defendants effective assistance of counsel in the course of the proceedings in which the State has formally instituted prosecution.

Mr. Lowe further contends that his counsel **was notified** of sexual relations between himself and the victims' mother in this matter. Counsel failed to adequately investigate these claims, as he was notified by the State that there was DNA evidence to be provided in the trial concerning a blanket retrieved from the bedroom of the victims. Mr. Lowe informed counsel that he and the mother of the victims had numerous sexual encounters in that location, on that very blanket. As the State **only** tested for the DNA of the victims and Mr. Lowe, defense counsel had the opportunity to motion the court for

further testing. The allegations of the sexual affair between Mr. Lowe and the mother of the victims **was verified** by the testimony of the victims' father in open court. Mr Simpson's testimony during direct examination is as follows:

Q: Was there anything - - well, let me ask you this, did you see anything between Mr. Lowe and your wife that caused you concern about your relationship with your wife?

A: Well, there is many times I'd come in from work, and Mr. Lowe would be at my house; my wife would be nervous; and Mr. Lowe would be nervous; you know, far distance, acting funny. And there was several occasions that my wife told me that Brian Lowe - -

BY MR. MORTON:

Objection. That is hearsay what the wife told him.

A: Well, it is the facts, you know.

BY MR. MORTON:

Objection, Your Honor.

BY THE COURT:

Objection is sustained.

BY MR. FONTENOT:

Q: Mr. S., if I ask you a question, I am not asking you to tell us what anybody else told you. I am just asking you what you know. Okay?

A: Yes, sir.

Q: Did you observe anything else about this relationship between your wife and Mr. S. (sic) that made you believe that there was more than just being friends?

A: Eye contact, whispering when I go to the bathroom or walked outside of, you know, just - - as you want to call it. How do you say it, school boy flirting.

Q: Okay. And did anything ever happen in your residence that confirmed that there may have been more than a friendship between these two people?

A: Well, I was woke up on several occasions of the trailer rocking, moaning; and, you know, I didn't know what to do about it, except roll over, put a pillow over my head, and go back to sleep.

Q: Who was present when you heard those sounds?

A: My wife and Mr. Lowe.

Q: And where were that at, if you know?

A: Most occasions, they either did it in the living room or in the girl's room.

Q: Okay. Now November 7th of 2003, had Mr. Lowe visited in your house during that period of time?

A: Yes, sir.

Q: Had he been there during that week?

A: Yes, sir.

Q: Did any of those sounds that you heard before happen during that period of time, if you remember?

A: Yes, sir.

Q: And do you remember when that would have been in relation to November the 7th?

A: To the best of my knowledge, the night before or the night before that.

(T.Tr. pp. 376-377)

As defense counsel had called Mr. Simpson to testify, knowledge of the testimony to be presented to the jury was imminent. Therefore, defense counsel **should have known** that with this testimony, there would have been substantial reason in which to have further testing on the blanket in question (as the analyst testified that there were "numerous" unidentified specimens included in the samples).

The purpose of "fully" testing the evidence is to proof the defense theory that the mistaken accusation that "the only way that Mr. Lowe's DNA was found on the blanket was that he had alleged inappropriate sexual conduct with the victims in this matter." Defense counsel's failure to investigate the information supplied to him through Mr. Lowe and Mr. Simpson that Mr. Lowe had an ongoing sexual relationship with Mrs. Simpson (Tr.p. 376). **Further or thorough** testing of the blanket used for evidence in trial would have shown the sustenance of Mr. Lowe's DNA being found on the blanket. The State provided evidence through Leann Suchanek that there were numerous other donor's DNA found on the blanket during the testing process, but that the only samples that they had to compare, were of Mr. Lowe and the alleged victims.

Through defense counsel's unprofessional actions in failing to properly investigate the knowledge of Mr. Lowe's ongoing sexual relationship with Mrs. Simpson greatly jeopardized the defense counsel's ability to introduce to the jury the evidence required to contradict the State's theory in this matter.

Therefore, the reasonable probability of the jury acquitting Mr. Lowe on these charges was greatly hampered by defense counsel's inadequate representation during these proceedings. Any reasonable finder of fact would have found **reasonable doubt** as to convicting a defendant in these circumstances.

The Supreme Court generally recognized that a showing of ineffective assistance of counsel, within the meaning of the federal constitution, would establish cause, for purpose of the cause and prejudice requirement for federal habeas corpus relief from a state criminal conviction or sentence. Under the cause and prejudice test for federal habeas corpus relief, ineffective assistance of counsel, within the meaning of the federal constitution's Sixth Amendment, is cause for excusing a prior state court procedural default with respect to a claim concerning a state criminal conviction or sentence, the supreme court recognized in ***Murray v. Carrier***, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). According to the Supreme Court, if a procedural default is the result of ineffective assistance of counsel, then the Sixth Amendment itself requires that responsibility for the default be imputed to the state, which may not conduct trials at which persons who face incarceration must defend themselves without adequate assistance.

A convicted defendant can establish the requisite prejudice in an ineffective assistance case by demonstrating a reasonable probability that, but for counsel's deficiency, the trial outcome would have been different. For this purpose, a reasonable probability is defined as that which undermines confidence in the result of the proceeding. See ***Strickland***, 466 U.S. at 694, 104 S.Ct at 2068; See also ***Kotteakos v United States*** 328 U.S. 750, 764,66 S.Ct 1239, 1247, 90 L.Ed. 1557 (1946). We caution however, that the analysis does not focus solely on outcome determination, but also takes into prominent consideration "whether the result of the proceeding was fundamentally unfair or unreliable." ***Lockhart v Fretwell***, 506 U.S.364, 113 S.Ct 838, 842, 122 L.Ed 2d 180, (1993). ***Scarpa v Dubois*** supra.

According to the Supreme Court, the rule that constitutionally ineffective assistance provides cause is based not on a theory that the error is so bad that an accused's attorney ceases to be the accused's agent but on the proposition that if a procedural default is the result of such ineffective assistance, then

the Sixth Amendment itself requires that (1) the responsibility of the default must be imputed to the state; and (2) the state, which is responsible for the denial of the right to effective assistance as a constitutional matter, must bear the cost of any resulting default and the harm to states interest that federal habeas corpus review entails. The Supreme Court further stated that it is not the gravity of the attorney's error that matters, but that the error has to be seen as an external factor to be imputed to the state. ***Murray v. Carrier***, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), supra.

In ***Dretke v. Haley***, 541 U.S. 386, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004), a federal habeas corpus case involving an accused's noncapital state sentence the supreme court remanded the case for consideration of Haley's claim of ineffective assistance of counsel and observed that success on the merits of his ineffective assistance claim would (1) give accused all of the relief which he sought (re-sentencing); and (2) provide cause to excuse Haley's prior state-court procedural default of another federal habeas corpus claim concerning sufficiency of evidence. The ***Dretke*** decision also settled the issue of whether an accused can apply the actual innocence standard to noncapital cases.

The Supreme Court also noted however, than an accused, in respect to the default in question, had disavowed any claim that his counsel's performance had been so deficient as to make out an ineffective assistance claim. See: ***Smith v. Murray***, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). (In procedural default case, recognizing rule, but determining that assistance was not constitutionally ineffective; and ***McCleskey v. Zant***, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), reh. den. 501 U.S. 1224, 111 S.Ct. 2841, 115 L.Ed.2d 1010 and stay den. 501 U.S. 1281, 112 S.Ct. 37, 115 L.Ed.2d 1117, cert. Den. 501 U.S. 1282, 112 S.Ct. 38, 115 L.Ed.2d 1118. (In abuse of writ case, recognizing rule with respect to procedural default cases).

Even though the supreme court recognized that attorney error which constitutes ineffective assistance of counsel, within the meaning of the federal constitution's Sixth Amendment, is cause, under the cause and prejudice standard for excusing on federal habeas corpus review a prior state court procedural default with respect for a claim for relief from a state criminal conviction or sentence, the Supreme Court held in ***Coleman v. Thompson***, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)

reh. den. 501 U.S. 1277, 112 S.Ct. 27, 115 L.Ed.2d 1109, and stay denied, (US) 119 L.Ed.2d 1, 112 S.Ct. 1845, that counsel's ineffectiveness constitutes such case only if such ineffectiveness is an independent constitutional violation-that is,, the Supreme Court held that if an accused did not have a federal constitutional right to counsel in the particular situation in which the default occurred, and, thus, no independent Sixth Amendment claim was possible, then it was not enough for cause purpose to demonstrate that counsel's conduct in the situation had not met the Sixth Amendment's standard of ineffectiveness. According to the Supreme Court, the rule that constitutionally ineffective assistance provides cause is based not on a theory that the error is so bad that an accused's attorney ceases to be the accused's agent but on the proposition that if a procedural default is the result of such ineffective assistance, then the Sixth Amendment itself requires that (1) the responsibility of the default must be imputed to the state; and (2) the state, which is responsible for the denial of the right to effective assistance as a constitutional matter, must bear the cost of any resulting default and the harm to states interest that federal habeas corpus review entails. The Supreme Court further stated that it is not the gravity of the attorney's error that matters, but that the error has to be seen as an external factor to be imputed to the state.

United States v. Cronic, 466 U.S. 648, 654 n. 11, 104 S.Ct. 2039, 2044 n. 11, 80 L.Ed.2d 657 (1984), the court states that there are circumstances in which "the performance of counsel may be so inadequate that, in effect, constitute no assistance of counsel at all. In such case, prejudice is presumed. An attorney must engage in a reasonable amount of pretrial investigation and at a minimum interview potential witness and made an independent investigation of the facts and circumstances in the case. The failure to interview eyewitnesses to a crime may strongly support a claim of ineffective assistance of counsel. When alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and ascertain whether their testimony would aid the defense.[1]

Loyd v. Smith, 899 F.2d 1416, 1425 (5th Cir. 1990), the court stated that state court findings of fact made in the course of deciding an ineffectiveness claim are subject to deference requirement of §

[1] In this case, defense failed to attempt to interview anyone involved in this case. Most notably, the defense attorney **should have contacted** Serena Maricle and her daughter, Kaitlyn, who allegedly given statements, but were not called to testify at trial.

2254(d). That district court findings are subject to the clearly erroneous standard of Fed. R. Civ. P. 52(a), if the record contains sufficient evidence to support them. That ineffective assistance of counsel claim, the deficiency and prejudice prongs of the effective assistance of counsel inquiry, are mixed question of law and fact. That the district court's ultimate conclusion as to counsel's effectiveness is reviewed de novo by the appellate court.

Mr. Lowe contends that the presence of other semen and bodily fluids, along with DNA from other donors would have given strength to his defense account that he had sexual encounters with Mrs. Simpson, not the alleged victims in this matter as in *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992) whereas the State was obliged to turn over to Mr. Lowe any exculpatory semen evidence for use in federal habeas proceeding in which Mr. Lowe sought to overcome state procedural default through miscarriage of justice exception, for colorable showing of actual innocence, and duty was not extinguished by Mr. Lowe's failure to argue existence of such obligation in district court; due to obvious exculpatory nature of semen evidence in sexual assault case, neither specific request nor claim of right by Mr. Lowe was required to trigger duty of disclosure.

Therefore, for the foregoing reasons, Mr. Lowe's convictions for Aggravated Rape should be vacated and the matter remanded for a new trial, with the effective assistance of counsel.

ISSUE NO. 2

Mr. Lowe is Actual/Legal Innocent of the convictions of Aggravated Rape, Sexual Battery and Indecent Behavior; and Mr. Lowe's Newly Discovered Evidence of False Accusations has been obtained through Due Diligence.

The United States Supreme Court recently ruled in *McQuiggin v. Perkins*, 133 S.Ct. 1924 (U.S. 2013), where the Court held: "(1) plea of actual innocence can overcome habeas statute of limitations, abrogating *Escamilla v. Jungwirth*, 426 F.3d 868, but; (2) timing is factor relevant in evaluating reliability of a Mr. Lowe's proof of innocence.

In McQuiggin, more than 11 years after his conviction became final, Perkins filed his federal habeas petition, alleging, *inter alia*, ineffective assistance of trial counsel. To overcome AEDPA's time limitations, he asserted newly discovered evidence of actual innocence, relying on three Affidavits, the most recent dated July 16, 2002, each pointing to Jones as the murderer. The district court found that, even if the Affidavits could be characterized as evidence newly discovered, Perkins had failed to show diligence entitling him to equitable tolling of AEDPA's limitations period. Alternatively, the Court found, Perkins had not shown that, taking account of all the evidence, no reasonable juror would have convicted him. The Sixth Circuit reversed.

Federal habeas court may invoke "miscarriage of justice" exception to justify consideration of claims defaulted in state court under state timeliness rules.

Held: Actual innocence, if proven, serves as a gateway through which Mr. Lowe may pass whether the impediment is a procedural bar, as it was in *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808, and *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1, or expiration of the AEDPA statute of limitations, as in this case. pp. 1931-1935.

A federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas Mr. Lowe's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown. A Mr. Lowe invoking the miscarriage of justice exception "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."

Here, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s demanding standard, the gateway should open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error."

Mr. Lowe contends that with the discovery of Affidavits from Debbie Woods, Brian Simpson, Jeraldine Lowe, Alisha Myers John, and Daniel John Mosely. Mr. Lowe furthermore retains the right of Debbie Woods being the "out-cry" person in his innocence of these convictions. In the admission of the Affidavit of Debbie Woods, Mr. Lowe relies on the Hearsay Exception as allowed by La. C.E. Art. 804 (B)(5), allowing the declaration to an "out-cry" person. Ms. Woods knows the alleged victims in this case personally. The alleged victims in this matter have confided in her that their mother had **forced** them to give statements against Mr. Lowe. Ms. Woods had not questioned these alleged victims on their accounts of this case, yet A.S. and K.S. freely informed Ms. Woods of these contentions without any pressure on the part of Ms. Woods.

Recantations of trial testimony should be looked upon with the utmost suspicion. We have held specifically that a motion for a new trial should not be granted on the basis of a recantation because it is tantamount to an admission of perjury which would destroy the credibility of the witness at a new trial. It is not an abuse of discretion on the part of the trial court to refuse to grant a motion urged on such a basis. *State v. Clayton*, 427 So.2d 827 (La.1982) *Id.*, at 832-33. However, in this case, as K.S. unwillingness to talk and corroborate the allegations in her videotaped interview, along with the inconsistent statements and testimonies of the alleged victims and their mother, Mrs. Simpson, this Court should entertain the possibility of perjured statements and testimony.

AFFIDAVITS IN SUPPORT OF HENRY BRYAN LOWE:

1. Affidavit by Jeraldine Lowe dated February 21, 2007, which supports Mr. Lowe's theory of having sexual relations with the alleged victim's mother.
2. Affidavit by Alisha Myers Johns dated March 7, 2009, which informs Mr. Lowe of the conversation (or outburst) by one of the alleged victims informing her mother that, "Mama, Mama, I did just like you told me to." The mother then responded, "Good." After this conversation, the alleged victim and her mother walked off talking and laughing.

3. Affidavit by Debby Woods (no date), which states that she has known the alleged victims' mother for years; even had them living with them during a divorce. Jamie Simpson had informed Debby Woods that, "I had done something she wasn't very proud of, but didn't know how to fix it." Abbey Simpson (one of the alleged victims) informed Ms. Woods that Mr. Lowe had **NEVER** hurt her, and that she loved her PaPa Brian. Furthermore, Ms. Woods was also aware that Ms. Simpson had "drilled" the girls on what to say; and had also made threats to them.

4. Affidavit by Daniel John Mosley dated June 9, 2006 which states that Mr. Mosley had he information of Jamie Simpson stating that she had "one guy in jail in Deridder, and she knows how to do it again." When Mr. Mosley had questioned Mr. Simpson as to what Ms. Simpson was referring to, Mr. Simpson informed him that, "someone had ripped her off on a drug deal." Later, Mr. Mosley had been informed that Jamie was referring to having Mr. Lowe arrested.

   Mr. Mosley further states in this Affidavit that he had overheard the Assistant District Attorney in this case tell the Bailiff that, "The trial was going to be over with one way or another that day because his daughter (Mr. Fontenot's daughter) was graduating from college; and he was going to be there, no matter what."

5. Another Affidavit written by Daniel John Mosley (March 30, 2007), which states that Mr. Mosley had been a guest at the home of the Bryan and Jamie Simpson (the alleged victim's parents) around November 2004, when Jamie Simpson had informed him that she had already wrongfully sent someone to jail (by setting them up) and that she was not beyond doing it again. Later, Mr. Mosley found out that Mr. Lowe was the person in which Ms. Simpson had admitted that she had set up.

6. Mr. Simpson has also written an Affidavit (no date available) stating that he knew that his wife was having sexual relations with Henry Lowe and that the alleged victims mother was not properly caring for them. Mr. Simpson also stated that Ms. Simpson had been in trouble with the O.C.S. for failing drug tests. In this Affidavit, Mr. Simpson further states that the officers had removed articles from his home **WITHOUT** a warrant or permission.

Taken individually, these Affidavits may be subject to the harmless error review, but taken as a whole, proves that Mr. Lowe was never guilty of any sexual misconduct with these alleged victims. Furthermore, Mr. Lowe contends that with the mother of these children "**BRAGGING**" that she had placed an innocent man in jail (See Affidavits), and the children's plea to a "family friend" that **nothing** had happened with Mr. Brian (as the children know him)(See Affidavit of Ms. Debbie Woods), and with the alleged victim's father informing the Court that Mr. Lowe had been involved in an extramarital affair with Jamie Simpson (children's mother)(Tr.p. 376).

Instead of calling Ms. Debby Woods to the stand in relation to the conversation that she had with the alleged victim and mother, defense counsel, Elvin Fontenot, opted to assure that he would be able

to attend his daughter's college graduation (See: Affidavit of Daniel J. Moseley).

WHEREFORE, as Mr. Lowe has shown the courts that: (1) the victims' mother in this case was, in fact, having an extramarital affair with him prior to the allegations; (2) Mr. Lowe would have shown reasonable doubt to the jury if the "unidentified" DNA found on the blanket had been tested for the alleged victims' mother's DNA (as testimony from Mr. Simpson shows that his wife and Mr. Lowe were, in fact, using the girl's room for their affair while he was in the other room); (3) the alleged victims' mother in this case has "Bragged" about having an innocent man imprisoned; (4) the alleged victims in this case have informed a "close family friend" that Mr. Lowe has never harmed them, nor has ever touched them in any way; and, (5) defense counsel had placed his daughter's college graduation before the reasonable representation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

ISSUE NO. 3

Mr. Lowe was prejudiced by the State suppressing or destroying the original taped statement of K.S. From the proceedings.

Mr. Lowe avers that in accordance with La.C.Cr.P. Art. 930.8 (A)(1), which this claim is based, sets forth the procedural requirements this Court should consider in determining whether or not to address the issue of the Post-Conviction Relief claim.

In the landmark case of *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court declared that, regardless of the good faith or bad faith of the prosecution, the suppression of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment.

A failure on the part of the government to disclose *Brady* material requires a new trial, or a new sentencing hearing, if disclosure of the evidence creates a reasonable probability of a different result. As the Court explained in *Kyles*, "the adjective is important," and "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 115 S.Ct. at 1566.

Carlin v. Cain, 706 So.2d 968 (La. 1998) holds that claims presented on facts not known to Mr.

Lowe or his attorney imposes no diligence requirement on the indigent inmate and remands subject to the laches-like provisions of La.C.Cr.P. Art. 930.8 (B), which authorizes the dismissal of any application filed under any of the statutory exceptions to the time-bar, when the State shows that the delay has prejudiced it's ability to respond to the application as a result of events not within it's control.

Once defendant has established basis for his claim that undisclosed evidence contains exculpatory material or impeachment evidence, State must produce undisclosed evidence for trial judge's inspection; trial judge should then rule on materiality of evidence to determine whether State must produce it for defendant's use. *State v. Bryant*, 415 S.E.2d 806 (S.C. 1992).

Additionally, pursuant to La.C.Cr.P. Art. 930.4 (E), Mr. Lowe must also overcome with explanation, as to why this claim was not presented in his first application. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), the Supreme Court explained that a showing of materiality does not require the defendant to prove by a preponderance that the suppressed evidence would have resulted ultimately in his acquittal. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id., 115 S.Ct. at 1566. Second, the reviewing court is not to employ the sufficiency of evidence test. Id., 115 S.Ct. at 1566 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.") Third, once a reviewing court "has found constitutional error there is no need for further harmless-error review." Id., 115 S.Ct. at 1566. Finally, the reviewing court in assessing the suppressed favorable evidence must do so cumulatively, not item-by-item. Id., 115 S.Ct. at 1567.

Mr. Lowe alleges that the State is suppressing the exculpatory evidence within the first videotaped interview of K.S. on 11-07-03, which Mr. Lowe further contends, will conclusively prove that Ms. Jamie Simpson did coerce and manipulate both K.S. and A.S. to perjure themselves in the sexual abuse allegations against him. Furthermore, due to the continued suppression of the exculpatory facts within the videotape, Mr. Lowe and his counsel did not have knowledge of the exculpatory facts which this

claim is predicated on. These facts were not known during the proceedings of pre-trial, trial, direct review, or Mr. Lowe's first Application for Post-Conviction Relief.

Pursuant to La.C.Cr.P. Art. 930.2, Mr. Lowe is well aware of the fact that he has the burden of proof in these issues. As the State has intentionally withheld this videotape from Mr. Lowe and his defense counsel, Mr. Lowe contends that the State is in violation of the Public Records Act, or **LSA-R.S. 44:1, Et seq**..

Mr. Lowe contends that the suppression by the State of this videotaped interview and the exculpatory facts within, has created an impediment against Mr. Lowe presenting the claim of the constitutional violation at an earlier pleading for relief. Subsequently, this State impediment caused by the withholding of this exculpatory material will remain until Mr. Lowe is provided with an adequate opportunity to prove the allegation of this constitutional violation with the suppressed evidence.

Mr. Lowe relies upon the testimony of the State's own witness during the proceedings in which to institute this claim of the State's withholding of exculpatory evidence. Detective Jeanie Faciane testified on the State's behalf as to the allegations and investigation of Mr. Lowe.

Mr. Lowe contends that he has the right to **any and all** videotaped interviews conducted during the investigation of these allegations. Therefore, he is entitled to view the first interview conducted on each of these alleged victims. The State's withholding of this first video-taped interview and the acts of perjury committed by the State's witnesses concerning the **actual interview** of K.S. conducted prior to the alleged power failure denied Mr. Lowe "open-file" discovery, and the ability to show "coaching," "coercion," or "intimidation" during the course of the first interview.

The State contends that this first interview was "**recorded over**" after Det. Faciane had discovered that the power had failed prior to the taping of the first interview. Let the record reflect that there was **no** attempt to preserve this evidence for the proceedings in this matter. The State is **required** to preserve **any** and **all** evidence collected or obtained during an investigation. The State's refusal to preserve this video interview "opens the door" to allegations of "misconduct," "evidence tampering," "concealing evidence," and "outright un-professionalism." Mr. Lowe contends that the first taped

interview of K.S. **did not** contain the "information that the State deemed necessary of the victim in the allegations against Mr. Lowe," and allowed the interviewer to either tape over this interview, or simply destroy the necessary evidence that Mr. Lowe would require to show reasonable doubt during the investigation.

Furthermore, in *State v. Gray*, 533 So.2d 1242, the defendant had contended that he was prejudiced because his daughter was allegedly able to "rehearse" her video testimony because the first tape she made did not have sound, and it was the second tape which was shown to the jury. LSA-R.S. 15:440.4 provides only that the recording, which must be both visual and oral, be voluntarily made. There is no provision limiting the number of tapes made or specifying which tapes may be admitted. Without any evidence that the children made the tapes involuntarily, it is immaterial that only the daughter's second tape was admitted.

Mr. Lowe contends that the first interview of K.S. was not voluntarily, as she was unwilling to discuss this matter with Det. Faciane at the time of the initial interview with officials at the scene or the medical personnel during the examination. The State's use of the **second interview** without informing him of the **first interview** during the proceedings denied Mr. Lowe's right to exculpatory or impeaching evidence as required by the La.C.Cr.P. Art. 1424 (Production of Evidence). The failure of the State to produce a copy of this interview would constitute official misconduct and corrupt practices as defined in LSA-R.S. 14:134.2 (better known as Malfeasance in Office or Tampering with Evidence).

For the above asserted reason, Mr. Lowe contends that his un-timeliness of his filing of this Application for Post-Conviction Relief is allowed as this evidence is exculpatory and was intentionally suppressed by the State. *State ex rel. Walker v. State*, 2006 WL 231611 (La.). Additionally, Mr. Lowe represents that any procedural objections by the State to have this claim dismissed should be disregarded, where any delay in filing this claim by him were caused by the events directly in control of the State. **La.C.Cr.P. Art. 930.8 (B)**. Therefore, this Honorable Court should order further proceedings to determine whether Mr. Lowe's claim of the State's suppression of the first videotape of K.S. had exculpatory or impeaching materiality to innocence of these allegations.

ISSUE NO. 4

The Evidence Is Legally Insufficient To Sustain His Convictions For Aggravated Rape Under The "Oral Sexual Intercourse" Provisions Of LSA-R.S. 14:32, In Violation Of The Constitution Of The United States And The State Of Louisiana. Fourteenth Amendment To The United States Constitution.

Mr. Lowe contends the evidence presented at trial is insufficient to support his convictions for Aggravated Rape. The Fifth Amendment to the United States Constitution provides that no person shall be "deprived of live, liberty, or property without Due Process of Law." The Fourteenth Amendment imposes the same Due Process requirements to the states. Implicit in the Due Process Clause is the protection of an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. ***In re: Winship***, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, *rehearing denied*, 444 U.S. 890, 100 S.Ct. 195 (1979); ***State ex rel. Graffagnino v. King***, 436 So.2d 559, at 563 (La. 1983); ***State v. Goodjoint***, 716 So.2d 139 (La. App. 2nd Cir. 1998). Thus, an accused is entitled to a review of the evidence to the extent that it supports a finding of guilt beyond a reasonable doubt. ***Jackson***, ***State v. Bosley***, 29,253 (La. App. 2nd Cir. 4/02/97), 691 So.2d 347, *writ denied*, 97-1203 (La. 10/17/97), 701 So.2d 1333.

It is the role of the fact finder to weigh the respective credibility of the witness, and therefore the reviewing court should not second guess the credibility determination of the trier of fact beyond the sufficiency evaluations under the ***Jackson*** standard of review. See: ***State ex rel. Graffagnino v. King***, supra, at 563, citing ***State v. Richardson***, 425 So.2d 1228 (La. 1983).

The proper standard of review for a sufficiency of evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. ***Jackson***, supra, ***Goodjoint***, supra; ***State v. Bellamy***, 599 So.2d 326 (La. App. 2nd Cir. 1992), *writ denied*, 605 So.2d 1089 (La. 1992). The standard, initially enumerated in ***Jackson*** and now legislatively embodied in La.C.Cr.P. Art. 821, is applicable in cases involving both direct and circumstantial evidence. ***State v. Cotton***, 634 So.2d 937

(La. App. 2nd Cir. 1994). For circumstantial evidence to sustain a conviction, upon assuming every fact to be proven that the evidence tends to prove, it must exclude every reasonable hypothesis of innocence. *Cotton*, supra. Ultimately, all evidence, both direct and circumstantial, must be sufficient under *Jackson* to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt.

Considering the impact of eyewitness testimony in cases involving criminal misconduct, that testimony alone usually is deemed sufficient subsequent to a review of that testimony in light of standards set forth in cases involving identification.

However, in the instant case, where the evidence is rife with inconsistencies and conflicting testimony between the victims and law enforcement officers, even a reasonably pro-prosecution rational trier of fact possess a reasonable doubt. That is especially true where, as here, the victims, *i.e.*, KS's AND AS's testimony reflects that there was absolutely no oral vaginal or anal penetration.

In criminal prosecutions it is the burden of the prosecution to prove every element of the crime beyond a reasonable doubt. *In re: Winship*, 90 S.Ct. 1068 (1970). The requirement of proof beyond a reasonable doubt has this vital role in our criminal proceedings for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the certainty that he would be stigmatized by conviction. Accordingly, a society that value the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt.

Mr. Lowe argues herein, that the State failed to prove the elements necessary to support the convictions for Aggravated Rape, where the **penetration** is the **essential element** of oral sexual intercourse under the provisions of LSA-R.S. 14:42.

Circumstantial Evidence:

When circumstantial evidence is used to prove the commission of an offense, the code requires that "assuming every fact to be proven that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." LSA-R.S. 15:438; *State v. Seals*, 950-0305 (La. 11/25/96), 684 So.2d 368, 374, *cert. denied*, 520 U.S. 1199 (1997); *State v. Lilly*, 468 So.2d 1154 (La. 1985); also

see: *State v. Bright*, 98-0398 (La. 4/11/00), 776 So.2d 1134 (finding that "absence of conduct by word or deed," circumstantial evidence did not support a First Degree Murder conviction).

To be sure, testimony showing that the act of penetration occurred is the *sine qua non* of the criminal offense; and without such evidence or testimony, the charge of Aggravated Rape must fall. The record reveals that the State failed to prove the element of penetration "beyond a reasonable doubt." Therefore, Mr. Lowe's convictions for the Aggravated Rapes of KS and AS under the oral sexual intercourse provision of LSA-R.S. 14:42 C(1)(2) and LSA-R.S. 14:42 A(4) must be reversed.

ISSUE NO. 5

The use of Mr. Lowes statement to police against him at trial violated his Fifth and Fourteenth Amendment rights under the under the United States Constitution.

Mr. Lowe contends that the Courts have erroneously determined that Mr. Lowe was attempting to use an "Intoxication" defense in his pleadings. However, had the Courts reviewed the "actual" Claim, it would have noted that Mr. Lowe was arguing that he was intoxicated at the time that he had given his statements to the officers concerning these allegations. Mr. Lowe has been greatly prejudiced by the Courts improper interpretation of the pleadings.

Mr. Lowe avers that at the time of his arrest he was inebriated. Both the Vernon Parish Sheriff's Office and Beauregard made some note of Mr. Lowe's either 'drinking' or smelling of alcohol in their reports. In Mr. Lowe's statement given to Det. Galbreath, Mr. Lowe advised him that he couldn't remember to well after he'd been drinking (See Ex.2p.2).

Det. Galbreath explained the 41 minutes of unrecorded statement as "preliminary questions" in his testimony (Vol.2 Cross-exam. 231-32). However, there is one question and answer In Mr. Lowe's November 9, 2003, statement that indicates that there was more to the preliminary questions than Det. Galbreath indicated at Mr. Lowe's trial.

In pertinent part:

> Q. "At one point before making this written statement we were asking you if you had ever been accused of doing this to a child before and you told us that you wanted to talk to a lawyer before you answer any more about that. Then I asked you if you wanted to continue talking to us about Abby and Khristrian and you told me you did but you'd let me know if there was

something you didn't want to answer. Is that right?"

A. "So far."

Ex.3,p.4.

Mr. Lowe contends that neither the November 8th or 9th, statement contains any such exchange between Mr. Lowe and Det. Galbreath. This exchange had to take place within 41 minutes of Mr. Lowe's statement that was not recorded." This question is definitely not a preliminary type of question.

In the case of *Davis v. U.S.*, 512 U.S. 452, 114 S.Ct 2350, 129 L.Ed.2d 362 (1994) the court held:

> "If the suspect effectively waives his right to counsel after receiving the Miranda warnings, law enforcement officers are free to question him. [Cite Omitted]. But if a suspect request counsel at any time during the interview he is not subject to further questioning until a lawyer has been available or the suspect himself re-initiates conversation." Id. 114 S.Ct @ 2354-55.

Mr. Lowe contends that his request for counsel was made during the 41 minutes of unrecorded preliminary questions. Both statements taken after that request was made is in direct violation of his Fifth, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

In the case of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct 1880, 68 L.Ed2d 378 (1981) the court held:

> "When an accused has invoked his right to have counsel present during custodial interrogation a valid waiver of that right can not be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights." Id. 101 S.Ct @ 1884-5.

Mr. Lowe avers that at no time did 'he' initiate contact with the police in this case. His continued answers to questions by police was to resolve the situation.

In the case of *State v. Howard*, 443 So.2d 632 (La. App. 3 Cir. 1983) the court held:

> "We think that the prophylactic per se rule of Edwards was designed to protect an accused in custody from persistent badgering. That is a valid waiver of his right to counsel can not be established where an accused in custody is persistently re-interrogated until he implied or expressly waives his rights." Id 443 So.2d @ 636.

In the case at hand there is no verbatim record of Mr. Lowe's request for counsel, through no fault of his own, because the initial 41 minutes of this statement was not recorded. However, the record does indicate that none preliminary type questions were asked and answered during that time. This

information was buried in a 'second interrogation' that should have never taken place. The kind of situation that ***Howard*** Supra. And ***Edwards***, *Supra* protects an accused against.

Mr. Lowe avers that without a verbatim record of the 41 minutes of his statement that was not recorded, there is no way to establish whether or not Det. Galbreath's recount of his request for counsel was accurate.

Mr. Lowe contends that Det. Galbreath's failure to record the preliminary questions is highly suspect due to the mere fact that the sole purpose of the waiver was to take Mr. Lowe's statement. Mr. Lowe avers that the only reason that Det. Galbreath didn't record his statement in its entirety is that he made an unambiguous request for counsel during those initial 41 minutes of his statement. Det. Galbreath's continued and repeated interrogation is exactly the type of circumstances that Edwards and Howard's protected against. A request does not have to be formal or direct, as long as it's understood, and is not case specific. ***State v. Abadie***, 612 So.2d 1 (La.1993).

In the case of ***State v. Abadie***, 612 So.2d 1 (La.1993) the court held:

> "Once a suspect asserts his Miranda right to counsel not only must the current interrogation cease, but he may not be approached in connection with any further criminal investigation until his counsel is present [cite omitted]. And, if the police do subsequently initiate an encounter in the absence of counsel assuming there has been no break in custody the suspect statements are presumed involuntarily and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statement would be considered voluntary under traditional standards. Id. 612 So.2d @ 5.

Mr. Lowe contends that his statement to Det. Galbreath were involuntary and in direct violation of his constitutional right against self-incrimination, his right to have counsel present during interrogation and his right to due process of law.

In the case of ***State v. Tilley***, 99-0569 (La. 7/6/00), 767 So.2d 6, the court held:

> "When an accused invokes his right to counsel, the admissibility of a confession is determined by a two-step inquiry: (1) did the accused initiate further conversation or communication, and (2) was the purported waiver of counsel knowing and intelligent under the totality of the circumstances." Id. 767 So.2d @ 11.

Mr. Lowe avers that under the totality of the circumstances herein, his statements were inadmissible. Mr. Lowe did not initiate contact with the police and he was inebriated at the time of his

initial interview and statement. There's also 41 minutes of preliminary questions or interrogation questions' that was not recorded by Det. Galbreath. Should the court find that Mr. Lowe did not make a valid request for counsel during the initial 41 minutes of interrogation, at this time Mr. Lowe will invoke his compulsory rights to have Det. Galbreath go through 41 minutes of preliminary questions for the record. See attached Motion To Subpoenas.

Mr. Lowe's Miranda rights were violated when he was interrogated repeatedly after requesting counsel. Mr. Lowe made an explicit request for counsel during those 41 minutes of preliminary questions and Det. Galbreath failed to acknowledge it or record the request.

CONCLUSION

WHEREFORE, after a careful review of the merits of these Claims, Mr. Lowe contends that this Honorable Court could not find that reasonable jurists would allow these convictions to stand.

Counsel's failures were so unreasonable as not to amount to strategy at all. Mr. Lowe is entitled to reversal of the denials by both the District Court (Writ of Habeas Corpus) and the U.S. Fifth Circuit Court of Appeals (Certificate of Appealability).

Respectfully submitted,

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