No. 18-7327

ORIGINAL

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

TREVOR JOHNSON v. DARREL VANNOY, Warden

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

Trevor Johnson #384076
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December 26, 2018

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QUESTIONS PRESENTED

1. **Whether reasonable jurist would find that the State failed to prove beyond a reasonable doubt, every essential element of the offense that Mr. Johnson had committed Aggravated Rape of CF. Fourteenth Amendment to the United States Constitution.**
2. **Whether reasonable would find that the trial court erred in the defense counsel's Motion to Suppress the "partially inaudible" telephone into evidence. First, Fourth, and Fourteenth Amendments to the United States Constitution; Article 15 of the Louisiana Code of Criminal Procedure; and, Section 605 of the Federal Communications Act.**
3. **Whether reasonable jurist would find that Mr. Johnson was denied the right to a fair and impartial trial by jury when the State was allowed to strike two African-American prospective jurors. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).**
4. **Whether jurists of reason would debate that Mr. Johnson was denied Equal Protection of the law when the district court accepted the non-unanimous verdict of guilt by the jury. Fourteenth Amendment to the United States Constitution.**
5. **Whether reasonable jurists would determine that Mr. Johnson was convicted with the unreliable "expert" testimony which fails to meet the threshold of the *Daubert* test for scientific validity. *Daubert v. Dow Pharmaceuticals*: *Frye v. United States*.**

INTERESTED PARTIES

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TREVOR JOHNSON v. DARREL VANNOY, Warden

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

Pro Se Petitioner, Trevor Johnson 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 October 16, 2017 (Date PCR filed); that the issues presented to the Fifth Circuit were: (1) Whether reasonable jurists would find that the State failed to prove beyond a reasonable doubt, every essential element of the offense that Mr. Johnson had committed Aggravated Rape; (2) Whether reasonable jurists would find that the trial court erred in denying defense counsel's Motion to Suppress the "partially inaudible" telephone conversation into evidence.; (3) Whether reasonable jurists would find that Mr. Johnson was denied the right to a fair and impartial trial by jury when the State was allowed to strike two African-American prospective jurors; (4) Whether jurist of reason would debate that Mr. Johnson was denied Equal Protection of the Law when the district court accepted the non-unanimous verdict of guilty by the jury; and, (5) Whether reasonable jurists would determine that Mr. Johnson was convicted with unreliable "expert" testimony which fails to meet the threshold of the *Daubert* test for scientific validity; is such that no juror, acting reasonably would have voted to find him guilty beyond a reasonable doubt.

NOTICE OF PRO-SE FILING

Mr. Johnson requests that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

OPINIONS BELOW

The opinion of the Fifth Circuit was assigned Docket No.: 17-30933. This pleading was filed as a Certificate of Appealability.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2018; and the Application for Re-Hearing was denied on November 29, 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

This pleading is based upon a criminal conviction in the 22nd Judicial District Court, in and for the Parish of St. Tammany, State of Louisiana. Although Mr. Johnson was convicted of Aggravated Rape by a non-unanimous jury, he was ordered to serve a life sentence at hard labor without the benefit of Probation, Parole, or Suspension of Sentence. Post-trial motions were denied by the district court.

After conviction, Mr. Johnson timely filed his Original and Pro-Se Supplemental Briefs on Appeal to the Louisiana First Circuit Court of Appeals. The Court of Appeals affirmed Mr. Johnson's conviction and sentence on June 8, 2012.

Mr. Johnson then timely filed his Pro-Se Application for Writs of Certiorari to the Louisiana Supreme Court, which also affirmed his conviction and sentence on January 25, 2013.

On January 10, 2013, Mr. Johnson filed his Application for Post-Conviction Relief into the 22nd Judicial District Court. On February 11, 2014, Mr. Johnson received the State's Answer. On February 18, 2014, Mr. Johnson filed Traverse to the State's Answer to the Application. the ONLY notification of ANY Ruling was when the district court denied his Motion for Evidentiary Hearing and Appointment

of Counsel and Petition for Habeas Corpus Ad Testificandum had been denied on February 12, 2014. The denials of these aforementioned motion are the ONLY Rulings which Mr. Johnson has received from the 22nd Judicial District Court.

After numerous Status Checks to the district court, on September 4, 2014, the Clerk's response to this Status Check simply stated, "In response to your letter dated 9-4-14, the Post-Conviction Petition was denied on 2-10-14, subsequent pleading to traverse is moot, per Judge Richard A. Swartz on this 11th day of September, 2014."

Mr. Johnson filed numerous motions in an attempt to have the Court forward him a copy of the final ruling on his PCR. On October 17, 2014, Mr. Johnson filed his Application for Supervisory Writ into this Honorable Court. On January 12, 2015, the First Circuit Court of Appeals, "Writ denied on the showing made in part and Writ denied in part" (See: Reasons on Ruling).

On January 8, 2016, Mr. Johnson was denied by the Louisiana Supreme Court in *State ex rel. Trevor Johnson v. State of Louisiana*, docket number 2015-KH-0267 (La. 1/8/16)(per curiam).

On February 1, 2016, Mr. Johnson filed a Pro-Se Petition for Habeas Corpus to the U.S. Eastern District Court of Louisiana. On November 7, 2017, the U.S. Eastern District Court of Louisiana denied Mr. Johnson relief. Notice of Intent to Seek Certificate of Appealability was then filed on November 27, 2017.

On December 7, 2017, the U.S. Fifth Circuit Court of Appeals docketed Mr. Johnson's Appeal, and was denied on October 31, 2018. Mr. Johnson then filed for Re-Hearing on November 13, 2018, which was denied on November 29, 2018. Mr. Johnson now timely files for Writ of Certiorari to this Honorable Court, with Mr. Johnson requesting relief for the following reasons to wit:

REASONS FOR GRANTING THE WRIT

First and foremost, this Court must consider the fact that in *Evangelisto Ramos v. Louisiana*, No. 18-5924, ordered the State to file a Brief in Opposition to Mr. Ramos' Petition for Writ of Certiorari. It appears as though the United States Supreme Court has, after 46 years of affirming *Apodoca v. Oregon*, 406 U.S. 404 (1972), determined that it is time to review the constitutionality of Louisiana's

non-unanimous jury verdicts.

This Honorable Court must also consider the fact that on November 6, 2018, the voters of Louisiana voted to change the Law concerning non-unanimous verdicts. Although the new law only applies to persons whose trial commences on or after January 1, 2019, the State ***admitted*** that the Law was premised on racial discrimination during the arguments concerning such during the Legislative Session. A Law based on discrimination cannot stand.

This Court must also consider that in ***State v. Melvin Maxie***, Docket No.: 13-CR-725 (11th JDC 10/11/18), Parish of Sabine, the Honorable Stephen B. Beasley declared that the use of non-unanimous verdicts unconstitutional. Although this case may only be used as "Persuasive Law," this was the first time that "Expert" testimony was submitted to a Court which proves beyond a reasonable doubt that the Law was based on racial premises. It is well settled that a Law based on any discriminatory basis is unconstitutional, and cannot stand.

Before a prisoner seeking Post-Conviction Relief under § 2254 may appeal a district court's denial or dismissal of the Petition, he must first seek and obtain a COA from a Circuit Justice or Judge, 28 U.S.C. § 2253. When a habeas applicant seeks a COA, the Court of Appeals should limit its examination to a threshold inquiry into the underlying merits of his Claims. ***E.g., Slack***, 529 U.S., at 481, 120 S.Ct. 1595. This inquiry does not require full consideration of the factual or legal basis supporting the Claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." § 2253 (c)(2).

Mr. Johnson has satisfied this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. *E.g., Id*, at 484, 120 S.Ct. 1595. He need not convince a Judge, or, for that matter, three Judges that he will prevail, but must demonstrate that reasonable jurist would find the district court's assessment of the constitutional Claims debatable or wrong. *Ibid.*, pp. 1039-1040. Quoting, ***Miller-El v. Cockrell***, 537 U.S. 322, 123 S.Ct. 1029, 1032 (2003).

Furthermore, as Mr. Johnson has shown this Honorable Court the fact that the decisions rendered

by the state courts and the federal district court: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C.A. § 2254(d)(2). *Williams v. Taylor*, 120 S.Ct. 1495, 529 U.S. 362 (2000); *Yarborough v. Alvarado*, 124 S.Ct. 2140, 541 U.S. 652 (2004).

On October 31, 2018 (received November 8, 2018), the Honorable Jennifer Walker Elrod denied Mr. Johnson's Appeal from the United States District Court for the Western District of Louisiana.

Mr. Johnson suggest that the judgment denying COA calls for further scrutiny. Mr. Johnson contends that all issues previously raised in the original Habeas Corpus petition and Motion for COA are before this Honorable Court for review for the following reasons to wit:

LAW AND ARGUMENT

ISSUE NO. 1

Whether reasonable jurists would find that the State failed to prove beyond a reasonable doubt, every essential element of the offense that Mr. Johnson had committed Aggravated Rape of CF; and whether reasonable jurists would find that the State improperly used unreliable "Expert" testimony which fails to meet the *Daubert* test for scientific validity.

Insufficient Evidence:

The State failed to prove beyond a reasonable doubt, every essential element of the offense that Mr. Johnson had committed Aggravated Rape of CF.

The Due Process Clause of the Fourteenth Amendment protects persons accused of a crime against conviction unless the State proves every element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970).[1] *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 60 (1979).

In *Jackson*, the United States Supreme Court reached the legal standard of review, *i.e.*, ". . .

[1] This type of error has been recognized as patent error preventing conviction for the offense, La.C.Cr.P. art. 920(2), see indicative listing at ***State v. Guillot***, 200 La. 935, 9 So.2d 235, 239 (1942). Quoting: ***State v. Crosby***, 338 So.2d 584, 588 (La.1976).

whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt ..." In the court's view, the factfinder's role as weigher of evidence was preserved by considering all of the evidence in the light most favorable to the prosecution: ". . . The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson*, 443 U.S. at 319, 99 S.Ct., at 2790, 61 L.Ed.2d at 573-574. This standard is applied with "explicit reference to the substantive elements of the criminal offense as defined by state law." *id. at* 324 n. 16, 99 S.Ct. at 2791 n. 16. *Dupuy v. Cain*, 210 F.3d 582 (5th Cir. 2000).

This does not does not permit the type of fine-grained factual parsing necessary to determine that the evidence presented to the factfinder was in "equipoise," and that therefore reversal of the conviction is warranted; abrogating *United States v. Jaramillo*, 42 F.3d 920, *United States v. Ortega Reyna*, 148 F.3d 540, *United States v. Penaloza-Duarte*, 473 F.3d 575, and, *United States v. Stewart*, 145 F.3d 273. **Criminal Law Key 110k1159.2(1).**

Courts reviewing a conviction are empowered to consider whether the inferences drawn by a jury were rational, as opposed to being speculative or insupportable, and whether the evidence is sufficient to establish every element of the crime. **Criminal Law Key 110k1159.2(8).**

The *Jackson* standard, which has been repeatedly reaffirmed by the Supreme Court, may be difficult to apply to specific cases but is theoretically straightforward. In contrast, the "equipoise rule" is ambiguous. At one level, whether it applies only to cases ungirded by circumstantial evidence, as opposed to direct or circumstantial evidence, is not entirely clear. Moreover, no court opinion has explained how a court determines that evidence, even when viewed most favorably to the prosecution, is "in equipoise." Is it a matter of counting inferences or of determining qualitatively whether inferences equally support a theory of guilt or innocence?

In any event, when appellate courts are authorized to review verdicts of conviction for evidentiary "equipoise," they must do so on a cold appellate record without the benefit of the dramatic insights gained from watching the trial. The potential to usurp the jury's function in such circumstances is

inescapable. *Jackson*'s "deferential standard" of review, however, "does not permit the type of fine-grained parsing" necessary to determine that the evidence presented to the factfinder was in "equipoise." *Compare*: *Coleman v. Johnson*, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012).

Jackson also "unambiguously instructs that a reviewing court, 'faced with a record of historical facts that supports conflicting inferences must presume - - even if it does not affirmatively appear in the record - - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos v. Smith*, 132 S.Ct. 2, 6, 181 L.Ed.2d 311 (2011).

This case gives the Court the opportunity to give concrete substance to the rule of law that contradictory testimony, such as incredible, inherently improbable or impeached testimony, is insufficient to uphold a conviction.

> Corroboration of a victim's testimony in sexual offense cases is triggered only by contradictions in the victim's trial testimony. Thus, corroboration is mandated when the victim's testimony is so contradictory and in conflict with physical facts, surrounding circumstances and common experience that its validity is rendered doubtful such that corroboration of the victim's testimony is required to sustain the conviction.

75 CJS Rape § 94

There is no corroborating evidence in this case. The testimony of the accusing witnesses in this case was clearly contradictory and impeached, as shown by the record, notwithstanding the fact that the State suppressed further *Brady* impeachment evidence from the defense at trial ...

The State produced no physical evidence which would establish that anyone had committed any sexual offenses against this alleged victim. Indeed, even the question of venue of a crimes rests upon the establishment that an actual crime happened in the first place. The corpus delicti in the instant case is not satisfied by testimony of the prosecutrix without any corroborating circumstances. There is not even a doctor's report in evidence that establishes the possibility of sexual activity of kind.

The fact that impeached testimony, standing alone, cannot uphold a conviction under the law is predicated upon the fact that impeached testimony, standing alone, fails to establish a corpus delicti in the first instance ...

While the credibility of a witness is a matter for the finder of fact, once impeached, that witness's

testimony becomes suspect under the law and must be corroborated in order to be convincing evidence of guilt or innocence. This is especially true where the credibility of the witness is paramount to the outcome of the case.

"Impeached testimony, as a general rule, cannot stand alone to convict." *State v. Chism*, 591 So.2d 383, 386 (La. App. 2nd Cir. 1991), *citing*, *State v. Laprime*, 437 So.2d 1124 (La. 1983); *State v. Lott*, 535 So.2d 963 (La. App. 2nd Cir. 1988).

In *State v. Kennedy*, 803 So.2d 916 (La. 2001), in Justice Traylor's dissenting opinion, it is stated that the Louisiana Supreme Court has found that, "The victim's testimony, standing alone, can prove that the act occurred, ..." but is qualified in FN9, "However, we have also ruled post-trial that impeached testimony of a witness, standing alone, cannot prove the offense."

Jackson v. Virginia, supra; *Holloway v. McElroy*, 632 F.2d 605, 639 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981); *In re Winship*, supra.[2] The Due Process Clause of the Fourteenth Amendment protects persons accused of a crime against conviction unless the State proves every element of the offense beyond a reasonable doubt.

The United States Supreme Court in *Schlup v. Delo*, 115 S.Ct. 851 (1995) held that the appropriate standard for showing that a fundamental miscarriage of justice would result from a failure to address the claim is that of *Murray v. Carrier*, 106 S.Ct. 2639 (1986).

Only truly extraordinary cases will meet this standard. Prior to *Schlup v. Delo*, the federal circuit courts have been divided on what standard is required in showing a fundamental miscarriage of justice. That is, the standards of *Kuhlmann v. Wilson*, 106 S.Ct. 2616 (1986), *Murray v. Carrier*, 106 S.Ct. 2639 (1986); or *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992).

Ward v. Cain, 53 F.3d 106 (5th Cir. 1995), the miscarriage of justice standard as defined in *Schlup v. Delo*, is "where the petitioner shows, as a factual matter, that he did not commit the crime of conviction. Ward had made no showing that it is more likely than not no reasonable juror would have

[2]This type of error has been recognized as patent error preventing conviction for the offense, La.C.Cr.P. art. 920(2), see indicative listing at *State v. Guillot*, 200 La. 935, 9 So.2d 235, 239 (1942). Quoting: *State v. Crosby*, 338 So.2d 584, 588 (La.1976).

found him guilty if given a correct instruction."

The testimony adduced during these proceedings, along with the State's failure to produce **any physical evidence**, failed to show guilt of **any** essential element of the charged offense in this matter. The testimony of the victim (CF), along with the testimony of the State witnesses provided **no corroborating** evidence or testimony to the actual commission of this **or any offense** involving Mr. Johnson.

State v Davis, 498 So 2d 723 (La. 1986), "impeachment ... inconsistent statements, constitutional right to impeach, A constitutional right exist to present a defense," *State ex rel Nicholas v. State of Louisiana*, 520 So.2d 377(La. 1988); and the right includes the right to impeach witnesses by prior inconsistent statements. *State v Davis*,, supra. If that right is infringed, a conviction cannot be affirmed unless appellate review shows the constitutional violation was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Gibson*, 391 So.2d 421 (La. 1980).

The inconsistencies in the victim's testimony alone should be sufficient to obtain relief in the courts. The victim's (CF) inconsistencies throughout the direct and cross-examination proved beyond a reasonable doubt that CF has failed to even corroborate the fabrications relayed throughout the investigation and proceedings of this unjust allegation against him. Testimony "so unbelievable on its face that it defies physical laws" would be "incredible as a matter of law." *United States v. McKenzie*, 768 F.2d 602, 605 (5th Cir. 1989).

CF testified that she had initially been molested in her mother's room the weekend of her brother's birthday party (Tr. p. 464). She could explicitly remember what she was wearing at the time of the sexual assault, but for some reason, could not remember the clothing of Mr. Johnson (Tr. p. 465). As CF testified in direct and cross-examination, she had failed to remember which falsity to continue to tell. CF testified that Mr. Johnson had sexually assaulted her after her mother had been taken to work at 9:00 in the morning (486). However, she testified on cross-examination that these incidents would occur around 12:00 or 1:00 in the morning (Tr. p. 487). Furthermore, CF testified to several different

sexual encounters with Mr. Johnson (Tr. pp. 463, 465, 467, 473). But, on cross-examination, CF testified that Mr. Johnson had sex with her one time (Tr. p. 474, 487). CF had also testified that her first disclosure was to Melissa (Tr. p. 472), but failed to remember that she had testified that she had told mother right after the incident (Tr. pp. 468), or that she had told her mother much later after the incidents (Tr. p. 474), and that her mother had caught them in a sexual encounter (Tr. p. 469).

CF further testified to the fact that she was not living her grandparents due to the sexual abuse by Trevor, then testified that she had moved in with her grandmother due to the sexual misconduct on the part of Mr. Johnson (Tr. p. 481). CF then testified that she had stayed with her grandparents due to her mother working at the Waffle House and CF attending the Pineview School (Tr. p. 483). CF further testified that she had notified her grandparents and that they "knew" what was happening with Mr. Johnson and herself (Tr. p. 481). Then, CF testified that her grandparents did not know until later (Tr. p. 482). CF then testified that Mr. Johnson had molested her after he had brought her mother to work, and that her mother's shift began at 9:00 am in the morning (Tr. p. 486). However, CF **knew** that her mother's shift started at 6:00 in the morning at the Waffle House.

CF testified that the report introduced into evidence stated that her grandmother did not tell her to "recant her statement" (Tr. p. 477). However, CF did admit that she had stated on the report which was introduced into evidence that "they" (mother and grandmother) had told her not to tell anyone (Tr. p. 478).

In order to prove any kind of **Motive** on the part of CF for these allegations, the only information that this Honorable Court would really need to rely on is CF's own testimony. CF testified that she was **angry** with Mr. Johnson for not receiving a computer for Christmas (Tr. p. 485). CF further testified that she was **angry** with Mr. Johnson due to the fact that she **did want** to stay with her father, who had just recently been released from the penitentiary (Tr. p. 486). What better way to get her wishes of living with her father, than to tell this horrible fabrication on her mother and step-father, knowing that the both of them would be arrested (Tr. p. 495)(testifying that she knew she might have to testify against her mother also). CF had testified that she had informed Jo Beth Rickles that she had still loved Trevor Johnson (Tr. p. 489) and that she had sent a letter to Trevor Johnson through her mother which

stated that she missed Trevor, loved him, and hoped to see him soon (Tr. p. 489). This does not appear to be the reaction to someone who had actually sexually assaulted her.

These are just the discrepancies within the victim's own testimony during direct and cross-examination. The over-abundance of discrepancies in the testimony of the victim alone should suffice to this Honorable Court to grant relief (Tr pp. 459-496). As the Courts have ascertained in case law that, "testimony of the victim alone is enough to substantiate a conviction," the Courts should be allowed to determine the validity of the testimony from this victim as **unreliable** and **impeachable** as to the trustworthiness of the testimony of CF, as her testimony and statements varied from person to person, and from direct examination to cross-examination.

The **remarkable** discrepancies throughout the investigation and trial proceedings can be noted by a mere inspection of the record. The State **failed** in it's endeavors for a valid conviction in this matter. Many of the **noteworthy** contradictions are as follows:

Michelle Crowley testified as to the fact that CF had changed her interviews in a manner convenient to what she wanted Ms. Crowley to hear. CF had even denied that any sexual improprieties had even happened to her (Tr. p. 387). Ms. Crowley then testified that CF had "sabotaged relationships" with her friends (Tr. p. 415). As Ms. Crowley had testified that CF was presently in counseling with her (Tr. p. 406), and that she had **no personal knowledge** of any sexual contact with Mr. Johnson (Tr. p. 415). Ms. Crowley further testified that CF was presently on medication (Tr. p. 417). Ms. Crowley testified that CF had informed her that her mom, grandmother and Aunt Monique knew that Mr. Johnson was sexually molesting her (Tr. p. 407). However, CF testified that her mom, grandmother and Aunt Monique was not informed until after the initial interview with Ms. Crowley (Tr. p. 477), that she had told her mother (Tr. p. 468), and that her mother had caught Mr. Johnson committing an act of sexual molestation (Tr. p. 469). Ms. Crowley testified that CF had reported there was **no** acts of anal sex (Tr. p. 421), but CF testified that there was anal sex (Tr. p. 466).

CF had reported to Laura Morse that Trevor Johnson had been "raping" her (CF) since the 4th grade (Tr. p. 473), but testified that she had only had sex with Mr. Johnson one time (Tr. p. 474).

The State then proceeded to present the testimony of Jean Noto (Tr. p. 504), who had testified that she had a conversation with CF in her living room/kitchen area (Tr. p. 506). Ms. Noto further testified that she had informed CF's mother of these allegations against Trevor Johnson (Tr. p. 507). The State failed to have CF testify as to whether CF had confided in Ms. Noto or not. Ms. Noto testified that she had informed Melanie Johnson of the allegations of CF against Mr. Johnson (Tr. p. 507). Mrs. Melanie Johnson testified that she could not recall such a conversation with Ms. Noto (Tr. p. 689).

Laura Morse had testified to the fact that she had told CF about the sexual assaults occurring within her household, and that she was going to report these to the school counselor (Tr. p. 456). Ms. Morse had stated that after disclosing the sexual abuse in her home, CF told her that the **same thing** was happening in her home and that they were both going to report their abuse to the school counselor (Tr. p. 456). Ms. Morse further informed the Court that this conversation was "towards the end of the school year" (Tr. p. 456). Yet, CF testified that she was going **just** to report Laura's sexual abuse and since Laura didn't disclose anything to the counselor, CF lodged her allegations against Mr. Johnson (Tr. p. 472).

Also, the Trinity Report, which CF stated that during the preliminary report that there was **no sex abuse** by Mr. Johnson (Tr. p. 424, 425). Later, CF reported that Mr. Johnson had forced her to perform oral sex upon him, and that there was never any emission from the sexual encounters (Tr. p. 426). CF testified that she had to clean her sheets from this experience, as she could not lay down "in the mess" (Tr. p. 470), and that she didn't remember which sexual encounter the emission had occurred (Tr. p. 470-471), but that the emission had occurred during the third sexual assault (Tr. p. 468).

The defense witness also failed to corroborate CF's fabrications during direct examination and cross-examination. The State had failed to meet their burden in this instance, simply informed the jury that it was "a sad day that the entire family would turn on CF in favor of Trevor Johnson."

The State's witness had failed to corroborate or re-enforce the testimony of CF in this matter before the bar. This Honorable Court should note the differences which were presented throughout the investigation and the actual trial testimony presented to the jury.

The abundance of discrepancies throughout the testimony of the State's witnesses and the victim constitutes a reasonable probability that there was a substantial abundance of perjury and inconsistencies to the State's case. Indeterminately, with the **many different** accounts or non-accounts presented by the State with the presentation of the testimony that was virtually impossible for any reasonable trier of fact to keep track of. Basically, the jury should have suffered from mass confusion as a result of the presentation by the State in this matter.

Unreliable "Expert" Testimony:

Jo Beth Rickles testified in the State's behalf as the ACA worker responsible for the interviews involving CF (Tr. p. 429). Ms. Rickles testified as to the inconsistencies involved in this matter. Ms. Rickles stated that according to State's Exhibit 3, there was no sexual contact between Mr. Johnson and CF (Tr. p. 435). Ms. Rickles testified that CF had reported sexual abuse, then recanted her entire story (Tr. p. 436). The most amazing statement that Ms. Rickles had testified to is that CF had informed her, "I went to someplace with someone else and she said it, so I repeated it." (Tr. p. 445). In this instance, CF is informing Ms. Rickles that she had accompanied her friend, Laura Morse, to the counselor's office in order for Laura to report the sexual assaults occurring in Laura's own household. Apparently, Laura had decided against reporting this to the counselor, so CF had instead made allegations against Mr. Johnson (Tr. p. 472).

Ms. Rickles testified that the interviews with CF were **entirely contradictory** to each other. These interviews were conducted in October of 2008 and January of 2009 (Tr. p. 433). Ms. Rickles testified that the interviews with CF were "like pulling teeth" (Tr. p. 447) and that she had to "pull the answers out of CF" (Tr. p. 447).

The State presented Dr. Adrienne Atzemis as an expert witness in child abuse pediatrician (Tr. p. 510). Dr. Atzemis testified as to the fact that there was no damage to CF's hymen during the examination (Tr. p. 531). Dr. Atzemis testified that a hymen can repair itself **even after childbirth** (Tr. p. 533). Dr. Atzemis testified as to the fact that CF had reported anal penetration by Mr. Johnson (Tr. p. 538), although the medical examination showed "normal." Dr. Atzemis testified that CF did not cry or

show emotional outbreaks during the interview (Tr. p. 538), that "kids do lie, but not about sex" (Tr. p. 539), and that teenagers also lie (Tr. p. 545). If the doctor believes that a child will lie, why would she believe that they would not lie about a sexual allegation?

Dr. Atzemis dodged acknowledging that CF's story could be consistent with any type of sexual **misconduct** NOT happening (Tr. p. 545). Dr. Atzemis had presented testimony that this household was very unstable (Tr. p. 551-552), CF's story had transformed from "Nothing came from the penis" (Tr. p. 555)(directly contradicting CF's testimony that she had to clean the sheets (Tr. p. 470)), from no oral contact (Tr. p. 556-557), to oral contact (Tr. p. 560), no anal sex (Tr. p. 558), to having anal sex (Tr. p. 560), from everything happened in the CF's room (Tr. p. 562), to things happened in different locations in the house (Tr. p. 556, 563), and CF telling her mother every time (Tr. p. 563).

Recently, the Louisiana Supreme Court, in *State v. Ayo*, 167 So.3d 608 (La. 6/30/15), 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*, supra, 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 sentence to life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence and were considered "Sex Offenders" during their incarceration. The State had relied heavily on the testimony of its two "Expert" witnesses, JoBeth Rickles and Dr. Atzemis to obtain these convictions, as in this case. 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. 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.**

The Science Community recognizes Dr. Atzemis' field of expertize as "Junk Science," and that the testimony is contrary to the findings of the American Pediatrics Association (which she claims to quote from). Dr. Atzemis' testimony is ONLY to improperly "bolster" the testimony of the alleged victim and to "give credibility" to the testimony given, not for substantial evidence to show proof of guilt. This testimony does not meet the criteria of *Daubert v. Dow Pharmaceuticals*, 509 U.S. 579 (1993).

This testimony on credibility has the effect of "putting an impressively qualified expert's stamp of truthfulness" on a witness' testimony. *Azure*, infra, at 340. This "stamp" has the effect of "so bolstering a witness' testimony ... as to increase it's probative strength with the jury and ... it's admission may in some situations on this basis constitute reversible error." *Homan v. United States*, 279 F.2d 767, 772 (8th Cir.).

One of the early cases on this matter has been repeatedly followed is *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986). There, the Court held that a pediatrician's comment on whether or not the victim was indeed telling the truth about being the victim of sexual abuse was held to be reversible error: It states "... Credibility, however, is for the jury. The jury is the lie detector in the courtroom ..." It

is now suggested that psychiatrists and psychologists have more expertise in weighing veracity of a witness than either Judges or juries, and that their opinions can be of value to both Judges and juries in determining credibility, perhaps. The effect of receiving such testimony, however, may be two fold: First, it may cause juries to surrender their own common sense in weighing testimony; second, it may produce a trial within a trial on what is collateral but still an important matter.

WHEREFORE under these circumstances, it is requested that this Court evaluate the evidence presented at trial to determine whether it was sufficient to sustain the conviction. A thorough review of the record reveals a reasonable doubt concerning Mr. Johnson's guilt of Aggravated Rape. When a conviction is reversed for insufficient evidence, the double jeopardy provision of Article I, § 15, of the Louisiana Constitution of 1974 and the Fifth and Fourteenth Amendment to the United States Constitution prohibit a retrial of the defendant. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *State v. Williams*, 423 So.2d 1048 (La. 1982). Currently, Trevor T. Johnson should be ordered discharged, or in the alternate, this matter be reversed and remanded to the district court for further proceedings.

ISSUE NO. 2

Whether reasonable jurists would find that the trial court erred in the denial of defense counsel's motion to suppress the introduction of the partially inaudible telephone call into evidence; and Whether Mr. Johnson's conviction was obtained in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution; as the telephone call submitted to the jury was in violation of the Telecommunication Act.

The trial court erred in denying defense counsel's Motion to Suppress the introduction of a "partially inaudible" phone call into evidence. The defense counsel properly lodged a contemporaneous objection, and the admittance of such would be a violation of Article 15 of the Telecommunication Act (Tr. p. 119), but was erroneously denied by the trial court before the start of the Voir Dire.

Detective Suhre failed to follow **any and all** procedures involved in the interception or use of these taped conversations between CF and Trevor Johnson. Pursuant to LSA-R.S. 15:1308 and 15:1310, Detective Suhre failed to obtain permission to record these conversations. Detective Suhre simply took it upon himself to record conversations which he felt would ascertain additional evidence to build his

case against Mr. Johnson.

As Detective Suhre had failed to receive authorization for the recording of these communications, the Attorney General's Office could have instituted, prosecuted, or intervened in this criminal action as they are authorized to. Detective Suhre showed complete disregard for the law and Mr. Johnson's constitutional and statutorily protected rights as enumerated in the United States Constitution, Louisiana Constitution of 1974, and the Louisiana Code of Criminal Procedure. As the State of Louisiana has not reverted to the ways of Nazism, these recordings should have been disallowed by the trial court, as defense counsel had properly lodged an objection to their admittance. The trial court further disregarded Mr. Johnson's constitutional and statutory rights in siding with the State to allow these "partially inaudible" recordings to be presented to the jury without the proper foundation being laid by the State.

The State did propagate their disparity by failing to present Detective Suhre for the purpose of testifying to lay the foundation of these "partially inaudible" recordings. The State realized that this would have subjected Detective Suhre to the cross-examination by defense counsel. With the cross-examination by defense counsel, Detective Suhre would have been subjected to the scrutiny of rigorous questions as to the process of obtaining said recordings to the jury.

Det. Suhre failed to submit an application for an order authorizing or approving the interception of these "partially inaudible" communications. The failure of Detective Suhre to submit same with the court was, in fact, an admittance that the State had failed to thoroughly investigate their authority to use these communications as to the current law in effect at this time in the State of Florida, which requires and all-party consent in which to lawfully obtain these recordings and for the submitting of same into a court of law. See: LSA-R.S. 15:1310.

The State would have been subjected to the denial of the introduction of these "partially inaudible" recordings of communications pursuant to LSA-R.S. 15:1307, which prohibits the use of said oral communications in the course of the proceedings without proper authorization of one of the governing bodies that are entitled to grant the right of the recording of communications pursuant to Article 15 of

the Louisiana Code of Criminal Procedure.

Mr. Johnson's conviction was obtained in violation of the Fourteenth Amendment to the United States Constitution as the telephone call which was submitted to the jury was recorded in violation of the Federal Telecommunication Act.

The monitoring of this phone call violated Federal Law. Mr. Johnson submits that the Louisiana Law for recording a conversation is subject to one-person consent. Calls that cross state lines become complicated legal issues especially when one state is a one-party consent and the other state is an all-party consent state. What has happened is that you didn't violate the law in the one-party consent state and violated the law in the all-party state. Moreover, since the call went across a state line, the federal laws would certainly apply. The most famous case involving this type of issue is the Linda Trip case. You will recall that Linda Trip recorded the conversations of Monica Lewinski concerning her relationship with President Clinton. Trip was in Maryland and Lewinski was in DC. Note that Maryland is an all-party consent state while DC is a one-party consent state. The law is actually quite fuzzy on these issues. The recorder and the Court is advised to assume that the stricter law would apply in each instance.

In all 50 states and through federal law, it's considered illegal to record telephone conversations outside of the one-party consent. However, the law only addresses the use of one-party and all-party consent. Anything outside of that is a violation of state law and federal wire-tapping law.

The Federal Communications Commission goes further into details on recording telephone conversations and states that the party recording must give verbal notification before the recording and there must be a beep tone on the line to indicate that the line is being recorded.

Louisiana is a one-party consent state. However, Florida is a two-party consent state. At the time of the conversation, Mr. Johnson was, in fact, in the State of Florida for an interview, as this was stipulated by the State and defense; and Det. Suhre was well aware that Mr. Johnson would try his best to "cut the conversation short." Detective Ryan Suhre was heard in the background of the conversation

coaching CF in the questions which he wanted presented to Mr. Johnson. The State has improperly introduced these tapes into evidence; thus violating Federal Law.

CF was not at the age of consent, or having been emancipated, to allow Detective Suhre to record the communications between Mr. Johnson and herself. A person under the age of eighteen **must** obtain permission from their parents or legal guardian in order to make decisions about their selves or their bodies. LSA-R.S. 93.2.

La.Ch.C. Art. 728 defines (2) "Child" means a person under eighteen years of age who, prior to juvenile proceedings, has not been judicially emancipated or emancipated by marriage.

A "Child" may not even enlist in the military without the consent of their parent or guardian. LSA-29:20. Pursuant to LSA-R.S. 37:3390.4: (2) When the person is a minor under the age of eighteen and the information acquired indicates that the child was a victim or subject of a crime, then, the person having received the information may be required to testify fully in relation thereto upon any examination, trial, or other proceeding in which the commission of such crime is subject of inquiry, unless otherwise prohibited by law.

The State of Louisiana deems a person to be a "Child" until that individual reaches the age of eighteen. As the State of Louisiana requires that a person be of the age of eighteen in order to vote, sign a contract, enter the military, consent to sex, etc., the State would deem that a "Child" under the age of eighteen cannot consent to have their communications intercepted and recorded. The State had failed to interject into discovery, consent from a parent or guardian was not obtain prior to the interception of these communications. If Detective Suhre had given the consent to intercept and record these communications, does that make him the guardian? If Detective Suhre wasn't the guardian, where was the consent from the parents?

The State failed to call Detective Suhre as a witness to lay the foundation for the introduction of these recorded conversation. Instead, the State had called Darlene Carter to testify as to the fact that she had transcribed these "partially inaudible" taped conversations (Tr. p. 574). Ms. Carter testified that she

was not a certified transcriptionist (Tr. p. 576), and that she was not present during the conversation between CF and her stepfather, Trevor Johnson (Tr. p. 574-76). These tapes were then improperly presented to the jury as evidence without the proper testimony to lay the foundation in accordance with *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

Detective Suhre failed to follow procedures for the interception of Oral Communications. LSA-R.S. 15:1310, which states the proper procedures for obtaining authorization for the interception of an oral communication.

The Law prohibits of use as evidence of intercepted wire or oral communications in this matter LSA-R.S. 15:1307. The State introduced these recordings to the jury as evidence of admittance of the commission of a crime against CF, and the trial court failed to enforce the laws as set forth in the Louisiana Code of Criminal Procedure. LSA-R.S. 15:1307.

Section 605 of the Federal Communications Act provides that no person who, as an employee, has to do with the sending or receiving of interstate communication by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to subpoena issued by a court or competent jurisdiction or on demand of other lawful authority; and "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

In *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939), the United States Supreme Court, Judge Roberts gave his opinion stating that: "We nevertheless face the fact that the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "no person" shall divulge or publish the message or its substance to "any person." To recite the contents of the message in testimony before a court is to divulge the message. The same considerations may well have moved Congress to adopt Section 605 as evoked the guaranty against practices and procedures violation of privacy, embodied in the Fourth and Fifth Amendments of the Constitution. For years controversy has raged with respect to the morality of

the practice of wire tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong and in any case, should be reversed or prevented."

In *U.S. v. Polakoff*, 112 F.2d 888 (2nd Cir. 1940), the U.S. Court of Appeal for the Second Circuit, the opinion by Judge L. Hand, Circuit Judge states: "Every telephone talk, like any talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by Section 605 to hold that because one party originated the call he **had power to surrender the others' privilege**. There cannot be the least doubt of this as to the answers of the party the party called up; and while it might indeed be pedantically argued that each party had the power to consent to the interception of at least so much as he said, that would be extremely unreal, for in the interchange each answer may, and often does, imply by reference some part of that to which it responds.

It is impossible satisfactorily so to dissect a conversation, and the privilege is mutual; both must consent to the interception of any part of the talk." In the case of Trevor Johnson, no consent was obtained. The statute does not speak of physical interceptions of the circuit, or of "taps." It speaks of "interceptions" and anyone intercepts a message to whose intervention as a listener communicates do not consent; the means he employs can have no importance; it is breach of privacy that counts. Here, however, we need not be troubled by niceties, because no matter what the scope of any such implied consent, it cannot extend to the interception of prosecuting agents bent upon trapping either party criminally. A fair trial cannot be obtained with the admission of telephone records.

In *U.S. v. Fallon*, 112 F.2d 894 (2nd Cir. 1940), the opinion of Judges L. Hand and Augustus N. Hand stated that: "This case is controlled by the opinion handed down here with the case of *U.S. v. Polakoff*. The declarations of the accused over the telephone were even more damaging than the *Polakoff*'s case and certainly determined the verdict. A recording apparatus was interposed in the telephone circuit in the house of the prosecution's chief witness, who was then acting in conjunction with Agents of the investigation, after all had been arranged, called up the accused and their talk was

recorded. This was repeated another time. Just as in the case of Trevor Johnson. The Judges stated, "We see no reason for adding to what we have already said in the companion case (The *Polakoff* case), and the judgment was reversed; and a new trial was ordered.

The government refer to the context of the critical clause, and the legislative history of the Communications Act, the former to demonstrate that all communications are protected from interception and divulgence; the latter to prove that the language of the Act must be more narrowly intercepted to cover only interstate and foreign communications.

Section 605 renders all communications inadmissible, and is prejudicial error for the trial court to admit them into evidence, either by the defendant or by the prosecution.

Free speech and associated rights guaranteed by the First Amendment of the United States Constitution. Privacy rights are guaranteed by the Fourth Amendment of the United States Constitution.

In 1972, the Court decided in *U.S. v. U.S. District Court*, 407 U.S. 297 (1972)(The *Keith* case) and held that, for unlawful electronic surveillance even in domestic security matters, the Fourth Amendment requires a prior warrant.

The Fourth Amendment of the United States Constitution consist of the right of the people to be secure in their persons, house, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The Fourth Amendment, accordingly, was adopted to assure that Executive abuses of the power to search would not continue in our nation.

Justice White wrote in 1984 in *U.S. v. Karo*, 468 U.S. 705 (1984), "a case involving installation and monitoring of a beeper which had found it's way into a home, that a private residence is a place in which society recognizes an expectation of privacy; that warrant-less searches of such places are presumptively unreasonable, absent exigencies. **Id.** at 714-715.

The defendant's motion to dismiss the claim against Mr. Johnson should be granted because

litigation of that claim would require violation of the defendant's First and Fourth Amendments of the United States Constitution and the Statutory Law.

The State would erroneously submit to this Honorable Court that this case falls under the exception of LSA-R.S. 15:1303.

Federal Law requires that the State of Louisiana follow the guidelines of both the state for which the call originated and the state in which the call was received. The State of Florida requires an all-party consent for the interception and recording of a communication. 18 U.S.C.A. § 2510 et seq.

Defense counsel had pointed out the trial court, any statement can be construed to say what a person wants it to say. "Have you stopped beating your wife?" The State had misconstrued and "twisted" the conversations between Mr. Johnson and CF to sound as if Mr. Johnson had admitted guilt. Mr. Johnson was simply trying to hurry the conversation along in a manner as to not be rude to his step-daughter. There was no admittance of any improprieties on the part of Mr. Johnson, just concern as to where CF was calling from, as the number she had called from was not a number that he was familiar with.

Detective Suhre had violated Mr. Johnson's constitutional rights in obtaining a recording of the conversation, which was greatly misinterpreted by the State and the jurors, and should not have been submitted for evidence in this matter. The State has **FAILED** to submit any **PROOF** that this intercepted phone conversation between Mr. Johnson and the alleged victim was legally obtained, as the interception is in violation of the United States Constitution and also the Louisiana Constitution of 1974 in that he has been subjected to conviction with evidence that has been illegally obtained through this investigation. Furthermore, as noted above, Detective Suhre had **FAILED** to obtain any type of warrant for the recordation of such, nor had he obtained **PERMISSION** from **ANYONE** of legal age for same. The alleged victim **WAS NOT** of age to consent for the interception of this phone call (which was across state lines, in violation of the Federal Law).

WHEREFORE, for reasons stated above, this Honorable Court should rule that these tapes were improperly obtained and admitted into evidence by the trial court. This matter should be reversed and

remanded to the trial court for a new trial, with the exclusion of these improperly obtained and submitted communications from the evidence.

ISSUE NO. 3

Whether reasonable jurists would debate that the trial court erred in allowing the state to strike two African-American prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court explicitly held that the Equal Protection Clause of the 14th Amendment prohibits State prosecutors from striking prospective jurors from the petit jury on the basis of race, and that when the State racially exercise its peremptory challenges to excuse black potential jurors from the petit jury on the account of their race, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated. The Court set forth the standard that a defendant must establish to prove a prima facie case of purposeful discrimination. Under this standard, the defendant must show that he is a member of a cognizable racial group, and that the prosecutor exercised peremptory challenges to remove from the venire members of the defendant's race. Second, defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Third, defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. Id., 106 S.Ct. at 1723.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race. Id., 106 S.Ct. at 1723. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in making individual selection. Id., 106 S.Ct. at 1723-1724.

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 1866 (1991), the Supreme Court held that

"Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing became moot." *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), held that the Sixth Amendment requires that jury venire be drawn from a fair cross section of the community.

In *Batson v. Kentucky*, supra, the Supreme Court outlined a three-step process for determining whether peremptory strikes have been applied in a discriminatory manner: First, the claimant must make a prima facie showing that the peremptory challenges have been exercised on the basis of race. Second, if the requisite showing has been made, the burden shifts to the party accused of discrimination to articulate race-neutral explanations for the peremptory challenges. Finally, the trial court must determine whether the claimant has carried his burden of proving purposeful discrimination. *U.S. v. Bently-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993); *Haynes v. Quarterman*, 561 F.3d 535 (5th Cir. 2009).

As to the first element of *Batson*, counsel made a prima facie showing that the State's peremptory strikes were targeted at specifically removing African-Americans from the jury. The State used two (2) strikes. Each of the two (2) were to strike African-Americans, members of Appellant's racial/ethnical group. The Court has held that the requisite showing of racial discrimination can be demonstrated by the fact that 1). peremptory challenges constitute a jury selection practice that permits those to discriminate who are a mind to discriminate, and 2). that the facts and circumstances raise an inference that the prosecutor exercised peremptory challenges on the basis of race. *Batson*, 476 U.S. at 96, 106 S.Ct. 1712; *Price v. Cain*, 560 F.3d 284 (5th Cir. 2009).

In order to make a prima facie showing to satisfy the first element of *Batson*, the Supreme Court explained: "We did not intend the first step to be so onerous that a defendant would have to persuade the judge - - on the basis of all the facts, some of which are impossible for the defendant to know with certainty - - that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirement of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. *Johnson v. California*, 545

U.S. 162, 170, 125 S.Ct. 2410 (2005). The Fifth Circuit in ***Price v. Cain***, supra, interpreted this langluage as being "simple and without frills." It is beyond logical debate, the record clearly establishes a pattern allowing the reasonable inference to be drawn that the State's strikes were racially motivated. Two (2) peremptory challenges were used; Two (2) African-American's of appellant's racial/ethnical group were selectively and purposefully targeted and struck from the jury. It was then incumbent upon the Court to conduct further inquiry, as the burden shifted to the State to articulate race-neutral explanations for the peremptory challenges.

Defense counsel properly lodged a contemporaneous objection to the State using peremptory challenges to dismiss the **only two** prospective African-American jurors from this trial. As it was, in this group of twenty potential jurors, there were only two African-Americans in this panel. The State **peremptorily struck** both of these from the jury. These two are Mr. Sidney Harris, a well-respected law enforcement officer in Orleans Parish, and Mr. Walli Haqq. As the State and defense counsel had already challenged one African-American for cause, defense had properly raised a contemporaneous objection to the State dismissing these other two African-Americans from the jury. The State had used Strike Number Two to dismiss Mr. Sidney Harris. The colloquy for the strike is located on Tr.pp. 277-278.

After the dismissal of this African-American potential juror, the State further dismissed Mr. Walli Haqqi, an African-American. First, the State had challenged Mr. Haqqi for cause, which the Court had denied (Tr. p. 365-365). After the Court had denied the State's challenge for cause, the State then used a peremptory challenge to dismiss Mr. Haqqi (Tr. p. 368-369). As to the State's challenge for cause, Mr. Johnson requests this Honorable Court to refer to transcript pages 365-66.

Mr. Johnson now submits to this Honorable Court that the colloquy for the State's challenge for peremptory dismissal is located on transcript pages 368-369. After a mere inspection of the record in this matter, this Honorable Court will see that the trial court had denied Mr. Johnson his constitutional and statutorily protected rights in allowing the State to dismiss these two African-Americans from the jury.

ISSUE NO. 5

Whether reasonable jurists would find that the trial court abused its discretion by accepting the non-unanimous verdict of guilt by the jury.

Louisiana Constitution of 1974, Art. I § 17 (A) allowing non-unanimous jury verdicts and the enabling statute, La.C.Cr.P. Art. 782, violate Equal Protection under the Fourteenth Amendment and Article I, Section Three (3) of the Louisiana Constitution of 1974, because the constitutional provision's enactment was motivated by an express and overt desire to discriminate against blacks on account of race and because the provision has had a racially discriminatory impact since its adoption.

Unlike the familiar Sixth Amendment challenge to this State's non-unanimous jury regime, a challenge to the Louisiana Supreme Court has rejected, the Equal Protection challenge presented in this case has not been addressed on merits by any court. See: *State v. Bertrand*, 6 So.3d 38 (La. 3/17/09). Despite its apparent novelty, this claim follows from a straightforward application of settled United States Supreme Court jurisprudence that holds that any law that has a racially discriminatory impact and that was enacted with a racially discriminatory motive violates Equal Protection notwithstanding that the law may be facially neutral. *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

For example, in *Hunter v. Underwood* the Supreme Court affirmed that lower court's invalidation of an Alabama law that disenfranchised persons convicted of certain misdemeanors. The Court concluded that although the law was facially neutral with respect to race, the law violate Equal Protection because it had the effect of disenfranchising a disproportionate percentage of blacks and because the law was passed in the Alabama Constitutional Convention of 1801, a which the "zeal for white supremacy ran rampant." *Hunter*, 471 U.S. at 229. The Court further noted that Alabama's

constitutional convention "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." Id.

Over 40 years ago, Justice Potter Stewart warned about the Louisiana's flawed system: "[Ten] jurors can simply ignore the views of their fellow panel members of a different race or class," ***Johnson v. Louisiana***, 406 U.S. 366, 397 S.Ct. 1620, 32 L.Ed.2d 152 (1972)(Stewart, J., dissenting). The risk that the black community and black jurors have been denied a guarantee of meaningful participation in jury deliberations is simply too great to tolerate any longer.

Non-unanimous juries convict disproportionately greater number of blacks than whites. It is obviously true that convictions are easier to obtain when juries do not require unanimity to convict. It necessarily follows that juries in Louisiana convict more persons than they would if unanimity were required. While black citizens make up only 33% of Louisiana's population, they comprise 76% of Louisiana's prison population.[3] It simply cannot be denied that the law, which was born of overt racism, disproportion adversely affects black persons.

Louisiana's non-unanimous jury system is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article One, Section Three (3) of the Louisiana Constitution of 1974.

Accordingly, Mr. Johnson was convicted of the crime by a margin of 11-1. This Court should note that a life sentence in the State of Louisiana is similar to that of a death penalty, as an offender is meticulously guaranteed that he will **NEVER** see the light of day as a free man, and is virtually sentenced to die in incarceration. Although the State may submit the fact that Mr. Johnson may apply for a Pardon in twenty years; it should be noted that offenders sentenced to death are also able to apply for a Pardon. Hence, showing that this life sentence is really a "**Virtual Death Penalty**," or "**Death by**

[3]Http://www.gibbsmagazind.com/blacks_in_prisons.htm.

Incarceration."

This Honorable Court must consider the fact that on November 6, 2018, the voters of Louisiana voted to change the Law concerning non-unanimous verdicts. Although the new law only applies to persons whose trial commences on or after January 1, 2019, the State *admitted* that the Law was premised on racial discrimination during the arguments concerning such during the Legislative Session. A Law based on discrimination cannot stand.

This Court must also consider that in *State v. Melvin Maxie*, Docket No.: 13-CR-725 (10/11/18), of the 11th Judicial District Court, parish of Sabine, the Honorable Stephen B. Beasley declared that the use of non-unanimous verdicts unconstitutional. Although this case may only be used as "Persuasive Law," this was the first time that "Expert" testimony was submitted to a Court which proves beyond a reasonable doubt that the Law was based on racial premises. It is well settled that a Law based on any discriminatory basis is unconstitutional, and cannot stand.

Most recently, the United States Supreme Court, in *Evangelisto Ramos v. Louisiana*, No. 18-5924, ordered the State to file a Brief in Opposition to Mr. Ramos' Petition for Writ of Certiorari. It appears as though the United States Supreme Court has, after 46 years of affirming *Apodoca v. Oregon*, 406 U.S. 404 (1972), determined that it is time to review the constitutionality of Louisiana's non-unanimous jury verdicts.

WHEREFORE, for the foregoing reasons, this Honorable Court should reverse this non-unanimous verdict and Grant the desired relief in this matter.

CONCLUSION

After a review of the Record in this case, Mr. Johnson this Honorable Court must determine that Mr. Johnson was denied his constitutional rights to a fair and impartial trial in this matter.

Furthermore, jurists of reason would have properly considered Mr. Johnson's Issues and Granted

Mr. Johnson relief from his convictions.

The record sufficiently supports Mr. Johnson's allegation of substantial error. Therefore, this Honorable Court should find that, in the Interest of Justice, Mr. Johnson should receive a new trial, or in the alternative, an evidentiary hearing to review the merits of the constitutional violations. Mr. Johnson seeks relief and has stated grounds under 28 U.S.C. § 2253, specifying, with reasonable particularity, the factual basis for such relief. Additionally, his pleading clearly alleges Claims which if proven, entitle him to constitutional relief.

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

Respectfully submitted this 26th day of December, 2018.

Trevor Johnson

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 26th day of December, 2018. upon counsel of record for Respondent, pursuant to Rule 29 at the following address:

District Attorney's Office
701 N. Columbia St.
Covington, LA 70433

Trevor Johnson
(Signature of Petitioner)