No.: 18-7780

ORIGINAL

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

JOSEPH LEMOINE v. DARREL VANNOY, Warden

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

Joseph Lemoine #596689
MPWY/Oak-1
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January 28, 2019

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QUESTIONS PRESENTED

1. **Whether reasonable jurists could argue that the State failed to meet its burden of proof beyond a reasonable doubt, every essential element of the offense charged;**
2. **Whether reasonable jurists would find that Mr. Lemoine was denied effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution;**
3. **Whether reasonable jurists would debate that Mr. Lemoine was denied a fair and impartial trial with the submission of testimony from an "Expert" witness which failed to meet the *Daubert* standard, in violation of the Sixth and Fourteenth Amendments to the United States Constitution;**
4. **Whether reasonable jurists would find that the State improperly introduced the testimony of unsubstantiated, unfounded "expert" witnesses in order to overcome the factual insufficient evidence.**
5. **Whether reasonable jurists would find that Mr. Lemoine was denied a fair and impartial trial with the State's improper use of his statements which were made while intoxicated and could not be considered to be voluntary or knowing; Fifth, Sixth and Fourteenth Amendments to the United States Constitution; *Beecher v. Alabama*.**

INTERESTED PARTIES

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TABLE OF CONTENTS:

Page

INDEX OF AUTHORITIES: Page

U.S. CONSTITUTION:

FEDERAL CASES:

STATUTORY PROVISIONS:

STATE CASES:

MISCELLANEOUS:

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JOSEPH LEMOINE v. DARREL VANNOY, Warden

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

Pro Se Petitioner, Joseph Lemoine 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 November 28, 2018; that the issues presented to the Fifth Circuit were: (1) Whether reasonable jurists could argue that the State failed to meet its burden of proof beyond a reasonable doubt, every essential element of the offense charged; (2) Whether reasonable jurists would find that Mr. Lemoine was denied effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (3) Whether reasonable jurists would debate that Mr. Lemoine was denied a fair and impartial trial with the submission of testimony from an "Expert" witness which failed to meet the ***Daubert*** standard, in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (4) The State improperly introduced the testimony of unsubstantiated, unfounded "expert" witnesses in order to overcome the factual insufficient evidence (5) Whether reasonable jurists would find that Mr. Lemoine was denied a fair and impartial trial with the State's improper use of his statements which were made while intoxicated, and could not be considered to be voluntary or knowing; Fifth, Sixth and Fourteenth Amendments to the United States Constitution; ***Beecher v. Alabama***.

NOTICE OF PRO-SE FILING

Mr. Lemoine 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.: 18-30423. This pleading was filed as a Certificate of Appealability.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 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 is a criminal case resulting in a conviction. On March 14, 2010, the Grand Jury of Washington Parish indicted Joseph Lemoine on a charge of Aggravated Rape of BZ in violation of LSA-R.S. 14:42 for incidents which allegedly occurred on January 1, 2008 and February 8, 2009. Mr. Lemoine pled not guilty.

This matter was tried to a jury on March 12, 13, and 14, 2012. The jury returned a verdict of guilty as charged of Aggravated Rape. The defendant filed a Motion for New Trial and a Motion for Post-Verdict Judgment of Acquittal, both of which were denied by the court after a hearing.

The court sentenced Mr. Lemoine to be imprisoned for life at hard labor with the Louisiana Department of Public Safety and Corrections without the benefit of Parole, Probation or Suspension of Sentence, with credit for time served.

Appeal was filed on May 24, 2013, and denied on November 1, 2013 by the First Circuit Court of Appeals. Writs were filed into the Louisiana Supreme Court on November 20, 2013, and denied on April 25, 2014.

On June 29, 2015, Mr. Lemoine filed his Application for Post-Conviction Relief w/ Memorandum in Support to the 22nd Judicial District Court. On September 21, 2015, the district court, under the provisions of La.C.Cr.P. Art. 928 denied relief without the benefit of an evidentiary hearing or appointment of counsel.

September 29, 2015, Mr. Lemoine timely filed Notice of Intent to Seek Writs to the First Circuit Court of Appeals with the 22nd Judicial District Court.

On October 15, 2015, Mr. Lemoine filed for Supervisory Writs to the Louisiana First Circuit Court of Appeals, which was denied on December 18, 2018. On December 29, 2015, Mr. Lemoine filed for Supervisory Writs to the Louisiana Supreme Court. The Louisiana Supreme Court denied Writs on May 1, 2017.

On May 15, 2017, Mr. Lemoine filed his Petition for Habeas Petition to the U.S. Eastern District of Louisiana. On August 7, 2017, Mr. Lemoine received the State's Answer. On August 18, 2017, Mr. Lemoine filed his Traverse to the State's Answer.

On March 19, 2018, Mr. Lemoine received the Magistrate Judge's Report and Recommendation, and filed his Objection to such on March 27, 2018. On March 28, 2018, the Eastern District dismissed Mr. Lemoine's Petition. Mr. Lemoine filed his Notice of Appeal on April 6, 2018.

On April 30, 2018, Mr. Lemoine filed for Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal, which was denied on November 28, 2018. Mr. Lemoine now timely files for Writs to this Honorable Court, humbly requesting that this Honorable Court invoke its Authority over the lower courts and grant him relief for the following reasons to wit:

STATEMENT OF THE FACTS

In February 2009, Carol Marie Zenon and her three children: Angel, Perry, Jr., and BZ, were living with her mother, Rheba Marie,[1] in Mt. Hermon in Washington Parish. Carol has three brothers and one sister, and they would often have family gatherings at Rheba Marie's house.

On February 7, 2009, Carol's friend, Veronica, who is the mother of Madison, one of Angel's friends, called Carol and asked her, "Who is Uncle Joey?" When Carol told here that Uncle Joey is her brother, Joseph Lemoine, Veronica told her that some things had gone on with her brother, Joseph Lemoine, that should not have.

Carol went home and asked Angel if she knew of anything Uncle Joey did that he should not have done, and Angel confirmed that he had done something to BZ,[2] who was six years old. Carol questioned BZ, who accused the defendant, Joseph Lemoine, of licking her vagina, and then making her lick his penis behind a born at Rheba Marie's house.

On February 8, 2009, Carol reported the matter to the Washington Parish Sheriff's Office. Detective Anthony Stubbs made an appointment at the Child Advocacy for a forensic interview of BZ. On February 12, 2009, Mr. Lemoine went to the Sheriff's office and gave a statement denying any wrongdoing. He was not taken into custody. On February 24, 2009, he went back to the Sheriff's office and gave another statement to Detective Stubbs and Detective Tom Anderson. He was charged with the Sexual Battery of BZ after giving the statement. Mr. Lemoine was re-arrested 10 months later for the violation of Aggravated Rape, a violation of LSA-R.S. 14:42.

This case stems from a family get together where a heated argument between a brother (Joseph Lemoine) and a sister (Carol Zenon) erupted and turned "ugly." Unfortunately, during the course of this "heated argument," the alleged victim, and Mr. Lemoine's niece (BZ) was present and visibly upset

[1]The record stipulates that Ms. Marie is Rose, but her name is actually Rheba.
[2]The initials of the victim are used in this case in accordance with LSA-R.S. 46:1844 (W)

about the "name-calling" and "improper remarks" made by Mr. Lemoine.

REASONS FOR GRANTING THE WRIT

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. Lemoine 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. Lemoine 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).

Mr. Lemoine suggest that the judgment denying COA calls for further scrutiny. Mr. Lemoine 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 (Issue on Appeal)

The trial court erred in denying the defendant's Motion to Suppress his confession which was not free and voluntary as Mr. Lemoine was under the influence of alcohol?

On March 12, 2012, the court conducted a hearing on the defendant's Motion to Suppress a statement he made to Detectives Anthony Stubbs and Tom Anderson of February 24, 2009. Mr. Lemoine arrived at the Sheriff's office at about *6:00 pm*, and was interviewed at *6:53 pm*.

Mr. Lemoine admitted that he was an alcoholic. his wife drove him to the Sheriff's office for the interview because he he had been drinking since he got off work at 3:30 pm that afternoon. He testified that he did not remember signing the rights form and was not of his right mind. He also testified that before the taped interview started, Detective Anderson told him to say certain things, and if said those thing, he would not go to jail. That is the reason he made the inculpatory statement admitting that he improperly touched the victim. **Detective Stubbs confirmed that they did speak to the defendant** prior to the taped interview.

Before a confession can be introduced into evidence, the State has the burden of proving that it was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, promises or promises. La.C.Cr.P. Art. 703 (D); LSA-R.S. 15:541: *State v. Vaccaro*, 411 So.2d 415 (La. 1982).

If a defendant claims that he was under the influence of alcohol or drugs at the time he gave a statement, such a statement will be rendered inadmissible "... when the intoxication is of such a degree as to negate defendant's comprehension and to render him unconscious of the consequences of what he is saying." *State v. Robinson* 384 So.2d 332, 335 (La. 1980).

The state courts have erroneously denied relief in the direct review of the 22nd Judicial District Court's denial of the Motion to Suppress the Statement. The Courts in this matter have determined that

the statement was given voluntarily. However, as previously stipulated during this appeal, the Court **WAS INFORMED** that Mr. Lemoine was had been drinking prior to the questioning by the detectives and that he was an alcoholic. History of drinking from childhood, confession not product of free will. *U.S. ex rel Wakeley v. Russell*, 309 F. Supp. 68.

However, the Courts have relied on the fact that the detectives, Detective Stubbs and Lieutenant Anderson, that there was no intoxication involved, only nervousness. What the Courts have failed to address is the fact that the officers, in no way, attempted to verify if Mr. Lemoine was sober or intoxicated at this time. What better way to obtain a statement favorable to the State than to allow someone who is inebriated and under the influence to give a statement.

Furthermore, there is NO testimony from either officer that there was a breathalyser administered to Mr. Lemoine before, during, or after the statement was obtained. There is substantial testimony from Mr. Lemoine and the officers that Mr. Lemoine had admitted that he had started drinking before being questioned.

If, use of drugs or extreme intoxication, confession in fact could not be said to be product of a rational intellect and free will, it is not admissible and its reception in evidence constitutes a deprivation of due process of law. *Gladden v. Unsworth*, 396 F. 2d 373 (9th Cir. 1968).

The test to be applied to determine whether statement was compelled by promise of leniency; as such as in this case where the officers promised Mr. Lemoine that he **would not go to jail** if he gave a statement, is whether conduct of state's agents was such that it overrode defendant's will to resist and brought about admission or confession not freely self-determined. *Hunter v. Soenson*, 372 F. Supp. 287.

Under Due Process test, determination as to voluntariness of a defendant's confession depends upon a weighing of circumstances of pressure against the power of resistance of the person confessing. Fourteenth Amendment to the United States Constitution. Furthermore, the Due Process for evaluating

voluntariness of defendant's confession requires inquiry into whether defendant's will was overborne by the circumstances surrounding the confession. *Dickerson v. U.S.*, 530 U.S. 428, 120 S.Ct. 2326 (U.S. Va. 2000). Mr. Lemoine has shown that this statement was not freely and intelligently given as he was intoxicated. The detectives in this matter were informed prior to the statement that Mr. Lemoine had been consuming alcohol prior to being questioned. The testimony of the detectives that Mr. Lemoine had been "anxious" during the statement was misconstrued; as Mr. Lemoine had been intoxicated, not "anxious."

Generally, voluntariness of a confession is determined by the totality of the circumstances. The following is often considered: intoxication from drugs or alcohol, *Beecher v. Alabama*, 389 U.S. 35, 38, 88 S.Ct. 189, 19 L.Ed.2d 35 (1967); *State v. Narcisse*, 426 So.2d 118, 125-26 (La. 1983) (confession involuntary if it "negates the defendant's comprehension and renders him 'unconscious of the consequences of what he is saying'"); *Gilpin v. United States*, 415 F.2d 638 (5th Cir. 1969) (spontaneous statement in cellblock by drunken defendant involuntary); *Gladden v. Unsworth*, 396 F.2d 373 (9th Cir. 1968) (same); *Townsend v. Sain*, 372 U.S. 293, 307-09 (1963).

LSA-R.S. 15:451 provides:

> Before what purports to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces threats, inducements or promises.

LSA-R.S. 15:451 serves to safeguard a defendant's Fifth Amendment protection against self-incrimination, especially when the admission of an illegal confession denies a defendant Due Process of Law and the fundamental fairness essential to the very concept of justice. Because the State must prove "beyond a reasonable doubt" that the confession was freely and voluntarily given, this standard insures that the State cannot obtain a verdict against a criminal defendant "without convincing a proper fact-finder of his guilty with utmost certainty." *State v. Stewart*, 509 So.2d 129 (La. 1983).

Whether or not a showing of voluntariness has been made is analyzed on a case by case basis with regard to the facts and circumstances of each case. The trial judge must consider the "totality of the circumstances" in deciding whether the confession is admissible.

This confession was not free and voluntary. Mr. Lemoine had been drinking alcohol for hours. He testified that the officers told him he would not go to jail if he admitted to improper touching. He made the admission, not because he is guilty, but because he was drunk and though he could go home if he made the statement. A confession given under these circumstances is not free and voluntary.

ISSUE NO. 2

The evidence was insufficient to convict. *Jackson v. Virginia*; **and** *In Re: Winship*

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).

First and foremost, the United States Supreme Court set the standard in *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.*, ". . . 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 fact-finder'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).

In light of the overwhelming amount of inconsistent testimony, and after viewing evidence in light most favorable to prosecution, any rational trier of fact could not have found Mr. Lemoine guilty of every essential element of the crime beyond a reasonable doubt. U.S.C.A. Const. Amend. 14. (See: *Jackson v. Virginia*, 99 S.Ct. 2781, 443 U.S. 307 (U.S. 1979); *Winship*, supra.).

The appellate court does not assess the credibility of witnesses or reweigh evidence, and accords great deference to a jury's decision to accept or reject the testimony of a witness in whole or in part. However, in this matter before the bar, justice demands that this Court interject it's Supervisory Powers to weigh the evidence presented to the jury and determine whether or not the State had presented substantial evidence of proof beyond a reasonable doubt of Mr. Lemoine's guilt of every essential element of Aggravated Rape.

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 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, 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. Lemoine.

The inconsistencies in the victim's testimony alone should be sufficient to have this matter reviewed by the Higher Court. The victim's inconsistencies and perjury throughout the direct and cross-examination proved beyond a reasonable doubt that BZ has failed to even corroborate the fabrications relayed throughout the investigation and proceedings of this unjust allegation against him.

This case has an appearance of impropriety concerning "Coaching" on the part of the alleged victim's mother and Mr. Jay Adair (Assistant District Attorney). BZ testified that her mother had questioned her numerous times concerning these allegations (See: Tr.t.p. 389). Contrarily, Carol testified that the only time she discussed this situation with her daughter was when BZ brought it up (See: Tr.t.p. 334, 335). BZ further stipulated that her mother had questioned her more since she knew that she had to come to trial (See: Tr.t.p. 389).

During the testimony by Det. Anthony Stubbs, evidence was presented that the alleged victim in this matter gave a description of Mr. Lemoine's genitalia during the course of the CAC interview (that there was a distinctive mark [big bleeding bump] on Mr. Lemoine's penis). Det. Stubbs "admitted" that he did nothing to confirm or deny that report (See: Tr.t. pp. 320-21). Det. Stubbs testified as follows on cross-examination:

BY MR. ALMERICO:

Q: There's a point where the alleged victim victim supposedly describes the defendant's genitalia?

A: Correct.

Q: Did you ever confirm or deny that report?

A: I addressed that with Mr. Lemoine.

Q: You asked him a question?

A: Yes.

Q: Did you ask him to see it?

A: No.

Q: Why not?

A: **I didn't feel it was necessary (emphasis added).**

Q: You didn't feel it was necessary what you had heard on the alleged victim's tape?

A: I would have went further possibly, but after Mr. Lemoine gave the statement.

Q: So basically, you just went on statements is what you're saying?

A: Correct.

Q: Statements are good enough for you?

Q: You didn't feel the need to even bother to look for any other physical corroboration of the evidence?

A: If someone would have presented --

Q: You don't think the little girl describing his genitalia was opportunity that was presented?

A: Correct.

Q: You just didn't think that it was important to look?

A: Well, not at that point, no.

Det. Stubbs failed to investigate as to the alleged victim's description of Mr. Lemoine's genitalia. Although Det. Stubbs failed in properly investigating any/all possible leads or evidence presented through the interview with CAC, original trial attorney was ineffective for failing to follow through or conduct an independent investigation of the alleged victim's interview with CAC.

The confirmation of this alleged victim's description would have been the "nail in the coffin," or better yet, "the straw that broke the camel's back" if proven in this case. On the other hand, it would have helped to prove Mr. Lemoine's innocence in this matter, if presented to the jury.

BZ admitted during testimony that she had been interviewed by "Mr. Jay" on numerous occasions, including visits to her home (Tr.t.pp. 373, 375). BZ further testified that "Mr. Jay" had "talked to her about what she was going to say" (Tr.t.p. 390).

Jo Beth Rickels also testified to the fact that BZ had informed her during the interview that "Uncle Joey" had asked her, in front of her mom and grandmother," to "Let's Go Lick" (Tr.T.pp. 407-408). Even though the State attempted numerous times to have this alleged victim to make this statement during the course of the direct-examination, BZ was unable to recall making such a statement. Furthermore, Ms. Rickels testified to the fact that BZ informed her that she had "learned about sex" by spying on her mother and Mark (Tr.t.p. 404).

As the alleged victim in this case stated that this statement was made in front of her mother and grandmother, no other testimony presented by the State corroborates such. Surely, a mother, or at least a grandmother would have intervened if they would have heard such a comment. The alleged victim's mother stipulated that she paid "close attention" to everything concerning her daughter.

The sad part of this whole case is the fact that alleged victim had overheard her uncle Joey make some "very derogatory" statements to her mother[3] prior to the onset of this allegation and investigation. BZ is a very young, very impressionable person (6 years old). Mr. Lemoine is not proud of his "drunken outbursts" to BZ's mother, and **was not aware** that BZ was present during any of the verbal altercation with Carol until a later date.[4]

Mr. Lemoine has obtained Affidavits from witnesses to these "outbursts" between Mr. Lemoine and his sister, Carol (See: Affidavits of Dawn L. Autin and Donald Lemoine; Exhibits "A" and "B"). It should be noted that one of these "loud and heated" arguments, according to Ms. Autin and Donald Lemoine, was the day that this allegation stems. Carol made threats towards Mr. Lemoine in front of BZ and the other family members during this outburst.

Here, Mr. Lemoine has shown this Court the probability of this false accusation, along with the State failing to obtain corroborating evidence to support these allegations. Accordingly, the testimony adduced during the trial shows that Mr. Lemoine had made some "remarks" that should not have been made to his sister, Carol.

Testimony was adduced during trial concerning letters that Mr. Lemoine had written his sister, Carol, during his incarceration awaiting trial. True, Mr. Lemoine had requested that Carol keep from

[3]Mr. Lemoine had voiced his opinion of the fact that Carol had married an African-American and the fact that it was harder for people in the Parish of Washington to accept "mixed" children. Mr. Lemoine also had informed Carol of the hardships he thought that BZ would experience due to the fact that she was "mixed." This discussion escalated into a "very heated argument" to the point of Carol actually threatening him with bodily harm in the presence of BZ.

[4]Although the State contends that these arguments were "years ago," there was still tension between Mr. Lemoine and Carol, which had been "ongoing" due to the fact that he believed the children would suffer because of Carol's choices in life. This, in itself, would be difficult for BZ to experience between her mother and uncle.

having BZ testify during the trial. However, Mr. Adair had intentionally taken ALL of these letter out of context with the actual meaning. Mr. Lemoine was unfamiliar with the judicial system and testified to the reasons for his requests. The fact that Mr. Lemoine spent three years awaiting trial with limited contact with his attorney(s), along with the fact that he had been reading case-law which stipulated "testimony of the victim alone is enough to substantiate a conviction" for a sex offense, he was aware that the State did not have to produce any physical evidence in this case.

In light of the overwhelming amount of inconsistent testimony, family feuding, and discrepancies, after viewing evidence in light most favorable to prosecution, any rational trier of fact could not have found the essential element of the crime beyond a reasonable doubt. U.S.C.A. Const. Amend. 14. (See: *Jackson v. Virginia*, 99 S.Ct. 2781, 443 U.S. 307 (U.S. 1979); *Winship*, supra.).

ISSUE NO. 3

Mr. Lemoine was denied effective assistance of counsel.

The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. U.S. Const. amend. VI. The purpose of this Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The skill and knowledge counsel is intended to afford a Defendant "ample opportunity to meet the case of the prosecution." *Strickland*, 466 U.S. at 685 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942)).

Acknowledging the extreme importance of this right, the United States Supreme Court has held: That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to

satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. ***Strickland v. Washington***, 466 U.S. at 685.

Thus, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." ***McMann v. Richardson***, 397 U. S. 759, 771 n. 14, 90 S. Ct. 1441, 1449 n. 14, 25 L. Ed. 2d 763, 773 (1970). See also: ***United States v. Otero***, 848 F.2d 835, 837, 839 (7th Cir. 1988); ***Deutscher v. Whitley***, 884 F.2d 1152, 1162 (9th Cir. 1989); ***Duckworth v. Dillon***, 751 F.2d 895 (7th Cir. 1984); ***Goodwin v. Balkcom***, 684 F.2d 794 (11th Cir. 1982)(ineffective assistance found where counsel failed to: (1) investigate; (2) raise a challenge to the petit jury selection system; (3) raise illegality of the arrest; (4) interview crucial witnesses); ***Blake v. Zant***, 513 F. Supp. 772 (S.D.Ga. 1981)(ineffective Counsel in capital cases; standards applied with particular care; showing of prejudice not always required).

A defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test of ***Strickland v. Washington***, supra. The defendant must show that: (1) counsel's performance was deficient; and (2) that the deficiency prejudiced the defendant. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal.

"At the heart of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982); accord *Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983). As the Court held in *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986): Investigation is an essential component of the adversary process. "Because [the adversarial] testing process generally will not function properly unless counsel has done some investigation into the prosecution's case and into various defense strategies . . . 'counsel has a duty to make reasonable investigations. . . .'" Id. at 307 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986)(quoting *Strickland v. Washington*, supra).

However, the mere presence of an attorney does not satisfy the constitutional guarantee of counsel. As the Supreme Court has often noted, an accused is entitled to representation by an attorney, whether retained or appointed. "Who plays the role necessary to ensure that the trial is fair." *Morrison*, 477 U.S. at 377, 106 S.Ct. At 2584, quoting *Strickland v. Washington*, supra. "In other words, the right to counsel is the right to effective assistance of counsel," citing *Evitts v. Lucey*, supra.

Mr. Lemoine's initial defense counsel was ineffective for failing to investigate this matter. During the initial investigation of the alleged sexual misconduct, the investigators were informed that there was a distinctive mark (big bleeding bump) on Mr. Lemoine's penis (See: Insufficient Evidence Claim above; also: Tr.pp. 320-321). Had counsel acted in her client's best interest, an examination would have been completed, with photographs, to ensure a proper defense. Although the detectives had failed to investigate the "bleeding bump" BZ had alleged was present during the encounter, counsel had the opportunity, and the duty, to investigate this "identification" made by the alleged victim.

Mr. Lemoine was denied his right to effective assistance of counsel and his Due Process right in accordance with the Sixth and Fourteenth Amendments to the United States Constitution. *Strickland v.*

Washington, supra.

In *State v. J.D.*, 32 So.3d 1072 (La. App. 3rd Cir. 3/10/10), the victim informed the investigators that "my grandmother's name was written on his 'thing." After securing a warrant for photographs of JD's genitalia, it was discovered that the victim's grandmother's name was actually "tattooed" on the perpetrator's penis. Although the defendant argued that this was a "tattoo," and not "written," the Court found that the photographs were allowed in Court for the probative value.

Also, in *State v. Jeremy Landry*, 57 So.3d 611 (La. App. 1st Cir. 2/11/11), the Court found that after the victim in this matter informed the investigators of a "bad rash" around Mr. Landry's genitalia, photographs were taken to substantiate the victim's credibility.

In *State v. Bell*, 106 So.3d 295 (La. App. 3rd Cir. 1/9/13), the Court held that, "Probative value of photographs of defendant's penis was not substantially outweighed by the danger of unfair prejudice so as to render the photographs inadmissible in sexual battery prosecution even though the photographs showed the defendant wearing jailhouse orange, where the photographs were admitted to corroborate and support the testimony of victim that defendant's penis had a distinctive feature, ..."

When BZ touched defendant's penis, she noticed "a bump" on it; Defendant told her "he swallowed a banana Runt [candy], and it got stuck." After defendant denied the allegations, Detective Primeaux ask him how BZ could know about a specific characteristic of his penis. Defendant became very uncomfortable, pale, and "just about deflated."

Original counsel's deficient performance and errors committed by original trial counsel were so serious as to prejudice Mr. Lemoine and deprive him of a fair trial. There is a reasonable probability that, but counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra.

the district court should have appointed counsel to properly address the ineffective assistance of trial counsel Claims pursuant to *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 6/28/12); and *Coleman v. Goodwin*, No. 14-30785 (U.S. 5 (La.) 8/15/16).

In *Lindsey v. Cain*, 2012 WL 1366040 (5th Cir. Apr. 19, 2012),[5] the U.S. Fifth Circuit Court of Appeals granted a COA and remanded for further proceedings in light of *Martinez*, saying:

> When a state, like Louisiana, requires that a prisoner raise an ineffective assistance of counsel claim on collateral review, a prisoner can demonstrate cause for the default in two circumstances: (1) "where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial" and, (2) where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]." *Id.* at *8 (citation omitted). Further, the prisoner must also show that "the underlying ineffective assistance of trial counsel is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Most recently, in *Coleman v. Goodwin*, 833 F.3d 537 (U.S. 5 (La.) 8/15/16), the United States Fifth Circuit Court of Appeals held that: "... but Louisiana prisoners can benefit from the *Martinez/Trevino* procedural-default rule if they can show that they have submitted an IATC claim and received IAC from state habeas counsel;" overruling their own decision in *Sepulvado v. Cain*, 707 F.3d 550 (C.A. 5 (La.) 2013).

This Court has jurisdiction in light of the "**New Holding**" held in *Tabler v. Stephens*, where the Court held, "We now hold that the equitable rule established in *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012); "logically extends to ineffective assistance of habeas counsel that prevents an initial-review collateral proceeding from ever taking place. Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent **except** under the doctrine of res judicata,

[5]This unpublished case and others are mentioned to demonstrate how this Court and others have applied *Martinez*

collateral estoppel or law of the case establishing the limited circumstances set forth in 5th Cir. R. 47.5.4. Therefore, further jurisdiction is granted under 5th Cir. R. 47.5.4, which establishes the opinion as precedent under the limited circumstances. "An unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1 (a)(b)."

In light of the Supreme Court's decision in *Christenson v. Roper*, 574 U.S. ___ (2015), concerning the applicability of *Martinez*, and also *Tabler v. Stephens*, 2014 WL 4954294 (5th Cir. 2014) (unpublished). The Court now holds that the equitable ruling established in *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012), that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance of counsel at trial," logically extends to ineffective assistance of habeas counsel that prevents an initial-review collateral proceeding from ever taking place.

WHEREFORE, for these reasons, Mr. Lemoine requests that this Honorable Court, after full and careful review of the merits of this Claim grant a new trial.

ISSUE NO. 4

The State improperly introduced the testimony of unsubstantiated, unfounded "expert" witnesses in order to overcome the factual insufficient evidence.

Expert testimony that a child's symptoms are "consistent with" sexual abuse:

Despite the tendency of courts to admit "consistent with" testimony, there are three problems with such testimony. **First**, although testimony that a child's symptoms are consistent with sexual abuse is not an opinion in so many words that a child was sexually abused, the testimony is offered precisely for that purpose. The testimony invites the following reasoning: because the child has symptoms consistent with sexual abuse, the child was sexually abused. Thus, "consistent with" testimony is really an opinion regarding whether the child was abused.

"Consistent with" testimony is the functional equivalent of a direct opinion on abuse. As mentioned

previously, there is considerable controversy surrounding "direct opinion" testimony. "Consistent with" testimony masks the controversy behind the innocuous term "consistent with." If the testimony in the form of a direct opinion on sexual abuse is excluded because of doubts about reliability, the same should be true for testimony that a child's symptoms are "consistent with" sexual abuse.[6]

A **Second Concern** about "consistent with" testimony is that many symptoms consistent with sexual abuse are also consistent with non-abuse.[7] Nightmares are consistent with sexual abuse, but also with a host of issues that have nothing to do with abuse. In fact, nightmares are consistent with *normal* child development. Expert testimony that a child's symptoms are consistent with sexual abuse is likely to inflate the probative value of the symptoms and consequently mislead the jury.

Finally, "consistent with" testimony masks the twin issues of symptom frequency and population size. When an expert testifies that a child's symptoms are consistent with sexual abuse, the jury takes the testimony as proof that the child was sexually abused.

Given the shortcomings of "consistent with" testimony, such testimony should be excluded unless the proponent addresses two issues during the expert's direct examination. **First**, the expert should explain *why* the symptoms tend to *prove* sexual abuse. It is simply not enough for the expert to state that a child's symptoms are consistent with sexual abuse. **Second**, the expert should explain the impact of symptom frequency and population size on probative value. Only when explanations of symptom frequency and population size are added to "consistent with" testimony is the jury equipped with the information it needs to give "consistent with" testimony its proper weight. Absent this information, "consistent with" testimony is inherently misleading.

The analysis is also relevant to medical evidence of child sexual abuse. Medical experts often

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[6]Expert testimony that a child's symptoms are consistent with sexual abuse should be subjected to analysis under ***Daubert*** or ***Frye***. See: ***Hadden v. State***, 690 So.2d 573 (Fla. 1997)(consistent with testimony subject to ***Frye***.).

[7]See: ***Daniels v. State***, 4 So.3d 745 (Fla. Ct. App. 2009)(nurse testified she had never seen a child react as the victim did to the physical examination; there was no basis to conclude that the child's reaction suggested sexual abuse.

testify that the findings of a physical examination are consistent with sexual abuse. The concerns about "consistent with" testimony from mental health experts apply with equal vigor to "consistent with" testimony from medical experts.

Stress-related Psychological symptoms are seen in non-abused as well as abused children:

Stress-related symptoms are not unique to sexual abuse. For instance, ***witnessing domestic violence*** causes stress-related symptoms in children.[8] Children who are neglected but not sexually abused often have mental health issues.[9] Family disorganization, poverty, and substance/alcohol abuse are stressful for children and adults. Even children growing up in "normal" homes can be anxious, and some psychological symptoms (e.g., nightmares) are so common among non-maltreated children that they are considered a normal part of growing up.

A disturbing trend: Expert testimony from forensic interviewers offered as substantive evidence:

Interviewing children about possible sexual abuse is a challenging task requiring skill and patience. Today there are more than seven hundred specialized centers call Child Advocacy Centers (CAC) that interview children in abuse cases.[10] The forensic interviewers working in CACs are predominantly social workers and, to a lesser extent, police officers. These professionals are fully equipped to conduct forensic interviews. In a disturbing development, however, appellate decisions from Mississippi and South Carolina allowed forensic interviewers to offer what amounts to expert testimony that a child was sexually abused. With all due respect for forensic interviewers and these courts, forensic interviewers are experts on interviewing, not psychological assessment of child sexual abuse. This is a task for which most psychiatrists, psychologists, and clinical social workers lack competence.

In ***Williams v. State***, 970 So.2d 727 (Miss. Ct. App. 2007).[11] the Mississippi Court of Appeals

[8]Sandra A. Graham-Bermann & Kathryn H. Howell, Child Abuse in the Context of Intimate Partner Violence, In John E.B. Myers (Ed.), The APSAC Handbook on Child Maltreatment (3d ed. 2010)(Sage).
[9]Howard Dubowitz (Ed.) Neglected Children: Research, Practice, and Policy (1999)(Sage).
[10]See; National Children's Alliance website.
[11]See also: ***Hubert v. State***, 297 Ga. App. 71 (Ga. Ct. App. 2009)(court approves expert testimony from police officer /

approved expert testimony from a forensic interviewer that a child's interview was consistent with sexual abuse. This testimony was offered as substantive evidence. There was no showing that the interviewer possessed the expertise required to prove "consistent with" testimony.

The South Carolina Supreme Court in ***State v. Douglas***, 380 S.C. 499, 671 S.E.2d 606 (2009), considered testimony from a Victim Assistance Officer who regularly interviewed children. The interviewer attended forty hours of training on forensic interviewing as well as a follow up training session. She did not have a college degree. The interviewer testified based on her interview she concluded that the child needed a medical evaluation.

Although the interviewer did not opine that the child was telling the truth or was abused, the import of her testimony could not have been lost on the jury. For all intents and purposes, the interviewer said, "I believed the child was abused, therefore I referred the child for a medical examination." This is substantive evidence. The Supreme Court disagreed. The court emphasized that the interviewer did not say she believed the child. The court was convinced the interviewer's testimony – which the court did not consider to be expert testimony – was helpful to the jury. To reiterate: the interviewer's testimony was substantive evidence. As in the Mississippi case, there was no showing that the interviewer was competent to provide such evidence. A forensic interviewer's hunch about abuse should not be paraded before the jury as substantive evidence.

When discussing expert testimony to rehabilitate credibility, it is appropriate to mention Child Sexual Abuse Accommodation Syndrome (CSAAS).[12] This maligned and misunderstood "syndrome" was described by psychiatrist Roland Summit in 1983.[13] Summit's goal was to help mental health

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forensic interviewer who interviewed child that child appeared traumatized); ***Parnamore v. State***, 5 So.3d 1074 (Miss. 2009) (forensic interviewer testified that child's behavior and demeanor were consistent with other sexually abused children; Supreme Court did not address the issue of the forensic interviewer's testimony and affirmed the defendant's conviction).

[12]Roland C. Summit, ***The Child Sexual Abuse Accommodation Syndrome***, 7 Child Abuse and Neglect 177-193 (1983).

[13]***Id*** For discussion of CSAAS *see* John E.B. Myers, ***Myers, Evidence in Child, Domestic and Elder Abuse Cases*** §§ 6.20 [B]; 6.22 (2005, 2010 supp.)(Aspen).

professionals understand the psychological dynamics of sexual abuse, particularly incest.[14]

Summit never intended CSAAS as a test for sexual abuse.[15] Thus, CSAAS does not provide substantive evidence of sexual abuse. Rather, CSAAS assumes abuse occurred and explains how children respond. Although CSAAS must not be offered as substantive evidence of sexual abuse, the syndrome plays a useful role in rehabilitating credibility. CSAAS helps the jury come to grips with delayed reporting, halting or inconsistent disclosure, and recantation.

Symptoms that have a relatively strong nexus with sexual abuse:

Stress-related symptoms seen in sexually abused and non-abused children say little about sexual abuse. With children younger than ten or so, however, symptoms of a sexual nature have a strong connection to sexual knowledge. Sexual knowledge is sometimes rooted in sexual abuse. Particularly concerning symptoms are: (1) aggressive sexuality in young children, (2) imitation by young children of adult sexual acts, and (3) sexual knowledge that is unusual for a child of that age.[16]

Children are not asexual.[17] Yet, developmentally, inappropriate sexual knowledge or behavior in a young child indicates sexual knowledge.[18] Consider a four-year-old who says, "Joey's pee pee was big and hard, and he made me lick it and white stuff popped out and tasted really yucky." This child has seen a pornographic video, has been coached, or has been sexually abused. Pornography is unlikely to

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[14] For cases recognizing that CSAAS does not diagnose sexual abuse see: ***People v. Bowker***, 203 Cal. App. 385, 873 A.3d 886 (1988); ***People v. Gray***, 187 Cal. App. 3D 213, 231 Cal. Rptr. 658 (1986); ***Newkirk v. Commonwealth***, 937 S.W.2d 690 (Ky. 1996); ***State v. Sargent***, 738 A.2d 351 (N.H. 1999).

[15] See: Mary B. Meinig, ***Profile of Reluctant Summit***, 1 Violence Update 6 (May 1992)(This monthly newsletter is no longer published). To this day there is no syndrome that detects or diagnosis child sexual abuse. Nor is there a psychological test that detects or diagnosis sexual abuse.

[16] See: William N. Friedrich, P. Grambsch, D. Broughton, J. Kuipers & W.L. Beilke, ***Normative Sexual Behavior in Children***, 88 Pediatrics 456-64, 462 (1991)(Friedrich and his colleagues found that unusual sexual behaviors in non-abused children are those "that are either more aggressive or more imitative of adult sexual behavior.").

[17] See: Debra A. Poole & Michele A. Wolfe, ***Child Development: Normative Sexual and Nonsexual Behaviors That May Be Confused With Symptoms of Sexual Abuse***, in Kathryn Kuehnle & Mary Connell, **The Evaluation of Child Sexual Abuse Allegations** 101-28 (2009)(Wiley).

[18] See: C.L.S. v. G.J.S., 953 So.2d 1025, 1042 (La. Ct. App. 2007)("Some of the strongest evidence that the daughter was sexually abused was the testimony regarding the sexualized behavior that was exhibited by this young girl. It would have been almost impossible for the daughter at her tender age to stimulate male masturbation and to describe ejaculation in the way that she did without her having been exposed to sexual abuse.").

be the explanation when a child describes the taste and feel of the seminal fluid, leaving coaching or abuse as the only possible explanations.[19] It is unlikely that a four-year-old could be coached to provide such a graphic description of abuse and ejaculation. That leaves abuse. Of course, Joey might not be the abuser. The child might have named the wrong person. But even if Joey is innocent, sexual abuse remains. It sum, graphic descriptions of sexual abuse from young children often provide strong evidence of sexual abuse.[20]

Mental Health testimony as substantive evidence:

To provide substantive evidence of sexual abuse, a mental health professional must be able to: (a) determine with reasonable certainty that sexual abuse occurred or, (b) opine that a child's symptoms, behavior, and statements are consistent with sexual abuse.

The role of mental health professionals in determining whether sexual abuse occurred:

This question divides experts on child sexual abuse. Some experts, notably psychologist Gary Melton, argued that mental health professionals cannot reliably detect sexual abuse.[21] Melton asserts that evaluating symptoms observed in abused and non-abused children is a matter of common sense, and mental health professionals have little to add.[22] Moreover, Melton argues mental health professionals rely heavily on the child's word when forming their decisions about sexual abuse. A diagnosis of sexual abuse is, therefore, little more than a thinly veiled opinion about whether a child

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[19] See: Cynthia DeLago, Ester Deblinger, Christiine Schroeder & Martin A. Finkel, ***Girls Who Disclose Sexual Abuse: Urogenital Symptoms and Signs After Genital Contact***, 122 Pediatrics e281-e286, at e281 (2008)("In most cases, the final diagnosis of sexual abuse is based on the girl's history, especially if she provides idiosyncratic details unique to her situation.").

[20] ***State v. Smith***, 768 N.W.2d 62 (Wis. Ct. App. 2009)(child said defendant's penis felt like a "hard banana").

[21] See: Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin, **Psychological Evaluation for the Courts: A Handbook for Mental Health Professionals and Lawyers** 516 (3d ed.)(2007)(Guilford)("Although clinical intuition may be useful in guiding treatment planning, it is insufficient as a basis for determining whether maltreatment may have occurred"). See also: ***Id.***, at 526 ("There is no reason to believe that clinician's skills in determining whether a child has been abused is the product of specialized knowledge.").

[22] ***Id.***, at 508 ("The determination of whether abuse or neglect occurred is a judgment requiring common sense and legal acumen, but it is outside the specialized knowledge of mental health professionals."). See also: ***Id.***, at 516.

told the truth.[23] Courts agree that experts are not permitted to opine that a child was truthful.[24] Melton concludes that courts should not permit mental health professionals to testify whether a child was sexually abused.[25] Indeed, Melton argues such testimony is unethical.[26]

Steve Herman, also a psychologist, reviewed the small body of empirical research discussing the accuracy of clinical judgments about sexual abuse and concluded, along with Melton, that such judgments lack reliability.[27] Psychologists David Faust, Ana Bridges and David Ahern, who conclude that clinical judgments about sexual abuse are based on unverified methods and speculation, express similar skepticism.[28] Other experts agree.[29]

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[23] ***Id***, at 515 ("Some commentators distinguish the admissibility of an opinion about whether a purportedly abused child is believable from that of a 'diagnosis' of a child's as abused. In our view (and that of most appellate courts), this is a distinction without a difference.

Melton is not alone in believing that an opinion abuse occurred is essentially an opinion on credibility. See: e.g.a, ***State v. Streater***, 673 S.E.2d 365 (N.C. Ct. App. 2009)(physician's testimony that his findings were consistent with sexual abuse was an impermissible opinion regarding the child's credibility; there was no physical evidence of sexual abuse); ***Bell v. Commonwealth***, 245 S.W.3d 738 (Ky. 2008); ***State v. Kirkman***, 126 Wash. App. 97, 107 P.3d 124 (2005).

[24] See: John E.B. Myers, ***Myers on Evidence in Child, Domestic and Elder Abuse Cases*** § 6.25.(2005, 2010 Supp.)(Aspen) (collecting cases).

[25] Gary B. Melton & Susan Limber, ***Psychologists' Involvement in Cases of Child Maltreatment***, 44 American Psychologist 1225-33, at 1230 (1989)("Under no circumstances should a court admit the opinion of an expert about whether a particular child has been abused."); Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin, **Psychological Evaluations For The Courts: A Handbook For Mental Health Professionals and Lawyers** at 516 (3rd ed.)(2007) (Guilford)("Because testimony as an expert involves an explicit representation that the opinions presented are grounded in specialized knowledge, a mental health professional should decline on ethical grounds to offer an opinion about whether a child told the truth or has been 'abused.' By the same token, under the rules of evidence, such an opinion should never be admitted.").

[26] Gary B. Melton, John Petrila, Norman G. Poythress & Christopher Slobogin, ***Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*** at 516 (3rd ed.)(2007)(Guilford).

[27] Steve Herman, ***Forensic Child Sexual Abuse Evaluations***, in Kathryn Kuehnle & Mary Connell (Eds.). **The Evaluation of Child Sexual Abuse Allegations** 247-66 (2009)(Wiley)("There have been only a handfull of empirical studies that shed some light on the probable accuracy of of informal clinical judgments about the validity of allegations of CSA. There are also a number of relevant theoretical analysis and commentaries. Taken together, these empirical studies and theoretical analysis indicate that the reliability, validity, and accuracy of evaluator's clinical judgments about the validity of uncorroborated allegations of CSA are law." at 251. "This analysis indicates that, in the absence of corroborative evidence, forensic evaluators (a) are unable to discriminate between true and false reports of sexual abuse based on children's reports during unstructured investigative interviews at greater than expected chance accuracy (the level of accuracy that could be achieved by making judgments based on flipping a coin), and (b) have a limited ability to discriminate between true and false reports based on children's reports during NICHD protocol interviews" at 259); Stever Herman, ***Improving Decision Making in Forensic Child Sexual Abuse Evaluations***, 29 Law and Human Behavior 87-120 (2005).

[28] David Faust, Ana J. Bridges & David C. Ahern, ***Methods for the Identification of Sexually Abused Children; Issues and Needed Features for Abuse Indicators***, in Kathryn Kuehnle & Mary Connell (Eds.), **The Evaluation of Child Sexual Abuse Allegations** 3-19, at 4 (2009)(Wiley).

[29] See: e.g., Thomas A. Horner, Melvin J. Guyer & Neil M. Kalter, ***The Biases of Child Sexual Abuse Experts, Believing is Seeing***, 21 **Bulletin of the American Pediatric Academy of Psychiatry** 925-31 (1993).

Psychologist Howard Garb is an authority on the accuracy of clinical judgments by mental health professionals.[30] Garb's research indicates that when it comes to evaluating causation, such as whether a child was abused, mental health professionals fare poorly.[31]

Given the controversy over the reliability of mental health diagnosis of child sexual abuse, the burden should be on the proponent of such testimony to establish reliability. The most appropriate forum in which to address the issue is an evidentiary hearing under the microscope of ***Daubert v. Dow Pharmaceuticals***,[32] or ***Frye v. United States***.[33]

Most appellate courts reject mental health testimony stating that a particular child was sexually abused.[34] Some courts worry the opinion comes too close to the ultimate issue and usurps the function of the jury.[35] Other courts are concerned about the scientific/clinical controversy over the reliability of such testimony.[36]

Another disturbing trend: Expert testimony on interviewing offered by by the prosecution during the government's case-in-chief:

Part III.9. Describes a disturbing trend in some courts to allow forensic interviewers to provide what amounts to substantive evidence of child sexual abuse. This subsection discusses another worrisome development regarding forensic interviewers: prosecutors sometimes offer forensic

[30]Howard N. Garb, **Studying the Clinician: Judgment Research and Psychological Assessment** 100-101 (1998) (American Psychological Association)("A review of the validity of casual judgments did not reveal any task for which validity was good or excellent ... Clinicians should be very careful about making causal judgments. Because case formulations are frequently made on the basis of clinical experience and clinical intuition, and because reliability and validity have ofter been poor for case judgments about the causes of a client's problems or they may want to use empirical methods to derive causal inferences.").

[31]***Id.***

[32]509 U.S. 579 (1993). See: ***United States v. Sanchez***, 65 M.J. 145 (C.A.A.F. 2007)(court applied ***Daubert*** to expert medical testimony.

[33]293 F. 1013 (D.C. App. 1923).

[34]See; e.g., ***Peterson v. State***, 450 Mich. 349, 537 N.W.2d 857 (1995)(particularly thorough discussion); ***State v. Streater***, 673 S.E.2d 365 (N.C. Ct. App. 2009); ***State v. Cressey***, 628 A.2d 696 (N.H. 1993)(very useful discussion).

[35]See: ***State v. Florczak***, 76 Wash. App. 55, 882 P.2d 19 (1994)(opinion child had PTSD secondary to child sexual abuse was improper opinion on ultimate issue).

[36]See: ***Stewart v. State***, 652 N.E.2d 490 (Ind. 1995)(court recognized population size problem with generalized "syndrome" testimony); ***State v. Cressey***, 137 N.H. 402, 628 A.2d 969 (1993)(court understood population size issue); ***State v. Johnson***, 652 So.2d 1069 (La. Ct. App. 1995)(expert's testimony was undermined because expert did not understand population size issue).

interviewers as expert witnesses to describe proper interviewing methods and to state that they – the interviewer – used proper methods in the case on trial.[37] If such testimony were offered after the defense attacked the interview, there would be no problem. The concern, however, is that the prosecutor offers the interviewer's testimony during the state's case-in-chief and *before* any attack by the defense. The purpose of the testimony is to convince the jury that the interview was done properly, thus bolstering the child's testimony during the state's case-in-chief violates the rule that a party may not bolster the credibility of its own witnesses unless credibility is attacked.[38] The only proper role for a forensic interviewer during the state's case-in-chief is to lay the foundation for admission of the videotaped interview into evidence. Any testimony beyond that, especially expert testimony, is improper bolstering and is unfair to the defendant.

Child sexual abuse is difficult to prove. Usually there is no medical evidence, although when such evidence does exist it is admissible. These cases rise and fall on the child's shoulders. In an effort to bolster or undermine the child, prosecution and defense sometimes turn to expert testimony. Some forms of expert testimony are straightforward and uncontroversial; other forms are complex, controversial, and of dubious reality.

The integrity of criminal litigation depends on the bar and the bench. For attorneys locked in pitched battle it is tempting to offer any expert testimony – even dubious testimony – that helps to win the case. This is not a criticism of lawyers; it is reality. Of course, one can argue that the check of unreliable expert testimony is cross-examination, and many prosecutors and defenders are fully capable of dismantling unreliable expert testimony. The fear, however, is that many attorneys have only a superficial understanding of the complexity of expert testimony regarding child sexual abuse. Effective

[37] See; ***State v. Hakala***, 763 N.W.2d 346 (Minn. Ct. App. 2009); ***Williams v. State***, 970 So.2d 727 (Miss. Ct. App. 2007); ***Mooneyham v. State***, 915 So.2d 1102 (Miss. Ct. App. 2005); ***State v. Thomas***, 290 S.W.3d 129 (Mo. Ct. App. 2009); ***State v. Douglas***, 380 S.C. 499, 671 S.E.2d 606 (2009).

[38] See, Michael H. Graham, **Handbook of Federal Evidence** § 607:1 at 429, 431 (6th ed. 2006)(Thompson)("The credibility of a witness may not be bolstered in the absence of an attack.").

cross-examination is more the exception than the rule.

In the final analysis, it is up to judges to scrutinize expert testimony and separate the wheat from the chaff. It is time for trial and appellate judges to recommit to exacting scrutiny of expert testimony offered in child sexual abuse litigation. The stakes are too high to expose jurors to unreliable expert testimony. It will not do to avoid the judicial gatekeeping responsibility by deferring to cross-examination. Unreliable expert testimony should not be subjected to cross-examination because it should not have been admitted in the first place.

In *State v. Foret*, 620 So.2d 821 (La. 1993), this case was taken to the Louisiana Supreme Court where the defendant applied for writs of certiorari to this court, which were granted. Upon review, this Court reverses the court's decisions that the tardy delivery of the psychologist's report was not prejudicial, especially when given the questionable scientific basis and highly influential nature of his testimony. As this alone is grounds for reversal of the conviction and remand for a new trial.

The Court failed to consider whether this type of testimony was itself properly admitted into evidence, considering the significant problems that this type of testimony has created in other jurisdictions as recognized by reservations expressed by the concurring Justices in *State v. Brossette*, 599 So.2d 1092 (La. 1992)(Dennis and Hall, J.J., concurring): The introduction of expert opinion testimony as to the psychological characteristics of the victim or her testimony is fraught with serious *res nova* constitutional and evidentiary problems. While this type of evidence is absolutely not admissible for some purposes ... but might be admissible for others, it should be allowed only after careful study under strict control by the trial court.

La. C.E. Art. 702 set forth the general rule for the admissibility of expert testimony in Louisiana. Subsumed in the requirements of rule 702 is the premise that expert testimony must be reliable to be admissible. The reliability of expert testimony is to be ensued by a requirement that there be "a valid

scientific connection to the pertinent inquiry as a precondition to admissibility." This connection is to be examined in light of a "preliminary assessment" by the trial court.

The Court also stated other rules of evidence govern this testimony, mainly La. C.E. 403, which is a balancing test that will exclude probative evidence if outweighed by it's potential for unfair prejudice. The Court noted the possibility that the expert's testimony can be quite misleading and prejudicial if it's gate-keeping role is not properly satisfied, requiring of the methodology surrounding the testimony and it's conclusions.

In this case they also cite other cases such as ***State v. Cantanese***, 368 So.2d 975 (La. 1979) and states that ***Cantanese*** set forth a probative value versus prejudicial effect balancing test, focusing upon concerns that the trier of fact might assign too much weight to the expert opinion. The quality of such evidence, and the existence of either judicially or legislatively created "procedural safeguards" regulating the admissibility of such evidence at trial.

This type of testimony has been labeled as so inherently unreliable that they cannot aid decision making in the criminal justice system. The clinician observer applying his or her own theory is simply unreliable. It is logical that this Court should be reluctant to allow it to be used for a purpose which it was not intended a credibility evaluation tool.

The clinician observer's testimony is reported to be based on the findings of the American Board of Pediatrics concerning, "I believe the child is capable of lying about **anything** but a sexual assault." Failure to corroborate this testimony is due largely to the fact that the **AACAP PRACTICE PARAMETERS:** J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 36:10 SUPPLEMENT OCTOBER 10, 1997, stipulates on pages 50s and 51s that:

> **IV. Possible explanations of allegations of abuse.**
>
> Sometimes children make false accusations. Although most allegations made by children are true, the evaluator should consider the ways in which false allegations might come about an

allegation may be partly true (that the child was abused), but partly false (as to who was the perpetrator). An allegation may have a nidus of truth, but may have been inaccurately elaborated in response to repetitive questioning.

A. A false allegation arises in the mind of a parent or other adults and is imposed on the child.

Parental misinterpretation and suggestion. The parent has misinterpreted an innocent remark or neutral piece of behavior as evidence of abuse and induced the child to endorse this interpretation. This happens sometimes in child custody disputes as well as other settings.
2. Parental delusion. The parent and child may share a *folie a deux* or the child may simply give in and agree with the delusional parent.
3. Parental indoctrination. The parent fabricated the story and induced the child to collude in presenting it to the authorities.
4. Interviewer's suggestion. Previous interviewers have asked leading or suggestive questions.

B. The allegation is produced by mental mechanisms in the child that are not conscious or not purposeful.
1. Fantasy. A younger child may confuse fantasy with reality.
3. Misinterpretation. The child may have misunderstood what happened, so he or she later reported it inaccurately.
4. Miscommunication. The child may misunderstand an adult's question; the adult may misinterpret or take the child's statement out of context.

C. The allegation is produced by mental mechanisms in the child that are usually considered conscious and purposeful.
3. Deliberate lying. Children may choose to avoid or distort the truth for some personal advantage. This happens more with older children.

Therefore, the Courts find that this type of evidence is of highly questionable scientific validity, and fails to unequivocally pass the ***Daubert*** threshold test of scientific reliability. In any capacity, it is highly unlikely that it will be useful to a jury on the issue of witness' credibility, especially as a tool for determining whether or not abuse actually occurred.

Even assuming that CSAAS-based testimony or expert testimony itself does indeed pass the ***Daubert*** threshold test for scientific validity, we now explore whether or not it's use to bolster the victim's credibility was improper so as to unfairly prejudice the defendant.

Testimony by an expert is not particularly helpful to a jury that must rely upon own common sense as a barometer for the evaluation of truthfulness. The cases all seem to focus on, in the face such expert

testimony, fears of the jury surrendering it's own common sense in weighing victim testimony and deferring to a diagnosis was nothing more than a subjective opinion favoring the victim.

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.

Other jurisdictions agree with this reasoning on the subject of expert testimony on abuse victim's credibility. In *Commonwealth v. Seese*, 512 Pa. 439,517 A.2d 920, 922 (Pa. 1986), the Pennsylvania Supreme Court noted that this type of expert testimony was "an encroachment upon the province of the jury." The Court emphatically stated that: To permit expert testimony for the purposes of determining the credibility of a witness would be an invitation for the trier of fact to abdicate it's responsibility to ascertain facts relying upon the questionable premise that the expert is in a better position to make such a judgment.

The Court also stated that if experts were permitted to testify as to the credibility of a particular class of witnesses such as abused children, then one could imagine "experts" testifying as to the veracity of the elderly, various ethnic groups, or members of different religious faiths, of persons employed in various trades or professions, etc. The result would be to encourage jurors to shift their focus from determining the credibility of the particular witness who testified at trial, allowing them

instead to defer to the so called "expert" assessment of the truthfulness of the class of people of which the particular witness is a member. In addition, such testimony would imbue the opinions of "experts" with an unwarranted appearance of reliability on a subject, veracity, which is not beyond the facility of the ordinary juror to assess.

Courts have also been concerned with unfair prejudice to the defendant from this type of expert testimony. Prejudice can result from the testimony's giving "fact finders ... little more than a false sense of security based on the incorrect assumption that a reasonable accurate scientific explanation for behavior has been proved" ***Morse***, at 1026. This testimony on credibility has the effect of "putting an impressively qualified expert's stamp of truthfulness" on a witness' testimony. ***Azure***, supra, 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.).

A child's recollection of the event is another factor for the jury to determine when weighing credibility and we believe it would impermissibly infringe upon their determination to permit expert testimony on this point. As such, we find that it was error to admit an expert's testimony on the subject of delay of reporting, omission of details, and the inability to recall dates and times.

This sentiment was echoed by the Court in ***State v. Gibson***, 391 So.2d 421, 428 (La. 1980): Our state constitution and statutory harmless error rule admonish a reviewing court generally to shun factual questions and to reverse only when substantial rights of the accused have been affected.

When considering the erroneous admission of evidence, this Court has set out the test to be "whether there is a reasonable probability that the evidence might have contributed to the verdict, and whether the reviewing court is prepared to state beyond a reasonable doubt that it did not" ***State v. Walters***, 523 So.2d 811 (La. 1988).

In this instance, the State's case is based largely upon the testimony of the victim. The inadmissible expert testimony served to unduly bolster this testimony and, in all probability, made it much more believable to the jury. Consequently, the jury would probably gave the testimony of the victim more weight than it, standing alone, would have otherwise received. Given this effect of the expert's testimony, this Court is not prepared to state that, beyond a reasonable doubt, the testimony of the psychologist had no effect on the guilty. Thus, the prejudice created an error is not harmless, and warrants reversal.

In ***Lawrence***, the OCCA found that impermissible vouching occurred where a social worker testified, with reference to a minor child, that ten-year-olds generally do not lie. 796 P.2d at 1176-77. On direct examination, the prosecutor asked the social worker whether she had formed "any kind of opinion as to what was being told to you by [the child victim]?" *Id.* at 1176. The social worker replied, in part, "Yes, ... we usually with all the experience, et cetera, find that by ten or up to and past ten they do not lie about these things . . . ." *Id.* Citing the rule that experts may not be used to assess a witness's credibility, the OCCA held that the social worker had impermissibly vouched for the truthfulness or credibility of the child victim. *Id.* at 1177; *see also* ***Davenport v. Oklahoma***, 806 P.2d 655, 659 (Okla.Crim.App.1991) (citing *Lawrence* for this proposition that "expert testimony may not be admitted to tell the jury who is correct or incorrect, who is lying and who is telling the truth").

Parker v. Scott, 394 F.3d 1302, 1310 (10th Cir. 2005): Federal Rule of Evidence 702 permits expert testimony "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." However, "'[a]n expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.'" ***Azure***, 801 F.2d at 340 (quoting ***United States v. Samara***, 643 F.2d 701, 705 (10th Cir.), *cert. denied*, 454 U.S. 829, 102 S.Ct. 122, 70 L.Ed.2d 104 (1981)). Nor may an expert pass judgment on a witness' truthfulness in the guise

of a professional opinion. *United States v. Whitted*, 11 F.3d 782, 785-86 (8th Cir.1993).

Westcott v. Crinklaw, 68 F.3d 1073, 1076 (8th Cir. 1995): The most significant question raised by appellant is whether the trial court erred in allowing the government's expert to testify as to the credibility of the victims' statements about the conduct of the defendant. *See: United States v. Azure*, 801 F.2d 336 (8th Cir.1986). It is the exclusive province of the jury to determine the believability of the witness. *United States v. St. Pierre*, 812 F.2d 417, 419 (8th Cir.1987). An expert is not permitted to offer an opinion as to the believability or truthfulness of a victim's story. *United States v. Spotted War Bonnet*, 882 F.2d 1360, 1362 (8th Cir. 1989). If such testimony is admitted, we must decide whether the wrong is of a constitutional dimension; that is, whether it is so prejudicial as to be fundamentally unfair, thus denying the defendant a fair trial. *Adesiji v. State*, 854 F.2d 299, 300 (8th Cir.1988).

Bachman v. Leapley, 953 F.2d 440, 441 (8th Cir. 1992). [A]n expert witness may not give an opinion as to the believability or truthfulness of an alleged victim's story. *United States v. Azure*, supra; *U.S. v. Spotted War Bonnet*, supra.

In this instance, the State's case is based largely upon the testimony of the victim. The inadmissible expert testimony served to unduly bolster this testimony and, in all probability, made it much more believable to the jury. Consequently, the jury would probably give the testimony of the victim more weight than it, standing alone, would have otherwise received. Given this effect of the expert's testimony, this Court is not prepared to state that, beyond a reasonable doubt, the testimony of the psychologist had no effect on the guilty.

Most 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*, 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. 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.**

It is nearly uncontestable that young children's reports of past events are susceptible to distortion via adult's suggestions.[39] Factors such as question repetition, yes/no questions, misleading questions, repeated interviewing, plausible suggestions, stereotyping, anatomical dolls, and invocation of peer conformity – several factors of which are present in the case at bar – have been associated with errors in children's reports to adult interviewers.[40]

In Stephen C. Ceci's and Maggie Bruck's monumental study "The Suggestibility of the Child Witness: A Historical Review and Synthesis," the authors made several startling conclusions, including that children can be led to make false or inaccurate reports about very crucial, personally experience events and further, that children sometimes lie when the motivational structure is skewed towards lying.[41]

Drs. Ceci and Bruck determined that misinformation and false allegations in child sexual abuse cases often stem from social workers and forensic psychologist charged with the responsibility of interviewing the child-victim and ferreting out the truth. These "professionals" conduct interviews during play time using dolls or pictures. Their questions are often repetitive, leading and suggestive. They accept at face value a child's allegation as fact and immediately treat the child as the "victim." This, the authors refer to as being "hooked." The "professional" because the child is telling them what they want to hear; the child, because they can "read" in the interviewer – by their voice, tone, and expression – that what they are saying pleases them. This is far from a search for the truth, yet it happens again and again and is responsible for the conviction of many innocent people.

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[39] *See generally* Debra A. Poole and Michael E. Lamb, Investigative Interviews of Children: A Guide For Helping Professionals 48-49 (1998); Stephen J. Ceci & Richard D. Friedman, The Suggestibility of Children: Scientific Research and Legal Implications, 86 Cornell L. Rev. 33 (2000); Thomas D. Lyon, The New Wave in Children's Suggestibility Research: A Critique, 84 Cornell L. Rev. 1004 (1999).

[40] Livia L. Gilstrap, Kristina Fritz, Amanda Torres, and Annika Melinder, Child Witnesses, Common Ground and Controversies in the Scientific Community, 32 Wm. Mitchell L. Rev. 59 (2005).

[41] Stephen J. Ceci, Maggie Bruck, "The Suggestibility of the Child Witness: A Historical Review and Synthesis" Psychological Bulletin, 113(3), 403-439 (1993).

WHEREFORE, for the reasons above, Mr. Lemoine respectfully requests that this Honorable Court, after a thorough review, reverse this matter and remand for a new trial.

Simply put, the purpose of the State's introduction of the "expert" witness in this case was to corroborate the testimony of the alleged victim. With the lack of physical evidence, lack of corroborating evidence or testimony, the State had to overcome the credibility issues of the statements presented by the alleged victim and her mother. Therefore, the State utilized the testimony of the "expert" witnesses in order to defeat the fact of the insufficient evidence in this case. Thus, the prejudice created an error which is not harmless, and warrants reversal.

WHEREFORE, for these reasons, after careful consideration, this Honorable Court must reverse the conviction and sentence due to the lack of sufficient evidence "without" the testimony of this "expert" witness to corroborate the alleged victim's testimony in this matter. In the alternative, this Court must reverse the conviction and sentence and remand for further proceedings.

CONCLUSION

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

Furthermore, jurists of reason would have properly considered Mr. Lemoine's Issues and Granted Mr. Lemoine relief from his convictions.

The record sufficiently supports Mr. Lemoine's allegation of substantial error. Therefore, this Honorable Court should find that, in the Interest of Justice, Mr. Lemoine should receive a new trial, or in the alternative, an evidentiary hearing to review the merits of the constitutional violations. Mr. Lemoine 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. Lemoine contends that this Honorable Court will find that reasonable jurists would not allow these convictions to stand.

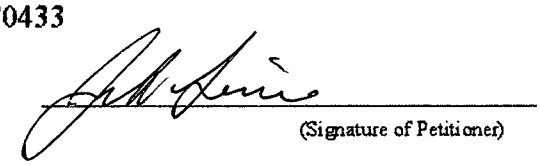
Respectfully submitted this 28th day of January, 2019.

Joseph Lemoine #596689
MPWY/Oak-1
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 28th day of January, 2019. 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



(Signature of Petitioner)