ORIGINAL

No. 18-8087

In The
Supreme Court of the United States
_____ Term, 2019

JOSEPH KURZ — Appellant

v.

STATE OF LOUISIANA — Appellee(s)

On Petition for a Writ of Certiorari to

LOUISIANA SUPREME COURT

Joseph Kurz #169198
MPEY/Cypress-2
La. State Penitentiary
Angola, LA 70712

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QUESTION(S) PRESENTED

1. **Reasonable jurists would determine that the district court erred in allowing the State to prosecute Mr. Kurz for an allegations that the time limitations had expired.**
2. **Jurists of reason would determine that Mr. Kurz's conviction and sentence must be reversed because Capital Trial Procedures were not employed in the trial of this Capital Trial.**
3. **Reasonable jurist would debate that the State failed to meet its burden of proof of beyond a reasonable doubt that Mr. Kurz is guilty of the offense beyond a reasonable doubt.**
4. **Reasonable jurists would debate that the trial court abused its discretion by permitting five distinct witnesses to testify under LSA-C.E. Art. 412.2.**
5. **Reasonable jurists would determined that the Louisiana Court of Appeal had erroneously sentenced Mr. Kurz to 50 years at hard labor based on a factually inaccurate recitation of the victim's trial testimony.**

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Appellant respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "E" to the petition and is the Louisiana Supreme Court in Docket Number 2018-KO-0512.

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Second Circuit Court of Appeal appears at Appendix "C" to the petition and is

[X] reported at 245 So.3d 1219 (La. App. 2nd Cir. 2/28/18); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was January 18, 2019. A copy of that decision appears at Appendix "E".

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This conviction was obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Specifically, Mr. Kurz was denied the right to a fair and impartial trial due to the fact that the time limitations had expired for prosecution.

NOTICE OF PRO-SE FILING

Mr. Kurz 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); Mr. Kurz is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court.

REASONS FOR GRANTING THE PETITION

In accordance with this Court's *Rule X, § (b) and (c)*, Mr. Kurz presents for his reasons for granting this writ application that:

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

A state court of last resort (Louisiana Supreme Court) has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE AND ACTION OF TRIAL COURT

Michael Kurz appeals his conviction and life sentence for one Count of Aggravated Rape, a violation of LSA-R.S. 14:42.

Mr. Kurz was charged by a Grand Jury Indictment with one Count of Aggravated Rape, under LSA-R.S. 14:42, which was alleged to have occurred between July 7, 1975 and July 6, 1977 (Rec.p. 5). The Indictment alleged that Mr. Kurz engaged in anal intercourse with JSC, his nephew, when JSC was under 12 years of age. The case was tried before a twelve-man jury and Mr. Kurz was convicted as charged (Rec.p. 339). No Post-Trial motions were filed. Mr. Kurz was sentenced to life imprisoned without the benefit of Probation, Parole, or Suspension of Sentence (Rec.p. 956).

Mr. Kurz timely appealed the sufficiency of the evidence used to support his conviction, other trial errors, and the imposition of an illegal sentence. Mr. Kurz's retained counsel filed the Original Brief on Appeal on September 5, 2017, and Mr. Kurz filed a Motion for Leave to File Supplemental Appeal Brief and Borrow Record on Appeal on September 12, 2017.

On February 28, 2018 the Louisiana Second Circuit Court of Appeals affirmed Mr. Kurz's convictions but amended his sentence to 50 years of incarceration at hard labor in Docket Number 51,781-KA, ***State v. Kurz***, 245 So.3d 1219 (La. App. 2nd Cir. 2/28/18). On March 26, 2018, Mr. Kurz timely filed for Writ of Certiorari to the Louisiana Supreme Court, which was denied on January 18, 2019 in Docket No. 2018-KO-0512.

Mr. Kurz now timely files for Writs of Certiorari to this Honorable Court, and respectfully requests that this Honorable Court exercise its Supervisory Authority of Jurisdiction over the lower courts for the following reasons to wit:

STATEMENT OF THE FACTS

Mr. Kurz is the biological uncle of JSC, the alleged victim in the charged offense. During a police interview that was secondary to another investigation, JSC disclosed that Mr. Kurz had touched him sexually beginning at age four and that varying forms of sexual conduct continued until he was 14 years old.

JSC testified that Mr. Kurz is his uncle on his father's side of the family (Rec.p. 777). JSC related that Mr. Kurz would attend family gatherings at JSC's grandmother's house, and that Mr. Kurz first touched him in his genital area at age 4 (Rec.p. 779). JSC testified that the sexual activity took place between age 4 and 14, that it occurred at different locations, and that it ranged from fondling to oral sex (Rec.p. 780). JSC stated that it started with touching over the clothes, but then progressed to oral sex, and finally to anal intercourse (Rec.p. 781).

At trial, JSC testified that the first incident of "penetration" occurred at age 11, continued through age 14, and occurred at least a dozen times. He claimed that he remembered the time because he was still in elementary school at Summer Grove Elementary, and that he was an Elvis fan, so when Elvis died in 1977, it was a significant event to him (Rec.p. 783).

JSC testified that he would have been 12 years old in 1977, and that the anal penetration happened at least a year to a year and a half before that. He recalls it being very painful, but did not recall how he responded. He stated that it ended between the ages of 14 and 15 when started dating a girl (Rec.p. 784).

With respect to his delay in reporting, he testified that he did not tell anyone until he was in his twenties because he felt ashamed and scared, but that he told his parents about it when he was approximately 26 years old (Rec.p. 785). He decided to talk to the police after he learned that Mr. Kurz had been accused of inappropriate sexual conduct with another young man (Rec.p. 786).

On cross-examination, JSC acknowledged that, when he was approximately 18 years old, his parents asked him if he had engaged in any sexual contact with Mr. Kurz, and that he had denied having done so (Rec.p. 792). He also confirmed that, during his original police interview, he was asked about when the penetration first occurred and that he answered, "I was a little older. I couldn't tell you what age, 10, 11, 12, or something like that" (Rec.p. 793). Later in the interview, JSC told the detective

that he didn't remember how old he was when the penetration began, but then he said he was "definitely under 14" (Rec.p. 811).

In addition to the testimony of JSC, the State presented the testimony of five witnesses, pursuant to LSA-C.E. Art. 412.2, to establish that Mr. Kurz had a lustful disposition toward children. Each of these witnesses testified that Mr. Kurz engaged in various forms of sexual activity with them when they were juveniles (Rec.pp. 688-714 [ATB]; pp. 816-824 [CC]; pp. 826-832 [BC]; pp. 832-838 [CC]; pp. 845-851 [AC]). It ***must*** be noted that in the 412.2 crimes, all of the alleged victims stated that there was no anal penetration committed.

The State also presented the testimony of Sgt. James Moore, a detective with the Caddo Parish Sheriff's Office, who recounted the course of the investigation in this case, identified some of the State's exhibits, and described how various forms of evidence and witness statements were obtained from Mr. Kurz's home pursuant to a search warrant, and the fact that child pornography images were discovered during those searches (Rec.pp. 852-863). Some of those images were admitted into evidence and published to the jury. None of these "other crimes" were obtained via a warrant concerning JSC's allegations.

Mr. Kurz did not testify, and one witness testified for the defense: Thomas Moseley. Moseley testified that he spent a great deal of time with Mr. Kurz during the time period outlined in the Indictment, and that he did not witness Mr. Kurz babysitting any children that were JSC's age at the time (Rec.pp. 900-03).

STANDARD OF REVIEW

In ***State v. Ashley***, 33,880, at *3 (La. App. 2nd Cir. 10/04/00), 768 So.2d 817, 819, the Court noted that, "the accused may be entitled to an acquittal ... if a rational trier of fact viewing the evidence in accord with ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in the light most

favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proven beyond a reasonable doubt."

In *State v. Sugasti*, 820 So.2d 518 (La. 6/2/02), the Courts are required to rely on the Law in effect at the time of the offense. In this case, the Courts should have relied solely on the Law as it was in effect in 1975.

In accordance to *Selman v. Louisiana*, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976), Mr. Kurz should have been sentenced to a maximum of 20 years at hard labor with sentencing benefits.

Furthermore, criminal statutes of limitation are to be liberally construed in favor of repose in favor of the defendant. *U.S. v. Marion*, 404 U.S. 307, 92 S.Ct. 45, 30 L.Ed.2d 468.

LAW AND ARGUMENT

ISSUE NO. 1

The district court erred in allowing the State to prosecute Mr. Kurz for an allegation that the time limitations had expired.

The State of Louisiana could not have properly obtained Jurisdiction to charge, try, and sentence him for an Aggravated Rape which allegedly occurred in 1975. Mr. Kurz would like this Court to note that the statute (LSA-R.S. 14:42) has had many modifications since its enactment, and that the Courts must rely upon the interpretation of *State v. Sugasti*, 820 So.2d 518 (La. 6/2/02), which simply holds that the Courts **must** rely on the interpretation of the law at the time of the alleged offense when determining the proper statutory procedures and regulations.

Although Mr. Kurz's retained appellate counsel argued that the Court had failed to ensure that capital trial procedures were employed during the course of this trial.

However, in the alternative, Mr. Kurz argues that this charge was no longer a capital offense, as the statute for capital offenses did not include sentences with Life without Parole eligibility did not become law until 1984.

Furthermore, at the time of the alleged incident between Mr. Kurz and his nephew, La.C.Cr.P. Art. 571 provided that there was no time limitation on any crime "for which the death penalty may be imposed." In 1984, the Legislators changed Art. 571 to include, "which the punishment may be death or life imprisonment."

The Court of Appeals had erroneously determined that, "During the time Kurz raped the victim, LSA-R.S. 14:42 provided a mandatory death penalty," and that in 1976, the United States Supreme Court abrogated the mandatory death penalty provision of LSA-R.S. 14:42 as cruel and unusual punishment." ***Selman v. Louisiana***, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976).

However, it must be noted that ***Furman v. Georgia***, 408 U.S. 238, 92 S.Ct. 2726 (U.S. Ga. 1972), the United States Supreme Court had held that, "the imposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

The Court of Appeals admits that on September 12, 1975, the maximum penalty for Attempted Aggravated Rape changed from 20 to 50 years of incarceration at hard labor. LSA-R.S. 14:24(D)(1), as amended by Acts 1975, No. 132, § 1." Hence, in the instant case, the time limitation for institution of prosecution would be six (6) years due to the fact that this charge is no longer defined as a "Capital" offense at the time of the alleged incident. It must be noted that this was not corrected until 1984 (eight years after the allegation).

The Court of Appeals correctly acknowledged that, "after the mandatory death penalty for Aggravated Rape was held unconstitutional, Art. 571 could not strictly apply in this case." But, the Court erroneously determined that Art. 571 continued to apply to Aggravated Rape despite the unconstitutionality of the mandatory death penalty prescribed for that crime.

The Court of Appeals has erroneously determined that the Legislature clearly manifested its

intention that there be no time limit on the institution of prosecution for Aggravated Rape. This is a misapplication of statutory laws. The Legislators were "silent" as to whether the newly revised Art. 571 was to be applied retroactively,[1] until the correction in 1984.

Accordingly, LSA-R.S. 1:2 **Revised Statutes not retroactive**, simply states that, "No Section of the Revised Statutes is retroactive unless it is expressly so stated." Simply put, had the Legislators intended La.C.Cr.P. Art. 571 to be retroactive, it would have been addressed in the Statute.

Prior to 1976, the crime of Aggravated Rape had only one sentence: **the death penalty**. However, in *Selman v. Louisiana*, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976), the United States Supreme Court held that Louisiana's mandatory death penalty for Aggravated Rape was "Cruel and Unusual" punishment. At that time, the applicable Criminal Code Article for time limitations was La.C.Cr.P. Art. 571. In 1976, Art. 571 provided that there was **no** time limitation for a prosecution for any crime which may be death. All other felonies had a time limitation.

As a result, LSA-R.S. 14:42 had **no penalty**. The initial concern with the appellate courts was with the penalty; until the Legislature addressed the matter. The Louisiana Supreme Court in *State v. Lee*, 340 So.2d 180 (La. 1976), held that in the absence of legislation setting a new penalty, the proper sentence would be the most serious penalty for the lesser included offense. In the case of *Lee*, supra, it was Attempted Aggravated Rape, carrying a maximum sentence of twenty (20) years. That decision was also affirmed in *State v. Fraise*, 350 So.2d 154 (La. 1977).

In 1978, the Louisiana Legislature amended LSA-R.S. 14:42 to impose a mandatory life sentence for the offense of Aggravated Rape. Then, in 1984, the Louisiana Legislature amended La.C.Cr.P. Art. 571 to include **life sentences** as **capital offenses**, which are not subjected to time limitations for prosecution.

Now, the question would be as to whether the "no time limitation" of capital offenses still applied

1 Unlike in La.C.Cr.P. Art. 572 B(4), which states, "The Paragraph shall have retroactive application to crimes prior to June 20, 2003."

to the offense of Aggravated Rape committed **BEFORE** the Legislature amended LSA-R.S. 14:42 to provide for mandatory life sentence. In *State v. Fraise*, supra, the Louisiana Supreme Court held that 1974 institution for prosecution for a 1971 offense of Aggravated Rape was not barred by prescription, since the offense was a capital offense at the time it occurred, and it was prosecuted. Mr. Kurz concurs with this decision. However, at that time, *Selman v. Louisiana*, had not been decided by the United States Supreme Court.

In *State v. Smith*, 809 So.2d 556 (La. App. 1st Cir. 2/15/02), the Louisiana Second Circuit Court of Appeals held that the pre-1978 Aggravated Rape cases were still capital offenses, with no time limitation for prosecution, even though the United States Supreme Court had declared the death penalty for the crime unconstitutional.

The holding in *State v. Smith*, supra was in error. It relied on Louisiana Supreme Court cases addressing the problems arising from the case of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 347 (1972), holding that the imposition and execution of the death penalty, where the jury has the discretion to impose the death penalty or a lesser sentence, violated provisions of the United States Constitution. The Louisiana Supreme Court correctly noted that the death penalty for murder was not declared unconstitutional; only the imposition and execution of the death penalty, which could resume. See: *State v. Holmes*, 269 So.2d 207 (La. 1972).

After *Furman* and *Selman*, the only penalty prescribed by LSA-R.S. 14:42 was no longer available and a twenty year sentence was imposed for convictions that were upheld. *See: State v. Fraise*, 350 So.2d 154 (La. 1977). If the death penalty could no longer be applied to Mr. Kurz, then *a fortiori* the case is no longer capital and the unlimited time limits for prosecution on La.C.Cr.P. art. 571 do not apply. La.C.Cr.P. Art. 572 would mandate this case be dismissed as the six year time limit for prosecution has run.

To the contrary, the United States Supreme Court declared the death penalty for Aggravated Rape to be unconstitutional. No legislative adjustment of procedural rules could revive the death sentence. The United States Supreme Court has recently re-affirmed its position in *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). As a result, **Aggravated Rape no longer met the definition of a capital offense** according to La.C.Cr.P. Art. 571 (pre-1978).

The Louisiana Second Circuit Court of Appeals has also incorrectly argued that the legislative silence meant that Aggravated Rape remained a capital offense, not subject to prescription. This argument overlooked the official comments of La.C.Cr.P. Art. 571, which notes that the 1928 Louisiana Code of Criminal Procedure excepted numerous other offenses (such as Aggravated Arson, Aggravated Burglary, and Armed Robbery) from prescription.

However, Article 571's restriction to capital offenses automatically made those offense subject to a prescriptive period. Likewise, the post-*Selman v. Louisiana*, supra, reduction of the sentence from the capital sentence of mandatory death to a maximum sentence of twenty (20) years meant that Aggravated Rape that occurred during that gap (time-frame), was not a capital offense. It did not, and could not meet the clear language as set forth in La.C.Cr.P. Art. 571 at that time.

This position is also supported by the United States Supreme Court, where it held that criminal statute of limitations protect a defendant's constitutional Due Process right to a fair trial when: the basic facts may have become obscured by the passage of time; and to minimize the danger of official punishment because of acts in the far-distant past. It also found that criminal statutes of limitation are to be liberally construed in favor of repose in favor of the defendant. *U.S. v. Marion*, 404 U.S. 307, 92 S.Ct. 45, 30 L.Ed.2d 468.

Action by the legislature after the time frame of this alleged rape has classified aggravated rape as a crime for which life imprisonment may be imposed (Acts 1977) and in 1984, the legislature amended

La.C.Cr.P. art. 571 to state that there are no time limits on prosecutions where life sentences are available. But those enactments cannot work to the prejudice of Mr. Kurz. As to Mr. Kurz, any assertion of a "new" time limit for institution of prosecution would be an *Ex Post Facto* application under the United States Constitution Art. I, § 10, cl. 1.

Indeed, any legislation that attempted to retroactively revise the penalty or the time limits for prosecution are unconstitutional. See for example, ***Stogner v. California***, 539 U.S. 607, 123 S.Ct. 2446 (2003) denying the State of California the ability to retroactively change the statue of limitations. ***Stogner*** is interesting in that California wished to prosecute crimes almost as stale as the ones at issue here. The statute that would have allowed prosecution had a safeguard that Louisiana doesn't have: Independent evidence that clearly and convincingly corroborates the victim's allegation.

In the present case, JCS's testimony only detailed one possible Aggravated Rape incident that occurred in 1975, when he was ten (10) years old. As to the rest of the alleged acts, the State failed to obtain testimony concerning such. As a result, JCS vaguely referred to what happened as "abuse" or "it." Nothing in his "sparse" testimony proves, beyond a reasonable doubt, that Mr. Kurz had committed an Aggravated Rape upon him, although the defense greatly impeached his uncorroborated testimony.

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. 2 Cir. 1988). 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.

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."

JSC also testified about only one rape incident that allegedly occurred in 1975 (he would have been ten years old at the time). Although he described, in detail, subsequent physical abuse, his testimony provided no references to sexual abuse which allegedly occurred after the 1978 amendment to the Aggravated Rape statute.

WHEREFORE, Mr. Kurz properly argues that the time limitation for prosecuting this allegation was six (6) years (unless he was determined to be the perpetrator after DNA testing pursuant to La.C.Cr.P. Art. 572 B(1)). In this case, the indictment should be quashed and Mr. Kurz released from further prosecution. This Honorable Court should grant Mr. Kurz' relief in this matter, ordering that he be released from custody concerning these charges.

ISSUE NO. 2

Mr. Kurz's conviction and sentence should be reversed because Capital Trial procedures were not employed in the trial of this capital offense.

Mr. Kurz was tried for an Aggravated Rape that was alleged to have occurred between July 6, 1975 and July 7, 1977. During that time frame, the United States Supreme Court held that the imposition of the death penalty for Aggravated Rape constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. ***Selman v. Louisiana***, 428 U.S. 906, 96 S.Ct. 324, 49 L.Ed.2d 1212 (1976).

The failure of the Louisiana Legislature to meaningfully conform out laws and criminal procedure articles to the holding in ***Selman*** created a great deal of procedural confusion in Louisiana. For example, a substantial quantity of litigation ensued regarding the applicable limitations period for Aggravated Rape, which, prior to September 9, 1977, was determined by the fact that the penalty for committing Aggravated Rape was death (the Legislature replaced the death penalty with life

imprisonment effective September 9, 1977). LSA-R.S. 14:42.

In 1984, however, the Louisiana Legislature enacted La.C.Cr.P. Art. 571, which provided that any offense for which the punishment was death *or* life imprisonment had no limitations period for the institution of prosecution. This, of course, left the question of what limitations period should be applied to Aggravated Rape cases that predated the 1977 amendment to the penalty provision of LSA-R.S. 14:42, but would have prescribed under the previous six-year limitations period in effect in 1977 for offenses punishable by life imprisonment.

The Louisiana Supreme Court ultimately decided that an Aggravated Rape committed during that time period continued to be an "imprescriptible" capital offense, with the caveat that capital procedure would have to be followed in cases that depended upon the offense's "capital" classification to avoid being quashed due to time limitations. *State v. Williams*, 372 So.2d 559, 560 (La. 1979).

The legal fiction of continuing to define Aggravated Rape as a capital offense (in order to allow prosecution for cases that would otherwise have prescribed) requires consistent application. However, and a trial for an Aggravated Rape that predates the 1977 statutory amendment must conform to capital procedure, including a unanimous jury, jury sequestration, and other procedural safeguards applicable to capital offenses. *State v. Rich*, 368 So.2d 1083, 1084 (La. 1979)(finding error patent in failure to comply with procedural rules for capital crimes, even though defendant could not actually be put to death); *State v. Hunter*, 306 So.2d 710, 711 (La. 1975)(noting error patent in failing to sequester the jury as required by capital procedural rules despite the fact that the defendant could not actually be sentenced to death).

Accordingly, the instant case is classified as capital despite the fact that the death penalty could not actually be imposed, and capital procedure had to be followed at this trials. See: e.g., *State v. Lott*, 325 So.2d 576, 578-9 (La. 1976)(no waiver of jury or unanimous verdict permitted in trial of 1972 murder,

even though *Furman* had invalidated use of the death penalty); *State v. Breaux*, 6 So.3d 982, 989 (La. App. 3rd Cir. 4/1/09).

Mr. Kurz has reviewed the record in this matter but has not seen an instance where the trial court, the State, or the defense discussed or contemplated the applicability of capital procedure in this case. For example, the jury was erroneously instructed that only 10 of the 12 members needed to concur in a verdict when the jury should have been instructed that a unanimous vote was required in order to convict (Rec.p. 338).

Additionally, the jury was not sequestered, and the record shows that no other capital procedures were followed. Each of these protections exists for important reasons, and their absence in this case worked to prejudice Mr. Kurz, especially considering the impact that the erroneous instruction on jury unanimity may have had on jury deliberations.

The failure to employ capital procedures in this specific type of case constitutes a structural defect, which is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *State v. Serigne*, 193 So.3d 297 (La. App. 4th Cir. 5/2/16), *citing*, *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

By definition, structural errors are so serious that they render a trial fundamentally unfair, and call into question the validity of any verdict rendered. See: *Needer v. U.S.*, 527 U.S. 1, 8-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Ruiz*, 955 So.2d 81, 85 (La. 4/11/07). Because structural errors are subject to automatic reversal, harmless error analysis is inapplicable. *Needer*, 527 U.S., at 8; *State v. Langley*, 958 So.2d 1160 (La. 5/22/07)(noting that a "structural error, by its very nature, impacts the entire framework of the trial from beginning to end, without reference to any other trial consideration").

In cases where a structural defect is found, the verdict is considered invalid and illegal. See: *Sullivan v. Louisiana*, 508 U.S. 275, 280, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)(rejecting harmless

error analysis for structural error); *State v. Goodley*, 423 So.2d 648, 650 (La. 1982)(applying rule in context of responsive verdict of Manslaughter in trial for First Degree Murder); see also, *State v. Mayeux*, 498 So.2d 701, 705 (La. 1986)(jury verdict containing nonwaivable defect operates as neither a conviction or an acquittal).

In light of this critical structural error, and the prejudice that resulted therefore, Mr. Kurz's conviction and sentence should be vacated, and the case remanded for further proceedings.

ISSUE NO. 3

The evidence adduced at trial is insufficient to support Mr. Kurz's conviction for Aggravated Rape.

In this Appeal, Mr. Kurz challenges the sufficiency of the evidence supporting his conviction for Aggravated Rape, and also asserts other trial errors. For this reason, this Honorable Court "should preliminarily determine the sufficiency of the evidence before discussing the other issues on Appeal." See: *State v. Herron*, 879 So.2d 778 (La. App. 1st Cir. 5/14/04), *citing*, *State v. Hearold*, 603 So.2d 731 (La. 6/29/1992).

This is because "a finding of insufficient evidence to support the guilty verdict bars the retrial of a defendant based on the constitutional protection against Double Jeopardy," and renders all other issues relating to that charge moot. *State v. Davis*, 822 So.2d 161, 162-3 (La. App. 1st Cir. 6/21/02).

For the purposes of appellate review, a conviction must be based upon proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the upholding the verdict, to find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Matthews*, 464 So.2d 298 (La. 1985).

Mr. Kurz shows that a reviewing Court's deference regarding credibility determinations is not absolute. When a trier of fact relies on the testimony of a single witness to establish a fundamental conclusion, that witness's testimony must be free of internal contradictions with respect to that factual

conclusion. On appellate review, this principle has been stated as follows: "[i]n the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support for a requisite factual conclusion." *State v. Robinson*, 874 So.2d 66, 79 (La. 4/14/04).

Stated conversely, a factual conclusion is not necessarily supported by constitutionally sufficient evidence when the conclusion is based on testimony that is internally contradictory or cannot be reconciled with physical evidence. While the trier of fact in a criminal case is afforded deference in making credibility determinations regarding witness testimony, this deference is limited by the bounds of rationality. *State v. Mussall*, 523 So.2d 1305, 1310 (La. 1988).

Mr. Kurz must inform this Court that it is "highly unlikely" that JSC's account of the allegations could be accurate. The discrepancies between his statements and the actual testimony are so substantial that trial counsel was able to impeach him during his testimony.

First and foremost, the State has failed to prove the most essential element of the crime charged (**the age of the alleged victim at the time of the offense**). At the time of this allegation, LSA-R.S. 14:42 stated, "victim was under the age of 12." During JSC's initial "Skype" interview with Det. Moore, JSC was unable to adequately determine how old he was at the time of these allegations, including stating that this occurred when he was, "10, 11, 12, or something like that" (Rec.pp. 783, 795, 800). However, JSC was absolutely sure that these alleged incidents occurred prior to his attaining the age of 14.

As the age of the alleged victim is one of the essential elements, the State has to prove that JSC was under the age of 12 at the time of these allegations. One of the most important factors in determining the evidence of the age presented is the fact that there was about a forty (40) year span between the time of the allegation and the time of the disclosure of the allegations.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution 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);[2] See: *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Matthews*, 464 So.2d 298 (La. 1985).

The deferential standard of review, whereby reviewing courts must affirm a conviction if, after viewing the evidence and all reasonable inferences 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, 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

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).

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).

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.

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Recently, the Louisiana Supreme Court was given the opportunity to give concrete substance to this rule of contradictory testimony. See: ***State v. Ayo***, 167 So.3d 608 (La. 6/30/15), where the Louisiana Supreme Court reversed the convictions of Derrick Mais, Brett Ward, Clayton King, and Michael Ayo for the charges of Aggravated Rape and Attempted Aggravated Rape. In that case, the Louisiana Supreme Court held that, "reports of alleged victim's pretrial statements to witnesses that she had not been raped, but had instead been injured in an accident on a four-wheeler, constituted newly discovered evidence and that warranted new trial."

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

> "[D]elayed piecemeal revelations of sexual abuse are common with younger victims, who usually make their first disclosure to peers instead of to a parent or to authorities 'because they are concerned about getting into trouble, family problems, and embarrassment,' and also

> because they 'often consider trying to forget about such events or pretend like they never happened.' according to Rickles, RP appeared to fit that pattern: she disclosed the rapes for the first time to Devon Radecker on the night they happened; she then made only the partial disclosure of a beating and attempted rape to her mother, the authorities, and forensic interviewers, Rickles and Atzemis, eventually adding the detail of the attempted oral intercourse; and she finally made full disclosure to her mother, the Attorney General's Office, and then to jurors at trial. Dr. Atzemis also opined that the bruises on RP's body could have stemmed from blunt force trauma but were more likely caused by a laying-on of hands during sexual assault.

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

There is no corroborating evidence in this case. The testimony of the accusing witnesses in this case was clearly contradictory and impeached, as shown be the record, notwithstanding the fact that the State suppressed further *Brady* impeachment evidence from the defense at trial ... This Court must note that JSC had impeached himself, stating, "I don't remember what age, and I don't remember informing his parents any sexual involvement with his Uncle Mike in 1984," when he was asked directly about such.

Further, incredible, contradictory, or impeached testimony fails to establish a corpus delicti in the first instance, and also goes to the *Winship* standard at trial.

Because his statements and testimony regarding the indispensable element of his age at the time of the offense are internally contradictory, this Court should find that his uncorroborated testimony is insufficient, standing alone, to support Mr. Kurz's conviction for Aggravated Rape. In the absence of sufficient evidence proving the essential element related to JSC's age at the time of the offense, Mr. Kurz's conviction for Aggravated Rape should be reversed. *Jackson*, 443 U.S. 307; *Matthews*, 464 So.2d 298.

JSC was adamant that these allegations had occurred prior to him turning 14 years of age due to the fact that he had started dating a girl at that time (Rec.pp. 780, 783, 795). In fact, the second time that JSC was asked his age at the time of the allegation, he simply stated, "I wasn't sure. I was under the age

of 14" (Rec.p. 815-6). Conclusive evidence cannot be ignored that the victim was not sure when the offense occurred and other witness failed to corroborate the victims testimony.

Most notably is the fact that the State relied "heavily" on the time of the death of Elvis (See: Closing Arguments and State's Rebuttal). Although JSC testified that he was able to recall the events because he was a "Huge" Elvis fan, and that it was about a year and a half prior to Elvis' death (Rec.pp. 783-4), JSC made no reference to such during the "Skype" interview with Detective Moore (Rec.pp. 804, 809, 812). Reasonable jurists would find that an individual would most likely remember events that had happened prior to the allegation, not after. How can someone state that the very reason that they could remember incidents was due to a "Memorable Event" such as the death of Elvis, and fail to state such during the initial interview?

Also, as the State relied on "memorable events" during these proceedings, one **must** note that probably the most memorable event that a juvenile has is when they start growing pubic hair. In this case, JSC was unable to remember if he had any pubic hair at the time of the alleged offense (Rec.p. 788).

Furthermore, had JSC been raped at such a young age, there would have been some type of evidence at the time (such as blood in his underwear, or the need for some type of medical treatment). A prime example is the fact that JSC testified that he was not sure if he had blood in his underwear after the initial encounter with Mr. Kurz (Rec.p. 791). Surely, someone would remember if there had been any blood in their underwear or not.

The testimony presented also adduced the fact that JSC had continued to visit with Mr. Kurz after experiencing "excruciating" pain from the encounter (Rec.p. 784), and that other incidents of this nature had allegedly occurred until the age of approximately 14 years of age (Rec.pp. 780, 783, 795). As JSC did not live in the same residence with Mr. Kurz (JSC lived approximately 18 miles from Mr. Kurz's home), nor was he required to be at Mr. Kurz's home, JSC testified that he continued to go to

Mr. Kurz's home because "He was my uncle and I enjoyed the things we did together," and "That's the only chance I got to do that type of thing" (Rec.pp. 790, 813).

Although it appears as though there was sufficient evidence that the allegations that JSC has placed against Mr. Kurz occurred prior to his fourteenth birthday, the evidence is greatly lacking that the State had proved beyond a reasonable doubt of each and every element of the accusation, that this allegation occurred prior to JSC attaining the age of 12.

It could be considered strange that JSC kept this to himself for close to forty (40) years, informing his parents in 1984 that nothing had occurred between himself and Mr. Kurz (Rec.pp. 792-3). But, JSC also testified that he had informed his parents in the late 80's of the alleged incidents (Rec.p. 785).

Most interestingly is the fact that JSC testified that he had not even discussed this matter in over 20 years (until he discussed such with Detective Moore). But, JSC admitted that he had discussed the alleged incidents with his mother for two (2) days prior to his interview with the detective (Rec.p. 809).

Although the Courts may argue that the testimony from Mr. Thomas Moseley was irrelevant to the case, one must note that his testimony actually verified the fact that only persons of driving age had been coming to Mr. Kurz's home. According to Mr. Moseley's testimony, the only juveniles that came to Mr. Kurz's home were high school students (Rec.p. 904).

Mr. Moseley had also testified that he had spent quite a bit of time at Mr. Kurz's home, and that Saturdays was their "race day" (Rec.pp. 902-3), and that he had lived across the street, a "stones throw" from Mr. Kurz's home (Rec.p. 901), with their driveways connecting.

Although the State noted that Mr. Moseley was not there **all** of the time, he did live only a "stones throw" from Mr. Kurz's home (Rec.p. 901), and that he was there during most of the weekend (Rec.pp. 902-3), and would have noticed if Mr. Kurz had visitors coming to his house (Rec.p. 904).

Accordingly, when a state fails to prove every element beyond a reasonable doubt, a due process

violation occurs. *Winship*, supra. The constitutional nature of the claim is far to important to leave review of a valid claim to make review discretionary by the working of a statutory law. The United States Constitution requires more.

WHEREFORE, for the foregoing reasons, and the reasons stated in the Original Brief filed by appellate counsel, The State has failed to meet its heavy burden of proof of guilt beyond a reasonable doubt, and this matter should be dismissed.

ISSUE NO. 4

The trial court abused its discretion by permitting five distinct witnesses to testify under LSA-C.E. Art. 412.2.

Mr. Kurz next shows that the trial court committed an abuse of discretion when it permitted the State to adduce testimony from five (5) additional witnesses regarding acts of sexual abuse by Mr. Kurz when they were minors pursuant to LSA-C.E. Art. 412.2, which provides as follows:

A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
C. This Article shall not be construed to limit the admissibility or consideration of evidence under any other rule.

Under LSA-C.E. Art. 412.2, the admissibility of this evidence is subject to the balancing test contained in LSA-C.E. Art. 403, which provides that evidence which is relevant may be excluded if its admission would result in undue prejudice, confusion, or waste of time. LSA-C.E. Art. 403. The concerns animating LSA-C.E. Art. 403 have been explained as follows:

> Any inculpatory evidence is "prejudicial" to a defeated, especially when it is "probative" to a high degree. As used in the balancing test, "prejudicial" limits the introduction of probative

> evidence of prior misconduct only when it is unduly and unfairly prejudicial. The term "unfair prejudice," as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged. ***State v. Rose***, 949 So.2d 1236, 1244 (La. 2/22/07).

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. ***State v. Cosey***, 779 So.2d 675, 684 (La. 11/28/00). The same standard of review is applied to rulings on the admission of other crimes evidence and evidence under LSA-C.E. Art. 412.2. ***State v. Merritt***, 877 So.2d 1079, 1085 (La. App. 5th Cir. 6/29/04); ***State v. Humphries***, 927 So.2d 650, 656 (La. App. 2nd Cir. 4/12/06).

The age, evidence, and unique circumstances of this case combined to create a situation where the concerns underlying Article 403's balancing test should have counseled in favor of limiting, to some degree, the quantity of evidence the State was permitted to present under Art. 412.2. Defense counsel properly preserved this issue for Appeal by filing a written motion and contemporaneously objecting to the trial court's ruling (Rec.pp. 248-9 [written motion]; pp. 365, 893 [objections noted for record]).

In this case, only one out of the five "other crimes" presented by the State was still subject to prosecution; the rest had long prescribed. Thus, in addition to having to present a defense to a case in chief that was approximately 40 years old, Mr. Kurz was also tasked with defending against four other sets of accusations that were between 30 and 40 years old. This created undue risk that the jury would conclude that Mr. Kurz was guilty based simply on the State's portrayal of him as a serial child abused, rather than limiting its decision to the question of his guilt or innocence with respect to the charged offense.

Additionally, the difficulty of defending against a single charge that is over 40 years old was compounded and multiplied by the addition of five other alleged victims and offenses. Mr. Kurz shows that, in this case, some limitation should have been placed in the number of Article 412.2 witnesses to avoid the risk of undue prejudice to Mr. Kurz that resulted from this cumulative and excessive quantum

of evidence.

Mr. Kurz therefore requests that this Court remand this matter for a new trial with an order directing the trial court to limit the quantity of evidence that the State may present under Art. 412.2 in order to avoid undue prejudice to Mr. Kurz.

ISSUE NO. 5

The Court of Appeal erroneously sentenced Mr. Kurz to 50 years at hard labor based on a factually inaccurate recitation of the victim's trial testimony.

Mr. Kurz was charged with committing an Aggravated Rape between July 1975 and July 1977. During the entirety of the time from in the Indictment, the only statutory penalty for Aggravated Rape was death. LSA-R.S. 14:42 (1950).

Because the death penalty was later ruled unconstitutional in *Selman*, supra, the Louisiana Supreme Court held, in a series of decisions, that the only appropriate penalty to be imposed in such cases is the maximum penalty applicable to the next lesser included offense: Attempted Aggravated Rape. *State v. Valentine*, 364 So.2d 595, 596-7 (La. 1978); *State v. Bryant*, 347 So.2d 227, 228 (La. 1977); *State v. Sledge*, 340 So.2d 205 (La. 1975); *State v. Craig*, 340 So.2d 191 (La. 1976); *State v. Lee*, 340 So.2d 180 (La. 1976). As such, the Court of Appeal correctly held that the trial court improperly applied the 1977 amendment to LSA-R.S. 14:42 to the instant offense.

Between 1970 and September 11, 1976, LSA-R.S. 14:42(D) provided:

> D. Whoever attempts to commit any crime shall be punishable as follows:
> (1) If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not more than 20 years.

The Court of Appeal erroneously related that "the victim testified that he was 11 years old when [Defendant] raped him, and the jury believed his testimony (Op. 22). In fact, the victim's testimony at trial focused on the earliest date that the offense began, and an estimate as to when it ended, but did not establish that any offense occurred between September 12, 1975 and July 6, 1977.

From July 6, 1975 until September 12, 1975, the maximum possible sentence for Attempted Aggravated Rape was twenty years at hard labor with no restriction on Parole, Probation, or Suspension of Sentence. The applicable provision of the Attempt statute, LSA-R.S. 14:27(D)(1), was amended, effective September 12, 1975, to increase the penalty for Attempted Aggravated Rape to not more than 50 years of imprisonment, with no restriction on Parole eligibility. 1975 La. Acts No. 132 § 1.

Based on the testimony adduced at trial and the language of the Indictment, there is no way to determine with any degree of certainty whether the pre- or post-September 1975 penalty is applicable. JSC did not testify precisely when the anal intercourse allegedly occurred; he ultimately conceded that, when asked when it began, he had told the police "... I couldn't tell you what age, 10, 11, or 12, or something like that," but later said that he was only sure that it was prior to turning 14. At trial, he testified that it occurred "*at least* a year to a year and a half" prior to 1977, which could mean the anal intercourse commenced prior to July of 1975, or any date between then and December or January of 1976, or a date that falls after the range of the Indictment (prior to age 14)(Rec.pp. 784, 793).

Notably, the State treated JSC's testimony as marking a beginning date that could be relied upon to establish a date certain after September 12, 1975, and the Court of Appeal made a similar error: treating the victim's estimate of ***the minimum span of time that had passed*** between 1977 and when the anal penetration began as establishing the latest date on which it had begun. In other words, the victim only testified that it began "at least that long ago" as opposed to "that long ago."

This did not establish the latest (or any particular) date when an Aggravated Rape occurred during the time period in the Indictment. Instead, it provided only an estimate s to the latest possible time tha the first incident occurred.

Further, the question cannot be answered by reference to the Indictment and verdict, as both leave open the possibility that the crime for which Mr. Kurz was convicted occurred before September 12,

1975. And lastly, no special interrogatory was submitted to the jury which might aid this Court in determining which penalty should be applied.

This case appears to be on all fours with prior jurisprudence counseling in favor of imposing the lesser of two possible sentences. See: *e.g.*, *State v. ML*, 35 So.3d 1183 (La. App. 3rd Cir. 4/14/10) (applying lesser punishment when date range in Bill of Information spanned two different penalty provisions, and evidence did not establish which penalty should apply).

Nevertheless, the Court of Appeal in this case erroneously determined that the greater penalty should be applied in such a situation rather than the lesser. The Court's decision flouts controlling authority on this matter and compounds the erroneous treatment of the sentencing and controlling law of this case at the trial level.

It is axiomatic that, where there is a conflict or ambiguity in the penalty applicable to a criminal offense, the rule of lenity counsels that the conflict should be resolved in favor of the accused, because the rule applies to both the substantive scope of criminal laws as well as the penalties imposed by those laws. *State v. Piazza*, 596 So.2d 817, 820 (La. 1992)(citing *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1989), and *State v. Bosworth*, 373 So.2d 152 (La. 1979)).

"To resolve the conflict when a criminal statute provides inconsistent penalties, or when two or more interpretations are possible, the rule of lenity directs that court to impose the least severe penalty. *Ibid.*

If anything, the jury in this matter should have received a special interrogatory establishing whether it found that the acts complained of occurred prior to or after September 12, 1975, due to the fact that Mr. Kurz faced substantially different penalties for the offense depending on when it occurred in the time period of the Indictment.

The Court of Appeal wholly sidestepped this glaring issue by its erroneous determination that the

testimony at trial established the commission of an act between September 12, 1976, and July 6, 1977. Considering that there is no way to determine from the record in this case whether Mr. Kurz's offense occurred before or after September 12, 1975, Mr. Kurz should be granted relief by the remand of this matter for re-sentencing to a maximum of twenty years at hard labor with no prohibition on sentencing benefits. See: *State v. M.L.*, 35 So.3d 1183 (La. App. 3rd Cir. 4/14/10)(applying lesser punishment when date range in Bill of Information spanned two different penalty provisions, and evidence did not establish which penalty should apply); *State v. Robertson*, 2018 La. App. LEXIS 1491, 2017 WL 3496173 (vacating life sentence for Aggravated Rape and imposing 20-year sentence for Attempted Aggravated Rape).

In light of the erroneous imposition of a life sentence in this matter, and the ambiguity created by the dates in the Indictment and testimonial evidence, the rule of lenity counsels that this Court resolve the conflict in Mr. Kurz's favor and impose a sentence of 20 years at hard labor without any restriction on sentencing benefits. Further, in light of the continuing confusion amongst trial courts, appellate courts, and practicing attorneys in this State that has been the unintended consequence of the inconsistent and wavering application of capital classification jurisprudence, this Court should grant this Writ Application and correct the factual and legally erroneous ruling of the Court of Appeal.

SUMMARY

First and foremost, Mr. Kurz has shown this Court that the prescriptive period for prosecution had lapsed according to Law.

Secondly, Mr. Kurz shows that this case is classified as a Capital Offense, and capital procedures should have been employed during the trial of this case. This resulted in specific prejudice to Mr. Kurz, including, but not limited to, the court erroneously instructing the jury that it did not need to be unanimous when reaching a verdict, and the failure of the court to sequester the jury.

Thirdly, Mr. Kurz shows that the evidence presented is insufficient to prove each and every element of the allegation beyond a reasonable doubt. Reasonable jurist would have found JSC's recollection of the events as "highly unlikely," especially due to the fact that 40 years had passed since the alleged incident had occurred. And, reasonable jurists would find that the use of Elvis' death as the "time marker" for remembering the allegations is unfounded. JSC testified that he remembered the incident because of the fact that he was a "huge" Elvis fan; and this incident allegedly occurred eighteen (18) months prior to Elvis' death.

Lastly, Mr. Kurz argues that he received an illegal sentence because the amendment to LSA-R.S 14:42 permitting life imprisonment instead of the death penalty was not effective until after the time period set out in the Indictment. Mr. Kurz further shows that the rule of lenity should control and lead to the imposition of a 20-year sentence without any restriction on parole eligibility.

The district court could not have obtained jurisdiction in this matter due to the modifications and amendments concerning LSA-R.S. 14:42 since the institution of such. Accordingly, this charge would not be considered a capital offense until 1984 when the Legislature added "sentences of Life without Parole" in La.C.Cr.P. Art. 571. Prior to this enactment, a capitol crime consisted of **only** convictions which could receive a Death Penalty.

The State failed to submit sufficient evidence in order to convict him of the crime charged beyond a reasonable doubt. Reasonable jurists would have found JSC's recollection of the events as "highly unlikely," especially due to the fact that 40 years had passed since the alleged incident had occurred. Also, reasonable jurists would find that the use of Elvis' death as the "time marker" for remembering the allegations is unfounded. JSC testified that he remembered the incident because of the fact that he was a "huge" Elvis fan; and this incidents allegedly occurred eighteen (18) months prior to Elvis' death.

Mr. Kurz also challenges the sufficiency of the evidence used to support his conviction. Specifically,

Mr. Kurz argues that the testimonial evidence adduced by the State was insufficient to establish that the alleged victim was under the age of 12 when the offense occurred.

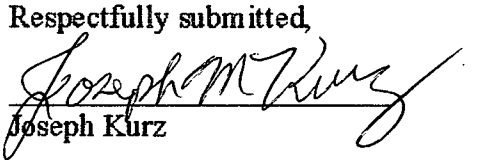
But, one **must** note that there was **NO MENTION** of Elvis' death during the initial interview with Detective Moore. The State failed to prove the most essential element of the crime charged (the age at the time of the allegation) as JSC was quite unsure as to his age when being interviewed via "Skype" with Det. Moore.

WHEREFORE, for the aforementioned reasons, the arguments in Mr. Kurz's pleadings during Appeal, Mr. Kurz respectfully requests this Honorable Court to invoke its Supervisory Authority of Jurisdiction over the lower court; and after a thorough review of the merits of such Grant the relief deemed necessary by this Court.

CONCLUSION

For the reasons stated above and in the previous filings in the State of Louisiana Courts, Mr. Kurz's Writ of Certiorari should be granted, and this matter be remanded to the district court for a dismissal; or in the alternative, a new trial. Mr. Kurz has shown that this conviction is contrary to clearly established federal law as established by the United States Constitution and the United States Supreme Court; and that reasonable jurists would debate the validity of the conviction.

Respectfully submitted,



Joseph Kurz

Date: February 12, 2019