No. 18-8154

IN THE

SUPREME COURT OF THE UNITED STATES

DIONDRÉ ROMERO -- PETITIONER

vs.

DARREL VANNOY, WARDEN -- RESPONDENT(S)

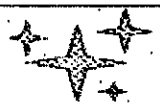
ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR CERTIORARI

Diondré Romero #552062, *Petitioner-Appellant*
Camp C Bear 3, Louisiana State Prison
Angola, Louisiana 70712

Prepared By:

	CAMP C – LITIGATION TEAM
	DR. ERIC M. DENET, PH.D., TH.D., DIV.D. #380958 CAMP C BEAR–2 CERTIFIED PARALEGAL / OFFENDER COUNSEL III

QUESTION(S) PRESENTED

1) Whether Petitioner's Fourteenth Amendment right to a fair and impartial trial was violated when the prosecutor elicited false testimony from the victim and allowed the victim to give false answers to questions posed to her by defense counsel?

2) Whether Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of counsel and to present evidence in his defense were violated when his:

> Subclaim One: Trial counsel failed to request a mistrial after the prosecutor misled defense counsel and the court during opening statement that the victim's sister would testify, and recited her purported testimony, but never produced her as an actual witness.
>
> Subclaim Two: Trial counsel failed to properly utilize the victim's prior inconsistent statements to impeach her credibility.
>
> Subclaim Three: Trial counsel failed to obtain exculpatory documents from the Office of Community Services (OCS) regarding an investigation of a complaint of physical abuse which led OCS officials to conduct routine visits with the victim and her siblings at their home and school between March and April of 2009.
>
> Subclaim Four: Trial counsel failed to call witnesses to testify at trial who were present during the times of the alleged offenses and who would have testified that petitioner could not have lured the victim in a room and rape her six times without their knowledge.
>
> Subclaim Five: Trial counsel refused to permit petitioner to testify in his own defense, after counsel failed to call any of his witnesses, and he insisted to counsel that he wanted to provide a rational explanation for the false accusation made against him by the victim.

3) Did the State present sufficient evidence to support the finding of guilt in this case?

4) Is the Petitioner deprived of his Fourteenth Amendment right to a fair trial based on the accumulation of errors committed during his trial?

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:

Diondré Romero, Petitioner-Appellant

Darrel Vannoy, Respondent-Appellee

Keith A. Stutes, Attorney for Respondent-Appellant

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at **Appendix B** to the petition and is

[X] reported at **Docket Number 18-30279**; 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 D** to the petition and is

[X] reported at **USDC No. 6:16-CV-120**; 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 C attached to the writ of habeas corpus as Exhibits "11" and "17"** to the petition and is

[X] reported at State v. Romero, 117 So.3d 9192012-2747 (La.05/17/13); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the court appears at **Appendix C attached to the writ of habeas corpus as Exhibits "7" and "15"** to the petition and is

[X] reported at State v. Romero, 98 So.3d 438 (La.App. 3 Cir. 2012)(unpublished); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was **December 26, 2018.**

[X] 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 **July 31, 2015.** A copy of that decision appears at **Appendix C attached to the writ of habeas corpus as Exhibits "11" and "17".**

[ ] 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

Fifth Amendment

Fourteenth Amendment

Sixth Amendment to the United States Constitution

La. C.Cr.P. Art. 928

La. Code Evid. Art. 607(D)(1)

La. Code Evid. Art. 613

La. R.S. 14:42(A)(4)

STATEMENT OF THE CASE

1. *Course of Proceedings*

Petitioner was indicted on September 2, 2009, with six counts of aggravated rape (La. R.S. 14:42(A)(4)). Petitioner plead not guilty- on September 24, 2009. Petitioner was found guilty in a bench trial on July 19, 2011. On August 11, 2011, Petitioner filed a motion for new trial alleging the verdict was contrary to the law and evidence. The trial court denied the motion on August 18, 2011. Petitioner was sentenced to six (6) concurrent life sentences at hard labor without benefit of parole, probation or suspension of sentence.

On February 6, 2012, Petitioner's direct appeal was filed in the Third Circuit Court of Appeal. On March 3, 2012, Petitioner submitted a pro se Supplemental Brief alleging two assignments of errors: (1) insufficient evidence. Additionally, the physical evidence introduced to support the alleged victim's testimony was (1) inconclusive as to the occurrence of rape, and (2) the trial court committed patent error for the trial court not advising Petitioner of the two year limitation period to file an application for post-conviction relief. On October 3, 2012, Petitioner's convictions and sentences were affirmed. *State* v. *Romero*, 98 So.3d 438 (La. App. 3rd Cir. 2012). Petitioner then applied for a reconsideration on October 5, 2012. The Third Circuit Court of Appeal, however, denied rehearing on November 14, 2012. *State v. Romero*, No. 12 00031-KA. Petitioner's Writ of Certiorari to the Louisiana Supreme Court was filed on December 14, 2012. Discretionary review was denied on May 17, 2013. *State ex rel. Romero v. State*, 117 So.3d 919 (La. 2013).

On February 25, 2014, Petitioner filed an Application for Post Conviction Relief ("PCR") in the district court. On March 12, 2014, the trial court dismissed the PCR pursuant to La. C.Cr.P. Art. 928.[1] On March 20, 2014, Petitioner filed a notice of intent to seek supervisory writs to the First Circuit Court of Appeal. On March 26, 2014, Petitioner filed his Supervisory Writ, which was denied on July

1 La. C.Cr.P. Art. 928 provides that "[t]he application may be dismissed without an answer if the application fails to allege a claim which, if established, would entitle the petitioner to relief."

29, 2014. On August 14, 2014, Petitioner filed an Application for Supervisory Writ in the Louisiana Supreme Court, which was denied on July 31, 2015.

2. *Facts of the Offense*

The Louisiana Third Circuit Court of Appeal summarized the facts of the underlying offenses in petitioner's initial appeal, as follows:

> At trial, the victim, L.T., testified that her birthdate is October 31, 1999, making her eleven years old at the time of trial.[2] For the two-and-one-half years preceding trial, L.T. lived with her grandmother. Prior to that time, she resided with her mother, the Defendant, whom she calls "Drey" for a year and a half until the State removed her from her mother's custody and placed her with her grandmother.
>
> L.T. testified that during the time she lived with her mother and the Defendant, she was sexually abused or raped. L.T. confirmed that she had talked to (OCS), doctors, her grandmother, her mother, her nanny, and Ms. Nicki from Hearts of Hope about the incidents. L.T. described the first incident as follows:
>
> > A. He told me to go in the room because we was going play a game, and I went, and he turned the lights off, and he locked the door, and he pushed me on the bed, and he pulled his pants down, and he pulled mine's down, and he held me down, and he – I don't know how to put this – he stuck his prostate into my vagina.
>
> L.T. testified that after the Defendant did this, she went into the bathroom and washed herself off as he instructed her to do. She noticed "white stuff" and blood coming out of her vagina. According to L.T., this occurred six times. When questioned how she knew it was six times, she replied, "[b]ecause I can remember."
>
> According to L.T., this incident occurred in her mother's and the Defendant's bedroom while her sister and two brothers were in living room. When asked where her mother was, L.T. replied that she was an exotic dancer at a strip club. She worked nights and returned home at 2:00 or 3:00 in the morning. While her mother was at work, L.T. stayed with the Defendant. However, her nanny, Candida, would occasionally stay with her.
>
> The second incident was described by L.T. as follows:
>
> > I was coming out the bathroom, and I went into my room, because we had two bathrooms, and I went into my room to get my clothes from taking a bath, and he was in the room and locked the door and turned the lights off and did what he did the first time.
>
> This incident took place in the "kids' room" while her brothers and sister were in

2 As required by La. R.S. 46:1844(W), the initials of the parties involved are used to protect the victim's identity.

the living room. The Defendant stopped when his brother, Sean Romero, knocked on the door. L.T. testified that the Defendant left to talk to his brother in his bedroom and L.T. went into the bathroom.

L.T. recalled another incident that occurred when she was in the bathroom. The Defendant entered the room, turned off the lights, pushed her on the floor, and "did what he did." After he left, she got into the tub and "washed [herself] out" "[b]ecause [she] didn't feel right." Her mother was not at home when this incident occurred.

L.T. testified she recalled another incident when she was in "the room by [herself] looking for clothes from [her] mamma's box." The Defendant entered the room, turned off the lights, and "did what he did all the other times." When he left the room, the victim cleaned herself in the tub. L.T. confirmed that "this" occurred about six times, including a time when she and Drey were alone and her siblings were not at home. According to L.T., adults were not present in the house when the incidents occurred. L.T. testified that the incidents occurred only at the house on Graceland.

L.T. testified that she never told her mother because the Defendant threatened her and she was scared. L.T. testified she eventually told her grandmother that "Drey" put his prostate in her vagina. Her grandmother asked, "you're not a virgin anymore?" and L.T. said "no." L.T.'s grandmother then called Ms. Katie.[3]

L.T. testified she had bruises on her arms and legs which she did not show to anyone. During April and May, she wore a jacket (a goldish/brown South Pole jacket) to school despite the hot weather. On cross-examination, L.T. testified her mother did not ask her about why she was wearing a jacket because "she was too full of drugs." L.T. testified her sister inquired but L.T. did not tell her why.

On cross-examination, L.T. testified that she first reported that these incidents occurred six or seven times, but when she could not remember the seventh incident, she maintained that the incidents occurred six times. L.T. testified that when the incidents occurred, she tried to push the Defendant off her. L.T. testified she tried to scream for help but the TV or music would be too loud for the others to hear her.

L.T. testified on cross-examination that she did not tell anyone that an incident occurred on May 13, 2009. Nor did she recall telling anyone that she had no bleeding as a result of the incidents. She also testified she could not recall when her mother went to a drug rehab program, but she recalled she was there for approximately two weeks. She testified that she did not recall telling anyone that this did not happen while her mother was in rehab. G.T., L.T.'s grandmother, testified that she had a conversation with L.T. that prompted her to call police. L.T. told her that the Defendant raped her six times. L.T. told G.T. that while her mother was away, she went in the room with the Defendant and he closed the door and turned up the music. He pulled her pants down and his pants down and "put it in her." L.T. said the Defendant put his legs over hers and held her arms so she would not move. L.T. said the Defendant told her if she said anything he would kill her mother. When the incident was over, L.T. washed herself off in the bathroom because she felt dirty. Although G.T. initially testified that L.T. did not talk about anything coming out of her body, after being shown her 2009 written statement to the Abbeville Police Department, she recalled that L.T. told her she had not bled but she had slimy stuff coming from her body. G.T. testified she called Katie McConnell from OCS and Ms. McConnell came and questioned L.T.

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3 It appears the victim was referring to Katie McConnell from OCS.

Dr. Myriam Hutchinson, the coroner for Vermilion Parish, examined the victim on June 18, 2009. She testified that the physical examination of the pelvic and vulvar area was normal but the victim's hymen was not intact. She testified that this can result from any penetration. According to Dr. Hutchinson there was no way to tell how long the hymen had been missing.

On cross-examination Dr. Hutchinson confirmed that some women are born without a hymen. She was further asked, "Isn't it also a fact that hymens can be injured or completely lost through certain activities? Playing, sports, things of that nature can cause damage to the hymen?" to which she responded, "If there is a penetration, it can happen." Dr. Hutchinson confirmed that she found no evidence of any tears, lesions, or scars in the victim's vaginal area. She was asked if she found this unusual; she explained that it was normal not to see any of this after the passage of a month. Dr. Hutchinson further explained there would be no scars unless there was a major tear; the loss of the hymen would not result in tears, but it could cause bleeding.

Dr. Hutchinson was asked if she found it unusual that there was no bleeding. She explained that she would not expect to find bleeding because "usually penetration like this will heal like in six, seven days." When asked whether it was unusual to have no bleeding with the loss of the hymen, Dr. Hutchinson stated, "It can bleed, but in some cases they don't bleed."

Dr. Hutchinson was asked what the victim reported to her. Her records stated, "He hold my hands back, put his thing in front, no back, nor in the mouth, no finger, locked the door, turned off the lights. Sister was trying to get in, and she couldn't come inside the room." The nurses wrote in the report that the last occurrence was on May 13, 2009.

On redirect examination, Dr. Hutchinson was asked whether the injury was consistent with sexual abuse considering the history that was provided and the results of her examination; she responded that it was.

L.T.'s mother, T.T., testified that from March 31, 2009 through May of 2009, she lived on Graceland Avenue with her four children and the Defendant. The Defendant kept the children while she worked at a strip club from approximately 5:00 p.m. until 2:30 or 2:45 a.m. Her living arrangement with the Defendant ended when she went to jail on May 13, 2009. According to T.T., during the time she lived with the Defendant, the victim did not complain of sexual abuse.

On cross-examination, T.T. testified that she entered rehab at the end of April or beginning of May, and she was there for a week. She testified she was at home for approximately a week before her arrest and during that time she did not work. During that time, the children were left alone with the Defendant if T.T. had to go somewhere such as the store.

T.T. was questioned about Mother's Day (May 10th) weekend that year. She testified that the children were at her mother's house on Friday and Saturday, and she and the Defendant picked them up on Sunday. According to T.T., on Sunday (Mother's Day), they went to the Defendant's mother's house with the children, and he was not left alone with the children that day. On Monday, T.T. got a call saying that the victim was sick at school. OCS picked her up and brought her to the hospital. T.T. was also at the hospital because she had been in a car wreck that day. According to T.T., the Defendant brought the children to his mother's house. L.T. left the hospital with the Defendant that night without seeing the doctor because it was taking too long, and she was feeling

better. According to T.T., the Defendant took L.T. to his mother's house with the rest of the children.

T.T. was released from the hospital and went home that night after purchasing medication for L.T. T.T. and the children went to bed. On Wednesday, T.T. was arrested; OCS picked up the children when they got off the school bus and took them to T.T.'s mother's house. T.T. confirmed that from Friday to the date of her arrest, the Defendant was not alone with the children. According to T.T., she learned of L.T.'s allegations against the Defendant on the day before Father's Day in 2009 while she was incarcerated. T.T. testified that during the time she and the Defendant lived together, she did not see any signs of abuse.

On redirect examination, T.T. acknowledged that she was under the influence of drugs in April of 2009 which may have made it difficult to actually perceive what was going on. She also confirmed there were times when she was out of rehab and not employed at the Paradise Club that she may have been gone from the home shopping or out with friends late at night:

Q. Would there have been opportunity -- like you said, you went to the store -- where Diondre was left, Mr. Romero, was left alone with the children?

A. Uh-huh ("Yes").

Q. Would there have been times that you went out with the girls or out with your friends late at night to another club at that point in time?

A. Maybe. Most likely.

Q. Most likely?

A. Yes, ma'am.

Q. Would this have been during the hours that would have been similar to the hours that you worked?

A. Yes.

T.T. was asked whether she thought it was odd that L.T. wore a coat to school during the months of April and May. She responded that she did not find it odd because L.T. told her that it was because she was cold in her classroom.

Nicolette Joseph of "Hearts of Hope, the Children's Advocacy Center" testified she interviewed L.T. on June 24, 2009. The recording of the interview was played during the trial. In the interview, the victim said that while her mother was at work (from 7 p.m. to 2 a.m.), the Defendant would tell her to come see because he had something for her. He put his "thing" in her, and when her sister attempted to open the door, he would tell her they were playing. L.T. said this occurred in her mother's room after the Defendant closed and locked the door. According to L.T., the Defendant put his "thing" in her six or seven times when she was nine.

L.T. was asked what happened the first time he did this, and L.T. responded that after the Defendant did this, he told her to go wipe herself. She said white slimy stuff came out of her "flower." She said his "thing" touched the inside of her "flower." She said she never told anyone about what he did because he had told her on more than one occasion that he would beat her.

During the incidents, L.T. said the Defendant would grab her arms and legs and put his "thing" in her "flower" after he had taken her clothes off and put them on side of the bed. When he put his thing in her "flower," she said it made her feel nasty and it would hurt her "flower." She said his legs would move around, and he would move his "thing' in and out. He would stop (she didn't know why), and he would then make her use the bathroom.

L.T. said this would occur in the dark, and she said she never saw the Defendant's "thing." She said this occurred a few months before the State took her away from her mother. She would wear a jacket to cover the bruises on her wrists and long socks to cover the bruises on her ankles. According to L.T., no one else has ever put their "thing" in her "flower."

Near the end of the interview, L.T. said her mother was in rehab for a couple of weeks, and during that time, they stayed with the Defendant. The Defendant's brother, his girlfriend, and baby stayed with them during this time. L.T. said the Defendant did not touch her "flower" while her mother was in rehab.

Katherine McConnell testified for the defense. She was the caseworker with the Department of Children and Family Services who worked with L.T. She conducted an interview on June 17, 2009. She confirmed that during the interview, L.T. stated that her mother was in drug rehab only days before OCS became involved and that while her mother was in rehab, the Defendant raped her six or seven times over a period of six or seven days. Ms. McConnell recalled that L.T. told her that right before OCS took them, the Defendant would make her go in a room away from the other children and would make her have sex with him.

State v. Romero, 2012-00031, Pgs. 3-10 (La.App. 3 Cir. 2012)(unpublished); writ denied 2012-2747 (La.05/17/13).

REASONS FOR GRANTING THE PETITION

I. REASONABLE

False Testimony.

Petitioner's right to a fair trial was violated when the state failed to correct the victim's false testimony.

A state must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935). The Louisiana Supreme Court "has repeatedly stated [that] strategical misconduct which affect a verdict will not be tolerated and will result in reversals of convictions." *State v. Green*, 416 So.2d 539, 541-42 (La. 1982). "Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed.2d 791 (1935). Justice is also offended when the state allows false evidence to go uncorrected. *Id.* See also *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). "A State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction" and this principle "does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173 (1959). "A lie is a lie, no matter what its subject." *Id.* at 270, 79 S.Ct. 1173.

L.T. repeatedly gave false answers to questions posed to her by both the state and defense. The attorneys knew that L.T.'s testimony was contrary with her initial statements made soon after the accusations arouse. Neither the defense nor the state made an effort to correct L.T.'s false testimony. Specifically, L.T. made false statements when L.T. was asked if she used "the word flower" in refer to her vagina. L.T. replied "Huh-uh ('No')." (Tr.p. 15). The state knew L.T.'s answer was false, because the state possessed the report of Ms. Nicolette Joseph where L.T. told Ms. Joseph that Petitioner "put his thing in her flower." *Id.* This report shows L.T. using the word "flower" at least six times in reference to

her vagina. *Id.*

Strategically, the state allowed L.T. to deny ever using the word "flower" in reference to her vagina, because Ms. Hulin intended to portray the child as more mature and intelligent for her age. To make L.T.'s testimony more persuasive, the eleven-year old child pretended to possess the ability to use sophisticated words. For example, L.T. found it relevant to impress upon the trial judge that she had a summer job as a "cosmetologist" (Tr. p. 10) and that her mother "was an exotic dancer...." (Tr. p. 14). L.T. told the judge she was "sexually abused" when Petitioner "stuck his prostate into my vagina" (Tr. p. 12, 13). In fact, Ms. Hulin complemented L.T. on her ability to use "big words" especially an "adult word" like "prostate" (Tr. p. 12, 13).

L.T.'s pretentious use of "big words" only lends support to Petitioner's position that the child was coached in her testimony. When L.T. was initially interviewed on June 17, 2009, by Ms. Kathryn McConnell[4] L.T. did not tell Ms. McConnell that Petitioner "sexually abused" her and "stuck his prostate into [her] vagina." Rather, she told Ms. McConnell that Petitioner "put his thingy in my private" (Ex. p. 36). When L.T. Was interviewed on June 24th, Ms. Nicolette Joseph[5] made a note of the child's vocabulary. Ms. Joseph, recalled that L.T. first stated that Petitioner "put his thing in her," then said that he "put his thing in her flower" (Ex. p. 50).

The dramatic change in L.T.'s vocabulary over the two year period strongly suggest the child was "coached" for trial. Nonetheless, L.T. lied to the judge when she answered "Huh-uh ('No')" to the state's question of whether she used the word "flower" to refer to her vagina. The state also knowingly allowed L.T. to answer falsely to questions posed to her by defense counsel. For example, Mr. Rowe asked L.T. if she ever told anyone that the alleged incidents of sexual abuse "occurred over a period of six to seven days." (Tr. p. 21). L.T. answered "No" to the question; however, during an interview with OCS caseworker, Kathryn McConnell L.T. stated "Petitioner did this to her for a period of 6 or 7 days."

4 Ms. Kathryn McConnell works for the Office of Community Service ("OCS").
5 Ms. Joseph is a forensic interviewer with the children Advocacy Center. Tr. p. 66.

(Ex. p 36).

When Mr. Rowe asked L.T. if she ever told anyone that the last incident occurred on May 13, 2009, L.T. answered "No" (Tr. p. 22). However, when L.T. was examined by Dr. Myriam Hutchinson on June 18, 2009, the doctor's nurse noted the "last occurrence May 13,2009." (Ex. p. 47). Dr. Hutchinson reaffirmed at trial that the "last occurrence" was "May 13, 2009" (Tr. p. 46-47). Then when Mr. Rowe asked L.T. if she ever told anyone that Petitioner made her "go into a room and have sex with him ... just before OCS removed" her from her home, L.T. answered "No" to counsel's question. (Tr. p. 22). Ms. McConnell noted during the interview the "child stated that this would only happen when her mother ... was at work" and "when her mother checked herself into a drug rehab facility days before OCS became involved." (Ex. p. 36). Ms. McConnell also testified that L.T. told her the incidents occurred only days before OCS became involved (Tr. p. 73-74).

L.T. denied telling anyone that she locked the bedroom door, but Petitioner kicked it down (Tr. p. 22). Ms. McConnell, however, noted that L.T. "stated that one time she locked the door while she was getting dressed so Petitioner could not go in, but he kicked the door in and got to her anyway." (Ex. p. 36). L.T. knowingly gave false answers to questions posed to her by the state and defense counsel. The attorneys knew that L.T.'s answers were false. The state had a duty to correct L.T.'s false testimony.

This Court must reverse "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). All false testimony pollutes a trial, making it difficult for the judge or jury to see the truth. No lawyer ... may knowingly present lies to the judge or jury and sit idly by while opposing counsel struggles to contain this pollution of the trial. *Nix v. Whiteside*, 475 U.S. 157, 166, 106 S.Ct. 988. 89 L.Ed.2d 123 (1986) ("Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.").

The state's duty to correct L.T.'s false testimony is not discharged merely because defense counsel knows and the judge may figure out that the testimony is false. Where the state knows that a witness has lied, she has a constitutional duty to correct the false impression of the facts. See *Napue*, 360 U.S. at 269, 79 S.Ct. 1173; *Cf.* Restatement (Third) of Law Governing Lawyers § 180(2)(1997)("*If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures.*") Ms. Hulin, as an officer of the court, had a special duty commensurate with a state's unique power, to assure that this defendant received a fair trial. "It is as much [her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Petitioner has established a "reasonable likelihood" that L.T.'s false testimony adversely affected the verdict. If the presiding judge had understood that the victim lied about making the prior statements, there is a "reasonable likelihood" the judge would have had a reasonable doubt regarding Petitioner's guilt. Thus, the state's failure to correct L.T.'s false testimony adversely affected the verdict. Because Ms. Hulin allowed the victim to repeatedly give false answers to questions posed to her, the convictions in this case cannot stand.

II. REASONABLE

Ineffective Assistance Of Counsel.

Petitioner was deprived of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

"In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." The Sixth Amendment has been made applicable to the States under the Fourteenth Amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S.Ct. 792, 797, 9 L.Ed.2d 799 (1963). The "Assistance of Counsel" means the "effective" assistance of counsel. See, e.g., *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under the *Strickland* standard, a reviewing court must reverse a conviction if the petitioner establishes: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052. Counsel's error must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

With respect to prejudice, the *Strickland* test does not merely question whether the outcome of the proceeding would have been different, but also looks at whether the verdict was fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The Supreme Court has also recognized that "the right to effective assistance of counsel ... may in a particular cased be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) (citing *United States v. Cronic*, 466 U.S. 648, 657 n. 20, 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657 (1984).

Deficient Performance

Trial counsel performance was deficient in that he: a) failed to file for a mistrial after the state misled the defense and the court during opening statement that the victim's sister would testify, reciting the purported testimony, but never produced her as a witness; b) failed to impeach the victim with her prior inconsistent statements; c) failed to obtain exculpatory evidence from the Office of Community Services (OCS) of prior investigation regarding physical abuse where OCS conducted routine visits

with the victim and her siblings at their home and school between March and April of 2009; d) failed to call witnesses that would testify they were present during the times of the alleged offenses and that Petitioner could not have lured the victim in a room and rape her six times without their knowledge; and e) refused to permit Petitioner to testify in his own defense to provide a rational explanation for the false accusation made against him.

Prejudice

a) Mistrial

The state misrepresented to the court and defense during her opening statement that she would call the victim's sister, De'Shante, to "testify there were times where Mr. Romero made the children go to the park and leave the residence while he was alone with [L.T.]." [6] (Tr. p. 7-8). Ms. Hulin, however, did not call De'Shante to testify as a witness. None of the witnesses who testified, suggested Petitioner made De'Shante and her brothers go to the park so he could be alone with L.T. See *State v. Smith*, 554 So.2d 676 (La.1989)(state is prohibited from intentionally referring to, or arguing on basis of facts outside record).

Ms. Hulin never intended to call De'Shante to testify. The state only used the opening statement for an opportunity to create the false impression that "opportunities" existed when Petitioner was alone with L.T. in the house. During closing and rebuttal arguments, Ms. Hulin's clarified her intent to mislead. Specifically, the state interjected that Petitioner "had ample opportunity because he was left alone with this child"; however, no evidence was presented to support the state's argument. (Tr. p. 80).

The state also misled the court during her opening statement that L.T.'s mother, Tabatha[7] Turner, would testify that she left L.T. alone with Petitioner while she served a jail sentence in May of 2009 (Tr. p. 7). Contrarily, L.T. and her siblings were placed in the custody of their grandmother, Goldie Turner, when Tabatha went to jail. (Tr. p. 12, 27, 52).

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6 Petitioner will continue to refer to the victim as "L.T."

7 Petitioner will continue to refer to L.T.'s mother as "Tabatha."

Petitioner right to a fair trial was violated when the state rested her case without calling De'Shante as a witness. The state's comments in an effort to create false "opportunities" where Petitioner and L.T. could have been alone, makes it more egregious because it is presumed the opening statement in a case is sensitive. A state's opening statement is meant to be an objective summary of the evidence that the prosecution reasonably expects to produce. *Frazier v. Cupp*, 394 U.S. 731, 736, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). Ms. Hulin intimating that she would call the victim's sister to testify and failing to put her on the witness stand was blatant deception. See *U.S. v. Murrah*, 888 F.2d 24 (5th Cir. 1989)(prejudicial for state to promise jury he would produce witness and no witness was called.).

The failure of Petitioner's counsel to request a mistrial or to object to the state's improper and prejudicial comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Thus, the trial court must reverse petitioner's convictions.

b) Impeachment Evidence

Trial counsel, Jan Rowe, was ineffective by failing to properly utilize the victim's prior inconsistent statements for impeachment purposes.

It is recognized that "impeachment of a witness is 'singularly important,' and that reports or [documents] can be essential to the impeachment efforts of the defendant when such material relates to witness' testimony." *Jencks v. United States*, 353 U.S. 657, 667, 77 S.Ct. 1007, 1013. The Court went on to state:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Id.* U.S. at 667, S.Ct. at 1013.

The allegations of sexual and physical abuse were made about a month after the victim and her siblings were placed in the custody of their grandmother, Goldie Turner. They initially told Goldie that Petitioner physically abused them; then L.T. allegedly revealed that Petitioner lured her in a room where he raped her on six or seven occasions. Goldie then called Katherine McConnell, a caseworker with the Office of Community Service, who in turn reported the alleged incidents to the Abbeville Police Department. Ms. McConnell then interviewed Goldie and the children on June 17, 2009. (Ex. p. 35-38). The next day L.T. was examined by Dr. Myriam Hutchinson. (Ex. p. 47). On June 24, 2009, L.T. was interviewed by Nicolette Joseph, a forensic interviewer with the children Advocacy Center (Ex. p. 49-51). They took written statements from Goldie, L.T., and her siblings.

L.T.'s testimony was contradicted with her statements made to the police, Ms. McConnell, Dr. Hutchinson and Ms. Joseph. Trial counsel, however, failed to establish the proper foundation for introducing and impeaching L.T.'s with her prior inconsistent statements. "A witness' credibility may be impeached by the use of a prior inconsistent statement, but the witness must first be asked about having made the statement in a question which gives the substance of the statement and names the time, the place and the person to whom the statement was made." ***State v. Davis***, 498 So.2d 723, 725 (La. 1986). La. Code Evid. art. 613 requires the witness's attention first be "fairly directed...to the statement...and the witness has been given the opportunity to admit the fact and has failed distinctly to do so." ***State v. Burbank***, 872 So.2d 1049, 1051 (La. 4/23/04).

Defense counsel did not effectively utilize the prior inconsistent statements to impeach L.T.'s credibility. Before Mr. Rowe questioned L.T. about statements she made prior to trial, counsel was required to lay the requisite foundation. The questions did not clearly name the persons to whom L.T. gave the statements to. Mr. Rowe simply asked L.T. did she "ever tell anyone" without naming any specific person. In any event, L.T. had to know that the statements counsel made reference to were

those she made to the above named individuals.

When L.T. was asked whether she ever told anyone the last incident occurred on May 13, 2009, she answered "No" (Tr. p. 22). L.T.'s answer was inconsistent with the date given to Dr. Hutchinson's nurse. Dr. Hutchinson testified that her nurse noted the "last occurrence" was "May 13, 2009" (Tr. p. 46-47) and (Ex. p. 47). L.T. also answered "No" when counsel asked her if she ever told anyone that Petitioner made her "go into a room and have sex with him ... just before OCS removed" her from her home. (Tr. p. 22). Ms. McConnell, however, noted in her report the "child stated this would only happen when her mother ... was at work" and "when her mother checked herself into a drug rehab days before OCS became involved." (Ex. p. 36). Ms. McConnell also testified L.T. told her the incidents occurred only days before OCS became involved. (Tr. p. 73-74).

Moreover, L.T. denied telling anyone that Petitioner kicked the bedroom door down when she locked the door (Tr. p. 22). Again, her denial was inconsistent with the statement she told Ms. McConnell, that is, L.T. "stated that one time she locked the door while she was getting dressed so Petitioner could not go in, but he kicked the door in and got to her anyway." (Ex. p. 36).

The impeachment of L.T.'s testimony was "singularly important" as she was the prosecution's key witness. The value of L.T.'s prior inconsistent statements were highlighted by her repeated denials of having made the prior inconsistent statements. The trial judge was unable to properly evaluate L.T.'s credibility because trial counsel never presented the judge with the actual reports containing L.T.'s prior inconsistent statements nor did counsel identify the person by name to whom the statements were made.

In our adversarial system of justice, a defendant's right to effective cross-examination is an essential safeguard of fact-finding accuracy. It is "the principal means by which the believability of a witness and the truth of their testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

This case was entirely dependent on the testimony of an eleven-year-old victim. Petitioner's right to the constitutional safeguards of a fair trial was denied by his attorney's failure to adequately comply with the guidelines set forth in La. Code Evid. Art. 613, towards impeachment of her credibility. When the victim denied making the prior inconsistent statements, counsel should have exposed her false testimony. Simply presenting the reports to the trial judge for his review would have made a significant difference. The judge may well have had a reasonable doubt as to Petitioner's guilt had laid the proper foundation for impeachment of L.T.'s testimony with her prior inconsistent statements.

Considering the inconsistencies in L.T.'s testimony and her denials of having made inconsistent statements, it is not difficult to imagine that the outcome of the verdict was "unreliable." Thus, Petitioner's convictions cannot stand.

c) Prior Investigation

Trial counsel was ineffective in failing to obtain reports from the Office of Community Services (OCS) regarding an investigation of complaints of physical abuse of the victim and her siblings, which led OCS officials to conduct random visits with the children at home and school between March and April of 2009.

"A lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)(holding that counsel's failure to review key documents corroborating defense witness's testimony constituted deficient performance); *Lord v. Wood*, 184 F.3d 1083, 1095-96 (9th Cir. 1999) (holding counsel's failure to call key witnesses whose testimony undermined the state's case constituted deficient performance).

The Office of Community Services (OCS) received a complaint sometime in March of 2009, alleging Petitioner physically abused the victim and her siblings (De'Shante, De'Quan and Brandale). The complaint led to an investigate where OCS conducted random visit to the children's home and school between March and May of 2009. Had Petitioner's attorney obtained the results of the OCS reports, counsel would have found there was no evidence of physical abuse. The reports would have cast doubt on the victim's subsequent allegations of sexual abuse.

The allegations of physical and sexual abuse did not come about until a month after the children were placed in the custody of their maternal grandmother, Goldie Turner, (Tr. p. 27), when their mother ("Tabatha") went to jail. (Tr. p. 52). Ms. Goldie contacted OCS caseworker, Katherine McConnell, regarding the children allegations. Ms. McConnell interviewed Ms. Goldie and reported:

> Ms. Turner stated that she was at home talking to her four grandchildren about what their life was like before they were placed in state custody in May. The children began telling her that Petitioner... was physically abusive towards them. The kids told her that Petitioner used to yell at them and hit them a lot. [L.T.] said there was something she thought she tell her about. Then [L.T.] told her that right before OCS took her, Petitioner would make her go in a room away from her siblings and make her have sex with him. [L.T.] said that Petitioner had sex with her 6 or 7 times.

See Ex. p. 36.

When Ms. McConnell interviewed the children, the victim alleged that Petitioner lured her in a room, took off her pants, held her down by her ankles, and raped her. The victim said she tried to fight Petitioner off, but "he would just push down her legs and hold them." (Ex. p. 36). In Ms. McConnell's report, she noted L.T. stated she wore a really big jacket to school, during this time, to hide the bruises around her wrists that were left as a result of Petitioner holding her down. (Ex. p. 36). L.T. also said Petitioner beat her siblings with curtain rods. Ibid.

De'Quan told Ms. McConnell that "Petitioner would put him and his siblings on their knees and hit them." (Ex. p. 37). Four-year-old Brandale reportedly told Ms. McConnell that Petitioner used to make them get on their knees and hit them with a pipe. (Ex. p. 38). Petitioner, however, denied the

allegations to OCS caseworker, Amber Wilkinson, but instead, told her the children's grandmother, Goldie, is making [L.T.] ... say that he raped her. (Ex. p. 39).

The trial court prohibited the attorneys from introducing or making reference to the children's allegation of physical abuse. The judge stated he was "disregarding all allusions or references in the interview to other crimes or bad acts by the defendant." (Tr. p. 70). The children's allegation of physical abuse, however, were relevant in light of the previous investigation by OCS officials between March and May of 2009; because OCS officials did not find any evidence of physical abuse. If there was any truth to the complaint of physical abuse, the OCS officials would have noticed marks, bruises or scars on the children body. Thus, trial counsel should have obtained the initial OCS reports which were exculpatory and relevant to impeach the victim's allegations of physical and sexual abuse.

The Confrontation Clause of the Sixth Amendment to the United States Constitution gives the defendant the right to impeach a witness for bias, interest, or corruption. See La. Code Evid. Art. 607(D)(1); *State v. Senegal*, 316 So.2d 124 (La.1975). The right to expose L.T.'s motivation for making unfounded allegations of physical and sexual abuse are both proper and important functions of the constitutionally protected right of cross-examination. *State v. Nash*, 475 So.2d 752, 755 (La.1985); *State v. Chester*, 724 So.2d 1276, 1286 (La.12/1/98), 528 U.S. 826, 120 S.Ct. 75, 145 L.Ed.2d 64 (1999). Even though the allegations of physical abuse contained in the OCS reports of June 17, 2009, (Ex. p. 35-42), may constitute "other crimes or bad acts" of the defendant, the judge could not arbitrarily deny him the right to use such evidence to impeach the victim's credibility regarding her unfounded allegations of sexual abuse.

The historical notes under paragraph (m) of La. Code Evid. Art. 607(D)(1) states that "[i]t is sometimes the case, in criminal cases, that an accused's constitutional right of confrontation militates in favor of admitting evidence arguably otherwise inadmissible under established rules. In such cases deviations from the rules stated in this Paragraph may be necessary." *Cf. Davis v. Alaska*, 415 U.S. 308,

94 S.Ct. 1105, 39 L.Ed.2d 347 (1978); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The failure of Petitioner's attorney to obtain the initial reports of the OCS investigation of physical abuse was objectively unreasonable and prejudicial to his confrontation rights. The fact that no reported evidence of physical abuse was found during the OCS investigation, is sufficient to undermine the victim's credibility regarding her subsequent claims of sexual abuse.

Had counsel obtain and presented the trial judge with the initial reports of the OCS investigation, the judge would have been incline to discredit the victim's allegations of sexual abuse. The fact that counsel did not obtain and introduce as impeachment evidence the initial OCS reports, prejudiced Petitioner's rights to confront and effectively cross-examine the victim's credibility. Other than the victim's missing hymen, there was no physical evidence (such as tears, lesions, scars, marks or bruises) to establish beyond a reasonable doubt that this nine-year girl was raped six or seven times. As such, counsel's deficient performance prejudiced Petitioner's constitutional rights and undermined confidence in the verdict. Thus, the court should reverse petitioner's convictions.

d) Subpoena Witnesses

Trial counsel also failed to call witnesses who were present during the times of the alleged offenses who were willing to testify that Petitioner could not have lured the victim in a room and rape her six times without their knowledge.

Petitioner has maintained that he did not sexually abuse his girlfriend's nine-year-old daughter (L.T.). Nor did he physically abuse L.T. De'Shante, De'Quan or Brandale. When Petitioner learned there was a warrant for his arrest for the rapes, he voluntarily went to the police station. He voluntarily waived his *Miranda* rights[8] and gave a statement to the police. The officer who conducted an interview with Petitioner noted Petitioner was "questioned as to if anything took place between himself and

8 See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[L.T.], Mr. Romero was adamant nothing took place." (Ex. p. 45).

The officer reported that:

> Mr. Romero stated he could not believe the child had said that about him, the only thing he can think of is Goldie must have told her to say that about him. When I asked about this Mr. Romero stated Tabitha's mother and (L.T.'s) grand-mother does not like him and she doesn't want him to be with (L.T.'s) mother.... The only other thing he can think is the [child's] boyfriend.... Mr. Romero said he couldn't believe that but he knows it is not him having sex with that child."

See Ex. p. 46.

When Petitioner was interviewed by OCS caseworker, Amber Wilkinson, on June 25, 2009, he again denied the allegations of physical and sexual abuse (Ex. p. 39). While Petitioner was awaiting trial in a prison facility, he sent numerous letters to his court-appointed attorneys.[9] (Ex. p. 55-74). In his letter to Mr. Melebeck, Petitioner asserted his innocence and stated "I did not do that crime, and I would like to know why I'm still being held in jail." (Ex. p. 55). He requested a speedy trial and to send him the State's discovery file so he could "see whats been said and where this supposedly have taken place, then I can inform you with the information on where I was at the time are how my relationship was with the victim, are why I believe these allegations was said against me." Ibid.

After Mr. Melebeck withdrew from the case and Mr. Rowe was reassigned to represent Petitioner, he provided Mr. Rowe with a list of witnesses he wanted subpoenaed to testify in his defense. (Ex. p. 59-60). Mr. Rowe then sent a letter to the Clerk of Court on June 13, 2011, requesting a subpoena be issued to the following people: Zilda Romero, Richard Brailey, Michael Romero, Amanda Duhon, Shawn Romero, Misty Blanchard, Candida Turner, and Tabatha Turner (Ex. p. 75-76). Mr. Rowe, however, did not call these witnesses to testify. Thus, Mr. Rowe's failure to call these witnesses "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052.

The testimony of Michael Romero[10] and his common-law wife, Amanda Duhon, would have

9 Mr. Melebeck was initially appointed to represent petitioner, but withdrew from the case due to a conflict of interest, and Mr. Rowe was assigned as petitioner's counsel.

10 Michael Romero is petitioner's brother.

impeached the victim's credibility regarding her allegations that petitioner lured her in a room and raped her "6 or 7 times while she was 9 years old," (Ex. p. 50), "for a period of 6 or 7 days," (Ex. p. 36), between April and May 13, 2009. L.T. reportedly told OCS caseworker, Kathryn McConnell, the incidents "would only happen when her mother ... was at work" and when "her mother checked herself into a drug rehab facility days before OCS became involved." (Ex. p. 36). However, Michael and Amanda would have testified they were staying at Petitioner's house and took care of the children while their mother was in drug rehab and sometimes when their mother was at work prior to the time she went in rehab. They would have testified that Petitioner could not have been alone with L.T. when they were babysitting them.

Petitioner received a letter from Ms. Duhon sometime after trial wherein she inquired about why his attorney did not call her to testify. She stated in her letter:

> "I was writing about why your lawyer didn't let me testify. I didn't even get a paper to go to court. I don't think he did a good job being a lawyer. If I would of got my chance to testify I would of told them that me and Michael was at your house everyday. I made sure that them kids did their homework, took a bath and I cooked everyday. When Tabatha went to Re-hab we was their. You never was alone with them girls. When she was in Re-hab on the weekends the boys went to their grandma's house and the girls went to there friends house. Even when Tabatha worked as an exotic dancer I was their. I made sure them kids got up for school and got on the bus. Well I hope I get my chance to testify in court. Well keep your head up."

See Ex. p. 77. Petitioner then contacted Ms. Duhon and asked her to provide him with a sworn affidavit which Ms. Duhon promptly provided. (Ex. p. 78-79).[11]

Ms. Duhon stated that she and Michael stayed at Petitioner's house and took care of L.T. and her siblings while their mother was in a drug rehabilitation facility. Ms. Duhon stated that she would sometimes come to Petitioner's house and take care of the children while their mother working at the strip club. She cooked for the children; made sure their schoolwork was completed; made them take their bath; woke them up for school; and made sure they got on the school bus.

11 Petitioner's brother, Michael Romero, just recently provided petitioner with an affidavit to confirm what Amanda stated in her affidavit. See Exhibit 18.

Ms. Duhon further noted in her affidavit that Petitioner's other brother, Shawn Romero, and Tabatha's sister, Candida Turner, came to Petitioner's house when Tabatha was in the rehab facility. Candida has taken care of L.T. and her siblings several times when their mother was a work.

Ms. Duhon made clear in her affidavit that Petitioner could not have lured L.T. in a room and rape her six times on six or seven occasions without her knowledge. If the children had been sexually or physically abused, Ms. Duhon would have noticed marks and bruises on the children body.

When L.T. testified at Petitioner's trial, she acknowledged Petitioner's "brother and his girlfriend" stayed at the house and "slept there sometimes, but they didn't live with us." (Tr. p. 23). L.T. also mentioned her "nanny" (Candida Turner) who would "sometimes" babysit the children "off and on" when their mother was at work. (Tr. p. 14). Moreover, L.T. testified that Petitioner's brother (Shawn Romero) was at the house during one of the alleged incidents (Tr. p. 17).

The state asked L.T. was anybody present in the house when the first and second incident took place. L.T. indicated "[m]y sister and my two brothers" were present in the living room at the time (Tr. p. 14 & 16).[12] She also testified that "my sister, my two brothers, Drey, and me," (Tr. p. 18) were at the house "another time" -- or the third time -- when petitioner allegedly raped her. (Tr. p. 17).

Petitioner told his attorney long before trial to subpoena Michael, Amanda, Shawn and Candida, because they were present at his house and could testify that Petitioner could not have lured L.T. in a room and rape her without their knowledge. Since Mr. Rowe did not call them to testify, L.T.'s testimony regarding their presence during the alleged offenses could have only created a negative inference against Petitioner. See ***State v. Barfield***, 81 So.3d 760, 772-73 (La.App. 3 Cir. 11/23/11) ("evidence under the control of a party and not produced by him was not produced because it would not have aided him.")

The other people on Petitioner's witness list would have provided valuable testimony in his

12 According to L.T., petitioner's brother (Sean Romero) was present during the second alleged incident. (Tr. p. 17).

behalf. For example, Petitioner's mother, Zilda Romero, would have testified that Tabatha's sister, Candida Turner, revealed that she was threaten by her mother, Goldie Turner, that if she (Candida) testified for Petitioner she would not have a place to stay.[13] Petitioner's mother and common-law husband, Richard Brailey, would have testified as character witnesses that Petitioner and Tabatha has stayed at their house with the children, and they have never seen Petitioner sexually or physically abuse the children.

Last, Petitioner's brother (Shawn) and his girlfriend, Misty Blanchard, would have testified as character witnesses that Petitioner has watched over Misty's children -- including her two daughters -- and they have never complained of any sexual or physical abuse by Petitioner.

Given the importance of the proposed testimony provided by Petitioner's witnesses, there is no logical reason for Mr. Rowe not calling witnesses to testify regarding the alleged incidents of physical and sexual abuse. Just because Petitioner's witnesses are family members does not justify a decision -- if that was counsel's reason -- not to call witnesses with potentially exculpatory information. See *Pavel v. Hollins*, 261 F.3d 210, 220 (2nd Cir. 2001)(counsel rendered ineffective assistance where he failed to call the defendant's mother at trial because "there [was] simply no suggestion in the record that there was any reason not to put [her] on the stand."); *Poindexter v. Booker*, 301 Fed.Appx. 522, 529 (6th Cir. 2008)(counsel's failure to call alibi witnesses because of their "close relationships with [petitioner]" was unreasonable "because alibi witnesses often have close relationships with the defendant"); *Bell v. Howes*, 757 F.Supp.2d 720, 737 (E.D. Mich. 2010)("[A] decision not to call an alibi witness based upon the alibi witness's close relationship with the defendant is not sound trial strategy because [ ] it is the nature of alibi witnesses that they typically have some sort of relationship with the defendant."); *Luna v. Cambra*, 306 F.3d 954, 958, 961 (9th Cir. 2002)(counsel provided ineffective assistance because of his failure to call defendant's sister and mother as alibi witnesses), amended by 306 F.3d 954

13 Tabatha also informed petitioner in letter that her mother "told me that if I still want to have anything to do with you that I will never see my kids again!!" (Ex. p. 52)

(9th Cir. 2002); and *Madrigal v. Yates*, 662 F.Supp.2d 1162, 1190 (C.D.Cal. 2009)(holding that counsel rendered ineffective assistance because he failed to call the petitioner's brother as an alibi witness, and noting that "the mere fact that [the witness] was a family member does not render [counsel's] failure to present his corroboration of Petitioner's alibi harmless").

The Supreme Court held that a criminal defendant has the right to a "meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Petitioner suffered substantial prejudice as a result of his counsel's failure to call his witnesses to testify in his defense. Thus, this court should reverse petitioner's convictions.

e) Right to Testify

Petitioner contends that his trial counsel was constitutionally ineffective in not allowing him to testify in his own defense after counsel refused to call any of his witnesses, and Petitioner insisted that he wanted to provide the court with a rational explanation for why the victim made the false accusation against him.

It is firmly established in American jurisprudence that a criminal defendant has a right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S.Ct. 2704, 2708-10, 97 L.Ed.2d 37 (1987). The Supreme Court emphasized that there is "no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case[.]" *Ferguson v. Georgia*, 365 U.S. 570, 582, 81 S.Ct. 756, 763, 5 L.Ed.2d 783 (1961). Rooted in the Fourteenth Amendment's guarantee of due process, the compulsory process clause of the Sixth Amendment, and as a necessary corollary to the Fifth Amendment's guarantee against self-

incrimination, this right to testify is clearly one of constitutional magnitude and import. *Rock*, 483 U.S. at 53 n. 10, 107 S.Ct. 2704; *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983)(defendant has the "ultimate authority to make certain fundamental decisions regarding the case, [such as] ... whether to ... testify in his or her own behalf.")

"It cannot be reasonable trial strategy for an attorney to not honor his client's decision to exercise his constitutional right to testify, not because the advice not to take the stand is unsound, but because counsel must in the end accede if the client will not abide by the advice." *United States v. Mullins*, 315 F.3d 449, 454 (5th Cir. 2002). "A defendant's personal constitutional right to testify truthfully in his own behalf may not be waived by counsel as a matter of trial strategy." *Id.*

At the close of the State's case, it was obvious that trial counsel was not going to call any of Petitioner's witnesses, so he told Mr. Rowe he wanted to testify. Mr. Rowe assured petitioner that he did not need to testify because the judge would not find him guilty based on the inconsistencies in the victim's testimony.[14] See e.g., *Pavel v. Hollins*, 261 F.3d 210, 217-18 (2nd Cir. 2001)(Pavel's attorney, Meltzer, "decided not to prepare a defense for Pavel solely because he was confident that, at the close of the prosecution's presentation of its evidence, the trial judge would grant Meltzer's motion to dismiss....").

Had Petitioner's testify in his defense, he would have testified that:

That he and the victim's mother, Tabatha Turner, were in a relationship for about two-and-a-half years prior to his arrest.

That Tabatha and her four children stayed with petitioner and he treated them with respect and was like a father to them.

That the children had never before complained that petitioner physically or sexually abused them.

That he voluntarily went to the police station soon as he learned about the warrant for his arrest

14 In fact, Mr. Rowe's trial strategy was made clear in a "brief statement" during opening statement to rely solely on "several inconsistencies in the testimony that will be given to today, some of which make the commission of this crime impossible, and we are certain that the Court will find that the defendant is not guilty." (Tr. p. 8).

(Ex. p. 45).

That he voluntarily waived his *Miranda* rights and gave a statement to the police (Ex. p. 45).

That he told the police officer that "nothing took place between himself and [L.T.](Ex. p. 45).

That he acknowledged the statement he gave to the police officer that "he could not believe the child had said that about him" and that "the only thing he can think of is Goldie must have told her to say that about him" because L.T.'s "grand-mother does not like him and she doesn't want him to be with [L.T.'s] mother" and that "[t]he only other thing he can think is the [child's] boyfriend" could have had sexual contact with L.T. (Ex. p. 46).

That he told OCS caseworker, Amber Wilkinson, "that he thinks that Goldie is making (L.T.] say that he raped her" and that "[h]e denied the allegations." (Ex. p. 40).

That his brother (Michael) and his girlfriend (Amanda) stayed at petitioner's house and took care of the children the entire time when their mother was in rehab and that his other brother, Shawn, also came to the house to visit.

That the children Aunt Candida stayed at Petitioner's house and took care of them when their mother was at work.

That there was no opportunity for Petitioner and L.T. to be alone in a room where he could have raped her six times.

That when Petitioner and Tabatha were confined in different facilities, while he was awaiting trial, they corresponded with each other. In one of Tabatha's letters, she mentioned that when she told her mother (Goldie) that she was corresponding with petitioner, Goldie told her that if she had anything more to do with petitioner that she (Tabatha) would not see her children again (Ex. p. 52).

That L.T. had a boyfriend, Damon Bessard, who petitioner suspected may have caused the trauma to L.T.'s vagina (Ex. p. 39)and that he made his suspicions known to his attorney in a letter prior to trial (Ex. p. 61-62)[15].

That between March and May of 2009, caseworkers from the Office of Community Services (OCS) conducted random visits with the children at home and at school to investigate a complaint of physical abuse that someone made sometime in March of 2009. The OCS investigators obviously did not find any evidence of physical abuse (such as marks and bruises) on the children body at the time. Had the OCS found any sign of physical or sexual abuse during their investigation, they would have taken protective actions at the time.[16] The fact that OCS did not find any such evidence at the time cast doubt on the victim's subsequent allegations of sexual abuse.

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15 Petitioner also informed his attorney prior to trial that Tabatha had expressed concern that L.T. is not a virgin due to inappropriate behavior with another boy. (Ex. p. 61-62).

16 About a month after the children were placed in the custody of their grandmother (Goldie Turner), they made allegations that petitioner hit them with curtain rods and a pipe. (Ex. p. 36 & 38).

Petitioner's proposed testimony would suffice to create a reasonable doubt regarding his guilty. The entire trial was no more than a "credibility contests" with the victim being the only witness to testify against Petitioner. Although her testimony was riddled with contradictions and shown to be inconsistent with her prior statements, the trial judge had no choice but to accept her testimony because it stood uncontradicted. In any event, the prosecution's case against petitioner was not so weak as to excuse counsel's failure to call him to testify in his own defense.

Petitioner had a constitutional right to explain his version as to why the victim would make false accusations against him. The verdict may very well have been different, had the judge heard from the petitioner himself. See *Rock v. Arkansas*, 483 U.S. at 52, 107 S.Ct. at 2709 (often in criminal cases, "the most important witness for the defense ... is the defendant himself."). Since trial counsel refused to call Petitioner's witnesses who would have provided exculpatory information, he was the only other witness who could have attempted to persuade the judge that he did not rape L.T. Indeed, "[w]here the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." *United States v. Walker*, 772 F.2d 1172, 1179 (5th Cir. 1985). Under these circumstances, there is more than a reasonable probability that the result of the verdict would have been different. See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

In *State v. Hampton*, 818 So.2d 720 (La. 2002), the Louisiana Supreme Court reiterated its conclusion on original hearing that "whenever a defendant is prevented from testifying after unequivocally expressing his desire to do so, the defendant has been denied a fundamental right and suffers prejudice.

Thus, the court should reverse his convictions.

III. REASONABLE

Insufficiency Of The Evidence.

Petitioner asserts there was insufficient evidence to support his conviction[17], resulting in a violation of his constitutional right to due process as interpreted by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979).

In *Jackson*, the Supreme Court held that the due process clause guarantees a right to be free from criminal conviction "except upon sufficient proof–defined as evidence necessary to convince a trier of fact beyond a reasonable doubt as to the existence of every element of the crime." *Jackson*, 443 U.S. at 316. A habeas petitioner is entitled to relief under *Jackson* "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

The only evidence offered in this case was the internal inconsistent and conflicting testimony of the alleged victim (L.T.).

L.T. gave inconsistent statements about the alleged rapes occurring while her mother was in rehab. When Katherine McConnell, caseworker, interviewed L.T., L.T. claimed Petitioner raped her while her mother was in rehab. During her child advocacy center interview on June 24, 2009, however, L.T. stated Petitioner did not touch her while her mother was in rehab. At trial, L.T. retracted to her earlier position that something happened while her mother was in rehab, and interjected she did not recall telling anyone nothing happened while her mother was in rehab.

L.T. gave inconsistent statements regarding the last rape. Dr. Myriam Hutchinson, coroner, who examined L.T. testified L.T. denied telling anyone that the last rape occurred on May 13, 2009. L.T.'s mother, T.T., testified Petitioner was not alone L.T. between May 8, 2009 until May 13, 2009, when she was arrested.

17 This issue was raised on direct appeal and exhausted in the Louisiana Supreme Court.

L.T. gave inconsistent statements about the time period in which the alleged rapes occurred. When L.T. first told her grandmother that she had been raped, L.T. said she was raped while her mother was "stripping in the bars." On June 17, 2009, L.T. told her caseworker, Ms. McDonnell, that she was raped while her mother was in rehab, just days before OCS became involved, and that she was raped six or seven times over a period of six to seven days. On June 24, 2009, L.T. told the child advocacy interviewer, Ms. Joseph, the rapes occurred while her mom was at work, not while she was in rehab, and that one of the rapes occurred a few months before OCS took her and her siblings away. At trial, L.T. denied telling anyone that the rapes occurred right before OCS took her and her siblings. She also denied telling anyone that the rapes occurred over a period of six to seven days.

L.T. testified inconsistently about physical details of the alleged rape. she told her grandmother that she did not bleed. L.T., however, testified that she did notice blood after one of the alleged rapes and denied telling anyone there was no blood. During her June 24, 2009 interview with the child advocacy worker, L.T. consistently called her vagina her "flower." L.T., however, called her vagina her "cat" and denied ever calling it her "flower."

Finally, the physical evidence was not conclusive of rape. There were no tears, no lesions and no scars. Dr. Hutchison did note that L.T.'s hymen was not present and that the absence of a hymen can be consistent with vaginal/penal penetration or malformation. Dr. Hutchison clarified that L.T. had "no hymen" rather than a "damaged hymen." Dr. Hutchison further explained that some women are born without a hymen and she could not tell if L.T. was one of these women. Dr. Hutchison also testified that hymens can be injured or completely lost through certain activities, such as playing and sports activities.

Although credibility determinations are normally reserved for the fact finder, credibility determinations may be erroneous when a witness's story "is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story..." *State in the Interest of*

T.W., 09-532 (La.App. 3 Cir. 10/01/09), 21 So.3d 465, 468.

L.T.'s inconsistencies are especially troubling because they occurred so closely together. The version of events L.T. gave her caseworker differed substantially from the version of events she gave to the child advocacy interviewer. The victim's inconsistencies was the only evidence offered to support the verdict which was not supported by the physical evidence. The evidence was clearly insufficient to convict Petitioner of the six counts of aggravated rape.

IV. REASONABLE

Cumulative Error.

Petitioner urge the Court to consider the accumulation of errors.

The United States Supreme Court has held that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. ***Chambers v. Mississippi***, 410 U.S. 284, 298, 302-03, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)(combined effect of individual errors "denied [*Chambers*] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"); see also ***Taylor v. Kentucky***, 436 U.S. 478, 487 n. 15, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)("[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness...."). A cumulative error claim allows for relief when, although no single error independently warrants reversal or rises to the level of constitutional violation, the effect of multiple errors caused the defendant to suffer undue prejudice. ***Chambers***, 410 U.S. at 290 n. 3, 93 S.Ct. 1038.

Petitioner has maintained his innocence and insist that he did not rape L.T. Before Petitioner was sentenced to life in prison, he reminded the judge that, "I'm being falsely accused of a crime that I did not do." (Sent.Hrg.p. 3). He demanded to know "under what circumstances am I being convicted?" *Ibid.* "Why am I being convicted? Under what evidence? What reasons?" *Ibid.*

Petitioner suggest that his counsel's ineffectiveness contributed to the verdict in this case. The

record makes clear "there was a breakdown in the adversarial process" which rendered "the adversary process itself presumptively unreliable." *United States* v. *Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). See *Wright v. Van Patten*, 552 U.S. 120, 128 S.Ct. 743, 746 n. 1, 169 L.Ed.2d 583 (2008)(per curiam)(recognizing that *Cronic*'s presumption of prejudice applies "when 'there [is] a breakdown in the adversarial process,' such that 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing' " (quoting *Cronic*, 466 U.S. at 662, 659, 104 S.Ct. 2039)). Considering the cumulative effect and prejudicial impact of all the errors committed during Petitioner's trial, this Court should apply *Cronic*'s "presumption of prejudice" standard and reverse Petitioner's convictions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

(Signature) Diondre Romero
DIONDRÉ ROMERO

Date: **February 11, 2019**