

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

NO. 18-9134

FILED

NOV 15 2018

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

JOE CLOPTON,  
PETITIONER,

VS.

LORIE DAVIS. DIRECTOR  
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.

JOE CLOPTON  
379 FM 2972 W.  
RUSK, TEXAS  
75785

## QUESTIONS PRESENTED

1. WHY WAS THE MEDICAL RECORDS NEVER INTRODUCED INTO EVIDENCE?
2. WHY WAS PETITIONER DENIED EFFECTIVE ASSIST. OF, - COUNSEL? A VIOLATION OF SIXTH AMENDMENT RIGHT.
3. WHY WASN'T C.P.S RECORDS ENTERED INTO EVIDENCE?
4. WHY WASN'T C.P.S SOCIAL WORKER BRUNG IN TO - TESTIFY FOR DEFENSE
5. WHY NO OBJECTIONS BY DEFENSE. (PLAIN ERROR)
6. WHETHER AMENDING THE INDICTMENT WITH - OUT GOING TO GRAND JURY, VIOLATED PETITIONERS DUE PROCESS RIGHT. PROTECTED BY THE 5th, 14th AMENDMENT U.S. CONST.
7. WHY THE LESSER INCLUDED OFFENCE "WITH THE SAME, ELEMENTS OF CHARGE. "DOUBLE Jeopardy"
8. WHETHER TRIAL ATTORNEY PUT ON A DEFENSE ..
9. WHETHER MS BLAKES TALKS WITH ASHLEY MOTIVATED HER TO MAKE FALSE ALLEGATIONS AND OUTCRY.
10. WHETHER THE BACK CHILD SUPPORT OWED BY MS. RICHIEY PLAYED A BIG PART IN THE FABRICATED STORY OF SEXUAL ASSAULT.

## QUESTIONS PRESENTED CONT.

11. WHETHER A BRADY VIOLATION OCCURRED.  
( GOVERNMENT'S PRESERVATION DUTIES )
12. WHETHER A PLEA OF NOLO CONTENDERE " ADVISED BY COUNSEL" WITH THE PRESUMPTION OF DEFERRED PROBATION WAS ACTUALLY HELPFUL STRATEGY FOR DEFENSE, WHEN PETITIONER IS - INNOCENCE AND A JURY TRIAL ALONG WITH MEDICAL EXAMS AND RECORDS THAT CONTRADICTS THESE ALLEGATIONS. WOULD PROVE HIS INNOCENCE.
13. WHETHER GOVERNMENT / STATE FAILED TO MEET ITS BURDEN OF PROOF CONCERNING THE ELEMENTS IN THIS CASE.
14. WHETHER CREDIBLE AND COMPELLING EVIDENCE WAS CALLED INTO SERIOUS DOUBT EVIDENCE LINKING PETITIONER TO CRIME.

## LIST OF PARTIES

JOE CLOPTON,

PETITIONER,

v.

S

S

S

S

S

No. 316-CV-1407-B

LORIE DAVIS, DIRECTOR

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,  
RESPONDENT.

### STATES DIRECT TESTIMONY PARTIES

ASHLEY CLOPTON (DAUGHTER) COMPLAINTANT

EDNA BLAKE (AUNT)

### DEFENSE DIRECT TESTIMONY PARTIES

TERRY MASTERS, (Cousin)

WENDY BALDOCK, (FRIEND)

DEBORAH CLARK, (EX-GIRLFRIEND)

BRENDA KIMBERLY, (MOTHER)

LEESA BRISTOW, (COMMON LAW WIFE)

JOE CLOPTON SR, (FATHER)

DALE CLOPTON (UNCLE)

### DEFENSE'S DIRECT EVIDENCE (EXPERT WITNESS)

D.R. WILLIAM FLYNN

LIST OF PARTIES CONT.

JUDGE HONORABLE GARY STEPHENS, "JUDGE SITTING IN FOR \_\_\_\_\_  
JUDGE MIKE SNIPES (HELD IN DALLAS, DALLAS COUNTY, TEXAS. \_\_\_\_\_

ATTORNEY FOR PLAINTIFF, STATE OF TEXAS \_\_\_\_\_

MARCI CURRY, ASSISTANT CRIMINAL DISTRICT ATTORNEY \_\_\_\_\_

S.B.O.T NO. 24047316 \_\_\_\_\_

ATTORNEY FOR THE DEFENDANT (PETITIONER) MR JOE CLOPTON \_\_\_\_\_

MARK NANCARROW (ATTORNEY) \_\_\_\_\_

KATHERINE A. DREW (ATTORNEY)  
ASSISTANT PUBLIC DEFENDER  
CHIEF, APPELLATE DIVISION

RE: JOE CLOPTON V. THE STATE OF TEXAS

TRIAL COURT NO: F08-62601-Y

APPELLATE COURT NO: 05-11-00762-CR

STATES ATTORNEY ON APPEAL

CRAIG WATKINS DALLAS COUNTY DISTRICT ATTORNEYS OFFICE  
DALLAS, TEXAS \_\_\_\_\_

## TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED	1, 2
PARTIES	3, 4
TABLE OF AUTHORITIES	5, 6
DECISIONS BELOW	7, 8
JURISDICTION	9.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	10, 11
BASIS FOR FEDERAL JURISDICTION	12
REASON FOR GRANTING THE WRIT	13-23
A. CONFLICTS WITH DECISIONS OF OTHER COURTS	13-23
B. IMPORTANCE OF THE QUESTION PRESENTED	13-23
CONCLUSION	24.

## APPENDIX EXIBITS

DECISIONS OF THE UNITED STATES COURT OF APPEALS	B.
ORDER OF THE UNITED STATES COURT OF APPEALS DENYING, REHEARING	B.
ORDER OF THE UNITED STATES DISTRICT COURT	A
ORIGINAL INDICTMENT	C
AMENDED INDICTMENT	D
AFFIDAVIT OF FACTS	E
MEDICAL RECORDS / EXAMS	F
STATEMENT FROM MICHAEL AND BRANDON CLOPTON (SONS)	G

## TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL AMENDMENTS 5th, 6th, AND  
14th. / TEX. CONST. ART 1 § 10 / TEX. CRIM. CODE. PROC. ART 2810,  
2811

## CASES INVOLVED

### SEC. A

BANKS v. THALER, 583 F.3d 295, 311

CALIFORNIA v. TROMBETTA

CONE v. BELL 556 U.S. 449, 469 (2009)

KYLES v. WHITLEY, 514 U.S. 419, 433 (1995)

STRICKLER v. GREENE 527 U.S. 263, 281-282 (1999)

U.S. v. BAGLEY, 473 U.S. 667, 682 (1985)

### SEC. B

POINTER v. TEX 380 U.S. 400, 403 (1965)

### SEC. C

BAGLEY, 473 U.S. AT 676 / U.S. v. BAGLEY 473 U.S. 667, 674, 105 Sct. 3375.

87 L.Ed

BRADY v. MARYLAND 373 U.S. 83, 87, 83 Sct. 1194, 10 L.Ed 2d 215 (1963)

CHAMBERS v. MISSISSIPPI 410 U.S. 284, 302 (1973)

BIGLIO v. UNITED STATES 405 U.S. 150, 153, 155, 92 Sct. 763 L.Ed 2d 104

U.S. v. O'BRIEN, 560 U.S. 218, 224 (2010)

IN RE WINDSHIP, 397 U.S. 358, 364 (1970)

## TABLE OF AUTHORITIES CONT.

### SEC. D

HEAD v. STATE, 299 S.W.3d, 414, 438 (TEX. APP. - HOUSTON [14th DIST.] 2009,  
Pet. Ref'd

RINEY v. STATE 28, S.W.3d 561, 566 (TEX. CRIM. APP. 2000)

UNITED STATES v. BROWN, 995 F.2d 1493 (10th Cir 1993)

UNITED STATES v. CABRERA-TERRAN, 168 F.3d 141, 143 (5th Cir 1999)

UNITED STATES v. DIESCH, 20 F.3d 139 (5th Cir 1994)

UNITED STATES v. ELDRINGTON 726 F.2d 1029, 1031 (5th Cir 1984)

UNITED STATES v. GAYLE 967 F.2d 483 (11th Cir 1992)

UNITED STATES v. ITALIANO, 837 F.2d 1480 (11th Cir 1988)

UNITED STATES v. KING, 587 F.2d 956, 963 (9th Cir 1978)

UNITED STATES v. KURKA 818 F.2d 1427, 1431 (9th Cir 1987)

UNITED STATES v. MORALES-ROSALES, 838 F.2d 1359, 1361-62 (5th Cir 1988)

UNITED STATES v. SPRUILL 118 F.3d 221, 227 (4th Cir 1997)

### SEC. E

BOWER v. QUARTERMAN 497 F.3d 459, 467 (5th Cir 2007)

BRYANT v. SCOTT, 28 F.3d 1411, 1415 (5th Cir 1994)

CANNEDY v. ADAMS 706 F.3d 1148, 1161 (9th Cir 2013)

FOSTER v. LOCKHART, 9 F.3d 722, 726 (8th Cir 1993)

JONES v. WOOD, 114 F.3d 1002 (9th Cir 1997)

NIXON v. NEWSOME, 888 F.2d 112 (11th Cir 1989)

RICHTER v. HICKMAN, 578 F.3d 944 (CA 9 2009)

SANDERS v. RATELLE, 21 F.3d 1446, 1456 (9th Cir 1994)

STRICKLAND v. WASHINGTON 466 U.S. 668, 694, 104 Sct. 2052, 2068, 80 L.Ed 2d 674

CONCLUSION U.S. v. JASIN 215 F. SUPP. 2d 552 (Ed. Pa. 2002)

## DECISIONS BELOW

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS  
OF OPINIONS IN THE CASE

ON 3-21-2012, ORDER ISSUED: JOINT MOTION TO ABATE;  
ORDER GRANTED JOINT MOTION TO ABATE

AMENDED INDICTMENT (NOT IN THE RECORD)

ON MAY 9<sup>th</sup> 2012 ORDER ISSUED AMENDED INDICTMENT  
RETRIEVED FROM THE PROSECUTOR AND TRIAL COUNSEL

ISSUED OCTOBER 10<sup>th</sup> 2012 MEMORANDUM OPINION,  
AFFIRM

ON FEBRUARY 24, 2014 CAUSE NO: W08-62601-Y (A)  
PER CURIAM ORDER TRIAL JUDGE ENTERED A TIMELY ORDER  
DESIGNATING ISSUES

WRIT OF HABEAS CORPUS 11.07 TR.CT. NO: W08-62601-  
-Y (A) 1st. DENIED WITHOUT WRITTEN ORDER

WRIT OF HABEAS CORPUS 11.07 TR. CT. NO: W08-62601-  
-Y (B) 2ND. DENIED WITHOUT WRITTEN ORDER

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT  
OF TEXAS ( DALLAS DIVISION ) C.O.A DENIED  
WRIT OF HABEAS CORPUS BE DISMISSED WITH PREJUDICE AS,  
BARRED BY THE ONE -YEAR LIMITATION PERIOD § 28 U.S.C.,  
§ 2244 ( D ) ON SEPTEMBER 22<sup>ND</sup> 2017

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT - ,  
NO: 17-11386 ORDER C.O.A DENIED

..... DECISIONS BELOW CONT. .....

NO: 17-11386 PER CURIAM IT IS ORDERED THAT THE ,—  
APPELLANTS MOTION FOR LEAVE TO FILE OUT OF TIME ,—  
THE MOTION FOR RECONSIDERATION IS GRANTED \_\_\_\_\_

A MEMBER OF THIS PANEL PREVIOUSLY DENIED APPELLANTS —,  
MOTION FOR A C.O.A. — THE PANEL HAS CONSIDERED , —  
APPELLANTS MOTION FOR RECONSIDERATION.

IT IS FURTHER ORDERED THAT THE MOTION IS DENIED

## JURISDICTIONAL GROUNDS

THE JUDGMENT OF THE UNITED STATES COURT OF APPEAL,  
FOR THE FIFTH CIRCUIT WAS ENTERED ON AUGUST 20, 2018.  
AN ORDER DENYING A PETITION FOR REHEARING/RECONSIDERATION  
WAS ENTERED ON SEPTEMBER 28, 2018, AND A COPY OF THAT  
ORDER IS ATTACHED AS APPENDIX B TO THIS PETITION. ( )

JURISDICTION IS CONFERRED BY U. S. C. 1254

### CONSTITUTIONAL PROVISIONS:

TEX. CONST. ART 1 § 10

U.S. CONST. AMEND V, VI

U.S. CONST. AMEND XIV

## STATEMENT OF CASE

PETITIONER (JOE CLOPTON) WAS CHARGED WITH CONTINUOUS SEXUAL ABUSE OF A CHILD UNDER FOURTEEN. PETITIONER WAIVED A JURY AND PLEADED NO CONTEST TO THE CHARGED OFFENSE. BUT THE COURT FOUND HIM GUILTY OF THE LESSER INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT OF A CHILD UNDER FOURTEEN. ON JUNE 6, 2011, THE COURT SENTENCED PETITIONER TO 25 YEARS IMPRISONMENT. THE JUDGEMENT AND SENTENCE WERE AFFIRMED ON DIRECT APPEAL BY BY THE FIFTH DISTRICT COURT OF APPEALS. SEE CLOPTON V. STATE, — NO. 05-11-00762-CR, 2012 TEX.

PRIOR TO THESE FALSA ALLEGATIONS AND TRIAL PROCEDURES, PETITIONER (JOE CLOPTON) WAS LIVING IN HOUSTON, TEXAS, WITH WIFE ROBIN "MOTHER, OF ASHLEY, MICHEAL, BRANDON". ROBIN SUFFERED FROM DRUG ADDICTION AND ALCOHOL IN 2000. SHE WAS ARRESTED FOR CHILD ABAND/ENDANGERMENT. ON THE FOLLOWING DAY CHILD PROTECTIVE SERVICE CAME TO MY HOME TO VISIT ME. AND ADVISED ME STRONGLY TO DIVORCE ROBIN IN ORDER TO KEEP FULL CUSTODY OF MY THREE CHILDREN. IN 2001 THE DIVORCE WAS FINALIZED. ROBIN WAS SENT TO PRISON FOR APPROX 3 YEARS AND UPON HER RETURN HOME WANTED VISITATION RIGHTS WITH OUR 3-CHILDREN, ASHLEY, MICHEAL, BRANDON. ROBIN WAS GIVEN STRICT VISITATION RULES ALSO SHE WAS TO PAY CHILD SUPPORT FOR OUR 3-CHILDREN. ROBIN PAID \$150.00 (ONE TIME PAYMENT) CHILD SUPPORT AND REFUSED TO PAY ANY MORE CHILD SUPPORT. THIS IS WHEN ALL, THE CALLS TO CHILD PROTECTIVE SERVICES STARTED. C.P.S. WOULD COME TO OUR HOME AND SPEAK WITH THE CHILDREN AND PETITIONER. NEVER WAS THERE ANY COMPLAINTS SAID. AS THESE STORIES WERE ALL FABRICATED FROM THE START. ON OR ABOUT BETWEEN 2007-2008 ASHLEY WANTED TO GO LIVE WITH HER MOTHER, AND AFTER I SAID NO AND WANTED ASHLEY TO STAY LIVING WITH HER 2-BROTHERS AND I. DID ALL HELL BREAK LOOSE. ASHLEY BECAME ANGRY AT ME AND REQUESTED

## STATEMENT OF CASE (CONT.)

TO MOVE IN WITH HER AUNT. I WAS TRYING TO WORK AND AND SUPPORT MY FAMILY, WHEN FINALLY ASHLEY'S AUNT EDNA TALKED ME INTO LETTING HER GO LIVE IN DALLAS WITH HER. AFTER A SHORT PERIOD OF TIME ASHLEY AGAIN STARTS IN WITH GOING TO LIVE WITH HER MOTHER. AGAIN I SAID NO. AND I MADE THE STATEMENT OF ROBIN WAS BEHIND \$20,000<sup>00</sup> PLUS, ON CHILD SUPPORT AND I WAS GOING TO TAKE HER TO COURT (ROBIN WOULD NOT STOP THE DRUGS) THIS IS WHEN THESE FABRICATED STORIES CAME OUT. EDNA I LEARNED LATER HAD BEEN SEXUAL ASST. BY HER STEP DAD I TRULY BELIEVE THIS IS WHERE ASHLEY COMES UP WITH THESE ALLEGATIONS AGAINST ME. (PETITIONER) THE NIGHT I SPOKE WITH ASHLEY AND SAID NO TO HER MOVING IN WITH HER MOTHER. SHE TOLD ME "I DO WHAT THE FUCK I WANT TO DO" I WAS LATER "ABOUT FOUR DAYS LATER" ARRESTED I WAS BONDED OUT. "SPENT APPROX 3 YEARS OUT ON BOND", MADE ALL MY COURT DATES AND WAS LED TO BELIEVE ALL THESE CHARGES WOULD BE DISMISSED "DUE TO MEDICAL RECORDS" SHOWS NO ASSAULT EVER TAKEN PLACE. THEN DUE TO ATTORNEY FEES OF \$10,000<sup>00</sup> COULD NOT BE MET. I WAS DEPRIVED OF A PAID ATTORNEY WHO WAS PUTTING UP A DEFENSE FOR MY CASE. AND GIVEN A COURT APPOINTED "PLEA OUT ATTORNEY WHO COHURST, AND LED ME TO PLEA OUT, "NOLO CONTENDRE" WITH THE PRESUMPTION OF PROBATION FOR A CHARGE I DID NOT COMMIT.

## BASIS FOR FEDERAL JURISDICTION

THIS CASE RAISES A QUESTION OF INTERPRETATION OF THE FIFTH, —  
SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES, —  
CONSTITUTION. THE DISTRICT COURT HAD JURISDICTION UNDER THE  
GENERAL FEDERAL QUESTION JURISDICTION CONFERRED BY 28 U.S.C. 1331(a)

[ RULE 14.1 (g) (i) SUPREME COURT RULES ]

# ARGUMENT

## "Reason For Granting The Writ"

### A. CONFLICTS WITH DECISIONS OF OTHER COURTS:

GOVERNMENT'S PRESERVATION DUTIES. THE GOVERNMENT HAS A LIMITED, DUTY TO PRESERVE EVIDENCE. IN CALIFORNIA V. TROMBETTA, THE SUPREME COURT HELD THAT THE CONSTITUTION REQUIRES THE GOVERNMENT TO PRESERVE EVIDENCE "THAT MIGHT BE EXPECTED TO PLAY A, SIGNIFICANT ROLE IN THE SUSPECT'S DEFENSE"

GOVERNMENT'S CONSTITUTIONAL DUTIES: THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THE GOVERNMENT TO DISCLOSE SPECIFIC, TYPES OF EVIDENCE TO DEFENDANTS. IN UNITED STATES V. BAGLEY THE COURT HELD THAT THE GOVERNMENT'S DUTY UNDER BRADY ARISES REGARDLESS OF WHETHER THE DEFENDANT MAKES THE REQUEST FOR THE EVIDENCE. 473 U.S. 667, 682 (1985) (PLURALITY OPINION) (PROSECUTION'S CONSTITUTIONAL DUTY TO DISCLOSE FAVORABLE EVIDENCE GOVERNED BY MATERIALITY STANDARD AND NOT LIMITED TO SITUATIONS WHERE DEFENDANT REQUEST FAVORABLE EVIDENCE); *id.* at 685 (WHITE, J., CONCURRING IN PART AND, CONCURRING IN JUDGMENT); See also Kyles V. Whitley, 514-U.S. 419, 433 (1995).

[“[E]RGARDLESS OF REQUEST, FAVORABLE EVIDENCE IS MATERIAL..”) FAVORABLE EVIDENCE IS MATERIAL TO PETITIONER IF THERE IS A “REASONABLE PROBABILITY” THAT THE DISCLOSURE OF THE EVIDENCE WOULD HAVE CHANGED THE OUTCOME OF THE PROCEEDINGS. STRICKLER V. GREENE 527 U.S. 263, 281-82 (1999); see also CONE V. BELL, 556 U.S. 449, 469 (2009) (“[W]HEN THE STATE WITHHOLDS FROM A, CRIMINAL DEFENDANT EVIDENCE THAT IS MATERIAL TO HIS GUILT OR PUNISHMENT, IT VIOLATES HIS RIGHT TO DUE PROCESS OF, LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.”).

IMPORTANCE OF THE QUESTION PRESENTED  
FOR SEC. A.

THE EVIDENCE IN PETITIONERS CASE (MEDICAL RECORDS, C.P.S. CHILD PROTECTIVE SERVICES RECORDS, D.V.D FROM, DALLAS CHILDREN'S ADVOCACY CENTER. IN THIS CASE THE (1) FORENSIC INTERVIEWER WAS MS. COURTNEY GOLDEN (IN WHICH HAD BEEN TERMINATED, FOR HER BEING "INCOMPETENT") WAS NOT INTRODUCED INTO EVIDENCE. (5<sup>th</sup> Cir 2009) BANKS, V. THALER, 583 F.3d 295, 311 (CERTAIN TRANSCRIPTS OF POLICE, INTERVIEWS WITH GOVERNMENT'S WITNESS FAVORABLE TO ACCUSED BECAUSE THEY COULD IMPEACH WITNESS TESTIMONY) AS IN PETITIONERS CASE. ASHLEY CLOPTON WAS COHURST ALONG BY FORENSIC INTERVIEWER WHAT TO, WHAT NOT TO SAY. (LEADING QUESTIONS) THAT OF NOT HER OWN. . . THE STATE FULL WELL KNOWS PETITIONER HAD PROOF OF INNOCENCE IN THE MEDICAL RECORDS IN WHICH, CONTRADICTS THESE FALSE ALLEGATIONS OF SEXUAL ASSAULT. NO TRAMA NOR EVIDENCE IN REPORT SUPPORTS THESE FALSE ALLEGATIONS. THIS CASE WAS WEAK FROM THE START. NEARSAY WAS THE ONLY EVIDENCE IN THIS CASE ALONG WITH THE STATES WITNESS EDNA BLAKE (AUNT) IN WHICH IN HER SITUATION OF BEING A VICTIM IN SEXUAL ASSAULT WAS ALSO COHURSTING (ASHLEY CLOPTON) PLAINTIFF IN HOW SHE WAS ABUSED. C.P.S RECORDS WILL REFLECT THAT EVERY VISIT MADE TO INVESTIGATE THESE FALSE ALLEGATIONS "NEVER ONCE WAS THIS REPORTED". ASHLEY WAS ALWAYS AROUND FAMILY NEVER DID SHE COMPLAIN OF ANY ABUSE. AGAIN, THIS IS A SITUATION OF A CHILD WANTING TO GO LIVE WITH HER MOTHER AND HAVE MORE FREEDOM TO DO WHAT SHE WANTED TO DO WITHOUT ADULT SUPERVISION. AS HER MOTHER WAS MORE PERSUASIVE TO GET HER TO COME LIVE WITH HER AND THE FACT THAT HER FATHER PETITIONER (JOE CLOPTON) WAS TAKING RUBIN (CHILD'S MOTHER) TO COURT FOR \$20,000 BACK CHILD SUPPORT. THAT LED TO THIS ERRONEOUS CHARGE

## ARGUMENT'S CONT.

SECTION B. PETITIONER ARGUES THAT IT WAS NOT AFFORDED THE RIGHT TO CROSS-EXAMINE STATES WITNESS. THIS WOULD OF GIVEN PETITIONER THE CHANCE TO ASK EDNA BLAKE ABOUT HER PAST SEXUAL ASSAULT TO COMPARE WITH THE STATEMENTS AND TESTIMONY OF ASHLEY CLOPTON (PLAINTIFF) STATE OBJECTED TO EVERY ATTEMPT TO CROSS-EXAM. THIS BEING A VIOLATION OF THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE. PROVIDES A CRIMINAL DEFENDANT THE RIGHT TO DIRECTLY CONFRONT ADVERSE WITNESSES, THE RIGHT TO CROSS-EXAMINE ADVERSE WITNESSES. THE SIXTH AMENDMENT PROVIDES IN PERTINENT PART THAT "[i]N ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT . . . TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM." U.S. CONST. AMEND. VI. THIS RIGHT EXTENDS TO STATE PROSECUTIONS THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. SEE Pointer v. Tex 380 U.S. 400, 403 (1965)

IMPORTANCE OF THE QUESTION PRESENTED  
FOR SEC. B.

PETITIONER STATES THIS RAISES A QUESTION OF IMPORTANCE  
EDNA BLAKES TESTIMONY WAS INCONSISTANT AT TRIAL AND THAT  
CROSS-EXAMINE WAS OF GREAT IMPORTANCE AS WELL WITH ASHLEY.  
SHE HAD TESTIFIED "THAT WHEN SHE TOLD A LIE SOMETIMES,  
IT COULD TURN INTO A MESS. R.R. Vol 2 of 5 PG. 57 L. 1-6.

ALSO STATED IN R.R. VOL. 2 of 5 PG 57 L. 14-15 ASHLEY STATES  
I'LL DO WHAT THE FUCK I WANT TO DO  $\downarrow$  TO HER DAD WHEN HE  
DENIES HER PERMISSION TO LIVE WITH HER MOTHER.  
THERE IS NO ABSOLUTELY NO CORROBORATING EVIDENCE OF ANY SORT  
TO CORROBORATE ASHLEY'S STATEMENTS. IN FACT, ITS THE CONTRARY

EDNA TESTIFIED THAT SHE IS OR WAS THE VICTIM OF ABUSE  
HERSelf R.R. VOL 2 of 5 PG. 44 L. 5-14 AND HAD DISCUSSED THAT,  
WITH ASHLEY PRIOR TO THESE ALLEGATIONS COMING UP. "THAT IS,  
EASILY SOMETHING THAT COULD INFLUENCE, AND BE SUGGESTED  
TO ASHLEY IN THE EVENT SHE WAS UPSET WITH HER DAD ABOUT  
NOT BEING ABLE TO MOVE IN WITH HER MOM.

R.R. Vol 2 of 5 PG 45 L. 16-21 DEFENSE EXPERT WITNESS

DR. FLYNN HAS TESTIFIED THAT, IN SITUATIONS, THERE'S A,  
CERTAIN PERCENTAGE OF CASES THAT HAVE BEEN DETERMINED TO BE,  
FALSE ALLEGATIONS. AND THAT NUMBERS SKYROCKETS WHEN THERE  
ARE ISSUES ABOUT CUSTODY, CHILDSUPPORT AND WERE, IN FACT  
HERE IN THIS CASE.

"FOOTNOTE: R.R. IS REPORTERS RECORD FOR COURT OF APPEALS NO.  
TRIAL COURT CAUSE NO. F08-62601  
VOL 2 of 5

## ARGUMENT CONT.

### C. PROOF ISSUES

PROVING ELEMENTS BEYOND A REASONABLE DOUBT. UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, THE PROSECUTION, IS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT EVERY ELEMENT OF THE CRIME WITH WHICH A DEFENDANT IS CHARGED. THE REASONABLE DOUBT REQUIREMENTS APPLIES TO ELEMENTS THAT DISTINGUISH A MORE SERIOUS CRIME FROM A LESS SERIOUS ONE, AS WELL AS TO THOSE ELEMENTS THAT DISTINGUISH CRIMINAL FROM NON-CRIMINAL CONDUCT. SEE *IN RE WINDSHIP*, 397 U.S. 358, 364 (1970) (HOLDING THAT THE GOVERNMENT MUST PROVE "EVERY FACT NECESSARY TO CONSTITUTE THE CRIME "BEYOND A REASONABLE DOUBT"); See Also *US v. O'BRIEN*, 560 U.S. 218, 224 (2010) Also See THE HOLDING IN *BRADY v. MARYLAND*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) SEE ALSO, *US. v. BAGLEY*, 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985) See Also *GIGLIO v. UNITED STATES*, 405 U.S. 150 153-55, 92 Sct. 763, 31 L.Ed.2d 104 (1972); *BAGLEY*, 473 U.S. at 676

"THE GOVERNMENT'S FAILURE TO MEET ITS BURDEN OF PROOF RESULTS IN THE DEFENDANT'S ACQUITTAL AT TRIAL, OR REVERSAL OF THE CONVICTION ON APPEAL."

ADDITIONALLY, THE SUPREME COURT HAS HELD THAT "WHERE, CONSTITUTIONAL RIGHTS DIRECTLY AFFECTING THE ASCERTAINMENT OF GUILT ARE IMPLICATED, THE HEARSAY RULE MAY NOT BE APPLIED MECHANISTICALLY TO DEFEAT THE ENDS OF JUSTICE." *CHAMBERS v. MISSISSIPPI*, 410 U.S. 284, 302 (1973) (DISCUSSING THE DUE PROCESS RIGHT TO A FAIR TRIAL).

## IMPORTANCE OF QUESTIONS PRESENTED FOR SEC. C

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THE MEDICAL EXAM CONDUCTED SHOWED NO EVIDENCE OF ANY TRAUMA TO COMPLAINANT'S BODY CONSISTENT, — WITH ALLEGATION OF SEXUAL ASSAULT. . [R.R.V. 2 of 5 PG 58-59]

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DR. FLYNN, A PRACTICING PSYCHOLOGIST LICENSED, IN THE STATE OF TEXAS SINCE 1978 TESTIFIED WHILE, — FALSE ALLEGATIONS OF SEXUAL ABUSE ARE RARE — WHERE CUSTODY PLACEMENT OR VISITATION DISPUTES EXIST, THE PERCENTAGE OF FALSE ALLEGATIONS DRAMATICALLY INCREASE TO AROUND THIRTY-THREE ("33%") IN ADDITION, TO AROUND SEVENTEEN PERCENT ("17%") OF THE —, ALLEGATIONS BEING INDETERMINATE. (R.R. 7-9)

NOTE: R.R. (REPORTERS RECORD)

NOTABLY DR. FLYNN FOUND THE COMPLAINANTS INTERVIEW TO BE INDETERMINATE.

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## ARGUMENT CONT.

### D. INDICTMENT IMPROPERLY AMENDED

THE FIFTH CIRCUIT HAS HELD IN UNITED STATES V. CABRERA - TERRAN, 168 F.3d 141, 143 (5th Cir. 1999) THAT THE FAILURE, OF THE INDICTMENT TO CHARGE EACH AND EVERY ESSENTIAL, ELEMENT OF AN OFFENCE IS A SERIOUS CONSTITUTIONAL VIOLATION. SEE ALSO UNITED STATES V. MORALES - ROSALES, 838 F.2d 1359, 1361-62 (5th Cir. 1988) THAT CRIMINAL INFORMATION . . ., DOES NOT CHARGE . . . THE SECOND ELEMENT OF THE OFFENCE - THE FAILURE OF AN INFORMATION TO CHARGE AN OFFENCE IS A JURISDICTIONAL DEFECT THAT IS NOT WAIVED BY A GUILTY PLEA. SEE ALSO UNITED STATES V. ELDORINGT 726 F.2d. 1029 1031 (5th Cir. 1984) : ALSO SEE UNITED STATES V. KING, 587 F.2d 956, 963 (9th Cir 1978) Also See UNITED STATES V. KURKA 818 F.2d 1427, 1431 (9th Cir 1987) IT IS NOT AMENABLE TO HARMLESS ERROR REVIEW. SEE UNITED STATES V. SPRUILL, 118 F.3d 721, 727 (4th Cir 1997) SEE ALSO, UNITED STATES V. BROWN, 995 F.2d 1493 (10th Cir 1993) ("FAILURE OF THE INDICTMENT TO ALLEGE ALL THE ESSENTIAL ELEMENTS OF AN OFFENCE . . . IS A JURISDICTIONAL DEFECT REQUIRING DISMISSAL . . . THE ABSENCE OF PREJUDICE TO THE DEFENDANT DOES NOT CURE WHAT IS NECESSARILY A, SUBSTANTIVE, JURISDICTIONAL DEFECT IN THE INDICTMENT") UNITED STATES V. GAYLE, 967 F.2d 483 (11th Cir. 1992) — ("A CRIMINAL CONVICTION WILL NOT BE UPHELD IF THE INDICTMENT UPON WHICH IT IS BASED DOES NOT SET FORTH THE ESSENTIAL ELEMENTS OF THE OFFENSE"); CITING UNITED STATES V. ITALIANO, 837 F.2d 1480 (11th Cir. 1988) UNITED STATES V. DEISCH, 20 F.3d 139 (5th Cir 1994) ("TO BE SUFFICIENT, AN INDICTMENT MUST ALLEGE EACH MATERIAL ELEMENT OF THE OFFENCE; IF IT DOES NOT, IT FAILS TO CHARGE THAT OFFENSE").

## IMPORTANCE OF QUESTIONS PRESENTED FOR SEC. D

THE TRIAL COURT ACQUITTED PETITIONER OF THE CONTINUOUS SEXUAL ASSAULT CHARGE AND ONLY FOUND PETITIONER GUILTY OF THE LESSER INCLUDED AGGRAVATED SEXUAL ASSAULT OF A CHILD, WHICH HAS THE SAME ESSENTIAL ELEMENTS OF THE ACQUITTED CHARGE OF THE ORIGINAL INDICTMENT

IN ORDER TO PROPERLY AMEND AN INDICTMENT, IT MUST BE AUTHORIZED BY A MOTION AND OR ORDER TO DO SO... SEE RINEY V. STATE 28 S.W.3d 561, 566 (Tex. Crim. App. 2000); SEE ALSO TEX. CODE CRIM. PROC. ARTS. 2810, 2811.

REGARDLESS THE METHOD EMPLOYED, THE LAW REQUIRES THAT THE AMENDMENT BE MEMORIALIZED IN A WRITTEN DOCUMENT. HEAD V. STATE, 299 S.W.3d 414, 438 (Tex. App.—Houston [14th Dist.] 2009, Pet. Ref'd) (SUMMARIZING CASES, REQUIRING WRITTEN DOCUMENT).

"FURTHERMORE THERE IS NO RECORD AS TO WHAT AMENDMENT. WERE MADE TO INDICTMENT").

ADDITIONAL EVIDENCE COULD HAVE PRODUCED ADDITIONAL DOUBT AS TO THE ALLEGATIONS AGAINST PETITIONER. THUS IS NOT POSSIBLE TO CONCLUDE THAT THESE ERRORS DID NOT CONTRIBUTE TO THE CONVICTION AND PUNISHMENT OF PETITIONER.

THE INDICTMENT AS CONTAINED IN THE CLERK'S RECORD, HOWEVER, REFLECTS NO ALTERATIONS TO THE FACE OF THE INDICTMENT BY PEN AND INK. (CR1:5). NOR DOES THE CLERK'S RECORD, CONTAIN A SEPARATE MOTION AND OR ORDER SETTING OUT THE AMENDMENT TO THE INDICTMENT.

## ARGUMENT CONT.

sec. E. PETITIONER DENIED EFFECTIVE ASSISTANCE OF COUNSEL. "VIOLATION OF HIS SIX AMENDMENT OF THE UNITED STATES CONSTITUTION."

THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION GUARANTEES THE RIGHT TO EFFECTIVE COUNSEL. STRICKLAND v. WASHINGTON 466 U.S. 668, 694, 104 S. CT. 2052, 2068, 80 L. ED 2nd 674 (1984). A DEFENDANT IS ENTITLED TO A NEW TRIAL IF HE CAN SHOW (1) THAT THE TRIAL COUNSEL'S PERFORMANCE WAS DEFECTIVE; AND (2) A REASONABLE PROBABILITY THAT, BUT FOR THE DEFICIENT PERFORMANCE, THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT. A PETITIONER CAN MEET THIS STANDARD BY SHOWING THAT COUNSEL FAILED TO CONDUCT ADEQUATE PRE-TRIAL INVESTIGATION.

JONES v. WOOD, 114 F.3d. 1002 (9th Cir. 1997) "BEFORE AN ATTORNEY CAN MAKE A REASONABLE STRATEGIC AGAINST PURSUING A CERTAIN LINE OF INVESTIGATION, THE ATTORNEY MUST OBTAIN THE FACTS NEEDED TO MAKE THE DECISION." FOSTER v. LOCKHART, 9 F.3d 722 726 (8th Cir. 1993) See Also. SANDERS v. RATELLE, 21 F.3d 1446, 1456 (9th Cir 1994).

HEART OF EFFECTIVE ASSISTANCE IS PREPARATION

RICHTER v. HICKMAN, 578 F. 3d 944 (CA 9 2009).

REINHARDT, CIRCUIT JUDGE: TO NOT PREPARE IS THE GREATEST OF CRIMES; TO BE PREPARED BEFOREHAND FOR ANY CONTINGENCY IS THE GREATEST OF VIRTUES. (CONT. NEXT PAGE)

## ARGUMENT E. CONT.

— SUN TZU, THE ART OF WAR 83 —  
(SAMUEL B. GRIFFITH TRANS. OXFORD UNIVERSITY PRESS  
1963 )

AT THE HEART OF AN EFFECTIVE DEFENSE IS AN ADEQUATE INVESTIGATION. WITHOUT SUFFICIENT INVESTIGATION A DEFENSE ATTORNEY, NO MATTER HOW INTELLIGENT OR, PERSUASIVE IN COURT RENDERS DEFICIENT PERFORMANCE AND JEOPARDIZES HIS CLIENT'S DEFENSE.

[...] ALTHOUGH IT WAS APPARENT THAT AN ISSUE CRITICAL TO THE OUT-COME COULD BEST BE RESOLVED THROUGH THE PRESENTATION OF FORENSIC EVIDENCE, COUNSEL FAILED AT EACH STAGE OF THE CASE TO CONSULT WITH A FORENSIC EXPERT OF ANY TYPE AND THUS FAILED TO CONDUCT THE RUDIMENTARY INVESTIGATION NECESSARY IN ORDER TO (1) DECIDE UPON THE NATURE OF THE DEFENSE TO BE PRESENTED, (2) DETERMINE BEFORE TRIAL WHAT EVIDENCE HE SHOULD OFFER, (3) PREPARE IN ADVANCE HOW TO COUNTER DAMAGING EXPERT TESTIMONY THAT MIGHT BE INTRODUCED BY THE PROSECUTION, AND (4) EFFECTIVELY CROSS-EXAMINE AND REBUT THE PROSECUTION'S EXPERT WITNESSES ONCE THEY DID TESTIFY DURING THE COURSE OF THE TRIAL. THERE WAS IN FACT NO STRATEGIC REASON FOR COUNSEL'S FAILURE TO DO SO. AS IT TURNED OUT, THESE REPEATED FAILURES TO INVESTIGATE, WERE PREJUDICIAL: AVAILABLE FORENSIC TESTIMONY WOULD HAVE CONTRADICTED THE PROSECUTION'S EXPLANATION OF THE EVENTS THAT TRANSPired AND WOULD HAVE STRONGLY SUPPORTED THE DEFENSE'S VERSION. { WRIT GRANTED? }

PETITIONER ALSO CONCURS WITH THIS ABOVE. PETITIONER WAS NEVER AFFORDED EXPERT FORENSIC TESTIMONY THAT OF THE MEDICAL EXAMINERS IN WHICH MEDICAL RECORDS PROVES HIS INNOCENCE

## IMPORTANCE OF QUESTIONS PRESENTED FOR SEC. E

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IN PETITIONER'S CASE IT IS UNMISTAKABLY CLEAR AND EVIDENT THAT HIS SIXTH AMENDMENT U.S. CONSTITUTIONAL RIGHT WERE VIOLATED WHEN COUNSEL FAILED TO PROPERLY INVESTIGATE THE MEDICAL EXAMS REPORT STATING "NO TRAUMA TO THE BODY" PETITIONER IS BEING CHARGED WITH AGGRAVATED SEXUAL —, ASSAULT OF A CHILD. MED. EXAMS CONTRADICT THE FALSE, ALLEGATIONS. "WHY DID THE DEFENSE COUNSEL IGNOR THIS, EXTREMELY IMPORTANT AND FORENSIC EVIDENCE TO PUT UP A DEFENSE FOR PETITIONER. THIS HAS CAUSED HARM AND HAS, ESTABLISHED PREJUDICE TO PETITIONER. A VIOLATION OF HIS, FIFTH, SIXTH AND FOURTEENTH U.S. CONSTITUTIONAL RIGHT. . . . COUNSEL FAILED TO SUBPOENA FORENSIC EXPERT FOR TESTIMONY FOR DEFENSE. ALONG WITH C.P.S. "CHILD PROTECTIVE SERVICES" RECORD / C.P.S. CASE WORKER. SEE: BOWER v. QUARTERMAN 497 F.3d. 459, 467 (5th Cir. 2007) C.P.S RECORDS WOULD OF PROVED NOTHING WAS EVER REPORTED OF SEXUAL ASSAULT OR ANY, COMPLAINT OF SUCH. OR ANY KIND OF ABUSE TAKING PLACE. COUNSEL FAILED TO PUT UP ANY KIND OF DEFENSE HE ONLY WANTED PETITIONER TO SIGN FOR A PLEA OF NO LO CONTENRE IN ORDER FOR THE COURT TO BE ABLE TO GIVE PROBATION TO PETITIONER. WHY, COULD NOT PETITIONER TAKE PROBATION TO A CHARGE HE DID NOT COMMIT? COUNSEL FAILED TO IMPEACH WITNESSES WITH —, INCONSISTANT STATEMENT MADE BEFORE TRIAL, AND SEVERAL OTHER DISCREPANCIES MADE BEFORE, DURING AND AFTER THE FINAL JUDGMENT. CANNEDY v. ADAMS 706 F.3d 1148, 1161 — (9th Cir. 2013); NIXON v. NEWSOME, 888 F.2d 112 — (11th Cir 1989) SEE: BRYANT v. SCOTT, 28 F.3d 1411, 1415, — (5th Cir 1994) AS IN THIS CASE WHERE THE PETITIONER HAS PROVEN, PRONG ONE OF THE STRICKLAND TEST. AT A BARE MINIMUM, A LAWYER MUST "INTERVIEW POTENTIAL WITNESSES AND . . . MAKE AN INDEPENDANT INVESTIGATION OF THE FACTS AND CIRCUMSTANCES IN THE CASE!" PETITIONER'S COUNSEL FAILED TO DO SO. DEFENSE COUNSEL BREACHED HIS DUTY TO INVESTIGATE ISSUES.

## CONCLUSION

FOR THE FOREGOING REASONS, AND AS IN THE CASE OF; \_\_\_\_\_  
U.S. v. JASIN, 215 F. SUPP. 2d 552 (E.D.Pa 2002) TRIAL COUNSEL  
WAS INEFFECTIVE BECAUSE HE INEXPLICABLY FAILED TO INTERVIEW AND CALL  
AT TRIAL A NUMBER OF FACT WITNESSES PETITIONER TOLD HIM WOULD BE, -  
HELPFUL TO HIS DEFENSE. LIKEWISE FAILED TO SEEK OUT EXPERT WITNESSES,  
AS IN "Medical Forensic Medical Examiner" THAT WOULD OF CHANGED  
THE OUTCOME OF THE TRIAL AND PROVEN PETITIONERS INNOCENCE. \_\_\_\_\_

CERTIORARI SHOULD BE GRANTED IN THIS CASE.