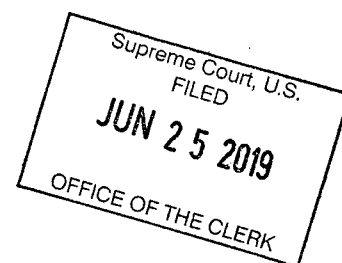


No. _____

19-5022

ORIGINAL

IN THE
SUPREME COURT
OF THE UNITED STATES



BRIAN K. BANKS
Appellant

VERSUS

STATE OF LOUISIANA
Appellee(s)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

DEFENDANT'S WRIT APPLICATION AND SUPPORTING MEMORANDUM OF LAW

Respectfully Submitted
Brian Banks, Inmate #719323
Pro-Se Litigant
Main Prison West,
Louisiana State Penitentiary
Angola, La. 70712

QUESTIONS PRESENTED

I. Did the Louisiana Supreme Court Error, when it allowed the Fifth Circuit Court of Appeals to contradict its own prior rulings by overruling the District Court's decision to not disallow the prosecution to present inadmissible 404(B) evidence to the trier of fact?

II. Did inadmissible 404(B) evidence, prejudice the defendant, and contributed to the violation of his Constitutional Right to a fair and impartial jury trial, by allowing the trier of fact to convict the defendant, not on the evidence of the crime charged, but because the non-relevant evidence depicted him as a bad man?

LIST OF PARTIES

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

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

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I. Conflicting Decisions:

A. Did the Louisiana Supreme Court Error, when it allowed the Fifth Circuit Court of Appeals to contradict its own prior rulings by overruling the District Court's decision to not disallow the prosecution to present inadmissible 404(B) evidence to the trier of fact? [Question 1]

The Fifth Circuit's own prior rulings confirm that the Trial Court Judge did not abuse his discretion. One of the Judges dissented.

1. The Fifth Circuit follows no State Precedents
2. Relevance Outweighed
3. One of These Factors Must Be at Issue

B. Did inadmissible 404(B) evidence, prejudice the defendant, and contributed to the violation of his Constitutional Right to a fair and impartial jury trial, by allowing the trier of fact to convict the defendant, not on the evidence of the crime charged, but because the non-relevant evidence depicted him as a bad man? [question 2]

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TABLE OF AUTHORITIES CITED

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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

☐ For cases from federal courts:

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

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

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

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

☒ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix E to the petition and is NO. 2018-KO-0586

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

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

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

JURISDICTION

☐ For cases from **federal courts**:

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

☐ No petition for rehearing was timely filed in my case.

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

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

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was March 25, 2019.
A copy of that decision appears at Appendix E. NO. 2018-KO-0586

☐ 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. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This conviction was obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Specifically, Mr. Banks was denied the right to a fair and impartial jury trial, when the State of Louisiana (in contradiction of its own state law jurisprudence), upheld an erroneous ruling by the Fifth Circuit Court of Appeals. The Fifth Circuit Court held (Judge Wicker dissenting), that the Honorable Judge Grefer, abused his discretion in denying the State's petition to introduce 404(B) extrinsic evidence to the trier of fact.

NOTICE OF PRO-SE FILING

The Petitioner Mr. Banks, request that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972): Mr. Banks is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court. Therefore, he should not be held to the same stringent standards as those of a trained attorney.

STATEMENT OF THE CASE

On November 12, 2015, Brian Banks, herein referred to as "Petitioner," was indicted on one count of Aggravated Rape of a Child Under Age Thirteen in violation of La. R.S. 14:42.¹ Petitioner plead not guilty. A year and a half later, On April 13, 2016, 13 days before his trial date, the State filed a "Notice of Intent to Introduce Evidence of Similar Crimes, Wrongs, and /or Acts in Sex Offense Cases Pursuant to Louisiana Code of Evidence Article 404(B), or in the Alternative, Pursuant to Louisiana Code of Evidence Article 412.2, or in the Alternative, Pursuant to *Res Gestae*. Such Motion was filed under seal, and therein the State argued that the Petitioner's prior acts of Physical abuse of the victim were admissible as other crimes evidence to put the rape into its proper context and to explain the victim's delayed reporting of the rape. Defendant filed an Objection to State's La. C.E. Article 404(B), 412.2 Evidence and *Res Gestae* on April 15, 2016. On April 20, 2016, the Trial Court Judge denied the State's Motion in part, holding that... "*any alleged other wrongs or other bad acts that took place during the course of the alleged incident itself, I do believe those are part of the res gestae.*" But, he also determined that apart from that, it was not possible to determine relevance due to the vagueness of a time frame. The State sought writs. On April 22, the State file to the Fifth Circuit Court of Appeals, and on the same day, the State's writ was granted.

The Fifth Circuit, in a 2-1 decision, overturned the district court decision, stating that the alleged prior acts of physical abuse were relevant to establish the defendant's opportunity, plan, and preparation to commit the alleged rape, and stop the victim from reporting it due to fear, and that the district Court Judge, abuse his discretion by excluding the evidence. On April 27th, the Trial Court granted the petitioner's request for a continuance and defendant's motion for stay in the proceedings due to his intent to seek writs for review to the Louisiana Supreme Court. The Louisiana Supreme Court, upheld the 5th Circuit Courts' decision without given an opinion. Trial was then set for August 30th.

On September 1, 2016, the presiding Judge, the Honorable Judge Stephen C. Grefer, halted the Jury deliberations after only a couple of hours, and declared a mistrial, due to the jury's deadlock. The Judge then polled the jury (after the declaration of the mistrial). Eight jurors voted to acquit the petitioner, four to convict. The second trial began on Feb, 6 2017. On Feb 8, 2017, the defendant was found guilty by a unanimous verdict. The defendant appealed.

Having raised the issue of the use of the 404(B) to all of the lower courts pretrial, the defendant now seeks a review of his claim on the merits to the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Supreme Court of Louisiana, clearly erred when it upheld the Fifth Circuit Court's decision to overturn the District Court's ruling to limit the State's use of 404(B) evidence.

1. The State of Louisiana, violated the petitioner's 6th and 14th Amendment constitutional right to a fair and impartial jury trial when it contradicted its own precedence concerning admissibility of 404(b) evidence and the use of the 404(b) statute; and allowed the State to essentially, use the 404(B) evidence, to paint the petitioner as a bad person. The petitioner believes, that this 'unfounded labeling' of him, was a contributing factor in his first trial ending in a hung jury, and his subsequent conviction. The petitioner contends, that this smear tactic, was used by the State as a silent element of the crime charged; an unfair advantage that the State did not have to prove beyond a reasonable doubt.

The State of Louisiana, has a plethora of examples in case law jurisprudence, regarding it's position concerning the use of the 404(B) rule of law. With respect to the fact that each case is different, its views are, some would say, somewhat conservative on the subject; meaning that the lower courts in the state, seldom deviate from the prescribed Code of Evidence, and the factors enumerated in the 404(b) article when determining what constitutes admissible evidence.

In the current case, the petitioner was charged and found guilty of aggravated rape of his own ten year old daughter. A charge in which he continues to confess his innocence. A charge that carries a heavy stench of prejudice and bias just from the thought of such a thing. With absolutely no proof of evidence from a medical examination to prove a crime of rape, and with only two weeks left to trial, the State file a motion to the district court, with intent to inflame the inherent biases and prejudices of the jury, with false claims of physical and psychological abuse supposedly perpetrated by the defendant. The rules of admissible evidence in 404(B), were put in place to prevent just such a thing from happening. The Trial Court Judge, viewed and weighed the evidence, and made the proper ruling; a ruling made in all fairness to the defendant, and to the State. The Trial Court Judge, disallowed in part, the States request to use 404(B). Holding that...in essence, those things alleged to have happened

holding that... in essence, those things alleged to have happened outside of... or years prior to the alleged incident, or irrelevant. Only the claims of physical abuse alleged to have happened during the course of the alleged incident for which the defendant was being charged, were admissible. With no proof of evidence at all, the State sought writs to the Fifth Circuit. Ruling against its own circuit's precedence, the Fifth Circuit charged The Trial Court Judge with abuse of discretion, and overruled his decision to not to allow the State to use allegations of physical abuse as be use as 404(b) evidence.

The petitioner contends, that this was a gross injustice perpetrated on the defendant. He believes that the shear magnitude and propensity for inflammatory bias due to the nature of the charge itself, should have offered the defendant every available statutory protection to help shield him against an unfair an impartial jury trial. Instead, the petitioner believes that his fate was sealed, before the doors of the jury box ever swung open. The Higher Courts, clearly favored the State and the accuser. In it's one page written disposition in granting the State's request to overrule the District Court Judge's decision, The Fifth Circuit Court, referred to the accuser as "The Victim," five times¹; insinuating that the defendant's guilt is a foregone conclusion. The petitioner believes that this is an indication of a bias decision given by the Fifth Circuit, not a fair an impartial one. This is also a violation of the Judges Canon:3(4).

The Higher Courts, denied the petitioner the protection of 404(B); and at the same time, allow the State to abuse and misuse the same Statute to convict him. To state to the jury, that the accused physically and mentally "terrorized"the accuser for years (for the sole purpose of raping her later in life)², without having to prove any of it, was grossly unfair to the accused. The district Court Judge tried to prevent it. The dissenting Circuit Court Judge, agreed with his decision. The Higher courts removed all safeguards put in place under Federal and State Legislative Rules of Evidence, to prevent the State from prosecuting the accused with such evidence.

1 See exhibit #

2 See Exhibit#

ARGUMENT

It is the petitioners' contention, that the Supreme Court of Louisiana, erred when it upheld the 5th circuit court's ruling to reverse the district court's sound discretion to limit the State's use of 404(b) in his particular case.

The trial court judge properly denied the State's motion to allow the alleged "prior acts" evidence of abuse. The Trial Judge properly ruled that the alleged incidents were too far removed (in regards to time) from the supposed rape, and that the alleged prior bad acts, did not fall into any of the enumerated categories in La CE 404(b); which is required in and of the statute itself, and well established in case law jurisprudence in the State of Louisiana. In addition, The State's Supreme Court, has fought rigorously in the past, as well as in recent cases, to uphold the very same position taken by the trial court judge that they are now (for some odd reason) opposing. The State argued that the list is not exhaustive; however, the precedence of the 5th circuit has held in *State v. Merritt*:

"Several other statutory and jurisprudential rules also play a role in determining the admissibility of such evidence. **First**, one of the factors listed in Article 404(b) 'must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible.'"877 So.2d 1079, 04-204 La.App. 5 Cir. 6/29/04.

Second, the state is required to prove the defendant committed these other acts by clear and convincing evidence. *Id.*; *State v. Davis*, 449 So.2d 466 (La.1984).

Third, even if independently relevant, the evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. La. C.E. art. 403.

And finally, the requirements set forth in *State v. Prieur*, 277So.2d 126 (La.1973) must be met. thereunder, the state must, within a reasonable time before trial, provide written notice of its intent to use other acts or crimes evidence and describe these acts in sufficient detail. The state must show the evidence is neither repetitive nor cumulative, and is not being introduced to show the defendant is of bad character."

La. art. 404(b) states: (1) Except as provide in Art. 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, for such purposes, or when it relates to conduct

that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

To determine the admissibility of other crimes evidence, the State is only required to make a showing, which can include live testimony, but may include police reports and prior transcripts. *State v. Brown*, 2001-0230 (La.App.4 Cir. 2/28/01), 782 So.2d 136, writ denied, 2001-0884 (La. 6/29/01), 794 So.2d 811. Hearsay evidence is sufficient to meet the Prieur standard for a hearing. *State v. Scales*, 93-2003, (La.5/22/95), 655 So.2d 1326, 1330, cert. denied, *Scales v. Louisiana*, 516 U.S. 1050, 116 S.Ct. 716, 133 L.Ed.2d 670 (1996). Furthermore, the Louisiana Supreme Court in *State v. Lee*, 05-2098, (La. 1/16/08), 976 So.2d 109, 125, cert. Denied, 76 USLW 3655, 129 S.Ct. 143, 172 L.Ed.2d 39 (2008), held:

Generally, courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. However, the State may introduce evidence of other crimes if the State establishes an independent and relevant reason, i.e., to show motive, opportunity, intent, or preparation, or when the of the act or transaction that is the subject of the present proceeding. La.Code Evid. Ann. art. 404(b)(1). Nonetheless, the State must provide the defendant with notice and a hearing before trial that it intends to offer prior crimes evidence. *State v. Prieur*, 277 So.2d 126, 130 (La.1973). Additionally, the State must prove the defendant committed the other acts. La.Code Evid. Ann. art. 1104; *Huddleston v. United States*, 485 U.S. 681, 690, 108 S.Ct. 1496, 1501-1502, 99 L.Ed.2d 771 (1988); *State v. Crawford*, 95-1352 (La.App. 3 Cir. 4/3/96), 679 So.2d 1379. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue, and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *State v. Hatcher*, 372 So.2d 1024, 1033 (La.1979); *State v. Jackson*, 352 So.2d 195, 196 (La.1977); *State v. Ledet*, 345 So.2d 474 (La.1977). However, the jurisprudence has established an exception to the general inadmissibility of other crimes evidence to include evidence that shows *modus operandi*, particularly when the *modus operandi* employed by the defendant in both the charged and the uncharged offenses is so peculiarly distinctive one must logically say they are the work of the same person. See e.g., *State v. Code*, 627 So.2d 1373, 1381 (La.1993) (other crimes evidence admissible where they show similar distinctive handcuff ligature, overkill, predominant use of a knife, and need for domination and control of the victims to the extent of moving them from room to room). Lastly, the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *Hatchet*, 372 So.2d at 1033.

The probative value of these alleged bad acts, do not go to prove any material fact in this case that is substantially outweighed by its prejudicial effect. Additionally, the alleged prior bad acts, are not *res gestae*. The State introduced nothing that constitutes an integral part in any way to the perpetration of an aggravated rape. Furthermore, the State's use of the case... *State v. Holley*, to illustrate similarities, was off point. Under *State v. Holley*, there were previous investigations by Parish Social Workers, not just the statements of the alleged victim. Additionally, in *Holley*, the defendant lived with the victim. The victim did not report the rape, until the defendant moved out. In the present case, as previously stated, the petitioner did not live with the accuser on the date of the alleged incident. The petitioner had been separate and divorced from the accuser's mother since 2010. The physical abuse supposedly took place between 2010-2012. Due to the divorce, the petitioner only had alternate weekend visitation rights during that time. Therefore, either the accuser made up this story, or the mother was complicit in her silence of all of the "stabblings" and supposed "terrorizing" alleged by the State that went on for two years...every other weekend mind you.

Furthermore, the Fifth Circuit erred in ruling that the Trial Court abused its discretion. The Trial Court had a hearing, the Trial Court reviewed and examined the evidence and ruled on its admissibility of the 404(b) evidence, and made a sound determination. Pursuant to LSA-C.E. art. 404(b)(1), that decision should not have been disturbed absent abuse of discretion ¹. And according to the dissenting Circuit court Judge (Wicker), the Judge did not abuse his discretion.

The alleged claims of physical abuse had nothing to do with the supposed rape. The only reason the State wanted to introduce this 404(b) evidence, was to "bootstrap a case together using an incomplete prior offense and an incomplete charged offense to reinforce each other, each providing the basis of an inference that completes the other." The result was a win for the prosecution; and the complete destruction of an innocent man's life.

¹*State v. Merritt*, 04-204 (La.App.5th Cir. 6/29/04), 877 So.2d 1079, 1085, writ denied, 2004-1849 (La. 11/24/04), 888 So.2d 228.

REASONS FOR GRANTING THE PETITION

in accordance with this Court's Rule X(1), § (b) and (c), Mr. Banks presents for his reasons for granting this writ application that:

The State Court of last resort (Louisiana Supreme Court), decided an important federal question regarding the probative and prejudicial effect of the use of 404(B) extrinsic evidence. The Supreme Court's decision to uphold the Lower courts ruling, conflicts with decisions of this State's own previous rulings on the same exact issue. As a result of the State of Louisiana's decision, the prosecution, in its opening statements to the jury, portrayed the petitioner (who had no criminal history), as a pathological, methodical, violent, child raping predator. The long established rule forbids the prosecution, unless and until the accused gives evidence of his good character, from initially introducing evidence of the bad character of the accused, including evidence of his other criminal acts. Accordingly, the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character¹. The State offered nothing by way of evidence but the testimony of the accuser. The only reason the State wanted to introduce this 404(b) evidence, was to...

"bootstrap a case together using an incomplete prior offense and an incomplete charged offense to reinforce each other, each providing the basis of an inference that completes the other."²

The result was a win for the prosecution; and the complete destruction of an innocent man's life.

"Due process requires extreme vigilance against the contamination of a criminal trial with cheap and mean character slander, and against the conviction of a citizen for improper reasons."

A review of the record will show that there is no evidence to prove the crime for which the petitioner was charged and convicted. But the record contains so much emphasis upon prejudicial testimony relating to other alleged crimes as to make the fairness of the trial highly unlikely.

¹Citing McCormick on Evidence, s 190 (Cleary ed. 1972); Wigmore on Evidence, ss 55, 57 (3d Ed. 1940).

² 582 F.2d 898, U.S.v. Beechum, (C.A.5 (Tex.) 1978)

Conflicting Decisions

First, the Fifth Circuit's decision to overrule the District Court Judge's ruling, conflicts with it's own circuits' precedents concerning the admissibility of 404(b) evidence. In *State v. Jackson*,³ The Fifth Circuit held that:

"Evidence of other acts is allowed to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.'LSA-C.E. art. 404(B)(1) One of these factors must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible."

This is exactly the rule of law the Trial Court Judge held in his decision to deny the State of its request to use 404(b). One of the Fifth Circuit court Judges dissented (Wicker), holding that: "The Judge did not abuse his discretion." ⁴

Also, this is exactly what the Louisiana Supreme Court has held in *State v. Sutfield*:

"...The responsibility of the trial court is greater than that of merely determining whether the particular evidence if other crimes does or does not fit in one of the approved classes. The underlying policy of protecting the accused against unfair prejudice demands that (1) before the evidence is admitted at all, the court must determine that there is clear and convincing evidence if the commission if the other crime and of defendant's connection therewith; and (2) the trial judge must balance all the pertinent factors and exclude the other crimes evidence, even if independently relevant, when its probative value is out weighed by its prejudicial effect."
354 So.2d 1334,(1978)

No Mechanical Solution is Offered

Even with my limited understanding of the complexities of the law on the subject of 404(b), it is plain to see that this has been one of those "kick the can down the road issues." I believe that the dynamics of this current case offers a prime opportunity to finally address this very fluid issue.

The petitioner is innocent of the charge for which he is now serving a life sentence. The petitioner had no prior criminal history. The State only had the power of an inference from the testimony of the

³ *State v. Jackson* (La.10/18/93), 625 So.2d 146, 149

⁴ See Exhibit APPEN I, J

accuser as evidence. They desperately needed to bolster its chances. 13 Days before trial, the fired off a Motion of Intent to offer 404(b) evidence. The petitioner contends, that the allowance of this evidence, hung the jury in the first trial. During the second trial, the defense introduced an alibi defense, as well as demonstrative evidence that verified that witness' account of events on the day of the supposed rape. The petitioner was found guilty. The verdict was unanimous. If there has ever been a case that can be use to make an example to prove that this system is woefully inadequate to be used as an instrument of justice, this one is it.

In the case of The United States v. Beechum ⁵,

“The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decisions of this kind under Rule 403”

28 U.S.C.A. Rules of Evidence @ 109 (1975)

5582 F.2d 898, U.S. v. Beechum, (C.A.5 (Tex.) 1978 Then Circuit Judge Goldberg

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce Bask

Date: 6/24/2019