No.: 19-7000

ORIGINAL

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

DAVID CONSTANCE v. DARREL VANNOY, Warden

On Petition for a Writ of Certiorari to

U.S. FIFTH CIRCUIT COURT OF APPEALS

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December 4, 2019

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QUESTIONS PRESENTED

1. **Reasonable jurists would determine that Mr. Constance was denied a fair and impartial trial with the State Courts denial concerning hearsay testimony;**
2. **Reasonable jurists would conclude that the State obtained Mr. Constance's conviction with insufficient evidence;**
3. **Reasonable jurists would conclude that Mr. Constance was denied effective assistance of counsel during trial and Appeal.**

INTERESTED PARTIES

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In The
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No.: _____

DAVID CONSTANCE v. DARREL VANNOY, Warden

Petition for Writ of Certiorari to the U.S. Fifth Circuit Court of Appeal

Pro Se Petitioner, David Constance respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Fifth Circuit Court of Appeal (Docket No.: 18-30686), entered in the above entitled proceeding on September 26, 2019; that the issues presented to the Federal Courts were: (1) Reasonable jurists would conclude that the State obtained Mr. Constance's conviction with insufficient evidence; (2) Jurists of reason would determine that Mr. Constance was denied a constitutionally fair and impartial decision by the State Court's denial of relief concerning the abuse of discretion in the improper Voir Dire; (3) Reasonable jurists would determine that Mr. Constance was denied a fair and impartial trial with the State Courts denial concerning hearsay testimony; and, (4) Reasonable jurists would conclude that Mr. Constance was denied effective assistance of counsel during trial and Appeal.

NOTICE OF PRO-SE FILING

Mr. Constance requests that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Mr. Constance 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.

Mr. Constance has remained in continued custody since his arrest, and is currently an inmate at Louisiana State Penitentiary at Angola, Louisiana, Darrel Vannoy, Warden. Mr. Constance requests that his *Pro-Se* efforts herein be liberally construed as he has made a good faith effort to follow form. See, *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000).

OPINIONS BELOW

The opinion(s) of the U.S. Fifth Circuit Court of Appeal Docket No.: 19-30686.

JURISDICTION

The judgment of the U.S. Fifth Circuit Court of Appeal, was entered on September 26, 2019. This Court's Certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

David Edward Constance was charged by Bill of Indictment filed in open court on March 23, 2005, with four counts of Aggravated Rape in violation of LSA-R.S. 14:42. On April 6, 2005, Mr. Constance entered a plea of not guilty, and was tried by a twelve person jury on March 14-17, 2006, where Mr. Constance was found guilty as charged. On April 24, 2006, Mr. Constance was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on each of the four counts, consecutive with each other.

The Louisiana First Circuit Court of Appeal affirmed the conviction and sentences on November 18, 2009 (unpublished opinion). Mr. Constance timely filed for Writs into the Louisiana Supreme Court, which denied relief on June 25, 2010. See: *State v. Constance*, 38 So.3d 335 (La. 2010).

Mr. Constance filed for collateral relief on June 16, 2011, which was denied on July 15, 2013 during the course of an evidentiary hearing. Mr. Constance filed Writ of Review on October 30, 2013, which was denied on February 27, 2014.[1] Mr. Constance filed Writs to the Louisiana Supreme Court on March 24, 2014, and was denied February 27, 2015.

On May 22, 2015, Mr. Constance filed for Habeas Corpus Relief to the U.S. Middle District Court of Louisiana. On April 2018, the Magistrate's Recommendation was filed. The Objection was filed on May 7, 2018. On May 21, 2018, the Court denied relief. Notice of Appeal was filed on May 31, 2018.

[1] After receipt of evidentiary hearing transcript and ruling.

Mr. Constance filed for Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal in Docket No.: 18-30878 on August 9, 2018, and was denied on September 9, 2019. On September 16, 2019, a Panel Re-Hearing was filed to the Fifth Circuit, which was denied on September 26, 2019 by a three-Judge panel (Smith, Costa, and Ho).

Mr. Constance now timely seeks Writ of Certiorari to this Honorable Court, humbly requesting that this Honorable Court invoke its Supervisory Authority of Jurisdiction, and after a thorough review, find that his Claims are deemed good and proper, and grant him relief for the following reasons to wit:

STATEMENT OF THE FACTS

On February 1, 2005, Christina Constance, the defendant's wife, was informed that Mr. Constance had received monetary assistance in order to retain an attorney to file for a divorce. Immediately upon learning of such, Christina proceeded to the Livingston Parish Sheriff's Office to speak to someone about the defendant.

Detective Woody Overton offered to assist Christina. Christina told Detective Overton that she and the defendant had committed various sexual crimes together.[2] Based on the police investigation of the matter and several Child Advocacy Center (CAC) interviews of the alleged victims, the State brought four charges, which spanned several years, against the defendant for the Aggravated Rape of four minors, TB (WM; DOB:1/18/1991); JK (WM; DOB: 4/23/94); K.F. (WM; DOB: 10/22/89); and J.F. (WF; DOB: 2/22/83). Each of the alleged victims testified at trial. Mr. Constance did not testify.

REASONS FOR GRANTING THE WRIT

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

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons. The following, although neither

[2] Although Christina informed Detective Overton of her alleged involvement in these allegations, Christina was not arrested, but allowed to leave. Christina was arrested at a later date.

controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

A United States Court of Appeal has entered a decision in conflict with the decision of another United States Court of Appeal on the same important matter;[3] has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and unusual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and,

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

Hearsay testimony:

The U.S. Fifth Circuit Court of Appeal Court has failed to address the Issue of this Court's longstanding rule that a CAC videotape ***cannot be admitted without the*** defense's ability to cross-examine the alleged "other crimes victim(s)" when the State was allowed to present the CAC videotaped interviews of Mr. Constance's daughters (without calling them to testify), and additional hearsay testimonial evidence through the testimony of Det. Overton. See: ***Crawford v. Washington***, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); ***D.G. v. Louisiana***, 130 S.Ct. 1729, 176 L.Ed.2d 176 (2010); ***Melendez-Diaz v. Massachusetts***, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); and, ***Lowery v. Collins***, 988 F.2d 1364 (5th Cir. 1993).

In ***Offor v. Scott***, 72 F.3d 30, 31 (C.A. 5 (Tex.) 1995), the Court stated that, "We follow both our prior cases in holding that the admission of the videotape violated the Confrontation Clause and did not constitute harmless error, citing ***Shaw v. Collins***, 5 F.3d 128 (5th Cir. 1993); and, ***Lowery v. Collins***, supra in its ruling.

[3] In this case, the U.S. Fifth Circuit has made a decision in conflict with its own precedence.

The courts have erroneously denied Mr. Constance relief in this Issue, stating that he had the opportunity to call these witnesses, shifting the burden to him, because they were "right outside the door." However, it is the State's duty to call these witnesses, not the defendant's.

In *Long v. State*, 742 S.W.2d 302 (Tex.Crim.App. 1987), the Court held that, "forcing a defendant to call a child complainant to testify in order to cross-examine that individual creates a risk of inflaming the jury against a criminal defendant and also unfairly requires a defendant to choose between his right to cross-examine a complaining witness and his right to rely on the State's burden of proof in a criminal case." (Quoted from *Lowery v. Collins*, 988 F.2d, at 1368, and 1370).

Surely, the *excessive* amount of hearsay testimony, and the State's failure to call witnesses whose videotaped interviews had been presented to the jury attributed to the verdict in this matter.[4] This Court has addressed this same issue whether a constitutional violation affects substantial rights under the harmless error analysis. See: *Chapman v. California*, 386 U.S. 18, 21-25, 87 S.Ct. 824, 827-8, 17 L.Ed.2d 7805 (1967); e.g., *Delaware v. Van Arsdall*, 475 U.S. 673, 673-6, 106 S.Ct. 1431, 1432-33, 89 L.Ed.2d 674 (1986)(holding that Sixth Amendment violation should have been reviewed under harmless error analysis). A constitutional violation is harmless error only if it is clear beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Chapman*, 386 U.S., at 828; see, *Lowery v. Collins*, 996 F.2d 770, 772 (5th Cir. 1993), *supplementing Lowery v. Collins*, 988 F.2d 1364 (5th Cir. 1993).

See also: 30 American Law Reports 6th 1: Construction and Application of Supreme Court's Ruling in *Crawford v. Washington*, Feder. R. Evid. Serv. 1077 (2004), **With Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant whom Defendant Had No Opportunity to Cross-Examine**; 58 American Law Reports 2nd 1024, Admissibility of Sound Recordings in Evidence; 29 Am. Jur. Proof of Facts 2nd 1, Foundation for Offering Deposition or Other

[4] This would also include the hearsay testimony presented through the State's witnesses.

Former Testimony.

Reasonable jurists would determine that Mr. Constance's convictions were obtained with the introduction of the CAC videotaped statements given by his daughters; along with the hearsay testimony presented by the State through the testimony of Detective Overton. Reasonable jurists could also determine that Mr. Constance was denied the right to confront or cross-examine his daughters and other witnesses due to the State's failure to call them to testify. As noted above in *Lowery*, supra, the Courts have held that if the State presents the recording of the interviews, the State ***must*** call those individuals to testify. The defendant cannot be held responsible for calling the State's witnesses. See: *Crawford v. Washington*, supra; *D.G. v. Louisiana*, supra; *Melendez-Diaz v. Massachusetts*, supra; and, *Lowery v. Collins*, supra.

In *Rapelje v. Blackston*, 136 S.Ct. 388 (U.S. 2015), this Court held that, "A criminal defendant 'shall enjoy the right ... to be confronted with the witnesses against him.' U.S. Const. Amend. 6. We have held that this right entitles the accused to cross-examine witnesses who testify at trial, and to exclude certain out-of-court statements that the defendant did not have a prior opportunity to cross-examine ..." "We have never held - - nor would the verb 'to confront' support the holding - - that confrontation includes *the right to admit out-of-court statements into evidence*" (***emphasis added***).

Ineffective assistance of counsel:

The Courts have erroneously denied relief in this matter as testimony adduced during the course of the evidentiary hearing on July 15, 2013 proves that not only was the counsel ineffective during the proceedings leading to conviction, defense counsel even admitted that, after being notified of the hearing, he ***still failed*** to review the Record in order to defend himself against the allegations of ineffective assistance during the collateral review proceedings.

Throughout the evidentiary hearing, Mr. Muscarello's (defense counsel) repeated answer to direct questions from Mr. Constance was either "I don't recall" or "I don't remember." Although the higher

courts may accept this answer in certain circumstances, this is not one of them. Mr. Muscarello was given ample opportunity to review his file in order to prepare for the hearing.

Although this Court may accept "I don't recall" or "I don't remember" as testimony from an attorney who has been called to testify during the course of an evidentiary hearing concerning ineffective assistance of counsel claims, this would only be "acceptable" IF the attorney has had NO PRIOR KNOWLEDGE of the hearing.[5] In this case, Mr. Muscarello admitted that he had been subpoenaed at least three weeks prior to the hearing.

Mr. Muscarello truthfully testified that he had prior notification of this hearing, and the substance of the Claims.[6] Mr. Muscarello has shown his lack of professionalism by failing to prepare for this hearing.

Mr. Muscarello testified that, "there were probably hours and hours of work put into this case,"[7] but could not remember the magnitude that the investigator had been involved in this case.[8] Mr. Muscarello could not even recall any specifics as to possible witnesses or defenses to be presented to the Court during the trial.[9]

Mr. Muscarello testified that he had called no witnesses to testify for the defense,[10] and that he could not recall any conversations concerning the witnesses who could have testified for the defense.[11]

Defense counsel had shown the same professionalism towards this hearing that he has shown towards Mr. Constance's case as a whole by failing to review the file before this hearing; even after being afforded the opportunity to do so by the trial court allowing continuances. In the event that Mr. Muscarello **had** reviewed the case file from this matter, his responses would not have been, "I don't

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[5] The district court even noted the additional continuances during the hearing.
[6] See: evidentiary hearing transcript pp. 46-48.
[7] See: evidentiary hearing transcript p. 51.
[8] See: evidentiary hearing transcript p. 30.
[9] See: evidentiary hearing transcript p. 30. See: evidentiary hearing transcript p. 37.
[10] Mr. Muscarello could remember that he failed to call witnesses in this case.
[11] See: evidentiary hearing transcript p. 35. This must be construed as Mr. Muscarello admitting that he did not interview any potential witnesses.

remember" and "I don't recall." Mr. Muscarello would have had to admit that he failed to prepare for this case as required by the State and Federal Constitutions.

Subsequently, the Judge had stated, "We come here, what, January 14th of this year, Mr. Muscarello and Mr. Sloan were subpoenaed for Claims 10 and 11, ineffective assistance of counsel at the trial level and appellate level in accordance with the First Circuit Court of Appeals opinion remanding to the trial court for consideration of the merits of claims 10 and 11. That was rendered October 9th, 2012. And January 14th, 2013 Mr. Muscarello and Mr. Sloan were subpoenaed. It was set for May 6th, 2012."[12]

Mr. Constance was denied a fair and impartial ruling in regards to his Post-Conviction Relief Claims based on the fact that the court failed to consider the fact that Mr. Muscarello **FAILED** to review the attorney file, even **AFTER** notification that he would be testifying at a hearing, and that there were Claims of ineffective assistance of counsel argued against defense counsel.

Ms. Constance has shown that he was denied effective assistance of counsel, a violation of the Sixth Amendment to the United States Constitution and in accordance with *Strickland v. Washington* 466 US 668, 104 S.Ct 2052, 80 L. Ed 2d 674 (1984); *Fenner v Desalvo*, 826 So 2d 39 (La App. 4th Cir 2000); **American Bar Association Standards 4-3.8.(A) and (B)**; and **ABA Standards 4-4.1**; Sixth and Fourteenth Amendment to the United States Constitution; Louisiana Constitution of 1974, Art. I § 2, 13, and 16.

See also: *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942).

The Fifth Circuit failed to consider the fact that counsel had prior knowledge of the hearing and the substance of the Claims in Mr. Constance's PCR when it stated, "despite counsel's inability to recall

[12]See: evidentiary hearing transcript p. 71. This statement proves Mr. Constance's allegation of defense counsel prior knowledge of the hearing.

much of the case ..." This Court *must* determine that defense counsel presented the *same effort* in defending himself against the ineffective assistance of trial counsel Claims as he did in defending Mr. Constance during these proceedings.

THEREFORE, Mr. Constance could be Granted relief in accordance with the State and Federal Constitutions and State and Federal Law.

IV. Specific Issue(s).

1. **Reasonable jurists would determine that Mr. Constance was denied a fair and impartial trial with the Courts' denial concerning hearsay testimony;**
2. **Reasonable jurists would conclude that Mr. Constance was denied effective assistance of counsel during trial and Appeal;**
3. **Reasonable jurists would conclude that the State obtained Mr. Constance's conviction with insufficient evidence.**

LAW AND ARGUMENT

CLAIM 1

Reasonable jurists would determine that Mr. Constance was denied a fair and impartial decision by the Court's denial of relief concerning hearsay testimony; *Crawford v. Washington*; Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment guarantees an accused in a criminal prosecution the right to be confronted with the witnesses against him. The confrontation clause of the Louisiana Constitution expressly guarantees the accused the right "to confront and cross-examine the witnesses against him." Louisiana Constitution Art. I, § 16; *Crawford v. Washington*, supra. Confrontation means more than the ability to confront the witnesses physically. It's main and essential purpose is to secure for the opponent the opportunity of cross-examination. Id. Cross-examination is the primary means by which to test the believability and truthfulness of testimony and has traditionally been used to impeach or discredit witnesses.

In *Crawford v. Washington*, supra, the Court addressed the Confrontation Clause and held that testimonial hearsay statements may be admitted as evidence at a criminal trial only when the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant.

See: *Crawford*, *supra*, where the Supreme Court clarified that a statement given to police during a custodial interrogation is only admissible where the declarant is unavailable and there was a prior opportunity to confront the witness. The United States Supreme Court stated in *Crawford*, in pertinent part:

> Exceptions to confrontation have always been derived from the experience that some of the out-of-court statements are just as reliable as cross-examined in-court testimony due to the circumstances under which they were made. We have recognized, for example, that co-conspirator statements simply "cannot be replicated, even if the declarant testifies to the same matters in court." *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986) (quoting *Tennessee v. Street*, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)(some internal quotation marks omitted)).
>
> Indeed, cross-examination is a tool to flesh out the truth, not an empty procedure. See *Kentucky v. Stincer*, 482 U.S. 730, 737, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)("The right to cross-examination, protected by the Confrontation Clause, this is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"); and ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact"). [I]n a given instance [cross-[541 U.S. 75] may] be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a word of supererogation." 5 Wigmore § 1420, at 251.

A defendant convicted on the basis of evidence introduced in violation of the Confrontation Clause is entitled to a new trial unless the admission of that evidence contains harmless error, meaning that there is no reasonable possibility that the improperly admitted evidence might have contributed to the conviction. See: *Alvardo-Valez*, 521 F.3d at 341 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The government bears the burden of establishing that the error is harmless beyond a reasonable doubt. Id. (citing *United State v. Akpan*, 407 F.3d 360, 377 (5th Cir. 2005)).

In determining whether a statement is testimonial, as may implicate the Confrontation Clause, a court considers: (1) whether the declarant was a victim or an observer, (2) whether it was the police of the declarant who initiated the conversation, (3) the location where the statements were made, (4) the declarant's emotional state when the statements were made, (5) the level of formality and structure of the conversation between the officer and the declarant, and (6) if and how the statements were recorded. U.S.C.A. Const. Amend. 6.

The trial court erred in denying the defendant his confrontational rights under the 6th and 14th Amendment to the United States Constitution and Louisiana Constitution of 1974 Articles 1 § 2, 13, and 16; also see: (*Bobadilla v. Carlson*, 575 F.3d 785 (C.A. 8 (Minn.) 2009); *Crawford v. Washington*, supra; *Kentucky v. Stincer*, supra.The trial court's admission of out-of-court statements of JD and his mother, KD constitutes prejudicial error.

Out-of-court statements and hearsay in general is addressed in *Bobadilla*, which persuasively states: "Statements taken by social worker during the course of her interview of minor victim were "testimonial," and thus, their admission, without the opportunity for cross-examination of victim violated defendant's Confrontation Clause rights." U.S.C.A. Const. Amend. 6; M.S.A. § 626.556. The district court was also correct to conclude the violation of the Confrontation Clause was not harmless. (citing: *Toua Hong Chang v. Minnesota*, 521 F.3d 828, 832 (8th Cir. 2008)).

Christina's Statement (Co-Defendant):

Mr. Constance was denied his right to confrontation under the 6th and 14th Amendments to the United States Constitution and the Louisiana Constitution of 1974 Arts. 1 § 2, 13, and 16 when the trial court allowed the introduction of the testimony of Christina's out-of-court statement into evidence. The error was prejudicial.

Mr. Constance's rights under the Confrontation Clause were violated when testimonial hearsay statements were admitted as evidence when the declarant(s) were not unavailable to testify, and the defendant did not have a prior opportunity to cross-examine the declarant. *Crawford*, supra.

The court must consider whether Mr. Constance had a prior opportunity to confront Christina, sufficient to satisfy the principles set forth in *Crawford*. A review of the record will show that at **no time** was Mr. Constance afforded the opportunity to cross-examine her.

Admission of a confession of a co-defendant who did not take the stand deprives defendant of his rights under the Sixth Amendment confrontation clause. U.S.C.A. Amend. 6. See also: *Mason v.*

Scully, 16 F.3d 38 (C.A.2 (N.Y.) 1994); whereas the United States Supreme Court of Appeals, Second Circuit ruled: "that a defendant's right to confront witnesses against him includes the right not to have incriminating hearsay statement of non-testifying co-defendant admitted in evidence against him." U.S.C.A. Amend. 6.

The State gave notice that Christina was "**available**" and "**willing**" to testify. Prior to the trial, Christina's defense attorney advised that she would plead the 5th to any questions concerning the case.

The detective's testimony of the statements given by Christina were used for their materiality of guilt, as Detective Overton had used direct quotes from the statement during his testimony.

The courts have recognized that a violation of a defendant's right to confrontation is subject to harmless error analysis. This was not harmless error, as the following is from direct examination of Detective Overton **quoting** from Christina's statement. (See Tr.T. pg. 373):

Q: And what happened on February 1, 2005?

A: I was asked by one of my secretaries if I had a moment to answer questions or a question for two ladies. I said I did. I brought them into my office and the lady said that she wanted to ask a question or tell something that had happened, but she didn't want to get into trouble for it. I told her to go ahead. And, she told me the David Constance had forced her to sleep with his sixteen year old nephew. And then in the same breath she said, and he forced, I saw David perform oral sex on my seven year old son and then he forced me to do it.

On cross, Detective Overton again **quoted** from Christina's statement, with (See: Tr.T. pg. 399):

Q: So, let me ask you this. Is it common procedure that if a person comes to the Detective's Office and says I committed a crime, that you don't arrest them and go ask other people that they implemented?

A: If you remember Mr. Muscarello, she said that he forced her, held her by the head of the hair and forced her to do it.

Q: I don't remember that. Because it's never been in the testimony.

A: Well, oh, okay.

On redirect examination, Detective Overton quoted from Christina's statement (Tr.T. pg. 399):

A: Okay. When she was staying with her, Ms. Domaine's son had written her a note saying that David had said it was okay if he had sex with her. She, Christina took the note to Kimberly Domaine and told her about it. And, at that time Kimberly Domaine asked her about and she

told her, "it was my husband made me have sex with a sixteen year old boy. And then I think it was -"

Q: Who was the sixteen year old boy?

A: I think at that point it was referring to Joe Maison. "And then my husband made me perform oral sex on a nine or ten year old girl," which would be Josie Falgoust. And then they began to talk, Kimberly Domaine -

MR. MUSCARELLO: Judge, I'm going to object to this testimony. It's hearsay.

THE COURT: Sustained.

BY MS. MALNAR:

Q: Detective Overton you had stated that with Christina, that she was forced to perform oral sex on the child. Tell me about that.

MR. MUSCARELLO: Objection. Hearsay.

THE COURT: Overruled. You were talking about a moment ago.

MS. MALNAR:

A: The reason I didn't immediately arrest Christina Constance was because her initial statement was that, "He held me by the head of my hair. When I saw him giving my son a blow job and asked what are you doing? He grabbed me by the head of my hair and made me do it." Okay?

Q: Made her do what?

MR. MUSCARELLO: Objection, calls for -

THE COURT: Overruled.

A: Perform oral sex on her own son.

Q: Now, the Joe Maison, whenever she came in there and said about the Joe Maison, saying that it was a sixteen year old; is that the same Joe Maison that he admits to on the tape, his taped statement?

A: I believe it's the one time in the taped statement it -

MR. MUSCARELLO: Judge, I'm going to object. It calls for speculation. We don't have Christina Constance here to testify.

THE COURT: Sustained. Rephrase.

The State willingly and knowingly admitted the substance of Christina's statement(s) with the knowledge that she would not be testifying. The State relies on Christina's statements in Closing Arguments to infer guilt with, "and I am not giving Christina Constance a gold star – I'm not; I mean she's in jail awaiting prosecution herself – but what would have happened if she had never come

forward? These people weren't telling; they couldn't bring themselves to talk about it."

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of peace in England. The statements are not **sworn** testimony, but the absence of the oath was not dispositive. *Crawford*, supra.

An error is harmless when the guilty verdict was surely unattributable to the error. Whether an error is harmless in a particular case depends upon many factors, including the following: 1) the importance of the witness' testimony; 2) whether the testimony was cumulative in nature; 3) whether corroborating or contradictory evidence regarding the major points of the testimony existed; 4) the extent of cross-examination permitted; and 5) the overall strength of the State's case. *State v. Maise*, 00-1158 (La. 1/15/02), 805 So.2d 1141, 1155.

In this case, Christina triggered the initial investigation into the allegations with the initial complaint lodged against Mr. Constance concerning her son (JK), and also that of JD; not by her being questioned by the officers for any offense; but, by Christina bringing her initial complaint.

This violation was not harmless because: 1) Christina had initiated the investigation with her unsolicited statements to Detective Overton on February 1, 2005; 2) defense counsel was not afforded an opportunity to cross-examine Christina; 3) there was a high probability that the outcome of the trial would have been different, because there would have been an opportunity for the defense counsel to introduce impeaching evidence against Christina's statement. 4) there was a high probability that the outcome of the trial would have been different if the declarant, Christina, would have been available to testify as to the actual reasoning behind the false allegations.

The United States Supreme Court ruled in *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132 (U.S. Tenn. 1979) that: "The trial court instructed the jury that each confession could be only used against the defendant who gave it and could not be considered as evidence of a co-defendant's guilt." Here, the

trial court failed to instruct the jury as to the admissibility of hearsay evidence concerning Christina's statement. This confession was not used against Christina, but instead against Mr. Constance. Christina Constance and David Constance were not being tried jointly in these charges, but were co-defendants.

After review of the record, this Court must find that the introduction of the out-of-court testimonial statements by Christina violated Mr. Constance's right to confrontation as guaranteed by the 6th and 14th Amendments to the United States Constitution. See: ***Crawford v. Washington***, supra; ***Kentucky v. Stincer***, supra. Mr. Constance's conviction and sentence must be reversed and remanded for a new trial.

JD and Kimberly Domaine:

The State admitted the statements of JD and Kimberly Domaine through the testimony of Detective Overton. The complaint from Kimberly Domaine with allegations against Mr. Constance was the initial complaint against Mr. Constance. Overton testified that Kimberly Domaine and Christina had approached him to file charges against Mr. Constance for allegedly informing JD that "it was alright with him if JD wanted to have sex with Christina, he could" (See: Tr.T. pg. 401).

The State had asserted this claim in Opening Arguments that JD and Kimberly Domaine would be available to testify (See: Tr.T. pg. 363-364). Then, the State informed the court that she was ready to present JD as a witness, and the court decided that it was too late in the evening to start another testimony (See: Tr.T. pg. 522). However, at the start of the trial the next morning, the State rendered Detective Overton; and never called JD or Ms. Domaine to testify. (See: Tr.T. pg. 524).

JD and Kimberly Domaine were not subject to cross-examination at any time during these proceedings. Subsequently, the State failed to call JD or Kimberly Domaine to testify as the accounts of this allegation. Mr. Constance has therefore be denied the right to cross-examine any of the **declarants** after counsel was notified that JD and Kimberly Domaine were "**available**" and "**willing**" to testify against Mr. Constance. (See: Tr. T. pg. 364). See ***Crawford***.

This action by the State denied the defendant the opportunity to present a defense against the

allegations of other crimes evidence. The State was basically able to say, "Mr. Constance did this to this person, but we don't have to let them testify to these allegations."

After a review of the record, this Court would find that the introduction of the out-of-court testimonial statements by Kimberly Domaine and JD Domaine violated Mr. Constance's 6th and 14th Amendments to the United States Constitution and Louisiana Constitution of 1974 Arts. 1 § 2, 13, and 16. Therefore, Mr. Constance's conviction and sentence must be reversed and remanded for a new trial.

AC and MC (Mr. Constance's daughters):

Mr. Constance's constitutional right to confrontation in accordance to the 6th and 14th Amendment to the United States Constitution and the Louisiana Constitution of 1974 Arts. 1 § 2, 13, and 16 were violated when the trial court allowed the introduction of the taped interviews of AC and MC (defendant's daughters) into evidence. The introduction of these videos, which were used as materiality to guilt via *res gestae* and other crimes evidence constitutes constitutional and prejudicial error.

Mr. Constance was not afforded the right to confront the witnesses, AC or MC, who were not called to testify, although in Opening Statement the State informed the jury that these children would be available (See: Tr. T. pg. 367). ***Crawford***, supra;

The State's admittance of the testimonial videotapes of AC and MC **greatly influenced** the jury in their decision, as these are defendant's own daughters alleging sexual misconduct. See: ***Crawford*** and its progeny; ***United States v. Inadi***; supra; and, ***Tennessee v. Street***, supra.

LSA-R.S. 15:440.5; Admissibility of videotaped statements, Title 15, Criminal Procedure, Chapter 2, Part II, General Rules of Evidence pertaining to electronic recordings of Protected Persons states in pertinent part: A. The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if: (4) The statement was not made in response to questioning calculated to lead the protected person to make a particular statement; (8) **The protected person is available to testify.** (emphasis added). B. The admission into evidence of the videotape of a

protected person as authorized herein *shall not preclude* the prosecution from calling the protected person as a witness or from taking the protected person's testimony outside of the courtroom as authorized by LSA-R.S. 15:283. Nothing in this Section shall be construed to prohibit the defendant's right of confrontation.

Admission of video recorded statement of child abuse victim without making her available at trial for cross-examination by defendant or otherwise producing her for confrontation constituted reversible error in absence of any evidence that defendant waived right to cross-examine child.

After objection by defense counsel concerning the admissibility of the tapes, the State informed the Court that the State was calling MC as a witness following the video. (See Tr.T. pp. 548-550):

BY MR. MUSCARELLO:

> I'm going to object to the admissibility of these tapes, Judge. Because it states that they have to be a victim of a crime and there has been no crime brought against my client as victims being Madeline Constance or Ashley Constance. And there is no evidence that they are even eyewitnesses to any of the alleged criminal acts billed on the Bill - - or the Grand Jury indictment. So that's my position.

BY MS. MALNAR:

> Your Honor, he was arrested on warrants charging him with this behavior with these two (2) juveniles. I've also included them in my - - witnesses that I'm going to call. And also I have allowed him and sent him letters to say that I am going to show these videos. And you came and view them. And as far as them being protected persons, Your Honor, it says a victim of a crime or a witness in a criminal proceeding and who is under the age of fourteen (14) which they do meet that, Your Honor. Right. And they are also in the 412.2 Motion, too.

THE COURT:

> Right, the Motion from Monday. That's what I was saying earlier about Ms. Maison's tape. Go ahead Mr. Muscarello.

BY MR. MUSCARELLO:

> Well Judge, if she is going to have them come testify, then she needs to have them testify to lay a foundation.

BY MS. MALNAR:

> Your Honor - -

BY MR. MUSCARELLO:

> And second of all there has been no evidence by Mr. Overton that the children are under the age of fourteen (14). I heard no testimony stating that they said they were under fourteen (14).

THE COURT:

> On 440.5 it just - - on Section A, it says the protected person is available to testify. I don't see any requirement that they testify before the tape, just that they are available.

BY MS. MALNAR:

> I don't need - - right, that's correct, Your Honor. They are available. They are outside. I don't have to call them. They are available. If he wants to call them, he can.

The courts have ***specifically rejected*** this catch-22, so called by the [Texas Court of Criminal Appeals] in ***Long v. State***, 742 S.W.2d 302 (Tex.Crim.App. 1987), the Court held that, "forcing a defendant to call a child complainant to testify in order to cross-examine that individual creates a risk of inflaming the jury against a criminal defendant and also unfairly requires a defendant to choose between his right to cross-examine a complaining witness and his right to rely on the State's burden of proof in a criminal case." (Quoted from ***Lowery v. Collins***, 988 F.2d, at 1368, and 1370).

In ***Lowery v. Collins***, 988 F.2d 1364(5th Cir. 1993), the defendant was convicted of aggravated sexual assault of a child. At the trial, a videotaped interview with the six-year-old child was played for the jury, in which the child explained the alleged molestation in detail. The child did not testify at the trial. The defendant timely objected to the videotaped interview. His objection was overruled and he was convicted. After exhausting his state remedies, the defendant instituted a habeas corpus proceeding in the federal court, asserting that he had been denied his confrontation rights under the Sixth Amendment. The Fifth Circuit found that the defendant's right of confrontation was violated and the violation was not harmless error. See: ***State v. Carper***, 41 So.3d 605, 612 (La. App. 2nd Cir. 2010).

The prosecution in ***Lowery***, *supra*, argued that the child was available to testify and that the defendant's failure to call the child to the witness stand constituted a waiver of his Sixth Amendment right. The Fifth Circuit rejected this argument. ***Lowery v. Collins***, supra.

In *State v. Carper*, 41 So.3d 605, 612 (La. App. 2nd Cir. 2010), ***reversed and remanded***, addressed this issue concerning CAC videos introduced into evidence without presenting the children as witnesses in trial. The Court stated in pertinent part:

> Admission of child victim's videotaped interviews during prosecution for aggravated rape and molestation of a juvenile, in combination with State's decision no to call the children as witnesses, violated Defendant's Sixth Amendment right of confrontation. U.S.C.A. Const. Amend. 6; LSA-R.S. 15:440.5; LSA-Ch.C. art. 326.
>
> Trial court's error in admitting child victims' videotaped interviews during prosecution for aggravated rape and molestation of a juvenile, in violation of Defendant's Sixth Amendment right of confrontation was not harmless; the videotaped interviews were the linchpin of the prosecution's case. U.S.C.A. Const. Amend. 6.

In this case, the State introduced videotaped interviews of the Mr. Constance's daughters which made allegations of sexual abuse as materiality to guilt via *res gestae* and other crimes evidence (See Tr.T. pgs. 552 and 557). However, the State failed to call AC or MC to testify, denying Mr. Constance's right to a fair trial with the denial of his right to confront his accusers as guaranteed by both the United States Constitution and Louisiana Constitution of 1974. See: *Crawford v. Washington*, supra; *State v. Carper*, supra; *D.G. v. Louisiana*, supra; *Melendez-Diaz v. Massachusetts*, supra.

Mr. Constance was prejudiced by the admission of this evidence to the jury without the right to confront the witness or the allegations that were lodged against him during the course of the videotapes. The State then used these particular taped statements, explaining that Mr. Constance had "**molested his own daughter**" in closing argument stating; "Then we have Madeline Constance, his own daughter - - who doesn't remember a whole lot, but remember something around the age of five or six that her dad had carried her somewhere – I think it was from the grandmother's house to the car, or something like that – and rubbed her vagina and it hurt. It hurt. He's doing this to his own daughter."[13] (See: Closing Argument), thus, giving "reliability" to the other testimony in this trial.

The State, during Opening Statement informed the jury that it would be presenting AC and MC "to

[13]During the videotaped statement, Madeline explained that "When we got to my grandmother's house, it was raining. So, my daddy put me on his hip and ran up the steps. This hurt my private." The State intentionally misquoted the statement to the jury during the course of the Closing Argument.

explain to you certain sexual acts that happened upon them." (See Tr.T. pg. 367). Mr. Constance could not have been more prejudiced by these statements, which relied on the videotapes of AC and MC as testimonial. The State basically informed the jury that "Mr. Constance molested his own daughter, and we don't have to give him a chance to confront this witness against him."

After review of the record, this Court would find that the introduction of the out-of-court testimonial videotaped interviews of AC and MC violated Mr. Constance's confrontation rights guaranteed by the 6th and 14th Amendments to the United States Constitution and Louisiana Constitution of 1974 Arts. 1 § 2, 13, and 16; also see: (*Bobadilla v. Carlson*, supra; *Crawford v. Washington*, supra. Therefore, Mr. Constance's conviction and sentence must be reversed.

Summary:

Mr. Constance was convicted on the basis of hearsay statements in support of the testimony alleging abuse. With **no** physical evidence, and no **corroborating testimony** from the "eyewitnesses," this hearsay evidence weighed in heavily with the jury concerning the allegations. A harmless error review of the contents of this hearsay evidence shows this court the declarant of the statement did not testify as to the contents of the statements, thus denying Mr. Constance the right to confront witnesses against him. Accordingly, Christina's alleged statement was in fact used **against** the defendant in the materiality of guilt and *res gestae* to the allegation, substantiating Mr. Constance's claim that Christina **was** in fact a witness, whom he was not allowed to confront. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: **confrontation**. Simply put, the State introduced "testimonial evidence" to the jury through the testimony of Det. Overton, while denying Mr. Constance the right to cross-examination.

The alleged statements by JD and Kimberly Domaine were presented to the jury without the opportunity to rebut by the defense.

CLAIM 2

The Reasonable jurists would conclude that the State obtained Mr. Constance's conviction with insufficient evidence.; *Jackson v. Virginia*; Sixth and Fourteenth Amendments to the United States Constitution.

The standard of review for a conviction obtained with insufficient evidence comprised in *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct., at 2790, 61 L.Ed.2d at 573-574. This standard is applied with "explicit reference to the substantive elements of the criminal offense as defined by state law." *Id. at* 324 n. 16, 99 S.Ct. at 2791 n. 16. *Dupuy v. Cain*, 210 F.3d 582 (5th Cir. 2000). *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).[14] (The Due Process Clause of the Fourteenth Amendment protects persons accused of a crime against conviction unless the State proves every element of the offense beyond a reasonable doubt).

The lack of evidence in this Count has not proven guilt beyond a reasonable doubt. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be to determine whether record evidence could possibly support a finding of guilt beyond a reasonable doubt. U.S.C.A. Const. Amend. 14; *Jackson v. Virginia*, supra. Therefore, the Mr. Constance's conviction and sentence must be reversed and remanded for a new trial.

When the conviction rests upon circumstantial evidence, that evidence must exclude every reasonable hypothesis except guilt. LSA-R.S. 15:438. Whether circumstantial evidence excludes every reasonable hypothesis of innocence presents the following question of law:

> **In all cases where an essential element of the crime is not proven by direct evidence, LSA-R.S. 15:438 applies.** As an evidentiary rule, it restrains the factfinder [in the first instance, as well as the reviewer on appeal, to accept as proven all that the evidence tends to prove and then to convict only if every reasonable hypothesis of innocence is excluded. **Whether circumstantial evidence excludes every reasonable hypothesis of innocence presents a question of law.** *State v. Hammontree*, 363 So.2d 1364, at 1373 (La. 1978); *Smith v. Schwander*, 345 So.2d 1173, at 1175 (La. 1977); *State v. Smith*, 339 So.2d 829, at 833 (La. 1976). **In applying LSA-R.S. 15:438, all the facts that the evidence variously tends to prove**

[14]This type of error has been recognized as patent error preventing conviction for the offense, La.C.Cr.P. art. 920(2), see indicative listing at ***State v. Guillot***, 200 La. 935, 9 So.2d 235, 239 (1942). Quoting: ***State v. Crosby***, 338 So.2d 584, 588 (La.1976).

> **on both sides are to be considered, disregarding any choice by the factfinder favorable to the prosecution**. The reviewer as a matter of law can affirm the conviction only if the reasonable hypothesis is one favorable to the State and there is no extant reasonable hypothesis of innocence.[15]

In light of the overwhelming amount of inconsistent testimony, and viewing evidence in light most favorable to prosecution, any rational trier of fact could not have found the essential element of the crimes beyond a reasonable doubt.

Furthermore, This case gives the Court the opportunity to give concrete substance to the rule of law that contradictory testimony, such as incredible, inherently improbable or impeached testimony, is insufficient to uphold a conviction.

> Corroboration of a victim's testimony in sexual offense cases is triggered only by contradictions in the victim's trial testimony. Thus, corroboration is mandated when the victim's testimony is so contradictory and in conflict with physical facts, surrounding circumstances and common experience that its validity is rendered doubtful such that corroboration of the victim's testimony is required to sustain the conviction.

75 CJS Rape § 94

There is no corroborating evidence in this case. The testimony of the accusing witnesses in this case was clearly contradictory and impeached, as shown be the record, notwithstanding the fact that the State suppressed further ***Brady*** impeachment evidence from the defense at trial ...

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

The State produced no physical evidence which would establish that anyone had committed Aggravated Rape on these alleged victims at anytime, at any place. The corpus delicti in the instant case is not satisfied by testimony of the prosecutrix without any corroborating circumstances. There is not even a doctor's report in evidence that establishes the possibility of sexual activity of kind.

The fact that impeached testimony, standing alone, cannot uphold a conviction under the law is predicated upon the fact that impeached testimony, standing alone, fails to establish a corpus delicti in

[15] ***State v. Shapiro***, pp. 19-20, 431 So.2d 372 (La. 1982)[emphasis added].

the first instance ...

While the credibility of a witness is a matter for the finder of fact, once impeached, that witness's testimony becomes suspect under the law and must be corroborated in order to be convincing evidence of guilt or innocence. This is especially true where the credibility of the witness is paramount to the outcome of the case.

Impeached testimony, as a general rule, cannot stand alone to convict. ***State v. Chism***, 591 So.2d 383, 386 (La. App. 2nd Cir. 1991), *citing*, ***State v. Laprime***, 437 So.2d 1124 (La. 1983); ***State v. Lott***, 535 So.2d 963 (La. App. 2nd Cir. 1988).

In ***State v. Kennedy***, 803 So.2d 916 (La. 2001), in Justice Traylor's dissenting opinion, it is stated that the Louisiana Supreme Court has found that, "The victim's testimony, standing alone, can prove that the act occurred, ..." but is qualified in FN9, "However, we have also ruled post-trial that impeached testimony of a witness, standing alone, cannot prove the offense."

Count One:

In Count One of the Indictment, Mr. Constance was charged with the Aggravated Rape of TB (WM; DOB: 1/18/91), in the year of 2001.

The State produced TB to testify, who testified as to the account of the allegations, and the defense was allowed to cross (See Tr.T. Pgs. 589-607).[16]

The State alleged the incident occurred in 2001. The date of birth of TB is January 18, 1991, which would show that TB was 10 years old at the time of the allegation. With the testimony of TB ***one hundred percent*** sure that this alleged incident occurred when he was going on 13, this would prove that his calculations would have been correct with his testimony stating that the alleged incident **had to** have happened in 2003, **not** 2001. The State **must** prove the elements of the charged crime, which was

[16]This Court must note that Mr. Constance was unable to obtain a copy of the transcripts in order to include the pages with his pleadings. Mr. Constance has had to rely solely upon the notes that he had taken when he was allowed to review his Record under "strict" supervision. See: LSA-R.S. 46:1844(W).

Aggravated Rape in the year of 2001.

During the direct examination, TB informed the court that Mr. Constance and his wife would visit and talk with his parents (See Tr.T, pgs. 592-593). TB testified that he was 12 at the time of the alleged incident (See Tr.T. pg. 594); as follows:

Q: And how old were you then?

A: Twelve (12).

Q: You were twelve (12). Are you sure?

A: Yes ma'am. I'm sure.

TB's initial statement was that the incident occurred in 2004 when he was "fixing to be" 14 years old, and that Mr. Constance was working in Jennings, La.; and states that Mr. Constance was not present when he was having sexual intercourse with Christina. In TB's second statement he says that he was "fixing to be thirteen" [years old]. TB's initial statement also included that, "Christina told me that Clutch said it was ok to have sex with her."[17]

The offense testified to at trial is not responsive to the Indictment. The State may allege harmless error. On the contrary, this would not be considered a **harmless error**, as the defense was prepared to present that TB and his family did not even know Mr. Constance in the year of 2001.

The State introduced TB's dad, Johnny Barnes, who testified that he was "*pretty sure*" the incident had happened in 2001. Mr. Barnes later testified that he was not living with his son in 2001, instead that he was living with his sister in Mississippi (See: Tr.T. pg. 614). TB had testified the incident occurred after Mr. Constance and his wife, had visited with both of his parents. Mr. Barnes had used TB's "strange behavior" as the factual basis that he believed that the incident had occurred in 2001, even after he had stated that he was not living with TB at that time (See Tr.T. Pgs. 608-620). However, Mr. Barnes *did testify* that TB would be in a better position to know when the incident had occurred.

The acknowledgment from State that the incident occurred in 2003 would make this Indictment

[17]In Mr. Barnes' initial statement, he stated that he was having sex with Christina while "Clutch" was at work.

defective, with a non-responsive verdict of aggravated rape in 2003, which is grounds for reversal. See: *State v. Norman*, 848 So.2d 91, 03-248 (La. App. 5th Cir. 5/28/03).

TB testified that the incident happened in 2003 (See Tr.T. pg. 606). Testimony from cross-examination is as follows:

Q: And you had told Ms. Malnar that this had - - when did this allegedly happen, this incident?

A: When I was twelve (12) at the time when it happened.

Q: So today is 2006.

A: Yes, sir.

Q: What year would that possibly have been in? If you're fifteen (15). When is your birthday?

A: 2003. That's when it happened.

Q: 2003. That's when it happened?

A: Yes, sir.

Q: Did anything happen in 2001?

A: No, sir.

Q: Are you one hundred percent sure this alleged incident happened in 2003?

A: I'm pretty sure.

BY MS. MALNAR: Asked and answered, Your Honor. Objection.

BY MR. MUSCARELLO:

Q: Do you know what month?

THE COURT: Overruled. Go ahead.

A: October, I would have to say.

Q: October.

A: I was about to be thirteen (13).

The evidence or testimony involving an Aggravated Rape in the year of 2001 of TB was not proven beyond a reasonable doubt. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether jury was properly instructed, but to determine whether record evidence could possibly support a finding of guilt beyond a reasonable

doubt; the relevant question is whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. U.S.C.A. Const. Amend. 14. (See: ***Jackson v. Virginia***, supra)

This testimony from the victim (and his father) *must* substantiate the charge of Aggravated Rape in the year of 2001 of TB or be dismissed. TB testified that this incident occurred in October of 2003 and that his birthday was January 18, 1991, which would substantiate the testimony that he was about to be thirteen (13) in the year of 2003. The State has failed to meet the burden of proof in Count One, and Mr. Constance's conviction and sentence must be reversed.

Count Two:

Count 2 of the Indictment charged Mr. Constance with the Aggravated Rape of JF (Juvenile WF). However, the evidence produced by the State at trial failed to establish that a rape had occurred. To establish the alleged rape of J.F., the State presented no physical evidence and relied solely on testimony to prove their case.

JF testified, and the defense cross-examined her (See Tr.T. Pgs. 455-474). During testimony (See: Tr.T. Pgs. 459, 472, 473), Josie stated that she had "known 'Clutch' (Mr. Constance's nickname) for a long time," and was given several opportunities to point out the person she knew as "Clutch" in the courtroom **WITHOUT** an identification. Even when defense counsel stood **directly behind** Mr. Constance so that the witness had a direct view, and was asked to point out "Clutch." The excerpt from the colloquy of the direct examination follows (See Tr.T. Pg. 459):

Q: Now who is Double Clutch? Do you know his real name?

A: No.

Q: Is he sitting in this courtroom today?

A: I don't know.

Q: Do you recognize anyone in here today?

A: No, ma'am.

Q: Do you see Clutch in here today? Take your time and look around.

A: (Nodded negatively)

Q: You don't see him?

A: (Nodded negatively)

The failure of the court to have this charge dismissed was error without positive identification. The following colloquy is from cross-examination (See Tr. T. pg. 472-473):

Q: Okay. Now you had stated that a gentleman by the name of Clutch was doing all these things to you. Do you see Clutch in the courtroom? Do you see Clutch in this courtroom? And I'm going to ask you to look around.

A: (Nodded negatively)

Q: You don't see the guy that did that to you?

A: No, sir.

Q: And we want you to tell the truth now. You don't see him?

A: (Nodded negatively)

Q: Is that a no?

A: I don't see him.

Furthermore, as JF was unable to identify Mr. Constance, the State introduced the testimony of MM, who identified Mr. Constance, and proceeded to give her version of the incident involving JF that she had allegedly witnessed Mr. Constance and JF having sex. MM then admitted that she **did not know what sex was** (See Tr.T. pgs. 510-524).

In her video statement, MM stated that she could not call anybody for help because Mr. Constance had locked the phones up in the safe. However, during trial she stated she called home several times (Tr.T. pg. 517).

The State presented three witnesses to support the charge of Aggravated Rape of JF; (1) JF, (2) MM, and (3) KF.[18] The testimonies had three different contradicting versions of the incident.

The testimonies are similar in some minor instances.[19] Taken separately, the individual testimonies

[18]KF testified that he did not see anything happen between Mr. Constance and JF.

[19]Could this be coaching? This Court must find that it is.

have a dismal and prejudicial affect on any reasonable trier of the fact. However, if combined, the statements have grave defects of proof. The differences in the statements greatly impeaches each one in it's individual capacity. The synopsis of the three statements of the alleged incidents show that although they reference the same incidents, none of the statements corroborate to the others.[20] A fair review clearly proves that the statements substantially impeach each other.

The only part of this testimony that was consistent was that these individuals had allegedly gone to Mr. Constance's residence for the weekend. This is where the consistencies end. The State used leading questions throughout the testimony, and the defense objected many times to the leading questions.

The circumstantial evidence presented at trial failed to exclude the reasonable hypothesis that there was no penetration. There was a complete absence of any direct testimony of even slight penile penetration of either the vagina or anus of JF by Mr. Constance. The bleeding and pain JF claimed to have experienced, which was not immediately reported, could have resulted from menstruation or digital penetration. Because the State failed to exclude these two reasonable hypothesis of innocence, the State failed as a matter of law to prove beyond a reasonable doubt that JF was raped by Mr. Constance.

Count Three:

In Count Three of the Indictment, Mr. Constance was charged with the Aggravated Rape of JK (WM; DOB: 4/6/92), in the year of 2001.

JK's testimony acknowledged that Mr. Constance and his mother were married. JK testified that he had a "***great dislike***" for Mr. Constance (See Tr.T. pg. 665). JK's testimony consisted of allegations of oral sex. At no point did his testimony allege rape as it was constituted in the year of 2001 in LSA-R.S. 14:42 2(b) (See Tr.T. Pgs. 657-679). JK initially, stated that no one was in the room at the time of the incidents (See Tr.T. pg. 662), then contradictorily stated that his mother was present during these

[20]In accordance with LSA-R.S. 46:1844 (W), Mr. Constance has not been afforded a copy of these transcripts. However, see: Rec.pp. 459, 461-465, 490-492, 495, 514-518, 676.

incidents (See: Tr.T. pg. 671). JK then testified that he was not able to take a bath without Mr. Constance in the tub with him (See: Tr. T. pg. 670), then stated that he had taken five (5) or six (6) baths with Mr. Constance (See: Tr.T. pg. 672). Apparently, JK only took five or six baths in the two years in which he lived in this residence, according to his testimony. JK testified that Mr. Constance had **molested him** and **raped his mother** several times during his testimony (See: Tr.T. pg. 660, 661, 665). When questioned by the defense about where he had learned about the word "**molest**," he stated, "**I've been knowing it a long time**" (See: Tr.T. pg. 675). When questioned by the if someone had told him those words, JK replied, "**I don't think so**" and that "**I don't remember**" (See: Tr.T. pg. 675).

JK admitted that he had talked to his mother and his grandparents on a regular basis about this case[21] (See: Tr.T. Pgs. 674-678), even though his mother, Christina was under a court-ordered "No-Contact Order." JK further testified that he had seen the Assistant District Attorney on several occasions prior to the trial (See: Tr. T. pg. 659), including the day of, and the day prior to the testimony.

Child Protection had investigated this **same allegation** in the latter part of 2000, earlier part of 2001, with a result of "no probable cause for criminal prosecution." Christina had lost custody of her children before the institution of "oral sex" into the statue for Aggravated Rape.

Count Four:

In Count Four of the Indictment, Mr. Constance was charged with the Aggravated Rape of KF (WM; DOB: 10/22/99), in the year of 2001 and 2002. The State had based the evidence on the reliability of the testimony of KF, and his accounting of the alleged incident(s).

KF testified that the abuse by Mr. Constance started when he was five (5) years old (See: Tr.T. pg. 481). KF further stated that this abuse was in the presence of Christina on several occasions. KF stated that he used to go to Mr. Constance's house every weekend. Then, contradictorily, Mr. Constance was living with KF's family, and that Mr. Constance and a woman named Melissa was living with KF's

[21] Could this also be considered "coaching?" This Court must find that it is.

family, also (See: Tr.T. pg. 482).

KF testified that the incidents occurred with Mr. Constance when he was five years old (See: Tr.T. pg. 481) and nine years old (See: Tr.T. pg. 487), which would indicate that he alleges that these incidents occurred in the years of 1995 and 1998 (as KF was born October 22, 1989)(See: Tr.T. pg. 486). KF *never* testified to any allegations of any occurrences in the year 2001 or 2002. The State failed to introduce **any** evidence into the court that proved guilt beyond a reasonable doubt that Mr. Constance was guilty of anything in the years of 2001 and 2002.

Applying the standards set forth in ***Jackson v. Virginia***, supra, The State failed to provide sufficient evidence to convict Mr. Constance on Count 4. See ***Dupuy v. Cain***, supra.

Summary of Insufficient Evidence Claims:

The state failed to present sufficient evidence supporting the charged offense in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, requiring relief. See ***In re Winship***, supra. Therefore, the Mr. Constance's conviction and sentence must be reversed.

The Due Process Clause of the Fourteenth Amendment protects persons accused of a crime against conviction unless the State proves every element of the offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The lack of evidence or corroborating testimony in this Count has failed to prove guilt beyond a reasonable doubt. The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must whether record evidence could possibly support a finding of guilt beyond a reasonable doubt; the relevant question is whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt. Fourteenth Amendment to the United States Constitution (See: ***Jackson v. Virginia***, supra. Therefore, the Mr. Constance's conviction must be reversed.

CLAIM 3

Reasonable jurists would determine that Mr. Constance was denied effective assistance of counsel during trial and Appeal; *Strickland v. Washington*; Sixth Amendment to the United States Constitution.

The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. U.S. Const. amend. VI. The purpose of this Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. *Powell v. Alabama*, supra; *Johnson v. Zerbst*, supra; *Gideon v. Wainwright*, supra; *Strickland v. Washington*, supra. The skill and knowledge counsel is intended to afford a Defendant "ample opportunity to meet the case of the prosecution." *Strickland*, 466 U.S. at 685 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 240, 87 L. Ed. 268 (1942)).

Lack of Investigation and preparation for trial:

Defense counsel failed to impeach the State's witnesses due to the lack of investigating the allegations. The State had presented defective Indictments of specific years with the original statements contradictory to the Indictment. Examples of these errors are as follows:

Count 1, TB In the original statement given to the authorities by TB, the incident had taken place in the year of 2004, when he was approaching the age of 14. TB testified the incidents occurred in 2003, when he was approaching the age of 13. Yet, the State's charge in Count 1 states "in the year of 2001." The failure of defense counsel's investigation into this charge prevented a proper defense during trial, or the possibility of a Motion to Quash. Also, defense counsel would have found that in TB's initial statement to Detective Overton, he admitted that he was having sex while Mr. Constance was working on the interstate in Jennings, Louisiana. His statement consisted of "Christina told me that Clutch said it was ok for us to have sex." Due to the unprofessional errors and lack of investigation in this case, the defendant was denied effective assistance of counsel.

Furthermore, defense counsel's lack of investigation denied the defendant with the right to include

into the record that TB had previously brought charges against one of his father's friends, which ended in the father's friend being convicted in trial. TB later recanted his statement against his father's friend. Defendant had informed counsel of this soon after the charges were instituted by the State. Positively, the use of this information would have been a substantial aid in the case the defense should have presented.

Count 4, K.F. Defense counsel failed to investigate the actual dates of the allegations in this count. K.F. had stated that he was six (6) and nine (9) at the time of these incidents, but the State alleged the years of 2001 and 2002. K.F. was born in 1989, these years would have made K.F. twelve (12) and thirteen (13) at the time of the allegations. Or, if he would investigated as to the age of the allegations, defense counsel would have noted that the years should have been 1995 and 1998.

Defense counsel informed the court on March 13 that he had not viewed the CAC videos that would be presented in trial (See: March 13, 2006 transcript, pg. 72 of 75). Had defense counsel viewed these tapes prior to admittance, counsel would have been able to impeach testimony, due to the discrepancies, and would have been prepared to impeach MM; and the other tapes that were not introduced into evidence could have presented the defense with an abundance of impeaching evidence. Subsequently, defense counsel had "no idea" what was on the un-presented tapes.

The testimony of MM was impeachable. MM stated on the tape that she was not allowed to call home to report the incident because defendant had locked the phone in the safe. At trial, she had contradicted her previous statement with the testimony that she had called home several times during the weekend (See: Tr.T. pg. 517). As MM was the only person to allegedly witness this incident, it was vital to impeach her testimony.

Apparently, counsel found **no time** to ensure his client of the possibility of **reliable** impeaching evidence against Christina or her son JK, as J.K was included in previous allegations. Child Protection had removed the children from the house in the month of July 2001 for the constant bickering and

arguing that was taking place in the residence between David and Christina Constance. Mr. Constance had been cleared of these sexual allegations through the investigation of Child Protection. Counsel's failure to investigate these same prior allegations resulted in prejudice, as defense counsel could have used the reports from that investigation.

Although Mr. Constance was not charged with Possession of Child Pornography, the allegation was used as a tool for conviction through the testimony of Overton. Counsel knew that **no child pornography** had been found during the search. Had the judge had ordered the jury to disregard the testimony of Detective Overton, you cannot "Un-ring a bell." Overton presented testimony that the Mr. Constance ***must have moved the evidence*** before the search of the residence (See: Tr. T. pg. 396-97).

Failure to investigate in this case left the defense unprepared for impeaching evidence or rebuttal of the State's witnesses that were presented during these proceedings. This failure to investigate denied Mr. Constance the effective assistance of counsel as guaranteed by the Sixth Amendment. Therefore, this conviction and sentence must be reversed and remanded for a new trial.

Summary of ineffective assistance of counsel Claims:

Deficiency Prong:

Trial counsel's performance fell below the reasonable standard as set for in *Strickland v. Washington*, and the Sixth Amendment to the United States Constitution. Defense counsel shows his deficiency by failing to prepare for the allegations that Mr. Constance lodged against him during the PCR (See: July 15, 2013, hearing tr. pp. 30-32, 35-39, 40-41, 44-46, 50).

Prejudice Prong:

The Courts have abused their discretion in denying relief in the Claims of ineffective assistance of counsel, as the district court "personally vouched" for Mr. Muscarello in its decision to deny relief. The testimony by counsel explaining that he "didn't know" and "couldn't remember," even after **adequate** notification of the context of the proceedings shows that Mr. Constance met his burden of proof

required in order for a reversal based on the grounds that trial counsel failed to even prepare to defend himself in this matter.

Mr. Constance has presented **VALID** constitutional violation concerning the ineffective assistance of counsel afforded him by the trial counsel in this matter. Sixth Amendment to the United States Constitution. Louisiana Constitution of 1974, Art. I § 2, 13, and 16.

Counsel even failed to review his records after **AMPLE** notification of the hearing in which there were Claims of ineffective assistance, simply relying on "I don't recall," and "I don't remember" during the hearing (See: hearing tr. July 15, 2013, pp. 30-32, 35-39, 40-41, 44-46, 50).

Although "I don't recall" and "I don't remember" may be reasonable answers for counsel during the course of a hearing, counsel was afforded at least one continuance to refresh his memory (or review the record), on January 14, 2013 (See: hearing tr., July 15, 2013, p. 71). Counsel had been informed prior to the hearing of the ineffective assistance of counsel Claims, but still failed to review his records in order to defend himself during the hearing. As counsel failed to investigate the allegations against him, it would be proper to state that he failed to investigate the allegations against his client, Mr. Constance.

The Courts have erroneously denied relief in this matter as testimony adduced during the course of the evidentiary hearings held before the district court proves that not only was the counsel ineffective during the proceedings leading to conviction, defense counsel even admitted that, after being notified of the hearing, he ***still failed*** to review the Record in order to defend himself against the allegations of ineffective assistance of trial counsel.

Throughout the evidentiary hearing held on July 15, 2013, Mr. Nicholas Muscarello's (defense counsel) repeated answer to direct questions was either "I don't recall" or "I don't remember." Although the higher courts will accept this answer in certain circumstances, this is not one of them. Mr. Muscarello was given ample opportunity to review the record.

Mr. Muscarello testified during the course of the July 15, 2013 evidentiary hearing that he had prior

notification of this hearing.[22] Mr. Muscarello has shown his professionalism by failing to prepare for this hearing even after being notified that the Claims associated with these proceedings were Claims of ineffective assistance of counsel lodged against him for his actions during the trial proceedings.

Furthermore, Mr. Muscarello testified that, "there were probably hours and hours of work put into this case,"[23] but could not "remember the extent that the investigator had been involved in this case."[24] Mr. Muscarello could not even recall any specifics as to possible witnesses or defenses to be presented to the Court during the trial.[25] Mr. Muscarello also committed perjury during the course of the evidentiary hearing as he had testified that he had reviewed the CAC tapes prior to the trial.[26]

Mr. Muscarello testified that he had called no witnesses to testify for the defense, and that he could not recall any conversations with prospective witnesses[27] who he could have testified for the defense.[28]

Although this Honorable Court may accept "I don't recall" or "I don't remember" as testimony from an attorney who has been called to testify during the course of an evidentiary hearing concerning ineffective assistance of counsel claims, this would only be "acceptable" **IF** the attorney has had **NO PRIOR KNOWLEDGE** of the hearing. In this case, Mr. Muscarello testified that he had been notified at least six weeks prior to the hearing.

Defense counsel had shown the same professionalism towards defending himself during this evidentiary hearing that he has shown toward this case as a whole by failing to review the record before the commencement of this hearing; even after being afforded the opportunity to do so by the trial court allowing continuances in his behalf. Furthermore, in the event that Mr. Muscarello **had** reviewed the case file from this matter, his responses would not have been, "I don't remember" and "I don't recall,"

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[22] See: evidentiary hearing transcript pp. 46-48.
[23] See: evidentiary hearing transcript p. 51.
[24] See: evidentiary hearing transcript p. 30.
[25] See: evidentiary hearing transcript p. 30.
[26] See: evidentiary hearing transcript p. 37. During the course of the trial, defense counsel had objected to the State's use of the CAC tapes due to the fact he was not given an opportunity to review the tapes prior to trial.
[27] This must be construed as Mr. Muscarello admitting that he did not interview any potential witnesses.
[28] See: evidentiary hearing transcript p. 35.

and Mr. Muscarello would have had to admit that he failed to prepare for this case as required by the State and Federal Constitutions.

Subsequently, the Judge had stated, "We come here, what, January 14th of this year, Mr. Nicholas Muscarello (defense counsel) and Mr. Frank Sloan (appellate counsel) were subpoenaed for Claims 10 and 11, ineffective assistance of counsel at the trial level and appellate level in accordance with the First Circuit Court of Appeals opinion remanding to the trial court for consideration of the merits of claims 10 and 11. That was rendered October 9th, 2012. And January 14th, 2013 Mr. Muscarello and Mr. Sloan were subpoenaed. It was set for May 6th, 2012."[29]

Accordingly, Mr. Constance correctly argues that this statement from the Court adds proof of counsel's notification of these hearings.

Mr. Constance was erroneously denied relief during this hearing a fair and impartial hearing in regards to his ineffective assistance of trial counsel Claims based on the fact that Mr. Muscarello **FAILED** to review the attorney file, even **AFTER** receiving notification that he would be testifying at an evidentiary hearing, and that there were Claims of ineffective assistance of counsel lodged against him in this matter.

Ms. Constance has shown that the testimony of his defense counsel during the hearing proves that he was denied effective assistance of counsel, a violation of the Sixth Amendment to the United States Constitution and in accordance with ***Strickland v Washington*** 466 US 668, 104 S.Ct 2052, 80 L. Ed 2d 674 (1984); **American Bar Association Standards 4-3.8.(A) and (B)**; and **ABA Standards 4-4.1**; Sixth and Fourteenth Amendment to the United States Constitution; Louisiana Constitution of 1974, Art. I § 2, 13, and 16.

Furthermore, the Courts have failed to consider the fact that counsel had prior knowledge of the hearing and the substance of the Claims in Mr. Constance's PCR when it stated, "despite counsel's

[29] See: evidentiary hearing transcript p. 71.

inability to recall much of the case." This Court ***must*** determine that defense counsel presented the ***same effort*** in defending himself against the ineffective assistance of trial counsel Claims as he did in defending Mr. Constance leading up to his conviction.

Reasonable jurists would determine that Mr. Constance was denied effective assistance of counsel after a review of defense counsel's testimony during the evidentiary hearing.

SUMMARY OF ARGUMENT

All trials should be fair, and the trial counsel be up to the challenge. Mr. Constance seeks to have his conviction reversed. His conviction is questionable due to defense counsel's inadequate representation during the course of the trial and the State's intentional use of "Hearsay' testimony throughout the trial. Had counsel performed as required by the Sixth Amendment to the United States Constitution and ***Strickland v. Washington***, supra, the outcome of the trial would have been different.

It appears that the Courts have totally disregarded the precedence concerning the State's intentional use of hearsay testimony throughout the trial process. This would include the introduction of out-of-court statements which were presented through the testimony of Det. Overton and the use of videotaped statements which were presented to the jury without the presentation of testimony from the person(s) being interviewed.

Mr. Constance has shown the Courts that his defense counsel failed to attempt to defend himself against ineffective assistance of trial counsel Claims which were filed during the course of the collateral review. A simple review of the attorney file by the defense counsel would have sufficed in order to, at a minimum, attempt to prove to the Court that he had provided competent representation to Mr. Constance. However, this was not done; even after defense counsel had been given more than adequate notice that he would be questioned during the course of a hearing. Is this the same effort defense counsel afforded Mr. Constance in this matter? Mr. Constance would suggest: **Yes.**

CONCLUSION

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

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

The record sufficiently supports Mr. Constance' allegation of substantial error. Therefore, this Honorable Court should find that, in the Interest of Justice, Mr. Constance's convictions should be revered; or in the alternative, Mr. Constance should receive a new trial. Mr. Constance seeks relief and has stated grounds under 28 U.S.C. § 2253, specifying, with reasonable particularity, the factual basis for such relief. Additionally, his pleading clearly alleges Claims which, if proven, entitle him to constitutional relief.

WHEREFORE, after a careful review of the merits of these Claims, Mr. Constance contends that this Honorable Court will find that reasonable jurists would not allow these convictions to stand.

Respectfully submitted this 4th day of December, 2019.

David Constance #304580

VERIFICATION

I, David Constance, hereby verify that I have read and understand the statements made in the above and foregoing and that the statements made are true and correct to the best of my knowledge, belief, and information under the penalties of perjury.

David Constance