

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH PETERSON

(Your Name)
VS.

PETITIONER

STATE OF LOUISIANA

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI FROM

THE LOUISIANA SUPREME COURT
NO. 2020-KO-00248

FOURTH CIRCUIT COURT OF APPEALS
DOCKET NO.: 2018-KA-1045 c/w 2018-KA-1046
HONORABLE JUDGES,
EDWIN A. LOMBARD, SANDRA CABRINA JENKINS,
REGINA BARTHOLOMEW-WOODS

TWENTY-FIFTH JUDICIAL DISTRICT COURT, PARISH OF PLAQUEMINES
CASE NO: 14-2838 C/W 17-1835
HONORABLE JUDGE MICHAEL D. CLEMENT PRESIDING
STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

JOSEPH PETERSON
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QUESTIONS PRESENTED

- Did the trial court violate Mr. Peterson's Due Process of Law when denying written materials seized from his computer when those materials were protected under the First Amendment of the United States Constitution?

LIST OF PARTIES

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

[] 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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TABLE OF AUTHORITIES CITED

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Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)

New York v. Ferber, 458 U.S. 747, 749, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)

Osborne v. Ohio, 495 U.S. 103, 110-11, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)

Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).

Ashcroft v. Free Speech Coal., 535 U.S. 234, 239, 122 S. Ct. 1389, 1406, 152 L. Ed. 2d 403 (2002).

State v. Germain, 433 So.2d 110, 117 (La. 1983).

State v. Cosey, 97-2020 (La. 11/28/00), 779 So.2d 675, 684).

State v. Rose, 06-0402, p.12 (La. 2/22/07), 949 So. 2d 1236, 1243.

State v. Wright, 2011-0141, pp. 10-11 (La. 12/6/11), 79 So.3d 309, 316

State v. Layton, 2014-1910 (La. 3/17/15), 168 So.3d 358.

State v. Girard, 2012-0790, p. 6 (La. App. 4 Cir. 3/6/13), 110 So.3d 687, 691).

State v. Gordon, 2013-0495, p. 23 (La. App. 4 Cir. 7/16/14), 146 So.3d 758, 772

State v. Frith, 2013-1133, pp.13-14 (La. App. 4 Cir. 10/22/14), 151 So.3d 946, 954.

State v. Barbain, 2015-0404 (La. App. 4 Cir. 11/04/15) n.2, 179 So. 3d 770, 773.

STATUTES AND RULES

First Amendment to the United States Constitution

Louisiana Code of Evidence Article 404(B).

Louisiana. Revised Statute 14:78.1

Louisiana Code of Evidence Article 412.2.

Louisiana Code of Evidence Article 403

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

Petitioner respectfully prays that a writ of certiorari be issued 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 this 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 this petition and is:

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

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

The opinion of the highest state court to review the merits, appears at Appendix “A” to the petition and is:

- [X] reported at State v. Peterson, 2020-00248, ---So.3d --- (La. 7/31/20), or,
- [] has been designated for publication but is not yet reported; or,
- [] is unpublished.

The opinion of the **Fourth Circuit Court of Appeals** at Appendix “B” to the petition and is:

- [X] reported at State v. Peterson, 2018-1045 (La. App. 4 Cir. 1/8/20), 289 So.3d 93; 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).

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

The date on which the highest state court decided the case was **July 31, 2020**. A copy of that decision appears at Appendix "A".

[] 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

First Amendment to the United States Constitution

Louisiana Code of Evidence Article 404(B).

Louisiana Revised Statute 14:78.1

Louisiana Code of Evidence Article 412.2.

Louisiana Code of Evidence Article 403

STATEMENT OF THE CASE

Mr. Peterson was indicted on October 29, 2014, in case number 14-2838 for two counts of aggravated incest, violations of La. R.S. 14:78.1. (R.pp.1; 32-33). On December 8, 2014, he was arraigned and plead not guilty. (R.p.2). On May 30, 2017, Mr. Peterson was indicted in case number 17-01835 for one count of aggravated incest. (Supp. December 13, 2018, p.14).¹ He was arraigned on that indictment on June 12, 2017, and entered a plea of not guilty. (Supp. December 13, 2018, p.2).

On December 15, 2015, Mr. Peterson filed a Motion and Order in Limine to Exclude Evidence. (R.pp. 153-263). Attached to the defense motion are eight examples of the type of material which the defense sought to exclude. (R.pp. 163-220). The State's Response was filed on December 16, 2015. (R.pp.290-294). The court held a hearing on the Motion in Limine on December 16, 2015, but deferred the matter to trial. (R.pp. 12-13; Supp. April 17, 2019, pp. 3-84).²

On December 21, 2015, Mr. Peterson filed a Notice of a Request for a Bench Trial, waiving his right to be tried by a jury. (R.p. 296). On March 8, 2017, the State filed a Notice of Intent to Introduce Evidence pursuant to *La. C.E. Art. 412.2*, giving the defense notice of its intent to introduce, in the trial of No. 14-2938, the evidence pertaining to a December 2012 incident subsequently charges in No. 17-1835 as noted above. (R.pp. 515-516).

¹ *La. R.S. 14:78.1*, entitled "Aggravated Incest," was repealed by Acts 2014, Nos. 177 and 602. Effective June 12, 2014, "aggravated incest" was redesignated "aggravated crimes against nature" and is now located at *La. R.S. 14:89.1*. "No change in the substantive proscriptions of Louisiana Law were effected – only the placement of the conduct constituting the offense in the aggravated crime against nature offense – and the repeal of the offense of Aggravated Incest." See *State v. Barbain*, 2015-0404 (La. App. 4 Cir. 11/04/15) n.2, 179 So. 3d 770, 773.

² During trial the State offered into evidence S-17, a compendium of eight pornographic stories allegedly collected from Mr. Peterson's computer. The trial court admitted their stories into evidence over defense objection, thereby effectively denying Mr. Peterson's Motion in Limine which sought to exclude that very material. (R.pp. 24; 1121-1128).

Trial began on February 21, 2018,³ and continued on February 22, and March 9, 2018, and concluded with verdicts of guilty as charges on all three counts, two counts in 14-2838 and one count in 17-1835, on March 28, 2018. (R.pp. 20-26; 660-1328; Supp. May 24, 2019, p.4 of 10).⁴ On August 8, 2018, Mr. Peterson was sentenced on each count to concurrent terms of imprisonment at hard labor for twenty-five years, without benefit of probation, parole, or suspension of sentence. (R.pp. 28; 139; 641; Supp. May 24, 2019, Transcript of August 8, 2018, p. 6).⁵

³ It was agreed that the charges in both case numbers 14-2938 and 17-8535, representing three counts of aggravated incest, would be consolidated for trial. (R.pp. 20; 660). The agreement to consolidate both case numbers for trial obviated the need for the trial court to rule on the state's 412.2 Motion.

⁴ At the conclusion of the State's case the defense made two oral Motions to Quash and an oral Motion for Acquittal, which motions were denied. (R.pp. 1161-1188).

⁵ Although grave, it appears that Mr. Peterson received the minimum sentence allowed by law for his crimes of conviction.

REASON FOR GRANTING THIS PETITION.

It was an error to deny Mr. Peterson's Motion in Limine seeking to exclude from trial the written materials seized from his computer as those materials were protected under the First Amendment to the United States Constitution.

As noted above, the state admitted into evidence prose materials seized from a computer which materials contain graphic fictional prose depictions of adult/child sexual activity. The activities described are illegal. Mere possession of the written materials, however, does not appear to be illegal. Rather, it appears that possession of such fictional material is protected by the First Amendment.⁶ Trial counsel filed a Motion in Limine seeking to exclude from use at trial those materials as unduly prejudicial pursuant to Rule 403 of the Louisiana Code of Evidence. (R.pp. 153-263). Attached to the defense motion are eight representative examples of the type of material which the defense sought to exclude. (R.pp. 163-220). The State filed a response. (R.pp. 290-294). The court held a hearing on the Motion in Limine on December 16, 2015, but deferred the matter to trial. (R.pp. 12-13). During trial the State offered into evidence S-17, a compendium of eight pornographic stories allegedly collected from Mr. Peterson's computer. The trial court admitted the stories into evidence over defense objection, effectively

⁶ In *New York v. Ferber*, 458 U.S. 747, 749, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), the Supreme Court held that child pornography is distinguishable from other sexually explicit speech. Child pornography is not protected by the First Amendment because the State has a "compelling" interest in safeguarding the well-being of minors. *Id.* at 756-57. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239, 122 S. Ct. 1389, 1406, 152 L. Ed. 2d 403 (2002). Therefore, while pornography may warrant First Amendment protection and can be banned only if it is found to be obscene, see *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), pornography that depicts minors can be proscribed whether or not the images are obscene. *Ashcroft*, 535 U.S. at 240. Moreover, the Court has held that the State's interest in protecting children from exploitation also justifies criminalizing the possession of pornography that is produced using children. *Osborne v. Ohio*, 495 U.S. 103, 110-11, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990); see also *Ashcroft*, 535 U.S. at 250 (affirming *Osborne* while striking down a statutory provision that outlawed possession of virtual child pornography because real children were not exploited in its production). "The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Ashcroft*, 535 U.S. at 246.

denying Mr. Peterson's Motion in Limine. (R.pp. 24; 1121-1128).

Mr. Peterson argues that the trial court committed reversible error. Mr. Peterson further argues that his trial counsel stated that although the materials were "vile, disgusting, shocking, and abhorrent" (Supp. April 17, 2019, p. 11) they were nonetheless constitutionally protected speech, a fact admitted by the prosecutor. Supp. April 17, 2019, Supp. P. 24). Thus, trial counsel argues, the materials were not illegal to possess and so not probative of criminal activity – and yet unduly inflammatory and prejudicial. Counsel reasoned, under the balancing required by 403 that such legal yet extremely prejudicial material should be excluded from use at trial. The state responded by claiming that although constitutionally protected, the speech contained within the documents was nonetheless admissible, despite its prejudicial effect, as evidence of lustful disposition evidence admissible under C.E. Art. 412.2. (Supp. April 17, 2019, p. 24). The State's argument prevailed.

Generally, evidence of other acts of misconduct is not admissible. See, e.g., *State v. Rose*, 06-0402, p.12 (La. 2/22/07), 949 So. 2d 1236, 1243. However, statutory and jurisprudential exceptions exist when the evidence of other acts "tends to prove a material issue and has independent relevance other than showing that the defendant is a man of bad character." *State v. Germain*, 433 So.2d 110, 117 (La. 1983). See also *La. C.E. art. 404(B)*. Even when a defendant's prior bad acts are relevant and otherwise admissible, the trial court must still balance the probative value of the evidence against its prejudicial effect before the evidence can be admitted. *Rose*, 06-0402, p.13, 949 So. 2d at 1243-44.

La. C.E. art. 412.2(A) provides: When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission

of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403. It is not necessary, for purposes of article 412.2 testimony for the defendant to have been charged, prosecuted, or convicted of the “other acts” described. See *State v. Layton*, 2014-1910 (La. 3/17/15), 168 So.3d 358.

In order for any evidence deemed to fall within *La. C.E. art. 412.2* to be admissible, it must pass the balancing test of *La. C.E. art. 403*, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.” “Unfair prejudice,” as used in *La. C.E. art. 403*, means that “the offered evidence has ‘an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” Author’s Note (3), *La. C.E. art. 403*, Handbook on Louisiana Evidence Law, Pugh, Force, Rault & Triche, p. 380 (2011). “A trial is vested with much discretion in determining whether the probative value of relevant evidence is substantially outweighed by its prejudicial effect.” *State v. Gordon*, 2013-0495, p. 23 (La. App. 4 Cir. 7/16/14), 146 So.3d 758, 772 (citing *State v. Girard*, 2012-0790, p. 6 (La. App. 4 Cir. 3/6/13), 110 So.3d 687, 691).

“A trial court’s ruling on the admissibility of evidence will not be overturned absent an abuse of discretion.” *State v. Wright*, 2011-0141, pp. 10-11 (La. 12/6/11), 79 So.3d 309, 316 (citing *State v. Cosey*, 97-2020 (La. 11/28/00), 779 So.2d 675, 684).

Mr. Peterson argues that the pornographic prose materials case were overwhelmingly heinous and vile, depicting in the most graphic way unimaginably abusive illegal sexual behavior. The materials cast Mr. Peterson in the worst possible light. Compared to the

allegations made by the alleged victim, as illegal as that alleged activity may have been, the activities described in the materials were even more extreme, such that the pornographic prose tail wagged the crimes of conviction dog. In fact, the imbalance between the materials and the crimes was so great as to warrant exclusion, for the written evidence was surely more prejudicial than probative, particularly given the facts of this case, where identity, motive, access, opportunity, all of the usual passkeys to “other crimes” evidence, were not in play.

If this were a case where the alleged actions of the perpetrator were equivocal in any way, then consideration of the evidence of his consumption of the pornography might have assisted the fact-finder in determining the perpetrator’s intent. In such a case where the crime remains inchoate, the pornographic evidence might assist a fact-finder in understanding the perpetrator’s ultimate criminal goal. But where, as here, the alleged criminal episodes so clearly speak for themselves, in matters of the motive and the intent of the perpetrator, and where identity and access were not in dispute, then the pornographic materials do nothing of the sort. Rather, the legal pornographic materials in this case served only to case Mr. Peterson in the worst possible light, condemning him before any evidence of criminal wrongdoing was even considered.

The question of whether the introduction of inadmissible evidence results in a trial error is subject to harmless error analysis on appeal. See *State v. Frith*, 2013-1133, pp.13-14 (La. App. 4 Cir. 10/22/14), 151 So.3d 946, 954. The inquiry “is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.” Id. (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).

In this case, considering the contradictory and uncorroborated evidence of Mr. Peterson’s

guilt, it cannot be said that the improperly admitted pornographic prose did not contribute to the verdict. The trial court's abuse of discretion was not harmless in this instance. The error mandates reversal.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,


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9/24/20

Date