

No. 20-7852

In The  
Supreme Court of the United States  
\_\_\_\_\_  
Term, 2021

JOHN ELMER — Appellant

v.

**ORIGINAL**

STATE OF LOUISIANA — Appellee(s)

On Petition for a Writ of Certiorari to  
LOUISIANA FIFTH CIRCUIT COURT OF APPEAL

FILED  
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John Elmer #185491  
MPWY/Wal-4  
La. State Penitentiary  
Angola, LA 70712

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**QUESTION(S) PRESENTED**

- 1. Reasonable jurists would determine that the State failed to meet the stringent burden of proof as established by Jackson v. Virginia and In re: Winship.**

## LIST OF PARTIES

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

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

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

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

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix \_\_\_\_\_ to the petition and is

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 is unpublished.

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

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 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "E" to the petition and is the Louisiana Supreme Court in Docket Number 2020-K-01131.

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 is unpublished.

The opinion of the Fifth Circuit Court of Appeal appears at Appendix "C" to the petition and is

reported at 19-KA-478; 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 is unpublished.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. \_\_\_\_\_.

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

For cases from state courts:

The date on which the highest state court decided my case was February 9, 2021. A copy of that decision appears at Appendix "E".

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

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

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This conviction was obtained in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Specifically, Mr. Elmer was denied the right to a fair and impartial trial due to the fact that the Court failed to consider that his entire case was based upon false allegations.

## NOTICE OF PRO-SE FILING

Mr. Elmer 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. Elmer is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court.

## REASONS FOR GRANTING THE PETITION

In accordance with this Court's *Rule X, § (b) and (c)*, Mr. Elmer 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 controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

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.

A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This Honorable Court must review the sufficiency of the evidence, especially considering the fact that Mr. Elmer had been found not guilty (unanimously) by the jury. Furthermore, Mr. Elmer was found guilty of three of his Counts by a non-unanimous jury verdict.

Mr. Elmer has properly informed the courts that this entire case was a case of "follow the money," because it appears that these allegations were lodged after a family confrontation concerning the money that Mr. Elmer had saved for his retirement. Let's not forget that the alleged victim's mother had sued Mr. Elmer in order to ensure that, "so that I can take care of the kids to the extent they have been living" (Rec.pp. 1072, 1086)."

In fact, almost all of the texts Sunnie Elmer (Mr. Elmer's daughter, and the alleged victim's mother) sent to Mr. Elmer were about money and property that she wanted from him because the family had basically been "cut off" from Mr. Elmer's money after his divorce from his wife (Sue Tegre). A close review of the texts and messages failed to include any allegations concerning TH. This Court must determine that these allegations had been lodged against Mr. Elmer because TH's mother and grandmother were concerned about their own financial security after the divorce.

There was quite a bit of testimony concerning John's money that everyone wanted, including the inheritance and the properties that he owned. The disclosure happened soon after everyone found out that John was moving to Brazil for retirement. This means that Sue wasn't going with him; which resulted in a Divorce. According to the pre-nuptial agreement, Sue would end up with *nothing*. The family had also discovered that John had changed his Will, leaving everything to his son instead of dividing up the money and assets.

Furthermore, testimony adduced during the course of the trial proves that the alleged victim had been constantly questioned by her mother, grandmother, and her mother's friend (Jennifer Richard) concerning TH. The questions presented to her were not "general" questions, but specific questions in which TH was asked about illicit conduct by her grandfather. The questions presented to TH were specifically designed to obtain the answers desired. These specific questions were, "Did Grandad do this or that?" Not what happened, and who did it?

In fact, Jennifer Richard (the alleged victim's mother's friend) had only recently obtained a job in Crisis Management a month prior to the commencement of Mr. Elmer's trial (Rec. p. 999), with only "some" training with children (Rec.p. 999). In fact, Ms. Richard testified that the arguments with TH and her mother concerned her troubles at school, the bullying TH had been doing to other students at her school (hence, the suspensions and moving to other schools), and the fact that TH was unable to get what she wanted when they went shopping on "Black Friday" (Rec.pp. 1013, 1304).

During TH's testimony, she admitted that the allegations were made during a family argument concerning her school, and her "attitude" concerning the shopping trip; and that her mother and grandmother had specifically asked her if her grandad had done anything to her (Rec.p. 1415). After the disclosure of the alleged abuse, all arguments ceased concerning TH's behavior.

The State has also relied heavily on the erroneous allegation that Mr. Elmer was taking his granddaughter to Victoria's Secrets to shop for underwear. Although Sue Tegre and Sunnie Elmer testified to such, TH specifically testified that her mother (Sunnie Elmer) was the one who brought her to Victoria's Secrets in order to purchase underwear (Rec.p. 1418).

In light of the argument above, and the argument presented to the Fifth Circuit Court of Appeal, Mr. Elmer contends that the State failed to meet their stringent burden of proof as required in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

#### STATEMENT OF THE CASE AND ACTION OF TRIAL COURT

John Elmer was charged by Bill of Information with four Counts of Molestation of a Juvenile, in violation of LSA-R.S. 14:81.2 (Rec.pp. 18-20).<sup>1</sup> On February 6, 2018, he entered a plea of not guilty (Rec.p. 2). The State filed a 404(B) notice to admit evidence of other crimes and on January 18, 2019, the State and defense stipulated to the admission of one prior act that occurred in Alabama (Rec.pp. 5, 6, 293-93).

<sup>1</sup> Mr. Elmer was originally charged with 4 other counts, but was found not guilty on Counts 1,2, 7, and 8 (Rec.pp. 18-20).

The defense filed a Motion in Limine to keep the child witness from testifying, which was denied (Rec.pp. 295-310). The defense also objected to allowing Detective Waguespack to be named as case agent and allowed to remain in the courtroom in the interest of justice and as an exception to the warrant requirement (Rec.pp. 311-8).

On January 22, 2019, a twelve person jury was seated (Rec.pp. 332-816). On January 24, 2019, Mr. Elmer was found guilty as charged on Counts 3-6 (non-unanimous verdicts of 11-1 on Counts 3, 4, and 5; and a unanimous verdict on Count 7). Mr. Elmer was found not guilty on Counts 1, 2, 7, and 8. The trial court ordered a pre-sentence investigation (hereinafter "PSI") (Rec.pp. 10-6).

The Motion for New Trial and Post-Verdict Judgment Motion of Acquittal were heard and denied on June 17, 2019 (Rec.pp. 16-7, 102-6). The trial court heard victim impact statements. Mr. Elmer was sentenced to serve ninety-nine (99) years at hard labor on Counts 3, 4, and 5. These sentences were ordered to be served concurrently, without the benefit of Probation, Parole, or Suspension of Sentence. Mr. Elmer was sentenced to serve twenty (20) years on Count 6, to be served consecutively to Count 3, and he was given credit for time served (Rec.pp. 16-7).<sup>2</sup> A written Motion for Appeal was filed and granted (Rec.pp. 152-4).

On October 28, 2019, the Louisiana Appellate Project timely filed the Original Brief on Behalf of Mr. Elmer on Appeal. On July 31, 2020, the Louisiana Fifth Circuit Court of Appeal, granted in part and denied in part, written reasons.<sup>3</sup> Mr. Elmer then timely filed for Writ of Certiorari to the Louisiana Supreme Court on August 17, 2020, which was denied on February 9, 2021. See: State v. Elmer, 310 So.3d 182 (La. 2/9/21).

Mr. Elmer now timely files for Writs of Certiorari to this Honorable Court, and respectfully requests that this Honorable Court exercise its Supervisory Authority of Jurisdiction over the lower

2 It must be noted that the Court has imposed the maximum sentences on all Counts.

3 In Docket No.: 19-478, the Louisiana Supreme Court remanded Counts 3, 4, and 5 for further proceedings pursuant to the recent ruling in Ramsey.

courts for the following reasons to wit:

#### **STATEMENT OF THE FACTS**

Detective Christopher Waguespack testified he was assigned as a juvenile detective. Sunnie Elmer called the office to make a complaint and was told to set up an appointment with Det. Waguespack on Monday. On the same day, a report was made by Jennifer Richard to a patrol deputy (Rec.pp. 895-904).

Ms. Elmer disclosed the JH disclosed to her and her mother that her grandfather had been molesting her for years. Det. Waguespack interviewed JH, who said the first time was in Alabama when they were on a trip together and she was 10 years old. Det. Waguespack testified that JH then spoke to a female forensic interviewer, Lt. Renee Kinler. Det. Waguespack testified that he got no indication that JH was being influenced by her mother for financial gain (Rec.pp. 905-14).

Det. Waguespack testified that there was no indication that Mr. Elmer had ever penetrated her vaginally. He admitted there was never any indication of PH being an eyewitness to any of these incidents. No physical exam was performed because it had been 5 or 6 months since the last alleged incident and the reporting (Rec.pp. 915-6).

Det. Waguespack next spoke with Jennifer Richard who was considered the first reporter and Sue Tregre. He testified the statements were all consistent and did not appear to be motivated by money. Det. Waguespack corroborated some of the information from texts on Sunnie's phone between her and Mr. Elmer. Det. Waguespack admitted he never contacted Mr. Elmer or attempted to get DNA (Rec.pp. 916-26).

Three months later in March of 2018, the detective got a second recorded statement from JH. He had been contacted by Sunnie Elmer again because her daughter was unable to sleep and worried if she was a virgin. He also spoke with JH again later that day and had Lt. Kinler conduct a second forensic interview.

No further action was taken or deemed necessary. On August 20, 2018, Sunnie contacted the detective again and claimed her son, PH, was a witness to some of the abuse. Det. Waguespack went to Mississippi and spoke with Lisa Barylski, the person PH disclosed to, and to PH. PH told the detective he had seen his grandfather on top of JH, and that the two had been behind closed doors and heard arguing about her taking off her clothes. Det. Waguespack admitted PH bounced around during his statement and had been talking about several different things. The detective asked him why he came forward now, and PH said it was because someone had been talking bad about his sister and he was trying to defend her (Rec.pp. 927-33).

On cross-examination, Det. Waguespack admitted the initial report while shopping was JH's response to why she was having disciplinary problems and her demeanor. He admitted they did not investigate any possible financial influences for the allegations. Det. Waguespack got a search warrant for the house at Bayou Gauche and permission from Mr. Elmer's wife at the time, Sue Tregre. They recovered some computers and SD cards, but nothing recovered was relevant to the allegations made (Rec.pp. 939-58). Det. Waguespack admitted the only phone they did a "dump" on was Sunnie's. None of the texts from Sunnie's phone indicated an admission of any of JH's allegations (Rec.pp. 957-76).

Jennifer Richard testified she was the Godmother of JH and she and her mother, Sunnie, had been friends since they were teenagers and met at Victory Life Church. She had a degree in Sociology and worked with law enforcement. Ms. Richard testified that Sunnie told her via text in December 2017 that JH had said Mr. Elmer had been touching her Goddaughter. Ms. Richard spoke with JH alone and asked her what Mr. Elmer had done to her. The next day on her way home from Mississippi, she called the St. Charles Sheriff's Office and made a report. Ms. Richard admitted to immediately texting Sunnie to not let Sue Tregre to talk the JH (Rec.pp. 985-1007).

Sunnie Elmer testified she was always close with her father, John Elmer, and after her second

divorce, she moved in with her parents in Bayou Gauche. She counted on them to help her with the children and take them to school and sports (Rec.pp. 1040-55, 1169-71). Sunnie testified Mr. Elmer took JH on hunting trips and they often went shopping and out to eat after practice. Sunnie admitted she felt excluded along with her son and her Mom.

She testified she decided to move to Mississippi in the Summer of 2017 because she was losing control over her kids. She had also moved in with her boyfriend, Nick. He didn't work as many hours as she did and could be home to take the kids to and from the bus stop (Rec.pp. 1055-65, 1171-7, 1188-1210).

Around November 2013, Mr. Elmer took his granddaughter, JH, to Alabama for a school project because she couldn't. Sunnie testified she mostly remembered JH came home in a leopard dress he had bought her and she thought it was inappropriate. She showed the jury a picture of JH in the dress. Sunnie testified she first became aware of something happening to JH when JH threw a fit while shopping on Black Friday 2017.

Mr. Elmer had been hunting in Mississippi and they had texted back and forth all day. When her and her Mom confronted JH about why she was so angry and confrontational, JH told them her grandfather had touched her. Sunnie texted her father and told him he needed to send her her inheritance and take care of her kids the way they had been living and she told him he had a week to do it (Rec.pp. 1065-72, 1086, 1158-85).

Sunnie testified she only reported it to the police 8 or 9 days later after she told her friend, Jennifer Richard. In the texts, Sunnie asked Mr. Elmer for the coastal property in Pass Christian, her Best Buy credit card, and to wire her money. Sunnie later read the texts to the jury that reveal both her and her father realized these texts can be perceived as compensation for not reporting. Sunnie testified that in August or September 2018, her son PH disclosed information to Lisa and then he told her. Sunnie

admitted that she sued her father in civil court two or three weeks after the disclosure in 2017. The lawsuit was settled for \$900,000 (Rec.pp. 1072-1136, 1141-55, 1185-8, 1198-1203).

PH testified he was 13 years old at the time of the trial. He testified he and his sister, JH, had different interests and he wouldn't lie or do any favors for her. PH testified that they saw their grandparents all the time growing up and they often spent the night there. PH admitted he would sometime lie about things like shooting his sister with a BB gun and doing his chores. He testified he saw some things wrong that happened between his "D-Dad" and his sister. PH recalled a time when the front door was locked and he saw his grandfather touching his sister on her chest while they were sitting on the couch. PH testified he didn't tell anyone about it because he didn't want to get in trouble or get his grandfather or sister in trouble.

A second the same thing happened and he walked in and yelled at his grandfather. PH said his grandfather told him not to say anything or he would hurt him, so he didn't. A third time, PH went upstairs and saw his grandfather on top of his sister. She had a swimsuit on and his grandfather was fully clothed. He yelled at his grandfather again, but did not tell anyone. PH testified at times he heard his sister yelling at her grandfather not to touch her behind closed doors. He testified that sometimes his grandfather slapped or hit him and he believed his grandfather preferred his sister over him. PH testified he finally blurted out what was happening when he had his Mom were in an argument (Rec.pp. 1233-57).

Sue Tregre testified that Mr. Elmer retired in 2013 or 2014. She testified that JH and PH were her grandchildren and they only occasionally got along. Ms. Tregre testified she has known both of them to lie, usually to tell on the other to get them in trouble. Ms. Tregre testified they often financially supported Sunnie and the kids, especially pay for travel ball. She testified Mr. Elmer's relationship with both grand-kids was normal. Ms. Tregre recalled when Mr. Elmer took JH to Alabama for social

studies project. She recalled the dress he bought JH at a boutique, and testified that she thought it cost too much and was inappropriate (Rec.pp. 1279-90).

Ms. Tregre testified that JH often stayed in her room at their house because she and PH fought a lot, and that after Sunnie and her kids moved to Mississippi, her relationship with Mr. Elmer improved and they began to look at places to retire. During that time, JH's appearance and behavior changed. Ms. Tregre testified she told Mr. Elmer she believed JH was being molested. The Friday after Thanksgiving, Ms. Tregre was shopping with Sunnie and JH, and JH had a bad attitude all day. That evening, Sunnie confronted her and she admitted Mr. Elmer had been touching her. Ms. Tregre testified that Mr. Elmer threatened to kill himself all the time. She admitted she did not call and report the matter to the police, but she did make a statement to the police after it was reported (Rec.pp. 1291-1332).

JH testified that the first time she was touched inappropriately was when her grandfather took her to Alabama for a social studies project and they stayed in a hotel room. A few months after he touched her again at his house, and it continued regularly after that. He never kissed her on the mouth or vaginally penetrated her with his penis. JH testified she never put her mouth on his penis, and that when she threatened to go to the police, Mr. Elmer told her he would kill himself. She testified he never threatened to hurt her or anyone else. JH testified she told her Mom and grandmother when confronted after shopping on Black Friday in 2017 (Rec.pp. 1360-97).

Joshua Elmer testified for the defense. He testified he and his father, Mr. Elmer, were sued in civil court by his sister, Sunnie in January 2018. Josh testified that almost a million dollars was seized from their joint account. He testified that in November 2017, his father was distributing his assets to his kids and grand-kids. Josh told the jury that Mr. Elmer planned to move with his wife overseas after the holidays, but his wife did not want to go (Rec.pp. 1430-49).

## **STANDARD OF REVIEW**

In State v. Ashley, 33,880, at \*3 (La. App. 2<sup>nd</sup> Cir. 10/04/00), 768 So.2d 817, 819, the Court noted that, “the accused may be entitled to an acquittal … if a rational trier of fact viewing the evidence in accord with Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the elements of the offense have been proven beyond a reasonable doubt.”

Also, 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).<sup>4</sup>

Furthermore, criminal statutes of limitation are to be liberally construed in favor of repose in favor of the defendant. U.S. v. Marion, 404 U.S. 307, 92 S.Ct. 45, 30 L.Ed.2d 468.

## **LAW AND ARGUMENT**

### **ISSUE NO. 1**

**John Elmer The State failed to meet the stringent burden of proof as required in Jackson v. Virginia, and In re: Winship, and there was insufficient evidence to prove that Mr. Elmer is guilty of Molestation of a Juvenile.**

Mr. Elmer challenges the sufficiency of the evidence supporting his convictions for Molestation of a Juvenile. For this reason, this Court “should preliminary determine the sufficiency of the evidence before discussing the other issues raised on Appeal.” State v. Herron, 2003-2305 (La. App. 1<sup>st</sup> Cir. 5/14/04), 879 So.2d 778 (citing State v. Hearold, 603 So.2d 731 (La. 6/29/1992)). This is because “a finding of insufficient evidence to support the guilty verdict bars the retrial of a defendant based on the constitutional protection against Double Jeopardy,” and renders all other issues relating to that charge moot. State v. Davis, 2001-3033 (La. App. 1<sup>st</sup> Cir. 6/21/02), 822 So.2d 161, 162-3.

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4This 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).

This Court cannot overlook the “very questionable” testimony from the State’s witnesses concerning these allegations. According to the testimony of the witnesses, the State failed to prove the essential elements of the offense beyond a reasonable doubt.

The testimony presented during trial failed to include any facts for the use of force, violence, duress, menace, psychological intimidation, threat of bodily harm, or the use of influence by virtue of a position of control or supervision.

Although the State may argue (as they did in Closing Arguments) that it appeared that Mr. Elmer had used psychological intimidation with the use of threats of suicide, this Court must note that the allegations of Mr. Elmer’s thoughts of suicide were alleged to have occurred *after* JH’s questionable disclosure to her mother and grandmother (See: texts between Sunnie Elmer and Mr. Elmer).<sup>5</sup>

This Court must also determine that the disclosure by JH must be considered “suspicious as best” due to the fact that this disclosure was made during the course of a “family” altercation (or argument) concerning JH’s “troubles” with school. In fact, JH’s grandmother, Sue Tegre (Mr. Elmer’s ex-wife) *specifically* asked JH during the argument of JH’s attitude and problems at school, “Did D-Dad do something to you that he shouldn’t have done to you?” Immediately upon answering Sue’s question, the argument (or chastising) was over with (Rec.pp. 1013, 1071, 1304, 1415).

What’s most amazing about this disclosure is the fact that no one decided to call the police about the disclosure (Rec.p. 1073). Yet instead, the decision was made to text Mr. Elmer and inform him that, “You’re going to give me some money, so I can take care of the kids to the extent they have been living. You better figure it out. Seriously, I don’t think you have a toe to stand on. You’re playing with fire at this point. I want their inheritance, so they can be taken care of. You have a week” (Rec.p. 1086). In fact, Sunnie was basically giving her mother two weeks in order to, “get things in order” (Rec.pp.

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<sup>5</sup> Please note that the texts were not made a part of the Record which was received by Mr. Elmer by the Court of Appeal.

1004, 1166).

Throughout the text messages, most of the discussion concerned money and property; not the actual allegations against Mr. Elmer.<sup>6</sup> This is a case of "*Follow the Money*" for the family; not Justice for TH. In fact, Sunnie admitted that she had sent a text to Mr. Elmer that he, "needed to send some money" (Rec.p. 1072, 1086),<sup>7</sup> and that she had filed a Civil suit on behalf of TH<sup>8</sup> approximately 2-3 weeks after Mr. Elmer's arrest (Rec.p. 1130).

Another issue this Court must consider is the fact that Jennifer Richard (Sunny's friend who is allegedly trained in Crisis Management violated *every* ethical code concerning her profession. During a discussion with an alleged victim, it is the normal process to have the alleged victim disclose; not ask direct questions (or "yes" or "no" questions) in order to determine the validity of the allegation.

In this case, Ms. Richard asked *direct* "yes" or "no" questions to JH (Rec.p. 1393), without questioning her about the actual account of the events. Ms. Richard admitted that the following conversation had occurred between herself and TH: "Did Granddad penetrate your vagina with his penis? She said: No. I said: Did Granddad take his penis and put it in the opening of your vagina? She said: Yes. I said: Did Granddad touch your vagina with his fingers, yes or no? She said: Yes. I said: Did Granddad ejaculate on you? She said: Yes. I said: Did Granddad touch your butt with his penis? She said: Yes. I said: Did Granddad make you touch his penis with your hand? She said: Yes. I said: Did Granddad touch your breasts? She said: Yes. I said: Did Granddad touch you with his -- with your mouth with his penis? She said: Yes." (Rec.p. 992).

Surely, no Court would consider this a proper questioning by someone who believes that they are a professional in this type of situation. Ms. Richard testified that her Internship began in 2016; and that her paid job started about a month prior to trial, but failed to stipulate and specifically training that she

6 This would include the inheritance concerning Mr. Elmer's decision to change his Will.

7 In fact, an overwhelming amount of the texts referred to either money or property.

8 Without discussing the matter with JH.

had received (Rec.p. 999).

The Court must also consider the “questionable” testimony and circumstances of PH (JH's younger brother), the *only* person who allegedly witnessed any of these incidents. PH *also* disclosed these incidents during the course of a heated family “discussion” concerning problems with his attitude and bullying other children. PH testified that he disclosed when him, his mother, her friend, and her friend's daughter were arguing (Rec.pp. 60, 1252).

PH also testified that he didn't know how many times he has lied, and that he would lie in order to get out of trouble (Rec.p. 1243). Incredibly, PH testified to the fact that he witnessed these alleged incidents when he was about 11 years old (Rec.p. 1256), but had given a statement to the authorities, informing them that he was approximately 7-8 years when he had witnessed the acts (Rec.pp. 55, 57).<sup>9</sup>

The State's credence to the credibility of the their witnesses cannot be justified by the Record in this matter. One *must remember* that, A liar cannot be believed on the one hand, but not the other. *Falsus en uno, falsus en omnibus.*

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 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 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.

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<sup>9</sup> Although PH's statement was not presented during trial, this Court must determine that it is available for use due to the fact that is part of the Record which was received by Mr. Elmer.

In State v. Kennedy, 803 So.2d 916 (La. 2001), in Justice Taylor'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."

For the purposes of appellate review, a conviction must be based upon proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to upholding the verdict, to find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Matthews, 464 So.2d 298 (La. 1985).

Mr. Elmer acknowledges that this Court typically accords great deference to a trier of fact's decision to accept or reject the testimony of a witness in whole or in part. State v. Perkins, 11-955, p. 10 (La. App. 3<sup>rd</sup> Cir. 3/7/12), 86 So.3d 810, 817; State v. Gilliam, 36,118 (La. App. 2<sup>nd</sup> Cir. 8/30/02), 827 So.2d 508, *writ denied*, 2002-3090 (La. 11/14/03), 858 So.2d 422. Where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. State v. Allen, 36,180 (La. App. 2<sup>nd</sup> Cir. 9/18/02), 828 So.2d 622, *writ denied*, 2002-2595 (La. 3/28/03), 840 So.2d 566.

The trier of fact is charged to make a credibility determination, and may, within the bounds of rationality, accept or reject the testimony of any witness; the reviewing court may impinge on that discretion only to the extent necessary to guarantee the fundamental Due Process of Law. State v. Casey, 99-0023, p. 9 (La. 1/26/00), 775 So.2d 1022.

The crime of Molestation of a Juvenile is defined in LSA-R.S. 14:81.2, which provides, in pertinent part:

A. Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen,

where there is an age difference of greater than two years between the two persons, with the intention of gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

State v. Watson, 39,362 (La. App. 2<sup>nd</sup> Cir. 4/20/05), 900 So.2d 325. Under LSA-R.S. 14:81.2, the State was required to prove that (1) the lewd or lascivious acts occurred, and critically, (2) that they were accomplished by Mr. Elmer's use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or use of influence over JH by virtue of having a position or control or supervision over her. See: State v. LeBlanc, 506 So.2d 1197 (La. 5/18/1987)(describing additional "use of force" element in LSA-R.S. 14:81.1 and distinguishing crime of Molestation from crime of Indecent Behavior With a Juvenile based on this additional element).

When the State fails to prove the essential element of "use of influence by virtue of position of control or supervision over the juvenile," the evidence is insufficient to support a conviction of Molestation of a Juvenile, but a responsive verdict of Indecent Behavior With a Juvenile may be appropriate. See, e.g., State v. Teague, 893 So.2d 198, 205 (explaining that when appellate court finds the evidence only supports a conviction of a lesser included offense ... [it] may modify the verdict and render a judgment of conviction off the lesser included responsive offense); *accord*, State v. Busby, 94-1354 (La. App. 3<sup>rd</sup> Cir. 4/5/95), 653 So.2d 140, *writ denied*, 95-1157 (La. 9/29/95), 660 So.2d 854 (holding, in part, that Indecent Behavior With a Juvenile is a responsive verdict to Molestation of a Juvenile); LeBlanc, *supra*.

Applying the foregoing laws and standard of review, Mr. Elmer's conviction should be reversed because the State failed to present any evidence that Mr. Elmer used force, threats, intimidation, or use of influence upon TH by virtue of having a position of supervision or control over her in order to facilitate the commission of a lewd or lascivious act upon her.

The “use of influence” element in LSA-R.S. 14:81.2 is the functional equivalent of a non-physical use of force. This alternate means of accomplishing the act of Molestation where, instead of force or threats, an accused uses a position of supervision or control over a juvenile in order to influence the juvenile into allowing the lewd or lascivious act to occur – is what separates the crime of Molestation of a Juvenile from other sexual crimes against juveniles that do not involve the manipulation of a victim by a person with authority over that victim. In order to constitute Molestation, more is required than simply *having* a position of supervision or control; the offender must actually *use* the influence gained by that position in order to overbear the will of the victim and accomplish the act complained of.

Before the Legislature enacted the Molestation statute in 1984, LSA-R.S. 14:81 (Indecent Behavior With a Juvenile) proscribed lewd or lascivious conduct with or in the presence of a child under the age of 17 by a person over the age of 17 and at least two years older than the child, with the intention of arousing or gratifying the sexual desires of either person. LSA-R.S. 14:81(A) provides, in pertinent part:

“Indecent Behavior With a Juveniles is the commission of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention or arousing or gratifying the sexual desires of either person.”

The Molestation statute tracks the language of the Indecent Behavior With a Juvenile statute, but adds an element not included in the definition of Indecent Behavior: commission of the offense either by use of force, threats, or intimidation or by the use of influence by virtue of a position of control or supervision over the juvenile. The Louisiana Supreme Court first clarified the difference between Indecent Behavior and Molestation in *State v. LeBlanc*, 506 So.2d 1197 (La. 1986), in which the Court explained:

“The definition of the new crime of Molestation of a Juvenile was a verbatim repetition of the

definition of the crime of Indecent Behavior With a Juvenile, with the addition of the essential element of the use of force (or use of some other enumerated behavior of the accused). It is therefore evident that the 1984 Legislature intended to create two distinct grades involving lewd acts with juveniles, the distinguishing element being the use of force (or use of some other enumerated behavior)."

LeBlanc, 506 So.2d at 1199.

In LeBlanc, the Court explained the "use of force" element by analogy to the crime of Simple Robbery in Louisiana, noting that "... [t]he crime of robbery contemplates that some energy or physical effort will be exerted in the "taking" element of the crime and that some additional "use of force" in *overcoming the will or resistance of the victim* is necessary to distinguish the crime of Robbery from the lesser crime of Theft, as defined by LSA-R.S. 14:67, *Id.*, at 1200 (internal citation omitted). The Court found that the lewd and lascivious acts were not committed by the use of force (or other enumerated means of overcoming the victim's will or resistance), and modified Defendant's conviction to the lesser included offense of Indecent Behavior With a Juvenile. *Id.*, at 1201.

As LeBlanc and several subsequent decisions have made clear, "the [Molestation statute] describes several ways in which an adult may coerce or influence a child to participate in or witness lewd conduct." State v. Shelton, 545 So.2d 1285 (La. App. 2<sup>nd</sup> Cir. 1989)(emphasis added). As explained in greater detail below, in the absence of proof that the defendant influenced a child to participate in lewd conduct using one of the enumerated means in LSA-R.S. 14:81.2, a conviction for Molestation is subject to reversal on Appeal.

To illustrate, the simple fact that a person is a father (or teacher, or babysitter, or employee) of a juvenile does not transform every lewd or lascivious act into a crime of Molestation. Instead, the person *must use* the influence gained by virtue of such a position in a manner that acts as an equally culpable substitute for the other enumerated means by which Molestation is accomplished: "force, violence, duress, menace, psychological intimidation, [or] threat of great bodily harm." LSA-R.S. 14:81.2(A).

These “aggravating factors,” along with the use of (and influence gained by) a position of control or supervision, are what separate “Molestation of a Juvenile” from other offenses that punish and deter lewd and lascivious acts committed upon juveniles by adults. See: *State v. Marrero*, 2011-1285, pp. 6-7 (La. App. 1<sup>st</sup> Cir. 2/10/12), 92 So.3d 21. To this end, it is helpful to consider cases where reviewing courts in Louisiana have determined what does, or does not, constitute sufficiency evidence in the particular context of this “use of influence” element.

In *State v. Ragas*, 607 So.2d 967 (La. App. 4<sup>th</sup> Cir. 1992), a 13-year-old victim was sexually abused by her step-uncle on multiple occasions. The Court of Appeals found, however, that the girl was not subject to her uncle's supervision or control, despite her affirmative response to the prosecutor's question about whether the uncle “looked after her” and her sister when they were at his home. *Id.*, at 973. The Court found that, although the uncle had committed lewd and lascivious acts upon her, the State failed to prove the “use of influence” element because the victim “was under no constraints to remain with her uncle nor be subject to his supervision.” *Ibid.* In light of this deficiency in the State's evidence, the court modified the defendant's conviction and entered a judgment of conviction for the responsive, lesser included offense of Indecent Behavior With a Juvenile. *Id.*

In *State v. Strather*, 43,363 (La. App. 2<sup>nd</sup> Cir. 8/20/08), 990 So.2d 130, the appellate court concluded that the defendant did use influence by virtue of a position of supervision or control over his minor victim. In that case, the Defendant hosted and supervised a party attended by minors, provided alcohol to the minor victim and encouraged her to consume it, and then *enforced a rule* that the victim had to remain at his home for the night because she had consumed alcohol and did not have a designated driver. *Id.*, at 10-11. The girl awoke in Defendant's bed while he was having sex with her. *Id.*, at 9. The Court of Appeals aptly described the defendant's use of influence as having “facilitated” his commission of lewd and lascivious acts upon the young girl. *Id.*, at 11. *Strather* provides a

paradigmatic example of the conduct proscribed by the Molestation statute, and the distinction between the crimes of Molestation and Indecent Behavior With a Juvenile.

In *State v. Rideaux*, 05-446 (La. App. 3<sup>rd</sup> Cir. 11/2/05), 916 So.2d 488, 490, the Court thoroughly discussed the “use of force or influence” element and referenced some of the above-cited jurisprudential examples of facts that did, or did not, satisfy the “use of influence element” in LSA-R.S. 14:81.2. Although *Rideaux* did not establish a particular analytical framework for determining whether the “use of influence” element has been proven, the Court did emphasize that the State must adduce evidence proving that a victim was forced to endure a lewd and lascivious act by the Defendant’s use of influence, and that this influence must be a product of the Defendant’s control or supervision over the victim. See: *generally, id.*

Turning to the facts of this case, there is no evidence to support a finding that Mr. Elmer used force, violence, duress, psychological intimidation, or a threat of great bodily harm in committing any offenses against TH. This leaves only the question of whether or not Mr. Elmer used “influence” he gained over JH as a result of having control or supervision of her in order to facilitate the commission of a lewd or lascivious act.

There is no testimony by JH or any other witness that supports the conclusion that this indispensable “use of force or influence” element of Molestation was proven beyond a reasonable doubt. JH did not testify that Mr. Elmer coerced her into committing these acts. Though certainly abnormal, JH seemed to describe these acts as having simply been committed by Mr. Elmer without any discussion beforehand about what might happen if she did not allow them to occur. She did not testify that she was afraid of the consequences of prohibiting Mr. Elmer from committing these acts, nor did she testify that Mr. Elmer used his authority over her to accomplish them. At multiple points, JH was specifically asked whether Mr. Elmer ever said *anything* to her when committing these acts, and she responded that he

did not.

According to JH's testimony, Mr. Elmer touched her in a lewd and lascivious manner, but he did not force her to engage in these acts physically or exert influence over her in such a way that her will to resist was overcome. Even if this Court found that Mr. Elmer held a position of supervision or control over TH, that fact alone would not even be enough to satisfy the force or influence element; Mr. Elmer must have *used* his influence over her to force her into participating in these acts against her will. On this Record, the State failed to prove any such conduct on the part of Mr. Elmer.

To illustrate, JH testified in detail about one particular act that she alleged was the beginning of the pattern of sexual abuse. She said that Mr. Elmer simply grabbed her and began kissing her. She did not testify that she protested or resisted, or that Mr. Elmer said anything to her in order to overcome her will. She went on to describe a relatively continuous pattern of sexual activity between them, but never testified to any facts establishing that Mr. Elmer used his influence over her in order to overbear her will and accomplish them. She never testified that she was raped or otherwise forced to endure them.

Certainly, the State could argue that his role as her grandfather, alone, should demonstrate that his influence over her enabled him to accomplish these acts. But Molestation requires more: the affirmative use of influence in order to overbear the will of the victim.

Further, JH's testimony regarding gifts she received from Mr. Elmer has nothing to do with the exercise of control or supervision over her, and as such, does not satisfy the indispensable element of "use of force or influence" as contemplated in LSA-R.S. 14:81.2. Indeed, if the simple act of offering gifts in exchange for a victim's participation in lewd or lascivious acts could satisfy this element, then the Legislature would have included a provision that included language such as "entice" or "persuade" such as is found in other statutes prohibiting sexual conduct between children and adults. See: LSA-R.S. 14:81.3 (Computer Aided Solicitation of a Minor)(proscribing electronic communication with the

intent to “persuade, induce, entice, or coerce the [minor] to engage or participate in sexual conduct”): LSA-R.S. 14:106(A)(5)(proscribing the “solicitation or enticement of an unmarried person under the age of seventeen years” to engage in prohibited sexual acts).

But, Louisiana's Molestation statute requires more: the functional equivalent of non-physical use of force. At most, the acts described by JH constituted the commission of lewd or lascivious acts upon a juvenile, but were not accomplished “by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the *use of influence* by virtue of a position of control or supervision over the juvenile.”

As the Supreme Court's decision in *LeBlanc* and subsequent appellate decisions have unequivocally demonstrated, the offender must effectively *force* a child to participate in the lewd acts by the exertion of influence over the child in order to be convicted of Molestation of a Juvenile. *Jackson* 443 U.S. 307; *Matthews*, 464 So.2d 298.

Alternatively, Mr. Elmer requests that this court modify his conviction for Molestation of a Juvenile and enter a conviction for the responsive offense of Indecent Behavior With a Juvenile. *Teague*, *supra*; *LeBlanc*, *supra*; *Busby*, *supra*; *Ragas*, *supra*.

WHEREFORE, for the foregoing reasons, and the reasons stated in the Original Brief filed by appellate counsel, The State has failed to meet its heavy burden of proof of guilt beyond a reasonable doubt, and this matter should be dismissed.

#### SUMMARY

Mr. Elmer has properly informed the courts that this entire case was a case of “follow the money,” because it appears that these allegations were lodged after a family confrontation concerning the money that Mr. Elmer had saved for his retirement. Let's not forget that the alleged victim's mother had sued Mr. Elmer in order to ensure that, “so that I can take care of the kids to the extent they have been

living" (Rec. pp. 1072, 1086)."

In fact, almost all of the texts Sunnie Elmer (Mr. Elmer's daughter, and the alleged victim's mother) sent to Mr. Elmer were about money and property that she wanted from him because the family had basically been "cut off" from Mr. Elmer's money after his divorce from his wife (Sue Tegre). A close review of the texts and messages failed to include any allegations concerning TH. This Court must determine that these allegations had been lodged against Mr. Elmer because TH's mother and grandmother were concerned about their own financial security after the divorce.

There was quite a bit of testimony concerning John's money that everyone wanted, including the inheritance and the properties that he owned. The disclosure happened soon after everyone found out that John was moving to Brazil for retirement. This means that Sue wasn't going with him; which resulted in a Divorce. According to the pre-nuptial agreement, Sue would end up with *nothing*. The family had also discovered that John had changed his Will, leaving everything to his son instead of dividing up the money and assets.

Furthermore, testimony adduced during the course of the trial proves that the alleged victim had been constantly questioned by her mother, grandmother, and her mother's friend (Jennifer Richard) concerning TH. The questions presented to her were not "general" questions, but specific questions in which TH was asked about illicit conduct by her grandfather. The questions presented to TH were specifically designed to obtain the answers desired. These specific questions were, "Did Grandad do this or that?" Not what happened, and who did it?

In fact, Jennifer Richard (the alleged victim's mother's friend) had only recently obtained a job in Crisis Management a month prior to the commencement of Mr. Elmer's trial (Rec. p. 999), with only "some" training with children (Rec.p. 999). In fact, Ms. Richard testified that the arguments with TH and her mother concerned her troubles at school, the bullying TH had been doing to other students at

her school (hence, the suspensions and moving to other schools), and the fact that TH was unable to get what she wanted when they went shopping on "Black Friday" (Rec.pp. 1013, 1304).

During TH's testimony, she admitted that the allegations were made during a family argument concerning her school, and her "attitude" concerning the shopping trip; and that her mother and grandmother had specifically asked her if her grandad had done anything to her (Rec.p. 1415). After the disclosure of the alleged abuse, all arguments ceased concerning TH's behavior.

The State has also relied heavily on the erroneous allegation that Mr. Elmer was taking his granddaughter to Victoria's Secrets to shop for underwear. Although Sue Tegre and Sunnie Elmer testified to such, TH specifically testified that her mother (Sunnie Elmer) was the one who brought her to Victoria's Secrets in order to purchase underwear (Rec.p. 1418).

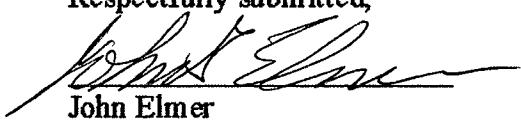
In light of the argument above, and the argument presented to the Fifth Circuit Court of Appeal, Mr. Elmer contends that the State failed to meet their stringent burden of proof as required in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

WHEREFORE, for the reasons stated within, Mr. Elmer humbly requests that this Honorable Court invoke its Supervisory Authority of Jurisdiction over the lower courts, and after a thorough review, deem his Application for Writ of Certiorari good, and Grant him the necessary relief.

## CONCLUSION

For the reasons stated above and in the previous filings in the State of Louisiana Courts, Mr. Elmer's Writ of Certiorari should be granted, and this matter be remanded to the district court for a dismissal; or in the alternative, a new trial. Mr. Elmer has shown that this conviction is contrary to clearly established federal law as established by the United States Constitution and the United States Supreme Court; and that reasonable jurists would debate the validity of the conviction.

Respectfully submitted,



John Elmer

Date: April 19, 2021